No. 15AP1258

In the Supreme Court of Wisconsin

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

On Appeal from the Wood County Circuit Court,
The Honorable Thomas B. Eagon, Presiding,
Case No. 12-CV-389

NON-PARTY BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF PETITIONER

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INTRODUCTION

This case provides the Court an opportunity to clarify its vested-rights jurisprudence by holding that Wisconsin's bright-line building-permit rule protects against subsequent rezoning not only the applicant's right to construct buildings, but also the right to use land integral to the project as outlined in the building-permit application. Though the Court has not had the opportunity to explicitly adopt this principle, it finds support from other jurisdictions with a bright-line building permit rule and cases involving large, integrated developments. In addition, the Legislature later codified it in Wis. Stat. § 66.10015, freezing zoning requirements for the full scope of a project—including integral land—at the time of first application. Under the Court of Appeals' rule, a town's interference with an owner's expectation to use land identified in a building-permit application and integral to the use of the buildings, as here, would effect an uncompensated regulatory taking of the land set aside for the buildings themselves, which the owner has an undisputed vested right to use for agriculture.

STATEMENT OF INTEREST

The State has an interest in the enforcement of Wisconsin's bright-line building-permit rule and in the avoidance of regulatory takings. Because the State often defends against takings claims, *see, e.g.*, *Zinn v. State*, 112 Wis. 2d 417, 436, 334 N.W.2d 67 (1983), it has an additional

institutional interest in the uniformity and predictability of land-use law. Explicit adoption of the integral-use principle also serves the State's interest in efficiency. The State invests significant time and money to issue permits for large agricultural operations, a process that takes a minimum of six months. *See* WPDES Flowchart, http://dnr.wi.gov/topic/AgBusiness/documents/CAFOWPDESApplicationProcessFlowchart.pdf (last visited Nov. 14, 2017). During this process, the State specifically requests and considers information related to local approvals, including building permits. Thus, any rule chosen here will affect state interests.

ARGUMENT

I. Under Wisconsin's Vested-Rights Doctrine, Golden Sands Obtained A Right To Use Its Land For Agriculture When It Filed Its Building-Permit Application

A. This Court's Bright-Line Building-Permit Rule Protects An Applicant's Right To Develop Property Integral To The Approved Use Of The Buildings And Identified In The Application

1. Both federal and state law safeguard vested rights in property. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–72 (1972); *Neiman v. Am. Nat. Prop. & Cas. Co.*, 2000 WI 83, ¶ 8, 236 Wis. 2d 411, 613 N.W.2d 160. The Fourteenth Amendment to the federal Constitution declares that no "State [shall] deprive any person" of "property" "without due process of law." U.S. Const. amend. XIV. The

Wisconsin Constitution guarantees "substantial[ly] equivalent" due-process rights in Article I, Section 1. *Neiman*, 236 Wis. 2d at 419. "Property interests," however, are created not by the Constitution, but by "existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577.

Vested rights are based generally on an individual's reasonable expectations. A right vests—and is thus constitutionally protected—when it is "an immediate right of present enjoyment or a present fixed right of future enjoyment," or "not dependent on uncertain future events." *Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64, ¶ 68, 370 Wis. 2d 500, 881 N.W.2d 702. It "so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, ¶ 36, 374 Wis. 2d 487, 893 N.W.2d 12.

In Wisconsin, an "exception" to the "[general] rule" that a landowner has no vested right in a particular zoning designation "arises when a property owner has applied for a building permit conforming to the original zoning classification." *McKee*, 374 Wis. 2d at 503. This rule "balances a municipality's need to regulate land use with a land owner's interest in developing property under an existing zoning classification" and "creates predictability for land owners, purchasers, developers, municipalities and the courts." *Id.* at 505.

Indeed, this Court chose the permit application as the vesting point because it recognized that the acquisition of a building permit correlates with expenditures made in reliance on current regulations. In *Lake Bluff Housing Partners v. City of South Milwaukee*, this Court analyzed the three "Building Height Cases" to identify "criteria for adjudicating zoning vested rights cases." 197 Wis. 2d 157, 171–72, 540 N.W.2d 189 (1995). In two cases, the builder had incurred expenses and obtained a permit, and this Court determined that the builder had acquired vested rights. *Id.* at 172–73. In the third, the developer had not applied for a permit, incurred no expenses, and no rights vested. *Id.*; *see Zealy v. City of Waukesha*, 201 Wis. 2d 365, 548 N.W.2d 528 (1996) (same). Comparing these cases, this Court held that the filing of the building-permit application is the moment of vesting because it is a good proxy for investments made in reliance on the zoning classification, *Lake Bluff*, 197 Wis. 2d at 172, and a full substitute for the "case-by-case analysis of expenditures," *McKee*, 374 Wis. 2d at 504–06. These cases, however, did not explicitly address how the municipality's zoning action would affect integral land beyond the buildings themselves.

Washington and Illinois, like Wisconsin, use the bright-line building-permit rule, and their courts explicitly state that—in addition to obtaining a vested right to the building permit—the developer gains a vested right to develop surrounding land under a previous zoning ordinance. *See Valley View Indus. Park v. City of Redmond*, 733 P.2d 182

(Wash. 1987); *Cos Corp. v. City of Evanston*, 190 N.E.2d 364 (Ill. 1963). The *Valley View* developer submitted five building-permit applications (out of a total 12 buildings contemplated) to build an industrial park on a 26.71-acre parcel. 733 P.2d at 188. The city took no action on the applications and subsequently downzoned the land. The Washington Supreme Court held that the developer's five building-permit applications "fixed, and firmly imprinted upon the [developer's entire property]," even land without buildings, "the zoning classification it carried at th[at] moment." *Id.* at 195–96. Similarly, the Illinois Supreme Court held that an owner was entitled to a building permit *and* the right to have fewer parking spaces around its buildings than required by subsequent zoning because the applicant's right to the previous zoning classification vested—as to all the property—at the moment of application. *See Cos Corp.*, 190 N.E.2d at 367–68.

The application of the vested-right doctrine's integral-use principle to large, integrated developments, such as mines, quarries, landfills, and farms, is especially straightforward. These are "not the usual case[s] of a business conducted within buildings, nor is the land" merely a site for the business. *Sturgis v. Winnebago Cnty. Bd. of Adjustment*, 141 Wis. 2d 149, 153, 413 N.W.2d 642 (Ct. App. 1987) (citation omitted). Where "the land itself is a [ ] resource," courts have held that "the enterprise is using all that land . . . which constitutes *an integral part* of the

operation." *Id.* (emphasis added); *see Cnty. of Du Page v. Elmhurst-Chicago Stone Co.*, 165 N.E.2d 310, 313 (Ill. 1960) (quarrying); *see also* 8A McQuillin Mun. Corp. § 25:195 (3d ed.) (citing *Ready Mix, USA, LLC v. Jefferson Cnty.*, 380 S.W.3d 52, 69, 72 (Tenn. 2012) (mining)). Hence, a landowner acquires a vested interest in the entirety of her property "where only part of a parcel has been used for a nonconforming use" by (1) "demonstrating that the use is unique and adaptable to the entire parcel" and (2) showing "an overt manifestation of [her] intent to utilize the entire property for the ascribed purpose." McQuillin, *supra*, § 25:194; *see Jones v. Town of Carroll*, 931 N.E.2d 535, 536, 537–38 (N.Y. 2010) (landfilling).

Under this rule, as implicitly recognized in Wisconsin and explicitly stated in Illinois and Washington, Golden Sands' right to use the land integral to its seven buildings under current zoning vested at the moment it filed its building-permit application, which "overt[ly] manifest[ed]" Golden Sands' "intent to utilize the entire property" for the purpose of dairy farming. McQuillin, *supra*, § 25:194. The application made clear that Golden Sands planned a "new dairy [farm]," *see* R.59.12 (cover letter); that the farm was large enough to require a Wisconsin Pollutant Discharge Elimination System (WPDES) permit, R.59.12; and that the "total" "project location" was "6,388 ac.," R.59:13. Golden Sands also attached a map showing all 6,388 acres. R.59:65. By that point, Golden Sands had expended or committed to

expend about $2.63 million on the property. *See* R.18:06. Even assuming *arguendo* that Golden Sands was then using only the 98 acres under its seven buildings for agriculture, the use—farming—was "unique" and "adaptable" to the entire parcel. Thus, the protection of the building-permit rule extends to all of Golden Sands' land.

2. The Court of Appeals' concern with identifying the bounds of the integral-use principle is misplaced. Courts have applied a similar standard for decades in the takings context. For example, courts must identify whether there is "unity of use, or integrated use" of "lands divided in some manner" sufficient to justify compensation for the decreased value of one piece due to condemnation of the other. *See* 59 A.L.R. 4th 308 § 2[a]. Moreover, under that standard, "[p]roperty utilized for a single business, commercial, or industrial purpose is often considered a single unit of land," especially when the use is "agricultural," like "farming" or "ranching." *Id.*; *Parks v. Wis. Cent. R.R. Co.*, 33 Wis. 413 (1873).

Takings doctrine also helps identify the contours of the integrated-use principle by offering a proof formula of sorts, keyed to the variable of the buildings' value: if the rezoning of the allegedly integral land would significantly (or entirely) diminish the value of the buildings themselves—in which everyone agrees the developers have a vested right—then the integral-use principle has been violated. Here, for example, if this Court accepted Saratoga's proposal to artificially divide the 98 acres with buildings from Golden Sands' other land, its

decision would result in a regulatory taking of Golden Sands' undisputed vested right to its seven buildings. *See infra* Part I.C. Because Golden Sands' land is integral to the use of the seven buildings, the buildings are essentially worthless to Golden Sands without the right to use the surrounding land for agriculture.

B. The Legislature Has Codified The Building-Permit Rule's "Integral Use" Principle

1. In 2013, the Legislature passed Wis. Stat. § 66.10015, which freezes local regulation at the time a developer files her application for a "project." Wis. Stat. §§ 66.10015(1)(a), (1)(b), (2)(a). If the "project" requires "more than one approval" or "approvals from [multiple] political subdivision[s]," all requirements for the approval(s) are frozen at the moment of first application as long as the developer "identifies the full scope of the project." *Id.* § 66.10015(2)(b). A "project" is "a specific and identifiable land development that occurs on defined and adjacent parcels of land." *Id.* § 66.10015(1)(d). "Adjacent in its ordinary usage means near to or close to, but does not imply actual physical contact." *Superior Steel Prods. Corp. v. Zbytoniewski*, 270 Wis. 245, 247, 70 N.W.2d 671 (1955) (citation omitted); *see Adjacent*, Black's Law Dictionary (10th ed. 2014) (same).

The statute, though passed after Golden Sands filed its building-permit application, is instructive because courts presume that legislatures codify common-law rules "unless they effect [a] change with clarity." Antonin Scalia & Bryan

A. Garner, *Reading Law: The Interpretation of Legal Texts* § 52, p. 318 (2012); *see State v. Gomaz*, 141 Wis. 2d 302, 320 n.11, 414 N.W.2d 626 (1987) (same). Here, no clear expression of change exists, and the language confirms that the integral-use principle is the rule in Wisconsin. Not only does the definition of "project" include buildings *and* "land development," but also the words "full scope" protect large, integrated developments. Wis. Stat. §§ 66.10015(1)(d), (2)(b).

2. Saratoga's lone counterargument is unavailing. It contends that this statute would not protect Golden Sands' farm because Golden Sands' land is not contiguous. But courts construe words in Wisconsin statutes "according to common . . . usage." Wis. Stat. § 990.01(1). As mentioned above, adjacent "in its ordinary usage" does not require that sections of land touch.

C. A Contrary Rule Would Effect An Unconstitutional Taking Of Golden Sands' Vested Right To Use Its Buildings For Agriculture

The federal and Wisconsin Constitutions forbid uncompensated takings of private property. The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. In addition, the Wisconsin Constitution provides that "[t]he property of no person shall be taken for public use without just compensation." Wis. Const. art. I, § 13.

A taking can result from a regulation of property that "goes too far." *Zealy*, 201 Wis. 2d at 373. Two kinds of regulatory takings are relevant here: *Lucas* takings and *Penn Central* takings.

Under *Lucas*, a regulation "takes" when it "deprives [a plaintiff's] property of all economically beneficial or productive use," *State ex rel. Ziervogel v. Wash. Cnty. Bd. of Adjustment*, 2004 WI 23, ¶ 30 n.5, 269 Wis. 2d 549, 676 N.W.2d 401 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)), or "all or substantially all practical uses of a property," *Brenner v. New Richmond Reg'l Airport Comm'n*, 2012 WI 98, ¶ 45, 343 Wis. 2d 320, 816 N.W.2d 291.

In contrast to *Lucas*' categorical test, *Penn Central*'s framework for partial regulatory takings calls for an "essentially ad hoc, factual [analysis]." *Noranda Expl., Inc. v. Ostrom*, 113 Wis. 2d 612, 628, 335 N.W.2d 596 (1983) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). Three factors have particular significance: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Zealy*, 201 Wis. 2d at 374 (citation omitted).

The concepts of takings and vested rights work in tandem. *See Bettendorf v. St. Croix Cnty.*, 631 F.3d 421, 430 (7th Cir. 2011) (Hamilton, J., concurring in part and dissenting in part) ("[T]he concept of vested rights has

migrated . . . to the modern jurisprudence of regulatory takings."); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). A regulation that denies a vested property right ordinarily commits a regulatory taking.

Here, applying Saratoga's zoning to Golden Sands' property would effectuate a taking of its undisputed vested right in its buildings under both the *Lucas* test and the *Penn Central* analysis. Under *Lucas*, Saratoga's rezoning deprives Golden Sands' seven buildings of all economically beneficial or productive uses. At least six of the seven buildings—two freestall barns, a special-needs barn, a dry-cow barn, a commodity shed, a separation building, and a parlor/office—are tailored for farming purposes. *See* R.59:14. The barns are not shaped like typical homes or office buildings, *see* R.59:21, 59:77 (*e.g.*, freestall barns are 98' x 1553'); the commodity shed stores hay and farm equipment, *see* R.67:262; and the separation building houses equipment to separate sand from liquid and solid waste, *see* R.67:260, R.67:344–45. If no farm exists, the farm buildings have been deprived of "all or substantially all practical uses." *See Brenner*, 343 Wis. 2d at 338; *see also Ill. Clean Energy Cmty. Found. v. Filan*, 392 F.3d 934, 936 (7th Cir. 2004) (causing value of property to "plummet, perhaps to zero," achieves "the same end" as "transfer[ring] title"); *compare R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 16, 244 Wis. 2d 497, 628 N.W.2d 781 (preventing 71 boat slips out of 272 total not a taking); *see generally Los Angeles v. Wolfe*, 491 P.2d 813 (Cal. 1971).

In fact, Saratoga rezoned the land "to be left substantially in its natural state"—a classic red flag under *Lucas*. 505 U.S. at 1018. Such rezoning carries "a heightened risk that private property is being pressed into some form of public service." *Id.* Here, the district's very name—"Rural *Preservation*"—suggests a goal to leave the land largely as-is. Indeed, Saratoga rezoned to "protect[ ]" the town's "surface [ ] resources" and "open space," and "to maintain the [town's] existing rural character." R.63:49. Permitted uses include "forestry," "harvesting of wild crops," "wildlife preserves," "hunting, fishing, and trapping," "public and private" recreation areas, "preservation of areas of scenic, historic, or scientific value," and "one dwelling per lot." R.63:49, 63:45. Obviously, Golden Sands cannot use its specialized buildings for those ends.

Even if the deprivation here were "one step short of complete," Golden Sands could claim a *Penn Central* taking. *See Lucas*, 505 U.S. at 1019 n.8. First, as discussed above, the regulation "ma[kes] it commercially impracticable [to use the seven buildings for farming]," "complete[ly] destr[oying]" the whole reason for the purchase. *See Penn Central*, 438 U.S. at 127–28; *see, e.g.*, *Maxey v. Redevelopment Auth. of Racine*, 94 Wis. 2d 375, 390, 288 N.W.2d 794 (1980).

Second, the ordinance has "interfered with distinct investment-backed expectations," indeed, the "primary expectation concerning the use of the parcel," *Penn Central*, 438 U.S. at 124, 136; which includes the sole commercial

purpose for which the property was purchased, *see*, *e.g.*, *Fla. Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 38–39 (1999). Here, it is undisputed that Golden Sands purchased, surveyed, and tested the land specifically to use it as a farm. *See, e.g.*, R.18:06.

Third, the government action here may fairly be characterized as the "acquisition[ ] of [a] resource[ ] to permit or facilitate uniquely public functions." *Penn Central*, 438 U.S. at 128. For example, this Court determined that a criminal statute prohibiting hunting on private property effectively pressed the owner's farmland into service as a "refuge" or "sanctuary" for "wildfowl," thus effectuating a taking. *State v. Herwig*, 17 Wis. 2d 442, 449–50, 117 N.W.2d 335 (1962); *see also Noranda*, 113 Wis. 2d at 614. Saratoga's "rural preservation" district rezoning accomplishes a similarly public end.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Dated this 15th day of November, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,992 words.

Dated this 15th day of November, 2017.

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SOPEN B. SHAH
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

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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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