THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

Brent Tweed, et al

v.

The Town of Nottingham, et al

Docket No. 218-2019-CV-00398

PLAINTIFFS' RESPONSE TO AIMICUS CURIAE NOTTINGHAM WATER ALLIANCE'S MEMORANDUM OF LAW OPPOSING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOW COME the plaintiffs, Brent Tweed and G&F Goods, LLC, and respectfully submit this memorandum in response to the filing submitted by *amicus curiae* Nottingham Water Alliance ["NWA"]. This memorandum addresses various arguments put forward by NWA in its pleading. However, the plaintiffs continue to rely primarily on their motion for summary judgment and their memorandum in support thereof to form the principal substantive request for relief and arguments urging the Court to grant summary judgment. That said, however, various arguments advanced by NWA are addressed in this responsive memorandum.

I. The Plaintiffs Have Standing to Challenge the Ordinance

NWA's argument that plaintiffs lack standing to bring this declaratory judgment action ignores a clause from the new standing language in Part I, Article 8, adopted by the voters in 2018. The recently adopted provision reads as follows:

> any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, ***or has approved spending***, public funds in violation of a law, ordinance, or constitutional provision.

NWA argues that the plaintiffs have not identified an expenditure or approved expenditure. However, NWA completely ignores the fact that the existence of the Ordinance itself constitutes approval to expend public funds enforcing it. No further legislative or budgeting action is required by the Town for it to be enforced Town officials.

NWA also argues that "[a]n ordinance which is proposed, but not yet enacted, is the functional equivalent of an ordinance which was enacted but which the municipality has never, and will never, enforce." NWA memo at 4. This is an assertion that NWA is simply in no position to make. Neither NWA, the plaintiffs, nor this Court possess a crystal ball enabling any of us to peer into the future and determine how future officials of the Town of Nottingham may act in relation to the Ordinance. Indeed, it is well established that the current individuals responsible for governing Nottingham have no authority to bind future governing or legislative town bodies. NWA's assertion that the municipality will never enforce the ordinance has no basis in fact and must be rejected. By adopting the ordinance and making it effective, the Town of Nottingham has done everything it must do in order to approve spending taxpayer funds in its enforcement.

NWA also argues that Part I, Article 8 requires:

> parties to have personal, legal or equitable rights that are adverse to one another with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." (quoting *State v. Actavis Pharma, Inc.* 170 N.H. 211, 215 (2017)(itself quoting *Duncan v. State*, 166 N.H. 630, 642-43 (2014)). While recognizing that Article 8, "grants taxpayers standing to sue without showing injury…two Constitutional standing requirements remain: parties must be adverse and the dispute must not be hypothetical.

NWA memo at 4. This contention is simply wrong. All of the authorities cited by NWA in support of this argument are cases decided before the voters amended Part I, Article 8 in 2018. The argument that the parties must have an "actual, not hypothetical" dispute

is directly contradicted by the plain language of both Part I, Article 8 and by RSA 491:22.

However, even if the requirements that the parties be adverse and the conflict be non-hypothetical survived the passage of the constitutional amendment, both of those factors are present here. The Ordinance is not hypothetical. It is a fully realized act of the Town's legislative body and it is in effect and capable of being enforced against the plaintiffs. The parties are adverse to each other because, by passing the Ordinance, the Town claims the right to control the conduct of the plaintiffs in relation to the subject matter of the Ordinance. The plaintiffs are forced to either comply with the terms of the Ordinance or risk enforcement measures being taken against them.

This is not a case in which the plaintiff seeks an "advisory opinion," as averred by NWA. In *Piper v. Meredith*, 109 N.H. 328, 330 (1969), the court found that the declaratory judgment act was not applicable because, "that act does not confer jurisdiction to give advice as to future cases." *Id. (*citing *Lisbon Village District v. Lisbon*, 85 N.H. 173, 177 (1931)). However, *Piper* involved an attempt to secure an injunction against passage of an ordinance *before* the town had adopted it. Under those circumstances, given the possibility that the ordinance might not pass, the requested judicial opinion would have been advisory in nature. Here, Nottingham's adoption of its Ordinance is a fully realized act and the ordinance is in effect and capable of being enforced against the plaintiffs

NWA's argument that this matter is not ripe for adjudication likewise ignores the inconvenient truth that New Hampshire's declaratory judgment statute and Part I, Article 8, permit precisely this kind of challenge. However, even if the court does consider NWA's ripeness claim (and it should not), the two-prong test is easily met, as

the matter is fit for judicial determination and the plaintiff will suffer hardship if the Court declines to decide the issue.

The issue to be determined is whether the town had authority under New Hampshire to adopt the Ordinance. In establishing RSA 491:22, the declaratory judgment statute, the "legislature allowed for precisely this kind of decision to be rendered by the superior court in order to permit citizens to enforce their "right and interest in the preservation of an orderly and lawful government." The government of Nottingham, with NWA cheering it along all the way, acted illegally and the plaintiffs have the right to have its actions so declared by this Court.

NWA's claim that the plaintiffs will suffer no hardship is also incorrect. The current selectmen have, apparently, asserted that they will not enforce the Ordinance. However, under the terms of the ordinance it is not only the selectmen who may enforce the Ordinance, but also any member of the public. Under the express terms of the Ordinance, "[a]ny resident of Nottingham may enforce or defend this Ordinance through an action brought in the resident's name." Ordinance at Section 2(d). Further, the Ordinance states that, "[a]ll residents of Nottingham … possess the right to enforce this Ordinance free of interference from corporations, other business entities, and governments." Ordinance Section 1(e).

Thus, the plaintiffs are faced with the prospect of enforcement by the actions of the Town, but also by any resident of the Town who, for whatever reason, seeks to enforce the provisions of the Ordinance against them. Our Supreme Court has noted the risk that private criminal prosecutions "often originate from private quarrels, are intended to vex and harass an opponent, and often do not result in a public benefit justifying the expense." *State v. Martineau*, 148 N.H. 259, 263 (2002).

This risk of vexatious litigation is particularly acute here, given the complete lack of standards defining the scope of the Ordinance's prohibitions. The Ordinance purports to establish a right to be free from all corporate activities that "infringe" on the "right to a healthy climate," a "right to clean air, water, and soil," and the "rights of ecosystems and natural communities." The Ordinance establishes no standards that guide the enforcement of these rights. Accordingly, the Ordinance permits every resident in the Town of Nottingham to establish his or her own standards and to initiate prosecution of his or her neighbors based on whatever standard he or she might decide is appropriate. Living under the threat of ungoverned, random civil prosecutions for undefined acts carrying penalties of $1000 per day, plus the cost of remediation, is a harm that the Court can and should remove for the benefit of all residents of Nottingham.

Finally, the Ordinance tells Nottingham residents that they have the right to, "enforce the rights and prohibitions of the law through non-violent direct action." Ordinance Section 2(e). Notably, the Ordinance protects "non-violent direct action," but does not limit or define this right in any way. The Ordinance does not even state that the "non-violent, direct action" must be lawful. A fair reading of the Ordinance's provisions suggests that it authorizes trespass, destruction of private property and other illegal (but "non-violent") acts. The potential for this kind of action, which seems to be encouraged by the Ordinance, is yet another reason that the Court should issue a declaratory ruling in this case.

The Federal District Court for the Northern District of Ohio recently found that Drewes Partnership, a farm, had standing to sue seeking invalidation of the Lake Erie Bill of Rights ["LEBOR"], an ordinance passed by the City of Toledo Ohio that is substantively and tonally similar to the Ordinance at issue here. The federal court

applied the federal standing requirement, which is stricter than New Hampshire's as the United States Constitution contains no language similar to our Part I, Article 8 taxpayer standing provision, to find that the plaintiff Drewes Farms satisfied the "injury-in-fact" requirement because the farm's activities arguably infringe the right of the Lake Erie watershed to "exist, flourish, and naturally evolve," and the right of Toledoans to a "clean and healthy environment." *Drewes Farm Partnership v. City of Toledo*, Case No. 3:19-CV-434-JZ, attached hereto as Exhibit #1, at page 4 of 8. The federal court also emphasized that, "the risk of suit under LEBOR is particularly high because enforcement does not depend on government prosecutors – Toledo residents may file suit themselves." Id. Thus, even under the stricter federal standing requirements, the plaintiffs would have standing, just like the plaintiffs in *Drewes Farms.*

II. THE ORDINANCE IS NOT A VALID EXERCISE OF THE TOWN'S "POLICE POWER"

NWA's argument that the Ordinance fits within the Town's police powers grossly confuses the broad police power of the State with the limited grant of authority contained in RSA 31:39. NWA relies on the case *Piper v. Meredith*,[1] 110 N.H. 291 (1970)) to make its point. It starts by repeating the bedrock proposition that "towns have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto." NWA's Memo at 7 (quoting *Piper* at 295). NWA's argument then sets about conflating the limited powers enjoyed by municipalities with the broad police powers held by the State.

Piper states that the Supreme Court has held that, "towns are empowered under the authority granted by RSA 31:39 to make by-laws for a variety of purposes which

[1] Note that two different cases captioned *Piper v. Meredith* are referenced here.

generally fall into the category of health, welfare and public safety." *Id*. at 295. The *Piper* court is thus broadly categorizing or summarizing the various kinds of powers that the State has delegated to municipalities. In its argument, NWA writes, "Among these powers expressly granted are those in RSA 31:39, allowing towns and cities to legislate for public health, safety and welfare." NWA Memo at 7 (third complete paragraph).

As its argument progresses, NWA ignores the limited nature of the authority conferred upon towns by RSA 31:39 and instead treats the categorization of "health, welfare and safety" as though municipalities possessed all of the State's police power. The very next paragraph of NWA's memorandum consists of a quote from *Piper*, which reads as follows:

> The police power is broad and 'includes such varied interests as public health, safety, morals, comfort, the protection of prosperity, and the general welfare.' *Corning Glass Works v. Max Dichter Co.*, 102 N.H. 505, 509 (1960). '(I)f it is to serve its purpose it must be of a flexible and expanding nature to protect the public against new dangers and to promote the general welfare by different methods than those formerly employed.'

Piper, 110 N.H. at 294. The use of the above quotation in this part of the argument is misleading because the quote is exclusively concerned with the *State's* police power and has nothing whatsoever to do with the powers of *municipalities*. NWA does not identify this fact in its use of the quotation. The sentence immediately preceding the above quotation reads, "[t]he governmental authority known as the police power is an inherent attribute of *state* sovereignty." *Piper*, 110 N.H. at 294 (citing *Peirce v. New Hampshire*, 5 How. (U.S.) 443, 582, 12 L.Ed. 279 (1847)(Emphasis added). The sentences immediately following the above quotation also cut against NWA's argument. They read:

> It is a long-established principle under law that towns are but subdivisions of the State and have only the powers the State grants to them. It follows that towns have such powers as are expressly granted to them by the Legislature and such as are necessarily implied or incidental

> thereto. These granted powers must be interpreted and construed in the light of the police powers of the State which grants them.

Piper, 110 N.H. at 295 (citations omitted).

Immediately after citing these quotations about the *state's* police power, NWA selects two subdivisions of RSA 31:39, RSA 31:39(a) and RSA 31:39(f), and categorizes them as statutes giving towns authority over what it claims should be construed as "commons." NWA Memo at 7-8. NWA then argues that since the subject of *Piper* involved things that could in theory be construed as "commons," and since (it argues) the Ordinance involves things that NWA claims can also be construed as "commons," that Nottingham has authority under its police power to pass the Ordinance.

The Court should not be taken in by this sleight of hand. The law is clear. Towns have such powers as are expressly granted to them by the Legislature and such as are necessarily implied or incidental thereto. NWA does not even attempt to argue that the sweeping and radical propositions contained in the Ordinance are implied or incidental to the municipal powers conferred in RSA 31:39 or elsewhere. Rather, it simply seeks to use the *Piper* court's formulation of "health, welfare and safety" to imply that a full transfer of the state's police power has occurred. The Court should reject NWA's claim that the Ordinance falls within Nottingham's municipal "police powers."

NWA includes a paragraph in this section of its memorandum that requires comment, as it cuts strongly against its argument that Ordinance fits within any conception of municipal "police powers." NWA argues that:

> For an ecosystem or a natural community to be a jural person with standing to enforce or defend the Ordinance is not such a "radical and bizarre proposition that flies in the face of existing law," as Plaintiffs allege. For example, should natural persons incorporate in the ecosystem's name that corporation would have standing to sue on its own behalf. The extension of personhood rights to a nonhuman entity is a familiar legal fiction that the law took readily to when Corporate personhood was first

> created by a headnote in *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 396 (1886).

NWA memo at 9.

First, the concept of jural personhood is indeed a common and accepted fact of long standing. However, this was not accomplished by an act of one or more municipalities. The authority to allow the creation jural persons exists as a matter of State, not local, lawmaking. Indeed, the New Hampshire legislature has been doing exactly this for a long, long time. *See generally*, RSA Chapters 292 through 303. Second, nothing in current New Hampshire law allows natural persons to "incorporate in an ecosystem's name." The fact that a state law could, at least conceivably, create such a right, and that such a legal entity could, under state law, be authorized to sue (and presumably to be sued) is irrelevant to the question of whether *Nottingha*m has authority to pass the Ordinance. But it does highlight the fact that if these ideas were to pass into law, it would have to be done by an act of the legislature and not by a municipality.

III. THE ORDINANCE IS VAGUE, OVERBROAD AND VIOLATES THE SEPARATION OF POWERS

NWA's memorandum betrays the weakness of its position concerning the obvious vagueness and overbreadth of the Ordinance. NWA writes that the Ordinance "prohibits activities that harm ecosystems, impede clean air, or otherwise pollute or destroy the necessary commons of Nottingham; namely its air, water, soil, and climate." NWA memo at 11. NWA also argues that the Ordinance becomes clear if a person simply asks himself or herself, "am I doing anything with the ***reasonable*** potential to ***spoil*** not only the earth and air on my property but also the air, soil, and water for the rest of my community?" NWA memo at 12. NWA also writes that, "the question is simply whether an activity has been shown elsewhere or previously to ***destroy***

surrounding habitats. NWA memo at 12. Soon thereafter, NWA posits that activities, "involving ***serious disturbances*** of earth, ***discharges of effluent***, ***clear-cutting or substantial paving***, or ***withdrawals*** of groundwater," are the kinds of activities that represent "threats to life sustaining resources." NWA memo at 12. NWA then contrasts these activities with "the ***dribble*** of oil from a corporate truck, the wind blowing ***particles of metal or dust*** away from a workbench, the placement of rodent ***poison*** in a store, or the chopping of a ***handful of trees*** to expand a building or yard. These activities hardly go so far as to destroy the commons and construing the Ordinance to apply to such negligible impacts would be laughable." NWA memo at 12.

While NWA may find enforcement actions based on the second set of activities to be a "laughable" prospect, it is not because of anything the Town bothered to put down in writing. Nothing in the Ordinance provides any guidance whatsoever concerning when moving earth becomes a ***"serious"*** disturbance, what level of ***"discharge"*** or effluents runs afoul of its provisions, how many trees or acres represent ***"clear-cutting,"*** how many square meters of pavement are a ***"substantial***," amount, and ***what quantity*** of withdrawal of groundwater authorizes prosecution. Likewise, it is unclear what quantity of leaking oil is merely a ***"dribble,"*** what quantity of wind-blown ***"particles of metal or dust"*** are within the safe harbor NWA claims exists, how much ***rat poison*** can be placed in a store (or elsewhere), or how many trees there are in a ***"handful."*** These provisions provide absolutely no guidance to a person seeking to follow the law about what conduct is permitted and what conduct is forbidden. There is no way for a person to know what activities are permitted and what activities are not.

In *Drewes*, the federal court found that the LEBOR, which is in many ways similar to the Ordinance, to be unconstitutionally vague and overbroad. The Court wrote as follows:

> LEBOR's environmental rights are even less clear than the provisions struck down in [cited] cases. What conduct infringes the right of Lake Erie and its watershed to "exist, flourish, and naturally evolve"? TOLEDO MUN. CODE ch. XVII, § 254(a). How would a prosecutor, judge, or jury decide? LEBOR offers no guidance. Similar uncertainty shrouds the right of Toledoans to a "clean and healthy environment." Id. § 254(b). The line between clean and unclean, and between healthy and unhealthy, depends on who you ask. Because of this vagueness, Drewes Farms reasonably fears that spreading even small amounts of fertilizer violates LEBOR. Countless other activities might run afoul of LEBOR's amorphous environmental rights: catching fish, dredging a riverbed, removing invasive species, driving a gas-fueled vehicle, pulling up weeds, planting corn, irrigating a field -- and the list goes on. LEBOR's authors failed to make hard choices regarding the appropriate balance between environmental protection and economic activity. Instead, they employed language that sounds powerful but has no practical meaning. Under even the most forgiving standard, the environmental rights identified in LEBOR are void for vagueness.

Exhibit #1 at 5-6. The federal court concluded, "This is not a close call. LEBOR is unconstitutionally vague and exceeds the power of the municipal government in Ohio." Exhibit #1 at 8.

Finally, the Ordinance grossly violates the separation of powers doctrine. The plaintiffs' argument in this regard is fully developed in its memorandum in support of summary judgment.

IV. THE STATE HAS PREEMPTED THE FIELD THAT THE ORDINANCE PURPORTS TO GOVERN.

NWA fundamentally miscomprehends preemption. On the one hand, NWA argues that, "[p]laintiffs identify no instance where a person or entity could not comply with both the ordinance and any other state or federal environmental regulation." NWA memo at 13. This suggests that NWA is asserting a municipal right to enforce heightened standards on its populace that exceed the environmental protections of state and federal law. On the other hand, NWA is clearly aware that the state's

environmental laws represent a compromise between appropriate environmental protection and lawful economic activity. NWA correctly states that:

> The Clean Water Act and other existing state and federal acts and regulations that constitute traditional environmental law operate in a field quite distinct from the Ordinance.[2] Traditional environmental statutes create "acceptable levels" of harm and immunize polluters from liability for causing that harm.

NWA Memo at 15. This is basically correct. Existing state and federal law define what level of pollution is acceptable. NWA continues, however, stating:

> Once a project has a Department of Environmental Services permit and/or if a project stays below predefined concentrations of specific pollutants, *all* activity done within those confines is legal regardless of how much destruction that project does to surrounding air, water, soil, and ecosystem.

NWA memo at 15 (emphasis added). It is simply not true that a person or corporation that receives a permit has *carte blanche* to do whatever it pleases to the surrounding environment. A permitee's conduct continues to be circumscribed by the laws of the United States, State of New Hampshire, and even municipalities to the extent that the municipality had adopted ordinances actually within the scope of its proper authority. The problem here is that the environmental arena in which the Ordinance seeks to legislate is filled by state and federal law, written by legislatures that, unlike Nottingham, made what the *Drewes* court referred to as "the hard choices regarding the appropriate balance between environmental protection and economic activity." *Supra.* The State having made those decisions, the Town is preempted from amending or changing them.

[2] This is an understatement.

V. CONCLUSION

For the forgoing reasons, and for the reasons set forth in prior pleadings, the plaintiffs respectfully urge this Court to grant summary judgment.

Respectfully Submitted
Brent Tweed and G&F Goods, LLC
By their attorneys,
Lehmann Law Office, PLLC

/s/*Richard J. Lehmann*
May 18, 2020 _____
Richard J. Lehmann (Bar No. 9339)
3 North Spring Street, Suite 200
Concord, N.H. 03301
(603) 731-5435
rick@nhlawyer.com

CERTIFICATION

I hereby certify that a copy of this pleasing was this day forwarded to opposing counsel and *amicus* counsel via the court's electronic service system.

/s/*Richard J. Lehmann*
_____
Richard J. Lehmann

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Drewes Farms Partnership,

Plaintiff,

-and-

State of Ohio,

Intervenor,

-vs-

City of Toledo,

Defendant.

Case No. 3:19 CV 434

ORDER INVALIDATING
LAKE ERIE BILL OF RIGHTS

JUDGE JACK ZOUHARY

INTRODUCTION

On a Saturday morning in August 2014, City of Toledo officials issued a warning to residents: Don't drink the water. The City water supply contained unsafe levels of a toxic substance, and pollution in Lake Erie was the culprit.[1] The water remained undrinkable for nearly three days.[2]

In response, Toledo residents began a multi-year campaign to add a Lake Erie Bill of Rights ("LEBOR") to the City Charter (Doc. 10-3 at ¶ 6). They collected over ten thousand petition signatures, triggering a February 2019 special election under Article XVIII, Section 9 of the Ohio Constitution (Doc. 41 at 37–38). LEBOR won about sixty percent of the 16,215 votes cast, so it became part of the Charter the next month (*id.* at 38).

---

[1] Emma G. Fitzsimmons, *Tap Water Ban for Toledo Residents*, N.Y. TIMES (Aug. 3, 2014), https://www.nytimes.com/2014/08/04/us/toledo-faces-second-day-of-water-ban.html.

[2] Michael Wines, *Behind Toledo's Water Crisis, a Long-Troubled Lake Erie*, N.Y. TIMES (Aug. 4, 2014), https://www.nytimes.com/2014/08/04/us/toledo-faces-second-day-of-water-ban.html.

Plaintiff Drewes Farms Partnership, which grows crops in four counties near Toledo, initiated this lawsuit the day after the election (Doc. 1 at ¶¶ 18, 21). Intervenor State of Ohio joined a few months later (Doc. 21). Both ask this Court to declare LEBOR invalid under Federal Civil Rule 12(c) and 28 U.S.C. § 2201 (Docs. 34, 35, 52, 53, 59). Defendant City of Toledo opposes (Docs. 47, 48, 56, 60). The City contends neither Drewes Farms nor the State has a right to challenge LEBOR, and it further contends LEBOR is valid. With agreement from both sides, this Court issued a Preliminary Injunction last year (Doc. 9). The Injunction prevents enforcement of LEBOR until this lawsuit ends. This Court heard oral argument at a recent Hearing (Doc. 61) and received an amicus brief from Toledoans for Safe Water, Inc. (Doc. 51).

LAKE ERIE BILL OF RIGHTS

LEBOR declares that "Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve." TOLEDO MUN. CODE ch. XVII, § 254(a). Additionally, the Charter amendment grants Toledo residents "the right to a clean and healthy environment." *Id.* § 254(b). Under LEBOR, Toledoans also "possess both a collective and individual right to self-government in their local community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights." *Id.* § 254(c). LEBOR contains no definitions or other provisions that would clarify the meaning of these rights, although it does indicate that the protected Lake Erie watershed includes "natural water features, communities of organisms, soil [sic] as well as terrestrial and aquatic sub ecosystems." *Id.* § 254(a).

"The City of Toledo, or any resident of the City," may sue to enforce the three rights enumerated in LEBOR. *Id.* § 256(b). Businesses and governments that infringe the rights "shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation." *Id.* § 256(a). LEBOR applies to businesses and

governments "in or from any jurisdiction," *id.* § 256(c), and "implementing legislation shall not be required," *id.* § 254(d). State laws, regulations, permits, and licenses are declared invalid in Toledo to the extent they conflict with LEBOR. *Id.* §§ 255(b), 257(b). LEBOR also purports to supersede federal permits and licenses. *Id.* § 255(b). The full Charter amendment is attached to this Order.

STANDING

Before analyzing LEBOR, this Court must determine whether Drewes Farms or the State has a right to bring this lawsuit. The relevant doctrine is called standing. Litigants have standing to sue only if they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Standing ensures that federal courts do not issue advisory opinions, which the United States Constitution forbids. *See Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972). Federal courts adjudicate live disputes only. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990). This lawsuit may proceed if either Drewes Farms or the State has standing, even if one or the other does not. *See Janus v. AFSCME, Council 31*, 851 F.3d 746, 748 (7th Cir. 2017) (citing *Vill. of Oakwood v. State Bank & Trust Co.*, 481 F.3d 364, 367 (6th Cir. 2007)), *rev'd on other grounds by* 138 S. Ct. 2448, 2486 (2018).

The central dispute here concerns the injury-in-fact requirement. An injury in fact is an injury that is "concrete and particularized[,] and actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation and internal quotation marks omitted). "An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Id.* (citation and internal quotation marks omitted). Likely targets of a law need not wait for prosecution to challenge its validity. *See id*.

Drewes Farms and the State satisfy the injury-in-fact requirement. LEBOR has already injured the State: at least on paper, State laws, regulations, licenses, and permits are invalid in Toledo to the extent they conflict with LEBOR. *See Maine v. Taylor*, 477 U.S. 131, 136–37 (1986). The State could also be sued under LEBOR for failing to sufficiently protect Lake Erie or for violating LEBOR's guarantee of local self-government. Drewes Farms falls within LEBOR's crosshairs, too. The business spreads fertilizer on fields in the Lake Erie watershed (Doc. 1 at ¶¶ 18, 24, 51), arguably infringing the watershed's right to "exist, flourish, and naturally evolve" and the right of Toledoans to a "clean and healthy environment." TOLEDO MUN. CODE ch. XVII, §§ 254(a), (b). The risk of suit under LEBOR is particularly high because enforcement does not depend on government prosecutors -- Toledo residents may file suit themselves. *See Driehaus*, 573 U.S. at 164.

Drewes Farms and the State also satisfy the other two standing requirements: traceability and redressability. Their LEBOR-related injuries are traceable to the City -- LEBOR is part of the City Charter. True, LEBOR was enacted by voters rather than legislators, but the City is a proper defendant in this lawsuit nevertheless. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 623 (1996); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 462–64 (1982); *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 291 (6th Cir. 1997). Additionally, a court order invalidating LEBOR would redress the alleged injuries, meaning Drewes Farms and the State satisfy the third standing requirement. Having demonstrated their right to bring this lawsuit, both litigants are entitled to an adjudication of their claims. This Court therefore analyzes LEBOR next.

DUE PROCESS

The Fourteenth Amendment to the United States Constitution protects the right to due process. An "essential" element of due process is clarity of the laws. *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (citation omitted). If a law is so vague that "persons of common intelligence

must necessarily guess at its meaning," it is unconstitutional. *Id.* (brackets and citation omitted). Heightened scrutiny applies to laws that impose criminal penalties, burden the exercise of constitutional rights, or apply a strict-liability standard. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498–99 (1982). Vague laws are unconstitutional for at least two reasons: they "may trap the innocent by not providing fair warning," and they invite arbitrary enforcement by prosecutors, judges, and juries. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). The clarity requirement also "ensures that [governmental] power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values." *Roberts*, 468 U.S. at 629.

Federal courts have invalidated municipal legislation on vagueness grounds. For example, a Cincinnati ordinance criminalized gathering on sidewalks "in a manner annoying to persons passing by." *Coates v. City of Cincinnati*, 402 U.S. 611, 611 (1971). The Supreme Court struck it down because "[c]onduct that annoys some people does not annoy others." *Id.* at 614. A Detroit-area township regulated the use of machines that keep water near boats and docks free from winter ice. *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 555 (6th Cir. 1999). These ice-free areas could not exceed a "reasonable radius." *Id.* The Sixth Circuit found the ordinance void for vagueness, in part due to the "failure to include a definition of 'reasonable.'" *Id.* at 558–59. A Columbus gun-safety ordinance met the same fate. The ordinance banned forty-six specific guns, as well as "other models by the same manufacturer . . . that have *slight* modifications or enhancements." *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 251 (6th Cir. 1994) (emphasis added) (brackets omitted). The Sixth Circuit saw "no reasoned basis" for determining what changes qualify as "slight," so it invalidated the ordinance. *Id.* at 253–54.

LEBOR's environmental rights are even less clear than the provisions struck down in those cases. What conduct infringes the right of Lake Erie and its watershed to "exist, flourish, and

naturally evolve"? TOLEDO MUN. CODE ch. XVII, § 254(a). How would a prosecutor, judge, or jury decide? LEBOR offers no guidance. Similar uncertainty shrouds the right of Toledoans to a "clean and healthy environment." *Id.* § 254(b). The line between clean and unclean, and between healthy and unhealthy, depends on who you ask. Because of this vagueness, Drewes Farms reasonably fears that spreading even small amounts of fertilizer violates LEBOR. Countless other activities might run afoul of LEBOR's amorphous environmental rights: catching fish, dredging a riverbed, removing invasive species, driving a gas-fueled vehicle, pulling up weeds, planting corn, irrigating a field -- and the list goes on. LEBOR's authors failed to make hard choices regarding the appropriate balance between environmental protection and economic activity. Instead, they employed language that sounds powerful but has no practical meaning. Under even the most forgiving standard, the environmental rights identified in LEBOR are void for vagueness.

The right of Toledoans to "self-government in their local community" is impermissibly vague as well. *Id.* § 254(c). At first blush, this provision seems to reiterate Article XVIII, Section 3 of the Ohio Constitution, which grants municipalities "authority to exercise all powers of local self-government." Unlike the Ohio Constitution, however, LEBOR imposes a fine on any business or government that violates the right. The amount of the fine is "the maximum . . . allowable under State law for that violation." *Id.* § 256(a). But Ohio law does not identify any fine for violating a right to self-government. Additionally, this right includes "the right to a system of government that protects and secures . . . human, civil, and collective rights," but the nature of those human, civil, and collective rights is anybody's guess. *Id.* § 254(c). Like LEBOR's environmental rights, this self-government right is an aspirational statement, not a rule of law.

SEVERABILITY

LEBOR contains a severability clause: "If any court decides that any . . . provision of this law is illegal . . . such decision shall not . . . invalidate any of the remaining . . . provisions of the law." *Id.* § 259. Notwithstanding the clause, however, the unconstitutional parts of LEBOR are severable from the rest only if "the severability will not fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part." *State v. Hochhausler*, 76 Ohio St. 3d 455, 464 (1996); *accord Midwest Media Prop. v. Symmes Twp.*, 503 F.3d 456, 464 (6th Cir. 2007); *State v. Dean*, 170 Ohio App. 3d 292, ¶¶ 50, 52 (2007). "Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?" *Hochhausler*, 76 Ohio St. 3d at 464 (citations omitted). If not, the entire law must fall. *Id.*

No part of LEBOR can be saved under this standard. Once the three vague rights are stripped away, the remainder is meaningless. The City urges this Court to at least leave in place LEBOR's preamble, but the preamble contains nothing to invalidate. TOLEDO MUN. CODE ch. XVII, § 253. It merely declares certain values and findings; it does not purport to create legal rights or obligations.

To be clear, several of LEBOR's other provisions fail on their own merits (*see, e.g.*, Doc. 61 at 19–21). For example, LEBOR's attempt to invalidate Ohio law in the name of environmental protection is a textbook example of what municipal government cannot do. Lake Erie is not a pond in Toledo. It is one of the five Great Lakes and one of the largest lakes on Earth, bordering dozens of cities, four states, and two countries. That means the Lake's health falls well outside the City's constitutional right to local self-government, which encompasses only "the government and administration of the internal affairs of the municipality." *In re Complaint of Reynoldsburg*, 134 Ohio St. 3d 29, ¶ 25 (2012) (citation omitted). Consequently, municipal laws enacted to protect Lake Erie are generally void if they conflict with Ohio law. *See Mendenhall v. City of Akron*, 117 Ohio St.

3d 33, ¶¶ 17–18 (2008). *See also Pa. Gen. Energy Co. v. Grant Twp.*, 139 F. Supp. 3d 706, 720 (W.D. Pa. 2015) (invalidating part of local ordinance similar to LEBOR due to conflict with Pennsylvania state law). LEBOR flagrantly violates this rule.

With careful drafting, Toledo probably could enact valid legislation to reduce water pollution. For instance, a Madison, Wisconsin ordinance restricted the use of phosphorus-containing fertilizers within city limits in 2004. *CropLife America, Inc. v. City of Madison*, 432 F.3d 732, 733 (7th Cir. 2005). "[P]hosphorus . . . contributes to excessive growth of algae and other undesirable aquatic vegetation in water bodies." *Id.* (brackets, citations, and internal quotation marks omitted). The ordinance survived a lawsuit like this one. *Id.* at 735. In contrast, LEBOR was not so carefully drafted. Its authors ignored basic legal principles and constitutional limitations, and its invalidation should come as no surprise.

CONCLUSION

Frustrated by the status quo, LEBOR supporters knocked on doors, engaged their fellow citizens, and used the democratic process to pursue a well-intentioned goal: the protection of Lake Erie. As written, however, LEBOR fails to achieve that goal. This is not a close call. LEBOR is unconstitutionally vague and exceeds the power of municipal government in Ohio. It is therefore invalid in its entirety. The Motions of Drewes Farms Partnership and the State of Ohio (Docs. 34, 35) are granted, and the City of Toledo's Cross Motions (Docs. 47, 48) are denied. The Preliminary Injunction (Doc. 9), now unnecessary, is lifted.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U.S. DISTRICT JUDGE

February 27, 2020

CHAPTER XVII
LAKE ERIE BILL OF RIGHTS

Section 253. Introduction.

We the people of the City of Toledo declare that Lake Erie and the Lake Erie watershed comprise an ecosystem upon which millions of people and countless species depend for health, drinking water and survival. We further declare that this ecosystem, which has suffered for more than a century under continuous assault and ruin due to industrialization, is in imminent danger of irreversible devastation due to continued abuse by people and corporations enabled by reckless government policies, permitting and licensing of activities that unremittingly create cumulative harm, and lack of protective intervention. Continued abuse consisting of direct dumping of industrial wastes, runoff of noxious substances from large scale agricultural practices, including factory hog and chicken farms, combined with the effects of global climate change, constitute an immediate emergency.

We the people of the City of Toledo find that this emergency requires shifting public governance from policies that urge voluntary action, or that merely regulate the amount of harm allowed by law over a given period of time, to adopting laws which prohibit activities that violate fundamental rights which, to date, have gone unprotected by government and suffered the indifference of state-chartered for-profit corporations.

We the people of the City of Toledo find that laws ostensibly enacted to protect us, and to foster our health, prosperity, and fundamental rights do neither; and that the very air, land, and water - on which our lives and happiness depend - are threatened. Thus it has become necessary that we reclaim, reaffirm, and assert our inherent and inalienable rights, and to extend legal rights to our natural environment in order to ensure that the natural world, along with our values, our interests, and our rights, are no longer subordinated to the accumulation of surplus wealth and unaccountable political power.

We the people of the City of Toledo affirm Article 1, Section 1, of the Ohio State Constitution, which states: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

We the people of the City of Toledo affirm Article 1, Section 2, of the Ohio State Constitution, which states: "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

And since all power of governance is inherent in the people, we, the people of the City of Toledo, declare and enact this Lake Erie Bill of Rights, which establishes irrevocable rights for the Lake Erie Ecosystem to exist, flourish and naturally evolve, a right to a healthy environment for the residents of Toledo, and which elevates the rights of the community and its natural environment over powers claimed by certain corporations.

(Added by electors 2-26-19)

Section 254. Statements of Law - A Community Bill of Rights.

(a) Rights of Lake Erie Ecosystem. Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve. The Lake Erie Ecosystem shall include all natural water features, communities of organisms, soil as well as terrestrial and aquatic sub ecosystems that are part of Lake Erie and its watershed.

(b) Right to a Clean and Healthy Environment. The people of the City of Toledo possess the right to a clean and healthy environment, which shall include the right to a clean and healthy Lake Erie and Lake Erie ecosystem.

(c) Right of Local Community Self-Government. The people of the City of Toledo possess both a collective and individual right to self-government in their local community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights.

(d) Rights as Self-Executing. All rights secured by this law are inherent, fundamental, and unalienable, and shall be self- executing and enforceable against both private and public actors. Further implementing legislation shall not be required for the City of Toledo, the residents of the City, or the ecosystems and natural communities protected by this law, to enforce all of the provisions of this law.

(Added by electors 2-26-19)

Section 255. Statements of Law - Prohibitions Necessary to Secure the Bill of Rights.

(a) It shall be unlawful for any corporation or government to violate the rights recognized and secured by this law. "Corporation" shall include any business entity.

(b) No permit, license, privilege, charter, or other authorization issued to a corporation, by any state or federal entity, that would violate the prohibitions of this law or any rights secured by this law, shall be deemed valid within the City of Toledo.

(Added by electors 2-26-19)

Section 256. Enforcement.

(a) Any corporation or government that violates any provision of this law shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of this law, shall count as a separate violation.

(b) The City of Toledo, or any resident of the City, may enforce the rights and prohibitions of this law through an action brought in the Lucas County Court of Common Pleas, General Division. In such an action, the City of Toledo or the resident shall be entitled to recover all costs of litigation, including, without limitation, witness and attorney fees.

(c) Governments and corporations engaged in activities that violate the rights of the Lake Erie Ecosystem, in or from any jurisdiction, shall be strictly liable for all harms and rights violations resulting from those activities.

(d) The Lake Erie Ecosystem may enforce its rights, and this law's prohibitions, through an action prosecuted either by the City of Toledo or a resident or residents of the City in the Lucas County Court of Common Pleas, General Division. Such court action shall be brought in the name of the Lake Erie Ecosystem as the real party in interest. Damages shall be measured by the cost of restoring the Lake Erie Ecosystem and its constituent parts at least to their status

immediately before the commencement of the acts resulting in injury, and shall be paid to the City of Toledo to be used exclusively for the full and complete restoration of the Lake Erie Ecosystem and its constituent parts to that status.

(Added by electors 2-26-19)

Section 257. Enforcement - Corporate Powers.

(a) Corporations that violate this law, or that seek to violate this law, shall not be deemed to be "persons" to the extent that such treatment would interfere with the rights or prohibitions enumerated by this law, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or prohibitions enumerated by this law, including the power to assert state or federal preemptive laws in an attempt to overturn this law, or the power to assert that the people of the City of Toledo lack the authority to adopt this law.

(b) All laws adopted by the legislature of the State of Ohio, and rules adopted by any State agency, shall be the law of the City of Toledo only to the extent that they do not violate the rights or prohibitions of this law.

(Added by electors 2-26-19)

Section 258. Effective Date and Existing Permit Holders.

This law shall be effective immediately on the date of its enactment, at which point the law shall apply to any and all actions that would violate this law regardless of the date of any applicable local, state, or federal permit.

(Added by electors 2-26-19)

Section 259. Severability.

The provisions of this law are severable. If any court decides that any section, clause, sentence, part, or provision of this law is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections, clauses, sentences, parts, or provisions of the law. This law would have been enacted without the invalid sections.

(Added by electors 2-26-19)

Section 260. Repealer.

All inconsistent provisions of prior laws adopted by the City of Toledo are hereby repealed, but only to the extent necessary to remedy the inconsistency.

(Added by electors 2-26-19)