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COURT OF APPEALS DECISION NOTICE

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Samuel A. Christensen
Clerk of Court of Appeals

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Appeal No. 2025AP366 **Cir. Ct. No. 2024CV209**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BEN BINVERSIE AND JENNY BINVERSIE,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF EUREKA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County: ANGELINE E. WINTON, Judge. *Affirmed*.

Before Stark, P.J., Hruz, and Gill, JJ.

¶1 GILL, J. Ben and Jenny Binversie appeal from a circuit court order granting the Town of Eureka's motion to dismiss their declaratory judgment action challenging the Town's ordinance (the "Ordinance") regulating concentrated animal feeding operations ("CAFOs"). The Binversies argue that the court erred by concluding that they failed to present a justiciable controversy. They claim that they have standing as taxpayers as the Ordinance will result in municipal expenditures.

¶2 For the reasons explained below, we conclude that the Binversies do not have taxpayer standing and, therefore, failed to satisfy the legal interest requirement of justiciability. *See* ***Fabick v. Evers***, 2021 WI 28, ¶9, 396 Wis. 2d 231, 956 N.W.2d 856. The Binversies have not adequately alleged that they will suffer a pecuniary loss due to the Ordinance. The challenged provisions of the Ordinance plainly state that any hypothetical costs associated with the Town reviewing CAFO permit applications or enforcing the Ordinance are the responsibility of the permit applicants and permit holders, not taxpayers.
Accordingly, we affirm.

BACKGROUND

¶3 In March 2022, the Town adopted an ordinance titled the "[CAFO] Ordinance." Town of Eureka, Wis., Ordinance No. 22-01-0 (Mar. 10, 2022). The Ordinance states that a "new or expanded" livestock facility must apply for a CAFO permit from the town board if the facility "will operate with 700 or more animal units." Ord. § 4.1. It further states that the Ordinance does not apply to a livestock facility that was operating in the Town before March 10, 2022, unless the facility's owner "proposes to house a different livestock species or an expansion to exceed 1,000 animal units." Ord. § 4.2. The Ordinance requires that an application be signed "by one or more qualified and professionally licensed third party engineers or geoscientists who attest that they have prepared or have reviewed" several plans required by the Ordinance—for example, a "CAFO Waste Management Plan"—and that the plans meet certain requirements. Ord. § 8.1.

¶4 In addition, the Ordinance imposes several monetary conditions on CAFO applicants and permittees. The Ordinance states that a CAFO permit application "shall" be accompanied by a nonrefundable fee of $1 per proposed animal unit "for the purpose of offsetting the Town['s] costs to review and process the application." Ord. § 7. It further states that any CAFO permit issued pursuant to the Ordinance "shall be subject to an annual renewal fee" of $1 per animal unit in order to "assist" the town board in ensuring compliance with CAFO permit conditions and the Ordinance. Ord. § 14.

¶5 Furthermore, the Ordinance states that a CAFO permit applicant "shall" agree, regardless of whether a permit is subsequently approved or denied, "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." Ord. § 8.2. The Ordinance also states that a CAFO permit applicant "shall" submit "an administrative fee deposit as required by the Town Clerk" and "shall" agree "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." ***Id.***

¶6 The Ordinance further contains a section titled "Financial Surety," which states that all CAFO permits "shall require the applicant and all contractors, subcontractors, agents and representatives, 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." Ord. § 9. This section also includes several provisions concerning how the Town will determine the amount of a surety, how a CAFO applicant may

deposit a surety, and how often the Town can reevaluate the amount of a surety. Ord. § 9.1-3.

¶7 The Ordinance provides that the town board may designate one or more local authorities to enforce and ensure compliance with the Ordinance. Ord. §§ 5, 10.1, 14. It also states that the Town may impose conditions on CAFO permits, including "the operator's paying for periodic inspections and air emission, surface water, and ground water testing by consultants retained by local authorities." Ord. § 10.2.

¶8 In July 2024, the Binversies filed an action against the Town seeking a declaratory judgment that WIS. STAT. § 93.90 (2023-24),[1] known as the Livestock

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

Facility Siting Law, and the regulations promulgated thereunder, preempt the Ordinance's "monetary and application requirements." In the alternative, the Binversies sought a declaration that the Ordinance's requirements are preempted by WIS. STAT. § 92.15 and WIS. STAT. ch. 283. The Binversies also sought "an injunction against further collection under and enforcement of those requirements." The Binversies attached the Ordinance to their complaint.

¶9 According to their complaint, the Binversies are residents, taxpayers, and property owners in the Town, and the "Ordinance harms [them] as taxpayers" because it "will result in unlawful expenditures of public funds." The Binversies further alleged that the Town's "taxpayers will be responsible for some or all of the costs that [the Town] will incur in reviewing" the CAFO permit applications and enforcing the Ordinance. In addition, the Binversies alleged that because "the

reimbursement and other monetary requirements in the Ordinance are unlawful," the Town "will not get reimbursed for the taxpayer money that it spends enforcing and administering this unlawful Ordinance."[2]

[2] The Binversies conceded in their complaint that the "requirements in the Ordinance do not apply" to them.

¶10 The Town moved to dismiss the Binversies' action, arguing that the Binversies could not satisfy the requirements to maintain a declaratory judgment action. The Town asserted that the Binversies did not allege that any permitting or enforcement costs related to the Ordinance had been incurred by the Town or that such costs will be incurred by the Town in the future. Regardless, argued the Town, the Ordinance, by its express terms, shifts all permitting and enforcement costs onto CAFO applicants and permittees.

¶11 In response to the Town's motion to dismiss, the Binversies argued that the Ordinance's requirements that CAFO applicants are responsible for any costs the Town incurs to review an application and enforce the Ordinance are unlawful under the Livestock Facility Siting Law and regulations promulgated under that law. Therefore, stated the Binversies, the Town "would need to violate state law to be reimbursed for any costs it incurs under" the Ordinance, and "[t]hat means in the end [the Town's] taxpayers, not applicants, will have to shoulder the cost of enforcing" the Ordinance.

¶12 The Town disputed the Binversies' reasoning. It argued that the fact that the Binversies "believe that one day they **may** be harmed because the Town **may** one day incur costs to review and enforce permits" "run[s] completely

contrary to the plain language of the Ordinance" and is "hypothetical, abstract, and lack[s] the immediacy required to have a justiciable claim."

¶13 Following briefing and oral argument, the circuit court granted the Town's motion, concluding that the Binversies had failed to establish a justiciable controversy necessary to sustain a declaratory judgment action. The court held that by the Binversies' own admission, the requirements in the Ordinance did not apply to them; the Binversies did not allege that "anyone else" had applied for a CAFO permit under the Ordinance; and that "[n]o actual action ha[d] been taken by the Town or otherwise that would make this case ripe for adjudication." In addition, the court determined that it was unclear whether "pecuniary damages or losses" to taxpayers would occur "given that the Ordinance contains certain provisions for reimbursement from the applicant for those sums." Thereafter, the court entered a written order dismissing the Binversies' action with prejudice.

¶14 The Binversies now appeal.[3]

DISCUSSION

¶15 "A motion to dismiss tests the legal sufficiency of the complaint. Under our established methodology for review of a motion to dismiss, we accept all facts pleaded in the complaint as true." ***Hinrichs v. DOW Chem. Co.***, 2020

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[3] We pause to note that the Town's appellate brief does not comply with WIS. STAT. RULE 809.19(8)(bm), which requires a brief to "have page numbers centered in the bottom margin using Arabic numerals with sequential numbering starting at '1' on the cover." Our supreme court has explained that this pagination requirement "will match the page number to the page header applied by the eFiling system, avoiding the confusion of having two different page numbers." S. CT. ORDER 20-07, 2021 WI 37, 397 Wis. 2d xiii (eff. July 1, 2021). We admonish the Town's counsel that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

WI 2, ¶24, 389 Wis. 2d 669, 937 N.W.2d 37 (citation omitted). "However, legal conclusions asserted in a complaint are not accepted, and legal conclusions are insufficient to withstand a motion to dismiss." ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶18, 356 Wis. 2d 665, 849 N.W.2d 693. Because the Binversies attached the entire Ordinance to their complaint, we must consider the Ordinance in determining the sufficiency of the pleadings. *See* ***Peterson v. Volkswagen of Am., Inc.***, 2005 WI 61, ¶15 & n.8, 281 Wis. 2d 39, 697 N.W.2d 61 (stating that when "a document is attached to the complaint and made part thereof, it must be considered a part of the pleading, and may be resorted to in determining the sufficiency of the pleadings" (citation omitted)).

¶16 To obtain declaratory relief, a justiciable controversy must exist. ***Fabick***, 396 Wis. 2d 231, ¶9.

> A controversy is justiciable when four conditions are met: (1) "A controversy in which a claim of right is asserted against one who has an interest in contesting it"; (2) "The controversy must be between persons whose interests are adverse"; (3) "The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest"; and (4) "The issue involved in the controversy must be ripe for judicial determination."

Id. (citation omitted). The parties dispute whether the Binversies put forth sufficient allegations in their complaint to satisfy each of these conditions. However, we need only address the third condition because it is dispositive of this appeal. *See* ***Barrows v. American Fam. Ins.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

¶17 The third condition of justiciability, the legal interest requirement, "has often been expressed in terms of standing." ***Village of Slinger v. City of***

Hartford, 2002 WI App 187, ¶9, 256 Wis. 2d 859, 650 N.W.2d 81. Standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy, and we construe the law of standing liberally. ***Friends of the Black River Forest v. Kohler Co.***, 2022 WI 52, ¶¶17, 19, 402 Wis. 2d 587, 977 N.W.2d 342. "Whether a party has standing is a question of law that we review independently." ***Id.***, ¶10 (citation omitted).

¶18 Here, the Binversies claim that they "have taxpayer standing because they allege that the Ordinance is unlawful and that it will result in the expenditure of public funds." "In Wisconsin, taxpayers may challenge the illegal expenditures of public funds. In taxpayer actions, the complaining taxpayers must allege that the 'taxpayers as a class have sustained, or will sustain, some pecuniary loss.'" ***Rabiebna v. Higher Educ. Aids Bd.***, 2026 WI 20, ¶18, 420 Wis. 2d 562, 36 N.W.3d 611 (citation omitted). "Because 'a taxpayer [has] a financial interest in public funds … akin to that of a stockholder in a private corporation,' '[a]ny illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss.'" ***Id.*** (alterations in original; citation omitted).

¶19 "[T]hreatened, as well as actual, pecuniary loss can be sufficient to confer standing." ***Fabick***, 396 Wis. 2d 231, ¶11 n.5. Our supreme court has previously stated that it is "disposed toward finding that the taxpayer has sustained a direct and personal pecuniary loss." ***City of Appleton v. Town of Menasha***, 142 Wis. 2d 870, 877-78, 419 N.W.2d 249 (1988). Indeed, "[t]he fact that the loss to any one, individual taxpayer may be minimal does not defeat standing." ***Rabiebna***, 420 Wis. 2d 562, ¶18. Even so, a taxpayer does not have standing to challenge a law "merely because he or she disagrees with the legislative body. A declaratory judgment will not determine hypothetical or future rights." ***Village of Slinger***, 256 Wis. 2d 859, ¶10 (citation omitted).

¶20 According to the Binversies, the circuit court erred by granting the Town's motion to dismiss because the "court was required to accept the Binversies' allegation that the Ordinance will result in an expenditure of public funds." Moreover, the Binversies argue that even if they "had not alleged that they and other taxpayers would sustain a pecuniary loss, this allegation would be implied" pursuant to the holdings in ***Tooley v. O'Connell***, 77 Wis. 2d 422, 253 N.W.2d 335 (1977), and other cases.

¶21 We agree with the Town that the Binversies misstate the law. While the Binversies are correct that we accept all *facts* pleaded in their complaint as true for purposes of the motion to dismiss, *see* ***Hinrichs***, 389 Wis. 2d 669, ¶24, as noted above, "*legal conclusions* asserted in a complaint are not accepted" and "are insufficient to withstand a motion to dismiss," *see* ***Data Key Partners***, 356 Wis. 2d 665, ¶18 (emphasis added).

¶22 Here, the allegations in the Binversies' complaint as to standing center on the Ordinance's alleged, and potential, illegal expenditure of public funds. Therefore, whether the challenged provisions of the Ordinance will impose a cost on taxpayers, such as the Binversies, depends on what the pertinent provisions mean, which are questions of law, not fact.[4] *See* ***Thompson v. Kenosha County***, 64 Wis. 2d 673, 679-80, 221 N.W.2d 845 (1974) (holding that taxpayers had standing to challenge the constitutionality of a statute providing for the creation of a countywide assessor system because, in relevant part, the statute

provided that "the state and the county jointly finance the operation of the system" and, therefore, "the statute d[id] require expenditure of public money"); ***Kaiser v. City of Mauston***, 99 Wis. 2d 345, 360, 299 N.W.2d 259 (Ct. App. 1980) ("An allegation that the city has spent, or proposes to spend, *public funds* illegally is … sufficient to confer standing on a taxpayer." (emphasis added)), *overruled on other grounds by*, ***DNR v. City of Waukesha***, 184 Wis. 2d 178, 515 N.W.2d 888 (1994); ***Banuelos v. University of Wis. Hosps. & Clinics Auth.***, 2023 WI 25, ¶¶9, 12-14, 406 Wis. 2d 439, 988 N.W.2d 627 (stating that whether a complaint, challenging the imposition of fees for patient health care records as unlawful under a state statute, states a claim on which relief can be granted depends on what the pertinent statute means).

[4] Notably, this determination is not an adjudication on the merits of the Binversies' declaratory judgment action, which the parties agree would be inappropriate at the motion to dismiss stage for purposes of determining justiciability. *See* ***Tooley v. O'Connell***, 77 Wis. 2d 422, 434, 253 N.W.2d 335 (1977) ("The merits of plaintiffs' cause of action do not determine its justiciability.").

¶23 The Binversies' reliance on ***Tooley*** to support their argument is misplaced. In ***Tooley***, taxpayers residing in the City of Milwaukee brought a declaratory judgment action against the school board and its members, claiming that a statute governing the financing of the Milwaukee public schools was unconstitutional. ***Tooley***, 77 Wis. 2d at 427-28. The statute required the expenditure of "*public monies* for school purposes *as well as the levy and collection of taxes* to provide these monies." ***Id.*** at 438 (emphasis added).
Relying on the court's reasoning in ***Thompson***, our supreme court held that while not all of the taxpayers in the suit had children enrolled in the Milwaukee public school system, the taxpayers had standing. ***Tooley***, 77 Wis. 2d at 438-39.
According to the court, "it is inferred that [the taxpayers] will suffer or have suffered pecuniary loss because any expenditure would be illegal if the provisions are held unconstitutional." ***Tooley***, 77 Wis. 2d at 439.

¶24 Likewise, the Binversies cite ***Hart v. Ament***, 176 Wis. 2d 694, 500 N.W.2d 312 (1993), to support their argument that a mere allegation in a

complaint from a taxpayer that a government body will illegally spend taxpayer dollars is sufficient to confer taxpayer standing. In ***Hart***, taxpayers challenged Milwaukee County's decision to transfer the management of a public museum to a nonprofit corporation. ***Id.*** at 696. The County argued that the taxpayers did not have standing because the taxpayers' complaint alleged that the museum's then-current annual operating budget included revenue of over $5 million from the County's tax receipts. ***Id.*** at 698-99. In addition, the County noted that the taxpayers further alleged that during the initial five-year term of the transfer agreement, the

County would pay the nonprofit corporation the fixed sum of $4.3 million annually for the management and operation of the museum. ***Id.*** at 699.
Thus, the County argued that the taxpayers "effectively demonstrated that the challenged transaction w[ould] save taxpayer money." ***Id.***

¶25 Our supreme court rejected the County's argument that these alleged facts meant that the taxpayers did not have standing. The court held that "[t]he fact that the county's contribution to [the nonprofit corporation] will apparently be less than its contribution to the museum as a county agency does not conclusively indicate that the challenged transaction will result in tax savings to county taxpayers." ***Id.*** at 700. "To the contrary," the court stated, the nonprofit corporation "may not be able to operate the museum for less than the county operated the museum unless it reduces museum services or the quality of those services." ***Id.*** In particular, the court reasoned that "[i]f the reduction in the value of museum services is ultimately greater than the reduction in tax dollars expended to support those services, a pecuniary loss to taxpayers results." ***Id.***

¶26 Moreover, in ***Rabiebna***, which the Binversies have submitted as supplemental authority, taxpayers filed a declaratory judgment action seeking to enjoin Wisconsin's Higher Educational Aids Board and Tammie

DeVooght-Blaney from administering a grant program that provided "financial aid to students attending Wisconsin private and technical colleges who belong to specified race-, national origin-, ancestry-, or alienage-based groups." ***Rabiebna***, 420 Wis. 2d 562, ¶¶1-2. Our supreme court held that the taxpayers had standing to challenge the grant program because they alleged a pecuniary loss by claiming that the program unconstitutionally distributed "[t]axpayer funds to racially preferred groups." ***Id.***, ¶¶19-20.

¶27 In contrast to the above cases, the Town argues, we "cannot accept as true [the Binversies'] legal assertions that they have standing as taxpayers … as those assertions are directly contradicted by the express terms of the Ordinance," which was incorporated by attachment into the complaint. *See* ***Thompson***, 64 Wis. 2d at 679-80; ***Kaiser***, 99 Wis. 2d at 360; ***Banuelos***, 406 Wis. 2d 439, ¶¶9, 12-14. That is, the Town argues that the express terms of the Ordinance make clear that any hypothetical costs associated with the Town reviewing CAFO permit applications or enforcing the Ordinance are shifted to the permit applicants and permit holders, not taxpayers. Accordingly, unlike the expenditure of public funds in ***Thompson***, ***Kaiser***, ***Tooley***, and ***Rabiebna***—or the reasonably foreseeable cost to taxpayers in ***Hart***—the challenged law in this case, by its plain terms as alleged in the Binversies' complaint, is completely funded by CAFO permit applicants and permit holders and, therefore, does not "directly affect[] taxpayers" who will sustain no pecuniary loss.[5] *See* ***Thompson***, 64 Wis. 2d at 680 (citation omitted).

[5] The Binversies rely on ***Coyne v. Walker***, 2015 WI App 21, ¶11, 361 Wis. 2d 225, 862 N.W.2d 606, *aff'd*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, for the proposition that we "'must accept as true' the Binversies' allegation that the Ordinance 'will result in the expenditure of [public] funds.'"

(continued)

¶28 The Binversies do not persuasively respond to the Town's argument that the Ordinance plainly provides that CAFO permit applicants and permit holders bear the costs of reviewing permit applications and enforcing the Ordinance. The Binversies cite to allegations in their complaint that the Town "will use taxpayer money" to review CAFO permit applications and enforce the Ordinance, but they fail to reconcile these allegations with the plain terms of the Ordinance.

¶29 For example, the Binversies alleged in their complaint that the Town will use taxpayer money to compensate "any local authority described in" Ordinance §§ 5, 8.1, 10.1, and 14. However, Ordinance § 8.2 states that a CAFO permit applicant "shall" submit "an administrative fee deposit as required by the Town Clerk" and "shall" agree "to fully compensate the Town for all legal

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In ***Coyne***, the plaintiffs filed a declaratory judgment action challenging 2011 Wis. Act 21 as unconstitutional as applied to Wisconsin's State Superintendent of Public Instruction. ***Coyne***, 361 Wis. 2d 225, ¶¶1-3. In terms of standing, the plaintiffs alleged that "Act 21 will result in the disbursement of tax revenues to 'implement the unconstitutional procedures for the promulgation of administrative rules' and to 'meet the increased costs of the Department of Public Instruction.'" ***Id.***, ¶12.

On appeal, the defendants challenged the plaintiffs' standing as taxpayers, arguing that "Act 21 does not require the expenditure of public funds." ***Id.***, ¶10. We held that the defendants failed to "explain why the *allegations in the complaint*, if true," did not demonstrate that the challenged provisions of Act 21 would result in the expenditure of public funds. ***Id.***, ¶12. Notably, while the defendants argued that "[t]here must be more than just an allegation that there will be an illegal expenditure of [public] funds," we held that the defendants failed to "explain this legal assertion or supply authority for it." ***Id.***, ¶12 n.5 (citing ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992)).

Accordingly, this court's decision in ***Coyne*** is of limited value to the issue presented in this case because the relevant analysis in ***Coyne*** depended on the defendants' failure to adequately develop an argument as to why the challenged provisions of Act 21 would not result in the expenditure of public funds. For the reasons explained in this opinion, case law demonstrates that when the challenged law plainly does not require the expenditure of public funds, the requirements for taxpayer standing have not been met.

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." *See* ***Peterson***, 281 Wis. 2d 39, ¶15 & n.8. And Ordinance § 10.2 states that the Town may impose conditions on CAFO permits, including "the operator's paying for periodic inspections and air emission, surface water, and ground water testing by consultants retained by local authorities," while Ordinance § 14 states that any CAFO permit issued pursuant to the Ordinance "shall be subject to an annual renewal fee" of $1 per animal unit in order to "assist" the town board in ensuring compliance with CAFO permit conditions and the Ordinance. As the Town argues, "the Ordinance uses mandatory language making clear that no [expenditures] shall fall on taxpayers." (Formatting altered.)

¶30 The Binversies attempt to liken this case to ***Fabick***. In ***Fabick***, a taxpayer challenged two of the governor's executive orders declaring states of emergency in response to the COVID-19 pandemic. ***Fabick***, 396 Wis. 2d 231, ¶¶3, 11. Our supreme court concluded that the taxpayer had standing because it was undisputed that the National Guard had been deployed pursuant to the emergency declarations. ***Id.***, ¶11. According to the court, "[t]his expenditure of taxpayer funds gives [the taxpayer] a legally protected interest to challenge the … emergency declarations." ***Id.*** The court further noted that when the initial orders were challenged, the then-existing federal-state funding placed upon Wisconsin taxpayers the responsibility to fund 25% of the National Guard forces deployed in response to COVID-19. ***Id.***, ¶11 n.5. The court stated that "it appears the federal government may now be choosing to fund [100%] of the National Guard expenditures." ***Id.*** This fact did not change the court's conclusion regarding the taxpayer's standing because "a century's worth of precedent makes clear that threatened, as well as actual, pecuniary loss can be sufficient to confer standing," and

> [i]f National Guard funding may be altered by the stroke of the President's pen, … this status quo can certainly be altered again. Taxpayer funds have already been spent in support of National Guard deployments pursuant to these emergency powers. The imminent threat of unreimbursed costs, past and future, is sufficient to confer taxpayer standing on [the taxpayer] under the circumstances of this case.

Id.

¶31 The Binversies contend that "for similar reasons, the Ordinance might not yield full reimbursement. A permit applicant may refuse to comply with the reimbursement requirements because they are illegal or because the applicant has insufficient funds." However, unlike the undisputed allegation that public funds had already been used in ***Fabick***, there is no allegation that the Town has expended any public funds in relation to the Ordinance's challenged provisions. More to the Binversies' point, pursuant to Ordinance § 7, if a CAFO permit applicant fails to comply with the monetary requirements in the Ordinance, the Town will simply not issue a CAFO permit or further process the permit application, and there is no risk of illegal public expenditure thereafter.

¶32 The Binversies further argue that the Town's "reliance on the reimbursement provisions is misplaced" because "the Ordinance's reimbursement requirements are illegal, so taxpayers will foot the bill for virtually any money that [the Town] spends implementing the Ordinance." Stated differently, the Binversies allege that while the Ordinance does not require the expenditure of public funds on its face, it will require the expenditure of public funds once the Binversies successfully challenge the alleged illegal provisions requiring CAFO

permit applicants and permit holders to bear the costs of reviewing permit applications and enforcing the Ordinance. Once the alleged illegal provisions are deemed unlawful, argue the Binversies, the costs of reviewing permit applications and enforcing the Ordinance will then be passed to taxpayers, thus conferring standing on the Binversies and other similarly situated taxpayers.

¶33 The fundamental flaw in the Binversies' argument is that the Ordinance will not result in the *illegal* expenditure of public funds at any point, even if we accept as true their allegations that the Ordinance's challenged provisions are preempted by state law. If their challenge were successful, the expenditure of public funds to enforce any of the Ordinance's remaining, unchallenged provisions would be, according to the Binversies' complaint, lawful as the Binversies do not challenge the legality of those remaining provisions.[5] *See* ***Fabick***, 396 Wis. 2d 231, ¶10

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[5] The Binversies further allege that the Town "has already spent $3,000 to help fund a town partnership committee's creation of a model ordinance, which served as a basis for the Ordinance." Even so, there is no allegation that the $3,000 was spent illegally.

(stating that to assert taxpayer standing a plaintiff must "contest governmental actions leading to an *illegal* expenditure of taxpayer funds" (emphasis added)). And, as it stands, the Ordinance's costs are sustained entirely by CAFO permit applicants and permit holders, not taxpayers. Therefore, the Binversies have failed to sufficiently allege that taxpayers have sustained, or will sustain, some pecuniary loss. *See* ***Rabiebna***, 420 Wis. 2d 562, ¶18.

¶34 Lastly, we address whether judicial policy supports the Binversies' standing, as they contend on appeal. *See* ***Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n***, 2011 WI 36, ¶40, 333 Wis. 2d 402, 797 N.W.2d 789 (stating that

standing depends, in part, on whether judicial policy calls for protecting the interest of the party whose standing is challenged). While we agree with the Binversies that this case presents an important issue for CAFO operators and those who wish to start a CAFO operation within the Town's limits—namely, whether the Ordinance is preempted by state law—judicial policy does not support a conclusion that general taxpayers, as opposed to taxpayers who are also CAFO operators or who wish to start a CAFO operation, have standing to challenge the Ordinance.

¶35 Venture Dairy Cooperative and the Wisconsin Dairy Alliance (collectively, Venture Dairy), which filed a joint amicus curiae brief in this case, contend that judicial policy favors a conclusion that the Binversies have taxpayer standing because absent that conclusion, the Ordinance will escape judicial review. Venture Dairy argues that the Ordinance's "application process and conditions are so onerous that no large dairy farmer will even attempt to do business" in the Town.

¶36 To the extent that judicial policy in the context of standing extends to an issue evading judicial review, we disagree that our conclusion that the Binversies do not have taxpayer standing will result in the Ordinance escaping judicial review. If an entity or individual can demonstrate that they are subject to the Ordinance because they have a CAFO farm and want to expand the number of animal units, or that they would be subject to the Ordinance if they built a new CAFO farm within the Town's limits, they will likely meet the four justiciability requirements to obtain declaratory relief. *See* ***Fabick***, 396 Wis. 2d 231, ¶9. As

such, the validity of the Ordinance is not likely to escape judicial review without taxpayer standing in this case.[6]

[6] Venture Dairy also raises new arguments, with new authority, that were not raised by the Binversies or the Town in the circuit court or on appeal. The Town moved for leave to file a reply brief to Venture Dairy's amicus brief in order to address these new arguments and authorities, and we held the Town's motion in abeyance until after we had screened the case. We decline to address the new arguments and authorities raised by Venture Daily that were not raised in the circuit court, *see* ***State ex rel. Zignego v. WEC***, 2021 WI 32, ¶33, 396 Wis. 2d 391, 957 N.W.2d 208, and, further, the reply brief would not affect our decision in this appeal. Therefore, we deny the Town's motion for leave to file a reply brief.

CONCLUSION

¶37 In summary, we conclude that the circuit court did not err by granting the Town's motion to dismiss. The Binversies failed to demonstrate that a justiciable controversy exists because they do not have taxpayer standing. As we have explained, courts are not bound by legal conclusions asserted in a complaint, including allegations that a plaintiff taxpayer has standing because the challenged law will result in the illegal expenditure of public funds. Here, the Ordinance clearly, as a matter of law, mandates that any hypothetical costs associated with the Town reviewing CAFO permit applications or enforcing the Ordinance are shifted to the permit applicants and permit holders, not taxpayers. Furthermore, as we have explained, even if the Binversies were ultimately successful on the merits of their declaratory judgment action, the expenditure of public funds to enforce any of the Ordinance's remaining, unchallenged provisions would be lawful, given the Binversies' failure to allege otherwise. Accordingly, we affirm.

By the Court.—Order affirmed.

Recommended for publication in the official reports.