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

SUE MERCIER, ELIZABETH J. ASH, ANGELA BELCASTER, JANET BOHN, JULIE CHAMBERLAIN, MAUREEN FREEDLAND, DAVID GOODE, BETTY HAMMOND, CURT LEITZ, CONSTANCE R. LONG, DAVID W. LONG, MYRNA D. PEACOCK, BECKY POST, JAMES L. REYNOLDS, ELLEN DODGE SEVERSON, ERIC SEVERSON, LESLIE SLAUENWHITE, HERMAN S. WIERSGALLA, HOWARD WIERSGALLA, JAMES E. WIFFLER, ROBERT WINGATE, HENRY ZUMACH, and FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

v.

CITY OF LA CROSSE,

Defendant.

Case No. 02-C-0376-C

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Abraham Lincoln once posed the following riddle: how many legs would a dog have if you called the tail a leg? The answer: a dog has only four legs, no matter what you call the tail.

Lincoln's riddle captures the City of La Crosse's response to the plaintiffs' challenge to the Ten Commandments Monument in Cameron Park. In trying to convince this Court that it has not violated the U.S. and Wisconsin Constitutions, the City has denied that the Monument is religious, claimed that the Monument is not in the park, suggested that Cameron Park is not really a park, and declared on a sign that the City does not endorse the religious message on the Monument. But calling the Monument a five-legged dog does not make it one.

ARGUMENT

I. THE CITY'S CHALLENGE TO THE TAXPAYER STANDING OF CERTAIN PLAINTIFFS IGNORES THEIR UNDISPUTED ACTUAL INJURIES.

The City contends that because certain plaintiffs are not taxpayers of the City of La Crosse, they have no standing to challenge the sale of the parcel of land under the Monument and should be dismissed from the suit. But *none* of the plaintiffs has alleged standing based on their status as taxpayers. Rather, they all have alleged specific, personal injuries caused by their contact with the Monument—injuries that the City does not dispute. *See* the City's response to Proposed Finding of Fact in Support of Plaintiffs' Motion for Summary Judgment ("PF") Nos. 35-57.[1] Accordingly, the plaintiffs all have standing under principles articulated in *Books v. City of Elkhart*, 235 F.3d 292, 299 (7th Cir. 2000), and the Court should deny the City's request that certain plaintiffs be dismissed.

II. THE CITY HAS NOT TERMINATED ITS ACTUAL ENDORSEMENT OF RELIGION.

The cornerstone of the City's defense is its claim to have terminated its endorsement of religion by selling a parcel of land under and immediately around the Monument. The sale alone is not enough. "[A]dherence to a formalistic standard invites manipulation." *Freedom From Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). This Court must look to the substance of the sale, not merely its form, to determine whether the City's endorsement of religion actually has ceased. *See id.*

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[1] The defendant filed its response to Proposed Findings of Fact in Support of Plaintiffs' Motion for Summary Judgment under the title "Defendant's Proposed Findings of Fact In Support of Brief In Opposition to Plaintiffs' Motion for Summary Judgment." For their reply, the plaintiffs have used a title that more clearly indicates that the underlying facts were initially proposed by the plaintiffs: Plaintiffs' Reply to Defendant's Response to Proposed Findings of Fact In Support of Plaintiffs' Motion For Summary Judgment. That document includes all of the pertinent texts: each of the plaintiffs' proposed facts is followed by the defendant's response to that fact, followed by the plaintiffs' reply, if any. Accordingly, the plaintiffs will refer to that document as the source for all citations to plaintiffs' proposed facts ("PF"), the defendant's response to those proposed facts, and the plaintiffs' reply.

A. The City's Attempted Sale Of Park Land To The Eagles Was Not Legal.

The plaintiffs have attacked the substance of the City's sale to the Eagles of the parcel of land under and immediately around the Monument because the sale does not comply with Wisconsin law. The City has no response supported by evidence.

1. The City has offered no evidence that it made any actual findings as to whether the land was needed for park purposes.

The plaintiffs contend in their motion for summary judgment that the sale violates section 27.08(2)(c) of the Wisconsin Statutes because the City failed to make the requisite factual determination that the land no longer was needed for park purposes. The City contends that it has determined that the land no longer was needed for park purposes because the resolution authorizing the sale says so, and the resolution was approved by the necessary boards and committees and the Common Council. Brief in Opposition to Plaintiffs' Motion for Summary Judgment ("Brief in Opposition") at 2.

But declaring that the land is not needed for park purposes is not enough. The statute requires that the City make factual findings. It did not. The *only* document the City even can point to concerning whether the land was needed for park purposes is the resolution itself. The minutes of the meetings at which the resolution was considered contain no reference to any City entity requesting or soliciting *any* information concerning the need for park land. *See* PF Nos. 22, 24-26, and the City's response. The only documented comments at these meetings concerning the need for park land indicated that La Crosse faces a *shortage* of park land. Indeed, the City's own Park and Recreation Plan indicates a *shortage* of neighborhood park land, as the City admits. *See* the City's response to PF No. 23.

The City now attempts to disavow this statement in its own Park and Recreation Plan, but its disavowal rings hollow. It simply is not supported by the evidence. First, the City admits that

the Plan indicates that there is a shortage of neighborhood parks, but "disputes it is a significant shortage in the downtown area." Response to PF No. 23. The City cites no evidence concerning the severity of the shortage of neighborhood parks in the downtown area. Without such evidence, the City has failed to place the fact or magnitude of the shortage of neighborhood parks in genuine dispute.

Second, the City denies that Cameron "Square" is a "neighborhood park." Brief in Opposition at 2. The City's point is not entirely clear. Apparently, the City believes that because the land that is now Cameron Park was acquired by the City through an unrestricted quit claim deed, Cameron Park is not really a park, and the City can dispose of it without complying with section 27.08(2)(c), Stats. The City has cited no authority suggesting that section 27.08(2)(c), Stats., applies only to park land acquired by a municipality through a dedication. The City already has admitted that Cameron Park is a city park. *See* the City's response to PF No. 1; Answer and Affirmative Defenses to Second Amended Complaint, ¶ 14. It cannot now turn it into something else simply by calling it "Cameron Square."

If the City's point is that Cameron Park is not a *neighborhood* park, but a park of some other type of which there is no shortage, the City's point is contradicted by its own Park and Recreation Plan. Table 1 of the plan expressly classifies Cameron Park as a neighborhood park.[2] *See* the plaintiffs' reply to the City's response to PF No. 14.

2. The sale was not for fair market value.

The City suggests that as long as it sold the land for fair market value, and the rest of the park is still useable, the sale was legal. Brief in Opposition at 3. Whether the land was sold for

[2] The plaintiffs submitted the City's Park and Recreation Plan as Exhibit L to the Affidavit of James A. Friedman, but without the attached tables and maps. The City's challenge to the plaintiffs' proposed fact that Cameron Park is classified as a "neighborhood park" makes one of those tables relevant and, accordingly, that table

fair market value is, at best, a disputed fact as explained in the plaintiffs' Brief in Opposition to Defendant's Motion For Summary Judgment. The City Assessor determined the sale price based on the average assessed value assigned to the land in assessments of property contiguous to Cameron Park, not on actual sales of comparable property. The best information on which to base a determination of fair market value is a recent arm's-length sale of a comparable property. *See Waste Mgmt. of Wisconsin, Inc. v. Kenosha County Bd. of Review*, 184 Wis. 2d 541, 556-57, 516 N.W.2d 695 (1994). The only arm's-length sale of comparable property without a building on it—a parking lot near Cameron Park—suggests a fair market value of approximately $19 per square foot, not the $6 per square foot paid by the Eagles. *See* Plaintiffs' Response to Proposed Findings of Fact of Defendant City of La Crosse No. 21. When comparable sale information is available, it is error for an assessor to use other information to value the property. *See id.*

The significance of the City's failure to properly determine the fair market value of the parcel is not that La Crosse taxpayers have been shorted a few thousand dollars. Rather, the City's improper determination of the fair market value is yet one more indication that the sale of the parcel was merely an expedient calculated to keep the Monument in Cameron Park with as little disruption as possible.

B. The City Has Delegated The Duties Of Ownership To The Eagles To Preserve The Display Of The Monument.

The City contends that the sale of the parcel is valid unless it results in "continuing and excessive involvement between the government and private citizens." Brief in Opposition at 1, citing *City of Marshfield*, 203 F.3d at 491. Because the City no longer exercises the rights of ownership over the parcel, it argues, there is no excessive involvement, and the sale must be

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is attached to the Second Affidavit of James D. Peterson, which is submitted in support of the plaintiffs' reply to the City's response to PF No. 14.

valid. To the contrary, the history of the Monument demonstrates that the City has used the Eagles to effectuate the City's purpose of preserving the Monument in Cameron Park. The sale, therefore, does not terminate the City's actual endorsement of religion. It is the means by which the City seeks to preserve that endorsement in the face of the plaintiffs' challenge to it.

The City forthrightly admits that the Eagles have exercised the duties of ownership with respect to the land under and immediately around the Monument for more than thirty years, since the Eagles donated the Monument to the City. Brief in Opposition at 3. Thus, what has been characterized as the Eagles' donation of the Monument to the City in 1965 also could be characterized as the City's donation of part of Cameron Park to the Eagles. The Eagles and the City have jointly displayed the Monument in Cameron Park for decades. Nothing of substance has changed as a result of the formality of the City deeding the parcel to the Eagles.

The City's intent in purporting to sell the land to the Eagles is clear: it was "a way to keep the monument in place ...." PF No. 27. In the context of the history of the Monument, the purported transfer of title to the parcel under and around the Monument demonstrates that the City has attempted to maintain the display of the Monument in Cameron Park, using the instrumentality of a private entity, the Eagles. The sale of the parcel is a sham, and the City's actual endorsement of the religious message on the Monument has not ceased.

III. THE CITY HAS NOT TERMINATED THE PERCEPTION OF ITS ENDORSEMENT OF RELIGION.

The City contends that it only is obligated to "ensure that a reasonable observer does not perceive that the Monument is still a part of the city park." Brief in Opposition at 5. The City is mistaken for two reasons. First, should the Court determine that the City has continued its *actual* endorsement of religion, the Court need not even address whether the City has violated the second prong of the *Lemon* test, concerning the perceived endorsement of religion. If the City

fails under any prong, the plaintiffs prevail. *See Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680, 686 (7th Cir. 1994). Second, under the second prong of the *Lemon* test, this Court must determine whether "a reasonable person could perceive that a government action conveys the message that religion or a particular religious belief is *favored* or *preferred*." *City of Marshfield*, 203 F.3d at 493 (emphasis added). In this case, the perception of endorsement endures, even if the observer believes that the Monument is on a tiny parcel of privately owned land.

The City contends that the City and the Eagles have "declared to the public through the use of fences and signs that any religious message associated with the monument is attributable to the Eagles and not the City." Brief in Opposition at 5. In response to the City's motion for summary judgment, the plaintiffs noted that the parcel is far too small to be meaningfully designated as a "private park," and the message on the signs rings hollow.

The City's response is that the size of the parcel is proportional to the size of Cameron Park. According to the City, it has sold 1.2% of the land in Cameron Park and, therefore, it has met the standard in *City of Marshfield*. Nothing in the *City of Marshfield* decision or this Court's order on remand in that case establishes a "proportionality" standard by which the perceived endorsement of religion is terminated when one percent—or some other arbitrary amount—of a park is fenced off for the display of a profoundly religious monument. Because the parcel sold by the City of La Crosse is so small, reasonable observers would understand the Monument is displayed with the approval of the City.

The City has posted signs declaring that it does not endorse the religious views on the Monument. But the City's actions speak louder than its words, and a reasonable observer will

perceive the intended message: the City has established a miniscule "private park" simply to preserve the display of the Ten Commandments Monument in Cameron Park.

CONCLUSION

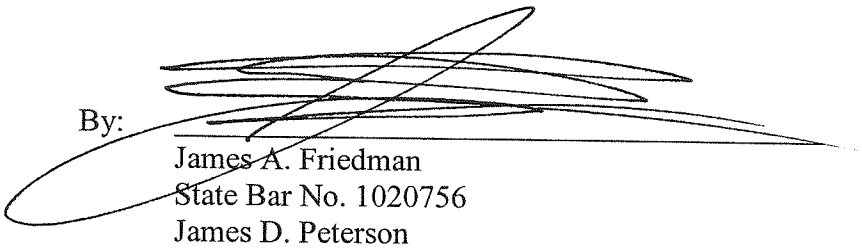
The City has not attempted to defend the display of the Monument as it existed at the time the plaintiffs filed this suit. Accordingly, the plaintiffs are entitled to summary judgment declaring that the City violated the plaintiffs' Constitutional rights until at least early April, 2003 and awarding damages based on that violation.

The latest efforts by the City are nothing more than its continued attempt to satisfy the Constitution simply by declaring that the Monument is not what it is and that the City no longer favors the religious views carved on it. But the Monument is not a five-legged dog no matter what the signs on it say. The sale of the parcel to the Eagles was a sham transaction that the City hoped would be the means of preserving the Monument's display in Cameron Park. Even with the latest fence and signs, a reasonable observer will realize that the Monument is displayed with the endorsement of the City and that City favors the religious views expressed by the Monument.

A government cannot, consistent with the Constitution, display an inherently religious monument on its land for thirty years, then, when challenged, sell a tiny parcel of land around the monument to a private party, with the sole intent of keeping the religious message intact in its current location. The First Amendment and its Wisconsin counterpart simply won't permit it. Accordingly, the plaintiffs are entitled to summary judgment that the City continues to violate the Establishment Clause of the First Amendment and Article I, Section 3 of the Wisconsin Constitution.

Dated May 14, 2003.

LA FOLLETTE GODFREY & KAHN

By: 

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CERTIFICATE OF SERVICE

James A. Friedman hereby certifies that on the 14th day of May, 2003, true and correct copies of REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PROPOSED FINDINGS OF FACT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; PLAINTIFFS' REPLY TO DEFENDANT'S PROPOSED FINDINGS OF FACT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; and SECOND AFFIDAVIT OF JAMES D. PETERSON were delivered via First Class Mail to:

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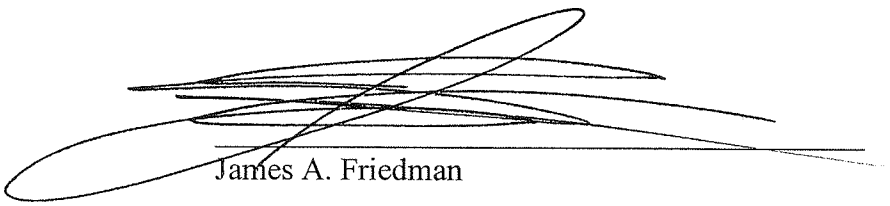

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