SUPREME COURT OF WISCONSIN

GOLDEN SANDS DAIRY LLC,

Plaintiff-Respondent-Petitioner

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v. Appeal No. 2015AP001258

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

Defendants-Appellants

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

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

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

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BRIEF OF DEFENDANTS-APPELLANTS TOWN OF SARATOGA ET AL.

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TABLE OF CONTENTS

Contents

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 4

- A. Town Development of Zoning 4
- B. Golden Sands' Planning for the Dairy. 7
- C. Golden Sands' Building Permit Application. 8
- D. The Proposed Golden Sands Project. 12

ARGUMENT 13

I. GOLDEN SANDS' POSITION CONFLICTS WITH THE GENERAL RULE THAT NO ONE HAS A VESTED RIGHT TO EXISTING ZONING. 13

- A. There Is No Vested Right To Existing Zoning Because Such Ordinances Protect The Public Welfare Including Property Rights. 13
- B. The Building Permit Exception And Nonconforming Use Exception Are Exceptions To The General Rule Against Vested Rights In Zoning. 15

II. THE BUILDING PERMIT EXCEPTION IS LIMITED TO THE BUILDING PERMIT SITE. 19

- A. There Are No Building Permit Cases In Wisconsin Which Grant Vested Rights To Off-Site Uses Beyond The Building Permit Site. 19
- B. The Court Should Not Create A New Common Law Rule That Extends The Building Permit Exception To Off-Site Parcels. 22
  1. Golden Sands' "Integration" Rule Is Inconsistent With The Bright Line Test And Creates Uncertainty. 22
  2. Golden Sands' Argument That Confining The Building Permit To The Building Site Creates Two Classes Of Developers Is Without Merit. 25
  3. Golden Sands' Rule Would Adversely Affect The Property Rights Of Existing Property Owners. 26

C. This Court Need Not Create A New Common Law Rule Extending Vested Rights Beyond The Building Permit Site Because Golden Sands' Building Permit Did Not Identify The Lands Outside Of The Building Permit Parcels. 29

III. THE COURT SHOULD AVOID CREATING A CONFLICT WITH THE NEW VESTED RIGHTS LEGISLATION. 30

A. Golden Sands' Position Is Inconsistent With Wis. Stat. § 66.10015. 31

B. As A Matter Of Statutory Interpretation, The Legislature Considered And Expressly Rejected The Position Golden Sands Now Asserts. 33

C. As A Matter Of Separation Of Powers, This Court Should Not Overturn Legislative Determinations. 35

D. This Court Should Not Create a Conflict Between The Common Law And Statutory Law. 37

CONCLUSION 38

FORM AND LENGTH CERTIFICATION 41

CERTIFICATION REGARDING ELECTRONIC BRIEF 42

CERTIFICATION OF FILING AND SERVICE 43

TABLE OF AUTHORITIES

Wisconsin Cases

Barland v. Eau Claire, 216 Wis. 2d 560, 575 N.W.2d 691 (1998) 36
Buhler v. Racine Co., 33 Wis. 2d 137, 146 N.W.2d 403 (1966) 14, 15
City of Lake Geneva v. Smuda, 75 Wis. 2d 532, 249 N.W.2d 783 (1977) 17
Crown Castle USA, Inc. v. Orion Const. Grp., LLC, 2012 WI 29, 339 Wis. 2d 252, 811 N.W.2d 332 34
Des Jardin v. Town of Greenfield, 262 Wis. 43, 53 N.W.2d 784 (1952) 19
Gabler v. Crime Victims Rights Board, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384 36
Golden Sands Dairy, LLC v. Fuehrer, No. 2013AP1468, unpublished slip op. (Wis. Ct. App. July 24, 2014) 10
Kolupar v. Wilde Pontiac Cadillac, Inc., 2007 WI 98, 303 Wis. 2d 258, 735 N.W.2d 93 18
Lake Bluff Hous. Partners v. City of S. Milwaukee, 197 Wis. 2d 157, 540 N.W.2d 189 (1995) ..... passim
Lessard v. Burnett County Bd. of Adjustment, 2002 WI App 186, 256 Wis. 821, 649 N.W.2d 728 20
McKee Family I, LLC v. City of Fitchburg, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12 ..... passim
Pace v. Oneida County, 212 Wis. 2d 448, 569 N.W.2d 311 (Ct. App. 1997) 36
Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N.W.2d 838 (1929) 19
Scott by Ricciardi v. First State Ins. Co, 151 Wis. 2d 286, 444 N.W.2d 405 (Ct. App. 1989) 36
State ex rel American Oil Co., v. Bassent, 27 Wis. 2d 537, 135 N.W.2d 317 (1965) 14
State ex rel. Klefisch v. Wisconsin Telephone Co., 181 Wis. 519, 195 N.W. 544 (1923) 15
State ex rel. Martin v. Zimmerman, 249 Wis. 101, 23 N.W.2d 610 (1946) 35
State ex rel. Mueller v. Thompson, 149 Wis. 488, 137 N.W.2d (1912) 36
State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964) 35
State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1965) 14
State ex rel. Schroedel v. Pagels, 257 Wis. 376, 43 N.W.2d 349 (1950) 19, 20
State v. Matasek, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811 34

State v. Washington, 266 83 Wis. 2d 808, 815, N.W.2d 587 (1978) 36
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 17
Wagner Mobil, Inc. v. City of Madison, 190 Wis. 2d 585, 527 N.W.2d 301 (1995) 36
Waukesha County v. Pewaukee Marina, Inc., 187 Wis. 2d 18, 522 N.W.2d 536 (1994) 17
Waukesha County v. Seitz, 140 Wis. 2d 111, 409 N.W.2d 403 (Ct. App 1987) 18
Willow Creek Ranch, LLC v. Town of Shelby, 224 Wis. 2d 269, 592 N.W.2d 15 (1998) 29
Zealy v. City of Waukesha, 201 Wis. 2d 365, 548 N.W.2d 528 (1996) 15

Wisconsin Statutes

Wis. Stat. § 60.61(1)(b) 14
Wis. Stat. § 62.23(7)(c) 14
Wis. Stat. § 66.10015 ..... passim

Other Authorities

4 Edward H. Ziegler, Jr. et al., Rathkopf's The Law Of Zoning And Planning § 69:2 (4th ed. 2011) 15
8A McQuillan, Municipal Corporations § 25.208, at 128 (rev. 3d ed. 1994) 20

Other States Cases

Deer Creek Developers, LLC v. Spokane County, 157 Wash. App. 1, 236 P.3d 906 (2010) 20
Huff v. City of Des Moines, 244 Iowa 89, 56 N.W.2d 54 (1952) 21
Summers v. Earth Island Inst., 555 U.S. 488, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) 35
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 27

Wisconsin Legislation

1999 Wisconsin Act 9 5
2013 Wis. Act 74 31
2015 Assembly Bill 582, LRB-3974/1 33
2015 Wisconsin Act 391 33

Wisconsin Constitution

Wis. Const. Art. IV, sec. 1 36

INTRODUCTION

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

A. Town Development of Zoning

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Golden Sands' Planning for the Dairy.

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

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

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

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

C. Golden Sands' Building Permit Application.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The Proposed Golden Sands Project.

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

McKee, 2017 WI 34, ¶ 37.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

DATED this 1st day of November, 2017.

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FORM AND LENGTH CERTIFICATION

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

The length of this brief is 10,777 words.

Dated: November 1, 2017.

Remzy D. Bitar

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

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

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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:

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