COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT 3
APPEAL CASE NO. 2015AP1858

Voters with Facts, Pure Savage Enterprises, LLC, Wisconsin Three, LCC, 215 Farwell LLC, Dewloc, LLC, Leah Anderson, J. Peter Bartl, 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,
Plaintiffs-Appellants,

v.

City of Eau Claire and City of Eau Claire Joint Review Board,
Defendants-Respondents.

Appeal from the Circuit Court of Eau Claire County
Honorable Paul J. Lenz Presiding
Case No. 15-CV-175

BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

The Plaintiffs-Appellants are taxpayers who assert that the City of Eau Claire is abusing Wisconsin's Tax Incremental Financing ("TIF") law. They allege the City has created tax increment districts ("TIDs") that do not meet statutory requirements and is using the incremental taxes collected to fund unlawful project plans that will pay millions of tax dollars to the project's owner and developer. These payments amount to nothing more than an illegal tax rebate in violation of the Uniformity Clause of the Wisconsin Constitution.

The Plaintiffs-Appellants allege that the Defendants-Respondents did not and could not establish that the real property within the challenged TIDs constituted a blighted area as required by the TIF statute. As a result, the challenged TIDs are invalid and the expenditure of the taxpayer funds under the TIDs' projects plans will be unlawful.

The Circuit Court dismissed the case primarily based on the Court's conclusion that the taxpayer plaintiffs lacked standing and that whether a TID satisfies the statutory requirements is a political question not proper for judicial review. Because the Circuit Court misapplied the law of taxpayer

standing and the political question doctrine, among other errors, the Circuit Court's decision should be reversed.

STATEMENT OF ISSUES

Issue 1: Whether the Plaintiffs, taxpayers of the City of Eau Claire, have standing to challenge the legality of the creation and amendment of two TIDs in the City of Eau Claire.

Circuit Court's Decision: The Circuit Court ruled that the Plaintiffs lacked standing because they had no legally protectible interest in the controversy.

Issue 2: Whether this case is ripe for determination.

Circuit Court's Decision: The Circuit Court ruled that the case was not ripe because the case raised a political question and the taxpayer injury alleged is highly speculative.

Issue 3: Whether the Complaint states a claim that the City's actions violated the Wisconsin Constitution.

Circuit Court's Decision: The Circuit Court apparently interpreted the Plaintiffs' claim as a facial challenge to the constitutionality of the tax incremental financing ("TIF") laws, which was precluded by *Sigma Tau*

Gamma Fraternity House Corp. v. City of Menomonie, 93 Wis. 2d 392, 288 N.W.2d 85 (1980).

Issue 4: Whether the Complaint states a certiorari claim that the City's actions constitute an abuse of discretion, excess of power, or error of law.

Circuit Court's Decision: The Circuit Court ruled that the Complaint did not state such a claim.

STATEMENT ON ORAL ARGUMENT

Oral argument is not necessary in this case. This appeal largely involves the application of settled law to alleged facts. Briefing is likely to be sufficient to fully present, develop, and meet the relevant arguments.

STATEMENT ON PUBLICATION

The Court should publish the decision in this matter under the considerations of Wis. Stat. (Rule) 809.23(1)(a). It is likely to apply the established rules of taxpayer standing and the political question doctrine to a factual situation (challenging TIDs) not addressed in existing published opinions. The question of whether taxpayers have the right to sue to challenge unlawful TIDs is an issue of substantial and continuing public

interest, given the high-profile and often controversial nature of subsidizing private development with taxpayer funds.

STATEMENT OF THE CASE

This is an action challenging the validity of the actions taken by Defendants City of Eau Claire ("City") and City of Eau Claire Joint Review Board ("JRB") to create a new TID, Eau Claire TID #10, and to amend and expand an existing TID, Eau Claire TID #8. Plaintiff Voters With Facts ("VWF") is an unincorporated association of grassroots citizen volunteers and Eau Claire taxpayers who question the propriety of the developments that are the subject of this lawsuit. The individual Plaintiffs are Eau Claire property owners and taxpayers, and many of them are officers and volunteers of VWF.

On March 12, 2015, the Plaintiffs filed this lawsuit seeking a judgment declaring void the resolutions creating and amending the TIDs, along with any municipal actions taken in reliance on the lawful existence of the TIDs. The Plaintiffs put forth several theories for why the TIDs were invalid:

1. The TIDs do not meet the statutory requirement that "[n]ot less than 50%, by area, of the real property within the district is . . . a blighted area." Wis. Stat. §66.1105(4)(gm)4.a.
2. The TIDs do not meet the statutory requirement that development would not occur within them without tax incremental financing. §66.1105(4m)(c)1.a.
3. The City Council and JRB lacked sufficient factual basis in the record to conclude that the property was sufficiently blighted and development would not occur without tax incremental financing.
4. The JRB failed to "review the public record, planning documents and the resolution passed by" the City Council for the TIDs. §66.1105(4m)b.1.
5. Because the TIDs do not actually eliminate blight, they lack a public purpose and therefore are an unconstitutional expenditure of public funds.
6. The Uniformity Clause of the Wisconsin Constitution prohibits an arrangement under the TIF statutes whereby the owner of property within the TID is, in effect, given a tax rebate in the form of millions of dollars of incremental TID funds.

7. TID #10 unlawfully reimburses the developer of the underlying project for demolishing historic buildings in violation of §66.1105(2)(f)1.a.
8. The actions of the City Council and JRB were arbitrary, capricious, and outside the scope of their lawful authority (an alternative claim for certiorari review if the court determined that declaratory relief was unavailable).

(*See generally* R. 1.) The Plaintiffs also alleged that as taxpayers, they are harmed by the Defendants' actions because their tax dollars will be spent in an unlawful manner, tax revenues from the incremental growth in the TIDs will be unavailable for general purposes such as schools, roads, and public safety, and incremental tax revenues from the TIDs will be unavailable for other taxing jurisdictions that they pay taxes to. (R. 1:21, 23 (Compl. ¶¶79, 91).)

After answering, the Defendants moved to dismiss the Complaint for failure to state a claim pursuant to Wis. Stat. §802.06. They raised nine arguments for dismissal:

1. The Plaintiffs' [sic] lack standing to bring a Declaratory Judgment action.
2. The Plaintiffs' [sic] lack standing to bring a certiorari action.

3. The Plaintiffs' claims are impermissible challenges to legislative enactments.
4. The Plaintiffs' historic buildings claims fail to state a claim and are moot.
5. The Plaintiffs' [Uniformity Clause claim] constitutes a facial constitutional challenge, and Wisconsin's TIF law is constitutional.
6. The Plaintiffs failed to serve the Wisconsin Attorney with a copy of the proceeding despite alleging Wisconsin's TIF law violates the Constitution.[1]
7. The City Council and Joint Review Board's actions comport with the Public Purpose Doctrine.
8. Declaratory Judgment is not a proper method to review the formation or amendment of TIF districts.
9. Voters With Facts lacks association standing.

(R. 8:3-4.)

After briefing and oral argument the Circuit Court issued an oral ruling on August 17, 2015, granting the Defendants' Motion. The court concluded that the Plaintiff taxpayers lacked standing because they lacked a legally protectible interest. (R. 14:4-5 (App. 4-5).) The court concluded that the case was not ripe because the case raised a political question inappropriate for judicial review (R. 14:5-6 (App. 5-6)), and the Plaintiffs' alleged harms were too speculative (R. 14:7 (App. 7)). The court also ruled that the Plaintiffs' constitutional claims failed because TIDs are constitutional under *Sigma Tau* (R. 14:6-7 (App. 6-7)), and that the

[1] The Plaintiffs disputed that notice to the Attorney General was necessary, as they were challenging the constitutionality of government actions, not statutes or ordinances. Nevertheless, they provided the Attorney General with a copy of the pleadings on May 27, 2015.

Plaintiffs failed to allege abuse of discretion, excess of power, or error of law, (R. 14:7 (App. 7)).

The court entered an order dismissing the case on August 28, 2015. The Plaintiffs filed a timely notice of appeal on September 8, 2015

STATEMENT OF FACTS

All facts are presented as alleged in the Complaint, and are assumed to be true for purposes of the Defendants' Motion to Dismiss. *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶5, 262 Wis. 2d 127, 663 N.W.2d. 715.

Plaintiff VWF is an unincorporated association of grassroots citizen volunteers and Eau Claire taxpayers who question the propriety of the proposed developments that are the subject of this lawsuit. (R. 1:6.) The other Plaintiffs are individuals and LLCs who own property in the City of Eau Claire and pay property taxes to the City of Eau Claire, the Eau Claire Area School District, the County of Eau Claire, and the Chippewa Valley Technical College District. (R. 1:7-8.)

TID #10 was created, and TID #8 was amended, to support a development in downtown Eau Claire known as the "Confluence Project," which was announced in 2012. (R. 1:14.) The properties on the

Confluence Project site are owned by a real estate development partnership that acquired them in three transactions between 2012 and 2014 for purposes of the Confluence Project. (*Id.*) After acquiring them, but before the City finally approved the two TIDs, the developer demolished several buildings within the Confluence Commercial District that were listed on the National Register of Historic Places. (R. 1:14-15.) The properties located in TID #10 and the amended area of TID #8 were not blighted, and development would occur in them even without tax incremental financing. (R. 1:15.)

At a public meeting on August 18, 2014, the City of Eau Claire Plan Commission voted 8-1 to endorse the project plans for TID #10 and Amendment No. 3 to TID #8. (R. 1:16.) On September 9, 2014, the day after an open public hearing, the City's Common Council adopted a resolution approving the amendment to TID #8. (R. 1:16-17.) The statement in the City Council's Resolution that "not less than 50%, by area, of the real property within the amended boundary area of the District is a 'blighted area' and is in need of 'rehabilitation or conservation' within the meaning of Section 66.1105(2)(a)1 of the Wisconsin Statutes" is neither supported by record evidence nor factually correct. (R. 1:17.)

On September 26, 2014, the JRB adopted a resolution approving Amendment No. 3 to TID #8. (*Id.*) The statement in the resolution that in the judgment of the JRB "the development described in the Amendment [to TID #8] would not occur without the amendment" is neither supported by record evidence nor factually correct. (*Id.*)

On October 13, 2014, the City Council held a second open public hearing on the creation of TID #10. (*Id.*) On October 14, 2014, counsel for the Plaintiffs sent a letter via electronic mail to Eau Claire City Attorney, Stephen C. Nick, copying City Clerk Donna Austad. (*Id.*) In the letter, counsel for the Plaintiffs raised claims on behalf of Voters With Facts that the City lacked authority to enact Amendment No. 3 to TID #8 and to create TID #10, pointing out that: (1) the areas in question did not meet the statutory definition of "blighted area" necessary to permit a TID; (2) the City Council lacked any evidence that would support a finding of blight in either TID; and (3) there was no evidence that could support a finding by the JRB that in its judgment the developments in question would not occur within the TIDs but for the creation of the TIDs. (R. 1:18, 29-36.)

Nevertheless, at its meeting on that same day, the City Council adopted a Resolution approving the creation of TID #10. (R. 1:18.) The

statement in the Resolution that "not less than 50%, by area, of the real property within the amended boundary area of the District is a 'blighted area' and is need of 'rehabilitation or conservation' within the meaning of Section 66.1105(2)(a)1 of the Wisconsin Statutes" is neither supported by record evidence nor factually correct. (*Id.*)

On October 22, 2014, the JRB adopted a Resolution approving the creation of TID #10. (*Id.*) The statement in the Resolution that in the judgment of the JRB "the development described in the Project Plan would not occur without the creation [of TID #10]" is neither supported by record evidence nor is factually correct. (*Id.*)

On November 10, 2014, counsel for the Plaintiffs, expressly on behalf of all of the Plaintiffs in this action, sent a "Notice of Claim and Injury Pursuant to Wis. Stat. §893.80" ("Notice of Claim") via electronic mail and certified mail to the City Clerk, Donna Austad. (*Id.*) The Notice of Claim incorporated counsel for Plaintiffs' October 14, 2014 letter by reference as to the circumstances of the claim and was signed by the Plaintiffs' attorney. (R. 1:19, 37-47.) The Notice of Claim contained the claimants' addresses and an itemized statement of relief, which requested "(a) an acknowledgment by the City of Eau Claire and the JRB that their

conduct did not comply with the Wisconsin statutes governing the creation and amendment of TIDs, and are therefore unlawful, void, and of no force and effect; and (b) the cessation of any and all actions by the City to implement the amended TID #8 and TID #10." (*Id.*)

Nevertheless, on November 11, 2014, the City Common Council voted 8-3 to adopt a Resolution approving the city's 2015 – 2019 Capital Improvement Plan, effectively implementing the unlawful TIDs by appropriating funds to be spent pursuant to the project plans for TID #8 ($9,976,100) and TID #10 ($5,945,800) in 2015, among other things. (R. 1:19.) The City Council was aware that the Plaintiffs' claims had been filed at the time it voted on this Resolution. (*Id.*) At the same meeting the City Council also voted unanimously to adopt a resolution authorizing the issuance of bonds to be funded by the incremental revenue from TID #10 and TID #8. (*Id.*) As of the date the Complaint was filed, the City had not responded to the Notice of Claim and the claims were deemed to have been denied by operation of law. (*Id.*)

The Project Plan for TID #10 indicates that $10,400,000 of the project costs will come in the form of "contributions" – *i.e.* cash payments from the City – to the Confluence developer. These contributions are to be

paid in the form of cash grants to the partnership to compensate it for development costs. The funds to be paid to the developer depend upon its achieving specified milestones in the project, but they are paid to the developer in a lump sum once those milestones have been reached. Neither the Project Plan for TID #10 nor the agreements with the developer clearly provide that the lump sum grants may not be used by the Confluence developer to reimburse itself for some or all of the costs it had already incurred for purchasing then demolishing the listed historic properties that are the subject of the Complaint. (R. 1:13.)

The Project Plan for Amendment No. 3 to TID # 8 indicates that $11,100,000 of the project costs will fund the construction of a parking ramp that is intended, among other purposes, to provide parking for the Confluence Project's Performing Arts Center. An additional $1,500,000 will be in the form of another "contribution" to the developer of the Confluence buildings. (*Id.*)

ARGUMENT

Background and Summary of Argument

The Wisconsin TIF law is a specially-designed tool to accomplish specific purposes. It is not an open invitation for municipal governments to

hand over taxpayer money to real estate developers and avoid accountability for doing so by telling the taxpayers that only earmarked "incremental" tax dollars are being thrown into the deal. Because the TIF law was designed to accomplish specific purposes the municipality must establish the existence of specific factual predicates in order to create a TID.

In this case the two TIDs under consideration were created for the ostensible purpose of combating blight. To lawfully create such a TID the municipality must establish that "[n]ot less than 50%, by area, of the real property within the district is . . . a blighted area." Wis. Stat. §66.1105(4)(gm)4.a. "Blighted area" in turn means "a slum area, in which the structures, buildings or improvements, which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of these factors is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime, and is detrimental to the public health, safety, morals or welfare." *See* Wis. Stat. §66.1105(2)(ae).

This is an objective standard, the truth of which can be proved or disproved in court based upon evidentiary facts. The Plaintiffs-Appellants have expressly alleged that the required determination of blight was fabricated, because the areas making up the TIDs were not blighted as a matter of fact. They seek the opportunity to present evidence on that issue in court.

The Circuit Court, however, ruled that for a number of reasons the Plaintiffs-Appellants are not entitled to a day in court on this issue. First, the Circuit Court found that the Plaintiffs-Appellants lacked standing. But that legal conclusion is inconsistent with the legion of cases on taxpayer standing in Wisconsin. The taxpayer Plaintiffs in this case seek to prevent over $15,000,000 of taxpayer money being spent under illegal TIDs. Wisconsin law recognizes their right to do so.

Second, the Circuit Court concluded that the question of whether "[n]ot less than 50%, by area, of the real property within the district is . . . a blighted area" is a political question and not an adjudicative fact. But Wisconsin courts do not apply the "political question" doctrine to municipal actions, and the factual question involved is well within the capacity of a court to answer.

Third, the Circuit Court concluded that the harm alleged by the Plaintiffs-Appellants was "highly speculative," but that is not the case at all. An illegal expenditure of $15,000,000 of taxpayer money is a specific and concrete harm to taxpayers.

Fourth, the Circuit Court ruled that the Wisconsin TIF law has already been held constitutional in *Sigma Tau*, and the Circuit Court would not revisit that issue. However, Plaintiffs-Appellants have not asserted a facial constitutional challenge to Wisconsin's TIF law as was the case in *Sigma Tau*. Rather, the Plaintiffs-Appellants have made an as applied challenge asserting that in this case paying $11,900,000 to the developer would be an improper tax rebate that would violate the Uniformity Clause of the Wisconsin Constitution.

Fifth, the Circuit Court held that the Plaintiffs-Appellants could only challenge the legislative decision to create and amend the TIDs by alleging "an abuse of power, excess of power, or error of law." But the Circuit Court ignored that Plaintiffs-Appellants asserted exactly such a claim for certiorari review as an alternative remedy.

The court did not reach three additional grounds for dismissal advanced by the Defendants: that the historic building claim was moot, that

a declaratory judgment action is an improper method for challenging TIDs, and that VWF does not have associational standing.

Under Wisconsin law, Plaintiffs-Appellants, as taxpayers, have the right to challenge municipal conduct that results in the illegal expenditure of taxpayer funds. That is precisely what the Plaintiffs-Appellants are doing in this case and it was error for the Circuit Court to deny them their day in court by granting the Defendants-Respondents motion to dismiss.

Standard of Review

Whether a complaint has properly pled a cause of action is a question of law. *Hermann v. Town of Delavan*, 215 Wis. 2d 370, ¶4, 572 N.W.2d 855 (1998). Because the purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint, all facts pled and all reasonable inferences from those facts are taken as admitted. *Scott*, 2003 WI 60, ¶5. The complaint must be liberally construed in favor of stating a claim, and should be dismissed only if it is clear that there are no conditions under which the plaintiff could prevail. *Hermann*, 215 Wis. 2d 370, ¶4. "The court is not to be concerned with whether the plaintiff can actually prove the allegations . . . . The underlying facts alleged are taken as true, and only the legal premises derived therefrom are challenged."

Keller v. Welles Dept. Store of Racine, 88 Wis. 2d 24, 29, 276 N.W.2d 319 (1979).

I) THE CIRCUIT COURT IMPROPERLY CONCLUDED THAT THE PLAINTIFFS LACKED STANDING

The circuit court initially addressed the four factors necessary to bring a declaratory judgment action:

> In order to maintain a declaratory judgment action under Wisconsin Statute Section 806.04, . . . there must exist a justiciable controversy. And a controversy is justiciable when the following factors are present: one, a controversy in which a claim of right is asserted against one who has an interest in contesting it; two, the controversy must be between persons whose interests are adverse; three, the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and, four, the issue involved in the controversy must be ripe for judicial determination.

(R. 14:4 (App. 4) (citation omitted).) As to the third factor, the circuit court ruled that the Plaintiffs lacked standing. The court reasoned:

> I find that none of the plaintiffs and, as a result, Voters with Facts also, which derives its standing from the constituent members, none allege a legally protectible interest. A party must have a personal stake in the outcome and must be directly affected by the issues in controversy. Here, the plaintiffs allege no particular pecuniary loss attributable to them except a speculative possibilities [sic] that general tax revenues could be affected. This is not enough to confer standing on individual taxpayers dissatisfied with a legislative action.

(R. 14:4-5 (App. 4-5) (citation omitted).)

However, the circuit court misapplied the doctrine of taxpayer standing, which in Wisconsin permits taxpayers to challenge any unlawful expenditure of general tax revenues.

A) Taxpayer Standing in Wisconsin

"In order to maintain a taxpayers' action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss . . . ." *S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 21, 112 N.W.2d 177 (1961) (citing *McClutchey v. Milwaukee County*, 239 Wis. 139, 300 N. W. 224 (1941) & 137 A. L. R. 628, and cases cited therein). Taxpayers have an easy time establishing that they will suffer pecuniary loss when tax revenues will be spent in an allegedly unlawful manner. "[A] taxpayer [has] a financial interest in public funds" and "[a]ny illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *Id.* at 22 (emphasis added). The harm occurs because the government entity has "less money to spend for legitimate governmental objectives" or because additional taxes must be levied "to make up for the loss resulting from the expenditure." *Id.*

This is well-settled law that has been applied in wide variety of contexts. *See, e.g.*, *Coyne v. Walker*, 2015 WI App 21, 361 Wis. 2d 225, 862 N.W.2d 606 (taxpayer challenge to statutory change to Superintendent of Public Instruction's rulemaking authority); *Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993) (taxpayer challenge to transfer of a county museum to a private organization); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988) (taxpayer challenge to "Frankenstein" veto); *Appleton v. Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988) (taxpayer challenge to statutory scheme for apportionment after annexation of a town); *Tooley v. O'Connell*, 77 Wis. 2d 422, 253 N.W.2d 335 (1977) (taxpayer challenge to statutory plan for financing city schools from property taxes); *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976) (taxpayer challenge to negative-aid school financing); *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1976) (taxpayer challenge to constitutionality of veto); *Thompson v. Kenosha*, 64 Wis. 2d 673, 221 N.W.2d 845 (1974) (taxpayer challenge to statute allowing counties to adopt county assessors); *West Milwaukee v. Area Bd. of Vocational, Tech. and Adult Ed.*, 51 Wis. 2d 356, 187 N.W.2d 387 (1971) (taxpayer challenge to statute allowing for area vocational districts);

Columbia County v. Bd. of Trustees of Wisconsin Retirement Fund, 17 Wis. 2d 310, 116 N.W.2d 142 (1962) (taxpayer challenge to statute mandating all counties join the welfare fund); *Fed'l Paving Corp. v. Prudisch*, 235 Wis. 527, 293 N.W. 156 (1940) (taxpayer challenge to statute allowing certain cities to pay funds under contracts later found void); *O'Donnell v. Reivitz*, 144 Wis. 2d 717, 424 N.W.2d 733 (Ct. App. 1988) (taxpayer challenge to statute requiring counties to fund youth aid programs); *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983) (taxpayer challenge to waiver of competitive bidding requirements); *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 299 N.W.2d 259 (Ct. App. 1980) (taxpayer challenge to lake rehabilitation plan).

B) The Plaintiffs Have Standing to Bring this Action

The circuit court erred by misconstruing taxpayer standing. The court stated that the Plaintiffs did not have standing because they "allege[d] no particular pecuniary loss attributable to them except a speculative possibilities [sic] that general tax revenues could be affected. That is not enough to confer standing on individual taxpayers dissatisfied with a legislative action." (R. 14:5 (App. 5).)

But it is enough. Taxpayer standing is a low hurdle, and a taxpayer plaintiff need merely allege that general tax funds will be spent in an unlawful manner:

> The illegal disbursement of this money would constitute an invasion of the funds of the city in which each individual taxpayer has a substantial interest, notwithstanding the fact that the payment of this sum would not necessarily result in increased taxation. The fact that the ultimate pecuniary loss to the individual taxpayer may be almost infinitesimal is not controlling.

S.D. Realty, 15 Wis. 2d at 22, *quoting Wagner v. City of Milwaukee*, 196 Wis. 328, 330, 220 N.W. 207, 208 (1929).

The Complaint alleges pecuniary harm caused by the TIDs. Pleading to the legal standard stated in *S.D. Realty*, it alleges that the Plaintiffs suffer exactly the type of harm recognized in that case – that tax funds will be spent unlawfully and that those tax funds will be unavailable for other, legitimate, purposes. (R. 1:21, 23.) The Complaint contains sufficient allegations to establish that the Plaintiffs have the necessary interest in the controversy to establish their standing to bring this case.

True, the Complaint does not use the explicit phrase "pecuniary harm." But the illegal expenditure of taxpayer funds is a pecuniary harm to taxpayers. *S.D. Realty*, 15 Wis. 2d at 22. And the unavailability of funds

for legitimate purposes is a pecuniary harm to taxpayers. *Id.* The Plaintiffs alleged pecuniary harm to themselves as taxpayers when they alleged that taxpayer funds would be spent unlawfully and be unavailable for legitimate purposes.

Several courts have explicitly held that an inference of pecuniary harm to taxpayers may be drawn merely from the allegation that public funds will be spent unlawfully. For example, the supreme court in *Thompson v. Kenosha* explained:

> Liberally construed the plaintiffs' complaint stands as a taxpayers' suit to enjoin illegal governmental expenditure. True, the complaint does not specifically allege that the plaintiffs, individually or as a class, have suffered any loss; that defect however is not fatal. The allegation that one taxpayer is suing to vindicate rights of all taxpayers may be implied. As to the allegation of pecuniary loss, the complaint does state that plaintiffs are taxpayers and that sec. 70.99, Stats., providing for creation of a countywide assessor system, is unconstitutional. Under sec. 70.99(12) the state and the county jointly finance the operation of the system. Thus the statute does require expenditure of public money, and if the statute were held unconstitutional, this expenditure would also be illegal. That sufficiently establishes plaintiffs' pecuniary loss, according to S. D. Realty Co. v. Sewerage Comm.

64 Wis. 2d at 679-80 (footnotes omitted, emphasis added); *see also State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d at 436, *citing Thompson v. Kenosha*, 64 Wis. 2d at 679 ("[W]e need not consider the absence of any

specific allegation in the petition that [the taxpayer plaintiffs], either individually or as a class, have suffered pecuniary loss, to be fatal.")); *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶18, 275 Wis. 2d 533, 685 N.W.2d 573, citing *Thompson v. Kenosha*, 64 Wis. 2d at 679 ("When a challenge is made to standing as alleged in a complaint, we take the allegations in the complaint as true and liberally construe them in the plaintiff's favor."); *Gottlieb v. City of Milwaukee*, 90 Wis. 2d 86, 92, 279 N.W.2d 479 (Ct. App. 1979) citing *Thompson v. Kenosha*, 64 Wis. 2d at 680 ("When taxpayers sue for declaratory relief from a statute requiring expenditure of public funds, the complaint, even though it does not allege pecuniary loss, will be liberally construed to incorporate such missing allegations.").[2]

Because the Complaint alleges that the Plaintiffs pay property taxes and that taxpayer funds would be spent unlawfully and be unavailable for legitimate purposes, it alleges sufficient facts for the Plaintiffs to have

[2] One published case has stated that a complaint must specifically allege pecuniary harm. *See Metropolitan Builders Ass'n of Greater Milwaukee v. Village of Germantown*, 2005 WI App 103, ¶26, 282 Wis. 2d 458, 698 N.W.2d 301 ("[M]ere status as a taxpayer or property owner does not suffice to confer standing" absent an allegation of pecuniary loss.) That court of appeals statement, however, contradicts binding supreme court precedent and furthermore is dicta, as the court found the plaintiffs had standing on another theory. *Id.*, ¶13.

established taxpayer standing. This Court should reverse the lower court in that regard.

II) THE CIRCUIT COURT IMPROPERLY CONCLUDED THAT THIS CASE IS NOT RIPE

The circuit court then moved to the fourth factor necessary to permit a declaratory judgment action, concluding that the case is not ripe. The court found two separate reasons to dismiss the case on that ground: that the case raises a political question and that the injury claimed is speculative. Neither reason is correct.

A) This Case Does Not Raise a Political Question

The circuit court ruled that, under the six-factor test of *Baker v. Carr*, 369 U.S. 186 (1962), this case raises a political question inappropriate for judicial review. (R. 14:5-6 (App. 5-6).) Relatedly, the court also ruled that whether a particular area was more than 50% blighted was a "legislative fact" rather than a "quasi-judicial adjudicative fact," and therefore could not be reviewed by the court. (R. 14:3 (App. 3).)

Although the Defendants did not cite explicitly to the political question doctrine, they did argue that judicial review of the legislative

decisions of the City Council and JRB was inappropriate. (R. 8:3, 4, 12-13, 14-16.) They argued that the actions were "legislative" rather than "quasi-judicial" (R. 8:3), and that the decisions made were within the discretion of those bodies, reviewable only for "abuse of discretion, excess of power, or error of law," (R. 8:4). They argued that the dispute was about the merits of the TIDs, and therefore inappropriate for judicial review. (R. 8:12-13.)

The Defendants and the circuit court are wrong, however, to characterize this as a dispute over the wisdom of using TIDs to facilitate the Confluence Project. The circuit court erred when it stated that the Plaintiffs were asking the court to determine whether "the funding of the Confluence in part through tax incremental finance district creation [is] good for the City of Eau Claire and the community." (R. 14:6 (App. 6).) The Plaintiffs ask for no such thing. They ask the court to determine (1) whether the statutory prerequisites for creating and amending TIDs were met; and (2) whether the TIDs comport with constitutional requirements. In other words, the issue here is whether the TIDs are legal, not whether they are a good idea. The question of legality has nothing to do with whether, if they are legal, using TIDs for the Confluence Project is wise. The Plaintiffs ask only that the legal requirements for TIDs are followed. The legislature

placed limitations on TIDs for good reasons, and the courts should ensure that they are followed.

Nor does this case raise a political question. A "political question" involves an issue that, based on separation of power concerns, the courts should not entertain because its determination is best left to the other branches of government. *See generally Mills v. Vilas County Bd. of Adjustments*, 2003 WI App 66, ¶17, 261 Wis. 2d 598, 660 N.W.2d 705. "Traditionally, the courts have applied the doctrine to obscure issues that can be answered only by unenforceable judgments or by complex solutions beyond the capabilities of the courts and to issues that would require the decisionmaker to choose between political philosophies." Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 855 Summer 1990.

Under the modern formulation, courts look to six factors to determine whether a political question exists:

1. a textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. a lack of judicially discoverable and manageable standards for resolving it;
3. the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

4. the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
5. an unusual need for unquestioning adherence to a political decision already made; or
6. the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217 (numbering added).

Wisconsin courts have recognized the doctrine, and have used this six-factor test. *See, e.g., State v. Jensen*, 2004 WI App 89, ¶¶48-50, 272 Wis. 2d 707, 681 N.W.2d 230, *aff'd per curiam* (applying the six-factor test and determining that the issue of whether legislators violated legislative rules was not a political question).

However, Wisconsin courts have never applied the political doctrine question to bar review of the actions *of local municipalities*. On the rare occasion when the political question doctrine has precluded judicial review in Wisconsin, it has been applied only to the review of state officials' actions. *See State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶¶6-10, 334 Wis. 2d 70, 798 N.W.2d 436 (courts cannot enjoin the Secretary of State from publishing a law); *Goodland v. Zimmerman*, 243 Wis. 2d 459, 466-68, 10 N.W.2d 180 (1943) (same); *In re John Doe Proceeding*, 2004 WI 65, ¶¶28, 272 Wis. 2d 208, 680 N.W.2d 792 (courts cannot review whether the

legislature followed its own "rules of proceedings" when passing legislation); *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 365, 338 N.W.2d 684 (1983) (same); *School Bd. of Joint Dist. No. 2, Towns of Herman v. State Superintendent of Public Instruction*, 20 Wis. 2d 160, 179-80, 121 N.W.2d 900 (1963) (reviewing whether the Superintendent acted outside of his jurisdiction in ordering new school district boundaries, but refusing to review the substance of the new boundaries); *State ex rel. City of La Crosse v. Rothwell*, 25 Wis. 2d 228, 233-35, 130 N.W.2d 806 (1964) (refusing to review the substance of the new boundaries, because plaintiffs had no constitutional right to determine school district boundaries (which would have permitted review under *Baker*)).

This is not mere happenstance. Separation of power concerns are not raised when the judiciary reviews the actions of municipalities as opposed those of the legislative or executive branches of State government. *Cf. State v. Kempf*, 69 Wis. 470, 34 N.W. 226, 227 (1887) (rejecting the assertion that courts lacked the authority to review aldermanic elections despite a state statute amending the Milwaukee charter to provide that "the common council shall be the judge of the election and qualification of its own members"). Municipalities are the subordinate creations of the state,

subject to the powers of the courts, which act as part of the State government. *See Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶89 & n. 25, 358 Wis. 2d 1, 851 N.W.2d 337 ("A municipality is merely a department of the state . . . and hold[s] powers and privileges subject to the sovereign will.") (quoting *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). Separation of power concerns are only raised when one branch of government invades the constitutional authority of a coequal branch of government. *See generally Marbury v. Madison*, 1 Cranch 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

Nonjusticiable political questions are exceedingly rare. In fact, as noted by former supreme court Justice Diane Sykes, Wisconsin courts have never found a question of state constitutional law unreviewable under the *Baker* framework. *Vincent v. Voight*, 2000 WI 93, ¶194, 236 Wis. 2d 588, 614 N.W.2d 388 (Sykes, J., concurring in part and dissenting in part); Because this case challenges the actions of municipal government and involves questions of state constitutional law, the political question doctrine is not applicable.

The present case does not break new ground. It is analogous to *Fenton v. Ryan*, 140 Wis. 353, 122 N.W. 756 (1909). In *Fenton*, plaintiffs challenged the incorporation of the Village of Kimberly. The defendants argued that "fixing the limits of the village is a legislative or political question, and not a judicial one," 122 N.W. at 756, but the court disagreed. Citing earlier cases, the court first held that courts competency to rule on whether the statutory factual requirements to create a village (a minimum size of one half square mile and a minimum population of 300 people) had been met:

> [A] court might determine such questions as whether the survey was correct, whether the population was as large as the statute required in proportion to the area, **and whether the statutory requirements have been complied with** on all questions of fact which the court may determine.

Id. (citing *In re North Milwaukee*, 93 Wis. 616, 67 N.W. 1033 (1896) (emphasis added)). It went even further, concluding the courts could rule on whether rural land could be included in the village, in light of constitutional requirements of uniformity. *Id.* at 758. While the decision to create a village is a question of policy, whether the requisite process was followed and the conditions precedent met are questions of law for the courts.

Likewise here, the Legislature has created rules by which courts can test the propriety of a TID. Just as courts can review whether proposed villages have sufficient size and population and meet constitutional requirements, courts can review whether proposed TIDs have sufficient blighted property and meet constitutional requirements.

Working through the six-factor test requires the same result. The circuit court erred by concluding that factors two, three, and four required it to refrain from considering the case. (*See* R. 14:6 (App. 6).)

First, judicially discoverable and manageable standards exist to resolve this dispute (factor two). The legislature provided them right in the statute. TIDs may not be created or amended unless specific criteria are met, including that 50% or more of the area within the TID meet the statutory definition of "blighted" and that development would not occur within the TID but for the tax incremental financing. Wis. Stat. §66.1105(4)(gm)4.a. The statute even contains a detailed definition of what "blight" means. *See* Wis. Stat. §66.1105(2)(ae)(1).

Second, as noted above, the Plaintiffs are not asking the court to rule that the TIDs are bad as a matter of policy (factor three). Contrary to the court's statement (R. 14:6 (App. 6)), it <u>is</u> possible to decide this case

without deciding whether financing the Confluence Project through properly created TIDs is a good idea. The legislature has already decided that financing projects through TIDs can be a good idea, but municipalities are only permitted to do so within the strict restrictions set by the law. The court can decide this case by comparing the facts to those restrictions (as well as constitutional restrictions). *See In re Beckstrom v. Kornsi*, 63 Wis. 2d 375, 384, 217 N.W.2d 283 (1974) (holding that although the rationale for a recall election is beyond the scope of judicial review, the validity of the recall proceedings was a judicial question).

Third, ruling in this case would not express a lack of respect to coordinate branches of government (factor four). Municipalities are not "coordinate branches of government" to the state judiciary. *See Barland v. Eau Claire County*, 216 Wis. 2d 560, 572-73, 575 N.W.2d 691 (1998) (calling the "judicial, legislative, and executive branches" the "three separate coordinate branches of government"). The state legislature and the state executive officials are the "coordinate branches of government." More importantly, refusing to enforce the restrictions on TIDs codified by the legislature would express disrespect to the legislature. The legislature creates laws expecting them to be enforced in the courts. "It is the

responsibility of the judiciary to act, notwithstanding the fact that the case involves political considerations or that final judgment may have practical political consequences." *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d at 436-37.

Finally, none of the other three factors are applicable. The Constitution does not commit decision-making on TIDs to municipal governments. There is no unusual need for unquestioning adherence to political decisions already made. Nor is there a potential for embarrassment based on conflicting pronouncements of validity.

This case does not raise a political question, and the lower court should be reversed.

B) The Harms Alleged in the Complaint Are Concrete and Certain to Occur

The circuit court also ruled that the Plaintiffs claims were not ripe because "the alleged harms are highly speculative injuries which are neither imminent nor practically certain to occur." (R. 14:7 (App. 7).) The court's error in this regard was caused by its misunderstanding of the nature of the harm the Plaintiffs alleged. As noted above, the illegal expenditure of tax

money is an injury sufficient to confer standing to taxpayers. *See* Section I.A., *supra*.

The millions of dollars the City has pledged to spend under TID #10 and the amendment to TID #8 are not speculative; they are certain. The Complaint alleges that TID #10 has been created and TID #8 has been amended, that the City has entered into a development agreement with the Confluence Project developer, and that the Project Plan calls for the expenditure of millions of dollars of tax revenue. (R. 1:11, 14-18 (Compl. ¶¶29, 41, 44, 46-47, 51, 53, 58, 60).) The Complaint alleges that the City has already appropriated over $15,000,000 to be spent pursuant to the project plans for TID #8 and TID #10. (R. 1:19 (Compl. ¶65).) The Complaint also alleges that those expenditures would be unlawful. (R. 1:21, 23 (Compl. ¶¶78, 90).)

Therefore, the Complaint alleges that pecuniary harm to the taxpayers is certain, which is sufficient to make this dispute ripe. The City has bound itself legally and contractually to spend millions of dollars of taxpayer money. Absent court intervention, those unlawful expenditures are practically certain to occur. Any unlawful expenditure of tax revenues causes a pecuniary harm to taxpayers. Since harm to the Plaintiffs is

practically certain to occur, and indeed already may be occurring, this case is ripe for adjudication.

III) THE CIRCUIT COURT IMPROPERLY CONCLUDED THAT *SIGMA TAU* PRECLUDES THE PLAINTIFFS' CONSTITUTIONAL CHALLENGES

Despite concluding that the Plaintiffs lacked standing and the case is not ripe, the circuit court briefly addressed the merits of the Plaintiffs' constitutional challenges, finding that they were precluded by *Sigma Tau*. The court's entire reasoning was as follows:

> It is the role of the court to determine the constitutionality of legislation. Tax incremental finance districts are constitutional, under *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 396 (1980).

(R. 14:6-7 (App. 6-7).)

The court appears to have implicitly accepted the Defendants' argument that the Plaintiffs' constitutional challenge was facial, and therefore precluded by *Sigma Tau*. However, the Complaint asserts two "as applied," not facial, constitutional challenge to the specific actions of the City: (1) that they lack a public purpose; and (2) that they violate the Uniformity Clause. Those challenges are not precluded by *Sigma Tau.*

The Plaintiffs first allege that the expenditure of tax funds on TID #10 and the amendment to TID #8 do not serve a public purpose because they failed to eliminate blight (the public purpose recognized by *Sigma Tau*). (R. 1:20-23.) This is not a facial challenge to the TIF statutes, but an as-applied challenge focused specifically on the facts as they exist in the City of Eau Claire. Granting the Plaintiffs their sought-after relief would not invalidate TIDs that do eliminate blight.

Nor is the Plaintiffs' public purpose claim precluded by the specific holding of *Sigma Tau*. The court in that case ruled that a TID that eliminated blight served a public purpose. 93 Wis. 2d at 413-14. But the Plaintiffs allege that the TIDs do not, in fact, eliminate blight. (R. 1:15, 20-21, 22-23.) If that fact is proven true, the TIDs would lack a public purpose, and be unconstitutional.

The Plaintiffs also alleged that the expenditure of tax funds on TID #10 and the amendment to TID #8 violated the Uniformity Clause of the Wisconsin Constitution because the millions of dollars that must be paid to the developer/owner of the TID properties operate as a tax rebate, which is prohibited by *State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94, 270 N.W.2d 187 (1978). (R. 1:25-27.) This is not a facial challenge to the TIF

statutes, but an as-applied challenge focused specifically on the facts as they exist in the City of Eau Claire. Granting the Plaintiffs their sought-after relief would not invalidate TIDs that spend tax money in other ways.

A previous court ruling declaring a statute constitutional does not preclude later as-applied challenges to specific applications of that statute. *See State v. Hamdan*, 2003 WI 113, ¶5, 264 Wis. 2d 433, 665 N.W.2d 785 (holding the ban on concealed carry unconstitutional as applied to the criminal defendant despite a prior case finding the law facially constitutional). A statute survives a facial challenge so long as there is *some circumstance* in which it can be constitutionally applied. *League of Women Voters of Wis. Educ. Network v. Walker*, 2014 WI 97, ¶15, 257 Wis. 2d 360, 851 N.W.2d 302. But statutes that are facially constitutional can nevertheless be unconstitutional as applied. And Plaintiffs are not precluded from raising a challenge to an unconstitutional application of a statute simply because a court has ruled that it is *facially* constitutional. *Sigma Tau* does not preclude the Plaintiffs' as-applied challenges.

The Defendants argued (and the circuit court appears to have implicitly agreed) that the Plaintiffs' Uniformity Clause challenge was

actually a facial challenge, because cash grants to owners are expressly permitted by state law. (R. 8:17-19.) That portion of the TIF law reads:

> 2. Notwithstanding subd. 1., none of the following may be included as project costs for any tax incremental district for which a project plan is approved on or after July 31, 1981:
> . . .
> d. Cash grants made by the city to owners, lessees, or developers of land that is located within the tax incremental district unless the grant recipient has signed a development agreement with the city, a copy of which shall be sent to the appropriate joint review board or, if that joint review board has been dissolved, retained by the city in the official records for that tax incremental district.

Wis. Stat. §66.1105(2)(f)2.d. The City has signed a development agreement with the developer/owner. (R. 1:16, 24-25 (Compl. ¶¶46, 94, 96).)

The factual lynchpin of the Plaintiffs' Uniformity Clause argument is that Eau Claire TIF money is being paid to an owner. Because only the owner pays taxes on a property, only a cash payment to an owner could operate as a tax rebate. The Plaintiffs' therefore are only challenging §66.1105(2)(f)2.d. as applied to cash grants to owners, not in all circumstances.

Even if the Plaintiffs' Uniformity Clause claim is treated as a facial challenge to §66.1105(2)(f)2.d., it is not precluded by *Sigma Tau*. *Sigma*

Tau dealt with a facial challenge to the constitutionality of TIF financing in general. 93 Wis. 2d at 396. The supreme court concluded that where all taxpayers within a TID are taxed at a uniform rate and no taxpayer is given "preferential treatment either in the form of an exemption from taxation or a tax credit," the TIF laws do not violate the Uniformity Clause. *Id.* at 412.

The Plaintiffs allege that the actions of the City are distinguishable from *Sigma Tau*, because the owner is being given preferential treatment in the form of an advance tax credit. (R. 1:27.) The *Sigma Tau* court did not opine on the constitutionality of §66.1105(2)(f)2.d., nor did the facts of that case implicate that portion of the statute. The TID in *Sigma Tau* did not involve a cash grant to an owner, lessee, or developer; rather, the TID called for the government to acquire property and sell it to a developer. 93 Wis. 2d at 397-98.

The distinction is important, because earlier versions of TIF laws were struck down as unconstitutional for that very reason. The *Sigma Tau* court was careful to distinguish the situation in front of it from a previous case that had held a precursor to the current TIF law unconstitutional. *Id.* at 411-12 (citing *State ex rel La Follette v. Torphy*, 85 Wis. 2d 94, 270 N.W.2d 187 (1978)). The court noted that the law struck down in *Torphy*

permitted tax credits to offset increased taxes generated by improvements on the owners' property, which violated the uniformity clause. *Id.* The court then contrasted that situation to the situation in front of it, concluding that the Uniformity Clause was not violated because "[n]o taxpayer or group of taxpayers is being singled out for preferential treatment either in the form of an exemption from taxation or a tax credit." *Id.* at 412.

If municipalities are permitted to skirt uniformity by providing cash rebates to taxpayers, the command of uniformity in Article VIII, section 1 would be meaningless. This issue was not addressed in Sigma Tau. It is presented here. The Complaint alleges that Eau Claire has created a situation more like *Torphy* than *Sigma Tau*. (R. 1:26-27.) That sufficiently states a claim for a violation of the Uniformity Clause. Consequently, that claim should be preserved for summary judgment or trial.

IV) THE CIRCUIT COURT IMPROPERLY CONCLUDED THAT THE PLAINTIFFS DID NOT ALLEGE THAT THE CITY'S ACTIONS WERE AN ABUSE OF DISCRETION, IN EXCESS OF ITS POWER, OR IN ERROR OF LAW

Within the context of its discussion of the political question doctrine, the circuit court stated that "the court can review legislative action which is an abuse of discretion, excess of power, or error of law. This is not alleged

here." (R. 14:7 (App. 7) (citation omitted).) The court's intent is not quite clear, but it appears to have been saying that the case would be ripe, notwithstanding the political question doctrine, if the Plaintiffs had alleged abuse of discretion, excess of power, or error of law.

The court did not use the word, but it was describing certiorari review. "Common law certiorari is available whenever there is no express statutory method of review." *Ottman v. Town of Primrose*, 2011 WI 8, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411. The court reviews only the record compiled by the municipality to determine "(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.*

But the Plaintiffs *did* raise a certiorari claim, which they pled in the alternative if the court refused to hear a declaratory judgment action. (*See* R. 1:27 ("FIFTH CLAIM FOR RELIEF (In the alternative for certiorari)").) The Complaint alleged that "the Resolutions of the City Council and the

Joint Review Board are arbitrary, capricious, and outside the scope of their lawful authority." (*Id.*)

The circuit court committed plain error in ignoring that pleading. Even if this Court agrees that declaratory judgment is an improper vehicle for challenging TIDs, it should reverse and remand to the circuit court with instructions to hear the case as a certiorari challenge.

V) THE DEFENDANTS' REMAINING ARGUMENTS FOR DISMISSAL LACK MERIT

Having already disposed of the case on the above grounds, the lower court reasonably chose not to address three other grounds for dismissal raised by the Defendants: that the historic building claim was moot, that a declaratory judgment action is an improper method for challenging TIDs, and that VWF does not have associational standing.

In the interest of judicial efficiency, this Court should rule on each of those arguments. They remain unresolved, and this case could be further delayed (permitting unlawful expenditures of tax funds to continue) if the Defendants renew their arguments and the circuit court agrees with them, leading to another appeal. *See Sands v. Menard*, 2013 WI App 47, ¶3, 347 Wis. 2d 446, 831 N.W.2d 805 (deciding to rule on issues not necessary for

the appeal in order to avoid having them raised on remand). Furthermore, they are purely issues of law based on the assumption that all facts alleged in the Complaint are true – this Court has no need of input from the lower court to rule on them.

A) The Plaintiffs' Historical Building Claims Are Not Moot

The Defendants argued that the Plaintiffs' claims related to the destruction of historic buildings are moot because the buildings have already been torn down. (R. 8:16-17.) That would be correct if the Plaintiffs were seeking an injunction to halt the destruction of those historic buildings, but the Plaintiffs do not request that relief.

The Plaintiffs' Third Claim for Relief seeks a declaration that the resolution implementing TID #10 is unlawful and therefore void, because it reimburses the developer for costs associated with the destruction of historic buildings. (R. 1:24-25.) Wisconsin law prohibits tax incremental funds from being used to compensate a developer for the costs associated with the destruction of listed properties. Wis. Stat. §66.1105(2)(f)1.a. That claim is not mooted by the destruction of the buildings.

Nor is the claim defectively pled. The Complaint alleges that the developer demolished historic buildings and that the TID #10 project plan

reimburses the developer for costs associated with that demolition. (R. 1:24-25 (Compl. ¶¶94-96.)) If true, those allegations establish that TID #10 is unlawful and therefore void.

B) Declaratory Judgment Is a Permissible Method for Challenging TIDs

The Defendants also argue that declaratory judgment is not available to review the creation or amendment of TIDs. (R. 8:21-22.) Declaratory judgment is available when: (a) there is a controversy between the parties; (b) the interests of the plaintiffs and defendants are adverse; (c) the plaintiffs have a legally-protected interest; and (d) the controversy is ripe. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶15, 259 Wis. 2d 107, 655 N.W.2d 189. This case meets those criteria. The first two requirements are easily satisfied – a controversy over the legal validity of the TID exists between the parties, with the Plaintiffs arguing they are unlawful and the Defendants arguing they are lawful. As demonstrated above, the Plaintiffs have a legally-protected interest, *see* Section I.B., *supra*, and the case is ripe, *see* Section II, *supra*. All the requirements for declaratory judgment are met.

The Defendants erroneously argued that Wisconsin law "concludes that certiorari, not Declaratory Judgment, is the proper method for challenging municipal decisions such as TIF actions. (R. 8:22.) No Wisconsin court has ever held that declaratory judgment actions may not be used to challenge TIF actions. Although such challenges are often brought as certiorari actions, in at least two published cases TIF actions were brought as declaratory actions, and neither of them was dismissed for not using certiorari (although the issue was not raised in either case). *See City of Hartford v. Kirley*, 172 Wis. 2d 191, 493 N.W.2d 45 (1992) (original action seeking a declaration on whether TIF bonds count toward municipal debt limit); *Town of Baraboo v. Village of West Baraboo*, 2005 WI App 96, 283 Wis. 2d 479, 699 N.W.2d 610 (declaratory action, dismissed due to lack of standing). Furthermore, the seminal case on the constitutionality of the current TIF law, *Sigma Tau*, appears to have been a declaratory judgment case. Although the opinion does not expressly state whether it was a declaratory or certiorari action, the court did not review the city's actions using the deferential and highly-specific standards for certiorari review. *See* Section IV, *supra*.

More importantly, this is a taxpayer action, and taxpayer actions are routinely brought as declaratory judgment actions. *See, e.g.*, *Coyne*, 2015 WI App 21, ¶3; *Hart*, 176 Wis. 2d at 698; *Thompson*, 144 Wis. 2d at 432; *Appleton*, 142 Wis. 2d at 872; *Tooley*, 77 Wis. 2d at 430; *State ex rel. Sundby*, 71 Wis. 2d at 121; *West Milwaukee*, 51 Wis. 2d at 360; *Columbia County*, 17 Wis. 2d at 316; *O'Donnell*, 144 Wis. 2d at 720; *J.F. Ahern Co.*, 114 Wis. 2d at 75; *Kaiser*, 99 Wis. 2d at 349. The Defendants failed to demonstrate why this case may not be brought as a declaratory judgment action.

C) Voters With Facts Has Associational Standing

The Defendants argued that VWF should be dismissed as a party because it lacks associational standing. The circuit court may have ruled implicitly that VWF did have associational standing (or at least, it would have, had its members had standing) when it stated that "none of the plaintiffs and, as a result, Voters With Facts also, which derives its standing from the constituent members, none allege a legally protectible interest." (R. 14:4-5 (App. 4-5).) For clarity, if this Court rules that the individual and corporate Plaintiffs have taxpayer standing, it should also state that VWF has standing as well.

Under Wis. Stat. §184.07, "[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." VWF meets all three of those elements.

First, as demonstrated above, VWF's members, many of whom are Plaintiffs in this action, have standing. Second, VWF is seeking to halt unlawful TIDs that are funding aspects of the Confluence Project, which is germane to its purpose. Paragraph 2 of the Complaint asserts VWF's relevant purpose is to "question[] the propriety of the proposed developments that are the subject of this lawsuit." (R. 1:6 (Compl. ¶2).) Third, although VWF's members have standing, none of them are required parties for the claims brought in this suit and the relief requested. None of the claims or requested remedies are specific to any individual, but rather could be sought by any taxpayer. Therefore, VWF has associational standing to maintain this suit.

CONCLUSION

The Plaintiffs ask this Court to reverse the lower court, directing it to proceed with the Plaintiffs' claims as a declaratory judgment action or, in the alternative, as a certiorari action.

Dated this 7th day of December, 2015.

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 9,614 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: December 7, 2015

/s/ RICHARD M. ESENBERG

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, and the appendix, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: December 7, 2015

/s/ RICHARD M. ESENBERG