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FOR IMMEDIATE RELEASE

LEGAL CHALLENGE TO CITY OF EAU CLAIRE'S UNWARRATED EXPANSION OF TIF DISTRICTS

Will Letter Puts Eau Claire City Council on Notice
That Action on TIF #8 and TIF # 10 May Violate Wisconsin Law

October 14, 2014, Milwaukee, WI - Tax Incremental Financing Districts 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. Because the line between crony capitalism and the public welfare is thin, TIF Districts can be lawfully created only based on certain facts and under limited circumstances. It is unclear that these facts and circumstances exist with respect to certain existing and proposed TIF districts in Eau Claire.

On behalf of Voters with Facts, an Eau Claire volunteer organization, the Wisconsin Institute for Law & Liberty ("WILL") today sent the attached letter to the Eau Claire City Council, the City Plan Commission and the Eau Clare Joint Review Board. The letter calls into question the propriety of their recent actions under the Wisconsin statutes that regulate the creation of TIFs.

The City has been expanding a TIF district it first created in 2002, supposedly to facilitate the redevelopment of a "blighted" area within the City. It is also seeking to create a new TIF district covering the so-called Confluence Project in downtown Eau Claire, again using its power under Wisconsin law to address issues of urban blight. These projects are controversial. Voters with Facts has made the case that the areas covered by these new or expanded TIF districts do not qualify as blighted under the statutory definition. If they do not, the City is exceeding its authority under Wisconsin law. WILL's letter calls these facts to the attention of the City Council, explains the applicable law, and requests further information from the City. Legal action on behalf of Voters with Facts may be appropriate if the City cannot establish the proper basis for its actions under the Tax Increment Law.

Rick Esenberg, President and General Counsel of WILL, said: "We are representing Voters with Facts because we share their concerns. Wisconsin allows cities to create TIF districts for limited purposes such as the financing of redevelopment projects to remediate slum-like conditions in blighted areas. The law was not intended as a means for cities to use tax dollars to subsidize real estate developers for any project that catches their eye and seems to local government like a good idea. Eau Claire is not unique. The use of TIF laws to finance projects that go far beyond the

original legislative purpose appears to be a growing problem both in Wisconsin and in other states that permit tax incremental financing."

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The Wisconsin Institute for Law & Liberty is a non-profit, public interest law firm promoting the public interest in constitutional and open government, individual liberty, and a robust civil society. Further inquiries may be directed to Mr. Esenberg at rick@will-law.org.

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October 14, 2014

Mr. Stephen C. Nick, City Attorney
Via Electronic Mail: Stephen.Nick@CI.eau-claire.wi.us; Donna.Austad@eauclairewi.gov
City of Eau Claire
203 S. Farwell Street
Eau Claire, Wisconsin 54702-5148

Re: Amendment No. 3 TIF District # 8; TIF District # 10

Dear Mr. Nick:

The Wisconsin Institute for Law & Liberty is a public policy legal center that seeks to advance the rule of law and the public interest in open and transparent government. WILL represents Voters with Facts. Our client has serious concerns regarding the manner in which the City Council, the Plan Commission, and the Joint Review Board have purported to comply with the Wisconsin statutes that authorize tax incremental financing. In particular, there are substantial and serious questions whether they have exceeded their authority in connection with their recent actions in expanding the boundaries of Eau Claire TIF District # 8 and with respect to plans underway to create yet another such district, Eau Claire TIF District # 10.

The Statutory Framework

The Wisconsin statutes relating to tax incremental financing ("TIF") were enacted in 1975. Their purpose was to provide Wisconsin municipalities with a method for financing certain kinds of urban redevelopment projects. Development projects that can be financed using TIF include those that are intended to assist in the redevelopment and revitalization of "blighted" urban areas as defined by the Tax Increment Law. Municipalities are permitted to create tax districts in which the incremental tax revenues from increasing property values that are presumed to result from a targeted development project may be committed to pay some or all of the development costs. Because the statutes permits the diversion of revenue that would ordinarily go to other taxing jurisdictions, they provide that municipal action must be approved by a Joint Review Board that includes representatives of the governmental entities that will be affected.

The TIF districts at issue here have been specifically proposed or created to address the issue of urban blight within the City of Eau Claire. We understand that questions have been raised with respect to the merits of the development project plans that are to be funded by the TIFs. As you know, our client has been involved in posing some of those questions. We do not intend to argue the merits of the development plans here. They are not relevant to our analysis.

The Wisconsin statutes specify in detail the procedures that Wisconsin cities must follow in order to create a TIF district. They have not been given the power to create TIFs for general purposes of urban development. To the contrary, a TIF may be created for one of only four purposes: (a) addressing blighted areas as defined in the statute; (b) urban rehabilitation or conservation under Wis. Stat. §66.137(2m); industrial development under Wis. Stat. §66.1101; and the promotion of mixed use development as defined by Wis. Stat. 66.105(2)(cm). The plans for the amendment to TIF District # 8 and the creation of TIF District # 10 make it clear that the city of Eau Claire is invoking its authority under that part of the statute that relates to the elimination of blight.

A. Blight

The Tax Increment Law, Wis. Stat. §66.1105 contains the definition of blight. Section 66.1105(2)(ae)1. provides that "blighted area" means any of the following:

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.

b. An area which is predominantly open and which consists primarily of an abandoned highway corridor as defined in s. 66.1333(2m)(a), or that consists of land on 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 arrest the sound growth of the community.

The first of these two definitions applies to urban areas that contain structures, buildings or improvements. The second applies to urban areas that are "predominantly open." The question is whether any of the areas included within the amendment to TIF 8 or the proposed TIF 10 could possibly fall within either of these definitions. We do not believe that they can, for the reasons described in detail below. Neither of them is "predominantly open" and there is no evidence that these areas of downtown Eau Claire are slums that pose an imminent danger to public health, safety, morals or welfare.

Even if by some stretch of the imagination it could be argued that the areas in question are blighted under the statutory definition, neither the Planning Commission nor the City Council have made the required findings of fact that would support that position.

Thus, without regard to any factual dispute over the question of blight, the failure of the City and the Planning Commission to make the required statutory findings calls the legality of their actions into serious question.

B. Required Findings of Fact

In order to validly address the issue of blight and therefore lawfully create the TIF Districts in question here, the statutes provide that the Common Council must make a "finding" 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. "Blighted area" is a defined term as described above. Thus, the statute requires a "finding" by the Common Council that the areas covered by the proposed TIF Districts properly fall within the definition of blight.

The requirement for a "finding" by the Common Council obviously involves something more than the mere assertion, unsupported by any facts, that the statutory definition of blight has been satisfied. That finding must be supported by the record. The actions of the City Council are subject to judicial review, and at a minimum it must articulate the basis for its findings in way a court can understand. As the Wisconsin Supreme Court has explained, "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." *Stas v. Milwaukee Civil Service Comm'n.*, 75 Wis. 2d 465, 473 (1977), quoting *U.S. v. Chicago, Milwaukee, St. Paul, and Pacific R. Co.*, 294 U.S. 499, 511 (1935).

The Common Council's conclusory assertion that areas within the proposed TIF districts are blighted cannot, without more, satisfy this standard. The "finding" required by the statute requires a record containing some facts and some explanation of how those facts satisfy the statutory definition of "blighted area." No such finding has been made with respect to TIF # 8. And given the actual facts, it is by no means clear that such findings could ever be made with respect to proposed TIF # 10.

C. The Joint Review Board and the "but for" test.

The purpose of a TIF is to create a dedicated revenue stream – the tax increment associated with the increasing value of properties in the district – that can be used to finance development projects within the district. This deprives the enacting City of revenue that could otherwise be used for general purposes. It also deprives other taxing jurisdictions, such as counties or school districts, from their share of the incremental tax revenue associated with the TIF.

The Wisconsin statutes therefore require the creation of a Joint Review Board that must review and approve the creation of any TIF districts within their jurisdiction. The Joint Review Board must include a representative of each of the taxing entities that will be affected by the creation of the TIF. Wis. Stat §66.1105(4m). The Joint Review Board must consider and approve any municipal resolution creating or amending a TIF district. Wis. Stat. §66.1105(4)(gs).

The statutes require the Joint Review Board to review the public record, planning documents, and the resolution passed by the local legislative body, and to hold one or more hearings on the TIF proposal. And the statutes specifically provide that "[t]he board may not approve the

resolution [creating the TIF] 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." Wis. Stat. §66.1105(4m)(b)1. and 2. (emphasis added).

This "but for" test is intended to check the power of municipalities and to assure that there is broad agreement within all of the affected communities that public funds are in fact being spent for projects that are appropriate for funding using TIF. Before the Joint Review Board approves the creation of a TIF, it is required to consider the record and to make a *judgment* that the "but for" test has been satisfied. As is the case for the findings that the city is required to make, an unsupported and conclusory assertion that the test has been met should not suffice. The Board must give some explanation of the facts it has considered, and the reasons it has reached the judgment that is required. It has not done so here.

Amendment No. 3 to TIF District 8

According to Amendment 3 to the Project Plan, the City of Eau Claire created TIF District # 8 in 2002 to eliminate blight by providing financing for utilities, streets, parking, park improvements and property acquisition in the downtown area. The Plan has been amended three times. The first of these amendments did not change the boundaries of the district, but provided for the financing of additional infrastructure development and developer incentives to support the Phoenix Parkside project.

More recently, the City enlarged the TIF boundaries to include the site of an operating post office (amendment 2) and three parcels that include the sites of Green Tree Hotel, Superior Auto Body, and AT&T (amendment 3). The stated purpose of these expansions was to provide additional funding for amendments to the Project Plan involving additional infrastructure improvement and a proposed municipal parking ramp that will serve the downtown area and the proposed Confluence Community Arts Facility.

None of the subsequent amendments that have enlarged the boundaries of the original district have referenced any purpose other than the elimination of blight. And, according to Amendment No. 3, "[t]he third amendment to the TIF is intended to address another blighted area." See Amendment at 3.

As we have said, the Wisconsin statutes do not permit a City to create or expand a TIF district simply because it endorses and wishes to fund a particular development project. That is true even if the Common Council believes the project in question presents a wonderful opportunity to foster urban growth and economic vitality. Cities have other methods to encourage or finance such development if it is in their interest to do so. The statutes limit the authority of cities to create TIF districts, to the purposes that are specified in the Tax Increment Law. In this case the City has stated that the recent amendments to TIF District 8 are intended to address the problem of urban blight.

Given its stated purpose, the City's power to create or amend TIF District # 8 depends upon whether or not it can reasonably find that the proposed district falls within the definition of

"blighted area" set forth in the statute. Again, section 66.1105(4)(gm)4.a. requires the Common Council to make a finding that "[n]ot less than 50%, by area, of the real property within the [proposed] district is…a blighted area." We do not believe that the district, as recently amended, could possibly satisfy that test.

As noted above, the statutory definition of "blighted area" contains two sections. The first section deals with areas that contain structures, buildings or other improvement. Such areas are blighted if conditions relating to the structures, buildings or improvements are "conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime and is detrimental to the public health, safety, morals or welfare." The recent amendments to TIF District 8 have included parcels that contain the then operating Eau Claire Post Office, an operating auto repair business, and a hotel that is being redeveloped by private investors. There is no indication in the project plans associated with these amendments that these or any other structures or buildings involved posed a threat to public health. Nor is there any evidence that more than 50% by area of the real property within either the amendment area or revised TIF District 8 as a whole includes buildings or structures that fit within the statutory definition, a definition that by its own terms is intended to identify "slums."

The second section deals with areas that are "predominantly open." They must be open as the result of the demolition of buildings or structures, or the abandonment of a highway corridor. The parcels added to District # 8 by the two recent amendments cannot possibly satisfy this definition, since all of them contain structures that have not been demolished. Although District # 8 does contain limited open space as the result of structures that have been demolished, most of the district as modified by amendment consists of land on which there are existing structures, or public land which has never been improved such as Phoenix Park. It is not "predominantly open" under the statutory definition.

There is no indication in the minutes of the Plan Commission meeting that the Commission considered or even received any evidence in support of its decision that the properties within amended TIF District # 8 were "blighted" within either statutory definition. Indeed, the record shows that the citizens present at the meeting highlighted the statutory definition of blight and explained why it does not apply to the properties in question. The minutes do not disclose that any evidence was presented to the contrary; and they do not disclose why the Commission decided to ignore these concerns. They state only that the Plan Commission is "approving the TIF definition of blight" and approving the project plan. What the first of these decisions is supposed to mean is open to question, as the Commission has no power to approve any definition of blight. Its job is to apply the statutory definition of blight to the actual facts relating to properties within a proposed district. There is no indication that the Plan Commission did so in this case.

In any event, amendment No. 3 to the Project Plan for TIF 8 makes no reference to any specified factors in either part of the statutory definition of "blighted area." There are no facts that suggest slum-like conditions or that any of the structures within the district pose a threat to public health, safety or welfare. There is no support for the proposition that area within the district is "predominantly open" as required by the second definition. The only discussion of blight in the Project Plan consists of the statement that "[t]he third amendment to the TIF is intended to

address another blighted area…The amended area is 67% blighted." See September 9, 2014 Plan Amendment at 3. The only support for this statement is a map attached to the plan as Exhibit 2, which nothing more than labels two of the three parcels being added to the TIF as "blighted." These are little more than conclusory assertions and cannot possibly assist the Common Council in making the required finding that their action in amending TIF District # 8 is consistent with the statutory requirements for the creation or amendment of a TIF district that qualifies as a blighted area.

The City Council held a public hearing on the proposed amendment to TIF # 8 on September 8, 2014. The information packet prepared for that meeting contains no information that is relevant to the question of blight, except for a reference to the project plan amendment for TIF # 8. As noted, the project plan amendment contains nothing more than conclusory assertions that the amendment satisfies the statutory test for blight.

The City Council considered amendment No. 3 to TIF # 8 at its meeting on September 9, 2014. The amendment was approved and a resolution to that effect was adopted. There is no indication in the minutes of the September 9, 2014 meeting that any evidence was considered on the question of blight, or that the issue was even discussed. The information packet prepared for the City Council in connection with the resolution contains no facts that are pertinent to that question, except again a reference to the amended project plan.

Amendment No. 3 to TIF District # 8 was taken up by the City Council in order to address issues relating to blight within that district. There is no question that in order to create or amend a TIF district for that purpose the City Council must make a finding that the condition of properties within the district is such that it falls within the statutory definition of blighted area. The City Council has not done so in this case, quite simply because there are no facts in the record before it that could possibly support such a finding.

The resolution does suggest that the Council's finding relating to the issue of blight was allegedly based on "findings" by the Plan Commission to that effect that the amended district qualifies as a blighted area. See September 9, 2014 Resolution (fifth "whereas" clause.) But the Plan Commission made no such findings in this case.

The City Council's resolution is not based on record facts, and does nothing more than parrot the statutory requirements. That is not, and cannot be, the finding that the Council itself is required to make as to the question of blight. In the absence of such a finding based on actual facts in the record before it, the City Council's amendment to TIF District # 8 does not comply with the requirements of Wisconsin law.

The validity of the Joint Review Board's approval of the amendment to TIF District # 8 is subject to serious doubt as well. As noted above, the Joint Review Board must make a judgment that the creation or amendment of a TIF district passes the "but for" test required by the statutes. The written record before the Board consisted of a two page "Joint Review Board Report." The report asserts that "developers demand assurance that parking will be available in easily accessible locations within reasonable distances from their buildings." That may be true, but this barebones assertion neither describes nor explains why, if the developers "demand" parking, they

will not provide it for themselves or rely on the free market to meet their needs. These assertions, even if true, do not satisfy the “but for” test. The Wisconsin statutes do not permit cities to create TIF districts at the whim or demand of developers.

TIF District #10

The Project Plan for TIF District # 10 states clearly that the district is being created to “eliminate blight.” See Project Plan at 1. The Plan says that more than 50% of the area within the proposed district exhibits “blighted conditions. ” The Plan offers no factual support for these statements.

More to the point, however, these statements do not actually satisfy the requirements of the definition of “blighted area” set forth in §66.1105(2)(ae). That section requires not only that structures be dilapidated, deteriorated, old or obsolescent, but that as a result of those factors they are found to present a danger to public health, safety or welfare. There are no facts set forth in the Project Plan that would permit the City Council to make a finding that any areas within TIF District # 10 satisfy the statutory definition of blight. The area is not predominantly open and there is no indication that the condition of buildings or structures within the proposed district are **“**conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime and is detrimental to the public health, safety, morals or welfare.”

And in any event, it appears to be the case that almost all of the properties designated as blighted in proposed TIF # 10 are already in the hands of a developer. In fact that developer has already torn down almost all of the overlay properties (those in both TIF 8 and the proposed TIF # 10). It may well be the case that the developer would enjoy the benefit of contributions that the City might make to its project as the result of tax incremental financing, but that is not the standard the City must satisfy to create a TIF district. The City must show that the property in question presents slum-like conditions and poses a danger to public health or welfare. That is manifestly not the case for much of the property in proposed TIF District # 10.

The creation of TIF District # 10 was considered and endorsed by the Plan Commission at its meeting on August 18, 2014, the same meeting during which it endorsed Amendment three to TIF No. 8. The citizens present at the meeting also explained that the blight definition did not apply to the allegedly blighted properties in TIF 10. The minutes of that meeting do not disclose what, if any, evidence the Plan Commission considered in support of its statement that TIF # 10 qualifies as blighted area under the statute. It says only that the district, like TIF # 8, has “blighted property.” This statement, without more, is plainly insufficient to establish that TIF # 10 falls within the statutory definition.

We understand that the City Council is prepared to consider a resolution approving TIF District #10 at its meeting later today. We hope that you will bring the concerns that we have raised to the attention of the Council before it acts on that proposal.

Conclusion

For the reasons set forth above, we do not believe that the actions of the City Plan Commission, the Eau Claire Common Council and the Joint Review board in amending TIF District # 8 have

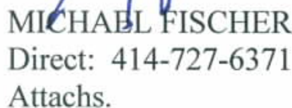
been in compliance with Wisconsin law. Our analysis raises the same questions, for the same reasons, should the City Council decide to adopt a resolution approving TIF District # 10. We would, of course, be willing to consider any additional facts or legal authorities that you or your clients believe are pertinent to our analysis.

It is our understanding that the City is proceeding with design and engineering work on the parking structure and other improvements associated with the amendment to TIF District # 8, and that it is negotiating with the developer of the Confluence Project with respect to projects that may be funded under TIF District # 10. It is our position that it may be unlawful for the City to expend any funds or to commit to spend any funds generated by tax incremental financing related to either of those districts.

We understand that you represent the City, and in writing you this letter we assume that you also represent the Plan Commission and the Joint Review Board. If you will not be acting as counsel for the Commission or the Board, we ask that you advise of that fact immediately. Attached to this letter are Open Records Law requests directed to the custodian of records for the Plan Commission, the City Council and the Joint Review Board. We ask that you forward them to the appropriate persons within the City administration. If you are not able or willing to do so, please advise us immediately so that we can make alternative arrangements for service.

Our client is an Eau Claire organization and many of its volunteers are City taxpayers. They do not assert these claims lightly, and we hope that you will give them due consideration.

Very truly yours,
WISCONSIN INSTITUTE FOR LAW & LIBERTY



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October 14, 2014

Attn: CUSTODIAN OF RECORDS
Eau Claire Joint Review Board.
City of Eau Claire
203 S. Farwell Street
Eau Claire, Wisconsin 54702-5148

Re: Open Records Request

Dear Sir or Madam:

This letter is a request for the following records, made under Wisconsin's Open Records Law, Wis. Stat. §§ 19.31-19.39:

(1) All documents reviewed or considered by the Joint Review Board in connection with their decision that the development described in Amendment No. 3 to TIF District #8 would not occur without the amendment.

Please be aware that the Open Records Law defines "record" to include information that is maintained on paper as well as electronically, such as data files and unprinted emails. Wis. Stat. § 19.32(2).

If these records are stored electronically, please provide them in that electronic format via email to tom@will-law.org. Otherwise, they may be mailed to the address above.

Please also be aware that the Open Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat. § 19.32(1). If you deny my request, the law requires you to do so in writing and state what part of the law you believe entitles you to deny my request. Wis. Stat. § 19.35(4)(a).

The Open Records Law states that you may charge for "the actual, necessary and direct cost" of locating records, if this exceeds $50, for photocopies, and for postage. Wis. Stat. § 19.35(3). Please advise me before processing this request if the total cost will exceed $50.

As you know, the law requires you to respond to this request "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a).

If you are not the records custodian for this information, please forward this request to the appropriate person.

Also, please contact me if I can help clarify or refine this request.

Very truly yours,
WISCONSIN INSTITUTE FOR LAW & LIBERTY

MICHAEL FISCHER
Direct: 414-727-6371

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Attn: CUSTODIAN OF RECORDS
Eau Claire Plan Commission/
Eau Claire City Council
City of Eau Claire
203 S. Farwell Street
Eau Claire, Wisconsin 54702-5148

Re: Open Records Request

Dear Sir or Madam:

This letter is a request for the following records, made under Wisconsin's Open Records Law, Wis. Stat. §§ 19.31-19.39:

(1) All documents reviewed or considered by the Eau Claire Plan Commission in connection with their consideration of Amendment No. 3 to TIF District # 8 that relate or refer to the issues of blight or blighted property;

(2) All documents reviewed or considered by the Eau Claire Plan Commission in connection with their consideration of the creation of TIF District # 10 that relate or refer to the issues of blight or blighted property;

(3) All documents reviewed or considered by the Eau Claire City Council in connection with their consideration of Amendment No. 3 to TIF District # 8 that relate or refer to the issues of blight or blighted property.

Please be aware that the Open Records Law defines "record" to include information that is maintained on paper as well as electronically, such as data files and unprinted emails. Wis. Stat. § 19.32(2).

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