STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY

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

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

Case No. 15-CV-175

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

The Defendants' Brief in Support of Motion to Dismiss ("Def. Br.") is replete with factual allegations that are at times irrelevant, at times unsupported, at times contradictory to the allegations of the Complaint, and at all times inappropriate for this stage of litigation. A motion to dismiss tests the legal sufficiency of the allegations of the complaint; it is not a vehicle for defendants to introduce evidence and challenge the complaint's factual assertions. Rather than testing the Complaint, the Defendants are attempting to tell their own story (without providing an evidentiary basis for their version of events), and for that reason alone, this Motion should be denied.

Furthermore, the Defendants seriously misconstrue the law of taxpayer standing in Wisconsin and make myriad flawed arguments in arguing for dismissal of this suit. For the reasons set forth below, this Motion should be denied.

I. DEFENDANTS IMPROPERLY MISCHARACTERIZE THE COMPLAINT AND INCLUDE UNSUPPORTED FACTUAL ALLEGATIONS CONTRADICTING THE COMPLAINT.

Whether a complaint has properly pled a cause of action is a question of law, not of fact. *Hermann v. Town of Delavan*, 215 Wis. 2d 370, ¶4, 572 N.W.2d 855 (1998). Because the purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the

complaint, all facts pled and all reasonable inferences from those facts are taken as admitted. *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶5, 262 Wis. 2d 127, 663 N.W.2d. 715. The complaint must be liberally construed in favor of stating a claim, and should be dismissed only if it is clear that there are no conditions under which the plaintiff could prevail. *Hermann*, 215 Wis. 2d 370, ¶4. "The court is not to be concerned with whether the plaintiff can actually prove the allegations . . . . The underlying facts alleged are taken as true, and only the legal premises derived therefrom are challenged." *Keller v. Welles Dept. Store of Racine*, 88 Wis. 2d 24, 29, 276 N.W.2d 319 (1979). Because the allegations of the Complaint must be taken as true, the Defendants, at this stage, cannot prevail by simply contradicting them. A motion to dismiss must argue that, even if true, the allegations of the complaint do not state a claim. Whether they are true is a question for another day.

The Defendants play fast and loose with rules of evidence and procedure in their Brief. They seek to put their version of events in front of the Court at this early stage by making repeated factual allegations that are not only contrary to the allegations of the Complaint, but lack any evidentiary basis. These are not merely peripheral facts of little import, but facts that form the core of the Plaintiffs' claims, such as whether the area in question was truly blighted and whether the Racine Common Council and Joint Review Board ("JRB") actually had a record in front of them that supported a finding of blight.

For example, the Defendants make this lengthy statement as if it were fact:

> Although significant progress had been made in Eau Claire's downtown, blighted areas still remained. The Ramada Inn and Green Tree Hotel were closed and deteriorating. Many downtown buildings showed significant signs of age and distress. Building code violations, nonconforming uses, and police responses were more common downtown than other areas of the City. Structural improvements were difficult or impossible in many downtown buildings due to shared walls and basements. Shared walls and common basements also created dangerous fire hazards.

(Def. Br. 3.) Those statements not only lack any evidentiary support, they contradict the assertions of the Complaint, which must be accepted as true. The Complaint alleges that blighted conditions sufficient to create a TID did not exist and further that the record before the City Council did not support a conclusion that the area was blighted. (Compl., ¶¶44, 52, 59, 72-75, 83-86.)

Similarly, the Defendants also claim that "[T]he City Council and Joint Review Board were provided an extensive record demonstrating blight." (Def. Br. 15.) That statement has no evidentiary support. It also contradicts the Complaint, which alleges that the record before the City Council did not demonstrate blight. (Compl., ¶¶52, 59, 72.)

The Defendants' Brief also contains statements that, while not contradicting the Complaint, are not based in or reasonably inferable from the Complaint and lack separate evidentiary support. For example, "TIF investment in this area eventually contributed to the construction of Phoenix Park as well as the JAMF and RCU buildings." (Def. Br. 3.)

Finally, the Defendants make repeated assertions about the Complaint itself that are incorrect, such as "the Plaintiffs fail to allege any connection between TIF funds and the acquisition or demolition of historic buildings." (Def. Br. 16.) But the Complaint alleges that TIF funds will be used to reimburse the developer for costs of demolishing the historic buildings located on the site where the Confluence Project will be built. (Compl., ¶¶94-96.)

Their brief is so full of these unsupported and contradictory factual assertions that they cannot easily be listed here, and so are detailed (along with the allegations of the Complaint they contradict) in the attached Appendix.

These voluminous mischaracterizations of the Complaint and improper attempts to challenge the factual averments of the Complaint by themselves demonstrate that the

Defendants' various arguments that the Complaint fails to state a claim upon which relief may be granted are erroneous. Nearly every time the Defendants claim the Plaintiffs failed to make an allegation, the Plaintiffs in fact did so. The only things the Defendants accurately state that the Plaintiffs failed to allege are irrelevant.[1] On that ground alone, the Defendants' Motion fails.[2] But as demonstrated below, their legal arguments fail as well.

II. THE INDIVIDUAL PLAINTIFFS HAVE TAXPAYER STANDING TO CHALLENGE THE TIDs VIA DECLARATORY JUDGMENT OR CERTIORARI.

The Defendants argue that the Plaintiffs lack standing to bring either a declaratory judgment or certiorari claim. (Def. Br. 9-13.) In doing so, the Defendants seriously distort the robust law of taxpayer standing in Wisconsin.

"In order to maintain a taxpayers' action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss . . . ." *S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 21, 112 N.W.2d 177 (1961), citing *McClutchey v. Milwaukee County*, 239 Wis. 139, 300 N. W. 224 (1941) & 137 A. L. R. 628, and cases cited therein. Taxpayers have an easy time establishing that they will suffer pecuniary loss when tax revenues will be spent in an allegedly unlawful manner. That is because "a taxpayer [has] a financial interest in public funds" and "[a]ny illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *Id.* at 22 (emphasis added).

[1] For example, the Defendants state correctly that "the Plaintiffs allege no facts demonstrating the City has contributed TIF funds to the Confluence Project." (Def. Br. 6.) That is irrelevant, however, because the Plaintiffs are seeking to enjoin future payments by the City to the project developer.

[2] The Defendants may argue that their Motion should be converted to a motion for summary judgment under Wis. Stat. § 802.06(2)(b). However, that would be inappropriate, because the Defendants have failed to place into the record any evidence that contradicts the allegations of the Complaint. The only evidence they entered was the full text of public documents referenced in the Complaint. It would also be unfair to the Plaintiffs, who have not been given the opportunity to engage in the lengthy and detailed discovery this case is likely to entail. However, if the Court does decide to consider this Motion as one for summary judgment, the Plaintiffs request that the Court inform them of that decision and give them a substantial extension of time to conduct discovery and file evidentiary materials. *See Alliance Laundry Systems LLC v. Stroh Die Casting Co., Inc.*, 2008 WI App 180, ¶¶19-24, 315 Wis. 2d 143, 763 N.W.2d 167 (court must provide notice that it might convert to a summary judgment motion, and should provide notice if it intends to do so, in order to give the opposing party a fair opportunity to respond).

This is well-settled law, not some obscure principle. *See, e.g.*, *Coyne v. Walker*, 2015 WI App 21, 361 Wis. 2d 225, 862 N.W.2d 606 (taxpayer challenge to statutory change to Superintendent of Public Instruction's rulemaking authority); *Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993) (taxpayer challenge to transfer of a county museum to a private organization); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988) (taxpayer challenge to "Frankenstein" veto); *Appleton v. Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988) (taxpayer challenge to statutory scheme for apportionment after annexation of a town); *Tooley v. O'Connell*, 77 Wis. 2d 422, 253 N.W.2d 335 (1977) (taxpayer challenge to statutory plan for financing city schools from property taxes); *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976) (taxpayer challenge to negative-aid school financing); *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1976) (taxpayer challenge to constitutionality of veto); *Thompson v. Kenosha*, 64 Wis. 2d 673, 221 N.W.2d 845 (1974) (taxpayer challenge to statute allowing counties to adopt county assessors); *West Milwaukee v. Area Bd. of Vocational, Tech. and Adult Ed.*, 51 Wis. 2d 356, 187 N.W.2d 387 (1971) (taxpayer challenge to statute allowing for area vocational districts); *Columbia County v. Bd. of Trustees of Wisconsin Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962) (taxpayer challenge to statute mandating all counties join the welfare fund); *Fed'l Paving Corp. v. Prudisch*, 235 Wis. 527, 293 N.W. 156 (1940) (taxpayer challenge to statute allowing certain cities to pay funds under contracts later found void); *O'Donnell v. Reivitz*, 144 Wis. 2d 717, 424 N.W.2d 733 (Ct. App. 1988) (taxpayer challenge to statute requiring counties to fund youth aid programs); *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983) (taxpayer challenge to waiver of competitive bidding requirements); *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 299 N.W.2d 259 (Ct. App. 1980) (taxpayer challenge to lake rehabilitation plan).

The Defendants list several municipal actions they fear could be challenged under the Plaintiffs' theory of standing. (Def. Br. 10-11.) But this "parade of horribles" is actually a list of cases that could well be brought under Wisconsin's rule of taxpayer standing. All involve the expenditure of tax money, just like the Plaintiffs' list of cases finding taxpayer standing. For example, if a city council made a "long term investment decision" that violated federal securities law, taxpayers could challenge that action. If the "city council borrow[ed] money for a large public works project in excess of applicable debt limits," taxpayers could challenge that action. When a complaint alleges that the expenditure of public funds will be unlawful, that establishes the harm necessary for taxpayer standing. *S.D. Realty*, 15 Wis. 2d at 21-22.

The Complaint alleges pecuniary harm caused by the TIDs. Borrowing language directly from *S.D. Realty*, it alleges that the Plaintiffs suffer the types of harms recognized in that case – that tax funds will be spent unlawfully and that those tax funds will be unavailable for other, legitimate, purposes. (Compl., ¶¶79, 91.) Therefore, the Complaint contains sufficient allegations to establish that the Plaintiffs have the necessary interest in the controversy to establish their standing to bring this case.

It is true that the Complaint does not use the explicit phrase "pecuniary harm." Instead, the Plaintiffs used more specific language defining their particular pecuniary harm rather than the conclusory label "pecuniary harm." The illegal expenditure of taxpayer funds is a pecuniary harm to taxpayers. *S.D. Realty*, 15 Wis. 2d at 22. The unavailability of funds for legitimate purposes is a pecuniary harm to taxpayers. *Id.* Therefore, the Plaintiffs alleged pecuniary harm to themselves when they alleged that taxpayer funds would be spent unlawfully and be unavailable for legitimate purposes.

Even were the Complaint less detailed, courts construe complaints liberally to do substantial justice. *Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448. Several courts have explicitly held that an inference of pecuniary harm may be drawn merely from the allegation that public funds will be spent unlawfully. For example, the supreme court in *Thompson v. Kenosha* explained:

> Liberally construed the plaintiffs' complaint stands as a taxpayers' suit to enjoin illegal governmental expenditure. True, the complaint does not specifically allege that the plaintiffs, individually or as a class, have suffered any loss; that defect however is not fatal. The allegation that one taxpayer is suing to vindicate rights of all taxpayers may be implied. As to the allegation of pecuniary loss, the complaint does state that plaintiffs are taxpayers and that sec. 70.99, Stats., providing for creation of a countywide assessor system, is unconstitutional. Under sec. 70.99(12) the state and the county jointly finance the operation of the system. Thus the statute does require expenditure of public money, and if the statute were held unconstitutional, this expenditure would also be illegal. That sufficiently establishes plaintiffs' pecuniary loss, according to S. D. Realty Co. v. Sewerage Comm.

64 Wis. 2d at 679-80 (footnotes omitted, emphasis added); *see also State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 436, 424 N.W.2d 385 (1988) citing *Thompson v. Kenosha*, 64 Wis. 2d at 679 ("[W]e need not consider the absence of any specific allegation in the petition that [the taxpayer plaintiffs], either individually or as a class, have suffered pecuniary loss, to be fatal."); *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶18, 275 Wis. 2d 533, 685 N.W.2d 573, citing *Thompson v. Kenosha*, 64 Wis. 2d at 679 ("When a challenge is made to standing as alleged in a complaint, we take the allegations in the complaint as true and liberally construe them in the plaintiff's favor.); *Gottlieb v. City of Milwaukee*, 90 Wis. 2d 86, 92, 279 N.W.2d 479 (Ct. App. 1979) citing *Thompson v. Kenosha*, 64 Wis. 2d at 680 ("When taxpayers sue for declaratory relief from a statute requiring expenditure of public funds, the complaint, even though it does not allege pecuniary loss, will be liberally construed to incorporate such missing allegations.").

The Defendants rely on *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, 259 Wis. 2d 107, 655 N.W.2d 189. However, that case is easily distinguishable, because in it the plaintiff failed to allege that any harm would accrue to taxpayers from the expenditure of public funds. In that case, Hartland "rezoned a single parcel of land to allow for certain conditional uses and . . . conveyed the parcel to a private party." *Id.*, ¶22. Nowhere in the opinion does the court indicate that these actions would require the expenditure of public funds. The court ruled that Lake Country had not demonstrated it had standing, because it failed to "demonstrate any risk of pecuniary loss or substantial injury," *id.*, ¶23, noting that "Lake Country fail[ed] to allege any facts even remotely suggesting that it is adversely affected, financially or otherwise, by the Village's actions, *id.*, ¶19, and that "[i]t does not claim any pecuniary loss or other form of damage or injury," *id.*, ¶14. Contrary to *Lake Country*, here the Plaintiffs claim pecuniary loss because the TIDs require the unlawful expenditure of public funds.

The Defendants also argue that under *Town of Baraboo v. Village of West Baraboo*, 2005 WI App 96, 283 Wis. 2d 479, 699 N.W.2d 610, taxpayers are not among the entities who are permitted to bring challenges to TIDs. (Def. Br. 11-12.) *Baraboo* cannot be read so broadly. *Baraboo* held that a town did not have standing to challenge a TID because it failed to identify any "financial interests of its own, as a governing and taxing entity, that [we]re adversely affected by the enlargement of the Village's TIF district." *Id.* at 505. The town tried to argue that its taxpayers were negatively affected by the TIF, but the court concluded that the town could not rely on harms to its taxpayers for its own standing. *Id.* at 504-06.

The *Baraboo* court not only did not rule that taxpayers lack standing to challenge TIDs, the court's language at the very least implies that taxpayers do have such standing. It first noted

that "in making the inquiry [into standing], we are to view the plaintiff's interests liberally, not restrictively, and grant standing if the harm to those interests is 'no more than a trifle,'" *Id.* at 505 (quoting *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 315-16, 529 N.W.2d 245 (Ct. App. 1995)). The court recognized such harm to taxpayers (but not the town), stating, "Although property taxpayers in adjoining towns that lie within the same overlying taxing districts are arguably affected when TIF districts are created or amended, the towns themselves are not, and thus towns lack "a personal stake in the outcome of the controversy." *Id.* at 506. It is highly likely, then, that the court would have concluded that those property taxpayers would have had standing, had they been plaintiffs. *Baraboo* is therefore at best helpful to the Plaintiffs and at worst irrelevant.

The Defendants also argue that the Plaintiffs lack standing because the TIDs could, potentially, be a net positive. (Def. Br. 12-13.) This argument ignores binding precedent, directly on point. In *Hart v. Ament*, the supreme court ruled that any potential upside to allegedly-unlawful government expenditures was immaterial to the question of whether the expenditures were sufficient to grant taxpayers standing. 176 Wis. 2d at 698-700. In that case, the taxpayers were forced to admit that the transfer of the operation of a museum to a non-profit organization would actually save taxpayers money. *Id.* at 698-99. Yet the court still found that the taxpayers had standing due to the alleged unlawful nature of government expenditures. *Id.* at 699-700.

Furthermore, the Defendants seem to be arguing that if the TIDs have some positive aspects, it really does not matter if they are actually illegal. Even were this relevant, it would be impossible to determine at this point. But more fundamentally, this Court need not – and cannot – undertake any kind of balancing of potentially positive effects of the TIDs, either at the

dismissal stage or at any point in this litigation. Contrary to the Defendants' assertions, the Plaintiffs are not asking the Court to decide whether the TIDs or the Confluence Project are good ideas, only whether they are lawful. If the TIDs were formed unlawfully, it does not matter how wonderful they may be; the court must strike them down.

In any event, even if the question of the benefits of the TIDs were somehow relevant, now is not the proper time to litigate them (particularly based on the wholly-unsupported factual allegations placed in the Defendants' Brief, which contradict the allegations of the Complaint). *See Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 69 Wis. 2d 1, 14, 230 N.W.2d 243 (1975) ("The question of whether the injury alleged will result from the [government] action in fact is a question to be determined on the merits, not on a motion to dismiss for lack of standing.").

Finally, the Defendants argue that declaratory judgment is not available to review the creation or amendment of TIDs. (Def. Br. 21-22.) Declaratory judgment is available when: (a) there is a controversy between the parties; (b) the interests of the plaintiffs and defendants are adverse; (c) the plaintiffs have a legally-protected interest; and (d) the controversy is ripe. *Lake Country*, 2002 WI App 301, ¶15. This case meets those criteria. The Defendants cannot seriously argue that there is no controversy between the parties or that their interests are not adverse. As demonstrated above, the Plaintiffs have a legally-protected interest (standing). The controversy is ripe because the TIDs have been created and the City has taken action to implement the project plans as though they had been validly created. (*See* Section III, *infra,* for elaboration of the ripeness of this controversy.)

The Defendants erroneously state that Wisconsin law "concludes that certiorari, not Declaratory Judgment, is the proper method for challenging municipal decisions such as TIF

actions. (Def. Br. 22.) No Wisconsin court has ever held that declaratory judgment actions may not be used to challenge TIF actions. Although such challenges are often brought as certiorari actions, in at least two published cases TIF actions were brought as declaratory actions, and neither of them was dismissed for not using certiorari (although the issue was not raised in either case). *See City of Hartford v. Kirley*, 172 Wis. 2d 191, 493 N.W.2d 45 (1992) (city brought original action seeking a declaration on whether bonds it intended to issue pursuant to a TIF plan would count toward municipal debt limit); *Baraboo*, 2005 WI App 96 (declaratory action, dismissed due to lack of standing). Furthermore, the prime case on the constitutionality of the current TIF law, *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 288 N.W.2d 85 (1980), appears to have been a declaratory judgment case. Although the opinion does not expressly state whether it was a declaratory or certiorari action, the court did not review the city's actions using the deferential and highly-specific standards for certiorari review. (*See* Section IV, *infra*).

More importantly, this is a taxpayer action, and taxpayer actions are routinely brought as declaratory judgment actions. *See, e.g.*, *Coyne*, 2015 WI App 21, ¶3; *Hart*, 176 Wis. 2d at 698; *Thompson*, 144 Wis. 2d at 432; *Appleton*, 142 Wis. 2d at 872; *Tooley*, 77 Wis. 2d at 430; *State ex rel. Sundby*, 71 Wis. 2d at 121; *West Milwaukee*, 51 Wis. 2d at 360; *Columbia County*, 17 Wis. 2d at 316; *O'Donnell*, 144 Wis. 2d at 720; *J.F. Ahern Co.*, 114 Wis. 2d at 75; *Kaiser*, 99 Wis. 2d at 349. Defendants fail to explain why this case may not be brought as a declaratory judgment action.

III. THE CASE IS RIPE BECAUSE THE CITY HAS ENACTED RESOLUTIONS AND ENTERED INTO CONTRACTS CALLING FOR THE UNLAWFUL EXPENDITURE OF TAX REVENUE.

The Defendants argue that this case is not ripe because any potential harm to the Plaintiffs is neither imminent nor practically certain to occur. (Def. Br. 13-14.) As explained in

Section II, the Defendants seriously mischaracterize the pecuniary injury that taxpayers suffer when the tax revenues they provide to municipal entities are spent in an unlawful manner.[3] The mere fact that tax money will be spent unlawfully is sufficient to cause pecuniary harm to taxpayers and grant them standing.

The Defendants ignore that the City has pledged millions of dollars that the Plaintiffs allege cannot be lawfully spent. The Complaint alleges that TID #10 has been created and TID #8 has been amended, that the City has entered into a development agreement with the Confluence Project developer, and that the Project Plan calls for the expenditure of millions of dollars of tax revenue. (Compl., ¶¶29, 41, 44, 46-47, 51, 53, 58, 60.) The Complaint alleges that the City has appropriated over $15,000,000 to be spent pursuant to the project plans for TID #8 and TID #10. (Compl., ¶65.) The Complaint also alleges that those expenditures would be unlawful. (Compl., ¶¶78, 90.)

Therefore, the Complaint alleges that pecuniary harm to the taxpayers is certain, which is sufficient to make this dispute ripe. The City has bound itself legally and contractually to spend millions of dollars of tax money. Absent court intervention, those unlawful expenditures are practically certain to occur. Any unlawful expenditure of tax revenues causes a pecuniary harm to taxpayers. Therefore, harm to the Plaintiffs is practically certain to occur, and this case is ripe for adjudication.

[3] The Defendants also misquote Paragraph 91 of the Complaint (likely accidentally, as immediately prior to that misquote, they properly quote Paragraph 79, which is nearly identical to 91), which reads in full:

> As taxpayers, the Plaintiffs are harmed by the Defendants' actions as their tax dollars will be spent in an unlawful manner, tax revenues from the incremental growth in TID #10 will be unavailable for general purposes such as schools, roads, and public safety, and incremental tax revenues from TID #10 will be unavailable for other taxing jurisdictions.

IV. THE FACTS ALLEGED IN THE COMPLAINT FORM THE BASIS FOR A CLAIM THAT THE CITY COUNCIL AND JRB ACTED UNLAWFULLY.

The Defendants argue that the Plaintiffs' claims should be dismissed because the City's actions were permissible legislative acts. (Def. Br. 14-16.) They even go so far as to say that the Plaintiffs' allegations that the TIDs fail to eliminate blight "are meritless." (Def. Br. 20.) This argument attempts to shoehorn an argument on the merits of Plaintiffs' claims into a motion to dismiss, even going so far as to make unsupported factual allegations contradictory to those allegations made in the Complaint (e.g., that "the City Council and Joint Review Board were provided an extensive record demonstrating blight," that those two entities "thoughtfully consider[ed] the extensive record, their knowledge and experience in the community, and the best interest of their respective public entities and citizens they serve," and that they used their "sound discretion"). (Def. Br. 15.) But the Defendants may not make those arguments at this time, because the Court must take the allegations of the Complaint at face value and assume that all of them are true. *Scott*, 2003 WI 60, ¶5.

Throughout their Brief, the Defendants repeatedly characterize the Plaintiffs as merely disagreeing with the policy choices of the City, or asking the Court to "substitute its judgment" for that of the City. (*See, e.g.*, Def. Br. 1-2, 10, 12-13, 15, 16.) But that is just not so. The Plaintiffs have alleged that the City's actions violate state law and the state Constitution. These are the only questions before the Court, and it owes no deference whatsoever to the City when determining whether its actions were lawful or constitutional. *See Ottman v. Town of Primrose*, 2011 WI 18, ¶54, 332 Wis. 2d 3, 796 N.W.2d 411 ("[C]ourts review questions of law independently from the determinations rendered by the municipality").

The proper review for the Plaintiffs' declaratory judgment claim (as opposed to the certiorari claim) is not, as the Defendants state, whether the City Council's and JRB's actions

were "reasonable" or lacked a "rational basis" or were "arbitrary and capricious" (Def. Br. 15-16), but whether the City followed the legal requirements for creating and amending TIDs and whether their actions violate the Wisconsin Constitution. The Plaintiffs have alleged that the City's actions did not follow the TIF laws – specifically that the City Council failed to "find" that blight existed (rather jumping to that conclusion without proper evidence), that the JRB failed to "find" that the development would not occur without tax incremental financing, and that the Project Plan for TID #10 unlawfully reimburses the developer for the destruction of historic buildings. (Compl., ¶¶72, 76, 83, 87, 93-96.) The Plaintiffs have also alleged that the City's actions are unconstitutional in that they violate the Public Purpose Doctrine and the Uniformity Clause. (Compl., ¶¶78, 90, 99-107; *see* Sections VI, VII, *infra*.) Those are the questions that need to be answered under a declaratory judgment action.

If heard under certiorari review, as the Defendants point out (Def. Br. 21-22), the court determines whether (1) the municipality acted within its jurisdiction; (2) the municipality applied the law correctly; (3) the municipality acted arbitrarily or unreasonably; and (4) the evidence provides support for the conclusion reached by the municipality. *Ottman*, 2011 WI 18, ¶35. Again, the Defendants are just wrong in claiming that the Complaint does not contain allegations sufficient to state a certiorari claim. The allegations detailed in the previous paragraph establish a claim that the City failed to apply the TIF law correctly, in violation of the second prong. The Complaint makes an explicit claim that the City Council and JRB reached decisions that were not supported by the evidence in front of those bodies. (Compl., ¶¶72, 76, 83, 87.) That is sufficient to state a claim that those bodies failed the fourth prong of certiorari review, as well as the third, because the City Council and JRB cannot have acted "reasonably" if they considered

no evidence supporting their conclusions. Those factual allegations cannot be challenged at this time, and the Complaint sufficiently states a claim for certiorari relief.

Finally, the Defendants argue that even if the Plaintiffs are successful on their claims that the Resolutions creating TID #10 and amending TID #8 are void, the court cannot void the City's issuance of bonds and appropriation of funds to be spent under the Project Plans for those TIDs. (Def. Br. 16.) That argument makes no sense. If the Resolutions approving the TIDs are themselves void, then the City has no lawful authority to carry out the terms of the Project Plan. Wis. Stat. § 66.1105(4)(gm) (conditioning the implementation of the entire TIF statute on the adoption of a particular resolution). If the City has no lawful authority to issue bonds or appropriate funds (or distribute funds in the future) pursuant to the Project Plan, then those actions themselves are unlawful. *See Kaiser v. City of Mauston*, 99 Wis. 2d 345, 299 N.W.2d 259 (Ct. App. 1980) (in a taxpayer action, enjoining all action by a lake improvement district that was created by an unlawful city resolution). Even the Development Agreement the Defendants included with their Motion indicates it is voidable if the "New TIF District" is declared void by the courts. (Nick Aff., Ex. 1, 11.) To permit the project to continue without TIF funding – placing the burden of paying back bonds on all shareholders without a City Council vote authorizing such an arrangement – would be to make the strict requirements of the TIF laws meaningless. This Court has the authority to strike down and enjoin all actions by the City taken in reliance upon any TIF resolution the Court declares void.

V. THE PLAINTIFFS' HISTORIC BUILDINGS CLAIM STATES A CLAIM FOR RELIEF AND IS NOT MOOT.

The Defendants argue that the Plaintiffs' claims related to the destruction of historic buildings are moot because the buildings have already been torn down. (Def. Br. 16-17.) That

would obviously be correct if the Plaintiffs were seeking an injunction to halt the destruction of those historic buildings, but nowhere do the Plaintiffs request that relief.

The Plaintiffs' Third Claim for Relief seeks a declaration that the resolution implementing TID #10 is unlawful and therefore void, because it reimburses the developer for costs associated with the destruction of historic buildings. Wisconsin law prohibits tax incremental funds from being used to compensate a developer for the costs associated with the destruction of listed properties. Wis. Stat. § 66.1105(2)(f)1.a. That claim is not moot.

Nor is the claim defectively pled. The Complaint alleges that the developer demolished historic buildings and that the TID #10 project plan in fact reimburses the developer for costs associated with that demolition. (Compl. ¶¶94-96.) If true, those allegations establish that TID #10 is unlawful and therefore void. The Defendants cannot ignore those allegations or try to argue at this point that they are not true. The Court must accept them as true at this point. *Scott*, 2003 WI 60, ¶5.

The Defendants seem to think that the Complaint needed to contain excruciating detail laying out precisely how the demolition was paid for, and how money has or will change hands from the City to the developer, and how that payment reimbursed or will reimburse the developer for those demolition costs. But that is not the standard for complaints in Wisconsin. A complaint must merely set forth "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." Wis. Stat. § 802.02(1)(a). Dismissing the claim at this time is premature.

VI. THE PLAINTIFFS' CONSTITUTIONAL CHALLENGE IS AS-APPLIED, NOT FACIAL, AND EVEN IF FACIAL, NOT PRECLUDED BY *SIGMA TAU*; THE ATTORNEY GENERAL HAS BEEN SERVED.

The Defendants argue that the Plaintiffs' Fourth Claim should be dismissed because *Sigma Tau* has already settled the question of the constitutionality of the TIF law and the Attorney General was not given notice or an opportunity to be heard. (Def Br. 17-19.) The Defendants do not independently argue why the TIF law or the City's actions are constitutional; they rely solely on the argument that *Sigma Tau* has already decided the question raised by the Plaintiffs.

The Defendants are wrong. To begin with, it was not necessary to notify the Attorney General. Wis. Stat. § 806.04(11) states that the Attorney General shall be notified and permitted to be heard when "a statute, ordinance or franchise is alleged to be unconstitutional." The Plaintiffs have not alleged that any statute, ordinance, or franchise is unconstitutional. They have alleged that actions taken by the City are unconstitutional, actions that take the form of two resolutions creating TID #10 and amending TID #8. A resolution is not an ordinance. The attorney general does not need to be notified or heard.

Nor is this case controlled by *Sigma Tau*. *Sigma Tau* dealt with a facial challenge to the constitutionality of TIF financing in general. 93 Wis. 2d at 396. *Sigma Tau* upheld TIF laws against two particular challenges. The supreme court concluded that where all taxpayers within a TID are taxed at a uniform rate and no taxpayer is given "preferential treatment either in the form of an exemption from taxation or a tax credit," the TIF laws do not violate the Uniformity Clause. *Id.* at 412. The court also concluded that "the elimination of blight" was a sufficient public purpose to satisfy the Public Purpose Doctrine. *Id.* at 413-14.

The Plaintiffs allege that the actions of the City here are distinguishable from the assumptions that the supreme court relied on to conclude that the TIF laws were generally constitutional. First, the Plaintiffs allege that the developer here is in fact being given the equivalent of a tax credit – paid as an advance on future taxes. (Compl., ¶¶105-06.) Therefore, the *Sigma Tau* conclusion on the Uniformity Clause is not controlling here. Second, the Plaintiffs allege that the TIDs do not, in fact, eliminate blight. (Compl., ¶¶44, 73-75, 84-86.) Therefore, the *Sigma Tau* conclusion on the Public Purpose Doctrine is not controlling here.

Even if this claim can be construed, as the Defendants argue, as a facial challenge to Wis. Stat. § 66.1105(2)(f)2.d.,[4] which permits cash grants of TIF funds to be made to "owners, lessees, or developers" pursuant to a development agreement, *Sigma Tau* does not require its dismissal. Just because the court declared TIF laws to be generally constitutional does not mean that every single sentence of the law (and the law spans 17 pages in the Statutes) or any action taken pursuant to it is forevermore immune from challenge. The *Sigma Tau* court did not opine on the constitutionality of § 66.1105(2)(f)2.d., nor did the facts of that case implicate that portion of the statute. The TID in *Sigma Tau* did not involve a cash grant to an owner, lessee, or developer; rather, the TID called for the government to acquire property and sell it to a developer. 93 Wis. 2d at 397-98.

The Complaint explains why this distinction matters. The *Sigma Tau* court was careful to distinguish the situation in front of it from a previous case that had held a precursor to the current TIF law unconstitutional. *Id.* at 411-12 (citing *State ex rel La Follette v. Torphy*, 85 Wis. 2d 94, 270 N.W.2d 187 (1978)). The court noted that the law struck down in *Torphy* permitted tax

[4] If this claim is construed as a challenge to that statute, then the Attorney General does need to be served under Wis. Stat. § 806.04(11). Although the Plaintiffs do not concede that such service was necessary, the Plaintiffs have done so, via letter dated May 27, 2015, a copy of which was provided to the Court. It was not necessary for the Plaintiffs to plead compliance with § 806.04(11), as that requirement cannot be complied with until after the case is filed.

credits to offset increased taxes generated by improvements on the owners' property, which violated the uniformity clause. *Id.* The court then contrasted that situation to the situation in front of it, concluding that the Uniformity Clause was not violated because "[n]o taxpayer or group of taxpayers is being singled out for preferential treatment either in the form of an exemption from taxation or a tax credit." *Id.* at 412.

The Complaint alleges that the developer is, in fact, getting the equivalent of a tax credit, explains that *Sigma Tau* did not decide whether such an arrangement violated the Uniformity Clause, and alleges that this arrangement does violate the Uniformity Clause. (Compl. ¶¶104-05.) While such allegations may not be sufficient to prove a violation of the Uniformity Clause, they are sufficient to state such a claim. The City makes no argument as to why the arrangement does not violate the Uniformity Clause other than arguing that the issue is settled under *Sigma Tau* (and should not be permitted to raise those new arguments in a reply brief). Consequently, the claims should be preserved for summary judgment or trial.

VII. WHETHER THE LEGISLATIVE TIF ACTIONS SERVED A PUBLIC PURPOSE IS DEPENDENT ON WHETHER THEY ELIMINATE BLIGHT, WHICH IS A FACTUAL ISSUE.

The Defendants argue that the City's actions "comport with the Public Purpose Doctrine." (Def. Br. 19.) Tellingly, the Defendants fail to state what public purpose TID #10 and the Amendment to TID #8 serve. Where, as here, the governmental expenditures consist of handing millions of public dollars to private entities to develop buildings that will be owned by those private entities and commit taxpayer funds for decades, courts should inspect the governmental actions closely to ensure that they truly serve a public purpose. The public purpose of TIDs such as these is stated plainly in the statutes – to eliminate blighted areas. *See*

Wis. Stat. § 66.1105(4)(gm)4.a. The Complaint alleges that the TIDs do not, in fact, eliminate blight. That is all that is needed to state a claim that the City's actions lack a public purpose.

Again, the Defendants are demanding an excessive level of detail in the Plaintiffs' Complaint. Apparently, the Defendants wanted the Plaintiffs to name dozens of possible public purposes and then plead facts that negate every single one of them. Such extensive pleading is not necessary in Wisconsin. § 802.02(2)(a). Arguing that the City's actions lacked a legitimate public purpose and supporting that argument with pleaded facts (that the TIDs do not eliminate blight) is sufficient to state a claim.

Since the Defendants cannot, at this point, argue that the TIDs do, contrary to the allegations of the Complaint, eliminate blight, the claims should not be dismissed. The determination of whether Plaintiffs' claim in that regard is correct is too factual to be decided now. Although the Defendants could have argued that, even accepting the Complaint's factual allegations, some other public purpose was served by the TIDs, it did not do so[5] (and should not be permitted to raise those new arguments in a reply brief). Consequently, the claims should be preserved for summary judgment or trial.

VIII. VOTERS WITH FACTS 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

[5] Although the Defendants did mention, in a parenthetical to a case citation, that valid public purposes include "creating jobs, promoting orderly growth, increasing the tax base, and preserving the environment for the benefit of citizens" (Def. Br. 20), they failed to "connect the dots" and make any argument showing how, based on the facts alleged in the Complaint, the two TIDs would achieve any of those goals. Conclusory allegations lacking supporting argument should not be considered. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (arguments supported only by general statements and unsupported by legal authority need not be considered).

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, as a Plaintiff VWF is seeking to halt the TIDs that form the basis of the Confluence Project, which is germane to its purpose. Paragraph 2 of the Complaint asserts 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 required 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. Therefore, VWF has standing to maintain this suit.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny the Defendants' Motion to Dismiss and set this case for a scheduling conference.

Respectfully submitted,
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APPENDIX A

The Defendants make the following factual averments that are contrary to the allegations in the Complaint, and therefore should be disregarded:

- "The creation of TID #10 and the 3rd Amendment of TID #8 involve precisely the type of urban redevelopment that Wisconsin's TIF law was created to address." (Def. Br. 2.) (Complaint alleges that these TIDS do not address blight, which was the type of urban redevelopment that Wisconsin's TIF law was created to address. (Compl., ¶¶44, 52, 59, 73-74, 84-85.))
- "Participating in [the] legislative process is the most appropriate forum for the Plaintiffs to voice their TIF related public policy preferences." (Def. Br. 2, n. 1.) (Plaintiffs' TIF-related public policy preferences, whatever they may be (and those preferences vary among the Plaintiffs), are not the basis for this lawsuit – rather the basis is the Plaintiffs' insistence that TIF laws be followed when TIDs are created. (Compl., First through Fifth Claims for Relief.))
- "The Eau Claire Leader Telegram noted in an editorial by its Editor that 'the TIF incentives being used in downtown Eau Claire are exactly what the law was meant to foster when it was created in the early 1950s as a way to revitalize rundown urban centers." (Def. Br. 2, n. 3.) (Complaint alleges that these TIDS do not address blight, which was the type of urban redevelopment that Wisconsin's TIF law was created to address. (Compl., ¶¶44, 52, 59, 73-74, 84-85.))
- "Although significant progress had been made in Eau Claire's downtown, blighted areas still remained. The Ramada Inn and Green Tree Hotel were closed and deteriorating. Many downtown buildings showed significant signs of age and distress. Building code violations, nonconforming uses, and police responses were more common downtown than other areas of the City. Structural improvements were difficult or impossible in many downtown buildings due to shared walls and basements. Shared walls and common basements also created dangerous fire hazards." (Def. Br. 3.) (Complaint alleges that blighted conditions sufficient to create a TID did not exist and further that the record before the City Council did not demonstrate blight. (Compl., ¶¶44, 52, 59, 72-74, 83-85.))
- "[T]he City of Eau Claire and the Joint Review Board's legislative actions to address urban blight were informed by robust public input and involved the careful consideration of extensive evidence of blight. The Joint Review Board thoughtfully examined the extensive record in approving TID #10 and Amendment #3 to TID #8." (Def. Br. 3.) (Complaint alleges that blighted conditions sufficient to create a TID did not exist and further that the record before the City Council did not demonstrate blight (the JRB did not consider whether the area was blighted). (Compl., ¶¶44, 52, 59, 72-74, 83-85.))
- "TID #8 was amended and TID #10 was created as part of a larger effort to redevelop and eliminate blight in downtown Eau Claire." (Def. Br. 5.) (Complaint alleges that stated purpose of eliminating blight was pretext, and true

purpose was to fund the development of a desired project. (Compl., ¶¶41, 44, 45, 52, 59, 72-75, 83-85.))

- "[N]ot taking action to create or amend TIF districts also carries risks. Higher crime, elevated fire or flood risk, health and safety implications associated with contaminated or poorly maintained properties, or lack of a socially and economically vibrant downtown all have costs to the citizens of Eau Claire." (Def. Br. 12.) (Complaint alleges that blighted conditions sufficient to create a TID did not exist and further that the record before the City Council did not demonstrate blight. (Compl., ¶¶44, 52, 59, 72-75, 83-85.))
- "[T]he City Council and Joint Review Board were provided an extensive record demonstrating blight." (Def. Br. 15.) (Complaint alleges that the record before the City Council did not demonstrate blight (the JRB did not consider whether the area was blighted). (Compl., ¶¶ 52, 59, 72, 83.))
- "After thoughtfully considering the extensive record, their knowledge and experience in the community, and the best interest of their respective public entities and citizens they serve, the Joint Review Board applied Wisconsin's TIF law in approving the creation of TID #10 and the Amendment of TID #8." (Def. Br. 15.) (Complaint alleges that the JRB acted without proper consideration, not "thoughtfully," and that the record before the JRB did not demonstrate that development would not occur but for the tax incremental financing. (Compl., ¶¶76-77, 87-88.))
- "These allegations [that the TIDs fail to eliminate blight] are meritless . . . ." (Def. Br. 20.) (Complaint alleges that blighted conditions sufficient to create a TID did not exist and further that the record before the City Council did not demonstrate blight. (Compl., ¶¶44, 52, 59, 72-75, 83-85.))

The Defendants make the following factual averments that are not found in the Complaint and lack any evidentiary basis, and therefore should be disregarded:

- "In September 2002, when TID #8 was initially created, downtown Eau Claire was riddled with environmental contamination, high crime, code violations and stagnating property values. It was a blighted slum. Increased demand for service was a strain on city resources while stagnating downtown property values increased the financial demands on city taxpayers. Urban blight made it difficult to attract or retain business and educated professionals. The status quo was not sustainable. While some said the downtown was a lost cause that could never return to its former vitality, city policymakers decided to take action. TIF financing was utilized to begin addressing this urban blight's undesirable effects." (Def. Br. 2-3.)
- "The Wisconsin Legislature continues to study possible changes to Wisconsin's TIF law. A special Legislative Council TIF Study Committee has recommended various bills which include numerous changes to Wisconsin's TIF law." (Def. Br. 2, n. 1.)
- "TIF investment in this area eventually contributed to the construction of Phoenix Park as well as the JAMF and RCU buildings." (Def. Br. 3.)

- "To date none of [the building] benchmarks have yet been met." (Def. Br. 6.)

The Defendants also make factually-incorrect statements about the Complaint:

- "The Complaint does not plead any facts supporting the allegation that TIF funds have been used or will be used to demolish historic buildings . . . ." (Def. Br. 6.) (Complaint alleges that TIF funds will be used to reimburse the developer for costs of demolishing the historic buildings located on the site where the Confluence Project will be built. (Compl., ¶¶94-96.))
- "No facts were alleged demonstrating any likelihood that [the Plaintiffs' claimed] injuries will occur." (Def. Br. 9.) (Complaint alleges that Plaintiffs will be harmed because tax revenues will be spent unlawfully. (Compl., ¶¶79, 91.))
- "[T]he Plaintiffs have not alleged any concrete injury or interest, but rather merely attempt to voice their disagreement with the legislative actions of the City Council and Joint Review Board. The Plaintiffs (apparently) believes that the City of Eau Claire and other taxing authorities will realize losses in tax revenues as a result of the Joint Review Board's legislative actions regarding TID #10 and TID # 8. The Plaintiffs allege no facts in support of this alleged future injury, and rather base their claims entirely on the speculative possibility that general tax revenues might be impacted." (Def. Br. 10.) (Assertions of what Plaintiffs are "really" trying to do unsupported by the record and contradicted by the Complaint's assertions of pecuniary harm to taxpayers caused by illegal expenditures of tax revenues. (Compl., ¶¶79, 91.))
- "The Plaintiffs do not allege any facts that demonstrate the Plaintiffs have standing to bring actions on behalf of other taxing jurisdictions . . . ." (Def. Br. 12.) (Plaintiffs do not allege they have standing to bring actions on behalf of other taxing jurisdictions, but rather, that as taxpayers residing in those other taxing jurisdictions, they have standing to bring claims that tax revenue is being spent unlawfully. (Compl, ¶¶19, 79, 91)
- "The Plaintiffs' Complaint alleges no facts that demonstrate that tax burden reallocation is either imminent or practically certain to occur." (Def. Br. 14.) (Complaint alleges that under TIF law, such reallocation will occur as a natural consequence of creation of the TIDs. (Compl., ¶¶27, 33, 78-79, 89-91.)
- "The Plaintiffs allege no facts demonstrating the legislative acts of the Eau Claire City Council or Joint Review Board lacked a rational basis or were otherwise arbitrary or capricious." (Def. Br. 15.) (Complaint alleges that City Council and JRB acted contrary to the records in front of them. (Compl., ¶¶52, 54, 59, 61, 72, 83.))
- "The Plaintiffs do not allege any facts demonstrating that the legislative actions of the City Council and Joint Review Board were unreasonable." (Def. Br. 16.) (Complaint alleges that City Council and JRB acted contrary to the records in front of them. (Compl., ¶¶52, 54, 59, 61, 72, 83.))
- "[T]he Plaintiffs neglect to allege any facts demonstrating the legislative actions the (sic) Joint Review Board in making the 'blight' determination was (sic) arbitrary or capricious." (Def. Br. 16.) (Complaint alleges that City Council and

JRB acted contrary to the records in front of them. (Compl., ¶¶52, 54, 59, 61, 72, 83.))

- "The Plaintiffs fail to allege any connection between TIF funds and the acquisition or demolition of historic buildings . . . ." (Def. Br. 16.) (Complaint alleges that TIF funds will be used to reimburse the developer for costs of demolishing the historic buildings located on the site where the Confluence Project will be built. (Compl., ¶¶94-96.))
- "The Plaintiffs allege no facts demonstrating any kind of connection between the money disbursed to the developers and the demolition costs . . . ." (Def. Br. 17.) (Complaint alleges that TIF funds will be used to reimburse the developer for costs of demolishing the historic buildings located on the site where the Confluence Project will be built. (Compl., ¶¶94-96.))
- "The Plaintiffs' Complaint alleges no facts demonstrating that the TIF actions violated the Public Purpose Doctrine . . . ." (Def. Br. 20.) (Complaint alleges that the TID areas are not, in fact, blighted, and that if the TIDs do not eliminate blight, then they lack a public purpose. (Compl., ¶¶44, 52, 59, 72-75, 83-86.))
- "The Plaintiffs (sic) Complaint alleges no facts . . . demonstrating that Voters With Facts' interests are germane to its purposes . . . ." (Def. Br. 23.) (Complaint alleges that Voters With Facts ("VWF") is a group of volunteers and taxpayers "who question the propriety of the proposed developments that are the subject of this lawsuit." (Compl., ¶2.))