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

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other State Cases

INTRODUCTION

The claim by Golden Sands Dairy ("GSD") that it can extend its limited Building Permit into an authorization to use thousands of acres throughout the Town in a manner contrary to the Town's zoning is based on an unprecedented and unwarranted extension of Wisconsin law. The general rule is that no one can rely on existing zoning unless it has either established a nonconforming use or has filed a compliant building permit application.

Here, GSD concedes that it did not establish a nonconforming use and that its claim to vested rights arises solely from its Building Permit. GSD cites no case from Wisconsin or elsewhere that extends a vested right arising from a building permit to off-site parcels, regardless of how "integrated" the uses of those parcels are to the Building Permit. Moreover, GSD claims that such an unprecedented result is necessary to protect private property interests, when in fact a self-described and open-ended standard of "integration" merely creates confusion and uncertainty. Current law avoids this confusion by applying the Building Permit Exception to the building permit site and the specific buildings for which approval is sought.

In addition, GSD ignores the balance between protecting private investment and public rights and interests. Contrary to GSD's assertion that the Town enacted a "willy-nilly" change in zoning (GSD Br. at 50), the Town's zoning was the culmination of land use planning going back to its Comprehensive Plan (Plan) in

2007. That Plan was not based on some attempt to "circumvent development" or thwart a GSD plan that had not yet been conceived, but to respond to real public policy concerns about land use and groundwater in the Town. It is an unassailable fact that "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 . . . The Town residents rely on groundwater for drinking water and other purposes." (App. 61).

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.

ARGUMENT

I. THE BUILDING PERMIT EXCEPTION DOES NOT APPLY TO THE 6,000 ACRES OF LAND OUTSIDE OF THE 98-ACRE BUILDING SITE FOR WHICH GSD OBTAINED A BUILDING PERMIT.

GSD would have this Court believe that, if a developer spends enough money in reliance on existing zoning, it should be immune from any zoning change. That is not the law in Wisconsin. No one has a vested right to existing zoning. This rule has been established through an unbroken line of cases from *Eggebeen v. Sonnenburg*, 239 Wis. 213, 218, 1 N.W.2d 84 (1941), to *Buhler v. Racine Co*., 33 Wis. 2d 137, 148, 146 N.W.2d 403 (1966), and most recently, *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 381, 548 N.W.2d 528 (1996). These

cases reflect the principle that zoning ordinances are designed to promote the public health safety and welfare and therefore can affect private property rights. *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, 338 Wis. 2d 488, 809 N.W.2d 362. While GSD attempts to distinguish *Eggebeen* and *Buhler* on their facts, GSD cannot and does not dispute the basic legal principle for which these cases were cited.

There are only two exceptions to the general rule which give rise to vested rights. One is to have engaged in such use on the land before the Town enacted its zoning ordinance and become a nonconforming use. GSD concedes it did not do so. The other exception is the Building Permit Exception. The Building Permit Exception gave GSD the right to agricultural use of seven buildings on the 98 acres covered by the Building Permit. Such vested rights fall within the scope of the GSD's Building Permit application and the Town's review. The Building Permit Exception did not grant GSD the unfettered right to develop 6000+ acres of other land GSD unilaterally deems "integrated" with its seven buildings, especially where the Town did not review and authorize such use.

A. GSD's Building Permit Application Was Expressly Limited To The Buildings And Building Site.

GSD apparently recognizes the significance of the limited scope of its Building Permit application because it tries to hide the relevant facts. The original Building Permit application, filed with the Town on June 6, 2012, lists the "Area Involved" as "7 building structures." (*See* Town's Appendix, App. 40). The

Design Report filed with the application expressly defines the "Site Location" as "SE¼ SW¼ of Section 20, T21 R6E, and the eastern 200 foot strip of SW¼ of SW¼," approximately 98 acres. (App. 42). The amended Building Permit application dated July 17, 2012, attached to GSD's complaint, includes an attachment unambiguously entitled "Building Permit Application – Legal Description." It also provides a specific legal description of approximately 98 acres, not 6000+ acres, as the building site. (App. 55).

GSD's Appendix fails to include the amended application at all. GSD included the Design Report, but omits page one, which lists the Site Location as the 98 acres (Compare R-App 006-008 and App. 41-53). GSD includes a copy of the June 6, 2012 application, but not the one received by the Town, in which the area involved is listed as "7 building structures." (Compare R-App 001 with App. 40).

GSD also fails to respond to the fact that in the Building Permit Litigation, it adamantly argued that the scope of the Building Permit application was limited:

> **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; Building Permit Hearing Tr. 9-10).

GSD did provide the Town with a "Project Site Map" in which the production facility that was the subject of the Building Permit application was shown in yellow and the other property in which GSD claimed an ownership interest was shown in blue. The Design Report, along with various state applications, also referenced potential uses of the off-site lands for landspreading and cropping. However, the fact remains that the Building Permit sought by GSD was only for seven buildings on 98 acres. In fact, as the court noted, GSD made it clear that the other applications and maps were only being submitted "as a courtesy"(App. 13) and not for the purpose of seeking Town approval.

GSD does not dispute that "*a building permit* has been a central factor in determining when a builder's rights have vested…. (emphasis added)." *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 540 N.W.2d 189 (1995). There was no Building Permit for 6,000 acres and therefore no vested rights could arise to those parcels. GSD does not refute the point that had the Building Permit been issued by the adjoining town, the Town of Saratoga could have enacted its zoning as to the 6000+ acres at issue here without any vested rights argument from GSD.

B. There Are No Cases Holding That The Building Permit Exception Authorizes Land Uses On Properties Other Than The Building Site.

GSD claims that the grant of a Building Permit also authorizes the use of the building and any land use on off-site parcels "integrally related to the

structures for which the permit was requested." (GSD Br. at 17). A building permit does carry with it the right to use the building for its intended use. However, GSD cites no case from Wisconsin or any other state allowing an owner to use a building permit for a defined site to obtain vested rights to off-site uses *regardless* of how "integrally related" those uses might be. All of the Wisconsin cases cited by GSD, including *Rosenberg v. Village of Whitefish Bay,* 199 Wis. 214, 225 N.W.2d 838 (1929), *State ex rel. Schroedel v. Pagels*, 257 Wis. 376, 43 N.W.2d 349 (1950) and *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 46, 53 N.W.2d 784 (1952), are limited to the use on a single defined site, not to use of off-site parcels.

The closest cases in Wisconsin on this point are the nonconforming use cases. Although the event which triggers vested rights is different – actual use instead of a compliant building permit – the result and equities are the same. Courts have expressly refused to attach vested rights to parcels outside of those used before the enactment of the zoning ordinance. *See Lessard v. Burnett County Bd. of Adjustment*, 256 Wis. 821, 649 N.W.2d 728 (Ct. App. 2002). GSD makes no response to those arguments. Other nonconforming use cases cited by GSD (*Waukesha County v. Seitz,* 140 Wis. 2d 111, 409 N.W.2d 403 (Ct. App 1987) and *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) also speak only of the use on a specific parcel, not off-site parcels.

Cases in many other states also confirm this principle. GSD only responds to the Washington cases and then mischaracterizes them. *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wash. 2d 20, 242, 218 P.3d 180 (2009), stands for the proposition that the filing of a site plan – which is basically all that GSD did as to the 6,000+ acres – is not enough to create vested rights. GSD attempts to distinguish *Abbey Road* on the basis that the developer in that case never submitted *any* building permit. (GSD Br. at 34-35). But GSD also did not submit a Building Permit for anything *other than* 7 buildings on 98 acres.

Deer Creek Developers, LLC v. Spokane County, 157 Wash. App 1, 236 P.3d 906 (2010), establishes that filing for a building permit for a structure to be built on a parcel intended to be developed in phases does not confer upon the entire parcel the zoning then in existence, even if the building permit refers to the additional contemplated phases. 157 Wash. App at 13, ¶ 24. GSD claims *Deer Creek* does not apply because GSD did not need to submit a Building Permit for the agricultural land use *itself*. (GSD Br. at 24). But that again is the point. Absent a Building Permit or a nonconforming use, GSD has no vested rights.

GSD cites *Valley View Industrial Park v. City of Redmond*, 107 Wash. 2d 521, 733 P.2d 182 (1987), and claims that the "dispositive circumstances of *Valley View* are precisely those here." (GSD Br. at 36). GSD misreads *Valley View*. In *Valley View,* the developer submitted a site plan showing development of seven buildings on a "single tract of land" but submitted building permits only for the

first five buildings. The court noted, "as a general principle we reject any attempt to extend the vested rights doctrine to site plan review." *Id.* at 639. While GSD argues the *Valley View* decision turned on the fact it made no economic sense to build only five of the seven planned buildings, that was not the dispositive factor. Instead, the court concluded the rezoning of Valley View's property bore no relationship to the public interest it sought to serve; Valley View's application had been filed when the agricultural character of the area had already "changed drastically;" and Valley View chose the number and location of buildings based on pre-application conversations with City officials. *Id.* at 640-242, 649-50. None of those circumstances, exist here.

Finally, GSD cites *Noble Manor Co. v. Pierce County*, 133 Wash. 2d 269, 943 P.2d 1378 (1997), in which the court held that a property owner had vested rights to uses identified in its short plat subdivision approval application. (GSD Br. at 37-38) *Noble* involved the interpretation of a Washington statute that expressly expanded vested rights to plat applications. No such statute is involved here. *Noble* simply is not relevant here.

C. Allowing Vested Rights To Off-Site Uses That Are "Integral" To The Buildings On A Building Permit Creates Uncertainty.

According to GSD, all that is necessary for vested rights to the zoning that existed at the time it applied for its Building Permit for the 7 buildings on 98 acres, is that the uses of the other 6000+ acres fit into GSD's concept of "Farming Full Circle," which GSD describes as follows:

> Farming full Circle is a term coined by the Wysocki family to describe its integrated dairy and animal husbandry practices with traditional vegetable production agriculture. . . From its initial inception, Farming Full Circle has been expanded to utilize an anaerobic digester . . . to produce all the electricity the dairy needs.

(R. App. 016). As the quoted language acknowledges, "Farming Full Circle" is a self-created term that describes a general concept and apparently evolves over time to include a variety of uses and practices. Five years from now, GSD could claim that the addition of a rendering plant to dispose of aged or nonproductive cows from the dairy is integral to its operation and therefore vested. There is no principled basis to know the scope of the activities and uses under a self-defined, open-ended concept like Farming Full Circle.

Applying GSD's concept of vested rights to more traditional developments further illustrates the uncertainty and ambiguity created by such an approach. Assume a developer who owns 6,098 acres in a town applies for a building permit for a hotel on 98 acres. The developer says that the hotel is part of his concept of "Lodging Full Circle," which involves the future development on his remaining 6,000 acres of other commercial uses that are "integral" to providing guests for his hotel. Those uses might involve a golf course, entertainment venues, and restaurants. GSD's theory would mean that the building permit for the hotel now gives him vested rights on 6,000 acres to develop anything that could draw guests to the hotel. Nothing in Wisconsin law sanctions such a result.

The uncertainty created by GSD's theory is further illustrated by the fact that the specific use of the 6,000 acres here has evolved over time. As the circuit

court noted with respect to proposed landspreading sites, "which of those acres will actually be used for [landspreading] purposes was not known at the time of the submittal of the Building Permit." (App. 12). Moreover, GSD does not dispute that 1,800 acres of landspreading associated with the dairy have been moved out of the Town after the Building Permit application was filed.

GSD argues that developers are entitled to certainty, but the approach it champions would require a fact-intensive, case-by-case analysis to determine what off-site uses were integrated with the use for which a Building Permit was granted. This approach to vested rights invites litigation. Both of the vested rights exceptions recognized under existing Wisconsin law avoid uncertainty by having a defined and limited scope. For nonconforming uses, the use is defined by what was an active and existing use prior to the zoning change. *See Waukesha County v. Pewaukee Marina, Inc*., 187 Wis. 18, 522 N.W. 2d 536 (Ct. App 1994). For the Building Permit Exception, the use is defined by the Building Permit application and plans. *Lake Bluff*, 197 Wis. 2d at 172. Either way, a developer's rights to use of property are not determined by its vision of "integrated" operations on off-site land. If property owners want certainty, the novel extension of the law that GSD urges is not the means to achieve it.

II. VESTED RIGHTS INVOLVE A BALANCING OF PUBLIC AND PRIVATE INTERESTS.

The Town's zoning was the culmination of land use planning going back to its 2007 Comprehensive Plan. The Town's legitimate interest in protecting the

health and welfare of its residents through zoning is intensified here because GSD proposes an operation to cut down thousands of acres of forest and annually apply 55 million gallons of liquid manure and tons of solid manure to those sandy soils.

GSD asserts that the Town has no legitimate interests in this case because its concerns about groundwater are all preempted by the State. But the Town is not trying to regulate groundwater or high capacity wells; it is only attempting to regulate land use that can affect those resources and existing residences and residential wells. The Town's regulatory effort is well within its police power. *See Zwiefelhofer*, 2012 WI 7 ¶ 38.

GSD also asserts that livestock siting is preempted by the State. But that is not an issue here. Indeed, GSD's livestock siting claim was dismissed with prejudice. (R. 82 ¶ 1; Order). The Town's ability to regulate land use 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.

GSD cavalierly dismisses the Town's legitimate interests and argues that because it spent a lot of money and relied on existing zoning, it should have vested rights to all lands in the Town in which GSD has some "ownership interest."[1] No case in Wisconsin sanctions this one-sided balance. GSD has a vested right to the

[1] The exact nature of GSD's interest is still unclear. *See* Town Br. at 8.

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.

DATED this 8th day of October, 2015.

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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.

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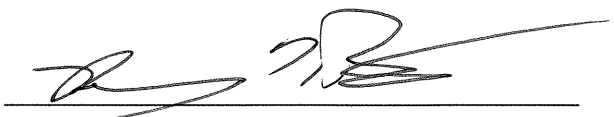

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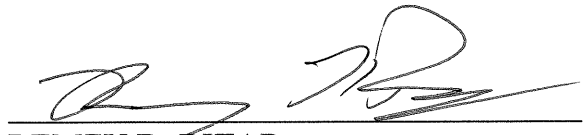

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REMZY D. BITAR