COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1468 **Cir. Ct. No. 2012CV362**

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

GOLDEN SANDS DAIRY, LLC,

PETITIONER-RESPONDENT,

V.

LORELEI FUEHRER,

RESPONDENT,

TOWN OF SARATOGA, TERRY A. RICKABY,
DOUGLAS PASSINEAU, PATTY HEEG,
JOHN FRANK AND DAN FORBES,

INTERVENING-RESPONDENTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Wood County: THOMAS B. EAGON, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 BLANCHARD, P.J. The Town of Saratoga appeals a decision of the circuit court granting a writ of mandamus compelling the Town, via its building inspector, to issue a building permit to Golden Sands Dairy, LLC, for the construction of seven farm buildings.[1] The Town argues that the circuit court erred in granting the writ for four reasons: (1) Golden Sands did not have a vested right in the building permit; (2) the building inspector did not have a positive and plain duty to issue the permit; (3) Golden Sands would not suffer substantial harm if the permit were denied; and (4) Golden Sands has an adequate alternative remedy to mandamus through a separate lawsuit pending between Golden Sands and the Town.

¶2 For the following reasons, we reject each of these arguments and affirm the decision of the circuit court.

BACKGROUND

¶3 This appeal concerns the Town's denial of a building permit application submitted by Golden Sands to allow it to construct seven farm buildings on the same parcel of land as part of a new dairy operation. The relevant facts are taken from testimony and documentary evidence presented at an evidentiary hearing at which witnesses included the Town's building inspector, Lorelei Fuehrer, and the chief financial officer of Golden Sands, Jim Wysocki.

¶4 We summarize at some length the events that preceded Golden Sands' June 2012 application for a Town building permit, which is the focus here,

[1] The Town of Saratoga building inspector does not separately appeal the circuit court's decision.

because this background is necessary to understand the wide range of arguments raised on appeal.

¶5 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.

¶6 The Town did not have its own zoning ordinance until September 2012, three months after Golden Sands submitted the application for a building permit at issue here. Therefore, at the time Golden Sands submitted its application, Wood County's zoning ordinance governed in the Town.

¶7 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 location for the proposed Golden Sands buildings is in an area zoned as unrestricted pursuant to the Wood County zoning ordinance.

¶8 Separate from the Wood County zoning ordinance, which regulates the use of land, the Town regulates the construction of buildings under its own building code. The Town adopted its building code pursuant to WIS. STAT. § 101.65(1)(a) (2011-12),[2] which gives towns statutory authority to "[e]xercise jurisdiction over the construction and inspection of new dwellings by passage of ordinances." *See* § 101.65(1)(a). The Town adopted its building code in order to

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

"exercise jurisdiction over the construction and inspection of new one[-] and two[-]family dwelling[s], and to establish regulations for construction of structures other than new dwellings …." TOWN OF SARATOGA, WIS., BUILDING CODE § 1.1.A. (2007). This building code establishes requirements for the construction of buildings within the Town, including the requirement that anyone planning to construct a building or structure must first obtain a building permit. BUILDING CODE § 2.2.A.

¶9 The Town building code adopts the requirements of the State Uniform Dwelling Code ("the state dwelling code") for the construction of one- and two-family dwellings. *See* WIS. STAT. § 101.65(1)(a); WIS. ADMIN. CODE ch. SPS 320 (Dec. 2011).[3] Pertinent to the issues raised here, and discussed in further detail below, the Town building code also purports to apply the requirements of the state dwelling code to farm buildings, even though the state dwelling code explicitly exempts farm buildings from its reach. *Compare* BUILDING CODE § 1.4.A.4. *with* WIS. ADMIN. CODE § SPS 320.05(6).

¶10 The Town building code vests authority to enforce its requirements in a "building inspector." It provides that the building inspector "shall issue a building permit" for the construction of a building if he or she "finds that the proposed building will comply in every respect with state and local laws and orders." BUILDING CODE §§ 1.3.A., 2.2.C.1.

¶11 Distinct from the Town building code and the Wood County zoning ordinance, on August 15, 2007, well in advance of the application at issue here,

[3] All references to the Wisconsin Administrative Code ch. SPS 320 are to the December 2011 version unless otherwise noted.

the Town adopted a "Comprehensive Plan 2007-2025."[4] The comprehensive plan states that one of its central purposes is to "define[] the direction and manner that the Town of Saratoga would like to grow and how that growth should occur." The Town's comprehensive plan follows the statutory requirements for such a plan set forth in WIS. STAT. § 66.1001.

¶12 As required by WIS. STAT. § 66.1001(2)(h), the Town's comprehensive plan includes a "future land use" section, which consists of "objectives, policies, goals, maps and programs to guide the future development and redevelopment of public and private property" within the Town. This section of the Town's comprehensive plan establishes the Town's "desired pattern of land use and … the Town's vision and intent for the future" of development within the Town. Toward this end, the "future land use" section of the plan includes a "Future Land Use Map," which identifies "future land use areas." These are "areas of similar character, use, and density," as defined by the types of uses that the Town would allow or prohibit in each land use area. As it relates to the parcel on which Golden Sands now seeks to develop a dairy, this section of the comprehensive plan expresses the Town's intent to designate, at a future date, this area as being within a "Rural Preservation" land use area, on which "large agricultural uses" would be prohibited.

[4] The Town adopted the comprehensive plan pursuant to WIS. STAT. § 62.23(2) and (3), as a town exercising village powers. Golden Sands does not argue that the Town did not have the authority to adopt a comprehensive plan, and we are satisfied from the record that the Town had authority to exercise village powers and, thus, also to adopt the comprehensive plan. *See* WIS. STAT. §§ 60.22(3), 60.10(2)(c) (authorizing towns to exercise village powers), and 61.35 (authorizing villages to adopted comprehensive plans pursuant to WIS. STAT. § 62.23).

¶13 In this same section of the comprehensive plan, the Town acknowledges that these projected land use areas "are not zoning districts" and, thus, "do not legally set performance criteria for land uses …." Instead, the comprehensive plan includes an implementation section, as required under WIS. STAT. § 66.1001(2)(i), which calls for the eventual adoption of a Town-specific zoning ordinance that would establish permitted land uses. More specifically, the implementation section provides for the development and adoption of a Town-specific zoning ordinance within five years of adoption of the comprehensive plan, or by 2012. By enacting and enforcing the Town-specific zoning ordinance, the Town could implement the goals set forth in the comprehensive plan, including establishing zoning districts based on the "land use areas" explained in the "future land use" section of the comprehensive plan. Until such zoning ordinance was adopted, the comprehensive plan had no enforcement mechanism.

¶14 In 2008, consistent with the implementation section of the comprehensive plan, the Town planning commission began developing the specifics of a Town zoning ordinance. By September 2010, the Town had drafted certain portions of the proposed zoning ordinance. By September 2011, these drafts were being reviewed at publicly noticed Town planning commission meetings.

¶15 Over the course of 2011 and 2012, this planning commission process produced several draft versions of a Town zoning ordinance. However, there were no planning committee meetings regarding development of the draft zoning ordinance between November 2011 and April 2012.

¶16 The last draft of the zoning ordinance created before Golden Sands submitted its building permit application was produced in April 2012. The April

2012 draft was incomplete. For one, it did not contain any language regarding areas to be zoned for rural preservation. As a then member of the planning commission subsequently explained in testimony in this case before the circuit court, the commission had not yet reached that section in its drafting process.

¶17 In order to adopt a complete zoning ordinance to replace the Wood County zoning ordinance for land use regulation within the Town, the Town was required by statute to be authorized to do so by a "town meeting,"[5] or by a referendum vote of its electors. *See* WIS. STAT. § 60.62(2). The Town had not obtained the authority to adopt a zoning ordinance from a Town meeting or an elector referendum until sometime in July or August 2012.

¶18 In early 2012, prior to submitting its building permit application to the Town, Golden Sands attempted to determine what zoning laws were applicable in the Town through "internet research" and through research conducted by Golden Sands' legal team. This research included visiting the Town's website. However, as Wysocki explained during testimony before the circuit court, this research did not include speaking to any Town officials regarding zoning at any point prior to submitting the application, nor did any representatives of Golden Sands attend any of the planning commission meetings regarding development of the zoning ordinance from 2008 through July 2012.

¶19 Golden Sands' legal team discovered that the Town had not adopted its own zoning ordinance, but instead operated under the Wood County ordinance. Additionally, through a search of the Town's website, Golden Sands became

[5] A "town meeting" is either the annual town meeting held as proscribed by statute or a special town meeting. *See* WIS. STAT. §§ 60.62(2), 60.001, 60.11, and 60.12.

aware of the Town's adoption of the comprehensive plan, which called for the eventual creation and adoption of a Town zoning ordinance. However, Wysocki testified that Golden Sands' legal team informed him that the land use goals in the comprehensive plan were not enforceable.

¶20 On June 6, 2012, Golden Sands submitted an application to the Town for a building permit to allow it to construct the seven farm buildings. Golden Sands spent over $200,000 in putting together its permit application, in addition to the almost $2 million it spent to purchase the land at issue.

¶21 During June and July 2012, Fuehrer and Wysocki had a series of conversations regarding additional materials that Golden Sands would need to submit in order to obtain a building permit. Based on the fact that she did not think the building permit application was complete, Fuehrer did not issue the permit to Golden Sands prior to July 19, 2012. We summarize in discussion below the specific materials that Fuehrer identified to Gold Sands, before July 19th, as necessary for approval.

¶22 The date, July 19, 2012, is significant, because on that day the Town Board adopted an ordinance that imposed a moratorium on "plan review, building permit issuance, construction and related activities that are inconsistent with existing land use," meaning a moratorium on construction activities inconsistent with land uses outlined in the Town's comprehensive plan. Fuehrer subsequently testified that the moratorium prevented her from issuing the building permit after July 19th, because the use of the location as a dairy operation would be inconsistent with the comprehensive plan.

¶23 On July 26, 2012, Golden Sands filed a Petition for Alternative Writ of Mandamus in the circuit court, alleging that the Town, through Fuehrer, had

unlawfully refused to issue the building permit. On August 10, 2012, Golden Sands filed a separate lawsuit against the Town, alleging substantially the same set of facts as alleged in the mandamus petition. The suit challenged, in part, the enforceability of the moratorium and the Town's subsequent adoption of a Town-specific zoning ordinance.

¶24 On April 11, 2013, after extensive briefing, an evidentiary hearing, and oral argument, the circuit court granted the writ of mandamus to Golden Sands, directing the Town to issue the building permit. The Town appeals this decision.

STANDARD OF REVIEW

¶25 This court will uphold a circuit court's decision regarding a petition for a writ of mandamus unless the court erroneously exercised its discretion in either granting or denying the writ. ***Lake Bluff Hous. Partners v. City of S. Milwaukee***, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995). A court erroneously exercises discretion where it bases its decision on an erroneous understanding of the law. ***Id.***

¶26 We will uphold the circuit court's factual findings unless they are clearly erroneous, but we decide legal questions, such as the interpretation of a statute or regulation, independently of the circuit court. *See* WIS. STAT. § 805.17(2); ***State v. Cole***, 2003 WI 59, ¶12, 262 Wis. 2d 167, 663 N.W.2d 700.

¶27 We are called on to interpret the language of the Town building code. Courts interpreting an ordinance, such as the Town building code, follow the rules of statutory interpretation. *See* ***Marris v. City of Cedarburg***, 176 Wis. 2d

14, 32, 498 N.W.2d 842 (1993). The procedure a court must follow when interpreting a statute is clear:

> [S]tatutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.
>
> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted). An ordinance "is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *See* ***Id.***, ¶47.

DISCUSSION

¶28 "Mandamus is an extraordinary legal remedy." ***Lake Bluff***, 197 Wis. 2d at 170. A party seeking the writ must show that: (1) it is based on a "'clear, specific legal right which is free from substantial doubt,'" also referred to as a "vested right"; (2) "the duty sought to be enforced is positive and plain"; (3) "substantial damage will result if the duty is not performed"; and (4) "no other adequate remedy at law exists." *See* ***id.*** (quoted source omitted).

¶29 The Town argues that Golden Sands was not entitled to obtain a writ of mandamus because it meets none of the requirements enumerated above. The Town specifically argues: (1) that Golden Sands did not have a vested right in the

permit, because the application it submitted was incomplete and because Golden Sands could not reasonably rely on the Wood County zoning ordinance; (2) overlapping extensively with the first argument, that the building inspector did not have a plain duty to issue the permit, because the application was incomplete; (3) that Golden Sands would not be substantially harmed if the permit is not issued; and (4) that the second lawsuit filed by Golden Sands against the Town provides Golden Sands with an adequate remedy for the alleged injuries Golden Sands sustained due to the Town's failure to grant the permit.

I. Vested Rights

A. The Building Permit Application

¶30 The Town argues that Golden Sands does not have a vested right in the building permit because it failed to submit a complete building permit application prior to July 19th, the date the Town enacted the moratorium.

¶31 In order for Golden Sands to show that it has a vested right in the building permit, it must establish that it submitted an application for the permit that was in "strict and complete conformance with applicable zoning and building code requirements." *See* ***Lake Bluff***, 197 Wis. 2d at 174-75. Golden Sands agrees that strict and complete conformance here requires that it submitted a complete building permit application. The Town does not contest that Golden Sands' building permit application complied with the Wood County zoning ordinance. Thus, the vested right issue turns on whether Golden Sands' permit application strictly and completely conformed to the building permit requirements contained in the Town building code.

¶32 Based on the Town building code requirements, described above and in further detail below, the Town argues that the building permit application that Golden Sands submitted was incomplete because it lacked: (1) a complete "site plan" or "plot plan,"[6] a separate floor plan for the commodity shed, and an erosion control plan, each required by the state dwelling code, as it is incorporated into the Town building code; (2) evidence showing compliance with state transportation laws regarding the driveway providing access to and from an adjoining state highway and state environmental laws regarding the proposed "separation building";[7] and (3) the dimensions of setbacks for each of the proposed farm buildings.

1. State Uniform Dwelling Code Requirements

¶33 The Town has "'only such powers as are specifically delegated to it by the legislature,'" as well as those powers "which 'are necessarily implied' from any power conferred on it by a statute." *See* ***Town of Clearfield v. Cushman***, 150 Wis. 2d 10, 20, 440 N.W.2d 777 (1989) (quoted sources omitted). As previously mentioned, WIS. STAT. § 101.65 gives the Town the specific statutory authority to adopt a building code to regulate the construction of one- and two-family dwellings. *See* § 101.65(1)(a). Towns electing to exercise jurisdiction under this statute must adopt building codes that "meet the requirements of" the state dwelling code, as set forth in WIS. ADMIN. CODE ch. SPS 320. Sec. 101.65(1)(a).

[6] The parties stipulated during the evidentiary hearing that at least for purposes of this appeal the terms "site plan" and "plot plan" are interchangeable.

[7] According to testimony given at the evidentiary hearing, the "separation building" would house the equipment necessary to separate solid manure from liquid manure for disposal purposes.

Pursuant to the state dwelling code, Towns "shall, by ordinance, adopt [the state dwelling code] in its entirety," and "[n]o additional requirements within the scope of this code may be adopted … unless approved by the department." WIS. ADMIN. CODE § SPS 320.06(1)(a)2., 3.

¶34 The Town building code adopts the requirements of the state dwelling code for one- and two-family dwellings. The Town building code goes further, however, as we now explain. The state dwelling code exempts farm buildings from its regulation: "FARM BUILDINGS. The provisions of this code do not apply to the buildings used exclusively for farm operations and not for human habitation." WIS. ADMIN. CODE § SPS 320.05(6). The Town building code, however, states that it applies the requirements of the state dwelling code to farm buildings. BUILDING CODE § 1.4.A.4. There is no dispute that the proposed buildings at issue here are buildings used exclusively for farm operations and, thus, are exempted from regulation by the explicit terms of the state dwelling code. Thus, the question arises as to whether the Town can apply the state dwelling code to farm buildings in the manner that it has attempted to do, as we discuss below.

¶35 Before turning to the specifics of the Town's argument, we explain the limited scope of its argument. Before the circuit court and now on appeal, the Town's only arguments regarding the completeness of Golden Sands' building permit application relate to whether the application fulfilled the terms of the Town building code, which was adopted pursuant to WIS. STAT. § 101.65, and, as part of that building code, the requirements of the state dwelling code. If the Town means to make any arguments about what it could have required of Golden Sands based on any other Town ordinances, enacted pursuant to its general police powers under WIS. STAT. § 61.34 as a Town exercising village powers, or pursuant to any other

statutory authority, we do not discern a developed legal argument to that effect. Thus, we do not purport to determine here what other requirements the Town could have established before an applicant could obtain a building permit to construct farm buildings under any other authority that may have been legislatively granted to the Town.

¶36 Turning to the argument that the Town actually makes, it is limited to the assertion that the Town validly applied the requirements of the state dwelling code to farm buildings in its building code adopted pursuant to WIS. STAT. § 101.65. Under the state dwelling code, a building permit application must include a "site plan," "floor plans," and documentation of "erosion and sediment control measures." WIS. ADMIN. CODE § SPS 320.09(5). The Town argues that the building inspector was not required to issue Golden Sands' building permit because, as she testified, its application omitted these state dwelling code requirements.

¶37 Putting aside Golden Sands' arguments that it in fact provided sufficient proof of compliance with the state dwelling code requirements, Golden Sands responds with a two-part argument. The first argument is that, because the state dwelling code explicitly exempts farm buildings from the reach of its regulation, the Town is entirely preempted from regulating farm buildings. The second argument is narrower. It is that the state dwelling code does not authorize the Town to apply all of the specific requirements of the state dwelling code to farm buildings and, thus, the Town could not deny the building permit on this basis.

¶38 We need not, and do not, address the first point, namely, the broad question of whether the state dwelling code preempts townships from regulating

farm buildings in any manner. We need not reach the issue, because we agree with Golden Sands that the Town cannot regulate farm buildings by explicitly applying all of the requirements of the state dwelling code to the construction of farm buildings, when the state dwelling code does not authorize the Town to do so.

¶39 As previously explained, WIS. STAT. § 101.65 gives the Town the authority to regulate one- and two-family dwellings by adopting the state dwelling code. However, the Town is required to "adopt [the state dwelling code] in its entirety" and "[n]o additional requirements within the scope of this code may be adopted … unless approved by the department." *See* WIS. ADMIN. CODE § SPS 320.06(1)(a)2., 3. Adoption of the state dwelling code "in its entirety" necessarily includes adoption of the provision that exempts farm buildings from the requirements of this code. *See* § SPS 320.05(6). It defies logic that the Town could adopt the entirety of the state dwelling code, while at the same time contradicting the very terms of the state dwelling code by claiming that the state dwelling code covers farm buildings, which it expressly does not. The Town does not argue that it has approval from the department to apply the requirements of the state dwelling code to farm buildings, nor does the Town otherwise provide an explanation as to why its application of the state dwelling code requirements to farm buildings is consistent with the authority granted to the Town.

¶40 The Town argues that it can regulate farm buildings by applying the requirements of the state dwelling code because farm buildings are exempt and, thus, fall outside of the scope of the state dwelling code. In making this argument, the Town relies on a provision in the state dwelling code that "[a]ny municipality may, by ordinance, require permits and fees for any construction … not within the scope of this code." *See* WIS. ADMIN. CODE § SPS 320.02(2)(c). The problem

with this argument is that, while this provision authorizes the Town to "require permits and fees" for construction of buildings outside of the scope of the state dwelling code, it does not authorize the Town to apply the terms of the state dwelling code to those buildings.

¶41 In sum, the authority on which the Town relies to support its argument that it can apply the requirements of the state dwelling code to farm buildings expressly undercuts the Town's argument. It explicitly exempts farm buildings from the state dwelling code requirements. Thus, the building inspector could not deny Golden Sands' building permit application based on its failure to provide application materials purportedly required by the state dwelling code.

2. State Approvals

¶42 Even if the building inspector could not explicitly require compliance with the state dwelling code as part of Golden Sand's building permit application, the Town argues that the application was still incomplete. As previously stated, the Town building code provides that the building inspector "shall issue a building permit" if he or she "finds that the proposed building will comply in every respect with state and local laws and orders." BUILDING CODE § 2.2.C.1. From this language, the Town argues that Golden Sands did not have a vested right in the building permit because it did not submit, as part of its building permit application, approvals from the State Department of Transportation (DOT) for a driveway permit and from the State Department of Natural Resources (DNR) for the separation building.[8]

[8] There appears to be some ambiguity in the record and the arguments of the parties as to whether these grounds offered by the Town for denial of the permit application were for Golden (continued)

a. The Driveway Approval

¶43 The Town argues that the circuit court erred in determining that the building inspector could not deny Golden Sands' permit application due to the lack of evidence submitted by Golden Sands that it had complied with state law requiring it to obtain a DOT permit for driveway access to the adjoining state highway. It is not disputed that, at some point in the development of the proposed dairy operation, Golden Sands would need DOT approval for driveway access onto the state highway. Moreover, the circuit court acknowledged that DOT approval for a driveway appeared to implicate "the general police powers of the building inspector and it does affect the Town's responsibility to provide fire protection." However, the court concluded that, because "the driveway itself [would] not [be] part of the building," and the building permit "simply addresses the structural building itself," the lack of submitted proof that Golden Sands had obtained the DOT driveway permit was not a valid reason for the building inspector to have denied the permit under the Town building code. We understand the Town to be arguing that, contrary to the circuit court's interpretation, we should interpret the phrase "proposed building will comply in every respect" "with state … laws" to extend to access to the building and, therefore, compliance with state driveway access requirements.

¶44 Our examination of the building code supports the conclusion that the meaning of the phrase "proposed building" does not include driveway access

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Sands' failure to provide proof of actual approval by state agencies or instead failure to provide proof merely that the agencies might, or were likely to, approve at some future time. However, the difference would not matter to our analysis, and for the sake of simplicity we refer to these as requirements of proof of actual state approval.

under a plain language interpretation. The common, ordinary, and accepted meaning of the term "building" is a "structure." *See* WEBSTER'S II NEW COLLEGE DICTIONARY 145 (1995). The context of these words within the building code does not suggest a different meaning. The title of the code refers to buildings, and the subject matter of the code is primarily the regulation of "buildings," "accessory buildings," "dwellings," and "structures." The code contains a section regarding "detached garages," but this section is limited to regulating the location requirements, size, and floor surfaces of detached garages. BUILDING CODE § 7.01. Nowhere does the code reference driveways or otherwise purport to regulate access to buildings.

¶45 The Town fails to persuasively explain why we should conclude that the plain meaning of the term "proposed building" includes driveway access to a proposed building. The Town simply asserts that the circuit court's conclusion "ignored the clear language of the ordinance, as the driveway permit required approval of the state." The Town does not point to any language in the building code supporting the proposition that the term "proposed building" means something other than a building itself. As for the part of the Town building code that requires compliance "in every respect" with state laws, this adds nothing to the analysis that we can see, because it is the "proposed building," not access to it, that must "comply in every respect."

¶46 Because Golden Sands' ability to obtain a state driveway permit from the DOT does not pertain to Golden Sands' "proposed buildings," according

to the Town building code, the building inspector could not deny the building permit on those grounds.[9]

b. The Separation Building

¶47 In a similar vein, the Town argues that the circuit court erred in determining that the proposed separation building did not need approval from the DNR. As with DOT approval, there is no dispute that Golden Sands would eventually need DNR approval in order to operate separation equipment, wherever and however this equipment is to be housed. The Town argues that the separation building is subject to DNR approval because it would be "a structure associated with the handling of manure," as that phrase is used in a DNR regulation. In the Town's view, this is true because, "The purpose of the building is to separate solid manure from liquid manure." Because Golden Sands did not submit evidence that it had obtained DNR approval for its separation building, the Town argues that Golden Sands failed to submit a complete building permit application.

¶48 To support its argument, the Town points to DNR regulations requiring all large concentrated animal feeding operations that store manure or process wastewater to obtain a Wisconsin pollutant discharge elimination system (WPDES) permit. WIS. ADMIN. CODE § NR 243.11(3)(a) (April 2013).[10] As part

[9] If the Town means to make additional arguments that Golden Sands failed to submit state approvals for proposed high capacity wells or additional permits for the operation of a Concentrated Animal Feeding Operation, it does not fully develop these arguments. In any case, it appears we would reject them for reasons similar to those that we rely on to reject the Town's argument regarding the driveway permit. That is, the Town fails to explain how state approval for high capacity wells or additional permits regarding the dairy's status as a Concentrated Animal Feeding Operation relate to the proposed *buildings* at issue here.

[10] All references to the Wisconsin Administrative Code ch. NR 243 are to the April 2013 version unless otherwise noted.

of its permit approval process, DNR reviews plans and specifications for the design and construction of all:

> runoff control structures, feed and other raw materials storage, permanent spray irrigation or other land application systems, groundwater monitoring systems, manure storage facilities, manure treatment or transfer systems, or other *structures* or systems *associated with the storage, containment, treatment or handling of manure or process wastewater*.

WIS. ADMIN. CODE § NR 243.03(56) (emphasis added); *see also* WIS. ADMIN. CODE § NR 243.15(1). The Town argues that the separation building is a structure "associated with" the "storage, containment, treatment or handling of manure," and therefore requires DNR approval, which Golden Sands had not obtained and submitted to the Town before the moratorium was enacted.

¶49 We conclude that the Town's argument is defeated by implicit, if not explicit, findings of the circuit court crediting testimony to the effect that the processes and structures subject to DNR approval are unrelated to any particular feature of the structure of the particular "separation building" planned here. That is to say, the evidence supports the circuit court's determination that the building that would house the separation process, as opposed to the separation process and the equipment necessary to run that process, did not require DNR approval. Golden Sands' engineer testified that the function of the planned separation building itself is merely to "provide shelter from the rain" for the separation equipment and "make sure the area can be warmed." According to this engineer, the "building itself" is not "designed to contain or handle manure," but, rather, would eventually house the separation equipment that would contain and handle the manure.

¶50 Based on these findings, Golden Sands argues that the separation building is not a "structure" "associated with" the "storage, containment, treatment or handling of manure." Golden Sands states: "the buildings for which Golden Sands sought [a building permit] from the Town were separate and distinct from the 'reviewable facilities'" for which Golden Sands needs DNR approval.

¶51 The Town does not develop an argument that these factual findings are erroneous, and fails to present a developed legal argument that the separation building falls within the definition of a "reviewable facility." It is true that, when considered in isolation, the phrase "associated with" is broad. However, the context here limits the scope of this phrase to include only those structures with features logically subject to DNR regulation of pollutant discharge operations. Although the proposed separation building will, eventually, house the equipment and materials necessary for the separation process, the building itself is not "associated with" the "storage, containment, treatment or handling of manure." The Town fails to develop an argument based on evidence in the record that any feature of the structure of the building is "associated with" that process.[11]

¶52 Thus, we conclude that the building inspector could not deny Golden Sands' permit on the basis that it had failed to submit proof with its application that the separation building would comply in every respect with state laws.

[11] The Town points to a letter that Golden Sands provided to the circuit court stating that the "water-tight concrete floor construction and equipment contained within the separation building may be subject to [DNR] review and approval." However, the Town does not now make a developed argument regarding the import of this statement, nor does the Town point to evidence that it presented a developed argument on this topic to the circuit court. If the Town means to argue that the circuit court erred by failing to explicitly address the "water-tight concrete floor construction," as distinct from the "other equipment" necessary for the separation process, it does not develop this argument.

3. Other Requirements

¶53 Having determined that the inspector could not require that Golden Sand's building permit application comply with the requirements of the state dwelling code and that no applicable state laws support the building inspector's denial of the permit pursuant to the Town building code, we turn to the Town's argument that the building permit application was still incomplete because it lacked: "a complete and accurate plot plan [setting] forth the [correct] acreage for the building site," as well as plans that illustrated the setbacks for the farm buildings.

¶54 The first problem with the Town's plot plan argument is that the Town does not point to any place in the building code, other than the building code's application of the state dwelling code to farm buildings, or in any other Town ordinance, requiring submission of a plot plan. As previously explained, the Town cannot apply the state dwelling code to farm buildings and, thus, the Town cannot rely on the plot plan requirement in the state dwelling code to support its assertion that Golden Sands was required to submit a plot plan and failed to do so.

¶55 The second problem with this argument is that Golden Sands submitted to the Town numerous plans, including "site plans" for the proposed buildings and a document entitled "plot plan," and the Town does not develop an argument on appeal demonstrating that these plans do not constitute a sufficient "plot plan." Indeed, the circuit court found, to the contrary, that "Golden Sands did provide an accurate plot plan that indicated the locations of the building[s]." The Town does not develop an argument that this finding was erroneous.

¶56 As for the Town's argument that Golden Sands was required to submit documentation of the setbacks for each of the proposed buildings, the

Town again fails to point to a provision in its building code that required Golden Sands to do so for farm buildings. The Town building code does require certain setbacks for "dwellings," "garages," and "accessory buildings." BUILDING CODE § 3.3.B. It does not, however, require any particular setbacks for farm buildings. ***Id.***, § 3.01. Additionally, the circuit court found that, according to testimony of the building inspector, the plans that Golden Sands submitted to the Town provided sufficient information from which the building inspector could determine setbacks. The Town does not develop an argument that this finding was erroneous.

¶57 Thus, the Town has failed to develop a persuasive argument that Golden Sands failed to submit sufficient documentation to comply with the requirements of the Town building code, if the requirements of the state dwelling code are inapplicable.

B. Reasonable Reliance on the Wood County Zoning Ordinance

¶58 The Town argues that even if Golden Sands submitted a complete building permit application, it did not have a vested right in the building permit because Golden Sands knew that the Town was in the process of adopting its own zoning ordinance and, thus, Golden Sands could not have reasonably relied on the Wood County zoning ordinance. According to the Town:

> Golden Sands was aware of the Town's efforts to regulate land use through a zoning ordinance but actively ignored them and sought to beat the clock with the application for a building permit. It was not reasonable to rely upon unrestricted County Zoning when the Town was on the verge of completing [a] five-year plus effort to regulate land use.

¶59 To support its argument, the Town cites to ***Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc.***, 2009 WI App 142, 321 Wis. 2d 671, 775 N.W.2d 283. In ***Kitt's***, this court addressed whether tavern owners had obtained a vested right in the use of their premises for adult entertainment in the context of the nonconforming use statute, WIS. STAT. § 59.69(10)(a) (2007-08). ***Id.***, ¶1. As of early 2005, Kitt's was operating as a tavern in Cross Plains. ***Id.***, ¶4. On January 31, 2005, a county board committee voted to approve an amendment to a zoning ordinance that would limit adult entertainment in the area in which Kitt's was located. ***Id.***, ¶5. The proposed amendment was scheduled for action by the board on February 18, 2005. ***Id.*** On February 11, 2005, the owners of Kitt's, who were aware of the plans to amend the zoning ordinance sometime in early 2005, began presenting adult entertainment at the tavern every night. ***Id.***, ¶7. The owners acknowledged that they commenced presenting adult entertainment on this date "in order to attempt to beat the ordinance amendment and to be 'grandfathered.'" ***Id.*** The board adopted the amendment rezoning the area in which Kitt's was located as to adult entertainment, and the amendment became effective February 23, 2005. ***Id.***, ¶8.

¶60 In deciding whether Kitt's had obtained a vested right to use the premises for adult entertainment, we examined whether the owners of Kitt's had "reasonably relied" on the pre-amendment zoning ordinance that did not prohibit adult entertainment at their location. ***Id.***, ¶39. The reasonable reliance inquiry is premised on the notion that "it is unfair to deprive persons of the benefits of their investments when at the time they made them they were reasonably relying on the existing law." ***Id.***, ¶41; *see also* ***Lake Bluff***, 197 Wis. 2d at 175 ("The theory behind the vested rights doctrine is that a builder is proceeding on the basis of a

reasonable expectation."). Reliance is not reasonable, however, when a law change appears likely in the near term. As we explained:

> The fairness analysis is significantly altered when the owners know before they undertake to establish a new use that an ordinance amendment *will soon prohibit* the use in that zoning district. The owners here were aware, before they began making investments and incurring liabilities to establish an adult entertainment bar … that this use was soon to be prohibited. They nonetheless proceeded, with the goal of creating, before the effective date of the ordinance amendment, a use that would constitute a lawful nonconforming use.… If the ordinance amendment is enforced against the owners, the financial loss will not be the result of a change in the zoning they had no notice of and could not reasonably anticipate.

Kitt's, 321 Wis. 2d 671, ¶42 (emphasis added). Because the tavern owners "knew of the pending ordinance amendment before they made expenditures and incurred liabilities to establish [adult entertainment], they did not reasonably rely on the then-existing ordinance" and, thus, they did not acquire a vested interest. ***Id.***, ¶¶2, 39, 43.

¶61 The Town contends that, following the reasoning in ***Kitt's***, we should conclude that Golden Sands did not reasonably rely on the Wood County zoning ordinance in submitting its permit application. According to the Town, Golden Sands' knowledge that the Town had adopted a comprehensive plan and, pursuant to that plan, was in the process of developing a Town zoning ordinance is comparable to the knowledge of tavern owner in ***Kitt's***. We disagree.

¶62 In ***Kitt's***, the board had approved a zoning amendment before the owners started staging nightly adult entertainment. In contrast, here Golden Sands submitted its permit application before the Town had developed a complete proposed zoning ordinance. It is true that the Town's comprehensive plan

indicated that the Town disfavored large agricultural uses on the land on which Golden Sands sought to build its proposed dairy. However, the comprehensive plan was only that, a plan containing goals. It did not change the zoning restrictions. The Town had not yet drafted any sections relevant to the land on which Golden Sands proposed to build at the time Golden Sands submitted its permit application. Moreover, as of the date that Golden Sands submitted its building permit application, the Town had not been granted the authority by its town meeting or electors necessary to adopt a new zoning ordinance.

¶63 The key concept in ***Kitt's*** was that a business owner cannot claim reasonable reliance on existing ordinances when he or she knows that a new ordinance "will soon prohibit" that use. ***Id.***, ¶42. We conclude here that, at the time Golden Sands submitted its permit application, there was insufficient evidence on which Golden Sands could conclude that the Town would "soon prohibit" large agricultural uses. Therefore the exception, under the rationale explained in ***Kitt's***, to the general rule that property owners may rely on existing regulations does not apply here.

¶64 The Town urges us to interpret ***Kitt's*** broadly, because any other approach would encourage property owners considering construction projects to intentionally avert their eyes to pertinent, unfavorable plans by governmental bodies to change zoning for particular land uses. However, we do not see that danger arising from the facts of this case. Had Golden Sands engaged in more investigation than it did, for example by having a representative attend planning commission meetings, it still would not have learned of a soon-to-be enacted new zoning ordinance prohibiting agricultural use on the lands at issue here. There was no such proposed ordinance, only incomplete drafts, and the ongoing process had already stretched over a period of years. It did not appear to be near completion.

To repeat, the only draft of the zoning ordinance available at the time Golden Sands submitted its permit application did not contain any language regarding prohibited uses for areas zoned as rural preservation, such as the land at issue here. For this reason, the Town fails to explain why we should read ***Kitt's*** as containing a broad exception that would cover the very different facts of this case.

¶65 The Town does not develop an argument on this issue other than the one we have rejected above, based on an application of ***Kitt's***, that Golden Sands did not reasonably rely on the Wood County zoning ordinance. Because ***Kitt's*** is distinguishable on its facts and the rationales articulated in ***Kitt's*** do not apply here, we conclude that Golden Sands could reasonably rely on the Wood County zoning ordinance at the time it submitted its building permit application. Therefore, under the general rule that property owners may rely on existing regulations, Golden Sands had a vested right in the issuance of the permit.

II. Positive and Plain Duty

¶66 The Town argues that the building inspector did not have a "positive and plain duty" to issue the building permit to Golden Sands. This argument parallels the Town's argument, addressed above, that Golden Sands did not have a vested right in the permit because it did not submit a complete application. The Town argues that because the application was not complete, the building inspector had the discretion to either approve or deny the permit and, thus, mandamus is inappropriate.

¶67 We can be brief in addressing this argument because, as discussed above, Golden Sands submitted a building permit application that strictly and completely conformed to all of the relevant zoning and building code requirements. Given this compliance, the duty of the building inspector was

positive and plain under the Town building code: "If the building inspector finds that the proposed building will comply in every respect with state and local laws and orders, he shall issue a building permit." BUILDING CODE § 2.2.C.1. The Town apparently did not argue to the circuit court and in any case does not argue on appeal that the building inspector had the discretion to deny a building permit even if the permit application was complete.

¶68 The Town asserts that the "Building Inspector had considerable difficulty in determining which standards to apply to the permit application and attempted to resolve those discrepancies." From this, the Town may mean to argue that the building inspector was faced with a "confusing regulatory" scheme, and therefore her duty to issue the permit was not positive and plain. If the Town means to make this argument, we reject it. The Town fails to cite to any authority to support the proposition that a duty is not positive or plain because the determination of whether the duty is triggered may be based on legal standards that are complex. As we have explained above, the building inspector was incorrect, as a matter of law, to the extent that she determined that the building application was required to, but did not, exhibit compliance with state law and with the requirements of the building code that the Town, after all, elected to adopt. Based on this conclusion, the building inspector's duty to issue the building permit was positive and plain.

III. Substantial Damages

¶69 The Town makes a narrow argument that no substantial damage will result if the building permit for the seven farm buildings "is not immediately granted" to Golden Sands and, therefore, that mandamus is not appropriate. The Town states:

> Golden Sands presented evidence of its investment in the proposed dairy farm, but the evidence also demonstrated the DNR had not approved the dairy farm. In October of 2012, the DNR issued a letter rejecting Golden Sands[']planned waste storage facilities.
>
> At the time of the hearing, Golden Sands had not come up with any plans to correct the deficiencies noted by the DNR and did not know the timeframe for when the DNR would approve the facility. Similarly, the DNR was still conducting its environmental review and the date for completion of the review was unknown.

As we understand this argument, it is that Golden Sands will not be harmed if the Town is not compelled to issue the building permit because it is unclear, at this juncture, whether Golden Sands will obtain DNR approval for other aspects of the proposed dairy.

¶70 We can imagine a legal standard under which the following might be fatal to a petition for a writ of mandamus: the petitioner fails to establish that it will be substantially damaged in light of evidence that necessary approvals for the project at issue from governmental entities (other than those against whom mandamus is sought) cannot or will not be granted to the petitioner. However, the Town fails to cite any legal authority to support this general proposition. Moreover, the Town fails to explain why such a doctrine would apply to the facts here, where the Town acknowledges that the DNR's approval process for the dairy was ongoing at the time the circuit court granted the mandamus relief. The Town does not point to evidence that DNR had foreclosed Golden Sand's ability to obtain the necessary state permits. We need not address arguments that are unsupported by citation to legal authority or facts in the record. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

IV. Adequate Alternative Remedy

¶71 The Town argues that Golden Sands is not entitled to mandamus because the separate lawsuit that Golden Sands filed against the Town regarding the validity of the July 19 moratorium provides Golden Sands with "an adequate, specific legal remedy for the injury that Golden Sands claims it will suffer if a building permit is not compelled." We conclude that the Town forfeited this argument when it failed to raise the argument before the circuit court.

¶72 In seeking dismissal of Golden Sands' petition for a writ of mandamus, the only reference the Town asserts that it made to the fact that Golden Sands had an alternative remedy in its separate lawsuit was the following statement:

> The Petition for Mandamus is hopelessly flawed as it seeks to invalidate the actions of the Town Officials and Town Board, who are not parties to the action. As is clear from the above, the real controversy is between Golden Sands and the Town. That controversy is currently pending before the Circuit Court for Wood County ….

The first sentence alleges a flaw arising from a lack of party status for Town officials and the Town Board, which has nothing to do with the doctrine at issue. The second two sentences refer to the separate lawsuit, but only in order to categorize it as "the real controversy." This did not put the circuit court on adequate notice that the Town was asserting the separate lawsuit as a defense to mandamus because that lawsuit provided Golden Sands with an alternative remedy at law. It is one thing to refer to "the real controversy" existing elsewhere, and quite another to address the particular doctrine under which mandamus will not lie when there is an alternate adequate remedy at law. The latter idea may be

expressed in a number of different ways, but the Town did not use any recognizable expression of this legal concept.

¶73 As a general rule, courts will not address "issues raised for the first time on appeal since the [circuit] court has had no opportunity to pass upon them." ***Hopper v. City of Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977). The forfeiture rule is one of judicial administration, and appellate courts have the authority to ignore forfeiture when, for example, a case presents an important recurring issue. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶¶21-26, 338 Wis. 2d 114, 808 N.W.2d 155. However, the Town here merely asserts that the issue was preserved and does not offer any reason that we should not apply the general rule if the Town is wrong on that issue, which we conclude it is. We see no sound reason to ignore this forfeiture.

CONCLUSION

¶74 For the forgoing reasons, we conclude that the circuit court did not erroneously exercise its discretion in granting Golden Sands' request for a writ of mandamus. We therefore affirm the decision of the circuit court requiring the Town to issue a building permit to Golden Sands for the seven farm buildings.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.