

**RECEIVED**

**11-29-2017**

**CLERK OF SUPREME COURT  
OF WISCONSIN**

**STATE OF WISCONSIN  
SUPREME COURT**

---

**GOLDEN SANDS DAIRY, LLC,**

Plaintiff-Respondent-Petitioner,

**ELLIS INDUSTRIES SARATOGA, LLC,**

Plaintiff,

DISTRICT IV  
Appeal No. 2015AP1258

v.

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

Defendants-Appellants,

**RURAL MUTUAL INSURANCE  
COMPANY,**

Intervenor.

---

**JOINT *AMICUS CURIAE* BRIEF OF THE WISCONSIN  
REALTORS<sup>®</sup> ASSOCIATION, WISCONSIN BUILDERS  
ASSOCIATION, WISCONSIN MANUFACTURERS AND  
COMMERCE, AND NAIOP-WI**

---

Thomas D. Larson (WBN 1026187)  
4801 Forest Run Road, Suite 201  
Madison, WI 53704  
608-241-2047

608-241-2901 Facsimile

Attorney for the Wisconsin REALTORS®  
Association, Wisconsin Builders Association,  
Wisconsin Manufacturers and Commerce, and  
NAIOP-WI.

## TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES .....	ii
OVERVIEW .....	1
LAW AND ARGUMENT .....	2
I. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH CONTROLLING LEGAL PRECEDENT AND STATE STATUTES .....	2
A. Applying The Vested Rights Doctrine Only To The Right To Construct Buildings Conflicts With The Building Permit Rule Established In <i>McKee Family I, LLC v. City of Fitchburg</i> . ....	3
B. Applying the Vested Rights Doctrine Only To The Right To Construct Buildings Conflicts With The Statutory Vested Right Law In Wis. Stat. § 66.10015(2). ....	6
C. Applying the Vested Rights Doctrine Only To The Right To Construct Buildings Will Have a Negative Impact On Large-Scale Economic Development Projects. ....	9
II. THE ABILITY OF LOCAL GOVERNMENTS TO CHANGE THE RULES NECESSARY TO OBTAIN A PERMIT AFTER A PROPERTY OWNER SUBMITS A PERMIT APPLICATION RAISES DUE PROCESS CONCERNS. ....	11
CONCLUSION .....	15
FORM AND LENGTH CERTIFICATION .....	16
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12) .....	16
CERTIFICATE OF SERVICE .....	17

## TABLE OF AUTHORITIES

### U.S CONSTITUTION

Amend. XIV, § 1 .....	12
-----------------------	----

### WISCONSIN CONSTITUTION

Art. I, § 8 .....	12
-------------------	----

### U.S. SUPREME COURT CASES

<i>Carey v. Phipus</i> , 435 U.S. 247 (1978) .....	12
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986) .....	12
<i>Zinerman v. Burch</i> , 494 U.S. 113 (1990) .....	12

### WISCONSIN COURT CASES

<i>Buhler v. Racine County</i> , 33 Wis. 2d 137, 146 N.W.2d 403 (1966) .....	13
<i>Building Height Cases</i> , 181 Wis. 519, 195 N.W. 544 (1923) .....	1
<i>Golden Sands Dairy LLC v. Town of Saratoga</i> , No. 2015AP1258 (Wis. Ct. App. Apr. 13, 2017) .....	3, 4, 5
<i>Heaney v. City of Oshkosh</i> , 47 Wis.2d 303, 177 N.W.2d 74 (1970) .....	13
<i>Lake Bluff Housing Partners v. City of South Milwaukee</i> , 197 Wis.2d 157, 540 N.W.2d 189 (1995) .....	1, 3
<i>McKee Family I, LLC v. City of Fitchburg</i> , 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12 .....	5, 6
<i>State ex. rel Schroedel v. Pagels</i> , 257 Wis. 376, 43 N.W. 2d 349 (1950) ..	3
<i>Thorp. v. Town of Lebanon</i> , 235 Wis.2d 610, 612 N.W.2d 59 (2000) ...	12

<i>Zealy v. City of Waukesha</i> , 201 Wis.2d 365, 548 N.W.2d 528 (1996) . . .	13
--	----

## CASES FROM OTHER JURISDICTIONS

<i>Town of Largo v. Imperial Homes Corporation</i> , 309 So.2d 571 (Fla. 2d DCA 1975) . . . . .	14
---	----

## ACTS

2013 Wis. Act. 74 . . . . .	6
-----------------------------	---

## STATUTES

Wis. Stat. §§ 66.10015(1) . . . . .	7
Wis. Stat. § 66.10015(2) . . . . .	6
Wis. Stat. § 809.62(1r)(a) . . . . .	10
Wis. Stat. § 809.62(1r)(c)(3) . . . . .	2

## MISCELLANEOUS

Richard B. Cunningham & David H. Kremer, <i>Vested Rights, Estoppel, and the Land Development Process</i> , 29 HASTINGS L.J. 625 (1978) . . . . .	1, 13
Daniel R. Mandelker, <i>Land Use Law</i> , (5th ed. 2003) . . . . .	13
12 Richard R. Powell, <i>Powell on Real Property</i> , (2016) . . . . .	13
9 PATRICK J. ROHAN, <i>ZONING AND LAND USE CONTROLS</i> (1997). . . . .	1

## OVERVIEW

In the context of real estate development, the vested rights doctrine attempts to provide the property owner with predictability and certainty as to when new regulations can be applied to a proposed development. 9 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, § 52D.01 (1997). The theory behind the vested rights doctrine is that “[the property owner] is proceeding on the basis of a reasonable expectation.” *See Lake Bluff Housing Partners v. City of S. Milwaukee*, 197 Wis.2d 157, 175, 540 N.W.2d 189, 196 (1995). Regulations or actions which take away or impair “rights that have vested under existing laws [are] generally unjust and may be oppressive” and thus “have always been looked on with disfavor.” *Building Height Cases*, 181 Wis. 519, 531, 195 N.W. 544 (1923) (citations omitted).

Wisconsin’s vested rights doctrine, however, provides very little certainty or predictability in the development-approval process, according to the court of appeals in this case. Based upon the court’s decision, local governments have the authority to change the zoning and other land-use regulations and apply those changes to a building permit after the building

permit application has been submitted to the local government (the building permit rule).

If allowed to stand, the court of appeals' decision would conflict with (a) the building permit rule established by this Court in *McKee Family I, LLC v. City of Fitchburg*, (b) the statutory vested rights law established by the Wisconsin Legislature, and (c) the due process protections afforded under state and federal law. Moreover, the court of appeals' decision, if allowed to stand, would likely create tremendous uncertainty and hardship for businesses and property owners throughout Wisconsin who must obtain permits from local governments to use or develop their property.

## **LAW AND ARGUMENT**

### **I. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH CONTROLLING LEGAL PRECEDENT AND STATE STATUTES.**

The fundamental question presented in this case is whether the court of appeals erred in interpreting the scope of Wisconsin's vested rights doctrine. Specifically, whether Wisconsin's vested rights law protects only a property owner's right to construct buildings, or whether it also protects the right to use the buildings and related land for uses identified in the

building permit application and authorized by the zoning ordinance when the application was submitted.

A. Applying The Vested Rights Doctrine Only To The Right To Construct Buildings Conflicts With The Building Permit Rule Established In *McKee Family I, LLC v. City of Fitchburg*.

In *Golden Sands Dairy LLC v. Town of Saratoga*, No. 2015AP1258 (Wis. Ct. App. Apr. 13, 2017) (*Golden Sands II*), the court of appeals held that Wisconsin's vested rights law entitles a property owner to construct buildings, but not necessarily to use the buildings or related land for a use permitted by the zoning ordinance when the application was submitted. *See id.* at ¶ 31. In reaching this conclusion, the court analyzed several Wisconsin vested rights cases and determined that vested rights are established under the building permit rule only for "purposes of building or altering a structure." *Id.* at ¶ 15; *see also id.* at ¶¶ 17-20 (analyzing *Lake Bluff Housing Partners*, 197 Wis. 2d 157 and *State ex. rel Schroedel v. Pagels*, 257 Wis. 376, 43 N.W. 2d 349 (1950)). The court further suggests that a vested right to construct a building does not necessarily constitute a right to use the building in a manner that was permitted by the zoning ordinance when the building permit application was submitted. *Golden Sands II*, at ¶17, fn. 3. "Even if we assume . . . 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.* at ¶ 20.

Moreover, with respect to use of the land identified in the building permit as part of the development proposal, the court determined that property owners do not have vested rights in the use of the land directly related to the buildings that were the subject of the building permit.

Although the proposed dairy operation consisted of approximately 6,488 acres, the court separated the property into two developments, with distinct vested rights associated with each development. *See id.* at ¶ 5 (noting the parties in the case are disputing only the intended use of the 6388-acre parcel, not the 100-acre parcel). In doing so, the court stated, “[i]t is readily apparent that the use of any land associated with a building as referenced in a building permit application poses additional and different issues than the use of a building site for purposes of constructing a building.” *Id.* at ¶ 21.

For the 6,388 acres of the property where the buildings were not to be constructed, the court concluded that no vested rights to use the property existed. *Id.* at ¶ 31. In fact, the court determined that the vested rights doctrine does not apply to uses of property. *See Golden Sands II*, at ¶ 14. Rather, a property owner only has a “vested interest” in the use of land,

not a vested right, and such interest is limited to uses that existed prior to the enactment of a zoning ordinance under a nonconforming use theory. *See id.* at ¶ 14.

The court of appeals' holding in this case is in direct conflict with this Court's recent pronouncement in *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12 (McKee). In *McKee*, this Court established that upon filing a complete building permit application a property owner acquires a vested right to use property according to zoning regulations in place at the time the building permit application was filed. *See id.* at ¶ 43. While a property owner generally cannot acquire vested rights in the zoning of a property, this Court recognized an exception "when a property owner has applied for a building permit conforming to the original zoning classification." *Id.* at ¶ 37 (citation omitted). "Wisconsin follows the bright-line building permit rule that a property owner's rights do not vest until 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." *Id.* at ¶ 4 (citation omitted). As this Court observed, "the bright-line building permit rule . . . creates predictability . . . [and] balances a municipality's need to regulate

land use with a land owner's interest in developing property under an existing zoning classification.ö *Id.* at ¶ 43. Thus, this Court in *McKee* made it clear that the building permit rule applies broadly to buildings, land uses and the right to develop property.

Accordingly, the court of appeals' narrow application of the vested rights doctrine directly conflicts with the building permit rule established in *McKee* and thus should be overturned.

B. Applying the Vested Rights Doctrine Only To The Right To Construct Buildings Conflicts With The Statutory Vested Right Law In Wis. Stat. § 66.10015(2).

Recognizing vested rights to be a policy matter of statewide significance, the Wisconsin Legislature enacted a broad vested rights law that protects the rights of property owners to use their property in accordance with the laws and regulations in effect at the time any development-related permit is submitted to a local government. *See* 2013 Wis. Act 74. Under Wis. Stat. § 66.10015(2), local governments are prohibited from applying new changes or conditions to permit-approval processes after a property owner has submitted an application for a development-related permit. The protection applies broadly to all development regulations, including zoning, and all forms of permits and

authorizations related to land development activities. *See* Wis. Stat. §§ 66.10015(1)(a) and (b).

The breadth of the statutory vested rights law is reflected in the plain language of the statute. Specifically, the statute provides “if a person has submitted an application for an approval, the political subdivision shall approve, deny, or conditionally approve the application solely based upon the existing requirements.” *Id.* (emphasis added). “Approval” is defined as “a permit or authorization for a building, zoning, driveway, stormwater, or other activity related to a project.” Wis. Stat. § 66.10015(1)(a) (emphasis added). Hence, by including the catch-all phrase “or other activity related to the project,” the Legislature intended for the vested rights law to apply to all approvals related to development including, but not limited to, building permits. Moreover, “existing requirements” is defined as “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 . . . .” Wis. Stat. § 66.10015(1)(a) (emphasis added). Again, the Legislature’s inclusion of the catch-all phrase “or other properly adopted requirements” demonstrates that

all local regulations, including zoning ordinances, are to be frozen and cannot be changed for purposes of evaluating the permit application.

The vested rights statute, however, does not create a vested right in zoning, nor is that the issue in this case. Nothing in this statute limits the ability of local governments to enact or amend its zoning regulations. The statute merely provides that any changes to the zoning regulations cannot be applied in the decision-making process related to permit applications submitted prior to the time the zoning changes go into effect.

By enacting this law, the Wisconsin Legislature has demonstrated the importance of having a fair and predictable approval process for all development-related permits that allows property owners to rely on the requirements and standards in place at the time a development proposal is submitted to a municipality for approval. While local governments are required to review and approve development to ensure regulatory compliance and the protection of public health, safety and welfare, they must do so in a fair and equitable manner that recognizes the rights of property owners. Attempts by local governments to thwart development projects by changing regulations after receiving a building permit

application are in direct conflict with Wisconsin's statutory vested rights law.

Because it is in direct conflict with Wisconsin's statutory vested rights law, the court of appeals' decision should be overturned.

C. Applying the Vested Rights Doctrine Only To The Right To Construct Buildings Will Have a Negative Impact On Large-Scale Economic Development Projects.

Large-scale, multi-phase economic development projects are common and often necessary in municipalities throughout Wisconsin. Economic development projects regularly require numerous parcels of real estate with large amounts of contiguous acreage to maximize economic development opportunities. For example, a single commercial parcel of land less than a half-acre in size generally has limited potential uses such as office or retail, given the floor area and parking requirements found in most building codes. A larger economic development with additional uses, such as a gas station or restaurant, generally requires several parcels of land. A more comprehensive and diverse economic development project that includes hotels, mixed-use residential or a regional shopping center may require even more acreage.

In addition, multiple parcels are often acquired for a project to avoid geographic or environmental constraints on property. For example, if a large wetland or steep sloping terrain is present on a parcel, an adjacent parcel that is relatively flat and dry may be acquired to create more developable land. Given the likely existence of state or local regulations prohibiting the development on or near steep slopes or wetlands, acquiring the adjacent parcel will often allow some of the development activity to be transferred from the parcel with wetland or steep slopes to the parcel with drier and flatter areas.

Once these parcels are assembled and placed under contract, the construction activity is often phased-in over a period of years due to market conditions and the complexities associated with large-scale development projects. Although approvals for the future development are often sought and obtained for multiple parcels at one time, it may take years to obtain all the necessary building permits for the construction activity on the individual parcels.

If a local government can change the allowable use of property at any time in the development process, even after a building permit application has been submitted, developers of large-scale economic

development projects will not have the necessary certainty regarding the allowable land uses to move forward with their projects. Before a building permit application is submitted, certainty regarding the allowable use of the property is necessary to obtain financing from lenders and to warrant the significant expenditures required in the early stages of development for due diligence activities such as financial feasibility analyses, engineering studies and environmental testing. Thus, if the scope of the vested rights law is limited to only the construction of buildings, large-scale economic development projects may be less likely to occur in Wisconsin.

**II. THE ABILITY OF LOCAL GOVERNMENTS TO CHANGE THE RULES NECESSARY TO OBTAIN A PERMIT AFTER A PROPERTY OWNER SUBMITS A PERMIT APPLICATION RAISES DUE PROCESS CONCERNS.**

The court of appeals' affirmation of the Town of Saratoga's efforts to change "the rules of the game" after Golden Sands submitted a building permit application raises due process concerns. Specifically, if a local government can change the requirements necessary to use or develop property after a business or property owner has submitted a building permit application, affected businesses and property owners can be subject to arbitrary and capricious changes to regulations at any point in the

permitting process. In turn, this will create tremendous uncertainty as to whether any specific use or development is permitted within a local community.

The Due Process Clause of the Fourteenth Amendment prohibits government from depriving “any person of life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 1; Wis. Const. Art. I, § 8. The U.S. Supreme Court has interpreted the Due Process Clause to protect both procedural and substantive rights. See *Zinerman v. Burch*, 494 U.S. 113, 125 (1990). “Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property.” *Carey v. Piphus*, 435 U.S. 247, 259 (1978). With respect to substantive rights, the Due Process Clause protects individuals from “certain arbitrary, wrongful actions” regardless of the fairness of the procedures used to implement them. See *Zinerman*, 494 U.S. at 125 (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

While property owners do not have a *per se* right to a particular zoning regulation remaining unchanged forever, they are entitled to due process which forbids local governments from arbitrarily or capriciously restricting owners’ rights to use their property for a lawful purpose. See *Thorp. v.*

*Town of Lebanon*, 235 Wis.2d 610, 638-40, 612 N.W.2d 59 (2000)(citations omitted); *see Zealy v. City of Waukesha*, 201 Wis.2d 365, 381-82, 548 N.W.2d 528 (1996). The “vested rights doctrine has a constitutional base. It confers constitutional protection on property rights a [property owner] has acquired in the use of his [property].” Daniel R. Mandelker, *Land Use Law*, §6.13 at 224 (5th ed. 2003). Even if a use is no longer allowed by a rezoning, property owners have a vested right in continuing the current use of their property. *See Heaney v. City of Oshkosh*, 47 Wis.2d 303, 309, 177 N.W.2d 74 (1970); *see also, Buhler v. Racine County*, 33 Wis. 2d 137, 148, 146 N.W.2d 403 (1966). “The vested rights doctrine in the land use context protects the rights of landowners to continue the use of their property, . . . , notwithstanding changes in zoning statutes or ordinances.” 12 Richard R. Powell, *Powell on Real Property*, ¶ 79C.13[4][a], at 79C-288 (2016). This doctrine recognizes that at some point in the development-approval process a property owner must have assurance that the proposed development can move forward without fear of retroactive application of new land use regulations. *See Richard B. Cunningham & David H. Kremer, Vested Rights, Estoppel, and the Land*

*Development Process*, 29 HASTINGS L.J. 625, 647 (1978). As described

by one court, the vested rights doctrine embodies the basic philosophy that:

One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the forms of words or deeds . . . .

*Town of Largo v. Imperial Homes Corporation*, 309 So.2d 571, 573 (Fla. 2d DCA 1975).

In this case, Golden Sands submitted an application for the only permit for a building permit required by the Town of Saratoga for the approval of Golden Sands dairy farm. Pet. Br. at 2. The building permit application was complete, complied with all of the necessary requirements, and identified the full scope of the project, including 6,388 acres to be used as integral part of the dairy farm. *See id.* at 9, 11. The Town refused to issue the building permit and six weeks later adopted a moratorium on all approvals of building permits and related activities inconsistent with the existing land use. *See id.* at 10-11. At the time Golden Sands submitted the building permit application, the proposed dairy farm was a permitted use of Golden Sands property. *Id.* at 10.

Allowing local governments to apply regulations retroactively to existing development permit applications runs counter to the principles of fundamental fairness and Wisconsin's long history of court cases that protect the due process rights of property owners from arbitrary and capricious ordinances.

### **CONCLUSION**

For the reasons stated above, we believe this Court should overturn the court of appeals' ruling and affirmatively declare that the vested rights doctrine prevents local governments from applying changes to local zoning and other land-use regulations to a building permit application after the application has been submitted to the local government.

Dated this 29th day of November, 2017.

Respectfully submitted,

By: \_\_\_\_\_

Thomas D. Larson (#10206187)  
4801 Forest Run Road, Suite 201  
Madison, WI 53704  
608-241-2047  
Fax: 608-241-2911

*Attorney for the Wisconsin REALTORS®  
Association, Inc., Wisconsin Builders  
Association, Inc., Wisconsin Manufacturers  
and Commerce, Inc., and NAIOP-WI.*

## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2973 words.

---

Thomas D. Larson

## CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 29th day of November, 2017.

---

Thomas D. Larson  
E-mail: [tlarson@wra.org](mailto:tlarson@wra.org)

### **CERTIFICATE OF SERVICE**

I hereby certify that:

I have caused three true and correct copies of this Joint *Amicus Curiae* Brief to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

Remzy D. Bitar  
P.O. Box 1348  
Waukesha, WI 53187

Ryan Braithwaite  
710 N. Plankinton Ave., Ste. 500  
Milwaukee, WI 53203-2404

Brian G. Formella  
P. O. Box 228  
Stevens Point, WI 54481-0228

Jordan J. Hemaïdan  
P.O. Box 1806  
Madison, WI 53701-1806

Paul G. Kent  
P.O. Box 1784  
Madison, WI 53701-1784

Monte Weiss  
1017 W. Glen Oaks Ln., Ste. 207  
Mequon, WI 53092

Dated this 29th day of November, 2017.

---

Thomas D. Larson

Attorney for the Wisconsin REALTORS®  
Association, Wisconsin Builders  
Association, Wisconsin Manufacturers and  
Commerce, and NAIOP-WI