RECEIVED
11-15-2017
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT
Case No. 2015AP001258

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v.

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

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

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

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

REPLY BRIEF OF PETITIONER GOLDEN SANDS DAIRY, LLC

Submitted by:

Jordan J. Hemaidan, SBN 1026993
Daniel A. O'Callaghan, SBN 1042866
Joseph D. Brydges, SBN 1079318
MICHAEL BEST & FRIEDRICH LLP
P.O. Box 1806
Madison, WI 53701-1806
608.257.3501

Brian G. Formella, SBN 1012637
ANDERSON, O'BRIEN, BERTZ,
SKRENES & GOLLA
1257 Main Street
P.O. Box 228
Stevens Point, WI 54481-0228
715.344.0890

Attorneys for Plaintiff-Respondent-Petitioner Golden Sands Dairy, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

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

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

---

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated this 15th day of November, 2017.

MICHAEL BEST & FRIEDRICH LLP

By: */s/ Jordan J. Hemaidan*

Jordan J. Hemaidan, SBN 1026993
Daniel A. O'Callaghan, SBN 1042866
Joseph D. Brydges, SBN 1079318
One South Pinckney Street
P.O. Box 1806
Madison, WI 53701-1806
608.257.3501

Brian G. Formella, SBN 1012637
ANDERSON, O'BRIEN, BERTZ,
SKRENES & GOLLA
1257 Main Street
P.O. Box 228
Stevens Point, WI 54481-0228
715.344.0890

Attorneys for Plaintiff-Respondent-Petitioner Golden Sands Dairy, LLC

CERTIFICATION OF FORM AND LENGTH

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

Dated this 15th day of November, 2017.

/s/ Jordan J. Hemaidan
Jordan J. Hemaidan

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

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

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

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

Dated this 15th day of November, 2017

/s/ Jordan J. Hemaidan
Jordan J. Hemaidan

STATE OF WISCONSIN
SUPREME COURT
Case No. 2015AP001258

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v.

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

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

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

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

---

AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

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

Petitioner Golden Sands Dairy, LLC to be served upon the following:

Via First Class mail, postage prepaid:

Paul Kent
Stafford Rosenbaum LLP
222 West Washington Avenue, Suite 900
Madison, WI 53701-1784

Remzy D. Bitar
Arenz, Molter, Macy, Riffle & Larson, S.C.
720 North East Avenue
Waukesha, WI 53186

Ryan Braithwaite
Crivello Carlson, S.C.
710 N. Plankinton Avenue, Suite 500
Milwaukee, WI 53203-2404

Monte E. Weiss
Weiss Law Office, S.C.
1017 W. Glen Oaks Lane, Suite 207
Mequon, WI 53092

Thomas D. Larson
Wisconsin REALTORS Association
4801 Forest Run Road, Suite 201
Madison, WI 53704-7337

H. Dale Peterson
John J. Laubmeier
Stroud, Willink & Howard, LLC
25 West Main Street, Suite 300
P.O. Box 2236
Madison, WI 53701-2236

Richard Manthe
Wisconsin Towns Association
W7686 County Road MMM
Shawano, WI 54166

/s/ Susan Bunge
Susan Bunge

Subscribed and sworn to before me
this 15th day of November, 2017

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