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COURT OF APPEALS

No. 2025AP000366**In the Wisconsin Court of Appeals**

DISTRICT III

BEN BINVERSIE AND JENNY BINVERSIE,
PLAINTIFFS-APPELLANTS*v.*TOWN OF EUREKA
DEFENDANT-RESPONDENT

On Appeal from the Circuit Court for
Polk County,
The Honorable Angeline E. Winton
presiding Circuit Court Case No.
2024-CV-209

BRIEF OF DEFENDANT-RESPONDENT
TOWN OF EUREKA

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ORAL ARGUMENT AND PUBLICATION

Oral Argument is not necessary nor is publication of the Court's opinion as the issues presented on appeal are straightforward and involve the application of well-settled rules of law. See Wis. Stat. §§ 809.09(1)(c), 809.22(2)(b), and 809.23(1)(b).

STATEMENT OF THE ISSUES

1. Do Plaintiffs-Appellants Ben and Jenny Binversie ("Plaintiffs") present a justiciable controversy to challenge a municipal ordinance regulating concentrated animal feeding operations where they concede the ordinance does not apply to them, the ordinance expressly prohibits taxpayer-funded enforcement and permit review, and they do not allege that the ordinance has been applied to anyone or that any taxpayer harm has occurred?

- The Circuit Court held that Plaintiffs failed to establish a justiciable controversy because the ordinance does not apply to them, contains explicit safeguards against taxpayer liability, and any claimed taxpayer harm is entirely speculative and conjectural based upon the plain language of the ordinance at issue. Additionally, Plaintiffs do not allege that they or anyone else have been subjected to enforcement under the ordinance.
- This Court should affirm the Circuit Court's dismissal of Plaintiffs' Complaint, as they fail to satisfy the requirements for establishing a justiciable controversy.

STATEMENT OF THE CASE

This appeal arises from Ben and Jenny Binversie’s challenge to an ordinance enacted by the Town of Eureka (“Town”) regulating concentrated animal feeding operations (“CAFOs”). Plaintiffs do not operate a CAFO, are not subject to the ordinance, and do not allege that the Town has enforced the ordinance against them—or against anyone else. Nor do they allege that anyone in the Town is currently subject to the ordinance. They do not even allege a CAFO permit has been granted to their detriment. Instead, Plaintiffs claim they have standing solely as taxpayers, speculating that the ordinance **may**—at some unspecified point in the future—result in municipal expenditures for enforcement or permit review. However, under the plain terms of the ordinance, whether the Town may incur any such costs is entirely discretionary, and more importantly, the ordinance **explicitly and mandatorily requires CAFO applicants—not taxpayers**—to reimburse the Town for all related expenses, meaning the Plaintiffs are not even at the outer edge of having any arguable standing.

On July 31, 2024, Plaintiffs filed a declaratory judgment action, asserting that Wisconsin’s Livestock Facility Siting Law (Wis. Stat. § 93.90) preempts the Town’s ordinance. The Town moved to dismiss, arguing that Plaintiffs failed to present a justiciable controversy because: (1) Plaintiffs have no present or fixed rights under the

ordinance; (2) no adverse interests exist between the parties; (3) Plaintiffs lack standing; and (4) Plaintiffs' suit is not ripe.

The Circuit Court granted the Town's motion, concluding that Plaintiffs failed to establish a justiciable controversy. The Circuit Court determined Plaintiffs conceded the ordinance does not apply to them, failed to allege any concrete harm—or even an imminent threat of harm—and that their speculative taxpayer theory was refuted by the plain language of the ordinance. The court therefore dismissed the complaint with prejudice and on the merits.

ALLEGATIONS IN PLAINTIFFS' COMPLAINT

Plaintiffs' Complaint alleges that on March 10, 2022, the Town adopted an ordinance establishing a procedure for obtaining a CAFO Permit for new or expanded livestock facilities ("Ordinance"). (R. 2: ¶¶ 3, 22). Under the Ordinance, a "new or expanded" livestock facility must obtain a CAFO Permit from the Town if the facility "will operate with 700 or more animal units." (R. 3:23; Ord. § 4.1.) A preexisting facility must obtain such a permit if it "proposes to house a different livestock species or an expansion to exceed 1,000 animal units." (R. 3:23; Ordinance § 4.2.)

However, **Plaintiffs explicitly admit that the Ordinance does not apply to them.** (R. 2: ¶ 13, footnote 3). Instead, they claim

they have standing to challenge the Ordinance as taxpayers, alleging that the Town's enforcement and review of CAFO applications **may** result in taxpayer expenditures. Specifically, they assert that the Town Board **may**: (1) designate authorities to enforce the Ordinance, (2) retain consultants for compliance inspections, and (3) hire legal counsel and experts to review applications. (*Id.* ¶¶ 30-35). However, they do not allege that any such expenses **will** occur. Indeed, as detailed below, the Ordinance employs **permissive** language, leaving it to the Town's discretion whether to incur costs in reviewing permits and enforcing the Ordinance.¹

Regardless, Plaintiffs' Complaint acknowledges that the Ordinance **expressly and mandatorily shifts all permitting and enforcement costs the Town may incur to the applicant—not to taxpayers.** This includes legal fees, expert consulting costs, and any other expenses incurred by the Town in reviewing and processing an application, enforcing the Ordinance, or ensuring adequate funds are available in the event the operation is abandoned. (*Id.*, ¶¶ 25–29, 51, 54, 57, 60). In fact, Plaintiffs attach the Ordinance to their Complaint, and its plain language precludes any burden on taxpayers—directly

¹ As this court is aware, the word “may” is permissive and discretionary, not mandatory. See *Questions, Inc. v. City of Milwaukee*, 2011 WI App 126, ¶ 18, 336 Wis. 2d 654, 807 N.W.2d 131; *Matter of Commitment of M.A.C.*, 2024 WI 30, 412 Wis. 2d 462, 518, 8 N.W.3d 365.

undermining Plaintiffs' speculative and conjectural allegations that they or any other taxpayer may one day be required to bear any costs:

- **Section 8.2 – Application Procedure:** “The applicant shall... agree[] to fully compensate the Town for all legal services, expert consulting services, and other expenses which may be reasonably incurred by the Town in reviewing and considering the application, regardless of whether or not the application for a permit is subsequently approved...or denied by the Town Board. The applicant... shall also... agree[] to fully compensate the Town for all legal services, expert consulting services and other expenses, for verifying and enforcing compliance with the terms of the permit, with or without conditions, if approved by the Town Board. The applicant shall submit an administrative fee deposit as required by the Town Clerk.” (R. 3:26; Ord. § 8.2.)
- **Section 9 – Financial Surety:** Applicants and associated parties must ensure sufficient funds are available for pollution cleanup, nuisance abatement, and proper closure of the facility if abandoned or ceases to operate as planned and permitted, in which such financial assurance must be acceptable and approved by the Town. (R. 3:27, 28; Ord. § 9).
- **Section 14 – License Terms and Modifications:** In order to ensure ongoing compliance with the Ordinance, all permits are subject to an annual renewal fee of one dollar per animal unit to support ongoing enforcement. (R. 3:31; Ord. § 14).
- **Section 7 – License Application Fee:** An applicant must pay a non-refundable fee of one dollar per proposed animal unit payable to the Town of Eureka and shall accompany an application for the purpose of offsetting the Town costs to review and process the application. (R. 3:24; Ord. § 7).²

Importantly, Plaintiffs' Complaint does not allege that the Ordinance has ever been applied to them or to anyone else. They do not

² At no point in their briefing—either before this Court or the Circuit Court—do Plaintiffs assert that these provisions are in any way ambiguous or unclear.

allege that they are farmers or otherwise engaged in agriculture. They do not claim to be “applicants,” nor do they assert that they or anyone else in the Town has applied for, or anticipate applying for, a new or expanded livestock facility. Further, they do not allege that they have incurred any monetary obligations under the Ordinance with respect to the provisions they challenge, nor do they claim that anyone else in the Town has incurred such obligations or suffered any pecuniary harm as a result of the Ordinance. In short, Plaintiffs identify no plausible risk of injury given the Ordinance’s discretionary framework and its mandatory cost-saving provisions fully protecting taxpayers.

PROCEDURAL HISTORY

Plaintiffs filed this declaratory judgment action challenging the validity of the Town’s CAFO Ordinance on or about July 31, 2024. (Dkt. 2). The Town of Eureka moved to dismiss Plaintiffs’ Complaint, arguing Plaintiffs could not establish the four elements necessary to maintain a declaratory judgment action—primarily that their suit was not justiciable because: (1) Plaintiffs had no present and fixed rights to challenge the Ordinance; (2) the interests of the Town and Plaintiffs were not adverse; (3) Plaintiffs lacked standing to challenge the Ordinance; and (4) Plaintiffs’ case was not ripe for judicial determination. (R: 6, 7, 23).

In its oral ruling on the Town's motion, the Court acknowledged Plaintiffs' legal and conclusory allegations that they have standing as taxpayers based on the speculative possibility that, at some point in the future, the Town might use public funds to review and enforce the Ordinance, thereby causing pecuniary harm to its taxpayers. (R. 31: 2–5). The Court also noted that Plaintiffs' own allegations—along with the Ordinance they attached to their Complaint—make clear that the Ordinance does not apply to them and moreover, both the Complaint and the Ordinance contain specific cost-saving provisions that place financial responsibility on applicants—not taxpayers—for any costs the Town may incur in administering the Ordinance. (R. 31:5.)

The Court ultimately found that Plaintiffs failed to present a justiciable controversy to the Court. (R. 31: 2–10). In particular, the Court noted that Plaintiffs conceded the Ordinance did not apply to them, Plaintiffs did not allege that the Ordinance had been applied to anyone in the Town, and that Plaintiffs had not identified any identifiable taxpayer harm or offered any plausible path to taxpayer harm. (R. 31: 5–10). The Court further concluded that any alleged pecuniary losses were too speculative and directly contradicted by the Ordinance itself, which requires applicants—not taxpayers—to reimburse the Town for any discretionary expenses related to application review and enforcement. (R. 31: 2–10). As to ripeness, the

Court also determined that Plaintiffs' suit was not ripe for judicial determination, explaining:

The issue in the controversy must be ripe for judicial determination and again, the court at this time notes that at this point the anticipated pecuniary damages or losses, first of all, it's not clear to the court that those will occur given that the Ordinance contains certain provisions for reimbursement from the applicant for those sums... but at this time it's not clear to the court that any actual financial or other damages or losses would occur to the (Plaintiffs) given those provisions; and regardless, at this point, the issue in controversy the court does not believe is ripe for determination... Again, the (Plaintiffs) haven't applied under the Ordinance, nor is the court aware that anyone else has. No actual action has been taken by the Town or otherwise that would make this case ripe for adjudication. (*Id.*, at 7-8).

Ultimately, the Court granted the Town's motion and issued a corresponding order. (R. 29).

STANDARD OF REVIEW

A motion to dismiss tests the legal sufficiency of a complaint. *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶ 24, 389 Wis. 2d 669, 937 N.W.2d 37. When ruling on a motion to dismiss for failure to state a claim, a court accepts as true all well-pled facts and reasonable inferences drawn from them. *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660, 664 (1979). However, a court does not accept as true legal conclusions asserted in a complaint. *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶ 19, 284 Wis. 2d 307, 700

N.W.2d 180; *Cattau v. Nat'l Ins. Servs. of Wisconsin, Inc.*, 2019 WI 46, ¶ 5, 386 Wis. 2d 515, 926 N.W.2d 756; *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶ 17–21, 356 Wis. 2d 665, 849 N.W.2d 693.

Moreover, the application of statutory language – here, the Ordinance – are matters of law. *Wisconsin Dep't of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27, ¶ 26, 299 Wis. 2d 561, 576, 729 N.W.2d 396, 403. Although courts must accept all well-pled facts as true, statutory interpretation remains a question of law, without deference to allegations in a complaint. *Hinrichs*, ¶¶ 24–26. See also *Banuelos v. Univ. of Wisconsin Hosps. & Clinics Auth.*, 2021 WI App 70, ¶ 7-8, 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 [a 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 (holding that when the legal sufficiency of a complaint depends on statutory application, statutory interpretation is a matter of law); *Data Key Partners*, ¶ 31 (“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.”); *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 2016 WI App 19, ¶ 13, 367 Wis. 2d 712, 724, 877 N.W.2d 604, 609 (Court of Appeals dismissing action due to lack of standing where plain language of the statute did not put plaintiffs in “any potential jeopardy.”)

In sum, the Court cannot accept as true Plaintiffs’ legal assertions that they have standing as taxpayers or that their claims are ripe, as those assertions are directly contradicted by the express terms of the Ordinance—which make clear that any hypothetical costs associated with reviewing applications or enforcing the Ordinance are borne by applicants and permit holders, not taxpayers. Further, despite the Court’s de novo review on matters such as justiciability and standing, the Court of Appeals “**values a trial court’s ruling on such a question.**” *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶ 13, 259 Wis. 2d 107, 114, 655 N.W.2d 189, 193 (emphasis added).

ARGUMENT

This case is not about livestock regulation and preemption under Wis. Stat. § 93.90. Rather, this appeal turns on a threshold requirement that every plaintiff must satisfy before seeking declaratory relief: the existence of a justiciable controversy. Plaintiffs’ complaint must be dismissed because it fails to meet this fundamental requirement.

Specifically, the complaint lacks all four essential elements of justiciability. To maintain a declaratory judgment action, a justiciable controversy must exist—meaning that all of the following four elements must be present:

1. A controversy in which a claim of right is asserted against one who has an interest in contesting it.
2. The controversy must be between persons whose interests are adverse.
3. The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest.
4. The issue involved in the controversy must be ripe for judicial determination.

Vill. of Slinger v. City of Hartford, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81.

Here, Plaintiffs' Complaint fails on all four elements.

A. Plaintiffs do not allege a controversy in which they have an interest in contesting.

To satisfy the first element of justiciability—asserting a claim of right against one with an interest in contesting it—Plaintiffs must have “present and fixed rights,” not “hypothetical or future rights.” *Fabick v. Evers*, 2021 WI 28, ¶ 10, 396 Wis. 2d 231, 956 N.W.2d 856. Indeed, “[a] declaratory judgment will not determine hypothetical or future rights.” *Vill. of Slinger*, 2002 WI App 187, ¶ 10.

Here, Plaintiffs fail to show any such “present and fixed rights” pertaining to the Ordinance. Rather, their complaint rests on future conjecture that one day they may be harmed as taxpayers as a result of the Ordinance. Their Complaint concedes that the Ordinance does not apply to them. They do not allege that the Ordinance has been applied to anyone in the Town, nor do they allege that any individual in the Town is subject to these provisions. They do not even allege a CAFO permit has been granted in a way that causes them injury or has been granted in contravention of the Ordinance.

Moreover, the Town retains discretion over whether to incur any such costs in reviewing applications or enforcing the Ordinance, and the Ordinance includes **mandatory** safeguards expressly prohibiting the shifting of those costs to taxpayers in the first place. In short, Plaintiffs’ alleged harm is so speculative that it requires stacking multiple hypotheticals merely to suggest the possibility of future injury:

1. Someone would have to apply for a CAFO permit and be subject to the Ordinance;
2. The Town would have to choose to incur costs to review applications; and
3. Those costs would have to be improperly passed on to taxpayers—despite the Ordinance expressly prohibiting that outcome.³

³ See (R. 3:26; Ordinance § 8.2):

“The **applicant shall... agree[] to fully compensate the Town** for all legal services, expert consulting services, and other expenses **which may be reasonably incurred by the Town** in reviewing and considering the application, regardless of

Plaintiffs make no allegation supporting the first hypothetical condition, the second is entirely discretionary, unknown, and hypothetical, and the third is foreclosed by the Ordinance's plain language. Rather than address these defects, Plaintiffs vaguely assert that they may be harmed as taxpayers at some undefined point in the future and the Court must accept those assertions as true. But these assertions rest on a chain of contingencies that run contrary to the Ordinance's express terms. This type of conjecture is precisely what the justiciability doctrine is designed to prevent.

Plaintiffs fail to explain how—despite the Ordinance's features and safeguards that categorically reject their conjectural harm—they could ever suffer any harm as a result of the Ordinance or possess “present and fixed rights” as opposed to hypothetical or future concerns. Neither their Complaint nor their opening brief articulates a plausible path to actual injury as a result of the Ordinance.

Plaintiffs attempt to satisfy the first element by relying on *Fabick*, 2021 WI 28, but as the Circuit Court correctly noted, their reliance is misplaced. In *Fabick*, the Wisconsin Supreme Court found

whether or not the application for a permit is subsequently approved... The applicant... shall also... agree[] to fully compensate the Town for all legal services, expert consulting services and other expenses, for verifying and enforcing compliance with the terms of the permit, with or without conditions, if approved by the Town... The applicant shall submit an administrative fee deposit as required by the Town Clerk.” (emphasis added).

that the plaintiff had asserted “present and fixed rights” 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, impacted the entire state, and public tax dollars had been expended, as compared to hypothetical or future rights. *Id.*, ¶ 1- 11 & n.5. The COVID orders at issue in that case did not have the regulatory features of this ordinance that expressly preclude any real possibility of these individuals bearing the weight of the regulation. Moreover, the COVID orders in that case raised serious questions about executive overreach, separation of powers and other issues that are not present here. *Id.*

Plaintiffs’ own Complaint acknowledges that the Ordinance has never been applied to them, does not apply to them, and will not apply to them. Further, there is no indication that the Ordinance has been applied or enforced against any applicant. The Town’s CAFO Ordinance governs only a specific category of large-scale agricultural operations, which Plaintiffs do not allege currently exist in the Town. Nor do they allege any likelihood that such operations will be proposed in the future.

Moreover, unlike *Fabick*, which involved the deployment of the National Guard and the expenditure of taxpayer funds that had already occurred, this case involves no past or present use of public funds. To the contrary, the Ordinance expressly precludes taxpayer funding of

enforcement activities, and whether the Town will even choose to incur such costs is entirely discretionary, remains unknown and regardless, will be the burden of applicants, not taxpayers. (Compare Ordinance §§ 8.2 and 9 at R. 3:26–27 with *Fabick*, ¶¶ 10–11 & n.5.) (See also R. 31:6–7, Circuit Court distinguishing *Fabick* from the present case).⁴

Because Plaintiffs’ “rights” are entirely hypothetical, based on future contingencies, and directly contradicted by the Ordinance itself, they do not allege a controversy in which they have an interest in contesting. Their claims must therefore be dismissed, and the Circuit Court’s ruling should be affirmed.

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

Plaintiffs do not have an interest adverse to the Town. They have not applied for a CAFO Permit, they have not incurred monetary costs as a result of applying for a CAFO Permit and they have not been denied

⁴ See also *Rabiebna v. Higher Educ. Aids Bd.*, 2025 WI App 24, ¶¶ 13-14, 2025 WL 657120, explaining the *Fabick* Court’s rationale:

“[B]ut the *Fabick* court concluded (*Fabick*) had standing as a taxpayer because Wisconsin taxpayer funds had already been and could again be expended to deploy the National Guard pursuant to the executive orders. Specifically, the court noted that at the time *Fabick* filed his suit, Wisconsin taxpayers were responsible for funding twenty-five percent of the costs of the Guard deployments, with the federal government picking up the other seventy-five percent. ‘This expenditure of taxpayer funds,’ the court stated, ‘gives *Fabick* a legally protected interest to challenge the Governor’s emergency declarations.’” (citations omitted).

a CAFO Permit in whole or in part. To the contrary, the Complaint acknowledges the Ordinance does not apply to Plaintiffs. As explained above, it is entirely uncertain whether the Town will ever receive an application for a CAFO permit from anyone, whether it will incur costs in reviewing or enforcing the Ordinance, and in any event, the Ordinance expressly precludes the imposition of such costs on taxpayers. Accordingly, Plaintiffs have no interest adverse to the Town; rather, they are mere bystanders dissatisfied with the outcome of a legislative process.

Plaintiffs cite to *Fabick* to support their argument that they possess an interest adverse to the Town. However, *Fabick* did not address the second element of justiciability; the Court only addressed the first and third elements. See *Fabick*, 2021 WI 28, ¶ 9. Regardless, as explained above, *Fabick* is materially distinguishable from the present case: the plaintiff there challenged executive orders that were actively in effect, impacted the public at large, and resulted in confirmed expenditures of taxpayer funds. None of those facts are present here.

Plaintiffs also rely on *Tooley v. O'Connell*, 77 Wis. 2d 422, 434, 253 N.W.2d 335 (1977), but *Tooley* is similarly inapposite. In that case, the plaintiffs were Milwaukee property owners and taxpayers directly subject to a statutory financing scheme for public schools through property taxes they were **required to pay.** *Id.* at 427–28. The adverse

interest in *Tooley* was clear: the plaintiffs sought to invalidate a tax structure that imposed a direct and ongoing financial burden on them. *Id.* at 437.

In contrast, Plaintiffs here do not allege that they are subject to the Ordinance, that they ever will be, or that they are required to comply with its provisions. The Ordinance expressly states that all permitting, and enforcement costs are to be borne by applicants—not taxpayers. Plaintiffs offer no explanation as to how they—or any non-applicant taxpayer—could possibly be harmed by the Ordinance. Thus, they lack an interest adverse to the Town.

Simply put, there is no controversy between these Plaintiffs and the Town. The Ordinance does not apply to them, require them to pay any funds, nor are there any ongoing taxpayer expenditures by the Town. Unlike an actual CAFO applicant who may be aggrieved by the Town’s enforcement of the Ordinance, Plaintiffs are not aggrieved in any stretch of the imagination. They have no interest adverse to the Town, and the second element of justiciability is therefore not satisfied.

C. Plaintiffs do not have standing.

The third element is expressed in terms of “standing.” See *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 9. “In order to have standing to sue, a party must have a personal stake in the outcome, and must be directly affected by the issues in controversy.” *Id.* “Standing is

a concept that restricts access to judicial remedies to those who have suffered some injury because of something that someone has either done or not done.” *Munger v. Seehafer*, 2016 WI App 89, ¶ 48, 372 Wis. 2d 749, 890 N.W.2d 22. If a party lacks this personal stake, they lack standing. *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis.2d 107, 655 N.W.2d 189.

An abstract injury is not enough. *Fox v. DHSS*, 112 Wis. 2d 514, 525, 334 N.W.2d 532 (1983). A plaintiff whose standing is being challenged instead must show that he or she “‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” *Id.* (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). It has been explained by the Wisconsin Supreme Court that the thrust of standing requires “(1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a “personal stake” in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged.” *Foley-Ciccantelli v. Bishop’s Grove Condo. Ass’n, Inc.*, 2011 WI 36, ¶ 40, 333 Wis. 2d 402, 797 N.W.2d 789.

Taxpayers who claim taxpayer standing do not get a free pass from these requirements. *Vill. of Slinger*, 2002 WI App 187, ¶¶ 9-12. “A taxpayer does not have standing merely because he or she disagrees with the legislative body.” *Id.* Rather, a taxpayer must have sustained, or will sustain, some pecuniary loss before he or she has standing. *Id.*, ¶¶ 9-12. A taxpayer must also have a personal stake in the outcome and must be directly affected by the issues in controversy. *Id.* A declaratory judgment **will not determine hypothetical or future rights**. *Id.* When a party cannot show that the action affects property they own or is not able to show a risk of pecuniary loss or substantial injury to themselves, then they do not have a personal stake in the outcome. *Id.* See also *Evers v. Outagamie Cnty.*, 191 Wis. 2d 361, 530 N.W.2d 70 (Ct. App. 1995) citing *Hart v. Ament*, 176 Wis.2d 694, 699, 500 N.W.2d 312, 314 (1993) (“As the trial court noted, taxpayers may seek judicial review of municipal decisions only if they have a direct pecuniary interest in them.”); *Lake Country Racquet & Athletic Club, Inc.*, ¶¶ 17 – 23 (same); *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 2016 WI App 19, ¶ 13, 367 Wis. 2d 712, 725, 877 N.W.2d 604, 609 citing *Lake Country Racquet & Athletic Club, Inc.*: (“[P]laintiff seeking declaratory judgment has burden to show risk of injury: ‘Here, Lake Country has failed to bring forth any facts demonstrating any pecuniary loss or the risk of any substantial injury...’”). A taxpayer may have standing to challenge

“governmental actions leading to an illegal expenditure of taxpayer funds, so long as (a taxpayer) can show ‘some pecuniary loss’ in the form of the government's allegedly unlawful expenditure.” *Wisconsin State Legislature v. Kaul*, 2025 WI App 2, ¶¶ 28-29, 414 Wis. 2d 633, 655, 17 N.W.3d 24, 34–35 (emphasis added).

Indeed, it is well rooted in our state’s history that taxpayer standing is not a limitless doctrine and taxpayer suits must be grounded in pecuniary injury, substantial injury or a legitimate and immediate threat thereof. See *Lake Country*, 2002 WI App 301; *Vill. of Slinger*, 2002 WI App 187; *Teigen v. Wisconsin Elections Comm’n*, 2022 WI 64, ¶ 160, 403 Wis. 2d 607, 699, 976 N.W.2d 519, 564, overruled on other grounds (Hagedorn, J., concurring);⁵ *S.D. Realty Co. v. Sewerage Comm’n of City*

⁵ One year after writing the *Fabick* opinion, Justice Hagedorn stated in his concurring opinion in *Teigen*:

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.

of Milwaukee, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961); *McClutchev 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).

Plaintiffs lack standing for several reasons, as set forth in the onset of this argument.

First, Plaintiffs' Complaint affirmatively alleges that they are not subject to the Ordinance. As such, they are not regulated by its provisions and face no present or imminent harm from its enactment or enforcement.

Second, Plaintiffs fail to demonstrate any pecuniary loss or imminent danger of pecuniary harm that is "real and immediate," rather than "conjectural" or "hypothetical." Plaintiffs' Complaint and the Ordinance expressly provide that all costs shall be borne by CAFO applicants and permit holders—not taxpayers. (See Ordinance §§ 7, 8.2, 9, 14 at R. 3: 24–31).⁶ Despite this clear mandate, Plaintiffs vaguely allege and speculate that the Town Board may, in the future, designate enforcement authorities, retain consultants, or hire legal counsel that could lead to taxpayer expenditures. (See R. 2: ¶¶ 30–35). Yet in their Complaint, Plaintiffs simultaneously acknowledge the very provisions

⁶ At no point—either in the Circuit Court or in their opening brief—do Plaintiffs contend that the Ordinance is unclear or ambiguous, or that its provisions fail to unequivocally protect taxpayers from financial harm.

of the Ordinance that mandatorily assign all such costs to applicants and permit holders and further, attach the Ordinance to their Complaint. (See R. 2: ¶¶ 25–29, 51, 54, 57, 60). As explained above, it is the plain language of the Ordinance—not Plaintiffs’ conclusory and internally inconsistent legal assertions—that governs the Court’s analysis. Plaintiffs’ alleged harm is entirely speculative, rests on a chain of hypotheticals, and is directly contradicted by the Ordinance’s express terms. Such conjectural allegations do not satisfy the requirements for standing.

Third, as noted above, Plaintiffs’ alleged harm depends on a series of speculative contingencies: (1) a CAFO applicant must exist and apply for a permit; (2) the Town must not only choose to enforce or review the application, but must also incur costs in doing so; and (3) the Town must unlawfully shift those costs to taxpayers, despite the Ordinance’s express language prohibiting that outcome. This chain of possibilities is the very definition of a hypothetical injury—conjectural, unsupported by the Ordinance, and foreclosed by the governing law. Plaintiffs are not in “immediate danger of sustaining some direct injury,” nor do they allege any concrete pecuniary loss, imminent threat thereof, or any plausible path to potential injury. Moreover, the Complaint does not allege that the Town will incur these costs, but only that it may designate enforcement authorities or hire consultants or legal counsel. (See R. 2:

¶¶ 30–35). The Ordinance and Complaint alike use permissive language, underscoring the absence of any certainty that expenditures will occur; and in any event, the Ordinance uses **mandatory language making clear that no such costs shall fall on taxpayers.**

Because Plaintiffs face no real, immediate, or concrete injury—and instead rely on vague, hypothetical allegations that directly contradict the language of the Ordinance—and because they cannot plausibly allege any pecuniary loss or imminent threat thereof, they lack standing.

This Court can rely on several authorities in affirming the Circuit Courts decision. The first is *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 2016 WI App 19, ¶ 1, 367 Wis. 2d 712, 715, 877 N.W.2d 604, 605. In *Planned Parenthood*, a medical center and its medical director sought declaratory judgment regarding the validity of various state statutes, specifically Wis. Stat. §§ 253.10 and 253.105, which sought to govern medication abortions. *Id.* In analyzing the third element of justiciability, and citing *Lake Country Racquet & Athletic Club, Inc.*, the Court of Appeals concluded that the plaintiffs lacked standing because, under the clear language of the statutes at issue, they failed to demonstrate how their medication abortion protocol could place them in

violation of the statutes they were challenging. *Id.*, ¶¶ 13, 18.⁷ The Court emphasized, “To have standing, Plaintiffs need to demonstrate they actually have a personal stake in the outcome and are directly affected by the issue in controversy.... They have failed to demonstrate this (citations omitted).” *Id.*, ¶ 19.

The same reasoning applies here. Plaintiffs have not demonstrated how the Ordinance directly affects them, how it could ever plausibly result in harm to them, or how they have any personal stake in its enforcement or validity. Their Complaint merely speculates that, at some future point, the Town may designate enforcement authorities, retain consultants, or hire legal counsel or experts (R. 2: ¶¶ 30–35), however, the plain language of the Ordinance—specifically Section 8.2—makes clear, and Plaintiffs do not dispute, that CAFO applicants are solely responsible for these costs, not taxpayers, if any such costs occur in the first place. As in *Planned Parenthood*, Plaintiffs here have failed to show that they are personally affected by the Ordinance. Their inability to demonstrate a concrete, individualized interest confirms they lack standing, and dismissal was appropriate.

This Court can also rely on *Lake Country Racquet & Athletic Club, Inc.*, 2002 WI App 301, in affirming the Circuit Court’s dismissal. In

⁷ *Id.* ¶ 13: “Significantly, however, Plaintiffs fail to explain how it is, based upon their protocol, that they reasonably could be found in violation of § 253.105(2).”

Lake Country Racquet & Athletic Club, a country club filed a declaratory judgment action against a municipality, challenging the municipality's conveyance of land to a third party as contrary to local ordinances and state law. *Id.*, ¶¶ 1–9. Specifically, the municipality had rezoned a single parcel to allow certain conditional uses, then conveyed it to a private party for use consistent with that zoning. *Id.*, ¶ 22.

The country club argued it had standing based on its status as a property owner and taxpayer, but the municipality contended the club failed to meet the third element of justiciability because it could not demonstrate any pecuniary loss or cognizable injury. *Id.*, ¶ 14. The Court of Appeals agreed with the municipality, stating:

In order to have standing to bring a declaratory judgment action, a party must have a personal stake in the outcome and be directly affected by the issue in controversy. This is measured by whether the claimant has sustained, or will sustain, some pecuniary loss or otherwise will sustain a substantial injury to his or her interests. Here, [the country club] has failed to bring forth any facts demonstrating any pecuniary loss or the risk of any substantial injury to its interests.

Id., ¶ 17.

The Court further distinguished facts in that case from cases where standing was granted to challenge ordinances affecting all citizens of a municipality, emphasizing that the ordinance at issue impacted only a single parcel conveyed to a third party. *Id.* ¶¶ 20–23.

The same is true here. The Town's Ordinance does not regulate all taxpayers, nor even all agricultural operations. It governs only a specific class of large-scale livestock facilities, which Plaintiffs do not allege currently exist in the Town. Nor do they allege such an application has been made, or such an application has been handled in contravention of the Ordinance. Further, any hypothetical costs that are incurred to review applications and enforce the Ordinance are borne by applicants, not taxpayers. Plaintiffs are not at risk of injury to their interest, pecuniary or otherwise. Plaintiffs do not—and cannot—show that they have sustained, or are in imminent danger of sustaining, any pecuniary loss or substantial injury to their interests like the plaintiffs in *Lake Country Racquet & Athletic Club*.

This Court may also look to *Village of Slinger*, 2002 WI App 187. In that case, taxpayers abutted an area of land annexed by the City of Hartford and brought a declaratory judgment action challenging a municipal annexation ordinance and an associated intergovernmental agreement. *Id.* ¶¶ 1–6. The Court rejected the plaintiffs' claim that they had standing as taxpayers, finding no plausible danger of substantial injury: "It has been held that a taxpayer can invoke equity to enforce the right of a public corporation where there is a danger of substantial injury that will affect the taxpayer to some extent... There is nothing in the record upon which to base an inference that the (property owners) would

be adversely affected by the annexation.” *Id.* ¶ 11, 12. The same is true here: Plaintiffs offer no plausible path to injury—immediate, present, or otherwise.

These cases confirm Plaintiffs lack standing. While Plaintiffs allege taxpayer status, they offer no plausible theory—grounded in fact or law—under which they are in danger of sustaining injury. Their allegations rely on a speculative and hypothetical chain of discretionary events that is directly contradicted by the plain terms of the Ordinance, which mandates that all permit-related costs be borne by applicants, not taxpayers. Accordingly, Plaintiffs have not met the requirements for standing, and their claims must be dismissed.

In their opening brief, Plaintiffs offer several unavailing arguments. First, they cite *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, 275 Wis. 2d 533, 547, 685 N.W.2d 573, 580, for the proposition that the Court must accept their allegations of standing as true and that standing is liberally construed.⁸ (App. Opening Brief at pg. 16). In essence, Plaintiffs ask the Court to ignore the plain language of the Ordinance they attached to their own

⁸ While standing has been held to be construed liberally, the Court of Appeals has held that a Plaintiff still must meet the necessary requirements to have standing. See *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶ 18, 259 Wis. 2d 107, 116, 655 N.W.2d 189, 194.

Complaint—an Ordinance that expressly contradicts their allegations by assigning costs to permit holders and applicants, not taxpayers (See R. 3:24–31; Ordinance §§ 7, 8.2, 9, 14); and further, Plaintiffs ask the Court to ignore their own allegations in which they acknowledge the terms of the Ordinance assigning costs to permit holders and applicants. (R. 2: ¶¶ 25-29, 51, 54, 57, 60). This request is both illogical and legally unsupported, as it is the underlying substantive law—not Plaintiffs’ vague legal conclusion—that governs the Court’s standing analysis. Plaintiffs’ bare assertion that they have standing as taxpayers is insufficient. Additionally, like here, in *Chenequa* **the plaintiff alleged it had standing, yet the Court of Appeals still nonetheless determined the plaintiff lacked standing and dismissed the plaintiff’s amended complaint.** *Chenequa*, ¶¶ 18, 27, 30. Moreover, *Chenequa* did not involve taxpayer standing analysis at all; rather, that case held that the plaintiff lacked standing as it did not have a legally protectable interest in challenging the Department of Transportation’s compliance with policies set forth in its own program manual. *Chenequa Land Conservancy, Inc.*, ¶ 27. It did not somehow ease the standing requirements a party must meet to bring a claim for declaratory relief as set forth in the above supporting authorities.

Next, Plaintiffs rely on a range of cases that are inapplicable to the facts presented here. They cite decisions involving laws that were

already in effect and directly impacting all taxpayers state or countywide; cases where defendants waived the arguments the Town raises here; and cases involving governmental actions that lacked express language protecting taxpayers from financial liability—unlike the Ordinance at issue.

Plaintiffs cite *Fabick v. Evers*, 2021 WI 28, in support of their claim that the mere allegation of potential pecuniary loss is sufficient to establish standing. That is incorrect. In *Fabick*, taxpayer funds had already been expended—the Wisconsin National Guard had been deployed pursuant to the challenged executive order. The Court held that this actual expenditure gave rise to standing:

During oral argument, the Governor's counsel confirmed that the National Guard had been deployed pursuant to the emergency declarations. This expenditure of taxpayer funds gives Fabick a legally protected interest to challenge the Governor's emergency declarations.⁹

Id. ¶ 11

⁹ Again, see *Rabiebna v. Higher Educ. Aids Bd.*, 2025 WI App 24, ¶¶ 13-14, 2025 WL 657120, explaining the *Fabick* Court's rationale as to why the plaintiff had standing:

“[B]ut the Fabick court concluded (Fabick) **had standing as a taxpayer because Wisconsin taxpayer funds had already been and could again be expended to deploy the National Guard pursuant to the executive orders.** Specifically, the court noted that at the time Fabick filed his suit, **Wisconsin taxpayers were responsible for funding twenty-five percent of the costs of the Guard deployments,** with the federal government picking up the other seventy-five percent. ‘This expenditure of taxpayer funds,’ the court stated, ‘gives Fabick a legally protected interest to challenge the Governor's emergency declarations.’” (citations omitted, emphasis added).

By contrast, Plaintiffs here do not—and cannot—plausibly allege that the Town has expended any taxpayer funds as a result of the Ordinance. As detailed throughout this brief, the Ordinance expressly and unequivocally shifts all costs to applicants and permit holders. Any harm alleged by Plaintiffs is entirely hypothetical, conjectural, speculative, and runs directly contrary to the plain language of the Ordinance. There is no threat, immediate or otherwise, of harm to taxpayers.

Plaintiffs also rely on *Coyne v. Walker*, 2015 WI App 21, 361 Wis. 2d 225, 862 N.W.2d 606, *aff'd*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520. In *Coyne*, the plaintiffs challenged the constitutionality of Act 21, a statutory change to administrative rulemaking that affected all state agencies. *Id.*, ¶ 2. The court explained that “a taxpayer has standing to challenge the constitutionality of a statute **when any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss.**” *Id.*, ¶ 9 (emphasis added). On appeal, Governor Walker argued that Act 21 did not involve the expenditure of public funds and thus plaintiffs lacked standing as taxpayers. *Id.*, ¶¶ 10–12. However, the Court of Appeals specifically found that Governor Walker had waived this argument by failing to raise it in the circuit court. *Id.*

Coyne is clearly distinguishable. The Town has not waived any standing-related arguments nor do Plaintiffs allege any such waiver. More importantly, Plaintiffs fail to identify any expenditure of public funds that causes them harm or how any such expenditure could even take place. Moreover, unlike the plaintiffs in *Coyne*, Plaintiffs here do not allege the Ordinance will cause the Town to incur any costs, but rather, they assert only that the Town may, at some indeterminate time in the future, incur discretionary costs to review applications or enforce the Ordinance, an allegation that runs contrary to the plain language of the Ordinance. Additionally, unlike *Coyne*, which involved a broad statewide policy affecting the entire administrative apparatus of government, this case concerns a local ordinance regulating a narrow and specific subject matter—with express safeguards shielding taxpayers from financial impact. Plaintiffs cite to no such case dealing with a safeguard provision protecting taxpayers as is the case here. Indeed, *Coyne* did not address such a provision protecting taxpayers.

Plaintiffs also rely on *Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993). In *Hart*, the Milwaukee County Board authorized the transfer of operation and management of the Milwaukee Public Museum to a private nonprofit corporation. The plaintiffs, as county taxpayers, sought a declaration invalidating the agreement on the ground that the county lacked statutory authority for the transfer. *Id.* at 698. The Court

concluded that the plaintiffs had standing because the agreement had already been finalized and approved, and there was a conceivable basis to conclude that taxpayers would suffer harm. *Id.* at 699. For instance, the Court reasoned that “[The nonprofit] may not be able to operate the museum for less than the county operated the museum unless it reduces museum services or the quality of those services. If the reduction in the value of museum services is ultimately greater than the reduction in tax dollars expended to support those services, a pecuniary loss to taxpayers results.” *Id.*

By contrast, no final transaction or governmental action has occurred in this case. Plaintiffs do not allege that anyone has applied for a CAFO permit, that anyone is subject to the Ordinance, or that the Town has incurred any costs. Nor do Plaintiffs present any plausible scenario in which taxpayers would be harmed. Instead, they vaguely assert that the Town may one day take discretionary actions—such as designating enforcement authorities, hiring consultants, or retaining legal counsel—that could result in taxpayer harm. These allegations are not only speculative and discretionary, but are also directly contradicted by the Ordinance itself, which expressly shifts all such costs to applicants.

Plaintiffs devote the remainder of their standing argument to discussing the merits of their claims—specifically, their assertion that

the Ordinance’s provisions protecting taxpayers from being harmed are unlawful and preempted by Wisconsin law. (Opening Br. at pgs. 20–26). However, Plaintiffs cite no authority supporting the notion that a court should consider the merits of a claim when determining justiciability. Wisconsin law is clear that courts do not address the merits of a case when evaluating standing. See *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 22, 402 Wis. 2d 587, 607, 977 N.W.2d 342, 352 (When reviewing a motion to dismiss for lack of standing, a court does not resolve the merits of the case.); see also *Tooley v. O’Connell*, 77 Wis. 2d 422, 434, 253 N.W.2d 335 (1977) (“The merits of [a case] do not determine its justiciability.”).¹⁰

There is also a fundamental irony—and circularity—in Plaintiffs’ position. They argue they have taxpayer standing because the Ordinance’s reimbursement provisions, which are expressly designed to shield taxpayers from financial harm, are themselves unlawful and, if invalidated, could result in taxpayer harm. But this reasoning presupposes the very legal conclusion they ask the Court to reach. In effect, they argue that yes, there are provisions that protect the taxpayers from being harmed, but those provisions are illegal and accordingly, Plaintiffs have standing. As noted, this argument is incredibly circular, puts the chariot before the horse, recognizes the

¹⁰ Plaintiffs concede this point in their opening brief. (See Opening Br. at pg. 21).

effect of the cost-protecting provisions, and Plaintiffs cite no case law in which a plaintiff has been able to manufacture standing in such a way.

As the Circuit Court correctly observed:

[T]he court at this time notes that at this point the anticipated pecuniary damages or losses, first of all, it's not clear to the court that those will occur given that the Ordinance contains certain provisions for reimbursement from the applicant for those sums. The argument is a bit circular in terms of the plaintiffs alleging that those provisions are unlawful, but at this time it's not clear to the court that any actual financial or other damages or losses would occur to the Binversies given those provisions. (R. 8:8.)

If any party has standing to challenge the Ordinance's cost-shifting provisions, it would be an actual permit applicant—not the Binversie family. Their attempt to bootstrap standing from a legal disagreement with the Ordinance's provisions that protect them from being harmed must be rejected.¹¹

¹¹ Plaintiffs also cite *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 360, 299 N.W.2d 259 (Ct. App. 1980), overruled by *DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994), for the proposition that they have standing merely because they allege that the very provisions designed to protect taxpayers are unlawful. This reliance is misplaced. First, *Kaiser* does not stand for the proposition that a taxpayer may manufacture standing by alleging that a provision protecting taxpayers is illegal. Second, the case makes clear that “[t]he taxpayer must have sustained, or will sustain, some pecuniary loss before he has standing to challenge the ordinance.” *Id.* at 360. As emphasized throughout this brief, Plaintiffs allege no such loss, nor any immediate threat thereof. Third, *Kaiser* involved the undisputed expenditure of public funds, and the court specifically noted that taxpayer standing requires not just an allegation of illegality, but a showing of actual or imminent pecuniary harm. *Id.* Here, while Plaintiffs allege illegality, they do not—and cannot—show any pecuniary loss or immediate threat of such harm.

In addition to the cases cited above, 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 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), overruled, in part, on other grounds (“A statute attacked as unconstitutional must affect the litigant in some way.”); *Milwaukee Mobilization for Survival v. Milwaukee Cnty. Park Comm’n*, 477 F. Supp. 1210, 1215-1216 (E.D. Wis. 1979) (plaintiffs lack standing to challenge provisions of Milwaukee ordinance which were not applied against them).

Lastly, sound judicial policy does not support standing under these circumstances. “The purpose of the requirement of standing is to ensure that a concrete case informs the court of the consequences of its decision and that people who are directly concerned and are truly

adverse will genuinely present opposing petitions to the court.” *In re Guardianship & Protective Placement of Carl F.S.*, 2001 WI App 97, ¶ 5, 242 Wis. 2d 605, 626 N.W.2d 330. As explained throughout this brief, this case is anything but concrete. It rests on incomplete hypotheticals and speculative harms that are both conjectural and inconsistent with the actual language of the Ordinance. Plaintiffs are neither “truly adverse” nor “directly concerned” in any meaningful sense. Recognizing standing here would disregard decades of precedent and effectively open the courthouse doors to any party merely dissatisfied with a legislative process. However, that outcome has been explicitly prohibited by the courts. Plaintiffs cite no authority to support such a sweeping departure from established standing principles—because none exists.¹²

In sum, Plaintiffs cannot satisfy the third element of justiciability because they have not alleged any concrete, particularized, or imminent threat of injury. The Ordinance does not apply to them, has not been enforced against them, and expressly protects taxpayers from incurring any costs. Plaintiffs are not subject to any regulatory burden, nor do they

¹² In the Circuit Court, Plaintiffs argued they had standing based on judicial policy, if not taxpayer standing, citing *McConkey v. Van Hollen*, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855. (R. 21:9–10.) However, Plaintiffs have appropriately not renewed that argument on appeal. This is because this Court has made clear that judicial policy-based standing may apply only when the case involves the interpretation of an important constitutional issue—as was the case in *McConkey*—and that extending the doctrine beyond constitutional matters would effectively eliminate standing as a meaningful requirement. *Wisconsin Manufacturers & Commerce 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. Plaintiffs do not raise any constitutional challenge to the Ordinance and do not assert judicial policy as a basis for standing in their opening brief.

face any real or immediate threat of pecuniary harm. Their alleged injury is entirely speculative and rests on a chain of hypothetical events that may never occur and, even if they did, would not result in taxpayer liability under the Ordinance's plain terms. Because Plaintiffs have failed to demonstrate any actual or threatened injury, they lack standing, and their claims must be dismissed.

D. Plaintiffs' claims are not ripe for judicial determination.

The final justiciability requirement is ripeness. Ripeness is a doctrine of judicial restraint designed to prevent courts from issuing advisory opinions on abstract disputes and to ensure they adjudicate only concrete controversies. *Papa v. DHS*, 2020 WI 66, ¶30, 393 Wis. 2d 1, 946 N.W.2d 17. Ripeness is a prerequisite to bringing a declaratory judgment action. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶32, 309 Wis. 2d 365, 749 N.W.2d 211. A claim is not ripe unless the facts are sufficiently developed to allow for a conclusive adjudication; courts do not weigh in on hypothetical or contingent disagreements. *Id.*, ¶43.

As the *Olson* Court explained, a matter is unripe when there is an “absence of certainty.” Instead, the dispute must be “real, precise, and immediate”—not “hypothetical, abstract, or remote.” *Id.*, ¶67. While Olson acknowledged that “**potential defendants** may seek a construction of a statute or a test of its constitutional validity without

subjecting themselves to forfeitures or prosecution,” (emphasis added)¹³
it reaffirmed that factual development is essential:

“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.” *Id.*, ¶43.

In *Miller Brands-Milwaukee, Inc. v. Case*, the Wisconsin Supreme Court underscored that “if another act can be taken to remove contingencies and doubt, it should be taken to make the action proper.” 162 Wis. 2d 684, 695, 470 N.W.2d 290, 295 (1991). Similarly, in *American Medical Services, Inc. v. Mutual Federal Savings & Loan Ass’n*, the Court cautioned that “advisory opinions should not be given under the guise of a declaration of rights.” 52 Wis. 2d 198, 203, 188 N.W.2d 529 (1971).

Here, Plaintiffs’ lawsuit is not ripe for multiple reasons. Plaintiffs have not applied for a CAFO permit under the Ordinance and even

¹³ See also *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶ 41, 244 Wis. 2d 333, 353, 627 N.W.2d 866, 876 : “**Ip[otential] defendants** may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution.” (emphasis added)

admit they are not subject to the Ordinance. Accordingly, they are not “potential defendants” entitled to test the Ordinance’s validity at its adoption. See *Olson*, ¶43: “potential defendants may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution”; *Jacobs v. Major*, 132 Wis. 2d 82, 103, 390 N.W.2d 86 (Ct.App.1986), overturned, in part, on other grounds (“A statute attacked as unconstitutional must affect the litigant in some way”); *Kmiec v. Town of Spider Lake*, 60 Wis. 2d 640, 648, 211 N.W.2d 471 (1973) (“Each case, in which the validity of such restrictions is challenged, must be determined on the facts that are directly applicable to the property of the parties complaining”);

Plaintiffs rely heavily on *Olson* to argue that the mere enactment of an ordinance renders a matter ripe. But the *Olson* Court found ripeness only because the plaintiff had affirmatively availed himself of the ordinance at issue by securing both conditional rezoning and plat approval—circumstances that distinguished him from landowners not subject to the ordinance. *Olson*, ¶ 64. The Court emphasized:

We note that Olson's interest, 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 and plat approval from the County and Town... []Olson received conditional rezoning approval from the County and conditional plat approval from the Town, **both of which distinguish him from a receiving area**

landowner who had no interest in seeking to rezone his property for purposes of development.... A declaratory judgment action filed by a receiving area landowner who had taken no steps to: (1) obtain final rezoning approval; or (2) proceed with development after receiving final rezoning approval, **would present a different and much more difficult question.** *Id.* (emphasis added).

By contrast, Plaintiffs here are in precisely that more difficult posture. They have neither availed themselves to the Ordinance nor are they subject to the Ordinance. This factual void is critical. As highlighted throughout this brief, the alleged harm to them as a result of the Ordinance is speculative, conjectural, uncertain, and directly contradicted by the plain language in the Ordinance. As the Court stated in *Miller-Brands*, “if another act can be taken to remove contingencies and doubt, it should be taken to make the action proper.” Here, it is unclear how the Ordinance will impact Plaintiffs, like the plaintiff in *Miller-Brands*:

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.

Miller Brands, at 695.

The same applies here. If Plaintiffs wish to challenge the Ordinance, they may apply for a CAFO themselves or wait to see if the

stacked hypotheticals, as noted throughout this brief, actually occur. Until then, they seek nothing more than an advisory opinion—which Wisconsin law clearly forbids. Accordingly, the Circuit Court came to the correct conclusion:

The issue in the controversy must be ripe for judicial determination and again, the court at this time notes that at this point the anticipated pecuniary damages or losses, first of all, it's not clear to the court that those will occur given that the Ordinance contains certain provisions for reimbursement from the applicant for those sums... but at this time it's not clear to the court that any actual financial or other damages or losses would occur to the (Plaintiffs) given those provisions; and regardless, at this point, the issue in controversy the court does not believe is ripe for determination... Again, the (Plaintiffs) haven't applied under the Ordinance, nor is the court aware that anyone else has. No actual action has been taken by the Town or otherwise that would make this case ripe for adjudication.

(R. 31: 7, 8).

Plaintiffs also cite various cases for the proposition that this suit became ripe upon the Ordinance's enactment. However, each of those cases involved statutory schemes or ordinances that had an immediate and demonstrable impact on the specific plaintiffs or, in some instances, on the State of Wisconsin as a whole. None supports the proposition that a bystander—who is not subject to the ordinance—may bring a ripe claim to challenge it merely upon enactment. That principle is consistent with the holdings in *Olson*, *Jacobs*, and *Kmiec*.

Plaintiffs first cite to *State v. Thiel*, 2012 WI App 48, 340 Wis. 2d 654, 660, 813 N.W.2d 709, 712. However, in *Thiel*, an inmate was adjudged to be a sexually violent person and was committed to the custody of DHS, in which Thiel later petitioned for release. *Id.*, ¶ 2-3. The court found that the five factors for supervised release under the Wisconsin Statutes were met and ordered DHS to submit a plan, with conditions, for Thiel's supervised release. *Id.* Thiel objected to two of the 48 conditions relating to his release, arguing they were not allowed under varying Wisconsin Statutes. *Id.* The Court determined the matter was ripe because the Court was able to decide the merits of those rules without additional factual development. *Id.* ¶ 7. That case, unlike this one, did not involve a third party seeking to challenge a statute or ordinance from the sidelines. Rather, the conditions at issue directly applied to Thiel's release. In other words, Thiel was the "potential defendant" emphasized in *Olson*. Moreover, *Thiel* involved no need for further factual development; the conditions were implemented and part of Thiels' conditions of release. Here, by contrast, numerous uncertainties remain: whether Plaintiffs will ever be subject to the Ordinance; whether any CAFO operation will ever exist in the Town; whether the Town will review or enforce any applications; whether any costs will be incurred by the Town; and whether any burden will fall on Plaintiffs or other taxpayers contrary to the Ordinance.

Plaintiffs also cite *State v. Roundtree*, 2021 WI 1, ¶18, 395 Wis. 2d 94, 102, 952 N.W.2d 765, 769, which distinguishes between the two major types of **constitutional challenges**: facial and as applied. *Id.* However, this case does not involve a constitutional challenge, and *Roundtree*—like the other cases Plaintiffs cite—does not support the proposition that a third party, standing on the sidelines and unable to show any concrete impact from a statutory scheme, may bring a ripe challenge to that scheme. As the Court stated in *Olson*, “potential defendants may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution.” *Olson*, ¶ 43. But regardless of whether a claim is constitutional or otherwise, Plaintiffs are not “potential defendants,” nor can they show any non-speculative harm. Their alleged injuries are entirely contingent and inconsistent with the express terms of the Ordinance. More factual development is needed as noted above.

There are potential scenarios in which Plaintiffs’ suit could conceivably become ripe—for example, if they applied for a CAFO permit, alleged that they were subject to the Ordinance, or if the Town received an application and incurred costs that were ultimately borne by taxpayers contrary to the Ordinance’s cost-allocation provisions. But none of those circumstances are present here, nor do Plaintiffs allege

them. As such, further factual development is necessary before any claim becomes ripe for judicial review.

CONCLUSION

For the foregoing reasons, the Town respectfully requests that this Court affirm the Circuit Court's dismissal of Plaintiffs' action in its entirety.

Dated: June 2, 2025.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is **43 pages** and **10,420 words**.

Dated: June 2, 2025.

/s/ Electronically signed by Adam J. Meyers