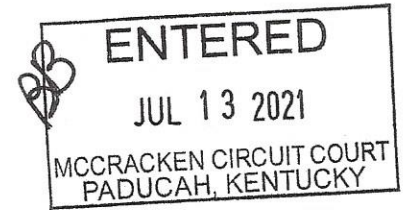


COMMONWEALTH OF KENTUCKY
MCCRACKEN CIRCUIT COURT
DIVISION NO. I
CIVIL ACTION NO. 20-CI-00725



MARSHALL DAVIS, *et al.*

PLAINTIFFS,

VS.

**MEMORANDUM AND ORDER DENYING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

CITY OF PADUCAH, *et al.*

DEFENDANTS.

Defendants, the City of Paducah, the Paducah City Commission, Brandi Harless, Gerald Watkins, Richard Abraham, Sandra Wilson, Brenda McElroy, and James Arndt ("City defendants"), move for the summary dismissal of the plaintiffs' verified complaint pursuant to CR 56.02. In their complaint, plaintiffs, Marshall and Alberta Davis, Mark and Paula Foglesong, Ronnie James, Kelly and Rebecca Ausbrooks, Beverly McKinley, Tony Veltri, Mike and Cindy Wyatt, Nicki Roof, and Concerned Taxpayers of Paducah and McCracken County, KY, LLC ("Taxpayers"), challenge a Paducah city ordinance that authorizes tax increment financing for the redevelopment of downtown property. The City's summary judgment motion will be denied because the Taxpayers have standing to challenge the ordinance, the Taxpayers' complaint states a claim for which relief could be granted, and the Taxpayers are entitled to conduct discovery on their claim that the city ordinance, Ordinance No. 2019-4-8569, is unreasonable, arbitrary, or capricious.

The parties have conducted no discovery. Therefore, the relevant facts are those alleged in the verified complaint, Ordinance No. 2019-4-8569, and the economic reports attached to the City defendants' motion and the Taxpayer's response.

Boehl, Stopher & Graves

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Briefly, on April 9, 2019, the Paducah Board of Commissioners unanimously adopted Ordinance No. 2019-4-8569 to establish a tax increment financing ("TIF") district to develop approximately 315 acres located within and around downtown Paducah and its riverfront area. The proposed development includes the construction of a hotel, a mixed-use facility, and a public parking lot. The City and Weyland Ventures Development, LLC ("Weyland") entered an agreement that required Weyland to complete construction of the proposed development on a 2.88-acre tract that is currently being used as a public parking facility.

The City's TIF district uses public financing for the construction of infrastructure for the proposed development. To obtain public financing from the state, the City was required to comply with KRS Chapters 65 and 154. Pursuant to those statutes, the City hired two consulting firms, Commonwealth Economics, LLC ("CE") and Anderson Economic Group ("AEG"), to prove that public investment was necessary to support private investment because "project economics are unable to support or secure necessary financing to undertake the public improvements, land preparation, demolition, and clearance." KRS 154.30-060(2). The first Anderson study concluded the total fiscal impact of the TIF district would be 2.76 million dollars over the 20-year life of the district. The second Anderson study concluded the total fiscal impact of the TIF district would be 21.42 million dollars.

On November 2, 2020, the Taxpayers filed a verified complaint challenging the validity of Ordinance No. 2019-4-8569. The Taxpayers own property within the proposed TIF district. Among its many allegations, the complaint alleges that the City defendants acted arbitrarily, capriciously, or contrary to law when they established the TIF district in

downtown Paducah and its riverfront area as well as the ordinance illegally authorizes the expenditure of city revenue generated by taxes for private investments. On March 2, 2021, the Taxpayers requested deposition dates for the City Commissioners and former Paducah Mayor Brandi Harless.

On March 18, 2021, the City defendants filed their motion for summary judgment and denied the Taxpayers' request for deposition dates. The motion contends that the Taxpayers do not have legal standing to bring their action and there are no genuine issues of fact that would prevent the entry of an order of dismissal. The gist of the City's motion is that "the City has provided this court with irrefutable evidence" to prove compliance with KRS Chapters 65 and 154 as well as the validity and rationality of its TIF Program.

Turning first to the Taxpayers standing, in order for a party to have legal standing in Kentucky, he or she must: (a) "have a sufficient interest in the controversy to assure an adversary presentation; (b) . . . have an interest in the alleged wrong other than that of a member of the general public; and (c) . . . show that his [or her] legal rights or privileges have been invaded." *Carrico v. City of Owensboro*, 511 S.W.2d 677, 679 (Ky. Ct. App. 1974). Specifically, a party would have legal standing as a taxpayer if he or she demonstrates that the legislative action he or she seeks "to prohibit [is] prejudicial to his [or her] rights as a taxpayer or would result in a loss to the municipality." *Id.* This prejudice would include injury by "the unlawful expenditure of public funds, . . . the illegal disposition of the public property, or . . . any other illegal act that would increase the person's burden of taxation." 74 Am. Jur. 2d § 8.

The Taxpayers have legal standing as outlined in *Carrico*. First, they have a sufficient interest in the proposed development of a TIF district in downtown Paducah and its riverfront area to assure an adversary presentation to the City defendants' adoption of the ordinance. Second, the Taxpayers have an interest in the City defendants' alleged wrong other than that of members of the general public because they are taxpayers who own property within the proposed TIF district. Lastly, they should be able to show that their legal rights or privileges have been invaded by the City defendants' actions.

No Kentucky appellate court has reviewed a challenge based on arbitrariness or other grounds to a legislative action resulting in an ordinance creating, implementing, or expanding a TIF district. However, some appellate courts in our sister states have at different points over the last four decades. See *Wolper v. City Council of City of Charleston*, 287 S.C. 209 (1985); see also *Meramec Valley R-III Sch. Dist. v. City of Eureka*, 281 S.W.3d 827 (Mo. Ct. App. E. Dist. Div. 3 2009); see also *Great Rivers Habitat Alliance v. City of St. Peters*, 384 S.W.3d 279 (Mo. Ct. App. W. Dist. 2012); see also *Voters with Facts v. City of Eau Claire*, 382 Wis.2d 1 (2018).

In evaluating a legislative action, appellate courts in our sister states have primarily used either the "fairly debatable" test or certiorari review. See *Meramec Valley R-III Sch. Dist.*, 281 S.W.3d at 839; see also *Great Rivers Habitat Alliance*, 384 S.W.3d at 286; see also *Voters with Facts*, 382 Wis.2d at 51-53.

The "fairly debatable" test limits judicial review of a legislative action to "whether it was arbitrary, . . . induced by fraud, collusion, . . . bad faith, or . . . exceeded its

powers." *Meramec Valley R-III Sch. Dist.*, 281 S.W.3d at 835; *Great Rivers Habitat Alliance*, 384 S.W.3d at 286. Under this test, a court may not:

substitute its discretion for that of a legislative body; instead it will review the legislative action to determine whether a sufficient showing of reasonableness exists so that the question is, at the least, fairly debatable. If such a showing is made, then the discretion of the legislative body is conclusive. In order to overcome the presumption of legislative validity and prevail on a claim that legislative action is unreasonable, arbitrary, or capricious, the challenger must show that the challenged action is not "reasonably doubtful or even fairly debatable." Reasonableness or arbitrariness turns upon the facts of each case and judicial review focuses on whether substantial evidence supports the municipal legislative determination. . . . The burden of proving that [a legislative action] is arbitrary is upon the [challenging] party . . . A legislative decision is arbitrary only if it "is so erroneous as to not be fairly debatable."

Great Rivers Habitat Alliance, 384 S.W.3d at 286.

In the alternative or in addition to the "fairly debatable" test, certiorari review provides courts with a mechanism to test the validity of a legislative action when there are no statutory provisions in its state for judicial review. See *Voters with Facts*, 382 Wis.2d at 51-53. When a court uses certiorari review of a legislative action, it:

reviews the record compiled by the municipality and does not take any additional evidence on the merits of the decision. The court's review is limited to: (1) whether the municipality 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 . . .

Id. at 53. According to these standards, if a city ordinance is not determined to be arbitrary, summary judgment would be appropriate in accordance with CR 56.03.

In other contexts, Kentucky has adopted a "substantial evidentiary support" standard. A Kentucky court may review a legislative action "for the limited purpose of considering whether such [action is] arbitrary." *Hilltop Basic Res., Inc. v. City of Boone*,

180 S.W.3d 464, 467 (Ky. Sup. Ct. 2005). In *Hilltop Basic Res., Inc.*, the Kentucky Supreme Court outlined the standard for arbitrariness review as being “limited to the consideration of three basic questions: (1) whether an action was taken in excess of granted powers; (2) whether affected parties were afforded procedural due process; and (3) whether determinations are supported by substantial evidentiary support.” *Id.*

The third consideration is at issue in the allegations made in the Taxpayers' complaint. The City defendants provide as substantial evidentiary support the three economic reports prepared by CE and AEG. The City defendants' contention is that the data in the second Anderson Economic Report and their adoption of its ordinance based upon that report are irrefutable. The Taxpayers contend the data relied upon by the City defendants is suspect, making any decisions based upon that data arbitrary and capricious. They assert the Anderson reports have vastly divergent economic projections.

Our courts have long recognized the importance of a party being given an adequate opportunity to conduct discovery. See *Leeds v. City of Muldraugh*, 329 S.W.3d 341 (Ky. Ct. App. 2010). In at least one TIF case, the trial court agreed with this standard. See *Meramec Valley R-III Sch. Dist.*, 281 S.W.3d at 829-30. In *Meramec Valley R-III Sch. Dist.*, the plaintiff filed an action against the city seeking to challenge its adoption of an ordinance authorizing the use of TIF for the re-development of an area within the city consisting of approximately 938 acres. See *id.* The trial court granted the request of the plaintiff to have time to undertake discovery in order to respond to the motion for summary judgment filed by the city. See *id.* at 834. It was only after the

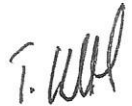
plaintiff had time to undertake discovery that the trial court considered all of the evidence in the record and made its ruling. *See id.*

The Taxpayers' request in the instant case is similar to the plaintiff's request in *Meramec Valley R-III Sch. Dist.* Contrary to the City defendants' contention, no Kentucky decision limits judicial review of legislative action to the record compiled by the municipality. Summary judgment will be denied because the Taxpayers have standing to challenge the validity of the Ordinance and they should be permitted under CR 56.03 to conduct discovery to prove the allegations in their complaint.

**ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Therefore, **IT IS HEREBY ORDERED** that the City defendants' motion for summary judgment requesting the dismissal of the Plaintiffs' complaint is **DENIED**.

ENTERED, this the 13 day of July, 2021.


**TIM KALTENBACH, JUDGE
McCRACKEN CIRCUIT COURT
DIVISION NO. I**

CLERK'S CERTIFICATE

I hereby certify that a copy of the foregoing Memorandum and Order Denying the Defendants' Motion for Summary Judgment was mailed on this the 13 day of July, 2021 to:

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KIM CHANNELL
McCRACKEN CIRCUIT COURT

By: Becky Brunn d.c.