

wanting to construct or re-route oil pipelines in Nebraska. (LB 1 §6). MOPSA requires pipeline carriers to submit an application detailing, among other things, the proposed route, the reasons for selecting the route, and providing evidence other routes were considered. (LB 1 § 6). The PSC then schedules a hearing on the application and publishes notice, and also gives notice to the governing bodies of the counties and municipalities where the proposed route is located. (LB 1 § 8). Prior to the hearing, certain agencies are required to file a report with the PSC in their areas of expertise, including the Department of Environmental Quality (“NDEQ”), Department of Natural Resources, Department of Revenue, Department of Roads, Game and Parks Commission, Nebraska Oil & Gas Conservation Commission, Nebraska State Historical Society, State Fire Marshal, and Board of Educational Lands and Funds. (LB 1 § 8(3)). The pipeline carrier has the burden to establish the pipeline is in the public interest, and MOPSA identifies the various criteria to be evaluated by the PSC in making that determination. (LB 1 § 8(4)). The PSC has seven months to issue its findings and either grant or deny the pipeline carrier’s application. Any party aggrieved by the PSC’s decision on the pipeline application may appeal pursuant to the Administrative Procedure Act. (LB 1 § 10). Under MOPSA, pipeline carriers are not authorized to exercise eminent domain authority until the PSC approves the application. (LB 1 §1).

LB 1161 was adopted in April of 2012, during a second special legislative session. (LB 1161, 102nd Leg., 2nd Spec. Sess.). LB 1161 amended MOPSA and, among other things, established an alternate procedure for oil pipeline carriers to obtain approval for pipelines larger than 8 inches in diameter, by submitting a route for evaluation or review to the NDEQ. LB 1161 authorizes the NDEQ to study the environmental, economic, social and other impacts of the proposed route, and requires the NDEQ to hold at least one public hearing to provide opportunities for public review and comment. (LB 1161 §7). The NDEQ then is required to submit to the Governor either a “supplemental environmental impact statement” (“SEIS”) or an evaluation of the proposed pipeline route, after which the Governor has 30 days to indicate whether he or she approves the route. (LB 1161 §7). If the Governor approves the route, LB 1161 authorizes the pipeline carrier to utilize eminent domain authority without applying for and receiving an order from the PSC under MOPSA. (LB 1161 §1). If the Governor does not approve the route, the pipeline carrier is notified it must file an application with the PSC pursuant to MOPSA if it wants approval of a route in Nebraska. (LB 1161 §§6 and 7).

PLAINTIFFS’ COMPLAINT

Plaintiffs’ Complaint seeks a declaratory judgment¹ that LB 1161 is unconstitutional and seeks injunctive relief preventing its enforcement.

¹ Plaintiffs’ Complaint alleges: “This Court has subject matter jurisdiction of this action for declaratory judgment pursuant to *Neb Rev Stat* § 24-302 & *Neb Rev Stat* §§ 25-24,129 *et seq.* The latter statute is the *Nebraska Declaratory Judgments Act.*” (Complaint at ¶ 5). Although the Complaint contains a typographical error when citing to the declaratory judgment statutes, the remaining allegations and citations in the Complaint make clear Plaintiffs’ intention to bring this declaratory judgment action pursuant to NEB. REV. STAT. § 25-21,149 *et seq.* (Reissue 2008).

Plaintiffs challenge the constitutionality of LB 1161 on several grounds, claiming the legislation:

- 1) Unlawfully delegates to the Governor powers over a common carrier contrary to Nebraska Constitution Article IV, § 20, which commits exclusively to the PSC the authority over common carriers and the regulation of common carriers when regulation is necessary (Complaint at ¶13.1);
- 2) Violates the doctrine of separation of powers by permitting action to occur without judicial review contrary to Nebraska Constitution Article II, §1 and Nebraska Constitution Article V, §1 *et seq.* and by failing to provide for notice to affected parties thereby depriving them of due process contrary to Nebraska Constitution Article I, § 3 (Complaint at ¶¶ 3.4 and 13.2);
- 3) Unlawfully delegates to the Governor the Legislature's plenary authority over the power of eminent domain, by empowering the Governor to decide what company shall be approved to build a pipeline and use the power of eminent domain to acquire real property rights for a pipeline route in and across Nebraska, thereby violating Nebraska Constitution Article II, § 1; Article V, § 1, and the doctrine of separation of powers (Complaint at ¶13.3);
- 4) Constitutes special legislation for the benefit of an unconstitutional, substantially closed class of persons contrary to Nebraska Constitution Article III, § 18 and the equal protection guarantee and special legislation prohibitions of the Nebraska Constitution including Article I, § 3 (Complaint at ¶ 13.4);
- 5) Unlawfully allocates to the NDEQ the sum of \$2.0 million to implement the unconstitutional provisions of LB 1161 and constitutes an unlawful expenditure of State funds (Complaint at ¶ 13.5); and
- 6) Unlawfully delegates legislative authority to the Governor because it fails to describe or prescribe standards, conditions, circumstances or procedures which are constitutionally mandatory for the action it purports to delegate, contrary to Nebraska Constitution Article II, § 1, and Article V, § 1 and standards prescribed by the Nebraska Supreme Court (Complaint at ¶ 13.6).

DEFENDANTS' MOTION TO DISMISS

Defendants have moved to dismiss the Plaintiffs' Complaint in its entirety, claiming a lack of subject matter jurisdiction pursuant to NEB. CT. R. PLDG. §6-1112(b)(1) and claiming the Complaint fails to state a claim upon which relief can be granted pursuant to NEB. CT. R. PLDG. §6-1112(b)(6). When a motion to dismiss challenges both subject matter jurisdiction and failure to state a claim, the court first should consider the subject matter jurisdiction challenge. *Doe v. Board of Regents*, 280 Neb. 492, 506-07 (2010); *Anderson v. Wells Fargo Financial Acceptance*

Pennsylvania, Inc. 269 Neb. 595 (2005).

I. Subject Matter Jurisdiction

Defendants move to dismiss this case in its entirety claiming the court lacks subject matter jurisdiction over the Plaintiffs' claims because: 1) Plaintiffs lack standing to challenge LB 1161 and; 2) Plaintiffs' claims are not ripe for judicial review.

A. Analysis of Standing

A party must have standing before a court can exercise jurisdiction, and the question of standing can be raised by the parties, or the court, at any time during the pendency of the case. *Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist.*, 280 Neb. 533, 539 (2010). "Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court." *State ex rel. Reed v. Nebraska Game and Parks Comm'n*, 278 Neb. 564, 568 (2009). The concept of standing relates to a court's jurisdiction to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist.*, 280 Neb. at 541. "Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination." *Id.* Generally, "standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf." *Chambers v. Lautenbaugh*, 263 Neb. 920, 927 (2002). The Nebraska Supreme Court has "long held that in order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public." *Ritchhart v. Daub*, 256 Neb. 801, 806 (1999).

The general rules of standing apply somewhat differently in cases involving taxpayers. The Nebraska Supreme Court has recognized that while "standing usually requires a litigant to demonstrate an injury in fact that is actual or imminent" a "resident taxpayer, *without showing any interest or injury peculiar to itself*, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes." *Project Extra Mile v. Nebraska Liquor Control Comm'n*, 283 Neb. 379, 386 (2012)(emphasis supplied). *See also Chambers v. Lautenbaugh*, 263 Neb. at 928 (taxpayer had standing to challenge allegedly illegal city council redistricting plan because city would spend money to implement plan); *Professional Firefighters of Omaha Local 385 v. City of Omaha*, 243 Neb. 166, 173 (1993)(taxpayer had standing to challenge city's allegedly illegal withdrawal of firefighters from the airport because, as a result of the withdrawal, the city allocated \$400,000 to build a new firehouse elsewhere).

The rationale for giving taxpayers standing to challenge unlawful expenditures of public funds without requiring them to show direct injury is recognition that "[a] good deal of unlawful government action would otherwise go unchallenged." *Project Extra Mile*, 283 Neb. at 390 (*citing*

Sprague v. Casey, 520 Pa. 38 (1988)). In discussing the “taxpayer exception” to the general rule of standing, the Nebraska Supreme Court explains:

Exceptions to the rule of standing must be carefully applied in order to prevent the exceptions from swallowing the rule. *Other than challenges to the unauthorized or illegal expenditure of public funds*, our more recent cases have narrowed such exceptions to situations where matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring the action.

State ex rel Reed v. State Game and Parks Comm’n, 278 Neb. at 571 (emphasis supplied).

The Complaint in this case alleges the named plaintiffs are citizens, residents, electors and taxpayers of Nebraska, and either own or have a legal interest in Nebraska real estate. (Complaint at ¶¶ 2 and 7). The Complaint further alleges the two-million-dollar appropriation to NDEQ provided for in LB 1161 § 8 is an unlawful expenditure of taxpayer funds in light of LB 1161’s alleged constitutional infirmity, and should be enjoined. (Complaint at ¶¶ 10 and 13.5) As such, Plaintiffs’ Complaint alleges, on its face, sufficient facts to show Plaintiffs have standing as taxpayers to bring an action “to enjoin the illegal expenditure of public funds raised for governmental purposes.” *Project Extra Mile*, 283 Neb. at 386.

Defendants argue Plaintiffs lack standing as taxpayers because: 1) The appropriation provided for in LB 1161 comes from the NDEQ Cash Fund and not from general tax revenues; 2) No “expenditure” of public funds occurs because LB 1161 requires pipeline carriers to reimburse the NDEQ for the costs associated with the evaluation and review; and 3) There are other potential parties better suited to challenge LB 1161.

Defendants’ first argument focuses on the source of the public funds appropriated under LB 1161, and suggests the taxpayer-standing analysis should be different in this case because the two-million-dollar appropriation provided for in LB 1161 derives from the NDEQ Cash Fund rather than general tax revenues. *See* LB 1161, § 8. Defendants argue Plaintiffs have not alleged facts in their Complaint indicating how they have contributed to the NDEQ Cash Fund, and further argue the existing allegations regarding general taxpayer standing are not adequate to establish standing as taxpayers to challenge LB 1161.

Defendants have not directed the court to any legal authority supporting their assertion that the NDEQ Cash Fund is funded exclusively by monies collected as fees or charges (and Plaintiffs vigorously dispute this assertion in their briefing) but there is no suggestion whatsoever that the NDEQ Cash Fund is something other than “public funds raised for governmental purposes.” *See Project Extra Mile*, 283 Neb. at 386 (“a resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes”); *see also Project Extra Mile* at 390 (recognizing “taxpayers have an equitable interest in *public funds*, including *state public funds*.”)(emphasis added). A review of the

Nebraska cases discussing taxpayer standing does not suggest an audit of the source of the “public funds” is a necessary prerequisite to determining whether Plaintiffs have, on the face of the Complaint, sufficiently alleged taxpayer standing. In this case Plaintiffs’ Complaint alleges the two-million-dollar appropriation required by LB 1161 is an “unlawful expenditure of taxpayer funds” (Complaint ¶ 13.5) and, as such, the Complaint contains facts sufficient to allege Plaintiffs have standing as resident state taxpayers to bring an action “to enjoin the illegal expenditure of public funds raised for governmental purposes.” *Project Extra Mile*, 283 Neb. at 386 (citing *Myers v. Nebraska Investment Council*, 272 Neb. 669 (2006)).

Next, Defendants argue LB 1161’s allocation of monies from the NDEQ Cash Fund is not really an “expenditure” of public funds because LB 1161 contains a provision requiring pipeline carriers to reimburse the department for the costs of evaluations or reviews. In that regard, LB 1161 provides:

A pipeline carrier that has submitted a route for evaluation or review pursuant to subdivision (1)(a) of this section shall reimburse the department for the cost of the evaluation or review within sixty days after notification from the department of the cost. The department shall remit any reimbursement to the State Treasurer for credit to the Department of Environmental Quality Cash Fund.

LB 1161 § 8 *codified at* NEB. REV. STAT. § 57-1503(1)(b). Defendants argue that because the pipeline carrier—and not the taxpayer—ultimately bears the burden of paying the costs of any evaluation or review, LB 1161 does not involve a permanent “expenditure” of public funds. While this argument may have practical appeal, a plain reading of LB 1161 reveals no requirement that all of the costs associated with implementing LB 1161 are to be repaid by pipeline companies. Nor does the language of LB 1161 suggest the appropriated funds are to be used exclusively to perform evaluations and reviews that are subject to reimbursement by a pipeline carrier. Instead, LB 1161 simply provides:

There is hereby appropriated . . . \$2,000,000 from the Department of Environmental Quality Cash Fund . . . to the Department of Environmental Quality . . . *to aid in carrying out the provisions of Legislative Bill 1161.*

LB 1161 § 8 (emphasis supplied). Defendants’ argument invites this court to speculate not only that the entire two-million-dollar appropriation was intended to fund nothing other than the costs of evaluations and reviews required by LB 1161, but also that pipeline carriers ultimately will reimburse all such costs in full, and that no further expenditure of public funds is necessary to carry out the provisions of LB 1161. The unsupported assertion that some portion of the challenged expenditure may be recouped by the State in the future is not sufficient, on a motion to dismiss, to divest the Plaintiffs of taxpayer standing to challenge an allegedly illegal expenditure of public funds raised for governmental purposes. *Accord Myers v. Nebraska Investment Council*, 272 Neb. at 680-682 (district court did not err in holding taxpayer litigants had standing to challenge the illegal

expenditure of public funds despite argument that the investments were not “expenditures” because they may be redeemed; plaintiff had alleged facts sufficient to survive a motion to dismiss).

Finally, Defendants argue Plaintiffs have not sufficiently alleged taxpayer standing because they have not shown there is no other potential party better suited to bring the action. Defendants argue the pipeline carriers are better suited to challenge LB 1161 since they are directly regulated by the act. (Defendants’ Reply Brief at 2-3). In making this argument, Defendants suggest the Supreme Court in *Project Extra Mile* imposed an additional standing requirement on all taxpayer plaintiffs to show the allegedly illegal action would “otherwise go unchallenged because no other potential party is better suited to bring the action.” See *Project Extra Mile* at 391 (holding taxpayers have standing to challenge unlawful regulations that reduce state revenues, but must show the unlawful failure to comply with the duty to tax would otherwise go unchallenged because no other potential party is better suited to bring the action). Defendants read the holding in *Project Extra Mile* too broadly.

In *Project Extra Mile*, the taxpayers were challenging the failure to collect tax revenue (rather than challenging an illegal expenditure of public funds) and the Court was called upon to determine whether the “taxpayer exception” to standing applied under those circumstances. *Project Extra Mile*, 283 Neb. at 389-90. The Court began its standing analysis by reiterating the rule that “common-law standing usually requires a litigant to demonstrate an injury in fact that is actual or imminent...[b]ut a resident taxpayer, *without showing any interest or injury peculiar to itself*, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.” *Id.* at 385-386 (emphasis supplied). The Court went on to consider whether the “taxpayer exception” to the standing requirement should be applied not only to claims that public funds are being expended illegally, but also to claims that state agencies have unlawfully promulgated rules that result in reduced tax revenues. *Id.* at 388-389. The Court concluded taxpayers *do* have standing to challenge a state official’s failure to comply with a clear statutory duty to assess/collect taxes, but they must show “the official’s unlawful failure ... would otherwise go unchallenged because no other potential party is better suited to bring the action.” *Id.* at 391. In so holding, the Court did not deviate from or qualify its earlier holdings on taxpayer standing to challenge an unlawful expenditure of public funds. *Id.* at 390. Accord *State ex rel Reed v. State Game and Parks Comm’n*, 278 Neb. at 571 (recognizing that “[o]ther than challenges to the unauthorized or illegal expenditure of public funds,” the Court’s more recent standing cases have narrowed such exceptions to situations where “matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring the action”).

In this case, Plaintiffs challenge an allegedly illegal expenditure of public funds rather than the failure to assess or collect taxes, and the holding in *Project Extra Mile* does not require Plaintiffs to show LB 1161 would go unchallenged unless taxpayers have the right to bring the action. That said, even if the additional requirement discussed in *Project Extra Mile* were to be imposed on all taxpayer plaintiffs (including those challenging the unlawful expenditure of public funds), Plaintiffs in this case appear able to satisfy such a requirement because, under the circumstances, the only group more directly affected by LB 1161 (the pipeline carriers) has no incentive to challenge the

allegedly unlawful expenditure of public funds being challenged by Plaintiffs. *Project Extra Mile*, 283 Neb. at 391. Plaintiffs' Complaint adequately alleges taxpayer standing to challenge an illegal expenditure of public funds and is sufficient to withstand a motion to dismiss on the issue of standing.

B. Analysis of Ripeness

Defendants argue that even if Plaintiffs have standing, their claims are not "ripe" for judicial review because they are contingent on future actions by the Governor, the NDEQ and the PSC. (Defendants' Brief at 9-11). In *City of Omaha v. City of Elkhorn*, 276 Neb. 70 (2008) the Nebraska Supreme Court explained the concept of ripeness, and identified the proper factors to be considered by district courts when determining whether a claim is ripe:

With regard to ripeness, we have recognized that if an action is not ready, or "ripe" for judicial determination, then the district court lacks subject matter jurisdiction to consider the case. See *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998). In the context of declaratory judgment actions, we have stated generally that "[a] court should refuse a declaratory judgment action unless the pleadings present a justiciable controversy which is ripe for judicial determination. . . . An action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain." *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 1003, 679 N.W.2d 235, 241 (2004). *Accord Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994). In a similar vein, we have noted that although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power. *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007).

A determination with regard to ripeness depends upon the circumstances in a given case. This is because "[t]he difference between an abstract question and a [case ripe for determination] is one of degree" See *Nebraska Public Power Dist. v. MidAmerican Energy*, 234 F.3d 1032, 1038 (8th Cir. 2000) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)).

City of Omaha v. City of Elkhorn, 276 Neb. at 79. The Nebraska Supreme Court went on to explain that determining judicial ripeness requires a two-part analysis: first the court must consider, as a jurisdictional matter, whether it can act at a certain time; then the court must consider, as a prudential matter, whether it *should* act at that time. *Id.* The first prong of the analysis involves considering whether the issues are fit for judicial decision, and protects against judicial review of hypothetical or speculative disagreements. The second prong of the analysis involves considering the hardship or harm to the parties if judicial consideration is withheld or delayed. *Id.* at 80.

1. The First Prong: Fitness for judicial decision

Defendants argue that although a pipeline route is being considered under LB 1161, the NDEQ has not yet submitted its “SEIS” or evaluation to the Governor, and Defendants suggest that until the review process required by LB 1161 plays out and the final decisions of the NDEQ and the Governor are clear, the court “should avoid a premature adjudication based on Plaintiffs’ alleged hypothetical future event.” (Defendants’ Brief at 11). Defendants’ argument would be more persuasive if Plaintiffs’ claims were dependent on a particular outcome regarding the pipeline route currently under consideration, but they are not.

Plaintiffs assert a facial challenge to LB 1161 in that they challenge the constitutionality of the operation of the statute itself, rather than its application under a particular set of facts. Plaintiffs seek a declaratory judgment challenging the constitutionality of the provisions of LB 1161 as they relate to allegedly illegal expenditures of public funds that already have commenced. “A declaratory judgment is by definition forward-looking, for it provides “preemptive justice” designed to relieve a party of uncertainty before the wrong has actually been committed or the damage suffered.” *Hauserman v. Stadler*, 251 Neb 106, 110 (1996) (quoting *Barelmann v. Fox*, 239 Neb. 771, 788 (1992)). “The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.” *Ryder Truck Rental, Inc. v. Rollins*, 246 Neb 250, 257 (1994).

Public funds and time already are being expended by the NDEQ in implementing LB 1161. Plaintiffs’ Complaint challenges the lawfulness of those expenditures and the constitutionality of the process and procedure by which a pipeline route is approved and eminent domain authority is granted under LB 1161. These issues are neither hypothetical nor contingent on future decisions of the NDEQ or the Governor and are fit for judicial review at this time.

2. The Second Prong: Hardship if judicial consideration is delayed

Defendants argue that since no particular pipeline route has been recommended by NDEQ or approved by the Governor, withholding or delaying judicial review of Plaintiffs’ Complaint will not result in a hardship or harm. In this context, “‘Harm’ includes both the traditional concept of actual damages—pecuniary or otherwise—and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution.” *City of Omaha*, 276 Neb. at 80 (quoting *Nebraska Public Power Dist. v. MidAmerican Energy*, 234 F.3d at 1038). Plaintiffs’ Complaint alleges LB 1161 is unconstitutional and challenges the current expenditure of public funds and time to implement the legislation. Already, public funds have been appropriated “to aid in carrying out the provisions of Legislative Bill 1161,” (LB 1161 § 8), pipeline routes have been proposed and the

review process is underway. (Compl. at ¶ 16). It is unnecessary to delay judicial consideration of constitutional challenges which are unaffected by whether a particular pipeline route ultimately is approved or disapproved. Under the circumstances, Plaintiffs' claims are ripe for judicial review and requiring the litigation to wait until a particular pipeline route is approved or denied by the Governor would result in unnecessary delay and relitigation of the constitutional issues presented, as well as continued uncertainty regarding the enforceability of LB 1161. Accord *City of Omaha*, 276 Neb. at 81-82 (recognizing that dismissal on ripeness grounds could "result in delay and the unnecessary expense of judicial resources" and "continued uncertainty regarding the enforceability" of challenged provisions which is "undesirable and unnecessary").

Continued uncertainty regarding the enforceability of LB 1161 is undesirable and unnecessary. After consideration of both the jurisdictional and prudential aspects of ripeness, this court concludes the instant case is ripe for judicial consideration.

2. Pleading a Claim Upon Which Relief Can Be Granted

Defendants also seek dismissal of Plaintiffs' Complaint on grounds it fails to state a claim upon which relief can be granted under NEB. CT. R. PLDG. § 6-1112(b)(6). When reviewing a motion to dismiss for failure to state a claim, this court is required to accept as true all facts which are well pled and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions. *Central Neb. Pub. Power and Irrigation Dist. v. Jeffrey Lake Dev., Inc.*, 282 Neb. 762, 764-65 (2011); *Zawaideh v. Nebraska Dep't of Health and Human Servs. Reg. and Licensure*, 280 Neb. 997, 1004 (2011). To survive a motion to dismiss for failure to state a claim, the Complaint must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face. *Doe v. Board of Regents*, 280 Neb. 492, 506 (2010). In cases where a plaintiff does not or cannot allege specific facts showing a necessary element, "the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim." *Id.*

Both parties, in their briefing, devote considerable argument to debating the substantive merits of the Plaintiffs' various constitutional claims and predicting whether Plaintiffs ultimately can prevail on such claims. These arguments are based, in large part, on facts outside the Complaint and evidence not yet before the court. As such, the parties' arguments will not be discussed in detail at this point, because a motion to dismiss for failure to state a claim is designed to test only the legal sufficiency of the Complaint, not the substantive merits of the claims. *Britton v. City of Crawford*, 282 Neb. 374, 379 (2011). "Dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Id.*

This court has reviewed and considered the governing case law pertaining to each of the constitutional infirmities alleged in paragraphs 13 through 13.6 of the Complaint. Accepting as true

all facts well pled and the reasonable inferences drawn therefrom, this court concludes Plaintiffs' Complaint states plausible claims for relief that LB 1161 constitutes an unlawful/unconstitutional delegation of authority, a violation of separation of powers, a violation of due process, and a violation of the prohibition against special legislation. Obviously it remains to be seen whether Plaintiffs can meet their burden of proof regarding any of these alleged constitutional infirmities, but the face of the Complaint is sufficient as to these claims and does not indicate an insuperable bar to relief. Defendants' Motion to Dismiss should be denied as to the claims of unlawful/unconstitutional delegation of authority, violation of separation of powers, violation of due process, and violation of the prohibition against special legislation.

However, to the extent Plaintiffs also attempt to state a claim that LB 1161 violates the equal protection clause, this court concludes the allegations of the Complaint are insufficient to state a plausible claim for relief. As the Supreme Court explained in *Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist.*, 280 Neb. 533 (2010):

For purposes of a motion to dismiss, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. A court is not obliged to accept as true a legal conclusion couched as a factual allegation. A pleader's obligation to provide the grounds of its entitlement to relief requires more than labels and conclusions. Nor does a pleading suffice if it tenders naked assertion, devoid of further factual enhancement.

Id. at 544. Plaintiffs' Complaint references equal protection twice: the first time in paragraph 3.3 where it is alleged simply that LB 1161 "denies equal protection of the law contrary to *Neb Const* Art I, § 3", and a second time in paragraph 13.4 where it is alleged "LB 1161 . . . constitutes special legislation for the benefit of an unconstitutional, substantially closed class of persons contrary to *Neb Const* Art III § 18 and the equal protection guarantee and special legislation prohibitions of the Nebraska Constitution including *Neb Const* Art I § 3." (Complaint ¶¶ 3.3 and 13.4). While the Complaint goes on to recite facts supporting Plaintiffs' claim that LB 1161 violates the prohibition against special legislation, no facts are plead in support of the legal conclusion that LB 1161 violates equal protection, and the existence of such facts cannot reasonably be inferred from allegations elsewhere in the Complaint. Under the circumstances Plaintiffs' Complaint fails to allege sufficient facts to state a plausible claim that LB 1161 violates equal protection. Defendants' Motion to Dismiss should be sustained as to the equal protection claim, and Plaintiffs should be given leave to amend their Complaint.

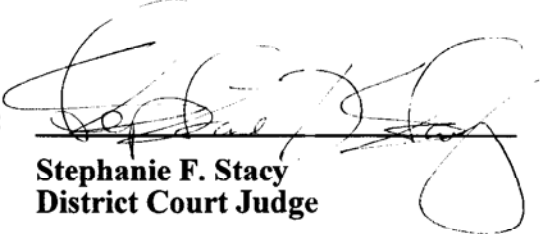
IT THEREFORE HEREBY IS ORDERED:

1. Defendants' Motion to Dismiss is sustained as to any claim that LB 1161 violates equal protection, and Plaintiffs are given 14 days from today's date to file an Amended Complaint; Defendants are given 14 days thereafter to Answer or otherwise plead;

2. Defendants' Motion to Dismiss is overruled in all other respects;
3. A progression hearing is set for JANUARY 31, 2013 at 4:00 p.m. to facilitate entry of a Progression Order establishing appropriate deadlines for discovery and dispositive motions, and setting dates for pretrial conference and trial.

Dated this 31st day of December, 2012.

BY THE COURT:


Stephanie F. Stacy
District Court Judge