STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP001258

GOLDEN SANDS DAIRY, LLC.

Plaintiff-Respondent,

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.

RESPONSE BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT GOLDEN SANDS DAIRY, LLC

On Appeal from the Circuit Court of Wood County
The Honorable Thomas Eagon Presiding
Circuit Court Case No. 12-CV-0389

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication of this Court's opinion is requested. This appeal involves well-established rules of law to a fact pattern distinct from that in published opinions and is also an area of continuing public interest within the meaning of Wis. Stat. §§ 809.23(1)(a)(2) and 809.23(1)(a)(5). Furthermore, pursuant to Wis. Stat. § 809.22, Appellee requests the opportunity for oral argument, as this case involves a detailed procedural history, law of the case and public policy considerations. Oral argument also may benefit the Court's understanding of the case and the potential consequences of its decision.

STATEMENT OF THE CASE

The trial court in this case concluded on summary judgment that Golden Sands, LLC and Ellis Industries Saratoga, LLC ("Golden Sands") acquired vested rights to develop a dairy farm in the Town of Saratoga in Wood County (the "Town"). The Court should affirm the trial court's grant of summary judgment in this case. This appeal is not, as the Town describes it, to determine if Golden Sands can "convert" a building permit for seven buildings into

vested rights to develop an entire farm. It is about whether an indisputably complete building permit application that identified the geographic and operational scope of Golden Sands' proposed farm (the "Farm") was adequate to vest Golden Sands with the right to use the Farm property for agricultural purposes.

Golden Sands' right to develop the entire Farm property in accordance with the property's "unrestricted" zoning classification vested on the date Golden Sands filed a complete building permit application for the project that complied with all existing building and zoning regulations. Under a fair, consistent and reasonable application of Wisconsin vested rights law, Golden Sands has a vested right not only to construct buildings and to house and feed its cows, but to use the land identified in the building permit application for the fully integrated dairy farm Golden Sands had invested millions of dollars developing well before the Town even drafted a proposed zoning ordinance.

In 2011 and 2012, Golden Sands invested over $2,000,000 to develop its proposed dairy farm, all of it on land where use was unrestricted by any zoning law since zoning was first implemented in this state nearly a century

ago. By June 6, 2012, with no zoning restrictions on the horizon, Golden Sands had obtained ownership rights in the land, applied for a building permit from the Town, applied for a manure storage permit from Wood County, and filed a comprehensive set of permit applications with the Wisconsin Department of Natural Resources ("DNR"): (i) to construct and operate the manure handling and storage facilities; (ii) to apply manure fertilizer to the Farm's crops, and; (iii) to use groundwater to irrigate the Farm's crops.

In reaction to Golden Sands filing its applications, the Town imposed a blanket development moratorium, drafted and enacted an interim zoning ordinance, obtained zoning authority from its electors, then quickly put in place a permanent zoning ordinance, which prohibited virtually all agricultural uses in the Town, including in all of the area to be occupied by the Farm.

On the basis of its post-hoc reaction, the Town now asks this Court to divest Golden Sands of millions of dollars and of Golden Sands' right to use the land for the purpose that was lawful at the point in time Golden Sands submitted its complete building permit application. The Town's approach depends on the notion that the Farm's crop fields

are not an integral part of the Farm but instead constitute an "ancillary", "off-site" use. In spinning the illusions of a functionally divisible project and applying separate legal standards to each of its components, however, the Town ignores the undisputed central fact of this case: the Farm was conceived, planned, developed and proposed as an economically integrated agricultural project.

Allowing the Town to retroactively apply zoning when Golden Sands made such enormous investments in reasonable reliance on the unrestricted zoning classification of the Farm property would extinguish the principle of legitimate investment backed expectations as the basis of vested rights law in Wisconsin.

Investment in economic growth will suffer a significant blow if investors cannot rely on the land use rules in place at the time they file their complete building permit applications. For these reasons, and those presented below, Golden Sands requests this Court affirm the decision of the trial court.

STATEMENT OF FACTS

Procedural Facts

On July 27, 2012, Golden Sands filed a Verified Petition for Alternative Writ of Mandamus (the "Building Permit Litigation") pursuant to Wis. Stat. § 753.04 seeking to compel the Town's building inspector to issue a building permit for the buildings Golden Sands would construct in connection with its proposed Farm. (R. 86: 4; *see* R. 60, Ex. B: *Golden Sands Dairy, LLC v. Lorelei Feuhrer and Town of Saratoga*, Wood County Case No. 12-CV-362.) In its Petition, Golden Sands contended it was entitled to a building permit, as it met all of the applicable requirements of the Town's building code prior to the Town's July 19, 2012 enactment of a development moratorium. On April 11, 2013, the circuit court ruled there was no lawful basis for the Building Inspector or the Town to withhold the building permit, and ordered it issued forthwith.

The Town subsequently appealed the circuit court's decision. On July 24, 2014, this Court upheld the circuit court's decision in *Golden Sands Dairy v. Town of Saratoga et. al.*, 2013AP1468, holding that: (i) mandamus was proper; (ii) Golden Sands was entitled to rely on the "Unrestricted"

zoning classification that was in effect at the time Golden Sands applied for the building permit; (iii) the Town's building code did not apply to farm buildings; and (iv) Golden Sands met the applicable requirements for a building permit prior to the Town's enactment of its development moratorium. (R. 60, Ex. B, ¶ 41, 57, 65, 74.)

This Lawsuit

Just two weeks after Golden Sands initiated the Building Permit Litigation, and fully cognizant of the limited nature of the remedy available in mandamus, Golden Sands filed this action seeking, among other relief, a declaration that Golden Sands acquired vested rights in agricultural use of the entire Farm property when it filed a complete building permit application describing that use prior to the Town engaging in any zoning-related action. (R. 1.)

On that question, the parties filed cross motions for summary judgment and submitted extensive briefs, affidavits and documents. Included in the summary judgment record were all of the material facts, supporting materials and findings from the Building Permit Litigation. On March 27, 2015, in an extensive oral decision, the circuit court granted Golden Sands' motion for summary judgment. (R. 86: 91.)

The circuit court concluded that (i) Golden Sands acquired a vested right to agricultural use the entire Farm property as described in conjunction with its building permit application, and (ii) the Town's permanent zoning ordinance could not be applied against Golden Sands retroactively. (R. 86: 91.)

Golden Sands Submitted A Complete Building Permit Application To The Town Fully Disclosing An Integrated Dairy Farm With Extensive Cropland Surrounding The Farm Buildings

In 2011, Golden Sands evaluated the potential purchase of a seven thousand acre timber plantation from Plum Creek Timberlands, L.P. (the "Farm property") in the Town 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 or even proposed zoning ordinances that would prohibit or otherwise restrict agricultural use. (R. 59:7-8, R. 60, Ex. B, ¶ 18-19.)

Based on its diligence, Golden Sands paid $2,433,232.90 to Plum Creek for ownership rights in the Farm property. (R. 59, ¶ 12; R. 60, Ex. A: 55, Ex. B, ¶ 20.) At the cost of hundreds of thousands of dollars, Golden Sands also 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 this integrated crop and dairy 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 landspreading manure fertilizer, designing the required components of the dairy, drafting plans and specifications, and preparing a comprehensive set of permit applications to the Town, Wood County, and the DNR. (R. 59, ¶¶ 10, 11; R. 60, Ex. A: 55, Ex. B, ¶ 20.)

On June 6, 2012, after completing its due diligence and investing millions of dollars, Golden Sands filed its applications for the permits it would need to build and operate the Farm (the "Applications"). (R. 59, ¶ 13; R. 60, Ex. A:56, Ex. B, ¶ 20.) The Applications Golden Sands submitted on June 6, 2012 included:

- Wisconsin Uniform Building Permit Application for approval to construct the buildings which would house the Farm's dairy production operations (the "Building Permit Application"). (Town of Saratoga, Wood County, Wisconsin.
- Application for a Permit to Construct an Animal Waste Storage Facility, submitted to Wood County, Wisconsin.
- Wisconsin Pollutant Discharge Elimination System ("WPDES") Permit Application, submitted to the DNR, together with the following documents:
    - 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.
    - Request for Approval of Plans and Specifications for the Farm's manure handling and storage facilities at the Farm's dairy production facility.
    - 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.
    - A Storm Water Notice of Intent
- Applications for High Capacity Wells, submitted to WDNR, for approvals to install and operate wells for irrigation of the Farm's crop fields and for watering, cleaning and cooling operations on the Farm's dairy production facility.

(R. 59, ¶ 14, Exs. B-E, R. 86: 68.)

To apprise the Town of the geographic and operational scope of the proposed Farm, Golden Sands attached to the Building Permit Application the applications for the WPDES Permit, the for High Capacity Wells, the Wood County Animal Waste Facility permit, and the filled-out DNR Environmental Analysis Questionnaire. (R. 59, ¶ 14; R. 86: 69.) Attached directly to the Building Permit Application was a scale map showing the proposed geographical boundaries of the Farm, including both the crop fields and the dairy production facility. (R. 59, Ex. D-1; App. 002.)

From the outset, the Farm was conceived, developed and described as an integrated dairy and crop farm. (R. 59, ¶ 16; R. 60: 81-83). This integrated dairy and crop farming approach reflects a farming methodology the Wysocki family of companies developed, called, "Farming Full Circle." (R. 59, ¶ 16.) Under the Farming Full Circle concept, dairy and crop production are integrated as a single farming project. Food and forage for the cows are grown in the crop fields. (R. 59, ¶ 17; App. 017-019.) Nutrients in the form of manure from the Farm's cows and feed residues are produced at the Farm's dairy barns, which are then used to fertilize the Farm's crop fields. (R. 59, ¶ 17, App. 017-019.) The

Wysocki family of companies implemented the Farming Full Circle approach in 2006 when it constructed and placed into operation the Central Sands Dairy farm in the Township of Armenia in Juneau County. (R. 59, ¶ 17.)

When Golden Sands Submitted Its Building Permit Application To The Town, Agriculture Was A Permitted Use For The Entire Farm Property.

When Golden Sands submitted its Building Permit Application to the Town, the Wood County Zoning Ordinance was the only applicable zoning regulation within the Town. The Farm property was located entirely within the unrestricted district, which permitted the land to be used for any purpose whatsoever not in conflict with law. (R. 59, ¶ 8; R. 60, Ex. A: 55, 65, Ex. B, ¶¶ 6-7, Exs. C-D.) The unrestricted district, applicable to the Farm property at the time Golden Sands submitted its Building Permit Application to the Town, thus allowed for the type of farming operation Golden Sands sought to develop. (R. 59, ¶¶ 7-9; R. 60, Ex. A: 55; Ex. B, ¶¶ 6-7, Ex. C.)

In its fact recitation, the Town cites its adoption of a comprehensive land use plan in 2007 disfavoring agricultural uses in certain areas of the Town. The Town makes no cogent argument, however, about its legal relevance. That it

has no legal significance is the law of this case. (R. 60, Ex. A: 53, 66, Ex. B, ¶¶ 11-13, 62.) Despite the Town's adoption of the plan in 2007, when Golden Sands submitted its Building Permit Application, the Town's electors had not granted the Town the necessary authority to adopt a new zoning ordinance. (R. 60, Ex. B, ¶¶ 17, 62.) Nor, at that time, had the Town even developed or circulated for public discussion a first draft of any complete zoning ordinance. (R. 60, Ex. A: 53-54, Ex. B, ¶¶ 15-16, 62, 64.) When Golden Sands filed the Building Permit Application in mid-2012, the only draft of a zoning ordinance available did not contain any language prohibiting agricultural use of the land to be occupied by the Farm. (R. 60, Ex. A: 54, 66-67, Ex. B, ¶¶ 16, 62, 64.)

The trial court properly found, and this Court affirmed, that even if Golden Sands had engaged in more investigation than it did, Golden Sands would not have learned of any plans by the Town to prohibit agricultural use on the Farm property. In short, the Town's slow, multi-year process of developing a proposed zoning ordinance exhibited no signs of significant progress let alone completion. (R. 60, Ex. A: 66-67, Ex. B, ¶¶ 14-16, 64.) In sum, it is the law of this case that when

Golden Sands submitted its Applications, there was insufficient evidence for Golden Sands to conclude the Town would soon act to prohibit large agricultural uses on the Farm property, or anywhere else in the Town for that matter. (R. 60, Ex. A: 66-67, Ex. B, ¶ 64.)

The Town Unlawfully Delayed Issuing The Building Permit While It Worked To Zone Out The Proposed Use.

After Golden Sands filed its Building Permit Application, Town officials castigated Golden Sands for failing to give advanced warning to the Town. In fact, the Town chairman vowed to Mr. Wysocki that he would do everything he could to stop development and construction of the Farm. (R. 60, Ex. A: 56-57.) In the first Town Board meeting after Golden Sands submitted the Building Permit Application, the Town Board invited Professor George Kraft to discuss how water levels in the Town might be impacted by the multiple proposed high capacity wells that would irrigate the Farm's proposed crop fields. (R. 71, Ex. A, App. 020-021.) George Kraft returned to another Town Board Meeting on July 3, 2012, to again, discuss the high capacity well permits in the context of "Wysocki Farms." (R. 71, Ex. C, App. 022-023.)

After weeks of requests from the Town's building inspector for more and more information about the Building Permit Application, the building inspector invited Golden Sands to the Town Hall on July 17, 2012, to receive the building permit. However, Town officials intercepted the building inspector and instructed her not to issue the building permit. (R. 60, Ex. A: 59-60.)

Two days later, on July 19, 2012, at a special Town Board meeting, the Town Board unanimously adopted Ordinance 07-19-12 entitled, "Ordinance Imposing Moratorium on the Issuance of Building Permits Approval of Site Plans or Construction Inconsistent With Existing Land Use Pending the Study of Possible Legislative Action" (the "Moratorium"). (R. 60, Ex. B, ¶ 22, Ex. F.) The Town had not yet acquired zoning authority from its electors when it enacted the Moratorium. (R. 60, Ex. B, ¶ 17.) On August 21, 2012, the Town Board adopted an Interim Zoning Ordinance, prohibiting agricultural use on the Farm property. (R. 60, Ex. G.) Even then, the Town did not have zoning authority. (R. 60, Ex. B, ¶ 17.)

Only on September 24, 2012 did the Town's electors authorize the Town to engage in zoning under Wis. Stat.

§ 60.62. (R. 29, ¶¶ 99-100; R. 32, ¶ 100; R. 60, Ex. B, ¶ 17; R. 86: 62.)

On October 17, 2012, the Town board met and approved Town Ordinance 10-17-12 (the "Permanent Zoning Ordinance"). (R. 29, ¶ 102; R. 32, ¶ 102). The Wood County Board approved the Permanent Zoning Ordinance on November 13, 2012, and the Town Board ratified the Permanent Zoning Ordinance on November 14, 2012. (R. 29, ¶ 103-104; R. 32, ¶ 103-104).

Under the Permanent Zoning Ordinance, agricultural uses are prohibited everywhere in the Town except for those areas zoned "Farmland Preservation." (R. 29, ¶ 106; R. 32, ¶ 106). Less than two percent of the Town of Saratoga is zoned "Farmland Preservation", and none of the Farm property falls within the "Farmland Preservation" zoning district. (R. 29, ¶¶ 107-108; R. 32, ¶¶ 107-108; R. 86: 66.) All of the Farm property falls within the Town's new Rural Preservation district, which prohibits agricultural uses such as the Farm.

At the conclusion of the Building Permit Litigation, the trial court concluded, in a final decision this Court affirmed, that Golden Sands had filed a complete building permit application before any of the Town's enactments

regulating land use. It is on that basis that the trial court turned its examination in this case to whether Golden Sands had adequately apprised the Town in its Building Permit Application of the scope and function of the Farm, and in so doing whether it acquired vested rights to the land use associated with the buildings for which the Building Permit Application was submitted.

The Circuit Court Decides that Golden Sands Acquired Vested Rights to Agricultural Use of the Farm Property

On March 27, 2015, the circuit court granted Golden Sands' motion for summary judgment. (R. 86: 68.) The circuit court concluded that (i) Golden Sands acquired a vested right to use the property for the operation of the dairy as specified in its permit applications, and (ii) the Town's permanent zoning ordinance could not be applied against Golden Sands retroactively. (R. 86: 68.)

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 scheme then in place, and; (ii) and that the proposed

agricultural use was integrally related to the structures for which the permit was requested. Golden Sands' right to the agricultural use of the Farm property vested at the same time as its right to receive the building permit to construct the buildings that are part of the Farm. (R. 86: 67-68, 90-91.)

STANDARD OF REVIEW

This Court reviews the trial court's summary judgment de novo, applying the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). The Court "will reverse the judgment of the circuit court only if it incorrectly decided a legal issue or if material facts are in dispute." *Van Straten v. Milwaukee Journal Newspaper-Publisher*, 151 Wis. 2d 905, 911, 447 N.W.2d 105 (Ct. App. 1989) (citation omitted). In this case, the parties agreed there were no genuine disputes of material fact. (R. 86: 3.) The question before this Court is therefore whether the trial court incorrectly applied the law of vested rights.

Importantly, the Town did not dispute any of the facts the trial court adopted – and that the trial court and this Court applied – in the Building Permit Litigation. The central factual finding in the Building Permit litigation was that

Golden Sands submitted a complete building permit application prior to the Town's adoption of any land use regulations. In this case, the trial court examined the undisputed scope of the uses associated with the buildings that were the subject of the Building Permit Application, and applied vested rights law to the undisputed facts. The trial court concluded that Golden Sands had reasonably relied on the Wood County classification to develop and operate the entirety of its proposed Farm, not just to construct its buildings and house cows.

As demonstrated below, the trial court correctly applied Wisconsin vested rights law in concluding Golden Sands has a right to agricultural use of the Farm property as described in the Building Permit Application submitted to the Town. For the reasons set forth below, this Court should affirm that conclusion.

ARGUMENT

In Wisconsin, a vested right to construct buildings carries with it a vested right to *use* the land identified in the application for the purposes associated with the buildings. Wisconsin law does not limit that use to the building site itself. Rather, cases consistent with Wisconsin's building

permit-based approach to vested rights instruct that vested rights extend to the land uses associated with the buildings as described in the building permit application.

That is precisely the approach the trial court followed in granting summary judgment to Golden Sands. The undisputed record is that the Farm was conceived, developed and applied for as an integrated, interdependent whole. (R. 86: 82-83.) The circuit court correctly concluded that the agricultural use to which all of the Farm property will be put is not susceptible to any legally relevant division for vested rights purposes. The Town failed on summary judgment to provide any evidence to support the assertion – central to the arguments in advances in this appeal – that the Court should view the Farm as a collection of legally distinct uses, but it did not. Rather, as the trial court concluded, the Farm is an integrated, interdependent whole. (R. 86: 82.)

As shown below, Wisconsin's vested rights law is built upon two primary principles that support the trial court's conclusion that Golden Sands acquired vested rights to agricultural use of the Farm property. First, a building permit application is the temporal trigger at which vested rights are evaluated, not only for the construction of buildings, but for

the use of the property the buildings will serve. Second, the submission of a complete building permit application that complies in all respects with then-existing building and zoning laws gives rise to vested rights in the full extent of the land use that is described in the application and is integrally connected with the proposed buildings that are the subject of the application. Golden Sands satisfies both of these requirements. It spent enormous resources doing so in reliance on the long-standing "unrestricted" zoning classification of the Farm property. And, the trial court correctly concluded that the Town zoning scheme enacted after and in direct reaction to Golden Sands' building permit application could not be used to deprive Golden Sands of its legitimate investment backed expectations.

I. THE TRIAL COURT CORRECTLY PROCEEDED FROM THE PRINCIPLE THAT A COMPLETE BUILDING PERMIT APPLICATION SERVES AS THE TEMPORAL TRIGGER FOR VESTED RIGHTS IN LAND USE.

It was conclusively established in the Building Permit Litigation, and not disputed in this case, that Golden Sands timely submitted to the Town a complete building permit application that complied fully with all existing requirements,

including any applicable zoning requirements, and that it did so prior to the Town's enactment of the Moratorium, the Interim Zoning Ordinance, and the Permanent Zoning Ordinance. (R. 60, Ex. A: 65, Ex. B, ¶ 67).

Both the Town and Golden Sands appear to agree on the threshold proposition that 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). 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, *Law of Zoning and Planning* § 70:16 (2014).

The state of Washington also follows this approach. *Valley View Indus. Park v. City of Redmond*, 107 Wn. 2d 621, 637, 733 P.2d 182 (1987) (holding that the right to a building permit, and thus, the land use associated with it, vests upon submission of a complete and compliant application). The Washington Supreme Court observed the building permit application is a useful tool for determining vested rights,

because it provides a date certain upon which courts can determine rights have vested. *Hull v. Hunt*, 53 Wn. 2d 125, 130, 331 P.2d 856 (1958) ("Notwithstanding the weight of authority [supporting the majority view], we prefer to have a date certain upon which the right vests . . . .").

In *Valley View*, the Washington Supreme Court held that "a developer's right to develop in accordance with a particular zoning designation vests only if the developer files a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop." *Valley View*, 107 Wn. 2d at 638. This approach is consistent with Wisconsin's in cases like *Lake Bluff*.

While the Town appears to accept the general proposition that vested rights in land use are determined by filing of a complete building permit application, it seeks to arbitrarily limit the vested rights of Golden Sands to a portion of the Farm property. The Town concedes that the filing of the Building Permit Application entitles Golden Sands to the right to use the buildings for agricultural purposes but argues, incorrectly, that Golden Sands' vested rights in agricultural

use must stop at the borders of the barn yard and cannot extend to the rest of the Farm property identified in the Building Permit Application. (App. Br. 17-30.) As demonstrated next, Wisconsin vested rights law admits of no such limitation.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT IN FILING A COMPLETE BUILDING PERMIT APPLICATION GOLDEN SANDS ACQUIRED A VESTED RIGHT IN AGRICULTURAL USE OF THE FARM AS A WHOLE, NOT THE FARM BUILDINGS ALONE.

In seeking to limit Golden Sands' vested rights to agricultural use to the ground on which the buildings will be constructed, the Town makes three legal arguments: (i) that a property owner has no vested right to rely on existing zoning; (ii) that the "building permit exception" does not apply to land and land uses for which no building permit is required, and; (iii) that vested rights do not extend to "ancillary" "off-site" uses of property. (App. Br. 18-24.) None of these arguments displace the common law principle that vested rights derived from a building permit application extend to integral use of the project land that is described within the building permit application and integrally related to the use of those buildings. Failing success on these arguments, the

Town asks the Court to limit Golden Sands' vested rights on grounds that the scope of Golden Sands' Building Permit Application was strictly limited to the seven buildings. This assertion directly contradicts the undisputed summary judgment record, and therefore cannot form the basis for disturbing the trial court's decision.

A. The Cases The Town Relies On For The Proposition That There Is No Vested Rights In Existing Zoning Are Inapposite.

The Town opens its brief with the unqualified assertion that a property owner has no vested rights to existing zoning. (App. Br. 14-17.) In support, the Town cites *Eggebeen v. Sonnenburg*, 239 Wis. 213, 1 N.W.2d 84 (1941), where the court held that residents of a single-family neighborhood who opposed the rezoning of a nearby property for an apartment house had acquired no vested rights against rezoning merely because of their own reliance upon the original zoning. Golden Sands' claim is nothing like that in *Eggebeen*. Here, the issue is whether Golden Sands' acquired vested rights to agricultural use of the Farm property when it submitted its complete Building Permit Application to the Town seeking approval to construct buildings so that the entirety of the Farm property could be developed as an

agricultural use. The Town also cites *Buhler v. Racine County*, 33 Wis. 2d 137, 146 N.W.2d 403 (1966), a case in which the court declined to reverse a county's refusal to rezone a parcel of land from residential to commercial zoning. *Buhler* is thus also inapposite to the issue in this case. The issue in this case is whether Golden Sands' rights vested in the "unrestricted" zoning classification when it submitted a complete Building Permit Application that complied with all building and zoning laws then in existence.

To be sure, Golden Sands asserts it acquired vested rights to use the Farm property consistent with the existing zoning unrestricted zoning classification, but that claim is based squarely on Golden Sands' submission of a complete building permit application. Because neither *Eggebeen* nor *Buhler* involved the application of the vested rights doctrine based on the submission of a building permit application, those cases provide no useful guidance in this appeal.

B. That No Building Permit Was Required For Agricultural Use Of The Farm Property Other Than The Buildings Is Legally Immaterial.

The Town argues that because no building permit was required for the land use itself, but only for construction of

the buildings, Golden Sands cannot acquire a vested right to agricultural use of the surrounding Farm property but only on the specific portion of the Farm property where the buildings will be located. (App. Br. 19.) The Town offers no authority for this specific proposition. Instead, it asks the Court to indulge in the simplistic notion that "building permits are required for buildings, not for land uses for which there are no buildings." In making this argument, the Town promotes a fiction that carries through its entire presentation – that the agricultural use of Golden Sands' farm buildings is somehow divorced from Golden Sands' agricultural use of the remainder of the Farm property. This fiction is belied by the undisputed record. Golden Sands' Farm is an integrated farming operation and was intended to be from the start. Golden Sands made enormous investments in the development of the Farm as an integrated whole. Golden Sands did so in reliance on the unrestricted zoning classification of the Farm property.

In positing its novel rule that vested rights arising from a building permit application cannot encompass vested rights in anything other than the intended use of the buildings themselves, the Town ignores the central dispute in nearly all

of Wisconsin's vested rights cases is ultimately about the right to use the land in a way permitted under then-existing zoning law. In *Rosenberg v. Village of Whitefish Bay*, 199 Wis. 214, 225 N.W. 838 (1929), the Supreme 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), the Supreme 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), the Supreme 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. There is simply no basis in Wisconsin law for the Town's attempt to bifurcate the vested rights analysis into the construction and use of buildings on the one hand, and the integrally dependent use of the land associated with those buildings on the other.

C. The Trial Court Properly Treated The Farm As A Single Integrated Project For Vested Rights Purposes.

The Town argues that the agricultural use of the buildings should be cleaved from the agricultural use of the associated Farm property for purposes of assessing Golden Sands' vested rights. Specifically, the Town argues that use of the lands surrounding the buildings for crop production to feed the livestock and to fertilize the crops with nutrients produced by the livestock is an "ancillary off-site" use or an "expansion" of the agricultural use. (App. Br. 14-17, 20.)

Adopting this characterization would require complete abandonment of the undisputed summary judgment record upon which the trial court relied. That record demonstrates the Farm's crop fields to be part of an integrated agricultural operation, not an "ancillary" use. The trial court emphasized this fact for purposes of assessing Golden Sands' vested rights:

> The use of the acreage that is described [in the building permit application] is integral to the farm operation that was described [in the building permit application] and, therefore, Golden Sands has a vested use in what was allowed at the time the building was applied for, which was agricultural use.

(R. 86: 89.) Golden Sands submitted abundant evidence for this ultimate proposition, the Town never disputed it, and the trial court adopted it as central to its decision.

Specific evidence of the integrated relationship between the use of the proposed buildings and the rest of the Farm property is found throughout the summary judgment record. Together with its complete and compliant Building Permit Application, Golden Sands submitted to the Town:

- A copy of its WPDES Permit application that would regulate discharges from both the dairy production facility and the application of manure to the crop fields on the Farm property;
- A proposed Nutrient Management Plan which detailed the proposed fields for crop production and application of manure nutrients to the crops;
- Applications for several high capacity well approvals for wells that the Farm will need to irrigate the crop fields on the Farm;
- An Environmental Analysis Questionnaire for the Farm describing the farming operation as a whole; and
- The Wood County Animal Waste Storage Facility permit.

(R. 60, Exs. D, E.)

Both the Building Permit Application and the copies of these other applications, disclosed to the Town the full geographic

and substantive extent of the proposed use of the Farm property as an integrated dairy and crop agriculture project. (R. 86: 82-83.) Even the building permit application form that Golden Sands submitted to the Town on June 6, 2012 included a description of the lot area as 6,338 acres, and attached to the back of the application form a map which showed both the building site and the portions of the Farm property which Golden Sands planned to grow crops and apply manure fertilizer. (R. 59, Ex. A; R. 60, Ex. B, App. 001-019.)

The Environmental Assessment Questionnaire and the Nutrient Management Plan both contained hundreds of pages of maps of the fields that would be used to grow crops that would be fertilized with manure produced by the Farm's livestock; SNAP-Plus reports for soil types, slopes, phosphorus, tolerable soil loss, and nutrient applications through 2017, fifteen pages of narrative describing the nutrients Golden Sands would generate and its plan to manage those nutrients on the acreage proposed for conversion; and a full description of the Farming Full Circle practices Golden Sands would implement on those fields. (R. 60, Ex. D, Vol. D-1, App. 016-019.) The Environmental

Analysis Questionnaire also 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. It follows the model and practices established at Central Sands Dairy, LLC built in Juneau County, Wisconsin. This project will include building structures and equipment to house dairy cows, store and manage feed inputs and manure/organic fertilizer, a milking center and a farm office.
>
> 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, App. 003-005.)

All of these materials filed with the Building Permit Application show that, from the beginning Golden Sands envisioned, planned for, purchased ownership rights in – and most importantly invested heavily in – a Farm that grows crops, feeds cows, milks cows, and fertilizes crops. The Town's suggestion that these activities can be broken down into separate and distinct "ancillary" or "off-site" uses not only belies the undisputed summary judgment record, it betrays common sense in a state whose identity is grounded in farming. The trial court, in its decision, aptly sums up its observation that the Farm is a single, integrated operation:

> We have a dairy farm. The farm has been described – as has been described, it is not a piecemeal farm. You have a milking station. You have crops. You have feeding. This farm, as has been applied and as presented, is a whole operation from beginning to end: growing crops to feed the cows; the concentrated feeding operation; the deposing [sic] of the animal waste to fertilize the crops; and the milking of

> the cows. ***The operation was laid out in all its applications that were filed with the building permit in June of 2012***.

(R. 86: 82-83.) (Emphasis added.)

D. Because The Farm Was Planned, Invested In, And Proposed As A Single Integrated Project, The Trial Court Correctly Concluded That Golden Sands Acquired A Vested Right In Agricultural Use Of All Of The Farm Property.

Because there is no basis to disturb the undisputed fact that the agricultural use proposed for the Farm buildings cannot be isolated from the proposed use of the Farm property as a whole, there can be no basis in law for treating the agricultural facets of the Farm differently from one another for purposes of determining the extent of Golden Sands' vested rights.

The Town seeks to skirt this obstacle with improper reliance on *Waukesha County v. Seitz*, 140 Wis. 2d 111, 116, 409 N.W.2d 403 (Ct. App. 1987). The central holding in *Seitz*, however, actually vindicates Golden Sands' vested rights in agricultural use of the Farm property. In *Seitz*, the Court of Appeals specifically rejected the notion of piece-mealing individual aspects of a synergistic business operation when applying a vested rights analysis. *Id.* at 116 ("This

synergistic action of Seitz's business activities vested his interest in their continuance").

Having misread *Seitz*, the Town has failed to identify even one Wisconsin case in which a court has restricted a developer's vested rights to something less than the developer's intended and proposed land use. While authority from Washington state is quite helpful in this case, the Town relies on the wrong cases. First, in *Deer Creek Developers, LLC v. Spokane County*, 157 Wn. App. 1, 236 P.3d 906 (2010), the developer did not submit a complete and compliant building permit application for a separate phase two of the building project. In this case, as the Town has pointed out, Golden Sands does not need to submit any application to the Town for the agriculture land use itself. Instead, Golden Sands acquired the right to agricultural use of both the buildings and the surrounding property for the purposes articulated in the Building Permit Application it submitted at a time when the use of the Farm property was unrestricted by any zoning limitation. The Town's reliance on *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn. 2d 242, 218 P.3d 180 (2009) is also misplaced, because the

developer in that case never submitted a building permit application at all. *Id.* at 246-47.

The facts in *Valley View Industrial Park v. City of Redmond* are more instructive than any case the Town cites. In *Valley View*, the owner of a tract of land zoned for light industrial use submitted five building permit applications to the City of Redmond together with a site plan that depicted a total of 12 buildings. 107 Wn. 2d 621, 626-27, 733 P.2d 182 (1987). With knowledge of the full scope of Valley View's proposed use, the City of Redmond subsequently changed the zoning of the balance of Valley View's property from "light industrial" to "agricultural." *Id.* at 628-29. The Supreme Court of Washington noted that "throughout the negotiations between Valley View and [the City], the [entire] project was considered as a complete whole." *Id.* at 639. Valley View argued that submitting the five building permit applications established vested rights to build not only the five buildings but also the other seven additional buildings depicted on the original site plan. *Id.* at 639.

The *Valley View* court agreed with the property owner and held, "when Valley View filed its five building permit applications on the subject property, it fixed, and firmly

imprinted upon the parcel, the zoning classification it carried at the moment of the filing. The City has lost its chance to change the zoning classification." *Id.* at 642. In reaching its conclusion, the *Valley View* court found it compelling that "nothing in the record indicates that the right to build just five buildings makes financial sense." *Id.* at 641. Indeed, the court found that "[t]he practical result of changing the zoning to agricultural could *place Valley View in a situation where economic realities dictate that no buildings will be built. This would deny Valley View its rights which vested upon the filing of the five building permit applications*." *Id.* (emphasis added).

The dispositive circumstances of *Valley View* are precisely those here. There is no dispute that when Golden Sands filed its complete Building Permit Application, it disclosed with specificity those lands that would contain buildings and those that were planned for cultivation. In doing so, Golden Sands "fixed, and firmly imprinted" the unrestricted zoning classification that applied to all of the Farm property at the moment of Golden Sands' filing. Similar to the circumstances in *Valley View*, there is nothing in this case to suggest that the right to use the Farm property

for the construction of the barns and other buildings alone "makes financial sense."

Indeed, as in *Valley View*, the undisputed summary judgment record in this case shows that because the Farm was conceived, planned and invested in as an integrated whole, the practical effect of a conclusion that Golden Sands is entitled to agricultural use of only the building site portion of the Farm property would be to place Golden Sands "in a situation where economic realities dictate that no buildings will be built." Like in *Valley View*, such a result would deny Golden Sands its rights, which vested upon the filing of its Building Permit Application.

Golden Sands' right to use the Farm property to the full extent of the agricultural use depicted and described in the Building Permit Application is also fully aligned with the Washington Supreme Court's reasoning in *Noble Manor Co. v. Pierce County*, 133 Wn. 2d 269, 943 P.2d 1378 (1997). The question in *Noble Manor* was whether the submission of a fully compliant plat established the developer's vested right to the land division alone, or also to the future use of the land under the zoning regulations that were in place when the plat was submitted. The court quickly established that the rights

that vested included rights to both land division and land use, and then it addressed whether the vested land use rights extended to "all uses allowed by the zoning and land use laws" or more narrowly, "the right to have the uses disclosed in their application." *Id.* at 283. The court concluded that the "second alternative comports with prior vesting law" and held that the property owner had obtained vested rights only to the uses identified in its application. *Id.*

The *Noble Manor* court explained that "the purpose of the vesting doctrine is to protect the expectations of the developer against fluctuating land use laws" and that this purpose is fulfilled when "what is vested is what is sought in the application." *Id.* at 283-84. The policy rationale laid down in *Noble Manor* and in the Wisconsin vested rights cases apply with equal force here. Golden Sands' reasonable expectations would be thwarted – not protected – if Golden Sands were allowed to construct agricultural buildings but not engage in the agricultural land use integrally tied to the use of those buildings.

E. There Is No Legally Relevant "Uncertainty" Associated With The Farm Project.

The Town baselessly asserts that Golden Sands' proposed Farm is somehow uncertain – a "carte blanche extension of vested rights to thousands of undefined acres of land." (App. Br. 31.) The Town provides no legal support for this contention. Golden Sands does not claim it can do anything it wants with the Farm property. Rather, Golden Sands' much narrower claim is that because the Building Permit Application was clear about the intended use of the Farm property for an agricultural purpose, Golden Sands acquired a vested right to use the Farm property for that purpose. Golden Sands' vested rights flow from satisfaction of the requirement, discussed above, that the land use associated with the buildings in the permit application fairly describe the land use for which vested rights are claimed. *Noble Manor Co.*, 133 Wn. 2d 269. Despite the Town's assertions to the contrary, and as discussed in detail above, Golden Sands met this obligation.

Furthermore, the Town cannot in all seriousness argue the project is "uncertain" when it has known full-well the extent of the project since June 6, 2012, not only as reflected

in the materials submitted in the Building Permit Application but as reflected by its documented activities. Indeed, in its June 20, 2012 Town Board meeting, held two weeks after Golden Sands' initial submission of its building permit application, the Town Board invited George Kraft to discuss how water levels would be affected by the installation of multiple high capacity wells that would irrigate the Farm's proposed crop fields. (R. 71, Ex. A, App. 020-021.) George Kraft came to another Town Board Meeting on July 3, 2012, to again, discuss the high capacity well permits in the context of "Wysocki Farms." (R. 71, Ex. C, App. 022-023.) All of this happened after Golden Sands filed its June 6, 2012 Building Permit Application and before the Town enacted its development moratorium on July 19, 2012.

As shown above, when Golden Sands filed its Building Permit Application, it identified the full extent of the Farm property and the extent it intended to engage in agricultural use of that property. The Town's suggestion that subsequent adjustments *within* that geographic extent somehow compromise vested rights is not only without support, it makes no logical sense – particularly when the summary judgment record is clear that these adjustments were made at

the request of DNR over concerns about certain environmentally sensitive areas. (R. 70, ¶ 10.)

F. 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.

The Town contends Golden Sands has no vested rights in agricultural use beyond the barn yard, because, aside from applying for a building permit to construct the buildings needed to operate the Farm, Golden Sands did not engage in "actual and active use" of the Farm property. (App. Br. 14-17.) This argument completely misses the point. As explained above, Wisconsin's vested rights law recognizes that when a proposed development is regulated by a building permit, the law will protect a developer from subsequent changes in the regulatory landscape, so long as the developer submitted a complete and compliant building permit application for the proposed development that complies with all building and zoning laws then in existence.

That is precisely what Golden Sands submitted, which is why Golden Sands secured a vested right to pursue development of the Farm even though Golden Sands has yet

to physically construct the Farm. It is undisputed in this case that, at the time Golden Sands filed its building permit application, the Farm property was zoned "unrestricted" and that the building permit application was determined to be complete prior to the date the Town began changing the local land use regulations in an effort to block the project. In this context, no Wisconsin vested rights case requires "actual and active use," as the Town argues. It was enough that Golden Sands had submitted a complete and compliant building permit application, prepared and submitted in reasonable reliance on the "unrestricted" zoning of the Farm property. To require "actual and active use" in this context would nullify the *Building Heights Cases* and their progeny.

The Town says it is unaware 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 with the hope of using it for a then-permitted purpose at some time in the future. (App. Br. 16.) Golden Sands agrees with the Town that the law of vested rights in Wisconsin will not protect a property owner's rights against future changes in the law based solely on the hope of developing the property at some point in the future. But those are not the facts of this

case. In this case, Golden Sands expended significant resources based on reasonable reliance on the then-existing "unrestricted" zoning designation, and it filed a complete and compliant building permit application to develop the Farm on the Farm property, together with all of its other Applications. At that point that Golden Sands' right to pursue development of the Farm, notwithstanding the Town's subsequent attempt to zone it out, had vested.

The Town attempts to confuse application of long-standing vested rights principles to this straightforward fact pattern by noting that much of the Farm property was and remains enrolled in the state's Managed Forest Law ("MFL") program (App. Br. 10, 16-17). The MFL status of the Farm property, however, has no relevance to the question of whether Golden Sands acquired vested rights to agricultural use of the Farm property at the time it submitted its building permit application, because, as discussed above, Wisconsin law freezes the frame for purposes of a vested rights analysis at the time the developer files a complete building permit application. Under that test, it is irrelevant for purposes of vested rights analysis to determine when Golden Sands plans to withdraw the Farm property from the MFL program. The

Town notes that, as of January 1, 2014, the Farm property was still enrolled in the MFL program and, on May 21, 2014, Golden Sands filed papers with the state to keep the Farm property enrolled in the MFL program. (App. Br. 16). These papers reflect nothing other than the fact that Golden Sands has indeed not yet filed an application with the State to withdraw the Farm property from the MFL program.

The Town posits that, if Golden Sands had withdrawn the Farm property from MFL, harvested the timber from the plantation and began developing the proposed Farm, Golden Sands might have secured a vested right to continue the operation as a nonconforming use. That may well be true, but that is not the issue here. This case is not about whether Golden Sands has established a continuous nonconforming use by actively using the entire Farm property. This case is about whether Golden Sands' application to construct the buildings necessary to develop the Farm on the Farm property vested Golden Sands' right to the agricultural use that was permitted by the Farm property's "unrestricted" zoning designation *even though* the Farm had not yet been physically developed. As discussed throughout this brief, that answer is yes.

III. WISCONSIN COURTS REFUSE TO GIVE EFFECT TO POST-HOC ZONING ENACTMENTS INTENDED TO HALT A DEVELOPMENT WHEN THE NATURE OF THAT DEVELOPMENT IS CLEAR FROM THE APPLICATION.

If the Town succeeds in this appeal, local units of government will be emboldened to change the rules in the middle of the game, after property owners have reasonably invested significant sums in reliance on those rules. In short, the whole principle of legitimate, investment backed expectations will have been extinguished. Vested rights law in Wisconsin requires the developer to proceed on the basis of reasonable expectations. The trial court has correctly concluded that it was reasonable for Golden Sands to rely on the zoning rules that were in effect on the date it submitted its Building Permit Application and that there was no reasonable basis for Golden Sands to believe that the Town was about to adopt zoning rules that would prohibit agricultural use of the Farm property. (R. 86: 79, 83.)

Where, as here, the applicant has made investments in reasonable reliance on existing law, Wisconsin courts do not allow governments to enforce after-the-fact restrictions inconsistent with that reliance. *See Building Height Cases*,

181 Wis. 519, 195 N.W. 544 (1923); *Rosenberg v. Village of Whitefish Bay*, 199 Wis. 214, 225 N.W. 838 (1929); *State ex rel. Schroedel v. Pagels*, 257 Wis. 376, 43 N.W.2d 349 (1950); *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 53 N.W.2d 784 (1952); *Lake Bluff Housing Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 540 N.W.2d 189 (1995); *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.

In *Lake Bluff* and *Kitt's Field of Dreams*, the developers did not acquire vested rights, because they did not establish reasonable reliance on the existing regulations. However, in the *Building Height Cases*, *Rosenberg*, *Schroedel*, and *Des Jardin*, the developers demonstrated reasonable reliance and the government was prohibited from enforcing zoning changes made after the submission of the building permit and, in most of these cases, in obvious reaction to the proposed or actual development. *See also State ex rel. Humble Oil & Refining Co. v. Wahner*, 25 Wis. 2d 1, 14, 130 N.W.2d 304 (1964) (observing in both *Schroedel* and *Humble Oil* "there was a last-minute effort by the city to zone out a use" and finding that "equitable

considerations bar the town from giving Humble such a fast shuffle at this late stage in the game").

As the Building Permit Litigation has already determined, when Golden Sands submitted its Building Permit Application to the Town, Golden Sands was reasonably relying on the regulatory framework in existence at the time. (R. 60, Ex. A: 67, Ex. B ¶ 65.) Since 1934, the Farm property had been zoned "unrestricted". (R. 60, Ex. A: 65, Ex. B, ¶ 5.) And as already determined in the Building Permit Litigation, Golden Sands could not have anticipated the Town could soon adopt new zoning regulations that would prohibit the planned Farm operation, because the Town did not even have the lawful authority to adopt its own zoning regulations. (R. 60, Ex. B, ¶¶ 62, 64.) In the face of Golden Sands' reasonable reliance on the existing zoning regulations, the Town is improperly asking this Court to give effect to the Town's own "fast shuffle" at the "late stage of the game" that the *Humble Oil* Court summarily rejected.

IV. PUBLIC POLICY PROTECTS GOLDEN SANDS' REASONABLE INVESTMENT BACKED EXPECTATIONS, NOT REACTIONARY GOVERNMENT ACTION DESIGNED TO DEPRIVE GOLDEN SANDS OF THOSE EXPECTATIONS.

The Town contends public policy precludes Golden Sands from obtaining vested rights because the Town has an interest in protecting its groundwater, trout streams, and resources. (App. Br. 33.). In short, the Town is alleging that if it does not want the Farm in the Town, it shouldn't have to have it there. In making this argument, the Town fails on several fronts.

The Town fails to recognize that the issues it claims to be concerned about are preemptively addressed by state law. Towns have no power, in the absence of specific statutory authority, to regulate the withdrawal and use of groundwater, since groundwater is generally a matter of statewide concern. *City of Fond du Lac v. Town of Empire*, 273 Wis. 333, 338-39, 77 N.W.2d 699 (1956). Whenever statewide interests are involved, home rule powers and standard local police powers do not include the power to prohibit the removal of groundwater. *Id.* at 339. In fact, the Supreme Court has ruled that the state has no power to delegate powers to towns for

the purpose of allowing them to independently control matters of statewide concern for the benefit of local interests. *Id.* at 337. Moreover, the legislature has chosen the DNR to serve as the central unit of state government to protect, maintain, and improve the quality and management of the waters of the state, ground and surface, public and private. Wis. Stat. § 281.11 (2008). And the purpose of Wis. Stat. ch. 281 (2008) is to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state. Wis. Stat. § 281.11 (2008).

More specifically, the Town ignores that there are multiple state-level permit applications pending for Golden Sands' farm that specifically address the interests the Town is concerned about. These state-level permitting procedures have preemptive effect, particularly in the area of livestock siting. Under Wisconsin's livestock siting law, Wis. Stat. § 93.80, local units of government are precluded from regulating large livestock operations unless they go through a carefully prescribed process of regulation. *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 50, 342 Wis. 2d 444, 471, 820 N.W.2d 404. The Town cannot

accomplish such regulation through a post-hoc zoning ordinance that has the effect of prohibiting virtually all agricultural activity throughout the entire Town.

Largely ignoring the circumstances of this case, the Town also asserts Golden Sands is "imposing a *de facto* moratorium on the regulation of [the Farm property] for the indefinite future and creates uncertainty for thousands of acres of land in the Town." (App. Br. 33.) Setting aside that the existence of comprehensive state-level livestock siting standards makes this statement simply untrue, the Town's rationale actually applies to its disadvantage. Here, the Town is attempting with post-hoc legislation to impose an *actual* moratorium on any future development within the Town's borders. In the Town's world, it could "willy nilly" change zoning law at any point in time to circumvent any development. And that is precisely what the Town is attempting to do in this case. The Town consistently ignores the fact that it had no zoning restrictions when Golden Sands submitted its Building Permit Application. The Town also ignores that, in reliance on the unrestricted zoning designation that governed the Farm property, Golden Sands spent millions of dollars to develop a Farm. The Town ignores that Golden

Sands' Building Permit Application fully disclosed the substantive and geographic extent of the full circle, combined crop and milk production Farm that would be sited within the Town, and the full extent of the property that would be used for the Farm. And, the Town refuses to acknowledge that the passing of its zoning enactments were all in reaction to Golden Sands' submission of a building permit application seeking to develop the Farm.

The public policy underpinning vested rights law does not make room for government to pull the rug out from reasonable investment backed expectations. To the contrary, vested rights law protects those expectations. This Court should therefore affirm the trial court's grant of summary judgment in this case.

CONCLUSION

For the foregoing reasons, Golden Sands respectfully requests this Court affirm the circuit court's decision granting summary judgment in favor of Golden Sands.

Dated this 23rd day of September, 2015.

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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 10,138 words.

Dated: September 23, 2015

Jordan J. Hemaidan

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 § 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: September 23, 2015

_____

Jordan J. Hemaidan

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP001258

GOLDEN SANDS DAIRY, LLC.

Plaintiff-Respondent,

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.

AFFIDAVIT OF MAILING

On Appeal from the Circuit Court of Wood County
The Honorable Thomas Eagon Presiding
Circuit Court Case No. 12-CV-0389

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, Susan Bunge, being first duly sworn, state that on September 23, 2015, I caused three (3) true and correct copies of the Response Brief and Appendix of Plaintiff-Respondent Golden Sands Dairy, LLC to be served upon the following:

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Susan Bunge

Subscribed and sworn to before me
this 23rd day of September, 2015.

_____
Notary Public, State of Wisconsin
My Commission:_____