



## *The Ongoing Evolution of Vested Rights & the Building Permit Exception What Counties Needs to Know*

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**O**n June 5, 2018, the Wisconsin Supreme Court issued its opinion in *Golden Sands Dairy, LLC, et al. v. Town of Saratoga et al.*, 2018 WI 61, 318 Wis. 2d 61, 318 N.W.2d 118. This case, when read in tandem with Wis. Stat. § 66.10015, changed the landscape of vested rights analysis in land use law for counties across the state. This article discusses important points for counties to consider when addressing situations that may include an applicant’s claim of vested rights in a particular zoning designation and other approval requirements that exist at the time an applicant files a development-related application.

### **THE BUILDING PERMIT EXCEPTION**

Wisconsin has a well-settled body of law establishing that a property owner does not have a vested right in a particular zoning designation. However, Wisconsin common law recognizes the need for balance between a county’s need to regulate land use with the need to provide predictability for land owners, purchasers, developers, municipalities, and the courts. To balance

these factors, Wisconsin law recognizes an exception to the rule that a party does not have a vested right in a particular zoning designation: the “Building Permit Exception.”

The Building Permit Exception holds that a property owner obtains a vested right in a particular zoning designation upon the submission of a complete and compliant building permit application. This rule contains two key elements: a vested right and a complete and compliant building permit application. A “vested right,” within the context of zoning, is defined as a right to use property that is consistent with the current zoning. The Wisconsin Supreme Court further described a vested right as the point at which a developer may make expenditures because the developer is proceeding on a basis of reasonable expectation and without fear of losing the required zoning designation. A ‘complete and compliant’ building permit application is defined as an application that is in “strict and complete compliance with the zoning and building code requirements.”

## CURRENT LAW – CASES AND A NEW STATUTE

Recent case law and statutory changes have expanded the scope of the Building Permit Exception. Specifically, the Wisconsin Legislature adopted 2013 Wisconsin Act 74, which created Wis. Stat. § 66.10015. This new statute codifies two important concepts in land use law: (1) the triggering mechanisms and scope of the Building Permit Exception; and (2) the ability of a county or other municipal entity to effect a “down zoning,” which is defined as a zoning ordinance that either decreases development density that was allowed under the land’s previous usage, or reduces the number of permitted uses on the land to fewer than were allowed under its previous usage.

### The Building Permit Exception Under Wis. Stat. § 66.10015

The provisions of Wis. Stat. § 66.10015 were intended to expand the Building Permit Exception by “freezing” all approval requirements (or lack thereof) at the time *any* development-related application is filed, not just a building permit. In addition, Wis. Stat. § 66.10015 freezes any other political subdivision’s requirements at the time of filing an application so long as the application “identifies the full scope of the project at the time of filing the application.” This seemingly represents a significant expansion of the Building Permit Exception given that a developer obtains a right to proceed under existing requirements upon filing *any* development-related application, not just under a building permit application. Also, it extends to all other political subdivisions’ approval requirements that are necessary for a project upon filing, not just those of the original political subdivision in which the filing occurred.

While the provisions of Wis. Stat. § 66.10015 appear to supersede previous case law by applying the Building Permit Exception to *all* development applications and freezing all other approval requirements

in other political subdivisions that are necessary for the project approval, certain aspects of the common law Building Permit Exception seemingly remain in effect:

1. In order to freeze approval requirements of a project, an applicant must still submit a “complete and compliant” development-related application; and
2. In order to freeze other political subdivision’s approval requirements for a project, an application must include “the full scope of the project at the time of filing the application.” This appears to be similar to the “complete and compliant” requirement set forth in previous case law.

### The Prohibition Against “Down Zoning”

In addition to the freezing of existing requirements at the time a development-related application is filed, Wis. Stat. § 66.10015 also prohibits “down zoning” unless two-thirds of the members-elect of the political subdivision approve the down zoning, or if the property owner requests the down zoning. The prohibition on down zoning came about as a result of the Wisconsin Supreme Court’s decision in *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, 374 Wis. 2d 487, 893 N.W.2d 12. *McKee*, like the seminal Building Permit Exception case of *Lake Bluff Housing Partners*, involved down zoning after a developer made expenditures based on an existing zoning designation, and the municipality then down zoned the properties to achieve less permitted density. While *Lake Bluff* and *McKee* found that the developer did not have vested rights in the prior zoning designation because a complete and compliant building permit application had not been filed, Wis. Stat. § 66.10015 now provides that a political subdivision is prohibited from adopting a new zoning designation that would decrease an allowed density and making that new zoning design-

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nation applicable to a project for which a development-related application has been submitted, unless at least two-thirds of the members-elect or if a land owner requests the down zoning.

## BEST PRACTICES FOR COUNTIES

In light of the changes in law noted above, the Wisconsin Counties Association (WCA) encourages county officials to consult with corporation counsel to discuss the following best practices to ensure that a county's interests are protected:

1. Ensure that county ordinances and other approval requirements are up to date and reflect current county policies. Also, a county should make sure that its ordinances and other approval requirements are comprehensive and cross-reference each other. For example, an ordinance may state that a rezone application may not be deemed complete and compliant unless all other applications relating to a project are submitted at the same time. Once a development-related application is submitted, a county will likely lose its opportunity to modify the regulations that apply to that project.
2. Engage in discussions with a developer prior to the submission of any development-related application. It is helpful for county officials to understand the full scope of the project to provide suggestions and feedback prior to an application. Early discussion will also prevent an application that triggers a vested right under Wis. Stat. § 66.10015 because a county may lose its opportunity to object to the proposal.
3. To the extent possible, keep the public informed of any preliminary discussions regarding a project. This will allow county officials to obtain public feedback prior to a development-related application being submitted.
4. When a development-related application is submitted, make sure that the application is com-

plete, compliant with existing zoning and other ordinances, and describes the "full scope of the project." This will ensure that the county may fully assess the project before the existing approval requirements are frozen by virtue of a development-related application being submitted.

5. Ensure that the county follows the procedural mandates of Wis. Stat. § 66.10015(2), e.g., if an application is not complete or does not describe a project's full scope, the county should provide written notice of non-compliance to the applicant within ten days of receiving the application.

If you have any questions about the Building Permit Exception or the vested rights doctrine, or any other governmental law needs, please contact WCA or any member of the von Briesen & Roper Government Law Group ([www.vonbriesen.com](http://www.vonbriesen.com)).

### Notes:

1. WCA submitted an amicus curiae brief in support of the Town's position in *Golden Sands*.
2. See *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 548 N.W.2d 528 (1996).
3. A second exception to the prohibition against vested rights in a zoning designation is the "Nonconforming Use Exception." This exception does not grant a vested right in a zoning designation, but rather grants a vested right to the property's use. The vested right arises if a non-conforming use is "actual and active" at the time of zoning changes. As such, a property owner may have a vested right in the continued use of property regardless of its nonconforming status because the owner is actually and consistently using the land. See *Golden Sands Dairy LLC v. Town of Saratoga*, 2018 WI 61, ¶21, 381 Wis. 2d 704, 913 N.W.2d 118.
4. See *Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 540 N.W.2d 189 (1995).
5. See *Golden Sands 2018 WI ¶18*.
6. See *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, ¶43, 374 Wis. 2d 487, 893 N.W.2d 12.
7. See *Lake Bluff*, 197 Wis. 2d at 175.
8. See Wis. Stat. § 66.10015(1)(as)1.-2.
9. See Wis. Stat. § 66.10015(2)(b). Also, Wis. Stat. § 66.10015(2) carves out the requirements of Wis. Stat. § 66.0401, which relate to solar and wind energy systems.
10. See Wis. Stat. § 66.10015(2).
11. See Wis. Stat. § 66.10015(2)(b).
12. See *Lake Bluff*, 197 Wis. 2d at 175.
13. See Wis. Stat. § 66.10015(3).
14. See *McKee*, 2017 WI ¶4; *Lake Bluff*, 197 Wis. 2d at 161, 166.
15. See Wis. Stat. § 66.10015(3).