

VOTERS WITH FACTS  
2815 Eisenhower Street  
Eau Claire, WI 54701,

J PETER BARTL  
3014 Irene Dr.  
Eau Claire, WI 54701,

Certiorari Review  
Case Code: 30955

DAWN BERGSTROM  
346 Heather Rd.  
Eau Claire, WI 54701,

Case No. 19-CV-

CYNTHIA M. BURTON  
3242 May St.  
Eau Claire, WI 54701,

MARYJO COHEN  
1703 Drummond St.  
Eau Claire, WI 54701,

JO ANN HOEPPNER CRUZ  
4874 Chevy Chase Blvd.  
Bethesda, MD 20815,

LEAH KUBETZ  
2016 E. Lexington Blvd.  
Eau Claire, WI 54701,

RACHEL MANTIK  
4564 Woodridge Dr.  
Eau Claire, WI 54701,

JANEWAY RILEY  
311 Garfield Ave.  
Eau Claire, WI 54701,

CHRISTINE WEBSTER  
1401 Emery St.  
Eau Claire, WI 54701,

DOROTHY A. WESTERMANN  
941 Violet Ave.  
Eau Claire, WI 54701,

JANICE M. WNUKOWSKI  
2815 Eisenhower Street  
Eau Claire, WI 54701,

Plaintiffs,

v.

CITY OF EAU CLAIRE  
203 S. Farwell St.  
Eau Claire, WI 54702,

CITY OF EAU CLAIRE JOINT REVIEW BOARD  
203 S. Farwell St.  
Eau Claire, WI 54702,

Defendants.

---

## COMPLAINT

---

NOW COME the Plaintiffs, by their attorneys, the Wisconsin Institute for Law & Liberty, and as and for their Complaint against the Defendants hereby allege as follows:

1. This is an action challenging the validity of the actions taken by Defendants City of Eau Claire (the “City”) and City of Eau Claire Joint Review Board (the “JRB”) to create a new tax incremental district, Eau Claire TID #12. The Plaintiffs allege, among other things, that the City and the JRB failed to satisfy the statutory requirements for the creation of the tax incremental district, and that their actions in doing so were arbitrary, oppressive, and unreasonable, in excess of their authority, and contrary to the evidence. In particular, development included in the predicted district growth had already been substantially completed before TID #12 was created, and therefore the TID could not have been a “but for” cause of that development, as required by state law. The tax revenue from that building by rights should be going to fund the ordinary expenses of government; instead, it is locked into funding-dedicated projects for the next 20 years.

2. Plaintiffs seek certiorari review of the actions taken by the City and the JRB, and a ruling that their actions in authorizing and implementing TID #12 are invalid, void, and of no force and effect, as are any further actions taken by the City to implement the TID or the financing of any projects using incremental revenue generated by the unlawful TID.

*Parties*

3. Plaintiff Voters with Facts (“VWF”) is an unincorporated organization with over a dozen members, who are citizen volunteers and Eau Claire taxpayers. They have the common purpose of opposing TID #12 and any actions taken or to be taken in furtherance of the TID #12 project plan. Many of the individual plaintiffs named herein are officers and volunteers of VWF. VWF has its principal place of business located at 2815 Eisenhower Street, Eau Claire, WI 54701.

4. Plaintiff J. Peter Bartl is an adult citizen of Wisconsin residing at 3014 Irene Drive in the City of Eau Claire.

5. Plaintiff Dawn Bergstrom is an adult citizen of Wisconsin residing at 346 Heather Road in the Town of Washington, Eau Claire County.

6. Plaintiff Cynthia M. Burton is an adult citizen of Wisconsin residing at 3242 May Street in the City of Eau Claire.

7. Plaintiff Maryjo Cohen is an adult citizen of Wisconsin residing at 1703 Drummond Street in the City of Eau Claire.

8. Plaintiff Jo Ann Hoepner Cruz is an adult resident of the State of Maryland residing at 4874 Chevy Chase Boulevard, Bethesda, Maryland. Plaintiff Cruz owns property located at 949 East Main Street in the City of Eau Claire.

9. Plaintiff Leah Kubetz is an adult citizen of Wisconsin residing at 2016 East Lexington Boulevard in the City of Eau Claire.

10. Plaintiff Rachel Mantik is an adult citizen of Wisconsin residing at 4650 Woodridge Drive in the City of Eau Claire.

11. Plaintiff Janeway Riley is an adult citizen of Wisconsin residing at 311 Garfield Avenue in the City of Eau Claire.

12. Plaintiff Christine Webster is an adult citizen of Wisconsin residing at 1401 Emery Street in the City of Eau Claire.

13. Plaintiff Dorothy A. Westerman is an adult citizen of Wisconsin residing at 941 Violet Avenue in the City of Eau Claire.

14. Plaintiff Janice M. Wnukowski is an adult citizen of Wisconsin residing at 2815 Eisenhower Street in the City of Eau Claire.

15. With the exception of Voters With Facts and Dawn Bergstrom, all of the Plaintiffs own property located in the City of Eau Claire and pay property taxes to the City of Eau Claire, the Eau Claire Area School District, the County of Eau Claire, and the Chippewa Valley Technical College District.

16. Dawn Bergstrom owns property in and pays property taxes to the Eau Claire Area School District, the County of Eau Claire, and the Chippewa Valley Technical College District.

17. Defendant City of Eau Claire is a Wisconsin municipal corporation, duly incorporated under Chapter 66, Wis. Stats., and maintaining its principal offices at 203 South Farwell Street, Eau Claire, WI 54702.

18. Defendant City of Eau Claire Joint Review Board is a “joint review board” convened by the City of Eau Claire under Wis. Stat. § 66.1105(4m)(a). The JRB maintains its principal offices at 203 South Farwell Street, Eau Claire, WI 54702.

#### ***Venue and Jurisdiction***

19. Venue is proper in this Court under Wis. Stat. § 801.50(2)(a) and (c) as the claim arose in Eau Claire County and the Defendants do substantial business there.

20. This Court has jurisdiction to conduct a certiorari review of the challenged actions of the Eau Claire City Council and the Joint Review Board under the common law of the State of Wisconsin.

#### ***Tax Incremental Law***

21. Wisconsin’s Tax Increment Law, Wis. Stat. § 66.1105, was first enacted in 1975. Its purpose is to provide Wisconsin municipalities with a method for financing certain specified kinds of urban redevelopment projects, using “tax incremental districts,” commonly referred to as “TIDs.” When a TID is created, all tax revenue from the incremental growth (all increases in property value above the “base” established when the TID is created) within the TID is dedicated to pay for projects delineated in the Project Plan associated with the TID. During the life of the TID, those revenues cannot be used to fund general government operations.

22. The dedicated revenue stream – the incremental tax revenue associated with the increasing value of properties in the district – is used to finance improvement projects within the district. Those improvements are intended to foster development that otherwise would not have occurred, thus creating the new property tax revenue stream. The framework for the creation of a TID assumes that the incremental tax revenue would not have been realized in the absence of the government-financed improvements envisioned by the TID Project Plan.

23. The creation of a TID necessarily raises the mill rate for the city, school district, county, and technical college district within which the TID is located. For the purpose of apportioning property taxes, the law requires that incremental property values in the TID be removed from the tax base. Wis. Stat. § 66.1105(11). With that property removed from the tax base, the city, county, school district, and technical college district containing the TID must charge a higher mill rate in order to fund their ordinary costs of governance.

24. Wisconsin statutes require the creation of a joint review board to review and approve any new TID. The joint review board is comprised of a taxpayer representative as well as representatives of each of the taxing entities that will be affected by the creation of the TID. Wis. Stat § 66.1105(4m). The joint review board must approve any municipal resolution creating or amending a TID district. Wis. Stat. § 66.1105(4)(gs).

25. The joint review board reviews the public record, planning documents, and the resolution passed by the local legislative body, and holds one or more hearings on the proposed TID. Wis. Stat. § 66.1105(4m)(b). “The board may not approve the resolution [approving the TID] 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. & 2. In other words, the joint review board must find that the predicted incremental property growth would not occur without the creation of the TID.

26. 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 by tax incremental financing. Before the

joint review board approves the creation of a TID, it is required to consider the record and determine that the “but for” test has been satisfied.

*Eau Claire’s Creation of TID #12*

27. TID #12 was approved by the Eau Claire City Council on September 12, 2017 and by the JRB on September 15, 2017.

28. The Project Plan for TID #12 provides a detailed list of estimated expenditures for three improvement projects: the expansion and improvement of an existing city-owned parking lot; the reconstruction of part of the existing Chippewa River Trail and its possible extension by purchase of intervening blocks; and the funding of a revitalization program for a residential neighborhood. None of these improvement projects will be undertaken until sometime in 2019, as that is the first year in which the TID #12 Project Plan states that any project costs will be incurred.

29. The TID Project Plan includes a 2017 incremental property growth value of \$14,000,000. That incremental property value represents a single new building within the TID, the Aspenson Mogensen residence hall, located at 222 Water Street. It is a four-story structure that includes retail space on the first floor and dormitory residences for UW-Eau Claire students on the top three floors.

30. That building was already developed, constructed, and occupied before the City Council or JRB voted to approve TID #12 and before any revenue from TID #12 was scheduled to be spent.

31. The \$14,000,000 tax incremental value of that building cannot possibly have justified the creation of TID #12, as plainly that development would occur – in fact it already had occurred – without the creation of TID #12.

32. Furthermore, a developer had already informed the City that he intended to develop two whole blocks within TID #12 whether or not TID-funded improvements were built.

33. During the September 12, 2017 City Council meeting, multiple City council members admitted that development had already occurred and was going to continue to occur in TID #12, and their express goal was to “capture” that growth in a TID increment.

34. The JRB held the most cursory of meetings when approving TID #12. At the meeting, the only “evidence” that projected development would not occur without tax incremental financing was a vague statement that the area in question was “largely unchanged for the last 25-30 years.” The JRB never discussed the fact that the development at 222 Water Street had already occurred or that other developments within the TID were already planned.

35. The City representative to the JRB failed to tell the JRB that the development that would allegedly only occur if the TID were created had already been built and/or was already planned and would occur even if a TID were not created.

36. The limited documents the JRB reviewed did not describe the developments that were anticipated to occur as a result of the creation of TID #12. The JRB did not discuss what the projected developments were expected to be.

37. The TID #12 Project Plan indicates that the City will not build the planned projects until after “the actual levels of new property value are known and sufficient increment is available to pay project costs.”

**CLAIM FOR RELIEF  
(Certiorari Review)**

38. Plaintiffs hereby incorporate the previous paragraphs as if fully set forth herein.

39. On January 12, 2018, the Plaintiffs timely filed a Notice of Claim & Injury relating to the creation and implementation of TID #12. A copy of that Notice is attached to this



Complaint as Exhibit A. Plaintiffs have not been served with a notice of disallowance, and pursuant to Wis. Stat § 893.80(1g), their claim has therefore been disallowed.

40. “Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality, an administrative agency, or an inferior tribunal.” *Ottman v. Town of Primrose*, 2011 WI 18, ¶34, 332 Wis.2d 3, 796 N.W.2d 411. “[C]ertiorari review is appropriate and adequate to address . . . claims regarding [a] municipality’s findings of blight and ‘but for’ assertions because certiorari review is the mechanism by which a court should test the validity of a municipality’s legislative determinations.” *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶70, 382 Wis. 2d 1, 913 N.W.2d 131.

41. The certiorari test considers four questions: “(1) [w]hether the [entity] kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable, and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.” *Klinger v. Oneida Cty*, 149 Wis. 2d 838, 843, 440 N.W.2d 348 (1989) (first alteration in original).

42. The City Council and the JRB, in enacting and implementing TID #12, did not proceed on a correct theory of law. Defendants incorrectly assumed that a building that already was completed could satisfy the statute’s “but for” test. They also incorrectly assumed that development that was already planned and that would occur even without a TID could satisfy the “but for” test.

43. It is unlawful to approve a TID project plan that relies on “incremental” tax revenue from properties that were already built or would be built without a TID. Putting such property into a TID removes the property from the allocable tax base and burdens the other

taxpayers in the municipality and overlapping taxing jurisdictions with the taxes that would otherwise be collected from the new property.

44. Furthermore, the Project Plan conditions the public improvement projects on new development and the receipt of new incremental revenue. If no TID money is collected, the projects will not occur. Therefore, contrary to the statutory requirement that the public improvements be a but-for cause of development, in TID #12, the development is a but-for cause of the public improvements.

45. The actions of the City Council and the JRB in enacting and implementing TID #12 were arbitrary, oppressive, and unreasonable, representing their will instead of their judgment. Defendants admitted openly that development was going to occur regardless of city action, and their express goal was to “capture” revenue from those developments in a TID instead of allowing it to go to ordinary government expenditures.

46. Furthermore, because the developments were never described to the JRB, the JRB could not have determined that “the development described in the documents the board has reviewed . . . would not occur without the creation of a tax incremental district.” Wis. Stat. § 66.1105(4m)(b)2. (emphasis added).

47. The actions of the City Council and the JRB in enacting and implementing TID #12 were contrary to the evidence and therefore unreasonable. The record evidence shows that the development within TID #12 had already occurred and would continue to occur regardless, not that the creation of a TID was a necessary condition for that development.

48. Plaintiffs are harmed by TID #12 in two ways. First, TID #12 is unlawful, and therefore any expenditure of TID funds is also unlawful. City taxpayers such as the Plaintiffs

(excepting Bergstrom) have standing to challenge the unlawful expenditure of tax funds. *S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 21, 112 N.W.2d 177 (1961).

49. Second, Plaintiffs are harmed as taxpayers more specifically because the creation of TID #12 raises the mill rate they pay on property they own. The absence of the 222 Water Street building (as well as all other incremental growth in TID #12) from the tax base shifts that development's property tax burden to all other taxpayers.

50. Plaintiff Voters With Facts has standing to assert a claim on behalf of its members because its members have standing, its purposes of ensuring good government are furthered by the litigation, and neither the claim asserted nor the relief requested requires the participation of a member. *See* Wis. Stat. § 814.07.

WHEREFORE, Plaintiffs request the following relief:

1. An order directing the Defendants to promptly produce the record for certiorari review;
2. Judgment against the Defendants voiding TID #12;
2. Judgment against the Defendants voiding any municipal actions taken in reliance upon or in furtherance of the project plans for TID #12, including but not limited any resolutions appropriating funds and authorizing the issuance of bonds;
3. Judgment against the Defendants directing them to cease any further action in reliance upon or in furtherance of the project plans for TID #12;
4. Costs as allowable by law; and
5. Such other relief as the Court deems proper.

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

Date: April 17, 2019

Electronically signed by Thomas C. Kamenick  
Richard M. Esenberg, WBN 1005622  
(414) 727-6367; rick@will-law.org  
Thomas C. Kamenick, WBN 1063682

(414) 727-6368; tom@will-law.org  
Donald A. Daugherty, Jr., WBN 1017628  
(414) 727-7420; don@will-law.org  
1139 E. Knapp St.  
Milwaukee, WI 53202  
414-727-9455; FAX: 414-727-6385