

1 STATE OF WISCONSIN: CIRCUIT COURT: EAU CLAIRE COUNTY:  
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3 VOTERS WITH FACTS,  
4 PURE SAVAGE ENTERPRISES, LLC,  
5 WISCONSIN THREE, LLC,  
6 215 FARWELL LLC,  
7 DEWLOC, LLC, LEAH ANDERSON,  
8 J. PETER BARTL, CYNTHIA BURTON,  
9 CORINNE CHARLSON, MARYJO COHEN,  
10 JO ANN HOEPPNER CRUZ,  
11 RACHEL MANTIK, JUDY OLSON,  
12 JANEWAY RILEY, CHRISTINE WEBSTER,  
13 DOROTHY WESTERMANN, JANICE WNUKOWSKI,  
14 DAVID WOOD, and PAUL ZANK,

ORAL RULING

Case No. 15-CV-175

Plaintiffs,

-vs-

11 CITY OF EAU CLAIRE and  
12 CITY OF EAU CLAIRE JOINT REVIEW BOARD,

Defendants.

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14 The above-entitled matter coming on to be heard before  
15 the Honorable Paul J. Lenz, judge of the above-named court, on  
16 the 17th day of August, 2015, commencing at approximately 2 p.m.,  
17 in the courthouse in the City of Eau Claire, County of  
18 Eau Claire, State of Wisconsin.  
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20 APPEARANCES:

21 MICHAEL D. FISCHER and THOMAS C. KAMENICK, of the  
22 Wisconsin Institute for Law & Liberty, 1139 E. Knapp Street,  
23 Milwaukee, Wisconsin 53202-2828, appeared telephonically  
representing the Plaintiffs.

24 STEPHEN C. NICK and DOUGLAS J. HOFFER, Attorneys at  
25 Law, 203 S. Farwell Street, Eau Claire, Wisconsin 54702-5148,  
appeared representing the Defendants.

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1 THE COURT: All right. This is 15-CV-175, Voters With  
2 Facts, et al., versus the City of Eau Claire. The appearances by  
3 telephone today? We'll start there.

4 MR. FISCHER: Good afternoon, Judge. This is Mike  
5 Fischer with the Wisconsin Institute for Law & Liberty. I have  
6 with me Tom Kamenick, also of this firm, and we -- we'd like to  
7 thank the court for letting us appear by telephone. I hope you  
8 can hear us okay.

9 THE COURT: We can hear you just fine. Now, could you  
10 state the name and spell the name, also, of the other person so  
11 that it's on for the record, please.

12 MR. KAMENICK: Tom Kamenick. Last name is  
13 K-A-M-E-N-I-C-K.

14 THE COURT: All right. And appearing in person today?

15 MR. NICK: Stephen Nick and Doug Hoffer on behalf of  
16 the City of Eau Claire.

17 THE COURT: Essentially, in sum, Voters With Facts'  
18 claim is that the tax incremental finance district decision, to  
19 include what's called the Confluence Project, is illegal because  
20 the area is not less -- it is not the "not less than 50 percent  
21 blighted" as is required by the tax incremental financing  
22 statutes, and this is a claim as an empirical fact.

23 The City, among other grounds, challenges the standing of  
24 the plaintiffs and moves to dismiss the complaint because the  
25 plaintiffs cannot allege facts that demonstrate that the party,

1 here Voters With Facts, and the named parties with whom their  
2 standing is derived from its members are, quote, adversely  
3 affected financially or otherwise by the decision.

4 In order for an area to become part of a tax incremental  
5 finance district, it must meet legislative standards of which one  
6 is that the area is, quote, not less than 50 percent, and then  
7 there's a whole bunch of other things, but blighted, end quote,  
8 is one. This is the standard under which the City of Eau Claire  
9 adopted the tax incremental finance district, including this  
10 area.

11 In the determination of not less than 50 percent blighted,  
12 is that an adjudicated fact or a legislative fact? The finding  
13 of blight to be not less than 50 percent is a legislative finding  
14 of fact. It is not a quasi-judicial adjudicative fact -- finding  
15 of fact such as, for example, a disciplinary procedure from a  
16 police and fire commission, rather it is legislative action, and  
17 the finding of not less than 50 percent blighted, therefore, is a  
18 legislative fact. The hearings held under the statute are  
19 legislative hearings rather than evidentiary hearings in a  
20 quasi-judicial function. Thus, the determination of blight is  
21 legislative and is, in essence, a political question. Here, the  
22 Voters With Facts presented information at these legislative  
23 hearings against the tax incremental finance district, to include  
24 the Confluence Project. As with all political questions, to  
25 quote the R&B group The Controllers, somebody's gotta win and

1 somebody's gotta lose. Here, in the political arena, Voters With  
2 Facts -- Without Facts won and the Voters With Facts lost. Is  
3 the judicial branch of government the appropriate forum to  
4 resolve this political question? It is not. I find that the  
5 plaintiffs do not have standing, and the complaint is dismissed.  
6 This is a question of law reviewable de novo on appeal. And I  
7 need not say anything further because no one ever has to even  
8 read what I'm going to tell them what my view is, because the  
9 reviewing court will review this without deference to the  
10 determinations of the trial court.

11 In order to maintain a declaratory judgment action under  
12 Wisconsin Statute Section 806.04, there -- there must exist a  
13 justiciable controversy. *Loy v. Bunderson*, 107 Wis.2d 400, 409,  
14 410 (1982). And a controversy is justiciable when the following  
15 factors are present: one, a controversy in which a claim of  
16 right is asserted against one who has an interest in contesting  
17 it; two, the controversy must be between persons whose interests  
18 are adverse; three, the party seeking declaratory relief must  
19 have a legal interest in the controversy, that is to say, a  
20 legally protectible interest; and, four, the issue involved in  
21 the controversy must be ripe for judicial determination. And  
22 that comes from *Lake Country Racquet & Athletic Club, Inc. v.*  
23 *Village of Hartland*, 259 Wis.2d 107, 114, 115 (2002 Ct. App.). I  
24 find that none of the plaintiffs and, as a result, Voters With  
25 Facts also, which derives its standing from the constituent

1 members, none allege a legally protectible interest. A party  
2 must have a personal stake in the outcome and must be directly  
3 affected by the issues in controversy. *Village of Slinger v.*  
4 *City of Hartford*, 256 Wis.2d 859 (Ct. App. 2002). Here, the  
5 plaintiffs allege no particular pecuniary loss attributable to  
6 them except a speculative possibilities that general tax revenues  
7 could be affected. This is not enough to confer standing on  
8 individual taxpayers dissatisfied with a legislative action.

9 Further, the issue must be ripe for judicial determination.  
10 This is not, for two reasons: first is the political question  
11 doctrine; and, second, the harms claimed are too speculative.  
12 First, under the political question doctrine, in order to uphold  
13 the separation of powers, the courts -- there must be a  
14 demonstrable commitment of the issue to a coordinate political  
15 department -- and that can be said of a lot of things, but --  
16 two, there needs to be a lack of judicially discoverable and  
17 manageable standards for resolving it; three, the impossibility  
18 of deciding without an initial policy determination of a kind  
19 clearly for nonjudicial discretion; and, four, the impossibility  
20 of the court's undertaking independent resolution without  
21 expressing a lack of respect due to coordinate branches of  
22 government; five -- five and six, neither one of them which apply  
23 here -- an unusual need for unquestioning adherence to political  
24 decisions already made; or, six, the potentiality of  
25 embarrassment from multifarious pronouncements by various

1 governmental agencies. And this goes back to the *Bar -- Baker v.*  
2 *Carr*, 369 U.S. 186 (1962).

3 Here, the creation of a tax incremental finance district,  
4 and inclusion therein, is a legislative determination by the City  
5 Council and the Joint Review Board. There is a lack of  
6 judicially discoverable and manageable standards for resolving  
7 this dispute short of the court substituting its own judgment  
8 rather by a finding of fact by this court or that of a jury of  
9 the judgment of another branch of government. This the court  
10 should not do. *Bisenius v. Karns*, 42 Wis.2d 42, 54 (1969).

11 Next, there is the impossibility of deciding this matter  
12 without an initial policy determination of a kind that is clearly  
13 not for judicial discretion. Is the funding of the Confluence in  
14 part through tax incremental finance district creation good for  
15 the City of Eau Claire and the community? This goes to the core  
16 of the legislative function, not the judicial function.

17 Finally, the court's undertaking an independent resolution  
18 of this matter would express a lack of respect due to coordinate  
19 branches of government. There -- it would be unjustifiable for  
20 the court under these circumstances to make a contrary  
21 determination.

22 Now, just because a matter involves a political question  
23 does not preclude judicial review. It is the role of the court  
24 to determine the constitutionality of legislation. Tax  
25 incremental finance districts are constitutional, under *Sigma Tau*

1        *Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis.2d 392,  
2        396 (1980). Further, the court can review legislative action  
3        which is an abuse of discretion, excess of power, or error of  
4        law. *Buhler v. Racine County*, 33 Wis.2d 137, 146 (1966). This  
5        is not alleged here.

6                Second, the alleged harms are highly speculative injuries  
7        which are neither imminent nor practically certain to occur. The  
8        courts do not deal with hypothetical questions. *City of*  
9        *Janesville v. Rock County*, 107 Wis.2d 187, 199 (Ct. App. 1982).  
10       The courts are not to issue advisory opinions on speculative  
11       political questions.

12               For the reasons stated, I find that the plaintiffs lack  
13       standing to bring this action and that it is a political  
14       question. The complaint is dismissed. As this is a question of  
15       law reviewable de novo on appeal, good luck, folks. Thank you.

16               MR. FISCHER: Thank you, Judge.

17               MR. NICK: Thank you, Your Honor.

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19               (The proceedings came to a close at approximately  
20       2:15 p.m.)  
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1 STATE OF WISCONSIN )  
2 COUNTY OF EAU CLAIRE ) ss

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4 I, Becky J. Thomas, Official Circuit Court Reporter for  
5 Eau Claire County, State of Wisconsin, do hereby certify that the  
6 above and foregoing is a true and correct transcript of the  
7 proceedings in the foregoing matter, held on the 17th day of  
8 August, 2015, as contained in my Stenograph shorthand notes, and  
9 all matters pertaining thereto, to the best of my ability.

10 Dated: August 19, 2015.

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15 Becky J. Thomas, RMR, CRR