



April 19, 2022

Debbie Tretsven – Town Clerk, Town of Laketown
P.O. Box 455
Luck, Wisconsin 54853

Sent via electronic mail to:
Townoflaketown@gmail.com

RE: Notice of Circumstances Giving Rise to a Claim and Notice of Claim Pursuant to Wis. Stat. § 893.80

To the Town Clerk:

PLEASE TAKE NOTICE THAT Claimants hereby provide formal notice to the Town of Laketown (hereafter “the Town”) of circumstances giving rise to a claim and further give notice of claim, including a statement of relief sought.

With this letter, Claimants notify you that certain provisions in the Town’s recently adopted Ordinance No. 22-01, titled “Concentrated Animal Feeding Operations (CAFO) Ordinance” (hereafter “the Ordinance”), are unlawful and preempted by Wis. Stat. § 93.90 (hereafter “the Siting Law”) and state regulations.

You are hereby notified of these claims pursuant to Wis. Stat. § 893.80.

Claimants’ names and addresses are as follows:

Michael and Joyce Byl
2322 County Road B
Grantsburg, WI 54840

Sara Byl
2896 230th Street
Cushing, WI 54006

Scott and Jen Matthiesen
2156 250th Avenue
Cushing, WI 54006

Merle and Janice Spoelstra
2837 230th Street
Cushing, WI 54006

The Ordinance harms Claimants as farmers, business owners, property owners, and taxpayers.

- I. **The Ordinance contains at least 16 provisions that are preempted by state law and illegal.**
 - a. **The Siting Law and its regulations preempt most local control over the permitting process for a new or expanded livestock facility, and they apply to the Ordinance.**

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. Specifically, and without limitation, Claimants believe that at least 16 provisions in the Ordinance violate and are preempted by the Siting Law and state administrative rules promulgated thereunder.

Claimants believe that the Siting Law applies to the Ordinance’s requirements for obtaining a livestock facility siting or expansion permit. 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). “The key language, ‘may not disapprove or prohibit,’ plainly contemplates all decisions on siting and expansion applications. The double negative ‘may not disapprove’ necessarily means ‘must approve.’” *Adams v. State Livestock Facilities Siting Rev. Bd.*, 2010 WI App 88, ¶ 19, 327 Wis. 2d 676, 787 N.W.2d 941, *aff’d*, 2012 WI 85. “Properly read, sub. (3)(a) directs that a political subdivision must approve a livestock siting or expansion application, unless a listed exception applies.” *Id.* “[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. So, the Siting Law applies to each of the Ordinance’s requirements for obtaining a permit for a new or expanded livestock facility.

“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.

The Ordinance purports to rely on one of those narrow exceptions, stating that the Ordinance “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. As relevant here, this 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.¹ Pursuant to Wis. Stat. § 93.90, the Department of Agriculture, Trade and Consumer Protection

¹ 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*, 2012 WI 85, ¶¶ 48–49.

(“DATCP”) promulgated state standards that are codified at Wisconsin Administrative Code ch. ATCP 51 (“ATCP 51”). *Adams*, 2012 WI 85, ¶ 7.

Claimants believe that 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, meaning this exception does *not* allow local requirements *in addition to* those state standards. In other words, this exception can apply only if a local requirement has a less-stringent direct counterpart in ATCP 51. Claimants also believe that 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.

b. Ordinance § 4.2 violates and is preempted by the Siting Law and a DATCP regulation.

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. That requirement is preempted by a DATCP regulation that 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.” ATCP § 51.06(1)(a). A municipality may require local approval only for the “expansion of a pre-existing or previously approved livestock facility.” ATCP § 51.06(2). This state regulation thus preempts Ordinance § 4.2 to the extent that the latter applies to a preexisting livestock facility that is proposing only to house a new animal species, without proposing to expand.²

c. The Ordinance’s fee sections violate and are preempted by the Siting Law and a DATCP regulation.

The Ordinance imposes several fees that are unlawful. It requires a permit applicant to: (1) pay a fee of \$1 per proposed animal unit (Ordinance § 7); (2) 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); and (3) “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). The Ordinance requires a permittee to pay “an annual renewal fee in the amount of One Dollar (\$1.00) per animal unit” (Ordinance § 14).

Those fee requirements are preempted by the Siting Law and a DATCP regulation. This 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.” 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).” ATCP § 51.30(4)(b). Read together, these

² 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). The regulations in ATCP 51 can thus preempt a local ordinance. *See Adams*, 2012 WI 85, ¶¶ 37–39.

two provisions 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.

Sections 7, 8.2, 9, and 14 of the Ordinance are preempted because state law expressly withdraws local governments' power to impose monetary requirements like these ones, because these monetary requirements are logically inconsistent with state law, because they defeat the purpose of state law, and because they violate the spirit of state law. Specifically, Ordinance § 7 is preempted by ATCP § 51.30(4) to the extent that it would require an application fee in excess of \$1,000. Ordinance §§ 8.2, 9, and 14 are preempted because those sections require fees, bonds, or securities that are prohibited by the language, purpose, and spirit of ATCP § 51.30(4) and the Siting Law.

d. The Ordinance's application requirements violate and are preempted by the Siting Law and DATCP regulations.

Ordinance § 8 imposes 11 requirements before an applicant may receive a permit. All 11 requirements are unlawful and preempted by state law.

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." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of 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 regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered "more stringent" without a direct counterpart in ATCP 51, Ordinance § 8.1.a. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town's findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.b. requires an applicant to create a "CAFO Waste Management Plan." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it is additional to the state regulations in ATCP 51. Even if this requirement has direct counterparts in ATCP 51 such that it is "more stringent" than them,³ it is still preempted because the Town's findings do not show that it is clearly necessary for protecting public health or safety.

Ordinance § 8.1.c. requires an applicant to create "Animal Population Control and Depopulation Plans." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of 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 regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered "more stringent" without a direct counterpart in

³ Cf. ATCP §§ 51.14, 51.18, and 51.20.

ATCP 51, Ordinance § 8.1.c. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town’s findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.d. requires an applicant to create a “Biosecurity and Animal Health Plan.” This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of 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 regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered “more stringent” without a direct counterpart in ATCP 51, Ordinance § 8.1.d. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town’s findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.e. requires an applicant to create an “Animal Transportation Plan.” This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of 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 regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered “more stringent” without a direct counterpart in ATCP 51, Ordinance § 8.1.e. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town’s findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.f. requires an applicant to create a “Water Use Plan.” This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it is additional to the state regulations in ATCP 51. Even if this requirement has direct counterparts in ATCP 51 such that it is “more stringent” than them,⁴ it is still preempted because the Town’s findings do not show that it is clearly necessary for protecting public health or safety.

Ordinance § 8.1.g. requires an applicant to create an “Odor and Toxic Air Pollution Prevention Plan.” This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it is additional to the state regulations in ATCP 51. Even if this requirement has direct counterparts in ATCP 51 such that it is “more stringent” than them,⁵ it is still preempted because the Town’s findings do not show that it is clearly necessary for protecting public health or safety.

Ordinance § 8.1.h. requires an applicant to create a “Community Economic, Land Use and Property Value Assessment and Impact Study.” This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of 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 regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered “more stringent” without a direct

⁴ Cf. ATCP §§ 51.18 and 51.20.

⁵ Cf. ATCP § 51.14.

counterpart in ATCP 51, Ordinance § 8.1.h. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town’s findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.i. requires an applicant to create “Construction, Fire and Road Plans.” This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of 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 regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered “more stringent” without a direct counterpart in ATCP 51, Ordinance § 8.1.i. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town’s findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.j. requires an applicant to create a “Compliance Assurance Testing, Sampling and Monitoring Plan.” This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of 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 regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered “more stringent” without a direct counterpart in ATCP 51, Ordinance § 8.1.j. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town’s findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.k. requires an applicant to create a “Compliance Assurance Plan.” This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of 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 regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered “more stringent” without a direct counterpart in ATCP 51, Ordinance § 8.1.k. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town’s findings do not show that this requirement is clearly necessary for protecting public health or safety.

II. Statement of relief sought

For the reasons stated herein, provisions in the Ordinance are unlawful and preempted by state law. The Ordinance harms Claimants. They are injured on an ongoing basis because of the Ordinance.

Accordingly, unless the Town repeals the Ordinance provisions discussed in this letter, Claimants will commence an action in the Polk County Circuit Court seeking declaratory relief and/or certiorari review, and further will seek injunctive relief preventing the Town from enforcing the provisions of the Ordinance challenged herein.

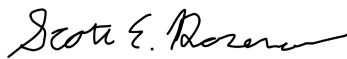
To the extent that Ordinance fees are collected by the Town, Claimants may also seek a refund of all fees so collected.

III. Conclusion

Service of this Notice of Claim does not waive any other claims or arguments to support the claims that Claimants may make.

Going forward, any communications to Claimants on this matter should be directed to my attention.

Sincerely,



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Attorney for Claimants