

JOSEPH PETERS, et al,

Plaintiffs,

v.

Case No. 09-CV-20225

CITY OF MILWAUKEE, et al,

Defendants.

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

The Plaintiffs, Joseph Peters, Tomika Culpepper d/b/a TJ Properties, and Salida Properties, LLC, by their attorneys, Maistelman & Associates, LLC, by Attorneys Michael S. Maistelman, David R. Halbrooks, and Matthew D. Lerner, hereby submit this Brief in Opposition to Defendants' Motion to Dismiss.

PROCEDURAL HISTORY

The captioned-matter was filed with the Milwaukee County Circuit Court on December 29, 2009 (113 days ago). With their lawsuit, the Plaintiffs also submitted a Notice of Motion and Motion for Temporary Restraining Order in which the Plaintiffs requested that the Defendants be restrained from enforcing § 200-53 ("Residential Rental Certificate Ordinance"), Milwaukee Code of Ordinances ("MCO"). On December 30, 2009, a hearing was held on the Plaintiffs' Motion for Temporary Restraining Order and the Circuit Court, by Judge Dugan, denied the Plaintiffs' motion.

On March 3, 2010, the parties, by counsel, appeared for the Scheduling Conference which had been noticed by the Circuit Court. At the Scheduling Conference, Attorney Stephens on behalf of the Defendants argued that the lawsuit should be dismissed based upon his belief

that the Plaintiffs failed to comply with the notice of claim requirements dictated by § 893.80, Wis. Stats. In lieu of proceeding with the Scheduling Conference, the Circuit Court set a briefing schedule for the Defendants' motion. Pursuant to the Circuit Court's briefing schedule, the Plaintiffs are now submitting this brief in opposition. The Circuit Court has set a hearing date on the Defendants' motion for May 21, 2010 (143 days after the lawsuit was filed)

FACTS

While the lawsuit was commenced on December 29, 2009, the actual history of this dispute dates back several months prior to the lawsuit being filed. The Plaintiffs are all members of the Apartment Association of Southeastern Wisconsin, Inc. ("Apartment Association"). On October 27, 2009, the City of Milwaukee's Zoning, Neighborhoods & Development Committee ("the Committee") met and for over two hours considered the proposed language of the draft Residential Rental Certificate Ordinance. Enclosed with this brief and incorporated herein as Exhibit A is a DVD containing video copies of the October 27, 2009 Committee meeting as well as both the November 3, 2009 and December 1, 2009 Common Council meetings. After two hours of discussion and appearances by numerous individuals including people there on behalf of the Apartment Association, the Committee voted to recommend approval of the draft Residential Rental Certificate Ordinance on a vote of 5-0.

Within 24 hours of the Committee's recommendation, the Apartment Association retained the services of Maistelman & Associates, LLC as to the Residential Rental Certificate Ordinance. On October 29, 2009, the Apartment Association, by its legal counsel, submitted a letter to City Attorney Grant Langley regarding its concerns about the Residential Rental Certificate Ordinance. Attached hereto and incorporated herein as Exhibit B is the October 29,

2009 letter. In the letter, the Apartment Association made its concerns about the Residential Rental Certificate Ordinance known to the City of Milwaukee. The letter details concerns including, but not limited to subjective definitions of terms within the ordinance, legal issues with the Commissioner of the Department of Neighborhood Services reviewing his own orders and decisions, and the concern about additional language proposed by Commissioner Dahlberg in an email to the Apartment Association President.

Also on October 29, 2009, Apartment Association President Tristan Pettit sent an email and letter to Common Council President Willie Hines and the 14 other members of the Common Council. Attached hereto and incorporated herein as Exhibit C are the email and letter. In his letter, Mr. Pettit also addresses concerns about the Residential Rental Certificate Ordinance, including, but not limited to problems with the draft language from Commissioner Dahlberg, the subjective definitions of terms within the Residential Rental Certificate Ordinance, the length of the program, and the handling of any appeals made to decisions under the ordinance. The letter also specifically states that the ordinance will likely "spend significant time in the courts" and also avers to a "legal review."

As a result of these concerns forwarded by the Apartment Association and some apparent apprehensions by some of the members of the Common Council, at the November 3, 2009 Common Council meeting, instead of abiding by the Committee's recommendation and approving the Residential Rental Certificate Ordinance, the Common Council opted instead to hold the matter for one cycle at the Common Council level in order to further evaluate the language of the Residential Rental Certificate Ordinance and address some of the potential problems pointed out by the Apartment Association.

Because of the issues pointed out by the Apartment Association, a meeting was scheduled for November 13, 2009 at City Hall. This meeting was attended by Alderman Kovac (a sponsor of the ordinance), Commissioner Dahlberg, Tom Mishefske (Operations Manager of DNS), a representative of Mayor Barrett's office, Alex Runner (legislative assistant to Council President Hines), and Attorneys Halbrooks and Maistelman on behalf of the Apartment Association. At this meeting, the Apartment Association again presented its concerns about the proposed ordinance. The concerns presented included that the ordinance would go into effect on January 1, 2010 and unless rental certificates were immediately issued on that date that every tenancy in the pilot areas would be illegal; that there were no standards for what constitutes a "disqualifying violation" within the ordinance; that the legislation would impair the landlord and tenant's right to contract; that it was illegal for the Commissioner of DNS to be the first step in an appellate process considering decisions made by his department; and numerous other concerns. At this meeting, counsel for the Apartment Association also told the various representatives of the City of Milwaukee that the ordinance would require litigation if all of the issues discussed at the meeting were not resolved.

Between November 13, 2009 and December 1, 2009, the Apartment Association continued to make attempts to have all of its concerns with the Residential Rental Certificate Ordinance resolved. On December 1, 2009, the Common Council again convened for its regular meeting and took up the issue of the Residential Rental Certificate Ordinance which had been held at the Common Council at its last regular meeting. This time, the Common Council passed the Residential Rental Certificate Ordinance, as amended (the amendment did not resolve all of the Apartment Association's concerns), on a 9-5 vote. On December 10, 2009, Mayor Barrett signed the Residential Rental Certificate Ordinance into law and on December 17, 2009 the City

Clerk published the newly passed ordinance. *See* printout from the City of Milwaukee's Legistar attached hereto and incorporated herein as Exhibit D.

Despite the fact that the Residential Rental Certificate Ordinance did not go into effect until January 1, 2010, the Defendants commenced sending notices to property owners regarding their scheduled inspection times, requirements of the ordinance, and rental certificate applications as early as December 28, 2009. Of great importance is that the Defendants scheduled many inspections less than 120 days after the commencement date of the ordinance.

Further, the Defendants have sent follow-up letters which served as "interim rental certificates" while the ordinance is being phased in and these letters also made threats for non-compliance with the ordinance. The chief threat being, of course, that the tenant must immediately move out of their residence. Attached hereto and incorporated herein as Exhibit E is one of the "follow-up" letters sent by the Defendants. The follow-up letter states, in part, "Please be aware that the interim certificate may be revoked if access is not provided at the time of the scheduled inspection mentioned above." As referenced *supra*, many of these scheduled inspections and compliance deadlines occur less than 120 days from the date the ordinance commenced and after the Defendants objected to the case proceeding for lack of a notice of claim.

The Plaintiffs, who are three members of the Apartment Association, all own property within one of the pilot areas where the ordinance was going into effect and all were (and continue to be) vehemently against the legislation.

APPLICABLE LAW

As the Defendants explained in their supporting brief, §§ 893.80(1)(a) and (b), Wis. Stats., explain the process for filing a notice of claim with a government or municipality.

Generally, as explained in the Defendants' brief, one must file a notice of claim within 120 days after the happening that has given rise to the complaint, and the claim is to address the relief sought from the government.

A portion of § 893.80(1)(a), Wis. Stats., in part, addresses circumstances in which a claim is not filed. § 893.80(1)(a), Wis. Stats, in part, states:

Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee...

Pursuant to § 893.80(1g), Wis. Stats., when a notice of claim is filed, the government has 120 days to disallow the claim. § 893.80(1g), Wis. Stats., further provides that if a claimant intends to then bring an action against the government, that it must do so within 6 months after the notice of disallowance or the claim would be barred.

The Wisconsin Court of Appeals, in *Kuehne v. Burdette*, 320 Wis. 2d 784, 772 N.W.2d 225 (Ct. App. 2009), held that the notice of claim requirements of § 893.80, Wis. Stats. do not always require a formal notice of claim to be filed nor is it always required for the Plaintiff or claimant to wait 120 days for a notice of disallowance from the government before proceeding with litigation. *Id.* at 794, 772 N.W.2d at 231. The Court of Appeals had doubts as to whether the requirements of § 893.80, Wis. Stats., were even applicable to the matter at hand because the municipality's actions made compliance with the statute impossible. *Id.* at 794, 772 N.W.2d at

231. The Court of Appeals further held that even if § 893.80, Wis. Stats., applied, that the claim was not barred as stated in § 893.80(1)(a), Wis. Stats., because the municipality had actual notice of the claim and the municipality suffered no prejudice as a result of the failure to provide the statutory notice.

ARGUMENT

- I. **Because the Residential Rental Certificate Ordinance was signed into law on December 10, 2009 and the ordinance went into effect on January 1, 2010, it was impossible for the Plaintiffs to comply with the notice requirements of § 893.80, Wis. Stats.**

In *Keuhne v. Burdette*, five residents of the Town of Ledgeview filed suit requesting that the Circuit Court grant an injunction against the Town in order to prevent it from holding a referendum on incorporation. *Id.* at 788, 772 N.W.2d at 228. The Town was considering incorporation and in December 2007, the Town approved a referendum to be held for February 2008, approximately two months later. *Id.* at 795, 772 N.W.2d at 231. One of the issues raised by the Town in defense of the litigation was that the plaintiffs had failed to file a notice of claim as required by § 893.80, Wis. Stats., and that this failure to file the statutorily-required notice of claim required that the case be dismissed. *Id.* at 795, 772 N.W.2d at 231.

In considering the Town's argument, the Court of Appeals wrote:

We have serious doubts whether this statute even applies under these circumstances. The Town adopted a motion to hold the referendum in December 2007, but it scheduled the referendum for February 2008 – just two months later. **It appears axiomatic to us that the Town cannot use lack of notice as a defense when the Town by its own actions made compliance with the statute impossible.** [emphasis added]. *Id.* at 795, 772 N.W.2d at 231.

In the current litigation, we have *precisely* the identical circumstance as in *Keuhne*. The City of Milwaukee adopted the legislation at issue on December 10, 2009 when Mayor Barrett

signed the Residential Rental Certificate Ordinance into law. *22 days later*, on January 1, 2010, the legislation was scheduled to go into effect.

Had the Plaintiffs filed a notice of claim with the City of Milwaukee on the ordinance's commencement date, January 1, 2010, the city would have had no legal obligation to respond or *disallow* the claim until approximately May 1, 2010. Based upon the Defendants' assertions about the notice of claim being required, the City of Milwaukee would have been able to operate under the ordinance for more than four months without any court having the ability to examine the legislation and determine its legality. This certainly creates a preposterous result and one in which property owners in the pilot areas such as the Plaintiffs are left without any remedy by which to challenge the legality of the ordinance before it is enforced upon them.

In fact, the Defendants clearly intended to operate under the ordinance regardless of the filing of a notice of claim. The Defendants began sending out notices and letters about the ordinance to property owners as early as December 28, 2009 and continued sending them even after the filing of the captioned-matter. Had the ordinance been signed into law, but the commencement date was more than 120 days after the date the ordinance was passed, the Defendants would then have a good faith argument that the Plaintiffs should have followed the notice of claim statute and waited 120 days to commence the captioned-action. However, because the Defendants' ordinance took effect 22 days after its passage and the Defendants' began sending out notices and operating under the ordinance as early as December 28, 2009, the Plaintiffs were left without any other remedy than to immediately file suit and immediately challenge the legality of the ordinance.

As the *Keuhne* court discussed, it certainly appears *axiomatic* that the Defendants cannot use lack of notice as a defense when the Defendants, by their own actions, made it impossible for

the Plaintiffs to comply with notice of claim statute. *Id.* at 795, 772 N.W.2d at 231. Equity, as the *Kuehne* court recognized, does not allow a government to run unchecked for 120 days when such a waiting period as required under § 893.80, Wis. Stats., would render a challenge to the government moot.

II. The Defendants had actual notice of the claims being made by the Plaintiffs in the current action.

In *Kuehne*, the Court of Appeals wrote that the Town had actual notice of the plaintiffs' claims on the basis that the plaintiffs' legal counsel notified the Town's counsel that the residents would likely file a challenge to the referendum on incorporation. *Id.* at 795, 772 N.W.2d at 231. The notice from the residents' counsel to the Town's counsel occurred on February 13, 2008. *Id.* at 795, 772 N.W.2d at 231. According to records obtained through CCAP, the lawsuit in *Kuehne* was filed on the very same day, February 13, 2008, that the Town's counsel was provided notice that a legal challenge would be filed. Attached hereto and incorporated herein as Exhibit F is the printout from CCAP for *Kuehne, et al v. Burdette, et al*, Brown County Case No. 08-CV-406.

Unlike in *Kuehne*, where the Court of Appeals determined that *same day* notice was enough to satisfy the requirements of § 893.80(1)(a), Wis. Stats., the Defendants in the captioned-matter have been on notice about the Plaintiffs' concerns since October 29, 2009, approximately *two months* prior to the date the current action was filed.

As described *supra*, the Plaintiffs (by and through the Apartment Association prior to the start of this litigation), made all of their concerns and objections about the Residential Rental Certificate Ordinance known to the Defendants through the October 29, 2009 letter to City Attorney Grant Langley, the October 29, 2009 letter from the Apartment Association to the Common Council, the *numerous* communications with Alderman Kovac and Commissioner

Dahlberg, and the November 13, 2009 meeting with Alderman Kovac, Commissioner Dahlberg, and other city representatives.

Based upon the vast amount of communication between the parties prior to the litigation being filed, the Defendants would be quite hard pressed to argue that they did not have actual notice of the Plaintiffs' claims.

III. The Defendants have suffered no prejudice as a result of the Plaintiffs filing the captioned action without filing a notice of claim.

In *Kuehne*, the Court of Appeals further wrote that there was no prejudice to the Town due to the residents' failure to file the statutory notice of claim. *Id.* at 795, 772 N.W.2d at 231. In its brief, the Defendants claim that the purpose of the statute requiring a notice of claim is to provide the government with an opportunity to compromise or settle the claim without going through the costs and time involved with litigation. (Def. Brief pg. 2).

However, the Defendants fail to mention that they were given *numerous* opportunities to compromise and resolve the concerns forwarded by the Plaintiffs. As described *supra*, the Plaintiff had significant correspondence, discussions, and meetings with the Defendants during which the Plaintiffs' concerns and objections were discussed and the Defendants had every opportunity to entirely resolve these issues. The Defendants failed to resolve these issues despite being provided notice of the same.

The Defendants cannot show that they have suffered any prejudice as a result of the Plaintiffs filing the captioned-matter without filing the statutory notice of claim. To date, this litigation has produced no adverse results for the Defendants. The Defendants successfully prevented the Plaintiffs from obtaining a temporary restraining order and the Residential Rental Certificate Ordinance has been in full force and effect since January 1, 2010. As with the notice

requirements discussed in Section II *supra*, the Defendants cannot prove they have suffered any prejudice as a result of this litigation commencing without a notice of claim being filed and disallowed prior thereto.

CONCLUSION

As explained in *Kuehne v. Burdette*, 320 Wis. 2d 784, 772 N.W.2d 225 (Ct. App. 2009), the Defendants' Motion to Dismiss must be denied and this case allowed to proceed. Because the City of Milwaukee passed the Residential Rental Certificate Ordinance into law only 22 days prior to the date that the ordinance was set to take affect, it was impossible for the Plaintiffs to comply with the notice of claim and disallowance timelines prior to commencing this litigation. If litigants are required to abide by the notice of claim requirements in these types of situations, the flood gates will be open for municipalities to potentially trample all over the rights of citizens as the citizens affected by the municipality's actions will have no remedy to challenge the government's actions for four months. This is precisely the reason why the *Keuhne* Court would not allow the Town to claim a defense on this basis. *Id.* at 795, 772 N.W.2d at 231. Equity requires that citizens have an immediate remedy which insures that their claims are not moot. Because the Defendants began operating under the ordinance on December 28, 2009, scheduled inspections well before the 120 days would have expired, and additionally made threats to property owners for non-compliance, as the *Keuhne* court recognized, the government cannot use the notice of claim statute to its advantage to operate above legal scrutiny.

Further, the notice of claim statute, § 893.80, Wis. Stats., in (1)(a), described *supra*, provides that failure to give the required notice does not bar a claim if the government had actual notice of the claim and the government suffered no prejudice as a result of the claim not being

filed. In *Kuehne*, the Court of Appeals determined that *same day* notice by the residents' legal counsel to the Town's legal counsel was sufficient to meet the statutory requirement of actual notice. *Id.* at 795, 772 N.W.2d at 231. In the captioned-matter, the Defendants were on notice for two months about the Plaintiffs' numerous concerns and objections to the legislation and there had been abundant communications and meetings with the Defendants about these issues. The Defendants did have actual notice of the objections and claims in this case.

Finally, the Defendants have suffered no prejudice as a result of the statutory notice of claim not being filed. The Defendants have claimed no such prejudice nor can they prove any such prejudice has been suffered.

Because it was impossible for the Plaintiffs to comply with the statutory notice of claim requirements based upon the timing of the passage and implementation of the ordinance, because the Defendants had actual notice of all of the Plaintiffs' claims and objections, and because the Defendants have suffered no prejudice as a result of statutory claim not being filed, the Defendants' Motion to Dismiss must be denied in its entirety and the case be allowed to proceed on a determination of the legality of the ordinance.

Dated at Milwaukee, Wisconsin this 21st day of April, 2010.

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