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CLERK OF COURT OF APPEALS
OF WISCONSIN

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT 3
APPEAL CASE NO. 2019AP1528

Voters with Facts, J. Peter Bartl, Dawn Bergstrom, Cynthia M. Burton,
Maryjo Cohen, Jo Ann Hoepfner Cruz, Leah Kubetz, Rachel Mantik,
Janeway Riley, Christine Webster, Dorothy A. Westermann and Janice M.
Wnukowski,

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
Case No. 19-CV-192

APPENDIX OF PLAINTIFFS-APPELLANTS

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APPENDIX
COURT OF APPEALS BRIEF
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FILED
04-17-2019
Clerk of Circuit Court
Eau Claire County, WI
2019CV000192
Honorable Michael A
Schumacher
Branch 2

STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY

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

RACHEL MANTIK
4564 Woodridge Dr.
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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.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 20 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Eau Claire County Clerk of Courts, 721 Oxford Ave, Suite 2220, Eau Claire, WI 54703**, and to Wisconsin Institute for Law & Liberty, Plaintiffs' attorney, whose address is: **1139 E. Knapp St, Milwaukee, WI 53202**.

You may have an attorney help or represent you.

If you do not provide a proper answer within 20 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs

Date: April 17, 2019

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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

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P R O C E E D I N G S:

THE COURT: Good morning, everyone.
Please be seated.

MR. HOFFER: Good morning, your Honor.

THE COURT: Okay. This is 19-CV- --
Someone just pull the door shut,
please.

Thank you for doing that.
(A discussion was held off the
record.)

THE COURT: This is 19-CV-192, ***Voters
With Facts, Et Al., vs. City of Eau Claire.***

Counsel, would you note your
appearances, please.

MR. DAUGHERTY: On behalf of
plaintiffs, Don Daugherty, Wisconsin Institute for
Law and Liberty.

MR. HOFFER: Your Honor, on behalf of
the City of Eau Claire, Deputy City Attorney Douglas
Hoffer and City Attorney Stephen Nick.

THE COURT: All right. Welcome,
everybody.

This is the time that's been set for
oral argument and perhaps a decision on motion -- on
motions to dismiss that have been filed by the City.

1 Counsel, I've read all your briefs.
2 I'm pretty conversant in what the issues may be here
3 at this point. We've gotten together to hear your
4 comments.

5 And so, Mr. Hoffer, will you be taking
6 the laboring oar for the City?

7 MR. HOFFER: Yes, your Honor.

8 THE COURT: All right.

9 MR. HOFFER: So I think it's important
10 in analyzing these issues to recognize the things
11 that are not in dispute, and first of all -- you
12 know, and importantly for the motion to dismiss.

13 There's no dispute that this action
14 was filed more than six months after the legislative
15 TIF determinations were final. The Wisconsin
16 Institute --

17 (The court reporter interrupted for
18 clarification.)

19 MR. HOFFER: The Wisconsin Institute
20 for Law and Liberty. My apologies.

21 THE COURT: And you're going to hear
22 TIF, T-I-F.

23 MR. HOFFER: Yes.

24 THE COURT: And T-I-D.

25 MR. HOFFER: And Voters With Facts and

1 the City of Eau Claire. I will -- I will do my best
2 to slow down.

3 THE COURT: And -- and when you cite
4 cases, if you cite cases, spell them --

5 MR. HOFFER: Sure.

6 THE COURT: -- as well.

7 So go ahead, Counsel.

8 MR. HOFFER: So the six-month deadline
9 to bring a certiorari action is settled law. It's
10 been settled law for over 50 years in the State of
11 Wisconsin.

12 The failure to bring a certiorari
13 action within six months constitutes laches as a
14 matter of law. We don't need to demonstrate
15 prejudice or -- or anything else. By missing the
16 deadline, that constitutes laches, and the action
17 must be dismissed.

18 Now there's one appellate opinion that
19 has addressed whether or not this six-month deadline
20 to bring a certiorari action applies to -- to TIF
21 actions, and that's the opinion of then Judge -- then
22 Appellate Court of Appeals Judge Roggensack in the
23 *Baraboo Olson* case.

24 I think this decision is really
25 noteworthy for a number of reasons, your Honor.

1 First of all, it -- it makes clear that certiori
2 actions challenging legislative TIF determinations
3 must be brought within six months.

4 And it's noteworthy for other reasons.
5 The Voters With Facts argues it's not binding
6 authority, and it's not, but they argue how much
7 persuasive authority it should have.

8 I think it's noteworthy that in the
9 last case that Voters With Facts brought against the
10 City of Eau Claire challenging TIF, the City of
11 Eau Claire said, citing that Roggensack opinion,
12 paragraph 32 in that Roggensack opinion, that said
13 certiorari is the standard of review.

14 Voters With Facts said this isn't
15 binding authority. It's -- it's just comments made,
16 you know, that shouldn't be even taken as persuasive
17 authority.

18 The Wisconsin Supreme Court disagreed,
19 and in determining that certiorari is the standard of
20 review cited paragraph 32 of the Roggensack opinion
21 which is the same paragraph that says the six-month
22 deadline applies. I think that demonstrates the
23 persuasive value of that opinion.

24 Other arguments -- and I -- I know
25 we've briefed these heavily so I don't want to over

1 belabor the points -- but Voters With Facts argue
2 that the notice of claims statute preempts the
3 six-month deadline.

4 Again, that conflicts with the opinion
5 of -- of Chief Justice Roggensack, and whether it
6 applies or not, the six-month dead -- whether the
7 notice of claim deadline applies to this action or
8 not, the six-month deadline still applies.

9 Either it shortens the time they have
10 to -- to file a notice of claim to less than 60 days,
11 or in the alternative, the notice of claims statute
12 doesn't -- doesn't apply, and then you still have six
13 months to bring the action.

14 There's no contradiction -- there's no
15 expressed contradiction -- in the statute preempting
16 that six-month deadline, and, again -- again, I'd
17 point out to the court that common law is presumed
18 not to be preempted unless it is clearly pre --
19 preempted. That is an axiomatic rule of statutory
20 construction.

21 As far as the failure to state a claim
22 action, again, even if it was brought timely, the
23 action still needs to be dismissed.

24 This case factually is on point with
25 the -- the *Baraboo* case. In *Baraboo* there was a

1 Walmart that was planned ahead of time. They created
2 a TIF district anyway, and what the court said is the
3 analysis is looking at the district as a whole.

4 The fact that one or -- you know, that
5 there's planned developments ahead of time doesn't
6 invalidate a TIF district because the analysis is
7 whether the development in the district as a whole
8 might occur to the size and scale it would without
9 TIF.

10 One attempt that the Voters With Facts
11 made to distinguish *Baraboo* was they -- they have a
12 paragraph in their Complaint, ironically also
13 paragraph 32, where they say in addition to the
14 Aspenson Mogensen Building, there was an unnamed
15 developer who allegedly informed the City he intended
16 to develop two whole unnamed -- and those are my
17 words, not theirs -- blocks within TID 12, with or
18 without TIF.

19 Those are not well-pleaded facts, and
20 the court in examining the motion to dismiss has to
21 use the standard set out in the *Data Key* case which
22 is a plausibility standard. The court doesn't just
23 look at the facts of the Complaint. It looks at the
24 well-pleaded facts in the Complaint.

25 Now, regardless of whether you

1 consider that fact or not, I don't think it's enough
2 to distinguish the **Baraboo** decision, and I do think
3 they have failed to state a claim.

4 As far as standing is concerned, you
5 know, it's a -- it's kind of an alternative argument.
6 In Wisconsin, to demonstrate taxpayer standing, you
7 have to show it's an illegal expenditure.

8 Now, in the prior case that Voters
9 With Facts brought, the circuit court and the Court
10 of Appeals described their pleading deficiencies as a
11 lack of standing. The Wisconsin Supreme Court
12 described their pleading deficiencies as a failure to
13 state a claim and assumed standing.

14 We look at it as kind of two sides of
15 the same coin. There were pleading deficiencies.
16 They haven't adequately pled an illegal expenditure,
17 and so either they've failed to state a claim or they
18 lack standing, but the case needs to be dismissed.

19 Additionally, their --

20 THE COURT: And the -- and the failure
21 is failing to state an illegal expenditure? That's
22 not in the Complaint?

23 MR. HOFFER: Right. And in order for
24 there to -- to be an illegal expenditure, if
25 you're -- if you're taking their argument even at

1 face value, the but-for determination, they have to
2 have pleaded sufficient facts demonstrating the
3 but-for determination is without a reasonable basis.

4 They haven't done that because all
5 they've pleaded is that the Aspenson Mogensen Center
6 was planned previously. The fact that the Aspenson
7 Mogensen Building was already under way, just like
8 the fact that the Walmart building was already
9 planned, doesn't invalidate the entire TIF district.

10 And -- and, in fact, most of the time
11 when you see -- when there -- when a TIF district is
12 created, they have to do two things. They have to
13 say that but for the use of TID, there -- there is
14 some development that wouldn't occur, but they also
15 have to determine that it's economically feasible.

16 And so usually they're trying to
17 balance those two things. Where we see some
18 development occurring here, but we're not seeing
19 enough, and so we're not seeing it on the size and
20 scale we see with TIF, but we have -- we have an idea
21 that it could succeed here with TIF, and so they're
22 balancing those two things.

23 And so you're often going to see some
24 development because you don't want communities where
25 TIF has failed and the State can leave, your Honor,

1 when communities have invested everything on the
2 front end, on a wing and prayer, hoping there will be
3 future development.

4 What they need is an idea that some
5 might occur, and then as you look at, you know, for
6 example, this case, often the -- the project plans
7 spell out money that will be earmarked but not all of
8 it's necessarily going to be spent immediately.
9 They're going to look at the needs of that TIF
10 district to decide when that money needs to be
11 allocated.

12 So, additionally, the last thing,
13 issue preclusion, the analysis of -- the application
14 of the but-for determination was part of the prior
15 case that Voters With Facts were a part of, and what
16 the Wisconsin Supreme Court said, consistent with
17 what the *Baraboo Olson* decision said, was that the
18 but-for determination isn't a piecemeal
19 determination.

20 You don't look at one development here
21 or another development there and determine whether
22 the but-for determination was -- was proper. What
23 you do is you look at the district as a whole.

24 And, again, because these are
25 legislative actions, there is a high bar as far as

1 the number -- the kind of facts that need to be
2 pleaded and demonstrated to the court in order to
3 survive -- in order to satisfy the deferential
4 certiorari standard.

5 Again, even taking all well-pleaded
6 facts in the Complaint as true, Voters With Facts
7 have not pleaded sufficient facts to survive the
8 motion to dismiss.

9 THE COURT: Thank you, Mr. Hoffer.
10 Mr. Daugherty.

11 MR. DAUGHERTY: Thank you, your Honor.

12 The fact remains that there is no
13 statute of limitations whatsoever that governs this
14 case. There is -- there are a series of cases from
15 the State Supreme Court in which that court has found
16 laches using its equitable authority in factual
17 circumstances that aren't present here at all.

18 Those cases all involve something
19 different, involved individuals seeking some recourse
20 from the government, individuals who have been
21 employed by the government.

22 That is not what we have here. There
23 is no case. The dissent by now Chief Justice
24 Roggensack in *Baraboo* notwithstanding is that to
25 which -- I don't know how it would be persuasive

1 authority just in passing references to those cases,
2 again in the dissent, which is an issue that the
3 majority didn't even consider, but there is no case
4 that has applied this six months supposed matter of
5 law doctrine that -- that the plaintiff -- the
6 defendants -- rely on in circumstances like here.

7 THE COURT: Is there -- is there any
8 case where -- certiorari case -- which held not to
9 have followed the six months rule --

10 MR. DAUGHERTY: There --

11 THE COURT: -- from any factual
12 circumstances?

13 MR. DAUGHERTY: It's never been
14 applied. No, not that I'm aware of. We've looked.
15 They haven't brought it up. Again, the cases they
16 rely on are factual circumstances that are different
17 here.

18 Also as I note too, as we say in our
19 brief, the *Doe* case said that it is up to the
20 legislature to set time bars, definitive deadlines
21 and time bars, through the enactment of statutes. We
22 don't have that here.

23 Again, the court -- the -- the State
24 Supreme Court in all three cases, *Casper*,
25 *Mentkowski* --

1 (The court reporter interrupted for
2 clarification.)

3 THE COURT: Spell the names, if you
4 would, Counsel.

5 MR. DAUGHERTY: Yeah. Let me find
6 them here. Please give me a moment here.

7 **Mentkowski** is M-e-n-t-o-w-s-k-i
8 (verbatim). **Casper** is C-a-s-p-e-r. And the third
9 one is the difficult one, but give me a moment,
10 please.

11 Yeah. It's C-z-a-p-i-e-w-s-k-i.

12 So, again, the legislature normally
13 sets the statute of limitations. Judges can find
14 laches, but, again, it's through the use of their
15 equitable powers.

16 Equitable powers are only exercised
17 after some factual -- attempted factual analysis of
18 the facts in front of them. It's done on a
19 case-by-case basis. It's not done in the sort of
20 blanket rule they would have you believe as
21 established by the **Casper** line of cases. That simply
22 isn't the fact here.

23 And, of course, with regard to laches,
24 there's, obviously, sides of that that were here at
25 the outset of the case. It's their affirmative

1 defense.

2 All we're looking at with regard to
3 this motion to dismiss is the face of the Complaint,
4 but even in their answer and even in their responses
5 to -- in support of their motion to dismiss, they
6 haven't indicated that they didn't know this was
7 coming, which is a requirement to prove laches.

8 In fact, we filed a notice of claim
9 with them in January of 2018, I believe. So they
10 knew it was coming. They haven't talked about any
11 prejudice.

12 Maybe they'll come up with that later
13 in the case, I doubt it, but certainly by a motion to
14 dismiss that's directed to the face of the Complaint
15 they can't say that they carried their affirmative
16 defense burden demonstrating laches.

17 I don't think they're going to be able
18 to eventually, but, again, the courts in *Casper*,
19 *Et Al*. all act out of equitable authority. That
20 simply can't be done here, certainly not at this
21 point of the case.

22 The other point too is that --
23 there -- there is 893.80, the notice of claims
24 statute, does, in fact, apply. In fact, it's odd
25 that in their brief, the City doesn't really take a

1 position. They say it may apply, may not apply.

2 And first of all, it would be nice for
3 the City to sort of let people know whether the
4 notice of claims statute applies to these kinds of
5 things, but they don't want to.

6 What -- what I will say, first of all,
7 your Honor, that 893.80 says that no case may be
8 brought against a municipality unless certain things
9 are satisfied; namely, the notice of claim, notice of
10 injury, such as we did here, and there's no case that
11 has said that the notice of claims statute does not
12 apply to --

13 (The court reporter interrupted for
14 clarification.)

15 MR. DAUGHERTY: That the notice of
16 claims statute did not apply to the certiorari --
17 certiorari -- that's c-e-r-t-i-o-r-a-r-i -- in any
18 event, review such as one we're taking here today.

19 THE COURT: Is the -- is the flip side
20 also true that there's not a case holding the other
21 way?

22 MR. DAUGHERTY: Holding -- there's
23 really no cases that -- there's no case that said 893
24 applies or doesn't apply. I would say, your Honor,
25 that in the TID 8 and 10 cases, we filed notice of

1 claims in those cases.

2 In those cases, we were never told by
3 the City we don't have to do that. The issue was
4 never addressed at all, by the City, by Judge Lenz,
5 by the Court of Appeals, by the State Supreme Court.
6 So nobody ever said there was no need to do that.

7 Even here, when we filed the notice of
8 claim in January of 2018, there was nothing from
9 them -- from the City I should say -- saying we don't
10 need to do that. Instead they just sort of went on.

11 And now they're saying, Well, maybe
12 you have to, maybe you don't, but they're being
13 very -- I guess I would say -- not transparent as to
14 what their position is.

15 893.80 does, to the extent there is a
16 statutory scheme that applies for a certiorari claim,
17 a common -- a common law certiorari claim, that is
18 893.80. That sets clear -- clear guidelines and time
19 limits.

20 You've got under -- I believe it's
21 (1d) -- you've got 120 days to bring -- to file the
22 notice of claim, 120 days or less. Then after that,
23 the City has 120 days to actually issue a formal
24 disallowance, which they didn't bother doing here, or
25 simply do an action that the claim is disallowed.

1 So that -- this 893.80 anticipates a
2 total of eight months for it to run its course.
3 Obviously, the six-month judge made statute of
4 limitations -- or should I say limitation period,
5 laches period, whatever you want to call it -- is in
6 conflict with that. And between the two, certainly
7 the statute enacted by the legislature I think has to
8 give way to this rule from the *Casper* line of cases.

9 The City, I think, asks this court to
10 ignore part of that statute, 893.80. I don't think
11 that's appropriate, but they say that -- well,
12 actually under -- under 893.80(1d) it is, I think
13 that really a claimant should wait -- only wait six
14 to bring -- bring their notice of claim within 60
15 days. Well, the statute says they have 120 days.

16 So they're asking you to expand the
17 rules set forth in *Casper, Et Al*. They're asking you
18 to expand it for circumstances that aren't present
19 here. They're asking you to expand it without a
20 finding of laches and that rule determination that
21 laches, in fact, exists. No facts show that here in
22 this case.

23 They're asking you to basically
24 truncate 893.80(1d) and only give claimants in
25 certiori -- common law certiori review claims 60 days

1 to file their notice of claim. That's simply not, I
2 think, appropriate for the court to sort of do those
3 things here.

4 If -- if at some point, there's going
5 to be an extension of this six-month laches period
6 beyond the type of cases that -- that were
7 encompassed in *Casper, Et Al.*, that would have to be
8 from the State Supreme Court.

9 And, again, Mr. -- Mr. Hoffer talked
10 about how there's laches as a matter of law. Even
11 that -- that phrase I don't think has ever been used.
12 Laches is only a matter of equity. It has to be as a
13 matter of equitable finding. It's not a legal
14 determination. It's an equitable determination.

15 So saying laches, as a matter of law,
16 I think just shows the inherent contraction between
17 the quote, unquote, "rule" they're arguing for and
18 the court's authority in the cases they rely on to --
19 to -- to dismiss the claims.

20 THE COURT: So let -- let me -- let me
21 ask you --

22 MR. DAUGHERTY: Sure.

23 THE COURT: -- about *Mentkowski*.

24 MR. DAUGHERTY: Sure.

25 THE COURT: And -- and maybe the

1 answer is, well, they're different -- different
2 facts --

3 MR. DAUGHERTY: Yeah.

4 THE COURT: -- I don't know, but --
5 but *Mentkowski* says, This court applied a definite
6 rule, and a certiori proceeding must be commenced
7 within six months for the action sought to be
8 reviewed, and parties who fail to so commence
9 proceedings are guilty of laches.

10 How do we get by that?

11 MR. DAUGHERTY: Well, first of all,
12 they're asking you to find laches. Again, I think if
13 it is true that in these three cases, *Casper, Et Al.*,
14 *Mentkowski* included, the State Supreme Court -- we
15 don't know what was in the record below or it's not
16 entirely clear, and there is, you know, language in
17 there, but it always comes, like -- like the language
18 you quoted -- but it always does come back to a
19 finding of laches.

20 Maybe their -- their laches
21 analysis in those cases is a little abbreviated.
22 They didn't necessarily go through the elements which
23 are required before the determination of laches can
24 be found.

25 But specifically with regard to Men --

1 **Mentkowski** -- again, you know, I'm -- I'm trying to
2 find -- that was the case -- yeah -- where there
3 was a -- a civil service commission had made an order
4 that suspended a city employee.

5 Again, that's a discrete government
6 action, different from what we have here, and that's
7 similar to the government actions that were
8 challenged also in **Czapiewski** and **Casper** --

9 Actually, I'm sorry. **Mentkowski** was
10 the one where the six-month laches period was applied
11 to review of the City -- City's dismissal of a police
12 officer.

13 Again, that's a discrete -- discrete
14 act by a government that, you know, is different from
15 when you're talking about enacting an entirely new
16 TIF, TID, and that's going to affect many taxpayers
17 for a long period of time, and those -- those -- and
18 I think it's fair to say that -- that -- that
19 requires much more than six months to go ahead and
20 figure out whether there is a legal challenge there,
21 to find who the plaintiffs would be, all that kind of
22 thing.

23 And, again, the fact of the matter, if
24 the court does apply **Mentkowski** here, it's extending
25 the rule, because, again, as I -- and as the court

1 anticipated, the facts are different here than they
2 are in the three cases, including *Mentkowski*.

3 THE COURT: So would I have to find
4 what an appropriate period of time would be?

5 MR. DAUGHERTY: No. No. What -- what
6 the appropriate period of time here -- 893.80 sets
7 out the basic scheme. We've got 120 days to go ahead
8 and file notice of claim, and then after that, the
9 City has a 120 days to disallow it.

10 If they wanted -- if they wanted the
11 six months to go ahead and apply, 893.80(1g), I
12 believe it is, says that if they give us formal
13 written notice, you know, they don't have to wait 120
14 days.

15 They could have given us 120 days --
16 they could give us notice very early. That would
17 have started the six months limitations period under
18 893.80. That's not the decision the judge made, the
19 rule that they argued -- that they argued for here.

20 So that would have been the applicable
21 statutory scheme. Without that, though, laches is
22 what the court -- the court must look to in order to
23 determine whether or not a common law certiorari
24 review is -- is timely or not.

25 And, again, the court, you, exercising

1 its equitable powers, does have to go through
2 analysis of the facts. It's a case-by-case
3 determination in equity.

4 And, again, they haven't pled anything
5 that -- that shows or even raised anything in their
6 pleading that talks about how they -- they didn't
7 know this was coming. Obviously, they can't say
8 that. We gave them a notice of claim saying it was
9 coming.

10 They haven't said anything about how
11 their case -- their ability to defend against our
12 claim was prejudiced because of any sort of
13 unreasonable delay. They don't even try to prove,
14 even at this very preliminary part of this lawsuit,
15 they haven't even tried to prove laches because I
16 don't think ultimately they're going to be able to.

17 But, again, directing this to the face
18 of the Complaint and to the extent that they're
19 raising affirmative defenses, they've got to come
20 forward to carry their burden. They haven't, and I
21 don't think they're going to be able to later.

22 THE COURT: Do you want to address the
23 other --

24 MR. DAUGHERTY: Yes, your Honor --

25 THE COURT: -- topics?

1 MR. DAUGHERTY: Yes, your Honor.

2 With regard to failure to state a
3 claim, again, the *Baraboo* case talked about how a --
4 a -- which is what they rely on -- and that's the
5 majority opinion, unlike the dissent by now Chief
6 Justice Roggensack in *Baraboo* they're relying on for
7 their laches argument.

8 But in *Baraboo*, the -- Mr. Olson, who
9 is the plaintiff challenging the TIF -- or the TID --
10 talked about how because Walmart owned some land in
11 this 40-acre -- I think it was a TID district -- or
12 a -- a TID area -- that Walmart was going to develop
13 that anyway. It hadn't been developed at the time
14 the TID was created, but they were going to do it
15 anyway he said.

16 Well, by contrast here, in one of the
17 big pieces of property, one of the big developments
18 in the area, has already occurred, and that's the --

19 (The court reporter interrupted for
20 clarification.)

21 MR. DAUGHERTY: That is going to be
22 developed in -- in TID 12, in fact, had already been
23 developed. It's not a matter of at some point in the
24 future. It, in fact, had been developed before the
25 TID was even created.

1 THE COURT: The residence hall?

2 MR. DAUGHERTY: The residence hall,
3 correct.

4 But beyond that, though, too, the
5 notion that we rely solely on the fact the residence
6 hall was created misreads the Complaint. Rather we
7 talk about -- and, you know, the -- the Complaint on
8 its face shows this -- you talk about how a
9 developer, another developer, had said that two city
10 blocks, he would develop those, with or without a
11 TID.

12 We also talk about how -- I mean,
13 in -- in a misusing of the statute, the City talked
14 about -- the City said that their goal was to try
15 recapture retroactively the value that had been
16 created before the TID was created, incremental value
17 that occurred when Aspenson Mogensen was created.

18 But, again, that all happened before
19 TID 12 was created in October of 2017, and that --
20 that turned the statute entirely on its head. The
21 statute is supposed to involve public money being
22 used to spur private development.

23 Here you've got private development,
24 including the residence hall, also -- well, the
25 residence hall, we'll focus on that for now -- that

1 being used to spur public spending. That turns
2 66.1105 on its head, and I don't think it's the
3 appropriate use of 66.1105, and that's another reason
4 why we challenge it here.

5 As I said the -- and -- and, again, in
6 our -- in our Complaint, members of the City Council
7 admitted that's what they wanted to do. They wanted
8 to recapture retroactively the value that had already
9 been created. That's, again, not proper under
10 66.1105.

11 Besides those, we also in our
12 Complaint alleged that -- that the project plan --
13 that there was no presentation by the -- by the City
14 to the JRB, the Joint Review Board, other specific
15 developments they say were going to be occur.

16 So the JRB couldn't have considered
17 what developments would not be created but for the
18 TID. Be -- because there was nothing that they were
19 given to consider, they didn't discuss anything, all
20 that is set forth in the face of our Complaint. All
21 that is a violation of 66.1105, and all that sets
22 forth the claim for certiorari review in the creation
23 of TID 12 in these circumstances.

24 I can -- unless, your Honor, has any
25 questions, I can move on to standing.

1 THE COURT: Please.

2 MR. DAUGHERTY: Okay.

3 Just -- Mr. Hoffer said that -- I
4 think there was a question, and we say -- I'll read
5 it straight from our Complaint in regard to standing.
6 We say, TID 12 is unlawful, and therefore any
7 expenditure of TID funds is also unlawful.

8 We cite the *SD Realty*, R-e-a-l-t-y,
9 case which says exactly that. So that does establish
10 standing. There is a broad, robust taxpayer standing
11 in Wisconsin. *SD Realty*, which we cite and they cite
12 as well, shows that. So -- so that's there.

13 In addition, he didn't mention that we
14 also talk about how this will not only have that kind
15 of a broad -- broad pecuniary loss to taxpayers, but
16 the taxpayers will also have their mill rates raised.
17 It will significantly increase their property taxes.

18 So that's the additional allegation we
19 made in paragraph 49 of our Complaint. So I think
20 under *SD Realty*, that establishes our standing.

21 Also looking back at Voters With Facts
22 One, which -- which challenges TID 8 and 10, the
23 State Supreme Court remanded for certiorari review.
24 If we didn't get -- if Voters didn't have certiori --
25 standing to bring certiorari review in that case, why

1 would, you know, the -- the Supreme Court have
2 remanded for that to occur, which is currently
3 occurring in front of one of the other judges, one of
4 your colleagues, in this very courthouse.

5 So, again, it seems to me that's a
6 pretty clear authorization by the State Supreme
7 Court, as well as the Court of Appeals in Voters With
8 Facts One, of what -- us having the standing to seek
9 certiori review like -- like we're seeking here
10 today.

11 THE COURT: Thank you, Counsel.

12 MR. DAUGHERTY: Finally, with regard
13 to issue preclusion, I would just say there's an
14 identity of parties, but there's no identity of
15 issues.

16 The previous case, Voters With Facts
17 One, dealt with 8 and 10. No court has ever looked
18 at TID 12.

19 Your -- your Honor is -- is the lucky,
20 fortunate of being the first to get to do that, but
21 in any event, there is no identity of issues that are
22 before this court and those before the court in
23 Voters With Facts One. 8 and 10 are not TID 12.
24 There's different issues raised in each.

25 THE COURT: Mr. Hoffer, comments in

1 response?

2 MR. HOFFER: First of all, I think
3 Voters With Facts are clearly asking this court to
4 determine that those three Wisconsin Supreme Court
5 cases we cited on the six-month deadline have been
6 overruled.

7 They haven't explicitly asked for
8 that, but if -- I mean, the language in -- in those
9 cases could not be more clear. If you do not bring a
10 certiorari action within six months, that constitutes
11 laches. That's a direct quote.

12 They've also said that it's -- you
13 know, they've made the comparison that it's akin to
14 the powers -- equitable powers exercised when the
15 courts determine an unreasonable amount of time has
16 taken place, and they've determined that six months
17 is that time.

18 I'd add that this is a common law
19 remedy, it's common law certiorari that they're
20 pursuing, and so the -- it seems a little bit unusual
21 that they would say that a common law rule does not
22 apply to a common law -- a common law action.

23 But regardless, those cases are still
24 good law, and they -- in order for the common law to
25 be preempted by statute, it has to be clear. That's

1 an axiomatic rule of construction.

2 It -- it hasn't been done, and part of
3 the reason you know it hasn't been clearly preempted
4 is we have the opinion from Justice Roggensack. You
5 know, one of the -- one of our most preeminent
6 appellate judges -- justices -- in the state has
7 reached the opinion that the six-month rule still
8 applies.

9 Now, it's difficult to think that a --
10 a justice of that experience and sophistication could
11 miss something that obvious in a statute that
12 everyone knows. 893.80 is something that anyone that
13 has any exposure to litigation understands well.

14 We don't need to demonstrate prejudice
15 or the other factors involved with laches. We just
16 need to demonstrate the six months, but I would point
17 out cities are prejudiced, as we pointed out in our
18 brief, when people have all the time in the world to
19 bring these challenges because it makes the ability
20 to get economic development done much more difficult.

21 If people think a lawsuit could be
22 coming years from now -- and I've -- I've largely
23 stayed silent, although we -- we didn't in our
24 briefs -- their excuses for why this was brought too
25 late, we waited on the Wisconsin Supreme Court

1 decision. Not a good excuse.

2 We then waited until the -- the
3 tax-exempt claim that was brought in January of 2019,
4 was disallowed by the City Council in February of
5 2019, and then they brought this action in April of
6 2019.

7 If you determine -- part of the reason
8 we've made the argument whether the notice of claims
9 statute applies or not -- and they haven't pointed to
10 any cases where the notice of claims statute has
11 extended the time a party can bring litigation. That
12 flies in the face of the expressed purpose of the
13 statute which is to aid the speedy resolution of
14 claims against government.

15 If you decided if anything tolled that
16 deadline, there's still no way that -- that they
17 filed this timely. The only way they filed this
18 timely is if those three cases by the Wisconsin
19 Supreme Court were overruled by the statute.

20 They said -- you know, they point to
21 the -- the language in 893.80 that says no case may
22 be brought unless it follows the statute, but the
23 courts have articulated all kinds of exceptions
24 when -- when -- when cases are allowed to be brought
25 outside of the requirements of 893.80.

1 And here there's no -- there's no
2 contradiction -- there's no explicit contradiction,
3 other than it forces parties to file their notice of
4 claim in a shorter time period. A time period around
5 60 days is consistent with the statute of limitations
6 on all kinds of actions against the government in
7 similar circumstances.

8 Again, one -- one thing I'd point out
9 to the court too that they talk about the fact
10 that -- that in this case, it's different from
11 **Baraboo** because we're capturing some development
12 retroactively.

13 I just direct the court to the portion
14 of 66.1105. It's a -- (4)(gm)2 that talks about the
15 dates that -- that apply when a -- a TID district is
16 created.

17 As a matter of law, if the City
18 creates a -- a TID district between January 2nd and
19 September 30th, the date of that TID, that TID is
20 effective, is the preceding January 1st.

21 The City didn't have the ability to
22 apply a date after the construction of that building.
23 The law doesn't allow it. If -- and -- and it makes
24 sense that it wouldn't. So I won't -- I won't
25 belabor the point.

1 But, again, under -- under state
2 statute we're required to retroactively date TID
3 districts created between January 2nd and
4 September 30th. If it would have been created
5 between October 1st and December 30th -- 31st -- then
6 the date shall be the next subsequent January. The
7 City just followed what it is legally required to do.

8 Again, the other development they
9 mention in the district, they don't mention who the
10 developer is. They don't say where it's going to
11 take place. That is not a well-pleaded fact.

12 The court shouldn't have to accept
13 rumors and innuendos included in a Complaint in order
14 to survive the motion to dismiss. It certainly does
15 not satisfy the **Data Key** standard which applied the
16 **Twombly** standard. That's T-w-o-m-b-l-e-y.

17 As far as standing is concerned, I
18 think the **SD Realty** case is an important case for
19 this court to look at. They cite in their brief, we
20 cite in our brief, but the facts in that case are
21 interesting.

22 What the court said is a party can
23 establish taxpayer standing if they can show if --
24 that an expenditure was illegal. In that case, the
25 court determined the expenditure here isn't illegal

1 and then dismissed the case.

2 Now, the court didn't say whether it
3 dismissed for a lack of standing or whether it
4 dismissed for failure to state a claim, and that's
5 part of the reason why we bring -- are bringing both
6 arguments, because either way they haven't pleaded
7 sufficient facts to meet the plausibility standard
8 and they haven't pleaded sufficient facts to
9 demonstrate an illegal expenditure, which you need to
10 do.

11 Lastly, they -- they mentioned that --
12 they say the mill rate will be raised because of
13 the -- of the creation of the TID. That is so highly
14 speculative and unlikely.

15 They -- they provide and plead no
16 facts to support the likelihood of that occurring
17 that it's -- it's not sufficient to meet the
18 plausibility standard, and it -- it really is based
19 on the assumption that new development won't occur,
20 and they haven't pleaded sufficient facts to
21 demonstrate that. If new development will occur
22 because of TID, the mill rate will not be affected.

23 And so with that, again, I -- I won't
24 belabor the point on issue preclusion.

25 Thank you.

1 THE COURT: Thank you, Counsel.

2 MR. DAUGHERTY: Your Honor, first of
3 all, I'm -- I'm -- I'm a very big admirer of -- of
4 Chief Justice Roggensack, but a dissent she wrote 17
5 years ago I don't think is binding authority on this
6 court. Again, if you look at it, it's just in
7 passing.

8 So I don't think that she was trying
9 to enunciate any sort of rule. Maybe she'll have to
10 if this goes back up at some point, but -- but maybe
11 she'll have to extend the rule and then -- but we'll
12 see. That remains to be seen, and I hope it doesn't
13 come to that.

14 So -- and we're not -- we are not
15 saying in any way that *Casper, Et Al.* is overruled.
16 They apply. If -- if this court has a situation
17 where some Eau Claire City employee asks for benefits
18 they think they were owed or if they come and say
19 that -- that they were improperly suspended, you
20 know, when the commission -- whatever commission
21 apparatus there is denied that, they have the right
22 to certiorari review.

23 But, again, the court can look to
24 *Casper* and all those cases and say, Well, those cases
25 find that six -- six months passes and there's no --

1 and the laches is present, that would be different.

2 Now, I hope the court would do a
3 little more -- and I think the court probably would
4 actually go through the three elements of laches
5 which the Supreme Court did not do in *Casper, Et Al*.
6 They just kind of breezed through it.

7 Nonetheless, this court could very
8 well say, looking at *Casper* and the others, you know,
9 Mr. Former -- Mr. or Mrs. Former City Employee, I
10 find that, you know, laches applies here because the
11 elements of laches exist.

12 Namely, there was unreasonable delay,
13 the City didn't know you were going to go ahead and
14 bring this -- this certiorari review, and the City
15 was prejudiced, but -- but, again, that's different
16 from what we have here.

17 Also too with regard to the elements
18 of laches, again, there's been no evidence put into
19 the record supporting their affirmative defense.
20 They're just, you know, making arguments, which is
21 fine. They can put in evidence later.

22 But there's no way it would seem to me
23 on God's green -- God's green earth they could say
24 that they didn't know this claim was coming when we
25 sent them a notice of claim saying that we would go

1 ahead and bring this action. Now, we sent that to
2 them in January of 2018, and that's a second element
3 of -- of laches.

4 The third element is prejudice, and
5 they're misstating or misunderstanding prejudice.
6 Prejudice has to do with their ability to defend
7 themselves.

8 If somehow one year and seven months,
9 that passage of time prejudiced their ability to
10 defend themselves against this claim, that's one
11 thing. I don't see how it did, but they can go ahead
12 and try to prove that later in this case, but that's
13 what the prejudice goes to.

14 And, again, at the outset here, we're
15 just looking at the face of the Complaint. They
16 haven't shown that. They haven't brought any
17 evidence, obviously, because we're just looking at
18 the face of the Complaint.

19 I -- we're also -- it's also
20 misstating the argument saying that someone would
21 have all the time in the world to -- to bring a
22 claim. No.

23 893.80, first of all, says you file
24 your notice -- file your notice of claim, and then
25 what the City can do -- and they could have done here

1 but chose not to -- they can go ahead and give you a
2 formal disallowance and say that you only have six
3 months then to bring an action.

4 They could have done that if he wanted
5 to, but they didn't. They just laid in the weeds
6 here. Let the time pass with inaction. So it's not
7 open-ended.

8 Besides the 893.80(1)(g) six-month
9 period which is triggered only by, and each condition
10 present, a formal written disallowance from the City
11 which we didn't get here. Besides that, you still
12 have laches.

13 Again, that is an equitable finding.
14 That's what the court used in three -- three other
15 cases, and it's at the best premature finding --
16 finding laches to occur here, and I think, based on
17 what we've seen from the City thus far, they're
18 ultimately going to be unable to prove that
19 affirmative defense, to carry their burden in regard
20 to that.

21 Again, they say that even though
22 893.80(1)(d) says you get 120 days, you must file
23 your notice of claim within 120 days, they're saying,
24 well, 60 days is enough.

25 Well, they're asking this court to

1 override 893.80(1)(d) and truncate that 120-day time
2 period. I think that's -- that's -- that's something
3 that this court doesn't have the authority to do.

4 And I also note that I'm pretty
5 confident if we hadn't, had not, followed 893.80 in
6 this case, I think we'd see as one of their defenses
7 raised against us that we had failed to follow with
8 the statute's prerequisite in bringing our certiorari
9 review.

10 But like TID -- like -- like Voters
11 With Fact One -- Facts One -- could be applied with
12 notice of claims statute. We did so here, and it
13 wasn't until we got their reply brief just a little
14 while ago, at the end of their -- their reply brief
15 they say, Well, maybe the notice of claims statute
16 doesn't apply. That's the first we ever heard from
17 them on that.

18 With regard to ***SD Realty***, the standing
19 issue, that's a little circular. They're saying that
20 because there was no finding of an illegal
21 expenditure of funds; therefore, there wasn't
22 standing.

23 And I think ***SD Realty***, again -- I -- I
24 don't believe that was a side of our motion to
25 dismiss, but it is a little bit circular. I mean, I

1 think we have our -- as we say in the -- the **Data Key**
2 and **Cattau**, the recent cases, that -- that -- that
3 **Strid**, the **Strid** standard, the motion -- the motion
4 to dismiss is still to be followed, and you need to
5 make inferences in favor of the -- of the nonmovant,
6 the plaintiff, that kind of thing.

7 **Strid** would be S-t-r-i-d, and **Cattau**
8 would be C-a-t-t-a-u, which is very recently cited in
9 our Complaint.

10 That -- again, at this point, we've
11 alleged there were illegal expenditures, and the
12 court has to accept that as true. So that does
13 enforce standing under **SD Realty**.

14 As well as getting back to Voters With
15 Facts One, the State Supreme Court remanded that case
16 for the specific kind of certiori review that's
17 occurring here. The State Supreme Court, nor did the
18 Court of Appeals, ever say that Voters With Facts
19 didn't have standing to challenge TIDs 8 and 10.

20 So I'm not sure how that -- that
21 decision could be understood to say we don't have
22 standing and that that -- I don't know how that
23 decision could be understood to say anything, other
24 than we do have standing, Voters does, to challenge
25 TID 12 here.

1 Thank you, your Honor.

2 THE COURT: Thank you, Counsel.

3 All right. I'd like to give an oral
4 decision here this afternoon. Give me ten minutes.
5 I'm -- I just need to reorganize things after hearing
6 your comments and arguments, and then we'll get this
7 ball rolling.

8 So give me about ten minutes. Be back
9 about 12:15.

10 MR. HOFFER: Thank you, your Honor.

11 (A brief recess was taken.)

12 THE COURT: Please be seated.

13 Okay. We're back in session once
14 again in 19-CV-192. The parties are present as
15 indicated earlier.

16 All right. So we're here on the
17 defense motion to dismiss. I'm granting the motion
18 with regard to the six-month rule. With regard to
19 the sufficient pleadings, I think there are
20 sufficient pleadings to -- to get by a motion to
21 dismiss.

22 I believe that the plaintiffs do have
23 standing. I believe that claim preclusion is not
24 applicable here. It's a different case. It's a
25 different district. There are different facts from

1 Voters With Facts One. So let me tell you how I got
2 to that point.

3 So first I can find, based upon the
4 Complaint, that the Eau Claire City Council approved
5 the TID Number 12 on September 12th of 2017.

6 The Joint Review Board approved the
7 TID on -- Number 12 -- on September 15, 2017. The
8 plaintiffs filed a notice of claim January 12th of
9 2018. That claim was disallowed by inaction May 13th
10 of 2018. Importantly, of course, that's already
11 beyond the six-month timeframe.

12 And the lawsuit itself is filed
13 April 17th of 2019, about a year -- a little over a
14 year and a half after the final decision of the Joint
15 Review Board.

16 I think we're kind of on unbroken
17 ground here in some regards. Nobody's been able to
18 find or cite a case where the six-month rule did not
19 apply to a certiorari case. Nobody's been able to
20 find a certiorari case where 893.80 was applied.

21 And so I have to go on what I believe
22 is -- is decided law here. I'm going to quote just a
23 little bit from Voters With Facts One, paragraph 70,
24 where it said, It is well established in this state,
25 where there are no statutory provisions for judicial

1 review, the action of a board or commission may be
2 reviewed by way of certiorari.

3 No statutory appeal process has been
4 created to review the formation of a TID; therefore,
5 certiorari review of the decisions of both the City
6 Common Council and JRB is appropriate.

7 Interestingly, and I'll, I'm sure,
8 mention it later, they -- among other things, they do
9 cite the Roggensack dissenting opinion after that
10 statement.

11 So the -- the law with regard to a
12 motion to dismiss is that the court's to look at the
13 factual allegations in the Complaint and accept them
14 as true, along with their reasonable inferences. The
15 Complaint must plead facts which, if true, would
16 entitle the plaintiff to relief. Wisconsin, of
17 course, is a notice pleading state.

18 Both parties acknowledge Voters With
19 Facts One has made it clear that certiorari is the
20 proper avenue for challenging a TID. The dispute
21 really is whether the six-month period of limitations
22 that applies to most, if not all, other certiorari
23 cases applies to the fact pattern in this case with
24 the creation of a TID or instead whether the notice
25 of claim provision of 893.80 is what needs to be

1 followed by a plaintiff.

2 There's been no court that's ruled on
3 the question of whether the six-month rule applies to
4 a TID or whether 893.80 does either for that matter.

5 The defendants do point out current
6 Chief Justice Roggensack's statement made in her
7 dissent in the Court of Appeals case, *State Ex Rel.*
8 *Olson, s-o-n, vs. Baraboo Joint Review Board*, and, of
9 course, a comment made in a dissent is not binding on
10 this court.

11 It's not authoritative, but I do find
12 it -- and the fact that that language was, again,
13 quoted by the Supreme Court in *Voters With Facts*
14 *One* -- to be helpful and perhaps giving this court
15 some direction on that question.

16 Justice Roggensack said, In order --
17 and I'm going to leave out various citations -- In
18 order to form a TIF district, all of the statutory
19 directives must be followed. No statutory appeal
20 process has been created to review the formation of a
21 TIF district; therefore, the review of the decision
22 of both the Common Council and the JRB is by
23 certiorari.

24 However, because only final decisions
25 of the Board or Council are reviewable by certiorari,

1 neither the original resolution of the Common Council
2 nor the approval of the JRB could be reviewed until
3 all of the steps set out in Section 66.46(4)(a)(k)
4 were completed and the TIF district was then
5 statutorily created.

6 Then she says, An action requesting
7 certiori review must be commenced within six months
8 when the decision for which review is sought becomes
9 final.

10 I think those sentences give this
11 court direction. Again, I'm not bound to follow a
12 dissenting comment in a Court of Appeals case. On
13 the other hand, she probably wouldn't have said it if
14 she didn't believe it at that time.

15 While I'm looking at this, I'm -- I'm
16 also concluding that the City does not have to prove
17 laches. Rather, the failure to commence the
18 proceedings within six months constitutes laches.

19 I am concerned about the equity of
20 that in this particular situation since the
21 plaintiffs did file a notice of claim. Still, I
22 think I'm bound to follow what I think is the law.

23 And now we're looking at *Mentkowski*
24 where it said, This court has applied a definite rule
25 that certiorari proceedings must be commenced within

1 six months of the action sought to be reviewed, and
2 parties who fail to so commence the proceedings are
3 guilty of laches.

4 Based upon that language -- and it
5 cites the other cases, *Czapiewski* and *Casper*, and
6 there's no case holding otherwise. In other words,
7 there's no case that says in a TID case, you've got
8 to be able to prove laches.

9 So I -- here we have, I think, no
10 quarrel that procedurally there were issues in
11 creating the -- the TID. I don't think there's a
12 quarrel that certiorari proceedings are the
13 appropriate avenue to challenge the decision here.

14 I don't think that there's a quarrel
15 that in most, if not all, certiorari cases, the six
16 months rule applies. We haven't found any case that
17 says or that accepts a factual situation that says
18 the six months rule does not apply, even though it is
19 a certiorari case.

20 There's no quarrel that the suit was
21 filed more than six months after the final decision,
22 and the plaintiffs urge that it's not fair or
23 reasonable for the six months rule to apply because
24 they believed they had to comply with Section 893.80,
25 the notice of claims statute, and further that the

1 defense has failed to show laches. We wouldn't
2 expect a showing of laches at this stage, a motion to
3 dismiss on the pleadings.

4 And this conundrum of whether 893.80
5 or the six months rule applies here puts the
6 plaintiff in a difficult -- difficult position.

7 In the absence of some authority
8 holding the six months rule does not apply to some
9 certiorari case or specifically to a -- a TID case, I
10 think this court needs to follow the existing case
11 law that I've discussed and conclude that the six
12 months rule does apply to TID certiorari cases as it
13 applies to, apparently, all other certiorari cases.

14 And for those reasons, I'm granting
15 the motion to dismiss only under the six months rule.
16 I'm quite sure that others at a higher pay grade may
17 get a chance to take a look at this issue, or these
18 issues, but this is the first step.

19 Mr. Hoffer, will you be kind enough to
20 prepare an order summarizing the court's findings,
21 specifically granting the motion on the six months
22 rule and denying the motion on the other three
23 grounds.

24 You don't really need to go into great
25 detail. Cite comments made in court on the record.

1 Before you submit it to the court, Mr. Daugherty
2 should also have an opportunity to look at that.

3 So while you might not agree with the
4 decision, hopefully you can come to an agreement on
5 the form of the order.

6 Other things, Mr. Hoffer?

7 MR. HOFFER: No, your Honor.

8 THE COURT: Mr. Daugherty?

9 MR. DAUGHERTY: Nothing, your Honor.

10 There's still -- there's still the
11 matter of the motion for sanctions that -- that the
12 City brought that we've got a hearing date on it, and
13 I don't know if the court finding that -- I think
14 it's a close case and that at least three of the four
15 grounds presented, the court -- by the City -- the
16 court has rejected, obviously finding the six-month
17 rule applies, but I don't know if Mr. Hoffer still
18 intends to pursue that.

19 I think it's probably moot, but just
20 so we don't have to go through another round of
21 briefing before the court for a motion for sanctions
22 that I think is no longer viable based on this
23 court's decision.

24 I don't know whether the City's going
25 to pursue that or if the court can find here, based

1 on its decision, that that motion for sanctions is
2 moot, but it would be nice to avoid having to do
3 additional briefing on that motion if possible.

4 THE COURT: Mr. Hoffer, do you know
5 the answer to the question right now?

6 MR. HOFFER: No, your Honor. I'll
7 leave that to the court's discretion whether or not
8 to grant that motion or entertain that motion or not.

9 THE COURT: All right. I think there
10 was the hope that you were not going to pursue that
11 motion any longer. That's the question that I was
12 asking, whether you're going to pursue that motion
13 for sanctions or not.

14 If you are, I'm -- frankly, I'm not
15 prepared to render a decision on that issue today.
16 If you're not going to pursue that based upon what
17 you heard from the court today, then it can be
18 disposed of.

19 Which way do you want to go with that?

20 MR. HOFFER: Well, your Honor, this
21 case has been dismissed. So I don't -- I don't know
22 that we plan to schedule -- schedule anything on
23 that.

24 I mean -- I don't know -- know that
25 we're going to withdraw it.

1 It --

2 MR. DAUGHERTY: I think we should --

3 MR. HOFFER: We'll -- we'll -- if we
4 could just have a chance to discuss it internally,
5 and we can get back to you.

6 THE COURT: Of course. Of course.

7 MR. DAUGHERTY: I just don't know if
8 we should set a hearing date for that and start
9 briefing that. Again, I would hope that's
10 unnecessary based on the court's decision, but I'll
11 wait to hear back from Mr. Hoffer.

12 THE COURT: So as I see it, the case
13 has been dismissed now, and I would likely defer any
14 decision, if I needed to make a decision, until it
15 comes back to me once again.

16 But have some discussion among
17 yourselves, and let's not leave that loose end out
18 there.

19 MR. HOFFER: Thank you, your Honor.

20 MR. DAUGHERTY: Thank you.

21 THE COURT: All right. Thanks for
22 coming today.

23 We're adjourned.

24 (The proceedings concluded at 12:33
25 p.m.)

1 STATE OF WISCONSIN)
2) ss.
3 COUNTY OF EAU CLAIRE)
4
5
6

7 I, Mary P. Bader, Official Court
8 Reporter in and for the State of Wisconsin, do hereby
9 certify that I took in shorthand the proceedings had
10 in the above-entitled matter on the 17th day of July
11 2019, and that the foregoing transcript is a true,
12 correct, and complete transcript of the proceedings
13 in the foregoing matter to the best of my ability
14 under the circumstances.

15 Dated this 9th day of August 2019.
16

17 Electronically Signed by Mary P. Bader

18 MARY P. BADER, FAPR, RPR
19 Official Court Reporter
20
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FILED
08-13-2019
Clerk of Circuit Court
Eau Claire County, WI
2019CV000192

DATE SIGNED: August 13, 2019

Electronically signed by Michael A. Schumacher
Circuit Court Judge

BY THE COURT:

DATE SIGNED:

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 2

EAU CLAIRE COUNTY

VOTERS WITH FACTS, *et al.*,

Plaintiff,

v.

CITY OF EAU CLAIRE, *et al.*,

Defendant.

ORDER

Case No. 2019CV192
Case Code: 30301

This matter came before the Court on July 17, 2019 on a Motion to Dismiss pursuant to Wisconsin Statute § 802.06. Plaintiffs appeared by the Wisconsin Institute for Law & Liberty by Attorney Don Daugherty, and the City of Eau Claire appeared by Deputy City Attorney Douglas Hoffer and City Attorney Stephen Nick. After reviewing the briefs of the parties and holding oral argument, for the reasons stated on the record **IT IS ORDERED** that:

1. The City of Eau Claire’s Motion to Dismiss this case is granted.
2. Based on the agreement of the parties reached after the conclusion of the motion hearing, upon receipt of all statutory costs the City of Eau Claire is entitled to, the City of Eau Claire withdraws its motion for sanctions.

This is a final order pursuant to Wis. Stat. § 808.03(1)

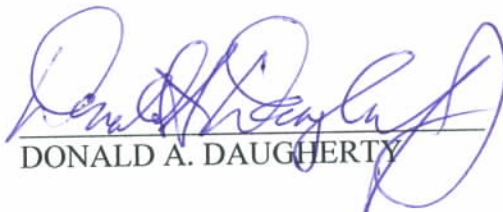
CERTIFICATION OF COMPLIANCE WITH SECTION 809.19 (2) (a)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: December 6, 2019


DONALD A. DAUGHERTY

CERTIFICATION OF COMPLIANCE WITH SECTION 809.19 (13)

I hereby certify that:

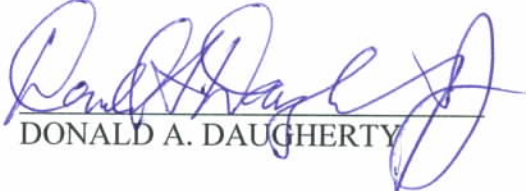
I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated: December 6, 2019


DONALD A. DAUGHERTY