

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2015AP001258

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**CLERK OF 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.

Review of an 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

NON-PARTY BRIEF OF LOCAL BUSINESS AMICI

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INTRODUCTION

Ebbe Realty, Inc. *et al.* are fourteen businesses and institutions in and around the Town of Saratoga. (*See* Ebbe Realty, Inc. *et al.*, Mot. to File Non-Party Brief, 11/15/17 and affidavits cited therein.) These businesses (hereinafter, “Local Business Amici”) work in five general categories: construction and realty, hospitality and tourism, agriculture, home-based businesses, and a church and religious school. (*Id.* ¶3.)

Despite the variety in their clientele, all of the Local Business Amici would be affected if Golden Sands Dairy LLC’s (“GSD’s”) vested rights to build a dairy on a 98-acre production site were expanded to thousands of acres of land the dairy intends to convert from pine forest to irrigated agriculture and manure-spreading. (*Id.* ¶1.) Most homeowners and businesses in the area rely on private wells and clean, abundant water for their livelihoods, and many of amici’s customers are attracted by the area’s natural setting and recreational opportunities. (*See id.* ¶¶4-8.) The land use changes proposed by GSD would dramatically alter the area’s character, and vast new areas of manure application and groundwater pumping threaten the area’s groundwater quality and supply. (*Id.* ¶¶2-8.)

The Legislature has granted local governments broad authority to exercise their zoning powers, which allows for orderly growth and development and prevents land use conflicts between neighbors.

Consistent with this Legislative authority, the Town of Saratoga appropriately considered not just the interests of future businesses like GSD when it zoned the area Rural Preservation in 2012, but also the property rights and interests of existing businesses and residents like Local Business Amici. Golden Sands Dairy's interpretation of the vested rights doctrine would undermine local authority to balance these interests and create a premature, nebulous exception to statutory zoning. Alternative means to address local land use conflicts, such as nuisance suits and state regulation, are not favored or effective substitutes for sound local land use planning.

This Court should reject GSD's invitation to expand the vested rights doctrine far beyond the buildings described in a permit application and affirm the court of appeals.

ARGUMENT

I. The Town of Saratoga Used Its Zoning Power As The Legislature Intended and The Courts Have Recognized.

The Town of Saratoga appropriately used its zoning authority to preserve existing land uses and protect the local environment, on which Local Business Amici and other property and business owners rely.

A. Zoning Permits Local Governments to Develop In an Orderly Manner and Prospectively Address Potential Land Use Conflicts, Including Conflicts with Agriculture.

Wisconsin, like most jurisdictions, strives for orderly land development and avoidance of land use conflicts between neighbors, including neighbors of agricultural uses.

Zoning and land use regulations are some of the most vital tools local governments have to regulate their affairs, enabling a municipality to protect existing property rights while guiding future development in the interest of its citizens.

[T]he purpose of zoning is twofold: (1) to preserve the existing character of an area by excluding...uses prejudicial thereto, and (2) to provide for the development of the ... sub-areas ... of the municipality in a manner consistent with the uses for which each is suited, such regulations being related to the character of the district which they affect and being designed to serve not only the welfare of those who own and occupy land in those districts, but also the general welfare of the community.

2 Ziegler, *Rathkopf's The Law of Zoning and Planning*, §2:10, 23-24 (4th ed. 2009).

In Wisconsin, the Legislature has made local zoning authority comprehensive. It is an exercise of the police power, for the purpose of promoting public health, safety, and the general welfare. *See* Wis. Stat. §§62.23(7)(am), 60.61(1)(a). “The concept of public welfare...embraces in comprehensive zoning the orderliness of community growth, land value and aesthetic objectives.” *State ex rel. Am. Oil Co. v. Bessent*, 27 Wis. 2d 537, 545, 135 N.W.2d 317 (1965).

Protection of existing property values has long been accepted as within the general welfare. *State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923) (“[I]f such [land use] regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare.”) Wisconsin statutes also specifically recognize that zoning may be used “to encourage the protection of groundwater resources.” Wis. Stat. §62.23(7)(c).

The principles of zoning do not just apply in cities and urban environments, but also in rural areas where agriculture is prevalent. The Legislature has explicitly stated its preference that land use conflicts involving agricultural uses be addressed prospectively, through zoning:

The legislature finds that development in rural areas and changes in agricultural technology, practices and scale of operation have increasingly tended to create conflicts between agricultural and other uses of land. The legislature believes that, to the extent possible consistent with good public policy, the law should not hamper agricultural production or the use of modern agricultural technology. The legislature therefore deems it in the best interest of the state to establish limits on the remedies available in those conflicts which reach the judicial system. **The legislature further asserts its belief that local units of government, through the exercise of their zoning power, can best prevent such conflicts from arising in the future, and the legislature urges local units of government to use their zoning power accordingly.**

Wis. Stat. §823.08(1) (emphasis added).

In sum, local governments have broad zoning authority to promote orderly development and protect existing properties.

B. The Town of Saratoga Appropriately Exercised its Zoning Authority in this Case.

Golden Sands Dairy's dispute with the Town does not play out in a vacuum, but amid existing residents and businesses in a uniquely vulnerable environment. The Town of Saratoga appropriately classified forest land within the Town as Rural Preservation, consistent with its statutory authority, comprehensive plan, and the interests of residents such as Local Business Amici.

The Town of Saratoga hosts numerous homes and businesses that rely on private wells sunk into the shallow groundwater table; the Town's lakes, streams, and forests make the area attractive for hunting, fishing, and other recreational uses. (R.63, Ex. D §1.4.; R.67; Mot. to File Non-Party Br., ¶¶2-5.) The Town sits on well-drained soils, which permit contaminants on the land surface to easily migrate to the high groundwater table below. It also hosts trout streams, lakes, and forests. (*Id.*) Growing crops on the Town's sand soils would require significant application of water, as well as manure and other fertilizers, yet these practices are precisely what threaten local groundwater quality and quantity. (*Id.*) By contrast, the Town's existing pine forest preserves groundwater quality and quantity by precluding application of manure or chemicals and installation of high-capacity wells. (*See id.*)

Golden Sands Dairy's proposed large-scale conversion of Town forests to cropland is a transformational land use that would significantly impact existing residents, including Local Business Amici. Customers of area builders and realtors are attracted by the Town's fresh air and water and recreational opportunities, but business has already slowed due to consumer concerns of odors, loss of pine forest, deteriorating local roads, and groundwater impacts that thousands of new acres of irrigated agriculture would bring. (Mot. to File Non-Party Brief, ¶4.) Tourism and hospitality-oriented businesses, such as campgrounds, restaurants, and a hunting club, are concerned about changing the area's character and impacts to air and water quality. (*Id.* ¶5.) Local home-based businesses near fields that GSD would convert reasonably believe customers will cease visiting them without adequate access to clean air and water, and are concerned for their own loss of property value. (*Id.* ¶7.) A local Lutheran church and school with a private well has worries about losing access to clean water and has placed its expansion plans on hold. (*Id.* ¶8.)

Existing agricultural uses that do not rely on irrigated cropping, such as cranberry marshes, would also be affected by large-scale conversion of fields for this purpose. One organic cranberry farm, which requires plentiful water uncontaminated by nitrates or bacteria, commissioned an independent report on how it might be impacted by

GSD's plans. (*Id.* ¶6.) It learned that it was at high risk of negative groundwater quality impacts due to expanded fertilizer application on upgradient fields, as well as the significant loss of water supply. (*Id.*) These risks were confirmed by data from GSD's existing sister facility in Juneau County—also situated in sand soils—where wells have for years indicated groundwater quality problems, including nitrates at over seven times the 10 mg/L public health standard. (*Id.*) Wis. Admin. Code §NR 140.10, Table 1.

Thus, while GSD asserts its investment-based expectations in this case (*e.g.*, GSD Br. at 5), the Town must also look out for other interests, including existing businesses and homeowners who have already invested in the area. These residents have spent years building up their businesses, in reliance on the area's existing attributes and the Town's preservation plans, as stated in the Comprehensive Plan and now its zoning ordinance. (Mot. to File Non-Party Brief, ¶¶2-3.) The Town rightly recognized the property interests of existing businesses and homeowners, and the need to protect groundwater quality, when it applied the Rural Preservation zoning designation to lands within the Town.

In sum, the Town in this case performed exactly the zoning function that the Legislature and courts intended.

II. Local Zoning Works Best When Exceptions To It, Such as the Vested Rights Doctrine, are Narrowly Construed.

Like any rule of general application, local zoning works best when exceptions to it are narrowly construed, including the vested rights doctrine. The Court should not expand the doctrine as GSD requests.

The Legislature has directed that zoning ordinances and plans “shall be liberally construed in favor of the city and as minimum requirements for the purposes stated.” Wis. Stat. §62.23(7)(am). Local authorities need zoning flexibility to respond to changing needs and circumstances affecting individuals, businesses, and the environment.

The concerns of Fitchburg's citizens in this case demonstrate why the legislature must have flexibility to address the changing needs of the community. Although Fitchburg adopted the [land use regulation] in 1994, it needed to be able to respond to the changing development needs of the community in 2008.

McKee Family I, LLC v. City of Fitchburg, 2017 WI 34, ¶57, 374 Wis. 2d 487, 893 N.W.2d 12. Hence, “[p]roperty holders...acquire no vested rights against rezoning... Indeed, if this were not so no changes in zoning or in comprehensive zoning plans could ever be made to adapt land use realistically to changing times and environment.” *Buhler v. Racine Cty.*, 33 Wis. 2d 137, 148, 146 N.W.2d 403 (1966); *see also Eggebeen v. Sonnenburg*, 239 Wis. 213, 218, 1 N.W.2d 84 (1941).

The vested rights doctrine should not be expanded beyond buildings identified in a building permit. Golden Sands Dairy's arguments would permit circumvention of local zoning authority through vague references to adjoining or even far-flung lands in building permit applications, which permit applicants could later claim as necessary to their development. This creates a substantial risk that the exception will swallow the general rule that there is no right to existing, less-restrictive zoning. The vested rights doctrine cannot be applied too broadly, beyond the confines of the buildings specified in the application, or too soon, as a craven placeholder for an ill-defined future development.

Confining the building permit rule to buildings is particularly important in the local government context. Towns and other governments should not be put in the position of interpreting building permit applications to divine what uses the application could possibly encompass in the future. Bright line rules afford parties "the ability to predict the consequences of their actions and to guide their conduct accordingly without the intercession of the judicial branch." *Risser v. Klauser*, 207 Wis. 2d 176, 202, 558 N.W.2d 108 (1997). This, in turn, promotes judicial efficiency. *Id.*

The benefits of a bright-light building permit rule also extend to both existing and future businesses. *McKee Family I*, 374 Wis. 2d 487,

¶43 (noting the building permit rule “creates predictability for land owners, purchasers, developers, municipalities and the courts”). Here, GSD received certainty as to its building site, but the Town’s Rural Preservation zoning provided certainty to Local Business Amici and other existing interests as an appropriate response to evolving understandings of environmental conditions, groundwater supply, and impacts to property value.

While the vested rights doctrine and other exceptions to the zoning authority of local governments should be narrowly construed, this is not a system without limits. Local governments remain accountable to their constituents through elections that occur every April. Should a local government go too far in exercising its zoning authority, electors can register their displeasure at the polling booth and elect new officials to change any offending zoning rules or other legislation.

This Court should not expand the vested rights doctrine beyond the building permit rule, as recently affirmed in *McKee Family I*.

III. Alternatives to Local Zoning as a Means to Address Land Use Conflicts are Not Favored, or Not as Effective as Sound Local Zoning Regulation.

Should the vested rights doctrine be expanded as GSD asks, this will put pressure on other alternatives to address land use conflicts, such as nuisance suits and state regulation. These strategies are not favored

in the law, or not as effective for avoiding problems that may affect neighbors like Local Business Amici.

A. The Legislature Disfavors Nuisance Suits Against Agricultural Uses.

As noted above, the Legislature has explicitly stated its preference that land use conflicts between agricultural uses and other uses be addressed prospectively, through zoning, and not through retroactive measures like nuisance suits. Section I, *supra*.

So firm is the Legislature in this belief that it has significantly limited the reach of and remedies available through nuisance suits against agricultural uses. Wisconsin's Right to Farm Law permits individual nuisance actions against existing agricultural uses only when they present a "substantial threat to public health or safety." Wis. Stat. §832.08(3)(a)2. If a circuit court finds an agricultural action is a nuisance, it is limited in what remedies it can apply; if it finds for the defendant, it must award litigation expenses against the plaintiff. *Id.* §823.08(3)(b), (4).

Because the Legislature has limited nuisance suits against agricultural uses, its preference that conflicts be prospectively addressed through zoning must be given effect by this Court. Otherwise, neighbors of these agricultural uses may suffer loss of property value and the use and enjoyment of their property with no available remedy.

Taken to its extreme, simultaneous application of Wisconsin's Right to Farm law and an expansive vested rights doctrine could result in an unconstitutional taking of neighbors' property. *See Bormann v. Bd. of Supervisors, Kossuth County*, 584 N.W.2d 309 (Iowa 1998) (holding nuisance immunity provisions in Iowa's Right to Farm statute created an unconstitutional taking of neighbors' property). Already, the Wisconsin Department of Revenue has agreed to property value reductions of 8-13% for homes adjacent to CAFOs.¹

It is far better, and consistent with the Legislature's purpose, to preserve local zoning authority and prevent land use conflicts between agricultural uses and their neighbors.

B. State Regulation is Not as Broad, or Effective, as Local Zoning.

Opponents of local zoning often point to the state Department of Natural Resources and incorrectly assert that it will address any environmental problems that arise from an offending use.

First, the DNR does not have authority or jurisdiction over the broader array of issues within a town's police powers. For example, the DNR does not have authority to regulate odor or increased traffic,

¹ Steve Verburg, *Property values drop near CAFOs, state says*, Wis. State J., (Nov. 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.

common problems associated with concentrated animal feeding operations (“CAFOs”) like GSD, or consider impact to property value.

Second, even when DNR has regulatory and enforcement authority, the agency may not use it. In the case of CAFOs, the DNR issues permits intended to regulate and limit the discharge of pollutants to surface and groundwater. *See* Wis. Stat. §283.31; Wis. Admin. Code ch. NR 243. This permitting program is known as the Wisconsin Pollution Discharge Elimination System (WPDES) program.

However, a 2016 study conducted by the Wisconsin Legislative Audit Bureau revealed that DNR is failing to meet its statutory duties for permitting, inspecting, and initiating enforcement actions for CAFOs under this program. State of Wisconsin, Legislative Audit Bureau, Wastewater Permitting and Enforcement: Department of Natural Resources, Report 16-6 (June 2016).²

For example, of the 260 CAFOs for which WPDES permits were reissued between 2006 and 2014, 6.5% were inspected *after* the permit was already reissued and 19% were inspected more than 12 months before permit expiration, violating statutory requirements and/or applicable DNR policy and practice. (*Id.* at 55.) And although the DNR states it will inspect each CAFO permittee at least twice every five

² Available at <https://legis.wisconsin.gov/lab/media/1052/16-6full.pdf>.

years, the percentage of CAFOs that actually received two inspections in five years never exceeded 48% between 2005 and 2014. (*Id.* at 49.) The study also found permitting backlogs and inconsistent enforcement across DNR regions. (*Id.* at 4, 75.)

Neighbors like Local Business Amici cannot rely on the DNR to adequately consider and protect their interests. Zoning and land use regulation, therefore, can and should be used by local governments like the Town in order to address their constituents' interests.

CONCLUSION

Over 1.7 million Wisconsin citizens—more than 30% of the state's population—reside in towns like the Town of Saratoga.³ In this case, the Town reasonably evaluated local conditions and zoned its land to prevent harm to property values and businesses, drinking water quality, and local character. By seeking a 6,000-acre exception to this rule, GSD cannot credibly state that expanding the vested rights doctrine does “no violence” to the Town's ability to regulate land use. (GSD Br. at 26.)

The Court should affirm the court of appeals' decision upholding the Town's lawful exercise of its zoning authority in this case, and reject GSD's requested expansion of the vested rights doctrine.

³ “Town Quick Facts,” Wisconsin Towns Association, at <http://wisctowns.com/about-towns>.

Respectfully submitted this 1st day of December, 2017.

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RULE 809.19(8)(D) CERTIFICATION

I hereby certify that this brief conforms to the rule contained in §809.19(8)(b) for a brief produced with a proportional serif font. The length of those portions of this brief referred to in §809.19(1)(d), (e), and (f) is 2,996 words.

/s/ Christa O. Westerberg

Christa O. Westerberg

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. §809.19(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 1st day of December, 2017.

/s/ Christa O. Westerberg

Christa O. Westerberg