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**WISCONSIN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN EX REL.
KRISTLE MAJCHRZAK and ROBERT
GLAU d/b/a KRISTLE KLR,

Petitioners-Appellants,

Appeal No. 2022AP001241
Circuit Court Case No. 21-CV-0088

v.

BAYFIELD COUNTY and BAYFIELD
COUNTY BOARD OF ADJUSTMENT,

Respondents-Respondents.

ON APPEAL FROM FINAL ORDER OF THE BAYFIELD COUNTY CIRCUIT
COURT, THE HONORABLE MICHAEL J. BITNEY, PRESIDING

**NON-PARTY BRIEF IN SUPPORT OF RESPONDENTS
ON BEHALF OF LAKE SUPERIOR NOT FOR SALE, INC.**

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INTRODUCTION

Appellant Kristle KLR's approach to this case has not changed since it appeared before the Bayfield County Board of Adjustment ("BOA") in August 2021 and calls to mind the oft-repeated legal aphorism: "If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and facts are against you, pound the table and yell like hell." Carl Sandburg, *The People, Yes* at 181 (Harcourt Brace & Co., First Harvest Edition, 1990). Replete with mischaracterizations and misapplications of Wisconsin law as well as forays into immaterial factual issues,¹ Kristle KLR's table pounding is nothing more than an attempted end run around Bayfield County's Zoning Ordinance and conditional use permitting scheme. This Court should dismiss it as such and affirm Bayfield County's decision denying Kristle KLR's conditional use permit ("CUP") application to harvest and transport artesian water for future bottling, which Bayfield County's Zoning Ordinance simply does not authorize in districts zoned Residential-Recreational Business ("R-RB").

STATEMENT OF INTEREST

LSNFS has a significant interest in the outcome of this litigation and has recognized the potential impact the proposed use could have since LSNFS's founding members became aware of Kristle KLR's CUP application. LSNFS is headquartered in the Town of Clover (Herbster), Wisconsin and was formed in response to Appellants' CUP application to harvest artesian water from property located within the Town of Clover and transport that water for bottling and sale. LSNFS's stated mission is to stop water extraction industries in the Lake Superior Basin through education, cross-cultural and cross-generational organizing, networking, and action. To that end, LSNFS and its members actively participated in the county-level administrative proceedings before the Bayfield County Planning

¹ Respondents' Brief adequately addresses these issues and those arguments will not be repeated here.

& Zoning Committee and the BOA. Concurrent with its advocacy efforts, LSNFS educates the public through online activities and in-person community outreach events. LSNFS is also participating in a water sampling project at Horseshoe Creek—a tributary of the Bark Bay Sloughs and Bark Bay of Lake Superior that the artesian well at issue in this case feeds—with a local, science-based partner organization. Ultimately, LSNFS seeks to speak for the water and for the life she brings, because she cannot speak for herself.

The vast majority of LSNFS's members live and rely upon the resources within the Lake Superior Basin. In fact, multiple LSNFS members own real estate within the applicable zoning district. However, LSNFS is not limited to regional interests, as it welcomes anyone who shares their vision of clean, healthy water and ecosystems in the Lake Superior Basin for current and future generations. In that respect, LSNFS is composed of thousands of members throughout the western Great Lakes region in both the United States and Canada. Many members have actively and persistently voiced their personal opposition to Kristle KLR's permit application, but likewise share the values and beliefs of LSNFS.

Finally, as a non-partisan, nonprofit organization, LSNFS places an emphasis on diversity and inclusion and advocates for the cultural and communal values reflected in public and Tribal water rights in the Lake Superior Basin. The Town of Clover is in ceded territory, meaning that Tribal members have reserved treaty rights to hunt, fish, and gather in the area. Half of the LSNFS board are Indigenous women, and their voice and perspective help guide the organization's work.

ARGUMENT

I. BAYFIELD COUNTY HAS JURISDICTION OVER KRISTLE KLR'S CUP APPLICATION AND PROPERLY DENIED THAT APPLICATION BECAUSE THE PROPOSED USE IS NOT AUTHORIZED IN THE R-RB ZONE.

A. Local Authority Over Land Use Decisions.

Local governments in Wisconsin, including counties, have long enjoyed significant authority over land uses within their jurisdictions, especially when regulating land uses through zoning. *See, e.g., State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923) (upholding City of Milwaukee's zoning ordinance enacted pursuant to state statute as reasonable and not in violation of Equal Protection, Due Process, or Takings Clauses when landowner sought to expand preexisting, non-conforming use). *See also, e.g., 1929 Wis. Act 356* (expanding county zoning previously authorized in 1923 to allow for management of all land uses). Counties can enact zoning ordinances for a wide variety of purposes, all of which fall under the general police power of promoting public health, safety, and general welfare. *See, e.g., Cohen v. Dane Cnty. Bd. of Adjustment*, 74 Wis. 2d 87, 91, 246 N.W.2d 112 (1976). *See also* Wis. Stat. § 59.69(1)² (providing counties with authority to enact zoning ordinances to, *inter alia*, “encourage uses of land and other natural resources which are in accordance with their character and adaptability;...to encourage the protection of groundwater resources; to preserve wetlands; to conserve soil, water and forest resources”). As long as the intent and meaning of a zoning ordinance's text is clear, the power of local governments to zone for those purposes is broadly construed. *Cohen*, 74 Wis. 2d at 91.

Although the Wisconsin Legislature has recently limited the extent to which the mere opinions of a community may direct local decision-making with respect to

² All citations are to the 2019-20 version of the Wisconsin Statutes unless otherwise noted.

discrete zoning applications, *see, e.g.*, 2017 Wis. Act 67,³ the exercise of local zoning authority is still necessarily informed by the community that elects the officials who enact zoning ordinances. Indeed, historians have observed that the first comprehensive rural zoning ordinance in the country, enacted by Oneida County, Wisconsin in 1933, “became a model for other counties in Wisconsin and...demonstrated that careful planning, by local people...is essential for wise use of our natural resources.” *See, e.g.*, Sarah Davis McBride, *History Just Ahead: Guide to Wisconsin Historical Markers* (1999).⁴ County boards of supervisors are elected representatives of the people, responsible for enacting zoning ordinances, i.e., zoning is a county-level legislative function that is generally a matter of discretion. Wis. Stat. §§ 59.02, .10. *See also Harper*, 182 Wis. at 160. Like any democratically elected body, county supervisors are accountable to the electorate for how those supervisors exercise that discretion. *See, e.g., The Federalist No. 52* (James Madison or Alexander Hamilton). It is therefore rather axiomatic that county zoning ordinances reflect the will of the local community as expressed through their duly elected representatives. *See, e.g., Carlin Lake Ass’n v. Carlin Club Props., LLC*, 2019 WI App 24, ¶49, 387 Wis. 2d 640, 929 N.W.2d 228 (“[Z]oning...does provide for the interest of the community. That’s what zoning regulations are designed to do.”). *See also Ottman v. Town of Primrose*, 2011 WI 18, ¶51, 332 Wis. 2d 3, 796 N.W.2d 411 (“The presumption of correctness and validity is appropriate because it recognizes that locally elected officials are especially attuned to local concerns.”).

CUP schemes contained within county zoning ordinances provide landowners with additional flexibility to engage in uses “that a community

³ 2017 Wis. Act 67 was enacted in part to counteract the holding in *AllEnergy Corp. v. Trempealeau Cnty. Environment & Land Use Cmte.*, 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368. *See* Legis. Council Memo on 2017 Wis. Act 67 at 1, fn.1 (Dec. 1, 2017), <https://docs.legis.wisconsin.gov/2017/related/lcactmemo/act067.pdf>.

⁴ Excerpted by Wis. Historical Society, *The Oneida County Ordinance*, <https://wisconsinhistory.org/Records/Article/CS7679>.

recognizes as desirable or necessary but which the community will sanction only in a controlled manner.” *Town of Rhine v. Bizzell*, 2008 WI 76, ¶20, 311 Wis. 2d 1, 751 N.W.2d 780 (citation omitted). Because conditional uses “often represent uses that may be problematic, their development is best governed more closely.” *Id.* ¶24. However, while applicants may now be entitled to CUPs if they “meet[] or agree[] to meet all of the requirements and conditions specified in the county ordinance or those imposed by the county zoning board,” Wis. Stat. § 59.69(5e)(b)1, a CUP only “allows property to be put to a purpose that the zoning ordinance conditionally allows.” *Bizzell*, 2008 WI 76, ¶57 (quoting *Primeco Pers. Commc’ns v. City of Mequon*, 242 F.Supp.2d 567, 576 (E.D. Wis. 2003)).

Imagine then the surprise of residents of the Town of Clover—where the proposed operation at issue in this case would be located—when they discovered Kristle KLR trying to shoehorn its artesian water harvesting and transportation project into a zoning district “intended to provide for permanent or seasonal residential development and associated recreational use”. Bayfield County, Wis., *Code of Ordinances*, § 13-1-61(e) (2021). Notwithstanding Kristle KLR’s flippant and downright insulting characterization of the surrounding community’s opposition to its proposed use as a manufactured “public outrage campaign”, Appellants’ Br. at 30, residents living in and around the Town of Clover who oppose Kristle KLR’s CUP application have good reason to be outraged—namely, the proposed use of harvesting and transporting artesian water for bottling and sale is not authorized by an ordinance enacted by their duly-elected representatives. The Bayfield County Zoning Ordinance restricts how every other landowner uses their property based on the zoning district that property is in. Kristle KLR certainly is not the first landowner to want to put their property to a prohibited use. Why should Kristle KLR be exempt when everyone else must comply?

In its attempt to run roughshod over local zoning laws, Kristle KLR seems to overlook the benefits it receives from those same zoning laws and how its

preferred interpretation would undermine Bayfield County's conditional use permitting scheme to the detriment of the entire community, including Kristle KLR.

Although one owns property, he may not do with it as he pleases... [T]he interest of society justifies...restraints upon the use to which property may be devoted...[T]here is a reciprocity of benefits resulting from limitations imposed upon the use of property by general laws. He who is limited in the use of his property finds compensation therefore in the benefits accruing to him from the like limitations imposed upon his neighbor.

Harper, 182 Wis. at 153-54. Just as Kristle KLR would likely be concerned about, for example, an industrial manufacturing facility opening directly adjacent to its property in violation of the Bayfield County Zoning Ordinance, so too are Kristle KLR's neighbors concerned about its proposed use to harvest artesian water and transport it for eventual bottling and sale. Kristle KLR must be held to the same standard as every other landowner in Bayfield County.

Kristle KLR had an opportunity to answer community concerns and questions at a Town of Clover Plan Commission meeting but walked away from that opportunity. Appellant Kristle Majchrzak was on the April 5, 2021 Town of Clover Plan Commission Agenda but removed herself from the agenda a mere three hours before the meeting. *See* Town of Clover, Wis., Plan Comm'n Amended Agenda (Apr. 6, 2021) (amended to note that Kristle KLR may withdraw application).⁵ As a result, the Town of Clover Board of Supervisors unanimously recommended denial of Kristle KLR's CUP application. Town of Clover, Wis., Regular Board Meeting Minutes (Apr. 14, 2021).⁶

When interpreting the Bayfield County Zoning Ordinance in context, this Court must consider the other six instances where "etc." is used in § 13-1-62(a) to describe uses. *See Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶11, 385 Wis. 2d 748, 924 N.W.2d 153 ("In interpreting municipal ordinances, we

⁵ <https://herbsterwisconsin.com/toc-town-plan-commission-meeting-april-6-2021/>.

⁶ <https://herbsterwisconsin.com/toc-minutes-april-14-2021/>.

apply the same principles used in statutory interpretation.”) (citation omitted); *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (“[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole.”) Interpreting the inclusion of the abbreviated phrase “etc.” to render “Irrigation Facilities, Dams, Canals, Reservoirs, etc.” ambiguous, and thus construed in favor of the unrestricted use of property, *see Cohen*, 74 Wis. 2d at 91, would ignore the methodology outlined in *Kalal* and could expose the Bayfield County Zoning code to further challenge, significantly undermining it as a whole and allowing for the proliferation of numerous unauthorized uses. By including language like “etc.” in the description of uses, Bayfield County is taking advantage of the canon of construction *esjudem generis* it identified in its brief, Resp’t’s Br. at 44, to provide landowners with greater flexibility when it comes to available land uses. But such flexibility was never intended to encompass any tangentially related use that a landowner proposes and that the county board never contemplated authorizing. Fortunately, that is an absurd result this Court is bound to avoid and should be dismissed as much. *Kalal*, 2004 WI 58, ¶46 (“[S]tatutory language is interpreted...reasonably...to avoid absurd or unreasonable results.”).

County boards have broad discretion to determine what land uses are permitted, as of right or as a conditional use, or prohibited in which zoning districts throughout the county. The Bayfield County Board of Supervisors, on behalf of and in consultation with the residents of Bayfield County, enacted a zoning ordinance that does not permit the harvesting and transporting of artesian water in the R-RB District. If Kristle KLR wants to engage in its proposed use in the R-RB District, it needs an amendment to the Bayfield County Zoning Ordinance. To do that, the proper forum is the Bayfield County Board of Supervisors, not this Court. And even then, for the reasons stated herein, the County has the authority and discretion to say no, and the Bayfield County community would be well within their rights to oppose such a request.

B. The Importance of Protecting Lake Superior and the Great Lakes Basin.

The measured and directed “outrage” from the Bayfield County community is more than appropriate given what is at stake should the County’s decision to deny Kristle KLR’s CUP application be reversed. Members of LSNFS live, work, and recreate on and near Lake Superior, which provides sustenance, education, joy, fulfillment, and fosters a human connection with the natural world. Private commodification of such a valuable and sensitive resource therefore creates substantial present and future concerns to LSNFS, its members, and the Bayfield County community as a whole.

The Great Lakes are one of our nation’s greatest environmental, cultural, and economic treasures. Lakes Superior, Michigan, Huron, Erie, and Ontario, and their connecting channels form the largest fresh surface water system on earth, holding nearly one-fifth of the world’s freshwater supply and nine-tenths of the United States’ supply. *About the Lakes*, Great Lakes Comm’n.⁷ The lakes provide drinking water to more than 48 million people in the United States and Canada and are home to more than 3,500 plant and animal species. *Id.* Specifically, Lake Superior is the largest lake in the world by surface area and holds more water than the other four Great Lakes combined. Northland College, Mary Burke Center for Freshwater Innovation, *Water Quality Concerns on the South Shore of Lake Superior*, Northland College, 2 (2019)⁸. Lake Superior supports thriving trade, shipping, fishing, and tourism industries. The Soo Locks alone, which connect Lake Superior to the lower four Great Lakes, support 123,172 jobs in the United States and Canada and \$22.6 billion in economic activity. Martin & Assocs., *Economic Impacts of Maritime Shipping in the Great Lakes – St. Lawrence Region*, 2 (2018).⁹

⁷ <https://www.glc.org/lakes/>.

⁸ <https://www.northland.edu/wp-content/uploads/2019/12/IJC-white-paper-Interactive.pdf>.

⁹ https://greatlakes-seaway.com/wp-content/uploads/2019/10/eco_impact_full.pdf.

Lake Superior also has a specific cultural significance for Anishinaabe Tribes in the upper Great Lakes, including the Ojibwe. Prior to contact with European settlers and foreign governments, Tribes exercised their sovereignty both by establishing their own governing systems and forming alliances with other Tribal nations. Great Lakes Indian Fish and Wildlife Comm'n, *Metallic Mineral Mining: The Process & the Price*, 4 (2016).¹⁰ Anishinaabe Tribes in the upper Great Lakes entered into their first treaty with the Spirit of the Universe, which held that the land is a gift and the Tribes should live in harmony with and take care of that land through ceremonies, teachings, language, and lifestyle. *Id.*

The Ojibwe nation named Lake Superior “Gichigami,” meaning “Great Lake,” which was a reference to both the size of the lake and but the respect held for it. U.S. National Park Service, *Apostle Islands, Ojibwemowin – Place Names* (2022).¹¹ The Ojibwe have called Gichigami and the surrounding region home for thousands of years. Historically, Ojibwe people have thrived on the land, developing a deep respect for the region and natural resources, and acquiring special knowledge and cultural practices. Anton Treuer, *Young Naturalists - Ojibwe Lifeways*, Minn. Conservation Volunteer, 39 (Sept.-Oct. 2012).¹² These traditional lifeways have passed from adults to children for generations. *Id.* Importantly, these lifeways are not simply for sustenance, they are spiritual and cultural, and many Indigenous people continue to practice them in the Lake Superior Basin today.

Appellants’ proposed water harvesting operation exists within ceded territory in northern Wisconsin. Within that ceded territory, signatory Ojibwe Tribes have reserved the right to continue to hunt, fish, and gather. LSNFS is not asserting those rights or concerns on behalf of Tribes in the ceded territory, but note that Lake Superior and the waters that feed it are culturally, spiritually, economically, and

¹⁰ <https://www.glifwc.org/publications/pdf/PROCESS.pdf>.

¹¹ <https://www.nps.gov/apis/learn/historyculture/ojibwemowin-place-names.htm>.

¹² https://files.dnr.state.mn.us/mcvmagazine/young_naturalists/young-naturalists-article/ojibwe/ojibwe.pdf.

environmentally significant for a myriad of reasons that far outweigh any purported needs of individual landowners.

For all its size, Lake Superior is nonetheless vulnerable. “The waters of the Great Lakes are, for the most part, a nonrenewable resource.” Int’l Joint Comm’n, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States*, 6 (2000).¹³ The water level of each of the Great Lakes fluctuates based on annual precipitation levels, but ultimately depends on the balance between the amount of water entering and leaving the Basin. *See id.* However, Lake Superior receives the least amount of renewal through precipitation, in relation to its volume, of all five Great Lakes. Dr. Randall Schaetzl, *Lake Superior*, Michigan State University, Dep’t of Geography, Environment, and Spatial Science.¹⁴ With minimal means for water renewal, Lake Superior, and the resources it offers are particularly susceptible to lasting degradation from water withdrawals, and recently, Lake Superior has started to show signs of degradation and contamination. *See Water Quality Concerns on the South Shore of Lake Superior* at 2. Deforestation, intensive agriculture, and other extractive industries are detrimentally affecting the Lake’s water quality, causing serious concerns for those who rely on it. *Id.*

Hydrologic concerns do not stop at the shoreline, as Bayfield County’s numerous artesian wells provide public access to pristine groundwater. A 2007 survey identified nearly 11,000 springs statewide and similarly noted that as many as 1,000 have dried up. Wis. Geological and Nat. History Survey, *Inventory of Wisconsin’s Springs* (2007).¹⁵ LSNFS, Bayfield County, and the Wisconsin Geological and Natural History Survey are now working to update that survey and map the wells in the County. Initial estimates indicate at least 60 artesian wells exist

¹³ <https://legacyfiles.ijc.org/tinymce/uploaded/documents/protection-of-the-waters-great-lakes-feb-2000.pdf>.

¹⁴ <https://project.geo.msu.edu/geogmich/lakesuperior.html>.

¹⁵ <https://www.wpr.org/sites/default/files/wofr2007-03.pdf>.

or did exist in Bayfield at one time, but the study aims to affirm those estimates while also collecting data about the flow rate, depth, and presence of contaminants in the wells.

The artesian well at issue in this case feeds Horseshoe Creek, which in turn feeds Bark Bay Slough and eventually Lake Superior's Bark Bay. Bark Bay Slough is a 646-acre natural area made up of a barrier spit, lagoons, springs, and wetlands. Wis. Dept. of Nat. Res., *Bark Bay Slough (No. 137)* (2022).¹⁶ To the east of Horseshoe Creek lies the Bark River, a Class I trout stream primarily fed by cold groundwater that allow salmonids that are common to Lake Superior tributaries like brown trout, brook trout, rainbow trout, and coho salmon to naturally reproduce. Wis. Dep't of Nat. Resources, *Lake Superior Fisheries Mgmt. Plan, 2020-2029, Admin. Rep. No. 93*, 28.¹⁷

Bayfield County artesian wells are unique as they are fed by and operate in a largely undeveloped region and are therefore not impaired by development or over pumping. Northland College, Mary Burke Center for Freshwater Innovation, *Aversion to Diversion: Wisconsin's Artesian Resources and Implications for Future Withdrawals*, 4 (2021).¹⁸ Those wells now effectively serve as a historical artifact as the majority of past artesian wells in Wisconsin have dried up because of development or unsustainable groundwater withdrawals. *Id.* History teaches us that these wells should be appreciated and protected; they are a public resource, not something to be commodified for personal gain and to the potential detriment of current and future generations.

We cannot be certain how Kristle KLR's proposed artesian water harvesting operation will affect the artesian wells, the Lake Superior watershed, Lake Superior itself, or the communities that rely on them. What we can be certain of is that they

¹⁶ <https://dnr.wi.gov/topic/Lands/naturalareas/index.asp?SNA=137>.

¹⁷ <https://widnr.widen.net/s/wtwwsnnqqr>.

¹⁸ https://www.northland.edu/wp-content/uploads/2022/01/Aversion-to-Diversion-white-paper_web-V3_FINAL_Jan-2022_Hyperlinked.pdf.

are worth protecting, and that the proposed land use does not comply with the zoning ordinance designed to protect them. The increased industrial activity and withdrawal from a lake and groundwater system with limited renewal capability pose additional, unnecessary strains on an ecosystem already showing signs of vulnerability. Community members are rightfully concerned that the proposed exploitation of that valuable resource fails to meet the standards for issuing a CUP, and allowing Appellants to siphon and export of water from the Lake Superior watershed would set an unwelcome precedent.

CONCLUSION

This case is simple. The law is clear; the facts are clear; and no amount of table pounding will justify the result Appellants seek. Bayfield County properly denied Kristle KLR's CUP application based on local concerns reflected in applicable zoning regulations. LSNFS accordingly asks the Court to affirm the BOA.

Respectfully submitted this 5th day of December, 2022.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c)3 for a brief produced with a proportional serif font. The length of the Argument and Conclusion portions of this brief, as identified in Wis. Stat. § 809.19(8)(c)3, is 2,978 words.

Dated: December 5, 2022.

Electronically signed by Robert D. Lee
Robert D. Lee

WIS. STAT. § 801.18(6) COMPLIANCE CERTIFICATION

I hereby certify that:

In compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which accomplishes electronic notice and service for all parties who are registered users.

Dated: December 5, 2022.

Electronically signed by Robert D. Lee
Robert D. Lee