No. _____

IN THE SUPREME COURT
of the
UNITED STATES

EAGLE COVE CAMP & CONFERENCE CENTER, INC., a Wisconsin non-stock corporation, ARTHUR G. JAROS, JR., as Co-Trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, and as Trustee of the Arthur G. Jaros, Sr. Declaration of Trust and as Trustee of the Dawn L. Jaros Declaration of Trust, WESLEY A. JAROS, as Co-Trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, and RANDALL S. JAROS, as Co-Trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust

Plaintiffs/Appellants/Cross-Respondents/ Petitioners,

v.

COUNTY OF ONEIDA, *Defendant/Respondent,*

TOWN OF WOODBORO, and ONEIDA COUNTY BOARD OF ADJUSTMENT, *Defendant/Cross-Appellant/Respondent,*

Defendant.

SEPARATE APPENDIX
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of
PETITION FOR WRIT OF CERTIORARI

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June 16, 2020

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You are hereby notified that the Court has entered the following order:

No. 2018AP940 Eagle Cove Camp & Conference Center, Inc. v. Oneida County Board of Adjustment L.C. #2013CV345

A petition for review pursuant to Wis. Stat. § 808.10 having been filed by plaintiffs-appellants-cross-respondents-petitioners, Eagle Cove, et al., and a motion for sanctions against Defendant-Respondent-Cross-Appellant Town of Woodboro having been filed by plaintiff-appellants-cross-respondents-petitioners, and considered by this court;

IT IS ORDERED that the motion for sanctions is denied;

IT IS FURTHER ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

APPENDIX B

COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2019

Sheila T. Reiff
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. 2018AP940 Cir. Ct. No. 2013CV345

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

EAGLE COVE CAMP & CONFERENCE CENTER, INC., A WISCONSIN NON-STOCK CORPORATION, ARTHUR G. JAROS, JR., AS CO-TRUSTEE OF THE ARTHUR G. JAROS, SR. AND DAWN L. JAROS CHARITABLE TRUST, AND AS TRUSTEE OF THE ARTHUR G. JAROS, SR. DECLARATION OF TRUST, AND AS TRUSTEE OF THE DAWN L. JAROS DECLARATION OF TRUST, WESLEY A. JAROS, AS CO-TRUSTEE OF THE ARTHUR G. JAROS, SR. AND DAWN L. JAROS CHARITABLE TRUST AND RANDALL S. JAROS, AS CO-TRUSTEE OF THE ARTHUR G. JAROS, SR. AND DAWN L. JAROS CHARITABLE TRUST,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

COUNTY OF ONEIDA,

DEFENDANT-RESPONDENT,

TOWN OF WOODBORO,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

ONEIDA COUNTY BOARD OF ADJUSTMENT,

DEFENDANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Oneida County: MICHAEL H. BLOOM, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 HRUZ, J. Eagle Cove Camp & Conference Center, Inc., and Arthur, Wesley, and Randall Jaros, as trustees of various family trusts (collectively, "Eagle Cove"), appeal an order dismissing their claims asserting various violations of their rights under the Wisconsin Constitution. These violations allegedly stem from Oneida County's and the Oneida County Board of Adjustment's refusal years ago to rezone certain real property on Squash Lake or to grant a conditional use permit on that property so that Eagle Cove could develop a year-round Bible camp.

¶2 Eagle Cove previously litigated numerous claims relating to these denials in federal court, including a claim for a violation of Eagle Cove's religious liberties under article I, section 18 of the Wisconsin Constitution. The federal district court, exercising both federal question and supplemental jurisdiction, dismissed all of Eagle Cove's civil claims on their merits, including its claim under the Wisconsin Constitution. The court declined, however, to take supplemental jurisdiction of a certiorari claim Eagle Cove had advanced against the board of adjustment, preferring to have that claim adjudicated in state court given the limited scope of certiorari review.

¶3 Eagle Cove subsequently commenced the present action, seeking not only certiorari review but also advancing a variety of civil claims under the Wisconsin Constitution. The circuit court dismissed the non-certiorari claims based upon its conclusion that claim preclusion applied, insofar as Eagle Cove

brought or could have brought the civil claims as part of its federal action. Eagle Cove appeals this determination and the denial of its motion for reconsideration, in which it asserted that claim preclusion should not apply because of an intervening change in the case law governing one of its federal law claims.

¶4 We conclude the circuit court properly dismissed Eagle Cove's non-certiorari claims and denied its motion for reconsideration. The parties in the federal action were the same as in this action, the federal litigation resulted in a judgment on the merits, and the claims in the two actions all arise out of the same transaction. Accordingly, Eagle Cove was required to bring all of its claims in that action. Further proceedings in state court are limited to Eagle Cove's certiorari claim, which the district court dismissed without prejudice.

¶5 The Town of Woodboro cross-appeals, asserting Eagle Cove's commencement and continuation of the state court action against it was frivolous. Applying WIS. STAT. § 895.044 (2017-18),[1] we agree that Eagle Cove's action against the Town was frivolous. Because Eagle Cove did not withdraw or correct the frivolous filings after being served with a motion for sanctions, we conclude the circuit court was required to award the Town damages consisting of the actual costs it incurred as a result of the frivolous action. We affirm the circuit court's decision in all other respects, but we reverse on the issue of sanctions and remand the matter to the circuit court for a determination of damages.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

BACKGROUND

¶6 The procedural history underlying this appeal is long, but an understanding of that history is necessary to our analysis of the arguments on appeal. In particular, that history directly informs our application of principles of claim preclusion.

¶7 The Jaros family has long owned real property on Squash Lake within the jurisdictions of the Town of Woodboro and Oneida County.[2] Eagle Cove desires to use that land to operate a year-round Bible camp that will serve, among others, youth with medical disabilities. The proposed camp includes a chapel, classrooms, boarding accommodations, food service facilities including a commercial kitchen and dining hall, and recreational amenities like a soccer field. According to Eagle Cove, the "majority of the Bible Camp's activity will involve evangelism, worship, prayer, meditation, devotional Scripture reading, discipleship and role-modeling and Christian educational instruction."

¶8 Under Oneida County's zoning ordinance, a portion of the subject property is zoned as residential and farming (District 4) and the remainder is zoned as single-family residential (District 2). The Town has accepted and approved the County's zoning ordinance as its own. It is undisputed that the zoning ordinance does not explicitly refer to a "Bible camp" or "religious camp" as an authorized use in these or any other districts.

[2] The subject property consists of approximately 34 acres containing between 550 and 600 feet of shoreline. Two of the trusts involved in this litigation own an additional 24 acres of undeveloped land directly to the north of the subject property. This additional land is also intended to be used for the benefit of the proposed Bible camp.

¶9 In 2005, Oneida County staff informed Arthur Jaros that recreational camps, religious or otherwise, are not allowable uses in areas zoned District 2 or District 4. Year-round recreational camps are permitted in Oneida County only on land that is either unzoned or zoned recreational (District 5) or general use (District 10). It is undisputed that none of those zoning designations exist within the Town.

¶10 Eagle Cove then submitted a petition to have the subject property rezoned as District 5. The Town's plan commission and the Town board held proceedings on the petition throughout the first half of 2006 and made a formal recommendation that Oneida County deny the petition. The County's zoning and planning committee, too, recommended that the petition be denied, and the Oneida County Board of Supervisors accepted the recommendations and denied the petition in August 2006.

¶11 Eagle Cove asserts that following the rezoning petition denial, it expended approximately $200,000 to prepare an application for a conditional use permit (CUP) that would allow for the use of the subject property as a Bible camp within the District 2 and District 4 classifications.[3] Eagle Cove filed an original application in 2006 and an amended application in 2008, and the application was deemed complete in March 2009. The County forwarded the application to the Town, but the County informed Eagle Cove that it did not expect the Town to recommend approval because the proposed use was not consistent with the subject property's zoning districts. The Town ultimately recommended that the County

[3] Conditional uses for a zoning district are those land uses that are allowed in the district only with a CUP issued by the Oneida County Planning and Zoning Committee.

deny the CUP application, as did a staff report prepared for the Oneida County Zoning and Planning Committee.

¶12 Following a public hearing and a site visit, the zoning and planning committee denied the CUP application, adopting the reasons provided in the staff report. The committee specifically concluded that the proposed conditional use "would not conform to the applicable regulations of the district in which it would be located," and that the proposed use was incompatible with the subject property's existing zoning designations. The committee also concluded there were other locations within the County where Eagle Cove could obtain approval to construct the proposed Bible camp, and that the denial "would not make the religious exercise of the applicant effectively impracticable."

¶13 In September 2009, Eagle Cove appealed the CUP denial to the Oneida County Board of Adjustment. Following two public hearings and an opportunity for written submissions, on January 12, 2010, the board of adjustment voted to affirm the denial. The denial was memorialized in a written resolution on February 11, 2010.

¶14 Eagle Cove then commenced an action against the Town, the County, and the County's board of adjustment in the United States District Court for the Western District of Wisconsin. Invoking federal question jurisdiction under 18 U.S.C. § 1331, Eagle Cove raised numerous claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a claim under the Americans with Disabilities Act, a claim under the Rehabilitation Act, and claims under the United States Constitution for violations of the Equal Protection Clause and the First Amendment's Free Exercise Clause. Invoking supplemental jurisdiction under 28 U.S.C. § 1367(a), Eagle Cove also brought state law claims

for a violation of the right to freedom of worship under WIS. CONST. art. I, § 18 and for certiorari review of the decisions of the County and its board of adjustment.

¶15 In February 2013, the district court granted the defendants' motion for summary judgment, concluding Eagle Cove had "no right to relief under RLUIPA, the United States Constitution or the Wisconsin Constitution." The court determined the undisputed facts showed that Eagle Cove did "not meet their burden of establishing all the elements of proof under any of their claims." After determining the Town, the County, and the board of adjustment were entitled to summary judgment on Eagle Cove's federal claims, the district court noted it would typically decline to exercise supplemental jurisdiction to decide the state law claims. However, the court concluded that Eagle Cove's claim under the Wisconsin Constitution was "'doomed' for all the same reasons as its federal constitutional equivalent," and there would be no purpose for expending additional judicial resources to resolve the claim in state court. The court therefore dismissed the state constitutional claim with prejudice, but it declined to exercise supplemental jurisdiction over Eagle Cove's certiorari claim and dismissed that claim without prejudice.

¶16 Eagle Cove appealed to the United States Court of Appeals for the Seventh Circuit, which affirmed the district court's decision. *See* ***Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro***, 734 F.3d 673 (7th Cir. 2013) (***Eagle Cove I***).[4] The Seventh Circuit denied Eagle Cove's motion for

[4] As we will explain, the Seventh Circuit's analysis on one of the RLUIPA claims was later called into question by two decisions of the United States Supreme Court. *See* ***Schlemm v. Wall***, 784 F.3d 362, 364 (7th Cir. 2015) (recognizing abrogation).

rehearing and rehearing en banc. Eagle Cove then filed a petition for a writ of certiorari in the United States Supreme Court, which the Court ultimately denied.

¶17 Meanwhile, on November 27, 2013, Eagle Cove filed the present action in the Oneida County Circuit Court against the Oneida County Board of Adjustment, asserting a single count for certiorari review of the board's determinations. This action was stayed by stipulation pending the Supreme Court's decision on Eagle Cove's petition for a writ of certiorari. After the Supreme Court denied review, Eagle Cove filed an amended complaint adding the County and the Town as defendants. In addition to seeking certiorari review, Eagle Cove's amended complaint sought declaratory judgment on fifteen additional due process, religious burden/preference, and equal protection claims under article I of the Wisconsin Constitution.

¶18 The County (together with its board of adjustment) filed a motion to dismiss all counts except the certiorari claim. The County argued that claim preclusion and issue preclusion applied to each of Eagle Cove's fifteen new claims in this action because those claims had been or could have been litigated in the antecedent federal action. Additionally, it argued that only the board of adjustment was a proper party to Eagle Cove's certiorari claim, and that the scope of the certiorari claim was limited by the federal decisions in the prior action (e.g., Eagle Cove could not assert that the board acted contrary to law in any manner rejected as an independent claim in the federal lawsuit).

¶19 The Town joined in the County's arguments. Additionally, the Town emphasized that the federal district court had determined that the Town had no independent authority to grant or deny a zoning change or a CUP. Accordingly, the Town asserted that it could not be liable to Eagle Cove for the

denials, the claims against it were properly dismissed by the federal district court, and the parties were bound by that determination. Consequently, the Town moved for judgment on the pleadings and for sanctions against Eagle Cove for filing an action against it with no basis in fact or law.[5]

¶20 The circuit court decided the various motions on January 23, 2015. In deciding these motions, the court observed that there was no dispute Eagle Cove was entitled to bring its certiorari claim in state court. It concluded, however, that the remaining fifteen counts Eagle Cove raised in its amended complaint arose out of the same transaction that gave rise to all of the civil claims Eagle Cove had brought in the prior federal action. Thus, the court determined that Eagle Cove could have raised the present claims in the federal action. Moreover, the court concluded it was not clear that the district court would have declined to exercise supplemental jurisdiction over the present claims, as it had taken jurisdiction to decide Eagle Cove's state law constitutional claim.[6] The court dismissed the additional fifteen state law claims as claim precluded, but it declined to limit the scope of certiorari review. Additionally, the court declined to sanction Eagle Cove for filing a frivolous lawsuit, as it concluded there was a good faith basis for Eagle Cove to attempt to raise its state law claims.

¶21 Eagle Cove filed a motion for reconsideration, asserting the circuit court had erred in dismissing all but its certiorari claim. Specifically, Eagle Cove

[5] The County and board of adjustment also filed a motion for sanctions asserting portions of Eagle Cove's action were frivolous. Only the Town's motion for sanctions is at issue on appeal.

[6] Indeed, the circuit court determined that the district court likely would have exercised supplemental jurisdiction over these additional issues because they were "similar enough in nature to the federal issues that were actually raised and decided by the court."

contended, among other things, that the court had misapplied certain Wisconsin case law regarding the preclusive effect given to certiorari claims, incorrectly analyzed the issue of whether the district court would have exercised supplemental jurisdiction over additional state law claims, and failed to consider whether it was fair or just to give the federal judgment preclusive effect. Following responsive briefing, the court denied the motion at a hearing on April 22, 2015.

¶22 On May 14, 2015, Eagle Cove filed a "Renewed Motion for Reconsideration" in the circuit court. By this revised motion, Eagle Cove informed the court that in ***Schlemm v. Wall***, 784 F.3d 362 (7th Cir. 2015), the Seventh Circuit had acknowledged that subsequent United States Supreme Court decisions established that it had incorrectly analyzed one of Eagle Cove's RLUIPA claims in the earlier federal action. Specifically, the Seventh Circuit concluded that its definition of a "substantial burden" under RLUIPA in Eagle Cove's appeal was too narrow; whereas it had defined a "substantial burden" as something that makes religious observance "effectively impracticable," the Supreme Court had held that a RLUIPA claim lies where there is a "serious violation" of one's religious beliefs. ***Id.*** at 364. Eagle Cove advised the circuit court that, as a result, it was seeking to reopen the federal court proceedings, and the state proceedings were stayed pending the outcome of those efforts.

¶23 The district court ultimately denied Eagle Cove's motion for relief from the judgment dismissing its federal lawsuit. *See* ***Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro***, No. 10-CV-118-wmc, 2016 WL 6584687 (W.D. Wis. Aug. 11, 2016). Without commenting on whether the changed "substantial burden" standard would have made a material difference, the

district court concluded the Federal Rules of Civil Procedure did not provide an avenue to reopen the judgment based upon a change in the law.[7] *Id.* at *2-*3. In January 2017, the Seventh Circuit Court of Appeals adopted the district court's reasoning and affirmed the order denying relief. ***Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro***, 674 F. App'x 566 (7th Cir. 2017) (***Eagle Cove II***). The Seventh Circuit subsequently denied Eagle Cove's motion for rehearing en banc, and in October 2017, the United States Supreme Court denied Eagle Cove's petition for a writ of certiorari.

¶24 Proceedings then resumed in the circuit court on Eagle Cove's renewed motion for reconsideration. Eagle Cove, expressly invoking WIS. STAT. § 806.07(1)(g) and (h), contended it was inappropriate to give the federal judgment preclusive effect because it was "now obvious that Eagle Cove should not have suffered summary judgment" on one of its RLUIPA claims.

¶25 Following responsive briefing, the circuit court denied Eagle Cove's renewed motion during an oral ruling on February 21, 2018. The court concluded that absent a "sea change" in the law, a litigant may not avoid claim preclusion merely because a court has modified its approach to a particular legal question that could have been raised in the earlier proceeding. The court, observing it had not yet entered a final judgment, found no basis to apply WIS. STAT. § 806.07 or to otherwise reconsider its decision on fairness grounds. The court subsequently entered a judgment dismissing all claims in the amended complaint against the

[7] The district court explained that under federal case law, intervening developments in the law rarely constitute extraordinary circumstances justifying relief from a judgment. *See* ***Agostini v. Felton***, 521 U.S. 203, 239 (1997).

County and the Town, but permitting the certiorari claim against the board of adjustment to proceed.

¶26 Eagle Cove appeals the dismissal of its claims against the County and the Town, as well as the dismissal of its non-certiorari claims against the Oneida County Board of Adjustment, arguing that the circuit court improperly gave the federal court proceedings preclusive effect.[8] Eagle Cove also argues that because the disposition of one of its RLUIPA claims in the federal action was based on the federal court's "admitted error" regarding the proper legal standard, the circuit court here erroneously denied its "Renewed Motion for Reconsideration" seeking to avoid preclusion on that claim. The Town cross-appeals the circuit court's denial of its motion for sanctions against Eagle Cove.

DISCUSSION

I. The circuit court properly applied claim preclusion to bar all but Eagle Cove's certiorari claim against the Oneida County Board of Adjustment.

¶27 This case requires us to determine whether the circuit court properly gave the federal judgment preclusive effect. Because the federal district court was located in Wisconsin and exercising federal question jurisdiction, there is no dispute that the Wisconsin law of claim preclusion applies to this case. *Cf.* ***Wisconsin Pub. Serv. Corp. v. Arby Constr., Inc.***, 2012 WI 87, ¶30, 342 Wis. 2d 544, 818 N.W.2d 863. Whether claim preclusion applies to a given factual

[8] By order, we noted we have jurisdiction only to review the dismissal of the claims against the County and the Town, as the certiorari claim remains to be litigated against the board of adjustment and therefore the order is not final as to that party.

scenario is a question of law that we review de novo. ***Teske v. Wilson Mut. Ins. Co.***, 2019 WI 62, ¶20, 387 Wis. 2d 213, 928 N.W.2d 555.

¶28 "The doctrine of claim preclusion provides that a final judgment on the merits bars parties from relitigating any claim that arises out of the same relevant facts, transactions or occurrences." ***Sopha v. Owens-Corning Fiberglas Corp.***, 230 Wis. 2d 212, 233, 601 N.W.2d 627 (1999). In other words, "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." ***Teske***, 387 Wis. 2d 213, ¶23 (quoting ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994)). The doctrine exists to distinguish between meritorious claims and those that are merely vexatious or repetitious. Once a litigant has had his or her day in court, the litigant may not indulge in the chaos of endless litigation, wastefully expending scarce judicial resources in an attempt to produce inconsistent decisions. *See* ***id.***, ¶24.

A. All elements of claim preclusion are present.

¶29 Claim preclusion has three elements: (1) an identity between the parties or their privies in the prior and present suits; (2) a final judgment on the merits by a court of competent jurisdiction in the prior action; and (3) an identity of the causes of action in the two suits. ***Kruckenberg v. Harvey***, 2005 WI 43, ¶21, 279 Wis. 2d 520, 694 N.W.2d 879. "In effect, the doctrine of claim preclusion determines whether matters undecided in a prior lawsuit fall within the bounds of that prior judgment." ***Id.***, ¶22. The party asserting claim preclusion bears the burden of proof on each of these elements. ***Pasko v. City of Milwaukee***, 2002 WI 33, ¶16, 252 Wis. 2d 1, 643 N.W.2d 72.

i. There is an identity of parties between the two actions.

¶30 There is no dispute that the parties are the same in both this action and the prior federal action. Eagle Cove Camp & Conference Center, Inc., and Arthur, Wesley, and Randall Jaros (in their capacity as trustees of various trusts) were plaintiffs in the federal suit, just as they are here. The defendants here—Oneida County, the Town of Woodboro, and the Oneida County Board of Adjustment—were named defendants in the federal suit. The requirement that there be an identity of parties has therefore been satisfied.

ii. The federal action resulted in a final judgment.

¶31 The second element of claim preclusion is a final judgment on the merits by a court of competent jurisdiction in the prior action. ***Kruckenberg***, 279 Wis. 2d 520, ¶21. Citing various sections of the RESTATEMENT (SECOND) OF JUDGMENTS (AM. LAW. INST. 1982), Eagle Cove attacks the circuit court's determination on this element in two ways. First, Eagle Cove contends claim preclusion is inapplicable because the federal district court did not dispose of the entire case. Second, Eagle Cove argues that its federal and state actions are all part of a single case, such that claim preclusion is inapplicable. We reject both arguments.

¶32 Eagle Cove misapprehends the Restatement in asserting that the federal district court did not dispose of the entire case. This argument rests on RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(b) and a comment to that section—neither of which has been adopted in Wisconsin. Section 20(1)(b) states, as relevant here, that a personal judgment for the defendant, although valid and

final,[9] does not bar another action by the plaintiff on the same claim "[w]hen ... the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice." Comment e. to § 20 concerns situations in which a dismissal is based on two or more "alternative" determinations, one of which "would not render the judgment a bar to another action on the same claim."

¶33 RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(b) and comment e. are plainly inapplicable to the procedure that occurred in this case. Only Eagle Cove's certiorari claim in the prior action was dismissed without prejudice, and there is no dispute that claim survives so as to be litigated in this state action. For the remaining claims adjudicated in the federal district court—including Eagle Cove's claim under the Wisconsin Constitution—§ 20(1)(b) does not aid Eagle Cove because those claims were dismissed with prejudice. Comment e. is similarly unavailing because the district court did not use "alternative determinations" when dismissing those claims. Each of the claims was dismissed

[9] Because RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(b) presupposes the existence of a prior valid and final judgment, it would be proper to frame it as an exception to the rule of claim preclusion rather than as a matter analyzing whether a prior judgment in fact existed. Nonetheless, we will follow Eagle Cove's framing of the issue and address it here.

on summary judgment because the court determined the established facts did not give rise to a valid claim for relief.[10]

¶34 We also reject Eagle Cove's contention that its federal and state actions are one "case" so as to make claim preclusion inapplicable. As authority for this proposition, Eagle Cove cites primarily to ***Montano v. City of Chicago***, 375 F.3d 593 (7th Cir. 2004), in which the federal district court elected to keep jurisdiction of the plaintiff's federal claims but severed and dismissed without prejudice the plaintiff's state law claims. ***Id.*** at 594. After the plaintiffs filed their dismissed claims in state court, the district court held a trial on the federal claims, during which it dismissed all but two of the claims on their merits and ordered a retrial on the remaining two federal counts. ***Id.*** at 596. The district court then entered an order staying the federal litigation pending the resolution of the state court action, later entering a further order dismissing what remained of the federal case without prejudice. ***Id.***

¶35 Precisely how Eagle Cove believes ***Montano*** benefits it is unclear. The Seventh Circuit Court of Appeals called the procedure in that case a "mess" and described its efforts to "put this Humpty Dumpty-like case back together

[10] Eagle Cove attacks the federal courts' determinations for failing to specifically address one of their religious liberty arguments—namely, the prohibition under the Wisconsin Constitution of giving preference under the law to any religious establishments or modes of worship. *See* ***Milwaukee Cty. v. Carter***, 258 Wis. 139, 142, 45 N.W.2d 90 (1950). Eagle Cove also asserts the federal courts "gave only perfunctory, erroneous treatment" to their religious exercise claim under Wisconsin law. Even if both assertions are true, the appropriate avenue for relief is not the filing of a second action in state court asserting the same claims. For the reasons stated herein, the district court's judgment was final and, as such, was appealable within the federal court system. Indeed, the case has twice been litigated through the federal courts to the point of Eagle Cove petitioning the United States Supreme Court for a writ of certiorari. We perceive no basis upon which Eagle Cove should be permitted to raise new claims in this state action based upon any perceived omissions or "perfunctory" treatment in the federal courts' analysis of Eagle Cove's claims.

again." *Id.* at 595. The Seventh Circuit first considered whether it had jurisdiction to review any of the orders in the case, ultimately concluding that it could exercise rarely used pendent appellate jurisdiction to review the order dismissing the plaintiff's state law claims. *Id.* at 599-600. The doctrine "allows a court of appeals to review an otherwise unappealable interlocutory order if it is inextricably intertwined with an appealable one." *Jones v. InfoCure Corp.*, 310 F.3d 529, 536 (7th Cir. 2002). In this context, the Seventh Circuit noted in *Montano* that pendent appellate jurisdiction was appropriate in part because the plaintiffs had presented "only one constitutional 'case' ... even though [they] have a number of theories supporting their claim." *Montano*, 375 F.3d at 600.

¶36 Contrary to Eagle Cove's argument, the "single case" consideration appears to apply solely to the issue of the Seventh Circuit's appellate jurisdiction and the intertwinement of the district court's orders dismissing without prejudice the state and remaining federal claims. We do not read *Montano* to say that claim preclusion cannot apply under the materially different circumstances present in this case, where a federal court has dismissed all but a state law certiorari claim on the merits and with prejudice. Indeed, in addressing whether there was a final appealable order, the *Montano* court remarked that the judgment in the parallel state court proceedings might have a preclusive effect on the dismissed federal law claims. *Id.* at 597, 599. The fact that the state and federal causes of action in *Montano* were viewed as part of "one case" for purposes of pendant appellate jurisdiction does not establish that Eagle Cove can now bring any claims it wants regardless of its prior opportunity and efforts to litigate claims arising from the same transaction.

iii. The two causes of action share an identity.

¶37 For purposes of determining whether there is an identity of causes of action between two lawsuits, Wisconsin has adopted the "transactional approach" set forth in RESTATEMENT (SECOND) OF JUDGMENTS § 24. ***Teske***, 387 Wis. 2d 213, ¶31. Under this approach, all claims arising out of one transaction or factual situation are treated as being part of a single cause of action and are required to be litigated together. ***Id.*** (citing ***A.B.C.G. Enters., Inc. v. First Bank Se., N.A.***, 184 Wis. 2d 465, 480-81, 515 N.W.2d 904 (1994)). "The transactional approach 'reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so.'" ***Id.*** (quoting ***Kruckenberg***, 279 Wis. 2d 520, ¶27).

¶38 In applying the transactional approach, we endeavor "to see a claim in factual terms and to make a claim coterminous with the transaction, regardless of the claimant's substantive theories or forms of relief, regardless of the primary rights invaded, and regardless of the evidence needed to support the theories or rights." ***Kruckenberg***, 279 Wis. 2d 520, ¶26. Claim preclusion may lie even though the legal theories advanced, remedies sought, and evidence used may be different between the first and second actions. ***Id.*** A "transaction" consists of a common nucleus of operative facts. ***Id.*** We determine what constitutes the transaction pragmatically, considering whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations. ***Id.***, ¶25.

¶39 This is not one of those cases where determining what factual grouping constitutes a "transaction" is a difficult task. *See* ***id.*** It is apparent that both Eagle Cove's federal claims and its state claims arise from the same cluster of

facts relating to the County's and its board of adjustment's refusal to allow the development of the subject property for use as a year-round Bible camp. Even if some of the legal theories Eagle Cove advances in this action to justify the relief it seeks may be different from those it advanced in the federal action, all plainly arise from that common nucleus of operative facts.

¶40 Even aside from the identical factual nexus for all of Eagle Cove's causes of action, many of the claims Eagle Cove raises in this action were actually raised in the federal action. In federal court, Eagle Cove alleged various violations of federal law—namely, RLUIPA and the First Amendment—that were unique to that action. Eagle Cove emphasizes that the Wisconsin Constitution offers more expansive protections for freedom of conscience than those offered by the First Amendment, and that we are not limited to current First Amendment jurisprudence when interpreting our own constitutional protections for religious liberty. *See* ***Coulee Catholic Sch. v. LIRC***, 2009 WI 88, ¶60, 320 Wis. 2d 275, 768 N.W.2d 868. Based upon this principle, Eagle Cove believes its claims under the Wisconsin Constitution in this action survive.

¶41 The problem with Eagle Cove's attempt to avoid claim preclusion is that in the federal action, in addition to its federal claims, Eagle Cove asserted that the refusal to allow its year-round Bible camp violated WIS. CONST. art. I, § 18 "by interfering with the Plaintiffs' rights of conscience, and by preferring other religious establishments and modes of worship." In this action, Eagle Cove's amended state court complaint asserts that the County, its board of adjustment, and the Town each violated WIS. CONST. art. I, § 18 by excluding the proposed Bible camp from zoned areas within the County and Town, by preferring other types of

religious institutions or modes of worship, and by violating its right of conscience.[11] The Wisconsin religious liberty claims therefore appear merely to be slightly more specific variations of the general claim raised in the federal action. To the extent any of these state claims espouse new legal theories not advanced in the federal litigation, those claims nonetheless arise out of the same factual grouping as the federal claims and are therefore barred.

¶42 Eagle Cove also has attempted to advance equal protection challenges in both actions. In federal court, Eagle Cove alleged that the refusal to allow it to develop a year-round Bible camp violated the Fourteenth Amendment's Equal Protection Clause. The district court, observing that there was a substantial overlap between the equal protection claim and various alleged violations of RLUIPA, rejected the equal protection claim on its merits and dismissed it with prejudice after concluding that the zoning determinations easily satisfied rational basis review. In this action, Eagle Cove raises equal protection challenges under the Wisconsin Constitution. But equal protection under the state constitution is generally defined in the same manner as equal protection under the federal constitution, and Eagle Cove provides us with no basis for distinguishing its Wisconsin equal protection claims from the federal claim that has already been resolved. *See* ***Milwaukee Cty. v. Mary F.-R.***, 2013 WI 92, ¶10, 351 Wis. 2d 273, 839 N.W.2d 581.

¶43 Only one claim appears to be truly unique to the Wisconsin action, and that is a procedural due process claim ostensibly advanced under WIS. CONST.

[11] The state court amended complaint also asserts due process violations that, while unique to the state court action, are largely derivative of the religious liberty claims Eagle Cove advances under WIS. CONST. art. I, § 18.

art. I, § 18.[12] Eagle Cove explains that this claim is based upon the statements officials made, when rejecting the rezoning application, to the effect that most of Eagle Cove's stated objectives could be achieved through a CUP. Eagle Cove believes it was denied procedural due process when the board of adjustment "rejected the [CUP] application, contrary to [the board's] prior statements." This procedural objection thus arises out of the common nucleus of facts that formed the basis for Eagle Cove's claims in the federal action and is therefore also barred.[13]

¶44 Eagle Cove also advanced a claim in the federal action for certiorari review of the board's denial under WIS. STAT. § 59.694(10), just as it does in this action. "Certiorari is an extraordinary remedy by which courts exercise supervisory control over inferior tribunals, quasi-judicial bodies and officers." ***Acevedo v. City of Kenosha***, 2011 WI App 10, ¶8, 331 Wis. 2d 218, 793 N.W.2d 500 (2010). On certiorari review, judicial inquiry is limited to four topics: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable; and (4) whether the evidence was such that it might reasonably make the order or determination in question. ***Oneida Seven Generations Corp. v. City of Green Bay***, 2015 WI 50, ¶41, 362 Wis. 2d 290, 865 N.W.2d 162. The municipality or agency is afforded a "presumption of

[12] Contrary to what Eagle Cove's amended complaint suggests, procedural due process is rooted in article I, § 1 of the Wisconsin Constitution, not article I, § 18. *See State v. Wood*, 2010 WI 17, ¶17, 323 Wis. 2d 321, 780 N.W.2d 63.

[13] Indeed, the federal complaint included roughly five pages of factual allegations detailing the actions and statements of members of the Oneida County Zoning and Planning Committee and various other County officials in denying the rezoning petition.

'correctness and validity'" to its determination. ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals***, 2005 WI 117, ¶16, 284 Wis. 2d 1, 700 N.W.2d 87 (citation omitted).

¶45 The circuit court properly allowed Eagle Cove's certiorari claim to proceed pursuant to ***Hanlon v. Town of Milton***, 2000 WI 61, 235 Wis. 2d 597, 612 N.W.2d 44. Yet, Eagle Cove argues that the circuit court misinterpreted ***Hanlon***, apparently under the belief that ***Hanlon*** affords "more generous treatment of ... certiorari plaintiffs" than what the circuit court contemplated. Considered together with Eagle Cove's assertion of various exceptions to the doctrine of claim preclusion (which we will soon address), we understand Eagle Cove to be arguing that ***Hanlon*** endorses a view that would permit its new state court claims to proceed alongside its yet-to-be-litigated claim for certiorari review. We disagree with Eagle Cove on this point given the procedural posture of this case and the prior federal action.

¶46 In ***Hanlon***, the plaintiff sought certiorari review of a CUP denial in state court. ***Id.***, ¶¶5, 8. After those efforts to overturn the denial proved unsuccessful, Hanlon filed an action in federal district court under 42 U.S.C. § 1983, seeking a money judgment based upon allegations that the defendants deprived him of his rights to due process and equal protection of the law by denying the CUP application. ***Id.***, ¶11. The federal case was dismissed on summary judgment, as the municipality argued that Hanlon's failure to assert the § 1983 claim within the certiorari proceeding, or to join that claim with the certiorari claim arising from the same transaction, resulted in claim preclusion. ***Id.***, ¶¶11-12.

¶47 The Seventh Circuit Court of Appeals certified the following question of law to the Wisconsin Supreme Court:

> Whether a litigant challenging an administrative determination according to the [certiorari] provisions set forth in [WIS. STAT.] Chapter 68 may bring an equal protection claim and whether the reviewing Wisconsin court may consider the merits of such a claim under this chapter when the claim arises from the same transaction forming the basis for the administrative determination so that the failure to raise such a claim invokes the doctrine of claim preclusion.

Id., ¶1.

¶48 Our supreme court first concluded that although a litigant may raise constitutional objections to municipal determinations in a certiorari proceeding, that forum is not appropriate to advance a claim for money damages under 42 U.S.C. § 1983. ***Hanlon***, 235 Wis. 2d 597, ¶13. Second, the court observed that certiorari proceedings "are distinct from civil actions, which are filed to resolve a controversy between the parties." *Id.*, ¶22. The court pointed out the limited scope of certiorari review, finding it incompatible with the process of litigating a civil claim. *Id.*, ¶¶24-26. Although Hanlon could have joined his § 1983 claim with his certiorari claim, the court determined that he was not required to do so because making joinder mandatory would "unduly complicate the procedure established by the legislature to provide for an orderly review of a municipality's determinations." *Id.*, ¶26.

¶49 ***Hanlon*** shows that the circuit court used the correct procedure here in dismissing the civil claims Eagle Cove brought in state court alongside its certiorari claim. Given ***Hanlon***'s holding that a litigant is not required to join additional civil claims with a certiorari claim arising from the same transaction, Eagle Cove would not have been precluded from pursuing the present claims had

it sought only the remedy available by certiorari in the prior federal action. But, having joined additional civil claims with its request for certiorari review in federal court, and having received a determination on the merits of those civil claims, the ordinary principles of claim preclusion apply. Eagle Cove cannot use the limited ***Hanlon*** exception to gain new opportunities to litigate additional claims that could have been brought in the prior action.[14]

B. The exceptions to claim preclusion argued by Eagle Cove are inapplicable.

¶50 Eagle Cove proposes that a number of exceptions to claim preclusion contained in the RESTATEMENT (SECOND) OF JUDGMENTS apply to allow its non-certiorari state claims to survive. Eagle Cove first relies on comment e. to RESTATEMENT (SECOND) OF JUDGMENTS § 25. Under § 25, claim preclusion extinguishes a claim even though a plaintiff in the second action endeavors to present evidence, grounds or theories of the case not presented in the first action, or seeks remedies or forms of relief not demanded in the first action.[15] Comment e. illustrates how these general rules apply to separate state and federal theories of recovery:

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[14] Eagle Cove appears to fault the circuit court for having used the phrase "two different claims," asserting that this phrasing is incompatible with the transactional view that focuses on the factual grouping. However, the various holdings in ***Hanlon v. Town of Milton***, 2000 WI 61, 235 Wis. 2d 597, 612 N.W.2d 44, are predicated upon the assumption that both the certiorari claim and the additional civil claims the plaintiff later desires to bring are rooted in the same facts and would be otherwise barred. ***Hanlon*** merely carves out a narrow exception to the traditional rule of claim preclusion given the limited scope of certiorari review—an exception that is, as the circuit court recognized, focused on the nature of the claim as arising in certiorari.

[15] RESTATEMENT (SECOND) OF JUDGMENTS § 25 therefore mirrors Wisconsin law regarding the scope of the preclusive effect. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶26, 279 Wis. 2d 520, 694 N.W.2d 879.

> A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground.

RESTATEMENT (SECOND) OF JUDGMENTS § 25, cmt. e. In essence, comment e. contains a cogent summary of our foregoing explanation of how the general rules of claim preclusion apply to claims grounded in both state and federal law.

¶51 Comment e. also contains an exception to these general rules, on which Eagle Cove relies:

> If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.

Id. Jurisdiction is not the issue; Eagle Cove recognizes that the district court would have had supplemental jurisdiction to consider all of the claims it attempts to raise in this state action. Rather, Eagle Cove argues that the district court would clearly have declined to exercise supplemental jurisdiction over the "new" claims presented here.

¶52 Comment e. to RESTATEMENT (SECOND) OF JUDGMENTS § 25 has been adopted as the rule in Wisconsin. *See* ***Parks v. City of Madison***, 171 Wis. 2d 730, 735-38, 492 N.W.2d 365 (Ct. App. 1992). Federal courts have long recognized that a determination on the merits of a federal claim in their forum may have a preclusive effect on all other claims (including state claims) arising out of the same transaction. *See* ***United Mine Workers of Am. v. Gibbs***, 383 U.S. 715,

725 (1966). Thus, ***Parks*** observed that federal courts "consistently have held that when a federal claim is dismissed on a motion for summary judgment, the exercise of sound discretion requires dismissal of the state claims as well, without prejudice to the plaintiff's right to litigate them in the proper state forum." ***Parks***, 171 Wis. 2d at 737; *see also* ***Cenco Inc. v. Seidman & Seidman***, 686 F.2d 449, 458 (7th Cir. 1982) ("The rule in pendent jurisdiction is that if the federal claim to which the state-law claim is pendent is dismissed before trial, the court will decline jurisdiction over the state-law claim and remit the claimant to the state courts.").

¶53 Here, the district court acknowledged that it was departing from this "usual practice" in retaining supplemental jurisdiction over Eagle Cove's claim under WIS. CONST. art. I, § 18. A district court is permitted to retain such jurisdiction if the state law claim is clearly without merit, the justification being that resolving the claim in federal court "spares overburdened state courts additional work that they do not want or need." ***In re Repository Techs., Inc.***, 601 F.3d 710, 725 (7th Cir. 2010). The district court stated it was retaining supplemental jurisdiction because Eagle Cove's claim under the Wisconsin Constitution was "'doomed' for all the same reasons as its federal constitutional equivalent," and considerations of judicial economy warranted simply disposing of the claim. Notably, the dismissal was partially due to Eagle Cove's own failures in adequately distinguishing that cause of action, as the district court noted Eagle Cove had offered "no plausible argument that the protections offered Wisconsin

citizens under Article I, § 18, are in any way greater than its federal counterpart, much less RLUIPA's additional protections."[16]

¶54 Given this background, it is astounding that Eagle Cove now argues the district court "would clearly have declined to exercise" supplemental jurisdiction over the religious liberty and other various claims it advances here. The district court took pains to acknowledge the usual federal practice and explain its departure from that procedure. It found Eagle Cove's religious liberty claim under the Wisconsin Constitution so lacking in merit that it was more efficient for the court simply to decide it than to allow it to be further litigated. On the other hand, the district court recognized the "restrictive standard imposed for certiorari review of a municipal body's determination," and it concluded that claim was "sufficiently unique to state law" such that it would dismiss it without prejudice. The notion that the district court would have applied these considerations to non-certiorari claims that largely mirrored claims the court had already found meritless is untenable. The circuit court here properly concluded it was not clear the district court would have declined to exercise jurisdiction over the state law claims.

¶55 Eagle Cove also asserts that three exceptions under RESTATEMENT (SECOND) OF JUDGMENTS § 26 are applicable. The first is § 26(1)(b), which states that claim preclusion does not apply when "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action." For reasons

[16] Had Eagle Cove argued in the federal forum that Wisconsin law uniquely supported its WIS. CONST. art. I, § 18 claim, as it does now in this appeal, the district court's reasoning suggests it might well have dismissed that claim without prejudice. Nonetheless, Eagle Cove's arguable failure to properly litigate its claim in the prior action is not a compelling reason to avoid the application of preclusion doctrines, and Eagle Cove does not argue as much.

similar to those we addressed above regarding RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(b), we conclude § 26(1)(b) is inapplicable. *See supra* ¶¶32-33. At best for Eagle Cove, the federal district court judgment can be construed as reserving only Eagle Cove's right to maintain a second action on its dismissed certiorari claim, not on all claims that were, or could have been, litigated in the federal action. Further, Eagle Cove points to no language in any of the federal court decisions expressly authorizing it to assert claims in the second action that could have been raised in the prior action.

¶56 Next, Eagle Cove relies on RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(d). Under § 26(1)(d), a plaintiff is not precluded from bringing a second action if, as relevant here, "[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme." Eagle Cove views the federal judgment as inconsistent with the Wisconsin constitutional protections for religious liberty, and it accuses the federal courts of omitting discussion of, or insufficiently analyzing, certain aspects of its claim under article I, § 18 of the Wisconsin Constitution.[17]

¶57 Nothing Eagle Cove has presented persuades us that RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(d) applies here in any fashion. Again, to the

[17] Eagle Cove's citations to authority for this argument are baffling. Neither of the Wisconsin cases it cites dealt with issues concerning claim preclusion or the scope of RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(d). In ***Milwaukee Metropolitan Sewerage District v. DNR***, 122 Wis. 2d 330, 362 N.W.2d 158 (Ct. App. 1984), *aff'd*, 126 Wis. 2d 63, 375 N.W.2d 648 (1985), the dispositive issue was whether an administrative review statute created an independent right to a contested case hearing. ***Geinsenfeld v. Village of Shorewood***, 232 Wis. 410, 287 N.W. 683 (1939), involved the reasonableness of a local zoning determination classifying the plaintiff's property as residential. Further, we agree with Oneida County's criticism that "[t]he task of determining what Eagle Cove references in any of its citations to case law is made more difficult, of course, by its counsel's failure to utilize pinpoint citations."

extent the federal courts failed to consider unique aspects of Wisconsin constitutional protections for religious liberty, that failure appears to have been caused by Eagle Cove not sufficiently advancing any distinguishing argument.[18] As noted above, when retaining supplemental jurisdiction over Eagle Cove's state law constitutional claim, the district court expressly recognized that Eagle Cove had failed to present any basis for distinguishing that claim from the arguments it had advanced in support of its federal claims. If Eagle Cove failed to raise with sufficient prominence a meritorious issue regarding Wisconsin's unique protections for religious liberty, it can hardly be said that the federal judgment unfairly or inequitably applied Wisconsin constitutional law.

¶58 Moreover, even assuming the federal courts were in some fashion wrong in their determination regarding Eagle Cove's claim under WIS. CONST. art. I, § 18, Eagle Cove has provided no authority for the proposition that this error alone justifies a second action under RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(d). Certainly one component of a "fair and equitable" constitutional scheme is the ability of a litigant to seek relief based upon a violation of substantive legal principles, and Eagle Cove was provided an opportunity to litigate its religious liberty claim during the initial federal litigation. Federal court rules provide the opportunity to address errors in a judgment through motions for

[18] To the extent Eagle Cove accuses the defendants of "sandbagging" in the federal litigation by not sufficiently arguing that its summary judgment motion was based on a lack of evidence as opposed to defenses or other matters, we are unpersuaded this approach demonstrates that the district court's determination was plainly inconsistent with the fair and equitable application of Wisconsin's protection of religious liberties. A motion for summary judgment puts the plaintiff on notice that he or she must produce sufficient evidence to support a determination in his or her favor on the merits of the claim. Eagle Cove acknowledges that the defendants alleged in the federal action that Eagle Cove had "fail[ed] to show sufficient burden under Article I, § 18's freedom of conscience clause."

relief or appeals, avenues that Eagle Cove has repeatedly pursued.[19] Absent citation to authority showing that an incorrect federal determination on state law grounds provides the basis for a subsequent state action under RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(d), we reject Eagle Cove's reliance on that exception to claim preclusion. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (noting we typically do not address undeveloped arguments or arguments unsupported by citations to applicable legal authority).

¶59 Eagle Cove also asserts that the exception under RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(f) is applicable. Under that paragraph, claim preclusion does not apply if

> it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

Id. For example, in ***Sopha***, our supreme court applied this exception to permit an insulation worker to maintain a second action based upon a mesothelioma diagnosis despite his having unsuccessfully brought a prior lawsuit a decade earlier based on nonmalignant injuries. ***Sopha***, 230 Wis. 2d at 237-38. The court has also applied § 26(1)(f) to allow a second action to determine the location of a property boundary line where that issue was not explicitly determined by the prior action. ***Kruckenberg***, 279 Wis. 2d 520, ¶41.

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[19] Eagle Cove admits that the Seventh Circuit Court of Appeals "corrected" an error in the district court's analysis, but it argues the appeals court then went on to commit additional errors in its application of constitutional principles to the facts of the case. Even if the Seventh Circuit erred in some way, the remedy is not to bring a new action in state court in an effort to obtain an inconsistent disposition.

¶60 These are narrow exceptions, however, and since ***Kruckenberg*** no reported Wisconsin case has articulated any further "special circumstances" that permit a litigant to avoid claim preclusion. Nonetheless, Eagle Cove argues two "extraordinary reasons" warrant allowing its civil claims to proceed: (1) an "incoherent disposition" in federal court because the courts did not consider one aspect of Eagle Cove's religious liberty claim under the Wisconsin Constitution; and (2) the district court's decision to dismiss Eagle Cove's certiorari claim without prejudice. These reasons are merely duplicative of arguments that we have already rejected and are without merit. We perceive no basis for relief from the preclusive effect of the earlier action under RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(f).[20]

¶61 Lastly, Eagle Cove vaguely asserts that applying claim preclusion in this instance deprives it of its due process and equal protection rights. The contours of this argument are difficult to comprehend. It appears Eagle Cove believes it suffered "disparate treatment" because of the change in the applicable RLUIPA standard recognized by ***Schlemm***. Essentially, Eagle Cove appears to reason that it has been treated differently than a hypothetical litigant whose certiorari claim had been tried in federal court, because under those circumstances, the Federal Rules of Civil Procedure would have provided a mechanism to reopen the judgment on the dismissed claims. Eagle Cove suggests that this court has the

[20] We observe that RESTATEMENT (SECOND) OF JUDGMENTS § 26 requires, as a basis for proceeding with a second action under subsec. (1)(f), that the plaintiff follow the procedure set forth in §§ 78-82, including by filing a motion for relief in the court that rendered the first judgment. It does not appear any Wisconsin case applying § 26(1)(f) has discussed these procedural requirements.

authority to fashion a remedy for this perceived discrimination under WIS. CONST. art. I, § 9.

¶62 We agree with the County that these "hypotheticals and vague invocations of due process, equal protection, and equity" are not developed legal arguments that require resolution. As an initial matter, the proposition that a litigant can avoid preclusion doctrines because of an intervening change in the law seems untenable on its face, as no litigation would truly be final. But ultimately, Eagle Cove's arguments contain scant citations to applicable legal authority, and Eagle Cove does not even attempt to apply controlling due process or equal protection case law to the facts here.[21] We decline to review arguments that consist only of general statements and that lack citation to legal authority. *See* ***Pettit***, 171 Wis. 2d at 646.

II. The circuit court properly denied Eagle Cove's "Renewed Motion for Reconsideration."

¶63 Eagle Cove also argues that the circuit court erroneously denied its "Renewed Motion for Reconsideration," which asserted that claim preclusion should not apply given the Seventh Circuit Court of Appeals' decision in ***Schlemm***. Eagle Cove argues the circuit court erred because relief from the

[21] As just one example, nowhere does Eagle Cove discuss the applicable level of scrutiny or its burden of proof. *See* ***Mayo v. Wisconsin Injured Patients & Families Comp. Fund***, 2018 WI 78, ¶¶28-29, 383 Wis. 2d 1, 914 N.W.2d 678.

court's earlier decision applying claim preclusion was warranted pursuant to WIS. STAT. § 806.07(1)(g) and (h).[22] We disagree.

¶64 We review a circuit court's decision denying relief under WIS. STAT. § 806.07 for an erroneous exercise of discretion. ***Thoma v. Village of Slinger***, 2018 WI 45, ¶11, 381 Wis. 2d 311, 912 N.W.2d 56. A circuit court's exercise of discretion will be upheld if it based its decision on the pertinent facts in the record, applied the correct legal standard, and reached a reasonable determination. ***Id.***

¶65 Eagle Cove first invokes WIS. STAT. § 806.07(1)(g). Under that provision, relief is warranted when "[i]t is no longer equitable that the judgment should have prospective application." Wisconsin law is clear that § 806.07(1)(g) applies only in equitable actions, ***State v. Henley***, 2010 WI 97, ¶69, 328 Wis. 2d 544, 787 N.W.2d 350, and this is not such an action—Eagle Cove sought only various forms of declaratory relief on the dismissed claims.

¶66 Furthermore, the federal and state rules dealing with relief from judgments are analogous. ***DOC v. Kliesmet***, 211 Wis. 2d 254, 260, 564 N.W.2d 742 (1997). The federal equivalent to WIS. STAT. § 806.07(1)(g) is FED. R. CIV. P. 60(b)(5). "Like the traditional equity rule on which it is based, Rule 60(b)(5) applies only to judgments that have prospective effect 'as contrasted with those

[22] As the County observes, Eagle Cove's motion for relief from the judgment was premature, as the circuit court's decision had not been reduced to a judgment at the time of the motion. The result of this appeal is the same regardless of whether one views the motion as one for reconsideration or, as Eagle Cove argues, as one for relief from a judgment under WIS. STAT. § 806.07. To prevail on a motion for reconsideration, the movant must either present newly discovered evidence or establish a manifest error of law or fact. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. Eagle Cove has not argued these points and, given the foregoing discussion, we conclude Eagle Cove could not satisfy either standard.

that offer a present remedy for a past wrong.'" ***Cook v. Birmingham News***, 618 F.2d 1149, 1152 (5th Cir. 1980) (citation omitted); *accord* ***Norgaard v. DePuy Orthopaedics, Inc.***, 121 F.3d 1074, 1077 (7th Cir. 1997) (holding that although Rule 60(b)(5) permits the revision of an ongoing decree, it does not provide an avenue for upsetting the disposition of a claim for a money judgment merely because the law on which the judgment was founded has changed). The judgment in this action did not have any prospective effect; it merely disposed of Eagle Cove's declaratory judgment claims for alleged violations of the Wisconsin Constitution.

¶67 Next, Eagle Cove suggests that relief was warranted under WIS. STAT. § 806.07(1)(h), which is a "catch-all" provision that permits courts to reopen a judgment for any other reason justifying relief. The federal analog to § 806.07(1)(h) is FED. R. CIV. P. 60(b)(6), but neither the state nor federal system permits a litigant to obtain relief under these provisions based upon a subsequent change in the law. *See* ***Shah v. Holder***, 736 F.3d 1125, 1127 (7th Cir. 2013) ("District courts cannot use Rule 60(b)(6) to apply new decisions retroactively to closed civil cases."); ***Allstate Ins. Co. v. Brunswick Corp.***, 2007 WI App 221, ¶7, 305 Wis. 2d 400, 740 N.W.2d 888 (noting the general rule that a change in the law is not an extraordinary circumstance justifying relief from a final judgment); ***Kovalic v. DEC Int'l***, 186 Wis. 2d 162, 165, 519 N.W.2d 351 (Ct. App. 1994) (rejecting a rule permitting an unsuccessful litigant to reopen a judgment based on new law because such a rule "would destroy the finality of many judgments").

¶68 In a technical sense, Eagle Cove is not directly attacking the federal court judgment; it is seeking relief from the preclusive effect of that judgment based on a change in the way the federal courts dealt with one of its claims. The federal courts, though, have already rejected Eagle Cove's attempts to

retroactively apply the new case law, *see generally* ***Eagle Cove II***, 674 F. App'x 566, and Eagle Cove's efforts to obtain relief from the judgment here effectively constitute a collateral attack on those determinations. We disfavor such collateral challenges because they disrupt the finality of other judgments and thereby tend to undermine confidence in the integrity of our procedures, as well as cause delay and impair the orderly administration of justice. ***State v. Gudgeon***, 2006 WI App 143, ¶6, 295 Wis. 2d 189, 720 N.W.2d 114. The circuit court did not erroneously exercise its discretion in determining that these principles militated against granting relief from the court's January 23, 2015 decision.

III. Sanctions were warranted against Eagle Cove for prosecuting a frivolous action against the Town.

¶69 The Town cross-appeals the denial of its motion for sanctions. In its initial pleading, Eagle Cove sought only certiorari review, and therefore named only the Oneida County Board of Adjustment as a defendant. The Town was brought into this action when Eagle Cove filed its amended complaint, which included the additional fifteen, now-dismissed counts. The Town argues it is entitled to its actual costs incurred in defending the action pursuant to WIS. STAT. § 895.044, a relatively new statute which it appears no reported Wisconsin case has yet applied. Whether an attorney made a frivolous claim presents a mixed question of fact and law, under which we review the circuit court's findings of the historical facts using the clearly erroneous standard, but we independently decide the ultimate question of frivolousness. ***Elmakias v. Wayda***, 228 Wis. 2d 312, 319, 596 N.W.2d 869 (Ct. App. 1999).

¶70 WISCONSIN STAT. § 895.044 was adopted in 2011. *See* 2011 Wis. Act 2, § 28. It provides, as relevant here, that a party or a party's attorney in most civil actions "may be liable for costs and fees under this section for commencing,

using, or continuing an action ... or appeal" if the party or the party's attorney "knew, or should have known, that the action ... or appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law." Sec. 895.044(1)(b). If a court concludes, based on clear and convincing evidence, that the action has been frivolously commenced or continued—and if no correction or withdrawal of the frivolous filing has occurred after at least 21 days have elapsed since the service of the motion for sanctions—the court "shall" award as damages to the party making the motion "the actual costs incurred by the party as a result of the action ... including the actual reasonable attorney fees the party incurred ...." Sec. 895.044(2)(b).

¶71 The adoption of WIS. STAT. § 895.044 appears to have been a legislative response to the supreme court's recognition that a circuit court was not required to impose sanctions for frivolous filings. The previous (and still existing) manner for obtaining relief from frivolous filings was WIS. STAT. § 802.05. Section 802.05(2)(b) states that by signing a paper, an attorney or unrepresented litigant is representing to the court that the claims and legal contentions therein are "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." If, upon a motion for sanctions or on its own initiative, the circuit court concludes this provision has been violated, the court "may impose an appropriate sanction," but only to the extent necessary to deter repetition of the conduct or comparable conduct by others similarly situated. Sec. 802.05(3)(a), (3)(b). The sanction may consist of nonmonetary measures, an order to pay a penalty, or, if the aggrieved party so moves, an award of some or all of the party's reasonable attorney fees and expenses incurred as a direct result of the violation. Sec. 802.05(3)(b).

¶72 Our supreme court has recognized that, under WIS. STAT. § 802.05, sanctions are not mandatory upon a circuit court's finding of frivolousness. *See* ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2007 WI 88, ¶28, 302 Wis. 2d 299, 735 N.W.2d 1. In contrast, WIS. STAT. § 895.044(2)(b) appears, by its plain language, to remove the circuit court's discretion not to sanction a party for frivolous filings that are not withdrawn or corrected after being served with a motion for sanctions. In other words, upon a finding of frivolousness under subsec. (2)(b), it is now mandatory that a circuit court award as damages the actual costs incurred "as a result" of the frivolous action. This result is apparent because the circuit court retains discretion to award such damages even if a filing is withdrawn or corrected, as evidenced by the legislature's use of "may" in subsec. (2)(a).

¶73 Here, the Town asserts that Eagle Cove's amended complaint and its continuation of the lawsuit, including the motions for relief from the judgment, were frivolous. The Town observes that the claim against it for a violation of WIS. CONST. art. I, § 18 was litigated in the federal action, resulting in a final judgment on the merits of that claim. According to the Town, Eagle Cove's state court action against it is frivolous not just because the claims against it are all precluded, but also because the federal courts have concluded that the Town was never properly in the action, as it had no relevant land use authority regarding Eagle Cove's property. *See* ***Eagle Cove I***, 734 F.3d at 680 ("Woodboro chose to be subordinate to Oneida's zoning ordinance, and thereby relinquished its jurisdiction over land use regulations to the County."). [23]

[23] Eagle Cove does not present any argument regarding the construction of WIS. STAT. § 895.044. Its argument regarding sanctions is limited to the issue of whether its filings were, in fact, frivolous.

¶74 We conclude, as a matter of law, that the present action against the Town was frivolously commenced and maintained. Even aside from the applicability of claim preclusion, it should have been obvious to Eagle Cove that the Town had no authority over the land use decisions that thwarted its desired Bible camp.[24] The fact that the circuit court found that some of Eagle Cove's arguments for avoiding claim preclusion arguably demonstrated good faith does nothing to undercut the plain fact that Eagle Cove was suing the Town for something it had not done and could not do.

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[24] Eagle Cove argues the Town did, in fact, maintain authority over the zoning regulations and was therefore a proper party. As an initial matter, Eagle Cove attempts to cabin the scope of the Seventh Circuit Court of Appeals' ruling regarding the Town's jurisdiction by arguing that opinion addressed only an as-applied "total exclusion" challenge to the zoning regulations, whereas the various claims here include facial challenges. But the Seventh Circuit's decision does not mention any unique attributes of an as-applied challenge; rather, the court noted that Eagle Cove's "total exclusion" argument was "predicated, and in fact depends, on the assumption that Woodboro has jurisdiction to implement land use regulations on the subject property." *See Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673, 679 (7th Cir. 2013) (*Eagle Cove I*). The court, after substantial analysis, flatly rejected that contention. *Id.* at 679-80. Eagle Cove fails to explain why any arguable distinction between its as-applied and facial challenges makes a difference as to the issue of the Town's land use authority.

Alternatively, Eagle Cove suggests the County was a mere instrumentality of the Town because the County was required to adopt the Town's land use plan under WIS. STAT. § 59.69(1). The subsection discussing the relationship between a county's development plan and a town's master plan is § 59.69(3)(b), not subsec. (1), and it states that a county's development plan must incorporate a town's master plan only in counties with a population of at least 485,000—well in excess of Oneida County's estimated 2018 population of 36,383. *See* Wisconsin Legislative Reference Bureau, *Wisconsin Blue Book 2019-2020*, at 535 (2019).

Additionally, we fail to see the merit in Eagle Cove's assertion that the Town somehow caused an independent injury by adopting the County ordinance. Eagle Cove does not dispute that its proposed Bible camp required County approval because it affected shorelands. *See* WIS. STAT. § 59.692(2)(a) (stating that county ordinances pertaining to shoreland zoning "shall not require approval or be subject to disapproval by any town or town board"). Although Eagle Cove notes the Town did approve the County zoning ordinance with respect to the non-shoreland areas, Eagle Cove does not argue the Town had any authority to grant or deny its rezoning or CUP applications. The denial of those applications is the fulcrum on which all of Eagle Cove's claims pivot, and those were solely actions of the County.

¶75 Accordingly, we conclude the circuit court erred by denying the Town's motion for sanctions under WIS. STAT. § 895.044. The Town, by its motion to dismiss, notified Eagle Cove and the circuit court that Eagle Cove's amended complaint was frivolous under that section. The Town filed a formal motion for sanctions on October 31, 2014. At no point did Eagle Cove correct or withdraw its pleading; instead, it continued to litigate in an attempt to avoid the preclusive effect of the federal court judgment, including by filing the "Renewed Motion for Reconsideration" that necessitated further response from the Town. Under these circumstances, and given our determination as a matter of law that the claims against the Town were frivolous, the circuit court was required to award the Town damages under § 895.044(2)(b), measured by the actual costs the Town incurred as a result of the commencement and continuation of Eagle Cove's frivolous action against the Town, beginning with the amended complaint's filing.

¶76 We therefore reverse the portion of the circuit court's January 23, 2015 decision in which it denied the Town's WIS. STAT. § 895.044 motion. The case is remanded for a determination of the actual costs that the Town incurred as a result of Eagle Cove's frivolous commencement and continuation of the action against the Town. *See* § 895.044(2)(b). Additionally, because we have concluded that the action was frivolous, the Town is also entitled to damages in an amount sufficient to compensate it for the reasonable attorney fees it incurred in this appeal. *See* § 895.044(5). We affirm the order in all other respects.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

APPENDIX C

STATE OF WISCONSIN CIRCUIT COURT Branch II ONEIDA COUNTY

EAGLE COVE CAMP & CONFERENCE CENTER, INC., et al,
Plaintiffs,

v.

Case No. 13-CV-345

ONEIDA COUNTY BOARD OF ADJUSTMENT, et al,
Defendants.

DECISION ON MOTIONS FOR JUDGMENT ON THE PLEADINGS

Introduction

On November 27, 2013, the plaintiffs, Eagle Cove Camp & Conference Center, Inc., Arthur G. Jaros, Wesley A. Jaros, and Randall S. Jaros, filed an action seeking certiorari review of the Oneida County Board of Adjustment's decision to deny them a conditional use permit. The plaintiffs' action was filed shortly after the 7th Circuit Court of Appeals affirmed a decision by the United States District Court for the Western District of Wisconsin granting summary judgment in favor of the instant defendants—and against the instant plaintiffs—on all matters except a state law certiorari count, which was dismissed without prejudice. On August 29, 2014, the plaintiffs filed an amended complaint in this action, supplementing the original certiorari count with 15 additional counts. The amended complaint added two defendants, Oneida County and the Town of Woodboro, both of whom were defendants in the aforementioned federal action. The Town has filed a motion for judgment on the pleadings and the County and Board of Adjustment have filed a joint motion for partial judgment on the pleadings.

Standard of Review

A party may bring a motion for judgment on the pleadings when it appears that the pleadings, on their face, indicate that the party so moving is entitled to judgment as a matter of law. Wis. Stat. § 802.06(3). A motion for judgment on the pleadings is essentially a summary judgment motion without affidavits and other supporting documentation. Freedom from Religion Found., Inc. v. Thompson, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991). A court must determine whether a claim has been stated in the complaint such that relief may be granted. All factual allegations are accepted as true and all reasonable inferences drawn from them are drawn in favor of the non-moving party. Heinritz v. Lawrence Univ., 194 Wis. 2d 606, 601, 535 N.W.2d 81 (Ct. App. 1995).

"A court may consider judicially noticed documents without converting a motion to dismiss into a motion for summary judgment." Menominee Indian Tribe of Wis. V. Thompson, 161 F.3d 449, 456 (7th Cir. 1998). The consideration of historical documents, documents of public record, and reports of administrative bodies does not convert a motion for judgment on the pleadings to a motion for summary judgment. Papasan v. Allain, 478 U.S. 265, 268 n. 1 (1986). Noticed documents in this case include, among other things, various pleadings and decisions entered in the aforementioned federal action.

Analysis

All three defendants argue that claim preclusion and issue preclusion apply to this case. The Town asserts that claim preclusion bars the entire action against them. The County and the Board of Adjustment assert that claim preclusion bars all issues except the state law certiorari issue and that issue preclusion bars certain components of the plaintiffs' complaint relative to the

certiorari issue. The plaintiffs contend that claim preclusion does not apply at all and that issue preclusion could apply, but, for various reasons, should not be applied in this case.

There is no real dispute that the plaintiffs have the right to bring a state law certiorari action in this case. The federal district court dismissed the certiorari count in the federal action *without* prejudice. Clearly, the plaintiffs have the right to raise the certiorari issue in state court. However, whether the plaintiffs can now assert additional issues not previously raised in the federal action as part of this state law certiorari action in this court is less clear. This is because the federal district court both *exercised* and *declined to exercise* supplemental federal jurisdiction over the state law issues raised in the federal action. As such, the issue presented by this case is this: Does the fact that the federal district court both *exercised* and *declined to exercise* supplemental jurisdiction relative to state law issues allow the plaintiffs to raise issues in *this case* that were not raised—but could have been raised—in the federal action? In other words, does claim preclusion apply to the non-certiorari counts raised in this case? If so, then the plaintiffs would be precluded from raising non-certiorari issues in this case if such issues *could have been* raised in the prior federal action. If claim preclusion does not apply, then the plaintiffs would *not* be precluded from raising these additional issues in state court, provided they are not barred by the doctrine of *issue* preclusion.

I. Claim Preclusion Bars All Counts Alleged in the Amended Complaint Except The Certiorari Count.

The County and the Board of Adjustment argue that the application of claim preclusion bars the entirety of this action, *except* the state law certiorari claim, on the basis that the non-certiorari counts raised in the plaintiffs' amended complaint are issues that *could have been raised* in the federal action, and that all three prongs of claim preclusion are met. The Town argues that claim preclusion bars this *entire* action, at least as it applies to the Town. The

plaintiffs argue that the defendants have misapprehended the term "claim" in the context of claim preclusion and that claim preclusion cannot, by definition, apply. The plaintiffs argue that application of claim preclusion bars an *entire* second action. According to the plaintiffs, because the state law certiorari count was dismissed by the federal court *without prejudice*, a subsequent action was a foregone conclusion and, therefore, claim preclusion cannot and does not apply.

The doctrine of claim preclusion, formerly known as res judicata, operates to bar "all subsequent actions between the same parties as to all matters which were litigated *or which might have been litigated* in the former proceeding." Wis. Pub. Serv. Corp. v. Arby Constr., Inc., 2012 WI 87, ¶ 33, 342 Wis. 2d 544, 818 N.W.2d 863 (Emphasis supplied.). Claim preclusion has three elements: (1) a common identity of the parties or their privies in the prior and present suits; (2) the prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) common identity of the causes of action in the two suits. Kruckenberg v. Harvey, 2005 WI 43, ¶ 21, 279 Wis. 2d 520, 694 N.W.2d 879. The doctrine of claim preclusion is applied to promote efficiency, judicial economy, finality, and address concerns regarding the "resources the parties would expend in repeated and needless litigation of issues that were, or might have been resolved in a single prior action." Stuart v. Stuart, 140 Wis. 2d 455, 461, 410 N.W.2d 632 (Ct. App. 1987), aff'd 143 Wis.2d 347, 421 N.W.2d 505 (1988).

The plaintiffs assert that claim preclusion simply does not apply in this case. The plaintiffs present various arguments in support of their assertion. The plaintiffs argue that there was no final judgment on the merits as to all theories and/or grounds presented, relying on the Restatement (Second) of Judgments § 20(1)(b). The plaintiffs also argue that, "if a court having jurisdiction would clearly have declined to exercise it as a matter of discretion, then a second action in a competent court presenting the omitted theory or ground should be held not

precluded." The plaintiffs base this argument on comment *e* to the Restatement (Second) of Judgments § 25 and Parks v. City of Madison, 171 Wis. 2d 730, 492 N.W.2d 365 (Ct. App. 1992) (review denied, 497 N.W.2d 131(Table)). The plaintiffs further argue, based on the Restatement (Second) of Judgments § 26(1)(b), that the federal court "expressly reserved the plaintiff's right to maintain the second action." In addition, the plaintiffs rely on the Restatement (Second) of Judgments § 26(1)(d) to support their assertion that "[t]he judgment in the [federal] action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme...." Finally, the plaintiffs argue that, if "it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy." This argument is based on the Restatement (Second) of Judgments § 26(1)(f), see Sopha v. Owens-Corning Fiberglas Corp., ¶ 57, 230 Wis. 2d 212, 601 N.W.2d 627 (1999).

The plaintiffs' claim preclusion analysis, specifically the first three bases referenced above, is grounded in their assertion that, because the federal district court did not dispose of the federal case *in its entirety*, a subsequent state court action was a contemplated result and, since claim preclusion operates to bar a second *action*, claim preclusion cannot apply. While appealing in its simple straightforwardness, the plaintiffs' argument fails to account for the treatment of certiorari actions in regards to claim preclusion under Wisconsin law.

In Hanlon v. Town of Milton[1], the Wisconsin Supreme Court held that certiorari actions and other civil actions "do not fit together within the fundamental structure of bringing one

[1] Though the certiorari action in Hanlon was a certiorari action under Wis. Stat. § 68.13, and the certiorari action in the instant case is under Wis. Stat. § 59.694(10), I find that any distinction between the statutes does not impact the

judicial action. The objectives of claim preclusion, therefore, cannot be attained." Hanlon v. Town of Milton, 2000 WI 61, ¶ 24, 235 Wis.2d 597, 612 N.W.2d 44. The Hanlon court also held that "[c]ertiorari proceedings are distinct from civil actions." *Id.* at ¶ 22 (citation omitted). They are distinct from civil actions because of their limited scope of review. *Id.* at ¶ 21. "If the scope of review on certiorari is not enlarged by statute, then the traditional standards of common-law certiorari review apply: (1) whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." *Id.* at ¶ 23 (citing State ex rel. Rutherberg v. Annuity & Pension Bd., 89 Wis. 2d 463, 472, 474, 278 N. W.2d 835 (1979)).

Under Hanlon, certiorari actions are considered different enough from other civil actions to constitute a distinct form of action for purposes of claim preclusion. Thus, an action which asserts a civil claim (or claims) and arises out of the same transaction which underlies a separate action for certiorari is permissible. In the context of the instant case, the upshot of Hanlon is that, for purposes of claim preclusion analysis, the prior federal action was akin to two separate

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applicability of the Hanlon decision to the instant case. Generally, the scope of review on certiorari under both of these statutes is the same: common-law certiorari review. See Murr v. St. Croix County Bd. of Adjustments, 2011 WI App 29, ¶ 7, 332 Wis. 2d 172, 796 N.W.2d 837 ("Certiorari review under Wis. Stat. § 59.694(10) is limited to: (1) whether the board kept within its jurisdiction; (2) whether it proceed on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the board might reasonably make the order or determination in question based on the evidence."(citing Klinger v. Oneida Cnty., 149 Wis. 2d 838, 843, 440 N.W.2d 348 (1989).) The only significant difference between the two statutes is that Wis. Stat. § 59.694(10) allows for the court to take evidence if it so decides. Klinger v. Oneida County, 149 Wis. 2d 838, 844-845, 440 N.W.2d 348 (1989). This distinction is of little significance here. First of all, none of the parties have requested this court to take evidence in connection with the certiorari review. More importantly, it is unlikely, even if such a request were to be made, that this court would grant it, considering the extensive record that already appears to exist in this matter. Furthermore, even if this court were to take evidence, if the evidence that is provided is substantially the same as the evidence already contained in the record, the scope of review is still that of common-law certiorari review. Klinger v. Oneida County, 149 Wis. 2d 838, 845, 440 N.W.2d 348 (1989) ("When... the circuit court takes evidence that is substantially the same as that taken by the Board, deference to the Board demands that the evidentiary hearing should be treated as a nullity for purposes of determining the standard of review to be applied to the Board's decision.") As such, any distinction between certiorari review under Wis. Stat. § 68.13 and certiorari review under Wis. Stat. § 59.694(10) does not impact the applicability of the Hanlon decision to the instant case.

actions—two different *claims* for purposes of claim preclusion analysis: one raising multiple civil issues, and the other a state law certiorari claim. Therefore, the multiple non-certiorari issues raised in the federal action constitute a separate and distinct action from the certiorari claim for purposes of applying the doctrine of claim preclusion.

The issues raised in counts 2 through 16 of the plaintiffs' amended complaint arise out of the same transaction that gave rise to all of the non-certiorari civil issues brought by the plaintiffs in the prior federal action. In light of Hanlon, claim preclusion bars litigation of any of those issues, as well as any *other* issues that *could have been raised* by the plaintiffs in the federal case, but were not.

It is important to note that, if the instant case was on point factually and procedurally with Parks v. City of Madison, 171 Wis. 2d 730, 492 N.W.2d 365 (Ct. App. 1992) (review denied), there would be no question that *all* of the issues raised by the plaintiffs in the amended complaint could be ligated in the instant case. However, this case is not on point with Parks. In Parks, after dismissing all of the federal issues raised in that case *with* prejudice, the federal district court dismissed *all* of the state law issues *without* prejudice. *Id.* at 733 (emphasis added). When Parks filed his complaint in state court, he raised new issues that were not raised during the pendency of the federal action. *Id.* The Court of Appeals held that since the district court did not exercise pendent jurisdiction (now known as supplemental jurisdiction) over the related state claims, and instead dismissed them *without* prejudice, Parks *could* bring those dismissed claims with any additional state law claims because it was clear that such claims would also have been dismissed by the federal court without prejudice if they had, in fact, been brought. *Id.* at 739.

That is *not* what happened here. The federal district court *did* exercise supplemental jurisdiction over all of the state law issues raised by plaintiffs, *except* the state law certiorari

issue, which it dismissed without prejudice. Therefore, it is not *clear* that the federal court would have declined to exercise supplemental jurisdiction over the additional counts now raised by the plaintiffs. Comment *e* to Restatement (Second) of Judgments § 25 provides, in essence, that claim preclusion is not applicable "if...the court in the first action would *clearly* not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would *clearly* have declined to exercise it as a matter of discretion)" (emphasis supplied). In this case, it is not only possible, but *likely* that the federal district court *would* have exercised supplemental jurisdiction over the issues raised in counts 2-16 of the plaintiffs' amended complaint. This is because it is likely that the federal court would have seen the issues raised in counts 2-16 of the plaintiffs' amended complaint as similar enough in nature to the federal issues that were actually raised and decided by the court and likely would have seen the state constitutional issues as sufficiently equivalent to their federal counterparts that the court would have exercised supplemental jurisdiction over such issues. Granted, I cannot declare—with *certainty*—that the federal district court would, in fact, have exercised supplemental jurisdiction over these 15 additional counts. Likewise, however, I definitely cannot say, with *any* degree of certainty, that the federal district court would have *declined* to exercise supplemental jurisdiction over these 15 additional counts. Therefore, it is far from *clear* that the federal district court would have declined to exercise supplemental jurisdiction over the addition counts now raised by the plaintiffs. As such, the holding in Parks is inapplicable here.

The plaintiffs fourth and fifth reasons for arguing that claim preclusion should not apply in this case are based on equity and fairness. The plaintiffs' main contention in that regard arises from their belief that the federal district court and the 7th Circuit did not address the "No Preference" clause issue asserted by the plaintiffs under Article 1, Section 18 of the Wisconsin

Constitution, thus preventing it from being adjudicated "on the merits." The plaintiffs note that "[e]quating claim with transaction... is justified only when the parties have ample procedural means for fully developing the entire action going to the merits," citing Restatement (Second) of Judgments, § 24, Comment *a*. The record in this matter makes it abundantly clear that the plaintiffs litigated the federal case quite exhaustively, even petitioning the United State Supreme Court for review. It is hard to imagine that during the entire course of the federal litigation that the plaintiffs were somehow denied ample procedural process to fully develop all of the issues appropriately. The fact that the federal district court dismissed without prejudice the state law certiorari count is consistent with an acknowledgment that the procedural process is different in certiorari actions than for civil actions. This is likely an acknowledgment of Hanlon, a case that, like the instant action, has its origins in the Federal District Court for the Western District of Wisconsin. The Hanlon decision arose out of an issue that was certified to the Wisconsin Supreme Court by the 7th Circuit Court of Appeals.

Though the federal district court did expressly reserve the plaintiffs' ability to bring a subsequent state court certiorari action, the Wisconsin Supreme Court has held that certiorari actions are *different* from other civil actions for purposes of applying the doctrine of claim preclusion. Therefore, under the facts and circumstance of this case, I am holding that the doctrine of claim preclusion bars all counts in the plaintiffs' amended complaint *except* for the certiorari count. All three prongs of claim preclusion are present. The parties to this action and the prior federal action are the same, the prior federal action resulted in a final judgment on the merits, and there exists an identity between the causes of action in both suits: The non-certiorari state law issues raised in the prior federal court action arise out of the same transaction as the non-certiorari issues raised in this case. As such, since the non-certiorari issues raised in this

case could have been raised in the prior federal court action, claim preclusion bars counts 2-16 in the plaintiffs' amended complaint and those counts are accordingly dismissed with prejudice.

II. Issue Preclusion.

Having concluded that claim preclusion bars all counts in the plaintiffs' amended complaint except the certiorari count, the only remaining consideration regarding the application of *issue* preclusion is whether to apply issue preclusion to particular paragraphs of the certiorari count. The County and the Board of Adjustment assert that issue preclusion bars ¶¶ 23, 37, 39, 45-51, 166, 169-174, 176-78, 184, and 187-201 of the certiorari count. The plaintiffs argue that these paragraphs simply assert facts and may be taken into account during certiorari review of the Board of Adjustment's decision. The plaintiffs further assert that they are not trying to re-litigate any of the issues already decided by the federal district court.

Issue preclusion, formerly known as collateral estoppel, bars the re-litigation of issues in a subsequent action that were actually litigated and decided. "An issue is actually litigated when it is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." City of Sheboygan v. Nytsch, 2006 WI App 191, ¶ 12, 296 Wis. 2d 73, 722 N.W.2d 626 (internal quotations omitted, citation omitted). "To apply issue preclusion, (1) the issue in both actions must be the same and have been actually litigated, and (2) the party against whom preclusion is asserted must have been a party, in privity with a party, or had an identity of interest with the party to the previous litigation." Kruczek v. Wisconsin Dep't of Workforce Dev., 2005 WI App 12, ¶ 28, 278 Wis. 2d 563, 579, 692 N.W.2d 286, 295. The application of issue preclusion to a particular case is a two-step process: "(1) we ask whether issue preclusion can, as a matter of law, be applied, and if so, (2) whether the application of issue preclusion would be fundamentally fair." Flooring Brokers, Inc. v. Florstar Sales, Inc., 2010 WI App 40, ¶ 6, 324

Wis. 2d 196, 781 N.W.2d 248 (citation omitted). Therefore, the decision to actually apply issue preclusion to a particular case is a discretionary decision. Mrozek v. Inra Financial Corp., 2005 WI 73, ¶ 15, 281 Wis. 2d 448, 699 N.W.2d 54.

All of the paragraphs that the County and the Board of Adjustment wish to exclude from the certiorari claim are either factual assertions made by the plaintiffs—statements of fact rather than assertions of a legal issue or claim—or merely arguments regarding the plaintiffs' position. Furthermore, there is a difference between asserting a claim that one's equal protection rights have been violated as a basis for an award of damages and asserting that one's equal protection rights have been violated in the context of certiorari review. Hanlon at ¶ 15 ("there is a distinction between presenting an equal protection argument in a...certiorari proceeding and asserting an equal protection claim for money damages..."). The plaintiffs assert that they are not attempting to re-litigate the federal issues already adjudicated. They argue that this information may nevertheless provide context for the certiorari review and should not be barred. I agree and therefore, am denying the County and the Board of Adjustment's motion to bar the above-referenced paragraphs from the plaintiffs' certiorari claim on the basis of issue preclusion. However, when addressing these specific paragraphs in the future, this court will be cognizant of the County and Board of Adjustment's position that several of the plaintiffs' contentions are contrary to findings made by the federal district court.

Conclusion

For the reasons stated above, the Town's motion for judgment on the pleadings is granted. The County's and Board of Adjustment's joint motion for partial judgment on the pleadings is granted in part and denied in part, insofar as their motion to bar certain paragraphs from the plaintiffs' certiorari claim on the basis of issue preclusion has been denied. As such,

the sole issue remaining before this court is certiorari review of the Oneida County Board of Adjustment's decision to deny the plaintiffs a conditional use permit. Therefore, the Town of Woodboro and Oneida County are dismissed as defendants in this action. Statutory costs are awarded in favor the Town and the County and against the plaintiffs.

Motions for Sanctions

The defendants have filed motions for sanctions, asserting that the plaintiffs' claims (or, in the case of the County and the Board of Adjustment, the bulk of the plaintiffs' claims) are frivolous under Wis. Stat. §§ 802.06(2) and 895.044(1), and that the plaintiffs should be sanctioned accordingly. Wis. Stat. § 802.06(2)(b) requires that the "claims, defenses, and other legal contentions" stated in a complaint must be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Wis. Stat. § 895.044(1) provides that "a party or a party's attorney may be liable for costs and fees under this section for commencing...an action" if the "party or the party's attorney knew, or should have known, that the action...was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law."

The defendants argue, in essence, that the plaintiffs should have been aware that counts 2-16 in their amended complaint would be disallowed on the basis of claim preclusion. I am finding that the plaintiffs had a good faith basis upon which to argue that they should be permitted to include more than just the certiorari issue when pleading their case before this court. The plaintiffs cited an actual case, Peacock v. County of Orange, 2009 Cal. App. Unpub. Lexis 7999at *13-*14 (Fourth App. District 2009), and argued that I adopt the reasoning of the California Court in that case. Though I was not ultimately persuaded to adopt the California

court's reasoning, it is not frivolous to cite non-binding persuasive authority in an effort to try and persuade a court to extend or modify the law to cover a novel scenario. In addition, to the best of this court's knowledge, Wisconsin's appellate courts have yet to decide the precise issue presented in this case. As such, the plaintiffs should not be precluded from making a good faith argument that current law be extended or modified to cover scenarios like the instant case, where a federal court both exercised and declined to exercise supplemental jurisdiction over state law issues. Finally, the plaintiffs have cited various sections of the Restatement (Second) of Judgments and certain comments to those sections in support of their argument that claim preclusion should not be applied in this case. The Wisconsin Supreme Court has adopted portions of the Restatement (Second) of Judgments for purposes of claim preclusion analysis. Parks, 171 Wis. 2d at 735, 492 N.W.2d 365. Again, while the plaintiffs' arguments in that regard did not carry the day in this case, I cannot in good conscience find that those arguments were frivolous or otherwise not made in good faith for "the extension, modification, or reversal of existing law or the establishment of new law."

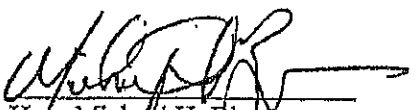
The fact that the plaintiffs did not ultimately prevail in their effort does not render their effort frivolous. Perhaps if the federal court had dismissed multiple issues without prejudice, or had dismissed some non-certiorari issues without prejudice along with the state law certiorari issue, then I very well may have accepted the plaintiffs' arguments regarding the application of claim preclusion. However, the fact that the plaintiffs' arguments did not ultimately prevail does not mean that counts 2-16 in the plaintiffs' amended complaint were frivolous or so without merit that sanctions should be imposed.

By all appearances, the plaintiffs are acting on a sincere desire to pursue their religious calling—on their own land—in the face of what is, from their perspective, restrictive government

regulation. It is beyond dispute that counties and towns have the lawful authority to engage in land use regulation. However, I believe that it would be unjust to penalize the plaintiffs for pursuing every available legal avenue in furtherance of their perceived rights. While my ruling has dismissed the bulk of that effort in this case, I do not find it to be frivolous. Therefore, the defendants' respective motions for sanctions are denied, without costs.

Dated this 23rd day of January, 2015.

BY THE COURT:



Hon. Michael H. Bloom
Oneida County Circuit Court, Branch II

APPENDIX D

Exhibit 31

ONEIDA COUNTY PLANNING & ZONING
JUNE 14, 2006
11:30 A.M. – CLOSED SESSION - COMMITTEE ROOM #2
12:30 P.M. REGULAR MEETING – COMMITTEE ROOM #2
2ND FLOOR, ONEIDA COUNTY COURT HOUSE

Members present:	Chairman Bob Metropulos Scott Holewinski Frank Greb - Absent Ted Cushing Larry Greschner
Department staff present:	Karl Jennrich, Zoning Director Pete Wegner, Assistant Zoning Director Steve Osterman, Planning Manager Mary Bartelt, Typist III
Other County Staff:	Larry Heath, Corporation Counsel Brian Desmond, Assistant Corporation Counsel

See Attached Guest List:

It is possible that a quorum of the County Board of Supervisors will be at this meeting to gather information about a subject over which they have decision-making responsibility. This constitutes a meeting of the county board pursuant to State ex rel Badke v. Greendale Village Board. Wis 2d 553, 494 n.w. 2d 408 (1993), and must be noticed as such, although the county board will not take any formal actions at this meeting.

1. Call to order.

Chairman Metropulos called the meeting to order at 11:40 A.M., In accordance with the Wisconsin Open Meeting Law.

2. Discussion/decision to approve the agenda.

MOTION: (Larry Greschner/Scott Holewinski) to approve the June 14th, 2006 agenda. With all members present voting "aye" motion carries.

3. It is anticipated that the Committee may meet in Closed Session pursuant to Wisconsin Statutes, Section 19.85 (1)(g), conferring with legal counsel concerning strategy to be adopted by the governmental body with respect to litigation in which it is or is likely to become involved. A roll call vote will be taken to go into closed session.

MOTION: (Larry Greschner/Ted Cushing) to enter into Closed Session, Roll Call Vote: Scott Holewinski "aye", Larry Greschner "aye", Ted Cushing "aye" and Chair Metropulos "aye", motion carries.

Time: 11:42 A.M.

4. A roll call vote will be taken to return to open session

MOTION: (Larry Greschner/Ted Cushing) to return to open session. Roll Call Vote: Scott Holewinski "aye", Larry Greschner "aye", Ted Cushing "aye" and Chair Metropulos "aye", motion carries.

Time: 12:24 P.M.

For the record, the Committee conferred with legal counsel regarding possible litigation.

5. Discussion/decision concerning Rezone Petition #32-2005 of Squash Lake Christian Camp, Inc., and the Arthur G. Jaros Sr. and Dawn L. Jaros Charitable trust, owners, to rezone lands from #02 Single Family Zoning District and #04 Residential and Farming Zoning District to #05 Recreational Zoning

District for property described as part of the SW NW and part of Gov't Lot 4, Section 24, T36N, R7E, in the Town of Woodboro, PIN# WB 357 & WB 357-5. Said lands are depicted on Oneida County Certified Survey Map V13 P3107 & P3107A, Document #611861. A public hearing was held April 19, 2006.

Chair Bob Metropulos, Sr. gave a brief comment. "There will be no additional input or presentations to be made by any of the parties on both sides of the issue." "The decisions made by this committee on the issue will be based on the May 15, 2006 and April 19, 2006 hearing and also on additional information received by the deadline on or before June 15, 2006." "We also will take in consideration any information which was received after June 15, 2006 deadline prior to today's meeting."

Mr. Steve Osterman, Planning Manager, explained to the committee that a public hearing was held on April 19, 2006 and at the conclusion of the public hearing there was motion made and seconded that the oral portion of the public hearing was closed and that written comments would be accepted until the end of the work day on Monday May 15, 2006 and that the Planning and Zoning Committee would consider this matter at 12:30 on Wednesday June 14, 2006. The written comments will include the rebuttal by the Jaros's and that motion carried.

Mr. Osterman read for the record correspondences after the public hearing, 4/19/06. (EXHIBIT #1)

Mr. Osterman read into the record via fax, dated June 9, 2006, from Attorney Gregory Harrold, representing the Town of Woodboro to Karl Jennrich regarding an open records request for copies of any official opinions given by Corporation Counsel to the Planning and Zoning Department regarding Arthur G. Jaros (Squash Lake Christian Camp, Inc.) (EXHIBIT #2)

Mr. Osterman read into the record Mr. Jennrich's responding letter to Atty. Harrold, dated June 9, 2006. (EXHIBIT #3)

Mr. Osterman read into the record letter dated May 15, 2006 from Attorney Harrold regarding the recommendation from the Town Board of Woodboro. (EXHIBIT #4)

Mr. Osterman read into the record a fax, dated May 9, 2006 received from Attorney Harrold regarding a restricted covenant, #630222, recorded on March 14, 2006 in the Register of Deeds Office. (EXHIBIT #5)

Mr. Osterman read into the record a letter, dated May 10, 2006 from the Town of Crescent. (EXHIBIT # 6)

Mr. Osterman read into the record a letter dated May 12, 2006 from Squash Lake Christian Camp to the Planning and Zoning Committee regarding letter of response to May 1, 2006 letter of Dr. Jim Dyreby. (EXHIBIT #7)

Both Mr. Osterman and Mr. Karl Jennrich, Zoning Director read into the record a letter dated May 10, 2006 from Arthur G. Jaros, Jr. President for Squash Lake Christian Camp regarding response to letters of objectors. (EXHIBIT #8)

Mr. Larry Heath, Corporation Counsel, "Just for the record, did the Zoning Department send out copies of those of what you just read to the committee members?"

Mr. Jennrich, Zoning Director, "Yes."

Mr. Heath, "And it's my understanding that the Committee members have read that letter prior to this meeting, is that a fair statement?"

Committee responds, "Certainly."

Mr. Scott Holewinski, "Larry we have read everything accept what was received after the cutoff date."

Mr. Heath, "Alright, thank you."

Mr. Jennrich reads into the record a letter from Squash Lake Christian Camp Inc. Arthur G. Jaros, Jr. President, dated May 15, 2006.

Mr. Heath, "Well let me just interject here, is it satisfactory to present here that the committee has stated they read everything up to the cutoff date?" (Mr. Heath asking Mr. Arthur Jaros)

Mr. Jaros, "The May 15, 2006 letter is satisfactory, the letter that Karl is referring to now, that's fine." "If there are other ones, let's take them one at a time."

Mr. Jennrich, "Yes, May 15, 2006, from Arthur G. Jaros, President and there is another letter here from Wes Jaros by precedence Squash Lake Christian Camp, Inc. fax date 5/15/06."

Mr. Arthur G. Jaros, "We'd like those read because the objective letters were read."

Mr. Jennrich reads into the record fax letter dated May 15, 2006 from Wes Jaros. (EXHIBIT #9)

Mr. Steve Osterman, read into the record a faxed letter dated May 15, 2006 from Randall S. Jaros. (EXHIBIT #10)

Mr. Karl Jennrich explained that correspondence was received after the deadline date of May 15, 2006.

Mr. Jennrich read into the record a letter dated May 16, 2006, which was faxed to the Planning & Zoning Department on May 17, 2006, letter directed to Mr. Larry Heath from Arthur G. Jaros. This letter was not given to the Planning & Zoning Committee.

Mr. Larry Greschner, "Mr. Chairman, I think the motion reads, "cutoff May 15, 2006, all verbal and written." "I have no problem if those are to the record, to the date, who to and who from, but I don't think this should be something that we should be listening to, to be very honest with you." "Because it contradicts our motion of May 15, 2006."

Chair Bob Metropulos, "I will refer to Counsel."

Mr. Heath, "I would recommend that if the one that you are referring to I think is in response to the Town's denial?"

Mr. Jennrich, "Correct."

Mr. Heath, "You did receive the Town's recommendation on either the deadline date or the next day, is that right?"

Mr. Jennrich, "Yes, on the deadline date."

Mr. Heath, "So the applicants here did not have an opportunity to respond to that by the deadline date." "You have read, or are aware of the Towns' recommendations, are you not?" (Mr. Heath asks the committee)

Chair Metropulos, "Yes, I am and I think we all are."

Mr. Holewinski asks how many responses were received after the cutoff date.

Mr. Jennrich, "Well we have this letter of May 16, 2006 regarding additional legal consideration, Rezone Petition #32-2005. Also received was a ten-page document dated June 8, 2006, which we received June 9, 2006 regarding this refutation from Arthur G. Jaros, Jr. President."

Mr. Heath, "Has that already been read?"

Mr. Jennrich, "No."

Mr. Heath, "Certainly make it a record, but can we just refer to your (Mr. Jaros's) specific refutation and not have to read over again the town's statement."

Mr. Arthur G. Jaros, Jr., "Certainly, and if you use the one June 8, that would be appreciated."

Mr. Heath, "Alright, so on the June 8TH one, just read what's in italics English."

Mr. Jaros, "That would be great."

Mr. Heath, "I think those should be read into the record, the italic responses." "I recommend that you allow the responses from the applicants to be part of the record." "Just read the italics."

Mr. Karl Jennrich reads into the record a letter dated June 8, 2006, via Federal Express, from Mr. Arthur G. Jaros, Jr., President, Squash Lake Christian Camp, Inc. (EXHIBIT #11)

Chair Metropulos asks if there are anymore correspondence. There are none.

Committee recessed – 2:25 P.M.

Committee reconvened – 2: 37 P.M.

Chair Metropulos asks for the staff's recommendation on the Jaros Rezone Petition #32-2005.

Mr. Jennrich stated that both he and Mr. Steve Osterman had a chance to work on a position of the staff to give to the committee. This is just a recommendation to the committee by staff on what to do with the rezone petition but it is ultimately the decision of the Planning & Zoning Committee. Mr. Jennrich reads for the record the General Information to the committee. (EXHIBIT #12)

Rezoning Petition #32-2005, change from Single Family Residential District and Residential & Farming District to District #05 Recreational for land described as Oneida County Certified Survey Map #003107 being part of the SW NW and Gov't Lot 4 Section 24 T36R 7E located in the Town of Woodboro. A public hearing was held on April 19, 2006 and this report was prepared on June 13, 2006 by Steve Osterman, Planning Manager and Karl Jennrich, Zoning Director.

Staff recommendation is to deny the rezone petition. Mr. Jennrich reviewed Section 9.86 F General Standards to the committee. Mr. Jennrich reads the General Standards.

Chair Metropulos explains that the Planning & Zoning Committee received the Planning and Zoning Committee Findings, which is basically a checklist of questions and asks that the committee go through all of them.

1. *Whether the change is in accord with the purpose of this ordinance*
   - Would the rezone, if granted, be consistent with the purpose statements of the Oneida County Zoning Code as referenced in the staff recommendations?

     Comments
     Mr. Scott Holewinski, "Under 9.11 the purpose that Mr. Jennrich stated in his findings under the next page, "It is further the goal of this ordinance to promote the following specific purposes, under D1 it says "control building sites, placement of structures and land use through separating conflicting land uses." "Therefore, it does not want those mixed in with the residential." "I don't believe that under the zoning districts, when you look at the purpose of recreational is too far different then a single family which is the most restrictive." "So, I don't believe it does."

     Mr. Larry Greschner, "Not whatsoever."

The committee agrees that the rezone would not be consistent with the purpose statements of the Oneida County Zoning Code.

- Does the 7th Circuit Court of Appeals definition of "substantial burden on religious exercise," as set forth in the C.L.U.B. case and referenced in the staff recommendations apply to this rezone request?"

  Comments
  Mr. Brian Desmond, Assistant Corporation Counsel, explains that this bullet point is getting at more of a procedural question in the law that the 7th Circuit Court of Appeals decisions being that Wisconsin is a part of that circuit, that their decisions are binding upon us and their rulings are binding upon the actions of the Planning & Zoning Committee. The procedural question is to whether or not the law that they have set out is the law that we have to follow.

  Mr. Scott Holewinski, "I agree with that." Committee unanimously agrees with the second bullet (b).

- Does the current zoning allow for "religious exercise" in both of the zoning districts on the property? In what form?

  Comments
  Chair Metropulos, "Well, we know that they can have a church and also have living quarters and they are allowed to do exercise their religion."

  Mr. Holewinski, "They are allowed to exercise their religion, but maybe not to the magnitude that they would want, but they are allowed to do it."

  Committee unanimously agrees with the third bullet (c).

- Has Oneida County previously granted Conditional Use Permits allowing religious exercise in the Zoning district, Single Family and Residential and Farming, that are currently in place on the parcel that is subject to the rezone petition?

  Comments
  Committee agrees with bullet #4.

  Mr. Jennrich, "Yes, we did some research and found four Conditional Use Permit approved applications in Single Family/Residential."

  Mr. Heath, "I would suggest to you that there is a consensus or not."

  Committee unanimously agrees with bullet number four (d).

- Was the development allowed with the previously issued conditional use permits for religious institutions, similar or the same as allowed by governmental entities and secular applicants?

  Comments
  Mr. Brian Desmond, "That is in reference to what is allowed in Single/Family zoning district where the issue has been raised that in Single Family you are allowed to have recreation fields, government meeting halls." "Community living arrangements and governmental uses and public parks and playgrounds are discriminatory because it gives more of a, it allows more uses for the government and non-religious entities." "Have we previously issued conditional use permits for religious entities that allow for playground type areas, park type areas, meeting rooms, class rooms, things of that nature that these secular and governmental uses are allowed?"

Committee agrees fully with bullet number 5 (e).

- Does the Oneida County currently have any Planned Unit Development Ordinance?

  Comments
  Mr. Jennrich, "We do not."

  Committee agrees fully with Mr. Jennrich for bullet number 6 (f).

- Does Oneida County have any other ordinance that would allow for development control if the rezone were granted?

  Comments
  Mr. Jennrich, "No."

  Committee agrees fully with Mr. Jennrich for bullet number 7 (g)

- Would any delay, uncertainty or added expense have to be born by the parties seeking this rezone, given that "religious exercise" is allowed on the property with a conditional use permit in the districts that the property is currently zoned?

  Comments
  Committee unanimously agrees that there would be no delay, uncertainty or added expense born by the parties seeking this rezone. Bullet number 8 (h)

- Based on the current zoning of the parcel subject to the re-zone request, could the petitioner achieve most or all of their stated objectives?"

  Comments
  Committee unanimously agrees that the petitioner could achieve most or all of their stated objectives.

  Mr. Holewinski, "Maybe not to the magnitude which he has presented, but he could achieve the objective." Unanimously agreed, "yes" to bullet number 9 (i)

- Based on the foregoing conclusions, would a "substantial burden on religious exercise" be effectuated by a denial of Rezone Petition #32-2005?

  Comments
  Committee unanimously agrees that the petitioner would not suffer substantial burden on religious exercise be effectuated by a denial of Rezone Petition #32-2005. Unanimously agreed "no" to bullet number 10 (j)

- Does the Committee believe that a Compelling governmental interest exists in protecting the landowners affected by this rezone petition from the inconsistent land uses that would be available under a zoning classification of Recreational District #05

  Comments
  Committee unanimously agree with bullet #11 (k)

- What uses would be allowed in Recreational District #5 that would be inconsistent with the surrounding Single Family Residential district.

  Comments
  Mr. Jennrich, "Under the Recreational Zoning district we allow all the permitted use in District #3 Multi-Family so you would be looking at multi-family develops that would be allowed within that zoning district." "Personal stables." "Administrative Review Uses, all

the administrative review uses of District #3, Multi-family, boat liveries, boat storage and sale of bait, recreational camps with more then one principal structure, commercial riding academies, gift and specialty shops customary in a recreational district, servicing a marina, snowmobile and other recreational vehicles." "The CUPS that would be allowed are all the conditional uses of District #3, Multi-family/Residential, hotels, motels and resorts of five units or more, mobile home, manufactured home and house trailer parks, restaurants, dinner club, taverns and other private clubs, amusement parks and drive-in theaters, marinas for boat launching areas, schools, campgrounds, telephone exchanges of right of ways, golf grounds, dog kennels, animal shelters, wildlife rehabilitation centers and veterinary clinics would all be allowed in the Recreational zoning district." "Whereas, when you look at Single Family you are looking as single family uses primarily, gardens, customary home occupations, harvesting of any wild crop and the conditional uses would be the churches and schools, libraries, community buildings, community living arrangements, governmental uses, bed and breakfasts, public parks and pre-existing licensed resorts."

"Residential Farming, the uses that are permitted, back to Multi-family, you could have livestock, sale of farm produce." "Administrative Reviews of Multi-family, commercial greenhouses." "Conditional uses of District #3, Multi-Family/Residential would be commercial agriculture/horticulture, commercial stables, airports and landing fields, mobile home, manufactured homes, house trailer parks, schools, trapping, skeet, shooting the rifle, pistol and archery ranges, contractor storage yards, retail and wholesale business, non-metallic mining, dog kennels and or cat shelter, animal shelter, wildlife, veterinary clinics."

No consensus by the Committee for bullet #12 (l).

- Given that religious exercise is allowed with a conditional use permit in the districts that the subject parcel is currently zoned and that rezoning to a Recreational (District 5) zone allows for a multitude of inconsistent uses with the surrounding, longstanding single family districts and the lack of development controls if the property is re-zoned, is there any less restrictive means to further the County's compelling governmental interests in this rezone besides following the staff recommendation of denial?

  Comments
  Committee unanimously agree with "no" that there would be any less restrictive means to further the County's compelling governmental interests in this rezone beside following the staff recommendation of denial. Bullet #13 (m)

2. *Whether the change is consistent with land use plans of the County, the affected town, and Towns adjacent to the affected town.*

   - Does the County currently have a land use plan?

     Comments
     Committee unanimously agrees that the County does not have a land use plan.

   - Has the Town of Woodboro adopted a land use plan?

     Comments
     Committee unanimously agrees that the Town of Woodboro has adopted a land use plan. "YES"

   - In what manner is the requested rezone consistent and/or inconsistent with the Land Use Plan of the Town of Woodboro?

     Comments

Mr. Scott Holewinski, "I would feel that the requested rezone is inconsistent with the Land Use Plan of the Town of Wooboro."

Full consensus by the committee.

Mr. Brian Desmond, "Then you should put on the record with some reasons why you've (Planning & Zoning Committee) come to this conclusion or what you're reasoning is behind that."

Mr. Cushing, "Woodboro basically has Single Family Zoning in lake districts on waterfront property and they have no Recreational Zoning in their township."

- What if any recommendation has the Town of Woodboro given to the County with regard to the requested rezone?

  Comments
  The letter on record by the Town of Woodboro recommending denial.

- Has any other town commented on the requested rezone?

  Comment
  Yes, the letter on record by the Town of Crescent opposing the rezone petition.

3. *Whether conditions have changed in the area generally that justify the change proposed in the Petition.*

   - Have their been any recent changes that would justify the granting of the rezone petition?

     Comment
     Committee unanimously agrees that there have been no recent changes that would justify the granting of the rezone petition.

4. *Whether the change would be in the public interest.*

   - How was the public notified of Rezone Petition #32-2005

     Comment
     Mr. Jennrich stated that a notice of public hearing and a mailing to the adjoining property owners and the Town Board of Woodboro and published in the newspaper.

   - What was the public response to Rezone Petition #32-2005?

     Comment
     Overwhelming opposed to the rezone.

5. *Whether the character of the area or neighborhood would be adversely affected by the change.*

   - Again what uses would be available under District 5 recreational zoning?

     Comment
     This was discussed in bullet #12 (l) (See page 7)

   - How would, if at all, the character of the area be changed if Rezone #32-2005 were granted?

     Comment

Mr. Holewinski, "If the property was rezoned to District 5 and the camp was not built, the area would be definitely changed." "The whole residential area would change drastically."

Mr. Heath, "Any of the uses in Recreation would be allowed if it were changed."

6. *Whether the uses permitted by the change would be appropriate in the area.*

   - What type of zoning does the Woodboro town land use plan designate for this area?

     Comment
     Residential and Residential/Farming

   - Would this rezone petition, if granted, based on the staff recommendations and previous conclusions be appropriate for the area?

     Comment
     Committee unanimously agrees that the rezone petition, if granted would not be appropriate for the area.

7. *Whether the town board of the town in which the change would occur approves of the change.*

   - Does the Town of Woodboro object to the Rezone Petition #32-2005?

     Comment
     Committee unanimously agrees that "yes" the Town of Woodboro does object to the Rezone Petition #32-2005 and that it is on record.

8. *The size of the property that is the subject of the proposed change.*

   Comment
   Mr. Holewinski, "This has been defined as thirty plus acres."

9. *Whether the area to be rezoned is defined by recognizable or clearly definable boundaries such as those found in U.S.G.S. Land Office Survey maps or recorded plats, or those created by highways, railroad rights-of-way, meandering streams or lakes.*

   Comment
   Mr. Ted Cushing, "This has already been defined and pointed out by staff under 9.86 (9)

10. *Position of affected landowners.*

    Comment
    Mr. Larry Greschner, "That is on record with documentation of all of it."
    Mr. Holewinski, "It just doesn't affect the nearby landowners, it affects all the landowners around the lake".

Chair Metropulos asks the committee if they have any more discussion.

MOTION: (Scott Holewinski/Ted Cushing) that the General Standards of Approval of the rezone have not been met and that the Planning & Zoning Committee follow staff recommendation and deny the rezone petition and forward on to the Full County Board. Roll Call Vote: Scott Holewinski "aye", Larry Greschner "aye", Ted Cushing "aye" and Bob Metropulos "aye". All "aye", motion carries.

Mr. Heath, "I would ask that you (Chair Metropulos) ask the committee whether it would be appropriate to have findings prepared consistent with the committee's action today to be signed by the chairman in behalf of the committee consistent with your actions today." "The findings should be finalized and signed

off by the committee so they could be of record based of your action today." The Planning and Zoning Committee directs Planning and Zoning Staff and the Corporation Counsel office to prepare the findings.

MOTION: (Ted Cushing/Larry Greschner) to direct staff in conjunction with Corporation Counsel office to prepare a document of findings for Planning & Zoning Committee Chairman to sign. All "aye" on voice vote. Motion carries.

6. Adjourn.

3:27 PM There being no further matters to lawfully come before the Committee, a motion was made by Bob Metropulos, second by Ted Cushing to adjourn the meeting. With all members present voting "aye", the motion carried.

Chairman Bob Metropulos

Karl Jennrich, Zoning Director

APPENDIX E

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary
John Gozdzialski, Regional Director

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Telephone 715-365-8900
FAX 715-365-8932

November 16, 2007

IP-NO-2007-44076UW

Mr. Art Jaros
Squash Lake Christian Camp, Inc
1200 Harger Rd.
Oak Brook, IL 60523

Dear Mr. Jaros:

We have reviewed your application for Grading on the banks of Squash Lake, located in the Town of Woodboro, Oneida County. Your application is approved with a few limitations.

I am attaching a copy of your permit which lists the conditions which must be followed. A copy of the permit must be posted for reference at the project site. Please read your permit conditions carefully so that you are fully aware of what is expected of you. Also, please provide a copy of this permit to your contractor to ensure they know and understand what is expected.

Please note you are required to submit photographs of the completed project on the bank of Squash Lake within 7 days after you've finished construction. This helps both of us to document the completion of the project and compliance with the permit conditions.

Your next step will be to notify me of the date on which you plan to start construction and again after your project is complete.

If you have any questions about your permit, please call me at 715-365-8991.

Sincerely,

James Grafelman
Water Management Specialist
cc: Mike O'Keefe, Project Manager, (715)345-7911, Stevens Point, WI, U.S. Army Corps of Engineers
Karl Jennrich, Oneida County Zoning Administrator
Jim Jung, Conservation Warden

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

Grading PERMIT
IP-NO-2007-44076UW

Squash Lake Christian Camp, Inc is hereby granted under Section 30.19(1g)(c), Wisconsin Statutes, a permit for Grading on the banks of Squash Lake, Town of Woodboro, Oneida County, also described as the SW¼-NW¼ S29, T36N, R7E, subject to the following conditions:

PERMIT

1. You must notify James Grafelman at phone 715-365-8991 before starting construction and again not more than 5 days after the project is complete.

2. You must complete the project as described on or before November 15, 2010. If you will not complete the project by this date, you must submit a written request for an extension prior to the expiration date of the permit. Your request must identify the requested extension date and the reason for the extension. A permit extension may be granted, for good cause, by the Department. You may not begin or continue construction after the original permit expiration date unless the Department grants a new permit or permit extension in writing.

3. This permit does not authorize any work other than what you specifically describe in your application and plans, and as modified by the conditions of this permit. If you wish to alter the project or permit conditions, you must first obtain written approval of the Department.

4. You are responsible for obtaining any permit or approval that may be required for your project by local zoning ordinances or by the U.S. Army Corps of Engineers before starting your project.

5. Upon reasonable notice, you shall allow access to your project site during reasonable hours to any Department employee who is investigating the project's construction, operation, maintenance or permit compliance.

6. The Department may modify or revoke this permit if the project is not completed according to the terms of the permit, or if the Department determines the activity is detrimental to the public interest.

7. You must post a copy of this permit at a conspicuous location on the project site, visible from the waterway, for at least five days prior to construction, and remaining at least five days after construction. This may be placed in a plastic bag or laminated and posted on the project site. You must also have a copy of the permit and approved plan available at the project site at all times until the project is complete.

8. Your acceptance of this permit and efforts to begin work on this project signify that you have read, understood and agreed to follow all conditions of this permit and agree to instruct your contractor(s) to follow it.

9. You must submit a series of photographs to the Department, within one week of completion of work on the site. The photographs must be taken from different vantage points and depict all work authorized by this permit.

10. You, your agent, and any involved contractors or consultants may be considered a party to the violation pursuant to Section 30.292, Wis. Stats., for any violations of Chapter 30, Wisconsin Statutes or this permit.

11. Construction shall be accomplished in such a manner as to minimize erosion and siltation into surface waters. Erosion control measures such as silt fence and straw bales must meet or exceed the standards in the Wisconsin Construction Site Best Management Practices Handbook.
12. Construction of the proposed retaining wall in front of the building shall incorporate native vegetation transplanted from elsewhere on the property or provided by growers of species native to Oneida County. The majority of shrubs and trees transplanted shall be native evergreen species in order to better screen the development.
13. Exotic or non-native species may not be used to stabilize the slopes or be incorporated into the retaining wall.
14. The contractor shall develop and submit an Erosion Control Implementation Plan (ECIP) to the Department for review at least 10 days prior to commencement of construction.
15. Ground may not be disturbed within 35 feet of the Ordinary High Water Mark (OHWM), except as noted on the plans.

All equipment used for the project including but not limited to tracked vehicles, barges, boats, silt or turbidity curtain, hoses, sheet pile and pumps shall be de-contaminated for invasive and exotic viruses and species prior to use and after use. **Specific disinfection measures are required on infested waters and must be taken prior to moving to another waterbody. The most current de-contamination protocols and a list of infested waters can be found at the following website** http://dnr.wi.gov/ **under the Topic "VHSv".**

If your project is on a non-infested water, the following steps should be taken *every time* you move your equipment to avoid transporting invasive and exotic viruses and species. To the extent practicable, equipment and gear used on infested waters should not be used on other non-infested waters.

1. **Inspect and remove** aquatic plants, animals, and mud from your equipment.

2. **Drain all water** from your equipment that comes in contact with infested waters, including but not limited to tracked vehicles, barges, boats, silt or turbidity curtain, hoses, sheet pile and pumps

3. **Dispose** of aquatic plants, animals in the trash. Never release or transfer aquatic plants, animals or water from one waterbody to another.

4. **Wash your equipment** with hot (>104° F) and/or high pressure water OR allow your equipment to **Dry thoroughly for 5 days.**

FINDINGS OF FACT

1. Squash Lake Christian Camp, Inc has filed an application for Grading on the banks of Squash Lake, located in the Town of Woodboro, Oneida County, also described as in the SW¼ of the NW¼ of Section 29, Township 36 North, Range 7E.

2. The project will consist of construction of a 42,225 square foot building complex with a vegetated rock gabion retaining wall and emergency road access to the front of the building. All other developments on the site are located away from the lake, are not on the banks of the lake and are not part of this grading permit.

3. The Department has completed an investigation of the project site and has evaluated the project as described in the application and plans.

4. The proposed project, if constructed in accordance with this permit will not adversely affect water quality, will not increase water pollution in surface waters and will not cause environmental pollution as defined in s. 283.01(6m), Wis. Stats.

5. The project will not affect wetlands if constructed as proposed.

6. The Department conducted a Public Informational Hearing on October 29, 2007 at the request of several members of the public. Twenty-eight individuals completed appearance slips and spoke at the hearing. Thirty letters were received from the public within 10 days of the hearing (4:30 pm, November 9, 2007). A majority of the Issues raised as a result of the hearing pertained to use of the lake, noise, privacy, exotic species, well water, wastewater, developments away from the "bank" and other issues. These issues are more appropriately addressed under local zoning rules or through other Department authorities. A request was made that the Department complete an Environmental Assessment (EA) under Chapter NR 150, Wis. Adm. Code. Since grading is a Type IV action under Section NR 150.03(8)(f)2, Wis. Adm. Code, this EA is not required. Issues raised regarding water quality, grading on the bank or erosion control may be addressed through permit conditions. The issue of aesthetics or natural scenic beauty was also raised. The Department considers natural scenic beauty a public interest in the respect that impacts to it are reviewed for grading applications. The proposed site of the Squash Lake Bible Camp is not a unique site on the lake. Other sites have been developed on steep gradients, some with manicured lawns to the water's edge. Many lots on the lake contain large homes or other buildings readily visible from the lake and from the opposite shorelines. The Squash Lake Bible Camp proposes to screen the building from the lake's viewshed using native vegetation to the extent possible. The Department concludes that the impact to natural scenic beauty will not be significant if the applicant complies with the permit conditions and their plan to screen the development using native vegetation.

7. The Department of Natural Resources and the applicant have completed all procedural requirements and the project as permitted will comply with all applicable requirements of Sections 1.11, 30.19(1g)(c), Wisconsin Statutes and Chapters NR 102, 103, 115, 116, 117, 150, 299 of the Wisconsin Administrative Code.

CONCLUSIONS OF LAW

1. The Department has authority under the above indicated Statutes and Administrative Codes, to issue a permit for the construction and maintenance of this project.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that the Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions shall be filed. For judicial review of a decision pursuant to sections 227.52 and 227.53, Wis. Stats., you have 30 days after the decision is mailed, or

otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

To request a contested case hearing of any individual permit decision pursuant to section 30.209, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources, P.O. Box 7921, Madison, WI, 53707-7921. The petition shall be in writing, shall be dated and signed by the petitioner, and shall include as an attachment a copy of the decision for which administrative review is sought. If you are not the applicant, you must simultaneously provide a copy of the petition to the applicant. If you wish to request a stay of the project, you must provide information, as outlined below, to show that a stay is necessary to prevent significant adverse impacts or irreversible harm to the environment. The filing of a request for a contested case hearing is not a prerequisite for judicial review and does not extend the 30-day period for filing a petition for judicial review. If you are not the permit applicant, you must provide a copy of the petition to the permit applicant at the same time that you serve the petition on the Department.

A request for contested case hearing must meet the requirements of section 30.209, Wis. Stats., and section NR 310.18, Wis. Adm. Code, and must include the following information:

1. A description of the Department's action or inaction which is the basis for the request; and,
2. A description of the objection to the decision that is sufficiently specific to allow the department to determine which provisions of Chapter 30, Wis. Stats., may be violated; and
3. A description of the facts supporting the petition that is sufficiently specific to determine how you believe the project may result in a violation of Chapter 30, Wis. Stats.; and,
4. Your commitment to appear at the contested case hearing, if one is granted, and present information supporting your objection.
5. If the petition contains a request for a stay of the project, the petition must also include information showing that a stay is necessary to prevent significant adverse impacts or irreversible harm to the environment.

Dated at Northern Region Headquarters, Wisconsin on November 15, 2007.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES
For the Secretary

By James Grafelman
James Grafelman
Water Management Specialist

APPENDIX F

IN THE MATTER OF THE

ONEIDA COUNTY PLANNING & ZONING COMMITTEE MEETING

TRANSCRIPT OF PROCEEDINGS CONCERNING

AGENDA ITEM NUMBER 4:

Conditional Use Permit Application

Submitted by Arthur G. Jaros, Jr., Applicant.

DATE: July 29, 2009

TIME: 1:00 p.m.

PLACE: Oneida County Courthouse
County Board Room
Rhinelander, Wisconsin

Reported by Holly J. Ford, RMR

APPEARANCES:

Planning and Zoning Committee Members
Scott Holewinski, Chairman
Ted Cushing
Charles Wickman
Franklin Greb
Larry Greschner

Oneida County Corporation Counsel
Brian Desmond

Outside Legal Counsel
Andrew Jones, Attorney at Law
Whyte Hirschbeck Dudek, S.C.
555 E. Wells Street, Suite 1900
Milwaukee, WI 53202-3819

Planning and Zoning Personnel
Karl Jennrich, Director of Zoning
Peter Wegner, Assistant Zoning Director
Steve Osterman, Planning Manager
Nadine Wilson, Land Use Specialist
Kim Gauthier, Secretary

Becher-Hoppe Associates, Inc.
Dave Oberbeck, Architect

Applicant representatives
Arthur G. Jaros, Jr., Attorney at Law
1200 Harger Road
Oak Brook, IL 60523
Randy Jaros
Wes Jaros

Town of Woodboro representative
Gregory J. Harrold, Attorney at Law
Harrold, Scrobell & Daner, S.C.
315 Oneida Street
P.O. Box 1148
Minocqua, WI 54548-1148

P R O C E E D I N G S

CHAIRMAN HOLEWINSKI: We will call the meeting to order. The agenda was properly posted on July 23, 2009. Remind committee members to speak into the microphone so everybody can hear.

Item 2: Approve the agenda.

MR. CUSHING: So move.

MR. GREB: Second.

CHAIRMAN HOLEWINSKI: We have a motion and a second. All those in favor, say "aye."

COMMITTEE MEMBERS: (In unison) Aye.

CHAIRMAN HOLEWINSKI: Opposed? Carried.

Item 3: Approve public hearing meeting minutes of April 29, 2009.

MR. GRESCHNER: So moved.

MR. CUSHING: Second.

CHAIRMAN HOLEWINSKI: Okay. A motion and a second. Is there any corrections or changes? Hearing none all those in favor signify "aye."

COMMITTEE MEMBERS: (In unison) aye.

CHAIRMAN HOLEWINSKI: Opposed? Carried.

Item 4: Conditional Use Permit application submitted by Arthur G. Jaros, Jr., Applicant, consisting of the development of a religious Bible camp identified as Eagle Cove Camp and Conference

subject land for various religious and/or educational purposes given the fact that churches and schools are allowable uses under the current zoning. In other words, the Committee correctly recognized that the Applicant could use the property under its current zoning for substantial components of the overall proposed use by constructing a church or school with limited accessory uses.

Staff does not understand the Committee by its comments during the rezone petition to have indicated that the Applicant could simply resubmit the proposal for the recreational camp virtually unchanged as a Conditional Use Permit application and obtain approval. Mr. Holewinski, staff believes, correctly stated, quote, "maybe not to the magnitude which he has presented, but he could achieve the objective," end quote. The objective would be to allow the Applicant to exercise their religious beliefs, even if not as a recreational camp.

Staff also notes that the Applicant fully understood the Committee's intent at the time of the Committee's denial of the rezone petition (even if he disagreed with the Committee). For instance, in an August 9, 2006, letter to the Chair of the County Board, Mr. Jaros states: Quote, "The Zoning

APPENDIX G

Exhibit 52

Oneida County
Planning & Zoning Department
Courthouse Building
PO Box 400
Rhinelander WI 54501-0400
Telephone 715/369-6130
FAX 715/369-6268
Email: zoning@co.oneida.wi.us

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

August 19, 2009

Arthur G. Jaros, Jr.
1200 Harger Rd.
Oak Brook, IL 60523

RE: Your Conditional Use Permit Application consisting of the development of a religious bible camp identified as "Eagle Cove Camp and Conference Center" for property on Squash Lake, further identified as part of Gov't Lots 2, 3 and 4 and part of the SW NW, Section 24, T36N, R7E, PIN#'s 354-12, 355-1, 356-3, 356-4, 356, 357, 357-5 and 357-4 all in the Town of Woodboro.

Dear Mr. Jaros:

As you are aware the Oneida County Planning and Zoning Committee held a public hearing on your Conditional Use Permit Application on April 29, 2009. The Committee also performed an on-site inspection of your property on June 26, 2009.

The Planning and Zoning Committee met today and finalized their decision to deny your Conditional Use Permit Application. Their decision is based on the Findings of Facts included in the attachment.

If you wish, you may appeal the denial of your application to the Oneida County Board of Adjustment. The form is enclosed and the appeal fee is $500.00. If you intend to appeal you must have the completed form in the office no later than thirty days (30) in receipt of this letter.

Sincerely,

Karl Jennrich
Zoning Director

Cc: Brian Desmond, Oneida County Corporation Counsel
Attorney Andrew Jones
Attorney Greg Harrold
Elmer Goetsch, Secretary Board of Adjustment
Kurt Zalewski, Town of Woodboro Chairman

ONEIDA COUNTY PLANNING AND ZONING COMMITTEE

FINDINGS AND CONCLUSIONS

EAGLE COVE CAMP AND CONFERENCE CENTER
CONDITIONAL USE PERMIT APPLICATION

WHEREAS, the applicant, through its agent, Arthur G, Jaros, Jr., originally submitted an application for a conditional use permit on December 28, 2006 seeking approval to construct a recreational camp (termed a "religious bible camp" by the applicant) on the subject property located in the Town of Woodboro, Oneida County;

WHEREAS, the applicant thereafter provided further submissions to the Committee supplementing its original conditional use permit application on various dates through and including March 4, 2009;

WHEREAS, the application was first deemed complete by the Planning & Zoning Department pursuant to § 9.42(A) of the Oneida County Zoning Code on March 4, 2009;

WHEREAS, an advisory recommendation was thereafter sought by the Committee from the Town of Woodboro pursuant to § 9.42(B) of the Oneida County Zoning Code;

WHEREAS, the Town of Woodboro provided a written advisory recommendation to the Committee on April 23, 2009 recommending that the Committee deny the requested conditional use permit application, which advisory recommendation is incorporated herein by reference;

WHEREAS, the Committee held a duly noticed public hearing regarding the conditional use permit application pursuant to § 9.42(B) of the Oneida County Zoning Code on April 29, 2009, at which public hearing the applicant, the Town, and members of the public were afforded the opportunity to address the Committee regarding the application;

WHEREAS, the Committee determined on April 29, 2009 to extend the time for its review of the conditional use permit application to 180 days from March 4, 2009, the date on which the application was deemed complete, pursuant to § 9.42(C)(1) of the Oneida County Zoning Code;

WHEREAS, the Committee conducted an on-site inspection of the proposed project on June 26, 2009;

WHEREAS, the Committee received a written staff report and recommendation from the Planning & Zoning Department on July 29, 2009, which report and recommendation is incorporated herein by reference;

WHEREAS, the Committee held a duly noticed meeting on July 29, 2009 for the purpose of deliberating and making a final determination regarding the conditional use permit application; and

WHEREAS, following the Committee's deliberations, a motion was duly made and seconded to deny the conditional use permit application, which motion was then unanimously approved by the members of the Committee;

NOW, THEREFORE, the Committee hereby adopts the following findings and conclusions based on its deliberations and decision to deny the conditional use permit application during its meeting of July 29, 2009:

1. With respect to Standard 1 under the General Standards for Approval of a conditional use permit application as set forth in § 9.42(E) of the Oneida County Zoning Code, and for the reasons discussed during the July 29, 2009 Committee meeting, the majority of the Committee concludes that the establishment, maintenance, or operation of the proposed conditional use would not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare;

2. With respect to Standard 2 under the General Standards for Approval of a conditional use permit application as set forth in § 9.42(E) of the Oneida County Zoning Code, and for the reasons discussed during the July 29, 2009 Committee meeting, the majority of the Committee concludes that the uses, values and enjoyment of neighboring property would be substantially impaired or diminished by the establishment, maintenance, or operation of the proposed conditional use;

3. With respect to Standard 3 under the General Standards for Approval of a conditional use permit application as set forth in § 9.42(E) of the Oneida County Zoning Code, and for the reasons discussed during the July 29, 2009 Committee meeting, the Committee unanimously concludes that the proposed conditional use would not be compatible with the use of adjacent land and any adopted local plans for the area. Specifically, and as discussed by the Committee, the land adjacent to the subject property is primarily zoned single family (District 2), and the nature and scope of the project, as ultimately proposed by the applicant, would not be compatible with such single family zoning. In addition, as discussed by the Committee, the Town of Woodboro has adopted a Comprehensive Land Use Plan, and the nature and scope of the project, as ultimately proposed by the applicant, would not be compatible with said Comprehensive Land Use Plan;

4. With respect to Standard 4 under the General Standards for Approval of a conditional use permit application as set forth in § 9.42(E) of the Oneida County Zoning Code, and for the reasons discussed during the July 29, 2009 Committee meeting, the majority of the Committee concludes that the establishment of the proposed conditional use would not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the applicable districts;

5. With respect to Standard 5 under the General Standards for Approval of a conditional use permit application as set forth in § 9.42(E) of the Oneida County Zoning Code, and for the reasons discussed during the July 29, 2009 Committee meeting, the majority of the Committee concludes that adequate utilities, access roads, drainage, and other necessary site improvements have been or would be provided for the proposed conditional use;

6. With respect to Standard 6 under the General Standards for Approval of a conditional use permit application as set forth in § 9.42(E) of the Oneida County Zoning Code, and for the reasons discussed during the July 29, 2009 Committee meeting, the Committee unanimously concludes that adequate measures have been or would be taken to provide ingress and egress to the proposed conditional use so as to minimize traffic congestion in the public streets;

7. With respect to Standard 7 under the General Standards for Approval of a conditional use permit application as set forth in § 9.42(E) of the Oneida County Zoning Code, and for the reasons discussed during the July 29, 2009 Committee meeting, the Committee unanimously concludes that the proposed conditional use would not conform to the applicable regulations of the district in which it would be located. Specifically, and as discussed by the Committee, the subject property is zoned single family (District 2) and residential farming (District 4), and the nature and scope of the project, as ultimately proposed by the applicant, would not be compatible with such zoning. In this respect, the Committee notes and specifically approves of the discussion of this subject and the prior communications between the Committee and the applicant on this subject as set forth by the Department in its written staff report;

8. With respect to Standard 8 under the General Standards for Approval of a conditional use permit application as set forth in § 9.42(E) of the Oneida County Zoning Code, and for the reasons discussed during the July 29, 2009 Committee meeting, staff informed the Committee that the Planning & Zoning Department had concluded that the proposed conditional use would not violate any shoreland or floodplain regulations governing the subject property, and the Committee accepts the Department's conclusions;

9. With respect to Standard 9 under the General Standards for Approval of a conditional use permit application as set forth in § 9.42(E) of the Oneida County Zoning Code, and for the reasons discussed during the July 29, 2009 Committee meeting, the majority of the Committee concludes that adequate measures have been or would be taken to prevent and control water pollution, including sedimentation, erosion, and runoff with respect to the proposed conditional use;

10. For the above reasons, the Committee unanimously concludes that the denial of the conditional use permit application is warranted under the General Standards for Approval of a conditional use permit application as set forth in § 9.42(E) of the Oneida County Zoning Code;

11. For the reasons discussed during the July 29, 2009 Committee meeting, and based on the information provided by the Department in its written staff report, the Committee unanimously concludes that other locations exist in the County where the applicant could obtain approval to construct a recreational camp as proposed in the present application, whether religious or not;

12. For the reasons discussed during the July 29, 2009 Committee meeting, and based on the information provided by the Department in its written staff report, the Committee unanimously concludes that a denial of the conditional use permit application would not make the religious exercise of the applicant effectively impracticable. Specifically, the Committee notes the availability of other land within the County where recreational camps, whether

religious or not, are allowable uses and that uses such as churches and religious schools are allowable based on the current zoning of the subject property;

13. For the reasons discussed during the July 29, 2009 Committee meeting, and based on the information provided by the Department in its written staff report, the Committee unanimously concludes that there are no alternative, less restrictive means of effectuating the reasons for a denial of the conditional use permit application;

14. For the reasons discussed during the July 29, 2009 Committee meeting, and based on the information provided by the Department in its written staff report, the Committee unanimously concludes that religious uses are allowed in the zoning districts in place on the subject property. The Committee notes, for instance, that uses such as churches and religious schools are allowable based on the current zoning of the subject property;

15. For the reasons discussed during the July 29, 2009 Committee meeting, and based on the information provided by the Department in its written staff report, the Committee unanimously concludes that the Oneida County Zoning Code does not treat religious land uses less favorably that nonreligious land uses;

16. For the reasons discussed during the July 29, 2009 Committee meeting, and based on the information provided by the Department in its written staff report, the Committee unanimously concludes that the Zoning Code is not written in such a way as to effectively prevent religious land uses from locating in the County;

17. For the reasons discussed during the July 29, 2009 Committee meeting, and based on the information provided by the Department in its written staff report, the Committee unanimously concludes that religious land uses are not excluded from the Town of Woodboro;

18. For the reasons discussed during the July 29, 2009 Committee meeting, and based on the information provided by the Department in its written staff report, the Committee unanimously concludes that Oneida County has previously granted conditional use permits allowing religious exercise in the zoning districts in place on the subject property;

19. For the reasons discussed during the July 29, 2009 Committee meeting, and based on the information provided by the Department in its written staff report, the Committee unanimously concludes that Oneida County has not previously treated nonreligious recreational camps differently than religious recreational camps in applying the Oneida County Zoning Code; and

20. For the reasons discussed during the July 29, 2009 Committee meeting, and based on the information provided by the Department in its written staff report, the Committee unanimously concludes that the Zoning Code has not otherwise been selectively enforced against religious land uses.

FURTHER, the Committee hereby directs the Department to provide written notice to the applicant of the denial of the subject conditional use permit application, attaching these Findings and Conclusions as the reasons for the denial and providing the applicant with notice of its right to appeal the denial to the Oneida County Board of Adjustment.

Approved by the Planning and Zoning Committee this 19th day of August, 2009.

Vote Required: Majority = _____ 2/3 Majority = _____ ¾ Majority = _____

Offered and passage moved by:

Supervisor

Supervisor

Supervisor

Supervisor

Supervisor

APPENDIX H

Exhibit 54

DECISION
of the
ONEIDA COUNTY BOARD OF ADJUSTMENT

Post Office Box 400, Rhinelander, WI 54501-0400

FINDINGS OF FACT

Case No:	09-005
Appeal Date:	September 16, 2009
Public Notice Dates:	On file
Certificates of Publication:	On file
Site Inspection Date:	No site inspection was conducted
Public Hearing Dates:	December 1, 2009 and January 12, 2009

1. The Appellants are:

Eagle Cove Camp and Conference Center, Inc., a Wisconsin non-stock corporation (f/k/a Squash Lake Christian Camp, Inc.); Arthur G. Jaros, Jr., Wesley A. Jaros and Randall S. Jaros, as Co-Trustees of the Arthur G. Jaros, Sr,. and Dawn L. Jaros Charitable Trust; Arthur G. Jaros, Jr., as Trustee of the Arthur G. Jaros, Sr., Declaration of Trust; and Arthur G. Jaros, Jr., as Trustee of the Dawn L. Jaros Declaration of Trust; 1200 Harger Road, Suite 830, Oak Brook, Ill 60523.

2. The Appellants were represented by Attorney Arthur G. Jaros, Jr. and Attorneys Roman P. Storzer and Robert L. Greene with Attorney Lillian Bearns, of Storzer & Greene, P.L.L.C. Oneida County (the County) was represented by Corporation Counsel Brian Desmond and Attorney Andrew A. Jones of Whyte Hirschboeck Dudek, S. C. The Town of Woodboro was represented by Attorney Gregory J. Harrold of Harrold, Scrobell & Danner, S.C. Ms. Janet Appling, treasurer of the Squash Lake Association, represented the Association. Attorney John M. Bruce of Schober Schober & Mitchell, S.C., served as independent legal counsel to the Board of Adjustment (the BOA).

3. The properties involved in this appeal are identified as follows:

Property Owners:	As identified in Section 1 above.
Property Locations:	p/o Gov't Lots 2, 3 and 4, and p/o SW NW, all in Section 24, T36N, R7E
Parcel ID Numbers:	354-12, 355-1, 356-3, 356-4, 356, 357, 357-5, 357-4 Town of Woodboro, Oneida County
Property Address:	Fire number not asgd, US Highway West, Rhinelander, WI 54501
Total Property Area:	58.1 acres
Total Lake Frontage:	2402 feet (approx) on Squash Lake
Zoning District(s):	53.72 acres, District 2, Single Family Residential 4.38 acres, District 4, Residential and Farming

4. Appellants appealed to the BOA a decision on July 29, 2009 by the Oneida County Planning and Zoning Committee (the Committee) to deny the Appellants' application for a conditional use permit (CUP) for a Bible camp and conference center to be located on the property identified above. Section 17.04(1), BOA Rules of Procedure, Chapter 17, Oneida County Code, provides that, on appeals from actions of the Committee, *"...the Board shall...render an independent de novo decision."* Therefore the appeal was considered by the BOA as an application for a CUP.

5. Appellants asserted that they were entitled to develop and operate the proposed facility at the desired location in order to freely exercise their religion on their privately owned lands as specifically enforced by the Federal Religious Land Use and Institutionalized Persons Act of 2000, 42 USC (RLUIPA). Pertinent portions of Sec 2 of RLUIPA read as follows:

"GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

"(A) is in furtherance of a compelling governmental interest; and

"(B) is the least restrictive means of furthering that compelling governmental interest."

"EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.'

"NONDISCRIMINATION- No Government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."

"EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that–

"(A) totally excludes religious assemblies from a jurisdiction; or

"(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

6. RLUIPA Sec. 5(e) states *"GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE- A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden."*

7. As a result of communication among counsel for the BOA and the Appellants, and with interested parties or their attorneys, it was agreed that the BOA would address and decide two issues prior to any site inspection or evidentiary hearing in the appeal. At a public meeting on November 10, 2009 the BOA agreed to this procedure, and that the two preliminary issues to be determined were as follows:

a. "May the Board find, in this case, that the Oneida County Zoning and Shoreland Protection Ordinance (the Ordinance) violates the Federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), or, alternatively, based on RLUIPA, may the Board, in this case, approve an "exemption" to the Ordinance?"

b. "Is the proposed Camp & Conference Center an allowed conditional use within the meaning of Sec. 9.22(D)(10) of the Ordinance, i.e. a church, school, library, community building or museum?"

8. The BOA further decided at its November 10, 2009 meeting that it would hold a public hearing regarding these issues on December 1, 2009.

9. The BOA through its counsel invited the Appellants, the County, the Town of Woodboro and the Squash Lake Association to submit written letter briefs addressing those issues. In response, briefs were submitted prior to the December 1, 2009 hearing.

10. At the hearing on December 1, 2009, the BOA heard oral argument from the Appellants, the County, the Town of Woodboro and the Squash Lake Association, and heard public comment, regarding the preliminary issues. In addition, by motions made, seconded and duly adopted by the BOA, the record of previous action on the Appellants' CUP application by the Planning and Zoning Department and the Committee was entered into the record, as were written comment and materials presented at the hearing and the written briefs submitted prior to the hearing. After such argument and comments, the public hearing was closed, and on motion duly made, seconded and adopted, the BOA adjourned to meet and deliberate on January 12, 2010.

11. As described in the CUP application and further explained at the hearing on December 1st, the proposed use of the property would be as a year-around "Bible camp and conference center"along the shore of the 396 acre Squash Lake. It would have a single principal structure ("lodge"). The camp would include, but not be limited to, lodging; chapel; classrooms and conference center; commercial kitchen, cafeteria and dining hall; gymnasium; soccer field, baseball field, archery range; and swimming, boating and water skiing facilities. A self-propelled "train" would transport persons to the lodge from a visitors' center just off US Highway 8. Several hundred persons could be in residence at any one time. Evidence was submitted that the proposed use must be licensed as a "recreational/educational camp" by the State of Wisconsin.

12. At the BOA hearing on December 1, 2009, Appellants took the position that the BOA did not have the authority to repeal applicable ordinances of the County nor to amend those ordinances. This was also the position of the County and the Town of Woodboro. It is consistent with court rulings in ***Kmiec v. Town of Spider Lake,*** 60 Wis.2d 640, 211 N.W.2d 471 (1973) and ***Ledger v. Waupaca Board of Appeals,*** 430 N.W.2d 370 (Ct. App. 1988).

13. Sec. 17.01(9) of the Oneida County Code of Ordinances, Chapter 17, BOA Rules of Procedure, states: *"Nothing herein shall be construed to give or grant to the Board the authority to alter or change the zoning ordinance or zoning or other official maps of the County, which authority is reserved to the County Board of Supervisors."*

14. Sec. 9.80(A) of the Ordinance states that *"The Oneida County Board of Supervisors is responsible for the enactment, amendment and repeal of the Oneida County Zoning and Shoreland Protection Ordinance."*

15. The Appellants desire to locate the proposed camp and conference center primarily in Zoning District 2, Single Family Residential. Section 9.22(A) of the Ordinance specifies that *"The purpose of the Single Family Residential District is to provide an area of quiet seclusion for families. This is the County's most restrictive residential zoning classification. Motor vehicle traffic should be infrequent and people few."* Sec. 9.22(D) of the Ordinance allows the following uses in District 2 upon issuance of a CUP:

1. *Churches, schools, libraries, community buildings and museums.*
2. *Community living arrangements with nine or more residents. The County may review the CUP after issuance, pursuant to Sec. 59.69, Wis. Stats.*
3. *Governmental uses.*
4. *Bed and breakfast establishments with three or more guest rooms.*
5. *Public parks and playgrounds.*
6. *Preexisting, licensed resorts, hotels, motels and tourist rooming houses, individual unit replacements or expansions consistent with the number and/or square footage permitted under Appendix (to the Ordinance).*

16. The Ordinance does not define the words "church" or "school." It does define "recreation camps" as *"areas of land improved with buildings or tents, and sanitary facilities used for the accommodation of groups for educational or recreational purposes."* Recreational camps have not previously been allowed by the County in the zoning districts in which this property is located. However, recreational camps, whether secular or religious, are allowed, and do exist, in other zoning districts in the County.

17. Appellants indicated that they do not desire to operate a church or school, but, rather, propose to operate a "bible camp and conference center" on the property. Appellants argued, however, that their proposed use of the property could be construed as a church or school under the Ordinance. The County, Town of Woodboro and the Squash Lake Association argued to the contrary.

18. At its meeting on January 12, 2010, the BOA deliberated and, on motions duly made, seconded and adopted, by unanimous vote orally made its determinations with respect to the preliminary issues to be addressed, with a specific written decision to be approved at a public meeting on February 11, 2010.

CONCLUSIONS OF LAW

19. Based on the written and oral arguments made and the entire record in this matter, the BOA concludes the following:

a. The BOA has no authority to repeal or amend the Ordinance nor to determine the constitutionality of that Ordinance. This is clear from the language of the Ordinance itself, which reserves such authority in the Oneida County Board of Supervisors, and is consistent with Wisconsin case law.

b. The BOA is obligated to apply RLUIPA in rendering its decision in this appeal.

c. The BOA has authority under RLUIPA to change a policy or practice *"that results in a substantial burden on religious exercise, ... by providing exemptions from the policy or practice for applications that substantially burden religious exercise..."*

d. Given the nature and extent of the proposed use taken as a whole, and especially the fact that it is to provide overnight lodging and a campground for hundreds of persons in addition to conference facilities, a chapel and classrooms, commercial meal services and a cafeteria, and extensive facilities for various forms of indoor and outdoor recreational activity, the proposed use cannot reasonably be deemed either a "church" or a "school," even on a broad interpretation of those words. To interpret such words to include the proposed use in its entirety would be inconsistent with the clearly stated intent of Zoning District 2 in which the great majority of the proposed use is to be located, i.e., a single family residential district. By the terms of the Ordinance, the stated purpose of District 2 is *"to provide an area of quiet seclusion for families,"* and that the district is *"the county's most restrictive residential zoning classification."* The BOA concludes that Zoning District 2 does not contemplate a use of the nature or extent described in the CUP application as a conditional use, regardless of whether such a use is secular or religious. The proposed use is more accurately considered a "recreational camp" as defined by the Ordinance and licensed by the State as a "recreational/educational camp." That is not a use allowed as a permitted or conditional use in either Zoning Districts 2 or 4.

e. Zoning District 2, Single Family Residential, does not prohibit religious exercise, as it allows for use of property for a "church" or "school" upon issuance of a CUP in that district.

f. The Appellants have not demonstrated that Sec. 9.22 of the Ordinance imposes a substantial burden on religious exercise. The terms of the Ordinance are not such as would impose a direct, primary and fundamental responsibility for rendering religious exercise impracticable in this case. The fact that the Ordinance does not allow for the operation of a religious "camp and conference center" of the kind proposed by Appellants in a single family residential district does not in itself establish that it imposes such a substantial burden, or that it violates RLUIPA in any other respect. RLUIPA does not require that Appellants be allowed to engage in religious exercise of the kind proposed by the Appellants on the specific property in question. There is no evidence that non-religious uses allowed by the Ordinance as conditional uses are favored over religious uses.

g. In this case, the Ordinance is not in violation of RLUIPA and no exemption from terms of the Ordinance is justified.

h. The proposed use does not constitute a permitted conditional use in either Zoning District 2 or 4. Because an exemption to the Ordinance is not justified under RLUIPA, in this case the BOA cannot grant a CUP as requested by the Appellants.

ORDER AND DETERMINATION

20. Based on the testimony, argument, evidence and record of this matter, and the above Findings of Fact and Conclusions of Law, the Oneida County Board of Adjustment orders that the conditional use permit application of the Eagle Cove Camp and Conference Center, Inc. is denied and the prior decision of the Oneida County Planning and Zoning Committee to deny the permit application is affirmed.

CERTIFICATION OF DECISION

21. On February 11, 2010, by unanimous vote the Board approved this written decision drafted by Attorney John M. Bruce, independent counsel to the Board.

FOR THE ONEIDA COUNTY BOARD OF ADJUSTMENT:

ELMER A. GOETSCH
Secretary

Copies furnished: Appellants, Attorney Arthur G. Jaros, Jr.; Wesley A. Jaros; Randall S. Jaros; Oneida County Planning & Zoning Committee; Oneida County Zoning Director; Oneida County Corporation Counsel Brian Desmond; Attorney Andrew A. Jones; Attorney Roman P. Storzer; Attorney Robert L. Greene; Attorney Gregory J. Harrold; Squash Lake Association; DNR Northern Region, Members of Board of Adjustment; Attorney John M. Bruce; Town of Woodboro Clerk; Rhinelander Daily News; Lakeland Times; Vilas County News-Review; Hodag Buyer's Guide/Our Town; WOBT/WRHN Radio; WHDG Radio; WXPR Public Radio; WJFW TV-12.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EAGLE COVE CAMP & CONFERENCE CENTER INC., a Wisconsin non-stock corporation; ARTHUR G. JAROS, JR., individually and as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, and as trustee of the Arthur G. Jaros, Sr. declaration of trust, and as trustee of the Dawn L. Jaros declaration of trust; WESLEY A. JAROS, as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros charitable trust; RANDALL S. JAROS, individually and as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros charitable trust; CRESCENT LAKE BIBLE FELLOWSHIP, a Wisconsin non-stock corporation; and KIM WILLIAMSON,

Plaintiffs,

vs.

TOWN OF WOODBORO, Wisconsin, a body corporate and politic; COUNTY OF ONEIDA, Wisconsin, a body corporate; and ONEIDA COUNTY BOARD OF ADJUSTMENT,

Defendants.

OPINION AND ORDER

10-cv-118-wmc

This action concerns the impact of zoning and land use regulations adopted by the Town of Woodboro and the County of Oneida on a group that believes they have been called to build a large, year-round Bible camp on a specific piece of land located on a northern Wisconsin lake. After unsuccessfully petitioning for permanent rezoning of the land, plaintiffs applied for a conditional use permit. When this, too, was denied, plaintiffs turned to this federal court for relief under various provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), certain provisions of the United States and Wisconsin Constitutions, the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, the Rehabilitation Act, 29 U.S.C. § 794, and a

state law claim for certiorari review pursuant to Wisconsin Statute § 59.694(10). Presently before the court are defendants' motions for summary judgment as to all claims and plaintiffs' motion for summary judgment as to their RLUIPA Total Exclusion claim.

The court has no reason to doubt plaintiffs', and particularly the Jaros brothers', sincere belief that they have been called to build a Bible camp on the land in issue -- and is aware of the years, talents and money spent, as well as dedication shown, in pursuit of that belief. Patently obvious is this court's inability to discern whether plaintiffs' utter lack of success to date is God's way of telling them -- through admittedly-imperfect, secular institutions -- to look elsewhere for a more acceptable location. Ultimately, only God knows if they should continue to knock at this particular door or look for an open window somewhere else. What appears substantially more certain, at least to this court, is that plaintiffs have no right to relief under RLUIPA, the United States Constitution or the Wisconsin Constitution. Indeed, as set forth below, the undisputed facts demonstrate that plaintiffs do not meet their burden of establishing all the elements of proof under any of their claims. Accordingly, the court will grant summary judgment to defendants.

UNDISPUTED FACTS[1]

A. Overview

1. The Parties

Plaintiffs consist of Eagle Cove Camp & Conference Center, Inc., a non-stock, Wisconsin corporation formed on December 27, 2004, and approved by the Internal Revenue System as a § 501(c)(3) charitable organization and private operating foundation. Plaintiff Arthur G. Jaros, Jr. is a co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, ("Charitable Trust"), successor trustee under the Arthur G. Jaros, Sr. Declaration of Trust and successor trustee under the Dawn L. Jaros Declaration of Trust. Arthur's brothers Wesley A. Jaros and Randall S. Jaros are also plaintiffs and co-trustees of the Charitable Trust. The Charitable Trust was established in 2002.

Plaintiff Crescent Lake Bible Fellowship ("CLBF") is a non-stock, Wisconsin corporation. CLBF has operated a Bible camp in the area since the 1930s. Plaintiff Kim Williamson is an employee of CLBF. On August 13, 2006, the Jaros brothers entered into an Operating Agreement with CLBF.

Defendant Town of Woodboro is located in Oneida County, Wisconsin, and possesses the authority of a township conferred by Chapter 60 and other provisions of the Wisconsin Statutes. The Town is comprised of roughly 21,857 acres of land or 34.6 square miles and 2.4 square miles of water, all lying within Oneida County. As of the

[1] Based on the submissions of the parties, the following facts appear to be material and undisputed.

2000 federal census, the Town's population was 685 persons. As of January 1, 2010, the Wisconsin Department of Administration estimated the Town's population to be 756 persons.

Defendant County of Oneida is a body corporate under Wis. Stat. § 59.01, situated entirely within the State of Wisconsin and within a geographic region with an abundance of lakes and forests.[2] Defendant Oneida County Board of Adjustment is a board authorized by Wis. Stat. § 59.694 and created by action of the County of Oneida. This county is comprised of roughly 708,751 acres of land (excluding the City of Rhinelander, which lies within its boundaries).

2. The Subject Property

The Jaros family has owned property on Squash Lake in the Town of Woodboro and the County of Oneida for over sixty years, consisting of two principal parcels of land (the "Subject Property" or "Property"). The largest part of the Property, approximately 29 acres, was deeded to Eagle Cove (under its prior name, Squash Lake Christian Camp, Inc.) by the Charitable Trust on December 30, 2004, at an appraised value of $400,000. Eagle Cove has owned this land since that time. The Charitable Trust also holds -- and at all times relevant to this lawsuit has held -- an ownership interest in approximately five acres contiguous to Eagle Cove's 29 acres. The Jaros family has no desire to sell either of these two parcels.

[2] The parties point out that this region is sometimes colloquially referred to as "The Northwoods," though in this court's experience mainly by those attempting to market the area or by people who do not actually live there full-time.

The Subject Property as a whole contains both "shoreland" and non-"shoreland" areas, as those terms are defined by Wisconsin law.[3] Between 550 and 600 feet of this Property is lake frontage on Squash Lake, an approximately 400-acre clear water, publicly-owned inland lake. The Property is directly serviced by United States Highway 8, a major east-west artery running across northern Wisconsin.

The Charitable Trust holds assets totaling in excess of $2,000,000 in value, which must be devoted exclusively for the use of charitable, religious, and educational purposes consistent with its status as a § 501(c)(3) entity, with special emphasis on "the purpose of dissemination of the word of God by any and all legitimate means," although it does not require that the assets be devoted exclusively for the purposes of a Bible camp. (Count's MSJ, Ex. 26 (dkt. #63-26) 3-4; *id.*, Ex. 25 (dkt. #63-25) 64-67.) The Arthur G. Jaros, Sr. Declaration of Trust and the Dawn L. Jaros Declaration of Trust also hold title to an additional 24 acres of undeveloped land directly north of the Subject Property. The assessed value of this land totals approximately $1,552,000, which plaintiffs also intend to use for the benefit of the proposed Bible-camp by (1) deeding one acre to Eagle Cove; (2) granting an easement to Eagle Cove to construct an access road between U.S. Highway 8 and the camp facilities; and (3) allowing the camp to use the land for passive recreation activities. The Jaros family also has no desire to sell this land.

[3] For zoning purposes, "shorelands" are defined as land within 1,000 feet of the ordinary high-water mark of lakes, ponds, or flowages and within 300 feet of the ordinary high-water mark of rivers and streams. *See* Wis. Stat. § 50.692(1)(b).

3. The Planned Bible Camp

Plaintiffs are motivated by their faith to develop the proposed Bible camp. The Operating Agreement between Eagle Cove and CLBF includes a doctrinal statement that the purpose of the Bible camp is to act

> based on the teachings of God's Word, a Christian Bible Camp within that certain Protestant tradition within the Christian religion and broadly described and known as "evangelical" for the purposes of evangelizing non-Christians, providing opportunities to worship the triune God in the special setting of the beauty of His Northwoods creation and with due consideration and respect for the residents of Squash Lake, fostering discipleship and sanctification and equipping Christians for the work of ministry and for the apologetics task . . . .

(Pls.' PFOFs, Ex. E (dkt. #61-5) 1; *see also id.* at 6, 9 (describing the purpose of the camp as providing religious assembly and exercise).)

The Bible camp's mission is summarized in terms of "Five Purposes": (1) "Worship," meaning worshiping God through various aspects, including preaching and singing, and exulting God in his name; (2) "Discipleship," which means encouraging growth in the life of a believer; (3) "Fellowship," meaning associating with other believers of like mind, sharing struggles and comradery with other believers; (4) "Outreach/Evangelism," which means sharing the Gospel with others; and (5) "Service," meaning to help and bless other people. These Five Purposes are an important part of plaintiffs' religious beliefs, and plaintiffs wish to impart these religious beliefs to campers.

In this way, plaintiffs seek to "save unbelievers" at the Bible camp, as they are obligated to do by the "Great Commission" passage in the Book of Matthew.[4]

Specifically, plaintiffs believe that the Great Commission includes constructing and operating a Bible camp to disseminate God's word on a lake -- just as Jesus did in preaching around the Sea of Galilee -- where baptisms can be performed. Even more specifically, the Jaros brothers believe that their religion mandates them to build the Bible camp *on the Subject Property*.

The planned Bible camp is to be a year-round facility, with one principal structure, a multi-function lodge building. This building will include a chapel, classrooms for religious instruction, boarding accommodations, food service facilities, and recreational amenities. The activities will involve evangelism, worship, prayer, meditation, devotional scripture reading, discipleship and role-modeling, as well as Christian educational instruction. The camp will be open to 250 to 300 children and adults, offering pastoral and other religious retreats. Plaintiffs also intend to minister to children with various serious disabling medical conditions, and plaintiffs have considered that purpose in

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[4] Matthew 28:16-20:

> Then the eleven disciples went to Galilee, to the mountain where Jesus had told them to go. When they saw him, they worshiped him; but some doubted. Then Jesus came to them and said, "All authority in heaven and on earth has been given to me. Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you. And surely I am with you always, to the very end of the age."

designing the Bible camp to be a safe and secure environment for children with serious disabling medical conditions.

B. Land Use Regulation Scheme in Oneida County and Town of Woodboro

Plaintiffs' use of the Property is subject to the laws and regulations of both the County and the Town of Woodboro, including the Oneida County Zoning and Shorewood Protection Ordinance (the "Zoning Code"), which was enacted effective May 15, 2000, pursuant to the authority granted the County under Wis. Stat. § 59.69. But for the Town's adoption of the Zoning Code, no conditional use permit or rezoning would have been required to construct and operate the proposed Bible camp on the non-"shoreland" portion of the Property.

1. Zoning Districts

Sixteen of the twenty towns in Oneida County, including the Town of Woodboro, have approved the Zoning Code pursuant to Wis. Stat. § 59.69(5). The Town of Woodboro formally adopted the Zoning Code on May 8, 2001. The Code describes fourteen separate zoning "Districts":

1. Forestry 1-A (District 1-A)
2. Forestry 1-B (District 1-B)
3. Forestry 1-C (District 1-C)
4. Single Family Residential (District 2)
5. Multiple Family Residential (District 3)
6. Residential and Farming (District 4)
7. Recreational (District 5)
8. Business B-1 (District 6)
9. Business B-2 (District 7)
10. Manufacturing and Industrial (District 8)
11. General Use (District 10)
12. Shoreland-Wetland (District 11)

13. Residential and Retail (District 14)
14. Rural Residential (District 15)

2. Conditional Use Permitting Process

Within each zoning district, various land uses are categorized as (1) permitted, (2) administrative review and (3) conditional uses. Permitted uses for a zoning district are those land uses that are allowed in the district with a building permit.[5] Administrative review uses for a zoning district are those land uses that are allowed in the district only with an administrative review permit issued by the Oneida County Planning and Zoning Department (the "Planning and Zoning Department").[6] Administrative review uses must be compatible with the permitted uses for a given zoning district and generally include specific conditions to fulfill the purpose of the district and the Zoning Code. Conditional uses for a zoning district are those land uses that are allowed in the district only with a conditional use permit issued by the Oneida County Planning and Zoning Committee (the "Planning and Zoning Committee").[7]

Because of their unique characteristics, conditional uses are allowed in a given zoning district only after specific steps are taken to consider their impact under the

[5] There is an exception to this. Under § 9.35(c) of the Code, the Zoning Administrator has unreviewable power to decree that a permitted use shall instead be treated as an administrative review if it is "likely to have significant impact on surrounding property or on the provision of governmental services." (County's MSJ, Ex. 13 (dkt. #63-13) § 9.35(C).)

[6] In certain circumstances an application for an administrative review permit may be considered as one for a conditional use.

[7] A conditional use permit can also be issued by the Oneida Board of Adjustment and/or by a court of competent jurisdiction. Wis. Stat. § 59.694(10).

Zoning Code. The Planning and Zoning Department initially reviews a conditional use permit application to determine if it is complete. To be deemed complete, all permits required by the Wisconsin Department of Natural Resources and U.S. Army Corps of Engineers must be submitted with the conditional use permit application.[8] Then the Planning and Zoning Committee seeks an advisory recommendation from the town in which the proposed conditional use is located and holds a public hearing on the application. Finally, certain standards must be met before a conditional use permit is approved:

1. The establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, morals, comfort or general welfare.

2. The uses, values and enjoyment of neighboring property shall not be substantially impaired or diminished by the establishment, maintenance or operation of the conditional use.

3. The proposed conditional use is compatible with the use of adjacent land and any adopted local plans for the area.

4. The establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.

5. Adequate utilities, access roads, drainage and other necessary site improvements have been or will be provided for the conditional use.

6. Adequate measures have been or will be taken to provide ingress and egress so as to minimize traffic congestion in the public streets.

7. The conditional use shall conform to all applicable regulations of the district in which it is located.

[8] The parties dispute whether certain other permits must be submitted for the permit application to be deemed complete.

8. The conditional use does not violate shoreland or floodplain regulations governing the site.

9. Adequate measures have been or will be taken to prevent and control water pollution, including sedimentation, erosion and runoff.

(County's MSJ, Ex. 1 (dkt. #63-1) § 9.42(E).)

3. Petition for Rezoning Process

Under the Zoning Code, when reviewing a petition for rezoning, the Planning and Zoning Committee and the County Board must consider the following factors:

1. Whether the change is in accord with the purpose of this ordinance.

2. Whether the change is consistent with the land use plans of the County, the affected town, and towns adjacent to the affected town.

3. Whether conditions have changed in the area generally that justify the change proposed in the petition.

4. Whether the change would be in the public interest.

5. Whether the character of the area of neighborhood would be adversely affected by the change.

6. Whether the uses permitted by the change would be appropriate in the area.

7. Whether the town board of the town in which the change would occur approves of the change.

8. The size of the property that is the subject of the proposed change.

9. Whether the area to be rezoned is defined by recognizable or clearly definable boundaries such as those found in U.S.G.S. Land Officer Survey maps or recorded plant, or those created by highways, railroad rights-of-way, meandering streams or lakes.

10. Position of affected landowners.

(*Id.* at § 9.86(F).)

4. The Town's Land Use Programs

The Town of Woodboro has a number of other programs directly and indirectly affecting land use within the Town. The Town of Woodboro adopted the "Woodboro Land Use Plan" on November 11, 1997. Oneida County amended its Zoning Map to be consistent with the Town's Land Use Plan in 1998. This Plan neither expressly contemplates Bible camps, whether year-round or seasonal, nor other religious land uses. (The significance, if any, of this express omission is in dispute.) The Town of Woodboro Land Division Ordinance establishes minimum lot size for newly-platted parcels and some minimum road standards.

During the plaintiffs' application process for a conditional use permit to operate the Bible camp, the Town of Woodboro developed a Comprehensive Plan pursuant to Wisconsin Statutes Chapter 66. Adopted in April 2009, this Comprehensive Plan states as a policy: "The Town should encourage low density single family residential development for its lake- and river-front properties." (County's MSJ, Ex. 19 (dkt. #63-19) 14.) While the Comprehensive Plan was in draft form, Eagle Cove submitted to the Town a written comment letter in early February 2009, which criticized the draft for omission of religious land uses of any kind. The parties dispute whether the Comprehensive Plan regulates land use, as well as whether the Comprehensive Plan's failure to allow Bible camps expressly in the Town of Woodboro means that plaintiffs' proposed Bible camp is not permitted in the Town.

The Town actively participates in County zoning and subdivision review decisions that may affect the Town, including (1) zoning amendment and subdivision requests

acted on by the County Planning and Zoning Committee, and (2) variance and conditional use requests acted on by the County Zoning Board of Adjustment. The Town's Plan Commission reviews zoning applications and makes formal recommendations to the Town Board, which forwards a decision to Oneida County for consideration. The Town's 30(b)(6) designee testified that he could not recall the County ever rejecting the Town's recommendation for a petition for rezoning.

C. Breakdown of Zoning in County and Town

1. Zoning Districts

Roughly 57.47% of the land in the Town of Woodboro is zoned Forestry 1-A. (No land in the Town is zoned Forestry 1-B.) Seasonal, recreational camps -- whether religious or secular -- and religious shrines are categorized as "administrative review" uses in the Forestry 1-A and 1-B zoning districts.[9] Campgrounds -- whether religious or secular -- are categorized as conditional uses in the Forestry 1-A and 1-B zoning districts.

Approximately 16% of the County's land (excluding the City of Rhinelander) is zoned General Use (District 10). Recreational camps, seasonal recreational camps, and religious shrines are categorized as administrative review uses; schools and campgrounds are categorized as conditional uses.

[9] With regard to this provision and others, the code limits seasonal recreational camps with "more than one principal structure" to this category. Defendants contend that this language has never been enforced and that seasonal recreational camps, regardless of the number of principal structures, are all categorized as administrative review uses in Forestry 1-A and 1-B districts. (Defs.' Reply to Pls.' PFOFs (dkt. #93) ¶ 71.)

Approximately 10% of the County's land (once again, excluding Rhinelander) and 18% of the Town's land is zoned Single Family Residential (District 2). The stated purpose of District 2 is

> to provide an area of quiet seclusion for families. This is the County's most restrictive residential zoning classification. Minor vehicle traffic should be infrequent and people few.

(County's MSJ, Ex. 1 (dkt. #63-1) § 9.22(A).) Churches, schools, libraries, community buildings, museums, community living arrangements with nine or more residents, governmental uses, bed and breakfast establishments with three or more guest rooms, and public parks and playgrounds are categorized as conditional uses in District 2. There are no objective size restrictions on these conditional uses, but all are subject to approval. Some of these uses may generate significant motor vehicle traffic and noise, at least periodically, though all of these conditional uses are subject to approval within District 2.

Approximately 10% of the County's land (excluding Rhinelander) and 20% of the Town's land is zoned Residential and Farming (District 4). Like in District 2, the same uses -- churches, schools, etc. -- are categorized as conditional uses in District 4. In addition to those uses, a number of other uses, including airports, commercial farming operations, retail businesses, etc., are categorized as conditional uses in District 4. Some of these conditional uses could have greater traffic impacts than a recreational camp. Some of the retail uses allowed conditionally in this district might also be of a size and scale equal to or greater than a recreational camp.

Roughly 3.6% of the County's land (excluding Rhinelander) is zoned Recreational (District 5). In this district, recreational seasonal camps, schools and campgrounds are categorized as conditional uses.

Roughly 0.42% of the County's land (excluding Rhinelander) is zoned Multiple Family Residential (District 3) and a little less than 3% of the land in the County (excluding Rhinelander) and approximately 4.5% of the Town's land is zoned Rural Residential (District 15). Churches and schools also are categorized as conditional uses in these zoning districts.

Less than 1% of the land in the County (excluding Rhinelander) and a little over 1% of the land in the Town is zoned Manufacturing and Industrial (District 8). Religious shrines, churches and schools are categorized as conditional uses in this district.

2. Squash Lake Area

Squash Lake is partially located in the Town of Woodboro and partially located in the neighboring Town of Crescent. The entire lake and both towns are all located in Oneida County. The surface area of Squash Lake comprises approximately 396 acres; the lake's shoreline is approximately 7.8 miles. Before 1976, all of the land surrounding Squash Lake in the Towns of Woodboro and Crescent was zoned General Use. At that time, all of the land within 1,000 feet of Squash Lake was rezoned Single Family Residential, except for the seven parcels described below. These same zoning restrictions were carried forward in a 1998 amendment to the County Zoning Map and again in the 2000 comprehensive re-write of the text of the Zoning Code.

There are a total of 177 parcels designated for real estate tax purposes surrounding Squash Lake. All but one of the 170 parcels zoned Single Family Residential are only licensed for single family use. The one exception is a parcel dedicated in 1974 as a "public park" pursuant to a subdivision plat approved by the Town of Woodboro.[10]

The seven parcels not zoned Single Family Residential (District 2) are zoned Business B-2 (District 7).[11] Six of the seven "business" parcels are located in one area of the lakeshore in Woodboro. These parcels comprise 6.11 acres of developed property with 998 feet of lake frontage, consisting of: (1) a personal home, (2) four cottages (ranging in size from one to three bedrooms), (3) a personal residence, (4) a 4-unit rental apartment building with three 1-bedroom units and one 2-bedroom units, (5) 5-unit rental apartment buildings with two 2-bedroom units and three 1-bedroom units, and (6) a 17-unit apartment building with eleven 2-bedroom units and six 1-bedroom units. The seventh parcel is located in the Town of Crescent and consists of approximately 20 acres of land with 3,823 feet of lake frontage, which was formerly a resort, but has not been in operation since 1999. This parcel is subject to (1) an order issued by the Wisconsin Department of Natural Resources designating it "managed forest land" under Chapter 77 of the Wisconsin Statutes, and (2) a conservation easement with the Northwoods Land Trust.

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[10] This parcel is roughly 0.4 acres in size with approximately 60 feet of lake frontage. The subdivision plat contains a written restriction that states: "The public park shown on this plat shall remain as a permanent green area for the benefit of the public and shall remain forever in its natural state." (Jennrich Decl. (dkt. #48) ¶ 82.)

[11] The seven parcels are comprised of 11 sellable "lots" for real estate purposes, portions of 4 additional "lots" and one twenty-acre tract with approximately 3,800 lineal feet of lake frontage.

D. Plaintiffs' Rezoning and Conditional Use Applications

Part of the Property in dispute is zoned Residential and Farming (District 4); the other part is zoned Single Family Residential (District 2). More generally, the eastern portion of the land dedicated to the Bible Camp nearer to Squash Lake, is zoned Single Family Residential; the western portion nearer to U.S. Highway 8 is zoned Residential and Farming. (The additional 24 acres described above are similarly zoned.) Neither of these zoning districts allows for the proposed camp.

Year-round, recreational camps are permitted in the County of Oneida only on land that is either unzoned or zoned Recreational (District 5) or General Use (District 10). Since neither of these two zoning districts exists anywhere within the Town of Woodboro, there are *no* locations within the Town that currently permit a year-round camp.

In an effort to obtain permission for its Bible camp on the Subject Property, plaintiffs attempted first to obtain rezoning -- December 2005 through August 2006 -- and then a condition use permit ("CUP") -- December 2006 through February 2010. The Town opposed both. The County denied the rezoning petition on August 5, 2006, and the County and the Board of Adjustment denied the CUP on July 29, 2009.

1. Rezone Petition

In October 2005, Arthur Jaros exchanged emails with Steve Osterman of the County Zoning Department regarding the Jaros brothers' desire to construct a Bible camp in Woodboro. Osterman advised Jaros that both a rezone and a conditional use

permit from the County would be required to proceed with the project. The County informed plaintiffs that a rezoning of the Property to District 5 or District 10 would be necessary for the proposed, year-round camp. On December 3, 2005, the plaintiffs filed a petition to rezone the 34 acres of land described above to Recreational District 5. The general reason provided for rezoning was to allow for the construction and operation of a Bible camp and related activities. The petition contained a general description of the planned Bible camp, but did not provide any specifics on its anticipated capacity for campers, the size of the buildings, or the extent of the camp's intended operations.

The County sent a copy of the rezone petition to the Woodboro Town Clerk on December 14, 2005, asking for comments. The Woodboro Town Plan Commission held a public meeting on the petition on February 6, 2006. Arthur Jaros was present and sent a subsequent letter to the Town addressing questions raised during the meeting. On February 20, 2006, the Woodboro Town Plan Commission met again, discussed the rezone petition and voted to recommend to the Town Board that the Town submit a negative recommendation to the County. On March 14, 2006, the Town Board met to discuss the petition. Arthur Jaros was given an opportunity to speak before the Board deliberated. Ultimately, however, the Town Board also voted to recommend that the County deny plaintiffs' petition for rezoning.

Following that meeting, the Town of Woodboro's Attorney, Gregory Harrold, contacted Arthur Jaros by letter, requesting a copy of a proposed restrictive covenant

Jaros had mentioned in support of his rezone petition.[12] Attorney Harrold received a draft of the restrictive covenant and forwarded it to Town Clerk Schmidt on March 30, 2006. On April 18, 2006, the Town Board met at Attorney Harrold's request to reconsider its original March 14 recommendations. At that meeting, there was a presentation by a member of Attorney's Harrold's firm on RLUIPA. Arthur Jaros was also present and given an opportunity to respond.

On May 11, 2006, the Town Board again held a public meeting on the rezone petition, though it failed to provide actual notice of the meeting to the rezone petitioners. The Town Board voted again to recommend that the County deny the petition on May 15, 2006. In its written recommendation dated May 16, 2006, the Town provided the following reasons why the proposed camp would be inconsistent with its Land Use Plan:

- It does not preserve the rustic/rural character of the Town;
- It will result in significant increased traffic and noise which will impact the safety and general welfare of the occupants in the vicinity;
- It will encourage excessive utilization for single family residential housing;
- Further, the unknown nature of use which could be expanded significantly is an unknown risk to which neighbors and the Town should not be exposed to;

[12] During the rezoning effort, the petitioners filed a document entitled "Restrictive Covenant" providing that if the Subject Property were rezoned to District 5 Recreational, but then at some point in the future, no longer used as a Bible camp, the property's uses would again be governed by District 2 and District 4 zoning restrictions.

- The [Town Land Use Plan] encourages single family development, not large scale (275 campers per week) utilization[.]

(County's MSJ, Ex. 30 (dkt. #63-30) 2.)

On April 19, 2006, the Oneida County Planning and Zoning Committee conducted a public hearing on the rezone petition, during which plaintiffs had another opportunity to speak. On June 13, 2006, the Planning and Zoning Department provided a staff report to the Committee, which also recommended denial of the petition. The staff report concluded that rezoning the subject property to Recreational would conflict with the majority, single-family usage on Squash Lake, the purposes of a Single Family Residential district, the Zoning Code as a whole, and the 1998 Town Land Use Plan. In addition, the staff report addressed whether the denial would constitute a "substantial burden" or implicate the unequal treatment provision of RLUIPA, concluding that it would not. The report stated that the petitioners could practice their faith under existing zoning, but acknowledged that the zoning of the Subject Property would not allow for a recreational camp, such as that proposed by the applicants.

On June 14, 2006, the Planning and Zoning Committee voted unanimously to recommend to the County Board that it deny the requested rezoning. The Committee concluded that (1) rezoning would be inconsistent with the 1998 Town Land Use Plan and (2) the uses in a Recreational zoning district would conflict with those permitted in a Single Family Residential zoning district. The Committee also purported to consider whether the denial implicated RLUIPA's provisions.

In August 2006, the County's Planning and Zoning Committee submitted a Report to the County Board of Supervisors, which memorialized its June 14th recommendation. By resolution adopted on August 15, 2006, the County's Board of Supervisors accepted the County Zoning Committee's recommendation and denied plaintiffs' rezone petition.

2. Conditional Use Permit Application

On December 29, 2006, Eagle Cove, the Charitable Trust, and the Dawn L. Jaros Declaration of Trust submitted a conditional use permit application to the County for the purpose of constructing a Bible camp on the Subject Property. The original CUP application described (1) visitor welcome/service facility located adjacent to U.S Highway 8; (2) a visitor parking lot located adjacent to Highway 8 with visitors transported to the lodge by means of a "self-propelled train car;" (3) athletic fields adjacent to the visitor center; (4) a small "depot"/wellhouse near the lodge for the purpose of loading and unloading visitors from the train; and (5) a lodge located adjacent to the lake consisting of a "Chapel, Classroom Area, Dining Hall, Lodging, Multipurpose Room/Gymnasium and Administrative Areas." (County's MSJ, Ex. 38 (dkt. #63-38); *id.*, Ex. 28 (dkt. #63-28) 94-95.) The application also stated that the facilities were designed to accommodate 250 to 300 guests/campers.

On February 1, 2007, the County Zoning Department informed the applicants that their original CUP application was incomplete under § 9.42 of the Zoning Code, because permits were missing from the Wisconsin Department of Natural Resources and

the Department of Transportation. The letter also asked petitioners for additional information about the ownership of the land, the number of campers to be served, and details regarding planned recreational uses. In early August 2007, the County Zoning Department administratively closed its file because the applicants submitted nothing further, but informed the applicants that they were free to refile.

In the meantime, plaintiffs were expending extensive resources obtaining various site-specific permits from various State of Wisconsin departments. On November 15, 2007, plaintiffs obtained a grading permit from the Wisconsin Department of Natural Resources, which in part found that the "impact to natural scenic beauty will not be significant if the applicant complies with the permit conditions and their plan to screen the development using native vegetation." (Pls.' Add'l PFOFs (dkt. #77) ¶ 8.)

On December 17, 2008, the applicants submitted an amended CUP application to the County, including some of the information previously requested by the County Zoning Board. Specifically, the amended application included an "Overall Site Plan," describing the layout of the proposed Bible camp facilities, including a proposed lodge in excess of 106,000 square feet in size, with a building footprint in excess of 42,000 square feet, making it the largest building in the Town of Woodboro.[13] As for the number of campers, the Overall Site Plan provided that the lodge would accommodate a maximum of 348 persons, including 240 campers and 108 staff and visitors. In addition, the Plan provided for five outdoor tent camping sites, each accommodating two 5-6 person tents.

[13] On May 27, 2009, the applicants submitted a potential, alternate plan for the lodge, reducing it from three to two wings, but maintaining all of the components of the lodge along with essentially the same total square footage and footprint.

The Plan also provided for at least 97 parking spaces for cars and buses near Highway 8, proposing to utilize a self-propelled, standard gauge, diesel powered rail car measuring over 85 feet in length and otherwise similar in size to a typical single-level Amtrak passenger rail car to transport campers and other visitors from the parking area to the lodge near the lake. The amended CUP application included plans for the construction of facilities for various recreational uses, including an archery range, an observatory, sports fields, ropes courses, volleyball courts, and ice skating facilities.

In a letter dated February 18, 2009, the County Zoning Department stated that it would forward the CUP application to the Town of Woodboro, but warned that it did "not expect that it will be in a position to recommend to the Planning and Zoning Committee that it approve a conditional use permit" because "it does not believe that the proposed use as outlined in the application is permitted by or is otherwise consistent with the zoning of the property[.]" (County's MSJ, Ex. 47 (dkt. #63-47) 3-4.) While acknowledging that the Zoning Code allows a church and/or school in the Single Family Residential district with a CUP, the Department noted that the proposed project is neither a church nor school, but rather a recreational camp, which is not a permitted use in the Subject Property's zoning districts. The Department deemed the application complete on March 4, 2009.

The Woodboro Town Board met to discuss the CUP application on March 3, 2009. On April 23, 2009, the Town issued a recommendation to the County that it deny the CUP. On April 29, the Planning and Zoning Committee conducted a public hearing regarding the CUP application. The applicants were given an opportunity to

advocate in favor of the application. On June 26, the Planning and Zoning Committee conducted an onsite inspection of the Subject Property.

A staff report dated July 29, 2009, recommended that the Planning and Zoning Committee deny the application, explaining that the plan was significantly different than that of either a school or church, and that a year-round, recreational camp is not a permitted use in the zoning districts at issue. The report concluded that the proposed use was not compatible with the predominantly single family residences adjacent to the property, the purposes and nature of the Single Family Residential zoning district, and the Town's 2009 Comprehensive Plan. That same day, the Planning and Zoning Committee conducted a public meeting at which it voted to deny the CUP application, effectively adopting the reasons provided in the staff report.

On September 16, 2009, the applicants filed an appeal with the County Board of Adjustment. That Board conducted a public hearing regarding the applicants' appeal on December 1st. The Board allowed the parties to make written submissions and the applicants were given an opportunity to advocate in favor of their appeal at that hearing. On January 12, 2010, the County Board of Adjustment conducted another public meeting at which it affirmed the denial on January 12, 2010, and memorialized the denial in a written resolution on February 11, 2010.

E. Other Properties in Oneida County

Plaintiffs have never looked into the possibility of constructing and operating the proposed Bible camp on other land in Oneida County. Plaintiffs have also not explored

operating a seasonal Bible camp. Since 2006, a number of properties have been sold in Oneida County of comparable size with lake frontage and zoned Recreational or General Use. The parties dispute whether there is other land in the County which is available and would meet the needs of plaintiffs' proposed Bible camp; in addition, the Jaros plaintiffs claim to have a specific, spiritual connection to the Subject Property that does not exist with any other lakefront properties. Plaintiffs also contend that they cannot sell the Subject Property and buy property elsewhere.

At least fifteen recreational camps currently exist in Oneida County. All fifteen existing recreational camps are located within the Recreational, Forestry 1-A, Forestry 1-B, or General Use zoning districts. Defendants identify four Bible camps in the County, including plaintiff CLBF's camp. The most recent recreational camp in the County was built in 1956. The County's 30(b)(6) designee could not recall receiving any applications to rezone an area as District 5 or District 10 for purposes of a year-round recreational camp, nor any conditional use permits granted for any new recreational camps.

OPINION

Plaintiffs bring the following eleven causes of action against defendants:

(1) RLUIPA Total Exclusion Claim;

(2) RLUIPA Unreasonable Limitation Claim;

(3) RLUIPA Substantial Burden Claim;

(4) RLUIPA Equal Terms Claim;

(5) RLUIPA Discrimination Claim;

(6) Equal Protection Claim;

(7) Free Exercise Claim;

(8) Wisconsin Constitution Article I, Section 18 Claim;

(9) ADA Claim

(10) Rehabilitation Act Claim

(11) State Law Certiorari Review.

Plaintiffs affirmatively moved for partial summary judgment only as to its claim of a violation of RLUIPA's total exclusion provision. Both defendants -- the Town and the County -- filed largely-overlapping motions for summary judgment on all eleven counts. Finding no merit in plaintiffs' claims, the court will grant defendants' motions.[14]

I. RLUIPA Total Exclusion Claim

RLUIPA's total exclusion provision provides:

> No government shall impose or implement a land use regulation that-- (A) totally excludes religious assemblies from a jurisdiction; . . . .

42 U.S.C. § 2000cc(b)(3)(A).

Plaintiffs contend that the exclusion of year-round Bible camps from the Town of Woodboro violates this provision. For plaintiffs' claim to succeed, however, they must

[14] Also before the court is a motion by plaintiffs for leave to file notice of supplemental authority. (Dkt. #152.) The motion is unnecessary, and therefore the court will deny it as moot. The court, however, did consider the supplemental authority and defendant Town of Woodboro's attempts to distinguish these cases.

demonstrate that: (1) the exclusion of year-round Bible camps from the Town constitutes an exclusion of "religious assemblies"; and (2) the relevant jurisdiction is the Town rather than the County. Plaintiffs stumble as to both hurdles.

As to the first, neither the County, nor even the Town, prohibits religious assemblies from their respective jurisdictions. Plaintiffs could use their land for religious assemblies, albeit not the specific, year-round religious camp they feel called to build. Churches and schools, including religious schools, are conditional uses on the Subject Property. The record also reflects that plaintiffs have used their land for some religious retreats, although on a much more limited scale than their planned facilities. Unfortunately for plaintiffs, RLUIPA's total exclusion provision is concerned with just that: "the complete and total exclusion of activity or expression protected by the First Amendment." *See Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975, 989 (7th Cir. 2007) (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (town totally excluded live entertainment, which included nonobscene nude dancing)). The land use regulations at issue here do not approach the complete and total exclusion of religious activity or expression, including plaintiffs' religious assembly, whether from the County, the Town, or even from the Subject Property.

Moreover, unlike the unreasonable limitations provision discussed below, the total exclusion provision is limited to the exclusion of "religious assemblies" and does not address the exclusion of religious "institutions or structures." *Compare* § 2000cc(b)(3)(A) ("totally excludes religious assemblies from a jurisdiction"), *with* § 2000cc(b)(3)(B) ("unreasonably limits religious assemblies, institutions, or structures within a

jurisdiction"). The conspicuous absence of the words "institutions or structures" from the total exclusion provision further supports the conclusion that this provision is concerned with the exclusion of religious expression and not with the exclusion of specific kinds of institutions or structures.[15]

In addition, the plaintiffs' choice to operate a year-round Bible camp, rather than a seasonal one, further restricts the land available to their use since over half of the land in the Town of Woodboro (57.4%) is zoned Forestry 1-A. Seasonal recreational camps -- whether religious or secular -- are categorized as administrative review uses in this zoning district. While operating a seasonal rather than a year-round Bible camp would certainly restrict plaintiffs' religious exercise, such a temporal limitation also does not constitute a *total* exclusion of religious assemblies under RLUIPA. This court is not holding -- and defendants do not argue -- that the proposed year-round Bible camp is not a religious assembly under RLUIPA. Rather, the court holds that RLUIPA simply does not require every plausible religious assembly to be allowed, wherever, whenever and however plaintiffs may choose.

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[15] Comparing the language of the total exclusion provision to other provisions of RLUIPA is also instructive on this point. The total exclusion provision is concerned with "religious assemblies" at an aggregate level as compared to (1) the substantial burden provision which is concerned with "the religious exercise of a person" (§ 2000cc(a)(1)) or (2) the equal terms provision which is concerned with the treatment of "a religious assembly" (§ 2000cc(b)(1)). The latter two provisions are focused on the kind of individual treatment of religious entities that plaintiffs seek to challenge, while the purpose of the total exclusion provision is to prohibit efforts to make a purely "secular cityscape." *See* Roland F. Chase, *Zoning Regulation of Religious Activities: The Impact of Federal Law*, R.I. Bar J. 27 (Sept./Oct. 2005). To the extent the district court in *First Korean Church of New York, Inc. v. Cheltenham Twp. Zoning Hearing Bd.*, No. 05-6389, 2012 WL 645986, at *16 (E.D. Pa. Feb. 29, 2012), held that the total exclusion claim hinges on whether a particular religious assembly, institution or structure was totally excluded from a township, the court rejects the court's analysis.

As to the second hurdle, the court is unconvinced that the Town is the appropriate unit to consider for the total exclusion claim. The County made the crucial decisions at issue here, consistent with *its* Zoning Code. While it is true the Town chose to adopt the Zoning Code, its adoption does not render the Town a land use regulator. Plaintiffs' most compelling argument to the contrary is that absent the Town's adoption of the County's Zoning Ordinance, the Subject Property would have remained unzoned, allowing for the Bible camp. By adopting the Code, the Town effectively ceded to the County the role of land use regulator, with the Town retaining an advisory role. Ultimately, however, it is the County's Zoning Code and the County's denials of plaintiffs' efforts to work around the Code that resulted in this lawsuit. To use the language of RLUIPA's total exclusion provision: while the Town acquiesced, it was the County that "impose[d] or implement[ed]" the Zoning Code.[16]

Plaintiffs next argue that the use of "a" in "a jurisdiction" -- rather than, for example, the use of "its" -- is meaningful, because the use of "a" signals that the relevant jurisdiction the "government" regulates under § 2000cc(b)(3)(A) could be different than the total jurisdiction regulated by the governmental entity. Applied here, plaintiffs argue that the County could be liable under RLUIPA's total exclusion provision so long as year-round Bible camps are totally excluded from "a jurisdiction," namely the Town. Under plaintiffs' reasoning, however, a jurisdiction could be a single zoning district, which

[16] Plaintiffs also point to other "land use programs" adopted by the Town, namely the Town's 1998 Land Use Plan and the 2009 Comprehensive Plan. While these plans informed the zoning districts and types of uses in the County's Zoning Code, the Zoning Code ultimately governed the County's decisions to deny the rezoning petition and the CUP application.

would mean a government could be liable merely by excluding churches from a particular zoning district. Such piecemeal application of the total exclusion provision goes too far. A far more reasonable construction is for "a jurisdiction" under RLUIPA's total exclusion provision to refer to the entire geographic area governed by the zoning ordinance at issue. *See Elijah Grp., Inc. v. City of Leon Valley, Tex.*, No. SA-08-CV-0907 OG (NN), 2009 WL 3247996, at *8 (W.D. Tex. Oct. 2, 2009), *rev'd on other grounds*, 643 F.3d 419 (5th Cir. 2011).

Typically, cases that have turned on the determination of the appropriate jurisdiction have involved a plaintiff seeking review at a zoning district level and a court holding that the appropriate scope is at the municipality level. *See, e.g., Elijah Grp.*, 2009 WL 3247996, at *8 ("As applied to a land use regulation like a zoning ordinance, 'jurisdiction' logically refers to the geographical area covered by ordinance. The City's zoning ordinance applies to the entire City [rather than a particular zoning district]."). While these cases are factually distinguishable, the general legal principle articulated in those cases -- that the appropriate jurisdiction or area under review is the land over which the governmental body has regulatory control -- is a sound one.

Plaintiffs counter with an example where a county is the land use regulator, but only one town within the county allows churches. Under the court's construction, this hypothetical would not implicate the total exclusion provision because religious assemblies are not totally excluded from the county, but this is not to hold that the hypothetical would pass other RLUIPA provisions, particularly the unreasonable

limitations provision. Moreover, an exclusion of a particular sect or denomination from a jurisdiction would likely implicate RLUIPA's nondiscrimination provision.

II. RLUIPA Unreasonable Limitation Claims

Indeed, this is exactly plaintiffs' position in contending that defendants' land use regulations also violate RLUIPA's "unreasonable limitations," which provides:

> No government shall impose or implement a land use regulation that-- . . . (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc(b)(3)(B).

There is very little case law on this particular RLUIPA provision. At least one commentator has described the "unreasonable limitation" provision as "a step-down from the total exclusion provision." *See* Chase, *supra*, at 27 ("[J]ust as the government cannot prohibit all religious assemblies in a jurisdiction, so it cannot prohibit all but a token church or two."). In *Vision Church*, the Seventh Circuit held that a zoning ordinance that requires a church to obtain a conditional use permit to construct a church in a residential district does not unreasonably limit religious assemblies: "The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate non-discriminatory municipal planning goals." *Vision Church*, 468 F.3d at 991.

Here, too, plaintiffs offer no evidence that the County or the Town unreasonably limits their or other's religious assemblies, institutions or structures. Year-round recreational camps -- whether religious or secular -- are allowed on roughly 36% of the land in the County (excluding the City of Rhinelander), and seasonal recreational camps

-- again religious or secular -- are allowed on 72% of the land in the County.[17] Moreover, seasonal recreational camps are allowed on roughly 57% of the land in the Town. Similarly, churches and schools (including religious schools) are allowed on 60% of all of the land in the County (excluding the City of Rhinelander) and approximately 42% of the land in the Town. So, too, campgrounds -- whether religious or secular -- are allowed on approximately 75% of the land in the County (excluding Rhinelander) and roughly 57% of the land in the Town. Finally, religious shrines are allowed on roughly 72% of the County's land (excluding Rhinelander) and 59% of the land in the Town.

The Zoning Code's requirement that certain uses obtain an administrative review or conditional use permit is also "neutral on its face." *Vision Church*, 468 F.3d at 991. As the Seventh Circuit explained in *Vision Church*, the distinction between permitted uses and administrative review or conditional uses is also "justified by legitimate non-discriminatory municipal planning goals." *Id.* "A municipality may chart out a quiet place where yards are wide, people few, and motor vehicles restricted[.] [These] are legitimate guidelines in a land-use project addressed to family needs." *Id.* at 1001 (quoting *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 135 (3d Cir. 2002)). As such, "religious assemblies have a reasonable opportunity to build within the [Town and the County], provided that the requirements for a special use permit have been fulfilled." *Id.*

[17] "Allowed" includes permitted uses, administrative review uses and conditional uses, as well as unzoned land.

III. RLUIPA Substantial Burden Claim, Free Exercise Claim and Wisconsin Constitution Claim

Defendants also move for summary judgment on plaintiffs' "substantial burden" claim under RLUIPA. Under this provision,

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless the government demonstrates that imposition of the burden on that person . . . (A) is in furtherance of a compelling government interest; and (B) is the least restrictive means of furthering that compelling government interest.

42 U.S.C. § 2000cc(a)(1). "RLUIPA defines 'religious exercise' to encompass 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief,' including '[t]he use, building, or conversion of real property for the purpose of religious exercise.'" *Civil Liberties for Urban Believers v. City of Chi.* ("*CLUB*"), 342 F.3d 752, 759 (7th Cir. 2003) (quoting 42 U.S.C. § 2000cc-5(7)).

While this provision offers plaintiffs' strongest claim under RLUIPA, the Seventh Circuit has repeatedly warned that the "substantial" component of this test must be taken seriously. Otherwise, "the slightest obstacle to religious exercise incidental to the regulation of land use -- however minor the burden it were to impose -- could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means." *CLUB*, 342 F.3d at 761; *see also Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) ("Unless the requirement of substantial burden is taken seriously, the difficulty of providing a compelling government interest will free religious organizations from zoning restrictions of any kind.").

For this reason, the Seventh Circuit has explained that a "substantial burden" under RLUIPA "is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise -- including the use of real property for the purpose thereof within the regulated jurisdiction generally -- *effectively impracticable*." *CLUB*, 342 F.3d at 761 (emphasis added); *see also Vision Church*, 468 F.3d at 997.[18] "Scarcity of affordable land" and the "inherent political aspects" of zoning and planning decisions do not render the use of real property for religious exercise "impracticable." *CLUB*, 342 F.3d at 761. Expending "considerable time and money" also does not entitle land use applicants "to relief under RLUIPA's substantial burden provision." *Id.*

In *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), the Seventh Circuit reversed the district court's decision granting summary judgment to the City and granted summary judgment to the plaintiff-church, finding the denial of a zoning variance constituted a substantial burden. Understandably, plaintiffs rely heavily on certain language from that case, which suggests that "delay, uncertainty and expense" constitute a substantial burden. 396 F.3d at 901 ("The Church could have searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense.").

[18] The court considered but rejected the district court's analysis in *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328 (N.D. Ga. 2012), because it appears to be a substantial departure from the Seventh Circuit's requirement that a substantial burden must render religious exercise effectively impracticable.

Importantly in *Sts. Constantine & Helen*, as in other cases where courts have focused on the "delay, uncertainty, and expense" language, however, the government's action in denying the requested accommodation appears arbitrary, unreasonable, or even in bad faith. In these cases, courts also seem to conflate the second component of § 2000cc(a)(1) -- whether a compelling government interest exists -- with the substantial burden requirement. In *Sts. Constantine & Helen*, for example, the Seventh Circuit noted that the "repeated legal errors by the City's officials casts doubt on their good faith," and described the mayor of the City of New Berlin as "playing a delaying game." 369 F.3d at 899; *see also Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 991 (9th Cir. 2006) (finding substantial burden where the plaintiff's history with the defendant county suggested that any further attempts "could very well be in vain").

As much as plaintiffs purport to have done so, they fail to offer similar evidence here that would allow a reasonable trier of fact to find that the "delay, uncertainty, and expense" incurred was the result of defendants' bad faith. At most, plaintiffs contend that the defendants mislead them by suggesting that rezoning was not required and that the Bible camp could be built on the Subject Property with conditional use permits. Plaintiffs' argument, however, is based on a refined, even strained, parsing of certain statements by Town and County officials, while the full exchanges simply do not support a finding of bad faith or gamesmanship on the part of defendants.[19]

[19] In particular, plaintiffs have failed to put forth evidence of bad faith like that at issue in *Fortress Bible Church v. Feiner*, 694 F.3d 208, 214, 218 (2d Cir. 2012) (describing evidence of Board members comments that they did not want the property to be used as a church and raising concerns about tax-exempt status of church).

Specifically, plaintiffs latch onto the following language in a June 13, 2006, Staff Report: "But with reasonable accommodation by the petitioner, Town and the County, the petitioner could achieve most if not all of its objectives under the existing zoning districts." (County's MSJ, Ex. 32 (dkt. #63-32) 4.)[20] Importantly, however, plaintiffs omit other critical language: "Neither land use classifications [governing the Subject Property] allow for the proposed recreation camp proposal." (*Id.*) A fair reading of this report and other exchanges between the parties during the rezoning petition demonstrates that County officials were simply noting -- as this court has noted -- that plaintiffs could exercise their religious beliefs on the Subject Property, but not necessarily by means of a year-round Bible camp.

Plaintiffs also take issue with defendants' delay in deciding their CUP application, specifically arguing that defendants should have rejected the application at the outset, rather than after prolonged deliberations, given their position that the planned Bible camp was not an allowed use on the Subject Property. The real issue here seems to be the County's requirement that a CUP applicant obtain certain permits before the application can be deemed "complete" and only then subject to review by County officials. While the court could certainly see the value of the kind of practical, initial screening by the County advocated by plaintiffs, the County's approach of requiring applicants to pass state agency permit hurdles before review is not unreasonable and certainly does not support a finding of a bad faith delay. Indeed, around the time the

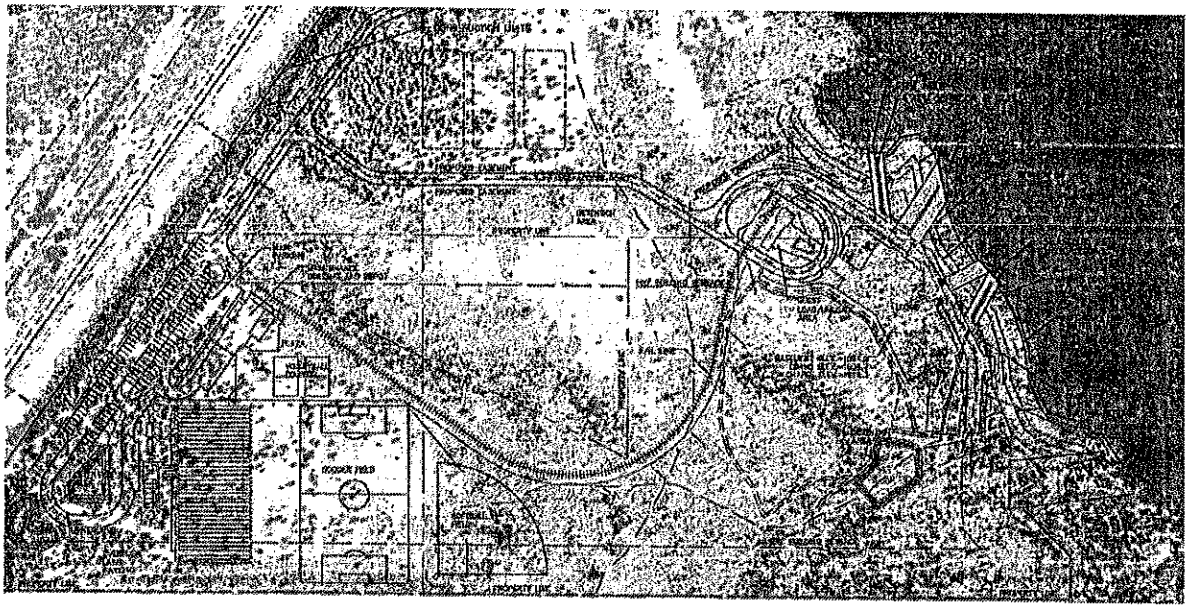
[20] Similar language about plaintiffs being able to achieve most or all of their stated objectives is also in the minutes from the Planning and Zoning Committee's June 14, 2006, hearing. (County's MSJ, Ex. 31 (dkt. #63-31) 6.)

County deemed plaintiffs' CUP application complete, the County Zoning Department warned plaintiffs that it did not expect to recommend approval of the permit to the Planning and Zoning Committee, because the proposed use was not permitted by or consistent with the zoning of the property. (County's MSJ, Ex. 47 (dkt. #63-47) 3-4.) Moreover, the final decision, including the denial of the appeal by the Board of Adjustment, was issued less than one year after the CUP application was deemed complete. The court does not doubt, and defendants do not dispute, that plaintiffs "expended considerable time and money" in pursuit of the rezoning petition and CUP application, but this is not enough to "entitle them to relief under RLUIPA's substantial burden provision." *CLUB*, 342 F.3d at 762.

Regardless of whether plaintiffs' experienced "delay, uncertainty and expense," the Seventh Circuit reiterated in *Vision Church* -- a case post-dating *Sts. Constantine & Helen* -- the test first announced in *CLUB*: that a substantial burden is one that renders religious exercise "effectively impracticable." *Vision Church*, 468 F.3d at 997. Here, too, defendants' land use regulations fall short of this standard. As discussed above, plaintiffs here are able to engage in religious exercise on the Subject Property, not to mention alternative sites which could accommodate a Bible camp. While plaintiffs reject any alternative site for various reasons, the real impediment to plaintiffs' plan seems to be the scope of their vision, rather than the constraints of defendants' land use regulations.

In particular, the aspects of the planned Bible camp that seem most troubling to the Town and County are fairly categorized as "secular" in nature. The Overall Site Plan, depicted below and submitted with the amended CUP application, calls for a large

parking lot, extensive recreational fields, a beach, a large enough lake to accommodate water sports, and a train car similar in size to a single-level Amtrak passenger rail car:



(County's MSJ, Ex. 44 (dkt. #63-44).) In keeping with the sheer size of these various amenities, (1) the planned number of campers, visitors and other guests at the Bible camp at any given time would exceed 50% of the Town's population, and (2) the proposed lodge -- a 106,000 square foot facility with a footprint in excess of 42,000 square feet -- would be the largest building in the Town. Placing reasonable constraints on the size, nature and duration of camp activities cannot constitute a substantial burden on religious exercise simply because this particular, large proposed recreational camp has a religious purpose.

Other courts have rejected similar claims that zoning limitations on the size or the secular aspects of a project could alone implicate the substantial burden provision of RLUIPA. For example, in *Vision Church,* the Seventh Circuit considered the denial by a village of some 6,000 persons of a church's application for a planned 99,000 square foot

church facility with five main buildings and an over 1,000 seat sanctuary. 468 F.3d at 981-82. The court ultimately found credible concerns about the effect of such a large complex on the village's character, rejecting the notion that there was a "triable issue of fact with respect to whether the size, capacity and other restrictions imposed by the Ordinance constitute a non-incidental, substantial burden on the exercise of religion." *Id.* at 999. Specifically, the court could not "fathom a situation is which limiting the church to a three-building, 55,000-square foot facility would impose an unreasonable and substantial burden on religious exercise." *Id.* at 1000; *see also Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 662 (10th Cir. 2006) (affirming jury verdict finding city's denial of church's conditional use application to build a 100-child daycare center in a low-density residential zone did not constitute a substantial burden on religious exercise even though daycare intended to have a religious education component); *Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 183, 189 (2d Cir. 2004) (holding that village's zoning ordinances did not substantially burden an Orthodox Jewish school seeking to expand its facilities for secular education purposes). Having failed to even pursue a more modest recreational camp before coming into court, particularly where allowed by existing zoning and CUPs, plaintiffs fall well short of proving a substantial burden on their exercise of religion.[21]

Plaintiffs' free exercise claim under the First Amendment of the United States Constitution and claim under the Wisconsin Constitution Article I, § 18 fail for the

[21] Even if these zoning regulations were found to impose a "substantial burden" on religious exercise, a rural County's and small Town's interest in managing the sheer size, duration and facilities of such a large undertaking may well constitute a compelling government interest.

same reasons their RLUIPA substantial burden claim fails.[22] *See Vision Church*, 468 F.3d at 996 (collapsing the plaintiffs' claims because "both the Free Exercise Clause and RLUIPA provide that, if a facially-neutral law or land use regulation imposes a substantial burden on religion, it is subject to strict scrutiny"); *see also Coulee Catholic Schs. v. LIRC*, 2009 WI 88, ¶ 60, 768 N.W.2d 868, 768 N.W.2d 868 (applying "compelling state interest/least restrictive alternative test" to a claim that a freedom of conscience claim, which requires the plaintiff to prove "(1) that it has a sincerely held religious belief, and (2) that such belief is burdened by the application of the state law at issue. Upon this showing, the burden shifts to the state to prove (3) that the law is based upon a compelling state interest (4) that cannot be served by a less restrictive alternative.").

IV. RLUIPA Equal Terms and Nondiscrimination Claims

Plaintiffs also bring claims under RLUIPA's "equal terms" and nondiscrimination provisions. The equal terms provision provides:

> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or

[22] Article I, § 18 of the Wisconsin Constitution provides:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

> institution on less than equal terms with a nonreligious assembly or institution.

42 U.S.C. § 2000cc(b)(1). RLUIPA's nondiscrimination provision states:

> No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

42 U.S.C. § 2000cc(b)(2).

"The equal-terms section is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on religious uses." *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007). In an *en banc* decision, the Seventh Circuit held that if a religious and nonreligious use "though different in many respects, do not differ with respect to any accepted zoning criterion, then an ordinance that allows one and forbids the other denies equality and violates the equal-terms provision." *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 371 (7th Cir. 2010). The *River of Life* court offered some examples of accepted zoning criteria: sufficiency of parking space, vehicular traffic flows, ability to generate municipal revenue, and ability to provide ample and convenient shopping for residents. *Id.* at 373. Relying on case law from the Eleventh Circuit, the Seventh Circuit has also identified "three distinct kinds of Equal Terms statutory violations: (1) a statute that facially differentiates between religious and nonreligious assemblies or institutions; (2) a facially neutral statute that is nevertheless 'gerrymandered' to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions; or (3) a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions." *Vision Church*, 468 F.3d

at 1003 (quoting *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1308 (11th Cir. 2006)).

Plaintiffs' "proof" falls under none of these categories. The Zoning Code does not facially differentiate between religious and nonreligious assemblies or institutions; nor is there any evidence of "gerrymandering" or selective enforcement. In fact, the County has previously granted rezoning petitions for applications with a religious use or purpose, including:

- A petition filed by the YMCA in 2007 seeking to rezone land zoned Single Family Residential and Rural Residential to Forestry 1-A in connection with an outdoor camping program.
- A petition filed by the Holy Family Catholic Church in 2005 seeking to rezone land zoned Single Family Residential to Business B-2 for the purpose of selling the land so that the church could purchase new land to construct a church, and a separate petition to rezone different land zoned Single Family Residential to Multiple Family Residential.
- A petition in 2001 seeking to rezone land adjacent to plaintiff CLBF zoned Single Family Residential to Recreational to allow an expansion of the camp.

The County also has previously granted CUPs for religious land uses, including the following:

- A CUP in 1994 to the Faith Evangelical Free Church for the Construction of a new church on land zoned Single Family Residential in the Town of Woodruff.
- A CUP in 2002 to the Faith Evangelical Free Church for the addition of classrooms and a gymnasium to their existing church on land zoned Single Family Residential in the Town of Woodruff.
- A CUP in 2005 to the Northwoods Unitarian Fellowship, Inc. for the construction of an addition to an existing church on land zoned Single Family Residential in the Town of Woodruff.
- A CUP in 2006 to the Holy Family Catholic Parish for the construction of a new church on land zoned Single Family Residential in the Town of Woodruff.

Given these examples, plaintiffs concede that they cannot say that the County would have made different decisions regarding the proposed Bible camp had it been secular in nature. In fact, plaintiffs are not aware of any evidence indicating that the County was influenced by any community opposition based on hostility toward plaintiffs' religion or the religious aspects of the proposed use; offering only the fact that the minutes of the June 14, 2006, Planning and Zoning Committee meeting indicate that the public was "overwhelming[ly] opposed to the rezone." (County's MSJ, Ex. 31 (dkt. #63-31) 8, ¶ 4; *id.*, Ex. 57 (dkt. #63-57) 5.)[23] In the absence of some evidence that a nonreligious (or even different religious) entity would have been treated differently, the court will grant summary judgment to defendants on plaintiffs' claim under RLUIPA's nondiscrimination provisions. *See World Outreach*, 591 F.3d at 538 (affirming dismissal because there was no indication that a nonreligious entity would have been treated differently).

In light of these undisputed facts, plaintiffs' principal challenge seems to be with the treatment of Bible camps in particular, arguing that Bible camps are not different from other, permissible secular uses with regard to any accepted criteria under the Zoning

[23] Plaintiffs also point to an isolated remark by one of the County Planning and Zoning Committee members. In advance of the April 29, 2009, public hearing on the CUP application, a female member of the staff of the Planning and Zoning Committee overheard Committee member Greshner making the following comment described by her as "snide" with respect to the religion of the plaintiffs: "don't let [the public hearing] turn into a Bible lesson . . . ." (Pls.' PFOFs, Ex. 9 (dkt. #77-9) at 49.) However unfortunate, this isolated remark is not by itself sufficient to raise a genuine issue of material fact as to whether the County or Town harbored discriminatory animus toward plaintiffs, particularly in the face of overwhelming evidence that the opposition was motivated by concerns over the size and year-round nature of the proposed camp.

Code. However, the most closely comparable use -- purely recreational camps -- is also not allowed on the Subject Property. In that way, religious (Bible camps) and nonreligious (secular recreational camps) uses are treated the same under the Zoning Code. *See Vision Church*, 468 F.3d at 1001 ("[L]ike churches, schools also are not permissible uses in residential districts, demonstrating that the distinction between permissible and special uses is not rooted in animosity towards religious institutions.").

Plaintiffs also argue that the so-called differential treatment of Bible camps as compared to institutionalized churches violates RLUIPA's nondiscrimination provision. Again, however, plaintiffs offer no evidence of discrimination based on plaintiffs' *religion*; rather, the discrimination, if any, is between plaintiffs' use of the Property for a church rather than a Bible camp, a difference in treatment not covered by RLUIPA.

V. Equal Protection Claim

Though the claim obviously overlaps with the equal terms and nondiscrimination claims under RLUIPA, plaintiffs separately allege a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The court has already found that the County Zoning Code does not discriminate on the basis of religion. As in *CLUB*, "Whatever the obstacles that the [Zoning Code] might present to a church's ability to locate on a specific plot of Chicago land, they in no way regulate the right, let alone interfere with the ability, of an individual to adhere to the central tenets of his religious beliefs." 342 F.3d at 766. As such, rational basis review is appropriate. *See CLUB*, 342 F.3d at 766; *Vision Church*, 468 F.3d at 1001.

To pass rational basis review, plaintiffs "must demonstrate 'governmental action wholly impossible to relate to legitimate governmental objectives.'" *Vision Church*, 468 F.3d at 1001 (quoting *Patel v. City of Chi.*, 383 F.3d 569, 572 (7th Cir. 2004)). For the same reasons plaintiffs' equal terms claim fails, plaintiffs' claim under the equal protection clause of the Fourteenth Amendment fails. *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 849 (7th Cir. 2007) ("The 'less than equal terms' provision of RLUIPA codifies the constitutional prohibition.").[24]

VI. ADA and Rehabilitation Act Claims

Plaintiffs' allegations of violations of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, fair no better, and for the same basic reason -- a lack of evidence.

Both acts prohibit discrimination against qualified persons with disabilities. 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity."); 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be

[24] Plaintiffs do not allege, nor does the evidence suggest, that they were the target of "deliberate, irrational discrimination," that has nothing to do with their religion. *See World Outreach*, 591 F.3d at 538 ("What is true, however, is that a deliberate, irrational discrimination, even if it is against one person (or other entity) rather than a group, is actionable under the equal protection clause. . . . It has nothing to do with religion, but so what?").

subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."). The Rehabilitation Act provides that the ADA standards are to be applied to determine whether the Rehabilitation Act has been violated. 29 U.S.C. § 794(d); *see also Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 845 n.6 (7th Cir. 1999) ("We have held previously that the standards applicable to one act are applicable to the other."). Therefore, the court will consider these two claims together.

Plaintiffs first considered the possibility of serving disabled campers in late 2008 or early 2009. Except for a reference to serving children with "medical disabilities" by Mike Jewell, the Executive Director at CLBF, at the April 29, 2009, public hearing before the Planning and Zoning Committee, however, plaintiffs did not raise this purpose in their rezoning petition, CUP application, amended CUP application, or appeal to the County Board of Adjustment.[25]

Plaintiffs even concede that there is reason to believe the County would have come to the same decisions regarding the proposed Bible camp had plaintiffs not wished to serve, among others, disabled campers. (Pls.' Resp. to Defs.' PFOFs (dkt. #93) ¶ 276.) Absent *some* evidence that the alleged discrimination was *because of* the disability of proposed campers, plaintiffs' ADA and Rehabilitation claims cannot survive summary judgment. *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010)

[25] Plaintiffs also point to a reference in the CUP application about requiring wider paths to the shoreline. (*See* dkt. #94 at ¶ 286.) Even in combination with Mr. Jewell's early allusion to the possibility of serving children with "medical disabilities," this reference falls unreasonably short of a finding that defendants were on notice of plaintiffs' intent to serve disabled children.

(liability attached under the ADA only for "decisions made 'because of' a person's disability").

VII. State Law Claims

Because the court has found that defendants are entitled to summary judgment on plaintiffs' federal claims, the court would typically not decide plaintiffs' state law claims on the merits, but instead would dismiss those claims without prejudice to be refiled in state court. This practice is consistent with "the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial." *Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999); *see also* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if the district court has dismissed all claims over which it has original jurisdiction.").

A court may depart from "usual practice" and continue to exercise supplemental jurisdiction if the circumstances weigh in favor of such action. For example, a court need not send back to state court "'doomed litigation' that will only be dismissed once it gets there." *Groce*, 193 F.3d at 502. In such circumstances, the district court should retain supplemental jurisdiction "because when a state-law claim is clearly without merit, it invades no state interest -- on the contrary, it spares overburdened state courts additional work that they do not want or need -- for the federal court to dismiss the claim on the merits, rather than invite a further, and futile, round of litigation in the state courts." *In re Repository Tech., Inc.*, 601 F.3d 710, 725 (7th Cir. 2010) (internal quotation omitted).

Here, plaintiffs' claim for violation of the Wisconsin Constitution's Free Exercise Clause, Article I, § 18, is indeed "doomed" for all the same reasons as its federal constitutional equivalent, and no purpose will be served and unnecessary resources will be expended by this court failing to exercise its supplemental jurisdiction over this claim. Indeed, plaintiffs offer no plausible argument that the protections offered Wisconsin citizens under Article I, § 18, are in any way greater than its federal counterpart, much less RLUIPA's additional protections. Accordingly, judgment will be entered against plaintiffs on the merits of that claim.[26]

Plaintiffs' state certiorari claim is different. While likely to fail under the restrictive standard imposed for certiorari review of a municipal body's determination -- and the factual and legal issues are sufficiently different from the others considered in this case -- the claim is sufficiently unique to state law that the court will not retain supplemental jurisdiction over this state law claim unless defendants are unwilling to waive any statute of limitation defense they may have in state court by virtue of plaintiffs choosing to file in this court first.

ORDER

IT IS ORDERED that:

1) plaintiffs' motion for a hearing on the motions for summary judgment (dkt. #105) is DENIED;

2) defendant Town of Woodboro's motion in limine (dkt. #150) is DENIED;

[26] By virtue of the Wisconsin Legislature's enactment of Wis. Stat. § 893.80, the county defendants also argue they are immune from suit under Article I, § 18. The court need not, and does not, reach this issue.

3) plaintiffs' motion for leave to file notice of supplemental authorities (dkt. #152) is DENIED AS MOOT;

4) plaintiffs' motion for partial summary judgment (dkt. #55) is DENIED;

5) defendant County of Oneida's motion for summary judgment (dkt. #46) is GRANTED IN PART and defendant Town of Woodboro's motion for summary judgment (dkt. #56) is GRANTED IN PART;

   a. with respect to all of plaintiffs' federal claims (both statutory and constitutional), defendants' motions for summary judgment are GRANTED; and

   b. with respect to plaintiffs' Wisconsin Constitution Article I, Section 18 claim, defendants' motions for summary judgment are GRANTED; and

6) The court dismisses plaintiffs' remaining state law certiorari review claim without prejudice, having declined to exercise supplemental jurisdiction over it unless defendants are unwilling to waive any statute of limitation defense they may have in state court by virtue of plaintiffs choosing to file in this court first.

7) The clerk of the court is directed to enter judgment consistent with this order and close this case.

Entered this 1st day of February, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EAGLE COVE CAMP & CONFERENCE CENTER INC., a Wisconsin non-stock corporation; ARTHUR G. JAROS, JR., individually and as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, and as trustee of the Arthur G. Jaros, Sr. Declaration of Trust, and as trustee of the Dawn L. Jaros Declaration of Trust; WESLEY A. JAROS, as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust; RANDALL S. JAROS, individually and as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust; CRESCENT LAKE BIBLE FELLOWSHIP, a Wisconsin non-stock corporation; and KIM WILLIAMSON,

Plaintiffs,

v.

TOWN OF WOODBORO, Wisconsin, a body corporate and politic; COUNTY OF ONEIDA, Wisconsin, a body corporate; and ONEIDA COUNTY BOARD OF ADJUSTMENT,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 10-cv-118-wmc

This action came for consideration before the court, District Judge William M. Conley presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants Town of Woodboro, Wisconsin, County of Oneida, Wisconsin, and Oneida County Board of Adjustment granting defendants' motions for summary judgment and dismissing all of plaintiffs' federal claims, both statutory and constitutional, and dismissing plaintiffs' Wisconsin Constitution Article I, Section 18 claim.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered dismissing plaintiffs' remaining state law certiorari review claim without prejudice, the court having declined to exercise supplemental jurisdiction over it.

Peter Oppeneer

Peter Oppeneer, Clerk of Court

2/5/13

Date

APPENDIX K

windfall of $650,000 to award Wells Fargo $750,000.

We disagree. The subordination agreements between Hindman and Wells Fargo were intended to ensure that Clark paid off its debts to Wells Fargo before paying off its debts to Hindman. Wisconsin law calls for placing the non-breaching party in the position it would have been in had the contract been performed instead of simply restoring the parties to their original positions. Assuming that Hindman breached, the only way to place Wells Fargo in the position that it would have been in had Hindman not breached would be to award the full $750,000. As Wells Fargo's actual damages are $750,000 (again, assuming breach), the enforceability of the "Prohibited Payments Clause" is immaterial.

III. Conclusion

For the foregoing reasons, the district court's judgment is VACATED and the cause is REMANDED for further proceedings consistent with this opinion.

EAGLE COVE CAMP & CONFERENCE CENTER, INC., et al., Plaintiffs–Appellants,

v.

TOWN OF WOODBORO, WISCONSIN, Oneida County, Wisconsin, and Oneida County Board of Adjustment, Defendants–Appellees.

No. 13–1274.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 10, 2013.

Decided Oct. 30, 2013.

Rehearing and Rehearing En Banc Denied Dec. 10, 2013.

Background: Property owner brought action against town, county, and county's board of adjusters, alleging that land use regulations prohibiting proposed year-round Bible camp on residentially-zoned property violated Religious Land Use and Institutionalized Persons Act (RLUIPA), First and Fourteenth Amendments of federal constitution, and Wisconsin Constitution. The United States District Court for the Western District of Wisconsin, William M. Conley, Chief Judge, granted defendants' motion for summary judgment. Owner appealed.

Holdings: The Court of Appeals, Kanne, Circuit Judge, held that:

(1) county, rather than town, exercised jurisdiction over subject property;

(2) regulations did not impose substantial burden on owner's exercise of religious freedoms;

(3) regulations did not impose unreasonable limitations on owner's exercise of religious freedoms;

(4) regulations did not violate equal-terms provision of RLUIPA; and

(5) regulations were supported by compelling state interest, precluding state constitutional claim.

Affirmed.

1. Federal Courts ⇐776, 802

Court of Appeals reviews a district court's grant of summary judgment de novo, with all conflicting evidence and reasonable inferences drawn from it construed in favor of the non-movant.

2. Civil Rights ⇐1073

County, rather than town, exercised jurisdiction over subject residentially-zoned property, thus precluding property owner's total exclusion claim under Reli-

gious Land Use and Institutionalized Persons Act (RLUIPA) to challenge land use regulations prohibiting owner's proposed year-round Bible camp on that property, in light of ample evidence suggesting that operating such camp was possible in many parts of county and that owner was free to construct religious church or school on property; while town retained jurisdiction on numerous matters of local governance, it chose to be subordinate to county's zoning ordinance and thereby relinquished jurisdiction over land use regulations in county. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(3)(A), 42 U.S.C.A. § 2000cc(b)(3)(A).

3. Municipal Corporations ⇐589

Municipality's jurisdiction requires that it is able to exercise control or authority over a designated area.

4. Civil Rights ⇐1073

County land use regulations that prohibited property owner from constructing year-round Bible camp on residentially-zoned property did not impose substantial burden on owner's exercise of religious freedoms, and county stated compelling reason for those regulations, precluding owner's challenge under Religious Land Use and Institutionalized Persons Act (RLUIPA); there were several tracts within county on which owner could construct its camp, it was owner who insisted on using this particular property, county merely sought to enforce facially-neutral regulations that were intended to encourage area of quiet seclusion for families and that were in place prior to owner's proposal, and owner was given opportunity to seek rezoning and conditional use permit. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a), 42 U.S.C.A. § 2000cc(a).

5. Civil Rights ⇐1073

"Substantial burden" under the Religious Land Use and Institutionalized Persons Act (RLUIPA) is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable; the burden must be truly substantial, as to hold otherwise would permit religious organizations to supplant even facially-neutral zoning restrictions under the auspices of religious freedom. Religious Land Use and Institutionalized Persons Act of 2000, § 2(a), 42 U.S.C.A. § 2000cc(a).

See publication Words and Phrases for other judicial constructions and definitions.

6. Civil Rights ⇐1032
Constitutional Law ⇐1307

Both the Free Exercise Clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA) provide that, if a facially-neutral law or land use regulation imposes a substantial burden on religion, it is subject to strict scrutiny. U.S.C.A. Const.Amend. 1; Religious Land Use and Institutionalized Persons Act of 2000, § 2 et seq., 42 U.S.C.A. § 2000cc et seq.

7. Civil Rights ⇐1073

County land use regulations that prohibited property owner from constructing year-round Bible camp on residentially-zoned property did not impose unreasonable limitations on owner's religious freedoms, precluding owner's challenge under Religious Land Use and Institutionalized Persons Act (RLUIPA); regulations, consistent with town's land use plans, had neutral purpose of upholding rural and rustic nature of town and area near owner's property, while still allowing for religious assemblies throughout county and on subject property, and owner was given reasonable opportunity not only to seek rezoning and conditional use permit, but

also to look for other land that would serve its purpose. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(3)(B), 42 U.S.C.A. § 2000cc(b)(3)(B).

8. Civil Rights ⇐1073

Reasonableness of a limitation under the Religious Land Use and Institutionalized Persons Act (RLUIPA) is determined in light of all the facts, including the actual availability of land and the economics of religious organizations. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(3)(B), 42 U.S.C.A. § 2000cc(b)(3)(B).

9. Civil Rights ⇐1073

County land use regulations that prohibited property owner from constructing year-round Bible camp on residentially-zoned property did not violate equal-terms provision of Religious Land Use and Institutionalized Persons Act (RLUIPA); zoning district in which property was located was most restrictive district in county and ensured quiet seclusion for families living in area, and, while it permitted certain religious and secular assemblies, recreational camps were prohibited outright, regardless of religious affiliation. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

10. Civil Rights ⇐1073

Equal-terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on religious uses. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

11. Civil Rights ⇐1073

In determining whether a claim exists under the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), courts look to the zoning criteria rather than the purpose behind the land use regulation. Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

12. Civil Rights ⇐1073

If religious and secular land uses are treated the same from the standpoint of an accepted zoning criterion, that is enough to rebut an equal-terms claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Religious Land Use and Institutionalized Persons Act of 2000, § 2(b)(1), 42 U.S.C.A. § 2000cc(b)(1).

13. Constitutional Law ⇐1402
Zoning and Planning ⇐1089

Assuming that property owner had sincere belief that it was burdened by county land use regulations that prohibited owner from constructing year-round Bible camp on residentially-zoned property, county demonstrated that it had compelling state interest in preserving rural nature of area around property and achieved that interest by least restrictive means possible, precluding owner's challenge under Wisconsin Constitution's protection of freedom of conscience; regulations were generally applicable to all residents of county, and thus were "normally acceptable" under that constitutional provision. W.S.A. Const. Art. 1, § 18.

14. Constitutional Law ⇐1037, 1305, 1306

Wisconsin applies a compelling state interest/least restrictive alternative test when a claim is brought challenging a state law that violates an organization or individual's freedom of conscience; the test requires that the organization prove it

has a sincere religious belief and that such belief is burdened by the state law at issue, and, if the organization does so, the burden is then shifted to the state to rebut the claim by showing a compelling state interest that cannot be served by a less restrictive alternative. W.S.A. Const. Art. 1, § 18.

Roman Storzer, Storzer & Greene, New York, NY, Robert Leo Greene, Jr., Storzer & Greene, Washington, DC, Robert Leo Greene, Jr., Roman Storzer, for Plaintiffs–Appellants.

Andrew A. Jones, Whyte Hirschboeck Dudek S.C., Milwaukee, WI, for Defendants–Appellees.

Before KANNE, WILLIAMS, and TINDER, Circuit Judges.

KANNE, Circuit Judge.

Eagle Cove Camp & Conference Center, Inc. ("Eagle Cove") appeals from the district court's entry of summary judgment in favor of the Town of Woodboro, ("Woodboro") Oneida County and the Oneida County Board of Adjusters (collectively "the County"). Eagle Cove alleged that Woodboro and the County's land use regulations, which prohibit them from running a year-round Bible camp on residentially zoned property, violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the First and Fourteenth Amendments of the United States Constitution, and the Wisconsin Constitution. Eagle Cove also sought state certiorari review under Wisconsin Statute § 59.694(10). For the reasons set forth below, we affirm the decision of the district court.

I. Background

A. *The Town of Woodboro and Oneida County*

Woodboro comprises approximately 750 residents and about 21,857 acres of land. Oneida County has 708,751 acres of land. Squash Lake is partially located in Woodboro. Pursuant to Wisconsin Statute § 60.62(1), Woodboro adopted a Land Use Plan in 1998, which seeks to "encourage low density single family residential development for its lake-and river-front properties." (R. 63–20 at 9.) The plan incorporated a survey Woodboro took that found the majority of the residents desired to maintain the town's rural and rustic character. In 2009, Woodboro adopted a Comprehensive Plan in accordance with Wisconsin Statute § 66.1001 that incorporates the aforementioned language.

The zoning around Squash Lake reflects the goals set forth in the plans and the survey. There are one hundred seventy-seven parcels of real estate on Squash Lake, and all but seven are zoned for single-family uses. The seven parcels that are not zoned for single-family use are zoned for business and were grandfathered into the zoning plan as pre-existing uses during the initial zoning in 1976.

On May 8, 2001, Woodboro voluntarily subjected itself to the Oneida County Zoning and Shoreland Protection Ordinance ("OCZSPO"), which establishes zoning districts throughout the County. Towns must elect to be subordinate to the OCZSPO's provisions. In doing so, they relinquish zoning authority to the County.

According to the OCZSPO, religious land uses are permitted throughout the County and Woodboro. Year-round recreational and seasonal camps are permitted on thirty-six and seventy-two percent of the County, respectively. In addition, churches and religious schools are allowed

on sixty percent of the land in the County. Churches and schools are permitted on nearly forty-three percent of the land in Woodboro and campgrounds (religious or secular) on approximately fifty-seven percent.

B. *The Proposed Bible Camp*

Eagle Cove sought to construct a Bible camp on thirty-four acres of property that they own on Squash Lake in Woodboro. Eagle Cove believes that their religion mandates that the Bible camp must be on the subject property. Eagle Cove also believes that they must operate the Bible camp on a year-round basis. Neither of these beliefs is in dispute.

The subject property's eastern parcels are zoned Single Family Residential and the western parcels are zoned Residential and Farming. As the OCZSPO states, "The purpose of the Single Family Residential District is to provide an area of quiet seclusion for families. This is the County's most restrictive residential zoning classification. Motor vehicle traffic should be infrequent and people few." (R. 63–1 at 12.) The land was not specifically purchased for the construction of the proposed camp and has been owned by the same family since 1942.

C. *Petition for Rezoning and Conditional Use Permit*

On December 13, 2005, Eagle Cove filed a petition with Oneida County to rezone the subject property to a Recreational zoning district. The general reason provided for the rezoning was to permit construction of a Bible camp. The OCZSPO does not permit year-round recreational camps in Single Family Residential zoning districts. The County sent a copy of the rezone petition to Woodboro for its consideration on the matter. Beginning in February 2006, Woodboro held a series of meetings on the rezoning petition. After much discussion, Woodboro recommended that the County deny the petition. It found that the recreational camp was not consistent with the goals of maintaining the rural and rustic character of Woodboro and would conflict with the existing single-family development surrounding Squash Lake.

Following this recommendation, the County held several meetings and hearings regarding the zoning petition. The County denied the rezoning petition on the grounds that it would conflict with the majority single-family usage on Squash Lake and land use regulations set forth in the Woodboro Land Use Plan.

In doing so, the County considered the implications of RLUIPA and whether a denial would hinder Eagle Cove's right to exercise their religion on the subject property. It found that a religious school or church could be constructed under existing zoning, that Eagle Cove could achieve its goals without rezoning by applying for a conditional use permit, and that the proposed Bible camp directly conflicted with the Single Family Residential zoning around Squash Lake. By resolution adopted on August 15, 2006, the County accepted the recommendation of the County Zoning Committee and denied the rezone petition.

In 2008, Eagle Cove sought to obtain a conditional use permit ("CUP") to construct its proposed Bible camp on the subject property. If permitted, the CUP would allow Eagle Cove to construct its Bible camp without requiring rezoning of the subject property. Eagle Cove attached an "Overall Site Plan" with the application, which included plans for a lodge in excess of 106,000 square feet. The proposed Bible camp would have a maximum capacity of 348 campers and also

accommodate 60 people in outdoor camping sites.

Woodboro recommended that the County deny the CUP application. The Zoning Committee issued a staff report detailing its reasons for denying the application. Once again, the report found that the proposed Bible camp did not conform to the zoning goals in the district. It also stated that the proposed use was incompatible with the single-family residential use of adjacent land to the subject property, the purposes and nature of the Single Family Residential district, and Woodboro's 2009 Comprehensive Plan. The County Zoning Committee agreed with the report and denied the CUP application. Finally, Eagle Cove appealed to the Oneida County Board of Adjusters, which also found that the proposed use was impermissible.

D. *District Court Proceedings*

On March 10, 2010, Eagle Cove filed an action in the United States District Court for the Western District of Wisconsin. They filed an amended complaint on April 27, 2010, and asserted that the land use regulations by Woodboro and Oneida County deprived Eagle Cove of rights set forth under various provisions in RLUIPA, the First and Fourteenth Amendments of the United States Constitution, the Americans with Disabilities Act, the Rehabilitation Act, and the Wisconsin Constitution. They also petitioned for a writ of certiorari to the Wisconsin Supreme Court. All parties moved for summary judgment.

The district court granted summary judgment for the County and Woodboro on all counts.[1]

The district court found that the RLUIPA total exclusion claim lacked merit as neither the County nor the Town prohibited religious assemblies in their jurisdictions. It found that Eagle Cove could use their land for religious assembly, albeit not in the form of a year-round Bible camp. Citing our opinion in *Vision Church v. Village of Long Grove*, the district court held that the total exclusion provision of RLUIPA requires the complete and total exclusion of activity protected by the First Amendment, not just prohibition of a certain type of religious activity. 468 F.3d 975, 989–90 (7th Cir.2007). The district court went on to disagree with Eagle Cove's contention that Woodboro itself exercises jurisdiction over the land use regulations within its borders, finding that Woodboro has only an advisory role in the overall process and that it is the County that exercises jurisdiction over the land use regulations on the subject property.

In considering Eagle Cove's unreasonable limitation claim under RLUIPA, the district court found that Eagle Cove's proposed use of implementing a year-round Bible camp would be permitted in thirty-six percent of Oneida County and that seasonal recreational camps would be permitted on seventy-two percent of the County. Additionally, Woodboro's planning scheme allows for seasonal recreational camps on roughly fifty-seven percent of its land. The County and Woodboro did not unreasonably limit religious assemblies in their respective jurisdictions, but rather, Eagle Cove's insistence on locating the year-round camp on the subject property impeded the exercise of their religious beliefs.

The district court next addressed Eagle Cove's RLUIPA substantial burden claim. Despite the fact that Eagle Cove has spent considerable amounts of time and re-

1. We need not address the Rehabilitation Act or the Americans with Disabilities Act claims as they were not appealed by Eagle Cove.

sources on the various permits described above, the district court found that this did not entitle them to relief under the substantial burden provision of RLUIPA. It held that simply having a religious purpose does not prevent the County from placing reasonable constraints on the proposed camp. Citing *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir.2003) (hereinafter *"CLUB"*), the district court emphasized that, to qualify under this provision, the burden placed on religion must indeed be substantial. To find otherwise would allow even the slightest of obstacles to trigger RLUIPA's substantial burden provision. Eagle Cove specifically rejected alternative sites and methods for exercising their religion. As the district court observed, the scope of Eagle Cove's vision, not the OCZSPO, hindered their religious exercise.

The district court, using the same reasoning as in its substantial burden analysis, found that the free exercise claim under the First Amendment and the claim under the Wisconsin Constitution Article 1, § 18 also failed.

Eagle Cove filed this timely appeal.

II. Analysis

[1] We review the district court's grant of summary judgment de novo. *See Hottenroth v. Village of Slinger*, 388 F.3d 1015, 1027 (7th Cir.2004). To determine whether summary judgment is appropriate, all conflicting evidence and reasonable inferences drawn from it are construed in favor of Eagle Cove. *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 794 (7th Cir.2013). Summary judgment is proper if, in considering all evidence in favor of the non-moving party, we find that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A. *Total Exclusion Claim*

[2] Eagle Cove argues that Woodboro has violated RLUIPA's total exclusion provision, which prohibits governmental land use regulations from totally excluding religious assemblies from a jurisdiction. 42 U.S.C. § 2000cc(b)(3)(A). Eagle Cove's total exclusion argument is predicated, and in fact depends, on the assumption that Woodboro has jurisdiction to implement land use regulations on the subject property. This stems from the fact that year-round recreational camps are permitted throughout the County (rendering Eagle Cove's total exclusion claim obsolete), but not allowed within Woodboro's borders.

"Jurisdiction generally describes any authority over a certain area or certain persons ... Smaller geographic areas, such as counties or cities, are separate jurisdictions to the extent that they have powers independent of the federal and state governments." (Appellant's Br. at 22–23), *citing West's Encyclopedia of American Law* (2011). *Black's Law Dictionary* defines jurisdiction as: "A geographic area within which political or judicial authority may be exercised." 867 (9th ed.2009). Neither of these definitions yields any support for Eagle Cove's contention that Woodboro retains jurisdiction over land use regulations within the town.

[3] Jurisdiction requires that a municipality is able to exercise control or authority over a designated area. Indeed, Woodboro does retain jurisdiction on numerous matters of local governance that are within its control. The town board can, for example, regulate bowling centers, dance halls, and roadhouses maintained in commercial facilities. Wisconsin Statute § 60.23(10). It can dispose of dead animals or contract with a private disposal facility to do the

same. Wisconsin Statute § 60.23(20). Town meetings may be called to regulate the appropriation of money. Wisconsin Statute § 60.10(1)(3).

In this case, Woodboro was able to exercise its jurisdiction in approving the OCZSPO. "A county ordinance enacted under this section shall not be effective in any town until it has been approved by the town board ... The ordinance shall supersede any prior town ordinance in conflict therewith or which is concerned with zoning[.]" Wisconsin Statute § 59.69(5)(e). Woodboro chose to be subordinate to Oneida's zoning ordinance, and thereby relinquished its jurisdiction over land use regulations to the County.

Eagle Cove argues that Woodboro's implementation of its Land Use and Comprehensive Plans is proof that the town maintains sufficient control over the zoning regulations. The record suggests otherwise. Though Woodboro created the aforementioned plans, these were not binding on the County's ultimate zoning decisions. Whether or not the town approves of a change in zoning is merely one of the factors considered by the County in making its determination. Woodboro serves a limited, consultative role in determining the town's zoning regulations. The weight given to Woodboro's recommendation is at the discretion of the County. The town board itself acknowledged its advisory role in reviewing Eagle Cove's CUP application: "[T]he Town of Woodboro ... hereby provides an *advisory recommendation* to the Oneida County Planning and Zoning Department that the [CUP] Application for Eagle Cove ... be denied." (R. 62–48 at 2.) (emphasis added). Thus, it is clear that the County, not Woodboro, exercises jurisdiction.

For this reason, Eagle Cove's total exclusion claim must fail. There is ample evidence in the record to suggest that operating a year-round Bible camp would be possible in many parts of Oneida County. *See supra* Part I.A. In *Vision Church*, we held that the total exclusion provision of RLUIPA prohibits only "the complete and total exclusion of activity or expression protected by the First Amendment." 468 F.3d at 989. It is undisputed that Eagle Cove could construct a year-round Bible camp on thirty-six percent of the land in Oneida County. It is further undisputed that Eagle Cove could construct a religious church or school on the subject property. This is hardly a complete and total exclusion.

B. *Substantial Burden and Free Exercise Claims*

[4] Eagle Cove also seeks relief under the substantial burden provision of RLUIPA, which requires land use restrictions on religious assemblies be in furtherance of a compelling governmental interest and use the least restrictive means possible to achieve that interest. 42 U.S.C. § 2000cc(a). Eagle Cove must demonstrate that the zoning in Oneida County imposes a substantial burden on the exercise of religious rights and that the County did not have a compelling reason in creating the burden.

[5] A substantial burden under RLUIPA "is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable." *CLUB*, 342 F.3d at 761. The burden must be truly substantial, to hold otherwise would permit religious organizations to supplant even facially-neutral zoning restrictions under the auspices of religious freedom. *See Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir.2007) ("Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental inter-

est will free religious organizations from zoning restrictions of any kind.")

There are numerous locations within Oneida County for Eagle Cove to place its Bible camp. *See supra* Part I.A. Eagle Cove concedes that there are four tracts of land, out of the ten put forth by the County, which would be suitable for their proposed camp. (Appellant's Br. at 33.) Despite this admission, Eagle Cove has insisted from the onset of this litigation that the camp must be built on the subject property. In fact, they have never even looked into operating the Bible camp on any other land in Oneida County, though several properties in the County that could have supported a year-round camp have been sold since 2006. It is not the land use regulations that create a substantial burden, but rather Eagle Cove's insistence that the expansive, year-round Bible camp be placed on the subject property. *See Petra*, 489 F.3d at 851 ("When there is plenty of land on which religious organizations can build churches ... in a community, the fact that they are not permitted to build everywhere does not create a substantial burden.").

The OCZSPO itself applies a neutral land use regulation by zoning the area around Squash Lake, including the subject property, as a Single Family Residential district. The zoning occurred before Eagle Cove expressed any interest in constructing a Bible camp. Eagle Cove was given the opportunity to seek rezoning and a CUP application, both of which were denied. They also had the opportunity to seek out other properties on which to build their camp, but chose not to do so. Rather, Eagle Cove brought this suit. Though they claim to seek the protections of RLUIPA, in reality Eagle Cove seeks nothing more than an exception from the OCZSPO on the basis of their religious beliefs. RLUIPA is meant to protect religious freedoms from impermissible land use regulations, it is not meant to allow religious exercise to circumvent facially-neutral zoning regulations. Eagle Cove is not requesting relief from an unjust law or ordinance implemented by the County that inhibits their religious activity; rather, they seek special treatment on the basis of their religious purpose. *See CLUB*, 342 F.3d at 762 ("[N]o such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise").

Eagle Cove also maintains that Oneida County and the Town of Woodboro caused considerable delay, uncertainty, and expense in the execution of the rezoning application they submitted by leading them to believe that their permits would be granted. They rely on our holding in *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir.2005), which found a substantial burden under RLUIPA where there was considerable "delay, uncertainty and expense." We held that "[i]f a land-use decision ... imposes a substantial burden on religious exercise ... and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision." *Id.* at 900. In *New Berlin*, however, there were indicia of bad faith by the City that led the Court to find no compelling governmental interest that the City could put forth to justify its substantial burden on the Church. *Id.* at 899 ("The repeated legal errors by the City's officials casts doubt on their good faith"). That is not the case here.

First, the fact that Eagle Cove has spent considerable time and money on various applications for rezoning does not constitute, *prima facie*, a substantial burden. *See, e.g., CLUB*, 342 F.3d at 761 ("That [Appellants] expended considerable time

and money ... does not entitle them to relief under RLUIPA's substantial burden provision"). Further, it is clear from the record that the Town and County maintained their position throughout the rezoning application process that, while religious exercise would be allowed in the form of a church or school on the subject property, they would not permit the construction of a year-round recreational camp. The County had a compelling interest in preserving the rural and rustic character of the Town as well as the single-family development around Squash Lake. To do this, it zoned the area around Squash Lake for single family purposes four years before Eagle Cove first sought to build the camp. The zoning regulations do not seek to inhibit Eagle Cove's religious activity; they merely encourage an area of quiet seclusion for families around Squash Lake.

[6] Eagle Cove's Free Exercise claim must fail for the same reasons. We have previously noted that "both the Free Exercise Clause and RLUIPA provide that, if a facially-neutral law or land use regulation imposes a substantial burden on religion, it is subject to strict scrutiny." *Vision Church*, 468 F.3d at 996. As in *Vision Church*, we apply our substantial burden analysis to deny Eagle Cove's Free Exercise claim. *Id.* ("Given the similarities between RLUIPA § 2(a)(1) and First Amendment jurisprudence, we collapse [appellant's] claims for the purpose of this analysis; this approach seems most consistent with post-RLUIPA case law").

C. *Unreasonable Limitations Claim*

[7, 8] Eagle Cove also contends that there is at least a genuine issue of material fact as to whether reasonable opportunities exist to build the proposed Bible camp within the County. Reasonableness is determined "in light of all the facts, including the actual availability of land and the economics of religious organizations." *Vision Church*, 468 F.3d at 990; *see also Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548, 560 (4th Cir.2013) ("RLUIPA's unreasonable limitation provision prevents government from adopting policies that make it difficult for religious institutions to locate anywhere within the jurisdiction"). It cannot be said that the land use regulations in Oneida County "unreasonably limit[ ] religious assemblies, institutions, or structures[.]" 42 U.S.C. § 2000cc(b)(3)(B). The evidence clearly suggests otherwise.

The OCZSPO has a neutral purpose that incorporates Woodboro's Comprehensive and Land Use Plans. It seeks to uphold the rural and rustic nature of the town and the area surrounding Squash Lake. Nonetheless, it allows for religious assemblies throughout Oneida County and on the subject property. Eagle Cove has had reasonable opportunity not only to seek rezoning and a conditional use permit, but also to look for other land in Oneida County that would serve its purpose. It chose not to do so. While it may be said that Eagle Cove's insistence on a year-round Bible camp on the subject property without seeking alternatives is unreasonable, Oneida County's zoning regulations that seek to preserve the character of the area around Squash Lake are not.

D. *Equal Terms Claim*

[9–12] Eagle Cove also argues that the OCZSPO violated the equal terms provision of RLUIPA, which prevents governmental land use regulations that treat religious institutions on less than equal terms with similarly situated institutions that do not have a religious affiliation. 42 U.S.C. § 2000cc(b)(1). "The equal-terms section is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimi-

nation imposes a substantial burden on religious uses." *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir.2007). In determining whether a claim exists under the equal terms provision, we look to the zoning criteria rather than the purpose behind the land use regulation. *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 371 (7th Cir.2010). And "if religious and secular land uses that are treated the same from the standpoint of an accepted zoning criterion, ... that is enough to rebut an equal-terms claim[.]" *Id.* at 373.

The Single Family Residential zoning district, wherein the subject property lies, is the most restrictive district in the county and ensures quiet seclusion for families living in the area. While this zoning district permits certain religious and secular assemblies, recreational camps are prohibited outright, regardless of religious affiliation. It is clear that the OCZSPO does not treat religious land uses, in particular year-round Bible camps, less favorably than their secular counterparts. The County established the land use regulations to ensure that the single-family environment around Squash Lake remains intact. To achieve this goal, the OCZSPO forbids year-round recreational camps outright. Unfortunately for Eagle Cove, this means that they will have to place their Bible camp elsewhere.

E. Wisconsin Constitutional Claim

[13, 14] Eagle Cove believes that the protection offered under Article 1, § 18 of the Wisconsin Constitution is greater than that offered under federal law. Wisconsin applies a compelling state interest/least restrictive alternative test when a claim is brought challenging a state law that violates an organization or individual's freedom of conscience. *Coulee Catholic Schools v. Labor and Industry Review Comm'n*, 320 Wis.2d 275, 768 N.W.2d 868, 886 (2009). The test requires that the organization prove it has a sincere religious belief and that such belief is burdened by the state law at issue. The burden is then shifted to the state to rebut the claim by showing a compelling state interest that cannot be served by a less restrictive alternative. *Id.*

Even accepting that Eagle Cove has a sincere belief and that it is burdened by the OCZSPO, the County has demonstrated that it has a compelling state interest in preserving the rural nature around Squash Lake achieved by the least restrictive means possible (a neutral zoning ordinance). Like any entity, religious organizations are subject to general laws for taxes, licensing, social security, and the like that are "normally acceptable." *Id.* at 887. The zoning ordinance at issue here is generally applicable to all residents within Oneida County and thus would qualify as "normally acceptable" under Article I, § 18 of the Wisconsin Constitution.

III. Conclusion

Considering all facts in favor of Eagle Cove, we find that all claims under RLUIPA as well as the federal and Wisconsin constitutions lack merit. Consequently, we AFFIRM the district court's order granting Woodboro and the County's motion for summary judgment.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EAGLE COVE CAMP & CONFERENCE CENTER INC., a Wisconsin non-stock corporation; ARTHUR G. JAROS, JR., individually and as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, and as trustee of the Arthur G. Jaros, Sr. declaration of trust, and as trustee of the Dawn L. Jaros declaration of trust; WESLEY A. JAROS, as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros charitable trust; RANDALL S. JAROS, individually and as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros charitable trust; CRESCENT LAKE BIBLE FELLOWSHIP, a Wisconsin non-stock corporation; and KIM WILLIAMSON,

Plaintiffs,

vs.

TOWN OF WOODBORO, Wisconsin, a body corporate and politic; COUNTY OF ONEIDA, Wisconsin, a body corporate; and ONEIDA COUNTY BOARD OF ADJUSTMENT,

Defendants.

OPINION AND ORDER

10-cv-118-wmc

On February 4, 2013, this court granted summary judgment to defendants on all federal claims and related Wisconsin Constitutional claims and declined to continue to exercise supplemental jurisdiction over the remaining state law certiorari claim, which was dismissed without prejudice. (Dkt. #155.) Judgment was entered the next day. (Dkt. #156.) Plaintiffs appealed, and this court's decision was affirmed on October 30, 2013. (Dkt. #169-1.)

More than two years after this court's entry of final judgment in this case, plaintiffs -- a group seeking to build a year-round Bible camp on a specific piece of land located in the Town of Woodboro, Oneida County, Wisconsin -- filed two related

motions under Federal Rules of Civil Procedure 54(b) and 60(b), seeking relief from that judgment. For the reasons that follow, the court will deny both motions, finding neither Rule affords post-judgment relief to plaintiffs. Indeed, under the law and proceedings here, it is not even a close call.

OPINION

In their complaint in this court, plaintiffs asserted a myriad of claims under various provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), certain provisions of the United States and Wisconsin Constitutions, the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, the Rehabilitation Act, 29 U.S.C. § 794, and a state law claim for certiorari review pursuant to Wisconsin Statute § 59.694(10). Material to plaintiffs' present motions, the court granted summary judgment to defendant on plaintiffs' "substantial burden" claim under RLUIPA, finding plaintiffs had failed to demonstrate that defendants' refusal to rezone the land or provide a conditional land use permit did not render plaintiffs' religious practice "effectively impracticable." (2/4/13 Op. & Order (dkt. #155) 34 (citing *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (discussing 42 U.S.C. § 2000c(a)(1)).

After the United States Supreme Court denied plaintiffs' petition for *certiorari* review of this court's final judgment, however the Court eased this substantial burden

standard. *See Holt v. Hobbs*, 135 S. Ct. 853 (2015);[1] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *see also Schlemm v. Wall*, 784 F.3d 362, 364 (7th Cir. 2015) (recognizing the change in standard). Based on this change, plaintiffs seek relief from the court's grant of summary judgment on their RLUIPA substantial burden claim. Without commenting on whether the changed standard would have made a material difference in the final judgment in this case, the Federal Rules of Civil Procedure simply do not provide an avenue for plaintiffs to reopen that judgment.

Plaintiffs first cite to Rule 54(b) for relief. That rule provides in pertinent part:

> (b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b).

Plaintiffs argue that this court's decision to dismiss plaintiffs' state law certiorari claim without prejudice, and plaintiffs' ongoing pursuit of that claim in state court empowers me to "revise" the judgment even years after its entry. The fundamental flaw

[1] The Supreme Court denied plaintiffs' writ of certiorari on May 5, 2014, approximately two months after the Court had granted certiorari in *Hobbs*. The Court could have held plaintiffs' writ of certiorari pending a decision in the *Hobbs* case but opted not to, although as has been oft emphasized by the Supreme Court, that denial has no precedential impact. *See, e.g., Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985).

in this argument in that the court's June 5, 2013, judgment was *not* a "partial" judgment; it was a final judgment on all of plaintiffs' claims. After entry of that judgment, all of the claims against all of the parties in this action had been disposed of; there was no further work for this court to do; and the case was closed. (2/5/13 Judgment (disposing of all claims against all defendants, and *not* certifying an appeal of a partial judgment under Rule 54(b)).) The fact that the parties continued to pursue litigation as to one of their state law claims in state court did not leave any claim open for the court to review under Rule 54(b).

Perhaps in recognition of this settled law, plaintiffs turn next to the catch-all provision in Rule 60(b)(6), which does allow for relief from final judgment for "any other reason that justified relief." Notwithstanding this seemingly broad language, however, Rule 60(b)(6), too, proves to be a dead end. As the Supreme Court has explained, "intervening developments in law by themselves rarely constitute extraordinary circumstances required for relief under Rule 60(b)(6))." *Agostini v. Felton*, 521 U.S. 203, 239 (1997). *Shah v. Holder*, 736 F.3d 1125, 1127 (7th Cir. 2013) (holding that district court cannot use Rule 60(b)(6) to apply new decisional law to a closed civil case); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-29 (7th Cir. 1997) (fact that federal court's interpretation of state law in diversity case was contrary to interpretation later reached in another case by the state's highest court does not constitute extraordinary circumstances).[2] Given this case law, a leading treatise has

[2] While the Seventh Circuit has allowed some opening for changes in decisional law in the post-conviction context, the court's reasoning for adopting a "flexible approach" in that context does

concluded that "changes in decisional law should not, by themselves, be the basis for relief from judgments that have no prospective application." 12 James Wm. Moore, *Moore's Fed. Practice* § 60.48[5][b] (3d ed. 2016). As a result, the final judgment ties this court's hands under Rule 60(b)(6) as well.

Likely in further recognition of the weakness of its claims to relief under Rules 54(b) and 60(b)(6), plaintiffs filed a second motion, this time pointing to Rule 60(b)(5). That rule provides for relief from a final judgment where "applying it prospectively is no longer equitable." This provision necessarily requires that a judgment is applied "prospectively." As the D.C. Circuit explained,

> Virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect; even a money judgment has continuing consequences, most obviously until it is satisfied, and thereafter as well inasmuch as everyone is constrained by his or her net worth. That a court's action has continuing consequences, however, does not necessarily mean that it has "prospective application" for the purposes of Rule 60(b)(5).

Twelve John Does v. D.C., 841 F.2d 1133, 1138 (D.C. Cir. 1988).

Typically, judgments involving prospective application concern an injunction or consent decree, neither of which is at issue here. *Horne v. Flores*, 557 U.S. 433, 447 (2009). While plaintiffs may continue to feel the repercussions of the court's grant of judgment to defendant, there is no injunction or consent decree which is being applied. Indeed, plaintiffs themselves emphasize their continued efforts for relief in state court.

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not apply to the civil claims pursued here. *Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015).

Regardless, Rule 60(b)(5) does not provide an avenue for this court to reconsider the judgment due to a change in caselaw.

While there is no avenue for further relief in this case, in light of the changed standard of a "substantial burden" under RLUIPA, perhaps plaintiffs could start again by filing a *new* (scaled back) petition for a conditional use permit or rezoning before the appropriate Town and County agencies, but that is a local government administrative remedy far outside of the confines of jurisdiction of this court.

ORDER

IT IS ORDERED that plaintiffs' motions for relief from judgment (dkt. ##171, 178) are DENIED.

Entered this 11th day of August, 2016.

BY THE COURT:

/s/

William M. Conley
District Judge

APPENDIX M

674 Fed.Appx. 566 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 7th Cir. Rule 32.1.
United States Court of Appeals, Seventh Circuit.

EAGLE COVE CAMP & CONFERENCE CENTER, INC., et al., Plaintiffs-Appellants,

v.

TOWN OF WOODBORO, Wisconsin, et al., Defendants-Appellees.

No. 16-3194

Submitted November 18, 2016*

Decided January 25, 2017

Rehearing and Rehearing En Banc Denied February 27, 2017

Appeal from the United States District Court for the Western District of Wisconsin., No. 10-cv-118-wmc, William M. Conley, *Judge.*

Attorneys and Law Firms

Arthur G. Jaros, Jr., Attorney, Oak Brook, IL, for Plaintiffs-Appellants

Mark Baruch Hazelbaker, Attorney, Hazelbaker & Associates, Madison, WI, for Defendant-Appellee Town of Woodboro, Wisconsin

Andrew A. Jones, Attorney, Husch Blackwell LLP, Milwaukee, WI, for Defendants-Appellees Oneida County, Wisconsin, Oneida County Board of Adjustment

Before MICHAEL S. KANNE, Circuit Judge ANN C. WILLIAMS, Circuit Judge

ORDER

In 2010, Appellants brought eleven causes of action against Appellees, ten federal causes of action and one state cause of action. The district court granted Appellees motion for summary judgment and dismissed with prejudice all ten federal causes of action. The district court then declined to exercise supplemental jurisdiction over the remaining state law cause of action and dismissed it without prejudice. We affirmed. *Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, Wis.*, 734 F.3d 673 (7th Cir. 2013).

Appellants filed this successive appeal challenging the district court's denial of their motion to vacate its original judgment. We find the district court's reasoning in that order persuasive and affirm the district court's order on those grounds. *Eagle Cove Camp & Conference Ctr. Inc. v. Town of Woodboro*, No. 10–cv–118–wmc, 2016 WL 6584687 (W.D. Wis. Aug. 11, 2016).

Additionally, Appellees moved to sanction Appellants under Federal Rule of Appellate Procedure 38 for raising frivolous claims on appeal. We exercise our discretion to deny that motion.

All Citations

674 Fed.Appx. 566 (Mem)

Footnotes

* This successive appeal has been submitted to a quorum of the original panel under Operating Procedure 6(b), Judge John D. Tinder having retired since the time of our original decision. See 28 U.S.C. § 46(d). After examining the briefs and record, we have concluded that oral argument is unnecessary. Thus the appeal is submitted on the briefs and record. *See* FED. R. APP. P. 34(a)(2).

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APPENDIX N

Case: 13-1274 Document: 56 Filed: 12/10/2013 Pages: 1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 10, 2013

Before

MICHAEL S. KANNE, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No. 13-1274

EAGLE COVE CAMP & CONFERENCE CENTER, INC., *et al.*,
Plaintiffs-Appellants

v.

TOWN OF WOODBORO, WISCONSIN, ONEIDA COUNTY, WISCONSIN, and ONEIDA COUNTY BOARD OF ADJUSTMENT,
Defendants-Appellees.

Appeal from the United States District Court for the District of Wisconsin, Western Division.

No. 3:10-cv-00118-wmc

William M. Conley,
Chief Judge.

ORDER

On consideration of the petition for rehearing and rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and the judges on the panel have voted to deny rehearing. It is, therefore, **ORDERED** that rehearing and rehearing en banc are **DENIED.**

APPENDIX O

COPY

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

****

EAGLE COVE CAMP & CONVENTION CENTER, INC., at al,

Plaintiff,

Case Number 13-CV-345

-vs-

ONEIDA COUNTY BOARD OF ADJUSTMENT, et al.,

Defendant.

****

Pursuant to notice the above-entitled matter came on for an Oral Ruling in Circuit Court for Oneida County at the Courthouse in the City of Rhinelander, Wisconsin, on the 22nd day of April, 2015, commencing at 1:30 o'clock p.m., with the Honorable Michael H. Bloom, Circuit Judge, presiding.

APPEARANCES:

MR. MICHAEL DEAN, Attorney at Law, appeared telephonically representing the Plaintiffs.

MR. ARTHUR JAROS, Attorney at Law, appeared personally representing the Plaintiffs.

MR. ANDREW JONES, Attorney at Law, appeared personally representing the Defendants.

MR. MARK HAZELBAKER, Attorney at Law, appeared telephonically representing the Defendants.

PAULA J. ANDERSON RPR
Oneida County Branch II Court Reporter

THE COURT: We will go on the record in 2013-CV-345, Eagle Cove Camp and Conference--

MR. DEAN: Your Honor, the volume is very low on our end. If you could maybe pull the microphone closer or something, I'd appreciate it.

THE COURT: All right. I'll try to do that.

MR. DEAN: That's much better.

THE COURT: In any event, this is 13-CV-345, Eagle Cove Camp and Conference Center versus Oneida County, et al. The plaintiffs appear by Attorney Michael Dean via telephone with leave of court. Attorney Arthur Jaros is here in the courtroom. Also with us we have--

RANDY JAROS: Randy Jaros.

THE COURT: Randy Jaros is here in person in the courtroom. Attorney Mark Hazelbaker on behalf of the Town of Woodboro appears via telephone with leave of court. Attorney Andrew Jones on behalf of Oneida County and the Oneida County Board of Adjustment appears here in person in the courtroom.

Back on January 23rd, the court ruled on a motion for judgment on the pleadings. There was since a motion to reconsider filed by the plaintiffs. That motion has been briefed significantly. I've reviewed all of the submissions of the parties, and we are convened today for purposes of the court delivering its ruling, so I will proceed. I have had sufficient argument presented to me in writing for me to

rule, and so I will simply proceed.

Back on March 4th it should be noted that the court vacated the written decision, but did not vacate its oral ruling. I believe the technical posture was that the granting of January 23rd remained in force, but any rendering or entry was vacated, and so that's the lay of the land.

In any event, the ruling on which the plaintiff's seek reconsideration of the court's decision on motions for judgment of the pleadings, in order to prevail on a motion for reconsideration a moving party must either present newly discovered evidence or must establish that the court committed a manifest error of law or fact.

A manifest error is not demonstrated by disappointment on the part of the losing party. It is quote "the wholesale disregard, misapplication, or failure to recognize controlling precedent," and a party is not permitted to rehash old arguments or introduce new evidence or arguments that could have been introduced previously.

In support for their motion for reconsideration, the plaintiffs have identified six different issues relative to the court's decision and have also provided an additional reason for reconsideration.

The plaintiff's first contention is that the Hanlon decision of the Wisconsin Supreme Court does not support this court's underlying decision. Basically the plaintiffs

disagree with my analysis of Hanlon and have invited me to reconsider my analysis of the Hanlon decision with the benefit of their briefing.

The plaintiffs have presented an effective exposition of the various procedural differences between the scenario underlying the Hanlon decision and the posture of this case. In my judgment, the plaintiffs have not refuted the basic premise established by the Hanlon decision that's relevant to this case.

Specifically, the Hanlon court declared that Wisconsin certiorari actions are distinct from other non-certiorari civil actions for purposes of claim preclusion and that, in essence, is what Hanlon stands for. The procedural distinctions between the underlying facts of the Hanlon case or the underlying procedure of the Hanlon case, that doesn't alter the basic elemental gist of what the Hanlon court was saying about certiorari actions relative to other forms of civil actions in the context of claim preclusion.

In this case, I am presented with a scenario where the Federal District Court chose to exercise supplemental jurisdiction over all of the state law counts brought by the plaintiffs in the underlying federal court action except the certiorari count. In other words, the district court chose to exercise supplemental jurisdiction over all non-certiorari

state law counts asserted by the plaintiffs in their federal court action.

In the plaintiff's reply brief in the context of this motion to reconsider they appropriately, in my opinion, characterized what the Hanlon court did as the court split the claim for claim preclusion purposes.

Now, one of the issues that was integral to this court looking at what the federal court did for purposes of claim preclusion was that supplemental jurisdiction was not exercised over some non-certiorari state law counts and not others. We have a situation where the federal court exercised supplemental jurisdiction over some state law claims generally and not others, but the split in the federal court's decision relative to which state law counts it would consider was between the state law certiorari count and every other state law count choosing to exercise supplemental jurisdiction over the non-certiorari state law counts and not on the certiorari count.

In assessing the significance of the district court's action in the context of claim preclusion, the Hanlon decision comes home to roost, in my judgment, and the goals of claim preclusion are designed not necessarily directed at the ability of a litigant to bring claims but in the ability of the court system to manage litigation looking in part to issues of finality and reliability of judgments.

Now, certainly there are exceptions that have been discussed in this case to the doctrine of claim preclusion that certainly are designed to protect the rights of the litigants themselves, and we'll have a chance to touch on those this afternoon, but for purposes of the applicability of the Hanlon decision to this case, I'm finding that any procedural distinctions between this case and those underlying the Hanlon decision do not render it inapplicable.

Now, the plaintiff's second contention is that the footnote in this court's underlying written decision did not properly account for a distinction between the Chapter 68 certiorari proceeding that was at issue in Hanlon and the Chapter 59 certiorari proceeding which we have in this case.

As the plaintiffs correctly pointed out, the Chapter 59 certiorari proceedings allow for the court to hear additional evidence, and the plaintiffs applied a soft touch in the use of their language, which I appreciate, regarding the court potentially prejudging the matter. I don't believe that the argument that I entered into was prejudging the use of the term unlikely suggests that on its face it looks a certain way, but if new information were to come around that wouldn't foreclose a different result, and certainly I don't believe that I have foreclosed the issue of new evidence and in the event that either party were to request that I receive additional evidence when we get to the certiorari end of

things, I'll decide whether I'll receive the evidence at that time. That's the way it is.

Now, if I had said clearly I will not hear additional evidence in this case, that particular term applies a more near certainty. But in any event, the plaintiffs do raise a valid point on that issue, and as a result any language included in the underlying written decision relative to whether additional evidence will or will not potentially be taken in this case I'm withdrawing from my decision, and the reason I'm doing that is because I'm finding that even if it's assumed that additional evidence will be received in the certiorari review in this case, the distinction still doesn't change the claim preclusion analysis in this case under Hanlon.

Both Chapter 68 and Chapter 59 provides for the court conducting certiorari review, and the review under both statutes requires a reviewing court to consider the same four issues which for certiorari are whether the board or agency kept within its jurisdiction, whether it proceeded on a correct theory of law, whether its action was arbitrary, oppressive, or unreasonable representing its will and not its judgment, and whether the board or agency might reasonably make the order determination in question based on the evidence.

The taking of additional evidence does not change

the fact that review is still that of certiorari and the same four issues are still addressed. The taking of evidence expands the information to be reviewed and may change the amount of deference to be provided to the agency making the decision, but if additional evidence is taken and the evidence that comes in is substantially the same as the evidence already in the record under the Klinger versus Oneida County decision at 149 Wis 2d 838, which I believe is actually included in the footnote in the decision, the court has the option to disregard that.

In addition, regardless of whether the new evidence adds new information to the existing record, it does not remove the deferential aspect of a certiorari review despite the fact that it provides a basis for the court to be less deferential to the underlying agency, and -- I mean, in other words, certiorari is an inherently deferential proceeding given its very -- given its nature under any of these circumstances.

Also, regardless of the impact that any new evidence has on the record, any evidence that the court receives needs to be relevant to one of the four prongs of certiorari review, and that is -- that comes from the Wisconsin Supreme Court decision in Knoll versus City of Wausau which is 2013 WI 88 and that's Paragraph 48 in that decision, and the upshot of all of that is that the taking of

new evidence does not substantially alter the structure of certiorari review. Regardless if additional evidence is received, certiorari proceedings do not call for assessing damages or crafting a remedy or the various other aspects of non-certiorari civil matters.

In certiorari actions under Chapter 59, the court is still charged with either affirming, reversing, or modifying an underlying agency decision that's being reviewed.

So for all those reasons I'm finding that any distinction between Chapter 68 and Chapter 59, certiorari reviews are insufficient to take this case out from under the distinction that Hanlon draws between certiorari actions and other actions for purposes of claim preclusion.

The plaintiffs also assert that the court improperly made findings of fact or drew conclusions of law as to what the district court might or might not have done in terms of exercising supplemental jurisdiction over non-certiorari state law issues brought by the plaintiffs in this case.

According to the Restatement of Judgment (Second), it is the plaintiff's burden -- and this is also something that's addressed in Wisconsin under the Parks decision which has been referred to in the briefing in this case. It is the plaintiff's burden to show that the district court clearly

would have declined to exercise supplemental jurisdiction, and in that context my role is to determine whether the record establishes clearly that the district court would have declined to exercise supplemental jurisdiction over Counts 2 through 16 of the plaintiff's amended complaint in this case.

The district court did exercise supplemental jurisdiction over all of the non-certiorari state law issues brought by the plaintiff and only declined, as I said, to exercise supplemental jurisdiction over the state law certiorari issue.

The district court exercised supplemental jurisdiction over the Wisconsin constitutional issues under Article 1, Section 18, and the district court found that these issues were similar enough to their federal counterparts that the federal court could address them along with all the other federal issues raised.

Now, the -- as the plaintiffs have pointed out, there are aspects of the district court's understanding in that regard which may not be precisely accurate. It's worth noting that the Seventh Circuit decision which is part of the federal litigation involving the district court's decision the Seventh Circuit Court noted that and ruled in light of that awareness, so that issue has been addressed to an extent already in the federal court litigation before things got here.

But nevertheless, the plaintiffs assert that the district court was in error on that point. The question in the context of at least this portion of the analysis regarding claim preclusion isn't whether the district court got it right or whether the district court would have gotten it right. The question is whether the district court would or wouldn't have exercised supplemental jurisdiction, and one could make an argument that if the district court in its impression of the law locked all these things together that might make it more likely that they would have taken it all in.

The question for purposes of this specific part of the analysis isn't whether the federal court would have gotten it right. It's whether they would have taken jurisdiction.

Now, before we're done here there's going to be some touching upon the merits of some of these things, but for purposes of the Parks analysis the issue is whether it can be shown that the district court clearly would have declined supplemental jurisdiction, and the record does not establish that the district court clearly would have declined to exercise jurisdiction.

The district court appeared to be ready to address the non-certiorari state law issues, and certainly it hasn't been proven otherwise, and thus it was not -- I find it was

not manifest error on my part to determine -- to make that determination that it has not been shown that the district court clearly would have declined jurisdiction over the non-certiorari counts raised in the plaintiff's complaint in this case.

Now, speaking of the merits -- underlying merits of the decision, the other issues raised in the defendants -- excuse me -- the plaintiff's motion to reconsider and the brief in support thereof involve assertions that this court did not thoroughly address the exception from the Restatement of Judgment (Second) which applies when the first court action is plainly inconsistent with a fair and equitable implementation of a constitutional scheme.

The plaintiffs have also asserted that my earlier decision did not address the issue of the continuing restraint that was according to the plaintiffs left in place as a result of the district court action, and also that the prior federal court proceedings failed to yield a coherent disposition of the state constitutional issues, and the -- what I refer to as an additional issue that the plaintiffs brought in was making reference to the Lake Drive Baptist Church versus Bayside decision at 12 Wis 2d 585, and the plaintiffs assert that exclusion of a particular religious use from an entire town constitutes a per se violation of the Wisconsin constitution based on the Bayside decision.

Now, the -- whether there is a continuing restraint there needs to be a violation in order for there to be a continuing restraint. If the court failed to implement a constitutional scheme, implement as a verb is to put something into effect so there has to be something there, so for purposes of assessing those issues we need to delve into the merits and the applicability of what the plaintiffs assert is the holding of the court in the Bayside decision, but for purposes of todays ruling it needs to be kept in mind by everybody that this is a motion to reconsider an underlying decision based on claim preclusion.

It certainly -- I don't believe it's necessary for me to make rulings as to the constitutionality of anything at this point or a conclusive interpretation of the Bayside decision because what needs to be determined here is is there -- did this court make a manifest error of law in terms of the underlying decision which addressed claim preclusion.

Now, when we reach the certiorari end of things, certainly there's room for discussion of these things, and in the applicability of the Bayside decision to the decision of the Board of Adjustment certainly seems to be fair game, but for purposes of the today's ruling any discussion is in the context of whether or not a manifest error of law has been shown relative to an underlying claim preclusion decision, and it should be clear that any pronouncements I make about

the Bayside decision are in that context.

Regarding the failure to yield a coherent disposition, the plaintiffs argue that if, in essence, the district court's decision is allowed to stand in light of the Bayside requirement you could have a situation where an individual seeking to start up a camp along the lines of what the plaintiffs are seeking to do in a different county with a different zoning structure that this could be a precedent that would create an unequal playing field between the plaintiffs in this case and this hypothetical party.

I don't believe that the yielding of the coherent disposition language in the Restatement of Judgments is meant to go beyond the confines of the specific case, claim, transaction that we're dealing with within the context of the decision that has to be made about the applicability of claim preclusion.

In this case the disposition is that the district court dismissed at summary judgment all state law counts other than the certiorari count. It's pretty clear cut. I don't believe that the coherent disposition language in the Restatement was meant to go beyond that, so I don't believe that there's an issue relative to that aspect of the plaintiff's argument that constitutes a manifest error of law.

Relative to a failure to fairly and equitably

implement a constitutional scheme or whether there's a continuing restraint that is left in place by the action of the district court where we have to determine well, if Bayside says what the plaintiff's say it says is that something where we have sitting in front of us a per se violation of the Wisconsin constitution but we're just going to decline to deal with it because we can push it off by way of claim preclusion. Presumably the reason why these exceptions have been put in place in the Restatement of Judgments is to avoid that result.

The Bayside decision makes reference at two different portions of the opinion relative to the proposition that the plaintiffs pointed out, and in Section 4 of the opinion which is subheading of "Invalidity of ordinance before 1956," the Wisconsin Supreme Court in the Bayside decision states "The ordinance adopted in July, 1954, appears to exclude churches from the entire village. We do not hesitate to say that the ordinance in that form was invalid. From July, 1954, to November, 1956, it would have been lawful to build a church anywhere in the village."

Also in Section 7 which is subheading "Arbitrary action of the board" the court states, "As we have heretofore noted, the Bayside ordinance of 1954 excluded churches from the village, and therefore could not have prevented plaintiff from building on its site." That is the language that's

written in the Bayside decision.

Now, the Bayside decision was based on the finding that the municipality had acted arbitrarily and capriciously in its finding and it did not grant the relief that it did in that case as a result of the constitutional finding along the lines of the language that I've just read. The court said, among other things, that "an ordinance which excludes a church from a particular district must pass two tests: (1) Can it reasonably be said that use for a church would have such an effect on the area that exclusion of such use will promote the general welfare; and (2) Does the exclusion impose a burden upon freedom of worship which is not commensurate with the promotion of general welfare secured?"

The court discusses the exclusion of churches from residential areas which permit other buildings such as schools or other municipal buildings and the court states "It is at least arguable that it is arbitrary and capricious to exclude churches while permitting schools. Exclusion of churches has been held invalid where an ordinance permitted dwellings, schools, colleges, public libraries, public museums and art galleries, parks, etc., and farms and greenhouses and where an ordinance permitted homes, municipal buildings, railroad stations, public schools and club houses. This court has upheld exclusion of private and parochial high schools from a district where public high schools are

permitted, but considered it necessary to point out that while all high schools would present detrimental effects, public high schools presented certain advantages which the zoning authority could have considered compensating."

This is an example of the sort of analysis that the court engaged in in the Bayside case, and the reason why I point it out is that there was a relatively extensive discussion of the place that a church or churches have within a residential community.

The court eventually stated that "In reaching the conclusion that the action or village board was arbitrary and capricious, we have been persuaded by the following propositions: (a) Plaintiff is entitled to the benefit of equitable considerations arising out of its actions in reliance on the board's indication of the agreement. (b) The board rejected not only its own original view, but the recommendation of the consultant it employed, and the repeated recommendation of the village plan commission. (c) It appears that the property is better suited for a church than for residences." They also base it on traffic hazards being manageable and other factors.

It is worth pointing out that the concurring opinion from Justice Hallows concurred with the result of the court's opinion but indicated that he would reverse also on the ground that the exclusion of churches from residential

districts is invalid and particularly exclusion of churches from the "C" district which permits schools and municipal buildings as well as residences is invalid because such classification is arbitrary, unreasonable, and capricious.

So Justice Hallows is even pointing out that the -- that the scope of the decision is not as broad as he would like it to be given his own particular views on that regard.

Now, the reason I point all that out is can it be said that the original language that I cited regarding the court's opinion regarding the validity of the ordinance which appeared to exclude churches from the entire village can it be said that the Bayside decision means that if in any individual municipality, anywhere in the State of Wisconsin, if churches are excluded there from entirely that that is a per se a violation of the Wisconsin constitution. I don't know if I can say that is the law based on the Bayside decision.

Now, I don't know if I can say it's not, but I don't believe that it's clear that language that is included in the decision that is not the basis for the court's decision -- and I'm not saying that the language is dictum. I'm simply pointing out that it is not clear that we have a situation where this case stands for the proposition that in any individual municipality anywhere in the State of Wisconsin if churches are excluded entirely from the

municipality that it is a per se violation of the Wisconsin constitution. But if it, is if we assume that that is what the Bayside decision means at this point in time, the assertion of the plaintiffs is that that extends to camps -- religious camps such as the camp that the plaintiffs are seeking to create here in Oneida County.

The Wisconsin Supreme Court in the B'Nai B'rith decision reported at 59 Wis 2d 296, in addressing an issue of whether a community, a zoning district, a municipality could exclude a religious camp from a district which allowed churches, that was the basic question that was before the court, and the answer was yes. The Wisconsin Supreme Court in 1973 said yes, and in my judgment that decision severs the connection between at least as it might apply under Bayside between a church and a camp.

The Bayside decision clearly is talking about churches. The B'Nai B'rith decision clearly says that a municipality while allowing churches can disallow camps, and the bulk of the B'Nai B'rith decision does address things purely in terms of zoning law, but it does -- it does also point out towards the end of the decision that a denial of its intended use of the 28 acres is arbitrary and capricious and amounts to a denial of its rights under both state and federal constitutions and the court finds that this action by the Walworth County Board of Adjustment was not contrary.

So while the constitutional aspects of things was not the focus of the court's decision in B'Nai B'rith it was addressed, and under those circumstances for purposes of determining whether or not I made a manifest error of law in terms of my underlying decision relative to claim preclusion for the reasons stated I'm finding that the constitutional scheme suggested by the plaintiffs is not there to be implemented as it applies to religious camps because the Bayside decision doesn't reach that far and, therefore, there cannot be a continuing restraint either.

So for all those reasons, I'm finding that there has not been a manifest error of law shown relative to my decision of January 23rd, and the motion for reconsideration is denied.

Counsel, I know we've discussed at an earlier telephone conference the likely procedure, but I'll need my memory refreshed. Starting with you, Mr. Jaros, where do we go from here?

MR. JAROS: Your Honor, on the procedural point, I would like to defer to my co-counsel, Mr. Dean.

THE COURT: All right. Mr. Dean.

MR. DEAN: Your Honor, logically the next step would be for plaintiffs to submit the certiorari record and also in conjunction with that a motion proposing to submit additional evidence, if any, outside that record. I would

suggest in light of the court's extended and thoughtful remarks this afternoon that perhaps 30 days from whatever date we could obtain a transcript of those remarks would be an appropriate date on which to make those submissions and then another appropriate period of time for defense to respond.

THE COURT: Is -- there was discussion when the entry and rendering were vacated. Obviously that was done for purposes of allowing a coherent opportunity for pursuing appellate relief for this decision, and I don't recall if there was any discussion about staying proceedings in this court pending a potential appeal. Refresh my memory in that regard, Mr. Dean, and I don't know if decisions have been made in that regard, but refresh my memory.

MR. DEAN: Yes, we did -- there was discussion in that regard. There is, of course, the possibility that there would be an interlocutory appeal of this decision. That's, if my memory serves me correctly, that's within ten days. There's a real short time window for ten days within entry. That's something that I would need to discuss with the client including Mr. Jaros and the two Mr. Jaroses that are in the courtroom.

However, for purposes of -- maybe that's -- that would be the next logical step for us to advise the court by the end of the week, for example, whether we intend to seek

interlocutory relief.

However, in the event that we decline to do so, then my earlier remarks would be I think the logical way to proceed that we obtain a copy of the transcript of the court's remarks today and thereafter submit the proposed certiorari record along with a motion to admit any additional evidence, and under the statute I believe that at least contemplates the possibility of additional discovery, but I think that would be the decision -- the contents of such a motion, if any, I really don't want to speculate at this point. It just makes better sense for us to digest the court's remarks today. We did touch upon the court's view of additional evidence or at least the opportunity for that under the statute, and so consequently I would suggest that we -- that I confer with the client.

THE COURT: All right.

MR. DEAN: I would advise the court and counsel of any intention or declining to pursue interlocutory relief and then after that submit a proposed schedule for further proceedings.

THE COURT: All right. Mr. Jones.

MR. JONES: I don't know that I have anything to add, but based on proceedings to date I think the question of whether the plaintiffs are going to pursue an appeal in one form or another is obviously important in terms of how we

proceed. It certainly seems in the past that they intended to. If they don't, then I agree with Mr. Dean that the next thing that needs to be addressed is the record.

THE COURT: Why don't we -- well, as a result of the ruling today, I am -- I think we're ready for rendering an entry, so I would prevail upon -- I would prevail on Mr. Jones and Mr. Hazelbaker as the prevailing parties at this point to prepare proposed orders and/or judgment relative to the rulings that are now in place with an opportunity for the plaintiffs to lodge any objections and we can wait until it's appropriate that everyone has had a chance to digest those issues before the trigger is pulled and those are actually entered, and then perhaps it will be appropriate thereafter to set a status conference where after decisions have been made as to where the case is going relative to a potential interlocutory appeal we can further schedule what Mr. Dean was getting at as far as the certiorari procedure.

Any disagreement with that?

MR. DEAN: Judge, let me inject. One of the issues which I do have to discuss with our client is whether or not -- and this goes back to the original discussion from months ago whether or not the ruling today would be interlocutory or would be a final judgment on those individual claims that give rise to a hard and fast period for appeal on those claims, and that's -- if that's the case,

we may need to -- it may very well that we pursue with an ordinary appeal rather than interlocutory appeal. But again, that's a discussion that I would need to have with the client before so -- I don't want to indicate in advance one way or the other that we would view the ruling today as interlocutory instead under Wisconsin's admittedly somewhat ungainly appellate statute that allows for, as we understand it, probably split appeals on individual elements of the case. It may, in fact, be something that we would need to appeal on a mandatory basis, and if so then that -- whether or not the rest of it be -- the case is held in abeyance pending outcome of that appeal or at least a motion to stay that appeal pending further proceedings in the trial court. Those are all considerations that have to be made in taking -- so I think by the time that counsel submit their proposed judgments I think I would have the opportunity to confer with my client and we would be able to make a final decision on those issues.

THE COURT: Let's set--

MR. HAZELBAKER: Your Honor, may I be heard briefly?

THE COURT: Go ahead, Mr. Hazelbaker

MR. HAZELBAKER: First of all, I'd like to just correct something that I think Mr. Dean may have misapprehended how this matter moves forward from here. The

plaintiffs do not submit the record in a certiorari case. The secretary of the Board of Adjustment compiles and then certificates the record of the proceedings to the court. That's why it's called certiorari review.

If the plaintiffs then want to supplement the record either with additional documentary materials or with discovery or other evidence, then that's when they make their motion. I've done these many, many times representing counties, towns, et cetera, and appealing them and that's the procedure that way.

As to the other question, the decision that you've made disposes of all of the non-certiorari claims on their merits as well as the reconsideration motion on its merits. It is a final judgment. There's nothing left to happen as to that part of the action, so there's no sense at all as to an interlocutory decision.

The question that is really before counsel is whether or not we would render or agree to have one appeal touching on the whole case or have an appeal of the judgment dismissing the other claims on their merits and then on the certiorari claim.

Of course, I'm sure the town would like this case to be over as quickly as possible, but out of deference to the county and for that matter to the other parties, we will be -- we will be willing to go along with whatever solution

seems to be the best, so I think counsel should confer on that.

We have an oral decision right now on both of the substantive issues, and the court is correct if the court withholds entry of the judgment, there is nothing final to appeal.

I also would add I don't think there's any interlocutory to appeal because there are no further proceedings that the Court of Appeals would need to address.

So I would hope we can just make a decision and move forward in a straightforward fashion.

THE COURT: Let's -- let me propose this before we continue to discuss. What I would propose is that we identify a time frame within which proposed orders or judgments or both can be prepared, submitted, hashed out, so that they are ready for signature and entry, and in the meantime allowing the parties the opportunity to do whatever they need to do to make decisions about how they wish to proceed relative to any appeal and we can conduct the scheduling conference or the status conference. If we determine where we're at and where the parties want to go, I enter the judgments or I enter the orders and judgments at that time and we either stay proceedings pending some appeal or we continue with certiorari while other issues are being appealed. We do whatever we're going to do, but we make

and the defendant's call.

THE COURT: Well, what I would suggest is that between now and the 18th that counsel discuss that or whatnot, we can all discuss it and make determinations on the 18th, but I'm not sure what precisely whether that was what he was proposing or not, but certainly one of the reasons we're putting this out is to allow an opportunity for discussion between counsel on those points.

MR. JAROS: Thank you, judge.

THE COURT: Mr. Jones, anything further?

MR. JONES: Nothing further, judge.

THE COURT: Anything further from you, Mr. Hazelbaker?

MR. HAZALBAKER: I guess I would only comment just by way of moving this along, your Honor, that perhaps it would be wise for the process of compiling the certiorari to begin it's not my side of the case, but the sooner it's filed the sooner can move forward.

THE COURT: Mr. Jones heard you. All right. Okay. That concludes today's proceeding. We are adjourned.

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APPENDIX P

STATE OF WISCONSIN

CIRCUIT COURT ONEIDA COUNTY BRANCH 2

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EAGLE COVE CAMP AND CONFERENCE
CENTER, INC., et al.,

Plaintiffs,

vs. Case No. 13 CV 345

ONEIDA COUNTY BOARD
OF ADJUSTMENT, et al.,

Defendants.

****

ORAL RULING

****

HON. Judge Michael H. Bloom,
Circuit Court Judge Presiding

February 21, 2018

Oneida County Courthouse, Wisconsin

****

LYNN M. PENFIELD, RPR, CRR
Oneida County Branch 2 Court Reporter
P.O. Box 400
Rhinelander, WI 54501

APPEARANCES:

ARTHUR G. JAROS, JR., Attorney at Law, Oak Brook, Illinois, and MICHAEL D. DEAN, Attorney at Law, Brookfield, Wisconsin, appeared telephonically representing the Plaintiffs

ANDREW ALSTON JONES, Attorney at Law, Milwaukee, Wisconsin, appeared telephonically representing the Defendant, Oneida County Board of Adjustment

MARK B. HAZELBAKER, Attorney at Law, Madison, Wisconsin, appeared telephonically representing the Defendant, Town of Woodboro

ALSO PRESENT:

BRIAN DESMOND
Oneida County Corporation Counsel

KARL JENNRICH
Oneida County Planning and Zoning

Oneida County; February 21, 2018; 9:40 a.m.

Judge Michael H. Bloom; Branch 2

* * *

THE COURT: We'll go on the record in 13 CV 345, Eagle Cove Camp and Conference Center, et al., versus Oneida County Board of Adjustment, Oneida County and Town of Woodboro.

The plaintiffs appear by Attorney Michael Dean and Arthur Jaros, both via telephone with leave of court. Oneida County and the Board of Adjustment appear by Attorney Andrew Jones, also via telephone with leave of court; and the Town of Woodboro appears by Attorney Mark Hazelbaker via telephone with leave of court.

For counsels' information, Corporation Counsel Brian Bennett --

MR. DESMOND: Desmond.

THE COURT: -- and the Zoning Administrator -- Brian Desmond -- excuse me -- and the Zoning Administrator Karl Jennrich are here in the courtroom.

We're here today for the Court to deliver an oral ruling on the plaintiffs' renewed motion to reconsider.

The motion has been adequately briefed by an original updated brief on behalf of the plaintiffs, a response brief from Attorney Jones, and a reply brief

from the plaintiffs. I am ready to rule and am going to do so.

In January of 2015, I ruled that all claims asserted by the plaintiffs in this action, except for their state law certiorari claim, were barred by the doctrine of claim preclusion. In April of 2015, I denied the plaintiffs' first motion to reconsider that ruling, and the plaintiffs have since filed a renewed motion to reconsider.

To grant a motion for reconsideration, either newly discovered evidence or a manifest error of law is required. A party is not permitted to --

MR. HAZELBAKER: Your Honor, may I be excused, please? I hear some tones going on. I wonder if we lost somebody.

THE COURT: Let's have a roll call.

Mr. Dean.

MR. DEAN: Yes, Your Honor, still here.

THE COURT: Mr. Jaros.

MR. JAROS: I am here.

THE COURT: Mr. Jones.

MR. JONES: Still here, Judge.

THE COURT: Mr. Hazelbaker --

MR. HAZELBAKER: I apologize. I thought I heard somebody dialing in. I apologize.

THE COURT: Well, I did hear some beep tones like a phone was being dialed but, in any event, it appears we are all here and I will press on.

In any event, as I was saying, for purposes of a motion to reconsider, it is not for rehashing old arguments or introducing new evidence or new arguments that could have been presented previously; and a manifest error of law is the, quote, wholesale disregard, misapplication, or failure to recognize controlling precedent, unquote.

In the plaintiffs' renewed motion for reconsideration, the cornerstone of their argument is that since the federal court dismissed their lawsuit on the merits, there's been an intervening change in the law concerning the applicable standard under the Religious Land Use and Institutionalized Persons Act, which I will refer to as RLUIPA. Briefly stated, the federal court had previously applied the effectively impractical standard when they dismissed the plaintiffs' RLUIPA claim.

Now, after the Hobby Lobby decision in the United States Supreme Court, the standard under RLUIPA is easier to satisfy and, based upon this change in the interpretation of RLUIPA, the plaintiffs are asserting that the doctrine of claim preclusion should not bar

them from pursuing their non-certiorari claims in this action.

The plaintiffs haven't cited and I have been unable to locate any Wisconsin authority that says that an intervening change in case law is sufficient to render the doctrine of claim preclusion inapplicable. The plaintiffs have cited federal case law in which federal court has refused to apply the doctrine of claim preclusion because there had been an intervening change in the law.

In my judgment, though, the case law relied upon by the plaintiffs, at least in this regard, does not support a broad enough exception to the claim preclusion doctrine to prohibit application of claim preclusion under the circumstances of this particular case.

The plaintiffs have cited Christian versus Jemison. In that case, the Fifth Circuit Court of Appeals held that given the intervening Brown versus Board of Education decision, that the doctrine of res judicata, which is referred to in Wisconsin as claim preclusion, did not preclude an action against an ordinance that had previously been approved under the Plessy versus Ferguson separate but equal rule.

And the Jemison court characterized the Brown

decision as a, quote, momentous change that has occurred in the field of constitutional law since the adjudication of the first suit, unquote.

The Court also stated that if ever there was an intervening decision or change in the law creating an altered situation, that this is it, and that the wisdom of the rule which exempts such cases from the doctrine of res judicata is clearly revealed in this instance.

Now, a change in the interpretation of a statute -- in this case, RLUIPA -- in my judgment is not the equivalent of a change in the interpretation of a Constitutional provision, and it certainly doesn't equate with the sort of momentous change in constitutional law that occurred after Brown versus Board of Education struck down the separate but equal doctrine. And also there is -- there may be some overlap between RLUIPA and the First Amendment, but the specific contours of a person's rights under each are not the same. Claims under RLUIPA are distinguishable from claims made under the religious clauses of the First Amendment.

In the Burwell versus Hobby Lobby decision, the United States Supreme Court stated as follows: "In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress

deleted the reference to the First Amendment and defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"

Now, because there's a complete separation between the interpretation of the First Amendment and RLUIPA, a change in the interpretation of RLUIPA cannot be characterized, in my judgment, as the type of momentous change in Constitutional law that might preclude application of claim preclusion under the analysis in Christian versus Jemison.

There is case law to support the proposition that changes in the interpretation of a statute are not enough to defeat application of the doctrine of claim preclusion. For example, antitrust law is a creature of statute and in Lim versus Central DuPage Hospital, which is a Seventh Circuit decision reported at 972 F.2d 758, the Seventh Circuit held that a change in antitrust law did not create an exception to the res judicata rule.

The change from "effectively impractical" to an "easier to satisfy standard" relative to RLUIPA, as articulated in the Schlemm versus Wall decision does not, in my judgment, constitute a sufficient sea change in the law to justify an exception to the claim preclusion doctrine in this case, particularly in light

of the fact that the plaintiffs' federal RLUIPA claim, the specific claim that was affected by Schlemm versus Wall, would never have been litigated in this State court action, and the plaintiffs have acknowledged as much in the final footnote in their amended and updated memorandum in support of the plaintiffs' renewed motion for reconsideration.

Therefore, in my judgment, the modified standard articulated in Schlemm versus Wall does not provide a basis for reconsidering and changing my previous ruling.

The plaintiffs have also cited Wisconsin statute 806.07 in support of their motion. Specifically the plaintiffs have relied upon 806.07(1)(g), which provides relief if it is no longer equitable that the judgment should have prospective application, and also 806.07(1)(h), which provides for relief based on any other reasons justifying relief from the operation of the judgment.

As of today, I have yet to enter any final judgment in this case. Now, the Court has inherent authority to reconsider non-final rulings at any time prior to entry of the final order or judgment, and the plaintiffs are utilizing that aspect of the law by way of their motions for reconsideration. Therefore, any

aspect of the plaintiffs' motion directed at my rulings in this case is simply not governed by 806.07.

Now, the plaintiffs are attempting to utilize 806.07 to obtain relief from the summary judgment entered by the federal court in a previous and separate, though related, case, from this court in this case. Specifically, the plaintiffs assert on page 6 of their amended and updated memorandum in support of their renewed motion for reconsideration that, The plaintiffs' request and argument is that they should, as a matter of law and equity, be granted relief under subsections (g) and/or (h) from any estoppel effect arising from claim preclusion of the federal court summary judgment.

Now, in Wescott versus Catencamp, which is reported at 190 Wisconsin 520, the Wisconsin Supreme Court declared that it is well settled that when an attempt is made to change or vacate a judgment, the application should be made in the action in which the judgment was entered and to the Court that rendered the judgment, for the very obvious reason that one court will not review, set aside, or restrain the enforcement of a judgment entered by another court of concurrent jurisdiction.

Now, I acknowledge that this 1926 decision of the Wisconsin Supreme Court, you know, may not

constitute a precise declaration as to the parameters of the current version of 806.07; however, in my judgment, it is axiomatic that when a party seeks to negate the continuing legal effects of a previously entered final judgment, they necessarily must seek such relief in the action in which the judgment was entered and in the Court that rendered the judgment. Otherwise, parties would be free to attempt to relitigate unfavorable judgments before new courts, which is exactly what the case law precluding collateral attack of judgments that's been cited by defendants in their response brief seeks to avoid.

I'm holding that, as a matter of law, relief under 806.07 must be sought in the action in which the judgment was entered and before the Court that rendered the judgment. But, you know, with that said, even if section 806.07 was not so limited, relief thereunder would not be justified in this case.

The essence of the plaintiffs' argument is that the federal court's unwillingness to correct its underlying summary judgment, in light of the new proper standard articulated in Schlemm versus Wall, makes giving the federal court's judgment preclusive effect in this case is -- makes it inequitable or unfair, thereby justifying relief under 806.07(1)(g) or (1)(h).

Now, in Kruckenberg versus Harvey, which is reported at 279 Wis.2d 520, while recognizing the exceptions to the doctrine of claim preclusion set forth in the Restatement (Second) of Judgments, the Wisconsin Supreme Court pointed out that claim preclusion is strictly applied, and disavowed any language in the decisions of the court of appeals to the extent that the language requires a court to conduct a, quote, fundamental fairness, unquote, analysis in applying the doctrine of claim preclusion or allows litigation of an otherwise barred claim to continue simply because in that particular case, application of the doctrine of claim preclusion might appear unfair.

And, subsequently, in Menard, Incorporated versus Liteway Lighting Products, which is reported at 282 Wis.2d 582, the Wisconsin Supreme Court cited its Kruckenberg decision as a basis for declining to address Menard's arguments concerning the equities of applying claim preclusion in that case.

As such, under Wisconsin law, arguments as to the general unfairness or inequity of the claim preclusion are not recognized; and, therefore, in my judgment, the equitable provision in 806.07(1)(g) and the catchall provision in (1)(h) should not serve as a basis for relief from an application of the doctrine of

claim preclusion in this case.

As a further basis for relief, the plaintiffs cite the discussion of Article 1, Section 9 of the Wisconsin Constitution contained in Collins versus Eli Lilly. Article 1, Section 9 provides that every person is entitled to certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character.

In the Collins case, the Wisconsin Supreme Court took the broad principles stated in that section and fashioned a remedy under the unique circumstances of that case where a plaintiff who had suffered the ill effects of medications taken by her mother during pregnancy but was unable, decades later, to identify which manufacturer had supplied the drug taken by her mother. Essentially, the Wisconsin Supreme Court in Collins provided a remedy to a category of plaintiffs who would otherwise not even be able to get into court, and that's not the case here.

Article 1, Section 9 of the Wisconsin Constitution as it is addressed in Collins is about access to the courts. Article 1, Section 9 does not entitle litigants to the precise remedy they may desire, but merely their day in court, and that is according to the Court of Appeals in Acharya versus AFSCME, which is

reported at 146 Wis.2d 693.

With regard to the non-certiorari claims at issue in this case, it is abundantly clear that the plaintiffs have had their day in court in a federal forum. The plaintiffs have not been deprived of due process. The plaintiffs are understandably disappointed with the outcome of the federal litigation, particularly in light of the intervening developments in the case law surrounding RLUIPA; however, the plaintiffs have not cited, and I have not located, any case in which Article 1, Section 9 defeated an otherwise valid assertion that the doctrine of claim preclusion barred additional litigation of a previously litigated matter. And, as such, I'm finding that Article 1, Section 9 does not defeat the application of the doctrine of claim preclusion in this case.

The plaintiffs argue that the exceptions to the application of claim preclusion set forth in the Restatement (Second) of Judgments should apply in this case. Specifically the plaintiffs argue that the prior federal judgment upon which my application of claim preclusion was based was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme and that it resulted in a patently incoherent result.

As an initial matter, I reject out of hand, you know, the argument that the federal court judgment resulted in a patently incoherent result. The federal court dismissed all claims on their merits with the exception of the state law certiorari claim, which was dismissed without prejudice.

In other words, all non-certiorari claims were disposed of and over with and the plaintiffs were free to refile the state law certiorari claim in state court. It's that simple. And there's nothing incoherent about it, in my judgment; certainly nothing patently incoherent, and the applicability of that particular exception requires no further discussion as I see. And that leaves the plaintiffs' argument that the federal court's judgment is plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme.

It's important to note at this juncture that two things need to be kept in mind. First, the issue of whether the denial of a conditional use permit to the plaintiffs violates the no preference clause in Article 1, Section 18 of the Wisconsin Constitution is not straight-up before this Court. The issue that was decided previously by this Court, by me, and the issue that the plaintiffs are currently asking the Court to

reconsider is claim preclusion. As such, the merits of the plaintiffs' no preference clause argument are not before me; only whether it satisfies a recognized exception to the doctrine of claim preclusion.

Second, the current posture of that issue is a renewed motion to reconsider which deals with manifest error; in other words, the precise question before me today is whether my previous ruling that the federal court's judgment is not plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, does that constitute a wholesale disregard, misapplication, or failure to recognize controlling precedent?

The plaintiffs assert that the no preference clause of Article 1, Section 18 of the Wisconsin Constitution has been violated by the defendants in this case. The plaintiffs argue that the defendants' zoning, which permits churches and religious schools but not bible camps, is an impermissible preference between different modes of worship. Now, I've reviewed my prior analysis regarding State ex rel Lake Baptist Church versus Village of Bayside and State ex rel B'Nai B'Rith foundation versus Walworth County, and from a subjective standpoint I'm finding that my prior analysis does not constitute a manifest error of law.

As an initial matter, the plaintiffs have acknowledged that there are no reported Wisconsin decisions that address the constitutional "modes of worship" language, and that was in their brief to the Seventh Circuit which is set forth in Attorney Jaros' affidavit that was entered on November 19th, 2014 in this case. In other words, this area of state constitutional law in Wisconsin remains undeveloped.

Now, in the B'Nai B'Rith case, a Jewish foundation intended to use a 28-acre tract of land for a conference center, leadership training center, and a children's program. These 28 acres were located within what was referred to as Residence District A, which permitted single-family dwellings as well as churches, public, and parochial schools. The County denied the application for a zoning and occupancy permit. The zoning ordinance did not contemplate the proposed use of the 28 acres as within the words "church" and "school."

A zoning administrator in that case testified that the proposed use was more in the nature of a recreational camp, which was a permitted use in Residence District B and Residence District C. The foundation argued in that case that the denial of its applications was arbitrary, capricious, and violative of its constitutional rights; and the Wisconsin Supreme

Court disagreed and affirmed.

Now, my reading of the B'Nai B'Rith case is that it creates a separation between a church or school on the one hand and a recreational camp on the other. Under B'Nai B'Rith, a municipality may allow a church and disallow a religious camp within a certain zoning district.

During the May 7th, 2015 hearing on the first motion to reconsider, I acknowledged that the constitutional issues were not the focus of the B'Nai B'Rith case. However, in the absence of more specific controlling authority relative to how the "modes of worship" language of Article 1, Section 18 would apply in cases such as the instant case, the plaintiffs cannot establish that my previous application constitutes a wholesale disregard, misapplication, or failure to recognize controlling precedent.

There is no developed law in Wisconsin relative to the parameters of the "religious establishments" and "modes of worship" language in Article 1, section 18 of the Wisconsin Constitution. What courts do have to work with is Bayside, which held that the total exclusion of churches from an entire municipality was unconstitutional, and B'Nai B'Rith, which held that the municipality may allow a church and disallow a religious

camp within a certain zoning district.

So, you know, the question is, how could a federal court have failed to implement Wisconsin's constitutional scheme when the underlying state constitutional law is undeveloped and the available state precedent is more or less consistent with the federal court's ruling? And how can it be asserted that this court, in the face of Wisconsin Supreme Court precedent holding that a municipality can allow a church and disallow a religious camp, how can that be called a manifest error of law by holding that? In my judgment, the argument that the federal court failed to implement Wisconsin's constitutional scheme and that this court committed a manifest error of law are without merit.

I find that the doctrine of claim preclusion is dispositive in this case as to all claims except the certiorari claim and that includes the plaintiffs' no preference claim. Claim preclusion extends to any and all claims that either were or which could have been asserted in the previous litigation.

Something that needs to be kept in mind here is that the no preference issue was raised in federal court. Count VIII of the plaintiffs' federal complaint and amended complaint asserted as follows: "Paragraph 201. Defendants have deprived and continued

to deprive plaintiffs of their freedom of worship, as secured by Article 1 Section 18 of the Wisconsin Constitution by interfering with the plaintiffs' rights of conscience, and by preferring other religious establishments and modes of worship."

The alleged violation of the Wisconsin Constitution, including preference of one mode of worship over another, was expressly raised by the plaintiffs in the federal litigation. The plaintiffs further made the asserted failure of the district court to adequately address the no preference clause part of its federal appellate argument.

In the context of the federal litigation, the plaintiffs further requested certification of the no preference issue to the Wisconsin Supreme Court. As such, the plaintiffs' no preference claim not only could have been litigated in the federal case, it was litigated in the federal case; and in the federal forum, the plaintiffs had full and fair opportunity to litigate their constitutional issues and good, bad, or otherwise, their dissatisfaction with the outcome does not defeat the application of claim preclusion in this case.

And the plaintiffs' attempt to relitigate their no preference claim in the state forum is barred by the doctrine of claim preclusion in the same manner and to

the same extent as all of their other non-certiorari claims.

So I'm finding that the Court's previous holding as such does not constitute a manifest error of law and the plaintiffs' renewed motion to reconsider is therefore denied.

All right. I guess I'll start with Mr. Dean. Where do we go from here?

MR. DEAN: Excuse me, Your Honor. I had the microphone on mute. I will defer to Mr. Jaros.

THE COURT: Mr. Jaros.

MR. JAROS: Yes, Your Honor. So we have to confront the procedural questions, I think, Your Honor, in light of the ruling that you just made as to whether you want to actually now reduce today's ruling and the January 2015 main decision to judgment form, which then would start the appeal period running or at least conceivably start it running.

As we had submitted to the Court in our December 26th, 2015 submission, we would feel the need to file a protective notice of appeal. That led to Your Honor's March 27th, 2015 ruling that vacated the written judgment, I believe, but left the oral ruling stand.

And so there's this procedural question, a

rather thorny one, that I think should be considered.

I'd also like a bit of time to obtain a transcript of Your Honor's very detailed ruling this morning. There was a lot in it and I didn't catch it all, and I'd like a chance to study it, so we would order that transcript right away, Your Honor.

THE COURT: All right. Well, before hearing from other counsel, my initial reaction is that if there is to be an appeal of the Court's ruling, something that is not a shock to anyone, my take is that we would want to get that resolved before we plowed forward with the certiorari process prior to knowing the result of any appeal.

Do you disagree with that, Mr. Jones?

MR. JONES: I do not, Your Honor.

THE COURT: Do you disagree with that, Mr. Hazelbaker?

MR. HAZELBAKER: I really have no say in that matter because the certiorari claim solely involves the County. To the extent that it would implicate the Town's considerations, the Town wants to get this matter done as to the Town as soon as possible.

THE COURT: All right. Well, my thought would be since there is a judgment here which completely disposes of the plaintiffs' claim against the Town of

Woodruff [sic], that without having cracked the books on that issue, my off-the-cuff reaction is that the plaintiffs may appeal that ruling as a matter of right following entry of a written order or judgment to that effect.

And I guess I imagine in the event that the -- that this issue is subject to appeal and we proceed with the certiorari, in the event that my ruling today were reversed, that we have to wipe the slate and come back to the beginning with new parties on the table and whatnot, and that doesn't make a lot of sense.

Do -- Mr. Jaros, do you disagree with that?

MR. JAROS: At this point I don't think I do, but I think I need a chance to confer with my co-counsel, Mr. Dean, on this.

The procedure is very intricate and technical, Your Honor, so I think I do not agree, but that's sort of a tentative comment on my part.

MR. DEAN: Mr. Dean. Yes, Your Honor, we did have a discussion and possibly some briefing on this in the earlier submissions, that this does set up the unusual situation in which there are two parties, one party may be the subject to a final appealable order as a right in which a final statute of limitations would run, and the second party with matters still remaining

open which would not be appealable as of right, leaves us in sort of a -- it may not be the correct term, but at any rate, an unusual situation in which issues submitting -- affecting one party are subject to, you know, appealable rights; the other would be subject to appeal only on an interlocutory basis.

And so my recollection is that Your Honor, in response to that observation, made the same observation then as you did now: That it would make sense to have all matters resolved so that we -- so when we do proceed with the certiorari, that all -- that all the -- there's no possibility of a second certiorari if, in fact, the earlier procedural ruling happened to be reversed.

With that in mind, we have -- those issues were discussed before and Mr. Jaros and I will confer.

I would suggest that perhaps within a reasonably short time we -- on plaintiffs' behalf -- we might even confer with defense counsel, of course -- and submit to the Court a suggested -- as far as entry of -- because Mr. Hazelbaker, of course, would be entitled to then submit a proposed order for final entry of judgment and it might be prudent for Mr. Jaros and I to confer with each other and then with counsel and perhaps then advise the Court as to what we suggest the most expeditious procedure would be, keeping those two

possibly inconsistent tracts in mind.

MR. JONES: Your Honor, if I may? This is Andrew Jones.

THE COURT: Go ahead.

MR. JONES: Before the second motion for reconsideration, the one that Your Honor ruled on this morning was filed, we were already at the point where I had submitted to Your Honor a proposed judgment and taxation of costs that essentially dealt with Your Honor's ruling. This dismisses all of the claims against not only the Town of Woodboro but Oneida County, and I think we're back to that point again currently.

So I am certainly open to further conversation with Mr. Jaros and Mr. Dean about whether that's the correct posture, but I think we're going to end up at the point where we are again submitting to Your Honor proposed judgments that take into account today's ruling but that potentially request Your Honor to enter final judgment in favor of the Town and the County and that then would be appealable, I think as a matter of right by the plaintiffs if they so choose.

But as Your Honor said, if there's going to be an appeal as to what was already ruled on, it's the County's and the Board of Adjustment's position that we proceed on that appeal rather than dual tracking things

or setting that aside and having to come back to square one if it were determined after Your Honor had put in the certiorari review claim that the claim preclusion ruling was an error.

So, as I said, I'm certainly open to further conversation with Mr. Jaros and Mr. Dean and I think we ought to do that, but I think we're going to end up at a place where the County and the Town are submitting a proposed order to Your Honor that would be appealable.

MR. HAZELBAKER: May I be heard?

THE COURT: Go ahead.

MR. HAZELBAKER: Mark Hazelbaker.

This case has been going on for eight years. It has been to the Supreme Court twice, the U.S. Supreme Court; there have been multiple motions to reconsider both in the federal court and the state court. The fact of the matter is that the merits of the claims seeking damages and relief from the zoning regulations, the RLUIPA claims and the Wisconsin Constitution free exercise claims and the First Amendment claims, they have all been litigated beyond reason. And, you know, I understand the seriousness of Mr. Jaros' good faith in pursuing these and I credit him with perseverance. Perseverance is a virtue until the point where it becomes a lost cause, and this one certainly is, at

least in my opinion, but we'll differ about that.

The Town has an interest in the finality of this matter, and we have been dragged along with this matter for eight years, even though the Town does not have zoning authority, only a veto and planning power. At this point, the prejudice to the Town of not going forward with the appeal of the merits of these claims, which are legal claims seeking, you know, damages or -- and/or equitable relief, the prejudice to the Town is enormous. We need a finality.

We've had now three different town boards in the time since this matter started. The citizens of the Town of Woodboro are entitled to know this is over, and it certainly is now.

The certiorari claim is a totally different kind of matter, as you know, Your Honor, from these other claims. Certiorari claims are an administrative review procedure which tests whether an administrative body has exceeded the substantial discretion dedicated to it under the statutes. There is a slight possibility -- and slight as in approaching infinitesimal -- that somehow a higher court might rule that a legal mistake was made which would be material to the determination by the Board of Adjustment.

But the Board of Adjustment decisions, as the

Court I'm sure is aware, are entitled to a substantial presumption of validity. The one thing that is solid in contesting a Board of Adjustment determination is an error of law, except that whether or not the legal determinations that were made at the time the board acted has, in the related claims, been litigated to death with no success on the part of the plaintiffs.

So, all that said, I'm certainly willing to brief the Court of Appeals case, if that's what's going to happen, the Supreme Court petition for review, if that's what is going to happen. I think we need to move on ahead.

I for one would simply like to submit a proposed judgment. I would say that the situation we're in, where one party is dismissed from a multi-party litigation, is perhaps not frequent, but it is not unusual. It's happened many, many times. It happens every day in Wisconsin and having separate appeals by a party which gets dismissed on summary judgment because of an immunity or because of a coverage determination as to one party but not another happens all the time.

The Court of Appeals deals with it all the time. I've dealt with it many times in my career. Mr. Jones has dealt with it many times. It isn't unusual. It may be infrequent.

So I really don't see that we need to spend more time agonizing over what we do. The plaintiffs lost. They lost over and over and over again, and it is time to give the defendants their judgment on the merits, and if the plaintiffs want to appeal it, let them appeal it.

But we have anecdotes that have passed all necessary and reasonable points. I don't want to confer with them because I could talk to them for six weeks, and I'm still going to insist that we get a final judgment and the appeal go up the ladder. It's time to move this to the end. Thank you.

THE COURT: All right. Well, now that I've heard from all counsel, two things: I want to move this case forward as quickly as reasonably possible under its peculiar circumstances. Second, I really don't want, after wading into a likely very elaborate certiorari process, to find that the Court of Appeals has determined that my ruling today and earlier on the issue of claim preclusion was in error and then we have to start up again.

So what I want to have happen is a written judgment effecting my ruling to be drafted and entered and that it be done in a way that will allow the plaintiffs to make a determination -- within the time

frames prescribed by statute to determine whether or not they wish to appeal and then to either do so or not do so as they -- as they see fit.

Now, I guess what I want to establish is a -- sort of a deadline for submission of a written -- proposed written judgment and perhaps a status conference to conduct further scheduling. And in that regard, I'm looking at the afternoons of Monday and Tuesday, March 12th and March 13th, for scheduling purposes. And my expectation would be that counsel -- and we can talk about who is the person to draft the proposed judgment -- but my intent would be to enter the judgment on that date.

Is there any counsel that wouldn't be available for a telephone conference late in the afternoon on Monday, March 12th, or Tuesday, March 13th?

MR. JONES: Your Honor, this is Andrew Jones. I'd be available on the afternoon of the 13th. On the 14th, I have to be in Racine County Circuit Court.

THE COURT: Actually, it's the 12th and the 13th that I'm looking at.

MR. JONES: Oh, I'm sorry.

THE COURT: But you are available the afternoon of Tuesday, the 13th?

MR. JONES: I am that afternoon, yes. On

Monday, March 12th, I have to be in Racine County Circuit Court.

THE COURT: Mr. Dean? Mr. Jaros?

MR. JAROS: Mr. Jaros here. I am available on both the 12th and the 13th.

MR. DEAN: Your Honor, Mr. Dean. Either of those dates is acceptable with me.

THE COURT: Mr. Hazelbaker?

MR. HAZELBAKER: Mark Hazelbaker is available on both.

As far as drafting a proposed judgment, Mr. Jones and I had previously submitted -- or I think Mr. Jones submitted it; I think I had -- I commented upon it. I think we'll probably update that, and I'm sure we can get it in in a very timely fashion.

THE COURT: All right. And -- all right. 4:00 p.m., Tuesday, March 13th, telephone conference. And we will presumably have the proposed judgment submitted by Messrs. Hazelbaker and/or Jones, and my intention will be to pull the trigger on that on March 13th, and we will set further scheduling to establish a status conference at a time when the appeal, if there will be an appeal, has been filed, or, if not, to schedule further proceedings relative to the certiorari issue.

If an appeal -- a notice of appeal is filed, my intention would be to set scheduling conferences and not proceed with the certiorari for the reasons stated.

And we are --

MR. JAROS: Your Honor, what time on the 13th did the Court say? The telephone connection broke up momentarily.

THE COURT: 4:00 p.m. central time.

MR. JAROS: Thank you, Judge.

THE COURT: And whoever was so kind to arrange today's conference call, can the Court prevail upon you to do the same on that date?

MR. DEAN: Yes -- Mr. Dean responding -- and my connection broke up as well. Which date was that at 4:00 p.m.?

THE COURT: Tuesday, March 13th, 2018, at 4:00 p.m.

MR. DEAN: Okay. Okay.

THE COURT: Anything further that we need to take up today, Mr. Dean?

MR. DEAN: No, Your Honor.

THE COURT: Mr. Jaros?

MR. JAROS: No, Your Honor. Thank you.

THE COURT: Mr. Jones?

MR. JONES: No, thank you, Judge.

THE COURT: Mr. Hazelbaker?

MR. HAZELBAKER: One further comment to the reporter, if I may, Your Honor.

Since Mr. -- I believe it was Mr. Jaros asked for a copy of the transcript of today's proceedings. I would like a copy as well.

THE COURT: She nods her head in acknowledgment.

MR. HAZELBAKER: Thank you, Your Honor.

Your Honor, I want to thank you for the tremendous time and effort you put into the decision. I appreciate it very much, and I think all counsel share that feeling --

THE COURT: Well --

MR. HAZELBAKER: -- whether they agree with the result or not.

MR. DEAN: Yes, Your Honor. Thank you.

MR. JAROS: Yes.

THE COURT: Well, I'm taking it seriously.

MR. JAROS: Much effort went in on the part of the Court and we thank you for the effort.

THE COURT: That's all for today. You may hang up and have a good rest of your day.

(Proceedings concluded at 10:28 a.m.)

-oOo-

I, Lynn Penfield, RPR, CRR, Official Court Reporter in and for the State of Wisconsin, do hereby certify:

That I reported stenographically the proceedings held in the above-entitled cause; that my notes were thereafter transcribed with Computer-Aided Transcription; and the foregoing transcript, consisting of pages numbered from 1 to 33, inclusive, is a full, true and correct transcription of my shorthand notes taken during the proceeding had on February 21, 2018.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of February, 2018.

Electronically signed by:

Lynn M. Penfield, RPR, CRR

APPENDIX Q

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DISTRICT III

December 12, 2019

To:

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Circuit Court Judge
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Rhinelander, WI 54501

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You are hereby notified that the Court has entered the following order:

2018AP940 Eagle Cove Camp & Conference Center, Inc. v. Oneida County Board of Adjustment (L.C. # 2013CV345)

Before Stark, P.J., Hruz and Seidl, JJ.

The appellants-cross-respondents have filed a motion for reconsideration of the decision issued by this court on November 19, 2019. Nothing in the motion persuades us that reconsideration is warranted.

Therefore,

IT IS ORDERED that the motion for reconsideration is denied.

Sheila T. Reiff
Clerk of Court of Appeals

APPENDIX R

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

EAGLE COVE CAMP & CONFERENCE CENTER, INC., a Wisconsin non-stock corporation,

ARTHUR G. JAROS, JR., as Co-Trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, and as Trustee of the Arthur G. Jaros, Sr. Declaration of Trust, and as Trustee of the Dawn L. Jaros Declaration of Trust,

WESLEY A. JAROS, as Co-Trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust,

and

RANDALL S. JAROS, as Co-Trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust,

Plaintiffs,

vs.

ONEIDA COUNTY BOARD OF ADJUSTMENT, COUNTY OF ONEIDA, and TOWN OF WOODBORO,

Defendants.

Case No. 13-CV-345

JUDGMENT AND TAXATION OF COSTS

JUDGMENT

The Court convened on January 23, 2015, with plaintiffs represented by Attorney Arthur G. Jaros, Jr., in court, and Attorney Michael D. Dean, by telephone; defendants Oneida County and Oneida County Board of Adjustment by Attorney Andrew A. Jones, Husch Blackwell LLP, by telephone; and defendant Town of Woodboro by Attorney Mark B. Hazelbaker, Kasieta Legal Group, LLC, by telephone.

The Court had previously received briefs from the parties on defendants' motions for judgment on the pleadings. The defendants also had each filed motions for sanctions under sections 802.05 and 895.044, Wis. Stats., but no briefs or argument were received on those motions.

The Court prepared a written decision which the Court rendered in open court, and which was entered on January 23, 2015 (the "Decision"). In the Decision, which is incorporated herein by reference, the Court granted the motion for judgment on the pleadings of the Town of Woodboro and the motion for judgment on the pleadings of Oneida County. The Court denied in part and granted in part the motion for partial judgment on the pleadings of the Oneida County Board of Adjustment. The Court also denied the motions for sanctions filed by all defendants absent briefing or argument. The Court did not enter a judgment as to the matters resolved in the Decision.

On February 13, 2015, plaintiffs filed a Motion for Reconsideration of Decision on Motions for Judgment on the Pleadings. The Court subsequently received briefs from the parties on plaintiffs' motion for reconsideration. In addition, the Court, by Order entered on March 9, 2015, vacated the Decision pending its ruling on plaintiffs' motion for reconsideration.

On April 22, 2015, the Court issued an oral ruling on plaintiffs' motion for reconsideration. For the reasons set forth on the record, the Court denied plaintiffs' motion for reconsideration, reinstated the Decision, and directed defendants to submit a proposed Judgment consistent with the Decision.

On May 14, 2015, plaintiffs filed a Renewed Motion for Reconsideration of Decision on Motions for Judgment on the Pleadings. On May 18, 2015, the Court stayed further proceedings in this action pending further proceedings initiated by plaintiffs in Case No. 10-CV-118 in the U.S. District Court for the Western District of Wisconsin. The Court subsequently lifted the stay and received briefs from the parties on plaintiffs' renewed motion for reconsideration.

On February 21, 2018, the Court issued an oral ruling on plaintiffs' renewed motion for reconsideration. For the reasons set forth on the record, the Court denied plaintiffs' renewed motion for reconsideration.

Consistent with the foregoing, and for the reasons set forth on the record on January 23, 2015, April 22, 2015, and February 21, 2018, the Decision originally entered on January 23, 2015 is hereby re-entered effective on the date of this Judgment. In addition, based on the Decision, the Court hereby grants judgment to the Town of Woodboro and Oneida County dismissing plaintiffs' Amended Complaint against both the Town and the County, on its merits and with prejudice. The Court awards the Town and the County their respective statutory costs. The Court expressly states that this Judgment does not dismiss or resolve plaintiffs' claim against the Oneida County Board of Adjustment seeking certiorari review (Count I of the Amended Complaint), which claim remains pending.

THIS IS A FINAL JUDGMENT WHICH CONCLUDES ALL OF THE MATTERS IN LITIGATION IN THIS ACTION BETWEEN PLAINTIFFS AND THE TOWN OF WOODBORO AND ONEIDA COUNTY, FOR THE PURPOSES OF APPEAL UNDER SEC. 808.03, WIS. STATS.

TAXATION OF COSTS

The defendant Town of Woodboro and the defendant Oneida County having each submitted proposed Bills of Costs, and the Clerk having allowed costs as stated therein, costs are taxed against plaintiffs and in favor of the Town of Woodboro in the amount of $500.00, and costs are taxed against plaintiffs and in favor of Oneida County in the amount of $602.75. Judgment is entered against plaintiffs for the amount of costs awarded.

Dated this 2nd day of April, 2018

BY THE COURT:
Electronically signed by Michael H. Bloom
Circuit Court Judge