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## TAX INCREMENT FINANCING IN MISSOURI: IS IT TIME FOR BLIGHT AND BUT-FOR TO GO?

### I. INTRODUCTION

Westfield America, Inc. (Westfield), a publicly-traded real estate investment trust (REIT), owns significant interests in thirty-nine major U.S. shopping centers known as “Westfield Shoppingtowns.”<sup>1</sup> These “Shoppingtowns,” which serve over ten percent of the U.S. population, currently account for 35.6 million square feet of leased retail space and house 4800 specialty stores.<sup>2</sup> Moreover, Westfield’s “Funds From Operations” totaled more than \$177 million in 1999, making Westfield one of the largest REITs engaged in the shopping center leasing business.<sup>3</sup>

In 1997, Westfield acquired West County Center shopping mall in Des Peres, Missouri, the second wealthiest municipality in the St. Louis area.<sup>4</sup> Soon after acquiring West County Center, Westfield announced a \$200 million redevelopment plan for the mall.<sup>5</sup> The planned development would double the shopping center’s size to approximately 1.2 million square feet and add upscale shopping stores such as Lord & Taylor and Nordstrom as anchor tenants.<sup>6</sup> Westfield sought public financing assistance for the West County Center project from the City of Des Peres in the form of tax increment financing (TIF).<sup>7</sup>

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1. WESTFIELD AMERICA, INC., 1999 ANNUAL REPORT 20 (2000), *available at* <http://www.westfieldamerica.com>.

2. *Id.*

3. *Id.* at 33. “Funds From Operations” is defined as net income (loss), excluding gains (or losses) from debt restructuring and sales of property, plus real estate related depreciation and amortization and after adjustments for unconsolidated real estate affiliates. “Funds From Operations” does not directly equate with net profit. *Id.*

4. Dan Mihalopoulos & Fred Faust, *West County Center Pushes to be Declared Blighted*, ST. LOUIS POST-DISPATCH, Oct. 30, 1997 (Zone West), at A1. Des Peres was the second wealthiest suburban St. Louis municipality, after Ladue, based on figures for median income and residential property value. The median income of Des Peres residents was \$74,901 in 1994 and its average residential property value exceeded \$173,000. *Id.*

5. Linda Billingsly, *Hearing Set on Mall’s Rebuilding Panel Will Tackle 3 Key Questions*, ST. LOUIS POST-DISPATCH, Oct. 30, 1997 (Zone West), at A1.

6. *See* Mihalopoulos & Faust, *supra* note 4. The Nordstrom’s would be the first built in the St. Louis area. *Id.*

7. *Id.* It was not unexpected for Westfield to request TIF funds for the mall. In states with TIF, nearly all cities with populations over 50,000 use TIF in some fashion. Jeffrey I. Chapman,

TIF, a statutory mechanism permitting public financing of private redevelopment projects, is common for large-scale redevelopment projects such as Westfield's West County Center initiative.<sup>8</sup> Specifically, TIF works by permitting incremental tax revenues—*i.e.*, the additional taxes generated by the redevelopment itself—to be diverted from traditional taxing jurisdictions, such as school districts and police and fire departments, to defray up-front costs of the project.<sup>9</sup> This fiscal bootstrapping technique unique to TIF is enormously popular with municipal governments seeking to finance real estate development without raising general taxes or withdrawing existing tax revenues from traditional taxing jurisdictions.<sup>10</sup>

By statute, however, TIF is restricted to certain types of development.<sup>11</sup> Most importantly, TIF is limited to projects that will eradicate blight or, in the alternative, halt the advance of blight.<sup>12</sup> Therefore, in Missouri as well as most other states, TIF statutes call for the municipality's governing body to meet certain tests prior to authorizing TIF.<sup>13</sup> The municipality must issue findings that "the redevelopment area on the whole is a blighted area, a conservation area, or an economic development area" (the "blighting test") and that the redevelopment 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 tax increment financing" (the "but-for" test).<sup>14</sup> These tests, coupled with an array of procedural requirements, form the heart of Missouri's TIF statute and are the principal tests required of any municipality to proceed with the use of TIF on a redevelopment initiative.

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*Tax Increment Financing as a Tool of Redevelopment*, in LOCAL GOVERNMENT TAX AND LAND USE POLICIES IN THE UNITED STATES 184 (Helen F. Ladd ed., 1998).

8. Gary H. Feder, *Recent Trends and Municipal Government Perspectives*, in MAJOR LAND USE LAWS IN MISSOURI 63 (1999). One commentator stated: "[I]n most instances today in this region, market forces alone do not support the [redevelopment] project. Except for rare instances, all projects receive some form of assistance." Michael Lazaroff, *Remarks at the St. Louis Regional Economic Forecast* (Oct. 15, 1999), in ST. LOUIS BUS. J., Oct. 22, 1999, at 95, available at 1999 WL 24027263.

9. SAM CASELLA, AMERICAN PLANNING ASS'N, TAX INCREMENT FINANCING: WHAT IS TIF? 1 (1984). For a fuller discussion of the workings of TIF, see *infra* text accompanying notes 60-118.

10. *Id.*

11. See JIM CULOTTA, NATIONAL ASSOCIATION OF COUNTIES, TAX INCREMENT FINANCING: AN ALTERNATIVE ECONOMIC DEVELOPMENT FINANCING TECHNIQUE 1 (2000).

12. See MO. REV. STAT. § 99.805 (Supp. 1998). The area must be either a "blighted area" or an area that is not yet blighted, but is still "detrimental to the public health, safety, morals, or welfare, and may become a blighted area." *Id.* § 99.805(3).

13. See *id.* § 99.810.

14. *Id.* § 99.810(1). For a more complete description of the "blighting test" and for definitions of what constitutes blighted areas, conservation areas and economic development areas, see *infra* text accompanying notes 111-117.

In the West County Center situation, the Des Peres Board of Aldermen declared that West County Center was “blighted” and met the requirements of the but-for test.<sup>15</sup> Based on these findings, Des Peres ultimately approved \$28.9 million in TIF for Westfield’s proposed redevelopment.<sup>16</sup> The decision to award the TIF funds precipitated a maelstrom of controversy in the St. Louis area.<sup>17</sup> Opponents derided the project as an unnecessary giveaway to deep-pocketed developers,<sup>18</sup> and legislators grappled with overhauling TIF’s statutory framework in response to the perceived misuse of TIF on projects such as West County Center.<sup>19</sup>

In fact, certain Des Peres residents, together with The Jacobs Group, the owner of a rival mall in suburban St. Louis, sued the City of Des Peres based on the Westfield TIF.<sup>20</sup> The plaintiffs sought a declaratory judgment invalidating the ordinances passed by Des Peres which authorized the development and an injunction preventing Des Peres from utilizing TIF on the project.<sup>21</sup> The plaintiffs argued that West County Center could not rationally be declared “blighted” when the mall had near 100% occupancy and annual sales topped \$100 million, and that the subsidizing of the mall through TIF funds amounted to unfair competition.<sup>22</sup> Plaintiffs also argued that Westfield, “one of the largest shopping center owners in the world,” had the economic ability to complete the redevelopment project without public subsidy.<sup>23</sup> The

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15. Dan Mihalopoulos, *West County Center Expansion Wins Approval*, ST. LOUIS POST-DISPATCH, Dec. 19, 1997, at C1.

16. *Id.* Westfield initially requested more than \$50 million in TIF for the project. *Id.*

17. *See, e.g.*, Editorial, *Time To End TIF Giveaway*, ST. LOUIS POST-DISPATCH, Nov. 24, 1997, at B6; Kenneth P. Thomas, Editorial, *Without Reform, Tax Increment Financing Makes No Sense*, ST. LOUIS POST-DISPATCH, Feb. 10, 2000, at B7.

18. *See Time To End TIF Giveaway*, *supra* note 17. This editorial labeled the TIF to Westfield a “dubious handout.” *But see* Andrew Morris, Editorial, *True Meaning of TIFs*, ST. LOUIS POST-DISPATCH, Nov. 29, 1997, at 36.

19. *See* Phil Sutin, *A Group of Area Lawmakers Sets Aside Political Differences to Forge Unity on Regional Goals*, ST. LOUIS POST-DISPATCH, Dec. 10, 2000, at B1. The effort to statutorily limit TIF is ongoing. Proposals have focused on limiting TIF to areas of pervasive poverty or high unemployment. However, these proposals have not achieved the necessary consensus among state lawmakers. The primary problem with the legislative proposals thus far is that the proposals would limit TIF to “narrowly defined pockets without inadvertently excluding other areas needing (tax increment financing) to overcome development obstacles.” *Id.* In light of the legislative impasse, this Comment suggests an alternative method to reforming Missouri’s TIF statute that would not limit TIF to only certain municipalities.

20. William C. Lhotka, *One Mall Challenges Another’s Use of TIF Money*, ST. LOUIS POST-DISPATCH, July 26, 1998, at D1. *See also* John Gibeaut, *The Money Chase: Municipalities Love Using Tax Breaks to Lure New Businesses, But Sweetheart Deals Have Lawyers for School Districts and Industry Rivals Raising Red Flags*, 85 A.B.A. J. 58, 61 (March 1999).

21. *JG St. Louis West L.L.C. v. City of Des Peres*, No. ED77037, 2001 Mo. App. LEXIS 2, at \*3 (Mo. Ct. App. Jan. 2, 2001).

22. *Id.* at \*4. *See also* Gibeaut, *supra* note 20, at 61.

23. Lhotka, *supra* note 20.

suit, apparently the first of its kind in the United States, “stunned” certain municipal law experts.<sup>24</sup>

However, the trial court denied the plaintiffs’ request to enjoin the TIF subsidy.<sup>25</sup> On appeal, the decision was affirmed.<sup>26</sup> In its opinion, the Missouri Court of Appeals noted that while “it is illogical to label as an economic liability a commercial enterprise that is indisputably [the] City’s greatest economic asset,” the court was unwilling to strike down the allocation of TIF dollars by the municipality to the developer on legal grounds.<sup>27</sup> Emphasizing that it would not interfere with the “fairly debatable” legislative decision made by Des Peres’ Board of Aldermen, the court thus allowed Westfield to proceed with the redevelopment of the shopping mall with the TIF subsidy.<sup>28</sup>

This Comment argues that rules of statutory construction and considerations of public policy—namely, judicial deference to matters of municipal policy-making—propelled the court’s decision in *JG St. Louis West L.L.C. v. City of Des Peres*. In other words, the outcome in *JG St. Louis West* was a predictable one, beginning with TIF’s expansive statutory language and solidified by long-standing policies mandating judicial deference to “legislative decisions” made at the local level. However, while the court’s decision makes sense in light of these principles, this Comment argues that the TIF statute, and by implication the court’s decision in *JG St. Louis West*, has eliminated traditional and even common-sense notions of blight that are more logical and intuitive than the current blighting and but-for tests. To correct this situation, this Comment advocates discarding the blighting and but-for tests completely, or, alternatively, replacing these tests with a more intuitive, rational standard befitting the current conception of TIF as an all-purpose development tool. In conjunction with aligning TIF with its broad present-day purposes, this Comment also advocates providing additional subsidies or incentives to the urban “slum” areas that TIF was originally intended to help but largely failed to reach.

In light of this argument, this Comment is divided into seven sections, including this Introduction. Section II provides a brief history of TIF, focusing

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24. *Id.*

25. *JG St. Louis West*, 2001 Mo. App. LEXIS 2, at \*1. However, the circuit court judge suggested that the use of TIF in conjunction with the Shoppingtown’s renovation could be “bad public policy.” Dan Mihalopoulos, *A Winner is Declared in Suburban Mall War*, ST. LOUIS POST-DISPATCH, Oct. 3, 1999, at E1. Specifically, the judge stated: “The court has limited and, in this court’s judgment, inadequate authority to test . . . the appropriateness of the actions . . . of the Board of Aldermen, when that board acts seemingly as a bank board of directors, as opposed to acting as a legislative body with police powers.” William C. Lhotka, *Judge OK’s West County Center Subsidy*, ST. LOUIS POST-DISPATCH, Oct. 8, 1999, at A1.

26. *JG St. Louis West*, 2001 Mo. App. LEXIS 2, at \*21.

27. *Id.* at \*8.

28. *Id.*

on the evolution of TIF from a fairly limited redevelopment tool for the removal of “urban slum” conditions to an all-purpose economic development engine. Section III examines the basic structure and workings of TIF, first looking at TIF’s mechanical operation, and then examining the requirements of Missouri’s Real Property Tax Increment Allocation Development Act.<sup>29</sup> Section IV looks at the advantages and disadvantages of TIF, from both developer and the municipal perspectives.. Section V provides an overview of Missouri case law dealing with “blighting” statutes, focusing on the *JG St. Louis West* decision. Finally, Section VI provides an explanation of the forces driving the outcome of the recent TIF litigation, and considers two alternative avenues for legislative reform—either dropping the blighting and but-for tests completely, or revising the tests into a more workable, intellectually honest approach.

## II. A BRIEF HISTORY OF TAX INCREMENT FINANCING

States have employed TIF for nearly forty years for a wide variety of development projects.<sup>30</sup> However, in TIF’s early years, it was used for fairly limited purposes: the clearance and rehabilitation of urban decay in downtown areas.<sup>31</sup> Only in the past twenty years, due to changing economic conditions and increasing reliance on business subsidies, has TIF become an all-purpose economic development tool.<sup>32</sup>

California was the first state to legislate TIF in 1952.<sup>33</sup> TIF was instituted in California after voters failed to approve a local match for federal urban renewal funds.<sup>34</sup> Local officials, seeking alternative methods to tap into the

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29. MO. REV. STAT. §§ 99.800–.865 (1994).

30. See Chapman, *supra* note 7, at 182.

31. *Id.* See also CULOTTA, *supra* note 11, at 1.

32. This, in turn, has lead TIF to be more closely scrutinized by legal scholars proposing a wide range of solutions to perceived TIF abuses. See, e.g., Julie A. Goshorn, Note, *In A TIF: Why Missouri Needs Tax Increment Financing Reform*, 77 WASH. U. L.Q. 919 (1999) (arguing that TIF abuse by municipalities and developers could be curbed by statutory amendments that limit TIF to areas of “pervasive poverty” or high crime); Todd A. Rogers, *A Dubious Development: Tax Increment Financing and Economically Motivated Condemnation*, 17 REV. LITIG. 145 (1998) (arguing that compelled transfers of land via eminent domain for the purpose of redevelopment—in conjunction with TIF—constitutes “economically motivated condemnation” lacking a public purpose); Catherine Michel, Note, *Brother, Can You Spare a Dime: Tax Increment Financing in Indiana*, 71 IND. L.J. 457 (1996) (arguing that legislative reform is necessary to make TIF more responsive to community interests); Joseph F. Luther, Comment, *Tax Increment Financing: Municipalities Avoiding Voter Accountability*, DETROIT C.L. REV. 89 (1987) (arguing that TIF violates certain states’ constitutional provisions concerning voter approval of new municipal debt).

33. KENNETH HUBBELL & PETER J. EATON, CENTER FOR ECONOMIC INFORMATION, UNIVERSITY OF MISSOURI-KANSAS CITY, *TAX INCREMENT FINANCING IN THE STATE OF MISSOURI I* (1997).

34. Chapman, *supra* note 7, at 190.

federal funds, devised TIF as a substitute method of obtaining the local match. However, officials recognized that the viability of TIF as a financing mechanism continued even after the federal programs were completed.<sup>35</sup> Therefore, California development authorities experimented with TIF in conjunction with other, privately financed property redevelopment projects.<sup>36</sup> California's success with TIF on these projects led many other states to adopt the TIF mechanism.<sup>37</sup>

California and other states initially utilized TIF in a conservative fashion.<sup>38</sup> TIF projects were generally not speculative in nature, but rather were based on pre-existing tax flows.<sup>39</sup> Moreover, nearly all states with TIF were using TIF solely in urban slum areas clearly meeting the statutory requirements of the blighting and but-for tests.<sup>40</sup> TIF was used in these urban areas in a predictable, straightforward manner for the construction of commercial and retail business spaces and also for low-income housing projects.<sup>41</sup>

However, political and economic pressures, and increasing reliance on business incentives to capture business activity, forced cities to experiment with broader applications of TIF.<sup>42</sup> Business interests increasingly viewed TIF, along with other development incentives, as a necessity for certain types of large-scale redevelopment projects.<sup>43</sup> Moreover, federal economic development funds were eliminated in the 1970s and 1980s, forcing cities with aging commercial and residential infrastructures to find creative financing methods to entice new development.<sup>44</sup> Under these conditions, TIF was

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35. *Id.*

36. See George Lefcoe, *When Governments Become Land Developers: Notes on the Public-Sector Experience in the Netherlands and California*, 51 S. CAL. L. REV. 165, 172 (1978).

37. Indeed, by 1994, TIF was being utilized by 5400 agencies in forty-four states. Chapman, *supra* note 7, at 184. See, e.g., 65 ILL. COMP. STAT. 5/11-74.4-2 (1992); IND. CODE ANN. § 36-7-14-1 (Michie 1999); IOWA CODE ANN. § 403.19 (West 1994); KAN. STAT. ANN. § 12-1770 (1992).

38. DAVID A. WILCOX & DAVID E. VERSEL, ECONOMIC RESEARCH ASSOCIATES, REVIEW OF BEST PRACTICES FOR TAX-INCREMENT FINANCING IN THE UNITED STATES 5 (1999) (on file with the Saint Louis University Law Journal).

39. *Id.* In other words, the incremental taxes were in some sense "guaranteed" by the federally funded projects. For a fuller discussion of debt instruments in relation to TIF, see *infra* text accompanying notes 67-74.

40. CULOTTA, *supra* note 11, at 2.

41. Chapman, *supra* note 7, at 182.

42. CULOTTA, *supra* note 11, at 2.

43. See HUBBELL & EATON, *supra* note 33, at 1.

44. CULOTTA, *supra* note 11, at 1; see also JOHN BRANCAGLIONE & CAROL LEVINSON, NATIONAL BUSINESS INSTITUTE, THE MYTH AND REALITY OF TAX INCREMENT FINANCING 75 (1999).

viewed as one of the few remaining effective tools available to municipalities seeking to jump-start property redevelopment.<sup>45</sup>

As TIF became a more recognized and all-inclusive development tool, and federal subsidies continued to wither, states sought to enhance TIF's flexibility. For instance, the traditional funding mechanism of TIF was broadened in many states to include other community tax bases as well as property taxes.<sup>46</sup> Thus, local governments were allowed to earmark local sales taxes, earning taxes, and other business revenues, along with property taxes, as the "incremental tax revenues" available to fund TIF projects.<sup>47</sup> This, in turn, allowed TIF to be utilized on a wider variety of projects, including commercial retail projects, which generate significant sales tax revenue.<sup>48</sup>

Clearly, by the 1990s TIF was something of an all-purpose developmental tool. In fact, TIF was increasingly viewed not only as a device for the removal of blight, but rather, as a tool capable of eliminating "fiscal stress" placed upon urban and suburban municipalities.<sup>49</sup> Fiscal stress results from financial obligations incurred by municipalities seeking to provide costly services, including police protection, trash removal, and infrastructure improvements, to residents and businesses.<sup>50</sup> Faced with mounting fiscal stress, municipalities recognized that TIF would be one way to finance new development or redevelopment without raising general taxes or expending additional out-of-pocket funds.<sup>51</sup>

Missouri enacted its TIF statute, the Real Property Tax Increment Allocation Redevelopment Act,<sup>52</sup> in 1982. Missouri's statute is substantially similar to statutes found in many other states, and resulted in over 100 TIF redevelopment districts.<sup>53</sup> These TIF districts are mainly concentrated in Missouri's metropolitan areas.<sup>54</sup> For instance, as of August 2000, Kansas City

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45. See Marc Jolin et al., *Tax Increment Financing: Urban Renewal of the 1990s*, 32 CLEARINGHOUSE REV. 81, 83 (1998); see also Tim Fischesser, Editorial, *Effort to Reform TIF Could Hurt St. Louis City and County*, ST. LOUIS POST-DISPATCH, May 1, 2000, at B7.

46. CULOTTA, *supra* note 11, at 2.

47. *Id.*

48. See *infra* notes 130-132 and accompanying text for additional discussion of this point.

49. See Chapman, *supra* note 7, at 186.

50. *Id.* Cities gauge fiscal stress in relation to the experiences of other municipalities. Chapman states: "It is also evident that some jurisdictions are more fiscally stressed than others. While 'unstressed' jurisdictions may consistently run budget surpluses, others are continually dipping into contingency accounts, borrowing from separate funds, instituting an array of new fees and charges, dramatically reducing services, or allowing public infrastructure to deteriorate." *Id.*

51. *Id.*

52. MO. REV. STAT. §§ 99.800-.865 (1994).

53. Dan Mihalopoulos, *TIF Laws Bring Blight to Affluent Areas*, ST. LOUIS POST-DISPATCH, April 8, 1997, at A1.

54. See *infra* notes 55-59 and accompanying text.

established thirty-seven TIF districts.<sup>55</sup> St. Louis has established more than forty such districts.<sup>56</sup> Also, the use of TIF in Missouri has increased sharply in recent years.<sup>57</sup> For instance, in Kansas City, seven TIF plans were approved between 1982 and 1991, but eighteen plans were approved between 1992 and 1997.<sup>58</sup> Based on these figures, it is clear that TIF is continuing to expand in Missouri.<sup>59</sup>

### III. THE BASICS OF TAX INCREMENT FINANCING

#### A. *The TIF Mechanism—“Freezing,” PILOTs, EAV and EATS*

As mentioned earlier, TIF enables a municipality to use additional incremental tax revenues generated by a development project to finance the upfront costs of the development itself.<sup>60</sup> Specifically, TIF is set in motion when a municipality acts to “freeze” the tax values on a subject property or contiguous areas at a pre-development level—the initial “equalized assessed value” (EAV).<sup>61</sup> Taxes paid up to the EAV are still collected and paid to the appropriate taxing jurisdictions, such as the school district or police district.<sup>62</sup> Thus, these taxing jurisdictions are not deprived of any revenue per se, in that they receive the same amount apportioned to them prior to the redevelopment project.<sup>63</sup> On the other hand, taxes collected above the initial EAV resulting from the improvements to the property, *i.e.*, the incremental taxes, are paid into a Special Allocation Fund established by the municipality.<sup>64</sup> The taxes paid

55. OFFICE OF THE CITY AUDITOR, CITY OF KANSAS CITY, MISSOURI, PERFORMANCE AUDIT: REVIEW OF THE 1999 TIF ANNUAL REPORT 5 (2000) (on file with the Saint Louis University Law Journal) [hereinafter 2000 PERFORMANCE AUDIT].

56. Mihalopoulos, *supra* note 53.

57. OFFICE OF THE CITY AUDITOR, CITY OF KANSAS CITY, MISSOURI, PERFORMANCE AUDIT: TAX INCREMENT FINANCING 5 (1998) (on file with the Saint Louis University Law Journal) [hereinafter 1998 PERFORMANCE AUDIT].

58. *Id.*

59. TIF is gaining in popularity in other states as well. For instance, in Illinois, over 300 TIF districts have been established. Michael T. Peddle, *TIF in Illinois: The Good, the Bad, and the Ugly*, 17 N. ILL. U. L. REV. 441, 441 (1997). Nearly sixty percent were instituted after 1987. *Id.* In California, the tax increment was \$400 million in 1984-85. By 1992-93, however, the increment had tripled to \$1.5 billion. Chapman, *supra* note 7, at 190-91.

60. See Feder, *supra* note 8, at 63.

61. See MO. REV. STAT. § 99.855 (1994).

62. Chapman, *supra* note 7, at 183.

63. See MO. REV. STAT. § 99.855.1 (1994).

64. *Id.* § 99.805(15) (Supp. 1998). The “Special Allocation Fund” is defined as “the fund of a municipality or its commission which contains at least two separate segregated accounts for each redevelopment plan, maintained by the treasurer of the municipality or the treasurer of the commission into which payments in lieu of taxes are deposited in one account, and economic activity taxes and other revenues are deposited in the other account.” *Id.*

into the Special Allocation Fund are known as “payments in lieu of taxes” (PILOTs), as they do not specifically constitute tax payments.<sup>65</sup>

In almost every case, municipalities will issue bonds for a TIF project and use the funds generated by the bond issue to pay off the project’s up-front development costs.<sup>66</sup> In turn, the money in the Special Allocation Fund (made as PILOTs) is generally used to pay off principal and interest on the bond issue.<sup>67</sup> Primarily, revenue bonds are issued in conjunction with TIF.<sup>68</sup> Under a revenue bond financing arrangement, the revenue generated by the project itself would serve as security for the bonds.<sup>69</sup> Like most other states, Missouri does not allow for general obligation bonds to be issued for TIF projects.<sup>70</sup> General obligation bonds are bonds secured by the “full faith and credit” of the issuing municipality and therefore represent an additional risk to the issuing municipality, because if incremental taxes are insufficient to pay off the

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65. *Id.* § 99.805(10). Payments in lieu of taxes are specifically defined as:

[T]hose estimated revenues from real property in the area selected for a redevelopment project, which revenues according to the redevelopment project or plan are to be used for a private use, which taxing districts would have received had a municipality not adopted tax increment allocation financing, and which would result from levies made after the time of the adoption of tax increment allocation financing during the time the current equalized value of real property in the area selected for the redevelopment project exceeds the total initial equalized value of real property in such area until the designation is terminated pursuant to subsection 2 of section 99.850.

*Id.*

66. *See* CASELLA, *supra* note 9, at 1. To gain credibility in the bond market, it may be necessary for the municipality to show some guarantee that it will generate a substantial enough increment to cover principal and interest costs of bonds. Of course, at the time of the issuance of the bonds, there would likely be no increment because the project has not reached fruition. Therefore, the developers or the municipality may have to dedicate funds to “jump start” the project and lend credibility to their efforts. Chapman, *supra* note 7, at 184.

67. *See* MO. REV. STAT. § 99.850 (1994). Chapman deems TIF to be “self-financing” at least to a certain extent: “The increment in land value generates the revenue to pay for the debt that was used to finance the expenditures that helped to cause the increment in land value.” Chapman, *supra* note 7, at 184.

68. *See* MO. REV. STAT. §99.835 (Supp. 1998). Revenue bonds are “tax-exempt, long-term obligations issued by public bodies.” M. DAVID GELFAND & PETER W. SALSICH, JR., STATE AND LOCAL TAXATION AND FINANCE IN A NUTSHELL 154 (1985).

69. GELFAND & SALSICH, *supra* note 68, at 155. Revenue bonds are not backed by the taxing authority of the municipality, and they are generally payable through revenues generated on specific projects financed by the bonds. *Id.* at 154.

70. MO. REV. STAT. §99.835.5 states:

The obligations issued pursuant to sections 99.800 to 99.865 shall not be a general obligation of the municipality, county, state of Missouri, or any political subdivision thereof, nor in any event shall such obligation be payable out of any funds or properties other than those specifically pledged as security therefor. The obligations shall not constitute indebtedness within the meaning of any constitutional, statutory or charter debt limitation or restriction.

*Id.*

principal and interest of the bond, the city must find additional revenue sources or risk default.<sup>71</sup>

Municipalities, however, are not limited to bond financing arrangements. In the alternative, municipalities may use their own funds to pay the preliminary costs of development.<sup>72</sup> Thus, the municipality may access general governmental funds, economic development funds, municipal utility funds, or federal grant funds to finance the TIF project. In this case the tax increment generated by the project is then used to repay the loan from the municipality's funds.<sup>73</sup> Also, "pay as you go" arrangements may be made between the city and developer.<sup>74</sup> With this type of financing, developers obtain their own project financing and pay for development costs. The city then uses tax increments to reimburse the developer for these up-front costs. Therefore, the developer bears the risk if the increment is insufficient to repay the costs incurred on the project.<sup>75</sup>

When utilizing a bond financing scheme or other type of loan arrangement in conjunction with TIF, the redevelopment must quickly generate incremental taxes large enough to service the principal and interest payments on the bond issue or loan.<sup>76</sup> However, if the increment is smaller than expected, default is generally considered to be the option of last resort. Prior to taking this step, the municipality may either reduce its expenditures in other project areas, or utilize intragovernmental grants or other interest income to service the debt.<sup>77</sup>

TIF is also flexible in that it allows municipalities to defray a wide variety of up-front development costs. TIF funds may be used to acquire property or structures, demolish or remove obsolete structures, install utilities or other public site improvements, or construct streets.<sup>78</sup> TIF may also be used to pay off various miscellaneous costs, such as economic and environmental studies, engineering surveys, building plans and specifications and master planning documents.<sup>79</sup> TIF funds, however, cannot be used to directly finance the

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71. GELFAND & SALSICH, *supra* note 68, at 143.

72. See MO. REV. STAT. § 99.805(8) (Supp. 1998) (defining "obligations" as "bonds, loans, debentures, notes, special certificates, or other evidences of indebtedness issued by a municipality to carry out a redevelopment project or refund outstanding obligations").

73. See *id.*

74. See MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY, *What is Tax Increment Financing?*, at <http://www.mcda.org/Org/factsheets/taxincrementfinancing.htm>.

75. *Id.*

76. See Chapman, *supra* note 7, at 185.

77. *Id.*

78. See MO. REV. STAT. § 99.805(14) (listing the typical costs associated with TIF). See also NATIONAL BUSINESS INSTITUTE, MAJOR LAND USE LAWS IN MISSOURI 134-35 (1998). Mary B. Schultz authored this article.

79. Schultz, *supra* note 78, at 135.

private interests of the developer (*i.e.*, by allowing the developer to purchase equipment, or by contributing to his profit).<sup>80</sup>

As noted earlier, TIF traditionally acted to “freeze” only the property taxes within the TIF district. However, under the Missouri statute, fifty percent of any new local Economic Activity Taxes (EATS), such as local sales taxes, earnings taxes, or utility taxes generated from the project may also be paid into the Special Allocation Fund.<sup>81</sup> This greatly expands the uses of TIF, especially for commercial retail projects such as shopping malls and strip mall centers, which generate significant sales taxes. TIF projects located within an Enterprise Zone, Federal Empowerment Zone or the Central Business District may also tap fifty percent of the “new state revenue” generated by the project.<sup>82</sup>

### B. Procedural Requirements of the TIF-Enabling Statute

Under Missouri’s Real Property Tax Increment Allocation Redevelopment Act, municipalities are subject to a host of procedural requirements that must be met prior to enacting a TIF project. These requirements create a procedural mechanism for municipalities to follow in enacting TIF plans and serve as a safeguard against the misuse of TIF.

#### 1. The Redevelopment Plan

Generally, the authorization of a TIF redevelopment project begins with the municipality commissioning urban planning experts to prepare a written Redevelopment Plan.<sup>83</sup> The Redevelopment Plan must set forth numerous details of the project, including its objectives, estimated costs, anticipated sources of funding, evidence of financial commitments acquired, anticipated type and terms of the bond obligations to be issued by the municipality or development authority, and the most recent EAV of the property and estimates of the incremental taxes which are expected to be generated.<sup>84</sup> The Redevelopment Plan must also contain a cost-benefit analysis illustrating the economic impact of the plan on affected taxing jurisdictions, the impact on the municipal economy if the plan is not undertaken and “sufficient information

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80. See CASELLA, *supra* note 9, at 5.

81. St. Louis Development Corp., *Tax Benefit Programs: Tax Increment Financing (TIF)*, at <http://stlouis.missouri.org/sldc/busdev/tif.html>. See also MO. REV. STAT. § 99.805(4).

82. St. Louis Development Corp., *supra* note 81. This applies to TIF projects initiated after January 1, 1998. *Id.*

83. See MO. REV. STAT. § 99.810.1.

84. *Id.* The Redevelopment Plan must also include findings that the “blighting” and “but for” tests, described *infra* in text accompanying notes 112-117, are met. Furthermore, the Redevelopment Plan must “confor[m] to the comprehensive plan for the development of the municipality as a whole.” *Id.* §99.810(2).

from the developer . . . to evaluate whether the project proposed is financially feasible.”<sup>85</sup>

## 2. The TIF Commission

In conjunction with the Redevelopment Plan, the municipality is required to establish a TIF Commission consisting of nine, eleven or twelve persons.<sup>86</sup> Appointments to the TIF Commission are made by the chief elected officer of the municipality, the school boards, the other affected taxing districts, and, at times, the county in which the TIF district is located.<sup>87</sup> Specifically, the chief elected officer of the municipality appoints six members of the TIF Commission, subject to the consent of the majority of the municipality’s governing board.<sup>88</sup> The affected school board appoints two members to the TIF Commission, and the other affected taxing jurisdictions appoint one member.<sup>89</sup> The county appoints three members to the TIF commission where a twelve-person TIF commission is established.<sup>90</sup> The members of the TIF commission appointed by the municipality serve a fixed term, but the members appointed by the school district and other affected taxing jurisdictions may either serve a fixed term or a term coinciding with the length of time of the redevelopment project.<sup>91</sup>

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85. *Id.* § 99.810(5). The financial analysis should also show “the impact on the economy if the project is not built, and is built pursuant to the redevelopment plan under consideration.” *Id.*

86. MO. REV. STAT. § 99.820.2. Specifically, the statute reads:

[P]rior to adoption of an ordinance approving the designation of a redevelopment area or approving a redevelopment plan or redevelopment project, the municipality shall create a commission of nine persons if the municipality is a county or a city not within a county and not a first class county with a charter form of government with a population in excess of nine hundred thousand, and eleven persons if the municipality is not a county and not in a first class county with a charter form of government having a population of more than nine hundred thousand, and twelve persons if the municipality is located in or is a first class county with a charter form of government having a population of more than nine hundred thousand . . . .”

*Id.*

87. *Id.* § 99.820.2(1)-(6).

88. *Id.* § 99.820.2(3).

89. *Id.* § 99.820.2(1)-(2). Where there is an eleven-person TIF commission, the two additional appointments are made by the county of the municipality. Where there is a twelve-person TIF commission—*i.e.*, a municipality located in a first class county with a charter form of government and having a population in excess of nine hundred thousand—the three additional appointments are made by the county of the municipality. *Id.* § 99.820.2(4)-(6).

90. MO. REV. STAT. § 99.820.2(6) (Supp. 1998).

91. *See id.* § 99.820.2(7). Specifically, “of the members first appointed by the municipality, two shall be designated to serve for terms of two years, two shall be designated to serve for a term of three years and two shall be designated to serve for a term of four years . . . .” *Id.*

The TIF commission is given broad powers to effectuate the redevelopment project.<sup>92</sup> Generally speaking, the commission will give notice regarding the Plan and carry out public hearings related to the Plan.<sup>93</sup> Also, within thirty days of the public hearings on the Redevelopment Plan, the TIF Commission must vote on the Plan and make recommendations to the city's governing body.<sup>94</sup> The TIF Commission may also be called on by the municipal board periodically to review the status of the redevelopment project area.<sup>95</sup>

### 3. Public Hearing Requirements

The statute requires that the TIF Commission hold public hearings on the proposed Redevelopment Plan.<sup>96</sup> The TIF notice requirements related to the public hearings are fairly strict to ensure that the interested parties and the public are made aware of the Redevelopment Plan. Notice must be given to all interested parties by mail or publication.<sup>97</sup> Notice by publication must be given twice—once within thirty days of the hearing and again within ten days.<sup>98</sup> Notices must also be sent by certified mail to all persons who paid general property taxes on parcels of property within the affected redevelopment district.<sup>99</sup> The notices must include the following: the meeting time and place, the proposed project boundaries, a description of the proposed redevelopment, a notice of where the Redevelopment Plan may be viewed, and a statement that all parties attending the public hearing will have an opportunity to be heard.<sup>100</sup> At the hearing, the public is given a chance to comment on the proposed plan, voice concerns and give additional feedback.<sup>101</sup>

### 4. Municipal Approval and Ordinances

Within ninety days of the public hearing, and after receiving a recommendation from the TIF Commission that the Redevelopment Plan be approved, the municipality's governing board—generally, its board of

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92. *See id.* § 99.820.3.

93. *Id.*

94. MO. REV. STAT. § 99.820.3 (Supp. 1998).

95. *See id.* § 99.810.2.

96. *Id.* § 99.830.1.

97. *Id.* Where notice is given by mail, it must be made by certified mail addressed to “the person or persons in whose name the general taxes for the last preceding year were paid on each lot, block, tract, or parcel of land lying within the redevelopment project or redevelopment area . . .” *Id.*

98. MO. REV. STAT. § 99.830.1 (Supp. 1998).

99. *Id.*

100. *Id.* § 99.830.2(1)-(4).

101. *Id.* § 99.825.1. Written objections to the plan may be filed, or, alternatively, oral comments may be given. *Id.*

aldermen—must decide whether it will put the Redevelopment Plan into effect.<sup>102</sup> If the board chooses to do so, it must adopt ordinances approving the Redevelopment Plan and designating the redevelopment area.<sup>103</sup> After approving such ordinances, the municipality is authorized to “[m]ake and enter into all contracts necessary or incidental to the implementation and furtherance of its redevelopment plan or project.”<sup>104</sup> Thereafter, the municipality may purchase or lease the subject project, or, alternatively, acquire the property by eminent domain. More commonly, however, the developer will already own the property or act to purchase it.<sup>105</sup> After the acquisition of the property is finalized, the municipality, acting in conjunction with the developer, may proceed with the preparation of the property for development.<sup>106</sup> By statute, the municipality is given the power to use all means “reasonably necessary to achieve the objectives of the redevelopment plan.”<sup>107</sup>

### 5. Ongoing Compliance

Generally speaking, the municipality periodically will review the TIF districts under its authority to ensure compliance with state regulations. Specifically, the municipality will look to make sure that its bond debt is being retired in a timely fashion. Under the Missouri statute, the TIF bonds must be retired within twenty-three years.<sup>108</sup> When the debt is fully retired, the tax assessments are “unfrozen” and the totality of the incremental tax revenues are returned to the traditional taxing jurisdictions.<sup>109</sup> Of course, the TIF project, if successful, will result in a considerably higher tax base than before the redevelopment project began.<sup>110</sup>

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102. *Id.* § 99.820.1(1).

103. MO. REV. STAT. § 99.820.1(1). Also, section 99.830(1) provides that “no redevelopment project shall be approved unless a redevelopment plan has been approved and a redevelopment area has been designated prior to or concurrently with the approval of such redevelopment project . . . .”

104. *Id.* § 99.820.1(2) (Supp. 1998).

105. *Id.* § 99.820.1(3). Specifically, the municipality may “acquire by purchase, donation, lease or eminent domain, own, convey, lease, mortgage, or dispose of, land or other property, real or personal, or rights or interests therein, and grant or acquire licenses, easements and options with respect thereto . . .” *Id.*

106. *Id.* § 99.820(4).

107. *Id.* § 99.820(3). In fact, TIF often goes hand in hand with eminent domain. *See* Rogers, *supra* note 32, at 167.

108. MO. REV. STAT. § 99.810(3). However, in certain circumstances the debt can be refinanced and the length of the project extended. Chapman, *supra* note 7, at 184.

109. Chapman, *supra* note 7, at 184.

110. *Id.*

C. *Substantive Requirements of the TIF-Enabling Statute*

In contrast to the host of procedural requirements that must be satisfied for a municipality to use TIF, the enabling statute requires only two substantive tests to be met.<sup>111</sup> Specifically, the statute calls for the municipality to issue findings in its Redevelopment Plan that the proposed redevelopment has met the requirements of the blighting test and the but-for test. The requirements of each test will be examined in turn.

1. The Blighting Test

A common misunderstanding of TIF is that it can only be used in conjunction with “blighted” properties. In fact, to meet the requirements of the so-called blighting test, the municipality must issue findings in its Redevelopment Plan that “the redevelopment area on the whole is either a ‘blighted area,’ a ‘conservation area,’ or an ‘economic development area.’”<sup>112</sup>

A blighted area is defined by the statute as any area:

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.<sup>113</sup>

A conservation area, on the other hand, is defined as any area:

[I]n which 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.<sup>114</sup>

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111. The distinction between “procedural tests” and “substantive tests” within TIF’s enabling statute is this author’s interpretation of the statute. The statute itself does not break the requirements into these terms.

112. MO. REV. STAT. § 99.810.1(1).

113. *Id.* § 99.805(1).

114. *Id.* § 99.805(3) (Supp. 1998). A conservation area “shall meet at least three of the factors provided in this subdivision for projects approved on or after December 23, 1997.” *Id.*

Finally, an economic development area is defined as an area that is neither a blighted area nor a conservation area, but where the municipality finds redevelopment to be in the public interest, because the redevelopment 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.<sup>115</sup>

In order to establish an Economic Development Area, a municipality must also find that the subject property “will not be solely used for development of commercial businesses which unfairly compete in the local economy.”<sup>116</sup>

## 2. The But-For Test

The municipality, along with declaring the property as either a blighted area, conservation area, or economic development area, must also issue findings that “[t]he redevelopment area on the whole . . . 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 [the redevelopment plan].”<sup>117</sup> This requirement is known generally as the but-for test (*i.e.*, the property would not be developed but-for the tax increment financing). The but-for test is a matter for both the developer and the municipality to consider, and the financial documents contained in the Redevelopment Plan should indicate the municipality’s but- for findings.<sup>118</sup>

## IV. PROS AND CONS OF TAX INCREMENT FINANCING

TIF, as with most other business incentives, has both advantages and disadvantages, depending upon the manner in which it is used. In its present form, TIF mostly appeals to municipal government and development interests. On the other hand, TIF is mainly criticized by economic and social policy groups, as well as residents in communities using TIF, who question whether or not TIF is necessary to spur additional development. The arguments both for and against TIF will be presented in this section.

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115. *Id.* § 99.805(5) (Supp. 1998).

116. *Id.*

117. MO. REV. STAT. § 99.810(1).

118. *Id.* § 99.810(1) (Supp. 1998).

### A. Advantages of Tax Increment Financing

#### 1. Property “Recycling”

TIF allows for redevelopment of “problem” property tending toward decay and obsolescence.<sup>119</sup> The costs associated with redeveloping or rehabilitating such property are generally greater than developing “green space,” due to the demolition costs, environmental remediation expenses, and the need for additional infrastructure associated with such projects.<sup>120</sup> By subsidizing development in areas of aging infrastructure, TIF provides a mechanism to “level the playing field” through its simple yet powerful fiscal bootstrapping technique.<sup>121</sup> Moreover, this “recycling” of infrastructure and property, if successful, also leads to beneficial secondary effects, such as the creation of job opportunities and the enhancement of neighborhood sustainability, as well as ultimately enhancing the municipality’s tax base, pending the retirement of its bond obligations.<sup>122</sup> Furthermore, such redevelopment will often stimulate other nearby property development.<sup>123</sup> Not surprisingly, municipalities often cite these secondary effects as factors justifying the use of TIF.<sup>124</sup>

#### 2. Read My Lips: “No New Taxes”

In Missouri and other states, TIF provides a means of funding real estate development projects without raising general taxes. Unlike other general tax levies, with TIF, there is no need for the municipality to levy additional taxes or request a public referendum on the use of TIF funds in conjunction with the proposed redevelopment project. Instead, in place of taxes, the developer makes payments in lieu of taxes (PILOTs).<sup>125</sup> This is not the case in several other states, which subject TIF to the general restrictions imposed on tax levies.<sup>126</sup>

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119. CULOTTA, *supra* note 11, at 5.

120. *Id.*

121. *See supra* notes 8-10 and accompanying text.

122. MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY, *supra* note 74.

123. *See id.*

124. *See* Peddle, *supra* note 59, at 447.

125. *See* MO. REV. STAT. § 99.835(1). The issue of whether PILOTs are actually taxes was litigated in *Tax Increment Fin. Comm’n of Kan. City v. J.E. Dunn Constr. Co.*, 781 S.W.2d 70 (Mo. 1989). Dunn argued in part that PILOTs are taxes and that article X, section 22(a) of the Missouri Constitution “requires increases in government *revenues* and expenditures to be approved by a vote of the people affected by the increase.” *Id.* at 74 (emphasis added). The Missouri Supreme Court rejected this argument, holding that “[t]he Constitution does not prohibit a city from levying an existing tax without voter approval; instead, it prohibits a city from increasing the current levy of an existing tax without voter approval.” *Id.*

126. Iowa, Arizona, South Dakota, Kentucky and Wisconsin have held that tax increment financing is subject to constitutional debt limitations, thereby, at least in part subjecting TIF to voter approval. *See* Goshorn, *supra* note 32, at 938-39.

### 3. Strong Local Control

TIF allows for strong local control.<sup>127</sup> While TIF is authorized by state statute, the decision-making power with respect to TIF is in the hands of individual municipalities.<sup>128</sup> Municipalities may initiate the TIF project and solicit developer proposals. Alternatively, developers may approach municipalities with a project suitable for TIF. In either case, municipalities maintain the authority to examine the financial merits of each proposed project, define the extent of the TIF, and oversee the developer's efforts.<sup>129</sup>

### 4. Flexibility

TIF also has built-in flexibility. It allows for reimbursement of a wide range of costs of development.<sup>130</sup> As noted earlier, TIF funds may be used for the acquisition of land; demolition and removal of blighted structures; installation, construction or reconstruction of streets, utilities or other site improvements; restoration of properties of historic or architectural value; and for the payment of miscellaneous costs.<sup>131</sup> TIF employs several types of financing schemes, including bond debt and pay-as-you-go arrangements.<sup>132</sup> TIF may be initiated anytime a development opportunity arises. Also, TIF may be used on both commercial and residential projects. Such flexibility makes TIF highly attractive to developers engaged in a wide range of projects.

### 5. Positive Fiscal Impacts

Finally, municipalities point to studies stating that TIF's fiscal bootstrapping technique is successful in raising assessed property values and creating successful projects. For instance, a 1997 *St. Louis Post-Dispatch* study found that TIF-subsidized projects almost always enlarge a city's tax base in the long run, with the assessed value of the TIF districts in Missouri appreciating an average of seventy-five percent after the implementation and completion of the TIF plan.<sup>133</sup> However, recent data studies have reached contradictory conclusions as to the value of TIF as an economic development tool. For instance, one recent study by economists Richard F. Dye and David

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127. See 1998 PERFORMANCE AUDIT, *supra* note 57, at 5.

128. *Id.*

129. See, e.g., MID-AMERICA REGIONAL COUNCIL, LOCAL ECONOMIC DEVELOPMENT INCENTIVES: KANSAS CITY METROPOLITAN AREA 3 (1996) (on file with the Saint Louis University Law Journal).

130. 2000 PERFORMANCE AUDIT, *supra* note 55, at 5.

131. See *supra* notes 78-80 and accompanying text.

132. See *supra* notes 66-75 and accompanying text.

133. Mihalopoulos, *supra* note 53. The *Post-Dispatch* study noted that as of April, 1997, nearly \$1 billion in private investment had accompanied \$250 million in TIF-financed projects in the St. Louis metro area. *Id.*

F. Merriman showed that TIF ultimately produced a negative growth rate for assessed property values.<sup>134</sup>

### B. *Disadvantages of Tax Increment Financing*

Regardless of the ultimate financial impacts, TIF is not universally lauded. Taxing jurisdictions and public advocacy groups often oppose TIF as an unnecessary “giveaway” to developers. Opponents also allege that TIF results in substantial losses to traditional taxing jurisdictions, displacement of existing businesses and residents, inefficient use of public resources, and “revenue-shifting” that undermines the health of the regional economy.

#### 1. Inefficient Allocation of Resources

The primary argument against TIF is that it may result in inefficient allocation of scarce resources.<sup>135</sup> This is most apparent where the development would have occurred without the subsidy. In other words, if the developer obtained an excessive TIF subsidy, the taxing jurisdictions are wrongfully deprived of the incremental revenue, and the developer excessively benefits because the public ultimately absorbs the additional costs.<sup>136</sup> When this happens, TIF represents an inefficient use of market resources and may prevent the dedication of such resources to other deserving projects.

#### 2. Effects on Traditional Taxing Jurisdictions

Critics also contend that traditional taxing jurisdictions often lose substantial incremental property revenues to TIF, especially when multiple large redevelopment projects are authorized within a single municipality.<sup>137</sup> Studies have noted that large-scale TIF projects result in very long-term and intensive tax commitments.<sup>138</sup> Missouri, however, largely mitigates this TIF danger by providing the school district with a voice on any TIF commission.<sup>139</sup> Other states have vested taxing jurisdictions with even more power, by

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134. Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Economic Development*, 47 J. URB. ECON. 306, 307 (2000).

135. For a fuller exposition of this view, see Kenneth P. Thomas, Editorial, *When Tax Help Goes To Those Not In Need*, ST. LOUIS POST-DISPATCH, Aug. 16, 1998, at B3. Professor Thomas argues that economic efficiency is not served by TIF, or by other economic incentives. *Id.*

136. Chapman, *supra* note 7, at 188.

137. WILCOX & VERSEL, *supra* note 38, at 16.

138. *Id.*

139. See *supra* notes 86-91 and accompanying text. By giving school boards and other affected taxing jurisdictions representation on TIF commissions, the state provides a check on the municipality. The affected taxing jurisdictions may voice their opinion as to the effects of the TIF and ultimately vote on whether or not the TIF should be approved.

allowing them to independently negotiate with the municipality in the increment determination process.<sup>140</sup>

### 3. Inter-municipal Bidding and Revenue-Shifting

Critics of TIF also argue that TIF encourages disadvantageous inter-municipality bidding wars for development dollars.<sup>141</sup> These bidding wars, if unchecked, can lead to adverse revenue-shifting effects that undermine the health of the larger regional economy.<sup>142</sup> Such inter-municipality bidding on new development does not generate new wealth on its own, but shifts wealth from one outlet to another.<sup>143</sup> Concededly, revenue-shifting occurs to some extent whenever a new provider enters the market. However, the effects of revenue-shifting may be exacerbated by the use of subsidies such as TIF.<sup>144</sup>

The ultimate problem posed by this revenue-shifting effect is that, as one commentator pointed out, TIF is not a “perpetual motion machine.”<sup>145</sup> In other words, TIF cannot sustain itself indefinitely. Each TIF project is ultimately not “self-financing” because it relies on the larger economic marketplace to generate the additional incremental tax revenue. Thus, TIF, if used sparingly and judiciously, will increase property values and generate enough increment to finance its own projects. However, if TIF is overused, the community will experience diminishing marginal returns from its TIF-backed redevelopment.<sup>146</sup> Such diminishing returns will lead to two possible outcomes. First, the diminishing returns may lead to a decline in the projected increment, forcing smaller projects or cancellation of TIF projects. Second, municipalities may overestimate the projected increment and then be forced to default on their bond obligations when the increment is insufficient to cover their bond debt.<sup>147</sup>

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140. WILCOX & VERSEL, *supra* note 38, at 17. Other states, such as Kansas, are considering whether to allow school districts the right to receive both present and future tax increments from the proposed development, effectively removing the school district from the TIF equation. *Id.*

141. See Merrill Goozner, *Governments Rethink Corporate Tax Breaks*, CHI. TRIB., March 14, 2000, at <http://www.chicago.tribune.com/news/printedition/article/0,2669,SAV-0003140318,FF.html>.

142. See Editorial, *TIF Reform and Regional Growth*, ST. LOUIS POST-DISPATCH, April 3, 2000, which states: “In our area, TIFs have done more harm than good. Instead of revitalizing declining areas, they have hastened their decline by redirecting capital to richer areas.” *Id.*

143. 2000 PERFORMANCE AUDIT, *supra* note 55, at 5.

144. See Peddle, *supra* note 59, at 444.

145. Chapman, *supra* note 7, at 185.

146. *Id.*

147. *Id.* at 188. Certain states have acted to limit such “competitive retail outlet hunting.” For instance, some states require the municipality to independently negotiate with the school districts regarding the amount of the increment devoted to the redevelopment. Other states now limit the amount of vacant land that can be included in a redevelopment project area. See WILCOX & VERSEL, *supra* note 38, at 9.

## V. THE MISSOURI COURTS' ACCEPTANCE OF THE BLIGHTING STANDARD

While TIF obviously has both strengths and weaknesses, it will almost undoubtedly continue to be used by municipalities on a wide range of development projects. This trend has been accepted by the Missouri courts, which have consistently and uniformly held that Missouri's TIF statute is constitutional as written, and that the blighting and but-for tests are valid restraints upon the municipal exercise of power.<sup>148</sup> This trend recently reached its zenith in *JG St. Louis West L.L.C. v. City of Des Peres*. However, prior decisions, including decisions predating Missouri's adoption of TIF, laid the foundation for the court's decision in *JG St. Louis West*. Thus, this section provides a look at the most significant decisions in Missouri involving municipal determinations of blight and but-for, starting with *Tierney v. Planned Industrial Expansion Authority of Kansas City* and culminating with *JG St. Louis West*.<sup>149</sup>

### A. *Tierney v. Planned Industrial Expansion Authority of Kansas City*<sup>150</sup>

#### 1. Historical Facts

In 1967 Missouri adopted section 100.310 of the Missouri Revised Statutes, also known as the Planned Industrial Expansion Act, which allows municipalities to acquire and redevelop land in "blighted," "insanitary" or "undeveloped" areas.<sup>151</sup> The section 100.310 provisions are in many respects substantially similar to TIF.<sup>152</sup> Under the powers conferred by section 100.310, the Planned Industrial Expansion Authority of Kansas City (PIEA), sought to redevelop a twenty-two acre parcel of land in downtown Kansas City.<sup>153</sup> PIEA declared the parcel to be of a "blighted, insanitary or undeveloped" condition and instituted condemnation proceedings to acquire the land.<sup>154</sup> The Tierneys, owners of a "structurally sound and useable" property within the larger blighted parcel, opposed PIEA's condemnation proceedings on the grounds that their property did not fall into any of the three statutory categories (blighted, insanitary or undeveloped).<sup>155</sup> The Tierneys also

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148. See *infra* notes 150-212 and accompanying text.

149. It should be noted that several of these cases do not directly involve TIF, but other redevelopment statutes enacted in Missouri. However, these decisions are important in that they involve determinations of "blight" and influence the court's view of TIF in later cases such as *JG St. Louis West v. City of Des Peres*.

150. 742 S.W.2d 146 (Mo. 1988) (en banc).

151. *Tierney v. Planned Indus. Expansion Auth. of Kan. City*, 742 S.W.2d 146, 148-49.

152. See MO. REV. STAT. § 100.310 (1994).

153. *Tierney*, 742 S.W.2d at 149. Tierney's property formed only a small part of a larger "blighted" tract. *Id.*

154. *Id.*

155. *Id.* at 151.

objected to the municipality's use of "economic underutilization" as a rationale for its finding of blight.<sup>156</sup> The Tierneys suggested that the court's acceptance of the concept of "economic underutilization" as a legitimate rationale for redevelopment would result in municipalities acquiring virtually "unlimited discretion" to determine where to pursue redevelopment.<sup>157</sup>

## 2. Holding

The court noted that the Tierneys were not challenging the "basic concepts underlying urban redevelopment," but rather the application of section 100.310 to their "structurally sound and useable" property.<sup>158</sup> Under this "as applied" challenge to the municipal findings, the court accorded deference to the legislative determinations of blight.<sup>159</sup> Indeed, the court stated that, unless the municipality's decision was of an arbitrary or unreasonable nature, determining "whether a particular area is blighted . . . is a matter for the legislative body to resolve."<sup>160</sup> Moreover, the court held that "economic underutilization" was a reasonable basis for a municipality to issue findings of blight.<sup>161</sup> The court stated that "[t]he concept of urban redevelopment has gone far beyond slum clearance and the concept of economic underutilization is a valid one."<sup>162</sup> Thus, the court would not sit as a "court of appeal over the decision made by the municipal board," but the "burden is on the owners to show that the finding of blight constitutes an arbitrary or unreasonable abuse of the legislative authority."<sup>163</sup> The Tierneys failed to meet this burden.<sup>164</sup>

## B. *Crestwood Commons Redevelopment Corp. v. 66 Drive-In*<sup>165</sup>

### 1. Historical Facts

The Eastern District of the Missouri Court of Appeals again considered the extent of a municipality's power to issue findings of blight in *Crestwood Commons Redevelopment Corp. v. 66 Drive-In*.<sup>166</sup> The case involved the

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156. *Id.* Apparently, either in issuing the findings of blight or in prior conversations with the plaintiff-owner, the municipality stated that the land was "economically underutilized" and sought to use this as a basis for condemnation, although this was not specifically stated in the opinion. *Id.*

157. *Tierney*, 742 S.W.2d at 151.

158. *Id.* at 150.

159. *Id.*

160. *Id.*

161. *Id.* at 151.

162. *Tierney*, 742 S.W.2d at 151.

163. *Id.*

164. *Id.*

165. 812 S.W.2d 903 (Mo. Ct. App. 1991).

166. *Id.*

redevelopment of the 66 Drive-In movie theater into what was to be a Schnuck's supercenter grocery store.<sup>167</sup> The Crestwood Board of Aldermen determined that the 66 Drive-In site would be the ideal, if not the only, site within the municipality that could accommodate the new store.<sup>168</sup> The City, acting under section 353, which, like TIF, requires a finding of blight, therefore sought to condemn the Drive-In's property.<sup>169</sup> The City commissioned studies finding that the property had "building, structures, and land uses which, because of age, obsolescence, inadequate or outmoded design, or physical deterioration have resulted in economic and social liability to the City and its residents . . . and may be found to be a blighted area."<sup>170</sup> The Drive-In, however, desired to redevelop the property itself, and thus opposed the condemnation and redevelopment under section 353.<sup>171</sup> The City issued a finding of blight and ultimately petitioned for condemnation of the Drive-In's property, despite 66 Drive-In's opposition to the project.<sup>172</sup>

## 2. Holding

The circuit court determined that Crestwood's decision to declare the Drive-In blighted was arbitrary and issued an injunction to stop the condemnation proceedings. On appeal, however, the decision of the lower court was reversed.<sup>173</sup> As in *Tierney*, the court found that Crestwood, in issuing its findings of blight, had acted in its "legislative capacity" and thus the standard of judicial review was limited to whether the legislative determination was "arbitrary" or induced by "fraud, collusion or bad faith."<sup>174</sup> Therefore, the court accorded the City wide discretion in the "exercise of judgment in determining a condition of blight in a given area."<sup>175</sup> Furthermore, the court stated that it "could not substitute its opinion for that of the board unless it appeared the board's conclusion was clearly 'arbitrary.'"<sup>176</sup> In this case,

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167. *Id.* at 905.

168. *Id.*

169. *Id.* MO. REV. STAT. § 353.020(2) states: "[B]lighted area shall mean that portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration, have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes."

170. *Crestwood Commons*, 812 S.W.2d at 905. Moreover, these conditions were such as to be "conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes."  
*Id.*

171. *Id.*

172. *Id.* at 906-07.

173. *Id.* at 908.

174. *Id.* at 909.

175. *Crestwood Commons*, 812 S.W.2d at 909.

176. *Id.* Specifically, the court states that "there was room for reasonable differences and fair debate on this issue. From the evidence, the Board reasonably could have concluded both that the

because the evidence neither compelled a finding of “blight” nor did it compel a conclusion to the contrary, the court held that the board *reasonably could have concluded that the area was blighted* and in need of redevelopment. Therefore, the Board’s decision was permitted to stand.<sup>177</sup>

C. *Tax Increment Financing Commission of Kansas City v. J.E. Dunn Construction Co.*<sup>178</sup>

1. Historical Facts

In 1986, Kansas City designated a 57,000 square foot parcel of property as a “conservation area” under Missouri’s TIF statute.<sup>179</sup> The City’s Redevelopment Plan called for the rehabilitation of two existing buildings and the construction of a new building for office and warehouse space.<sup>180</sup> Dunn, the owner of a useable 7500 square foot parcel of land within the redevelopment project area, rejected the city’s initial buyout offer.<sup>181</sup> Subsequently the city filed a petition to condemn the property under its power of eminent domain.<sup>182</sup> After the trial court ordered Dunn’s property condemned, three condemnation commissioners awarded \$55,000 to Dunn.<sup>183</sup> Subsequently Dunn filed a motion to dismiss.

Dunn did not allege that the City Council had acted in an arbitrary or fraudulent manner in finding that the property was a conservation area, but rather Dunn challenged the constitutionality of the Real Property Tax Increment Allocation Redevelopment Act.<sup>184</sup> One argument Dunn raised was

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area was blighted within the meaning of Section 353.020 and that a redevelopment plan was necessary.” *Id.*

177. *Id.* (emphasis added).

178. 781 S.W.2d 70 (Mo. 1989) (en banc).

179. Tax Increment Fin. Comm’n of Kan. City v. J.E. Dunn Constr. Co., 781 S.W.2d 70, 74-78 (Mo. 1989) (en banc).

180. *Id.* at 74.

181. *Id.*

182. *Id.*

183. *Id.*

184. *J.E. Dunn Constr. Co.*, 781 S.W.2d at 74. While Dunn argued that TIF was unconstitutional, or more specifically, that TIF’s authorization of the redevelopment of “conservation areas” was unconstitutional, this was not his main argument. Dunn’s primary argument, which lies outside the scope of this Note, was that PILOTs, the incremental funds paid by the property owners into the Special Allocation Fund, were taxes, and that the Missouri Constitution requires such taxes to be approved by a vote of the people affected by the increase. *Id.* The court rejected this argument, stating: “PILOTs are special assessments levied against the property in the District for the improvements provided that property under a redevelopment plan.” *Id.* at 77. In labeling the PILOTs as “special assessments” rather than new taxes, the bond indebtedness did not violate the constitutional requirements. *Id.* This issue, as to whether PILOTs are taxes, has already been addressed by other authors. See Goshorn, *supra* note 32, at 938. Goshorn questions the formalistic distinction made by the court between “special

that the Missouri Constitution did not expressly allow for a municipality to designate land as a “conservation area” under the TIF statute. Dunn argued primarily from article VI, section 21 of the Missouri Constitution, which provides that “laws may be enacted, and any city or county . . . may enact ordinances . . . providing for the clearance, replanning, reconstruction, redevelopment, and rehabilitation of blighted, substandard or insantarity areas . . . and for the taking . . . by eminent domain, of property for such purchases.”<sup>185</sup> Noting that the constitution never expressly mentioned the phrase “conservation area” as a legitimate area that could be found blighted, Dunn contended that the powers of eminent domain did not apply to the taking of property within such a designated area.<sup>186</sup>

## 2. Holding

The court rejected Dunn’s constitutional interpretation argument.<sup>187</sup> Rather, the court stated that the term “substandard,” as used in the constitution, “speaks to a power given certain political subdivisions to prevent, as well as eliminate, *incipient conditions of blight*.”<sup>188</sup> Therefore, conservation areas, which are areas “not yet blighted” but “detrimental to the public health, safety, morals, or welfare” could be legitimately categorized as “substandard” under the constitution, and the designation of Dunn’s land as a “conservation area” under the statute would not be deemed unconstitutional.<sup>189</sup>

### D. *City of St. Charles v. DeVault Management*<sup>190</sup>

#### 1. Historical Facts

In 1993, the City of St. Charles, Missouri, attempted to establish a TIF district for the redevelopment of 106 acres within its city limits.<sup>191</sup> St. Charles declared the area to be of a “blighted” condition.<sup>192</sup> DeVault owned apartments occupying eleven acres within the Redevelopment Plan boundaries.<sup>193</sup> When St. Charles instituted condemnation proceedings to acquire possession of the property, DeVault Management and its owners

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assessments” as opposed to “taxes” and has been questioned by various commentators. Moreover, several other states, including Iowa and Wisconsin, have held that debt generated from TIF is subject to constitutional debt limits. *Id.*

185. *J.E. Dunn Constr. Co.*, 781 S.W.2d at 78.

186. *Id.*

187. *Id.*

188. *Id.* (emphasis added).

189. *Id.*

190. 959 S.W.2d 815 (Mo. Ct. App. 1998).

191. *City of St. Charles v. DeVault Mgmt.*, 959 S.W.2d. 815, 818 (Mo. Ct. App. 1998).

192. *Id.*

193. *Id.* at 817-18.

sought to dismiss the suit, alleging that St. Charles failed to plead sufficient facts for eminent domain, to inform defendant of all relevant hearings, and to adopt proper ordinances.<sup>194</sup> DeVault's primary contention was that the city's Redevelopment Plan, which called for the development of a hotel and entertainment area, was not in conformity with its comprehensive plan, which called for park land and moderate density residential use in the area of the subject property.<sup>195</sup>

## 2. Holding

In this case the court stated that St. Charles, as plaintiff seeking condemnation of the DeVault property, bore the initial burden of proof of showing compliance with the TIF statute.<sup>196</sup> The court found that the city failed to carry its burden of proof as it failed to prove that the Redevelopment Plan "conforms to the comprehensive plan for the development of the municipality as a whole" as required under section 99.810(2).<sup>197</sup> The lack of conformity, which was neither doubtful nor even fairly debatable, was thus "arbitrary, contrary to fact, and an unwarranted abuse of discretion."<sup>198</sup> *City of St. Charles v. DeVault Management*, therefore, provides some illumination of what is required to prove that a municipality acted in an "arbitrary" manner in making its determination of blight.

### E. *JG St. Louis West L.L.C. v. City of Des Peres*<sup>199</sup>

#### 1. Historical Facts

As was previously discussed, in 1997, Westfield America, hoping to attract a Nordstrom's department store to one of its Shoppingtowns, asked the City of Des Peres to consider redeveloping West County Center with TIF funds.<sup>200</sup> Des Peres agreed to negotiate with Westfield for the TIF funds, and over the next two years undertook the requisite initial procedural steps of establishing a TIF commission and hiring planning consultants to do preliminary financial

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194. *Id.* at 818. Plaintiffs also contended lack of subject matter jurisdiction and personal jurisdiction and failure to state a claim for relief. *Id.*

195. *DeVault Mgmt*, 959 S.W.2d at 820. A city's "comprehensive plan" is distinguished from a "redevelopment plan." The purpose of a comprehensive plan is to "guide the development and use of land within the city." *Id.* at 822.

196. *Id.* at 820.

197. *Id.*

198. *Id.*

199. No. ED77037, 2001 Mo. App. LEXIS 2 (Mo. Ct. App. Jan. 2, 2001).

200. *JG St. Louis West L.L.C. v. City of Des Peres*, No. ED77037, 2001 Mo. App. LEXIS 2, at \*2 (Mo. Ct. App. Jan. 2, 2001). See *supra* notes 1-28 and accompanying text for additional background.

analysis on West County Center.<sup>201</sup> These consultants concluded that West County Center could be declared blighted and met the but-for test.<sup>202</sup>

The West County Center Redevelopment Plan set forth five blighting factors of the mall. First, the Plan stated that the shopping mall suffered from “obsolete platting” due to its two-anchor configuration and limited amount of space for small retail shops.<sup>203</sup> Second, the mall was hindered by “improper subdivision” due to irregularly platted lots constraining the ability of the mall to grow.<sup>204</sup> Third, “deteriorated site conditions” existed in the roof, utility system and parapet wall.<sup>205</sup> Fourth, deterioration of the mall’s water line could potentially endanger mall property if there was a water main break during a fire.<sup>206</sup> Finally, the Plan found that the mall was an “economic liability” due to the fact that the mall was experiencing declining sales and that the mall was not keeping its value relative to neighboring, similarly situated, similarly-used properties.<sup>207</sup> Based on these findings, the Board unanimously passed four ordinances which approved and adopted the Redevelopment Plan, authorized a bond issue in the amount of \$29.8 million, approved a site plan for the West County Center redevelopment, and authorized Des Peres to enter into a development agreement with Westfield.<sup>208</sup> JG St. Louis West L.L.C., the owner of a rival shopping mall in St. Louis, in conjunction with several residents of Des Peres, filed suit against the city seeking to enjoin the use of TIF on the project, and also seeking declaratory judgment invalidating the four TIF ordinances.<sup>209</sup>

## 2. Holding

Adapting the earlier tests of *Tierney* and *Crestwood Commons Redevelopment Corp.*, the court found that the Des Peres Board of Alderman had the power to declare the mall blighted so long as there was no showing that they acted in an arbitrary or fraudulent manner in making that decision.<sup>210</sup> Absent such evidence of fraud, the court would not challenge the municipality’s “fairly debatable” determination that the mall was blighted.<sup>211</sup> Moreover, the court held that plaintiffs also failed to produce evidence that the mall could be redeveloped without the use of TIF; therefore, plaintiffs also

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201. *Id.*

202. *Id.*

203. *Id.* at \*7.

204. *Id.*

205. *JG St. Louis West*, 2001 Mo. App. LEXIS 2, at \*7.

206. *Id.*

207. *Id.*

208. *Id.* at \*3.

209. *Id.*

210. *JG St. Louis West*, 2001 Mo. App. LEXIS 2, at \*8.

211. *Id.*

failed to carry their burden in regards to the municipality's application of the but-for test.<sup>212</sup>

## VI. ANALYSIS

### A. Principles of Statutory Construction

Missouri courts apply generally accepted principles of statutory construction.<sup>213</sup> Thus, when interpreting a statute, Missouri courts determine the intent of the statute from the language of the statute itself, as far as is possible.<sup>214</sup> Indeed, the words considered are given their "plain and ordinary meaning" unless they conflict with a "ascertained legislative intent."<sup>215</sup> Where a statute is ambiguous, the court will "attempt to construe it in a manner consistent with the legislative intent, giving meaning to the words used within the broad context of the legislature's purpose in enacting the law."<sup>216</sup> These principles of statutory construction have dictated the court's expansive interpretation of blight in Missouri's Real Property Tax Increment Allocation Redevelopment Act.

According to the *Oxford English Dictionary*, blight has multiple definitions.<sup>217</sup> Most generally, blight is considered to be "any malignant influence of obscure or mysterious origin; anything which withers hope or prospects, or checks prosperity."<sup>218</sup> In its verb form, blighting can mean "to exert a baleful influence on" or "to destroy the brightness, beauty, or promise of," or even "to nip in the bud, mar, [or] frustrate."<sup>219</sup>

In relation to cities, however, blight takes on somewhat different connotations. Most generally, blight could be described as any "unaesthetic or uneconomic section; an area of such kind that razing all the buildings will serve a public purpose, even though a few of them may not be substandard or blighted."<sup>220</sup> More specifically, blighted areas are those "marked by

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212. *Id.* at \*13.

213. *See Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. 1993).

214. *Id.*

215. *Id.*

216. *Id.*

217. *See OXFORD ENGLISH DICTIONARY* 919 (2d ed. 1961).

218. *Id.* Blight, in relation to plants, is defined as "any baleful influence of atmospheric or invisible origin, that suddenly blasts, nips, or destroys plants, affects them with disease, arrests their growth, or prevents their blossom from 'setting'; a diseased state of plants of unknown or assumed atmospheric origin." *Id.*

219. *Id.*

220. Jonathan M. Purver, Annotation, *What Constitutes a "Blighted Area" Within Urban Renewal and Redevelopment Statutes*, 45 A.L.R. 3d 1096 (1972).

termination of healthy growth and development accompanied by deterioration and decline of property values.”<sup>221</sup>

While incorporating elements of these definitions, Missouri’s Real Property Tax Increment Allocation Redevelopment Act does not define blight in these specific terms. Rather, the statute identifies blight as “an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.”<sup>222</sup> Several “factors” are identified to indicate the existence of this “economic or social liability,” including: (1) defective or inadequate street layout, (2) unsanitary or unsafe conditions, (3) deterioration of site improvements, (4) improper subdivision or obsolete platting, (5) the existence of conditions which endanger life or property by fire or other causes, or (6) any “combination of such factors.”<sup>223</sup>

Once a municipality makes the determination that the subject property is blighted (*i.e.*, that the property suffers from “obsolete platting,” “improper subdivision,” “deteriorated site conditions” or the like) the Missouri courts, constrained by the rules of statutory construction, must abide by that municipal determination so long as there is *at least some evidence* that the blighting factors exist. In other words, so long as there is a modicum of evidence of improper subdivision or obsolete platting or any of the other blighting factors, the court will not question the fairly debatable determination made by the municipality.<sup>224</sup> Any evidence of high surrounding poverty rate, or crime rates, or abandoned structure, while not necessary to establish blight, will help cement the municipality’s blighting declaration.<sup>225</sup>

The end result is that Missouri municipalities are afforded a presumption of validity in making their determinations of blight, so long as they have some evidence of blight as dictated by the statute’s list of blighting factors.<sup>226</sup>

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221. *Id.*

222. MO. REV. STAT. § 99.805(1) (Supp. 1998).

223. *Id.* at § 99.805(3). Similarly, to be declared a “conservation area,” some combination of the following factors must be in existence: 1) deterioration; 2) illegal use of individual structures; 3) presence of structures below minimum code standards; 4) abandonment; 5) excessive vacancies; 6) overcrowding of structures and community facilities; 7) lack of ventilation, light or sanitary facilities; 8) inadequate utilities; 9) excessive land coverage; 10) deleterious land use or layout; 11) depreciation of physical maintenance; 12) the lack of community planning. *Id.* at § 99.805(3). Logically, municipalities seeking to utilize TIF rely on this very statutory language in making their determinations of blight. For instance, in the West County Center situation, Des Peres determined that the mall was blighted due to “obsolete platting,” “improper subdivision,” “deteriorated site conditions,” and the “existence of conditions which could endanger life or property.” See *supra* notes 203-209 and accompanying text.

224. One author, having reviewed “probably fifty TIF qualification studies,” stated that he “had yet to see more than a perfunctory treatment of the blighting factors and but-for criterion.” Peddle, *supra* note 59, at 449.

225. See Peddle, *supra* note 59, at 448.

226. See *JG St. Louis West*, 2001 Mo. App. LEXIS 2, at \*11.

Obsolete platting, deterioration of infrastructure, declining sales figures, declining property values, increasing maintenance costs—the existence of any combination of factors forms evidence sufficient for the municipality to reach its conclusion that the subject area is blighted.<sup>227</sup> If such evidence is available to the municipality, the Board’s decision is deemed “fairly debatable” and the court will not scrutinize it, absent a showing of fraud or abuse.<sup>228</sup>

Similarly, where municipalities provide at least a modicum of evidence that the development would not occur without the subsidy, Missouri courts will not interfere with the municipality’s determination that the but-for test is met. Thus, to satisfy the but-for test, the municipality must supply financial analysis of the redevelopment project showing a gap between the expected costs of the project and the projected value.<sup>229</sup> Alternatively, the municipality may also show a consistent pattern of previous but unsuccessful redevelopment efforts as evidence that the requirement is fulfilled.<sup>230</sup> But so long as the municipality presents some evidence to justify its findings, its but-for declaration will be shielded from judicial scrutiny.

The main burden placed upon municipalities seeking to meet the blighting and but-for test, is thus one of fact-finding and due diligence.<sup>231</sup> To be afforded the presumption of validity, the municipality must perform studies, engage expert urban planners, and complete the requisite financial analysis regarding the subject property. As one author stated: “[F]or a determination of blight to survive scrutiny by trial and appellate courts, the determination must be supported by substantial evidence directly apposite to the state requirements in the relevant statutory definition of blight.”<sup>232</sup>

This presumption of validity, however, imposes a high barrier on a plaintiff seeking to enjoin a municipality’s decision to use TIF. Indeed, the plaintiff

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227. *Id.* at \*10. Of course, it may be the case that all real estate has increasing maintenance costs over time, or “tends toward obsolesce.”

228. *Id.* at \*9.

229. However, some municipalities fail to include financial analysis in their “but-for” findings. One author describes this as the municipality using their “administrative fiat” to meet the but-for test. Peddle, *supra* note 59, at 449.

230. *Id.* at 444.

231. See, e.g., Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 476 (2000).

232. *Id.* He also notes that “the quality of the evidence is important” and should consist of photographs, records of police, fire, public health, welfare, and taxing agency, and maps of the proposed blighted areas. *Id.* Thus, it is apparent why in the West County Center situation, the Des Peres Board of Aldermen “consulted a wide variety of independent information sources, including field investigations, records from local sources, interviews with local officials, and other independent studies.” *JG St. Louis West*, 2001 Mo. App. LEXIS 2, at \*8. Such information, served as a mandate for the board’s ultimate findings that the blighting and but-for tests were met, and ultimately served to shield the board’s decision from judicial scrutiny in the case brought against the city.

would have to show that there was some evidence of fraud or misdealing, or that the finding of blight is “so arbitrary and unreasonable as to amount to an abuse of the legislative process.”<sup>233</sup> In large part this accounts for the decisions being decided against plaintiffs challenging a municipal determination of blight in TIF and similar non-TIF cases.<sup>234</sup> Evidence of fraud or misdealing, however, is exceedingly difficult to produce. Plaintiffs are thus left with little recourse when seeking to overturn municipal decisions to use TIF.

### B. Policy Issues

Besides the principles of statutory construction, several policy issues have also influenced the stance of the courts towards the blighting and but-for tests of Missouri’s TIF statute. First, the courts recognize that the redevelopment of “blighted, substandard, or insanitary” areas serves a public purpose.<sup>235</sup> Secondly, municipal determinations of blight are deemed to be legislative findings not in the realm of judicial review. Finally, the courts believe that the municipalities are in the best position to determine what is and is not blight, and, moreover, the courts imply that the electoral process serves a proper check on municipal government boards making determinations of blight for the purpose of TIF redevelopment.

Missouri courts hold that the redevelopment of “blighted, substandard, or insanitary” areas is a public purpose.<sup>236</sup> This principle is embodied in the Missouri Constitution, which states that “laws may be enacted . . . providing for the clearance, replanning, reconstruction, redevelopment, and rehabilitation of blighted, substandard, or insanitary areas . . . as may be deemed in the public interest.”<sup>237</sup> Moreover, a long and unbroken line of cases has also supported the conclusion that property redevelopment serves a “public purpose.” As early as 1954, in *State ex rel Dalton v. Land Clearance for Redevelopment Authority*,<sup>238</sup> the Missouri Supreme Court stated: “A legislative finding . . . that a blighted or insanitary area exists and that the legislative agency proposes to take the property therein under the processes of eminent domain for the purpose of clearance and improvement . . . as it may deem in the public interest will be accepted by the courts as conclusive evidence that the contemplated use thereof is public.”<sup>239</sup>

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233. *See Tierney*, 742 S.W.2d at 150.

234. *See supra* notes 151-212 and accompanying text.

235. *Tierney*, 742 S.W.2d at 150.

236. *Id.*

237. MO. CONST. art. VI, § 21.

238. 270 S.W.2d 44 (Mo. 1954) (en banc).

239. *State ex rel Dalton v. Land Clearance For Redevelopment Auth. of Kan. City*, 270 S.W.2d 44, 52 (Mo. 1954) (en banc).

Second, the courts have long held that decisions made at the local level are legislative determinations that generally fall outside of the scope of judicial review. While municipalities do not have “inherent” legislative powers, the Missouri General Assembly, which has plenary powers under article III, section I of the Missouri Constitution, may grant municipalities certain legislative powers, so long as these powers are within constitutional limits.<sup>240</sup> Under Missouri’s Real Property Tax Increment Allocation Act, municipalities acquired certain powers to make legislative determinations as to what constitutes “blighted property.”<sup>241</sup> The court will thus afford deference to such municipal “legislative” determinations, to the extent that there is no showing that the determination was tainted by fraud or misdealing.<sup>242</sup>

Finally, the courts believe that municipalities are in the best position to determine what areas within its borders are blighted. In other words, the courts recognize the municipal governing boards’ expertise as to matters of municipal governance—or at the very least, heightened knowledge—and judges (or juries) are ill-equipped to review such judgments.<sup>243</sup> Therefore, the court will not substitute its authority for the municipality’s unless the municipality’s decision is shown to be “arbitrary or induced by fraud, collusion or bad faith or whether the board exceeded its powers.”<sup>244</sup>

### C. Critique and Proposal

While the court’s decision in *JG St. Louis West* is supported by long-standing principles of statutory construction and public policy, the decision handed down in *JG St. Louis West* fails in that it does not take into account common-sense notions of blight. In other words, 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.

Similarly, the but-for standard has proven to be more elusive than helpful. Commentators have often pointed out that it is nearly impossible to predict

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240. See *City of Kansas City v. Hon*, 972 S.W.2d 407, 407 (Mo. Ct. App. 1998).

241. See MO. REV. STAT. § 99.810.

242. See *JG St. Louis West*, 2001 Mo. App. LEXIS 2, at \*3.

243. This logic is similar to the protection afforded by the business judgment rule in corporate law. Simply stated, the business judgment rule holds that corporate directors should not be held liable for business actions made in good faith, even if other boards would have reached an opposite conclusion. Kenneth B. Davis, *Once More, The Business Judgment Rule*, 2000 WIS. L. REV. 573, 573 (2000). One rationale for the courts’ application of the business judgment rule is that business judgments are best left to business experts, *i.e.*, corporate directors. *Id.* at 580.

244. *JG St. Louis West*, 2001 Mo. App. LEXIS 2, at \*3.

what amount of development would actually have occurred but-for the TIF.<sup>245</sup> Thus, municipalities cannot conclusively document that the project would not happen but-for the subsidy. Rather, they are forced to rely on pledges from the developer that the but-for test is met. Likewise, plaintiffs seeking to challenge a but-for determination have almost no hope of producing the documentary evidence required to show that the project would occur but-for the subsidy.

In other words, these two tests, originally intended to supply adequate justification for government intervention in private markets, have failed to provide meaningful boundaries to when and where TIF should be utilized. The tests are simply too subjective to afford the adequate accountability necessary to ensure the proper use of public money.<sup>246</sup> As a result, the public is often outraged by the municipal use of TIF funds.

In light of the dissonance between common-sense definitions of blight and the current statutory definition of blight, as well as the difficulties with proving the but-for test, options for reform should be carefully considered.<sup>247</sup> Indeed, the legislature has considered reforming TIF several times. These proposals have focused on limiting TIF to deteriorating, inner-city areas. However, such proposals have failed to garner the requisite majority of lawmakers, in part because they would limit TIF to only the most deteriorated areas within the state.<sup>248</sup>

In light of the current legislative impasse, there are at least two additional possible avenue of TIF reform for the legislature to consider. First, the legislature could completely remove the blighting and but-for tests from the Missouri statute.<sup>249</sup> Dropping the but-for test and blighting tests would result

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245. Chapman, *supra* note 7, at 188. Often, in fact, there is a give-and-take process of negotiation between the municipalities and the developers, which indicates the variability of the necessity of the public subsidy. For instance, in a TIF project that was supposed to occur in Olivette, Missouri, the developers initially stated that \$41 million in TIF was necessary to finance the project. Dan Mihalopoulos, *Olivette Mulls \$39.5 Million Subsidy for Plaza Report on Shopping Center*, ST. LOUIS POST-DISPATCH, April 12, 1999 (West Post), at A1. The city however, had sent a letter to the homeowners stating that they did not want to give more than \$35 million in TIF to the project. The developer relented, and was prepared to perform the redevelopment for \$35 million (indicating that the “but for” test was not absolute, but was open to negotiation).

246. ECONOMIC DEVELOPMENT STUDY ADVISORY COMMITTEE, AN ASSESSMENT OF THE COSTS, BENEFITS, AND OVERALL IMPACTS OF THE STATE OF OHIO’S ECONOMIC DEVELOPMENT PROGRAMS 24 (1999) [hereinafter ECONOMIC DEVELOPMENT STUDY ADVISORY COMMITTEE REPORT]. The contents of this report do not reflect the views of the State of Ohio or a consensus of the Economic Development Study Advisory Committee.

247. Most proposals for reform have attempted to limit TIF to areas of “pervasive poverty” or high unemployment.

248. See Eric Stern, *State Legislators Debate Measure to Restrict TIFs*, ST. LOUIS POST-DISPATCH, Feb. 9, 2000, at B1.

249. Of course, TIF would remain subject to the procedural tests discussed earlier in *supra* notes 83-114 and accompanying text.

in no more TIF plans being adopted by municipalities than are adopted under the current system—in large part because the municipality has built-in, well-defined procedural checks that limit the use of TIF.<sup>250</sup> However, in dropping these tests, the municipality (and, ultimately, the courts) would be freed from being forced to make irrational declarations of blight that do not correspond to common-sense notions of the term.

Alternatively, the blighting and but-for tests could be discarded in favor of a more realistic, intuitive test. Such a test would recognize that TIF is no longer a limited-purpose development tool, but rather has evolved into a general-purpose economic development engine. For example, the Missouri legislature could revise the Missouri Real Property Tax Increment Allocation Act to allow TIF to be utilized by municipalities based on one of the following eight justifications:

1. Occurrence of a private market failure;
2. Problem created by an unintended government policy impact;
3. Occurrence of a sudden and severe economic dislocation;
4. Presence of structural barriers impeding the economic advance of certain population groups (minorities, disadvantaged populations, etc.);
5. Presence of a serious competitive disadvantage impeding economic development;
6. Situation that threatens an established or emerging industry that is strategically important to state or local economic vitality;
7. Opportunity exists that offers the potential to produce an overwhelming positive public benefit; or
8. Situation exists to stimulate valuable and significant regional, intergovernmental, or public-private cooperation and benefit.<sup>251</sup>

This test, being considered currently by the State of Ohio, would provide more logical justifications for the municipal use of TIF, but would not limit TIF to certain municipalities based on arbitrary economic criteria. There is, however, one major problem with discarding the blighting and but-for tests. The intent of these tests, at the time they were instituted, was to ensure that TIF would be used in urban areas of the greatest need. Therefore, any changes to the TIF statute should take into account the needs of these communities. Perhaps, as some critics have suggested, a “Super TIF” arrangement could be

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250. These checks include representation on TIF commissions by the affected school boards, taxing districts and (at times) the county. *See supra* notes 86-91 and accompanying text.

251. These justifications were suggested in the ECONOMIC DEVELOPMENT STUDY ADVISORY COMMITTEE REPORT, *supra* note 246, at 24.

instituted for these communities, allowing them to tap into some form of state matching funds for TIF projects in truly needy areas.<sup>252</sup> Such a Super TIF would, in theory, stimulate additional development in the most needy areas, including urban areas and inner-ring suburbs.

## VII. CONCLUSION

Ockham's Razor is the philosophical principle that the simplest solution to a problem is often the best one.<sup>253</sup> The simplest solution—and perhaps the best solution—for the problems associated with TIF would be to discard the blighting and but-for tests, and possibly replace these tests with a more workable, intuitive standard. At the very least, through such changes TIF would be properly aligned with its broad present-day uses. Secondly, such changes should spur the legislature to look more closely at areas which TIF was intended to help but failed to reach. In taking these steps, the legislature would address most, if not all, of the concerns connected with tax increment financing in Missouri.

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252. 1998 PERFORMANCE AUDIT, *supra* note 57, at 4. Kansas City allows for a “super TIF” program described as follows: “Under a normal TIF plan, 50 percent of the local economic activity taxes increment is available to reimburse eligible costs. Under Super TIF, all of [the] economic activity taxes are made available.” *Id.*

253. More precisely, Ockham's Razor stands for the proposition that “terms, concepts, and assumptions must not be multiplied beyond necessity.” NEW INTERNATIONAL DICTIONARY 876 (10th ed. 1997).

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