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

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

OPINION AND ORDER

Plaintiffs,

vs. 10-cv-118-wmc

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

Defendants.

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

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

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

UNDISPUTED FACTS[1]

A. Overview

1. The Parties

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

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

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

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

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

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

2. The Subject Property

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

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

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

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

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

3. The Planned Bible Camp

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

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

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

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

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

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

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

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[4] Matthew 28:16-20:

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

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

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

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

1. Zoning Districts

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

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

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

2. Conditional Use Permitting Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Petition for Rezoning Process

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

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

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

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

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

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

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

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

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

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

10. Position of affected landowners.

(*Id.* at § 9.86(F).)

4. The Town's Land Use Programs

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

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

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

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

C. Breakdown of Zoning in County and Town

1. Zoning Districts

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

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

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

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

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

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

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

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

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

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

2. Squash Lake Area

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

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

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

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

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

D. Plaintiffs' Rezoning and Conditional Use Applications

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

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

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

1. Rezone Petition

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Conditional Use Permit Application

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

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

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

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

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

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

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

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

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

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

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

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

E. Other Properties in Oneida County

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

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

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

OPINION

Plaintiffs bring the following eleven causes of action against defendants:

(1) RLUIPA Total Exclusion Claim;

(2) RLUIPA Unreasonable Limitation Claim;

(3) RLUIPA Substantial Burden Claim;

(4) RLUIPA Equal Terms Claim;

(5) RLUIPA Discrimination Claim;

(6) Equal Protection Claim;

(7) Free Exercise Claim;

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

(9) ADA Claim

(10) Rehabilitation Act Claim

(11) State Law Certiorari Review.

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

I. RLUIPA Total Exclusion Claim

RLUIPA's total exclusion provision provides:

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

42 U.S.C. § 2000cc(b)(3)(A).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. RLUIPA Unreasonable Limitation Claims

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

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

42 U.S.C. § 2000cc(b)(3)(B).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs' free exercise claim under the First Amendment of the United States Constitution and claim under the Wisconsin Constitution Article 1, § 18 fail for the

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

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

IV. RLUIPA Equal Terms and Nondiscrimination Claims

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

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

[22] Article 1, § 18 of the Wisconsin Constitution provides:

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

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

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

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

42 U.S.C. § 2000cc(b)(2).

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

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

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

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

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

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

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

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

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

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

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

V. Equal Protection Claim

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

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

VI. ADA and Rehabilitation Act Claims

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

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

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

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

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

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

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

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

VII. State Law Claims

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

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

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

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

ORDER

IT IS ORDERED that:

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

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

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

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

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

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

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

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

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

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

Entered this 1st day of February, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge