

METROPOLITAN MILWAUKEE  
ASSOCIATION OF COMMERCE, INC.,  
ASSOCIATED GENERAL CONTRACTORS  
OF GREATER MILWAUKEE, INC.,  
BUILDING ADVANTAGE,  
COMMERCIAL ASSOCIATION OF  
REALTORS WISCONSIN, INC.,  
NAIOP WISCONSIN CHAPTER, INC.,  
WISCONSIN REALTORS ASSOCIATION,  
INC.,  
SIDS SEALANTS LLC, and  
SID ARTHUR,

Plaintiffs,

v.

CITY OF PORT WASHINGTON and  
SUSAN WESTERBEKE,

Defendants.

Case No. 26-CV-47

Case Codes: 30701, 30704, 30953

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**ANSWER AND AFFIRMATIVE DEFENSES**

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**BACKGROUND**

On November 13, 2025, a petition for direct legislation was submitted to Defendant Westerbeke. On November 26, 2025, Defendant Westerbeke certified the petition and forwarded it to the Common Council for consideration. At the December 16, 2025, Common Council meeting, the City Attorney expressed concerns related to the legality of the proposed ordinance, but nonetheless recommended that the Council forward it to the electors pursuant to Wis. Stat. §9.20 and *State ex re. Althouse v. City of Madison*, which contains the following language: “...the common council has no authority whatsoever, in respect to direct legislation, to make an initial judgment of the constitutionality or validity of the proposed legislation.” Thus, the

Defendants find themselves in a position where they are prohibited by law from rejecting the subject legislation even though they largely agree with the concerns outlined in the Complaint.

Defendants City of Port Washington and Susan Westerbeke (“Defendants”) by and through their attorneys, Antoine, Hoeft & Eberhardt, S.C., hereby answer the Plaintiffs’ Complaint as follows:

### **INTRODUCTION**

1. This action challenges the legal sufficiency and validity of a proposed municipal ordinance that has been certified for placement on the ballot pursuant to Wis. Stat. § 9.20 and that would require voter approval as a precondition to the creation or approval of certain Tax Incremental Districts within the City of Port Washington. Although Wisconsin law permits direct legislation by referendum in limited circumstances, such legislation (if passed and enacted) must strictly comply with statutory requirements and may not exceed municipal authority, conflict with state law, or mislead the electorate. The proposed ordinance at issue fails those requirements. It unlawfully restricts and conditions powers that the Legislature has expressly delegated to municipalities and Joint Review Boards under Wis. Stat. § 66.1105, conflicts with state law governing tax incremental financing, and is impermissibly vague, internally inconsistent, and misleading to voters. Unless the Court intervenes to halt the matter being submitted to the electorate, the proposed ordinance will irreparably harm employers, taxpayers, and economic development interests in the City of Port Washington and throughout the region.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

### **PARTIES**

2. Plaintiff Metropolitan Milwaukee Association of Commerce, Inc. (“MMAC”) is a Wisconsin non-profit, non-stock corporation with a principal place of business in Milwaukee, Wisconsin. MMAC represents thousands of member businesses across southeastern Wisconsin, including Ozaukee County. MMAC’s members include employers, developers, financial institutions, and investors that regularly engage in economic development projects utilizing tax incremental financing and that depend upon the uniform, predictable application of Wis. Stat. §66.1105. A substantial number of MMAC’s members do business in, invest in, employ workers in, or contract with entities located in the City of Port Washington. These members are directly and adversely affected by unlawful restrictions on the City of Port Washington’s statutory authority to create and approve TIDs

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

3. Plaintiff Associated General Contractors of Greater Milwaukee, Inc. (“AGCGM”) is a Wisconsin nonstock corporation with a principal place of business in Milwaukee County, Wisconsin. AGCGM is a trade association whose members include general contractors and construction-related businesses that regularly perform construction work throughout the State of Wisconsin.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

4. Plaintiff Building Advantage (“Building Advantage”) is a Wisconsin nonstock corporation with its principal place of business in Wisconsin. Building Advantage is a trade association representing union construction contractors and affiliated businesses that operate throughout Wisconsin.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

5. Plaintiff Commercial Association of REALTORS® Wisconsin, Inc. (“CARW”) is a Wisconsin nonstock corporation with a principal place of business in Wisconsin. CARW is a statewide trade association whose members include commercial real estate brokers, owners, developers, and related professionals engaged in commercial real estate activities throughout Wisconsin.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

6. Plaintiff NAIOP Wisconsin Chapter, Inc. (“NAIOP”) is a Wisconsin nonstock corporation with a principal place of business in Wisconsin. NAIOP is a trade association representing commercial real estate developers, owners, investors, and service providers conducting business throughout Wisconsin.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

7. Plaintiff Wisconsin REALTORS® Association, Inc. (“WRA”) is a Wisconsin nonstock corporation with a principal place of business in Wisconsin. WRA is a trade association representing practicing real estate sales agents, brokers, appraisers, inspectors, bankers and other professionals involved in real estate in Wisconsin.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

8. Plaintiff Sid’s Sealants LLC (“Sid’s Sealants”) is a Wisconsin limited liability company with a principal place of business in Wisconsin. Sid’s Sealants is located in the City of

Port Washington. Sid's Sealants is engaged in the business of construction services, including sealant and related work, and regularly performs work on commercial construction projects in Wisconsin.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

9. Plaintiff Sid Arthur is a resident, property taxpayer, and qualified elector of the City of Port Washington, Wisconsin. Sid Arthur has standing to bring this action because the proposed ordinance will affect his rights as a voter to receive a lawful and non-misleading ballot question and his rights as a taxpayer to have municipal affairs conducted in accordance with state law.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

10. Defendant City of Port Washington ("City") is a Wisconsin municipal corporation organized under Wis. Stat. Ch. 62, with its principal offices located in Ozaukee County, Wisconsin.

**ANSWER:** Admits on information and belief.

11. Defendant Susan Westerbeke is the City Clerk of the City of Port Washington and named in this action in her official capacity.

**ANSWER:** Admits on information and belief.

### **JURISDICTION AND VENUE**

12. This Court has jurisdiction pursuant to Wis. Stat. §§ 753.03 and 806.04.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

13. Venue is proper in Ozaukee County under Wis. Stat. § 801.50 because the City is located in this county and the acts and omissions giving rise to this action occurred here.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

### **FACTUAL ALLEGATIONS**

14. On November 13, 2025, the petition for direct legislation attached hereto as Exhibit A was filed with the City Clerk of the City pursuant to Wis. Stat. § 9.20, seeking adoption of an ordinance regulating the creation and approval of some, but not all, new Tax Incremental Districts (“TIDs”) in the City.

**ANSWER:** Admits on information and belief.

15. On November 26, 2025, the City Clerk certified the petition as sufficient under Wis. Stat. § 9.20(3) and forwarded it to the Port Washington Common Council; see attached Exhibit B.

**ANSWER:** Admits on information and belief.

16. On or about December 16, 2025, the City Attorney advised the Common Council that, pursuant to Wis. Stat. § 9.20 and notwithstanding his concerns about legality and enforceability, the Council was legally required to either adopt the proposed ordinance without alteration or submit it to the electors at a spring or general election, and recommended submission to the electorate at the April 7, 2026, spring election; see attached Exhibit C.

**ANSWER:** Admits on information and belief.

17. On December 16, 2025, the Common Council affirmatively voted to submit the petition for referendum at the April 7, 2026 election; see attached Exhibit D.

**ANSWER:** Admits on information and belief.

18. Direct legislation under Wis. Stat. § 9.20 is not without limits. The Wisconsin Supreme Court has held that there are four limitations implicit in the statute. “An ordinance initiated under Wis. Stat. § 9.20: 1) must be legislative as opposed to administrative or executive

in nature; 2) cannot repeal an existing ordinance; 3) may not exceed the legislative powers conferred upon the governing municipal body; and 4) may not modify statutorily prescribed procedures or standards.” Mount Horeb Community Alert v. Village Bd. of Mt. Horeb, 2003 WI 100, ¶ 17, 263 Wis. 2d 544, 655 N.W.2d 229 (citation omitted). As noted on Exhibit C, the City Attorney identified issues with wording and construction which will make it difficult for the City to follow and enforce the proposed ordinance. The City Attorney advised the City Council not to adopt the proposed ordinance but to submit it to the electors. Accordingly, the City has not fully evaluated whether the proposed ordinance would violate any of the four Mount Horeb criteria.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

19. Upon information and belief, the City intends to report to Ozaukee County that the proposed ordinance will be on the ballot for the April 7, 2026 spring election.

**ANSWER:** Admits on information and belief.

20. Upon information and belief, on or before February 23, 2026, Defendant Westerbeke intends to certify the proposed ordinance for inclusion as a municipal referendum on the ballot for the April 7, 2026 spring election.

**ANSWER:** Admits on information and belief.

21. The proposed ordinance would require that any new TID involving undefined “large capital expenditures,” or having a projected base value or project cost exceeding \$10,000,000, be approved by a majority of electors at a general or special election before the creation or approval such a TID. The proposed ordinance also provides that “[u]pon approval by the electors, the Common Council shall have the exclusive authority to create and approve any TIDs...” Thus, the proposed ordinance contained in the petition for referendum would exceed the

legislative powers conferred upon the City, override the powers of the Joint Review Board altogether and modify procedures prescribed in Wis. Stat. § 66.1105.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

22. Wisconsin law comprehensively governs tax incremental financing through Wis. Stat. § 66.1105, which expressly delegates to municipal governing bodies and their Joint Review Boards – subject to detailed procedural safeguards and Department of Revenue oversight – the authority to create TIDs, approve project plans, and incur project costs.

**ANSWER:** Admits on information and belief.

23. The proposed ordinance directly conflicts with and seeks to override that statutory framework by stripping the Common Council and the Joint Review Board of authority granted by the Legislature and substituting ad hoc voter approval requirements that are not authorized by state law. Thus, the proposed ordinance contained in the petition for referendum would modify statutorily prescribed procedures or standards, namely, those contained in Wis. Stat. § 66.1105.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

24. The proposed ordinance is facially vague and internally inconsistent. It fails to define the central operative phrase “large capital expenditures,” wrongfully suggests that general tax revenues will be used, provides no standards for determining when the voter-approval requirement is triggered and invites arbitrary application by municipal officials and confusion among voters.

**ANSWER:** Admits on information and belief.



25. The ballot question associated with the proposed ordinance fails to provide a concise and intelligible statement of the ordinance's true nature and effect. It does not disclose that the ordinance would materially curtail statutory municipal powers, disrupt the uniform statewide tax incremental financing ("TIF") system, and impair the City's ability to respond to economic development opportunities.

**ANSWER:** Admits on information and belief.

26. If the City is unable to use TIF it would likely need to raise taxes directly to fund development improvements in the future or borrow to make improvements, which in turn increase taxes, either of which negatively affect Sid Arthur.

**ANSWER:** Admits that the inability to use TIF would likely lead to raised taxes but lacks knowledge and sufficient information to form a belief as to the truth or falsity of the allegations related to the affect higher taxes would have on plaintiff Sid Arthur.

27. MMAC's members include employers, developers, lenders, and investors that rely on the predictable and timely use of TIF as authorized by state law. Subjecting TID creation to uncertain and undefined referendum requirements will deter investment, increase financing costs, and place the City at a competitive disadvantage relative to other municipalities.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

28. AGCGM's members include general contractors and construction-related businesses that regularly perform construction work throughout the state of Wisconsin. Building Advantage is a trade association representing union construction contractors and affiliated businesses that operate throughout Wisconsin. Many of the construction projects that the members of AGCGM and Building Advantage work on are funded by TIF.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

29. Subjecting TID creation to uncertain and undefined referendum requirements will result in a decrease in construction projects available to AGCGM and Building Advantage's members.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

30. CARW is a statewide trade association whose members include commercial real estate brokers, owners, developers, and related professionals engaged in commercial real estate activities throughout Wisconsin. NAIOP is a trade association representing commercial real estate developers, owners, investors, and service providers conducting business throughout Wisconsin. WRA is a statewide trade association whose members include practicing real estate sales agents, brokers, appraisers, inspectors, bankers and other professionals involved in real estate in Wisconsin.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

31. Subjecting TID creation to uncertain and undefined referendum requirements will result in a decrease in development projects available to the members of CARW, NAIOP and WRA.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

32. Sid's Sealants is a Wisconsin limited liability company with its principal place of business in Wisconsin. Sid's Sealants is located in the City of Port Washington. Sid's Sealants is

engaged in the business of construction services, including sealant and related work, and regularly performs work on commercial construction projects in the City.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

33. Subjecting TID creation to uncertain and undefined referendum requirements will result in a decrease in construction projects available Sid's Sealants.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

34. Plaintiff Sid Arthur, as a resident, taxpayer, and elector of the City, will be irreparably harmed if presented with a misleading and unlawful ballot question that asks voters to approve an ordinance the City has no authority to enact and that conflicts with state law.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

**COUNT I – DECLARATORY JUDGMENT**  
**(Improper Subject of Direct Legislation)**

35. Plaintiffs reallege and incorporate paragraphs 1–34 as if fully set forth herein.

**ANSWER:** Defendants incorporate by reference their responses to each of the foregoing paragraphs.

36. The right of direct legislation in Wisconsin is purely statutory and exists only to the extent authorized by Wis. Stat. § 9.20.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

37. An ordinance proposed and enacted through direct legislation must comply with all statutory and constitutional limitations applicable to municipal ordinances adopted by a common council.

**ANSWER:** Admits on information and belief.

38. The Legislature has enacted a comprehensive, uniform, statewide statutory scheme governing tax incremental financing through Wis. Stat. § 66.1105, reflecting a matter of statewide concern.

**ANSWER:** Admits on information and belief.

39. The proposed ordinance seeks to alter, restrict, and condition powers that the Legislature has expressly delegated to municipal governing bodies and the Joint Review Board and therefore exceeds the permissible scope of direct legislation under Wis. Stat. § 9.20.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

40. Because the proposed ordinance conflicts with state law and exceeds municipal authority, it is invalid and may not lawfully be submitted to the electorate.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

**COUNT II – DECLARATORY JUDGMENT**  
**(Preemption and Conflict with State Law)**

41. Plaintiffs reallege and incorporate paragraphs 1–40.

**ANSWER:** Defendants incorporate by reference their responses to each of the foregoing paragraphs.

42. Municipalities possess only those powers expressly granted or necessarily implied by the Legislature and may not impose additional substantive conditions where the Legislature has occupied the field.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

43. Wis. Stat. § 66.1105 grants municipal governing bodies and the Joint Review Board – not the electorate – the authority to create TIDs and approve project plans, subject to specific procedural requirements and state oversight.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

44. By conditioning the exercise of that authority on voter approval and undefined thresholds, the proposed ordinance is logically inconsistent with, defeats the purpose of, and violates the spirit of Wis. Stat. § 66.1105.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

45. The proposed ordinance is therefore preempted by state law and void.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

**COUNT III – DECLARATORY JUDGMENT**  
**(Void for Vagueness)**

46. Plaintiffs reallege and incorporate paragraphs 1–45.

**ANSWER:** Defendants incorporate by reference their responses to each of the foregoing paragraphs.

47. The proposed ordinance is unconstitutionally vague because it fails to define essential terms and provides no objective standards for compliance or enforcement.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

48. Such vagueness violates due process under Article I, Section 1 of the Wisconsin Constitution.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

**COUNT IV – DECLARATORY JUDGMENT**  
**(Insufficient and Misleading Ballot Question)**

49. Plaintiffs reallege and incorporate paragraphs 1–48.

**ANSWER:** Defendants incorporate by reference their responses to each of the foregoing paragraphs.

50. Wis. Stat. § 9.20(6) requires that the ballot contain a concise statement of the ordinance’s nature sufficient to inform voters of the substance and effect of the proposed law.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

51. The ballot language associated with the proposed ordinance omits material information regarding its legal effect, scope, and conflict with existing state law, rendering it misleading and invalid.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

**COUNT V – INJUNCTIVE RELIEF**

52. Plaintiffs reallege and incorporate paragraphs 1–51.

**ANSWER:** Defendants incorporate by reference their responses to each of the foregoing paragraphs.

53. Plaintiffs lack an adequate remedy at law and will suffer irreparable harm if the proposed ordinance is submitted to the electorate or enforced.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

54. Plaintiffs are entitled to temporary and permanent injunctive relief prohibiting the City from placing the proposed ordinance on the ballot or enforcing it.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

#### **COUNT VI – WRIT OF PROHIBITION**

55. Plaintiffs reallege and incorporate paragraphs 1–54.

**ANSWER:** Defendants incorporate by reference their responses to each of the foregoing paragraphs.

56. A writ of prohibition is an extraordinary remedy available to restrain a municipal body or officer from acting outside its lawful jurisdiction or in excess of its statutory authority.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

57. The City lacks jurisdiction and legal authority to submit to the electorate an ordinance that conflicts with state law, exceeds municipal power, and is not a proper subject of direct legislation under Wis. Stat. § 9.20.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

58. Submission of the proposed ordinance to the electorate would constitute an unlawful exercise of power and would result in immediate and irreparable harm that cannot be adequately remedied by appeal or post-election litigation.

**ANSWER:** Lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

59. Plaintiffs are therefore entitled to a writ of prohibition prohibiting the City, its Common Council, officers, agents, and the City Clerk, Susan Westerbeke, from placing the proposed ordinance on any ballot or taking further action to effectuate its submission to the voters.

**ANSWER:** The allegations of this paragraph state a legal conclusion to which no response is required.

#### **AFFIRMATIVE DEFENSE**

1. Defendants have at all material times complied with all of their duties and obligations with regard to the proposed ordinance and the matters set forth herein.

Dated this 3rd day of February, 2026.

By: Electronically signed by Matthew V. Nugent  
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