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SPECIFICITY, BLIGHT AND TWO TIERS OF TIF: A PROPOSAL FOR REFORM OF TAX INCREMENT FINANCING LAW

INTRODUCTION

A recent urban development project in St. Louis' north side generated tremendous legal and political controversy. Like many development projects in the area, it sought tax increment financing (TIF) as its core source of start-up funding. At stake was over \$390 million in TIF funding, by far the most in Missouri history,¹ for the 1,500-acre urban development widely held to be the only real hope to revitalize the long-stagnant north side.²

The battle lines were drawn and played out in Missouri courts, as well as the local media. Proponents of the TIF, which included the City of St. Louis and local aldermen,³ maintained that the plan of developer Paul McKee and his "NorthSide Regeneration LLC" was the only viable hope of redirecting the area away from many decades of decline.⁴ Denying the TIF would mean denying a project that embodied the core legislative justification for TIF: urban renewal.⁵ They argued that such a massive project required flexibility to evolve and meet market demand, and that judicial oversight of a project already

1. Tim Logan, *NorthSide TIF Back in Court This Week*, ST. LOUIS POST-DISPATCH, Nov. 26, 2012, at A1, A4.

2. See, e.g., Editorial, *Give NorthSide a Chance*, ST. LOUIS POST-DISPATCH, Dec. 21, 2012, at A18 [hereinafter *Give NorthSide a Chance*] ("[McKee's] working in a part of the city that began hollowing out in the 1950s. If it was going to spontaneously regenerate, it would have done so by now. And we don't see a lot of other developers standing in line to do business there.").

3. See Missouri ex rel. Smith v. TIF Comm'rs (*Smith I*), No. 0922-CC09379, 2010 WL 7352897, at *2-3 (Mo. 22d Cir. July 2, 2010), *aff'd sub nom.* Smith v. St. Louis, No. ED95733, 2012 WL 2317240 (Mo. Ct. App. E.D. June 19, 2012), *aff'd in part, rev'd in part*, 395 S.W.3d 20, 26 (Mo. 2013) ("Defendants-respondents included the City of St. Louis, the members of the City's Tax Increment Financing Commission, the Mayor, and all members of the Board of Aldermen, as well as NorthSide Regeneration, LLC, the proponent of the NorthSide Redevelopment Plan." Plaintiffs-petitioners included Bonzella Smith, a resident in the area to be affected by the proposed TIF.).

4. *Give NorthSide a Chance*, *supra* note 2.

5. See, e.g., Editorial, *Gentrification by TIF*, ST. LOUIS POST-DISPATCH, Nov. 1, 2012, at A14 [hereinafter *Gentrification by TIF*].

approved by local government amounted to judicial activism and legislating from the bench.⁶

The trial court judge summarized the key issue in his decision: “The question before the Court, fundamentally, is whether the City’s Board of Aldermen had the discretion to say, in Alderman Bosley’s words, ‘Let’s try it.’ The Court concludes that the answer must be, ‘No.’”⁷ The trial court held that the massive redevelopment project impacting two square miles of urban land lacked the specificity of a “discrete, definable redevelopment project” required by the TIF statute.⁸ However, the finding of blight, also required by statute, though challenged, was found to be supported by “incontestable evidence.”⁹

The developer, Paul McKee of NorthSide Regeneration, acknowledged that disallowing the TIF funding would prevent the entire multimillion dollar redevelopment project, one of the largest in St. Louis history, from getting started.¹⁰ McKee lost again in the Missouri Court of Appeals,¹¹ but the Missouri Supreme Court reversed the lower courts on procedural grounds, largely side-stepping the substantive issues.¹² The core issues behind the challenge to the TIF remain largely undecided in Missouri.¹³

While the Missouri Supreme Court was deciding the NorthSide case, on the other side of the St. Louis metro area, a number of other controversial TIF projects of a different sort were being debated during the same week in January 2013.¹⁴ These were targeted, discrete and definable projects unlikely to have statutory issues with specificity. Two involved TIF subsidies for Wal-Mart

6. See Dierker’s ‘Issue’ with McKee Goes Before Supreme Court, ST. LOUIS AM., Nov. 21, 2012, at A11, available at http://www.stlamerican.com/news/political_eye/article_70918aec-3261-11e2-a1e1-0019bb2963f4.html?mode=print.

7. *Smith I*, 2010 WL 7352897, at *2.

8. *Id.* at *46.

9. *Id.* at *28.

10. See Logan, *supra* note 1, at A1.

11. *Smith v. St. Louis (Smith II)*, No. ED95733, 2012 WL 2317240, at *13 (Mo. Ct. App. E.D. June 19, 2012), *aff’d in part, rev’d in part*, 395 S.W.3d 20, 26 (Mo. 2013).

12. *Smith v. St. Louis (Smith III)*, 395 S.W.3d 20, 26 (Mo. 2013) (en banc) (holding “the judgment [of the lower court] went beyond the scope of pleadings”). The *Smith* cases at the circuit, appellate, and Missouri Supreme Court are also referred to as the “NorthSide cases” or the “McKee cases” in this article, in keeping with references by local media and the court.

13. See, e.g., Tim Logan, *NorthSide TIF Wins Backing of High Court*, ST. LOUIS POST-DISPATCH, Apr. 10, 2013, at A6 (“The judges didn’t directly tackle the legality of NorthSide’s \$390 million tax increment financing package or TIF law more broadly, instead ruling largely on a procedural issue.”).

14. See Steve Giegerich, *Wal-Mart Dispute Headed to Court*, ST. LOUIS POST-DISPATCH, Jan. 20, 2013, at B3 [hereinafter *Wal-Mart Dispute*]; Steve Giegerich, *Shrewsbury Board Approves Wal-Mart Proposal*, ST. LOUIS POST-DISPATCH, (Jan. 29, 2013), http://www.stltoday.com/news/local/shrewsbury-board-approves-walmart-proposal/article_a78be785-b679-5763-a8ae-230a71b9bed2.html [hereinafter *Shewsbury Wal-Mart Proposal*].

Supercenters in separate St. Louis area municipalities, one in Shrewsbury and one in Ellisville.¹⁵

Large numbers of residents and community leaders, along with local media, protested the Wal-Mart and similar TIFs as a waste of taxpayer funds.¹⁶ They ridiculed the finding of “blight” in suburban shopping areas in order to obtain TIF, and complained about lack of fair representation in the TIF approval process.¹⁷ Both the Ellisville and the Shrewsbury Wal-Mart proposals were rejected by their respective local TIF commissions¹⁸ which are required by statute and are appointed specifically to review and assess the impacts of each TIF on the community.¹⁹ One Ellisville TIF Commissioner found the project to be a “gross overuse” of TIF incentives.²⁰ Both the Ellisville and the Shrewsbury Boards of Aldermen overrode the recommendation of the TIF boards and approved the TIFs, which is permissible under Missouri statutory TIF procedure.²¹ While approval of the McKee NorthSide TIF funding affecting two square miles of the St. Louis inner city was rejected by the trial and appellate courts and, as a result, was tied up for over three years, TIF funding for the two Wal-Marts was approved in accordance with TIF statute and did not face such challenges in the courts.²²

The theory behind TIF is relatively straightforward, but the practice has been controversial for decades.²³ Much of the controversy today stems from the evolution of TIF so that it now subsidizes shopping mall development in the same way, with the same statutory framework, as it originally subsidized inner city redevelopment.

This note looks at the Missouri cases involving the McKee NorthSide redevelopment and examines the statutory structure that has given rise to apparent inequities in taxpayer funding of TIF redevelopment. The note proposes a change in Missouri TIF legislation to address these issues and to clarify statutory standards so developers of both large- and small-scale projects

15. See sources cited *supra* note 14.

16. See *Wal-Mart Dispute*, *supra* note 14.

17. See *Gentrification by TIF*, *supra* note 5.

18. See sources cited *supra* note 14.

19. MO. REV. STAT. § 99.820 (2010).

20. Editorial, *Retail Roulette*, ST. LOUIS POST-DISPATCH, Mar. 7, 2012, at A12.

21. § 99.820.

22. *Wal-Mart Dispute*, *supra* note 14. A dispute over the proposed construction of the Ellisville Wal-Mart did, in fact, end up in court. However, it was the “conditional use permit” that was challenged, a completely separate issue from the TIF. The Ellisville Wal-Mart TIF was approved in accordance with the TIF statute, and the \$10.8 million in TIF funding has not been challenged. See *id.*

23. See, e.g., Joyce Y. Man, *Introduction to TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT* 1, 4–6 (Craig L. Johnson & Joyce Y. Man eds., 2001) (outlining criticisms of TIF going back to the 1980s and 1990s).

can be clearer on the law and their funding, and so courts can adjudicate effectively without excessive interpretation of statutory terms.

This note advocates adopting legislation that would create two tiers of TIF in Missouri law. The first TIF tier, more in keeping with the original intent of TIF as an incentive for redevelopment and regeneration of neighborhoods,²⁴ would be targeted at district-wide TIFs and require adherence to strict standards of blight not presently in Missouri TIF law. However, it would allow more flexibility in contingent projects within the TIF plan, and provide additional incentives for redevelopment. The second tier of TIF would be more in keeping with current application of TIF as a purely developmental tool for specific projects in all neighborhoods. It would eliminate essentially meaningless blight requirements in current Missouri TIF law.²⁵

The note is divided into four parts. Focusing on Missouri, Part I overviews the basics of TIF law, outlining its general background and evolution, the theory behind TIF, and detailing its procedural and substantive elements as well as how developers, TIF commissions, and local government interact to approve a TIF. Part II examines Missouri court rulings involving blight and specificity, with special concentration on the NorthSide cases and their context with other cases in TIF law, as well as a clarification of deference standards given local government by the courts in TIF cases. Part II also looks at popular reaction to the NorthSide cases. Part III looks at the rationale for legislative change in TIF law proposed in this note: making the blight test meaningful and assuring specificity and accountability on the part of developers. Part III also examines the broader political and economic background of TIF law that lends support to the changes advocated, with special attention to current criticism and attempted reform of TIF. Part IV summarizes the proposed changes to Missouri TIF law advocated in this note.

I. THE FUNDAMENTALS OF TAX INCREMENT FINANCING

A. *General Background and Evolution of TIF*

Since its origins in California in 1952, Tax Increment Financing (TIF) has evolved from a targeted incentive to spur urban renewal to the most popular form of public finance for local economic development projects in the United

24. See *infra* note 144 and accompanying text.

25. See generally Josh Reinert, *Tax Increment Financing In Missouri: Is It Time For Blight And But-For To Go?*, 45 ST. LOUIS U. L.J. 1019 (2001) (proposing the elimination of blight requirement from Missouri TIF law). This note advocates Mr. Reinert's proposed elimination of the blight standard, but expands on the proposal to address project specificity and accountability concerns. See *id.*

States.²⁶ Today, almost all states have authorized TIF and over half of U.S. cities with populations over 100,000 have used TIF.²⁷ Missouri use of TIF is high, ranking third in total TIF bond sales out of 35 states surveyed for the period 2005–2010.²⁸

TIF began with the limited purpose of clearing and rehabilitating “urban decay in downtown areas,” but has evolved in recent years to become “an all-purpose economic development tool.”²⁹ It has moved far beyond its initial core purpose for urban redevelopment to its current, more general application to subsidize developers in a range of development projects; TIF has expanded from “redevelopment” to “simply development.”³⁰ The McKee NorthSide project could be characterized as “redevelopment;” the Ellisville and Shrewsbury Wal-Marts would more likely be characterized as “simply development.”

As in the rest of the country,³¹ proposed TIF projects in Missouri now range widely in scope and purpose—from the 1,560-acre McKee NorthSide project in the core of St. Louis City impacting a potential 10,000 new homes³² to the area within single stand-alone buildings, from shopping malls in affluent suburban areas to rural properties on farmland. Despite the tremendous variation in scope and purpose, each of these projects must meet the same criteria set forth in the Missouri TIF statute.³³

26. See Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 65 (2010); COUNCIL OF DEV. FIN. AGENCIES & INT’L COUNCIL OF SHOPPING CTRS., TAX INCREMENT FINANCE BEST PRACTICES REFERENCE GUIDE 2 (2007) available at <http://www.icsc.org/government/CDFA.pdf> [hereinafter TIF BEST PRACTICES GUIDE].

27. Briffault, *supra* note 26, at 70.

28. Randal O’Toole, *Crony Capitalism and Social Engineering: The Case Against Tax-Increment Financing*, 676 CATO INST. POL’Y ANALYSIS 1, 11–12 (2011), available at <http://www.cato.org/publications/archives/studies/policy-analysis/2011>. Missouri also ranked fourth in per capita TIF bond sales. *Id.*

29. Reinart, *supra* note 25, at 1023.

30. See Briffault, *supra* note 26, at 71 (“The redirection, or expansion, of TIF is best captured through the change in the language used to describe TIF activity from redevelopment—that is, the revitalization of a once vibrant but now economically depressed or physically deteriorated area—to simply development, or increase in economic activity in an area that might have been vacant, farmland, undeveloped, or simply lightly developed.”).

31. See *id.* at 68.

32. Rebecca S. Rivas, *Supreme Court Hears Northside’s Appeal*, ST. LOUIS AM., Dec. 6–12, 2012, at A1.

33. Real Property Tax Increment Allocation Redevelopment Act, MO. REV. STAT. §§ 99.800–99.865 (2010).

B. *How TIF Works*

The theory behind TIF is relatively straightforward. Tax revenues generated by the redevelopment itself (the incremental taxes) are diverted back into the project, and become a repayment stream to fund the core costs of the project.³⁴ Real estate taxes in the redevelopment area are frozen at the pre-development level.³⁵ The real estate taxes generated from the increased valuation resulting from the development is referred to as the “increment.”³⁶ The real estate tax increments can be supplemented in some states, such as Missouri, with percentages of certain other local taxes generated by the new economic activities in the development, such as sales and utility taxes, which form the repayment funds that are channeled back to the project’s costs.³⁷

TIFs are almost invariably presented by their promoters as self-financing, a “pay-for-itself” redevelopment tool, requiring no need for additional taxes.³⁸ As the attorney for St. Louis developer McKee argued in oral arguments in front of the Missouri Supreme Court, “this is not a handout subsidy. It’s a reimbursement. Nobody gets a single dime until you do the work to the satisfaction of the city.”³⁹

C. *Procedural Implementation of TIF: The Role of Local Government*

Both substantive and procedural requirements of TIF are usually governed by statute.⁴⁰ The Missouri Real Property Tax Increment Allocation Redevelopment Act⁴¹ (the “TIF Act”) is a typical state TIF statute.⁴²

34. See JAMES E. MELLO ET AL., SUMMARY OF THE MISSOURI REAL PROPERTY TAX INCREMENT ALLOCATION REDEVELOPMENT ACT 1 (2010), available at <http://www.armstrongteasdale.com/files/Uploads/Documents/Summary%20of%20MO%20Real%20Property-8992445-1.PDF>; MICHAEL P. KELSAY, UNEVEN PATCHWORK: TAX INCREMENT FINANCING IN KANSAS CITY 1 (2007), available at <http://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=KelsayKansasCity.html>.

35. MELLO ET AL., *supra* note 34.

36. *Id.*

37. *Id.*

38. See, e.g., TIF BEST PRACTICES GUIDE, *supra* note 26, at 2 (“The tax increment from a TIF district is created without raising taxes and without dipping into the tax value present at the time of adoption”); David Callies & Andrew Gowder, Jr., *Introduction to TAX INCREMENT FINANCING* xxi, xxi (David Callies & Andrew Gowder, Jr., eds., ABA Publishing, 2012) (“In theory, the diverted [TIF] stream is ‘free money’ used to pay for the redevelopment and then returned to its rightful place as part of a now-enhanced stream of revenue to the governmental bodies that levy such taxes on the property in the first place.”)

39. Nicholas Phillips, *Listen to Oral Argument from Yesterday’s High Court Battle Over Paul McKee’s Project*, RIVERFRONT TIMES BLOGS (Nov. 29, 2012), http://blogs.riverfronttimes.com/dailyrft/2012/11/oral_argument_supreme_court_mckee_north_side.php.

40. See Cory C. VanDyke, *Fields of Dreams: The Expectation And Common Reality Of Tax Increment Financing*, 79 UMKC L. REV. 791, 794 (2011).

Local government plays the operative role in the approval and actual implementation of a TIF project.⁴³ In Missouri, a municipality must establish a TIF commission, which is given broad powers to “review redevelopment plans, keep all interested parties (including the public) informed of the district’s progression, and ultimately control the decision-making power of the TIF process.”⁴⁴ The TIF commission consists of nine to twelve members, with representatives from the overall county and school districts impacted by the tax subsidy, in addition to the smaller municipality.⁴⁵ For example, in St. Louis County, municipal TIF commissions consist of six members appointed by the county, three members appointed by the municipalities, two members appointed by the school boards, and one member to represent other taxing entities.⁴⁶

When a TIF proposal is introduced by developers or urban planning experts, it is the responsibility of the municipal TIF commission to create a “redevelopment plan” to lay out fully the objectives of the plan and include “estimated redevelopment project costs, the anticipated sources of funds to pay for the costs, evidence of the commitments to finance the project costs” and other financial information on the anticipated funding.⁴⁷

After public hearings with strict notice and comment requirements, the TIF commission votes and makes recommendations to the municipality’s governing body, typically its board of aldermen, who then must decide whether to implement the redevelopment plan by adopting ordinances.⁴⁸ It is important to note that the statute only requires that the TIF commission make a recommendation and vote; it does not require that the commission approve the TIF.⁴⁹ If a TIF plan is voted down by the TIF commission, the municipality can still approve it and move forward.⁵⁰ Once the ordinances are approved by the municipality, the statute authorizes the municipality to “make and enter into all contracts necessary or incidental to the implementation and furtherance of its redevelopment plan or project”⁵¹ and to use any and all means

41. See Real Property Tax Increment Allocation Redevelopment Act, MO. REV. STAT. §§ 99.800–99.865 (2010).

42. MELLO ET AL., *supra* note 34.

43. See Briffault, *supra* note 26.

44. VanDyke, *supra* note 40, at 795.

45. MO. REV. STAT. § 99.820.2 (2010).

46. See § 99.820.3; MELLO ET AL., *supra* note 34, at 2.

47. § 99.810.

48. See § 99.820.1(1); Reinert, *supra* note 25, at 1030–31.

49. § 99.820

50. § 99.820.1(1) (explaining that if TIF commission opposes the plan, the municipality can override the commission and approve it with a two-thirds majority vote; if the TIF commission approves the plan, only a simple majority is required).

51. § 99.810.1(2).

“reasonably necessary to achieve the objectives of the redevelopment plan.”⁵²
 “Reasonable means” may include eminent domain.⁵³

D. The “Redevelopment Area,” the “Redevelopment Plan,” and the “Redevelopment Project”

It is important to recognize the statutory distinction between redevelopment area, redevelopment plan and redevelopment project to fully understand current issues relating to specificity in Missouri TIF law.⁵⁴ The “redevelopment area” must meet the substantive statutory requirements of the “blight” and “but-for” tests described below.⁵⁵ It is the area designated by the municipality that is subject of the redevelopment plan.⁵⁶ The “redevelopment plan” is a statement of general objectives and financial reports created by the TIF commission and voted on by the municipal Board, and it is essentially the ultimate vehicle for obtaining approval of TIF funding.⁵⁷ This redevelopment plan must “conform to the comprehensive plan for the development of the municipality as a whole.”⁵⁸ “Redevelopment project” is defined as simply “any development project within a redevelopment area in furtherance of the objectives of the redevelopment plan.”⁵⁹ A “redevelopment project” is required before approval of the overall redevelopment plan that initiates the TIF itself.⁶⁰ The statutory interpretation of the specificity necessary for a redevelopment project is the core issue that decided the McKee cases.⁶¹

E. Substantive Elements of a TIF: The Blight and “But for” Tests

The substantive requirements of developments that qualify for TIF are written into statutes that vary from state to state, but usually share three common characteristics.⁶² First, the redevelopment area, sometimes referred to

52. § 99.810.1(3).

53. *Id.*

54. *See* § 99.805(12)-(14).

55. § 99.805 (12); § 99.805 (13).

56. § 99.805(11).

57. § 99.805(13) (defining “redevelopment plan” as “the comprehensive program of a municipality for redevelopment intended by the payment of redevelopment costs to reduce or eliminate those conditions, the existence of which qualified the redevelopment area as a blighted area, conservation area, economic development area, or combination thereof, and to thereby enhance the tax bases of the taxing districts which extend into the redevelopment area. Each redevelopment plan shall conform to the requirements of section 99.810”). *See also Smith I*, 2010 WL 7352897, at *22, *25.

58. § 99.810.1 (2).

59. § 99.805 (13).

60. § 99.810.1(3).

61. *Smith I*, 2010 WL 7352897, at *45.

62. *See* TIMOTHY J. TRYNIECKI, 18 MO. PRACTICE SERIES: REAL ESTATE LAW § 26:2 (3d ed. 2006); *See also* Phillip J.F. Gehab, *Tax Increment Financing Bonds as “Debt” Under State*

as a TIF district, typically must meet the statutory definition of “blight” or “economic underutilization.”⁶³ Second, the economic development would not occur “but for” the development of the TIF.⁶⁴ Finally, the redevelopment plan must provide detailed economic impact plans and clear timeframes.⁶⁵

In Missouri, the so-called “blighting test” does not necessarily require a finding of “blight”; the test is met if the redevelopment area is a “blighted area,” a “conservation area,” or an “economic development area.”⁶⁶ “Blighted area” is defined as:

an area which, by reason of the predominance of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.⁶⁷

A “conservation area” is “not yet a blighted area but is detrimental to the public health, safety, morals, or welfare.”⁶⁸ An “economic development area” can be any area that is neither blighted nor a conservation area, but where “the municipality finds that the redevelopment will not be solely used for development of commercial businesses which unfairly compete in the local economy.”⁶⁹

The “but for” test requires that the proposed TIF area has “not been subject to growth and development through investment by private enterprise and would not reasonably be anticipated to be developed without the adoption of

Constitutional Debt Limitations, 41 URB. LAW. 725, 728 (2009); TIF BEST PRACTICES GUIDE, *supra* note 26, at 8.

63. TIF BEST PRACTICES GUIDE, *supra* note 26, at 8.

64. *Id.*

65. *Id.*

66. MO. REV. STAT. § 99.810.1(1) (2010). *See also* Reinert, *supra* note 25, at 1033.

67. § 99.805(1).

68. § 99.805(3) The full definition of a conservation area in the statute is an area where “fifty percent or more of the structures in the area have an age of thirty-five years or more. Such an area is not yet a blighted area but is detrimental to the public health, safety, morals, or welfare and may become a blighted area because of any one or more of the following factors: dilapidation; obsolescence; deterioration; illegal use of individual structures; presence of structures below minimum code standards; abandonment; excessive vacancies; overcrowding of structures and community facilities; lack of ventilation, light or sanitary facilities; inadequate utilities; excessive land coverage; deleterious land use or layout; depreciation of physical maintenance; and lack of community planning.” *Id.*

69. § 99.805(5). To be an “economic development area,” the area must be in the public interest because it will: (a) Discourage commerce, industry or manufacturing from moving their operations to another state; or (b) Result in increased employment in the municipality; or (c) Result in preservation or enhancement of the tax base of the municipality.

tax increment financing.”⁷⁰ In other words, the TIF must be the “but-for” cause of the growth in taxes for the area and not existing market or socio-economic factors that were already in place without the TIF.

II. MISSOURI COURT RULINGS ON TIF BLIGHT AND SPECIFICITY

A. *Cases of Statutory Blight*

Although a redevelopment area must pass the “blight test” to receive TIF funding in Missouri,⁷¹ the statutory requirements of “blight” are extremely broad.⁷² In a controversial landmark case in 2001, the Missouri Court of Appeals held that a redevelopment project within the West County Center shopping mall in suburban St. Louis met the statutory definition of blighting required for TIF, despite the fact that both the municipality and the trial court found that the shopping center was “indisputably [the] City’s greatest economic asset.”⁷³ The suburban city, Des Peres, was the second wealthiest municipality in the St. Louis area at the time.⁷⁴ The court refused to “substitute [its] judgment for that of the [municipal] Board . . . as to blighting.”⁷⁵

Under the terms of the statute, the Court found that the municipality could declare the shopping mall “blighted” under the Missouri TIF statute because of such factors as: “its limited space for small retail shops inhibits growth” (thus, “obsolete platting”); “improper subdivision . . . that constrain the ability to expand the size of the mall;” “deteriorated site conditions” such as a faulty roof; “problems with the mall’s water lines” (“potentially endanger mall property”); and “evidence of a decline in sales at [the] shopping mall” (“economic liability”).⁷⁶ The court found plaintiffs’ argument unpersuasive “that the blighting factors are minimally significant and do not dominate the redevelopment area.”⁷⁷

70. § 99.810.1(1).

71. In addition to a “blighted area”, a “conservation area” or “economic development area” also passes the so-called “blight test” in the statute. *Id.*

72. *See* VanDyke *supra* note 40, at 799.

73. *JG St. Louis W. Ltd. Liab. Co. v. Des Peres*, 41 S.W.3d 513, 518 (Mo. Ct. App. E.D. 2001).

74. *See* Reinert, *supra* note 25, at 1019.

75. *JG St. Louis W.*, 41 S.W.3d at 518.

76. *Id.* Note that “obsolete platting;” “Improper subdivision,” “conditions which endanger . . . property,” “deterioration of site improvements,” and “other causes, or any combination of such factors . . . [that] constitutes an economic or social liability” are all elements of the statutory definition of “blighted area” that were met by the West County Center shopping mall, as determined by the municipality and as affirmed by the Court. *See* MO. REV. STAT. § 99.805(1) (2010).

77. *JG St. Louis W.*, 41 S.W.3d at 519.

When such an expansive statutory definition of blighting is combined with strong deference to the local municipality by the courts, and with precedents such as the West County shopping mall case, Missouri courts rarely question a municipality's finding of blight.⁷⁸

B. Standard of Review: Deference to Local Government

It is important to understand the great deference courts are required to show local government in typical TIF cases.⁷⁹ The “[c]ourt’s role is narrowly circumscribed” and the municipality is given a high level of deference.⁸⁰ The court must confine itself to determining if procedural mandates have been observed, necessary findings have been made, and whether the municipality’s ordinances are arbitrary, capricious, the product of fraud, collusion or bad faith, or otherwise beyond the municipality’s powers.⁸¹ Even if the municipality’s legislative findings are “fairly debatable” or “reasonably doubtful,” the court has no authority to invalidate the ordinances.⁸²

In other words, the court cannot simply substitute its judgment for the municipal Board.⁸³ The municipality is making a determination that is considered “legislative” under the Missouri Constitution and treated as such by the court.⁸⁴ If the court finds, for example, there is a reasonable argument that under the statute the redevelopment area is blighted or a redevelopment project is specific enough, as determined by the municipality, then it must leave the TIF approval intact. The municipality’s determination could even be “doubtful,” but as long as it is “reasonably” doubtful, the court must not disturb it.⁸⁵ The court can only overturn the local government’s determination if the determination is invalid beyond reasonable doubt.

78. See Reinert, *supra* note 25, at 1050.

79. TIF Cases for eminent domain have a less deferential standard and are subject to constitutional demands. See generally *Smith I*, 2010 WL 7352897.

80. See, e.g., *Tierney v. Planned Indus. Expansion Auth. of Kansas City*, 742 S.W.2d 146, 159 (Mo. 1987); *Meramec Valley R-III Sch. Dist. v. Eureka*, 281 S.W.3d 827, 840 (Mo. Ct. App. E.D. 2009); *JG St. Louis W.*, 41 S.W.3d at 519–20.

81. See *Tierney*, 742 S.W.2d at 160; *Eureka*, 281 S.W.3d at 840; *JG St. Louis W.*, 41 S.W.3d at 517.

82. *Eureka*, 281 S.W.3d at 836; *JG St. Louis W.* 41 S.W.3d at 517.

83. See *Tierney*, 742 S.W.2d at 160; *Eureka*, 281 S.W.3d at 836; *JG St. Louis W.*, 41 S.W.3d at 517.

84. Though municipalities do not have “inherent” legislative powers, the Missouri Constitution may grant municipalities certain legislative powers. The Missouri TIF Act allows municipalities to make legislative determinations as to what constitutes “blighted property.” See Reinert, *supra* note 25, at 1050.

85. *Eureka*, 281 S.W.3d at 836.

C. *Specificity of the Project: The NorthSide TIF Cases*

The key issue in Paul McKee's redevelopment cases at the trial court⁸⁶ and Missouri Court of Appeals⁸⁷ is different from the majority of TIF cases.⁸⁸ The case turned not on the blight requirement, but on the specificity in the "redevelopment project" that the statute requires.⁸⁹ In the trial court ruling, Judge Dierker stated that the fundamental issue in the case was that the city board did not have the discretion to approve a TIF and "try it."⁹⁰ The court required specifically detailed projects.⁹¹

The finding of blight on the north St. Louis project area, though challenged, was supported by "incontestable evidence of obsolete platting, deterioration of site improvements, and higher than average crime rates."⁹²

The trial court found the NorthSide redevelopment *plan* approved by the St. Louis Board of Aldermen did comply with statutory requirements.⁹³ However, the trial court found the "fatal flaw" to be a lack of specificity in any "discrete, definable redevelopment *project*" (emphasis added) as required by statute, thus making the ordinances that created the TIF invalid.⁹⁴ The trial court noted that most TIF cases:

"have involved discrete, definable projects, such as the shopping center upgrade in *JG St. Louis West* . . . Of late, however, the TIF redevelopment plans have grown in grandeur and scope . . . The problem is, however, that without a defined project, the TIF redevelopment process allows cities to expand redevelopment area designations *ad infinitum*."⁹⁵

The court made clear the distinction between a redevelopment "project" and a redevelopment "plan": "The plan is not the project. Concepts are not projects. Projects are concrete, not hypothetical or abstract: sanitary sewers will be constructed in City Block 1000, commencing on such-and-such a date, at an estimated cost of so many dollars."⁹⁶ The court goes on to say that "the TIF act requires that a redeveloper present 'shovel-ready' redevelopment projects."⁹⁷

86. *Smith I*, 2010 WL 7352897.

87. *Smith II*, 2012 WL 2317240.

88. *State ex rel. Devanssay v. McGuire*, 622 S.W.2d 323 (Mo. Ct. App. 1981).

89. *Smith I*, 2010 WL 7352897, at *12.

90. *Id.*

91. *Id.* at *15.

92. *Id.* at *11.

93. *Id.* The statutory requirements of a "redevelopment plan" are minimal. *Id.* (citing *McGuire*, 622 S.W.2d at 327 (the trial court found "all that was required was enough information to permit the Board of Aldermen to determine the plan's feasibility, and the courts 'must presume' a certain expertise in the Board and the bureaucracy in evaluating such feasibility.")).

94. *Smith I*, 2010 WL 7352897, at *18.

95. *Id.* at *18. (emphasis added).

96. *Id.* at *15.

97. *Id.* at *17-18.

The court found that the developers used less specific language and deliberately chose to omit defined projects, and seemed to imply a comparison of McKee's NorthSide development to a pipe dream, and the 1989 film, *Field of Dreams*, with the classic line, "If you build it, they will come."⁹⁸

The trial court relied heavily on a Missouri Court of Appeals decision, *City of Shelbina v. Shelby County*,⁹⁹ where a TIF approved by the Missouri City of Shelbina was struck down because it referenced only "aspirational goals and conceptual frameworks" in its redevelopment plan and lacked any specific projects.¹⁰⁰ In *Shelbina*, the court held that the plain meaning of the statute¹⁰¹ required that a specific redevelopment project must be approved or acts establishing the specific project must be approved prior to TIF approval by the municipality.¹⁰² The court cited language in Shelbina's TIF plan such as "may be implemented," "assumes that," "envisions that," "program concept is intended to," "could include," and so forth, as indications that there was no specific project in place.¹⁰³ For example, the plan stated that it solicited proposals for part of the development "*intended* to result in a scenario where a property owned by the City *will be* redeveloped into . . . commercial uses which *could* include a gas station . . ."¹⁰⁴ The court found that this language made clear that the city did not have the specific projects required by statute and invalidated the TIF.¹⁰⁵

The Missouri Court of Appeals upheld the trial court decision in the NorthSide case, finding the project specificity issues analogous to *Shelbina*: "aspirational goals and conceptual frameworks" in the redevelopment plan, but no "actual data regarding particular projects."¹⁰⁶ The court cited the redevelopment plan as being "couched in terms of 'anticipated,' 'may be,' 'contemplated,' and 'depending on market demand'" generally describing "NorthSide's ideas for land use" but providing no "specifics detailing impending redevelopment projects" and concluded "these 'proposals' are not sufficient to be considered a project under *Shelbina*."¹⁰⁷ NorthSide attorneys

98. *Id.* at *1, *17.

99. *Shelbina v. Shelby Cnty.*, 245 S.W.3d 249 (Mo. Ct. App. E.D. 2008).

100. *Id.* at 253.

101. *Id.* The Court specifically cites Section 99.845.1 of the TIF statute which states "A municipality, *either at the time a redevelopment project is approved or, in the event a municipality has undertaken acts establishing a redevelopment plan and redevelopment project and has designated a redevelopment area* after the passage and approval of Sections 99.800 to 99.865 . . . which acts are in conformance with the procedures of Sections 99.800 to 99.865, may adopt tax increment allocation financing by passing an ordinance . . . (Emphasis added)."

102. *Id.*

103. *Id.*

104. *Id.*

105. *Shelbina v. Shelby Cnty.*, 245 S.W.3d 249, 253-54 (Mo. Ct. App. E.D. 2008).

106. *Smith II*, 2012 WL 2317240, at *11.

107. *Id.*

argued that *Shelbina* was distinguishable because there was no developer in *Shelbina* and the TIF was only a vehicle for soliciting proposals for redevelopment with a vague conceptual objective, unlike McKee and NorthSide.¹⁰⁸ Attorneys also argued that the trial court exercised “judicial activism” not advocated by the appellate court in *Shelbina*, nor by the plain meaning of the statute.¹⁰⁹ The court found these arguments unpersuasive in its ruling.¹¹⁰

From a procedural perspective, it was extraordinary that plaintiffs in the trial court case did not even raise the issue of project specificity in their pleadings, though that was the issue that decided the case.¹¹¹ Plaintiffs’ pleading raised the issues of blight, the “but for” test, and the City’s good faith, among other things.¹¹² The trial court denied each of plaintiffs’ points in the pleading, but the decision was made in favor of the plaintiffs on a separate issue “detected by the Court,” which involved the statutorily required specificity of the redevelopment project.¹¹³ Even the trial court acknowledged that “there may be an argument that the defect in [the TIF] Ordinances . . . detected by the Court was not fairly embraced by the pleadings in this case.”¹¹⁴ The trial court, however, accepted plaintiffs’ motions *in limine* and objections at trial “as injecting specific claims of invalidity of the ordinances, and not as mere evidentiary objections.”¹¹⁵ At the Missouri Court of Appeals, NorthSide attorneys argued that a legal or factual challenge was never raised “based upon a lack of sufficiency of the redevelopment project in [plaintiff’s] pleadings or at trial,” and, therefore, the trial court’s judgment was void.¹¹⁶ The appellate court upheld the validity of the judgment, finding that the redevelopment project issue was “tried by the implied consent of the parties.”¹¹⁷

At the Missouri Supreme Court, however, in a 6-0 decision, the lower court’s ruling on specificity of the project plan was set aside on procedural grounds.¹¹⁸ The court held that:

“the petitions did not place Northside on notice that the specific project issue was a subject of this litigation and, therefore, did not preserve that issue for purposes of this case. . . the judgment went beyond the scope of pleadings and

108. Brief of Appellant at 41, NorthSide Regeneration LLC, *Smith v. St. Louis*, No. ED95733, 2012 WL 2317240 (Mo. Ct. App. E.D. June 19, 2012).

109. *Id.*

110. *Smith II*, 2012 WL 2317240, at *10–11.

111. *See Smith I*, 2010 WL 7352897, at *2–3.

112. *Id.*

113. *Id.* at *18.

114. *Id.*

115. *Id.* at *3.

116. *Smith II*, 2012 WL 2317240, at *4.

117. *Id.*

118. *Smith III*, 395 S.W.3d at 26, 24–26.

is voidable to the extent that it provides that there are no defined redevelopment projects or a cost-benefit analysis of such projects.”¹¹⁹

The Missouri Supreme Court did not address the issue of TIF specificity in its ruling¹²⁰ and, thus, the issue has not been addressed fully and conclusively in Missouri courts.¹²¹ Lawyers for plaintiffs indicated they had no plans to pursue further legal action against NorthSide.¹²² The level of specificity required for a TIF to meet the requirements of the statute remains an open question in Missouri.

D. Public Reaction to the NorthSide TIF Case

The NorthSide rulings were controversial, and the opinions on the decisions were sharply divided. However, local media was largely supportive of the project, and coverage on the matter continued for years.¹²³ A lengthy editorial on the topic in *The St. Louis Post-Dispatch* in December 2012, titled “Give NorthSide a Chance,”¹²⁴ forcefully stated the paper’s support for the project since the project went public in 2009.¹²⁵ The paper contrasted the NorthSide TIF with other TIFs in the St. Louis area that have “abused TIF laws by granting subsidies in well-to-do suburbs for big-box retail projects that cannibalize older retail operations . . . Meanwhile, the city’s overwhelmingly poor, African-American north side is bogged down in court. Weeds grow, criminals flourish, the few remaining residents hang on for dear life.”¹²⁶

A local African-American periodical, the *St. Louis American* (“*American*”), was among the staunchest supporters of the TIF, stating on its Editorial page, “We encourage those who dislike McKee but care about the future of the city to reconsider the critical value of his proposal to bring development and jobs to an area of the city sorely lacking in both.”¹²⁷ The *American* even publicly debated the legal issues and judges involved in the case, responding to an email from attorney Eric Vickers¹²⁸ that stated, “The *American* has thoroughly skewered and castigated Judge Robert Dierker for his

119. *Id.* at 24, 26.

120. *Id.*

121. *See, e.g.*, Logan, *supra* note 13.

122. *Id.*

123. *See, e.g.*, *Give NorthSide a Chance*, *supra* note 2; *Gentrification by TIF*, *supra* note 5; Rivas, *supra* note 32.

124. *See Give NorthSide a Chance*, *supra* note 2.

125. *Id.*

126. *Id.*

127. Editorial, *Perception vs. Law in Northside Appeal*, ST. LOUIS AM. (Nov. 29, 2012), http://www.stlamerican.com/news/editorials/article_dcbdcf1e-39c8-11e2-a33a-001a4bcf887a.html.

128. Vickers argued for plaintiffs as intervener in the NorthSide cases. *See Smith II*, 2012 WL 2317240.

decision to void McKee's proposal for being only a plan and not a project, his decision rests squarely and entirely on the well-reasoned appellate decision [in *Shelbina*]¹²⁹ of Supreme Court Justice George W. Draper III [supported by the *American* for appointment to the Missouri Supreme Court].¹³⁰ The *American* responded by stating it believes "Draper will show his sound legal judgment in ruling that the narrow precedent he established in *Shelbina* does not pertain to a redevelopment project that actually has a redeveloper and a redevelopment agreement."¹³¹

In addition to the media, a number of politicians and attorneys weighed in on the matter. City of St. Louis Mayor Francis Slay stated that he was committed to proceeding with the NorthSide development regardless of the courts.¹³² He said it "was a very complex legal issue" but that his development team was "absolutely" considering options and that "Paul McKee is moving forward with his project."¹³³ St. Louis Alderman Scott Ogilvie stated that "Paul McKee's problems are our problems" because North St. Louis' problems are St. Louis' problems.¹³⁴

A brief signed by the three attorneys representing the City of St. Louis, the Board of Aldermen and the TIF Commission states, "Taken to its logical end, [the] approach [of our opponents] will unavoidably require Missouri's courts to second-guess legislative decisions and micromanage TIF-financed redevelopment."¹³⁵

On the other side of the argument, north city residents stated that the plan of NorthSide Regeneration was "pie-in-the-sky" and caused their property values to drop.¹³⁶ Bevis Schock, attorney for several north city residents, argued before the Missouri Supreme Court, "I represent people who've been harmed . . . So who is harmed? My client is harmed!"¹³⁷ After the Missouri Supreme Court ruling which allowed NorthSide to go ahead with TIF plans,

129. *Shelbina v. Shelby Cnty.*, 245 S.W.3d 249, 253 (Mo. Ct. App. E.D. 2008).

130. Editorial, *No Dilemma Between Draper and Shelbina*, ST. LOUIS AM., Dec. 6, 2012, at A10.

131. *Id.*

132. *State Supreme Court to Weigh in on McKee Plan*, CBS ST. LOUIS LOCAL (Nov. 26, 2012), <http://stlouis.cbslocal.com/2012/11/26/state-supreme-court-to-weigh-in-on-mckee-plan/>.

133. *Id.*

134. *Dierker's 'Issue' with McKee Goes Before Supreme Court*, *supra* note 6, at A11.

135. *Id.*

136. Nicholas Phillips, *Listen to Oral Argument from Yesterday's High Court Battle Over Paul McKee's Project*, RIVERFRONT TIMES BLOGS (Nov. 29, 2012), http://blogs.riverfronttimes.com/dailyrft/2012/11/oral_argument_supreme_court_mckee_north_side.php.

137. *Id.*

Schock commented, “This is classic ‘crony capitalism’... [i]t’ll never work.”¹³⁸

Among the most vocal critics of the NorthSide plan was the chair of Washington University’s Department of Economics, Mr. Michele Boldrin, who testified at the trial that the benefits promised by McKee such as new jobs and increases in property value were “dreamy,” “out of thin air,” “unreasonable,” and “completely arbitrary”¹³⁹ and further stated that “if an MBA student came up with it, I’d throw him out of my office.”¹⁴⁰

Though reaction to NorthSide rulings was mixed and sometimes sharp, the attacks were largely on the specificity of developer Paul McKee’s plan or on personal concerns with McKee, not the broader objective of redeveloping the north side of St. Louis itself.¹⁴¹ Attorney Schock stated, “The heart of this case and 90 percent of the arguments focus on whether a project means a specific building that has a door, a roof, a purpose, or not.”¹⁴² A St. Louis planner remarked, “There is such a thing as making the area so big that you really can’t have the plan be completely believable,” and, he said, “Maybe that’s what this one is suffering from.”¹⁴³

III. THE RATIONALE FOR PROPOSED LEGISLATIVE CHANGE TO MISSOURI TIF LAW

A. *The Meaning of “Blight”*

The original intent of TIF was “the clearance and rehabilitation of urban decay in downtown areas”¹⁴⁴ so, logically, “blight” was set as an essential

138. Adam Allington, *Mo. Supreme Court Gives Paul McKee Green Light on Northside Project*, ST. LOUIS PUB. RADIO NEWS BLOG (Apr. 9, 2013), <http://news.stlpublicradio.org/post/mo-supreme-court-gives-paul-mckee-green-light-northside-project>.

139. Nicholas Phillips, *Wash U. Economist Rips McKee’s Plan for North St. Louis in First Day of Trial*, RIVERFRONT TIMES BLOGS (Feb. 17, 2010), http://blogs.riverfronttimes.com/dailyrft/2010/02/wash_u_economist_rips_mckees_plan_for_the_north_side.php.

140. Jeff Carroll & Michael Offerman, *Blight, Plight & Urban Flight*, WASHINGTON UNIVERSITY IN ST. LOUIS OLIN SUSTAINABILITY CASE COMPETITION (2013), available at <http://apps.olin.wustl.edu/mba/casecompetition/PDF/2013OSCCCaseFinal.pdf>.

141. See, e.g., *Give NorthSide a Chance*, *supra* note 2 (“Ever since Mr. McKee started secretly buying parcels before convincing the Legislature to help him with tens of millions of dollars in tax incentives, there have been people in St. Louis rooting for his failure. . . he’s a white guy from the suburbs. . . he kept things secret for a while, even to the point of letting properties run down. . . the idea is a long shot. But he’s working in a part of the city that began hollowing out in the 1950s”).

142. Rivas, *supra* note 32.

143. Logan, *supra* note 1.

144. Reinert, *supra* note 25, at 1023.

element of any area proposed for TIF redevelopment.¹⁴⁵ However, the meaning of blight in TIF law has evolved to the point where such a designation has “lost any real meaning.”¹⁴⁶ In testimony before the St. Louis TIF Commission, one observer found that “‘blighting’ . . . [which is] supposed to be subject to independent analysis [is] a rigged game.”¹⁴⁷ Many find that “nearly any area can qualify as blighted.”¹⁴⁸ As one author noted,

the court’s semantic manipulation of the term “blight” ignores an underlying reality that many of the controversial TIF projects in Missouri are not, by common-sense standards, blighted. Thus, the TIF blighting test is made at best illogical and at worse meaningless by the court’s statutory construction of the term.¹⁴⁹

Under the standard of review for typical TIF cases,¹⁵⁰ the court is not permitted to substitute its judgment for the municipal board.¹⁵¹ As held in *JG St. Louis West, LLC v. Des Peres*, factors such as limited space, improper subdivision, a faulty roof, and so forth can meet the statutory definition of “blight” if a municipality finds it.¹⁵² Thus, blight was found in a suburban shopping mall deemed to be the economic engine of one of the wealthiest suburbs in the area.¹⁵³

145. See, e.g., Kenneth Hubbell & Peter J. Eaton, *Tax Increment Financing in the State of Missouri*, MSCDC Economic Report Series No. 9703, at 2 (1997) available at <http://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=HubbellEatonMissouri> (“Early on, states restricted TIF projects to ‘blighted’ or ‘substandard’ areas within the community. But over time, bending to local political pressures, the requirements for such a designation were watered down and lost any real meaning.”); Kenneth Thomas Luce, *Reclaiming the Intent: Tax Increment Finance in the Kansas City and St. Louis Metropolitan Areas*, BROOKINGS INSTITUTION CENTER ON URBAN AND METROPOLITAN POLICY, Apr. 2003, at 3 (author argues that combating blight as “true purpose of TIF” and focuses study on “reclaiming the intent” of TIF.).

146. KELSAY, *supra* note 34.

147. David Stokes, *The Use of Tax Increment Financing in the City of Saint Louis: Testimony Before the Tax Increment Financing Commission of the City of Saint Louis*, SHOW-ME INSTITUTE, (Oct. 29, 2012), at 2, available at <http://showmeinstitute.org/publications/testimony/corporate-welfare/848-tif-in-saint-louis.html>.

148. VanDyke, *supra* note 40, at 799.

149. Reinert, *supra* note 25, at 1050.

150. The standard of review described is used in TIF cases where no eminent domain or condemnation is involved.

151. See, e.g., *Tierney v. Planned Indus. Exp. Auth.*, 742 S.W.2d 146 (Mo. 1987) (en banc); *Meramec Valley R-III Sch. Dist. v. Eureka*, 281 S.W.3d 827 (Mo. Ct. App. E.D. 2009); *JG St. Louis West, LLC v. Des Peres*, 41 S.W.3d 513 (Mo. Ct. App. E.D. 2001).

152. *JG St. Louis W.*, 41 S.W.3d at 518.

153. *Id.* See also Reinert, *supra* note 25, at 1019–1022; Ray Hartman, *Des Peres Has Gone Mad, But Don’t Take My Word for It*, RIVERFRONT TIMES, Oct 6, 1999. (Economist Murray Weidenbaum states, “To describe it [the West County mall] as a blighted area and keep a straight face is quite a trick.”).

Since the courts must defer to the municipality's finding of blight, and since there are no meaningful standards of blight in the statute, blight can be found in almost any area, making the statutory meaning of blight essentially meaningless.¹⁵⁴ The result of the lack of a meaningful blight standard in TIF law is that there is no economic incentive under TIF to develop in the areas that need it the most.¹⁵⁵

For example, a study in Kansas City found that 88% of TIF plans are in areas that contain the most affluent and best educated, while areas with high rates of poverty and unemployment receive only 12% of the TIFs.¹⁵⁶

In St. Louis, a study found that TIFs are used more frequently in higher-income communities, giving them unneeded advantage and contributing to economic and racial disparity in St. Louis.¹⁵⁷ They were used often in the more affluent central and west end of the city of St. Louis but little in the depressed sections of north St. Louis.¹⁵⁸ As the study summarized,

areas of concentrated poverty begin at a distinct disadvantage when trying to compete for customers, businesses and jobs and are further handicapped when higher-income communities receive additional advantages through diversion of tax dollars to private developers via tax incentives.¹⁵⁹

Another study specifically about TIF in Missouri, this one supported by the Brookings Institution,¹⁶⁰ made a similar conclusion.¹⁶¹ It found that "Missouri law creates the potential for overuse and abuse of TIF. Vague definitions of the allowable use of TIF permit almost any municipality, including those market forces already favor, to use it."¹⁶² It further concluded that because of these "flaws" in Missouri law, TIF is used in suburbs with little need for assistance.¹⁶³ Particularly in the St. Louis area, the study found that "TIF money very frequently flows to purposes other than combating 'blight' in disadvantaged communities—its classic purpose."¹⁶⁴

154. *No Dilemma Between Draper and Shelbina*, *supra* note 130.

155. Luce, *supra* note 145.

156. KELSAY, *supra* note 34, at 25.

157. EAST-WEST GATEWAY COUNCIL OF GOV'TS, AN ASSESSMENT OF THE EFFECTIVENESS AND FISCAL IMPACTS OF THE USE OF DEVELOPMENT INCENTIVES IN THE ST. LOUIS REGION: FINAL REPORT, 35–37 (Jan. 2011) [hereinafter EAST-WEST GATEWAY REP.], available at <http://www.ewgateway.org/pdffiles/library/dir/TIFFinalRpt.pdf>.

158. *Id.* The proposed redevelopment area of the NorthSide TIF is in a part of St. Louis that has rarely been used for TIF prior to NorthSide.

159. *Id.* at 36.

160. The Brookings Institution was probably the first think-tank in the United States. *Brookings Institution*, SOURCE WATCH, http://www.sourcewatch.org/index.php/Brookings_Institution (last visited Apr. 22, 2014).

161. Luce, *supra* note 145, at v.

162. *Id.*

163. *Id.*

164. *Id.*

The study did not fault the tool of TIF itself, but found that “poorly designed TIF laws are being misused . . . As a result, a potentially dynamic tool for reinvestment in Missouri’s most disadvantaged communities . . . is abused by high-tax-base suburban areas that do not need public subsidies.”¹⁶⁵

Ironically, because of the structure of TIF laws in Missouri, the very areas that need it the most, the areas that would fit the dictionary definition of “blight,”¹⁶⁶ are not receiving the benefit of TIF. The TIF statutory requirement of “blight” seems just a remnant of the early days of TIF which focused on redevelopment and “rehabilitation of urban decay in downtown areas.”¹⁶⁷

This note does not advocate the abolishment of TIF as a tool for non-blighted areas by developers. Rather, it argues for a new and separate “tier” in Missouri TIF law that would further incentivize redevelopment in truly blighted areas and accommodate the special needs of large-scale blighted districts, such as that proposed by the NorthSide plan. Under the reform proposed in this note, a TIF redevelopment area that meets a heightened definition of blight would be given a separate “tier” in the Missouri TIF statute. Under the current Missouri TIF statute, a “redevelopment area” must meet the definition of either a “blighted area,” a “conservation area,” or an “economic development area.”¹⁶⁸ This note will refer to an area that meets the proposed heightened standard of blight as a “true blight” area.

The definition of “true blight” in the modified statute could restrict blighting to urban and residential areas and provide clearer, objective standards for determining blight.¹⁶⁹ Modification to the blight definition was attempted in 2002 in Missouri in the wake of the *JG West St. Louis* decision and the blighting of the West County Center shopping mall.¹⁷⁰ The legislation, never enacted, includes objectively defined factors of high unemployment, low fiscal capacity, and moderate income in its definition of blight.¹⁷¹ Provisions from

165. *Id.*

166. According to Dictionary.com, blight refers to “impairment, destruction, ruin, or frustration” or “the state or result of being blighted or deteriorated; dilapidation; decay” as in “urban blight.” *Blight*, DICTIONARY.COM, <http://dictionary.reference.com/browse/blight?s=t> (last visited Apr. 22, 2014).

167. Reinert, *supra* note 25, at 1023.

168. MO. REV. STAT. § 99.805 (2010).

169. See Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L. J. 305, 335 (2004).

170. *Id.* See S.B. 172, 92d Gen. Assem., 1st Sess. (Mo. 2003) (unenacted), available at <http://www.senate.state.mo.gov/03INFO/billtext/intro/SB172.htm>.

171. S.B. 172, *supra* note 170. For example, the unenacted legislation defined “high unemployment” as “unemployment in the proposed redevelopment area of at least one and one-half times that of the metropolitan statistical area in which the area is located.” “Low fiscal capacity” is defined as “per capita assessed valuation of property in the municipality of less than sixty percent of the entire county in which it is located.” “Moderate income” is defined in part as

this proposed legislation could be incorporated into the “true blight” redevelopment area definition.

As former presidential economic advisor Murray Weidenbaum points out, “The idea of a TIF is to help truly blighted areas by providing a tax incentive for businesses to move into those areas.”¹⁷² Under the reform proposed in the note, a developer seeking TIF funding to develop an area where “true blight” is found would be entitled to special incentives and special provisions.

First, a “true blight” area may be entitled to increased tax incentives. A general structure for increased incentives based on condition of redevelopment area already exists at both a state and local level.¹⁷³ Under the current statute, additional tax incentives are available for blighted areas in pre-designated enterprise zones, empowerment zones or urban core areas.¹⁷⁴ This is called a “State TIF” and allows access to incremental state sales tax to supplement the amount of the local TIF.¹⁷⁵ Kansas City has also introduced a “Super TIF” to increase local incentives for residential development in “distressed areas.”¹⁷⁶ By using a clear defined statutory framework, two different levels of TIF incentives could be created, similar to the “State TIF” or “Super TIF,” with heightened incentives for areas with “true blight,” in relation to non-blighted development TIFs.

Second, a “true blight” redevelopment area, if it encompasses a large area, would be allowed a more flexible two-step project implementation process and relaxed specificity as described below in section B.

Finally, this note proposes either eliminating the definitions of blight currently in the statute entirely, or replacing these definitions with requirements that more realistically reflect the actual use of TIF for economic development in a range of non-blighted areas.¹⁷⁷ This approach has been

“median household income of under eighty percent of the median household income for the metropolitan statistical area.”

172. Ray Hartman, *Des Peres Has Gone Mad, But Don't Take My Word for It*, RIVERFRONT TIMES, Oct. 6, 1999. Weidenbaum goes on to say that TIF is “not designed for middle-class neighborhoods. It's designed for poor neighborhoods.”

173. See EAST-WEST GATEWAY REP., *supra* note 157.

174. MO. REV. STAT. § 99.845.4–99.845.14 (2010).

175. See MO. DEP'T OF ECON. DEV., STATE SUPPLEMENTAL TAX INCREMENT FINANCING PROGRAM (2007), available at <http://ded.mo.gov/upload/tif%2811-07%29.pdf>.

176. See CITY OF KANSAS CITY, MO., ECONOMIC DEVELOPMENT INCENTIVES 4–5 (April 2004), available at <http://www.kcmo.org/idc/groups/cityplanningplanningdiv/documents/cityplanninganddevelopment/017322.pdf>. The program has met with some criticism. See, e.g., Leigh McIlvaine, “*Super TIF*” *EATs Kansas City Alive!*, CLAWBACK, A BLOG OF GOOD JOBS FIRST (Sept. 25, 2008), <http://clawback.org/2008/09/25/%E2%80%9Csuper-tif%E2%80%9D-eats-kansas-city-alive/>.

177. Reinert, *supra* note 25, at 1051–52.

proposed by several authors in the past,¹⁷⁸ and, in fact, the states of Iowa and Indiana have dropped the “blight” test entirely.¹⁷⁹ These states allow TIF to be used in “Economic Development Areas,”¹⁸⁰ which more accurately reflects its actual use in Missouri, in areas such as suburban shopping malls and targeted retail outlets like Wal-Mart. Previous attempts by the legislature to exclusively limit TIF to an area like the “true blight” standard proposed above have failed to garner the necessary support from lawmakers on several occasions.¹⁸¹ This note proposes a solution that acknowledges the current use of TIF in suburban development, but would free municipalities from “being forced to make irrational declarations of blight that do not correspond to common-sense notions of the term.”¹⁸² These “irrational declarations of blight” infuriate the public because it seems a disingenuous use of taxpayer money.¹⁸³ The State of Ohio proposed a test that might be substituted for the current blighting standard, based on “private market failure,” “sudden and severe economic dislocation,” “unintended government policy impact,”¹⁸⁴ and so forth. This type of test, if carefully constructed, would serve to focus the TIF on true economic development benefiting the region, rather than meeting a blight standard that has no real meaning.

B. *Specificity and Accountability*

Smaller, project-specific TIFs, those whose “redevelopment area” is limited to a single structure or shopping mall, are unlikely to have specificity issues.¹⁸⁵ They have a clear agenda, with developers and contractors lined up, typically for targeted retail development.¹⁸⁶ On the other hand, large scale TIFs that impact entire districts, such as the NorthSide plan, have many more variables because of the time involved and the scale of infrastructural improvements needed.¹⁸⁷ The NorthSide trial court contrasted “discrete,

178. Reinert, *supra* note 25 (Recall the title of the article is “*Tax Increment Financing In Missouri: Is It Time For Blight And But-For To Go?*”); David N. Farwell, *A Modest Proposal: Eliminating Blight, Abolishing but-for, and Putting New Purpose in Wisconsin’s Tax Increment Financing Law*, 89 MARQ. L. REV. 407, 431 (2005).

179. Hubbell & Eaton, *supra* note 145, at 1.

180. *Id.*

181. See S.B. 172 *supra* note 170; Reinert, *supra* note 25, at 1051.

182. Reinert, *supra* note 25, at 1051.

183. See, e.g., David Nicklaus, *TIF Subsidy Tilts the Retail Playing Field*, ST. LOUIS POST-DISPATCH, Nov. 4, 2012 (commenting on a recent controversial use of TIF in St. Louis, “In plain, commonsense English, ‘blighted’ means that a property is an eyesore or a nuisance. In real estate law, it simply means that a property is eligible for a subsidy.”).

184. Reinert, *supra* note 25, at 1052.

185. See Logan, *supra* note 1. Urban planner John Brancaglione argues that the “easier” TIFs are “small and specific,” driven by developers often for retail projects.

186. *Id.*

187. TIF BEST PRACTICES GUIDE, *supra* note 26.

definable projects such as the shopping center upgrade in *JG St. Louis West*” with the “grandeur and scope” of redevelopment plans of NorthSide.¹⁸⁸ Concerns about specificity were the deciding factors in the NorthSide case at the Missouri Court of Appeals.¹⁸⁹ The court found no “specifics detailing impending redevelopment projects,” citing terms like “anticipated” and “depending on market demand” in the TIF Plan, and on this basis, the TIF was declared invalid.¹⁹⁰

The attorney for NorthSide summarized the core issue of the case: “whether the TIF act can be used to subsidize large scale redevelopment projects that will evolve over time with changing markets, politics and technology.”¹⁹¹ He also stated that the court’s decision was “detached from the commercial reality of large scale redevelopment.”¹⁹² Opposing attorney Bevis Schock responded, “If Paul McKee thinks as a policy matter that we should have large-scale TIF . . . he should go to the Legislature and get the law changed.”¹⁹³

St. Louis-based urban planner John Brancaglione questioned TIF law that makes large projects harder to obtaining funding, “If you’re trying to induce development in a large area, why make it more difficult? . . . You want to make it more difficult when they’re going for a small project.”¹⁹⁴ Brancaglione added that changes to Missouri law requiring more detailed financial projections have made it “tough for a city to create a district and then use the incentive to lure developers.”¹⁹⁵ He added other successful large-scale TIFs, such as the Grand Center TIF which covered nearly 300 acres, might not “pass muster” under the current standards of TIF law.¹⁹⁶

While TIF has the greatest impact when entire neighborhoods are transformed, large scale plans need some level of flexibility over the duration of the plan, which could be decades. TIF plans can span up to twenty-three years.¹⁹⁷ Missouri courts have held that “discrete, definable projects”¹⁹⁸ must

188. *Smith I*, 2010 WL 7352897, at *18.

189. *Smith II*, 2012 WL 2317240. As noted previously the case was later overturned on procedural grounds by the Missouri Supreme Court. *Smith III*, 395 S.W.3d at 26.

190. *Id.*

191. *Paul McKee Fights to Get His TIF Back for Northside Redevelopment Project*, CBS LOCAL ST. LOUIS BLOG (Feb. 1, 2012), <http://stlouis.cbslocal.com/2012/02/01/paul-mckee-fights-to-get-his-tif-back-for-northside-redevelopment-project/>.

192. *Dierker’s ‘Issue’ with McKee Goes Before Supreme Court*, *supra* note 6.

193. Logan, *supra* note 1.

194. *Id.*

195. *Id.*

196. *Id.* The \$25 million Grand Center TIF, established in 2003, includes the main campus of Saint Louis University. See Lisa Brown, *Grand Center’s Court Victory Resurrects \$130 Million in Projects*, ST. LOUIS BUS. J. (July 25, 2005).

197. MO. REV. STAT. § 99.810(3) (2010). Estimated dates of completion can be up to twenty-three years from the adoption of the ordinances approving the redevelopment project.

be presented prior to approval of the TIF plan.¹⁹⁹ Missouri courts have found “aspirational” language such as “anticipated” and “depending on market demand” not sufficient to meet the requirement of a project under the TIF statute, and that it was likewise unacceptable that specific projects be decided at a later time.²⁰⁰

The NorthSide TIF Redevelopment Plan, for example, stated that “up to approximately” 2,200 new homes and 7,800 apartments “may be” constructed, and that “up to approximately” 3,900 existing residential units could be retained or rehabilitated, depending on the condition of such units and the “market demand” for rehabilitated units.²⁰¹ Another section states that an adjacent area may be developed with “medium density mixed-use projects that may contain ground floor retail with residences or offices above, depending upon the market demand for such uses.”²⁰² The estimates and “aspirational language” was not acceptable to the Court.²⁰³ The trial court gave a hypothetical example of the specificity required for an acceptable project: “sanitary sewers will be constructed in City Block 1000, commencing on such-and-such a date, at an estimated cost of so many dollars.”²⁰⁴

NorthSide attorneys and others have argued that this approach makes large scale TIF plans impossible, even though they have been approved by local municipalities.²⁰⁵ They argue that a 1500-acre redevelopment spanning decades requires flexibility and that the level of specificity required should be left to the discretion of the municipality once a redevelopment agreement was executed with a redeveloper.²⁰⁶ Others have argued that the NorthSide plan was “pie-in-the-sky” and “unreasonable” and taxpayers must have the specificity necessary to be assured of a viable plan.²⁰⁷

This note proposes that large-scale TIFs be approved in a more flexible, two-step process. The redevelopment plan would require specific projects, but not require that the specific projects for the entire redevelopment be presented beforehand, prior to TIF approval. Rather, the entire plan and the funding would be conditionally approved as the first step; but be contingent on a series

198. *Smith I*, 2010 WL 7352897, at *18.

199. *Smith II*, 2012 WL 2317240, at *8–9.

200. *Id.* at *11.

201. NORTHSIDE REGENERATION LLC, NORTHSIDE REGENERATION TAX INCREMENT FINANCING (TIF) REDEVELOPMENT PLAN 6 (2009), available at <http://www.scribd.com/doc/21411368/NorthSide-TIF-Redevelopment-Plan>.

202. *Id.* at 21.

203. *Smith I*, 2010 WL 7352897, at *15.

204. *Id.*

205. *Dierker's 'Issue' with McKee Goes Before Supreme Court*, *supra* note 6.

206. Brief of Appellant, *Smith v. St. Louis*, No. ED95733, 2012 WL 2317240, at *41–43 (Mo. Ct. App. E.D. June 19, 2012).

207. *See supra* notes 136 and 139 and accompanying text.

of “discrete, specific projects” that the municipality would approve on a project-by-project basis through the course of the redevelopment. This note also advocates modifying the TIF statute to include so-called “accountability statutes” or “clawback” provisions that allow taxpayers to recoup the value of local tax incentives if those outcomes don’t materialize.²⁰⁸ The proposed statute would require the municipality to detail in the TIF agreement particular levels of performance expected and consequences for not meeting these expectations.²⁰⁹

To qualify for the increased level of flexibility this note proposes, the redevelopment area must meet the standards of “true blight” and the area must encompass a statutorily set minimum threshold of geographic size. This approach allows the developer the necessary flexibility to implement large-scale redevelopment, but also assures that the municipality is provided a reasonable level of specificity by requiring definable projects, as well as accountability and remedy through “clawback” provisions if the developer does not deliver promised work or outcomes.

IV. SUMMARY OF PROPOSED CHANGES TO MISSOURI TAX INCREMENT FINANCING LAW

This note proposes changes to Missouri law to accommodate the distinct characteristics of two different types of TIF. First, the proposal creates a new level or “tier” of TIF, which provides for increased incentives and increased flexibility. In order to qualify for these special incentives, a TIF must meet the standards of “true blight” in keeping with the original intent of tax increment financing to redevelop poorer neighborhoods and combat urban decay. To address specificity concerns in large-scale TIFs, yet still maintain an incentive to redevelop in truly blighted urban areas, this note advocates a two-step implementation process for TIFs that meet the heightened definition of blight in a larger redevelopment area. This would allow greater flexibility for large-scale developers to develop on a more realistic, project-by-project basis, yet still maintain specificity and accountability for each project within the overall TIF plan. “Clawback provisions” allow taxpayers to recoup the value of local tax incentives from developers if developer obligations are not met. It is proposed that these provisions be incorporated into the Missouri TIF statute.

The other “tier” is more typical of TIFs across the state.²¹⁰ A majority of TIFs are for project-specific retail development, and, particularly in St. Louis,

208. EAST-WEST GATEWAY REP., *supra* note 157, at 36. Note that the city of St. Louis “has required a ‘clawback’ provision in its redevelopment agreements since 2005.” It is not, however, required by statute. This note proposes that a clawback provision be added to the statewide TIF statute.

209. See KELSAY, *supra* note 34, at 27–28.

210. Luce, *supra* note 145, at 8, 11.

TIFs are used “by suburban areas with little need for assistance.”²¹¹ This note advocates eliminating the statutory “blight” test for this type of TIF, and replacing it with tests that measure the TIF’s effectiveness in generating economic development that benefits the region. In this way, the statutory test reflects the nature and purpose of this type of TIF.

CONCLUSION

The NorthSide cases raise several important issues in Missouri TIF law. Most obviously, how much specificity is required to meet the statutory requirements of a TIF project in Missouri? Yet other questions are also implied: How important is blight in determining the validity of TIF? How can laws be constructed to incentivize large-scale urban redevelopment, yet still assure developer accountability? The NorthSide TIF stands in sharp contrast in nature and scope to the more typical TIFs in Missouri involving targeted retail development. This note seeks to find a reasonable path of reform. It seeks a balanced approach by tightening standards in certain areas, eliminating meaningless standards in other areas, and providing flexibility in still other areas.

Tax increment financing is a powerful tool for both redevelopment and development. It has the power to reclaim whole neighborhoods that are truly blighted and also to facilitate many smaller development projects that stimulate economic growth. TIF involves many billions of dollars in Missouri taxes, and, furthermore, it has impact on school districts, communities, and businesses large and small. It is essential that the nature of tax increment financing law reflect the nature of the development itself in order to optimize the benefits of TIF and to minimize its abuse.

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211. *Id.* at 11.

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