STATE OF WISCONSIN CIRCUIT COURT POLK COUNTY

BEN BINVERSIE and JENNY BINVERSIE
2285 220th Street
Luck, WI 54853,

Plaintiffs,

v.

TOWN OF EUREKA
Eureka Town Hall
2395 210th Avenue
St. Croix Falls, WI 54024,

Defendant.

Case Type: Declaratory Judgment
Case Code: 30701
Case No. 24-CV-

SUMMONS

THE STATE OF WISCONSIN, To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 20 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Polk County Justice Center, **1005 West Main Street, Suite 300, Balsam Lake, Wisconsin 54810**, and to the WMC Litigation Center, Plaintiffs' attorney, whose address is **501 East Washington Avenue, Madison, Wisconsin 53703**. You may have an attorney help or represent you.

If you do not provide a proper answer within 20 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real

estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 31st day of July 2024.

Respectfully submitted,

Electronically signed by

Scott E. Rosenow

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COMPLAINT

The above-named Plaintiffs, through their undersigned counsel, hereby allege the following as their complaint:

1. The Wisconsin Legislature has greatly limited the authority of political subdivisions, including towns, to impose local requirements on the permitting process for a new or expanded livestock facility.

2. Wisconsin's Livestock Facility Siting Law (Wis. Stat. § 93.90) and its regulations preempt most local control over the permitting process for a new or expanded livestock facility.

3. On March 10, 2022, the Town of Eureka's (hereafter "Eureka" or "Town") Town Board adopted Ordinance No. 22-01-0, titled "Concentrated Animal Feeding Operations (CAFO) Ordinance" (hereafter "Ordinance").[1]

[1] The Ordinance is filed along with this complaint as Exhibit 1; the Ordinance's appendix is filed along with this complaint as Exhibit 2; the minutes from the Town Board's meeting where the Town Board adopted the Ordinance are filed along with this complaint as Exhibit 3; and the resolution adopting the Ordinance is filed along with this complaint as Exhibit 4. In February 2020, the Town Board adopted a prior version of the Ordinance, which is available at https://townofeureka.org/wp-content/uploads/2020/06/CAFO-Ordinance.pdf.

4. The Ordinance's monetary and application requirements are unlawful and preempted by Wis. Stat. § 93.90 and state regulations promulgated thereunder.

5. The Ordinance harms Plaintiffs as taxpayers.

6. Plaintiffs, who are residents, taxpayers, and property owners in Eureka, seek a declaration that the Ordinance's monetary and application requirements are unlawful and an injunction against further collection under and enforcement of those requirements.

PARTIES

7. Plaintiffs Ben Binversie and Jenny Binversie reside at 2285 220th Street in Luck, Wisconsin, zip code 54853.

8. That address is in the Town of Eureka and in Polk County. (Ex. 5.)[2]

9. Plaintiffs Ben Binversie and Jenny Binversie pay taxes to the Town of Eureka. (Ex. 5.)

10. Defendant Eureka is the municipal subdivision responsible for the adoption and enforcement of the Ordinance challenged in this complaint.

JURISDICTION AND VENUE

11. Plaintiffs seek a declaration that certain provisions in the Ordinance are unlawful and unenforceable, giving this Court jurisdiction to hear this case under Wis. Stat. § 806.04.

12. Plaintiffs Ben Binversie and Jenny Binversie pay taxes to Eureka. (Ex. 5.)

13. Plaintiffs Ben Binversie and Jenny Binversie have standing to bring this lawsuit and assert the claims in this complaint because they pay taxes to Eureka, and the Ordinance will

[2] Exhibit 5, which is filed along with this complaint, is an affidavit by Plaintiff Ben Binversie.

result in unlawful expenditures of public funds, thereby causing pecuniary harm to Plaintiffs Ben Binversie and Jenny Binversie and other taxpayers in Eureka.[3]

14. In addition, as a matter of judicial policy, Plaintiffs Ben Binversie and Jenny Binversie have standing to bring this lawsuit and assert the claims in this complaint because the issues raised are important.

15. On October 6, 2023, the Plaintiffs' notice of claim was sent via e-mail to Eureka's town clerk.[4]

16. On October 17, 2023, Eureka's town clerk accepted electronic service of the notice of claim.[5]

17. This notice of claim satisfied the requirements of Wis. Stat. § 893.80(1d).

18. Eureka did not disallow that claim in writing.

19. Venue of this action in Polk County is proper under Wis. Stat. § 801.50(2).

BACKGROUND

20. Eureka's Town Board held a meeting on March 10, 2022.

21. At that meeting, the Town Board adopted the Ordinance.

22. According to the Ordinance, the "Ordinance sets forth the procedures for obtaining a CAFO Operations Permit for the operation of new and expanded livestock facilities" in Eureka. Ordinance § 2.

23. A "new or expanded" livestock facility must obtain a CAFO Operations Permit from Eureka if the facility "will operate with 700 or more animal units." Ordinance § 4.1.

[3] To be clear, the requirements in the Ordinance do not apply to Plaintiffs Ben Binversie and Jenny Binversie.

[4] A copy of the notice of claim is filed along with this complaint as Exhibit 6.

[5] A copy of the Eureka town clerk's admission of service is filed along with this complaint as Exhibit 7.

24. The Ordinance does not apply to a livestock facility that was operating in Eureka before the Ordinance took effect unless the facility "proposes to house a different livestock species or an expansion to exceed 1,000 animal units." Ordinance § 4.2.

25. The Ordinance requires a CAFO Operations Permit applicant to pay a non-refundable fee of $1 per proposed animal unit "for the purpose of offsetting the Town costs to review and process the application." Ordinance § 7.

26. The Ordinance requires a CAFO Operations Permit applicant to 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" and "submit an administrative fee deposit as required by the Town Clerk." Ordinance § 8.2.

27. The Ordinance requires a CAFO Operations Permit applicant to "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." Ordinance § 9.

28. "To assist in" enforcing the Ordinance, a CAFO Operations Permit is subject to "an annual renewal fee in the amount of One Dollar ($1.00) per animal unit." Ordinance § 14.

29. The Ordinance requires a CAFO Operations Permit applicant to "have one or more qualified and professionally licensed third party engineers or geoscientists attest that they have prepared or have reviewed the plans and certify that they will meet" certain requirements. Ordinance, § 8.1. The applicant must obtain an attestation that the applicant's plans will "[p]revent the spread of infectious diseases from the CAFO to other animals, livestock and humans." Ordinance, § 8.1.a. The Ordinance requires the application to submit a "CAFO Waste Management Plan," "Animal Population Control and Depopulations Plans," a "Biosecurity and Animal Health

Plan," an "Animal Transportation Plan," a "Water Use Plan," an "Odor and Toxic Air Pollution Prevention Plan," a "Community Economic, Land Use and Property Value Assessment and Impact Study," "Construction, Fire and Road Plans," a "Compliance Assurance Testing, Sampling, and Monitoring Plan," and a "Compliance Assurance Plan." Ordinance, § 8.1.b.–k.

30. The Town Board may designate one or more local authorities to enforce and ensure compliance with the Ordinance. *See, e.g.*, Ordinance §§ 5, 8.1.c., 8.1.d., 8.1.f., 8.1.j., 10.1, 14.

31. Eureka will use taxpayer money to compensate any local authority described in paragraph 30 of this complaint.

32. The Town Board may retain consultants to conduct periodic inspections to ensure compliance with the Ordinance. Ordinance § 10.2.

33. Eureka will use taxpayer money to retain any consultant described in paragraph 32 of this complaint.

34. The Town Board may hire "special legal counsel and expert consultants . . . to review [a CAFO Operations Permit] application and advise the Town Board." Ordinance § 6.

35. Eureka will use taxpayer money to hire any counsel or consultant described in paragraph 34 of this complaint.

36. The Ordinance's monetary requirements are illegal, as explained below.

37. Eureka taxpayers will be responsible for some or all of the costs that Eureka will incur in reviewing CAFO Operations Permit applications and enforcing the Ordinance.

CAUSES OF ACTION

Count 1:
State Law Preempts the
Scope of Ordinance § 4.2

38. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

39. Wisconsin's Livestock Facility Siting Law (Wis. Stat. § 93.90, hereafter "Siting Law") and its regulations preempt most local control over the permitting process for a new or expanded livestock facility.

40. The Siting Law and its regulations apply to the Ordinance's provisions challenged in this complaint.

41. Under the Siting Law, the Wisconsin Legislature has greatly limited the authority of political subdivisions to impose local requirements on the permitting process for a new or expanded livestock facility. *See* Wis. Stat. § 93.90(3)(a); *see generally Adams v. State Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404.

42. Pursuant to Wis. Stat. § 93.90, the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP") promulgated state standards that are codified at Wis. Admin. Code ch. ATCP 51 ("ATCP 51"). *Adams*, 2012 WI 85, ¶ 7.

43. An "administrative rule having the force and effect of law is superior to any conflicting action of [a municipality]." *Law Enf't Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 489, 305 N.W.2d 89 (1981).

44. The regulations in ATCP 51 can thus preempt a local ordinance. *See Adams*, 2012 WI 85, ¶¶ 37–39.

45. The Ordinance requires a preexisting livestock facility to apply for a permit if "its owner or operator proposes to house a different livestock species." Ordinance § 4.2.

46. That requirement is preempted by § ATCP 51.06.

47. This DATCP regulation states: "Except as provided in sub. (2), a local ordinance may not require local approval under this chapter for . . . [a] livestock facility that existed . . . before the effective date of the local approval requirement." Wis. Admin. Code § ATCP

51.06(1)(a). Under the single exception in subsection (2), a municipality may require local approval for the "*expansion* of a pre-existing or previously approved livestock facility." Wis. Admin. Code § ATCP 51.06(2) (emphasis added).

48. "'Expansion' means an increase in the number of animals fed, confined, maintained, or stabled." Wis. Stat. § 93.90(1m)(d).

49. Section ATCP 51.06 thus preempts Ordinance § 4.2 to the extent that this Ordinance section applies to a preexisting livestock facility that is proposing only to house a new livestock species, without proposing to expand.

Count 2:
State Law Preempts the Ordinance's Monetary Requirements

Count 2.A:
State Law Preempts the Fee Requirement in Ordinance § 7

50. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

51. Ordinance § 7 requires a permit applicant to pay a non-refundable fee of $1 per proposed animal unit.

52. The Siting Law and a DATCP regulation preempt this fee requirement to the extent it would impose a fee greater than $1,000.

53. A DATCP regulation provides that "[a] political subdivision may charge an application fee established by local ordinance, not to exceed $1,000, to offset the political subdivision's costs to review and process an application." Wis. Admin. Code § ATCP 51.30(4)(a). This regulation also provides that "[a] political subdivision may not require an applicant to pay any fee, or post any bond or security with the political subdivision, except as provided in par. (a)." Wis. Admin. Code § ATCP 51.30(4)(b).

54. Read together, § ATCP 51.30(4)(a) and (4)(b) prohibit a town from charging an applicant any fee or requiring an applicant to post any bond or security except for a one-time application fee up to $1,000.

55. Ordinance § 7 is preempted by § ATCP 51.30(4) to the extent that it would require an application fee in excess of $1,000. State law expressly withdraws local governments' power to impose such monetary requirements, and such monetary requirements are logically inconsistent with state law, defeat the purpose of state law, and violate the spirit of state law.

Count 2.B:
State Law Preempts the Monetary
Requirements in Ordinance § 8.2

56. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

57. 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 the application" and "submit an administrative fee deposit as required by the Town Clerk." Ordinance § 8.2.

58. Those monetary requirements are preempted by the Siting Law and § ATCP 51.30(4). State law expressly withdraws local governments' power to impose such monetary requirements, and such monetary requirements are logically inconsistent with state law, defeat the purpose of state law, and violate the spirit of state law.

Count 2.C:
State Law Preempts the Monetary
Requirement in Ordinance § 9

59. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

60. The Ordinance requires an applicant to "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." Ordinance § 9.

61. This requirement is preempted by the Siting Law and § ATCP 51.30(4). State law expressly withdraws local governments' power to impose such monetary requirements, and such monetary requirements are logically inconsistent with state law, defeat the purpose of state law, and violate the spirit of state law.

Count 2.D:
State Law Preempts the Fee
Requirement in Ordinance § 14

62. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

63. The Ordinance requires a CAFO Operations Permit holder to pay "an annual renewal fee in the amount of One Dollar ($1.00) per animal unit." Ordinance § 14.

64. The Siting Law and § ATCP 51.30(4) preempt this fee requirement. State law expressly withdraws local governments' power to impose such monetary requirements, and such monetary requirements are logically inconsistent with state law, defeat the purpose of state law, and violate the spirit of state law.

Count 3:
The Siting Law Preempts the Ordinance's
Required Application, Permit, and Plans

Count 3.A:
State Law Preempts the Application
Requirements in Ordinance § 8.1.a.

65. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

66. The Siting Law and ATCP 51 apply to the Ordinance's requirements for obtaining a livestock facility permit, including the requirements in Ordinance § 8.1.

67. A town may *not* "achieve ongoing regulation *through* a livestock siting permit." *Adams v. State Livestock Facilities Siting Rev. Bd.*, 2010 WI App 88, ¶ 33 n.14, 327 Wis. 2d 676, 787 N.W.2d 941, *aff'd*, 2012 WI 85.

68. The requirements in Ordinance § 8.1 attempt to achieve ongoing regulation through a livestock siting permit.

69. The Siting Law provides that "a political subdivision may not disapprove or prohibit a livestock facility siting or expansion unless at least one" statutory exception applies. Wis. Stat. § 93.90(3)(a).

70. This statutory language "directs that a political subdivision must approve a livestock siting or expansion application, unless a listed exception applies." *Adams*, 2010 WI App 88, ¶ 19.

71. "The Siting Law expressly withdraws political subdivisions' authority to disapprove livestock facility siting permits unless one of eight narrow exceptions applies." *Adams*, 2012 WI 85, ¶ 40. These narrow exceptions are codified at Wis. Stat. § 93.90(3)(a)1.–9. *Adams*, 2012 WI 85, ¶ 45.

72. "[A]ny attempt by [a town] to regulate the livestock facility siting process outside the parameters set by the Siting Law is preempted." *Adams*, 2012 WI 85, ¶ 50.

73. The Ordinance states that it "is based upon reasonable and scientifically defensible findings, as adopted by the Town Board, clearly showing that these requirements are absolutely necessary to protect public health and safety." Ordinance § 2.

74. That language closely tracks the narrow statutory exception in Wis. Stat. § 93.90(3)(a)6.b.

75. This narrow statutory exception allows a political subdivision to deny a permit if "[t]he proposed new or expanded livestock facility will have 500 or more animal units and violates a requirement that is more stringent than the state standards under sub. (2)(a)"—but only if the political subdivision "[b]ases the requirement on reasonable and scientifically defensible findings of fact, adopted by the political subdivision, that clearly show that the requirement is necessary to protect public health or safety." Wis. Stat. § 93.90(3)(a)6.b.[6]

76. The regulations in ATCP 51 are the state standards under Wis. Stat. § 93.90(2)(a). *Adams*, 2012 WI 85, ¶ 7.

77. The narrow exception in Wis. Stat. § 93.90(3)(a)6. can apply only to local requirements that are "more stringent" than the state standards in ATCP 51.

78. The narrow exception in Wis. Stat. § 93.90(3)(a)6. does *not* allow local requirements *in addition to* the state standards in ATCP 51. In other words, this exception can apply only if a local requirement has a less-stringent direct counterpart in ATCP 51.

79. A political subdivision can satisfy Wis. Stat. § 93.90(3)(a)6. only if its findings are specific to local circumstances in that political subdivision.

80. Ordinance § 8.1.a. requires an applicant to have a licensed engineer or geoscientist attest that the applicant's plans will "[p]revent the spread of infectious diseases from the CAFO to other animals, livestock and humans."

81. The Siting Law preempts this requirement because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a).

[6] This exception mirrors the language in Wis. Stat. § 93.90(3)(ar), which governs a political subdivision's ability to impose conditions on a permit when issuing the permit. *Adams v. State Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, ¶¶ 48–49, 342 Wis. 2d 444, 820 N.W.2d 404.

82. This requirement falls outside Wis. Stat. § 93.90(3)(a)6. because it has no direct counterpart in ATCP 51—in other words, it is not "more stringent" than any state standard in ATCP 51. It is additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state standards.

83. Regardless of whether this local requirement is more stringent than any state standard, Ordinance § 8.1.a. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that this requirement is necessary for protecting public health or safety.

Count 3.B:
State Law Preempts the Application
Requirements in Ordinance § 8.1.b.

84. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

85. Ordinance § 8.1.b. requires an applicant to have an engineer or geoscientist attest that the application's "CAFO Waste Management Plan" will meet certain requirements.

86. Specifically, the engineer or geoscientist must attest that this plan "as implemented with engineered perimeter berms and liners, or equivalent or better containment measures, will prevent any obnoxious odors emanating from waste management activities, any discharge of contaminated runoff to surface water, and any seepage to ground water, including impacts to surface water and ground water from offsite management or disposal of animal wastes and that the CAFO has applied for and will not operate until it has received a zero-discharge permit from the State, or in absence of action by the State, from the Town, a local zero discharge waste water and storm water permit(s)." Ordinance § 8.1.b.

87. The requirements in Ordinance § 8.1.b. are preempted because they do not satisfy any exception in Wis. Stat. § 93.90(3)(a).

88. These requirements fall outside Wis. Stat. § 93.90(3)(a)6. because they have no direct counterpart in ATCP 51—in other words, they are not "more stringent" than any state standard in ATCP 51. They are additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state standards.

89. Regardless of whether these local requirements are more stringent than any state standard, Ordinance § 8.1.b. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that these requirements are necessary for protecting public health or safety.

Count 3.C:
State Law Preempts the Application
Requirements in Ordinance § 8.1.c.

90. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

91. Ordinance § 8.1.c. requires an applicant to have an engineer or geoscientist attest that the application's "Animal Population Control and Depopulation Plans" will meet certain requirements.

92. Specifically, an engineer or geoscientist must attest that these plans "provide for the daily recording and reporting of animal counts and mortality and reporting to the Town-designated local authority within 24 hours of any unusual mortality, as defined in the plan, and that the provisions for managing the movement and transportation of livestock, containment and treatment of bodily fluids from carcasses, and safe disposal of carcasses, will prevent the spread of disease to other livestock, animals, workers and other residents and humans in the area." Ordinance § 8.1.c.

93. The requirements in Ordinance § 8.1.c. are preempted because they do not satisfy any exception in Wis. Stat. § 93.90(3)(a).

94. These requirements fall outside Wis. Stat. § 93.90(3)(a)6. because they have no direct counterpart in ATCP 51—in other words, they are not "more stringent" than any state standard in ATCP 51. They are additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state standards.

95. Regardless of whether these local requirements are more stringent than any state standard, Ordinance § 8.1.c. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that these requirements are necessary for protecting public health or safety.

Count 3.D:
State Law Preempts the Application
Requirements in Ordinance § 8.1.d.

96. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

97. Ordinance § 8.1.d. requires an applicant to have an engineer or geoscientist attest that the application's "Biosecurity and Animal Health Plan" will meet certain requirements.

98. Specifically, the engineer or geoscientist must attest that this plan "provides for the health and humane treatment of all animals, routine observation and routine testing for diseases of concern--as defined in the plan--, and for the separation and quarantine of diseased animals and animals in contact with diseased animals, their euthanasia, and the handling and disposal of diseased animals, sufficient to prevent the spread of disease to workers, other livestock and animals and to humans and provides for quarterly reporting of animal testing results and plan-specified enforceable metrics confirmation that the livestock and conditions at the facility, based on plan-identified metrics, are healthy by a third-party inspector and that any deviations from the metrics and any detection of diseases of concern will be immediately reported to the local health department and local authority; and that the plan provides for adequate financing and immediate implementation of emergency containment measures by third-party contractors, including testing

of workers and contractors who may have come into contact with diseased animals, and other emergency measures in the event of an outbreak of disease, based on the latest authoritative disease containment guidance." Ordinance § 8.1.d.

99. The requirements in Ordinance § 8.1.d. are preempted because they do not satisfy any exception in Wis. Stat. § 93.90(3)(a).

100. These requirements fall outside Wis. Stat. § 93.90(3)(a)6. because they have no direct counterpart in ATCP 51—in other words, they are not "more stringent" than any state standard in ATCP 51. They are additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state regulations.

101. Regardless of whether these local requirements are more stringent than any state standard, Ordinance § 8.1.d. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that these requirements are necessary for protecting public health or safety.

Count 3.E:
State Law Preempts the Application
Requirements in Ordinance § 8.1.e.

102. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

103. Ordinance § 8.1.e. requires an applicant to have an engineer or geoscientist attest that the application's "Animal Transportation Plan" will meet certain requirements.

104. Specifically, the engineer or geoscientist must attest that this plan, "in combination with the biosecurity and animal health plans, will provide for the safe transportation of all livestock to and from the CAFO, the disinfection of transport trailers and treatment of water used to disinfect trailers, the prevention of disease, and provide for coordination with local traffic and road authorities to assure their safe transport and prevent traffic accidents and to provide the necessary emergency response measures in the event of an accident." Ordinance § 8.1.e.

105. The requirements in Ordinance § 8.1.e. are preempted because they do not satisfy any exception in Wis. Stat. § 93.90(3)(a).

106. These requirements fall outside Wis. Stat. § 93.90(3)(a)6. because they have no direct counterpart in ATCP 51—in other words, they are not "more stringent" than any state standard in ATCP 51. They are additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state standards.

107. Regardless of whether these local requirements are more stringent than any state standard, Ordinance § 8.1.e. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that these requirements are necessary for protecting public health or safety.

Count 3.F:
State Law Preempts the Application Requirements in Ordinance § 8.1.f.

108. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

109. Ordinance § 8.1.f. requires an applicant to have an engineer or geoscientist attest that the application's "Water Use Plan" will meet certain requirements.

110. Specifically, the engineer or geoscientist must attest that this plan "is based on a thorough hydrogeologic characterization study, including identification of all onsite and nearby wells and springs, and artesian fed streams and water bodies (including ponds, wetlands, and lakes) within 5 miles, and that the planned use of water will have no impact, considering projected 50-year growth of population in the area, on the flow rate, extent, volume and storage capacity for any existing well or spring, or artesian fed water body within 2 miles of the CAFO and the quarterly reporting of water use to the local authority or their designated hydrogeologist." Ordinance § 8.1.f.

111. The requirements in Ordinance § 8.1.f. are preempted because they do not satisfy any exception in Wis. Stat. § 93.90(3)(a).

112. These requirements fall outside Wis. Stat. § 93.90(3)(a)6. because they have no direct counterpart in ATCP 51—in other words, they are not "more stringent" than any state standard in ATCP 51. They are additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state standards.

113. Regardless of whether these local requirements are more stringent than any state standard, Ordinance § 8.1.f. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that these requirements are necessary for protecting public health or safety.

Count 3.G:
State Law Preempts the Application
Requirements in Ordinance § 8.1.g.

114. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

115. Ordinance § 8.1.g. requires an applicant to have an engineer or geoscientist attest that the application's "Odor and Toxic Air Pollution Prevention Plan" will meet certain requirements.

116. Specifically, the engineer or geoscientist must attest that this plan "will prevent the presence of odiferous smells noticeable to human olfactories and the detection of toxic air pollutants along the property boundaries and provides for adequate offsets, waste containment, air and odor emission control devices including particulate filters to prevent air pollution and the transmission of disease particles from the CAFO or offsite waste management area." Ordinance § 8.1.g.

117. The requirements in Ordinance § 8.1.g. are preempted because they do not satisfy any exception in Wis. Stat. § 93.90(3)(a).

118. These requirements fall outside Wis. Stat. § 93.90(3)(a)6. because they have no direct counterpart in ATCP 51—in other words, they are not "more stringent" than any state

standard in ATCP 51. They are additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state standards.

119. Regardless of whether these local requirements are more stringent than any state standard, Ordinance § 8.1.g. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that these requirements are necessary for protecting public health or safety.

Count 3.H:
State Law Preempts the Application Requirements in Ordinance § 8.1.h.

120. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

121. Ordinance § 8.1.h. requires an applicant to have an engineer or geoscientist attest that the application's "Community Economic, Land Use and Property Value Assessment and Impact Study" will meet certain requirements.

122. Specifically, the engineer or geoscientist must attest that this study "has been performed by a licensed appraiser and a qualified land use planner, is scientifically sound and concludes that there will be no negative impact to properties within 1 mile of the proposed CAFO, and a net positive benefit to the Town, including considering the risks of the operations on the public health." Ordinance § 8.1.h.

123. The requirements in Ordinance § 8.1.h. are preempted because they do not satisfy any exception in Wis. Stat. § 93.90(3)(a).

124. These requirements fall outside Wis. Stat. § 93.90(3)(a)6. because they have no direct counterpart in ATCP 51—in other words, they are not "more stringent" than any state standard in ATCP 51. They are additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state regulations.

125. Regardless of whether these local requirements are more stringent than any state standard, Ordinance § 8.1.h. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that these requirements are necessary for protecting public health or safety.

Count 3.I:
State Law Preempts the Application Requirements in Ordinance § 8.1.i.

126. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

127. Ordinance § 8.1.i. requires an applicant to have an engineer or geoscientist attest that the application's "Construction, Fire and Road Plans" will meet certain requirements.

128. Specifically, the engineer or geoscientist must attest that these plans, "including signed engineered drawings for the measures required to meet the performance requirements of this ordinance and the measures specified in the plan have been submitted with the application, and include a fire prevention/fire-fighting capacity/fire-water capacity needs analysis and the requisite fire water storage/fire prevention/fire-fighting equipment plans, as well as a traffic study and road improvement needs analysis and road traffic and roadway improvement plans, along with letters of conformance, on agency letterhead, stating that application-submitted plans are complementary with and are in conformance with the associated traffic and road plans and requirements of and from the local, regional, state and federal road and transportation authorities." Ordinance § 8.1.i.

129. The requirements in Ordinance § 8.1.i. are preempted because they do not satisfy any exception in Wis. Stat. § 93.90(3)(a).

130. These requirements fall outside Wis. Stat. § 93.90(3)(a)6. because they have no direct counterpart in ATCP 51—in other words, they are not "more stringent" than any state

standard in ATCP 51. They are additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state standards.

131. Regardless of whether these local requirements are more stringent than any state standard, Ordinance § 8.1.i. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that these requirements are necessary for protecting public health or safety.

Count 3.J:
State Law Preempts the Application Requirements in Ordinance § 8.1.j.

132. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

133. Ordinance § 8.1.j. requires an applicant to have an engineer or geoscientist attest that the application's "Compliance Assurance Testing, Sampling and Monitoring Plan" will meet certain requirements.

134. Specifically, the engineer or geoscientist must attest that this plan "shall provide for an identified chain-of-command, including local authority incident commanders, for the reporting and correction, including emergency measures, of any and all deviation(s) from the plan's enforceable metrics, as well as the daily monitoring of all operations for compliance with the enforceable metrics identified in the plan, including inspection and sampling of storm water discharges, quarterly ground water monitoring at locations that will allow corrective actions and containment measures to prevent offsite migration or vertical migration of contamination, identification and verification of the efficacy of testing methods and quality assurance reviews of test results, and reporting within 24 hours of any and all deviations from compliance metrics to the owner, the third-party corrective measures contractor, and the local authorities identified in the local permit." Ordinance § 8.1.j.

135. These requirements in Ordinance § 8.1.j. are preempted because they do not satisfy any exception in Wis. Stat. § 93.90(3)(a).

136. These requirements fall outside Wis. Stat. § 93.90(3)(a)6. because they have no direct counterpart in ATCP 51—in other words, they are not "more stringent" than any state standard in ATCP 51. They are additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state regulations.

137. Regardless of whether these local requirements are more stringent than the state standards, Ordinance § 8.1.j. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that these requirements are necessary for protecting public health or safety.

Count 3.K:
State Law Preempts the Application Requirements in Ordinance § 8.1.k.

138. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

139. Ordinance § 8.1.k. requires an applicant to have an engineer or geoscientist attest that the application's "Compliance Assurance Plan" will meet certain requirements.

140. Specifically, the engineer or geoscientist must attest that this plan "shall document that the prepared plans and procedures are based on sound science and includes an updated review of best practices and technologies and test methods, and provides for specific compliance metrics to assure the performance requirements of the plans are met and the permit approval conditions are satisfied, and for annual audits, inspections, and certification by qualified and experienced, and licensed third party(ies), of compliance with the procedures and provisions of the various operational plans, including with the identified metrics in the plans." Ordinance § 8.1.k.

141. The requirements in Ordinance § 8.1.k. are preempted because they do not satisfy any exception in Wis. Stat. § 93.90(3)(a).

142. These requirements fall outside Wis. Stat. § 93.90(3)(a)6. because they have no direct counterpart in ATCP 51—in other words, they are not "more stringent" than any state standard in ATCP 51. They are additional to the state standards, but Wis. Stat. § 93.90(3)(a)6. does not authorize local requirements that are additional to the state regulations.

143. Regardless of whether these local requirements are more stringent than any state standard, Ordinance § 8.1.k. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because Eureka's findings do not clearly show that these requirements are necessary for protecting public health or safety.

Count 4:
Wisconsin Stat. § 92.15
Preempts the Ordinance

144. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

145. If the Siting Law and ACTP 51 do not apply to the Ordinance provisions discussed above in Counts 1–3, then they are preempted by Wis. Stat. § 92.15.

146. This statute provides that "a local governmental unit may enact regulations of livestock operations that are consistent with and do not exceed the performance standards, prohibitions, conservation practices and technical standards under [Wis. Stat. § 281.16(3)." Wis. Stat. § 92.15(2).

147. This statute also provides that "a local governmental unit may enact regulations of livestock operations that exceed the performance standards, prohibitions, conservation practices and technical standards under [Wis. Stat. §] 281.16(3) only if the local governmental unit demonstrates to the satisfaction of the department of agriculture, trade and consumer protection or the department of natural resources [("DNR")] that the regulations are necessary to achieve water quality standards under [Wis. Stat. §] 281.15." Wis. Stat. § 92.15(3)(a).

148. If the Ordinance provisions discussed above in Counts 1–3 constitute regulations of livestock operations, then they are preempted by Wis. Stat. § 92.15.

149. These Ordinance provisions exceed and are inconsistent with the performance standards, prohibitions, conservation practices and technical standards promulgated under Wis. Stat. § 281.16(3).

150. In addition, neither DATCP nor DNR has approved these Ordinance provisions pursuant to Wis. Stat. § 92.15(3)(a).

151. For all these reasons, Wis. Stat. § 92.15 preempts the Ordinance provisions discussed above in Counts 1–3.

Count 5:
Wisconsin Stat. ch. 283 Preempts the Ordinance

152. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

153. If the Siting Law and ACTP 51 do not apply to the Ordinance provisions discussed above in Counts 1–3, then they are preempted by Wis. Stat. ch. 283.

154. "[I]f a local ordinance prohibits what the DNR has authorized pursuant to the statutes, its rules, and its role as manager of water resources, that ordinance is preempted because it frustrates the purpose of the state law." *Lake Beulah Mgmt. Dist. v. Vill. of E. Troy*, 2011 WI 55, ¶ 18, 335 Wis. 2d 92, 799 N.W.2d 787.

155. An ordinance is thus preempted if it imposes additional requirements that may prohibit an operation that the DNR has authorized. *See id.* ¶ 19.

156. A concentrated animal feeding operation is "a 'point source' subject to the [Wisconsin Pollutant Discharge Elimination System or WPDES] permit program, as outlined in [Wis. Stat.] ch. 283." *Clean Wisconsin, Inc. v. DNR*, 2021 WI 71, ¶ 3 n.3, 398 Wis. 2d 386, 961 N.W.2d 346.

157. "All owners and operators of point sources in Wisconsin must obtain a WPDES permit in order to discharge pollutants into the waters of the State." *Id.*

158. The DNR has broad authority to impose conditions in a WPDES permit. *See id.* ¶¶ 2, 25–26, 30.

159. Under the Ordinance, if a livestock facility is required to obtain a permit, the facility may not operate in the Town without applying for a permit. Ordinance §§ 4, 6.

160. To obtain such a permit, an applicant must prove that "the applicant can and will comply with all conditions imposed by the Town . . . and that the applicant and the application *meet all other requirements of this Ordinance*." Ordinance § 6 (emphasis added).

161. So, if a new or expanded livestock facility does not comply with all the requirements in the Ordinance, the facility may be prohibited from operating within the Town.

162. The Ordinance thus imposes requirements that may prohibit a CAFO from operating, even if the CAFO is authorized to operate under a WPDES permit issued by the DNR.

163. Under the reasoning of *Lake Beulah*, the DNR's broad authority to regulate CAFOs under Wis. Stat. ch. 283 preempts the Ordinance.

REQUEST FOR RELIEF

Plaintiffs therefore respectfully request the following relief:

A. A declaration that the Ordinance provisions challenged in this complaint are unlawful and preempted by state law.

B. A permanent injunction prohibiting Defendant from enforcing the Ordinance provisions challenged in this complaint.

C. Costs and attorney fees awarded to the Plaintiffs as authorized by law.

D. Any such other relief as the Court deems appropriate.

Dated this 31st day of July 2024.

Respectfully submitted,

Electronically signed by

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