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**CLERK OF SUPREME COURT
OF WISCONSIN**

**STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2015AP1858**

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

Plaintiffs-Appellants-Petitioners,

v.

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

Defendants-Respondents.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS
DISTRICT III, AFFIRMING AN ORDER FOR EAU CLAIRE COUNTY
CASE NO. 15CV175 THE HONORABLE PAUL J. LENZ PRESIDING

**JOINT *AMICUS CURIAE* BRIEF OF THE WISCONSIN
REALTORS[®] ASSOCIATION, NAIOP-WI AND THE WISCONSIN
ECONOMIC DEVELOPMENT ASSOCIATION**

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OVERVIEW

Tax increment financing (TIF) is one of the most effective tools Wisconsin municipalities have to promote economic development and job creation. TIF is a partnership between the public and private sectors where both parties are willing to invest financial resources in an economic development project that will create jobs and grow the tax base.

Since Wisconsin's TIF law was enacted in 1975, Wisconsin municipalities have used TIF successfully to pay for public improvements and other eligible costs using the future taxes collected on the increased property value within the tax increment district (TID). *See* Laws of Wis. ch. 105 (1975). As of August 2015, Wisconsin had 1,128 active TIDs, which have generated over \$16 billion, or \$14.4 million per TID, in property tax growth for their respective communities. "Tax Incremental Financing: A Powerful Economic Development Tool," League of Wisconsin Municipalities, at 1 <https://www.lwm-info.org/DocumentCenter/View/1036>. These TIDs have added approximately 1.2 million annually to the tax base of their communities. *Id.*

The success of TIF in Wisconsin can be attributed to, among other things, the flexibility that the law provides to municipalities. This flexibility is especially important for municipalities in making key determinations such as whether a project would occur *but for* the use of TIF, whether an area is *blighted*, or whether a project warrants a cash grant to a developer. *See* Wis. Stat. §§ 66.1105(4m)(b)2, 66.1105(2)(ae)1.a, and 66.1105(2)(f)2.d . These determinations are fact-specific and made by local elected officials on a case-by-case basis, after receiving input from citizens through the public hearing process.

The Court's decision in this case will directly impact whether municipalities will continue to have the discretionary authority, under Wisconsin's TIF law, to make these critical decisions necessary to promote economic development in Wisconsin.

LAW AND ARGUMENT

This case involves the interpretation of Wisconsin's TIF Law, outlined in Wis. Stat. § 66.1105. The interpretation and application of a state statute is a question of law that this Court reviews *de novo*. See *State v. Harrison*, 2015 WI 5, ¶37, 360 Wis. 2d 246, 858 N.W.2d 372. In doing so, courts are to assume that the legislature's intent is expressed in the statutory language. See *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. If the language is clear, the statute must be applied as it is written. *Id.* at ¶45. A court may not attempt to re-write a statute or interpret it in a manner contrary to its plain language even if to avoid what the court believes are inequitable or unwise results. See *City of Kenosha v. Phillips*, 142 Wis. 2d 549, 560-61, 419 N.W.2d 236 (1988)(citations omitted).

I. MUNICIPALITIES HAVE BROAD DISCRETIONARY AUTHORITY UNDER WISCONSIN'S TIF LAW.

Wisconsin's TIF law provides municipalities with broad authority to create, approve, and manage TIDs to help finance public improvement projects. Specifically, the Wisconsin Legislature has authorized municipalities to exercise any power necessary and convenient to carry out the purposes of [the TIF law]. See Wis. Stat. § 66.1105(3). This authority

includes the power to create [TIDs] and define the[ir] boundaries, prepare, approve and implement project plans, and enter into any contracts or agreements . . . determined by the local legislative body to be necessary or convenient to the implement . . . the project plans. *Id.* at §§ 66.1105(3)(a), (b) and (e).

At issue in this case is whether the decisions made by municipalities under the TIF law should be subject to review by courts under a declaratory judgment action. The Wisconsin Legislature has given municipalities broad authority under the TIF law to make key determinations, including those related to whether an area is blighted and whether the development would not occur in the area without TIF. Because municipalities have broad authority to make TIF decisions, any judicial review of such decisions should be subject to a *certiorari* review. *See Buhler v. Racine County*, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1996)(indicating that a court will not substitute its judgment on legislative determination unless authorized by statute); *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 34, 332 Wis. 2d 3, 796 N.W.2d 411(indicating that a court may test the validity of a local decision through *certiorari* review).

A. Municipalities Have Broad Authority To Determine Whether An Area is Blighted.

Under the TIF law, municipalities have the authority to locate TIDs in a variety of locations including areas that are "blighted." Wis. Stat. § 66.1105(4)(a). Municipalities also are given broad authority to determine whether an area is "blighted." For purposes of this case, a "blighted area" is defined as:

An area, including a slum area, in which the structures, buildings or improvements, which by reason of dilapidation, deterioration, age or obsolescence . . . , is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime, and is detrimental to the public health, safety, morals or welfare.

Id. at § 66.1105(2)(a)1. The definition requires local elected officials to make a series of fact-based determinations including whether an area (a) consists of structures, buildings or improvements that satisfy any of a variety of conditions, (b) is "conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime," and (c) is "detrimental to the public health, safety, morals or welfare." *Id.* The absence of objective or numeric standards necessary to satisfy these requirements underscores the discretionary nature of the "blight" determination. *Id.* Even where a numeric standard is established, the legislature made it clear that "blight" is a discretionary determination to be

made by the local legislative body. *Id.* at § 66.1105(4)(gm)4.a (requiring adoption of a written resolution containing findings that at least 50% of the property within the TID is a blighted area).

B. Municipalities Have Broad Authority To Determine Whether A Project Would Occur Without TIF Assistance.

In addition to determinations regarding blight, the Wisconsin Legislature has given municipalities broad authority to determine whether a project would occur without the assistance of TIF.

Under the TIF law, the joint review board (JRB) must decide whether to approve a TID based on three criteria, including whether the development expected in the [TID] would occur without the use of [TIF]. Wis. Stat. § 66.1105(4m)(c)1. The statutes further emphasize the discretionary nature of this determination by emphasizing that the JRB is prohibited from approving a TID unless the board determines that, in its judgment, the development [within the TID] would not occur without the creation of a [TID]. *Id.* at § 66.1105(4m)(b)2 (emphasis added). This is often referred to as the “but for” test. In other words, TIF may not be used for a proposed development unless the JRB determines the proposed development would not occur but for the use of TIF.

The JRB's decision-making process, by nature, is fact-intensive and requires weighing a variety of public interests. An approval by the JRB means "they have seen or heard evidence that convinces them of the vital need for TIF assistance to make this development a reality." "Wisconsin Tax Incremental Finance Manual," Wisconsin Department of Revenue, Ch.5, Sec. 1, at 1 (Revised 4/12). "By making the finding, [members of the JRB] are sacrificing some amount of tax revenue for many years into the future." *Id.* The decision by the JRB reflects the "balance between the near-term risk and the long-term benefits" for both the taxing jurisdictions and the overall community. *Id.* at 2. The JRB's "but for" determination is a discretionary decision to "endorse" the use of tax dollars to help bring growth that would otherwise not occur." *Id.* at 3.

C. The TIF Law Establishes Specific Procedural And Public Input Requirements For Creating A TID.

While providing local elected officials with broad authority to make substantive determinations, the TIF law establishes specific procedural and public input requirements for creating TIDs. Before creating a TID, a municipality must hold a public hearing before the plan commission, notify the property owners within proposed boundaries of the TID, adopt a project plan by the plan commission, and have the project plan approved by both

the local legislative body and the JRB. Wis. Stat. §§ 66.1105(4)(a) ó (gs). The public hearing requirement specifies that interested parties must be afforded a reasonable opportunity to express their viewsö on both the proposed creation and the proposed boundaries of the TID. *Id.* at § 66.1105(4)(a). Also, notice of the hearing must be sent by first class mail to the chief executive officer or administrator of each affected taxing authority. *Id.* If any property within the proposed TID is identified as öblightedö or öin need of rehabilitation or conservation work,ö the owners of the property must receive special notification of the public hearing. *Id.* at § 66.1105(4)(c).

To ensure that decisions regarding the TID approval will be made by those who have direct financial interest in the success of the TID, the membership of the JRB must consist of representatives from the various taxing jurisdictions that will be directly impacted by the TID. Specifically, the JRBø's membership must consist of one representative from the school district, technical college, county, municipality, and the public. *Id.* at § 66.1105(4m). The statutes further specify in detail who can serve as a representative of each entity, requiring the representative to be well-informed on financial matters. *Id.* at § 66.1105(4m)(ae). For example, the

school board representative must be the school board president, or the president's designee. *Id.* at § 66.1105(4m)(a)1. If the president appoints a designee, preference must be given to the school district's finance director or another person with knowledge of local government finances. *Id.* The statutes provide a similar level of specificity for choosing the other representatives on the JRB. *Id.* at §§ 66.1105(4m)(a)2-4.

The TIF law's extensive public notice, public hearing, and JRB membership requirements demonstrate the legislature's intent to make the approval process subject to public scrutiny with numerous checks and balances in place to ensure decisions are made in the public's interest.

II. CASH GRANT PAYMENTS UNDER WISCONSIN'S TIF LAW DO NOT VIOLATE THE UNIFORMITY CLAUSE.

The Uniformity Clause of Wisconsin's Constitution requires all property to be taxed fairly and equally. *See* Wis. Const. Art. VIII, § 1. The purpose of the uniformity clause is to "protect the citizen against unequal and unjust taxation." *State ex. rel. La Follette v. Torphy*, 85 Wis. 2d 94, 108, 270 N.W.2d 187 (1978). Under the uniformity clause, only one "constitutional class" of property can exist, and all property "within that

class must be taxed [equally].⁶ *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 424, 147 N.W.2d 633 (1967).

While claiming to be making an as-applied challenge only to cash grants given to developers who own property within the TID, the Petitioners, for all practical purposes, are making a facial challenge to the constitutionality of cash grants to developers generally. *See* Pet. Resp. Br. at 8; *see also*, Wis. Stat. §§ 66.1105(2)(f)1.i, (3)(a), (3)(b) and (3)(e). A developer generally owns the property in which they seek to develop, regardless of whether TIF is involved. The developer may have a long-term commercial ground lease (e.g., 50 or 90 years) that allows the developer to construct improvements on the property, but such cases are relatively uncommon in Wisconsin. In other cases, if someone is hired to develop property they don't own, they would be acting as a general contractor, consultant, or in some other non-developer capacity.

A. The Wisconsin Statutes Authorize Municipalities To Award Cash Grants To Developers.

State statutes are presumed to be constitutional and courts must uphold a statute "if there is any reasonable basis for the exercise of legislative power."⁷ *State v. McManus*, 152 Wis.2d 113, 139, 447 N.W.2d 653 (1989).⁸ Every presumption must be indulged to sustain the law if at all possible

and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality. *Id.* (citation omitted).
The court cannot reweigh the facts found by the legislature. If a court can conceive of any facts on which legislation could reasonably be based, it must hold the legislation constitutional. *Id.* (citation omitted).

The Wisconsin TIF Law authorizes municipalities to award cash grants to developers. A "cash grant" is defined as a "payment[] made to owners, lessees or developers of property included in a signed development agreement." Wisconsin Tax Incremental Finance Manual, at 2. A cash grant is a reimbursement for expenses the developer has incurred or will incur in creating public facilities or making public improvements. *See Wis. Stat. §66.1105(2)(f)1.* Moreover, cash grants are generally offered only for redevelopment projects (as opposed to "greenfield developments"), due to the increased risks, financial uncertainties, and broader public benefits associated with such projects. Finally, they are awarded only as part of a complex set of negotiations consummated through a development agreement, which generally requires the developer to subject their business practices to scrutiny and incorporate public goals and practices into their

project. See Sarah Jo Peterson, "Tax Increment Financing: Tweaking TIF for the 21st Century," *Urban Land*, June 9, 2014 (quotations omitted).

Under the TIF law, the local legislative body has broad authority to make any payments they find "necessary or convenient to the creation of [TIDs] or the implementation of project plans." Wis. Stat. § 66.1105(2)(f)1.i. The statutes also provide municipalities with "any powers necessary and convenient to . . . create [TIDs] . . . cause project plans to be prepared . . . [and] enter into any contracts or agreements . . . determined by the local legislative body to be necessary and convenient to implement the provisions and effectuate the purposes of project plans." *Id.* at §§ 66.1105(3)(a), (b) and (e).

While the TIF law provides municipalities with broad discretionary authority to make cash grants to developers, such authority is not unlimited. A municipality may give cash grants only as a reimbursement for "project costs" which are defined as:

Any expenditures made or estimated to be made or monetary obligations incurred or estimated to be incurred by the city which are listed in a project plan as costs of public works or improvements within a tax incremental district . . . plus any incidental costs, . . . received or reasonably expected to be received by the city in connection with the implementation of the plan.

See Wis. Stat. § 66.1105(2)(f)1. Project costs must be expended only within the TID's boundaries, or the territory located within one-half mile of the TID's boundaries and within the municipality that creates the TID. *Id.* Moreover, a municipality may provide a cash grant to a developer only if the developer has entered into a development agreement with the municipality. Wis. Stat. § 66.1105(2)(f)2.d. Finally, if a municipality anticipates awarding a cash grant to a developer of property within a TID, the notice for the public hearing must include a statement to that effect. Wis. Stat. § 66.1105(4)(h).

Wisconsin's TIF law provides municipalities with broad authority to award cash grants to developers and places specific restrictions on the allowable use of grants and the process the municipality must follow in awarding such grants. However, nothing in the TIF law prohibits or creates specific restrictions on awarding cash grants to developers who own property within the TID.

B. A Cash Grant Is Not An Exemption From Taxation, A Tax Credit, Or A Tax Rebate.

The Petitioners maintain that a cash grant to a developer who owns property within a TID is an unconstitutional tax rebate in violation of the Uniformity Clause. Pet. Br. at 43. Specifically, the Petitioners, citing

Torphy, assert that if a property owner is paying taxes and receives any form of payment from the taxing jurisdiction, regardless of the purpose of the payment, such payment is a violation of the Uniformity Clause. *See* Pet. Br. at 44-46.

In *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 288 N.W.2d 85 (1980), this Court upheld the constitutionality of Wisconsin's TIF law against a uniformity challenge. *Id.* at 414. In doing so, the Court distinguished the TIF law from the Urban Redevelopment Law and the Improvements Tax Relief Law, which were both declared to be unconstitutional violations of the Uniformity Clause. *See Id.* at 411-12. The Court noted that, unlike the TIF law, the other tax laws were declared unconstitutional because they required "taxpayers owning equally valuable property . . . to pay disproportionate amounts of taxes." *Id.* at 412. In distinguishing the TIF law from these other laws, the Court concluded:

[T]here is no . . . disproportionate impact upon taxpayers within the same territorial boundaries of the unit imposing the tax. All taxpayers within the territorial limits of each local [taxing jurisdiction] continue to be taxed at a uniform rate based upon valuations uniformly arrived at. No taxpayer or group of taxpayers is being singled out for preferential treatment either in the form of an exemption from taxation or a tax credit.

Id. at 412.

Cash grants made to developers under Wisconsin's TIF law are not violations of the Uniformity Clause. They are given on a case-by-case basis only as a reimbursement for expenses the developer has incurred or will incur in creating public facilities or making public improvements. *See* Wis. Stat. §66.1105(2)(f)1. They are independent of the developer's obligation to pay property taxes according to the same methodology as other property taxpayers located within the TID. *See Sigma Tau*, 93 Wis. 2d at 412. Cash grants do not "offset increased property taxes" or act as some form of "tax credit." *See Torphy*, 85 Wis. 2d at 105. Moreover, they are not a tax rebate, nor do they result in "an exemption from taxation." *Sigma Tau*, 93 Wis. 2d at 412.

CONCLUSION

For the reasons stated above, we respectfully request this Court to uphold the court of appeals' decision and reaffirm that (a) any judicial review of a municipality's decisions related to TIF should be subject to *certiorari* review, and (b) the authorization of cash grants to developers under Wisconsin's TIF law is not unconstitutional.

Dated this 19th day of December, 2017.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2985 words.

Thomas D. Larson

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 19th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that:

I have caused three true and correct copies of this Joint *Amicus Curiae* Brief to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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