

**FILED**  
**05-16-2025**  
**Burnett County**  
**Clerk of Court**  
**2025CV000048**

STATE OF WISCONSIN

CIRCUIT COURT

BURNETT COUNTY

CHAD M. MCEVER  
6520 Buffalo Speedway  
Houston, Texas 77005,

SCOTT OPPENHEIMER  
9487 Napoli Lane #202  
Naples, Florida 34113,

Case No.  
Class Code 30701

and

PEGGY O OPPENHEIMER LIVING TRUST  
101 S Fort Lauderdale Beach Blvd ~ Apt 1104  
Fort Lauderdale, FL 33316,

Plaintiffs,

vs.

TOWN OF SCOTT  
28390 County Road H  
Spooner, WI 54801,

Defendants.

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## SUMMONS

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### TO TOWN OF SCOTT, RESPONDENT:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action. Within **20 days** of receiving this Summons and Complaint, you must respond with a written Answer, as that term is used in ch. 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an Answer that does not follow the requirements of the statutes.

The Answer must be sent or delivered to the Court, whose address is:

Clerk of Circuit Court  
Burnett County Courthouse  
7410 County Road K, 115  
Siren, WI 54872

The Answer must also be sent or delivered to Plaintiffs' attorneys, whose address is:

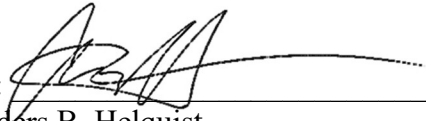
Weld Riley, S.C.  
3624 Oakwood Hills Parkway  
P.O. Box 1030  
Eau Claire, WI 54702-1030


You may have an attorney help or represent you.

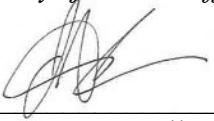
If you do not provide a proper Answer within **20 days**, the Court may grant a Judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is, or may be, incorrect in the Complaint. A Judgment may be enforced as provided by law. A Judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 16<sup>th</sup> day of May, 2025.

**WELD RILEY, S.C.**

By:   
Anders B. Helquist  
WI State Bar # 1070854  
Weld Riley, S.C.  
3624 Oakwood Hills Parkway  
Eau Claire, WI 54701  
715-839-7786  
ahelquist@weldriley.com  
*Attorneys for Plaintiffs*

By:   
John Robert Behling  
WI State Bar # 1036097  
Weld Riley, S.C.  
3624 Oakwood Hills Parkway  
Eau Claire, WI 54701  
715-839-7786  
*Attorneys for Plaintiffs*

By:   
Jeffrey A. Cornell  
WI State Bar # 1101522  
Weld Riley, S.C.  
3624 Oakwood Hills Parkway  
Eau Claire, WI 54701  
715-839-7786  
*Attorneys for Plaintiffs*

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Defendants.

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## COMPLAINT

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Plaintiffs, Chad M. McEver, Scott Oppenheimer, and the Peggy O Oppenheimer Living Trust and by its attorneys, Weld Riley, S.C., by Anders B. Helquist, Jeffrey A. Cormell, and John Robert Behling, as its Complaint against above-named Defendant, alleges as follows:

## INTRODUCTION

This action seeks a declaratory judgment that an ordinance attempting to completely ban

wake surfing on all lakes in the Town of Scott, Burnett County, is illegal and unconstitutional. This action also seeks injunctive relief, enjoining Defendant and any of its officers or other officials from attempting to enforce the vague, overbroad, and illegal ordinance.

### **THE PARTIES**

1. Chad M. McEver (“McEver”), is an adult resident of the State of Texas, with an address of 6520 Buffalo Speedway, Houston, Texas 77005. McEver co-owns a parcel of real property in the Town of Scott, Burnett County, Wisconsin with an address of 28845 Birch Island Lake Drive, in the Town of Scott, Burnett County, Wisconsin (“McEver Property”).

2. Scott Oppenheimer (“Oppenheimer”), is an adult resident of the State of Florida, with an address of 9487 Napoli Lane #202 Naples, Florida 34113. Oppenheimer is the co-trustee of the Peggy O Oppenheimer Living Trust (the “Trust”), which owns real property in the Town of Scott, Burnett County, Wisconsin with an address of 28833 Birch Island Lake Drive, in the Town of Scott, Burnett County, Wisconsin (“Oppenheimer Property”).

3. The Peggy O Oppenheimer Living Trust (the “Trust”), owns the Oppenheimer Property, as set forth above

4. Defendant, the Town of Scott (“Town”), is a local government unit and municipality organized and existing under ch. 60, Wis. Stats., and is located in Burnett County, Wisconsin. The Town has a mailing address of 28390 County Road H, Spooner, Wisconsin 54801.

### **JURISDICTION AND VENUE**

5. This action arises from the passage of an ordinance in the Town of Scott, Burnett County, that adversely impacts Plaintiffs’ riparian rights on properties in the Town in Burnett County.

6. The Court has jurisdiction in this matter under Wis. Stat. §§ 806.04, 813.01, and 813.02.

7. This Court also has jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343 because Plaintiff's action arises under the Fourteenth Amendment to the United States Constitution; and under federal law, particularly the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1988; and declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. This Court has authority to issue the requested declaratory relief pursuant to 28 U.S.C. § 2201 and 2202, the requested injunctive relief under 28 U.S.C. § 1343, and reasonable attorneys fees and costs under 42 U.S.C. § 1988. *See Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 19, 235 Wis. 2d 610, 623, 612 N.W.2d 59, 67.

8. This Court has personal jurisdiction over the Defendant in Burnett County.

9. Venue in Burnett County Circuit Court is proper under Wis. Stat. § 801.50(2)(a)-(c).

### **GENERAL ALLEGATIONS**

10. Plaintiffs reallege all prior allegations.

#### **Wake Surfing**

11. Wake boats are almost exclusively the watercraft used for “wake surfing.” Wake surfing allows a person on a “surf” board to ride the “wave” created by the wake boat without using a rope or going at a high rate of speed (unlike wakeboarding).

12. Wake surfing occurs at significantly slower speeds, typically 10-12 miles per hour compared to higher-speed and higher-impact watersports like tubing, wakeboarding, and water skiing, which occur at speeds of 25-30 miles per hour.

13. Wake surfing is a “low impact” watersport that is accessible for many ages and ability levels, including people with disabilities, physical limitations or infirmities, or those that can no longer incur the harder falls associated with water skiing or wakeboarding at high speeds. A wake surfing prohibition targets and adversely impacts those affected population groups and lake users.

14. With slower speeds and the nature of wake surfing, youth can also safely enjoy this recreational watersport without the risks of injury incurred in higher-speed and higher-impact watersports like water skiing and wakeboarding, potentially minimizing concussion and other physical risks.

Town of Scott Passes Ordinance Banning Wake Surfing with No Discussion

15. On November 11, 2024, the Town, through its Town Board of Supervisors, passed Ordinance No. 2024-01 (“Ordinance”) in an affirmative 2-1 vote.

16. Town Chairman Scott Barton and Town Supervisor John Vanous voted in favor of the Ordinance. A copy of the Ordinance is attached as Exhibit 1 to this Complaint.

17. The Ordinance prohibits wake surfing on every lake in the Town, including Birch Island Lake. In effect, this ban targets a specific type of boat, a “wake boat.”

18. The Ordinance adopts the penalties in Wis. Stat. § 30.80, which imposes monetary penalties.

19. Prior to passage of the Ordinance, the Town held a public hearing on September 23, 2024.

20. At the public hearing, members of the public were generally limited to 3 minutes of comment during the public hearing, but the Town accommodated and allowed a nearly 35-minute presentation by a person opposed to wake surfing.

21. On September 23, 2024, after the public finished their comments at the public hearing and before adjournment, Town Chairman Barton said regarding the then-proposed Ordinance, “This is a decision for the Board that’s not going to be made lightly.” He then further stated, “We have to review this. I think we’ll have to continue to talk about this. If the people with the boats want to come up with a proposal, I’m not in favor of oversweeping law that says we can’t do this here or there. I mean there’s got to be a compromise someplace.”

22. After the public hearing, another Town Supervisor, John Vanous, verbalized on September 23, that, “We need all the information that we can get.”

23. The apparent commitments to additional discussion, compromise, review, and need for additional information acted as misrepresentations to hide a predetermined decision with no additional public discussion, and no opportunity for public comment at the meeting when the Ordinance was next addressed.

24. After the September 23 public hearing, the Ordinance was not on a Town Board meeting agenda until the Town Board’s regular monthly meeting on November 11, 2024.

25. Despite the supposed commitments for additional discussion, review, compromise, or “need[ing] all the information that we can get,” on October 11, 2024, one month before passage, Supervisor Vanous sent an e-mail to the Town Clerk seeking to delete comments received related to the pending Ordinance. In response to comments or information regarding the then-pending Ordinance, Vanous said:

We had a meeting about this for everyone to speak. I do not need to hear more or anyone of us [sic]. I [sic] my opinion **just delete any more that come in. They are to [sic] late to the party** so please do not forward anymore wake boat opinions to me please. John vanous [sic].



(emphasis added). If any such records were deleted, the deletion of those records would be prohibited by Wisconsin law requiring retention of public records and raises a concern whether all public records were provided to records requesters, such as Plaintiffs.

26. After October 11, 2024, without knowledge of Vanous' comment, McEver e-mailed the Town Board additional information regarding wake surfing and the lack of any complaints or issues on Birch Island Lake. McEver received no response from the Town Board.

27. After October 11, 2024, without knowledge of Vanous' comment, Plaintiffs' attorneys sent a letter with information to the Town Board which demonstrated the safety of wake surfing to the public and the environment, including a PowerPoint presentation with video demonstrating the safety of wake boats and wake surfing compared to other boats.

28. Further, in the letter to the Town Board sent by Plaintiffs' attorneys, the attorneys requested the following: "At the November 11 meeting, we request the same opportunity that Richard Phillips did – to present this video/PowerPoint to the Board and public. We would bring our own laptop and would coordinate any equipment needs with the Town Clerk and we promise not to talk for over 20 minutes like Phillips did after his video."

29. No one from the Town replied to that letter requesting equal time to hear an opposing viewpoint.

30. Further, the Town Chairman and Supervisor Vanous did not download, open, or review the PowerPoint presentation to review and consider information and a viewpoint that was contrary to what the proposed Ordinance would ban.

31. On November 8, 2024 and prior to the November 11 Town Board meeting, Plaintiffs' legal counsel requested a copy of the agenda so "we may be prepared to appear on Monday."

32. The Town was, or should have been, aware Plaintiffs' legal counsel was going to attend the meeting and intended to speak and address the Town Board regarding the Ordinance.

33. Upon information and belief, the Town was aware other individuals would want to appear to oppose and voice opposition to the Ordinance. On November 7, 2024, the Town Clerk sent a text message to Chairman Barton. In that text message, the Town Clerk asked the Town Chairman whether the wake boat ordinance would be on the agenda and added that "There is a guy annoying me from Illinois that is changing his schedule around to attend and wants to know."

34. In response to the November 8 request for the agenda, the Town Clerk waited until the day of the meeting – Monday, November 11, 2024 – to email the agenda to Plaintiffs' legal counsel.

35. Plaintiffs' attorneys – Anders Helquist and Jeffrey Cornell – and McEver attended the November 11, 2024 Town Board meeting and were prepared to present the PowerPoint presentation, oppose the Ordinance, discuss Ordinance compromises, and to work cooperatively with the Town, as the Town Chairman had committed to during the September 23 public hearing.

36. Minutes before the start of the meeting, in the Town office, Plaintiffs' legal counsel asked the Town Chairman if he had received and reviewed the additional information sent by Plaintiffs' legal counsel, including the PowerPoint presentation. In response to that direct question, Chairman Barton stated he had done so, but that he had no questions. Since the Town Chairman did not download or open the information sent by Plaintiffs' counsel, we believe the Chairman may not be telling the truth.

37. There was no public comment on the agenda and no public comment was allowed for the Town Board's regular monthly meeting on November 11, 2024.

38. Contrary to the September 23 statements from the Chairman about the need to “continue to talk about this” or that wake boat owners could “come up with a proposal,” McEver and Plaintiffs’ attorneys were prohibited from making comments and expressing their viewpoints related to the Ordinance at the November 11 meeting before its passage because the Town Board did not notice or allow public comment at the November 11 meeting before it considered and passed the Ordinance.

39. Except for the three (3) meetings during the beginning of COVID, prior to November 11, 2024 and dating back to January 1, 2013, the Town Board had public comment on its agenda or allowed public comment at its previous 125 regular monthly Town Board meetings.

40. And yet, on November 11, 2024, for the first time in at least the last 52 regular monthly Town Board meetings (or at least 125 meetings dating back until at least January 1, 2013 (excluding the 3 COVID meetings)), the Town excluded public comment from its meeting agenda when the Ordinance was up for discussion and action and when Plaintiffs’ attorneys had notified the Town that they would be appearing and planned to speak.

41. Upon information and belief, the Town’s exclusion of a public comment period on the November 11, 2024 agenda before passage of the Ordinance was intended to and did in effect, suppress a contrary viewpoint held by McEver, Plaintiffs, and their attorneys.

42. On November 11, 2024, after prohibiting public comment, the Board conducted zero discussion before passing the Ordinance, an Ordinance with broad and sweeping adverse impacts to Plaintiffs and others.

43. When the agenda item for the Ordinance came up on the agenda at the November 11 meeting, the following dialogue was all that occurred:

Town Chairman Scott Barton: Reports, Discussions, and Actions. First on the agenda we would have a wake boat ordinance. What we're going to do is vote on the ordinance whether we approve or disapprove. So we'll just take, uh, a vote. All in favor of

Town Clerk Ken Busby: We need a motion.

Barton: Well, I need a motion to adopt the Ordinance Number 2024-1.

Town Supervisor John Vanous: I'll make a motion that we adopt the Ordinance 20 [partially inaudible].

Barton: I would second the motion. As written.

Vanous: [Inaudible second-long mumble].

Barton: All in favor of the ordinance say 'Aye.'

Vanous: Aye.

Barton: Aye. Anyone opposed?

Town Supervisor Deni Olson: Aye.

Barton: Ayes have it 2 to 1. We'll sign this afterwards.

44. From the time the motion to approve the Ordinance was made through the Ordinance's approval, only 14 seconds elapsed, approximately the brief length of time it took for the Town Board to open the meeting by reciting the Pledge of Allegiance.

45. No discussion or rationale was provided by the Board in passing the Ordinance on November 11, 2024 and no rationale or discussion occurred or was provided by the Board which justified the Ordinance's prohibitions as applied to Birch Island Lake and as required under Wis. Stat. § 30.77(3)(cm).

46. Based on Town Board meeting minutes dating back to July 8, 2024 – the date that outside interests brought the Ordinance to the Board at the Board's regular meeting – there is no evidence in the minutes that the Board itself ever discussed the need for the Ordinance, the basis

for any “condition report,” justifications for the Ordinance, or factual findings in support of the Ordinance, especially as it applies to Birch Island Lake.

47. Contrary to Chairman Barton’s September 23 stated commitment that this Ordinance wasn’t a decision “that would be made lightly” and that “we’ll have to continue to talk about this,” the Board failed to engage in any discussion regarding the Ordinance in open session after September 23 and passed the Ordinance without any discussion or public input at the November 11 meeting, with only 14 seconds elapsing from the time the motion was made to approve the Ordinance.

Notice of Claim and Failure to Affirmatively Disallow Claim

48. On January 11, 2025, Defendant Town of Scott, Scott Barton, and John Vanous were personally served a Notice of Circumstances Giving Rise to Claim and Claim Pursuant to Wis. Stat. § 893.80 (“Notice of Claim”), with the above-named Plaintiffs named as the Claimants.

49. Defendants failed to affirmatively disallow the Notice of Claim within 120 days of it being served.

50. Consistent with Wis. Stat. § 893.80, Plaintiffs have timely brought this Complaint against the Defendant.

Post-Ordinance Passage Evasion of Public Records Law

51. Since the passage of the Ordinance and due in part to the minimal 14 seconds of non-discussion the Board had on November 11, which implies a predetermined and discussed result outside of a properly noticed meeting, two of the Plaintiffs requested under Wisconsin’s Public Records Law, to inspect communication records (e.g., emails, text messages, and call logs) of Scott Barton, John Vanous, and Town Clerk Ken Busby related to the Ordinance and wake surf-related issues.

52. Contrary to the requirements of transparency and open government related to their action passing the Ordinance, the Town denied the inspection request.

53. Accordingly, two of the Plaintiffs have sued the Town, Scott Barton, John Vanous, and Ken Busby through a Writ of Mandamus attempting to compel inspection of records related to the Ordinance and wake surf-related issues. *See McEver et al v. Town of Scott et al*, (Burnett County Case No. 2025CV000021).

McEver and Oppenheimer – Riparian Property Owners and Wake Boat Owners

54. The McEver Property abuts Birch Island Lake in the Town of Scott and McEver is a riparian owner on Birch Island Lake.

55. McEver owns a boat – a 2017 Mastercraft XT20 (the “McEver Boat”) – which he uses for wake surfing with his family and friends on Birch Island Lake. The McEver Boat is designed to be used as a wake boat for wake surfing.

56. The McEver Boat is not transported from lake to lake during the summer season, and is used exclusively on Birch Island Lake.

57. Any justification used by the Town related to aquatic invasive species related to wake boat use is completely negated by McEver not transporting the McEver Boat to other lakes.

58. The Ordinance attempts to prohibit the ability of McEver to use the McEver Boat for its intended purpose and use – wake surfing.

59. McEver is damaged through the taking of his personal property – the McEver Boat, including the equipment on it – through the Ordinance and compensation is due in an amount of not less than \$124,570, the value of the McEver Boat.

60. The Oppenheimer Property abuts Birch Island Lake in the Town of Scott. The Trust is a riparian owner and through the Trust, Scott Oppenheimer enjoys the privileges and benefits of

real property ownership. He stays at the residential building on the Oppenheimer Property and has the right to access Birch Island Lake and engage in recreational activities on it.

61. Oppenheimer owns a boat – a 2012 Nautique 200 V Sport (the “Oppenheimer Boat”) – which he uses for wake surfing with his family and friends on Birch Island Lake. The Oppenheimer Boat is designed to be used as a wake boat for wake surfing.

62. The Oppenheimer Boat is not transported from lake to lake during the summer season, and is used exclusively on Birch Island Lake.

63. Any justification used by the Town related to aquatic invasive species related to wake boat use is completely negated by Oppenheimer not transporting the Oppenheimer Boat to other lakes.

64. The Ordinance attempts to completely prohibit the ability of Oppenheimer to use the Oppenheimer Boat for its intended purpose and use – wake surfing.

65. Oppenheimer is damaged through the taking of his personal property – the Oppenheimer Boat, including the equipment on it – through the Ordinance and compensation is due in an amount of not less than \$65,587, the value of the Oppenheimer Boat.

#### **CAUSE OF ACTION I**

**(Declaratory Judgment under Wis. Stat. § 806.04 – Ordinance is *Ultra Vires*, as Ordinance Exceeded Statutory Authority when Town Failed to Make Required Findings and Support for Findings on all Lakes in the Town, including but not limited to Birch Island Lake (Wis. Stat. § 30.77(3)(cm)1.-3.)**

66. Plaintiffs reallege all prior allegations.

67. The Town has limited authority to enact ordinances restricting use of the waters of the state, including lakes within its Town boundaries, such as Birch Island Lake.

68. Unless the Town enacts an ordinance pursuant to its authority in Wis. Stat. § 30.77(3), an ordinance, “that *in any manner* excludes any boat from the free use of the waters of

this state *or that pertains to the use, operation or equipment of boats* or which governs any activity regulated by ss. 30.50 to 30.71” is prohibited. Wis. Stat. § 30.77(1)(b) (emphasis added).

69. Prior to the Town enacting an Ordinance under Wis. Stat. § 30.77(3) “for a given body of water,” such as Birch Island Lake, the town “*shall* take into account factors that include *all of the following*: 1. The type, size, shape and depth of the body of water and any features of special environmental significance that the body of water has. 2. The amount, type and speed of boating traffic on the body of water and boating safety and congestion. 3. The degree to which the boating traffic on the body of water affects other recreational uses and the public’s health, safety and welfare, including the public’s interest in preserving the state’s natural resources.” Wis. Stat. § 30.77(3)(cm)1.-3 (emphasis added).

70. The Town failed to take into account all of those mandatory factors, in particular for Birch Island Lake, and other bodies of water throughout the Town, which are covered by the Ordinance.

71. No specific findings of fact were made by the Town in its Ordinance relating to Birch Island Lake.

72. There was no discussion when the Ordinance passed that created findings that justified the prohibition.

73. None of the “Whereas” clauses make the findings required as it pertains to any specific lake, much less Birch Island Lake specifically.

74. Any so-called “Condition Report” that the Town may attempt to rely on after-the-fact is not referenced or referred to in the Ordinance as being relied on.

75. Any so-called Condition Report does not discuss the “amount, type and speed of boating traffic on [Birch Island Lake] and boating safety and congestion” and any so-called



Condition Report does not review the “degree to which the boating traffic on [Birch Island Lake] affects other recreational uses and the public’s health, safety and welfare, including the public’s interest in preserving the state’s natural resources.”

76. There are no known studies with scientific evidence conducted by the Town specific to Birch Island Lake, or specific to any other lake in the Town, which justify the prohibition of wake surfing.

77. There exists justiciable controversies between the parties.

78. The interests of the Plaintiffs and Defendant are adverse.

79. Plaintiffs have a legally protectable interest that is the subject of this controversy, and thus, in achieving a declaration of their rights and interests.

80. The issues involved in said controversy are ripe for judicial determination.

81. Further, if the issues presented are resolved by the Court, such resolution will end this controversy.

#### **CAUSE OF ACTION II**

**(Declaratory Judgment under Wis. Stat. § 806.04 – Ordinance is *Ultra Vires* as Wis. Stat. § 30.77(3)(cr) Does Not Authorize Complete Prohibition )**

82. Plaintiff realleges all prior allegations.

83. The Town has limited authority to enact Ordinances under Wis. Stat. § 30.77.

84. Sections 1 and 2 “prohibit” certain activities and the Town exceeds its statutory authority by creating outright prohibitions, i.e., bans.

85. There exists justiciable controversies between the parties.

86. The interests of the Plaintiffs and Defendant are adverse.

87. Plaintiffs have a legally protectable interest that is the subject of this controversy, and thus, in achieving a declaration of their rights and interests.

88. The issues involved in said controversy are ripe for judicial determination.

89. Further, if the issues presented are resolved by the Court, such resolution will end this controversy.

**CAUSE OF ACTION III**

**(Declaratory Judgment under 28 U.S.C. §§ 2201-2202– Ordinance is Unconstitutionally Vague (Void for Vagueness) and Overbroad and Violates Plaintiffs’ Constitutional Rights to Procedural Due Process under the Fourteenth (14<sup>th</sup>) Amendment of the U.S. Constitution– 42 U.S.C. § 1983)**

90. Plaintiffs reallege all prior allegations.

91. A municipality is subject to liability under § 1983 if “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.” *Monell v. Department of Soc. Serv. of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

92. The Ordinance is void due to vagueness and violates Plaintiffs’ rights to procedural due process under the 14<sup>th</sup> Amendment of the United States Constitution.

93. The Ordinance contains no definitions for any of its terms. Multiple terms in the Ordinance are vague, lack fair notice to Plaintiffs and others seeking to wake surf, and encourages arbitrary and discriminatory enforcement against Plaintiffs.

94. The Wisconsin Department of Natural Resource’s (“WDNR”) own advisory review of the Ordinance concluded terms in the Ordinance “are subjective and therefore, difficult to enforce.”

95. Upon information and belief, the Town ignored the WDNR’s concerns about subjectivity, i.e., vagueness and ambiguity, and enforceability of the Ordinance.

96. The Ordinance contains no definition for “bow high manner” or “artificially bow high manner.”

97. Those terms – “bow high” and “artificially bow high” – also appear to be different and conflict with each other, creating additional vagueness.

98. While operating their respective wake boats during wake surfing activities, Plaintiffs are able to safely see over the bow of their boat, can view the water and what is in front of their respective boats, and continue to operate their respective boats in a safe manner.

99. Plaintiffs understand they are not operating in a “bow high” or “artificially bow high” manner since they can safely see over and operate their wake boats while wake surfing. However, in the context of this Ordinance and its undefined terms, Plaintiffs are unaware whether operating their wake boats when wake surfing will violate those vague and ambiguous terms.

100. There are no guidelines, measurements, or other calculable basis for enforcement in the Ordinance to determine whether a boat is operated in a “bow high manner” or “artificially bow high manner” giving virtually complete discretion to law enforcement to justify a stop of the Plaintiffs’ wake boats in an attempt to further search or enforce the Ordinance.

101. For example, wake boats, when engaged in wake surfing, operate in a manner that is not apparently “bow high” or “artificially bow high” as the operator of the boat can see over the bow of the boat, as shown below. Under the Ordinance, is this allowed or not? Who knows, until it is enforced, without any guidelines, measurements or other calculable, non-arbitrary basis for enforcement.



Photo credit to Paul A. Smith of the *Milwaukee Journal Sentinel*, for image showing wake boat that does not appear to be operating in a “bow high manner” while wake surfing.



102. In contrast, other exempt activities allowed under the Ordinance, such as water skiing, wakeboarding, or tubing, apparently have no limits on operating in a “bow high manner,” so long as ballast tanks, ballast bags, or fins aren’t used. For example, the Town’s Ordinance appears to allow the following activities and it is unclear if the boat is operating in a “bow high” or “artificially bow high” manner, but because the individual is being towed by a rope, the Ordinance might allow this or might not.



103. The below fishing boat is operating in a manner that has a higher bow than a wake boat (compare images in ¶101), the driver can't see over the bow, and depending on the enforcement officer, could be construed to be operating in an "artificially bow high" manner contrary to the Ordinance. The Ordinance may prohibit fishing boat operation if the use of the outboard motor is "artificial," the boat as pictured here is "bow high" and if the motor has increased the boat's wake, but it is unclear if this would be prohibited by the Ordinance until it's enforced, because the terms of the Ordinance are vague and ambiguous.



104. If boats similar to the above fishing boat are not targeted for operating in a "bow-high manner" or an "artificially bow high manner," but the Ordinance targets wake boat operations as shown in Paragraph 101, above, then the Ordinance is unlawfully targeting and attempting to ban use of a wake boat. Across-the-board regulation by boat size, type of boat, or horsepower has been considered and is an unwarranted prohibition on public rights.

105. The below pontoon boat is operating in a manner that has a higher bow than a wake boat (compare images in ¶101), and depending on the enforcement officer, could be construed to be operating in an "artificially bow high" manner contrary to the Ordinance. The Ordinance may

prohibit pontoon boat operation if the use of the outboard motor is “artificial,” the boat as pictured here is “bow high” and if the motor has increased the boat’s wake, but it is unclear if this would be prohibited by the Ordinance until it’s enforced, because the terms of the Ordinance are vague and ambiguous.



106. If boats similar to the above pontoon boat are not targeted for operating in a “bow-high manner” or an “artificially bow high manner,” but the Ordinance targets wake boat operations as shown in Paragraph 101, above, then the Ordinance is unlawfully targeting and attempting to ban use of a wake boat. Across-the-board regulation by boat size, type of boat, or horsepower has been considered and is an unwarranted prohibition on public rights.

107. The Ordinance also exempts from its prohibitions, a “brief transition operation” but that term is undefined. There are no guidelines, measurements, or other calculable basis for enforcement in the Ordinance to determine whether a “brief transition operation” is, whether that is measured in seconds, minutes, or distance, giving virtually complete discretion to law enforcement on whether to stop the boat and enforce the Ordinance.

108. The term “fin” is also undefined and provides no guidance on how to define that term and what constitutes a “fin.”

109. The Ordinance's prohibition on ballast tanks, ballast bags, or so-called "fins" are features that are primarily internal to the boat, under the water's surface or the boat itself, and are not readily visible to a law enforcement officer to justify stopping a boat based on a visual observation. That leaves virtually complete discretion to pick and choose whether a boat is operating in a "bow-high manner," "artificially bow high manner," or "brief transition speed" in an attempt to arbitrarily and unlawfully stop it and engage in additional unlawful searches for use of ballast tanks, ballast bags, or so-called "fins."

110. The Ordinance is also overbroad. The Town Chairman admitted that the Ordinance is an "oversweeping law."

111. There exists justiciable controversies between the parties.

112. The interests of the Plaintiffs and Defendant are adverse.

113. Plaintiffs have a legally protectable interest that is the subject of this controversy, and thus, in achieving a declaration of their rights and interests.

114. The issues involved in said controversy are ripe for judicial determination.

115. Further, if the issues presented are resolved by the Court, such resolution will end this controversy.

#### **CAUSE OF ACTION IV**

**(Declaratory Judgment under 28 U.S.C. §§ 2201-2202– Ordinance Violates Plaintiffs' Constitutional Rights to Substantive Due Process under the Fourteenth (14<sup>th</sup>) Amendment of the U.S. Constitution – 42 U.S.C. § 1983)**

116. Plaintiffs reallege all prior allegations.

117. There exists justiciable controversies between the parties.

118. The interests of the Plaintiffs and Defendant are adverse.



119. Plaintiffs have a legally protectable interest that is the subject of this controversy, and thus, in achieving a declaration of their rights and interests.

120. The issues involved in said controversy are ripe for judicial determination.

121. Further, if the issues presented are resolved by the Court, such resolution will end this controversy.

**CAUSE OF ACTION V**

**(Declaratory Judgment under Wis. Stat. § 806.04 – Ordinance Violates Plaintiffs’ Constitutional Rights to Procedural Due Process under Art. 1, § 1 of the Wisconsin Constitution)**

122. Plaintiffs reallege all prior allegations.

123. There exists justiciable controversies between the parties.

124. The interests of the Plaintiffs and Defendant are adverse.

125. Plaintiffs have a legally protectable interest that is the subject of this controversy, and thus, in achieving a declaration of their rights and interests.

126. The issues involved in said controversy are ripe for judicial determination.

127. Further, if the issues presented are resolved by the Court, such resolution will end this controversy.

**CAUSE OF ACTION VI**

**(Declaratory Judgment under Wis. Stat. § 806.04 – Ordinance Violates Plaintiffs’ Constitutional Rights to Substantive Due Process under Art. 1, § 1 of the Wisconsin Constitution)**

128. Plaintiffs reallege all prior allegations.

129. There exists justiciable controversies between the parties.

130. The interests of the Plaintiffs and Defendant are adverse.

131. Plaintiffs have a legally protectable interest that is the subject of this controversy, and thus, in achieving a declaration of their rights and interests.

132. The issues involved in said controversy are ripe for judicial determination.

133. Further, if the issues presented are resolved by the Court, such resolution will end this controversy.

**CAUSE OF ACTION VII**  
**(Declaratory Judgment under Wis. Stat. § 806.04 – Ordinance Constitutes Unconstitutional Violation (Equal Protection and Substantive Due Process) of Plaintiffs’ Rights as Riparian Owners who Possess Riparian Rights)**

134. Plaintiffs reallege all prior allegations.

135. Through the Ordinance’s attempt to prohibit wake surfing – an otherwise legal and reasonable recreational use of the water in Wisconsin for riparian owners – the Town has deprived McEver and Oppenheimer of their rights as riparian property owners on Birch Island Lake to a reasonable means of recreation on Birch Island Lake.

136. Plaintiffs, as riparian owners on Birch Island Lake, have recognized constitutional rights as riparian owners to engage in recreational activities on their lakes, including boating. “It is clear in Wisconsin that the mere fact that one owns property abutting a natural body of water presumptively confers certain rights.” *Mayer v. Grueber*, 29 Wis. 2d 168, 174, 138 N.W.2d 197, 203 (1965).

137. Riparian owners have “‘special rights to make use of water in a waterway adjoining an owner’s property.’ They are the ‘bundle of rights’ that may be conferred upon a property owner by virtue of his contiguity to a navigable body of water.” *Movrich v. Lobermeier*, 2018 WI 9, ¶ 22, 379 Wis. 2d 269, 283-84, 905 N.W.2d 807, 813 (internal citations excluded) (emphasis added).

138. Plaintiffs' riparian rights include "[t]he right to reasonable use of the waters for ... recreational purposes." *Id.* at ¶ 22.

139. Riparian rights include the right to use a body of water "for bathing, swimming and boating purposes." *Bino v. Hurley* 273 Wis. 10, 16 (1956).

140. Plaintiffs' riparian rights are "substantial and valuable [] for which compensation must be given if the owner is to be deprived of [them]." A deprivation of riparian rights constitutes "the taking of property . . . without due process and without compensation. It violates the 14th Amendment of the Federal Constitution and the provisions of sec. 13, art. 1, Wisconsin Constitution." *Id.*

141. The Wisconsin Department of Natural Resources' "Guideline for Creating Local Boating Ordinances and Placing Waterway Markers in Wisconsin Waters" (PUB-LE-317-2016) states towns must consider riparian owners' rights when enacting an ordinance under Wis. Stat. § 30.77. The Town did not do so here.

142. There exists justiciable controversies between the parties.

143. The interests of the Plaintiffs and Defendant are adverse.

144. Plaintiffs have a legally protectable interest that is the subject of this controversy, and thus, in achieving a declaration of their rights and interests.

145. The issues involved in said controversy are ripe for judicial determination.

146. Further, if the issues presented are resolved by the Court, such resolution will end this controversy.

#### **CAUSE OF ACTION VIII**

**(Declaratory Judgment under Wis. Stat. § 806.04 – Ordinance is Arbitrary, Capricious, or an Abuse of Discretion and therefore Void and Illegal)**

147. Plaintiffs reallege all prior allegations.

148. The Ordinance's approval was arbitrary and capricious, as the Town provided no discussion during the 14 seconds between when the motion was made to pass the Ordinance and when it received a majority 2-1 vote of its Supervisors.

149. In its 14 seconds of discussion, the Town provided no evidence to support its overbroad and generalized assertions in its Ordinances "Whereas" clauses as specifically applied to Birch Island Lake or other lakes in the Town.

150. The Ordinance itself contained no evidence in support of its generalized and overbroad "Whereas" clauses as specifically applied to Birch Island Lake or other lakes in the Town.

151. Further, the Ordinance arbitrarily and capriciously targets one particular type of boat (wake boats) and activity (wake surfing) but expressly exempts activities such as water skiing, tubing, and wake boarding even though those activities engage in the same prohibited operations that wake surfing does. *See* ¶102. Water skiing, tubing, and wake boarding, especially when training youth to engage in such activities, occur at slower speeds and create waves equal to or greater than a wave created by a wake boat when wake surfing.

152. For example, when tubing, safe speeds for youth are 8-12 miles per hour. When engaging in tubing or other recreational uses, those other non-wake boats generate wave heights averaging 11 inches and as high as 17 inches at just 100 feet from the boat.

153. If wave size is the basis to prohibit wake surfing, the Town is arbitrarily and capriciously targeting wake boats and wake surfing. Based on multiple studies (though none performed on any of the lakes in the Town), the average wake boat wave height when wave surfing is approximately 10.7 inches in height 200 feet from the boat. At 300 feet from the boat, the average wave height is 9.2 inches. The average wave height for all boats with no ballast 100 feet

from the boat is approximately averaged at 9.8 inches high, and for wake boats or other larger typical boats without ballast, the wave height averages 11.8 inches high.

154. If speed of the activity is the concern, the Town's action is arbitrary in allowing high speed activities like water skiing, tubing, and wakeboarding (which can operate speeds of up to 25-30 miles per hour), but prohibiting slow speed activities like wake surfing (which typically operates at speeds of 10-12 miles per hour).

155. If aquatic invasive species is the concern, the Town is not enacting prohibitions on the use of other equipment on other types of boats that can transport water and potentially invasive species from lake to lake, such as live wells, bilge pumps, outboard motors, and stern drive motors, which all can retain some level of water and aquatic invasive species.

156. For Plaintiffs' wake boats, their boats do not travel from lake to lake and remain on Birch Island Lake during the open water season. They do not and cannot transport aquatic invasive species, but Plaintiffs, as riparian owners, are prohibited from wake surfing.

157. If there is a generalized concern about wakes being dangerous from wake surfing, the Town was made aware State Statutes already prohibit dangerous boat operations and hazardous wakes through existing, enforceable state laws, and such additional regulations through the Ordinance are arbitrary, capricious, and unreasonable in light of existing laws.

158. Section 30.68(2), Wis. Stats., provides, "No person may operate or use any boat, or manipulate any water skis, aquaplane or similar device upon the waters of this state in a careless, negligent or reckless manner so as to endanger that person's life, property or person or the life, property or person of another." Further, "No person shall operate a motorboat so as to approach or pass another boat in such a manner as to create a hazardous wake or wash." Wis. Stat. § 30.68(4)(a).

159. The Town produced no evidence in the passage of its Ordinance.

160. There exists justiciable controversies between the parties.

161. The interests of the Plaintiffs and Defendant are adverse.

162. Plaintiffs have a legally protectable interest that is the subject of this controversy, and thus, in achieving a declaration of their rights and interests.

163. The issues involved in said controversy are ripe for judicial determination.

164. Further, if the issues presented are resolved by the Court, such resolution will end this controversy.

### **CAUSE OF ACTION IX**

#### **(Declaratory Judgment under Wis. Stat. § 806.04 – Violation of Plaintiffs’ Rights Under the Public Trust Doctrine – Article IX, § 1 of the Wisconsin Constitution)**

165. Plaintiffs reallege all prior allegations.

166. Article IX, § 1 of the Wisconsin Constitution enshrines legally protectable interests to Wisconsin’s waters, which is known as the Public Trust Doctrine.

167. Article IX, § 1 of the Wisconsin Constitution provides, Wisconsin’s waters, including its lakes, “shall be common highways and forever free.”

168. Under the Public Trust Doctrine, “the right of the citizens of the state to enjoy our navigable streams for recreational purposes . . . is a legal right that is entitled to all the protection which is given financial rights.” *Muench v. Public Serv. Comm’n*, 261 Wis. 492, 511-12, 53 N.W.2d 514, 522 (1952).

169. Under the Public Trust Doctrine, regulations or ordinances impacting the use of Wisconsin’s waters “must be balanced and accommodated on a case by case basis.” *State v. Vill. of Lake Delton*, 93 Wis. 2d 78, 96, 286 N.W.2d 622, 632 (Ct. App. 1979).

170. Under the Public Trust Doctrine, the Ordinance must “confine[] its remedy to the precise outlines of the need addressed” and “[i]ts effect on the rights of others [i.e., Plaintiffs]”

must be “negligible,” but the Ordinance’s *prohibition* does not meet those requirements. *Id.* at 105-06.

171. With the recognized constitutional rights in mind, either as riparian owners or pursuant to the Public Trust Doctrine, the Town Ordinance’s *prohibition* on a recreational activity is not a narrow or reasonable tailoring of a restriction, does not confine its remedy to the precise outlines of the need addressed, is not balanced, and does not accommodate Plaintiffs as riparian owners.

172. Riparian rights or rights under the Public Trust Doctrine are fundamental rights and strict scrutiny applies, and the Ordinance must be narrowly tailored to serve a compelling governmental interest. The Ordinance must be the least restrictive means to achieve that end and complete prohibitions do not satisfy that standard. There are less discriminatory methods to achieve any desired objectives or goals that the Town bypassed.

173. Alternatively, if these rights are something other than fundamental rights, the Town’s Ordinance fails to further an important governmental interest and does not do so by a means that is substantially related to that interest, especially with the carve-outs for other recreational uses that present the same issues the Town purports to address with wake boats.

174. Alternatively, the Ordinance is arbitrary and capricious.

175. There exists justiciable controversies between the parties.

176. The interests of the Plaintiffs and Defendant are adverse.

177. Plaintiffs have a legally protectable interest that is the subject of this controversy, and thus, in achieving a declaration of their rights and interests.

178. The issues involved in said controversy are ripe for judicial determination.

179. Further, if the issues presented are resolved by the Court, such resolution will end this controversy.

**CAUSE OF ACTION X**  
**(Declaratory Judgment under Wis. Stat. § 806.04 – Ordinance Violates Consistency Requirement with Wis. Stat. §§ 30.60-30.71)**

180. Plaintiffs reallege all prior allegations.

181. The Ordinance is prohibiting from conflicting with Wis. Stat. §§ 30.60-30.71.

182. Section 2 of the Ordinance also requires wake boat operators to operate at high speeds, discouraging a slower transition speed for some undefined “brief” time, regardless of water conditions or the safety of others around them. The Ordinance also requires boat operators to operate in a careless, negligent or reckless manner which may endanger the operator’s life, property or person or the life, property or person of another in order to comply with the Ordinance’s attempts to prohibit slow speeds.

183. Such Ordinance requirements are contrary to the health, safety, and welfare of the public.

184. Such Ordinance requirements are contrary to Wis. Stat. § 30.66(1), which requires, “No person shall operate a motorboat at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. The speed of a motorboat shall be so controlled as to avoid colliding with any object lawfully in or on the water or with any person, boat or other conveyance in or on the water in compliance with legal requirements and exercising due care.”

185. There exists justiciable controversies between the parties.

186. The interests of the Plaintiffs and Defendant are adverse.

187. Plaintiffs have a legally protectable interest that is the subject of this controversy.



188. The issues involved in said controversy are ripe for judicial determination.

189. Further, if the issues presented are resolved by the Court, such resolution will end this controversy.

### **RELIEF REQUESTED**

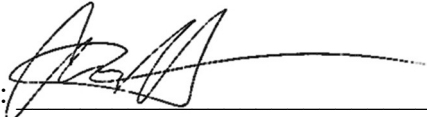
THEREFORE, Plaintiffs, Chad M. McEver, Scott Oppenheimer, and the Peggy O Oppenheimer Living Trust, request judgment be entered in their favor and against the above-named Defendant as follows:

1. A declaratory judgment and declaration of interests and rights;
2. An injunction and order enjoining Defendant from enforcing its Ordinance;
3. Nominal damages in the amount of \$1. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021)
4. An award of actual, compensatory, or other damages to be determined by the Court, together with interest;
5. An award and order directing Defendant to pay Plaintiffs' attorneys' fees, costs, and disbursements in this action, including but not limited to fees due under 42 U.S.C. § 1988; and
6. For such other and further relief that the Court deems just and equitable.


Dated this 16<sup>th</sup> day of May, 2025.

*[Signatures on following page]*


**WELD RILEY, S.C.**

By: 

Anders B. Helquist  
WI State Bar # 1070854  
Weld Riley, S.C.  
3624 Oakwood Hills Parkway  
Eau Claire, WI 54701  
715-839-7786  
ahelquist@weldriley.com  
*Attorneys for Plaintiff*

By: 

John Robert Behling  
WI State Bar # 1036097  
Weld Riley, S.C.  
3624 Oakwood Hills Parkway  
Eau Claire, WI 54701  
715-839-7786  
*Attorney for Claimants*

By: 

Jeffrey A. Cornell  
WI State Bar # 1101522  
Weld Riley, S.C.  
3624 Oakwood Hills Parkway  
Eau Claire, WI 54701  
715-839-7786  
*Attorney for Claimants*

# Exhibit 1

## ORDINANCE NO. 2024- 01

Town of Scott, Burnett County, Wisconsin

### AN ORDINANCE RESTRICTING CERTAIN ARTIFICIAL WAKE ENHANCEMENT

**WHEREAS**, in the interest of public health, safety, and/or welfare, including the public's interest in preserving natural resources, the Town of Scott ("Town") has the authority to enact ordinances covering waters within its jurisdiction if the ordinances are not contrary to or inconsistent with Chapter 30, Wis. Stats., and they relate to the equipment, use, or operation of boats or to any activity regulated by Sections. 30.60 to 30.71, Wis. Stats.; and

**WHEREAS**, there exist within the Town numerous lakes; and

**WHEREAS**, artificially enhanced wakes can cause environmental damage to lakes and lakeshore, including resuspension of sediment adding nutrients to the water and increased risk of algal blooms, turbidity, shoreline erosion, and threats to aquatic life and waterfowl; and

**WHEREAS**, boats with ballast systems increase the likelihood of aquatic invasive species being introduced and spread on lakes; and

**WHEREAS**, artificially enhanced wakes can damage shoreline, lake bottom, moored boats, and shoreline structures including docks; and

**WHEREAS**, operating boats in a stern down manner creates downward prop wash, disturbing the lake bottom far below the wave zone, 20 feet and more below the surface; and

**WHEREAS**, artificially enhanced wakes can endanger swimmers, anglers, and other watercraft; and

**WHEREAS**, the use of ballast and wake enhancing fins can cause unsafe operation by causing the bow to rise obscuring vision forward; and

**WHEREAS**, the Town submitted a draft of this ordinance to the Wisconsin DNR for advisory review at least 60 days prior to passage, pursuant to 30.77(3)(d), Wis. Stats.; and

**WHEREAS**, the Town has conducted a public hearing as required by 30.77(3)(aw) Wis. Stats in view of the ordinance extending to certain lakes which have over 60% of their shoreline in the Town, but which each extend into a second town; and

**WHEREAS**, the Town Board, after considering public comments and any DNR suggestions, determines that adopting this Ordinance is consistent with all other ordinances of the Town and would promote the public health, safety and welfare, including the public's interest in preserving natural resources;

**NOW, THEREFORE**, the Town board of the Town of Scott, Burnett County, Wisconsin, does hereby ordain as follows:

**Section 1. Applicability and Enforcement:** The provisions of this ordinance shall apply to all waters wholly within the Town of Scott, Burnett County, Wisconsin and shall also apply to the following lakes all of which have 60% or more of their shoreline within the Town of Scott, Burnett County, Wisconsin.

Birch Island Lake - Over 60% of shoreline in Town of Scott and all remaining shoreline in Town of Jackson.

McKenzie Lake – Over 60% of shoreline in Town of Scott and all remaining shoreline in Washburn County/Town of Casey.

Middle McKenzie Lake – Over 60% of shoreline in Town of Scott and all remaining shoreline in Washburn County/Town of Casey.

Fish Lake – Over 60% of shoreline in Town of Scott and all remaining shoreline in Town of Webb Lake.

This ordinance shall be enforced by all officers of Town of Scott, Burnett County, Wisconsin and all other individuals empowered to enforce ordinances in this Town.

## **Section 2. Certain Artificial Wake Enhancement Prohibited**

**(1) Prohibited Equipment.** No person may use or employ ballast tanks, ballast bags or fins to cause a boat to operate in a bow-high manner, or which increases or enhances a boat's wake.

**(2) Prohibited Operation.** No person may operate a boat in an artificially bow-high manner having the effect of increasing the boat's wake. Such prohibited operation shall include wake enhancement by use of ballast tanks, or ballast bags, or mechanical fins, or continuous operation at transition speed (the speed below planing speed in which a boat is operating in plowing mode).

**(3) Certain Operations Excluded.** In no event shall any of the following operations be deemed a violation of this Ordinance, provided such operations do not use or employ ballast tanks, ballast bags or wake enhancing fins: i) water skiing, ii) tubing, iii) wake boarding employing a tow rope; iv) brief transition operation to empty a boat of bilge water, or v) brief transition operation of a boat accelerating into a planing condition.

## **Section 3. Penalty.**

**(1)** Wisconsin state boating penalties as found in s. 30.80, Wis. Stats., and deposits established in the Uniform Deposit and Bail Schedule established by the Wisconsin Judicial Conferences, are hereby adopted by reference, except all references to fines are amended to forfeitures and all references to imprisonment are deleted.

**(2)** To the extent that the penalty for any violation of this Ordinance is not provided under Wisconsin state boating penalties as found in s. 30.80, Wis. Stats., any person violating this Ordinance shall forfeit \$500 for the first offense and shall forfeit \$1000 for the second and subsequent offenses within one year. Deposits established in the WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE AND SURCHARGE TABLES shall also apply to any violation.

**Section 4. Severability.** Should any portion of this Ordinance or the affected Code Section(s) be held invalid by a court of competent jurisdiction, the remainder shall not be affected.

**Section 5. Effective Date.** Upon adoption, this Ordinance shall take effect the day after publication or posting.

Enacted: 11/11, 2024

TOWN OF SCOTT, BURNETT COUNTY, WI

By 

SCOTT BARTON, Town Chair