Case Law Update
WCCA 2018 Fall Conference

Atty. Peter Conrad
Barkers Island, Superior WI
October 11, 2018

Six Cases

- *Golden Sands Dairy LLC v. Town of Saratoga*
  2018 WI 61 – Wisconsin Supreme Court
- *Lagoon Lane, LLC v. Rice*
  2018 WL 1124567 (Slip Op.) – WI Court of Appeals
- *Town of Rib Mountain v. Marathon County*
  2018 WI App 42 – WI Court of Appeals
- *Enbridge Energy, Co., Inc. v. Dane County*
  2018 WI App 39 – WI Court of Appeals
- *Zelman v. Town of Erin*
  2018 WI App 50 – WI Court of Appeals
- *Krueger v. AllEnergy Hixton, LLC*
  2018 WI App 60 – WI Court of Appeals

Golden Sands Dairy LLC v. Town of Saratoga 2018 WI 61

- Issue: Does the "Building Permit Rule" extend to vest rights in a "project" on all land identified in a building permit application even though no actual construction was planned on all of the property?

Golden Sands Dairy LLC v. Town of Saratoga 2018 WI 61

- Golden Sands Dairy either owns outright, or is under contract to purchase, about 6,388 acres in and around the Town of Saratoga in Wood County.
- Golden Sands wants to operate a farm using the "farming full circle" model.
- As part of its operations, in 2012 Golden Sands applied for a building permit for seven farm buildings from the Town.

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- The building permit application identified the building site as 100 acres and the total farm as 6,388 acres.
- Golden Sands also included a map with its original building permit application that identified the land it would use for its farm and the location of the seven structures.

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- At the time of application, the Town was under county zoning – the land was zoned unrestricted.
- Subsequently, the Town adopted a zoning ordinance.
- The Town refused to issue a building permit (it passed a moratorium).
- Golden Sands sued, and won at both the Circuit Court and Court of Appeals.

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- While the first lawsuit was pending, Golden Sands started a second action asking the Court to declare that it could use all of the land it identified in its building permit application for agricultural purposes.
- The circuit court found that Golden Sands had a vested right to use the land for agricultural purposes.
- The Court of Appeals reversed.

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- The Court of Appeals reversed.
- According to the Court of Appeals, Wisconsin's vested right law applies only to constructing or altering a building.
- The Court also found that Golden Sands had not established a nonconforming use under Wisconsin law because Golden Sands' use of the land was not actually and actively occurring at the time the Town amended its zoning ordinance.

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- Golden Sand petitioned the Supreme Court for review.
- The Wisconsin Supreme Court reversed the Court of Appeals.
- The Supreme Court held that Wisconsin uses the "Building Permit Rule" – the right to use property that conforms to the current zoning vests at the time a building permit is filed.

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- The Supreme Court then goes on to conclude that the Building Permit Rule applies to all land specifically identified in the building permit application.
  - "we are guided by the policies underlying the rule. The primary advantage of the bright-line Building Permit Rule is 'predictability for land owners, purchasers, developers, municipalities, and the courts."

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- *Murr*

  "As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition."

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- *McKee*

  "Wisconsin applies the bright-line building permit rule because it creates predictability for land owners, purchasers, developers, municipalities and the courts….

  In contrast, the rule proposed by McKee, which would require a case-by-case analysis of expenditures, would create uncertainty at the various stages of the development process…. According to McKee, "the concept of fair play and protection of settled expectations demands a more flexible and searching inquiry than bright-line rules such as the building permit test can provide….

  For the reasons set forth above, we decline to adopt this approach."

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- BUT, what about Wis. Stat. §66.10015, didn't that render the issue moot?

> "If a project requires more than one approval or approvals from one or more political subdivisions and the applicant identifies the full scope of the project at the time of filing the application for the first approval required for the project, the existing requirements applicable in each political subdivision at the time of filing the application for the first approval required for the project shall be applicable to all subsequent approvals required for the project, unless the applicant and the political subdivision agree otherwise. "

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- No – in a footnote the Court explains that law only applies prospectively, and states that its decision "should not be read to intimate how courts should apply s. 66.10015."
- However, §66.10015 now applies and probably limits the overall impact of this opinion.

Golden Sands Dairy LLC v. Town of Saratoga – continued –

- That said, the Court acknowledged the circuit court's language in its decision:
  - "Golden Sands' vested right to use the land for agricultural purposes expires at the same time the building permit expires."
- What does that mean?
- Any implication for §66.10015?

Lagoon Lane, LLC v. Rice 2018 WL 1124567 (Slip Op.)

- Issue: Can a town use its frontage, minimum lot size, and setback requirements to deny a CSM in a shoreland zone.

Lagoon Lane, LLC v. Rice
– continued –

- Lagoon Lane wanted to divide land it owned in the Town of West Bend in Washington County.
- The land was located within 1000 feet of Big Cedar Lake (i.e. in the shoreland zone).
- The County approved the CSM, but the Town denied because it failed to comply with the Town's setback, minimum lot size, and frontage requirements.

Lagoon Lane, LLC v. Rice
– continued –

- Lagoon Lane sought review of the denial in circuit court.
- At the circuit court, the Town conceded that the setback and lot size standards were enacted under the Town's zoning authority, and the frontage requirement was enacted under both zoning and subdivision authority.
- The circuit court ruled against the Town holding that it improperly denied the subdivision "for zoning reasons."

Lagoon Lane, LLC v. Rice
– continued –

- The circuit court noted that under Wis. Stat. §59.692 and *Hegwood v. Town of Eagle Zoning Bd. of Appeals* the Town lacked authority to zone in shoreland areas.
- Therefore, the court concluded that the Town had no basis to deny the CSM.
- The Town appealed the circuit court's decision to the Court of Appeals.

Lagoon Lane, LLC v. Rice
– continued –

- The Court of Appeals affirmed the decision of the circuit court.
- In affirming the decision of the circuit court, the Court of Appeals also incorrectly assumed that towns could not zone in the shoreland zone.
  - "The power to zone shorelands in towns rests exclusively with counties."
- Published decision, but….

Lagoon Lane, LLC v. Rice – continued –

- Both the Court of Appeals and the circuit court were unaware of Wis. Stat. §60.61(3r)/60.62(5).
  - A town may enact a zoning ordinance that applies in shorelands, except a town "may not impose restrictions or requirements in shorelands with respect to matters regulated by a county shoreland zoning ordinance enacted under s. 59.692 affecting the same shorelands…."

Lagoon Lane, LLC v. Rice
– continued –

- The Town asked for reconsideration based on the statute.
- The Court of Appeals agreed, and reconsiders due to the legislative changes…kind of.

Lagoon Lane, LLC v. Rice – continued –

- On reconsideration the Court of Appeals reaffirms its prior ruling, but notes: "the parties and public should understand that this opinion does not consider these relevant statutory amendments, but rather proceeds under the assumption that *Hegwood* remains unaltered and the statutory authority of towns to zone in shoreland areas remains as it was at the time *Hegwood* was decided."

Lagoon Lane, LLC v. Rice – continued –

- Takeaway:
  - Towns can zone in shoreland areas.
  - But a town "may not impose restrictions or requirements in shorelands with respect to matters regulated by a county shoreland zoning ordinance."
  - So, applying the Court's reasoning, a town cannot deny a CSM in the shoreland zone if the County has adopted a regulation on that issue – even with the statutory change.

Town of Rib Mountain v. Marathon County 2018 WI App 42

- Issue: Can a county implement a uniform addressing system in any unincorporated area or only a "rural" part of a town.

Town of Rib Mountain v. Marathon County – continued –

- Marathon County enacted an ordinance that mandated the creation of a uniform addressing system in the County.
- The Ordinance stated that the uniform addressing system would apply "to each road, home, business, farm, structure, or other establishment in the unincorporated areas of the County."

Town of Rib Mountain v. Marathon County – continued –

- Consistent with the Ordinance, the County published a draft Uniform Addressing Implementation Plan, required all towns in the County to participate in the County's uniform addressing system.
- The County notified Rib Mountain that it would be required to rename 61 of its 202 roads.

Town of Rib Mountain v. Marathon County – continued –

- Rib Mountain filed a lawsuit against the County, seeking declaratory and injunctive relief.
- The Town argued that the County's authority to implement a naming or numbering system under Wis. Stat. §§59.54(4) and (4m) extended only to "rural" areas in towns, rather than to all unincorporated areas of the County.

Town of Rib Mountain v. Marathon County – continued –

- Rib Mountain contended the County had failed to consider whether the roads affected by its plan were in in fact in rural areas.
- Rib Mountain further argued that that some of the roads to be renamed had previously been "identified … as roads located in urban areas" by either the Marathon County MPO or the U.S. Census Bureau.

Town of Rib Mountain v. Marathon County – continued –

- The circuit court agreed with the County.
- After analyzing the text of the statute, the Court of Appeals reversed – it agreed with the Town's interpretation.
- The Court of Appeals held that "rural area" is not synonymous with "unincorporated area."

Town of Rib Mountain v. Marathon County – continued –

- The Court then used the dictionary to find that: "(1) the term 'rural' is used to describe things that are characteristic of, or related to, the 'country'; and (2) the 'country' encompasses places that are distinct from 'urban' areas—i.e., areas with comparatively higher concentrations of people or buildings."
- Thus, the Court held that the term "rural" means "areas that are not urban."

Town of Rib Mountain v. Marathon County – continued –

- Takeaway: Unclear – The Town of Rib Mountain suggested that the County use the Wausau Metropolitan Planning Organization Planning Boundary as the dividing line between "urban" and "rural" but the Court took no position on whether that was appropriate and did not offer any criteria for where to draw the line between urban and rural, i.e. that a fight for a later day.

Enbridge Energy, Co., Inc. v. Dane County 2018 WI App 39

- Issue: Did the circuit court select an inappropriate remedy when it severed certain conditions from a CUP, rather than remanding the CUP back to the County to determine whether the County could issue a permit that satisfies its standards without those conditions.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- Dane County issued a conditional use permit to Enbridge for expansion of a crude oil pipeline.
- The CUP contained a couple of conditions that require Enbridge to have insurance to make sure there is funding for remediation, clean up, and payment for damages in the event of a spill.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- However, in 2015, the Legislature passed 2015 Wisconsin Act 55 that prohibits a county from requiring an interstate hazardous liquid pipeline operator to obtain insurance if the operator "carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability."

Enbridge Energy, Co., Inc. v. Dane County – continued –

- Enbridge alleged that it had such insurance, so it argued to the County that its permit should be amended and that the new law required the County to sever the insurance conditions from the permit.
- The County denied the request, and kept the insurance requirement in the final CUP.
- Enbridge sued.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- The circuit court granted Enbridge's request to sever the insurance conditions, and leave all of the other permit conditions in place.
- The County appealed, and the Court of Appeals reversed.
- The Court of Appeals found that Enbridge failed to make the necessary showings to demonstrate that it had the insurance necessary to prohibit the County from including its conditions regarding insurance.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- The case was remanded to the circuit court, with directions to return the matter to the County, so that the County could determine whether a permit should be issued that contains conditions sufficient to satisfy permitting standards established in the zoning ordinance.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- Takeaway – Unpublished opinion, so no precedent, but…

- The Wisconsin Supreme Court accepted review, so an important question remains unsettled –
  - Is striking an "unlawful" condition in a CUP the proper remedy?

Zelman v. Town of Erin
2018 WI App 50

- Issue: When does the time limit to appeal a CUP begin?

Zelman v. Town of Erin
2018 WI App 50

- A neighbor challenged the approval of a CUP for a wine business.
- After conducting a hearing, the Town ultimately approved the CUP.

Zelman v. Town of Erin – continued –

- After the Town's approval, the Town informed Zelman (the neighbor) that the CUP was not final until it is signed by all parties and recorded with the County Register of Deeds.
- It took almost a month for the CUP to be signed and recorded with the ROD.
- The Town never gave Zelman a copy.
- Zelman initiated the lawsuit very soon after she got a copy of the decision at the ROD.

Zelman v. Town of Erin
2018 WI App 50

- One of the issues in the case was whether the complaint challenging the permit was filed in time.
- The statue requires a party to seek judicial review of a final decision within 30 days of receipt of the final determination.

Zelman v. Town of Erin
– continued –

- The Town argued that Zelman's lawsuit was untimely because it was not brought within 30 days of the Town Board's hearing on the appeal of the plan commission's approval of the CUP.
- The circuit court agreed with the Town and dismissed the lawsuit.
- The Court of Appeals reversed.
- The final determination on the CUP did not occur until the CUP was recorded with the Register of Deeds.

Zelman v. Town of Erin – continued –

- The Court of Appeals reversed.
- The Court of Appeals held that the clock did not begin to run until Zelman had a copy of the final determination after it was recorded with the Register of Deeds.

Zelman v. Town of Erin – continued –

- Since Zelman initiated her lawsuit within 30 days of the recording of the CUP, the Court of Appeals held that the lawsuit was timely and remanded the case to the circuit court.
- The Court of Appeals did leave one issue unresolved – would the clock actually have started had Zelman not obtained a copy of the decision on her own.
- Takeaway: Get decisions filed timely.

Krueger v. AllEnergy Hixton, LLC 2018 WI App 60

- Issue: Does Wisconsin law allow private anticipatory nuisance claims.

Krueger v. AllEnergy Hixton, LLC – continued –

- *Krueger* involved a challenge to a proposed frac sand mine in Jackson County.
- The neighbors argued that if the mine were allowed it would cause harm to their property.
- AllEnergy sought dismissal on the basis that Wisconsin law did not recognize a cause of action for an "anticipatory nuisance" (i.e. harm that has not yet occurred).

Krueger v. AllEnergy Hixton, LLC – continued –

- The Court interpreted Wisconsin law as allowing anticipatory nuisance.
- But, it held that the neighbor's complaint did not properly state a claim for an anticipatory nuisance, so it was dismissed.

Krueger v. AllEnergy Hixton, LLC – continued –

- Takeaway: There may more ways to fight a approval of a particular land use than just challenging a permit approval.

Questions?

Peter Conrad
Manitowoc County Courthouse
1010 South Eighth Street
Manitowoc, WI 54220
(920) 683-4062
peterconrad@co.manitowoc.wi.us