STATE OF WISCONSIN
SUPREME COURT
NO. 2015AP1858

Voters with Facts, Pure Savage Enterprises, LLC, Wisconsin Three, LCC, 215 Farwell LLC, Dewloc, LLC, Leah Anderson, J. Peter Bartl, Cynthia Burton, Corinne Charlson, Maryjo Cohen, Jo Ann Hoeppner Cruz, Rachel Mantik, Judy Olson, Janeway Riley, Christine Webster, Dorothy Westermann, Janice Wnukowski, David Wood, and Paul Zank,
Plaintiffs-Appellants-Petitioners,

v.

City of Eau Claire and City of Eau Claire Joint Review Board,
Defendants-Respondents.

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

---

PLAINTIFFS-APPELLANTS-PETITIONERS' REPLY BRIEF

Richard M. Esenberg, WI Bar No. 1005622
Brian McGrath, WI Bar No. 1016840
Thomas C. Kamenick, WI Bar No. 1063682
WISCONSIN INSTITUTE FOR LAW & LIBERTY
1139 E. Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385
Attorneys for Plaintiffs-Appellants-Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. THE CITY DID NOT FILE A CROSS-PETITION AND THEREFORE CANNOT CHALLENGE ADVERSE COURT OF APPEALS RULINGS

Under Wis. Stat. § (Rule) 809.62(3m)(a), a party seeking to "reverse, vacate, or modify an adverse decision of the court of appeals" must file a cross-petition for review. A litigant can defend the court of appeals' "ultimate result" on an alternative ground, § (Rule) 809.62(3m)(b), but it cannot seek a more favorable result without filing a cross-petition.

The City did not do so, yet it seeks a more favorable result than it achieved in the Court of Appeals on two issues. First, it argues generally that none of the Plaintiffs have standing. (D. Br. 18-22.) Second, it argues specifically that Voters With Facts lacks associational standing. (*Id.*, 24-25.) However, contrary to both of those arguments, the Court of Appeals ruled that all the Plaintiffs have standing to bring a certiorari action. (Ct. App. Dec. ¶23; P. App. 112-13.) The City cannot ask this Court to rule that they do not or that VWF does not have associational standing.

II. THE COMPLAINT SUFFICIENTLY PLEADS STANDING AND A CLAIM

A. Voters Sufficiently Pled Facts to State a Claim

The City rests much of its argument on claimed "concessions" and "deficiencies." (*See* D. Br. 13-15.) Yet even a cursory review reveals that

(1) many of the "concessions" are not concessions at all; (2) those that are concessions are immaterial; and (3) the claimed deficiencies do not exist.

First, the Complaint did not concede that all of the steps for creating or amending a TID were properly followed. It specifically alleged multiple procedural failures. (R. 1:6, 17-24.)

Second, counsel for Voters hardly "conceded" that Voters "did not know" what a judicial review of legislative TIF determinations would look like. (*See* D. Br. 14.) Voters sufficiently pled facts to establish claims that the TIDs fail to meet statutory requirements. Voters pled that as a factual matter, the TIDs were not blighted under the statutory definition and development within the TIDs would have occurred without a TID. (R. 1:6, 17-18, 20-23.) Voters also alleged that 50% or more of each TID was not dilapidated, rundown, or "conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime." (R. 1:20, 22.) Those are factual questions, not legal ones; like any other facts they can be proven or disproven by evidence at trial.

The City's argument takes counsel's remarks out of context. Reading the entire passage, it is clear that counsel was saying he "did not know" how a trial would play out because the City had refused to respond

to discovery requests, and Voters could not detail what arguments the City might make without access to information within the City's control. (R. 20:34-37.) This Court's adoption of federal cases such as *Iqbal* and *Twombly* did not abolish notice pleading or require that a complaint list in detail every fact that might be adduced at trial.

Third, other concessions are immaterial. Yes, the actions at issue here are legislative, and courts do give deference[1] to local legislative bodies in some circumstances. Not these. TIDs can be constitutionally used for some purposes. Not these. The Legislature has not granted municipalities the authority to create TIDs whenever they believe it would be a good idea. TIDs may be created only under certain circumstances. Fidelity to the law requires that they be created only when those circumstances are present. Once the facts are known, courts are competent to judge whether a statutory definition has been satisfied. (*See* P. Br. 33-36.)

B. Voters Sufficiently Pled Standing

The flaws in the City's arguments here are obvious. It pulls a few vague quotes from generic standing cases that might – were this a question

[1] Even if any deference is appropriate in this case, deference alone cannot be used to dismiss a complaint. Any deference given to the City will factor in the proof stage.

of first impression – weigh against recognizing taxpayer standing in Wisconsin.

But taxpayer standing is not a question of first impression. Wisconsin courts have for over a hundred years recognized that taxpayers have standing to challenge the unlawful expenditures of tax funds. *See Mueller v. Eau Claire County*, 108 Wis. 304, 84 N.W. 430 (1900). Voters' briefs have cited more than 15 such cases. (*See* P. Br. 19-23, 26-27; P. Ct. App. Br. 19-25; R. 10:4-9.) **The City ignores them all**. It does not even attempt to explain why the fundamental principles of taxpayer standing do not apply here.

First principle – taxpayers are harmed by the unlawful expenditure of tax funds. *S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961). The City claims Voters do not allege any concrete injury, but the unlawful expenditure of tax funds is a concrete injury to taxpayers. *Id.* ("Any illegal expenditure of funds directly affects taxpayers and causes them to sustain a pecuniary loss.").

Second principle – alleging an unlawful expenditure of tax funds is sufficient to establish standing. Whether the expenditure actually is unlawful is irrelevant to standing. *Kaiser v. City of Mauston*, 99 Wis. 2d

345, 349, 299 N.W.2d 259 (Ct. App. 1980) (another case ignored by the City). The question of standing is distinct from the merits. *See, e.g.*, *McConkey v. Van Hollen*, 2010 WI 57, ¶13, 326 Wis. 2d 1, 783 N.W.2d 855.

Wisconsin has recognized taxpayer standing for over 100 years, and none of the awful things the City hints at have happened. The courts haven't been flooded with taxpayer claims. Courts haven't been substituting their own judgment for the policy choices of municipalities. This case doesn't require the expansion of taxpayer standing. The case stands squarely within existing boundaries.

C. This Case Is Ripe

The City claims that Voters failed to plead that spending will occur and claims further that any spending is speculative. Balderdash. The two TIF Project Plans require the expenditure of tens of millions of taxpayer dollars. (R. 1:16.) The City in fact has admitted in past pleadings that the project has been proceeding. (*See, e.g.*, Resp. to Pet. 1 ("[M]ost of the construction on the challenged project is complete pursuant to a public-private development agreement that included state budget **and local TIF disbursements** . . . .") (emphasis added).)

The City also claims that tax burden reallocation is merely speculative. But the reallocation of tax burdens is not something that could, possibly, maybe, happen, depending on what the City does. It is something that absolutely, for sure, no-matter-what, will happen. The TIF law requires it to happen. As noted in *Town of Baraboo v. Village of West Baraboo*, 2005 WI App 96, ¶¶32-34, 283 Wis. 2d 479, 699 N.W.2d 610, the legal effect of a TID shifts the burdens of taxes and causes some taxpayers to bear a greater burden than others. The very Attorney General Opinion the City cites for another proposition explains how a TID necessarily raises the mill rate of all taxpayers within a county. 65 Op. Att'y Gen. 194, 204-05 (1976); *see also* Wisconsin DOR, CITY/VILLAGE TAX INCREMENTAL FINANCING (TIF) MANUAL, § 5.4, *Effects on Other Taxing Jurisdictions* (2012), *available at* https://www.revenue.wi.gov/DOR%20Publications/tifman5-4.pdf (explaining how TIDs increase the tax burdens on school district, technical college district, and county taxpayers).

D. VWF Has Associational Standing

If this Court considers this argument at all, it should conclude VWF has associational standing. Under Wis. Stat. §184.07, "[a] nonprofit

association may assert a claim in its name on behalf of its members if one or more members of the nonprofit association have standing to assert a claim in their own right, the interests that the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member." VWF meets all three of those elements.

First, as demonstrated above, VWF's members, many of whom are Plaintiffs in this action, have standing. Second, VWF is seeking to challenge the TIDs that form the basis of the Confluence Project, which is germane to its purpose. (R. 1:6 (VWF's relevant purpose is to "question[] the propriety of the proposed developments that are the subject of this lawsuit").) Third, although VWF's members have standing, none of them are necessary parties for the claims brought in this suit and the relief requested. None of the claims or requested remedies are specific to any individual, but rather could be sought by any taxpayer.

III. VOTERS ARE NOT ASKING THIS COURT TO OVERRULE *SIGMA TAU* OR DECLARE THE ENTIRE TIF LAW UNCONSTITUTIONAL

The City claims that Voters are seeking to overturn *Sigma Tau* or strike down the entire TIF Law. (D. Br. 25, 37-38.) They are not. They

have asked to have these two[2] specific TIDs declared unconstitutional on an as-applied basis. A ruling in this case would apply only to these TIDs and those that also involve cash grants to property-tax-paying owners.

The City also claims that the Complaint lacked factual allegations distinguishing this case from *Sigma Tau*. (D. Br. 13, 18, 31.) But the Complaint alleges that the owner is being paid millions of dollars and explicitly distinguishes that arrangement from the one condoned in *Sigma Tau*. (R. 1:16, 27.)

The City also argues that the TIF Law prior to 2003 permitted cash grants to owners, based on an unsupported statement in a Department of Administration Fiscal Estimate. The text of the TIF Law did not support that reading, as cash grants were not included as permissible project costs. *See* Wis. Stat. §66.1105(2)(f) (2001). More importantly, even if the TIF Law allowed cash grants prior to 2003, *Sigma Tau* did not rule on the constitutionality of a TIF that involved cash grants directly to property owners. (*See* Ct. App. Dec. ¶46; P. App. 126.)

The City also complains that Voters did not allege what the cash grants were compensating the owner for. (*See* D. Br. 27-28.) While the

[2] Contrary to the City's claims, Voters challenge both TIDs on uniformity grounds. (R. 1:25 ("Declaratory Judgment relating to both TIDs").)

City does not explain why this is relevant, it is, in any event, not true. The Complaint alleges the money is being paid "for development costs," for "achieving specified milestones," "for the demolition of historic buildings," for "project costs" and to "reimburs[e] the owner" for the property taxes it pays. (R. 1:6, 16, 27.) No more detail is necessary for a "short and plain statement of the claim," *see* Wis. Stat. § (Rule) 802.02(1)(a), or to lay out a "plausible" scenario at the pleadings stage, *see Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶31, 356 Wis. 2d 665, 849 N.W.2d 693.

Voters argues that municipalities who use TIF funds to make cash payments back to a taxpayer are actually paying a tax rebate. This Court's cases have made clear that this violates the Uniformity clause even if the taxpayer has done something to increase the value of its property. (*See* P. Br. 40-48.) The City now says that because some of the properties within the TIDs are tax exempt, the Uniformity Clause challenge should be dismissed. First, the tax exempt status of any property is not in the record. More importantly, the City does not dispute that some of the TID property is property-tax-paying or that the owner is receiving TIF money to fund the construction of buildings it owns. If some of the property is tax exempt,

and if as a result some of the TIF payments are not unlawful, those are factual questions not to be resolved at the pleadings stage.

Finally, the City briefly cites to an Attorney General opinion and several out-of-state cases opining on the constitutionality of TIF Laws. (D. Br. 25, n. 7, 26, n. 8.) As the City failed to develop any argument around those sources, they should be disregarded. *See DOJ v. DWD*, 2015 WI 114, ¶33, 365 Wis. 2d 694, 875 N.W.2d 545. More importantly, the Opinion was limited to the statutory language and did not consider a situation where a property owner was getting the equivalent of a tax rebate from TIF funds. *See* 65 Op. Att'y Gen. 194 (1976). Likewise, with one exception, none of these cases addressed the question of whether a cash payment to a property owner in a TID operates as an unconstitutional tax rebate.

That one exception, *Delogu v. Maine*, 720 A.2d 1153, 1155-56 (Me. 1998), is inapplicable because this Court has interpreted our Constitution to prohibit what Maine's courts allow. In *Delogu*, the Supreme Judicial Court of Maine approved a legislative system providing various tax reimbursements to manufacturers within a TID. *Id.*, ¶¶4-6, 18. Unlike Wisconsin, though, Maine courts have not interpreted their Uniformity Clause to prohibit tax rebates, so long as everyone pays the same rate at the

front end. *Id.*, ¶18. To the contrary, Wisconsin courts look at substance over form and prohibit both express property tax rebates and payments that have the same effect as a property tax rebate. *See State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94, 270 N.W.2d 187 (1978); *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

IV. THE HISTORIC BUILDING CLAIM IS WELL PLED

At the risk of repetition, Voters' allegation that the development agreement did not prohibit reimbursement of demolition costs is not the "only" pertinent allegation. Voters made multiple positive allegations that the owner would in fact be reimbursed for the demolition of historic properties. (*See* P. Br. 51-52.) If in fact such reimbursement is happening, then the statute is violated regardless of what the legal documents do or do not say. That claim must survive for discovery.

Nor is it moot. Voters do not seek to halt the demolition of historic buildings. Rather, they seek to have the TID declared unlawful because it illegally reimburses the developer for demolition of historic buildings.

V. DECLARATORY JUDGMENT IS APPROPRIATE

The City's arguments in this regard largely involve its assertion that Voters have not identified a judicially-manageable standard for reviewing

whether the statutory requirements are met. As noted above, it is simply not true that Voters "does not know" what judicial review would look like. Voters have consistently argued that the statutory definition of blight provides all the guidance a court would need to determine whether it exists. (P. Br. 34-36; P. Ct. App. Br. 32; R. 10:13-14.) Judicial review of that question and whether development would occur in a TID without a TID would look like judicial review normally looks – competing testimony, review of documents, credibility determinations, weighing competing evidence, and a reasoned decision.

The City also claims that the grant of a liquor license is like the creation of a TID, but fails to explain how. In fact, they are quite different, and that difference is what makes a TIF challenge appropriate for declaratory judgment. Granting a liquor license or a conditional use permit is a highly subjective and discretionary task involving a city's own rules and regulations. A city can decide for itself under what terms and conditions it will grant a liquor license or permit, and in considering applications has wide latitude in how to proceed. Not so for a TID, which is governed by state law. While a city has discretion to decide whether or not it wants to create a TID, it has <u>no discretion</u> on what factual

prerequisites are necessary before a TID can be created or even on the procedure that must be used. The two processes share nothing of consequence in common.

Nor is this case analogous to those in which courts are asked to defer to the judgment of the Legislature. In this case, the Legislature placed clear limits on municipal creation of TIDs, and these limits must be enforced. (*See* P. Br. 33-36.)

Finally, this Court made clear in *Sigma Tau* that the actual elimination of blight was necessary to satisfy the Public Purpose Doctrine. 93 Wis. 2d 392, 407-09, 288 N.W.2d 85 (1980). Even if it would be possible for the legislature to decree that a public purpose is fulfilled by the creation of TIDs for other purposes, the City here acted pursuant to a statutory requirement that blight be present. To enforce those constitutional limitations, declaratory relief is necessary to ensure that the actual facts, not merely a sanitized public record, fulfill that requirement.

VI. RELIEF SHOULD NOT BE PROSPECTIVE ONLY

For the first time, the City argues that a decision in favor of Voters (presumably on the constitutional claims) should be applied prospectively only. By failing to raise it at any point previously, it should be deemed

waived. *See In re Ambac Assur. Corp.*, 2012 WI 22, ¶21, 339 Wis. 2d 48, 810 N.W.2d 450 (*quoting Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974)) ("'The practice of this court is not to consider an issue raised for the first time on appeal.'").

Furthermore, the City fails to cite to any authority on when prospective application is appropriate, citing one case merely for the proposition that prospective application has happened before. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

"Wisconsin generally adheres to the 'Blackstonian Doctrine,' which provides that a decision that clarifies, overrules, creates or changes a rule of law is to be applied retroactively." *In re Thiel*, 2001 WI App 52, ¶7, 241 Wis. 2d 439, 625 N.W.2d 321. Prospective application is the exception to the rule, and may only be applied when each of three specific conditions is met. *Id.*, ¶10 (citing *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 112, 280 N.W.2d 757 (1979)). The City has failed to argue, much less demonstrate, how each of those conditions is met.

Voters do not have space in their Reply Brief to fully address those three conditions, due to the City raising the issue for the first time in their Response Brief. This Court should reject the City's request.

Dated this 1st day of December, 2017.

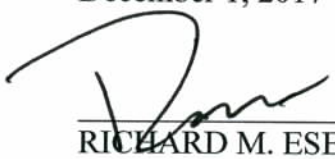
Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs-Appellants-Petitioners

Richard M. Esenberg, WBN 1005622
(414) 727-6367; rick@will-law.org
Brian McGrath WBN 1016840
(414)727-7412; brian@will-law.org
Thomas C. Kamenick, WBN 1063682
(414) 727-6368; tom@will-law.org
1139 E. Knapp St.
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of the portions of this brief referred to in section 809.19(8)(c)1. is 2,999 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: December 1, 2017

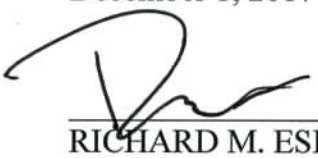


RICHARD M. ESENBERG

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of sections 809.19(12) and 809.19(13). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all opposing parties.

Dated: December 1, 2017



RICHARD M. ESENBERG