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.

Appeal from the August 28, 2015 Order by the Eau Claire County Circuit Court, Case No. 15-CV-175, the Honorable Paul J. Lenz Presiding

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PLAINTIFF-APPELLANT-PETITIONERS' BRIEF AND APPENDIX

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INTRODUCTION

At the broadest level, this case poses two fundamental questions: who may challenge a tax incremental district ("TID"), and how may such challenges be brought? As to "who," Plaintiffs-Appellants-Petitioners ("Voters") argue that they have taxpayer standing because they pay property taxes to the City of Eau Claire and they have alleged that the City will spend tax funds illegally in implementing two particular TIDs. As to "how," they argue that they may bring declaratory judgment claims challenging the TIDs on both statutory and constitutional grounds, or in the alternative may bring a certiorari review claim.

The Circuit Court dismissed the entire case, concluding that Voters lacked standing because allegations of illegal expenditure of tax funds were insufficient and Voters needed to allege another pecuniary injury. The Circuit Court also concluded that the TIDs were constitutional, and that whether a TID satisfies statutory requirements is a political question not proper for judicial review.

The Court of Appeals affirmed in part and reversed in part, concluding that Voters lacked standing to bring declaratory judgment claims because those claims failed on their merits. However, the Court of

Appeals also concluded that Voters did have standing to bring its certiorari claim.

STATEMENT OF ISSUES

Issue 1: Do taxpayers have standing to challenge the legality of a 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.

STATEMENT ON PUBLICATION

The Court should publish its opinion in this case, as it usually does. As this case presents multiple questions of first impression, a published opinion will provided useful guidance to future litigants and courts.

STATEMENT ON ORAL ARGUMENT

The Court should hear oral argument in this case, as it usually does. The Court may wish to question the attorneys and probe the extent of the differing positions advanced by the parties. Furthermore, as this case presents multiple questions of first impression, oral argument will provide the Court the opportunity to ask questions not anticipated by the parties.

STATEMENT OF FACTS AND OF THE CASE

This is an action challenging the validity of the actions taken by the City of 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-Appellant-Petitioners, Voters, 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-Appellants-Petitioners 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.)

Eau Claire TID #10 was created, and Eau Claire 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. (*Id.*) The properties located in TID #10 and the amended area of TID #8 were not blighted, and development would have occurred in them even without tax incremental financing. (R. 1:15.) After acquiring them, but before the City finally approved the two TIDs, the owner/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 to endorse the project plans for TID #10 and Amendment Number 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 Number 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 10, 2014, counsel for Voters, expressly on behalf of all of the Plaintiffs-Appellants-Petitioners 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 an earlier letter sent to the City by reference as to the circumstances of the claim and was signed by Voters' attorney. (R. 1:17, 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.*)

On November 11, 2014, the City Common Council adopted 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. The project plan for TID #10 compensates the developer for the demolition of historic buildings. (R. 1:6.)

The Project Plan for Amendment Number 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. They 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 City's 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 either a declaratory judgment or certiorari action, Voters were impermissibly challenging an act of legislative discretion, TIDs cannot be challenged with declaratory judgment actions, 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.) The court concluded that Voters lacked standing because they lacked a legally protectable interest. (R. 14:4-5; P. App. 138-39.) The court concluded that the case was not ripe because the case raised a political question inappropriate for judicial review (R. 14:5-6; P. App. 139-40), and Voters' alleged harms were too speculative (R. 14:7; P. App. 141). The court also ruled that Voters' constitutional claims failed because TIDs are constitutional under *Sigma Tau Gamma Fraternity House Corp. v. City of*

Menomonie, 93 Wis. 2d 392, 288 N.W.2d 85 (1980) (R. 14:6-7; P. App. 140-41), and that Voters failed to allege abuse of discretion, excess of power, or error of law (R. 14:7; P. App. 141).

The Circuit Court 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

TIF Law Background

Wisconsin's TIF Law, Wis. Stat. §66.1105, was first enacted in 1975. Its purpose is to provide Wisconsin municipalities with a method for financing specified kinds of urban redevelopment projects using specialized taxation districts. Municipalities are permitted (if they follow the strict statutory requirements) to fund local development by diverting incremental tax revenues from property within the TID that are presumed to result from the development within or adjacent to the TID. Such development might include things municipalities typically pay for, such as beautification and thoroughfare and utility improvements, or it might include things private parties usually pay for, such as residential or commercial buildings.

Because the incremental tax revenues from the TID are dedicated to funding the planned development costs for the life of the TID, such revenues cannot be used to fund general government operations. In many cases, municipal bonds are issued to actually fund the development costs, with the incremental taxes over the life of the TID then legally dedicated to payment of interest and principal on the TIF bonds until they are retired.

See generally City of Hartford v. Kirley, 172 Wis. 2d 191, 197-201, 493 N.W.2d 45 (1992).

The creation of a TID distorts the municipal tax base. It routes incremental taxes from the properties within the TID to pay for localized development costs and makes such revenues unavailable for other purposes. *Town of Baraboo v. Village of West Baraboo*, 2005 WI 96, ¶32, 283 Wis. 2d 479, 699 N.W.2d 610. Accordingly, the legislature has determined that municipalities may use TIDs only for four purposes: (1) addressing blighted areas as defined in the statute; (2) urban rehabilitation or conservation under Wis. Stat. §66.137(2m); (3) industrial development under Wis. Stat. §66.1101; or (4) the promotion of mixed use development as defined by Wis. Stat. §66.105(2)(cm).

In this case, the two TIDs under consideration were created for the ostensible purpose of combating blight. A "blighted area" is defined as:

> 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.

Wis. Stat. §66.1105(2)(ae)1.a.[1] In order to create a valid TID under this section of the law, a city must hold various public hearings, designate the boundaries of the TID, identify the properties claimed to be blighted, and approve a project plan. *See* §66.1105(4)(a)-(g).

The city's common council then must adopt a resolution that, among other things, contains findings that:

> a. Not less than 50%, by area, of the real property within the district is . . . a blighted area . . . ;
> b. The improvement of the area is likely to enhance significantly all of the other real property in the district. . . . and;
> bm. The project costs relate directly to eliminating blight . . . consistent with the purpose for which the tax incremental district is created . . . .

§66.1105(4)(gm)4.

A TID must also be approved by the "Joint Review Board," an intergovernmental entity created by the Tax Increment Law. The Board's approval is necessary because the "capture" of incremental tax revenues over the life of a TIF to fund municipal development costs deprives other taxing jurisdictions (counties, technical college districts, and school districts) of the ability to collect taxes from the incremental property value

[1] An additional definition of blighted area, focusing on predominantly open areas, §66.1105(2)(ae)1.b., is not at issue in this case.

created in the TID. *Town of Baraboo*, 2005 WI App 96, ¶¶32-33. Because that source of funding is cut off, the burden on other taxpayers necessarily increases. *Id.*, ¶34. To ensure that the interests of other taxing authorities are considered, representatives of each of those authorities, as well as a public member, are appointed to serve on the Joint Review Board. Wis. Stat. §66.1105(4m)(a).

The Joint Review Board must "review the public record, planning documents and the resolution passed by the [city] . . . [and] may hold additional hearings on the proposal." Wis. Stat. §66.1105(4m)(b)1. The Joint Review Board's decision to approve or deny a TID must be based on three criteria:

> a. Whether the development expected in the tax incremental district would occur without the use of tax incremental financing.
> b. Whether the economic benefits of the tax incremental district, as measured by increased employment, business and personal income and property value, are insufficient to compensate for the cost of the improvements.
> c. Whether the benefits of the proposal outweigh the anticipated tax increments to be paid by the owners of property in the overlying taxing districts.

§66.1105(4m)(c)1. Finally, "[t]he 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." §66.1105(4m)(b)2.

Using the same procedure, including the requirements for a finding of blight by the city council and the "but for" finding by the joint review board, a TID may be amended after it is created. §66.1105(4)(h).

Summary of Arguments

(1) Voters alleged that the statutory requirements for TIDs were not met: that the required determination of blight was fabricated because the areas making up the TIDs were not blighted, and that the but-for test was not met because development would have occurred in the area anyway without a TID. They seek the opportunity to present evidence on these issues in a declaratory judgment action. The Court of Appeals concluded that declaratory judgment was unavailable, but the resolutions could be challenged under certiorari review.

(2) Voters alleged that the two TIDs are unconstitutional for two reasons. First, because they fail to reduce blight or expand the tax base, they lack a public purpose under *Sigma Tau*. The Court of Appeals likewise concluded that this claim could be brought by certiorari review,

but not declaratory judgment. Second, because they involve cash payments directly to an owner of property within a TID for making specified improvements, they create unconstitutional tax rebates, violating the Uniformity Clause. The Court of Appeals concluded that Voters lacked standing to bring this claim because such payments do not violate the Uniformity Clause.

(3) Voters alleged that TID #10 was invalid because it unlawfully reimburses the developer of the project for demolishing historic buildings in violation of Wis. Stat. §66.1105(2)(f)1.a. The Court of Appeals concluded that Voters lacked standing to bring this claim because they failed to sufficiently allege that TIF funds were used to pay for the demolition of historic buildings.

Standard of Review

Whether a complaint has properly pled a cause of action is a question of law reviewed independently by this Court, benefiting from the discussions of the Court of Appeals and Circuit Court. *Data Key Partners*, 2014 WI 86, ¶17. 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 accepted as true. *Id.*, ¶19.

In order to survive such a motion, "a complaint must plead facts, which if true, would entitle the plaintiff to relief . . . [by] plausibly suggest[ing] a violation of applicable law." *Id.*, ¶21. "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). "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." *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶18, 275 Wis. 2d 533, 685 N.W.2d 573.

I. TAXPAYERS HAVE STANDING TO CHALLENGE ALLEGEDLY UNLAWFUL TIDS

This case presents an issue of first impression – whether taxpayers have standing to challenge an allegedly unlawful TID.[2] Taxpayer standing is based on a very simple concept – if taxpayer funds are being spent unlawfully, that harms all taxpayers, and all taxpayers have standing to challenge such expenditures. *S.D. Realty Co. v. Sewerage Comm'n of*

[2] This Court, in *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 416, 147 N.W.2d 633 (1967), acknowledged that the trial court in that case had found taxpayer standing to challenge Milwaukee's actions under a predecessor to the TIF Law, but did not rule on the issue because the defendants had conceded it.

Milwaukee, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961). Therefore, a taxpayer needs to allege only that the government is spending or will spend funds illegally to have standing. *Id.* at 21.

The Circuit Court approached this question from the wrong direction and erred at the most basic level. It denied that taxpayers have standing in those situations, and instead looked at whether Voters had alleged some other specific and concrete harm. (R. 14:4-5; P. App. 138-39.) It found Voters had not because, in its view, any harms from the expenditure of TIF funds were speculative in nature. (R. 14:5; P. App. 139.) The court erred by failing to recognize that any expenditure of taxpayer funds in an illegal manner necessarily causes harm to taxpayers.

The Court of Appeals erred in a subtler way. It acknowledged the basic principles of taxpayer standing, noting that Voters had alleged the proper harms (Ct. App. Dec. ¶¶16-18; P. App. 108-110), but went awry by concluding that a government expenditure must actually be illegal before a taxpayer has standing (*see generally* Ct. App. Dec. ¶¶18-59; P. App. 108-132). It explicitly stated that because the expenditures in this case did not violate the TIF law or the Wisconsin Constitution, Voters did not have standing to challenge them through a declaratory judgment action. (Ct.

App. Dec. ¶¶2-3, 23, 59; P. App. 102-03, 112, 132.) Yet the court also concluded that Voters had standing to challenge the TIDs through a certiorari action.

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 Voters didn't sufficiently allege that TIF funds would be spent on destroying historic buildings.

The Court of Appeals 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.

A. Standing Does Not Depend on the Merits

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).

Whether or not a taxpayer's claim is meritorious is irrelevant to standing; merely alleging illegality is sufficient. For example, in *Kaiser v. City of Mauston*, taxpayers challenged the expenditure of public funds

based on an allegedly-unlawful annexation. 99 Wis. 2d 345, 349, 299 N.W.2d 259 (Ct. App. 1980) (overruled on other grounds by *DNR v. City of Waukesha*, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994)). 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 is necessary for standing is 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 Voters' 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 may 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 merits of Voters' complaint, its approach would be problematic. Courts should 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, such as whether litigants have a sufficient stake in a matter to pursue it, and not whether they are legally correct. *See Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶40, 333 Wis. 2d 402, 797 N.W.2d 789. Standing analysis is concerned with alleged 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.

When courts confuse doctrine, litigants do not know what they must argue or how a court will address the arguments they do make. The Court of Appeals' opinion encourages judges and litigants to shortcut the question of standing by using the merits as a substitute. It is not limited to the question of taxpayer standing – its logic would apply to all questions of standing. The opinion alters well-settled law, and this Court should put it right again.

B. The Unlawful Expenditure of Funds Pursuant to a TID Project Plan Causes a Pecuniary Injury to Taxpayers

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, & 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 a 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*, 51 Wis. 2d 356 (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 Voters 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 going to the merits of the dispute. As noted above, that ruling completely confuses the doctrine of taxpayer – or any – standing in Wisconsin.

The City has previously argued that under *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, 259 Wis. 2d 107, 655 N.W.2d 189 and *Town of Baraboo*, 2005 WI App 96, taxpayers do not have standing to challenge TIDs. (R. 8:5-6; Ct. App. Resp. Br. 14-17, 19.) But as the Court of Appeals correctly recognized (Ct. App. Dec. ¶17, P. App. 109), *Lake Country* did not deal directly with a challenge to a TID but stands merely for the basic proposition that a taxpayer must allege the illegal expenditure of public funds to have standing (which the plaintiff in that case did not do). And as the Court of Appeals also recognized (Ct. App. Dec. ¶22, n. 8; P. App. 112), *Baraboo* addressed only whether a town

had standing, not whether taxpayers would have standing. Furthermore, language in *Baraboo*, in dicta, suggests that taxpayers would have standing. *See* 2005 WI App 96, ¶¶33, 37 (noting that TIDs affect property tax payers in the town, but the town could not assert a claim on its residents' behalf).

Because the Complaint alleges that Voters pay property taxes and that taxpayer funds would be spent unlawfully and be unavailable for legitimate purposes, it alleges sufficient facts for Voters to have established taxpayer standing. This Court should reverse the lower court in that regard.

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

Once it has been determined that taxpayers have standing to challenge a TID, the question still remains whether a declaratory judgment action is a proper method for such a challenge, or whether the only method is certiorari review. Although it couched its conclusions in terms of standing, the Court of Appeals analyzed that question and concluded that a declaratory judgment action may not be used to challenge the statutory and constitutional validity of a TID. (Ct. App. Dec. ¶¶15-59; P. App. 108-132.) The Court of Appeals got this wrong and did so in a way that opens the door for municipalities to effectively ignore the limits the legislature has placed on TIF funding.

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*, 2002 WI App 301, ¶15. 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 Voters arguing they are unlawful and the City arguing they are lawful. As demonstrated above, Voters have a legally-protected interest (standing). *See* Section I.B., *supra*. The case is ripe, as the City has created TID #10 and amended TID #8, and committed itself to spending tens of millions of tax dollars pursuant to the project plan.

As noted above, the Court of Appeals improperly shoehorned a question of statutory interpretation into the third requirement – standing. *See* Section I.A., *supra*. Because Voters have standing and the rest of the conditions are met, declaratory relief is available and the question is whether there is something about the TIF law that makes its requirements nonjusticiable.

The Court of Appeals concluded that the statutory requirements of "blight" and "but for" causation are not requirements at all, but mere

procedural hurdles – things that must be recited but that need not actually exist. (Ct. App. Dec. ¶25; P. App. 113-14.) According to the Court of Appeals, even if "a neutral factfinder 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.

The Court of Appeals inexplicably did allow Voters – despite their supposed lack of standing – to proceed on these statutory claims 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 to be fabricated (*see Id.*, ¶32; P. App. 118) demonstrates that the requirements <u>are</u> substantive and that the court's contrary reading of the statute is both implausible and dangerous.

Its preference for certiorari review is an abdication of judicial responsibility to ensure the laws that the legislature makes are enforced. The TIF law is not ambiguous, and there is no reason to believe that the legislature did not mean what it said. It decided that municipalities can give the type of tax preferences represented by TIDs only under certain circumstances. But, under the Court of Appeals' view, courts may enforce those requirements only in the most farcical of cases.

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. (*Id.*, ¶60; P. App. 133.) Although 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. 118), its approach would permit precisely that. By requiring certiorari review, the court is permitting a 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, and appeared to believe that without such language, a declaratory judgment action is unavailable. But courts review – by more than certiorari – whether preconditions to municipal actions exist. For example, in *Fenton v. Ryan*, 140 Wis. 353, 122 N.W. 756 (1909), this Court rejected an argument that a court could not review whether the statutory factual requirements to create a village had been met, concluding that:

> 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.

122 N.W. at 756 (citing *In re Vill. of North Milwaukee*, 93 Wis. 626, 67 N.W. 1033 (1896)) (emphasis added); *see also 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).

This case – involving the creation of special taxation districts – is most analogous to *Kaiser*, 99 Wis. 2d 345. In that case, the plaintiffs were

challenging the creation of a lake improvement district, arguing that the city creating the district did not encompass the entire lake frontage as required by statute. *Id.* at 349. As in this case, the defendants argued that the plaintiffs could proceed only by certiorari review. *Id.* at 354-55. The Court of Appeals disagreed, noting that "declaratory judgment has long been held to be a proper method of challenging the validity of an ordinance." *Id.* at 355. The court saw no bar to carefully reviewing whether the statutory prerequisites to the creation of a lake improvement district existed, and there is similarly no bar here.

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." (Ct. App. Dec. ¶¶25, 31; P. App. 113-14, 117-18.)[3]

But that reading of the statute is wrong. When setting forth specific conditions that must exist to justify some action, the legislature need not

[3] 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.

explicitly also say a city cannot just make those conditions up. It need not say that a municipality may do a certain thing only under given circumstances "and we really mean it." In normal parlance, when a grant of authority is conditioned on and limited by given conditions, it can only be exercised when those conditions are present. Indeed, it would be 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 is 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.").

Courts are more than capable of evaluating a factual determination made by a municipal body. Here, the legislature created a detailed standard for what is "blighted." *See* Wis. Stat. §66.1105(2)(ae)1. While there will 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 to redevelop, expand, or refurbish, or where a development has already been or is nearly completed. (*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 proper method of review was not raised as an issue in any of them). *See City of Hartford*, 172 Wis. 2d 191 (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 successfully challenging predecessor to TIF law); *Town of Baraboo*, 2005 WI App 96 (declaratory action, dismissed due to lack of standing).

The Court of Appeals here relied on then-judge 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, that it characterized as

"an assessment that the [proper method of challenging TIDs] is review by common-law certiorari." (Ct. App. Dec. ¶34; P. App. 119.) But only certiorari review was sought in *Olson*, so the decision can tell us nothing about when declaratory relief may be available. *Kaiser*, which addressed certiorari versus declaratory review, tells us it should be available.

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 action. 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 highly-specific standards for certiorari review. A court engaging in certiorari review is limited to four inquiries: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its decision was arbitrary, oppressive, or unreasonable and represented the municipality's will and not its judgment; and (4) whether the evidence was such that the municipality might reasonably make the determination in question. *Ottman v. Town of Primrose*, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411. None of those inquiries appears in *Sigma Tau*.

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.

Allowing municipalities to ignore legislative conditions for TIDs, as long as they say they have not ignored them, raises grave constitutional 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. A reading of the statute that turns these constitutional requisites into mere *ipse dixit* is incompatible with the extraordinary deviation from the normal rules of taxing and spending that TIDs represent and ought to be avoided. Only in a declaratory judgment action can those constitutional safeguards be preserved.

III. CASH GRANTS TO THE CONFLUENCE PROJECT OWNER/DEVELOPER TO FUND PRIVATE IMPROVEMENTS VIOLATE BOTH THE UNIFORMITY CLAUSE AND THE PUBLIC PURPOSE DOCTRINE

Voters alleged in its Complaint that the TIDs violate the Uniformity Clause by providing the owner of property within the TIDs an unconstitutional tax rebate. Voters also alleged that because the TIDs do not in fact work to eliminate blight, they lack a public purpose and are unconstitutional. The Court of Appeals concluded that Voters lacked standing to raise those two constitutional claims (Ct. App. Dec. ¶2; P. App. 102), yet proceeded to consider the merits of the Uniformity Clause claim, dismissing it (*Id.*, ¶¶41-54; P. App. 123-130). This Court should declare that the TIDs violate the Uniformity Clause, and revive Voters' public purpose claim for further factual finding.

A. Cash Grants to the Confluence Project Owner/Developer Act as Tax Rebates in Violation of the Uniformity Clause

1. Uniformity Clause Background

The Uniformity Clause of the Wisconsin Constitution reads simply "[t]he rule of taxation shall be uniform." Wis. Const. Art. 8, § 1. Wisconsin courts have divined six principles out of that statement, three of which are relevant to this case:

1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
2. All within that class must be taxed on the basis of equality so far as practicable and all property taxed must bear its burden equally on an Ad valorem basis.
3. All property not included in that class must be absolutely exempt from property taxation.

Sigma Tau, 93 Wis. 2d at 410-11 (quoting *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 424, 147 N.W.2d 633 (1967)).

Governmental attempts to incentivize property owners to develop their own properties (thereby increasing the tax base) have a rocky constitutional history in Wisconsin. Such efforts can run afoul of the Uniformity Clause by imposing a lower effective tax rate on some property owners.

For example, in *Ehrlich v. City of Racine*, 26 Wis. 2d 352, 132 N.W.2d 489 (1965), this Court struck down a contractual arrangement that effectively gave one property owner a partial exemption. The City and a landowner signed a contract whereby the City would annex the owner's property, obtain a sewer easement across it, and pay the owner back any excess taxes it paid to the City over what it had been paying previously. *Id.* at 354. The City then refused to make the tax rebate payments, and the owner sued. This Court ruled that the rebate payments had the effect of

creating a partial exemption in violation of the Uniformity Clause. *Id.* at 356.

In *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 147 N.W.2d 633 (1967), this Court struck down a 1943 law that closely resembled the current TIF law. Under the Urban Redevelopment Law, cities were authorized to enter into contracts with "redevelopment corporations," who would commit to erecting new buildings or improvement on specified land. *Id.* at 411-12. In exchange, the property owners were granted a partial tax freeze for 30 years. *Id.* at 412.

This Court struck down the Urban Development Law as violating the Uniformity Clause, because "the property of the redevelopment corporation is given preferential treatment and bears less of its tax burden on the true ad valorem basis than does other property." *Id.* at 429. This Court reasoned that the partial freeze in assessments created un-uniform property taxes by partially exempting property owned by the redevelopment corporations. *Id.*

To get around *Gottlieb*'s prohibition on freezing tax assessments, the legislature created the Improvements Tax Relief Law, which paid owners of residential property tax credits for making certain improvements to their

properties. *See State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94, 98, 270 N.W.2d 187 (1978). Such owners' property assessments increased as they normally would, and the owners paid the higher property taxes that resulted. *Id.* at 98, 104. The tax credits were paid later, out of the state's general fund revenue. *Id.* at 104.

This Court held that the tax credits violated the Uniformity Clause. *Id.* at 107. It rejected an argument that "the applicability of the uniformity clause ends with the assessment and collection of real estate taxes." *Id.* This Court focused heavily on the substance of the payments rather than their form, concluding that the credits acted as tax rebates and resulted in certain property owners paying a lower effective tax rate than others, despite initially being assessed and charged in a uniform manner. *Id.* at 108-11. Importantly, this Court distinguished the tax credits from other cases upholding expenditures "for government and public improvements" because those cases did not "involve direct distribution to individual taxpayers," which "affect[] the individuals' tax burden[s] relative to other taxpayers." *Id.* at 107. In the end, this Court concluded that the law "results in an unequal tax burden. The owners of homes with identical

assessed valuations will bear an unequal tax burden even though they initially pay the same amount to the local taxing authority." *Id.* at 111.

The TIF law, Wis. Stat. §66.1105, avoided the pitfalls of *Gottlieb* by ensuring that properties are assessed in the same manner and taxed at the same rate as other property. And, at least as it was originally passed, it contained no provision for paying back property owners within the TID, satisfying *Torphy*. The law was upheld against a Uniformity Clause challenge because no taxpayer was given "preferential treatment either in the form of an exemption from taxation or a tax credit." *Sigma Tau*, 93 Wis. 2d at 412.

2. Voters' Uniformity Clause Challenge

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 acts as an unconstitutional tax rebate in violation of the Uniformity Clause. Such payments were not permitted under the TIF Law as reviewed by the *Sigma Tau* court; they were introduced by the legislature in 2003 as Wis. Stat. §66.1105(2)(f)2.d., which permits "[c]ash grants made by the city to owners, lessees, or developers of land" within the TID if "the grant

recipient has signed a development agreement with the city." *See* 2003 Wis. Act 126, § 3.

The parties dispute whether Voters' challenge is facial or as-applied. A facial challenge attacks a law as a whole, arguing that the law is unconstitutional in all its applications, while an as-applied challenge attacks the law specifically as it applies to the facts of the case. *See State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63. Voters' Complaint characterizes the claim as an as-applied challenge, because it seeks only to invalidate these particular TIDs. Eau Claire argues that the challenge is facial because it would invalidate §66.1105(2)(f)2.d. (*See* Ct. App. Resp. Br. 33-35.)

But Voters is not challenging all applications of §66.1105(2)(f)2.d. The Uniformity Clause is not implicated when cities provide cash grants to lessees or developers of property within a TID. Because such people are not paying property taxes, a cash grant could not operate as an unconstitutional tax rebate. Even a cash grant to an owner would not operate as a tax rebate if the owner did not pay property taxes on the parcel in the first place, for example if it were exempt from property taxes under Wis. Stat. §70.11.

A ruling for Voters on this claim would not bar all cash grants under §66.1105(2)(f)2.d. It would bar only those claims in situations like that presented here – cash grants to owners of property that is not exempt from taxation. *Cf. In re Zachary B.*, 2004 WI 48, ¶36, 271 Wis. 2d 51, 678 N.W.2d 831 (acknowledging a criminal statute would be unconstitutional as applied to any person like the defendant); *State v. Hamdan*, 2003 WI 113, ¶86, 264 Wis. 2d 433, 665 N.W.2d 785 (prohibition of concealed carry unconstitutional as applied to a broad set of circumstances similar to those of the defendant). Therefore, this is an as-applied challenge.

The arrangement here acts as an unconstitutional tax rebate under *Torphy*. Property tax funds generated from new development on a particular parcel are being refunded to the owner of that parcel. Under a TIF development agreement like the one here, before they are even paid, tax revenues from the incremental value in a TID are earmarked to be returned to the property owner. Depending on the Project Plan at issue, they might be paid up front in order to fund construction, or they might be paid later on the completion of certain milestones. They might be paid for with funds that are borrowed (to be paid back by incremental taxes), or they might be paid for with funds that have already been raised (once the

incremental taxes are collected). Regardless of the order in which those things happen, the result is the same – the owner is getting a rebate on their property tax bill. *See Torphy*, 85 Wis. 2d at 108 ("It is the effect of the statute, not the form, which determines whether it is a tax statute subject to the uniformity clause."); *Id.* at 110 ("[I]t is the effect of the rebate credit that must be considered, not merely its form.").

This arrangement violates the rule of *Torphy* because it acts as a tax rebate to the owner of the Confluence Project, unconstitutionally singling that owner out for preferential treatment. *See Id.* at 111. Just like in *Torphy*, the owner is paying the same formal rate as everyone else, but is getting paid a reimbursement that lowers its effective rate. Taxpayers in Eau Claire are no longer paying a uniform rate. One – the owner of the Confluence Project – is being given a huge rebate. *See also Ehrlich*, 26 Wis. 2d 352 (looking beyond the form of a transaction to its substance and striking down a contract that in effect gave a property owner a rebate of taxes attributable to development and improvement of its property).

The Court of Appeals wrongly held that this case is like *Sigma Tau*, where TIF funds were paid to private parties to acquire land, appraise the land, relocate streets, clear land, and relocate utilities. 93 Wis. 2d at 398,

407. (*See* Ct. App. Dec. ¶¶47, 52; P. App. 127, 129.) In *Sigma Tau*, the owner was not being paid by the city to do any of those things, and furthermore the owner purchased the land and 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 owner 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 assumed that the payments made to the owner were limited to "costs of 'public works or improvements' that the City would otherwise bear." (Ct. App. Dec. ¶53; P. App. 129-130 (emphasis added).)

These assumptions are untrue. Nothing in the statute limits project costs to projects that a municipality would otherwise have to bear itself. The statute includes "the actual costs of the construction of . . . new buildings, structures, and fixtures" as an allowable "project cost" separate from "public works or improvements." *See* Wis. Stat. Stat. §66.1105(2)(f)1.a. Furthermore, it explicitly permits cash grants to "owners, lessees, or developers of land that is located within the [TID],"

§66.1105(2)(f)2.d., which logically could only apply to entities other than the municipality itself.

The City would not normally bear the cost of constructing a building owned by a private entity. 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.) Property tax payments paid by the owner are being returned to the owner for the owner's benefit. Therefore, the payments are acting as a tax rebate and are unconstitutional.

B. If the TIDs Do Not Eliminate Blight or Expand the Tax Base, They Lack a Public Purpose

Voters' Public Purpose Doctrine challenge is straightforward – because the area in question is not blighted and because development would occur in the area without a TID, the TIDs do not serve the public purposes of eliminating blight or expanding the tax base. Voters alleged facts that, if true, would establish a violation of the Public Purpose Doctrine, and so should have survived a motion to dismiss.

The Court of Appeals concluded that Voters lacked standing to raise its Public Purpose Doctrine claim via declaratory judgment, but could raise it in certiorari. (Ct. App. Dec. ¶59; P. App. 132.) Because the blight and but-for findings could be challenged only in a certiorari action, the court

reasoned, a constitutional challenge based on those grounds could proceed only in that manner as well.

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, 93 Wis. 2d at 413-14 – then they must actually be present. Even if it were possible to conclude that the legislature, in enacting the TID law, was improbably agnostic about whether these things must actually exist, the constitutional requirement recognized in *Sigma Tau* remains. It cannot be satisfied if this requisite does not exist. If that is all the TID law permits – a mere procedural checklist instead of judicial review of whether constitutional requirements are actually present – then it would be unconstitutional. The legislature cannot limit courts' ability to protect constitutional rights. Certiorari review is inadequate to protect constitutional rights, so Voters' declaratory judgment claim should be revived.

IV. THE COMPLAINT ADEQUATELY STATES A CLAIM THAT TIF FUNDS WILL BE USED TO UNLAWFULLY 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 registers of historic places as defined in §44.31(4). Voters alleged that TIF funds for TID #10 were in fact being used to reimburse the developer for the acquisition and destruction of historic properties.

The Court of Appeals dismissed this claim 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).[4] (Ct. App. Dec. ¶¶39-40; P. App. 122-23.)

But the Court ignored factual allegations in the Complaint. The court 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.'

[4] Eau Claire argued below that the historic buildings claim was moot because the buildings have already been destroyed. (*See*. App. Resp. Br. 41-42.) But Voters are not attempting to halt destruction of the buildings, they are seeking to have the TID declared invalid.

(*Id.*, ¶38; P. App. 122.) But those were not 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 has destroyed historic buildings as part of the Confluence Project and that it <u>will</u> be reimbursed for the costs incurred for that destruction out of TIF funds. 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.[5] 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 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. Such a reading denies taxpayers the opportunity to prove that the funds were actually used for demolition. 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.

[5] 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." (Ct. App. Dec. ¶37; P. App. 121.) Why the Court of Appeals then ignored exactly those allegations is unclear.

CONCLUSION

This Court should reverse the Court of Appeals, ruling that Voters have standing to raise all their claims, that a declaratory judgment action is a proper procedure to challenge a TID on statutory and constitutional grounds, that the TIDs violate the Uniformity Clause, and that Voters' historic buildings claim may proceed.

Dated this 1st day of November, 2017.

Respectfully submitted,
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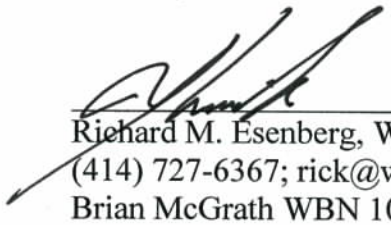

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FORM AND LENGTH CERTIFICATION

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 10,558 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: November 1, 2017

THOMAS C. KAMENICK

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.

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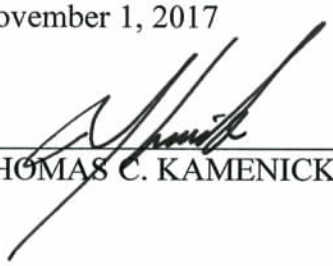

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