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STATE OF WISCONSIN SUPREME COURT

GOLDEN SANDS DAIRY, LLC,
Plaintiff-Respondent-Petitioner,

ELLIS INDUSTRIES SARATOGA, LLC,
Plaintiff, Case 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.

LEAGUE OF WISCONSIN MUNICIPALITIES AMICUS BRIEF

—
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

LEAGUE OF WISCONSIN MUNICIPALITIES
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INTRODUCTION

This case is about a vested rights claim for proposed uses of 6388 acres or about 1/5th of the total land mass in the Town of Saratoga (“Town”). The claim, asserted by Goldens Sands Dairy, LLC and Ellis Saratoga Industries, LLC (“Goldens Sands”), rests on a single non-specific and inconsistent reference in a building permit application and an equally non-specific designation in a map included with the building permit application. Neither the building permit nor the map specifically identify the proposed use(s) of the 6388 acres.

This case turns on the content of Golden Sands’ permit application and the questions for the Court are three-fold and straightforward. First, did Golden Sands file its building permit application in good faith reliance on the then-existing Wood County zoning ordinance classification? Second, did Golden Sands’ permit application provide sufficient information to show that its proposed land use(s) strictly conformed to applicable zoning and building code requirements? And, third, did Golden Sands’ permit application provide meaningful notice to the public and the Town of its vested

rights claim for agricultural use of 6388 non-agricultural acres? The facts show that the Golden Sands application was not filed in good faith reliance under Wisconsin law; did not provide sufficient information to show strict conformity with applicable zoning and building code requirements, and; did not give fair notice of the proposed land use(s). Accordingly, this Court should hold that Golden Sands has not established its vested right claims.

ARGUMENT

I. A VESTED RIGHTS CLAIM MUST BE BASED ON GOOD FAITH RELIANCE ON EXISTING LAND USE REGULATIONS.

Wisconsin case law establishes that there must be reasonable reliance on existing regulations in order to acquire a vested land use interest. It also establishes that reasonable reliance on existing regulations is not present where the party claiming vested rights knew existing regulations would soon change.

The Court of Appeals addressed the good faith reliance issue in the first Golden Sands appeal. *See Golden Sands Dairy, LLC v. Fuehrer*, No. 20134P1468, unpublished slip op. (Wis. Ct. App. July

24, 2014). But, its analysis focused on the land Golden Sands sought to build the farm buildings. The court did not extend its analysis to the property at issue in this case. If it had, Golden Sands would not have sought a separate judicial determination upholding its vested rights claim for the property in this case.

Wisconsin case law has consistently treated the owner's reasonable reliance as a critical factor in deciding whether there is a vested right. In the *Building Height Cases*, the court's conclusion that substantial rights had vested in one of the cases was based on the fact that "long before the passage of the act the telephone company *in good faith* not only resolved but actually arranged for the completion of its original plans and to that end had incurred great expense." *Atkinson v. Piper (Building Height Cases)*, 181 Wis. 519, 532, 195 N.W. 544 (1923) (emphasis added). In the context of that case, "good faith" means that the owner reasonably relied on the previous state of the law in incurring the expense. In both *Rosenberg v. Vill. of Whitefish Bay*, 199 Wis. 214, 218, 225 N.W. 838 (1929) and in *State ex rel. Schroedel v. Pagels*, 257 Wis. 376, 380, 43 N.W.2d 349 (1950), the court concluded there were vested interests

entitled to protection because the expenditures were made “relying upon” or “in reliance” of the then-existing zoning laws. The implication in both cases is that the reliance was reasonable. In *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 175, 540 N.W.2d 189 (1995), the court used the term “reasonable expectation” to describe proceeding in reasonable reliance on the ordinance as it existed at the time and explained that “the theory behind the vested rights doctrine is that a builder is proceeding on the basis of a reasonable expectation” (citations omitted). *See also Hearst-Argyle Stations*, 260 Wis. 2d 494, ¶ 28 n. 12, 659 N.W.2d 424 (citing *State ex rel. Cities Serv. Oil Co. v. Board of Appeals*, 21 Wis. 2d 516, 528-29, 124 N.W.2d 809 (1963) (“The theory behind the vested rights doctrine is that a property owner is proceeding on the basis of a reasonable expectation that his or her modification of the property is in compliance with the then-existing zoning codes.”)).

Vested rights analysis is altered when landowners know before they attempt to establish a new use that an ordinance amendment will soon impact the property upon which they seek to

establish that use. *See Town of Cross Plains v. Kitt's Field of Dreams Korner*, 2009 WI App 142, 321 Wis. 2d 671, 775 N.W.2d 283. Golden Sands was aware, before it filed its building permit application, that the Town was nearing the end of its comprehensive planning process and drafting zoning ordinances for the Town. The comprehensive plan specifically identified the Golden Sands 6388 acres for a Rural Preservation zoning classification that would prohibit their proposed land uses. Thus, Golden Sands had reasonable notice of potential zoning changes to the 6388 acres before it filed its building permit application.

It is not significant that Golden Sands might not have had notice of a specific zoning change for a specific parcel in the Town when it filed its building permit application. After all, they were seeking to change the land use of more than 1/5th of the entire township. It is simply not reasonable to presume that the Town's forthcoming zoning ordinance would not have some impact on their property given the size of their holdings. When a landowner seeks to change land use on more than 20% of the land in a township,

common sense advises that there will be some impact on his property when the townships adopts a new zoning ordinance.

Golden Sands' expectation that they could establish a vested right to their proposed use(s) of the 6388 acres in the Town by filing a building permit application that didn't even identify the proposed use(s) prior to the effective date of a forthcoming zoning ordinance, even though they knew a new zoning classification for the lands was being considered and the sheer size of their land holdings dictated some impact, is not a reasonable expectation. Their reliance on the then-existing Wood County zoning ordinance classification to preserve a vested right to their proposed use(s) is not reasonable.

Nonconforming land uses are antithetical to sound planning and effective land use policy implementation. They undermine the effectiveness of land use policies and public faith in them. Vested rights to nonconforming land uses on the other hand are warranted to protect reasonable land use expectations in private property. However, the vested rights doctrine should be applied in a way that does not encourage the establishment of nonconforming uses, particularly massive nonconformity as in this case.

A vested rights claim must be based on a reasonable expectation; reasonable good faith in the existing land use regulations. Golden Sands' vested rights claim to the proposed land uses for its 6388 acres under the Wood County zoning ordinance is not reasonable and should not be sustained.

II. GOLDEN SANDS FAILED TO SPECIFY THE PROPOSED LAND USE(S) FOR THE 6388 ACRES IN ITS BUILDING PERMIT APPLICATION AND CANNOT ESTABLISH ITS VESTED RIGHTS CLAIM UNDER WISCONSIN LAW.

Wisconsin law establishes that a landowner may acquire a vested right in an existing or proposed land use only where it “is in strict and complete conformance with applicable zoning and building code requirements.” *See Lake Bluff*, 197 Wis. 2d at 174-75. A landowner cannot acquire a vested right in a current or proposed land use without such showing.

The Town is located in Wood County. In 1934, Wood County adopted a zoning ordinance, which continues to be operative, regulating land uses. This zoning ordinance establishes zoning districts in Wood County.

The Town did not have an effective zoning ordinance at the time Golden Sands submitted its building permit application to the Town. Therefore, at the time Golden Sands submitted its application, Wood County's zoning ordinance governed in the Town.

Wood County's zoning ordinance established two types of land use districts for zoning purposes: a "Forestry and Recreation" district and an "Unrestricted" district. Any land zoned as unrestricted could be used "for any purpose whatsoever, not in conflict with the law." The 6388 acres Golden Sands asserts a vested right in are zoned Unrestricted pursuant to the Wood County zoning ordinance.

The applicable zoning requirement for the 6388 acres when Golden Sands filed its building permit application was lawfulness. Any lawful land use was allowed under the Wood County Zoning ordinance. So, Golden Sands' permit application needed to show that its proposed land use(s) for the 6388 acres was lawful.

In order to ascertain whether a proposed land use is lawful or not, the use must be specified. That is simple logic. If a proposed land use is not specified it is not possible to ascertain anything about it, including whether it is lawful or not.

The Golden Sands building permit application arguably identifies the 6388 acres it claims vested rights to use under the unrestricted zoning classification of the Wood County zoning ordinance.¹ The permit makes a single reference to the acreage in a box on the “Project Location” line of permit that is labeled “Lot area” and nowhere else.

However, the building permit application does not identify any proposed land use(s) for the 6388 acre Lot area reference. In the application section titled “Zoning District(s)” the term “Wood County – Unrestricted” is provided but there is no additional specification of the proposed land use(s) to be found in the four corners of the permit application.

The Golden Sands application fails to identify the land use(s) for the 6388 acres it references in it. Without that information, it is not possible to determine, in accordance with Wisconsin vested rights law, whether the proposed land use(s) are in strict and

¹ It can be assumed for purposes of this analysis that the permit identified the 6388 acres. However, the information in the permit is not wholly consistent on this fact since the permit also makes two specific references that seem to specify only the parcel where farm buildings were to be constructed.

complete conformance with applicable zoning and building code requirements.

It is Golden Sands' burden to provide information that establishes its proposed land use(s) strictly conform to applicable zoning and building requirements. Moreover, Golden Sands is a sophisticated enterprise with substantial financial and professional resources available to it. It is reasonable for it to shoulder the responsibility for providing clear and unambiguous information that proves its vested rights claim. It is even more reasonable that they perform this duty given the massive size of their vested rights claims.

III. GOLDEN SANDS FAILED TO SPECIFY THE PROPOSED LAND USE(S) FOR THE 6388 ACRES WITH SUFFICIENT CLARITY TO GIVE ADEQUATE NOTICE OF ITS VESTED RIGHTS CLAIM CONTRARY TO WISCONSIN LAW.

Wisconsin is a Building Permit Rule state for purposes of vested rights in proposed land uses. *See McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, 374 Wis.2d 487, 893 N.W.2d 12. The building permit requirement serves multiple purposes, including

notice of the proposed land use. This obligation is reflected in the recently enacted vested rights statute wherein the Legislature sought to codify existing vested rights common law and, thus, established a requirement that the statutory vested right protection only applies to a project, which is defined in relevant part as “a specific and identifiable land development” in the land use authority’s jurisdiction. See Wis. Stat. secs. 66.0015(1)(a), (b), (2)(a) and (b).

In Wisconsin, a landowner may establish a vested right in a proposed land use only when it provides sufficient public notice of the proposed land use. This notice requirement makes sense and is important for multiple reasons.

Land use actions impact the property interests and rights of other owners. That is why the Wisconsin zoning enabling law for cities and villages, set forth in Wis. Stat. sec. 62.23, provides numerous requirements for public notice related to zoning action and land use actions. *See e.g.*, Wis. Stat. secs. 62.23(7)(d)(1)a. and (2)(Class 2 public notices required for new zoning ordinance hearings and zoning ordinance amendment hearings); and *see* Wis. Stat. sec. 62.23(7)(d)4. (requirement to keep list of persons who

must be given notice of certain zoning actions). Notice of a vested right claim will give nearby property owners knowledge of the activity and the opportunity participate in all processes that they think are necessary to protect their own property interests and rights.

Land use actions impact the ability of cities and villages to implement the land use plans and policies that their residents have secured through their elected representatives. Vested rights claims are inherently made for land uses that do not conform to existing or future land use regulations. Thus, they yield and protect nonconforming uses, which are generally disfavored because of their negative impacts on effective land use planning. Notice of vested rights claims provides the local authority with knowledge of the nonconformity and the opportunity to protect community interests reflected in comprehensive plans and land use policies.

The Golden Sands' permit application does not provide meaningful notice of its vested rights land use claims to 6388 acres of land in the Town. It barely mentions the total acreage at all. And, the proposed land use(s) aren't even identified in the permit application. Thus, the permit did not provide any meaningful public

notice in accordance with a fundamental purpose of Wisconsin's building permit rule.

The quality or specificity of public notice is also significant. The Court has recognized this important factor in notice requirements under the Open Meetings law. In that context, the Court held that the level of notice specificity increases in accordance with the likely public interest in a topic to be addressed by a governmental body. *See State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804 (“both the number of people interested and the intensity of that interest,” is an important factor for determining the specificity of notice required).

In this case, Golden Sands seeks to immunize more than 1/5th of the entire land mass of a community from zoning requirements Town residents think should apply. Roughly 6388 acres of land would not be subject to the Town's new zoning ordinance. The impact of Golden Sands vested rights claim is not just significant for the Town and its residents, it is by any reasonable measure monumental. The magnitude of Golden Sands' vested rights claims

on an entire community deserves more specific notice than a single vague reference in a building permit to a project area.

CONCLUSION

Golden Sands did not file its building permit application in good faith reliance on the then-existing Wood County zoning ordinance classification; Golden Sands' permit application did not provide sufficient information to show that its proposed land use(s) strictly conformed to applicable zoning and building code requirements, and; Golden Sands' permit application did not provide meaningful notice to the public and the Town of its vested rights claim for agricultural use of 6388 non-agricultural acres. Accordingly, the Court should reject Golden Sands' vested rights claims.

Dated: December 1, 2017.

LEAGUE OF WISCONSIN MUNICIPALITIES

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c), Stats. for a brief produced with a 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 the brief is 2484 words.

Dated: December 1, 2017.

Daniel M. Olson (SBN 01021412)

SECTION 809.19(12) CERTIFICATION

I hereby certify 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 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 parties.

Dated: December 1, 2017.

Daniel M. Olson (SBN 01021412)