STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY

VOTERS WITH FACTS, *et al.*,

Plaintiffs,

v.

CITY OF EAU CLAIRE, *et al.*,

Defendants.

Case No. 19-CV-192

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs (collectively, "Voters") challenge the legality of the creation of tax incremental financing district ("TID") #12 by the City of Eau Claire ("City") and the City of Eau Claire Joint Review Board ("JRB" and, collectively with the City, "Eau Claire"), which have statutory responsibility for TID #12.[1] Hoping to insulate from judicial review their September 2017 decision to create TID #12, Eau Claire invokes a variety of affirmative defenses, none of which apply here.[2]

Eau Claire's initial argument is that Voters failed to file this lawsuit on a timely basis. Eau Claire relies on cases in which courts imposed limitations based on the doctrine of laches. However, Eau Claire cannot establish the elements necessary for laches and, in its motion to dismiss, it does not even try. Moreover, the cases cited by Eau Claire are rendered inapposite by

[1] Although in an earlier, separate action filed in this Court as Case No. 15-CV-175, Voters challenged two different TIDs created by Eau Claire (namely, TID #8 (as amended for a third time), and TID #10), this is the first lawsuit challenging TID #12. Case No. 15-CV-175 is currently pending before Judge Sarah Harless after the Supreme Court remanded for further proceedings on Voters' claim for certiorari review. *See Eau Claire County Case Number 2015CV000175 Voters with Facts et al vs. City of Eau Claire et al*, Wisconsin Circuit Court Access, https://wcca.wicourts.gov/caseDetail.html?caseNo=2015CV000175&countyNo=18 (last visited June 12, 2019).

[2] Contrary to Eau Claire's contention, Voters have never challenged Wisconsin's TID Law but, rather, they challenge Eau Claire's failure to comply with the Law. Similarly then, the first few pages of Eau Claire's brief are filled with complaints about Voters exercising their free speech rights, right to seek relief in the courts, and the like. Eau Claire's complaints are irrelevant as a legal matter, and simply reflect Eau Claire's heavy-handed approach to this action. Yesterday, Eau Claire doubled down on its efforts to bully and chill its residents' exercise of their civil rights by filing a motion for sanctions. This Court should reject Eau Claire's tactics.

the operation of the Notice of Claim statute, Wis. Stat. § 893.80, which not only makes a six-month period from the time a claim arose unworkable but, further, makes the running of a six-month period from disallowance contingent on a condition precedent – service of a written notice of disallowance in compliance with that statute – that did not occur here.

Besides timeliness, Eau Claire also asserts that the facts alleged by Voters fail to support their claim, arguing that Voters' challenge to the "but for" finding by the JRB is based solely on construction of a single building (a residence hall for UW-Eau Claire students) before TID #12 was created. (Defs.' Br. 2.) This assertion is false. While the Complaint does point out that the residence hall was completed before TID #12 was created (which establishes that development of the hall could not have been retroactively "induced" by TID #12), it also alleges that other development in the TID was either underway or would have occurred anyway, and that the JRB only considered development that either was underway or would have occurred without the TID. Put differently, Voters do not argue that TID #12 fails to meet the "but for" test because some development would have occurred in its absence; it argues that *all* of the development would have occurred regardless of any public financing.

Eau Claire's third argument for dismissal is that Voters lack standing. The Wisconsin Supreme Court and Court of Appeals have made clear, however, that certiorari review is the proper avenue for challenging a TID, explicitly endorsing it in their decisions in the appeal from Case No. 15-CV-175. The plaintiffs have a concrete injury, long-recognized in Wisconsin case law, flowing from the illegal expenditure of public money. Furthermore, TID #12 directly impacts their pocketbooks by raising the taxes they pay on their property.

Finally, Eau Claire mistakenly claims that Voters' case is barred by the doctrine of issue preclusion. It could not be. Issue preclusion bars relitigation of a particular issue and has nothing

to do with this case, which involves a set of facts that no court has previously considered because no action challenging TID #12 has ever been filed before this one.

BACKGROUND FACTS

The following background is taken from the factual allegations in Voters' Complaint, and such allegations (along with any reasonable inferences that can be drawn therefrom) must be accepted as true at this stage of the litigation. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693.

At its outset, the Complaint states, "[D]evelopment 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" Wis. Stat. § 66.1105. (Complaint, ¶ 1 (emphasis original).) The Complaint references the Aspenson Mogensen student residence hall as one example of development in TID #12 that had occurred without the benefit of tax incremental financing (*id.*, ¶ 29-30). The fact that "a building" had already been constructed might support a "but for" finding if the JRB could also conclude that other development would be induced by the TID, but the Complaint plainly alleges that that is not what happened here.

The TID #12 Project Plan refers to incremental property growth value of $14 million in 2017, all of which resulted from pre-TID construction of the residence hall. (*Id.*, ¶ 29.) The $14 million tax incremental value of the building could not have justified creating TID #12, as it had already been built without the need for tax incremental financing. (*Id.*, ¶ 31.) In other words, $14 million of the increase in incremental value that the TID #12 expenditures for future improvements purportedly would have created – the tax revenue from which would be applied towards repayment of such expenditures – occurred before the TID was created.

But the Complaint does not stop there, and the fact that the Aspenson Mogenson residence hall predates the TID #12 is not the only reason it fails the "but for" test. The Complaint goes on to allege that "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" (*id.*, ¶ 32) and that, at a meeting before TID #12 was approved, "multiple City council members admitted that development had already occurred and was going to occur in TID #12" (*id.*, ¶ 33). The Complaint further alleges that at its September 15, 2017 meeting, the JRB was not told that other development would occur anyway, nor did it discuss the fact that the residence hall was completed and other development had been built, was planned, or would have occurred anyway. (Id., ¶ 35.) The Complaint alleges that the documents reviewed by the JRB did not describe *any* development that would occur as a result of the TID, and that the JRB did not discuss any such development. (*Id.*, ¶ 36.) Clearly, Voters' challenge to Eau Claire's "but for" determination does not rest on construction of the residence hall alone.

In fact, the Complaint goes even farther, alleging that the TID could not have been found to be a "but for" catalyst of any development within its borders because the City expressly said it would not incur any expenditures for project costs – in other words, the TID would do nothing – until after the development occurs. (*Id.*, ¶ 37.) Under these facts, it is hard to see how the JRB could have made the "but for" finding, and it certainly is not possible to reasonably conclude that the Complaint fails as a matter of law.

ARGUMENT

I. VOTERS TIMELY FILED THIS ACTION FOR COMMON LAW CERTIORARI REVIEW.

Eau Claire first argues that Voters failed to file this lawsuit in a timely manner. Because no statute of limitations governs Voters' claim for common law certiorari review, Eau Claire raises

the affirmative defense of laches, citing a six-month judge-made limitations period that relies on this equitable doctrine. However, neither the limitations period specifically, nor laches generally, applies here.

A) The Six-Month Period Does Not Apply in This Case.

No court has ever held that the six-month period applies to challenging the creation of a TID.[3] All the cases cited by Eau Claire involved relief sought by government employees or their families, which is unlike the circumstances before this Court. *See State ex rel. Mentkowski*, 76 Wis. 2d 565, 575-76, 252 N.W.2d 28 (1977) (six month limitations period applied to certiorari review of city's dismissal of police officers); *State ex rel. Czapiewski v. Milwaukee Serv. Comm'n,* 54 Wis. 2d 535, 538-39, 196 N.W.2d 742 (1972) (six month limitations period applied to certiorari review of order by civil service commission suspending city employee); *State ex rel. Casper v. Board of Trustees*, 30 Wis. 2d 170, 174-75, 140 N.W.2d 301 (1966) (six month limitations period applied to certiorari review of denial of claim by heirs of deceased judge for benefits allegedly owed by state retirement fund). Not only does Eau Claire identify no application of the six-month limitations period beyond such a factual context, no court has ever applied it to bar certiorari review of a TID.

This makes sense, because *Casper, et al.* involved challenges by an individual to a discrete and completed governmental action, and not to allegations of ongoing misuse of tax dollars with a potentially long-term, adverse impact on numerous taxpayers. Evaluating the impact of such a broad misuse of the public fisc, and whether it warrants litigation, takes time. It would be an extraordinary matter if taxpayers were forever barred from righting the matter by a severely-

[3] Contrary to Eau Claire's reliance on the dissent in *State ex rel. Olson v. City of Baraboo Joint Review Board*, 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796, a statement made in passing regarding an issue that the court of appeals' majority opinion never addressed does not constitute binding precedent.

truncated limitations period, especially where the limitations period was created by the courts, not the legislature. *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 346, 565 N.W.2d 94 (1997) ("The legislature determines when the opportunity to file a claim for an accrued cause of action expires.").

More fundamentally, the six-month limitation has only been applied in situations where no statutory limitations on timeliness are provided. By contrast, the notice of claim statute, Wis. Stat. § 893.80, governs the time for bringing a lawsuit against a municipal entity on a state law cause of action, like Voters do here. Remarkably, Eau Claire's motion completely ignores Section 893.80.

Section 893.80(1d) provides that "no action may be brought or maintained against" a municipal governmental entity "unless" the claimant first complies with the notice of injury and claim requirements of its Subsections (a) and (b). These requirements are intended to "afford governmental entities the opportunity to investigate and evaluate potential claims," *Maple Grove Country Club, Inc. v. Maple Grove*, 2019 WI 43, ¶ 28, 386 Wis. 2d 425, 926 N.W.2d 184 (citation omitted), and "the opportunity to compromise and settle a claim in order to avoid the burdens of litigation," *id.*, ¶ 29 (citation omitted). This has three implications for this case.

First, under Wis. Stat. § 893.80(1d), before a party may sue a municipal entity, they must file a notice of injury and claim with the entity no later than 120 after the events giving rise to the claim. If the party fails to meet that deadline, they lose the right to sue. Once provided with such a notice, the municipal entity has an additional 120 days to resolve the claim or to disallow it. Wis. Stat. § 893.80(1g). The municipality can disallow the claim either by serving written notice (more on that later) or by taking no action and simply allowing the four-month period to expire. A party cannot sue before the claim is disallowed so, in effect, Section 893.80 creates a waiting period that

can be as long as *eight months after the events giving rise to the action.* Obviously, a six-month period that starts on the date a TID is created – which is what Eau Claire explicitly argues for, and consistent with the three cases it cites[4] – is incompatible with the statutory requirement of a notice of claim process, which can take up to eight months. It would undermine Section 893.80 by effectively reducing the period within which a notice of claim must be filed to less than two months.

No court has reviewed any limit on bringing common law certiorari claims in the context of a notice of claim requirement but, as a practical matter, it is clear that both limitations cannot apply to the same claim. In the presence of an applicable statutory procedure, judge-made limitations must give way. *Cf. MBS-Certified Pub. Accountants, LLC v. Wisconsin Bell, Inc.*, 2012 WI 15, ¶ 4, 338 Wis. 2d 647, 809 N.W.2d 857 (common law defense could not be applied to bar claims permitted by statute).

Second, Section 893.80 also makes clear that a six-month period from the end of the claim and disallowance periods cannot apply in this case. Under Section 890.83(1g), a municipality may send a formal disallowance via certified or registered mail and, if it does so, then the claimant must file a lawsuit within six months of that disallowance or lose the right to sue. *Id.* The disallowance must inform the party of that limitation. *Id.* Alternatively, if the municipality does not send formal written noti ce informing the claimant of the six-month limitation period that it – and only it – triggers, *then the six-month period under Subsection (1g) does not apply*. *See Linstrom v. Christianson*, 161 Wis. 2d 635, 639, 469 N.W.2d 189 (Ct. App. 1991).

It would be inconsistent with the clear language of the statute to allow a judge-made period developed for cases without statutory guidance to override the legislature's determination that a

[4] The courts in *Casper, et al.* all hold that the six months begins to run on the date of the decision that is to be reviewed. *See, e.g., Mentkowski*, 76 Wis. 2d 565, 575, 252 N.W.2d 28 (1977).

six-month period requires written disallowance. This is particularly so in light of the legislature's decision to protect claimants by requiring that notice of this short, six-month period be provided. Put differently, the legislature has created a condition precedent to a six-month limitation period. Eau Claire argues that *Casper*, *et al.* – cases in which the notice of claim statute was not invoked – should be used to read that condition precedent out of the statute. It does no good to say that not all litigation brought following disallowance of a claim under Section 893.80 will involve certiorari review; the framework of Section 893.80 – including the condition precedent for a six-month limitation period – applies on its face to all claims.

Third, as more fully explored below, even if Section 893.80 did not make expressly clear that there cannot be a six-month period, prior uses of a six-month period in cases involving certiorari were applications of the doctrine of laches. Laches is an equitable remedy designed to prevent claimants from lying in the weeds to the disadvantage of defendants. But compliance by Voters with Section 893.80 means that did not happen here, and Eau Claire was in fact placed promptly on notice. If Eau Claire had been concerned about being prejudiced by the passage of time, it could have availed itself of a six-month period by simply serving a written notice of disallowance informing Voters of the shorter period. Eau Claire chose not to do so.

The instant case aptly demonstrates why a six-month limitation cannot apply to a situation controlled by the notice of claim statute. TID #12 was approved by the JRB on September 15, 2017. (Compl., ¶27, Dkt #1.) Voters filed a timely notice on January 12, 2018 (*id.*, ¶39), yet could not file suit until after Eau Claire disallowed the claim. Eau Claire disallowed the claim by inaction on May 13, 2019 (*id.*, ¶39), at which time more than six months from the creation of TID #12 had already passed. Voters acted in complete compliance with the notice of claim statute, yet could

not have met a six-month deadline. If Eau Claire's argument is accepted, parties fully in compliance with the notice of claim statute could still lose the right to bring a lawsuit.

B) Eau Claire Has Failed to Demonstrate That It Is Entitled to Equitable Relief Under the Doctrine of Laches.

The judge-made, six-month limitation on certain actions seeking common law certiorari review is derived from the equitable doctrine of laches. *See, e.g.*, *Mentkowski*, 76 Wis. 2d at 575-76 ("parties who fail to [commence certiorari proceedings within six months] are guilty of laches"); *see also Haferman v. St. Clare Healthcare Found.*, 2005 WI ¶ 17, 286 Wis. 2d 621, 707 N.W.2d 621 (in absence of statute of limitations enacted by legislature, courts look to doctrine of laches to determine whether claim is timely). "Laches is an equitable defense to an action based on the plaintiff's unreasonable delay in bringing suit under circumstances in which such delay is prejudicial to the defendant." *State ex rel. Lopez-Quintero v. Dittman*, 2019 WI 58, ¶16, ___ Wis. 2d. ___, ___ N.W.2d. ___ (citing *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999)). To carry its burden of proving laches, Eau Claire must show that 1) Voters unreasonably delayed in filing this action; 2) Eau Claire lacked knowledge that Voters would bring an action challenging TID #12; and 3) Eau Claire was somehow prejudiced by any such delay by Voters. *See State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶¶ 28-29, 290 Wis. 2d 352, 714 N.W.2d 900.

Eau Claire does not even try to satisfy this burden. Its brief is devoid of facts or argument showing that any of those three elements are met and, in fact, none of them are. A "delay" of several months here was not unreasonable and did not prejudice Eau Claire.

First, it was reasonable for Voters to wait until after the Wisconsin Supreme Court issued its June 6, 2018 decision in *Voters With Facts v. Eau Claire* 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131 ("*Voters I*"), the case, filed in this Court as Case No. 15-CV-1575, challenging Eau

Claire TIDs #8 and #10, because the result there would determine whether Voters could bring any challenge at all to TID # 12 and, if so, what form that challenge would have to take. Furthermore, the tax-exempt status of the Aspeson Mogensen building was unclear. The owner-developer was seeking a tax exemption, which the City Council denied on February 26, 2019. *See* Minutes, Eau Claire City Council Legislative Meeting, Tuesday February 26, 2019, *available at* https://www.eauclairewi.gov/Home/ShowDocument?id=28083.[5] Had the residence hall become tax exempt (and thus not created any incremental revenue to spend on projects in TID #12), the plans for TID #12 may have fallen apart and the district may have been voluntarily repealed, making this lawsuit unnecessary. It was reasonable for Voters to wait to see what would happen with that situation before commencing this action.

Second, Eau Claire had clear knowledge that Voters intended to bring an action challenging TID #12 because Voters filed a formal notice of claim with the City on January 12, 2018. (Compl., ¶39, Dkt #1.)

Finally, Eau Claire offers no argument that it has been prejudiced – and it has not been, in any event. For example, Eau Claire cannot seriously argue that it is unable to compile the record of events that happened less than two years ago and present arguments based on that record. In the case challenging TIDs #8 and #10, Eau Claire recently compiled a record of events that largely took place in 2014, and also included records as far back as 2002. *See Voters With Facts v. Eau Claire*, Eau Claire County Case No. 2015-cv-175, Dkt Nos. 62-80, November 27-28, 2018.

Equity also does not favor a laches defense here because Eau Claire's hands are not clean. Had Eau Claire wanted to put Voters on a strict, six-month timeline to file a lawsuit, it could have

[5] Like Voters, the hall's owner also challenges Eau Claire's tax treatment of the building, and filed suit against the City last week. *See* https://wqow.com/news/top-stories/2019/06/07/blugold-real-estate-sues-city-of-eau-claire-over-tax-dispute/.

easily done so by disallowing their claim in writing and delivering that disallowance by registered or certified mail. Wis. Stat. § 893.80(1g). By law, such a disallowance must inform the claimants that they have six months to file a lawsuit. *Id.* But Eau Claire did not disallow Voters' claim in that manner, and if a municipality disallows a claim by inaction, the six-month statutory time limit on bringing an action is never triggered. *Linstrom v. Christianson*, 161 Wis. 2d at 639. Furthermore, once the 120-period under Subsection (1g) runs, a municipality may not revive the 6-month limitation period by giving notice of disallowance. *Blackbourn v. Onalaska Sch. Dist.*, 174 Wis. 2d 496, 497 N.W.2d 460 (Ct. App. 1993). The lack of a time limit is entirely Eau Claire's own doing, and they cannot now claim that equity requires that this Court rectify their own failure.

II. VOTERS PLEAD SUFFICIENT FACTS TO STATE A CLAIM FOR COMMON LAW CERTIORARI REVIEW.[6]

As made clear by a recent decision from the Wisconsin Supreme Court, Eau Claire overstates the holding of *Data Key*: "*Data Key* did not change Wisconsin's pleading standard as previously articulated in *Strid v. Converse*, 111 Wis. 2d 418, 422-23, 331 N.W.2d 350 (1983)." *Cattau v. National Ins. Servs. of Wis., Inc.*, 2019 WI 46, ¶ 3, 386 Wis. 2d 515, 926 N.W.2d 756. "If the facts reveal an apparent right to recover under any legal theory, they are sufficient as a cause of action." *Id.*, ¶ 4 (citing *Strid*, 111 Wis. 2d at 423). Eau Claire's citation to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) notwithstanding, Wisconsin's Supreme Court has confirmed that "as a notice pleading state, Wisconsin law requires only that a complaint 'set forth the basic facts giving rise to the claims.'" *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶ 21, 349 Wis. 2d 587, 836 N.W.2d 807.

[6] Unlike in their motion to dismiss, Eau Claire contends in its answer that Voters alleges *too many* facts. *See e.g., Answer* ¶¶ 21-23.

Pleadings must be construed to do "substantial justice." Wis. Stat. § 802.02(6). Under Section 802.02(1)(a), "a complaint must plead facts, which if true, would entitle the plaintiff to relief." *Data Key*, 2014 WI 86, ¶ 21 (citing *Strid*, 111 Wis. 2d at 418). "It is the sufficiency of the facts alleged that controls the determination of whether a claim for relief is properly" pled. *Id.* (quoting *Strid*, 111 Wis. 2d at 422-23).

Eau Claire argues that because the *Baraboo* court concluded that in those circumstances, the fact that one parcel would probably be developed even without a TID was insufficient, the same is true here and thus, Voters' claim necessarily fails. (Defs.' Br. at 12-13.) But *Baraboo* is not controlling on the issue of the "but for" test for three reasons.

First, *Baraboo*'s holding was reached following review of the certiorari record. *See State ex rel. Olson v. City of Baraboo Joint Review Board*, 2002 WI App 64, ¶¶ 7, 27-30, 252 Wis. 2d 628, 643 N.W.2d 796. The case was not dismissed on the complaint, as Eau Claire asks this Court to do. In *Baraboo*, the court noted that the taxpayer had failed to produce evidence that certain development would have occurred even without creation of the TID, *id.*, ¶ 29; by contrast, Voters aver that the residence hall and other development accounting for the "new" incremental value in TID #12 had already been built or would be built even without TID #12. (Compl., ¶¶ 29-33, 42-43, Dkt #1.) While the *Baraboo* plaintiff failed to meet his burden, this Court is not able to say whether Voters have met their burden in such a fact-specific case without first reviewing the certiorari record.

Second, *Baraboo* involved a claim that only a *single* development was going to occur with or without a TID. 2002 WI App 64, ¶ 27. By contrast, as explained above, Voters have not only alleged that the residence hall was already built and no other increment was projected but, also, that developers have said that additional development of, for example, two whole blocks, was

going to happen with or without the TID. They have alleged that there would have been no other development and that, in fact, no such development was identified or discussed by the JRB. Voters allege that Eau Claire openly admitted that it sought to capture retroactively revenue from developments it knew were going to occur with or without a TID. (*Id.*, ¶¶ 33, 45.) And Voters allege that the TID could not have been the "but for" cause of additional development because no TID projects were going to be undertaken until after the development occurred.

By contending that Voters' claim rests entirely on a single development, Eau Claire cherry picks one part of Voters' entire case, and review of the complete Complaint refutes this contention. In the Complaint's very first paragraph, Voters state that "development included in the predicted district growth *had already been substantially completed* before TID #12 was created." (Compl., ¶ 1, Dkt #1 (emphasis original).) The Complaint references the residence hall as an example of development in TID #12 that had occurred without the benefit of tax incremental financing (*id.*, ¶¶ 29-30), but also alleges that "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" (*id.*, ¶32). The Complaint further states that at a meeting before TID #12 was approved, "multiple City council members admitted that development had already occurred and was going to occur in TID #12." (*Id.*, ¶34.) These allegations are not "bare legal conclusions," as Eau Claire argues, but averments of specific, concrete facts that form the legal basis for Voters' claim.

Third, the *Baraboo* court concluded that the fact that one development was *going to occur* (that is, in the future) even in the absence of a TID was not sufficient to invalidate that TID. 2002 WI App 64, ¶ 28. Those are not the factual circumstances here. Voters allege that a development that the City claims would not occur in the absence of a TID *has already occurred* (that is, in the past). (Compl., ¶ 30.)

In sum, *Baraboo* is distinguishable in several ways with respect to its "but for" holding. In addition, Voters raise two other deficiencies in the creation of TID #12 not discussed in *Baraboo*.

First, the City failed to "describe" in the documents it provided to the JRB those developments that supposedly required tax incremental financing in order to occur, as required by Wis. Stat. § 66.1105(4m)(b)2, and the JRB did not even discuss the developments listed only by dollar figure in the Project Plan. (Compl., ¶ 36, Dkt #1.) Without any explanation or discussion, the JRB could not have reasonably concluded that the unidentified developments would not exist without the TID. (*See id.*, ¶ 46.) *Baraboo* did not address such a situation.

Second, Eau Claire has turned the "but for" requirement on its head. TID spending is supposed to *spur* new development. Here, however, the City's own documents establish that TID #12 spending will not occur until there is development that can generate incremental revenue to actually pay for it. (*Id.*, ¶ 37.) Instead of public spending causing new development, new development is causing public spending. (*See id.*, ¶ 44.) *Baraboo* did not address such an inversion of the TID law.

III. VOTERS HAVE STANDING AS TAXPAYERS TO CHALLENGE TID #12 VIA CERTIORARI REVIEW.

Mischaracterizing this action as "[m]ere disagreement with legislative action," Eau Claire argues that Voters lack standing to bring a claim for common law certiorari review. (Defs.' Br. 13-14.) In doing so, Eau Claire ignores the Supreme Court and Court of Appeals decisions in *Voters I*, as well as the robust law of taxpayer standing in Wisconsin.

In Case No. 15-CV-175, the circuit court found that Voters lacked standing to seek declaratory judgment, but did not explain its reasons for dismissing Voters' certiorari claim. *See Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶¶ 12-13, 376 Wis. 2d 479, 899 N.W.2d 706, *aff'd*, 2018 WI 63. Although the Court of Appeals affirmed the circuit court's ruling that

Voters lacked declaratory judgment standing, it reversed the decision as to certiorari review. *Id.*, ¶¶ 2-4 ("We agree with the circuit court that Voters lacks taxpayer standing to seek a declaratory judgment . . . [but] reverse the circuit court's dismissal of [the certiorari] claim."). And the Supreme Court agreed, remanding Case No. 15-CV-175 for further proceedings on Voters' claim for certiorari review. *Voters I*, 2018 WI 63, ¶ 74. As with the current proceedings in Case No. 15-CV-175, this case involves certiorari review of the creation of a TID – not a request for declaratory judgment – and such review was expressly authorized by both the Court of Appeals and the Supreme Court.

The holdings in the *Voters With Facts* decisions are consistent with Wisconsin law, under which standing is broadly and permissively construed. *Bence v. City of Milwaukee*, 107 Wis. 2d 469, 478, 320 N.W.2d 199 (1982). "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) (complaint alleging that expenditure of public funds will be unlawful establishes harm necessary for taxpayer standing) (citation omitted). Taxpayers suffer pecuniary loss when tax revenues will be spent in an allegedly unlawful manner 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).

To support Voters' standing to bring this action, the Complaint alleges that because TID #12 is unlawful, "any expenditure of TID funds will be unlawful" and subject to challenge by City taxpayers pursuant to *S.D. Realty*. (Compl., Dkt #1, ¶48.) The illegal expenditure of taxpayer funds, along with the unavailability of funds for other governmental purposes, constitutes pecuniary harm to taxpayers. *S.D. Realty*, 15 Wis. 2d at 22. In further support, Voters allege that

they "are harmed as taxpayers more specifically because the creation of TID #12 raises the mill rate they pay on property they own." (Compl., Dkt #1, ¶49.)

S.D. Realty is the only case relied on by Eau Claire that involved a taxpayer as plaintiff, and it supports Voters' standing here: "Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss. . . . Though the amount of the loss . . . has only a small effect on each taxpayer, nevertheless it is sufficient to sustain a taxpayer's suit." *S.D. Realty*, 15 Wis. 2d at 22 (citations omitted) (holding that taxpayer had standing to sue city sewage commission for alleged illegal use of public funds in entering into lease). By contrast, *Krier v. Villione* rejected a novel theory that would have allowed "any business [to] sue another business's advisor whenever that business advice negatively affects a plaintiff's business, 2009 WI 45, ¶25, 317 Wis. 2d 288, 766 N.W.2d 517 (holding that plaintiff must be a current shareholder for standing to bring derivative claim on behalf of corporation), and *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.* involved an exception to the general rule that a non-client party lacks standing to bring a disqualification motion against opposing counsel, 2011 WI 36, ¶¶7-8, 333 Wis. 2d 402, 797 N.W.2d 789, which is irrelevant to this case.

IV. VOTERS' CLAIM FOR CERTIORARI REVIEW OF TID #12 IS NOT SUBJECT TO ISSUE PRECLUSION.[7]

Voters do not dispute that they and Eau Claire were parties to Case No. 15-CV-175, but there is no identity of *issues* between that case, which centered on TIDs #8 and #10, and this one, which challenges TID #12.

Issue preclusion "'is designed to limit the relitigation of issues *that have been actually litigated* in a previous action,'" and "[t]he party asserting issue preclusion carries the burden to

[7] In contrast to claim preclusion, issue preclusion is not among the defenses enumerated in Section 802.06, and it is not clear that it is a proper basis for Eau Claire to raise in a motion to dismiss under 802.06.

establish that it should be applied." *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999) (citations omitted) (emphasis added). Because no court has ever considered whether TID #12 satisfies any of the requirements of Wisconsin's TID statute, those issues have never "been actually litigated," and Eau Claire cannot carry its burden. The case challenging TIDs #8 and #10 – which still has not been completed – does not preclude Voters from simultaneously challenging TID #12.

Nor does the Supreme Court's decision in *Voters I* foreclose the type of challenge Voters bring here. At base, the main argument in this case revolves around the question of "how much" development must depend on the TID to satisfy the "but for" test. The Supreme Court did not address that question in *Voters I*; rather, it addressed whether declaratory judgment or certiorari review was appropriate, whether a cash grant to a developer/owner operated as an unconstitutional property tax rebate, and whether Voters had sufficiently alleged facts to demonstrate that TID funds were being unlawfully spent on the destruction of historic buildings. *See generally Voters I*, 2018 WI 63, ¶¶ 24-25 (presenting the issues and conclusions on each issue). In fact, *no court* has ever ruled that, as Voters dispute here, a city can satisfy the "but for" test if all of its claimed development would occur even without a TID.[8]

If it has any relevance at all, *Voters I* demonstrates that Voters have pled a cognizable claim here. The Supreme Court concluded that Voters *had* pled a proper certiorari claim challenging the "but for" test for TIDs #8 and #10. *Voters I*, 2018 WI 63, ¶ 69. Like in the instant case, the plaintiffs in *Voters I* pled that the development claimed to satisfy the "but for" test in those two

[8] Similarly, the Supreme Court in *Voters I* never addressed a claim that the developments were never described to the JRB or that the TIF spending was conditioned on the existence of "new" development (instead of vice versa), both of which are asserted by Voters in the instant case.

TIDs would have occurred even without those two TIDs, *Voters I*, 2018 WI 63, ¶¶ 11, 44, which is the same allegation Voters make in this case, (Compl., Dkt #1, ¶¶42-43).

CONCLUSION

For the foregoing reasons, this Court should deny Eau Claire's motion to dismiss.

Respectfully submitted,

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