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
VOLUME 3 OF 3 – APPENDICES HH - QQ
of
PETITION FOR WRIT OF CERTIORARI

Arthur G. Jaros, Jr., *Counsel of Record*
The Law Office of Arthur G. Jaros, Jr.
1200 Harger Road, #830
Oak Brook, IL 60523
(630) 574-0525
agjlaw@earthlink.net

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APPENDIX HH

No. 2018AP000940

COURT OF APPEALS
for the
STATE OF WISCONSIN
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,*
and
ONEIDA COUNTY BD. OF ADJUSTMENT, *Defendant.*

APPEAL FROM THE ONEIDA COUNTY CIRCUIT COURT
No. 2013CV345
THE HONORABLE MICHAEL H. BLOOM, Circuit Judge, Presiding

PLAINTIFFS-APPELLANTS' BRIEF

Michael D. Dean, *Counsel of Record*
Michael D. Dean, LLC
350 Bishops Way #201
Brookfield, WI 53005
(262) 798-8044
miked@michaelddeanllc.com

Arthur G. Jaros, Jr., *Counsel of Record*
The Law Office of Arthur G. Jaros, Jr.
1200 Harger Road, #830
Oak Brook, IL 60523
(630) 574-0525
agjlaw@earthlink.net

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STATEMENT OF ISSUES.

1) Did the trial court err in dismissing (and in refusing to reconsider that dismissal) of all of the Plaintiffs-Appellants' non-certiorari counts against Oneida County and the Town of Woodboro on grounds of claim preclusion?

2) Did the trial court err in denying Plaintiffs-Appellants' renewed motion for reconsideration to the extent that it sought prospective-only relief from any continuing preclusive effect of the federal courts' grant to the Defendants of partial summary judgment where such motion was based upon error admitted by the federal courts (in a different and intervening religious liberties case) in granting summary judgment against the Plaintiffs–Appellants on a key federal ground urged by them?

3) Did the Circuit Court err, either in denying relief or otherwise, when it held that the RLUIPA[1] "substantial burden" ground raised in Count III of Plaintiffs-Appellants' federal amended complaint "would never have been litigated in this State court action"?

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[1]Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc, *et seq.*

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLICATION.

Oral Argument

Oral argument would materially benefit the Court. Appellants' arguments: (i) are not plainly contrary to relevant legal authority; (ii) are meritorious on their face and supported by authority; and (iii) do not involve questions of fact. Sec. 809.22(2)(a).

The circuit court's various errors applying claim preclusion doctrine were all affected by (i) the complex procedural history of the case, including the federal district and appellate courts' reliance on precedent they later acknowledged--while the certiorari count of Appellants' claim was still pending in state court--was wrongly decided, (ii) Wisconsin courts' inconsistent usage of terminology (*e.g.*, "action," "cause of action," "claim," "count," etc.) in examining the unitary transaction of events that is the basis of claim preclusion analysis, and (iii) the extensive number of sub-issues and sub-rules presented in applying general claim preclusion doctrine to the novel facts of the case.

Oral argument presented by counsel conversant with the broad range of issues and law would therefore assist the court in testing and harmonizing application of that doctrine. Sec. 809.22(2)(b).

Publication

Publication is appropriate under § 809.23(1)(a).

Sec. 809.23(1)(a)1. While the general "rule of law" at issue is the familiar doctrine of claim preclusion, its application to the novel procedural facts of this case will create new law in Wisconsin. For example, this Court must decide whether the circuit court was correct, as a matter of law, when it concluded that the federal district court would "clearly" have declined to exercise pendent jurisdiction over Appellants' *state* law equal protection, due process, and no preference counts,[2] even though the constitutional rights and theories at issue in those counts are *exactly the same* rights and theories at issue in the "incorrect theory of law" element of Appellant's certiorari count that the district court *did* explicitly decline to consider because of its unfamiliarity with those state law issues.

Sec. 809.23(1)(a)2. The "facts" of this case are its procedural history–no trial or evidentiary hearing having been conducted in either the federal or state court forums--and there is no reported case with this fact pattern. The district court dismissed Appellants' federal RLUIPA counts with prejudice, dismissed one of their state law religion counts with prejudice without addressing their "No Preference" count, and expressly declined jurisdiction to consider whether the defendant Board applied an "incorrect theory of law" in denying their *state* law equal protection, due

[2] R. 48:8, citing *Parks v. City of Madison*, 171 Wis. 2d 730, 492 N.W.2cl 365 (Ct. App.1992).

process, and no preference rights at issue in their §59.694(10) certiorari count.

Then, while Appellants' §59.694(10) count was still pending in state court, the federal courts acknowledged that their rationale for the grant to the Defendants of summary judgment of one of Appellants' federal RLUIPA counts was erroneous. Yet neither the federal nor the state courts granted Appellants any relief they had sought, even though Appellants' state certiorari count was still pending. No reported cases examine application of claim preclusion doctrine to litigants' rights under those facts.

Sec. 809.23(1)(a)4. As stated above, the extensive number of sub-rules and sub-issues presented in applying general claim preclusion doctrine to the facts of this case will entail a comprehensive review and harmonization of the body of claim preclusion law, including consistent use of terminology.

Sec. 809.23(1)(a)5. Further, this case also presents issues of substantial and continuing public interest. The procedural issues alone are of broad-based interest because challenges to zoning decisions are commonplace, and virtually all such challenges implicate state equal protection and due process rights under a certiorari review's "incorrect theory of law" element. Further, *federal* constitutional and statutory rights of such litigants are also frequently at stake in such cases, as they are here.

Generally. Finally, the state and federal constitutional and civil rights at issue here are of grave significance in and of themselves:

(i) This case involves the critical issue of the protection of Appellants' right to free exercise of religion in the face of increasing secular attacks including attacks made by local governmental units upon such sacred and cherished constitutional right;

(ii) In the federal court phase of this case, the federal courts have shown remarkable hostility to the protection of such right, have admitted applying an incorrect standard to deny the Plaintiffs protections afforded by and under federal law and then refused to correct such error and, above all, have shockingly held in published rulings that Wisconsin law affords no greater protection of religious liberties than does federal law with abject disregard for the important, proud, consistent and long line of Wisconsin judicial decisions that holds precisely the contrary;

(iii) this case presents as an important matter of first impression the application of the "No Preference" clause contained in Article I, §18 of the Wisconsin Constitution where the Defendants expressly preferred, both on the face of their land use regulatory scheme and as it was applied by them, institutional churches over Bible camps.

STATEMENT OF THE CASE[3]

A) Appellants' Desired Religious Use of the Land

Plaintiffs Arthur, Wesley and Randall Jaros, are brothers and co-trustees of an IRS-approved §501(c)(3) charitable trust. They also serve as sole members of the governing board of Eagle Cove Camp & Conference Center, Inc. ("ECC&CC")--likewise §501(c)(3)-approved-- formed to develop a new year-round Christian camp on thirty-four acres[4] of land with 550' of frontage on 400-acre, clear water Squash Lake situated in Wisconsin's "Northwoods" within the Defendants' jurisdictions.[5]

The Jaros brothers' Christian faith, rooted in their Biblical stewardship understanding ("first fruits" and offerings "without blemish,"[6]) compelled them to dedicate and convert[7] those thirty-four acres – family-owned for over sixty years – to full-time Christian ministry as a Bible camp, serving youth, including youth with medical disabilities, during the summer season and older teens and adults during the

[3]"R#" throughout this Brief refers to the Index issued by the Circuit Court Clerk. "DCD" refers to the federal district court docket number for 10-cv-118 (W.D. Wis. 2010) in the original, predecessor federal proceeding, as explained at p. 17, *infra*. Unless otherwise indicated, "Appndx." and "App. __" refer respectively to lettered appendices and appendix page numbers contained in the Plaintiffs' 2017 Petition for Writ of Certiorari to the United States Supreme Court in Docket #16-1444, included in the record below. "SA" references the Separate Appendix accompanying this Brief.

[4]Approximately twenty-nine acres owned by the charitable corporation and approximately five acres owned by the charitable trust. The camp also has permission to passively use approximately twenty-four acres of immediately adjacent land held jointly under the two trust declarations.. R#77|App.86.

[5]R#77|App.83-85.

[6]Deposition of Arthur Jaros, DCD##83,84 at transcript p.245.

[7]42 U.S.C. §2000cc-5(7)(B), re: "conversion" of land use.

remainder of the year.[8] Arthur and Randall desire to personally teach Christian education courses at camp.[9] The federal courts found "undisputed":

> 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. (R.#87|App.143).

B) County & Town Land Use Regulatory Scheme

The entire parcel is subject to the laws and regulations of both the Town and County and is located in zoning districts "2" and "4," per the zoning map for Woodboro.[10] Per STATS. §§60.10(2)(c) and 60.22(3), the Town's electorate on April 12, 2005 conferred "Village Powers" upon its Town Board,[11] vesting it with land use planning power. STATS. §§ 60.22(3), 61.35, 62.23. On April 14, 2009, the Town Board adopted a Comprehensive Plan,[12] a/k/a "Master Plan,"[13] incorporating the Town's 1997 Land Use Plan[14] adopted during 1998[15] to serve as a future development planning guide.[16] STATS. §59.69(1) requires the County's zoning ordinance to "incorporate" the Town's plan. As consistently construed and applied

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[8]R.#77|App.87-89.
[9]Amended Complaint, ¶28 at R#10|SA4; same as federal Amended Complaint at R.#24|SA1, ¶ 19).
[10]R#77 at App.89; R#77|App; R#87|App.143; R#92|App.275.
[11] DCD#61-7.
[12]Amended Complaint, ¶66 at R#10; federal Amended Complaint, ¶53 at R.24.
[13]STAT. §§ 66.1001(1)(a)2, 66.1001(2)(h).
[14]DCD#63-20.
[15]R#87|App.141 (734 F.3d at 676); DCD# 63-20, p. 11.
[16]WIS. STAT. §§ 60.62(4), 62.23(2); DCD#63-19, Chapter 7(D), ECF pp. 60 ff; DCD#103-40.

by the Defendants, the Town's Land Use Map doesn't allow any year-round religious camps anywhere within Woodboro.[17]

During the first half of 2000, the County adopted, per STATS. §59.69(5)(d), a comprehensive revision to its existing zoning ordinance, namely the OCZSPO, that created thirteen discrete zoning districts[18] and included a zoning map for each of the County's twenty Towns (including Woodboro).[19] Woodboro's zoning map[20] reflected its 1997 Land Use Plan[21] and continues to reflect it as incorporated into its 2009 Comprehensive Plan. The1997 Plan didn't provide any location for Plaintiffs' religious land use.[22] Per statute, the OCZSPO took effect upon County Board enactment in shoreland areas throughout the unincorporated portions of County including part of Plaintiffs' property.[23] The OCZSPO took effect for non-shoreland areas including the balance of Plaintiffs' property only upon approval by Woodboro's Board (May 8, 2001 Resolution[24]).

Within each zoning district, three categories of uses are provided:[25]

(1) Permitted-as-of-right;

[17]R.77|App.100; R.86|App.111).
[18]R.77|App.89; R.90|App.247 (§ 9.20).
[19]DCD#103-3 to 103-22.
[20]DCD#103-21.
[21]DCD#63-20.
[22]DCD#63-19, Chapter 7(D), ECF pp. 60 ff.; DCD#103-40.
[23]R.90|App.247(§ 9.12(B))
[24]*(Id.*; R.77|App.89; R.87|App.142;DCD#61-6.
[25]R.77|App.90; R.90|App.250.

(2) Administrative Review; and

(3) Conditional.

The OCZSPO doesn't denominate any use for "religious camps" whatsoever. Instead, the Defendants determined that Plaintiffs' proposed year-round Bible camp use would be treated under "recreational camps"[26] that aren't permitted-as-of-right uses in any zoning district but are listed by §§9.25 and 9.28 of the OCZSPO only as administrative review uses and then only for zoning Districts 5, "Recreational," and 10, "General Use."[27] Therefore, there wasn't anywhere within the County where Plaintiffs could construct their camp as-of-right.

The camp's easterly lakefront portion was zoned District 2, "Single Family Residential;" the westerly portion abutting U.S. 8 was zoned District 4, "Residential and Farming."[28] "Churches" and "schools" are listed conditional uses for various districts, including Districts 2 and 4.[29]

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[26]R.2|App.58.

[27]R.77|App.100; R.90|App.259; R.90|App.261).

[28]R.77|App.100; R.87|App.143.

[29]R.77|App.97; R.90|App.254; R.90|App.257. Other listed uses in the County's zoning districts 2 and/or 4 include community buildings, community living arrangements of unlimited capacity, government uses of any type, public parks and playgrounds, hospitals, airports, and businesses. (R.77|App.97; R.90|App.252; R90|App.256). The County acknowledged and substantial evidence was presented that these permitted uses could have equal or greater impacts to the relevant land use interests at issue. [As admitted by the Defendant County's Seventh Circuit Brief in #13-1274 at p. 52 and at p. 53, footnote 9. *See also*, Plaintiffs' expert report at DCD#132, p. 249, County staff report at DCD#63-51, p. 12; DCD#77-5 at 22, 23; OCZSPO §§ 9.22 and 9.24 at Appndx.R|R.90|App.252-258; and Business-zoned districts at Squash Lake (Appndx.T|R.82|App.275), such evidence presented to the Seventh Circuit by Appellants' Brief at pp. 50-51 and 54-58 and by Reply Brief, pp. 42-48 in #13-1274.]

None of the Town was zoned District 5 or 10 under the zoning map[30] included as part of the OCZSPO that was formally adopted by the Town's Board[31] and which map was required to and did[32] incorporate the Town's own land use plan. STATS. §59.69(1). Consequently, Plaintiffs' year-round Bible camp use is totally excluded from Woodboro.

C) Rezone Effort (2005 - August 2006)

County staff initially advised Plaintiffs during 2005 that rezoning of the camp's land to District 5 or 10 was required.[33] After proceedings before the Town and County,[34] the County on June 14, 2006 expressly informed the Plaintiffs that the rezoning petition filed in December, 2005[35] was unnecessary and that the camp could accomplish "most or all of its stated objectives" without any rezoning by using the County's CUP procedure.[36] As noted, Plaintiffs' "stated objectives" were to construct a single principal structure, year-round Bible camp on long-owned family lands in Woodboro. The Committee assured the Plaintiffs that:

> there would be no delay, uncertainty or added expense born [sic] by the parties seeking this rezone ...

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[30]R.77|App.100.
[31]R.77|App.89 (DCD#61-6).
[32]R.77|App.94.
[33]R.77|App.100.
[34]R.87|App.143.
[35]R.87|App.143; DCD#63-29.
[36]R.85|App.24.

> given that "religious exercise" is allowed on the property with a conditional use permit in the districts that the property is currently zoned .. .

Consequently, the County Board denied rezoning in August, 2006.[37]

D) Conditional Use Permit Phase (Fall 2006 - August 2009)

The Plaintiffs then proceeded through the discretionary CUP process per the County's explanation for denying rezoning. That process required the submission of a site-specific design.[38] During Fall 2006, the camp selected an architectural and engineering team to do so.[39] The County began processing the application filed in December 2006.

Contrary to the federal courts' inferences that the "sheer size"[40] of the camp's development was unusually "expansive",[41] the camp was, in fact, of only average size for year-round Oneida County camps.[42]

As a condition of its further processing the CUP application, County staff required Plaintiffs to procure site-specific permits from various departments of the state government including grading, well-water, sanitary system and ingress/egress.[43]

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[37]R.77|App.101; R.87|App.144.
[38]R.77|App.91; R.90|App.263; DCD#63-37.
[39]The design is set forth at R.77|App.88; R.77|App.105 and as submitted at DCD## 63-38, 63-44 and 63-45. Instead of multiple, scattered stand-alone cabins typical of camps (*see*, OCZSPO, § 9.25(C)(3) at R.90|App.259 and fn. 9|R.77|App.96, respectively), ECC&CC's design instead provided for a single, larger multi-function lodge structure. R.77|App.88.
[40]R.86|App.123.
[41]R.87|App.152.
[42]DCD#63-53, at ECF p.19 of 27, "clearly of average size for a Bible camp"; DCD#103-1; DCD#103, point 3; DCD#102, point 12.
[43]R.77|App.105.

The camp incurred costs approaching $200,000 for professional services and successful procurement[44] of those permits from the State government between Autumn 2006 and late 2008.[45] The design complied with the objective minimum acreage and dimension requirements applicable to Recreation Camps,[46] a revised design submitted in May 2009 voluntarily reduced the height to the 35' height limit applicable only to single family residences,[47] and the County's staff informed the P&Z Committee favorably of the camp's resolution of all of the staff's "technical concerns."[48] But at its July meeting, the Committee denied ECC&CC's application, concluding ECC&CC's use wouldn't be "compatible with ... local plans for the area."[49] The Committee also found that ECC&CC's use would impair or diminish neighboring properties, despite acknowledging there was "nothing to base" that finding upon.[50] Significantly, the Committee (and later the Board of Adjustment ("BOA")) ignored the findings of the Wisconsin DNR that ECC&CC's Bible camp was designed in a manner fully consistent with the statutory requirement of preserving "scenic natural beauty" – in contrast to other uses on Squash Lake, including an apartment complex (whose largest building is openly perched overlooking the lake),

[44]Appndx.D at R.76|App.35; DCD##77-23, 77-24, 77-25.
[45]R.77|App.105; DCD#144-5, pp. 13, 14, Schedule A, Columns O, Q-7.
[46]R.90|App.271.
[47]DCD#63-46; DCD#110-4, p. 24, *see*, fn. 13|R.77|App.106.
[48]DCD#110-4, p.24.
[49]OCZSPO§ 9.42(E)(3) at R.77|App.92; R.90|App.267.
[50]R.75|App.54; *see*, R.75|App.60 at "2."

various lake parcels zoned Business, and homes with manicured lawns extending to the lake shore.[51]

Remarkably, after ECC&CC spent multiple years and $200,000 following the Committee's direction to pursue a conditional use permit because rezoning wasn't necessary, the Committee reversed its position in July, 2009, concluding[52] that rezoning was necessary after all[53] and that ECC&CC's Bible camp wasn't compatible with the Town's Land Use Plan.[54] The District Court found this treatment didn't constitute an RLUIPA "substantial burden."

Plaintiffs unsuccessfully appealed to the BOA.[55]

E) District Court Proceeding (March 2010 - February 2013)

Plaintiffs commenced their civil action on March 10, 2010 in federal District Court (W.D.Wis.).[56] Count III raised RLUIPA's[57] "Substantial Burdens" ground (42 U.S.C. §2000cc(a))[58] and Count XI raised Wisconsin's state law certiorari review ground.[59] Count VIII, "Wisconsin Constitution," included various allegations, some specific to the "No Preference" Clause. (*See*, SA12).

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[51]Appndx.S|R.91|App.273; Appndx.T|R.82|App.275; R.75|App.43.
[52]Appndx.F|R.75|App.56ff.
[53]Transcript at DCD#110-4, pp. 71-72; *see*, R.75|App.62, point "7."
[54]Transcript at DCD#110-4, pp. 63; *see*, R.75|App.61 at "3."
[55]Appndx.G| R.75|App.68.
[56]DCD#1.
[57]"Religious Land Use and Institutionalized Persons Act of 2000."
[58]Federal question jurisdiction existed per 28 U.S.C. § 1331.
[59]R.86|App.109.

The Town and County each filed motions for summary judgment on all counts.[60] On February 2, 2013, the District Court granted them summary judgment on all counts except for Count XI, "WIS. STATS. §59.694(10) Certiorari Review".[61]

With respect to Count VIII, "Wisconsin Constitution," the Court at p. 40 of its Opinion[62] cited to, but didn't quote from, *Coulee Catholic Schools v. LIRC* (Wis. S.Ct. 2009) that actually reads:

> The protections ...in the Wisconsin Constitution [pertaining to religious liberty] are far more specific. And with regard to the rights of conscience, this clause contains extremely strong language, providing expansive protections for religious liberty. *** [W]e are required to give effect to the more explicit guarantees set forth in our state constitution.

But, at page 48 of the Opinion, the Court summarily rejected Plaintiff's request for relief under the Wisconsin Constitution, concluding that the protections offered Wisconsin citizens under Article I, § 18, are not in any way "greater than its federal counterpart, much less RLUIPA's additional protections."[63]

The Opinion didn't address the Wisconsin Constitution's no preference clause raised by the Plaintiffs.[64]

Count I of Plaintiffs' federal amended complaint charged the Defendants with violation of RLUIPA's "total exclusion" provision[65] by totally excluding year-round

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[60]R.77|App.82; R.86|App.110.
[61]DCD #155; Appndx.H| R.77|App.81;SA2.
[62]DCD#155.
[63]SA14.
[64]SA12.
[65]42 U.S.C. §2000cc(b)(3)(A).

religious camps from Woodboro. Plaintiffs pointed out RLUIPA's rule of construction in favor of "broad protection of religious exercise." 42 U.S.C. §2000cc-3(g). The District Court's Opinion at p. 28, however, refused to follow case development (*First Korean Church of New York, Inc. v. Cheltenham Twp. Zoning Hearing Bd.*) that construed RLUIPA's ban on total exclusion favorably to Plaintiffs.

Count III of Plaintiffs' federal amended complaint (R.#24) charged the Defendants with violation of RLUIPA's "Substantial Burden" provision (42 U.S.C. §2000cc(a)(1).

The District Court's Opinion at p. 37 rejected that count, too, holding that "a substantial burden is one that renders religious exercise 'effectively impracticable.'"

Plaintiffs immediately appealed.[66]

F) First Appeal: U.S. Court of Appeals (February 2013 - December 2013)

The Seventh Circuit affirmed on October 30, 2013.[67] In so granting and affirming summary judgment for the Defendants, the federal courts concluded that the foregoing facts, as a matter of law, couldn't be found by a jury to constitute a substantial burden on the Plaintiffs' religious exercise.[68] Specifically with respect to the RLUIPA Substantial Burden Count III, the Court of Appeals like the District Court held:

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[66]DCD#157.
[67]Appndx.J|R.87|App.140ff|SA3|734 F.3d 673.
[68]R.87|App.148; R.87|App.157; R.77|App.83.

> A substantial burden under RLUIPA 'is one that necessarily bears direct, primary and fundamental responsibility for rendering religious exercise ... effectively impractical.

The Court of Appeals' Opinion stated that although it was undisputed that:

> Eagle Cove believes that their religion mandates that the Bible camp must be on the subject property . . . and that they must operate the Bible camp on a year-round basis ... R.87|App.143.

> [i]t is not the land use regulations that create a substantial burden, but rather Eagle Cove's insistence" that the camp "be placed on the subject property. R.87|App.147.

The Court of Appeals also held that no substantial burden upon Plaintiffs' religious exercise arose because the Plaintiffs "had the opportunity to seek out other properties on which to build their camp" elsewhere in the County other than Woodboro "but chose not to do so"[69] despite the Court's own finding that Plaintiffs' forgoing their property's conversion to religious use in favor of such a search for other properties would have violated their religious beliefs. The federal courts didn't consider the uncontroverted evidence that such a search would've in fact likely been futile.[70]

Under federal Count III, RLUIPA "Substantial Burden," the appeals court also held that even if the Plaintiffs' religious exercise had been substantially burdened by a government, "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

[69]R.87|App.152; R.87|App.155.
[70]As set forth in detail at pp. 19-26 of Seventh Circuit Reply Brief (7th Cir. doc. #33) in #13-1274.

Lake"[71] despite the Wisconsin DNR's finding that ECC&CC's use wouldn't negatively impact aesthetics.[72]

As to Count VIII, the Seventh Circuit stated:

> Eagle Cove believes that the protection offered under Article 1, § 18 of the Wisconsin Constitution is greater than that offered under federal law. *** 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). *** The zoning ordinance at issue here is generally applicable ... and thus would qualify as "normally acceptable" under Article I, § 18 of the Wisconsin Constitution.

As with Count III (p. 16, *supra*), the panel cited to no authority that aesthetic values ever facially rise to the level of a "compelling governmental interest" and also ignored the DNR's no-aesthetic impact finding.

Like the District Court, the appellate panel also ignored the "No Preference" clause of the Wisconsin Constitution.

The Plaintiffs' petition for rehearing was denied on December 10, 2013.[73]

G) Wisconsin State Court (November 2013 - present) and First U.S. Supreme Court (March 2014 - May 2014) Proceedings

While Plaintiffs' Petition for Rehearing was pending, they commenced their one-count state court action[74] for state law certiorari review against the BOA on what had been federal Amended Complaint Count XI.

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[71]R.87|App.154.
[72]Appndx.D|R.75|App.42-43.
[73]Appndx.K|R.87|App.159.
[74]R.1.

On March 13, 2014, Plaintiffs filed their U.S. Supreme Court Petition for Writ of Certiorari (#13-1099) that was denied on May 5 (134 S.Ct. 2160).

On August 29, 2014, Plaintiffs filed an Amended Complaint[75] in the state Circuit Court action that added fifteen additional counts, each seeking declaratory relief,[76] grounded in divers provisions of Wisconsin law, various of which grounds hadn't been presented by the Plaintiffs' federal Amended Complaint. The Town and County were added as defendants.

The nature of each count is summarized in the table[77] appearing at SA4, p. 6.

The amended Circuit Court Complaint contains express allegations referencing the Wisconsin Constitution's "No Preference" Clause. SA12.

On October 2, 2014, the Town moved to dismiss the entire state court action, falsely alleging that the federal District Court "reached the merits of the state law claims and dismissed them on their merits."[78] In contrast, the County Defendants only moved for partial judgment on the pleadings.[79]

On January 23, 2015 after complete briefing[80] and December 12, 2014 oral argument, the Circuit Court denied Woodboro's motion but struck the additional, newly-added state law declaratory counts (Counts II - XVI) on the basis of Claim

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[75]R.10|SA4.
[76]R.10 at p.1.
[77]Count IV is misdescribed as being under the "No Preference" Clause.
[78]R.16.
[79]R.21.
[80]Including Plaintiffs' submission of "Corrected Combined Response" filed by leave granted December 12, 2014 (R##45;46) to the twin Motions to Dismiss.

Preclusion thereby limiting the Plaintiffs' state court action to its original state law certiorari review as first raised by federal court Count XI.[81]

On February 13, 2015, Plaintiffs moved for reconsideration,[82] arguing[83] that the court had misapplied claim preclusion. After briefing,[84] the Court denied Plaintiffs' Motion for Reconsideration in an oral ruling on April 22, 2015.[85]

Unbeknownst to the litigants and court, the previous day, the federal Court of Appeals decided *Schlemm v. Wall*.[86] Schlemm alleged infringement of his religious liberty protected by RLUIPA's "substantial burden" provision. The Seventh Circuit concluded that it had applied an incorrect standard in affirming the grant of summary judgment in its previous 2013 *Eagle Cove* affirmance. (*See*, SA16). Shepard's case citator reported the 2013 ECC&CC Opinion to have been "Overruled in part as stated in *Schlemm v. Wall*"[87]

In its February 2013 grant to the Defendants of summary judgment on ten counts, the District Court wrote:

> 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

[81]R.48|SA5.
[82]R.49.
[83]R.50.
[84]R.55; R.56, R.57.
[85]R.115.
[86]Appndx.N|R.88|App.179ff.)
[87]R.59|pp.8-9.

> 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 ... is that plaintiffs have ***no right to relief under RLUIPA***, the United States Constitution ***or the Wisconsin Constitution.*** R.77|App.83.

After discovering *Schlemm v. Wall*, Plaintiffs on May 13, 2015 dispatched to the Circuit Court their Renewed Motion for Reconsideration[88] and supporting memorandum[89] that referenced the *Schlemm* development and apprised the state court of their federal court filing of a motion for relief[90] from the summary judgment on Count III, "RLUIPA Substantial Burden." The Renewed Motion for Reconsideration was held in abeyance.

H) District Court Motions for Relief re: Summary Judgment on Federal Count III, RLUIPA Substantial Burden (Spring, 2015 - Summer 2016)

That same May 13, Plaintiffs filed both their Motion for Relief under F.R.Civ.P. 54(b) and 60(b)(6)[91]--from the grant to the Defendants of summary judgment on Count III and seeking vacatur thereof-- and supporting memorandum[92] Briefing ensued.[93] On June 13, 2015, Plaintiffs filed their Supplemental Motion for Relief under F.R.Civ.P. 60(b)(5).[94] After briefing,[95] the District Court on August 11,

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[88]R.58.
[89]R.59.
[90]Motion at Appndx.W-1|R.94|App.318; memorandum at Appndx.W-2|R.94|App.321.
[91]Appndx.X-1|R.94|App.329.
[92]Appndx.X-2|R.94|App.332.
[93]DCD#173 corrected by DCD#179; DCD#174; Appndx.X-3|R.94|App.339ff. & R.95.
[94]Appndx.Y-1|R.95|App.365ff.
[95]Appndx.Y-2|R.95|App.368ff.; DCD#180; DCD#181; Appndx.Y-3|R.95|App.377ff. & R.76.

2016 denied Plaintiffs' F.R.Civ.P. 54(b), 60(b)(6) and 60(b)(5) motions.[96] Notice of Appeal was filed August 17, 2016.

[96]Appndx.B|R.85|App.3ff|SA7.

I) Second Appeal: U.S. Court of Appeals.

On January 25, 2017, that Court summarily affirmed the denial of the Plaintiffs' three motions.[97] A Petition for Rehearing *en banc*[98] was denied on February 27, 2017.[99]

J) Second Appeal: U.S. Supreme Court.

Plaintiffs May 30, 2017 Petition for Writ of Certiorari[100] was denied on October 2, 2017.[101]

K) Reactivation of Circuit Court Proceeding.

On November 22, 2017, the Circuit Court permitted submission of Plaintiff's Amended and Updated Memorandum[102] in support of their still-pending Renewed Motion for Reconsideration. That Memorandum explained that, notwithstanding the federal courts' refusal to vacate the Count III summary judgment, Plaintiffs should be granted relief under Wisconsin law *from the prospective preclusive effect of that judgment* found to exist by the January 23, 2015 ruling below. Additional briefing ensued.[103] By oral ruling[104] of February 21, 2018, the Circuit Court denied the

[97]Appndx.A|R.85|App.1ff|SA8.
[98]Appndx.Z| R.76|App.400ff.
[99]Appndx.P|R.88|App.191.
[100]R.80&79.
[101]138 S.Ct. 129.
[102]R#84 including Exhibit A being the 2017 U.S. Supreme Court Petition for Writ of Certiorari (R.80&R.79 and its Appendix referenced at footnote 3, *supra*) and Exhibit B (R.81) being a Shepard's Citation Report through April, 2015 for this case in the federal court system.
[103]R.98-100.
[104]R.124|SA9.

Renewed Motion for Reconsideration; a Judgment[105] was filed April 4, 2018 in favor of the Town and County, dismissing them from the case and leaving only the BOA as a party-defendant.

Notice of Appeal was filed May 15, 2018.[106]

ARGUMENT

I) THE TRIAL COURT ERRED IN DISMISSING ALL NON-CERTIORARI COUNTS AGAINST ONEIDA COUNTY AND WOODBORO ON GROUNDS OF CLAIM PRECLUSION.

INTRODUCTION RE: CLAIM PRECLUSION

"The rules of *res judicata* state when a judgment in one action is to be carried over to a second action and given a conclusive effect there, whether by way of bar, merger, or issue preclusion." (Comment a. to §13 of Restatement (Second) of Judgments (hereinafter "Restatement")). "Bar"is the subject of §17(2) of that Restatement and is in issue in this case, "Merger" is the subject of §17(1) and "Issue Preclusion" is the subject of §17(3). §17(2) provides:

> A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:
> ***
> (2) If the judgment is in favor of the defendant, ***the claim* is extinguished and the judgment *bars* a subsequent action on that claim** (see §19).
> *** (emph. added)

With respect to Sub-§2, Comment b., "Bar," amplifies that:

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[105]R.107|SA10.
[106]R.110.

> The general rule as to bar is dealt with in greater detail in §19 and the exceptions to the general rule in §20.

§19, in turn, provides:

> A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

Thus, the Restatement makes clear that where "bar" applies, it is the "claim" that is barred. Thus, it's important to recall the Restatement's definition of "claim" appearing at SA15 but summarized here:

> § 24 Dimensions of "Claim" ***for Purposes of Merger or Bar ...***
>
> **(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), *the claim extinguished includes all rights of the plaintiff to remedies against the defendant* with respect to all or any part of the transaction ... out of which the action arose.**
>
> *a.* *** **In defining claim to embrace all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions), this Section responds to modern procedural ideas** ...
>
> ***The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories ...;***

Wisconsin agrees. [*Juneau Square Corp. v. First Wis. Nat'l Bank, Depratt,*; *Parks v. City of Madison*; *Kruckenberg v. Harvey* (Wis. S.Ct. 2005), at SA17].

The Circuit Court erred by disregarding the transactional definition of claim when it wrote at pp. 6-7 of its January 23, 2015 Decision:

> [T]he upshot of Hanlon is that, for purposes of claim preclusion analysis, the prior federal action was akin to two separate actions–two different *claims* for purposes of claim preclusion analysis: one raising multiple civil issues, and the other a state law certiorari claim.

Hanlon, however, didn't state that a certiorari action constituted a different "claim" for preclusion purposes and its fact pattern bears no resemblance to the one presented here; it is therefore inapposite. See the analysis of *Hanlon* at Point IV, p. 47, *infra.*

It is, however, plain that the Circuit Court misunderstood *Hanlon* because §24(1), quoted above, makes absolutely clear that when Claim Preclusion is operative, "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction ... out of which the action arose."

A) The Circuit Court Erred, as a Matter of law, in Concluding that the Doctrine of Claim Preclusion Had Any *Prima Facie* Applicability on the Undisputed Procedural Facts of the Case.

1) The Federal Courts Did Not Dispose of the Entirety of Plaintiffs' Case as Submitted in the Federal Court Forum on the Merits (or otherwise with Prejudice) and thus Claim Preclusion Does Not Apply.

§20 of the Restatement provides in relevant part:

> (1) A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:
>
> ***
>
> (b) When ...the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice;

The District Court directed that Count XI of the federal amended complaint be dismissed without prejudice to refiling in Wisconsin's courts which was effectuated while the case was still pending in the federal forum.

Comment e. to §20, applicable here, states:

> A dismissal may be based on two or more determinations, at least one of which, standing alone, would not render the judgment a bar to another action on the same claim. In such a case, if the judgment is one rendered by a court of first instance, it should not operate as a bar. *** Even if another of the determinations, standing alone, would render the judgment a bar, that determination may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta.

The refiling of non-suited federal Count XI permits Plaintiffs to show errors of law[107] were committed in the denying of the CUP. It's also clear that the federal courts never considered Plaintiffs' "No Preference" clause argument (precisely as comment e. describes) and gave only perfunctory, erroneous treatment to their' "burden-on-religious-exercise" argument by wrongly equating the scope of Wisconsin constitutional protection with federal law. The Circuit Court erred in: (i) disregarding this argument of the Plaintiffs presented below;[108] and (ii) instead imposing Claim Preclusion adverse to the protection of religious liberties.

2) Claim Preclusion Can Apply Only When a "Case" Has Been Fully Concluded; Plaintiffs' Case, begun in the federal forum and partly refiled in the Wisconsin state court forum, Constitutes but a "Single Case" and thus "Plaintiffs' "Case" Has Never Been Concluded.

Claim Preclusion operates to bar a "second case" after a first case has been concluded against a Plaintiff with prejudice with respect to the same transactional "claim." But, this raises the question of whether the proceeding in the Circuit Court below really is a "second case" (as held below).

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[107]"whether the board acted according to law" as a certiorari review standard (*State ex rel. Rutherberg v. Annuity & Pension Bd.*).
[108]R.33;45, pp. 20-21; R.46.

All counts of Plaintiffs' Amended Complaint grew out of the same transactional claim: the constellation of actionable facts involving governmental denials of applications to exercise Plaintiffs' religious liberties on long-owned private lands. *Montano v. City of Chicago* (7th Cir. 2004), considered the situation where the first of three District Court orders (the "September 25 Order") declined to exercise federal supplemental jurisdiction over state law theories or grounds and a third federal order had dismissed the federal law theories or grounds without prejudice (rendering a moot a second order that had stayed their consideration). That court wrote of the companion ("parallel") federal and state court proceedings:

> Furthermore, ***it is clear that only one constitutional "case" is present here,*** even though the Montano parties have a number of theories supporting their claim. (375 F.3d at 600, emph. added)

Thus, *Montano* regards the parallel ***proceedings*** in the federal and state court forums as being but a single "***case.***" This view is consistent with text of F.R.Civ.P 1, 2 and 3 that describes the judicial events taking place in the District Court as a "civil action" or "proceeding" but not as a "case."

One unpublished California decision likewise held that where federal and state theories of relief are presented to the federal courts and the federal courts determine all of the federal but only some of the state theories on their merits, while dismissing the remaining state theories without prejudice to their being litigated in the state court system, then the federal and state proceedings are part of the "same case" and the concepts of "claim preclusion" and "issue preclusion" are entirely inapplicable in the

follow-on state court proceeding as to what was decided during the preceding federal proceeding and, instead, more fluid "law-of-the-case" principles apply. (*Peacock v. County of Orange*, SA11).

The Circuit Court erred in refusing to apply the "same case" concept.

B) Even if Claim Preclusion Had *Prima Facie* Applicability, Recognized Exceptions to its Operation and/or Applicability Were Present.

1) The Circuit Court Erred as a Matter of Law in Disregarding an Express Provision of the Restatement That Bars Application of Claim Preclusion Where the Right of the Plaintiff to Proceed in a Second Forum is Expressly Recognized and Preserved in the First Forum.

Restatement §26(1)(b) states "the general rule of §24 ***does not apply to extinguish the claim***" where:

> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action;

This is precisely what the District Court did in dismissing federal Count XI without prejudice to refiling in the Wisconsin state court system. Thus, the bar of §24 "does not apply to extinguish the claim." The second action is limited only insofar as issue preclusion is operative (see, §§17(3), 27, 28 of the Restatement).

2) The Circuit Court Erred as a Matter of Law in Making a Ruling that It Was "Not Clear" That the Federal District Court Would Have Declined to Exercise Supplemental Jurisdictional Over Counts Contained in the state court Amended Complaint Unique to Wisconsin Law Had They Been Pleaded in the Federal Court Forum.

Parks v. City of Madison, 171 Wis. 2d 730 at 736 (Ct. Ap. 1992) applied the rule laid down on comment e. of Restatement §25 that where the first court "***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 summary judgment opinion[109] of the federal district court clearly explained the basis of its decision not to exercise supplemental jurisdiction over Count XI. The Circuit Court below disregarded that clear explanation and instead ruled that it wasn't clear that the District Court would not have exercised jurisdiction over various counts added by the Amended Complaint that are undisputedly grounded on Wisconsin law that is unique and divergent from federal law. For example, Count V, a facial challenge to the OCZSPO on substantive due process protections afforded by the Wisconsin Constitution and not pleaded as a count in the federal forum, was grounded specifically in Wisconsin case law holding that total exclusion from a local jurisdiction of a given mode of religious exercise violates the Wisconsin Constitution:

> The ordinance adopted in July, 1954, appear to exclude churches from the entire village. We do not hesitate to say that the ordinance in that from was invalid. (*State ex rel. Lake Drive Baptist Church v. Bayside Bd. of Trustees,* 12 Wis.2d 585 at 601 (1961)).

The federal District Court[110] and appeals court[111] ruled that such town-wide exclusion imposed by the OCZSPO and its zoning map for Woodboro doesn't violate

[109]Relevant excerpt at SA14.
[110]p. ?, *supra*.
[111]734 F.3d 637 at 679-680.

federal law. Thus, this ground of relief is clearly unique to Wisconsin law and the District Court would, under its own clearly articulated standard, clearly have declined to exercise supplemental jurisdiction had it been raised in a federal pleading.

Other counts added by the Amended Complaint but likewise stricken that are unique to Wisconsin law and not presented in the federal forum include Counts III, IX, X, XI, XIII and XIV.

3) The Circuit Court Erred as a Matter of Law in Refusing to Consider and/or Rule Upon Plaintiffs' Argument under the Restatement that the Defendants' Zoning Scheme Constitutes an Impermissible Continuing Restraint on the Plaintiffs' Personal Liberty Interest in the Exercise of their Religious Beliefs.

Restatement §26(1)(f) states "the general rule of §24 does not apply to extinguish the claim" where:

> **(f) 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 have a vital relation to personal liberty... .**

Here, the policy reason for favoring preclusion of a second "action"–*arguendo*, the proceeding in the Wisconsin courts–was entirely non-existent because the federal District Court expressly permitted and contemplated that such a proceeding would be filed and prosecuted in any event by the Plaintiffs as a continuation of federal Count XI. On the other hand, it is likewise plain that the OCZSPO, on its face and as

applied, continues to prohibit the Plaintiffs from constructing a new year round Bible camp on cherished long-held family lands and anywhere else in Woodboro. Such restraint is invalid under Wisconsin law. (p. 29, *supra*) Although acknowledging this argument's existence[112], the Circuit Court failed to analyze or consider it.[113]

4) The Circuit Court Erred as a Matter of Law in Rejecting Plaintiffs' Argument that the Decision Making by the Federal District and Appeals Courts Yielded an Incoherent Disposition that Eliminates Claim Preclusion.

Restatement§26(1)(f) states "the general rule of §24 does not apply to extinguish the claim" where:

> **(f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as ... the failure of the prior litigation to yield a coherent disposition of the controversy.[114]**

The District Court explained it was declining to exercise federal supplemental jurisdiction over Count XI because "the factual and legal issues" posed by that state law certiorari count "are ***sufficiently different*** from the others considered in this case." Yet, Judge Conley granted summary judgment on the Wisconsin Constitution's entirely unique (and obviously "***sufficiently different***") "No Preference" clause without ever addressing it, thereby creating a patently incoherent disposition.

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[112]At pp. 12 and 15 of R.115.
[113]At p. 27 of R.33;R.45;R.46 and again at pp. 19-20 of R.50.
[114]Approvingly referenced by *Kruckenberg v. Harvey*, 279 Wis.2d 520 at 537 (2005).

Plaintiffs pointed out during reconsideration[115] the failure of the Decision to address this argument but its April 22, 2015 ruling on reconsideration also overlooked that argument.[116]

> **5) The Circuit Court Erred as Matter of Law in Refusing to Find the Decision Making by the Federal District and Appeals Court Was Inconsistent with Wisconsin's Constitutional Scheme of Providing Special Protections for Religious Liberties.**

Restatement §26(1)(d) states "the general rule of §24 does not apply to extinguish the claim" where:

> **(d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a ... constitutional scheme, ...**

Plaintiffs asserted that Claim Preclusion had no application because of the applicability of this §26(1)(d) exception either or both of two ways:

> **(i) The federal courts refused to consider or apply the "No Preference" Clause of the Wisconsin Constitution in the face of express favoritism both on the face of the OCZSPO and as it was applied for year-round churches over year-round Bible camps.**

Where a court overlooks a theory (a/k/a ground) for relief presented, claim preclusion doesn't apply, particularly where the theory is rooted in a statutory, or, as here, constitutional scheme. [*Edwards v. Fireman's Fund Ins. Co.*; *In re I.G. Servs., Ltd.*; *Milwaukee Metro. Sewerage Dist. v. Wis. DNR*; *Geisenfeld v. Vill. of Shorewood*].

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[115]R.50, pp.20-21.
[116]R.115|SA6, p.14.

Here, both federal courts refused to consider the "No Preference" clause of the Art. I, §18 of the Wisconsin Constitution both pleaded and urged upon those courts by the Plaintiffs. Therefore, the federal courts did fail to address and implement Wisconsin's special constitutional scheme of protecting particular modes of worship and types of religious establishments against second-class treatment.

The Circuit Court erred in interjecting at R.115, pp. 19-20 and again at R.116, pp. 16-18 *State ex rel. B'Nai B'Rith Foundation v. Walworth County BOA.* That case didn't consider the "No Preference" clause; it is therefore inapposite.

(ii) The federal courts also failed to apply Wisconsin's Constitutional Scheme that affords protections greater than afforded by federal law of religious liberties under "No Infringement" and "No Interference" Provisions of Article I, §18.

The District Court granted summary judgment on this issue by incorrectly equating the Wisconsin standard of mere "burden" by which "strict scrutiny" (i.e., a government's burden on religious exercise is constitutionally justified only if compelling governmental interest and only if least restrictive means conceivable are employed to protect that interest) is triggered with the less protective federal RLUIPA standard of "substantial burden." The District Court failed to perceive this critical difference despite quoting the *Coulee Catholic Schools* decision that used the term "burdened" instead of "substantially burdened." The Plaintiffs pointed out this critical

error to the Court of Appeals.[117] In response, the Court of Appeals corrected the error and invoked strict scrutiny but only as to the facial challenge and then further erred in the application: (i) of strict scrutiny to that facial challenge--an issue not reached by the District Court; and (ii) of the "least restrictive alternative" requirement to Plaintiffs' as-applied challenge.

To wit, without citation to authority, it held (734 F.3d at 683) that aesthetic interests were a compelling governmental interest. Such a holding contravened case authorities from across the nation including *Metromedia v. City of San Diego*, 453 U.S. 490 at 511-512 (1981) and *Whitton v. City of Gladstone.*

In addition, even if the protection of aesthetic interests were a compelling governmental interest under Wisconsin law, the Seventh Circuit--again without citation to authority and without any reasoning--concluded that a zoning ordinance's provision that "neutrally" banned all year round camps--both religious and non-religious--from an entire Town (while permitting such camps in other Towns) was the "least restrictive means" of protecting that governmental interest. Such conclusion contradicted the prior determination of the Wisconsin DNR that the Plaintiffs' camp development as designed would not negatively impact rural, rustic aesthetic interests. As such, a less restrictive alternative to a blunderbuss, Town-wide exclusionary ordinance would be to analyze the impact on the aesthetic interests on a case-by-case

[117] Appellants' Brief, 7th Cir. Doc. #14 5/9/2013 at pp. 46-47.

basis. The Seventh Circuit failed to consider this less restrictive alternative and erred in refusing to implement Wisconsin's Constitutional scheme of heightened protection for religious liberties.

C) By Applying Claim Preclusion, the Circuit Court Denied the Plaintiffs Rights Guaranteed Them by the U.S. and Wisconsin Constitutions to Due Process of Law in the Protection of their Liberty Interest in Fair Judicial Process and in Equal Protection of the Laws.

Under either of two different scenarios, the District Court either would have or could have tried federal Count XI state law certiorari (instead of dismissing it without prejudice to refiling in Wisconsin's courts).

F.R.Civ.P.54(b), operative in that situation, authorizes the District Court to revise its summary judgment ruling on federal Count III in light of the case law development in *Schlemm v. Wall,* because Claim Preclusion is never operative within the same case. The two scenarios are as follows:

1) The District Court's summary judgment ruling stated that it would have retained jurisdiction over Count XI, "State Law Certiorari" if:

> 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. (SA2 at p. 48)

2) In the exercise of its discretion, the District Court could have simply chosen to retain supplemental jurisdiction over Count XI.

The upshot of this is that by virtue of the District Court's not retaining of jurisdiction over Count XI, Claim Preclusion– plainly not available to prevent revision of the summary judgment ruling on Count III if that court retained jurisdiction over Count XI–has now been imposed against the Plaintiffs to their prejudice. What this means is that the application of substantive law in terms of modification of the summary judgment ruling on Count III, "RLUIPA Substantial Burden," is now different for two identically situated litigants,[118] one whose pendent Count XI was tried to the District Court and one whose pendent Count XI was dismissed without prejudice for the purpose of being tried in the state Circuit Court. Such disparate treatment based merely on the forum violates Plaintiffs' rights under the U.S. and Wisconsin Constitution to equal protection and to substantive due process. (*County of Kenosha v. C&S Management, Inc.*, 223 Wis.2d 373 at 393 (P.31); *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

Moreover, when an adequate remedy does not exist to provide due process, Wisconsin courts are to fashion an adequate remedy. [Wisconsin Constitution, Art. I, §9; *Collins v. Eli Lilly Co.*; *Bielski v. Schulze*].

This Court--in considering STATS.§806.07--should also be guided by the federal rule that would have applied had the federal district court not decided to split

[118]The same procedural posture would exist--except as to the forum in which federal Count XI continued to pend -- following the District Court's same grant of summary judgment on Counts I-X if interlocutory appeal to the Court of Appeals were taken under 28 U.S.C. §1292(b) and F.R.A.P. 5.

Plaintiffs' case between federal (as to federal Counts I - X) and state (as to federal Count XI) forums. If, as it had authority so to do, the District Court could correct any ruling on the merits for so long as Count XI remained unadjudicated, so can Wisconsin courts as a matter of equity, due process and equal protection of the laws.

D) If Claim Preclusion Is Not Applicable, then Neither Would Any of Plaintiffs' Non-Certiorari Counts Contained in Plaintiffs' Amended State Court Complaint Have Been Subject to Dismissal under the Doctrine of Issue Preclusion.

Under Restatement §27, Issue Preclusion only applies when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment. The dismissed counts of the Amended Complaint fall into one of three categories.

1) Counts III, V, VIII - XI, XIII, XIV and XVI were not presented to the federal District Court and therefore issue preclusion cannot apply.

2) In contrast, Counts II, VI - VII and XII are grounded in the unique "No Preference" clause contained in Article I, §18 of the Wisconsin Constitution. The "No Preference" clause was expressly included in Count VIII, "Wisconsin Constitution" of the federal Amended Complaint. But, neither the summary judgment ruling of the District Court nor the opinion in affirmance of the U.S. Court of Appeals in any way analyzed or addressed the "No Preference" clause.

Relief was sought for violation of this protection of the Wisconsin Constitution

by a portion[119] of federal Count VIII. Within the body of the federal Amended Complaint, allegations specific to the violation of the "No Preference" clause were made. (*See*, SA12).

Defendants moved for summary judgment on Plaintiffs' Amended Complaint but nowhere within any of their four summary judgment memoranda of law[120] was briefed that portion of Amended Count VIII which invoked the "No Preference" clause of §18 of Article I.

The Plaintiffs pointed out (SA13) the separate "No Preference" theory that was also readily apparent from the many paragraphs of the federal Amended Complaint (identified at SA12).

Judge Conley's ruling on summary judgment didn't address the "No Preference" clause of §18 of the Article I of the Wisconsin Constitution yet purported to grant summary judgment on the entirety of Count VIII, namely, both the "No Infringement/No Interference" provisions and the "No Preference" clause.

Plaintiffs' "No Preference" clause argument[32] was likewise ignored by the Seventh Circuit.

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[119]Federal Count VIII also raised the separate theory of relief under the No Infringement with Worship according to Dictates of Conscience and No Interference with Rights of Conscience provisions also found in §18. (SA1, p.51).

[120]DCD#52; #57; #97; #98.

[32]Appellants' Seventh Circuit Brief, Doc.#14, pp.48-49.

Issue preclusion doesn't operate against the theories presented in the counts grounded in the "No Preference" clause as follows:

First, Restatement §28(2) provides that issue preclusion doesn't apply where "[t]he issue is one of law and ...(b) a new determination is warranted in order ... to avoid inequitable administration of the laws: ..." Here, because the Defendants obtained an erroneous summary judgment ruling on all of Count VIII by stealth--that is without ever briefing or otherwise discussing the "No Preference" clause of the Wisconsin Constitution clearly pleaded in the Plaintiffs federal Amended Complaint--and because neither the U.S. District Court nor the Seventh Circuit U.S. Court of Appeals ever even recognized the existence of the theory raised by the Plaintiffs under the "No Preference" clause, it would plainly be inequitable for this Court to apply issue preclusion to bar the first-ever consideration on the merits of that theory by a court of competent jurisdiction.

Second, Restatement §28(3) provides that issue preclusion doesn't apply where "a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts ... " Here it is plain that the procedures followed in both federal courts were woefully inadequate.

Third, Restatement §28(5) provides that issue preclusion doesn't apply where "[t]here is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest ...

In this regard, the right of the County's ordinance and its officials to confer a preferred position on institutional churches and parochial schools at the expense of Bible camps–i.e., essentially the government dictating the mode of worship and/or types of religious establishments it prefers--is a matter of fundamental religious liberty with profound public policy ramifications and clearly contrary to the "No Preference" clause of the Wisconsin Constitution. Therefore, Plaintiffs respectfully submit that this Honorable Court should find issue preclusion inapplicable to Counts VI, VII and XII of the Amended Complaint herein.

3) Lastly, Counts IV and XV are grounded in the "No Infringement/No Interference provisions contained in Article I, §18 of the Wisconsin Constitution.

Count IV of the instant Amended Complaint seeks declaratory relief premised on the theory that the total exclusion of year round religious camps from Woodboro and/or from various zoning districts violates the No Infringement with Worship according to the Dictates of Conscience and No Interference with the Rights of Conscience provision of §18 of Article I of the Wisconsin Constitution.

The total exclusion theory was presented to the federal district court only under the "total exclusion" portion of the federal RLUIPA. Plaintiffs did not plead and/or assert in the district court that such total exclusion violated the Wisconsin Constitution.

Therefore, the "actually litigated" threshold requirement for issue preclusion to apply was not satisfied.

Count XV squarely poses the question of whether the "as-applied" process employed by the County and its BOA impermissibly burdened the Plaintiffs' exercise of their religion in a manner violative of the No Infringement with Worship according to the Dictates of Conscience and No Interference with the Rights of Conscience provision also found in §18 of Article I of the Wisconsin Constitution.

This issue was directly posed by the portion of Count VIII of the federal Amended Complaint grounded in other than the "No Preference" clause. Judge Conley treated this portion of Count VIII as being synonymous with the facial ("imposing") and as-applied ("implementing") challenges under RLUIPA's substantial burden provision (as expressly pleaded in federal Count III). While the federal District Court did squarely rule upon this issue--erroneously, as just noted-- the Court of Appeals only ruled on the facial aspect of the appeal and ignored the as-applied challenge posed by the instant Count XV. The appeal from the District Court's as-applied ruling is found at Appellants' Seventh Circuit Brief, Arguments III(B) and V(A)-(C).

Thus, issue preclusion does not apply to Count XV.

Under Restatement §28(5), at p. 39 *,supra*, the public interest in Wisconsin is not served by permitting a grossly erroneous interpretation by a federal court of

"strict scrutiny" under Wisconsin law to stand. State courts are the principal expositors of state law. (*Moore v. Sims*, 442 U.S. 415 at 429 (1979)). When the issue of state law decided incorrectly by a federal court is a question of law rather than of fact, the prior federal court determination is not conclusive on state courts either if injustice would result or if the public interest requires that relitigation not be foreclosed. (*City of Sacramento v. State of California*, 50 Cal. 3d 51 (1990); *Scott v. Bank One Trust Co.*, 62 Ohio St.3d 39 (1991)).

II) THE TRIAL COURT ERRED BY DENYING PLAINTIFFS' RENEWED MOTION FOR RECONSIDERATION THAT SOUGHT PROSPECTIVE-ONLY RELIEF FROM ANY CONTINUING PRECLUSIVE EFFECT OF THE FEDERAL COURTS' GRANT TO THE DEFENDANTS OF SUMMARY JUDGMENT ON COUNT III WHERE SUCH MOTION WAS BASED UPON AN ADMITTED ERROR.

In the light of the Seventh Circuit's overruling in *Schlemm v. Wall* of its prior affirmance of the District Court's grant of summary judgment on federal Count III, "RLUIPA Substantial Burden," the Plaintiffs moved the District Court to vacate that judgment on that Count. Plaintiffs' effort was rebuffed by the District Judge and, on renewed appeal, by the same panel that had heard the 2013 summary judgment appeal.

Plaintiffs did not move the Circuit Court to vacate the federal court grant of summary judgment on federal Count III. Thus, the Circuit Court's reliance at p.10 of R.#116 upon *Wescott v. Catencamp* was misplaced.

Instead, the Plaintiffs moved the Circuit Court under WIS.STAT. 806.07(1)(g) and (h) (or under its inherent power) to eliminate the preclusive effect afforded by that Court's January 23, 2015 Decision of the federal court's grant of summary judgment on federal Count III in order to afford the Plaintiffs prospective-only relief from that effect of that judgment. In other words, the federal courts found, as of 2013, that the Defendants had not violated RLUIPA's prohibition on imposition of a "substantial burden" on the free exercise of religion and were thus not liable for money damages for past actions, Plaintiffs' motion did not seek to have the Circuit Court undo that ruling.

The relief Plaintiffs did seek from the Circuit Court would have allowed them, independent of their other arguments, to show that their still-active proceeding to overturn the denial of their application for conditional use permit and to recover other prospective relief can be maintained, in part, on that basis that the continuing existence and application of the OCZSPO does now violate that RLUIPA provision in light of the intervening change in the law made in April 2015 by *Schlemm v. Wall.*

Restatement §26(1)(f) denies ongoing preclusive effect to a judgment that constitutes an ***apparently invalid continuing restraint*** discussed at p. 30, *supra*, and is in accord with sub (g) and (h) of the §806.07(1). The Circuit Court overlooked this basis for the seeking of relief from Claim Preclusion and instead incorrectly attributed

to Plaintiffs, as the "essence" of their position, a mere "inequity" or "unfairness" argument rather than one rooted in the text of the Restatement. (R.#116 at p. 11).

Plaintiffs also pointed out (at R#84, p. 5) that where there is a substantive change in the law, *res judicata*, in general, is no longer a defense:

> As the Fifth Circuit U.S. Court of Appeals observed in *Christian v. Jemison*, 303 F.2d 52 at 55 (5th Cir. 1962):
>
> The Supreme Court has many times declared "the general rule[33] that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154 , 162 (1945); *Blair v. Commissioner*, 300 U.S. 5 (1937); *Commissioner v. Sunnen*, 333 U.S. 591 (1948).

Thus, federal court decisions on a portion of the previously adjudicated federal grounds, namely, federal Count III, are no longer *res judicata*.

The Circuit Court erroneously construed *Christian v. Jemison* to apply only to "momentous changes" and then only in "constitutional [not statutory] law" (R.#116, pp. 6-8). The Circuit Court ignored *State Farm Mutual Auto Ins. Co. v. Duel*; *Blair v. Commissioner* and *Commissioner v. Sunnen*, none of which involved either "momentous changes" or "changes in constitutional law." In fact, the U.S. Supreme Court in *Duel* stated: "We cannot find that Wisconsin has a different rule." (324 U.S. 154 at 162).

---

[33]An exception to the general rule also laid down by the U.S. Supreme Court in *Federated Department Stores v. Moitie*, 452 U.S. at 398 is that where the judgment of the trial court in the earlier case went "unappealed," then an intervening or supervening change in the law does not undo the preclusive effect of the unappealed judgment.

The Circuit Court also erroneously claimed, *sua sponte*, at p. 8 of R#116 that *Lim v. Central DuPage Hospital* (7th Cir. 1992) stood for the proposition that intervening changes in statutory law are never sufficient to override ongoing preclusive effect. *Lim* merely noted a briefing failure: "Dr. Lim has ***failed to demonstrate*** that a change in law after the entry of judgment creates an exception to the application of federal *res judicata* law." (972 F.2d at 763).

III) THE CIRCUIT COURT ERRED WHEN IT HELD THAT THE RLUIPA "SUBSTANTIAL BURDEN" GROUND RAISED BY COUNT III OF PLAINTIFFS' FEDERAL AMENDED COMPLAINT "WOULD NEVER HAVE BEEN LITIGATED IN THIS STATE COURT ACTION".

In its ruling of February 21, 2018 at R.116, pp. 8-9 the Circuit Court stated:

> ... 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 ... .

Here, the Court committed two additional errors.

First, the Circuit Court misread and/or misunderstood Plaintiffs' "final footnote" (R.#84 at p.12) as to what it "acknowledged." That footnote merely stated that Plaintiffs acknowledged they could not continue their effort to obtain relief under RLUIPA by seeking "independent relief within their statutory certiorari review count" but didn't state that Plaintiffs could not seek to obtain RLUIPA relief in state court by seeking "independent relief" within a non-certiorari count.

Second, the Court below erred in stating:

> 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

If the proceeding below is determined to be the "same case" as that which pended in the federal forum, then there is no such impediment.

However, if the proceeding below is a different "case," then Claim Preclusion is inapplicable per Argument I, *supra*. In such case, submitting what had been federal Count III, "RLUIPA Substantial Burden" as an additional count in the Circuit Court would be precluded only if Issue Preclusion applied. But, Issue Preclusion wouldn't apply because Restatement §28(2) provides that

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded

where:

> (2) The issue is one of law and ... (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws;

Both elements of (b) are present.

Comment c to this section states that: "Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of a law." To wit, another, different applicant for a religious camp to be situated in Woodboro with identical legally-relevant characteristics to Plaintiffs' proposed camp would receive RLUIPA substantial burden protection (under *Schlemm*) greater than that now afforded to the Plaintiffs

unless Plaintiffs are given relief from preclusive effect of summary judgment on federal Count III.

IV) THE CIRCUIT COURT ERRED IN ITS APPLICATION OF *HANLON*.

The Circuit Court's January 23, 2015 Decision ("Decision") rested principally on that Court's extension, *sua sponte*, of *Hanlon v. Town of Milton* (S.Ct. 2000). There the similarly-situated plaintiff filed an action in Wisconsin state court and presented, as the only ground, state law certiorari review. After that case lost on the merits (including this Court's review), plaintiff proceeded to file in federal court a federal civil rights action seeking money damages. This procedural fact pattern is, of course, entirely different than the one presented here.

There, the defendant town sought to bar the federal proceeding on the basis of claim preclusion, arguing that it required plaintiff to have presented its federal equal protection theory that sought money damages in the first, state court cert. proceeding. The federal district court ruled in favor of the defendant-movant Town's claim preclusion argument; plaintiff appealed the dismissal to the U.S. Court of Appeals. That court, in turn, certified the following questions[34] to the Wisconsin Supreme Court:

> Whether a litigant challenging an administrative determination according to the provisions set forth in Chapter 68 may bring an equal protection ***claim*** [denoted as Issue 1]

[34]This brief parses the certified questions into the three "Issues" as denominated above for the sake of analytical clarity.

> 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 [denoted as Issue 2]
>
> so that the failure to raise such a claim invokes the doctrine of claim preclusion. [denoted as Issue 3] (235 Wis. 2d 597 at 600)

The context of *Hanlon* makes clear that Issue 1's phrase "may bring an equal protection claim" refers to the hypothetical question as to whether the plaintiff could have joined a federal equal protection theory seeking money damage ***either within the certiorari count itself or as an additional count*** within the state court proceeding for which state law certiorari review had been sought. The Wisconsin Supreme Court answered that question–overlooked by the Decision--***in the negative*** as to "within the certiorari count" and ***in the affirmative*** as to "as an additional count" (235 Wis.2d at 601; 608-609)

Regarding Issue 2, our Supreme Court answered that part of the certified question partly in the affirmative and partly in the negative-- the Court holding that a federal equal protection issue can be raised *even within the state law certiorari count* but that a prayer for money damages relief grounded on the theory of an equal protection violation could not be raised within such a count. (235 Wis.2d 597 at 603-604).

Regarding Issue 3, the Wisconsin Supreme Court held that the federal action for money damages was not barred by claim preclusion even though the same legal theory and prayer for relief (i.e., money damage) could have been "joined" as a separate count to the earlier state law certiorari proceeding in state court. 235 Wis.2d at 601; 608-609.

The Wisconsin Supreme Court determined to exempt the Plaintiff from the operation of claim preclusion under the Restatement based upon three specific considerations articulated at 235 Wis.2d at 608.

However, as the Court made clear none of these three considerations barred the joinder of a certiorari proceeding with a §1983 proceeding as separate counts within a single court case; rather, these factors merely resulted in the conclusion that joinder was not mandatory in order to avoid the pain of suffering claim preclusion.

Therefore, the Decision correctly observed at p. 6 that a separate non-certiorari action is not barred by claim preclusion.

And, it is ***permissible*** under the Restatement because our Supreme Court was applying §26(1)(d) that provides:

> the general rule of §24 ***does not apply to extinguish the claim ...***

where:

> (d) **... it is the sense of the [statutory] scheme that the plaintiff should be permitted to split his claim;**

As such, our Supreme Court declined to apply the general rule of claim preclusion by applying the Restatement's own exception in favor of ***more*** generous treatment of all chapter 68 certiorari plaintiffs.

However, the Decision went on to fallaciously extrapolate the converse, resulting in ***less*** generous treatment of plaintiffs than under the ordinary operation of claim preclusion that under the transactional approach of the Restatement expressly disregards "variant forms of relief" and "forms of action" as being separate "claims." The Circuit Court had no judicial or logical justification in erroneously deducing its asserted "upshot of *Hanlon*" that is quoted at p. 24, *supra*. Referring to a certiorari proceeding (or count) and a money damages equal protection proceeding (or count) as presenting "two different claims" is directly violative of the transactional approach mandated by Wisconsin's adoption of the Restatement.

Hanlon applied the §24(d) exception not by stating that there were "two claims" existing for claim preclusion purposes but by observing that "the principles underlying the doctrine of claim preclusion cannot be achieved by joining a §1983 claim with a certiorari proceeding brought pursuant to Wis. Stat. Ch. 68" (*Hanlon* at P20).

CONCLUSION

Plaintiffs-Appellants pray the Court:

(A) vacate the Circuit Court's Judgment and Taxation of Costs filed April 4, 2018;

(B) reverse:

(i) Part I of the January 23, 2015 Decision;

(ii) the April 22, 2015 oral ruling denying Plaintiffs' Motion for Reconsideration; and

(iii) the February 21, 2018 oral ruling: (a) denying Plaintiffs' Renewed Motion for Reconsideration; and (b) stating that RLUIPA substantial burden "would never have been litigated in this State court action";

(C) remand for further proceedings; and

(D) grant all other appropriate relief.

SIGNATURES

ATTORNEYS FOR PLAINTIFFS-APPELLANTS

Dated: July 23, 2018

/s/ Michael D. Dean

Michael D. Dean, Esq.
SBN 01019171

/s/ Arthur G. Jaros, Jr.
Arthur G. Jaros, Jr., Esq.

APPENDIX II

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STATE OF WISCONSIN

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 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, Co-Trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust,

Plaintiffs-Appellants-Cross-Respondents

v. APPEAL NO. 2018-AP-940

COUNTY OF ONEIDA,

Defendant-Respondent,

TOWN OF WOODBORO,

Defendant-Respondent-Cross-Appellant,

ONEIDA COUNTY BOARD OF ADJUSTMENT,

Defendant

APPEAL FROM THE CIRCUIT COURT FOR ONEIDA COUNTY
THE HONORABLE MICHAEL H. BLOOM, CIRCUIT JUDGE, PRESIDING
CIRCUIT COURT CASE NO. 2013-CV-345

THE TOWN OF WOODBORO'S STATEMENT THAT NO SEPARATE RESPONDENT'S BRIEF WILL BE FILED

KASIETA LEGAL GROUP, LLC
Mark B. Hazelbaker
State Bar No. 1010302
559 D'onofrio Drive, Suite 222
Madison, WI 53719-2842
608-662-2300, Fax 608 662-9977
mh@kasieta.com

STATE OF WISCONSIN

COURT OF APPEALS, DISTRICT III

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TOWN OF WOODBORO,

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ONEIDA COUNTY BOARD OF ADJUSTMENT,

Defendant

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THE HONORABLE MICHAEL H. BLOOM, CIRCUIT JUDGE, PRESIDING
CIRCUIT COURT CASE NO. 2013-CV-345

THE TOWN OF WOODBORO'S CROSS-APPELLANT'S BRIEF

KASIETA LEGAL GROUP, LLC
Mark B. Hazelbaker
State Bar No. 1010302
559 D'onofrio Drive, Suite 222
Madison, WI 53719-2842
608-662-2300, Fax 608 662-9977
mh@kasieta.com

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STATEMENT OF THE ISSUES

Was the Amended Complaint filed against the Town of Woodboro by Eagle Cove without a basis in law such that it was frivolous within the meaning of Wis. Stats. secs. 802.05 and/or 895.044:

The Circuit Court held that the Amended Complaint was not frivolous.

Was the Motion for Reconsideration filed by Eagle Cove on April 27, 2016 without a basis in law, as against the Town of Woodboro, such that it was frivolous within the meaning of Wis. Stats. secs. 802.05 and/or 895.044?

The Circuit Court did not impose sanctions.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Town of Woodboro believes the briefs will present the arguments of the parties without requiring oral argument.

The Town of Woodboro requests that the decision be published, since there is no published case law construing Wis. Stats. sec. 895.044.

STATEMENT OF THE CASE

The issue presented in this Cross-Appeal is whether Eagle Cove had a meritorious basis in law for two actions it pursued against the Town of Woodboro in the Circuit Court: (1) its attempt to re-litigate its religious freedom claims in the Circuit Court, and, (2) its various attempt to obtain relief from judgment after the Seventh Circuit indicated its 2013 decision involving Eagle Cove was no longer good law on one point decided in the case. For the purposes of this Brief and in the interest of economy, the Town relies primarily upon the statement of the case offered by Oneida County in its Respondents' Brief.

To provide a full context for the issue presented in this Cross-Appeal, however it is important to present further information.

The litigation between Eagle Cove, Oneida County and the Town began more than eight years ago after Eagle Cove unsuccessfully sought to rezone land located on Squash Lake in Oneida County. The core of Eagle Cove's claims were allegations under the Religious Land Uses and Institutionalized Persons Act (RLUIPA), 42 U.S.C. sec. 2000cc et seq. The history of Eagle Cove's efforts was summarized by the Seventh Circuit in its decision affirming the District

Court's grant of summary judgment dismissing Eagle Cove's federal and state claims:

> ***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 [Oneida County Zoning and Shoreland Protection Ordinance] 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.
>
> Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, Wis., 734 F.3d 673, 677-78 (7th Cir. 2013)

Eagle Cove responded to the denial of its petition by filing an action in the United States District Court for the Western District of Wisconsin, *Eagle Camp & Conference Center, et al., v. Town of Woodboro, et al.*, Case No 10-CV-118-wmc (the "Federal Case").

In the Federal Case, plaintiffs also brought pendant state-law claims alleging that the defendants County and Town violated the Wisconsin Constitution. Plaintiffs invoked the

District Court's jurisdiction under 18 U.S.C. sec. 1367. The state law claims in the Federal Case involved the same nucleus of operative facts.

Judge William Conley did not defer resolution of the merits of the plaintiff's state law claims. In his decision disposing of the Federal Case, Judge Conley explicitly stated that although he could defer the state law claims and remand them, he would not do so. Instead, he reached the merits of the state law claims and dismissed them on their merits. He did not dismiss the plaintiff's statutory certiorari claim.

The Seventh Circuit affirmed Judge Conley's decision. In its decision, the Seventh Circuit held that the Town of Woodboro does not have land use regulatory authority, over the land involved, only Oneida County does. The Seventh Circuit stated:

> 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.
>
> Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, Wis., 734 F.3d 673, 680 (7th Cir. 2013).

Eagle Cove petitioned for certiorari to the United States Supreme Court, which rejected the petition, *Eagle Cove Camp & Conference Center v. Town of Woodboro, et al.*, 134 S.Ct. 2160, 2014 W.L. 1757838 (5/5/2014).

After the U.S. Supreme Court rejected Eagle Cove's petition, Eagle Cove filed the Circuit Court action now on appeal to this Court. The original complaint sought only certiorari review. The Town, therefore, was not a party. But on August 29, 2014, Eagle Cove filed an amended complaint. Eagle Cove added the Town of Woodboro as a defendant. The amended complaint restated Eagle Cove's free exercise claims under the artifice of characterizing them as claims under the Wisconsin Constitution.

The Town moved to dismiss the amended complaint and answered on October 2, 2014. Oneida County and the BOA responded to the amended complaint by moving for judgment on the pleadings on October 17, 2014, accompanied by a brief. The Town also filed a motion for judgment on the pleadings on

October 22, 2014, also accompanied by a brief. After affording the plaintiffs a 21-day safe harbor period under secs. 802.05 and 895.044, Wis. Stats., the Town and the County moved the Circuit Court to award actual attorneys' fees and costs against the plaintiffs for the reason that the amended complaint was frivolous , as against the Town, upon its commencement under secs. 802.05 and 895.044, Wis. Stats.

The parties filed response and reply briefs on the merits, leading to argument before Oneida County Circuit Judge Michael Bloom on December 12, 2014. The Court took the arguments under advisement. On January 23, 2015, Judge Bloom rendered an oral decision from the bench. He denied the defendants' motion for frivolous costs and fees without allowing the defendants either briefing or argument on the motion. In rejecting the motion for fees, the Court stated:

> 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.

The court set the case for a February 13, 2015 status conference to discuss the process for resolving the remaining certiorari action.

Immediately before the February 13, 2015 status conference, plaintiffs served a Motion for Reconsideration on the defendants. In the motion, they alleged that the Circuit Court had failed to completely resolve all of the plaintiffs' claims. They also asserted that the Circuit Court had made errors of law in its decision. After reviewing the plaintiffs' motion, the Circuit Court directed the parties to submit briefs. In order to allow the reconsideration motion

to be heard before an appeal would need to be taken, the Circuit Court vacated its order dismissing the case. On April 22, 2015, the Circuit Court found that it had not committed a manifest error of law, and denied the plaintiffs' motion to reconsider. The Court set the case for a May 18, 2015 status conference to schedule further proceedings in the case; the state-law certiorari claim remained unresolved. When the Circuit Court rejected plaintiffs' motion for reconsideration, neither the Court nor the parties were aware that on April 21, 2015, the Seventh Circuit indicated that part of its *Eagle Cove* decision was invalid. In *Schlemmer v. Wall*, 2015 U.S.App. LEXIS 6592 (7th Cir. 2015), the Seventh Circuit stated that the *Eagle Cove* formulation of the substantial burden test did not survive the United States Supreme Court's decisions in *Holt v. Hobbs*, 135 S.Ct. 853 (2015) and *Hobby Lobby Stores, Inc., v. Burwell*, 134 S. Ct. 2751 (2015).

On May 14, 2015, Attorney Jaros filed a second motion for reconsideration with the Circuit Court, again contending that the Circuit Court had failed to completely dispose of plaintiffs' claim that the defendants violated the Wisconsin Constitution's prohibition of religious preferences. Attorney Jaros also indicated that the plaintiffs had filed a motion for relief from judgment with the U.S. District Court

Court. At the May 14, 2015 status conference, the parties agreed to defer further action in the Circuit Court until the federal court resolved the plaintiffs' motion for relief from judgment.

The United States District Court rejected Eagle Cove's request for relief from judgment in a written decision dated August 11, 2016, 2016 WL 6584687. The District Court stated:

> 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.
>
> Eagle Cove Camp & Conference Ctr. Inc. v. Town of Woodboro, No. 10-CV-118-WMC, 2016 WL 6584687, at *1 (W.D. Wis. Aug. 11, 2016).

Eagle Cove appealed Judge Conley's decision to the Seventh Circuit. That Court affirmed the District Court in an unpublished opinion on January 25, 2017, *Eagle Cove Camp & Conference Center v. Town of Woodboro,* 674 F. App'x 566 (7th Cir. 2017). Eagle Cove again petitioned for certiorari, which the U.S. Supreme Court declined, 138 S.Ct. 129 (October 2, 2017).

After Eagle Cove's attempt to re-open the case was rebuffed by the federal courts, Eagle Cove returned to the Circuit Court. There, Eagle Cove made the same arguments all over again. On December 4, 2017, Eagle Cove filed a memorandum of law in support of its renewed motion for reconsideration. On February 9, 2018, Oneida County filed a Brief in opposition to that motion. The Town later joined in the Brief. Eagle Cove filed a reply brief on February 16, 2018. The Circuit Court denied Eagle Cove's motion in an oral ruling on February 21, 2018. Judgment dismissing Eagle Cove's non-certiorari claims was entered April 4, 2018. This appeal followed.

STANDARD OF REVIEW

Whether or not a party should be sanctioned because its claims are unsupported by existing law is a discretionary decision under Wis. Stats. sec. 802.05. This Court should defer to the discretion of the Circuit Court. *Trinity Petroleum, Inc. v. Scott Oil Co., 2007 WI 88, 302 Wis. 2d 299, 735 N.W. 2d1 (2007).*

Whether or not a party should be sanctioned because its claims are unsupported by existing law under Wis. Stats. sec. 895.044, after failing to withdraw the claim when the 21-day "safe-harbor" period, presents a question of law to which no deference is required, sec. 895.044 (2)(b).

ARGUMENT

I. EAGLE COVE'S 2015 AMENDED COMPLAINT WAS WITHOUT LEGAL MERIT FROM ITS COMMENCEMENT, AND WAS FRIVOLOUS.

A. Applicable Law.

This appeal involves two different statutes which take different approaches to addressing frivolous claims.

The first statute, Wis. Stats. Sec. 802.05, was adopted by the Wisconsin Supreme Court in 2005, Supreme Court Order 03-06, 2005 WI 86. The Supreme Court repealed the prior version of sec. 802.05 to adopt a new rule based on Rule 11 of the Federal Rules of Civil Procedure.

The Court also repealed sec. 814.025, a separate statute which had been adopted by the Wisconsin Legislature in 1977, Chapter 209 Laws of 1977. Section 814.025 provided that when an action is found to be frivolous, the court "shall" award costs and reasonable attorney's fees. Sec. 814.025 (1) (2003).

Section 802.05 is a rule of pleading. It places attorneys and litigants under a duty to sign every pleading, written motion or other paper. 802.05 (1). Signing is more than applying ink to paper. Subsection (2) indicates that by signing a document, the attorney or person filing it certifies: (a)that the pleading is not being filed for an

improper purpose, such as harassment; (b) the claims are supported by the law or a good faith argument to modify the law; (c) the facts have evidentiary support; and, (d) denials of factual allegations are based on evidence.

The statute provides that if the court determines that the requirements for the certifications were violated, the court "may" impose sanctions. 802.05 (3). The sanctions "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." 802.05 (3)(b). The statute, therefore, is not a fee shifting or compensation statute. The available remedies "... may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation...."

All the determinations in sec. 802.05 are discretionary. The Court "may" determine that a claim is frivolous, and "may" impose a sanction.

The Legislature again weighed in on the issue in 2011 by adopting 2011 Wisconsin Act 2, creating sec. 895.044. That statute is plainly a compensatory statute. It provides for an award of "damages" if a defendant shows that an "...action,

special proceeding, counterclaim, defense, cross complaint, or appeal" was initiated for improper purposes or that the attorney knew or should have known the matter had no legal merit. The remedies are governed by two differing provisions.

Subsection 895.044 (2)(a) indicates that if the offending pleading is withdrawn within the safe-harbor period, the Court "may" award the actual fees and costs incurred. The court may take into consideration the party's conduct in withdrawing the pleading.

Subsection 895.044 (2)(b), by contrast, provides that if the party fails to withdraw the offending pleading within 21 days, the Court "shall" award, as damages, the fees and costs incurred by the party. The statute requires that fees incurred on an appeal from a frivolous claim be awarded. Subsection 895.044 (4). And, the statute overrules the prior rule that an appeal had to be entirely frivolous for appellate fees to be awarded, 895.044 (5). Also, there is no provision in sec. 895.044 which subordinates the statute to sec. 802.05

The 2011 statute created a much stronger remedy for legally frivolous actions. It differs from sec. 802.05 in that it applies only to claims which are without legal merit. Assertions that a claim has no factual support must continue to be made under sec. 802.05. But if, as here, the claim is alleged to be without legal merit, the remedy differs sharply.

Most significantly, if the movant shows the claim was without legal merit and the claim was not withdrawn, the court is required to award fees and costs. The award is not for deterrent purposes. It is an award of damages to compensate the victim of a frivolous claim. The newer law also extends the requirement of compensation to appeals, preventing parties from negating the effect of a fee award by filing an appeal which the injured party must defend potentially at their expense.

There are no reported cases construing sec. 895.044. However, the Legislature meant something by enacting the newer law. The Legislature is presumed to be aware of existing law and to intend what it enacts, *Reese v. City of Pewaukee*, 2002 WI App 67, ¶ 11, 252 Wis. 2d 361, 368, 642 N.W.2d 596, 599 (2002). The Legislature clearly did not merely re-enact section 802.05. The Legislature directed that the courts to compensate the victims of claims that have no legal basis.

The sequence of amendments addressing this subject leaves no doubt that the Legislature intended that courts award damages to parties victimized by claims filed without legal merit. The Legislature had adopted a strong mandate for fee awards by creating sec. 814.025. The Supreme Court decided to repeal that statute in favor of the discretionary

approach embodied in Rule 11 of the Federal Rules. See. *Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, ¶ 28, 302 Wis. 2d 299, 313, 735 N.W.2d 1, 8, ["…sanctions, including costs and reasonable attorney fees, are no longer mandatory upon a circuit court's finding of frivolousness."]

The Legislature replied by enacting a strong, mandatory sanctions statute. That this dialog took place over six years does not lessen the significance of the legislative action. The Legislature made it plain that actions filed without a basis in law are a serious concern, and directed that parties damaged by those suits receive compensation.

The Town submits that all claims or motions filed by Eagle Cove against the Town from the Amended Complaint to the present were without legal merit upon their commencement. For that reason, the Town asserts that the Amended Complaint, its continuation; the motion for relief from judgment, and, its continuation all were frivolous. The Town seeks damages pursuant to sec. 895.044 and, to the extent applicable, sec. 802.05, in the amount of its attorneys' fees and costs.

B. Eagle Cove's State Law Claims Were Adjudicated By The Federal Court.

Eagle Cove had ample opportunity to litigate the state law claims which Eagle Cove filed in 2010 as part of its

federal lawsuit. It was Eagle Cove which decided to bring these state law claims in the Federal Case.

The District Court exercised its discretion and resolved state law claims, since the claims significantly overlapped the federal claims. Eagle Cove thoroughly litigated them before Judge Conley. Eagle Cove lost.

Eagle Cove then appealed Judge Conley's decision. Of note, Eagle Cove appealed his decision as a "final decision of the district court," allowed as a matter of right under 28 U.S.C. sec. 1291. Appeal was not taken under 28 U.S.C. sec. 1292, the federal provision allowing interlocutory appeals in exceptional cases. Eagle Cove lost again at the Seventh Circuit. The Supreme Court refused to grant Eagle Cove's petition for a writ of certiorari. Eagle Cove's claims related to the County's rejection of its zoning petitions were concluded.

The Seventh Circuit's decision lent a further level of finality to Eagle Cove's disputes with the Town. The Seventh Circuit stated "Thus, it is clear that the County, not Woodboro, exercises jurisdiction." That conclusion became the law of the case.

And yet, when Eagle Cove decided to re-litigate its claims, Eagle Cove brought the Town of Woodboro into this case again as a defendant. The Amended Complaint Eagle Cover

filed on August 29, 2014 named the Town of Woodboro as a defendant even though the prior ruling of the Seventh Circuit established, correctly, that the Town had no land use authority over Eagle Cove.

By proceeding against Woodboro, then, Eagle Cove sued on claims that had already been found to be without merit. Eagle Cove filed the claims against a party that had already been found to have no jurisdiction over the matter. It could not be clearer that the claims in the Amended Complaint, as against the Town, utterly lacked merit at their commencement.

Eagle Cove's attempt to bring the same claim in state court is flatly barred by claim preclusion, even if brought in a different court.

"Once a court issues an order, the collateral bar doctrine prevents the loser from migrating to another tribunal in search of a decision he likes better. E.g., *Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1955)." *Homola v. McNamara*, 59 F.3d 647, 651 (7th Cir. 1995)[1].

[1] This Brief will cite federal cases because they provide guidance in construing sec. 802.05. Woodboro contents that if a pleading offends the discretionary provisions of sec. 802.05, the pleading must also violate sec. 895.044.

The collateral bar doctrine operates here as the converse of the *Rooker-Feldman*[2] doctrine, which precludes resort to federal court to review the decisions of state courts. The instant action is nothing more than forum shopping.

C. Commencing An Action Barred By Claim Preclusion Is Frivolous.

Where a party has litigated their claims in an earlier case, claim preclusion bars a subsequent case on the same cause of action. The Circuit Court correctly held that Eagle Cove's amended complaint was barred by claim preclusion. Claim preclusion deprives a subsequent action of legal merit. Therefore, a claim such as this is, by definition, frivolous. Eagle Cove commenced a second action against the Town on claims which had already been adjudicated. Eagle Cove had lost not only on the merits, but on the Town's jurisdiction.

It has been held that an action which impermissibly collaterally attacks a prior order is frivolous, *In re Grantham Bros.*, 922 F.2d 1438, 1441 (9th Cir. 1991).

In the *Grantham Brothers* case, the plaintiffs filed a bankruptcy petition under Chapter 11. The bankruptcy court approved the bankruptcy trustee's request for leave to sell

[2] *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923).

certain real estate owned by the bankrupt. Subsequently, the bankrupt filed a civil claim (as an adversary proceeding) seeking to challenge the order for sale of the property. The court found the collateral attack was frivolous and awarded sanctions. The Ninth Circuit affirmed:

> Because the collateral attack had no basis in law or fact, we agree that it was frivolous under Rule 11. Although no ninth circuit court has imposed Rule 11 sanctions for such a collateral attack, the district court was within its discretion to do so. *In re Grantham Bros.*, 922 F.2d 1438, 1442 (9th Cir. 1991)

In a case remarkably apposite to the case at bar, the Court found a second attempt to pursue a claim to be frivolous, *Roberts v. Chevron U.S.A., Inc.*, 117 F.R.D. 581, 583 (M.D. La. 1987), *aff'd sub nom. Roberts v. Chevron, U.S.A.*, 857 F.2d 1471 (5th Cir. 1988)

In *Roberts*, the plaintiffs filed a suit in Louisiana state court which was removed to federal court. The federal court ruled against plaintiffs. Its decision was affirmed on appeal. The plaintiffs then commenced a new suit against the defendants in state court, raising the same issues which had been determined adversely to them by the federal court. The District Court found that the second action was frivolous:

> The court has previously set forth a history of the litigation between these parties. It is clear that had the Roberts and their counsel made a reasonable inquiry as required by Rule 11, they would have and should have concluded that this suit was totally

> frivolous and without merit. Each should have discovered that the judgment rendered by this court in Civil Action 83-848 and affirmed by the Fifth Circuit Court of Appeals, after three separate appeals were taken to that court, was a final judgment and that res judicata applied to bar this action.
> Federal law determines the res judicata effect of a prior federal court judgment. A review of the allegations and judgment rendered in Civil Action 83-848 and the allegations and prayer for relief in this litigation clearly shows that the judgment rendered in Civil Action 83-848 bars the Roberts from relitigating the issues in this litigation. It would not have taken much inquiry to discover this fact.
> *Roberts v. Chevron U.S.A., Inc.*, 117 F.R.D. 581, 586 (M.D. La. 1987), *aff'd sub nom. Roberts v. Chevron, U.S.A.*, 857 F.2d 1471 (5th Cir. 1988)

Other federal cases have held that a second action filed in spite of the bar of claim preclusion is frivolous.

In *Bartel Dental Books Co. v. Schultz*, 786 F.2d 486, 488 (2d Cir. 1986), the plaintiff had settled claims for relocation assistance after the premises it had leased were taken in condemnation. Despite having released its claims, plaintiff filed a section 1983 suit against the condemnor in federal court. The Second Circuit concluded that the claim was frivolous and affirmed the award of fees:

> Mapleton's other claims had already been rejected by the New York courts and were clearly without merit. Furthermore, a competent attorney could not form a reasonable belief that any of these claims were "warranted by existing law or a good faith argument for extension, modification, or reversal of existing law." Fed.R.Civ.P. 11. See also Eastway Construction Corp. v. City of New York, 762 F.2d 243, 253-54 (2d Cir.1985).

> The district court clearly did not abuse its discretion when it ordered Mapleton to pay defendants' costs and attorneys' fees. The district court probably would have erred if it had not awarded attorneys' fees to NYDA and to Schultz under Rule 11 of the Federal Rules of Civil Procedure. See Eastway, 762 F.2d at 253-54. See also Harbulak v. County of Suffolk, 654 F.2d 194, 198 (2d Cir.1981) (trial court erred when it refused to award attorneys' fees to prevailing defendant where plaintiff's action under section 1983 was "unreasonable and groundless, if not frivolous").
> *Bartel Dental Books Co. v. Schultz,* 786 F.2d 486, 490 (2d Cir. 1986).

In *Med. Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp. 2d 1316 (D. Kan. 2006), plaintiff had filed two previous unsuccessful actions against the defendants. Although there were some differences in the identities of defendants, the Court noted that at least five claims had been filed repeatedly against three defendants. The District Court found that the plaintiffs were trying to "…attempt another bite at the proverbial apple…" The District Court found that sanctions in the amount of the defendants' reasonable attorneys fees and costs were the minimum amount needed to deter the undesirable behavior of suing despite the bar of claim preclusion. *Id.* at 419 F. Supp 1333 - 1335.

In *Potter v. Mosteller,* 199 F.R.D. 181 (D.S.C.), aff'd, 238 F.3d 414 (4th Cir. 2000), the District Court awarded sanctions against pro se plaintiffs who had

previously filed suits against the defendant Banks. The Court noted that the claims filed in the latest suit against these same defendants raised claims which could have been brought in the earlier suit. *Id.*, 199 F.R.D. at 190.

Accord, *Schueller v. Wells Fargo & Co.*, 303 F. Supp. 3d 1171, 1183 (D.N.M. 2018).

In this case, the plaintiffs had a more than ample opportunity to be heard on their claims in the Federal Case. They litigated their state law claims in the federal court. Their assertion that the federal court did not completely dispose of the state law claims lacks candor. Judge Conley's decision explicitly stated he was reaching and resolving the merits of Eagle Cove's state law claims.

If Eagle Cove considered Judge Conley's decision an interlocutory ruling, its subsequent actions showed no such belief. Eagle Cove filed a direct appeal with the Seventh Circuit, and then, a petition for certiorari. The appeal was explicitly premised on the assertion that there was a final decision.

Every state law merits claim Eagle Cove stated or could have stated was resolved. Under the doctrine of claim preclusion, every state law merits claim which Eagle Cove could have alleged but did not, is also barred.

There was and is no doubt that Eagle Cove's amended complaint in this matter constituted an egregious attempt to disregard the preclusive effect of the Federal Case. Eagle Cove was entitled to bring these claims and litigate them - once. The actions by Eagle Cove and its counsel in this case have required the Town to incur further expenditures of legal fees. These actions have also needlessly prolonged litigation which was over in 2014. Four years later, the Town is still in court on claims which were rejected by the United States Supreme Court.

It is appropriate for the courts to protect the right of claimants to have their day in court. But, the Town respectfully submits that it is equally important for the courts to protect defendants from repetitive litigation. The premise of the doctrine of claim preclusion is the importance of the finality of judgments. Finality is important because defendants who have prevailed deserve their peace. This case was over in 2014. That the plaintiffs are still putting the Town through the legal process five years later is a mockery of the legal system.

D. The Circuit Court Erred In Finding That "Good Faith" Justified Plantiffs' Second Lawsuit.

In its February 23, 2015 decision, the Circuit Court rejected sanctions because the Court concluded that the

plaintiffs had filed the amended complaint in "good faith." The Circuit Court cited three reasons for its conclusion, none of them constituted "good faith."

First, the Court noted the plaintiffs had cited an unpublished decision of the California Court of Appeals. Second, the Court noted the plaintiffs had argued that a provision of the Restatement (Second) of Judgments supported their argument. Finally, the Circuit Court noted the plaintiffs were motivated by religious beliefs.

The Court's analysis erred because subjective good faith does not justify filing an objectively meritless claim. Further, even if there were such a standard, none of the grounds cited by the Court constitute sufficient "good faith"

The subjective motivations of plaintiffs and their counsel are irrelevant:

> The reasonableness of a party's pre-filing inquiry is measured by an objective standard. See id. A party's good faith belief in the merits of an argument is not sufficient to avoid sanction.
>
> *The Ravens Grp., Inc. v. United States*, 79 Fed. Cl. 100, 105-06 (2007)

Accord:

> Thus good faith no longer provides a safe harbor for frivolous filings. "[A]ttorneys and parties alike [now face] an affirmative duty of reasonable inquiry 'more stringent than the original good-faith formula.' " Lancellotti, 909 F.2d at 18 (citations omitted). Rule 11 sanctions may now be

> imposed due to incompetence as well as willfulness. Cruz v. Savage, 896 F.2d 626, 631 (1st Cir.1990).
>
> *Navarro Ayala v. Hernandez Colon*, 143 F.R.D. 460, 464 (D.P.R. 1991), *aff'd as modified sub nom. Navarro-Ayala v. Nunez*, 968 F.2d 1421 (1st Cir. 1992)

The Circuit Court erred by considering the plaintiff's religious beliefs as a good faith basis to commence this action. The plaintiffs have the right to believe what they wish. They have the right to exercise their religion. They do not have the right to rationalize frivolous claims on the basis of their strongly held religious beliefs. The law of God may be binding to the plaintiffs. Our Constitution protects their right to decide to be bound by God's law. But that does not permit them to injure others in the exercise of their faith. The power to sign and summons cannot be used by a lawyer to act as a latter-day Torquemada.

The Circuit Court also gave the plaintiffs too much credit for coming up with two purported authorities for their motion.

Plaintiffs cited *Peacock v. Cty. of Orange*, No. G040617, 2009 WL 3184564, at *1 (Cal. Ct. App. Oct. 6, 2009)as supporting their right to bring state law claims after dismissal of claims in a prior federal suit. In *Peacock*, the plaintiff sued the defendant County in federal court alleging discrimination in employment on the basis of disability. The

case involved federal and California state law claims. The district court granted summary judgment. The Ninth Circuit reversed the summary judgment as to the state law claims. When the case was remanded to the district court, the district court declined to exercise jurisdiction over the remaining state law claims and remanded the case to state court.

The California Court of Appeals concluded that the prior federal case did not preclude litigation of factual issues raised in earlier state law claims. The *Peacock* court did not hold that state courts are entitled to relitigate state law issues after a federal court has adjudicated and dismissed those state law claims. The case is a routine application of a non-controversial proposition - that the law of the case doctrine precludes relitigation of legal issues, not facts.

If the California Court of Appeals had decided so momentous an exception to claim preclusion, it surely would have ordered the decision be published. Such a holding would have been an enormous change in the law with major consequences. Who would not want a second chance to litigate a state law claim? But that is not what the *Peacock* case said. Nor could an objectively reasonable attorney have concluded that is what the *Peacock* case said. And, even if that case had somehow supported the point made by Eagle Cove, it is an unpublished case applying California law. It is not a

sufficient basis upon which to commence a second lawsuit where the entire weight of federal and Wisconsin law is to the contrary.

Nor does Eagle Cove's mistaken invocation of the Restatement (Second) of Judgments help them. Wisconsin courts have recognized some of the Restatements prepared by the American Law Institute. The question is not whether the Restatement is authority, but rather, whether it stands for the proposition that a federal court's adjudication of a state law claim is not preclusive. Nothing in the Restatement says that.

As noted, Eagle Cove presented numerous, verbosely plead state law claims in the Federal Case. Eagle Cove chose the venue and brought these claims. Eagle Cove certainly cannot be heard to argue that the District Court lacked jurisdiction, was an improper venue, or lacked necessary parties; or that the state law claims were voluntarily dismissed. Eagle Cove certainly does not (and cannot) contend that the District Court expressly reserved Eagle Cove's right to bring the state law claims again. Quite to the contrary. The District Court expressly stated it was exercising its discretion to adjudicate the state law claims, in the interest of judicial economy. It takes no effort at all to realize these basic procedural facts.

Under these facts, the exceptions in the Restatement (Second)of Judgments secs. 20 and 26 plainly do not apply. The provisions create exceptions in cases where the first court lacked jurisdiction or necessary parties to adjudicate the claim. No objectively reasonable attorney could have concluded those exceptions applied here.

The District Court explicitly dismissed without prejudice only Eagle Cove's the certiorari claim. If the District Court had any inkling that the other state law claims remained unresolved, the District Court would have dismissed those claims without prejudice. Nor was the District Court's adjudication of Eagle Cove's state law claims in any sense a throwaway or cursory review, so as to support viewing the disposition as dicta.

The Circuit Court appears to have credited Eagle Cove with good faith merely because Eagle Cove was able to identify a treatise which dealt with claim preclusion. With respect, that analysis was backwards. Eagle Cove should not be credited for mentioning the Restatement (Second) of Judgments. Eagle Cove should be faulted for failing to read that treatise accurately. Eagle Cove and its counsel evidently applied wishful thinking to the language at issue. An objective reading of that language provides not a shred of support for Eagle Cove's position. Subjectively good

intentions of a lawyer do not excuse professional incompetence.

II. EAGLE COVE'S MOTION FOR RELIEF FROM JUDGMENT BASED ON A CHANGE OF LAW WAS ALSO FRIVOLOUS.

Eagle Cove further protracted this case by seeking to reopen the merits yet again after the Seventh Circuit repudiated part of the 2013 its decision affirming the District Court's grant of summary judgment. In doing so, Eagle Cove again refused to accede to the overwhelming weight of authority. Changes in the law simply are not applied retroactively in civil cases. Eagle Cove was told as much by the District Court, which denied Eagle Cove's motion to reopen or obtain relief from judgment. Judge Conley noted it was not even a close call.

Not content to be denied just by the federal courts, Eagle Cove then attempted to persuade the Circuit Court to reconsider dismissal of the Amended Complaint. Eagle Cove's first request for relief from judgment, made to the federal courts, was utterly without legal merit. Its second request to the circuit court was certainly frivolous. The motion for relief from judgment constituted a continuing and defiant attempt to collaterally attack the 2013 judgment rejecting Eagle Cove's claims.

A. Applicable Law

The underlying proposition for this argument has been ably argued by Oneida County in the merits appeal, which argument the Town has adopted. Respondent's Brief of Town of Woodboro. In a civil case, the court may not grant relief from judgment to apply a new decision retroactively, *Shah v. Holder*, 736 F. 3d 1125 (7th Cir. 2013). Making a claim to the contrary is without arguable merit at the outset. It also is frivolous.

It has been held that filing a motion for relief from judgment is frivolous if the bases is a change in law, *Kirby v. Gen. Elec. Co.*, 210 F.R.D. 180, 190 (W.D.N.C. 2000), aff'd, 20 F. App'x 167 (4th Cir. 2001), and aff'd, 20 F. App'x 167 (4th Cir. 2001).

In the *Kirby* case, the plaintiffs were 53 former employees of General Electric who were terminated when a plant was closed. They sued, alleging they were terminated to deprive them of retirement benefits protected by federal law. The District Court entered summary judgment dismissing the claims. The plaintiffs filed a direct appeal, but also moved for relief from judgment under Rule 60 (b)(6), the federal counterpart to Wis. Stats. sec. 806.07. Among other grounds, plaintiffs alleged that the judgment should be reopened

because an intervening decision favorable to their claim had been decided.

The Court disagreed, and found the motion for relief, citing the change in law was frivolous. The Court stated:

> Plaintiffs' argument that its Rule 60(b) motion was justified based on new case law also had no chance of success on the merits. First, Plaintiffs failed to establish that a change in law provides an appropriate basis for relief from judgment. Such a showing was essential, as the Fourth Circuit has held that "a change in a rule of law is not enough to warrant reopening a final judgment under Rule 60(b)(6)." Nunnery, 503 F.2d 1349, 23 Fed. R. Serv.2d at 234.
>
> Kirby v. Gen. Elec. Co., 210 F.R.D. 180, 190 (W.D.N.C. 2000), aff'd, 20 F. App'x 167 (4th Cir. 2001), and aff'd, 20 F. App'x 167 (4th Cir. 2001)

In an analogous case, the Ninth Circuit affirmed Rule 11 sanctions against parties for attempting to reopen a federal judgment by claiming that state court decisions required that the federal judgment be modified, *G.C. & K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1110 (9th Cir. 2003).

The *Wilson* case involved an arbitration proceeding. The Wilsons lost an arbitration case involving a franchise. The Wilsons unsuccessfully filed a state court action seeking to vacate the arbitration award. The prevailing franchiser filed a federal action to enforce the award. The federal court entered an injunction against the Wilsons to prohibit them from seeking further state court relief. They violated

that order and again sought relief in state court. The District Court sanctioned the Wilsons under Rule 11 for pursuing a motion for relief from judgment which a reasonable attorney should have known was barred, *G.C. & K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1110 (9th Cir. 2003).

B. Eagle Cove's Attempt to Relitigate The Merits By Seeking Relief From Judgment Was Frivolous.

Eagle Cove understandably may have felt a surge of hope upon learning that the Seventh Circuit had disavowed the 2013 decision it rendered in Eagle Cove's first appeal. However, before acting on that hope, Eagle Cove had a duty to make an objective review of the law. Any objective review of the law would have come to two evident conclusions: a change in the law does not warrant reopening a civil case, and, even if it did, the Seventh Circuit disavowed its disposition of only one claim among more than a dozen. There was no basis for Eagle Cove's decision to seek relief from the entire judgment.

Indeed, Judge Conley stated in rejecting Eagle Cove's motion, the question was not even close. Rather than take that as a warning, Eagle Cove appealed his decision all the way to the U.S. Supreme Court. And lost. The Seventh Circuit did not even regard its decision affirming Judge Conley as worthy of publication.

But, true to form, Eagle Cove returned to the Circuit Court and raised the very same issues. After another round of briefing, the Circuit Court also concluded that there was no basis for relief from judgment.

Eagle Cove's circuit court motion was frivolous because the motion was a continuation of its original, frivolous collateral attack on the Federal Case. Eagle Cove was told by the federal court, rather bluntly, that it had no meritorious argument for relief from judgment. A reasonable lawyer would take seriously a statement from a United States District Court that an issue was not even a close call. Not Eagle Cove. They appealed to the Seventh Circuit and lost. They asked for en banc review and were denied. The U.S. Supreme Court declined to hear the appeal. At that point, an objectively reasonable lawyer would conclude that the remedies were at an end. Efforts to persuade the federal court to reopen the case had been rejected by the highest federal court in the nation.

But, Eagle Cove insisted on putting the Town through yet another round of litigation. Eagle Cove did so even though nothing had changed to confer land use jurisdiction on the Town.

Every lawyer and litigant is responsible for assuring that every pleading filed in court has arguable merit. The

Town submits that the duty to objectively review proposed pleadings is heightened when the requested relief is on as tenuous a basis as everything Eagle Cove has filed since it lost the Federal Case. When a lawyer gets the impulse to seek to relitigate state claims after a federal court explicitly dismissed state law claims on their merits, that should prompt serious reflection - and the decision not to do so. When a lawyer thinks about bring a motion for relief from judgment in state court, after the very same motion has been rejected by the federal court in which the merits litigation occurred - the lawyer should decline to do so. It is not even a close call.

Conclusion

Eagle Cove had the right to bring the bloated, overdone complaint it filed in 2010. Eagle Cove had the right to overtry those claims, as it did. Eagle Cove had the right to hear from a federal judge that those claims could not survive summary judgment, and it did. Eagle Cove had the right to have that judge's decision reviewed by the Seventh Circuit and the U.S. Supreme Court. And it did.

But Eagle Cove did not stop there. Eagle Cove filed an amended complaint in the Circuit Court seeking to re-litigate the issues on which it had lost. The Circuit Court rejected that attempt, and then, a motion for reconsideration of the

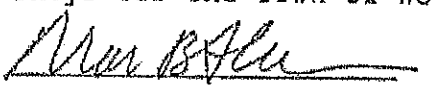
decision. Eagle Cove then pursued an impossible request to reopen the case in federal court, and when it lost, relitigated that issue in Circuit Court. And now, Eagle Cove appeals the latest loss in Circuit Court. The Town continues to be involved in litigation over an issue on which the Town has no jurisdiction, as the Seventh Circuit long ago ruled.

Litigation must end. It seems evident that Eagle Cove does not know how to stop. This Court will have to stop it. The Court of Appeals should reverse the Circuit Court, hold that the commencement and continuation of this action against the Town of Woodboro was frivolous. The case should be remanded to the Circuit Court for determination of the amount of damages to be awarded the Town.

Dated September 14, 2018.

KASIETA LEGAL GROUP, LLC

Attorneys for the Town of Woodboro

By: 

Mark B Hazelbaker
State Bar no 1010302
559 D'Onofrio Drive, Suite 222
Madison, WI 53705
608-662-2300
Fax 608 662-9966
mbh@kasieta.com

APPENDIX JJ

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CLERK OF COURT OF APPEALS
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No. 2018AP000940

COURT OF APPEALS
for the
STATE OF WISCONSIN
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,*
and
ONEIDA COUNTY BD. OF ADJUSTMENT, *Defendant.*

APPEAL FROM THE ONEIDA COUNTY CIRCUIT COURT
No. 2013CV345
THE HONORABLE MICHAEL H. BLOOM, Circuit Judge, Presiding

COMBINED BRIEF OF APPELLANT AND CROSS-RESPONDENT

Michael D. Dean, *Counsel of Record*
Michael D. Dean, LLC
350 Bishops Way #201
Brookfield, WI 53005

Arthur G. Jaros, Jr., *Counsel of Record*
The Law Office of Arthur G. Jaros, Jr.
1200 Harger Road, #830
Oak Brook, IL 60523

TABLE OF CONTENTS[1]

[1]"AOBr" throughout designates Appellants' opening Brief. "OCBr" throughout designates Respondent's Brief of Oneida County. "TBr" designates the Town's Cross-Appellant's Brief. SA# designates one of the separately numbered, separately bound Appendices.

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES.

STATE CASES:

FEDERAL CONSTITUTION AND STATUTES:

FEDERAL RULES:

STATE CONSTITUTION AND STATUTES:

OTHER AUTHORITIES:

[2]Pursuant to WIS. STATS. 809.23(3), *Peacock* isn't cited as precedent or authority. It is presented as the only case located in a nationwide search to have addressed the issue of first impression presented to the courts of Wisconsin as noted by the Circuit Court's ruling: "[T]o the best of this court's knowledge, Wisconsin's appellate courts have yet to decide the precise issue present in this case." (R.48) Pursuant to §809.23(3)(c), a copy of the opinion was provided to this court as SA11 to Plaintiffs-Appellants' Brief. See also, fn.73, p.39, *infra*.

ARGUMENT-IN-REPLY

I) AOBr's ARGUMENT I): ERROR DISMISSING ALL NON-CERTIORARI COUNTS. (AOBr, pp.23-42)

OPENING (OCBr, pp.7-9)

The Court's attention is directed to a summary (pp.24ff., *infra)* of Appellants' appeal-in-chief against which the OCBr is directed.

Respondent asserts it "seeks finality" based on federal partial summary judgment and that claim preclusion should be imposed on Plaintiffs to provide the particular kind [3] of "finality" it demands. Respondent misunderstands "*finality*"'s meaning for claim preclusion purposes and the concept of "claim preclusion" itself.

Respondent admits (p.10) Wisconsin embraces the Restatement and that "claim" means a transaction (or related set of transactions) giving rise to one or more asserted remedial rights, irrespective of the legal theories or grounds upon which a remedy is predicated (pp.11-12).

The Restatement provides: (i) that §24(1)'s bar of claim preclusion exists only if there's "final judgment"; and (ii) guidance (per §13's first sentence and comment

[3] As explained below, pp.2-3.

b) on the meaning of "finality":

> Finality will be lacking if an issue...essential to the adjudication of the claim[4] has been reserved for future determination.

Elaborating, §13's comment e, "judgment final as to a part of an action or claim.," expressly references ***F.R.Civ.P. 54(b)***, ignored by Respondent. Moreover:

> Federal law determines the effects under the rules of *res judicata* of a judgment of a federal court. (§87)

The federal courts never adjudicated "all the rights[5] and liabilities" of "all the parties" as Rule 54(b) requires for federal rulings to have finality *for preclusion purposes*;[6] Respondent's argument is erroneous that partial summary judgment on each of the ten counts should receive "finality" is erroneous. *See* fn.55, p.30.

Whenever claim preclusion exists, a second proceeding that is commenced after complete *adjudication* in an earlier proceeding upon the same transactional "claim" is barred. (AOBr, pp.23-26) (Because Respondent admits the proceeding

---

[4]State law certiorari review theory-of-relief issues were so reserved.

[5]*Blair v. Cleveland Twist Drill*, 197 F.2d 842 at 845 (7th Cir. 1952), explains that a count that's dismissed "without prejudice" but without leave to refile in that forum adjudicates only the single right *to litigate in that forum* but not "ultimate rights" and hence not "all rights."

[6]Rule 54(b) states that prior thereto, all rulings are subject to "revision" at any time–not the "finality" Respondent demands. Additionally, Respondent (p.27) notes the District Court determined–given the pendency in Wisconsin's courts--it could no longer employ Rule 54(b), observing "there was no further work" *for that court*. But that court didn't address *lack of preclusive effect* on Wisconsin's courts under Rule 54(b) of partial summary judgment [per §13's comments (b) and (e)].

below on the same claim isn't barred, it admits claim preclusion "finality" doesn't exist, yet inexplicably claims entitlement thereto.) Where claim preclusion isn't present, a second proceeding upon the same transactional claim can be subject instead to one of two doctrines[7] pertaining to matters actually decided in the first proceeding:

> (1) issue preclusion--if the second proceeding involves a different "case;"
>
> or
>
> (2) more flexible[8] law-of-the-case--if the second proceeding pertains to the same "case" involved in the first proceeding.

But it's Respondent's sleight-of-hand to claim entitlement to "finality" in the more sweeping[9] "claim preclusion" sense of "bar" where there's never been full adjudication of all parties' rights and liabilities.

CLAIM PRECLUSION (AOBr, pp.23-25; OCBr pp.9-14)

Respondent admits Claim Preclusion cannot apply absent "a final judgment *on the merits*...." (p.10). The Restatement provides dismissal without prejudice (as OCBr, p.3 admits occurred) of one or more theories or grounds supporting recovery on a singular transactional claim is insufficient to impose claim preclusion although other theories or grounds received merits adjudication.

---

[7] *Berg v. General Cas. Ins. Co.*, 2012 WI App 1@14 (SA18).

[8] *State v. Stuart*, 2003 WI 73 at *P23-*P24.

[9] "Finality"'s definition differs for "issue preclusion." SA19.

- **OCBr's Internal Contradiction re: Continuation of Litigation on Same Transactional Claim**

Respondent's Point I(A) correctly states:

> The doctrine of claim preclusion acts "to prevent endless litigation."
>
> Claim preclusion ensures that "a final judgment ***is conclusive in all subsequent actions***...."

Respondent's error is the federal courts expressly didn't terminate future litigation over the entire transactional claim. Therefore, "claim preclusion" isn't present. Respondent engages in self-contradiction, acknowledging Plaintiffs' action on the same transactional claim can continue while inconsistently asserting the federal court outcome should prevent that continuation litigation: "conclusive ***in all subsequent actions***."

- **Respondent Gives Lip Service to "Claim"'s Transactional Definition.**

Apart from its concluding clause--a non-sequitur--reading "and thus dictate the application of claim preclusion," [OCBr's p.10 (last ¶) through p.12 (first full ¶)] reads as if Plaintiffs-Appellants'. Respondent admits:

> An identity of causes of action may be present even though **"the legal theories** [and] **remedies sought**...may be different between the first and second actions." (p.11)

However, Respondent doesn't connect-up "claim"'s transactional definition in §24(2) including "Comment a." That comment's relevant portion appears at AOBr, p.24.

Respondent's key non-apprehension is that relief available *by state law certiorari review* is merely a "*variant form of relief*" per comment a's quoted text. The transactional definition of "claim" makes clear federal Count XI (state statutory certiorari review) isn't a separate "claim" for preclusion purposes; it's merely one possible basis for relief within the unitary transactional claim underlying the federal pleading's all eleven counts.

Respondent's Point I(B)(1) begins with this sentence containing two contradictions:

> Eagle Cove asserts that because the judgment entered by the District Court preserved its right to pursue a *claim for certiorari review*, the judgment does not act as a bar to any of its claims in this proceeding.

First, the improper use of "*claim for certiorari review*" and "*any of its claims*" to refer to variant forms of relief contradicts Respondent's own acknowledgement of Wisconsin's transactional definition of "claim." Disregarding that definition, Respondent repeatedly errs, describing relief sought by statutory certiorari review as a separate "claim." (pp.15-16, 31).

The second contradiction re: supposed failure to "bar" anything is addressed at p.6.

- **OCBr's Flawed Effort to Dismiss Comment e's Significance.**

Respondent attempts deflecting §20, Comment e,[10] stating the District Court "spent 48 pages discussing its reasoning in dismissing all of Eagle Cove's causes of action save its one for certiorari review" (p.17), yet Respondent doesn't rebut Appellants' argument that within those pages, the District Court:

> never considered Plaintiffs' "No Preference" clause argument...and gave only perfunctory, erroneous treatment to their' "burden-on-religious-exercise" argument by wrongly equating the scope of Wisconsin constitutional protection with federal law.

Respondent doesn't address Comment e's Illustration 4 supporting claim preclusion's inapplicability.

A) AOBr's Argument I(A): Claim Preclusion's *Prima Facie* Inapplicability. (AOBr, pp.28)

1) AOBr's Argument I(A)(1): Incomplete Adjudication. (AOBr, pp.25-26;OCBr, pp.14-19)

OCBr Point I(B.)(1.) (p.14) fabricates the accusation reproduced at p.5. Plaintiffs haven't maintained federal summary judgment on these counts isn't entitled to preclusive effect:

> V. RLUIPA Nondiscrimination
>
> VI. Federal Equal Protection

[10]AOBr, p.26.

VII. First Amendment

IX. ADA

X. Rehabilitation Act

Respondent then admits its fabrication::

> Perhaps **acknowledging** this absurdity, Eagle Cove suggests that any preclusive effect could **only** come under...*issue preclusion.* (p.16)

That's almost accurate: Plaintiffs' **acknowledg**ment re: the afore-listed counts comes not "only under issue preclusion" but rather under *either*[11] issue preclusion or, likelier, law-of-the-case.

Respondent's accusation notwithstanding, this case isn't about whether the entire federal summary judgment is modifiable, instead presenting narrower issues:

> (1) Whether Theories Not Presented to the federal courts Can Be Raised Below Where the Federal District Court Would've Clearly Refused Their Adjudication;
>
> (2) Whether Wisconsin's courts, in the Seamless Continued Prosecution of the Case, can:
>
> > (A) Address Theories of Wisconsin Constitutional Law Presented to the Federal Courts But Not Considered or Analyzed by Them (Yet Swept Into Demonstrably Erroneous Summary Judgment); and
> >
> > (B) Correct Issues of Wisconsin Constitutional Law Presented to and Wrongly Decided by the Federal Courts Despite Contrary Wisconsin Supreme Court Precedents;

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[11] See text at fn.7.

(3) Whether Plaintiffs Can Re-raise an RLUIPA Substantial Burden Ground Due to *Schlemm v. Wall*, whether or not limited to Prospective-only Relief.

2) AOBr's Argument I(A)(2): Full Adjudication of Single "Case". (AOBr, pp.26-28; OCBr, fn.2, p.19)

Respondent tries using a footnote to rebut arguments that the court below erred in refusing to apply the "same case" concept, and find claim preclusion inapplicable. *Montano* involved parallel proceedings *on one transactional claim* in state court (presenting state law theories) and in federal court (presenting federal law theories) stated to be the same constitutional case.

Respondent incorrectly claims *Peacock* only dealt with "issue preclusion." *See*, p.39.

The Restatement's "Scope" provision (SA20) addresses companion federal and state court proceedings.

B) AOBr's Argument I(B): Applicable Claim Preclusion Exceptions. (AOBr, pp.28-35; OCBr, pp.14-35)

1) AOBr's Argument I(B)(1): Express Reservation. (AOBr, p.28; OCBr, pp.14-19)

Respondent doesn't rebut §26(1)(b)'s rule rendering claim preclusion's bar inapplicable where "the court in the first action has expressly reserved the plaintiff's right to maintain the second action" as occurred here.

2) AOBr's Argument I(B)(2): Declination to Exercise Supplemental Jurisdiction. (AOBr , pp.28-30; OCBr, pp.19-21)

Respondent agrees *Parks* applied §25, comment e. AOBr (pp.28-30) contained argument raising Wisconsin's unique substantive due process state constitutional protection unavailable under federal law. Respondent's reliance on *C&S. Management, Inc.* is misplaced; it addressed only procedural, not the unique-to-Wisconsin substantive, due process protections. (223 Wis. 3d at 393) Thus, the outcome in *Parks* should likewise be the outcome here with *Parks* as controlling precedent.

3) AOBr's Argument I(B)(3): Impermissible Continuing Restraint on Plaintiffs' Religious Liberties. (AOBr, pp.30-31; OCBr, pp.25-26)

Respondent doesn't rebut that the OCZSPO, facially and as-applied, continues prohibiting Plaintiffs' constructing a year-round Bible camp on family lands (and elsewhere in Woodboro) or that such restraint violates §26(1)(f) and Wisconsin's heightened religious liberty protections. (AOBr, p.15)

4) AOBr's Argument I(B)(4): Incoherent Disposition. (AOBr, pp.31-32; OCBr, p.25)

The District Court declined retaining supplemental jurisdiction over Count XI because "the factual and legal issues" posed by that state law certiorari count "are ***sufficiently different*** from the others considered in this case." (AOBr, p.31). Yet, it granted summary judgment on the Wisconsin Constitution's unique (and obviously "***sufficiently different***") "No Preference" clause without ever addressing it, causing

incoherent disposition.

Respondent's assertion (p.26) Plaintiffs don't "cite to or articulate a standard" overlooks §26(1)(f)'s textual standard approvingly referenced by *Kruckenberg*, 279 Wis.2d at 537.

5) AOBr's Argument I(B)(5): Failure to Fairly & Equitably Implement Wisconsin's Constitutional Scheme. (AOBr, pp.35; OCBr, pp.21-25)

Respondent doesn't rebut §26(1)(d) renders claim preclusion inapplicable for two reasons:

(i) the federal courts' refusal to address Wisconsin Constitution's "No Preference" Clause, given OCZSPO disfavor of year-round Bible camps. (AOBr, pp.32-33)

Respondent doesn't rebut that where courts overlook theories for relief presented, claim preclusion's inapplicable. (AOBr, p32). Here, both federal courts refused to consider Article I, §18's "No Preference" Clause pleaded by Plaintiffs. Therefore, they failed implementing Wisconsin's special constitutional scheme protecting particular modes of worship and types of religious establishments against second-class treatment. It's untrue that: "[T]here is no evidence that the District Court or the Seventh Circuit failed to apply some explicit tenet of law." (OCBr, p.22).

OCBr, p.23, notwithstanding, Plaintiffs aren't "to blame" for the federal courts' failure to consider and/or address the "No Preference" Clause:

- Plaintiffs' federal complaint repeatedly charged "No Preference" Clause violations. (SA12).

- Respondent's federal Count VIII, "Wisconsin Constitution," motion sought summary judgment based *only* on:

(1) alleged non-giving Notice of Claim";[12]

(2) immunity re: defendants' as-applied acts in denying rezoning and the conditional use permit;[13] and

(3) Plaintiffs' alleged failure to show sufficient burden under Article I, §18's freedom of conscience clause;[14]

Respondents didn't brief summary judgment on the complaint's allegations of facial "No Preference" Clause violations. Plaintiffs' opposing memorandum argued Woodboro's zoning map "facially discriminates" in favor of year-round churches and against year-round Bible Camps.[15] Only in Defendants-movants' sandbagging Reply Brief was their immunity argument expanded to cover all of Count VIII. Responding,

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[12]DCD#52, Point VII, pp.49-51; Plaintiffs' rebuttal: DCD#91, pp.116-118.

[13]DCD#52, Point VIII, pp.51-53.

[14]DCD#52, Point IX, pp.53- 54.

[15]DCD#91, pp.98-99.

Plaintiffs filed their Notice of Additional Authority (OCBr, p23; DCD#106; SA21). Respondent incorrectly asserts DCD#106 (expressly devoted to Count VIII[16]) didn't cite to Article I, §18.

- Respondent asserts federal courts' failures to address the "No Preference" Clause supposedly "is fundamentally beside the point." (OCB, p.24) Contrary, §26(1)(d) provides judgments plainly inconsistent with "fair and equitable implementation of constitutional schemes" have no preclusive effect.

- The OCBr's footnote 5 assertion Plaintiffs' "waived" their "No Preference" argument is refuted by the defendants (summary judgment movants) never discussing it and by argument at SA21-22.

- Respondent's *Kruckenberg* reference (p.25) is inapposite: *Kruckenberg*'s not under §26(1)(d).

(ii) the federal courts' failure to apply Wisconsin's Constitution's Heightened Religious Liberty Protection Scheme. (AOBr, pp.33-35)

The OCB made no response to this point so there's no reply.

[16]SA1, p.51.

C) AOBr's Argument I(C): Due Process and Equal Protection Denials. (AOBr, pp.35-37; OCBr, pp.26-28)

Respondent attempts (p.27, full ¶) a refutation, incorrectly asserting the District Court rejected "this" hypothetical "argument." That court wasn't called upon to, and didn't, decide whether:

(1) F.R.Civ.P. 54(b) allows modifying its summary judgment ruling at any time before Count XI, "State Law Certiorari" was adjudicated *if*--rather than dismissing Count XI without prejudice--that court had instead decided to retain supplemental jurisdiction; and/or

(2) Federal law allows Wisconsin's courts to modify a federal court's summary judgment grant where manifest error and/or intervening change in controlling law is, as here, demonstrated.

D) AOBr's Argument I(D): No Issue Preclusion Dismissal. (AOBr, pp.37-42; OCBr, pp.33-37)

Respondent asserts (p.33) "relitigation of these issues is also barred by...issue preclusion." Given Respondent's unsuccessful,[17] issue-preclusion-based partial summary judgment motion,[18] its not cross-appealing therefrom bars its argument.

Respondent misreads (p.34) the federal ruling's fn.21 (DCD#155, p.39; SA2) as saying the OCZSPO "constituted a compelling governmental interest."

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[17]R.48, pp.10-11.

[18]R.21, Points B & C, pp.11-24.

Respondent incorrectly claims (p.35) "Eagle Cove failed to sufficiently develop and advance" its "No Preference" theory. Plaintiffs pleaded it to the federal courts (SA11), didn't seek summary judgment thereon, and had *no* responsibility to "advance" it until trial. It was the defendants--summary judgment movants--who sandbagged the District Court by not addressing the federal complaint's "No Preference" Clause allegations. (p.11, *supra*).

Respondent claims (p.36) "Eagle Cove was provided with more than an adequate opportunity to obtain a fair and full adjudication...in the federal action." Full adjudication hasn't occurred. Nor was adjudication in the federal system "fair" where Plaintiffs' "No Preference" pleadings were ignored and their arguments--opposing summary judgment[19] and appellate affirmance[20] on the "No Preference" Clause--were never mentioned by either federal court.

[19]DCD#106.

[20]SA22.

II) AOBr's ARGUMENT II: RENEWED RECONSIDERATION MOTION. (AOBr, pp.42-45; OCBr, pp.37-45)

Respondent states (p.42) "sec. 806.07(1)(g)...applies only to equitable actions" where "the decree has a prospective effect." Respondent's error is thinking "the federal judgment" on Count III wasn't "equitable or prospective." Plaintiffs sought injunctive relief;[21] its denial--part of summary judgment--means Defendants' facial prohibitions upon Plaintiffs' desired land use remain intact (*i.e.*, prospective effect) against Plaintiffs' renewed efforts for injunctive relief even where, as here, intervening law has dramatically changed.

Respondent incorrectly states:

> Eagle Cove asked the Circuit Court to allow it to do precisely what the federal courts rebuffed.... Eagle Cove denies any effort to vacate the federal judgment, but that is exactly what it asked the Circuit Court to do in "mov[ing]...to eliminate the preclusive effect...of the federal court's...summary judgment. (p.38)

Contrariwise, Plaintiffs explained (AOBr, pp.42-43) the difference between their federal and state courts' post-*Schlemm* efforts:

- Moving the federal courts to vacate Count III, "RLUIPA Substantial Burden" summary judgment denying Plaintiffs, *inter alia,* damages for Defendants' past (pre-*Schlemm*) acts;

versus:

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[21]DCD#16, p.53.

- Moving the Circuit Court for relief (i) from the continuing *post-Schlemm* preclusive effect of denial of injunctive relief, and/or (ii) as to their ability to recover money damages for the continuation, *post-Schlemm*, of Defendants' prohibitions; *but without requesting vacatur of the federal summary judgment.*

Respondent incorrectly claims (p.39) Plaintiffs' §806.07 motion was premature. The Circuit Court viewed, as final, summary judgment on RLUIPA's "Substantial Burden" count.

See, p.55ff., re: Respondent's argument concerning Rule 60(b)(6) and STATS. 806.07(1)(h).

III) AOBr's ARGUMENT III: RLUIPA SUBSTANTIAL BURDEN "WOULD'VE NEVER BEEN LITIGATED" BELOW. (AOBr, pp.45-47; OCBr, fn.6, p.37)

Respondent irrelevantly maintains Plaintiffs haven't "asserted an independent cause of action under RLUIPA in its amended complaint": the ruling forecloses Plaintiffs from ever submitting a second amended complaint raising RLUIPA based on *Schlemm* that was decided only after Plaintiffs' amended complaint had been filed.

See, p.56, re: Respondent's untrue assertion Plaintiffs' arguments "would undo any judgment any time subsequent developments in case law altered the applicable legal context...."

IV) AOBr's ARGUMENT IV: *HANLON*. (AOBr, pp.24-25; 47-50; OCBr, pp.28-33)

Respondent agrees that *Hanlon*'s inapposite to the instant procedural situation, being its "inverse."[22] Respondent doesn't contest error below that *Hanlon* was--rather than being *inverse*--supposedly *directly* on point[23] (the Circuit Court's sole basis for imposing claim preclusion).

Respondent (pp.29-30) wrongly charges Plaintiffs with maintaining *Hanlon* "adopted a new exception to...claim preclusion." *See*, §26(1)(d)'s exception (AOBr, p.49).

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[22]OCBr, p.32, "*Hanlon might have been directly on point*"; p.31: "Unlike...plaintiff in *Hanlon*"

[23]"...**applicability of...Hanlon...to the instant case.**" [R.48, fn.1].

CROSS-RESPONDENTS' PORTION

STATEMENT OF THE CASE[24]

While Plaintiffs' Petition for Rehearing filed November 13, 2013[25] was pending in the U.S. Court of Appeals as directed against that Court's October 30, 2013 Opinion, they commenced their one-count state court phase of their civil action[26] for state law certiorari review on what had been federal Amended Complaint Count XI.

On August 29, 2014, Plaintiffs, with leave of court, filed their Amended Complaint[27] in the state Circuit Court action that added fifteen additional counts,[28] grounded in divers provisions of Wisconsin law, various of which grounds hadn't been presented by the Plaintiffs' federal Amended Complaint. The nature of each count is summarized in tabular form (SA4, p.6[29]). The Amended Complaint

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[24]A comprehensive Statement of the Case appears at AOBr, pp.6-23.

[25]Doc. #52 in Docket #13-1274.

[26]R.1.

[27]R.10|SA4.

[28]SA4, p.1.

[29]Count IV was inadvertently misdescribed as being under the "No Preference" Clause.

contains express allegations referencing the Wisconsin Constitution's "No Preference" Clause. (SA12).

On October 2, 2014, Woodboro moved to dismiss the entire action below, falsely alleging that the federal District Court had "reached the merits of the state law claims and dismissed them on their merits."[30] In fact, the District Court didn't reach the merits of federal Count XI, "State Law Certiorari Review."

That day, Woodboro also submitted its motion for sanctions at issue in this cross-appeal.

On October 22, 2014, Woodboro filed a motion for judgment on the pleadings. (R.25)

Following briefing[31] on Woodboro's motions to dismiss and for judgment on the pleadings and the County's motion for partial judgment on the pleadings, the Circuit Court heard argument on December 12, 2014. By agreement, briefing on the sanctions motions was deferred. (R.121, pp.77-78).

On January 23, 2015, the Circuit Court declined to grant Woodboro's motion to dismiss the action but struck the additional, newly-added state law declaratory

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[30]R.16.

[31]Including Plaintiffs' submission of "Corrected Combined Response" filed by leave granted December 12, 2014 (R.45;46) to the Defendants' respective Motions to Dismiss.

counts (Counts II - XVI) on the basis of Claim Preclusion, thereby limiting the Plaintiffs' action to its original state law certiorari review (Count I) as originally raised by federal court Count XI.[32] The portion of the ruling denying sanctions is SA25.

On February 13, 2015, Plaintiffs moved for reconsideration,[33] arguing[34] that the court had erroneously applied claim preclusion in dismissing the added non-certiorari counts. After briefing,[35] the Court on April 22, 2015 denied Plaintiffs' Motion for Reconsideration.[36] Unbeknownst to the litigants and court, the previous day (April 21), the Seventh Circuit decided *Schlemm v. Wall*.[37] Plaintiff Schlemm alleged infringement of his religious liberty protected by RLUIPA's "substantial burden" provision. The Seventh Circuit concluded that it had applied an incorrect standard in affirming summary judgment on federal Count III, "RLUIPA Substantial Burden," in its earlier 2013 *Eagle Cove* affirmance. (SA16). Shepard's case citator reports the 2013 Opinion to be "Overruled in part as stated in *Schlemm v. Wall*"[38]

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[32]R.48|SA5.

[33]R.49-50.

[34]R.50.

[35]R.55; R.56, R.57.

[36]R.115.

[37]SA16.

[38]R.59|pp.8-9.

After discovering *Schlemm*, Plaintiffs dispatched on May 13, 2015 to the Circuit Court their Renewed Motion for Reconsideration[39] that referenced the *Schlemm* development and apprised the court of their contemporaneous federal court filing of a motion for relief[40] from the summary judgment on Count III, "RLUIPA Substantial Burden." The proceeding below, including the Renewed Motion for Reconsideration, was continued generally.

Plaintiffs' efforts to have the federal courts vacate the grant of summary judgment on Count III, RLUIPA "Substantial Burden" proved to be of no avail when, on October 2, 2017, the U.S. Supreme Court denied their Petition for Writ of Certiorari (AOBr, pp.19-22).

Thereafter--the federal track having terminated--the Circuit Court reactivated the proceeding and on November 22, 2017, permitted submission of Plaintiff's Amended and Updated Memorandum[41] in support of their still-pending Renewed Motion for Reconsideration. That Memorandum explained that, notwithstanding the federal courts' refusal to vacate the summary judgment on Count III, RLUIPA Substantial Burden, Plaintiffs should receive relief under Wisconsin law *from the prospective preclusive effect of that judgment* found to exist by the Court's January

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[39]R.58.

[40]Motion at Appndx.W-1|R.94|App.318; memorandum at Appndx.W-2|R.94|App.321.

[41]R#84 including Exhibit A (R.80&R.79 and its Appendix) and Exhibit B (R.81).

23, 2015 ruling. Additional briefing ensued.[42] By oral ruling[43] on February 21, 2018, the court denied Plaintiffs' Renewed Motion; a Judgment[44] was filed April 4, 2018 in favor of Woodboro and the County dismissing them from the case, and leaving only the BOA as a party-defendant. Woodboro filed no motion for sanctions against Plaintiffs' submissions.

This appeal and Woodboro's cross-appeal ensued.

Woodboro's assertion that Eagle Cove is attempting "to re-litigate its religious freedom claims in the Circuit Court" (TBr, p.2) is addressed at p.62, *infra*. Woodboro's Statement of the Case is imprecise and internally contradictory:

> Judge William Conley did not defer resolution of the merits of the plaintiff's state law claims. In his decision disposing of the Federal Case, Judge Conley explicitly stated that although he could defer the state law claims and remand them, he would not do so. Instead, he reached the merits of the state law claims and dismissed them on their merits. He did not dismiss the plaintiff's statutory certiorari claim. (TBr, p.5)

First, reference to "claims" in the plural is erroneous because what's in issue is preclusion doctrine. All counts of the Plaintiffs' federal and state court complaints arose out of the same transaction and thus constitute but a single "claim." [AOBr, pp.23-28]

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[42]R.98-100.

[43]R.124|SA9.

[44]R.107|SA10.

Second, Woodboro erroneously regards a request for relief under Wisconsin statutory certiorari review procedure as not involving "the merits of state law."[45] An essential component of state law certiorari review is whether the tribunal below correctly applied substantive state and federal law.[46]

Third, as correctly noted by the Circuit Court below and directly contrary to Woodboro's incorrect statement, District Judge Conley didn't "dismiss the merits" of issues of law and fact that are part of statutory certiorari review. [SA2, pp.47-48, "the court will not retain supplemental jurisdiction over this state law claim ..."]

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[45]This false assertion is repeated at TBr, p.24: "Every state law merits claim Eagle Cove stated or could have stated was resolved."

[46]*State ex rel. Rutherberg v. Annuity & Pension Board; Murr v. St. Croix County Bd. of Adjustment*, 332 Wis.2d 172, including among the four-pronged scope of §59.694(10) certiorari review "whether it [the tribunal below] proceeded on a correct theory of law."

CROSS-RESPONDENTS' ARGUMENT ON WOODBORO'S CROSS-APPEAL

I) THE CIRCUIT COURT PROPERLY DENIED WOODBORO'S OCTOBER 2, 2014 MOTION FOR SANCTIONS. (TBr, pp.13-31)

A) Plaintiffs' Position Below Was Supported by More Than a Reasonable Basis in the Law and By Good Faith Arguments on an Issue of First Impression.

Whether Plaintiffs' adding state constitutional grounds was frivolous is derivative of whether so pleading them as separate counts was supported by applicable legal principles. Before diving into the derivative "frivolous" question raised by Woodboro's cross-appeal, it's helpful to review the substantive analysis of Plaintiffs' appeal-in-chief.

Per AOBr, pp.26-28, the threshold question[47] in this entire matter is "What set of rules govern?" The answer to that threshold question turns on whether the federal and state proceedings constitute *one* "case" or *two* "cases."

If the federal and state proceedings pertain to only *one* actionable "case," then the state proceeding doesn't involve a separate "case," it's merely a continuation of the federal court forum phase of the "case," and law-of-the-case rules govern. Because claim and/or issue preclusion rules apply only where a

[47] As recognized in *Berg*.

"case" has received complete adjudication on all issues presented, those rules wouldn't apply.

But if the federal and state proceedings pertain to *two* "cases," then claim and issue preclusion rules govern. Because law-of-the-case rules apply only to proceedings involving the same "case," they wouldn't apply.

To recap, Plaintiffs argued[48] below:

1) The state proceeding constitutes continued prosecution of *one single "case"* which prosecution began in federal court.[49] Therefore, Law-of-the-Case rules govern, and Plaintiffs are entitled to:

(i) add the new state constitutional counts:

> (A) that contain theories and/or grounds not presented to the federal courts; and/or (B) that effectively provide for correction of manifest errors of Wisconsin Constitutional law committed by the federal courts on federal Count VIII, "Wisconsin Constitution, Article I, §18" with respect to both (a) its "No Preference"

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[48]R.33; Exhibit to R.45; R.46.

[49]AOBr, pp.26-28; p.8, *supra*; *Montano*, F.R.Civ.P. 1, 2 and 3, *Peacock*

Clause and (b) its "No Infringement with Worship according to the Dictates of Conscience and No Interference with the Rights of Conscience " provisions and

(ii) revisit the RLUIPA Substantial Burden issue, based on the Seventh Circuit's change in law pronounced in *Schlemm*, decided during the pendency of the "case."

2) But if the state court proceeding involves a *second separate "case"*:

(a) Claim Preclusion is Still *Prima Facie* Inapplicable for Want of a Final Judgment on the Merits as to all the rights and all the liabilities of all the parties presented to the federal courts on the transactional "claim" set forth in the federal amended complaint (AOBr, pp.25-26; Restatement §20 including comment e.); the fact pattern in *Parks* (171 Wis. 2d at 733)).

(b) Even if Claim Preclusion Were Ruled *Prima Facie* Applicable, Claim Preclusion Cannot be Properly Imposed on Plaintiffs for Multiple Reasons:

(1) The federal courts <u>expressly</u> dismissed part of the action (federal Count XI) "without prejudice" (AOBr, p.28;

Restatement §26(1)(b); the fact pattern, as noted above, in *Parks*);

(2) Per *Parks'* direct application of Restatement §25, comment e,[50] the "unique" state equal protection, due process, and religion clause issues caused Judge Conley to expressly decline jurisdiction over them, rather than decide them, in the state *certiorari* count.[51] Similarly, those exact same issues would "clearly" have caused him to also decline jurisdiction over them, rather than decide them, in the state *constitutional* counts had they been pleaded. Judge Conley's explanation *declining* jurisdiction over those "unique" state questions in the state *certiorari* count cannot possibly be read as *willingness to retain* jurisdiction over those *exact me* "unique" state law questions if and when presented in state *constitutional* counts.

(3) Where Interposition Would Result In:

(A) A Continuing Restraint on Fundamental Religious Liberties (AOBr, pp.30-31, Restatement §26(1)(f));

(B) An Incoherent Disposition (AOBr, pp.31-32 Restatement §26(1)(f)); and/or

(C) Inconsistency with a Constitutional Scheme that Provides Special Protections for Religious Liberties (AOBr, pp.32-35, Restatement §26(1)(d));

(4) Where the dismissal without prejudice was based on a discretionary ruling declining to retain supplemental jurisdiction over a pendent state law cause of action, such decision--intended to *benefit* plaintiffs by favoring determination of that state law count in state courts better versed in Wisconsin's law–cannot constitutionally result in causing claim preclusion only then to become applicable, thereby

[50]AOBr, pp.28-30.

[51]Those issues arise under certiorari's "incorrect theory of law" inquiry. (AOBr, fn.107).

placing plaintiffs in a *worse* position than if the court had decided to retain pendent jurisdiction where claim preclusion would plainly be inapplicable per F.R.Civ.P. 54(b). (AOBr, pp.35-37).

In sum, because claim preclusion cannot be imposed, then Plaintiffs are *still* entitled to:

(i) add the new state constitutional counts (A) that contain theories and/or grounds (i.e., "issues") not presented to the federal courts because issue preclusion is *prima facie* inapplicable; and/or (B) that provide for correction of manifest errors of Wisconsin Constitutional law, committed by the federal courts (e.g. on federal Count VIII, "Wisconsin Constitution" because of express exceptions to the imposition of issue preclusion. (AOBr, pp.37-42); and

(ii) revisit the RLUIPA Substantial Burden count for other reasons.[52]

Therefore, under either one-case or two-case analysis, Plaintiffs are entitled to the same relief.

B) Part I(A) of Woodboro's Argument Misstates "Applicable Law." (TBr, pp.13-17)

Woodboro references both STATS. 895.044(2)(a) (pertaining to withdrawal of an offending pleading) and STATS. 895.044(2)(b) (pertaining to non-withdrawal

[52]AOBr, pp. 42-47; p.15, *supra*; p.55, *infra*; Restatement §26(1)(f); WIS. STATS. 806.07(1)(g) and (h); *Christian v. Jemison.*

thereof). (TBr, p.15) But it doesn't accurately quote the critical "*clear and convincing evidence*" condition that's prefatory to both of the foregoing statutory provisions:

> Upon either party's motion made at any time during the proceeding or upon judgment ***if a court finds, upon clear and convincing evidence,*** that sub. (1)(a) or (b) applies to an action...commenced or continued by a plaintiff..., the court: [thence follows (a) pertaining to withdrawn pleadings and (b) pertaining to non-withdrawn pleadings] (STATS. 895.044(2))

Woodboro also doesn't quote the predicate "sub.(1)(a) or (b)" that must be found to have been violated:

> (1) A party or a party's attorney may be liable for costs and fees under this section for commencing, using, or continuing an action ... to which any of the following applies:
>
> > (a) The action ... was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
> >
> > (b) 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.

Rather than employing (1)(b)'s actual language, Woodboro repeatedly substitutes the phrase "without legal merit." (TBr, pp.16-17). Given the just-quoted statutory text, a "**good faith argument**"-- irrespective of the absence of "legal merit"-- is sufficient to prevent the award of sanctions under WIS. STATS. 895.044(1)(b) and (2).

Woodboro erroneously alleges that §895.044 "differs from §802.05 because it applies only to claims which are without legal merit." (TBr, p.15) Comparing these two statutes shows that their respective threshold tests are virtually identical: (i) the subjective bad faith/improper purpose tests of 802.05(2)(a) and 895.044(1)(a) are virtually indistinguishable; and (ii) the objective tests of 802.05(2)(b) and 895.044(1)(b) are likewise almost identical.[53]

C) Part I(B) of Woodboro's Argument Erroneously Alleges All of Plaintiffs' "State Law 'Claims' Were Adjudicated by the Federal Court." (TBr, pp.17-20)

Woodboro confuses a District Court's "final decision" with a District Court's "adjudication of all rights and liabilities." (TBr, p.18). The District Court didn't adjudicate the "ultimate rights"[54] and liabilities of all the parties under Count XI of the federal amended complaint based on the ground of state law certiorari review even though it entered a "final decision" in the sense of constituting its last act in the federal trial court phase of the action.[55] Rather, it

[53]Woodboro's observation is correct but irrelevant that §802.05(2)(c) and (d) pertain to factual assertions, whereas §895.04 doesn't. TBr, p.15.

[54]*Blair v. Cleveland Twist Drill Co.*, 197 F.2d at 845.

[55]Woodboro suggests (TBr, p.18) that Eagle Cove appealed the District Court's summary judgment decision as a "final decision of the district court." More precisely, the appeal there was taken under the "collateral order doctrine" as explained in SA26, being the Jurisdictional Statement of the Plaintiffs-Appellants' Brief (Doc. 9-1) in their renewed appeal #16-3194 to the Seventh Circuit. *U.S. v. Wallace & Tiernan Co.*, 336 U.S. 793 at 794, fn.1 (1949) makes clear that just because an order is appealable as a final order doesn't mean that the portion of such order directing a dismissal without prejudice is "final" in the sense of having any preclusive effect. An appealable order that dismisses an action without prejudice has "*no res judicata*" (*i.e.*,

expressly dismissed that Count XI, "State Law Certiorari Review," without prejudice to continuing the action, as Plaintiffs timely did, in Wisconsin's courts.[56] Moreover, state law certiorari review examines whether the administrative tribunal below proceeded upon a correct theory of law. Thus, all federal and state law bases presently remain before the Circuit Court within Count I, "State Law Certiorari Review" (f/k/a federal court Count XI) except for those legal theories actually adjudicated in the federal court system and to which issue preclusion or law-of-the-case doctrine applies. The Amended Complaint identified numerous state law theories not decided by the District Court and to which neither issue preclusion nor law-of-the-case doctrine could possibly apply. Per AOBr, p.37, these include the theories of law presented as independent bases for relief as Counts III, V, VII-XI, XIII, XIV and XVI of the Amended Complaint filed below and appearing at SA4. Even though the Circuit Court struck those counts,[57] those legal theories remain fully available as part of certiorari review as to whether the

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preclusive) effect. (*Rinieri v. News Syndicate Co.*, 385 F.2d 818 at 821 (2nd Cir. 1967)).

[56]Similarly, Woodboro asserts: "Eagle Cove certainly does not (and cannot) contend that the District Court expressly reserved Eagle Cove's right to bring the state law claims again." (TBr, p.29). In point of fact, Eagle Cove does precisely contend that the District Court expressly reserved Eagle Cove's right to present anew (meaning in the new state court forum) the same single transactional claim grounded upon the theory of state statutory certiorari review, with all the ramifications that that review entails, including but not limited to an adjudication of whether the administrative tribunal being reviewed correctly applied the substantive law. *See* Wisconsin case law at footnote 46. In addition, the District Court didn't address the impact on preclusion doctrine of its decision not to fully adjudicate all the parties' rights and liabilities.

[57]Which striking is here on appeal as part of the Plaintiffs' appeal-in-chief.

administrative tribunal below correctly applied the law. The Circuit Court so held in ruling:

> 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[58] and asserting that one's equal protection right have been violated in the context of certiorari review.[59] (R.48, p.11)

Thus, Woodboro errs in asserting that all state law issues (what it incorrectly calls "claims") were federally adjudicated.

The ruling below creates the irreconcilable contradiction that the District Court *didn't* exercise jurisdiction over the certiorari count because of the "unique" state issues that arise under the "incorrect-theory-of-law" inquiry, yet somehow might plausibly have exercised jurisdiction over the stricken counts where those *exact same* "unique" state issues present *exactly the same* bases/theories for relief as under the certiorari incorrect-theory-of-law inquiry. (*See*, AOBr, p. 29).

Woodboro also points to the Seventh Circuit's statement made in the context of the Plaintiff's RLUIPA "Total Exclusion" argument concerning Woodboro's role in deciding petitions for rezoning and application for a conditional use permit:

[58]See Amended Complaint, Counts X, XI and XIV.

[59]Amended Complaint, Count I.

> Thus, it is clear that the County, not Woodboro, exercises jurisdiction." (TBr, pp.18-19)[60]

The court so stated only in the context of Plaintiffs' as-applied challenges to the denials of their rezoning petition and conditional use permit application being addressed by the Seventh Circuit's Opinion. But the Plaintiffs also brought facial challenges to the OCZSPO including its zoning map for Woodboro. See, Amended Complaint Counts II, III, IV, V, VI, VIII, X, XII, XIII and XIV. Of these, Counts IV, V, VI, and VIII arise because the zoning map for Woodboro, by Woodboro's choice, deliberately contained no land whatsoever zoned District 5 or 10–the only districts allowing year-round religious camps. Per Amended Complaint ¶¶65 - 74, 76 - 82, 88-96 and 99-115, the zoning map for Woodboro included within the OCZSPO was subject to the Town's direct control per Wisconsin statutes in two ways:

> (1) Per Amended Complaint ¶70, the OCZSPO was required by WIS. STAT. 59.69(1) "to incorporate" Woodboro's Land Use Plan. Woodboro's Land Use Plan[61] didn't provide for institutional religious use of private lands anywhere within Woodboro[62] or for any recreational use of private lands that would have resulted in the

[60]As to rezoning, the Seventh Circuit erred: SA4, ¶65.

[61]DCD#61-24 and DCD#61-25.

[62]SA4, ¶71.

OCZSPO's zoning map having District 5 and/or 10 zoning districts per WIS. STAT. 59.69(1). Plaintiffs' objection to the continuing omission from Woodboro's land use plan for religious uses was ignored or rejected by Woodboro. (Amended Complaint, ¶76-80). (Woodboro's own adopted Land Use Plan was also used by the County as a basis for denying the Plaintiff's Petition for Rezone. (Amended Complaint, ¶81)). Thus, precisely as pleaded in the Amended Complaint, Plaintiffs' facial attacks on the land use regulatory scheme challenge Woodboro's *de jure* action in adopting its Land Use Plan that excluded year round religious camps from its entire jurisdiction.

(2) Under Wisconsin statutes, the OCZSPO including its zoning map for Woodboro facially didn't take effect for the non-shoreland portion of Plaintiffs' property except if and until there was formal action of Woodboro's own governing board.[63] Thus, the *de jure* action of the Town would be invalidated by a successful facial challenge to the OCZSPO.

[63]SA4: Amended Complaint, ¶¶63, 64 [WIS. STATS. 59.69(5)(e) and 59.692(2)(a); Amended Complaint, ¶¶73, 74, and, alleging portion of the subject property outside the 1000' shoreland area, ¶120].

Accordingly, Woodboro's conclusion that "the prior ruling of the Seventh Circuit established, correctly, that Woodboro and no land use authority[64] over Eagle Cove"[65] is incorrect, both as a matter of what the Seventh Circuit ruled and as a matter of Wisconsin statutory law.

Lastly, Woodboro's argument is incorrect that Plaintiffs' "attempt to bring the same claim in state court is flatly barred by claim preclusion." (TBr, p.19) The District Court expressly referenced the refiling of federal count XI in "state court." Woodboro's argument that the Plaintiffs' "assertion that the federal court didn't completely dispose of the state law claims lacks candor" (*Id.*) is demonstrably false.

Per Plaintiffs' opening and foregoing reply briefs, claim preclusion is inapplicable because there has yet to occur a complete adjudication with prejudice of all theories of recovery arising from the singular transactional claim.

The *Celotex* and *Homola* cases (TBr, p. 19) are inapposite: they don't pertain to the procedural pattern present here where the federal court didn't completely adjudicate all theories presented by a plaintiff upon a singular transactional claim and where, as here, the federal court expressly contemplated

[64] *Also see*, Amended Complaint, ¶65 (SA4).

[65] TBr, p.19.

the continuation in "state court" of the unadjudicated count and of issues unique to Wisconsin law.

D) Parts I(C) and (D) of Woodboro's Arguments Are Meritless Because Addition of Counts by Plaintiffs' Amended Complaint Wasn't Frivolous and Because Woodboro Misunderstands the Bases for Denying Sanctions (TBr, pp.21-31)

Woodboro incorrectly asserts: "The Circuit Court correctly held that Eagle Cove's amended complaint was barred by claim preclusion." (TBr, p.20). The Circuit Court didn't grant Woodboro's motion to dismiss the action and permitted Count I, *as amended by the Amended Complaint*, to stand.

Woodboro recites hornbook law: "Claim preclusion deprives a subsequent action of legal merit." But Woodboro's brief begs the question whether "claim preclusion" is present and operative. Plaintiffs' Restatement-grounded arguments demonstrate that claim preclusion cannot be interposed. More importantly, as to the sanctions issue, Woodboro's next sentence reads: "Therefore, a claim such as this is, by definition, frivolous." No authority is cited for that conclusion and it's a non-sequitur: whether or not claim preclusion is present presents, on the set of procedural facts of this case, multiple questions including a foundational question of first impression in the State of Wisconsin. As the Circuit Court correctly observed: *"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."* (R.48, p.13)

That foundational question appears in footnote 67 . The only case decision[66] located throughout the United States to have considered this foundational question[67] is the *Peacock* decision of the California Court of Appeals, offered by Plaintiffs for its persuasive value as discussed by the Circuit Court in denying sanctions (at pp.54, fn.100) as acknowledged at TBr, pp.27-29.

Woodboro errs arguing that "a claim such as this [namely one barred by claim preclusion] is, by definition, frivolous." Plaintiffs made good faith arguments based on the authoritative, precedential *Parks* decision; the non-authoritative, non-precedential *Peacock* decision; and the Restatement that the counts added by the amended complaint weren't barred by claim preclusion. Woodboro ignores STATS. 802.05(2)(b) and 895.044(1)(b) that exempt from sanctions good faith arguments for an extension, modification or reversal of existing law and, in the case of the latter statute, "establishment of new law."

[66]The question presented is restated in footnote 67. None of the case authorities relied upon by Woodboro pertains to the question presented and all are therefore inapposite: *Grantham Brothers* (TBr, p.20); *Roberts v. Chevron U.S.A.* (TBr, p.21); *Bartel Dental Books v. Schultz* (TBr, p.21); *Med. Supply Chain v. Neoforma* (TBr, p.23); *Potter v. Mosteller* (TBr, p.23); and *Schueller v. Wells Fargo & Co.* (TBr, p.24). At TBr, pp.28-29, Woodboro asserts, without citation to a single authority that involves the same set of procedural facts, that "the entire weight of federal and Wisconsin law is to the contrary" of Plaintiffs' position. Nothing could be further from the truth.

[67]The question presented is whether "claim preclusion" has any applicability where, as here, the federal court system didn't completely adjudicate all theories presented by a plaintiff upon a singular transactional claim–the prohibition by local governments upon the Plaintiffs' exercise of their religious freedom in the form of construction and operation of a year-round Bible camp--and where, as here, the federal court system expressly permitted the re-filing of one or more unadjudicated theories in "state court".

Here, neither the County nor Woodboro has cited to any precedent either from Wisconsin or any other jurisdiction that claim preclusion applies where, as here, a federal court declines to adjudicate every theory by which relief is sought for a single transactional claim but instead dismisses without prejudice one count, namely, Count XI for state law certiorari review, that encompasses multiple grounds (including violations of federal and state religious liberties law and of procedural due process), specifically contemplating that plaintiff will continue the action in state court on that count (OCBr, SA2, pp. 48-49).

Parks followed two of the Restatement's rules that where a federal court adjudicates federal law theories but dismisses state law theories without prejudice, claim preclusion, even if *prima facie* applicable, doesn't apply to a follow-on state court proceeding under these circumstances:

1) The actual state law theories (here, federal Count XI) presented to the federal court aren't barred from being litigated in the state court proceeding under Restatement §20 (AOBr, pp. 25-26) and/or 26(1)(b) (AOBr, p.28); and

2) Additional state law theories not presented to the federal court (here, the stricken counts of the amended complaint below) aren't barred from being litigated in the state court proceeding under §25, comment e.[68] *Parks* stated:

[68]Reproduced at AOBr, p.29.

> Here, the district court declined to entertain the pendent state claims raised in Parks's 1989 federal action[69], dismissing them without prejudice when it granted summary judgment dismissing the federal claims prior to trial. ***Even if Parks had joined the precise state-law claims he raises in this action***, the district court would not have considered them. It follows that the federal action does not bar the instant action on *res judicata* grounds. (171 Wis. 2d at 739, emph. added)

Plaintiffs relied on *Parks* (followed in *Aldrich v. Labor & Indus. Review Comm'n*, 2008 WI App 63) at ¶15 of their Amended Complaint and in their briefing[70] below. The potential applicability of *Parks* was, without more, sufficient basis for the denial of sanctions. But Plaintiffs--based upon *Montano*[71], F.R.Civ.P. 1, 2 and 3,[72] and the reasoning of *Peacock*--also went beyond *Parks'* presumption that claim preclusion could even have *prima facie* applicability under the procedural pattern presented here.

Peacock was a well reasoned decision of the California Court of Appeals that featured nearly identical procedural facts as here. Wisconsin courts may consider and adopt its sound analysis and reasoning even though it is neither precedential nor authoritative per WIS. STATS. 809.23(3)(a).[73]

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[69]As occurred here with federal Count XI.

[70]R.33, p.21; Exh. p.21 to R.45; R.46.

[71]AOBr, p.27.

[72]AOBr, p.27.

[73]*Peacock* was authored by a three-judge panel of the California Court of Appeals and issued on October 6, 2009 after the date contained in WIS. STATS. 809.23(3)(b).

The meaning and applicability of WIS. STATS. 809.23(3), "Citation of unpublished opinions" to

unpublished, non-Wisconsin authored opinions issued on or after July 1, 2009 particularly in the context of having decided a question of first impression in Wisconsin presented by this case (and indeed also a question of first impression nationwide) are unclear, to wit:

One interpretation is that WIS. STATS. 809.23(3)(a) and (b) only apply to Wisconsin non-published opinions and thus the bar of (a) has no applicable to *Peacock*, a California case decision. This is consistent with the view of the Circuit Court that held it was perfectly permissible for Plaintiffs to present *Peacock* to it not as authority or precedent (R.33, p. 16, fn.26) but for its persuasive reasoning on an issue of first impression. (The phrasing employed by the Circuit Court's Decision, namely, "persuasive ***authority***" wasn't that of the Plaintiffs at the aforesaid fn.26, but appears to reflect that court's view that the bar of WIS. STATS. 809.23(3)(a) against citing unpublished decisions as "***authority***" only applies to Wisconsin, not non-Wisconsin, unpublished decisions.

Another interpretation is that WIS. STATS. 809.23(3)(a) and (b) apply to both Wisconsin and non-Wisconsin non-published opinions alike, with the reference in (b) that reads "under s. 752.31(2)" to be interpreted as importing the companion provision of other jurisdictions in the case of non-Wisconsin non-published opinions. On this view, Plaintiffs are likewise permitted to use *Peacock* for its "persuasive value."

A third interpretation--not favored due to constitutional concerns--is that the bar and very limited exceptions contained in §809.23(3)(a) refer to Wisconsin and non-Wisconsin unpublished decision alike but that §809.23(3)(b) only applies to Wisconsin unpublished decisions under a literal reading of its "under s. 752.31(2)" phrase. Under this approach, Plaintiffs use of *Peacock* might conceivably be seen as problematic and contrary to the Circuit Court's holding. This interpretation would raise questions about the constitutionality of Wis. Stat. 809.23(3) as applied to non-Wisconsin unpublished decisions that address issues of first impression in Wisconsin. Constitutional issues raised in such an event include arguable violation of the federal constitution's Full Faith & Credit Clause, violation of federal and Wisconsin substantive due process protection against vague and/or irrational statutes, the violation of which can lead to imposition of sanctions, and abridgement of federal and Wisconsin (Constitution, Article I, §3) free speech protections. *State v. Higginbotham*, 162 Wis.2d 978 at 997 (S.Ct. 1991) held that employing an unpublished opinion doesn't violate the statute "when the citation is used to demonstrate the fact that a court of appeals' decision is in conflict with another court of appeals' decision." However, in dicta pronounced before the addition of paragraph (b) effective July 1, 2009, the Court added: "In common legal usage, the citation of an opinion as 'precedent' or 'authority' refers to the practice of a party citing a prior judicial decision involving a similar question of law ***for the purpose of persuading*** the court to accept a particular legal position or to adopt a particular rule or principle of law." *Id., emph. added.* This dictum was followed by *State v. Cooper*, 267 Wis.2d 886 at 900 (Ct. App. 2003): "His use of [multiple] unpublished opinions to support his argument, however, reveals his ***intent to persuade*** this court with the improper citations." Only and to the extent this Court might consider reversing *sua sponte* the law-of-the-case holding of the court below, Plaintiffs-Appellants urge this Court to distinguish the foregoing *Higginbotham* dictum and its application in *Cooper* as being overly broad and needlessly raising constitutional issues noted above. To wit, when an attorney stands before a court to make legal arguments, he or she seeks to "persuade" the court but he or she does constitute "persuasive authority." The essence of "authority" is that special credence must or should be given to the

The Circuit Court provided no analysis for its declining to follow the California Court of Appeals' sound reasoning. As argued at length to the Circuit Court (December 12, 2014 Transcript at pp.35-42), Peacock, a would-be employee, presented a claim of employment discrimination in the defendant's refusal to hire, grounded upon various theories of relief under both federal ("ADA") and state ("FEHA") law. (2009 Cal. App.Unpub. LEXIS 7999 at *5) It involved six distinct court forum phases:

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Court Phase 1) Plaintiff filed his employment discrimination case in California state (Superior) court, amending his complaint in November, 2000 .[74]

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pronouncement of that "authority" by the very nature of who the authority is rather than on account of the merit of the reasoning of the authority. Here, Plaintiff-Appellants don't ask this court to afford any special credence to the California Court of Appeals's pronouncement in *Peacock* but instead ask this court to consider solely the merits of the reasoning employed by that unpublished opinion. Specifically, no request is made of this Court to adopt the reasoning of *Peacock* in order to maintain uniformity of decisions between California and Wisconsin. Any such request would be improper because it would be based on the principle of seeking to maintain consistent *precedent*; as noted, however, *Peacock* is entirely *non-precedential*.

In any event, Plaintiffs are justified in presenting *Peacock* to this Court as persuasively reasoned: (i) because the Circuit Court below determined under paragraph (a)'s "any court of this state" phrase that the Plaintiffs acted properly in so doing (thereby making it part of the law-of-the-case); and (ii) because when an issue of first impression, as here, is presented, the policy reason for prohibiting certain uses of unpublished opinions (i.e., to undercut published, authoritative and/or precedential decisions) isn't present.

[74]"Plaintiff brought an employment discrimination action against defendant in state court, alleging causes of action under federal and state law, including California's Fair Employment and Housing Act (FEHA)." 2009 Cal. App. Unpub. LEXIS 7999 at *1.

Court Phase 2) Defendant removed the case, as of right in December 2000 to federal District Court. (In contrast, the case here was originally commenced in federal District Court). *op.cit.* at *5

The District Court granted the defendant prospective employer's motion for summary judgment on all federal and state law theories.[75] (In contrast, here the District Court granted summary judgment on all federal law theories but only some state law theories).

Court Phase 3) Like here, the defeated Plaintiff appealed to the U.S. Court of Appeals. The Ninth Circuit affirmed on all theories except that it reversed the District Court's grant of summary judgment on the state law theory of "perceived disability", namely, that a violation of the state statute exists if a refusal-to-hire decision is based upon the employer's perception of disability even if no actual disability exists.[76] The Ninth Circuit specifically found a triable issue of fact to exist on the state law theory of perceived disability and remanded for trial to the federal District Court.[77] **At this stage, as a result of the**

[75] *Op. cit.* at *1 and at *5.

[76] *Op. cit.* at *2 including fn.1.

[77] "... the Ninth Circuit affirmed summary judgment in defendant's favor on plaintiff's federal law claims. But as to plaintiff's FEHA cause of action, the Ninth Circuit partly upheld and partly reversed the district court's grant of summary judgment for defendant, ruling plaintiff has no actual disability under FEHA but a genuine issue of material fact exists on whether defendant

partial reversal by the Ninth Circuit, *Peacock* and this case became similarly situated procedurally, namely, both cases presented an unadjudicated state law theory of relief upon a single transactional "claim" with all federal and other state theories of relief having been adjudicated adversely to the plaintiff.

Court Phase 4) Upon remand, the federal District Court declined to exercise supplemental jurisdiction over the state law theory of relief that had been remanded to it by the Ninth Circuit for trial.[78] This is a similar outcome to what occurred here. There, because the litigation had originated in the state's Superior Court, the federal District Court could "remand" the case back to the state court system. Here, because the litigation originated in the federal system, District Judge Conley, in likewise declining to exercise supplemental jurisdiction over federal Count XI–that count being predicated upon the state law theory and ground of relief of certiorari review--dismissed that count without prejudice to refiling in Wisconsin's courts.

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perceived plaintiff to be disabled." *Op. cit.* at *1-*2; also at *5 -*6.

[78] *Op. cit.* at *2 and at *8.

Court Phase 5) In the state trial court (*i.e.*, the Superior Court in *Peacock*; Oneida County Circuit Court here where trial has yet to occur), the defendant again moved for summary judgment on the perceived liability theory of relief, even though the grant of summary judgment within the federal court system had been reversed.[79] The plaintiff, in responding to that motion, not only defended against that motion but asserted that his other state law theory of relief, namely, refusal-to-hire based upon "actual disability" that was the subject of an adverse federal court summary judgment ruling, affirmed by the Ninth Circuit, was viable in the state courts because the federal courts had ruled in error on that theory.[80] *Peacock's* assertion that the federal courts wrongly decided a state law theory is comparable to Plaintiffs' assertion that the federal courts clearly misapplied and/or ignored long established Wisconsin law that affords heightened protection, relative to federal law, of religious liberties.[81]

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[79]"The superior court granted defendant's motion for summary judgment on the perceived disability issue, finding no triable issue of fact existed." *op.cit.* at *3 and at *8 - *9.

[80]"In his opposition to defendant's summary judgment motion, plaintiff argued his **entire** FEHA claim remained viable, not simply the 'perceived as' aspect of the cause of action. *** He contended the law of the case doctrine was 'inapplicable because this is not a retrial or appeal' and because application of the doctrine would be unjust because the Ninth Circuit's decision on this issue is 'clearly ... not the law in California." *Op. cit.* at *9

[81](i) Invoking strict scrutiny where mere burden is imposed on a plaintiff's religious exercise versus federal RLUIPA's requirement that plaintiffs exercise of religious freedom be substantially burdened before strict scrutiny is invoked; and (ii) containing additional protections for religious exercise not found in federal law (*e.g.*, the Wisconsin Constitution's "No

In *Peacock*, per footnote 79, the Superior Court then granted defendant's motion for summary judgment on the "perceived disability" theory, holding that it wasn't bound by the federal court system's determination that a material issue of fact existed that forbade the grant of summary judgment. As to the plaintiff's effort to "re-litigate" the merits of the "actual disability" theory, the Superior Court likewise ruled for the defendant based on "collateral estoppel"[82] (a/k/a " issue preclusion"[83]) rather than on "law-of-the-case" doctrine.

Court Phase 6: *Peacock* 's plaintiff then appealed to the California Court of Appeals, resulting in the opinion at SA11, which reasoning was urged by Plaintiffs upon the court below and is now urged here.[84] On Peacock's appeal of the perceived disability issue, California's appeal court vacated the Superior Court's grant of summary judgment to the defendant because the Ninth Circuit's previous finding that there was a triable issue of fact precluding

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Preference" clause).

[82]"The [superior] court ruled the doctrine of collateral estoppel precluded further consideration of whether plaintiff has an actual disability." *Op. cit.* at *3

[83]Restatement §17(3) and Comment c, explaining that "issue preclusion" is "sometimes designated a *collateral estoppel*" and "sometimes designated a *direct estoppel*." (emph. original)

[84]"On appeal the parties disagree on whether the superior court was bound by the Ninth Circuit's rulings on both the actual disability and the perceived disability issues." *op.cit.* at *3

summary judgment was the "law-of-the-case"–there being only one case that pended in two different court systems. The state appeals court specifically observed that preclusion principles, including collateral estoppel, had no application[85] because the proceedings in both the federal and state court forums involved but a single case, so the more fluid and flexible concept of "law-of-the-case" applied. Crucially, the Court explained, with direct relevance to *Eagle Cove*:

> As we shall explain, both of the Ninth Circuit's decisions are binding as the law of the case. Under the law of the case doctrine, a decision made by an appellate court in an action binds both trial and appellate court in subsequent proceedings *in that same case.* (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491 (*Morohoshi*)). In contrast, the "doctrines of res judicata and collateral estoppel apply to later litigation to give conclusive effect to a former judgment or an issue determined in a *former proceeding,*" ***i.e.*** "a separate lawsuit." (*Op. cit.* at *11)

Concerning the degree of law-of-the-case's "binding" nature, the Court observed:

> "The case doctrine is not absolute" (*Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97 (Adams).... *** To lessen its harsh impact, the doctrine need not be applied "where its application would result in an unjust decision, e.g., where there has been a manifest misapplication of existing principles resulting in substantial injustice...." (*Morohoshi* at p.491-492)

Law-of-the-case doctrine also doesn't apply where the controlling rules of law have been altered or clarified by a decision[86] intervening

[85]See similar issue considered by District Four as set forth at fn.7, p.3.

[86]Here, the *Schlemm v. Wall* decision.

between the first[87] and second[88] appellate determinations.

(*Morohoshi v. Pacific Home*, 34 Cal.4th 482 at 492 (Cal. S.Ct. 2004)).

Peacock amplified:

> Here, the law of the case doctrine applies because although this case[89] has moved through the state court to the federal court and back again, this proceeding is still part of the same action. The same pleading has been at issue throughout. No final judgment was reached in the federal court on plaintiff's FEHA claim. In order for the outstanding state law issues to be resolved, the federal court remanded the case to the state court. *** **Collateral estoppel is thus inapplicable** as is full faith and credit under which federal final judgments on the merits may be[90] accorded

[87]The Seventh Circuit U.S. Court of Appeals October 30, 2013 decision in *Eagle Cove.*

[88]The decision to be rendered by this Court in the present appeal.

[89]"Case" is a concept contained in U.S. Constitution, Article III, §2 (hence, *Montano*'s formulation that"only one constitutional 'case' is present here" (AOBr, p.27; p.8, *supra*)) and is defined as a "justiciable controversy" that "consists of an actual dispute between parties over their legal rights that remain in conflict *at the time the case is presented* and must be a proper matter for judicial determination" and is a term that describes "the structure by which actual, conflicting claims of individuals must be brought before a federal court for resolution if the court is to exercise its jurisdiction to consider the questions and provide relief." (https://legal-dictionary.thefreedictionary.com/Case+or+Controversy) Thus, a "case" originates at the time acts or omissions occur giving rising to a plausible claim for relief. The commencement of litigation creates an "action" and/or "proceeding" by which when the "case" is first submitted to the judicial system.

[90]The verb form "may be" was employed advisedly. In the published decision of *Adams v. Pacific Bell Directory*, 111 Cal.App.4th 93 at 97-98, the California Court of Appeals stated: "[W]e are not required [by law-of-the-case doctrine] to adhere to decisions by the federal appellate courts, even on questions of federal law. (*Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1714–1715 [1 Cal. Rptr. 3d 328].) But, although not binding, we give great weight to federal appellate court decisions. (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320 [93 Cal. Rptr. 2d 36, 993 P.2d 366].) This is particularly true in the context of their determination of federal law, as happened here. *** [federal court decisions are especially persuasive in interpretation of federal law].)"

> *res judicata* effect[91] in state courts. Op. cit. at *13, emph. added.

****

Woodboro asserts: "If the California Court of Appeals had decided so momentous an exception to claim preclusion, it surely would have ordered the decision be published." (TBr, p.28). The just-quoted passages--entirely overlooked by Woodboro–indicate that the concepts of *res judicata* (a/k/a "claim preclusion") and collateral estoppel (a/k/a "issue preclusion") don't apply in the first place where a single case consisting of the same transactional claim has pended in both federal and state court forums. Thus, Woodboro errs in thinking *Peacock* creates an "exception to claim preclusion." *Peacock* instead accurately explains that the predicate for claim and issue preclusion to apply isn't satisfied where a single transactional claim has pended in federal and state court forums. That predicate is that the first case must have received a complete adjudication of all rights and liabilities of all parties. As just-quoted, *Peacock* observed: "No final judgment was reached in the federal court on plaintiff's FEHA claim." In *Peacock*, one state law theory for relief hadn't been adjudicated in federal courts; the same incomplete adjudication is present in *Eagle Cove*.

Accordingly, *Peacock*'s California appeals court reversed the grant of summary judgment on the issue of perceived disability and remanded that theory to

[91]That is, "claim preclusion."

the Superior Court for trial because the Ninth Circuit's ruling that there was a genuine issue of material fact requiring trial was "law-of-the-case." *Op. cit.* at *15.

On Peacock's appeal of the actual disability issue, the Superior Court's grant of summary judgment to the defendant was affirmed, but not on the issue preclusion (a/k/a collateral estoppel) ground it had employed. The California Appellate Court stated that it wasn't bound to the federal courts' grant of summary judgment (affirmed by the Ninth Circuit) to the defendant with respect to the state law theory of "actual disability" if the plaintiff were able to demonstrate "manifest misapplication" on the part of either federal court "of existing principles resulting in substantial injustice" in applying California state law. *(Op. cit.,* *15-*16). Thus Woodboro's assertion is incorrect that: "The Peacock court didn't hold that state courts are entitled to relitigate state law issues after a federal court has adjudicated and dismissed those state law claims." (TBr, p.28)

But, the California appeals court, after detailed review of California law (*16-*22), held that Peacock hadn't succeeded in making such a demonstration of error by the federal courts in applying California law; thus the California reviewing court affirmed the grant of summary judgment to the defendant on the issue of actual disability. *(Op. cit.* at *22). In contrast, Plaintiffs here have demonstrated a gross misapplication of Wisconsin's heightened and special

protections of religious liberty which were gutted by both federal courts' uninformed, superficial dispositions of Plaintiffs' well-pleaded state religious liberties theories and the distinctive Wisconsin Constitutional provisions on which those theories are grounded.

Thus both below and here on appeal, *Peacock*'s rationale certainly squarely supports a reasonable, good faith argument that "claim preclusion" doesn't apply:

> (1) There is only *one* case[92] that arose from the *single* transactional claim, namely, the series of local governmental actions that have prevented Plaintiffs from exercising their religious liberties in the manner they believe called by God to do, and that neither claim preclusion nor issue preclusion applies but rather the more fluid and flexible law-of-the-case doctrine (that allows for correction of error while the case is still pending); and
>
> (2) Wisconsin courts aren't bound by blatant errors committed by the federal courts, particularly in their indifference to distinctive Wisconsin constitutional and/or statutory religious liberties law (or even by blatant errors of federal law per footnote 90), applied to the undisputed facts of the case.

[92]Per fn.89.

Application of *Peacock*'s entirely correct reasoning requires not only reversal of the Circuit Court's striking Counts II-XVI of the Amended Complaint and dismissal of Woodboro and County as additional parties-defendant but also, *a fortiorari*, the affirmance of the Circuit Court's denial of Woodboro's Motion for Sanctions. Woodboro disputes *Peacock*'s observation that a state court isn't bound by a federal court's plainly erroneous ruling on the merits of that state's own law, arguing:

> The question is not whether the Restatement is authority, but rather, whether it stands for the proposition that a federal court's adjudication of a state law claim[93] is not preclusive. Nothing in the Restatement says that. (TBr, p.29).

Woodboro is wrong. The Restatement does say that, even where, unlike here, the second state law adjudication is a separate case from an earlier, completely concluded federal court adjudication of all rights and all liabilities of all of the parties presented to that forum. (§26(1)(d) at AOBr, pp.32-35). Moreover, *Peacock* and the Restatement aren't alone in demonstrating that state courts aren't bound by federal courts' prior erroneous applications of the state's own laws. *See,* authorities at AOB, p. 42, top. Woodboro asserts that Eagle Cove's amended complaint "constituted an egregious attempt to disregard the preclusive effect of the Federal Case." (TBr, p.22) Here, Woodboro begs the questions whether and

[93]Woodboro should have used the word "theory" or "ground" because, for preclusion purposes, the Restatement defines "claim" in its transactional sense. *See,* AOBr, pp.23-25.

to what extent the adjudications within the federal phase are entitled to preclusive effect.

Woodboro also argues "that it is equally important for the courts to protect defendants from repetitive litigation." (*Id.*) The federal District Court expressly declined to adjudicate all theories of relief for the single transactional claim presented by the Plaintiffs. F.R.Civ.P. 54(b)–a rule that Woodboro continues to ignore--alerted Woodboro that any adjudication of fewer than all the rights and liabilities of fewer than all the parties doesn't end the action[94] as to any of the parties and may be revised at any time before the entry of a judgment adjudicating all the parties' rights and liabilities. Even apart from Rule 54(b), federal case law at footnote 55 on p. 30 holds that there is no *res judicata* (*i.e.*, claim preclusive) effect from the grant of only partial summary judgment combined with a dismissal without prejudice. Woodboro fails to grasp that there has never been an adjudication of all of the rights and liabilities of all of the parties and that therefore Woodboro had and has no legitimate right to demand a premature termination of the litigation.

Lastly, Woodboro charges the Circuit Court with erring "because subjective good faith does not justify filing an objectively meritless claim." (TBr, p.26). It's

[94]The "civil action" a/k/a "action" was commenced by Plaintiffs' filing their federal complaint (F.R.Civ.P. 3) and has continued seamlessly into the state court forum below, all upon the actionable single "case" that originated (per fn.89) at the time the underlying acts occurred.

true that subjective good faith doesn't avoid being sanctioned if the pleading lacks a "reasonable" basis in law and/or in fact, but Woodboro is confused about what else the law provides and why the Circuit Court denied sanctions.

First, the law provides that sanctions can be imposed on either of two bases:

1) Lack of "good faith" including an improper purpose such as to harass or delay (the "subjective basis")[95]; and/or

2) Lack of "reasonable" basis in law[96] (including a "good faith argument" or "nonfrivolous argument" for change in existing law (the "objective basis") or in fact.[97] That is, the absence of one of these two bases is "not sufficient"[98] by itself to prevent imposing sanctions.

The Circuit Court, in fact, properly denied sanctions based on not one, but rather two, findings:

1) Plaintiffs possessed "good faith" based upon their sincere desire to exercise their religious liberty in a manner they subjectively believed

[95]WIS. STATS. 802.05(2)(a) and 895.044(1)(a).

[96]WIS. STATS. 802.05(2)(b) and 895.044(1)(b).

[97]WIS. STATS. 802.05(2)(c) and (d).

[98]TBr, p.26.

the federal and state law protected, and thus didn't have an improper motive in amending their state court complaint[99]; and

2) Plaintiffs had a reasonable basis in law (*Parks*, *Peacock* and the Restatement), meaning a non-frivolous, good faith argument for their position in a case of first impression under Wisconsin law.[100]

Nothing in Woodboro's brief shows that the Circuit Court abused its discretion in making either such finding. Therefore, the denial of sanctions should be affirmed.

[99]The Circuit Court found: "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." (R.48, pp.13-14)

[100] "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*,...Unpub...., 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. [*See*, ruling excerpt at SA25.]

II) WOODBORO FAILED TO PRESERVE ITS SECOND ISSUE FOR APPEAL; REGARDLESS, PLAINTIFFS' RENEWED MOTION FOR RECONSIDERATION WAS NOT FRIVOLOUS. (TBr, pp.31-36)

Woodboro poses a second issue on appeal:

> Was the Motion for Reconsideration filed by Eagle Cove on April 27, 2016[101] without a basis in law, as against the Town of Woodboro, such that it was frivolous within the meaning of Wis. Stats. secs. 802.05 and/or 895.044? (TBr., p.1)

Plaintiffs' motion and supporting memorandum (R.58-59) were grounded upon §§806.07(1)(g) and (h), 807.02 and 807.03.

As pointed out in the foregoing Statement of the Case, Woodboro filed no motion for sanctions directed at the Motion for Reconsideration. Therefore, there is no Circuit Court ruling exists to review, and Woodboro's seeking appellate review of a non-existent ruling may itself be frivolous.

A) Woodboro, Like the County, Misstates Applicable Law.

Woodboro (TBr, pp.32-34) argues only that F.R.Civ.P. 60(b)(6) and its analog §806.07(1)(h) don't permit retroactive relief from a judgment based upon a change in decisional law.[102] However, the Cross-Appellant doesn't dispute (and the Respondent even admits) that §806.07 allows for relief from a final judgment or

[101]The correct date, per TBr, p.10 is May 14, 2015. (R.58; R.59).

[102]The County makes the same argument at OCB, p. 43.

order when it is no longer equitable that the judgment or order should be given prospective application and that rulings on suits seeking injunctive relief can have prospective application. **The County and Town don't contest that both prospective and retroactive relief is available under F.R.Civ.P. 60(b)(5) and its analog §806.07(1)(g)).** Woodboro's argument that Rule 60(b)(6) cannot afford retroactive relief relies on three decisions:

- *Shah v. Holder (7th Cir. 2013)*
- *Kirby v. General Electric Co. (W.D.N.C. 2000)*
- *G.C. & K.B. Investments, Inc. v. Wilson (9th Cir. 2003)*

As explained below, none of these cases supports Woodboro's position.

A leading Supreme Court precedent on Rule 60(b)(6) is *Ackermann v. U.S.*, 340 U.S. 193 (1950). There the Court held that Rule 60(b)(6) wasn't available because the movant had failed "to appeal from a judgment of denaturalization" and the Court couldn't "agree that petitioner has alleged circumstances showing that his failure to appeal was justifiable." (340 U.S. at 194, 197). Professor of Law Scott Dodson (University of Hastings Law School) has articulated the proper Rule 60(b)(6) standard under *Ackermann* as follows:

> The *Ackermann* rule instead should apply...only when a litigant voluntarily and deliberately chooses to abandon or relinquish her legal rights.

(www.uchastings.edu/news/articles/2012/11/dodson-in-practice.php) (Full text at SA23)

Accord: Dodson, Scott, Rethinking Extraordinary Circumstances (November 8, 2011). 106 Northwestern University Law Review 377 (2012) (Full text at SA24.)

In *Eagle Cove*, Plaintiffs diligently pursued all appeal rights to the maximum.

Neither Cross-Appellant nor Respondent rebuts AOBr's argument (pp.44-45) or its cited law that: (i) changes in the law can result in the loss of *res judicata* effect of a previous judgment; and (ii) that the Circuit Court erred in *sua sponte* attempting to limit *Christian v. Jemison* to apply only to "momentous changes" in constitutional law.

G.C.&K.B. Investments, Inc. v. Wilson (9th Cir. 2003) (TBr, pp.33-34) has nothing to do with Woodboro's proposition concerning Rule 60(b)(6) and inability to be applied retroactively. Instead, it dealt with the affirmance of sanctions imposed for violation of the federal court's injunction by the offending party's basing a Rule 60(b) motion on a state court order obtained after, and in violation of, that injunction! (326 F.3d at 1110)

Kirby v. General Electric (W.D.N.C. 2000) (TBr, pp.32-33) is a non-precedential federal trial court decision that cited to the Fourth Circuit U.S. Court of Appeals decision in *Nunnery* (I), 23 Fed. R. Serv.2d at 234 (3/18/1977) for the

propositions "a change in a rule of law is not enough to warrant reopening a final judgment under Rule 60(b)(6)" and that "Plaintiffs had failed to establish" contrary authority. (210 F.R.D. 180 at 190). The *Kirby* court's reliance on *Nunnery I* was misplaced because: (i) the opinion was vacated by *Nunnery II*, 25 Fed.R.Serv.2d 856 (4/27/1977); and the quoted dictum is contrary to the Supreme Court's reasoning in *Ackermann*.

Shah v. Holder (7th Cir. 2013) (TBr, p.32; OCBr p.43) involved an attempt to reopen an administrative proceeding before the Board of Immigration Appeals. The Seventh Circuit stated that the Board's Regulation 1003.2(c)(2) serves the comparable function as Rule 60(b)(6) and, in imprecise and overly board dictum, wrote:

> District court cannot use Rule 60(b)(6) to apply new decision retroactively to closed civil cases. See, e.g. *Gonzalez v. Crosby*, 545 U.S. 524, 536-38 ... (2005); *Ackermann v. United States*, 340 U.S. 193 ... (1950).

As explained above, neither *Ackermann* nor *Gonzalez*[103] stands for such a sweeping assertion. In *Gonzalez*, the Supreme Court held that the movant's "lack of diligence in pursuing review" rendered his Rule 60(b)(6) "all the less extraordinary." (545 U.S. at 537). Moreover, the high court also stated:

> Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive

[103] As expressly addressed within SA23.

> habeas petition and should be treated accordingly. *** We think those holdings are correct. (545 U.S. 524 at 531)

Thus, *Gonzalez* was, in actuality, not even regarded as a case arising under Rule 60(b)(6).

In both *Shah* and *McKnight v. U.S. Steel Corp.* (OCBr, p.43), the Rule 60(b) movant had failed to exercise appeal rights. ("He [Shah] did not seek judicial review of that order", 736 F.3d at 1125; "McKnight did not appeal the dismissal, but filed a motion to reinstate the case.... Plaintiff's motion was based primarily upon Fed.R.Civ.P. 60(b)(2)." 726 F.2d at 335). In contrast, Plaintiffs here exhausted all avenues of judicial redress and are left only with their §806.07 motion to seek redress of the application of an overruled and improperly stringent standard as to "substantial burden" under RLUIPA.

With respect to *Nash v. Hepp* (OCBr, p.43), the Rule 60 motion was based merely on an argument that the judgment to which the motion related "may have been incorrect." That is entirely different than the situation here where the 7th Circuit itself has now determined that both it and the District Court had applied an erroneous standard in granting summary judgment against the Plaintiffs on the RLUIPA Substantial Burden count. Thus, the Plaintiffs here aren't merely arguing that the ruling standard employed by this Court and the Seventh Circuit as to federal Count III *might have been* incorrect. Rather, the 7th Circuit (as confirmed

by Shepards) has now declared that incorrectness without question–a point the Defendants cannot and do not contest.

The Respondent (p.43) argues that there is an absence of "extraordinary circumstances" that undergirds the companion federal court Rule 60(b)(6) and state court §806.07(1)(h) motions. A review of the record in both the federal and state court forums will demonstrate that this case is anything but "ordinary."[104] That is, it is an extraordinary case where, as here:

> (1) Federal and state law theories and grounds arising from a common set of facts--denoted as "claim" (singular) in the transactional sense of that term as employed by Section 24 of the *Restatement of the Law, Second, Judgments* and by the Wisconsin judiciary (*see, Parks v. City of Madison*, 171 Wis.2d 730 at 735 (Ct.App. 1992))--are presented to a federal trial court forum;
>
> (2) All grounds actually presented except for a single state law ground (*i.e.*, state law certiorari review) are dismissed ostensibly on the merits with the remaining ground dismissed without prejudice to refiling in a state court forum;
>
> (3) Immediate appeal is taken to the U.S. Court of Appeals which affirms; and then:
>
> (4) While the case is still continuing in the state court forum with respect to what had been federal Count XI:
>
> (5) The U.S. Court of Appeals determines–that in light of intervening Supreme Court decisions–it and the District Court applied an incorrect standard in ruling on a major federal statutory count.

[104]During the call of the state court proceeding on Monday, May 18, 2015, Circuit Judge Bloom likened the intertwined federal and state court proceedings to the "Game of Thrones."

> (6) Not only that, but under Wisconsin's certiorari review 4-factor ruling standard (as articulated at footnote 1 of the Circuit Court's January 23, 2015 Decision)--that is yet to be applied by the state Circuit Court--one of those factors is whether the Board of Adjustment ("BOA") did or did not "proceed on a correct theory of law." Whether the Defendant BOA did or did not "proceed on a correct theory of law" necessarily involves the Circuit Court determining what the correct theories of law were.[105] Further, the correct theory of law for RLUIPA's Substantial Burden prong is now unclear: should the Circuit Court employ the original federal court ruling (and the Seventh Circuit's affirmance) on Count III in determining whether the BOA proceeded under a correct understanding of RLUIPA's substantial burden provision or do those rulings no longer have preclusive effect in light of their overruling by *Schlemm v. Wall*?

Consequently, Defendants haven't explained why this is not an extraordinary set of circumstances–especially given the Circuit Court's aforesaid need for guidance in the continuing proceeding below.

Therefore, Plaintiffs respectfully submit they've met the Rule 60(b)(6) and §806.07(1)(h) standard for relief. Moreover, reliance by Plaintiffs upon Rule 60(b)(6) and its Wisconsin analog §806.07(1)(h) isn't necessary where, as here (p.56, *supra*), it isn't contested that F.R.Civ.P. 60(b)(5) and/or its analog §806.07(1)(g) are applicable.

[105]Including the requirements of RLUIPA (*see, for example,* Document #63-54 at points 19(f), (g) on p.6 of 6) urged by the Plaintiffs upon that Board during the administrative proceeding.

B) Eagle Cove Isn't Attempting to "Relitigate the Merits." (TBr, pp.34- 36)

To "relitigate" implies that a civil action on a case had been fully adjudicated on the merits only to be followed by a second, independent action that seeks to undo the merits adjudication made in the earlier action. The federal court proceeding didn't result in compete adjudication of all rights and liabilities of all parties and, thus, the proceeding in the Circuit Court doesn't constitute "re-litigation" except to the limited extent Plaintiffs seek correction, as permitted by applicable law, of manifest error by the federal courts.

CONCLUSION

For the reasons aforesaid, Plaintiffs, as Cross-Respondents, pray that this Honorable Court affirm the denial of sanctions, and award them their costs and all other relief just and proper under the circumstances.

SIGNATURES

ATTORNEYS FOR PLAINTIFFS-APPELLANTS

Electronically Signed

/s/ Michael D. Dean

Michael D. Dean, Esq.

SBN 01019171

Electronically Signed

/s/ Arthur G. Jaros, Jr.

Arthur G. Jaros, Jr., Esq.

November 20, 2018

APPENDIX KK

STATE OF WISCONSIN IN CIRCUIT COURT ONEIDA COUNTY

Eagle Cove Camp &
Conference Center, Inc., et. al,

Plaintiffs

Vs.

Oneida County
Board of Adjustment,
Oneida County and
Town of Woodboro,

Defendants

2013 CV 345

NOTICE OF MOTION AND MOTION FOR SANCTIONS AND AWARD OF ACTUAL ATTORNEYS' FEES AND EXPENSES UNDER SECS. 802.05 AND 895.044, WIS. STATS. AGAINST PLAINTIFFS AND PLAINTIFFS COUNSEL

To:

Plaintiffs, by their attorneys,

Attorney Michael Dean
17035 west Wisconsin Avenue
Brookfield, WI 53005

Attorney Tyson Cain
Schmidt & Schmidt, S.C.
123 Grand Avenue
Wausau, WI 54403

NOTICE OF MOTION

PLEASE TAKE NOTICE that at a time and date to be set by the Court, the undersigned Defendants will bring the following Motion for Sanctions before the Court. The matter will be heard upon at least five (5) days written notice by the Court.

MOTION FOR SANCTIONS UNDER SECS. 802.05 AND 895.044

NOW COMES the Defendant, The Town of Woodboro., by its attorneys, Kasieta Legal Group, LLC, by Mark B. Hazelbaker, and move the Court, pursuant to secs. 802.05 and 895.044, Wis. Stats., for the imposition of sanctions against Plaintiffs and, jointly and severally, their counsel. The grounds for this Motion are that the action herein was commenced and continued without either a factual basis or a meritorious basis in law. Specifically:

PLAINTIFFS AND THEIR COUNSEL KNEW OR SHOULD HAVE KNOWN THAT THE INSTANT CLAIMS ARE BARRED BY CLAIM PRECLUSION.

1. Every one of the claims related to the Wisconsin Constitution which have been made in the instant complaint either was raised or could have been raised in a civil action these plaintiffs filed in the United States District Court for the Western District of Wisconsin, *Eagle Camp & Conference Center, et al., v. Town of Woodboro, et al.*, Case No 10-CV-118-wmc (the "Federal Case").
2. In the Federal Case, plaintiffs brought pendant state-law claims alleging that the defendant Town violated the Wisconsin Constitution. Plaintiffs invoked the District Court's jurisdiction under 18 USC sec. 1367. The state law claims in the Federal Case involved the same nucleus of operative facts involved here.
3. Judge William Conley did not defer resolution of the merits of the plaintiff's state law claims. In his decision disposing of the Federal Case, Judge Conley explicitly stated that although he could defer the state law claims and remand them, he would not do so. Instead, he reached the merits of the state law claims and dismissed them on their merits.

4. The very claims plaintiffs have brought in this action were extensively litigated in the District Court, appealed unsuccessfully to the Seventh Circuit Court of Appeals, and included in the plaintiffs' unsuccessful petition for certiorari.

5. Further, because plaintiffs chose to bring state-law claims in their federal action, they were obligated to state all state-law claims they had against the Town which arose out of the same transaction or occurrence. Even state-law claims which were not asserted are barred by claim preclusion.

6. Therefore, this action is barred by claim preclusion and should be dismissed pursuant to sec. 802.06 (2)(a)8. Wis. Stats.

7. A reasonably competent attorney should have known that claim preclusion absolutely bars re-litigation of the claims stated in the instant complaint. Further, plaintiff Arthur G. Jaros, Jr., is an attorney and a litigator, and should be held to an attorneys' level of knowledge. The other plaintiffs should be expected to realize that the same claims cannot be re-litigated.

PLAINTIFFS AND THEIR COUNSEL KNEW OR SHOULD HAVE KNOWN THAT FACTUAL DETERMINATIONS MADE IN THE FEDERAL CASE PRECLUDE RECOVERY ON THE CLAIMS ASSERTED IN THIS ACTION

8. In the alternative that it were determined that the legal claims made by plaintiffs in this action are not barred by claim preclusion, the claims plaintiffs have brought are unsupportable under the facts which were conclusively established in the Federal Case.

9. The District Court, in the Federal Case, made factual findings and determinations on summary judgment. These findings were not the product of a perfunctory, succinct

fact-gathering process. Rather, Plaintiffs litigated this case to an extreme degree, and submitted hundreds of proposed findings of fact to the District Court. The District Court made findings of fact establishing undisputed material facts as a matter of law. These findings, which were affirmed on appeal, are binding on the plaintiffs in this and all future litigation.

10. The findings of fact in the Federal Case establish that the Town of Woodboro did not act in any discriminatory or unreasonable manner. The facts show that the Town did nothing more than provide recommendations to Oneida County on a zoning petition and a conditional use permit, relying in part on a land use plan that was developed in a completely proper manner.

11. A reasonably competent attorney should have known that the findings of fact in the Federal Case preclude recovery on the claims stated in the instant complaint. Further, plaintiff Arthur G. Jaros, Jr., is an attorney and a litigator, and should be held to an attorneys' level of knowledge. The other plaintiffs should be expected to realize that the claims are untenable under the facts found by the District Court.

TWENTY-ONE DAYS' NOTICE PROVIDED; SANCTIONS APPROPRIATE

12. On October 2, 2014, the Town served a draft of this Motion. In response to comments from the plaintiffs, the Town has withdrawn portions of the October 2, 2014 motion. The grounds contained in this Motion were served by mail on plaintiffs through their counsel. Plaintiffs have had the 21-day safe harbor period provided by law. Plaintiffs did not withdraw the lawsuit within the period of time between service of the notice and filing of the motion.

13. This Court should take judicial notice of the extraordinary extent of over-litigation of the Federal Case, as will be shown if proof is required. Deplte having already been afforded considerable latitude to discover and present a case, plaintiffs utterly failed to do so. Despite complete rejection of every claim that was litigated (the certiorari claim was deferred), plaintiffs have now instituted a second case attempting to re-litigate every claim they filed in the Federal Case in the guise of an action under the Wisconsin Constitution.

14. The Court should award the defendant all of their litigation costs and expenses in this action.

15. WHEREFORE, Defendant Town of Woodboro, requests that the Court find that this action was frivolous upon its commencement and throughout its entire pendency, in violation of secs. 802.05 and 895.044, Wis. Stats., and impose sanctions that are available to the Court under those sections. Defendants request the following sanctions:

    1. An award for their actual attorneys' fees and costs from the date of filing;
    2. For such other and further relief as the Court may deem proper.

Dated this 28th day of October, 2014.

Mark B. Hazelbaker
State Bar No. 1010302
Kasieta Legal Group, LLC
7818 Big Sky Drive, Suite 112
Madison, WI 53705
(608) 662-2300
(608) 662-9977 – fax
mh@kasieta.com

APPENDIX LL

FILED
09-21-2020
ONEIDA COUNTY
CLERK OF CIRCUIT
COURT
2013CV000345

DATE SIGNED: September 17, 2020

Electronically signed by Michael H. Bloom
Circuit Court Judge

STATE OF WISCONSIN IN CIRCUIT COURT ONEIDA COUNTY

EAGLE COVE CAMP & CONFERENCE CENTER, INC.,

Plaintiff,

Vs 2013 CV 345

ONEIDA COUNTY BOARD OF ADJUSTMENT,
COUNTY OF ONEIDA and
TOWN OF WOODBORO,

Defendants

JUDGMENT AWARDING ATTORNEYS' FEES AND COSTS TO THE TOWN OF WOODBORO

The above-captioned matter was remanded on June 16, 2020 to this Court by the Wisconsin Supreme Court, which declined to review the decision of the Wisconsin Court of Appeals of November 19, 2019. The Court of Appeals' decision directed this Court, on remand, to determine the amount of attorneys' fees and costs reasonably incurred by the Town of Woodboro in this matter, and enter judgment for that amount.

One June 17, 2020, the Town of Woodboro proposed a scheduling order governing the process for determining fees. On July 2, 2020, there having been no response to the proposed order from the plaintiffs, the Court entered the Order. Pursuant to the Order, on July 22, 2020, the Town submitted a Brief, an Affidavit of Mark Hazelbaker with the invoices for legal services provided to the Town; and, an Affidavit from Attorney Dean R. Dietrich in support of the Town's claim. On August 12, 2020, the Town filed a supplemental affidavit of Mark Hazelbaker with updated fee amounts. The total amount of fees and costs requested through July 31, 2020 is $33,096.22.

Pursuant to the Scheduling Order, the plaintiffs were required to file a response, if any, on or before August 20, 2020. Plaintiffs did not file a Brief but rather, a Motion asking the Court to stay briefing while the plaintiffs file a petition for certiorari with the United States Supreme Court.

The Court finds that the Town's submission in support of its request for judgment is sufficient to prove the Town's entitlement to the amount of fees and costs requested. The affidavits establish that the fees claimed were reasonable and necessary for defense of the claims against the Town in this case.

The Court finds that plaintiffs have not shown any good cause for modification of the July 2, 2020 scheduling order. The Court finds that Plaintiffs' failure to file a brief in opposition to the Town's request for judgment constitutes a waiver of response. In the absence of a response, the Court finds that the Town's request shall be granted.

The Court finds, based on the arguments and evidence advanced by the Town, that judgment for the amount requested should be entered against all plaintiffs, jointly and severally.

The Court further finds that in order to assure that the Town is compensated for all fees and costs it incurs as the result of the plaintiffs' commencement of a frivolous action, and as

provided by sec. 895.044 (4), fees should be awarded for further appellate litigation. The Court will enter a supplemental judgment for such fees upon the completion of any further appeals and the presentation of affidavits establishing the amount of fees incurred by the Town.

The Court, therefore, enters Judgment as follows:

1. The Court grants judgment to the Town of Woodboro to have and recover the amount of thirty-three thousand ninety six and 22/100 dollars ($33,096.22) from the following parties or persons, jointly and severally:

   Eagle Cove Camp & Conference Center, Inc., 1200 Harger Road, Suite 830, Oak Brook, IL 60523.

   Arthur G. Jaros, Jr., 7483 Highway 8, Rhinelander, WI 5450, individually, and, as attorney for plaintiffs.

   Wesley A. Jaros, 405 Birch Lane, Dixon, IL 61021

   Randall S. Jaros, 6637 West Higgins Avenue, Apartment 1, Chicago, IL 60656

   Attorney Michael Dean, 350 Bishops Way, Suite 201, Brookfield, WI 53008

2. The Court grants judgment to the Town of Woodboro for attorneys' fees and costs reasonably incurred by the Town for August 2020 in this action, and for any appeal or further litigation of the claims made by plaintiffs in this action. The Town shall, upon the conclusion of any such additional litigation, submit a supplemental affidavit to the Court. The Court shall review the affidavit and enter judgment for the additional reasonable fees.

THIS IS A FINAL ORDER WHICH RESOLVES ALL ISSUES IN LITIGATION BETWEEN THE PARTIES AND IS FINAL FOR THE PURPOSES OF APPEAL UNDER WIS. STATS. SEC. 808.03.

APPENDIX MM

APPENDIX NN

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act--42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Religious Land Use and Institutionalized Persons Act of 2000–42 U.S.C. §2000cc

Protection of land use as religious exercise

(a) Substantial burdens.

(1) 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.

(2) Scope of application. This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that

receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion.

(1) 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.

(2) 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.

(3) 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.

Religious Land Use and Institutionalized Persons Act of 2000–42 U.S.C. §2000cc-2

Judicial relief

(a) Cause of action. A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) Burden of persuasion. If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 [42 USCS § 2000cc], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) - (g) [Omitted}

Religious Land Use and Institutionalized Persons Act of 2000–42 U.S.C. §2000cc-3

Rules of construction

(a) Religious belief unaffected. Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated. Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected. Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected. Nothing in this Act shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) 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.

(f) Effect on other law. With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) Broad construction. This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) No preemption or repeal. Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more

protective of religious exercise than, this Act.

(i) Severability. If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

Religious Land Use and Institutionalized Persons Act of 2000–42 U.S.C. §2000cc-4

Establishment Clause unaffected

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Religious Land Use and Institutionalized Persons Act of 2000–42 U.S.C. §2000cc-5

Definitions

In this Act:

(1) Claimant. The term "claimant" means a person raising a claim or defense under this Act.
(2) Demonstrates. The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.
(3) Free Exercise Clause. The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.
(4) Government. The term "government"--
(A) means–

(i) a State, county, municipality, or other governmental entity created under the authority of a State;
(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5 [42 USC §§ 2000cc-2(b) and 2000cc-3], includes the United States, a branch, department, agency,

instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation. The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity. The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) Religious exercise.

(A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule. The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

F.R.Civ.P. 54(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.

Wis. Stat. §59.69. Planning and zoning authority.

(1) PURPOSE.

It is the purpose of this section to promote the public health, safety, convenience and general welfare; to encourage planned and orderly land use development; to protect property values and the property tax base; to permit the careful planning and efficient maintenance of highway systems; to ensure adequate highway, utility, health, educational and recreational facilities; to recognize the needs of agriculture, forestry, industry and business in future growth; to encourage

uses of land and other natural resources which are in accordance with their character and adaptability; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to encourage the protection of groundwater resources; to preserve wetlands; to conserve soil, water and forest resources; to protect the beauty and amenities of landscape and man-made developments; to provide healthy surroundings for family life; and to promote the efficient and economical use of public funds. To accomplish this purpose the board may plan for the physical development and zoning of territory within the county as set forth in this section and shall incorporate therein the master plan adopted under s. 62.23 (2) or (3) and the official map of any city or village in the county adopted under s. 62.23 (6).

(2)-(3) omitted.

(4) EXTENT OF POWER. For the purpose of promoting the public health, safety and general welfare the board may by ordinance effective within the areas within such county outside the limits of incorporated villages and cities establish districts of such number, shape and area, and adopt such regulations for each such district as the board considers best suited to carry out the purposes of this section. The board may establish mixed-use districts that contain any combination of uses, such as industrial, commercial, public, or residential uses, in a compact urban form. ***

(5) FORMATION OF ZONING ORDINANCE; PROCEDURE.

(a) When the county zoning agency has completed a draft of a proposed zoning ordinance, it shall hold a public hearing thereon, following publication in the county of a class 2 notice, under ch. 985 . If the proposed ordinance has the effect of changing the allowable use of any property, the notice shall include either a map showing the property affected by the ordinance or a description of the property affected by the ordinance and a statement that a map may be obtained from the zoning agency. After such hearing the agency may make such revisions in the draft as it considers necessary, or it may submit the draft without revision to the board with recommendations for adoption. Proof of publication of the notice of the public hearing held by such agency shall be attached to its report to the board.

(b) When the draft of the ordinance, recommended for enactment by the zoning agency, is received by the board, it may enact the ordinance as submitted, or reject it, or return it to the agency with such recommendations as the board may see fit to make. In the event of such return subsequent procedure by the agency shall be as if the agency were acting under the original directions. When enacted, duplicate copies of the ordinance shall be submitted by the clerk by registered mail to each town clerk for consideration by the town board.

(c) A county ordinance enacted under this section shall not be effective in any town until it has been approved by the town board. If the town board approves an ordinance enacted by the county board, under this section, a certified copy of the approving resolution attached to one of the copies of such ordinance submitted to the town board shall promptly be filed with the county clerk by the town clerk. The ordinance shall become effective in the town as of the date of the filing, which filing shall be recorded by the county clerk in the clerks office, reported to the town

board and the county board, and printed in the proceedings of the county board. The ordinance shall supersede any prior town ordinance in conflict therewith or which is concerned with zoning, except as provided by s. 60.62.

(d) The board may by a single ordinance repeal an existing county zoning ordinance and reenact a comprehensive revision thereto in accordance with this section. "Comprehensive revision", in this paragraph, means a complete rewriting of an existing zoning ordinance which changes numerous zoning provisions and alters or adds zoning districts. The comprehensive revision may provide that the existing ordinance shall remain in effect in a town for a period of up to one year or until the comprehensive revision is approved by the town board, whichever period is shorter. If the town board fails to approve the comprehensive revision within a year neither the existing ordinance nor the comprehensive revision shall be in force in that town. Any repeal and reenactment prior to November 12, 1965, which would be valid under this paragraph is hereby validated.

(e) The board may amend an ordinance or change the district boundaries. The procedure for such amendments or changes is as follows:

1. A petition for amendment of a county zoning ordinance may be made by a property owner in the area to be affected by the amendment, by the town board of any town in which the ordinance is in effect; by any member of the board or by the agency designated by the board to consider county zoning matters as provided in sub. (2) (a) . The petition shall be filed with the clerk who shall immediately refer it to the county zoning agency for its consideration, report and recommendations. Immediate notice of the petition shall be sent to the county supervisor of any affected district. A report of all petitions referred under this paragraph shall be made to the county board at its next succeeding meeting.

2. Upon receipt of the petition by the agency it shall call a public hearing on the petition. Notice of the time and place of the hearing shall be given by publication in the county of a class 2 notice, under ch. 985 . If an amendment to an ordinance, as described in the petition, has the effect of changing the allowable use of any property, the notice shall include either a map showing the property affected by the amendment or a description of the property affected by the amendment and a statement that a map may be obtained from the zoning agency. A copy of the notice shall be mailed by registered mail to the town clerk of each town affected by the proposed amendment at least 10 days prior to the date of such hearing. If the petition is for any change in an airport affected area, as defined in s. 62.23 (6) (am) 1. b., the agency shall mail a copy of the notice to the owner or operator of the airport bordered by the airport affected area.

3. Except as provided under subd. 3m., if a town affected by the proposed amendment disapproves of the proposed amendment, the town board of the town may file a certified copy of the resolution adopted by the board disapproving of the petition with the agency before, at or within 10 days after the public hearing. If the town board of the town affected in the case of an ordinance relating to the location of boundaries of districts files such a resolution, or the town boards of a majority of the towns affected in the case of all other amendatory ordinances file such resolutions, the agency may not recommend approval of the petition without change, but may

only recommend approval with change or recommend disapproval.

3m. A town may extend its time for disapproving any proposed amendment under subd. 3. by 20 days if the town board adopts a resolution providing for the extension and files a certified copy of the resolution with the clerk of the county in which the town is located. The 20-day extension shall remain in effect until the town board adopts a resolution rescinding the 20-day extension and files a certified copy of the resolution with the clerk of the county in which the town is located.

4. As soon as possible after the public hearing, the agency shall act, subject to subd. 3., on the petition either approving, modifying and approving, or disapproving it. If its action is favorable to granting the requested change or any modification thereof, it shall cause an ordinance to be drafted effectuating its determination and shall submit the proposed ordinance directly to the board with its recommendations. If the agency after its public hearing recommends denial of the petition it shall report its recommendation directly to the board with its reasons for the action. Proof of publication of the notice of the public hearing held by the agency and proof of the giving of notice to the town clerk of the hearing shall be attached to either report. Notification of town board resolutions filed under subd. 3. shall be attached to either such report.

5. Upon receipt of the agency report the board may enact the ordinance as drafted by the zoning agency or with amendments, or it may deny the petition for amendment, or it may refuse to deny the petition as recommended by the agency in which case it shall refer the petition to the agency with directions to draft an ordinance to effectuate the petition and report the ordinance back to the board which may then enact or reject the ordinance.

5g. If a protest against a proposed amendment is filed with the clerk at least 24 hours prior to the date of the meeting of the board at which the report of the zoning agency under subd. 4. is to be considered, duly signed and acknowledged by the owners of 50% or more of the area proposed to be altered, or by abutting owners of over 50% of the total perimeter of the area proposed to be altered included within 300 feet of the parcel or parcels proposed to be rezoned, action on the ordinance may be deferred until the zoning agency has had a reasonable opportunity to ascertain and report to the board as to the authenticity of the ownership statements. Each signer shall state the amount of area or frontage owned by that signer and shall include a description of the lands owned by that signer. If the statements are found to be true, the ordinance may not be enacted except by the affirmative vote of three-fourths of the members of the board present and voting. If the statements are found to be untrue to the extent that the required frontage or area ownership is not present the protest may be disregarded.

5m. If a proposed amendment under this paragraph would make any change in an airport affected area, as defined under s. 62.23 (6) (am) 1. b., and the owner or operator of the airport bordered by the airport affected area files a protest against the proposed amendment with the clerk at least 24 hours prior to the date of the meeting of the board at which the report of the zoning agency under subd. 4. is to be considered, no ordinance which makes such a change may be enacted except by the affirmative vote of two-thirds of the members of the board present and voting.

6. If an amendatory ordinance makes only the change sought in the petition and if the petition was not disapproved prior to, at or within 10 days under subd. 3. or 30 days under subd. 3m., whichever is applicable, after the public hearing by the town board of the town affected in the case of an ordinance relating to the location of district boundaries or by the town boards of a majority of the towns affected in the case of all other amendatory ordinances, it shall become effective on passage. The county clerk shall record in the clerks office the date on which the ordinance becomes effective and notify the town clerk of all towns affected by the ordinance of the effective date and also insert the effective date in the proceedings of the county board. Any other amendatory ordinance when enacted shall within 7 days thereafter be submitted in duplicate by the county clerk by registered mail to the town clerk of each town in which lands affected by the ordinance are located. If after 40 days from the date of the enactment a majority of the towns have not filed certified copies of resolutions disapproving the amendment with the county clerk, or if, within a shorter time a majority of the towns in which the ordinance is in effect have filed certified copies of resolutions approving the amendment with the county clerk, the amendment shall be in effect in all of the towns affected by the ordinance. Any ordinance relating to the location of boundaries of districts shall within 7 days after enactment by the county board be transmitted by the county clerk by registered mail only to the town clerk of the town in which the lands affected by the change are located and shall become effective 40 days after enactment of the ordinance by the county board unless such town board prior to such date files a certified copy of a resolution disapproving of the ordinance with the county clerk. If such town board approves the ordinance, the ordinance shall become effective upon the filing of the resolution of the town board approving the ordinance with the county clerk. The clerk shall record in the clerks office the date on which the ordinance becomes effective and notify the town clerk of all towns affected by such ordinance of such effective date and also make such report to the county board, which report shall be printed in the proceedings of the county board.

7. When any lands previously under the jurisdiction of a county zoning ordinance have been finally removed from such jurisdiction by reason of annexation to an incorporated municipality, and after the regulations imposed by the county zoning ordinance have ceased to be effective as provided in sub. (7), the board may, on the recommendation of its zoning agency, enact amendatory ordinances that remove or delete the annexed lands from the official zoning map or written descriptions without following any of the procedures provided in subds. 1. to 6., and such amendatory ordinances shall become effective upon enactment and publication. A copy of the ordinance shall be forwarded by the clerk to the clerk of each town in which the lands affected were previously located. Nothing in this paragraph shall be construed to nullify or supersede s. 66.1031.

(f) The county zoning agency shall maintain a list of persons who submit a written request to receive notice of any proposed ordinance or amendment that affects the allowable use of the property owned by the person. If the county zoning agency completes a draft of a proposed zoning ordinance under par. (a) or if the agency receives a petition under par. (e) 2., the agency shall send a notice, which contains a copy of the proposed ordinance or petition, to each person on the list whose property, the allowable use of which, may be affected by the proposed ordinance or amendment. The notice shall be by mail or in any reasonable form that is agreed to by the person and the agency. The agency may charge each person on the list who receives a

notice a fee that does not exceed the approximate cost of providing the notice to the person. An ordinance or amendment that is subject to this paragraph may take effect even if the agency fails to send the notice that is required by this paragraph.

Wis. Stat. §60.10. Powers of town meeting.

(1) DIRECT POWERS.

The town meeting may:

(a) Raise money. Raise money, including levying taxes, to pay for expenses of the town, unless the authority has been delegated to the town board under sub. (2) (a).

(b) Town offices and officers.

1. Fix the compensation of elective town offices under s. 60.32, unless the authority has been delegated to the town board under sub. (2) (k).

2. Combine the offices of town clerk and town treasurer under s. 60.305 (1).

2m. In a town with a population of 2,500 or more, provide for the appointment by the town board of the town clerk, town treasurer, or both, or of the combined office of town clerk and town treasurer under s. 60.305 (1), at a level of compensation to be set by the board that may not be reduced during the term to which the person is appointed.

3. Combine the offices of town assessor and town clerk under s. 60.305 (2).

4. Establish or abolish the office of town constable and establish the number of constables. Abolition of the office is effective at the end of the term of the person serving in the office.

5. Designate the office of town clerk, town treasurer or the combined office of clerk and treasurer as part-time under s. 60.305 (1) (b).

6. Designate town board supervisors as full-time officers.

(c) Election of town officers.

1. Adopt a plan under s. 5.60 (6) to elect town board supervisors to numbered seats.

2. Provide under s. 8.05 (3) (a) for the nomination of candidates for elective town offices at a nonpartisan primary election.

(e) Cemeteries. Authorize the acquisition and conveyance of cemeteries under s. 157.50 (1) and (3).

(f) Administrator agreements. Approve agreements to employ an administrator for more than 3 years under s. 60.37 (3) (d).

(g) Hourly wage of certain employees. Establish the hourly wage to be paid under s. 60.37 (4) to a town employee who is also an elected town officer, unless the authority has been delegated to the town board under sub. (2) (L).

(2) DIRECTIVES OR GRANTS OF AUTHORITY TO TOWN BOARD.

Except as provided under par. (c), directives or grants of authority to the town board under this subsection may be general and continuing or may be limited as to purpose, effect or duration. A resolution adopted under this subsection shall specify whether the directive or grant is general and continuing or whether it is limited as to purpose, effect or duration. A resolution that is continuing remains in effect until rescinded at a subsequent town meeting by a number of electors equal to or greater than the number of electors who voted for the original resolution. This subsection does not limit any authority otherwise conferred on the town board by law. By resolution, the town meeting may:

(a) Raise money. Authorize the town board to raise money, including levying taxes, to pay for expenses of the town.

(b) Membership of town board in populous towns. In a town with a population of 2,500 or more, direct the town board to increase the membership of the board under s. 60.21 (2).

(c) Exercise of village powers. Authorize the town board to exercise powers of a village board under s. 60.22 (3) . A resolution adopted under this paragraph is general and continuing.

(d) General obligation bonds. Authorize the town board to issue general obligation bonds in the manner and for the purposes provided by law.

(e) Purchase of land. Authorize the town board to purchase any land within the town for present or anticipated town purposes.

(f) Town buildings. Authorize the town board to purchase, lease or construct buildings for the use of the town, to combine for this purpose the towns funds with those of a society or corporation doing business or located in the town and to accept contributions of money, labor or space for this purpose.

(g) Disposal of property. Authorize the town board to dispose of town real property, other than property donated to and required to be held by the town for a special purpose.

(h) Exercise of certain zoning authority. In a town located in a county which has enacted a zoning ordinance under s. 59.69, authorize, under s. 60.62 (2), the town board to enact town zoning ordinances under s. 61.35.

(i) Watershed protection and soil and water conservation. Authorize the town board to engage in watershed protection, soil conservation or water conservation activities beneficial to the town.

(j) Appointed assessors. Authorize the town board to select assessors by appointment under s. 60.307 (2).

(k) Compensation of elective town offices. Authorize the town board to fix the compensation of elective town offices under s. 60.32 (1) (b).

(L) Hourly wage of certain employees. Authorize the town board to establish the hourly wage to be paid under s. 60.37 (4) to a town employee who is also an elected town officer, other than a town board supervisor.

(3) AUTHORIZATION TO TOWN BOARD TO APPROPRIATE MONEY.

The town meeting may authorize the town board to appropriate money in the next annual budget for:

(a) Conservation of natural resources. The conservation of natural resources by the town or by a bona fide nonprofit organization under s. 60.23 (6).

(b) Civic functions. Civic and other functions under s. 60.23 (3).

(c) Insects, weeds and animal diseases. The control of insect pests, weeds or plant or animal diseases within the town.

(d) Rural numbering systems. Posting signs and otherwise cooperating with the county in the establishment of a rural numbering system under s. 59.54 (4) and (4m).

(e) Cemetery improvements. The improvement of the town cemetery under s. 157.50 (5) .

Wis. Stat. §60.22. General powers and duties.

The town board:

(1) CHARGE OF TOWN AFFAIRS.

Has charge of all affairs of the town not committed by law to another body or officer or to a town employee.

(2) CHARGE OF ACTIONS.

Has charge of any action or legal proceeding to which the town is a party.

(3) VILLAGE POWERS.

If authorized under s. 60.10 (2) (c), may exercise powers relating to villages and conferred on village boards under ch. 61, except those powers which conflict with statutes relating to towns and town boards.

(4) JURISDICTION OF CONSTABLE. [omitted]

(5) PURSUE CERTAIN CLAIMS OF TOWN. [omitted]

Wis. Stat. §60.62. Zoning authority if exercising village powers.

(1) Except as provided in s. 60.23 (33) and subject to subs. (2), (3) and (4), if a town board has been granted authority to exercise village powers under s. 60.10 (2) (c), the board may adopt zoning ordinances under s. 61.35.

(2) If the county in which the town is located has enacted a zoning ordinance under s. 59.69, the exercise of the authority under sub. (1) is subject to approval by the town meeting or by a referendum vote of the electors of the town held at the time of any regular or special election. The question for the referendum vote shall be filed as provided in s. 8.37.

(3) In counties having a county zoning ordinance, no zoning ordinance or amendment of a zoning ordinance may be adopted under this section unless approved by the county board.

(4)

(a) Notwithstanding ss. 61.35 and 62.23 (1) (a), a town with a population of less than 2,500 that acts under this section may create a "Town Plan Commission" under s. 62.23 (1) (a) that has 5 members, all of whom shall be appointed by the town board chairperson, subject to confirmation by the town board. The town chairperson shall also select the presiding officer. The town board chairperson may appoint town board members to the commission and may appoint other town elected or appointed officials to the commission, except that the commission shall always have at least one citizen member who is not a town official. Appointees to the town plan commission may be removed only by a majority vote of the town board. All other provisions of ss. 61.35 and 62.23 shall apply to a town plan commission that has 5 members.

(b) If a town plan commission consists of 7 members and the town board enacts an ordinance or adopts a resolution reducing the size of the commission to 5 members, the commission shall continue to operate with 6 or 7 members until the expiration of the terms of the 2 citizen members, who were appointed under s. 62.23 (1) (a), whose terms expire soonest after the effective date of the ordinance or resolution that reduces the size of the commission.

(c) If a town plan commission consists of 5 members and the town board enacts an ordinance or adopts a resolution increasing the size of the commission to 7 members, the town board

chairperson shall appoint the 2 new members under s. 62.23 (1) (a).

(d) Notwithstanding ss. 61.35 and 62.23 (1) (a), if a town with a population of at least 2,500 acts under this section and creates a "Town Plan Commission" under s. 62.23 (1) (a), all members of the commission shall be appointed by the town board chairperson, subject to confirmation by the town board. The town chairperson shall also select the presiding officer. The town board chairperson may appoint town board members to the commission and may appoint other town elected or appointed officials to the commission, except that the commission shall always have at least 3 citizen members who are not town officials. Appointments shall be made by the town board chairperson during the month of April for terms that expire in April or at any other time if a vacancy occurs during the middle of a term except that the appointees to the town plan commission may be removed before the expiration of the appointees term by a majority vote of the town board. All other provisions of ss. 61.35 and 62.23 shall apply to a town plan commission to which this paragraph applies.

Wis. Stat. §61.35. Village planning.

Section 62.23 applies to villages, and the powers and duties conferred and imposed by s. 62.23 upon mayors, councils and specified city officials are hereby conferred upon presidents, village boards, and village officials performing duties similar to the duties of such specified city officials, respectively. Any ordinance or resolution passed prior to May 30, 1925, by any village board under s. 61.35, 1923 stats., shall remain in effect until repealed or amended by such village board.

Wis. Stat. §62.23. City planning.

(1) COMMISSION.

(a) The council of any city may by ordinance create a "City Plan Commission," to consist of 7 members. The commission shall also include, as a nonvoting member, a representative from a military base or installation, with at least 200 assigned military personnel or that contains at least 2,000 acres, that is located in the city, if the bases or installations commanding officer appoints such a representative. All members of the commission, other than the representative appointed by the commanding officer of a military base or installation, shall be appointed by the mayor, who shall also choose the presiding officer. The mayor may appoint himself or herself to the commission and may appoint other city elected or appointed officials, except that the commission shall always have at least 3 citizen members who are not city officials. Citizen members shall be persons of recognized experience and qualifications. The council may by ordinance provide that the membership of the commission shall be as provided thereunder.

(d) [omitted re: term, appointment and vacancy re: members of the commission]

(e) The city plan commission shall have power and authority to employ experts and a staff, and to

pay for their services and such other expenses as may be necessary and proper, not exceeding, in all, the appropriation that may be made for such commission by the legislative body, or placed at its disposal through gift, and subject to any ordinance or resolution enacted by the governing body.

(f) Any city may by ordinance increase the number of members of the city plan commission so as to provide that the building commissioner or building inspector shall serve as a member thereof.

(2) FUNCTIONS.

It shall be the function and duty of the commission to make and adopt a master plan for the physical development of the city, including any areas outside of its boundaries that in the commissions judgment bear relation to the development of the city provided, however, that in any county where a regional planning department has been established, areas outside the boundaries of a city may not be included in the master plan without the consent of the county board of supervisors. The master plan, with the accompanying maps, plats, charts, and descriptive and explanatory matter, shall show the commissions recommendations for such physical development, and shall, as described in sub. (3) (b), contain at least the elements described in s. 66.1001 (2) . The commission may from time to time amend, extend, or add to the master plan or carry any part or subject matter into greater detail. The commission may adopt rules for the transaction of business and shall keep a record of its resolutions, transactions, findings, and determinations, which record shall be a public record.

(3) THE MASTER PLAN.

(a) The master plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality which will, in accordance with existing and future needs, best promote public health, safety, morals, order, convenience, prosperity or the general welfare, as well as efficiency and economy in the process of development.

(b) The commission may adopt the master plan as a whole by a single resolution, or, as the work of making the whole master plan progresses, may from time to time by resolution adopt a part or parts of a master plan. Beginning on January 1, 2010, or, if the city is exempt under s. 66.1001 (3m), the date under s. 66.1001 (3m) (b), if the city engages in any program or action described in s. 66.1001 (3), the master plan shall contain at least all of the elements specified in s. 66.1001 (2). The adoption of the plan or any part, amendment, or addition, shall be by resolution carried by the affirmative votes of not less than a majority of all the members of the city plan commission. The resolution shall refer expressly to the elements under s. 66.1001 and other matters intended by the commission to form the whole or any part of the plan, and the action taken shall be recorded on the adopted plan or part of the plan by the identifying signature of the secretary of the commission, and a copy of the plan or part of the plan shall be certified to the common council, and also to the commanding officer, or the officers designee, of any military base or installation, with at least 200 assigned military personnel or that contains at least 2,000 acres, that is located in or near the city. The purpose and effect of the adoption and certifying of

the master plan or part of the plan shall be solely to aid the city plan commission and the council in the performance of their duties.

(4) MISCELLANEOUS POWERS OF THE COMMISSION.

The commission may make reports and recommendations relating to the plan and development of the city to public officials and agencies, public utility companies, civic, educational, professional and other organizations, and citizens. It may recommend to the mayor or council, programs for public improvements and the financing thereof. All public officials shall, upon request, furnish to the commission, within a reasonable time, such available information as it may require for its work. The commission, its members and employees, in the performance of its functions, may enter upon any land, make examinations and surveys, and place and maintain necessary monuments and marks thereon. In general, the commission shall have such powers as may be necessary to enable it to perform its functions and promote municipal planning.

(5) MATTERS REFERRED TO CITY PLAN COMMISSION.

The council, or other public body or officer of the city having final authority thereon, shall refer to the city plan commission, for its consideration and report before final action is taken by the council, public body or officer, the following matters: The location and architectural design of any public building; the location of any statue or other memorial; the location, acceptance, extension, alteration, vacation, abandonment, change of use, sale, acquisition of land for or lease of land for any street, alley or other public way, park, playground, airport, area for parking vehicles, or other memorial or public grounds; the location, extension, abandonment or authorization for any public utility whether publicly or privately owned; all plats of lands in the city or within the territory over which the city is given platting jurisdiction by ch. 236; the location, character and extent or acquisition, leasing or sale of lands for public or semipublic housing, slum clearance, relief of congestion, or vacation camps for children; and the amendment or repeal of any ordinance adopted pursuant to this section. Unless such report is made within 30 days, or such longer period as may be stipulated by the common council, the council or other public body or officer, may take final action without it.

(6) OFFICIAL MAP.

(a) As used in this subsection, "waterways" includes rivers, streams, creeks, ditches, drainage channels, watercourses, lakes, bays, ponds, impoundment reservoirs, retention and detention basins, marshes and other surface water areas, regardless of whether the areas are natural or artificial.

(am)

1. In this paragraph:

a. "Airport" means ... .

b. "Airport affected area" means ... .

2. [omitted; pertaining to airports]

(b) The council of any city may by ordinance or resolution establish an official map of the city or any part thereof showing the streets, highways, historic districts, parkways, parks and playgrounds laid out, adopted and established by law. The city may also include the location of railroad rights-of-way, waterways and public transit facilities on its map. A city may include a waterway on its map only if the waterway is included in a comprehensive surface water drainage plan. The map is conclusive with respect to the location and width of streets, highways, waterways and parkways, and the location and extent of railroad rights-of-way, public transit facilities, parks and playgrounds shown on the map. The official map is declared to be established to conserve and promote the public health, safety, convenience or general welfare. The ordinance or resolution shall require the city clerk at once to record with the register of deeds of the county or counties in which the city is situated a certificate showing that the city has established an official map. An ordinance or resolution establishing any part of an official map enacted prior to June 16, 1965, which would be valid under this paragraph is hereby validated.

(c) The city council may amend the official map of the city so as to establish the exterior lines of planned new streets, highways, historic districts, parkways, railroad rights-of-way, public transit facilities, waterways, parks or playgrounds, or to widen, narrow, extend or close existing streets, highways, historic districts, parkways, railroad rights-of-way, public transit facilities, waterways, parks or playgrounds. No such change may become effective until after a public hearing concerning the proposed change before the city council or a committee appointed by the city council from its members, at which parties in interest and citizens shall have an opportunity to be heard. ***

(d) The locating, widening or closing, or the approval of the locating, widening or closing of streets, highways, waterways, parkways, railroad rights-of-way, public transit facilities, parks or playgrounds by the city under provisions of law other than this section shall be deemed to amend the official map, and are subject to this section, except that changes or additions made by a subdivision plat approved by the city under ch. 236 do not require the public hearing specified in par. (c) if the changes or additions do not affect any land outside the platted area.

(e) No permit may be issued to construct or enlarge any building within the limits of any street, highway, waterway, railroad right-of-way, public transit facility or parkway, shown or laid out on the map except as provided in this section. The street, highway, waterway, railroad right-of-way, public transit facility or parkway system shown on the official map may be shown on the official map as extending beyond the boundaries of a city or village a distance equal to that within which the approval of land subdivision plats by the city council or village board is required as provided by s. 236.10 (1) (b) 2. Any person desiring to construct or enlarge a building within the limits of a street, highway, railroad right-of-way, public transit facility or parkway so shown as extended may apply to the authorized official of the city or village for a building permit. Any person desiring to construct or enlarge a building within the limits of a street, highway, waterway, railroad right-of-way, public transit facility or parkway shown on the official map within the

incorporated limits of the municipality shall apply to the authorized official of the city or village for a building permit. ***

(f) In any city in which there is no such board of appeals, the city council shall have the same powers and shall be subject to the same restrictions. For this purpose such council is authorized to act as a discretionary administrative or quasi-judicial body. When so acting it shall not sit as a legislative body but in a separate meeting and with separate minutes kept.

(g) Before taking any action authorized in this subsection, the board of appeals or city council shall hold a hearing at which parties in interest and others shall have an opportunity to be heard. ***

(h) In any city which has established an official map as herein authorized no public sewer or other municipal street utility or improvement shall be constructed in any street, highway or parkway until such street, highway or parkway is duly placed on the official map.***

(i) In those counties where the county maintains and operates parks, parkways, playgrounds, bathing beaches and other recreational facilities within the limits of any city, such city shall not include said facilities in the master plan without the approval of the county board of supervisors.

(7) ZONING.

(ab) Definition. In this subsection "nonconforming use" means a use of land, a dwelling, or a building that existed lawfully before the current zoning ordinance was enacted or amended, but that does not conform with the use restrictions in the current ordinance.

(am) Grant of power. For the purpose of promoting health, safety, morals or the general welfare of the community, the council may regulate and restrict by ordinance, subject to par. (hm), the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, mining, residence or other purposes if there is no discrimination against temporary structures. This subsection and any ordinance, resolution or regulation enacted or adopted under this section, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated. This subsection may not be deemed a limitation of any power granted elsewhere.

(b) Districts. For any and all of said purposes the council may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings and for the use of land throughout each district, but the regulations in one district may differ from those in other districts. ***

(c) Purposes in view. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other

dangers; to promote health and the general welfare; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to encourage the protection of groundwater resources; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; and to preserve burial sites, as defined in s. 157.70 (1) (b) . Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city.

(d) Method of procedure. [omitted]

(da) Interim zoning. The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance but shall be effective for no longer than 2 years after its enactment.

(e) Board of appeals. [omitted]

(ea) Filing fees. [omitted]

(em) Historic preservation. [omitted]

(f) Enforcement and remedies. [omitted]

(g) Conflict with other laws. Wherever the regulations made under authority of this section require a greater width or size of yards, courts or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this section shall govern. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts or other open spaces, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this section, the provisions of such statute or local ordinance or regulation shall govern.

(gm) Permits. Neither the city council, nor the city plan commission, nor the city plan committee of the city council, nor the board of appeals may condition or withhold approval of a permit under this section based upon the property owner entering into a contract, or discontinuing, modifying, extending, or renewing any contract, with a 3rd party under which the 3rd party is engaging in a lawful use of the property.

(h) Nonconforming uses. [omitted]

(hb) Repair and maintenance of certain nonconforming structures. [omitted]

(hc) Restoration of certain nonconforming structures. [omitted]

(he) Antenna facilities. [omitted]

(hf) Amateur radio antennas. [omitted]

(hg) Amortization prohibited. [omitted]

(hi) Payday lenders. [omitted]

(hm) Migrant labor camps. [omitted]

(i) Community and other living arrangements. [omitted]

(7a) EXTRATERRITORIAL ZONING. [omitted]

(8) OTHER MEASURES OF ENFORCEMENT AND REMEDIES; PENALTY [omitted]

(9) BUILDING INSPECTION. [omitted]

(9a) MAY EXERCISE POWERS OF BOARD OF PUBLIC LAND COMMISSIONERS. [omitted]

(10) WIDENING STREETS. [omitted]

(11) BUILDING LINES. [omitted]

(13) FUNDS. [omitted]

(14) ASSESSMENTS. [omitted]

(15) EXCESS CONDEMNATION. [omitted]

(16) BENEFITS FROM PUBLIC BUILDINGS.[omitted]

(17) ACQUIRING LAND.[omitted]

(18) LAKES AND RIVERS.

The city may improve lakes and rivers within the city and establish the shorelines thereof so far as existing shores are marsh, and where a navigable stream traverses or runs along the border of a city, such city may make improvements therein throughout the county in which such city shall be located in aid of navigation, and for the protection and welfare of public health and wildlife.

WIS. STATS. 802.05:

Signing of pleadings, motions, and other papers; representations to court; sanctions.

(1) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, electronic mail address, and state bar number, if any. Any attorney or party signing a paper under this section shall designate and provide the court with a primary electronic mail address and shall be responsible for the accuracy of and any necessary changes to the electronic mail address provided to the court. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(2) Representations to court. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:

(a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(b) The claims, defenses, and other legal contentions stated in the paper 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.

(c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so

identified, are reasonably based on a lack of information or belief.

(2m) Additional representations to court as to preparation of pleadings or other documents. An attorney may draft or assist in drafting a pleading, motion, or document filed by an otherwise self-represented person. The attorney is not required to sign the pleading, motion, or document. Any such document must contain a statement immediately adjacent to the person's signature that "This document was prepared with the assistance of a lawyer," followed by the name of the attorney and the attorney's state bar number. The attorney providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false, or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

(3) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation in accordance with the following:

(a) How initiated.

1. 'By motion.' A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate sub. (2). The motion shall be served as provided in s. 801.14, but shall not be filed with or presented to the court unless, within 21 days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion reasonable expenses and attorney fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

2. 'On court's initiative.' On its own initiative, the court may enter an order describing the specific conduct that appears to violate sub. (2) and directing an attorney, law firm, or party to show cause why it has not violated sub. (2) with the specific conduct described in the court's order.

(b) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subds. 1. and 2., the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation subject to all of the following:

1. Monetary sanctions may not be awarded against a represented party for a violation of sub. (2) (b).

2. Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(c) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(4) Prisoner litigation. ***

(5) Inapplicability to discovery. **

WIS. STATS. 809.22:

Rule (Oral argument).

(1) The court shall determine whether a case is to be submitted with oral argument or on briefs only.

(2) The court may direct that an appeal be submitted on briefs only if:

(a) The arguments of the appellant:

1. Are plainly contrary to relevant legal authority that appear to be sound and are not significantly challenged;

2. Are on their face without merit and for which no supporting authority is cited or discovered; or

3. Involve solely questions of fact and the fact findings are clearly supported by sufficient evidence; or

(b) The briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant.

(3) The court shall determine the amount of time for oral argument allowed to each party in a case either by general or special order.

(4) On motion of any party or its own motion, the court may order that oral argument be heard by telephone.

WIS. STATS. 895.044:

Damages for maintaining certain claims and counterclaims.

(1) A party or a party's attorney may be liable for costs and fees under this section for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal to which any of the following applies:

(a) The action, special proceeding, counterclaim, defense, cross complaint, or appeal was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense, cross complaint, 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.

(2) Upon either party's motion made at any time during the proceeding or upon judgment, if a court finds, upon clear and convincing evidence, that sub. (1) (a) or (b) applies to an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense, or cross complaint commenced, used, or continued by a defendant, the court:

(a) May, if the party served with the motion withdraws, or appropriately corrects, the action, special proceeding, counterclaim, defense, or cross complaint within 21 days after service of the motion, or within such other period as the court may prescribe, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section. In determining whether to award, and the appropriate amount of, damages under this paragraph, the court shall take into consideration the timely withdrawal or correction made by the party served with the motion.

(b) Shall, if a withdrawal or correction under par. (a) is not timely made, award to the party making the motion,

as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section.

(3) If a party makes a motion under sub. (2), a copy of that motion and a notice of the date of the hearing on that motion shall be served on any party who is not represented by counsel only by personal service or by sending the motion to the party by registered mail.

(4) If an award under this section is affirmed upon appeal, the appellate court shall, upon completion of the appeal, remand the action to the trial court to award damages to compensate the successful party for the actual reasonable attorney fees the party incurred in the appeal.

(5) If the appellate court finds that sub. (1) (a) or (b) applies to an appeal, the appellate court shall, upon completion of the appeal, remand the action to the trial court to award damages to compensate the successful party for all the actual reasonable attorney fees the party incurred in the appeal. An appeal is subject to this subsection in its entirety if any element necessary to succeed on the appeal is supported solely by an argument that is described under sub. (1) (a) or (b).

(6) The costs and fees awarded under subs. (2), (4), and (5) may be assessed fully against the party bringing the action, special proceeding, cross complaint, defense, counterclaim, or appeal or the attorney representing the party, or both, jointly and severally, or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(7) This section does not apply to criminal actions or civil forfeiture actions. Subsection (5) does not apply to appeals under s. 809.107, 809.30, or 974.05 or to appeals of criminal or civil forfeiture actions.

ONEIDA COUNTY ZONING AND SHORELAND PROTECTION ORDINANCE

CHAPTER 9

ARTICLE 1 - GENERAL PROVISIONS

9 10 STATUTORY AUTHORIZATION

This comprehensive revision to the Oneida County Zoning and Shore land Protection Ordinance is adopted pursuant to the authorization contained in the following sections of the Wisconsin Statutes: 59.03, 59.69, 59.692, 59.694, 281.31, 293.33, 144.839, 236.45, 30.12(3)(c), and 30.13(2).

9.11 PURPOSE- UNDERLYING ORDINANCE

It is the purpose of this ordinance to promote the public health, safety, convenience and general welfare, to encourage planned and orderly land use development, to protect property values and the property tax base; to permit the careful planning and efficient maintenance of highway systems; to insure adequate highway, utility, health, educational and recreational facilities, to recognize the needs of agriculture, forestry, industry and business in future growth; to encourage uses of land and other natural resources which are in accordance with their character and adaptability; to preserve wetlands, to conserve soil, water and forest resources; to protect the beauty and amenities of landscape and man-made developments, and to protect healthy surroundings for family life.
It is further the goal of this ordinance to promote the following specific purposes:

A. Prevent and control water pollution through:

1. Requiring setbacks between septic tanks and soil absorption

systems from lakes and other watercourses.

2. Regulating the use of septic tanks and soil absorption systems to protect the public health, safety and general welfare, and

3. Requiring alternate methods of sewage disposal where land conditions make soil absorption methods unsuitable.

B. Further the maintenance of safe and healthful conditions through:

1. Regulating the location and installation of septic tanks.

2. Limiting structures to those areas where soil and geologic conditions will assure optimal operation

3. Regulating the location of wells.

C. Protect spawning grounds, fish and aquatic life through:

1. Preserving wetlands and other fish and aquatic habitat.

2. Regulating pollution sources.

3. Controlling shoreline alterations, dredging and lagooning.

D. Control building sites, placement of structures and land uses through:

1. Separating conflicting land uses.

2. Prohibiting certain uses detrimental to the shoreland area.

3. Setting minimum lot sizes and widths.

4. Regulating side yards and building setbacks from roadways and waterways.

5. Requiring the platting of subdivisions.

6. Establishing minimum lot sizes.

E. Preserve shore cover and natural beauty through:

1. Restricting the removal of natural shoreland cover.

2. Preventing shoreline encroachment by structures.

3. Controlling shoreland excavation and other earth moving activities.

4. Regulating the use and placement of boathouses and other structures.

9.12 APPLICABILITY

A. State Agencies and Municipalities Regulated

Unless specifically exempted by law, all cities, villages, towns and counties are required to comply with this ordinance and obtain all necessary permits. State agencies are required to comply when sec. 13.48(13), Wis. Stats. applies. The construction, reconstruction, maintenance and repair of state highways and bridges by the Wisconsin Department of Transportation, are exempt when sec. 30.12(4)(a), Wis. Stats., applies.

B. Jurisdiction

The general zoning provisions of this ordinance, consisting of Articles 1, 2, 3, 4, 5, 6, 7, 8 and 10, shall apply in all town territory, subject to town approval as provided m sec. 59.69(5), Wis. Stats.

The shoreland protection provisions of this ordinance contained m Article 9, including any provisions incorporated therein, shall apply and control throughout the County in all shorelands as provided under sec. 59.692, Wis. Stats.

ARTICLE 2 - ZONING DISTRICTS

9.20 Zoning Districts
9.21 Forestry (Districts 1-A, 1-B, and 1-C)
9.22 Single Family Residential (District 2)
9.23 Multiple Family Residential (District 3)
9.24 Residential/Farming (District 4) and Residential/Retail (District 14)
9.25 Recreational (District 5)
9.26 Business B-1 and B-2 (Districts 6 and 7)
9.27 Manufacturing and Industrial (District 8)
9.28 General Use (District 10)
9.29 Rural Residential (District 15)

9 20 ZONING DISTRICTS

A. Districts Created

The following zoning districts are created:

District 1-A - Forestry
District 1-B - Forestry
District 1-C - Forestry
District 2 - Single Family Residential
District 3 - Multiple Family Residential
District 4 - Residential and Fanning
District 5 - Recreational
District 6 - Business (B-1)
District 7 - Business (B-2)
District 8 - Manufacturing and Industrial
District 10 - General Use
District 11 - Shore land-Wetland District*
District 14 - Residential and Retail
District 15 - Rural Residential

*Note that the specific provisions applicable to the Shoreland-Wetland District are contained in section 9.91 of this ordinance.

B. District Boundaries

The boundaries of each of the zoning districts shall follow (1) the line or lines extended indicated on the United States General Land Office survey maps, oi' (2) along meandered streams or lakes, or (3) along railroad right-of- ways, highways, boundaries or recorded plats or along any recognizable or clearly definable line.

The boundaries of the zoning districts are as shown on the current Oneida County Official Zoning Map, as designated by the Zoning Administrator, and as subsequently amended: 1"= 400' scale wetland boundary maps for the Town of Lynne, dated June 1, 1993; the Wisconsin Wetland Inventory Maps for all towns in Oneida County other than the Town of Lynne, stamped "Final" on December 15, 1983; and revised Wisconsin Wetland Inventory Maps for the Town of Lynne, stamped "Final" on June 15, 1993, which are hereby adopted and made a part of this ordinance. If a discrepancy exists between the wetland boundaries shown on the 1" = 400', scale wetland boundary maps for the Town of Lynne and the revised Wisconsin Wetland Inventory Maps for the Town of Lynne, the wetland boundaries shown on the revised Wisconsin Wetland Inventory Maps shall be used to delineate the boundaries of District 11, the Shore land-Wetland District. Detailed legal descriptions of the boundaries of the zoning districts are contained m the Master Zoning District Document maintained by the Department. In the event of a conflict between the boundaries of the Zoning Districts contained in the Master Zoning District Document and the Oneida County Zoning Map, the boundaries contained in the Master Zoning District Document shall govern and prevail.

C. Condominiums - Generally

The provisions of this ordinance apply to condominiums.

D. Types of Uses - Generally

Three types of principal uses are allowed in each zoning district - permitted uses, administrative review uses, and conditional uses. The purpose of the three types of uses is to provide more flexibility and to streamline the zoning process.

1. Permitted uses

Only the permitted use specified for a zoning district, services essential to the permitted use, and its accessory uses shall be permitted in that district as a matter of right.

Generally, a zoning permit must be issued by the Zoning Administrator before a permitted use may occur. (See sections 9.31 to 9.33.) In some instances, the Zoning Administrator may add specific conditions to the issuance of a zoning permit. (See sections 9.35 and 9.36.)

2. Administrative review uses

Each zoning district has uses that are identified as administrative review uses. The purpose of this delineation is to allow expedited action on those uses that might otherwise be designated as conditional uses requiring full Committee review and action.

Administrative review uses are those uses and their accessory uses that, while compatible with the permitted uses for the district, generally require that specific conditions be imposed on the use to fulfill the purpose of the zoning district and this ordinance. Pursuant to section 9.36, an administrative review permit containing specific conditions must be issued by the Zoning Administrator before such a use may occur.

3. Conditional uses

Conditional uses and their accessory uses are those uses which, because of their unique characteristics, cannot properly be allowed without consideration of the impact of those uses. Such uses may be allowed subject to the specific limitation, review, and approval provisions for conditional uses provided in this ordinance.

E. Accessory Uses and Structures (#83-2003, #35-2004, & #07 -2005)

Accessory uses and structures shall not be permitted in the Single-Family Residential District (District 2), the Multiple-Family Residential District (District 3), the Residential and Retail District (District 14), and the Rural Residential District (District 15) until the principal structure is constructed or under construction. However, an accessory structure may be constructed prior to construction of a residence if:

(1)The accessory structure has no plumbing.

(2) The accessory structure shall be used exclusively for personal storage only, not for rental or lease of space.

(3) Human occupancy is prohibited.

(4) The maximum size of the structure is 1008 square feet.

In those towns that have village powers and have passed a moratorium in accordance with State Statute, County zoning permits shall not be issued for accessory structures on lots on which there is no principal structure or zoning permit for the same for a period of 180 days beginning immediately upon enactment by the County Board and publication until regulatory controls are adopted by the County or applicable Town, whichever is sooner.

F. Unclassified and Unspecified Uses

Unclassified or unspecified uses are presumed to be prohibited unless authorized by the Committee after review and recommendation of the Zoning Administrator, provided that such uses are compatible with the permitted uses, administrative review uses, or conditional uses allowed in that district.

9.21 FORESTRY DISTRICTS 1-A, 1-B, and 1-C
(Amended #14-2001,19-2001, 07-2004,14-2008) * * *

9.22 SINGLE FAMILY RESIDENTIAL (DISTRICT 2) (#08-2000, 19-2001, 83-2003 & 11-2004, 14- 2008)

A. Purpose

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.

B. Permitted Uses

1. Single family dwellings, including long-term single-family rental and lease arrangements requiring a 30 consecutive day minimum length of stay.

2. Community and other living arrangements as allowed by sec. 59.69, Wis. Stats., that are properly licensed by the appropriate state agency and that have the capacity for eight or fewer persons.

3. Silviculture

4. Gardens and greenhouses for home use

5. Historical markers

6. Growing and harvesting of any wild crop such as wild rice, ferns, mosses, berries, mushrooms, tree fruits and seeds, and marsh hay.

7. An accessory structure may be constructed on a vacant unimproved lot but only in conformity with Section 9.20(E).

C. Administrative Review Uses

1. Cemeteries

2. Day care centers if a home occupancy, and only in accordance with the provisions of section 9.43 regarding home occupations

3. Telephone and public utility lines and transmission facilities. Communication structures regulated pursuant to section 9.54 are prohibited in this district, except for government owned or contracted operations

4. Customary home occupations, provided the space requirements do not exceed that which is customary for a family dwelling and accessory buildings and only in accordance with the provisions of section 9.43 regarding home occupations

5. Professional and service offices such as: doctor, dentist, lawyer, accountant, insurance, artist and musician when situated ill a dwelling and only in accordance with the provisions of section 9.43 regarding home occupations

6. Bed and breakfast establishments with 2 or fewer guest rooms

D). Conditional Uses

1. Churches, schools, libraries, community buildings and museums

2. Community living arrangements with 9 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 3 or more guest rooms

5. Public parks and playgrounds

6. Pre-existing, licensed resorts, hotels, motels and tourist rooming houses, individual unit replacements or expansions consistent with the number' and/or square footage permitted under Appendix A

E. Prohibited Uses

Any expansions in size, capacity or hours of operation are strictly prohibited for existing, camps, campgrounds, marinas, and business establishments other than D{6) above, located in the Single Family Residential District that were established and operating prior to December 27, 2004.

F. Minimum Lot Sizes

The minimum lot size requirements for the Single Family Residential District are contained in Appendix A, which is incorporated herein by reference. For any lot or tract of land that does not meet the minimum size requirements for this district as set forth in Appendix A, see Section 9.75 of this ordinance.

9.23 MULTIPLE FAMILY RESIDENTIAL (DISTRICT 3) (#19-2001, 83-2003, 11-2004, 28- 2005, & 18-2006)
* * *

9.24 RESIDENTIAL AND FARMING (DISTRICT 4)
(#1-2005,11-2008)) RESIDENTIAL AND RETAIL (DISTRICT 14) (#19-2001, 65-2002, & 83-2003)

A. RESIDENTIAL AND FARMING (DISTRICT 4)

1. Purpose

The purpose of the Residential and Farming District is to provide an area for residential, limited commercial and agricultural development m a rural atmosphere.

2. Permitted Uses

a. All the permitted uses of District 3 Multiple Family Residential

b. The keeping of personal livestock and poultry, hobby farms, horses

c. Sale of farm produce provided the produce is raised or produced on the same premises, and the erection of structures required m connection therewith

3. Administrative Review Uses

a. All the administrative review uses under District 3 Multiple Family Residential

b. Commercial greenhouses

4. Conditional Uses

a. All the conditional uses of District 3 Multiple Family Residential

b. Commercial agriculture, horticulture and fanning operations

c. Commercial stables or riding academies

d. Airports and landing fields

e. Mobile home, manufactured home and house trailer parks, only in accordance with the provisions of section 9.52, and provided they otherwise comply with this ordinance

f. Schools

g. Trap and skeet shooting and rifle, pistol, and archery ranges

h. Contractor storage yards

i. Retail or wholesale business

j. Non-metallic mining

k. Metallic mineral exploration

1. Dog kennels and/or cat boarding facilities

m. Animal shelters, as defined in Wis Stats.,173,40(c).

n. Wildlife rehabilitation centers pursuant to Wis. Administrative Code NR 19 or facilities subject to a federal permit

o. Veterinary clinics or animal hospitals

p. Structures used in communications subject to Section 9.54

5. Minimum Lot Sizes

The minimum lot size requirements for the Residential and Farming District are contained in Appendix A, which is incorj3orated herein by reference. For any lot or tract of land that does not meet the minium size requirements for this district as set forth in Appendix A, see Section 9.75 of this ordinance.

B. RESIDENTIAL AND RETAIL (DISTRICT 14)

* * *

9.25 RECREATIONAL (DISTRICT 5) (#19-2001 & 1-2005)

A. Purpose

The purpose of the Recreational District is to provide an area for the orderly and attractive grouping of recreational oriented service establishments as well as encouraging the maintenance and enjoyment of the County's natural resources.

B. Permitted Uses

1. All the permitted uses of District 3 Multiple Family Residential.

2. Personal stables, not to exceed more than 1 animal/ head of livestock per acre.

C. Administrative Review Uses

1. All the administrative review uses of District 3 Multiple Family Residential

2. Boat liveries, boat storage, and sale of bait

3. Recreational camps with more than 1 principal structure

4. Commercial riding academies

5. Gift and specialty shops customary in a recreation district

6. Servicing of marine, snowmobile, and other recreational vehicles

D. Conditional Uses

1. All the conditional uses of District 3 Multiple Family Residential 3 Multiple Family Residential
2. Hotels, motels, and resorts (with 5 or more units)
3. Mobile home, manufactured home and house trailer parks, only in accordance with the provisions of section 9.52, and provided they meet the requirements of this ordinance
4. Restaurants, dinner clubs, taverns, and other private clubs
5. Amusement parks and drive-in theaters
6. Marinas and/or boat launching areas
7. Schools
8. Campgrounds
9. Telephone exchanges and rights-of-way for transmission facilities, telephone, power, utility lines, and structures used in communication
10. Golf grounds
11. Dog kennels and/or cat boarding facilities
12. Animal shelters, as defined m Wis. Stats.,173.40(c)
13. Wildlife rehabilitation centers pursuant to Wis. Administrative Code NR19 or facilities subject to a federal permit
14. Veterinary clinics or animal hospitals

E. Minimum Lot Sizes

The minimum lot size requirements for the Recreational District are contained in Appendix A, which is incorporated herein by reference. For any lot or tract of land that does not meet the minimum size requirements for this district as set forth in Appendix A, see Section 9.75 of this ordinance.

* * *

9.28 GENERAL USE (DISTRICT 10) (#19-2001)

A. Purpose

The purpose of the General Use District is to provide areas for a variety of mixes uses.

B. Permitted Uses / Administrative Review Uses /Conditional Uses

All the same provisions applying to permitted uses, administrative review uses and conditional uses (but not special conditional uses) in the following districts - Forestry, Single Family, Multiple Family, Residential and Farming, Recreational, Business (B-1), Business (B-2), and Manufacturing and Industrial also apply to the General Use District and are incorporated herein by reference.

* * *

ARTICLE 4 - CONDITIONAL USES AND STRUCTURES/HOME OCCUPATIONS

9.40 Conditional Uses

9.41 Application for CUP

9.42 CUP Application Review Process

9.43 Home Occupations

9.40 CONDITIONAL USES

A. Purpose

This ordinance is based upon the division of the County into districts, within which districts the use of land and buildings, and location of buildings and structures in relation to the land, are mutually

compatible. However, there are certain uses that, because of their unique characteristics, cannot be properly classified as unrestricted permitted uses in any particular district or districts without consideration of the impact of those uses upon neighboring land or public facilities, and of the public need for the particular use. Such uses, nevertheless, may be necessary or desirable to be allowed m a particular district provided that due consideration is given to location, development and operation of such uses. Such uses are classified as conditional uses.

B. Conditional Use Permit

Conditional uses are allowed only upon the issuance of a conditional use permit (CUP), as provided in sections 9.41 and 9.42 of this ordinance. Where applicable, a CUP is required in addition to a zoning permit under Article 3 above.

9.41 APPLICATION FOR CUP

A. Applicant

Any person having ownership interest in property, an exclusive possessory interest, or a contractual interest in property that may become an ownership or exclusive possessory interest, may apply for a CUP. Prior to final approval of the CUP, the entire tract covered by the CUP or proposed project shall be either under single ownership, evidenced by legal title or binding sales contract or under lease or such other legal control over the land and proposed use which is sufficient to insure that the applicant will be able to carry out the proposed project and assume all liability for the project which would normally be assumed under full land ownership.

B. Application Fee

The application fee as periodically designated by the County Board shall be paid when the application is filed.

C. Filing of Application

Application for a CUP shall be made on forms approved by the Committee and available at the Department. A completed application, together with the applicable CUP application fee shall be filed with the Department. A minimum of 3 copies of the completed application must be filed, and the Zoning Administrator may request up to 7 additional copies without charge. The Zoning Administrator shall immediately

initial and date one copy of the application when received.

D. Additional information

In addition to the information obtained on the application, the Zoning Administrator and/or Committee may request any additional information deemed necessary or appropriate for review.

9.42 CUP APPLICATION REVIEW PROCESS
(Amend #2-2008, 9-2009)

A. Completed Applications Referred to Committee

1. The application shall first be reviewed by the Zoning Administrator for completeness. When it is deemed complete by the Zoning Administrator, a notation of completeness shall be made on the application, and it shall be referred to the Committee.

2. When a DNR permit or U.S. Corps of Engineers permit is required in order to undertake or complete the proposed project copies of these permits must be attached to the CUP application. The CUP application will not be deemed complete until these other necessary permits are provided.

B. Town Recommendation, Notice and Public Hearing

The Committee shall seek an advisory recommendation from the town board of the town in which the proposed conditional use is located and shall hold a public hearing on the completed application. Notice of the healing shall be published as a Class 2 notice pursuant to Ch. 985, Wis. Stats. In addition, at least 10 days prior to the date of the public hearing, written notice of the application and public hearing shall be mailed to the following:

1. The clerk of any municipality exercising extraterritorial jurisdiction where the proposed conditional use is located

2. The clerk of the town where the proposed conditional use is located

3. The applicant

C. Issuance or Denial of Application

1. Conditional use permit applications shall be reviewed for completeness by the Zoning Administrator within 30 working days of the date the application is filed and the fee is paid. The Committee shall attempt to approve the application, conditionally approve the application, or deny the application within 60 days of receipt of the completed application. However, at its sole discretion, the Committee may extend this review time for up to a total of 180 days after receipt of the completed application.

2. The Committee may request additional information from the applicant, the town, or others after the receipt of the completed application. If any comments or recommendations are timely received from the town, the Committee, in making its decision, shall consider but is not bound by the town's input.

3. If the application is approved or conditionally approved, the Zoning Administrator shall issue a written CUP with any conditions attached. The Zoning Administrator may require that the applicant and/or property owner sign a recordable CUP agreement expressly accepting the permit conditions.

4. If the application is denied, written reasons for the denial shall be provided to the applicant along with a notice of the applicant's light to appeal the denial to the Board of Adjustment.

I). Conditions

The Committee may attach conditions to the CUP deemed necessary or appropriate in furthering the purposes of this ordinance. Such factors to be considered may include, but are not limited to the following:

1. Landscaping
2. Type of construction
3. Sureties
4. Lighting
5. Fencing
6. Planting
7. Screening
8. Operational control
9. Period of operation
10. Improved traffic circulation
11. Deed restrictions
12. Free and unlimited access to the project site during daylight hours to any Committee member or any Planning and Zoning employee investigating the project's construction, operation or

maintenance

13. Written notification of the Department at least five days before the project is started and five days after each phase of the project is completed.
14. The conditions contained in section 9.97(F).
15. Parking requirements
16. Erosion control
17. Stormwater management
18. Signage
19. Construction schedule
20. An acknowledgment that the nature and extent of the conditional use shall not change from that described m the application and approved m the CUP

E. General Standards for Approval of CUP

No application for a CUP shall be approved oi' conditionally approved, unless the Committee finds that the following standards are fulfilled:

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 m the public streets.

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

8. The conditional use does not violate shore land 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

* * *

Appendix A
(Amend #30-2004, 19-2006, 14-2008)

Minimum lot area and dimensional requirements for uses and zoning districts

Acronyms

RFW = riparian frontage width

ALW = average lot width

frt. = frontage

• All uses not list shall have a minimum lot size as determined by the Zoning Administrator

District 5 Recreational

Use	Class 1 Waterways 50 Acres or less	Class II Waterways Greater than 50 Acres includes rivers and streams	Unsewered back lot	Sewered back lot
Single Family Dwelling Unit	Area = 50,000 RFW = 200' ALW = 150'	Area = 20,000 sq.ft. RFW = 100' ALW = 100'	50,000 sq ft 100' width	10,000 sq ft 100' width
Multi-Family Dwelling Units including Additional Dwelling Unit(s), Boarding and Lodging House(s), Hospitals, Sanitariums, Convalescent, Nursing, and Community Living Arrangements, Hotels/Motels, Marine, Snowmobile and recreational vehicle service	Area = 50,000 sq.ft. RFW = 200' ALW = 150' Each additional dwelling unit requires Area + 25,000 sq.ft. RFW + 100' ALW + 75'	Area = 20,000 sq.ft. RFW = 100' ALW = 100' Each additional dwelling unit requires Area + 15,000 sq.ft. RFW + 40' ALW + 40'	50,000 sq ft + 8,000 each unit Over 1st one	10,000 sq ft + 5,000 each unit Over 1st one
Private clubs, boat liveries, storage and landings, bait sales, restaurants, taverns, and dinner clubs	Area = 50,000 RFW = 200' ALW = 150'	Area = 20,000 sq.ft. RFW = 100' ALW = 100'	50,000 sq ft 100' frt & width	10,000 sq ft 100' frt & width
Cemeteries, Personal stables, Drive-in Theaters, Commercial Riding Acadamies	5 Acres 300' frt&width	5 Acres 300' frt&width	5 Acres 300' frt&width	5 Acres 300' frt&width
Livestock and poultry housing, Dog kennels and/or cat boarding facilities or animal shelters, Wildlife rehabilitation centers pursuant to Wis. Administrative Code NR 19 or facilities subject to a federal permit.	5 Acres 300' frt. & width	5 Acres 300' frt. & width	5 Acres 300' frt. & width	5 Acres 300' frt. & width
Veterinary Clinics or animal hospitals	Area = 50,000 RFW = 200' ALW = 150'	Area = 20,000 sq.ft. RFW = 100' ALW = 100'	50,000 sq.ft. 100' width	10,000 sq.ft. 100' width
Clinics, Schools, Churches, Libraries, and Community Buildings, Museums	Area = 50,000 RFW = 200' ALW = 150'	Area = 20,000 sq.ft. RFW = 100' ALW = 100'	50,000 sq ft 100' width	10,000 sq ft 100' width
Golf Grounds, Recreational parks, Manufactured, Mobile home and house trailer parks, Campgrounds, Amusements Parks	20 Acres 500' frt&width	20 Acres 500' frt&width	20 acres 500' width	20 Acres 500' width

- Uses not specifically listed shall have a minimum lot size as determined by the Zoning Administrator

APPENDIX OO

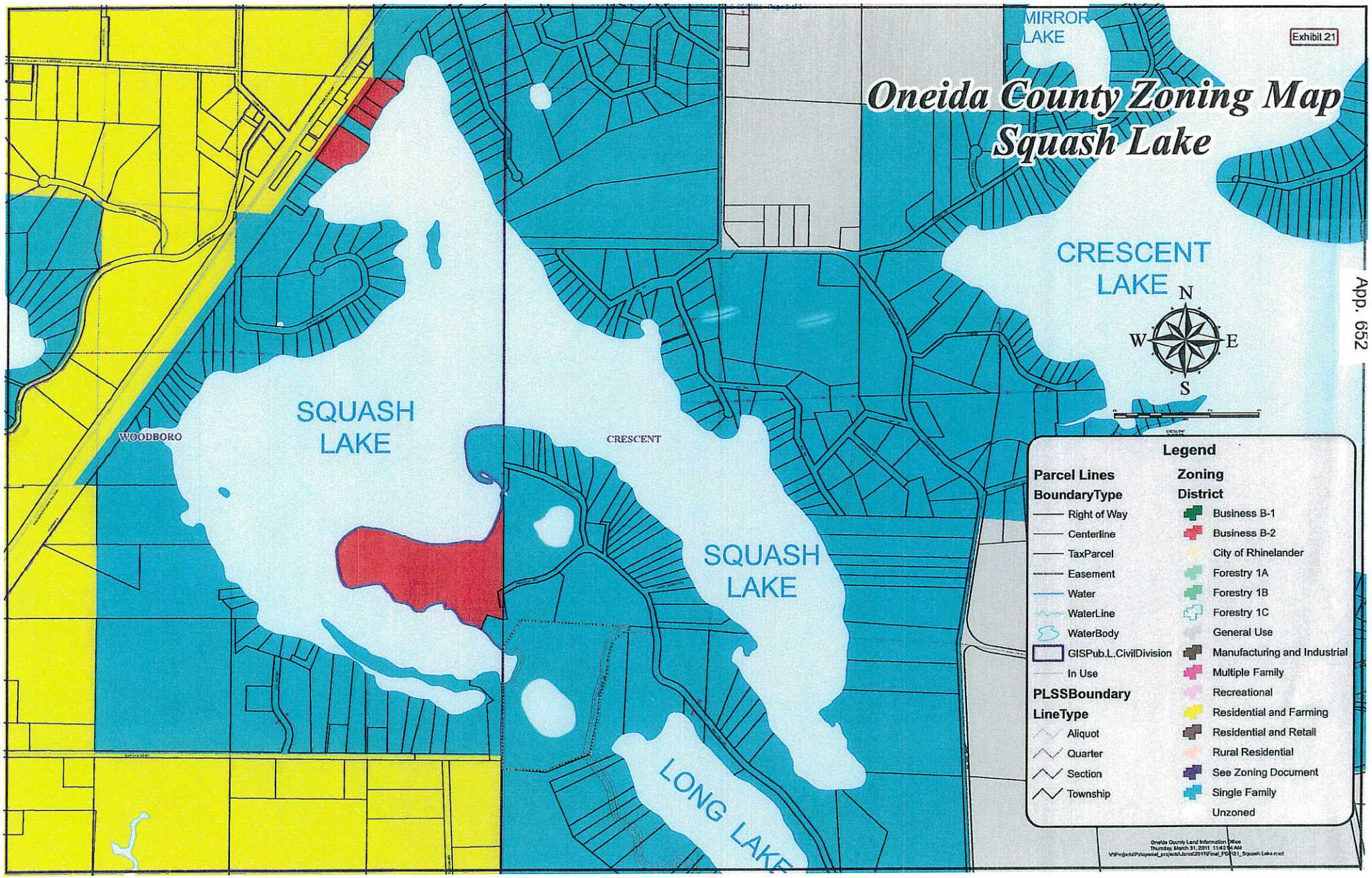
Exhibit 21
Oneida County Zoning Map
Squash Lake
MIRROR LAKE
CRESCENT LAKE
SQUASH LAKE
WOODBORO
CRESCENT
SQUASH LAKE
LONG LAKE
N
W
E
S
Legend
Parcel Lines
BoundaryType
Right of Way
Centerline
TaxParcel
Easement
Water
WaterLine
WaterBody
GISPub.L.CivilDivision
In Use
PLSSBoundary
LineType
Aliquot
Quarter
Section
Township
Zoning
District
Business B-1
Business B-2
City of Rhinelander
Forestry 1A
Forestry 1B
Forestry 1C
General Use
Manufacturing and Industrial
Multiple Family
Recreational
Residential and Farming
Residential and Retail
Rural Residential
See Zoning Document
Single Family
Unzoned
Oneida County Land Information Office
Thursday, March 31, 2011 11:40:14 AM

APPENDIX PP

Sheila T. Reiff
Clerk

WISCONSIN COURT OF APPEALS

OFFICE OF THE CLERK
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Telephone: 608-266-1880
TTY: 800-947-3529
Fax: 608-267-0640
http://www.wicourts.gov

ARTHUR G. JAROS JR.
THE LAW OFFICE OF ARTHUR G. JAROS, JR.
1200 HARGER ROAD, STE. 830
OAK BROOK, IL 60523

Eagle Cove Camp & Conference Center, Inc. v. Oneida County Board of Adjustment

Date: March 5, 2019

District: 3
Appeal No. 2018AP000940
Circuit Court Case No. 2013CV000345

Notice of Submission on Briefs

You are hereby notified that the above case has been **submitted** to the court for consideration and determination on briefs, without oral argument.

Sheila T. Reiff
Clerk of Court of Appeals

Distribution:
Court Original
Arthur G. Jaros Jr.
Charles H. Bohl
James C. Remington
Michael D. Dean
Mark Hazelbaker

APPENDIX QQ

"NO PREFERENCE CLAUSE" ALLEGATIONS

A) Federal Amended Complaint

¶1. *** Finally, Defendants have explicitly taken the position that Bible Camps used as a modality to evangelize is not entitled to the same protection as "churches" and "religious schools," contrary to the Wisconsin Constitution's protection of freedom of worship.

¶14. Christian Bible camp ministries are a vital form of religious exercise, separate and distinct from organized churches and play key roles in bringing persons to Christian faith and in strengthening and maturing the Christian faith of persons who have already professed Christianity. As described in detail below, an important aspect of the Bible Camp will be to specifically minister to youth suffering from serious disabling medical conditions that preclude them from attending many other established Bible camps.

¶147. The COUNTY OF ONEIDA's Board of Adjustment, which took the final agency action on the application for CUP or exemption for religious land use under RLUIPA, discriminates in favor of churches and religious schools, and against other forms of religious exercise, and discriminates against those that practice an Evangelical Christian belief system from other religious traditions.

¶151. The BOA decided in its written decision that "religious exercise" constitutes only church and school uses, thereby discriminating against the religious modality of a Bible camp: "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."

¶177. The Defendants, on the face of their land use regulations and as applied to the Plaintiffs, discriminate in favor of certain forms of religious exercise such as church and religious school uses and against missionary, outreach, and evangelistically oriented religious exercise carried out by Bible camps in the TOWN OF WOODBORO and on the Subject Parcel.

¶201. Defendants have deprived and continue to deprive Plaintiffs of their freedom of worship, as secured by Article I Section 18 of the Wisconsin Constitution **by interfering with** the Plaintiffs' **rights of conscience**, and **by preferring other religious establishments** and **modes of worship**. (emph. added)

B) Circuit Court Amended Complaint

¶23 Christian Bible camp ministries are a vital form of religious exercise, separate and distinct from organized churches and play key roles in bringing persons to Christian faith and in strengthening and maturing the Christian faith of persons who have already professed Christianity. As described in detail below, an important aspect of the Bible Camp will be to specifically minister to youth suffering from serious disabling medical conditions that preclude them from attending many other established Bible camps.

¶166 The COUNTY OF ONEIDA's Board of Adjustment, which took the final agency action on the application for CUP or exemption for religious land use under RLUIPA, adopted an unnecessary interpretation of the OCZSPO which interpretation resulted in a preference for religious exercise in the form of institutional churches and institutional diploma-oriented religious schools over year-around religious camps on the Subject Property and throughout the Town of Woodboro. ***

¶169 The BOA decided in its written decision that "religious exercise" constitutes only church and school uses, thereby discriminating against the religious modality of a Bible camp: "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."

Within Count VI: "Religious Preference, Facial Challenge--Wis. Cons. Art. I §18" and all ensuing Counts VI - XVI:

¶240 As such, the face of the OCZSPO, as so construed, confers a preference upon certain types of religious establishments and/or modes of worship, namely, institutional churches and institutional parochial schools over religious camps including Bible camps, which are thereby unreasonably limited.

Within Count IX: "Substantive Due Process, As Applied Challenge--Wis. Cons. Art. I §1" and all ensuing Counts X - XVI:

¶248 Such reasoning gave preference to certain types of religious establishments, namely, institutional churches and institutional schools, including parochial schools, over religious camps including Bible camps.

¶249. Such reasoning gave preference to certain modes of worship, namely, worship conducted at institutional churches and institutional schools, including parochial schools, over worship conducted at religious camps including Bible camps.

¶250. The adjudicatory process applied by the Defendants to the aforesaid Petition and Application (including appeal) contravened the "no preference" provisions of art. I, § 18 of the Wisconsin Constitution.

¶251 Count VIII of Plaintiffs' federal Amended Complaint in the preceding and now concluded federal litigation alleged that the "Defendants have deprived and continue to deprive Plaintiffs of their freedom of worship, as secured by art. I, §[18] of the Wisconsin Constitution ... by preferring other religious establishments and modes of worship."

¶252. Although the District Court granted and the Seventh Circuit U.S. Court of Appeals affirmed the grant of summary judgment on Count VIII, the Defendants' motion for summary judgment did not address the "no preference" provision of the Wisconsin Constitution and neither the Opinion of the District Court nor the Opinion of the U.S. Court of Appeals addressed that provision.

¶254. In addition, the panel of the U.S. Court of Appeals ignored and did not expressly rule on Plaintiffs' motion, included in their Appellants' Brief to certify a question pertaining to the "no preference" provision to the Wisconsin Supreme Court pursuant to Seventh Circuit Rule 52.

¶255. Accordingly, the federal court grant of summary judgment on all of federal Count VIII without considering the special, specific and unique prohibition on giving preference to one type of religious establishment over another and/or one type of mode of worship over another constituted a manifest misapplication of existing principles that resulted in substantial injustice.

Within Count XII: "Religious Preference, Facial Challenge--Wis. Cons. Art. I §18" and all ensuing Counts XIII - XVI:

¶255. Accordingly, on its face, the OCZSPO affords a preference to churches and parochial schools, both permitted to operate year round, over religious camps that are permitted to operate year round.

¶255. The OCZSPO including its zoning maps thereby on its face contravenes the "no preference" provisions of art. I, § 18 of the Wisconsin Constitution.