COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT 3
APPEAL CASE 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,

v.

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

Appeal from the Circuit Court of Eau Claire County
Honorable Paul J. Lenz Presiding
Case No. 15-CV-175

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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I) THE TIDS REQUIRE CITY FUNDS TO BE SPENT UNLAWFULLY, AND TAXPAYERS HAVE STANDING TO CHALLENGE ILLEGAL EXPENDITURES

The Plaintiffs' standing argument is simple. The challenged TIDs obligate the City to spend millions of dollars on a private development, including an enormous handout to the developer/owner. Because, among other reasons, the legal preconditions of the TIDs have not been met and the handout violates the uniformity clause, these expenditures are alleged to be unlawful. A wall of cases – which the City ignores – establish taxpayer standing to challenge unlawful expenditures. (*See* P. Br. 19-21.)

Instead of addressing any of those cases, the City criticizes Plaintiffs for not discussing *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, 259 Wis. 2d 107, 655 N.W.2d 189, suggesting it created some kind of "TIF exception" to the broad rule of taxpayer standing. Contrary to the City's claim (D. Br. 2, 16), the circuit court did not rely on *Lake Country*'s holding. The circuit court mentioned the case in passing, and only to recite the four well-established elements of a declaratory judgment claim. (R. 14:4.) Nowhere did the court even hint

that it believed *Lake Country*'s holding required a finding of no standing here.

That the Circuit Court did not rely on *Lake Country* is not surprising. The case did not announce a "TIF exception" to the general rule of taxpayer standing. The plaintiff there did not challenge the creation of a TID or even the expenditure of funds pursuant to creation of one. 2002 WI App 301, ¶9 (listing the plaintiff's four claims). To the contrary, it claimed it was harmed because the Village "rezoned a single parcel of land to allow for certain conditional uses and then conveyed the parcel to a private party for use consistent with one of those uses." *Id.*, ¶¶22; *see also* ¶¶7-9. It challenged that conveyance on several grounds, including that it could not be done until the TID it was part of was terminated. *Id.*, ¶¶1, 9.

Although the court of appeals stated that Lake Country had argued its interests were affected by the "creation and operation" of that TID, *Id.*, ¶16, both its description and analysis of the plaintiff's claims focused exclusively on the city's rezoning and conveyance of the property. *See Id.*, ¶¶1, 9, 18-23. Even if Lake Country did make such a broader claim, the court did not analyze how creation of the TID and expenditures pursuant to that creation might have harmed it, which

means it has little bearing on this case. Instead, the court spent the rest of the opinion analyzing whether Lake Country had proven that the rezoning and conveyance caused it harm. *Id.*, ¶¶18-23. As Lake Country failed to even allege, much less prove, such harm, it lacked standing. *Id.*, ¶¶1, 17, 23.

As the City admits, *Lake Country* would permit a finding of standing where a taxpayer alleged pecuniary harm. (D. Br. 2, 14.) While Lake Country failed to make that allegation, *Id.*, ¶¶14, 19, the Plaintiffs here have made such allegations which, on a motion to dismiss, must be taken as true. *See infra,* Section II.

Finally, *Lake Country* was decided on summary judgment. 2002 WI App 301, ¶10. Unlike the Plaintiffs here, Lake Country was given the chance to prove it had suffered pecuniary harm, and failed to do so. *Id.*, ¶17. The Plaintiffs here have alleged pecuniary harm, and to the extent that *Lake Country* is applicable at all, it suggests that they ought to have a chance to prove their claim.

The City's citation to *Town of Baraboo v. Village of West Baraboo*, 2005 WI App 96, 283 Wis. 2d 479, 699 N.W.2d 610, does not help it; in fact, it hurts. *Baraboo* held merely that the plaintiff town failed to allege a

legally-protectable interest affected by the challenged TID. *Id.*, ¶¶36-37 & n.6. That holding has no effect on this case, but other statements in the case support Plaintiffs' standing here. The court stated (in dicta) that the county, school, and vocational districts that contain a proposed TID have legally-protectable interests affected by TIDs. *Id.*, ¶37. Because TIDs distort the tax base by diverting money from those other taxing authorities to the TID-creating City, they are given seats on the joint review board. *Id.*, ¶¶32-33, 37. If the court is correct, taxpayers have a legally-protectable interest for the same reason. The fifth seat on a joint review board represents the public at large. Wis. Stat. §66.1105(4m)(a). The *Baraboo* court recognized this conclusion, stating that, unlike towns themselves, "property taxpayers in adjoining towns that lie within the same overlying taxing districts are arguably affected when TIF districts are created or amended." 2002 WI App 96, ¶37 (emphasis added). The Plaintiffs are not only taxpayers of the City of Eau Claire, but of the overlying school, county, and vocational districts. (R. 1:8, ¶19.)

II) THE PLAINTIFFS ALLEGED HARMS THAT ARE CERTAIN TO OCCUR

But, the City says, TIDs are about "financing" and not "expenditures" as if one could happen without the other. As explained in

the Plaintiffs' opening brief, TIDs are mechanisms for spending to facilitate a private development. (P. Br. 13-14.) As part of the process of creating TID #10 and amending TID #8, the City committed itself – via the Project Plan and the contractually-binding developer agreements – to spend tax funds. The Plaintiffs have challenged not only the creation and amendment of the TIDs, but also the expenditures of funds pursuant to those TIDs. (R. 1:21, 23, 28 ¶¶78-79, 90-91, requested relief 3, 4.)

Recognizing the potential for abuse, the legislature has made clear that TIDs may be created only in certain circumstances. The Complaint alleges that certain of those conditions (in this case, the existence of "blight" and that development would not occur "but for" the subsidy) have not been met and, therefore, the City will expend money illegally. (R. 1:20-23, ¶¶72-74, 77, 79, 83-85, 88, 91.) Under Wisconsin law that is all that is required, because any illegal expenditure of tax funds harms taxpayers as a matter of law. *S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961) ("Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss.").

The Complaint goes further than necessary, however, explaining the harm in more detail. The money spent illegally under the TIDs will be unavailable for lawful purposes. (R. 1:21, 23, ¶¶79, 91.) *Cf. S.D. Realty Co.*, 15 Wis. 2d at 22 (unlawful expenditures result in "less money to spend for legitimate government objectives"). The TIDs distort the tax base of all the taxing jurisdictions involved. Incremental TID revenues are unavailable to fund the operations of local units of government, and they must either increase the burden on their taxpayers or leave their operations under funded. (R. 1:21, 23 ¶¶78-79, 90-91.) *Cf. Baraboo*, 2005 WI App 96, ¶¶32-34 (explaining how TIDs divert tax money and burden taxpayers).

These results are not speculative, but happen automatically by the operation of a TID. That is why other taxing authorities must sign off on a TID via the JRB. *Id.*, ¶33.

The City's disingenuous suggestion that expenditures under the TIDs are uncertain is, therefore, misleading – particularly because it is a matter of public record they have in fact already taken place. This court

can take judicial notice[1] of the City's "online checkbook,"[2] which shows that over $2.6 million has already been spent for TID #10.

But, the City says, Plaintiffs cannot prove that taxpayers will not be "better off" because the potential "benefits" of the TIDs might just outweigh their costs.[3] In the City's view (which they fail to support with authority), courts must weigh the pros and cons of government action before even allowing a citizen to challenge its legality, precluding review of any actions, however illegal, that might be of net benefit for taxpayers. This, ironically, would enmesh the courts in an evaluation of the merits of a policy decision – the very trap the City warns against. Fortunately, the City's view is not the law of Wisconsin. *Hart v. Ament*, 176 Wis. 2d 694, 699-700, 500 N.W.2d 312 (1993) (rejecting argument that taxpayers lacked standing to challenge an illegal contract because the contract being challenged would allegedly save taxpayers money).

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[1] "[A]n appellate court may take judicial notice when that is appropriate." *Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶11, 313 Wis. 2d 411, 756 N.W.2d 667. These facts are not subject to reasonable dispute and are readily determined. *See* Wis. Stat. §902.01(2).

[2] http://ci.eau-claire.wi.us/government/financial-transparency/transparency-portal/open-checkbook (click on the large image in the center, type "Haymarket" into the search box and press Enter) (last accessed Feb. 22, 2016).

[3] Plaintiffs have a net harm by alleging that the "but for" test has not been met. If development would have occurred anyway, a TID is nothing but a gift of public money to private interests.

III) THE LEGALITY OF THE TIDS IS SUBJECT TO COURT REVIEW

The circuit court's reliance on the political question doctrine was mistaken, and the City does not defend the circuit court's ruling on that basis. That doctrine has no application here. The political question doctrine is concerned with the constitutional separation of powers between the courts and other co-equal branches of government. These concerns are not raised when the judiciary reviews the actions of municipalities. (*See* P. Br. 25-34.)

Because it plainly does not apply here, neither party raised the political question doctrine in the Circuit Court. Rather, the City argued a separate line of cases dealing with judicial deference to certain legislative decisions. (*See* R 8:14-16; R 10:13-15; 11:7-8.) The City argues that this Court should defer to the City's decision to create and amend TIDs. But this argument rests on a fiction the City is trying to sell – that the Plaintiffs are asking the courts to rule that using TIDs to finance the Confluence Project is a bad idea.

That is <u>not</u> the Plaintiffs' position. Never have they asked a court to substitute its judgment for the City's as to the wisdom of the Confluence

Project or the TIDs. They ask only that if the City chooses to create or amend TIDs, it follow the statutory requirements for doing so.

By statute, TIDs may not be created or amended unless specific statutory criteria are met, including that 50% or more of the area within the TID meet the statutory definition of "blighted" and that development would not occur within the TID but for the tax incremental financing. Wis. Stat. §66.1105(4)(gm)4, (4m)(b)2. The statute contains a detailed definition of what "blight" means. *See* Wis. Stat. §66.1105(2)(ae)1.

The question in this case is not whether either TID is a good idea, but rather whether 50% or more of the area within the TIDs meets the statutory definition of "blighted." This is a factual question and not a question of legislative discretion.

As pointed out in the Plaintiffs' opening brief, this kind of review is condoned by *Fenton v. Ryan*, 140 Wis. 353, 122 N.W. 756 (1909). In *Fenton*, individuals challenged the incorporation of the Village of Kimberly. Supporters of incorporation argued that deciding the boundaries of the proposed village "was passing upon a question that was legislative and not judicial." 122 N.W. at 757. But the court held it could review the

decision, noting that the issue involved a determination as to whether the factual predicates to incorporate a village had been met. *Id.* at 757-58.

The City argues that the requirement of "blight" is a "term of art" which, for the City, apparently means "anything we want it to be," making it incapable of judicial examination. (*See* D. Br. 28-29, 36-37.) In its view, the legislature's careful circumscription of the use of TIDs is no limitation at all: a mere paper that municipalities can honor or not without fear of legal consequence.

But the statutory requirements are capable of judicial enforcement. If the record ultimately shows that the City lacked a basis to make the requisite findings or that those findings are erroneous (*e.g.*, statutory blight is not present or development would occur even without a TID), then the City has not complied with the law. The presumption that municipal ordinances are constitutional does not preclude courts from holding municipalities to the requirements the state legislature has placed upon them.

IV) THE CONSTITUTIONAL CHALLENGE IS NOT PRECLUDED BY *SIGMA TAU*

The public purpose challenge is an as-applied challenge predicated on the specific circumstances of this case – that the TIDs do not, as a matter

of fact, eliminate blight. If that fact is proven true, the Plaintiffs can win. The Court should not deprive them of the chance to make their case.

The uniformity challenge is also an as-applied challenge. The TIF law does permit cash payments per Wis. Stat. §66.1105(2)(f)2.d., but the Plaintiffs' challenge applies only to cash payments made to an owner. A developer who does not also pay property taxes would obviously not be getting a tax rebate. A challenge to one specific application of a law is an as-applied challenge. *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63.

Even if considered a facial challenge, however, this challenge is not precluded by *Sigma Tau*. *Sigma Tau* did not opine on the constitutionality of an arrangement where the owner gets a cash payment, upholding the law only against the specific challenge brought by that plaintiff. *See Sigma Tau Gamma Frat. House v. Menomonie*, 93 Wis. 2d 392, 409-14, 288 N.W.2d 85 (1980)

The TIF law is over 22,000 words long with over 350 individual sections and subsections. *Sigma Tau* does not preclude a challenge to all of those sections, only those addressed in that case. Courts review laws based on the specific challenges brought by plaintiffs. They do not engage in

wholesale, unprompted review of entire laws for possible defects. The constitutionality of §66.1105(2)(f)2.d. was not reviewed in *Sigma Tau*, and its holding is therefore not preclusive of the Plaintiffs' challenge.

V) THE REQUESTED RELIEF IS APPROPRIATE

The City's future actions challenged in the Complaint are contingent on valid TIDs and Project Plans. If the TIDs and Project Plans are invalidated, the City lacks any authority to carry out those actions. As the City apparently intends to keep performing them even if the TIDs are invalidated, the courts should enjoin them.

VI) THE HISTORICAL BUILDING CLAIM IS NOT MOOT AND IS WELL PLED

The City argues that the historical building claim is moot because the buildings have been destroyed. As the Plaintiffs have already pointed out[4] (and the City has ignored), the Plaintiffs are not seeking to halt destruction of historical buildings, but rather argue that TID #10 is invalid because it reimburses the developer for destruction of historical buildings, which is prohibited by state law. Wis. Stat. §66.1105(2)(f)1.a. That claim is not moot.

[4] P. Br. 44-45.

Nor is the claim defectively pled. The City seeks to introduce material outside of the Complaint[5] to prove the developer is not being reimbursed for acquiring and destroying historic buildings. But the Court must accept the allegation that the developer is being reimbursed as true. The City can contest that allegation at summary judgment or trial but not on a motion to dismiss.

Even considering the language in the development agreement, the City cannot win at this stage. At most, the pro forma declarations create a contested issue of fact as to whether the developer is being reimbursed illegally. They do not establish that fact conclusively.

VII) VOTERS WITH FACTS HAS ASSOCIATIONAL STANDING

The Plaintiffs believe their arguments in their first brief adequately address the City's objections, but add that VWF's nonprofit status and size of at least three members can reasonably be inferred from the allegations of the Complaint.

[5] The City asked the lower court (although not this court) to take judicial notice of material in the affidavit of the City's attorney. (R. 9:2.) The court did not do so. Nor did the court convert the City's motion to dismiss to one for summary judgment, which the court would have had to have done to consider the extra-record material. Wis. Stat. §802.06(2)(b).

VIII) DECLARATORY JUDGMENT IS MORE APPROPRIATE THAN CERTIORARI

The City appears to have conceded that this case may proceed as a certiorari action if the Plaintiffs do have standing. (*See* D. Br. 42-43.)

However, declaratory judgment is more appropriate than certiorari. As previously argued, no court has ever required certiorari to challenge TIDs, and TID cases have proceeded as declaratory judgment actions previously. (P. Br. 45-47.) This is not the typical case that is well served by certiorari review, such as the discretionary decision of whether to grant a liquor license or a conditional use permit. Judging whether strict statutory requirements have been met is not like judging whether a city council had sufficient reason to deny a license application.

Several of the Plaintiffs' claims will need discovery to determine whether facts are actually true, as opposed to whether the City had "enough" evidence to make the decisions it did. Whether or not the areas are actually blighted (relevant to both the statutory and public purpose constitutional claims) is a factual matter not conclusively established by the limited evidence the City did (or did not) review. Whether the developer is actually reimbursed for acquiring or demolishing buildings cannot be determined solely by looking at a certiorari record.

Taxpayer actions exist as a way for the sovereign people to restrain their representatives from spending money in politically feasible, but illegal, ways. They exist to check the power of the majority over the minority and the well-connected over everyone else. Particularly here, where millions in taxpayer funds are being handed over to a private developer, judicial scrutiny of government actions should be thorough. As all taxpayer actions have been, this case should continue as a declaratory judgment action.

Dated this 22nd day of February, 2016.

Respectfully submitted,
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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 and appendix produced with proportional serif font. This brief is 2,980 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: February 22, 2016

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RICHARD M. ESENBERG

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12). 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 filed with the court and served on all opposing parties.

Dated: February 22, 2016

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RICHARD M. ESENBERG