

1 STATE OF WISCONSIN CIRCUIT COURT POLK COUNTY

2 BEN BINVERSIE ET AL,)
 Plaintiffs,) ORAL RULING
3 vs.) File No: 24CV 209
 TOWN OF EUREKA,)
4 Defendant.)

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9 Transcript of Proceedings had before the
10 Honorable Angeline Winton, Washburn Circuit Court, in
11 the Circuit Court for Polk County, Polk County Justice
12 Center, Balsam Lake, Wisconsin, on the 9th day of
13 January, 2025, commencing at approximately 8:33 a.m.
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24 REBECCA S. BERHOW, RPR-RMR
 COURT REPORTER
25 2685 55th Avenue
 Osceola, Wisconsin 54020

APPEARANCES:

SCOTT ROSENOW
Attorney At Law
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Madison, WI 53703

NATHAN KANE
Attorney At Law
501 E. Washington Avenue
Madison, WI

On behalf of the Plaintiffs.

ANDREW L. MARSHALL
Attorney At Law
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Minneapolis, MN 55402

ADAM J. MEYERS
Attorney At Law
730 N. Grand Avenue
Waukesha, WI 53186

On behalf of the defendant.

1 THE COURT: We'll go on the
2 record in Polk County case 24 CV 209. Case is
3 entitled Ben and Jenny Binversie versus the Town
4 of Eureka.

5 Mr. and Mrs. Binversie appear via
6 video conference. They are represented by
7 Attorney Scott Rosenow and Attorney Nathan Kane.
8 I would note that Attorney Rosenow as well as
9 Attorney Kane are appearing via video conference
10 as well. The defendants Town of Eureka appear by
11 Attorney Andrew Marshall and Attorney Adam Meyers
12 making an appearance today via video conference.

13 This is the time and date set for
14 the court's oral ruling in this matter. The Town
15 had moved to dismiss the Binversie's Complaint in
16 this matter.

17 Counsel, any final arguments
18 before the court renders its oral ruling, Mr.
19 Meyers?

20 MR. MEYERS: Your Honor, I think
21 it's been fully briefed and fully argued and I
22 have no more further arguments for the court.

23 THE COURT: Thank you. Mr. Kane,
24 on behalf of the Binversies?

25 MR. KANE: Thank you, your Honor.

1 The Binversies are prepared to stand on the
2 briefing as well.

3 THE COURT: Very good. The court
4 has reviewed the court's notes from the time of
5 the motion hearing in early December, as well as
6 the pleadings and the briefs that have been
7 submitted. The court at this time is going to
8 grant the Town's motion to dismiss.

9 As a way of background for that
10 the court notes that the Binversies filed a
11 Declaratory Judgment action against the Town of
12 Eureka on or about July 31st, 2024 alleging as
13 residents, taxpayers, and property owners in
14 Eureka they were harmed by the Town's March 10th,
15 2022 adoption of Town Ordinance 22-01-0 entitled
16 a Concentrated Animal Feeding Operation or CAFO,
17 C-A-F-O Ordinance. The plaintiffs' allege that
18 the Ordinance requirements and contents of the
19 Ordinance are unlawful, that they're preempted by
20 Wisconsin State Statute 93.90 as well as state
21 regulations promulgated thereunder. The
22 plaintiffs seek Declaratory Judgment that the
23 Ordinance is unlawful and unenforceable, and they
24 claim specifically that the Ordinance will result
25 in the unlawful expenditure of public funds

1 causing them pecuniary harm to them and other
2 taxpayers of Eureka. Footnote 3 on page 5 of 27
3 of the Complaint makes it clear, however, that
4 the requirements of the Ordinance do not apply to
5 the plaintiffs, the Binversies, nor do the
6 plaintiffs allege in the Complaint that they or
7 anyone else has applied for a CAFO Operations
8 Permit. Paragraphs 25 and 27 of the Complaint
9 discuss various financial requirements that the
10 Ordinance places on those that would apply for a
11 CAFO Operation Permit, the applicants are meant
12 to pay for under the Ordinance various costs for
13 the purpose of offsetting the Town costs for
14 review and processing the applications, as well
15 as for potential clean up efforts, nuisance
16 abatements, as well as other costs for review and
17 processing various permits. Plaintiffs allege
18 that taxpayer money will be used to compensate
19 any local authority. For example, the Town has
20 to retain consultants to conduct periodic
21 inspections to ensure compliance with the
22 Ordinance, to hire counsel or other assistants,
23 and allege at paragraph 37 that Eureka taxpayers
24 will be responsible for the costs that Eureka
25 will incur in reviewing the CAFO permit

1 applications and then for enforcing the
2 Ordinance.

3 The Town of Eureka in response
4 filed a Motion to Dismiss the Complaint in August
5 of last year asserting the plaintiffs do not meet
6 certain justiciability requirements and the court
7 agrees. In reviewing the case law that was cited
8 including Fabick versus Evers, 2021 Wisconsin 28,
9 396 Wisconsin second, 231, 2021 case of the
10 Wisconsin Supreme Court. The court notes that to
11 obtain declaratory relief a justicable
12 controversy must exist and that relates back to a
13 case of Loy versus Bunderson, 07 Wis. 2d 400 from
14 1982. Controversy is justicable when four
15 conditions are met. First of all, when there is
16 a claim of right against one with an interest in
17 contesting it; and as the court explained the
18 claim must assert a present and affixed rights,
19 not hypothetical or future rights. There must be
20 a real contest or -- of legal authority being
21 claimed and asserted and exercised right now, not
22 a hypothetical matter. Court notes in Fabick
23 versus Evers that case can be distinguished from
24 the present as can Teigen versus Wisconsin
25 Elections Commission, 22 Wisconsin 64. In both

1 of those cases there was certain action being
2 taken by the defendants, and the court believes
3 this case is distinguishable in that other than
4 adopting the Ordinance with its certain
5 provisions, no one at this point, other than the
6 Binversies have taken action with regard to the
7 Ordinance. The Binversies acknowledge that they
8 are not subject to the Ordinance nor has anyone
9 else applied for permitting under the Ordinance
10 and that is different and distinguishable from
11 Fabick versus Evers where the allegations therein
12 were that Governor Evers was illegally exercising
13 powers under emergency protocols beyond his time
14 to do so pursuant to statute. Teigen versus The
15 Wisconsin Elections Commission it was alleged
16 therein that certain election workers had
17 authorized through memorandum a placement of
18 certain drop boxes for the election and by the
19 time of the lawsuit, looking at paragraph 8 of
20 that case, approximately 528 drop boxes had been
21 used and installed for the fall 2020 election and
22 that case was a 2022 case.

23 This also goes to ripeness under
24 the fourth category. The issue in the
25 controversy must be ripe for judicial

1 determination and again, the court at this time
2 notes that at this point the anticipated
3 pecuniary damages or losses, first of all, it's
4 not clear to the court that those will occur
5 given that the Ordinance contains certain
6 provisions for reimbursement from the applicant
7 for those sums. The argument is a bit circular
8 in terms of the plaintiffs alleging that those
9 provisions are unlawful, but at this time it's
10 not clear to the court that any actual financial
11 or other damages or losses would occur to the
12 Binversies given those provisions; and regardless
13 at this point the issue in controversy the court
14 does not believe is ripe for determination at
15 this point, other than adoption of the Ordinance.
16 Again, the Binversies haven't applied under the
17 Ordinance nor is the court aware that anyone else
18 has. No actual action has been taken by the Town
19 or otherwise that would make this case ripe for
20 adjudication. So that is the court's ruling at
21 this time. Any clarification needed, Mr. Meyers?

22 MR. MEYERS: No, your Honor. No.

23 THE COURT: Mr. Kane?

24 MR. KANE: No, your Honor.

25 THE COURT: Mr. Meyers, would you

1 kindly supply to the court a short Order
2 consistent with the court's ruling here today?

3 MR. MEYERS: Yes, your Honor.

4 THE COURT: Very good. Counsel,
5 should you need any further scheduling please
6 contact the Washburn County Clerk of Court.
7 They're assisting me with scheduling as my
8 judicial assistant position is vacant. Anything
9 else for today, Mr. Kane?

10 MR. KANE: No, your Honor. Thank
11 you.

12 THE COURT: Thank you. Mr.
13 Meyers?

14 MR. MEYERS: No, your Honor.

15 THE COURT: We are adjourned.

16 Thank you.

17 (Conclusion of record, 8:43 a.m.)

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1 State of Wisconsin)
2) SS: CERTIFICATE
3 County of Polk)

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5 I, Rebecca S. Berhow, a Registered Professional
6 Reporter, Registered Merit Reporter hereby certify that
7 I have carefully compared the foregoing transcript of
8 testimony and/or proceedings in the above-entitled
9 matter with the original stenographic notes thereof
10 taken by me upon the hearing of said matter; that the
11 same is a true and correct transcript of all/excerpts of
12 the proceedings; and is a correct statement of the
13 evidence and proceedings had on such hearing.

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16 Dated: 14th day of January, 2025.

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19 ELECTRONICALLY SIGNED BY:

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Rebecca S. Berhow, RPR-RMR
Court Reporter
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Osceola, WI 54020