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STATE OF WISCONSIN
SUPREME COURT
Case No. 2015AP001258

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v.

TOWN OF SARATOGA, TERRY A. RICKABY, DOUGLAS PASSINEAU, PATTY HEEG, JOHN FRANK AND DAN FORBES,

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

Review of April 13, 2017 Decision of the Court of Appeals, District IV, Appeal No. 2015AP001258

Wood County Circuit Court Case No. 12-CV-0389, The Honorable Thomas Eagon Presiding

BRIEF OF PETITIONER GOLDEN SANDS DAIRY, LLC

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

When a permit applicant secures vested rights by filing a valid building permit application for a project (Wisconsin's "Building Permit Rule"), does the law protect the applicant's right to both construct the project buildings and use the project land in the lawful manner described in the building permit application?

The Circuit Court answered yes, concluding that the Building Permit Rule protects the applicant's right to not only construct the buildings but also to use the project land in the manner identified in the permit application.

The Court of Appeals answered no and reversed the Circuit Court, concluding that the Building Permit Rule does not protect an applicant's right to use the project land in the manner identified in the permit application.

INTRODUCTION

In 2012, after a period of due diligence, Golden Sands, LLC and Ellis Industries Saratoga, LLC ("Golden Sands") invested millions of dollars in the development of a proposed large-scale dairy farm (the "Farm") in Wood County, Wisconsin. From the outset, the Farm was conceived,

developed and described as an integrated dairy and crop farm. (R.59, ¶ 16.) Feed and forage for the cows are grown in the crop fields. (R.59, ¶ 17.) Cows are housed and milked in multiple buildings located on the Farm. (*Id.*) Nutrients in the form of manure from the Farm's cows are then used to fertilize the Farm's crop fields. (*Id.*)

Golden Sands' substantial investment in the Farm included acquisition of 6,388 acres of land necessary to develop and operate the Farm (the "Farm Property") – and the preparation of numerous and complex permit applications to state agencies and other jurisdictions. The entirety of the Farm Property is located within the Town of Saratoga (the "Town") and, at the time, was in the "Unrestricted" zoning district of the then-applicable Wood County Zoning Ordinance. (R.59, ¶ 8; R.60, Ex. A: 55, 65, Ex. B, ¶¶ 6-7, Exs. C-D.) Under the Unrestricted zoning classification, all of the Farm Property could be used "for any purpose whatsoever, not in conflict with law." (R.60, Ex. C at 5.)

While development of the Farm ultimately requires multiple permits at the local, county and state levels, the sole permit required from the Town was a building permit for the seven agricultural buildings necessary to operate the Farm.

Having satisfied itself through its due diligence that a large-scale dairy farm was a permitted use of the Farm Property, Golden Sands submitted its application for a building permit (the "Building Permit Application"). (R.59, ¶¶ 7-9; R.60, Ex. A: 55; Ex. B, ¶¶ 6-7, Ex. C; R.60, Ex. A: 56-57.) The Town unlawfully withheld the building permit from Golden Sands, using that period of time to obtain zoning authority and enact a new zoning ordinance that prohibited agricultural use of the entire Farm Property. (R.60, Ex. B, ¶ 22, Ex. F; R.29, ¶¶ 103-104; R.32, ¶¶ 103-104.)

To protect the investment Golden Sands made in reliance on the zoning laws that were in effect when it filed its Building Permit Application, Golden Sands filed two lawsuits against the Town within weeks of each other. (R.60, Ex. B; R. 1-2.) In the first, a mandamus action ("*Golden Sands I*"), Golden Sands sought and obtained a writ requiring the Town to discharge its ministerial duty to issue the building permit. (R.60, Ex. B.) In the second action, from which this appeal arises ("*Golden Sands II*"), Golden Sands sought a declaration on the scope of the rights protected by issuance of its building permit – that the law allows it to proceed with development and operation of its Farm as

compliant with the "Unrestricted" zoning classification that was in place when Golden Sands filed the Building Permit Application. (R.2.)

After the Circuit Court issued a writ of mandamus ordering the issuance of the building permit in *Golden Sands I* – a decision the Court of Appeals upheld – the Circuit Court granted Golden Sands summary judgment on the vested rights question presented in this case. The Circuit Court concluded that because Golden Sands satisfied the longstanding bright-line Building Permit Rule, it therefore acquired vested rights both to build the Farm's seven agricultural buildings and to farm the entirety of the Farm Property as described in the Building Permit Application. (R.82; R.86: 91; App. 015-017.)

In *Golden Sands II* the Court of Appeals reversed the Circuit Court, holding that while Golden Sands' filing of its Building Permit Application triggered a vested right to construct the buildings that were the subject of its Building Permit Application, it did not also trigger a vested right to farm the Farm Property. In so narrowly interpreting the bright-line Building Permit Rule, the Court of Appeals stripped Golden Sands of its right to rely on existing zoning

laws. This Court should reverse the Court of Appeals' holding and reinstate the trial court's decision. Left uncorrected, the Court of Appeals' decision will not only work a manifest injustice in this case, it will gut the bright-line Building Permit Rule that this Court recently affirmed in *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12.

STATEMENT OF THE CASE

I. GOLDEN SANDS REASONABLY RELIED ON THE "UNRESTRICTED" ZONING DESIGNATION THAT APPLIED TO THE FARM PROPERTY.

In 2011, Golden Sands began to evaluate the potential purchase of the Farm Property for use as a dairy farm. (R.59, ¶ 4; R.60, Ex. A: 52-53.) Golden Sands reviewed the zoning and land use restrictions governing the Farm Property and found no zoning ordinances – nor any proposed zoning ordinances for that matter – that would prohibit or otherwise restrict agricultural use. (R.59, ¶¶ 7-8; R.60, Ex. B., ¶¶18-19.) Indeed, the Farm Property was located in the "Unrestricted" zoning district of the then-applicable Wood County Zoning Ordinance. (R.60, Ex. F.) Based on this due diligence, Golden Sands negotiated contracts to purchase the

Farm Property for several million dollars. (R.59, ¶ 12; R.60, Ex. A: 55, Ex. B ¶ 20.) Also in 2011, and at the additional cost of hundreds of thousands of dollars, Golden Sands engaged a team of design professionals, consultants and other experts to assist in the preparation of a comprehensive set of permit applications required for the development and operation of the Farm. (R.59, ¶ 9; R.60, Ex. A: 55-56.)

The activities associated with the effort to develop the Farm spanned the better part of a year, and included surveying land, studying the physical characteristics of the property and the region, researching technical specifications, conducting soil tests, evaluating test results, writing reports, preparing environmental assessments, developing a nutrient management plan for land spreading organic fertilizers, designing the required components of the dairy, drafting engineering plans and specifications, and preparing a comprehensive set of permit applications to the Town, Wood County, and the Wisconsin Department of Natural Resources. (R.59, ¶¶ 10-11; R.60, Ex. A: 55, Ex. B, ¶ 20.)

On June 6, 2012, Golden Sands submitted its Building Permit Application to the Town to construct the buildings necessary to operate the Farm. (R.59, ¶ 13; R.60, Ex. A: 56,

Ex. B, ¶ 20; App.054.) At the same time, Golden Sands also filed various additional applications for the state and local permits it would need to build and operate the Farm. (R.59, ¶ 14, Exs. B-E; R.86: 68; *See* App.056-068 (extract of some of the materials attached to Building Permit Application).) The applications Golden Sands submitted on June 6, 2012 included, among other things, the Building Permit Application to the Town, the Application for a Permit to Wood County to Construct an Animal Waste Storage Facility, the Wisconsin Pollutant Discharge Elimination ("WPDES") Permit Application to the Wisconsin Department of Natural Resources ("WDNR"), and Applications for High Capacity Wells for the Farm. (*Id.*)

The WPDES Permit Application included: (i) The Nutrient Management Plan governing the land spreading of manure and other nutrients from the Farm's dairy production facility on the Farm's crop fields, (ii) a Request for Approval of Plans and Specifications for the Farm's manure handling and storage facilities, (iii) an Environmental Analysis Questionnaire response, summarizing the project, providing maps, and providing information in response to a series of WDNR questions relating to potential environmental impact,

and (iv) a Storm Water Notice of Intent. (*Id.*) The Environmental Analysis Questionnaire specifically explained the fully-integrated nature of the Farm:

> This proposal is for a new operation – Golden Sands Dairy, LLC – that will integrate dairy farming into newly developed irrigated potato and vegetable production land.
>
> . . .
>
> This proposal is environmentally-sized to allow for advanced manure handling and nutrient recycling systems. Dairy crop production enhances the sustainable farming methods of potato production systems. These practices reduce wind erosion by utilizing limited tillage practices on the field corn silage crops and having multiple years in alfalfa production in each rotation. Further, soils organic properties are built through the conversion of pine plantation to irrigated farm land and the addition of organic fertilizer and manure solids to further reduce wind erosion.
>
> Reduced nutrient leaching will be a benefit of the new farm by harvesting forages and using the recycled nutrients from the cow manure in the following crop years, thereby greatly reducing the amount of commercial fertilizer applied each year. As noted above, the combination of forage crops and the application of recycled nutrients increase the organic matter in the soil, which is needed in these sandy soils formerly planted to pine. Runoff, while not a significant issue on these sandy soils is virtually non-existent when dairy farming is introduced into the system due to the amount of surface residue and soil conditioning during forage production years.
>
> . . .
>
> Upon completion of all phases of construction, all of the irrigated agricultural land in the farm's nutrient management plan will implement this more sustainable form of agriculture. . . .

(R.60, Ex. D, Vol. D-1.)

This statement and all of the other materials enumerated above were filed with the Building Permit Application. They show that from the beginning, Golden Sands envisioned, planned for, and most importantly invested heavily in a single, integrated project – a Farm that grows crops, feeds cows, milks cows, and fertilizes crops. Golden Sands' June 6, 2012 Building Permit Application also plainly identified the "Project Location" and "Lot area" as the "6,388 ac" comprising the Farm Property. (R.59, Exs. A-B; R.60, Ex. B; App.054.)

To ensure that the Building Permit Application clearly conveyed the extent of the proposed development, Golden Sands attached to the Building Permit Application a scale map showing the proposed geographical boundaries of the Farm, including both the crop fields and the location of the seven agricultural buildings. (R.59, Ex. D-1; App.055.) The Nutrient Management Plan attached to the Building Permit Application included color map foldouts of every single field Golden Sands would use for cultivation of crops and land spreading of animal-produced nutrients on the Farm Property. (R.59, Ex. D-1.)

II. THE COURT OF APPEALS AFFIRMS THE CIRCUIT COURT'S ISSUANCE OF A WRIT OF MANDAMUS.

When Golden Sands submitted the Building Permit Application to the Town, the Town did not have a zoning ordinance, nor did it even possess the requisite authority from its electors to enact a zoning ordinance. (R.60, Ex. B, ¶ 17.) Rather, land use within the Town was governed solely by Wood County's zoning ordinance. (R.59, ¶ 8; R.60, Ex. A: 55, 65, Ex. B, ¶¶ 6-7, Exs. C-D.) On the date Golden Sands filed the Building Permit Application and for months after the Farm Property was within Wood County's "Unrestricted" zoning district, in which any lawful use – including agricultural use – was permitted.

On July 19, 2012, some six weeks after Golden Sands filed the Building Permit Application and the other applications for governmental permits for the Farm, and in direct reaction to Golden Sands' Building Permit Application, the Town adopted an ordinance imposing a moratorium on "plan review, building permit issuance, construction and related activities that are inconsistent with existing land use." (R.60, Ex. B, ¶ 22, Ex. F.) On July 27, 2012, Golden Sands filed a petition for a writ of mandamus seeking to compel the

Town to discharge its ministerial duty to issue a building permit for the buildings Golden Sands would construct for its proposed Farm. (R.86: 4; *see* R.60, Ex. B.) After a three-day evidentiary hearing and subsequent briefing, the Circuit Court found that the June 6, 2012 Building Permit Application met all applicable requirements of the Town's building code prior to the Town's July 19, 2012 moratorium, that the Town had unlawfully withheld the building permit, and on those grounds ordered the Town to issue it forthwith. (*Id.*) The Town appealed, and the Court of Appeals upheld the Circuit Court's decision in *Golden Sands I*. *Golden Sands Dairy, LLC v. Fuehrer,* No. 2013AP1468 (Wis. Ct. App. July 24, 2014). The Town did not seek this Court's review of *Golden Sands I*.

III. THE CIRCUIT COURT DECLARES THAT GOLDEN SANDS HAS A VESTED RIGHT TO AGRICULTURAL USE OF THE FARM PROPERTY.

The remedy in *Golden Sands I*, as in any mandamus action, was limited to the court ordering the government to discharge a ministerial duty – here, the Town's issuance of a building permit. Accordingly, two weeks after Golden Sands filed its mandamus action, Golden Sands filed this action on

the basis of the same underlying facts, seeking a declaration that Golden Sands acquired vested rights in agricultural use of the Farm Property when it filed the complete Building Permit Application. (R.1-2; R.86: 67-68, 90-91.)

After extensive briefing and argument, the Circuit Court granted Golden Sands' motion for summary judgment, concluding that Golden Sands' Building Permit Application triggered a vested right to agricultural use of the Farm Property as described in the Building Permit Application, and that the Town's new zoning ordinance could not be retroactively applied against Golden Sands. (R.86: 67-68, 90-91.) The Circuit Court's order was grounded in the ultimate findings that (i) Golden Sands' Building Permit Application submission documented Golden Sands' intent to use the Farm Property – a geographic area defined with specificity – for an agricultural use that was allowed under the Wood County zoning ordinance then in place; and (ii) that the proposed agricultural use described with specificity in the Building Permit Application was integrally related to the structures for which the Building Permit Application was submitted. (R.86: 67-68, 90-91.)

IV. THE COURT OF APPEALS REVERSES THE CIRCUIT COURT, CREATING A NEW LIMITATION ON WISCONSIN'S BRIGHT-LINE BUILDING PERMIT RULE.

The Town appealed the Circuit Court's decision that Golden Sands acquired a vested right under the bright-line Building Permit Rule to use the Farm Property for agricultural purposes. The Court of Appeals reversed, holding that "Golden Sands has not established a vested right to the nonconforming agricultural use of the 6388 acres" identified in the Building Permit Application. *Golden Sands Dairy, LLC v. Town of Saratoga*, No. 2015AP1258, at ¶ 2 (Wis. Ct. App. Arp. 13, 2017). In so holding, the Court of Appeals has left Golden Sands with an almost useless right to construct the Farm's buildings without the right to operate its Farm. To protect Golden Sands' legitimate, investment-backed expectation of developing and operating its Farm, this Court should reverse the Court of Appeals' holding and reinstate the trial court's decision.

STANDARD OF REVIEW

The Court reviews the circuit court's decision to grant summary judgment in favor of Golden Sands *de novo* and "independently of the determinations rendered by the circuit court and the court of appeals." *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, ¶ 27, 374 Wis. 2d 487, 893 N.W.2d 12 (citation omitted). "Summary judgment is appropriate when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law." *Id.* Significantly, the Town did not appeal or challenge any of the Circuit Court's factual findings. Thus, the only issue presented for appeal is a purely legal one: the extent of vested rights that were triggered by Golden Sands' properly-filed Building Permit Application. The Court also reviews this question of law *de novo*. *Id.* ¶ 28.

ARGUMENT

The Court of Appeals in *Golden Sands II* articulates an unprecedented limitation of the bright-line Building Permit Rule. It held that to trigger vested rights to agricultural use of the Farm Property, Golden Sands was required to meet the "active and actual" use test.

By acknowledging that Golden Sands' right to construct buildings was triggered by the filing of its complete Building Permit Application, but subjecting Golden Sands' agricultural use of the Farm Property to the active and actual use test, the Court of Appeals has essentially rendered the bright-line Building Permit Rule a nullity. The application of two different vested rights tests to a single development – one test for constructing buildings and another test for using the project land – fatally undermines the policy of the bright-line Building Permit Rule, which is to protect legitimate investment-backed expectations in property development. The Court of Appeals' decision also creates, without justification, a class of property owners who might otherwise be putting the land to active and actual use but for the ned to obtain other permits – in this case, the state-level permits required for construction and operation of large-scale dairies.

The Court of Appeals' decision also upsets the longstanding balance between local governments' ability to lawfully regulate land use and the protection of legitimate investments by tacitly approving a local governments' imposition of land use limitations only after a developer relied on the absence of such limitations. If the Court of

Appeals' decision is allowed to stand, local government will be empowered to defeat legitimate investments in property by using the filing of a building permit application as the shotgun start of a race to choke off the project, which is precisely what the Town did in this case. It is fundamentally unjust to require Golden Sands to show active and actual physical use of the Farm Property prior to the Town's zoning law change, especially when the Town conceived, and in a rush, codified that change in direct reaction to Golden Sands' filing of the Building Permit Application.

The Court of Appeals' application of two distinct vested rights doctrines to the same project has no foundation in vested rights jurisprudence. This Court's bright-line Building Permit Rule precedents seek to foster an atmosphere of certainty and predictability for all those who invest in future property development in this state and the local jurisdictions that host them, not just for buildings, but for the land whose use is integrally bound up with the buildings. Above all, the Building Permit Rule is designed to protect legitimate investments in future land use while also protecting a local government's legitimate prospective regulation of land use. That is the balance to be struck in this case. As shown

below, the active and actual use test is for different circumstances. While it too is designed to protect legitimate investment-backed expectations, the active and actual use test is employed in the context of a use that has already been established, rather than a proposed use for which a building permit application has been submitted.

I. THE BRIGHT-LINE BUILDING PERMIT RULE BECOMES USELESS IF IT DOES NOT PROTECT THE RIGHT TO USE THE PROJECT LAND.

A. The Bright-Line Building Permit Rule Was Created To Protect A Developer's Right To Use Its Property In The Manner Set Forth In The Application.

Wisconsin is in a minority of jurisdictions that clearly recognizes the vesting of rights to a given land use at the earliest point in time – upon the submission of a complete and fully compliant building permit application. 4 Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's Law of Zoning and Planning* § 70:16 (2014). Thus, the submission of a complete and legally compliant building permit application is the temporal focus of a vested rights analysis in Wisconsin. *Lake Bluff Housing Partners v. City of S. Milwaukee,* 197 Wis. 2d 157, 172, 540 N.W.2d 189 (1995). This approach has been articulated in cases like *Lake Bluff* and most recently

expressed by this Court in *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12.

In *McKee*, this Court succinctly summarized Wisconsin's bright-line Building Permit Rule as follows:

> Wisconsin follows the bright-line building permit rule that a property owner's rights do not vest until the developer has submitted an application for a building permit that conforms to the zoning or building code requirements in effect at the time of application.

Id. ¶ 4 (citing *Lake Bluff Hous. Partners*, 197 Wis. 2d at 172). This straightforward rule focuses on building permit applications as defining the point in time at which the right to develop property has vested. *Golden Sands II*, in contrast, separated the building from its *use* and declared for the first time in Wisconsin jurisprudence that the "rights" that vest under the bright-line Building Permit Rule stop at the right to construct the building alone and do not include the right to use the property tied to the building permit application.

Golden Sands II holds that the only vested right Golden Sands acquired was the construction of the Farm buildings, and observed: "Wisconsin law provides that a strictly compliant building permit application can establish a vested right to build a structure under the then-existing zoning classification, but that same law does not clearly address the

topic of property use." *Golden Sands II*, ¶ 17. Citing *Lake Bluff*, the Court of Appeals held that any vested rights that exist under the Building Permit Rule are solely for "purposes of building or altering a structure." *Id.* ¶ 15. On the contrary, the Court of Appeals' narrow interpretation of *Lake Bluff* and related jurisprudence improperly restricts the bright-line Building Permit Rule, compromises the policies underpinning that rule, and is out of step with this Court's prior holdings on vested rights.

In *Lake Bluff*, for example, the construction of the proposed buildings and the proposed use of the property were inextricably linked. The applicant in *Lake Bluff* filed an application seeking a building permit to construct seven apartment buildings, each with eight dwelling units on land zoned for multi-family apartments of that size. *Lake Bluff*, 197 Wis. 2d at 162. The *Lake Bluff* applicant asserted that it had acquired a vested right to continue with the multi-family development notwithstanding subsequent rezoning that restricted the *use* of the property to single-family residences. *Id.* at 167. Although the *Lake Bluff* applicant failed to satisfy the bright-line Building Permit Rule because its building permit application was not in strict compliance with

applicable codes before the change in zoning, the issue litigated in *Lake Bluff* very clearly involved not only the construction of buildings but the right to use the property identified in the building permit application for the specified purpose. Simply put, nothing in *Lake Bluff* suggests that an applicant's right to construct a building and right to use the project land identified in its building permit application ought to be evaluated separately under the bright-line Building Permit Rule, or that one standard out to be applied to construction of the buildings and another to the use of the project property.

The same is true in other Building Permit Rule cases that this Court and the Court of Appeals have previously considered. For example, in *Rosenberg v. Village of Whitefish Bay*, 199 Wis. 214, 225 N.W. 838 (1929), this Court considered whether the property owner had acquired vested rights to *use the land* for hotel or apartment purposes. In *State ex rel. Schroedel v. Pagels*, 257 Wis. 376, 43 N.W.2d 349 (1950), this Court considered whether the property owner had acquired vested rights to *use the land* for a garden-apartment complex. In *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 53 N.W.2d 784 (1952), this Court considered

whether the land owner had a vested right to *use his land* for residential living in a trailer. In *Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc.*, 2009 WI App 142, 321 Wis. 2d 671, 775 N.W.2d 283, the Court of Appeals considered whether the tavern operator had a vested right to *use the property* for providing adult entertainment.

Rather than reflect an examination and application of the policies underlying vested rights cases, the Court of Appeals' decision appears to be grounded in what it believed were important hypothetical questions (which have already been answered by *McKee*) about the nature and extent of Golden Sands' proposed agricultural use:

> For instance, how much and what parts of the purportedly associated land are necessary to allow the applicant to use the proposed building for its intended purpose? Why should the mere identification of purportedly associated land in a building permit application mean that all such land may be used in service of the proposed building? Should it matter whether the applicant asserts that all such identified land is necessary to the functioning of the building? Should a municipality be bound by such an assertion? In the apartment situation, could an owner/applicant use nearby property, merely identified in an application, to construct a new parking lot for residents, a use consistent with prior, but not current zoning? Importantly, how would a municipality determine the extent to which such identified property could be used in service of the apartment buildings?
>
> More generally, assuming for argument's sake that the use of purportedly associated land should sometimes be a part of the vested rights acquired by the filing of a building permit application in strict compliance with zoning and building code requirements,

> why should a municipality be bound by the applicant's mere identification of land? When it comes to giving land nonconforming status, should there not be, at a minimum, a mechanism for determining whether all such identified land is in fact necessary?

Golden Sands II, ¶¶ 21-22.

Some of these questions fall within the ambit of the WDNR's permit review process, not any zoning law. Others are legally irrelevant to a vested rights analysis. Still others stand in direct conflict with the fundamental notion of private property rights, including the notion that government somehow gets a say in whether a proposed development is necessary, even though the development is in complete harmony with existing zoning at the time of the building permit application. Despite the inapposite nature of these questions, *Golden Sands II* implicitly concludes that the lack of answers puts Golden Sands' investment outside the protection of the bright-line Building Permit Rule.

Having focused on these improper questions in reaching its decision, the Court of Appeals failed to explore or to establish any basis in Wisconsin law for its refusal to protect Golden Sands' right to use the Farm Property for farming under the bright-line Building Permit Rule. The absence of any construction/use distinction in Wisconsin's

Building Permit Rule cases makes sense because a vested right to construct buildings without the vested right to use the land is a meaningless right because it fails to vindicate legitimate investment-backed expectations.

Vested rights doctrines exist to protect a developer's right to *develop and use* property under an existing zoning classification – not simply the right to construct a building. *McKee*, 374 Wis. 2d 487, ¶ 43. Golden Sands thus asks this Court to make explicit that which has been implicit in the Building Permit Rule all along – that the Building Permit Rule vests an applicant with the right to construct buildings but also the right to use the land identified in the building permit application in the manner described in the application, consistent with zoning in effect at the time the application is filed.

B. Golden Sands′ Vested Rights Claim Rests Firmly On The Policies Underlying The Bright-Line Building Permit Rule.

This Court most recently explained the policy underlying the bright-line Building Permit Rule – and the concept of vested rights generally – when it reasoned in *McKee* that "[u]nderlying the vested rights doctrine is the

theory that a developer is proceeding on the basis of a reasonable expectation." *McKee*, 374 Wis. 2d 487, ¶ 42 (citations omitted). The Court then clearly stated that the bright-line Building Permit Rule is the best way to protect a developer's expenditures based on its reasonable expectation while still protecting (and indeed deferring to) a municipality's right to regulate land use:

> Wisconsin applies the bright-line building permit rule because it creates predictability for land owners, purchasers, developers, municipalities and the courts. *See, e.g., Guertin v. Harbour Assurance Co.*, 141 Wis. 2d 622, 634-35, 415 N.W.2d 813 (1987) (explaining that bright-line rules provide predictability and protect all parties). It balances a municipality's need to regulate land use with a land owner's interest in developing property under an existing zoning classification. A municipality has the flexibility to regulate land use through zoning up until the point when a developer obtains a building permit. Once a building permit has been obtained, a developer may make expenditures in reliance on a zoning classification.

Id. ¶ 43.

As this Court acknowledged, a municipality has the near absolute right and "broad discretion to enact zoning ordinances and land use regulations for a variety of purposes." *Id.* ¶ 35. However, "[t]he exception to the rule that zoning does not create vested rights arises when a property owner has applied for a building permit conforming to the original zoning classification." *Id.* ¶ 37 (citations

omitted). This bright-line rule, and the balance of interests underlying it, echoes the policy rationale in previous Building Permit Rule cases – to protect a developer's investment-backed expectation that it will be able to actually use the property in the manner described in its application.

In sum, because the interest in developing property articulated in *McKee* is tied to a zoning classification, it is necessarily tied to the intended use of the property described in the building permit application. And because the interest is tied to use of the property, it must logically extend to all of the property the developer has assembled to effectuate that use, again, so long as that property is identified in a complete building permit application and the proposed use conforms to any zoning classifications in effect at filing. *See id.* ¶ 43. Indeed, common sense dictates that it is the economic activity resulting from the anticipated use of the property that is protected, not the anticipation of simply building a structure without any certainty about how it and the land surrounding it can be used.

Golden Sands' predicament perfectly illustrates the need to interpret the bright-line Building Permit Rule in this way. If the goal of the bright-line Building Permit Rule as

articulated in *McKee* is to protect a landowner's legitimate, investment-backed expectations while balancing that right with a local government's right to regulate land use, there is no logical reason to apply a more demanding test to determine vested rights. By applying the Building Permit Rule, Golden Sands' legitimate expectations are protected, since no farmer could be expected to seek to construct seven large agricultural buildings for the purpose of housing animals to be fed and supported by surrounding land if the farmer could not also invest with confidence in farming the surrounding land. Second, no violence is done to the policy of preserving the Town's ability to regulate land use because, as this Court noted in *McKee*, the Town was free to regulate land use up until the time a building permit application is filed. In this case, the Town did not take the opportunity to regulate land use beyond the County's "Unrestricted" zoning classification prior to Golden Sands' submission of its Building Permit Application. Indeed, the Town had not even gone so far as to obtain zoning authority from its electorate prior to Golden Sands' submission.

As discussed above, the Court of Appeals' refusal to extend the bright-line Building Permit Rule to protect Golden

Sands' investment-backed expectations in the development of the Farm Property seems strongly influenced by its concerns over the scale of the proposed Farm and the Town's opposition to the development, as evidenced by the Court of Appeals' reliance on broad hypothetical questions about the project. But the Court of Appeals' reliance on uncertainty over such matters stands in direct contravention to this Court's explicit rejection of a "case-by-case" analysis under the Building Permit Rule. *See McKee*, 374 Wis. 2d 487, ¶ 44. Just as *McKee* rejected the idea of imposing a case-by-case analysis of a developer's expenditures in evaluating vested rights, the same rationale holds true for evaluations based on the scope and details of a project because such fragmented analysis "would create uncertainty at the various stages of the development process" to the detriment of all parties. *Id.*

Even if such an analysis were necessary, the undisputed and unappealable record in this case demonstrates that there was no attendant uncertainty in Golden Sand's Building Permit Application because, as detailed in the Statement of the Case above, the full scope and integrated nature of the Farm project was well documented and readily apparent on Golden Sands' application to the Town. Again,

the Building Permit Application defined the "Project Location" and "Lot area" as a parcel of land totaling 6,388 acres within the Town (referred to throughout this brief as the "Farm Property"). The 6,388 acre Farm Property encompasses the entirety of the proposed development: everything from the agricultural fields that will be used to grow feed, to the buffer acres that will be left around farmed fields, to the land on which the milking parlor will be situated.

The reason Golden Sands included this detail in its Building Permit Application is obvious – the seven buildings identified in the Application are useless to Golden Sands absent the attendant right to actually farm the 6,388-acre Farm Property in accordance with its zoning classification at the time the Building Permit Application was filed. As discussed above, every policy underlying the Building Permit Rule and vested rights in general (e.g., certainty, fairness, economic development) lead to the conclusion that the bright-line Building Permit Rule is appropriately extended to cover this situation and, more broadly, to protect a developer's reasonable investment-backed expectations in the land use

associated with and properly identified in its building permit application.

To hold otherwise would gut the Building Permit Rule because no developer would ever construct buildings without first ensuring it can use the associated land for its intended purpose consistent with its investment. As such, Golden Sands is not arguing for a new doctrine, new test, or even a new rule. Rather, it is simply seeking application of the existing bright-line Building Permit Rule to the facts of this case consistent with the policies and principles underlying the Rule. *See Tony Spychalla Farms, Inc. v. Hopkins Agric. Chem. Co.*, 151 Wis. 2d 431, 444 N.W.2d 743 (Ct. App. 1989) (holding that there is no extension of law when a circuit court applies an existing rule to the facts of the case before it).

II. THE BRIGHT-LINE BUILDING PERMIT RULE PROTECTS REASONABLE INVESTMENTS IN FUTURE LAND USE, WITHOUT REGARD TO ACTIVE AND ACTUAL USE OF THE LAND.

A. The Building Permit Rule Serves As A Trigger To Protect Future Use While The Active And Actual Use Test Serves A Different Purpose.

While the Court of Appeals applied the bright-line Building Permit Rule to hold that Golden Sands has the right

to construct the farm buildings, it then applied the "active and actual use" test to determine whether Golden Sands acquired a vested right in the proposed agricultural use of the Farm Property – a test that courts use to evaluate pre-existing non-conforming uses. *See Golden Sands II*, ¶ 14. No Wisconsin precedent requires a developer to satisfy both tests where a proper building permit application has been submitted, and dual tests should not be imposed in this case.

Applying two distinct vested rights tests as the Court of Appeals did in this case is not only bad policy, it is unnecessary. The active and actual use doctrine and the Building Permit Rule both seek to protect the same interest – the right to rely on zoning regulations currently in effect. However, the active and actual use doctrine protects individuals or entities who are engaged in a conforming use that later becomes non-conforming due to a change in zoning. *See Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc.*, 2009 WI App 142, ¶ 18, 321 Wis. 2d 671, 775 N.W.2d 283 (Wisconsin statutes and law "enabling counties to pass comprehensive zoning ordinances prohibited the discontinuance of *existing* trade or industry uses of buildings and premises"). Said differently, it protects property owners

currently engaged in a specific conforming use from retroactive application of a zoning classification rendering that use unlawful. *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 46-47, 53 N.W.2d 784 (1952) (imposing common law protection of *existing* uses against retroactive zoning prior to enactment of continuing use statutes).

In contrast, the bright-line Building Permit Rule protects individuals or entities planning to engage in a use that is conforming at the time their application is filed but which, as the result of intervening action by local government, would be nonconforming at the time the buildings are constructed and the operation up and running. *McKee*, 374 Wis. 2d 487, ¶ 43. Again, the Building Permit Rule is not merely about the right to construct a building. The "building permit" in the Building Permit Rule is a trigger for something larger and more important than the right to construct buildings. Submission of a complete building permit application marks the date on which the law first recognizes a developer's right to rely on the then-existing zoning classification in order to develop his or her property in the manner described to the municipality in the permit application. Per this Court's recent holding, "Wisconsin

applies the bright-line building permit rule because it creates predictability … [i]t balances a municipality's need to regulate land use with a land owner's interest in developing property under an existing zoning classification." *McKee*, 374 Wis. 2d 487, ¶ 43. Thus, the active and actual use doctrine protects past investment in reliance on zoning while the Building Permit Rule protects current and future investment in reliance on zoning classifications in place at the time of application. Both rules seek to protect property owners, purchasers and developers from knee-jerk reactions by municipalities attempting to zone them out of existence, but they are not interchangeable.

It is only through the application of two separate tests for purposes of ascertaining vested rights that the Court of Appeals came to the conclusion it did; but there was no rational basis or precedent for applying one test for construction of the proposed buildings and another for the proposed use. In creating the artificial distinction between constructing buildings and using property, the Court of Appeals creates the artifice that a developer may invest in one but not the other. As discussed previously, the right to build agricultural buildings without the right to operate a farm

eviscerates clear, investment-backed expectations legitimately grounded in existing zoning classifications. It is unreasonable to expect that Golden Sands would have started farming before obtaining the right to construct the agricultural buildings necessary to operate its Farm. The same principal applies to any project. In this sense, the Court of Appeals manufactured a chicken and egg problem that undermines, not encourages, predictability and certainty of investment in property development.

For example, a developer of a golf course could not reasonably be expected to begin planting fairways and grading greens without first securing the right to construct a clubhouse, pro shop, maintenance facility, and other structures necessary to operate a golf course. Nor would a manufacturer begin preparing a building site without the right to construct the plant, and vice versa. To avoid uncertainty and conflict in the law – and the resultant impact on the investment climate in Wisconsin – this Court should clearly delineate when vested rights are triggered by application of the bright-line Building Permit Rule such as in this case, versus when established uses are preserved by application of the active and actual use doctrine.

B. Applying Separate Vested Rights Tests To A Single Project Also Creates Disparate Protections For Equally Legitimate Investments.

In diminishing the reach of the bright-line Building Permit Rule's protections by piling on an active and actual use requirement, the Court of Appeals has now created two classes of developers: (i) those who have submitted a valid building permit application but who must also satisfy other non-zoning, non-local regulatory requirements before proceeding with the proposed development, and (ii) those who do not. This distinction is not where the bright-line is drawn under Wisconsin's Building Permit Rule, and elevating that distinction to legal significance works injustice.

As discussed in the Statement of the Case above, the record is clear and undisputed that Golden Sands cannot put the Farm Property to its intended agricultural use until it obtains the permits it requires from WDNR for irrigation wells, secures approval from the WDNR for land spreading of manure, and approvals from Wood County and WDNR for construction of the necessary manure handling and storage facilities. None of these regulatory requirements are zoning limitations, and none of them are Town requirements. Yet,

under the Court of Appeals' active and actual use approach, the bright temporal line in the Building Permit Rule is abandoned and the Town is allowed to use the review period for those non-local requirements as an ill-gotten opportunity to adopt zoning authority and disallow agricultural use on the Farm Property.

Significantly, the unfortunate dynamic validated by the Court of Appeals will not affect just Golden Sands. It stands to deprive any developer of protection under the bright-line Building Permit Rule where the proposed use is subject to regulatory requirements in addition to local building and zoning ordinances. This is *precisely* the situation the bright-line Building Permit Rule was designed to protect against.

Although in a slightly different context, this Court has already rejected the notion that non-zoning or building requirements could prevent the vesting of rights under the Building Permit Rule. *State ex rel. Schroedel v. Pagels*, 257 Wis. 376, 43 N.W.2d 349 (1950). In that case, the Wisconsin Supreme Court acknowledged that the village ordinance at issue required, as a prerequisite to the issuance of a building permit, the availability "in an abutting street a main sewer and a water main to which the plans and specifications for such

building provides a connection." *Id.* at 379. The Court expressed "considerable doubt" that such sewer and water improvements existed at the time the developer submitted the building permit application. *Id.* at 382.

But the court declined to express an opinion on that matter, because it concluded that "[t]he [developer's] plans call for a platting of the area so that such structures when erected will abut upon streets to be laid by the [developer] and dedicated to the public" and "that when completed the streets and sewers will conform to the requirements of the village." *Id.* The developer's vested rights were not compromised at all by the fact that, at the time it submitted its building permit application, it still needed to lay out streets, install sewer and water infrastructure in the streets, and dedicate those improvements to the village. There is similarly no reason why WDNR's future processing of Golden Sands' various applications should have any bearing on Golden Sands' vested rights in the prior "Unrestricted" zoning classification. Golden Sands complied with all of the building and zoning requirements that were in place when Golden Sands submitted its applications and that conclusion

will not change regardless of the outcome of WDNR's review of those applications.

The protections afforded by the Building Permit Rule should not be beyond reach simply because there may be regulatory requirements whose satisfaction precludes immediate active and actual use of the land. Imposing the active and actual use requirement on Golden Sands or any other developer who satisfies the Building Permit Rule negates the rule, and frustrates any developer's ability to rely on zoning regulations in place when a valid building permit application is submitted.

C. While The Court Could Reconcile The Building Permit Rule With The Active And Actual Use Doctrine In This Case, Doing So Is Unnecessary.

As explained above, the Court of Appeals' decision to apply multiple vested rights tests to a single project, if upheld, stands to create confusion, unequal protections, and a resultant negative impact on the investment climate in this state. If it were necessary, this Court could reconcile the application of these tests to ensure that their dual application does not diminish rights currently protected by the bright-line

Building Permit Rule. The Court could do so by confirming that significant investments in future uses made in reasonable reliance on existing zoning law and dependent on the approval of pending and duly prosecuted permit applications constitute actual and active use. The basis for doing so could legitimately be ascertained by a synthesis of this Court's precedents.

"The protection of lawful nonconforming uses – that is, uses that are lawful before the enactment of an ordinance but do not comply with the requirements of the new ordinance – arises out of the concern that the retroactive application of zoning ordinances would render their constitutionality questionable." *Kitt's "Field of Dreams" Korner, Inc.*, 321 Wis. 2d 671, ¶ 18 (citations omitted). Where a developer's "substantial rights would be adversely affected" by a change in zoning, the developer is afforded protection. *Id.* ¶ 31 (discussing and citing Wis. Stat. § 59.69(10)(a)). The court of appeals recently described the loss of substantial rights "relating to trade and industry" as meaning that "there has been a substantial investment in the use or that there will be a substantial financial loss if the use is discontinued." *Id.* The active and actual use doctrine

protects a nonconforming use of land where a zoning change adversely impacts "substantial rights" by providing "a vested interest in the continuance of that use" after a change in zoning. *Id.* ¶ 49. To demonstrate its vested interest, the owner or user of the property in question must demonstrate active and actual use of the property at the time of the zoning change. *Id.*

While Wisconsin jurisprudence in this area has focused on physical occupation and use of property, the policies underpinning the doctrine are not so narrow. In fact, the court of appeals itself recognized as recently as 2009 that the early cases laying the groundwork for the law of vested rights in Wisconsin "*concerned financial expenditures to develop a use in reliance on the existing law*, rather than a use that already existed." *Kitt's "Field of Dreams" Korner, Inc.*, 321 Wis. 2d 671, ¶ 21 (emphasis added). *See also Pagels*, 257 Wis. at 380-85 (recognizing vested rights by expenditures for plans and financing made in reliance on existing zoning); *Rosenberg v. Vill. of Whitefish Bay*, 199 Wis. 214, 217, 225 N.W. 838 (1929) (recognizing vested rights by incurring expenses in planning an apartment in reliance on existing zoning). Thus, while Golden Sands never sought protection

of its rights based on active and actual use, there is no reason it would not satisfy the policies underlying that test.

Here, Golden Sands has spent hundreds of thousands of dollars and countless hours to plan and develop the Farm. (R.59, ¶¶ 10-12.) Chief among these efforts is the prosecution of the applications for the necessary local and state federal permits which Golden Sands continues to diligently pursue to this day. (*Id.*) These expenditures effectively approximate the physical "shovel in the ground," because those are active, actual, significant and demonstrable activities undertaken in reasonable reliance on existing zoning law, and are as worthy of protection as any active and actual physical use. Indeed, denying protection to Golden Sands while affording it to property owners engaged in physical use potentially far less extensive than that demonstrated by Golden Sands' investments makes no sense at all.

While reconciliation of the bright-line Building Permit Rule with the active and actual use doctrine in the context of this case as discussed above is thus theoretically possible, articulating it would constitute an unnecessary complication of existing law. The bright-line Building Permit Rule already reconciles the rights in future uses which accrue from the

filing of a building permit application versus rights in established uses protected by the active and actual use doctrine.

III. THE LEGISLATURE'S CODIFICATION OF VESTED RIGHTS REINFORCES THE PRINCIPLE THAT THE RIGHT TO USE PROPERTY IS TRIGGERED BY THE FILING OF A PERMIT APPLICATION.

Five years ago, the Legislature codified certain aspects of common law vested rights by creating Wis. Stat. § 66.10015. This codification effort further supports the conclusion that Golden Sands has established its vested rights and is entitled to agricultural use of the Farm Property under Wood County's then-applicable "Unrestricted" zoning classification. In fact, Golden Sands' entitlement to rely on the pre-existing zoning classification would likely have been protected under the new statutory scheme had its effective date captured Golden Sands' project.

Created by 2013 Wisconsin Act 74 ("Act 74"), which was enacted December 12, 2013, the statute provides that "if a person has submitted an application for an approval, the political subdivision shall approve, deny, or conditionally approve the application solely based on existing requirements, unless the applicant and the political

subdivision agree otherwise." Wis. Stat. § 66.10015(2)(a).

The legislative drafting records[1] make it clear that the purpose of Act 74 was to codify the common law of vested rights. The initial drafting request that was submitted by Senator Frank Lasee's office to the Legislative Reference Bureau legal department articulated the sponsors' intent. (R. 61, Exh. C.) That initial drafting request included the following points:

> - The legislation would "codify current law related to when a property owner's rights to develop his or her property in a desired manner is protected or vested from subsequent changes to local land-use regulations, zoning ordinances and permit requirements."
>
> - "The concept of 'vested rights' recognizes that, at some point in time, it is unfair to change the rules and regulations affecting a property owner's ability to use or develop his or her property."
>
> - "Wisconsin law currently establishes 'vested rights' for changes to both zoning and subdivision regulations."
>
> - "Two problems exist with current law. First, a property owner's vested right to zoning is found in case law, not the state statutes. This is a

[1] The drafting records related to Act 74 are available from the Wisconsin Legislature's Wisconsin Law Archives at https://docs.legis.wisconsin.gov/document/draftingfiles/2013/74. Relevant drafting records are also those associated with the companion bill that was introduced in the Wisconsin Assembly, 2013 Assembly Bill 386, which are available from the Wisconsin Legislature's Wisconsin Law Archives at https://docs.legis.wisconsin.gov/2013/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2013_ab_0386.

> problem because not all local officials are attorneys and thus they are often unaware of legal standards established in case law. Second, the law is silent as to when a property owner's rights vest with respect to future changes in other types of development regulations and permit requirements at the local level."

(*Id.* (emphasis in original).) Under the heading "Proposed Solution," the drafting request stated:

> To ensure that the rules related to changes in the development-approval process are known by both permit applicants and permit grantors, we recommend that the law be clarified to specifically state that changes to any local land-use regulations cannot be applied to permit applications that have been submitted prior to the effective date of those changes.

(*Id.*) The Legislative Reference Bureau prepared a "Drafting Request" form for the companion Assembly Bill, 2003 A.B. 386, dated February 7, 2013, which lists the "Topic" of the proposed bill as: "Codify case law that vests a property owner's right to existing zoning regulations upon application for building permit." (R. 61, Exh. D.)

It is apparent that the Legislature followed through on the authors' intent. Under Wis. Stat. § 66.10015(2)(a), a filed application conclusively establishes the developer's vested rights to rely on *all* local regulations, ordinances, rules, or other properly adopted requirements in effect at the time of application, not just pre-existing zoning ordinances.

Moreover, Wis. Stat. § 66.10015(2)(b) provides for a universal vesting date for a project that requires multiple local approvals from multiple political subdivisions:

> If a project requires more than one approval or approvals from more than one political subdivision and the applicant identifies the full scope of the project at the time of filing the application for the first approval required for the project, the existing requirements applicable in each political subdivision at the time of filing the application for the first approval required for the project shall be applicable to all subsequent approvals required for the project, unless the applicant and the political subdivision agree otherwise.

The statute provides that such projects are evaluated against all local regulations that are in place when the developer files its first application for local approval. This requirement demonstrates that the Legislature intended to foreclose any possibility that a local government could change the development regulations in response to a regulatory filing submitted to a different government agency.

Most importantly, the entire framework of the statute was to reinforce the nature of the rights that are triggered, and the interests that are thereby protected, *by the submission of permit applications for property development*. Just like the Building Permit Rule cases, the statute makes no distinction between constructing a building and putting the associated land to the currently authorized use.

While Golden Sands' Building Permit Application did not trigger the statutory protections of Wis. Stat. § 66.10015 because it was filed before the effective date of the Act, the relief Golden Sands seeks in this action is wholly consistent with the Legislature's codification of the vested rights doctrine. Moreover, the relief requested is fully supported by the Legislature's codification of a single vesting date that applies universally to all required local approvals. Here, Golden Sands concurrently submitted a suite of applications to multiple agencies. The zoning classification in place on that submittal date provided for "Unregulated" zoning on the Farm property. Golden Sands has established its vested right to conduct its farming operation pursuant to those pre-existing zoning regulations and this subsequently enacted piece of Wisconsin Statutory law certainly aligns with that conclusion.

CONCLUSION

Golden Sands' right to a building permit vested before the Town took any action to zone the Farm off the map: before the Town's Moratorium, before its Interim Zoning Ordinance, before it obtained permission from its electors to engage in zoning, and before it passed its permanent zoning ordinance. (R.60, Ex. B, ¶¶ 17, 62.) Golden Sands thus satisfied the single requirement of the bright-line Building Permit Rule. When the Town found itself on the wrong side of this bright line, however, the Court of Appeals erased it and with it, Golden Sands' legitimate investment-backed expectations. This is *exactly* the scenario the bright-line Building Permit Rule is meant to prevent.

For these reasons, and all the reasons discussed above, the Court should reverse the decision of the Court of Appeals and hold that Wisconsin's bright-line Building Permit Rule protects an applicant's right to both construct buildings and to use the project land necessarily associated with the buildings

in the lawful manner described in the building permit application.

Dated this 12th day of October, 2017.

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CERTIFICATION OF FORM AND LENGTH

I certify that this Brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a Brief produced using a proportional serif font. The length of this Brief is 9,170 words.

Dated this 12th day of October, 2017.

/ s / Jordan J. Hemaidan
Jordan J. Hemaidan

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the Appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of the Brief and Appendix filed with the Court and served on all opposing parties.

Dated this 12th day of October, 2017

/ s / Jordan J. Hemaidan
Jordan J. Hemaidan

STATE OF WISCONSIN
SUPREME COURT
Case No. 2015AP001258

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v.

TOWN OF SARATOGA, TERRY A. RICKABY, DOUGLAS PASSINEAU, PATTY HEEG, JOHN FRANK AND DAN FORBES,

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

Review of April 13, 2017 Decision of the Court of Appeals, District IV, Appeal No. 2015AP001258

Wood County Circuit Court Case No. 12-CV-0389, The Honorable Thomas Eagon Presiding

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AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, Jodi Brown, being first duly sworn, state that on October 12, 2017, I caused three (3) true and correct copies of the Brief and Appendix of Plaintiff-Respondent-Petitioner Golden Sands Dairy, LLC to be served upon the following:

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/ s / Fran M. Wiley
Notary Public, State of Wisconsin
My Commission: expires 11/27/2020

SUPREME COURT OF WISCONSIN

GOLDEN SANDS DAIRY LLC,

Plaintiff-Respondent-Petitioner

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v. Appeal No. 2015AP001258

TOWN OF SARATOGA, TERRY A. RICKABY, DOUGLAS PASSINEAU, PATTY HEEG, JOHN FRANK AND DAN FORBES,

Defendants-Appellants

RURAL MUTUAL INSURANCE COMPANY,

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Review of April 13, 2017 Decision of the Court of Appeals, District IV, Appeal No. 2015AP001258

Wood County Circuit Court Case No. 12-CV-0389, The Honorable Thomas Eagon Presiding

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INTRODUCTION

This case is about the scope of an exception to the general rule that no one has a vested right to existing zoning. In particular, the issue is whether the "Building Permit Exception" recently discussed in *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12, applies to properties other than the property for which the building permit has been sought. Golden Sands argues that its building permit application for seven buildings on a 98-acre parcel automatically extends to more than 6,000 off-site acres scattered throughout the Town of Saratoga (Town) because it claims such lands are "integral to" or "associated with" the buildings. This position is contrary to case law and recently enacted statutes.

Although this issue has not been directly addressed in Wisconsin case law, in *McKee* this Court made it clear that the Building Permit Exception is a bright line that is intended to avoid case-by-case determinations. Golden Sands' interpretation conflicts with that approach. Contrary to the ruling in *McKee,* Golden Sands' argument – that vested rights extend to any parcels beyond the building site which it deems "integral" to the building – would require the courts to determine on a case-by-case basis what is integral and what is not.

Recent statutory law *has* directly addressed this issue. The Legislature created an equally bright line, even if a broader one than common law. The statute allows a vested right to extend to "a specific and identifiable land development that occurs on *defined and adjacent parcels* of land" identified in the building permit or local approval

application. Wis. Stat. § 66.10015. Thus, to the extent amicus parties are concerned about future projects that cross into adjacent parcels, that concern has been addressed. However, Golden Sands' position conflicts with this statute. Golden Sands urges this Court to remove the statutory "adjacency" provision and extend vested rights to any lands an applicant deems integral no matter how attenuated or distant they are from the building site. Indeed, the Legislature expressly considered and rejected the position Golden Sands is now taking. As a matter of statutory interpretation and separation of powers, this Court should not expand a common law rule and effectively overturn the statutory provision adopted by the Legislature.

It is equally important to clarify what this case is *not* about. Golden Sands' assertion that the court of appeals held a building permit only authorizes the construction – but not the use – of the approved buildings is a rhetorical straw man. For purposes of zoning, Golden Sands' vested right to construct the dairy buildings on the 98-acre parcel includes the right to use them as dairy buildings, and the Town has never argued otherwise. As the court of appeals stated, "The dispute here is over the non-building-site acres. The Town does not contest Golden Sands' right to use the 100-acre parcel as a building site." Slip Op. ¶5. In fact, the court of appeals assumed for purposes of its analysis, "that a vested right to a building permit carries with it the right to use the building in a manner consistent with the nature of the building…" *Id.* ¶20.

In addition, this case is not about vested rights arising from "actual and active" use. Had Golden Sands opted to use some of its lands for agricultural purposes prior to

the enactment of the zoning ordinance in November 2012, it might have been able to establish a nonconforming use. But, that is not the case. It is undisputed that Golden Sands was not using any of its land for agricultural purposes in November 2012. R. 63 (Hoefer Aff., Ex. A). At the time of the building permit application, the proposed cropland was pine plantation subject to the Wisconsin Managed Forest Law which precluded such use. *Id.* Any attempt by Golden Sands to argue that it meets such a test is not only too late, but wholly contrary to the undisputed facts.

Golden Sands' novel theory that vested rights extend to any off-site property beyond the building site, is not only contrary to Wisconsin law, but is contrary to the very interests it espouses – certainty and protection of property rights. If the Court adopts Golden Sands' interpretation, such a theory would create uncertainty in two ways: (1) common law will require a case-by-case determination of what lands are "integral" to the building permit and (2) it will create a direct conflict between the recently enacted statute and common law. In addition, Golden Sands' theory will undermine property rights by eviscerating the ability of zoning to protect the property rights of the existing property owners in the Town.

STATEMENT OF THE CASE

A. Town Development of Zoning

Contrary to Golden Sands' assertion that the Town "conceived and in a rush codified that change [zoning] in direct reaction to Golden Sands' filing" (Pet. Br. at 16), the development of the Town's zoning ordinance started in 2001. Among the key drivers for zoning were two basic geologic facts that existed long before the advent of Golden Sands' application: the Town has soils highly susceptible to groundwater contamination, and its 5,000 residents rely on private wells for their drinking water. R. 63 (Hoefer Aff., Ex. D, Town Zoning Ordinance §1.4).

The Town of Saratoga, located on the southeast corner of Wood County, is about 31,921 acres (50 sq. mi.) in size with predominant land uses being woodlands owned by private landholders, residential subdivisions, limited agriculture (including cranberry bogs), commercial developments and open spaces. R. 67 (Reginato Aff. Ex. C, Comprehensive Plan p. 1).[1] Survey crews in 1851 gave the following description of the area:

> The Character of this town is easily described. It is a uniform pine barren. Soil white sand. Poor & worthless for all farming purposes. The timber poor scrubby Pitch pines & there is not probably a single quarter section in it worth Entering either for soil or timber.[2]

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[1] "History of Wood County, Wisconsin" (1923) p. 41 (http://content.wisconsinhistory.org/cdm/ref/collection/wch/id/39243) (last visited 10/31/17).

[2] Board of Commissioners of Public Lands, "Interior Field Notes (Sept. 1851)," http://digicoll.library.wisc.edu/cgi-bin/SurveyNotes/SurveyNotes-idx?type=article&byte=3146767&isize=L&twp=T021NR006E) (last visited 10/31/17).

The lack of agriculture in this area is not just history, but the reality Golden Sands faces. All of the land in the Town which Golden Sands proposes to use for its operations was pine plantation land owned by Plum Creek Timber Company, Inc. ("Plum Creek"). R. 86 (Decision Tr. p. 72). In fact, at the time of the building permit application, this land was enrolled in the Wisconsin DNR's Managed Forest Land (MFL) program which precludes agricultural uses. R. 63 (Hoefer Aff., Ex. A). As the trial court found, "[t]he most recent application to the DNR indicates that it will continue to be used in that fashion for another 50 years." R. 86 (Decision Tr. pp. 16-17).

In addition, because of its sandy soils, the U.S. Geological Survey has characterized the Town of Saratoga as highly susceptible to groundwater contamination.[3] This is a particular concern because the 5,000 residents of the Town are dependent on private wells for their drinking water. *Id.*, Ex. D.

Against this background, the Town developed its "Comprehensive Plan 2007-2027" (Comprehensive Plan) starting in 2001.[4] R. 67 (Aff. Reginato, Ex. D, 11/29/12 and 11/30/12 Mandamus Transcript p. 510). The Comprehensive Plan process began with community surveys. By July 2006, the Plan Commission again discussed major concerns regarding development, preservation of natural resources and retaining open

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[3] dnr.wi.gov/education/documents/groundwater/susceptibilityMap.pdf. (last visited 10/31/17).

[4] These early efforts coincided with the Wisconsin's comprehensive planning program, known as the "Smart Growth" initiative, created by 1999 Wisconsin Act 9. *See* R. 67 (Reginato Aff. Ex. C, Comprehensive Plan p. 1 & 3).

space, including the discouragement of large/heavy agricultural uses in forested and rural preservation lands. *Id.*, pp. 496-497, 500-502. After years of work by the Plan Commission, on August 15, 2007, the Town adopted its final Comprehensive Plan which set as its goal to have a zoning ordinance in place within five years (i.e. August 2012). *Id.*, pp. 526, 528. Upon adoption of the Plan, the Town began working on the zoning ordinance implementing the visions of the Comprehensive Plan. *Id.*, p. 502. By 2011, and into April 2012, the Plan Commission continued discussing, reviewing and considering approval of a draft zoning ordinance. *Id.*, p. 503. In the final year of its planning, the Plan Commission received pressure from its County Board Supervisor to meet the August 2012 deadline and therefore began circulation of zoning ordinance drafts by April 2012, proceeding in its work from zoning "definitions" to the zoning plan itself. *Id.*, p. 504-506, 526.

The Town had not yet completed the ordinance as of June 6, 2012, when Golden Sands filed its building permit application. In response to Golden Sands' application, the Town promptly enacted a Moratorium on the issuance of building permits to allow the ongoing zoning process to be completed and prevent the development of land uses inconsistent with the Plan. R. 86 (Decision Tr. pp. 62-63). Subsequently, the Town completed its zoning ordinance, which became effective on November 14, 2012. *Id.*, pp. 62-63.

In short, this is not a case where a proposed use was consistent with existing land use and the local government arbitrarily decided to change the rules. To the contrary,

the Town was attempting to preserve existing land uses in accordance with its longstanding land use plan. In particular, the Town implemented longstanding goals of the Comprehensive Plan to protect its residents' drinking water and property rights.

B. Golden Sands' Planning for the Dairy.

Golden Sands overstates its investment and its due diligence. It is true that, at the time the building permit was submitted, the Town's zoning was not yet enacted. But, the Town's deliberations regarding the draft zoning ordinance were the subject of numerous public meetings subject to public notice. Indeed, the Comprehensive Plan's schedule sought zoning by 2012 and, to that end, ongoing Plan Commission meetings considered drafts of zoning. R. 67 (Aff. Reginato, Ex. D, 11/29/12 and 11/30/12 Mandamus Transcript p. 498, 502-507, 517, 520-521, 526-527, 528); R. 86 (Decision Tr. p. 62). Mr. Wysocki, the chief financial officer of Golden Sands was well aware of the Town's Comprehensive Plan, those plan commission meetings and the controversy surrounding large agricultural operations in the Town and elsewhere. R. 67 (Aff. Reginato, Ex. D, 11/29/12 and 11/30/12 Mandamus Transcript p. 25-27, 29, 140-146, 159). R.App. 137-150. He helped develop Wisconsin's Agricultural Siting Law, and fully understood that large-scale agricultural use was discouraged in this area. *Id.*

While Golden Sands claims it spent "several months" preparing its application, it chose not to consult the Town at any time prior to its submittal. *Id.*, pp. 27, 29-30, 159, 162-163. R. App 137-150. Mr. Wysocki of Golden Sands also admitted that he was aware the proposed dairy would be controversial and face opposition. *Id.*, p. 29.

Thus, as the circuit court observed, Golden Sands felt it "needed to keep their plans secret until they were ready to file." R. 86 (Decision Tr. p. 18). In effect, Golden Sands took a calculated risk that it could get its application in before Town zoning could be completed.[5]

Moreover, the calculated risk it took was less than it now represents. Golden Sands' assertion that in 2012 its "investment in the Farm included acquisition of 6,388 acres of land" (Pet. Br. at 2) is misleading. The amount of Plum Creek land actually acquired by Golden Sands remains unclear. Golden Sands claims it paid Plum Creek for "a significant portion of the Property," but "the balance of the Property remains under contract with Plum Creek." R. 59 (Wysocki Aff. ¶12). As late as 2014, the MFL lands actually owned by Ellis Industries Saratoga LLC (Golden Sands' land affiliate) comprised only 1,117 acres.[6]

C. Golden Sands' Building Permit Application.

Golden Sands asserts that the building permit application "documented a geographic area defined with specificity" and "plainly identified the 'Project Location' and 'Lot area' as the '6,388 ac.'" Pet. Br. at 9, 12. Again, the actual documents tell a different story.

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[5] Golden Sands complains about the Town racing to finish zoning, but as the aforementioned hearing testimony makes clear, it was Mr. Wysocki who rushed to beat the Town's impending zoning change, knowing the Town expressed hostility to his proposed use in the Comprehensive Plan.

[6] Golden Sands, LLC was "in the business of developing, owning and operating a dairy farm in the Town" and Ellis Industries Saratoga LLC, "is in the business of developing, owning and operating irrigated vegetable and potato production … in the Town." R. 18, Complaint ¶¶ 1-2. Jim Wysocki is the manager for both LLCs. *Id.*

First, the original building permit application form stated that the "Area Involved" is "7 building structures." R. 67, Ex. A; R-App. 101. Although the application form generically lists the "Project Location" as "6,338 ac," the legal description on the form only describes the building site. The attached Design Report, which contains the actual drawings of the buildings, listed the "Site Location" with a specific legal description comprising approximately 98 acres. *Id.*, R-App. 102-114. The amended building permit application dated July 17, 2012, includes an attachment unambiguously entitled "Building Permit Application – Legal Description." Again, it describes approximately 98 acres, not 6,000+ acres, as the building site, to wit:

> BUILDING PERMIT APPLICATION – LEGAL DESCRIPTION
>
> Southwest ¼ of Southeast 1/4 of Section 20, Town 21 North, Range 6 East, Saratoga, Wood County
> Southeast ¼ of Southwest ¼ of Section 20, Town 21 North, Range 6 East, Saratoga, Wood County
> East ½ of southwest ¼ of Southwest ¼ of Section 20, Town 21 North, Range 6 East, Saratoga, Wood County

R.18, (Complaint, Ex. G); R-App 115-116.[7] The limited legal description in the building permit is consistent with the fact that the building permit application and the Design Report were submitted by Golden Sands LLC, the dairy operation, not Ellis Industries Saratoga LLC, the cropland operation.

Golden Sands apparently recognizes the significance of the limited scope of its

[7] Generally, a "quarter-quarter" section is 40 acres. *See* Wisconsin DNR, "Tutorial on the Public Land Survey System," p. 3, http://dnr.wi.gov/topic/forestmanagement/documents/plsstutorial.pdf (last visited 10/31/17). Thus, two "quarter-quarter" sections plus a half of a quarter section would be 100 acres.

building permit application because it tries to hide the relevant facts. Golden Sands' Appendix fails to include the amended building permit application which has the legal description noted above. In addition, Golden Sands included portions of the Design Report, but omits page one, which is entitled "Key Information" and contains the legal description which lists the Site Location as 98 acres (Compare P-App 59-64 and R-App. 102-114).

In order to get to 6,388 acres or any legal description beyond the Building Site, one needs to look not to the building permit, but to copies of a map and state permit applications such as the Nutrient Management Plan. Pet. Br. at 9. Golden Sands submitted these documents to the Town "as a courtesy." R. 59 (Wysocki Aff. ¶ 15), not for the purpose of seeking approval of the building permit.

Second, Golden Sands repeatedly stressed in the first lawsuit against the Town that the only issue before the Town involved the building permit, not the state permits. This first lawsuit involved a mandamus action, referred to as *Golden Sands I*. *See Golden Sands Dairy, LLC v. Fuehrer*, No. 2013AP1468, unpublished slip op. (Wis. Ct. App. July 24, 2014). During the initial litigation in *Golden Sands I* – from the opening statement to closing argument – Golden Sands adamantly argued that the scope of the building permit application was limited to "seven buildings." Golden Sands' counsel began the first hearing describing what Golden Sands sought in terms of a building permit from the Town:

> Mr. Hemaidan: Your Honor, I have a brief opening statement about what this case is about. On June 6th, Golden Sands applied for **a building permit from the Town of Saratoga for seven buildings…**
>
> **Golden Sands didn't apply to the Town to construct and operate a dairy.** That's for someone else. That's for the State.
>
> And as we discussed at length on Tuesday, and as we briefed the Court further yesterday, the operation aspects of a dairy are strictly regulated by DNR. **So, the only issue before the town was the building permit for the buildings**. (Emphasis added)

R. 67 (Aff. Reginato, Ex. D, 11/29/12 and 11/30/12 Mandamus Transcript p. 9-10). In the argument prior to the circuit court's decision, Golden Sands continued this theme – the building permit application was only about the seven buildings:

> Mr. Hemaidan. **This case is about seven buildings, the construction of seven buildings on a piece of land** that for 75 years, lay within an unrestricted zoning district. …
>
> What is this case not about? It's not about whether the dairy is a good idea. It's not about its environmental impact, the water quality, the manure storage, the wells. Even whether the buildings could someday become empty of fall into disuse. **It's not about land use.**

R. 67 (Reginato Aff., Ex. E, Writ of Mandamus Decision Tr. p. 10).

Thus, Golden Sands' argument that the building permit was always about the ancillary farm land is at best disingenuous. Golden Sands wants it both ways. When it was trying to obtain the building permit and needed to demonstrate a complete approvable application, Golden Sands focused just on the seven buildings on 98 acres but specifically and repeatedly excluded the associated lands. Once it had the building permit, it then argued that the associated lands referenced in the state permits were part of the building permit.

Third, to the extent Golden Sands attempts to use the state permit applications to define the scope of the building permit application, the state permit applications do

not provide "a geographic area defined with specificity" as Golden Sands now claims. Pet. Br. at 12. The circuit court expressly found to the contrary:

> To the extent that Golden Sands Dairy is using the state permits to define the scope of the building permit, **such permit applications do not provide sufficient specificity as to the scope of the project because the scope of the project in those applications has already been changed and no final approval has been granted.**
>
> In particular, the ability of Golden Sands Dairy to utilize crop land for spreading of the manure, the area and location of the land-spreading parcels require the approval of the Nutrient Management Plan by the DNR and no approval has been granted. (Emphasis added.)

Decision Tr. pp. 73-74. Thus, there is no way to tell, from looking at the state application, precisely what lands will ultimately be used for the project other than the 98 acres described in the building permit application.

D. The Proposed Golden Sands Project.

Golden Sands describes its proposed project in bucolic terms that overstates its "integration" and understates its proposed impact. Golden Sands proposes to build a facility that would include 5,300 animals concentrated on a 98-acre parcel and would produce 55 million gallons per year of liquid manure in addition to tons of solid manure on an annual basis. R. 63 (Hoefer Aff., Ex. C). Further, Golden Sands proposes to clear-cut 4,660 acres of pine plantation in the Town, convert it to cropland and use that cropland to dispose of its massive quantities of manure. R. 86 (Decision Tr. pp. 70-74). This physical transformation of the community is of no small concern to the existing residences and businesses because, as noted above, the Town is in an area designated as highly susceptible to groundwater contamination because of its sandy soils and its 5,000 residents' reliance on shallow wells for drinking water.

Throughout its brief, Golden Sands refers to the off-site lands as "integral" to its operation because it needs a place for cows, a place to produce feed and a place to spread manure. Golden Sands states that the buildings will become "useless" without the manure-spreading fields. Pet. Br. at 13. There is nothing in this record to support that claim. Wysocki asserts that manure-spreading lands need to be "geographically proximate" to be economical, but provides no specific information to define or support that claim. *See* R. 59 (Wyscoki Aff. ¶18). Indeed, the record demonstrates that, as of the most recent submittal to the DNR, Golden Sands plans to apply manure to 1,800 acres of existing cropland *outside* the Town. R. 86 (Decision Tr. p. 74). It may be that Golden Sands would prefer to spread manure on lands closer to the dairy, but that fact alone does not make the cropland in the Town integral to the dairy.

ARGUMENT

I. GOLDEN SANDS' POSITION CONFLICTS WITH THE GENERAL RULE THAT NO ONE HAS A VESTED RIGHT TO EXISTING ZONING.

Golden Sands argues, "the Court of Appeals stripped Golden Sands of its right to rely on existing zoning." Pet. Br. at 4. Golden Sands proceeds under a faulty premise. The settled law in Wisconsin is to the contrary. There is no vested right to rely on existing zoning.

A. There Is No Vested Right To Existing Zoning Because Such Ordinances Protect The Public Welfare Including Property Rights.

Zoning ordinances are part of the police power designed to promote the public

safety, health and welfare including the protection of existing property rights. *State ex rel American Oil Co., v. Bassent,* 27 Wis. 2d 537, 544, 135 N.W.2d 317 (1965) ("this court considered a comprehensive zoning ordinance as justified in the exercise of the police power . . . General welfare was equated with the stabilization of the value of the property and the promotion of the permanency of desirable home surroundings and of the happiness of the citizens."). *See also, State ex rel. Saveland Park Holding Corp. v. Wieland,* 269 Wis. 262, 269, 69 N.W.2d 217 (1965) ("zoning results . . . from a realization that the value and usefulness of each parcel, not only to the owner but the community, is vitally affected by the use made of the adjoining parcel.") and Wis. Stat. § 62.23(7)(c) ("zoning purposes include "conserving the value of buildings and encouraging the most appropriate use of land."); *see also* Wis. Stat. § 60.61(1)(b) (counterpart statute for towns).

Zoning ordinances need to evolve with changing conditions of the local community to fulfill those purposes. *McKee*, 2017 WI 34, ¶ 57. As a result, the well-settled law in Wisconsin is that no one has a vested right to existing zoning. The court in *Buhler v. Racine Co.*, 33 Wis. 2d 137, 148, 146 N.W.2d 403 (1966) explained:

> Property holders have a great interest in zoning, but as this court said in *Eggebeen v. Sonnenburg,* (1941), 239 Wis. 213, 1 N.W.2d 84, 138 A.L.R. 495 **they acquire no vested rights against rezoning because of their reliance upon the original zoning.** Indeed, if this were not so no changes in zoning or in comprehensive zoning plans could ever be made to adapt land use realistically to changing times and environment. (Emphasis added)

This rule has been consistently applied. Just last term in *McKee*, this Court reiterated, "reliance on a particular zoning designation applicable to [a landowner's]

property does not suffice to give the landowner a vested right to such designation." 2017 WI 34, ¶ 36. *See also*, *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 381, 548 N.W.2d 528 (1996) ("Property owners obtain no vested rights in a particular type of zoning solely through reliance on the zoning.").

B. The Building Permit Exception And Nonconforming Use Exception Are Exceptions To The General Rule Against Vested Rights In Zoning.

While acknowledging the general rule, some of the early zoning cases also noted that "where substantial rights had vested prior to the enactment of the law," a landowner may acquire vested rights. *State ex rel. Klefisch v. Wisconsin Telephone Co.*, 181 Wis. 519, 195 N.W. 544, 549 (1923). In Wisconsin, there have been two distinct exceptions that give rise to vested rights in existing zoning.

The first exception, which is at issue in this case, is known as the Building Permit Exception. It arises through affirmative authorization by the local government in the form of a building permit.[8] "From the very beginning of zoning jurisprudence in this state, then, a building permit has been a central factor in determining when a builder's rights have vested...." *Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 172, 540 N.W.2d 189 (1995). *See also Buhler*, 33 Wis. 2d at 148 (mere intent to

[8] Modern land use planning inherently relies upon building permits. Before local municipalities were established, land could be developed without the prerequisite of securing governmental approval. *See* 4 Edward H. Ziegler, Jr. et al., Rathkopf's The Law Of Zoning And Planning § 69:2 (4th ed. 2011) (discussing the development of land regulation). However, building permit approvals arose with the establishment of local municipalities and the creation of regulations governing and restricting land use. *Id.*

develop based on reliance upon original zoning does not amount to vested rights). As this Court summarized last term:

> The exception to the rule that zoning does not create vested rights arises when a property owner has applied for a building permit conforming to the original zoning classification. .... In *Lake Bluff*, this court concluded that the developer "obtained no vested rights, because it never submitted an application for a building permit conforming to the zoning and building code requirements in effect at the time of the application." ...

McKee, 2017 WI 34, ¶ 37.

For vested rights to attach, therefore, an entity needs to have filed a building permit application, and there must be "strict and complete conformance with applicable zoning and building code requirements" in order to gain the benefit of the vested rights rule attributable to a building permit. *Lake Bluff*, 197 Wis. 2d at 174. "[V]ested rights should only be obtained on the basis of strict and complete compliance with zoning and building code requirements, because a builder's proceeding in violation of applicable requirements is not reasonable." *Id.* at 175. In *McKee*, this Court made clear that this exception imposed a bright-line test that was based on the submittal of a building permit application. The existence of expenditures and the submission of a "general development plan and a "specific development plan" do not create vested rights in the absence of a building permit. *McKee*, 2017 WI 34, ¶¶ 3, 34, 44, 49.

The second exception by which a party may establish a vested right in zoning, although inapplicable here, involves the "actual and active" use rule for nonconforming uses which had already been undertaken at the time of zoning changes. That exception allows for the continuation of a nonconforming use, balancing such continuation

against the "spirit of zoning, which "is to restrict and eventually eliminate" such uses "as quickly as possible" because they are "an anomaly," "suspect" and "therefore circumscribed." *Waukesha County v. Pewaukee Marina*, Inc., 187 Wis. 2d 18, 29, 522 N.W.2d 536 (1994); *see also City of Lake Geneva v. Smuda*, 75 Wis. 2d 532, 538, 249 N.W.2d 783 (1977). Under Wisconsin law, a party that is "actually and actively using" property in a manner that was permitted prior to a change in zoning has a vested interest in the continued use of that property, as a nonconforming use, notwithstanding a zoning change. *Town of Cross Plains v. Kitt's Field of Dreams Korner, Inc.*, 2009 WI App 142, ¶ 27, 321 Wis. 2d 671, 775 N.W.2d 283.

Here, because there was no actual and active use of the lands for agricultural purposes prior to the zoning ordinance, this exception does not apply. The record in this case unquestionably shows both parties agreeing that Golden Sands did not engage in "active and actual" agricultural use of the 6,000+ acres of land in the Town before the Town enacted an ordinance precluding such agricultural use. To the contrary, those lands remained in MFL status that precluded agricultural use. Golden Sands even admits that it "never sought protection of its rights based on active and actual use...." Pet. Br. pp. 39-40.[9]

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[9] Before the court of appeals in an argument header, Golden Sands stated very clearly:

> Because Golden Sands Vested Rights Arise from The Submission of a Complete Building Permit Application That Fully Described the Intended Use of Unrestricted Property, There Was No Requirement For Golden Sands To Engage In Active Use.

Golden Sands court of appeals' brief, Section II.F (p. 41).

The only reason this issue arises at all is because Golden Sands attempts to engraft inapposite nonconforming use cases like *Kitt's Field of Dreams* and *Waukesha County v. Seitz*, 140 Wis. 2d 111, 409 N.W.2d 403 (Ct. App 1987) into its Building Permit Exception analysis – claiming that "investments in future uses made in reasonable reliance on existing zoning law . . . constitute actual and active use." Pet. Br. at 38 -39. That has never been the law in Wisconsin. Quite simply, a proposed future use is not an "active and actual" use. And because Golden Sands never raised this issue below, it cannot do so now. *See Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶ 23, 303 Wis. 2d 258, 275, 735 N.W.2d 93 ("[g]enerally, arguments raised for the first time on appeal are deemed waived") (citation omitted).

Had Golden Sands obtained final control over the lands, removed the MFL status, cut the timber and begun agricultural practices on the land prior to November 12, 2012, then it could argue a vested right to continue agricultural uses as a nonconforming use after the Town enacted its zoning ordinance. But Golden Sands did none of those things.

Because no vested right arose as a nonconforming use to agricultural use of those lands, Golden Sands must rely solely on the Building Permit Exception for its assertion that vested rights extend to the 6,000+ acres scattered throughout the Town. For the reasons set forth below, it cannot make that case.

II. THE BUILDING PERMIT EXCEPTION IS LIMITED TO THE BUILDING PERMIT SITE.

A. There Are No Building Permit Cases In Wisconsin Which Grant Vested Rights To Off-Site Uses Beyond The Building Permit Site.

No case in Wisconsin has addressed the application of the Building Permit Exception to off-site parcels. That in itself is instructive. Numerous Wisconsin cases make it clear that a building permit carries with it the right to use the building for its intended use, and that is not in dispute here. At the same time, there are no cases in Wisconsin which have allowed an owner to use a building permit on one site to obtain vested rights to ancillary off-site uses.

Indeed, all of the cases are to the contrary. In *Rosenberg v. Village of Whitefish Bay,* 199 Wis. 214, 225 N.W.2d 838 (1929), the plaintiff was allowed to build an apartment hotel on a specific property according to the plans submitted to the Village. In *State ex rel. Schroedel v. Pagels*, 257 Wis. 376, 43 N.W.2d 349 (1950), the plaintiff was allowed to follow through on plans and specifications for an apartment building consistent with the existing zoning. In *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 46, 53 N.W.2d 784 (1952), the court held that the plaintiff had "a vested interest in said trailer and in the use thereof for dwelling purpose on said tract of land owned by him." In *Lake Bluff*, 197 Wis. 2d at 161, the issue involved a building permit for a parcel of land along Lake Michigan upon which the developer intended to construct a multi-family building.

Not surprisingly, Golden Sands has failed to cite *any* building permit case in which off-site lands apart from the building site are granted vested rights. In reviewing the cases cited by Golden Sands below, the court of appeals observed that it could find "no authority supporting Golden Sand's position." Slip Op. ¶13. Referring to *Lake Bluff* and *Pagels,* the court of appeals concluded "neither case addresses the use of purportedly associated land." Slip Op. at ¶20.

The conclusion that vested rights are confined to the building permit parcel is consistent with the result for the other vested rights exception – nonconforming use. Wisconsin law has expressly refused to allow nonconforming uses to expand on to parcels which were not actively used at the time of the zoning change. In *Lessard v. Burnett County Bd. of Adjustment*, 2002 WI App 186, ¶ 17, 256 Wis. 821, 649 N.W.2d 728, the court noted, "a nonconforming use is limited to the area it covers at the time of the enactment of the zoning ordinance or restriction and cannot later be expanded to the boundaries of the tract." (citing 8A McQuillan, Municipal Corporations § 25.208, at 128 (rev. 3d ed. 1994)). This conclusion comports with the underlying doctrinal purposes discussed above.

Other jurisdictions have also generally held that the scope of vested rights arising from a building permit is limited to the project authorized and does not extend to off-site "accessory uses" or other phases of a proposed development. For example, in *Deer Creek Developers, LLC v. Spokane County*, 157 Wash. App. 1, 236 P.3d 906 (2010), the Washington court refused to extend vested rights to a second phase of a

development because it was not part of the building permit application. Significantly, the developer submitted a number of other documents including a unified site plan for both phases along with an environmental analysis for both phases. In addition, it expended millions of dollars on infrastructure for *both* Phases I and II of the project. Nevertheless, the court ruled vested rights did not extend to Phase II, because no building permit was filed for Phase II. *See also Huff v. City of Des Moines,* 244 Iowa 89, 56 N.W.2d 54 (1952) (A building permit for construction of a utility house did not provide vested rights to allow for the development of a trailer park which was prohibited by a zoning change after the building permit was issued.).

The fact that building permit cases have not addressed off-site land use probably stems from the basic fact that building permits are required for buildings; not for land uses for which there are no buildings. Here, no building permit has ever been required for agricultural use of land in the Town, and Golden Sands made it very clear it was not seeking Town approval on land use; only the building permit for seven buildings. The scope of the Town's building permit approval was therefore limited to the building permit site.

This point is illustrated by the following example. Had Golden Sands put its dairy buildings in another town and was simply looking for land in the Town on which to apply its 55 million gallons of liquid manure, there would have been no requirement for a building permit from the Town, and therefore there would be no basis to argue that a vested right arose from a building permit. The Town could choose to change its

zoning at any time, subject only to the strictures of nonconforming use exception assuming Golden Sands met its burden to show a continuing "active and actual" use.

Here, the result should not be any different just because there was a building permit required for seven buildings on 98 acres. The Building Permit Exception does not extend vested rights to property and uses for which there is no building permit requirement. In short, outside of the seven buildings and 98 acres for which a permit was issued, vested rights under the Building Permit Exception cannot and do not apply.

B. The Court Should Not Create A New Common Law Rule That Extends The Building Permit Exception To Off-Site Parcels.

1. Golden Sands' "Integration" Rule Is Inconsistent With The Bright Line Test And Creates Uncertainty.

Golden Sands would like to create a new common law rule to the effect that merely referencing thousands of acres of land outside the building site in "courtesy" documents submitted with a building permit application suffices to create vested rights in the current zoning classification of all of those lands, no matter how attenuated the connection or how distant they are from the building site. Golden Sands asserts that the test is whether such lands are "integral" to the buildings. This, of course, begs the question of what lands are integral to the building permit. Golden Sands' proposition is the kind of case-by-case analysis this Court has expressly rejected.

In *McKee*, the developer submitted a conceptual development plan and cited its "substantial expenditures in preparation for development under the [prior] zoning." *Id.*, ¶35. This Court refused to adopt a test that would require "case-by-case analysis of

expenditures" because it would undermine the goal of creating predictability; instead, it would "create uncertainty at the various stages of the development process." *Id.* ¶¶43-44. By contrast, the bright-line rule "creates predictability for land owners, purchasers, developers, municipalities and the courts." *Id.* ¶43.

Golden Sands' argument here mirrors the developer's unsuccessful argument in *McKee*. Contrary to this Court's ruling, Golden Sands' position would similarly upend the rationale for the bright-line rule, supplanting it with a fact-specific, case-by-case approach to permitting, and its attendant uncertainty and unpredictability. The facts in this case are illustrative. Golden Sands' assertion that it needs crop lands "geographically proximate," R. 59 (Wysocki Aff. ¶ 18), to make the project viable, would require a fact-intensive analysis against a subjective standard. On the one hand, Golden Sands asserts that the buildings become "useless" without the manure-spreading fields in the Town, Pet. Br. at 13. On the other hand, Golden Sands' own filings show that approximately 1,800 of its planned crop fields are located entirely outside the Town. R. 86 (Decision Tr. p. 74). Such are the types of factual disputes that are likely to arise under Golden Sands' approach and the reason why the court of appeals rejected it.

Golden Sands tries to avoid the problem of a case-by-case approach by asserting that the questions noted by the court of appeals are irrelevant. Pet. Br. 21. In other words, the local government (and, by extension, the courts) must simply take the developer's word that all self-identified associated lands are essential to a purported

project. This radical notion would allow applicants to easily game the system by accompanying a modest permit application with a grand project that it claims – no matter how weakly – is part and parcel of a unified whole.

For example, under Golden Sands' approach, had the developer in *Lake Bluff* submitted a compliant application, it could have frozen the zoning classification on innumerable parcels scattered throughout the city by simply stating that its proposed building was merely one of a constellation of numerous apartment buildings and related uses it planned to develop some day as part of an allegedly integrated project, on additional parcels of land it identified. This approach is untenable, and inconsistent with the bright-line test.

Both of the vested rights exceptions recognized under existing Wisconsin law avoid uncertainty by having a defined and limited scope. For nonconforming uses, the use is defined by what was an active and existing use prior to the zoning change. *See Kitt's*, 2009 WI App 142, ¶27. For the Building Permit Exception, the use is defined by the site-specific building permit application strictly and completely conforming to applicable requirements. *Lake Bluff*, 197 Wis. 2d at 172.

To avoid considerations of subjective intent and case-by-case determinations, the test must have some defined bounds other than the applicant's own imagination. In the proceedings below, Golden Sands called its farming practice "Farming Full Circle," which it described as follows:

> Farming Full Circle is a term coined by the Wysocki family to describe its integrated dairy and animal husbandry practices with traditional vegetable production

> agriculture.... From its initial inception, Farming Full Circle has been expanded to utilize an anaerobic digester ... to produce all the electricity the dairy needs....

R. 59 (Wysocki Aff. ¶¶16-17). As the quoted language acknowledges, "Farming Full Circle" is a self-created term that describes a general concept that evolves over time. Golden Sands could claim that land for a rendering plant to dispose of aged cows is integral to its operation and therefore part of its vested rights. There is no principled basis to know the scope of the activities and uses under a self-defined, open-ended concept, and therefore no principled basis on which to grant vested rights.

2. Golden Sands' Argument That Confining The Building Permit To The Building Site Creates Two Classes Of Developers Is Without Merit.

Golden Sands asserts that the court of appeals created two classes of developers: those who have submitted a building permit and must satisfy other non-zoning requirements before proceeding with the project, and those who do not. (Pet Br. at 34). Golden Sands erroneously asserts that it is treated differently, and unfairly, because of its need to obtain state permits. It is not.

The need for state approvals to engage in certain activities is irrelevant to whether Golden Sands has vested rights to local zoning. On the 98-acre building site, Golden Sands obtained a vested right to the seven buildings, even though operation of the proposed dairy requires future permits from DNR. No one disputes that it could have built the approved buildings and used the building site for any lawful purpose, subject, of course, to any required state approvals.

The same thing applies to the 6,000+ acres of off-site farmland. Golden Sands could have removed the lands from MFL status and converted them to agricultural use (other than a use requiring DNR approval) at any time prior to the zoning ordinance without any DNR permits but it did not do so.

Golden Sands likens its situation to that of the developer in *Pagels*, arguing that "the developer's rights were not compromised at all by the fact that, at the time it submitted its building permit application, it still needed to lay out streets." (Pet Br. at 36). But Golden Sands' failure to obtain vested rights to the off-site lands was not based upon the need for future DNR approval, but on Golden Sands' failure to establish actual and active use consistent with the prior zoning, and on the fact that the lands were not part of the building site covered by its building permit.

In sum, *Pagels* simply did not address the issue here, whether the building permit created vested rights in associated lands apart from the building site. Whether such vested rights exist here is independent of any future DNR approvals.

3. Golden Sands' Rule Would Adversely Affect The Property Rights Of Existing Property Owners.

Golden Sands' novel theory also ignores an important component of the policy rationale underlying the bright-line test, namely the strong deference owed to local zoning classifications and the need to protect the property rights of its residents. Golden Sands claims the Town has no legitimate interests since the State approval process will address all groundwater and environmental impacts. But the Town is not trying to regulate groundwater or high capacity wells; it is only attempting to regulate land use

that can affect those resources and existing residences and residential wells. The Town's zoning effort is well within its police power.

Golden Sands' one-sided view of the vested rights doctrine would not only invert land use planning by allowing "a pig in the parlor instead of the barnyard," *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-388 (1926), but would undermine the purpose of the vested rights to serve as a balancing tool. From its earliest formulations, the vested right exception balances "a municipality's need to regulate land use with a land owner's interest in developing property under an existing zoning classification." *McKee*, 2017 WI 34, ¶ 43. In *McKee*, this Court noted the "broad discretion" municipalities possess to enact zoning ordinances, and the statutory directive that such ordinances "shall be liberally construed in favor of the [municipality]." 2017 WI 34, ¶ 6.

Granting Golden Sands' vested rights to 6,000+ off-site acres based solely on its unilateral expectations would interfere with the balancing of interests between a community's right to exercise land use planning through the police power, a citizen's right to use private property and the frequent changes to land use regulations because of shifting demands. Here, those policy considerations become stronger because the zoning ordinance is designed to serve the Town's legitimate interest in protecting the health and welfare of its residents' drinking water supply and property values from the inevitable contamination arising from the land-spreading of 55 million gallons of liquid manure on thousands of acres of sandy, porous soils throughout the community.

While Golden Sands' building permit application may have created rights on the building site which vested prior to the effective date of the ordinance, that should not subvert the Town's longstanding and legitimate rights to regulate 6,000+ off-site acres of land in order to protect its residents from activities occurring off the building permit site, particularly when Golden Sands knew the Town's Comprehensive Plan neared culmination. The Town's ability to regulate thousands of acres of land throughout the Town through lawfully enacted zoning not only protects public interests, it creates certainty for land use planning and development which is good for other business as well as the Town's residents.

By contrast, Golden Sands' vested rights argument means that any of the land in which Golden Sands has "an interest" as of the date of its building permit application becomes indefinitely removed from regulation under the Town's zoning ordinance for any agricultural purpose. In essence, Golden Sands is imposing a *de facto* moratorium on the regulation of such land for the indefinite future and creates uncertainty for thousands of acres of land in the Town and the Town's residents.

No case nor area of land use law – in Wisconsin or elsewhere or in the law of nuisance, takings or vested rights – sanctions such a one-sided balance. Golden Sands has a vested right to the seven buildings on 98 acres. Golden Sands does not have a vested right to use 6,000+ off-site acres in a manner inconsistent with Town zoning and the public interest.

C. This Court Need Not Create A New Common Law Rule Extending Vested Rights Beyond The Building Permit Site Because Golden Sands' Building Permit Did Not Identify The Lands Outside Of The Building Permit Parcels.

While the Building Permit Exception should not be expanded for the legal and policy reasons noted above, it is also unnecessary to do so on the facts of this case.

As noted above, other than a reference to 6,388 acres, the only legal description provided on the building permit form (both the original and amended form) expressly described the 98-acre building site. The legal description on the amended permit could not have been clearer (*see* R-App. 116-117), but Golden Sands chose to exclude it from its appendix. Both were submitted by Golden Sands LLC, the operator of the dairy, not Ellis Industries Saratoga LLC the operator for the cropland. The Design Report containing the actual building drawings included a legal description describing the 98-acre building site – on a page from the report which Golden Sands has also chosen to omit from its submission to the Court. R-App 102-114.

The only legal description of land *outside* of the building permit area was in the various permits and maps submitted to DNR, such as the Nutrient Management Plan. Those applications were not part of the building permit, and were only provided to the Town as a courtesy. Applications submitted to the state do not create vested rights. *Willow Creek Ranch, LLC v. Town of Shelby*, 224 Wis. 2d 269, ¶ 23, 592 N.W.2d 15 (1998), (a DNR permit for a game farm did not prevent the Town from subsequently rezoning the property to preclude use of the property as a game farm.) In addition, as

noted in the following section, the Legislature expressly considered and rejected a proposal to have state permits trigger local vested rights.

Moreover, as the circuit court noted, to the extent that Golden Sands intended to rely on the state permits to define the scope of the building permit, "such permit applications do not provide sufficient specificity as to the scope of the project because the scope of the project in those applications has already been changed and no final approval has been granted." R. 86 (Decision Tr. p. 73).

Lake Bluff and *McKee* require the municipality to look at the four corners of the building permit, not ancillary documents like a general development plan as was the case in *McKee*. Indeed, Golden Sands emphasized to the circuit court that the Town was limited to precisely that issue when it stated, "[s]o, the only issue before the town was the building permit for the buildings." R. 67 (Aff. Reginato, Ex. D, 11/29/12 and 11/30/12 Mandamus Transcript p. 9-10). In looking at the four corners of the building permit in this case, the legal description is limited to 98 acres. Simply having knowledge of a proposed development, whether by a press account or a courtesy copy of a DNR application, does not convert a building permit for a specific set of buildings on a parcel into a vested right to use thousands of acres off the building permit parcel.

III. THE COURT SHOULD AVOID CREATING A CONFLICT WITH THE NEW VESTED RIGHTS LEGISLATION.

While the newly enacted provisions of Wis. Stat. § 66.10015 do not apply to this case, the decision in this case has significant implications for future cases. First, this Court need not expand the common law here to address potential future projects that

could cross into adjacent parcels because the Legislature has now addressed that situation. Second, the Court should not adopt Golden Sands' position because it would create a common law rule that is not only broader than current case law, but one that is also broader and inconsistent with the new statutory provisions. Such conflict and uncertainty can and should be avoided by this Court.

A. Golden Sands' Position Is Inconsistent With Wis. Stat. § 66.10015.

In 2013, the Wisconsin Legislature enacted 2013 Wis. Act 74, which created Wis. Stat. § 66.10015. Its intent was to codify and extend the common law of vested rights. This section provides in relevant part as follows:

> **66.10015 Limitation on development regulation authority and down zoning**
>
> **(1)** DEFINITIONS. In this section:
>
> **(a)** "Approval" means a permit or authorization for building, zoning, driveway, stormwater, or other activity related to a project. . . .
>
> **(b)** "Existing requirements" means regulations, ordinances, rules, or other properly adopted requirements of a political subdivision that are in effect at the time the application for an approval is submitted to the political subdivision. . . .
>
> **(c)** "Political subdivision" means a city, village, town, or county.
>
> **(d)** "Project" means a specific and identifiable land development that occurs on defined and adjacent parcels of land, which includes lands separated by roads, waterways, and easements.
>
> **(2)** USE OF EXISTING REQUIREMENTS.
> **(a)** Except as provided under par. (b) or s. 66.0401, if a person has submitted an application for an approval, the political subdivision shall approve, deny, or conditionally approve the application solely based on existing requirements, unless the applicant and the political subdivision agree otherwise. An application is filed under this section on the date that the political subdivision receives the application.
>
> **(b)** If a project requires more than one approval or approvals from more than one political subdivision and the applicant identifies the full scope of the project at the time of filing the application for the first approval required for the project, the existing requirements applicable in each political subdivision at the time of filing the

> application for the first approval required for the project shall be applicable to all subsequent approvals required for the project, unless the applicant and the political subdivision agree otherwise.

Subsection (2)(a) codifies the *Lake Bluff*, common law vested rights principle that a building permit application is subject to the requirements in effect at the time of the application. Subsection (1)(a) extends that principle to project-related approvals other than building permits (*cf. McKee*). Subsection (2)(b) extends vested right to approvals where the project spans more than one political subdivision.

This legislation also addresses for the first time the scenario presented by this case, namely a project that spans multiple parcels beyond the building site. It does so by defining a "project" for purposes of permitting as "a specific and identifiable land development that occurs on *defined and adjacent parcels* of land which includes lands separated by roads, waterways, and easements." Wis. Stat. § 66.10015(1)(d) (emphasis added). This provision creates a new "bright line" – the building permit parcel and adjacent parcels. It maintains a defined and limited scope for the creation of vested rights through the Building Permit Exception.

Thus, if there is a concern about a future development that needs adjacent land – like a golf course or a large economic development involving mixed retail, restaurants, residential or a gas station – then the statute clearly resolves that issue.

Golden Sands now asks the Court to delete the language the Legislature chose and instead create a common law rule expanding a vested right to *any* land referenced in the building permit outside of a building site, whether it is adjacent land or not. It

replaces the new statutory bright line for an open-ended application of vested rights to any parcel the applicant deems to be integral to the project.

The difference in this case is dramatic. The Parcel Map relied upon by Golden Sands (R-App. 117) clearly shows isolated and non-adjacent parcels to the north, east and south of the Production Area.[10] What Golden Sands wants to do, therefore, is create a common law rule that is broader than the recently enacted statute. This Court should reject that approach for two fundamental reasons: rules of statutory construction and separation of powers.

B. As A Matter Of Statutory Interpretation, The Legislature Considered And Expressly Rejected The Position Golden Sands Now Asserts.

The Legislature considered and rejected the very approach Golden Sands now advocates. In 2016, Wis. Stat. § 66.10015 was amended by 2015 Wis. Act 391. The amendments arose out of 2015 Assembly Bill 582, LRB-3974/1. *See* R-App. 118-135. Section 22 of the original draft of the bill, LRB-3974/1, would have redefined the term "project" to remove the adjacency language. This section provided:

> SECTION 22. 66.10015(1)(d) of the statutes is amended to read:
>
> 66.10015 (1) (d) "Project" means a specific and identifiable land development, improvement activity, or use that occurs on defined ~~and adjacent~~ parcels of land, ~~which includes lands separated by roads, waterways, and easements~~ within one or more political subdivisions and is specified in one or more applications for approval.

R-App. 128. That change was not approved as part of the final bill and the definition

[10] Wis. Stat. § 66.10015(1)(d). These parcels are separated by land in addition to whatever roads, waterways and easements might be present.

of project remained unchanged. The Legislature's rejection of broader language retained express limits on the Building Permit Exception thereby protecting a community's ability to regulate land uses.

At the same time, the Legislature also rejected the attempt to have a state permit application trigger local vested rights. Section 23 of 2015 Assembly Bill 582 read:

> **Section 23**. 66.10015 (2) (b) of the statutes is amended to read:
>
> 66.10015 (2) (b) If a project requires more than one approval or approvals from more than one political subdivision or from an agency, as defined in s. 227.01(1), and a political subdivision and the applicant identifies the full scope of the project at the time of filing the first application for ~~the first~~ an approval required for the project, the existing requirements applicable in each political subdivision at the time of filing the application ~~for the first approval required for the project~~ shall be applicable to all subsequent approvals required for the project, unless the applicant and the political subdivision agree otherwise.

R-App. 129. Rejecting this proposed amendment the Legislature refused to allow an application for an approval by a state agency trigger local vested rights. Thus, Golden Sands' argument that the building permit site should be defined by the state permits such as the Nutrient Management Plan should also be rejected.

It is well established that courts "'should not read into [a] statute language that the legislature did not put in.'" *State v. Matasek*, 2014 WI 27, ¶ 20, 353 Wis. 2d 601, 846 N.W.2d 811 (quoting source omitted). Courts are particularly reluctant to read language into a statute where the Legislature has explicitly rejected such language. *See Crown Castle USA, Inc. v. Orion Const. Grp., LLC*, 2012 WI 29, ¶ 37, 339 Wis. 2d 252, 811 N.W.2d 332 (explaining that the court may not read into a statute language that the Legislature expressly removed).

In 2016, the Legislature considered and explicitly rejected language Golden Sands now asks the Court to embrace. Well-established principles of statutory interpretation prevent the Court from reading such language into the statute now.

C. As A Matter Of Separation Of Powers, This Court Should Not Overturn Legislative Determinations.

Under checks and balances inherent in our structure of government, the Legislature has the power to expand or overturn common law principles. As noted above, Wis. Stat. § 66.10015 prospectively expanded the concept of vested rights in several respects, including extending the concept of vested rights to cases involving approvals beyond the building permit and to adjacent parcels.

While the Legislature can displace the common law through legislation, the reverse is not true. It is simply not the role of the Court to effectively amend the statute by creating a common law rule that removes the "adjacency" provision after the Legislature refused to do so. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 560, 126 N.W.2d 551 (1964) ("'The court cannot initiate by judicial action legislation which has been placed in the hands of the legislature.'" (quoted source omitted). *State ex rel. Martin v. Zimmerman*, 249 Wis. 101, 103, 23 N.W.2d 610 (1946)). As Justice Scalia observed, "courts have no charter to review and revise legislative and executive action. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009).

The Wisconsin Supreme Court is "highly mindful" of the separate powers afforded to the three branches of government and "'does not engage in direct

confrontation with another branch of government unless confrontation is necessary and unavoidable'." *Gabler v. Crime Victims Rights Board*, 2017 WI 67, ¶ 30, 376 Wis. 2d 147, 897 N.W.2d 384 (quoted source omitted). This Court understands that "[t]he Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, "no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another." *Barland v. Eau Claire*, 216 Wis. 2d 560, 572-573, 575 N.W.2d 691 (1998) (internal citations omitted). Separation of powers as embodied in the Wisconsin Constitution has been interpreted as "prohibit[ing] one branch of government from exercising the powers granted to the other branches." *State v. Washington*, 83 Wis. 2d 808, 816, 266 N.W.2d 597 (1978) (citations omitted). *See also Wagner Mobil, Inc. v. City of Madison*, 190 Wis. 2d 585, 594, 527 N.W.2d 301 (1995) (the judiciary may not usurp the role of the Legislature.).

The separate roles of the legislative and judicial branches "involve the legislature's setting matters of broad public policy" and the courts' "interpretation of legislative intent when required." *Pace v. Oneida County*, 212 Wis. 2d 448, 458, 569 N.W.2d 311 (Ct. App. 1997) (internal citations omitted). That is, the Legislature has the power to make law. *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 491, 137 N.W.2d (1912); Wis. Const. Art. IV, sec. 1. It is the responsibility of the judiciary, then, to interpret and apply these legislative enactments. *Scott by Ricciardi v. First State Ins. Co*, 151 Wis. 2d 286, 293, 444 N.W.2d 405 (Ct. App. 1989).

Golden Sands would like this Court to expand the common law beyond the legislatively prescribed limits of the statute. It wants this Court to create a new test that applies vested rights to the building permit parcel and any other parcel identified by the applicant as integral to the project whether adjacent or not. But rewriting the statute is not an option, for the reasons noted above.

D. This Court Should Not Create a Conflict Between The Common Law And Statutory Law.

In light of the foregoing this Court should reaffirm the bright-line test so that the Building Permit Exception applies to the building permit parcel for existing cases, and allow the broader statutory standard to be applied to new cases. This provides certainty and a prospective application of the new rule.

The Legislature affirmed such a prospective approach when it considered 2015 Assembly Bill 582. As originally drafted, Section 46 proposed to apply portions of Wis. Stat. § 66.10015 including the definition of "project" retroactively to, "any project for which an application for approval is pending on the effective date" of the bill. R-App 135. This section was also rejected. By rejecting this section, the Legislature ensured that the changes in Wis. Stat. § 66.10015 would remain prospective only. Keeping the existing common law rule would be fully consistent with legislative intent on vested rights.

If the Court believes that the common law should be expanded to cover lands beyond the building site, it should not do so beyond the "adjacency" limitations created by the new statute. To adopt Golden Sands' position that vested rights should be

extended not just to adjacent parcels but to any parcels identified by the applicant regardless of their location or purpose would create a conflict with the statute. The Court should not create a conflict between common law and statutory law and between this Court and the Legislature for the reasons noted above. Golden Sands' request that the Court rewrite the statute should be rejected.

CONCLUSION

Zoning is designed to protect the public welfare and property rights of all of its residents and needs to adapt to changing conditions. For that reason, no one has a vested right in existing zoning. The Building Permit exception should not be read in a way to swallow that general rule. Moreover, the exception should provide a bright line so everyone has certainty on the scope of the exception.

In this case, Golden Sands knew the Town was approaching its the deadline to implement zoning in accordance with its Comprehensive Plan and acted in secret to file its building permit application before the Town could complete its zoning. In so doing, it won the race on the building permit for the seven buildings on 98 acres. The issue here, however, is whether that building permit application authorizes the use of 6,000+ off-site acres outside of the building site. Allowing Golden Sands to transform pine plantations into cropland so that its farm operation can spread 55 million gallons of liquid manure a year on the Town's sensitive sandy soils, necessarily jeopardizing public welfare and the property values of the Town's residents.

This case can be resolved in several ways. It can be resolved on its facts without reaching the legal issue. The legal description in the building permit documents only described the 98-acre parcel and as Golden Sands itself noted, the "only issue before the town was the building permit for the buildings." Golden Sands' reference to the larger project as part of the state permits is not a substitute for defining the area within the four corners of the building permit.

As a matter of law, there is no case in Wisconsin extending vested rights outside of the building permit parcel, and there is no need to do so here. Golden Sands' assertion that it should be allowed to have vested rights for any self-defined concept of an integrated project would require case-by-case determinations that this Court has repeatedly and recently rejected.

Finally, after this case began, the Legislature defined the scope of vested rights by statute under a broader bright-line test. That resolves any concern about future projects. While there is no need to expand the common law in this case, if the Court wants to expand the common law, it cannot do so here in a way that removes the "adjacency" required in the statute as Golden Sands urges. To do so would not only be inconsistent with the statute and its legislative history but would violate separation of powers.

For the foregoing reasons, the Court should conclude, as did the court of appeals, that the trial court must enter summary judgment in favor of the Town dismissing Golden Sands vested rights claim.

DATED this 1st day of November, 2017.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 10,777 words.

Dated: November 1, 2017.

Remzy D. Bitar

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the text of the electronic copy of the brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: November 1, 2017.

Remzy D. Bitar

CERTIFICATION OF FILING AND SERVICE

I certify that the brief was hand delivered to the Clerk of the Supreme Court on November 1, 2017.

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CERTIFICATION REGARDING APPENDIX

I certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. $ 809.19(2)(a) and that contains, at a minimum:

(1) A table of contents;

(2) Portions of the record essential to an understanding of the issues raised.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using fist names and last initials instead of full names of persons specifically including juveniles :and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: November 1, 2017.

Remzy D. Bitar

STATE OF WISCONSIN
SUPREME COURT
Case No. 2015AP001258

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v.

TOWN OF SARATOGA, TERRY A. RICKABY, DOUGLAS PASSINEAU, PATTY HEEG, JOHN FRANK AND DAN FORBES,

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

Review of April 13, 2017 Decision of the Court of Appeals, District IV, Appeal No. 2015AP001258

Wood County Circuit Court Case No. 12-CV-0389, The Honorable Thomas Eagon Presiding

REPLY BRIEF OF PETITIONER GOLDEN SANDS DAIRY, LLC

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INTRODUCTION

Prior to any Town[1] zoning, Golden Sands filed a complete Building Permit Application in compliance with applicable law. Golden Sands' Building Permit Application described a large-scale dairy farm, not a landless barnyard. The Farm was described clearly enough to not only trigger Golden Sands' vested right to the intended use of the Farm Property, but to prompt a flurry of Town reactions that culminated in the preparation and enactment of a new zoning ordinance that outright precluded agricultural use of all of the Farm Property.

The bright-line Building Permit Rule is meant to guard against exactly this kind of local reaction – to protect investments that are made in reasonable reliance on existing zoning. The Town's brief suggests several reasons why the Court should refrain from applying that protection in this case, but those reasons are legally immaterial and some are misleading. The Town had decades to engage in zoning but it chose not to. The Town took no material action to regulate

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[1] All capitalized and defined terms herein have the meaning assigned in Golden Sands' Opening Brief.

agricultural uses within the Town until *after* Golden Sands filed its application. In stark contrast, Golden Sands was diligent. It invested millions in reliance on the predictability and certainty of existing law. To deprive Golden Sands of the protections that the law affords would run counter to the policy goals of the Building Permit Rule, would require a narrowing of that rule, and would be unjust.

ARGUMENT

I. THE TOWN RELIES ON LEGALLY IRRELEVANT AND SOMETIMES MISLEADING FACTS.

The Town relies on facts that are legally irrelevant and in some cases misleading. For example, in an attempt to generate suspicion over the wisdom of Golden Sands' multi-million dollar investment, the Town cites a 161-year-old land surveyor's report – a report that was never introduced into evidence – questioning the suitability of the area's soils for farming. (Resp.Br. at 4-5.) But neither the suitability of the soil for farming nor the wisdom of Golden Sands' investment relates to any legal principle at issue in this case.

To suggest that it acted diligently to regulate land use, the Town points to its ten-year-old comprehensive plan and weaves the fiction that it embarked on a steady effort to

implement it. (*Id.* at 5-6.) But the record does not support the Town's story. The comprehensive plan the Town adopted in 2007 is for guiding future decision-making; it had no regulatory effect, *see* Wis. Stat. § 66.1001(2m). The only zoning in place at the time Golden Sands submitted its application and for the preceding 70 years was the Wood County zoning ordinance, which classified the Farm Property as within the "*UNRESTRICTED*" zoning district. (R.59, ¶8; R.60, Ex. A-C.) The Town neither sought zoning authority nor prepared a zoning ordinance until *after* Golden Sands filed its Building Permit Application. (R.60, Ex. C at 5; Resp.Br. at 6.)

In an attempt to paint Golden Sands as a cloak-and-dagger villain, the Town complains that Golden Sands kept its business plans secret until it filed its Building Permit Application. (Resp.Br. at 7-8 ("it chose not to consult the Town at any time prior to its submittal").) But the law affords protection upon submission of a building permit application; consultation with local authorities prior to submitting an application has never been a prerequisite to vested rights in this state, nor should it be.

In an attempt to persuade this Court to protect what the Town characterizes as the property rights of its residents, the Town pleads the specter of environmental ravages of large-scale dairy farming. (*Id.* at 26-28.) But a project's potential environmental impact is not a factor courts consider when applying the bright-line Building Permit Rule. Indeed, in this case, the regulation of the day-to-day operation of the Farm, and examination of any potential environmental impacts, will proceed under wide ranging regulatory frameworks administered by the Wisconsin Department of Natural Resources ("WDNR") and the Wisconsin Department of Agriculture Trade and Consumer Protection ("DATCP"), and will include permitting processes in which the Town and its residents have been and will undoubtedly continue to be active participants with the attendant right to be heard. *See, generally*, Wis. Admin. Code chs. NR 151 and 243; Wis. Stat. ch. 283.

Hoping to persuade the Court to avoid discussion of vested rights altogether, the Town selectively points to information on the Building Permit Application relating to the specific portion of the Farm Property where the buildings will sit. (Resp.Br. at 9-10, 29-30.) In short, the Town seeks to

reinvent the circuit court's ultimate finding that the Building Permit Application adequately described the scope and scale of the Farm. Argue what it may, the Town can do nothing to displace the fact that Golden Sands' Building Permit Application, in addition to the materials submitted with it, defined the "Project Location" and "Lot area" as a parcel of land totaling 6,388 acres and included a map of the Town showing the full boundaries of the Farm Property in color. (Supp. App. at 1-5.)

The Town also attempts to mislead the Court by quoting Golden Sands' argument in the *Golden Sands I* mandamus case that the mandamus case was only about the right to a permit to construct buildings. And so it was. But that does not justify the Town's attempt to conflate the limited purpose of that special proceeding with the fundamentally different purpose of this action, which is to obtain a declaration of the extent of Golden Sands' vested rights to use its land under the bright-line Building Permit Rule. As shown below, neither the legally irrelevant and sometimes misleading facts the Town has employed, nor the legal arguments in the Town's brief, serve to displace the

applicability of the bright-line Building Permit Rule in this case.

II. NO NEW RULE OR TEST IS NECESSARY FOR THE COURT TO HOLD IN FAVOR OF GOLDEN SANDS.

The bright-line Building Permit Rule is a well-established exception to the premise that developers cannot normally rely on existing zoning. *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, ¶ 37, 374 Wis. 2d 487, 893 N.W.2d 12. The Rule imposes "a bright-line test that [is] based on the submittal of a building permit application." (Resp.Br. at 16.) Where, as here, "the developer has submitted an application for a building permit that conforms to the zoning or building code requirements in effect at the time of application," the developer is entitled to construct the buildings subject to the application *and to use* the buildings for their intended purpose. *McKee*, 374 Wis. 2d 487, ¶ 4. But development projects are comprised of buildings and land, not just buildings. And, although the Court has never been presented with a fact pattern requiring it to directly state that the bright-line Building Permit Rule protects the right to build and use buildings as well as to use the project land, concluding otherwise would essentially gut the bright-line

rule, render uneven protections to different but equally deserving economic enterprises, and would compromise the principle of protecting investments made in reasonable reliance on existing law.

A. The Court of Appeals' Holding Creates An Improper 'Buildings Versus Use' Distinction.

The Town accuses Golden Sands of setting up a "rhetorical straw man," arguing that the Town does not dispute Golden Sands' right to use a portion of the Farm Property for agricultural purposes. (Resp.Br. at 2.) The 'buildings versus use' dichotomy, however, was adopted by the Court of Appeals, when it held that no Wisconsin case "even implicitly supports the proposition that a building permit carries with it the right to all uses of land that may be identified in a building permit application that are consistent with the nature of any building identified in the application." (App. 8.) As Golden Sands explained throughout its Opening Brief, the Court of Appeals erred because the right to use the buildings *and* the associated project land is inherent in the Building Permit Rule cases and in the policies underlying that rule.

B. Adopting The Town's Arguments Would Amount To Creation Of An Unwarranted "Scale-Of-Project" Limitation Under The Bright-line Building Permit Rule.

A suggestion woven throughout the Town's arguments, and underpinning the Court of Appeals decision, is that the sheer size of Golden Sands' project demands restrained application of the bright-line Building Permit Rule. Indeed, the Court of Appeals' long list of concerns, posed as questions, demonstrates the Town's success in making this a case about the Farm's scale.

Although the bright-line Building Permit Rule has never been applied by a Wisconsin court to a large-scale project spread across thousands of acres, the protections of the bright-line Building Permit Rule have never varied according to the size of a development. When a developer submits a complete building permit application proposing a use in accord with then-applicable zoning, its right "in developing *the property*" for the stated purpose vests under the rule – period. *McKee*, 374 Wis. 2d 487, ¶ 4 (emphasis added).

Here, it is undisputed that Golden Sands submitted a compliant building permit application in accord with the Farm Property's then-applicable *UNRESTRICTED* zoning classification. (R.59, ¶¶7-9; R.60 Ex. A-C.) Even the Town concedes that by filing its Building Permit Application, Golden Sands acquired a vested right to construct and *use* the buildings and the building site for large scale agricultural purposes. (Resp.Br. at 19, 22); *McKee*, 374 Wis. 2d 487, ¶ 4; *See also Lake Bluff Housing Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 172, 540 N.W.2d 189 (1995) (examining right to *use* land for apartment complex).

By the Town's own admission, then, the Building Permit Rule will protect the right to use buildings and the right to use at least some amount of the land described in the building permit application for agricultural purposes. The Town draws its line, however, at the specific 98-acre portion of the property that it calls the "building site," arbitrarily excluding the rest of the Farm Property that Golden Sands described in the Building Permit Application as being within the scope of the proposed project. In drawing that line, the Town fails to point to any authority or recognizable policy for such a limitation. Rather, the Town persuaded the Court of

Appeals to create such a limitation for the first time in the absence of such authority, and now improperly asks this Court to affirm it.

C. The Integral Relationship Between Buildings And Farmland Serves Only To Dispel The Idea That The Project Is Divisible For Purposes Of Vested Rights.

The Town argues Golden Sands cannot prevail unless the Court creates a "new common law rule" subjectively evaluating the relationship between the Farm's buildings on the one hand and farmland on the other. (Resp.Br. at 22-25.) But it is the Town that invites the Court to affirm a new rule, not Golden Sands, by asking the Court to hold that Golden Sands' vested rights are limited to what the Town calls the "building site" and not the full project site that was disclosed on the Building Permit Application. Golden Sands emphasizes the integral nature of the project not to satisfy or suggest some new test but to demonstrate the absurdity and impropriety of the Town's and the Court of Appeals' separation of the proposed development into two components – building site vs. farmland – and, on that basis, the application of different vested rights doctrines to each component.

In fact, Golden Sands explicitly argued *against* a case-by-case analysis "based on the scope and details of a project because such fragmented analysis 'would create uncertainty at the various stages of the development process' to the detriment of all parties." (Op.Br. at 27 (quoting *McKee*, 374 Wis. 2d 487, ¶ 44).) Adoption of the Town's approach, not Golden Sands', would necessitate creation of a panoply of arbitrary limitations on the bright-line Building Permit Rule that precedent has never contemplated; rules which would turn on the size of the project, whether the project might impact the neighbors, and whether it is fully integrated with the building site. Implementation of such rules would require the very "case-by-case" evaluation the Town urges this Court to avoid and which this Court explicitly rejected in *McKee.* As a consequence, the bright line of the Building Permit Rule would be blurred, if not erased.

III. GOLDEN SANDS DOES NOT SEEK PROTECTION UNDER THE ACTIVE AND ACTUAL USE TEST.

Golden Sands is not seeking, nor has it ever sought, protection under the active and actual use test. Golden Sands' Opening Brief discusses the active and actual use test primarily to show that the active and actual test has no

application in this case because there is no basis for applying both the active and actual use test and the bright-line Building Permit Rule to the same project. (Op.Br. at 29-40.) Golden Sands then discussed how the *principles* underlying the active and actual use are, in fact, consistent with the outcome sought in this case because of the extent of investment and activity associated with the development of this project. Like the Building Permit Rule, the role of the active and actual use test is to protect a developer's investment in property by shielding it from retroactive zoning decisions.

IV. GOLDEN SANDS' CLAIM TO COMMON LAW VESTED RIGHTS IS CONSISTENT WITH THE RIGHTS AFFORDED BY THE VESTED RIGHTS STATUTE.

It is undisputed that the vested rights statute, Wis. Stat. § 66.10015, does not apply to this case. It is also undisputed that in enacting that statute, the Legislature was seeking to codify the common law of vested rights. The greatest significance of the vested rights statute for purposes of this case is that the Legislature interpreted the common law as protecting investments in *projects*, not buildings or building sites.

In its statutory articulation of common law vested rights, the Legislature neither curtailed the bright-line Building Permit Rule nor limited vested rights on the basis of the scope or scale of a proposed development. Rather, by its plain language, the statute remains faithful to the investment protection principle underlying the bright-line Building Permit Rule by extending the vesting of rights to the *project* which is the subject of an application, whatever its scale or scope, and not just the building site or the parcel on which the buildings are located. Indeed, while the cases interpreting and applying the Wisconsin bright-line Building Permit Rule do not expressly articulate this principle, the policies that this Court has identified in cases like *McKee* make anything but a project-based approach to vested rights seem absurd. (Op.Br. at 14-23.)

The Legislature included other common-sense notions in the vested rights statute, all of which derive from the policy of protecting investments made in reasonable reliance on existing law – the same policy underlying the bright-line Building Permit Rule. First, the statute allows *any* local permit application (not just building permit applications) to serve as the trigger for vested rights, and that trigger freezes

regulation across *all* local governmental subdivisions in which the project might be located (not just the subdivision in which a building permit application is filed). Wis. Stat. § 66.10015 (1)(a) and (2)(b).

In trying to demonstrate that the statute protects something less than the rights claimed by Golden Sands, the Town points out that the statute defines a protected "project" as "a specific and identifiable land development that occurs on defined and adjacent parcels of land, which includes lands separated by roads, waterways, and easements." Wis. Stat. § 66.10015(1)(d). The Town insists that adjacent parcels must be touching one another to receive protection under the statute and, as such, Golden Sands is requesting relief in conflict with the new law. (Resp. Br. at 30-35.) The Town is wrong. The color map of the proposed Farm submitted as part of Golden Sands' Building Permit Application reveals that the Farm parcels do, in fact, generally abut one another and/or are generally only separated by a waterway or road. (Supp. App. 5.) Moreover, a plain language interpretation of "*adjacent*" definitively debunks the Town's conflict of law argument. The lead definition of "adjacent" in *Black's Law Dictionary* is "[l]ying near or close to, *but not necessarily*

touching." *Id.* (10th ed. 2014). Merriam-Webster likewise defines "adjacent" as being "not distant or far off . . . *nearby but not touching*." Webster's 3rd New Int'l Dictionary (2002). There can be no doubt from the project map supplied with the Building Permit Application that the Farm would meet the statutory definition of a "project."

Finally, the Town invokes the existence of the statute as a basis for withholding the extension of the bright-line Building Permit Rule in this case, suggesting that this case is the last of its kind and that the statute will take care of all future cases. That approach not only ignores the common law, it completely subverts justice in this case. As demonstrated above, under the common law of vested rights, Golden Sands acquired a vested right to develop the Farm described in its Building Permit Application. And, the Court can conclude as much without developing any new rules, applying any statute, or creating any fact-based test. The circuit court applied the only test the rule demands and whose factual findings the Town never appealed – that Golden Sands submitted a complete building permit application describing the nature and geographic scope of the project, and at the time, the

project was in strict compliance with all applicable zoning and building ordinances.

CONCLUSION

On the basis of its submissions to this Court and the record of this case, Golden Sands requests that the Court reverse the Court of Appeals and hold that Wisconsin's bright-line Building Permit Rule protects Golden Sands' right to both construct its proposed buildings and to use its land as described in its Building Permit Application.

Dated this 15th day of November, 2017.

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CERTIFICATION OF FORM AND LENGTH

I certify that this Brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a Brief produced using a proportional serif font. The length of this Brief is 2,953 words.

Dated this 15th day of November, 2017.

/s/ Jordan J. Hemaidan
Jordan J. Hemaidan

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the Appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of the Brief and Appendix filed with the Court and served on all opposing parties.

Dated this 15th day of November, 2017

/s/ Jordan J. Hemaidan
Jordan J. Hemaidan

STATE OF WISCONSIN
SUPREME COURT
Case No. 2015AP001258

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v.

TOWN OF SARATOGA, TERRY A. RICKABY, DOUGLAS PASSINEAU, PATTY HEEG, JOHN FRANK AND DAN FORBES,

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

Review of April 13, 2017 Decision of the Court of Appeals, District IV, Appeal No. 2015AP001258

Wood County Circuit Court Case No. 12-CV-0389, The Honorable Thomas Eagon Presiding

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AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, Susan Bunge, being first duly sworn, state that on November 15, 2017, I caused three (3) true and correct copies of the Reply Brief and Appendix of Plaintiff-Respondent-

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this 15th day of November, 2017

/s/ Suzanne K. Trotter
Notary Public, State of Wisconsin
My Commission: expires 5-8-21

No. 15AP1258

In the Supreme Court of Wisconsin

GOLDEN SANDS DAIRY LLC,
PLAINTIFF-RESPONDENT-PETITIONER,

ELLIS INDUSTRIES SARATOGA, LLC,
PLAINTIFF,

v.

TOWN OF SARATOGA, TERRY A. RICKABY, DOUGLAS PASSINEAU,
PATTY HEEG, JOHN FRANK, AND DAN FORBES,
DEFENDANTS-APPELLANTS,

RURAL MUTUAL INSURANCE COMPANY,
INTERVENOR

On Appeal from the Wood County Circuit Court,
The Honorable Thomas B. Eagon, Presiding,
Case No. 12-CV-389

NON-PARTY BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF PETITIONER

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INTRODUCTION

This case provides the Court an opportunity to clarify its vested-rights jurisprudence by holding that Wisconsin's bright-line building-permit rule protects against subsequent rezoning not only the applicant's right to construct buildings, but also the right to use land integral to the project as outlined in the building-permit application. Though the Court has not had the opportunity to explicitly adopt this principle, it finds support from other jurisdictions with a bright-line building permit rule and cases involving large, integrated developments. In addition, the Legislature later codified it in Wis. Stat. § 66.10015, freezing zoning requirements for the full scope of a project—including integral land—at the time of first application. Under the Court of Appeals' rule, a town's interference with an owner's expectation to use land identified in a building-permit application and integral to the use of the buildings, as here, would effect an uncompensated regulatory taking of the land set aside for the buildings themselves, which the owner has an undisputed vested right to use for agriculture.

STATEMENT OF INTEREST

The State has an interest in the enforcement of Wisconsin's bright-line building-permit rule and in the avoidance of regulatory takings. Because the State often defends against takings claims, *see, e.g.*, *Zinn v. State*, 112 Wis. 2d 417, 436, 334 N.W.2d 67 (1983), it has an additional

institutional interest in the uniformity and predictability of land-use law. Explicit adoption of the integral-use principle also serves the State's interest in efficiency. The State invests significant time and money to issue permits for large agricultural operations, a process that takes a minimum of six months. *See* WPDES Flowchart, http://dnr.wi.gov/topic/AgBusiness/documents/CAFOWPDESApplicationProcessFlowchart.pdf (last visited Nov. 14, 2017). During this process, the State specifically requests and considers information related to local approvals, including building permits. Thus, any rule chosen here will affect state interests.

ARGUMENT

I. Under Wisconsin's Vested-Rights Doctrine, Golden Sands Obtained A Right To Use Its Land For Agriculture When It Filed Its Building-Permit Application

A. This Court's Bright-Line Building-Permit Rule Protects An Applicant's Right To Develop Property Integral To The Approved Use Of The Buildings And Identified In The Application

1. Both federal and state law safeguard vested rights in property. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–72 (1972); *Neiman v. Am. Nat. Prop. & Cas. Co.*, 2000 WI 83, ¶ 8, 236 Wis. 2d 411, 613 N.W.2d 160. The Fourteenth Amendment to the federal Constitution declares that no "State [shall] deprive any person" of "property" "without due process of law." U.S. Const. amend. XIV. The

Wisconsin Constitution guarantees "substantial[ly] equivalent" due-process rights in Article I, Section 1. *Neiman*, 236 Wis. 2d at 419. "Property interests," however, are created not by the Constitution, but by "existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577.

Vested rights are based generally on an individual's reasonable expectations. A right vests—and is thus constitutionally protected—when it is "an immediate right of present enjoyment or a present fixed right of future enjoyment," or "not dependent on uncertain future events." *Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64, ¶ 68, 370 Wis. 2d 500, 881 N.W.2d 702. It "so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, ¶ 36, 374 Wis. 2d 487, 893 N.W.2d 12.

In Wisconsin, an "exception" to the "[general] rule" that a landowner has no vested right in a particular zoning designation "arises when a property owner has applied for a building permit conforming to the original zoning classification." *McKee*, 374 Wis. 2d at 503. This rule "balances a municipality's need to regulate land use with a land owner's interest in developing property under an existing zoning classification" and "creates predictability for land owners, purchasers, developers, municipalities and the courts." *Id.* at 505.

Indeed, this Court chose the permit application as the vesting point because it recognized that the acquisition of a building permit correlates with expenditures made in reliance on current regulations. In *Lake Bluff Housing Partners v. City of South Milwaukee*, this Court analyzed the three "Building Height Cases" to identify "criteria for adjudicating zoning vested rights cases." 197 Wis. 2d 157, 171–72, 540 N.W.2d 189 (1995). In two cases, the builder had incurred expenses and obtained a permit, and this Court determined that the builder had acquired vested rights. *Id.* at 172–73. In the third, the developer had not applied for a permit, incurred no expenses, and no rights vested. *Id.*; *see Zealy v. City of Waukesha*, 201 Wis. 2d 365, 548 N.W.2d 528 (1996) (same). Comparing these cases, this Court held that the filing of the building-permit application is the moment of vesting because it is a good proxy for investments made in reliance on the zoning classification, *Lake Bluff*, 197 Wis. 2d at 172, and a full substitute for the "case-by-case analysis of expenditures," *McKee*, 374 Wis. 2d at 504–06. These cases, however, did not explicitly address how the municipality's zoning action would affect integral land beyond the buildings themselves.

Washington and Illinois, like Wisconsin, use the bright-line building-permit rule, and their courts explicitly state that—in addition to obtaining a vested right to the building permit—the developer gains a vested right to develop surrounding land under a previous zoning ordinance. *See Valley View Indus. Park v. City of Redmond*, 733 P.2d 182

(Wash. 1987); *Cos Corp. v. City of Evanston*, 190 N.E.2d 364 (Ill. 1963). The *Valley View* developer submitted five building-permit applications (out of a total 12 buildings contemplated) to build an industrial park on a 26.71-acre parcel. 733 P.2d at 188. The city took no action on the applications and subsequently downzoned the land. The Washington Supreme Court held that the developer's five building-permit applications "fixed, and firmly imprinted upon the [developer's entire property]," even land without buildings, "the zoning classification it carried at th[at] moment." *Id.* at 195–96. Similarly, the Illinois Supreme Court held that an owner was entitled to a building permit *and* the right to have fewer parking spaces around its buildings than required by subsequent zoning because the applicant's right to the previous zoning classification vested—as to all the property—at the moment of application. *See Cos Corp.*, 190 N.E.2d at 367–68.

The application of the vested-right doctrine's integral-use principle to large, integrated developments, such as mines, quarries, landfills, and farms, is especially straightforward. These are "not the usual case[s] of a business conducted within buildings, nor is the land" merely a site for the business. *Sturgis v. Winnebago Cnty. Bd. of Adjustment*, 141 Wis. 2d 149, 153, 413 N.W.2d 642 (Ct. App. 1987) (citation omitted). Where "the land itself is a [ ] resource," courts have held that "the enterprise is using all that land . . . which constitutes *an integral part* of the

operation." *Id.* (emphasis added); *see Cnty. of Du Page v. Elmhurst-Chicago Stone Co.*, 165 N.E.2d 310, 313 (Ill. 1960) (quarrying); *see also* 8A McQuillin Mun. Corp. § 25:195 (3d ed.) (citing *Ready Mix, USA, LLC v. Jefferson Cnty.*, 380 S.W.3d 52, 69, 72 (Tenn. 2012) (mining)). Hence, a landowner acquires a vested interest in the entirety of her property "where only part of a parcel has been used for a nonconforming use" by (1) "demonstrating that the use is unique and adaptable to the entire parcel" and (2) showing "an overt manifestation of [her] intent to utilize the entire property for the ascribed purpose." McQuillin, *supra*, § 25:194; *see Jones v. Town of Carroll*, 931 N.E.2d 535, 536, 537–38 (N.Y. 2010) (landfilling).

Under this rule, as implicitly recognized in Wisconsin and explicitly stated in Illinois and Washington, Golden Sands' right to use the land integral to its seven buildings under current zoning vested at the moment it filed its building-permit application, which "overt[ly] manifest[ed]" Golden Sands' "intent to utilize the entire property" for the purpose of dairy farming. McQuillin, *supra*, § 25:194. The application made clear that Golden Sands planned a "new dairy [farm]," *see* R.59.12 (cover letter); that the farm was large enough to require a Wisconsin Pollutant Discharge Elimination System (WPDES) permit, R.59.12; and that the "total" "project location" was "6,388 ac.," R.59:13. Golden Sands also attached a map showing all 6,388 acres. R.59:65. By that point, Golden Sands had expended or committed to

expend about $2.63 million on the property. *See* R.18:06. Even assuming *arguendo* that Golden Sands was then using only the 98 acres under its seven buildings for agriculture, the use—farming—was "unique" and "adaptable" to the entire parcel. Thus, the protection of the building-permit rule extends to all of Golden Sands' land.

2. The Court of Appeals' concern with identifying the bounds of the integral-use principle is misplaced. Courts have applied a similar standard for decades in the takings context. For example, courts must identify whether there is "unity of use, or integrated use" of "lands divided in some manner" sufficient to justify compensation for the decreased value of one piece due to condemnation of the other. *See* 59 A.L.R. 4th 308 § 2[a]. Moreover, under that standard, "[p]roperty utilized for a single business, commercial, or industrial purpose is often considered a single unit of land," especially when the use is "agricultural," like "farming" or "ranching." *Id.*; *Parks v. Wis. Cent. R.R. Co.*, 33 Wis. 413 (1873).

Takings doctrine also helps identify the contours of the integrated-use principle by offering a proof formula of sorts, keyed to the variable of the buildings' value: if the rezoning of the allegedly integral land would significantly (or entirely) diminish the value of the buildings themselves—in which everyone agrees the developers have a vested right—then the integral-use principle has been violated. Here, for example, if this Court accepted Saratoga's proposal to artificially divide the 98 acres with buildings from Golden Sands' other land, its

decision would result in a regulatory taking of Golden Sands' undisputed vested right to its seven buildings. *See infra* Part I.C. Because Golden Sands' land is integral to the use of the seven buildings, the buildings are essentially worthless to Golden Sands without the right to use the surrounding land for agriculture.

B. The Legislature Has Codified The Building-Permit Rule's "Integral Use" Principle

1. In 2013, the Legislature passed Wis. Stat. § 66.10015, which freezes local regulation at the time a developer files her application for a "project." Wis. Stat. §§ 66.10015(1)(a), (1)(b), (2)(a). If the "project" requires "more than one approval" or "approvals from [multiple] political subdivision[s]," all requirements for the approval(s) are frozen at the moment of first application as long as the developer "identifies the full scope of the project." *Id.* § 66.10015(2)(b). A "project" is "a specific and identifiable land development that occurs on defined and adjacent parcels of land." *Id.* § 66.10015(1)(d). "Adjacent in its ordinary usage means near to or close to, but does not imply actual physical contact." *Superior Steel Prods. Corp. v. Zbytoniewski*, 270 Wis. 245, 247, 70 N.W.2d 671 (1955) (citation omitted); *see Adjacent*, Black's Law Dictionary (10th ed. 2014) (same).

The statute, though passed after Golden Sands filed its building-permit application, is instructive because courts presume that legislatures codify common-law rules "unless they effect [a] change with clarity." Antonin Scalia & Bryan

A. Garner, *Reading Law: The Interpretation of Legal Texts* § 52, p. 318 (2012); *see State v. Gomaz*, 141 Wis. 2d 302, 320 n.11, 414 N.W.2d 626 (1987) (same). Here, no clear expression of change exists, and the language confirms that the integral-use principle is the rule in Wisconsin. Not only does the definition of "project" include buildings *and* "land development," but also the words "full scope" protect large, integrated developments. Wis. Stat. §§ 66.10015(1)(d), (2)(b).

2. Saratoga's lone counterargument is unavailing. It contends that this statute would not protect Golden Sands' farm because Golden Sands' land is not contiguous. But courts construe words in Wisconsin statutes "according to common . . . usage." Wis. Stat. § 990.01(1). As mentioned above, adjacent "in its ordinary usage" does not require that sections of land touch.

C. A Contrary Rule Would Effect An Unconstitutional Taking Of Golden Sands' Vested Right To Use Its Buildings For Agriculture

The federal and Wisconsin Constitutions forbid uncompensated takings of private property. The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. In addition, the Wisconsin Constitution provides that "[t]he property of no person shall be taken for public use without just compensation." Wis. Const. art. I, § 13.

A taking can result from a regulation of property that "goes too far." *Zealy*, 201 Wis. 2d at 373. Two kinds of regulatory takings are relevant here: *Lucas* takings and *Penn Central* takings.

Under *Lucas*, a regulation "takes" when it "deprives [a plaintiff's] property of all economically beneficial or productive use," *State ex rel. Ziervogel v. Wash. Cnty. Bd. of Adjustment*, 2004 WI 23, ¶ 30 n.5, 269 Wis. 2d 549, 676 N.W.2d 401 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)), or "all or substantially all practical uses of a property," *Brenner v. New Richmond Reg'l Airport Comm'n*, 2012 WI 98, ¶ 45, 343 Wis. 2d 320, 816 N.W.2d 291.

In contrast to *Lucas*' categorical test, *Penn Central*'s framework for partial regulatory takings calls for an "essentially ad hoc, factual [analysis]." *Noranda Expl., Inc. v. Ostrom*, 113 Wis. 2d 612, 628, 335 N.W.2d 596 (1983) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). Three factors have particular significance: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Zealy*, 201 Wis. 2d at 374 (citation omitted).

The concepts of takings and vested rights work in tandem. *See Bettendorf v. St. Croix Cnty.*, 631 F.3d 421, 430 (7th Cir. 2011) (Hamilton, J., concurring in part and dissenting in part) ("[T]he concept of vested rights has

migrated . . . to the modern jurisprudence of regulatory takings."); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). A regulation that denies a vested property right ordinarily commits a regulatory taking.

Here, applying Saratoga's zoning to Golden Sands' property would effectuate a taking of its undisputed vested right in its buildings under both the *Lucas* test and the *Penn Central* analysis. Under *Lucas*, Saratoga's rezoning deprives Golden Sands' seven buildings of all economically beneficial or productive uses. At least six of the seven buildings—two freestall barns, a special-needs barn, a dry-cow barn, a commodity shed, a separation building, and a parlor/office—are tailored for farming purposes. *See* R.59:14. The barns are not shaped like typical homes or office buildings, *see* R.59:21, 59:77 (*e.g.*, freestall barns are 98' x 1553'); the commodity shed stores hay and farm equipment, *see* R.67:262; and the separation building houses equipment to separate sand from liquid and solid waste, *see* R.67:260, R.67:344–45. If no farm exists, the farm buildings have been deprived of "all or substantially all practical uses." *See Brenner*, 343 Wis. 2d at 338; *see also Ill. Clean Energy Cmty. Found. v. Filan*, 392 F.3d 934, 936 (7th Cir. 2004) (causing value of property to "plummet, perhaps to zero," achieves "the same end" as "transfer[ring] title"); *compare R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 16, 244 Wis. 2d 497, 628 N.W.2d 781 (preventing 71 boat slips out of 272 total not a taking); *see generally Los Angeles v. Wolfe*, 491 P.2d 813 (Cal. 1971).

In fact, Saratoga rezoned the land "to be left substantially in its natural state"—a classic red flag under *Lucas*. 505 U.S. at 1018. Such rezoning carries "a heightened risk that private property is being pressed into some form of public service." *Id.* Here, the district's very name—"Rural *Preservation*"—suggests a goal to leave the land largely as-is. Indeed, Saratoga rezoned to "protect[ ]" the town's "surface [ ] resources" and "open space," and "to maintain the [town's] existing rural character." R.63:49. Permitted uses include "forestry," "harvesting of wild crops," "wildlife preserves," "hunting, fishing, and trapping," "public and private" recreation areas, "preservation of areas of scenic, historic, or scientific value," and "one dwelling per lot." R.63:49, 63:45. Obviously, Golden Sands cannot use its specialized buildings for those ends.

Even if the deprivation here were "one step short of complete," Golden Sands could claim a *Penn Central* taking. *See Lucas*, 505 U.S. at 1019 n.8. First, as discussed above, the regulation "ma[kes] it commercially impracticable [to use the seven buildings for farming]," "complete[ly] destr[oying]" the whole reason for the purchase. *See Penn Central*, 438 U.S. at 127–28; *see, e.g.*, *Maxey v. Redevelopment Auth. of Racine*, 94 Wis. 2d 375, 390, 288 N.W.2d 794 (1980).

Second, the ordinance has "interfered with distinct investment-backed expectations," indeed, the "primary expectation concerning the use of the parcel," *Penn Central*, 438 U.S. at 124, 136; which includes the sole commercial

purpose for which the property was purchased, *see*, *e.g.*, *Fla. Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 38–39 (1999). Here, it is undisputed that Golden Sands purchased, surveyed, and tested the land specifically to use it as a farm. *See, e.g.*, R.18:06.

Third, the government action here may fairly be characterized as the "acquisition[ ] of [a] resource[ ] to permit or facilitate uniquely public functions." *Penn Central*, 438 U.S. at 128. For example, this Court determined that a criminal statute prohibiting hunting on private property effectively pressed the owner's farmland into service as a "refuge" or "sanctuary" for "wildfowl," thus effectuating a taking. *State v. Herwig*, 17 Wis. 2d 442, 449–50, 117 N.W.2d 335 (1962); *see also Noranda*, 113 Wis. 2d at 614. Saratoga's "rural preservation" district rezoning accomplishes a similarly public end.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Dated this 15th day of November, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,992 words.

Dated this 15th day of November, 2017.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of November, 2017.

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SOPEN B. SHAH
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STATE OF WISCONSIN
SUPREME COURT

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

Case No. 2015AP001258

v.

TOWN OF SARATOGA, TERRY A. RICKABY, DOUGLAS PASSINEAU, PATTY HEEG, JOHN FRANK AND DAN FORBES,

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

On Review of an Unpublished Decision of the Court of Appeals, District IV, Appeal No. 2015AP001258 (April 13, 2017), Reversing a Decision of the Wood County Circuit Court, the Honorable Thomas Eagon, presiding

AMICUS BRIEF OF AGRICULTURE COALITION

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STATEMENT OF INTEREST

The Wisconsin Farm Bureau Federation, Cooperative, the Dairy Business Association, Inc., the Midwest Food Products Association, Inc., the Wisconsin Cattlemen's Association, Cooperative, the Wisconsin Corn Growers Association, Inc., the Wisconsin Pork Association, Cooperative, and the Wisconsin Potato and Vegetable Growers' Association Inc. (collectively, the "Agriculture Coalition") submit this Amicus Brief of Agriculture Coalition. The members of the Agriculture Coalition are described in the Motion for Leave to File Amicus Brief filed herewith. The Agriculture Coalition includes associations involved in each of Wisconsin's four largest agricultural commodities: dairy, grains, livestock, and vegetables and potatoes. Agriculture contributes 413,500 jobs to Wisconsin's economy and generates more than $88.3 billion in economic activity.[1]

The members of the Agriculture Coalition are interested in protecting the ability of Wisconsin farms and agri-businesses to expand and undertake new operations in a fair and predictable manner. The Court of Appeals' decision that the Building Permit Rule does not include the right to land use has a significant adverse impact on Wisconsin's agriculture industry.

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[1] https://datcp.wi.gov/Pages/Publications/WIAgStatistics.aspx (last visited 11/14/2017).

INTRODUCTION

At its core, this case is about a farmer who submitted a building permit application in conformance with current zoning and building code requirements. The farmer's permit application identified the acres the farmer intended to farm as part of the project and included a map depicting the parcels. (R. 67, Ex. A.) In response, the municipality: (1) unlawfully denied the farmer's building permit application, (2) obtained zoning authority and changed the zoning to prohibit farming for the first time in the municipality's 150+ year history, and (3) forced the farmer to engage in years of litigation to implement the farm project that conformed with zoning when filed.

Wisconsin follows the "bright-line" Building Permit Rule, pursuant to which a property owner's rights vest when the property owner "has submitted an application for a building permit that conforms to the zoning or building code requirements in effect at the time of application." *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, ¶4, 374 Wis.2d 487, 893 N.W.2d 12. There is no dispute that the Building Permit Rule grants Golden Sands Dairy, LLC ("Golden Sands") the vested right to construct the buildings identified in the building permit application it submitted to the Town of Saratoga (the "Town").

The issue before this Court is whether the vested rights under the Building Permit Rule include the right to use the project land in conformance with the zoning at the time the application was filed. The Court of Appeals held the Building Permit Rule did not prevent the Town from changing the zoning of the project to prohibit farming. *Golden Sands Dairy LLC v. Town of Saratoga*, No. 2015AP1258, ¶31 (Wis. Ct. App. Apr. 13, 2017) ("*Golden Sands II*"). The Court of Appeals held that while the Building Permit Rule granted Golden Sands the right to ***construct*** the farm buildings identified in the building permit, it carried no right to ***use*** the land identified with the project for farming. *Id.*, ¶14. By creating an artificial distinction between project construction and project land use, the Court of Appeals' decision eviscerated the Building Permit Rule.

As discussed in detail below, the Agriculture Coalition requests that this Court reverse the decision of the Court of Appeals for three reasons. First, the Court of Appeals' decision destroys the purpose and intent of the Building Permit Rule. Second, the Court of Appeals' decision has a unique adverse impact on farming. Third, the Court of Appeals' decision conflicts with Wisconsin's place as a national leader in land-use certainty.

ARGUMENT

I. The Court of Appeals' Decision Destroys the Purpose and Intent of the Building Permit Rule.

Landowners and municipalities across Wisconsin have relied for decades on the Building Permit Rule to vest rights upon the submission of a conforming building permit. *See, e.g., Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis.2d 157, 172, 540 N.W.2d 189 (1995). In the 2017 case of *McKee Family I, LLC v. City of Fitchburg*, this Court explained that "Wisconsin applies the bright-line building permit rule because it creates ***predictability*** for land owners, purchasers, developers, municipalities and the courts." 2017 WI 34, ¶43 (emphasis added). This Court further explained that the Building Permit Rule "***balances*** a municipality's need to regulate land use with a land owner's interest in developing property under an existing zoning classification." *Id.* (emphasis added).

The "predictability" and "balance" of the Building Permit Rule is destroyed by the Court of Appeals' decision in *Golden Sands II*. The decision destroys the predictability of the Building Permit Rule because the right to construct a building is meaningless without the right to use the land associated with the project. A property owner cannot make expenditures in reliance upon the Building Permit Rule if he or she risks a change in zoning

to the associated project land during construction. The Court of Appeals' decision destroys the balance of the Building Permit Rule by shifting all of the power to the municipality. The municipality is granted the legal ability to "zone out" a particular project by changing zoning long after the submission of a conforming building permit.

The Court of Appeals' decision forces any farmer or developer of a multi-parcel project to proceed with construction of the project at his or her peril. If the Building Permit Rule has no vested rights to land use, the municipality is free to change the zoning at any time, even after the farmer or developer spends millions of dollars on construction. The municipality would apparently be free to change the zoning of the project at any point during construction up to the day the project is actually placed in service. Indeed, the Court of Appeals stated it found "no authority" that Golden Sands had a right to use its property "inconsistent with zoning ***at the time the property is put to use*** in service of the dairy buildings." *Golden Sands II*, ¶13 (emphasis added). The Court of Appeals' decision that a municipality can change project zoning at any point prior to actual use creates tremendous uncertainty in new farm development and cannot stand.

This Court should restore the predictability and balance of the Building Permit Rule by confirming it includes the right to use the land identified in the application consistent with the zoning at the time of filing. Such a holding would ***not*** create the need for a case-by-case analysis as argued by the Town. (Town Brief, p. 1.) To the contrary, a bright-line rule that the Building Permit Rule carries with it the right to use the land identified in the application would eliminate litigation such as this case. It would also make each of the Court of Appeals' hypothetical questions about how much of the associated land is "necessary" irrelevant. *Golden Sands II*, ¶¶21, 22.

As this Court recently recognized in *McKee*, once a conforming building permit application is filed, the municipality's ability to regulate land use through zoning ceases. *See McKee*, 2017 WI 34, ¶¶4, 43. At such time, the property owner's rights to proceed with the project – construction and land use – must vest. If these rights do not vest, then the Building Permit Rule is hollow and meaningless, and devoid of any certainty or predictability. The Court of Appeals' incredibly narrow interpretation of the Building Permit Rule cannot stand. This Court should reverse the decision of the Court of Appeals and hold that the Building Permit Rule vests rights to construct and use the project land identified in the permit application.

II. The Court of Appeals' Decision Has a Unique Adverse Impact on Farming and Agri-Business.

The Court of Appeals has held that the Building Permit Rule only vests rights to construction, not to use land associated with the project and identified in the building permit. While this decision strikes a major blow to all property development, it causes unique adverse impacts to farming. As discussed below, the Court of Appeals' decision gives municipalities a *de facto* veto power over all new proposed farm projects due to various factors inherent in farming.

First, farming is uniquely impacted by the Court of Appeals' decision due to the size of farming operations. While it is typical to develop an entire shopping center, apartment or condominium project on a single parcel of land, this is not the case for a farm project. The average farm in the State of Wisconsin is 209 acres.[2] A 209-acre farm project will necessarily involve multiple parcels of land. Even if the farmer has a vested right to construct the buildings on one parcel, the municipality can veto the farm project by changing the zoning for the other parcels after the submission of a conforming building permit. This is exactly what happened in this case.

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[2] https://www.nass.usda.gov/Statistics_by_State/Wisconsin/Publications/Annual_Statistical_Bulletin/2016AgStats_web.pdf (last visited November 14, 2017).

Second, the Court of Appeals' decision uniquely impacts farming because farming involves both building and non-building land parcels. The Court of Appeals' decision expressly applies to land use on "non-building-site" acres. *Golden Sands II*, ¶5. A farm project is a unique development because it will always involve both building-site acres (barns, feed storage, sheds) and "non-building site" acres (cropland or pasture). The Court of Appeals even recognized the nature of farming requires both building and non-building site acres, stating: "No doubt Golden Sands needs land for growing crops and spreading manure to fully utilize the multiple large dairy buildings it has acquired the right to construct." *Id.*, ¶24. Again, the Court of Appeals' decision uniquely impacts farm projects because the feasibility of farm projects will depend on the zoning of "non-building site" acres.

Third, the Court of Appeals' decision uniquely impacts farming due to the number and timing of permits and approvals required to commence new or expanded farm operations. A farmer cannot simply start a new dairy farm in an "unrestricted" zoning area and then rely on the non-conforming use exception to zoning changes. Rather, approvals and permits are required at the county and state level. Municipalities can use the time required to obtain the necessary approvals to change the zoning of project land parcels.

As discussed above, the Court of Appeals' decision gives municipalities a *de facto* veto power over all new proposed farm projects that conform to current zoning when proposed. Due to the size and nature of farming operations, and the time required to obtain the necessary approvals and permits, the ability of farmers to develop new farms and convert new lands are at serious risk under *Golden Sands II*. The Court of Appeals' decision must be reversed.

III. The Court of Appeals' Decision Conflicts with Wisconsin's Position as a Leader in Land-Use Certainty.

Wisconsin is one of eleven states in the nation that allows development rights to vest upon the filing of a conforming building permit application. 4 Am. Law. Zoning §32:3, *Vested rights, timing* (5th ed.); *see also* 4 Rathkopf's The Law of Zoning and Planning §70:16, *Minority view: At time of permit application—Generally* (4th ed.). Under this rule, "[w]hen a court determines that the owner's rights have vested prior to the new zoning ordinance, the government is prohibited from interfering ***with the project***, and any new zoning ordinances may not be applied to the particular property." 4 Am. Law. Zoning §32:3, *Vested rights, timing* (5th ed.) (emphasis added).

The Building Permit Rule recognized under Wisconsin law is in contrast to the "majority rule" followed in other states. "The majority rule requires issuance of a building permit by the municipality, plus substantial construction and/or substantial expenditures before rights vest." 4 Am. Law. Zoning §32:3, *Vested rights, timing* (5th ed.) The majority Building Permit Rule requires case-by-case litigation of whether "construction" and/or "expenditures" were "substantial," in contradiction to Wisconsin's "bright-line" Building Permit Rule confirmed by this Court in *McKee*. 2017 WI 34, ¶¶4, 34, 43, 47.

Wisconsin's Building Permit Rule, vesting rights at the time of filing the building permit application, provides invaluable certainty to Wisconsin property owners. Rights are established very early in the development process and property owners know that their investment will be protected.

The Court of Appeals' decision that the Building Permit Rule carries no land use rights turns the certainty of Wisconsin land use law on its head. It gives all municipalities a roadmap to prohibit new or expanded farming operations by allowing the municipality to change zoning after the submission of a conforming building permit application. This destroys the certainty the Building Permit Rule is designed to create and must be reversed.

IV. Wisconsin Statute §66.10015 Has No Application to this Case.

The Town spends a fair amount of its brief discussing and analyzing Wisconsin Statute §66.10015. The Town's focus on this statute is curious for two reasons.

First, the Town's focus on Section 66.10015 is curious because all parties agree that the statute was enacted after the facts of this case and is not, by its terms, applicable to the facts of this case. As such, the potential application of the facts of this case to the new statute is purely hypothetical. Appellate courts need not address hypothetical arguments. *Est. of Merrill ex rel. Mortenson v. Jerrick*, 231 Wis.2d 546, 557, 605 N.W.2d 645 (Ct. App. 1999.) In addition, issues that are not dispositive need not be addressed. *Maryland Arms Ltd. Partn. v. Connell,* 2010 WI 64, ¶48, 326 Wis.2d 300, 786 N.W.2d 15.

Second, the Town's focus on Section 66.10015 is curious because, if the statute applied, the Town would lose this case. The statute would protect Golden Sands' "defined and adjacent parcels of land, which includes lands separated by roads, waterways, and easements." The project map shows that 80-90% of the project acres would come within the purview of the statute and be protected from the Town's after-the-fact zoning change. (P-App. 055.)

This case requires applying the law as it existed in June of 2012, prior to the enactment of Section 66.10015. Therefore, this Court's decision in this case will not conflict with the legislature's intent or purpose in passing Section 66.10015. The impact of Section 66.10015 to this case is not before this Court. However, if it were before the Court, the vast majority of the Town's after-the-fact zoning changes would clearly be prohibited by statute.

CONCLUSION

The Agriculture Coalition requests that this Court reverse the Court of Appeals and confirm that the Building Permit Rule includes the vested right to use the project land identified in the permit application consistent with zoning at the time of filing.

Respectfully submitted this 15th day of November, 2017.

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CERTIFICATIONS

Certification as to Form and Length: I hereby certify that this Amicus Brief of Agriculture Coalition conforms to the rules contained in Section 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of this brief is 2,407 words.

Certificate of Compliance with Wis. Stat. §809.19(12). I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Section 809(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of November, 2017.

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CERTIFICATE OF SERVICE

I, Rose Brice, being first duly sworn on oath, certify that on the 15th day of November, 2017, I served copies of the *Motion for Leave to File Amicus Brief of Agriculture Coalition* and *Amicus Brief of Agriculture Coalition*, including Certificates, upon the following persons, as indicated:

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Rose Brice

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this 15th day of November, 2017.

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Notary Public, State of Wisconsin
My commission expires: 5/18/18

STATE OF WISCONSIN
SUPREME COURT OF WISCONSIN

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v.

Case No. 2015AP001258

TOWN OF SARATOGA, TERRY A. RICKABY
DOUGLAS PASSINEAU, PATTY HEEG,
JOHN FRANK AND DAN FORBES,

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

Review of April 13, 2017 Decision of the Court of Appeals,
District IV, Appeal No. 2015AP001258

Wood County Circuit Court Case No. 12-CV-0389
The Honorable Thomas Eagon, Presiding

BRIEF OF *AMICUS CURIAE* WISCONSIN COUNTIES ASSOCIATION

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I. INTRODUCTION

The primary issue before this Court is straightforward: should the current bright-line "Building Permit Exception" rule be expanded to grant vested rights in lands mentioned as an "area involved" in a building permit application. The Court has already reviewed this issue in detail through its decisions in *Lake Bluff* and *McKee* by adopting and reaffirming the bright-line "Building Permit Exception" and the "Nonconforming Use Exception" relating to the law on vested land use and development rights. *See Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 540 N.W.2d 189 (1995); *McKee v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d. Wisconsin counties have enjoyed a relative amount of legal certainty in defining the scope of "vested rights" through application of the long-standing rule, first enunciated in *Lake Bluff* and recently affirmed in *McKee*, that the Building Permit Exception does not extend to lands or uses that were not a subject of, or adequately described in, a building permit application. *Id.*, ¶47; *Lake Bluff*, 197 Wis. 2d at 182. The Wisconsin

Counties Association ("WCA") respectfully submits that the wholesale expansion of *Lake Bluff* and *McKee* sought by Golden Sands Dairy, LLC ("Golden Sands") is both unnecessary and contrary to long-standing legal and policy precedent.

This Court's vested rights jurisprudence, along with recent legislative actions, demonstrate that certainty, reliability and consistency are the core principles that provide the foundation for the Building Permit Exception.[1] The Court should not dilute that well-established certainty by altering the bright-line rule.

The WCA is concerned that if the Court were to accept Golden Sands' argument, the nebulous end-point of the argument presents several significant questions, which if left unanswered, create the very climate of uncertainty that the Building Permit Exception was established to avoid. The illogical expansion of the Building Permit Exception and the Nonconforming Use Exception is likely to significantly restrict a county's

[1] Wisconsin Stat. § 66.10015 does not create a vested right in a particular zoning designation, but rather instructs that a municipality use the applicable code at the time of submission of a complete application.

ability to properly regulate the use of land and otherwise deprive the public of notice of development projects.

II. ARGUMENT

A. WISCONSIN LAW RECOGNIZES TWO EXCEPTIONS TO THE GENERAL RULE OF NO VESTED RIGHTS IN A ZONING DESIGNATION.

Wisconsin has a well-settled body of law establishing that a property owner does not have a vested right in a particular zoning designation. *See Zealy v. City of Waukesha*, 201 Wis. 2d 365, 548 N.W.2d 528 (1996). However, Wisconsin common law recognizes the need for balance between a municipality's need to regulate land use with a land owner's interest in developing property. *McKee*, 374 Wis. 2d 487, ¶43. In order to provide predictability for land owners, purchasers, developers, municipalities and the courts, Wisconsin law now recognizes two exceptions to the rule that a party does not have a vested right in a particular zoning designation: the "Building Permit Exception" and the "Nonconforming Use Exception."

1. Building Permit Exception.

This Court has long recognized the need for an identifiable point in the development process at which a development or use right would vest. In Wisconsin, a development or use right vests when an applicant submits a compliant building permit application. *Lake Bluff*, 197 Wis. 2d at 175. Unlike Wisconsin, many other states proceed under a factual analysis of factors such as substantial reliance and costs expended. *See* 4 Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* §§ 70:20 – 70:23 (4th ed. *updated* 2017). This Court has specifically rejected the majority approach because it invites a mishmash, fact-intensive analysis. As this Court recently affirmed, Wisconsin favors a distinct bright-line rule to provide certainty and predictability. *See McKee*, 374 Wis. 2d 487, ¶47.

This Court first recognized the "Building Permit Exception" in *Lake Bluff,* 197 Wis. 2d at 175. In *Lake Bluff*, the Court analyzed the history of vested rights cases in Wisconsin, starting with the "*Building Height Cases*" in 1923. *Id.* at 171-172. The *Building Height*

Cases established that a building permit is the central factor in determining whether a right to develop pursuant to a particular zoning designation has vested. *Id.* at 172. A 'complete and compliant' building permit application is one that conforms to the applicable zoning or building code in order to show a clear right. *Id.* at 175. Implicit in this rule is that the applicant must have a "clear right" that so "completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." *McKee,* 374 Wis. 2d 487, ¶36, (citing *Stoker v. Milwaukee Cty.*, 2014 WI 130, ¶12, 359 Wis. 2d 347, 857 N.W.2d 102).

To properly analyze the vested rights issue in this case, the property must be identified in two distinct parts: (1) land that was legally described in Golden Sands' Building Permit Application (the "BPA") and; (2) land that was generally referenced in the BPA as part of the "area involved." (R-App 115). The BPA references the "area involved" as "100 acres of site and 6,388 acres total." (*Id.*) However, only the 100 acres of the actual building site were legally described in the BPA (the

"Building Property"). The remaining 6000+ acres (the "Remaining Property") were referenced only in the "area involved" section and in an attached map. (*Id.*) Golden Sands, upon submission of the complete BPA to the Town of Saratoga ("Town"), acquired a vested right in the zoning for the Building Property because it was appropriately described in the BPA. The Remaining Property, however, was not fully described or otherwise sufficiently identified in the BPA. Therefore, the Remaining Property was not actually a part of the BPA, and Golden Sands could not obtain a vested right to develop the Remaining Property pursuant to the previous zoning designation.

United States Supreme Court precedent also counsels against finding that a vested right in the Remaining Property exists. In *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1027 (1992), the Court recognized that an owner should expect that "the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Id.*; *see also*

Biggs v. Town of Sandwich, 470 A.2d 928 (N.H. 1984) (holding that a developer does not acquire vested rights when taking a "calculated risk" and knows that a forthcoming ordinance would restrict development); *Town of Cross Plains v. Kitt's Field of Dream Korner, Inc.*, 2009 WI App 142, ¶¶43-44, 321 Wis. 2d 671, 775 N.W.2d 283 (noting that am applicant's knowledge of a forthcoming zoning change may create bad faith and therefore deny a use protection otherwise afforded). In this matter, there is evidence suggesting that Golden Sands knew or should have known of the forthcoming zoning changes to the Remaining Property and Golden Sands did not identify with any modicum of precision the particular property to which the vested rights would apply. In other words, Golden Sands failed the bright-line Building Permit Exception test and is now asking the Court to create new law to judicially sanction its failure.

2. "Actual and Active" Nonconforming Use Exception.

The second exception to the general rule of no vesting arises if a non-conforming use is "actual and

active" at the time of zoning changes ("Nonconforming Use Exception"). The Nonconforming Use Exception does not grant a vested right in a zoning designation, but rather grants a vested right to the property's use. *See Town of Cross Plains,* 321 Wis. 2d 671 ¶31. A property owner may therefore have a vested right in the continued use of property regardless of its nonconforming status because the owner is actually and consistently using the land. *See id* at ¶27.

Golden Sands and the Town agree that there was no "actual and active" agricultural use of the Remaining Property prior to the Town's implementation of the Town Zoning Ordinance, which prohibited that agricultural use of the Remaining Property. Because there was no previous active and actual agricultural use of the Remaining Property at the time of the zoning change, Golden Sands did not acquire a vested right in an agricultural use under the second exception. *Id.*

Yet, Golden Sands argues that this Court "could reconcile" the Building Permit Exception with the active and actual use doctrine set forth in the Nonconforming

Use Exception. In doing so, Golden Sands urges the Court to consider the "significant investments in future uses made in reasonable reliance on existing zoning law" to meet the requirements of the "active and actual use" exception. However, there is no inconsistency in the law to be reconciled: *McKee* just answered this question when it explicitly rejected a rule permitting a case-by-case analysis of expenditures made after a point of municipal approval. *See McKee*, 374 Wis. 2d 487, ¶44. Indeed, Wisconsin law does not recognize isolated "investment-backed expectations" in a vested rights analysis because the party claiming those vested rights has not yet established an underlying, protectable right. *See Rainbow Springs Golf. Co. v. Town of Mukwonago*, 2005 WI App 163, ¶12, 284 Wis. 2d 519, 702 N.W.2d 40; *R.W. Docks & Slips v. State,* 2001 WI 73, ¶¶17-18, 244 Wis. 2d 497, 628 N.W.2d 781; *see also Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 127 (1978).[2] When analyzed within the context of "active and actual use," a

[2] "Investment-backed expectations" analysis generally appears in takings analyses, not within vested rights analyses.

party not having a vested right based on expenditures or expectations makes perfect sense because it is that actual nonconforming *use* that creates the vested right, not the expenditures or reliance on a zoning designation in *anticipation* of use.

Because there is no actual discrepancy or disparity in existing law that intermingles the Building Permit Exception and the Nonconforming Use Exception, this Court should refrain from creating a new theory of law and should adhere to is current precedent as a fundamental legal principle of *stare decisis*. *See State v. Outagamie County Bd. of Adjustment*, 2007 WI 78, ¶66, 244 Wis. 2d 613, 628 N.W.2d 376.

B. THE BUILDING PERMIT EXCEPTION DOES NOT EXTEND TO LANDS OUTSIDE THOSE PROPERLY DESCRIBED IN THE BUILDING PERMIT APPLICATION.

Contrary to Golden Sands' assertion, the Building Permit Exception is not "implicit" to vest an applicant with the right to use any land referenced in a building permit application. Such an interpretation would

broaden the scope of the Building Permit Exception far beyond this Court's recent decision in *McKee*.

There is no question that Golden Sands has a vested right in the zoning and use of the Building Property because the BPA properly identified the Building Property. The Remaining Property, however, was not fully described or otherwise sufficiently identified in the BPA. By failing to sufficiently identify and describe all the Remaining Property in the BPA, the Remaining Property was not actually a part of the BPA and Golden Sands did not obtain a vested right in the zoning of the Remaining Property.[3] *McKee*, 374 Wis. 2d 487, ¶42, *citing Lake Bluff*, 197 Wis.2d at 175.

Golden Sands does not cite any cases holding that a vested right in a building permit extends to lands either referenced in a building permit or otherwise argued to be "integral" to the use of buildings approved via the permit.

[3] In addition, Golden Sands' claim to vested rights in the Remaining Property is flawed by the fact that it may not have owned all of the parcels comprising the Remaining Property. A developer can gain vested rights only if it has legal or equitable title in the property. 4 Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* §§ 70:20 – 70:10 (4th ed. *updated* 2017); *see also R.W. Docks & Slips v. State,* 244 Wis. 2d 497, ¶¶17-18.

The lack of supporting precedent is likely because Golden Sands' theory runs contrary to Wisconsin's vested rights jurisprudence in adhering to the bright-line Building Permit exception. In fact, many cases from other jurisdictions follow Wisconsin's rule that the threshold to obtain vested rights is much higher than simply referring to an "area involved" in an application. *See Rainbow Springs*, 284 Wis. 2d 519, ¶12 (stating that a conditional use permit holder does not have a vested right in continued operations despite financial expenditures and reliance on the permit); *Vill. of Hobart v. Brown County*, 2004 WI App 66, 271 Wis. 2d 268, 678 N.W.2d 402 (holding that vested rights may only be obtained by strict compliance with the code requirements, regardless of expenditures made); *Valley View Indus. Park v. City of Redmond*, 733 P.2d 182, 193 (Wash. 1987) (refusing to extend vested rights to an approved site plan); *Application of Campsites Unlimited, Inc.,* 215 S.E.2d 73, 78 (N.C. 1975) (holding that the type and extent of public improvements already paid for by a developer does not create a vested right); *City of Chicago v. Zellers*, 212

N.E.2d 737 (Ill. App. 1965) (holding that a permit which was deceptive on its face was not sufficient to establish vested rights). Nor do the cases cited by the State of Wisconsin in its Amicus Brief establish that a developer obtains a vested right to develop surrounding lands.[4]

Another reason why no case holds that an owner has a vested right in lands merely mentioned in a building permit is because such a concept runs contrary to the very purpose of a building permit: to ensure that a proposed building comports with the then-existing zoning and building code regulations. *Lake Bluff*, 197 Wis. 2d 170-182. A building permit does not address conditions or restrictions on land use for other properties because those issues are left to the general land use approval process. *Id.* If the land subject to the building permit is not legally described, how can a governing body properly

[4] *Valley View* addressed the rejection of "substantial reliance" on a building permit in order to trigger equitable estoppel, and did not hold that a property owner's vested rights extend to any surrounding land. *See Valley View,* 733 P.2d at 193. *Cos. Corp.* is distinguishable because the land at issue was one parcel, fully described in the application. *See Cos. Corp. v. City of Evanston,* 190 N.E.2d 364, 366 (Ill. 1963). In addition, the issue in *Cos. Corp.* was not whether a vested right had occurred, but whether a building permit should even be issued. *See id.* at 368.

approve the application for any use, including any "integral" use?

As the Court of Appeals noted, Golden Sands' argument invites questions that have no logical stopping point. *Golden Sands Dairy, LLC v. Town of Saratoga,* 2017 WI App 34, ¶¶21-25, 375 Wis. 2d 797, 899 N.W.2d 737. Contrary to Golden Sands assertion, these are not just hypothetical questions but rather very real issues that could undermine the required land use approval process because a developer would not be required to provide details of the development's impact. This would likely upset the balanced process of ensuring constancy in land planning while also considering future development. *See Golden Sands,* 375 Wis. 2d 797, ¶21.

Golden Sands attempts to dismiss the importance of this myriad of questions by stating that a vested right applies to uses, land and other buildings that are "integral" to that which is approved in a building permit. However, Golden Sands' proposed analysis of whether an area is "integral" to the buildings creates the exact situation that *McKee* sought to avoid: a piecemeal, case-

by-case analysis. Determining whether a building or area of land is "integral" would be a tremendously fact-intensive analysis for any governing body in the approval process. This analysis would also create uncertainty and undermine the goal of creating predictability for applicants, land owners, and the public during various stages of the development process.

The fact-intensive analysis that Golden Sands promotes is best left to the general land use approval process. As noted by the Court of Appeals, the building permit review process is not the proper forum for deciding complex land use and legal issues. *Golden Sands*, 375 Wis. 2d 797, ¶23; *see also Lake Bluff*, 197 Wis. 2d 170-182. Complex land use issues such as conceptual uses of land, zoning, conditional uses, and implementation of other land use tools should be determined within the framework of a general land use process in which a governmental body may properly review and analyze proposals. Further, the public should also be afforded an opportunity to be heard on potential uses of land in its community. The lack of specificity in a

building permit application denies the public a right to hear whether that application will impact his or her land. *See Weber v. Town of Saukville*, 209 Wis. 2d 214, 234, 526 N.W.2d 412 (1997). The general land use process consisting of a developer's application, analysis by the governing body and public input represents the balance of interests noted by this Court in *McKee*. *See McKee*, 374 Wis. 2d 487, ¶¶44-45.

If this Court were to adopt Golden Sands' argument, municipalities will likely begin requiring significantly more information in the building permit process, which would usually be provided in the general land use process. Indeed, if a municipality were to be bound by any information, even a reference to lands that may (or may not) be used in association with an approved building permit, municipalities would be required to complete far more plan review and analysis during the building permit application process so as not to be robbed of their ability to exercise proper land use planning.

III. CONCLUSION

Based upon the foregoing, the WCA respectfully requests that this Court affirm the Wisconsin Court of Appeals' decision in this case.

Respectfully submitted this 29th day of November, 2017.

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FORM AND LENGTH CERTIFICATE

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced using a proportional serif font.

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Dated: November 29, 2017.

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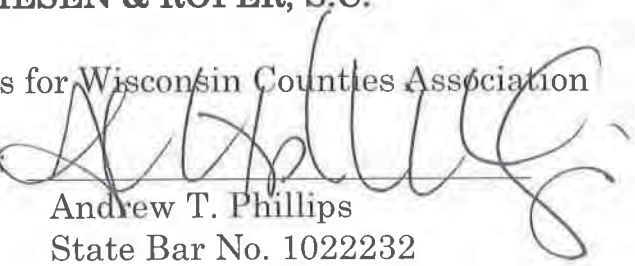
By: 

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of this brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

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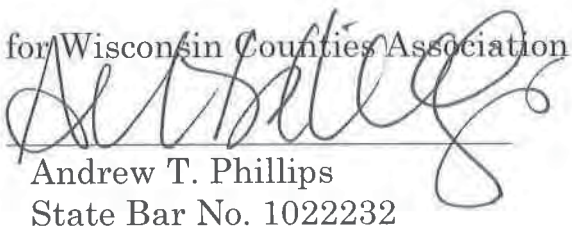
By: 

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I, Tracey Strelka, being first duly sworn on oath, certify that on November 29th, 2017, I caused true and correct copies of the Amicus Brief of Wisconsin Counties Association to be served, c upon the following, as indicated:

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Tracey Strelka

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Subscribed and sworn to before me
this 29th day of November, 2017.

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Notary Public, State of Wisconsin
My Commission expires April 5, 2019.

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GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

DISTRICT IV
Appeal No. 2015AP1258

v.

TOWN OF SARATOGA, TERRY A. RICKABY, DOUGLAS PASSINEAU, PATTY HEEG, JOHN FRANK AND DAN FORBES,

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

JOINT *AMICUS CURIAE* BRIEF OF THE WISCONSIN REALTORS® ASSOCIATION, WISCONSIN BUILDERS ASSOCIATION, WISCONSIN MANUFACTURERS AND COMMERCE, AND NAIOP-WI

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In the context of real estate development, the vested rights doctrine attempts to provide the property owner with predictability and certainty as to when new regulations can be applied to a proposed development. 9 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, § 52D.01 (1997). The theory behind the vested rights doctrine is that "[the property owner] is proceeding on the basis of a reasonable expectation." *See Lake Bluff Housing Partners v. City of S. Milwaukee*, 197 Wis.2d 157, 175, 540 N.W.2d 189, 196 (1995). Regulations or actions which take away or impair "'rights that have vested under existing laws [are] generally unjust and may be oppressive" and thus "have always been looked on with disfavor.'" *Building Height Cases*, 181 Wis. 519, 531,195 N.W. 544 (1923) (citations omitted).

Wisconsin's vested rights doctrine, however, provides very little certainty or predictability in the development-approval process, according to the court of appeals in this case. Based upon the court's decision, local governments have the authority to change the zoning and other land-use regulations and apply those changes to a building permit after the building

permit application has been submitted to the local government ("the building permit rule").

If allowed to stand, the court of appeals' decision would conflict with (a) the building permit rule established by this Court in *McKee Family I, LLC v. City of Fitchburg*, (b) the statutory vested rights law established by the Wisconsin Legislature, and (c) the due process protections afforded under state and federal law. Moreover, the court of appeals' decision, if allowed to stand, would likely create tremendous uncertainty and hardship for businesses and property owners throughout Wisconsin who must obtain permits from local governments to use or develop their property.

LAW AND ARGUMENT

I. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH CONTROLLING LEGAL PRECEDENT AND STATE STATUTES.

The fundamental question presented in this case is whether the court of appeals erred in interpreting the scope of Wisconsin's vested rights doctrine. Specifically, whether Wisconsin's vested rights law protects only a property owner's right to construct buildings, or whether it also protects the right to use the buildings and related land for uses identified in the

building permit application and authorized by the zoning ordinance when the application was submitted.

A. Applying The Vested Rights Doctrine Only To The Right To Construct Buildings Conflicts With The Building Permit Rule Established In *McKee Family I, LLC v. City of Fitchburg*.

In *Golden Sands Dairy LLC v. Town of Saratoga*, No. 2015AP1258 (Wis. Ct. App. Apr. 13, 2017) (*Golden Sands II*), the court of appeals held that Wisconsin's vested rights law entitles a property owner to construct buildings, but not necessarily to use the buildings or related land for a use permitted by the zoning ordinance when the application was submitted. *See id*. at ¶ 31. In reaching this conclusion, the court analyzed several Wisconsin vested rights cases and determined that vested rights are established under the building permit rule only for "purposes of building or altering a structure." *Id*. at ¶ 15; *see also id.* at ¶¶ 17-20 (analyzing *Lake Bluff Housing Partners*, 197 Wis. 2d 157 and *State ex. rel Schroedel v. Pagels*, 257 Wis. 376, 43 N.W. 2d 349 (1950)). The court further suggests that a vested right to construct a building does not necessarily constitute a right to use the building in a manner that was permitted by the zoning ordinance when the building permit application was submitted. *Golden Sands II*, at ¶17, fn. 3. "Even if we assume . . . that a vested right to a

building permit carries with it the right to use the building in a manner consistent with the nature of the building . . .." *Id.* at ¶ 20.

Moreover, with respect to use of the land identified in the building permit as part of the development proposal, the court determined that property owners do not have vested rights in the use of the land directly related to the buildings that were the subject of the building permit. Although the proposed dairy operation consisted of approximately 6,488 acres, the court separated the property into two developments, with distinct vested rights associated with each development. *See id.* at ¶ 5 (noting the parties in the case are disputing only the intended use of the 6388-acre parcel, not the 100-acre parcel). In doing so, the court stated, "[i]t is readily apparent that the use of any land associated with a building as referenced in a building permit application poses additional and different issues than the use of a building site for purposes of constructing a building." *Id.* at ¶ 21. For the 6,388 acres of the property where the buildings were not to be constructed, the court concluded that no vested rights to use the property existed. *Id.* at ¶ 31. In fact, the court determined that the vested rights doctrine does not apply to uses of property. *See Golden Sands II*, at ¶ 14. Rather, a property owner only has a "vested 'interest'" in the use of land,

not a "vested 'right,'" and such "interest" is limited to uses that existed prior to the enactment of a zoning ordinance under a nonconforming use theory. *See id.* at ¶ 14.

The court of appeals' holding in this case is in direct conflict with this Court's recent pronouncement in *McKee Family I, LLC v. City of Fitchburg,* 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12 ("*McKee*"). In *McKee,* this Court established that upon filing a complete building permit application a property owner acquires a vested right to use property according to zoning regulations in place at the time the building permit application was filed. *See id.* at ¶ 43. While a property owner generally cannot acquire vested rights in the zoning of a property, this Court recognized an exception "when a property owner has applied for a building permit conforming to the original zoning classification." *Id.* at ¶ 37 (citation omitted). "Wisconsin follows the bright-line building permit rule that a property owner's rights do not vest until the developer has submitted an application for a building permit that conforms to the zoning or building code requirements in effect at the time of application." *Id.* at ¶ 4 (citation omitted). As this Court observed, "the bright-line building permit rule . . . creates predictability . . . [and] balances a municipality's need to regulate

land use with a land owner's interest in developing property under an existing zoning classification." *Id.* at ¶ 43. Thus, this Court in *McKee* made it clear that the building permit rule applies broadly to buildings, land uses and the right to develop property.

Accordingly, the court of appeals' narrow application of the vested rights doctrine directly conflicts with the building permit rule established in *McKee* and thus should be overturned.

B. Applying the Vested Rights Doctrine Only To The Right To Construct Buildings Conflicts With The Statutory Vested Right Law In Wis. Stat. § 66.10015(2).

Recognizing vested rights to be a policy matter of statewide significance, the Wisconsin Legislature enacted a broad vested rights law that protects the rights of property owners to use their property in accordance with the laws and regulations in effect at the time any development-related permit is submitted to a local government. *See* 2013 Wis. Act 74. Under Wis. Stat. § 66.10015(2), local governments are prohibited from applying new changes or conditions to permit-approval processes after a property owner has submitted an application for a development-related permit. The protection applies broadly to all development regulations, including zoning, and all forms of permits and

authorizations related to land development activities. *See* Wis. Stat. §§ 66.10015(1)(a) and (b).

The breadth of the statutory vested rights law is reflected in the plain language of the statute. Specifically, the statute provides "if a person has submitted an application for an approval, the political subdivision shall approve, deny, or conditionally approve the application solely based upon the existing requirements." *Id.* (emphasis added). "Approval" is defined as "a permit or authorization for a building, zoning, driveway, stormwater, or other activity related to a project ." Wis. Stat. § 66.10015(1)(a) (emphasis added). Hence, by including the catch-all phrase "or other activity related to the project," the Legislature intended for the vested rights law to apply to all approvals related to development including, but not limited to, building permits. Moreover, "existing requirements" is defined as "regulations, ordinances, rules, or other properly adopted requirements of a political subdivision that are in effect at the time the application for an approval is submitted to the political subdivision . . . ." Wis. Stat. § 66.10015(1)(a) (emphasis added) Again, the Legislature's inclusion of the catch-all phrase "or other properly adopted requirements" demonstrates that

all local regulations, including zoning ordinances, are to be frozen and cannot be changed for purposes of evaluating the permit application.

The vested rights statute, however, does not create a vested right in zoning, nor is that the issue in this case. Nothing in this statute limits the ability of local governments to enact or amend its zoning regulations. The statute merely provides that any changes to the zoning regulations cannot be applied in the decision-making process related to permit applications submitted prior to the time the zoning changes go into effect.

By enacting this law, the Wisconsin Legislature has demonstrated the importance of having a fair and predictable approval process for all development-related permits that allows property owners to rely on the requirements and standards in place at the time a development proposal is submitted to a municipality for approval. While local governments are required to review and approve development to ensure regulatory compliance and the protection of public health, safety and welfare, they must do so in a fair and equitable manner that recognizes the rights of property owners. Attempts by local governments to thwart development projects by changing regulations after receiving a building permit

application are in direct conflict with Wisconsin's statutory vested rights law.

Because it is in direct conflict with Wisconsin's statutory vested rights law, the court of appeals' decision should be overturned.

C. Applying the Vested Rights Doctrine Only To The Right To Construct Buildings Will Have a Negative Impact On Large-Scale Economic Development Projects.

Large-scale, multi-phase economic development projects are common and often necessary in municipalities throughout Wisconsin. Economic development projects regularly require numerous parcels of real estate with large amounts of contiguous acreage to maximize economic development opportunities. For example, a single commercial parcel of land less than a half-acre in size generally has limited potential uses such as office or retail, given the floor area and parking requirements found in most building codes. A larger economic development with additional uses, such as a gas station or restaurant, generally requires several parcels of land. A more comprehensive and diverse economic development project that includes hotels, mixed-use residential or a regional shopping center may require even more acreage.

In addition, multiple parcels are often acquired for a project to avoid geographic or environmental constraints on property. For example, if a large wetland or steep sloping terrain is present on a parcel, an adjacent parcel that is relatively flat and dry may be acquired to create more developable land. Given the likely existence of state or local regulations prohibiting the development on or near steep slopes or wetlands, acquiring the adjacent parcel will often allow some of the development activity to be transferred from the parcel with wetland or steep slopes to the parcel with drier and flatter areas.

Once these parcels are assembled and placed under contract, the construction activity is often phased-in over a period of years due to market conditions and the complexities associated with large-scale development projects. Although approvals for the future development are often sought and obtained for multiple parcels at one time, it may take years to obtain all the necessary building permits for the construction activity on the individual parcels.

If a local government can change the allowable use of property at any time in the development process, even after a building permit application has been submitted, developers of large-scale economic

development projects will not have the necessary certainty regarding the allowable land uses to move forward with their projects. Before a building permit application is submitted, certainty regarding the allowable use of the property is necessary to obtain financing from lenders and to warrant the significant expenditures required in the early stages of development for due diligence activities such as financial feasibility analyses, engineering studies and environmental testing. Thus, if the scope of the vested rights law is limited to only the construction of buildings, large-scale economic development projects may be less likely to occur in Wisconsin.

II. THE ABILITY OF LOCAL GOVERNMENTS TO CHANGE THE RULES NECESSARY TO OBTAIN A PERMIT AFTER A PROPERTY OWNER SUBMITS A PERMIT APPLICATION RAISES DUE PROCESS CONCERNS.

The court of appeals' affirmation of the Town of Saratoga's efforts to change "the rules of the game" after Golden Sands submitted a building permit application raises due process concerns. Specifically, if a local government can change the requirements necessary to use or develop property after a business or property owner has submitted a building permit application, affected businesses and property owners can be subject to arbitrary and capricious changes to regulations at any point in the

permitting process. In turn, this will create tremendous uncertainty as to whether any specific use or development is permitted within a local community.

The Due Process Clause of the Fourteenth Amendment prohibits government from depriving "any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1; Wis. Const. Art. I, § 8. The U.S. Supreme Court has interpreted the Due Process Clause to protect both procedural and substantive rights." *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). With respect to substantive rights, the Due Process Clause protects individuals from "certain arbitrary, wrongful actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon*, 494 U.S. at 125 (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

While property owners do not have a *per se* right to a particular zoning regulation remaining unchanged forever, they are entitled to due process which forbids local governments from arbitrarily or capriciously restricting owners' rights to use their property for a lawful purpose. *See Thorp. v.*

Town of Lebanon, 235 Wis.2d 610, 638-40, 612 N.W.2d 59 (2000)(citations omitted); *see Zealy v. City of Waukesha*, 201 Wis.2d 365, 381-82, 548 N.W.2d 528 (1996). The "[v]ested rights doctrine has a constitutional base. It confers constitutional protection on property rights a [property owner] has acquired in the use of his [property]." Daniel R. Mandelker, Land Use Law, §6.13 at 224 (5th ed. 2003). Even if a use is no longer allowed by a rezoning, property owners have a vested right in continuing the current use of their property. *See Heaney v. City of Oshkosh*, 47 Wis.2d 303, 309, 177 N.W.2d 74 (1970); *see also*, *Buhler v. Racine County*, 33 Wis. 2d 137, 148, 146 N.W.2d 403 (1966). "The vested rights doctrine in the land use context protects the rights of landowners to continue the use of their property, . . . , notwithstanding changes in zoning statutes or ordinances." 12 Richard R. Powell, Powell on Real Property, ¶ 79C.13[4][a], at 79C-288 (2016). This doctrine recognizes that at some point in the development-approval process a property owner must have assurance that the proposed development can move forward without fear of retroactive application of new land use regulations. *See* Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land*

Development Process, 29 HASTINGS L.J. 625, 647 (1978). As described by one court, the vested rights doctrine embodies the basic philosophy that:

> One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the forms of words or deeds . . . ."

Town of Largo v. Imperial Homes Corporation, 309 So.2d 571, 573 (Fla. 2d DCA 1975).

In this case, Golden Sands submitted an application for the only permit – a building permit – required by the Town of Saratoga for the approval of Golden Sands' dairy farm. Pet. Br. at 2. The building permit application was complete, complied with all of the necessary requirements, and identified the full scope of the project, including 6,388 acres to be used as integral part of the dairy farm. *See id.* at 9, 11. The Town refused to issue the building permit and six weeks later adopted a moratorium on all approvals of building permits and related activities inconsistent with the existing land use. *See id.* at 10-11. At the time Golden Sands submitted the building permit application, the proposed dairy farm was a permitted use of Golden Sands' property. *Id.* at 10.

Allowing local governments to apply regulations retroactively to existing development permit applications runs counter to the principles of fundamental fairness and Wisconsin's long history of court cases that protect the due process rights of property owners from arbitrary and capricious ordinances.

CONCLUSION

For the reasons stated above, we believe this Court should overturn the court of appeals' ruling and affirmatively declare that the vested rights doctrine prevents local governments from applying changes to local zoning and other land-use regulations to a building permit application after the application has been submitted to the local government.

Dated this 29th day of November, 2017.

Respectfully submitted,

By:_____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2973 words.

_____
Thomas D. Larson

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 29th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that:

I have caused three true and correct copies of this Joint *Amicus Curiae* Brief to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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STATE OF WISCONSIN SUPREME COURT

GOLDEN SANDS DAIRY, LLC,
Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,
Plaintiff, Case No. 2015AP001258

v.

TOWN OF SARATOGA, TERRY A. RICKABY,
DOUGLAS PASSINEAU, PATTY HEEG,
JOHN FRANK and DAN FORBES,
Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,
Intervenor.

LEAGUE OF WISCONSIN MUNICIPALITIES AMICUS BRIEF

Review of April 13, 2017 Decision of the Court of Appeals
District IV, Appeal No. 2015AP001258

Wood County Circuit Court Case No. 12-CV-0389,
The Honorable Thomas Eagon Presiding

LEAGUE OF WISCONSIN MUNICIPALITIES
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INTRODUCTION

This case is about a vested rights claim for proposed uses of 6388 acres or about 1/5th of the total land mass in the Town of Saratoga ("Town"). The claim, asserted by Goldens Sands Dairy, LLC and Ellis Saratoga Industries, LLC ("Goldens Sands"), rests on a single non-specific and inconsistent reference in a building permit application and an equally non-specific designation in a map included with the building permit application. Neither the building permit nor the map specifically identify the proposed use(s) of the 6388 acres.

This case turns on the content of Golden Sands' permit application and the questions for the Court are three-fold and straightforward. First, did Golden Sands file its building permit application in good faith reliance on the then-existing Wood County zoning ordinance classification? Second, did Golden Sands' permit application provide sufficient information to show that its proposed land use(s) strictly conformed to applicable zoning and building code requirements? And, third, did Golden Sands' permit application provide meaningful notice to the public and the Town of its vested

rights claim for agricultural use of 6388 non-agricultural acres? The facts show that the Golden Sands application was not filed in good faith reliance under Wisconsin law; did not provide sufficient information to show strict conformity with applicable zoning and building code requirements, and; did not give fair notice of the proposed land use(s). Accordingly, this Court should hold that Golden Sands has not established its vested right claims.

ARGUMENT

I. A VESTED RIGHTS CLAIM MUST BE BASED ON GOOD FAITH RELIANCE ON EXISTING LAND USE REGULATIONS.

Wisconsin case law establishes that there must be reasonable reliance on existing regulations in order to acquire a vested land use interest. It also establishes that reasonable reliance on existing regulations is not present where the party claiming vested rights knew existing regulations would soon change.

The Court of Appeals addressed the good faith reliance issue in the first Golden Sands appeal. *See Golden Sands Dairy, LLC v. Fuehrer*, No. 20134P1468, unpublished slip op. (Wis. Ct. App. July

24, 2014). But, its analysis focused on the land Golden Sands sought to build the farm buildings. The court did not extend its analysis to the property at issue in this case. If it had, Golden Sands would not have sought a separate judicial determination upholding its vested rights claim for the property in this case.

Wisconsin case law has consistently treated the owner's reasonable reliance as a critical factor in deciding whether there is a vested right. In the *Building Height Cases*, the court's conclusion that substantial rights had vested in one of the cases was based on the fact that "long before the passage of the act the telephone company *in good faith* not only resolved but actually arranged for the completion of its original plans and to that end had incurred great expense." *Atkinson v. Piper* (*Building Height Cases*), 181 Wis. 519, 532, 195 N.W. 544 (1923) (emphasis added). In the context of that case, "good faith" means that the owner reasonably relied on the previous state of the law in incurring the expense. In both *Rosenberg v. Vill. of Whitefish Bay*, 199 Wis. 214, 218, 225 N.W. 838 (1929) and in *State ex rel. Schroedel v. Pagels*, 257 Wis. 376, 380, 43 N.W.2d 349 (1950), the court concluded there were vested interests

entitled to protection because the expenditures were made "relying upon" or "in reliance" of the then-existing zoning laws. The implication in both cases is that the reliance was reasonable. In *Lake Bluff Housing Partners v. City of South Milwaukee,* 197 Wis. 2d 157, 175, 540 N.W.2d 189 (1995), the court used the term "reasonable expectation" to describe proceeding in reasonable reliance on the ordinance as it existed at the time and explained that "the theory behind the vested rights doctrine is that a builder is proceeding on the basis of a reasonable expectation" (citations omitted). *See also Hearst-Argyle Stations,* 260 Wis. 2d 494, ¶ 28 n. 12, 659 N.W.2d 424 (citing *State ex rel. Cities Serv. Oil Co. v. Board of Appeals*, 21 Wis. 2d 516, 528-29, 124 N.W.2d 809 (1963) ("The theory behind the vested rights doctrine is that a property owner is proceeding on the basis of a reasonable expectation that his or her modification of the property is in compliance with the then-existing zoning codes.").

Vested rights analysis is altered when landowners know before they attempt to establish a new use that an ordinance amendment will soon impact the property upon which they seek to

establish that use. *See Town of Cross Plaíns v. Kitt's Field of Dreams Korner*, 2009 WI App 142, 321 Wis. 2d 671,775 N.W.2d 283. Golden Sands was aware, before it filed its building permit application, that the Town was nearing the end of its comprehensive planning process and drafting zoning ordinances for the Town. The comprehensive plan specifically identified the Golden Sands 6388 acres for a Rural Preservation zoning classification that would prohibit their proposed land uses. Thus, Golden Sands had reasonable notice of potential zoning changes to the 6388 acres before it filed its building permit application.

It is not significant that Golden Sands might not have had notice of a specific zoning change for a specific parcel in the Town when it filed its building permit application. After all, they were seeking to change the land use of more than 1/5th of the entire township. It is simply not reasonable to presume that the Town's forthcoming zoning ordinance would not have some impact on their property given the size of their holdings. When a landowner seeks to change land use on more than 20% of the land in a township,

common sense advises that there will be some impact on his property when the townships adopts a new zoning ordinance.

Golden Sands' expectation that they could establish a vested right to their proposed use(s) of the 6388 acres in the Town by filing a building permit application that didn't even identify the proposed use(s) prior to the effective date of a forthcoming zoning ordinance, even though they knew a new zoning classification for the lands was being considered and the sheer size of their land holdings dictated some impact, is not a reasonable expectation. Their reliance on the then-existing Wood County zoning ordinance classification to preserve a vested right to their proposed use(s) is not reasonable.

Nonconforming land uses are antithetical to sound planning and effective land use policy implementation. They undermine the effectiveness of land use policies and public faith in them. Vested rights to nonconforming land uses on the other hand are warranted to protect reasonable land use expectations in private property. However, the vested rights doctrine should be applied in a way that does not encourage the establishment of nonconforming uses, particularly massive nonconformity as in this case.

A vested rights claim must be based on a reasonable expectation; reasonable good faith in the existing land use regulations. Golden Sands' vested rights claim to the proposed land uses for its 6388 acres under the Wood County zoning ordinance is not reasonable and should not be sustained.

II. GOLDEN SANDS FAILED TO SPECIFY THE PROPOSED LAND USE(S) FOR THE 6388 ACRES IN ITS BUILDING PERMIT APPLICATION AND CANNOT ESTABLISH ITS VESTED RIGHTS CLAIM UNDER WISCONSIN LAW.

Wisconsin law establishes that a landowner may acquire a vested right in an existing or proposed land use only where it "is in strict and complete conformance with applicable zoning and building code requirements." *See Lake Bluff*, 197 Wis. 2d at 174-75. A landowner cannot acquire a vested right in a current or proposed land use without such showing.

The Town is located in Wood County. In 1934, Wood County adopted a zoning ordinance, which continues to be operative, regulating land uses. This zoning ordinance establishes zoning districts in Wood County.

The Town did not have an effective zoning ordinance at the time Golden Sands submitted its building permit application to the Town. Therefore, at the time Golden Sands submitted its application, Wood County's zoning ordinance governed in the Town.

Wood County's zoning ordinance established two types of land use districts for zoning purposes: a "Forestry and Recreation" district and an "Unrestricted" district. Any land zoned as unrestricted could be used "for any purpose whatsoever, not in conflict with the law." The 6388 acres Golden Sands asserts a vested right in are zoned Unrestricted pursuant to the Wood County zoning ordinance.

The applicable zoning requirement for the 6388 acres when Golden Sands filed its building permit application was lawfulness. Any lawful land use was allowed under the Wood County Zoning ordinance. So, Golden Sands' permit application needed to show that its proposed land use(s) for the 6388 acres was lawful.

In order to ascertain whether a proposed land use is lawful or not, the use must be specified. That is simple logic. If a proposed land use is not specified it is not possible to ascertain anything about it, including whether it is lawful or not.

The Golden Sands building permit application arguably identifies the 6388 acres it claims vested rights to use under the unrestricted zoning classification of the Wood County zoning ordinance.[1] The permit makes a single reference to the acreage in a box on the "Project Location" line of permit that is labeled "Lot area" and nowhere else.

However, the building permit application does not identify any proposed land use(s) for the 6388 acre Lot area reference. In the application section titled "Zoning District(s)" the term "Wood County – Unrestricted" is provided but there is no additional specification of the proposed land use(s) to be found in the four corners of the permit application.

The Golden Sands application fails to identify the land use(s) for the 6388 acres it references in it. Without that information, it is not possible to determine, in accordance with Wisconsin vested rights law, whether the proposed land use(s) are in strict and

[1] It can be assumed for purposes of this analysis that the permit identified the 6388 acres. However, the information in the permit is not wholly consistent on this fact since the permit also makes two specific references that seem to specify only the parcel where farm buildings were to be constructed.

complete conformance with applicable zoning and building code requirements.

It is Golden Sands' burden to provide information that establishes its proposed land use(s) strictly conform to applicable zoning and building requirements. Moreover, Golden Sands is a sophisticated enterprise with substantial financial and professional resources available to it. It is reasonable for it to shoulder the responsibility for providing clear and unambiguous information that proves its vested rights claim. It is even more reasonable that they perform this duty given the massive size of their vested rights claims.

III. GOLDEN SANDS FAILED TO SPECIFY THE PROPOSED LAND USE(S) FOR THE 6388 ACRES WITH SUFFICIENT CLARITY TO GIVE ADEQUATE NOTICE OF ITS VESTED RIGHTS CLAIM CONTRARY TO WISCONSIN LAW.

Wisconsin is a Building Permit Rule state for purposes of vested rights in proposed land uses. *See McKee Family I, LLC v. City of Fítchburg*, 2017 WI 34, 374 Wis.2d 487, 893 N.W.2d 12. The building permit requirement serves multiple purposes, including

notice of the proposed land use. This obligation is reflected in the recently enacted vested rights statute wherein the Legislature sought to codify existing vested rights common law and, thus, established a requirement that the statutory vested right protection only applies to a project, which is defined in relevant part as "a specific and identifiable land development" in the land use authority's jurisdiction. See Wis. Stat. secs. 66.0015(1)(a), (b), (2)(a) and (b).

In Wisconsin, a landowner may establish a vested right in a proposed land use only when it provides sufficient public notice of the proposed land use. This notice requirement makes sense and is important for multiple reasons.

Land use actions impact the property interests and rights of other owners. That is why the Wisconsin zoning enabling law for cities and villages, set forth in Wis. Stat. sec. 62.23, provides numerous requirements for public notice related to zoning action and land use actions. *See e.g.*, Wis. Stat. secs. 62.23(7)(d)(1)a. and (2)(Class 2 public notices required for new zoning ordinance hearings and zoning ordinance amendment hearings); and *see* Wis. Stat. sec. 62.23(7)(d)4. (requirement to keep list of persons who

must be given notice of certain zoning actions). Notice of a vested right claim will give nearby property owners knowledge of the activity and the opportunity participate in all processes that they think are necessary to protect their own property interests and rights.

Land use actions impact the ability of cities and villages to implement the land use plans and policies that their residents have secured through their elected representatives. Vested rights claims are inherently made for land uses that do not conform to existing or future land use regulations. Thus, they yield and protect nonconforming uses, which are generally disfavored because of their negative impacts on effective land use planning. Notice of vested rights claims provides the local authority with knowledge of the nonconformity and the opportunity to protect community interests reflected in comprehensive plans and land use policies.

The Golden Sands' permit application does not provide meaningful notice of its vested rights land use claims to 6388 acres of land in the Town. It barely mentions the total acreage at all. And, the proposed land use(s) aren't even identified in the permit application. Thus, the permit did not provide any meaningful public

notice in accordance with a fundamental purpose of Wisconsin's building permit rule.

The quality or specificity of public notice is also significant. The Court has recognized this important factor in notice requirements under the Open Meetings law. In that context, the Court held that the level of notice specificity increases in accordance with the likely public interest in a topic to be addressed by a governmental body. *See State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804 ("both the number of people interested and the intensity of that interest," is an important factor for determining the specificity of notice required).

In this case, Golden Sands seeks to immunize more than 1/5th of the entire land mass of a community from zoning requirements Town residents think should apply. Roughly 6388 acres of land would not be subject to the Town's new zoning ordinance. The impact of Golden Sands vested rights claim is not just significant for the Town and its residents, it is by any reasonable measure monumental. The magnitude of Golden Sands' vested rights claims

on an entire community deserves more specific notice than a single vague reference in a building permit to a project area.

CONCLUSION

Golden Sands did not file its building permit application in good faith reliance on the then-existing Wood County zoning ordinance classification; Golden Sands' permit application did not provide sufficient information to show that its proposed land use(s) strictly conformed to applicable zoning and building code requirements, and; Golden Sands' permit application did not provide meaningful notice to the public and the Town of its vested rights claim for agricultural use of 6388 non-agricultural acres. Accordingly, the Court should reject Golden Sands' vested rights claims.

Dated: December 1, 2017.

LEAGUE OF WISCONSIN MUNICIPALITIES

By: _____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c), Stats. for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of the brief is 2484 words.

Dated: December 1, 2017.

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Daniel M. Olson (SBN 01021412)

SECTION 809.19(12) CERTIFICATION

I hereby certify I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify:

That this brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated: December 1, 2017.

_____

Daniel M. Olson (SBN 01021412)

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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2015AP001258

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v.

TOWN OF SARATOGA, TERRY A. RICKABY, DOUGLAS PASSINEAU, PATTY HEEG, JOHN FRANK and DAN FORBES,

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

Review of an April 13, 2017 Decision of the Court of Appeals, District IV, Appeal No. 2015AP001258

Wood County Circuit Court Case No. 12-CV-0389, The Honorable Thomas Eagon Presiding

NON-PARTY BRIEF OF LOCAL BUSINESS AMICI

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INTRODUCTION

Ebbe Realty, Inc. *et al*. are fourteen businesses and institutions in and around the Town of Saratoga. (*See* Ebbe Realty, Inc. *et al*., Mot. to File Non-Party Brief, 11/15/17 and affidavits cited therein.) These businesses (hereinafter, "Local Business Amici") work in five general categories: construction and realty, hospitality and tourism, agriculture, home-based businesses, and a church and religious school. (*Id*. ¶3.)

Despite the variety in their clientele, all of the Local Business Amici would be affected if Golden Sands Dairy LLC's ("GSD's") vested rights to build a dairy on a 98-acre production site were expanded to thousands of acres of land the dairy intends to convert from pine forest to irrigated agriculture and manure-spreading. (*Id*. ¶1.) Most homeowners and businesses in the area rely on private wells and clean, abundant water for their livelihoods, and many of amici's customers are attracted by the area's natural setting and recreational opportunities. (*See id*. ¶¶4-8.) The land use changes proposed by GSD would dramatically alter the area's character, and vast new areas of manure application and groundwater pumping threaten the area's groundwater quality and supply. (*Id*. ¶¶2-8.)

The Legislature has granted local governments broad authority to exercise their zoning powers, which allows for orderly growth and development and prevents land use conflicts between neighbors.

Consistent with this Legislative authority, the Town of Saratoga appropriately considered not just the interests of future businesses like GSD when it zoned the area Rural Preservation in 2012, but also the property rights and interests of existing businesses and residents like Local Business Amici. Golden Sands Dairy's interpretation of the vested rights doctrine would undermine local authority to balance these interests and create a premature, nebulous exception to statutory zoning. Alternative means to address local land use conflicts, such as nuisance suits and state regulation, are not favored or effective substitutes for sound local land use planning.

This Court should reject GSD's invitation to expand the vested rights doctrine far beyond the buildings described in a permit application and affirm the court of appeals.

ARGUMENT

I. The Town of Saratoga Used Its Zoning Power As The Legislature Intended and The Courts Have Recognized.

The Town of Saratoga appropriately used its zoning authority to preserve existing land uses and protect the local environment, on which Local Business Amici and other property and business owners rely.

A. Zoning Permits Local Governments to Develop In an Orderly Manner and Prospectively Address Potential Land Use Conflicts, Including Conflicts with Agriculture.

Wisconsin, like most jurisdictions, strives for orderly land development and avoidance of land use conflicts between neighbors, including neighbors of agricultural uses.

Zoning and land use regulations are some of the most vital tools local governments have to regulate their affairs, enabling a municipality to protect existing property rights while guiding future development in the interest of its citizens.

> [T]he purpose of zoning is twofold: (1) to preserve the existing character of an area by excluding…uses prejudicial thereto, and (2) to provide for the development of the … sub-areas … of the municipality in a manner consistent with the uses for which each is suited, such regulations being related to the character of the district which they affect and being designed to serve not only the welfare of those who own and occupy land in those districts, but also the general welfare of the community.

2 Ziegler, *Rathkopf's The Law of Zoning and Planning*, §2:10, 23-24 (4th ed. 2009).

In Wisconsin, the Legislature has made local zoning authority comprehensive. It is an exercise of the police power, for the purpose of promoting public health, safety, and the general welfare. *See* Wis. Stat. §§62.23(7)(am), 60.61(1)(a). "The concept of public welfare… embraces in comprehensive zoning the orderliness of community growth, land value and aesthetic objectives." *State* ex rel. *Am. Oil Co. v. Bessent*, 27 Wis. 2d 537, 545, 135 N.W.2d 317 (1965).

Protection of existing property values has long been accepted as within the general welfare. *State* ex rel. *Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923) ("[I]f such [land use] regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare.")*)* Wisconsin statutes also specifically recognize that zoning may be used "to encourage the protection of groundwater resources." Wis. Stat. §62.23(7)(c).

The principles of zoning do not just apply in cities and urban environments, but also in rural areas where agriculture is prevalent. The Legislature has explicitly stated its preference that land use conflicts involving agricultural uses be addressed prospectively, through zoning:

> The legislature finds that development in rural areas and changes in agricultural technology, practices and scale of operation have increasingly tended to create conflicts between agricultural and other uses of land. The legislature believes that, to the extent possible consistent with good public policy, the law should not hamper agricultural production or the use of modern agricultural technology. The legislature therefore deems it in the best interest of the state to establish limits on the remedies available in those conflicts which reach the judicial system. **The legislature further asserts its belief that local units of government, through the exercise of their zoning power, can best prevent such conflicts from arising in the future, and the legislature urges local units of government to use their zoning power accordingly**.

Wis. Stat. §823.08(1) (emphasis added).

In sum, local governments have broad zoning authority to promote orderly development and protect existing properties.

B. The Town of Saratoga Appropriately Exercised its Zoning Authority in this Case.

Golden Sands Dairy's dispute with the Town does not play out in a vacuum, but amid existing residents and businesses in a uniquely vulnerable environment. The Town of Saratoga appropriately classified forest land within the Town as Rural Preservation, consistent with its statutory authority, comprehensive plan, and the interests of residents such as Local Business Amici.

The Town of Saratoga hosts numerous homes and businesses that rely on private wells sunk into the shallow groundwater table; the Town's lakes, streams, and forests make the area attractive for hunting, fishing, and other recreational uses. (R.63, Ex. D §1.4.; R.67; Mot. to File Non-Party Br., ¶¶2-5.) The Town sits on well-drained soils, which permit contaminants on the land surface to easily migrate to the high groundwater table below. It also hosts trout streams, lakes, and forests. (*Id*.) Growing crops on the Town's sand soils would require significant application of water, as well as manure and other fertilizers, yet these practices are precisely what threaten local groundwater quality and quantity. (*Id*.) By contrast, the Town's existing pine forest preserves groundwater quality and quantity by precluding application of manure or chemicals and installation of high-capacity wells. (*See id*.)

Golden Sands Dairy's proposed large-scale conversion of Town forests to cropland is a transformational land use that would significantly impact existing residents, including Local Business Amici. Customers of area builders and realtors are attracted by the Town's fresh air and water and recreational opportunities, but business has already slowed due to consumer concerns of odors, loss of pine forest, deteriorating local roads, and groundwater impacts that thousands of new acres of irrigated agriculture would bring. (Mot. to File Non-Party Brief, ¶4.) Tourism and hospitality-oriented businesses, such as campgrounds, restaurants, and a hunting club, are concerned about changing the area's character and impacts to air and water quality. (*Id.* ¶5.) Local home-based businesses near fields that GSD would convert reasonably believe customers will cease visiting them without adequate access to clean air and water, and are concerned for their own loss of property value. (*Id.* ¶7.) A local Lutheran church and school with a private well has worries about losing access to clean water and has placed its expansion plans on hold. (*Id.* ¶8.)

Existing agricultural uses that do not rely on irrigated cropping, such as cranberry marshes, would also be affected by large-scale conversion of fields for this purpose. One organic cranberry farm, which requires plentiful water uncontaminated by nitrates or bacteria, commissioned an independent report on how it might be impacted by

GSD's plans. (*Id*. ¶6.) It learned that it was at high risk of negative groundwater quality impacts due to expanded fertilizer application on upgradient fields, as well as the significant loss of water supply. (*Id*.) These risks were confirmed by data from GSD's existing sister facility in Juneau County—also situated in sand soils—where wells have for years indicated groundwater quality problems, including nitrates at over seven times the 10 mg/L public health standard. (*Id.*) Wis. Admin. Code §NR 140.10, Table 1.

Thus, while GSD asserts its investment-based expectations in this case (*e.g.*, GSD Br. at 5), the Town must also look out for other interests, including existing businesses and homeowners who have already invested in the area. These residents have spent years building up their businesses, in reliance on the area's existing attributes and the Town's preservation plans, as stated in the Comprehensive Plan and now its zoning ordinance. (Mot. to File Non-Party Brief, ¶¶2-3.) The Town rightly recognized the property interests of existing businesses and homeowners, and the need to protect groundwater quality, when it applied the Rural Preservation zoning designation to lands within the Town.

In sum, the Town in this case performed exactly the zoning function that the Legislature and courts intended.

II. Local Zoning Works Best When Exceptions To It, Such as the Vested Rights Doctrine, are Narrowly Construed.

Like any rule of general application, local zoning works best when exceptions to it are narrowly construed, including the vested rights doctrine. The Court should not expand the doctrine as GSD requests.

The Legislature has directed that zoning ordinances and plans "shall be liberally construed in favor of the city and as minimum requirements for the purposes stated." Wis. Stat. §62.23(7)(am). Local authorities need zoning flexibility to respond to changing needs and circumstances affecting individuals, businesses, and the environment.

> The concerns of Fitchburg's citizens in this case demonstrate why the legislature must have flexibility to address the changing needs of the community. Although Fitchburg adopted the [land use regulation] in 1994, it needed to be able to respond to the changing development needs of the community in 2008.

McKee Family I, LLC v. City of Fitchburg, 2017 WI 34, ¶57, 374 Wis. 2d 487, 893 N.W.2d 12. Hence, "[p]roperty holders…acquire no vested rights against rezoning… Indeed, if this were not so no changes in zoning or in comprehensive zoning plans could ever be made to adapt land use realistically to changing times and environment." *Buhler v. Racine Cty.*, 33 Wis. 2d 137, 148, 146 N.W.2d 403 (1966); *see also Eggebeen v. Sonnenburg*, 239 Wis. 213, 218, 1 N.W.2d 84 (1941).

The vested rights doctrine should not be expanded beyond buildings identified in a building permit. Golden Sands Dairy's arguments would permit circumvention of local zoning authority through vague references to adjoining or even far-flung lands in building permit applications, which permit applicants could later claim as necessary to their development. This creates a substantial risk that the exception will swallow the general rule that there is no right to existing, less-restrictive zoning. The vested rights doctrine cannot be applied too broadly, beyond the confines of the buildings specified in the application, or too soon, as a craven placeholder for an ill-defined future development.

Confining the building permit rule to buildings is particularly important in the local government context. Towns and other governments should not be put in the position of interpreting building permit applications to divine what uses the application could possibly encompass in the future. Bright line rules afford parties "the ability to predict the consequences of their actions and to guide their conduct accordingly without the intercession of the judicial branch." *Risser v. Klauser*, 207 Wis. 2d 176, 202, 558 N.W.2d 108 (1997). This, in turn, promotes judicial efficiency. *Id.*

The benefits of a bright-light building permit rule also extend to both existing and future businesses. *McKee Family I,* 374 Wis. 2d 487,

¶43 (noting the building permit rule "creates predictability for land owners, purchasers, developers, municipalities and the courts"). Here, GSD received certainty as to its building site, but the Town's Rural Preservation zoning provided certainty to Local Business Amici and other existing interests as an appropriate response to evolving understandings of environmental conditions, groundwater supply, and impacts to property value.

While the vested rights doctrine and other exceptions to the zoning authority of local governments should be narrowly construed, this is not a system without limits. Local governments remain accountable to their constituents through elections that occur every April. Should a local government go too far in exercising its zoning authority, electors can register their displeasure at the polling booth and elect new officials to change any offending zoning rules or other legislation.

This Court should not expand the vested rights doctrine beyond the building permit rule, as recently affirmed in *McKee Family I*.

III. Alternatives to Local Zoning as a Means to Address Land Use Conflicts are Not Favored, or Not as Effective as Sound Local Zoning Regulation.

Should the vested rights doctrine be expanded as GSD asks, this will put pressure on other alternatives to address land use conflicts, such as nuisance suits and state regulation. These strategies are not favored

in the law, or not as effective for avoiding problems that may affect neighbors like Local Business Amici.

A. The Legislature Disfavors Nuisance Suits Against Agricultural Uses.

As noted above, the Legislature has explicitly stated its preference that land use conflicts between agricultural uses and other uses be addressed prospectively, through zoning, and not through retroactive measures like nuisance suits. Section I, *supra*.

So firm is the Legislature in this belief that it has significantly limited the reach of and remedies available through nuisance suits against agricultural uses. Wisconsin's Right to Farm Law permits individual nuisance actions against existing agricultural uses only when they present a "substantial threat to public health or safety." Wis. Stat. §832.08(3)(a)2. If a circuit court finds an agricultural action is a nuisance, it is limited in what remedies it can apply; if it finds for the defendant, it must award litigation expenses against the plaintiff. *Id.* §823.08(3)(b), (4).

Because the Legislature has limited nuisance suits against agricultural uses, its preference that conflicts be prospectively addressed through zoning must be given effect by this Court. Otherwise, neighbors of these agricultural uses may suffer loss of property value and the use and enjoyment of their property with no available remedy.

Taken to its extreme, simultaneous application of Wisconsin's Right to Farm law and an expansive vested rights doctrine could result in an unconstitutional taking of neighbors' property. *See Bormann v. Bd. of Supervisors, Kossuth County*, 584 N.W.2d 309 (Iowa 1998) (holding nuisance immunity provisions in Iowa's Right to Farm statute created an unconstitutional taking of neighbors' property). Already, the Wisconsin Department of Revenue has agreed to property value reductions of 8-13% for homes adjacent to CAFOs.[1]

It is far better, and consistent with the Legislature's purpose, to preserve local zoning authority and prevent land use conflicts between agricultural uses and their neighbors.

B. State Regulation is Not as Broad, or Effective, as Local Zoning.

Opponents of local zoning often point to the state Department of Natural Resources and incorrectly assert that it will address any environmental problems that arise from an offending use.

First, the DNR does not have authority or jurisdiction over the broader array of issues within a town's police powers. For example, the DNR does not have authority to regulate odor or increased traffic,

[1] Steve Verburg, *Property values drop near CAFOs, state says*, Wis. State J., (Nov. 16, 2017), *available at* http://host.madison.com/wsj/news/local/govt-and-politics/property-values-drop-near-large-cafos-state-says/article_9f6da467-b0bc-5de9-9883-2f14a6d0e439.html.

common problems associated with concentrated animal feeding operations ("CAFOs") like GSD, or consider impact to property value.

Second, even when DNR has regulatory and enforcement authority, the agency may not use it. In the case of CAFOs, the DNR issues permits intended to regulate and limit the discharge of pollutants to surface and groundwater. *See* Wis. Stat. §283.31; Wis. Admin. Code ch. NR 243. This permitting program is known as the Wisconsin Pollution Discharge Elimination System (WPDES) program.

However, a 2016 study conducted by the Wisconsin Legislative Audit Bureau revealed that DNR is failing to meet its statutory duties for permitting, inspecting, and initiating enforcement actions for CAFOs under this program. State of Wisconsin, Legislative Audit Bureau, Wastewater Permitting and Enforcement: Department of Natural Resources, Report 16-6 (June 2016).[2]

For example, of the 260 CAFOs for which WPDES permits were reissued between 2006 and 2014, 6.5% were inspected *after* the permit was already reissued and 19% were inspected more than 12 months before permit expiration, violating statutory requirements and/or applicable DNR policy and practice. (*Id*. at 55.) And although the DNR states it will inspect each CAFO permittee at least twice every five

[2] *Available at* https://legis.wisconsin.gov/lab/media/1052/16-6full.pdf.

years, the percentage of CAFOs that actually received two inspections in five years never exceeded 48% between 2005 and 2014. (*Id.* at 49.) The study also found permitting backlogs and inconsistent enforcement across DNR regions. (*Id.* at 4, 75.)

Neighbors like Local Business Amici cannot rely on the DNR to adequately consider and protect their interests. Zoning and land use regulation, therefore, can and should be used by local governments like the Town in order to address their constituents' interests.

CONCLUSION

Over 1.7 million Wisconsin citizens—more than 30% of the state's population—reside in towns like the Town of Saratoga.[3] In this case, the Town reasonably evaluated local conditions and zoned its land to prevent harm to property values and businesses, drinking water quality, and local character. By seeking a 6,000-acre exception to this rule, GSD cannot credibly state that expanding the vested rights doctrine does "no violence" to the Town's ability to regulate land use. (GSD Br. at 26.)

The Court should affirm the court of appeals' decision upholding the Town's lawful exercise of its zoning authority in this case, and reject GSD's requested expansion of the vested rights doctrine.

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[3] "Town Quick Facts," Wisconsin Towns Association, at http://wisctowns.com/about-towns.

Respectfully submitted this 1st day of December, 2017.

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/s/ Christa O. Westerberg

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RULE 809.19(8)(D) CERTIFICATION

I hereby certify that this brief conforms to the rule contained in §809.19(8)(b) for a brief produced with a proportional serif font. The length of those portions of this brief referred to in §809.19(1)(d), (e), and (f) is 2,996 words.

/s/ Christa O. Westerberg

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. §809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 1st day of December, 2017.

/s/ Christa O. Westerberg

Christa O. Westerberg

SUPREME COURT OF WISCONSIN

GOLDEN SANDS DAIRY LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

Appeal No. 2015AP001258

v.

TOWN OF SARATOGA, TERRY A. RICKABY, DOUGLAS PASSINEAU, PATTY HEEG, JOHN FRANK AND DAN FORBES,

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

Review of April 13, 2017 Decision of the Court of Appeals, District IV, Appeal No. 2015AP001258

Wood County Circuit Court Case No. 12CV0389, The Honorable Thomas Eagon Presiding

BRIEF OF *AMICUS CURIAE* WISCONSIN TOWNS ASSOCIATION

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INTRODUCTION

The Wisconsin Towns Association (WTA) is a voluntary association of 1,251 town and 22 village governments. WTA promotes town government; protects member interests, provides education; and assists in political and legal matters that address the concerns of town government, taxpayers, and residents.

ARGUMENT

Golden Sands' proposed expansion to the building permit rule threatens local planning, zoning, and individual property rights of others. Local governments expend countless time and resources carefully crafting zoning ordinances to implement comprehensive plans. The intent of zoning is to create certainty and balance individual property rights between both other individual property owners and community interests. Golden Sands' proposed expansion of vested rights would eliminate the utility of government planning and zoning because one property owner could broadly freeze zoning (versus narrowly under current law) regardless of a community plan or zoning ordinance, including land in other municipalities and land not owned by the applicant. This would shift the current and long held balance of private property rights toward one property owner and against the neighbors, all other private property owners, and the remaining

community. Furthermore, expansion of the bright line building permit rule to a "project" creates an environment in which a permit in one community vests rights in another and would cause utter disarray in land use regulation statewide.

I. EXPANDING THE BUILDING PERMIT RULE WOULD INDEED DO VIOLENCE TO LOCAL GOVERNMENT ABILITY TO REGULATE LAND USE.

Expanding the building permit rule to include property not specifically described in an application or subjectively labeled by the applicant as integral to the project would undermine planning and zoning. Wisconsin towns use a comprehensive, deliberate and lengthy process to create a zoning ordinance. Golden Sands' proposed rule would undermine that process, as well as zoning amendments, because one property owner could freeze zoning based on unsubstantiated and purely subjective assertions. This would shift an inordinate amount of power to one property owner, destroying the vested rights balance.

A. Towns Must Follow a Lengthy Process to Enact Zoning Ordinances

Since the Town of Saratoga originally lacked its own zoning ordinance, it is helpful to understand the lengthy procedure required to pass a zoning ordinance.

Creating a comprehensive plan is the first step in zoning ordinance development. A plan is not a regulation per se; however, zoning regulations must be consistent with a comprehensive plan. Wis. Stat. § 66.1001(3)(L). The comprehensive plan is a necessary initial action because it guides zoning ordinance development. Creating a comprehensive plan itself is complicated. It forces the municipality to critically evaluate and develop a compilation of objectives, policies, goals, maps and programs related to what are commonly referred as the nine elements of a comprehensive plan. The nine elements include: issues and opportunities; housing; transportation; utilities and community facilities; agricultural, natural, and cultural resources; economic development; intergovernmental cooperation; land use; and, implementation. *See* Wis. Stat. § 66.1001(2). Even prior to beginning the heart of the aforementioned planning process, the municipality is required to develop and adopt a separate public participation plan that requires open discussion, communication programs, information services and deploying other strategies to obtain public input. *See* Wis. Stat. § 66.1001(4)(a). And, frequently, prior to the beginning of any planning process, a municipality engages in a months-long request for proposal procedure to obtain a planning consultant.

Such an expansive planning process rich in data gathering and analysis, goal setting, and the balancing of opinions of thousands of stakeholders, which requires dozens, if not hundreds of meetings and hearings, often takes years. The Town of Saratoga's six-year planning process is not uncharacteristic of a community its size and complexities.

To enact a zoning ordinance, towns located in counties with general zoning ordinances must follow a specific procedure under Wis. Stat. § 60.62. The town must acquire village powers. Wis. Stat. § 60.62(1). Obtaining village powers requires elector approval at an Annual Meeting or Town Meeting of Electors. Wis. Stat. § 60.10(2)(c).

After adopting village powers, towns must obtain additional approval to exercise zoning at another Annual Meeting or Town Meeting of Electors under Wis. Stat. § 60.10(2)(h), or a referendum under Wis. Stat. § 60.62(2).

Before obtaining elector approval for zoning, towns most commonly decide to fully develop their zoning ordinance, as did the Town of Saratoga. This requires immense planning and preparation, especially if the town is working from a functional blank slate. Because much of the Town of Saratoga was in an unrestricted zone

under county zoning, it was indeed the case that Saratoga, like many towns, began its work from a functional blank slate.

The town must create a plan commission. Wis. Stat. § 60.62(4) Appointing a plan commission requires vetting potential candidates and an appointment process. Once created the plan commission must invest in significant education before starting to craft the complex ordinance.

Creating the actual zoning ordinance does not happen overnight, and because it is the "devil in the details" portion of the process, often takes more time than the development of the foundational plan. The plan commission receives input from town residents and property owners by holding public hearings; hires zoning experts and holds meetings with them; crafts different zoning districts to determine compatible land uses with specific properties; labors over what types of uses will be permitted, prohibited, or conditional to protect property values, private property rights, and community interests; and, avoid unintended consequences or inconsistent uses. The ordinance must carefully define uses; current uses of property and evaluate how future plans impact them; and decide the criteria used for granting a conditional use. The entire

process takes time because the town must plan for development that could occur decades after the ordinance passes.

After creating the zoning ordinance, even more approvals are necessary. The town board must pass the zoning ordinance. Then, the county board must give its approval. Only after the town has created a comprehensive plan, gotten elector approval for village powers, received elector approval for zoning authority, created a plan commission, developed the zoning ordinance effectively from scratch, received plan commission approval, passed the ordinance at a town board meeting, and received county approval will the ordinance go into effect. It is not uncharacteristic for this process to take in excess of five years.

B. Expanding Vested Rights Would Undermine the Complex Zoning Process for Towns

Golden Sands' assertion that Saratoga raced to prohibit their development could not be further from the truth. The process began a decade earlier and neared completion within a typical planning and zoning ordinance development timeframe. The wheels of government, and indeed planning and zoning ordinance development, turn slowly. In contrast, a landowner can submit a building permit in an astronomically shorter timeframe. The community and other private

property owners are provided certainty that the bright line building permit test, moratoria, and other tools are in place to protect their interests and property values from a quick race to have secret plans dropped on the community disrupting a decade of work. Golden Sands is asking to eliminate this balance and these protections for private property owners.

This Court's decision in *Mckee Family I, LLC v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12, provides the proper lens to view vested rights. *Mckee* began with the "basic premise that municipalities have broad discretion to enact zoning ordinance and land use regulations for a variety of purposes". *Mckee*, 2017 WI 34, ¶ 35. This broad authority works in conjunction with property owner expectations because "[u]derlying the vested rights doctrine is the theory that a developer is proceeding on the basis of a reasonable expectation." *Id.* ¶ 42. Wisconsin follows the building permit rule "because it creates predictability for land owners, purchasers, developers, municipalities and the courts." *Id.* ¶ 43. The building permit rule "balances a municipality's need to regulate land use with a land owner's interest in developing property under an existing zoning classification. A municipality has the flexibility to regulate

land use through zoning up until the point when a developer obtains a building permit." *Id.*

Golden Sands' proposal to extend the building permit rule to include subjective vague references of land "integral" to the project outside the building permit site would undo the purpose of the rule and contravene the underpinnings of it. Golden Sands wishes for the building permit rule to encompass undeveloped plans and subjective intent. Filing for a building permit on specific and adjacent property is objective evidence of intent to construct a building and utilize property for a specific purpose. However, including other parcels beyond property specifically described in the application or even property not owned by the applicant allows a single property owner to completely disrupt municipal planning and zoning.

There are hundreds of towns with neither county nor town zoning. If one of those towns began the process of enacting a zoning ordinance, a single property owner could easily derail the process, as in this case. Under Golden Sands' interpretation, the property owner could apply for a building permit for a tool shed for a dairy operation and state it is part of a comprehensive project involving thousands of acres, even ones not owned by the applicant or in the municipality for which the tool shed is to be built. That would have the effect of the

constant harbinger and of a single individual's ability to broadly freeze land use regulations, thereby creating uncertainty for at least one, if not multiple, municipalities and neighboring property owners.

The negative impacts would extend beyond towns without zoning. Municipalities pursuing zoning amendments must follow a similar procedure outlined above. Additionally, Dane County towns can utilize a separate zoning procedure created by 2015 Wis. Act 178. In both scenarios one property owner, unhappy with the zoning changes, could file a building permit and claim thousands of acres within the town is integral to a project, but not specifically define that land. Under Golden Sands' proposed rule, this would freeze zoning throughout the town. The rule would unfairly give one person an immense amount of power to upend municipal planning.

This is especially important because local governments cannot move through this process quickly. Unlike the private sector, where decisions come rapidly, municipal governments need time. The planning process requires constant analysis and evaluation of changing science and conditions. The bodies hold multiple public hearings and meetings. This is because local governments make decisions to further the public health, safety, and general welfare for

not only the present community, but also future residents. Thus the building permit rule should not be expanded.

II. THE PROPOSED EXPANSION OF THE BUILDING PERMIT RULE NEGATIVELY IMPACTS PROPERTY RIGHTS OF OTHERS.

As the Court reiterated in *Mckee*, the vested rights doctrine is aimed at creating balance. Balance must exist between a developer's rights, the local government's planning ability, and the rights of other property owners. Expanding the building permit rule to include off-site property would sway the balance in favor of an individual developer over the municipality and other property owners.

This court has repeatedly stated one major purpose of zoning is the preservation of property value. *See State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 269, 69 N.W.2d 217 (1955) ("the proper purpose of zoning is 'Conserving the value of property and encouraging the most appropriate use of the land") (quoting *Griggs v. City of Paterson*, 1944, 132 N.J.L. 145, 39 A.2d 231, 232); *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, ¶ 46, 338 Wis.2d 488, 809 N.W.2d 362 (quoting *State ex rel. Saveland Park Holding Corp. v. Wieland* with approval).

Zoning is a quintessential tool for preserving property values and rights. It ensures consistent uses within districts; thereby providing

certainty to homeowners and businesses. This is because certain industries or uses have negative externalities that reduce property values and the full enjoyment of property. For example, a recent study by the Wisconsin Department of Revenue found properties located within a mile of the six largest Concentrated Animal Feeding Operations in Kewaunee County saw reductions in value by 8 to 13 percent.[1] These impacts also affect other property owners in the form of increased taxes. When one property's value decreases, the overall levy imposed by taxing jurisdictions does not change. This shifts taxes onto properties that did not lower in value. Thus everyone feels the negative impacts.

Creating zoning districts with consistent and appropriate land uses maintains property values and eliminates negative externalities, but still preserves property rights. Golden Sands' expansion of the building permit rule would frustrate those goals because one property owner could prevent a zoning ordinance change based on new evidence. It allows one owner to effectively freeze others' use or impacts the value of their own property by stating her project

[1] Steven Verburg, *Property Values Drop Near Large CAFOs, State Says*, Wisconsin State Journal, November 16, 2017, *available at* http://host.madison.com/wsj/news/local/govt-and-politics/property-values-drop-near-large-cafos-state-says/article_9f6da467-b0bc-5de9-9883-2f14a6d0e439.html

encompasses many different parcels regardless of how serious those plans are. It creates uncertainty for other property owners or other developers who might consider projects.

III. THE TOWN'S INTERPRETATION OF WIS. STAT. § 66.10015 IS ENTIRELY CONSISTENT WITH THE BUILDING PERMIT RULE AND CHAPTER 66 OF THE WISCONSIN STATUTES.

One controversy in this case deals with how the term "adjacent" is defined in Wis. Stat. § 66.10015. Black's Law Dictionary defines adjacent as "lying near or close to; contiguous." *See* Adjacent, Black's Law Dictionary (10th ed. 2014). Although the dictionary definition could have multiple interpretations, the term's usage throughout Chapter 66 and the purpose of the statute support "adjacent" to mean contiguous.

Wis. Stat. § 990.01(1) requires words in statute "be construed according to common and approved usage". This Court provided further guidance in interpreting statutes when it stated "[c]ontext is important to meaning. So, too, is the structure of the statute in which the operative language appears." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58 ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

The legislature uses the term "adjacent" throughout Chapter 66 of the Wisconsin Statutes connoting a meaning of "contiguous". For example, Wis. Stat. § 66.0215 creates an incorporation procedure when a "town is adjacent to a 1st class city". Indeed this Court even stated the term "adjacent" in this section "be defined as contiguous." *City of Waukesha v. Salbashian*, 128 Wis. 2d 334, 355, 382 N.W.2d 52 (1986). Further, Wis. Stat. § 66.0415 reads "lands adjacent to these rivers and canals or within 100 yards of them, are within the jurisdiction of the city of Milwaukee". The statute would not need the qualifier of "100 yards" if "adjacent" did not mean contiguous. These examples require at the very least touching between the lands and territories. Chapter 66 has several other similar examples that presume some form of contact between boundaries. In order to use the term "adjacent" consistently throughout Chapter 66, Wis. Stat. § 66.10015(1)(d) must be given the same meaning and include some form of touching for all project parcels.

The Legislature's modification of the term "adjacent" in Wis. Stat. § 66.10015(1)(d) further bolsters this interpretation. This section defines a project as "a specific and identifiable land development that occurs on defined and adjacent parcels of land, *which includes lands separated by roads, waterways, and easements*." Wis. Stat. §

66.10015(1)(d) (emphasis added). Importantly, the second clause clarifies that "adjacent parcels of land" includes those parcels separated by "roads, waterways, and easements". This clarification clause shows the Legislature intended this statute apply to compact projects at most separated by roads, waterways, and easements. If the legislature had intended Golden Sands' definition of "adjacent", it would not have specified that "roads, waterways, and easements" do not prohibit a finding of adjacency because the word's definition would have explicitly protected those types of separations. Further, the statute does not mention other parcels of property preserving adjacency. Thus the term "adjacent" requires, at a minimum, contact between parcels of property under Wis. Stat. § 66.10015.

The main purpose of the building permit rule also supports this definition. Wisconsin follows the building permit rule because it creates a clear standard for municipalities, courts, and property owners. Finding that "adjacent" applies to parcels of property not touching would create confusion because adjacency would become a question of degree. When submitting a building permit, a developer would not know if its rights vested on non-continuous properties. The municipality would also face uncertainty if their development regulations became frozen with the filing of the application. This

would leave it to courts to increasingly decide disputes on a case-by-case basis over the degree of "adjacency". Interpreting "adjacent" consistently with its usage throughout Chapter 66 reduces this uncertainty and keeps it in harmony with the purpose of the building permit rule.

The Town of Saratoga correctly interprets Wis. Stat. § 66.10015 because it maintains a consistent usage of the word "adjacent" in Chapter 66 and supports the purpose of the building permit rule. Therefore Golden Sands' project would not comply with the codification of the building permit rule under Wis. Stat. § 66.10015 because the properties are not adjacent.

CONCLUSION

The Court of Appeals decision should be affirmed because Golden Sands did not obtain vested rights to off-site property. Expanding the building permit rule would have negative consequences for local governments and property owners alike.

Dated this 30th day of November, 2017

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced using the following font: Proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,901words.

Dated this 30th day of November, 2017.

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CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80 and 809.18, that 22 copies of the Brief of *Amicus Curiae* Wisconsin Towns Association was sent by U.S. mail on November 30, 2017, to the Clerk of the Wisconsin Supreme Court, with three (3) copies served on the parties as follows:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 30th day of November, 2017.

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