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SUCCESS AND THE PROBLEM OF TOO MUCH TIF

ANTHONY DERISO\*

*Tax increment financing is a tool used by cities and counties throughout the country to fund economic development efforts. When used appropriately, this tool allows such cities and counties to finance projects within its borders that would not otherwise occur. Unfortunately, local governments often abuse or over-use tax increment financing by granting public money to private projects that would likely occur without the public assistance. This abuse and over-use hurts cities and counties by restricting how much revenue they may collect in property taxes, for potentially decades at a time. The current mechanisms for dealing with this problem lack teeth, while the current proposed solutions only seek to limit such abuse before it occurs. This article suggests how a claw-back provision, to be invoked only after review under distinct circumstances, may allow cities and counties suffering from such abuse or over-use to recuperate their investments.*

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\* The views and opinions set forth herein are the personal views or opinions of the author; they do not necessarily reflect views or opinions of the law firm with which he is associated.

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#### INTRODUCTION

When asked to describe "how the government works," economist Milton Friedman responded —

There are four ways in which you can spend money. You can spend your own money on yourself. When you do that, why then you really watch out what

you're doing, and you try to get the most for your money. Then you can spend your own money on somebody else. For example, I buy a birthday present for someone. Well, then I'm not so careful about the content of the present, but I'm very careful about the cost. Then, I can spend somebody else's money on myself. And if I spend somebody else's money on myself, then I'm sure going to have a good lunch! Finally, I can spend somebody else's money on somebody else. And if I spend somebody else's money on somebody else, I'm not concerned about how much it is, and I'm not concerned about what I get. And that's government.<sup>1</sup>

Accurate or not, this portrayal is an apt characterization of certain issues surrounding an increasingly popular tool for economic development—tax increment financing. Tax increment financing is a mechanism whereby a city or county will subsidize the re-development of real estate with revenue it will earn from the increased future tax assessments the re-development will generate.

The issues around tax increment financing fall into the two latter descriptions of how Friedman believes an individual can spend money. First, the funds generated through tax increment financing may be abused when they are allocated by an official in a self-serving manner (e.g., to support a re-election bid). This is what Friedman would describe as “spending somebody else's money on myself.” Second, these funds may be over-used when officials treat this revenue as a slush fund to finance interesting but perhaps otherwise unnecessary projects. This is what Friedman would describe as “spending somebody else's money on somebody else.”

For a number of reasons, abuse and over-use of tax increment financing often goes unchecked. Many of the projects on which these funds are spent often turn out to be successful within the city or county they are situated, clouding the fact that these funds may not have been necessary to the creation of these projects in the first place.

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1. Interview by David Asman with Milton Friedman, *Economist*, Hoover Inst. (May 15, 2004), <https://www.foxnews.com/story/your-world-interview-with-economist-milton-friedman>.

In the forthcoming article, Part (I) will provide a detailed exposition of tax increment financing and its intricacies; Part (II) will then highlight the issues of abuse and over-use. Part (III) will introduce an example of tax increment financing in action in a small municipality, while Part (IV) will summarize the municipality's concerns about the use of tax increment financing. Finally, Part (V) will describe the potential tools a city or county may use to combat the harms of abuse and over-use.

## I.

### AN EXPOSITION OF TAX INCREMENT FINANCING

#### A. *A Brief History*

Tax increment financing ("TIF") is a powerful tool of economic development found in the arsenals of city and county managers across the United States. Simply put, tax increment financing refers to a process of paying for re-development activity with the anticipated increased property tax revenue the re-development activity will generate upon completion.<sup>2</sup> In the context of TIF, re-development activity generally includes improvements to public infrastructure, projects deemed integral to an adopted plan of urban renewal, or, in certain situations, residential rehabilitation.<sup>3</sup>

It is generally accepted that the concept of tax increment financing was conceived in post-World War II California with its passing in 1945 of the Community Re-development Act.<sup>4</sup> The broad purpose of the Act was to halt the accelerated middle class exodus from central cities in California after the War. In response, the Act established re-development agencies ("RDAs") in California's cities and counties. RDAs were tasked with attracting business to these communities to stem the exodus and to tackle the problem of blight which resulted from the abandonment of many of these areas.<sup>5</sup>

To provide RDAs with the cash and tools necessary to carry-out their stated purpose, California residents voted over-

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2. George Lefcoe & Charles W. Swenson, *Redevelopment in California*, 67 NAT'L TAX J. 719, 719 (2014).

3. *E.g.*, *Tax Increment Financing*, OHIO DEV. SERVS. AGENCY, OFF. OF STRATEGIC BUS. INVS., [https://development.ohio.gov/bs/bs\\_tif.pdf](https://development.ohio.gov/bs/bs_tif.pdf).

4. Lefcoe & Swenson, *supra* note 2, at 719-21.

5. Casey Blount et al., *Redevelopment Agencies in California* (U.S. Dep't of Hous. & Urb. Dev., Working Paper No. EMAD-2014-01, 2014).

whelmingly to approve Proposition 18 in 1952.<sup>6</sup> Proposition 18 was an amendment to the State Constitution that provided authorization for “financing [the] cost of [a] re-development project from [a] portion of revenue derived from taxes on taxable property within [the] project.”<sup>7</sup> According to the California Legislative Analyst’s Office, this amendment would allow the excess tax assessments collected to be placed into a special fund of the re-development agency to pay the interest and principal on any debts incurred by the agency in financing or refinancing a re-development project.<sup>8</sup> Today, this proposition can still be found in California’s Constitution under Article 16, Section 16.<sup>9</sup>

Despite beginning in California, tax increment financing can presently be found in the toolboxes of city and county managers everywhere. Currently, every state but Arizona has enacted enabling legislation which authorizes the use of tax increment financing.<sup>10</sup> While the enabling legislation varies from state to state, the broad mechanics behind each state’s individual TIF program generally remain the same.

#### B. *Why Have Tax Increment Financing?*

A meaningful explanation of what tax increment financing is and how it works first requires an understanding of why a city or county would want to adopt TIF. While there are numerous rationales, this article will introduce only a few of the most popular.

The most popular reason for adopting TIF is the argument that it provides a city or county with the resources necessary to spur or generate new economic development. This line of reasoning presumes that certain areas within a city or county would attract economic development, were it not for some underlying issue (e.g., inadequate public infrastructure, such as insufficient utilities or a lack of access to a convenient thoroughfare). From this premise, the argument naturally

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6. *California Proposition 18*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_18,\\_Community\\_Redevelopment\\_Projects\\_\(1952\)](https://ballotpedia.org/California_Proposition_18,_Community_Redevelopment_Projects_(1952)).

7. *Id.*

8. *Id.*

9. CAL. CONST. art. XVI, § 16.

10. *Tax Increment Financing Resource Center*, COUNCIL OF DEV. FIN. AGENCIES, <https://www.cdfa.net/cdfa/cdfaweb.nsf/resourcecenters/tif.html?open&state=AZ>.

concludes that resolving the issue will catalyze development. However, cities or counties often may lack the resources necessary to address an issue. TIF answers this problem by providing a city or county with a means to raise the resources necessary to correct an issue and to catalyze development. According to the Council of Development Finance Agencies, TIF funds are most effectively spent on projects aimed at improving public infrastructure, including such costs as land acquisition, relocation, demolition, utilities, debt service and planning expenses.<sup>11</sup>

While the previous theory suggests cities and counties adopt TIF to catalyze new growth, a competing theory argues that TIF is employed by cities or counties to accommodate growth that is already well underway. A 1990 article published in the *National Tax Journal* compared common characteristics between cities in Michigan that employed TIF with Michigan cities that chose not to employ TIF.<sup>12</sup> It concluded that “the TIF mechanism is used by faster growing cities to fund economic development projects.”<sup>13</sup> The article went on to posit that those TIF cities experiencing faster population growth may have used TIF as ‘budget manipulation tools’ to reallocate resources away from other taxing jurisdictions (e.g., school boards) and into their own general funds. Such a maneuver would open up revenue for those cities to finance the infrastructure needed to accommodate their growth. Under this lens, TIF is a useful tool for city or county managers to increase the size of their treasuries at the point in time such additional resources are needed to react to and accommodate pre-existing growth. Under this theory, TIF neither spurs nor attracts development; rather, TIF provides cities or counties with the resources necessary to appease growth caused by other factors.

In brief, one last theory as to why a city or county may adopt TIF has to do with the strategic interactions between neighbors.<sup>14</sup> This theory suggests that cities adopt TIF simply

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11. *Understanding Tax Increment Financing*, COUNCIL OF DEV. FIN. AGENCIES, <https://www.cdfa.net/cdfa/cdfaweb.nsf/ord/understandingtif.html>.

12. John E. Anderson, *Tax Increment Financing*, 43 NAT'L TAX J. 155 (1990).

13. *Id.* at 162.

14. Paul F. Byrne, *Strategic Interaction and the Adoption of Tax Increment Financing*, 35 J. REGIONAL SCI. & URB. ECON. 279 (2005).

because their neighbors have already done so. In other words, these cities and counties adopt TIF in order to remain competitive with their neighbors at attracting private investment.

### C. *How Does TIF Work?*

At a high level, any justification for adopting TIF must rely on the premise that the development of a piece of property will correspond with an increase in its value.<sup>15</sup> Under the theory that TIF helps catalyze new development, the rationale is that property with newly minted infrastructure should be more valuable than simple green space or blighted property. Under a theory that TIF appeases pre-existing growth, an increase in market demand for property should positively impact its worth.<sup>16</sup> This fundamental premise is what TIF seeks to exploit.<sup>17</sup>

TIF exploits expected increases in property assessments by freezing the taxable bases of targeted parcels at their values just prior to the taking place of any re-development activity. This attempts to ensure that any taxing authority relying on property tax revenue (e.g., school boards) will receive around as much in tax revenue following the re-development activity as it would have without the imposition of TIF. Upon completion of the re-development activity, any increase in the assessments of the targeted parcels is termed the “increment.” Depending on the enabling statute of the state in which the parcels are located, a portion of the property tax revenue the increment will earn is earmarked for a special TIF account. The income collected through the TIF account is then used by a city or county manager to service any debt or other costs incurred by the city or county in funding the re-development

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15. See Robert Eversberg & Paul Goebel, *ABCs of TIF*, TIERRA GRANDE, June 10, 2005, at 1 (“When developers make improvements, property values increase.”).

16. Anderson, *supra* note 12.

17. See Joseph Blocher & Jonathon Q. Morgan, *Questions About Tax Increment Financing in North Carolina*, UNC SCH. GOV'T COMMUNITY AND ECON. DEV. BULL., Aug. 2008, at 9 (“Tax increment financing is not a silver bullet solution to development problems. There is no guarantee that the initial public investment will spur sufficient private investment, over time, that creates enough increment to pay back the bonds. Moreover, even if the investment succeeds on paper, it may do so by “capturing” growth that would have occurred even without the investment.”).

activity. In this light, it is often said that TIF projects are self-financing, with their expenditures paid for by the increased revenue resulting from the TIF growth, without a tax increase.<sup>18</sup>

#### D. *The Life-Cycle of TIF*

This Section will outline the basic life-cycle of TIF, which may be broken into five phases. The life-cycle begins with a determination of a proposal's feasibility and terminates with an evaluation of the finished project.<sup>19</sup> The enabling statutes of most states layout the specifics of each phase.

##### 1. *Phase 1 - Make an Assessment of Need*

Phase one in the life-cycle of TIF requires a finding that TIF is necessary or even desired within a county or municipality. In literature published by the Government Finance Officers Association ("GFAO"), such an assessment is "judged by local policymakers and external stakeholders."<sup>20</sup> According to guidance distributed by the State of Ohio, an assessment of need may be established by a finding that the improvements to be funded by TIF serve a public purpose.<sup>21</sup> Generally, TIF efforts aimed at combating blight are considered as serving a public purpose.<sup>22</sup> In addition, some states list a number of pre-ordained factors (typically associated with blight), the combating of which will automatically qualify as serving a public purpose. For example, in Illinois, TIF serves a public purpose if it remedies some combination of dilapidation, deterioration, obsolescence, the illegal use of individual structures, structures below minimum building code standards, inadequate utilities, environmental concerns, and so forth.<sup>23</sup>

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18. Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 66 (2010).

19. NICHOLAS GREIFER, GOV'T FIN. OFFICERS ASS'N, AN ELECTED OFFICIAL'S GUIDE TO TAX INCREMENT FINANCING 12 (2007).

20. *Id.* at 12.

21. OHIO DEV. SERVS. AGENCY, TAX INCREMENT FINANCING: GENERAL PURPOSE (PARCEL) 1, [https://development.ohio.gov/files/bs/TIF\\_Summary.pdf](https://development.ohio.gov/files/bs/TIF_Summary.pdf).

22. *E.g.*, OHIO REV. CODE ANN. § 5709.40 (LEXIS through file 18 of the 133rd General Assemb. (2019–2020)).

23. GREIFER, *supra* note 19, at 14.



## 2. Phase 2 - Create a Plan of Re-development

Phase two in the TIF life-cycle involves the formation of a formal re-development plan. Creating such a plan requires completing a number of sub-steps.<sup>24</sup>

First, a plan must determine the legal boundaries of a TIF district. A TIF district is the grouping of parcels on which TIF will be levied. A portion of the tax revenue collected on the increments of these parcels will be earmarked for the segregated TIF account. Ordinarily, this revenue may only fund projects closely linked to parcels located within the TIF district.

The boundaries of a TIF district include both a geographic and temporal element, and not just any parcel or property may be “TIF’d.” In Illinois, for example, in order for a property to be placed into a TIF district, the property must be located in either a blighted area or a conservation area.<sup>25</sup> In Ohio, residential properties are generally not eligible for TIF.<sup>26</sup> Meanwhile, some states allow for TIF ‘incentive districts’ which allow cities to TIF large swaths of parcels all at once.<sup>27</sup> Additionally, for some states, such as Texas, TIF automatically will terminate when a project’s costs are paid in full.<sup>28</sup> However, in other states, like California, TIF districts may exist for 50 years before an effort to renew them need be undertaken.<sup>29</sup>

Second, the formation of a formal re-development plan requires a city or county to make a number of declarations.<sup>30</sup> For example, a city or county should generally estimate a project’s timeline and cost. This may be done by soliciting bids from potential developers. The city or county must also determine at what level to freeze the taxable bases of parcels within

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24. *Id.* at 12–13.

25. S. B. FRIEDMAN & CO., TAX INCREMENT FINANCING 1–2, [https://www.hudexchange.info/resources/documents/TIF\\_FactSheet.pdf](https://www.hudexchange.info/resources/documents/TIF_FactSheet.pdf).

26. OHIO DEV. SERVS. AGENCY, *supra* note 21, at 1.

27. OHIO DEV. SERVS. AGENCY, TAX INCREMENT FINANCING INCENTIVE DISTRICTS 1 (2006), [https://development.ohio.gov/files/bs/TIF\\_IncentiveDistrictsSummary.pdf](https://development.ohio.gov/files/bs/TIF_IncentiveDistrictsSummary.pdf).

28. TEX. TAX CODE ANN. § 311.017 (LEXIS through the 2019 Reg. Sess., 86th Leg., and 2019 election results).

29. *Tax Increment Financing Resource Center*, COUNCIL OF DEV. FIN. AGENCIES, <https://www.cdfa.net/cdfa/cdfaweb.nsf/resourcecenters/tif.html?open&state=CA>.

30. GREIFER, *supra* note 19, at 13.

the TIF district. This is particularly important because it determines how much base revenue taxing jurisdictions, such as school boards, will receive following TIF. Other important declarations include a projection of how much revenue TIF will collect and a detailed statement describing the public purpose to be achieved through TIF. These last two findings are important because they relate to the feasibility of a project as well as to whether or not the government has the authority to exercise TIF.

The third and final step in setting forth a plan of re-development is the finding that TIF satisfies a “but for” analysis. A “but for” analysis is simply a determination that, ‘but for’ the financial assistance TIF will provide, no economic development or re-development would take place. For example, before creating a TIF district in Minnesota, a city or county must make “but-for” findings that (1) the development would not occur without TIF assistance and (2) that the market value of the TIF development will be higher (after subtracting the value of the TIF assistance) than what would occur on the site if TIF were not used.<sup>31</sup> This finding is meant to protect TIF funds from misappropriation. In the words of the Minnesota Legislature, “if development would have been done anyway, why should TIF be used to assist it?”<sup>32</sup>

### 3. *Phase 3 - Adopt the Plan of Re-development*

Phase three in the TIF life-cycle is the formal adoption by a city or county of a declaratory resolution broadly laying out the justification, scope, and terms of a TIF plan.<sup>33</sup> Following the drafting of such a resolution, a city or county must attempt to notify all parties potentially to be affected by a proposed TIF plan. This includes notifying not only those whose properties will be placed into the TIF district, but also the bodies of government whose taxing authority may be affected by the creation of the TIF plan, namely school boards.<sup>34</sup> In certain states, TIF may not be adopted without the blessing of the local

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31. JOEL MICHAEL, MINN. HOUSE RESEARCH DEP'T, TAX INCREMENT FINANCING (2018), <http://www.house.leg.state.mn.us/hrd/pubs/ss/sstif.pdf>.

32. *The But-For Test*, MINN. HOUSE RESEARCH DEP'T (2015), <https://www.house.leg.state.mn.us/hrd/issinfo/tif/butfor.aspx>.

33. GREIFER, *supra* note 19, at 12–13.

34. *See, e.g.*, OHIO DEV. SERVS. AGENCY, *supra* note 21, at 2 (“Municipalities, townships, and counties are required to notify all affected boards of

school board. After a series of public hearings, a city or county will vote on the aforementioned resolution.<sup>35</sup> An adopted resolution will ultimately be recorded as an ordinance.

#### 4. *Phase 4 - Implement the Plan of Re-development*

Phase four in the TIF life-cycle allows for a city or county to begin implementing its plan of re-development. The specifics of implementation vary depending on the nature of a re-development project (e.g., whether the project is a public or private initiative). Generally, TIF may either (i) provide gap financing to certain private “but for” projects that would not otherwise occur, or (ii) fund certain public initiatives being undertaken directly by a city or county (e.g., public infrastructure). When TIF funds are granted to private developers to subsidize private projects deemed to serve a public purpose, a city or county will enter into grant agreements with the developers. Such agreements list the terms that must be met by a developer in order for him or her to receive the proceeds of a TIF grant.<sup>36</sup> No such grant agreements are necessary where a city or county directly undertakes a re-development effort.

The next step when implementing a plan of re-development is the issuance of debt by a city or county. This debt will be used to fund a re-development project and will be serviced by the increased tax revenue generated on the project’s increment. A number of financing options are available to a city or county when raising debt, including general obligation bonds, TIF revenue notes, private activity revenue bonds, and special assessments.<sup>37</sup>

Upon the completion of a re-development project, a city or county will begin to collect tax revenue earned on a project’s increment. This revenue is referred to as PILOT, or “payment in lieu of taxes.” This term demonstrates that the revenue is being collected in place of property taxes that would otherwise be owed on a parcel. PILOTs are collected in the same manner as property taxes, but instead of being appropri-

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education at least 14 calendar days prior to their formal consideration of proposed TIF legislation.”)

35. DAN JONES, IND. DEP’T OF LOCAL GOV’T FIN., TAX INCREMENT FINANCING (TIF) 16–18 (2015), <http://slideplayer.com/slide/3929688>.

36. Interview with Eric Wobser, City Manager, City of Sandusky, in Sandusky, Ohio (Jan. 3, 2019).

37. See COUNCIL OF DEV. FIN. AGENCIES, *supra* note 10.

ated to certain taxing jurisdictions, like school boards, are placed into a TIF account and used to service a city or county's TIF debt.<sup>38</sup> While the retiring of this debt coincides with the termination of TIF in some states, like Texas and New Hampshire, in many states, where debt may be retired prior to the end of TIF's lifespan (which can be as long as 50 years), TIF will continue to collect PILOTs.<sup>39</sup> This additional revenue may then be used to fund other projects in a TIF district that satisfy an assessment of need.

5. *Phase 5 - Evaluate the Plan of Re-development and Terminate*

The last phase in the life-cycle of TIF includes its evaluation and, ultimately, termination. Throughout this step "a government monitors the performance of the TIF district and reports financial results to internal management and, if applicable, to state oversight bodies."<sup>40</sup> Typically, a city or county will create a group or council tasked with reviewing a TIF project. For example, the State of Ohio requires every county, township, or municipal corporation granting an exemption from taxation under any number of state provisions to create a Tax Incentive Review Council ("TIRC").<sup>41</sup> Under this statute, a TIRC is generally tasked with (i) reviewing agreements which grant exemptions from property tax and (ii) making determinations as to whether or not a party has complied with the requirements of its agreement. After review, a TIRC will submit a report to its relevant legislative body. The report will include a recommendation indicating whether or not a city or county should withdraw from its agreement. Assuming that a TIRC or TIRC-equivalent finds no reason to recommend a withdrawal from a TIF agreement, TIF may run until the end of its statutorily prescribed life, unless measures are taken to amend it. When TIF expires, tax revenue earned by the TIF account on the increment will be redirected to an applicable taxing authority (usually a school district).

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38. See, e.g., GREIFER, *supra* note 19, at 13; see also Interview with Eric Wobser, *supra* note 36.

39. See COUNCIL OF DEV. FIN. AGENCIES, *supra* note 10.

40. GREIFER, *supra* note 19, at 13.

41. See OHIO REV. CODE ANN. § 5709.85(A) (West 2016). TIFs, which are characterized as PILOTs, are included under this provision.

There are a variety of measures a TIRC or TIRC-equivalent may use when evaluating TIF projects.<sup>42</sup> First, for example, a government may evaluate success by measuring the number of inputs or resources used within a TIF district. This type of metric usually quantifies the amount of dollars a TIF account raised for development or how much square footage TIF impacted.<sup>43</sup> This metric often tallies the gross number of resources used in a TIF project and places little regard on how effectively these resources were used. Second, oversight may focus on the output of an investment. This metric lists how TIF funds were spent. For example, Evanston, Illinois measures the number of jobs retained or created by TIF, the number of streetscaping fixtures installed, and the amount of commercial space created.<sup>44</sup> Again, such a metric ignores any analysis as to whether these results were worth the resources used to achieve them.

In order to examine the effectiveness of TIF spending, some cities and counties have turned to efficiency and effectiveness metrics. Efficiency metrics “monitor the relationship between amounts produced and resources used.”<sup>45</sup> Such metrics are typically ratios, like the ‘leverage ratio,’ which measures private investment over public investment in a TIF district. A high leverage ratio implies TIF funds are catalyzing private investment. Effectiveness metrics, meanwhile, “measure the effect of a TIF project against its goal, such as blight reduction.”<sup>46</sup> For example, Evanston, Illinois also measures the percentage change in assessed property values within its TIF district as compared to such changes within the rest of the city.<sup>47</sup>

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42. See, e.g., GREIFER, *supra* note 19, at 28–29.

43. See, e.g., JOHANNA NYDEN, CITY OF EVANSTON, MEMORANDUM TO CHAIR AND MEMBERS OF THE CHICAGO/MAIN TIF COMMITTEE (Sept. 25, 2013), <https://www.cityofevanston.org/Home/ShowDocument?id=31306>; see also *What Are the Different Types of Performance Measures?*, IOWA DEP’T OF MGMT., <https://dom.iowa.gov/faq/what-are-different-types-performance-measures> (last visited Feb. 1, 2020).

44. See NYDEN, *supra* note 43.

45. IOWA DEP’T OF MGMT., *supra* note 43.

46. GREIFER, *supra* note 19, at 28.

47. NYDEN, *supra* note 43.

## II.

## ISSUES WITH TAX INCREMENT FINANCING

A. *Introduction*

As prolific as tax increment financing is throughout the United States, it has not been well received by all. In recent years in particular, tax increment financing has attracted new and heavy criticism aimed at nearly every one of its underlying premises. For example, the following is a short survey of common assaults hurled against TIF proponents:

“Politicians tend to make bad venture capitalists.”<sup>48</sup>

“Developments subsidized by TIF would have happened anyway. . .”<sup>49</sup>

“City officials will always be tempted to use TIF as a vehicle for crony capitalism. . .”<sup>50</sup>

“TIF subsidizes big businesses at the expense of less politically influential competitors and ordinary citizens. . .”<sup>51</sup>

“The entire Western World could be blighted.”<sup>52</sup>

“TIF is. . . becom[ing]. . ., in some cases a slush fund.”<sup>53</sup>

“TIF funds are sheltered from official oversight”<sup>54</sup>

“. . . [C]ities that adopt TIF grow more slowly than those that do not.”<sup>55</sup>

And the list goes on.

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48. Adam Milsap, *Does Tax Increment Financing (TIF) Generate Economic Development?*, MERCATUS CTR., GEO. MASON U.: NEIGHBORHOOD EFFECTS (Jun. 20, 2016), <https://neighborhoodeffects.mercatus.org/2016/06/20/does-tax-increment-financing-tif-generate-economic-development/>.

49. Randal O’Toole, *Crony Capitalism and Social Engineering: The Case Against Tax Increment Financing*, POL’Y ANALYSIS, May 18, 2011, at 1.

50. *Id.*

51. Daniel McGraw, *Tax Increment Financing: A Bad Bargain for Taxpayers*, RECLAIM DEMOCRACY!, [http://reclaimdemocracy.org/tax\\_increment\\_financing/](http://reclaimdemocracy.org/tax_increment_financing/) (last visited Feb. 1, 2020).

52. *Id.*

53. Scott Beyer, *The Perils and Promises of a Popular Yet Controversial Financing Method*, GOVERNING: URB. NOTEBOOK (May, 2016), <https://www.governing.com/columns/urban-notebook/gov-tax-increment-financing.html>.

54. Camille Fink, *The Problems with Tax Increment Financing and How to Fix Them*, PLANETIZEN (Nov. 13, 2018, 11:00 AM), <https://www.planetizen.com/news/2018/11/101506-problems-tax-increment-financing-and-how-fix-them>.

55. Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Economic Development*, 47 J. URB. ECON. 306, 306 (2000).

While each of these criticisms is worthy of further analysis, such analysis is outside the scope of this article. Instead this article seeks to highlight a common theme underlying these concerns. Namely, this article will explore what problems may arise if TIF turns out to be too successful.

### B. *The Problem of Success*

#### 1. *Is There a Problem?*

Despite recent criticism, it does not appear that the use of tax increment financing will disappear any time soon. As a matter of fact, TIF is often heralded for its many success stories.<sup>56</sup> For example, the League of Wisconsin Municipalities recently labeled TIF “the most effective tool Wisconsin cities and villages have to spur economic development and job creation.”<sup>57</sup> A former advisor to the Obama Administration on development finance policy, meanwhile, has attributed the successful renovation of the Beltline corridor around Atlanta, Georgia to TIF.<sup>58</sup> For many people, finding a TIF success story requires nothing more than taking a walk around the block or turning on one’s television. For instance, Chicago’s Willis Tower was purchased in 2004 for \$840 million. Between 2004 and 2015, Chicago spent millions of TIF dollars refurbishing the tower and subsidizing companies willing to relocate their offices to it.<sup>59</sup> In 2015, these efforts helped lead to a sale of the tower for \$1.3 billion. While the TIF improvements are not responsible for this entire increase in value, they undoubtedly had a positive impact on its overall assessment.

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56. See, e.g., *TIF Success Stories*, DEP’T OF PLANNING AND DEV., CITY OF CHICAGO, [https://www.chicago.gov/city/en/depts/dcd/supp\\_info/tif\\_success\\_stories.html](https://www.chicago.gov/city/en/depts/dcd/supp_info/tif_success_stories.html) (last visited Jan. 20, 2020).

57. *TIF Economic Development Tool*, LEAGUE OF WIS. MUNICIPALITIES, <http://www.lwm-info.org/1544/TIF-Economic-Development-Tool> (last visited Jan. 20, 2020).

58. Toby Rittner, *Tax Increment Finance: A Success-Driven Tool for Catalyzing Economic Development and Social Transformation*, 9 COMMUNITY DEV. INV. REV. 131 (2013), <https://www.frbsf.org/community-development/files/tax-increment-finance-success-driven-tool-catalyzing-economic-development-social-transformation.pdf>.

59. Ben Joravsky & Mick Dumke, *The Shadow Budget*, CHI. READER, (Oct. 22, 2009), <https://www.chicagoreader.com/chicago/the-chicago-shadow-tif-budget/Content?oid=1218391>.

Given the apparent efficacy of tax increment financing at achieving its stated purpose of aiding economic development and increasing the value of a parcel, what does it mean to portray its positive outcomes as problematic? While the full answer to this question is nuanced and requires a review of the first and second phases of tax increment financing, and possibly of its underlying rationales, the short answer is that “successful” TIF may in fact be a strong indication that its use in the first place was unnecessary.

Cities and counties adopt TIF to finance projects that will attract or accommodate economic development. To finance these projects, TIF’d property values are frozen at their pre-development level for years on end. Freezing these property values imposes a ceiling on how much in property tax revenue a city or county may collect from these properties. This is tax revenue that would otherwise go to a local school district or to a general fund. Accordingly, it is in the interest of a city or county government employing TIF to ensure that such financing is used only where absolutely necessary to finance a project that would not otherwise occur.

Without limiting the use of TIF to projects that would not otherwise occur, it may become subject to abuse and over-use. TIF is abused when a city or county official exploits its funds for personal gain. It is over-used when it is granted in situations which, arguably, may not require its use. The difference between abuse and over-use is simply intent. In any event, if used excessively, “successful” TIF projects may start to include those which could have (and maybe would likely have) occurred with or without such assistance. Once projects, especially projects that would likely always have been successful, begin to exploit tax increment financing, the tool loses legitimacy as local residents begin to see it as a government provided subsidy to developers (i.e., a handout). This lack of legitimacy spawns many of the previously alluded to complaints, such as “TIFs are public slush funds.” The final effect of TIF, in this respect, may ultimately be that it imposes long financial constraints on a local government or school district, antagonizes a local population, and needlessly appropriates away public funds. In return, a city or county may simply receive a project that would have happened with or without TIF.



## 2. *Current Checks on the Problem of Success and Their Drawbacks*

Phase one in the life-cycle of TIF mandates an assessment of need, while phase two (in most states) requires a ‘but for’ analysis. The assessment of need is meant to ensure that TIF funds are only spent on projects serving a public purpose. For states with a ‘but for’ requirement, such an analysis is thought to serve two purposes.<sup>60</sup> First, a ‘but for’ analysis is meant to prevent the excessive and unnecessary use of TIF. Second, the analysis is meant to protect the revenue streams of city and county governments.

When taken seriously, these two precautions help protect a city or county from an air of impropriety and from unnecessarily diverting significant revenue away from a general fund or local school district. Unfortunately, these precautions are often glossed over and lack the teeth necessary to render them effective checks on TIF abuse and excess.

For example, when conducting an assessment of need, most jurisdictions allow for TIF in the event of blight. However, what exactly qualifies as ‘blight’ has been the subject of debate for decades. From *Berman v. Parker* to *Kelo v. City of New London*, blight remains poorly defined, and a finding of ‘blight’ by a state or local government is rarely successfully challenged.<sup>61</sup> In Cincinnati, Ohio for example, local law lists at least sixteen different factors that may support a determination of blight. Many of these factors are vague and are flexible enough to include most of Cincinnati. For example, these factors include age and obsolescence; inadequate light, air, ventilation, or open space; excessive dwelling unit density; faulty lot unit layout in relation to size, adequacy, accessibility, or usefulness; and even an overcrowding of buildings.<sup>62</sup>

As poor as assessments of need are at preventing the excessive use of TIF, the problems surrounding the efficacy of a

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60. MINN. HOUSE RESEARCH DEP’T, *supra* note 32.

61. *See, e.g.*, JAMES S. BURLING, EMINENT DOMAIN AND LAND VALUE LITIGATION: BLIGHT LITE, SH053 A.L.I.–A.B.A. CONTINUING LEGAL EDUC. 43 (2003) (“[I]f the requisite finding of blight entails little more than an unchallenged and unchallengeable incantation of a few ubiquitous factors, then landowners may suffer a needless loss of property while the public gains only a dubious redevelopment project.”).

62. *Tax Increment Financing and Ohio’s Definition of Blight*, CINCYPOLIS (Nov. 11, 2014), <https://cincyopolis.wordpress.com/2014/11/11/tax-increment-financing-and-ohios-definition-of-blight/>.

'but for' analysis are equally detrimental to its effectiveness as a check. For example, in Minnesota, despite requiring that a city or county conduct preliminary 'but for' analyses, there appears to be no remedy in the event such analyses are later shown to be "false or contrary to fact."<sup>63</sup> In the words of the state legislature, the provisions surrounding TIF appear to indicate an intent "to preclude a court or another administrative entity (State Auditor or Attorney General) from 'second guessing' the basis for the finding."<sup>64</sup> Overall, there is a general concern that "many TIF projects lack a legitimate 'but for' element,"<sup>65</sup> and that they usually require only a "very low hurdle" and are "not uniformly or rigorously applied."<sup>66</sup>

The ineffectiveness of these two precautionary steps leave cities and counties vulnerable to the negative consequences of excessive TIF. Projects that likely would have occurred without TIF assistance receive subsidies and divert tax revenue from general budgets and school districts for years on end. For these reasons, TIF projects, even where successful by all other measures, may be doing more harm than good. In this regard, successful TIF projects have been said to represent nothing more than pyrrhic victories.<sup>67</sup>

### 3. *What About the Political Process?*

A final check offered against excessive TIF is the political process. The underlying theory is that residents of a city or county may always vote out of office politicians who abuse or over-use tax increment financing. Unfortunately, several obstacles often impede voting electorates from holding the responsible parties accountable. Below is a brief survey outlining some of the most manifest hindrances.

First, TIF is often criticized for its lack of transparency.<sup>68</sup> A lack of information concerning the use and success of TIF

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63. MINN. HOUSE RESEARCH DEP'T, *supra* note 32.

64. *Id.*

65. Robert Sroka, *Pyrrhic Victory: Tax Increment Financing, "But For," and Developer Capture in the Dallas Arena District*, 28 MARQ. SPORTS L. REV. 201, 202 (2017).

66. Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 77 (2010).

67. Sroka, *supra* note 65.

68. See, e.g., Kate Campaigne Piercy, *Tax Increment Financing: Hidden in Plain Sight*, ILL. POL'Y, <https://www.illinoispolicy.org/reports/tax-increment->

may inhibit an electorate's ability to make an informed decision on TIF related issues. Second, an electorate may be unable to determine if blame should be held by a city or county manager, who often is the person negotiating a proposal, or by the officials whose authority it ultimately is to ratify a proposal. The fact that many city or county managers are appointed, and not elected, further may exacerbate this point. Third, TIF projects can span many years, if not decades. By the time the success or necessity of a project may be adequately determined, the fact that TIF helped subsidize a project may be nothing more than a distant memory in the minds of the public. Finally, TIF is complicated by its very nature, leaving savvy politicians ample room to cover their actions under a cloak of confusion and complexity.

For further reading about issues surrounding the political process, refer to *Political Process: Needs Repair*.<sup>69</sup>

### III.

#### TAX INCREMENT FINANCING IN ACTION

##### A. *Introduction*

The subject matter of Parts III and IV will focus on the municipality of Sandusky, Ohio and, in particular, on projects in a TIF district covering a large part of its historic downtown. These Parts will consider the rationale for why TIF was chosen as an instrument of development, the course of its life-cycle, and the potential risks and issues related to its projects. The information for this Part resulted from a compilation of local newspaper articles, minutes and transcripts from local hearings, ordinances and resolutions passed by the municipality, and from an interview with the city manager.

##### B. *Sandusky, Ohio*

Sandusky, Ohio is a two hundred year old micropolitan situated on Lake Erie. Finding itself nestled between Detroit,

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financing-hidden-in-plain-sight/ (last visited Jan. 29, 2020); see also ROB KERTH & PHINEAS BAXANDALL, U.S. PIRG EDUC. FUND, TAX INCREMENT FINANCING: THE NEED FOR INCREASED TRANSPARENCY AND ACCOUNTABILITY IN LOCAL ECONOMIC DEVELOPMENT SUBSIDIES (2011).

69. FREEDOM HOUSE, *Political Process: Needs Full Repair*, in TODAY'S AMERICAN: HOW FREE, <https://freedomhouse.org/report/todays-american-how-free/political-process-needs-repair-full-chapter> (last visited Jan. 29, 2020).

Michigan and Cleveland, Ohio, Sandusky is firmly planted within the American Rust Belt. In line with the fall of the U.S. manufacturing industry, which began in the 1980s, Sandusky has seen a decline in its population every decade since its peak in 1970 of 33,000 residents. As of 2017, Sandusky has just under 25,000 residents, representing a further decline of over 4% from its 2010 population.<sup>70</sup>

Despite manufacturing's decline, the industry still captures a plurality of Sandusky's workforce, although it appears that the accommodation and food service industry may soon overtake its position as the region's top employer.<sup>71</sup> Sandusky's waterfront location and the presence of multiple regional draws, such as the Cedar Point amusement park, have shifted Sandusky toward this more service-based economy in recent decades.

The median household income within Sandusky is just over \$36,000, and an estimated 22.9% of the population lives below the poverty line. The median age is 39.4 years.<sup>72</sup> In comparison, statistics for the overall United States include a median household income of \$59,000, a poverty rate of 13.5%, and a median age of 38 years.

### C. *Downtown Sandusky and the Chesapeake TIF*

Foot, boat, train, and horseback comprised the most common means of locomotion prior to the dawn of the automobile. Compared to an automobile, none of these means are particularly efficient forms of travel. While driving a few miles to the nearest supermarket may be quick and easy in modern times, the same trip could take many hours without a car. For this reason, many of America's historic downtowns are geographically confined to pedestrian-friendly city cores.

This sort of development, commonly referred to as transit oriented development, is easily imagined. Simply picture how any U.S. city looked at the turn of the 20th century. For most Americans, such a thought likely sparks images of two and three story brick buildings, side-by-side, along a short strip of

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70. *QuickFacts: Sandusky City, Ohio*, U.S. CENSUS BUREAU (2018), <https://www.census.gov/quickfacts/sanduskycityohio>.

71. *Sandusky, OH*, DATA USA, <https://datausa.io/profile/geo/sandusky-oh/#economy> (last visited Mar 29, 2019).

72. U.S. CENSUS BUREAU, *supra* note 70.

road. On the ground level, just off a sidewalk, may be a market or shop. Above this level are apartments and offices. A block further may appear a post office and public library. Such an image is how Sandusky looked near the turn of the 20th century. It was designed in a way that would most efficiently accommodate its population.

Unfortunately, the rise of the automobile brought with it the problem of urban sprawl.<sup>73</sup> Beginning in the 1950s, anchor stores, such as a department store or local grocery, began to leave main street for larger spaces on cheaper land closer to the edge of town. Cities abandoned their schemes of vertical and pedestrian-friendly growth in favor of an uncontrolled model of horizontal growth. As more and more people and businesses left for the outskirts, many of America's urban cores became ghost towns. This was true of many American cities, Sandusky included.

After decades of decline, however, many downtowns are beginning to see signs of rebirth. Between 2000 and 2010, all but five of the country's fifty largest central cities experienced an uptick in population.<sup>74</sup> While various reasons have been cited as the cause behind Americans' renewed interest in downtown living, city and county managers have been quick to take notice. Sandusky responded to this nationwide wave of enthusiasm, for example, by adopting what came to be known as the "Chesapeake TIF."<sup>75</sup>

The Chesapeake TIF, named for the property on which it is levied, was adopted to finance the re-development of an empty waterfront factory adjacent to the core of Sandusky's downtown. While this particular project, which transformed the factory into modern condominiums, is not the focus of this illustration, it provides some important background. The Chesapeake TIF, officially passed in 2006, is a thirty year, 100% TIF. It is not set to terminate until the year 2038 and 100% of

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73. Barrett Barlowe, *How Did Urban Sprawl Begin?*, SFGATE (2018), <https://homeguides.sfgate.com/did-urban-sprawl-begin-1719.html>.

74. Mario Polese, *Why (Some) Downtowns Are Back: Lessons from the Urban Resurgence*, CITY J., Winter 2014 (nearly every major downtown suffered a loss in population between 1950 and 1980).

75. Richard Payerchin, *Waterfront Plan in Motion*, MORNING J. (Feb. 3, 2004), [https://www.morningjournal.com/news/waterfront-plan-in-motion/article\\_31691767-b623-5409-904f-2aec882b8bdf.html](https://www.morningjournal.com/news/waterfront-plan-in-motion/article_31691767-b623-5409-904f-2aec882b8bdf.html).

any increase in property value above its 2006 base is diverted directly toward Sandusky's Chesapeake TIF account.<sup>76</sup>

Fortunately for Sandusky, the Chesapeake TIF was successful. The Chesapeake Lofts, as the property is now called, maintain healthy occupancy and generate enough payments in lieu of tax to service the debt borrowed to finance the redevelopment. In fact, Sandusky estimates that it will fully pay off its debt related to this project by 2020.<sup>77</sup> The Chesapeake TIF account had a 2018 net present value of roughly \$11 million after accounting for any remaining debt payments. The following illustration will focus on how these funds are being put to use throughout Sandusky.

#### 1. *Phase 1 - Sandusky's Assessment of Need*

An Ohio city looking to spend TIF dollars on economic development projects must first designate which properties will be included in its TIF district. Properties located within a TIF district are generally the only properties eligible to receive TIF dollars. When determining which properties to include within a district, a city is guided by the additional limiting principle that TIF dollars may only be spent on projects serving a public purpose.<sup>78</sup> With \$11 million in present value TIF available, Sandusky officials assessed which of its downtown properties could best be served through inclusion in the Chesapeake TIF district.<sup>79</sup>

Sandusky's initial assessment of need focused on buildings which were both registered on the National Registry of Historic Places<sup>80</sup> and which were largely vacant, totally abandoned, or in danger of being demolished.<sup>81</sup> In other words, these properties could be understood as "blighted." Underlining the need for the public to protect and include these historic buildings was the expensive loss of similar structures from the city's skyline in previous years. For example, the Kel-

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76. Interview with Eric Wobser, *supra* note 36.

77. *Id.*

78. *Business Grants, Loans and Tax Credits: Tax Increment Financing (TIF)*, OHIO DEV. SERVS. AGENCY, [https://development.ohio.gov/bs/bs\\_tif.pdf](https://development.ohio.gov/bs/bs_tif.pdf).

79. Interview with Eric Wobser, *supra* note 36.

80. *National Register of Historic Places Listings in Sandusky, Ohio*, WIKIPEDIA, [https://en.wikipedia.org/wiki/National\\_Register\\_of\\_Historic\\_Places\\_listings\\_in\\_Sandusky,\\_Ohio](https://en.wikipedia.org/wiki/National_Register_of_Historic_Places_listings_in_Sandusky,_Ohio).

81. Interview with Eric Wobser, *supra* note 36.

ler Building, a century old icon adjacent to the Chesapeake Lofts was recently torn down at a cost to the city of \$550,000. This occurred after Sandusky was unable to lure investors to re-develop the property.<sup>82</sup> In addition to the loss of such a prominent building, the site of the former Keller Building today remains undeveloped green space.<sup>83</sup> While future development on the site is planned for 2020, it is unclear if the property taxes to be generated from this new development will raise more than those of a refurbished Keller Building.<sup>84</sup>

In addition to targeting historic buildings worth more to the city standing than as green space, Sandusky identified a number of other locations which, if included as “part of a thoughtful strategy” of revitalization, had potential to catalyze economic growth in the area.<sup>85</sup>

## 2. Phase 2 - Sandusky Creates a Plan of Re-development

Sandusky’s assessment identified a number of properties in need of development and eligible for TIF. With limited funding available, however, Sandusky was forced to restrict which eligible properties would be granted inclusion in the Chesapeake TIF district. Sandusky turned to its “Bicentennial Vision” to inform such determinations. The Bicentennial Vision resulted from a “yearlong fact-finding mission” undertaken in 2015.<sup>86</sup> During that year, Sandusky reached out to “residents, entrepreneurs, stakeholders, and anyone else valuing Sandusky” to shape the goals of the plan. The Vision sets out detailed goals for Sandusky to achieve over its next 5, 10, and 20 years.<sup>87</sup> Chief amongst its goals is the creation of a more

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82. Richard Payerchin, *Keller Building Could Become Apartments, Proposal States*, MORNING J. (May 12, 2009), [https://www.morningjournal.com/news/keller-building-could-become-apartments-proposal-states/article\\_3b04a2ba-70b4-5b82-a545-8c11d330c212.html](https://www.morningjournal.com/news/keller-building-could-become-apartments-proposal-states/article_3b04a2ba-70b4-5b82-a545-8c11d330c212.html)

83. See Appendix.

84. Andy Ouriel, *Downtown Sandusky Townhouse Project Receives Public Subsidy*, SANDUSKY REG., Aug. 15, 2019, <https://sanduskyregister.com/news/27219/downtown-sandusky-townhouse-project-receives-public-subsidy/>

85. Interview with Eric Wobser, *supra* note 36.

86. Andy Ouriel, *The \$95M Plan for a Stellar Sandusky*, SANDUSKY REG. (Apr. 27, 2018), <http://www.sanduskyregister.com/story/201804270013>.

87. Andy Ouriel, *The New Sandusky*, SANDUSKY REG. (Dec. 12, 2015), <http://www.sanduskyregister.com/story/201512110038>.

vibrant, bustling, and livable downtown, as well as a downtown that more fully exploits its waterfront location.<sup>88</sup>

With guidance from the Bicentennial Vision, Sandusky chose five eligible properties the development of which would be consistent with the goals of the plan. Three such properties were historic buildings in danger of demolition or further deterioration.<sup>89</sup> The remaining two properties represented land adjacent to waterfront on the Sandusky Bay.<sup>90</sup>

After choosing these five properties for further development, Sandusky retained outside organizations to perform feasibility studies and to conduct other professional design services.<sup>91</sup> In addition, Sandusky began working with potential developers to lure investment to the sites.<sup>92</sup> Only projects consistent with the Bicentennial Vision would be considered for a TIF grant. In addition, developers were required to provide proof that their proposals would not be possible “but for” TIF assistance.<sup>93</sup>

### 3. *Phase 3 - Sandusky Adopts the Plan of Re-development*

With the completion of phases one and two, Sandusky kicked off the process of formally adopting its plans of re-development. Adoption required, first, approval to expand Chesapeake TIF coverage over the five chosen properties and, second, the passing of an ordinance granting TIF dollars to the related projects.

The first step involved the Sandusky City School Board. Per Ohio law, municipalities must notify all affected school boards prior to formal consideration of a TIF proposal.<sup>94</sup>

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88. CITY OF SANDUSKY, SANDUSKY 2018: CITY OF SANDUSKY BICENTENNIAL VISION, STRATEGIC PLAN 2016–2020 (2016), <http://www.ci.sandusky.oh.us/BICENTENNIAL/Bicentennial%20Plan%202016.pdf>.

89. The Cooke Building, Calvary Temple, and Feicke Building Projects.

90. The Jackson St. Pier Project, The Shoreline Drive Project.

91. See, e.g., SANDUSKY CITY COMM’N, REGULAR SESSION AGENDA (Jan. 23, 2017), <http://www.ci.sandusky.oh.us/CC%20Agendas/1.23.17.pdf> (Items #7 & #8); see also CITY OF SANDUSKY COMM’RS, REGULAR SESSION (Dec. 11, 2017), <http://www.ci.sandusky.oh.us/CC%20Agendas/CC%20Minutes/12.11.17%20CC%20Minutes%20R%20E%20V%20I%20S%20E%20D.pdf>.

92. Andy Ouriel, *Sandusky Provides \$500K for Cooke Complex Project*, SANDUSKY REG. (July 23, 2018), <http://www.sanduskyregister.com/story/201807230019>.

93. Interview with Eric Wobser, *supra* note 36.

94. OHIO DEV. SERVS. AGENCY, *supra* note 21, at 2.



Should a proposed TIF exempt more than 75% of an increment from taxation, an Ohio school board may approve, conditionally approve, or reject any proposed exemptions in excess of 75%. Here, school board approval was required as Sandusky sought to expand the Chesapeake TIF, which would exempt 100% of the increment. Such approval was ultimately granted. According to city manager Eric Wobser, his office and that of the school board understand their fates are “intertwined.”<sup>95</sup> It is ultimately in the best interest of the school district if his office can effectively attract new businesses and increase overall property assessments in the long run.

With school board approval, Sandusky held hearings to discuss and vote on expansion of the TIF district and approval of the proposed projects. On February 13th, 2017, after a full discussion of the proposals, the Sandusky City Commission voted five-to-one, with one abstention, in favor of expanding the Chesapeake TIF. The single dissenting vote expressed a concern that city residents would lack meaningful say in choosing which projects would ultimately receive funding.<sup>96,97</sup> After expansion, the City Commission held further public hearings<sup>98</sup> and later approved the specific TIF projects.<sup>99</sup>

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95. Interview with Eric Wobser, *supra* note 36.

96. CITY OF SANDUSKY, OHIO, ORDINANCE 17-019 (Feb. 13, 2017), <http://www.ci.sandusky.oh.us/LEGISLATION/12.22.17%20ORD.pdf>; CITY OF SANDUSKY COMM’RS, REGULAR SESSION 8 (Feb. 13, 2017), <http://www.ci.sandusky.oh.us/CC%20Agendas/CC%20Minutes/2.13.17%20CC%20Minutes.pdf>.

97. CITY OF SANDUSKY COMM’RS, *supra* note 96, at 8.

98. *See, e.g.*, CITY OF SANDUSKY COMM’RS, REGULAR SESSION 10 (July 24, 2017), <http://www.ci.sandusky.oh.us/CC%20Agendas/CC%20Minutes/7.24.17%20CC%20Minutes.pdf>; CITY OF SANDUSKY COMM’RS, REGULAR SESSION 1 (Sept. 25, 2017), <http://www.ci.sandusky.oh.us/CC%20Agendas/CC%20Minutes/9.25.17%20CC%20Minutes.pdf>; CITY OF SANDUSKY COMM’RS, REGULAR SESSION 14 (Apr. 23, 2018), <http://www.ci.sandusky.oh.us/CC%20Agendas/CC%20Minutes/4.23.18%20CC%20Minutes.pdf>; CITY OF SANDUSKY COMM’RS, REGULAR SESSION 1 (July 23, 2018), <http://www.ci.sandusky.oh.us/CC%20Agendas/CC%20Minutes/7.23.18%20CC%20Minutes.pdf>.

99. *See, e.g.*, CITY OF SANDUSKY COMM’RS, REGULAR SESSION 1 (Mar. 27, 2017), <http://www.ci.sandusky.oh.us/CC%20Agendas/CC%20Minutes/3.27.17%20CC%20Minutes.pdf> (city hall); CITY OF SANDUSKY COMM’RS, REGULAR SESSION 4 (Mar. 26, 2018), <http://www.ci.sandusky.oh.us/CC%20Agendas/CC%20Minutes/3.26.18%20CC%20Minutes.pdf> (Feick; Jackson St. Pier).

#### 4. *Phase 4 - Sandusky Implements its Plan of Re-development*

The five projects granted TIF included (1) the re-development of a new city hall (TIF/Total Cost: \$3M/\$11.5M),<sup>100</sup> (2) the construction of a large marketplace (\$500K/\$6M),<sup>101</sup> (3) the re-opening of a centrally located mixed-use apartment complex (\$1.3M/\$14M),<sup>102</sup> (4) the redesign of a waterfront thoroughfare (\$3.15M/\$8.8M),<sup>103</sup> and (5) the overhaul of a bay-front pier (\$4.8M/\$8.1M).<sup>104</sup>

These projects will represent over \$48 million dollars of investment in Sandusky's downtown by 2020. TIF accounts for over \$12 million, or 26%, of this aggregate investment. Upon completion, nearly 160,000 square feet of commercial space will be improved, not including the renovations to the thoroughfare or pier. In short, these projects seek to radically alter the current economic trajectory of the Sandusky downtown.

Of these projects, the marketplace and mixed-use apartment complex constitute projects undertaken by private investors, while the pier and thoroughfare represent public initiatives. The new city hall is a public-private partnership.

To implement the privately led projects, Sandusky negotiated grant agreements with private developers. These agreements detailed the terms surrounding the TIF disbursements. With its downtown crumbling into green space,<sup>105</sup> a major priority for Sandusky during negotiation was to ensure the protection of its historic architecture. To this end, the city tied

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100. Andy Ouriel, *A Sneak Peek into Sandusky's New City Hall*, SANDUSKY REG. (Jan. 18, 2019, 1:00 AM), <http://www.sanduskyregister.com/story/201901180025>.

101. Andy Ouriel, *Change Coming for the Cooke Building*, SANDUSKY REG. (Mar. 4, 2018, 1:00 AM), <http://www.sanduskyregister.com/story/201803020023>; Ouriel, *supra* note 92.

102. Andy Ouriel, *\$14M Project Proposed for the Feick Building*, SANDUSKY REG. (Mar. 26, 2018, 2:00 AM), <http://www.sanduskyregister.com/story/201803260013>.

103. Andy Ouriel, *Sandusky Approves \$8.8M Overhaul to Shoreline Drive*, SANDUSKY REG., Oct. 10, 2018.

104. Andy Ouriel, *Sandusky Supports \$8.1M Revamp to Jackson St. Pier*, SANDUSKY REG. (Oct. 9, 2018, 2:00 AM), <http://www.sanduskyregister.com/story/201810090039>.

105. *E.g.*, Dawn Kendrick, *Severe Weather Causes Roof Collapse in Sandusky*, WKYC STUDIOS (July 27, 2018, 3:22 AM), <https://www.wkyc.com/article/news/local/northeast-ohio/storm-damage-severe-weather-causes-roof-collapse-in-sandusky/95-577795308>.

such disbursements to milestones in order to ensure certain thresholds of private investment. This meant a developer would need to complete a percentage of a project before receiving any grant funds. These thresholds focused on physical improvements to the underlying properties, as opposed to more fluid metrics such as job creation. Linking the disbursements to physical improvements of real property aligned the developers' incentives with the city's goal of funneling the TIF dollars toward rehabilitating its historic architecture.<sup>106</sup>

Sandusky employed a different approach when implementing the public initiatives. Since it was leading these initiatives, a grant agreement between Sandusky and itself would provide the city with little incentive to enforce its terms in the event of breach. In the event one of these initiatives failed, it would be left to the political process to hold the appropriate parties responsible. Sandusky was aware of the potentially inadequate back-end remedies available to it in the event of failure. This motivated the city to perform additional front-end cost-benefit and risk analyses prior to beginning the public initiatives.

The final step in implementing Sandusky's plan of re-development was to procure the necessary cash. While the Chesapeake TIF had a net present value of \$11 million as of 2018, the account's cash balance at the time measured \$2 million. It appears Sandusky issued notes of indebtedness secured by the future Chesapeake TIF PILOTs to raise its funds.<sup>107</sup> With cash in hand, the developers broke ground on the projects.

5. *Phase 5 - How the City of Sandusky Plans to Evaluate its Plan of Re-development*

Sandusky employs a number of tools to evaluate the success of its TIF projects and to protect its interests. Its principal tools include oversight by the local Tax Incentive Review Council, exercise of a debt service ratio, and threat of the political process.

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106. Interview with Eric Wobser, *supra* note 36.

107. *E.g.*, SANDUSKY CITY COMM'N, REGULAR SESSION AGENDA (Oct. 9, 2018), <http://www.ci.sandusky.oh.us/CC%20Agendas/10.9.18%20CC%20Agenda%20REV.pdf> (Item #2); CITY OF SANDUSKY COMM'RS, REGULAR SESSION 10 (Jan. 23, 2017), <http://www.ci.sandusky.oh.us/Commission/1.23.17.pdf> (Item #7).

The Tax Incentive Review Council annually reviews TIF projects for compliance with the terms of their grant agreements.<sup>108</sup> The TIRC will determine if private investors hit their investment and development thresholds. Where a developer fails to fulfil his or her obligations, the TIRC may recommend withdrawal from a grant agreement.

Sandusky's debt service ratio "reflects the [TIF district's] ability to service debt given a particular level of income."<sup>109</sup> The expanded Chesapeake TIF has a current required debt service ratio of 120%. For every \$100 of debt owed, its TIF account is to collect and hold for repayment \$120. Any PILOTs collected in excess of the 120% mark may be immediately spent on other TIF related projects. The purpose for such a ratio is to provide the TIF account with a cushion of cash upon which it can draw to service its debt in the event future PILOTs are insufficient. Such a cushion protects Sandusky's general budget, which would otherwise cover any shortfall.

The political process is a safeguard against TIF mismanagement and misappropriation. Where a TIF project is unsuccessful, Sandusky residents may voice their displeasure at the ballot box. For this reason, Sandusky officials sought input from local stakeholders at nearly every phase of the process—from creating the Bicentennial Vision through holding public hearings.

The city manager also offered an example of the political process as a strong motivator for responsible TIF planning. In the nearby municipality of Eastlake, Ohio, TIF was used in the early Aughts to finance a \$22 million minor league baseball stadium.<sup>110</sup> As part of the mayor's election platform, TIF funds—not general funds—would help pay for the project. However, poor attendance meant the stadium could not generate the PILOTs necessary to service its debt, and Eastlake was compelled to draw upon its general budget to pay for the

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108. Interview with Eric Wobser, *supra* note 36.

109. Adam Hayes, *Debt-Service Coverage Ratio - DSCR*, INVESTOPEDIA (June 27, 2019), <https://www.investopedia.com/terms/d/dscr.asp>.

110. Heather Fletcher, *City Hopes Stadium Will Help Regain Lost Funds*, NEWS-HERALD (Jan. 21, 2002), [https://www.news-herald.com/news/city-hopes-stadium-will-help-regain-lost-funds/article\\_7d6668ee-951d-595b-91a9-ceaf07dac788.html](https://www.news-herald.com/news/city-hopes-stadium-will-help-regain-lost-funds/article_7d6668ee-951d-595b-91a9-ceaf07dac788.html); Thomas Francis, *Money Pit Park*, CLEVE SCENE (Apr. 30, 2003), <https://www.clevescene.com/cleveland/money-pit-park/Content?oid=1482319>.

Stadium. Such failure likely contributed in small part to the mayor's resignation in 2004.<sup>111</sup>

#### IV.

#### PUBLIC CONCERN OVER SANDUSKY'S SYSTEM OF TAX INCREMENT FINANCING

##### A. Introduction

Optimism abounds in downtown Sandusky. The city's core is receiving, for the first time in decades, significant fanfare and investment. The efforts behind the currently heralded revitalization undoubtedly have the potential to affect the type of change and development that occur only "once-in-a-generation."<sup>112</sup> If successful, these investments may catalyze an entirely new economic trajectory for the entire city, not just its downtown.

Despite the enthusiasm surrounding these projects, the use of TIF as a means of financing them remains unpopular in the minds of many Sandusky residents.<sup>113</sup> The root cause of this unpopularity cannot be neatly defined, but appears to relate to the projects' anticipated success. There are those who believe that downtown's transformation would still occur with or without the use of TIF. These residents point to the fact that in recent years a significant number of private businesses have re-emerged downtown without the assistance of TIF.<sup>114</sup> Others argue that Sandusky's TIF funds are being given to wealthy out-of-town investors,<sup>115</sup> or that they are diverting important tax revenue from the school district.<sup>116</sup>

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111. Joe Wagner, *He Was Once Lake County's Fastest-Rising Political Star, but Where is Former Eastlake Mayor Dan DiLiberto?*, PLAIN DEALER, Sept. 15, 2008; Thomas Francis, *Collapse of Eastern Civilization: Lessons Learned from the Burning of Eastlake*, CLEVESCENE (Oct. 6, 2004), <https://www.clevescene.com/cleveland/collapse-of-eastern-civilization/Content?oid=1488176>.

112. Andy Ouriel, *The Landing Coming to Sandusky's Unexplored Frontier*, SANDUSKY REG. (Nov. 26, 2017), <http://www.sanduskyregister.com/story/201711190009>.

113. Interview with Eric Wobser, *supra* note 36.

114. Interview with John MacDonald (Mar. 14, 2020).

115. See Sharon Johnson, *Your Five Minutes Are Up*, SANDUSKY REG. (Apr. 3, 2018), <http://www.sanduskyregister.com/story/201804030016>; see also Andy Ouriel, *Developers Continue Major Investment in Sandusky*, SANDUSKY REG. (Apr. 26, 2017), <http://www.sanduskyregister.com/story/201704250044>.

116. Sharon Johnson, *Think Before Voting for Another Sandusky School Levy*, SANDUSKY REG. (Sept. 11, 2018).

In short, despite the support for downtown's reinvigoration, skepticism remains as to whether tax increment financing is the appropriate tool to fund these efforts. Feeding this skepticism is an optimistic atmosphere surrounding—and hopeful reporting about—these projects.<sup>117</sup> In light of the rosy tone around the city's re-development plan, many residents may be murmuring amongst themselves, “why should TIF be used to assist it?”<sup>118</sup>

B. *Problems Associated with a Successful Plan of Re-development*

Why would a successful TIF outcome, as measured by increased economic growth, higher property assessments, and a more livable downtown be seen as a problem in Sandusky? After all, Sandusky lags behind the country in measures of median income and poverty. The answer to this question may lie in perspective.

First, in the event its projects successfully catalyze economic development, disruption to the city's status quo will be inevitable. For example, there is a growing concern that the new developments are ousting many of the city's older businesses.<sup>119</sup> Additionally, the remaining businesses endure operational hurdles, including less parking<sup>120</sup> and narrower access roads for suppliers to offload freight.<sup>121</sup> Even some simple tasks—like disposing refuse—are made significantly more difficult by these developments.<sup>122</sup> There is also a creeping suspicion amongst incumbent business owners that TIF funds—given the fungible nature of cash—will be used to subsidize the rents of their future competition.<sup>123</sup> The obvious effect of

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117. Andy Ouriel, *A Look Inside the Cooke's Marketplace*, SANDUSKY REG. (Mar. 13, 2019), <http://www.sanduskyregister.com/story/201903010053>.

118. MINN. HOUSE RESEARCH DEP'T, *supra* note 32.

119. *See, e.g.*, Andy Ouriel, *The Lunch Box Shuts Down Its Downtown Eatery*, SANDUSKY REG. (Jan. 7, 2019), <https://www.sanduskyregister.com/news/21844/the-lunch-box-shuts-down-its-downtown-eatery>.

120. Sharon Johnson, *Parking Problems Are Coming to Downtown Sandusky*, SANDUSKY REG. (May 30, 2017), <http://www.sanduskyregister.com/story/201705300024>.

121. Ouriel, *supra* note 103.

122. *Id.*

123. *See, e.g.*, Rick Hogrefe & Megan Hogrefe, *Grant to Bolster Businesses for a Better Sandusky*, SANDUSKY REG. (Aug. 21, 2018), <http://www.sanduskyregister.com/story/201808190013>.

these contentions, if true, suggests higher operating costs and lower profit margins.

Second, some concerned residents express a belief that Sandusky should have been more judicious in investing its TIF funds. For example, downtown's current water and sewage system is prone to boil-water advisories which effectively force businesses to close their doors for hours on end. Despite lacking the glamour of a new city hall or marketplace, such a project was likely eligible for a TIF grant.

In June 2018, as alluded to above, Sandusky granted \$500,000 to an out-of-town developer overseeing one of the approved projects.<sup>124</sup> While the grant's disbursement is tied to the satisfaction of pre-determined development thresholds, the developer is using the money to fund its "Emerging Sandusky Business Grant Initiative."<sup>125</sup> With this grant of TIF funds, the developer will award discounted rents to the future tenants of its development. One vocal Sandusky writer, upon learning of the \$500,000 grant, wrote "[While] it is difficult to see the Chesapeake TIF funds used as grants to give to developers for remodeling, [ . . . ] it is taking things too far when a developer expends grant money to help tenants pay their rent that they cannot afford in the first place." The writer goes on to posit, "Since the city has extended rent subsidies for one developer, will the city have to do it for the rest of the developers?"

## V.

### PROTECTING AGAINST TIF ABUSE AND EXCESS

#### A. *Summarizing the Problems*

TIF is widely accepted as an effective tool for cities and counties to encourage economic development. However, its susceptibility to excessive use is a point of criticism. The concern is that its funds may be used to develop projects that would likely occur even without such assistance. While TIF may often finance a 'successful' development project, it is not always the case that TIF played a deciding role in generating the success. The consequences of such excessive use can be

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124. Andy Ouriel, *Sandusky Kicks in \$500K for Cooke Resurrection*, SANDUSKY REG. (Feb. 27, 2019), <http://www.sanduskyregister.com/story/201902260033>.

125. Hogrefe & Hogrefe, *supra* note 123.

serious, as TIF diverts tax revenue away from general funds and school districts, often into the hands (and potentially pockets) of wealthy developers.

While there are checks aimed at curbing TIF's excessive use, these checks are often ineffective. A lax definition of what qualifies as "blight" creates a low bar for a project hoping to pass an assessment of need. Meanwhile poor external oversight and hesitation to overturn a city or county's "but for" analysis renders this check a simple pro forma requirement. Additionally, the confusion and lack of transparency which surrounds how TIF operates leaves politicians ample room to navigate any TIF related political fallout.

### B. *Potential Solutions Going Forward*

A number of suggestions are being floated that have the potential to ensure TIF funds are only expended on projects city or county residents both want and need.

One common suggestion is to increase the amount of voter oversight to which a project is subject.<sup>126</sup> Despite allowing for public hearings, most TIF related decisions are made by a mayor, commission, or city or county manager. This power structure fosters criticism that TIF "is a vehicle for crony capitalism"<sup>127</sup> or that TIF "subsidize[s] big businesses at the expense of less politically influential competitors and ordinary citizens."<sup>128</sup> Placing TIF approval into the hands of the public theoretically mitigates the potential for a developer to use political connections or lobbying efforts to win TIF dollars.

Another suggestion increases transparency in the TIF process by requiring a city or county government to submit mandatory TIF filings.<sup>129</sup> According to professor David Merriman, an advocate of increased TIF protection, most TIF operates in a "pretty opaque manner" and may fund projects like "erecting new Whole Foods, renovating glitzy hotels, and

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126. *Public Needs More Oversight of Tax Increment Financing*, JOHN LOCKE FOUND. (May 27, 2008), <https://www.johnlocke.org/press-release/public-needs-more-oversight-of-tax-increment-financing/>.

127. O'Toole, *supra* note 49, at 1 & 7.

128. McGraw, *supra* note 51.

129. See DAVID MERRIMAN, LINCOLN INST. LAND POL'Y., *IMPROVING TAX INCREMENT FINANCING (TIF) FOR ECONOMIC DEVELOPMENT* 38 (2018), <https://www.lincolninst.edu/publications/policy-focus-reports/improving-tax-increment-financing-tif-economic-development>.



building stadiums—the types of projects, one might argue, should not require such incentives.”<sup>130</sup>

Professor Merriman believes that transparency is the “biggest concern with TIF” because once TIF is created, its operation is rarely subject to meaningful scrutiny. The lack of transparency surrounding TIF enables politicians to use it as a mechanism to “bypass the public municipal budget process”<sup>131</sup> and to divert TIF funds toward projects which may not need public assistance.

An example of this came to light in a 2009 exposé entitled “The Shadow Budget.” The exposé details the struggles two reporters endured while gathering information on what Chicago spends its TIF dollars.<sup>132</sup> Over a third of all Chicago property tax revenue is funneled into various TIF accounts (roughly 1/6 of its general budget).<sup>133</sup><sup>134</sup> According to the article, multiple freedom of information requests concerning the TIF budget were refused by Chicago’s legal department. Any information the reporters uncovered came from the heads of various neighborhood wards. According to these wards, many “necessary expenditures” are pushed into this shadow budget, such as infrastructure money for police stations, fire houses, and schools. Various ward heads relayed that “mayoral aides pressure them on key votes—such as the ordinances for funding the Olympics or moving the Children’s Museum to Grant Park—by either promising to give their wards more TIF dollars or threatening to take TIF dollars away.”

One last solution simply includes more rigorous enforcement of the checks currently in place: the assessment of need and the “but for” analysis. Arguably, both of these protections, if taken seriously, should limit TIF funds to (1) projects that are desired by a community (not just its politicians) and (2) projects that otherwise would not likely be undertaken without such assistance. For instance, take Chicago’s famous Navy Pier which, in 2014, received \$55 million in TIF, meaning it met

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130. Tanvi Misra, *The Trouble with TIF*, CITYLAB (Sept. 12, 2018), <https://www.citylab.com/solutions/2018/09/the-trouble-with-tif/569815/>.

131. *Id.*

132. Joravsky & Dumke, *supra* note 59.

133. Misra, *supra* note 130.

134. Joravsky & Dumke, *supra* note 59.

the city's liberal definition of "blight."<sup>135</sup> A marginally more rigid definition of blight would have prevented such a determination. Furthermore, cities or counties can implement "but for" analysis requirements that meet a more specific legal standard. For instance, take the previously mentioned Willis Tower. Some may consider it a stretch to say that, but for the assistance of TIF, the tower—an American architectural icon—would not be re-developed .

C. *Expanding Grant Agreements to Include Provisions  
Covering "Successful" TIF*

1. *The Need for Such Provisions*

While the preceding suggestions, if adopted, would likely limit future instances of TIF abuse or over-use, they may be imperfect remedies. When these protections fail to protect against the excessive use of TIF, cities and counties stand to suffer. Such consequences beg the question of whether cities or counties should continue subsidizing projects later found not to have needed TIF assistance. While one's answer to this question may depend on notions of contract law or the concept of unjust enrichment, a potential solution arises in the form of a claw-back provision. Such a provision could enable a city or county to recapture TIF dollars after a retroactive review of a grant agreement.

Claw-back provisions are contractual clauses which include a mechanism whereby monies disbursed under an agreement may be recovered in certain situations. The purpose of these provisions is "to manage risk and control future fraud."<sup>136</sup> In the case of tax increment financing, a claw-back would guard against the excessive use of TIF and alleviate the potential effects of fraud, cronyism, lobbying, and bribery in the TIF process.

The inclusion of a claw-back provision within a grant agreement would not represent a radical shift in TIF policy. In fact, many cities and counties already employ claw-back provi-

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135. John Chase & Danny Ecker, *How City Power Players Diverted \$55 Million in Blight-Fighting TIF Cash to Navy Pier*, BETTER GOV'T ASS'N. (July 21, 2017), <https://www.bettergov.org/news/how-city-power-players-diverted-55-million-in-blight-fighting-tif-cash-to-navy-pier>.

136. *What Is a Clawback Provision?*, L. DICTIONARY, <https://thelawdictionary.org/article/what-is-a-clawback-provision/>.

sions within their grant agreements. However, these provisions differ in their focus and only recover funds in the event a TIF project has failed to achieve a pre-determined threshold of economic development.<sup>137</sup> For example, Appleton, Wisconsin recently invoked such a claw-back provision after the tax revenue generated from a project “fell short.”<sup>138</sup> Meanwhile, Chartwell, Wisconsin included a claw-back provision that would trigger in the event its project failed to maintain an adequate number of jobs.<sup>139</sup> In River Forest, Illinois, one such provision will trigger in the event a tenant business vacates its space within 3 to 5 years.<sup>140</sup>

## 2. *How Such Provisions Could Function*

Claw-back provisions recapture previously disbursed funds in the event certain situations or conditions are met. Usually, these conditions are met when an underlying TIF project fails to meet its pre-determined development threshold. However, where TIF surpasses these thresholds, when should such success qualify as a triggering event? An answer is challenging. Obviously not all successful projects should be vulnerable to a claw-back provision. After all, success is the goal of every TIF project. At the same time, taxpayers should not be expected to subsidize private developers for projects which did not need public assistance.

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137. See, e.g., *Vallas Calls for Delay in Approval of New TIF's – Including Lincoln Yards TIF*, VALLAS FOR MAYOR (Jan. 3, 2019), <https://vallasforallchicago.com/2019/01/03/vallas-calls-for-delay-in-approval-of-new-tifs-including-lincoln-yards-tif/>; John Lambert, *The Disadvantages of TIFs and Other Tax Breaks*, METRO WEST DAILY NEWS (Dec. 18, 2008), <https://www.metrowestdailynews.com/x520545514/Lambert-The-disadvantages-of-TIFs-and-other-tax-breaks>; Deena Winter, *More Oversight Sought on Using TIF in Nebraska*, DAILY NEWS (Aug. 7, 2013), <https://www.platteinstitute.org/library/doclib/More-oversight-sought-on-using-TIF.pdf>.

138. CITY OF MADISON, TIF PRACTICES AND CLAWBACKS: THEIR USE IN WISCONSIN COMMUNITIES 1, <http://legistar.cityofmadison.com/attachments/7b0020da-f9c4-43f1-babc-1c14cd673fa1.pdf>.

139. Cameron Bren, *Chartwell to Expand in Middleton, Expected to Add 100 Jobs*, TIMES-TRIB. (Mar. 7, 2019), <http://www.middletontimes.com/articles/2019/03/07/chartwell-expand-middleton-expected-add-100-jobs>.

140. Steve Schering, *As Lake and Lathrop Plans Move Forward, River Forest Aims to Help Businesses Relocate to Madison Street*, CHI. TRIB. (Aug. 24, 2018), <https://www.chicagotribune.com/suburbs/river-forest/news/ct-rfl-business-relocation-tl-0830-story.html>.

Accordingly, the first step in striking a balance between fostering successful TIF projects and recapturing taxpayer handouts requires a definition of what qualifies as too much success. Such a definition will allow a city or county to discriminate between appropriate TIF and excessive TIF. A potential definition derives from the ‘but for’ requirement set out by the Minnesota legislature. Minnesota’s ‘but for’ test requires a finding that “the market value of the TIF development [is] higher (after subtracting the value of the TIF assistance) than what would occur on the site, if TIF were not used.”<sup>141</sup>

For this article, a project will initially be considered too successful when upon completion its property’s market value (after subtracting out the value of the TIF assistance) is greater than what the market value would be estimated without such development. These are situations where a developer earns a return on the value of a property which is in excess of the value of the grant money received. Under these facts, it is arguable that a developer could have received a private loan for the development, instead of public assistance. The rationale—putting aside issues of risk, access to financing, and imperfect information—is simply that the value of the property that could have been used to secure private financing, in the end, exceeded the amount of gap-financing necessary to complete the project. This would have left a potential lender with adequate security to provide a loan. Where after the fact it appears a developer *could* have borrowed privately to fund a project, a city or county should be able to look back and review a grant agreement and, if necessary, invoke a claw-back. Such a trigger would allow a government to re-examine such disbursements for abuse and efficacy.

Specifically, a local government could include within a grant agreement its own formula for setting out when a review for abuse or over-use is triggered. Such a formula would compare the amount of TIF dollars granted to a project to the value of the project’s increment after development. The value of a project’s increment is simply the market value of the property at some point in time (time *t*) after development *less* the value of the property’s base at that time. For example, if black-acre’s taxable base prior to development was frozen at a fair market value of \$100 after being placed into a TIF district, and

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141. MICHAEL, *supra* note 31.

if blackacre had a fair market value of \$150 at time  $t$  after a development project, blackacre's increment at  $t$  would equal \$50 (\$150 - \$100). If \$30 of TIF grants contributed to blackacre's development, the ratio of TIF dollars to increment value at  $t$  would be 0.6 [\$30 TIF grant : \$50 increment value]. In such a case, because the value of the increment exceeds the value of the TIF grant, it is arguable that private funding could have been used to finance the development project through the use of the development as collateral for a loan.

Cities or counties have the ability to customize these formulas to fit a project's specific facts. In the above example, for instance, a city or county could adjust the point at which a ratio would trigger a review. For example, a city or county could include language in a grant agreement that a ratio of TIF dollars to increment value greater than 0.5 would not trigger a review. Given the facts of the previous example, that means that, for a \$30 grant to a development project, a review would not be triggered unless the value of the increment at  $t$  hit at least \$60 dollars, or double the amount of public assistance. A value at  $t$  of less than \$60 would not trigger a review. A city or county could set the values of  $t$  and of the ratio in light of a project's unique facts, circumstances, and expectations. Formulaically, these equations would take the following form: A review is triggered when—

[ (TIF Funds Disbursed) : (Value of the Tax Increment (at time  $t$ )) ] <  $X$  (where  $X$  equals an appropriate pre-determined and fact specific ratio threshold)

The triggering of a review—conducted by a TIRC or TIRC-equivalent—would prompt an investigation into the efficacy of the underlying grant agreement. Such an investigation would determine whether an agreement bears any of the hallmarks of abuse or over-use. For example, such a review would concern itself with the relationships between the parties to the agreement, the nature of the financed project, and (especially) the developer's initial access to capital. Depending on the investigations findings, a city or county would initiate the claw-back process.

#### D. *Potential Issues and Concerns*

Of course, the above leaves a number of important questions unanswered. For example, how long after the comple-

tion of a project should such variables be assessed? Additionally, how will a city or county invoking such a clause recover its funds, and when would it be unfair for a city or county to do so? Will the invocation of such a clause terminate the TIF prematurely, or will it continue to collect PILOTs? Does this method suffer other limitations?

The answers to these questions will likely be specific to the facts and circumstances surrounding each individual grant agreement. However, the following offer potential suggestions for how to answer some of these questions.

How long after the completion of a project should a city or county wait before deciding whether a *prima facie* case for review has been triggered? Intuitively, the answer is *shortly* thereafter. As time elapses after the completion of a project, other external factors begin to impact an increment's value. If an external and previously un contemplated reason is responsible for a property's increased market value (and overall increment), it will be difficult for a reviewing body to parse between the external factor's effect on market value and that of abuse or over-use.

How should a city or county claw back its funds? This may depend on the financial situation of the remitting party, but at least three options include: (i) the imposition of a lien against the TIF'd property, (ii) an assessment paid in the same manner as back taxes, or (iii) some combination of (i) and (ii). Theoretically, a developer could always borrow against the TIF'd property to satisfy any obligations owed to the city or county.

When should fairness and equity bar a city or county from invoking a claw-back? This question returns to the issues of risk and imperfect information that surround any project seeking a loan. If the goal of a claw-back is to retrieve what are perceived to be government handouts—in an effort to combat excessive TIF—it should matter whether the risk or information asymmetries surrounding a project effectively made it impossible for a developer to access private funding. Where a developer is truly unable to acquire private funding, tax increment financing is an appropriate tool. In these situations, it may honestly be held that, 'but for' the TIF, development would not otherwise occur.

While claw-back provisions help cities and counties recapture what were public handouts or giveaways, they do not ad-

dress another issue surrounding TIF: the long-term constraints TIF places on general funds and school districts . To alleviate this, a city or county employing a claw-back provision should also reassess the status of its TIF district, and where appropriate, terminate the district. Stakeholders, such as an affected school district, should likely have a vote in these determinations.

How will a city or county set the variables and thresholds used within its formula? This is very important as the integrity of a formula is only as good as its underlying assumptions. For instance, a city manager could set a ratio threshold low enough that it may never trigger a review. For this reason, outside guidance from either the state or an organization like the GFOA, coupled with transparency and a notice and comment period would likely be helpful.

Are there other issues or limitations surrounding claw-back provisions? One potential unintended consequence of claw-back provisions targeting successful projects is a chilling effect on the use of TIF. While the goal of these provisions is to combat excessive TIF use, if these provisions are too readily triggered, they have the potential to deter developers from seeking TIF dollars for legitimate projects. This could lead to a sub-optimal amount of TIF spending.

Another limitation of this method concerns its efficacy in public initiatives. While such formulae could be easily included in contracts with private developers, it is less clear if they would be effective—or even necessary—in a development project led by a city or county itself. For the time-being, such initiatives must rely on the political process and a vigilant electorate for accountability.

## CONCLUSION

The use of tax increment financing in the United States is prolific. From Chicago's Navy Pier to Detroit's Little Caesar's Arena, or from Albuquerque's 16,000-acre Mesa-del-Sol planned community to Denver's Union Station, numerous American icons stand as testimony to the power and reach of TIF.

But, as is always the case, too much of a good thing may in fact be a bad thing. When used appropriately, TIF can be integrated into a thoughtful strategy of revitalization. But, when

used in excess, the benefits of TIF may be overtaken by its cons. Instead of allocating funds to projects serving clear public purposes, and which would not otherwise be possible, abuse and over-use of TIF operate to constrain local budgets and antagonize local populations.

Unfortunately, the current mechanisms in place to curb this excess are ineffective. A lax and fluid definition of “blight” can be interpreted in such a way as to allow almost any project to satisfy an assessment of need. Meanwhile, a desire not to second guess local determinations of true necessity has defanged the ‘but for’ requirements of most states.

But, in recent years, new discussions are emerging which center on how better to combat the excessive use of TIF. For example, TIF accountability advocate David Merriman has advanced a compelling argument why increased transparency could alleviate these issues. Where accepted, his proposals will rein in those cities and counties which use TIF to cover their actions under a cloak of confusion. Transparency would require mayors, commissioners, and the like to justify grants for “renovating glitzy hotels, and building stadiums.”

These recent conversations, however, are focused on creating checks that will limit TIF excess before it ever occurs. Such preventative measures, if adopted, will undoubtedly help to re-legitimize TIF as an appropriate tool of re-development. Nevertheless, these solutions do little for cities or counties which, despite their best efforts, pay out TIF dollars on projects which did not strictly need the assistance.

Where can these cities and counties turn for relief? One potential answer is a claw-back provision, placed in a grant agreement, which designates situations where a city or county may review an agreement to recapture its TIF funds. While the specific language of such a provision would be adjusted to fit the facts and circumstances of each individual agreement, a claw-back would provide a city or county with the capability to protect its tax base.



## APPENDIX



Downtown Sandusky, Ohio.

Seth Gaines, Downtown Sandusky, OH, FLICKR, <https://www.flickr.com/photos/sethgaines/2448296227/in/photostream/> (last visited Mar. 14, 2020) (photo taken June 30, 2007).



Demolition of an adjoining property helped lead to an adjoining cave-in following severe weather.

Ryan Whaley (@RyanJWhaley), TWITTER (July 26, 2018, 6:34 PM), <https://twitter.com/RyanJWhaley/status/1022611033175859202>.



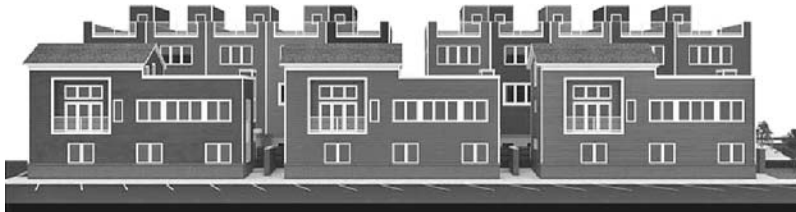
The old Keller Building.

SANDUSKY REG., <https://sanduskyregister.com/photo-single/121865/?mode=team> (last visited Mar. 14, 2020).



Greens space following the Keller Building demolition.

Andy Ouriel, SANDUSKY REG., <https://sanduskyregister.com/photosingle/29060/?mode=team> (last visited Mar. 14, 2020).



Proposed development for the former Keller Building parcel.

Andy Ouriel, *Downtown Sandusky Townhouse Project Receives Public Subsidy*, SANDUSKY REG. (Aug. 15, 2019), <https://sanduskyregister.com/news/27219/downtown-sanduskytownhouse-project-receives-public-subsidy/>.



Chesapeake Lofts pre-TIF development.

Chesapeake Lofts: History, CHESAPEAKE LOFTS, <http://www.chesapeakelofts.com/history.pdf> (last visited Mar. 14, 2020).



Chesapeake Lofts post-TIF development.

*Chesapeake Lofts*, APARTMENTGUIDE, <https://www.apartmentguide.com/apartments/Ohio/Sandusky/Chesapeake-Lofts/Inp0014400001yinImAAI/> (last visited Mar. 14, 2020).



The current City Hall pre-TIF development.

Tom Horsman (@TomHorsman), TWITTER (Feb. 22, 2020, 12:16 PM), <https://twitter.com/TomHorsman/status/1231266519440613376>.



The TIF-financed City Hall.

*Id.*