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CLIENT/MATTER NUMBER
121527-0106

September 5, 2023

Via Personal Service

Deanna Landwehr
Town Clerk
Town of Eau Pleine
111630 Equity Street
Stratford, Wisconsin 54484

Re: Notice of Injury and Claim Against The Town of Eau Pleine Pursuant to Wis. Stat. § 893.80

Dear Clerk Landwehr:

PLEASE TAKE NOTICE that Marathon Wind Farm LLC (including and on behalf of itself and its affiliates, "MWF") hereby gives written notice of the circumstances giving rise to its claims against the Town of Eau Pleine and its Town Board (collectively, the "Town"), MWF's claims against the Town, and an itemized statement of relief sought pursuant to Wis. Stat. § 893.80. MWF is a Delaware corporation with its principal place of business at 1501 McKinney Street, Suite 1300, Houston, TX, 77010.

MWF develops and maintains renewable energy systems, including wind energy systems. Its systems bring clean, low-cost energy to citizens of Wisconsin and other states. It has developed plans to establish wind energy systems in rural Marathon County, possibly including within the Town of Eau Pleine.

On or about June 13, 2023, the Town enacted the "Town of Eau Pleine Wind Energy Facility Licensing Ordinance," or Ordinance No. 2023-1 (the "Wind Ordinance"). The Wind Ordinance is unlawful, causes severe damage to wind energy systems providers like MWF, and must be repealed immediately.

Section 66.0401(1m) of the Wisconsin Statutes states, "No political subdivision may place any restriction, either directly or in effect, on the installation or use of a wind energy system that is more restrictive than the rules promulgated by the commission . . ." "Political subdivision" is defined as "a city, village, town, or county." Wis. Stat. § 66.0401(1e)(c). The Town is therefore a political subdivision subject to the limitations of Wis. Stat. § 66.0401(1m).

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The term “commission” in Wis. Stat. § 66.0401(1m) means the Wisconsin Public Service Commission (the “PSC”). The PSC has adopted detailed regulations relating to wind energy systems. These are codified in the Wisconsin Administrative Code Chapter PSC 128 (“PSC 128”). Relevant to this discussion, PSC 128 states, “A political subdivision may not place any restriction, either directly or in effect, on the installation or use of a wind energy system except by adopting an ordinance that complies with this chapter and [Wis. Stat. §] 66.0401, and is not more restrictive than this chapter.” Wis. Admin Code § PSC 128.03.

On its face, the Wind Ordinance is more restrictive than PSC 128. Here are some examples of the Wind Ordinance’s excessive restrictions (this list is not exhaustive):

	Wind Ordinance	PSC Chapter 128
Noise Limits (Maximum)	35 decibels (Section 6-1.7), enforceable through shutdown orders (Section 8-4)	50 decibels (6am-10pm) 45 decibels (10pm-6am) (PSC 128.14(3))
Minimum Setbacks	From the property line, the greater of: One mile; or Ten times the turbine height. (Section 6-4)	From occupied community buildings or nonparticipating residences, the lesser of: 1,250 feet or 3.1 times the maximum blade tip height From participating residences, nonparticipating property lines, public rights-of-way, and overhead communication/transmission lines: 1.1 times the maximum blade tip height. (PSC 128.13)
Monetary Compensation	Wind Energy System (“WES”) Applicant must guarantee there will no loss in value to any real property within <u>2</u> miles of the WES, and must provide assurances to property	A WES operator must provide annual compensation to a nonparticipating residence within <u>0.5</u> miles of the facility. Assuming the facility has three or more turbines, the annual



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	Wind Ordinance	PSC Chapter 128
	owners that will have protection from losses. (Section 7.4)	payment to each residence must \$1,000 plus an inflation factor. (PSC 128.33(3))
Liability Insurance	Town and its officers, employees, agents, etc., must be included as additional insureds on the WES's required general liability policy. (Section 7-6)	Only turbine host property owners must be named as additional insureds on the required general liability policy. (PSC 128.18(3)(c))
Environmental Impact Statement	Requires an Environmental Impact Study (EIS), with comments solicited from the WDNR, WDOT, WDHS, USFWS, and USACE. (Section 6-3)	PSC 128 does not require any EIS for projects subject to municipal approval, since the Wisconsin Environmental Policy Act (WEPA) only applies to state agencies and all WDNR permits required for the project are "integrated actions" not requiring an EIS pursuant to Wis. Admin. Code NR 150.20.
Design Criteria	Prohibition on signage (Section 7-3.C) Siting requirements regarding interference with television and other broadcasts, and requirements to move turbines if found to cause interference (Section 7-3.D)	No similar prohibition Requires use of reasonable and "commercially available" means to remedy any interference with commercial or private communications (PSC 128.16)
Indemnification of Town Board	Requires applicant to indemnify Town for the construction, operation, maintenance, repair, removal etc. of the WES.	A WES is only required to indemnify the owners of the property on which the facility is located for any damages or injury caused by the construction,



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	Wind Ordinance (Section 7-7)	PSC Chapter 128 operation, or decommissioning of the facility. (PSC 128.11(2))
Criteria for Permit Issuance	Includes subjective criteria related to whether WES is contrary to a zoning designation, presents a net economic liability to the community, presents risks to public health, presents risks to wildlife or regional ecosystems, changes the character of an area, impacts radar systems, impacts use of restricted air space or a military installation. (Section 7-10)	If application complete, a political subdivision may not unreasonably deny an application for a wind energy system, or impose unreasonable conditions as a part of an approval of a wind energy system. (PSC 128.32(2))
Construction Damage	Requires reimbursement to the Wisconsin DOT and Town for damage to roads caused by construction or decommissioning of WES (Section 8-3)	No similar provisions in PSC 128.
Environmental Monitoring	Requires post-construction studies funded by Applicant through Escrow Account as well as reporting requirements (Section 8-5)	No similar provisions in PSC 128.
Decommissioning	Requires decommissioning based on condemnation by "state building codes official" or after 3 consecutive months of non-	No condemnation provision: decommissioning only required after 540 days of continuous non-generation or within 360 days of the



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	Wind Ordinance	PSC Chapter 128
	generation; decommissioning required within 3 months	end of useful life of a wind generation system.
	(Section 8-6)	(PSC 128.19)

Thus, many key provisions of the Wind Ordinance violate both Wis. Stat. § 66.0401(1m) and Wis. Admin Code § PSC 128.03. The violations render the entire Wind Ordinance unlawful. Controlling Wisconsin case law supports this result. See *Ecker Bros. v. Calumet County*, 2009 WI App 112, 321 Wis. 2d 51, 772 N.W.2d 240 (Wis. Stat. § 66.0401 “is a state legislative restriction that expressly forbids political subdivisions from regulating . . . wind energy systems”).

The Wind Ordinance is not saved by virtue of the Town having granted itself “village powers” before enacting the ordinance. Wisconsin courts have long held that villages have “no power to deal by way of chapter ordinance with matters which are primarily of state-wide concern.” *Van Gilder v. City of Madison*, 222 Wis. 58, 83, 267 N.W. 25 (1936). If the state legislature has determined that a matter is of state-wide concern, that determination “is entitled to great weight.” *City of Fond du Lac v. Town of Empire*, 273 Wis. 333, 338, 77 N.W.2d 699 (1956).

MWF is directly harmed by the Wind Ordinance. The Wind Ordinance makes it effectively, if not literally, impossible to establish a wind energy system in the Town of Eau Pleine. This contravenes state law in violation of the above authority and unlawfully restricts MWF’s ability to do business in the Town.

In light of these facts and the clear unenforceability of the Wind Ordinance, MWF has a claim for, and intends to file an action seeking, a declaratory judgment to enjoin enforcement of the Wind Ordinance and to strike it from the Town’s ordinances. The Town did not have the authority to enact the Wind Ordinance and thus cannot enforce it.

MWF therefore seeks the following relief:

- 1) A declaration enjoining enforcement of the Wind Ordinance.
- 2) A declaration striking the Wind Ordinance from the Town’s ordinances.
- 3) Reimbursement of all costs allowed under applicable law.



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Please be aware that MWF is required to submit this notice to preserve its legal rights under Wisconsin law. MWF's strong preference is to find a solution that makes further legal action unnecessary and it would very much like to meet with the Town to discuss possible resolutions. For example, MWF is willing to work with the town on amending the Wind Ordinance so it complies with Wisconsin law in a manner similar to Marathon County Ord. Ch. 17.405. Please do not hesitate to reach out to me if the Town is interested in starting that dialogue. We hope that this matter may be resolved without further delay and expense.

Sincerely yours,

A handwritten signature in blue ink that reads "Matthew D. Lee".

Matthew D. Lee