COURT OF APPEALS OF WISCONSIN
DISTRICT IV

GOLDEN SANDS DAIRY LLC,

Plaintiff-Respondent,

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,

Intervenor.

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

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

CRIVELLO CARLSON, S.C.
Remzy D. Bitar (State Bar #1038340)
Ryan G. Braithwaite (State Bar #1037232)
Matteo Reginato (State Bar #1089724)
710 North Plankinton Avenue
Milwaukee, WI 53203
Phone: 414-271-7722
Attorneys for Defendants-Appellants

Date: August 24, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Other States Cases

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Does the Plaintiff-Respondent Golden Sands Dairy LLC, have vested rights to agricultural use for approxmiately 6,000 acres of land throughout the Town of Saratoga contrary to the Town's zoning ordinance, based on a building permit that grants it the right to build seven agricultural buildings on 98 acres?

Answer by the Circuit Court: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case involves legal questions based on undisputed facts and documents. Oral argument is not requested by Appellants.

While the resolution of the legal issues in this case rests on well-established law, the application of that law to the facts in this case presents a novel situation. There are no cases in Wisconsin which have allowed vested rights arising from a building permit on a defined parcel to extend to land uses on thousands of acres of land throughout a municipality. Therefore, publication may be warranted.

STATEMENT OF THE CASE

This case will determine whether Golden Sands Dairy LLC (GSD) can convert a building permit for seven buildings on a defined 98-acre parcel into a vested right to use approximately 6,000 acres in the Town of Saratoga (Town) in a manner inconsistent with the Town's zoning ordinance. GSD hopes to accomplish this result so that it can apply 55 million gallons of liquid manure and tons of solid manure each year on thousands of acres of land in the Town. GSD's argument is without precedent and is contrary to the existing law of vested rights in Wisconsin.

Property is always held subject to the police power. With limited exceptions, no one has a vested right to existing zoning, regardless of the amount of their reliance on existing zoning. One exception to this rule is when a party has engaged in actual and active use of the property prior to a change in zoning which prohibits that use. Such a use is allowed as a nonconforming use. A second exception is where a person has submitted a complete and compliant building permit application prior to a change in zoning which prohibits that use. This is the building permit exception (Building Permit Exception).

It is undisputed that GSD did not engage in actual and active agricultural use of the 6,000 acres of land in the Town before the Town enacted an ordinance precluding such agricultural use. Prior to the time the Town's zoning was enacted, the land in which GSD claims an interest was, and remains today, forest land registered under the managed forest law which does not allow agricultural use.

Unable to satisfy the first avenue for obtaining vested rights as a nonconforming use, GSD seeks to create a vested right to use the 6,000 acres in which it has an interest, for agricultural uses by pointing to its building permit from the Town which allows GSD to build seven agricultural buildings on 98 acres. Wisconsin cases addressing vested rights show that a compliant building permit application can create vested rights for a proposed building and the use of that building on that parcel. But there are no cases in Wisconsin which allow a party to use a building permit as a basis to claim vested rights for ancillary facilities and land uses outside of the building permit parcel. The Building Permit Exception does not create vested rights for parcels and uses outside of the building permit parcel and scattered over thousands of acres in the municipality. Even if it were possible to obtain vested rights for land uses outside of the building permit parcel, GSD's building permit application did not define such areas or uses with any certainty. Indeed, the uses proposed at the time of the building permit application have already been modified by hundreds of acres.

GSD's attempt to expand its limited building permit into a blanket authorization to use thousands of acres throughout the Town in a manner contrary to the Town's zoning, is an unprecedented and unwarranted intrusion into the ability of local governments to manage land use. The Town's legitimate right to protect the health, safety and welfare of its residents through its zoning ordinance should not be thwarted by a novel expansion of the Wisconsin law of vested rights.

FACTS

Procedural History

The Town of Saratoga adopted its Comprehensive Plan (Plan) for land use in 2007, long before GSD made any proposal to the Town. R. 86 (Decision Tr. 62); App. 62. The Plan called for the Town to adopt a zoning ordinance to implement the Plan by 2012. *Id.* That process was underway but had not yet been completed as of June 6, 2012, when GSD filed its building permit application. Thus, the only applicable zoning at that time was a Wood County ordinance that provided for an unrestricted district in the Town. R. 86 (Decision Tr. 78); App. 23.

When GSD submitted its building permit to the Town, it sought approval for the construction of seven buildings on approximately 98 acres that it planned to use as a large dairy farm. R. 67 (Reginato Aff., Ex. A); App 40. A revised application was filed on July 17, 2015. R. 2 (Complaint, Ex. G); App. 54-55. On July 19, 2012, the Town enacted a Moratorium on the issuance of building permits to allow the zoning process to be completed and prevent the development of land uses inconsistent with the Plan. R. 60 (Hermaiden Aff., Ex F). On July 26, 2012, GSD filed a mandamus action against the building inspector seeking to compel her to issue the building permit (hereinafter, "Building Permit Case"). *See Golden Sands Dairy LLC v. Lorelei Fuehrer and Town of Saratoga,* Wood County Case No. 12-CV-362. At that time, GSD emphasized to the court that, "This case is

about seven buildings, the construction of seven buildings on a piece of land . . . It's not about land use." R. 67 at 750 (Building Permit Hearing Tr. 10).

On April 11, 2013, the circuit court "granted the writ for the seven buildings" based on findings that the building permit application was complete prior to the Moratorium and therefore GSD had vested rights to proceed with those buildings. In issuing its ruling, the circuit court noted, "but we are not dealing with the use. We are dealing with a permit for a farm building." R. 67 at 829 (Building Permit Decision Tr. 89).

On July 24, 2014, the Court of Appeals affirmed that decision on the grounds that: (1) the Town could not apply the state dwelling code to the construction of farm buildings; (2) the Town could not deny the building permit on the basis that the application failed to comply with state laws; and (3) GSD provided sufficient documentation to comply with the requirements of the Town building code. *Golden Sands Dairy, LLC v. Fuehrer*, 2014 WI App 90, ¶¶41, 52, 57, 356 Wis. 2d 326, 855 N.W2d 491 (unpub).

In making its determination, the Court of Appeals made it clear that it was addressing only the seven buildings. "This appeal concerns the Town's denial of a building permit application submitted by Golden Sands to allow it to construct seven farm buildings on the same parcel of land as part of a new dairy operation." *Id.* ¶3; s*ee also id.* ¶1 ("The Town of Saratoga appeals a decision of the circuit court granting a writ of mandamus compelling the Town, via its building inspector, to issue a building permit to Golden Sands Dairy, LLC, for the

construction of seven farm buildings. . . ."); ¶12 ("As it relates to the parcel on which Golden Sands now seeks to develop a dairy, . . .); ¶74 ("We therefore affirm the decision of the circuit court requiring the Town to issue a building permit to Golden Sands for the seven farm buildings.").

While the Building Permit Case was still proceeding, the Town completed the final steps to adopt its final comprehensive zoning ordinance. In its statement of purpose, the Town's zoning ordinance cited the 2007 Comprehensive Plan and noted the particular concerns about groundwater and surface water contamination and drawdown that exist in the Town:

> As identified in the Comprehensive Plan, there are many natural resources in the Town. Among other things, the ordinance is designed to protect the groundwater and surface waters in the Town. **The Town is in an area where groundwater is highly susceptible of contamination due to highly permeable soils and high groundwater tables according to the U.S. Geological Survey and the Wisconsin Department of Natural Resources.** (See the Appendix to this ordinance, which is incorporated herein by reference.) **The Town residents rely on groundwater for drinking water and other purposes.** In many cases, the groundwater comes from shallow wells that can be easily impacted by sources of contamination or drawdown. There are two trout streams that run through the Town that can also be impacted by sources of contamination or drawdown. (Emphasis added)

R. 63 (Hoefer Aff., Ex. D, Town Zoning Ordinance §1.4); App. 61.

Requisite approvals of the proposed ordinance were obtained from the Town and Wood County, and the zoning ordinance was adopted and became effective on November 14, 2012. R. 86 (Decision Tr. 66); App 11. With a few exceptions not applicable to the case at hand, the zoning ordinance does not allow agriculture uses within the Town. *Id.*

Meanwhile, GSD filed this action against the Town and its individual Board Members on August 10, 2012. Among other things, GSD sought a declaratory judgment that the building permit for seven buildings on 98 acres gave GSD vested rights to use approximately 6,000 acres of land throughout the Town for its agricultural operations. Those declaratory claims were subject to cross motions for summary judgment. On March 27, 2015, the circuit court granted GSD's motion for summary judgment and this appeal followed.[1] R. 86; App. 4-39; and R. 83.

Background Facts

All of the land in the Town which GSD proposes to use for its operations was originally owned by Plum Creek. R. 86 (Decision Tr. 77); App 22. The amount of Plum Creek land actually adquired by GSD is unclear. GSD 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). Thus, throughout the litigation, GSD referred to land "in which Golden Sands has interests" and it has not claimed ownership of all of the proposed land in which it now claims a vested right. *See e.g.,* R. 58 (Plaintiffs' Brief at 1).

The building permit application GSD filed with the Town on June 6, 2012 consisted of the Town's standard building permit form, a "Design Report" which provided text for the building application, and a facility development plan

[1] All other claims in the action including challenges to the legislative steps in zoning the land and various civil rights claims, were dismissed and are not the subject of this appeal.

consisting of drawings for the seven buildings. R. 67 (Reginato Aff., Ex. A); App. 40-53. The application form states that the "Area Involved" is "7 building structures" and lists the occupancy as "dairy." *Id*; App 40. Although the application form lists the "Project Location" as "6,338 ac," the legal description only describes one quarter quarter section or 40 acres. *Id.* The Design Report filed with the building permit listed the "Site Location" as follows: "Town of Saratoga (T 21N, R 6E) SW ¼ of SE ¼, and the SE ¼ of SW1/4 [and]... Section 20 and eastern 200 foot strip of SW ¼ of SW ¼" which is approximately 92 acres. *Id;* App. 42.

The amended application form filed on July 17, 2015 listed the area involved as "100 acres of site and 6,338 acres total." However, it had an attached sheet which specified the legal description for the Building Permit Application as follows:

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. 2, (Complaint, Ex. G); App 55. Thus, this legal description for the Building Permit Application describes approximately 100 acres.[2] Subsequent filings have

[2] Generally, a quarter quarter section is 40 acres. Thus, two quarter quarter sections plus a half of a quarter section would be 100 acres.

referred to the dairy production area as 98 acres. *See* R. 86 (Decision Tr. 72); App. 17. For consistency, we will refer to the building site as 98 acres.

At the same time, GSD also provided "as a courtesy" copies of the applications it was making to the Wisconsin Department of Natural Resources (DNR), including its wastewater permit and nutrient management plan. A "Project Map" showing land in which GSD had an interest was also provided. The map highlighted the 98-acre building site in yellow and with a star. R. 67 (Reginato Aff., Ex. A) App. 56.

GSD claims it relied on the existing Wood County zoning and land use when it acquired the interest in Plum Creek lands and when it proceeded to spend in excess of $200,000 to prepare various permit applications. R. 86 (Decision Tr. 77-79); App 22-24. GSD chose not to consult the Town at any time prior to this submittal because GSD felt they "needed to keep their plans secret until they were ready to file. *Id.* (Decision Tr. 79); App 24.[3]

At the time of the building permit application, the proposed cropland in the Town was in pine plantation and subject to the Wisconsin Managed Forest Law (MFL). *Compare* MFL lands (App. 57-60) *with* the "Project Map" App. 56. The ability of GSD to undertake any agricultural activities on lands currently enrolled in Managed Forest Law requires withdrawal of those lands from MFL status, and

[3] During the Building Permit hearing, GSD explained the reasons for its secrecy through Jim Wysocki, Chief Financial Officer. R. 67 (Aff. Reginato, Ex. D, Building Permit Hearing Tr. 15). Mr. Wysocki knew that Heartland Farms had previously attempted to develop a potato farm on the very same land at issue here and that the project had not gone forward after opposition from the Town. *Id.* (Building Permit Hearing Tr. 140, 142-43). He was aware the proposed dairy would be controversial and face opposition. *Id.* (Building Permit Hearing Tr. 29).

no withdrawal application was made at the time of the building permit application. R. 86 (Decision Tr. 67); App 12.

In addition, there is no dispute that the actual amount of acreage that could be used for irrigated cropland and application of manure is subject to DNR permitting. R. 86 (Decision Tr. 68); App. 13. At the time of the building permit application, the amount of land that could actually be used for cropland and the land application of manure was not known. The circuit court found:

> The project map that accompanied the application shows that acres may be used for the project purposes presumably could include landscaping (sic landspreading) and irrigated crops. **Which of those acres will actually be used for purposes was not known at the time of the submittal of the building permit** because state permits associated with manure spreading and high capacity wells were not granted. …
>
> **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. (emphasis added)

Id. (Decision Tr. 67, 73); App 12, 18.

As of the time of the summary judgment proceeding, DNR indicated that the GSD project would include 5,300 animals that would produce 55 million gallons per year of liquid manure in addition to the solid manure. R. 63 (Hoefer Aff., Ex. C); App. 62-67. The operation is now projected to include a total of 7,838 acres of land, of which 1,800 acres are existing cropland outside of the Town. Of the 6,038 acres in the Town, 4,660 acres are currently managed pine plantation that GSD proposes to clear cut and convert to cropland, 1,280 acres are

proposed as buffer areas, and 98 acres are for the dairy facility. R. 86 (Decision Tr. 70-74); App. 15-19.[4] *See also* App. 62-67.

Additional facts will be provided as appropriate with the arguments below.

STANDARD OF REVIEW

The standard of review is *de novo.* This Court is reviewing a summary judgment determination and the issues presented are questions of law. "We review a grant of summary judgment independently, using the same methodology as the circuit court." *Barrows v. American Family Ins. Co.*, 2014 WI App 11, ¶5, 352 Wis. 2d 436, 842 N.W.2d 508; *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). "The proper interpretation of a statute and case law raises questions of law that we review de novo." *State v. Starks*, 2013 WI 69, ¶28, 349 Wis. 2d 274, 833 N.W.2d 146.

ARGUMENT

I. THE WELL-ESTABLISHED RULE IS THAT NO ONE HAS A VESTED RIGHT IN EXISTING ZONING.

Zoning ordinances are enacted pursuant to a local government's police power and are designed to promote public safety, health and welfare. *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, 338 Wis. 2d 488, 809 N.W.2d 362. Private property is always held subject to this police power. *Eggebeen v. Sonnenburg*, 239 Wis. 213, 218, 1 N.W.2d 84 (1941).

---

[4] Thus, there are approximately 6,000 acres (5,940 acres to be exact) of land in the Town for which GSD seeks vested right status outside of the 98 acres of the dairy facility.

Thus, Wisconsin follows the rule that existing zoning does *not* create vested rights:

> 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)

Buhler v. Racine Co., 33 Wis. 2d 137, 148, 146 N.W.2d 403 (1966); *see 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.").

Although reliance on existing zoning does not create vested rights, there are two ways in which a party wishing to preserve its ability to rely on existing zoning may do so. First, a party may demonstrate that it has a vested right in zoning by establishing that it was engaged in a lawful use at the time the zoning was changed even if that use is subsequently prohibited. 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.

The second way in which vested rights can be obtained was recognized in *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 177, 540 N.W.2d 189 (1995). Pursuant to *Lake Bluff*, an entity that has submitted a

complete application for a building permit has a vested right in the zoning in existence at the time, for the purposes of that building permit. (Building Permit Exception)

The concept of vested rights is designed to accommodate both public and private interests. The public interests that local zoning is designed to protect could be subverted if a vested right that overrides that zoning is too easily granted. On the other hand, there are defined and limited circumstances in which private property rights are protected from zoning changes. Of the two exceptions recognized by Wisconsin law noted above, neither grants vested rights to GSD for the nearly 6,000 acres that are the subject of this appeal.

II. GSD HAS NO VESTED RIGHTS AS A NONCONFORMING USE BECAUSE IT WAS NOT USING THE 6,000 ACRES FOR AGRICULTURAL PURPOSES PRIOR TO THE ENACTMENT OF TOWN'S ZONING ORDINANCE.

The first way in which GSD could have obtained a vested right to use the 6,000 acres at issue for agricultural uses is to have engaged in such use on the land before the Town enacted its zoning ordinance in November 2012. The undisputed evidence shows that it did not do so.

Under Wisconsin law, a property owner who wishes to engage in a use of his property that does not conform to current zoning regulations may be able to do so by establishing that the property was used for the now-nonconforming use prior to the change in zoning restricting that use. To qualify, the use must be "active and actual" prior to the change:

> A legal nonconforming use, however, is when "there is an active and actual use of the land and buildings which existed prior to the commencement of the zoning ordinance [that banned the use] and which has continued in the same or a related use until the present."

Hussein v. Village of Germantown Bd. of Zoning Appeals, 2011 WI App 96, 334 Wis. 2d 764, 800 N.W.2d 551 (citing *Waukesha County v. Seitz*, 140 Wis. 2d 111, 115, 409 N.W.2d 403 (Ct. App. 1987); s*ee Des Jardin v. Town of Greenfield*, 262 Wis. 43, 47-48, 53 N.W.2d 784, 786 (1952) (citing 8 McQuillin on Municipal Corporations § 25.181 (rev. 3d ed.)) ("a nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted. . . .").

In *Kitt's Field of Dreams*, the court explained an owner acquires a vested interest by having engaged in an active and actual use of the property for the now-prohibited purpose prior to the change in zoning. "The 'actual and active use' standard tells us that there can be no vested interest if the use is not actually and actively occurring at the time the ordinance amendment takes effect." 2009 WI App 142, ¶31.

The property owner bears the burden to prove by a preponderance of the evidence that the nonconforming use was in existence at the time that the zoning change was passed. *See Walworth County v. Hartwell*, 62 Wis. 2d 57, 61, 214 N.W.2d 288, 289-90 (1974). In other words, the property owner must show that the use was "so active and actual that it can be said he [or she] has acquired a 'vested interest' in its continuance." *Id.*

GSD cannot meet this standard as to the nearly 6,000 acres at issue. It is undisputed that GSD was not using the land for agricultural purposes before November 12, 2012. All of the land was pine plantation forest. Although GSD proposes to clear cut 4,660 acres in the future to accommodate cropland, those acres were not cropland in November 2012. R. 63 (Hoefer Aff., Ex. A); App. 57-60.

In fact, at the time of the building permit application, the proposed cropland was subject to the Wisconsin Managed Forest Law. *Id.* The MFL designation restricts the cutting of timber on such lands and as a result, for that land to be used as cropland, it would need to be withdrawn from MFL (and the appropriate tax penalty paid). *See* Wis. Stat. §§ 77.06(1) and 77.10. As of January 1, 2014, no application for withdrawal of the land from MFL status had been made. R. 63 (Hoefer Aff. ¶3). Indeed, as of May 21, 2014, GSD through Ellis Industries Saratoga LLC stated its intent was to continue to use the land in MFL status for "timber production." R. 74 (Second Hoefer Aff., Ex. G.).

While GSD argues that it made a substantial investment in obtaining an interest in the 6,000 acres it *hoped to use* in conjunction with its dairy operation, Wisconsin law makes it clear that that is not enough to give GSD a vested interest in the zoning of such land. Actual and active use is required prior to the time of the adoption of zoning, not at some distant point in the future. The Town is not aware of any Wisconsin case that has granted vested rights to existing zoning *on vacant land* based solely on the owner's acquisition of the land (or acquisition of

some interest in the land) with the hope of using it for a then-permitted purpose at some time in the future. Creating such a vested right is particularly inappropriate when the proposed use of the land directly contradicts the vision of the local municipality to regulate land use in a manner to protect public health, safety and welfare.

Had GSD 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, it could at least argue that it had a vested right to continue agricultural uses as a nonconforming use after the Town enacted its zoning ordinance. But GSD did none of those things. Because GSD had no active and actual agricultural use of the 6,000 acres in which it had some kind of interest, no vested right arose to agricultural use of those lands as a nonconforming use.

III. GSD HAS NO VESTED RIGHTS TO AGRICULATURAL USE OF 6,000 ACRES OF VACANT LAND AS A RESULT OF THE BUILDING PERMIT FOR SEVEN BUILDINGS ON 98 ACRES.

Having failed to establish a vested right to use the 6,000 acres for agricultural purposes via actual and active use of that acreage for agricultural purposes before the zoning was changed, GSD seeks to create a vested right to the old zoning for those acres by attaching them to the building permit it obtained for seven buildings on 98 acres. The Court should reject this bootstrapping for the reasons to which we now turn.

As noted above, the Building Permit Exception, as articulated in *Lake Bluff*, provides a way to establish a vested right where there is a building permit

application on file before the zoning change. "In order for a developer's rights to vest, the developer must submit an application for a building permit which conforms to the zoning or building code requirements in effect at the time of the application." *Lake Bluff,* 197 Wis. 2d at 177. This provides an equitable balance between public and private interests. However, the Building Permit Exception does not apply to the nearly 6,000 acres of land outside of the 98-acre building site for which GSD obtained a building permit for four reasons: (1) the Building Permit Exception does not apply to land and land uses for which no building permit is required; (2) vested rights do not extend to ancillary uses off-site of the building permit property; (3) even if vested rights could extend to off-site property, the building permit application submitted here was limited to the seven buildings; and (4) the actual use of the 6,000 acres was uncertain at the time of the application.

A. The Building Permit Exception Does Not Apply To 6,000 Acres of Agricultural Use Because Such Use Is Not Subject To A Building Permit.

The underlying theory of the Building Permit Exception is that where a party seeks a building permit approval based on a compliant application, the government is estopped from changing the rules after the application has been submitted. There is no dispute that submission of a compliant building permit is a central factor in Wisconsin in determining whether vested rights arise under this exception: "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*, 197 Wis. 2d at 172.[5]

Building permits are required for buildings; not for land uses for which there are no buildings. That obvious and straightforward fact is significant. Here, no building permit has ever been required for agricultural use of land in the Town. That was certainly true under the original Wood County zoning ordinance upon which GSD supposedly relied, and was equally true under the Town's Building Permit Ordinance.

This point is illustrated by the following example. If GSD put its dairy buildings in another town and was simply looking for land in the Town to apply its 55 million gallons of liquid manure, there would be 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 County and/or the Town could choose to change their zoning at any time. 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

[5] In the majority of other states, vested rights do not arise until the building permit is actually issued and acted upon by the property owner. But what all states share in common, is the necessity of a building permit. *See e.g.*, *Covenant Media of Cal. LLC v. City of Huntington Park, Cal.*, 377 F. Supp. 2d 828, 839, (C.D. Cal 2005) ("Respondents have been unable to cite a single California decision in which a property owner has been held to have acquired a vested right against future zoning without having first acquired a building permit to construct a specific type of building."; *Chapel Creek, Ltd v. Mathews County*, 12 Va. Cir 350 (1988) ("In Virginia, as in most states, the existence of a valid building permit is still the principle benchmark used by the courts to determine if a sufficient governmental act is present for the invocation of either the vested rights rule or the doctrine of equitable estoppel.")

buildings and 98 acres for which a permit was issued, vested rights cannot and do not apply.

If GSD wanted to obtain a vested right to proceed with a land use for which no building permit was required, its option would have been to begin using the parcel for the intended use prior to the effective date of zoning. As noted above, it did not do so.

B. Vested Rights Created By A Building Permit Do Not Extend To Ancillary Off-Site Uses.

GSD argues that even though the proposed cropland did not require a building permit, agricultural use should nevertheless be considered an ancillary use associated with the building permit for the seven buildings on 98 acres. There is no basis for this claim. The scope of vested rights arising from a building permit does not extend to ancillary and off-site uses.

1. There are No Building Permit Cases in Wisconsin Which Grant Vested Rights to Uses Beyond the Building Permit Site.

In Wisconsin, the scope of the vested right resulting from the issuance of a building permit is limited to the project authorized by the building permit. In *Lake Bluff*, the court specified that what has vested is the builder's right to build the structure identified in the issued permit. There is no indication in *Lake Bluff* that the builder has a vested right for a building other than the one described in the permit.

While a number of Wisconsin cases make it clear that a building permit carries with it the right to use the building for its intended use, 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, 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."

Applying these cases to GSD's operation, the result is that GSD can build the seven buildings it included in its building permit application on the 98 acres identified as the site location for the buildings as set forth in the application. And GSD can use these buildings for agricultural purposes, notwithstanding the subsequently enacted zoning, provided necessary state permits are obtained. However, nothing in the cited cases authorizes GSD to use any other land in the Town in which it has an interest for purposes inconsistent with the Town's zoning.

This conclusion is also consistent with the result from the cases addressing nonconforming uses in Wisconsin. 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*, 256 Wis. 821, 649 N.W.2d 728 (Ct. App. 2002), 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)).

Similarly, in *Waukesha County v. Seitz*, 140 Wis. 2d 111, 116, 409 N.W.2d 403 (Ct. App. 1987), the dispute was about the evolution of commercial activities occurring on a specific and identifiable tract of land on Pewaukee Lake. Nothing in *Seitz* authorized the expansion of the commercial uses to other property throughout the Town. *See also* 4 Arden H. Rathkopf, *The Law of Zoning and Planning* § 73:16 (2005) (Generally, a physical expansion into land not previously utilized for the nonconformity constitutes an expansion of a nonconforming use.).

While GSD does not qualify as a nonconforming use for the reasons set forth above, the underlying policy result is the same. Under Wisconsin law, one cannot extend a vested right arising out of a specific permit or use to other parcels.

2. Cases from Other States Also Limit the Scope of Vested Rights to the Building Permit and Do Not Extend Thos Rights to Off-Site Ancillary Uses.

Other jurisdictions also hold that the scope of the 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.

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:

> Deer Creek did not submit a building permit for Phase II. . . Deer Creek devotes several pages of its brief to a description of the various ways that the documents mention Phase II. For example, Deer Creek quotes responses to the SEPA checklist indicating that the SEPA report would cover both Phase I and Phase II. These references did not trigger vesting because Deer Creek failed to file an application for a building permit for Phase II.

236 P.3d at 911. Thus, future phases, even when tied together with physical infrastructure are not vested absent a compliant building permit. *See Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wash. 2d 242, 218 P.3d 180 (2009) (development rights do not vest upon filing of a site plan absent a building permit.).

This conclusion is true for both the majority of states, which look for a showing of substantial reliance on the building permit, in addition to the minority of states, like Wisconsin and Washington, which require only the submittal of a compliant application. *See Court House Plaza Co. v. City of Palo Alto*, 117 Cal. App. 3d 871, 885, 173 Cal. Rptr. 161 (1981) ("Once the appellant here had made substantial expenditures in reliance on the Phase 1 permits, it acquired a vested

right to complete the four-story building "in accordance with the terms of the permit," . . . but no such right ripened as to Phase 2 for which no permits or other final approvals were obtained."). *See also Chapel Creek, Ltd v. Mathews County*, 12 Va. Cir. 350 (1988). ("The issuance of a single building permit, without more, cannot be the basis of a vested right to do more than build that building, and certainly not to build seven more new units.")

In short, a vested right arises from the scope of the building permit and applies to the land for which the permit was sought. A vested right does not arise for other lands just because a developer has expectations about future phases or related uses for those neighboring lands. That is true in Wisconsin and elsewhere.

C. The Authorization GSD Sought Was Limited to Seven Buildings on 98 Acres.

Even if it were possible for GSD to seek vested rights to lands other than those for which the building permit was sought, that is not what GSD did here. The building permit application was for seven buildings on 98 acres. The references to the 6,000 acres off that site were not part of the approval being sought.

1. The Building Permit Application Itself Was for Seven Buildings on 98 Acres.

GSD's building permit application was limited to seven buildings on 98 acres. As noted above, the building permit application filed with the Town on June 6, 2012 consisted of the Town's standard building permit form, a Design

Report which provided text for the building application and a facility development plan that contained drawings for the seven buildings. The application form stated:

- The "Area Involved" is "7 building structures"
- The "Project Location" is listed as "6,338 ac" but only the only legal description is: "SE¼ SW¼ of Section 20, T21 R6E."
- The occupancy as "dairy," not agriculture.

R. 67 (Reginato Aff., Ex. A); App.40.

The Design Report lists the "Site Location" by the legal description "SE¼ SW¼ of Section 20, T21 R6E, and the eastern 200 foot strip of SW¼ of SW¼. *See* Maps in Appendix A." *Id.*; App. 42. The only site-specific maps in Appendix A are soil boring maps limited to the building site. The sole reference to agricultural land in the design report is "The farm has approximately 6,112 acres of cropland owned, rented or in a land spreading agreement available to apply nutrients." *Id.* No legal description is provided for these acres.

The July 17, 2012 amended building permit application includes a separate attachment which specifically identifies the legal description for the building permit application. Entitled "Building Permit Application – Legal Description," it provides a detailed legal description of a site consisting of two and a half quarter quarter sections of approximately 98 acres. R. 2 (Complaint, Ex. G); App. 55. In short, the building permit application materials sought approval for seven buildings on the building site of 98 acres; nothing more.

2. In the Building Permit Litigation, GSD Repeatedly Argued that the Building Permit Application Was Only About Seven Buildings on 98 Acres.

During the Building Permit Case – from the opening statement to closing argument and throughout the hearing – "seven buildings" was GSD's consistent theme. GSD's counsel began the Building Permit Case hearing describing what GSD sought in terms of a building permit from the Town:

> **Mr. Hermaidan**: 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 (Reginato Aff. at 161-62, Building Permit Hearing Tr. 9-10). In the oral argument prior the Court's decision, the theme was the same – the building permit application was only about the seven buildings:

> **Mr. Hermaidan. 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.**
>
> ***
>
> And when **we talk about these buildings, which is what the focus of this case and the application has to be**, nobody has even come close to making the suggestion that these buildings are technically deficient… (Emphasis Added)

R. 67 (Reginato Aff. at 750,752, Building Permit Decision Tr. 10, 12.)

The court also made clear that the scope of its ruling was limited to the building permit for the seven buildings. The court began its ruling by noting:

> What the issue with regard to the building permit is, in essence, is whether the town of Saratoga by its building inspector had the requisite information which it needed to issue Golden Sands **the building permit to build the seven farm buildings that it applied for**, and whether they had that information on or before July 19, 2014(sic) when the moratorium went into effect. (Emphasis added)

Id. at 745. Thus, in its Order, the court directed its mandate not to "the Property" but rather to the seven "Proposed Buildings:"

> In its Petition, Golden Sands maintains that the Building Inspector unlawfully refused to issue a building permit to Golden Sands for the construction of seven buildings identified in its June 6, 2012 application to the town **(the "Proposed Buildings").**
>
> IT IS ORDERED, ADJUGDED AND DECREED that: …
>
> 2. [T]he Town, acting through its Building Inspector, shall issue the building permit to Golden Sands **authorizing the construction of the Proposed Buildings identified in the June 6, 2012 building permit** application form and the site plans submitted therewith. (Emphasis added)

R. 82. GSD never sought Town approval for the use of the 6,000 acres for agriculture. In claiming that the building permit is "not about land use" and that "the only issue before the town was the building permit for the buildings," GSD expressly acknowledged that the building permit did not extend to the associated land use.

3. The State Applications Submitted with the Building Permit Do Not Create Vested Rights in Town Zoning.

To bolster its claim about the scope of the building permit, GSD claims that the state applications it submitted to the Town "as a courtesy" defined the scope of the project and thereby created vested rights to more than the buildings. But, GSD

has cited no case in which applications submitted to other local and state agencies for approval at some future time create vested rights in local zoning. Indeed, existing case law is to the contrary. *See Willow Creek Ranch, LLC v. Town of Shelby*, 224 Wis. 2d 269, ¶23, 592 N.W.2d 15 (1998). In *Willow Creek*, where 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. The state permit, even when granted, did not create vested rights to local zoning.

Moreover, the scope of the building permit is determined by the building permit application and its request for Town approval of that permit. If there is no Town action, there can be no vesting of rights. 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.

D. Even If A Building Permit Could Authorize Off-Site Development, The Off-Site Development Proposed Here Was Uncertain And Therefore Cannot Trigger A Vested Right.

Even if it were possible for vested rights to arise for off-site lands and land uses through the building permit process, a certain level of specificity as to the lands and land use at issue is necessarily required before any rights could vest. The circuit court found that "Golden Sands Dairy's building permit application was complete in all respects required under the law for construction of Golden Sands Dairy's seven agricultural buildings." R. 86 (Decision Tr. 71); App 16.

That has never been the case as to the proposed cropland, and to the extent that information is available at all, it has been a moving target.

The Design Report submitted with the building permit application stated, "the farm has *approximately* 6,112 acres of cropland owned, rented or in a land spreading agreement available to apply nutrients." R. 67 (Reginato Aff., Ex. A); App. 46. However, GSD also provided the Town with copies of the permits it submitted to the DNR "as a courtesy." R. 69 (GSD Br. at 32). As part of those submittals, there was a proposed nutrient management plan (NMP) application that was submitted to the DNR. The NMP listed the acreage for proposed landspreading as 6,338 acres and attached various proposed maps but no legal descriptions. R. 59 (Wyscoki Aff., Ex. D-2). The use of this area for landspreading is subject to DNR approval at some future time after a series of future events which have not yet transpired.

On March 7, 2014, GSD submitted a revised NMP to DNR along with its Environmental Impact Report. That application had substantially revised the amount and location of land proposed for landspreading. R. 74 (Second Hoefer Aff.; Exs. H and J). The amount of proposed irrigated cropland in the revised application includes 6,460 acres; 4,660 acres of converted pine plantation in the Town and 1,800 acres of existing cropland now located outside of the Town of Saratoga. R. 86 (Decision Tr. 72); App 17; and R. 63 (Hoefer Aff., Ex. C); App. 62-67. The amount of land that may be used by GSD in the Town has changed significantly. Subsequently, the DNR submitted comments on the EIR to which

GSD responded in a 105-page document on August 19, 2014. In its response, GSD repeatedly noted that *further revisions* to the NMP were being prepared to address various DNR concerns. R. 74 (Second Hoefer Aff.; Ex. I). Final approval of the NMP has not yet occurred.

The circuit court found as an undisputed fact that at the time of the building permit application, the amount of land to be used for agricultural purposes was uncertain. The court found:

> The project map that accompanied the application shows that acres may be used for the project purposes **presumedly could** include landscaping [sic landspreading] and irrigated crops. **Which of those acres will actually be used for purposes was not known at the time of the submittal of the building permit** because state permits associated with manure spreading and high capacity wells were not granted.
>
> ***
>
> 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.
>
> The proposed Nutrient Management Plan provided to the Town concurrent with the building permit application showing potential land application sites has been revised from 6,338 acres to 6,460 acres of land, which approximately 4,600 are in the Town and 1,800 acres outside the Town. (Emphasis added)

R. 86 (Decision Tr. 67, 73-74); App 12, 18-19.

And while the circuit court also concluded that use of the land is integral to the farm operation, (*Id.* at 89; App 34), that conclusion is not supported by the record in this case. Certainly the production of irrigated potato and vegetable

crops could occur in a variety of locations and is not central to the dairy operation. While the dairy operation needs to have to have some place to spread the 55 million gallons of liquid manure and associated solid manure, that activity does not have to take place in the Town. Indeed, the record demonstrates that as of the most recent submittal to the DNR, GSD is now planning to land apply manure to 1,800 acres of existing cropland *outside* the Town. It may be that GSD 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.

There is no case law in Wisconsin or elsewhere that has come close to authorizing the *carte blanche* extension of vested rights to thousands of undefined acres of land outside of the area described in a building permit. If GSD can obtain a vested right to use any land in which it has an interest for agricultural uses because of a building permit for seven buildings, the implications for land use statewide are daunting.

IV. VESTED RIGHTS INVOLVES A BALANCING OF PUBLIC AND PRIVATE INTERESTS.

The doctrine of vested rights is not a one-way street; it is designed to accommodate both public and private interests. As succinctly summarized by the court in *Abbey Road* with respect to Washington's vested rights statute:

> The goal of the [vested rights] statute is to strike a balance between the public's interest in controlling development and the developers' interest in being able to plan their conduct with reasonable certainty. Development interests can often come at a cost to the public interest. The practical effect of recognizing a vested right is to potentially sanction a new nonconforming use. A proposed development which does not conform to newly adopted laws, is by definition,

> inimical to the public interest embodied in those laws. If a vested right is too easily granted the public interest could be subverted. (Emphasis added).

218 P. 3d at 183.

GSD repeatedly attempts to characterize the Town as attempting to thwart GSD's property interests. What GSD fails to acknowledge is that the Town also has legitimate rights and responsibilities to protect the Town and its residents. Five years before GSD made its application to the Town, the Town developed a comprehensive plan to address activities with potential adverse public impacts. Among these concerns was the susceptibility of local soils to groundwater contamination. The 2007 Plan was not an attempt to deprive GSD of a project that it had not even conceived at the time; it was directed to ensure that future land uses would be compatible with residential, forestry and other existing uses, and that the groundwater, trout streams and other resources in the Town would be protected.

Its 2012 zoning ordinance is designed to effectuate that 2007 Plan. It expressly recognizes the concerns noted in the 2007 Plan. Among these concerns is that the U.S. Geological Survey and the Wisconsin DNR have identified the Town as an area that is highly susceptible to groundwater contamination due to highly permeable soils and high groundwater tables. R. 63 (Hoefer Aff., Ex. D, Town Zoning Ordinance §1.4); App. 61. As a result, a stated purpose of the zoning ordinance is to protect the health, safety and welfare of the Town recognizing the following:

> The Town residents rely on groundwater for drinking water and other purposes. In many cases, the groundwater comes from shallow wells that can be easily impacted by sources of contamination or drawdown. There are two trout streams that run through the Town that can also be impacted by sources of contamination or drawdown.

Id.

While GSD's building permit application may have vested prior to the effective date of the ordinance that should not subvert the Town's longstanding and legitimate rights to regulate land use to protect its residents from activities occurring off the building permit site. 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, GSD's vested rights argument means that any of the land in which GSD has "an interest" as of the date of its building permit application is indefinitely removed from regulation under the Town's zoning ordinance for any agricultural purpose. In essence, GSD 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. No case in Wisconsin sanctions such a one-sided balance. GSD has a vested right to the seven buildings on 98 acres. GSD does not have a vested right to use 6,000 acres of land in a manner inconsistent with Town zoning and the public interest.

CONCLUSION

For the foregoing reasons, the Town of Saratoga respectfully requests that the decision of the circuit court be reversed, and that the Court find that GSD does not have any vested right to use thousands of acres of land in the Town outside of the Building Permit site for uses inconsistent with the Town's zoning ordinance.

DATED this 24th day of August, 2015.

CRIVELLO CARLSON, S.C.
Attorneys for Town of Saratoga,
Terry A. Rickaby, Douglas Passineau,
Patty Heeg, John Frank, and Dan Forbes.

BY: _____
REMZY D. BITAR (State Bar No. 1038340)
RYAN G. BRAITHWAITE (State Bar No. 1037232)
MATTEO REGINATO (State Bar No.: 1089724)

P.O. ADDRESS:
710 North Plankinton Avenue
Milwaukee, WI 53203
Phone: 414-271-7722
Fax: 414-271-4438
Email: rbitar@crivellocarlson.com
rbraithwaite@crivellocarlson.com
mreginato@crivellocarlson.com

OF COUNSEL
STAFFORD ROSENBAUM LLP
Paul G. Kent (SB #1002924)
P.O. Box 1784
Madison, WI 53701-1784
Telephone: 608-256-0226
Fax: 608-259-2600
Email: pkent@staffordlaw.com

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 8,921 words.

Dated: August 24, 2015.

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: August 24, 2015.

REMZY D. BITAR

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: August 24, 2015.

REMZY D. BITAR

CERTIFICATION REGARDING ELECTRONIC APPENDIX

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that the electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated: August 24, 2015.

REMZY D. BITAR

CERTIFICATION OF FILING AND SERVICE

I certify that the brief and appendix were hand delivered to the Clerk of the Court of Appeals on August 24, 2015.

I further certify that, on August 24, 2015, three copies of the brief and appendix were mailed via U.S. Mail to:

Brian G. Formella
P.O. Box 228
Stevens Point, WI 54481-0228

Jordan J. Hermaidan
P.O. Box 1806
Madison, WI 53701-1806

Monte Weiss
1017 W. Glen Oaks Ln., Suite 207
Mequon, WI 53092

I further certify that the brief and appendix was correctly addressed and postage was prepaid.

Dated: August 24, 2015.

REMZY D. BITAR