

FILED
10-12-2022
Clerk of Circuit Court
Polk County, Wisconsin
2022CV000274
Honorable Jeffery L.
Anderson
Branch 2

STATE OF WISCONSIN

CIRCUIT COURT

POLK COUNTY

MICHAEL BYL AND JOYCE BYL
2322 County Road B
Grantsburg, Wisconsin 54840,

SARA BYL
2896 230th Street
Cushing, Wisconsin 54006,

MERLE SPOELSTRA
AND JANICE SPOELSTRA
2837 230th Street
Cushing, Wisconsin 54006,

Case Type: Declaratory Judgment
Case Code: 30701
Case No. 22-CV-

Plaintiffs,

v.

TOWN OF LAKETOWN
Laketown Town Hall
2153 275th Avenue
Cushing, Wisconsin 54006,

Defendant.

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 12th day of October 2022.

Respectfully submitted,

Electronically signed by
Scott E. Rosenow

Scott E. Rosenow (WI Bar No. 1083736)
WMC LITIGATION CENTER
501 East Washington Avenue
Madison, WI 53703
Phone: (608) 661-6918
E-mail: srosenow@wmc.org

Attorney for Plaintiffs

FILED
10-12-2022
Clerk of Circuit Court
Polk County, Wisconsin
2022CV000274
Honorable Jeffery L.
Anderson
Branch 2

STATE OF WISCONSIN

CIRCUIT COURT

POLK COUNTY

MICHAEL BYL AND JOYCE BYL
2322 County Road B
Grantsburg, Wisconsin 54840,

SARA BYL
2896 230th Street
Cushing, Wisconsin 54006,

MERLE SPOELSTRA
AND JANICE SPOELSTRA
2837 230th Street
Cushing, Wisconsin 54006,

Case Type: Declaratory Judgment
Case Code: 30701
Case No. 22-CV-

Plaintiffs,

v.

TOWN OF LAKETOWN
Laketown Town Hall
2153 275th Avenue
Cushing, Wisconsin 54006,

Defendant.

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. In February 2022, the Town of Laketown's (hereafter "Laketown" or "Town") Town Board adopted Ordinance No. 22-01, titled "Concentrated Animal Feeding Operations (CAFO) Ordinance" (hereafter "Ordinance").¹

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 farmers, business owners, property owners, and taxpayers.

6. Plaintiffs, who are residents, taxpayers, farmers, and property owners in Laketown, 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 Michael Byl and Joyce Byl reside at 2322 County Road B in Grantsburg, Wisconsin 54840, and presently co-operate Northernview Farms at this same address. This address is in Laketown.

8. Plaintiff Sara Byl resides at 2896 230th Street in Cushing, Wisconsin 54006, and presently co-operates Northernview Farms at 2322 County Road B in Grantsburg, Wisconsin 54840. Both of these addresses are in Laketown.

9. Plaintiffs Merle Spoelstra and Janice Spoelstra reside at 2837 230th Street in Cushing, Wisconsin 54006. They also own a farm at that address. Their farm and residence are in Laketown.

¹ The Ordinance is available at <https://townoflaketown.org/wp-content/uploads/2022/03/Final-Concentrated-Animal-Feeding-Operations-Ordinance-22-01.pdf>. The Ordinance incorrectly states that it was adopted in 2021. It was adopted in 2022, as reflected in the Town Board's meeting minutes from February 22, 2022, which are available at <https://townoflaketown.org/wp-content/uploads/2022/02/2-22-2022-Monthly-Board-Minutes.pdf>. The Ordinance is included with this complaint as Exhibit 1; the Ordinance's three appendices are included with this complaint as Exhibits 2–4; and the minutes from the Town Board's February 22, 2022 meeting are included with this complaint as Exhibit 5.

10. Defendant Laketown 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 Merle Spoelstra, Janice Spoelstra, Michael Byl, and Joyce Byl have standing to bring this lawsuit and assert the claims in this complaint because they pay taxes to Laketown, and the Ordinance will result in unlawful expenditures of public funds.

13. In addition, Plaintiffs Merle Spoelstra, Janice Spoelstra, Michael Byl, and Joyce Byl have standing to bring this lawsuit and assert the claims in this complaint because the Ordinance will diminish the value of the property they own in Laketown, and this interest is arguably protected by Wis. Stat. § 93.90.

14. Plaintiff Sara Byl has standing to bring this lawsuit and assert the claims in this complaint because the Ordinance will diminish the value of the property in Laketown on which she co-operates a farm, and this interest is arguably protected by Wis. Stat. § 93.90.

15. In addition, all five Plaintiffs have standing to bring this lawsuit and assert the claims in this complaint because the Ordinance harms Plaintiffs' ability to expand their farms in the future, and this interest is arguably protected by Wis. Stat. § 93.90.

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

17. On April 19, 2022, the Plaintiffs' notice of claim was personally served on Laketown's town clerk.²

² A copy of the notice of claim is included with this complaint as Exhibit 6.

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

19. On July 26, 2022, the Laketown Town Board voted to disallow the Plaintiffs' claims.

20. The undersigned counsel received a letter from Laketown's town chair dated August 11, 2022, disallowing Plaintiffs' claims.³

21. Venue in Polk County is proper under Wis. Stat. § 801.50(2).

BACKGROUND

22. Laketown's Town Board held a meeting on February 22, 2022. At that meeting, the Town Board adopted the Ordinance by a 2–1 vote.

23. 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 Laketown. Ordinance § 2.

24. A “new or expanded” livestock facility must obtain a CAFO Operations Permit from Laketown if the facility “will operate with 700 or more animal units.” Ordinance § 4.1.

25. The Ordinance does not apply to a livestock facility that was operating in Laketown 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.

26. 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.

27. 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

³ A copy of the letter is included with this complaint as Exhibit 7.

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.

28. 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.

29. “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.

30. 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.

31. 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.

32. Laketown will use taxpayer money to compensate any local authority described in the immediately preceding paragraph.

33. The Town Board may retain consultants to conduct periodic inspections. Ordinance § 10.2.

34. Laketown will use taxpayer money to retain any consultant described in the immediately preceding paragraph.

35. 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.

36. Laketown will use taxpayer money to hire any counsel or consultant described in the immediately preceding paragraph.

37. The Ordinance’s monetary requirements are illegal, as explained below.

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

CLAIM ONE:
State Law Preempts the
Scope of Ordinance § 4.2

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

40. 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.

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

42. 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.

43. 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. ATP 51 (“ATCP 51”). *Adams*, 2012 WI 85, ¶ 7.

44. 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).

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

46. 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.

47. That requirement is preempted by § ATP 51.06.

48. 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 § ATP 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 § ATP 51.06(2) (emphasis added).

49. “‘Expansion’ means an increase in the number of animals fed, confined, maintained, or stabled.” Wis. Stat. § 93.90(1m)(d).

50. Section ATP 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.

CLAIM TWO:
State Law Preempts the Fee
Provision in Ordinance § 7

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

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

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

54. 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).

55. 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.

56. 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.

CLAIM THREE:
State Law Preempts the Monetary
Requirements in Ordinance § 8.2

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

58. 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.

59. 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.

CLAIM FOUR:
State Law Preempts the Monetary
Requirement in Ordinance § 9

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

61. 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.

62. 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.

CLAIM FIVE:
State Law Preempts the Fee
Provision in Ordinance § 14

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

64. 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.

65. 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.

CLAIM SIX:
State Law Preempts the Application
Requirements in Ordinance § 8.1.a.

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

67. 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.

68. 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.

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

70. 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).

71. 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.

72. "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.

73. “[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.

74. 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.

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

76. 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.⁴

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

78. 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 ATP 51.

⁴ 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 granting the permit. *Adams v. State Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, ¶¶ 48–49, 342 Wis. 2d 444, 820 N.W.2d 404.

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

80. 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.

81. 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."

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

83. This requirement falls outside Wis. Stat. § 93.90(3)(a)6. because it has no direct counterpart in ATPC 51—in other words, it is not "more stringent" than any state standard in ATPC 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.

84. 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 Laketown's findings do not clearly show that this requirement is necessary for protecting public health or safety.

CLAIM SEVEN:
State Law Preempts the Application
Requirements in Ordinance § 8.1.b.

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

86. 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.

87. 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.

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

89. 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.

90. 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 Laketown’s findings do not clearly show that these requirements are necessary for protecting public health or safety.

CLAIM EIGHT:
State Law Preempts the Application
Requirements in Ordinance § 8.1.c.

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

92. 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.

93. 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.

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

95. 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.

96. 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 Laketown’s findings do not clearly show that these requirements are necessary for protecting public health or safety.

CLAIM NINE:
State Law Preempts the Application
Requirements in Ordinance § 8.1.d.

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

98. 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.

99. 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.

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

101. 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.

102. 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 Laketown’s findings do not clearly show that these requirements are necessary for protecting public health or safety.

CLAIM TEN:
State Law Preempts the Application
Requirements in Ordinance § 8.1.e.

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

104. 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.

105. 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.

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

107. 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.

108. 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 Laketown’s findings do not clearly show that these requirements are necessary for protecting public health or safety.

CLAIM ELEVEN:
State Law Preempts the Application
Requirements in Ordinance § 8.1.f.

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

110. 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.

111. 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.

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

113. 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.

114. 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 Laketown’s findings do not clearly show that these requirements are necessary for protecting public health or safety.

CLAIM TWELVE:
State Law Preempts the Application
Requirements in Ordinance § 8.1.g.

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

116. 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.

117. 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.

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

119. 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.

120. 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 Laketown's findings do not clearly show that these requirements are necessary for protecting public health or safety.

CLAIM THIRTEEN:
State Law Preempts the Application
Requirements in Ordinance § 8.1.h.

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

122. 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.

123. 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.

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

125. 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.

126. 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 Laketown's findings do not clearly show that these requirements are necessary for protecting public health or safety.

CLAIM FOURTEEN:
State Law Preempts the Application
Requirements in Ordinance § 8.1.i.

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

128. 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.

129. 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.

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

131. 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.

132. 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 Laketown’s findings do not clearly show that these requirements are necessary for protecting public health or safety.

CLAIM FIFTEEN:
State Law Preempts the Application
Requirements in Ordinance § 8.1.i.

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

134. 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.

135. 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.

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

137. 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.

138. 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 Laketown’s findings do not clearly show that these requirements are necessary for protecting public health or safety.

CLAIM SIXTEEN:
State Law Preempts the Application
Requirements in Ordinance § 8.1.k.

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

140. 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.

141. 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.

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

143. 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.

144. 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 Laketown's findings do not clearly show that these requirements are necessary for protecting public health or safety.

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. Any such other relief as the Court deems appropriate.

Dated this 12th day of October 2022.

Respectfully submitted,

Electronically signed by
Scott E. Rosenow

Scott E. Rosenow
Wis. Bar No. 1083736
WMC LITIGATION CENTER
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Attorney for Plaintiffs