STATE OF WISCONSIN
SUPREME COURT
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-Petitioners,

v.

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

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS DISTRICT III

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The Plaintiffs-Appellants-Petitioners (collectively, "Voters") respectfully petition the Wisconsin Supreme Court for review of the May 31, 2017 decision of the Court of Appeals.

ISSUES PRESENTED FOR REVIEW

Issue 1: Do taxpayers have standing to challenge the legality of a tax incremental district ("TID")?

Court of Appeals' Decision: The Court of Appeals, conflating standing with review of the merits, concluded that Voters lacked taxpayer standing to challenge the TIDs through a declaratory judgment action because it did not believe that Voters could win on the merits. Conversely, it found that Voters did have taxpayer standing to challenge the TIDs through a certiorari claim.

Issue 2: Must the legal requisites for a formation of a TID actually exist, such that their presence or absence can be challenged in a declaratory judgment action?

Court of Appeals' Decision: The Court of Appeals concluded that the law does not require that these requisites actually exist, so a declaratory judgment action is not an appropriate vehicle for such challenges.

Issue 3: Does the payment of a cash subsidy to a property owner for private improvements violate the Uniformity Clause or the Public Purpose Doctrine?

Court of Appeals' Decision: The Court of Appeals held that it does not.

Issue 4: Did Voters sufficiently plead a claim that Eau Claire is using TID funds to reimburse the owner/developer for the destruction of historic buildings in violation of Wis. Stat. §66.1105(2)(f)1.a.?

Court of Appeals' Decision: The Court of Appeals concluded that Voters had not sufficiently pled that TID funds would actually reimburse the owner/developer for the destruction of historic buildings and that the claim was not ripe.

BRIEF STATEMENT OF CRITERIA FOR REVIEW

This lawsuit challenges the validity of actions taken by Eau Claire to create a new TID, Eau Claire TID #10, and to expand an existing TID, Eau Claire TID #8. The Complaint alleges that the TIDs are unlawful under both statutory and constitutional theories.

The Court of Appeals took the case in the wrong direction from the start by concluding that Voters lacked standing to seek declaratory relief, because it otherwise concluded that Voters' claims lacked merit. In so doing, the court turned the law of standing on its head, as standing is a threshold matter to be resolved without looking at the merits of a claim. The opinion (which will be published) upsets over a century of settled law on taxpayer standing. If left in place, it will confuse litigants and lower courts by collapsing the distinct concept of standing into the legal merits of a claim.

TIDs allow certain taxpayers – those who develop real estate – to have a portion of the property taxes they pay diverted to purposes that privately benefit them. The legislature has made clear that such an extraordinary thing can happen only under limited circumstances – here, where the area to be developed is "blighted" and the development would not occur "but for" the TID. The Court of Appeals essentially immunized TIDs from judicial review, holding that those prerequisites need not actually exist, but are merely procedural steps that need only be recited, not established.

The following criteria under Wis. Stat. §809.62(1r) justify taking this case:

1. The Court of Appeals' decision conflicts with controlling opinions of this Court and other court of appeals decisions. *See* Wis. Stat. §809.62(1r)(d). This Court has repeatedly held that standing should be decided before a determination on the merits, and is not dependent on the merits of a claim. *See, e.g., Wis. Envtl. Decade, Inc. v. PSC*, 69 Wis. 2d 1, 14, 230 N.W.2d 243, 250 (1975) (questions to be determined on the merits are distinct from standing); *see also Kaiser v. City of Mauston*, 99 Wis. 2d 345, 360-61, 299 N.W.2d 259 (Ct. App. 1980) (rejecting the defendant's argument that because the challenged actions were legal, plaintiff taxpayers lacked standing). For taxpayer standing, a plaintiff need only allege that general tax funds will be spent in an unlawful manner. *S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 21, 112 N.W.2d 177 (1961). "[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. The Court of Appeals collapses standing with an analysis of the adequacy of the complaint, complicating standing analysis and raising the potential for confusion.

2. This case also presents real and significant questions of state constitutional law. *See* Wis. Stat. §809.62(1r)(a). Attempts to permit municipalities to subsidize development with the expectation of future increased tax revenues have a dicey constitutional history in Wisconsin, because they may result in unequal taxation in violation of the Uniformity Clause or spend money without a valid public purpose. *See, e.g.*, *State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94, 270 N.W.2d 187 (1978) (striking down a system of tax credits to certain owners whose improvements resulted in increased property tax assessments); *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 147 N.W.2d 633 (1967) (striking down property tax freezes on improved property owned by a redevelopment corporation). Voters allege that the TID Project Plans here, which provide for direct monetary payments to the owner/developer of a new project, act as an unconstitutional tax rebate to a property owner, an issue that has not been addressed in previous court decisions in this state. The case raises a secondary constitutional issue as well – whether a TID that <u>does not in fact</u> eliminate blight actually has a valid public purpose. That issue has also not been addressed in Wisconsin cases.

3. A decision from the Court in this case will also develop the law regarding: (A) whether Wis. Stat. §66.1105(4)(gm)4.a. imposes substantive requirements and limitations on municipalities with regard to the creation of TIDs (for example, must the TID actually be blighted or is the city merely saying that it is blighted sufficient); (B) whether a TID that does not eliminate blight actually has a public purpose; and (C) whether the fungibility of money means that the government may provide TIF funds to private developers who demolish historic buildings. *See* Wis. Stat. §809.62(1r)(c).

4. Some of those areas may require the development of new doctrines rather than involve applying settled law to different facts. *See* Wis. Stat. §809.62(1r)(c)1. There is no settled doctrine to resolve the dispute over whether the requirement that cities and joint review boards make certain findings creates a substantive hurdle or merely a procedural one. There is no settled law regarding how to determine whether cash payments to an owner who has demolished a historic building as part of a TID project have unlawfully reimbursed the cost of that demolition.

5. These areas are novel and have statewide impact. *See* Wis. Stat. §809.62(1)(c)2. The questions regarding whether the statutory

requirements are real and actually require blight and whether and when cash can be provided to someone whose project involved the demolition of historic buildings are novel. In addition, while Wisconsin courts have concluded that remedying blight is a sufficient condition for finding a public purpose, it is unsettled whether that condition is necessary – *i.e.*, whether TIDs have other public purposes and whether a TID that does not eliminate blight has a public purpose. Nor is it settled whether cash payments to an owner to reimburse improvements of the owner's property as part of TIF financing violates the Uniformity Clause. These questions all have statewide impact, as cities across the state frequently use TIDs as financing vehicles for development projects.

6. All of the current issues in this case are legal, not factual, and likely to recur if not resolved by this Court. *See* Wis. Stat. §809.62(1r)(c)3.

STATEMENT OF FACTS AND OF THE CASE

This is an action challenging the validity of the actions taken by Eau Claire to create a new TID, Eau Claire TID #10, and to amend and expand an existing TID, Eau Claire TID #8. The facts set forth herein are taken from the Complaint and must be accepted as true for purposes of reviewing

a motion to dismiss. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693.

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. (*Id.*) 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.) 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.)

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 a 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 City of Eau Claire Joint Review Board ("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. At its meeting on that same day, the 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 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. (R. 1:19.) 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.*)

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 owner/developer. These contributions are to be paid in the form of cash grants to the owner to compensate it for development costs upon reaching certain milestones. Neither the Project Plan for TID #10 nor the agreements with the developer clearly provide that funds may not be used by the Confluence developer to reimburse itself for some or all of the costs already incurred for purchasing and 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 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.*)

On March 12, 2015, Voters 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 alleged that TIDs were invalid because:

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. (R. 1:17-18, 20, 22.)
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. (R. 1:17-18, 21, 23.)
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. (R. 1:17-18, 20-23.)
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. (R. 1:21, 23.)
5. Because the TIDs do not actually eliminate blight, they lack a public purpose and therefore are an unconstitutional expenditure of public funds. (*Id.*)

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 property tax rebate in the form of millions of dollars of TID funds. (R. 1:25-27.)
7. TID #10 unlawfully reimburses the developer of the underlying project for demolishing historic buildings in violation of §66.1105(2)(f)1.a. (R. 1:24-25.)
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). (R. 1:27.)

Voters 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 to which they pay taxes. (R. 1:21, 23.)

After answering, Eau Claire moved to dismiss the Complaint for failure to state a claim pursuant to Wis. Stat. §802.06. They raised nine

arguments for dismissal, including that Voters lacked standing to bring a declaratory judgment or certiorari action, Voters were impermissibly challenging an act of legislative discretion, a declaratory judgment action should not lie to challenge the formation of TIDs, Voters' historical buildings claims failed to state a claim and were moot, and Voters' constitutional claims were without merit. (*See generally* R. 8.)

After briefing and oral argument, the Circuit Court issued an oral ruling on August 17, 2015, granting Eau Claire's Motion. (R. 14, P. App. 135-42.) It entered an order dismissing the case on August 28, 2015. (R. 15, P. App. 143.) Voters filed a timely notice of appeal on September 8, 2015. (R. 17.) The Court of Appeals affirmed in part and reversed in part on May 31, 2017. The Court of Appeals concluded "that Voters lacks taxpayer standing to seek a declaratory judgment that Eau Claire acted unlawfully, either under its statutory authority or from a constitutional standpoint." (Ct. App. Dec. ¶2, P. App. 102.) Because the Court of Appeals believed that the complained-of behavior was not actually unlawful, the court concluded that Voters lacked standing to challenge it. The Court of Appeals concluded, however, that Voters could challenge the

TIDs through certiorari and reversed the Circuit Court's dismissal of that claim. (*Id.*, ¶¶3-4, P. App. 103.)

ARGUMENT

I. STANDING DOES NOT DEPEND ON THE MERITS

The Court of Appeals conflated and confused the concept of a party's standing to bring claims with the merits of those claims. The court mistakenly treated a motion to dismiss for lack of standing as a motion to dismiss for failure to state a claim, concluding that Voters lacked standing specifically because they were wrong on the merits – because the required findings to create or amend a TID are mere procedural steps and not substantive requirements, because the TIDs are constitutional, and because the Plaintiffs didn't sufficiently allege that TIF funds would be spent on destroying historic buildings.

In the Court of Appeals' view, a party lacks standing if the allegations of its complaint could be the subject of a successful motion to dismiss on its merits. For the reasons explored below, it was wrong to conclude that Voters' claims for declaratory relief could be dismissed on the pleadings – that the threshold question of standing includes an assessment of the merits of the claim. That has never been the law.

Standing is a threshold issue and should not be confused with the merits. *See, e.g.*, *McConkey v. Van Hollen*, 2010 WI 57, ¶13, 326 Wis. 2d 1, 783 N.W.2d 855 ("Before we can address the merits of McConkey's challenge, we must confirm whether McConkey's suit is properly before us — that is, whether McConkey has standing to bring his claim.") (emphasis added); *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 240, 332 N.W.2d 782 (1983) (court could not reach the merits because the plaintiffs lacked standing); *West Milwaukee v. Area Bd. of Vocational, Technical and Adult Ed. (Dist. 9)*, 51 Wis. 2d 356, 363, 187 N.W.2d 387 (1971) (court must first resolve threshold issue of standing before proceeding to the merits); *State v. Fox*, 2008 WI App 136, ¶1, 314 Wis. 2d 84, 758 N.W.2d 790 (stating it is error for a court to reach the merits of a claim if the plaintiff lacks standing); *In re Carl F.S.*, 2001 WI App 97, ¶4, 242 Wis. 2d 605, 626 N.W.2d 330 ("Before addressing the merits of Carla's appeal, we must consider the guardian's argument that Carla lacks standing to bring this appeal.") (emphasis added); *State v. Braun*, 103 Wis. 2d 617, 622, 309 N.W.2d 875 (Ct. App. 1981) ("[T]he preliminary issue of standing must be resolved before reaching the merits of the case.") (emphasis added).

Standing is a threshold question in taxpayer standing cases as well. In *Kaiser*, plaintiffs challenged the expenditure of public funds based on an allegedly-unlawful annexation. 99 Wis. 2d at 349. The defendants argued that because the annexation was not unlawful, the plaintiffs lacked standing. *Id.* at 360. The Court dismissed that argument, noting it went to the merits instead of standing, and that all that was necessary for standing was for the complaint to allege illegality. *Id.* at 360-61.

Here, Voters did allege illegality. Repeatedly. (R. 1:6 (summarizing each allegation of unlawful actions); 1:17 (alleging that the City and JRB findings regarding the amendment to TID #8 were neither supported by record evidence nor factually correct); 1:18 (same allegations for TID #10); 1:17-18 (summarizing Plaintiffs' allegations in their Notice of Claim that the TIDs were unlawful); 1:19-22 (alleging that the amendment to TID #8 is illegal for failing to follow the proper procedures and lacking a valid public purpose); 1:22-24 (same allegations for TID #10); 1:24-25 (alleging TID #10 is illegal for reimbursing the developer for demolishing historic buildings); 1:25-27 (alleging both TIDs are illegal for violating the Uniformity Clause); 1:27 (alleging Eau Claire's actions regarding TID #8

and TID #10 were arbitrary, capricious, and outside the scope of their lawful authority).)

That should have resolved the question of standing. As noted above, this Court has long made clear – most recently just last term – that "[s]tanding and statutory interpretation are distinct and should not be conflated." *Moustakis v. Wis. DOJ*, 2016 WI 42, ¶3, n. 2, 368 Wis. 2d 677, 880 N.W.2d 142. This Court was critical of the lower courts and parties in that case for casting a question of whether a statute created a protectable interest as one of "standing." *Id.* The dissenting justices agreed as well. *Id.*, ¶65 (Roggensack, C.J., concurring in part and dissenting in part). The Court of Appeals here made exactly that mistake.

While a court can certainly skip the question of standing if it concludes that a case lacks merit, *see, e.g.*, *Town of Somerset v. DNR*, 2011 WI App 55, ¶7, n. 2, 332 Wis. 2d 777, 798 N.W.2d 282, that is not what the Court of Appeals did here. Instead, the Court of Appeals ruled on standing grounds, but by applying the wrong standard – the standard for whether a complaint states a claim upon which relief can be granted.

Even if the Court of Appeals was right about the sufficiency of Voters' complaint, this would be problematic. There is good reason to

insist that lower courts be precise. Standing is distinct from the various reasons given by the Court of Appeals for rejecting Voters' claims. It addresses a different set of concerns, *i.e.*, whether litigants have a sufficient stake in a matter to pursue it and not whether they are right. *See Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶40, 333 Wis. 2d 402, 797 N.W.2d 789. When courts confuse doctrine, litigants don't know what they must argue or how the court will address the arguments they do make.[1] With this opinion, judges across the state will think they should shortcut the question of standing by using the merits as a substitute. The opinion is not limited to the question of taxpayer standing – its logic would apply to all questions of standing. The opinion drastically alters well-settled law, and this Court should put it right again.[2]

[1] In this case, while the parties argued on appeal about the sufficiency of the complaint, those arguments were framed in terms of ripeness and the political question doctrine as opposed to the statutory construction analysis that the Court of Appeals emphasized. It is not surprising that the Court of Appeals did not believe that the parties' briefs quite framed the issues in the way that it wanted. They thought they were arguing about something else.

[2] Although standing requirements are formulated in terms of injury stemming from violation of a legally protected interest, standing analysis is concerned with the fact of injury and its connection to the alleged violation. *Fox v. DHSS*, 112 Wis.2d 514, 524-25, 334 N.W.2d 532, 537 (1983). Whether the conduct alleged is actually unlawful is a separate and distinct matter.

II. TAXPAYERS HAVE STANDING TO CHALLENGE AN ALLEGEDLY UNLAWFUL TID

Had the Court of Appeals applied the proper methodology for a standing challenge, it would have reversed the Circuit Court and concluded that Voters have standing to bring their claims. Taxpayer standing has a long and consistent history in Wisconsin, and all its elements are met here.

"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*, 15 Wis. 2d at 21 (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*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520 (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 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 Wis. 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).

The Complaint alleges exactly the type of harm recognized in *S.D. Realty* – 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. Nevertheless, the Court of Appeals ruled that Voters lacked standing by ignoring the allegations in the Complaint and going to the merits of the dispute. As noted above, that ruling completely confuses the doctrine of taxpayer – or any – standing in Wisconsin.

This runs the risk of confusing the law. No court has previously ruled on the precise question here – whether taxpayers have standing to challenge an allegedly unlawful TID.[3] This Court should hear this case not

[3] This Court, in *Gottlieb*, acknowledged that the trial court in that case had found taxpayer standing to challenge Milwaukee's actions under the Urban Redevelopment Law and that the defendants had conceded those taxpayers had standing, but did not rule on the issue. 33 Wis. 2d at 416.

only to correct the Court of Appeals' erroneous analysis, but to further develop the law of taxpayer standing in this context.

III. DECLARATORY JUDGMENT IS A PROPER METHOD TO CHALLENGE THE LEGALITY OF A TID

Of course, merely having standing would not help Voters if their claims for declaratory relief were properly dismissed on the pleadings. Although it couched its conclusions in terms of standing, the Court of Appeals did analyze whether a declaratory judgment action may be used to challenge the statutory and constitutional validity of a TID. The Court of Appeals got this wrong and did so in a way that opens the door for municipalities to ignore the limits the legislature has placed on TIF funding.

The Court of Appeals concluded that the statutory requirements of "blight" and "but for" causation are not requirements at all, but mere procedural hurdles that need not actually exist. (Ct. App. Dec. ¶25, P. App. 113-14.) According to the Court of Appeals, even if "a neutral finder of fact" could conclude that there was "an inadequate factual basis" for the findings that blight exists and development would not occur without the tax incremental financing, the resulting TIDs could not be challenged as unlawful. (*Id.*, ¶¶25-26, P. App. 113-14.) The findings, apparently, are mere incantations that must be made but cannot be challenged.

Inexplicably, the Court of Appeals did allow Voters – despite their supposed lack of standing – to proceed by certiorari. But if those requirements are merely, as the court put it, "procedural" and not "substantive" (*i.e.*, all that is required is that a "finding" is made) (*Id.*, ¶29, P. App. 115), then on what basis could any challenge based on the adequacy of those findings be brought?

The Court of Appeals' concern that the required findings ought not be fabricated, demonstrates that they are substantive and that its contrary reading of the statute is both implausible and dangerous. Its preference for certiorari review does not adequately protect the legislature's determination that municipalities can give the type of tax preferences represented by TIDs only under certain circumstances. The Court of Appeals made clear that certiorari review would entail no discovery or other opportunity to assess whether, even under a standard that gives some measure of deference to the municipality, these incantations of "blight" and "but for" development are accurate. The Court of Appeals seemed concerned that, as Voters argued, municipalities might find "blight" with respect to "an apartment building that was full, that was in good repair [and] that was financially and physically sound." (*Id.*, ¶32, P. App. 18.) By requiring certiorari review,

the court is permitting finding of blight without regard to the actual condition of the apartment building.

The Court of Appeals noted that there is no express provision for judicial review of the "blight" and "but for" findings. But courts review – by more than certiorari – whether preconditions to municipal actions exist. *See, e.g., Town of Mt. Pleasant v. City of Racine*, 24 Wis. 2d 41, 127 N.W.2d 757 (1964) (court reviewed whether "shoestring" annexation met statutory requirement of contiguity); *Bechthold v. City of Wauwatosa*, 228 Wis. 544, 277 N.W. 657 (1938) (court reviewed whether proper procedure for bidding had been followed); *Fenton v. Ryan*, 140 Wis. 353, 122 N.W. 756 (1909) (court reviewed whether the factual predicates to incorporating a village had been met); *In re Vill. of N. Milwaukee*, 93 Wis. 616, 67 N.W. 1033 (1896) (same). In fact, in *Kaiser* (a case discussed previously), the defendants also argued that the plaintiffs could only use a certiorari action to challenge a municipal resolution creating a lake improvement district. The Court of Appeals disagreed, noting that declaratory judgment had long been a proper method of challenging the legality of resolutions and ordinances. 99 Wis. 2d at 354-55.

The Court of Appeals thought the prerequisites for a TID were too subjective for judicial review and answering them would simply substitute a court's judgment for that of a municipality. This, it thought, would be inconsistent with what it thought was "clear" legislative language "conspicuously not requiring that a municipality be correct…." But that reading of the statute – or any similar statute – is wrong. When setting forth specific conditions that must apply to some action, the legislature need not explicitly also say the conditions it has specified must also be true. Indeed, it would seem far more plausible to think that, when the legislature established conditions for diverting tax money for the benefit of private parties, it intended to permit such diversion only where those conditions actually exist. If that's so, it is improper for a court to abdicate its responsibility to enforce the law. *See State ex rel Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110 ("It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning.").

That a law might require courts to evaluate a factual determination made by a municipal body is of no matter. As the Court of Appeals

conceded, judicial review of municipal decisions does not raise political questions or separation of powers issues. (Ct. App. Dec. ¶31, n. 10, P. App. 117.) If that is what the legislature requires, then that is what the courts must do. Here, the legislature created a clear standard for what is "blighted":

> 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.[4]

Wis. Stat. §66.1105(2)(ae)1. While there will be undoubtedly be close cases – in which some degree of deference to a municipal body might be appropriate – this standard is not so inscrutable or capacious as to be incapable of application. Likewise, although whether development will or will not occur is often a difficult question, there are times when it can be proven with near certainty that development would occur even without a TID – for example, where property owners have already announced plans

[4] The Court of Appeals noted that use of the term "public health, safety, morals or welfare" invokes the police power, which is broad. But that ignores the fact that the legislature did not say that TIDs may be formed whenever the police power would permit. The affected property must also be blighted.

to redevelop, expand, or refurbish. (*See* R. 1:12 (noting developments underway in the Confluence District before the TID changes).)

Until this case, no Wisconsin court has ever held that declaratory judgment actions may not be used to challenge TIF actions. In fact, in at least three published cases TIF actions were brought as declaratory actions (although the issue was not raised). *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); *Gottlieb*, 33 Wis. 2d 408 (declaratory judgment action brought by taxpayers challenging predecessor to TIF law); *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).[5] Furthermore, the seminal case on the constitutionality of the current TIF law, *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 288 N.W.2d 85 (1980), appears to have been a declaratory judgment case. Although the opinion does not expressly state whether it was a declaratory or certiorari action, the

[5] The Court of Appeals relied on now-Chief Justice Roggensack's dissent in *State ex rel. Olson v. City of Baraboo Joint Review Board*, 2002 WI App 64, ¶32, 252 Wis. 2d 628, 643 N.W.2d 796 (Ct. App. Dec. ¶34, P. App. 119), that it characterized as "an assessment that the answer is review by common-law certiorari." But only certiorari review was sought in *Olson*, so the decision can tell us nothing about when declaratory relief may be available. Furthermore, even while proceeding under certiorari, the court reviewed whether development would occur but for the creation of the TID. *Id.*, ¶¶27-30.

court did not review the city's actions using the highly-specific standards for certiorari review.

More importantly, this is a taxpayer action, and taxpayer actions are routinely brought as declaratory judgment actions. *See, e.g.*, *Coyne v. Walker*, 2016 WI 38, ¶1; *Hart*, 176 Wis. 2d at 698; *State ex rel. Wis. Senate*, 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 v. Reivitz*, 144 Wis. 2d 717, 720, 424 N.W.2d 733 (Ct. App. 1988); *J.F. Ahern Co. v. Wis. State Bldg Comm'n*, 114 Wis. 2d 69, 75, 336 N.W.2d 679 (Ct. App. 1983); *Kaiser*, 99 Wis. 2d at 349. This is not the typical case well-served by certiorari review, such as the discretionary decision of whether to grant a liquor license or a conditional use permit. Judging whether strict statutory requirements have been met is not like judging whether a city council had sufficient reason to deny a license application.[6]

Allowing municipalities to ignore legislative preconditions for TIDs as long as they <u>say</u> they haven't ignored them, raises grave constitutional

[6] The Court of Appeals cited language in Wis. Stat. § 66.1105(4m)(b)2. that the JRB makes the "but for" finding "in its judgment." (Ct. App. Dec. ¶20, P. App. 111.) This is a thin reed on which to conclude that the finding need not be correct and, in any event, does not apply to the blight requirement of § 66.1105(2)(ae)1.

concerns. In *Sigma Tau*, this Court rejected a challenge to TIF financing under the Public Purpose Doctrine because the affected taxing authorities "benefit from the expansion of [the] tax base that results from urban redevelopment or other public improvements" and because "the elimination of blight is a public purpose." 93 Wis. 2d at 413-14. But, under the Court of Appeals' view, there need not actually be an expanded tax base due to the TID or any blight to be eliminated. Even if this interpretation would not subject the statute to a facial challenge (because a municipality would still have to actually ignore the prerequisites), a reading of the statute that precludes any real review of these constitutional requisites is anomalous and ought to be avoided.

IV. CASH PAYMENTS TO TAXPAYERS TO PAY FOR PRIVATE IMPROVEMENTS VIOLATE BOTH THE UNIFORMITY CLAUSE AND PUBLIC PURPOSE DOCTRINE

The Court of Appeals concluded that Voters lacked standing to raise its two constitutional claims (Ct. App. Dec. ¶2, P. App. 102), yet – in contradictory fashion – it proceeded to consider the merits of one of those claims, dismissing it (*Id.*, ¶¶41-54, P. App. 123-30).

A. Uniformity Clause

Voters challenge TID #10 and the amendment to TID #8 insofar as they provide cash payments to an owner of property within the TID, which thereby acts as an unconstitutional tax rebate in violation of the Uniformity Clause. Under *Torphy*, a payment that acts as a tax rebate to a property owner unconstitutionally singles out some taxpayers for preferential treatment. 85 Wis. 2d at 111.

In *Torphy*, this Court struck down statutes reimbursing property owners for certain improvements they made to their properties (that resulted in increased tax assessments) with a series of tax credits paid after property taxes were paid. 85 Wis. 2d at 98-99. While those taxpayers paid the same formal rate as everyone else, the payment of these reimbursements lowered their effective rate and, therefore, violated uniformity. *Id.* at 111. In this case, the municipality has paid money to a taxpayer for constructing improvements on his own property. Thus it cannot be said that all taxpayers are paying a uniform rate. One – the owner of the Confluence Project – is being given a huge upfront rebate.

The only difference here from *Torphy* is that the property owner is being reimbursed for improvements to its properties that are expected to

result in increased tax assessments before property taxes are paid. That difference is not significant. Both arrangements treat certain property owners better than others with equally valuable property. *See also Ehrlich v. Racine*, 26 Wis. 2d 352, 132 N.W.2d 489 (1965) (looking beyond the form of a transaction to its substance and striking down a contract that in effect gave property owners a rebate of taxes attributable to development and improvement of their properties).

The Court of Appeals wrongly held that this case is like *Sigma Tau*, where TIF funds were paid to unrelated parties to acquire land, appraise the land, relocate streets, clear land, and relocate utilities. 93 Wis. 2d at 398, 407. In *Sigma Tau*, the owner/developer was not being paid by the city to do any of those things, and furthermore the owner/developer paid for construction of the proposed building with its own money, without being reimbursed with TIF funds. *Id.* at 397.

In holding that *Sigma Tau* is controlling, the Court of Appeals seemed to assume that the developer was obtaining no specific benefit from the construction of the Confluence Project and therefore was merely being reimbursed for improvements it built on the city's behalf. It seemed to believe that the payments made to the owner of the Confluence Project

were limited to "costs of 'public works or improvements' that the City would otherwise bear." (Ct. App. Dec. ¶53, P. App. 129-30 (emphasis added).) These assumptions are untrue. In this case, as in *Torphy*, funds provided to a taxpayer are being used to pay for the construction of privately owned buildings on privately owned lands. (R. 1:14)

The Court of Appeals concluded that the city bearing the cost of acquiring and clearing land before selling it the owner (as happened in *Sigma Tau*) is no different from Eau Claire's reimbursement of an owner for private structures. But if that's so, then *Sigma Tau* is inconsistent with *Torphy* (where owners were reimbursed for private improvements on their own land). This Court should resolve that inconsistency.

B. Public Purpose Doctrine

The Court of Appeals dealt with Voters' Public Purpose Doctrine challenge by concluding that Voters lacked standing to raise it as a declaratory judgment claim, but could raise it in certiorari. This challenge is dependent on Voters' allegation that the TIDs do not, in fact, eliminate blight, and therefore lack public purpose. As noted above, the Court of Appeals concluded that a challenge to the blight finding could only be

raised as a certiorari claim, a conclusion it also applied to this constitutional challenge.

If the prerequisites that blight is being eliminated and the tax base is being expanded are critical to satisfaction of the Public Purpose Doctrine – and *Sigma Tau* says they are (see Section IV.A., *infra*) – then they must actually be present. Even if the legislature, in enacting the TID law, was improbably agnostic about whether these things must actually exist, the constitutional requirement remains. Just what those requirements are and how they may be enforced are significant and novel questions of constitutional law.

V. THE COMPLAINT ADEQUATELY STATES A CLAIM THAT TID FUNDS WILL BE USED UNLAWFULLY TO REIMBURSE THE OWNER/DEVELOPER FOR DEMOLISHING HISTORIC BUILDINGS

Pursuant to Wis. Stat. §66.1105(2)(f)1.a., TIF funds cannot be used to compensate a developer for costs associated with the destruction of properties listed on the national or state register of historic places as defined in §44.31(4). The Court of Appeals concluded that Voters' historic buildings claim failed for two reasons: it was inadequately pled and it was not ripe (the court declined to address Eau Claire's argument that it was moot).

But the Court ignored factual allegations in the Complaint. It said that "Voters alleges no facts connecting any past or future payment to the developer's action in demolishing historic buildings, and it does not even allege that such a payment has occurred," (Ct. App. Dec. ¶39, P. App. 122), stating that the following allegations were the "sum total" of Voters' allegations on this issue:

> (1) the development agreement does not prohibit the developer from using the lump-sum payments to reimburse itself for demolishing historic buildings; and (2) 'there is in fact no way to assure that the payments have been used as reimbursement for certain already incurred costs, and not used as reimbursements for others.'

(*Id.*, ¶38, P. App. 122.) But those were <u>not</u> the sum total of Voters' allegations. The Complaint also alleged:

- "[T]he project plan for TID #10 unlawfully compensates the developer for the demolition of historic buildings." (R. 1:6.)
- "The buildings that have been purchased and subsequently demolished by the developer include the Kline Department Store, which was listed on the National Register of Historic Places. Also demolished were several other buildings within the Confluence Commercial District, also on the national register." (R.1:14-15.)
- "A substantial part of the development costs actually incurred by the developer thus includes the costs of demolition as well as the purchase price of the Kline Department Store building and other buildings that are listed properties pursuant to Wis. Stat. § 44.31(1m)(4)." (R. 1:15.)
- "The developer demolished the historic buildings in the Confluence Commercial Historic District after the project

plans were developed and, upon information and belief, with the understanding that it would be reimbursed for the costs of development. Lump sum reimbursement for already incurred costs can properly be viewed as including any of those costs, including the costs of demolishing historic structures within the Confluence Commercial Historic District." (R. 1:21.)

- "The TID #10 project plan and implementing development agreement unlawfully reimburses the developer for such costs." (R. 1:24-25.)

The Complaint alleges plainly that the owner/developer has destroyed historic buildings as part of the Confluence Project and that it will be reimbursed for the costs incurred for that destruction out of TIF funds. The courts must accept those allegations as true when considering a motion to dismiss, and those allegations demonstrate a violation of Wis. Stat. §66.1105(2)(f)1.a.[7] The additional language focused on by the Court of Appeals is an anticipatory rebuttal to the argument that the Project Plan and development agreements do not expressly designate funds for reimbursing the destruction of historic buildings.

The Court of Appeals' conclusion that this claim was not ripe was based on the same mistaken reading of the Complaint – the Court

[7] The Court of Appeals even acknowledged that "[h]ad Voters alleged, and ultimately been able to substantiate, that City funds related to TIF No. 10 were used to pay for the demolition of historic buildings, Voters would be entitled to relief on its claims that such payments constitute unlawful expenditures." Why the Court of Appeals then ignored exactly those allegations is unclear.

concluded that Voters complained only of future and highly speculative actions, when in fact they alleged certain, predetermined actions.

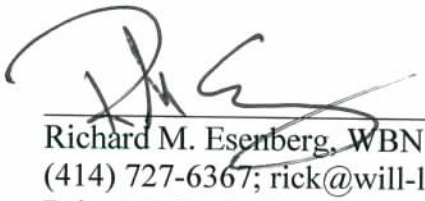
Given what Voters actually alleged, if the Court of Appeals is correct, then reimbursement for the destruction of historic buildings can be challenged only when TID funds are expressly earmarked for demolition. It denies taxpayers the opportunity to prove that the funds were actually used for demolition. But that result renders a nullity the legislature's statutory prohibition on using TID funds to support the demolition of historic buildings. The prohibition in §66.1105(2)(f)1.a. becomes no prohibition at all because it can always be avoided.

CONCLUSION

This Court should take this case to resolve serious questions of standing, constitutional law, and the available avenues for challenging TIF actions. The Plaintiffs-Appellants respectfully request that this Court grant their Petition for Review.

Dated this 30th day of June, 2017.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs-Appellants



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief and appendix conform to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of the portions of this brief referred to in section 809.19(8)(c)1. is 7,791 words, calculated using the Word Count function of Microsoft Word 2010.

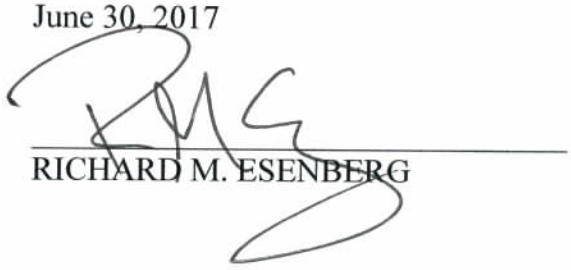
Dated: June 30, 2017

RICHARD M. ESENBERG

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief and appendix which comply with the requirements of sections 809.19(12) and 809.19(13). I further certify that this electronic brief and appendix are identical in content and format to the printed form of the brief and appendix filed as of this date. A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all opposing parties.

Dated: June 30, 2017



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