STATE OF WISCONSIN CIRCUIT COURT POLK COUNTY

MICHAEL BYL, SARA BYL, MERLE SPOELSTRA AND JANICE SPOELSTRA, AND WISCONSIN FARM BUREAU FEDERATION, COOPERATIVE, Plaintiffs, v. TOWN OF LAKETOWN, Defendant.	Case No. 22-CV-274 Case Code: 30701

BRIEF IN SUPPORT OF PROPOSED INTERVENOR-DEFENDANT TOWN OF EUREKA'S MOTION TO INTERVENE

Proposed Intervenor-Defendant Town of Eureka moves to intervene both as of right and permissively in the above-captioned matter because the Town of Eureka administers an ordinance that was developed contemporaneously with, and for the purposes of this present action, is nearly identical to Town of Laketown Ordinance No. 22-01 (the "Laketown Ordinance"), the validity of which Plaintiffs challenge here.

Plaintiffs challenge the Laketown Ordinance, which regulates the operation of concentrated animal feeding operations ("CAFOs") in Laketown. Plaintiffs allege that certain provisions of the Laketown Ordinance are "unlawful and preempted by Wis. Stat. § 93.90[1] and state regulations promulgated thereunder," and seek declaratory and injunctive relief, holding that ordinance is unlawful, and prohibiting Laketown from enforcing it. First Amended Complaint, at ¶ 4, and Request for Relief, ¶¶ A and B. More specifically, the Plaintiffs assert 17

[1] All citations are to the 2021-22 version of the Wisconsin Statutes unless otherwise noted.

separate claims, alleging that the "scope" (§ 4.2), "fee provisions" (§§ 7 and 14), "monetary requirements" (§§ 8.2 and 9), and "application requirements" (§§ 6, 8.1.a. through k. and 8.7) of the Ordinance are all preempted by state law. *Id*. ¶¶ 49-164.

STATEMENT OF THE CASE

Defendant Laketown, and five neighboring towns in Polk and Burnett Counties, including proposed Intervenor-Defendant Town of Eureka ("Eureka"), in early 2020 declared temporary moratoria on the issuance of CAFO operation permits in their jurisdictions, to allow time for the towns to study the potential impacts of such facilities on their communities. Anderson Affidavit, ¶ 7. The six towns later signed an Intergovernmental Agreement, pursuant to Wis. Stat. § 66.0301(2), to work with each other via their representatives on the Large Scale Livestock Town Partnership Committee ("Partnership"). Anderson Aff. ¶ 8. The Partnership reviewed the scientific literature and formulated recommended findings of fact and ordinance provisions which it delivered to the town boards in each of the six towns. Anderson Aff. ¶ 9. Following the Partnership's recommendations, five of the towns adopted similar ordinances (collectively, the "Local CAFO Ordinances"), regulating the operation of CAFOs in their respective jurisdictions. Anderson Aff. ¶ 10. Town of Eureka Ordinance No. 22-01-0 (hereinafter, "Eureka Ordinance"), adopted by the Eureka Town Board on March 10, 2022, Anderson Aff. ¶ 11, except for the recitals and Local Findings sections, is nearly identical in all respects to the Ordinance challenged in this case, except for two additional provisions, found in Sections 3.3.b.[2] and 8.2[3] of Eureka's ordinance. Anderson Aff. ¶ 12.

[2] Section 3.3.b. of the Eureka Ordinance provides that: "Any lot or any facility, regardless of location that meets the definition of Section 3.2.A. and uses land in the Town to manage waste." Anderson Aff. ¶ 11, and Ex. D, at D-23.

[3] Section 8.2 of the Eureka Ordinance in identical to Section 8.2 of the Laketown Ordinance, except for the following sentence, which was added to the Eureka Ordinance: "The applicant statement shall also state that the applicant agrees to fully compensate the Town for all legal services, expert consulting services and other expenses, for verifying and enforcing compliance with the terms of the permit, with or without conditions, if approved by the Town Board." Anderson Aff. ¶ 12, and Ex. D, at D-26.

Given that the Laketown Ordinance and the Eureka Ordinance are nearly identical, the Town of Eureka ("Eureka") seeks to intervene as a defendant in this litigation, to advocate against Plaintiffs' strained misreading of Wis. Stat. § 93.90, and their claim that the statute preempts the towns' regulation of CAFO operations. The similarity between the two ordinances also means it is likely that if the courts invalidate the Laketown Ordinance, the holding will threaten the validity of the Eureka Ordinance as well. In fact, if this Court grants the declaratory judgment Plaintiffs seek, holding that the Siting Law and ATCP 51 preempt the Local CAFO Ordinances, it could have a statewide impact, limiting or eliminating all regulation of CAFO operations by local governments.

Wisconsin law provides circuit courts with authority to grant intervention as of right, as well as permissive intervention, to parties with interests in pending litigation. Wis. Stat. § 803.09(1)–(2). As discussed below, Eureka meets the standards for both intervention as of right and permissive intervention. In compliance with Wis. Stat. § 803.09(3), Eureka also submits a responsive pleading setting forth its answers to the Plaintiffs' allegations, and the affirmative defenses for which it seeks to intervene. The proposed Answer is attached as Exhibit A to Eureka's Motion to Intervene.

STANDARDS OF REVIEW

I. Intervention as of right.

There is "no precise formula for determining whether a potential intervenor meets the requirements of [Wis. Stat.] § 803.09(1);" "[t]he analysis is holistic, flexible, and highly fact-specific." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 742, 601 N.W.2d 301 (Ct. App. 1999). "A

court must look at the facts and circumstances of each case against the background of the policies[4] underlying the intervention rule." *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 40, 307 Wis. 2d 1, 745 N.W.2d 1 (quoting *State ex rel. Bilder v. Delevan Twp.*, 112 Wis. 2d 539, 549, 334 N.W.2d 252 (1983); internal quotation marks omitted). To intervene as of right, a proposed intervenor must satisfy the four criteria specified in Wis. Stat. § 803.09(1):

> A. its motion to intervene must be timely;
>
> B. it must claim an interest sufficiently related to the subject of the action;
>
> C. it must show that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and
>
> D. it must demonstrate that the existing parties do not adequately represent its interest.

Id. ¶ 38. "Wisconsin Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, and interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1)." *Id.* ¶ 37. Intervention must be granted if these elements are satisfied. *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994) ("If [movant] meets each of the requirements [in Wis. Stat. § 803.09(1)], we must allow him to intervene.").

II. Permissive intervention.

The standard for permissive intervention, which Eureka seeks in the alternative, is even less stringent: "Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). The circuit court has discretion to decide whether a movant may be permitted to intervene, if the motion is timely, and a claim or defense has a question of law or fact in common with the main action. *Helgeland*, 2008 WI 9, ¶ 120.

[4] Of note, the policies behind the intervention rule represent two "conflicting" interests: 1) that "the original parties to a lawsuit should be allowed to conduct and conclude their own lawsuit;" and 2) that "persons should be allowed to join a lawsuit in the interest of the speedy and economical resolution of controversies."

ARGUMENT

I. Eureka is entitled to intervention as of right.

Eureka satisfies the standards for intervention as of right under Wis. Stat. § 803.09(1), namely: (1) Eureka's Motion is timely; (2) Eureka has interests directly related to the subject matter of the action; (3) disposition of the action may, as a practical matter, affect Eureka's interests; and (4) the Defendant cannot adequately represent Eureka's interests.

A. Eureka's motion is timely.

The timeliness criterion for intervention as of right is measured by the applicant's diligence and the impact the motion will have on the existing litigants. Two factors guide a court in deciding whether a motion to intervene is timely: (1) whether, considering all the circumstances, the proposed intervenor acted promptly; and (2) whether the intervention will prejudice the original parties. *Bilder*, 112 Wis. 2d at 550. The "promptness" element hinges on when the proposed intervenor discovered its interest was at risk and how far the litigation has proceeded at the time of the motion to intervene. *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶¶ 16–17, 247 Wis. 2d 708, 634 N.W. 2d 882.

Eureka satisfies the timeliness requirement. The original Plaintiffs filed their initial Summons and Complaint in October 2022, but considering all the circumstances, including the intervening holiday seasons, and the need for the Town Board to meet to consider intervention, and retain counsel, the Town of Eureka acted promptly. Moreover, the First Amended Complaint, which added Wisconsin Farm Bureau Federation, Cooperative ("WFBF") as an additional plaintiff, and asserted an additional claim, was not filed until February 16, 2023. And Eureka's intervention will not prejudice any party, as Plaintiffs' case has not progressed in any material way since the filing of the First Amended Complaint, no hearings have been held, and no briefing schedule has been set for dispositive motions. Additionally, Eureka will agree to

work within whatever schedule this Court establishes for the resolution of the present action. This is clearly sufficient to meet the timeliness requirement. *See Bilder*, 112 Wis. 2d at 550-51 ("The critical factor is whether in view of all the circumstances the proposed intervenor acted promptly."). Note that in *Bilder*, the parties had already formulated a stipulation to settle the lawsuit when the motion to intervene was filed, but since the circuit court had not yet considered or approved it, the court granted the motion. *Id.*

B. Eureka has an interest sufficiently related to the subject of the action.

Consistent with the "broader, pragmatic approach" taken by Wisconsin courts when considering intervention, the "sufficient interest" requirement serves "'primarily [as] a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Helgeland*, 2008 WI 9, ¶¶ 43–44 (quoting *Bilder*, 112 Wis. 2d at 548–49).

Eureka has important and protected interests in the subject matter of this litigation. As a neighboring town that was part of the Partnership that studied the issues and potential effects of CAFOs on the region, and which adopted an ordinance that is nearly identical in most respects to the Laketown Ordinance, Eureka has an extremely compelling interest in the outcome of this litigation. Indeed, opposition groups view the Local CAFO Ordinances collectively and have even mentioned working with Plaintiffs' counsel to oppose them. *See* Wis. Ag Connection, Groups Call Out Another Polk Co. Town for Regulatory Overreach (Nov. 21, 2022) ("Town boards are taking the Laketown ordinance and using it as a template…That is why we worked closely with the WMC Litigation Center to challenge this exact type of ordinance."). If the court grants the declaratory judgment sought by the Plaintiffs, and holds that the Laketown Ordinance is unlawful, and preempted by Wis. Stat. § 93.90, it will threaten the validity of Eureka's ordinance as well. And if an adverse decision is upheld by the appellate courts, this litigation

may actually invalidate the Eureka Ordinance. In fact, this appears to be the intent of Plaintiff WFBF, which has discussed a goal of uniform agriculture law in Wisconsin. *See* Wis. Farm Bur. Fed., Wisconsin Farm Bureau Statement on Lawsuit Over Unlawful Regulation of Farms (Feb. 17, 2023) ("The lawsuit seeks to invalidate the ordinance so agriculture can remain governed by Wisconsin's uniform law.").[5]

As such, Eureka has a protected interest in ensuring the enforceability of an ordinance that was developed through a collaborative effort with Laketown and based on the same or similar underlying facts and data.

Moreover, as a neighboring town, Eureka has an independent interest in ensuring that the Laketown Ordinance is upheld. The Intergovernmental Agreement was, to an extent, entered into because the six towns recognized the shared susceptibility and connectivity of environmental resources in the region. *See* Anderson Aff. ¶ 8, Ex. C. That concern was realized and affirmed in the findings of fact developed by the Partnership. For example, the Partnership concluded that CAFOs present a range of health hazards, including "large volumes of untreated animal waste, the release of environmental contaminants to air, water, and soil, and the generation and spread of antibiotic-resistant pathogens." Laketown Ordinance at 4; Eureka Ordinance at 4, Anderson Aff. Ex. D at D-6 (emphasis added). Further, the ordinances recognize that Laketown and Eureka are hydrologically connected to the St. Croix River. Laketown Ordinance at 3; Eureka Ordinance at 3, Anderson Aff. Ex. D at D-4. The Partnership also found that CAFOs can introduce pathogens to "the surrounding community." Laketown Ordinance at 10-11; Eureka Ordinance at 10-11, Anderson Aff. Ex. D at D-11-12. Because many of the potential deleterious effects of CAFOs, such as odors, air and groundwater contamination, the spread of disease, and

[5] https://wfbf.com/farm-bureau-news/wisconsin-farm-bureau-statement-on-lawsuit-over-unlawful-regulation-of-farms/

suppression of property values cross municipal boundaries, Eureka has a strong interest in defending the validity of Laketown's ordinance, as well as its own.

Thus, Eureka clearly has its own interests that are sufficiently related to the subject matter of the present action to satisfy the second element for intervention as of right.

C. Disposition of this action in Eureka's absence would impair its ability to protect its interests.

Eureka also satisfies the minimal burden required to meet the third element needed for intervention as of right, that the disposition of this case may impair its ability to protect its interest. As with the other elements, Wisconsin courts take "a pragmatic approach" to this prong and "focus on the facts of each case and the policies underlying the intervention statute." *Helgeland*, 2008 WI 9, ¶ 79 & n.70 (citing 6 James Wm. Moore, et al., MOORE'S FEDERAL PRACTICE § 24.03[3][a], at 24–42 (3d ed. 2002)). The Wisconsin Supreme Court has identified two factors to be weighed in considering this prong: (1) "the extent to which an adverse holding in the action would apply to the movant's particular circumstances;" and (2) "the extent to which the action into which the movant seeks to intervene will result in a novel holding of law." *Id.* ¶¶ 80–81. Intervention is more warranted when a novel holding is at stake because its stare decisis effect is "more significant when a court decides a question of first impression." *Id.* ¶ 81.

Here, for the reasons previously discussed above, an adverse ruling would seriously impair Eureka's ability to protect the validity of its own ordinance, in the interest of the Town and its residents. When a proposed intervenor has protectible interests in the outcome of litigation, as Eureka does here, courts generally have "little difficulty concluding" that its interests will be impaired. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893[6], 898 (9th Cir. 2011). Intervention is especially warranted if the proposed remedy *directly* threatens

[6] Copies of all federal cases cited herein are attached as Appendix A.

to harm intervenors. *See, e.g.*, *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (granting intervention when proposed intervenors "would be directly rather than remotely harmed by the invalidation" of challenged statute).

As described above, a ruling in favor of the Plaintiffs in this action would adversely affect both Eureka's independent interest in the validity and enforceability of the Laketown Ordinance and would threaten the validity and enforceability of the Eureka Ordinance. Moreover, an adverse holding exclusively on the enforceability of the Laketown Ordinance may still threaten the environmental resources of Eureka. Therefore, Eureka should be permitted to intervene, to defend those interests.

D. No existing party adequately represents Eureka's interests.

Finally, no existing party adequately represents Eureka's interests. The burden to satisfy this factor is "minimal." *Armada Broad., Inc.*, 183 Wis. 2d at 476 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Because the future course of litigation is difficult (if not impossible) to predict, the test is whether representation "may be" inadequate, not whether it *will* be inadequate. *Wolff*, 229 Wis. 2d at 747. The facts that Laketown may share a "mutually desired outcome" with Eureka and might make "similar arguments" as Eureka, do not bar intervention. *Id*. at 748. When there is a realistic possibility that the existing parties' representation of the proposed intervenor's interests *may* be inadequate, "all reasonable doubts are to be resolved in favor of allowing the movant to intervene and be heard on [its] own behalf." 1 Jean W. Di Motto, WIS. CIV. P. BEFORE TRIAL § 4.61, at 41 (2d ed. 2002) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

Courts have rarely addressed the issue of adequate representation of interests by a peer government. That being said, the Wisconsin Court of Appeals reviewed a similar issue in *Wolff*. In *Wolff*, the town sought to intervene in a challenge to a Grant County Board of Adjustment

decision. There, the court rejected the argument that the town's interest would be adequately represented. Analyzing a 1997 D.C. Circuit Court decision, the court explained that even when a potential intervenor may seek the same outcome as a party and have a "tactically similar" position, intervention may be appropriate when the intervening party can better "provide the full ventilation of the legal and factual context" of the dispute. *Wolff*, 229 Wis. 2d at 748 (citing *Nuesse v. Camp*, 385 F.2d 694, 703, 128 U.S.App.D.C. 172 (D.C. Cir. 1967).

Due to Eureka's unique factual situation, its local Findings of Fact and Ordinance are not completely identical to Laketown's, which may supply Eureka with arguments that are unique from those that may be asserted by Laketown, and which could carry the day in this litigation. Also, Eureka retains "the substantial responsibility for the well-being of the residents and the property within its boundaries." *See Wolff*, 229 Wis. 2d at 746. Given the interconnectedness of the environmental resources, Eureka has the responsibility to protect the well-being of its residents. That responsibility is categorically distinct Laketown's responsibility to its residents and its interest in ensuring the enforceability of its ordinance.

Moreover, as is the case with any governmental entity involved in litigation, the interests and desired outcomes of the Town of Laketown may shift during the course of this case. Changes in the makeup of the Town Board due to resignations, appointments, or elections can change the position of a municipal government towards the issues raised in the litigation. While the Laketown and Eureka Boards are currently aligned in their support for CAFO Operations Ordinances, that alignment may be threatened by future changes in a board's composition. Especially in the case of town boards, which often have as few as three members,[7] a change of one seat on the board may dramatically change the body's position on an issue. Because the lead

[7] The Town of Eureka has a 5-member town board, and may therefore be less likely to change its position on the issues at stake in this litigation. *See*, *Town of Eureka*, https://townofeureka.org/about-us/ (last visited Mar. 21, 2023).

Defendant's board could shift position during the course of the litigation, Eureka cannot rely on Laketown to adequately represent its interests when there is a realistic possibility that that those interests may change. *See* Di Motto *supra* at 9, ("all reasonable doubts are to be resolved in favor of allowing the movant to intervene and be heard on [its] own behalf.").

Because Eureka cannot rely on Defendant Laketown to fully protect its distinct interest in this litigation, it satisfies the fourth requirement of Wis. Stat. § 803.09(1) and is entitled to intervention as of right.

II. Eureka should be allowed to intervene permissively.

In the alternative, Eureka should be granted permissive intervention. In addition to granting intervention as a matter of right, this Court can and should exercise its broad discretion to permit Eureka to intervene. Permissive intervention is appropriate, upon timely motion, when the "movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2); *see also Helgeland*, 2008 WI 9, ¶¶ 119– 20.

Eureka meets the criteria for permissive intervention. The motion to intervene is timely, as discussed above, and, in its proposed Answer to Plaintiff's First Amended Complaint, submitted to the Court with Eureka's Motion to Intervene, Eureka asserts a counterclaim alleging that the Eureka Ordinance, like the Laketown Ordinance, is not preempted by the Facility Siting Law, Wis. Stat. § 93.90, or the administrative rules promulgated thereunder, including Wis. Admin. Code Ch. ATCP 51. This counterclaim, and the affirmative defenses contained in the proposed Answer, have questions of law (whether a local operations ordinance is preempted by State law) and fact (e.g., the specific facts surrounding the development and adoption of the ordinances by the Towns) in common with the main action. Thus, Eureka meets the requirements for permissive intervention, and respectfully asks the court to exercise its discretion to grant Eureka's motion to intervene.

CONCLUSION

For the reasons stated above, this Court should grant the Town of Eureka's Motion to Intervene as a matter of right. In the alternative, this Court should exercise its discretion, to grant the Town of Eureka permissive intervention.

Respectfully submitted this 24th day of March, 2023.

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CERTIFICATE OF SERVICE

I certify that, in compliance with Wis. Stat. § 801.18(6), I am electronically filing this Brief in Support of proposed Intervenor-Defendant Town of Eureka's Motion to Intervene with the Clerk of Court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Respectfully submitted this 24th day of March, 2023.

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