STATE OF WISCONSIN CIRCUIT COURT SHAWANO COUNTY

VILLAGE OF MATTOON and
TOWN OF HUTCHINS

Plaintiffs,

Case No. 19-CV-10
Case Code No: 30701

vs.

UNIFIED SCHOOL DISTRICT
OF ANTIGO

Defendant.

BRIEF OF UNIFIED SCHOOL DISTRICT OF ANTIGO OPPOSING MOTION OF SHEPHERD'S WATCH COMMUNITY CENTER, INC. TO INTERVENE OR BE JOINED AS A PARTY

FACTS

Shepherd's Watch Community Center, Inc. ("Shepherd's Watch") was incorporated through the Wisconsin Department of Financial Institutions on June 19, 2018. Its registered agent is listed as Wade Reimer. Mr. Reimer was involved with negotiations for the transfer of the Mattoon School from the Unified School District of Antigo to the Village of Mattoon from at least mid-March 2018. Reimer expressed interest, at that time, in the Village of Mattoon acquiring the Mattoon School and then transferring the School to Shepherd's Watch for what Reimer indicated was to be a community center and not a school.

The Unified School District of Antigo and the Village of Mattoon entered into a purchase agreement for the Mattoon School with the Antigo district accepting the offer on June 14, 2018. This offer had a provision that the deed conveying title would contain a restrictive covenant that the property would not be used for pre-kindergarten through 12th grade compulsory education recognized by the Wisconsin Department of Public Instruction or any successor agency to that

department. The Village was simultaneously working with Wade Reimer/Shepherd's Watch to turn around and transfer the property to Shepherd's Watch. The Village of Mattoon and Reimer were reluctant to accept the restrictive covenant.

When the District obtained title work for this transaction, the title was shown to be held by a defunct school district that was merged into the Antigo School District, as stated in the complaint for this action. At that point, the Village took the position that the Village of Mattoon and the Town of Hutchins were the owners of the Mattoon School property, and this litigation ensued. As shown by the offer to purchase attached to the Shepherd's Watch motion to intervene, those parties, along with the Town of Hutchins, have once again aligned interests to have the property transfer to Shepherd's Watch in the event Mattoon and Hutchins are declared to be the owners.

ARGUMENT

Shepherd's Watch is attempting to intervene in this matter pursuant to Wis. Stat. §803.09(1) intervention as of right, Wis. Stat. §803.09(2) permissive intervention, Wis. Stat. §806.04(11) or as a necessary party under Wis. Stat. §803.03(1)(b).

INTERVENTION AS OF RIGHT

Intervention as a matter of right is set forth in Wis. Stat. §803.09(1) which states as follows:

> Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

Before delving into the factors guiding intervention as a matter of right, it is worth noting that intervention as a matter of right is allowed only where the intervenor is "necessary" to the action. *City of Madison v. Wis. Employment Relations Comm'n*, 234 Wis.2d 550, 556-57, 610

N.W.2d 94, 97 n. 8 (2000). Shepherd's Watch certainly is not necessary to adjudicate ownership of a parcel of land where the two claimants of ownership – neither being Shepherd's Watch – are already parties. If plaintiffs prevail, Shepherd's Watch can buy the School. If defendants prevail, Shepherd's Watch may also buy the School – just potentially from defendant instead. Shepherd's Watch's manufactured intervention into this dispute is not necessary to its resolution.

Wisconsin courts have interpreted Wis. Stat. §803.09(1) to require an intervenor to satisfy four (4) factors before intervention is allowed:

(a) The movant's motion to intervene must be timely;
(b) The movant must claim an interest sufficiently related to the subject of the action;
(c) Disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and
(d) The existing parties do not adequately represent the movant's interest.

Helgeland v. Wisconsin Municipalities 2008 WI 9 ¶38, 307 Wis 2d 1, 745 N.W. 2d 1.

In analyzing the first factor, it would appear that Shepherd's Watch's motion is timely. Regarding the second factor, the intervenor claims an interest related to the subject of this action. But the claimed interest was manufactured by the plaintiffs and Shepherd's Watch *after* this lawsuit was commenced. Plaintiffs filed the summons and complaint on January 21, 2019. Plaintiffs and Shepherd's watch signed the offer to purchase the School on April 16, 2019 as noted on the real property purchase agreement attached to the complaint. Shepherd's Watch thus knowingly purchased its way into a dispute.

This purported "purchase agreement," however, is not a land contract nor is it even a typical purchase agreement. Shepherd's Watch has essentially contracted to purchase the School *if Plaintiffs even own it*. The contract between Shepherd's Watch and Plaintiffs dissolves "automatically" by its own terms if Plaintiffs do not own the School or any part of the School. The purported purchase agreement is thus not truly a contract purchasing an interest in real estate; it is

an *option* to purchase real estate only. "An unexercised option is not yet…an interest in real property." William B. Stoebuck & Dale A. Whitman, *The Law of Property* 802 (3d ed. 2000).

Shepherd's Watch claims an interest in property under Wis. Stat. §840.01. However, Section 840.01 does not mention an "option" as an interest in real estate. So whatever interest Shepherd's Watch has, it is insufficient to be included within the very statute by which Shepherd's Watch claims an interest in the School. The Court should find this manufactured and tangential interest to be insufficient to intervene in this lawsuit.

As previously referenced, this would have been the second time that the Village of Mattoon and Shepherd's Watch entered into an agreement regarding the School. The Village was also proposing to transfer the subject property to Shepherd's Watch after receiving it from the Antigo School District back in July 2018, which was shortly after Shepherd's Watch incorporated. The Village and Shepherd's Watch had cooperated with and aligned with each other throughout the initial attempt at transferring ownership of the School. The only reason they did not wait for the resolution of this case was so Shepherd's Watch could attempt to inject itself into the lawsuit. Its interest was specifically manufactured for this purpose, and such manufactured interests should not be allowed to satisfy this second factor.

The third factor is whether the disposition of the action may as a practical matter impair or impede the movant's ability to protect the claimed interest. Again, the interest of Shepherd's Watch was only recently manufactured after the commencement of this lawsuit and movants should not be afforded an opportunity to participate with such an interest that is contingent upon and derives from a successful outcome in this case by the Plaintiffs.

Shepherd's Watch's interests are not impeded by the Plaintiffs' successful or unsuccessful prosecution of this action at all. Shepherd's Watch has structured its purchase agreement with

Plaintiffs such that, if Plaintiffs prevail, they must convey the School to Shepherd's Watch. If Plaintiffs do not prevail, Shepherd's Watch does not have to do anything. If Plaintiffs do not own the School, Shepherd Watch's contract "shall automatically terminate…" If Plaintiffs lose this lawsuit, it has no affect on Shepherd's Watch and Shepherd's Watch has no interest to protect. In effect, Shepherd's Watch has already protected its interest by contract. It has no interest that can be impeded by this lawsuit regardless of the outcome.

Shepherd's Watch's attempt to paint itself as adverse to Plaintiffs is thus nothing more than a ruse. Shepherd's Watch claims that it has "an interest in enforcing its contract without regard to whether Mattoon and Hutchins wish to do so and without regard to whatever self-imposed limits Mattoon and Hutchins may have." The "self-imposed limits" here are those that Shepherd's Watch explicitly agreed to in its contract. Shepherd's Watch cannot "enforce its contract" against Plaintiffs unless Plaintiffs are deemed owners of the property in some way. This is true regardless of whether this result comes from a judicial declaration or, as Shepherd's Watch alludes to, a settlement.[1] Unless Plaintiffs have some interest in the School, Shepherd's Watch's contract (and thus interest in the property, such that it has one) terminates "automatically."

The entire object of this lawsuit is "who owns the School?" Shepherd's Watch can only gain title to the School from the Village if the Village has title to convey, which is precisely what the Village is seeking in its complaint. Shepherd's Watch's interest is already represented in total by the Village. To the extent the Village and Shepherd's Watch are in conflict, that conflict is over the purchase agreement that both of those parties willingly signed. And pursuant to that agreement,

[1] And if there is a settlement that puts some ownership interest in plaintiffs, Shepherd's Watch's dispute, if any, would be with plaintiffs on how to distribute that property under its contract with plaintiffs. Considering the manufacture of interest to interject itself in this lawsuit, it seems unlikely that Shepherd's Watch will have any dispute with plaintiffs at any time. They are on the same side.

Shepherd's Watch does not even have a claim for Plaintiffs' failure to convey clear title. Shepherd's watch has contracted away its ability to assert any interest distinct from Plaintiffs.

The fourth factor is whether the existing parties adequately represent the movant's interest. Adequate representation is presumed when a movant and an existing party have the same ultimate objective. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶90, 307 Wis. 2d 1, 745 N.W.2d 1. The analysis of this factor parallels the third factor. The Village of Mattoon and the Town of Hutchins sued for a declaration that they are the owners of the School. That is their clearly stated objective, which would also be the exact same objective of Shepherd's Watch. Adequate representation is thus presumed in this case, making intervention inappropriate.

Helgeland also held that when the potential intervenor's interests are substantially similar to interests already represented by an existing party, that similarity weighs against the potential intervenor. *Id.* at ¶86. Additionally, if a movant's interest is identical to that of one of the parties, or if a party is charged by law with representing a movant's interest, a compelling showing is required to demonstrate that the representation is not adequate. *Id.* Shepherd's Watch tries to suggest that its interest is not identical to that of the Village of Mattoon and Town of Hutchins, but that argument is not persuasive. The Plaintiffs' interest is to be designated as owner of the real estate at issue. That is the exact interest of Shepherd's Watch which would then result in Plaintiffs transfer of the property to Shepherd's Watch pursuant to the parties' contractual obligations.

Shepherd's Watch attempts to speculate that the plaintiffs might settle the matter in a way that would harm its interest such as acquiring only part of the property at issue. This is untrue under the plain language of Shepherd's Watch's purchase agreement. If this lawsuit results in Plaintiffs only owning part of the School property, Shepherd's Watch can buy the School – or not – in its sole discretion. This is even more evidence that Shepherd's Watch is a mere option holder

and that there is no interest of Shepherd's Watch that requires protection via this lawsuit. Shepherd's Watch has already protected itself.

Shepherd's Watch also spins some vague claim that they may raise arguments that the plaintiffs would not. But as referenced in *Helgeland*, a difference of opinion in trial strategy does not amount to inadequate representation.

Moreover, a claimed interest does not support intervention where it is only remotely related to the subject of the action. *Helgeland*, 307 Wis.2d at 26, 745 N.W.2d at 12. Direct and immediate interests support intervention, but speculative interests do not. *Id.* Since Shepherd's Watch cannot even imagine what those issues might be as it seeks to intervene, those issues do not rise to the level of a protectable interest that Plaintiffs might fail to protect. Shepherd's Watch asks this Court to grant it standing based on speculative reasons Shepherd's Watch itself does not even care to explain. If Shepherd's Watch cannot articulate a separate, direct, immediate interest, it should not be granted permission to intervene.

Shepherd's Watch also claims judicial efficiency as grounds for its intervention. It claims that it could simply sue Defendant independently and then move for consolidation with the instant matter. Shepherd's Watch fails to acknowledge, however, that if it fails to establish standing here, it will also fail to establish standing in a separate lawsuit. Its separate lawsuit would thus be a frivolous waste of the Court's time. Moreover, since Defendant has not *done* anything to Shepherd's Watch (e.g. no torts alleged, no contracts), Shepherd's Watch's separate lawsuit would, at best, be simply another declaratory judgment action over ownership of the School. That is exactly what is before the Court right now. So once again, a collateral lawsuit by Shepherd's Watch on the same exact issue would be a frivolous waste of the Court's time (and Defendant's time).

Shepherd's Watch cites *Hoppmann* to support its position, but Hoppmann actually cuts against Shepherd's Watch's attempted intervention. In *Hoppmann*, a landowner, Hilldale, was attempting to sell its real property. The property had a tenant with a right of first refusal, Reid. Reid submitted several offers to purchase Hilldale's property but Hilldale rejected them. Hilldale then marketed the property for sale and Hoppmann offered to buy it. Hilldale accepted Hoppmann's offer subject to Reid's right of first refusal. When Reid did not match or exceed Hoppman's offer, Hilldale accepted the Hoppman's offer and moved to evict Reid. Reid countersued Hilldale for specific performance.

The eviction and specific performance actions were consolidated and tried. After the conclusion of the trial, Hoppmann attempted to intervene post-judgment. The trial court denied the Hoppmann's motion.

The Supreme Court concluded that the trial court's decision to deny the Hoppman's motion was discretionary. *Hoppman*, 86 Wis.2d at 535, 273 N.W.2d at 300. *Hoppmann* concluded that the trial court properly denied the Hoppman's motion to intervene post-trial because Hoppmann knew of the action between Hilldale and Reid and deliberately decided to not intervene. *Id.* The *Hoppmann* Court's comment on whether Hoppmann had sufficient interest is thus nothing more than dicta. Whether Hoppmann had a sufficient interest was irrelevant where Hoppmann purposefully failed to intervene in the first place. Tellingly, *Hoppmann* makes no analysis of the nature of Hoppman's interest whatsoever.

Moreover, the factual differences between this case and *Hoppmann* weigh against intervention here. In *Hoppmann*, the purchaser was a *bona fide* purchaser. *Hoppmann* was tried on stipulated facts that included statements, accepted as true, that Hoppmann had believed its offer to purchase was accepted and acted in reliance on that belief. *Id.* at 533, 299. Shepherd's Watch

cannot claim to be a bona fide purchaser. It purchased nothing with certainty (again, it holds at most an option). It "purchased" knowing of the ongoing lawsuit and disputed title. It did not act in reliance of acquiring good title by its own admissions. Shepherd's Watch executed its odd agreement with Plaintiffs merely for the purpose of intervention. That is not a bona fide interest worthy of protection via intervention.

Finally, that case was decided under the former intervention statute. Wis. Stat. §260.205 (1973). Section 260.205 was worded differently than the current version.[2] *Hoppmann* was commenced on June 24, 1975 and the new statute applied to actions commenced on or after January 1, 1976. Section 260.205 required only an "interest" in property for intervention. The modern statute requires satisfaction of *four* elements stated above, including that "the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest" and not allowing intervention where "the movant's interest is adequately represented by existing parties." Wis. Stat. § 803.09. Cases decided under Section 260.205 are thus not germane to the issues at bar and do not offer guidance to this Court.

Shepherd's Watch also cites the *Vill. of Arlington Heights* case in support of its position. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). In that case, the developer with a contract to purchase real estate was determined to have standing to contest rezoning denial. But in that case, the developer was the one who had applied for the zoning change that was denied, and since it was the party that had applied, it was

[2] Wis Stat. §260.205 (1973). If in an action for the recovery of property, a person not a party has an interest in the property, or if in any other action, a person not a party has such an interest in the subject matter of the controversy as requires him to be a party for his own protection, and such person applies to the court to be made a party, the court may order him brought in. The motion shall be accompanied by a complaint or answer stating the cause of action or defense desired to be interposed. If the motion is granted the court shall indicate in its order the existing parties on whom the pleading should be served, and the time within which it should be served. If answer or reply is proper, the party served shall have 20 days in which to answer or reply.

the only party that could challenge the denial. Here, on the other hand, Plaintiffs are already challenging the ownership of the School.

Moreover, Shepherd's Watch does not analyze the holding or facts of *Vill. of Arlington Heights*. *Vill. of Arlington Heights* reiterated longstanding common law that, to be a proper intervenor, the interventor's proposed "complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions." *Vill. of Arlington Heights*, 429 U.S. at 261, 97 S. Ct. at 561 (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925 - 1926, 48 L.Ed.2d 450 (1976)). That is not true here.

First, it is unclear whether Shepherd's Watch has any injury at all because if Plaintiffs do not own the School, Shepherd's Watch has not lost anything. It does not have to pay money. It does not have to occupy the School. It is in the same position it was before this lawsuit commenced. Second, the Antigo School District's actions in no way contributed to Shepherd's Watch's faux-injury. Shepherd's Watch bought into this lawsuit with its eye's wide open and does not allege anything that Defendant has done that are the proximate cause of any injury. Shepherd's Watch fails this critical component of standing. Under the precedent of *Vill. of Arlington Heights*, Shepherd's Watch's motion should be denied.

This case is also factually different than *Vill. of Arlington Heights* because Shepherd's Watch, unlike the intervenor in that case, has no economic injury. In *Vill. of Arlington Heights*, a redevelopment agency applied to the village to rezone "a 15-acre parcel from single-family to multiple-family classification. Using federal financial assistance, [the agency] planned to build 190 clustered townhouse units for low-and moderate-income tenants." *Vill. of Arlington Heights*, 429 U.S. at 254, 97 S. Ct. at 557–58. To accomplish this proposed redevelopment, the intervenor in *Vill. of Arlington Heights* "expended thousands of dollars" on a redevelopment plan and related

studies. *Id.* at 262, 562. Shepherd's Watch has expended nothing. It thus fails to show standing under any prong of *Vill. of Arlington Heights*, whether legal or factual, and its motion should be denied.

JOINDER OF NECESSARY PARTY

The movant correctly states that despite the textual differences between §803.09(1) and §803.03(1)(b), the Wisconsin Supreme Court has held that the four-factor analysis previously referenced applies under either statute and a movant must meet all four factors. *Helgeland*, 307 Wis. 2d 1 ¶¶128-137. As already pointed out, Shepherd's Watch does not meet all four factors. In fact, it does not satisfy three out of the four factors, where satisfaction of all four factors is necessary. Joinder as a necessary party should not be allowed either.

DECLARATORY JUDGMENT STATUTE

The declaratory judgment statute, Wis. Stat. §806.04(11), indeed states as follows:

> "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceedings."

However, where a court determines that a movant does not meet the four-part test for intervention as of right, it should not allow that party to join under the declaratory judgment action statute. In fact, *Helgeland* was a case where declaratory judgment was sought and proposed intervenors attempted to argue they should be made a party pursuant to the provisions of the declaratory judgment statute. However, the Supreme Court denied this claim citing factors from the four-part test, such as adequacy of existing representation and the speculative interest of the proposed intervenors. *Helgeland* Wis. 2d 1 ¶ 140-141.

PERMISSIVE INTERVENTION

The permissive intervention statute which is Wis. Stat. §803.09(2) states:

> "Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The court should not permit someone to intervene on the basis of a manufactured claim such as the one in the instant case particularly where an existing party already adequately represents its objective. Shepherd's Watch claims that its interest in the School is "beyond dispute." Not so. Shepherd's Watch's interest in the property is designed as a vehicle to enter into this lawsuit and is not a bona fide offer to purchase.

Moreover, its "perspective" is irrelevant. This is a dispute between two government entities. Period. Plaintiffs are already represented by Husch Blackwell, a firm that touts 700+ attorneys on its own website. Surely, whatever perspective is needed can be thought of by those 700+ attorneys. The fact that Shepherd's Watch desires to offer additional perspective is nothing more than Shepherd's Watch attempting to serve as additional, outside counsel for Plaintiffs. That is not a permissible reason to allow party intervention.

CONCLUSION

In *Helgeland*, the court stated that broadly speaking, courts determinate whether an outside entity should intervene in or join an existing lawsuit by striking a balance between allowing the original parties to a lawsuit to conduct and conclude their own lawsuit and allowing others to join a lawsuit in the interest of the speedy and economical resolution to a controversy without rendering the lawsuit fruitlessly complex or unending. Whether to order intervention or joinder turns on judgment calls and fact assessments. In fact, in *Helgeland*, it was stated whether to allow or deny intervention as of right is a question of law that the Supreme Court decides independently of the

circuit court and court of appeals, but benefitting from the analysis of each court. One federal court concluded: "Despite its nomenclature, intervention 'as of right' usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb except for clear mistakes". *Helgeland* ¶ 45. Here, the parties should be allowed to conduct their own lawsuit without an additional party trying to advance the same objective as two current parties, Village of Mattoon and Town of Hutchins. Shepherd's Watch should not be joined in this case for the reasons set forth.

Dated this 23 day of May, 2019.

Respectfully submitted,

WINTER, WINTER & BEHRENS
Attorneys for Unified School District of Antigo

BY Michael B. Winter
Attorney Michael B. Winter

This document was drafted by:
Attorney Michael B. Winter
State Bar No. 1025676
Winter, Winter & Behrens
835 Fifth Avenue
Antigo, WI 54409
(715) 623-2905