

FILED  
06-11-2019  
Clerk of Circuit Court  
Eau Claire County, WI  
2019CV000192

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.

NOTICE OF MOTION AND MOTION FOR SANCTIONS

PLEASE TAKE NOTICE that the defendants, City of Eau Claire and City of Eau Claire Joint Review Board, by their attorneys at Municipal Law & Litigation Group, S.C. will move the Court, the Honorable Michael A. Schumacher presiding, at the Eau Claire County Courthouse, 721 Oxford Ave, Ste 2220, Eau Claire, WI 54703, on a date and time to be provided by the Court, for an Order for sanctions based on the Plaintiffs and their counsel's action against the Defendants pursuant to Wis. Stat. §§ 802.05, 895.044.

Sanctions are appropriate under Wis. Stat. §§ 802.05, 895.044 for commencing an action without a reasonable inquiry and for continuing an action that the plaintiffs knew or should have known was without any reasonable basis in law or a nonfrivolous argument for the extension of

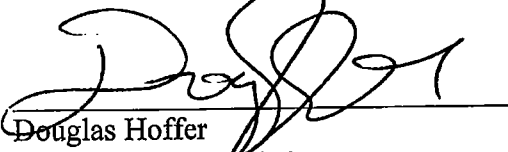
law and without evidentiary support, among other reasons, all of which are discussed in the accompanying Brief.

This Motion and Brief were served on Plaintiffs' counsel as provided in Wis. Stat. §§ 801.14, 802.05, and has not been filed with or presented to the Court until twenty-one days after the service of this Notice of Motion as provided in Wis. Stat. §§ 802.05, 895.044.

The sanctions sought include, among other relief, actual attorneys' fees and other costs.

Dated: May 20th, 2019

Attorneys for City of Eau Claire and City of  
Eau Claire Joint Review Board.



Douglas Hoffer  
State Bar No. 1079432  
Deputy City Attorney  
City of Eau Claire  
203 S. Farwell St.  
Eau Claire, WI 54701  
(715) 839-6006  
[douglas.hoffer@eauclairewi.gov](mailto:douglas.hoffer@eauclairewi.gov)

Stephen C. Nick  
State Bar No. 1020929  
City Attorney  
City of Eau Claire  
203 S. Farwell St.  
Eau Claire, WI 54701  
(715) 839-6006  
[stephen.nick@eauclairewi.gov](mailto:stephen.nick@eauclairewi.gov)

Remzy Bitar  
Municipal Law & Litigation Group, S.C.  
State Bar No. 1038340  
P.O. Box 1348  
Waukesha, WI 53187-1348  
(262) 548-1340  
[rbitar@ammr.net](mailto:rbitar@ammr.net)

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Defendants.

**DEFENDANT'S BRIEF IN SUPPORT OF  
MOTION FOR SANCTIONS PURSUANT TO § 802.05, WIS. STAT.**

Defendant, City of Eau Claire, by its attorneys, City Attorney, Stephen C. Nick and Deputy City Attorney, Douglas Hoffer, and by Municipal Law & Litigation Group, S.C., submits this Brief in Support of its Motion for Sanctions pursuant to Wis. Stat. § 802.05.

**INTRODUCTION**

The Court should impose sanctions against counsel for the Plaintiffs, the Wisconsin Institute for Law & Liberty ("WILL"), because the claims are not warranted by existing law and are frivolous, this action was brought for an improper purpose, and because WILL failed to undertake a reasonable pre-filing investigation. WILL's failure to undertake a reasonable inquiry is part of a pattern of filing lawsuits against the City of Eau Claire without meeting its duty of pre-filing due diligence.

Similar to a prior lawsuit filed by WILL challenging the use of TIF by the City of Eau Claire, this case was brought to publicize Voters With Facts and WILL's policy disagreements with tax incremental financing ("TIF"), and to harass the Eau Claire City Council into giving up the use of TIF as an economic redevelopment tool. An examination of the complaint demonstrates WILL did not undertake a reasonable inquiry prior to filing this action.

First, Certiorari claims must be brought within six months of when the decision for which review is sought becomes final. WILL waited almost a year-and-a-half to bring this lawsuit, and over a year after filing a notice of claim with the City of Eau Claire. The six month requirement to bring a certiorari action is settled law that any attorney conducting a reasonable inquiry would uncover. WILL either ignored this requirement or failed to meet its duty to research the law prior to filing. Second, the existence of a single development within a TIF district is not sufficient by itself to render a TIF district invalid. This rule was articulated by the Wisconsin Supreme Court in WILL's prior TIF lawsuit against the City of Eau Claire, so it cannot be said that this rule would be missed by an attorney conducting a reasonable inquiry. Moreover, an examination of the record in WILL's prior lawsuit challenging the City of Eau Claire's use of TIF demonstrates WILL's pattern of filing lawsuits against the City of Eau Claire for political purposes without doing a reasonable pre-filing inquiry.

Filing frivolous lawsuits for political purposes should not be tolerated, and WILL should reimburse the City of Eau Claire for the costs undertaken answering their meritless lawsuit, preparing a motion to dismiss, preparing this motion for sanctions, and all other costs reasonably undertaken responding to this action.

#### **STATEMENT OF FACTS**

Review of Plaintiffs' first lawsuit – filed before this one and pending in this Circuit Court – demonstrates this instant lawsuit is frivolous, and demonstrates WILL's pattern of filing

lawsuits against the City of Eau Claire for political purposes without doing a reasonable pre-filing inquiry.

**Plaintiffs' First Lawsuit: Case No. 15CV175**

This is not the first time Voters With Facts and WILL have brought an action against the City of Eau Claire challenging the use of tax incremental financing (“TIF”). Their first lawsuit, filed in this Circuit Court as Case No. 15CV175, also sought to challenge the use of TIF to support economic redevelopment in the City of Eau Claire.<sup>1</sup> See Exhibit 1 (Hoffer Aff); see also Exhibit 2. During the prior lawsuit WILL issued a number of press releases criticizing TIF, which they said “cost the government revenue and grant special treatment to a favored class of taxpayers, all in the hope of spurring development that might not otherwise happen.” See <http://www.will-law.org/?s=voters+with+facts>.<sup>2</sup>

The City of Eau Claire moved to dismiss that lawsuit citing a variety of legal and factual deficiencies. During the motion hearing the circuit court repeatedly pressed WILL 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. (Case No. 15CV175 R. 20: 6-7, 11-14). WILL was unable to explain why the determinations were wrong, “did not know what [the legislative bodies] did” and repeatedly said they “did not know” what judicial review of these determinations would look like. (Case No. 15CV175 R. 20: 34-37). WILL also 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

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<sup>1</sup> The City of Eau Claire asks the Court to take judicial notice of the record for Circuit Court case no. 15CV175, as well as the City of Eau Claire’s Brief in Support of Judgment on Certiorari Record which includes various pin cites to the voluminous certiorari record in that case. The record for 15CV175 is available online through the Wisconsin Circuit Court efile website, so the City of Eau Claire believes the Court should have access to the voluminous record in that case which exceeds one thousand pages. The City of Eau Claire is willing to submit these documents if the Court does not have access to the record in that case.

<sup>2</sup> Throughout both TIF lawsuits, WILL has issued press releases, and made TV and radio appearances criticizing the use of TIF. See <http://www.will-law.org/wisn-channel-12-esenberg-appears-mike-gousah-state-rep-chris-taylor->

filing their Complaint. (Case No. 15CV175 R: 10: 4; R. 20). The municipal record, which WILL apparently failed to review before filing the prior TIF lawsuit, included a robust record supporting the challenged legislative determinations.<sup>3</sup> See Exhibit 1 (Hoffer Aff.); Exhibit 2 fn 1.

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. See *Voters with Facts v. City of Eau Claire*, 2018 WI 63, 382 Wis. 2d 1, 8, 913 N.W.2d 131 (hereafter, *Voters I*). In the Plaintiffs' first TIF case, the Wisconsin Supreme Court rejected the single issue raised in this case, that is: whether the existence of a single property under development within a TIF district invalidates that TIF district. *Id.* at ¶¶ 45-47.

After losing in the Wisconsin Supreme Court, WILL acknowledged in a press release that the Supreme Court's decision might mean that a legislative rather than judicial remedy was most appropriate for addressing its concerns. Cameron Sholty, *It May be to the Legislature to End TIF Abuse in Wisconsin*, available at <http://www.will-law.org/scowis-decision-in-voters-facts-v-city-eau-claire/> (posted June 6, 2018); see also Todd Richmond, *Wisconsin's high court affirms*

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[discuss-supreme-court-race/](http://www.will-law.org/scowis-decision-in-voters-facts-v-city-eau-claire/); <https://www.weau.com/content/news/State-Supreme-Court-ruling-on-TIFs-favors-City-of-Eau-Claire-484697891.html>; <http://www.will-law.org/?s=voters+with+facts>.

<sup>3</sup> The municipal record, which WILL could have reviewed prior to filing 15CV175 by simply filing a public records request, included: Repeated references to the statutory definition of blight and the statutory but-for determination in front of the relevant legislative bodies; Extensive environmental contamination caused by lumber and industrial uses including coal tar deposits, solid waste materials, and remediation under DNR oversight; Repeated severe flooding problems in the districts for over one hundred years; Inadequate soils caused by lumber and industrial uses; Parcels exhibiting dilapidation, deterioration, age and obsolescence; Many vacant buildings and vacant lots, including two vacant hotels; Old, deteriorated, and obsolete buildings, many from the 1800s; Inadequate storm water facilities; Prior blight and but-for determinations made by prior City Councils and Joint Review Boards, and prior blight determinations made by the Redevelopment Authority; Nonconforming lot sizes and setbacks; Buildings with improper ventilation; Fire hazards and fire risks in a designated fire district; Lack of off street parking and lack of parking; Various structures with blighted appearances; Obsolete planning and platting; Increased crime; Lack of redevelopment in the area, and noting the confluence project was the largest development in the area since the creation of the redevelopment authority; Explanations why development would not occur to the same size and scope without TIF including challenges associated with urban redevelopment; Development agreement that included transfer of ownership of prime river front property to city for public trails and large public plaza making development in the districts more likely. See Exhibit 2 fn 1 (which includes pin cites).

*use of economic incentives*, available at [https://madison.com/wsj/news/local/courts/wisconsin-high-court-affirms-use-of-economic-incentives/article\\_65818a41-f08e-5456-ac2b-fca18ebd23b3.html](https://madison.com/wsj/news/local/courts/wisconsin-high-court-affirms-use-of-economic-incentives/article_65818a41-f08e-5456-ac2b-fca18ebd23b3.html) (quoting WILL stating “[i]t’s time for the Legislature to take a close look at these districts and see if they’ve gotten out of hand.”) (emphasis added).

### **This Lawsuit**

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, Plaintiffs and their counsel 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 as described more fully below.

The Complaint in this second lawsuit, mimicking the Complaint in the first lawsuit, recites Wisconsin’s TIF law and 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.* Plaintiffs 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 Plaintiffs 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 could not approve TID No. 12 “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 Plaintiffs and their counsel 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 no future development in the district needed TIF to occur. *Id.*

Plaintiffs and their counsel allege they were injured for two reasons. First, Plaintiffs 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, Plaintiffs 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).

### **Commencement of This Lawsuit and Publicity**

Plaintiffs’ commenced this lawsuit during the briefing on the certiorari claim in Case No. 15CV175. Upon commencing this lawsuit, WILL also commenced a public campaign. The same day they brought the present lawsuit, they issued a Press Release publicizing their disagreements with the use of TIF. *See* Exhibit 1; Exhibit 2; Defendants’ Motion to Dismiss. 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, Plaintiffs 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.

The City of Eau Claire filed a Motion to dismiss this case because the failure to bring a certiorari action constitutes laches, the complaint’s but-for determination arguments contradict settled law, the Plaintiffs lack standing, and because the lawsuit was barred by issue preclusion. Despite being on notice of these legal deficiencies, an op-ed piece written by WILL criticizing the City of Eau Claire’s use of TIF in TID no. 12 was published by the Eau Claire Leader Telegram on May 18, 2019. See [https://www.leadertelegram.com/opinion/letters\\_to\\_editor/it-seems-to-me-wrong-use-of-a-tif-district/article\\_a1ebf1f0-8648-59a2-85d3-92ee8a80251b.html](https://www.leadertelegram.com/opinion/letters_to_editor/it-seems-to-me-wrong-use-of-a-tif-district/article_a1ebf1f0-8648-59a2-85d3-92ee8a80251b.html) (describing the “blatant disregard of the ‘but for’ requirement” in creating TID no. 12).

### STANDARD OF REVIEW

Under Wis. Stat. § 802.05, when an attorney signs, files, submits or advocates a pleading, motion, or other document, the attorney is *certifying* that “to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,” all of the following:

- (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
- (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
- (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Wis. Stat. § 802.05(2)(a), (b) & (c). The standard is an objective one—whether the litigant or attorney knew or should have known that the position was frivolous as determined by what a reasonable litigant or attorney would have known or should have known under the same or similar circumstances. *See Osman v. Phipps*, 2002 WI App 170, ¶ 16, 256 Wis.2d 589, 649 N.W.2d 701 (quoted source omitted). Because the Wisconsin statutory schemes follows Federal Rule of Civil Procedure 11 (see comments to Wis. Stat. § 802.05), the federal standards influence the standards here. “The violation of Rule 11 is complete when the paper is filed.” *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987).

If a circuit court finds that a paper violates § 802.05(2)(b), it may sanction the attorney, law firm, or party responsible. Wis. Stat. § 802.05(3). Similar provisions are found in § 895.044, which states:

- (1) A party or a party's attorney may be liable for costs and fees under this section for commencing [or] using ... an action ... to which any of the following applies:
  - (a) The action...was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
  - (b) The party or the party's attorney knew, or should have known, that the action... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Wis. Stat. § 895.044. If, within 21 days after service of a motion for sanctions, a party fails to withdraw or correct a paper, then the court “[s]hall . . . award the party making the motion, as damages, the actual costs incurred by the party as a result of the action . . . including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application” of § 895.044. *Id.* § 895.044(2)(b).

The purpose of the frivolous claims statute is “to deter . . . litigants . . . from commencing or continuing frivolous actions and to punish those who do.” *Minniecheske v. Griesbach*, 161 Wis. 2d 743, 748, 468 N.W.2d 760 (Ct. App. 1991)(quoted source omitted). Fees and costs are not the only remedy, for a court may prevent a litigant from re-filing its lawsuits. “A court faced with a litigant engaged in a pattern of frivolous litigation has the authority to implement a remedy that may include restrictions on that litigant’s access to the court.” *Id.* (quoted source omitted). A finding of frivolousness “is based on an objective standard, requiring a determination of whether the party or attorney knew or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances.” *Osman v. Phipps*, 2002 WI App 170, ¶ 16, 256 Wis. 2d 589, 649 N.W.2d 701 (internal quotations and citations omitted).

The above authority is not the only source to spare the courts and parties from the abuses of the judicial system. Irrespective of the the requirements contained in § 802.05, a circuit court may award attorney fees as a sanction as part of its inherent power. “Circuit courts are bestowed with those powers necessary to maintain their dignity, transact their business, and accomplish the purposes of their existence.” *Schultz v. Sykes*, 2001 WI App 255, ¶2, 248 Wis. 2d 746, 638 N.W.2d 604. Thus, a circuit court has inherent authority to impose sanctions on a party for misconduct during litigation. *See Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991) (courts have “inherent authority to sanction parties for failure to prosecute,

failure to comply with procedural statutes or rules, and for failure to obey court orders”). This power extends to litigation abuse and misconduct outside of § 802.05. See also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (noting that a court’s “inherent power extends to a full range of litigation abuses”); *Lee v. GEICO Indem. Co.*, 2009 WI App 168, ¶23, 321 Wis. 2d 698, 776 N.W.2d 622 (“the common law in Wisconsin is clear that a trial court has inherent power to sanction a party to maintain the dignity of the circuit court.”). Indeed, the federal courts recognize as much relative to FRCP 11, which is the foundation for § 802.05. See *Chambers*, 501 U.S. at 46-47 (holding FED. R. CIV. P. 11 did not displace a federal court’s “inherent power to impose sanctions”).

Lastly, the standards governing pleading practice shed light on why this Complaint is frivolous. 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. 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. 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);

### **LEGAL ANALYSIS**

The Defendants seek the imposition of said sanctions due to Plaintiffs and their legal counsel's violation of § 802.05(2)(a), (b) and (c), Wis. Stat., in that:

- (a) The instant Complaint is presented for the improper purpose of harassing or to cause unnecessary delay or needless increase in the cost of litigation;
- (b) Plaintiffs and their legal counsel's claims set forth in their Complaint are not warranted by existing law and are not warranted by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and
- (c) The allegations and other factual contentions stated by Plaintiffs and their legal counsel's in their Complaint do not have evidentiary support.

Here, the Court should award attorneys' fees and costs to the Defendants because of the nature of the Complaint, its timing and its context meet all three of these statutory factors.

**1. The Complaint is demonstrably unwarranted by existing law and non-frivolous arguments.**

Although second in the statutory scheme, this element of the statute bears attention first. The Complaints' allegations contradict settled law.

**a. The failure to bring a certiorari action within six months constitutes laches and requires dismissal of the action.**

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. *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) (review proceedings where certiorari is permitted must be commenced within six months from the entry of the order sought to be reviewed); *State ex rel Czapiewski v. Milwaukee City Service Commission*, 54 Wis. 2d 535, 196 N.W.2d 742 (1972) (in case involving common law certiorari of civil service commission order, court found six month deadline for certiorari review had

elapsed); *State ex rel. Enk v. Mentkowski*, 76 Wis. 2d 565, 575-576, 252 N.W.2d 28 (1977) (finding precedent “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.” ); *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.”). An action that must be dismissed as a matter of law is frivolous.

The needlessness and cost of this lawsuit is also evidenced by its untimely filing under statutes of limitations and presentation of issues that are barred by issue preclusion. The untimeliness and preclusive effect of issues has led to a finding of frivolity in other cases. In the case of *Bethesda Lutheran Homes and Servs., Inc. v. Born*, 238 F.3d 853, 859 (7th Cir. 2001), the plaintiffs brought multiple rounds of litigation over the constitutionality of regulations and actions. Despite actually winning in their first round, they repeated the litigation with some twists. The Seventh Circuit did not buy it, finding Rule 11 sanctions warranted where “it should have been obvious to any lawyer that relief was barred on multiple grounds, including res judicata [and] judicial estoppel.” *Id.* at 859. Similarly, in *Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 560-561, 597 N.W.2d 744 (1999), the court explained that the amount of time an attorney has to investigate a claim is one consideration that shapes the objective standard for determining whether an attorney’s inquiry was reasonable for purposes of the frivolousness statute.

The four corners of the Complaint demonstrates this action is not timely. As outlined in the Defendants' Motion to Dismiss, robust case law demonstrate that certiorari actions must be brought within six months of when the decision for which review is sought becomes final. *Id.* Plaintiffs' were aware of the untimeliness of their action because they were involved in similar litigation in Case No. 15CV175, they were aware of and participated in the public process of this TID No. 12 and they filed a Notice of Claim thereto. Yet, they have commenced this lawsuit well beyond the limitations period.

**b. The “but-for” determination argument raised by WILL contradicts settled law.**

The Complaint seeks certiorari relief alleging the Joint Review Board did not proceed on a correct theory of law, specifically because an entire TIF district is invalid if it included a single building already constructed at the time of the TIF district's creation. (Compl. ¶¶ 29-35, 42). This claim – the sole claim involving the “but-for” determination of TIF law – contradicts settled law including a recent Wisconsin Supreme Court case to which Plaintiffs and their counsel were a party.

In the first TIF case to which Plaintiffs and their counsel were a party, the Wisconsin Supreme Court rejected this claim, finding that the existence of a single property under development within a TIF district does not invalidate that TIF district. *Voters I*, 2018 WI 63, ¶¶ 45-47. The Supreme Court's guidance is clear. 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 Plaintiffs and their counsel 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 Supreme Court's ruling in *Voters I* re-affirms settled appellate case law for which the Plaintiffs and their counsel knew or should know. 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. As here, the plaintiff alleged the entire TIF district was invalid because the TIF district included land that was going to be developed without TIF. *Id.* In support of this argument, the plaintiff – as the Plaintiffs and their counsel do here – 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.*

As a result of the holdings of *Voters I* and *Baraboo*, the Plaintiffs and their counsel here cannot genuinely present the claims in the instant suit as warranting review. Rather, the claims of Plaintiffs and their counsel have set forth in this lawsuit are unwarranted and frivolous.

**2. The Complaint is presented for the improper purpose of harassing or to cause unnecessary delay or needless increase the cost of litigation.**

A lawsuit cannot be for a proper purpose if the attorneys bringing the claim know their arguments are frivolous. Given the timing of this lawsuit and Plaintiffs and their counsel's publicity-stunt surrounding it – after having their essential argument already rejected by the

Wisconsin Supreme Court – this instant action constitutes a real attempt to harass the Defendant governing bodies and their officials and to needlessly increase the Defendants’ litigation costs. ’

The new lawsuit is meant to harass by discouraging the use of TIF, as well as to promote Plaintiffs and their counsel’s policy disagreements with TIF. The Plaintiffs and their counsel have already filed one Complaint on such matters and publicized it up to, during and upon remand from the Supreme Court. That controversy is already front-and-center in the first suit which is still active and heading towards disposition. In the midst of addressing the certiorari claim in that first case, they have mounted a second litigation attack on the Defendants’ governing bodies and officials regarding their policy disagreement with TIF. This second suit serves no purpose, especially when it raises an already-rejected claim, other than to aggressively pressure and intimidate the Defendants about the soundness of their legislative decisions and to discourage vigorous defense of the first TIF lawsuit or sensible use of TIF in general.

Additionally, Plaintiffs and their counsel have needlessly increased the Defendants’ litigation costs. It is one thing to force a defendant to defend a position in one controversy, but quite another to burden the defendant into duplicating its efforts twice on the same issue. The irony, of course, is that the taxpayer Plaintiffs’ and their counsel proclaim they desire a better use of public money, yet by their second lawsuit they now force the public to spend twice for what should be a one-time adjudication of their claim. The irony is even more pronounced when examined beyond the context of these parties, that is: not only have these Plaintiffs and their counsel added to the cost and burden of the Defendants’ local taxpayers, they have cost the Circuit Court by consuming the time and resources the court could apply to other litigants’ needs and controversies. Imposition of fees and costs, as well as orders barring further access to the courts, is reasonable to “strike a balance among the [plaintiffs] access to the courts, the [defendants’] interest in res judicata, the taxpayers’ right not to have frivolous litigation become

an unwarranted drain on their resources and the public interest in maintaining the integrity of the judicial system.” *Minniecheske*, 161 Wis.2d at 749.

Plaintiffs and their counsel cannot skate by this issue by arguing they have rights to access the courts to vindicate their public interests in fair taxation. At a time when they are advocating such interests in the first suit, they commenced this action during the briefing cycle when the Defendants were in the process of defending the TIF in the first suit. Plaintiffs and their counsel were thus fully and timely aware of the status of the adjudication of their sought-after interests in the first suit. Rather than allowing the certiorari legal proceedings to play out, they commenced this action. Whether they are trying to wear down the Defendants (or courts) or trying to get “two bites at the apple” for their sought-after interests, the point remains the second suit is harassing.

Moreover, it should not pass this court’s attention that the instant lawsuit duplicates their first lawsuit in many ways, which not only supports dismissal under preclusion theories but further evidences the harassment and unnecessary costs imposed upon the Defendants, courts and public. As outlined in the Defendants’ Motion to Dismiss, the claim here is barred by issue preclusion. The Defendants respectfully maintain that because a reasonable attorney should have known that issue preclusion bars the Plaintiffs’ claims, the action was frivolous. Preclusion doctrines share some of the same goals serving the imposition of sanctions here: they are designed to minimize the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions. Beyond the arguments already presented in support of issue preclusion in the Defendants’ Motion to Dismiss, this needless duplication between the first Complaint in Case No. 15cv175 and this instant Complaint can be seen by the following examples:

- The majority of the Plaintiffs are the same, to wit: Voters With Facts, Bartl, Cohen, Cruz, Mantik, Riley, Webster, Westermann, Wnukowski.

- The Plaintiffs' law firm and their lead counsel are the same.
- The Defendants are the same.
- Both Complaints open with an expression of the Plaintiffs and their counsel's dissatisfaction with the legislative wisdom of TIF law in this State as applied by the Defendants. Both Complaints proclaim "this is an action challenging the validity of the actions of the Defendants" relative to TIF, that the Defendants "failed to satisfy the statutory requirements [here, as to one building]," and that the TID could not have been the "but for" cause of development.
- The primary argument made by the Plaintiffs and their counsel in this lawsuit is similar to one of several claims in the first suit. As discussed above, the Wisconsin Supreme Court rejected this claim.
- While they "dress up" their new action as involving a single building, the reality is they are really challenging the legislative determination of "blight" for this area, which is another principal challenge in the first suit and yet another issued rejected by the Supreme Court. See *Voters I*, 2018 WI 63, ¶ 4 ("First, we consider whether dismissal of Plaintiffs' declaratory judgment claims was proper. We conclude that it was, because Plaintiffs have failed to state claims upon which relief can be granted: the first and second counts fail because the City Common Council's findings of blight and the JRB's "but for" assertions are legislative determinations that do not present justiciable issues of fact or law.").
- The same damages are alleged in that both lawsuits allege the Defendants' actions have had deleterious consequences on the tax base. In the first Complaint, they allege the use of TIF "distorts the tax base," their "tax dollars will be spent in an unlawful manner," "deprives other taxing jurisdictions of revenue," and "tax revenues [from the TIF] will be unavailable for general purposes." Complaint Case No. 15cv175, ¶¶ 27, 78, 79, 90, 91. Similarly, here, they contend "any expenditure of TID funds is unlawful" that they, as taxpayers, must challenge as "unlawful expenditure of tax funds." Compl., ¶ 48. They also say they are harmed by the creation of TIF in this district since it raises the mill rate thereby shifting the "tax burden to all taxpayers." *Id.*, ¶ 49.

In sum, a finding of frivolousness and awarding sanctions is warranted given the untimeliness of this action, the preclusive nature of the issue presented and the context and timing of the lawsuit. The publicity surrounding the commencement of this action that Plaintiffs and their counsel developed – all at the same time that the Defendants were in the midst of responding to the issues in the first suit – supports the sanctionable behavior. See *Wisconsin Chiropractic Ass'n v. Wisconsin Chiropractic Examining Bd.*, 2004 WI App 30, ¶¶33-34, 269 Wis. 2d 837, 676 N.W.2d 580 (observing that frivolity and sanctionable behavior can be evidenced by timing of news releases surrounding a lawsuit: "[Defendant] is not asking the

court to sanction the [plaintiff] for its news release, but, rather, to consider the news release as evidence that the [plaintiff] filed the complaint against [Defendant] to injure his reputation.”).

**3. The allegations and other factual contentions stated by Plaintiffs and their legal counsel's in their Complaint do not have evidentiary support.**

This factor is also met here. As explained above, Plaintiffs and their counsel do not present allegations, factual contentions or evidentiary support that have not already been reviewed and rejected by the courts.

There is a sheer lack of factual allegations involving the Defendants misapplication of the TIF statutory laws, which would be the only thing reviewable under certiorari. As discussed above at p. 2-3, the Complaint does not dispute that the City of Eau Claire and Joint Review Board completed all steps required by Wisconsin's TIF law.

Because the existence of a single development within a TIF district does not invalidate an entire TIF district. Plaintiffs and their counsel 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. *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. Plaintiffs and their counsel 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.

Plaintiffs and their legal counsel's poorly pleaded allegations, after having large swath's of their first lawsuit dismissed for poor pleading and after having the availability of public

records to support whether their future claims have factual and legal support (something private litigants may not always have access to pre-suit), justify an award of sanctions. Such sanctions are appropriate for trying to duplicate claims again without faithful adherence to the pleadings rules, especially for these kinds of cases. In *Voters I*, 2018 WI 63, ¶¶ 37-40, 71, the Court reviewed their first action and applied the pleadings standards of *Data Key*, finding Plaintiffs and their counsel had not properly pled facts to support declaratory relief against legislative determinations. Plaintiffs and their counsel are now, essentially, claims the same thing, albeit “dressing it up” a bit differently, yet still failing to offer plausible facts. The court should sanction Plaintiffs and their counsel for such unwarranted symmetry between these actions.

**4. In addition to awarding costs, the Court should order the disclosure of payments or contributions from Plaintiffs to WILL.**

In determining the proper monetary sanction, this court should allow the City of Eau Claire to provide the court with an accounting of reasonable attorney fees and costs incurred in defending this action. The Court should also order the disclosure of payments or contributions from all Plaintiffs, or any entities associated with the Plaintiffs, to WILL. This brief already demonstrates this action was brought for improper purposes. In addition to the improper purposes outlined above, the Court should scrutinize whether generating revenue by pursuing frivolous claims was also an improper purpose. See Jessie Opoien, *Wisconsin Institute for Law & Liberty plans growth in face of Democratic administration*, The Capital Times, available at [https://madison.com/ct/news/local/govt-and-politics/election-matters/wisconsin-institute-for-law-liberty-plans-growth-in-face-of/article\\_28e33b60-eb7d-5c99-9ac5-23cd2edddae1.html](https://madison.com/ct/news/local/govt-and-politics/election-matters/wisconsin-institute-for-law-liberty-plans-growth-in-face-of/article_28e33b60-eb7d-5c99-9ac5-23cd2edddae1.html) (In discussing WILL’s 2018 budget of \$2 million, and plans for expansion that require WILL “to reach out to high-wealth individuals, business executives and ideologically motivated people...” and “[y]ou need to be strong by making sure that you’re well-funded...”). To the extent any of the Plaintiffs, or entities associated with the Plaintiffs, have provided large sums of money to

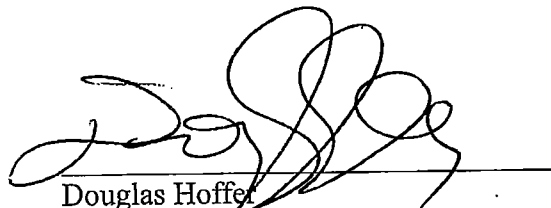
WILL that is relevant in determining whether this frivolous lawsuit was brought for another improper purpose. It also serves as an appropriate sanction helping to discourage WILL from bringing similar frivolous actions challenging future Eau Claire TIDs.

### CONCLUSION

Plaintiffs and their counsel have been put on notice that their Complaint lacks factual and legal support, but they have refused to withdraw the Complaint. Accordingly, because they should have known that their Complaint is unwarranted and violative of the authority above, the Court should award the Defendants actual attorney's fees and costs in defending this action, and order WILL to disclose all payments or contributions received from all Plaintiffs or entities associated with the Plaintiffs.

Based on the foregoing, it is respectfully requested that the Defendants' Motion for Sanctions be granted, awarding all reasonable attorneys' fees and costs in defending this action.

Dated: May 20, 2019



Douglas Hoffer  
State Bar No. 1079432  
Deputy City Attorney  
City of Eau Claire  
203 S. Farwell St.  
Eau Claire, WI 54701  
(715) 839-6006  
[douglas.hoffer@eauclairewi.gov](mailto:douglas.hoffer@eauclairewi.gov)

Stephen C. Nick  
State Bar No. 1020929  
City Attorney  
City of Eau Claire  
203 S. Farwell St.  
Eau Claire, WI 54701  
(715) 839-6006  
[stephen.nick@eauclairewi.gov](mailto:stephen.nick@eauclairewi.gov)

Remzy Bitar  
Municipal Law & Litigation Group, S.C.  
Arenz, Molter, Macy, Riffle, Larson & Bitar  
State Bar No. 1038340  
P.O. Box 1348  
Waukesha, WI 53187-1348  
(262) 548-1340  
[rbitar@ammr.net](mailto:rbitar@ammr.net)



STATE OF WISCONSIN

CIRCUIT COURT  
Branch I

EAU CLAIRE COUNTY

=====

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

Case No. 19CV192

Case Code: 30955

Plaintiffs,

vs.

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

Defendants.

=====

**AFFIDAVIT OF DOUGLAS J. HOFFER IN SUPPORT OF  
 THE CITY OF EAU CLAIRE'S MOTION FOR SANCTIONS**

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STATE OF WISCONSIN )  
 )  
 EAU CLAIRE COUNTY )

Douglas Hoffer, being first duly sworn, says,

1. That I am the Deputy City Attorney for the City of Eau Claire and the attorney of record in the above referenced matter.
2. That Exhibit 2 attached to the City of Eau Claire's Brief in Support of Motion for Sanctions is a true and correct copy of the Reply Brief in Support of Judgment on Certiorari Record filed in 15CV175, and the record citations and facts included in this brief are accurate.
3. That the citations and references to press releases, radio appearances, TV appearances, and other media engagements by the Wisconsin Institute for Law and Liberty are, to the best of my knowledge, accurate.

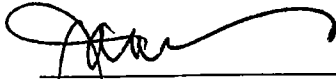
Further your affiant sayeth not.

Dated this 20<sup>th</sup> day of May, 2019.



Douglas Hoffer  
Deputy City Attorney  
State Bar No. 1079432

Subscribed and sworn to before me this  
20<sup>th</sup> day of May, 2019.



Janeen M. Whelihan, Notary Public  
Eau Claire County, Wisconsin  
My commission expires 4/25/21





STATE OF WISCONSIN

CIRCUIT COURT  
Branch V

EAU CLAIRE COUNTY

=====

VOTERS WITH FACTS,  
 PURE SAVAGE ENTERPRISES, LLC,  
 WISCONSIN THREE, LLC,  
 215 FARWELL LLC,  
 DEWLOC, LLC,  
 LEAH ANDERSON,  
 J. PETER BARTL, LEAH ANDERSON,  
 CYNTHIA BURTON, CORINNE CHARLSON,  
 MARYJO COHEN, JO ANN HOEPPNER CRUZ,  
 RACHEL MANTIK, JUDY OLSON,  
 JANEWAY RILEY, CHRISTINE WEBSTER,  
 DOROTHY WESTERMANN, JANICE  
 WNUKOWSKI, DAVID WOOD, AND PAUL ZANK,

Case No. 15CV175

Case Code: 30701

Plaintiffs,

vs.

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

Defendants.

=====

**DEFENDANT'S REPLY BRIEF IN SUPPORT OF  
 OF JUDGMENT ON CERTIORARI RECORD**

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Defendant, City of Eau Claire, by its attorneys, City Attorney Stephen C. Nick and Deputy City Attorney Douglas Hoffer, hereby ask the Court to deny Plaintiffs' Motion in Support of Judgment on Certiorari Record and enter judgment in favor of the City of Eau Claire and the Joint Review Board.

**INTRODUCTION**

The Court should apply the Wisconsin Supreme Court's decision in this case and deny Voters With Facts' Motion in Support of Judgment on Certiorari Record. This case involves an attempt to obtain a desired political outcome through litigation. The Plaintiffs ("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. This lawsuit is Voters With Facts’ attempt to achieve through the judicial system what they were unable to obtain through the state and local political process. The Court should be mindful of the Wisconsin’s Supreme Court’s discussion of the important separation of powers issues raised by this case, which seeks court intervention into legislative matters.

Voters With Facts have not overcome the presumption of correctness and validity of the legislative determinations of the Eau Claire City Council and Joint Review Board, and they have not demonstrated these legislative determinations were without a rational basis. Certiorari review is limited and deferential, and only examines questions of law. Certiorari review does not involve fact finding. Voters With Facts seek to move the goalposts on certiorari review and ask the court to reweigh the evidence and substitute its judgment the Eau Claire City Council and Joint Review Board’s legislative judgment. Voters With Facts previously sought de novo review of these legislative determinations through a declaratory judgment action, but the Wisconsin Supreme Court rejected their effort. Although the municipal record supporting the legislative determinations of the Eau Claire City Council and Joint Review Board is substantial, certiorari review does not involve reweighing the evidence or substituting the Court’s discretion for these legislative bodies. The Court should reject Voters With Facts attempt to convert this certiorari action into a de novo declaratory judgment action.

In addition to mischaracterizing the certiorari standard, Voters With Facts also misrepresent the statutory definition of blight and the statutory but-for determination. A proper understanding of the blight and but-for standards applied to these environmentally contaminated areas with vacant buildings and lots, and development patterns dating back to the 1800s demonstrates Voters With Facts’ arguments are meritless. Wisconsin’s TIF statute broadly

defines blight, and its definition is universally accepted. Wisconsin's TIF statute grants local legislative bodies broad discretion to determine what constitutes blight. The record before the City Council and the Joint Review Board presents precisely the scenario Wisconsin's TIF statute intended to address, and Voters With Facts' alleged defects cannot be reconciled with the plain language of the statute. Voters With Facts fail to provide a sufficient bases overcome the legislative judgment of the Eau Claire City Council and the Joint Review Board.

The Court should enter judgment in favor of the City of Eau Claire and make the following conclusions of law: 1) The Eau Claire City Council and the Joint Review Board kept within their jurisdiction; 2) The Eau Claire City Council and the Joint Review Board proceeded on a correct theory of law; 3) The legislative determinations made by the Eau Claire City Council and Joint Review Board were not arbitrary, oppressive, or unreasonable representing their will and not their judgment; and 4) the evidence was such that the Eau Claire City Council and Joint Review Board might reasonably make the legislative determinations in question.

#### STATEMENT 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 addressing blighted conditions in Eau Claire's downtown. (R. 1:3, 6-24; R. 10: 19). The blight and lack of development in Eau Claire's downtown were well known to the Eau Claire City Council and the Joint Review Board, and the record contains numerous references to these public welfare deficiencies and impediments to desired economic and social progress.<sup>1</sup>

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<sup>1</sup> Although certiorari review does not involve fact-finding or a reweighing of evidence, nevertheless the City has endeavored to provide the court with a non-exhaustive sample of record citations supporting the legislative determinations in question. Citing every piece of evidence in the record supporting these determinations would be too time-consuming and in some cases redundant, but these citations demonstrate that the legislative determinations cannot reasonably be characterized as "arbitrary" or "without a rational basis." (R. 9: 2-3); (R. 11) (referencing inadequate soils, obsolete platting, and flood plain development limitations at 8, recognizing development that would not occur without TIF at 11, referencing city obtaining land for construction of riverwalk pedestrian trail and public plaza at 59-77, referencing parcels exhibiting dilapidation, deterioration, age and obsolescence and/or the parcel is located within the 100 year flood plain at 104-109) ; (R: 50) (Brief for Eau Claire Area Chamber of

Eau Claire's downtown developed as part of a large lumber boom in the 1800s. *Id.* The lumber industry continued to play an important role in Eau Claire's downtown in the 20<sup>th</sup> century, and was eventually joined by various environmentally intensive industrial uses. *Id.* A legacy of 19<sup>th</sup> century development patterns, environmental contamination, aging and deteriorating buildings, vacant buildings and lots, flooding problems, and significant fire hazards continued to impact Eau Claire's downtown into the 21<sup>st</sup> century. *Id.* Additionally, well founded suspicions about the extent of possible environmental contamination in Eau Claire's downtown created risk and uncertainty for developers who would have to add the costs of investigating and (possibly) remediating environmental contamination to the cost of any downtown redevelopment project. *Id.* While some said the downtown was a lost cause that could never return to its former vitality, city policymakers decided to take action. *Id.*

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Commerce, Inc. as Amicus Curiae Supporting City of Eau Claire) (referencing the "moribund" downtown Eau Claire prior to TIF related development which included transformation of contaminated industrial site, noting the exhaustive political debate regarding the TIF supported confluence project, noting the success of TIF supported development in helping spur development throughout Eau Claire's downtown, and citing various news articles describing well known downtown redevelopment challenges and successes); (R. 63: 25-38) (noting a variety of conditions at the old post office property contributing to blight including the building's age, deterioration, and obsolescence, as well as recurring flooding problems, orders from the DNR to remediate subsurface environmental conditions related to coal tar deposits which are contrary to the public health and welfare, needed storm water facilities, and obsolete platting/planning which will impair future development at 25-26) (R. 65: 13-15, 20-22, 28-31, 57-102) (referencing the City Council's determination in 2007 that over 50% of the property in TID no. 8 were blighted at 13-15, including an environmental indemnity agreement related to possible environmental contamination at one of the development parcels at 92); (R. 66: 17) (noting obsolete building partially in flood plain); (R. 67: 28-34) (noting many of the structures within TID no. 8 were built in the 1800s, severe flooding that has occurred repeatedly in the TID over the last century, the creation of a statutory Redevelopment Authority in the district in 1993 to remove blighted residential properties that experienced severe flooding, nonconforming lot sizes or nonconforming setbacks, a lack of off street parking or no parking at all, various structures with blighted appearances, many vacant/unimproved lots, many vacant buildings including the vacant Xcel Energy coal gasification retort building, and undersized lots at 28); (R. 68: 20); (R. 70: 27) (referencing Hyett Palma study of Eau Claire's downtown); (R. 71: 1-69) (noting the blighted parcels for one or more of the following reasons: dilapidation, deterioration, age and obsolescence and/or the parcel is located within the 100 year flood plain at 6, noting the reasons why the expected development would not occur without TIF including the challenges associated with urban redevelopment and the indications from the developer that the size and scope of the project would not be economically feasible without TIF incentives at 25, noting creation of statutory Redevelopment Authority in the district in 1995 at 32, quoting statutory blight definition at 41, noting fire hazards in TID no. 10 at 43, noting improper ventilation that required closure of Ramada hotel which had not been resolved at time of blight determination at 44); (R. 73: 21) (noting the development agreement called for the largest development in downtown Eau Claire since the establishment of the redevelopment district); (R. 74) (including objections of various plaintiffs and others regarding the use of TIF); (R. 75: 1- 107) noting the developer's responsibility for maintaining the bulk head wall at 18); (R. 77: 38) (noting the Phoenix Park estimate "does not include costs of relocating or removing on-site existing hazardous waste material); *see also* Wisconsin DNR Plant Recovery Initiative, PUB-RR-862

The City of Eau Claire began utilizing TIF financing to address this urban blight's undesirable effects, and to ensure development that otherwise would not materialize would occur. *Id.* In September 2002, when TID no. 8 was initially created, downtown Eau Claire was riddled with environmental contamination, high crime, code violations, vacant lots and buildings, and stagnating property values. *Id.* It was a blighted slum. *Id.* Increased demand for service was a strain on city resources while stagnating downtown property values increased the financial demands on city taxpayers. *Id.* Urban blight made it difficult to attract or retain business and educated professionals. *Id.* The status quo was not sustainable. *Id.* TID no. 8 was later amended on April 10, 2007, June 11, 2013, and September 26, 2014. *Id.* TID no. 10 was created on October 22, 2014. *Id.* (R. 1: 14-16).

TIF investment in this area eventually contributed to the construction of Phoenix Park as well as the JAMF and RCU buildings. *Id.* Although significant progress in Eau Claire's downtown occurred, blighted areas still remained. *Id.* The Ramada Inn and Green Tree Hotel were closed and deteriorating. *Id.* Many downtown buildings showed significant signs of age and distress. *Id.* Building code violations, nonconforming uses, and police responses were more common downtown than other areas of the City. *Id.* Structural improvements were difficult or impossible in many downtown buildings due to shared walls and basements. *Id.* Shared walls and common basements also created dangerous fire hazards. *Id.*

Voters With Facts filed a Summons and Complaint on March 3, 2015 challenging the third Amendment to TID no. 8 and the creation of TID no. 10. (R. 1). Neither the creation nor the first two TID no. 8 amendments were legally challenged, and the City Council and Joint Review Board considered these past legislative determinations and the record before prior Plan Commissions, City Councils, and Joint Review Boards in making their own legislative

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(September 2012) (noting that real or perceived environmental contamination may hinder efforts to redevelop property) Available at <https://dnr.wi.gov/files/PDF/pubs/rr/RR862.pdf>.

determinations regarding the third amendment to TID no. 8 and the creation of TID no. 10. 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. (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); (R:62). 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, 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, and despite the robust record supporting these determinations, 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).

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 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 the circuit court did not address every issue raised or briefed by the parties. (R. 14: 1-7).

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. *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, 376 Wis. 2d 479, 488, 899 N.W.2d 706, 710, review granted, 2017 WI 94, ¶ 1, 378 Wis. 2d 222, 904 N.W.2d 371, and *aff'd on other*

*grounds*, 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131. The Court of Appeals then remanded the case for further proceedings on Voters With Facts' alternative Certiorari claim because the municipal record was not part of the record on appeal. *Id.*

The Supreme Court of Wisconsin affirmed the Court of Appeals decision, and held that the blight and but-for determinations were both legislative determinations of public policy that did not raise justiciable issues of fact or law, that the allegations in the Complaint were insufficient to demonstrate a violation of the Uniformity Clause of the Wisconsin Constitution or the Public Purpose doctrine, that the allegations in the Complaint were insufficient to demonstrate TIF funds were improperly used to reimburse the developers to demolish historic buildings, and that certiorari review is the proper remedy for parties seeking to challenge legislative TIF determinations. *Voters with Facts v. City of Eau Claire*, 2018 WI 63, 382 Wis. 2d 1, 8, 913 N.W.2d 131.

The Supreme Court of Wisconsin's decision, in explicitly rejecting Voters With Facts' arguments, cited the separation of powers doctrine in holding that the blight determination constitutes an exercise of police power which is delegable, and its delegation to cities regarding matters of redevelopment have been upheld against constitutional attack on numerous occasions. *Voters* 382 Wis. 2d at ¶ 37-38. The Supreme Court also held that blight and but-for determinations do not need to itemize the evidence in the record in support of their findings. *Id.* at ¶¶ 37-48.

The Wisconsin Supreme Court remanded the case to the circuit court to review the official record. Voters With Facts and the City of Eau Claire stipulated that the City Councils and Joint Review Boards reviewing TID no. 8 and TID no. 10 considered the record considered by previous Plan Commissions, City Councils, and Joint Review Boards addressing TID no. 8

and TID no. 10 in making their determinations. (R. 84: 2). This court then set a briefing schedule for the parties.

### **SUMMARY OF TAX INCREMENTAL FINANCING**

Wisconsin's TIF statute, § 66.1105, was enacted in 1975. TIF allows communities to finance development 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 terminates 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.*

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).

#### COMMON LAW CERTIORARI

Certiorari review of legislative determinations is limited and deferential. Only questions of law are raised in a common law certiorari proceeding. *Franklin v. Housing Authority of City of Milwaukee*, 155 Wis. 2d 419, 424, 455 N.W.2d 668 (Ct. App. 1990). When the legislature vests discretion in local legislative bodies it does "not intend a circuit court to substitute its discretion for that committed to the Board." *Klinger v. Oneida County*, 149 Wis. 2d 838, 843, 440 N.W.2d 348, 350 (1989). Legislative judgments are presumed to be supported by facts known to the legislative body, unless facts judicially known or proved preclude that possibility. *State ex. Rel. Hippler v. City of Baraboo*, 47 Wis. 2d 603, 613-15, 178 N.W.2d 1, 7-8 (1970). Common law certiorari review examines the record, not to see whether the findings are supported by the evidence, but to ascertain upon the whole record whether the legislative choice is without rational basis. *Id.*

“When conducting common law certiorari review, a court reviews the record compiled by the municipality and does not take any additional evidence on the merits of the decision.” *Voters With Facts v. City of Eau Claire*, 2018 WI 63, ¶ 71, 382 Wis. 2d 1, 913 N.W.2d 131 *citing Ottman v. Town of Primrose*, 2011 WI 18, ¶ 35, 332 Wis. 2d 3, 796 N.W.2d 411. The court’s review is limited to: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Id.* “[O]n certiorari review, there is a presumption of correctness and validity to a municipality’s decision.” *Id.* This standard is commensurate with established judicial deference to legislative determinations. *Id.*

Voters With Facts concede the legislative determinations satisfy the first certiorari issue, and argue the court should examine the second, third and fourth certiorari issues. Voters With Facts fail to clearly articulate how the legislative determinations in question fail to satisfy these requirements. The record, the plain language in Wisconsin’s TIF statute, the Wisconsin Supreme Court decision in this case, and other case law demonstrate the City Council and Joint Review Board proceeded on a correct theory of law, their legislative determinations were not arbitrary, oppressive, or unreasonable representing its will and not its judgment, and the evidence was such that it might reasonably make the order or determination in question.

### ARGUMENT

**1. Voters With Facts have not overcome the legislative acts’ presumption of correctness and validity.**

Voters With Facts have not provided a sufficient basis to overcome the presumption of correctness given to the legislative determinations of the City Council and the Joint Review Board. To succeed under certiorari review, Voters With Facts must demonstrate that the blight and but-for legislative determinations were without a rational basis. They have not demonstrated

that the blight and but-for determinations were without rational basis, and it is not the role of this court to reweigh the evidence or to engage in fact finding. Furthermore, the record provides substantial support for these legislative determinations.

As they have done throughout this process, Voters With Facts seek to have this Court reweigh the evidence and substitute its discretion for the legislative discretion of the Eau Claire City Council and the Joint Review Board. Voters With Facts argue that a community “must show its work” when creating a TID, and then cite a number of inapplicable cases applying certiorari review to administrative decisions rather than legislative determinations in support of its arguments. Although Voters With Facts exaggerate the standard outlined in these cases, even under the most strained interpretation of the certiorari standard the robust record in this case supports the City Council and Joint Review Board determinations.

The City Council and the Joint Review Board proceeded on a correct theory of law. Voters With Facts attempt to distort the statutory definition of blight and the but-for determination, but the plain language in Wisconsin’s TIF statute, the Wisconsin Supreme Court decision in this case, and other case law demonstrate Voters With Facts arguments on this point are meritless. Furthermore, the record provided to this Court demonstrates the legislative determinations in this case were not arbitrary, oppressive, or unreasonable, and also demonstrates the evidence was such that it might reasonably make the order or determination in question.

**a. Voters With Facts distort the statutory definition of blight.**

Voters With Facts allegation that the blight determination must satisfy three discrete “elements” is meritless. (R. 99:6-8). A plain text reading of Wisconsin’s TIF statute demonstrates “blight” is not as narrow as Voters With Facts allege. Wisconsin statute section 66.1105(2)(a)1.a defines blight as follows:

a. **An area, including a slum area, in which the structures, buildings or improvements, which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of these factors is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime, and is detrimental to the public health, safety, morals or welfare.**

(emphasis added).

A plain text reading of this provision demonstrates the broad discretion provided to local legislative bodies making blight determinations. The statute defines blight as an area that by reasons of dilapidation, deterioration, overcrowded conditions, etc. or a combination of factors “is detrimental to the public health, safety, morals or welfare.” The Wisconsin Supreme Court agreed with this interpretation, and said that the “key language” in the statute is that the “area” in its current state, “is detrimental to the public health, safety, morals, or welfare.” *Voters With Facts*, 382 Wis. 2d at ¶¶ 38-40. “Public safety, public health, [and] morality...are some of the more conspicuous examples of the police power,” and “it must also be remembered that the law is directed against slum and blighted areas, not individual structures.” *Id.* Legislative determinations of public policy questions, such as the blight determination in this case, do not raise justiciable issues of fact or law. *Id.*

Moreover, *Voters With Facts*’ assertion that the City of Eau Claire must itemize the evidence in support of its blight determination into three discrete categories is expressly contradicted by the Wisconsin Supreme Court’s decision in this case. *Voters With Facts*, 382 Wis. 2d at ¶ 33 (noting the “plain language” of Wisconsin’s TIF statute does not require the City Council to “itemize the evidence in the record that supports its finding of blight.”).

The Wisconsin Supreme Court’s interpretation of blight’s statutory definition is consistent with judicial canons of statutory interpretation, consistent with the interpretation of the

Wisconsin Department of Revenue (the state agency empowered to administer Wisconsin's TIF statute), consistent with the University of Wisconsin Extension's interpretation, and even consistent with the interpretation of TIF critics in academic law journals. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 116-25 (Describing the conjunctive/disjunctive canon which examines the location of "and" as well as "or" in determining statutory meaning), 132-33 (Noting the verb "include" introduces examples, not an exhaustive list); see also Wisconsin Department of Revenue, *2019 Tax Incremental Financing Manual*, 37 <https://www.revenue.wi.gov/DOR%20Publications/tif-manual.pdf> (blight determination involves an area detrimental to the public health, safety, morals or welfare due to dilapidation, age or obsolescence, and other factors.); John Kovari, Ryan Hutter & Karl Green, *The Two Sides of TIF: An Analysis of Tax Incremental Financing in the Greater La Crosse Region*, University of Wisconsin-Extension 4 (September 2013) (Noting while Minnesota's TIF law narrowly defines "blight" Wisconsin's TIF law does not, and that municipalities have broad discretion in deeming what blight means.) <https://lacrosse.extension.wisc.edu/files/2014/02/The-Two-Sides-of-TIF.pdf>; David N. Farwell, *A Modest Proposal: Eliminating Blight, Abolishing But-for, and Putting New Purpose in Wisconsin's Tax Increment Financing*, 89 Marq. L.Rev. 407, 419 (2005) (Wisconsin's TIF statute definition of blight "describes an area with dilapidated, deteriorated or obsolete buildings, overcrowded conditions, or a combination of factors that are 'detrimental to the public health, safety, morals or welfare.'") (emphasis added).

In addition to distorting the statutory definition of blight, Voters With Facts also misapply the blight standard. Voters With Facts argue that a failure to use TIF money directly on blighted properties demonstrates the City's blight determination is a pretextual excuse for economic development. (R. 99:11). This assertion fails to cite any legal authority precluding the use of TIF funds except on blighted properties, and ignores the Wisconsin Supreme Court's

discussion that Wisconsin's TIF law addresses blighted "areas," not individual properties. *Voters With Facts*, 382 Wis. 2d at ¶¶ 38-40. TIF investments are designed to eliminate blight throughout the whole district, not simply target individual blighted properties.

*Voters With Facts* also incorrectly assert that inconsistency with a comprehensive plan cannot contribute to blight, that flooding risk isn't stopping development in Eau Claire's downtown, and that no TIF money is being used to address flooding concerns. (R. 99: 15-18). *Voters With Facts* cite neither the record nor any legal authority in support of these meritless contentions. First, inconsistencies with the comprehensive plan and other land use regulations provide challenges and expense to redevelopment, which support obsolescence conclusions for the blight determination, and support the determination that development would not occur without TIF. Second, there is nothing in the record to support the contention that flooding isn't stopping development in Eau Claire's downtown, and it is reasonable to believe the one hundred plus years of flooding problems in Eau Claire's downtown contribute to blight, and support the determination that development would not occur without TIF. Lastly, it is well known that a great deal of work related to the confluence project has been dedicated to addressing flood concerns, and *Voters With Facts* provide no evidence to the contrary.

*Voters With Facts*' assertion, that City Attorney Stephen Nick's September 8, 2014 summary of items which could contribute to blight was "fatal to Eau Claire's determination of blight," is meritless. (R. 99: 8). The City Council examined the precise statutory blight definition, a memorandum clearly articulating the blight standard, and extensive evidence supporting their blight determination. City Attorney Nick's examples of factors that could contribute to blight is consistent with Wisconsin's TIF statute, and consistent with the Wisconsin Supreme Court's interpretation of the TIF statute's definition of blight. The Wisconsin Supreme Court stated that a plain language interpretation of Wisconsin's TIF statutory definition of blight

is supported by the context of surrounding and closely related statutes including the statute cited by City Attorney Stephen Nick. *Voters With Facts*, 382 Wis. 2d at ¶¶34-35. The Wisconsin Supreme Court believes the TIF statute's definition of blight can be properly understood in context with closely related statutes, so it is appropriate for city attorneys providing explanations on blight to their City Councils to do the same.

**b. Voters With Facts distort the statutory but-for determination**

Voters With Facts distort the statutory but-for determination, and they ignore a robust record in support of this determination. Many of the facts supporting the blight determination also support the but-for determination because it is less likely development will occur in areas with environmental contamination, high crime, vacant and deteriorating buildings, etc. without TIF.

Voters With Facts' assertion that the Joint Review Board must itemize the evidence in support of the but-for determination is inconsistent with Wisconsin's TIF statute which states in relevant part, as follows:

[N]o tax incremental district may be created and no project plan may be amended unless the board approves the resolution adopted under sub. (4)(gm).... The board may not approve the resolution under this subdivision unless the board's approval contains a positive assertion that, in its judgment, the development described in the documents the board has reviewed under subd. 1. would not occur without the creation of a tax incremental district.

*Voters with Facts v. City of Eau Claire*, 382 Wis. 2d ¶ 45 (emphasis added).

Voters' With Facts interpretation is expressly contradicted by the Wisconsin Supreme Court's decision in this case. *Voters With Facts*, 382 Wis. 2d at ¶ 46 (noting "the plain language of the statute does not require that the JRB itemize the evidence in the record that supports its 'but for' assertion."). The Wisconsin Supreme Court also noted the but-for determination is holistic and wholly within the discretion of the legislative body. *Id.* at ¶ 47.

Voters With Facts also incorrectly allege that a developer's decision to purchase properties and raze buildings precludes a valid but-for determination. (R. 99:16). The fact that a developer has acquired land and demolished buildings does not guarantee that the property will develop to the size and scale it will with TIF support, if development occurs at all. The existence of initial development work on one parcel is not sufficient to demonstrate the Joint Review Board's but-for determination is without a rational basis. *See State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶¶ 29, 47, 252 Wis. 2d 628, 643 N.W.2d 796 (A Joint Review Board's task is to look at the TIF district "as a whole and determine whether development would occur without the use of tax incremental financing.") Developers routinely acquire land and engage in site preparation only to later postpone, cancel, or scale-back development as conditions change. Furthermore, in addition to other compelling information considered by the Joint Review Board, much of which is contained in this briefs' discussion on blight, the absence of a larger private development in Eau Claire's downtown since the creation of the Redevelopment Authority also supports the determination that development this large in scale would not occur without TIF.

**2. The record supporting the legislative determinations in this case is substantial.**

The record provided to this Court demonstrates the legislative determinations in this case were not arbitrary, oppressive, or unreasonable, and also demonstrates the evidence was such that the City Council and Joint Review Board might reasonably make the determinations in question. The record includes, but is not limited to, the following evidence:

- Repeated references to the statutory definition of blight and the statutory but-for determination in front of the relevant legislative bodies
- Extensive environmental contamination caused by lumber and industrial uses including coal tar deposits, solid waste materials, and remediation under DNR oversight.
- Repeated severe flooding problems in the districts for over one hundred years
- Inadequate soils caused by lumber and industrial uses
- Parcels exhibiting dilapidation, deterioration, age and obsolescence

- Many vacant buildings and vacant lots, including two vacant hotels
- Old, deteriorated, and obsolete buildings, many from the 1800s
- Inadequate storm water facilities
- Prior blight and but-for determinations made by prior City Councils and Joint Review Boards, and prior blight determinations made by the Redevelopment Authority
- Nonconforming lot sizes and setbacks
- Buildings with improper ventilation
- Fire hazards and fire risks in a designated fire district
- Lack of off street parking and lack of parking
- Various structures with blighted appearances
- Obsolete planning and platting
- Increased crime
- Lack of redevelopment in the area, and noting the confluence project was the largest development in the area since the creation of the redevelopment authority
- Explanations why development would not occur to the same size and scope without TIF including challenges associated with urban redevelopment
- Development agreement that included transfer of ownership of prime river front property to city for public trails and large public plaza making development in the districts more likely

No reasonable person can point at the above (non-exhaustive) list of evidence and say the blight and but-for determinations were arbitrary or without a rational basis. Voters With Facts may disagree with the legislative determinations reached by the City Council and the Joint Review Board, but calling the determinations “unsupported conclusory allegations” is misleading and not supported by the record. Voters With Facts ignore these portions of the record rather than engaging them because there is no meritorious manner in which the above evidence would not satisfy even Voters With Facts’ strained interpretation of the certiorari standard.

### **3. The Plaintiffs’ requested relief is invalid.**

Furthermore, the Plaintiffs’ requested relief is invalid. The Plaintiffs requested a judgment declaring void “any municipal action taken in reliance on the lawful existence of the TIDs.” Even if the Court determines that the Eau Claire City Council or Joint Review Board’s legislative TIF actions – which are financing actions - violated Wisconsin law, such a determination cannot void unspecified separate legislative actions of the City Council such as

issuing bonds and appropriating funds. The Wisconsin legislature grants broad legislative powers to City Councils 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, and the Plaintiffs do not demonstrate entitlement to this kind of broad relief.

**4. In the alternative, the court should apply any decision against the city of Eau Claire prospectively.**

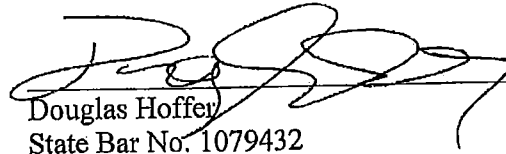
In the alternative, the Court should apply any decision in favor of Voters With Facts prospectively. The City of Eau Claire and the Joint Review Board worked in good faith under longstanding existing law. Communities and developers statewide have likewise relied in good faith on the express language 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 v. City of Milwaukee*, 33 Wis. 2d 408, 415, 147 N.W.2d 633, 637 (1967). 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.* 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 deny Plaintiffs' Motion in Support of Judgment on Certiorari Record and enter judgment in favor of the City of Eau Claire and the Joint Review Board.

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Douglas Hoffer  
State Bar No. 1079432  
Deputy City Attorney  
City of Eau Claire  
203 S. Farwell St.  
Eau Claire, WI 54701  
(715) 839-6006  
[douglas.hoffer@eauclairewi.gov](mailto:douglas.hoffer@eauclairewi.gov)

Stephen C. Nick  
State Bar No. 1020929  
City Attorney  
City of Eau Claire  
203 S. Farwell St.  
Eau Claire, WI 54701  
(715) 839-6006  
[stephen.nick@eauclairewi.gov](mailto:stephen.nick@eauclairewi.gov)