

STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2015AP1858

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**CLERK OF SUPREME COURT
OF WISCONSIN**

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

Plaintiffs-Appellants-Petitioners,

v.

City of Eau Claire and City of Eau Claire Joint Review Board,

Defendants-Respondents.

Appeal from the Circuit Court for Eau Claire County
the Honorable Paul J. Lenz Presiding

**AMICUS CURIAE BRIEF OF
EAU CLAIRE AREA CHAMBER OF COMMERCE, INC.**

WELD RILEY, S.C.
Ryan J. Steffes, State Bar No. 1049698
3624 Oakwood Hills Parkway
PO Box 1030
Eau Claire, WI 54702-1030
(715) 839-7786; (715) 839-8609 Fax

Attorneys for Eau Claire Area Chamber of Commerce, Inc.

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INTRODUCTION

The Eau Claire Area Chamber of Commerce, Inc. (“the Chamber”) is a non-stock corporation founded in 1915. Its purpose is to further business and community development in Eau Claire and the surrounding area. It has over 1,200 members and is accredited by the United States Chamber of Commerce. For the reasons set forth below, it respectfully urges the court to affirm the court of appeals’ decision in the above-captioned action.

ARGUMENT

The first section of this brief will explain how TIF districts have played a significant role in an ongoing and remarkable revitalization of downtown Eau Claire. It will also explain why a judgment nullifying the creation/amendment of the two TIF districts at issue or otherwise impeding the development taking place in those districts would jeopardize that revitalization.

The second section of the brief will focus on the exhaustive political debate that preceded the creation/amendment of the TIF districts at issue. The political debate highlights why courts cannot and should not subject the political determinations underlying the decision to use TIF to the sort of judicial review Petitioners seek.

I. TIF Has Played a Significant Role in the Ongoing and Remarkable Revitalization of Downtown Eau Claire.

Downtown Eau Claire was moribund for a long period of time. Efforts to jump start development were unsuccessful. Then, in 2002, the City of Eau Claire (“the City”) established TIF District No. 8. The first development in District No. 8 was the transformation of a contaminated industrial site into the aptly

named Phoenix Park. Julian Emerson, *Downtown's TIF Factor*, E.C. Leader-Telegram, May 1, 2016, at 1A; Christena T. O'Brien, *Phoenix Rises*, E.C. Leader-Telegram, Sept. 17, 2005 at 1B. Thereafter, Royal Credit Union built its headquarters next to the park. Tom Giffey, *Sparkling Success*, E.C. Leader-Telegram, Jan. 1, 2006, at 1D. In 2007, the Eau Claire Leader-Telegram, opining on a proposed multi-use development in District No. 8, noted:

“Why should a single development project matter so much to Eau Claire residents? If the deal is indeed sealed, in a few years the North Barstow area’s new restaurants, stores, offices and apartments – coupled with the scenic beauty of Phoenix Park – could once again make Eau Claire’s downtown a commercial and cultural hub. That would mark a historic springtime for the city, which has long neglected its heart and soul.” Editorial, *In the Midst of Winter, Signs of Spring on North Barstow*, E.C. Leader-Telegram, Dec. 13, 2007, at 6A.

Despite an intervening recession, that springtime has come and has brought a surge in downtown residents and jobs, a \$20 million renovation of a decrepit hotel and many new downtown businesses. *Downtown's TIF Factor*, supra, at 3. The Milwaukee Journal-Sentinel, in detailing what it calls a “cultural renaissance” in Eau Claire, recently noted:

“The Uniroyal Goodrich Tire Company was (Eau Claire’s) largest employer until the factory shut down in the early 1990's, eliminating more than 1,300 jobs. A decade later,

city leaders sought to breathe life into Eau Claire's downtown. They started by cleaning up blighted properties along the riverfront. 'The public sector led the way by turning these properties into something a developer could actually utilize,' said Mike Schatz, the city's economic development administrator. The city built Phoenix Park on the river at the apex of downtown and encouraged community members to use it for a farmers market, weddings and yoga. It hosts a variety of outdoor concerts, including the Sounds Like Summer series on Thursday nights, which...draws 2,000 to 3,000 people with music, food trucks and craft vendors. The city also invested in other resident-friendly infrastructure: bike trails, sidewalks, an outdoor sound system on the main drag. Then the private sector stepped forward, Schatz said. Royal Credit Union placed its headquarters across from Phoenix Park. Next door is Jamf, an Apple management software company...New apartments sprung up, and today downtown is home to around 3,500 residents." Erin Richards and Karen Herzog, *How Eau Claire Became a Magnet for Artsy Millennials*, Milwaukee Journal-Sentinel, July 2, 2017, <http://www.jsonline.com/story/news/2017/07/01/eau-claire-cultural-renaissance/409782001/>.

The article goes on to correctly note that since 2010, Eau Claire has seen its population increase by 3% while similarly sized Wisconsin cities have experienced little or no population growth *Id.* It concludes:

"Many Eau Claire transplants and those considering a move say they are attracted to the city's energy. Sarah Godlewski grew up in Eau Claire but has spent 15 years building her consulting business in Washington, D.C. She and her husband are preparing to move back. 'It feels like Eau Claire is on this precipice where it's attracting skilled people willing to take risks,' said Godlewski... 'I think it's a place where people with ideas and financial resources and academia are all coming together to think about things differently.'" *Id.*

That is an anecdotal account, but it is one the Chamber believes paints an accurate picture of what is happening in Eau Claire. The business community is growing and is as optimistic about Eau Claire's future as it has been in decades. The revitalization of downtown, and the belief that more is yet to come, plays a significant role in that growth and optimism.

The 2014 amendment to TIF District No. 8 is one of the two legislative enactments being challenged in this case. The other is the 2014 creation of TIF District No. 10, which is one of three downtown TIF districts created after District No. 8. *Downtown's TIF Factor*, supra, at 3. The development within those two districts, most notably the construction of a performing arts center, a public plaza and a large multi-use building (collectively, "the Confluence Project"), is well underway.

The Confluence Project is important to maintaining the momentum and optimism from the remarkable revitalization that has already occurred downtown. A judgment nullifying the creation/amendment of the two TIF districts or otherwise impeding the development occurring in those districts would, in

the Chamber's view, jeopardize the great progress that has been and still is being made in Eau Claire.

II. The Political Debate Regarding the Confluence Project Was Exhaustive.

The Confluence Project was proposed in May 2012. It almost instantly became *the* local political issue. The Eau Claire Leader-Telegram named the project the top local story of 2013. Andrew Dowd, *Confluence Quandary*, E.C. Leader-Telegram, Dec. 29, 2013, at 1A ("An ambitious development that would change the face of downtown Eau Claire and has stirred passions both pro and con is the Leader-Telegram's top local story of 2013").

Opponents of the project pushed for public referendums. Mike Bollinger, Op-Ed, *Let Voters Decide Fate of Risky Confluence Project*, E.C. Leader-Telegram, Aug. 4, 2013, at 3F. Ultimately, two referendums, one city-level and one county-level, took place on April 1, 2014. Eric Lindquist, *Closing Arguments on Project*, E.C. Leader-Telegram, Mar. 30, 2014, at 1A. The need for and appropriateness of TIF were front-and-center issues in the campaigns for and against the project. Eric Lindquist and Andrew Dowd, *Debate over Confluence Project*

Spotlights TIFs, E.C. Leader-Telegram, Feb. 12, 2014, at 1A.

Two days before the referendums, the Leader-Telegram noted in a front-page article:

“One of the most talked about building projects in recent Eau Claire history will be put in the hands of voters this week. Two high-profile referendums will be on the ballot in Tuesday’s election that likely will determine the fate of the Confluence Project, a \$77.2 million public/private venture proposed in the heart of downtown.” *Closing Arguments on Project*, supra, at 6.

City voters approved the project 59% to 41%. Eric Lindquist and Andrew Dowd, *Confluence Moves Forward*, E.C. Leader-Telegram, Apr. 2, 2014, at 1A. County voters approved it 54% to 46%. Id. Prior to the vote, opponents of the project had argued:

“(T)he City Council should give taxpayers a chance to absorb this complex proposal, challenge its designers, and decide whether local taxpayers should be responsible for its construction and operation. We are the recipients of public services that will financially be put at risk. Take this decision to the people!” Bollinger, supra, at 6.

The same opponents had a change of heart after the vote and decided it would actually be better to: “Take this decision to the courts!” First came a claim that the City had violated open meetings laws when discussing the project. Andrew Dowd, *Local Residents Suing City Council*, E.C. Leader-Telegram, Sept. 17, 2014, at 1B. That claim failed. Andrew

Dowd, *Judge Tosses Lawsuit Against City*, E.C. Leader-Telegram, June 25, 2015 at 1B. Next came this case, where the opponents make various statutory and constitutional challenges to the creation/amendment of the TIF districts at issue. Those claims are now before this court after the court of appeals affirmed the circuit court's dismissal of the claims.

In doing so, the court of appeals correctly determined that courts are ill-suited to make the sort of policy judgments involved in deciding whether to create a TIF district. Voters with Facts v. City of Eau Claire, 2017 WI App 35, ¶ 30-31, 376 Wis.2d 479, 899N.W.2d 706. Those judgments include deciding whether the proposed district is sufficiently “blighted,” i.e., deciding whether enough of it has deteriorated to a point where it is “detrimental to the public health...or welfare,” and determining the chances of the proposed development occurring without TIF. Wis. Stat. §§ 66.1105(2)(ae), 66.1105(4)(gm)4, and Wis. Stat. § 66.1105(4m)(b)2. Both are highly subjective, totality-of-the-circumstances judgments, which explains why the legislature left them to the political process. Id. In this case,

that process was exhaustive and included two public referendums.

Yet, Petitioners now want a *de novo* trial so a circuit court judge can second-guess the political and legislative decisions made by voters and their representatives. They want “competing testimony, review of documents, (and) credibility determinations.” (Petitioners’ Reply Brief, p. 12). That sort of judicial review would put courts in an untenable position and would give opponents of development projects the ability to defeat projects by delay and protracted litigation, even when the project has been exhaustively debated and decided via the political process, as it was in this case. If any judicial review of the political and legislative decisions underlying the creation of a TIF district is appropriate, it must be limited to certiorari review, as the court of appeals correctly concluded. Voters with Facts, 376 Wis.2d 479 at ¶ 34-35.

As for Petitioners’ constitutional “cash grant” and “public purpose” claims and their statutory “historic buildings” claim, the Chamber believes they were properly dismissed for the reasons noted by the court of appeals, the City and numerous

amici curiae. However, if this court disagrees, the Chamber urges the court not to decide the issues on the merits given the procedural posture of the case. To make decisions that could have far-reaching (and potentially very damaging) effects without a more developed record would be a disservice to the Chamber, its members and many other non-parties in Eau Claire and throughout the state.

CONCLUSION

There was a huge amount of public scrutiny and political debate regarding the Confluence Project, including scrutiny and debate on whether TIF was appropriate. That culminated in two public referendums. The voters favored going forward with the project, by comfortable margins. Subjecting the complex, subjective, policy-heavy determinations that went into the decision to create/amend the TIF districts at issue and that went into the negotiation of a development agreement to the sort of judicial review Petitioners seek would put courts in a role they are ill-suited to fill. It would also encourage opponents who lose in the political arena, like Petitioners in this case, to attack development projects with protracted and costly litigation.

TIF has played a significant role in what has already been a remarkable revitalization of downtown Eau Claire. A court judgment impeding the development underway in the TIF districts at issue would put at risk the momentum and optimism that has developed and steadily grown over the past decade, both in the Eau Claire business community and the community at large. For that reason and all the other reasons set forth above,

the Chamber respectfully urges the court to affirm the court of appeals' decision.

Dated this 15th day of December, 2017.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Eau Claire Area
Chamber of Commerce, Inc.

ADDRESS
3624 Oakwood Hills Pkwy
PO Box 1030
Eau Claire, WI 54702-1030
(715) 839-7786
(715) 839-8609 Fax

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced using the following font:

Proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,005 words.

Dated this 15th day of December, 2017.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Eau Claire Area
Chamber of Commerce, Inc.

CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80 and 809.18, that the Amicus Curiae Brief of Eau Claire Area Chamber of Commerce, was sent by U.S. mail on December 15, 2017, to the Clerk of the Wisconsin Supreme Court, with three (3) copies served on the parties as follows:

Thomas C. Kamenick
Wisconsin Institute for Law & Liberty
1139 E. Knapp Street
Milwaukee, WI 53202

Douglas Hoffer, Assistant City Attorney
City of Eau Claire
203 S. Farwell Street
Eau Claire, WI 54701

Remzy D. Bitar
Arenz, Molter, Macy, Riffle & Lason S.C.
720 N. East Avenue
Waukesha, WI 53186

Dated this 15th day of December, 2017.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Eau Claire Area
Chamber of Commerce, Inc.

**CERTIFICATE OF COMPLIANCE WITH
RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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 this 15th day of December, 2017.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Eau Claire Area
Chamber of Commerce, Inc.