

STATE OF WISCONSIN

CIRCUIT COURT
Branch II

EAU CLAIRE COUNTY

VOTERS WITH FACTS,
J. PETER BARTL,
DAWN BERGSTROM
CYNTHIA BURTON,
MARYJO COHEN, JO ANN HOEPPNER CRUZ,
LEAH KUBETZ, RACHEL MANTIK,
JANEWAY RILEY, CHRISTINE WEBSTER,
DOROTHY WESTERMANN, JANICE
WNUKOWSKI,

Case No. 19CV192
Case Code: 30955

Plaintiffs,

vs.

CITY OF EAU CLAIRE and
CITY OF EAU CLAIRE JOINT REVIEW BOARD

Defendants.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant, City of Eau Claire, by its attorneys, City Attorney, Stephen C. Nick and Deputy City Attorney, Douglas Hoffer, and by Arenz, Molter, Macy, Riffle, Larson & Bitar., by special appearance and reserving all jurisdictional objections, submit this Brief in Support of its Motion to Dismiss for failure to state a claim upon which relief can be granted, pursuant to Wis. Stat. § 802.06(2)(a)6.

INTRODUCTION

This lawsuit is Voters' With Facts' latest attempt to achieve through the judicial system what they were unable to obtain through the state and local political process. Voters With Facts have policy disagreements with Wisconsin's TIF law, and disagree with the use of TIF to support local development projects. A lawsuit is not an appropriate mechanism for determining whether

Wisconsin's Tax Incremental Financing law constitutes good public policy. The proper forum to decide such public policy issues is the legislative body of either the State or local government.

The Court should dismiss this case because an action requesting certiorari review must commence within six months of when the decision for which review is sought becomes final. The failure to bring a Certiorari action within six months constitutes laches, and requires dismissal of the action. The complaint concedes the challenged decisions took place in September 2017, and thus this action is time barred. Additionally, the Court should dismiss this case because Voters With Facts' arguments contradict settled law, the complaint fails to plead sufficient facts to state a claim, the Plaintiffs lack standing, and the Plaintiffs' claims are barred by issue preclusion.

Joint Review Boards must find that development within a TIF district would not occur without TIF. This is often referred to as the "but-for" determination. In making a but-for determination, Joint Review Boards look at the TIF district as a whole and determine whether development in the district would occur without the use of TIF. Joint Review Boards do not, as Voters With Facts suggest, merely examine whether development would occur on a single property within a TIF district. As a matter of law, a single existing development within a TIF district does not invalidate the entire district. The arguments raised in the complaint on the but-for determination contradict settled law including a recent Wisconsin Supreme Court case to which Voters With Facts were a party.

It is difficult to believe the purpose of bringing this lawsuit was anything other than publicity. The same day Voters With Facts brought the present lawsuit they issued a press release publicizing their disagreements with the use of TIF. The press release complained that TIF is "often sold as 'free' to the public" but "TIF districts raise property taxes and lets [sic] cities exceed their normal revenue limits." Additionally, the press release also alleged that

“property tax [sic] will necessarily rise because the development’s property tax revenue is captured and can no longer be counted on to pay for the cost of government services.” The press release also alleged that the City of Eau Claire is “cheating its taxpayers,” and said that TID no. 12 “is the second district the City has created in two years in an area where development was in progress.” The press release was not the only place that counsel for Voters With Facts engaged in unsupported hyperbole for the sole purpose of publicizing disagreement with the use of TIF. In an interview with the Eau Claire Leader Telegram, counsel for Voters With Facts called TID no. 12 the “biggest abuse of [TIF] we’ve ever seen.” In support of this rhetoric, Voters With Facts pointed to a single existing development in TID no. 12 that it alleges would have occurred without TIF. Coincidentally, the filing of this lawsuit and the issuance of the press release coincided with the thirty days the City of Eau Claire were provided to respond to Voters With Facts’ brief in the prior (confluence project) TIF lawsuit, and provided Voters With Facts with another opportunity to publicly voice their objections to the use of TIF to support the confluence project.

Regardless of the purpose of the lawsuit, which the City intends to address in a forthcoming motion for sanctions, the Court should dismiss this case because it is untimely and contradicts settled law.

STATEMENT OF FACTS

On September 12, 2017 the Eau Claire City Council approved TID no. 12. (Compl. ¶¶ 27, 39, 42, 45, 47, 49). The Joint Review Board approved TID no. 12 on September 15, 2017. *Id.* Voters With Facts filed a notice of claim on January 12, 2018. *Id.* On April 17, 2019, Voters With Facts filed the present lawsuit alleging the existence of a single completed building development within TID no. 12 invalidates the legislative actions creating this TIF district. (Compl.); *See also* Wis. Stat. § 66.1105.

Voters With Facts' 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. *Id.* The Complaint does not dispute that the City of Eau Claire and Joint Review Board completed all steps required by Wisconsin's TIF law. *Id.* The City of Eau Claire and the Joint Review Board held all statutorily required public hearings. *Id.* Voters With Facts were provided an opportunity to provide input at these public hearings, and they did so. *Id.* The City Council and Joint Review Board had the opportunity to consider the objections raised by Voters With Facts along with various other information. *Id.* The boundaries were properly designated, and project plans were approved. *Id.* 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. *Id.* The Joint Review Board approved the creation of TID no. 12 on September 15, 2017. *Id.*

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 does not dispute that the Joint Review Board adopted a resolution that contains such a positive assertion.

The Complaint seeks certiorari relief alleging the Joint Review Board did not proceed on a correct theory of law. (Compl. ¶ 42). In support of this allegation Voters With Facts alleged that an entire TIF district was invalid if it included a single building that was already constructed at the time the TIF district was created. (Compl. ¶¶ 29-35, 42). Because a single development in the district allegedly would have occurred even without TIF, the complaint asserted that no future development in the district needed TIF to occur. *Id.*

Voters With Facts allege they were injured for two reasons. First, Voters With Facts allege they were injured because TIF funds may at some future unspecified date be spent, and if TID no. 12 was defectively created then these future unspecified expenditures would be illegal. (Compl. ¶ 48). Second, Voters With Facts allege that they were harmed as taxpayers because the creation of TID no. 12 raises the mill rate they pay on their property taxes because future tax increment could be used to repay future unspecified and yet unspent TIF project costs. (Compl. ¶ 49).

This is not the first time Voters With Facts have brought an action against the City of Eau Claire challenging the use of tax incremental financing (“TIF”). *See Voters with Facts v. City of Eau Claire*, 2018 WI 63, 382 Wis. 2d 1, 8, 913 N.W.2d 131. Voters With Facts previously brought an action challenging the use of TIF in connection with the confluence project. *Id.* After the circuit court dismissed the action, the Court of Appeals and Wisconsin Supreme Court affirmed dismissal of all but one count of the complaint, and the case is currently in front of the circuit court on remand to review the official record. *Id.* In the prior TIF case to which Voters With Facts was a party the Wisconsin Supreme Court rejected the single issue Voters With Facts raise in this case: that the existence of a single property under development within a TIF district invalidates that TIF district. *Id.* at ¶¶ 45-47.

SUMMARY OF TAX INCREMENTAL FINANCING

Wisconsin’s TIF statute, § 66.1105, was enacted in 1975. TIF allows communities to finance development or other public projects if certain criteria are met, using the increased property tax revenue generated by the resulting increased property value within the tax incremental district (“TID”) to repay the costs of the improvements. *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 396-97, 288 N.W.2d 85, 86 (1980); *see also* Wisconsin Department of Revenue, *2019 Tax Incremental Financing Manual*,

37 <https://www.revenue.wi.gov/DOR%20Publications/tif-manual.pdf> (summarizing many aspects of Wisconsin's TIF law). Once a TID is created, a base value is established for property within the district. *See generally* Wis. Stat. § 66.1105. The base value includes the equalized value of all taxable property and the value of municipally-owned property (absent certain municipal owned property used for certain purposes). *Id.* Generally, the base value remains unchanged until the district is terminated or until the boundaries of the TIF are amended. *Id.*

If the property value increases above the base value, this increase is called a value "increment." *Id.* The Wisconsin Department of Revenue determines the value increment each year by subtracting the base value from the sum of all of the taxable property value in the TID. *Id.* All property owners within the TID continue to pay the same amount in property taxes they would pay if the TID did not exist. *Id.* However, the county, school district, and technical college district, or any other tax district, do not receive taxes on the value increment. *Id.* The taxes on the value increment for all taxing jurisdictions are collected by the municipality and allocated to a special tax increment fund. *Id.* The municipality uses this fund to pay for public works and other improvements included in the TID project plan as a way to stimulate increases in property value. *Id.*

Wisconsin's TIF statute includes a variety of procedural requirements. *Id.* Project plans must include a number of items such as a list of project costs, and maps of existing uses and proposed improvements must be created. *Id.* Notices must be given and hearings must be held. *Id.* The project plan must be reviewed and recommended by the plan commission, the city council, and the joint review board, which must approve resolutions. *Id.* The Joint Review Board's approval must contain a positive assertion that, in its judgment, some development would not occur in the TIF district without TIF. Even critics of TIF acknowledge it is the most widely used local government program for financing economic development in the United

States. Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U.CHI.L.REV. 65 (2010) (also noting that forty-nine states and the District of Columbia authorize TIF).

MOTION TO DISMISS STANDARD

Whether a Complaint states a claim upon which relief can be granted is a question of law. *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. *Id.* Courts applying the Motion to Dismiss standard in cases involving deference to legislative determinations should apply a heightened standard. See *Data Key*, 2014 WI 86 (applying standard to case involving business judgment rule); See also *Voters With Facts*, 382 Wis. 2d at ¶ 37-40, 71 (applying standard to case involving legislative determinations); see also Douglas J. Hoffer, *Threshold Issues in State Court Civil Litigation*, 92 — Jan. Wis. Law. 24 (2019) (“Lawyers representing civil defendants should also examine whether the complaint pleads sufficient facts to state a claim, especially in situations in which the actions challenged, like the actions in *Data Key* and *Voters With Facts*, are entitled to deference and thus may require additional pleaded facts.”) (emphasis added).

1. The Court should dismiss this case because the action was not timely filed.

The Court should dismiss this case because the action was filed after the six month deadline established for certiorari actions. An action requesting certiorari review must be commenced within six months of when the decision for which review is sought becomes final. *State ex rel. Casper v. Bd of Trustees of Wisconsin Ret. Fund*, 30 Wis. 2d 170, 174-75, 140 N.W.2d 301, 303 (1966); *State ex rel Czapiewski v. Milwaukee City Service Commission*, 54

Wis. 2d 535, 196 N.W.2d 742 (1972); *State ex rel. Enk v. Mentkowski*, 76 Wis. 2d 565, 574-77, 252 N.W.2d 28 (1977); *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶¶ 31-32, 252 Wis. 2d 628, 643 N.W.2d 796 (Roggensack, J., dissenting on other grounds) (“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” and “[a]n action requesting certiorari review must be commenced within six months of when the decision for which review is sought becomes final.”). The failure to bring a Certiorari action within six months constitutes laches. *Id.*

The Court should apply *Casper*, *Czapiewski*, *Mentkowski*, and Judge Roggensack’s dissenting opinion in *Baraboo* (dissenting on other grounds) and dismiss Voters With Facts’ lawsuit because it is untimely filed. The six month deadline to bring a certiorari action is well-known. The *Baraboo* decision was cited by Voters With Facts, the City of Eau Claire, and the Wisconsin Supreme Court in an earlier case involving another TIF challenge brought by Voters With Facts against the City of Eau Claire. The Complaint concedes that the actions it seeks to challenge were the legislative determinations of the Eau Claire City Council taken on September 12, 2017, and the Joint Review Board taken on September 15, 2017. These actions took place over a year and a half prior to Voters With Facts filing this lawsuit. The Complaint pleads no other facts demonstrating these actions were not final. The Complaint concedes Voters With Facts filed a Notice of Claim on these actions on January 12, 2018, which also conceded the challenged actions took place in September of 2017. Voters With Facts then waited over a year to file this action.

In *Casper*, an action seeking common law certiorari was commenced challenging a denial by the Board of Trustees of the Wisconsin Retirement Fund (Board) for a claim of benefits. *Casper*, 30 Wis. 2d at 172-173. Judge Daniel D. Sullivan, a circuit court judge for many years in

Milwaukee County, died in 1952 before his retirement and shortly after electing to participate in the Wisconsin Retirement Fund. Judge Sullivan's widow was entitled to a death benefit payment which she elected to receive in monthly installments for her life. After her death her children claimed entitlement to remaining unpaid benefit, and this claim was denied by the Wisconsin Retirement Fund. The children then brought a certiorari action six months and fourteen days later to review the Wisconsin Retirement Fund's determination.

In *Casper* the Wisconsin Supreme Court held that review proceedings where certiorari is permitted must be commenced within six months from the entry of the order sought to be reviewed. *Casper*, 30 Wis. 2d at 174-75. *Casper* said that this rule, which is based on the doctrine of laches, rests on the principle that when a statute does not prescribe the time within which the right to review must be exercised, such right must be exercised within a reasonable time. Unlike the present case, the defendants in *Casper* waived the defense of untimeliness by raising the defense too late.

In *Czapiewski*, a maintenance technician for the City of Milwaukee was discharged, and appealed his termination to the Milwaukee City Service Commission. After an appeal hearing the commission sent a letter to the technician's attorneys dated June 23, 1970 which sustained the charges, but set aside the discharge and placed him on suspension until he obtained a medical clearance. The technician brought a common law certiorari action on February 11, 1971, and the City moved to quash the writ on the ground the technician was guilty of laches because he did not seek certiorari review within six months as required.

In *Czapiewski*, the Wisconsin Supreme Court held that the order of the civil service commission issued on June 23, 1970 was final in nature. The six month deadline for certiorari review had elapsed. Therefore, the technician's common law certiorari action was barred by laches, and his claim could not proceed.

In *Mentkowski*, two City of Milwaukee police officers were accused of striking, manhandling, and mistreating a prisoner, as well as being untruthful in written reports about the incident. *Mentkowski*, 76 Wis. 2d at 567-68. The officers were dismissed by the Police Chief upon the recommendation of a Board of Inquiry. *Id.* The officers appealed their dismissal to Board of Fire and Police Commissioners, which affirmed the Chief's order of dismissal. *Id.* The findings and decision of the Board were entered in writing on August 1, 1974. *Id.* The officers next appealed the decision of the Board to the circuit court, but did not bring a certiorari action. *Id.* After the initial appeal was dismissed by the circuit court, on March 20, 1975, the officers petitioned the circuit court for common law certiorari. *Id.* The City moved to dismiss the action on the grounds that the officers were guilty of laches by failing to bring a certiorari action within six months of the action they sought to challenge. *Id.*

In *Mentkowski*, the Wisconsin Supreme Court held that the Wisconsin Supreme Court “has applied a definite rule that certiorari proceedings must be commenced within six months of the action sought to be reviewed, and parties who fail to so commence the proceedings are guilty of laches.” *Mentkowski*, 76 Wis. 2d at 575-76. Applying this rule to the facts of the case, *Mentkowski* held that the officers' petition was not timely made, and their claim could not proceed.

Baraboo, discussed in more detail below on substantive issues, examined a certiorari action brought challenging the creation of a TIF district. Judge Roggensack, in an opinion dissenting on other grounds, pointed out that the review of City Council and Joint Review Board legislative TIF determinations is by certiorari, and “[a]n action requesting certiorari review must be commenced within six months of when the decision for which review is sought becomes final.” *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶¶ 31-32, 252 Wis. 2d 628, 643 N.W.2d 796 (Roggensack, J., dissenting on other grounds).

Casper, Czapiewski, Mentkowski, and Judge Roggensack's dissenting opinion in *Baraboo* demonstrate that Certiorari actions must be brought within six months of when the decision for which review is sought becomes final. The Supreme Court characterized the six month deadline to bring a certiorari action as "definite." Voters With Facts' Complaint and Notice of Claim demonstrate this action was not brought within six months and is therefore untimely. Accordingly, the Court should apply settled law and dismiss this action.

2. The Court should dismiss this case because the complaint fails to plead sufficient facts to state a claim, the Plaintiffs lack standing, and the Plaintiffs claims are barred by issue preclusion.

The Court should dismiss this case because the complaint fails to plead sufficient facts to state a claim, the Plaintiffs lack standing, and the Plaintiffs claims are barred by issue preclusion.

a. Failure to state a claim

The Court should dismiss this action because the Joint Review Board applied a correct theory of law. The arguments raised by Voters With Facts contradict settled law. The Court should apply *Baraboo* and dismiss this case because as a matter of law the existence of a single development within a TIF district does not invalidate an entire TIF district. Voters With Facts have not pleaded sufficient facts to demonstrate that the Joint Review Board's determination — that development in the TIF district would not occur without TIF — is in error.

In *Baraboo*, a plaintiff filed a certiorari action challenging the creation of a TIF district which included land owned by Walmart that would have been developed without TIF. *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796. Because the TIF district included land that was going to be developed without TIF, the plaintiff alleged, the entire TIF district is invalid. *Id.* In support of this argument, the plaintiff pointed to the statutory requirement that states the Joint Review Board may not approve a TIF district unless the board's approval contains a positive assertion that, in its judgment,

development would not occur without the creation of a TIF district. *Id.* This resolution is often referred to as the “but-for” determination.

Baraboo held that the existence of a single development within a TIF district that would occur without TIF does not invalidate an entire district. *Baraboo*, 252 Wis. 2d at ¶ 29. A Joint Review Boards’ task is to look at the TIF district “as a whole and determine whether development would occur without the use of tax incremental financing.” *Id.* Because Walmart’s property was not the only land in the TIF district, the court pointed out, the Walmart property’s development was not sufficient to demonstrate other development within the TIF district would occur without TIF. *Id.* *Baraboo* also pointed out that the plaintiff did not produce any evidence that would show that the property in the TIF district not owned by Walmart would have been developed without TIF. *Id.*; see also *Voters With Facts*, 382 Wis. 2d at ¶ 47.

Baraboo demonstrates that alleging particular development(s) in a TIF district would occur without TIF is not sufficient to invalidate a TID. A party seeking to challenge a but-for determination must plead facts demonstrating no other future development in the district needs TIF to occur. *Voters with Facts* failed to plead sufficient facts distinguishing this case from *Baraboo*, and thus they failed to plead sufficient facts to state a claim. *Data Key* makes clear that bare legal conclusions are insufficient to survive a motion to dismiss.

b. Voters With Facts lack standing.

Mere disagreement with legislative decisions is not sufficient to confer standing. Demonstrating taxpayer standing is contingent upon the affected taxpayer(s) sufficiently alleging the unlawfulness of a particular expenditure. The Court should apply *S.D. Realty Co. v. Sewerage Comm’n.*, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961); *Krier v. Vilione*, 2009 WI 45, ¶ 22, 317 Wis. 2d 288, 766 N.W.2d 517; and *Foley-Ciccantelli v. Bishop’s Grove Condominium Ass’n., Inc.*, 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789, and dismiss this case

because the complaint does not plead sufficient facts to demonstrate an illegal expenditure has occurred, and thus Voters With Facts lack standing.

In *S.D. Realty*, a taxpayer brought an action seeking to have a lease of public property to shopping center developers declared void and use of public funds for carrying out such lease declared illegal. *S.D. Realty*, 15 Wis. 2d at 15-22. The taxpayer alleged the lease involved the illegal expenditures of public funds because the lease did not serve a public purpose. *S.D. Realty* said that taxpayers could demonstrate standing if they could show public funds were being spent illegally. *S.D. Realty* then held that the lease did not violate the public purpose doctrine, and thus no public funds were illegally spent, and dismissed the case. *Id.* At 29-31.

In *Krier* businesses and their owners brought an accounting malpractice and breach of fiduciary duty action against accountants for allegedly covering up misappropriations by a former owner of the businesses. *Krier*, 317 Wis. 2d at ¶ 22. The accountants argued that the owners lacked standing to bring the suit. In *Krier*, the Wisconsin Supreme Court held that the plaintiffs' arguments had no basis in Wisconsin law, plaintiffs whose argument have no basis in Wisconsin (or traditional corporate) law lack standing, and thus the plaintiffs lacked standing. *Id.*; see also *Foley-Ciccantelli* at ¶ 133.

Voters With Facts arguments have no basis in Wisconsin law, and they have not pleaded sufficient facts to demonstrate the Joint Review Board's action was illegal. Thus the Court should dismiss this case because Voters With Facts lack standing. Other injuries alleged in the complaint are highly speculative, and are insufficient to demonstrate standing.

c. Issue Preclusion

The Plaintiffs' causes of action are barred by the doctrine of Issue Preclusion. "[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior

litigation.” *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 594 N.W.2d 370 (1999) (citing *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970 (1979)).

Determining whether issue preclusion applies against a litigant requires a two-step analysis. *Paige K.B.*, 226 Wis. 2d at ¶ 22. The first step involves a determination of whether the litigant against whom issue preclusion is sought was a litigant or had a sufficient identity of interest with a party to the prior proceeding. *Id.* The second step is whether actually applying issue preclusion comports with principles of fundamental fairness. *Paige K.B.*, at ¶ 23. Both issue preclusion steps are satisfied in the present case. Courts may consider some or all of the following factors in determining whether applying issue preclusion comports with principles of fundamental fairness:

- (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment;
- (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
- (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;
- (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or
- (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Paige K.B., 226 Wis. 2d at ¶ 14.

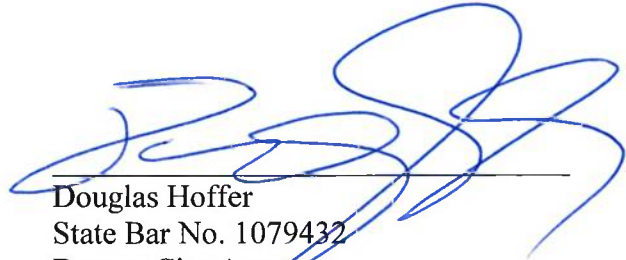
Both issue preclusion steps are satisfied in the present case. First, Voters With Facts was a litigant in the prior case. Second, applying issue preclusion comports with principles of fundamental fairness. All five factors articulated in *Paige K.B.* also favor an issue preclusion determination. Voters With Facts raised similar arguments in a prior case, and the Wisconsin Supreme Court rejected Voters With Facts’ arguments, stating that the Joint Review Board does not look at a single property in making the but-for determination, but rather looks at the TIF

district “as a whole.” *Voters With Facts*, 382 Wis. 2d at ¶¶ 45-48. Consequently, Voters With Facts’ arguments are barred by issue preclusion.

CONCLUSION

For all the foregoing reasons the Court should dismiss this case.

Dated: May 7, 2019



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