

FILED
08-27-2024
Clerk of Circuit Court
Polk County, Wisconsin
2024CV000209

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 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 Brief in Support of its Motion to Dismiss.

INTRODUCTION

Plaintiffs Ben and Jenny Binversie (“Plaintiffs”) bring forth this declaratory judgment action challenging the validity of the Town’s Concentrated Animal Feeding Operations Ordinance (the “Ordinance”). However, Plaintiffs’ lawsuit should be dismissed because a justiciable controversy does not exist for a multitude of reasons as explained below, including the absence of standing.

ALLEGATIONS IN THE COMPLAINT

Plaintiffs’ Complaint alleges that on March 10, 2022, the Town adopted the Ordinance which sets forth a procedure for obtaining a Concentrated Animal Feeding Operations (“CAFO”) Permit for the operation of a new or expanded livestock facility. (See Compl. ¶¶ 3, 22). Their

lawsuit contends Wisconsin's Livestock Facility Siting Law (Wis. Stat. § 93.90) and its regulations preempt local control over the permitting process and that the Ordinance violates state law preemption.

However, **Plaintiffs admit the Ordinance does not apply to them.** (*Id.* ¶ 13, footnote 3). Instead, Plaintiffs allege they have standing because they are taxpayers of the Town. In support of this assertion, the Complaint alleges the Town Board **may** do a variety of things to review a Permit application and assure compliance with the Ordinance which will result in the expenditure of taxpayer money, such as to designate one or more local authorities to enforce the Ordinance, retain consultants to conduct periodic inspections to ensure compliance with the Ordinance, and hire legal counsel and expert consultants to review applications and advise the Town Board. (*Id.* ¶¶ 30 – 35).

However, Plaintiffs' Complaint acknowledges that **the Ordinance requires an applicant 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 an application, as well as to ensure sufficient funds are available if the operation is abandoned.** (*Id.* ¶¶ 25-29, 51, 54, 57, 60; See Sec. 8.2 of the Ordinance). Further, Section 8.2 of the Ordinance **also requires an Applicant to fully compensate the Town for all legal services, expert consulting services, and other expenses the Town may incur for verifying and enforcing compliance with the terms of a permit if given.** Additionally, the Complaint acknowledges that to assist in enforcing the Ordinance, an applicant is subject to an annual renewal fee in the amount of one dollar per animal unit. (*Id.* ¶ 28).

Plaintiffs then allege several causes of action asserting that various parts of the Ordinance pertaining to the application and enforcement processes **as it relates solely to CAFO applicants** are preempted under state law. (See Compl. pgs. 5 – 26).

STANDARD OF REVIEW

The purpose of a motion to dismiss for failure to state a claim under Wis. Stat. § 802.06(2)(a) is to test the legal sufficiency of the complaint. *Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶ 13, 284 Wis. 2d 264, 700 N.W.2d 158. When ruling on a motion to dismiss for failure to state a claim, a court accepts facts pleaded and all reasonable inferences to be drawn from them as true. *Morgan v. Pennsylvania General Ins. Co.*, 275 N.W.2d 660, 664, 87 Wis.2d 723, 731 (Wis., 1979). However, a court does not assume as true legal conclusions pled 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, 519, 926 N.W.2d 756, 759; *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶ 17 - 21, 356 Wis.2d 665, 849 N.W.2d 693. “[T]he 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.” *Data Key Partners*, ¶ 31. Further, interpretation of a statute and application of its language are matters of law which receive de novo review. *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

ARGUMENT

As noted, **Plaintiffs own Complaint admits the Ordinance does not apply to them,** despite the Ordinance being passed in March 2022. (Complaint ¶ 13, footnote 3). Since March 2022, they do not allege anywhere in their 163 paragraph Complaint that the Ordinance has ever been applied against them or anybody else. They do not even allege they are farmers or otherwise active in agriculture. They do not allege they are “applicants,” that they have applied or even that they anticipate applying for a new livestock facility (or an expanded one). They also do not allege they have incurred any monetary obligations under the Ordinance relative to those provisions they

challenge in Count 2 of their Complaint. Although they present various claims under Count 3 challenging the Ordinance's provisions relative to application, permit and plans, they do not allege they have applied, been denied a permit in whole or in part or that they have had to submit any plans. Further, they do not allege their Notice of Claim raised any claims specifically involving them vis-à-vis the Ordinance. Nor do they allege they have to set-aside any funds for pollution clean-up, nuisance abatement, and proper closure if the CAFO operation is abandoned or ceases to operate.

Plaintiffs' complaint must be dismissed as it lacks all of the necessary components of being a justiciable controversy, which includes legal standing. In order to maintain a declaratory judgment action, a justiciable controversy must exist which includes all of the following four elements:

- (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 condition—a claim of right against one with an interest in contesting it—the claim must assert “present and fixed rights” rather than “hypothetical or future rights.” *Fabick v. Evers*, 2021 WI 28, ¶ 10, 396 Wis. 2d 231, 956 N.W.2d 856.

Here, Plaintiffs do not allege any “present and fixed rights.” Rather, Plaintiffs acknowledge the Ordinance does not apply to them, and Plaintiffs do not allege that they have or intend to apply for a CAFO Permit. Plaintiffs have no interest in contesting the validity of the Ordinance as they have no present and fixed rights.

Further, any allegations as to how Plaintiffs will be harmed as taxpayers are only based on **hypothetical future costs** that the Town one day **may** incur to review applications and enforce the Ordinance, but the Complaint and the Ordinance do not state that the Town **will** incur such costs. Plaintiffs’ Complaint even acknowledges the Ordinance leaves it to the Town’s discretion as to whether it will incur any costs to review applications and to enforce permits.¹ Further, the Ordinance and Complaint make clear that an applicant is responsible for any costs the Town incurs to review an application or enforce the Ordinance, not the taxpayers. The Ordinance actually sets forth a number of requirements for applicants that would 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. Plaintiffs do not have an interest in contesting this “controversy.”

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

Plaintiffs do not have an adverse interest with 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 a CAFO Permit in whole or in part. On the contrary, the Complaint acknowledges the Ordinance does not apply to Plaintiffs. Further, as explained above, any future

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.

costs the Town may incur are merely hypothetical and, regardless, taxpayers are not responsible for such costs. Plaintiffs have no adverse interest to the Town.

C. Plaintiffs do not have a legally protectible interest, or 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. “A taxpayer does not have standing ‘merely because he or she disagrees with the legislative body.’” *Vill. of Slinger*, 2002 WI App 187, ¶ 10. Rather, a taxpayer must have sustained, or will sustain, some pecuniary loss before he or she has standing. *Id.* ¶ 10 Further, a taxpayer may only sue in their own name for “the violation of a public duty when it appears that he has suffered an injury peculiar to himself which is not sustained by the public in general.” *AquaTech, Inc. v. Como Lake Protection and Rehab. Dist.*, 71 Wis.2d 541, 553, 239 N.W.2d 25 (1976). 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 to confer standing. *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)). Put more succinctly, “plaintiffs must show that they suffered, or were threatened with, an

injury to an interest that is legally protectable.” *Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W. 517. Indeed, a declaratory judgment will not determine hypothetical or future rights. *City of Janesville v. Rock County*, 107 Wis.2d 187, 199, 319 N.W.2d 891 (Ct.App. 1982).

Plaintiffs lack standing for a multitude of reasons as noted at the outset of this Argument. Additionally, several points warrant dismissal. First, Plaintiffs’ Complaint clearly alleges they are not subject to the Ordinance. Accordingly, they are not subject to any of the regulations within the Ordinance and therefore have not been harmed nor do they face any immediate harm due to the Ordinance and its regulations.

Second, Plaintiffs simply allege they have standing as a taxpayers, but fail to plead or explain how the Ordinance impacts them more than any other taxpayer in the Town. Rather, Plaintiffs allege that they will be harmed taxpayers because the Town may use public funds to review applications and enforce permits. However, Plaintiffs would not suffer more than anyone else within the Town if the public incurred such costs.

Third, Plaintiffs allege that the Town may incur costs to review applications and to enforce the Ordinance which will result in costs to taxpayers. However, Plaintiffs do not allege that any such costs have been incurred by the Town nor do they allege any costs will be incurred by the Town. In addition, even if the Town did, sometime in the future, hire a consultant to review the operations of an applicant, Plaintiffs have not alleged that such an expenditure of taxes would be greater than the tax savings afforded by the requirements placed on an applicant by the Ordinance. (For example, the \$1 per animal unit to be paid to the Town by the applicant to offset costs incurred by the Town in reviewing the application (Compl. ¶ 25), the obligation to compensate the Town for legal services or expert consultants retained to review and consider the application (Compl. ¶ 26) and the requirement that the applicant “ensure that sufficient funds will be available for

pollution clean-up, nuisance abatement, and proper closure of the operation if it is abandoned or otherwise ceases to operate as planned and permitted” (Compl. ¶ 27).) Accordingly, any “injury” is merely hypothetical and conjectural as opposed to real and immediate, as the allegations are based upon what “may” happen, not what “will happen.” As stated above, to have standing there must be a real and immediate threat, but Plaintiffs do not allege anything remotely involving their own harm. Indeed, the Ordinance leaves it to the discretion of the Town as to whether it may incur any costs to review applications and enforce the Ordinance. Further, **the Ordinance makes entirely clear that an applicant is responsible for any hypothetical costs** incurred by the Town to review applications or to enforce the Ordinance, **not the taxpayers**. Accordingly, not only are any hypothetical costs permissive under the Ordinance, but the Ordinance shows the taxpayers will not suffer any pecuniary loss as the taxpayers are not responsible for any such costs incurred by the Town. Here, Plaintiffs lack standing as any injury is hypothetical as opposed to immediate and because any such costs are the responsibility of an applicant, not the taxpayers. Plaintiffs lack taxpayer standing.

Fourth, judicial policy does not favor standing. In conclusory fashion, Plaintiffs’ Complaint states that judicial policy favors Plaintiffs’ standing to bring this suit because, “the issues raised are important.” (See Compl. ¶ 14). However, this invocation of standing is not welcomed by courts as such a limitless version of standing would eliminate a meaningful requirement to commence an action. *Wisconsin Manufacturers & Com. v. Evers*, 2021 WI App 35, ¶ 32, 398 Wis. 2d 164, 960 N.W.2d 442, 456, aff’d, 2022 WI 38, ¶ 32, 977 N.W.2d 374. Indeed, the current case does not present any “important issues of constitutional law” which the Court of Appeals has determined is necessary for a court to even entertain standing based solely off judicial policy. *Id.*

D. Plaintiffs' Claims are Not Ripe for Judicial Determination.

Ripeness is a necessary prerequisite to reaching the merits of and entertaining a declaratory action. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 32, 309 Wis. 2d 365, 749 N.W.2d 211. Ripeness, as a component of justiciability, is a threshold jurisdiction question. *Id.* Facts need to be sufficiently developed to allow conclusive adjudication; courts do not involve themselves in abstract or future disagreements. *Town of Cottage Grove*, ¶ 43. In order for a claim to be ripe, there must be no “absence of certainty” and, rather, the issue must be “real, precise, and immediate,” not “hypothetical, abstract, or remote.” *Id.*, ¶ 67

For the same reasons as stated above, Plaintiffs' suit is not ripe. Plaintiffs do not allege that **anyone** has filed an application that is subject to the Ordinance, that the Town has enforced this Ordinance, or that Plaintiffs intend to apply for a CAFO Permit. Plaintiffs simply do not allege they have been harmed as a result of the Ordinance. Here there is a glaring “absence of certainty” that the Town will incur costs which will burden the taxpayers and any future harm is hypothetical, abstract, and remote. Plaintiff's claim is not ripe.

CONCLUSION

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

Dated this 27th day of August 2024.

MUNICIPAL LAW & LITIGATION GROUP, S.C.

Attorneys for the Town of Eureka

By: /s/ Electronically signed by Remzy D. Bitar
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