STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

FRANKLIN COMMUNITY ADVOCATES,
WOODLAKE VILLAGE HOMEOWNERS
ASSOCIATION, CHAD and KARYN ZOLECKI,
JEFF and DANELLE KENNEY,
RYAN and RACHEL RINGWELSKI,
STEVE VALLEE and COLLEEN DOMASK,
and NICK POPLAR,

Plaintiffs, CASE NO. 20-CV-7031

v.

CITY OF FRANKLIN,

Defendant.

And

STRAUSS BRANDS, LLC,

Intervening Defendant

CITY OF FRANKLIN'S RESPONSE BRIEF TO PLAINTIFFS' MOTION TO COMPLETE THE RECORD AND FOR AN EXTENSION OF THE BRIEFING SCHEDULE

The City of Franklin, by its attorneys, Municipal Law & Litigation Group, S.C., submits the following in opposition to Plaintiff's Motion to Complete the Record and for an Extension of the Briefing Schedule.

Plaintiffs' case is one of certiorari review of an administrative body. They are challenging the decision of the City of Franklin Common Council at its November 2, 2020 regular meeting to approve Strauss Brands, LLC's Special Use Permit ("SUP") application. From the beginning of this lawsuit Plaintiffs have attempted to muddy the certiorari waters by claiming that social media posts and other extraneous correspondence invalidates the entire

Common Council's decision and claiming that these social media posts are somehow a part of the administrative record. This assertion completely ignores that the scope of certiorari review is limited to four specific criteria[1], that "[d]ecision makers in certiorari review cases are "entitled to a presumption of honesty and integrity," and that city officials are permitted to have opinions about local zoning issues. *Marris v. City of Cedarburg*, 176 Wis. 2d 14 at 26, 498 N.W.2d 842 (1993); See also *Buena Vista Hall, LLC*, 2018 WI App 66 at ¶ 30 (unpublished) (a description of an applicant "may insinuate favoritism, but it does not suggest that a decision ha[d] already been made, nor does it overcome the presumption of honest adjudicators."). None of the vaguely identified materials Plaintiffs reference in their motion were part of the reviewed materials by the Common Council in deciding whether or not to grant Strauss Brands, LLC's SUP application and therefore they are not a part of the administrative record. Thus, Plaintiffs' claim that they are necessary to "complete" the record is a misguided attempt to violate the applicable legal standard, cause a waste of time and undue burden and create an opportunity for reversible error.

I. Plaintiffs' Motion is an Improper Attempt to Expand the Scope of Certiorari Review to Include Extraneous Materials which were not Considered by the Plan Commission or the Common Council in Determining the Merits of the Special Use Permit Application.

Plaintiffs' motion correctly asserts that the Common Council has the burden of submitting the complete administrative record, and that is it necessary to afford proper due process. (Motion to Complete the Record and for an Extension of the Briefing Schedule at 2; Dkt. # 103). But Plaintiffs do not assert, and cannot assert, that any social media postings were

[1] The scope of a Circuit Court's certiorari review is limited to the following criteria: (1) whether the body kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 47, 332 Wis. 2d 3, 28, 796 N.W.2d 411, 423.

considered by the City of Franklin Plan Commission or the Common Council in reviewing the merits of Strauss, Brands, LLC's SUP application.

While Plaintiffs' brief speaks only in generalities regarding what materials they believe should be added to expand the administrative record, the Affidavit of David Sorenson, while still vague, identifies what materials he personally believes are missing from the administrative record in a slightly more specific manner. He admits that the extraneous proposed materials are materials he identified largely as a result of his own "extensive investigation of the facts regarding the proposed development," and not actual hearings on the narrow issue of the SUP application. (Aff. of Sorenson ¶ 3). Mr. Sorenson describes his personal investigation as a "review of on-line postings of statements by the Mayor and others in favor and opposed to the development." *Id*. Mr. Sorenson attests that he serves as the "Director of Legal and Finance" for the Franklin Community Advocates ("FCA"). *Id* at ¶ 2. He is not however a licensed Wisconsin attorney and does not identify any credentials or expertise involving the administrative record requirements of certiorari reviews. He also attests that he "attended the public meetings and hearings held on the proposed slaughterhouse and in particular the special use permit that the applicant Strauss Brands applied for and approval of which is require to allow for the development." *Id*. The materials considered by the Common Council at those meetings, as well as the transcripts of those public hearings, are already included in the record filed with the Court.

Mr. Sorenson then provides a generalized list of things that he believes should be in the administrative record. The majority of these materials are not actually identified but described as showing or proving Mr. Sorenson's various claims of impropriety. In the interest of brevity, the City will only address the categories of materials Mr. Sorenson actually identified in his affidavit.

First, Mr. Sorenson claims that the City's responses to various broad open records requests made by FCA should be included in the administrative record. (Aff. of Sorenson ¶ 6(b)). The City has provided FCA with thousands of documents over the past year, the majority of which are irrelevant to the actual SUP standard or Strauss Brands, LLC's SUP application. Plaintiffs' have attempted to use their public records requests as a form of discovery throughout the duration of this case and continue to make public records requests as a method of subverting Judge Grady's March 30, 2021 Order denying Plaintiffs' Motion for Leave to Take Discovery. (Dkt. # 57). While the City is not obligated to provide public records responses to an adversary or a potential adversary in litigation, it has continued to fulfill FCA's requests in the interest of transparency. *Seifert v. School District of Sheboygan Falls*, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177 (Wis. App. 2007) (the Open Records Statute "plainly allows a records custodian to deny access to one who is, in effect, a potential adversary in litigation or other proceeding unless or until required to do so under the rules of discovery in actual litigation."); See also *Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶17 (Finding that the exception to 19.35(1)(am)1 regarding potential adversaries in litigation is primarily designed to prevent potential adversaries of the government from "getting a jump" on that government by effectively engaging in discovery prior to filing a suit). That does not make the public records responses a part of the administrative record. The SUP application process is a completely separate City function from its public records responses.

Second, Mr. Sorenson attests that "there are numerous emails that I know exist" between certain staff members of the City Engineering Department regarding their own opinions on a Strauss facility not involved in the current SUP application, some aspects of the SUP application, and City personnel issues. (Aff. of Sorenson ¶ 6(c)). While Mr. Sorenson allegedly has seen has

knowledge of the existence of such emails, they are not attached to Plaintiffs' brief, making his assertion nothing more than hearsay. Even if Mr. Sorenson did identify which emails he is referencing, they would not be a part of the administrative record. Strauss' existing facility and any City personnel decision have nothing whatsoever to do with the SUP application. Additionally, the City engineer has a voting position on the Plan Commission and is able to voice any possible concerns at the October 8, 2020 Plan Commission meeting where the Plan Commission recommended approval of the SUP application.

Third, Mr. Sorenson again alleges that "there are numerous emails, and other written correspondence that I know exist," this time regarding Alderman Hanneman's motivation for voting to approve the SUP application as well as Alderman Barber and his interaction with his constituents. (Aff. of Sorenson ¶ 6(d-e)). Alderman Hanneman stated her motivation on the record during the November 2, 2020 Common Council meeting, and the transcript from the meeting is included in the record. (Admin R. # 19 at p. 95-97; Dkt. # 95). Again, Mr. Sorenson's hearsay regarding possible emails and "other written correspondence" does not provide the City or the Court with any reason to expand the scope of the administrative record.

Fourth, Mr. Sorenson again complains of Mayor Olson's alleged social media postings. The particular postings he refers to are not identified nor are they attached. (Aff. of Sorenson ¶ 6(f)). Social media posts are clearly not a part of the administrative record, as neither the Plan Commission nor the Common Council considered them in determining the merits of the SUP application. The meeting packets for these meetings are included in the administrative record.

Fifth, Mr. Sorenson expresses his concern that the meetings were held in person during the COVID-19 pandemic. (Aff. of Sorenson ¶ 6(g)). While the COVID-19 pandemic has certainly caused challenges for many municipalities at no point were remote meetings mandated

for the City of Franklin, by either Milwaukee County or the State of Wisconsin, as state and local government facilities were explicitly exempt from such orders[2]. As such, no documentation regarding the venue of the regular meetings held by the Common Council or the Plan Commission were a part of the SUP application record. Wisconsin open meetings law only requires that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law." Wis. Stat. § 19.81(2). A meeting must be preceded by notice providing the time, date, place, and subject matter of the meeting, generally, at least 24 hours before it begins. Wis. Stat. § 19.84. When holding an in-person public meeting, there is no Wisconsin law that requires the municipality to facilitate remote comments from the public, as the meeting is open for public attendance. Rather, there is simply a requirement in Wis. Stat. § 19.82(3) to enable access to persons with functional limitations to the meeting, "as defined in s. 101.13(1)." Wis. Stat. § 101.13(1) defines access as:

> the physical characteristics of a place which allow persons with functional limitations caused by impairments of sight, hearing, coordination or perception or persons with semiambulatory or nonambulatory disabilities to enter, circulate within and leave a place of employment or public building and to use the public toilet facilities and passenger elevators in the place of employment or public building without assistance.

Clearly, this section discusses the physical attributes of the building itself. Thus, so long as the meeting venue meets the above definition, then the requirement of Wis. Stat. § 19.82(3) is met. Nowhere does this provision require remote comments from the public. This is again a red herring in an attempt to muddy the certiorari waters and it does not support the expansion of the certiorari record.

[2] https://www.dhs.wisconsin.gov/publications/p02792.pdf;

Sixth, Mr. Sorenson complains of a lack of correspondence between Alderman Dandrea and various other parties. (Aff. of Sorenson ¶ 6(h)). Again, these extraneous, unidentified correspondences which Mr. Sorenson and Plaintiffs' brief continually reference (but did not produce) between members of the Common Council, if they even exist, were not part of a meeting packet or the SUP application and are clearly hearsay and not a part of the administrative record. Mr. Sorenson then references an alleged statement of Alderman Dandrea expressing an opinion during a public meeting, which would be a part of the transcripts of the meetings already included in the administrative record. *Id.*

Seventh, Mr. Sorenson references an engineering report which was not considered at the October 8, 2020 Plan Commission meeting, or the October 20, 2020 and November 2, 2020 Common Council meetings. (Aff. of Sorenson ¶ 6(i); Admin. R. # 12, 15, 19). Because this alleged report was not considered at any of the relevant meetings it is not a part of the administrative record.

Eighth, Mr. Sorenson discusses the tax assessed value of the Strauss development and the possible hook up to the City sewer. (Aff. of Sorenson ¶ 6(j-l)). These are not arguments to include certain documents in the administrative record. Rather, they are simply arguments that the Common Council's decision was not supported by evidence such that it might reasonably make the order or determination in question, one of the four prongs of certiorari review. *Ottman*, 2011 WI 18 at ¶ 47. While Plaintiffs may argue this in their principal brief, these anecdotes from Mr. Sorenson do not support expanding the record to include unidentified extraneous documentation.

The submitted record includes the agendas, minutes, meeting packets, and transcripts of the October 8, 2020 Plan Commission meeting where the Plan Commission recommended

approval of the SUP application, the October 20, 2020 Common Council meeting where the SUP application was initially denied, and the November 2, 2020 Common Council meeting where the SUP was application was granted on reconsideration. (Administrative Record # 8-17). The inclusion of the transcripts refutes Plaintiffs' assertion that the record does not include "many of the statements made and facts submitted by members of the public before and at the October 20th 2020 and November 2, 2020 hearings." (Motion to Complete the Record and for an Extension of the Briefing Schedule at p. 3; Dkt. # 103). The relevant materials provided to the Common Council prior to these hearings were included in the meeting packets. Any public comments or presentations given at the hearings are a part of the hearing transcript. Plaintiffs' brief asks that the Court "recall that the City Council voted 4-2 **against** this slaughterhouse permit at the October 20th hearing." *Id*. The City does not hide this fact, and upon its review of the transcripts of the October 20th and the November 2nd Common Council meetings the Court will find the public comments and Commons Council statements made prior to denying the SUP application as well as Alderwoman Hanneman's clear explanation why she voted no at the October 20th meeting and her reasoning for requesting reconsideration of the SUP application. (Admin R. # 19 at p. 95-97; Dkt. # 95).

II. Extending the Briefing Schedule is Unnecessary and Any Prejudice to the Plaintiffs has been Self-Imposed by Their Own Delay in Requesting an Extension.

Plaintiffs also request an extension to the briefing schedule but provide no reasoning or support for their request, let alone good cause for the same. Nor do they even offer a proposed duration for the requested extension. Further underscoring the lack of credibility in Plaintiffs' request is that fact that they have not identified the vast majority of the documents they want added to the administrative record, and they have not provided any of the documents to the Court

for its review. This would put this case into an indefinite limbo, which would unnecessarily inflate the cost of litigation for all of the involved parties.

Additionally, Plaintiffs had ample time to review the administrative record and file their motion with plenty of time for the Court to rule on the motion without altering the briefing schedule. Yet they waited until two weeks prior to the due date of their merit brief, binding the Court and attempting to force an extension. This Court set the briefing schedule during its status conference on June 1, 2021. Plaintiffs waited a month to file a four-page motion. This is nothing more than a delay tactic, and this Court should not grant the requested extension.

CONCLUSION

For the foregoing reasons, the City of Franklin respectfully requests that the Court deny Plaintiffs' Motion to Complete the Record and for an Extension of the Briefing Schedule.

Dated this 16th day of July, 2021.

MUNICIPAL LAW & LITIGATION GROUP, S.C.

Attorneys for City of Franklin

By: *Remzy D. Bitar*
REMZY D. BITAR
State Bar No: 1038340
ANTHONY J. GARCIA
State Bar No. 1120983

P.O. ADDRESS:
730 N. Grand Avenue
Waukesha, WI 53186
O: (262) 548-1340
F: (262) 548-9211
E: rbitar@ammr.net
agarcia@ammr.net