STATE OF WISCONSIN
SUPREME COURT OF WISCONSIN

GOLDEN SANDS DAIRY, LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

v. Case 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

BRIEF OF *AMICUS CURIAE* WISCONSIN COUNTIES ASSOCIATION

Submitted by:

VON BRIESEN & ROPER, S.C.
Andrew T. Phillips, SBN 1022232
Rebecca J. Roeker, SBN 1044004
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202
Phone: (414) 276-1122
Email: aphillips@vonbriesen.com
rroeker@vonbriesen.com

Attorneys for Wisconsin Counties Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

The primary issue before this Court is straightforward: should the current bright-line "Building Permit Exception" rule be expanded to grant vested rights in lands mentioned as an "area involved" in a building permit application. The Court has already reviewed this issue in detail through its decisions in *Lake Bluff* and *McKee* by adopting and reaffirming the bright-line "Building Permit Exception" and the "Nonconforming Use Exception" relating to the law on vested land use and development rights. *See Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 540 N.W.2d 189 (1995); *McKee v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d. Wisconsin counties have enjoyed a relative amount of legal certainty in defining the scope of "vested rights" through application of the long-standing rule, first enunciated in *Lake Bluff* and recently affirmed in *McKee*, that the Building Permit Exception does not extend to lands or uses that were not a subject of, or adequately described in, a building permit application. *Id.*, ¶47; *Lake Bluff*, 197 Wis. 2d at 182. The Wisconsin

Counties Association ("WCA") respectfully submits that the wholesale expansion of *Lake Bluff* and *McKee* sought by Golden Sands Dairy, LLC ("Golden Sands") is both unnecessary and contrary to long-standing legal and policy precedent.

This Court's vested rights jurisprudence, along with recent legislative actions, demonstrate that certainty, reliability and consistency are the core principles that provide the foundation for the Building Permit Exception.[1] The Court should not dilute that well-established certainty by altering the bright-line rule.

The WCA is concerned that if the Court were to accept Golden Sands' argument, the nebulous end-point of the argument presents several significant questions, which if left unanswered, create the very climate of uncertainty that the Building Permit Exception was established to avoid. The illogical expansion of the Building Permit Exception and the Nonconforming Use Exception is likely to significantly restrict a county's

[1] Wisconsin Stat. § 66.10015 does not create a vested right in a particular zoning designation, but rather instructs that a municipality use the applicable code at the time of submission of a complete application.

ability to properly regulate the use of land and otherwise deprive the public of notice of development projects.

II. ARGUMENT

A. WISCONSIN LAW RECOGNIZES TWO EXCEPTIONS TO THE GENERAL RULE OF NO VESTED RIGHTS IN A ZONING DESIGNATION.

Wisconsin has a well-settled body of law establishing that a property owner does not have a vested right in a particular zoning designation. *See Zealy v. City of Waukesha*, 201 Wis. 2d 365, 548 N.W.2d 528 (1996). However, Wisconsin common law recognizes the need for balance between a municipality's need to regulate land use with a land owner's interest in developing property. *McKee*, 374 Wis. 2d 487, ¶43. In order to provide predictability for land owners, purchasers, developers, municipalities and the courts, Wisconsin law now recognizes two exceptions to the rule that a party does not have a vested right in a particular zoning designation: the "Building Permit Exception" and the "Nonconforming Use Exception."

1. Building Permit Exception.

This Court has long recognized the need for an identifiable point in the development process at which a development or use right would vest. In Wisconsin, a development or use right vests when an applicant submits a compliant building permit application. *Lake Bluff*, 197 Wis. 2d at 175. Unlike Wisconsin, many other states proceed under a factual analysis of factors such as substantial reliance and costs expended. *See* 4 Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* §§ 70:20 – 70:23 (4th ed. *updated* 2017). This Court has specifically rejected the majority approach because it invites a mishmash, fact-intensive analysis. As this Court recently affirmed, Wisconsin favors a distinct bright-line rule to provide certainty and predictability. *See McKee*, 374 Wis. 2d 487, ¶47.

This Court first recognized the "Building Permit Exception" in *Lake Bluff,* 197 Wis. 2d at 175. In *Lake Bluff*, the Court analyzed the history of vested rights cases in Wisconsin, starting with the "*Building Height Cases*" in 1923. *Id.* at 171-172. The *Building Height*

Cases established that a building permit is the central factor in determining whether a right to develop pursuant to a particular zoning designation has vested. *Id.* at 172. A 'complete and compliant' building permit application is one that conforms to the applicable zoning or building code in order to show a clear right. *Id.* at 175. Implicit in this rule is that the applicant must have a "clear right" that so "completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." *McKee,* 374 Wis. 2d 487, ¶36, (citing *Stoker v. Milwaukee Cty.*, 2014 WI 130, ¶12, 359 Wis. 2d 347, 857 N.W.2d 102).

To properly analyze the vested rights issue in this case, the property must be identified in two distinct parts: (1) land that was legally described in Golden Sands' Building Permit Application (the "BPA") and; (2) land that was generally referenced in the BPA as part of the "area involved." (R-App 115). The BPA references the "area involved" as "100 acres of site and 6,388 acres total." (*Id.*) However, only the 100 acres of the actual building site were legally described in the BPA (the

"Building Property"). The remaining 6000+ acres (the "Remaining Property") were referenced only in the "area involved" section and in an attached map. (*Id.*) Golden Sands, upon submission of the complete BPA to the Town of Saratoga ("Town"), acquired a vested right in the zoning for the Building Property because it was appropriately described in the BPA. The Remaining Property, however, was not fully described or otherwise sufficiently identified in the BPA. Therefore, the Remaining Property was not actually a part of the BPA, and Golden Sands could not obtain a vested right to develop the Remaining Property pursuant to the previous zoning designation.

United States Supreme Court precedent also counsels against finding that a vested right in the Remaining Property exists. In *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1027 (1992), the Court recognized that an owner should expect that "the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Id.*; *see also*

Biggs v. Town of Sandwich, 470 A.2d 928 (N.H. 1984) (holding that a developer does not acquire vested rights when taking a "calculated risk" and knows that a forthcoming ordinance would restrict development); *Town of Cross Plains v. Kitt's Field of Dream Korner, Inc.*, 2009 WI App 142, ¶¶43-44, 321 Wis. 2d 671, 775 N.W.2d 283 (noting that am applicant's knowledge of a forthcoming zoning change may create bad faith and therefore deny a use protection otherwise afforded). In this matter, there is evidence suggesting that Golden Sands knew or should have known of the forthcoming zoning changes to the Remaining Property and Golden Sands did not identify with any modicum of precision the particular property to which the vested rights would apply. In other words, Golden Sands failed the bright-line Building Permit Exception test and is now asking the Court to create new law to judicially sanction its failure.

2. "Actual and Active" Nonconforming Use Exception.

The second exception to the general rule of no vesting arises if a non-conforming use is "actual and

active" at the time of zoning changes ("Nonconforming Use Exception"). The Nonconforming Use Exception does not grant a vested right in a zoning designation, but rather grants a vested right to the property's use. *See Town of Cross Plains,* 321 Wis. 2d 671 ¶31. A property owner may therefore have a vested right in the continued use of property regardless of its nonconforming status because the owner is actually and consistently using the land. *See id* at ¶27.

Golden Sands and the Town agree that there was no "actual and active" agricultural use of the Remaining Property prior to the Town's implementation of the Town Zoning Ordinance, which prohibited that agricultural use of the Remaining Property. Because there was no previous active and actual agricultural use of the Remaining Property at the time of the zoning change, Golden Sands did not acquire a vested right in an agricultural use under the second exception. *Id.*

Yet, Golden Sands argues that this Court "could reconcile" the Building Permit Exception with the active and actual use doctrine set forth in the Nonconforming

Use Exception. In doing so, Golden Sands urges the Court to consider the "significant investments in future uses made in reasonable reliance on existing zoning law" to meet the requirements of the "active and actual use" exception. However, there is no inconsistency in the law to be reconciled: *McKee* just answered this question when it explicitly rejected a rule permitting a case-by-case analysis of expenditures made after a point of municipal approval. *See McKee*, 374 Wis. 2d 487, ¶44. Indeed, Wisconsin law does not recognize isolated "investment-backed expectations" in a vested rights analysis because the party claiming those vested rights has not yet established an underlying, protectable right. *See Rainbow Springs Golf. Co. v. Town of Mukwonago*, 2005 WI App 163, ¶12, 284 Wis. 2d 519, 702 N.W.2d 40; *R.W. Docks & Slips v. State,* 2001 WI 73, ¶¶17-18, 244 Wis. 2d 497, 628 N.W.2d 781; *see also Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 127 (1978).[2] When analyzed within the context of "active and actual use," a

[2] "Investment-backed expectations" analysis generally appears in takings analyses, not within vested rights analyses.

party not having a vested right based on expenditures or expectations makes perfect sense because it is that actual nonconforming *use* that creates the vested right, not the expenditures or reliance on a zoning designation in *anticipation* of use.

Because there is no actual discrepancy or disparity in existing law that intermingles the Building Permit Exception and the Nonconforming Use Exception, this Court should refrain from creating a new theory of law and should adhere to is current precedent as a fundamental legal principle of *stare decisis*. *See State v. Outagamie County Bd. of Adjustment*, 2007 WI 78, ¶66, 244 Wis. 2d 613, 628 N.W.2d 376.

B. THE BUILDING PERMIT EXCEPTION DOES NOT EXTEND TO LANDS OUTSIDE THOSE PROPERLY DESCRIBED IN THE BUILDING PERMIT APPLICATION.

Contrary to Golden Sands' assertion, the Building Permit Exception is not "implicit" to vest an applicant with the right to use any land referenced in a building permit application. Such an interpretation would

broaden the scope of the Building Permit Exception far beyond this Court's recent decision in *McKee*.

There is no question that Golden Sands has a vested right in the zoning and use of the Building Property because the BPA properly identified the Building Property. The Remaining Property, however, was not fully described or otherwise sufficiently identified in the BPA. By failing to sufficiently identify and describe all the Remaining Property in the BPA, the Remaining Property was not actually a part of the BPA and Golden Sands did not obtain a vested right in the zoning of the Remaining Property.[3] *McKee*, 374 Wis. 2d 487, ¶42, *citing Lake Bluff*, 197 Wis.2d at 175.

Golden Sands does not cite any cases holding that a vested right in a building permit extends to lands either referenced in a building permit or otherwise argued to be "integral" to the use of buildings approved via the permit.

---

[3] In addition, Golden Sands' claim to vested rights in the Remaining Property is flawed by the fact that it may not have owned all of the parcels comprising the Remaining Property. A developer can gain vested rights only if it has legal or equitable title in the property. 4 Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* §§ 70:20 – 70:10 (4th ed. *updated* 2017); *see also R.W. Docks & Slips v. State,* 244 Wis. 2d 497, ¶¶17-18.

The lack of supporting precedent is likely because Golden Sands' theory runs contrary to Wisconsin's vested rights jurisprudence in adhering to the bright-line Building Permit exception. In fact, many cases from other jurisdictions follow Wisconsin's rule that the threshold to obtain vested rights is much higher than simply referring to an "area involved" in an application. *See Rainbow Springs*, 284 Wis. 2d 519, ¶12 (stating that a conditional use permit holder does not have a vested right in continued operations despite financial expenditures and reliance on the permit); *Vill. of Hobart v. Brown County*, 2004 WI App 66, 271 Wis. 2d 268, 678 N.W.2d 402 (holding that vested rights may only be obtained by strict compliance with the code requirements, regardless of expenditures made); *Valley View Indus. Park v. City of Redmond*, 733 P.2d 182, 193 (Wash. 1987) (refusing to extend vested rights to an approved site plan); *Application of Campsites Unlimited, Inc.*, 215 S.E.2d 73, 78 (N.C. 1975) (holding that the type and extent of public improvements already paid for by a developer does not create a vested right); *City of Chicago v. Zellers*, 212

N.E.2d 737 (Ill. App. 1965) (holding that a permit which was deceptive on its face was not sufficient to establish vested rights). Nor do the cases cited by the State of Wisconsin in its Amicus Brief establish that a developer obtains a vested right to develop surrounding lands.[4]

Another reason why no case holds that an owner has a vested right in lands merely mentioned in a building permit is because such a concept runs contrary to the very purpose of a building permit: to ensure that a proposed building comports with the then-existing zoning and building code regulations. *Lake Bluff*, 197 Wis. 2d 170-182. A building permit does not address conditions or restrictions on land use for other properties because those issues are left to the general land use approval process. *Id.* If the land subject to the building permit is not legally described, how can a governing body properly

[4] *Valley View* addressed the rejection of "substantial reliance" on a building permit in order to trigger equitable estoppel, and did not hold that a property owner's vested rights extend to any surrounding land. *See Valley View,* 733 P.2d at 193. *Cos. Corp.* is distinguishable because the land at issue was one parcel, fully described in the application. *See Cos. Corp. v. City of Evanston,* 190 N.E.2d 364, 366 (Ill. 1963). In addition, the issue in *Cos. Corp.* was not whether a vested right had occurred, but whether a building permit should even be issued. *See id.* at 368.

approve the application for any use, including any "integral" use?

As the Court of Appeals noted, Golden Sands' argument invites questions that have no logical stopping point. *Golden Sands Dairy, LLC v. Town of Saratoga,* 2017 WI App 34, ¶¶21-25, 375 Wis. 2d 797, 899 N.W.2d 737. Contrary to Golden Sands assertion, these are not just hypothetical questions but rather very real issues that could undermine the required land use approval process because a developer would not be required to provide details of the development's impact. This would likely upset the balanced process of ensuring constancy in land planning while also considering future development. *See Golden Sands,* 375 Wis. 2d 797, ¶21.

Golden Sands attempts to dismiss the importance of this myriad of questions by stating that a vested right applies to uses, land and other buildings that are "integral" to that which is approved in a building permit. However, Golden Sands' proposed analysis of whether an area is "integral" to the buildings creates the exact situation that *McKee* sought to avoid: a piecemeal, case-

by-case analysis. Determining whether a building or area of land is "integral" would be a tremendously fact-intensive analysis for any governing body in the approval process. This analysis would also create uncertainty and undermine the goal of creating predictability for applicants, land owners, and the public during various stages of the development process.

The fact-intensive analysis that Golden Sands promotes is best left to the general land use approval process. As noted by the Court of Appeals, the building permit review process is not the proper forum for deciding complex land use and legal issues. *Golden Sands*, 375 Wis. 2d 797, ¶23; *see also Lake Bluff*, 197 Wis. 2d 170-182. Complex land use issues such as conceptual uses of land, zoning, conditional uses, and implementation of other land use tools should be determined within the framework of a general land use process in which a governmental body may properly review and analyze proposals. Further, the public should also be afforded an opportunity to be heard on potential uses of land in its community. The lack of specificity in a

building permit application denies the public a right to hear whether that application will impact his or her land. *See Weber v. Town of Saukville*, 209 Wis. 2d 214, 234, 526 N.W.2d 412 (1997). The general land use process consisting of a developer's application, analysis by the governing body and public input represents the balance of interests noted by this Court in *McKee*. *See McKee*, 374 Wis. 2d 487, ¶¶44-45.

If this Court were to adopt Golden Sands' argument, municipalities will likely begin requiring significantly more information in the building permit process, which would usually be provided in the general land use process. Indeed, if a municipality were to be bound by any information, even a reference to lands that may (or may not) be used in association with an approved building permit, municipalities would be required to complete far more plan review and analysis during the building permit application process so as not to be robbed of their ability to exercise proper land use planning.

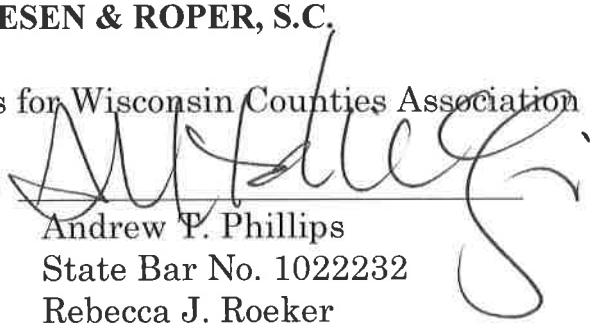
III. CONCLUSION

Based upon the foregoing, the WCA respectfully requests that this Court affirm the Wisconsin Court of Appeals' decision in this case.

Respectfully submitted this 29th day of November, 2017.

VON BRIESEN & ROPER, S.C.

Attorneys for Wisconsin Counties Association

By: 

Andrew T. Phillips
State Bar No. 1022232
Rebecca J. Roeker
State Bar No. 1044004

FORM AND LENGTH CERTIFICATE

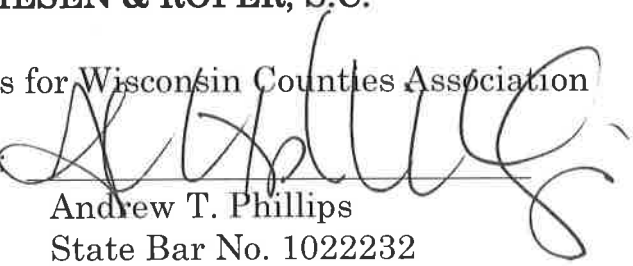
I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced using a proportional serif font.

The length of this brief is 2991 words.

Dated: November 29, 2017.

VON BRIESEN & ROPER, S.C.

Attorneys for Wisconsin Counties Association

By: 

Andrew T. Phillips
State Bar No. 1022232
Rebecca J. Roeker
State Bar No. 1044004

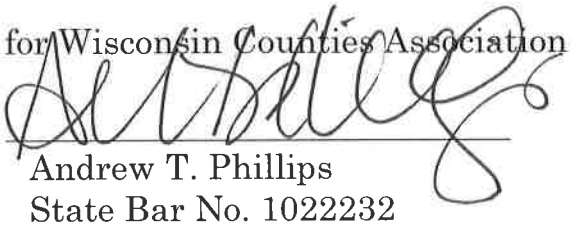
ELECTRONIC FILING CERTIFICATE

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 text of the electronic copy of this 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: November 29, 2017.

VON BRIESEN & ROPER, S.C.

Attorneys for Wisconsin Counties Association

By: 

Andrew T. Phillips
State Bar No. 1022232
Rebecca J. Roeker
State Bar No. 1044004

CERTIFICATE OF SERVICE

I, Tracey Strelka, being first duly sworn on oath, certify that on November 29th, 2017, I caused true and correct copies of the Amicus Brief of Wisconsin Counties Association to be served, c upon the following, as indicated:

Twenty-two (22) copies via Hand Delivery:

Diane M. Fremgen, Clerk
Wisconsin Supreme Court
110 East Main Street, Suite 215
Madison, WI 53704

Three (3) copies via First-Class Mail, postage prepaid:

Ryan Braithwaite Crivello Carlson, S.C. 710 N. Plankinton Ave., Ste. 500 Milwaukee, WI 53203-2404	Brian G. Formella Anderson, O'Brien, Bertz, Skrenes & Golla P.O. Box 228 Stevens Point, WI 54481-0228
Remzy D. Bitar Arenz, Molter, Macy, Riffle & Larson, S.C. P.O. Box 1348 Waukesha, WI 53187	Jordan J. Hemaidan Daniel A. O'Callaghan Joseph D. Brydges Michael Best & Friedrich LLP P.O. Box 1806 Madison, WI 53701-1806
Daniel M. Olson League of Wisconsin Municipalities 131 W. Wilson St., Ste. 505 Madison, WI 53703	Paul G. Kent Stafford Rosenbaum LLP P.O. Box 1784 Madison, WI 53701-1784
Richard Manthe Wisconsin Towns Association W7686 County Road MMM Shawano, WI 54166-6086	Monte Weiss Weiss Law Office, S.C. 1017 W. Glen Oaks Ln., Ste. 207 Mequon, WI 53092

Thomas D. Larson Wisconsin REALTORS Association 4801 Forest Run Rd. Ste. 201 Madison, WI 53704-7337	Sopen Shah State of Wisconsin Deputy Solicitor General P.O. Box 7857 Madison, WI 53707-7857
John J. Laubmeier H.D. Peterson Stroud, Willink & Howard, LLC P.O. Box 2236 Madison, WI 53701-2236	Christa Westerberg Pines Bach LLP 122 W. Washington Ave., Ste. 900 Madison, WI 53703

Dated this 29th day of November, 2017

Tracey Strelka

Tracey Strelka

Subscribed and sworn to before me
this 29th day of November, 2017.

Kelly A. Reince

Notary Public, State of Wisconsin
My Commission expires April 5, 2019.

NOTARY PUBLIC
KELLY A. REINCE
STATE OF WISCONSIN