STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY
BRANCH 3

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TOWN OF WASHINGTON
5750 Old Town Hall Road
Eau Claire, WI 54701

Case No. 2022CV347
Case Code: 30701

Plaintiffs,

v.

CITY OF EAU CLAIRE
203 South Farwell Street
Eau Claire, WI 54701

Defendant.

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CITY OF EAU CLAIRE'S REPLY BRIEF IN SUPPORT MOTION TO DISMISS

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The Court should apply unambiguous statutory requirements, long-standing binding precedent, and more recent persuasive authority and dismiss this case. Contrary to the contention of the Town, which characterized City of Eau Claire arguments as "created out of thin air," this case is not a matter of first impression seeking to create new law. Courts have examined the issues raised in this case and have determined that this type of annexation is unanimous, DOA review is necessary before pursuing this type of litigation, and certiorari is the appropriate judicial remedy to review this type of legislative enactment.

Property owners filing annexation petitions decide how to characterize proposed annexations, and the decision to file this annexation as unanimous is supported by binding Wisconsin Supreme Court precedent as well as persuasive Wisconsin circuit court authority. The Eau Claire City council reviewed the petition along with a robust legislative record and determined the annexation was unanimous. Courts have limited authority to substitute their judgment for the judgment of private property owners and legislative judgments made by city

councils, and courts must apply deference to these decisions. The Eau Claire City Council's legislative decision to accept the petition by ordinance was legally sound and within their legislative discretion. This is not the first time this issue has been examined in Wisconsin courts. An Ozaukee circuit court confronted the same issue as this case and applied *International Paper* in deciding that a signature is not needed for county owned land in a unanimous annexation.

In *Town of Port Washington v. City of Port Washington*, the Ozaukee County circuit court examined whether an annexation which included a county owned park-and-ride was unanimous if it did not include a signature from a representative of the county.[1] Seeking to distinguish *International Paper* in the same manner as the Town of Washington in this case, the Town of Port Washington contended that a county owned park-and-ride lot is not a public highway or alley, and therefore a county representative signature was needed to render the annexation petition unanimous. The Ozaukee circuit court rejected this contention and dismissed the Town of Port Washington's case. The Court should apply the Port Washington circuit court decision as persuasive authority that *International Paper* applies to county owned land and dismiss the Town of Washington's lawsuit in this case. The Town of Washington provides no reasonable argument for treating a county owned park-and-ride differently than a county owned park, and instead cites older case law applying different statutes.

Additionally, the failure to seek DOA review prior to filing this action requires dismissal of this case. The Town of Washington concedes they did not seek DOA review prior to filing this action, and does not dispute that if DOA review is mandatory that this Court lacks competency to proceed. The Town's brief mischaracterizes *Lincoln's* holding on this issue, and misunderstands Wisconsin's court competency doctrine by arguing that circuit courts can

retroactively confer court competency. *Lincoln* made clear that a town may only invoke its right to challenge an annexation labelled as unanimous if the town first seeks DOA review. The Town of Washington's failure to do so deprives this Court of competency even if a court later determines the annexation is not unanimous, and thus the Court should dismiss this action.

If the Court does not dismiss this action in its entirety the case should proceed as a certiorari action, and the Court should request a copy of the legislative record from the City of Eau Claire. The Town of Washington's arguments on this issue are nearly identical to the arguments raised by the Plaintiffs in *Voters With Facts v. City of Eau Claire*. The *Voters With Facts* plaintiffs argued that prior TIF challenges were brought by declaratory judgment, and that the declaratory judgment statute authorized challenges to municipal ordinances so TIF challenges could be brought by declaratory judgment. These arguments were rejected by the Wisconsin Court of Appeals, and by the Wisconsin Supreme Court because declaratory relief is disfavored if there is an adequate alternative remedy, and because certiorari is a more appropriate remedy to challenge legislative determinations which require deference from courts. The Town of Washington's brief provides no argument that certiorari does not constitute an adequate remedy.[2] Furthermore, the Town of Washington also fails to demonstrate why a de

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1 *See State ex rel. Town of Port Washington v. City of Port Washington* attached as Exhibit 2. The City attaches a copy of the unpublished Court of Appeals per curiam opinion which summarizes the conclusion of the Ozaukee circuit court strictly to cite the circuit court decision as persuasive authority.

2 The Town of Washington does not only ignore the conclusions reached in *Voters With Facts* on the certiorari issue, but also ignores the decisions reached by the Eau Claire circuit court, the Wisconsin Court of Appeals, and the Wisconsin Supreme Court on whether a motion to dismiss an action challenging a legislative determination can introduce additional evidence. *See Voters With Facts v. City of Eau Claire*, 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131. In *Voters With Facts* the Plaintiffs made identical arguments to the Town of Washington that the City of Eau Claire could not provide additional evidence available to the Eau Claire city council in making its legislative determination as part of a motion to dismiss. This argument was rejected by the Eau Claire circuit court, the Wisconsin Court of Appeals, and the Wisconsin Supreme Court which all understood that courts broadly interpret what constitutes evidence known to "legislative" bodies, and that Plaintiffs seeking to file lawsuits challenging legislative determinations will often omit facts known to the legislative bodies hoping to avoid motions to dismiss. *Id.*; *See also State ex. Rel. Hippler v. City of Baraboo*, 47 Wis. 2d 603, 613-15, 178 N.W.2d 1, 7-8 (1970) (Legislative judgments are presumed to be supported by facts known to the legislative body, unless facts judicially known or proved preclude that possibility); see also *Voters With Facts* Supreme Court oral argument available at https://wiseye.org/2018/02/23/supreme-court-oral-argument-voters-with-facts-v-city-of-eau-claire/ (including various questions regarding the development agreement and other evidence included in City of Eau Claire's motion to dismiss). The Town's arguments on this issue fundamentally misunderstand what legal challenges to legislative

novo hearing with potentially extensive discovery is appropriate to review this type of legislative determination which requires judicial deference.

Lastly, the Town's brief also demonstrates the purpose of this lawsuit is nothing more than frustrating the desires of the private property owners in this case. The Town's brief concedes that the proposed annexation would satisfy a 50% annexation if additional notice was provided, but does not describe any prejudice to the Town or any property owner as the annexation was well publicized and the City Council received significant input from a variety of sources including the Town. The Court should not disturb the well-supported legislative determination of the Eau Claire city council just so the town can frustrate or annoy property owners that seek to develop their property in another community.

1. The annexation petition filed in this case was unanimous.

The annexation petition filed in this case was unanimous. The Town of Washington asks this Court to apply *Mueller v. City of Milwaukee*, 254 Wis. 625, 37 N.W.2d 464 (1949) in determining that Eau Claire County should be treated as an "owner" of property for annexation purposes. The Town of Washington further seeks to distinguish *International Paper* by arguing that County owned land should be treated differently than city owned right-of-way. The Town's arguments are meritless.

First, the Town of Washington acknowledges that *Mueller* examined a completely different statute that predated *International Paper*. Nevertheless, the Town then argues that *International Paper* did not explicitly overrule *Mueller*, so the two cases must be harmonized. *International Paper* did not need to overrule *Mueller* because *Mueller* examined a different statute. That is basic judicial interpretation, and this Court should simply apply *International Paper* in dismissing this case.

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determinations look like, and serve as an unnecessary distraction from the substantive issues related to the City's motion to dismiss.

Second, unlike *Mueller,* which interprets a different statute, there is a more recent Wisconsin circuit court decision which cited *International Paper* and determined that a unanimous annexation that included county owned land does not require a county representative signature under Wisconsin's annexation law. In the *Port Washington* case the Ozaukee County circuit court examined whether an annexation which included a county owned park-and-ride was unanimous if it did not include a signature from a representative of the county. Seeking to distinguish *International Paper* in the same manner as the Town of Washington in this case, the Town of Port Washington contended that a county owned park-and-ride lot is not a public highway or alley, and therefore a county representative signature was needed to render the annexation petition unanimous. The Ozaukee circuit court rejected this contention and dismissed the Town of Port Washington's case. The Court should apply the Port Washington circuit court decision as persuasive authority that *International Paper* applies to county owned land and dismiss the Town of Washington's lawsuit in this case. The Town of Washington provides no reasonable argument for treating a county owned park-and-ride differently than a county owned park.

Furthermore, the Town of Washington's arguments are not sufficient to demonstrate that the Eau Claire city council's legislative act approving the proposed annexation was clearly in error. The Eau Claire city council's legislative determination, that the proposed annexation is unanimous, is presumed valid. *Town of Waukesha v. City of Waukesha*, 206 N.W.2d 585, 58 Wis. 2d 525 (1973); *See also Voters With Facts,* 2018 WI 63, ¶ 71, 382 Wis. 2d 1, 913 N.W.2d 131 (It is well established that legislative determinations require deference from courts). An annexation ordinance's presumption of validity remains until overcome by the party attacking it. *Town of Menasha v. City of Menasha (Banta Annexation)*, 42 Wis. 2d. 719, 168 N.W.2d 161 (1969) (Objectors to annexation ordinance have burden to demonstrate signers of annexation

petition did not qualify as owners). It is not sufficient for the Town of Washington to assert that the Eau Claire city council's legislative determination is mistaken. The Town of Washington must demonstrate the legislative determination was clearly in error. *International Paper* and the Ozaukee county circuit court decision demonstrate the city council's determination was grounded in sound legal principles, so the Court should dismiss this action.

2. The Town's failure to request DOA review deprives this court of competency to proceed.

The Town of Washington's failure to request DOA review deprives this court of competency to proceed. The Town of Washington's reading of *Lincoln* is mistaken. The Town of Washington argues that because ¶ 37 of *Lincoln* lifted the limitations on challenges set forth in Wis. Stat. § 66.0217(11)(c) that means the requirement to first seek DOA review was retroactively lifted to not be needed at the time of filing. The Town of Washington's argument ignores ¶¶ 10-15 of the *Lincoln* decision which states that by first seeking DOA review the town invoked its right to file a circuit court action, ignores the fact that 66.0217(6)(d)2 still applies, and also ignores a rule of judicial interpretation that courts do not retroactively confer competency. At the time an action challenging a unanimous annexation is filed the Court is only competent to hear the challenge if a Town first sought DOA review. A later court determination that an annexation is not unanimous allows towns to raise additional arguments because the limitations of § 66.0217(11)(c) are lifted. It does not, however, remove the DOA review requirement which was necessary for the court to exercise its jurisdiction at the time the action is filed. *See Village of Elm Grove v. Brefka*, 2013 WI 54, 348 Wis. 2d 282, 832 N.W.2d 121 (Court lacking competency to hear case due to failure to meet statutory deadline may not later confer competency by later determining that the failure to meet deadline was due to the defendant's excusable neglect).

The Town's interpretation asks the Court to conclude that the language found in ¶¶ 10-15 of *Lincoln* is superfluous. It is not. The language included in ¶¶ 10-15 of *Lincoln* recognizes that court competency cannot be retroactively conferred.[3] Additionally, accepting the Town's interpretation of *Lincoln* does two things. First, it encourages towns to bring bad faith lawsuits challenging unanimous annexations by simply alleging the annexation is not unanimous. The Town of Washington's interpretation is inconsistent with the purpose of Wisconsin's annexation statute which is to discourage town-initiated litigation which seeks to delay and frustrate the rights of private property owners. *see Town of Burke v. City of Madison*, 225 Wis. 2d 615, 593 N.W.2d 822 (Ct. App. 1999) (Time limits chosen by the legislature in statute governing actions to challenge validity of annexation are a demonstration of its intent to require that contests to annexation be resolved in an expedient manner). Second, the town's interpretation deprives circuit courts of the benefit of the DOA review. As demonstrated in ¶¶ 10-15, *Lincoln* wanted courts to have the benefit of DOA review.

The Town of Washington's failure to request DOA review deprives this court of competency to proceed, and thus this case must be dismissed.

3. If the Court does not dismiss this action in its entirety the case should proceed as a certiorari action, and the Court should request a copy of the legislative record from the City of Eau Claire.

If the Court does not dismiss this action in its entirety the case should proceed as a certiorari action, and the Court should request a copy of the legislative record from the City of Eau Claire. The Town of Washington argues that because some annexation challenges have been brought by declaratory judgment, and because the declaratory judgment statute allows review of municipal ordinances it follows that annexation challenges may be brought as

3 Although court competency cannot be retroactively conferred, court competency challenges can be waived or forfeited. *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738. The City of Eau Claire immediately raised the issue of court competency in this case, and the Town of Washington has not alleged this argument was waived or forfeited.

declaratory judgment actions. These arguments are nearly identical to the arguments raised by the Plaintiffs in *Voters With Facts v. City of Eau Claire*. 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131. The Plaintiffs in *Voters With Facts* argued that because some prior TIF challenges were brought by declaratory judgment, and because the declaratory judgment statute allows challenges to municipal ordinances it followed that TIF challenges could be brought by declaratory judgment. This argument was rejected by the Eau Claire circuit court (which dismissed the claims altogether), as well as by the Wisconsin Court of Appeals and by the Wisconsin Supreme Court which both concluded that certiorari constituted a speedy, effective, and adequate alternative remedy. *Voters With Facts*, 2018 WI 63, ¶ 71, 382 Wis. 2d 1, 913 N.W.2d 131 ("Where, as here, there is no express statutory method of review, common law certiorari applies."). *Voters With Facts* and numerous other cases demonstrate that the declaratory judgment statute's language permitting review of municipal ordinances does not constitute an express statutory method of review, and thus common law certiorari applies. *See also Nowell v. City of Wausau*, 2013 WI 88, ¶36, 351 Wis. 2d 1, 838 N.W.2d 852 (Permitting a circuit court to determine de novo whether legislative determination was correct would improperly transfer that legislative function from the municipality to the court); *Ottman v. Town of Primrose*, 2011 WI 18, 332 Wis. 2d 3, 796 N.W.2d 411 (Where there is no express statutory method of review, common law certiorari applies); *Voters With Facts*, 2018 WI 63, ¶¶ 69-71, 382 Wis. 2d 1, 913 N.W.2d 131.

Furthermore, *Voters With Facts* pointed out that lengthy and detailed discovery often associated with declaratory judgment is inconsistent with the deference that should be afforded by court examining legislative determinations such as the annexation determination in this case. *Id.*

The Town of Washington's brief provides no argument that certiorari does not constitute an adequate remedy.

CONCLUSION

For all the foregoing reasons the Plaintiff's complaint should be dismissed.

Dated: December 16, 2022

/s/Douglas J. Hoffer
Douglas J. Hoffer
Deputy City Attorney
State Bar No. 1079432
City of Eau Claire
203 S. Farwell St.
Eau Claire, WI 54701
(715) 839-6006
douglas.hoffer@eauclairewi.gov