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Clerk of Circuit Court
Eau Claire County, WI
2015CV000175

STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY

VOTERS WITH FACTS, *et al.*,
 Plaintiffs,

Case No. 15-CV-175

v.

CITY OF EAU CLAIRE, *et al.*,
 Defendants.

PLAINTIFFS’ NOTICE OF MOTION
and
MOTION TO STRIKE PORTIONS OF DEFENDANTS’ REPLY BRIEF IN SUPPORT
OF JUDGMENT ON CERTIORARI RECORD

TO: Honorable Sarah Harless
 Circuit Court, Branch 5
 721 Oxford Ave.
 Eau Claire, WI 54703

Counsel for Defendants
City Attorney’s Office
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PLEASE TAKE NOTICE, that Plaintiffs, by their counsel the Wisconsin Institute for Law & Liberty, hereby move that this Court strike the following portions of the “Defendant’s [sic] Reply Brief in Support of Judgment on Certiorari Record” (Dkt #105) (“Defendants’ Brief”):

- The portion of Footnote 1 beginning “(R: 50)” through and including “well known downtown redevelopment challenges and successes”;
- The last citation and parenthetical of Footnote 1, beginning with “*see also* Wisconsin DNR Plant Recovery Initiative” through the end of the Footnote;
- All main body text on page 4;
- The first two paragraphs of main body text on page 5.

The grounds for this Motion are as follows:

1. The Court is currently undertaking certiorari review of actions taken by the Eau Claire Plan Commission, Eau Claire City Council, and Eau Claire Joint Review Board (“JRB”).

2. “When conducting common law certiorari review, a court reviews the record compiled by the municipality and does not take any additional evidence on the merits of the decision.” *Ottman v. Town of Primrose*, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411 (emphasis added).

3. The portions of Defendants’ Brief objected to above contain numerous factual allegations based on evidence outside the certiorari record, or no evidence at all. They therefore are an attempt to insert additional evidence on the merits of the decision and should be stricken.

4. In Footnote 1, the citation to “R. 50” is to an amicus brief filed in the Supreme Court. Obviously, a brief filed by the Eau Claire Chamber of Commerce on December 18, 2017, was not anything that was or could have been considered by the Plan Commission, City Council, or JRB in 2014. The amicus brief itself, when it cited anything at all, cited extra-record materials like newspaper articles. The brief is therefore not part of the certiorari record and should be stricken from the Defendants’ Brief.

5. In Footnote 1, the Defendants also cite to a DNR Publication, “Wisconsin DNR Plant Recovery Initiative.” While that document was published in September, 2012, it is not contained in the certiorari record and there is no indication in the certiorari record that the publication was ever considered by the Plan Commission, City Council, or JRB. It is therefore not part of the certiorari record and should be stricken from the Defendants’ Brief.

6. Almost every sentence in the three full main-body paragraphs on pages four and five of Defendants’ Brief are all supported by the same citation: “*Id.*”. However, that “*Id.*” does

not seem to refer to anything. The immediately preceding citation in the main text was to “R. 1:3, 6-24; R. 10:19.” Record 1 (numbering based on the October 23, 2015 Index for Appeal Record) is the Complaint, which contains none of those facts. Record 10 is the Plaintiffs’ Brief in Opposition to Motion to Dismiss, which also contains none of those factual allegations. Footnote 1, which precedes those three paragraphs, contains 15 distinct citations citing over 280 pages in the record as well as extra-record material.

7. In actuality, the Defendants are citing to their own brief in those three paragraphs. The two full paragraphs on page five of the Defendants’ Brief are taken nearly verbatim from the Defendants’ May 22, 2015 Brief in Support of Motion to Dismiss at 2-3 (R. 8). The paragraph on page four of the Defendants’ Brief appears to be original, except the last sentence is also taken directly from the May 22, 2015 Brief.

8. Obviously, a brief filed by the Defendants on May 22, 2015 was not anything that was or could have been considered by the Plan Commission, City Council, or JRB in 2014. It is therefore not part of the certiorari record and these three paragraphs should be stricken from the Defendants’ Brief.

9. Compounding the problem, the May 22, 2015 brief itself contained no citations for its factual allegations. Contrary to all the rules of evidence (and the standards for a motion to dismiss, which must accept a complaint’s allegations as true and may not add additional evidence, as Plaintiffs pointed out in their June 22, 2015 Brief in Opposition to Motion to Dismiss at 1-4 & App. A (R. 10)), the Defendants made factual allegations based solely on the say-so of the Defendants’ attorneys.

10. That error is magnified here, where Defendants use vague and ambiguous citations in the Defendants’ Brief obscuring the actual source of the “facts” they allege to be true.

Only diligent and scrupulous review of every citation, combined with familiarity with past proceedings, would uncover the sleight-of-hand. Such tactics justify striking those portions of the Defendants' Brief.

11. The Defendants had the same opportunity the Plaintiffs had to supplement the Record prior to this point if they so wished. They should not be allowed to do so now without even having filed a motion or argued why the record should be supplemented.

This Motion shall be heard at a date and time to be decided by this Court.

Dated this 22nd day of May, 2019.

Respectfully submitted,
WISCONSIN INSTITUTE FOR
LAW & LIBERTY
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