

HEINONLINE

Citation: 43 Urb. Law. 427 2010-2011

Provided by:

USC Law Library



Content downloaded/printed from [HeinOnline](#)

Wed Mar 8 18:44:02 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing

George Lefcoe*

DEMOGRAPHERS PREDICT THAT THE U.S. POPULATION WILL GROW by one hundred million by 2050. Newcomers are expected to continue the trend to suburbia—particularly to the fast-growing big cities of the south and west; cities in the resurgent heartland of the country; exurbia; and a string of discernible ‘superstar cities,’ mostly coastal.

Many communities across the country eager to appeal to these newcomers will, as they have for decades, include tax increment financing among their means of financing public improvements, such as stadiums, museums, plazas, and promenades. These public improvements are often integrated into signature private redevelopment projects, carefully designed to achieve environmental and planning objectives by being pedestrian-friendly, high density, and mixed use—accessible not only by automobile but public transit as well.

After illustrating the beneficial use of tax increment financing, I describe six major criticisms often leveled against tax increment financing (TIF): (1) Prosperous, growing outer suburbs use TIF to lure jobs from center cities and inner suburbs, and the low income and minority populations that live there; (2) TIF should be confined to seriously blighted urban areas and not used, as cities often do, to support projects in already well-established, successful commercial areas; (3) TIF is often used to subsidize retail development for the property and sales taxes it will bring, displacing sales from other locations; (4) Cities sponsoring tax increment projects drain property tax revenues from schools and counties while attracting new residents and firms, increasing demands for public services; (5) Local governments sometimes confer excessive

*Florine and Ervin Yoder Professor of Real Estate Law, Gould School of Law, University of Southern California. Prepared originally as the basis for the Richard Babcock Memorial Lecture at the 2010 ALI-ABA Land Use Conference, the author gratefully acknowledges the enormous contribution to this paper of Frank Schnidman, the director and organizer of that conference, Gus B. Bauman, Calvin E. Hollis, Robert H. Freilich, Daniel M. Klerman, Jeffrey L. Oris, Jose Vera and USC law students Parag L. Amin, Nicholas Christen, KeAndra D. Dodds, and Kaleb E. Keller, research assistants, summer 2010.

TIF-funded benefits to attract private redevelopers; and (6) Many local governments hide or neglect to gather information that would reveal whether each of their TIF projects was a net tax producer or loser, and whether actual property tax yields matched the estimated yields forecast when the project was approved.

This article divides the six criticisms into three pairs: the questionable, the contingent, and the convincing. The first two criticisms are objectionable because they overestimate what TIF can realistically achieve. The second pair of criticisms are contingent because their validity depends on a comparison of a project's success in adding net present value to the tax base greater than the local tax revenues that would have been generated had the TIF-funded project not been built.

The last two criticisms, calling for greater TIF accountability and fiscal transparency, merit serious attention. While some localities make responsible fiscal disclosures, many others are so secretive about how they raise and spend public funds on redevelopment projects as to threaten popular support for such programs.

I. Introduction: The Resort-like Walkable Urban Places Where the Next Hundred Million Americans Are Likely to Live

A. Overview: The Evolving Urban Form

Demographers are predicting that the U.S. population will grow by more than one hundred million in the next four decades.¹ In *The Next Hundred Million: America in 2050*,² Joel Kotkin estimates how this increased population will distribute among four categories of destinations: (1) "superstar cities,"³ (2) suburbia, (3) exurbia, and (4) the resurgent heartland. He forecasts that fifty to seventy million of the one hundred million will locate to suburbia, mostly in the south and west.⁴

1. See, e.g., JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., U.S. POPULATION PROJECTIONS: 2005-2050, 1 fig. 1 (2008), available at <http://pewhispanic.org/files/reports/85.pdf>; JOHN PITKIN & DOWELL MYERS, U.S. HOUSING TRENDS: GENERATIONAL CHANGES AND THE OUTLOOK TO 2050 (2008), discussed in TRANSP. RESEARCH BD., NAT'L RESEARCH CTR., DRIVING AND THE BUILT ENVIRONMENT: THE EFFECTS OF COMPACT DEVELOPMENT ON MOTORIZED TRAVEL, ENERGY USE, AND CO₂ EMISSIONS 119 (2009) [hereinafter DRIVING AND THE BUILT ENVIRONMENT].

2. JOEL KOTKIN, *THE NEXT HUNDRED MILLION: AMERICA IN 2050* (2010).

3. See Gyourko, Mayer & Sinai, *infra* note 8.

4. See KOTKIN, *supra* note 2, at 15, 78. See also CHRISTOPHER B. LEINBERGER, *THE OPTION OF URBANISM: INVESTING IN A NEW AMERICAN DREAM* 4, 7 n.1 (2008) (discussing trends in the built environment and predictions of population growth in the United States).

Kotkin predicts that “superstar cities” will enjoy “massive opportunities to provide for as many as fifteen to twenty million new urban dwellers by 2050.”⁵ The others will move to exurbia—very low density settlements beyond the boundaries of suburbia—and the growing cities in the country’s heartland from the Mississippi River to the Rocky Mountains—Des Moines, Fargo, Sioux Falls, and Omaha,⁶ prominently among them.

For most people, especially families with school-age children, what matters most in their location decisions are affordable housing, tolerable population densities, abundant business and job opportunities, decent public schools, and safe neighborhoods. The “plain vanilla” suburbs will be their destination.⁷ Think San Fernando Valley in Los Angeles, or Queens in New York City. But a new variable has been added to the familiar factors that nurture or retard growth, plainly visible in “superstar cities.”

The term “superstar cities” was coined in 2006 by The Wharton School of the University of Pennsylvania Professor Joseph Gyourko and his associates and refers to unique, highly desirable metropolitan areas, which attract high-income individuals willing to pay a premium

5. KOTKIN, *supra* note 2, at 18.

6. See Martin Shukert, *A Synthesis of Visions: Planning, Politics, and Controversy Redeveloping Downtown Omaha*, 39 REAL EST. REV. 23, 23 (2010).

During the last 30 years, downtown Omaha, Nebraska has experienced a true renaissance, changing from a traditional district with a declining office and retail base into a vital mixed use center. The Missouri Riverfront and adjacent areas, largely abandoned and ignored in 1980, have been transformed by a 110-acre redevelopment project anchored by the six-building, 650,000 square foot corporate headquarters campus of ConAgra Foods, a major city park, and the central dispatching center of the Union Pacific Railroad.

Subsequent riverfront development includes the Qwest Center, with a 17,000-seat arena and 200,000 square foot exhibition hall and convention center; the adjacent 450-room Omaha Hilton and six other new hotels; the 25,000-seat ballpark that will be the permanent home to the NCAA College World Series beginning in 2011; a major corporate facility and continuing education center for the Gallup Organization; and new residential, retail, and entertainment development. The Bob Kerrey Pedestrian Bridge spans the Missouri River, linking the Omaha and Council Bluffs, Iowa trail systems and becoming the centerpiece of a 200-mile long pathway system that will connect four states.

Elsewhere in downtown, Omaha’s largest bank developed the 42-story, one million square foot First National Tower and adjacent data processing center; the city’s daily newspaper, Omaha *World-Herald*, built new publishing facilities; and the Union Pacific Railroad built a new corporate headquarters building. Downtown has added over 3500 new housing units since 1980 and completed many other projects, while at the same time preserving and considerably expanding the iconic mixed use Old Market Historic District.

Id.

7. KOTKIN, *supra* note 2, at 62-63.

for the property.⁸ Leading the ranks of established superstar cities are New York, Boston, San Francisco, Washington, D.C., and Los Angeles.⁹ These cities tend to appeal to “the affluent, particularly those with inherited wealth, as well as nomadic groups like college students and recent immigrants.”¹⁰ Rising stars in the firmament include Seattle, Portland, and Austin.¹¹

Terry Nichols Clark calls superstar cities “entertainment machines” for the privileged¹² and characterizes them as career launching pads for advantaged populations of young professionals in finance, design, media, advertising, and similar callings.¹³ “A new image of urban America is in the making,” proclaimed William H. Frey, a demographer at Brookings. “What used to be white flight to the suburbs is turning into ‘bright flight’ to cities that have become magnets for aspiring young adults who see access to knowledge-based jobs, public transportation and a new city ambiance.”¹⁴

Land use strategist and real estate developer Christopher Leinberger labels the type of development that will act as a magnet in attracting the next one hundred million Americans as “walkable urbanism” where “school[s], shopping, parks, friends, and even employment, [will be] within walking distance or transit of one’s home.”¹⁵ These places will be modeled on the Main Streets of earlier decades: the retail cores that were drained of trade from the 1960s to the 1990s by the drivable, ubiquitous regional shopping malls that have come to anchor so much of suburbia—low density buildings centered on acres of asphalt-covered surface parking lots.

Kotkin agrees, and sees these new settlements taking shape much differently than the bedroom suburbs that were developed after World War II with single-use, wall-to-wall production housing tracts, com-

8. Joseph Gyourko, Christopher Mayer & Todd Sinai, *Superstar Cities* 2-3 (Nat'l Bureau Econ. Research, Working Paper No. 12355), available at http://real.wharton.upenn.edu/~sinai/papers/superstar_cities_06-16-06-final.pdf.

9. See generally KOTKIN, *supra* note 2, at 18 (noting the function and draw of established and potential “superstar cities”).

10. *Id.*

11. *Id.*

12. Terry Nichols Clark, *Urban Amenities: Lakes, Opera, and Juice Bars: Do They Drive Development?*, in *THE CITY AS AN ENTERTAINMENT MACHINE* 103, 108 (Terry Nichols Clark ed., 2004).

13. *Id.* at 105.

14. Hope Yen, *White Flight? Suburbs Lose Young Whites to Cities*, KSDK 5 NEWS, May 9, 2010, <http://www.ksdk.com/news/local/story.aspx?storyid=201688>.

15. LEINBERGER, *supra* note 4, at 3, 7.

pletely dependent on the automobile.¹⁶ Kotkin anticipates that suburbs will be carefully redeveloped to “sustain their economic and social viability.”¹⁷ “These suburbs of tomorrow will have a diversity of housing types, thriving town centers, and growing cultural and religious institutions. They will provide more opportunities to walk, ride bikes, and work at nearby companies.”¹⁸

Suburban residents are looking for congenial and comfortable places where they can get out of their cars and enjoy a stroll through tree-lined streets enlivened by carefully designed boutiques and cafes—a place more like a pre-industrial town or urban village than the enclosed regional shopping malls that have come to anchor so much of suburbia. Leinberger warns that “[i]f the lifestyle choice of walkable urbanism is not offered, many businesses and households will settle elsewhere.”¹⁹ Leinberger observes that Washington, D.C., had just two walkable urban places in the 1980s (Georgetown and Old Town Alexandria).²⁰ “In 2007, there [were] seventeen walkable places, with at least five more emerging.”²¹

In older communities fortunate enough to have been built around pedestrian-friendly walking streets, like Georgetown and Old Town Alexandria, local governments are revitalizing long-neglected historic Main Streets.²² Kotkin mentions Fullerton, California, “twenty-two miles south of Los Angeles in Orange County,” a farming community until the 1950s, when “mass suburbanization enveloped it.”²³ Newly built shopping malls emptied the old central district of patronage, and downtown retail died. In the 1990s, Fullerton restored its downtown, preserving over seventy historic buildings.²⁴ By the 2000s, downtown Fullerton emerged as the “acknowledged social and cultural center for the city’s 126,000 residents” and “a magnet for people from surround-

16. KOTKIN, *supra* note 2, at 81, 95.

17. *Id.* at 95.

18. *Id.* at 72.

19. LEINBERGER, *supra* note 4, at 8.

20. *Id.* at 103.

21. *Id.* at 103-04. As examples, he names “Ballston, Clarendon, Crystal City, Reston Town Center, and Rosslyn in Virginia, and Bethesda, Silver Spring, Rockville, and National Harbor in Maryland.” Christopher Leinberger, *A Model for Growth: Walkable Urbanism*, 69 URB. LAND 113 (2010).

22. KOTKIN, *supra* note 2, at 193. This was also true in Georgetown and Old Town Alexandria; both were “eighteenth-century colonial towns.” LEINBERGER, *supra* note 4, at 103.

23. KOTKIN, *supra* note 2, at 96.

24. *Id.*

ing communities.”²⁵ Fullerton achieved its downtown revival through two decades of active redevelopment utilizing TIF.²⁶

Even in communities lacking the “good bones” of a historic center, failed regional malls designed to be accessed exclusively by automobile can be redeveloped for accessibility by automobile, public transit, and walking. Leinberger describes the emergence of Belmar, in Lakewood, Colorado, a “middle-income suburb of Denver,” where the failed Villa Italia mall was recycled into a “twenty-two-block grid of streets and sidewalks” with one million square feet of retail, including a multiplex theater and a Whole Foods.²⁷

1. THE VIRGINIA BEACH TOWN CENTER IN VIRGINIA BEACH, VIRGINIA

The Virginia Beach Town Center is another example of a drivable suburb developing a walkable urban core. Virginia Beach never had a traditional downtown like nearby Norfolk or Richmond. The city, once little more than a thriving beach resort, grew rapidly in the 1980s and 1990s. It began as a random assemblage of housing tracts, strip commercial developments, and shopping malls. Located in the southeastern corner of Virginia, the small town merged in 1963 with Princess Anne County to form what has since become Virginia’s largest city, with a population of over 425,000.²⁸

25. *Id.*

26. Fullerton’s Redevelopment Agency website offers:

Loans: Rehabilitation Loans, Retail Business Improvement Loans, and lender partnerships with the Small Business Finance Corporation. Land Acquisition: Land assembly and land and lease write downs. Partial Financing: The Agency is anxious to consider participation in financing projects which will generate significant new revenue. [And] Off-Site Improvements: Including street, utilities, parking, and other infrastructure improvements.

Fullerton Redevelopment Agency, *Redevelopment*, CITY OF FULLERTON, http://www.ci.fullerton.ca.us/depts/eco_dev/redevelopmentagency.asp (last visited Mar. 27, 2011).

27. LEINBERGER, *supra* note 4, at 125-26.

28.

FIVE MOST POPULOUS CITIES IN VIRGINIA

City	1990	City	2000
	Population		Population
Virginia Beach	393,069	Virginia Beach	425,257
Norfolk	261,229	Norfolk	234,403
Richmond	203,056	Chesapeake	199,184
Newport News	170,045	Richmond	197,790
Chesapeake	151,976	Newport News	180,150

Sources: U.S. Census Bureau for 1990 and 2000 figures.

CITY OF VIRGINIA BEACH DEV. AUTH., OFFICIAL STATEMENT: SERIES 2002A & 2002B BONDS A-10 (2002).

Business and civic leaders in Virginia Beach worked for years to create a walkable central business district by transforming a sparsely developed seventeen-block area anchored by the lackluster Pembroke Mall, badly in need of renovation by the 1990s.²⁹ The result is a “\$500 million multi-phased mixed-use development” featuring a twenty-three-story Class A office tower, The Westin Hotel & Residences (the tallest building in Virginia³⁰), multi-level upscale retail, and an array of cafes and restaurants.³¹

TIF funds were spent on public works—a plaza and fountain; streetscape improvements (pavers, benches, landscaping, and street lights); curbs and gutters; utilities (sanitary sewer, water, storm sewer, gas and electric); a plaza where civic celebrations and political rallies could be staged; the Sandler Center for the Performing Arts, a 1200-seat theater and concert venue; and ample parking in multi-story garages.³²

Parking structures are an important feature of pedestrian-friendly urban design, though sometimes not financially feasible for private developers locked in dead-heat competition with traditional regional malls offering free parking distanced from adjoining sidewalks on acres of surface-level asphalt lots. Virginia Beach is typical of the new generation of suburban downtowns in offering free parking in parking structures located to encourage visitors to park their cars and then enjoy leisurely strolls on shop-lined, landscaped, well-lit sidewalks. The Virginia Beach Town Center website boasts “3,200 free parking spaces.”³³ Without parking garages, the Town Center project would be indistinguishable from a regional mall. The Virginia Beach Town Cen-

29. *Id.* See also COUNCIL OF DEV. FIN. AGENCIES, TIF ACROSS AMERICA—FIVE CASE STUDIES: THE DIVERSITY OF TAX INCREMENT FINANCING 1, available at [http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/09bb875ff7a9b74c862571c3006ac51e/\\$FILE/TheDiversityofTIF.pdf](http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/09bb875ff7a9b74c862571c3006ac51e/$FILE/TheDiversityofTIF.pdf) (stating that, by the early 1990s, the Pembroke area was badly in need of renovation with its aging parking lots, shopping malls, and big box retailers).

30. ARMADA HOFFLER, <http://www.armadahoffler.com> (last visited Mar. 27, 2011) (advertising on main page that the Westin Virginia Beach Town Center Hotel & Residences is the tallest building in Virginia).

31. *Project Portfolio: Mixed Use*, ARMADA HOFFLER, http://www.armadahoffler.com/portfolio_mixeduse.html (last visited Mar. 27, 2011) (developer’s website providing information about the Town Center of Virginia Beach project).

32. *Project Portfolio: Public Private Joint Ventures*, ARMADA HOFFLER, http://www.armadahoffler.com/portfolio_publicprivate.html (last visited Mar. 27, 2011).

33. “Situated centrally within the city of Virginia Beach, The Town Center is a quick stop off Interstate 264, and an easy drive for Hampton Roads residents and visitors. With more than 3,200 FREE parking spaces located in covered garages, surface parking lots and on-street, Town Center guests can always park within a short distance of the shops, restaurants and offices.” *The Town Center of Virginia Beach: Directions & Parking*, TOWN CENTER: LIVE IT UP, <http://www.vabeachtowncenter.com/directions-parking> (last visited Mar. 27, 2011).

ter project needed assistance from the local government to finance construction of the parking structures.³⁴

Besides the Town Center being a planning success, Virginia Beach officials see it as a fiscal triumph as well. Local officials take pride in the revenue the project has brought the city. Assessed property values in the Town Center climbed steadily from \$150,000,000 in 1998 to over \$800,000,000 in 2009. Besides producing over \$5,000,000 a year in property taxes, the project area also generates \$5,700,000 in other business taxes (hotel, meal and admission taxes, business property and license fees, and sales taxes).³⁵

Walkable urban places cost more to build out than drivable suburbia, typically 20% to 40% more. Leinberger explains why. Besides parking structures, walkable urbanism tends to take the form of multi-story, high density and, sometimes, high rise development, and this often means the use of re-enforced concrete. Even low rise buildings are more expensive; they need better finishes because they are meant to be seen by people strolling by, and not glimpsed from an automobile windshield at 35+ mph.³⁶

2. THE PEARL DISTRICT IN PORTLAND, OREGON

Portland, Oregon, is home to one of the country's most ambitious efforts at sustainable development. Oregon state planning laws call for every city to protect farms and forests by confining new development to lands located within specified urban growth boundary lines.³⁷ An elected regional governing body called Metro implements an ambitious policy to concentrate growth in compact developments along light rail corridors.³⁸ To implement this strategy, Portland city officials are determined to maintain downtown as the core regional business center.

Diminished reliance on the automobile is a core tenet of Oregon land use and transportation policy, coordinated by the Department of Land

34. To avoid getting stuck with empty parking structures if the project was not built as planned, the city contracted for the developer to build the parking structures in tandem with the phases of private development, and then be reimbursed by selling the structures to the city. Virginia Beach Town Center Term Sheet Phase III (Dec. 7, 2004), available at <http://www.gfoa.org/downloads/VirginiaBeachTownCenterTermSheet.pdf>.

35. DEP'T OF FIN., CITY OF VIRGINIA BEACH, REPORT ON THE TAX INCREMENT FINANCING DISTRICTS AND SPECIAL SERVICE DISTRICTS IN THE CITY OF VIRGINIA BEACH, VIRGINIA 11, 13, 16 (2009), available at http://www.vbgov.com/file_source/dept/mcg/WebPage/HotTopics/Document/tif_report_2009.pdf.

36. LEINBERGER, *supra* note 4, at 161.

37. OR. REV. STAT. § 195.141 (2010).

38. *Planning and Conservation: Urban Development and Revitalization*, OREGON METRO REGIONAL GOVERNMENT, <http://www.oregonmetro.gov/index.cfm/go/by.web/id=26> (last visited Mar. 27, 2011).

Conservation and Development (DLCD).³⁹ The region aggressively promotes alternatives to the automobile—buses, light rail, biking, and walking—with the goal of reducing greenhouse gas emissions by curbing vehicle miles traveled (VMT) per capita.

“The evidence indicates that Portland’s policies to steer growth into more compact, mixed-use development have paid off, not only in revitalizing the downtown and many of its neighborhoods but also in changing travel behavior. . . . For example, while daily VMT per capita has risen sharply in the United States as a whole, it has declined in the Portland metro area since about 1996.”⁴⁰ Analysts attribute Portland’s success to three factors in reducing VMTs by 19% while the population grew by 2%: increased transit ridership; an 18% increase in housing density, mostly from constructing single-family housing on small lots; and the compact layout of the urban area due to the urban growth boundary.⁴¹

Of Portland’s many TIF-funded redevelopment areas,⁴² the Pearl District (also known as the River District Urban Renewal Area) is the biggest jewel in the crown. Before redevelopment, the Pearl District was an abandoned rail yard, manufacturing and warehouse hub. By 1994 the area was in decay, despite its prime location just north of downtown, near a freeway and the Willamette River. Today, the former rail yard has been transformed into a thriving, carefully designed, pleasant urban neighborhood vaguely reminiscent of Tribeca or Soho in New York City—at a much reduced scale, of course. Visit the Pearl District and you will see beautifully designed mid-rise housing, boutique retail and a variety of restaurants, prime office space and an assortment of employment centers, on small blocks with intersecting street grids.

To achieve its broad civic betterment objectives, the redevelopment agency paid for public works, including a Classical Chinese Garden, new roads and parking facilities, and 2000-3000 units of subsidized affordable housing. This thriving district has drawn thousands of enthusiastic new residents and visitors, exactly as the Portland Redevelopment Commission had hoped. It has also quadrupled the property tax base,

39. See generally MARTHA J. BIANCO & SY ADLER, *THE POLITICS OF IMPLEMENTATION: OREGON’S STATEWIDE TRANSPORTATION PLANNING RULE—WHAT’S BEEN ACCOMPLISHED AND HOW 2* (1998), available at <http://www.upa.pdx.edu/CUS/publications/docs/DP98-8.pdf> (stating that the DLCD adopted its Transportation Planning Rule in 1991, calling for staged reductions in vehicle miles traveled and parking spaces).

40. *DRIVING AND THE BUILT ENVIRONMENT*, *supra* note 1, at 85.

41. *Id.* at 86 (stating that Portland’s increased density of 8.8% was not remarkable. Portland ranked 24th out of 50 cities, 1990 to 2000, in increased densities).

42. *Urban Renewal Areas*, PORTLAND DEV. COMM’N, http://www.pdc.us/pdf/maps/pdc-all-ura-map_tabloid.pdf (last visited Mar. 27, 2011).

adding a billion dollars in assessed property values to the tax rolls in less than a decade.⁴³

At the outset of project planning, the two private housing redevelopers in the Pearl District would have preferred more office and retail space, and less housing, than public officials desired. They would also have preferred to build housing at moderate residential densities in the twenty to thirty unit per acre range, townhomes like those that grace Washington, D.C.'s Georgetown. The applicable zoning code prescribed a minimum buildable density of fifteen housing units per acre, far short of what the redevelopment plan for the area called for.⁴⁴ But the Portland Redevelopment Commission wanted much higher densities than that.

Homer Williams, the Pearl District's primary developer, agreed to build apartments and condos at densities of sixty units per acre if the city would develop three parks in the area to compensate for the lack of open space on site if projects were built at this density, and as many as ninety units per acre, contingent on the city opening a modern public street car connecting the Pearl District to the rest of downtown (at a cost to the city of \$70,000,000, funded by bonds paid by downtown parking revenues, with the developer contributing \$700,000).⁴⁵ Al Burns, a Portland senior planner, calls this use of TIF "buying the urban form you want."⁴⁶

B. *The Use of TIF to Support Walkable Urbanism*

All of the projects described in the preceding section were TIF-financed, and it is unlikely that any of them could have come to fruition without TIF. All states except Arizona authorize its use.⁴⁷ TIF enables local

43. See *Downtown Waterfront*, PORTLAND DEV. COMM'N, <http://pdc.us/ura/dtwf/dtwf.asp> (last visited Mar. 27, 2011) ("Since its creation in 1974, assessed land values in our central core have increased an average of 10.4 percent annually, from a total of \$466 million to more than \$1.6 billion.").

44. *Amended and Restated Agreement for Development Between the City of Portland and Hoyt Street Properties, L.L.C.*, PORTLAND DEV. COMM'N (Mar. 12, 1999), available at http://www.pdc.us/pdf/ura/river_district/hoyt-street-properties/19990308-dda-amended.pdf.

45. Interview with Homer Williams, Chairman, Williams & Dame Dev., in Portland, Or. (Sept. 29, 2009).

46. Interview with Al Burns, Senior Planner, Portland, Or., in Portland, Or. (May 6, 2008).

47. In Arizona the legislature can create special assessment districts in which TIF can be used, but TIF is still subject to voter approval. *Program Presentation: Rio Nuevo Tax Increment Financing District Arizona State Legislature*, 49th Leg., 1st Sess. (Ariz. 2009), available at http://www.azsenate.gov/Committee_Program_Presentations/Rio%20Nuevo%20Tax%20Increment%20Financing.pdf; See also, ARIZ. CONST. art. VII, § 13; COUNCIL OF DEV. FIN. AGENCIES, ORIGINAL RESEARCH: 2008 TIF STATE-BY-STATE REPORT (2008), available at [http://www.cdfa.net/cdfa/cdfaweb.nsf/pages/TIFStatebyState.html/\\$file/CDFA-2008-TIF-State-By-State-Report.pdf](http://www.cdfa.net/cdfa/cdfaweb.nsf/pages/TIFStatebyState.html/$file/CDFA-2008-TIF-State-By-State-Report.pdf) (listing enabling TIF statutes in 49 states and District of Columbia).

governments to raise capital for public works in order to jump-start tax-base-enhancing private development.⁴⁸ Vermont's enabling legislation recites the rationale: "[to] stimulate development or redevelopment within the district, provide for employment opportunities, improve and broaden the tax base, or enhance the general economic vitality of the municipality, the region, or the state."⁴⁹

Essentially, tax increment deals are negotiated between a local public agency, often the community redevelopment or economic development arm of a city, and a private real estate developer or end user of real estate, such as a major retailer. Either the private developer or the public agency could initiate the process.

The developer or end user promises to construct a defined project at an identified site that city officials wish to encourage. That project adds new value to the city's property tax rolls, out of which the public agency promises to finance 15% to 25% of the total project cost by paying for 'public goods' needed to complement the new development—roads, parking structures, plazas, and parks.⁵⁰ The public works are built now and paid for later. Either the public agency rebates the developer a share of TIF revenues as they are collected, and the developer borrows against this future cash flow, or the public agency floats bonds secured by the anticipated tax increment.⁵¹

TIF is a win-win-win situation for the city, the private developer, and the taxpayers.⁵² City officials can claim credit for the new private development, an increased tax base, and the public improvements. The private developer obtains public improvements that enhance the value of the project, and would not have been feasible for the developer to finance privately, along with wholehearted city support for its project, which can prove useful in expediting the requisite land use approvals. Taxpayers benefit from the new public works and private development being added to the tax rolls.

48. See William M. Leavitt, John C. Morris, & John R. Lombard, *Developing Infrastructure Through the Use of Tax Increment Financing: The Case of the Virginia Beach Town Center Project*, 13 PUB. WORKS MGMT. & POL'Y 92 (2008).

49. VT. STAT. ANN. tit. 24, § 1893 (2010).

50. These percentages apply to private developments; in providing funds for public or education improvements, the percentage was 58.8%. TAX INCREMENT FINANCE IN CHICAGO: A REVIEW OF PROJECTS APPROVED BETWEEN 2000 AND 2008, POLSKY & ASSOC. 3 (2010), <http://www.polskylaw.com/chicagotifstudy/cover.html>.

51. See generally BOND PROSPECTUS, THE SHOPS AT WHITE OAK VILLAGE COMMUNITY DEVELOPMENT AUTHORITY (Virginia), CUSIP: 964238 AA7, at 37 (2007) (outlining how the tax increment amount is projected and calculated) (on file with author).

52. Rachel Weber & Laura Goddeeris, *Tax Increment Financing: Process and Planning Issues* 32, (Lincoln Inst. of Land Policy, Working Paper No. WP07RW1, 2007), available at <http://www.lincolninst.edu/subcenters/teaching-fiscal-dimensions-of-planning/materials/goddeeris-weber-financing.pdf>.

Advantages of TIF Over Other Forms of Public Finance. TIF offers distinct advantages over other means by which local governments can finance capital improvements to attract new private development: (a) tax abatements, (b) general obligation bonds, and (c) special assessment financing.⁵³

- (a) Tax abatements. Local governments can grant tax abatements to induce firms to build new taxable facilities. Tax abatements are not contingent on the tax base increasing. Until all taxes have been collected and rebates claimed, local governments will not really know how much a tax rebate or subsidy eroded the tax base.⁵⁴ Local governments granting rebates or subsidies to property owners based on tax increments owe them nothing unless the anticipated tax increments actually materialize.
- (b) General obligation bonds. TIF financing is easier to arrange than general obligation financing—the way that most local governments finance capital improvements—because in most states it escapes constitutional debt limits and majority or supermajority voter approval.⁵⁵
- (c) Special assessment financing. A special assessment is more akin to a user fee than a tax because it is based on the benefit conferred upon the taxpayer.⁵⁶ The special assessment will be levied in addition to the regular ad valorem tax. Affected property owners have to approve the formation of a special assessment district and, during the formation process, are entitled to challenge the local government's determination of how much each owner must pay for the

53. JONATHAN MILTIMORE, PUB. INTEREST INST., *TAX INCREMENT FINANCING: GETTING IT RIGHT 7* (2008), available at <http://www.limitedgovernment.org/publications/pubs/studies/ps-08-6.pdf>.

54. NAT'L EDUC. ASS'N, *PROTECTING PUBLIC EDUCATION FROM TAX GIVEAWAYS TO CORPORATIONS 9-12* (Jan. 2003), available at <http://www.goodjobsfirst.org/pdf/edu.pdf>.

55. See Phillip J.F. Geheb, *Tax Increment Financing Bonds as "Debt" Under State Constitutional Debt Limitations*, 41 *URB. LAW.* 725, 732-33 (2009); MILTIMORE, *supra* note 53. See, e.g., ALA. CODE § 11-99-8(c) (2010) ("Tax increment obligations may be authorized by resolution of the local governing body without the necessity of a referendum or any approval by the electorate."); On general obligation bonds, see, e.g., ALA. CONST. art. XII, § 225 (limits indebtedness); ARIZ. CONST. art. IX, § 8 (limits indebtedness and also requires majority of voters); GA. CONST. art. IX, § 5, para 1 (limits indebtedness); OKLA. CONST. art. X, § 26 (a) (limits indebtedness and requires supermajority of voters); WASH. CONST. art. VIII, § 6 (limits indebtedness and requires supermajority of voters); IOWA CODE § 331.442 (2010) (general obligation bonds require 60% electorate approval).

56. Special assessments are not deductible from federal income tax because the property owner receives a benefit proportionate to the levy. 26 U.S.C. § 164(c)(1) (2010) ("No deduction shall be allowed for the following taxes: (1) Taxes assessed against local benefits of a kind tending to increase the value of the property assessed; but this paragraph shall not prevent the deduction of so much of such taxes as is properly allocable to maintenance or interest charges.").

benefits to be received.⁵⁷ By contrast, property owners in a TIF district continue paying exactly the same general real property taxes as they did before, no different from property owners outside the district, and have no right to block its formation or challenge whether they are being taxed disproportionately to the benefits received.⁵⁸

What Next? Turning from our examples of Virginia Beach, Virginia and Portland, Oregon, we now analyze six criticisms often raised in opposition to TIF, along with accompanying vignettes from Los Angeles, Chicago, Houston, Las Vegas, and the Minneapolis region. Based on the author's assessment of them, these six criticisms are divided into three groups: The Questionable, the Contingent, and the Convincing.

II. Two Questionable Criticisms of TIF

Of the six frequent criticisms of TIF, we consider first the criticism that TIF subsidies should not be used to stimulate job growth in the outer suburbs because low-income and minority workers tend to live in the inner cities.

This critique discounts the benefits to the regional economy of job growth, regardless of the localities within the region where it takes place. It also seems to assume that TIF funding could reverse the decades-long trend of land-hungry manufacturers migrating from inner cities to the outer suburbs, as firms follow skilled workers there. Further, the critique fails to take into account that a steadily growing percentage of low-income and minority workers are moving to the suburbs in search of jobs.

The second criticism would restrict TIF to blighted areas despite the reality that redevelopment in such areas will seldom pay its own way, as TIF-funded projects are expected to.

A. *Outer Suburbs Use TIF to Lure Employers from Center Cities and Inner Suburbs*

1. TIF IN MINNESOTA

TIF is the most commonly used economic development tool in Minnesota,⁵⁹ available to all the cities and counties within a state. Two researchers decided to take advantage of excellent available data in Minnesota to see

57. See, e.g., CAL. CONST. art. XIII D, §§ 4(d)-(e); FLA. STAT. § 170.08 (2010); 65 ILL. COMP. STAT. 5/9-2-55 (2010); IOWA CODE § 384.50 (2010).

58. Sometimes, TIF developers form special assessment districts in order to offer a supplemental revenue source to comfort bond investors if public funding runs short. R. Lisle Baker, *Using Special Assessments as a Tool for Smart Growth: Louisville's New Metro Government as a Potential Example*, 45 BRANDEIS L.J. 1, 52 (2006).

59. In 2008, there were over 2,000 TIF districts in Minnesota. JOEL MICHAEL, MINN. HOUSE OF REP., HOUSE RESEARCH—SHORT SUBJECTS: TAX INCREMENT FINANCING (2010), available at <http://www.house.leg.state.mn.us/hrd/pubs/ss/sstif.pdf>.

whether TIF-subsidized employment helped where it was most needed, within easy reach of minority, low income, and transit dependent big city populations.⁶⁰ The study faulted Minnesota's program for enabling prosperous outer suburbs sometimes to lure employers from the poverty-burdened cities of Minneapolis and St. Paul and their inner suburbs.⁶¹

Because the state's goal was job growth and keeping employers within the state, it was virtually inevitable that some of those jobs would end up in the outer suburbs. Eager to attract the high quality labor force that has already relocated to the suburbs, "[j]obs have followed people."⁶² This has caused a significant decentralization of employment.⁶³ From 2000 to 2008, Minneapolis-St. Paul, and their inner suburbs lost jobs while employment grew 15% in the developing outer suburbs.⁶⁴

The two researchers need not despair about the implications for the poor and minorities of suburban job growth because, over time, poorer and minority Americans move to where the jobs are,⁶⁵ and the Twin Cities is no exception: 54% of the region's poor resided in the suburbs in 2008, up from 46% in 2000.⁶⁶ In 2008, the nonwhite population in the Minneapolis-St. Paul region was only 18.7%, compared to 14.1% in the suburbs, but from 2000 to 2008 the nonwhite population in the suburbs grew more than twice as fast as in the Metropolitan Minneapolis-St. Paul region.⁶⁷

60. GREG LEROY & KARLA WALTER, GOOD JOBS FIRST, HOW SUBSIDIZED JOB PIRACY DEEPENS INEQUALITY IN THE TWIN CITIES METRO AREA 9 (2006), available at <http://goodjobsfirst.org/pdf/thincities.pdf>.

61. Based on state records, they were able to study eighty-six subsidized job relocations in the Minneapolis-St. Paul area that occurred between 1999 and 2003, most of them TIF funded. *Id.* at 7.

62. Edward L. Glaeser & Matthew E. Kahn, *Decentralized Employment and the Transformation of the American City* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 8117, 2001), available at <http://www-agecon.ag.ohio-state.edu/class/aede680/irwin/pdf/glaeserkahn%20employment.pdf>.

63. *Id.* at 3.

64. During the 2000-2008 period, Minneapolis lost 5.6% of its jobs and St. Paul lost 2.5%, compared to 15% job growth in the outer suburbs. METROPOLITAN COUNCIL, METRO STATS: EMPLOYMENT IN THE TWIN CITIES REGION, 2000-2008, 1 (2009), available at <http://metro council.org/metroarea/Employment08.pdf>.

65. Joel Kotkin observes that the next one hundred million Americans will be a "staggering amalgam of racial, ethnic, and religious groups," an unprecedented ethnic diversity for a country as big and populous as ours. KOTKIN, *supra* note 2, at 2.

66. In 2008, 46% of poor individuals across the metro area lived in the primary city compared to 54% in the suburbs. Compared to 2000, this is a significant increase in the suburban share of the metro area's poor. ELIZABETH KNEEBONE & EMILY GARR, METRO. POLICY PROGRAM, BROOKINGS INST., THE SUBURBANIZATION OF POVERTY: TRENDS IN METROPOLITAN AMERICA, 2008-2008 9 tbl. 4 (2010), available at http://www.brookings.edu/~media/Files/rc/papers/2010/0120_poverty_kneebone/0120_poverty_paper.pdf.

67. METRO. POLICY PROGRAM, BROOKINGS INST., STATE OF METROPOLITAN AMERICA: MINNEAPOLIS-ST. PAUL, MN-WI METRO AREA 1 (2009), available at http://www.brookings.edu/~media/Files/Programs/Metro/state_of_metro_america/metro_america_profiles/minneapolis.pdf. Growth of the nonwhite population from 2000-2008 was 77.2% in the suburbs as compared to 33.1% in the metro area.

The relocation of nonwhite populations from cities to suburbs is a national trend.

Slightly more than half of African-Americans now live in large metropolitan suburbs, as do 59% of Hispanics, almost 62% of Asian-Americans, and 78% of whites. As a result the country is closer than ever to achieving a goal that many thought would never be achieved: city/suburban racial/ethnic integration. This is particularly so in the faster growing metropolitan areas of the South and West.⁶⁸

2. ROGERS, MINNESOTA: HOW ONE SUBURBAN TOWN TRANSFORMED ITSELF THROUGH TIF, UNTIL VOTERS SAID, "ENOUGH!"⁶⁹

To appreciate what Minneapolis-St. Paul's outer suburban towns can accomplish with the strategic use of TIF, consider the example of Rogers, Minnesota. Before 1984, the town of Rogers was an isolated farming community of three square miles, with a population of 650, on the outer fringe of the Twin Cities (Minneapolis and St. Paul). Today, Rogers houses 7,000 residents on seven square miles (through annexations). Median household income and median house/condo values are 50% above the state average. In 1984, the tax base was \$40 million. Today it is \$1.1 billion. Now, as then, over half the town is dedicated to commercial and industrial uses.⁷⁰

This transformation began the year Gary Eitel became the city administrator and planner of Rogers, Minnesota.⁷¹ He arrived at about the

68. Morley Winograd & Michael D. Hais, *Twenty-first Century Electorate's Heart is in the Suburbs*, NEW GEOGRAPHY (May 28, 2010), <http://www.newgeography.com/content/001591-twenty-first-century-electorate%E2%80%99s-heart-suburbs>. One-third of the U.S. population is non-white; 83% of the population growth from 2000 to 2008 has been non-white. Nearly one-fourth of all U.S. children have at least one parent who is an immigrant to the United States. By 2008 in large metropolitan areas a majority of the residents under eighteen were non-white. *See id.* *See also* METRO. POLICY PROGRAM, BROOKINGS INST., STATE OF METROPOLITAN AMERICA: ON THE FRONT LINES OF DEMOGRAPHIC TRANSFORMATION 7 (2010), available at http://www.brookings.edu/~media/Files/Programs/Metro/state_of_metro_america/metro_america_report1.pdf. Nonetheless, because the urban poor have difficulty relocating to job-rich suburbs, a strong case can be made that "housing and labor market policies should seek to maximize access to job opportunities for the poor, and low-income workers more broadly, throughout metropolitan areas, regardless of where the workers and the jobs are located." STEVEN RAPHAEL & MICHAEL A. STOLL, JOB SPRAWL AND THE SUBURBANIZATION OF POVERTY, METRO. POLICY PROGRAM, BROOKINGS INST. 15 (2010), available at http://www.brookings.edu/~media/Files/rc/reports/2010/0330_job_sprawl_stoll_raphael/0330_job_sprawl_stoll_raphael.pdf.

69. Mike Kaszuba, *Enough with the Subsidies, Rogers' New Officials Say*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Nov. 27, 2006.

70. *Rogers, Minn.*, CITY-DATA.COM, <http://www.citydata.com/city/RogersMinnesota.html> (last visited April 13, 2010). Estimated median household income in Rogers, 2009, was \$89,197. Statewide: \$55,616. Median house/condo values were \$305,501. Statewide median: \$200,400. Rogers is 93.8% white, non-Hispanic.

71. *See* Bob Grawey, *Eitel's Legacy Measured in Concrete Block*, STAR NEWS (Elk River, Minn.), Feb. 6, 2007.

same time as Interstate 94 was being extended through town. He saw the potential because the interstate extension brought Rogers within commuting distance of Minneapolis-St. Paul. He began energetically planning for the town's expansion with much-needed sewer and water facility improvements, and a planning framework friendly to new commercial and industrial development. Gary Eitel explains: "By using tax increment programs to leverage public and private investments into infrastructure, the City could influence the location of new industry and retail where it was most efficiently served by utilities and transportation, and ensure compatible land use consistent with the City's existing and planned residential areas."⁷²

The pace of commercial and industrial development quickened in the mid-1990s as the Minnesota Department of Trade and Economic Development embraced the notion of using tax increment financing to keep major industrial firms from departing across state lines after a well-known manufacturer named Graco threatened to leave the state. "[State officials] wanted us to develop an economic assistance program [along with other cities in the state]," Eitel explains.⁷³ "They wanted us to be aggressive, so we came up with a policy that projects costing \$10 million or more and could get 25% of the available tax increment as an economic incentive."⁷⁴

Roger's Eitel landed Graco's 300,000 square foot facility, visible from I-94, and other firms soon followed as the town negotiated deals with Graybar, Opus, Super Target, Kohl's and MBY. Today, Rogers boasts an industrial park of 3 million square feet of built space.

All these new businesses, through their utility bill payments, helped amortize the town's sizable investment in updated sewer and water systems. In 1984, the town's wastewater treatment facility could handle only 100,000 gallons a day. Its present capacity is 1.6 million gallons a day. Before launching its aggressive economic development program, the town had only one school, an elementary school. Today it boasts a high school adjoining a new forty acre park, a junior high school located next to a fifty acre park, and two elementary schools. There are other new parks as well, a fire station, the Rogers Activity Center and Ice Arena, trails, new streets, and a small but tidy downtown. Because

72. E-mail from Gary Eitel, City Adm'r and Planner of Rogers, Minn. (Jan. 23, 2009) (on file with author).

73. *Id.*

74. *Id.*

Rogers keeps 75% of the tax increment, it has been able to finance these public improvements from TIF dollars.⁷⁵

In 2006, Rogers' voters elected a city council that would put an end to the tax increment rebates. Rogers' citizens had been slowly simmering as the town led all Minnesota cities in the percentage of its TIF surrendered to private firms (27%).⁷⁶ They finally reached the boiling point when the city granted a TIF rebate to Cabela's, a sporting gear retailer which builds colossal megastores.⁷⁷

B. *Should TIF Projects Be Restricted to Seriously Blighted Areas?*

1. WHY RESTRICTING TIF TO SERIOUSLY BLIGHTED AREAS IS IMPRACTICAL

Some TIF critics believe that TIF should be confined to seriously blighted areas filled with dilapidated or abandoned buildings because public subsidies are best reserved for "truly distressed areas marked by a high poverty rate and/or high unemployment rate,"⁷⁸ characterized by a resident population with incomes below regional medians. A legislature could reserve TIF subsidies for census tracts where median incomes stood below the regional median by a certain amount, or where property valuations had steadily declined for years.⁷⁹ Indeed, a bill proposed in 2002 for Missouri but never passed would have limited the use of TIF to areas of moderate income (less than 80% of the surrounding area's median income), high unemployment (one-and-a-half times the rate of the surrounding area), or low fiscal capacity (assessed property value per capita at least 40% lower than in the surrounding area).⁸⁰

2. BLIGHT AND THE EFFICIENT USE OF TIF

The problem is that TIF is an ineffectual tool for assisting most seriously blighted areas. Few "truly distressed areas marked by a high poverty and/or unemployment rate"⁸¹ offer untapped opportunities for

75. Memorandum from Gary Eitel, City Adm'r and Planner of Rogers, Minn. (Feb. 11, 2009) (on file with author).

76. Kaszuba, *supra* note 69, at 3B.

77. *Id.*

78. *New Rules Project: TIF Reform*, INST. FOR LOCAL SELF-RELIANCE, <http://www.newrules.org/retail/rules/tif-reform> (last visited Mar. 27, 2011).

79. In Kentucky, the state will share its property tax increment to assist with mixed use redevelopment in blighted urban areas. To qualify as blighted, the project area must meet at least two of seven criteria, one of which is that 40% of the project area households must be low income. KY. REV. STAT. ANN. § 65.7049(3) (West 2010).

80. See S.B. 172, 92nd Leg. Reg. Sess. (Mo. 2002), available at <http://www.senate.mo.gov/03info/billtext/intro/sb172.htm>.

81. *New Rules Project: TIF Reform*, *supra* note 78.

profitable private development. Localities with the attributes identified in the proposed, rejected Missouri law could have great difficulty finding projects that would produce tax increment. In Chicago, for instance, with its 152 separate TIF districts, eight of the ten TIF districts scheduled to receive the most tax increment money through 2011 are in prosperous neighborhoods near downtown.⁸² Similarly, Iowa researchers found that TIF projects in struggling medium-sized cities produced “lack-luster results at best,” while TIF worked best “by a large margin” in booming suburbs and metropolitan areas.⁸³ After all, that is where costly new developments have the best chance of being financed and built, adding greatly to the property tax rolls.

Christopher Leinberger explains that “most of the market demand for walkable urbanism will probably take place in the inner suburbs” of the favored quarter of the city.⁸⁴ To locate the favored quadrant in any city, draw an arc from downtown in the direction with the most limited access freeways, upper income housing, high-income households, the largest concentration of white collar jobs outside of downtown, and the lowest crime rates.⁸⁵ “The local minority housing concentration is typically 180 degrees on the other side of the metro area from the high-income housing, assuming the topography allows it, and where it does not, it is as far away as physically possible.”⁸⁶

Professor Dan Klerman makes a different but equally telling critique of the argument for confining redevelopment to blighted areas:

Even if it were practical to restrict TIFs to seriously blighted areas, why forgo the benefits of using TIFs elsewhere? Perhaps critics assume there is a fixed supply of TIF capital, which, if it can't be used in rich areas, will be used in poor areas. This is a questionable assumption. There is no shortage of capital for good projects. Profitable opportunities in poor neighborhoods would find funding regardless of whether projects were also going forward in richer neighborhoods. While there may be some projects which, if they cannot get TIF financing elsewhere will be relocated to blighted areas, many cannot. Development is often contingent on site specific fea-

82. Ben Joravsky & Mick Dumke, *Shedding Light on the Shadow Budget*, CHICAGO READER, Dec. 10, 2009, <http://www.chicagoreader.com/chicago/shadow-budget-tif/Content?oid=1251320> (“The biggest winner is the Near South TIF, roughly bounded by Michigan, Van Buren, State, and 21st Street: the TIF budget indicates that about \$118 million will be spent there through 2011 on things like streetscaping on Congress, facade work on the Harold Washington Library, a rehab of the Blackstone Hotel, and construction of a new Jones High School. That’s more than the total TIF spending planned for eighty-two districts on the other end of the spectrum in the same period.”).

83. DAVE SWENSON & LIESL EATHINGTON, DEP’T OF ECON., IOWA STATE UNIV., TAX INCREMENT FINANCING GROWTH IN IOWA 6 (2006), available at http://www.econ.iastate.edu/sites/default/files/publications/papers/paper_12586.pdf.

84. LEINBERGER, *supra* note 4, at 134.

85. *Id.* at 35–41.

86. *Id.* at 38–39.

tures—proximity to transportation, shoreline or other natural features, or particular kinds of consumers—that are only available in non-blighted areas. The net effect of restricting TIFs to truly blighted areas would likely be a small increase in development in blighted area at the cost of many foregone projects in non-blighted areas.⁸⁷

3. PERMISSIVE OR NO BLIGHT FINDINGS ARE THE NORM

Legislatures have elected not to confine the use of TIF to blighted areas in one-third of the states.⁸⁸ In most of the others, blight is defined expansively and findings of blight are left to the discretion of local government.⁸⁹ In Oregon, for instance, the statutory definition of blight would permit a local agency to replace a one-story building if the market would support a six-story building on the site.⁹⁰ Another example, before 1985, Iowa urban renewal law was aimed at the elimination of slum and blighted areas. In that year, the urban renewal law was amended “to provide a municipality with authority to adopt an urban renewal plan based solely on the existence of an economic development area.”⁹¹

In other legislatures and courts there has been some “push back” in favor of requiring evidence of blight to justify redevelopment activity. Local governments must have been wielding their redevelopment powers rather expansively for the Colorado legislature to have felt the need of amending state law to ban the inclusion of agricultural land within urban renewal areas.⁹² And New Jersey courts have interpreted state constitutional blight finding requirements to stop local governments from including vacant parcels within redevelopment project areas for being stagnant, unproductive, or underutilized, unless the local public agency could show that the vacant parcel had “a demonstrable negative

87. E-mail from Dan Klerman, Assoc. Dean and Charles L. and Ramona I. Hilliard Professor of Law and History, Gould Sch. of Law, Univ. of S. Calif. (Dec. 24, 2010) (on file with author).

88. See Craig L. Johnson & Kenneth A. Kriz, *A Review of State Tax Increment Financing Laws*, in *TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES, AND IMPACT* 31, 38 (Craig L. Johnson & Joyce Y. Man eds., 2001) (showing thirty-three states with a blight finding requirements). See also COUNCIL OF DEV. FIN. AGENCIES, *supra* note 47 (showing that sixteen states and the District of Columbia do not require a blight finding).

89. See Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 320 (2004); Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 *U. CHI. L. REV.* 65, 78-79 (2010).

90. See OR. REV. STAT. § 457.010 (2010). One of a number of potentially permissive conditions that qualifies as “blight” under Oregon’s statute is “[a] growing or total lack of proper utilization of areas, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to the public health, safety and welfare. . . .” § 457.010(1)(h) (2010).

91. *McMurray v. City Council of W. Des Moines*, 642 N.W.2d 273, 281 (Iowa 2002).

92. COLO. REV. STAT. § 31-25-102 (2010).

impact on the community or surrounding areas.”⁹³ But these examples are exceptions. For the most part, the objects of TIF no longer need to be blighted in any way.

4. OBSTACLES TO CHALLENGING TIF PROJECTS FOR FLAWED FINDINGS OF BLIGHT

State laws invariably delegate the task of making blight findings to the same local government sponsoring the TIF-funded redevelopment project.⁹⁴ Some officials use their best efforts to comply, while others hire permissive consultants and rely on their findings uncritically.⁹⁵

In any event, few blight determinations are ever challenged in court. Blight litigation is complicated and expensive. The attorneys most capable of filing such challenges are jeopardizing their future dealings with the city officials they sue and with officials in other cities who get wind of their whistle-blower-like behavior.⁹⁶ Challengers usually lose when contending that a particular renewal area was not blighted; standards of judicial review strongly favor upholding local government decisions.⁹⁷

5. REDEVELOPMENT OF SERIOUSLY BLIGHTED AREAS DOES NOT NECESSARILY HELP AREA RESIDENTS

Restricting TIF projects to seriously blighted areas will not necessarily aid the residents of those areas, and could harm them. State enabling legislation does not mandate that projects in seriously blighted areas must be designed to improve the well-being of its impoverished or poorly housed residents.⁹⁸ Displaced property owners have rights to compen-

93. Robert S. Goldsmith & Robert Beckelman, *What Will Happen to Redevelopment in New Jersey When the Economy Recovers?*, 36 RUTGERS L. REC. 314, 319 (2009).

94. *See, e.g.*, ALA. CODE § 11-9-2(d) (2010); VA. CODE ANN. § 58.1-3245.2(A) (2010); MINN. STAT. §§ 469.174 subdiv.10, 469.175 subdiv. 3 (2010).

95. *See* Bd. of Educ., Pleasantdale Sch. Dist. No. 107, Cook County, Ill. v. Village of Burr Ridge, 793 N.E.2d 856, 860 (Ill. App. Ct. 2003) (stating that an eligibility study commissioned by the redevelopment agency was used to justify the creation of a TIF district despite its own counsel acknowledging the findings were “marginal”; the project was put to end by a successful challenge in court by the local school board); *see also* MATTHEW MARL, STRATEGY, REFOCUSING WISCONSIN’S TIF SYSTEM ON URBAN REDEVELOPMENT: THREE REFORMS, CTR. ON WIS. STRATEGY, 11 (2005), available at http://www.cows.org/pdf/rp-tif_2005.pdf.

96. George Lefcoe, *Finding the Blight That’s Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1025–27 (2001).

97. “[A]ll that is at issue is a reasonable difference of opinion as to whether the area in question is in fact substandard and insanitary. This is not a sufficient predicate for us to supplant [New York State Urban Development Corp]’s determination.” Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 173 (N.Y. 2009).

98. *See, e.g.*, Friends of Urban Renewal v. City of Portland, LUBA No. 2008-116, slip op. at 11 (Or. Land Use Bd. App. Jan 2, 2009), available at <http://www.oregon.gov/>

sation and displaced residents to relocation payments.⁹⁹ But they have no constitutional or statutory right to prevent the redevelopment of the project area for the benefit of others.¹⁰⁰ Tax increment would seldom result from demolishing high density, run down housing and replacing it with affordable housing built at a lower density, particularly if the replacement housing was exempt from the property tax.¹⁰¹ Tax increment might result, though, from replacing worn out housing occupied by a low income population with expensive office buildings, shopping malls, and luxury housing that attract affluent newcomers.¹⁰² Residents' best hope of blocking wholesale demolition and displacement is through aggressive participation in the political process.¹⁰³

6. REDEVELOPMENT OF BUNKER HILL, LOS ANGELES

Bunker Hill in downtown Los Angeles was typical of early redevelopment efforts. The 133 acre redevelopment site was the only hill in an otherwise flat area. The topography and street design needed to be re-engineered for downtown to compete effectively as an office center with emerging office hubs in mid-Wilshire, Hollywood, LAX, and the San Fernando Valley. Downtown streets built to accommodate street cars

LUBA/docs/Opinions/2009/01-09/08116.pdf (blocking the Portland Development Commission's attempt to expand the TIF district to finance the construction of a multi-purpose public facility ten miles from the original TIF district).

99. See David L. Callies & Shelly Ross Saxer, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo*, in *EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT* 137, 148–54 (Dwight H. Merriam & Mary Massaron Ross eds., 2006); Ronald K. Chen, Brian Weeks & Catherine Weiss, *Compensation and Relocation Assistance for New Jersey Residents Displaced by Redevelopment: Reform Recommendations of the State Department of the Public Advocate*, 36 *RUTGERS L. REC.* 300 (2006).

100. Laura S. Underkuffler, *Kelo's Moral Failure*, 15 *WM. & MARY BILL RTS. J.* 377, 384–85 (2006).

101. *CAL. REV. & TAX. CODE* § 236 (West 2009).

102. *Bunker Hill Urban Renewal Project 1B of Cmty. Redev. Agency of L.A. v. Goldman*, 389 P.2d 538, 567 (Cal. 1964) (describing Occidental Petroleum's interest in one million square feet of office space in the proposed Bunker Hill redevelopment project area).

103. See, e.g., John Powell, *Sprawl, Fragmentation, and the Persistence of Racial Inequality: Limiting Civil Rights by Fragmenting Space*, in *URBAN SPRAWL: CAUSES CONSEQUENCES AND POLICY RESPONSES* 73, 105–07 (Gregory D. Squires ed., 2002); Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 16 *GEO. J. ON POVERTY L. & POL'Y* 117, 166 (2009). ("Accountable development is defined as a movement that seeks 'to change city redevelopment practices through more confrontational grassroots campaigns aimed at increasing community participation in the planning process and forcing local developers and governmental officials to commit to redevelopment projects that are responsive to the needs of low-income residents.'" (quoting Scott Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, 17 *J. AFF. HOUS. & COMM. DEV. L.* 59, 59 (2008)); Mina Dixon, *Putting Residents at the Center*

(1880-1920) were too narrow for heavy automobile traffic and on-street parking.¹⁰⁴ By the 1950s much of the central city housing stock was in deplorable condition. The most picturesque buildings, once glorious Victorian mansions, had long ago been cheaply converted into “flop-houses.”¹⁰⁵

No doubt, Bunker Hill met the most stringent definition of physical blight. A sad consequence of the area being labeled blighted was to justify turning 11,000 people out of their homes.¹⁰⁶ This made possible the transformation of Bunker Hill as redevelopment brought a new extensive network of wide roads and re-configured city blocks to accommodate amply sized building pads that would support the generous floor plates demanded by modern accounting, law, finance, and other business firms. Without this aggressive civic intervention, it is quite possible that downtown would have forfeited its place as one of the region’s prime office centers. Dorothy Parker is said to have described Los Angeles as “72 suburbs in search of a city.”¹⁰⁷ The TIF-funded Bunker Hill project was the beginning of a concerted and continuing civic effort to re-establish the regional primacy of downtown.¹⁰⁸

7. THE HOUSTON INNER LOOP GENTRIFICATION STORY

Gentrification of Houston’s Inner Loop has been the result of concerted public action.

In the past decade, the public sector has invested upwards of \$8 billion in the central area . . . much of it geared toward making the city more enticing to affluent suburbanites. There’s an eight-mile light rail line, new football and baseball stadiums, a museum district that’s doubled in size, new downtown parks and fresh landscaping.¹⁰⁹

of Neighborhood Redevelopment, JOURNALISM CTR. ON CHILDREN AND FAMILIES (May 12, 2010), <http://www.journalismcenter.org/resource/reporting-best-practices/putting-residents-center-neighborhood-redevelopment>.

104. SCOTT L. BOTTLES, *LOS ANGELES AND THE AUTOMOBILE: THE MAKING OF THE MODERN CITY* 59 (1987).

105. *See About On Bunker Hill*, ON BUNKER HILL (March 19, 2008, 1:44 AM), <http://www.onbunkerhill.org/about>. *See also* ANGELS WALK: BUNKER HILL/HISTORIC CORE DISTRICT, ANGELS WALK LA 16 (2008), *available at* http://www.angelswalkla.org/pdfs/AWLA_BUNKERHILL_GUIDEBOOK.pdf.

106. Anastasia Loukaitou-Sideris & Gail Sansbury, *Lost Streets of Bunker Hill*, 74 CAL. HISTORY, Winter 1995/1996, at 394.

107. Spencer Beck, Editor’s Note, *A Tale of Two Cities*, L.A. MAG., Feb. 1999, at 6.

108. MARC HUGHES, NATIONAL CASE STUDIES: TIF DIVERSITY, COUNCIL OF DEV. FIN. AGENCIES & TEX. ECON. DEV. COUNCIL 15, *available at* [http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/b950e5ec216cf14b86257664007a6b51/\\$FILE/10-30-09%20TEDC%20Presentation%20TIF%20Districts.pdf](http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/b950e5ec216cf14b86257664007a6b51/$FILE/10-30-09%20TEDC%20Presentation%20TIF%20Districts.pdf) (last visited Mar. 27, 2011).

109. John Buntin, *Land Rush: Inner Cities are Becoming Hot Places to Live. Does Government Have Any Business Telling Developers to Keep Out?*, GOVERNING, Feb. 28, 2006, *available at* <http://www.governing.com/topics/health-human-services/housing/Land-Rush.html>.

Increasing numbers of Houston-area suburbanites are warming to the idea of shortening their interminable commutes by moving closer to downtown.¹¹⁰

Two University of Houston professors studied twenty TIF projects in Houston, 1994-2005, and discovered considerable gentrification in four of six redevelopment project areas within Houston's Inner Loop. Professors Yuasa and Thomas selected clear, simple metrics for identifying the equity and efficiency consequences of TIF subsidized development in the Inner Loop. They measured equity or redistributive impacts by calculating block-by-block income and racial/ethnic characteristics of the residents before and after redevelopment. Their assumption was that gentrification would be signaled if the number of white residents increased while the number of African-American and Hispanic residents fell, and if median incomes rose markedly over pre-redevelopment levels.

To measure efficiency, they looked at real estate values and building permits. In four of the Inner Loop tax increment reinvestment zones (TIRZ), property values increased enormously and at a far higher rate than the citywide average.¹¹¹ Low-income residents were replaced by inhabitants with above average incomes,¹¹² and the percentage of African-American and Hispanic residents fell sharply while the white population multiplied.¹¹³ With gentrification came increased property values. Gentrification was not inevitable. In several Houston wards it was forestalled or moderated by aggressive political intervention.¹¹⁴

III. Two Criticisms of TIF Contingent on the Specific Impacts of Particular Projects

The first of this pair of criticisms is that TIF-supported retail is ultimately a waste of public funds because new shops do nothing to increase consumer spending per capita except, possibly, to shift sales from one retailer to another, with no net tax benefit, region-wide. Sometimes, though, TIF-supported retail is designed to meet fresh demand based on increases in population and wealth, or to achieve planning objectives

110. Toshiyuki Yuasa & Richard D. Thomas, *Efficiency-Equality Consequences in City Redevelopments: Assessing the "Devil-in-the-Details" of Tax Increment Financing in Houston*, 2006 ANNUAL MEETING OF THE MIDWEST POLITICAL SCI. ASS'N, 16-21 (Apr. 19-23, 2006), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/3/6/9/4/pages136948/p136948-1.php.

111. *Id.* at 11 fig. 1.

112. *Id.* at 22 tbl. 4.

113. *Id.* at 21 tbl. 3.

114. *Id.* at 25-26. See also, Buntin, *supra* note 109.

other than the enhancement of the tax base within the project area, often to resuscitate a moribund downtown commercial center.

The second criticism faults the inclusion of school, county, and special district shares of the property tax in the calculation of tax increment available for new development. Advocates for these other taxing entities note that redevelopment yields no net tax benefits to them when it supports projects that would have been built within their taxing jurisdictions anyway. Further, redevelopment often increases the demand for school and county services without compensating revenues to offset the costs.

In rebuttal, redevelopment advocates contend that TIF-based redevelopment acts as a catalyst to new construction, both within the redevelopment project area and in areas adjoining it, that would not otherwise have taken place, eventually rewarding patient school districts and county governments with a greatly enlarged property tax base. Determining which of these positions is true requires a case-by-case assessment of each proposed project's likely impacts compared to estimates, necessarily speculative because they are counter-factual, of what would have occurred in the project's absence.

A. TIF-Supported Retail Can Displace Sales from Other Retailers

1. DISPLACEMENT, CANNIBALIZATION

Many TIF-sponsored projects involve retailing. Cities have lavished billions of dollars of subsidies upon big box retailers like Wal-mart, Costco, Target, IKEA, and Nordstrom,¹¹⁵ as well as regional mall developers. Some redevelopment plans seek retailing purely in hopes it will fatten the local tax base, especially in states that remit a share of the sales tax back to the locality where the sale took place. Other redevelopment plans call for attractively designed retailing partly to strengthen the tax base but also as a catalyst to draw the public to the project area, and enliven what would otherwise be rather dull single-use office or housing enclaves.

"Retailers generally locate in relation to their customer base, transportation accessibility, suppliers, and competitors"; regardless of

115. See STACY MITCHELL, *BIG-BOX SWINDLE: THE TRUE COST OF MEGA-RETAILERS AND THE FIGHT FOR AMERICA'S INDEPENDENT BUSINESSES* 165 (2006) ("One would be hard-pressed to find a major chain that had not financed part of its growth with public subsidies. . . . Some chains have based their entire expansion strategy on government handouts."); EAST-WEST GATEWAY COUNCIL OF GOV'T, *AN ASSESSMENT OF THE EFFECTIVENESS AND FISCAL IMPACTS OF THE USE OF LOCAL DEVELOPMENT INCENTIVES IN THE ST. LOUIS REGION: INTERIM REPORT* iv (2009), available at <http://www.ewgateway.org/pdf/library/regdev/tifprt-012609.pdf> (stating that \$2.5 billion in public funds has been spent in TIF districts and similar programs in Missouri alone).

whether they are granted tax-funded concessions.¹¹⁶ It is axiomatic that unless demand for consumer goods increases, new retailing comes at the expense of old. “Cannibalization is the extent to which new sales come at the expense of existing sales.”¹¹⁷ Aggregate spending for consumer goods does not vary much with the proliferation of new shops, due to the “relatively fixed nature of retail spending per capita.”¹¹⁸

Studying the “fierce competition for retail business” among California cities, two researchers concluded in the late 1990s that despite municipal efforts to subsidize redevelopment projects with retail components, “the total sales tax revenues of all cities, measured in real dollars per capita, were only marginally higher in 1995-96 than in 1971-72.”¹¹⁹ The California researchers found that despite substantial efforts to lure retailers, the overall hierarchy of cities in terms of their success has been quite stable over time. In other words, whatever their efforts in recruiting retail, most cities have not risen or sunk a great deal relative to their competitors.¹²⁰ Nonetheless, new TIF funded retail in a place like St. Louis, with flat population growth, is more threatening to established retailers than it would be in many burgeoning California communities where population growth is sufficient to absorb new retail development without eroding sales in established commercial centers.

2. LEAKAGE AND INTER-MUNICIPAL RIVALRY

Leakage is a word used to describe a city’s failure to capture its proportionate share of taxes derived from its residents’ per capita spending.¹²¹ Leakage is especially costly in states that remit a portion of retail

116. PUB. POLICY INST. OF CAL., CITY COMPETITION FOR SALES TAXES: SYMPTOM OF A LARGER PROBLEM? 2 (1999) (summarizing Paul G. Lewis & Elisa Barbour, CALIFORNIA CITIES AND THE LOCAL SALES TAX (1999)), available at http://www.ppic.org/content/pubs/rb/RB_799PLRB.pdf (“Given the favorable attention that cities show to retail, it is also likely that residential and industrial development are somewhat more difficult and expensive to develop than would be the case in the absence of a situs-based sales tax.”). See also MAX NEIMAN & DANIAL KRIMM, PUB. POLICY INST. OF CAL., ECONOMIC DEVELOPMENT: THE LOCAL PERSPECTIVE 12 (May 2009), available at http://www.ppic.org/content/pubs/report/R_509MNR.pdf (“The chase for sales tax has been a factor in driving out manufacturing jobs in California.”).

117. Allan T. Ingraham, Hal J. Singer & Thomas G. Thibodeau, Inter-City Competition for Retail Trade: Can Tax Increment Financing Generate Incremental Tax Receipts? 5 (July 22, 2005) (unpublished manuscript), available at <http://ssrn.com/abstract=766925>.

118. PUB. POLICY INST. OF CAL., *supra* note 116, at 2.

119. *Id.*

120. *Id.*

121. Retail leakage occurs when “goods [are] not readily available within the City, or when greater selection and/or better prices are available elsewhere, [and] residents [] travel outside of the City to make purchases and satisfy at least a portion of their demand. When residents travel out of the City to shop, retail expenditures ‘leak’ out

sales taxes back to the city where the sales took place. Remittances vary wildly from one city to the next. In California, for instance, “the amount of local sales tax revenues per resident received by California cities ranged from \$2.25 to \$56,891.84 in 1995-96.”¹²² Cities experiencing leakage are eager to grow their tax revenues by encouraging new retail development, and seldom hesitate because, in doing so, they could ‘beggar their neighbors’ retailers.’¹²³ They regard subsidizing new retail development as a legitimate defensive move to assure the municipality’s fiscal survival.

In Missouri, where local governments also benefit from sales taxes originating within their boundaries,¹²⁴ retail development can be found in about 80% of the \$2.5 billion TIF subsidized projects in Missouri.¹²⁵ A recent study by the East-West Gateway Council of Governments (the St. Louis region) concluded that these subsidies did not result in real growth, and regional benefits were elusive at best. Short-term, localized benefits, however, were undeniable.¹²⁶ Elected officials could enhance the local tax base by subsidizing retailers even though “[f]ocusing development incentives on expanding retail sales is a losing economic development strategy for the region.”¹²⁷

Inter-city rivalry for prime retailers is predictable. Naively, we might assume that city officials would avoid subsidizing intra-city retail competition because, in the end, new retail outlets, while increasing traffic,

of the City, that is merchants located outside the City capture expenditures that local residents, businesses, or employees might otherwise have made with local merchants.” Memorandum from Matt Kowta, Principal of Bay Area Econ., to Mike Webb, Econ. Dev. Coordinator for City of Davis, Cal. (July 22, 2004), http://www.city.davis.ca.us/ed/pdfs/2003_Davis_Retail_Leakage_Memo.pdf.

122. *Pursuit of Sales Tax Revenues Driving Development Decisions in California Cities*, PUB. POLICY INST. OF CAL., (July 8, 1999), <http://www.ppic.org/main/pressrelease.asp?i=347>.

123. See, e.g., OFFICE OF THE CITY MANAGER, CITY OF RIO RANCHO, N.M., 2010-2015 RETAIL DEVELOPMENT PLAN iv, v, 13-19 (2010), available at <http://ci.riorancho.nm.us/documents/City%20Administration/Retail%20Development/Retail%20Plan%20updated.PDF>.

124. MO. REV. STAT. § 99.845(3) (2010).

125. Both California and Missouri enabled local governments to keep a share of sales taxes originated locally. This added to the already powerful incentive to subsidize retail development. But while California’s population has grown steadily in the past three decades, Missouri’s population growth has been nearly flat. See U.S. CENSUS BUREAU, UNITED STATES SUMMARY: POPULATION & HOUSING UNIT COUNTS 26-27 tbl. 16 (1993), available at <http://www.census.gov/population/www/censusdata/files/table-16.pdf>; FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 23-24 (2002), available at <http://www.census.gov/prod/2002pubs/censr-4.pdf>.

126. EAST-WEST GATEWAY COUNCIL OF GOV’T, *supra* note 115, at iv.

127. *Id.* at v.

noise, and demands for police and other public services, would be revenue neutral for the city. But city officials elected by district, not city-wide, may be tempted to disregard broader municipal interests and vote to subsidize retailers locating within the boundaries of their electoral districts.

3. STATE LAW REFORMS ENACTED TO CURB TIF USE FOR RETAILING

State legislators have done little to curb inter-municipal competition for retail activity. A handful of states have enacted limitations on TIF funding of retail development. The most aggressive can be found in Utah and Minnesota. Utah bars the collection or expenditure of TIF for retail development in an economic development area if development of retail is the project area's "primary objective."¹²⁸ It only allows TIF to be used for retail development in a blighted urban renewal area. In Minnesota, TIF from economic development districts is generally usable only for specified types of job-generating uses such as manufacturing, tourism, warehousing, industrial parks, research and development, and telemarketing. TIF from economic development cannot be used for retail, office, or similar commercial developments.¹²⁹ Statutes in Missouri¹³⁰ and

128. Utah state law provides:

(1)(a) If the development of retail sales of goods is the primary objective of an urban renewal project area, tax increment from the urban renewal project area may not be paid to or used by an agency unless a finding of blight is made under Chapter 2, Part 3, Blight Determination in Urban Renewal Project Areas.

(b) Development of retail sales of goods does not disqualify an agency from receiving tax increment.

(c) After July 1, 2005, an agency may not be paid or use tax increment generated from the value of property within an economic development project area that is attributable to the development of retail sales of goods, unless the tax increment was previously pledged to pay for bonds or other contractual obligations of the agency.

UTAH CODE ANN. § 17C-1-407(1) (West 2010).

129. MINN. STAT. § 469.176, subdiv. 4c(d) (2010); *see also* Telephone interview by Nicholas Christen with Arlan Waelti, Assistant State Auditor, Dir. of TIF Div., State of Minn. (June 24, 2010) (explaining that there are two exceptions allowing retail in TIF: One is that retail or commercial uses are allowable in economic development projects in small cities (less than 5,000 population and more than 10 miles from a city of 10,000 or more); the other is that unsubsidized retail or commercial uses are permissible in redevelopment or economic development areas following blight removal).

130. MO. REV. STAT. § 99.810.1(1) (2010). *See, e.g., id.* at § 99.805(5) (explaining that an economic development area is one that is neither blighted nor a conservation area and "in which the governing body of the municipality finds that redevelopment will not be solely used for development of commercial businesses which unfairly compete in the local economy and is in the public interest because it will: (a) Discourage commerce, industry or manufacturing from moving their operations to another state; (b) Result in increased employment in the municipality; or (c) Result in preservation or enhancement of the tax base of the municipality.").

West Virginia¹³¹ require local governments to make a finding that retail projects in economic development areas will not “unfairly compete” in the local economy. In Missouri, when a locality seeks permission from the state to utilize a portion of the increment from state sales taxes to finance a redevelopment project, it must convince the state development finance board and department of economic development that “the sales tax increment attributable to retail sales is from new sources which did not exist in the state during the baseline year.”¹³²

North Carolina takes an anti-sprawl tack by restricting economic development projects located outside the boundaries of a central business district from dedicating more than 20% of its built space to “retail sales, hotels, banking, and financial services offered directly to consumers, and other commercial uses other than office space.”¹³³ The statute makes an important “welfare” exception for tourism-related economic development in disadvantaged areas.¹³⁴

California bars agencies from assisting a motor vehicle dealer or big box retailer “that is relocating from the territorial jurisdiction of one community to the territorial jurisdiction of another community but within the same market area.”¹³⁵

In Illinois, “TIF funds cannot be used to pay for a new retail project that is relocating into a TIF district while closing a similar facility in another town within ten miles of the TIF, except in cases where the relocation is ‘beyond the control’ of the company. This provision is intended to prevent the use of TIF funds to ‘pirate’ or steal stores from

131. W. VA. CODE § 7-11B-3(10) (2010) (“‘Economic development area’ means any area or portion of an area within the boundaries of a development or redevelopment district located within the territorial limits of a municipality or county . . . and for which the county commission finds that development or redevelopment will not be solely used for development of commercial businesses that will unfairly compete in the local economy. . . .”).

132. MO. REV. STAT. § 99.845 subdiv. 8 (2010).

133. N.C. GEN. STAT. § 158-7.3(a)(1) (2010). If the district in which a development project is to be built is outside a city’s central business district then a maximum of 20% of the plan’s estimated square footage of floor space may be proposed for use in retail sales, hotels, banking, and financial services offered directly to consumer, and other commercial uses other than office space. *Id.*

134. N.C. GEN. STAT. § 158-7.3(a)(1), 143B-437.08 (2010). The 20% limitation does not apply to development financing districts located in an area with high unemployment, low median household income, a high percentage growth in population in the last 3 years, and low property value per capita, and “created primarily for tourism-related economic development” (e.g. developments featuring facilities for exhibitions, athletic and cultural events, show and public gatherings, racing facilities, parks and recreation facilities, art galleries, museums, etc.). *Id.*

135. CAL. HEALTH & SAFETY CODE § 33426.7(a) (West 2010).

other municipalities.”¹³⁶ It does not prohibit a city, for instance, from subsidizing a retailer that is likely to eviscerate the sales of a competitor doing business in a neighboring town.

Oklahoma prohibits the use of property tax exemptions for retail establishments to avoid this type of cannibalization between cities.¹³⁷ But this law applies only to tax abatements, not to TIF-related tax breaks.¹³⁸ Oklahoma redevelopment authorities often lure retail development with deals that provide sales tax kickbacks, but seldom with rebates of property tax increments.¹³⁹

Iowa has taken a step in the opposite direction, empowering local governments to include within their TIFs the revenues from a “local option” sales tax.¹⁴⁰ TIF critics in Iowa faulted this as a step in the wrong direction, facilitating shifts in sales tax receipts from one city to another without any net public benefit.¹⁴¹ Though the measure was not formally debated by the legislature, we can only guess whether legislators and the governor were convinced that TIF-supported retail could yield public benefits sufficient to justify the diversion of sales tax revenues from counties to cities nurturing retail redevelopment.

4. WHY SO FEW STATES INTERVENE TO HALT THE INTER-LOCAL TIF SUBSIDIZED COMPETITION FOR RETAIL ACTIVITY

Only state legislatures can put an end to TIF-based bidding wars among localities for retail development. We can but imagine why so few states have done that.

136. NEIGHBORHOOD CAPITAL BUDGET GROUP, TIF ALMANAC 21 (2003); see also 65 ILL. COMP. STAT. 5/11-74.4-3(Q)(13) (2010).

137. Oklahoma state law provides:

No ad valorem tax incentives or exemptions authorized in this section may be granted for retail establishments. If a retail establishment is located in property which otherwise qualifies for an incentive or exemption pursuant to this section, the incentive or exemption shall not be allowed for that portion of the property used for such retail establishment. As used in this subsection, ‘retail establishment’ shall not include an establishment that provides lodging, including but not limited to a hotel, apartment hotel, public rooming house or motel.

OKLA. STAT. tit. 62, § 860 (2010)

138. Telephone interview by Nicholas Christen with Don Batchelor, Gen. Counsel, Okla. City Urban Renewal Auth. (June 19, 2010).

139. *Id.*

140. The local option sales tax enables counties with a majority vote of the electorate to impose a locally levied sales tax of up to one percent. See *Iowa Local Option Tax Information*, IOWA DEP’T OF REVENUE, <http://www.iowa.gov/tax/educate/localoption.html> (last visited Mar. 27, 2011); *A Step Backward in TIF Reform*, IOWA POLICY PROJECT (May 21, 2008), <http://www.iowapolicyproject.org/TIF.html>.

141. *Id.*

Professor Briffault notes that TIF fits well with “the fragmentation of local governments and the resulting interlocal struggle for investment” and “the entrepreneurial spirit characteristic of contemporary local economic development policy.”¹⁴² Perhaps state legislators are sympathetic to local governments’ efforts to overcome chronic shortage of funds for capital improvements. It could be that state legislators want to avoid alienating local elected officials whose support they could need in the next election. Maybe it is just politically difficult to convince legislators to tighten up permissive TIF laws and deny localities within their own districts the same opportunities to compete that rival municipalities took advantage of earlier. Possibly, state legislators recognize that many low income neighborhoods lack a full range of retail outlets, forcing residents to travel long distances to shop for the basics. But it has proven difficult to find politically acceptable statutory language for defining those areas and denying other localities the right to use TIF. Legislators may recognize that tax-base enhancement is not the only or even the primary impetus for some redevelopment plans to seek retail activity, and that efforts to distinguish pure tax grabs from other goals will often prove inconclusive.

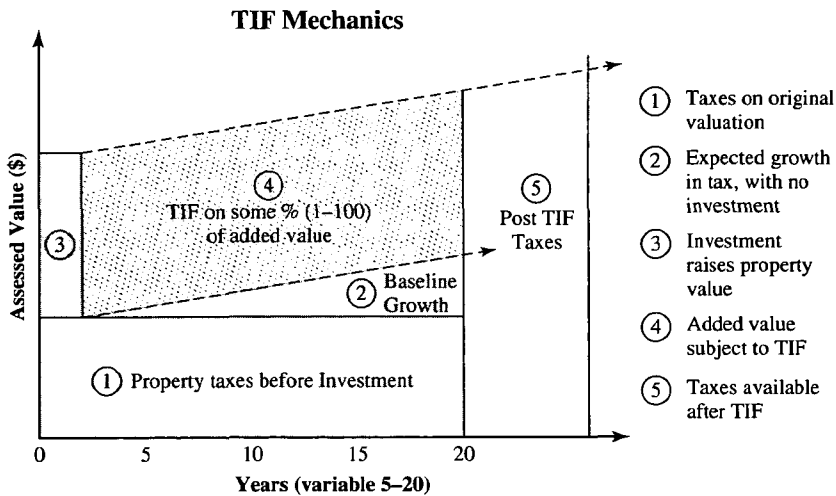
*B. The Legitimate Interests of Other Taxing Entities
(Schools and Counties) Are Often Undervalued in
the Tax Increment*

1. THE TIF BIFURCATION OF THE PROPERTY TAX
CASH FLOW

This section highlights the debate between redevelopment-sponsoring cities and other taxing entities over how best to share the costs of tax-increment-financed projects. In most states, other taxing entities, including school districts and counties, defer collecting any of the *tax increment* until the sponsoring agency fully recoups its development costs. By having their tax bases frozen at the pre-TIF development levels, other taxing entities dependent upon property taxes contribute indirectly to the TIF effort. These other entities continue receiving the same cash flow from property taxes as they did before the TIF district was formed. All tax proceeds above that level are potentially available to the sponsoring agency or city to repay project debt. Once the TIF debt is retired—statutory time limits for paying off TIF debt range in duration from eight to forty years¹⁴³—the other taxing entities can begin reaping the same percentage of the increment as they were entitled to receive of the pre-TIF general property tax base.

142. Briffault, *supra* note 89, at 65.

143. See FLA. STAT. § 163.385(1)(a) (2010); MINN. STAT. § 469.176(1b) (2010).



2. THE IMPACT ON TIF ISSUERS OF DENYING THEM ALL OF THE CASH FLOW FROM THE INCREMENT

Typically, cities have claims to less than one-fourth of all local property taxes collected.¹⁴⁴ By being empowered to pledge all of the increment, not just the city's share, cities augment the property tax cash flow available to finance economic development or redevelopment. In California, for instance, school districts on average capture 45% of the property tax.¹⁴⁵ Cities would either have to downsize their economic development ambitions, or amortize their investments over much longer periods, if they were not able to include tax increments otherwise available to counties and school district coffers.

In states where local governments have no opportunity to pledge tax increments from other taxing entities such as counties and school districts, there is very little TIF-funded redevelopment. This is true in Virginia, where TIF is only rarely deployed.¹⁴⁶ Similarly, TIF is seldom used in New York because the state constitution places tax increments

144. George Lefcoe, *When Governments Become Land Developers: Notes on the Public-Sector Experience in the Netherlands and California*, 51 S. CAL. L. REV. 165, 258 (1978).

145. E-mail from John Shirey, Executive Director, Cal. Redevelopment Ass'n, to author (June 21, 2010) (on file with author).

146. Independent cities in Virginia perform county functions and have no chance to siphon tax increments from counties because they are not lodged within counties. Also, school funding in Virginia is unaffected by TIF, as it is dependent on revenue sources other than locally assessed property taxes. See Leavitt, Morris, & Lombard, *supra* note 48, at 93-94; Interview with Jose Vera, Vice President, Stone & Youngberg (May 19, 2010).

from schools beyond the reach of TIF-sponsoring cities, and other taxing entities have the option of participating or not. As a result, cities in New York State can only amortize their redevelopment or economic development investments with their own property tax increments. Not many have chosen to do so.¹⁴⁷

3. THE CASE FOR AND AGAINST THE USE OF TIF PROCEEDS FROM OTHER TAXING ENTITIES

Redeveloping cities justify utilizing county and school district shares of the tax increment to preclude free-loaders from contributing nothing and reaping the benefits of a TIF-spurred enhancement in the tax base.¹⁴⁸ Once an area is successfully redeveloped, the theory goes, other tax entities should experience increased tax yields and possibly reduced public service costs.

Representatives of school districts and counties counter that much of the subsidized new development would have occurred anyway somewhere within their boundaries, making these projects economically inefficient for the public sector, considered as a whole. TIF proceeds are sometimes used for investing in the most affluent areas, where private investment is abundant,¹⁴⁹ and cities have created TIF project boundaries specifically to include already-scheduled, purely private development just to capture additional tax increment for the sponsoring city or county.¹⁵⁰

147. Gary P. Winter, *Tax Increment Financing: A Potential Redevelopment Financing Mechanism for New York Municipalities*, 18 *FORDHAM URB. L.J.* 655, 682 (1991) ("The reason that the TIF law is infrequently used may be due to the fact that only the municipality's tax levy against the CV [captured value, the tax increment] is available to retire bonded indebtedness or repay project expenditures. Without the county and school district levies against the CV, the municipality's annual tax increment may not generate enough revenue to meet principal and interest payments on a typical redevelopment bond issue."); *see generally* THERESA J. DEVINE, N.Y.C. INDEP. BUDGET OFFICE, *LEARNING FROM EXPERIENCE: A PRIMER ON TAX INCREMENT FINANCING* (2002), available at <http://www.ibo.nyc.ny.us/iboreports/TIF-Sept2002.pdf> (noting that TIF had never been used in New York City and rarely in New York State).

148. Winter, *supra* note 147, at 685 ("[T]he increase in assessed valuation that would otherwise not exist, is now on the tax roll benefitting each and every political subdivision[, therefore] . . . each political subdivision should share in the burdens.").

149. MICHAEL P. KELSAY, *UNEVEN PATCHWORK: TAX INCREMENT FINANCING IN KANSAS CITY: EXECUTIVE SUMMARY* (2007), available at <http://www4.kcmo.org/finance/Uneven%20Patchwork.pdf> ("88% of TIF plans are in four Council Districts [of Kansas City, MO] (1, 2, 3, and 6) which contain the two-thirds of the city's population who are the most affluent, best educated and least likely to be members of a minority group.").

150. *See, e.g.*, Rob O'Dell, *Rare Funding Method Sets Rio Nuevo Tax Area Apart*, *ARIZ. DAILY STAR* (Tucson), Mar. 12, 2006, available at http://azstarnet.com/news/local/govt-and-politics/article_45a94682-16e0-5937-a1b8-8ff822528ae8.html (reporting that Tucson officials wanted the legislature to extend the Rio Nuevo taxing district from 10 years to 40 years to capture an additional \$1.2 billion in state sales tax money).

4. THE DISTINCTION BETWEEN FINANCIAL VIABILITY AND ECONOMIC EFFICIENCY

Representatives of school districts and counties worry that city officials will only concern themselves with whether a project is financially viable, not whether it is also economically efficient for all the taxing entities contributing to it. A project is financially viable if it produces enough increment to reimburse the public for its investment in the project. A project is economically efficient if it produces greater net public revenues than any alternate use of the site and would not have been built elsewhere within the taxing entity's boundaries.

TIF officials chasing financial viability at the expense of economic efficiency would not hesitate to designate an already thriving neighborhood as a TIF project area even though it would almost certainly have developed in virtually the same way without public assistance. Redevelopment agencies have been known to spring into action and modify a redevelopment project boundary to include a newly announced major private development project that the agency had no part at all in bringing to the area.¹⁵¹

Sometimes, the pre-TIF tax base is adjusted upward automatically for inflation or to reflect historic trends in the growth of the local tax base, sometimes not.¹⁵² In places like Chicago where many taxing entities had been experiencing growth in their tax base, the calculation of the tax increment is made as if the tax base would not have grown at all but for the redevelopment effort. The losses to other taxing entities can be substantial. By one estimate, calculated on a twenty-three year projection, other taxing entities in Chicago would surrender \$1.6 billion of increment—\$1.3 billion in base line growth that would have occurred anyway, and a gain of only about \$300 million attributable to new development.¹⁵³

151. *Regus v. City of Baldwin Park*, 139 Cal. Rptr. 196, 201–04 (Cal. Ct. App. 1977) (striking down redevelopment project area formed to nurture retail and hotel uses, and which combined two separate areas within one project: one arguably blighted area, and another area totally devoid of blight characteristics, located one mile away and across a freeway, and which contained parcels already acquired by United Parcel Service, Nichols Lumber, and other private firms for imminent development). *See also* *Leach v. City of San Marcos*, 261 Cal. Rptr. 805, 810 (Cal. Ct. App. 1989) (rejecting agency's inclusion for the tax increment of non-contiguous, non-blighted property about to be developed).

152. *Compare* MASS GEN. LAWS ch. 40Q, § 1 (2010) (increasing base assessment value by at least 1% per year), *and* S.B. 3151, 96th Gen. Assemb., Reg. Sess. (Ill. 2010) (aiming to adjust TIF district base assessment value for devaluation), *with* FLA. STAT. § 163.387(1) (2010) (acknowledging Florida does not account for inflation in its ad valorem base).

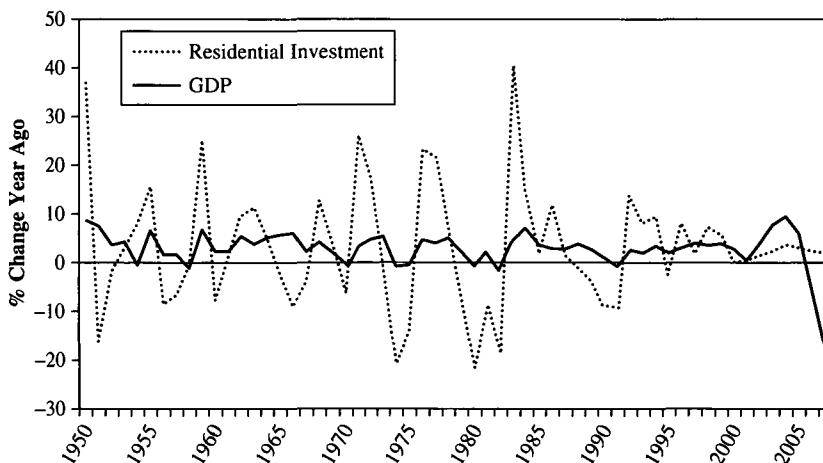
153. *Who Pays for the Only Game in Town?*, NEIGHBORHOOD CAPITAL BUDGET GROUP, <http://www.ncbg.org/tifs/game.htm#fisc> (last visited Apr. 13, 2010) (acknowledging website is no longer available).

“If property values would grow at a high rate in the absence of TIF, even a project that results in a permanent reduction in the growth rate would be easy to finance. Policy makers unused to the concept of opportunity cost might be susceptible to making a poor decision if financial viability is confused with efficiency.”¹⁵⁴ Thus, a TIF project that increased values by 3% in a part of the city where values had been rising by 5% might be financially viable in the sense that it covers costs. But if values in the project area would have risen by 5% without public intervention, the other taxing entities will be net losers (along with the general public).

This is not an easy problem to solve because property values are so volatile. In nine housing busts since WWII, house prices fell on average 25% in each, and rose by 50% in periods of growth.¹⁵⁵ It would be easy to exclude from the tax base subject to TIF the percentage by which property values rose or fell in the project area in the preceding year, or the average of the most recent two, three, or four years prior to the TIF district having been established. Only by sheer coincidence would this be identical to the actual increase or decrease in property values in the TIF district, had the project not been undertaken.

154. Richard F. Dye & Jeffrey O. Sundberg, *A Model of Tax Increment Financing Adoption Incentives*, 29 *GROWTH & CHANGE*, Winter 1998, at 90, 96, available at http://pirun.ku.ac.th/~g5164187/a_model_of_tax.pdf.

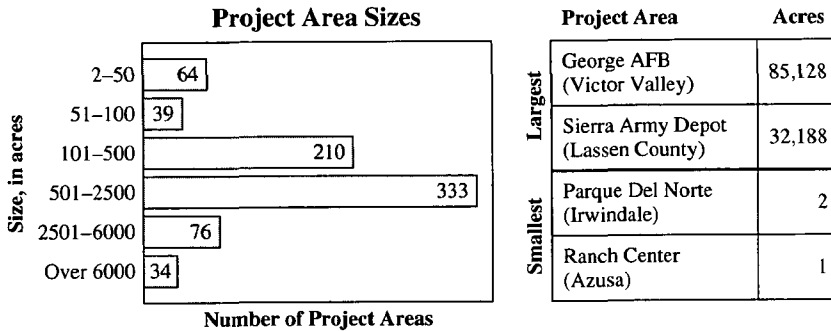
155. MARK ZANDI, *FINANCIAL SHOCK* 134 (2009).



5. THE TENSION BETWEEN FINANCIAL VIABILITY AND ECONOMIC EFFICIENCY IN THE DECISION WHETHER TO FORM A SITE-SPECIFIC OR AREA-WIDE TIF BOUNDARY

Perhaps no decision portrays the tension between financial viability and economic efficiency better than the size of the redevelopment project area. In most places, the TIF boundary is drawn to be coterminous with a particular, discrete project site. An alternative is to draw the boundary area-wide to encompass enough territory to contain numerous individual projects.

California redevelopment agencies tend to have selected area-wide project boundaries. Here are the project area sizes for California’s 425 redevelopment agencies (398 active).¹⁵⁶



Larger project areas appeal to bond investors more than project specific ones that depend for enhanced property taxes on a limited geographic area, a single development, and one developer.¹⁵⁷

Cities and counties that take the district-wide approach could be doing so just to capture the tax increment from projects that would have been built within the area in any event. TIF skeptics could point out that the larger the area within the TIF district boundary, the more likely it will receive credit for tax increments it had no part in creating. Sometimes, it is apparent that a city or county is designating a huge redevelopment project area for purely fiscal reasons—to enlarge the agency’s tax base at the expense of other taxing entities.¹⁵⁸

156. CAL. S. LOCAL GOV’T COMM’N, REDEVELOPMENT AGENCY FACT SHEET (Oct. 2009).

157. Interview with Jose Vera, *supra* note 146.

158. *See, e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

To curb potential excesses, researchers have counted twenty-two states that limit the land area and value of the tax base that can be committed to a TIF district.¹⁵⁹ Federal tax law also limits the deductibility of interest from the investor's adjusted gross income to "qualified redevelopment bonds," and the bonds won't qualify if they exceed 20% of the assessed value of all real property located within the jurisdiction of the local government.¹⁶⁰

Redevelopment agencies defend the use of area-wide TIF boundaries when they "intend to stimulate a series of reinvestments in a broader area."¹⁶¹ Redevelopment agencies can rebut allegations that they were engaging in a pure tax grab when they draw district wide project areas that are coterminous with the city's well-established planning goals for the area, even if the agency was motivated by both fiscal and planning factors in drawing project boundaries.¹⁶² Generally, redevelopment efforts that require major infrastructure—new roads, bridges, parks, and parking garages—will be district-wide, and not confined to a single development site. All things equal, the bigger the redevelopment area, the more complicated the process, and the longer its completion.

Vast project areas also position TIF-sponsoring entities to capture the benefits of their successful catalytic redevelopment efforts. Las Vegas is a good example of this strategy at work. For decades, Las Vegas city officials watched enviously as developers built lavish new hotels and casinos on the strip, located in Clark County beyond city limits. Downtown was home to government offices, pawn shops, and worn out casinos.¹⁶³ The city's earlier redevelopment programs produced mixed results at attempting to convert downtown into a regional hub for entertainment, high density residential, office and retail. But in recent years, new development within the redevelopment agency's 2,000+ acres has generated sufficient untapped increment¹⁶⁴

159. Webber & Goddeeris, *supra* note 52, at 61.

160. "The blighted area may not be greater in value than 20% of the total assessed property value of the jurisdiction as determined on the date of designation, nor can it be less than one hundred (100) acres provided that in the case where no more than 25% of the land in the area is provided to a single person or a group of related persons the one hundred (100) acre limitation is reduced to ten (10) acres." John G. Roach, *Financing Public Needs After Tax Reform*, TENN. BUS. J., Apr. 23, 1987, at 19, 22 (discussing 26 U.S.C. § 144 (c)(4)(C)).

161. COUNCIL OF DEV. FIN. AGENCIES, *ADVANCED TAX INCREMENT FINANCE REFERENCE GUIDE 16* (2009) [hereinafter *TAX INCREMENT GUIDE*].

162. *See* Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008).

163. Kristina Shevory, *Downtown Las Vegas Draws Developers*, N.Y. TIMES, Dec. 21, 2010, <http://www.nytimes.com/2010/12/22/realestate/commercial/22vegas.html>.

164. Redevelopment Agency, City of Las Vegas, Rating Presentation 26 (Mar. 9, 2009) (showing a 174% debt service coverage ratio for \$20 million bond issue) (on file with author).

to support an emerging downtown “as an unlikely magnet for development.”¹⁶⁵ The city has recently entered a multi-year contract with Forest City Enterprises to build a new city hall and 1.3 million square feet of new office and retail space within a five block radius, with a hotel-casino nearby. The old city hall will be occupied by the online shoe firm Zappos, and its 1,000 employees, heralded by Mayor Oscar B. Goodman as members of what Richard Florida has called “the creative class”¹⁶⁶—relocating to downtown from suburban Henderson, Nevada. Construction is also underway for a new \$485 million performing arts center. Already completed is a new Frank Gehry-designed brain health center.¹⁶⁷

6. STATE INTERVENTION TO PROTECT OTHER TAXING ENTITIES

Only the state can confer upon a city the right to utilize property tax increments that otherwise belong to counties, schools, and special districts.¹⁶⁸ The basis for legislative concern is clear.¹⁶⁹ Other taxing entities need to make up the revenue by service cutbacks, or increased fees and taxes, to the extent states allow development agencies to tap into their revenue streams.¹⁷⁰ Counties may have to cut back on health clinics, drug treatment centers, sheriff patrol officers, jail beds, and library services.¹⁷¹ Schools are particularly burdened by TIF and tax abatements to business firms. These firms often bring new families to the area without contributing to the property taxes that schools need “to increase school capacity to serve the enrollment.”¹⁷²

165. Shevory, *supra* note 163.

166. Deborah Solomon, *What Happens in Vegas*, NEW YORK TIMES MAG., Jan. 14, 2011, <http://www.nytimes.com/2011/01/16/magazine/16FOB-Q4-t.html>.

167. Shevory, *supra* note 163.

168. L.A. Unified Sch. Dist. v. Cnty. of L.A., 104 Cal. Rptr. 3d 590, 598 (Cal. Ct. App. 2010) (“As against the state, local governments have no vested right to receive property tax revenues and have no property interest in those revenues.”).

169. See *Meaney v. Sacramento Housing & Redevelopment Agency*, 16 Cal. Rptr. 2d 589 (Cal. Ct. App. 1993) (where four school districts and the Superintendent of Schools in the Sacramento area sued the Sacramento Housing & Redevelopment Agency, the city of Sacramento, and its council alleging improper diversion of tax revenue to build a courthouse that would have otherwise gone to the schools).

170. See *id.*

171. Joanne Zuhl, *Balancing Act: Ted Wheeler Wants to Talk Urban Renewal Areas. Here's Why You Should Listen*, STREET ROOTS (Portland, Or.), July 23, 2009, available at <http://streetroots.wordpress.com/2009/07/23/balancing-act-ted-wheeler-wants-to-talk-urban-renewal-areas-heres-why-you-should-listen/> [hereinafter *Ted Wheeler*].

172. See NAT'L EDUC. ASSN., *supra* note 54, at 2 (stating that, in Illinois, municipalities are obligated to reimburse school districts when they use their TIFs to fund new housing that brings increased enrollment).

States have promulgated various ways of protecting school and county tax bases.

- (1) A few states authorize payments in lieu of taxes (PILOTs) to schools, counties and other taxing entities.¹⁷³ PILOTs never fully replace revenues lost to TIF.¹⁷⁴ Some states make up all or most of the local school district revenue loss due to TIF by the formulas they use to distribute state funding for schools.¹⁷⁵
- (2) Generally, the schools, counties or other districts receive notice of proposed TIF-funded projects that would divert revenues from schools and the opportunity to comment.¹⁷⁶
- (3) In some states, school districts and counties take a seat on a TIF joint review board.¹⁷⁷

173. *Id.* at 16. *See, e.g.*, OHIO REV. CODE ANN. § 5709.42 (West 2010); MO. REV. STAT. § 99.820(11) (2010); 65 ILL. COMP. STAT. § 5/11-74.4.5(q) (2010). *See also* NAT'L EDUC. ASS'N, *supra* note 54, at app. G (displaying a table showing which states allow PILOTs).

174. In 1993-94 the California Redevelopment Association (a trade association representing the state's local redevelopment agencies) persuaded the state legislature to switch from a system of 'opt out' to a prescribed schedule of pass through payments in lieu of taxes to other taxing entities, amounting to 35% of the tax increment collected. CAL. REDEVELOPMENT ASS'N, BILL ANALYSIS, A.B. 1290, at 3 (Sept. 1, 1993), available at http://info.sen.ca.gov/pub/93-94/bill/asm/ab_1251-1300/ab_1290_cfa_930901_151805_sen_floor [hereinafter CAL. BILL ANALYSIS]. Cities and redevelopment agencies supported the change; opponents included school districts, counties, and other taxing entities (fire protection agencies, mostly). *Id.* Generally, these payments equal about 20% of what the school districts and counties would have received from a full exemption. E-mail from Calvin Hollis, Chief Operating Officer, L.A. Cmty. Redevelopment Agency, to author (Aug. 14, 2010) (on file with author).

175. This calculation includes:

In most states' foundation programs, the state first establishes a baseline level of funding that each student needs to get a good education. Then, the state determines each local government's ability to raise the money to reach that foundation for all of its students. If local property taxes are insufficient, then the state pays the difference. . . . State aid = (No. of students X Foundation) - (Tax Rate X Property Values). . . . If a state includes all property in a district when it estimates local property wealth, including property that does not actually contribute to the schools because of an abatement or TIF, then the state will commensurately overestimate the affected district's net tax capacity. That, in turn, means that the state will not reimburse the district for the revenue lost to the abatement or to TIF. On the other hand, if a state excludes the value of tax-abated or TIF-captured property from the locality's tax capacity, then the schools may get reimbursement for some or all of the resulting revenue loss.

NAT'L EDUC. ASS'N, *supra* note 54, at app. B, H.

176. *See, e.g.*, ARK. CODE ANN. § 14-168-306(e) (2010); FLA. STAT. § 163.346 (2010); IOWA CODE § 403.5 (2) (2010); KAN. STAT. ANN. § 12.1771(d) (2010); MINN. STAT. § 469.175(2) (2010); OKLA. STAT. tit. 62, § 859, 862 (2010) (stating school districts can protest base level assessment).

177. *See, e.g.*, COLO. REV. STAT. § 31-25-107(9) (2010); 65 ILL. COMP. STAT. § 5/11-74.4.5(b) (2010); UTAH CODE ANN. § 17C-1-402 (West 2010); WIS. STAT. § 66.1105(4m) (2010).

- (4) In Florida,¹⁷⁸ Kentucky,¹⁷⁹ and New York,¹⁸⁰ school districts are barred from contributing any of their property taxes.
- (5) A handful of states allow schools, counties, and other taxing entities the choice of opting in or out of sharing their tax increments for any particular redevelopment or economic development plan.¹⁸¹

Taxing entities with the option of withholding their revenues from TIF projects frequently negotiate the terms of their participation through agreements with sponsoring jurisdictions.¹⁸² Deal points usually include the duration of participation, the percentage of increment to be shared, reporting requirements, guaranteed minimum tax payments in the event that tax yields fall below the pre-redevelopment tax base,¹⁸³ and, sometimes, specific in-kind contributions such as a new school for a school district or a new fire station for a county.¹⁸⁴

Why have so few states granted schools, counties and other taxing entities the right to opt out of sharing their tax increments? The short answer probably lies in an analysis of the lobbying effectiveness of redevelopment agencies, schools, and counties.

Legislative advocates for schools and counties could contend that if schools and counties were granted the option of participating or not, they could withhold their share of future increments from projects they deemed economically inefficient, and this might deter redevelopment agencies from sponsoring ill-conceived projects.

178. FLA. STAT. ANN. §§ 163.340(2), 163.387 (West 2010).

179. In Kentucky, cities or counties have the option of contracting to join each other's TIF redevelopment projects. KY. REV. STAT. ANN. § 65.7051(4) (West 2010). School tax revenues are not local revenues subject to inclusion within a TIF district. KY. REV. STAT. ANN. §§ 65.7045(22b), 65.680(27), 65.490 (West 2010).

180. N.Y. CONST. art. XVI, § 6. This provision authorizes the use of TIF by any county, city, town or village, but excludes schools. Counties, cities, towns, and villages are empowered to enter joint powers agreements with other local governments to provide for tax increment revenue sharing. N.Y. GEN. MUN. § 970-n (McKinney 1986).

181. See, e.g., GA. CODE ANN. 36-44-8(1) (2010) (needing consent from independent taxing entities); OHIO REV. CODE ANN. § 5709.40(D)(1) (West 2010) (needing school board approval if district is to last for more than ten years); 53 PA. CONS. STAT. § 6930.5 (a)(7) (2010) (authorizing that each entity can opt out of the plan); TEX. TAX CODE ANN. § 311.013(f) (West 2010) (authorizing that each taxing unit can opt out).

182. TAX INCREMENT GUIDE, *supra* note 161, at 18.

183. North Carolina authorizes development finance districts to enter agreements with other taxing entities guaranteeing a minimum value agreement so that even if property values decline, the taxing entity will be sure to receive enough of the property tax increment to continue making payments on its outstanding debts. N.C. GEN. STAT. § 159-108(c) (2010).

184. TAX INCREMENT GUIDE, *supra* note 161, at 18.

Redevelopment agency defenders might counter that school districts and counties could become free-loaders by withholding their approval even of projects likely to yield net tax benefits to all affected taxing entities. Schools and counties might even abuse their power of opting out, by trying to extract through negotiation more than their fair share of the tax increment from the sponsoring city.¹⁸⁵

In one instance, the Houston Independent School District (HISD) conditioned its participation in the redevelopment of an older shopping center on financial assistance to rehabilitate a school three miles away. Texas prohibits funds from one TIF district being spent in another district,¹⁸⁶ and also has a contiguity requirement for district boundaries,¹⁸⁷ so the boundary was gerrymandered by including public rights of way linking the shopping center tenuously to the school.¹⁸⁸ “The proposed strategy succeeded; the HISD contributed significant revenues to the overall list of projects and also received assistance in the redevelopment of its school.”¹⁸⁹

When the Portland Development Commission tried something similar, connecting the River (Pearl) District with a long, thin line to a school site ten miles away, the Land Use Board of Appeals (LUBA) blocked the cross-subsidy move.¹⁹⁰ An Oregon statute specifies that when an urban renewal project includes a public building, the plan must explain how the public building serves or benefits the renewal area.¹⁹¹ The Oregon court reasoned that public buildings pay no taxes so the statute must have been enacted to make sure that taxed properties benefited from these tax-exempt public buildings. In this case, the court concluded that the new elementary school site was located too far from the core of the River District to benefit or serve it.¹⁹²

Florida redevelopment expert Jeff Oris offers additional explanations for state legislative inertia. Few legislators really understand well

185. The California Redevelopment Association contended that other taxing entities had been doing this under the state’s pre-1993 opt-out arrangement: “CRA contends that counties and other agencies have effectively extorted money from redevelopment agencies by using pass-through agreements and threatening to challenge a project area.” CAL. BILL ANALYSIS, *supra* note 174, at 7.

186. *See* TEX. TAX CODE ANN. § 311.014 (West 2010).

187. *Id.* § 311.003(a) (requiring contiguity if the district spans across the municipality’s borders).

188. TAX INCREMENT GUIDE, *supra* note 161, at 18.

189. *Id.* at 19.

190. Friends of Urban Renewal v. City of Portland, LUBA No. 2008-116, slip op. at 11 (Or. Land Use Bd. App. Jan. 2, 2009), available at <http://www.oregon.gov/LUBA/docs/Opinions/2009/01-09/08116.pdf>.

191. OR. REV. STAT. § 457.085(2)(j) (2010).

192. Friends of Urban Renewal, LUBA No. 2008-116, slip op. at 11.

enough how TIF works to appreciate the tax allocation issue, or have any political incentives to squander their political capital redressing it, in the absence of strong political push-back from counties, school districts, and special districts; TIF fiscal subtleties elude the electorate, and, as Oris notes, the curse of representative government is that it is representative. Further, many state legislators do not believe they “have a dog in this fight” because TIF revenues are usually derived from local property taxes, not from the taxes that support state government directly.¹⁹³

IV. Convincing Criticisms of TIF for Granting Excessive Subsidies to Private Developers and Hiding the Fiscal Realities from Taxpayers

A. Local Governments Sometimes Neglect to Determine Through The Use of “But for” Tests That TIF Subsidies Are Needed and Efficient

1. THE PROJECT AREA “BUT FOR” TEST

In a minority of states, at the time public officials designate a project area for redevelopment, local governments are obliged by statute to make a finding that without government assistance, private developers would not have undertaken the project on their own. In twenty-one states and the District of Columbia, local governments must make a finding that redevelopment would not reasonably be expected to occur solely through private investment within the reasonably foreseeable future, or that no significant private development would have been likely to be built at the target site ‘but for’ the public role.¹⁹⁴ Enforcement, though, is scant, left entirely to the discretion of the same local officials

193. Interview with Jeffrey L. Oris, Former President, Fla. Redevelopment Ass’n; President, Planning & Redevelopment Consultants, in South Miami Beach, Fla. (Dec. 18, 2010).

194. See ALA. CODE § 11-99-4(5) (2010); CAL. HEALTH & SAFETY CODE § 33367 (D)(11) (West 2010); D.C. CODE ANN. § 2-1217.03 (LexisNexis 2010); GA. CODE ANN. § 36-44-8 (3)(G) (West 2010); 65 ILL. COMP. STAT ANN. § 5/11-74.4-3 (N)(J) (West 2010); IND. CODE ANN. § 36-7-14-15(2) (West 2010); KY. REV. STAT. ANN. § 65.7049 (West 2010); MICH. COMP. LAWS ANN. § 125.1813 (1)(A) (West 2010); MINN. STAT. ANN. § 469.175 subdiv. 3(B)(2) (West 2010); MO. ANN. STAT. § 99.810.1(1) (West 2010); NEB. REV. STAT. ANN. § 18-2116 (LexisNexis 2010); N.J. STAT. ANN. § 52:27D-471 (West 2010); N.Y. GEN. MUN. LAW § 970-e (f) (McKinney 2010); N.C. GEN. STAT. ANN. § 159-105 (b)(5) (West 2010); OKLA. STAT. ANN. tit. 62, § 852 (West 2010); 53 PA. CONS. STAT. ANN. § 6930.5(A)(6)(IV)(D) (West 2010); R.I. GEN. LAWS § 45-33.2-4 (5)(II) (2010); S.C. CODE ANN. § 31-6-80 (G)(I) (2010); TEX. TAX CODE ANN. § 311.003(a) (Vernon 2010); WASH. REV. CODE ANN. § 39.89.030 (2) (LexisNexis 2010); W. VA. CODE § 7-11B-7 (7)(D)(F)-(G) (West 2010); WIS. STAT. ANN. § 66.1105(4M)(C)(1) (West 2010).

responsible for initiating the TIF effort, with no one specifically empowered to stop them from proceeding on the basis of cursory, poorly supported 'but for' findings.

2. THE INDIVIDUAL PROJECT "BUT FOR" TEST

Once a jurisdiction selects a private redeveloper and negotiates a deal, a second type of 'but for' test calls for local officials to determine that the proposed project could not reasonably be expected to proceed with the same public benefits, on the same timetable, at the designated location, and still be financially feasible for the developer without the public contribution.¹⁹⁵ In cities where this type of 'but for' test is taken seriously, Minneapolis, for instance, TIF applicants are expected to provide the basic financial data from which city officials can assess how much public support, if any, their projects require to be viable.¹⁹⁶ City staff or outside auditors analyze the proposal and advise the city council, before they approve it, on whether the terms of the contract the agency struck with the developer are prudent for the city.

In ideal circumstances, responsible public agencies and developers negotiate, often for months, over the appropriate rate of return the project should yield the developer, and how much of a public subsidy would be required to boost the developer's estimated returns to that level. Analysts for the city scrutinize the developer's estimates of project expenses and costs, consider the cost implications of different site plans and architectural treatments, and study the rates of return developers are earning on comparable projects. A thorough analysis takes into account the track record, solvency, and capacity of the developer; the tim-

195. For example, the City of Hartford requires that "[t]he developer is able to demonstrate that 'but for' the TIF assistance requested, the project in question could not reasonably be expected to move forward." DEP'T OF DEV. SERV., CITY OF HARTFORD, TAX INCREMENT FINANCING POLICY 3 (1999), available at <http://econdevelopment.hartford.gov/Shared%20Documents/corp-tif-pol03-06.pdf>. Similarly, the City of Ottawa, Kansas requires that "but for the availability of TIF, such projects would not be as economically viable." CITY OF OTTAWA, TAX INCREMENT FINANCING POLICY 1 (2004), available at http://www.ottawakansas.net/content/TIF_Policy.pdf.

196. Minneapolis tax increment policy provides:

In all cases, it is required that the need for public assistance be demonstrated and documented by the developer to the satisfaction of the City Finance Department. All such documentation, including development budgets, cash flow projections, market studies and other financial and market information, must be submitted by the developer along with an application for public financial assistance. If the request is based on financial gap considerations, the developer will demonstrate the profitability and feasibility of the project (i.e. gross profit, cash flow before taxes, cash-on-cash return, IRR, etc.), both with and without public assistance.

Minneapolis Tax Increment Policy, CITY OF MINNEAPOLIS, MINN., http://www.ci.minneapolis.mn.us/cped/tax_increment_policy.asp (last updated Sept. 9, 2009).

ing of the agency's and developer's respective contributions; "unusual/extraordinary costs that made the project financially unfeasible in the marketplace" and "public infrastructure investment to remedy existing inadequate conditions . . . [or] construct adequate capacity to support the project."¹⁹⁷

Though the industry lacks policies, procedures, and guidelines,¹⁹⁸ one of the industry's leading trade associations, the Council of Development Finance Agencies (CDFA), strongly recommends project-specific 'but for' studies as a best practice. This is an opportunity for local governments to (1) articulate precisely why TIF is needed, identifying the aspects of the project that justify public assistance; (2) make the most efficient use of public funds, not to squander public funds by over compensating developers; and (3) justify public subsidies for private development.¹⁹⁹

Skeptics may challenge the utility of these types of studies, likely to be expensive and inconclusive because opinions will vary on whether an area is likely to be redeveloped without public assistance, and how large a rate of return the developer of any proposed subsidized project should receive. If forced to make these determinations against their will, public officials can be expected to select consultants likely to give them the results they are looking for, at considerable public expense.

Local elected officials sometimes insist on approving greater subsidies for private developers than responsible consultants would have recommended based on a careful review of the developer's pro forma.²⁰⁰ Because local officials rarely possess familiarity with the underlying economics of complex real estate deals, they have difficulty being sure when a developer is just bluffing who claims that a proposed project will result in huge losses without a massive public subsidy. And if they deny the requested subsidy, they are wary of being blamed by the electorate for scaring away development if the developer should back out.

197. For annual reports required of public agencies using TIF, the Missouri Department of Economic Development issues a questionnaire that identifies potential justifications for public assistance. MO. DEP'T OF ECON. DEV., TAX INCREMENT FINANCING ANNUAL REPORT 2 (rev. 2009), available at http://missouridevelopment.org/pdfs/loc_TIF_rpt_form.pdf [hereinafter MISSOURI TIF FORM] (form required to meet the requirements of Mo. REV. STAT. § 99.865).

198. TAX INCREMENT GUIDE, *supra* note 161, at 3.

199. *Id.* at 2.

200. Interview with Jeffrey L. Oris, *supra* note 193.

3. JUDICIAL REVIEW OF “BUT FOR” DETERMINATIONS

Most courts display little interest in second-guessing the local public agency’s ‘but for’ analysis.²⁰¹ Yet, it is not completely impossible to launch a successful challenge. A school district succeeded in doing so in its suit against the Village of Burr Ridge. The Illinois TIF Act required a showing that the subject property “would not reasonably be anticipated to be developed without the adoption of the redevelopment plan.”²⁰² The plaintiffs showed that nearby sites had been successfully developed for a variety of commercial uses (three banks, a restaurant, and two office buildings), and that the subsidized site at issue in the case had been sought after by other developers.²⁰³ Earlier, the town had voted down two proposals for the site, a 30-screen movie complex and a residential townhome development, to appease neighboring home owners.²⁰⁴ Equally telling, the current owner had proceeded with its project before the village actually adopted the ordinances establishing the TIF district.²⁰⁵ Bottom line: the project in Burr Ridge flunked its ‘but for’ test. Make no mistake: This case is an outlier. As Professor Briffault observes, state courts generally treat ‘but for’ determinations as legislative matters deserving great judicial deference “without much evidence required.”²⁰⁶

Similarly, challenges seldom succeed to redevelopment deals based on a public agency having paid a private redeveloper too much for the benefits the public received. Many variables figure in the final determination of what counts as a suitable rate of return and courts usually manage to sidestep second guessing the numbers.

Challenges based on overcompensation of the private redeveloper could be predicated on state constitutional provisions prohibiting governments from making gifts or loans to private firms. These suits seldom succeed.²⁰⁷ Generally, courts have held that public subsidies are not a gift of public money to private firms as long as conferred to achieve

201. *See, e.g.*, *Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W.3d 556, 562-63 (Mo. Ct. App. 2008) (applying the ‘fairly debatable’ test to local government’s finding that but for the city’s intervention, private development is not reasonably anticipated to occur in the designated redevelopment site without the adoption of TIF).

202. 65 ILL. COMP. STAT. 5/11-74.4-3(n)(J)(1) (2010).

203. *Bd. of Educ., Pleasantdale Sch. Dist. No. 107, Cook County, Ill. v. Village of Burr Ridge*, 793 N.E.2d 856, 867 (Ill. App. Ct. 2003).

204. *Id.*

205. *Id.*

206. Briffault, *supra* note 89, at 80.

207. *See, e.g.*, CAL. CONST., art. XVI, § 6 (“The Legislature shall have no power to give or to lend . . . the credit of the State . . . in aid of or to any person, association, or corporation, whether municipal or otherwise. . .”).

an identifiable public purpose or public benefit, whether tangible or intangible.²⁰⁸

The Arizona Supreme Court recently rejected this permissive “public purpose” test unless accompanied by a more stringent inquiry.²⁰⁹ In the future the Court promised to enforce the constitutional prohibition against gifts of public money by probing whether the governmental entity received consideration “so inequitable and unreasonable” as to evidence an abuse of discretion.²¹⁰

B. TIF Project Finances Often Lack Transparency

1. THE CASE FOR TRANSPARENCY

Redevelopment agencies have been known to subsidize tax-exempt projects for reasons of political expediency in areas they know will not add any new property tax revenues,²¹¹ transferring TIF gains from thriving project areas to cover losses from financially disastrous ones,²¹² refusing to spend money on support facilities promised in the officially approved plans for the project,²¹³ and using TIF proceeds to close gaps in the municipal budget unrelated to economic development or rede-

208. See, e.g., *Redevelopment Agency of San Pablo v. Shepard*, 142 Cal. Rptr. 212 (Cal. Ct. App. 1977).

209. See *Turken v. Gordon*, 224 P.3d 158, 165 (Ariz. 2010).

210. *Id.* Developers of a \$1.8 billion mixed-use project, with over one million square feet of retail space, sought aid from the city of Phoenix to complete the project. The city agreed to provide up to \$97.4 million dollars from tax increments for the right to reserve for commuters up to 200 parking spaces in the project's 3,180 space garage. The Arizona Supreme Court found “it difficult to believe that the 3,180 parking places have a value anywhere near the payment potentially required under the Agreement. The Agreement therefore quite likely violates the Gift Clause.” *Id.* at 167.

211. Leeann Eckroth, *Lawsuit Filed Against the City of Bismarck over TIF Funds*, BISMARCK TRIBUNE, April 6, 2010, available at http://www.bismarcktribune.com/news/local/article_883ce240-413c-11df-b15d-001cc4c03286.html; see also *Chicago Competes with Dallas to Keep YMCA Headquarters*, Daily Herald (Plainview, Tex.), June 15, 2005, http://www.myplainview.com/article_e4df47db-369a-5c67-bacf-0986c6fb74af.html (describing Dallas and Chicago competing to lure YMCA headquarters with TIF funds).

212. This practice in Rockford, Illinois, has been likened to “corporate communism,” because “one district is rewarded at the expense of another” thereby “deplet[ing] tax dollars from their intended uses.” Stuart R. Wahlin, *Rockford's TIF report card: Negative balances will drain public funds*, ROCK RIVER TIMES (Rockford, Ill.), May 19-25, 2010, <http://rockrivertimes.com/2010/05/19/rockfords-tif-report-card-negative-balances-will-drain-public-funds>.

213. See *State ex rel. Credit Life Ins. Co. v. City of Springfield*, 551 N.E.2d 1252 (Ohio 1990) (holding that the local government that pledged TIF funds for a parking structure could not avoid using the funds for that purpose, even though the city council amended the redevelopment plan, because the court regarded the agency using TIF to be acting as an agent of the state and the initial council resolution as a state-level obligation not modifiable by municipal ordinance).

velopment.²¹⁴ There is “virtually no oversight” to preclude cities from treating tax increment accumulations “as an ATM for projects that are important to the City Council but aren’t necessarily a top priority to the citizens of [the] community.”²¹⁵

Generally, state laws explicitly allow the use of TIF funds for land acquisition and construction of public capital improvements but stop short of specifying limits on how TIF funds may be used.²¹⁶ There are two notable exceptions: A few contain prohibitions against the use of public funds for purely private purposes,²¹⁷ and a handful of state laws limit the extent to which TIF funds can be spent outside the project area or district where they were raised.²¹⁸

214. *See, e.g.*, Tom Daykin, *Milwaukee Might Tap TIF Money for Other Street Projects*, JOURNAL SENTINEL (Milwaukee, Wis.), Jan. 22, 2010, available at <http://www.jsonline.com/blogs/business/82297032.html> (“Milwaukee officials are moving forward with a plan that would tap tax incremental financing districts to pay for street repairs outside those districts.”).

215. *Ted Wheeler, supra* note 171.

216. *See, e.g.*, ALASKA STAT. § 29.47.460 (2010) (allowing municipalities to use bond proceeds “to finance the acquisition, construction, rehabilitation, or development of public improvements in . . . an area that is capable of being substantially improved based on the property value within the area,” and provides no further guidance on what “public improvements” qualify); MINN. STAT. § 469.1763, subdiv. 2 (2010); MONT. CODE ANN. § 7-15-4288 (2010) (allowing municipalities to use tax increments to pay the costs of land acquisition, demolition and removal of structures, relocation of occupants, and the acquisition, construction, and improvement of infrastructure, industrial infrastructure, examples of which are listed in detail, and which include, bridges, rail lines, sewers, sewer lines, telecommunication lines, and waterlines); WIS. STAT. § 66.1105(4)(i) (2010) (requiring itemized cost reports and explanations why improvements benefiting private property owners should not be paid for by owners); IDAHO CODE ANN. § 50-2903 (2010) (allows project costs for tax increment financing to include, but does not limit them to, capital costs, financing costs, professional service costs, and other costs incidental to capital, financing, or professional service costs); ALA. CODE § 11-99-2 subdiv. 7 (2010) (allowing eligible project costs to include, but not limiting them to, capital costs for acquiring and grading land, acquiring equipment, financing costs, costs associated with any deficit or loss incurred as a result of the sale or lease by the public entity within a tax increment finance district, professional services costs such as architects, lawyers, and underwriting costs).

217. *See, e.g.*, KAN. STAT. ANN. § 12-1770a(o)(2) (2010) (contains a lengthy list of permitted uses of funds, but prohibits funds from being used for any “[c]osts incurred in connection with the construction of buildings or other structures to be owned by or leased to a developer,” auto race tracks and multilevel parking structures notwithstanding).

218. *See, e.g.*, OFFICE OF THE STATE AUDITOR, STATE OF MINN., STATEMENT OF POSITION: POOLING RESTRICTIONS AND THE FIVE-YEAR RULE 1-2 (2010) (“[A]t least 75 percent of the tax increment generated from a TIF district be spent on activities in the TIF district that generates the tax increment. Up to 25 percent of the tax increment generated from a TIF district can be spent outside the district, but within the project area. However, all administrative expenses, up to 10 percent of the revenues generated by the district, are considered to be for activities outside the district.”).

Redevelopment and economic development agencies often keep the public in the dark about their transactions.²¹⁹ Scant public reporting of TIF expenditures and revenues, “guided by the invisible hand of lobbyists, political action committees and campaign contributions,”²²⁰ does nothing to allay suspicions of favoritism and corruption. In some places, it is difficult even for local public officials to know whether agency cost-and-revenue estimates are accurate, and whether the project’s performance matched its original projections.

There are great variations among local governments in what they report about TIF projects to the public, the state, and other taxing entities. Only a handful of states require TIF-using agencies to make formal assessments of whether a project is likely to be financially feasible for the local government, and mandate periodic audits to confirm whether the projections were realized.

The use of TIF permits a municipality to finance redevelopment with dollars that do not originate from the general revenues of the municipal budget. As a result, local public officials need not consider alternative uses, such as capital improvements, fire and police protection, health, recreation and maintenance of the capital infrastructure, for the funds they spend for urban real estate development. Since they are not forced to evaluate redevelopment expenditures in terms of other objects of municipal spending, public officials have less reason to review redevelopment expenditures as closely as they examine other budgetary items.²²¹

Redevelopment expert Oris attributes the lack of transparency partly to “lack of oversight and of monitoring by the public.”²²² “Citizens are not participating.”²²³ Mr. Oris opines that reports are “a complete waste

219. A study of economic development subsidies in the St. Louis region by the Council of Governments concluded that, across all incentive programs, reporting of revenues, expenditures, and outcomes—such as increased taxes, jobs, and personal incomes—are “remarkably weak.” EAST-WEST GATEWAY COUNCIL OF GOV’T, *supra* note 115, at iv. In Chicago, where Mayor Daley exercises control of more than half a billion in TIF revenues each year, TIF critics contend that “the specifics of how the city spends TIF money have always been kept from the public, even when Mayor Daley and his top aides craft a budget for it.” Joravsky & Dumke, *supra* note 82.

220. Ike Wilson, *Study: Young Businesses Grow Faster*, FREDERICK NEWS-POST, April 30, 2009, http://www.fredericknewspost.com/sections/archives/display_detail.htm?StoryID=96285. “[E]ntrepreneurial capitalism—where investors use their own money—guided by the invisible hand of the marketplace, is a preferable means of financing private business entities than the government—where politicians use the taxpayers’ money—guided by the invisible hand of lobbyists, political action committees and campaign contributions.” (quoting John L. Thompson Jr., Cnty. Comm’r, Frederick Cnty., Md.).

221. Winter, *supra* note 147, at 682.

222. E-mail from Jeff Oris, Former President, Fla. Redevelopment Ass’n; President, Planning & Redevelopment Consultants, Inc., to author (June 2, 2010) (on file with author).

223. *Id.*

of effort and money” if no one reads them and, on the basis of what is revealed, holds decision-makers accountable.²²⁴

Oris advances another reason for the reluctance of local redevelopment agency officials to compare public revenue spent with public revenue earned on a project-by-project basis. This is because dedicated redevelopment officials do not believe their primary mission is fiscal. Redevelopment is about governments using their development powers to achieve public goals like a higher quality urban environment, job growth, or affordable housing. Projects that fall short fiscally may succeed brilliantly in other ways.

He offers the example of Boca Raton’s much-praised Mizner Park Project.²²⁵ This 28.7-acre mixed-use project features a public promenade and park, retail shops and restaurants, 262,000 square feet of office space, a movie theater, and a museum.²²⁶ The public cost of the Mizner Park Project was approximately \$58,000,000, a price that could take decades to repay from the slowly rising tax increments the project generated, despite a fourteen-fold increase in assessed property values in the area from 1990 to 2002.²²⁷

Despite unsatisfactory fiscal results, the city’s website proudly proclaims that the project accomplished its central mission by giving people a reason to go downtown.²²⁸ According to a case study prepared by the U.S. Environmental Protection Agency:

A large, tree-lined central boulevard encourages walking and cruising, creating an unhurried environment for shopping and socializing. It has become the city’s most popular community meeting place and the new center of Boca Raton. While roughly half of the project is a park located in the middle of a boulevard, high-density development in the remaining areas creates a vital community center.²²⁹

Office rents were the lowest in the county before redevelopment, and are now the highest in all of South Florida. The area once had a scant seventy-three housing units, and now has about 1500 units.²³⁰ The Mizner Park town center exemplifies how suburban communities can revitalize declining downtowns.

224. *Id.*

225. *The Mizner Park Project*, CITY OF BOCA RATON, <http://www.ci.boca-raton.fl.us/dev/pdf/CRA/MiznerParkHandout.pdf> (last visited Mar. 27, 2011). Readers, especially skeptics, should visit this website and see the pictures and descriptions of the project and its results.

226. *Smart Growth Illustrated: Mizner Park, Boca Raton, Fla.*, EPA, <http://www.epa.gov/dced/case/mizner.htm> (last visited Mar. 27, 2011).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

2. DISCLOSURE MENU

Ideally, local governments would lay out two types of information for the public about their TIF projects.

(A) Financial Feasibility for the Local Government. An assessment of financial feasibility involves putting a price tag on projected public-sector costs and benefits, with a back-up source of guaranteed funding if tax increments fall short of covering the agency's debt service. Though some states demand exacting financial projections of local TIF agencies,²³¹ other states do not.²³²

(B) Annual Audit of Revenues and Expenses. Once the project is in place, the local government should audit annually, comparing anticipated with realized expenditures and revenues. The audit informs other taxing entities of the annual increment diverted from them, and how the public agency used these funds. Sometimes, public agencies aggregate revenues and expenditures from all their projects, making it impossible for taxpayers and other taxing entities to trace the sources and uses of TIF capital to particular projects.

3. AN EXAMPLE: AMERICANA AT BRAND

Examples abound of TIF project cost and revenue projections and audits.²³³ In California, if and when a local agency acquires land with

231. See, e.g., MINN. STAT. § 469.175 subd. 6 (2010).

Annual financial reporting. (a) The state auditor shall develop a uniform system of accounting and financial reporting for tax increment financing districts. The system of accounting and financial reporting shall, as nearly as possible: (1) provide for full disclosure of the sources and uses of tax increments of the district; (2) permit comparison and reconciliation with the affected local government's accounts and financial reports; (3) permit auditing of the funds expended on behalf of a district, including a single district that is part of a multidistrict project or that is funded in part or whole through the use of a development account funded with tax increments from other districts or with other public money; (4) be consistent with generally accepted accounting principles.

Id.; MO. REV. STAT. § 99.865 (2010); W. VA. CODE. § 7-11B-15 (2010).

232. One exception can be found in Kansas, where feasibility studies are required of local governments desiring to pledge the locality's 15% sales tax for STAR Bonds to facilitate certain large-scale projects, such as sports stadiums, museums, auto race tracks, regional lifestyle and entertainment commercial malls, and other tourism attractions. The financial feasibility study requires an analysis that there will be enough sales tax generated to repay the STAR Bonds, a market study of how much draw the project will have, how many visitors there will be, and the impact of the project on existing businesses and projects. Telephone Interview by Parag Amin with Allen Bell, Econ. Dev. Dir., Wichita, Kan. (June 25, 2010). See also KAN. STAT. ANN. § 12-17, 162 (2010); CANYON RESEARCH SOUTHWEST, INC., STAR BOND FEASIBILITY STUDY: PRAIRIEFIRE AT LIONSGATE (2009), available at http://docs.opkansas.org/sites/CityDocs/CityDocs/2009/07/09/15/plm2009-17_EXHIBIT%20J%20-%20PRAIRIEFIRE%20STAR%20BOND%20PROJECT%20PLAN%20FEASIBILITY%20MARKET%20AND%20MARKET%20IMPACT%20STUDY.pdf.

233. See, e.g., *Seaholm Redevelopment Project*, CITY OF AUSTIN (Mar. 27, 2008), http://www.ci.austin.tx.us/seaholm/downloads/seaholm_pres_march_27_08.pdf.

TIF funds, and then makes that land available to a private developer for less than the agency's acquisition price, it is obliged to justify the discount as representing the fair market value of the property in light of the restrictions on the purchaser's use of the site.²³⁴ The agency must also make public the terms of the agency's sale or lease contract for the land.²³⁵ (By negative inference, if the agency acquires the land with funds not derived from tax increments, it has no statutory obligation to justify its below-cost selling price.)

This law was applicable to the Glendale Redevelopment Agency. (Glendale is a middle-income city with a population of about 200,000 at the eastern edge of the San Fernando Valley, commonly regarded as a suburb of Los Angeles.) The Glendale Redevelopment Agency had acquired a potential redevelopment site, over a fifteen year period, along Brand Avenue, the city's premier office high-rise and entertainment street—a site adjoining a regional mall called the Glendale Galleria. The agency proposed to make the land available to a private real estate developer for a retail-and-housing complex called Americana at Brand.

This development is a multi-use property of trendy stores, upscale restaurants, and luxury apartment and condominium residences. With dancing fountains similar to those at the Bellagio in Las Vegas (though admittedly on a much smaller scale), the Americana relates more to the more diverse, younger, affluent population than the profile of Glendale's original residents—WASP, Republican, middle class, traditional families.²³⁶

The terms of the deal were embodied in a Development and Disposition Agreement (DDA), which the city put online for all to see.²³⁷ The city internal auditor issued an analysis of the costs and benefits of the

234. CAL. HEALTH & SAFETY CODE § 33433(a)(B)(iii) (West 2010).

235. *Id.* § 33433. The agency needs to specify the cost of the agreement to the agency, the estimated value of the property at its highest and best use, the estimated value of the property given the conditions placed on the property by the agency, the compensation to be received by the agency, and an explanation of how the project will eliminate blight. *See also* *Contra Costa Theatre, Inc. v. Redevelopment Agency of Concord*, 184 Cal. Rptr. 630, 632 (Cal. Ct. App. 1982) (“The obvious focus of the law is upon affording interested persons adequate notice, information and a hearing prior to the sale of any property interest acquired with tax increment funds. § 33433 particularly reveals a legislative intent to ensure disclosure of the comparison between the acquisition cost of fair market value of the property interest and its resale price, so that expenditure of tax funds can be monitored and fraud or corruption avoided.”).

236. Laura Jean Berger, *Suburbia Evolved: Glendale Then and Now*, NEW GEOGRAPHY (Sept. 19, 2010), <http://www.newgeography.com/content/001774-suburbia-evolved-glendale-then-and-now>.

237. GLENDALE REDEVELOPMENT AGENCY & CARUSO AFFILIATED HOLDINGS, DISPOSITION AND DEVELOPMENT AGREEMENT (2004), available at http://www.ci.glendale.ca.us/pdf/town_center_EIR/Disposition_and_Development_Agreement/DDA_Document.pdf.

project to the city. By reading the auditor's cost study, we learn that the city invested a total of \$77.1 million in the Americana at Brand project: the city contributed land at the city's acquisition price of \$62.6 million, promised public improvements of \$12.7 million, and pledged \$1.8 million to the payment of specified development costs. The developer contributed \$98 million in building costs, \$6 million in public improvements, and \$29.5 million in private improvements. A housing developer committed \$53.6 million to build out the project's condo and rental units.²³⁸

In return, the city could anticipate increased property and sales tax revenues. The DDA also called for the city to share half the developer's profits once the developer achieved an internal rate of return of 11.75% on the retail component of the project, and 8.25% on the residential component.²³⁹

The resulting project is an open-air, life-style mall, where the central area connecting the shops and residences is designed to resemble an idealized city street. The developer was not going to entrust the security and maintenance of this space to anyone else. The city parks department estimated that the city would have spent a net present value of \$4.6 million taking care of the three acres had the developer not assumed the maintenance burden for the dedicated public space.²⁴⁰

The Glendale Redevelopment Agency had no problem preparing and releasing all this information, though it is easy to see why public officials in other cities might be reluctant to prepare and publicize comparable data from their own communities. It arms project opponents with information they might otherwise never have found, and invites hard questions, and later criticism, of elected officials if their revenue projections prove wrong. In this case, for instance, project opponents could probe whether the land was worth the \$62 million the city had paid for it, and if this project was the best the city could do for its money. They could argue about whether the city's internal auditor made realistic estimates of the extent of retail sales displacement or cannibalization. Project opponents could embarrass city officials by producing their own experts to contradict the city's estimates. Opponents could object to the city ceding supervisory control of public open space to the

238. See Jeanne Armstrong, Dir. Dev. Serv., *Joint Report to City Council/Agency*, CITY OF GLENDALE, CAL., 23 (Apr. 13, 2004), http://www.ci.glendale.ca.us/government/council_packets/cc041304/twnCtr_ProjEcon_BusTerms.pdf.

239. *Id.* at 36.

240. *Id.* at 28.

private developer's maintenance and security personnel. In the event, the Americana at Brand project was subject to a public referendum; most of the above arguments were raised in the public debate preceding the referendum, and Americana at Brand triumphed at the ballot box in a close vote.²⁴¹

4. STATE REPORTING REQUIREMENTS

State-mandated financial reporting requirements are rare and, for the most part, tepid and unenforced. Indiana economic development agencies are not even required to calculate how much increment they are deflecting from other taxing entities each year.²⁴²

A few states require local redevelopment or economic development agencies to file annual reports concerning their activities.²⁴³ Florida, for instance, requires redevelopment agencies to file an annual audit with their governing bodies, the local government that created them.²⁴⁴ Until recently, the methodology and contents of these annual reports was left

241. *Caruso Affiliated Wins Final Victory in Glendale as General Growth Concedes*, BUSINESS WIRE (Dec. 20, 2005), <http://www.allbusiness.com/legal/trial-procedure-suits-claims/5182397-1.html>.

242. Telephone Interview by Parag Amin with Dan Jones, Assistant Dir., Budget Div., Ind. (June 21, 2010).

243. *E.g.*, Massachusetts state law provides:

Each municipality implementing an approved development program shall provide an annual status report to the EACC (Economic Assistance Coordinating Council) describing all significant activities, projects and events during the preceding year in furtherance of the program, including but not limited to, a list of properties acquired by the municipality by eminent domain during the preceding year, an update on the costs and financing of the program, including the status of tax increment financing for the program, and a schedule for the program containing a description of anticipated events during each of the next five years, and for each five-year period thereafter.

402 MASS. CODE REGS. 3.12 (2010); Minnesota state law provides:

The state auditor shall develop a uniform system of accounting and financial reporting for tax increment financing districts. The system of accounting and financial reporting shall, as nearly as possible: (1) provide for full disclosure of the sources and uses of tax increments of the district; (2) permit comparison and reconciliation with the affected local government's accounts and financial reports; (3) permit auditing of the funds expended on behalf of a district, including a single district that is part of a multidistrict project or that is funded in part or whole through the use of a development account funded with tax increments from other districts or with other public money; (4) be consistent with generally accepted accounting principles.

MINN. STAT. § 469.175(6)(a) (2010); W. VA. CODE § 7-11B-15 (2010); MO. REV. STAT. § 99.865 (2010).

244. Florida state law provides:

An agency . . . shall file with the governing body, on or before March 31 of each year, a report of its activities for the preceding fiscal year, which report shall include a complete financial statement setting forth its assets, liabilities, income, and operating expenses as of the end of such fiscal year. At the time of filing the report, the agency shall publish in a newspaper of general circulation in the community a notice to the

entirely to the discretion of each issuing agency, so the reports varied enormously in coverage and quality; and the lack of uniform information from one agency to the next disabled efforts at inter-municipal comparison. This is about to change with the promulgation of guidelines specifying precisely what should be included in these reports.²⁴⁵

Some states have prescribed local transparency. Economic development agencies in Missouri must file an annual report, which elicits information probing whether public costs for proposed projects are offset by reasonably anticipated public revenues.²⁴⁶ Illinois TIF agencies must commission the preparation of annual district financial reports prepared by outside consultants (based on unaudited information the city supplies), and make available project redevelopment agreement information arranged by TIF district narratives and goals.²⁴⁷

Wisconsin mandates that each TIF-sponsoring “city shall prepare and make available to the public updated annual reports describing the status of each existing tax incremental district, including expenditures and revenues.”²⁴⁸ Milwaukee’s annual audit of its forty-nine TIF projects, for instance, shows the financial viability of each of them, enumerating public revenues and expenditures.²⁴⁹ This transparency has made it possible for the Milwaukee city council to engage in serious public debate over how TIF funds should be used.²⁵⁰ Madison, Wisconsin, enacted new policies and procedures in 2009 that set out funding priorities for TIFs, and established a staff supervised ‘but for’ review of each funding

effect that such report has been filed with the county or municipality and that the report is available for inspection during business hours in the office of the clerk of the city or county commission and in the office of the agency.

FLA. STAT. ANN. § 163.356(3)(c) (West 2010).

245. E-mail from Jeff Oris, *supra* note 219.

246. MISSOURI TIF FORM, *supra* note 197, at 2.

247. See 65 ILL. COMP. STAT. 5/11-74.4-5(d)(9), 5/11-74.4-7 (2010). For information on Chicago’s TIF districts, including redevelopment agreements, narratives, and financial reports, see *Tax Increment Financing*, CITY OF CHICAGO, http://www.cityofchicago.org/city/en/depts/dcd/provdrs/tif/svcs/tax_increment_financing.html (last visited Mar. 27, 2011).

248. WIS. STAT. § 66.1105(6m)(c) (2010).

249. DEP’T OF CITY DEV., CITY OF MILWAUKEE, 2009 ANNUAL REPORT: MILWAUKEE TAX INCREMENTAL FINANCE DISTRICTS (2010), <http://www.mkedcd.org/business/TIF/pdfs/2009AnnualTIDReport.PDF>.

250. See generally Daykin, *supra* note 214 (noting that Milwaukee’s Common Council must approve a proposed plan to extend the life of a TIF district to use the money for issues such as street repairs and environmental cleanups before it can take effect. The plan is controversial because approving the plans means that the funds that would otherwise have gone toward local services, like Milwaukee’s public schools, would go toward only the uses outlined in the proposed plan).

application before the application could be considered by the Board of Estimates and approved by the Common Council.²⁵¹

Another exception to the lax reporting and auditing requirements comes from Kansas. Kansas requires approval by the secretary of the Department of Commerce of a detailed feasibility and market analysis. But this law only applies to certain large-scale projects for which the locality wants to issue bonds secured by *state* sales taxes, projects such as sports stadiums, museums, auto race tracks, regional lifestyle malls, entertainment centers, and major tourism attractions.²⁵² The financial feasibility study needs to show that enough sales taxes will be generated to repay the bonded indebtedness, a market study of the project's draw, including anticipated numbers of visitors, and the impact of the project on competing businesses within a 100 mile radius.²⁵³ State officials have issued guidelines for reviewing these studies so they can foresee the net economic benefits to Kansas.²⁵⁴

As with all state-imposed auditing requirements upon local governments, what matters most are the thoroughness of the state's oversight and the quality of the auditor's performance. Investigative reporters for the Los Angeles Times recently found California cities shirk state auditing requirements imposed upon municipalities, with "the biggest audit breakdowns occurring in redevelopment agencies."²⁵⁵ About one-in-four municipal redevelopment agencies fail to file their annual reports on time.²⁵⁶ Despite this, the state controller's office has no systemic review procedures, and outside auditors hired by cities did "a poor job of verifying" agency compliance with "the most basic tenets of redevelopment law."²⁵⁷ Cities routinely dismissed auditors who uncovered major problems, and replaced them with auditors willing to give them a clean

251. CITY OF MADISON, TIF OBJECTIVES AND POLICIES 9 (2009), available at <http://www.cityofmadison.com/planning/tidmaps/TIFPOLICY.pdf> (including policies that require developer equity to exceed TIF assistance, and noting that "no more than 50% of the net present value of the tax increment generated by a private development project shall be made available to that project as gap financing.").

252. Telephone Interview with Dan Jones, *supra* note 242.

253. Telephone Interview with Allen Bell, *supra* note 232.

254. Telephone Interview by Parag Amin with Richard Cram, Dir. of Policy and Research, Kan. Dep't of Revenue (June 25, 2010); see also *Guidance to STAR Bond Applicants*, KAN. DEP'T OF COMMERCE, <http://www.kansascommerce.com/DocumentView.aspx?DID=75> (last visited Jan. 18, 2010) (noting that seven criteria are used when evaluating the tourism potential of a proposed project).

255. Jessica Garrison & Jeff Gottlieb, *Bad City Finances Often Go Unflagged*, L.A. TIMES, Nov. 12, 2010, at 16.

256. *Id.*

257. *Id.*

bill of health.²⁵⁸ In one notorious case the auditor had not reported that the city's redevelopment agency had utterly failed to produce an annual report or adopt an annual budget.²⁵⁹

As for state oversight of redevelopment agency compliance with the requirement that 20% of TIF be set aside for affordable housing, "citing limited funds, the [California] Department of Housing and Community Development stopped auditing redevelopment agencies three years ago."²⁶⁰

Even if a state agency—the California State Controller's Office or the Department of Housing and Community Development—were appropriated ample funds to audit local redevelopment agency annual reports, without resources to spot-check the accuracy of locally supplied data, reliance on the truthfulness of submissions from local redevelopment authorities would sometimes be misplaced. The Los Angeles Times investigative reporters concluded that "there is little to ensure the information [from redevelopment agencies] is correct."²⁶¹

5. SEC REQUIRES ANNUAL REPORTS FROM BOND ISSUERS TO BOND HOLDERS

The SEC prohibits brokers, dealers, or underwriters from purchasing or selling municipal securities unless the issuer has contracted in writing to provide certain financial information for the benefit of bond holders: an annual report and certain "event" notices. The information is all about the TIF cash flow—tax rates, assessed valuations, identification of the ten largest taxpayers in the project area responsible for more than 5% of the taxes levied, property tax appeals, exemptions, tax increments collected in the prior year, tax delinquencies, and estimated debt service coverage ratios.²⁶²

V. Summary: The Future of TIF

As cities and suburbs compete for the next hundred million Americans, they will need both public and private capital investments to build the kinds of places potential newcomers desire. TIF enables local government officials to influence the design, location, and uses of private devel-

258. *Id.*

259. *Id.*

260. Jessica Garrison, Kim Christensen & Doug Smith, *Arrested Redevelopment*, L.A. TIMES, Oct. 3, 2010, available at <http://articles.latimes.com/2010/oct/03/local/m-redevelop-housing-20101003/2>.

261. *Id.*

262. TAX INCREMENT GUIDE, *supra* note 161, at 73.

opment more directly than they could in their regulatory capacity alone. Portland nurtured a downtown revival with high-density residential construction in mixed-use projects served by street car. Virginia Beach countered its suburban sprawl image with the addition of a carefully designed, pedestrian-friendly central business district and civic center. Through TIF, residents of both cities were able to advantageously alter the “prevailing pattern of private sector investment.”²⁶³

Times are not optimal for TIF. Bond investors these days anticipate local government tax revenues remaining flat and demand high debt-service-coverage ratios. For every dollar of debt service, investors are insisting upon \$1.25 to \$1.50 of estimated property or sales tax revenue.²⁶⁴ At the same time, many redevelopment agencies are struggling to make ends meet because of property tax revenues declining in tandem with falling property values. Under severe fiscal stress, some cash-strapped cities and states could dissolve redevelopment agencies instead of trying to cover the administrative costs of keeping them alive with appropriations from the general fund.²⁶⁵ But as the economy improves, we can expect to see developers eager to reduce their equity needs by adding a TIF component to their financing capital stack. It remains to be seen how state and local government officials will respond to calls for greater TIF accountability. Ignoring those calls could erode public confidence in the role of governments as redevelopers, and lead local and state government officials to push for an end to all TIF-financed redevelopment.

263. Michael T. Peddle, *TIF in Illinois: The Good, the Bad, and the Ugly*, 17 N. ILL. U.L. REV. 441, 446–47 (1997).

264. The debt service coverage ratio (DSCR) is the ratio between bond debt service and the property tax base available to support it. A DSCR of one means that there is one dollar of increment for every dollar of bonded indebtedness coming due. Currently, TIF bond investors are looking for DSCRs of 1.25 to 1.5. See David A. Rogers, *TIFs: Harder Than Before But Still Viable*, BRICKER & ECKLER, 11 (2010), <http://www.bricker.com/documents/publications/1986.pdf>.

265. Anthony York, *Jerry Brown Tells City Officials to Come to the Table*, L.A. TIMES, Jan. 19, 2011, available at <http://latimesblogs.latimes.com/california-politics/2011/01/jerry-brown-tells-city-officials-to-come-to-the-table.html>.