Local Governments in a TIF(f): Theories on Municipal Renegotiation of Tax-Increment Financing Agreements in a Post-Retail Pandemic

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I. Introduction

Just like many facets of American life affected by COVID-19 pandemic closures and social distancing guidance, public-private real estate development projects in many U.S. cities experienced severe setbacks in 2020 and 2021.[1] For both newly and not-yet-built developments, construction delays, supply chain backups, and financing issues plagued projects.[2] Existing developments saw decreased foot traffic, the breaking of commercial leases, and government-mandated capacity limitations—all of which caused development revenues and the associated tax revenues they produce to fall.[3] From empty office spaces spurred by remote working[4] to shuttered small businesses unable to stay afloat following reduced demand,[5] thousands of commercial real estate parcels experienced under-utilization and an uncertain future.[6]

When a government or a quasi-government agency is a party to a real estate development, unique issues in addition to these broken leases and decreased revenues can arise. Cities or their development arms take leading roles in redevelopment projects by providing site remediation services, installing or improving utilities, increasing police presence, and financing projects with municipal bonds.[7] When the revenues associated with these projects fail to live up to expectations, cities that agreed to and have often already provided project-specific services and financing can experience budget constraints in the face of these obligations. Depending on the language of the public-private development agreement, local governments may have recourse against both project developers and financiers.

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[1] Camden Betz and H. Arthur Bolick (Aug. 12, 2020), COVID's Lasting Impacts on Construction and Real Estate Trends, JD Supra, https://www.jdsupra.com/legalnews/covid-s-lasting-impacts-on-construction-44134

[2] *Id*.

[3] *Id*. and Oliver Peckham (May 18, 2020), New Dashboard Shows How COVID-19 is Changing Foot Traffic for Top Brands

[4] Phillip Bantz (2020, August 3), Imaging Office Space in a Post-COVID-19 World, *Globest*, https://www.globest.com/2020/08/03/imagining-office-space-in-a-post-covid-19-world/?slreturn=20201001235306

[5] Nick Routley (2020, October 6), Mapping the uneven recovery of America's small businesses, World Economic Forum, https://www.weforum.org/agenda/2020/10/mapped-uneven-recovery-us-america-small-businesses-closure

[6] Ron Derven (2020), Experts Speak: COVID-19's Impact on Commercial Real Estate, *Development*, retrieved from NAIOP website: https://www.naiop.org/en/Research-and-Publications/Magazine/2020/Summer-2020/Business-Trends/Experts-Speak-on-COVID19s-Impact-on-Commercial-Real-Estate

[7] George Lefcoe (2001), Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, 43 Urban Lawyer 427, 433

In this vein, what has been called the most popular American form of development financing[8] deserves special attention when assessing municipalities' options in upholding warranties in or exiting development agreements with private parties. Commonly abbreviated as TIF but known in some states as Revenue Allocation Districts (RAD), Tax Allocation Districts (TAD), and Tax Increment Reinvestment Zones (TIRZ),[9] tax increment financing is a public-private financing method that reallocates the future tax benefits of a redeveloped district. It does so by using the expected and actualized increase in property and sales tax[10] revenue to initially pay for a portion of the development needed to make these projects a reality.[11] Development and site improvements that TIFs fund benefit both private businesses in the form of financing land acquisition and building costs, as well as the public via infrastructure improvements and blight remediation.[12]

The diverted taxes and related bond obligations associated with various tax increment financing projects and districts represent a potential source of revenue recapture for cash-strapped cities that have committed to TIF funding. Municipal stakeholders, including cities, school districts, and the Community Development Agencies (CDAs) that facilitate TIF agreements with businesses may be particularly interested in revisiting the terms of these agreements and possibly seek to renegotiate, judicially enforce, or terminate them due to pandemic-related revenue shortfalls. Businesses and developers benefitting from tax increment financing, especially in the heavily pandemic-impacted retail sector,[13] may and have been willing to acquiesce to various municipal demands at the risk of losing coveted public funding. Changing interest rate environments, political landscapes, and heightened risk of municipal

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[8] Richard Briffault (2010), The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government, 77 U. Chi. L. Rev. 65

[9] Council of Development Finance Agencies (2008), 2008 TIF State-By-State Report, ii

[10] States differ in allowing for sales, property, or even other types of taxes as eligible TIF financing sources, but property and sales taxes are the most common taxes used, respectively, in TIF agreements and are duly critical revenue sources for municipalities affected by pandemic-related shortfalls. See Council of Development Finance Agencies (2015), Tax Increment Financing State-By-State Report: An Analysis of Trends in State TIF Statutes (2015 edition), Figure 2. Eligible Revenue Sources by State, *6, https://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=201601-TIF-State-By-State.html

[11] Council of Development Finance Agencies, Tax Increment Finance Resource Center, accessed September 9, 2020, https://www.cdfa.net/cdfa/cdfaweb.nsf/resourcecenters/tif.html

[12] *Id*.

[13] Marc Federbush (2020, October 30), U.S. Retail Industry Experiences the Best and Worst Times Amid COVID-19 Pandemic, *Supply and Demand Chain Executive*, https://www.sdcexec.com/sourcing-procurement/article/21195602/us-retail-industry-experiences-the-worst-and-best-of-times-amid-covid19-pandemic

bankruptcies[14] following the pandemic's economic fallout may also cause financial institutions underwriting and financing TIF bonds to reexamine their securitization and liabilities. This is especially true should TIF renegotiations substantially change the terms of municipal obligations.

Many TIF districts failed to generate projected revenue as the pandemic shut down much of the retail sector. The failure to produce these incremental tax revenues undermines the justification of tax increment financing. Local governments, who are the parties in contract in TIF agreements, are still on the hook for serving bond obligations and providing services for improvements already rendered for these developments.

Despite this bleak scenario, local governments are not without recourse. This comment provides a framework for analyzing TIF renegotiation from the perspective of municipalities, states, and CDAs, with special consideration for the complications caused by the COVID-19 pandemic and the accelerated decline of retail centers in the United States. Underperforming districts represent a net revenue source through this renegotiation lens, as cities may seek to enforce the terms of TIF agreements with developers through these agreements' minimum revenue warranties, land use recapture provisions, remittances of municipal services, and related agreement clawbacks. Additionally, cities and CDAs may renegotiate repayment options with municipal bondholders due to the special protections and circumstances afforded to government borrowers.

The remainder of this introduction briefly summarizes the history of TIFs, notable critiques of tax increment financing, and how the COVID-19 pandemic and related issues impacted TIF developments, businesses associated with these developments, and the governing stakeholders that have an interest in renegotiating the terms of tax increment financing agreements. While TIF authorizing statutes vary by state, common threads have emerged from courts that reflect various limiting principles placed on municipalities in TIF agreements. This jurisprudence, as well as the history and critiques of tax increment financing, are briefly summarized below. This comment then explores various renegotiation and recission theories as applied to the special circumstance surrounding the government as a party in contract. Renegotiating in bond financing is also explored due to the dual nature of TIFs being both development and finance agreements. Finally, the comment explores a successful tax increment

[14] Laura N. Coordes and Thom Reilly, *Predictors of Municipal Bankruptcies and Municipal and State Intervention Programs: An Exploratory Study*, 105 KY. L.J. 493 (2016).

financing renegotiation of a recently opened project in a slowly growing Midwestern city. This successful TIF renegotiation serves as a case study for the renegotiation framework explored in this comment.

A. A Brief History of Tax Increment Financing in the United States

Tax increment financing began in California in the 1950s as an incentive mechanism for developing specific blighted parcels and high-poverty areas which had difficulty attracting private development.[15] While growth in TIF adoption was slow through the 1960s, additional states implemented tax increment financing to tackle blight and related economic development issues in the 1970s.[16] The 1980s and 1990s then saw a huge growth in TIF enactment laws.[17] Today, legislatures in 49 states and Washington, D.C., have enacted TIF-enabling legislation. Arizona is the only state whose legislature does not enable counties and municipalities to utilize the incremental gains in tax revenues received from appreciating assets for economic development purposes.[18] That state, however, offers numerous public development tools whose components resemble tax increment financing, including the Government Property Lease Excise Tax (GPLET).[19]

While states authorize and have the power to adjudicate disputes involving TIFs, tax increment financing is at its core a public-private partnership between developers and local governments. TIFs are often facilitated by quasi-public entities such as economic development agencies. These entities work together to designate TIF districts, geographically defined portions of a city that often meets some state definition of blight or zone of economic opportunity to qualify for TIF funding.

What makes these districts unique is the bifurcated nature of their taxing mechanism. In TIF districts, the property and other collected taxes that would normally be distributed to local

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[15] Council of Development Finance Agencies (2015), Tax Increment Financing State-By-State Report: An Analysis of Trends in State TIF Statutes (2015 edition)
[16] Larry Marks (2005), The Evolving Use of TIF
[17] *Id*.
[18] Council of Development Finance Agencies (2015), Tax Increment Financing State-By-State Report
[19] This state-authorized, local government (city, town, county, or county stadium district) implemented program reduces development costs for qualified properties by substituting a property's real property tax with a reduced and sometimes abated excise tax for a period lasting no longer than 25 years. See A.R.S. § 42-6201–10 and Arizona Commerce Authority, Lease Excise, accessed December 11, 2020, https://www.azcommerce.com/incentives/lease-excise

government units are split into two streams.[20] The first stream, referred to as the base rate, represents the tax revenues the district had been producing prior to the TIF agreement.[21] This base stream serves as the anchor point for which future tax revenue growth caused in theory by TIF redevelopment is measured.[22]

The incremental growth in revenue greater than this base rate is diverted into the second stream of tax increment financing, referred to as the tax increment.[23] This second stream represents the tax revenue generated by higher property values for TIFs utilizing property taxes or increased sales revenues for TIFs utilizing sales tax diversion.[24] Rather than being paid to the general funds of districts' taxing authorities, funds in this second stream are kept separate by the municipality or CDA overseeing the TIF to pay for improvements to the redeveloped site.[25] These improvements often take the form of public works projects within the TIF districts,[26] but TIF funds have also been used for property acquisition, building construction, job training and creation, and other forms of economic development.[27]

Of course, this bifurcation of taxes is most useful to developers if the incremental revenues are redirected in the short term, as this increases the incentive for developers to redevelop a project in the first place. As a result, such improvements are often made by the city on the front-end through borrowing financed by the promise of repayment by revenue from the second stream.[28] Unlike other bonding measures, state and municipal bonds which fund TIF agreements often do not need to go through a referendum process.[29] This can make TIF projects

[20] Good Jobs First, Tax-Increment Financing, accessed September 16, 2020
[21] *Id*.
[22] *Id*.
[23] East-West Gateway Council of Governments (2011), An Assessment of the Fiscal Impacts of the Use of Incentives in the St. Louis Region (Final Report), *42
[24] Council of Development Finance Agencies (2015), Tax Increment Financing State-By-State Report: An Analysis of Trends in State TIF Statutes (2015 edition)
[25] Depending on the nature of the TIF agreement, this funding can take the form of servicing bond payments already funding improvements or reimbursing developers on a pay-as-you-go basis. Good Jobs First, Tax-Increment Financing
[26] George Lefcoe (2001), Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, 43 Urban Lawyer 427, 433
[27] Larry Marks (2005), The Evolving Use of TIF, *Review*, *18*(1), https://www.cdfa.net/cdfa/cdfaweb.nsf/ord/8658dcc15c4a609588257936005f0541/$file/evolving_tif.pdf
[28] Good Jobs First, Tax-Increment Financing
[29] Phillip J.F. Geheb, *Tax Increment Financing Bonds as "Debt" Under State Constitutional Debt Limits*, The Urban Lawyer, *41*(4), 725, 726

attractive from a political standpoint for municipalities and developers, although most states still require a public comment period before a TIF agreement can pass.[30]

B. Critiques of TIFs Regarding Fiscal Dealings and Economic Development

As TIFs gained popularity, states broadened the scope of what constituted blight or altogether eliminated blight requirements to obtain a TIF designation, thereby expanded the number of parcels and projects eligible for tax increment financing.[31] This weakening of blight requirements in TIF statutes, which were originally included in 37 states' TIF laws,[32] has been criticized by scholars and community stakeholders for diverting tax dollars to private development in parts of cities that do not need incentives to attract development.[33]

This criticism is exacerbated by many TIF statutes' "but for" provisions. Most states require municipalities seeking to create or modify a TIF district to conduct a "but for" analysis. These analyses must show that, but for the incentives associated with the tax increment financing, the proposed development would not occur on its own with private development.[34] A comparison of internal rates of return (IRR) between a project with and without TIF financing is commonly used in municipalities' but-for analyses.[35] The increased allowance for tax increment financing in non-blighted areas is, at first glance, in tension with these "but for" provisions. Economic development researchers Alyssa Talanker and Kate Davis found 16 states "weakened" their TIF blight requirements by loosening geographic poverty definitions, expanding TIF district boundaries to non-adjacent parcels, and increasing the size of TIF districts throughout the 1990s and early 2000s.[36]

Such broadening and loosening of blight definitions represents potential revenue loss for local government stakeholders. The application of states' "but for" provisions in tax increment

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[30] George Lefcoe (2001), Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, 43 Urban Lawyer 427, 464
[31] Alyssa Talanker and Kate Davis (2003), Straying from Good Intentions: How States are Weakening Enterprise Zone and Tax Increment Financing Programs, Good Jobs First
[32] *Id*. at 3
[33] *Id.* at 1
[34] Citizens Budget Commission (2017, December 5), Tax Increment Financing: A Primer, https://cbcny.org/research/tax-increment-financing-primer
[35] Property Metrics, How to Analyze Tax Increment Financing (TIF) Projects, last updated October 20, 2016, retrieved from https://propertymetrics.com/blog/how-to-analyze-tax-increment-financing-tif-projects
[36] Talanker and Davis at *1

financing has become a point of contention at both town hall meeting and courtrooms. Opponents of the public revenue diversion associated with TIFs have attempted to invalidate the contractual agreements based on the notion that many development subsidies are unnecessary.[37] Courts tend to be deferential to public development agencies in upholding a broad interpretation of "but for" analyses, though. For example, in *Mazur v. Trinity Area Sch. Dist*., the Pennsylvania Supreme Court found that a township describing a property as desirable for a TIF-supported shopping and dining development did not establish bad faith in its characterization of the property as blighted.[38]

In addition to the lack of rigidity associated with the "but for" test and their increased use in non-blighted and suburban settings, Professor George Lefcoe has identified four additional major criticisms levied against TIFs. TIF developments often lure jobs away from nearby communities and thus have little effect on overall regional economic growth. Similarly, the subsidization of retail development via tax increment financing can displace sales tax revenue from other locations, both within and outside the TIF-authorizing jurisdiction. Third, TIF projects drain property tax resources that would otherwise go to schools and municipalities that, due to growth associated with TIF districts, see an increased demand for services. Lastly, TIF funding tends to be excessive when compared to other means of attracting development.[39]

Schools and education interest groups, especially, reference the third critique in opposing tax increment financing agreements. They have attempted to limit the impacts of TIFs on the distribution of property taxes, which make up a sizable portion of school district revenues.[40] While these groups often phrase opposition to TIF projects in terms of a lower tax base available to schools, tax revenues calculated from the TIF district's base may be higher than without the TIF due to the increased property values of parcels surrounding TIF districts.[41] The merits of such arguments are nuanced by the difficult-to-prove analysis of whether the economic growth in

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[37] Richard Briffault (2010), The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government, 77 U. Chi. L. Rev. 65
[38] 961 A.2d 96 (Pa. 2008)
[39] George Lefcoe (2001), Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, *427–8
[40] *See*, for instance, L.A. Unified Sch. Dist. v. Cnty. Of L.A., 104 Cal. Rptr. 3d 590, 598 (Cal. Ct. App. 2010)
[41] Sheri Farris and John Horbass, *Creation vs. Capture: Evaluating the True Costs of Tax Increment Financing,* Journal of Property Tax Assessment, *6*(4), 5, 20

TIF districts would have occurred but for the tax increment financing, an issue courts have taken a variety of approaches to evaluate.[42]

C. COVID-19 and Related Impacts on Tax Increment Financing

Municipalities and Community Development Agencies have been challenged with the financing and site maintenance of public-private development districts containing large and dense retail projects. These projects, which increasingly utilize tax increment financing in urban cores,[43] were ripe for pandemic-induced shutdowns and social distancing measures that caused drastic decreases in traditional consumer spending.

Retail and dining establishments were particularly impacted and faced mounting closures.[44] Prior to the pandemic, the American economy was reasonably healthy, albeit with moderately low labor force participation and unequal distributions of income growth.[45] The in-person retail sector, though, had been at a crossroads.[46] Businesses located in retail-heavy TIF districts faced the double-edged sword of a dramatically changing American retail landscape coupled with reduced consumer mobility stemming from safety and social distancing guidelines.[47] The increased prevalence of e-commerce—seen as both convenient and safe for American consumers in the climate of a pandemic—also posed challenges to retail-heavy TIF districts whose businesses compete for similar market segments.[48] These market conditions also

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[42] For more on this issue, see the Summary of TIF Jurisprudence on p. 13

[43] George Lefcoe (2001), Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, 43 Urban Lawyer 427, 436

[44] Mike Snider (2020, October 7), Your favorite restaurant or small business – as many as 36,000 – faces closure without coronavirus relief, *USA Today*, https://www.usatoday.com/story/money/usaandmain/2020/10/07/restaurants-small-businesses-face-closures-without-covid-19-stimulus/5916732002

[45] USA Facts (2019, December 19), The 2019 economy in review: GDP, employment, income, and trade, https://usafacts.org/articles/2019-economy-review-gdp-employment-income-and-trade

[46] Melissa Repko and Lauren Thomas (2020, September 29), 6 ways the coronavirus pandemic has forever altered the retail landscape, *CNBC*, https://www.cnbc.com/2020/09/29/how-coronavirus-pandemic-forever-altered-retail.html

[47] Marc Federbush (2020, October 30), U.S. Retail Industry Experiences the Best and Worst Times Amid COVID-19 Pandemic

[48] Grant Thornton (Jan. 21, 2021), Retail industry finds solutions to COVID-19 shocks, https://www.grantthornton.com/library/articles/retail/2020/retail-industry-finds-solutions-to-COVID-19-shocks.aspx

made it difficult for commercial landlords, who are expected to continue to fund common area expenses in TIF districts, to fill space abandoned by failing tenants.[49]

Meanwhile, state and local governments braced for revenue shortfalls caused by reductions in retail spending. Subsequent declines in commercial property values, which consequently reduce the sales and property taxes municipalities are able to collect from businesses, also reduced government revenues.[50] Because commercial property is at the bedrock of many cities' tax bases, a downturn to this sector is seen as causal to local budget reductions.[51] Banking systems are also impacted by this process.[52] As a result of these factors, it was not inconceivable that tax revenues in many distressed TIF districts would fall below the base rate necessary for municipalities to derive both predictable revenue streams as well as to meet TIF-associated bond payments.

Pandemic-related challenges imposed hardships on TIF developments in 2020 and 2021, and municipalities were tasked with difficult decisions in assisting with their financing. A TIF-funded theater rehabilitation in Chicago, subject to a foreclosure suit, was on its last legs following developers' inability to secure additional financing in excess of the nearly $10 million initial tax increment financing.[53] Downstate in Illinois, Effingham officials considered a tax increase to cover retail-related revenue losses in TIF-funded business districts while continuing to solicit bids for a TIF-funded parking garage reconstruction.[54]

One point of comparison to these municipal government financial hardships is the 2008 Financial Crisis. Some studies show that municipalities that conducted tax increment financing projects in the years leading up to the Great Recession were stuck with bad TIF debt that was

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[49] Katie Clark and Cheryl Kelly (2020), As COVID-19 Prompts More Retail Tenant Bankruptcies, How Should Landlords and Lenders Respond, ABA RPTE eReport (2020 Summer Issue), https://www.americanbar.org/groups/real_property_trust_estate/publications/ereport/rpte-ereport-summer-2020/retail-tentant-bankruptcies/?utm_medium=email&utm_source=salesforce_310380&sc_sid=04859114&utm_campaign=MK20CNTT&promo=MKCONTENT1&utm_content=&additional4=&additional5=&sfmc_j=310380&sfmc_s=87264945&sfmc_l=2198&sfmc_jb=176&sfmc_mid=100027443&sfmc_u=9122888

[50] Girard Miller (2020, August 18), When Will Tax Revenues Rebound? It Depends on the Tax, *Governing*, https://www.governing.com/finance/When-Will-Tax-Revenues-Rebound-It-Depends-on-the-Tax.html

[51] Noah Buhayar, John Gittelsohn, and Jackie Gu (Dec. 22, 2020), Commercial Real Estate's Pandemic Pain is Only Just Beginning, *Bloomberg*, https://www.bloomberg.com/graphics/2020-commercial-real-estate

[52] *Id*.

[53] Lauren Leazenby (Sep. 1, 2020), Foreclosure suit may derail Logan Square's Congress Theater rehabilitation, *Chicago Tribune*

[54] Charles Mills (Aug. 19, 2020), Effingham considers tax hike to cover deficits caused by COVID-19

difficult to sell or renegotiate on financial markets.[55] This problem was exacerbated by the decreased tax revenues produced in TIF districts due to the economic downturn.[56] Others have argued that, at least in the retail and mixed-used spaces, tax increment financing helped municipalities recover and spur economic development in the aftermath of the recession.[57] Municipalities' ability to pledge tax revenues in the future for present investments provided a viable market for economic development when the cost of capital had significantly increased, according to these proponents.[58]

The economic circumstances of the COVID-19 pandemic are distinguishable from the Great Recession in multiple aspects, though. First, the 2008 recession was largely the product of a residential real estate bubble. When this bubble burst, property tax revenues collected by municipalities decreased substantially. The diverted incremental commercial property taxes used to pay for TIF improvements would have been especially helpful in making up these local budget shortfalls.[59] While the growth in residential real estate prices slowed and in some cases declined in the early months of the pandemic,[60] historically low inventory and high real estate prices in 2021[61] showed municipalities were not faced with a similar residential property tax pinch as during the Great Recession despite a commercial real estate market reckoning.[62]

Additionally, the health of the financial industry and cities' ability to finance capital improvements via bond markets was substantially better during the pandemic than during the

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[55] Martin Luby and Tima T. Moldogaziev (2014), Tax Increment Finance Debt and the Great Recession, *National Tax Journal*, *67*(3), https://dx.doi.org/ 10.17310/ntj.2014.3.07
[56] Dick Layton (2016), Effects of the Great Recession on Tax Increment Financing in the United States, Georgia, and Atlanta, Georgia State Center for State and Local Finance, https://cslf.gsu.edu/files/2016/01/Effects-of-Great-Recession-on-Tax-Increment-Financing-January-2016.pdf
[57] Joshua Drucker and Rachel Weber (May 4, 2020), Did Tax Increment Financing Help Municipalities Recover from the Great Recession? American Society for Public Administration, https://patimes.org/did-tax-increment-financing-help-municipalities-recover-from-the-great-recession
[58] *Id*.
[59] Richard F. Dye, David F. Merriman, and Katherine Goulde (2014), Tax Increment Financing and the Great Recession, *National Tax Journal*, *67*(3), 697–718, http://dx.doi.org/10.17310/ntj.2014.3.08
[60] Charles S. Gascon and Jacob Haas (Oct. 6, 2020), *The Impact of Covid-19 on the Residential Real Estate Market*, Federal Reserve Bank of Saint Louis, https://www.stlouisfed.org/publications/regional-economist/fourth-quarter-2020/impact-covid-residential-real-estate-market
[61] Diana Olick, Epic Housing Shortage May Finally be Starting to Lift, as New Listings Hit Market in June, CNBC, https://www.cnbc.com/2021/07/01/epic-housing-shortage-may-finally-be-starting-to-lift.html
[62] Noah Buhayar, John Gittelsohn, and Jackie Gu (Dec. 22, 2020), Commercial Real Estate's Pandemic Pain is Only Just Beginning, *Bloomberg*, https://www.bloomberg.com/graphics/2020-commercial-real-estate

Great Recession.[63] Due in large part to historically low interest rates, municipal bond instruments experienced a substantial rebound months after pandemic-induced lockdowns.[64] Despite the low yields associated with these instruments, investors still saw municipal bonds as relatively safe investment vehicles and provided local governments with access to capital.[65]

II. Summary of TIF Jurisprudence

Due to the confidential nature of development negotiations,[66] the personnel overlap between developers, governments, and financiers,[67] and the benefits that TIF districts tend to provide, jurisprudence of disputes between parties to tax increment financing agreements is sparse. While amendments and even removals of TIF authorizing laws emerged as these districts struggled to produce revenues in the years following the Great Recession,[68] there did not appear to be a noteworthy volume of contested lawsuits between local governments and other parties to TIF agreements.

There is, however, a bevy of tax increment financing cases filed by non-TIF agreement parties from which governments can draw in attempting to enforce the agreements' warranties. They may also use theories from this jurisprudence as negotiating tactics with developers and bondholders. Such litigating stakeholders are often not parties in contract to the TIF agreements or bonding instruments cities and CDAs utilize to effectuate TIF-backed development. Even so, the cases stemming from ancillary taxing authorities' attempts to alter or invalidate these agreements, as well as those seeking to enforce revenue-related redevelopment agreement clauses on private developers, offer some of the most extensive recent jurisprudence on tax increment financing. These non-party cases, as well as potential direct causes of action for

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[63] Center on Budget and Policy Priorities, Chart Book: Tracking the Post-Great Recession Economy, last updated October 30, 2020, retrieved from https://www.cbpp.org/research/economy/chart-book-tracking-the-post-great-recession-economy

[64] https://www.barrons.com/articles/municipal-bond-funds-rebound-after-covid-19-collapse-51598649974

[65] *Id*.

[66] Sean P. Byrne and Scott J. Ziance (2020), Nondisclosure Agreements Best Practice When Negotiating Incentives, *Area Development*, https://www.areadevelopment.com/taxesIncentives/Q4-2020/nondisclosure-agreements-special-public-entity-issues.shtml

[67] Brian Wallheimer (Aug. 7, 2017), Should We Stop the 'Revolving Door'?, *Chicago Booth Review*, https://review.chicagobooth.edu/public-policy/2017/article/should-we-stop-revolving-door

[68] Dick Layton (2016), Effects of the Great Recession on Tax Increment Financing in the United States, Georgia, and Atlanta, Georgia State Center for State and Local Finance, *6

warranty breaches in tax increment financing agreements, provide a useful framework for municipalities seeking to renegotiate these agreements with developers as well as their payments with municipal bondholders.

Often, these challenges take the form of adjudicating whether the jurisdiction's "but for" provision was met in approving TIF funding for a project. An example of a successful "but for" TIF challenge is *Bd. Of Educ., Pleasantdale Sch. Dist. No. 107 v. Village of Burr Ridge,* 793 N.E. 2d 856 (Ill. App. Ct. 2003). A suburban Chicago school board sought to challenge the diversion of property taxes for the development of a tract in what the Illinois Court of Appeals described as "one of the wealthiest communities in Illinois" via an injunction. *Id*. at 858. Illinois's TIF statute included a "but for" provision requiring a government showing that the land would not reasonably be anticipated to be developed without the community's adoption of the proposed redevelopment plan.[69] The court found the proposed TIF agreement did not meet the state's "but-for" test due to its affluent location, lack of noticeable blight, and the developer's initiation of the project before the municipality enacted the ordinance creating the TIF district.[70]

Village of Burr Ridge is largely seen as an outlier in terms of municipalities' and developers' vulnerability to "but for" challenges, though.[71] In a previous Illinois case, a state appellate court dismissed a school board's "but for" challenge of a Chicagoland village's designation of a TIF district intended to attract a waste-to-energy incinerator company.[72] The court described the village as "impoverished" and in need of economic development in ruling for the village, which stands in contrast to the setting in *Village of Burr Ridge*.[73] Other courts have used a "fairly debatable" deference in determining whether a municipality's tax increment financing was actually the catalyst for private development.[74] As Prof. Lefcoe writes in a parrel to *Chevron* deference, "[m]ost courts display little interest in second-guessing the local public agency's 'but for' analysis."[75]

[69] 65 Ill. Comp. Stat. Ann. 5/11-74.1 et. seq. (1994)
[70] 793 N.E. 2d 856, 867–8
[71] Lefcoe at 457
[72] Bd. of Educ. v. Robbins, 327 Ill. App. 3d 599 (Appellate Court of Illinois, First District, 2001)
[73] *Id*. at 602
[74] see *Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W. 3d 556, 562–63 (Mo. Ct. App. 2008), utilizing a "fairly debatable" test to suburban city's statutorily required analysis of whether private development would have occurred but for the TIF
[75] Lefcoe at 457

Often, stakeholders encounter standing issues when attempting to challenge tax increment financing agreements. During a conflict between Boone County, Missouri, and the City of Columbia, a bitter dispute arose between the city and county due to a perceived lack of transparency by Columbia in authorizing TIF agreements.[76] The parties eventually settled, but not before the Missouri Court of Appeals determined that a county council member did not have standing to sue the city for its alleged misuse of tax increment financing.[77]

Lawsuits involving the invalidation or revocation of tax increment financing agreements raise important property interest issues. For instance, in *L.A. Unified Sch. Dist. v. Cnty of L.A.*, the Los Angeles Unified School District attempted to compel Los Angeles County to recalculate the district's share of tax increment property tax passthroughs.[78] California's TIF-authorizing statute at the time mandated property tax increments be shared with other taxing authorities such as school districts that would otherwise only receive their share of the base property taxes.[79] The contested TIF agreements and county codes did not incorporate a separate state property tax fund designated to the school district. The absence of the fund in the calculations reduced the tax increment which the district was entitled to receive under the agreements. The county argued that, as the signatory of the TIF agreement, it was entitled to deference in its calculation of the passthrough revenue.

The appellate court disagreed, noting that "as against the state, local governments have no vested right to receive property tax revenues and have no property interest in those revenues." *L.A. Unified* at 425. The case demonstrates that, just as TIF agreements are authorized by states and subject to their interpretation, so too are the taxes that municipalities, counties, and Community Development Agencies rely on to facilitate tax increment financing. This is especially true in the California TIF context due to the interaction of the state's statutory tax district increment sharing provision and Educational Revenue Augmentation Fund[80] and

[76] William Schmitt (2016, January 23), Tensions and debts remain as Columbia appeals Boone County's lawsuit, *Columbia Missourian*
[77] State v. City of Columbia, 509 S.W. 3d 140 (Mo. Ct. App., 2017)
[78] 181 Cal. App. 4th 414
[79] Cal. HSC § 33607.5(a)(2)
[80] *Id*.

Educational Revenue Augmentation Fund.[81] The latter's statutory definition stipulates legal obligations like municipal bonds do not factor in to required increment education fund sharing.[82]

A famous example of non-contracting stakeholders attempting to hold private companies to account in economic incentive agreements is *Twp. of Ypsilanti v. Gen. Motors Corp.,* 506 N.W.2d 556 (Mich. Ct. App. 1993).[83] Ypsilanti Township, Michigan, provided General Motors with two rounds of incentives to build an automotive factory. The $1.3 billion in tax incentives, including property tax exemptions, were intended per discussions with government leaders and company executives (but, importantly, not explicitly listed in the economic incentive agreement) to last for 25 years.[84] G.M. relocated the factory after 12 years, but not before the township and auto workers attempted to stop the relocation via injunction. After the trial court granted injunctive relief on a theory of promissory estoppel, the appellate court reversed. It reasoned that corporate solicitation of an economic incentive such as a tax abatement did not alone constitute a contractual promise such that promissory estoppel would apply.[85]

In a more recent federal case, the United States District Court for the Southern District of Illinois dismissed a "but for" challenge from Mounds, Illinois, in that city's attempt to invalidate a TIF agreement with a developer used to finance a Dollar General.[86] The municipality, seeing revenue shortfalls, sought to invalidate the agreement after it was executed due to a lack of procedural steps such as final council approval. The court nevertheless found that the "but for" and public notice requirements of Illinois's TIF statute were met. The city had previously attempted to renegotiate the agreement by reducing the agreed-upon TIF payments to the developer, for which the court found the city to be in contractual breach.[87]

While municipalities are given great latitude by courts in designating parcels for and approving tax increment financing, they may have advantages in adjudicating TIF disputes unique to the non-agreement stakeholders in previous lawsuits. For one, municipal governments that are party to or underwrite the bonds associated with TIF agreements do not face the same

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[81] Cal. HSC § 33681.7
[82] L.A. Unified Sch. Dist. v. Cnty. Of L.A., 104 Cal Rptr. 3d 590, 595 n.3
[83] *Twp. of Ypsilanti v. Gen. Motors Corp.,* 506 N.W.2d 556 (Mich. Ct. App. 1993)
[84] Joshua P. Rubin (1995), Take the Money and Stay: Industrial Location Incentives and Relational Contracting, 70 N.Y.U. L. REV. 1227, 1279
[85] *Twp. of Ypsilanti v. Gen. Motors Corp.*
[86] Westmore Equities, LLC v. City of Mounds, 2017 U.S. Dist. LEXIS 112330
[87] *Id.*

standing issues as non-party stakeholders. Even if litigating the unknown terrains of post-development TIF agreements presents risks to cities, the lower standing bar can give them greater leverage in negotiations with developers and bondholders.

Second, because municipalities are often parties in contract to the TIF agreements, they will be more knowledgeable of and in a better position to litigate the terms of the agreement should they be broken by developers. Municipalities may face laches challenges in adjudicating TIF disputes with developers that do not pertain to explicit representation and warranty breaches in TIF agreements, although the unique challenges presented by the COVID-19 pandemic may cause some courts to view a laches defense less favorably.[88]

III. Renegotiation Theories as Applied to Tax Increment Financing

Financing economic development projects by diverting tax revenues allows municipalities to quickly benefit from bond markets and private developers in building out or improving land parcels.[89] Because of this nature, TIF agreements tend to be long and complicated legal documents spelling out standards and controls among various public and private entities. They also encompass facets of real estate, public finance, and contract law.[90] Due to changing circumstances of municipal finances, business conditions, and exterior demand shocks, well-crafted development contracts such as TIF agreements allow for revision and evolution over time.[91]

Where economic conditions necessitate revision of these agreements, municipalities should first look to their terms and see whether revision or recission are contractually available. Explicit agreement warranties like revenue targets or occupancy rates can be objectively measured in negotiations. More subjective provisions of the agreement such as maintenance

[88] Ross Panko and Laura Zell (February 25, 2021), New Headache for Trademark Litigants? Fourth Circuit's Bayer Decision Rejects Application of State Statute of Limitations to Laches Defense, JD Supra, https://www.jdsupra.com/legalnews/new-headache-for-trademark-litigants-4031014

[89] George Lefcoe (2001), Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, 43 Urban Lawyer 427, 437

[90] Edward J. Collins, Jr. (2013), Understanding and Crafting Development Agreements in Massachusetts (Center for Public Management Paper 17), *11, https://scholarworks.umb.edu/cpm_pubs/17

[91] *Id*.

standards, on the other hand, may require input from third parties in resolving disputes. Additionally, assessing the mandate of the jurisdiction's TIF authorizing statute for vetting and renegotiating tax increment financing agreements will provide municipalities with proper legal backing in their dealings with other TIF stakeholders.[92]

This section provides an overview of various renegotiation theories applicable to municipalities that seek to enforce or alter the terms of tax increment financing agreements. It first notes the unique considerations of renegotiations involving government entities as parties in contract. Then, it examines renegotiation considerations in commercial real estate and development transactions, which municipal stakeholders can apply in TIF negotiations with developers. Finally, this section considers renegotiation of bond instruments. It emphasizes the unique qualities that municipal bonds used in TIFs can play in cities' efforts to alter their ongoing obligations associated with tax increment financing.

A. Contract Renegotiations Involving States and Municipalities, Generally

Economic incentive agreements like TIFs present unique contract considerations due to their public-private nature. The incremental tax revenue diverted from governments for private and private-adjacent uses could be used by other public entities for which governments authorizing tax increment financing are directly responsible.[93] This is contrasted with the businesses located in TIF districts, which are primarily responsible to the developing landlords. Should these businesses fail, economic conditions change, or developers not fulfill explicit or implicit promises within tax increment financing agreements, governments will be burdened with various unexpected costs. These TIF costs include overdue bond obligations, utilities charges, and infrastructure improvements that are not yielding the projected economic growth.[94]

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[92] The TIF code of Freeport, Maine, for instance, requires the town planner and economic development director to "renegotiate with the [developer] as necessary." Freeport (Maine), Tax Increment Policy and Process Freeport, Maine October 2010, *9-10, https://www.freeportmaine.com/sites/g/files/vyhlif4436/f/uploads/tif_policy_and_process_-_october_2010.pdf

[93] Indeed, this was the primary rationale described by St. Louis Mayor Tishaura Jones in that city's tax increment financing renegotiation with a new TIF developer. More on this project and renegotiation is analyzed in Section IV.

[94] Randle B. Pollard (2015), "Was the Deal Worth It?": The Dilemma of States with Ineffective Economic Incentives Programs, *11 Hastings Bus. L.J. 1*, 8

Municipalities may wish to renegotiate or adjudicate various aspects of TIF agreements in order to avoid these costly scenarios.

Like many public-private contracts, tax increment financing agreements present a variety of bargaining asymmetries and informational hurdles. Private companies like developers and bond financiers can investigate their bargaining powers with governments via public means accessible to all citizens such as council meetings minutes, zoning records, and public records requests. They may also lobby governments to pass a public financing project. Cities in tax increment financing negotiations, on the other hand, may not have parallel information on their private counterparts due to the information not existing or it not being required by law to be disclosed. This information asymmetry allows private actors to bluff[95] in negotiations with municipalities for development agreements because governments may not possess the requisite information regarding the amount of competition there is for a proposed investment.[96]

Such asymmetries make it all the more imperative for municipalities entering public-private contracts like TIF agreements to take advantage of the negotiating benefits prescribed to them by law and administrative practice. Whereas buyer-side counsel tends to dominate drafting in many aspects of commercial negotiation,[97] tax increment financing agreements are subject to state and municipal bidding, public notice, and financial projection requirements, among others. These procedures serve as an important counterbalance to those seeking to profit from tax-funded economic development incentives. They may also provide municipalities with legal protection should these processes or agreement provisions be violated by private parties.

Joshua P. Rubin argues courts should apply Relational Contract Theory when assessing whether economic incentive programs such as TIFs are enforceable.[98] Specifically focusing on manufacturing industry incentives, Rubin uses Relational Contract Theory in describing how a court could have factored in non-contracting stakeholders impacted by failed business promises following economic incentives like in *Ypsilanti*. Such a theory invokes the norms and

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[95] Rebecca Hollander-Blumoff and Matthew T. Bodie (2021), The Market as Negotiation, *96(3) Notre Dame L. Rev.* 1257, 1304.

[96] Cassandra Butler, Tax Increment Financing in Missouri: Political Development of the Statute Contextualized with Use and Patterns of Adoption (May 14, 2013) (dissertation), *27

[97] Grace Maral Burnett (Oct. 22, 2020), Analysis: In M&A Contract Drafting, Who Holds the Pen?, *Bloomberg*, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-in-m-a-contract-drafting-who-holds-the-pen

[98] Joshua P. Rubin (1995), Note: Take the Money and Stay: Industrial Location Incentives and Relational Contracting, 70 N.Y.U. L. REV. 1227

expectations of contracting parties and municipal stakeholders alike, with violated norms eligible for adjudication.[99]

As applied to TIF districts, Relational Contract Theory provides a useful framework for government renegotiation. Incentives, Rubin notes, can be discretionary or as-of-right.[100] Municipalities may have more leverage with the former category of incentives, especially in the case of non-manufacturing beneficiaries that do not incur the same high fixed costs of moving locations.

Even businesses with as-of-right TIF incentives will want to be seen as good community stewards, which cities may use in a Relational Contract Theory of negotiation. At least one application of the theory was proposed within a tax increment financing project during the COVID-19 pandemic. A Memphis, Tennessee, developer seeking TIF funding for a housing-focused district planned to grant an ownership stake in the project to residents via a Neighborhood Investment Portfolio. This system allows residents to invest in TIF projects for a return of district-associated dividend payments.[101] A similar entity in Portland, Oregon, resulted in modest economic returns for resident-investors.[102]

B. Renegotiation in Commercial Real Estate and Development Transactions

Prior to the Great Recession, scholars observed a trend of large anchor stores acting as partners with developers in publicly financed shopping centers.[103] When one of these private parties failed, the other was left with unexpected obligations from the development. Additionally, governments that granted incentives such as tax increment financing were faced with having distributed benefits to a now-insolvent party.

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[99] *Id*. at 1317

[100] *Id.* at 1302.

[101] Corinne S. Kennedy (Dec. 9, 2020), South Memphis TIF: Residents could have ownership stake in developments. Here's how., *Memphis Commercial Appeal*, https://www.commercialappeal.com/story/money/business/development/2020/12/10/south-memphis-development-tif-neighborhood-investment-portfolio/3832315001

[102] Reniya Dinkins (2020), *A community investment trust for Portland, Ore., residents to 'buy back the block,'* Brookings Institution, https://www.brookings.edu/research/a-community-investment-trust-for-portland-ore-residents-to-buy-back-the-block

[103] Jacob w. Reby and Marisa L. Byram (2005), Negotiating Takeover and Self-Help Rights in Shopping Center Construction Projects (with Form), 21 Prac. Real Est. Law. 27

In these scenarios, the surviving party may seek to negotiate with the municipality for more financing to account for the loss of a capital partner.[104] Ideally, the surviving party and government will have specified in their agreement various contingencies so that adjudication isn't necessary. In order to avoid this or other unwanted scenarios, attorneys Jacob Reby and Marisa Byram recommend that the surviving party confirm to the city various aspects of any existing financing agreements. These provisions include bond closing dates and terms, dates that funds will be available for reimbursement, applicable sales tax projections and reporting requirements, and parcel transfer responsibilities.[105]

Similar measures may be used by municipalities and CDAs in crafting TIF agreement safeguards for when contracting parties dissolve or fail to meet agreement terms. TIF agreements between municipalities and developers are ultimately contracts, albeit unique ones due to their private-public nature. In drafting these agreements by clearly spelling out terms for recission, default, mitigation, and other contractual breaks, cities will be in a better position to reclaim possible revenue losses while reallocating real estate for more efficient uses. Additionally, at least one major city since the start of the pandemic has utilized a tax increment financing agreement's phased incentive structure—perhaps the greatest arrow cities have in their TIF negotiation quivers—to successfully enforce the agreement's terms and gain additional incentives from a private developer.[106]

The remainder of this section presents various tools and theories like the aforementioned TIF agreement provisions cities use during negotiations in commercial real estate and development transactions. These theories and tools may be useful to cities in attempting to renegotiate the development portion of their TIF agreements.

(1) Zoning and Specialized District Composition

Cities are more likely to successfully renegotiate tax increment financing terms when TIF districts are specialized in their portfolio of tenants or call for highly regulated zoning. This is

[104] *Id*. at 28
[105] *Id*.
[106] Jacob Kirn (June 3, 2021), *'No More Inferiority Complex,' City Says, as New Deal for City Foundry Subsidies Advances*, ST. LOUIS BUSINESS JOURNAL, https://www.bizjournals.com/stlouis/news/2021/06/03/foundry-subsidies-advance.html

because businesses and developers pegged to such districts have higher exit and entrance costs. For instance, lawmakers in Michigan were able to successfully negotiate an increase in a gross receipts tax with multiple casinos operating within the city limits.[107] The casinos fell short on their investments as specified in a development agreement with the City of Detroit. Using a state statute guaranteeing municipalities a share of casinos' gross receipts for public costs associated with hosting gambling operations. Detroit successfully negotiated for an additional percentage of winnings.[108] Because of the state's limited casino licensing scheme and the TIF district's specialized zoning, the casinos had little bargaining power with the city. The renegotiation has been lauded for its collaborative approach between private actors and a municipality in addressing shortcomings in a development agreement.[109]

Cities with multiple TIF districts or that are located in regionally competitive environments may be less able to utilize such tactics. TIF developers, businesses, and their associated tax revenues are associated with greater mobility risks in these settings. In Missouri's urban areas, which are recognized as containing both a high volume of TIF districts as well as a large number of small, fragmented municipalities, cities have been weary to forgo developer-led TIF proposals at the risk of surrendering potential tax dollars to neighboring jurisdictions.[110] Recognizing these forces, Colorado revised its TIF authorizing statute to require non-municipal officials sit on TIF-authorizing boards. That state also requires mediation between neighboring government entities to settle TIF-related disputes.[111]

(2) Threat of State Intervention

State intervention is always a potential threat to municipalities' dealings with developers. Cities derive their authority from states.[112] States have an incentive to monitor the fiscal health of

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[107] Edward J. Collins, Jr. (2013), Understanding and Crafting Development Agreements in Massachusetts (Center for Oublic Management Paper 17), *21
[108] *Id*. at *35
[109] *Id*. at *36
[110] Susan G. Mason and Kenneth P. Thomas, *Exploring Patterns of Tax Increment Financing Use and Structural Explanations in Missouri's Major Metropolitan Regions*, CITYSCAPE, *2*(20), 203, 227 (2018)
[111] Council of Development Finance Agencies (2015), Tax Increment Financing State-By-State Report: An Analysis of Trends in State TIF Statutes (2015 edition), *3
[112] National League of Cities, Cities 101 – Charters [Web page], https://www.nlc.org/resource/cities-101-charters

their cities, and they may be authorized to take over the finances of cities that are in financial distress.[113]

The most powerful example of state interference with tax increment financing comes from California. In 2012, the state legislature dissolved more than 400 Community Redevelopment Agencies (CRAs), which were the quasi-public entities through which California municipalities conducted utilize tax increment financing for redevelopment.[114] The dissolution redirected a substantial portion of tax increments from the TIF districts to other government agencies, resulting in a lack of funds for infrastructure, site maintenance, and other public deliverables for which many TIF developments were dependent.[115] Billions worth of outstanding bonds and contracts were placed in limbo during the subsequent unwinding.[116] While tax increment financing was later reinstituted in some measure after subsequent litigation and legislative measures, the threat of state action remains among the most extreme risks to parties in tax increment financing agreements.

Another issue unique to California is the ability for redevelopment agencies to directly share in the developer's profits of a project. This municipal profit sharing is another source in paying for public infrastructure improvements to redevelopment sites.[117] Other TIF statutes simply authorize CDAs to gain from the increased tax revenues associated with a TIF district. A change in a state's TIF law to allow for this California system of redevelopment financing could change the relationship between developers and municipalities, if not alter the incentive structures in TIF agreements altogether.

States may be more likely to intervene in tax increment financing when cities are unable to provide services and financing to underperforming TIF districts. Developers can mitigate this risk of state action by earnestly entering negotiations with cities when these districts underperform. These renegotiations can promote the fiscal health of the weaker, municipal

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[113] Omer Kimhi, *A Tale of Four Cities-Models of State Intervention in Distressed Localities Fiscal Affairs*, 80 U. CIN. L. REV. 881, 897 (2011–12)
[114] Council of Development Finance Agencies (2015), Tax Increment Financing State-By-State Report: An Analysis of Trends in State TIF Statutes (2015 edition), *2, rhttps://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=201601-TIF-State-By-State.html
[115] George Lefcoe (2012), *Redevelopment in California: Its Abrupt Termination and a Texas-Inspired Proposal for a Fresh Start*, 44(*4*) URB. LAW. 767, 795
[116] California Legislative Analyst's Office (Feb. 17, 2012), The 2012–13 Budget: Unwinding Development, https://lao.ca.gov/analysis/2012/general_govt/unwinding-redevelopment-021712.aspx
[117] Benito Arrunada and Amon Lehavi, *Prime Property Institutions for Subprime Era: Toward Innovative Models of Homeownership*, 8 BERKELY BUS. L.J. 1, 23 (2011).

governing entity—with which developers actually entered into contract—while avoiding larger scale conflicts with more powerful state governments. Cities will also want to avoid a California-like restructuring of TIF districts so as not to lose out on local tax revenues.

(3) Contract Theories and Provisions

Economic shocks such as those brought on by the COVID-19 pandemic are often precursors to attempts to change the terms or alter the results of a contractual agreement.[118] Among the basic contractual tenets of amending, voiding, or enforcing a contract, reformation based on mistake and unjust enrichment are the most apt for TIF agreements that faltered during the COVID-19 pandemic.[119] Longer-term agreements, especially, may be impacted by such shocks and give rise to judicial impracticability decisions.[120] Courts, however, have held impracticability from changed macroeconomic conditions alone cannot be used to renegotiate contracts generally.[121] Such holdings seem to be applicable as well to municipalities in TIF agreements.[122]

Swiftly changing economic conditions can also cause seemingly fair contracts to generate unjust enrichment. In the TIF context, municipalities can and have advanced unjust enrichment and equity arguments when developers are procuring municipal financing and services within districts that are not producing projected tax revenues.[123] Some state constitutions prohibit governments from making gifts or loans to private firms.[124] While consideration in a tax increment financing agreement is not contractually a gift, those seeking to invalidate development agreements like TIFs have sought to use these constitutional provisions in arguing

[118] Katherine Crispi, Not Just the Luck of the Irish: A Contractual Solution to the Problems of Sovereign Debt Restructuring, *Fordham Int'l L.J.* 1859, 1888 (2014)
[119] Shana Cook Mueller (March 24, 2020), Client Alert: What Role Can Municipal Tax Increment Financing (TIF) Play in Maine's Response to COVID-19?, Bernstein Shur, https://www.bernsteinshur.com/what/publications/client-alert-what-role-can-municipal-tax-increment-financing-tif-play-in-maines-response-to-covid-19
[120] *Aluminum Co. of America v. Essex Group, Inc.*, 499 F.Supp. 53 (W.D. Pa. 1980)
[121] *Mo. Public Service Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App. 1979)
[122] *City of Lancaster v. Flagstar Bank*, 789 F. Supp. 2d 873, 880 (S.D. Ohio 2011)
[123] Corinne Ruff (June 11, 2021), St. Louis' Renegotiation of City Foundry Tax Incentives Could Pave Way for More Equitable Growth, *St. Louis Public Radio*, https://news.stlpublicradio.org/economy-business/2021-06-11/st-louis-renegotiation-of-city-foundry-tax-incentives-could-pave-way-for-more-equitable-growth
[124] George Lefcoe (2001), Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, 43 Urban Lawyer 427, 470

private firms were overcompensated for services that failed to live up to the public agreements.[125]

Unconscionability is a related theory that municipalities may use in altering their tax increment financing agreements. The theory is especially appropriate if fulfilling these agreements leaves cities unable to perform other services. For instance, an Oklahoma city's council sought ways to end a 13-year-old TIF because of an anticipated general revenue shortfall during its 2019 budget cycle.[126] This TIF was designed to divert monthly $300,000 in sales taxes into the TIF fund, which was funding the city desperately needed by 2019.[127] The city attempted to invalidate the TIF with a public petition process while simultaneously amending the agreement with the developer to lessen the revenue impact.

That city's efforts were ultimately stopped in June 2020 when the Oklahoma Supreme Court determined the gist of the referendum petition was legally insufficient.[128] Another Oklahoma city in 2017 experienced an unconscionability theory applied to one of its TIF projects in federal arbitration. A fire fighters union unsuccessfully claimed in a grievance that the city's TIF district's sales tax distribution violated both the public will and collective bargaining.[129]

Careful drafting of TIF agreements with city-favored provisions can help mitigate the need to turn to judicial reformation. Incentive phasing[130] and early termination clauses[131] are two provisions used by cities to hold developers accountable for TIF projects' revenue and related objectives. These provisions have been the topics of recent TIF renegotiations. The Kansas City suburb of Shawnee renegotiated its TIF agreement with a developer for a shopping center in 2019 after the developer sought pre-issuance of TIF-backed pay-as-you go special obligation

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[125] *Id*.
[126] Tim Farley and Mindy Ragan Wood (Feb. 25, 2020), Judge Jeff Virgin rules tax increment financing initiative didn't explain topic properly, *The Norman Transcript*, https://www.normantranscript.com/news/local_news/judge-jeff-virgin-rules-tax-increment-financing-initiative-didnt-explain-topic-properly/article_4ccc4384-b678-5426-bb59-fbf5edb69a2d.html
[127] *Id*.
[128] *Miller v. Ellis*, 467 P.3d 691 (Okla. 2020)
[129] D.E. Smoot (Aug. 17, 2017), TIF dispute resolved in city's favor, *Muskogee Phoenix*, https://www.muskogeephoenix.com/news/tif-dispute-resolved-in-city-s-favor/article_433a8303-82b1-50aa-a0f3-b3daa59063a7.html
[130] Randle B. Pollard (2015), "Was the Deal Worth It?": The Dilemma of States with Ineffective Economic Incentives Programs, *11 Hastings Bus. L.J. 1*, 26
[131] Jacob w. Reby and Marisa L. Byram (2005), Negotiating Takeover and Self-Help Rights in Shopping Center Construction Projects (with Form), 21 Prac. Real Est. Law. 27

bonds.[132] The originally passed agreement did not have the pay-as-you-go component, which some city leaders feared did not give the city enough protection should the project fail to produce projected revenues.[133]

In commercial leases, parties frequently negotiate for early termination rights.[134] Early termination clauses may also be a mechanism for cities enforcing phased incentives and holding developers and commercial landlords to account. Similar to minimum sales thresholds typical in commercial lease early termination clauses used to safeguard against tenant underperformance,[135] tax increment financing agreements have been written to decrease or even terminate development incentives for projects failing to produce previously projected revenues.[136] Overlapping taxing entities authorized to withhold taxes from these projects also negotiate guaranteed minimum tax payments in the event a TIF district's tax revenues fall below the pre-TIF base amount.[137]

TIF agreements may also be crafted to spell out when a developer is in breach or failing to uphold a specified warranty.[138] Site preparedness and maintenance provisions are common warranties imposed on developers in TIF agreements.[139] Especially as municipalities see budget crunches stemming from the pandemic, it is imperative for cities to hold developers accountable for the upkeep of TIF districts to avoid declines in property values. Developers may request waivers for such warranty provisions. When this occurs in the TIF process, cities have required these waivers be rationalized based on a high standard of need.[140]

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[132] Leah Wankum (Jan. 10, 2019), Shawnee to Consider Renegotiating Agreement and TIF for Bellmont Promenade, *Shawnee Mission Post*, https://shawneemissionpost.com/2019/01/10/shawnee-to-consider-renegotiating-agreement-and-tif-for-bellmont-promenade-76259
[133] *Id*.
[134] Travis D. Hughes and Oscar R. Rivera, *Navigating Early Termination Clauses in Commercial Leases*, PROBATE & PROPERTY, *34(*6), 11, 14
[135] *Id*.
[136] The City Foundry project in St. Louis, for example, includes a provision disallowing for TIF as well as other economic development incentives should the project not produce TIF revenues as projected. More on this TIF project may be found in the next section.
[137] George Lefcoe (2001), Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, 43 Urban Lawyer 427, 465
[138] Edward J. Collins, Jr. (2013), Understanding and Crafting Development Agreements in Massachusetts (Center for Public Management Paper 17), https://scholarworks.umb.edu/cpm_pubs/17
[139] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, *11, https://www.stlouis-mo.gov/government/city-laws/ordinances/ordinance.cfm?ord=70750
[140] Freeport (Maine), Tax Increment Policy and Process Freeport, Maine October 2010, *9-10, https://www.freeportmaine.com/sites/g/files/vyhlif4436/f/uploads/tif_policy_and_process_-_october_2010.pdf

Agreements between developers and community leaders solidified before the ultimate approval of TIF districts can go a long way in avoiding later warranty and breach disputes. A county in Maine, for instance, negotiated an annual per-turbine fee for a TIF-supported wind farm as part of a community benefit agreement.[141] Such agreements may be judicially limited if they are deemed to solely be monetary extractions from developers seeking land use authorization from the government, though.[142]

Finally, whether a developer attempts to mitigate its deficiencies in a tax increment financing agreement will impact how a municipality is able to renegotiate or pursue other legal avenues. Well-crafted agreements spell out mitigation procedures between developer and city from the outset.[143] Failure to mitigate may give rise to breach within the agreement and place the city in a stronger position in negotiating reduced incentives.

C. Renegotiation in Bond Financing

At the onset of the COVID-19 pandemic, the Council of Development Finance Agencies[144] urged cities and CDAs to take stock of their economic incentive bond portfolios in order to determine if modifications were needed.[145] It recommended consulting with a financial advisor to determine whether refinancing outstanding bond obligations would be beneficial given historically low interest rates.[146] It also recommended potential new issuance given these rates, while cautioning that cities' credit ratings should be closely monitored.[147]

Reissuance may be especially favorable for cities weighed down by underperforming TIF districts because most states' constitutional debt limits do not apply to tax increment financing bonds.[148] Depending on their financial situation, cities may find it attractive to convert standard

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[141] Edward W. De Barbieri, *Do Community Benefit Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773, 1778 (2016).
[142] Koontz v. St. Johns River Management Dist., 570 U.S. 595 (2013)
[143] Edward J. Collins, Jr. (2013), Understanding and Crafting Development Agreements in Massachusetts (Center for Public Management Paper 17), *1, https://scholarworks.umb.edu/cpm_pubs/17
[144] This group acts as a national advocacy arm for those participating in development financing agreements such as TIFs
[145] CDFA (2020), Key COVID-19 Response Strategies for Development Finance Agencies, https://www.cdfa.net/cdfa/cdfaweb.nsf/pages/COVID-19_DFA_Response_Strategies.html
[146] *Id.*
[147] *Id.*
[148] Lefcoe at 438

bond obligations to "Go-Bonds." This bond type would apply the incremental tax gains directly toward the bond payments, with the municipality only paying any deficiency on the notes.[149]

In determining whether to renegotiate terms with TIF bondholders, cities should monitor whether bond revenue shortfalls from economically depressed TIF assets affect their ability to finance other projects. Generally with faulty TIF bonds, the municipality will prefer to bail out the bond obligation as opposed to letting them go into default to protect its credit rating.[150] Even if the local government is not the contractually named debtor in the TIF financing agreement, ratings agencies have used the relationship between municipalities, CDAs, and tax increment financing districts as rationale for lowering a city's credit rating in the event a TIF bond becomes delinquent.[151]

This chain of events makes it more difficult and expensive for cities to borrow for other municipal functions. Such a risk makes it even more imperative that cities carefully consider their legal options before entering negotiations with TIF bondholders. The remainder of this section identifies theories and options cities and other municipal stakeholders may wish to use in renegotiations involving municipal bonds, including those used to pay for TIF redevelopment.

(1) Litigating Municipal Bond Validity

Jurisprudence considering municipal bond validity sheds light on cities' bond renegotiation options and ramifications. In assessing whether municipal bonds are valid, courts have sought to make three determinations: 1) Whether the public body has the requisite statutory authority to issue said bonds; 2) Whether the purpose of the bond financing itself is legal; and 3) Whether the obligations and procedures—such as notice requirements and referendum approval —comply with state law. *Bay County v. Town of Cedar Grove*, 992 So. 2d 164, 167 (Fla. 2008) (quoting *City of Gainesville v. State*, 863 So. 2d 138, 143 (Fla. 2003).

But because many state TIF statutes allow municipalities to define the procedures for various TIF and bond issuance, this "valid under state law" prism used by courts often allows for

[149] Good Jobs First, Tax Increment Financing, https://www.goodjobsfirst.org/accountable-development/tax-increment-financing

[150] Phillip J.F. Geheb, Tax Increment Financing Bonds as "Debt" Under State Constitutional Debt Limits, The Urban Lawyer, *41*(4), 725, 747

[151] *Id*.

a degree of deference when municipalities are challenged for their TIF bonding. Should cities seek to renegotiate or litigate their existing bond obligations from TIF districts, though, these very procedures are a way to examining their validity.

Additionally, taxpayer and government activists should be cautious to present a timely action in litigating government bond issuance. The failure to do so may be barred by the equitable doctrine of laches. For instance, the Illinois Supreme Court declined to permit a taxpayer's challenge to the state's $14 billion issuance of general obligation bonds because he had constructive notice from public records for at least two years of the issuance. *Tillman v. Pritzker*, 2021 IL 126387, *19 (Ill. 2021). In dismissing the lawsuit, the court noted that such an attempt to invalidate the bond issuance could have a negative impact on the state's credit rating and possibly prevent it from future borrowing. *Id*. at *21.

(2) State Intervention and Oversight

States have an incentive to monitor the fiscal health of cities because of the interrelated financial relationship of governments. Because governments participate in the same markets for municipal bonds, the default of one agreement can raise the cost to borrow for other cities in a state.[152] North Carolina attempts to control for this risk with its powerful state debt oversight board, which among other things has the power to compel municipal payments, approve debt agreements of a certain size and scope, and assist local governments avoid bankruptcy.[153] Creditors of tax increment financing agreements may wish to avoid dealing with powerful state actors with powers such as North Carolina's as compared to relatively weaker municipalities in debt restructuring discussions,[154] although some suggest that the state's oversight of municipal debt actually increases certainty to debt issuers and therefore promotes increased investment.[155]

Even so, commentators have called for North Carolina's board to have greater oversight over TIF-related bonds, which do not normally fit within the board's statutory authorization due

[152] Adam C. Parker, *Positive Liberty in Public Finance: State Oversight of Local Government Debt and the North Carolina Model,* 27 CAMPBELL L. Rev. 107, 109–10 (2015)
[153] *Id*. at 115, 145
[154] Missouri, the state of interest for the below case study applying these theories, does not have a debt oversight board whose power is comparable to North Carolina's.
[155] Parker at 112

to their classification as non-general obligation bonds.[156] For TIF debt that does fit the board's authorization, the board is only permitted to conduct fiscal analyses related to cities' abilities to pay back the debt. It is not permitted to conduct cost-benefit or "but-for" analyses utilized by courts in adjudicating TIF disputes.[157] Such treatment generally holds for debt oversight entities in other states as well, although some states require additional issuance approvals depending on the classification of the TIF's revenue stream.[158]

(3) Risk of Default and Bankruptcy

Local governments have also used the risk of default or bankruptcy in negotiations with municipal bondholders and issuers. This tactic has not always been available to cities and is generally seen as a last resort, though.[159] Following budget shortfalls stemming from the pandemic, commentors raised the specter of the first largescale municipal bankruptcy risk since the Great Recession.[160] Prior to the expansion of Chapter 9 municipal bankruptcy in the 1970s, the U.S. Supreme Court had only once sustained the impairment of a municipal bond contract.[161] Municipalities now have few legal options for discharging large bond obligations outside of Chapter 9.[162]

Just like parties to economic development agreements must deal in good faith, so too must cities in negotiating with creditors if they wish to comply with Chapter 9.[163] But because municipalities are not necessarily the debtor of record in TIF bond agreements,[164] creditors may be required to use substantive consolidation in bankruptcy proceedings involving TIF districts.

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[156] Parker at 156
[157] John Locke Foundation (2008), *Common-Sense TIF Reforms: Ways to Avoid Randy Parton-Like Debacles and Other Disasters*, Spotlight No. 350, http://www.johnlocke.org/acrobat/spotlights/spotlight-350-tifreforms.pdf
[158] Connecticut, for instance, requires state approval for the authorization of TIF bonds backed by state sales taxes. Parker at FN 24, 114
[159] Ivan L. Kallick, Randall Keen, and Jacob Itzkowitz (August 1, 2020), Municipal Bankruptcy in the Time of COVID-19, PM MAGAZINE, https://icma.org/articles/pm-magazine/municipal-bankruptcy-time-covid-19
[160] Ivan L. Kallick, Randall Keen, and Jacob Itzkowitz (August 1, 2020), Municipal Bankruptcy in the Time of COVID-19
[161] David L. Dubrow, *Chapter 9 of the Bankruptcy Code: A Viable Option for Municipalities in Fiscal Crisis*, 24 URB. LAW. 539, 543 (1992).
[162] *Id*.
[163] Aurelia Chaudhury, Adam J. Levitin, and David Schleicher, *Junk Cities: Resolving Insolvency Crises in Overlapping Municipalities*, 107 CALIF. L. REV. 459, 497 (2019).
[164] Phillip J.F. Geheb, *Tax Increment Financing Bonds as "Debt" Under State Constitutional Debt Limits*, The Urban Lawyer, *41*(4), 725, 741

This equitable doctrine, traditionally used in the corporate bankruptcy context,[165] disregards organizational separateness in treating substantively consolidated entities' assets as common assets. Such an application of the doctrine to Community Development Agencies appears to be untested in contemporary caselaw. Should TIF bond holders successfully apply substantial consolidation of CDAs' TIF debts to cities, though, municipalities seeking to discharge TIF debt in bankruptcy may be unable to do so.

This leads to a corollary critique shared between Chapter 9 bankruptcy and tax increment financing: The propensity for collective action problems to arise due to the competing interests of neighboring and overlapping taxing entities. In the Chapter 9 bankruptcy context, there is a temptation for one overlapping taxing district to wait to restructure its debt until another does first. Districts may do so in hopes that other districts' initial restructuring will relieve the strain on the tax base and thus reduce the possible pain to the "waiting" district or municipality.[166]

Likewise, and as discussed above, cities often disregard the protests of overlapping taxing entities like school and fire districts in designating TIF districts and redirecting tax revenues that could have other gone to these entities. Cities may not feel compelled to be protective of the financial health of overlapping taxing entities, as well as of bordering municipalities. Creditors of defaulting tax increment financing developments may fear this lack collective action among taxing entities could reduce the chance of recovering debt via municipal bankruptcy. This is especially true if creditors have common debtors among area governments, TIF districts, and overlapping taxing entities that simultaneously face financial hardships.

(4) Contract Theories and Provisions

While municipalities can attempt to reform or rescind various incentives in TIF agreements with developers, the contractual theories of mistake and unjust enrichment are likely not applicable to the same degree with municipal bond instruments. Depending on the law of the state in which the city issuing TIF bonds is located, an unjust enrichment claim against a

[165] Aurelia Chaudhury, Adam J. Levitin, and David Schleicher, *Junk Cities: Resolving Insolvency Crises in Overlapping Municipalities*, 107 CALIF. L. REV. 459, 488
[166] *Id*. at 459

bondholder is unlikely to succeed absent a showing of breach of contract. See *City of Philadelphia v. Bank of America Corp.*, 2020 WL 6430307 at *12 (S.D.N.Y. 2020).

Caselaw illustrates government mistake and unjust enrichment claims against municipal bondholders are especially difficult when a government's taxing authority pertaining to a municipal bond was not otherwise void or contrary to public policy.[167] For instance, in *Northern Palm Beach Cnty. Water Control Dist. v. State*, 604 So.2d 440 (Fla. 1992), the Florida Supreme Court reversed a lower court's declining to validate water improvement bonds due to the water district's vested authority in their otherwise legal issuance. Opponents of the bond attempted to invalidate them as a violation of a clause in Florida's constitution prohibiting state entities from using their taxing powers to aid private citizens. *Id*. at 440. The bonds were to fund drainage and other water infrastructure for a residential development connected to a country club. *Id*. Despite the district's strained interpretation of a public purpose, the court declined to invalidate the bond issuance due to the water authority's broad statutory enabling language. *Id*. at 441.

The inverse of this unjust enrichment principle, though, applies when a municipal bondholder seeks to enforce payment on an executed note with a public entity that has sought benefits from the bonds *ultra vires*. For instance, the Washington Supreme Court refused to apply unjust enrichment to a public utility in favor of a trustee of municipal bondholders. *Chemical Bank v. Wash. Public Power Supply System*, 691 P.2d 524 (Wash. 1994). The bonds were issued to finance construction of a nuclear power plant, which was later terminated due in part to the various participating utility districts lacking statutory authority to participate in the project. The court found the bondholders were not entitled to restitution from the municipalities due to this lack of authority. *Id*.

TIF developer incentives are often designed with project revenue targets and performance claw backs. Municipal bond instruments funding TIFs can be designed in a similar fashion to utilize tax revenue targets pertaining to TIF districts. Securing these instruments with revenue-specific targets is an attractive way to manage risk for cities authorizing debt with varying risk premiums and time horizons.[168] A city with a well-crafted TIF ecosystem will identify the main

[167] See *Meyer v. City of Muscatine*, 68 U.S. 384 (1863), holding that a city issuing municipal bonds and acting regularly in the procedural passage of the notes cannot later use procedural arguments to invalidate the notes when all parties acted in good faith.

[168] Benito Arrunada and Amon Lehavi, *Prime Property Institutions for Subprime Era: Toward Innovative Models of Homeownership*, 8 BERKELY BUS. L.J. 1, 24 (2011).

risks associated with the project, the level of public commitment, and how risks are allocated between the government and private developers.[169]

This risk management factor leads finally to cross-collateralization as a TIF bond renegotiation strategy for cities. In the non-government credit context, cross-collateralization occurs when a borrower puts up the same collateral for two or more lines of credit.[170] Cities may attempt to use the threat of cross-collateralizing the incremental tax revenues associated with a TIF district in renegotiating more favorable bond terms.

Municipal cross-collateralization has occurred in post-bankruptcy when cities secured general obligation or revenue bonds with multiple financers willing to provide an instant influx of cash.[171] Existing creditors of TIF-associated bonds would likely disapprove of the same pledged tax revenues being cross-collateralized in agreements with other creditors. Creditors may therefore be willing to negotiate with cities regarding payments of their existing instruments to preserve their special relationship to TIF project revenue streams. Of course, cities will want to make sure their tax increment financing agreements do not prohibit cross-collateralization before pursuing this option as a renegotiation tactic with TIF bondholders.

IV. A Floundering Foundry? St. Louis's City Foundry as a Case Study in TIF Renegotiation

Many of the renegotiation theories discussed in Section III are either untested or have been sparsely tested with litigated tax increment financing agreements. The long duration of these agreements and general cooperation between cities, developers, and economic development agencies do not tend to lead to public renegotiation spats. The public-private nature of tax increment financing, too, does not necessarily lend itself to strict application of renegotiation principles utilized in the private ordering context. Economic uncertainty from the COVID-19 pandemic fallout also called into question how development agreements generally were enforced

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169 *Id*. at 25

170 Ericka Shinpaugh, Cross-Collateralization and Cross-Default Clauses in Commercial Loan Documents, accessed January 3, 2021, https://www.hcmp.com/blog/legal-resources/business/cross-collateralization-and-cross-default-clauses-in-commercial-loan-documents-know-the-difference

171 David L. Dubrow, *Chapter 9 of the Bankruptcy Code: A Viable Option for Municipalities in Fiscal Crisis*, 24 URB. LAW. 539, 568 (1992).

and litigated, as largescale retail projects for which cities divert millions of dollars in tax incentives categorically underperformed.

One of the country's largest TIF users saw this economic uncertainty as a prime renegotiation opportunity, though. Spurred by the pandemic and a new, progressive mayoral administration, The City of St. Louis[172] successfully employed a variety of these theories to renegotiate one of its newest and largest tax increment financing agreements in 2021. The following section details the origins of this pandemic-delayed TIF project in St. Louis, a city that has been often criticized for the frequency and scale for which it utilizes tax increment financing. It then applies the various TIF renegotiation theories described in this comment to the development agreement and the associated TIF bond authorization. The city's successful tax increment financing renegotiation serves as a case study for municipalities in the future that are burdened with financing underperforming public-private developments.

A. Project Background and the St. Louis TIF Context

The City Foundry development in St. Louis could not have launched at a worse time. Designed as a mixed-use urban food hall with a movie theatre anchor tenant,[173] the revitalized former motor and generator factory's planned Spring 2020 opening was severely impacted by the COVID-19 pandemic.[174] The project's initial anchor tenant, an Alamo Drafthouse Cinema, closed all of its locations nationwide in 2020 and delayed its St. Louis opening until 2022.[175] Retail developments saw challenges during the pandemic due to foot traffic being heavily influenced by anchor tenants; If that tenant has limited capacity or is not operational, the entire development can suffer.[176] Subsequent stay-at-home orders and city-mandated restaurant

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[172] Unless otherwise specified, St. Louis refers to the independent city in Missouri and not Saint Louis County, Missouri, which is a separate and non-overlapping municipal entity.

[173] http://cityfoundrystl.com/our-story

[174] KMOV (2020, August 5), City Foundry STL not entirely open due to ongoing pandemic, https://www.kmov.com/news/city-foundry-stl-not-entirely-opening-due-to-ongoing-pandemic/article_797f3708-d731-11ea-83bc-fb5627a07243.html

[175] Steph Kukuljan (Apr. 3, 2020), City Foundry to delay reopening amid COVID-19, *St. Louis Business Journal*, https://www.bizjournals.com/stlouis/news/2020/04/03/city-foundry-to-delay-opening-amid-covid-19.html and Jacob Kirn (2021, April 30), Alamo Drafthouse gives timeline for City Foundry opening, *St. Louis Business Journal*, https://www.ksdk.com/article/news/local/business-journal/city-foundry-movie-theater-opening-timeline/63-48464373-b36f-45bb-8cc4-bf52b8513939

[176] Grant Thornton (Jan. 21, 2021), Retail industry finds solutions to COVID-19 shocks, https://www.grantthornton.com/library/articles/retail/2020/retail-industry-finds-solutions-to-COVID-19-shocks.aspx

closures fizzled the excitement for what was expected to be a big part of St. Louis's revitalized Midtown neighborhood.[177]

In order to induce the redevelopment, St. Louis passed a tax financing agreement to benefit City Foundry's developers in 2018.[178] The original agreement provided that tax increments from the project be redirected to the City Foundry RPA Special Allocation Fund. This TIF fund was to pay for the developer's[179] redevelopment costs and the associated bond payments financing the improvements.[180] Additionally, the agreement stipulated 50 percent of the total additional revenue from taxes, penalties, and interest imposed by the city's various taxing districts be allocated to the district's TIF fund for 23 years.[181] This is the maximum duration permitted under Missouri's TIF authorizing statute.[182]

TIFs in St. Louis are authorized by the State of Missouri, with its board of aldermen serving as the required municipal approval agency. Missouri's TIF authorizing statute broadly allows for blight, conservation, and economic development rationales in permitting tax increment financing.[183] Interestingly, Missouri's TIF statute was last substantially modified in the summer of 2018, which was immediately before the City Foundry TIF agreement passed as a St. Louis ordinance.[184] Missouri is one of only 18 states permitting earnings, profits, utilities, sales, and property taxes to be diverted in TIF districts.[185] Gross receipts taxes may also contribute to tax increment financing in Missouri, but all costs eligible for TIF reimbursement in the state must fit into a statutory site improvement category such as beatification and public transportation.[186]

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[177] Steph Kukuljan (2020, November 13), Opening of City Foundry depends on Covid-19, weather, officials say, *St. Louis Business Journal*, https://www.bizjournals.com/stlouis/news/2020/11/13/when-you-can-expect-city-foundry-to-open.html
[178] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, https://www.stlouis-mo.gov/government/city-laws/ordinances/ordinance.cfm?ord=70750
[179] While the project had multiple investors, FOPA Partners, LLC, is the developer of record in the TIF ordinance. References to this party will be described in the singular tense throughout this section.
[180] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, *3–4
[181] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, *4
[182] Mo. Rev. Stat. § 99.845.10(5)
[183] Susan G. Mason and Kenneth P. Thomas, *Exploring Patterns of Tax Increment Financing Use and Structural Explanations in Missouri's Major Metropolitan Regions*, CITYSCAPE, *2*(20), 203, 208 (2018)
[184] Mo. Rev. Stat. § 99.845
[185] Richard Briffault (2010), The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government, 77 U. Chi. L. Rev. 65, 68–9 n.12
[186] CDFA 2008 TIF State-By-State Report, *25

The City Foundry's 2018 TIF agreement diverted many of these tax streams into the TIF allocation fund but excluded personal property,[187] hotel, museum district, and public transportation taxes from diversion.[188] The project qualified for the blight rationale of Missouri's TIF statute as a government-designated blight remediation district.[189] Even though the district is a special taxing entity and is funded directly by the TIF allocation fund, the agreement stipulated the city itself shall pledge funding for the payment of the project's redevelopment costs.[190]

The allocation fund is a separate fund of the city's treasury and ultimately controlled by its comptroller. Half of the total tax increments realized from City Foundry are eligible to be segregated into the project's TIF fund. This tax ratio eligible for TIF treatment (50%) was also set at Missouri's maximum.[191]

The project's TIF funds were initially allocated to numerous site preparedness items. These included the demolition of a vacant building, construction of 46,000 square feet in entertainment, dining, and retail space, two office buildings, a 400-spot parking structure, landscaping, exterior lightings, and utilities enhancements.[192] These initial improvements were estimated to cost $97 million in 2018.[193]

Tax increment financing is especially prevalent in the St. Louis region. An estimated $1.1 billion in development incentives were committed to St. Louis-area TIF projects between 1986 and 2009.[194] These projects have tended to be focused on the retail sector, with retail-focused TIFs at one point representing more than three-fourths of all tax increment financing in the state of Missouri.[195] While such a high degree of TIF spending may incentivize urban core development in fast growing cities, the St. Louis region has been among the slowest growing in

[187] It should be noted that no personal property subject to taxation is currently located in the district. Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, *28
[188] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, *4
[189] *Id*. at 2
[190] *Id*. at 3
[191] *Id*.
[192] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, *11
[193] *Id*.
[194] East-West Gateway Council of Governments (2011), An Assessment of the Effectiveness and Use of Development Incentives in the St. Louis Region (Final Report), Table 1, *7, https://www.ewgateway.org/wp-content/uploads/2017/08/TIFFinalRpt.pdf
[195] George Lefcoe (2001), Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, 43 Urban Lawyer 427, 452

the country.[196] Critics have raises this lack of growth when debating the necessity of tax increment financing in the area.[197]

Nevertheless, researchers have found tax increment financing in St. Louis significantly impacted economic activity in the region due to increased sales in TIF districts, albeit with less substantial effects on employment.[198] Additionally, TIF enactment seems to have resulted in economic leakage from non-TIF using parts of the St. Louis region into those implementing TIF projects.[199] This leakage may best be attributed to the region's municipal fragmentation, though.

Municipal fragmentation and competition greatly affect tax increment financing in the St. Louis region. The City of St. Louis, whose neighboring county contains 88 distinct municipalities,[200] competes with other regional governments for large-scale development projects. Each municipality chartered by the State of Missouri can, in theory, offer tax increment financing to developers. The high volume of local governments surrounding St. Louis puts this independent city in a difficult negotiating position with developers seeking tax increment financing and other economic development incentives. If the city is not willing to "play ball," developers can take projects to a multitude of neighboring Missouri suburbs or even hop over the state line to Illinois to increase the likelihood of receiving development incentives.[201]

Other "legacy cities" such as St. Louis that experienced municipal fragmentation, economic downturns, racial strife, and depleted property tax bases have utilized regional planning and partnerships to facilitate public-private developments.[202] Because TIFs in St. Louis are managed and approved[203] by the city's own development corporation[204] and TIF

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[196] Walker Moskop (2016, March 14), It's slow growing for St. Louis as region slips down list of big metro areas, *St. Louis Post-Dispatch*, https://www.stltoday.com/news/local/metro/its-slow-growing-for-st-louis-as-region-slips-down-list-of-big-metro-areas/article_29851e3e-574e-5d44-bc5d-effb65604404.html

[197] George Lefcoe (2001), Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, 43 Urban Lawyer 427, 451

[198] William Rogers and William Winter, *The Economic Impact of TIFs: Jobs and Taxable Sales*, University of Missouri-St. Louis (2009)

[199] *Id*.

[200] Peter W. Salsich, Jr., and Samantha Caluori (2014), Can St. Louis City and County Get Back Together? (Do Municipal Boundries Matter Today)?, 34 Saint *Louis University Public Law Review* 13 and St. Louis Magazine (March 8, 2019), St. Louis County Municipalities and Better Together: 4 Things to Know, https://www.stlmag.com/news/politics/st-louis-county-municipalities-better-together

[201] Mason and Thomas at 222

[202] Allan Mallach and Lavea Brachhman (2013), *Regenerating America's Legacy Cities* (Policy Focus Report Series PF034), Lincoln Institute of Land Policy, *3

[203] Nicole Galloway (2020), *City of St. Louis: Tax Increment Financing* (Missouri State Auditor Report No. 2020-076), at *5

[204] St. Louis Development Corporation, https://www.stlouis-mo.gov/sldc/index.cfm

commission,[205] respectively, regional considerations are not at the forefront of the TIF approval process in St. Louis. Onlookers correlate this lack of regional coordination to the high number of TIF projects in the region.[206] A regional assessment found TIF projects in St. Louis provide short-term positive impacts for the bonding municipality while sometimes harming neighboring municipalities due to economic leakage.[207]

There is evidence, though, that municipalities in the St. Louis region engage in a more "give-and-take" negotiation process with TIF-linked developers.[208] St. Louis's placement in a bi-state region may also affect tax increment financing negotiations. A state's "but for" test may not be particularly useful in determining whether a development will occur within a given region. This framework is altered from a state's perspective when development can stay within a region while moving across a state border, thereby producing a net loss for a state.[209] In the Missouri context, this phenomenon appears to be more prevalent in the Kansas City area with neighboring Kansas than in St. Louis with bordering Illinois.[210]

In renegotiating its tax increment financing with the project's developers, St. Louis leaders may have hoped to avoid City Foundry becoming a redux of the St. Louis Marketplace. The city's first TIF project, a grocery store-anchored strip mall in the city's Dogtown neighborhood, was approved in 1990.[211] Tenants consistently turned over and left leases in the center. The city then struggled to pay the general obligation bonds, which per the project's ordinance were appropriated to cover any shortfalls with the TIF district's revenues, associated

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[205] St. Louis Tax Increment Financing Commission, https://www.stlouis-mo.gov/government/departments/sldc/boards/Tax-Increment-Financing-Commission.cfm
[206] East-West Gateway Council of Governments (2011), An Assessment of the Effectiveness and Use of Development Incentives in the St. Louis Region (Final Report)
[207] *Id*.
[208] Josh Reinhert, Tax Increment Financing in Missouri: Is It Time for Blight and But-For To Go? [Note], 45 SLU L. J. 1019, 1051 (2001).
[209] Susan G. Mason and Kenneth P. Thomas, *Exploring Patterns of Tax Increment Financing Use and Structural Explanations in Missouri's Major Metropolitan Regions*, CITYSCAPE, *2*(20), 203 (2018)
[210] Daniel Herriges (2020, October 8), The Opportunity Cost of Tax Incentives in Kansas City, retrieved from Strong Towns website: https://www.strongtowns.org/journal/2020/10/8/the-opportunity-cost-of-tax-incentives-in-kansas-city
[211] Susan G. Mason and Kenneth P. Thomas, *Exploring Patterns of Tax Increment Financing Use and Structural Explanations in Missouri's Major Metropolitan Regions*, CITYSCAPE, *2*(20), 203, 212 (2018); Urban Review St. Louis (2004, December 16), St. Louis Marketplace – a predictable failure, http://www.urbanreviewstl.com/2004/12/st-louis-marketplace-a-predictable-failure

with its TIF financing.[212] The project ultimately required a bailout from the city after developers requested additional TIF bonding to pay for anchor tenant remodeling.[213]

B. TIF Renegotiation Theories and Results as Applied to St. Louis's City Foundry Development Agreement

While specific in its financing and site preparedness provisions, the City Foundry TIF agreement is in many ways a flexible document that gives St. Louis a degree of options in its dealings with both the project's developer and financiers. This flexibility and authorization for future renegotiation were vested in Section 10 of the 2018 agreement, which stipulates that the city's "[m]ayor and [c]omptroller … are hereby further authorized to make any changes to the documents and instruments approved by the Ordinance as may be consistent with the intent" of the TIF agreement.[214]

The COVID-19 pandemic hindered multiple considerations and assumptions within the agreement. The project's developer anticipated the district's retail sales to eclipse $75 million in 2020.[215] This projection obviously did not occur due to the project's delayed opening. The development continued to delay opening that year to comply with the city's pandemic safety measures, and entertainment programming meant to enliven the area did not commence.

Pertinently, the district did not produce tax increments as projected. The 2018 TIF agreement, while not contemplating a global pandemic, repeatedly provides the city with financial protections in the event of district revenue shortfalls. For instance, if the project does not produce projected TIF revenues, the agreement stipulates the developer "will not realize those principal amounts … and the value of the TIF … to the Developer will be decreased."[216]

This same clause also provides financing protection to the city in the event of a revenue shortfall. It does so by permitting a lender to discount the TIF notes' face value and thereby decreasing the value of the TIF to the developer.[217] Additionally, the 2018 agreement stipulates

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[212] Id. at 213 and Stifel Nicholas (2010), Recovery Zone Facility Special Obligation Redevelopment Bonds Series 2010, at *A26, https://www.fpr.net/fulfillment/pdf/post_pos_land_clearance_600_wash.pdf
[213] Linda Tucci (1996, December 29), City helping Marketplace shop for potential grocery store tenant, *St. Louis Business Journal*, https://www.bizjournals.com/stlouis/stories/1996/12/30/story6.html
[214] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, *5
[215] *Id*. at 43
[216] *Id*. at 13
[217] *Id*.

the city will not be responsible for financing the principal or interest on the requested TIF financing if the district does not produce tax increment financing revenues as projected.[218]

These provisions positioned the city more favorably in a COVID-19 environment where projected TIF revenues could not be realistically realized. Still, in using revenue projections as a basis for renegotiating its tax increment financing agreement with City Foundry's developer, the city undertook some legal risks. The 2018 agreement's municipal protections are somewhat ambiguous as to what exactly may trigger a breach by the developer or release the city from providing financial support. For instance, the provisions relating to TIF claw backs in the event of revenue shortfalls are not cohesive in identifying duration, revenue variance, and possible period to cure.[219] A court or arbitrator could have declined to broadly enforce such a provision.

The city was also bound by agreements with other TIF developers in its negotiations of the City Foundry project. The developer of the TIF-financed Northside Regeneration Project procured a future assurances agreement with St. Louis to ensure future TIF agreements would not hinder the financing of his development.[220] Contractual differences between this 2016 agreement and a 2014 TIF agreement were ultimately litigated by the developer, the city, and its land bank. Particularly relevant to City Foundry TIF renegotiations was a clause in the future assurances agreement that stipulated the Northside Regeneration developer must provide written consent for the city to authorize tax increment financing to other developers in the project area.[221]

Despite the lack of economic activity at City Foundry, the additional 50 percent of tax revenue from the city and overlapping taxing districts diverted to the project's special allocation fund remained in effect in 2020 and early 2021. This lack of activity could have given rise to an unjust enrichment claim by the city, as the agreement's clause allowing for this diversion specifically dictates that these revenue "are generated by economic activities within the [TIF district]."[222] When these economic activities failed to come to fruition, the city was left with a shortfall.

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[218] *Id*.
[219] *Id*.
[220] Rachel Lippmann (Aug. 27, 2018). How a 2016 deal, made out of public eye, makes it hard for St. Louis to cut ties with McKee, *St. Louis Pubic Radio*, https://news.stlpublicradio.org/show/st-louis-on-the-air/2018-08-28/how-a-2016-deal-made-out-of-public-eye-makes-it-hard-for-st-louis-to-cut-ties-with-mckee
[221] *Id*.
[222] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, *2

The 2018 agreement also contained numerous provisions favorable to the project's developer. For instance, in its statutorily required cost-benefit analyses and revenue projections, the developer projected 3 percent bi-annual growth.[223] This projection is qualified later in the agreement, though, as an estimate subject to retail sale variation—which, of course, was negatively impacted by the pandemic.[224] The various revenue projections themselves were subject to multiple revisions, which the developer filed as agreement amendments during the TIF's approval process.

Even so, the revenue shortfalls of the TIF district and extenuating circumstances caused by the pandemic had many in St. Louis questioning the city's various tax abatement and incentive programs.[225] Among those vying for tax revenues from projects like City Foundry was the city's school's system. In late 2020, St. Louis Public Schools announced plans to close 11 schools in an effort to consolidate resources amidst declining enrollments.[226] Some pointed to the city's bevy of economic development incentives such as TIFs as funding that would better be directed toward public schools. In nearby Chicago, TIF funding had been used in 2019 as a negotiating chip between the city and the Chicago Teachers Union[227] in their collective bargaining.[228] A lawsuit by education backers challenging a Chicago TIF project was also initiated that same year.[229] On the other side of Missouri, in 2017, the Smithville School District

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[223] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, *27

[224] *Id*. at 56

[225] Richard Bose (Jan. 4, 2021), Tax Abatement for Gas Station Exemplifies All That Is Wrong, *NextSTL*, https://nextstl.com/2021/01/tax-abatement-for-gas-station-exemplifies-all-that-is-wrong

[226] Ryan Delaney (Dec. 8, 2020), St. Louis Public Schools Plans 11 School Closures to Consolidate Resources, *St. Louis Public Radio*, https://news.stlpublicradio.org/education/2020-12-08/st-louis-public-schools-plans-11-school-closures-to-consolidate-resources

[227] Matt Masterson (Oct. 29, 2019) Lightfoot Accuses CTU of Moving Goal Posts After Marathon Bargaining Session, *WTTW*, https://news.wttw.com/2019/10/29/lightfoot-accuses-ctu-moving-goal-posts-after-marathon-bargaining-session

[228] Interestingly, Chicago restaurant owners have also sought TIF funds to help implement outdoor dining as a means of securing new revenue during the pandemic. See Isabelle Sarraf (Jan. 12, 2021), Restaurant owners want city to pressure Pritzker on partially restoring indoor dining, *Chicago Sun-Times*, https://chicago.suntimes.com/coronavirus/2021/1/12/22227059/chicago-restaurants-pritzker-indoor-dining-ban-capacity-limits-coronavirus-covid

[229] Curtis Black (Sept. 19, 2019), Questions still loom on Lincoln Yards and TIF, *The Chicago Reporter*, https://www.chicagoreporter.com/questions-still-loom-on-lincoln-yards-and-tif

successfully renegotiated an additional 30 percent in captured tax revenues from a TIF project after public backlash pressured both the city and the project's developer.[230]

The 2018 City Foundry TIF agreement was structured with a core TIF renegotiation tactic—incentive phasing. The city phased the project's TIF incentives in multiple dimensions. The TIF obligations were first structured to consistent of temporary bonds. These bonds are to be refunded by permanent bonds secured by district revenues distributed by the special allocation fund.[231] Thus, at least pertaining to the continued financing of district improvements stipulated in the agreement, the project's developer assented to these incentives on an incremental basis.

Additionally, the initial agreement consisted of two broader incentive phases. The first of these phases provided the developer with $17.3 million in tax increment financing.[232] This funding was intended to expand the project from a cinema-anchored food hall to a full mixed-use development with office and residential space. The developer would ultimately have to negotiate for an additional phase of incentives after the first phase's opening was delayed.

For existing or nearly completed projects like the City Foundry, the ability for a developer to shop around for other municipal incentives is severely restrained due to the project already being anchored to a site. Instead, St. Louis has utilized this multi-phased incentive package to hold the developer accountable.[233] Indeed, a 2017 TIF funding request in fulfillment of the TIF district's second phase was delayed in order to allow for an additional public comment period.[234]

Pandemic-related opening delays ultimately put the city's TIF renegotiation bargaining power to the test. City Foundry's developer said in December 2020 that it would not seek additional public incentives to revive City Foundry. But the developers found a workaround in keeping City Foundry's second phase afloat by teaming with a local university's redevelopment corporation, which is not subject to a majority of the city's property and related taxes as a

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[230] Amanda Lubinski (Nov. 30, 2017), School district to receive more funding in TIF plan after renegotiation, *St. Joseph Courier-Tribune*, https://www.mycouriertribune.com/news/city_government/school-district-to-receive-more-funding-in-tif-plan-after-renegotiation/article_4e8d6990-95c1-5e9a-b00a-1e7c6478d929.html

[231] Ordinance 70750: Approved Amendment RPA2 City Foundry TIf, City of St. Louis, *13, https://www.stlouis-mo.gov/government/city-laws/ordinances/ordinance.cfm?ord=70750

[232] Jacob Barker (2021, June 3), City Foundry TIF Advances After Developer Pledges $1.8 Million to Affordable Housing, St. Louis Post-Dispatch

[233] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis

[234] Brian Feldt (2017, October 4), $17 million TIF request for City Foundry delayed, *St. Louis Business Journal*, https://www.bizjournals.com/stlouis/news/2017/10/04/17-million-tif-request-for-city-foundry-delayed.html

nonprofit entity, in order to assist with the project's second phase.[235] This practice, seen by some as providing tax incentives to non-taxpaying entities, drew criticism from civic onlookers and St. Louis leadership.[236]

While pandemic-related delays, closures, and revenue losses provided St. Louis a basis for renegotiating its City Foundry tax increment financing agreement, a new mayor and slate of municipal legislators in 2021 were the catalysts for the city successfully renegotiating the 2018 agreement. Tishaura Jones, formerly the city's treasurer, campaigned partially on reducing municipal financing of largescale developments in the city's affluent, central corridor.[237] Tina Pahl, a newly elected alderwoman whose ward partially contains the City Foundry development, also campaigned on more equitable growth for less-developed parts of the city.[238]

Negotiations with City Foundry's developer quickly commenced following the installment of Jones's administration in April 2021. The city's TIF committee, apparently at the behest of Jones, repeatedly delayed granting a hearing to the developers for the second round of funding under the 2018 agreement.[239] Pahl and other members of the Board of Aldermen then engaged in more than a month of behind-the-scenes negotiations with the developer in Spring 2021 regarding the future of the project's tax incentives.[240]

The second phase of City Foundry's TIF funding ultimately advanced in June 2021. The talking point of the renegotiated agreement from the mayoral administration's perspective was a $1.8 million "equitable development fee" that the project's developer agreed to pay to fund

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[235] Jacob Barker (Dec. 4, 2020), City Foundry again plans apartment component, *St. Louis Post-Dispatch*, https://www.stltoday.com/business/local/city-foundry-again-plans-apartment-component/article_f49c7840-f373-5e65-86ed-3056c1628493.html

[236] Jacob Barker (May 3, 2021), High-Profile City Foundry Appears to be Latest Project Facing Pushback from New St. Louis Administration, St. Louis Post-Dispatch, https://www.stltoday.com/news/local/govt-and-politics/high-profile-city-foundry-appears-to-be-latest-project-facing-pushback-from-new-st-louis/article_58192cc9-4b8d-54d3-94e0-ab1d27724976.html

[237] Mark Schlinkmann (November 4, 2020), 'Say No to Business as Usual': Tishaura Jones Kicks Off Repeat Campaign for St. Louis Mayor, St. Louis Post-Dispatch, https://www.stltoday.com/news/local/govt-and-politics/say-no-to-business-as-usual-tishaura-jones-kicks-off-repeat-campaign-for-st-louis/article_bff94f53-cd23-5e11-9ac1-bf04bfc04d9a.html

[238] Corinne Ruff (June 11, 2021), St. Louis' Renegotiation of City Foundry Tax Incentives Could Pave Way for More Equitable Growth, *St. Louis Public Radio*

[239] Jacob Barker (May 20, 2021), High-Profile City Foundry Appears to be Latest Project Facing Pushback from New St. Louis Administration, St. Louis Post-Dispatch, https://www.stltoday.com/news/local/govt-and-politics/high-profile-city-foundry-appears-to-be-latest-project-facing-pushback-from-new-st-louis/article_58192cc9-4b8d-54d3-94e0-ab1d27724976.html

[240] Jacob Barker (2021, June 3), City Foundry TIF Advances After Developer Pledges $1.8 Million to Affordable Housing, St. Louis Post-Dispatch

affordable housing in less-affluent parts of the city.[241] The fee was a first-of-its kind in St. Louis and was seen as a mechanism for spreading the economic benefits of tax-incentivized developments in the city to underserved neighborhoods,[242] which studies show have not shared in these benefits.[243] This fee was described as a condition precedent in the 2021 amended agreement and whose nonpayment rendered the entire development agreement void.[244] The developer secured a sales tax exemption for certain construction materials from the negotiations.[245] Additionally, the developer waived its claim to utility tax revenues under the 2018 TIF agreement.[246]

During hearings, the St. Louis Public Schools board also asked for the developer to pay for an upfront fee to the district to mitigate the tax revenue impact of the two decades-long agreement. This fee was ultimately not incorporated into the amended agreement.[247] The amended agreement afforded the city additional protections from the project's developer, though. These protections can broadly be delineated into two categories: Additional warranties and additional incentive phasing periods.

The amended agreement contains basic additional warranty-like provisions, including best efforts[248] and substantial completion[249] clauses. The former was drafted in boilerplate fashion and mandates the developer obtain a certificate of substantial completion to receive its incremental TIF payments for each defined sub-project of the development.[250] The latter requires the developer to use its best efforts to enforce tenant revenue projections and payments.[251] Both clauses include additional developer documentation and notice requirements to the city. For

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[241] *Id*. and Ordinance 7136: Amended and Restated Redevelopment Agreement and Financing Agreement, City of St. Louis, *4, https://www.stlouis-mo.gov/government/city-laws/ordinances/ordinance.cfm?ord=71376
[242] Corinne Ruff (June 11, 2021), St. Louis' Renegotiation of City Foundry Tax Incentives Could Pave Way for More Equitable Growth, *St. Louis Public Radio*
[243] (2014) Coffin, Sarah L. The Promises and Pitfalls of TIF in the St Louis Metropolitan Region: A Look at Neighborhood Disparities. Saint Louis University Public Law Review. 33 pp 55-78
[244] Ordinance 7136 at *4, 25
[245] Following the pandemic, City Foundry's developer substituted some of the project's office space for apartment buildings. This alteration appears to have necessitated the sales tax exemption.
[246] Ordinance 7136 at *27–28
[247] Jacob Barker (2021, June 3), City Foundry TIF Advances After Developer Pledges $1.8 Million to Affordable Housing
[248] Ordinance 7136 at *12
[249] Ordinance 7136 at *13
[250] *Id*.
[251] Ordinance 7136 at *27–28

instance, any material changes[252] to the development now requires a formal, written request be made to and approved by the city's development corporation.[253]

Another warranty-like municipal protection pertains to the development's vacancy rate. Obviously, the 2018 agreement did not anticipate a global pandemic causing the development to become completely vacant in 2020. While the 2021 agreement's force majeure clause added "restrictive government regulations"[254] as a possible hedge against government-directed pandemic lockdowns, it allows for only a 7 percent vacancy rate of the site's income-producing space before the city is allowed to claw back the project's TIF funding.[255]

The amended agreement promotes the city's interests in phasing TIF incentives in two manners. Most directly, the 2021 agreement doubles the number of TIF phases from two to four.[256] This increase gives the city more leverage in ensuring City Foundry's revenue objectives are met, as well as provides the St. Louis additional opportunities to renegotiate the agreement if it determines the developer is falling short of the amended agreement's terms.

TIF phasing in the agreement is also indirectly affected by additional claw back provisions. The amended agreement allows the city to reduce TIF funding for the development if future phases experience cost savings or excess profits.[257] The city now has a right of termination alleviating its duty to issue TIF bonds for project phases so long as it gives the developer at least 30 days' notice before the commencement of one of the development's sub-projects.[258]

C. TIF Bond Renegotiation Theories and Results as Applied to St. Louis's City Foundry Financing Agreement

As part of its renegotiations with City Foundry's developers, St. Louis's revised 2021 tax increment financing agreement also includes a revised financing agreement affecting the municipal bonds issued for the project. The initial financing letter contained within the 2018 agreement, contracted with Peoples National Bank, was contingent on the availability of sufficient tax increment financing revenues in a provision similar to the city's revenue projection

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[252] Defined as affecting 10 percent or more of the project's total square footage. Ordinance 7136 at *21.
[253] Ordinance 7136 at *21
[254] Ordinance 7136 at *30
[255] Ordinance 7136 at *18
[256] Ordinance 7136 at *14–15
[257] Ordinance 7136 at *25
[258] Ordinance 7136 at *28

clause with the developer.[259] Prior to the 2021 renegotiation, the city would likely have needed to rely on the 2018 agreement's TIF note discount clause that protects the city in the event the development does not realize the bonds' principal amounts from TIF district revenues in order to recoup on the bonds the city already issued for the development.[260]

This 2018 clause, though, was partially predicated on macroeconomic conditions outside of the city's control such as Federal Reserve interest rates. The 2021 financing agreement attempts to hedge this interest rate risk by capping City Foundry TIF bond rates at no more than 10 percent. It includes a specified range of 2 percent for the bonds which qualify for municipal bond tax exemption[261] and 4 percent interest for the bonds that do not qualify for this treatment.[262] The developer agreed to pay the city for the bond issuance costs as part of its renegotiation.[263]

This comment examined the threat of municipal bankruptcy as a renegotiation tactic with TIF bondholders. An interesting factor affecting this renegotiation tactic is the possibility of the city's merger with St. Louis County. St. Louis split from St. Louis County in the nineteenth century, thereby establishing itself as an independent city.[264] Steep population declines, revenue shortfalls, and a regional desire for government synergies in the twentieth and twenty-first centuries brought along several reunification proposals. The last of these proposals was pulled in 2019 after proponents successfully obtained the required signatures to include it as statewide ballot initiative.[265]

Even if a future merger were to go swimmingly, though, debt and bond obligations generally remain the responsibility of the incurring jurisdiction as opposed to the consolidated

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[259] Ordinance 70750: Approved Amendment RPA2 City Foundry TIF, City of St. Louis, *19, https://www.stlouis-mo.gov/government/city-laws/ordinances/ordinance.cfm?ord=70750
[260] *Id*. at 13
[261] The trustees of the TIF bonds, though, have an obligation to assess whether any further amendment to the project will affect the bonds' tax-exempt status. Ordinance 7136 at *59.
[262] Ordinance 7136 at *26
[263] Ordinance 7136 at *20
[264] Jeanette Cooperman (Mar. 8, 2019), St. Louis's Great Divorce: A Complete History of the City and County Separation and Attempts to Get Back Together, *St. Louis Magazine*, https://www.stlmag.com/news/politics/st-louis-great-divorce-history-city-county-split-attempt-to-get-back-together
[265] David Hunn (May 7, 2019), Better together pulls St. Louis city-county merger proposal, *St. Louis Post-Dispatch*, https://www.stltoday.com/news/local/govt-and-politics/better-together-pulls-st-louis-city-county-merger-proposal/article_c71a51d2-998b-5e95-9926-ad3707671690.html; Jeanette Cooperman, St. Louis's Great Divorce

entity.[266] Additionally, the 2021 City Foundry financing agreement defines municipal bankruptcy as a term of default on the issued TIF bonds.[267] Bankruptcy would cause the bonds' outstanding interest to be immediately due to creditors and would therefore not likely be an effective negotiation tactic for St. Louis.

V. Conclusion

In a climate of falling retail and commercial real estate taxes exacerbated by the COVID-19 pandemic, local governments and development agencies struggled to maintain municipal services and redeveloped urban cores. While cities may cut services or increase taxes to mitigate economic downturn, they may also consider revisiting the terms of their tax increment financing agreements with private developers and the financial agencies that underwrite the municipal bonds on which TIF districts depend. Put bluntly, the "incremental" tax revenue projected from many tax increment financing districts may not come to fruition. This can cause already cash-strapped municipalities to seek to negotiate their TIF agreements with developers and financiers.

Due in large part to their public-private nature, tax increment financing is often seen as a controversial funding mechanism. Local leaders have found renegotiating or attempting to terminate these agreements is more politically palatable than other forms of revenue stabilization. But this public-private nature also makes the property interests and related responsibilities contained in TIF agreements less straightforward to modify than in other types of contracts. This is especially relevant when intermediary organizations such as Community Development Agencies serve as the governmental party-of-record within the TIF agreement. State courts have typically been unforgiving to local governments that try to gain more than what is contained in the four corners of the agreement in TIF disputes.

Nevertheless, various theories of contract and public trust doctrine provide municipalities with tools in revisiting or renegotiating tax increment financing agreements. The short-term impact of TIF negotiation measures like cross-collateralization, upholding of warranties, unjust enrichment claims, and mitigation may be advantageous in dealings with both TIF developers

[266] Allan Mallach and Lavea Brachhman (2013), *Regenerating America's Legacy Cities* (Policy Focus Report Series PF034), Lincoln Institute of Land Policy, *41
[267] Ordinance 7136 at *61

and financers. More dramatic measures, such as default, district dissolution, state action, or municipal bankruptcy may also be considered by governments unable to meet the financial obligations associated with TIF districts planned in a pre-pandemic world. As St. Louis demonstrated in 2021, though, careful drafting of TIF development agreements with revenue warranties and incentive phasing provide the best basis for successful renegotiation of tax increment financing.

Any tax increment financing renegotiations will ultimately seek to improve municipal finances as they relate to TIF districts while also improving land use efficiency to better reflect changing consumer preferences and local demand accelerated by the pandemic. Due to the complexity and multiple actors involved in TIF agreements, though, local leaders would be wise to consider longer term impacts, judicial challenges, and the uncertainty surrounding pandemic-related recovery in attempting to renegotiate the terms of their tax increment financing.