STATE OF WISCONSIN CIRCUIT COURT POLK COUNTY

BEN BINVERSIE and
JENNY BINVERSIE,

Plaintiffs,

v.

TOWN OF EUREKA,

Defendant.

Case Type: Declaratory Judgment
Case Code: 30701
Case No. 24-CV-209

Plaintiffs' Response to Defendant's Motion to Dismiss

Introduction

Ben and Jenny Binversie[1] are taxpayers. They think their Town, Eureka, has adopted an illegal ordinance.[2] They think too Eureka will spend taxpayer dollars enforcing that ordinance. The Binversies therefore filed a declaratory-judgment action against Eureka, alleging all the above. More than 100 years of precedent would have their lawsuit move to the merits, and so it should. However: Eureka argues this lawsuit is not justiciable and the Binversies do not have standing. Eureka is wrong—its arguments rooted in misconceptions of declaratory-judgment actions and taxpayer standing. This brief explains why that's so, and why the Binversies do present a justiciable lawsuit and do have standing.

Argument

"To obtain declaratory relief, a justiciable controversy must exist." *Fabick v. Evers*, 2021 WI 28, ¶9, 396 Wis. 2d 231, 956 N.W.2d 856. A lawsuit is justiciable, as Eureka correctly notes, when four requirements are met: (1) "a claim of right is asserted against one who has an interest in contesting it"; (2) the controversy is

[1] Collectively, "the Binversies" throughout this brief.

[2] That ordinance is Eureka Ordinance No. 22-01-0, titled "Concentrated Animal Feeding Operations (CAFO) Ordinance"—or, throughout the remainder of this brief, "the Ordinance." (See R. 2:5–7 (explaining the Ordinance and detailing its adoption)).

"between persons whose interests are adverse"; (3) a party seeking declaratory relief has "a legal interest in the controversy"; and (4) the relevant issue is "ripe for judicial determination." *Id.* (internal quotation marks omitted). Here, Eureka seems to dispute all four requirements—though especially the third, which is "often voiced in terms of standing." *Id.* ¶11. The Binversies take each requirement in turn, explaining why they satisfy them all.

A. The Binversies have a claim of right, and Eureka has an interest in contesting the Binversies' claims.

> *A controversy in which a claim of right is asserted against one who has an interest in contesting it.*

Fabick, 396 Wis. 2d 231, ¶9.

To satisfy this first justiciability requirement, a plaintiff must assert a claim of right. *Id.* ¶10 (quoting *Tooley v. O'Connell*, 77 Wis. 2d 422, 434, 253 N.W.2d 335 (1977)). *Fabick* should instruct the analysis here.

Like this case, *Fabick* was a declaratory-judgment action brought by a taxpayer (though that case was a challenge to two declarations of emergency issued during the COVID-19 pandemic). *Id.* ¶3. There, the Wisconsin Supreme Court held that a taxpayer challenge was "not a hypothetical matter," presenting instead "a real contest over legal authority being claimed and exercised right now." *Id.* ¶10. The reason was: "The Declaratory Judgments Act allows litigants to seek a declaration of the 'construction or validity' of a statute." *Id.* (quoting Wis. Stat. § 806.04(2)). "That is what Fabick is doing," the supreme court explained. *Id.* And as the court further explained: "As a taxpayer, under our well-established law, [Fabick] has a legal interest (should taxpayer standing be satisfied) to contest governmental actions leading to an illegal expenditure of taxpayer funds. And the Governor is the proper party with an interest in defending the lawfulness of his actions." *Id.* Thus when plaintiffs bring taxpayer challenges under the Declaratory Judgments Act, they assert a claim of right contemplated under the first justiciability requirement.

That's what the Binversies are doing here. So long as they can show taxpayer standing (which they do in section C.i–ii. below), they have a present legal right under the Declaratory Judgments Act "to contest governmental actions leading to an illegal expenditure of taxpayer funds." *Id.* The Declaratory Judgments Act allows plaintiffs to bring an action to determine the "validity" of an "ordinance." Wis. Stat. § 806.04(2). The Binversies brought such an action here. As they noted in their complaint, they "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." (R. 2:4.)

More, Eureka issued the Ordinance, so Eureka (like the governor in *Fabick*) has an interest in defending the lawfulness of it. That means this lawsuit satisfies the second aspect of this requirement too.

In short, this declaratory-judgment action involves a claim of right asserted against a party having an interest in contesting it. It therefore satisfies the first justiciability requirement.

B. The Binversies and Eureka have adverse interests.

The controversy must be between persons whose interests are adverse.

Fabick, 396 Wis. 2d 231, ¶9.

The Binversies are testing the legality of Eureka's Ordinance, by way of the Declaratory Judgments Act. So via that act, the Binversies (as explained above) assert a "real contest over legal authority" that Eureka is both "claim[ing] and exercis[ing] right now." *See id.* ¶10. It's thus through those interests that they request a "declaration that the Ordinance provisions challenged in [their] complaint are unlawful" and a "permanent injunction prohibiting [Eureka] from enforcing the Ordinance provisions challenged in [their] complaint." (R. 2:26.) As Ben Binversie explained in an affidavit, "I do not want the Town of Eureka to unlawfully spend taxpayer money, including by spending taxpayer money enforcing or administering an unlawful ordinance." (R. 3:88.) And he asserted that the challenged ordinance "is

unlawful." (R. 3:88.) It is difficult to conjure up two groups more adverse to one another than the Plaintiffs and the Defendant here: citizen taxpayers asserting a statutory right to permanently enjoin the actions of an overweening government. This requirement is satisfied.

C. The Binversies have standing to pursue this lawsuit.

> *The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest.*

Fabick, 396 Wis. 2d 231, ¶9.

i. Taxpayer standing is a lenient doctrine.

> It is the private interest of the taxpayer, after all, that enables him to set judicial machinery in motion in a suit of this sort. . . . [I]n a suit of this kind the court will not stop to inquire respecting plaintiff's standing further than to determine whether he is a taxpayer.

Chippewa Bridge Co. v. City of Durand, 122 Wis. 85, 99 N.W. 603, 611 (1904).

Wisconsin courts liberally construe the law of standing. *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶19, 402 Wis. 2d 587, 977 N.W.2d 342 (citing *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855). They treat the Uniform Declaratory Judgments Act with equal liberality. *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶18, 259 Wis. 2d 107, 655 N.W.2d 189 (citing *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 315, 529 N.W.2d 245 (Ct. App. 1995)). That's because in state court, unlike in federal court, standing is not a question of jurisdiction. *See McConkey*, 326 Wis. 2d 1, ¶15 (explaining that standing is not rooted in a constitutional case-or-controversy requirement). In Wisconsin, standing serves a different role: "Standing requirements in Wisconsin are aimed at ensuring that the issues and arguments presented will be carefully developed and zealously argued, as well as informing the court of the consequences of its decision." *Id.* ¶16; *see also In re Carl F.S.,* 2001 WI App 97, ¶5, 242 Wis.2d 605, 626 N.W.2d 330 (2001) ("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.").

Toward that end, when standing is challenged, courts "take the allegations in the complaint as true and liberally construe them in the plaintiff's favor." *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶18, 275 Wis. 2d 533, 685 N.W.2d 573.

Because standing is a question not of jurisdiction but instead of "sound judicial policy,"[3] our supreme court—breaking again from federal courts—"has been disposed toward finding" taxpayer standing. *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878, 419 N.W.2d 249 (1988). Indeed, parties have for longer than a century used taxpayer standing to challenge "a variety of governmental activities accompanied by expenditure of public moneys." *Thompson v. Kenosha Cnty.*, 64 Wis. 2d 673, 680, 221 N.W.2d 845 (1974) (challenging the adoption of a countywide assessor system); *see also Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993) (challenging the transfer of management of a county museum); *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983) (challenging a statute resulting in public expenditures); *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 116 N.W.2d 142 (challenging a statute requiring that certain counties be included in the Wisconsin Retirement Fund); *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 112 N.W.2d 177 (1961) (challenging construction of a tunnel); *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 99 N.W. 603 (1904) (challenging construction of a bridge); *Lynch v. E., L.F. & M. Ry. Co.*, 57 Wis. 430, 15 N.W. 743 (1883) (seeking to enjoin the delivery of town-issued bonds to a private railway company).

This long train of challenges shows that taxpayers can (and, really, that they usually do) present cases that are "carefully developed and zealously argued" and capable of "informing the court of the consequences of its decision." *See McConkey*,

[3] *McConkey*, 326 Wis. 2d 1, ¶15.

326 Wis. 2d 1, ¶16. Indeed, a taxpayer's interest "in public funds . . . is akin to that of a stockholder in a private corporation." *S.D. Realty Co.*, 15 Wis. 2d 15, 22.

And establishing taxpayer standing is no real feat. To have it, a taxpaying plaintiff need only allege "that the [government] has spent, or proposes to spend, public funds illegally." *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 360, 299 N.W.2d 259 (Ct. App. 1980), *overruled on other grounds by DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994). So lenient is taxpayer standing, this allegation can be implied if the plaintiff alleges, at a minimum, that a law is invalid. *See Tooley*, 77 Wis. 2d 422, 438–39; *Thompson*, 64 Wis. 2d at 679–80. And so apt are courts to find taxpayer standing, they have held the mere *threat* of pecuniary loss—as opposed to loss in fact—establishes it. *Fabick*, 396 Wis.2d 231, ¶11 n.5. A taxpayer suffers pecuniary loss (and thus can prove standing) whenever the government spends or someday will spend public funds illegally—however drop-sized, "trifling,"[4] or "infinitesimal[ ]"[5] that expenditure might be.

ii. The Binversies have taxpayer standing.

The Binversies, like most who bring suits of this sort, breeze past the requirements for taxpayer standing. As an initial matter, they pay taxes. And they allege so in their complaint: "Plaintiffs Ben Binversie and Jenny Binversie pay taxes to the Town of Eureka." (R. 2:4.) Ben Binversie states the same in his affidavit: "Jenny and I pay property taxes to the Town of Eureka in Polk County, Wisconsin." (R. 3:88.) This fact is undisputed.

Past that, their complaint is bestrewn with allegations that the Ordinance is unlawful. Take one example from just the fourth paragraph: "The Ordinance's monetary and application requirements are unlawful and preempted by Wis. Stat. § 93.90 and state regulations promulgated thereunder." (R. 2:4; *see generally* R. 2 (alleging and explaining why Eureka's Ordinance is preempted by Wisconsin's

[4] *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶40 n.17, 333 Wis. 2d 402, 797 N.W.2d 789 (lead op.).

[5] *Hart,* 176 Wis. 2d at 699.

Livestock Siting Law, Wis. Stat. § 93.90; Wis. Admin. Code ch. ATCP 51; Wis. Stat. § 92.15; and Wis. Stat. ch. 283).) Eureka does not dispute the Binversies allege the Ordinance is illegal.

Building on those allegations, the Binversies then assert "the Ordinance will result in unlawful expenditures of public funds, thereby causing pecuniary harm to Plaintiffs Ben Binversie and Jenny Binversie and other taxpayers in Eureka." (R. 2:4–5.) With this allegation, the Binversies satisfy all the requirements for taxpayer standing: alleging they pay taxes, alleging illegality, and alleging unlawful expenditure.

Eureka disputes only the final requirement—of alleging unlawful expenditure. According to Eureka, the Ordinance will result in no tax-money expenditures of any sort. Its reason: "applicant[s are] responsible for any costs the Town incurs to review an application or enforce the Ordinance." (R. 7:5.) But this cannot be. It's true; the Ordinance requires that applicants reimburse Eureka for certain costs. As the Binversies explained in their complaint, however, this reimbursement scheme runs afoul of superior law—Wisconsin Admin. Code § ATCP 51.30(4). (R. 2:9–11.) Subsection (a) of that regulation prohibits any "application fee" for "offset[ing] the political subdivision's costs to review and process [a CAFO application] application" from exceeding "$1,000." And subsection (b) prohibits "any fee," "bond," or "security" except the fee permitted under subsection (a). Section ATCP 51.30(4) prevails over the Ordinance. *See Law Enf't Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 489, 305 N.W.2d 89 (1981) (noting a state regulation supersedes a municipal ordinance). As the Binversies allege, every reimbursement requirement in the Ordinance conflicts with either one or both of those subsections in section ATCP 51.30(4). (R. 2:9–11.) As a result, Eureka would need to violate state law to be reimbursed for any costs it incurs under its illegal Ordinance. That means in the end Eureka's taxpayers, not applicants, will have to shoulder the cost of enforcing the illegal Ordinance. (*See* R. 2:7 (identifying ways taxpayer money will be spent upon enforcement).)

That all is quite enough to establish taxpayer standing. After all, any "imminent threat of unreimbursed costs, past *and future*, is sufficient to confer taxpayer standing." *Fabick*, 396 Wis.2d 231, ¶11 n.5 (emphasis added); *see also Hart*, 176 Wis. at 699 (noting that a "potential loss" of taxpayer money "suffice[s] to sustain a taxpayer suit").[6]

Against all that, Eureka argues that "a taxpayer[7] 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.'" (R. 7:6 (citing *AquaTech, Inc. v. Como Lake Protection and Rehab. Dist.*, 71 Wis.2d 541, 553, 239 N.W.2d 25 (1976)).) Eureka, however, overlooks that the Binversies will suffer a particular loss when the Ordinance is enforced; they will suffer a loss of *their* taxpayer dollars. And nor will the "public in general" suffer some blanket injury. Not everybody in the public pays taxes to Eureka. But beyond all that, Eureka further overlooks that taxpayer actions are by definition brought by single taxpayers (asserting their particular losses) "to vindicate rights of all taxpayers." *Thompson*, 64 Wis. 2d at 679.

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[6] When reviewing a motion to dismiss for lack of standing, a court does not resolve the merits of the case. *See Friends of Black River Forest*, 402 Wis. 2d 587, ¶22. The legality of the challenged governmental action "goes not to standing, but to the merits of the plaintiffs' claim; it is sufficient that they allege illegality in order to have standing." *Kaiser*, 99 Wis. 2d 345, 361, *overruled on other grounds by DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994). So here and at this stage, this Court need not actually decide whether the Ordinance's reimbursement scheme is lawful. Whether it is lawful goes to the merits, not to standing. The Binversies need only allege it is illegal to establish taxpayer standing.

[7] Although Eureka frames this quotation as one about taxpayer standing, it is not. This quote is about standing more generally. Here's the full quotation: "The general rule is that *a private citizen or individual* may sue in his own name and for his own benefit to challenge 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." *Aqua-Tech, Inc. v. Como Lake Prot. & Rehab. Dist.*, 71 Wis. 2d 541, 553, 239 N.W.2d 25 (1976) (emphasis added). This quotation, saying nothing about taxpayer standing, is irrelevant to whether the Binversies have taxpayer standing. Besides, this quote says nothing that cases on taxpayer standing do not. For example: "However much the public may be interested, no individual can be permitted to vindicate its right unless he has a personal interest in the matter." *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 99 N.W. 603 (1904). But these cases also note"[i]t is the private interest of the taxpayer … that enables him to set judicial machinery in motion in a suit of this sort." *Id.*

Indeed, to have taxpayer standing at all, a plaintiff must allege "that the complaining taxpayer *and taxpayers as a class* have sustained, or will sustain, some pecuniary loss." *Fabick*, 2021 WI 28, ¶11 (citation omitted) (emphasis added). (The Binversies rightly allege as much, noting that enforcement of the Ordinance will cause "pecuniary harm to Plaintiffs Ben Binversie and Jenny Binversie and other taxpayers in Eureka.") (R. 2:5.) And overlooking even more still, Eureka fails to recognize that declaratory judgments are meant for testing, "prior to enforcement,"[8] the validity of ordinances that "affect[] all town residents," not just the plaintiff. *Weber*, 159 Wis. 2d at 149. So although Eureka has not so-to-speak "applied" the Ordinance against the Binversies, it need not for this suit to go on. Indeed, if personal application were required, then the plaintiff in *Fabick*, for instance, would not have had taxpayer standing—the Wisconsin Supreme Court there concluding the petitioner had taxpayer standing even though the challenged actions had no direct application to him. *See Fabick*, 2021 WI 28, ¶11 & n.5. The Binversies will suffer a particular and pecuniary loss (of their tax dollars) when Eureka enforces the Ordinance. Based on that interest, they test the validity of the Ordinance, which will affect the rights of every taxpayer. They have taxpayer standing.

iii. The Binversies also have standing based on judicial policy.

Jurisdiction in Wisconsin (again unlike jurisdiction in federal court) is a matter of complete judicial policy. That means—despite Eureka's bald assertions otherwise—a plaintiff may draw standing from sound policy alone. *See McConkey*, 2010 WI 57, ¶17; *see also Metro. Builders Ass'n of Greater Milwaukee v. Vill. of Germantown*, 2005 WI App 103, ¶15, 282 Wis. 2d 458, 698 N.W.2d 301 (identifying "public policy and the mandate to construe standing rules liberally as independent reasons supporting standing"); *WMC v. Evers*, 2021 WI App 35, ¶32, 398 Wis. 2d 164, 960 N.W.2d 442 (declining to find judicial-policy standing because the issue presented there "implicate[d] no constitutional or other statutory provision at all"), *aff'd,* 2022 WI 38, 977 N.W.2d 374.

[8] *Weber v. Town of Lincoln*, 159 Wis. 2d 144, 148, 463 N.W.2d 869 (Ct. App. 1990).

In *McConkey*, the supreme court concluded the plaintiff had judicial-policy standing to raise an "important issue of constitutional law." 326 Wis.2d 1, ¶18. That precedent controls here. It's true—and Eureka points this out—that the Binversies do not directly present an important issue of constitutional law. But that's irrelevant; the Binversies present important questions of statutory law and, by extension, of state preemption of municipal power. *See WMC*, 398 Wis. 2d 164, ¶32 (indicating that statutory implications can confer judicial-policy standing). Questions of power like these are no doubt worthy of judicial impression. Although they are not directly linked to a constitutional provision, "[t]he division of power between different levels of government" is what "makes possible the realization of certain basic values of a democratic state." *Wisconsin's Env't Decade, Inc. v. DNR*, 85 Wis. 2d 518, 526 n.1, 271 N.W.2d 69 (1978) (quoting Thomas P. Solheim, Comment, *Conflicts Between State Statute and Local Ordinance in Wisconsin*, 1975 Wis.L.Rev. 840). Few issues can be more foundational and important. And by implicating that depth of principle here, the Binversies in no way ask this Court—whatever Eureka suggests—to adopt some "limitless version of standing [that] would eliminate a meaningful requirement to commence an action." (R. 7:8.) The Binversies have judicial-policy standing solely because of the important issues their case presents.

But even other factors from *McConkey* support the Binversies' standing. There, the court identified five additional and discrete reasons McConkey had standing. *McConkey*, 2010 WI 57, ¶18. A couple apply equally here. For one, the court held there that McConkey had "competently framed the issues and zealously argued his case." *Id.* So have the Binversies, who have presented a clean legal question for this court's easy resolution. (*See generally* R. 2.) For another, dismissal there, the court explained, would have only compelled a different party to bring the same lawsuit. *McConkey*, 326 Wis.2d 1, ¶18. So here. If this lawsuit were dismissed, another citizen—perhaps a farmer, perhaps an applicant—would surely bring an identical lawsuit once Eureka enforces its unlawful Ordinance. Enabling this suit to go forward will save judicial resources—not to mention saving at least one person from becoming shackled by an

unlawful ordinance. For all those three reasons, judicial policy grants standing to the Binversies.

* * * * *

To sum up, the Binversies have standing for two separate reasons: they have taxpayer standing under more than a century's worth of precedent, and they have judicial-policy standing under *McConkey*.

D. This lawsuit is ripe.

> *The issue involved in the controversy must be ripe for judicial determination.*

Fabick, 396 Wis. 2d 231, ¶9.

Though ripeness typically requires that a plaintiff be injured,[9] "[b]y definition, the ripeness required in declaratory judgment actions is different from the ripeness required in other actions." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶43, 309 Wis. 2d 365, 386, 749 N.W.2d 211. In suits of this sort (declaratory-judgment actions asserting facial challenges to municipal ordinances), ripeness occurs "the moment the challenged ordinance is passed." *Id.* ¶44 n.9. That's when, according to courts, the facts are "sufficiently developed to allow a conclusive adjudication" and prevent an entanglement in "abstract disagreements." *Id.* ¶43. Nothing more is needed: plaintiffs in declaratory-judgment actions "need not" even "prove an injury has already occurred" for a suit to be ripe. *Papa v. Wisconsin Dep't of Health Servs.*, 2020 WI 66, ¶30, 393 Wis. 2d 1, 946 N.W.2d 17 (citing *Olson*, 309 Wis. 2d 365, ¶43).

This makes sense, of course, because declaratory-judgment actions like this one present pure legal questions. Questions about "rights," "status," "legal relations." *Milwaukee Dist. Council 48*, 244 Wis. 2d 333, ¶35. And they do so "whether or not further relief is or could be claimed." *Id.* So once a law is adopted, and once a plaintiff

[9] *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶41, 244 Wis. 2d 333, 627 N.W.2d 866. Justiciability is often understood to overlap with the concept of standing. *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶47 (lead op.).

with standing brings suit against it, no additional fact could render that suit's legal questions any readier for "an intelligent and useful decision to be made." *Ripeness*, Black's Law Dictionary (12th ed. 2024).

This suit fits that mold. As the Binversies undisputedly[10] pleaded, Eureka's "Town Board adopted Ordinance No. 22-01-0" on March 10, 2022. (R. 2:3, 5.). This suit has been ripe ever since; the Binversies need not plead anything more. As the facts stand, they are "sufficiently developed to allow a conclusive adjudication" of the legal questions the Binversies present. *Olson*, 309 Wis. 2d 365, ¶43.

Conclusion

The Binversies satisfy all the elements of justiciability. This Court should therefore deny Eureka's motion to dismiss and allow this suit to go on.

Dated this 26th day of September 2024.

Respectfully submitted,

Electronically signed by
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[10] (R. 7:1.)