

STATE OF WISCONSIN
SUPREME COURT

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OF WISCONSIN**

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

Case No. 2015AP001258

v.

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

Defendants-Appellants,

RURAL MUTUAL INSURANCE COMPANY,

Intervenor.

On Review of an Unpublished Decision of the Court of Appeals, District IV,
Appeal No. 2015AP001258 (April 13, 2017), Reversing a Decision of the Wood
County Circuit Court, the Honorable Thomas Eagon, presiding

AMICUS BRIEF OF AGRICULTURE COALITION

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STATEMENT OF INTEREST

The Wisconsin Farm Bureau Federation, Cooperative, the Dairy Business Association, Inc., the Midwest Food Products Association, Inc., the Wisconsin Cattlemen's Association, Cooperative, the Wisconsin Corn Growers Association, Inc., the Wisconsin Pork Association, Cooperative, and the Wisconsin Potato and Vegetable Growers' Association Inc. (collectively, the "Agriculture Coalition") submit this Amicus Brief of Agriculture Coalition. The members of the Agriculture Coalition are described in the Motion for Leave to File Amicus Brief filed herewith. The Agriculture Coalition includes associations involved in each of Wisconsin's four largest agricultural commodities: dairy, grains, livestock, and vegetables and potatoes. Agriculture contributes 413,500 jobs to Wisconsin's economy and generates more than \$88.3 billion in economic activity.¹

The members of the Agriculture Coalition are interested in protecting the ability of Wisconsin farms and agri-businesses to expand and undertake new operations in a fair and predictable manner. The Court of Appeals' decision that the Building Permit Rule does not include the right to land use has a significant adverse impact on Wisconsin's agriculture industry.

¹ <https://datcp.wi.gov/Pages/Publications/WIAgStatistics.aspx> (last visited 11/14/2017).

INTRODUCTION

At its core, this case is about a farmer who submitted a building permit application in conformance with current zoning and building code requirements. The farmer's permit application identified the acres the farmer intended to farm as part of the project and included a map depicting the parcels. (R. 67, Ex. A.) In response, the municipality: (1) unlawfully denied the farmer's building permit application, (2) obtained zoning authority and changed the zoning to prohibit farming for the first time in the municipality's 150+ year history, and (3) forced the farmer to engage in years of litigation to implement the farm project that conformed with zoning when filed.

Wisconsin follows the "bright-line" Building Permit Rule, pursuant to which a property owner's rights vest when the property owner "has submitted an application for a building permit that conforms to the zoning or building code requirements in effect at the time of application." *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, ¶4, 374 Wis.2d 487, 893 N.W.2d 12. There is no dispute that the Building Permit Rule grants Golden Sands Dairy, LLC ("Golden Sands") the vested right to construct the buildings identified in the building permit application it submitted to the Town of Saratoga (the "Town").

The issue before this Court is whether the vested rights under the Building Permit Rule include the right to use the project land in conformance with the zoning at the time the application was filed. The Court of Appeals held the Building Permit Rule did not prevent the Town from changing the zoning of the project to prohibit farming. *Golden Sands Dairy LLC v. Town of Saratoga*, No. 2015AP1258, ¶31 (Wis. Ct. App. Apr. 13, 2017) ("*Golden Sands II*"). The Court of Appeals held that while the Building Permit Rule granted Golden Sands the right to **construct** the farm buildings identified in the building permit, it carried no right to **use** the land identified with the project for farming. *Id.*, ¶14. By creating an artificial distinction between project construction and project land use, the Court of Appeals' decision eviscerated the Building Permit Rule.

As discussed in detail below, the Agriculture Coalition requests that this Court reverse the decision of the Court of Appeals for three reasons. First, the Court of Appeals' decision destroys the purpose and intent of the Building Permit Rule. Second, the Court of Appeals' decision has a unique adverse impact on farming. Third, the Court of Appeals' decision conflicts with Wisconsin's place as a national leader in land-use certainty.

ARGUMENT

I. The Court of Appeals' Decision Destroys the Purpose and Intent of the Building Permit Rule.

Landowners and municipalities across Wisconsin have relied for decades on the Building Permit Rule to vest rights upon the submission of a conforming building permit. *See, e.g., Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis.2d 157, 172, 540 N.W.2d 189 (1995). In the 2017 case of *McKee Family I, LLC v. City of Fitchburg*, this Court explained that "Wisconsin applies the bright-line building permit rule because it creates ***predictability*** for land owners, purchasers, developers, municipalities and the courts." 2017 WI 34, ¶43 (emphasis added). This Court further explained that the Building Permit Rule "***balances*** a municipality's need to regulate land use with a land owner's interest in developing property under an existing zoning classification." *Id.* (emphasis added).

The "predictability" and "balance" of the Building Permit Rule is destroyed by the Court of Appeals' decision in *Golden Sands II*. The decision destroys the predictability of the Building Permit Rule because the right to construct a building is meaningless without the right to use the land associated with the project. A property owner cannot make expenditures in reliance upon the Building Permit Rule if he or she risks a change in zoning

to the associated project land during construction. The Court of Appeals' decision destroys the balance of the Building Permit Rule by shifting all of the power to the municipality. The municipality is granted the legal ability to "zone out" a particular project by changing zoning long after the submission of a conforming building permit.

The Court of Appeals' decision forces any farmer or developer of a multi-parcel project to proceed with construction of the project at his or her peril. If the Building Permit Rule has no vested rights to land use, the municipality is free to change the zoning at any time, even after the farmer or developer spends millions of dollars on construction. The municipality would apparently be free to change the zoning of the project at any point during construction up to the day the project is actually placed in service. Indeed, the Court of Appeals stated it found "no authority" that Golden Sands had a right to use its property "inconsistent with zoning *at the time the property is put to use* in service of the dairy buildings." *Golden Sands II*, ¶13 (emphasis added). The Court of Appeals' decision that a municipality can change project zoning at any point prior to actual use creates tremendous uncertainty in new farm development and cannot stand.

This Court should restore the predictability and balance of the Building Permit Rule by confirming it includes the right to use the land identified in the application consistent with the zoning at the time of filing. Such a holding would *not* create the need for a case-by-case analysis as argued by the Town. (Town Brief, p. 1.) To the contrary, a bright-line rule that the Building Permit Rule carries with it the right to use the land identified in the application would eliminate litigation such as this case. It would also make each of the Court of Appeals' hypothetical questions about how much of the associated land is "necessary" irrelevant. *Golden Sands II*, ¶¶21, 22.

As this Court recently recognized in *McKee*, once a conforming building permit application is filed, the municipality's ability to regulate land use through zoning ceases. *See McKee*, 2017 WI 34, ¶¶4, 43. At such time, the property owner's rights to proceed with the project – construction and land use – must vest. If these rights do not vest, then the Building Permit Rule is hollow and meaningless, and devoid of any certainty or predictability. The Court of Appeals' incredibly narrow interpretation of the Building Permit Rule cannot stand. This Court should reverse the decision of the Court of Appeals and hold that the Building Permit Rule vests rights to construct and use the project land identified in the permit application.

II. The Court of Appeals' Decision Has a Unique Adverse Impact on Farming and Agri-Business.

The Court of Appeals has held that the Building Permit Rule only vests rights to construction, not to use land associated with the project and identified in the building permit. While this decision strikes a major blow to all property development, it causes unique adverse impacts to farming. As discussed below, the Court of Appeals' decision gives municipalities a *de facto* veto power over all new proposed farm projects due to various factors inherent in farming.

First, farming is uniquely impacted by the Court of Appeals' decision due to the size of farming operations. While it is typical to develop an entire shopping center, apartment or condominium project on a single parcel of land, this is not the case for a farm project. The average farm in the State of Wisconsin is 209 acres.² A 209-acre farm project will necessarily involve multiple parcels of land. Even if the farmer has a vested right to construct the buildings on one parcel, the municipality can veto the farm project by changing the zoning for the other parcels after the submission of a conforming building permit. This is exactly what happened in this case.

²https://www.nass.usda.gov/Statistics_by_State/Wisconsin/Publications/Annual_Statistical_Bulletin/2016AgStats_web.pdf (last visited November 14, 2017).

Second, the Court of Appeals' decision uniquely impacts farming because farming involves both building and non-building land parcels. The Court of Appeals' decision expressly applies to land use on "non-building-site" acres. *Golden Sands II*, ¶5. A farm project is a unique development because it will always involve both building-site acres (barns, feed storage, sheds) and "non-building site" acres (cropland or pasture). The Court of Appeals even recognized the nature of farming requires both building and non-building site acres, stating: "No doubt Golden Sands needs land for growing crops and spreading manure to fully utilize the multiple large dairy buildings it has acquired the right to construct." *Id.*, ¶24. Again, the Court of Appeals' decision uniquely impacts farm projects because the feasibility of farm projects will depend on the zoning of "non-building site" acres.

Third, the Court of Appeals' decision uniquely impacts farming due to the number and timing of permits and approvals required to commence new or expanded farm operations. A farmer cannot simply start a new dairy farm in an "unrestricted" zoning area and then rely on the non-conforming use exception to zoning changes. Rather, approvals and permits are required at the county and state level. Municipalities can use the time required to obtain the necessary approvals to change the zoning of project land parcels.

As discussed above, the Court of Appeals' decision gives municipalities a *de facto* veto power over all new proposed farm projects that conform to current zoning when proposed. Due to the size and nature of farming operations, and the time required to obtain the necessary approvals and permits, the ability of farmers to develop new farms and convert new lands are at serious risk under *Golden Sands II*. The Court of Appeals' decision must be reversed.

III. The Court of Appeals' Decision Conflicts with Wisconsin's Position as a Leader in Land-Use Certainty.

Wisconsin is one of eleven states in the nation that allows development rights to vest upon the filing of a conforming building permit application. 4 Am. Law. Zoning §32:3, *Vested rights, timing* (5th ed.); *see also* 4 Rathkopf's The Law of Zoning and Planning §70:16, *Minority view: At time of permit application—Generally* (4th ed.). Under this rule, "[w]hen a court determines that the owner's rights have vested prior to the new zoning ordinance, the government is prohibited from interfering *with the project*, and any new zoning ordinances may not be applied to the particular property." 4 Am. Law. Zoning §32:3, *Vested rights, timing* (5th ed.) (emphasis added).

The Building Permit Rule recognized under Wisconsin law is in contrast to the "majority rule" followed in other states. "The majority rule requires issuance of a building permit by the municipality, plus substantial construction and/or substantial expenditures before rights vest." 4 Am. Law. Zoning §32:3, *Vested rights, timing* (5th ed.) The majority Building Permit Rule requires case-by-case litigation of whether "construction" and/or "expenditures" were "substantial," in contradiction to Wisconsin's "bright-line" Building Permit Rule confirmed by this Court in *McKee*. 2017 WI 34, ¶¶4, 34, 43, 47.

Wisconsin's Building Permit Rule, vesting rights at the time of filing the building permit application, provides invaluable certainty to Wisconsin property owners. Rights are established very early in the development process and property owners know that their investment will be protected.

The Court of Appeals' decision that the Building Permit Rule carries no land use rights turns the certainty of Wisconsin land use law on its head. It gives all municipalities a roadmap to prohibit new or expanded farming operations by allowing the municipality to change zoning after the submission of a conforming building permit application. This destroys the certainty the Building Permit Rule is designed to create and must be reversed.

IV. Wisconsin Statute §66.10015 Has No Application to this Case.

The Town spends a fair amount of its brief discussing and analyzing Wisconsin Statute §66.10015. The Town's focus on this statute is curious for two reasons.

First, the Town's focus on Section 66.10015 is curious because all parties agree that the statute was enacted after the facts of this case and is not, by its terms, applicable to the facts of this case. As such, the potential application of the facts of this case to the new statute is purely hypothetical. Appellate courts need not address hypothetical arguments. *Est. of Merrill ex rel. Mortenson v. Jerrick*, 231 Wis.2d 546, 557, 605 N.W.2d 645 (Ct. App. 1999.) In addition, issues that are not dispositive need not be addressed. *Maryland Arms Ltd. Partn. v. Connell*, 2010 WI 64, ¶48, 326 Wis.2d 300, 786 N.W.2d 15.

Second, the Town's focus on Section 66.10015 is curious because, if the statute applied, the Town would lose this case. The statute would protect Golden Sands' "defined and adjacent parcels of land, which includes lands separated by roads, waterways, and easements." The project map shows that 80-90% of the project acres would come within the purview of the statute and be protected from the Town's after-the-fact zoning change. (P-App. 055.)

This case requires applying the law as it existed in June of 2012, prior to the enactment of Section 66.10015. Therefore, this Court's decision in this case will not conflict with the legislature's intent or purpose in passing Section 66.10015. The impact of Section 66.10015 to this case is not before this Court. However, if it were before the Court, the vast majority of the Town's after-the-fact zoning changes would clearly be prohibited by statute.

CONCLUSION

The Agriculture Coalition requests that this Court reverse the Court of Appeals and confirm that the Building Permit Rule includes the vested right to use the project land identified in the permit application consistent with zoning at the time of filing.

Respectfully submitted this 15th day of November, 2017.

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CERTIFICATIONS

Certification as to Form and Length: I hereby certify that this Amicus Brief of Agriculture Coalition conforms to the rules contained in Section 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of this brief is 2,407 words.

Certificate of Compliance with Wis. Stat. §809.19(12). I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Section 809(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of November, 2017.


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CERTIFICATE OF SERVICE

I, Rose Brice, being first duly sworn on oath, certify that on the 15th day of November, 2017, I served copies of the *Motion for Leave to File Amicus Brief of Agriculture Coalition* and *Amicus Brief of Agriculture Coalition*, including Certificates, upon the following persons, as indicated:

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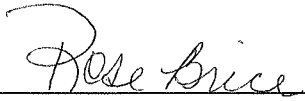
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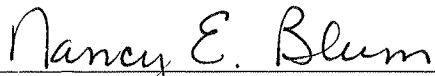
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Dated this 15th day of November, 2017.



Rose Brice

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



Notary Public, State of Wisconsin
My commission expires: 5/18/18