SUPREME COURT OF WISCONSIN

GOLDEN SANDS DAIRY LLC,

Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,

Plaintiff,

Appeal 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.

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

Wood County Circuit Court Case No. 12CV0389, The Honorable Thomas Eagon Presiding

BRIEF OF *AMICUS CURIAE* WISCONSIN TOWNS ASSOCIATION

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INTRODUCTION

The Wisconsin Towns Association (WTA) is a voluntary association of 1,251 town and 22 village governments. WTA promotes town government; protects member interests, provides education; and assists in political and legal matters that address the concerns of town government, taxpayers, and residents.

ARGUMENT

Golden Sands' proposed expansion to the building permit rule threatens local planning, zoning, and individual property rights of others. Local governments expend countless time and resources carefully crafting zoning ordinances to implement comprehensive plans. The intent of zoning is to create certainty and balance individual property rights between both other individual property owners and community interests. Golden Sands' proposed expansion of vested rights would eliminate the utility of government planning and zoning because one property owner could broadly freeze zoning (versus narrowly under current law) regardless of a community plan or zoning ordinance, including land in other municipalities and land not owned by the applicant. This would shift the current and long held balance of private property rights toward one property owner and against the neighbors, all other private property owners, and the remaining

community. Furthermore, expansion of the bright line building permit rule to a "project" creates an environment in which a permit in one community vests rights in another and would cause utter disarray in land use regulation statewide.

I. EXPANDING THE BUILDING PERMIT RULE WOULD INDEED DO VIOLENCE TO LOCAL GOVERNMENT ABILITY TO REGULATE LAND USE.

Expanding the building permit rule to include property not specifically described in an application or subjectively labeled by the applicant as integral to the project would undermine planning and zoning. Wisconsin towns use a comprehensive, deliberate and lengthy process to create a zoning ordinance. Golden Sands' proposed rule would undermine that process, as well as zoning amendments, because one property owner could freeze zoning based on unsubstantiated and purely subjective assertions. This would shift an inordinate amount of power to one property owner, destroying the vested rights balance.

A. Towns Must Follow a Lengthy Process to Enact Zoning Ordinances

Since the Town of Saratoga originally lacked its own zoning ordinance, it is helpful to understand the lengthy procedure required to pass a zoning ordinance.

Creating a comprehensive plan is the first step in zoning ordinance development. A plan is not a regulation per se; however, zoning regulations must be consistent with a comprehensive plan. Wis. Stat. § 66.1001(3)(L). The comprehensive plan is a necessary initial action because it guides zoning ordinance development. Creating a comprehensive plan itself is complicated. It forces the municipality to critically evaluate and develop a compilation of objectives, policies, goals, maps and programs related to what are commonly referred as the nine elements of a comprehensive plan. The nine elements include: issues and opportunities; housing; transportation; utilities and community facilities; agricultural, natural, and cultural resources; economic development; intergovernmental cooperation; land use; and, implementation. *See* Wis. Stat. § 66.1001(2). Even prior to beginning the heart of the aforementioned planning process, the municipality is required to develop and adopt a separate public participation plan that requires open discussion, communication programs, information services and deploying other strategies to obtain public input. *See* Wis. Stat. § 66.1001(4)(a). And, frequently, prior to the beginning of any planning process, a municipality engages in a months-long request for proposal procedure to obtain a planning consultant.

Such an expansive planning process rich in data gathering and analysis, goal setting, and the balancing of opinions of thousands of stakeholders, which requires dozens, if not hundreds of meetings and hearings, often takes years. The Town of Saratoga's six-year planning process is not uncharacteristic of a community its size and complexities.

To enact a zoning ordinance, towns located in counties with general zoning ordinances must follow a specific procedure under Wis. Stat. § 60.62. The town must acquire village powers. Wis. Stat. § 60.62(1). Obtaining village powers requires elector approval at an Annual Meeting or Town Meeting of Electors. Wis. Stat. § 60.10(2)(c).

After adopting village powers, towns must obtain additional approval to exercise zoning at another Annual Meeting or Town Meeting of Electors under Wis. Stat. § 60.10(2)(h), or a referendum under Wis. Stat. § 60.62(2).

Before obtaining elector approval for zoning, towns most commonly decide to fully develop their zoning ordinance, as did the Town of Saratoga. This requires immense planning and preparation, especially if the town is working from a functional blank slate. Because much of the Town of Saratoga was in an unrestricted zone

under county zoning, it was indeed the case that Saratoga, like many towns, began its work from a functional blank slate.

The town must create a plan commission. Wis. Stat. § 60.62(4) Appointing a plan commission requires vetting potential candidates and an appointment process. Once created the plan commission must invest in significant education before starting to craft the complex ordinance.

Creating the actual zoning ordinance does not happen overnight, and because it is the "devil in the details" portion of the process, often takes more time than the development of the foundational plan. The plan commission receives input from town residents and property owners by holding public hearings; hires zoning experts and holds meetings with them; crafts different zoning districts to determine compatible land uses with specific properties; labors over what types of uses will be permitted, prohibited, or conditional to protect property values, private property rights, and community interests; and, avoid unintended consequences or inconsistent uses. The ordinance must carefully define uses; current uses of property and evaluate how future plans impact them; and decide the criteria used for granting a conditional use. The entire

process takes time because the town must plan for development that could occur decades after the ordinance passes.

After creating the zoning ordinance, even more approvals are necessary. The town board must pass the zoning ordinance. Then, the county board must give its approval. Only after the town has created a comprehensive plan, gotten elector approval for village powers, received elector approval for zoning authority, created a plan commission, developed the zoning ordinance effectively from scratch, received plan commission approval, passed the ordinance at a town board meeting, and received county approval will the ordinance go into effect. It is not uncharacteristic for this process to take in excess of five years.

B. Expanding Vested Rights Would Undermine the Complex Zoning Process for Towns

Golden Sands' assertion that Saratoga raced to prohibit their development could not be further from the truth. The process began a decade earlier and neared completion within a typical planning and zoning ordinance development timeframe. The wheels of government, and indeed planning and zoning ordinance development, turn slowly. In contrast, a landowner can submit a building permit in an astronomically shorter timeframe. The community and other private

property owners are provided certainty that the bright line building permit test, moratoria, and other tools are in place to protect their interests and property values from a quick race to have secret plans dropped on the community disrupting a decade of work. Golden Sands is asking to eliminate this balance and these protections for private property owners.

This Court's decision in *Mckee Family I, LLC v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12, provides the proper lens to view vested rights. *Mckee* began with the "basic premise that municipalities have broad discretion to enact zoning ordinance and land use regulations for a variety of purposes". *Mckee*, 2017 WI 34, ¶ 35. This broad authority works in conjunction with property owner expectations because "[u]derlying the vested rights doctrine is the theory that a developer is proceeding on the basis of a reasonable expectation." *Id.* ¶ 42. Wisconsin follows the building permit rule "because it creates predictability for land owners, purchasers, developers, municipalities and the courts." *Id.* ¶ 43. 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. A municipality has the flexibility to regulate

land use through zoning up until the point when a developer obtains a building permit." *Id.*

Golden Sands' proposal to extend the building permit rule to include subjective vague references of land "integral" to the project outside the building permit site would undo the purpose of the rule and contravene the underpinnings of it. Golden Sands wishes for the building permit rule to encompass undeveloped plans and subjective intent. Filing for a building permit on specific and adjacent property is objective evidence of intent to construct a building and utilize property for a specific purpose. However, including other parcels beyond property specifically described in the application or even property not owned by the applicant allows a single property owner to completely disrupt municipal planning and zoning.

There are hundreds of towns with neither county nor town zoning. If one of those towns began the process of enacting a zoning ordinance, a single property owner could easily derail the process, as in this case. Under Golden Sands' interpretation, the property owner could apply for a building permit for a tool shed for a dairy operation and state it is part of a comprehensive project involving thousands of acres, even ones not owned by the applicant or in the municipality for which the tool shed is to be built. That would have the effect of the

constant harbinger and of a single individual's ability to broadly freeze land use regulations, thereby creating uncertainty for at least one, if not multiple, municipalities and neighboring property owners.

The negative impacts would extend beyond towns without zoning. Municipalities pursuing zoning amendments must follow a similar procedure outlined above. Additionally, Dane County towns can utilize a separate zoning procedure created by 2015 Wis. Act 178. In both scenarios one property owner, unhappy with the zoning changes, could file a building permit and claim thousands of acres within the town is integral to a project, but not specifically define that land. Under Golden Sands' proposed rule, this would freeze zoning throughout the town. The rule would unfairly give one person an immense amount of power to upend municipal planning.

This is especially important because local governments cannot move through this process quickly. Unlike the private sector, where decisions come rapidly, municipal governments need time. The planning process requires constant analysis and evaluation of changing science and conditions. The bodies hold multiple public hearings and meetings. This is because local governments make decisions to further the public health, safety, and general welfare for

not only the present community, but also future residents. Thus the building permit rule should not be expanded.

II. THE PROPOSED EXPANSION OF THE BUILDING PERMIT RULE NEGATIVELY IMPACTS PROPERTY RIGHTS OF OTHERS.

As the Court reiterated in *Mckee*, the vested rights doctrine is aimed at creating balance. Balance must exist between a developer's rights, the local government's planning ability, and the rights of other property owners. Expanding the building permit rule to include off-site property would sway the balance in favor of an individual developer over the municipality and other property owners.

This court has repeatedly stated one major purpose of zoning is the preservation of property value. *See State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 269, 69 N.W.2d 217 (1955) ("the proper purpose of zoning is 'Conserving the value of property and encouraging the most appropriate use of the land") (quoting *Griggs v. City of Paterson*, 1944, 132 N.J.L. 145, 39 A.2d 231, 232); *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, ¶ 46, 338 Wis.2d 488, 809 N.W.2d 362 (quoting *State ex rel. Saveland Park Holding Corp. v. Wieland* with approval).

Zoning is a quintessential tool for preserving property values and rights. It ensures consistent uses within districts; thereby providing

certainty to homeowners and businesses. This is because certain industries or uses have negative externalities that reduce property values and the full enjoyment of property. For example, a recent study by the Wisconsin Department of Revenue found properties located within a mile of the six largest Concentrated Animal Feeding Operations in Kewaunee County saw reductions in value by 8 to 13 percent.[1] These impacts also affect other property owners in the form of increased taxes. When one property's value decreases, the overall levy imposed by taxing jurisdictions does not change. This shifts taxes onto properties that did not lower in value. Thus everyone feels the negative impacts.

Creating zoning districts with consistent and appropriate land uses maintains property values and eliminates negative externalities, but still preserves property rights. Golden Sands' expansion of the building permit rule would frustrate those goals because one property owner could prevent a zoning ordinance change based on new evidence. It allows one owner to effectively freeze others' use or impacts the value of their own property by stating her project

[1] Steven Verburg, *Property Values Drop Near Large CAFOs, State Says*, Wisconsin State Journal, November 16, 2017, *available at* http://host.madison.com/wsj/news/local/govt-and-politics/property-values-drop-near-large-cafos-state-says/article_9f6da467-b0bc-5de9-9883-2f14a6d0e439.html

encompasses many different parcels regardless of how serious those plans are. It creates uncertainty for other property owners or other developers who might consider projects.

III. THE TOWN'S INTERPRETATION OF WIS. STAT. § 66.10015 IS ENTIRELY CONSISTENT WITH THE BUILDING PERMIT RULE AND CHAPTER 66 OF THE WISCONSIN STATUTES.

One controversy in this case deals with how the term "adjacent" is defined in Wis. Stat. § 66.10015. Black's Law Dictionary defines adjacent as "lying near or close to; contiguous." *See* Adjacent, Black's Law Dictionary (10th ed. 2014). Although the dictionary definition could have multiple interpretations, the term's usage throughout Chapter 66 and the purpose of the statute support "adjacent" to mean contiguous.

Wis. Stat. § 990.01(1) requires words in statute "be construed according to common and approved usage". This Court provided further guidance in interpreting statutes when it stated "[c]ontext is important to meaning. So, too, is the structure of the statute in which the operative language appears." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58 ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

The legislature uses the term "adjacent" throughout Chapter 66 of the Wisconsin Statutes connoting a meaning of "contiguous". For example, Wis. Stat. § 66.0215 creates an incorporation procedure when a "town is adjacent to a 1st class city". Indeed this Court even stated the term "adjacent" in this section "be defined as contiguous." *City of Waukesha v. Salbashian*, 128 Wis. 2d 334, 355, 382 N.W.2d 52 (1986). Further, Wis. Stat. § 66.0415 reads "lands adjacent to these rivers and canals or within 100 yards of them, are within the jurisdiction of the city of Milwaukee". The statute would not need the qualifier of "100 yards" if "adjacent" did not mean contiguous. These examples require at the very least touching between the lands and territories. Chapter 66 has several other similar examples that presume some form of contact between boundaries. In order to use the term "adjacent" consistently throughout Chapter 66, Wis. Stat. § 66.10015(1)(d) must be given the same meaning and include some form of touching for all project parcels.

The Legislature's modification of the term "adjacent" in Wis. Stat. § 66.10015(1)(d) further bolsters this interpretation. This section defines a 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) (emphasis added). Importantly, the second clause clarifies that "adjacent parcels of land" includes those parcels separated by "roads, waterways, and easements". This clarification clause shows the Legislature intended this statute apply to compact projects at most separated by roads, waterways, and easements. If the legislature had intended Golden Sands' definition of "adjacent", it would not have specified that "roads, waterways, and easements" do not prohibit a finding of adjacency because the word's definition would have explicitly protected those types of separations. Further, the statute does not mention other parcels of property preserving adjacency. Thus the term "adjacent" requires, at a minimum, contact between parcels of property under Wis. Stat. § 66.10015.

The main purpose of the building permit rule also supports this definition. Wisconsin follows the building permit rule because it creates a clear standard for municipalities, courts, and property owners. Finding that "adjacent" applies to parcels of property not touching would create confusion because adjacency would become a question of degree. When submitting a building permit, a developer would not know if its rights vested on non-continuous properties. The municipality would also face uncertainty if their development regulations became frozen with the filing of the application. This

would leave it to courts to increasingly decide disputes on a case-by-case basis over the degree of "adjacency". Interpreting "adjacent" consistently with its usage throughout Chapter 66 reduces this uncertainty and keeps it in harmony with the purpose of the building permit rule.

The Town of Saratoga correctly interprets Wis. Stat. § 66.10015 because it maintains a consistent usage of the word "adjacent" in Chapter 66 and supports the purpose of the building permit rule. Therefore Golden Sands' project would not comply with the codification of the building permit rule under Wis. Stat. § 66.10015 because the properties are not adjacent.

CONCLUSION

The Court of Appeals decision should be affirmed because Golden Sands did not obtain vested rights to off-site property. Expanding the building permit rule would have negative consequences for local governments and property owners alike.

Dated this 30th day of November, 2017

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CERTIFICATION

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 the following font: Proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,901words.

Dated this 30th day of November, 2017.

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CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80 and 809.18, that 22 copies of the Brief of *Amicus Curiae* Wisconsin Towns Association was sent by U.S. mail on November 30, 2017, to the Clerk of the Wisconsin Supreme Court, with three (3) copies served on the parties as follows:

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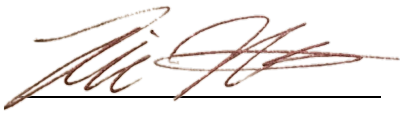
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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 this brief filed with the court and served on all parties and counsel of record.

Dated this 30th day of November, 2017.



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