

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 Hoepfner 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.

DEFENDANT-RESPONDENT CITY OF EAU CLAIRE'S REPLY TO BRIEF
OF PLAINTIFFS-APPELLANTS-PETITIONERS

ON REVIEW OF A DECISION OF THE COURT OF APPEALS
DISTRICT III, AFFIRMING AN ORDER FOR EAU CLAIRE COUNTY
CASE NO. 15CV175 THE HONORABLE PAUL J. LENZ PRESIDING

STEPHEN C. 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

ARENZ, MOLTER, MACY, RIFFLE &
LARSON S.C.

REMZY D. BITAR
State Bar No. 1038340
720 N. East Avenue
Waukesha, WI 53186
(262) 548-1340
(262) 548-9211 (Fax)
rbitar@ammr.net

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES.....ii

INTRODUCTION 1

STATEMENT OF ISSUES..... 2

STATEMENT ON PUBLICATION AND ORAL ARGUMENT 4

STATEMENT OF FACTS AND OF THE CASE..... 4

STANDARD OF REVIEW..... 9

ARGUMENT 12

 1. The Complaint fails to plead sufficient facts to plausibly state a claim or demonstrate standing..... 12

 2. Wisconsin’s TIF law is constitutional, and the Court should not overrule *Sigma Tau*..... 25

 3. The Complaint fails to plead sufficient facts to support the historic building claims 33

 4. The Declaratory Judgment claims were properly dismissed because Certiorari is the proper standard of review 35

 5. In the alternative, the Court should apply any decision in favor of Voters With Facts prospectively 39

CONCLUSION 39

CERTIFICATION OF FORM AND LENGTH..... 41

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12) 42

CERTIFICATION FOR THE APPENDIX 43

TABLE OF AUTHORITIES

CASES

<i>Baker v. Carr</i> , 369 U.S. 186 (1961)	8, 16
<i>BBB Doe v. Archdiocese of Milwaukee</i> , 211 Wis. 2d 312, 565 N.W.2d 94 (1997)	10
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 127 S.Ct. 955 (2007)	10
<i>Bisenius v. Karns</i> , 42 Wis. 2d 42, 165 N.W.377 (1969)	8, 16
<i>Buhler v. Racine County.</i> , 33 Wis. 2d 137, 146 N.W.2d 403 (1966).....	16
<i>City of Janesville v. Rock County.</i> , 107 Wis. 2d 187, 319 N.W.2d 891 (Ct. App. 1982).....	23, 24
<i>City of Madison v. Nickel</i> , 66 Wis. 2d 71, 223 N.W.2d 865 (1974)	17
<i>City of Milwaukee v. Hampton</i> , 204 Wis. 2d 49, 553 N.W.2d 855 (Ct. App. 1996).....	17
<i>Data Key Partners v. Permira Advisers LLC</i> , 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693	9, passim
<i>Davis v. City of Elkhorn</i> , 132 Wis. 2d 394, 393 N.W.2d 95 (Ct. App. 1986)	16
<i>Delogu v. State</i> , 1998 ME 246, 720 A.2d 1153 (1998).....	26
<i>Dennehy v. Dept. of Revenue</i> , 305 Or. 595, 756 P.2d 13 (1988)	26
<i>Doe v. Archdiocese of Milwaukee</i> , 2005 WI 123, 284 Wis. 2d 307, 700 N.W.2d 180	10, 11
<i>Ehrlich v. City of Racine</i> , 26 Wis. 2d 352, 132 N.W.2d 489 (1965)	31
<i>Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.</i> , 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789	19, passim
<i>Fox v. Wis. Department of Health and Social Services</i> , 112 Wis. 2d 514, 334 N.W.2d 532 (1983).....	20
<i>Gottlieb v. Milwaukee</i> , 33 Wis. 2d 408, 147 N.W.2d 633 (1967)..	11, passim
<i>Green Valley Inv., LLC v. Cnty. of Winnebago</i> ,790 F.Supp. 2d 947 (E.D. Wis. 2011).....	17
<i>In re Request for Advisory Opinion</i> , 430 Mich. 93, 422 N.W.2d 186 (1988)	26

<i>John Doe I v. Archdiocese of Milwaukee</i> , 2007 WI 95, 303 Wis. 2d 34, 734 N.W.2d 827	10
<i>Kaloti Enters., Inc. v. Kellogg Sales Co.</i> , 2005 WI 111, 283 Wis. 2d 555, 699 N.W.2d 205	10, 12
<i>Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland</i> , 2002 WI App 301, 259 Wis. 2d 107, 655 N.W.2d 189.....	19
<i>Libertarian Party of Wis. v. State</i> , 199 Wis. 2d 790, 546 N.W.2d 424 (1996)	32
<i>Lister v. Board of Regents of Univ. of Wis. Sys.</i> , 72 Wis. 2d 282, 240 N.W.2d 610 (1976).....	36
<i>Lounge Mgmt., Ltd. v. Town of Trenton</i> , 219 Wis. 2d 13, 580 N.W.2d 156 (1998)	16
<i>Loy v. Bunderson</i> , 107 Wis. 2d 400, 320 N.W.2d 175 (1982)	19
<i>Nowell v. City of Wausau</i> , 2013 WI 88, 351 Wis. 2d 1, 838 N.W.2d 852.....	16, 36
<i>Ottman v. Town of Primrose</i> , 2011 WI 18, 332 Wis. 2d 3, 796 N.W.2d 411	35
<i>People ex rel. City of Canton v. Crouch</i> , 79 Ill.2d 356, 38 Ill.Dec. 154, 403 N.E.2d 242 (1980)	26
<i>Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship</i> , 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626	22, 23
<i>R.E. Short Co. v. City of Minneapolis</i> , 269 N.W.2d 331 (Minn. 1978)	26
<i>Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie</i> , 93 Wis. 2d 392, 288 N.W.2d 85 (1980).....	18, passim
<i>State ex rel. Hammermill Paper Co. v. La Plante</i> , 58 Wis. 2d 32, 205 N.W.2d 784 (1973).....	32
<i>State ex rel. Johnson v. Cady</i> , 50 Wis. 2d 540, 185 N.W.2d 306 (1971)	36
<i>State ex rel. La Follette v. Torphy</i> , 85 Wis. 2d 94, 270 N.W.2d 187 (1978)	29, 30
<i>State ex rel. Olson v. City of Baraboo Joint Review Bd.</i> , 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796	36
<i>State ex rel. Olson v. Litscher</i> , 2000 WI App 61, 233 Wis. 2d 685, 608 N.W.2d 425	35
<i>State ex rel. Schneider v. City of Topeka</i> , 227 Kan. 115, 605 P.2d 556 (1980)	26

<i>Town of Beloit v. City of Beloit</i> , 37 Wis. 2d 637, 155 N.W.2d 633 (1968)	16
<i>Town of Beloit v. County of Rock</i> , 2003 WI 8, 259 Wis. 2d 37, 657 N.W.2d 344	32

STATUTES

Wis. Stat. § 62.11	38
Wis. Stat. § 65.90	38
Wis. Stat. § 66.1105	5, 26, 37
Wis. Stat. § 66.1333	7
Wis. Stat. § 184.07	25
Wis. Stat. § 802.02	10

CONSTITUTIONAL PROVISIONS

Wis. Const. art. VIII, § 1	26
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OTHER AUTHORITIES

65 Op. Att’y Gen. 194 (1976)	25
Bryan Garner et al, <i>The Law of Judicial Precedent</i> , 333-45 (2016)	12
Douglas J. Hoffer, <i>Navigating Conflict-of-Interest Disqualification Motions</i> , 84 – Sep Wis. Law 8 (2011)	19
Antonin Scalia & Bryan Garner, <i>Reading Law: The Interpretation of Legal Texts</i> , 247-51 (2012)	17

INTRODUCTION

This case involves an attempt to obtain a desired political outcome through litigation. The Plaintiffs-Appellants-Petitioners (“Voters With Facts”) are a group of citizens with policy objections to tax incremental financing (“TIF”) and the use of TIF for a public-private development in the City of Eau Claire known as the Confluence Project. The Confluence Project, which includes a performing arts center and a mixed use building, is a development with financial support from the State of Wisconsin, Eau Claire County, the City of Eau Claire, and private developers. Voters With Facts have opposed the Confluence Project from the outset, and this lawsuit is their latest attempt to achieve through the judicial system what they were unable to obtain through the state and local political process.

Voters With Facts ask the Court to overrule 37 years of precedent upholding the constitutional validity of tax incremental financing, to water down pleading standards necessary to state a claim, to create a taxpayer standing doctrine with no limitations, to potentially invalidate thousands of development agreements statewide, and to ignore settled law requiring deference to state and local legislative actions. Supporting such ambitious arguments requires a Complaint to contain well-pleaded facts. Unfortunately for Voters With Facts, the Complaint is long on bare legal conclusions but woefully short of well-pleaded facts.

Both the circuit court and Court of Appeals decisions were based on settled law. The Complaint fails to plead sufficient facts to state a claim or to demonstrate standing. Wisconsin's TIF law is constitutional, and the Complaint demonstrates the City of Eau Claire and the Joint Review Board followed all TIF statute requirements. Certiorari is the appropriate standard of review for legislative TIF determinations. This case should either be dismissed entirely or, in the alternative, remanded for certiorari review.

STATEMENT OF ISSUES

Issue 1: Did the Plaintiffs allege sufficient facts to plausibly demonstrate the City of Eau Claire and Joint Review Board failed to follow statutory procedures when approving creation and amendment of Tax Incremental Districts ("TIDs")?

Circuit Court and Court of Appeals answered: No. Voters With Facts' Complaint demonstrates Eau Claire made the required statutory findings when taking TIF actions, and the Complaint therefore fails to allege noncompliance with any statutory directives.

Issue 2: Does merely including the phrase "illegal expenditure" in a Complaint provide citizen taxpayers with standing to challenge the creation or operation of TIF districts without pleading sufficient facts demonstrating an actual harm or legally protectable interest or pleading sufficient facts demonstrating an illegal expenditure took place?

Circuit Court and Court of Appeals answered: No. The Plaintiffs' status as taxpayers and property owners is insufficient to challenge the creation or operation of TIF districts. Voters With Facts alleged injury is far too speculative to create a plausible claim for relief, and they therefore lack standing.

Issue 3: Is Wisconsin's TIF law constitutional?

Circuit Court and Court of Appeals answered: Yes. The Wisconsin Supreme Court, in *Sigma Tau*, held that Wisconsin's TIF law is constitutional. Voters With Facts failed to sufficiently allege that cash grants to developer violated the Uniformity Clause of the Wisconsin Constitution, and failed to sufficiently allege that the City Council and Joint Review Board's actions violated the public purpose doctrine.

Issue 4: Do the Plaintiffs plead sufficient historic building facts to state a claim, and, alternatively, are the historic building claims moot?

Circuit Court and Court of Appeals answered: Because other issues were dispositive the circuit court did not address this issue. The Court of Appeals held that Voters With Facts failed to sufficiently allege that city funds related to TID were used to pay for demolition of historic buildings.

Issue 5: Is Certiorari an adequate alternative remedy and thus a more appropriate method to review the TIF related actions of the City Council and Joint Review Board than Declaratory Judgment?

Circuit Court and Court of Appeals answered: Because other issues were dispositive the circuit court did not address this issue. The Court of Appeals held that Voters With Facts challenge was cognizable on Certiorari rather than Declaratory Judgment. Certiorari review constitutes an adequate alternative remedy, and would prevent an improper transfer of legislative power from city to courts.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The Court should follow its normal practice and publish the opinion and hear oral argument in this case. This case presents a number of important issues that could benefit future litigants and lower courts. Providing oral argument will likely further refine the important legal issues raised in this case.

STATEMENT OF FACTS AND OF THE CASE

This case involves a legal challenge to legislative actions taken by the Eau Claire City Council and the Joint Review Board to create and operate TIDs in the City of Eau Claire. (R. 1:3, 6-24; R. 10: 19). TID no. 8 was amended on September 26, 2014, and TID no. 10 was created on October 22, 2014. (R. 1: 14-16). The Complaint, citing Wisconsin's TIF law, lists a variety of steps that the City of Eau Claire and the Joint Review Board must complete to create or amend a TID. (R. 1: 8-16). The Complaint demonstrates that the City of Eau Claire and Joint Review Board

completed all steps required by Wisconsin's TIF law. (R. 1: 8-25, ¶¶ 52, 54, 58 - 61, 72, 83).

The City of Eau Claire and the Joint Review Board held all statutorily required public hearings. (R. 1: 8-25). Voters With Facts were provided an opportunity to provide input at these public hearings, and they did so. (R. 1: 3-25). The boundaries were properly designated, blighted properties were identified, and project plans were approved. (R. 1: 8-25). The Joint Review Board included a representative of each taxing jurisdiction affected by the creation of the TID (which includes the school district, the county, and the technical college district) as well as a public member. (R. 1: 8-25). The Joint Review Board approved the amendment of TID no. 8 and the creation of TID no. 10. (R. 1: 8-25).

The City Council must 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 finding 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).

Despite the fact that the Complaint conceded that the City Council adopted a resolution with statutorily required findings and the Joint Review Board adopted a resolution included a positive assertion that included all statutory requirements, the Complaint nevertheless asserted that the City Council Joint Review Board resolutions were defective. (R. 1: 8- 25). The Complaint also alleged that actions expressly permitted by Wisconsin's TIF law violate the Wisconsin Constitution despite conceding the Wisconsin Supreme Court has held that Wisconsin's TIF law is constitutional. (R. 1: 8-25).

The City of Eau Claire moved to dismiss the action because Voters With Facts failed to allege sufficient facts to successfully challenge the local legislative judgment expressly delegated to city councils and joint review boards under state TIF law, and because Voters With Facts lacked standing. (R. 7: 1-23). The City of Eau Claire moved in the alternative to dismiss various causes of action because the historic buildings claims failed to state a claim and were moot, because Wisconsin's TIF law is constitutional, because Certiorari is an adequate alternative remedy to Declaratory Judgment, and because one plaintiff - Voters With Facts - lacks association standing. (R. 7: 1-23).

In response to the motion, Voters With Facts argued that their status as property owners and taxpayers granted the Plaintiffs standing to challenge the legislative determinations of the Eau Claire City Council and the Joint Review Board. (R: 10: 1-21). Voters With Facts conceded the TIF actions were “legislative,” but still argued that the circuit court should apply quasi-judicial standards to the legislative TIF determinations.¹ (R: 1: 17, ¶ 71; R. 10: 19). Although TIF is a lawful statutory financing method rather than a spending action, Voters With Facts argued that the circuit court should apply non-TIF related jurisprudence which allow taxpayers to challenge illegal “expenditures,” but offered no logical limiting principle to this permissive interpretation. (R. 1: 8-25; R. 10: 1-21).

During the motion hearing the circuit court repeatedly pressed Voters With Facts to explain why the legislative determinations made by the Eau Claire City Council and Joint Review Board were wrong, and how the judiciary would be better positioned to make such determinations. (R. 20: 6-7, 11-14). Voters With Facts were unable to explain why the determinations were wrong, and repeatedly said they “did not know” what a judicial review of these determinations would look like. (R. 20: 34-37). Voters With Facts also asserted this case would likely involve “lengthy and

¹ The City of Eau Claire asserts the City Council and Joint Review Board relied on an extensive record in making the determinations entrusted to their judgment regarding tax incremental financing within a long existing statutorily blighted “project area” of the Eau Claire Redevelopment Authority. *See* Wis. Stat. § 66.1333.

detailed discovery,” while failing to explain why they had not reviewed the public record available to them prior to filing their Complaint. (R: 10: 4; R: 20).

In a later oral ruling the circuit court granted the City of Eau Claire’s Motion to Dismiss Voters With Facts’ action. (R. 14: 1-7). The circuit court concluded that the statutorily required resolutions adopted by the Eau Claire City Council and Joint Review Board involved legislative facts rather than the kind of quasi-judicial adjudicative facts argued by the Plaintiffs. (R. 14: 1-7). The circuit court held that Voters With Facts lacked standing to challenge the creation and operation of TIF districts because Voters With Facts lacked a personal interest in the controversy, only alleged speculative possibilities that general tax revenues could be affected, and the issues were not ripe for judicial determination. (R. 14: 1-7).

The circuit court, applying *Bisenius v. Karns*, 42 Wis. 2d 42, 54, 165 N.W.2d 377 (1969) and *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962), also held that the dispute involved a political question not suitable for judicial review. (R. 14: 1-7). In so doing, the court pointed out the lack of judicially discoverable and manageable standards for resolving this dispute without the court substituting its own judgment for the legislative judgment of the Eau Claire City Council and Joint Review Board. (R. 14: 1-7).

The circuit court's decision cited various reasons that completely disposed of the case, and thus not every issue raised or briefed by the parties was addressed. (R. 14: 1-7).

The Court of Appeals affirmed most of the circuit court holdings, and remanded the case for further proceedings on Voters With Facts' alternative Certiorari claim that Eau Claire's TIF resolutions were "arbitrary, capricious, and outside the scope of their lawful authority." The Court of Appeals held that Voters With Facts failed to sufficiently allege that the City of Eau Claire failed to follow the requirements of Wisconsin's TIF statute; the City's blight determination was a matter of legislative discretion; Voters With Facts failed to sufficiently allege that reimbursements to the developer violated the Uniformity Clause of the Wisconsin Constitution or the Public Purpose doctrine; and that Voters With Facts failed to sufficiently allege that city funds related to TID were used to pay for demolition of historic buildings.

STANDARD OF REVIEW

Whether a Complaint states a claim upon which relief can be granted is a question of law, although appellate courts benefit from analysis by the circuit court. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 17, 356 Wis. 2d 665, 675, 849 N.W.2d 693, 698. When reviewing a motion to dismiss, factual allegations in the Complaint are accepted as true for the purposes of review. *Id.* at ¶ 18. Legal conclusions asserted in the

Complaint, however, are not accepted, and legal conclusions are insufficient to withstand a motion to dismiss. *Id.*

Wisconsin standards governing a Motion to Dismiss track those of the Federal Rules of Civil Procedure. *See Data Key*, 2014 WI 86 at ¶¶ 19-31 (noting the U.S. Supreme Court’s decision in *Twombly* is consistent with Wisconsin Supreme Court precedent, and plaintiffs must allege facts that *plausibly* suggest they are entitled to relief). “A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint.” *Data Key*, 2014 WI 86 at ¶¶ 19-21; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 955 (2007); *John Doe I v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 12, 303 Wis. 2d 34, 734 N.W.2d 827 (quoting *BBB Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997)).

Upon a motion to dismiss, courts accept as true all facts well-pleaded in the Complaint and the reasonable inferences therefrom. *Data Key*, 2014 WI 86 at ¶¶ 19-21; *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 in the process of construing a Complaint. *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶ 19, 284 Wis. 2d 307, 700 N.W.2d 180. Furthermore, legal conclusions stated in the Complaint are not accepted as true, and they are insufficient to enable a Complaint to withstand a motion to dismiss. *Id.*. Therefore, it is important for a court

considering a motion to dismiss to accurately distinguish pleaded facts from pleaded legal conclusions. *Data Key*, 2014 WI 86 at ¶ 19.

Wis. Stat. § 802.02(1) sets the requirements for a Complaint to withstand a motion to dismiss for failure to state a claim. *Id.* at ¶¶ 19-21. To satisfy Wis. Stat. § 802.02(1)(a), a Complaint must plead facts, which if true, would entitle the plaintiff to relief. *Data Key*, 2014 WI 86 at ¶¶ 19-21. Bare legal conclusions set out in a Complaint provide no assistance in warding off a motion to dismiss. *Data Key*, 2014 WI 86 at ¶¶ 19-21; see *John Doe*, 2005 WI 123 at ¶ 19. Plaintiffs must allege facts that, if true, plausibly suggest a violation of applicable law.

The cardinal rule of statutory construction is to preserve a statute and to find it constitutional if it is at all possible to do so. *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 415, 147 N.W.2d 633, 637 (1967). All legislative acts are presumed constitutional, and every presumption must be indulged to sustain the law if at all possible. *Id.* If any doubt exists it must be resolved in favor of the constitutionality of a statute. *Id.* Courts are not concerned with the wisdom of what the legislature has done, but rather are concerned only when the statute clearly contravenes some constitutional provision. *Id.*

ARGUMENT

1. THE COMPLAINT FAILS TO PLEAD SUFFICIENT FACTS TO PLAUSIBLY STATE A CLAIM OR DEMONSTRATE STANDING.

The Complaint fails to plead sufficient facts to plausibly state a claim or demonstrate standing. The lack of well-pleaded facts impact every argument raised in this case. The Complaint seeks to overturn longstanding precedent of this Court by having Wisconsin's TIF law declared unconstitutional.² The Complaint also seeks to challenge local legislative actions applying authority delegated by Wisconsin's TIF statute. The Complaint does not plead sufficient facts to satisfy the *Data Key* plausibility standard, the fairly debatable standard, or the burden necessary to challenge the constitutional validity of a state statute.

A. The Complaint fails to plead sufficient facts to plausibly state a claim.

The Complaint does not allege sufficient facts to plausibly state a claim. A motion to dismiss for failure to state a claim tests the legal sufficiency of a 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 a Complaint and the reasonable inferences therefrom." *Id.* (citing *Kaloti* at ¶ 11). However, a court cannot add facts when analyzing the sufficiency of a Complaint. *Id.*

² See Bryan Garner et al., *The Law of Judicial Precedent*, 333-45 (2016) (Noting stare decisis applies with special force to questions of statutory construction).

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 challenged the constitutionality of a provision of Wisconsin’s TIF law under all circumstances, thus making the challenge a “facial” challenge, yet lacked any facts distinguishing the instant action from *Sigma Tau* (where the Wisconsin Supreme Court upheld the constitutionality of Wisconsin’s TIF law) (R.1)
6. The Complaint pleaded no facts in support of its argument that TIF funds were improperly used to demolish historic buildings, but instead pleaded 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. (R: 1; R: 8; R: 9).

7. 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 what the developer promised to do in the development agreement in exchange for the cash grants. (R.1)
8. 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 a plan, not an appropriation). (R.1:16, ¶ 65)
9. 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)
10. The Complaint did not challenge TID No. 8 on the basis of uniformity. (P.App.125 n. 14)

Additionally, throughout this litigation, the thin allegations by

Voters With Facts required them to make the following concessions:

1. During the circuit court motion hearing Voters With Facts repeatedly said they “did not know” what a judicial review of legislative TIF determinations would look like. (R. 20: 34-37)
2. The local TIF actions challenged in this case are “legislative” (R. 10:19)
3. Voters With Facts abandoned its argument that the Joint Review Board deficiently reviewed the public record. (P.App. 111 n. 7)
4. Deference to local legislative bodies is appropriate in “close cases.” (Pet’r’s Br. 35)
5. Cases involving discretionary decisions such as decisions whether to grant liquor licenses or conditional use permits are “well-served” by Certiorari review. (Pet’r’s Br. 38)
6. No violation of Uniformity occurs when TIF funds are used to “acquire land, appraise the land, relocate streets, clear land, and relocate utilities.” (Pet’r’s Br. 46)
7. “The uniformity clause is not implicated when cities provide cash grants to lessees of developers within a TID.” (brief pg 44)

8. Cash grants to owners of tax exempt land does not violate the Uniformity Clause. (Pet'r's Br. 44)
9. The original TIF law did not violate the Uniformity Clause. (Pet'r's Br. 43).

The Complaint's deficiencies, along with Voters With Facts concessions, demonstrate the lower courts both correctly applied the *Data Key* plausibility standard. Voters With Facts do not plead sufficient facts to plausibly suggest they are entitled to relief.

The Court should apply *Data Key* and affirm dismissal of Voters With Facts' Complaint. The Complaint's bare legal conclusions are not enough to survive a Motion to Dismiss. As *Data Key* pointed out, a plaintiff must allege *facts* that, if true, *plausibly* suggest a violation of applicable law. *Data Key* at ¶ 21 ("It is the *sufficiency of the facts alleged* that controls the determination of whether a claim for relief is properly [pleaded].") (emphasis added). Even if one accepted all well-pleaded facts in the Complaint as true, the Complaint does not plausibly demonstrate a lack of blight, a failure to meet the "but-for" test, a lack of uniformity of taxation, a lack of public purpose, or the use of TIF funds to demolish historic buildings. Failure to meet the *Data Key* plausibility standard is not the Complaint's only pleading deficiency.

Voters With Facts' also failed to plead sufficient facts to satisfy the bedrock separation-of-powers principle that challenges to state and local legislative acts should not be resolved by the judicial process if they are

“fairly debatable.” See *Buhler v. Racine County*, 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* at 45; see also *Baker v. Carr*, 369 U.S. 186, 217 (1961) (political question doctrine applies when there is a lack of judicially discoverable or manageable standards); 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).

Legislative acts enjoy a high level of judicial deference.³ This is especially true in cases where the legislative act involves a core legislative

³ Local legislative acts also enjoy a high level of judicial deference. See *Davis v. City of Elkhorn*, 132 Wis. 2d 394, 400, 393 N.W.2d 95, 98 (Ct. App. 1986) (local ordinance presumed constitutional, and party challenging constitutionality of an ordinance must demonstrate unconstitutionality beyond a reasonable doubt); *Lounge Mgmt., Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 26, 580 N.W.2d 156, 162 (1998); see also *City of Milwaukee*

function such as deciding how to finance future appropriations. As the Court of Appeals correctly pointed out in this case, Wisconsin's TIF statute delegates significant legislative discretion to local legislative bodies. Parties seeking to challenge legislative acts must meet a high burden.

The Complaint does not satisfy the fairly debatable standard. The Complaint does not demonstrate the duly authorized City Council and Joint Review Board findings determinations were clearly in error. The Court should deny Voters With Facts' request to have the judiciary substitute their judgment for those legislative bodies and the citizens those bodies represent without pleading sufficient facts. Budgetary decisions such as how to finance development projects are core legislative functions that courts should not disturb without clear legal authority.

Additionally, the Complaint does not plead sufficient facts to satisfy the burden necessary to challenge the constitutional validity of a state statute. It is not sufficient to say reasonable minds may disagree about whether a state statute is constitutional. Any doubt as to constitutionality must be resolved in favor of constitutionality. *Gottlieb* at 415; *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal*

v. Hampton, 204 Wis. 2d 49, 59, 553 N.W.2d 855, 859 (Ct. App. 1996) (courts apply similar rules of construction when examining ordinances as they do when examining state statutes); *Green Valley Inv., LLC v. County of Winnebago*, 790 F. Supp. 2d 947, 963 (E.D. Wis. 2011), *as amended* (July 15, 2011) *citing* *City of Madison v. Nickel*, 66 Wis. 2d 71, 79-80, 223 N.W.2d 865, 869-70 (1974) (“The Wisconsin Supreme [C]ourt has held, in accordance with the general rule elsewhere, that the existence of a severability clause, while not controlling, is entitled to great weight in determining whether valid portions of a statute or ordinance can stand separate from any invalid portion.”).

Texts, 247-51 (2012) (Noting the well-recognized judicial canon that a “statute should be interpreted in a way that avoids placing its constitutionality in doubt”). The Complaint does not plead sufficient facts to overcome this presumption, nor does it plead sufficient facts to distinguish this case from *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 288 N.W.2d 85 (1980).

B. The Complaint fails to plead sufficient facts to demonstrate standing.

Voters With Facts asks this Court to grant any taxpayer standing simply by including the phrase “illegal expenditure” in a Complaint. If a Complaint includes the phrase “illegal expenditure,” Voters With Facts asserts, the taxpayer has standing even if the facts included in the Complaint demonstrate no illegal activity occurred as a matter of law, and even if the Complaint includes no actual harm or legally protectable interest. Voters With Facts’ argument contradicts existing law on standing, and, unlike the Court of Appeals decision in this case, provides no logical limiting principle. The Court of Appeals reached the wholly uncontroversial conclusion that a Complaint which bases its standing entirely on the right of taxpayers to challenge illegal government expenditures must plead facts demonstrating an illegal expenditure. If the Complaint only pleads facts which – even if true – do not demonstrate a

violation of law, the Court of Appeals concluded, the Complaint fails to demonstrate standing.

The Court of Appeals decision applied well-settled Wisconsin law in concluding Voters With Facts lack standing. Successfully invoking standing requires (1) a personal interest in the controversy (sometimes referred to in the case law as a “personal stake” in the controversy);⁴ (2) an injury to the person whose standing has been challenged, that is, adversely affected; and (3) a demonstration that judicial policy calls for protecting the interest of the party whose standing is challenged (sometimes referred to as a “legally protectable interest”). *Foley-Ciccantelli v. Bishop’s Grove Condo Ass’n, Inc.*, 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789; *see also 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; *see also Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982). The Complaint does not satisfy any of these requirements,⁵ and fails to plead sufficient facts to demonstrate a personal interest or personal stake in the

⁴ See Douglas J. Hoffer, *Navigating Conflict-of-Interest Disqualification Motions*, 84 – Sep Wis. Law 8 (2011) (Noting four justices in *Foley-Ciccantelli* appeared to agree that if a party demonstrates a “personal stake,” a party can establish standing).

⁵ Various tests for standing have been applied in different contexts including constitutional law cases, Declaratory Judgment cases, and other contexts. *Foley-Ciccantelli*, 2011 WI 36, ¶ 6. *Foley-Ciccantelli* said that when a statute, rule, or constitutional provision is at issue, a court determines standing by examining *the facts* to determine whether an injured interest exists that falls within the ambit of the statute, rule, or constitutional provision involved that judicial policy calls for protecting. *Foley-Ciccantelli* at ¶ 6 (emphasis added). This case may implicate various tests on standing, but regardless of which standing test the Court applies the Complaint fails to plead sufficient *facts* to demonstrate standing.

controversy, any actual concrete injury, and that judicial policy calls for protecting the interests of Voters With Facts.

The Court should apply *Foley-Ciccantelli* and other settled law and determine that parties wishing to establish standing must do more than merely use the phrase “illegal expenditure.” Courts determine standing by examining the *facts*. *Foley-Ciccantelli* at ¶ 6 (emphasis added). Consequently, the Court of Appeals decision to examine the lack of *facts* pleaded in the Complaint in determining Voters With Facts lacked standing was both reasonable and based on settled law.

Voters With Facts fail to plead any concrete harm or personal stake in this controversy, but rather plead only highly speculative abstract injuries. “A person has standing to seek judicial review when that person has a personal stake in the outcome and is directly affected by the issues in controversy.” *Foley-Ciccantelli*, at ¶ 124 (Prosser, J., concurring). Likewise, a plaintiff must plead facts demonstrating he or she has sustained or is immediately in danger of sustaining an actual direct injury. *Foley-Ciccantelli*, at ¶ 154 (Roggensack, J., concurring) (noting an abstract injury is not sufficient to confer standing, the plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury); see also *Fox v. Wis. Department of Health and Social Services*, 112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983).

The Plaintiffs have not alleged any concrete injury or interest, but rather merely attempt to voice their disagreement with the legislative actions of the City Council and Joint Review Board. Voters With Facts allege that they will be harmed because tax increment will be unavailable for general purposes and because tax revenues will be unavailable for other taxing jurisdictions. No facts were alleged demonstrating any likelihood that these injuries will occur or that the injury is anything other than abstract. Voters With Facts (apparently) believe that the City of Eau Claire and other taxing authorities will realize losses in tax revenues as a result of the Joint Review Board's TIF legislative actions. Voters With Facts allege no facts in support of this alleged future injury, and base their claims on the entirely speculative possibility that general tax revenues might be impacted. Legislative TIF determinations involve policy choices that consider the risks of moving forward with TIF supported development and the risks of doing nothing (such as decreasing property values, higher crime, continued blight).

It is bad judicial policy to accept Voters With Facts permissive taxpayer standing doctrine without some kind of logical limiting principle. The Court of Appeals decision included a reasonable limiting principle on taxpayer standing, that is: taxpayers seeking to challenge local legislative financing decisions must either plead an actual harm or plead facts demonstrating a violation of law (or an actual "expenditure").

Voters With Facts’ permissive taxpayer standing interpretation, on the other hand, could invite a significant increase of litigation challenging economic development projects across the state.⁶ The lack of any limiting principle on Voters With Facts’ interpretation, if accepted, could lead to a significant increase in litigation and have a chilling effect on state and local economic development projects statewide. Moreover, Voters With Facts’ argument, that any dissatisfied taxpayer only needs to plead the phrase “illegal expenditure” to demonstrate standing, is not limited to TIF.

C. Voters With Facts lack standing to bring this suit because the controversy is not ripe for judicial determination.

The Plaintiffs lack standing to bring this suit because the controversy is not ripe for judicial determination. A Declaratory Judgment is ripe for judicial determination if the facts are sufficiently developed to avoid courts entangling themselves in abstract disagreements. *Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P’ship*, 2002 WI 108, ¶ 44, 255 Wis. 2d 447, 649 N.W.2d 626. Put another way, the facts on which the court is asked to make a judgment “should not be contingent or uncertain.” *Id.* Harm in the

⁶ Examples of economic development projects potentially impacted by Voters With Facts permissive taxpayer standing argument range from local projects such as the Confluence Project, to massive development projects with statewide impact such as Foxconn and the Milwaukee Bucks arena. See Patrick Marley & Jason Stein, *Foxconn subsidies could mean heavy borrowing for local municipalities*, Milwaukee Journal Sentinel, July 27, 2017 available at <http://www.jsonline.com/story/news/politics/2017/07/27/foxconn-wont-get-3-billion-unless-creates-13-000-wisconsin-jobs-gov-scott-walker-says/516073001/>; Todd Richmond & Scott Bauer, *Bucks: Scott Walker signs bill for new arena*, Wisconsin State Journal, August 13, 2015 available at http://host.madison.com/wsj/news/local/govt-and-politics/bucks-scott-walker-signs-bill-for-new-arena/article_9ab93072-2f07-5e12-8457-0fb347dffd0a.html

Declaratory Judgment context may be anticipatory only if imminence and practical certainty of an act or event exist. *Id.*

The Plaintiffs allege no facts demonstrating that their alleged harms are either imminent or practically certain to occur. The Plaintiffs' Complaint merely alleges the following injuries:

As taxpayers, the Plaintiffs are harmed by the Defendants' unlawful actions as their tax dollars will be spent in an unlawful manner, tax revenues from the incremental growth in TID #8 will be unavailable for general purposes such as schools, roads, and public safety, and the incremental tax revenues from TID #8 will be unavailable for other taxing jurisdictions.

(R. 1: 18, ¶ 79)

As taxpayers, the Plaintiffs are harmed by the Defendants' actions as their tax dollars will be spent in an unlawful manner, tax revenues from the incremental growth in TID #10 will be unavailable for other taxing jurisdictions.

(R. 1: 20, ¶ 91)

The Plaintiffs' Complaint alleges no facts that demonstrate tax burden reallocation is either imminent or practically certain to occur. To the contrary, the Plaintiffs merely speculate that tax burdens will be reallocated while failing to allege any practically certain injuries. The Plaintiffs believe their tax burdens may be reallocated by the TIF actions in this case. A justiciable controversy, however, requires more than beliefs or assumptions. Courts do not wade into controversies unless an injury is practically certain to occur. *See City of Janesville v. Rock County.*, 107 Wis. 2d 187, 199, 319 N.W.2d 891 (“A justiciable controversy requires the

existence of present and fixed rights. A Declaratory Judgment will not determine hypothetical or future rights.”).

Injury is not practically certain to occur. The mere possibility that tax burdens may be reallocated due to the speculative value of real property in the downtown with or without the TIF actions at issue, by some future City Council, at some unspecified future date, does not demonstrate the practical certainty necessary to maintain this action. Pleadings must allege facts which support the inference that injuries are practically certain to occur. Additionally, the Complaint fails to address the potential risks of doing nothing such as decreasing property values, higher crime, and continued blight.

The Complaint’s lack of facts demonstrating any present harm or practically certain future injuries is fatal to the Plaintiffs’ case. Because the Plaintiffs’ alleged injuries are neither imminent nor practically certain to occur this controversy is not ripe for judicial determination.

D. Additionally, Voters With Facts lack associational standing.

Additionally, Voters With Facts failed to plead any facts establishing associational standing. Wisconsin law includes a narrow exception providing unincorporated nonprofit associations standing. Unincorporated nonprofit associations may only assert claims on behalf of its members if one or more members of the association have standing to assert a claim in their own right, if the interests the nonprofit association seeks to protect are

germane to its purposes, neither the claim asserted nor the relief requested requires the participation of a member, and the unincorporated nonprofit association is comprised of 3 or more members. *See* Wis. Stat. § 184.07.

The Complaint fails to allege Voters With Facts’ non-profit purpose, how the interests Voters With Facts seeks to protect are germane to its purpose, and that Voters With Facts is comprised of 3 or more members. The Complaint merely states that Voters With Facts “question the propriety of the proposed developments that are the subject of this lawsuit.” (R. 1: 3-4, ¶ 2). The Complaint’s failure to allege sufficient facts demonstrating Voters With Facts has associational standing cannot be cured by the courts. *See Data Key*, 356 Wis. 2d 665 at ¶ 19 (“[A] court cannot add facts in the process of construing a complaint”).

2. WISCONSIN’S TIF LAW IS CONSTITUTIONAL, AND THE COURT SHOULD NOT OVERRULE *SIGMA TAU*.

This Court has already upheld the constitutional validity of Wisconsin’s TIF law in *Sigma Tau*, and communities across the state have relied on this ruling in utilizing TIF financing since this Court announced the decision 37 years ago.⁷ *Sigma Tau*, which rejected challenges based on uniformity and the public purpose doctrine, is not an outlier. States across the country have rejected similar uniformity and public purpose doctrine

⁷ The Wisconsin Attorney General also concluded that TIF does not violate the Uniformity Clause of the Wisconsin Constitution. *See* 65 Op. Att’y Gen. 194 (1976).

challenges to TIF financing under similar state constitutional provisions.⁸

Voters With Facts ask this Court to overrule this longstanding precedent without pleading any facts plausibly demonstrating entitlement to relief.

a. The Complaint does not plead sufficient facts to demonstrate a violation of Uniformity Clause.

Voters With Facts' argument, that the cash grants provided to the developers under a development agreement violates the Uniformity Clause of the Wisconsin Constitution, Wis. Const. art. VIII, § 1, contradicts this Court's ruling in *Sigma Tau*. Cash grants are specifically permitted by Wisconsin's TIF statute if the parties enter into a development agreement. Wis. Stat. § 66.1105(2)(f)2.d.⁹ Voters With Facts concede the parties

⁸ See *Delogu v. State*, 1998 ME 246, 720 A.2d 1153, 1155-56 (1998) (Tax Increment financing did not violate constitutional principles of public purpose doctrine or equal taxation.); *In re Request for Advisory Opinion*, 430 Mich. 93, 422 N.W.2d 186, 188 (1988) (Tax increment financing not facially unconstitutional as prohibition on general rate of *ad valorem* taxes and extension of municipality's credit was for a public purpose.); *Dennehy v. Department of Revenue*, 305 Or. 595, 756 P.2d 13, 18 (1988) (Tax increment financing statute upheld against constitutional attacks relating to legislative power, public purpose and equal taxation.); *State ex rel. Schneider v. City of Topeka*, 227 Kan. 115, 605 P.2d 556-57 (1980) (Tax increment financing: did not violate constitutional provisions requiring uniform and equal taxation; was not an unlawful delegation of legislative power; did not violate constitutional provisions requiring that levy of tax be for a specific purpose; and did not violate constitutional provisions requiring uniformity in distribution of tax money.); *People ex rel. City of Canton v. Crouch*, 79 Ill.2d 356, 38 Ill.Dec. 154, 403 N.E.2d 242, 248 (1980) (Tax increment financing fulfilled constitutional requirement that municipal revenue be spent for legitimate public purpose, did not violate uniformity clause and was a general rather than a special law.); *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331-333 (Minn.1978) (Tax increment financing served public purpose within meaning of constitution.).

⁹ Voters With Facts allege that cash grants were not permitted under the TIF law as reviewed by the *Sigma Tau* court, and were only permitted after legislation was passed in 2003. This assertion is incorrect. According to the Fiscal Estimate compiled for the state legislature for the 2003 legislation, "[c]urrent law does not prohibit cash grants and does not impose notice requirements for project expenditures that include cash grants." Instead of making cash grants available for the first time, the 2003 legislation created

executed a development agreement. Voters With Facts also acknowledge cash grants do not always violate the Uniformity Clause. Voters With Facts' failure to articulate the terms of the exchange, along with their acknowledgment that cash grants do not always violate the Uniformity Clause precludes their uniformity argument.¹⁰

The Court should apply *Sigma Tau* to the facts of this case and affirm the Court of Appeals. *Sigma Tau* addressed arguments similar to the uniformity arguments raised by Voters With Facts. In *Sigma Tau* a fraternity filed a Complaint against the City of Menomonie challenging the City's right to condemn its property. *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 396-97, 288 N.W.2d 85, 86 (1980). The fraternity alleged that the condemnation was not permitted under Wisconsin's TIF law, and that Wisconsin's TIF law was unconstitutional on its face and as applied because of a lack of uniformity of taxation and the lack of public purpose required by the Wisconsin Constitution. *Id.*

restrictions for when TIF cash grants could be used. Available at http://docs.legis.wisconsin.gov/2003/related/fe/sb305/sb305_DOR.pdf (Note 2);

¹⁰ In fact, many of the concessions included in the Complaint and Voters With Facts' brief to this court demonstrate there is no Uniformity Clause violation even if the Court accepted Voters With Facts' interpretation. The Complaint concedes that the amendment to TID No. 8 funded the acquisition and construction of a (municipally owned) parking structure, which is tax exempt. Similarly, under the development agreement TID No. 10 project costs were used to acquire prime riverfront real estate for the public from the developer, public infrastructure costs were shifted to the developer, and cash grants were used to support a tax-exempt arts center (that was also funded with \$15 million from the State of Wisconsin) as well as a University of Eau Claire dorm slated to make payments in lieu of taxes, as well as other consideration provided under the terms of the development agreement. (R. 8; R: 9).

Sigma Tau stated that the purpose of the Uniformity Clause is to protect the citizenry against unequal and unjust taxation. *Id.* Uniformity requires that all property within a class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an ad valorem basis. *Id.* at 410-13. Under tax incremental financing, *Sigma Tau* concluded, “there is no such disproportionate impact upon taxpayers within the same territorial boundaries of the unit imposing the tax.” *Id.* All taxpayers within the territorial limits of each local governmental unit “continue to be taxed at a uniform rate based upon valuations uniformly arrived at.” *Id.* “No taxpayer or group of taxpayers is being singled out for preferential treatment either in the form of an exemption from taxation or a tax credit.” *Id.*

Sigma Tau applies to this case because all taxpayers within the territorial limits continue to be taxed at a uniform rate based upon uniform valuations. The developers are not being singled out for preferential treatment either in the form of an exemption from taxation or a tax credit. To the contrary, no facts pleaded in the Complaint demonstrate there the terms of the exchange between developer and the City of Eau Claire under the development agreement includes any plausible constitutional infirmity, and does not demonstrate a constitutional infirmity beyond a reasonable doubt.

In *Sigma Tau* this court concluded that TIF “is clearly distinguishable, both in form and effect, from the tax provisions struck down by the court in *Gottlieb* and in *Torphy*.” *Sigma Tau* at 412. In both of those cases, *Sigma Tau* concluded, “the court based its conclusion that the provisions were unconstitutional upon its finding that taxpayers owning equally valuable property were required to pay disproportionate amounts of taxes.” *Id.* Under TIF, *Sigma Tau* concluded, there is no such disproportionate impact upon taxpayers because they all continue to be taxed at a uniform rate based on uniform valuations.

The Court should apply *Sigma Tau*, which distinguished *Torphy* and *Gottlieb*, and conclude that Voters With Facts did not plead sufficient facts demonstrating a Uniformity Clause violation. *Torphy*, *Gottlieb*, and *Ehrlich* involved facts demonstrating a specific exchange such as tax rebate.

This case is distinguishable from *Torphy* which included stipulated facts about what specific improvements the taxpayer undertook in exchange for a specified tax break under the Improvements Tax Relief law. *State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94, 97, 270 N.W.2d 187 (1978). The Improvements Tax Relief law provided certain property owners tax credits, within prescribed limitations, to certain property owners for building and garage improvements which result in increased property tax assessments. *Id.* In *Torphy*, the availability of tax credits was well defined to certain

classes of property owners, and certain types of property. *Id.* The amount of tax credits was also well defined by statute. *Id.*

Unlike *Torphy*, the Complaint fails to address the terms of the exchange between the City and the Developer. The Complaint does not address what the developer promises to provide in exchange for the cash grants. Consequently, Voters With Facts has not pleaded sufficient facts to demonstrate the cash grants are a “tax rebate” similar to *Torphy*. In fact, Voters With Facts acknowledge that not all cash grants violate uniformity, but still fail to recognize that this concession requires them to plead sufficient facts demonstrating the cash grants in this case violate uniformity.

Similarly, the Court should also apply *Sigma Tau* and distinguish *Gottlieb* from this case because the Complaint does not plead facts demonstrating a partial tax exemption. In *Gottlieb*, this Court held that a portion of the Urban Redevelopment Law, which granted urban redevelopment corporations partial exemptions from property taxes, violated uniformity. As *Sigma Tau* pointed out, the Urban Redevelopment Law is different than TIF because the Urban Redevelopment law, unlike TIF, involved taxpayers owning equally valuable property paying disproportionate amounts of taxes. Additionally, to the extent Voters With Facts repeated characterization of the Urban Redevelopment Law as a “predecessor to TIF law” is meant to imply that this law is similar in form or

function to TIF law (and thus *Gottlieb* is applicable to the present facts) *Sigma Tau* demonstrates this characterization is meritless.

The present case is also distinguishable from *Ehrlich v. City of Racine*, 26 Wis. 2d 352, 132 N.W.2d 489 (1965) where the City agreed to pay the property owner's taxes in exchange for annexation of the property and in exchange for an easement. In *Ehrlich*, the Court held that a City agreeing to pay taxes on behalf of the property owner constituted an impermissible tax rebate. Unlike the present case, the terms of the specific exchange in *Ehrlich* were known, and included a tax rebate. Here, the Complaint does not plead facts demonstrating the terms of the exchange in the development agreement between the City of Eau Claire and the developer. Furthermore, no facts in the Complaint demonstrate this case involves anything close to the kind of illegal tax rebate found in *Ehrlich*.

b. The Complaint does not plead sufficient facts to demonstrate a violation of the Public Purpose Doctrine.

The Complaint does not plead sufficient facts to distinguish *Sigma Tau's* conclusion that Wisconsin's TIF law does not violate the Public Purpose Doctrine. *Sigma Tau*, 93 Wis. 2d at 396. The Public Purpose doctrine has two aspects: the tax must be for a public, not a private, purpose; and the purpose of tax must be one which pertains to public purpose of the district within which tax is to be levied and raised. *Id.* at 412-13. "[A] conclusion that no public purpose exists can be determined

only if it is ‘clear and palpable that there can be no benefit to the public.’” *Town of Beloit v. County of Rock*, 2003 WI 8, ¶¶ 2 – 4, 21, 259 Wis. 2d 37, 51, 657 N.W.2d 344, 351 (holding that the goals of creating jobs, promoting orderly growth, increasing the tax base, and preserving the environment for the benefit of citizens constituted a legitimate and valid public purpose); *see also Libertarian Party of Wis. v. State*, 199 Wis. 2d 790, 809, 546 N.W.2d 424 (1996) (holding that encouraging economic development and enhancing the tax base were legitimate and valid reasons, along with others, for finding a legislative public purpose in the expenditure of public funds to build the Milwaukee Brewers’ Miller Park).

Furthermore, it is a “well-settled rule that the legislative body determines what constitutes a public purpose.” *Town of Beloit v. County of Rock*, 2003 WI 8 at ¶¶ 24 - 27. “[C]ourts will not interfere unless at first blush the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use.” *Id.* at ¶ 27. What constitutes a public purpose is peculiarly within the knowledge of the legislature. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 49, 56-57, 205 N.W.2d 784, 798-99 (1973). The court is to give great weight and very wide discretion to legislative declarations of public purpose. *Id.* at 50.

The Complaint alleges no facts demonstrating that the TIF actions – which Wisconsin’s TIF law expressly allows - violated the Public Purpose Doctrine. The Complaint merely alleges that the Tax Incremental Districts are not blighted, and that the lack of blight means there cannot be a public purpose. “Blight” is defined by statute and it is thus a legal term of art. Saying an area is “not blighted” is nothing more than a bare legal conclusion. Voters With Facts’ assertion does not demonstrate it is “clear and palpable that there can be no benefit to the public.” Furthermore, this assertion ignores additional TIF public purposes such as economic development.

It is not the role of courts to assume or infer facts the Plaintiffs neglect to allege in their Complaint. Instead, courts should, as the lower courts did here, conclude Wisconsin’s TIF law does not violate the Public Purpose Doctrine where the Plaintiffs’ fail to allege sufficient facts challenging local TIF decisions, overcoming the great weight and broad discretion given to legislative declarations of public purpose, and distinguishing the holding in *Sigma Tau*.

3. THE COMPLAINT FAILS TO PLEAD SUFFICIENT FACTS TO SUPPORT THE HISTORIC BUILDING CLAIMS

The Court should dismiss the Plaintiffs’ historic buildings claims for failure to state a claim and because the claims are moot. The Court may not need to address this issue if it affirms the decision of the court of appeals.

However, the City of Eau Claire includes a short argument to address issues raised by Voters With Facts brief.

The Complaint fails to plead facts demonstrating any connection between TIF funds and historic building acquisition or demolition. Rather, the Complaint alleges that “there is no way to assure” that cash grants provided to the developers will not be used to reimburse demolition costs. (R. 1: 21, ¶ 94). Pleading speculation and conjecture that “there is no way to assure” TIF funds will not be used to reimburse demolition costs is not sufficient to meet Wisconsin’s pleading standards. *See Data Key* at ¶ 17. Voters With Facts allege no facts demonstrating any kind of connection between the money disbursed to the developers and the demolition costs. No finder of fact could infer a connection from such a lack of facts. The Court should not overrule the plausibility standard and replace it with a “no way to assure” standard.

The four corners of the Complaint demonstrate the historic building claims are utterly without merit. The Complaint neglects to point out that the development agreement, which the Plaintiffs cite in their Complaint, explicitly forbids the developer from using TIF funds to acquire or demolish historic buildings. (R. 1; R: 8, 6; R: 9). The Complaint also fails to mention that the TIF project plans, which they also cite in their pleadings, include financial statements identifying TIF project costs, and none of these financial statements say that historic building acquisition or demolition will

involve TIF funds. (R: 1; R: 8; R: 9). Ignoring the development agreement and TIF projects plans is not Voters With Facts only historic building claim pleading problem.

The historic building claims are also moot because the buildings in question were already demolished. “An issue is moot when its resolution will have no practical effect on the underlying controversy.” *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. “In other words, a moot question is one which circumstances have rendered purely academic.” *Id.* Resolving the Plaintiffs’ historical buildings claims will have no practical effect on the underlying controversy. The buildings have already been demolished; no judgment can reverse that fact. If the Plaintiffs had truly desired to prevent the demolition of historic buildings they should have acted earlier by commencing an action seeking relief prior to demolition (a step they clearly could have undertaken based on the publicly available hearings and record).

4. THE DECLARATORY JUDGMENT CLAIMS WERE PROPERLY DISMISSED BECAUSE CERTIORARI IS THE PROPER STANDARD OF REVIEW.

Voters With Facts’ Declaratory Judgment claims were properly dismissed because Certiorari is the proper standard of review. The Court of Appeals determination - that common law Certiorari is the proper standard of review – is 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 State 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). It is also consistent with this Court’s jurisprudence concluding Certiorari is the proper standard review of local legislative functions. *Nowell v. City of Wausau*, 2013 WI 88, ¶ 36-37, 351 Wis. 2d 1, 838 N.W.2d 852 (certiorari is proper standard of review of legislative function granting liquor license).

Voters With Facts’ brief demonstrates that Certiorari is the proper remedy in this case. Voters With Facts concede that deference to local legislative bodies is appropriate in “close cases,” and that cases involving

discretionary decisions such as decisions whether to grant liquor licenses or conditional use permits are “well served” by Certiorari review. The Complaint does not include sufficient facts demonstrating legislative TIF determinations are not entitled to the kind of deference involved in Certiorari review. Furthermore, Voters With Facts fail to demonstrate why review of the “blight” or “but for” decisions would be any less “well served” by Certiorari than by decisions to grant liquor licenses or conditional use permits.

Granting liquor licenses or conditional use permits involve a legislative function similar to legislative TIF determinations. Voters With Facts concede “blighted area” is defined by statute, and includes an area that is “detrimental to the public health, safety, morals or welfare” due to any combination of factors listed in the statute. (R. 1: 8, ¶ 30; Wis. Stat. § 66.1105(2)(ae)1). The broad nature of the “blighted area” standard evidences the discretion the state legislature granted to City Councils and Joint Review Boards. A determination that an area is “detrimental to the public health, safety morals or welfare” is a determination of public interest similar to the type of municipal determinations made in the alcohol license and zoning context. Legislative TIF determinations would thus also be “well served” by Certiorari review.

Additionally, Voters With Facts fail to articulate judicially manageable standards for their Declaratory Judgment actions. The

Complaint seeks to overturn longstanding precedent of this Court by having Wisconsin's TIF law declared unconstitutional. The Complaint also seeks to challenge local legislative actions applying authority delegated by Wisconsin's TIF statute. However, Voters With Facts repeatedly said they "did not know" why or how the local legislative fiscal and policy determinations were wrong, or what judicial review of these actions would look like. These concessions were made despite the circuit court repeatedly allowing Voters With Facts to offer explanation, and repeatedly pressing Voters With Facts to explain how the judiciary would be better positioned to make such determinations. (R. 20: 6-7, 11-14, 34-37). Voters With Facts asserted this case would likely involve "lengthy and detailed discovery," while failing to explain why they had not reviewed the public record available to them prior to filing their Complaint. (R: 10: 4; R. 20). Voters With Facts' failure to articulate judicially manageable standards for their Declaratory Judgment actions also demonstrates Certiorari review is the proper standard of review for legislative TIF determinations.

For all these reasons, if this case allowed to proceed at all the Court should remand this matter for a Certiorari standard of review only.¹¹

¹¹ In the event this Court remands any portion of this case for further review, this Court should make it clear that some of Voters With Facts' requested relief is invalid. Voters With Facts requested a judgment declaring void "any municipal action taken in reliance on the lawful existence of the TIDs." State law grants City Councils broad legislative powers to manage and control City financial and budgetary matters. *See* Wis. Stat. § 62.11(5); Wis. Stat. § 65.90. The judiciary should not disturb this legislative authority in the absence of clear legal justification.

5. IN THE ALTERNATIVE, THE COURT SHOULD APPLY ANY DECISION IN FAVOR OF VOTERS WITH FACTS PROSPECTIVELY.

In the alternative, the Court should apply any decision in favor of Voters With Facts prospectively. The City of Eau Claire and the Joint Review Board worked in good faith under longstanding existing law. Communities and developers statewide have likewise relied in good faith on *Sigma Tau* and the express language found in Wisconsin's TIF statute in entering into countless development agreements in which the developers have promised consideration in exchange for cash grants.

Gottlieb is instructive on this point. In *Gottlieb* this court held that a portion of the Urban Redevelopment Law was unconstitutional, but recognized the fiscal impact on the City of Milwaukee as well as those corporations which in good faith entered into the contracts contemplated by the Urban Redevelopment Law. *Id.* at 432. The *Gottlieb* Court thus applied its mandate of unconstitutionality prospectively. *Id.*

Similar to *Gottlieb*, the impact of a retroactive application could invalidate thousands of contracts statewide between contractors and developers. Consequently, to the extent the Court should apply any decision in favor of Voters With Facts prospectively.

CONCLUSION

For all the foregoing reasons, the Court should affirm the decision of the Court of Appeals dismissing Voters With Facts' Declaratory Judgment

claims as insufficiently pleaded to state a claim, to demonstrate standing, or to demonstrate the unconstitutionality of Wisconsin's TIF statute. In the event a remand may be necessary, the Court should remand this case for Certiorari review only.

Dated: November 18, 2017

/s/Douglas J. 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

ARENZ, MOLTER, MACY, RIFFLE &
LARSON S.C.
REMZY BITAR
720 N. East Avenue
Waukesha, WI 53186
(262) 548-1340
(262) 548 9211 (Fax)
rbitar@ammr.net

Prepared By:
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 FORM AND LENGTH

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(c) for a brief 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 Brief is 10989 words.

Dated this 18th day of November, 2017.

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

Douglas Hoffer
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 brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of November 21, 2017

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

Dated this 18th day of November, 2017

BY: /s/Douglas J. 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 FOR THE APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: November 18, 2017

/s/Douglas J. Hoffer
Douglas J. Hoffer
Attorney for Defendants-Respondents
State Bar No. 1079432