

JOSEPH PETERS, TOMIKA
CULPEPPER d/b/a TJ PROPERTIES
and SALIDA PROPERTIES, LLC,

Plaintiffs,

Case No. 09CV020225

v.

CITY OF MILWAUKEE, CITY OF
MILWAUKEE COMMON COUNCIL,
CITY OF MILWAUKEE DEPARTMENT
OF NEIGHBORHOOD SERVICES and
ARTHUR DAHLBERG, COMMISSIONER,
CITY OF MILWAUKEE DEPARTMENT
OF NEIGHBORHOOD SERVICES,

Defendants.

**DEFENDANTS' REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS**

The general rule of Wisconsin Stat. §893.80(1) requires the receipt of a notice of a claim pursuant to that statute as a condition precedent to bringing an action in circuit court against a municipality. This includes causes of action seeking injunctive relief. *Johnson v. City of Edgerton*, 207 Wis.2d 343, 350, 558 N.W.2d 653 (Ct. App. 1996). One reason for this requirement is to permit the municipality time to budget for litigation. *DNR v. City of Waukesha*, 184 Wis.2d 178, 198, 515 N.W.2d 888, 895 (1994). If an exception to the general rule of notice is provided for in a statute or case law, then the notice is not required. *City of Racine v. Waste Facility Siting Board*, 216 Wis.2d 616, 620, 575 N.W.2d 712 (1998). In the event a municipality has actual notice of the both *the claim and the relief sought*, and if a court is satisfied that no prejudice arises from the lack of the proper notice of claim, the actual notice suffices. Wis. Stat.

§893.80(1)(a).

There was not a Notice of Claim filed by the plaintiffs prior to filing this action. Thus, this case should be dismissed unless the defendants had actual notice. The Plaintiffs' Brief in Opposition of the Defendants' Motion to Dismiss argues that the notice provided by the Apartment Association of Southeastern Wisconsin to the City of Milwaukee prior to the passage and implementation of the rental registration inspection program is actual notice of the claims later made by the plaintiff's in this case. In other words, do the three individual property owners named as plaintiffs in the above captioned manner have standing to assert that the Apartment Association of Southeastern Wisconsin provided actual notice to the City of Milwaukee of the possibility of litigation challenging the rental registration inspection program and thereby avoid the notice of claim requirements under Wis. Stat. §893.80(1)(a)&(b)?

THE APARTMENT ASSOCIATION OF SOUTHEASTERN WISCONSIN
IS NOT A PARTY TO THE ABOVE CAPTIONED MATTER¹

In the Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, Plaintiffs assert that they "are all members of the Apartment Association of Southeastern Wisconsin, Inc.. ("Apartment Association")". Pl. Br. at p. 2. This factual assertion is not found in the plaintiffs' complaint. Nor has any affidavit been offered by any of the three plaintiffs in support of the assertion that they are in fact members of the Apartment Association. This is important because for the remainder of the Plaintiffs' Brief in Opposition, especially in the "Facts" section and attached exhibits, the plaintiffs cite frequent communications between the Apartment

Association's president and lawyers (who happen to be the same counsel for the above-captioned plaintiffs) as if it is communication between the plaintiffs and the City of Milwaukee.

Exhibit D of Plaintiffs' Brief in Opposition notes the individuals who appeared before the Zoning, Neighborhood and Development Committee in opposition to the then-proposed ordinance. None of the named plaintiffs in the above captioned matter are mentioned attending this meeting (nor is there any allegation that they attended any other). The attached correspondence identified as Exhibit B and Exhibit C also do not name any of the named plaintiffs in the above captioned matter.

The three named plaintiffs in the above captioned matter filed a facial attack on the constitutionality of an ordinance by claiming that the ordinance is unconstitutionally vague, fatally defective, fails to provide impartial review and interferes with the constitutional rights of contract. However, the complaint does not allege that any of the named plaintiffs have been injured by the ordinance. Instead, it seems as though all three plaintiffs are just "vehemently against the legislation." (Pl. Br. at p. 5) That these named plaintiffs disagree with the law does not necessarily give them standing to sue. Property owners owning rental properties in the pilot program areas have received notices of the passage and requirements of the ordinance and the process of conducting inspections is ongoing. However, unless and until enforcement of the ordinance is conducted, this particular type of declaratory action is not ripe as the plaintiffs have suffered no injury.

The plaintiffs repeatedly assert in the Plaintiffs' Complaint and in the Plaintiffs' Response Brief in Opposition to Defendants' Motion to Dismiss that the ordinance notices are "threatening" and require property owners to evict their tenants. These assertions are based on

¹ Contrary to the assertion found at page 10 of Plaintiffs' Brief in Opposition ("based upon the vast amount of communication between *the parties* prior to the litigation being filed, the Defendants will be quite hard pressed to argue that it did not have actual

misinterpretations of the ordinance and were addressed by Judge Dugan during the hearing on the motion for temporary injunction. The ordinance speaks for itself and this court may judge for itself whether or not the ordinance is threatening.

Plaintiffs' Brief in Opposition cites to *State ex. Rel. Kuehne v. Burdette*, 2009 WI App. 119, 320 Wis.2d 784, 772 N.W.2d 225 for the proposition that the plaintiffs in this case can use the "actual" notice given by the Apartment Association some two months prior to the filing of litigation in the above-captioned litigation. It is true that *Kuehene* questioned, in dicta, whether or not the notice of claim statute applies to a constitutional challenge to a statute. ¶ 21. On the other hand, there is a long line of Supreme Court and Court of Appeals decisions cited in this Reply and in the Defendants' Motion to Dismiss in this case which seem to indicate otherwise.

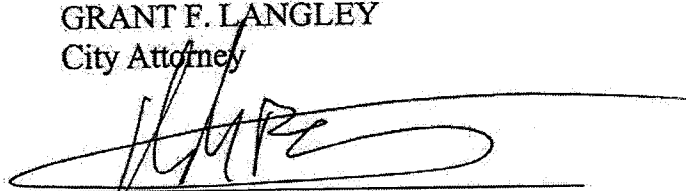
Wis. Stat. §893.80(1) requires a notice of circumstances of claim and a claim containing an itemized statement of relief sought. A party's failure to comply with §893.80(1) Wis. Stats. requires dismissal of the complaint. *Moran v. Milwaukee County*, 2005 WI App. 30, ¶ 3, 278 Wis.2d 747, 693 N.W.2d 121; *Selerski v. Village of West Milwaukee*, 212 Wis.2d 10, 20, 568 N.W.2d 9 (Ct. App. 1997); *Vanstone v. Town of Delafield*, 191 Wis.2d 586, 597, 530 N.W.2d 16 (Ct. App. 1995). If a claim has not been filed and rejected at the time the issue is raised in the suit, which is commenced before the filing and rejection of the claim, *the action shall be dismissed.* (*Probst v. Winnebago County*, 208 Wis.2d 280, 288, 560 N.W.2d 291 (Ct. App. 1997) (emphasis in decision); *Vanstone*, 191 Wis.2d at 597.

CONCLUSION

The courts are generally not in a position to routinely determine the legality of statutes and ordinances without a case or controversy. Unless and until the plaintiffs are injured somehow by the enforcement of the ordinance, there is no reason why they should not be required to comply with the notice of claim statute to proceed in their facial attack of an ordinance. Therefore, the defendants respectfully request the complaint against them be dismissed for failure to comply with the notice of claim requirements of Wis. Stat. §893.80.

Dated at Milwaukee, Wisconsin this 28 day of April, 2010.

GRANT F. LANGLEY
City Attorney



ADAM B. STEPHENS
State Bar No. 01033108
Assistant City Attorney
Attorney for Defendants

ADDRESS:
800 City Hall
200 East Wells Street
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-8550
asteph@milwaukee.gov

1053-2009-3504/157336