COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1258 **Cir. Ct. No. 2012CV389**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

GOLDEN SANDS DAIRY LLC,

PLAINTIFF-RESPONDENT,

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.

APPEAL from a judgment of the circuit court for Wood County: THOMAS B. EAGON, Judge. *Reversed and cause remanded with directions*.

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. This is an appeal of the second case arising out of a dispute between the Town of Saratoga and Golden Sands Dairy, LLC. The dispute involves Golden Sands' efforts to develop and operate what it identifies as an "integrated dairy farm" on approximately 6388 acres of land located in the Town. The primary issue in the first appeal (***Golden Sands I***) related to whether Golden Sands had acquired vested rights to a building permit allowing Golden Sands to construct seven farm buildings. ***Golden Sands Dairy, LLC v. Fuehrer***, No. 2013AP1468, unpublished slip op. ¶1 (WI App July 24, 2014). We concluded in ***Golden Sands I*** that Golden Sands met all of the requisite criteria to obtain a vested right to a building permit issued for the construction of the seven farm buildings and ordered the Town to issue a building permit to Golden Sands. ***Id.***, ¶74.

¶2 Here, the Town appeals a later decision of the circuit court in the second case, granting summary judgment to Golden Sands. The court declared that the vested rights Golden Sands acquired to a building permit extended to Golden Sands' right to a nonconforming use exception to new use zoning. More specifically, the court declared that Golden Sands had the right to use of approximately 6388 acres of land for agricultural purposes associated with the buildings that were the subject of its building application, even though such use conflicted with zoning enacted by the Town after Golden Sands filed its building permit application. We agree with the Town that Golden Sands has not established a vested right to the nonconforming agricultural use of 6388 acres. Accordingly, we reverse the summary judgment order entered in favor of Golden Sands and remand with directions to enter summary judgment in favor of the Town.

BACKGROUND

¶3 In ***Golden Sands I***, we summarized the events that occurred prior to and after Golden Sands submitted its building permit application. ***Id.***, ¶¶5-24. Here, our background summary is limited to the undisputed facts necessary to understand the arguments raised on this appeal.

¶4 This appeal concerns the Town's zoning classification of land that Golden Sands states it intends to use for agricultural purposes. As noted earlier, this court concluded in ***Golden Sands I*** that Golden Sands had acquired a vested right to a building permit allowing Golden Sands to construct seven farm buildings on land identified in the July 17, 2012 commercial building permit application. *See* ***id.***, ¶74.

¶5 As to the land identified in the building permit application, there is a box labeled "area involved." In that box Golden Sands wrote: "100 acres of site and 6388 acres total." There seems to be some dispute as to whether these numbers are precise. However, so far as we can tell, the precise numbers do not matter. For ease of discussion, we use the numbers in the application and refer to the building site acreage as 100 and the non-site acreage as 6388. The dispute here is over the non-building-site acres. The Town does not contest Golden Sands' right to use the 100-acre parcel as a building site. For that matter, apart from the construction of buildings, neither party addresses the permissible uses of the 100-acre site. Rather, the parties direct our attention to the 6388 non-building-site acres that Golden Sands intends to use to raise crops and spread manure for its planned dairy operation.

¶6 The Town is located in Wood County. At the time Golden Sands filed its building permit application, the disputed 6388 acres were zoned for

unrestricted use. Under this zoning, that land could be used "for any purpose whatsoever, not in conflict with the law." ***Id.***, ¶7. Therefore, at the time Golden Sands submitted its building permit application in July 2012 to construct the seven farm buildings, the Wood County unrestricted use zoning ordinance would have allowed the 6388 acres to be used for agricultural purposes.

¶7 Between 2007 and 2012, the Town discussed developing its own land use zoning ordinance, with an eye towards placing most of the land located in the Town, including the 6388 acres at issue here, under rural preservation status. *See* WIS. STAT. § 60.62(2) (2015-16).[1] On November 13, 2012, four months after Golden Sands submitted its building permit application, the Town rezoned the area, including the 6388 acres, in a manner that prohibited Golden Sands' planned agricultural use of the land.

¶8 On August 10, 2012, while the ***Golden Sands I*** litigation was pending in the circuit court, Golden Sands filed this lawsuit against the Town. In this action, Golden Sands seeks a declaration that it has a vested right to use the 6388 acres of land, which consists of many parcels scattered throughout the Town, for its dairy operation. Briefly stated, Golden Sands takes the position that the vested rights it acquired by filing a building permit application prior to the zoning change includes a vested right to the agricultural use of all land identified in its application as the "area involved," despite the change in zoning.

¶9 Golden Sands and the Town filed cross motions for summary judgment. The circuit court granted summary judgment on Golden Sands' claim

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that it "had acquired vested rights to agricultural use of the property identified in its June 6, 2012 building permit application[2] to the Town prior to the subsequent enactment of the Town's zoning ordinance." The circuit court's reference to "property identified" in the claim is to the 6388 acres Golden Sands' listed in its application under "area involved." The Town appeals.

STANDARD OF REVIEW

¶10 The Town appeals the circuit court's grant of summary judgment to Golden Sands. We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

DISCUSSION

¶11 In the instant case, Golden Sands contends that it has a vested right to use of 6388 acres of land in the Town for its dairy operation based on the same building permit application, which we determined, in ***Golden Sands I***, gave Golden Sands a vested right to a building permit allowing it to construct the seven farm buildings. Golden Sands argues that Wisconsin case law establishes that "a vested right to construct buildings carries with it a vested right to *use the land identified in the application* for the purposes associated with the buildings."

[2] Golden Sands initially submitted a building permit application dated June 6, 2012, and amended it on July 17, 2012. The circuit court's reference to the June 6, 2012 building permit application is to the first building permit application, which we do not rely on in this appeal.

(Emphasis added.) Applied here, Golden Sands argues that its reference to the 6388 acres in its 2012 building permit application, submitted prior to the use zoning change, establishes Golden Sands' vested right to agricultural use of that land.

¶12 The Town argues that Wisconsin law governing nonconforming land use prevents Golden Sands from commencing uses of the 6388 acres that conflict with the current rural preservation zoning classification. The Town also argues that Wisconsin case law on the topic of acquiring a vested right to a building permit to construct a structure does not apply to determining whether a property owner has acquired a vested right to nonconforming use of land. In short, the Town argues that the circuit court erred by not denying Golden Sands' motion for summary judgment.

¶13 As we explain below, the problem with Golden Sands' argument is that none of the authority Golden Sands relies on supports the view that merely identifying property in a building permit application results in a vested right to the *future use* of the identified property in a manner consistent with zoning at the time of the application, but inconsistent with zoning at the time the property is put to use in service of the dairy buildings. Our own research reveals no authority supporting Golden Sands' position.

¶14 This case calls for us to clarify the distinctions between (1) acquiring a vested "right" to construct or alter a building by virtue of filing a building permit that it is strictly compliant with then existing zoning and code provisions, and (2) acquiring a vested "interest" in the continued nonconforming use of land by virtue of having used the land in a particular manner prior to the enactment of a new zoning ordinance. This distinction is important because, so far as we can tell,

under current Wisconsin law these are the only two ways a party might be able to acquire a right to the nonconforming use of land. And, as we shall see, Golden Sands does not satisfy the criteria for either and does not even begin to argue for an extension of existing law.

¶15 First, under the vested rights doctrine, a property owner may establish a vested right in a zoning classification for the purposes of building or altering a structure by submitting a building permit that is in "strict and complete compliance with zoning and building code requirements" that existed at the time of the application. ***Lake Bluff Hous. Partners v. City of S. Milwaukee***, 197 Wis. 2d 157, 175, 540 N.W. 2d 189 (1995).

¶16 Second, a property owner may seek protection for a nonconforming use of land by proving "a vested interest in the *continuance* of that use." ***Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc.***, 2009 WI App 142, ¶49, 321 Wis. 2d 671, 775 N.W.2d 283 (emphasis added). The property owner must prove that his or her use of the property was lawful and predated the classification change and that this use was "'so active and actual that it can be said he [or she] has acquired a 'vested interest' in its continuance.'" ***Id.***, ¶¶18, 24 (quoting ***Walworth Cty. v. Hartwell***, 62 Wis. 2d 57, 61, 214 N.W.2d 288 (1974)). Under this option, it has been said that "there can be no vested interest if the use is not actually and actively occurring at the time the ordinance amendment takes effect." ***Id.***, ¶27.

¶17 To summarize thus far, Wisconsin law provides that a strictly compliant building permit application can establish a vested right to build a

structure under the then-existing zoning classification, but that same law does not clearly address the topic of property use.[3] Similarly, the case law addressing grandfathering in land *use*, as a nonconforming use, does not talk about whether a building permit carries with it the right to use purportedly associated property for a particular purpose. Rather, such law teaches that prior active and actual use of land can establish a vested right in continuing that use even if the use subsequently becomes nonconforming by a change in zoning.

¶18 With that background, we turn to the arguments and authority provided by Golden Sands.

¶19 As we indicated, Golden Sands argues that, under existing law, the vested rights it acquired to a building permit based on the submission of a legally conforming application with the Town include the right to use the 6388 acres referenced in the application for agricultural purposes, even though the zoning had changed. Stated differently, Golden Sands argues that the vested right it acquired to a building permit includes a vested right to use the 6388 acres in keeping with

[3] There are isolated, unclear references to the topic of property use in ***Lake Bluff Housing Partners v. City of S. Milwaukee***, 197 Wis. 2d 157, 540 N.W.2d 189 (1995). In some terminology and references, ***Lake Bluff Housing*** may suggest a view that the vested rights doctrine can include a vested right to use of property, not merely to the right to build structures identified in the application. *See* ***id.***, 172 (noting that under the "zoning jurisprudence" of Wisconsin, "a building permit has been a central factor in determining when a builder's rights have vested"); ***id.***, 180 (noting that "a building permit grants no right to an unlawful use"). However, no statement in ***Lake Bluff Housing*** even implicitly supports the proposition that a building permit carries with it the right to all uses of land that may be identified in a building permit application that are consistent with the nature of any building identified in the application. Moreover, regardless of the import of these "zoning" and "use" references in ***Lake Bluff Housing***, as we will explain in the text below, even if we assume in favor of Golden Sands 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 described in the permit application, this proposition does not support any argument that Golden Sands makes for its right to the land use that it now claims as a vested right.

the agricultural use that would have been permitted under the zoning classification in effect when Golden Sands submitted its building permit application. In support, Golden Sands cites several cases that address whether the submission of a building permit application created a vested right to a building permit allowing the applicant *to build a structure*. *See* ***Lake Bluff Hous.***, 197 Wis. 2d at 182 (ruling that builder did not establish vested rights to construct low-income apartment building "because it never submitted an application for a building permit conforming to the zoning and building requirements in effect at the time of the application"); ***State ex rel. Schroedel v. Pagels***, 257 Wis. 376, 43 N.W. 2d 349 (1950) (affirming builder's right to construct an apartment building that conformed with the zoning ordinance in effect when the building permits were filed). As we explain below, Golden Sands' reliance on these two cases is inapposite.

¶20 Even if we assume that cases such as ***Lake Bluff Housing*** and ***Pagels*** impliedly presume 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, neither case addresses the use of purportedly associated land. For example, regardless whether it is reasonable to assume that the right to construct the apartment building in ***Pagels*** carried with it the right of the property owner to use the constructed building as an apartment building, ***Pagels*** does not address the use of any land that might have been identified in the building permit application aside from that necessary to construct the building.

¶21 It 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. For instance, how much and what parts of the purportedly associated

land are necessary to allow the applicant to use the proposed building for its intended purpose? Why should the mere identification of purportedly associated land in a building permit application mean that all such land may be used in service of the proposed building? Should it matter whether the applicant asserts that all such identified land is necessary to the functioning of the building? Should a municipality be bound by such an assertion? In the apartment situation, could an owner/applicant use nearby property, merely identified in an application, to construct a new parking lot for residents, a use consistent with prior, but not current zoning? Importantly, how would a municipality determine the extent to which such identified property could be used in service of the apartment buildings?

¶22 More generally, assuming for argument's sake that the use of purportedly associated land should sometimes be a part of the vested rights acquired by the filing of a building permit application in strict compliance with zoning and building code requirements, why should a municipality be bound by the applicant's mere identification of land? When it comes to giving land nonconforming status, should there not be, at a minimum, a mechanism for determining whether all such identified land is in fact necessary?

¶23 These land use issues are matters that do not easily lend themselves to regulation by the mere issuance of a building permit, as is implicitly suggested by Golden Sands' argument. As we indicated, in order to obtain a building permit an applicant must show that the proposed building comports with then existing zoning and building code regulations. *See* ***Lake Bluff Hous.,*** 197 Wis. 2d at 170-82. The land use questions raised above are more complex than issues related to regulating the construction or alteration of a building.

¶24 The instant case presents a good example of the complexity of these issues. No doubt Golden Sands needs land for growing crops and spreading manure to fully utilize the multiple large dairy buildings it has acquired the right to construct. But how many of the identified 6388 acres are needed? Why should all 6388 acres obtain nonconforming use status simply because that amount of land was noted in the application? What if a factual inquiry would show that Golden Sands needs substantially fewer than 6388 acres to fully utilize its proposed farm buildings? If so, why should all 6388 acres obtain nonconforming use status? These sorts of questions were not addressed in Golden Sands' arguments or in the building permit cases Golden Sands relies on.

¶25 In addition, Golden Sands does not address whether ownership of purportedly associated land, or some other legal right to use the land, matters. So far as we can tell, Golden Sands advocates for a rule that turns simply on whether land is *identified* in a building application. Consistent with this argument, it does not appear that, in the application here, Golden Sands identified its legal relationship to all of the 6388 acres. Does this mean that the mere identification of land, regardless of the applicant's relationship to the land, is sufficient to effectively confer on that land nonconforming use status in keeping with the nature of the building that is the subject of the building permit? Such questions are not explored in Golden Sands' argument because of its incorrect insistence that existing law fully covers the situation here.

¶26 ***Lake Bluff Housing***, ***Pagels***, and similar building permit cases might be a starting point for the sort of argument Golden Sands needs to make, but Golden Sands does not use the cases this way. Rather, Golden Sands incorrectly asserts, without any legal analysis, that these cases fully support its position.

¶27 In addition to the above cases, Golden Sands cites ***Rosenberg v. Village of Whitefish Bay***, 199 Wis. 214, 225 N.W. 838 (1929), in support of its argument that it acquired vested rights in the use of the 6388 acres based on the submission of a legally compliant building permit application. Golden Sands' reliance on this case is misplaced. The issue in ***Rosenberg*** was whether a property owner established vested "substantial rights" where the owner relied on an existing ordinance in incurring substantial expenses in developing plans for an apartment hotel prohibited by an amended zoning ordinance. ***Id***. at 217. The ***Rosenberg*** court, in deciding that the property owner had "a right to proceed with the construction of [proposed] buildings," focused on the expenses the property owner incurred on the building project based on the owner's reasonable reliance on an existing zoning ordinance when the expenses were incurred. ***Id***. at 218-19. We acknowledge that Golden Sands' appellate briefing makes some references to expenses it has incurred. Golden Sands did not, however, argue before the circuit court, and does not argue now, that it is entitled to nonconforming use of the 6388 acres based on expenditures made in reliance on prior zoning. This may or may not be a viable legal theory, which may depend on the underlying facts that might have been developed. Our point here is that Golden Sands did not pursue this theory in the circuit court and does not present it to us as an alternative basis on which we might affirm the circuit court.

¶28 Golden Sands also cites ***Des Jardin v. Town of Greenfield***, 262 Wis. 43, 53 N.W.2d 784 (1952), ***Waukesha Cty. v. Seitz***, 140 Wis. 2d 111, 409 N.W.2d 403 (Ct. App. 1987), and ***Kitt's "Field of Dreams" Korner, Inc.***, 321 Wis. 2d 671. However, the issue in each of these cases is whether a property owner's use of property, prior to a change in zoning, was sufficient to establish a right to continue the now *nonconforming use*. Confusingly, Golden Sands cites these cases while

explicitly disclaiming any vested rights based on actual use prior to the zoning change. We fail to understand how any of these cases support the relief Golden Sands seeks here.

¶29 Before concluding, we observe that there is nothing inconsistent with our decision here and our decision in ***Golden Sands I***. It is important to remember that both the parties' arguments and our focus in that case were narrow. ***Golden Sands I*** was solely about whether Golden Sands satisfied the well-established criteria set forth in Wisconsin case law for acquiring a vested right to a building permit to construct the seven farm buildings. Indeed, in that case Golden Sands, before the circuit court and this court, repeatedly asserted that the case was "not about land use," but rather only about the building permit. Nothing before us in ***Golden Sands I*** raised even the prospect of the land use issue now before us. We may have assumed at the time of ***Golden Sands I*** that our decision meant that Golden Sands would be able to build farm buildings and operate them as such, but that was an unexamined assumption. Regardless, it is now clear that there is a related land use issue and that Golden Sands' arguments on that topic fall short.

¶30 Moreover, once Golden Sands became aware of the Town's effort to rezone land in the area near its construction site, it should have been clear to Golden Sands that there were land use issues that were not resolved by current case law development and that a Golden Sands victory in ***Golden Sands I*** with respect to the right to construct its proposed farm buildings would not necessarily carry with it the right to use all land identified in its building permit application, regardless of zoning changes.

¶31 In sum, we reject the arguments Golden Sands makes to support its claim of vested rights in agricultural use of all land identified in its building

application. As should be clear by now, Golden Sands similarly fails to support a theory it has a right to the nonconforming agricultural use of some portion of that land. Accordingly, we reverse and remand with directions to enter summary judgment in favor of the Town.

By the Court.—Judgment reversed and cause remanded with directions.

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