SUPREME COURT
OF THE
STATE OF WISCONSIN
Appeal No. 2015AP1858

Voters with Facts, Pure Savage Enterprises, LLC, Wisconsin Three, LLC, 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.

CITY OF EAU CLAIRE'S RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

APPEAL OF A DECISION OF THE COURT OF APPEALS DISTRICT III

STEPHEN NICK
City Attorney
State Bar No. 1020929
DOUGLAS HOFFER
Asst. City Attorney
State Bar No. 1079432

CITY OF EAU CLAIRE
203 S. Farwell Street
Eau Claire, WI 54702
(715) 839-6006
(715) 839-6177 (Fax)
stephen.nick@eauclairewi.gov
douglas.hoffer@eauclairewi.gov

REMZY D. BITAR
State Bar No. 1038340
ARENZ, MOLTER, MACY, RIFFLE & LARSON S.C.
720 N. East Avenue
Waukesha, WI 53186
(262) 548-1340
(262) 548-9211 (Fax)
rbitar@ammr.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

The Petition filed by the Plaintiffs-Appellants-Petitioners ("Voters With Facts") for review of a published Court of Appeals decision should be denied. The Court of Appeals decision involved the application of well settled law in the areas of pleading requirements, Wisconsin's TIF law, and standing. The Petition thus fails to satisfy the criteria found in Wis. Stat. § 809.62(1r).

The Petition for Review fundamentally ignores not just one, but three, elephants in the room. First, the Complaint simply does not allege sufficient facts to support the legal arguments asserted by Voters With Facts. Second, the Court of Appeals remanded this case to give Voters With Facts their day in court to develop a more complete factual record. Without the benefit of the remand proceedings to develop the record, the Petition for Review is a request for this Court to engage in a strictly academic exercise. Third, most of the construction on the challenged project is complete pursuant to a public-private development agreement that included state budget and local TIF disbursements, along with substantial private investment of capital and donations in reliance on that agreement, because Voters With Facts did not request a Temporary Restraining Order or injunctive relief to enjoin these lawful and legislatively directed actions from taking place.

There is no need to develop, clarify or harmonize the law under Wis. Stat. § 809.62(1r)(c). The Court of Appeals correctly pointed out that the present action pleaded a variety of bare legal conclusions, but failed to plead sufficient facts to state a claim to meet the *Data Key* plausibility standard necessary to survive a Motion to Dismiss. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693 (A Complaint's sufficiency depends on the substantive law that underlies the claim, and the alleged facts related to that substantive law must "plausibly suggest [the plaintiff is] entitled to relief."). The Court of Appeals application of the plausibility pleading standard – which requires a well pleaded Complaint – is in accord with the controlling law in this state. This Court should not be put in the position of questioning the validity of its prior decisions, the validity of state statutes and the validity of local legislative application of well-settled law when a Complaint is so devoid of well-pleaded facts, and the record is so undeveloped, particularly when a remand is forthcoming to develop a more complete ceritorari record.

In addition to being consistent with the pleading standards this Court articulated in *Data Key*, the Court of Appeals decision is supported by the Complaint's failure to meet the "fairly debatable" standard necessary to challenge state and local legislative actions. *See Buhler v. Racine Cnty.*, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966) ("fairly debatable" legislative

actions should not be resolved by the judicial process). The Complaint's lack of well-pleaded facts makes this a weak case to test either the constitutional sufficiency of Wisconsin's TIF law or the legal validity of local legislative TIF determinations which applied well-settled state law.

As Voters With Facts pointed out in the Petition for Review, merely having standing would not help Voters With Facts if their claims for declaratory relief were properly dismissed on the pleadings. (Pet. 23). Voters With Facts' claims for declaratory relief were properly dismissed on the pleadings, and thus Voters argument that the Court of Appeals "confused and conflated the concept of standing" is nothing more than a desperate attempt to maintain an action doomed to fail because of a lack of well pleaded facts.

A real and significant question of state constitutional law is not presented in this yet-to-be remanded case. As the Court of Appeals correctly pointed out, the City of Eau Claire is situated "in this case in precisely the same way as the City of Menomonie in Sigma Tau, vis-à-vis the constitutionality of the Tax Increment Law." This Court has already held that Wisconsin's TIF law does not violate the Uniformity Clause of the Wisconsin Constitution nor does it violate the Public Purpose Doctrine. *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis.

2d 392, 396, 288 N.W.2d 85, 86 (1980).[1] Because the Complaint demonstrates the City of Eau Claire and the Joint Review Board followed all requirements in a statute that is constitutional, and because the City of Eau Claire is situated in precisely the same way as the City of Menomonie in *Sigma Tau*, it cannot reasonably be argued that the Complaint alleged "unlawful" activity. Thus the Complaint failed to state a claim. Consequently, the Petition for Review is not seeking clarification or harmonization of the law. The Petition for Review seeks to reverse years of well-settled law and to do so without the benefit of a complete certiorari record.

Contrary to the Petition's assertion, the Court of Appeals decision has not "immunized TIDs from judicial review." The Court of Appeals remanded the case for certiorari review. The Court of Appeals determination – that common law certiorari is the type of judicial review available in reviewing the validity of the City Council and Joint Review Board TIF determinations – is also supported by well-settled law. *See Ottman v. Town of Primrose*, 2011 WI 18, ¶ 34, 332 Wis. 2d 3, 796 N.W.2d 411 ("Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality, an administrative agency, or an inferior tribunal."); *see also* S*tate ex rel. Olson v. City of Baraboo Joint*

[1] *Sigma Tau* has been cited 20 times by Wisconsin appellate courts since it was released, and none of these decisions have called its ruling into question.

Review Bd., 2002 WI App 64, ¶ 32, 252 Wis. 2d 628, 643 N.W.2d 796 (Roggensack, J., dissenting) ("No statutory appeal process has been created to review the formation of a TIF District; therefore, the review of the decision of both the common council and the JRB is by certiorari."); *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549-50, 185 N.W.2d 306 (1971) ("It is well established in this state that where there are no statutory provisions for judicial review, the action of a board or commission may be reviewed by way of certiorari.").

The Court of Appeals decision is consistent with longstanding Wisconsin law determining that declaratory relief is disfavored if there is a "speedy, effective and adequate" alternative remedy. *Lister v. Board of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 307-08, 240 N.W.2d 610 (1976). The Petition for Review does not articulate why certiorari is not a "speedy, effective and adequate" alternative remedy, or why the Court of Appeals decision improperly considered *Lister* and other well-settled law on this point.

This case has been remanded for further proceedings which will allow a more complete certiorari record to be developed. If the Court desires to examine the legal issues in this case it should do so after the certiorari record is developed on remand or wait for a case in which the challenging party undertakes an adequate pre-filing investigation sufficient to plead legally adequate facts.

This case has always been an attempt by Voters With Facts to accomplish through litigation what they could not accomplish in the political arena. Voters With Facts initially brought this action alleging this case involved an "as-applied" challenge to local legislative actions taken by the City Council and the Joint Review Board. However, Voters With Facts now asks this Court to engage in a statewide academic exercise that has little to no impact on the local actions in question because of Voters With Facts' pleading deficiencies and other missteps. During the pendency of this action construction of a multi-use building and a parking ramp have been completed, and the construction of a performing arts center is taking shape. Voters With Facts did not request a Temporary Restraining Order or injunctive relief to enjoin these lawful and legislatively directed actions – that various parties have relied on - from taking place. Voters With Facts' failure to take these actions, along with the pleading deficiencies found in the Complaint, and the fact that the remand will allow further development of a certiorari record all demonstrate the Court should not grant the Petition for Review in this case

This case is not worthy of Supreme Court review for at least three reasons: (1) the Court of Appeals applied well-settled principles of law to find Voters With Facts presented an inadequately pled Complaint to sustain the claims for declaratory relief; (2) an opportunity on remand exists for Voters With Facts to develop a complete certiorari record, thereby allowing

it to test its politically and conclusory charged allegations beyond the conceptual or academic level; and (3) the evolving nature of Voters With Facts theories, coupled with the actual fact most of the redevelopment has already occurred, and many of the parties (the City of Eau Claire, Eau Claire County, the State of Wisconsin, the Wisconsin University System, and private developers and donors) have already performed most of their obligations related to the project, makes judicial review both challenging and unnecessary without the benefit of remand.

ARGUMENT

1. A decision by the Supreme Court is not needed to help clarify and harmonize the law because the Court of Appeals decision involved the application of well-settled law in the areas of pleading requirements, Wisconsin's TIF law, and standing.

a. The Court of Appeals decision is consistent with the *Data Key* plausibility pleading standard.

The Complaint does not allege sufficient facts to satisfy the *Data Key* plausibility standard. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. Upon a motion to dismiss, courts accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Id.* (*citing Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 11, 283 Wis. 2d 555, 699 N.W.2d 205). However, a court cannot add facts when analyzing the

sufficiency of the complaint. *Id.* Bare legal conclusions are not sufficient to withstand a Motion to Dismiss. *Id.* The complaint's sufficiency depends on the substantive law that underlies the claim, and the alleged facts related to that substantive law must "plausibly suggest [the plaintiff is] entitled to relief." *Id.*, ¶ 31. The Court of Appeals decision, applying *Data Key*, correctly pointed out that the Complaint's bare legal conclusions were insufficient in the absence of well-pleaded facts to survive a Motion to Dismiss.

The Complaint includes the following deficiencies and concessions which resulted in a failure to state a claim:

1. The Complaint conceded the City of Eau Claire and Joint Review board completed all steps required by Wisconsin's TIF law. (R. 1: 8-25, ¶¶ 31, 32 – 38, 52, 54, 59, 61, 72, 83).
2. The Complaint pleaded no facts in support of its legal conclusion that blight did not exist. (R. 1)
3. The Complaint pleaded little to no facts in support of its legal conclusion that the City did not satisfy the "but-for" test. (R.1)
4. The Complaint pleaded no facts demonstrating any direct harm or pecuniary loss to any of the Plaintiffs. (R.1)
5. The Complaint sought to challenge the constitutionality of a provision of Wisconsin's TIF law under all circumstances, thus making the challenge a "facial" challenge. (R.1)
    a. (Voters With Facts failed to serve copy of Complaint on Attorney General until the City cited this deficiency as grounds for dismissal in its Motion to Dismiss).(R.8)
6. The Complaint did not plead facts which demonstrated the City was situated differently from the City of Menomonie in *Sigma Tau*, in which the Wisconsin Supreme Court upheld the constitutionality of Wisconsin's TIF law. (R.1)
7. The Complaint pleaded no facts in support of its argument that TIF funds were improperly used to demolish historic buildings, but instead pled in conclusory fashion there "is no way to assure" such an occurrence. (R.1:21, ¶ 94)

a. In addition to "no way to assure" being legally deficient, the development agreement (which the Complaint cites) prohibits such an occurrence, and the project plans (which the Complaint also cites) does not list demolition as a project cost.

8. The Complaint asserts that cash grants to developers – which under Wisconsin's TIF law must be accompanied by a development agreement which the Complaint concedes the parties entered into - constitute an illegal tax rebate, but pleaded no facts addressing consideration provided to the City under the development agreement. (R.1)
9. Voters With Facts conceded the local TIF actions were "legislative" (R. 10:19)
10. The Complaint pleaded no facts demonstrating any kind of "spending" took place. (The Complaint only pleaded the approval of a capital improvement plan – which is not a "spending" action such as an appropriation). (R.1:16, ¶ 65)
11. The Complaint pleaded no facts to support a conclusion that the City of Eau Claire or Joint Review Board engaged in "unlawful" activity. (R.1)

These deficiencies demonstrate the Court of Appeals and the Circuit Court both correctly applied the *Data Key* plausibility standard. Bare legal conclusions are not enough to survive a Motion to Dismiss.

The Court of Appeals decision is further bolstered by Voters With Facts' failure to plead sufficient facts to satisfy the "fairly debatable" standard. Challenges to state and local legislative acts – and it is not disputed the state and local acts in question are "legislative" in nature – should not be resolved by the judicial process if they are "fairly debatable." *See Buhler v. Racine Cnty.*, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966) ("fairly debatable" legislative actions should not be resolved by the judicial process); *see also* (R. 10:19 conceding TIF actions at issue were

"legislative"). Therefore, although a court may differ with the wisdom, or lack thereof, or the desirability of legislative decisions, a court cannot substitute its judgment for that of the legislative authority in the absence of statutory authorization. *Buhler*, 33 Wis. 2d at 146-47. It is for the legislature to determine the justice, wisdom, policy, necessity, or expediency of a law which is within its powers to enact, and such questions are not open to inquiry by the courts. *Bisenius v. Karns*, 42 Wis. 2d 42, 45 165 N.W.377 (1969); see also *Baker v. Carr*, 369 U.S. 186, 217 (1961); see also *Nowell v. City of Wausau*, 2013 WI 88, ¶ 36, 351 Wis. 2d 1, 19, 838 N.W.2d 852, 860 ("It is well established that legislative power may not be delegated to the circuit court."); see also *Town of Beloit v. City of Beloit*, 37 Wis. 2d 637, 643, 155 N.W.2d 633, 635 (1968) (determination of public interest is legislative function not judicial function).

The Complaint's lack of well-pleaded facts makes this a weak case to test either the constitutional sufficiency of Wisconsin's TIF law or the legal validity of local TIF determinations.

b. The Court of Appeals reached an unremarkable decision that Voters With Facts failed to plead any facts showing its lawsuit differed from already established law in Sigma Tau.

Furthermore, the Court of Appeals decision – which concluded that the Complaint did not allege the City of Eau Claire acted "unlawfully" – is consistent with Wisconsin's jurisprudence on tax incremental financing

("TIF") law. Putting aside the aforementioned deficiencies in the Complaint, the Court of Appeals correctly found the Complaint demonstrates that the City of Eau Claire followed all the requirements found in Wisconsin's TIF statute. Wisconsin's TIF statute does not violate the uniformity clause of Wisconsin Constitution nor does it violate the public purpose doctrine. *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 396, 288 N.W.2d 85, 86 (1980). As the Court of Appeals pointed out, the City of Eau Claire "is situated in this case in precisely the same way as the City of Menomonie in *Sigma Tau*, vis-à-vis the constitutionality of the Tax Increment Law." Because the Complaint demonstrates the City of Eau Claire and the Joint Review Board followed all requirements in a statute that is constitutional, and because the City of Eau Claire is situated in precisely the same way as the City of Menomonie in *Sigma Tau*, the Complaint did not allege any "unlawful" activity, and thus failed to state a claim for declaratory relief.

c. It is well-settled law that certiorari review is the type of judicial review available to review a municipality's legislative TIF determinations.

The Court of Appeals determination - that common law certiorari is the type of judicial review available in reviewing the validity of the City Council and Joint Review Board TIF determinations – is also supported by well-settled law. *See Ottman v. Town of Primrose*, 2011 WI 18, ¶ 34, 332

Wis. 2d 3, 796 N.W.2d 411 ("Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality, an administrative agency, or an inferior tribunal."); *See also* S*tate ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 32, 252 Wis. 2d 628, 643 N.W.2d 796 (Roggensack, J., dissenting) ("No statutory appeal process has been created to review the formation of a TIF District; therefore, the review of the decision of both the common council and the JRB is by certiorari."); *see also State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549-50, 185 N.W.2d 306 (1971) ("It is well established in this state that where there are no statutory provisions for judicial review, the action of a board or commission may be reviewed by way of certiorari."). The Court of Appeals decision is consistent with longstanding Wisconsin law determining that declaratory relief is disfavored if there is a "speedy, effective and adequate" alternative remedy. *Lister v. Board of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 307-08, 240 N.W.2d 610 (1976).

The Petition for Review does not articulate why the certiorari is not a "speedy, effective and adequate" alternative remedy, or why the Court of Appeals decision improperly considered *Lister* and other well-settled law on this point. To the contrary, Voters With Facts assert that Declaratory Judgment is necessary so they can engage in "lengthy and detailed discovery" to determine whether the City of Eau Claire complied with legal requirements, but this assertion does not support review by this Court for

several reasons. (R.10: 4) Voter With Facts had six months to conduct an adequate pre-filing investigation, including the ability to file public records requests for all documents relevant to the TIF determinations and to participate and monitor the several public hearings and public activities associated with this redevelopment. Voters With Facts failure to undertake a proper investigation before initiating this lawsuit, and Voters With Facts desire to engage in extensive discovery, are not adequate reasons demonstrating certiorari is not an adequate alternative remedy. Nor are they adequate reasons to support review at this time when the case is being remanded for further development of a complete certiorari record.

d. The Court of Appeals decision is consistent with well-settled law and recent standing jurisprudence of the Wisconsin Supreme Court.

Voters With Facts' assertion that the Court of Appeals decision confuses or contradicts existing law on standing is meritless. The Court of Appeals application of standing principles is consistent with well-settled law. Additionally, Voters With Facts concedes that merely having standing would not help voters if their claims for declaratory relief were properly dismissed on the pleadings. (Pet. 23)

The Court of Appeals decision applied well-settled Wisconsin law on standing. It is well-settled law that the successful invocation of standing requires an allegation of either direct harm to the Plaintiff's property or a

risk of pecuniary loss or substantial injury. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶¶ 16, 17, 23, 259 Wis. 2d 107, 655 N.W.2d 189;[2] *see also Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982)(regarding declaratory judgment standing requirements); *see also Foley-Ciccantelli v. Bishop's Grove Condominium Association, Inc.*, 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789; *see also Tooly v. O'Connell*, 77 Wis. 2d 422, 433-34, 253 N.W.2d 335 (1977); *see also Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶ 41, 255 Wis. 2d 447, 649 N.W.2d 626. The Complaint fails to allege sufficient facts to demonstrate standing.

The Complaint did not allege sufficient facts to establish standing under existing Wisconsin law and the Petition cannot get around this fatal defect no matter how much it tries to politicize tax incremental financing and how much it relies on the partially overruled case of *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 299 N.W.2d 259 (Ct.App.1980). The *Kaiser* case, overruled on other grounds by *DNR v. City of Waukesha*, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994), has not been followed with such precedential force – as the Petition repeatedly implies – for the proposition

[2] Similar to this case, *Lake Country* involved the invocation of taxpayer standing to challenge – among other things – the violation of Wisconsin's TIF statute - § 66.1105(4)(gm) - without pleading any pecuniary loss or other form of damage or injury. "Lake Country contends, consistent with § 806.04(2), that its rights are affected by the Village's amendment to the zoning ordinance *and the creation of TID No. 2*. We disagree." (emphasis added). *Lake Country*, consistent with other well-settled law, held that taxpayer standing requires an allegation of either direct harm to the Plaintiff's property or a risk of pecuniary loss or substantial injury, and that the citizen taxpayers in that case lacked standing.

"a plaintiff need only allege that general tax funds will be spent in an unlawful manner." (Pet. 4) Moreover, only one taxpayer standing case (*Vill. of Slinger v. City of Hartford*) has looked to *Kaiser*, and it adopted the same test used by the cases discussed above and the Court of Appeals here (i.e., "the successful invocation of taxpayer standing requires an allegation of either direct harm to the plaintiff's property or a risk of pecuniary loss or substantial injury."). See *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 866, 650 N.W.2d 81 (observing "[t]he taxpayer must have sustained, or will sustain, some pecuniary loss before he or she has standing." and ruling landowners did not have standing to bring action challenging annexation ordinance because they did not sufficiently allege the necessary elements of standing). In any event, the *Kaiser* case has limited factual relevance here. It allowed a declaratory judgment action challenging the validity of an ordinance creating a single lake improvement district, but this case involves Wisconsin's TIF statute - the largest statutory legislative economic development tool available to municipalities - which expressly authorizes municipalities to pursue tax incremental financing as a legislative policy decision for the benefit of the entire community.

Moreover, *Kaiser* paid scant attention to the doctrine of standing in this state, whereas the Wisconsin Supreme Court has more recently studied and standardized the standing inquiry in *Foley-Ciccantelli*, which stated that the standing analysis examines (1) Whether the party whose standing is

challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) Whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) Whether judicial policy calls for protecting the interest of the party whose standing is challenged. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 40, 333 Wis. 2d 402, 421-22, 797 N.W.2d 789, 798-99. In reaching these conclusions, the *Foley* court specifically took note of the same cases relied upon by the City in its Motion to Dismiss and the Court of Appeals in its decision including *Lake Country*. *Id*. ¶ 40 n. 17. The *Foley* court also examined standing in the context of the declaratory judgment statute and clarified the inquiry, contrary to Voters With Facts bald assertions that the Court of Appeals somehow confused everything and this Court needs to examine it. *Id*. ¶¶ 47-54.

Here, the Complaint does not satisfy any of these criteria, and largely ignores the third criteria found in *Foley* by failing to address why judicial policy calls for protecting Voters With Facts interests when the Court of Appeals already remanded this case for certiorari review, and citizens have other political remedies available to address these legislative concerns.

The Complaint does not plead sufficient facts to demonstrate taxpayer standing. Taxpayer standing jurisprudence requires litigants to

plead facts that allege either a direct harm to the Plaintiff's property or a risk of pecuniary loss or substantial injury. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 23, 259 Wis. 2d 107, 655 N.W.2d 189. The Complaint does not plead such facts demonstrating a direct harm or a pecuniary loss. Additionally, the Complaint does not plead any facts demonstrating a municipal expenditure. Instead, the Complaint merely alleges the City of Eau Claire approved a "capital improvement plan," which – as should be clear from its title – does not involve an expenditure (such as an appropriation) but merely approves a plan for possible future expenditures.

Moreover, as the Court of Appeals pointed out, the Complaint does not actually allege the City of Eau Claire engaged in any "unlawful" conduct. To the contrary, the Complaint demonstrates that the City of Eau Claire followed all the requirements found in Wisconsin's TIF statute. The Complaint concedes that the City of Eau Claire and the Joint Review Board held all statutorily required public hearings. The Plaintiffs were provided an opportunity to provide input at these public hearings. The boundaries were properly designated, blighted properties were identified, and project plans were approved. The Joint Review Board included a representative of each taxing jurisdiction affected by the creation of the TIF (which includes the school district, the county, and the technical college district) as well as a

public member. The Joint Review Board approved the amendment of TID no. 8 and the creation of TID no. 10.

The City Council is required to adopt a resolution that contains findings that not less than 50%, by area, of the real property within the district is a blighted area. Wis. Stat. § 66.1105(4)(gm)4.a. The Complaint concedes that the City Council adopted a resolution which contains the precise language required by Wisconsin's TIF law. (R. 1: 8-25, ¶¶ 52, 59, 72, 83). The Joint Review Board may not approve the resolution "unless the board's approval contains *a positive assertion* that, in its judgment, the development described in the documents the board has reviewed…would not occur without the creation of the tax incremental district." Wis. Stat. § 66.1105(4m)(b)2 (emphasis added). The Complaint concedes that the Joint Review Board adopted a resolution that contains such a positive assertion. (R. 1: 8-25, ¶¶ 54, 61).

Because the Court of Appeals decision on standing rests on well-settled law, there is no need for the Court to harmonize or clarify the law.

2. Reservation of all arguments and issues should the Court accept the Petition for Review.

For the reasons stated herein, the Court should deny the Petition for Review because it does not meet the criteria for review. However, in the event the Court accepts the Petition, the City of Eau Claire respectfully reserves all arguments and issues it raised before the Circuit Court and

Court of Appeals.[3] The City believes all of its arguments and issues will show the Petition was improvidently granted; and the City believes all of its arguments and issues will also show an independent basis to affirm the Circuit Court's dismissal of the Petitioner's Complaint.

3. The Court should allow this case to be remanded so a more complete record can be developed.

This case has been remanded for further proceedings which will allow a more complete record to be developed. If the Court desires to examine the legal issues in this case it should do so after a complete certiorari record is developed on remand or wait for a case in which the challenging party undertakes a pre-filing investigation sufficient to plead legally adequate facts.

[3] The City of Eau Claire respectfully reserves all arguments and issues it raised before the Circuit Court and Court of Appeals for review by this Court including, but not limited to: (1) That Voters With Facts lack standing to challenge the municipal "blight" and "but-for" findings, such that its four declaratory judgment claims fail as a matter of law, because such findings are unreviewable legislative acts - in other words, satisfaction of the "blight" procedural requirement of Wis. Stat. § 66.1105(4)(gm)4.a. and the "but- for" procedural requirement of (4m)(b)2 are legislative determinations that cannot be reviewed by the courts); (2) the circuit court appropriately determined the political question doctrine precludes this lawsuit as a matter of law because the City's "blight" and "but-for" TIF determinations are better left resolved by other branches of government – in other words, the separation of powers means the legislative branch, not the judicial branch, should decide whether the property in question is "blighted" and that redevelopment would not occur "but for" tax incremental financing; and (3) Voters With Facts should be dismissed as a party because it lacks associational standing. *Hofflander v. St. Catherine's Hosp., Inc*., 2003 WI 77, ¶102, 262 Wis. 2d 539, 664 N.W.2d 545 (observing appellate courts need not address additional issues when the resolution of one issue disposes of the case).

CONCLUSION

For all the foregoing reasons the Court should deny Voters With Facts Petition for Review.

Dated: July 19, 2017

__/s/Douglas Hoffer
Douglas J. Hoffer
Assistant City Attorney
State Bar No. 1079432
Stephen Nick
City Attorney
State Bar No. 1020929
City of Eau Claire
203 S. Farwell St.
Eau Claire, WI 54701
(phone) (715) 839-6006
(fax) (715) 839-6177
douglas.hoffer@eauclairewi.gov

CERTIFICATION OF FORM AND LENGTH

I certify that this petition conforms to the rules contained in Wis. Stat. § 809.19(8)(c) for a petition produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this petition is 5286 words.

Dated this19th day of July, 2017

BY: /s/Douglas Hoffer
Douglas Hoffer
State Bar No. 1079432

Douglas Hoffer
Eau Claire Assistant City Attorney
State Bar No. 1079432
203 S. Farwell Street
Phone: (715) 839-6006
Fax: (715) 839-6177
douglas.hoffer@eauclairewi.gov

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the petition mailed on July 19, 2017

A copy of this certificate is being filed with the court and served on all opposing parties as of this date.

Dated this 19th day of July, 2017

BY:/s/Douglas Hoffer
Douglas Hoffer
State Bar No. 1079432

Douglas Hoffer
Eau Claire Assistant City Attorney
State Bar No. 1079432
203 S. Farwell Street
Phone: (715) 839-6006
Fax: (715) 839-6177
douglas.hoffer@eauclairewi.gov

CERTIFICATION OF MAILING

I certify that this petition and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on July 19 , 2017.

Dated this 19th day of July, 2017

BY: /s/Douglas Hoffer
Douglas Hoffer
State Bar No. 1079432

Douglas Hoffer
Eau Claire Assistant City Attorney
State Bar No. 1079432
203 S. Farwell Street
Phone: (715) 839-6006
Fax: (715) 839-6177
douglas.hoffer@eauclairewi.gov