STATE OF WISCONSIN CIRCUIT COURT POLK COUNTY

BEN BINVERSIE and
JENNY BINVERSIE,

Plaintiffs,

Case No. 24-CV-209

v.

TOWN OF EUREKA

Defendant.

THE TOWN OF EUREKA'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR DISMISSAL

The Town of Eureka (the "Town"), by its attorneys, Municipal Law and Litigation Group S.C., submit this Reply Brief in Support of its Motion to Dismiss Plaintiffs' Complaint.

<u>INTRODUCTION</u>

Plaintiffs admit the Ordinance at issue does not apply to them, they admit the Ordinance has multiple mechanisms which protect taxpayers from incurring any costs, and they do not assert that they or anyone else in the Town has applied for a CAFO permit. In fact, Plaintiffs do not know whether anyone will ever apply to operate a CAFO in the Town of Eureka or whether the Town will ever utilize the provision in the Ordinance allowing it to hire experts to review the operations of an applicant. They also do not contest the fact the Ordinance sets forth a number of requirements for applicants that would eliminate or eliminate taxpayer expenditures, such as the requirement that the applicant post a bond or other surety to provide for remediation of any environmental damage caused by the applicant.

Rather, Plaintiffs' Response Brief hinges on the fact that they are taxpayers and believe that one day they **may** be harmed because the Town **may** one day incur costs to review and enforce permits. Not only do these allegations run completely contrary to the plain language of the Ordinance, but they are also hypothetical, abstract, and lack the immediacy required to have a justiciable claim. In asserting its claim and arguments, Plaintiffs completely ignore the plain language of the Ordinance and the standards a court must employ when reviewing a motion to dismiss.

A motion to dismiss tests the legal sufficiency of the complaint. *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶ 24, 389 Wis. 2d 669, 937 N.W.2d 37. Although a court is to accept all well pled facts as true, statutory interpretation is a question of law which a Court reviews de novo and without deference to allegations in a Complaint. *Id.* ¶ 24 – 26. See also *Banuelos v. Univ. of Wisconsin Hosps. & Clinics Auth.*, 2021 WI App 70, ¶ 7, 399 Wis. 2d 568, 966 N.W.2d 78 ("[A]complaint must show that the pleader is entitled to relief. Legal conclusions stated in the complaint are not accepted as true, and they are insufficient to withstand a motion to dismiss. The answer to the question of whether (Plaintiff's) complaint states a claim on which relief can be granted depends on what the pertinent statutes mean, which is also a question of law"); *Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, ¶ 22, 303 Wis. 2d 295, 735 N.W.2d 448 (when the legal sufficiency of a complaint depends on the application of a statute, interpretation of the statue is a matter of law); *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693 ("The sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled. Plaintiffs must allege facts that plausibly suggest they are entitled to relief.")

In other words, the Court cannot accept as true Plaintiffs' legal assertions that they have standing as taxpayers or that their suit is ripe when those assertions are based upon allegations that run directly contrary to the Ordinance.

A. There is no controversy in which Plaintiffs have an interest in contesting.

Plaintiffs assert they meet the first element to present a justiciable controversy by citing to *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856. However, in *Fabick,* the Court determined the plaintiff had the necessary "present and fixed rights" to meet the first element because the challenged government action – multiple executive orders by Governor Evers declaring a state of emergency due to COVID 19 that affected them directly – undisputedly was ongoing and impacted them along with the entire state, as compared to hypothetical or future rights. *Id.* ¶ 1- 9. That is not the case here. Rather, Plaintiffs' own Complaint acknowledges the Ordinance has never been applied to them, does not apply to them, and will not apply to them. Moreover, there is no indication at the present time that the ordinance will ***ever*** have to be enforced against anyone. Eureka's CAFO ordinance does not regulate the day-to-day conduct of a typical resident of the Town. It applies only to the operation of a very specific type of industrial farming operation which does not presently exist in the Town of Eureka, and which may never exist in the Town of Eureka. Plaintiffs have not been even alleged that there is a likelihood that anyone will ever apply to operate a CAFO in the Town of Eureka.

Additionally, the Ordinance sets forth several provisions that ***eliminate taxpayer expenditures*** as explained in the Town's opening brief, unlike *Fabick* where the governor's orders involved illegal expenditure of taxpayer funds in the form of deployment of the National Guard. (*Compare* Secs. 8.2 and 9 of the Ordinance at Dkt. 3, pgs. 26 – 27 with *Fabick*, ¶¶10-11

Further, the allegations in Plaintiffs' Complaint that the Town **may** one day incur future costs which will impact taxpayers not only runs contrary to the plain language of the Ordinance, but also shows Plaintiffs only have "hypothetical or future rights" as opposed to "present and fixed rights" which is required to meet the first element. See *Fabick*, ¶ 10. There is no controversy in which Plaintiffs have an interest in contesting.

B. Plaintiffs do not have an adverse interest to the Town.

Plaintiffs again cite *Fabick* to support the notion that they have adverse interests to the Town. However, the *Fabick* Court did not address the second element of justiciability – adversity of interests. See *Fabick*, ¶ 9. Plaintiffs and the Town have no adverse interest as the Ordinance does not apply to them and mechanisms to eliminate taxpayer expenditures are included in the Ordinance. Indeed, unlike a party who files an application under the Ordinance and is aggrieved by the application of the Ordinance, the Plaintiffs are not so aggrieved by any stretch of the imagination. There is no adverse interest between these Plaintiffs and the Town.

C. Plaintiffs Lack Standing.

As to the third element, Plaintiffs solely argue they have taxpayer standing. What Plaintiffs fail to address in their response is that in order to have taxpayer standing, they still must be directly affected by the issues in controversy, and they must have sustained pecuniary loss or be in danger of sustaining pecuniary loss which is immediate and tangible as opposed to conjectural or hypothetical. (See authorities cited in Town's opening brief at Dkt. 7, pgs. 5 - 7). Plaintiffs cite no caselaw showing that taxpayers get a free pass from these requirements. Indeed, it is well rooted in our state's history that taxpayer standing is not a limitless doctrine. See *S.D. Realty Co. v.*

Sewerage Comm'n of City of Milwaukee, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961) (it is well settled in Wisconsin that in order to maintain a taxpayer's action, the taxpayer must have sustained or will sustain pecuniary loss). The history of the "pecuniary loss" requirement for taxpayers can be traced back over a century. See *McClutchey v. Milwaukee County*, 239 Wis. 139, 140, 300 N.W. 224 (1941) citing to *Kasik v. Janssen*, 158 Wis. 606, 609, 149 N.W. 398 (1914) ("There is therefore no ground for the maintenance of a taxpayer's suit. Equity does not interfere with the rules or orders of an administrative officer at the suit of a taxpayer, unless the taxpayer and his class have sustained or will sustain some pecuniary loss therefrom.").

The Supreme Court rejected similar arguments made by Plaintiffs here that *Fabick* opened the door for taxpayers to sue over all sorts of things. In *Teigen*, although overruled on other grounds, the Supreme Court reviewed Fabick and such arguments, concluding:

> Taxpayer standing, however, does not extend as broadly as Teigen suggests. This argument, if accepted, would mark a radical departure in the law. *It would mean any taxpayer could challenge almost any government action*—as long as a government employee devoted some time and attention to the matter. *Since that is nearly always true, this would practically eliminate standing as a consideration in most challenges to government action.* It is true that the functional distance between an illegal government expenditure and staff time spent drafting a legally erroneous memo may be fuzzy, but it is meaningful and clear from our cases. We have never described taxpayer standing as broadly as Teigen asserts, and we should not grant Teigen's entreaty now.

Teigen v. Wisconsin Elections Comm'n, 2022 WI 64, ¶ 163, 403 Wis. 2d 607, 976 N.W.2d 519 (emphasis added), overruled on other grounds by *Priorities USA v. Wisconsin Elections Comm'n,* 2024 WI 32, ¶ 163, 412 Wis. 2d 594, 8 N.W.3d 429. In the same case, Justice Hagedorn, concurring, observed:

> The judiciary does not serve as a roving legal advisor, answering any questions about the law that may arise. The power we have is "judicial." Wis. Const. art. VII, § 2. The judicial power is the power decide disputes between parties about the law where there is harm to a party that can be remedied through the judicial process. Gabler v. Crime Victims Rights Bd., 2017 WI 67, ¶37, 376 Wis. 2d 147, 897

> N.W.2d 384. In this sense, the judicial policy buttressing our standing doctrine must stem from our constitutional role. Standing is not a historical relic that should be dispensed with in an age of judicial supremacy. It serves as a vital check on unbounded judicial power. A judiciary that understands its limited and modest role in constitutional governance will take it seriously. Doing so brings our judgment to bear when necessary to resolve legal disputes between parties, but allows many legal debates to take place where the constitution places them: in the court of public opinion and by and between the other branches of government.

Teigen, 2022 WI 64, ¶ 160 (Hagedorn, J., concurring). See also *Fabick*, 2021 WI 28, ¶92 (Ann Walsh Bradley, J., dissenting) (the doctrine of standing is important "because it reins in unbridled attempts to go beyond the circumscribed boundaries that define the proper role of courts."). Thus, although twice asked to fully open the gates to taxpayer suits, ultimately the Supreme Court twice rejected the notion in both *Teigen* and *Fabick* and the majority of justices agree that its not some open-ended pass to weigh in on every dispute brought by taxpayers.

In the present case, the <u>plain language of the Ordinance</u> protects the Town and taxpayers from incurring any potential costs associated with the operation of a CAFO in the Town of Eureka. (See Secs 8.2 and 9). Accordingly, there is no pecuniary loss to taxpayers nor is there an immediate threat of such a pecuniary loss. Plaintiffs further lack standing because the notion that the Town will ever incur any costs to review and enforce permits in the first place is hypothetical and uncertain. Assuming that there is an application for an operation permit sometime in the future, the provision of the Ordinance offered by Plaintiffs as a basis for standing, Sec. 8.2, is permissive in that the Ordinance states the Town **<u>may</u>** incur costs to review and enforce, but regardless, any such **<u>potential</u>** costs must be reimbursed by the applicant. Rather than addressing the requirements of standing, Plaintiffs ironically attack the validity of the provisions within the Ordinance that eliminate taxpayers from incurring costs as being preempted by state law. (Dkt. 21, pg. 7). But in doing so, Plaintiffs acknowledge they are not a party that will face pecuniary loss; rather, it is a potential future applicant that would be impacted by such a provision, not Plaintiffs.[1]

Plaintiffs also misplace reliance on *Weber v. Town of Lincoln*, 159 Wis. 2d 144, 463 N.W.2d 869 (Ct. App. 1990). The *Weber* Court did not discuss taxpayer standing, nor did it consider the unwillingness of the Supreme Court in *Fabick* and *Teigen* to open the doors up to such suits. The *Weber* Court addressed whether a citizen has standing to seek judgment when challenging a municipality's process for <u>repealing</u> an ordinance. The Court in that case allowed plaintiff to move forward with his claims because it determined (1) the lack of the Town's zoning ordinance in question impacted **<u>all</u>** citizens and (2) the legislature specifically conferred standing to citizens to bring forth that suit via a specific statutory scheme. *Id. Weber* is inapposite. In the present case, the Ordinance clearly does not apply to everyone as Plaintiffs acknowledge the Ordinance does not even apply to them. Additionally, Plaintiffs do not point to any statute which confers standing to challenge the validity of the Ordinance at issue. The statute in *Weber* involved Wis. Stat. § 60.61(6) which expressly conferred such standing, but here Plaintiffs' rest their lawsuit on a host of other statutory provisions, but none of which grant them standing.

In addition to the cases cited in the Town's opening brief, the present case is much more similar to *Town of Clearfield v. Cushman*, 150 Wis. 2d 10, 18, 440 N.W.2d 777, 780 (1989). In *Cushman*, a property owner sought to challenge several zoning ordinances of the municipality which regulated the installation of mobile homes, some of which applied to the plaintiff and some of which did not. *Id*. The Supreme Court determined that Cushman did not have standing to challenge the validity of provisions that were not being enforced against him. *Id.* (citing to *Kmiec v. Town of Spider Lake*, 60 Wis.2d 640, 648, 211 N.W.2d 471 (1973) ("Each case, in which the

[1] As Plaintiffs acknowledge in footnote 6 of their response brief, this Court need not address whether the Ordinance's reimbursement language is lawful at this stage.

validity of such restrictions is challenged, must be determined on the facts that are directly applicable to the property of the parties complaining"); *Jacobs v. Major*, 132 Wis.2d 82, 103, 390 N.W.2d 86 (Ct.App.1986) ("A statute attacked as unconstitutional must affect the litigant in some way"). Here, Plaintiffs cannot meet the third element as the Ordinance does not apply to them and they do not suffer nor will they suffer pecuniary loss resulting from the Ordinance.

D. Plaintiffs do not have standing based on judicial policy, nor legislative policy.

In their response brief, Plaintiffs acknowledge they do not present any important issues of constitutional law. However, such an issue is an absolute requirement to even bring forth an argument of standing based upon judicial policy. See *Wisconsin Manufacturers & Com. v. Evers*, 2021 WI App 35, ¶ 32, 398 Wis. 2d 164, 960 N.W.2d 442, aff'd, 2022 WI 38, ¶ 32, 977 N.W.2d 374. As the Court stated in *Wisconsin Manufacturers & Com*., inviting judicial standing beyond important constitutional issues would eliminate the concept of standing as a meaningful requirement and such a doctrine would essentially be eliminated. *Id.* Plaintiffs argue that the Court should disregard the rule stated in *Wisconsin Manufacturers & Com.* because of the "important issues" their case presents. However, Plaintiffs do not explain why their case is especially important nor do they explain why this Court should deviate from established precedent. Further, Plaintiffs cites no case law or other authorities holding that standing based upon judicial policy should be conferred to a party that is not impacted by an ordinance or statute it seeks to challenge.[2] Plaintiffs do not have standing based on judicial policy.

[2] In its response, Plaintiffs cite to *McConkey v. Van Hollen*, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855 for the proposition that it has standing based on judicial policy. However, as the Court in *Wisconsin Manufacturers & Com.* stated, *McConkey* dealt with an important issue of constitutional law which is the exception, not the rule to confer standing based upon judicial policy. WI App 35, ¶ 32. In the present case, Plaintiffs acknowledge there are no issues of constitutional law at stake.

Nor do they have standing based on legislative policy either. The Legislature has never adopted taxpayer standing as broadly as Plaintiffs would like in any of the statutes governing actions in court. Moreover, as noted earlier with respect to their misplaced reliance on *Weber*, which conferred by statute standing to the plaintiff, none of the statutes referenced in the Complaint grant taxpayer standing. Additionally, the Legislature recently addressed standing with respect to certiorari review of local land use decisions involving residential developments when it greatly curtailed who can bring lawsuits. While that new statute - under Wis. Stat. § 781.10(2)(c) - relates to building, zoning, driveway, stormwater or other activity related to residential development, it speaks volumes to the fact the Legislature (like the Supreme Court) has never opened up the door to taxpayer standing as argued by the Plaintiffs here. Therein, it reduced the class of litigants who could commence actions to only the involved applicants, owners of the land subject to the application, those with actual damages (who meet other preconditions), persons related to those other class members (again, with preconditions) and local governments or state agencies.[3] Plaintiffs do not fall under any of those classes, either.

[3] Section 781.10(2)(c) says in full:

> An action under this section may be filed only by any of the following:
> 1. The person who submitted the application for an approval.
> 2. A person that has an ownership interest in the real property that is the subject of the application for an approval.
> 3. A person that, as a result of the final decision on the application for an approval, sustains actual damages or will imminently sustain actual damages that are personal to the person and distinct from damages that impact the public generally. A person under this subdivision may not seek review under this section unless, prior to the final decision on the approval, the person provided a statement in writing on the approval to the political subdivision or agency of the political subdivision or appeared and provided an oral statement at a public proceeding held by the political subdivision or agency of the political subdivision at which the approval was considered.
> 4. A person, other than an individual, that satisfies all of the following conditions:
> a. The person has as a member, partner, or stockholder at least one person described under subd. 1., 2., or 3.
> b. The person was not organized or incorporated in response to the application.
> 5. A local governmental unit, as defined in s. 66.0131 (1) (a).
> 6. To the extent authorized by law, a state agency, as defined in s. 20.931 (1) (c), that is aggrieved by the final decision on the application for approval.

E. Plaintiffs' claim is not ripe.

The fourth and final element is ripeness. A ripeness determination is a legal conclusion and therefore reviewed as a question of law. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 37, 309 Wis. 2d 365, 383, 749 N.W.2d 211, 220. Plaintiffs cite to *Olson*, ¶ 37 asserting that a claim is ripe before any injury takes place when a plaintiff challenges the validity of an ordinance. However, Plaintiffs fail to cite to the rest of the paragraph which states:

> What is required is that the facts be sufficiently developed to allow a conclusive adjudication. As we stated in *Miller Brands–Milwaukee*, 'the facts must be sufficiently developed to avoid courts entangling themselves in abstract disagreements.' The facts on which the court is asked to make a judgment should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment (citations omitted). *Id.*

In *Olson*, the Court determined the matter was ripe because the plaintiff had availed himself to the statute at issue and "the impact of the ordinance on him individually, differs from the interest of any receiving area landowner in the Town who had not yet put the wheels in motion to secure conditional rezoning… A declaratory judgment action filed by a receiving area landowner who had taken no steps to (apply for rezoning) would present a different and much more difficult question." *Id.* ¶ 64.

In the present case, Plaintiffs' lawsuit is not ripe for two reasons. First, unlike the plaintiff in *Olson*, Plaintiffs in the present case have not applied under the Ordinance at issue (their Complaint acknowledges the Ordinance does not even apply to them), nor do they allege that anyone else has applied under the Ordinance. Second, the facts in the present case are not developed for a conclusive adjudication. Plaintiffs' Complaint hinges on the allegation that one day, the Town Board **may** incur costs which would burden taxpayers, but this is contingent and uncertain as explained above. The Complaint does not present any factual allegation about actual or imminent costs and expenses. Further, Plaintiffs' lawsuit is made even more hypothetical, abstract, and remote by the fact that the Section of the Ordinance relating to costs is permissive as also explained above. (See Section 8.2 of the Ordinance stating the Town **may** incur costs for reviewing and enforcing applications and permits). The fact is that the plain language of the Ordinance makes it likely that its enforcement would save taxpayer dollars, not incur them.

The Wisconsin Supreme Court stated, "if another act can be taken to remove contingencies and doubt, it should be taken to make the action proper. Factual circumstances determine whether (ripeness) is satisfied." See *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 695, 470 N.W.2d 290, 295 (1991).

> The facts which Miller Brands has supplied the court are insufficient for a declaratory judgment…. The actual facts of the case, as they relate to Miller Brands, are uncertain. What Miller Brands has done is create a definition…. and ask(s) the court, 'Is it legal to do this?' We agree that the facts of this case are too shifting and nebulous for the invocation of the remedy of declaratory judgment. *Id.*

Like in *Miller Brands*, the facts in the present case are uncertain and speculative. Plaintiffs challenge the validity of an Ordinance without alleging that they or anyone else has been subject to the Ordinance and without alleging that they have been harmed as taxpayers. More steps can be taken by Plaintiffs – they can either apply for a CAFO permit to see how the Ordinance is applied or they can wait to see if someone else applies for a CAFO permit to see if the taxpayers do in fact incur any costs. However, any decision by the Court at this stage would merely be an "advisory opinion."

CONCLUSION

For the reasons stated above, this action should be dismissed on its merits and with prejudice for lack of standing.

Dated this 11th day of October 2024.

MUNICIPAL LAW & LITIGATION GROUP, S.C.
Attorneys for Town of Eureka

By: *<u>/s/ Electronically signed by Adam J. Meyers</u>*

REMZY D. BITAR
State Bar No: 1038340
ADAM J. MEYERS
State Bar No. 1112804

730 N. Grand Avenue
Waukesha, WI 53186
O: (262) 548-1340
F: (262) 548-9211
E: rbitar@ammr.net
ameyers@ammr.net