

CITY OF EAU CLAIRE

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July 2, 2015

Hand Delivered

Clerk of Court
Eau Claire County Courthouse
721 Oxford Avenue
Eau Claire WI 54703

FILED
CIRCUIT COURT
EAU CLAIRE COUNTY

JUL - 2 2015

SUSAN SCHAFFER
CLERK OF CIRCUIT COURT

Re: Voters with Facts et. al. v City of Eau Claire et. al.
Case No. 2015 CV 175

Dear Clerk:

Please find enclosed the Defendant's Reply Brief in Support of Motion to Dismiss in the above captioned matter. Please file accordingly.

A copy of the Brief is being provided via email and US Mail to the Plaintiffs' counsel.

Thank you for your attention to this matter.

Sincerely,

Stephen C. Nick
City Attorney

SCN:jw

Encl.

cc: Richard M. Esenberg, Attorney for WILL by Email and US Mail
Remzy D. Bitar, Crivello Carlson, by Email

VOTERS WITH FACTS,
PURE SAVAGE ENTERPRISES, LLC,
WISCONSIN THREE, LLC,
215 FARWELL LLC,
DEWLOC, LLC,
LEAH ANDERSON,
J. PETER BARTL, LEAH ANDERSON,
CYNTHIA BURTON, CORINNE CHARLSON,
MARYJO COHEN, JO ANN HOEPPNER CRUZ,
RACHEL MANTIK, JUDY OLSON,
JANEWAY RILEY, CHRISTINE WEBSTER,
DOROTHY WESTERMANN, JANICE
WNUKOWSKI, DAVID WOOD, AND PAUL ZANK,

Case No. 15CV175

Case Code: 30701

FILED
CIRCUIT COURT
EAU CLAIRE COUNTY
JUL - 2 2015
SUSAN SCHAFFER
CLERK OF CIRCUIT COURT

Plaintiffs,

vs.

CITY OF EAU CLAIRE and
CITY OF EAU CLAIRE JOINT REVIEW BOARD,

Defendants.

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant, City of Eau Claire, by its attorneys, City Attorney Stephen C. Nick and Assistant City Attorney Douglas Hoffer, and by Crivello Carlson, S.C., by special appearance and reserving all jurisdictional objections, hereby respectfully move the Court for an order dismissing this action, with prejudice and on the merits pursuant to Wis. Stat. § 802.06, and submit this Brief in Support of its Motion to Dismiss.

INTRODUCTION

The Plaintiffs' case should be dismissed. The Complaint contains a variety of defects requiring dismissal of the entire action, or in the alternative, dismissal of the claims for

declaratory relief, dismissal of a party, and ordering certiorari review. The Plaintiffs' Response Brief does not refute the numerous reasons requiring dismissal, but instead tries to divert the court's attention away from whether the allegations and claims are plausible as a matter of law.¹

The Plaintiffs' action involves nothing more than a philosophical disagreement with the wisdom of permitting cities to use tax incremental financing as a development tool. Trial courts should not engage in such public policy examinations, particularly when the Wisconsin legislature believes in the legislative wisdom of such financing tools and the Wisconsin Supreme Court has approved the constitutional appropriateness of tax incremental financing.

The Plaintiffs lack standing to bring this suit because of their inability to allege a personal interest in the TIF actions. The Plaintiffs do not allege any actual, concrete harm, but rather allege highly speculative injuries and bare legal conclusions. Additionally, the Plaintiffs lack standing to challenge TIF actions which completed all procedural steps required by Wisconsin's TIF law without alleging a personal interest in the action.

The Plaintiffs' Fourth Claim for Relief is a facial constitutional challenge to Wisconsin's TIF law, and this Court is bound by *Sigma Tau* to dismiss it. The Plaintiffs concede that the Wisconsin Supreme Court held that Wisconsin's TIF law is constitutional. The Plaintiffs also concede that the TIF actions in this case are expressly allowed by Wisconsin's TIF law.

The Plaintiffs' request to void separate legislative actions must be dismissed because the Plaintiff provides no authority demonstrating the legality of such relief. City Councils are granted broad legislative powers to manage and control City financial and budgetary matters, and this authority should not be disturbed in the absence of compelling legal authority.

¹ Additionally, the Plaintiffs do not dispute a number of assertions found in the Brief in Support of Motion to Dismiss. Among the assertions the Plaintiffs fail to dispute are: the City Council and Joint Review Board's actions were legislative in nature, the development agreement and TIF project plans attached to the Motion to Dismiss are accurate and authentic, the development agreement prohibits the use of TIF funds for historic building demolition, no case law or other legal authority expressly provides citizens with standing to challenge TIF actions, cash grants are expressly permitted by Wisconsin's TIF law, the common law definition of "public purpose" includes more than

The Plaintiffs' Third Claim for Relief must be dismissed because it is defectively pled and moot. The Plaintiffs neglect to allege sufficient facts demonstrating that TIF funds will be used to reimburse demolition costs. The Complaint's assertion, that "there is no way to assure" that TIF funds will not be used to reimburse historic building demolition costs does not meet required pleading standards. Additionally, the development agreement, which the Plaintiffs cite in the Complaint, expressly prohibits TIF funds from being used for demolition costs.²

Voters With Facts must be dismissed as a party to this lawsuit because the Complaint does not allege sufficient facts demonstrating associational standing. The Plaintiffs fail to allege: Voters With Facts' non-profit purpose, how the interests Voters With Facts seeks to protect are germane to its purposes, that Voters With Facts is comprised of 3 or more members.

In the alternative, if the Court does not completely dismiss this action the Court should dismiss the Plaintiffs' Claims for Declaratory Relief and require this action to continue only as a Certiorari action. Declaratory Judgment is precluded when an adequate alternative remedy is available. Certiorari is not only adequate, but is also a more appropriate remedy for reviewing the formation or amendment of TIF districts.

THE STANDARD OF REVIEW REQUIRES A HEIGHTENED PLEADING STANDARD AND THAT THE COURT MAY TAKE NOTICE OF CERTAIN PUBLIC RECORDS IN DECIDING THIS MOTION

Plaintiffs' response repeatedly asks this court to accept as true its allegations and claims, but the standard of review is not that forgiving. Last year, the Wisconsin Supreme Court clarified that the Wisconsin standards governing a Motion to Dismiss track those of the Federal Rules of Civil Procedure. *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶ 19-

blight elimination, and Wis. Stat. § 184.07 includes the proper standard to apply in determining whether Voters With Facts have associational standing.

²The Complaint states that "the development agreement does not clearly provide that the Confluence developer may not use the lump sum payments to reimburse itself for the costs of demolishing listed properties." (Compl. ¶¶ 46, 94). This is demonstrably incorrect. The development agreement expressly prohibits use of cash grants for demolition costs – a point the Plaintiffs did not dispute in their response brief. (Def.'s Ex. 1, see, inter alia, Sections 1.8, 4.2 (h), and Ex. E).

31, 356 Wis. 2d 665, 674-80, 849 N.W.2d 693, 697-701 (noting the U.S. Supreme Court’s decision in *Twombly* is consistent with Wisconsin Supreme Court precedent, and plaintiffs must allege facts that *plausibly* suggest they are entitled to relief). “[A] court cannot add facts in the process of construing a complaint.” *Id.* at ¶19. Additionally, “legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss.” *Id.* Thus, it is important for a court considering a motion to dismiss to accurately distinguish pleaded facts from pleaded legal conclusions. *Id.*

The City will apply this standard as it discusses the legal defects in the Complaint in greater detail below. In overview, however, there are a number of instances where Plaintiffs attempt to avoid the legal flaws in their Complaint by trying to persuade the court to accept as true their allegations. They cannot do this because *Data Key* (and *Twombly*) direct this court to scrutinize more closely the allegations in order to determine whether they satisfy the aforementioned “plausibility” standard. This “plausibility” standard is at a minimum a “heightened” pleading standard than argued by Plaintiffs.

The Plaintiffs spend a significant portion of their response brief complaining that the introduction section of the City’s Brief in Support of Motion to Dismiss includes facts outside the record. The Plaintiffs do not allege that any of the facts in the (City) brief’s statement of facts, which is what the City’s legal arguments rely on, are unsupported by the record or are the kind of facts the court cannot take judicial notice of as explained in the Affidavit of Attorney Nick accompanying the motion. The Motion to Dismiss is appropriately based on the facts alleged in the Complaint, on undisputed facts, and on legal authority which requires dismissal of the Complaint, dismissal of several Claims for Relief, and dismissal of a certain Plaintiff.

ARGUMENT

1. **Taxpayer standing jurisprudence does not apply to this case because the Plaintiffs do not allege a personal interest and have not plausibly alleged an illegal expenditure.**

Plaintiffs lack standing to challenge the creation and amendment of TIF districts. Plaintiffs' Response Brief does not argue – or even mention – any kind of actual concrete injury necessary to confer standing or make their claims ripe for review. Additionally, the Plaintiffs do not argue that any of the specific Plaintiffs will suffer any unique harm not allegedly suffered by the general public. They also do not argue why the court should reject the City's position that their alleged damages are merely speculative not therefore entitling them to standing. Instead, the Plaintiffs continue to voice their public policy preferences against tax incremental financing. Disagreement with the wisdom of TIFs is not sufficient to confer standing.

The Plaintiffs concede that their alleged standing depends on two factors: 1) the Plaintiffs status as taxpayers;³ and 2) the TIF actions constituting illegal expenditures. Because the TIF actions in question do not constitute an "illegal expenditure" the Plaintiffs failure to allege a pecuniary loss or other personal interest deprives the Plaintiffs of standing to bring this claim.

Because the legislative actions forming and amending TIF districts do not involve illegal expenditures the Plaintiffs' standing argument, like the argument raised by the citizens in *Lake Country*, must fail. Similar to *Lake Country*, the Plaintiffs have not alleged any concrete injury or interest, but rather merely attempt to voice their disagreement with the legislative wisdom of the City Council and the Joint Review Board. The Plaintiffs' alleged injuries are too speculative to grant standing. Plaintiffs acknowledge as much in the Complaint; they contend the TIF plans "distort" the tax base. Complaint ¶ 27. But they do not allege how such distortion has actually occurred in a way that caused direct harm or injury; such distortion is instead another way of

³ The Plaintiffs concede that Voters With Facts is not a taxpayer, but rather allege that Voters With Facts have associational standing.

debating the wisdom of TIFs and contending they may experience uncertain harm at some remote time in the future.

As an aside, these speculative alleged damages are rendered even less likely in this case by the framework of the TIFs at issue, that is: “staged pay only upon performance” and “pay as you go” method of financing in order for the developer to achieve incentives required in the development agreement.⁴ Like most common government procurement contracts, the private contractor or in this instance developer must perform prior to any public payment. The TIF plans and development agreement do not extend a “blank check,” yet Plaintiffs ignore these undisputed facts of the public record, and misapply the existing law, in an effort to debate the wisdom of TIFs.

Furthermore, contrary to the Plaintiffs’ assertion, *Baraboo* does not support the Plaintiffs’ position. See *Town of Baraboo v. Vill. of W. Baraboo*, 2005 WI App 96, ¶ 37, 283 Wis. 2d 479, 506, 699 N.W.2d 610, 623-24. *Baraboo* pointed out that the legislature identified entities that have a legally protected interest in the formation and amendment of TIF districts. Wisconsin’s TIF law does not identify taxpayers as having a legally protected interest, and *Baraboo* did nothing more than say, in dicta, that taxpayers *may* arguably have a legally protected interest. In fact, the City’s analysis did not rely solely on *Baraboo*. The City had also directed this court to Wis. Stat. § 61.1105(4) & (4m), which identifies the parties having a legally protected interest in formation and amendment of TIF districts. Those sections do not identify citizen taxpayers, and the Plaintiffs ignore and thereby concede this argument entirely.

Additionally, any alleged expenditure is legal as a matter of law. Although the Complaint says that “proper procedures” were not followed, the Complaint does not allege sufficient facts demonstrating any required procedural steps were not completed. To the

⁴ The Complaint concedes that the developer will only receive cash grants once “specified milestones” are reached, but the Plaintiffs neglect to address the impact of this fact on standing. See Complaint ¶ 46.

Contrary, the Complaint merely alleges an unsupported legal assertion that the City Council and Joint Review Board failed to articulate a basis for their findings and/or failed to sufficiently review the public record, planning documents and resolution.⁵ Legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss. *Data Key*, 356 Wis. 2d 665 at ¶ 19.

The Complaint alleges that Wisconsin's TIF law requires certain procedural steps to be completed by the City Council and Joint Review Board.⁶ The Complaint concedes that the City Council and Joint Review Board undertook all of these steps, but argues some of the steps were not sufficiently completed without pleading any facts supporting that assertion. Under *Data Key*, the complete absence of such alleged facts in the Complaint fails to satisfy Wisconsin's "plausibility" pleading standard. Merely relying on legal conclusions is not sufficient to defeat a Motion to Dismiss. Because the City Council and the Joint Review Board completed all steps required by Wisconsin's TIF law – which was upheld by Wisconsin's Supreme Court in *Sigma Tau* - in creating and amending TIF districts, any alleged expenditure made in connection with the TIF districts is legal as a matter of law.

Instead of asking the Court to determine whether the City Council and Joint Review Board completed all statutorily required procedural steps, the Plaintiffs are asking the Court to substitute its judgment for the legislative judgment of the City Council and the Joint Review Board. The Court, however, is no better positioned to determine the justice, wisdom, policy, necessity, or expediency of legislatively created or amended TIF districts than the City Council and Joint Review Board. *See Bisenius v. Karns*, 42 Wis. 2d 42, 54-55, 165 N.W.2d 377, 383-84 (1969) (It is for the legislature to determine the justice, wisdom, policy, necessity, or expediency

⁵ In ¶¶ 71, 76, 83, and 87 of the Complaint the Plaintiffs allege that City Council and/or Joint Review Board failed to articulate a basis for their findings, and that the review of the public record, planning documents and resolution was deficient. These assertions are insufficiently pled, not supported by the record, and inconsistent with Wisconsin law.

⁶ See Complaint ¶¶ 31 – 38.

for a law which is within its powers to enact, and such questions are not open to inquiry by the courts).

Additionally, judicial policy does not call for protecting the interest of taxpayers who disagree with the wisdom of TIF related legislative acts. Not every act of legislative discretion that citizens disagree with creates a justiciable controversy. To the contrary, the most appropriate remedy for most legislative disagreements involves engagement in the legislative and political process. Citizens are permitted to support candidates who share their legislative sensibilities, lobby legislative bodies to pass (or not pass) legislation, and pursue other legislative mechanisms to effectuate change. As the Complaint points out, a number of Plaintiffs participated in public hearings regarding the Confluence project. The Plaintiffs' failure to persuade the City Council and Joint Review Board does not create a controversy suitable for judicial review.

Lastly, the Plaintiffs lack standing because their claims are not ripe. While many of the same arguments above and in the City's main brief apply equally here, the City wishes to respond to the long string cite at Page 5 of Plaintiffs' Response Brief wherein they cite cases like *Coyne*, *Hart*, *Menasha*, *Columbia* and *Marshfield*. The City respectfully submits those cases are inapplicable to support standing or ripeness here because none involved a financing tool like TIFs. Plaintiffs acknowledge TIFs are simply financing tools. Complaint ¶ 26. Further, those cases involved direct pecuniary harm caused by statutes or ordinances apportioning assets and liabilities as part of an annexation (like the *Menasha*); as part of the inclusion of counties in the state retirement fund (like *Columbia*); as part of the appointment of an assessor and illegal expenditures of public funds (like *Thompson*), as part of the assessment, levy, collection and distribution of property taxes for the Milwaukee public schools (like *Tooley*); or the apportionment of taxes for a joint school (like *Marshfield*). There is no direct concrete pecuniary

harm alleged by Plaintiffs in this case, their allegations of damages, as discussed above, are speculative, uncertain, and broad policy and legal claims merely couched as facts.

2. The Plaintiffs' Fourth Claim for Relief is a facial constitutional challenge and must therefore be dismissed.

The Plaintiffs' Fourth Claim for Relief is a facial constitutional challenge that must be dismissed. The Complaint concedes that in *Sigma Tau* the Wisconsin Supreme Court held that Wisconsin's TIF law is constitutional. The Plaintiffs' argument - that their challenge constitutes an as-applied challenge- is inaccurate. Although the Wisconsin Supreme Court may decide to overrule *Sigma Tau*, circuit courts are bound by *Sigma Tau* in determining Wisconsin's TIF law is facially constitutional.

The court should be mindful of the differences between an "as applied" versus a "facial" challenge. Facial constitutional challenges attack the statute itself as drafted by the legislature, claiming the law cannot be constitutionally enforced under any circumstances. *In re Gwenevere T.*, 2011 WI 30, ¶¶ 46 - 47, 333 Wis. 2d 273, 299, 797 N.W.2d 854, 867. In a facial constitutional challenge the challenger must persuade the court that the "heavy burden" to overcome the presumption of constitutionality has been met, and that there is proof beyond a reasonable doubt that the statute is unconstitutional. *Id.* As-applied challenges involve claims that a statute operates unconstitutionally as to him or her because of the challenger's particular circumstances. *Id.* As-applied constitutional challenges also require the challenger to demonstrate unconstitutionality beyond a reasonable doubt. *Id.*

The Plaintiffs do not allege any particular circumstances or harms which situate the Plaintiffs any differently than the rest of the public. Instead, the Plaintiffs merely challenge the constitutionality of Wisconsin's TIF law on its face. Indeed, the number of Plaintiffs challenging the wisdom of the City's actions underscores their injuries are no different than anyone else and that they attack the City's actions broadly and under every circumstance of the TIFs application.

Consequently, the Plaintiffs' challenge constitutes a facial constitutional challenge which must be dismissed under *Sigma Tau*.

Additionally, the Plaintiffs' attempt to distinguish *Sigma Tau* is a dubious argument. The Plaintiffs argue that cash grants - which the Plaintiffs concede are expressly permitted by Wisconsin's TIF law - actually constitute an unconstitutional tax rebate.⁷ The Plaintiffs make no serious attempt to articulate why, even accepting the Plaintiffs "illegal tax rebate" argument as true for the sake of argument, the Court should determine such an argument constitutes an "as applied" challenge to Wisconsin's TIF law. To the contrary, if providing cash grants violates the constitution, then Wisconsin's TIF law - which expressly allows such developer cash grants - is facially unconstitutional. The Circuit Court is bound by *Sigma Tau* and may not determine that Wisconsin's TIF law is facially unconstitutional, which, despite the Plaintiffs' protests, is what the Plaintiffs are actually seeking.

The Plaintiffs assert the City argues that *Sigma Tau*'s holding that Wisconsin's TIF law is constitutional forever bars legal challenges to Wisconsin's TIF law. That is not the City's position. The City's position is that *Sigma Tau*'s holding precludes circuit courts from concluding that Wisconsin's TIF law is facially unconstitutional and that Plaintiffs disingenuously and improperly assert an as-applied claim to side step settled law when it is clear they attack the TIF law facially.

3. The Plaintiffs' First, Second, and Third Claims must be dismissed because the TIF legislative actions comport with the Public Purpose Doctrine.

The Plaintiffs' First, Second, and Third Claims must be dismissed because the TIF legislative actions comport with the Public Purpose Doctrine. The Plaintiffs respond, in part, by arguing they do not need to plead facts beyond their factually unsupported legal conclusions that

⁷ The Complaint also neglects to allege facts demonstrating how cash grants provided to a developer under a development agreement where both the municipality and the developer receive consideration constitutes an "illegal tax rebate."

the City lacked a legitimate public purpose. Pl. Response Br. p. 19-20. *Data Key* says otherwise. This deficiency in their pleading alone allows for dismissal of this claim.

Even accepting the Complaint's facts as true, for the sake of argument, the Complaint does not demonstrate a lack of public purpose. The Complaint – although it acknowledges some of the nature of TIFs and how they are created – ignores *Sigma Tau's* holding that Wisconsin's TIF law does not violate the public purpose doctrine. As a matter of law the creation or amendment of a TIF district which completes all steps required by Wisconsin's TIF law contains a public purpose. Additionally, the Complaint's failure to allege the lack of "any public benefit" precludes a judicial determination that the creation and amendment of TIF districts lacks a public purpose. As a matter of law, courts have recognized a variety of public purposes in addition to blight elimination.⁸ Notably, the Complaint recognizes the developer bought this land at a price over its assessed value. Complaint ¶ 42. Such transaction implies this project is viewed as an economic engine to spur growth in and around the City, which is certainly a public benefit. It also supports the "but for" findings made by the City Council and Joint Review Board because development was not occurring at the level warranted by the then-assessed values.

The Plaintiffs' argument, that the City needs to list alternative public purposes to blight elimination, is inconsistent with Motion to Dismiss standards. As the Plaintiffs repeatedly point out, a Motion to Dismiss tests the sufficiency of the Complaint. The sole basis for the Plaintiffs' public purpose arguments is an alleged lack of blight elimination. Contrary to the Plaintiffs' assertion, the City is not arguing that the Plaintiffs needed to include an exhaustive list of public purposes and assert that none of these purposes exist in the TIF actions. At a minimum,

⁸ "[A] conclusion that no public purpose exists can be determined only if it is 'clear and palpable that there can be no benefit to the public.'" *Town of Beloit v. Cnty. of Rock*, 2003 WI 8, ¶¶ 2 – 4, 21, 259 Wis. 2d 37, 51, 657 N.W.2d 344, 351 (holding that the goals of creating jobs, promoting orderly growth, increasing the tax base, and preserving the environment for the benefit of citizens constituted a legitimate and valid public purpose); see also *Libertarian Party of Wisconsin v. State*, 199 Wis. 2d 790, 809, 546 N.W.2d 424 (1996) (holding that encouraging economic development and enhancing the tax base were legitimate and valid reasons, along with others, for finding a legislative public purpose in the expenditure of public funds to build the Milwaukee Brewers' Miller Park).

however, the Plaintiffs needed to include an allegation that “no other public benefit exists.” The failure to do so, along with *Sigma Tau*’s conclusion that TIF financing serves a public purpose, requires dismissal because the Court cannot add facts in the process of construing a complaint.

4. The Plaintiffs’ request to void separate legislative actions must be dismissed because the Plaintiffs provide no authority demonstrating the legality of such relief.

The Plaintiffs’ request to void separate legislative actions must be dismissed because the Plaintiffs provide no authority demonstrating the legality of such relief. City Councils are granted broad legislative powers to manage and control City financial and budgetary matters. *See Wis. Stat. § 62.11(5); Wis. Stat. § 65.90, Wis. Stats. § 66.0101, Wis. Const. art. XI, § 3.* A court determination that voids the creation or amendment of a TIF district may preclude the use of TIF funds from the defective TIDs to finance a project. It does not, however, void separate legislative appropriations which could use funds from a different source.

5. Plaintiffs’ Third Claim for Relief must be dismissed as defectively pled and moot.

As the City explained in its main brief, the buildings have been demolished making Plaintiffs’ Third Claim moot as a matter of law. Plaintiffs ignore this and instead ask the Court to accept as true their allegations (which included speculative assertions like “there is no way to assure” that cash grants provided to the developers will not be used to reimburse demolition costs). As previously discussed, they needed to plead facts that plausibly stated a claim under *Data Key*. On this issue alone, the third claim should be dismissed.

Furthermore, the development agreement, which the Complaint cites, expressly prohibits the use of TIF funds to reimburse historic building demolition costs. The Complaint’s “no way to assure” allegations amounts to an “anything is possible” argument. “Anything is possible” does not establish plausibility. Because of the paucity of facts the Plaintiffs allege, along with the express language of the development agreement, which the Plaintiffs do not dispute, the Third Claim for relief must be dismissed.

6. Voters With Facts must be dismissed as a party to this lawsuit because the Complaint does not allege sufficient facts to confer associational standing.

Voters With Facts must be dismissed as a party to this lawsuit because the Complaint does not allege sufficient facts demonstrating associational standing. Wis. Stat. § 184.01(2) defines a nonprofit association as “[a]n unincorporated organization consisting of 3 or more members joined by mutual consent for a common, nonprofit purpose.” Wis. Stat. § 184.07(2) states the requirement for associational standing: “A nonprofit association may assert a claim in its name on behalf of its members if one or more members of the nonprofit association have standing to assert a claim in their own right, the interests that the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member.”

The Complaint is insufficient, even if all facts are accepted as true, to demonstrate Voters With Facts has associational standing. The Complaint fails to allege: Voters With Facts’ nonprofit purpose, how the interests Voters With Facts seeks to protect are germane to its purposes, and Voters With Facts is comprised of 3 or more members.⁹

The Complaint fails to allege sufficient facts demonstrating Voters With Facts has associational standing. The Complaint merely states that Voters With Facts “question the propriety of the proposed developments that are the subject of this lawsuit.” Complaint ¶ 2. The Court may not add facts in construing a complaint. *Data Key*, 356 Wis. 2d 665 at ¶ 19.

7. In the alternative, Certiorari Review, not Declaratory Judgment, is the proper method of reviewing this case.

In the alternative, if the Court does not completely dismiss this action the Court should dismiss the Plaintiffs’ Claims for Declaratory Relief and allow this action to continue only as a Certiorari action, as Plaintiffs themselves recognize in their “alternative” Fifth Claim for Relief.

“The decision to grant or deny relief in a declaratory judgment action is a matter within the sound discretion of the circuit court.” *Wisconsin Educ. Ass'n Council v. Wisconsin State Elections Bd.*, 156 Wis. 2d 151, 161-62, 456 N.W.2d 839, 844 (1990).¹⁰ The existence of an alternative remedy is preferable to seeking declaratory relief. *See Lister v. Board of Regents*, 72 Wis.2d 282, 307-08, 240 N.W.2d 610 (1976) (if the alternative remedy is as speedy, effective, and adequate declaratory judgment relief may be precluded); *see also Madison Gen. Hosp. Ass'n v. City of Madison*, 71 Wis. 2d 259, 237 N.W.2d 750 (1976) (declaratory relief will not ordinarily be entertained where another equally or more appropriate remedy is available).

In a Certiorari action the Court examines the record compiled by the municipality without taking 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 (Certiorari is the mechanism by which a court may test the validity of a decision rendered by a municipality). The Court’s review is limited to whether: (1) the municipality kept within its jurisdiction; (2) it proceeded on a correct theory of law; (3) its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the order or determination in question. *Id.*

Certiorari is not only adequate, but is also a more appropriate remedy for reviewing the formation or amendment of TIF districts. *See State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 32, 252 Wis. 2d 628, 647, 643 N.W.2d 796, 805 (*Roggensack, J., dissenting*) (“No statutory appeal process has been created to review the formation of a TIF District; therefore, the review of the decision of both the common council and the JRB is by

⁹ The Complaint states “many” of the individual plaintiffs are “officers and volunteers” of Voters With Facts. Complaint ¶ 2. The Court should not have to infer Voters With Facts has three or more members because the Plaintiffs neglected to carefully plead this fact.

¹⁰ Also noting that “[o]ur review of the record persuades us that the circuit court reasonably concluded that the instant controversy was sufficiently contingent and uncertain so as to preclude declaratory relief.” (emphasis added)

certiorari.”) (dissenting as to waiver issue only). The Court should exercise its discretion and dismiss the Plaintiffs’ Claims for Declaratory Relief for a number of reasons.

First, Certiorari review would provide an adequate alternative remedy for reviewing the legal issues in this case. The Plaintiffs assert that the City Council and Joint Review Board relied on an insufficient record to create and amend TIF districts. Certiorari is the most appropriate mechanism for resolving this alleged infirmity. The Plaintiffs’ response brief fails to explain why Certiorari review is an inadequate remedy. Additionally, by pleading Certiorari in the alternative the Plaintiffs implicitly concede that Certiorari is an adequate “alternative.”

Second, Certiorari review would be more efficient than declaratory relief. The Plaintiffs allege that “lengthy and detailed discovery” “is likely” in this case. (Pl’s Br. 4 fn 2). It is entirely unclear why any discovery, let alone “lengthy and detailed discovery” is necessary to determine whether the City Council and Joint Review Board had sufficient facts to conclude a sufficient level of blight existed in the TIF districts. Regardless, Plaintiffs are not entitled to discovery. “The general rule in common law certiorari is that the circuit court does not take evidence on the merits of the case and the scope of review is limited to the record presented to the tribunal whose decision is under review.” *Sills v. Walworth Cnty*, 2002 WI App 111, 254 Wis. 2d 538, ¶ 36, 648 N.W.2d 878.

Third, Certiorari review is consistent with the deference courts are required to give factual determinations made by legislative bodies. If the Court concludes the case should not be dismissed because it accepts the Plaintiffs’ argument that the legislative TIF findings are highly factual, the Court should also determine that the case should only proceed on Certiorari review. The nature of Certiorari review is consistent with the level of deference Courts are required to show legislative factual determinations. *See State v. McManus*, 152 Wis. 2d 113, 129, 447 N.W.2d 654, 660 (1989) (“The court cannot reweigh the facts found by the legislature. If the

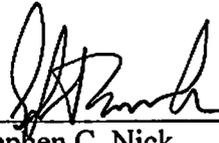
court can conceive any facts on which the legislation could reasonably be based, it must hold the legislation constitutional.”)

The record the City Council and Joint Review Board relied on “is what it is.” Permitting this matter to continue as a Declaratory Judgment action and allowing an unfettered fishing expedition will not assist the Court in analyzing the legal issues in this case.

CONCLUSION

For all the foregoing reasons the Court should grant the Motion to Dismiss.

Dated: July 2, 2015



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