UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Richard Bergmann, *et al*., Civil No. 10-2074 (JNE/FLN)

Plaintiffs,

v.

REPORT AND RECOMMENDATION

City of Lake Elmo, *et al.,*

Defendants.

Anthony B. Sanders, Jason A. Adkins for Plaintiffs.
John M. Baker, Jenny Gassman-Pines for Defendants.

THIS MATTER came before the undersigned United States Magistrate Judge on July 7, 2010 on Plaintiffs' Motion for Preliminary Injunction [#9]. The matter was referred to the undersigned for Report and Recommendation pursuant to 28 U.S.C. § 636 and Local Rule 72.1. For the reasons which follow, this Court recommends that the Plaintiffs' motion be granted.

I. BACKGROUND

Plaintiffs seek a preliminary injunction against the enforcement of a city ordinance limiting produce sales from local farms to solely the produce "produced on the premises." Specifically, Plaintiffs seek to enjoin the ordinance with respect to pumpkins and Christmas trees grown off of farm premises.

Plaintiffs here include farmer Richard Bergmann, and his three adult sons – Chad, Keith, and Troy Bergmann. Richard Bergmann and his wife own approximately 67 acres of farmland

in Lake Elmo, Minnesota known as Country Sun Farm. (R. Bergmann Aff. ¶ 3.) Richard Bergmann and his sons work for the family farm corporation, Country Sun Farm and Greenhouse, Inc. ("CSFGI"), a Minnesota corporation and a named plaintiff. (R. Bergmann Aff. ¶ 4.) The Bergmann family members also own separate parcels of land near New Richmond, Wisconsin – approximately 35 miles away from Country Sun Farm – where the family grows pumpkins. (K. Bergmann Aff. ¶ 12.)

In the fall, the Bergmann family sells pumpkins directly to customers from the premises of Country Sun Farm. (K. Bergmann Aff. ¶ 6.) From 2005 to 2009, Country Sun Farm annually sold between 27,300 and 36,700 pumpkins from farm premises. (K. Bergmann Aff. ¶ 28.) Over 90 percent of these pumpkins were grown outside of Minnesota. (K. Bergmann Aff. ¶ 29.) In 2009, close to 100 percent of the pumpkins sold from Country Sun Farm were grown in Wisconsin. (R. Bergmann Aff. ¶ 20.)

In the winter, the Bergmann family sells Christmas trees directly to customers from the premises of Country Sun Farm. (K. Bergmann Aff. ¶ 6.) From 2005 to 2009, Country Sun Farm annually sold between 934 and 1,033 Christmas trees. (K. Bergmann Aff. ¶ 28.) All of the Christmas trees sold from 2005 to 2009 were grown outside of Minnesota. (K. Bergmann Aff. ¶ 29.) In 2009, Country Sun Farm sold 1,022 Christmas trees. (K. Bergmann Aff. ¶ 14.)

Plaintiff Lynn Smith is a Christmas tree farmer in Banner Elk, North Carolina. (Smith Aff. ¶¶ 2-4.) He sells trees to buyers nationwide. *Id.* In 2009 Smith sold over a thousand trees to the Bergmanns, and he and the Bergmanns would like to make similar arrangements for 2010. (Smith Aff. ¶¶ 5-6; R. Bergmann Aff. ¶ 38.)

Plaintiff Andrew Daniels is a pumpkin farmer who runs a farm business known as

Daniels Produce near Columbus, Nebraska. (Daniels Aff. ¶¶ 2-3.) Daniels sells pumpkins nationwide; he sold pumpkins to the Bergmanns in 2004 and 2008. (Daniels Aff. ¶¶ 4-5.) He would like to sell pumpkins to the Bergmanns in 2010. (Daniels Aff. ¶ 6.)

Plaintiff Dan Fitzgerald grows Christmas trees on his family's land in Wisconsin. (R. Bergmann Aff. ¶ 22.) From 2005 to 2008, Fitzgerald sold Christmas trees to the Bergmanns. *Id.*

The Defendants here are the City of Lake Elmo and five Lake Elmo city officials sued in their official capacities.

A. The 2008 City of Lake Elmo Ordinance 08-006

The dispute here centers on the language of a 2008 Lake Elmo zoning ordinance known as Ordinance 08-006. The City's Comprehensive Plan expressly states that the city desires to preserve its rural character, open space, and green corridors while simultaneously preserving its historic village center. (Baker Aff. Ex. B.) To give effect to its comprehensive plan, Lake Elmo created a variety of different types of agricultural, residential, and business zoning districts. (Baker Aff. Ex. C.) A small area on the east-central side of the city, corresponding with the historic village center, is designated for commercial use. (Baker Aff. Ex. B at III-6 to III-7.) Much of the rest of the city is zoned for agricultural use or for public parks, with a large residential pocket in the northwest corner and smaller residential pockets scattered throughout the city. *Id.* Country Sun Farm is in an area of Lake Elmo designated as "Residential Agricultural Density," a classification representing low-density semi-rural residential development to include working farms, alternative agricultural uses, etc. (Klatt Aff. ¶ 4; Baker Aff. Ex. B at III-2.)

Leading up the enaction of the ordinance, the City of Lake Elmo worked with a planning

consultant in late 2007 and early 2008 to study the parts of the city's zoning code relating to signs and agricultural sales uses in non-commercial zoning districts (such as Country Sun Farm). (Klatt Aff. ¶¶ 10-14; Gozola Aff. ¶¶ 2-4.) The consultant examined historical and existing agricultural business operations and solicited feedback from citizens likely to be affected by proposed changes to the agricultural zoning regulations.[1] (Gozola Aff. ¶¶ 4-7, Exs. A-C; Baker Aff. Exs. L, M.) The consultant attended an April 14, 2008 meeting of the Lake Elmo Planning Commission. (Baker Aff. Ex. M.) Six members of the Commission were present at the meeting, during which the consultant reviewed the proposed revisions to the agricultural business regulations and received feedback from the Commission. (Baker. Aff. Ex. M.) The planning consultant then reported his recommendations (as revised by the Planning Commission) to the Lake Elmo City Council at a June 17, 2008 meeting. (Baker Aff. Ex. L; Klatt Aff. ¶ 11.) His report included a draft ordinance, which was adopted by the council as Ordinance 08-006 by a vote of four to zero. (*Id.*; Pl. Mem. Supp. Ex. I.)

The newly-enacted ordinance, entitled, "An Ordinance to Amend Agricultural Business Definitions and Regulations," focused on areas of Lake Elmo zoned "Agricultural," "Rural Residential," and "Open Space Preservation." (Pl. Mem. Supp. Ex. I.) The ordinance added two

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1 The parties dispute whether the Bergmanns were kept "in the loop" during the drafting of Ordinance 08-006. City officials maintain that the Bergmanns were kept in the loop during the process leading up to the enaction of the ordinance. (Klatt Aff. ¶ 11; Gozola Aff. ¶¶ 4-7, Exs. A-C.) The Bergmanns, on the other hand, state that they were kept in the dark about the ordinance and did not learn about important provisions of the ordinance until 2009. (3d K. Bergmann Aff. ¶¶ 4-8).

Relatedly, the parties also dispute whether city officials knew about Country Sun Farm's high-volume sales of produce grown outside the premises. The Bergmanns contend that the city not only knew that Country Sun Farm sold seasonal produce grown outside the farm (R. Bergmann Aff. ¶ 24) but had knowingly allowed this activity for over 30 years. (R. Bergmann Aff. ¶¶ 6-23.) In contrast, the city maintains that the language of Country Sun Farm's 2004 conditional use permit together with a 2004 letter to the city from the Bergmanns responding to concerns that Country Sun Farm was becoming more commercial than agricultural led them to believe that the Bergmanns largely sold produce grown on the premises. (Baker Aff. Exs. G, H, I, J.)

new definitions for agricultural enterprises – Agricultural Sales Business, and a subtype of Agricultural Sales Business known as an Agricultural Entertainment Business. These definitions lie at the heart of the case and are set forth in the ordinance as follows:

> "Agricultural Sales Business" – The retail sale of fresh fruits, vegetables, flowers, herbs, trees, or other agricultural, floricultural, or horticultural products *produced on the premises*. The operation may be indoors or outdoors, include pick-your-own opportunities, and may involve accessory sales of unprocessed foodstuffs; home processed food products such as jams, jellies, pickles, sauces; or baked goods and home-made handicrafts. The floor area devoted to the sale of accessory items shall not exceed 25 percent of the total floor area. No commercially packaged handicrafts or commercially processed or packaged foodstuffs shall be sold as accessory items. No activities other than the sale of goods as outlined above shall be allowed as part of the agricultural sales business.
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> "Agricultural Entertainment Business" – An agricultural sales business that combines the elements and characteristics of agriculture and tourism, which is not necessarily located in an existing building. Examples of agricultural entertainment include: corn mazes, hay rides, sleigh rides, petting farms, on farm tours, agricultural related museums, demonstrations of farming practices, techniques and methods, fee based fishing and hunting, horseback riding, nature trails, haunted barns and similar activities which are related to agriculture.

(Pl. Mem. Supp. Ex. I (Ordinance 08-006 § 1) (emphasis added).)

1. The 2009 Country Sun Farm Conditional Use Permit for an Agricultural Entertainment Business

In the fall of 2009, the Bergmanns, on behalf of Country Sun Farm, applied to the city for an update to an existing conditional use permit for their agricultural enterprise. (K. Bergmann Aff. ¶ 20, Ex. 1; Baker Aff. Ex. N.) Country Sun Farm applied for a conditional use permit for an Agricultural Entertainment Business as defined in Ordinance 08-006 and reproduced above. (Klatt Aff. ¶ 16; Baker Aff. Ex. N.) However, the conditional uses requested by Country Sun Farm were broader than the new definition of an Agricultural Entertainment Business. (Baker

Aff. Ex. N.) Specifically, the Bergmanns requested a permit allowing them to sell pumpkins and Christmas trees grown outside the premises of Country Sun Farm. (K. Bergmann Aff. ¶¶ 19-24; Baker Aff. Ex. N.) The city council rejected this request and instead prohibited seasonal sales of pumpkins and Christmas trees grown outside farm premises. (K. Bergmann Aff. Ex. 1 at ¶ 10.) The permit did allow for other business activities Country Sun Farm conducts, including hayrides, concessions, a corn maze, a petting zoo, and a haunted house. (K. Bergmann Aff. ¶ 8, Ex. 1.)

The city council discussed the Country Sun Farm conditional use permit at a December 1, 2009 city council meeting. Keith Bergmann was present and stated that Country Sun Farm had been selling pumpkins and Christmas trees grown outside farm premises for years. (Baker Aff. Ex. N at 6-7.) He further stated that these sales had never been a problem for the city and requested that the conditional use permit allow seasonal sales of produce grown off site. *Id.* The city council unanimously voted to deny this request. *Id.* at 13. However, the council also unanimously passed a motion to 1) delay enforcement against seasonal sales of Christmas trees grown outside farm premises until after January 1, 2010, and 2) to ask city staff to correspond with property owners who engage in seasonal sales to inform owners the city plans to enforce the "produced on the premises" portion of Ordinance 08-006 in 2010. *Id.* at 14. The council and the city administrator also discussed the potential for the development of a new seasonal sales permit to allow currently prohibited sales of produce grown outside farm premises. *Id.* at 14-15. To date, the record contains no evidence that the city has developed a seasonal sales permit. However, the record does show that, during 2010, city staff members have sought input from stakeholders and interested parties (including the Bergmanns) regarding alternatives to the

current "produced on the premises" restrictions. (Messelt Aff. ¶¶ 8-9.)

2. The Updated "Wayside Stand" Definition

Plaintiff Chad Bergmann grows sweet corn on his farmland in Wisconsin and has stated he would like to sell it to the public from a wayside stand outside his Lake Elmo home.[2] (C. Bergmann Aff. ¶ 6.) Prior to the initiation of this lawsuit, the definition of a "wayside stand" in Ordinance 08-006 was, "A temporary structure or vehicle used for the seasonal retail sale of agricultural goods produced by the operator of the wayside stand on-site *or on other property in Lake Elmo*." (Pl. Mem. Supp. Ex. I (emphasis added).) Ordinance 08-006's definition of "wayside" stand would prohibit Chad Bergmann from selling corn grown in Wisconsin from a wayside stand in Lake Elmo.

On July 6, 2010, the Lake Elmo City Council adopted Ordinance 08-026, entitled, "An Ordinance Amending the Definition of 'Wayside Stand.'" (2d Baker Aff. Ex. 2.) Now, pursuant to Ordinance 08-026, the "produced on the premises" language remains, but the "or on other property in Lake Elmo" language has been stricken. *Id.* Under the new ordinance, the definition of "wayside stand" is: "A temporary structure or vehicle used for the seasonal retail sale of agricultural goods, floriculture, and horticulture produced by the operator of the wayside stand on-site." *Id.* Nevertheless, it appears to the Court that the updated wayside stand definition would still prohibit Chad Bergmann from selling Wisconsin-grown sweet corn from a wayside stand on his Lake Elmo property because the corn was not produced on-site.

C. The Lake Elmo Markets in Interstate Pumpkins and Interstate Christmas Trees

Much of Lake Elmo's market in the direct sales of agricultural products to consumers

2 It is the city's position that Chad Bergmann never notified the city of his intent to sell Wisconsin-grown sweet

relies upon sales from farms. (R. Bergmann Aff. ¶ 26.) Only two commercial businesses in Lake Elmo sell retail produce. (R. Bergmann Aff. ¶ 32.) A combination grocery store and gas station known as Hagberg's Country Market, located in the village center, is the sole commercial business in Lake Elmo that sells pumpkins. (R. Bergmann Aff. ¶ 33; 2d Aff. K. Bergmann ¶ 11.) Hagberg's is in a General Business zone, and may therefore sell interstate pumpkins and other produce without restriction. (Klatt Aff. ¶ 8; Baker Aff. Ex. C.) From past personal observations of Hagberg's fall season pumpkin sales, Keith Bergmann estimates that Hagberg's sells one or two pickup truck loads per year, or between 100 to 200 pumpkins. (2d K. Bergmann Aff. ¶ 12.)

Two other farms in Lake Elmo sell pumpkins from their properties, and Richard Bergmann stated in his affidavit that to the best of his knowledge all of the pumpkins sold from these farms are grown in Lake Elmo. (R. Bergmann Aff. ¶ 28.) These other two Lake Elmo farms that sell pumpkins are much smaller than Country Sun Farm, encompassing only a few acres of land. (K. Bergmann Aff. ¶ 30.)

At least three other farms in Lake Elmo sell Christmas trees from their properties. (R. Bergmann Aff. ¶ 29; Baker Aff. Ex. N.) Country Sun Farm and Krueger's Christmas Trees are the biggest sellers of Christmas trees in Lake Elmo. (K. Bergmann Aff. ¶ 31.) Given the national scope of the Christmas tree market, it is likely that many of the trees sold from Krueger's Christmas Trees are grown outside Minnesota. (K. Bergmann Aff. ¶ 33.) City officials have stated that the third farm that sells Christmas trees obtains all of its trees from outside the premises. (Baker Aff. Ex. N at 15.)

Thus, besides Hagberg's, no commercial businesses sell pumpkins or Christmas trees in

corn from a wayside stand on his Lake Elmo property until the initiation of the instant lawsuit. (Messelt Aff. ¶ 11.)

Lake Elmo. (K. Bergmann Aff. ¶ 35.) Consequently, except for the 100 to 200 pumpkins annually sold from Hagberg's, the entirety of the Lake Elmo market in pumpkins and Christmas trees consists of pumpkins and Christmas trees sold from farms.

Although undeveloped land exists within commercial zoning districts where interstate produce may be sold without restriction, there is no evidence in the record that this land is likely to be developed for the purpose of selling interstate pumpkins, interstate Christmas trees, or any other interstate produce. (Klatt Aff. ¶ 9; Baker Aff. Exs. V, F, and C at 2-3 and 77.) It is also unlikely that Hagberg's will begin selling more pumpkins even if Country Sun Farm is no longer allowed to sell pumpkins grown outside farm premises. (E. Bergmann Aff. ¶¶ 4-5.) Plaintiffs contend that if Ordinance 08-006 is enforced, the Lake Elmo markets in interstate pumpkins and interstate Christmas trees will be destroyed.

II. CONCLUSIONS OF LAW

Under the Eighth Circuit's well-established *Dataphase* test, preliminary injunctive relief depends upon a "flexible" consideration of: 1) the threat of irreparable harm to the moving party; 2) balancing potential harm with any injury an injunction would inflict on other interested parties; 3) the probability that the moving party will succeed on the merits; and 4) the effect on the public interest. *Dataphase Sys., Inc., v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc); *see also Planned Parenthood Minnesota, et al. v. Rounds*, 530 F.3d 724, 729 n.3 (8th Cir. 2008) (en banc). The party seeking injunctive relief bears the complete burden of proving all of the *Dataphase* factors and persuading the Court of the propriety of a preliminary injunction. *Watkins, Inc. v. Lewis*, 346 F.3d 841, 846 (8th Cir. 2003); *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987).

As discussed below, the Court concludes that the issuance of the preliminary injunction here turns on the third *Dataphase* factor – the probability that Plaintiffs will succeed on the merits of their dormant Commerce Clause claims. As Plaintiffs seek a preliminary injunction of enforcement of a governmental action, the proper test for the third *Dataphase* factor is whether the Plaintiffs are "likely to prevail on the merits." *Rounds*, 530 F.3d at 733; *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). This "likely to prevail" standard is to be distinguished from the "fair chance of prevailing" test that is to be applied where a preliminary injunction is sought to enjoin something other than government action. *Rounds*, 530 F.3d at 732-33. A "fair chance of prevailing" has been described as a chance that is something less than 50 percent. *Id.* at 730. The "likely to prevail" standard is a more rigorous standard that "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." [3] *Id.* at 732 (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)). Thus, the Court must first determine whether Plaintiffs here make a threshold showing that they are likely to prevail on the merits, and then proceed to weigh the other *Dataphase* factors. *Id.*

A. Likelihood of Plaintiffs' Success on the Merits

Before conducting the analysis as to whether Plaintiffs successfully make a threshold

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3 In *Rounds*, a state statute – not a municipal ordinance – was before the Eighth Circuit. However, the court in *Rounds* noted that where preliminary injunctions are sought to enjoin city ordinances, courts examine circumstances surrounding such government actions to determine to what extent the challenged action represents "the full play of the democratic process" and, thus, "deserves the deference of the traditional test." *Rounds*, 530 F.3d 724, 733 n.6 (citing *Able v. United States*, 44 F.3d 128, 131-32 (2d Cir. 1995)). Based on the fact that the city hired a consultant to obtain citizen feedback, the fact that the elected city Planning Commission reviewed and provided feedback on the proposed ordinance, and the fact that the elected Lake Elmo City Council discussed the ordinance at a public hearing and subsequently voted to approve the ordinance, the Court finds that Ordinance 08-006 represents the full play of the municipal democratic process and therefore must be scrutinized under the more rigorous "likely to

showing that they are likely to prevail on the merits, the Court strongly re-emphasizes that at this stage in the proceeding the Court does not decide whether the Plaintiff will ultimately win the case. *See Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991) (citing *O'Connor v. Peru State College*, 728 F.2d 1001, 1002 (8th Cir. 1984)). That said, the Court does find that Plaintiffs provide evidence sufficient to establish a threshold showing that they are likely to prevail on the merits.

Plaintiffs' main argument is that Lake Elmo Ordinance 08-006 limiting sales from farms to only that produce "produced on the premises" is unconstitutional under the dormant Commerce Clause doctrine because the ordinance discriminates against interstate commerce.[4] Stated more specifically, Plaintiffs argue that because Lake Elmo's ordinance restricts sales of pumpkins and Christmas trees from farms to only those pumpkins and Christmas trees grown on the premises, the ordinance discriminates in effect against interstate commerce. (Pl. Reply Mem. at 6.) As stated by the U.S. Supreme Court in *C & A Carbone, Inc., et al. v. Town of Clarkstown*, two lines of dormant Commerce Clause analysis exist: 1) whether the ordinance discriminates against interstate commerce; and 2) whether the ordinance imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Carbone*, 511 U.S. 383, 389-90 (1994) (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624

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prevail" test. (Baker Aff. Exs. L, M, N; Gozola Aff. ¶¶ 2-7; Klatt Aff. ¶¶ 11-14.)

4 Plaintiffs initially argued that Ordinance 08-006 discriminates against interstate commerce 1) facially, 2) in purpose, and 3) in effect. (Pl. Mem. Supp. at 16); *Hazeltine*, 340 F.3d at 593. In light of the Lake Elmo City Council's passage of Ordinance 08-026 on July 6, 2010 amending the definition of "wayside stand," Plaintiffs concede that the city's code does not facially discriminate against interstate commerce. (Pl. Reply Mem. at 4.) Additionally, with respect to purposeful discrimination against interstate commerce, the Court assumes without deciding that the purpose of Ordinance 08-006's "produced on the premises" language is to preserve rural character by placing a natural limit on the amount of commercial activity that could exist on a farm within a Residential Agricultural District. Therefore, the Court will only analyze Plaintiffs' arguments with respect to discrimination in effect.

(1978) (discrimination); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (excessive burden)); *see South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003). As in *Carbone*, the Court here finds that the ordinance discriminates against interstate commerce and the Court need not reach the second "excessive burden" line of analysis. 511 U.S. at 390. The first step in the discrimination analysis, then, is to determine whether the ordinance discriminates against out-of-state articles. *SDDS, Inc. v. South Dakota*, 47 F.3d 263, 267 (8th Cir. 1995). The second step is to apply the appropriate level of scrutiny. *Id.* at 268.

The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests, and it is well-settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow. *Carbone*, 511 U.S. at 389, 394; *see NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937). A key factor in the Court's analysis must therefore be whether, in practical effect, the ordinance at issue will impede the free flow of interstate commerce in pumpkins and Christmas trees. *Carbone*, 511 U.S. at 394. The ordinance here, if enforced, would protect pumpkins and Christmas trees grown on Lake Elmo farms from competition by way of prohibiting the sale from Lake Elmo farms of interstate pumpkins and interstate Christmas trees. This framework results in a government-granted advantage to pumpkins and Christmas trees grown on Lake Elmo farms over pumpkins and Christmas trees grown in other states. Because the ordinance obtains its stated goal of protecting rural character by depriving out-of-state produce of access to the local Lake Elmo market, the ordinance unconstitutionally discriminates against interstate commerce.[5]

5 Additionally, the Court notes that it is immaterial that that the ordinance also prohibits non-Lake Elmo Minnesota produce from being sold from Lake Elmo farms. *Carbone*, 511 U.S. at 391; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n. 4 (1951); accord *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 361 (1992) ("[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the

See id. at 386.

Significantly, Plaintiffs have established that enforcement of Ordinance 08-006 will have the practical effect of destroying the Lake Elmo markets in interstate pumpkins and interstate Christmas trees. Like the ordinance in *Carbone*, the ordinance at issue here "squelches competition … altogether, leaving no room for investment from outside." *See id.* at 392; *see SDDS*, 47 F.3d at 271 (due to market conditions, law at issue predominantly affected only out-of-staters and was therefore discriminatory in effect). If the "produced on the premises" portion of Ordinance 08-006 is enforced, over 30,000 interstate pumpkins and more than 1,000 interstate Christmas trees will be removed from the Lake Elmo market. (*See* K. Bergmann Aff. ¶¶ 14, 28-29; *see* R. Bergmann Aff. ¶ 20.) The record clearly establishes that the interstate markets in pumpkins and Christmas trees are almost exclusively dependent on sales from farms. With respect to interstate pumpkins, the record shows that Country Sun Farm's recent annual sales of over 30,000 pumpkins constitute 99 percent of the Lake Elmo pumpkin market. (K. Bergmann Aff. ¶ 30.) If the ordinance is enforced, the Lake Elmo interstate pumpkin market will consist of at most 100 to 200 pumpkins. (K. Bergmann Aff. ¶ 35; 2d K. Bergmann Aff. ¶ 12.) With respect to Christmas trees, the record shows that 100 percent of the Lake Elmo Christmas tree market consists of interstate Christmas trees. (K. Bergmann Aff. ¶¶ 31, 33; Baker Aff. Ex. N at 15.) As interstate pumpkins and interstate Christmas trees sold from farms respectively make up 99 percent and 100 percent of the Lake Elmo markets in these items, it is clear that the practical effect of enforcing the ordinance will be the obliteration of the Lake Elmo markets in pumpkins and Christmas trees.

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strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the

Defendants do not effectively rebut Plaintiffs' evidence regarding market destruction; they simply note the fact that undeveloped land exists within commercially zoned areas where interstate produce may be freely sold. (Klatt Aff. ¶ 9; Baker Aff. Exs. V, F, and C at 2-3 and 77.) As stated above, the record contains no evidence that this land is likely to be developed for the purpose of selling interstate pumpkins, interstate Christmas trees, or any other interstate produce. Further, the record shows that the existing commercial business that does sell pumpkins – Hagberg's – does not intend to increase pumpkin sales even if Ordinance 08-006 is enforced. (E. Bergmann Aff. ¶¶ 4-5.) As a result, it is unlikely that the enforcement of the ordinance will lead to a rejiggering of the Lake Elmo markets in interstate pumpkins and interstate Christmas trees such that existing sales would simply shift from farms to commercially zoned areas. In fact, Plaintiffs have shown that the markets will be wiped out. Thus, Plaintiffs have successfully established that the "produced on the premises" provision of Ordinance 08-006, in practical effect, unconstitutionally discriminates against interstate commerce by drastically impeding the free flow of interstate pumpkins and interstate Christmas trees.[6]

As the Court finds that the ordinance discriminates against interstate commerce, the next step is to apply the correct level of scrutiny. *SDDS*, 47 F.3d at 268. If a state measure is discriminatory, strict scrutiny must be applied. *Id.* at 268, 271-72 (citing *Oregon Waste Sys.,*

State, rather than through the State itself.").

6 In contrast, it is not clear that the "produced on the premises" restriction within the city's "wayside stand" regulations will have this same practical effect. The record contains no evidence as to the Lake Elmo market in interstate sweet corn. It contains only the statement of Chad Bergmann that he would like to sell Wisconsin-grown sweet corn from a wayside stand on his property. The record is silent as to whether Chad Bergmann has ever in fact sold out-of-state sweet corn from a wayside stand. Thus, the Court finds that while the city's wayside stand restriction does theoretically protect local sweet corn sold from a wayside stand against competition from out-of-state sweet corn, the Court also finds that wayside stand regulations do not discriminate against an existing market because there is no evidence of a practical discriminatory effect against interstate sweet corn. *See Carbone*, 511 U.S. at 394. Therefore, the Court concludes that a preliminary injunction enjoining the enforcement of the city's wayside stand regulations is inappropriate as Plaintiffs are not likely to succeed on the merits of their wayside stand claims.

Inc. v. Dept. of Envtl. Quality of the State of Oregon, 511 U.S. 93, 100-01 (1994); *see Maine v. Taylor*, 477 U.S. 131, 138 (1986). "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392 (citing *Maine*, 477 U.S. at 131). Here, Lake Elmo has nondiscriminatory alternatives available to preserve rural character, including, for example, limiting the floor space for retail produce sales from farms, placing a volume cap on produce sales from farms, limiting available farm parking, and/or limiting allowed activities (such as hayrides and corn mazes) that attract crowds to Lake Elmo farms. *See id*. at 393; *see also Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 353-54 (1977). Therefore, as Defendants have failed to demonstrate that the City of Lake Elmo has no other means to advance the maintenance of rural character, the ordinance is *per se* invalid and fails strict scrutiny. *Carbone*, 511 U.S. at 392.

For all the reasons stated above, the Court finds that Plaintiffs are likely to prevail on the merits of their dormant Commerce Clause claim against Ordinance 08-006's "produced on the premises" requirement. As a result, the "likelihood of success" factor weighs heavily in favor of Plaintiffs.

B. Irreparable Harm

Because the Court concludes that Plaintiffs are likely to succeed on the merits, it may presume that Plaintiffs will suffer irreparable harm in the absence of preliminary injunctive relief. *Paul's Indus. Garage, LLC v. City of Red Wing*, No. 06-4770 (RHK/JSM), 2006 WL

3804243 at *8 (D. Minn. 2006) (citing *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *see Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Am. Library Assoc. v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997) ("Deprivation of the rights guaranteed under the Commerce Clause constitutes irreparable injury."). Defendants do not argue to the contrary. Therefore, the Court concludes that the irreparable harm factor weighs in favor of Plaintiffs.

C. Balance of Harms

The Court further finds that threatened injury to Plaintiffs' constitutionally protected rights outweighs whatever damage the preliminary injunction may cause due to Defendants' inability to enforce what appears to be an unconstitutional ordinance. Further, the record reflects that Lake Elmo city staff members, upon the recommendation of the mayor and the city council, are working toward creating an exception to the "produced on the premises" provision for seasonal sales of produce like pumpkins and Christmas trees. (Messelt Aff. ¶¶ 8-9; Baker Aff. Ex. N at 14-15.) As the city is seriously contemplating such a move, it appears that the harm to the city from seasonal sales of interstate pumpkins and interstate Christmas trees during the pendency of this litigation cannot be substantial. Additionally, Plaintiffs have established that enforcement of the ordinance would destroy Lake Elmo markets in interstate pumpkins and interstate Christmas trees, which would be harmful both to Plaintiffs and the city's tax base. Thus, the Court concludes that the balance of harms factor weighs in favor of Plaintiffs.

D. Public Interest

Finally, the public interest would be adversely affected by the denial of a preliminary injunction against an ordinance likely to be held unconstitutional. As the Plaintiffs have shown they are likely to prevail on the merits, a preliminary injunction is in the public interest. This

factor weighs in favor of Plaintiffs.

IV. CONCLUSION

As discussed above, all four *Dataphase* factors weigh in favor of Plaintiffs. Consequently, the Court concludes that a preliminary injunction is warranted, as follows:[7]

1. The Court recommends that Plaintiffs be **GRANTED** a preliminary injunction enjoining the enforcement of the "produced on the premises" requirements of Ordinance 08-006. Specifically, the Court recommends a preliminary injunction be granted enjoining the enforcement of Ordinance 08-006 against the sales of interstate pumpkins and interstate Christmas trees.

2. The Court recommends that Plaintiffs be **GRANTED** a preliminary injunction enjoining the enforcement of the "produced on the premises" requirements of Country Sun Farm's 2009 Conditional Use Permit, attached as Exhibit 1 to the Affidavit of Keith Bergmann. Specifically, the Court recommends a preliminary injunction be granted enjoining the enforcement of the "produced on the premises" requirements of Country Sun Farm's 2009 Conditional Use Permit against the sales of interstate pumpkins and interstate Christmas trees from Country Sun Farm.

3. The Court recommends that Plaintiffs' request for a preliminary injunction with respect to the City of Lake Elmo's "Wayside Stand" regulations be **DENIED**.

V. RECOMMENDATION

Based upon all the files, records and proceedings herein, **IT IS HEREBY RECOMMENDED** that Plaintiffs' Motion for Preliminary Injunction [#9] be **GRANTED in part** and **DENIED in part**.

The Court recommends that **JUDGMENT BE ENTERED ACCORDINGLY**.

DATED: August 18, 2010 *s/ Franklin L. Noel*

7 The Court rejects the Defendants' contention that the issuance of a preliminary injunction would of necessity require the vacation of both Ordinance 08-006 and Country Sun Farm's 2009 conditional use permit.

FRANKLIN L. NOEL
United States Magistrate Judge

Pursuant to the Local Rules, any party may object to this Report and Recommendation by filing with the Clerk of Court and serving on all parties, on or before **September 1, 2010**, written objections which specifically identify the portions of the proposed findings or recommendations to which objection is being made, and a brief in support thereof. A party may respond to the objecting party's brief within fourteen days after service thereof. All briefs filed under the rules shall be limited to 3,500 words. A judge shall make a de novo determination of those portions to which objection is made.

Unless the parties are prepared to stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendation, the party making the objections shall timely order and cause to be filed by **September 1, 2010** a complete transcript of the hearing.

This Report and Recommendation does not constitute an order or judgment of the District Court, and it is, therefore, not appealable to the Circuit Court of Appeals.