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# **Top 10 Tips to Avoid Constitutional Concerns in Municipal Regulation**

## **I. Thou Shalt Make No Laws Above the Higher Powers**

1. Preemption doctrine. § 15:18. Conformity to state and federal laws, 5 McQuillin Mun. Corp. § 15:18 (3d ed.)

*“It is fundamental that municipal ordinances are inferior in status and subordinate to the laws of the state. The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government. Consistently, it is a general rule, sometimes expressly enunciated by the state constitution, statutes, or city charters,<sup>3</sup> that ordinances regulating subjects, matters, and things on which there is a general law of the state must be in harmony with that state law, and in any conflict between an ordinance and a statute the latter must prevail, unless under the statutes or law of the state the ordinance plainly and specifically is given predominance in a particular instance or as to a particular subject matter. Fundamental to the doctrine of preemption is the understanding that local governments lack the authority to craft their own exceptions to general state laws... Furthermore, the fact that a local ordinance does not expressly conflict with the statute will not save it when the legislative purpose in enacting the statute is frustrated by the ordinance. Similarly, an intent by the state to preempt an entire field of legislation need not be expressly declared. Preemption may be implied from the nature of the subject matter being regulated and the purpose and scope of the state statutory scheme.”*

2. Second Amendment Example.
  - a. Federal authority. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. Amend. II
  - b. Wisconsin authority. “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” Wis. Const. Art. I, § 25

- c. Case example. *Wisconsin Carry, Inc. v. City of Madison*, 373 Wis. 2d 543, 892 N.W.2d 233. City had no authority, either through its governing body or its sub-units, to regulate possession of knives or firearms unless regulation was no more stringent than a state statute. The City of Madison Transit and Parking Commission adopted a rule to prohibit knives and handguns on City buses. Specifically, the rule prohibited “bringing any items of a dangerous nature on-board buses including: weapons (pistols, rifles, knives or swords) ...”. The rule was more stringent than a state statute prohibiting the carrying of loaded non-handguns on a bus, and thus rule was preempted. The rule conflicted with statute allowing a licensee to carry a concealed weapon anywhere in the state subject to certain exceptions, and thus rule was preempted.
3. Fourth Amendment Example.
    - a. Federal authority. *“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”* U.S. Const. Amend. IV
    - b. Wisconsin authority. *“The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”* Wis. Const. Art. I, § 11
    - c. Case example. *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015). Motel operators brought action challenging municipal code provision requiring hotel operators to provide police officers with specified information concerning guests upon demand. The Supreme Court, Justice Sotomayor, held that facial challenges under the Fourth Amendment are not categorically barred. The code provision on its face violated Fourth Amendment.
  4. Query: How far can we go in our licensing of vacation rentals, without violating the preemptions of Wisconsin Statutes Section 66.1014?
  5. **Recommendation:** To avoid a challenge, don’t overreach.

## II. Thou Shalt Provide Equal Protection

1. Wisconsin authority. *“Equality; inherent rights. Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.”* Wis. Const. Art. I, § 1

2. Federal authority. *“No State shall...deny to any person within its jurisdiction the equal protection of the laws.”* Amendment XIV, Section 1
3. Reasonable classification. *“Equal protection of the laws, guaranteed by federal and state Constitutions, does not forbid reasonable classification for the purpose of municipal legislation. Indeed, requisite constitutional equality does not forbid differentiation, or discrimination in the sense of mere differentiation, as to specified classes where the ground for differentiation, or, in other words, the basis for classification, is reasonable. It forbids only arbitrary or unreasonable discriminations.... Generally, when all persons in the same class are treated alike, when existing circumstances on which the classification is based are not so constituted as to preclude addition to the numbers included in the class, and when there is some material and substantial difference germane to a lawful subject and purpose of the legislation between those within and those without the class, equal protection is observed. ... If the evidence or conclusions leave it fairly debatable as to whether there is a reasonable basis for classification, the courts may not override the legislative determination. The proof must show that the classification is wholly without any rational basis and is essentially arbitrary.”*
4. Fourteenth Amendment equal protection claims. A plaintiff may state an independent “class of one” equal protection claim in a land-use context by demonstrating “a governmental action wholly impossible to relate to legitimate governmental objectives.” *Forseth v. Village of Sussex*, 199 F.3d 363, 370-371 (7th Cir.2000). Equal protection claims may be based on subjective ill will, where a plaintiff shows “malicious conduct of a governmental agent, in other words, conduct that evidences a spiteful effort to ‘get’ him for reasons wholly unrelated to any legitimate state objective.” *Id.* at 371.
5. Case example. *Hoffman v. Vill. of Pleasant Prairie*, 249 F. Supp. 3d 951 (E.D. Wis. 2017). Convicted sex offenders residing in village brought action against village, alleging that ordinance regulating residency of child sex offenders within village violated the Ex Post Facto Clause and the Equal Protection Clause, and seeking declaratory judgment in favor of one sex offender on the issue of whether he had to leave the village. Plaintiffs moved for summary judgment. Holdings: The District Court, J.P. Stadtmueller, J., held that: (1) claim seeking money damages was not moot; (2) ordinance violated Ex Post Facto Clause; (3) plaintiffs asserting Equal Protection claim had standing; and (4) ordinance violated equal protection.
6. Query: Obligated to collect garbage from CBRF’s, if collect from single family residences but not commercial property? Equal protection? Reasonable accommodation?
7. **Recommendation.** To avoid a challenge, do not create unreasonable classifications.

### III. Thou Shalt Provide Reasonable Accommodations

1. Wisconsin authority, e.g.. “(1) *Employment discrimination because of disability includes, but is not limited to: ... (b) Refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.*” Wis. Stat. § 111.34
2. Federal authority.
  - a. Fair Housing Act, as amended (FHA or FHAA):
    - i. It is unlawful to “otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(a).
    - ii. The FHA authorizes aggrieved persons to bring civil actions seeking relief with respect to discriminatory housing practices. 42 U.S.C. § 3613(a).
    - iii. A cause of action under the FHA may arise under one of three theories: (1) intentional discrimination, (2) actions that have a disparate impact, or (3) a failure to reasonably accommodate persons with a handicap. 42 U.S.C. § 3604(f)(3). The FHA requires accommodation if such accommodation (1) is reasonable, and (2) necessary, (3) to afford a handicapped person the equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B).
    - iv. Claimants with physical, mental and developmental disabilities typically look to the “handicap” provisions of the FHA, which specifically include the duty of reasonable accommodation. That duty extends only “to rules, policies, etc. that hurt handicapped people by reason of their handicap, rather than that hurt them solely by virtue of what they have in common with other people, such as a limited amount of money to spend on housing.” *Hemisphere Bldg. Co. v. Village of Richton Park*, 171 F.3d 437, 440 (7th Cir.1999). “Whether a requested accommodation is reasonable is highly fact-specific, and determined on a case-by-case basis by balancing the cost to the defendant and the benefit to the plaintiff.” *Dadian v. Village of Willmette*, 269 F.3d 831, 838 (7th Cir. 2001) (citations omitted).
    - v. Where the accommodations sought are reasonable, necessary and will afford disabled people equal opportunity to use and enjoy housing, the circumstances may lead to FHA liability. Reliance upon state statutes or even ordinances may be an insufficient basis for establishing “unreasonable burden or hardship.” See, e.g., *ORP v. Milwaukee*, 300 F.3d 775 (7th Cir. 2002) (FHA and ADA violations for refusal to grant variance requests to community living facility for six adults impaired by traumatic brain injury or developmental disabilities or both; the City denied the request for a variance pursuant to a municipal ordinance

restricting such homes from operating within 2,500 feet of another community living arrangement); *Brisben v. Village of Brown Deer*, 2003 WL 23845078 (E.D.Wis. 2003) (unpublished) (where the Village enforced a restrictive covenant against Brisben in denying a hearing on their application for a conditional use permit, and where the restrictive covenant was intended to discourage families with children from moving into a section of Brown Deer, court found the Village's action was unlawful in violation of the FHA).

- b. Americans with Disabilities Act.
  - i. “The ADA was built on the Rehabilitation Act and the FHAA, but extends the reach of those laws substantially. Invoking ‘the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce,’ the ADA was designed ‘to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’” *Wisconsin Community Serv. v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006) (citing 42 U.S.C. § 12101(b)(1), (b)(4)).
  - ii. Title II of the ADA provides: “No qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity.” 42 U.S.C. § 12132.
  - iii. Title II defines a “public entity” to include state and local governments, as well as their agencies and instrumentalities (s. 12131(1)).
  - iv. Municipal zoning qualifies as a public “program” or “service,” and the enforcement of those rules is an “activity” of a local government. *Wisconsin Community Serv.*, 465 F.3d at 750.
  - v. Similar reasonable accommodation requirements: Although the FHA’s accommodation provision does contain an express necessity requirement, the ADA version reads “necessary to avoid discrimination on the basis of disability.” *Id.* at 751-752 (quoting 28 C.F.R. § 35.130(b)(7)). *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001) (Homeowners who were denied a permit to reconstruct their home with an attached front garage under the local ordinance’s “hardship exception” were found to have stated a claim under Title II. The court found that accommodations were appropriate given the applicant’s osteoporosis and asthma made a rear garage impractical.).
8. Query: Obligated to allow a handicapped school bus driver to park school bus at his residence, in a residential district?
9. **Recommendation:** To avoid a challenge, provide reasonable accommodation.

## IV. Thou Shalt Not Have Discriminatory Customs or Practices

1. Section 1983. 18A McQuillin Mun. Corp. § 53:178.34 (3d ed.)
  - a. Custom or Policy. *“Municipal liability under Section 1983 requires that the municipality have a custom or policy which causes a deprivation of plaintiff’s rights.”*
  - b. Actual responsibility limit. *“Under § 1983, a municipality cannot be held liable for the tortious conduct of an employee, unless the employee acts pursuant to a municipality’s “official policy.” The “official policy” requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to an action for which the municipality is actually responsible.”*
  - c. Formal or informal. *“What is a municipal policy or custom may take a number of forms. A municipal policy or custom may take the form of (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by final policymakers of the decisions-and the basis for them-of subordinates to whom authority was delegated subject to these policymakers’ review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from “deliberate indifference” to the injuries that may be caused.”*
2. Case examples (arbitrary, discriminatory policies). *“A county public defender office’s policy under which the public defender office’s resources were allocated to clients based solely or principally on their performance on a polygraph test, with sharply curtailed resources being allocated to those who failed test, constituted deliberate indifference to the constitutional requirement of adequate representation and thus, violated*
3. *The Sixth Amendment rights of those defendants who failed test. Also, a county public defender office’s policy of assigning its least experienced attorneys to capital cases while refusing to provide any training for those cases constituted deliberate indifference to the capital defendants’ constitutional right to adequate representation.”*
4. Case example (harassment). *Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). “Under antidiscrimination provisions of Title VII, employer is subject to vicarious liability to victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over employee; when no tangible employment action is taken, employer may raise an affirmative defense to liability or damages, subject to proof by preponderance of evidence and comprising two necessary elements: (a) that employer exercised reasonable*

*care to prevent and correct promptly any sexually harassing behavior, and (b) that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).”*

5. Case example (land use). *Thorp v. Town of Lebanon*, 2000 WI 60, ¶¶ 37-44, 235 Wis. 2d 610, 633–38, 612 N.W.2d 59, 72–75

*“The Thorps own approximately 255 acres in the Town of Lebanon, which is located in Dodge County. The property is a mix of open land, woods, and wetlands, with some of the land being within the floodplain. Before July 7, 1994, the Thorps' land was zoned to a rural development classification... On July 7, 1994, the Town Board of Supervisors approved a new rezoning map that extensively revised the zoning classification of most of the Town land from a rural development classification to a general agricultural classification. ... The Thorps' land was one of the properties reclassified from rural development to general agricultural. According to the Thorps, the change in zoning substantially interfered with the use of their property and had a material adverse effect on its value. ...*

*The Equal Protection Clause ensures that people will not be discriminated against with regard to “ ‘statutory classifications and other governmental activity.’ ” Jackson v. Benson*, 218 Wis.2d 835, 901, 578 N.W.2d 602 (1998) (quoting *Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980)); U.S. Const. amend. XIV, Wis. Const. art. I, § 1. See also *Browndale v. Board of Adjustment*, 60 Wis.2d 182, 203-04, 208 N.W.2d 121 (1973) (stating that in the context of zoning ordinances, equal protection must be granted to those individuals who are similarly situated and who cannot be reasonably distinguished).

*Generally, two levels of judicial scrutiny are applied to equal protection challenges.<sup>12</sup> State ex 634 rel. Watts v. Combined Community Serv.*, 122 Wis.2d 65, 81 n. 8, 362 N.W.2d 104 (1985). *The first level of scrutiny applies to statutes (or ordinances) that involve “fundamental interests or rights, ... suspect classifications or ‘discrete and insular minorities.’ ” Id.* (quoting *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)). *If a statute or governmental activity applies to one of the protected classes, a reviewing court applies a strict scrutiny test. In re Hezzie R.*, 219 Wis.2d 848, 894, 580 N.W.2d 660 (1998). *For a statute or ordinance to pass constitutional muster under strict scrutiny, a governmental entity “must prove that the classification is necessary to promote a 73 ‘compelling governmental interest’....” Id.* (quoting *State v. Post*, 197 Wis.2d 279, 319, 541 N.W.2d 115 (1995)); *State ex rel. Watts*, 122 Wis.2d at 81 n. 8, 362 N.W.2d 104. *Further, the classification must be carefully tailored so that the statute or ordinance uses the least drastic means to achieve the compelling state interest. See State ex rel. Watts*, 122 Wis.2d at 82, 362 N.W.2d 104.

*Nowhere have the Thorps alleged that they belong to a suspect class such as a racial minority. See Jackson*, 218 Wis.2d at 901-02, 578 N.W.2d 602. *Moreover, it has been held that zoning does not involve fundamental rights. Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1239 (9th Cir.1994), cert. denied 513 U.S. 870, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994). *Because neither a suspect class nor a fundamental right is implicated in this case, the strict scrutiny test does not apply to the ordinance at issue.*

*The second level of scrutiny applies “[w]here a suspect class or fundamental interest is not 635 involved....” State ex rel. Watts, 122 Wis.2d at 82 n. 8, 362 N.W.2d 104. This level of scrutiny involves a rational basis test, wherein classifications are upheld “if they are in any way rationally related to the asserted purpose of the legislation.” Id.; In re Hezzie R., 219 Wis.2d at 849, 580 N.W.2d 660 (quoting State v. McManus, 152 Wis.2d 113, 131, 447 N.W.2d 654 (1989)). The statute (or ordinance) must only meet a legitimate state interest. Id. We have also stated the test in terms of whether a legislative enactment is “reasonable and practical” in light of the government’s objective in creating the legislation. In re Hezzie R., 219 Wis.2d at 895, 580 N.W.2d 660 (quoting McManus, 152 Wis.2d at 131, 447 N.W.2d 654).*

*Therefore, the Thorps’ complaint must allege facts that the ordinance is not rationally related to its purpose. We conclude that the Thorps have alleged sufficient facts to state a claim for deprivation of equal protection.”*

6. Query: Where will it all end with emotional support animals?
7. **Recommendation.** To avoid a challenge, do not inadvertently create or allow discriminatory customs or practices.

## V. Thou Shalt Preserve Discretion

1. Mandamus: Mandamus is an extraordinary legal remedy, available only to parties that can show that the writ is based on a “clear, specific legal right which is free from substantial doubt.” *Collins v. American Family Mut. Ins. Co.*, 153 Wis. 2d 477, 483, 451 N.W.2d 429 (1990). A party seeking mandamus must also show that the duty sought to be enforced is positive and plain; that substantial damage will result if the duty is not performed; and that no other adequate remedy at law exists. *Id.* at 483-84.
2. Case example. *Lake Bluff Housing Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 182, 540 N.W.2d 189, 199 (1995) “From our examination of relevant law, it is clear that Lake Bluff obtained no vested rights, because it never submitted an application for a building permit conforming to the zoning and building code requirements in effect at the time of the application. Our cases have consistently held that no rights vest in such an instance. Lake Bluff did not possess the “clear, specific legal right which is free from substantial doubt” that is required in an action for mandamus.” *Collins v. American Family Mut. Ins. Co.*, 153 Wis.2d 477, 483, 451 N.W.2d 429 (1990) (quoting *Eisenberg v. ILHR Dept.*, 59 Wis.2d 98, 101, 207 N.W.2d 874 (1973)).
3. Case example. *Engelhardt v. City of New Berlin*, 2019 WI 2, ¶¶ 2-4, 385 Wis. 2d 86, 89–90, 921 N.W.2d 714, 716. Eight-year-old girl on field trip sponsored by the New Berlin Park and Recreation Department drowned in a pool. The Supreme Court concluded that governmental immunity did not apply, because of the “known danger” exception to the discretionary immunity statute. In reaching this conclusion, the Supreme Court also considered whether municipal governments are ever entitled to discretionary immunity, and reasoned that they do, including the following analysis.

*“We begin our analysis with the text of Wis. Stat. § 893.80(4), the governmental immunity statute. In relevant part, Wis. Stat. § 893.80(4) immunizes municipalities from liability arising out of “acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.” For over 40 years, this court has consistently interpreted this particular statutory language to include any acts that involve the exercise of discretion....*

*Despite decades of legislative silence with regard to this court's long-standing interpretation of the governmental immunity statute, the Engelhardts invite this court to reverse course on the past 40 years of Wisconsin jurisprudence interpreting the governmental immunity statute. They urge the court to adopt an interpretation of the statute that would have the effect of exposing municipalities to liability in a far greater number of circumstances.*

*We decline the Engelhardts' invitation. ...” Engelhardt v. City of New Berlin, 2019 WI 2, ¶¶ 20-24, 385 Wis. 2d 86, 95-96, 921 N.W.2d 714, 718-19*

4. Query: Can the building inspector issue a permit to repair a building that violates the 50% rule, if the Code says the building inspector shall raze such buildings?
5. **Recommendation.** When your ordinance binds the municipality or its staff to do things you will be held to that standard and will be liable if you fail. To avoid a challenge, use words like “may” rather than “shall” when referring to a municipal role.

## **VI. Thou Shalt Provide for Due Process**

1. Wisconsin authority. *“Equality; inherent rights. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.” Wis. Const. Art. I, § 1*
2. Federal authority.
  - a. *“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. Amend. V.*
  - b. *“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges*

*or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV Section 1.*

3. Exhaustion of Remedies. Exhaustion of state law remedies is required unless the plaintiff can show that all state law remedies were either unavailable or inadequate. *Williamson County Regional Planning Commission v. Hamilton Bank*, 474 U.S. 172 (1985). The *Williamson* Court articulated a special ripeness doctrine for constitutional property rights claims which precludes federal courts from adjudicating land use disputes until: (1) the regulatory agency has had an opportunity to make a considered definitive decision, and (2) the property owner exhausts available state remedies for compensation. The purpose of requiring the plaintiff to exhaust all state law remedies is because the plaintiff would be spared all the harm alleged in the constitutional action if the state law remedies would resolve the issue. *Gamble v. Eau Claire County*, 5 F.3d 285, 288 (7<sup>th</sup> Cir. 1993).
4. Procedural Due Process: Notice and Opportunity to be Heard. The essential requirements of “due process” are notice and an opportunity to be heard. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-548 (1985). In any case involving a procedural due process claim, the first question for consideration is whether the plaintiff has been “deprived” of a constitutionally-protected liberty or property interest. The plaintiff must establish the existence of such an interest. In order to have a “property interest” in a benefit, an individual must have “a legitimate claim of entitlement to it,” not merely a “unilateral expectation of it.” *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Once the existence of a property interest has been established, the plaintiff must show that he or she has been “deprived” of it. Not every action that affects a property interest constitutes a deprivation of that interest. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 674 (1999). Once it is determined that the Due Process Clause is implicated by a specific deprivation of liberty or property, the relevant question becomes “what process is due” under the particular circumstances. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The standard for determining what process is due in a given situation is rather flexible, since the due process inquiry eschews reliance on rigid mandates in favor of an approach which accounts for the factual circumstances of the particular situation at issue. In circumstances in which a deprivation is occasioned by an unauthorized, random act of a state official, and not through the use of an established state procedure, the Due Process Clause is satisfied by the availability of an adequate post deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).
5. Substantive Due Process: There are two types of substantive due process violations. The first occurs when the state actor’s conduct is such that it “shocks the conscience.” *Rochin v. California*, 342 U.S. 165, 172-73 (1952). The second occurs when the state actor violates an identified liberty or property interest protected by the Due Process Clause. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

6. Case example.

*“Werner v. City of Green Bay, United States Court of Appeals, Seventh Circuit, July 30, 2018 743 Fed.Appx. On several occasions from 2009 to 2012, Werner sought permission to live at a particular halfway house within the restricted area. Each time the Sex Offender Residence Board, after a hearing, denied Werner’s request. These denials affected Werner most significantly beginning in March 2010, when his inability to find appropriate housing resulted in his being detained in the Brown County Jail for more than a year beyond his scheduled release date. During that period, Werner was let out of jail for four hours each weekday to look for housing and employment, yet not until July 2011 did Werner finally secure housing in Bellevue, a village just outside of Green Bay. In 2012 Green Bay replaced its ordinance with a similar one that categorically exempts halfway houses from the residency restrictions. Green Bay Mun. Code § 27.622. Werner later moved to the halfway house in Green Bay, where he lived until his most recent parole revocation in January 2013.*

*Werner alleges in this suit under 42 U.S.C. § 1983 that the application of these ordinances to him violates both the ex post facto clause of the Constitution and his right to procedural due process. A magistrate judge, presiding by consent, entered summary judgment for the City. The judge ruled that although the ordinances applied “retroactively to his convictions,” that did not pose an ex post facto problem because the effects of the ordinance were not punitive. See Smith v. Doe, 538 U.S. 84, 92-106, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). The judge also rejected Werner’s due-process claim, reasoning that he was not entitled to due process regarding the enactment of the ordinances, see Conn. Dep’t of Pub. Safety v. Doe, 538 U.S. 1, 7-8, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003), and Werner’s hearings before the Sex Offender Residence Board comported with the basic requirements of due process, i.e., notice and an opportunity to be heard, see Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).*

*On appeal Werner maintains that the ordinances are impermissible ex post facto laws and violate his right to procedural due process. But we recently rejected nearly identical arguments in Vasquez v. Foxx, No. 17-1061, 895 F.3d 515, 2018 WL 3372403 (7th Cir. July 11, 2018). In Vasquez we considered a challenge to an Illinois statute that made it a felony for a sex offender to live within 500 feet of a day-care home. Id. at 517–18, at 1. After noting that “a statute is not an impermissible ex post facto law unless it is both retroactive and penal,” id. at 520–21, at 3 (citing United States v. Leach, 639 F.3d 769, 773 (7th Cir. 2011) ), we explained that the Illinois statute raised no ex post facto concerns because it had no retroactive effect at all; it applied “only to conduct occurring after its enactment—i.e., knowingly maintaining a residence within 500 feet of a child day-care home or group day-care home,” id. After considering the factors in Smith, we added that the statute was not punitive. Id. at 520–23, at 3-5. And responding to the plaintiffs’ procedural due-process argument that the statute was enforced against them without a hearing to assess whether they actually posed a threat to children, we concluded that no hearing was required because the statute applied to “all child sex offenders regardless of their individual risk of recidivism.” Id. at 524, at 6.*

*Werner’s challenges to the Green Bay ordinances fail for the same reasons. That the City of Green Bay enacted the ordinances after Werner’s convictions does not pose an ex post facto problem because the ordinances have no retroactive effect. See id. at 520–51, at 3. Moreover, the penalty for violating the ordinance—a \$500 fine—is minor*

*compared to the possible three-year prison sentence faced by the plaintiffs in Vasquez, underscoring that the Green Bay ordinances were not punitive. Id. at 520–23, at 3-5.*

*Likewise, Werner is wrong when he asserts that the Board’s denial of his requests “to reside at one specific residence ... requires a finding of [the] denial of due process.” Werner is not entitled to any “hearing for an individualized risk assessment.” See id. at 524, at 6; see also Conn. Dep’t of Pub. Safety, 538 U.S. at 4, 123 S.Ct. 1160. Yet here the Sex Offender Residence Board gave Werner several such hearings, and eventually the City changed its residency restrictions to categorically exempt the halfway house where Werner wanted to live. Moreover, Werner does not articulate any coherent argument for why he thinks the Board’s procedures were inadequate.”*

7. Query: Does an appeal process always, ever, or never place the burden of proof onto the appellant? For example, if we establish aesthetic regulation of small cell telecommunications providers, and give the providers an avenue of appeal to show that our regulations violate State or federal laws, is the burden of proof on them to convince us that we’ve overreached? Are there any situations where due process would require that the burden shifts to us?
8. **Recommendation.** To avoid a challenge, establish an appeal process.

## **VI. Thou Shalt Remain Content Neutral**

1. Wisconsin authority. *“Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.”* Wis. Const. Art. I, § 3
2. Federal authority. *“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”* U.S. Const. Amend. I
3. Sign regulations, parade regulations, public assembly, private use of facilities, all should be regulated based on the physical impacts, not upon who is doing it or what they are saying.
4. Content-based regulation of speech is strictly construed.
  - a. Case Example: *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2222, 192 L. Ed. 2d 236 (2015).

*“Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. And courts are required to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny. The same is true for laws that, though facially content neutral, cannot be ‘justified without reference to the content of the regulated speech,’ or were adopted by the government ‘because of disagreement with the message’ conveyed.”*

2. Content neutral regulation can be acceptable. Reasonable time, place and manner regulations are acceptable.

- a. Case Example: *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

*“[C]ontent-neutral’ time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.”*

- b. Example Case: *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

*“The District’s regulation of the public’s use of city lampposts as convenient places to post signs is a content-neutral time, place, and manner restriction that is sufficiently tailored to a significant governmental interest in avoiding clutter to comport with the First Amendment. As the district court held, ‘the District’s lampposts are a textbook example of a limited or designated public forum.’ The District might have chosen not to make its lampposts available as a place for the people to put up their signs. But once it allows members of the public to post signs on its lampposts, the government lacks the ‘power to restrict expression because of its message, its ideas, its subject matter, or its content.’”*

3. Regulating the secondary effects of protected speech activities is permissible. This arises most often in the regulation of adult entertainment.

- a. Example Case: *City of Erie v. Pap’s A.M.*, 529 U.S. at 292, 120 S.Ct. 1382 (plurality opinion).

*“Local governments are usually smart enough to invoke ‘secondary effects’ in their regulation of adult businesses. Reciting the magic words doesn’t end the inquiry, of course; whether the adverse secondary effects invoked by the municipality have a basis in reality and are likely to be reduced by the challenged regulation are important inquiries in the intermediate-scrutiny analysis. But when a challenged regulation has been justified with some secondary-effects explanation, the potential or actual invalidity of those explanations doesn’t trigger strict scrutiny. As long as ‘one purpose of the ordinance is to combat harmful secondary effects,’ the ordinance is regarded as content neutral (despite the legal fiction) and thus intermediate scrutiny applies.”*

5. Query: Can we expect to see the SCOTUS, with its current composition, walk back some of the reach of *Reed v. Town of Gilbert*?
6. **Recommendation.** To avoid challenges, remain content neutral in your regulations.

## VII. Thou Shalt Not Take Too Much

1. Wisconsin authority. “*Private property for public use. The property of no person shall be taken for public use without just compensation therefor.*” Wis. Const. Art. I, § 13.
2. Federal authority. “*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*” U.S. Const. Amend. V
3. Regulation of land uses must preserve reasonable options. Do not regulate in a way that removes all reasonable ability to use the property.
4. Just compensation dispute. Where there has been a “taking” but the entity with condemnation power does not pay “just compensation,” the property owner may seek inverse condemnation under Wis. Stat. § 32.10.
5. Methods. A governmental taking occurs in one of three ways: (1) through a permanent physical occupation, (2) a physical invasion short of an occupation, or (3) a regulation that restricts the use of property.
6. Plaintiff challenge. For a challenge to a municipal regulation of land, plaintiffs must demonstrate that the regulation or government action denied them of all or substantially all practical use of the property. *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 548 N.W.2d 528 (1996) (emphasis added).
7. Property damage exception. Both “takings” clauses under the United States and Wisconsin Constitution compensate for takings but not for property damage. *Menick v. City of Menasha*, 200 Wis. 2d 737, 743, 547 N.W.2d 778 (Ct. App. 1996). Mere consequential damage to property resulting from government action is not a taking especially where the property has not been appropriated to the public use. *Wisconsin Power & Light Co. v. Columbia County*, 3 Wis. 2d 1, 6, 87 N.W.2d 279 (1958).
8. Case example. *Murr v. Wisconsin*, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017).  
Background: Owners of two contiguous parcels located along scenic river brought action against State and county, alleging that ordinance preventing them from separately using

or selling parcels resulted in uncompensated taking. The Circuit Court, St. Croix County, Scott R. Needham, J., granted summary judgment to State and county, and owners appealed. The Wisconsin Court of Appeals affirmed, 359 Wis.2d 675, 859 N.W.2d 628, and certiorari was granted. Holdings: The Supreme Court, Justice Kennedy, held that: (1) merger provision in local minimum lot size regulation applicable to property along river was legitimate exercise of government power; (2) parcels were required to be evaluated as a single parcel in determining whether the regulations effected a regulatory taking; and (3) regulations did not effect a compensable regulatory taking.

9. Query: What about trees? Is it a “taking” to require that trees (diseased, or dead, e.g.) be removed? Or is it a taking to prohibit cutting of trees on private property?
10. **Recommendation.** To avoid challenges, do not regulate in a way that causes a permanent physical occupation, a physical invasion short of an occupation, or a regulation that unreasonably restricts the use of property.

### VIII. Thou Shalt Provide for a Good Record

1. Certiorari Standard of Review: The court's review is limited to: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Id.* at 119–20, 388 N.W.2d 593; *Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment*, 74 Wis.2d 468, 475, 247 N.W.2d 98 (1976). *State ex rel. Ruthenberg v. Annuity & Pension Bd.*, 89 Wis.2d 463, 474, 278 N.W.2d 835 (1979). *Ottman v. Town of Primrose*, 2011 WI 18, ¶¶ 34-36, 332 Wis. 2d 3, 22–23, 796 N.W.2d 411, 420–21
2. Given that standard, need a good record. When ordinances, policies and procedures are established, be sure that the process allows for the creation of a good record.
3. Case example. *Arndorfer v. Sauk Cty. Bd. of Adjustment*, 162 Wis. 2d 246, 258–59, 469 N.W.2d 831, 835–36 (1991). “*We cannot conclude from the record that the Arndorfers would suffer unnecessary hardship if the variance is not granted. The record provides no basis for concluding that the soil problems that have caused the Arndorfers’ hardship are unique to their land. Because the Arndorfers have not met their burden of establishing uniqueness, this court is not in a position to order the Board to grant their variance.*”  
  
*We are reluctant, however, to affirm the Board’s action by substituting our own reason for denying the variance where the Board has denied the variance request by citing reasons that are unsupported by the record.”*
4. Query: What is the best way to create a good record under the new conditional use laws?

5. **Recommendation.** To avoid a challenge, make specific findings and conclusions in land use decisions.

## IX. Thou Shalt Not Take People in Vain

1. Negligent or intentional misrepresentation: “All misrepresentation claims share the following required elements: (1) the defendant must have made a representation of fact to the plaintiff; (2) the representation of fact must be false; and (3) the plaintiff must have believed and relied on the misrepresentation to his detriment or damage.” *Ollerman v. O'Rourke Co., Inc.*, 94 Wis.2d 17, 24-25, 288 N.W.2d 95 (1980). Intentional misrepresentation “carries the following additional elements: (4) the defendant must have made the misrepresentation with knowledge that it was false or recklessly without caring whether it was true or false; and (5) the defendant must have made the misrepresentation with intent to deceive and to induce the plaintiff to act on it to his detriment or damage.” *Id.*
2. Breach of contract: In evaluating a breach of contract claim, a court must determine whether a valid contract exists, whether a party has violated its terms, and whether any such violation is material such that it has resulted in damages. See *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis.2d 158, 178-83, 557 N.W.2d 67 (1996).
3. Breach of implied duty of good faith: The implied duty of good faith is attendant to every contract. *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶ 35, 291 Wis.2d 393, 717 N.W.2d 58 (“[p]arties to a contract have a duty of good faith to each other”). A breach of the implied duty of good faith requires intentional or purposeful conduct by one party to the contract which prevents the other party from carrying out its part of the agreement, or the commission of some arbitrary or unreasonable conduct that has the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Id.*
4. Tortious interference with contract: A party must establish: (1) it had a contract or prospective contractual relationship with the third party; (2) the defendant improperly interfered with that relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere. Importantly, the plaintiff bears the burden of proving each of these five elements. *Cudd v. Crownhart*, 122 Wis.2d 656, 661 (App. 1985).
5. Promissory estoppel: A plaintiff must establish: (1) the promise by the defendant is one that the defendant should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the plaintiff, (2) the promise induced such action or forbearance, and (3) injustice can be avoided only by enforcement of the promise. See *McLellan v. Charly*, 313 Wis.2d 623, 758 N.W.2d 94 (Ct. App. 2008). As an initial

requirement, a plaintiff must establish that an actual promise was made by the defendant. Id. at 650.

6. Slander of title: Section § 706.13, Wis. Stat., provides in part that “any person who submits for filing, entering in the judgment and lien docket or recording, any lien, claim of lien ... any other instrument relating to a security interest in or the title to real or personal property, and who knows or should have known that the contents or any part of the contents of the instrument are false, a sham or frivolous, is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of \$1,000 plus any actual damages caused by the filing, entering or recording.”
7. Case example. *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 26–28, 498 N.W.2d 842, 847–48 (1993). “Nevertheless, a board member's opinions on land use and preferences regarding land development should not necessarily disqualify the member from hearing a zoning matter. Since they are purposefully selected from the local area and reflect community values and preferences regarding land use, zoning board members will be familiar with local conditions and the people of the community and can be expected to have opinions about local zoning issues.

*The zoning decision in this case requires that the Board examine a specific piece of land and the activities of a particular property owner. It must engage in fact-finding and then make a decision based on the application of those facts to the ordinance. In this case, where established criteria direct the Board's fact-finding and decision-making, Marris should expect that a decision will be made on the basis of the facts and the law. If a Board member prejudges the facts or the application of the law, then Marris' right to an impartial decision-maker is violated.*

*Determining whether a board member has prejudged a matter requires an examination of the facts of the individual case. In this case we look to the statements made by chairperson Kuerschner. A clear statement “suggesting that a decision has already been reached, or prejudged, should suffice to invalidate a decision.” Marris asserts that the chairperson of the Board prejudged her case before the December public hearing and before the Board reached a final decision. Accordingly, she contends that she did not have a fair and impartial hearing. To support her position Marris points to three comments made by the chairperson. First, the chairperson referred to Marris' legal position as a “loophole” in need of “closing.” Marris claims that this reference indicates the chairperson's intention to terminate her legal nonconforming use status rather than to apply the ordinance objectively and impartially to the facts of her case. Second, the chairperson suggested to Board members and the assistant city attorney that they should try to “get her [Marris] on the Leona Helmsley rule.” Marris argues that this suggestion illustrates the chairperson's personal bias against Marris and her claim. Third, the chairperson questioned how the Board, in analyzing expenditures, could know whether Marris “bought a door for that building or for another building she built.” Marris asserts that this question indicates that the chairperson had prejudged her credibility. Marris asserts that because the totality of the comments indicate prejudgment, the chairperson's refusal to recuse himself denied her a fair hearing.”*

8. Query: How do you avoid interference with contract claims if you adopt a resolution of necessity under Chapter 32 at a time when the property owner had a signed purchase agreement which did not close due to the taking, and the municipality then abandons the taking?
9. **Recommendation.** To avoid claims, maintain a professional decorum. If a public official breaches this obligation, try to rehabilitate the official if possible. If not possible, speak with the official privately about recusal. That's all you can do.

## X. Thou Shalt Allow Free Exercise but Not Establish Religion

1. Wisconsin authority. “*Freedom of worship; liberty of conscience; state religion; public funds. 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.*” Wis. Const. Art. I, § 18.
2. Federal authority. “*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*” U.S. Const. Amend. I
3. Monuments on Public Property. Permanent monuments erected on public property “typically” constitute government speech, even when the monument is created and donated by a private entity. “In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech.” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 481, 129 S. Ct. 1125, 1138, 172 L. Ed. 2d 853 (2009). The Court reasoned that monuments on public property “are meant to convey and have the effect of conveying a government message.” *Id.* at 472, 129 S.Ct. 1125. The Court thus concluded that the Free Speech Clause did not apply to the city’s decision to reject a particular monument from display in a public park. *Id.* at 481, 129 S.Ct. 1125.
4. Reasonable person vs “endorsement:” “Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. Those conditions are satisfied here, and therefore the State may not bar respondents’ cross from Capitol Square.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770, 115 S. Ct. 2440, 2450, 132 L. Ed. 2d 650 (1995) “Thus, ‘we do not ask whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think [the State] endorses religion.’ ” *Id.* at 780, 115 S.Ct. 2440 (quoting *Ams. United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir.1992) (en banc)). Rather, we ask whether an objective, reasonable observer, “aware of the history and context of the community and forum in which the religious display appears,” would fairly understand the display to be a government endorsement of religion. *Id.*; see also *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308, 120 S.Ct. 2266; *County of Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086. This standard presupposes a person of ordinary understanding and sensibility, familiar with the circumstances surrounding the display. *Santa Fe*, 530 U.S. at 308, 120 S.Ct. 2266; *Books*, 235 F.3d at 306. “Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or

disapproval of religion.” American Jewish Cong., 827 F.2d at 127 (quoting Lynch, 465 U.S. at 694, 104 S.Ct. 1355 (O’Connor, J., concurring)). *Books v. Elkhart Cty., Ind.*, 401 F.3d 857, 867 (7th Cir. 2005)

5. Case example (establishment):

*Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018), cert. denied, 139 S. Ct. 823, 202 L. Ed. 2d 578 (2019): “Background: Plaintiff, an adherent of what he called non-theistic Satanism, brought action against the United States and officials from the United States Mint, Department of the Treasury, and Bureau of Engraving and Printing, to enjoin the printing of the national motto, “In God We Trust,” on United States currency, which he claimed violated his rights under the First Amendment’s Free Speech, Free Exercise, and Establishment clauses as well as the Equal Protection component of the Fifth Amendment, and placed an undue burden on his exercise of religion in violation of the Religious Freedom Restoration Act (RFRA). The United States District Court for the Northern District of Illinois, No. 17 C 3417, Amy J. St. Eve, J., 2017 WL 4340110, granted defendants’ motion to dismiss. Plaintiff appealed.

*Holdings: The Court of Appeals, Wood, Chief Judge, held that:*

1. the national motto’s inclusion on currency was not impermissible endorsement of a religious view in violation of the Establishment Clause;
2. the national motto’s inclusion on currency did not coerce plaintiff into advertising, supporting, or participating in Christianity, as would have violated Establishment Clause;
3. inclusion of national motto on currency did not violate the Establishment Clause under the *Lemon v. Kurtzman* test;
4. inclusion of national motto on currency did not violate plaintiff’s free speech rights;
5. inclusion of national motto on currency did not violate plaintiff’s rights under the First Amendment’s Free Exercise Clause;
6. inclusion of national motto on currency did not place an undue burden on plaintiff’s exercise of his religion, and thus did not violate RFRA; and
7. inclusion of national motto on currency did not violate the Equal Protection component of the Fifth Amendment.”

6. Case example (free exercise):

*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017). “Background: Church, which operated religious preschool and daycare program, brought action asserting free exercise claims against Director of Missouri Department of Natural Resources, seeking declaratory and injunctive relief, and challenging denial of church’s application for competitively-awarded grant for purchase of rubber playground surfaces, which denial was based on Department’s policy of denying grants to religiously affiliated applicants. The United States District Court for the Western District of Missouri, Nanette K. Laughrey, J., 976 F.Supp.2d 1137, dismissed action. Church appealed. The United States Court of Appeals for the Eighth Circuit, Loken, Circuit Judge, 788 F.3d 779, affirmed. Certiorari was granted.

*Holdings: The Supreme Court, Chief Justice Roberts, held that: (1) church's challenge was subject to the strictest scrutiny, and (2) denial of church's application for grant to purchase rubber playground surfaces was denial of church's free exercise rights."*

7. Query: Does the lawyer for a Satanist make arguments as the devil's advocate?
8. **Recommendation.** To avoid a challenge, do not regulate religious institutions differently than other users that have a similar impact (free exercise and RLUIPA issues); and do not act in such a way that a person of ordinary understanding and sensibility, familiar with the circumstances, would find to be endorsement of religion (establishment issue).