

**IN THE DISTRICT COURT OF  
LANCASTER COUNTY, NEBRASKA**

**CITY OF LINCOLN,  
NEBRASKA,  
a municipal corporation,**

**Plaintiff,**

**v.**

**INDIAN CENTER, INC., a  
Nebraska non-profit  
corporation; KEVIN  
ABOUREZK, RENEE SANS  
SOUCI, ERIN POOR, and  
KATHLEEN DANKER,**

**Defendants.**

**Case No. CI 22-3270**

**DEFENDANTS' BRIEF IN  
SUPPORT OF MOTION TO  
DISMISS**

Defendants Indian Center, Inc., Kevin Abourezk, Renee Sans Souci, Erin Poor, and Kathleen Danker (collectively, "Defendants") submit this brief in support of their Motion to Dismiss Plaintiff's Complaint pursuant to Neb. Sup. Ct. Rule § 6-1112(b)(1) and (6).

**INTRODUCTION**

Plaintiff's so-called "cause of action" in this case is nothing more than an ill-founded attempt to deny Native residents of the City of Lincoln ("Lincoln") a voice in development proceedings that threaten their sacred ceremonial grounds and violate fundamental rights of due process of all Defendants, as well as their rights to protect the land, water and air on properties in which they have an interest from environmental, aesthetic and physical harm, economic damage and degradation. Not only is this action an unjust attack on the

Defendants' lawful right to appeal, but it also has no legal basis and runs afoul of the most basic requirements of justiciability. As such, this Court must dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

### **FACTUAL BACKGROUND**

Plaintiff has filed suit against Defendants seeking the Court's advice, through declaratory judgment, about the extent of the City of Lincoln Board of Zoning Appeals' ("BZA") appellate jurisdiction. Further, Plaintiff seeks to enjoin Defendants from proceeding in their BZA appeal "until such a time as the Court has issued a final order" on Plaintiff's request for guidance on the BZA's jurisdictional limits. (Compl. at 7).

Plaintiff's Complaint comes in response to Defendants' appeal to the BZA of Lincoln Mayor Leirion Gaylor Baird's decisions to approve Resolutions and Ordinances allowing for construction of a large housing complex, including over 500 residential units, threatening the sacred ceremonial grounds of Lincoln's Native American religious practitioners. Defendants' appeal claims, in part, that the Mayor's decisions were untimely and failed to comply with the Lincoln-Lancaster County 2050 Comprehensive Plan as a result of Plaintiff's repeated refusal to consult with marginalized and underrepresented groups regarding the proposed housing development, and are thus invalid and ineffective.

Accordingly, Defendants filed their appeal challenging decisions of the Mayor, with whom the "administrative power of the city [is]

vested in . . . .” LINCOLN, NEB., CITY CHARTER art. IV, § 12. The Mayor of Lincoln is additionally responsible for “the proper conduct of the executive and administrative work and affairs of the city” and “enforc[ing] the provisions of this charter, city ordinances, and all applicable laws.” *Id.* The appeal was filed pursuant to sections of the Lincoln City Charter and Municipal Code that established the BZA’s appellate jurisdiction over “appeals where it is alleged there is an error in any order, decision, or determination made by an administrative official in the enforcement of this title.” LINCOLN, NEB., MUNICIPAL CODE ch. 27, § 75.020(a); *see also* LINCOLN, NEB., MUNICIPAL CODE ch. 27, § 75.030(a).

### ARGUMENT

The Complaint does not set forth a legally cognizable claim for relief because there is no active case or controversy requiring judicial resolution, and Plaintiff’s claim for declaratory judgment amounts to nothing more than a request for an advisory opinion from the Court. Plaintiff’s claims are non-justiciable, and as a result, this Court must dismiss the Complaint.

**I. NO CASE OR CONTROVERSY EXISTS BECAUSE PLAINTIFF DOES NOT HAVE STANDING TO REQUEST DECLARATORY RELIEF AGAINST DEFENDANTS.**

Plaintiff cites the Neb. Rev. Stat. § 25-21,149, the Uniform Declaratory Judgments Act (“Act”), as the jurisdictional basis in this case; however, the Act cannot stand alone as a basis for jurisdiction. The existence of a justiciable issue is an indispensable jurisdictional requirement to a court’s ability to grant declaratory relief. *Ryder Truck*

*Rental, Inc. v. Rollins*, 246 Neb. 250, 253 (1994) (“A court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination.”); *Ellis v. Scotts Bluff Cnty.*, 210 Neb. 495, 497 (1982) (“Our first inquiry must be whether this case, in its present posture, presents a justiciable issue, for the existence of such an issue is a fundamental requirement to a court’s exercise of its discretion to grant declaratory relief.”) “A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.” *Chase Cnty. v. City of Imperial*, 302 Neb. 395, 402 (2019). In order for a justiciable issue to exist, the plaintiff must have standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Stahmer v. Marsh*, 202 Neb. 281, 284-85 (1982) (holding where plaintiffs could not show they would benefit from declaratory judgment, no justiciable issue existed because plaintiffs lacked standing to sue).

The Supreme Court of the United States has held that the “irreducible constitutional minimum of standing” is an “essential and unchanging part of the case-or-controversy requirement” for federal courts. *Lujan*, 504 U.S. at 560. The state of Nebraska imposes the same requirement for its state courts: “A party must have standing before a court can exercise jurisdiction . . . .” *In re Application A-18503*, 286 Neb. 611, 615 (2013). Three elements must be satisfied to establish standing: (1) a party must “clearly demonstrate” that it has suffered an injury in fact (2) the injury can be fairly traced to the challenged action, and (3) that the injury is likely to be redressed by a favorable

decision from the court. *Id.* at 615-16. As Plaintiff here is unable to satisfy any of the elements required to establish standing, this Court lacks jurisdiction to decide this matter.

**A. Plaintiff cannot demonstrate that any injury would result from the proper exercise of jurisdiction by the Board of Zoning Appeals.**

To satisfy the injury requirement for standing, Plaintiff must allege an injury in fact that is “concrete in both a qualitative and temporal sense . . . distinct and palpable as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.” *Id.* (quoting *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 907 (2012)). “An injury in fact, for standing purposes, requires a more particularized harm to a more direct, identified interest.” *In re Application A-18503*, 286 Neb. at 618. Declaratory judgments, specifically, cannot be used to adjudicate hypothetical or speculative situations that may never actually occur. *Ryder Truck Rental*, 246 Neb. at 254. While federal courts have suggested that “threatened injury can satisfy standing requirements,” the Supreme Court of Nebraska has plainly declined to adopt such a rule, holding instead that the speculative claims involved in demonstrating a threatened injury cannot confer standing. *Id.* at 617-18.

In *In re Application A-18503*, appellants contested the Department of Natural Resource’s (“DNR”) dismissal of their objections to an application for appropriation of additional surface water from the Niobrara River. *Id.* at 613. Appellants based their objections upon the increased “likelihood that the Niobrara River

[would] be designated as fully appropriated” in the event the application was granted, as well as the potential for increased property taxes. 286 Neb. at 616, 619. The Supreme Court of Nebraska affirmed the DNR’s dismissal of Appellant’s objections for lack of standing, stating “[the court] cannot conclude that a party has standing because an application *might* be granted, which then *might* lead to a fully appropriated designation. To do so would be to find standing based upon speculation . . . .” *Id.* at 618 (emphasis in original). The court further found the allegations that granting that application could increase the appellant’s taxes and impact the value of his property were “both speculative, and not ‘actual or imminent.’” *Id.* at 619. The appellants were ultimately found to have failed to allege sufficient injury to confer standing.

Here, Plaintiff undoubtedly cannot satisfy the burden for demonstrating an injury in fact. Similar to the speculative claims alleged in *In re Application A-18503*, Plaintiff states “Defendants’ request for relief . . . *if granted*, would result in fundamental alteration of the system of checks and balances described in the [Lincoln City] Charter.” (Compl. ¶ 37) (emphasis added). Additionally, it alleges:

***Should*** Defendant’s Appeal be considered and granted by the BZA, and it is later adjudicated that the BZA lacked subject matter jurisdiction to have entered such a ruling, irreparable harm will occur in the interim to the City. That harm includes the ***uncertainty*** with respect to the delivery of municipal services . . . [and] serious and irreparable consequences related to the imposition and collection of real property and sales taxes.

(Compl. ¶ 39) (emphasis added).

These allegations are speculative, as they rely on the BZA exercising its jurisdiction and a harm which *may* result *if* the BZA exercises jurisdiction and *if* it is later adjudicated that the BZA lacked jurisdiction. Incredibly, even the alleged harm of “uncertainty with respect to the delivery of municipal services” is speculative in nature. Plaintiff cannot establish it has standing solely because the BZA *might* rule in favor of the Defendants, which then *might* lead to uncertain harms to the City. See *In re Application A-18503* at 618. The allegation of irreparable consequences to real property and sales taxes is neither particularized, actual nor imminent, and thus similarly insufficient to confer standing. These compounded “ifs” set forth in the Complaint have not established an injury in fact and do not confer standing.

**B. Even if Plaintiff could demonstrate an injury in fact, it is not traceable to the Defendants’ conduct.**

Given Plaintiff cannot satisfy the first element for establishing standing, the analysis need not go any further. However, even if Plaintiff could demonstrate the existence of an injury in fact, it could not trace any supposed injury to the conduct of Defendants and therefore fails to satisfy the second element for standing.

The second element requires “a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly trace[able] to the challenged action of the Defendant . . . .’” *Lujan*, 504 U.S. at 560. Even assuming, *arguendo*, that Plaintiff could establish actual injury other than those it has posited, Defendants have not

committed any acts to which an injury could be traced. In fact, as it pertains to this case, Defendants have not acted at all other than the filing their appeal with the BZA. The jurisdictional power of the BZA and any exercise thereof is created by Plaintiff's own City Charter and Municipal Code, over which it has power to amend. Therefore, any injury that might arise would be more accurately attributed to the City itself as it is the City who authorizes the BZA to hear Defendants' appeal pursuant to its' adopted provisions. Moreover, the BZA is a municipal body of the City; therefore, acts by the BZA are likewise acts of the City. Though Plaintiff bases its allegations of harm upon Defendants' very act of filing an appeal, the hypothetical injuries that may arise from the BZA's decision in the appeal are more fairly traceable to the City itself, and the plain language of Lincoln's own laws.

The language of Plaintiff's City Charter and Municipal Code outlines the appellate jurisdiction of the BZA: The Board of Zoning Appeals is authorized and "**required**" to "hear and decide upon appeals from any decision or order of the building inspector or **other officers charged with the enforcement of the zoning ordinance** in those cases where it is alleged that such decision or order is in error." LINCOLN, NEB., CITY CHARTER art. IX-B, § 10 (emphasis added); Neb. Rev. Stat. § 15-1106 (emphasis added). Furthermore, "[t]he Board of Zoning Appeals is authorized to hear and decide appeals where it is alleged there is an error in any order, decision, or determination made by an administrative official in the enforcement of this title." LINCOLN,



NEB., MUNICIPAL CODE ch. 27, § 75.020(a); *see also* LINCOLN, NEB., MUNICIPAL CODE ch. 27, § 75.030(a).

Additionally, the City Charter undeniably designates the Mayor as an administrative official charged with enforcing the City's laws, including zoning ordinances. First, the "administrative power of the city shall be vested in and exercised by a mayor." LINCOLN, NEB., CITY CHARTER art. IV, § 12. Second, "the [M]ayor shall be fully responsible for the proper conduct of the executive and administrative work and affairs of the city." *Id.* Third, the Mayor is required to "[e]nforce the provisions of this charter, city ordinances, and all applicable laws." LINCOLN, NEB., CITY CHARTER art. IV, § 12(2). Pursuant to the plain language of the City Charter, it is unquestionable that the Mayor is an administrative official.

Should Plaintiff feel that it has been harmed by the BZA's exercise of appellate jurisdiction, the harm cannot be traced to a party that simply exercised the right to appeal created by the Plaintiff's Charter and Municipal Code. Even if Plaintiff was able to establish an injury in fact resulting from the BZA's decision on appeal, such harm would be properly attributed not to the Defendants, but to the imprecise language of Plaintiff's own laws imbuing the BZA with broad jurisdictional power. Therefore, Plaintiff also fails to satisfy the second element required for standing.

**C. Plaintiff's claim is not likely to be redressed by a favorable declaration by this Court.**

Finally, to establish standing—and thus, the existence of a justiciable issue—Plaintiff must show it would be benefited by a

declaration from the Court that the BZA is not required to hear the Defendants' appeal. *See Stahmer*, 202 Neb. at 281. "Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court or tribunal's exercising its jurisdiction and remedial powers on the party's behalf." *Field Club v. Zoning Bd. of Appeals of Omaha*, 283 Neb. 847, 850 (2012). As Plaintiff has failed to demonstrate the existence of an injury that is traceable to the Defendants in this case, it does not warrant this court "exercising its jurisdiction or remedial powers on" Plaintiff's behalf. *Id.* This Court is not the appropriate forum for redress—in fact, Plaintiff is able to more adequately provide redress to its own alleged harm—by amending its laws.

**2. THE COURT IS NOT EMPOWERED TO ISSUE THE ADVISORY OPINION REQUESTED BY PLAINTIFF.**

In the absence of a valid case or controversy requiring judicial resolution, Plaintiff's complaint for declaratory judgment amounts to nothing more than an improper request for an advisory opinion from the Court. Nebraska courts are manifestly unable to issue advisory opinions: "The Nebraska Supreme Court has said numerous times that it can declare the law and its application to a given set of facts only when a justiciable controversy is presented for determination and that it is not empowered to render advisory opinions." *In re Estate of Tizzard*, 14 Neb. App. 326, 335 (Neb. Ct. App. 2006) (neither the Nebraska Court of Appeals nor county courts are empowered to issue advisory opinions).

In *Ellis v. Scotts Bluff Cnty.*, the Supreme Court of Nebraska reversed and remanded the plaintiff-appellee's claims with instructions to dismiss the action for lack of a justiciable controversy. 210 Neb. 495, 499 (1982). The court found that there was no judicially enforceable remedy for the claims presented, and thus no controversy existed that was susceptible to immediate resolution and capable of judicial enforcement—the plaintiff-appellee did not have standing. *Id.* In so holding, the court reasoned “[a]ny pronouncement by [the court] under the facts presented would merely give advice as to how and under what set of circumstances and facts the [Scotts Bluff County Board of Commissioner’s] policy should be applied, if at all, in the future.” *Id.* The Supreme Court of Nebraska refused to give such an advisory opinion.

As was the case in *Ellis*, Plaintiff here has failed to satisfy the requirements to establish standing and thus has not presented a justiciable issue. Plaintiff’s request for a “Declaratory Judgment that City of Lincoln Board of Zoning Appeals is limited in its jurisdiction” is therefore only a pretense used to obtain “advice as to how and under what set of circumstances and facts the [BZA’s jurisdiction] should be applied if at all, in the future.” *Id.* As this Court is not empowered to issue the advisory opinion Plaintiff has requested, Plaintiff’s Complaint must be dismissed.

## CONCLUSION

For the reasons set forth above, Defendants Indian Center, Inc., Kevin Abourezk, Renee Sans Souci, Erin Poor, and Kathleen Danker respectfully request that the Court dismiss the Complaint in this matter.

Respectfully submitted this 21<sup>st</sup> day of October 2022

**INDIAN CENTER, INC., a Nebraska non-profit corporation; KEVIN ABOUREZK, RENEE SANS SOUCI, ERIN POOR, and KATHLEEN DANKER, Defendants.**

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# Certificate of Service

I hereby certify that on Friday, October 21, 2022 I provided a true and correct copy of the Brief to the following:

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