

VOTERS WITH FACTS, *et al.*,  
   Plaintiffs,

Case No. 15-CV-175

v.

CITY OF EAU CLAIRE, *et al.*,  
   Defendants.

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**PLAINTIFFS’ BRIEF IN SUPPORT OF JUDGMENT ON THE RECORD**

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**INTRODUCTION**

This action challenges the legality of two tax incremental financing districts (“TIDs”). One, TID #10, was created in 2014, and the second, TID #8, was created in 2002 and was amended for the third time in 2014. Defendants City of Eau Claire (“City”) and City of Eau Claire Joint Review Board (“JRB” and, collectively with the City, “Eau Claire”) are the governmental entities with statutory responsibility for creating TIDs #8 and #10 and amending the former. The creation of TID #10 and the third amendment to TID #8 (the “Third Amendment”) fail certiorari review and should be invalidated.

**TIF LAW BACKGROUND**

Wisconsin’s Tax Increment Law, Wis. Stat. § 66.1105, was enacted in 1975 to provide Wisconsin municipalities with a method for financing certain, specified kinds of urban redevelopment projects: TIDs. When a TID is created, none of the property tax revenue from the incremental growth within the TID (all increases in property value above the “base” established when the TID is created) can be used to fund general government operations. Instead, that revenue pays the cost of projects delineated in the TID project plan. The decision to create a TID is not left to the unbridled discretion of the municipality. TIDs are not appropriate

whenever cities say they are. Municipalities may use TIDs only for purposes that are specifically enumerated in Section 66.1105.

In this case, the two TIDs at issue were ostensibly created for the statutory purpose of eliminating blight. Blight is not whatever a city says it is. A “blighted area” is defined as

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.

Wis. Stat. § 66.1105(2)(ae)1.a. A “blighted area” can alternatively be “[a]n area which is primarily open . . . that consists of land upon which buildings or structures have been demolished and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise, substantially impairs or arrests the sound growth of the community.” § 66.1105(2)(ae)1.b.

In order to create a blight TID, a city must designate the boundaries of the TID, identify the properties claimed to be blighted, hold public hearings, and approve a project plan. *See* § 66.1105(4)(a)-(g). The common council then must adopt a resolution that contains findings that “[n]ot less than 50%, by area, of the real property within the district is . . . a blighted area” and that “[t]he project costs relate directly to eliminating blight.” § 66.1105(4)(gm)4. That finding is not left to the discretion of the municipality, but is subject to certiorari review. *Voters With Facts v. Eau Claire*, 2018 WI 63, ¶69, 382 Wis. 2d 1, 913 N.W.2d 131.

A TID must also be approved by an intergovernmental entity referred to as a “joint review board.” The board’s approval is necessary because the “capture” of incremental tax revenues over the life of a TID deprives other taxing jurisdictions (counties, technical college

districts, and school districts) of the ability to collect taxes from the TID’s incremental property value. *Town of Baraboo v. Vill. of West Baraboo*, 2005 WI App 96, ¶¶32-33, 283 Wis. 2d 479, 699 N.W.2d 610. Because that source of funding is cut off, the burden on other taxpayers necessarily increases. *Id.*, ¶34. To ensure that the interests of other taxing authorities are considered, representatives of each of those authorities, as well as a public member, are appointed to serve on the joint review board. Wis. Stat. § 66.1105(4m)(a).

A joint review board must “review the public record, planning documents and the resolution passed by the [city].” Wis. Stat. § 66.1105(4m)(b)1. The joint review board’s decision to approve or deny a TID must be based on certain criteria, including “[w]hether the development expected in the tax incremental district would occur without the use of tax incremental financing.” § 66.1105(4m)(c)1. Finally, “[t]he board may not approve the resolution . . . unless the board’s approval contains a positive assertion that, in its judgment, the development described in the documents the board has reviewed . . . would not occur without the creation of the tax incremental district.” § 66.1105(4m)(b)2. This finding is also subject to certiorari review. *VWF*, 2018 WI 63, ¶69.

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

### **FACTUAL BACKGROUND**

In Fall 2014, Eau Claire TID #10 was created, and Eau Claire TID #8 was amended a third time, to support the “Confluence Project,” a development in downtown Eau Claire. (*See generally* R. 71:1-22, 79:1-25.) The properties comprising the Confluence Project site – located

southeast of the confluence of the Eau Claire and Chippewa Rivers and within the boundaries of both TIDs – are owned by a private real estate developer. (R. 75:96.)

At a public meeting on August 18, 2014, the Plan Commission voted to approve TID #10 and the Third Amendment. (R. 79:38.) On September 9, 2014, a day after a public hearing was held to consider the Third Amendment, the Common Council adopted a resolution approving it. (R. 72:12-14.) The resolution stated that “not less than 50%, by area, of the real property within the amended boundary area of the District is a ‘blighted area’.” (R. 72:13.) On September 26, 2014, the JRB adopted a resolution approving the Third Amendment. (R. 79:42.) The JRB resolution stated that “the development described in the [Third Amendment] would not occur without the amendment.” (*Id.*)

On October 13, 2014, the Common Council held a second public hearing on the creation of TID #10 and the next day adopted a resolution approving the creation of TID #10. (R. 73:9-11.) That resolution stated that “not less than 50%, by area, of the real property within the amended boundary area of the District is a ‘blighted area.’” (R. 73:10.) On October 22, 2014, the JRB adopted a resolution approving the creation of TID #10. (R. 71:27.) The JRB Resolution stated that “the development described in the Project Plan would not occur without the creation” of TID #10. (*Id.*)

On March 12, 2015, the Plaintiffs, (“Voters”), filed this lawsuit seeking a declaratory judgment voiding the resolutions creating TID #10 and amending TID #8 for the third time, along with any municipal actions taken in reliance on the TIDs. Voters also pled an alternative certiorari claim. The City moved to dismiss, and this Court granted the motion on August 17, 2015, on grounds that Voters lacked standing to seek any relief. On May 31, 2017, the Court of Appeals affirmed in part and reversed in part. Although it agreed that Voters lacked standing,

the Court of Appeals also concluded that Voters could challenge the TIDs through certiorari, and reversed dismissal of that claim. 2017 WI App 35, 376 Wis. 2d 479, 899 N.W.2d 706.

On June 6, 2018, the Wisconsin Supreme Court found that Voters had failed to state a claim for declaratory judgment, but agreed that “certiorari review is appropriate and adequate to address Plaintiffs’ claims regarding the municipality’s findings of ‘blight’ and ‘but for’ assertions because certiorari review is the mechanism by which a court should test the validity of a municipality’s legislative determinations.” 2018 WI 63, ¶69, 382 Wis. 2d 1, 913 N.W.2d 131. Thus, it remanded the case to this Court for certiorari review of those two of Voters’ claims.

Here, the certiorari record consists of PowerPoint slides, handouts, oral comments by government officials and members of the public (including Plaintiffs) that are memorialized in written minutes and video/audio recordings of public hearings, and the like, all of which were presented at the August 8 Plan Commission hearing, the September 8 and 9, and October 13 and 14 hearings of the Common Council, and the September 26 and October 22 JRB hearings. The certiorari record consists of docket numbers 62-80, 87, and 94-97.

## **ARGUMENT**

### **I. THE STANDARDS FOR CERTIORARI REVIEW**

“Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality, an administrative agency, or an inferior tribunal.” *Ottman v. Town of Primrose*, 2011 WI 18, ¶34, 332 Wis.2d 3, 796 N.W.2d 411. Certiorari review is “[i]n its essence . . . supervisory in nature” and “extends to all questions of jurisdiction, power and authority of the inferior tribunal to do the action complained of and all questions relating to the irregularity of the proceedings.” *Winkelman v. Town of Delafield*, 2000 WI App 254, ¶15, 239 Wis. 2d 542, 620 N.W.2d 438.

“When conducting common law<sup>1</sup> certiorari review, a court reviews the record compiled by the municipality and does not take any additional evidence on the merits of the decision.” *Ottman*, 2011 WI 18, ¶35 (footnote added). The municipality’s decision is accorded a rebuttable “presumption of correctness and validity,” *id.*, ¶¶48-51, but “[a] court should not defer to a municipality’s interpretation of a statewide standard” like Section 66.1105, *see id.*, ¶59.

The certiorari test itself is well-established and considers four questions: “(1) [w]hether the [entity] 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.” *Klinger v. Oneida Cty*, 149 Wis. 2d 838, 843, 440 N.W.2d 348, 350 (1989) (first alteration in original). Here, the second, third, and fourth questions are at issue.

## **II. THE CITY PROCEEDED ON AN INCORRECT THEORY OF LAW BY USING THE WRONG DEFINITION OF BLIGHT**

To be valid, the decisions approving the Third Amendment and TID #10 must be based on a “correct theory of law” – specifically, a correct interpretation of the statutory definition of “blighted area.” *See Wisconsin Dolls, LLC v. Town of Dell Prairie*, 2012 WI 76, ¶¶22-50, 342 Wis. 2d 350, 815 N.W.2d 690 (reviewing whether a town properly applied alcohol licensing statutes). Interpretation of a statute is a question of law that courts review de novo. *Id.*, ¶19.

There is a particular definition of blight for purposes of creating a TID (as opposed to, for example, condemning a property for eminent domain). The TID law provides two ways in which an area may be blighted. The first definition of “blighted area” is strict and breaks down into three elements: 1) a set of conditions that the “structures, buildings or improvements” must suffer from (namely, “dilapidation, deterioration, age or obsolescence, inadequate provision for

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<sup>1</sup> Because nothing in Section 66.1105 specifies a method of review, common law certiorari review is appropriate. *See Ottman*, 2011 WI 18, ¶¶35-36.

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”); 2) the conditions must be “conducive” to one of several negative effects (namely, “ill health, transmission of disease, infant mortality, juvenile delinquency, or crime”); and 3) the conditions must also be “detrimental to the public health, safety, morals or welfare.” Wis. Stat. § 66.1105(2)(ae)1.a. All three of these conditions must be met, *i.e.*, the nature of an area’s buildings must be *connected* to specified negative conditions and negative consequences – the conditions alone do not establish blight.

The second definition allows for a broader approach to blight. It applies where there is a “primarily open” area left after the demolition of buildings or structures. § 66.1105(2)(ae)1.b. In such an area, the test for blight is two-part: (1) a set of conditions (“obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise”); (2) that must “substantially impair[] or arrest[] the sound growth of the community.” *Id.* Similarly here, both parts must be met.

But both the Plan Commission and Common Council *used the wrong definition* of blight throughout their consideration of the Third Amendment and TID #10. For example, in its August 18, 2014 PowerPoint presentation to the Plan Commission on both the Third Amendment and TID #10, the Plan Commission was given an even broader definition of “blighted area” set forth in an entirely different law enacted for a different purpose. Rather than reference either definition of blight in the TIF law, Eau Claire erroneously used the definition set forth in Section 66.1333(2m)(b), the “Blight Elimination and Slum Clearance Act,” (which governs certain exercises of eminent domain and not the creation of TIDs). (R. 79:52.) The September 8, 2014 PowerPoint presented to the Common Council also offered the wrong definition of “blight.” The

definition appears to have been loosely – and erroneously – based on Section 66.1333(2m)(b)2. (the Blight Elimination and Slum Clearance Act), but also includes the overbroad, erroneous statement, “Designation of blight also includes inappropriate use of land.” (R. 74:2.)

At the September 8, 2014 Common Council meeting, City Attorney Stephen Nick did not correct these errors, but rather himself provided an inaccurate definition of “blight.” He described Wisconsin’s definition of “blight” as covering “stagnant or declining property values,” “increased vacancies,” and “any unproductive use of the land,” none of which appear in or would be covered by Wisconsin’s statutory definition. He told the council that it was completely in their discretion to determine whether an area was blighted.<sup>2</sup> (Video of 9/8/14 Common Council Meeting, Disc 2 at [2:25](#).) That is, at best, misleading. The discretion the Council has is cabined and cannot consist of the body’s own view of what constitutes “blight.” Whatever discretion exists is bounded by the statutory definition of blight, and the record is clear that the Council was not given the correct legal definition.

This alone is fatal to Eau Claire’s determination of blight. No deference can be afforded the determination of a body that did not know what it was supposed to do.<sup>3</sup> Because the City used an erroneous interpretation of “blighted area” under the TIF Law, the City did not proceed on a “correct theory of law.” The Third Amendment and TID #10 should be nullified for that reason.

### **III. THE RESOLUTIONS PASSED BY THE CITY AND JRB APPROVING THE THIRD AMENDMENT TO TID #8 WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

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<sup>2</sup> These errors may have been rooted in a curious decision not to cite Wisconsin law but to provide a review of cases from other states interpreting their TIF laws and an article in the American Law Review. (Video of 9/8/14 Common Council Meeting, Disc 2 at [00:01](#), [00:50](#).)

<sup>3</sup> The city’s longstanding misapplication of the blight definition may be best highlighted by the fact that they declared the upscale restaurant Stella Blues blighted in 2002. (R. 71:48.)



The third and fourth criteria of certiorari review are interrelated: “The fourth standard whether the evidence was such that it might reasonably make the order controls the third criterion.” *State ex rel. Harris v. Annuity & Pension Bd., Emp. Ret. Sys. of City of Milwaukee*, 87 Wis. 2d 646, 652, 275 N.W.2d 668 (1979). The *Harris* court explained that the “question is one of the sufficiency of the evidence,” and “[t]he sufficiency of evidence on review by common law certiorari is identical to the substantial evidence test used for the review of administrative determinations under ch. 227.” *Harris*, 87 Wis. 2d at 652. “‘Substantial evidence’ is evidence of such convincing power that reasonable persons could reach the same decision as the [entity].” *Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶43, 362 Wis. 2d 290, 865 N.W.2d 162. Quantitatively the standard is “less than a preponderance” but “more than ‘a mere scintilla’ and more than ‘conjecture and speculation.’” *Id.* at ¶44 (quoting *Gehin v. Wis. Grp. Ins. Bd.*, 2005 WI 16, ¶48, 278 Wis. 2d 111, 692 N.W.2d 572). Although the court does not weigh the evidence, some evidence may be “incredible as a matter of law.” *Harris*, 87 Wis. 2d at 652.

The lack of evidence bears on whether a decision is arbitrary or unreasonable. “In order for certiorari review [of whether a decision was arbitrary, oppressive or unreasonable] to be meaningful . . . a board must give the reviewing court something to review,” and “boards are generally required to make findings of fact and state reasons for their decisions.” *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals of City of Milwaukee*, 2005 WI 117, ¶26, 284 Wis. 2d 1, 700 N.W.2d 87. Requiring that a municipality “provide reasons for its determination is . . . consistent with common sense and traditional notions of due process.” *Id.*, ¶ 28 (citation omitted). Mere conclusory statements regarding the statutory criteria are insufficient to support a

municipality's decision, because they make it "impossible for the circuit court to meaningfully review [the] decision." *Id.*, ¶43.

To summarize, a municipality must show its work when creating a TID. The mere assertion that an area is blighted or that the TID is necessary to development is entitled to no deference at all. A municipality must offer evidence that is adequate to permit – even if it does not compel – a conclusion that the statutory requisites have been met. A simple assertion that an area is blighted or that certain conditions are present is not adequate unless it is accompanied by enough evidence to permit the required findings to be made. Otherwise the TID fails the third and fourth criteria.

**A. The Area Covered by the Third Amendment Is Not “Blighted” Under the TIF Law**

The statement in the 9/9/14 City Resolution that “not less than 50%, by area, of the real property within the amended boundary area of the District is a ‘blighted area’” is not supported by record evidence.

The certiorari record is completely devoid of any evidence upon which the Plan Commission or Common Council could reasonably have concluded that at least 50% of the amended area in TID #8 was blighted under any definition. The Project Plan contains a map showing which parcels city officials claimed were blighted (R. 80:37), but there is not a single piece of evidence supporting those claims. There is no evidence in the record showing that any building is dilapidated, or unsanitary, or overcrowded, much less that any of those or any other unsavory conditions are causing crime, infant mortality, or juvenile delinquency.

Video recordings of the 8/18/14 Plan Commission hearing and 9/8/14 Common Council meeting show City Finance Director Jacob Winzenz simply showing the map designating certain properties as “blighted” with no further explanation. (Video of 8/18/14 Plan Commission

Meeting, Disc 1 at [13:40](#); Video of 9/8/14 Common Council Meeting at [1:39:00](#).) His entire comment at the Plan Commission meeting was “Both of those blocks do contain properties that are considered to be blighted.” (Video of 8/18/14 Plan Commission Meeting, Disc 1 at [13:48](#).) His entire comment at the Common Council meeting was “This map shows the blighted parcels that are being added to the district.” (Video of 9/8/14 Common Council Meeting, Disc 1 at [1:39:09](#).) Never did he say how or why they were blighted. The City made an unsupported conclusory allegation, which itself is not enough to support a conclusion that the area was sufficiently blighted. *See Lamar Central*, 2005 WI 117, ¶32 (“A board may not simply grant or deny an application with conclusory statements that the application does or does not satisfy the statutory criteria.”). To hold otherwise would be to turn the requirement of a finding to one of incantation. While certiorari review may limit a court’s ability to weigh evidence, here there was no evidence to weigh.

Furthermore, none of the TIF money is being spent to remediate any of the allegedly-blighted parcels. Rather, all the TIF money is being spent on a parking structure and the Confluence Project, both located elsewhere in the district. (R. 79:13-14.) This tends to show that the City’s supposed concern about blight is pretextual – that this TID is actually about economic development, not eradicating blight. It also disproves the statutorily-required finding in the 9/9/14 Common Council resolution that “the project costs as described in the amended Project Plan relate directly to eliminating blight” in that amended area. (*See* R. 72:13.)

**B.     Redevelopment In The Area Covered By The Third Amendment Would Have Occurred Without Public Financing Under The TIF Law**

The statement in the 9/26/14 JRB Resolution that “the development described in the [Third] Amendment would not occur without the amendment” is not supported by record evidence.

A report provided to the JRB for the Third Amendment contains an entry explaining “why the expected development in TID #8 would not occur without the third amendment to the project plan.” (R. 79:28.) The two reasons given are that more money is needed for additional parking than was initially expected when TID #8 was amended for the second time the year prior, and that providing further funding for the Community Arts Facility in the Confluence Project would drive “the demand for additional retail, dining, and lodging opportunities.” (*Id.*)

The first justification is flatly contradicted by the Project Plan itself. If the development needed more parking to happen, then one would expect the amended project plan to provide this missing element. But that did not happen. Money – \$7.7 million – had already been dedicated for parking in the second amendment to TID #8. (R. 63:34-35.) The Third Amendment added no additional money for parking. (R. 79:13.) Rather, the money from the Third Amendment is dedicated entirely to a contribution to the Confluence Project (across the river) and minor administrative expenses. (*Id.*) The Third Amendment added no funding for the parking garage, so it cannot reasonably be concluded that the Amendment was necessary for any development that might require the garage.

The second justification is a non-starter. First, such a vague statement about a fine arts center increasing demand for tourist-related businesses cannot possibly prove that the TIF spending from the Third Amendment was so vital to the specific development listed in the Project Plan that none of it would occur without that \$1.5M donation. A destination center might plausibly increase tourism, but there is no evidence in the record that that increased tourism was necessary for the success of the planned developments.

More importantly, all of the development allegedly dependent on the Third Amendment was underway or already expected prior to the Third Amendment. The major developments

listed in Exhibit 8 of the Project Plan are the Riverfront Terrace, the JAMF Office Building, the Riverfront Terrace Apartment (Phase II), Post Office/Residential/Mixed Use, Block 7, and the Green Tree Hotel Renovation. (R. 79:15.) But all of the projects were already underway or planned, putting the lie to the claim that none of them would occur without the Third Amendment. Excepting the Green Tree, each of those developments had already appeared in the Project Plan for the second amendment to TID #8 (R. 63:37), showing that the City knew they were underway or planned a full year before the Third Amendment was approved. As for the Green Tree, the City had already approved the site plan for the hotel's planned renovation before the Third Amendment was approved. (R. 94:2-3, 6-19.<sup>4</sup>) Nothing in the record suggests that any of these developments would not go forward in the absence of a fine arts center.

#### **IV. THE RESOLUTIONS PASSED BY THE CITY AND JRB APPROVING TID #10 WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

##### **A. The Area Covered by TID #10 Is Not “Blighted” Under the TIF Law**

The statement in the 10/14/14 City Resolution that “[n]ot less than 50%, by area, of the real property within the amended [sic] boundary area of the District is a ‘blighted area’” is not supported by record evidence.

A map (R. 71:8) from the TID #10 Project Plan identifies the allegedly-blighted properties. An enhanced version of that map (R. 87:1) was presented by a Plaintiff as a public commenter during the 10/13/14 Common Council Public Hearing and labels those allegedly-blighted parcels. This brief will refer to various parcels by those labels for convenience.

At the most basic possible level, the finding in the 10/14/14 City Resolution fails because nowhere in the record does the City ever say what percentage of TID #10 is blighted. It “finds” that the number is greater than 50%, but on what evidence? There are no specifics, no

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<sup>4</sup> Numerous people testified about Green Tree's impending renovation as well. (*See, e.g.*, R. 74:22; Video of 9/8/14 Common Council Meeting, Disc 2 at [1:06:10](#); Video of 8/18/14 Plan Commission Meeting at [45:40](#).)

calculations. For the Third Amendment,<sup>5</sup> there at least was a statement that the exact percentage was 67% (R. 79:6) and a map (R. 79:7-8) where two of three similarly-sized blocks were declared blighted, at least providing for a visual approximation. But for TID #10, there is no stated number, and none can be inferred from the record. The map (R. 71:8) contains intermixed blighted and unblighted parcels, and visual approximation does not establish that those parcels claimed to be blighted are more than 50% of the total. Even assuming that every one of these parcels actually is blighted, the City gives the Court no evidence upon which to review the claim 50% or more of the area is blighted. *See Lamar*, 2005 WI 117, ¶26 (“[B]oards are generally required to make findings of fact and state reasons for their decisions.”)

But there is nothing in the record from which one could determine that each of these parcels is blighted. To be sure, in contrast to the Third Amendment to TID #8 where the City simply made unsupported assertions that some areas were blighted, the City made some effort to establish that the actual statutory criteria for blight were met for TID #10. But that effort was nowhere near adequate. The Project Plan describes the allegedly-blighted parcels, as a whole, as being “blighted for one or more of the following reasons: parcels consist of structures that exhibit dilapidation, deterioration, age and obsolescence and/or the parcel is located within the 100-year flood plain.” (R. 71:6.) City Finance Director Winzenz’s PowerPoint presentation to the Common Council on 10/14/14 argued that the following factors supported blight:

- Higher crime density in the district
- Fire dangers in a special “fire district” related to outdated fire protection and prevention features
- Inadequate ventilation as evidenced by the former Ramada Hotel being ordered closed due to HVAC issues
- Obsolete platting
- Land uses not consistent with the Comprehensive Plan

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<sup>5</sup> When TID #8 was created in 2002, the City was even more precise, listing the square footage of blight compared to the whole district. (R. 67:48.)

- Parcels located in the 100-year flood plain

(R. 71:42-49; *see also* 10/14/14 Video of Common Council Meeting, Disc 2 at [1:58:50 through Disc 3 at 14:10](#) (video of Mr. Winzenz’s PowerPoint presentation).)

It helps to break this question down into two groups of parcels: Confluence properties, which were primarily open, and other parcels.

*1) Confluence Parcels*

The Confluence (highlighted in green on the enhanced map at R. 87:1) at the time consisted primarily of open areas where buildings had been demolished. The City argued that 66.1105(2)(ae)1.b. applied (*see* R. 71:45-47), and the question is whether these parcels “substantially impair[] or arrest[] the sound growth of the community” because of obsolete platting or “otherwise.” It first argued that the “[Multi-Use Building] site . . . suffer[ed] from obsolete platting.” (R. 71:46.)

But it offered no evidence supporting or explaining how the “obsolete platting” actually impaired or arrested growth of the area. Obsolete platting might impair assembly of an area for development if disparate owners refused to cooperate, but here all of the parcels had been acquired by the Confluence Developer. (R. 75:96.)

The City also offered two arguments that the open areas “otherwise” impaired the sound growth of the community, but its arguments cannot withstand even the most cursory examination. First, it argued that the allegedly-blighted properties’ “uses” were inconsistent with the City’s Comprehensive Plan. It is not clear what this could possibly mean. The property had been acquired by the developer who was obligated to either develop it or seed it. *See* Eau Claire City Ordinance 16.04.300(c), available at <https://www.eauclairewi.gov/home/showdocument?id>

23071. Having paid millions for the land, the developer was going to build valuable riverfront property, and that development was precisely what the city wanted.

Even were that not the case, the fact that a use is inconsistent with the City's plan – i.e., the City would like it to be something else – cannot constitute “blight.” While the use of a term like “otherwise” gives the City some leeway, its elbowroom logically cannot extend this far. If all that was necessary to declare a parcel blighted was to claim the City would rather use it for something other than its present use, there would be no real limitation on “blight” – and therefore TIDs – at all. “Blight” would exist whenever the city wants something else. That's not what the law requires. There must be something more “the matter” with property than just that city leaders have a different opinion on its best use.

Finally, the City argued that being in the 100-year flood plain was an “otherwise” reason these parcels substantially impair or arrest the sound growth of the community. Plaintiffs agree that if recurring flooding was a severe enough problem to actually prevent development of parcels, that would be a good reason to declare those parcels blighted, and a TID could be used to pay for measures to alleviate the flooding.

But that doesn't work here, for two reasons. First, flooding isn't stopping development in this area, as evidenced by the fact that the Confluence developer purchased these properties and razed the buildings, planning on building brand new, highly-valuable buildings despite the alleged concerns of flooding. In fact, the developer agreed that FEMA's Letter of Map Revision – requested by the City – removed the Multi-Use Building from the flood plain (R. 94:21.)

Second, nothing is being done with TIF money to alleviate any alleged concerns with flooding. The proposed project costs in the Project Plan are devoted entirely to cash contributions to the developer, building a public plaza, and administrative costs. (R. 71:13; *see*



also R. 71:38 (diagram of expenditures).) If the City thinks the risk of flooding is so severe that this entire area is blighted, why isn't it doing anything about the flooding? How can it claim that the project costs relate directly to eliminating blight (§ 66.1105(4)(gm)4.bm.) when they aren't being used to address the very thing the City claims is causing the blight? The City has been claiming that the flooding in this area causes blight since at least TID #8 was created in 2002 (R. 67:28, 48), and, if its argument is accepted, will be able to claim this area is blighted forever, regardless of how beautiful and well-developed it becomes.

2) *Other Parcels*

The other allegedly-blighted parcels consist of the Barnes Building parking lot, the Hope Gospel Mission, the Kresge Building, and the Ramada/Lismore<sup>6</sup> Hotel. (R. 87:1.) The City argued that the first blight definition, § 66.1105(2)(ae)1.a., applied. (R. 71:41-44, 49.) Specifically, it argued that the Ramada/Lismore was blighted because of HVAC/ventilation issues, and then more generally that the district's blight determinations are based on crime and fire hazards, without tying them to any particular parcel, except that Playmakers (inside the Kresge building), lacked fire separation from an adjoining building in its basement. (R. 71:42-44.) The problem with the Ramada argument is clear – the building was already undergoing remodeling and was soon to reopen as the Lismore Hotel. (R. 79:10.) Those ventilation issues no longer existed.

On fire and crime, the obvious questions present themselves. If the concerns are real, why isn't every parcel in the fire district or near the crime "hot spot" blighted? If the concerns are real, why, like the flooding "problem," isn't any TIF money being spent to remedy the

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<sup>6</sup> Various references through the Record to the Ramada and the Lismore hotels are to the same building. The Ramada was closed at the time but was being renovated and was scheduled to reopen as the Lismore. (R. 79:9.)

perceived fire and crime risks? If the concerns are real, why is there no relevant record<sup>7</sup> of the kind of enforcement actions you would expect to see if the buildings were in such horrible shape that they were causing such terrible problems as crime, infant mortality, juvenile delinquency, and disease (§ 66.1105(1)(ae)1.a.)? If the concerns are real, why did every piece of testimony in the record talk about how nice they were, not how terrible they were? (R. 75:75-94.) Why do all of the photographs show clean, respectable buildings and not run-down dumps? (R. 87.)

In the end, even if those concerns are real, they do not get the City all the way to a statutory finding of blight. Section 66.1105(2)(ae)1.a. requires three things: the existence of one or more particular conditions (deterioration, fire risk, obsolescence, etc.) that are conducive to a particularly devastating result (juvenile delinquency, infant mortality, disease, etc.) and also harm the public health, safety, morals, or welfare. Missing any one is fatal to blight.

There is no evidence in the Record that any of the problematic conditions the City points to were causing, or even just leading to, any “ill health, transmission of disease, infant mortality, juvenile delinquency, or crime.” None of those are shown anywhere in the record except that there is slightly-higher crime in the area. But how are the fire risks or ventilation problems causing crime? There is no evidence that they are. That argument for blight fails, too.

**B.     Redevelopment In The Area Covered By The Third Amendment Would Have Occurred Even Without TID #10**

The statement in the 10/22/14 JRB Resolution that “the development described in the Project Plan would not occur without the creation [of TID #10],” is not supported by record evidence.

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<sup>7</sup> A Plaintiff asked for any such records via open record request. The City’s code enforcer had no documents indicating contacts with any of the properties. The City/County health department inspector provided a mere four documents spanning three decades, and no outstanding issues. (Video of 10/13/14 Common Council Meeting, Disc 1 at [38:20](#).)

This analysis is simpler than the analysis for the Third Amendment. The “development described in the Project Plan” consists almost entirely of the Confluence Mixed-Use Building, and the same developer’s other parcels – \$22.5 million worth, with only another million dollars’ worth at the Wells Fargo Site. (R. 71:14.) The question in main, then, is whether the evidence in the record supports a conclusion that the developer’s projects would not occur without TID #10.

To be sure, the developer claimed that TID #10 was necessary to continue with the Project. (See R. 73:27, 30 (developer agreement); 71:25-26 (JRB Report).) But government entities charged with making serious decisions and protecting the public purse must undertake a more diligent inquiry. Such an inquiry need not be exhaustive, but surely it must be more searching than simply accepting the self-serving claims of a developer asking for tens of millions of dollars in public subsidies. No developer who told the city, “A cash grant would be nice, but I’ll build this building either way,” would be likely to see a dime. A developer has to claim the money is necessary – particularly where a TID is in play – so therefore no claim that the money is necessary can be taken at face value.

And logically, development of the Confluence site would have proceeded without TID #10. Well before TID #10 was created, the developer had already spent millions purchasing the properties (prime riverfront real estate, downtown in the largest city in northwestern Wisconsin), razing buildings on them, and preparing the sites for development. (R. 75:96; Video of 8/18 Plan Commission Meeting at [45:05](#), [48:25](#).) It is unrealistic to think that after spending so much, the developer would have left it undeveloped without TIF money.

## **CONCLUSION**

TIF law provides an extraordinary funding mechanism for municipalities that fundamentally alters the ordinary flow of property tax revenue. To protect against abuse of that mechanism, the legislature created strict conditions that must be met before it may be used.

Courts must respect those limitations by requiring municipalities to meet them. Eau Claire has not done so. Voters requests that this Court enter judgment invalidating the decisions of the City and the JRB with respect to the Third Amendment and TID #10.

Respectfully submitted,  
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