

Tax Increment Financing as a Tool for Redevelopment: Attracting Private Investment to Serve a Public Purpose—The Example of Michigan

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I. Introduction

THE 2008 ECONOMIC CRISIS, which has limited the ability of local governments across the country to finance public projects, also raises questions about those governmental incentives that rely on predictions of economic growth and property tax increases to spur economic development.¹ Tax-related economic development incentives remain crucial nonetheless to maintaining stability and encouraging growth once the economy begins to improve. One type of incentive that is important to improving a state's economy and reviving aging city centers is tax increment financing (TIF). TIF has become an increasingly common way to encourage redevelopment nationwide, and now forty-nine states and the District of Columbia have adopted TIF legislation.² While TIF is a useful tool to promote economic growth and investment in distressed

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1. See *Strand v. Escambia County*, 992 So. 2d 150 (Fla. 2008) (reversing the decision of the appellate court and holding that under state law TIF bonds may be issued without holding a public hearing); see also Mary Williams Walsh, *Under Strain, Cities are Cutting Back Projects*, N.Y. TIMES, Oct. 1, 2008, at A1, available at http://www.nytimes.com/2008/10/01/business/01muni.html?_r=1&oref=slogin.

2. Arizona is now the only state without TIF legislation. See Council of Development Financing Agencies (CDFA), Tax Increment Financing State Statutes (2006), <http://www.cdfa.net/cdfa/cdfaweb.nsf/pages/tifstatestatutes.html> (last visited Oct. 13, 2008); Alex Iams, Council of Development Finance Agencies (CDFA), National Roundup: Tax Increment Financing (Mar. 1, 2006), <http://www.cdfa.net/cdfa/cdfaweb.nsf/pages/tifnationalroundup.html> (last visited Sept. 11, 2009); see also Harry M. Hipler, *Tax Increment Financing in Florida: A Tool for Local Government Revitalization, Renewal, and Redevelopment*, 81 FLA. B.J. 66 (2007). As Hipler explains, TIF was introduced in California in 1952 as a way of filling federal financing gaps for urban redevelopment projects. TIF use spread to other states in the 1980s and 1990s as federal redevelopment funds disappeared. Hipler, *supra* note 2, at 66.

urban areas, TIF has been criticized for diverting public funds from financially strapped municipalities to focus on speculative projects, that, if successful, may ultimately benefit a private entity as much as or more than the municipality itself.³ The debate is paramount to states like Michigan, which holds the position as the most economically depressed state in the country,⁴ and to cities like Detroit, and other cities across the nation which, regardless of the current state of the national economy, are in need of increased revenues, and also heavily dependent on incentive plans to entice private investors to the city.

This paper addresses the role of TIF in the redevelopment of Detroit and larger economic revival of the state of Michigan, though the information within is applicable to any economically depressed area seeking to increase revenues. Part II presents the legal framework for TIF, including constitutional limitations that may apply to TIF. Since TIF involves the use of public tax revenues to fund improvements that may benefit private entities, Michigan courts have analyzed the constitutionality of TIF plans with respect to the diversion of tax revenues,⁵ limitations on state and municipal lending of credit⁶ and the public purpose doctrine.⁷ Part III discusses public policy implications of TIF, including criticisms that TIF provides economic benefits to private businesses while existing tax revenues fail to meet other, more pressing municipal needs.⁸ TIF has also, and perhaps most convincingly, been challenged

3. See Hipler, *supra* note 2, at 69; Frank S. London, Note, *The Use of Tax Increment Financing to Attract Private Investment and Generate Redevelopment in Virginia*, 20 VA. TAX REV. 777, 790-91 (2001) (citing John P. Blair & Rishi Kumar, *Is Local Economic Development a Zero-Sum Game?*, in DILEMMAS OF URBAN ECONOMIC DEVELOPMENT 9 (Richard D. Bingham & Robert Mier eds., 1997), and noting that when a municipality overuses subsidies to attract businesses, the businesses may receive benefits which outweigh costs to taxpayers); see also *School Dist. of the City of Pontiac v. Auburn Hills*, 460 N.W.2d 258 (1990) (in which the school district challenged the use of public tax increment revenues to fund the construction of barrier-free access for a privately-owned technology park).

4. See, e.g., Chris Isidore, *Michigan's Economic Woes on the Ballot*, Jan. 15, 2008, http://money.cnn.com/2008/01/15/news/economy/michigan_economy_election/index.htm (last visited Aug. 31, 2009).

5. MICH. CONST. of 1963, art. IX, § 6 (limiting the tax rate for property taxes, but allowing for an increased tax rate for school purposes with voter approval).

6. MICH. CONST. of 1963, art. IX, § 18 (governing the lending of the state's credit); MICH. CONST. of 1963, art. VII, § 26 (governing the lending of a municipality's credit).

7. See, e.g., *City of Gaylord v. Beckett*, 144 N.W.2d 460, 467 (Mich. 1966) (stating that "the theme of public purpose runs through the [Michigan] Constitution").

8. Concern about TIF abuses in Michigan has prompted the introduction of a series of bills in the state legislature to amend TIF authorizing statutes to require each taxing jurisdiction located within a TIF authority district to "opt in" to a TIF plan. This would replace the option for a taxing jurisdiction to "opt out" of a TIF plan by adopting a

for relying on overly-optimistic predictions of market growth, which if unmet, may cause a municipality to dip into other funds or issue additional bonds to service the debt.⁹ Part III also presents the importance of TIF to revitalize distressed Michigan cities, and summarizes some of the projects TIF has been used to fund in the City of Detroit. Finally, in Part IV, this paper concludes that TIF can effectively stimulate private investment in an area where other incentives have been ineffective or insufficient. TIF remains a viable option to further the public purpose of economic development in Detroit, the revitalization of which depends on the availability of significant incentives, and throughout the state of Michigan.

II. The Legal Framework for Tax Increment Financing

A. Constitutional Issues Raised by Tax Increment Financing in Michigan

A TIF plan allows a local unit of government to freeze the amount of assessed property values in an underdeveloped or distressed area that is retained by that local unit, and apply any increases in property tax revenues due to increases in value to finance improvement projects in the area.¹⁰ Normally, a municipality establishes a development authority and designates a geographic district for the TIF plan. In Michigan, as in other states, different types of TIF authorities focus on different types of projects, and there are often slight variations in statutory requirements,

resolution to exempt its taxes from capture by the TIF authority. See H.B. 5182, 94th Leg., Reg. Sess. (Mich. 2007); H.B. 5178, 94th Leg., Reg. Sess. (Mich. 2007); H.B. 5180, 94th Leg., Reg. Sess. (Mich. 2007). TIF has long received criticism in Pennsylvania. See generally Jake Haulk & Eric Montarti, *A Primer on Tax Increment Financing in Pittsburgh*, Allegheny Institute for Public Policy at 7, June 1999, http://www.alleghenyinstitute.org/reports/99_06.pdf (last visited Sept. 11, 2009); Eric Montarti and Jake Haulk, *A Bad TIF*, PITTSBURGH TRIBUNE-REVIEW, Sept. 8, 2005, available at http://www.pittsburghlive.com/x/pittsburghtrib/s_371732.html. TIF has received somewhat more praise in Indiana. See generally Editorial, *How Tax Districts Help*, THE JOURNAL GAZETTE, FORT WAYNE, IND., Sept. 19, 2007, available at <http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20070919/EDIT07/709190413>; Karen Eschbacher, *Business Incentives in State Top \$400M*, IND. STAR, Sept. 2, 2007, at 1.

9. Request for an Advisory Opinion on Constitutionality of 1986 PA 281, 422 N.W.2d 186, 199 (Mich. 1988); see also Tom Henderson, *TechTown Tries to Find New Funding*, CRAIN'S DET. BUS., Oct. 22, 2007, at 1, 29.

10. See CITIZENS RESEARCH COUNCIL OF MICHIGAN, SURVEY OF ECONOMIC DEVELOPMENT PROGRAMS IN MICHIGAN 80 (2007); THERESA J. DEVINE, LEARNING FROM EXPERIENCE: A PRIMER ON TAX INCREMENT FINANCING, NEW YORK CITY INDEPENDENT BUDGET OFFICE 2 (2002), available at <http://www.ibo.nyc.ny.us/iboreports/TIF-Sept2002.pdf>.

so a municipality may choose one or more types of authority to accomplish different sets of development goals.¹¹ In Michigan, a Downtown Development Authority (DDA), for example, is intended to provide financing to promote economic growth and halt property value deterioration in a downtown district.¹² A Local Development Financing Authority (LDFA) is intended to finance the development of certain manufacturing businesses and technology parks.¹³ A Corridor Improvement Authority may only be established in, and to improve, existing commercial districts located along main thoroughfares, though such districts need not be in downtown areas.¹⁴ Neighborhood Improvement Authorities and Historical Neighborhood Authorities, on the other hand, may finance improvements to encourage residential and economic development in neighborhoods.¹⁵ Water Resource Improvement Districts may be established for lakefront property.¹⁶ Finally, Brownfield Redevelopment Authorities may use TIF for environmental remediation of

11. In April 2008, the Michigan legislature enacted the Water Resource Improvement Tax Increment Finance Authority Act, authorizing the use of TIF to fund improvements to inland lake districts and prevent deterioration in the state's water resources. This joins a long list of existing TIF-authorizing legislation in Michigan, under the Downtown Development Authority (DDA) Act (1975), the Tax Increment Financing Authority (TIFA) Act (1980), the Local Development Financing Act (LDFA) (1986), the Historical Neighborhood Tax Increment Finance Authority Act (2004), the Corridor Improvement Authority (CIA) Act (2005) and the Neighborhood Improvement Authority Act (2007). Michigan was also one of the first states to allow for the use of tax increment revenues to finance brownfield redevelopment, under the Brownfield Redevelopment Financing Act (BRFA) (1996). Each municipality in Michigan may establish only one DDA. MICH. COMP. LAWS ANN. § 125.165 (West 2006). An authority district may otherwise include multiple TIF plan areas, but with the exception of LDFA certified technology parks and brownfields, TIF plans may not overlap. *See* State of Michigan Department of Treasury, Tax Increment Financing, Frequently Asked Questions, <http://www.michigan.gov/taxes/0,1607,7-238-43876-154664—F,00.html> (last visited Sept. 11, 2009).

12. MICH. COMP. LAWS ANN. § 125.1653 (West 2006).

13. MICH. COMP. LAWS ANN. § 125.2151 (West 2006). A project may receive designation as a certified technology park, allowing for the overlap of TIF plans, by application to the Michigan Economic Development Corporation. MICH. COMP. LAWS ANN. § 125.2162 (West 2006).

14. MICH. COMP. LAWS ANN. § 125.2871 (West 2006).

15. MICH. COMP. LAWS ANN. §§ 125.2911, .2841 (West 2006). The LDFA Act was intended to replace the TIFA Act, which prohibited the creation of new TIFA districts beginning in 1987. *See* MICH. COMP. LAWS ANN. § 125.1829 (West 2006); H.B. 5728, 95th Leg., Reg. Sess. (Mich. 1986); H.B. 5729, 95th Leg., Reg. Sess. (Mich. 1986). The TIFA Act authorized financing to encourage economic development and neighborhood revitalization, MICH. COMP. LAWS ANN. § 125.1801 (West 2006), while the LDFA Act focuses on commercial and industrial development projects. MICH. COMP. LAWS ANN. § 125.2151 (West 2006). The Neighborhood Improvement Authority Act, thus, arguably recreates the powers formerly granted under the TIFA Act that were lost with the LDFA Act. *See* MICH. COMP. LAWS ANN. § 125.2911 (West 2006).

16. MICH. COMP. LAWS ANN. §§ 125.1771-.1794 (West 2008).

brownfield sites, and to finance the development of functionally obsolete property.¹⁷

Once an authority is established, a public hearing is held, and the TIF plan is approved by the governing municipality; the municipality or the authority may then issue bonds, secured by expected property tax revenue increases, to fund infrastructure and other property improvements in the designated TIF district.¹⁸ The improvements are aimed at stimulating private development, which in turn will raise property values to pay for the bonds and additional improvements.¹⁹ A TIF plan relies on increases in assessed property values, and generally does not levy new taxes on an area.²⁰ TIF, nonetheless, often uses governmental indebtedness to attract private investors and cover some development costs that might otherwise be borne by the private entities.²¹ Thus, TIF is not only governed by state statutory requirements, but is also subject to constitutional limitations on debt and the use of public funds, particularly where private interests may benefit from a TIF project.

TIF has, first, been challenged in Michigan for unconstitutionally diverting voter-approved school tax funds for non-school purposes, in

17. MICH. COMP. LAWS ANN. § 125.2651 (West 2006). Functionally obsolete property refers to property that can no longer function as intended because of changes in technology, design deficiencies, or other factors that affect the adequate use of the property. MICH. COMP. LAWS ANN. § 125.2652(q) (West 2006).

18. Across the country, some TIF plans use tax increment bond funds to improve a distressed area to attract businesses, while other plans provide bond funds to a private developer to cover upfront improvements, or reimburse the developer for costs as tax revenues above the initial assessed value are captured. DEVINE, *supra* note 10, at 2; London, *supra* note 3, at 787. Moreover, some states and municipalities may establish small TIF districts, and use TIF only to fill private financing gaps, as California did when it first implemented TIF in the 1980s. See Hipler, *supra* note 2, at 66; Evans Paull, *Using Tax Increment Financing for Brownfield Redevelopment*, NORTHEAST-MIDWEST ECON. REV., Spring 2007, available at <http://www.nh.gov/oep/programs/MRPA/conferences/documents/GarvinSpring07-1.pdf>. Other states and municipalities may finance consistent, long-term development activity by designating large, even city-wide TIF districts. See Paull, *supra* note 18, at 5. Note also that of the forty-nine states with TIF legislation, over half allow a TIF plan to remain in place for over twenty-five years, or place no time limit on a plan's duration. See Council of Development Financing Agencies (CDFA), *Tax Increment Financing State Statutes*, *supra* note 2.

19. DEVINE, *supra* note 10, at 2; Paull, *supra* note 18, at 5.

20. A TIF plan that is implemented after careful evaluation of the potential for development and property tax increases in the area will not ever generate an additional tax levy. TIF-enabling statutes in Michigan, however, do provide for bonds issued as part of a TIF plan to be secured, should the TIF district experience a shortfall of tax increment revenues, by an additional ad valorem tax levied to repay the bonds. See MICH. COMP. LAWS ANN. §§ 125.1661-.1666, .1811-.1815, .2160-.2164, .2921-.2926, .2853-.2859, .2884-.2890, .2661-.2667 (West 2006).

21. See generally Iams, *supra* note 2; Daniel McGraw, *TIF Epidemic Infects Local Governments*, BUDGET & TAX NEWS, Mar. 1, 2006, available at <http://www.heartland.org/Article.cfm?artId=18558>.

violation of Article IX, section 6 of the Michigan Constitution.²² In *In re Request for an Advisory Opinion on Constitutionality of 1986 PA 281* (“*In re Request*”), the Michigan Supreme Court was asked to issue an advisory opinion regarding the constitutionality of the LDFA.²³ The court was asked specifically to address the constitutionality of the provisions of the LDFA Act that allow the capture and use of tax increment revenues.²⁴ The LDFA Act differs from other acts governing development authorities because of its requirement that projects have a manufacturing or technological focus.²⁵ Nonetheless, because all Michigan development authority acts authorize the use of TIF for development projects,²⁶ and because Michigan courts have not addressed the constitutionality of TIF schemes of other development authorities, the court’s analysis with respect to the use of tax increment revenues for LDFA projects is helpful in determining the extent to which other financing plans are subject to constitutional limitations.

The *In re Request* court upheld TIF against the claim that the financing scheme constituted an unconstitutional diversion of taxes.²⁷ The

22. MICH. CONST. of 1963, art. IX, § 6; see *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 422 N.W.2d 186, 191-96 (Mich. 1988). Similar challenges have arisen in other states. In Kentucky, for example, the use of TIF was deemed an improper diversion of educational funding to non-educational purposes. *Miller v. Covington Dev. Auth.*, 539 S.W.2d 1, 5 (Ky. 1976). Michigan currently does not allow the capture of school taxes by DDAs. MICH. COMP. LAWS § 125.1651. Kentucky, in addition to other states including New York, Florida and Michigan, allow taxing units the opportunity to exempt themselves from tax increment capture under certain circumstances. See KY. REV. STAT. ANN. §§ 99.751(8), .761 (West 2009); N.Y. GEN. MUN. LAW § 970-n (McKinney 2009); FLA. STAT. § 163.340(2) (2009); MICH. COMP. LAWS §§ 125.1653, .1664 (West 2009). But see *Village of Holly v. Holly Twp.*, 708 N.W.2d 429 (Mich. 2006) (A taxing unit may exempt itself from tax increment capture during the procedure to establish a DDA of for new land added to a DDA, but not when a DDA’s TIF Plan is amended.) In Ohio, a payment in lieu of taxes must be made to a school district that does not approve a TIF plan, absent some other agreement. OHIO REV. CODE ANN. §§ 5709.40-.43 (municipalities), §§ 5709.73-.75 (townships), §§ 5709.77-.81 (counties) (West 2009).

23. *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 422 N.W.2d 186 (Mich. 1988).

24. *Id.* at 188. The court also emphasized its deference to the legislature, noting that “legislation is ‘clothed with the presumption of constitutionality’ and must be sustained if within constitutional limits.” *Id.* at 192 (quoting *WA Foote Memorial Hosp., Inc. v. Jackson Hosp. Authority*, 211 N.W.2d 649, 665 (1973)).

25. MICH. COMP. LAWS ANN. § 125.2151 (West 2006).

26. The Historical Neighborhood Improvement Act, Corridor Improvement Act, Neighborhood Improvement Act, and Brownfield Redevelopment Act were enacted after the court issued its opinion on the LDFA Act. The *In re Request* court, nonetheless, acknowledged legislative authorization of TIF under the DDA Act, and noted that the LDFA was meant to replace and refine the scope of the TIFA Act. 422 N.W.2d at 188.

27. *In re Request*, 422 N.W.2d at 194.

court found that TIF does not require a school district, or any other governmental unit, to forego tax revenues it would receive absent the existence of the TIF plan. Rather, the TIF district may capture only those amounts attributable to increases in assessed property values due to TIF-stimulated investment.²⁸ The court cited cases in other states which have similarly held that TIF legislation does not authorize an unconstitutional diversion of tax revenues.²⁹ The Wisconsin Supreme Court, notably, emphasized that without the development generated by a TIF authority, there would be no increased tax revenues for other taxing authorities to collect.³⁰ Thus, the argument that TIF forces governmental units to relinquish tax revenues to which they are entitled is unfounded.³¹ Nonetheless, to allay policy concerns about underfunding school districts that are already cash-strapped, TIF authorities in Michigan are limited in the amount of school taxes they may capture, and may not capture and use a greater percentage of school taxes than municipal operating taxes for tax increment district development.³²

Regardless of what tax funds are captured and used by a tax increment authority, TIF has also been challenged as violating constitutional lending of credit limitations. Under Article IX, section 18 of the Michigan Constitution of 1963, the state and its political subdivisions, including cities and villages, are prohibited from lending credit for any public or private purpose, except as otherwise provided in the constitution.³³ The constitution provides otherwise for cities and villages in Article VII, section 26, which states that “no city or village shall have the power to loan credit for any private purpose or, except as provided by law, for any public purpose.”³⁴ Therefore, a financing plan of a city or village that

28. *Id.* at 189-91.

29. *Id.* at 195 (citing *Kelson v. Pensacola*, 483 So. 2d 77, 78 (Fla. Dist. Ct. App. 1986); *State v. Daytona Beach*, 484 So. 2d 1214, 1215 (Fla. 1986); *Meierhenry v. City of Huron*, 354 N.W.2d 171, 181 (S.D. 1984) (finding no diversion because the TIF acts at issue do not affect taxes levied before the creation of TIF districts, and because increases in tax revenues within TIF districts are directly attributable to the activities of the tax increment financing authority)).

30. *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 288 N.W.2d 85, 95 (Wis. 1980).

31. *Id.*

32. MICH. COMP. LAWS ANN. § 125.2162(3) (West 2006); Michigan Department of Treasury, Tax Increment Financing, Frequently Asked Questions, *supra* note 11. The Brownfield Redevelopment Financing Authority Act differs slightly in that a brownfield authority may capture and use taxes levied after 2004 for school operating purposes for certain environmental response activities, including lead and asbestos abatement and landfill remediation. MICH. COMP. LAWS ANN. §§ 125.2663(15), .2665(1)(e) (West 2006).

33. MICH. CONST. of 1963, art. IX, § 18.

34. MICH. CONST. of 1963, art. VII, § 26.

constitutes a lending of credit is not absolutely prohibited, but may be upheld if it is authorized by law and for a public purpose.³⁵ The Michigan Supreme Court has extended the exception to development authorities, as entirely “creature[s] of the municipality.”³⁶

In Michigan, municipal authorities that are authorized to use TIF are also generally authorized to finance their activities from a variety of sources, including grants and revenue bonds.³⁷ The *In re Request* court held that LDFA-authorized TIF bonds constitute a lending of credit.³⁸ In reaching its decision, the court compared tax increment bonds to general obligation bonds, and distinguished tax increment bonds from revenue bonds, which have consistently been excluded from the definition of lending of credit.³⁹ The court noted its decision in *Schureman v. State Highway Commission*,⁴⁰ in which it was asked to address constitutional limits on state borrowing power with respect to highway bonds secured only by gasoline taxes collected by the Motor Vehicle Highway Fund.⁴¹ The *Schureman* court characterized the bonds as special obligation bonds, and held that the bonds were therefore not subject to

35. *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 422 N.W.2d 186, 201 (Mich. 1988).

36. *Id.* (“[T]he governing body of the municipality must approve of all development and tax increment financing plans.” The court noted that some states have found TIF schemes to constitute loans of credit by the authority, not the municipality.)

37. See DDA financing sources, MICH. COMP. LAWS ANN. § 125.1661 (West 2006); LDFA financing sources, MICH. COMP. LAWS ANN. § 125.2160 (West 2006); Historical Neighborhood Authority financing sources, MICH. COMP. LAWS ANN. § 125.2853 (West 2006); Corridor Improvement Authority financing sources, MICH. COMP. LAWS ANN. § 125.2884 (West 2006); Neighborhood Improvement Authority financing sources, MICH. COMP. LAWS ANN. § 125.2921 (West 2006); and Brownfield Redevelopment Authority financing sources, MICH. COMP. LAWS ANN. § 125.2661 (West 2006). This paper primarily addresses the use of TIF, and therefore does not discuss other authorized sources of financing for municipal authorities, except where a court has compared TIF to other financing plans to determine the constitutionality of TIF.

38. *In re Request*, 422 N.W.2d at 201.

39. *Id.* at 200 (distinguishing tax increment bonds from revenue bonds, noting that while revenue bonds are usually issued for improvements for which a demand is clear, a municipality implements a TIF plan with the “hope that general economic growth will result within the district”) (emphasis added); see also *City of Gaylord v. Gaylord City Clerk*, 144 N.W.2d 460, 471 (Mich. 1966) (declining to characterize industrial revenue bonds, issued by the City of Gaylord to finance the purchase of land and construction of an industrial plant, as a loan of credit); *Alan v. Wayne Co.*, 200 N.W.2d 628, 648 (Mich. 1972) (citing *Gaylord*, and stating that “neither debt nor credit is involved in a true revenue bond situation”). The *In re Request* court noted that its decision with respect to LDFA-authorized TIF plans would not necessarily apply to a TIF plan that did not obligate the governing municipality to repay the bonds. 422 N.W.2d at 200.

40. *Schureman v. State Hwy. Comm’n*, 141 N.W.2d 62 (Mich. 1966).

41. *Id.* at 62.

constitutional limitations imposed on general obligation bonds.⁴² The *Schureman* court held that general obligation bonds are distinct from both revenue bonds and special obligation bonds because general obligation bonds are supported by a pledge of credit from the governing body, in the *Schureman* case, the state.⁴³ Revenue bonds and special obligation bonds, on the other hand, are repaid from revenues derived in connection with or earmarked for the project financed by the bonds, and therefore do not constitute loans of credit.⁴⁴

The *In re Request* court was unwilling to apply the revenue bond rule to TIF.⁴⁵ The court stated that, unlike revenue bonds, which are usually issued for improvements for which a demand is clear, tax increment bonds are often used to fund redevelopment projects with less predictable rates of success.⁴⁶ While tax increment bonds are supported by expected revenues generated by a specific, identifiable project, TIF, like most public redevelopment incentives, is intended for areas which have otherwise failed to attract private investment.⁴⁷ A municipality may need to provide additional guarantees to service the debt if tax increments are insufficient, and may need to extend the municipality's credit to repay bonds issued to carry out the purpose of the TIF project.⁴⁸ Thus, the court defined LDFA-authorized TIF as a loan of credit subject to limitations under Article IX, section 18 of the Michigan Constitution, but that obligates the municipality that creates a development authority, and not the state, to repay the debt.⁴⁹ A TIF plan of a city or village may then be exempt from constitutional lending of credit limitations if the plan satisfies the requirements under Article VII, section 26, that it be (1) authorized by law, and (2) for a public purpose.⁵⁰

42. *Id.* at 63.

43. *Id.*

44. *Id.*

45. *In re Request*, 422 N.W.2d at 199.

46. *Id.*

47. *Id.* (ruling against the argument made by proponents of the act, that TIF revenues are a "restricted, readily-identifiable fund" and citing Jonathan M. Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 U. DET. J. URB. L. 405, 413 (1979)).

48. *Id.*

49. *In re Request*, 422 N.W.2d at 200-01.

50. *Id.* at 201. The *In re Request* court, notably, applies art. VII, § 26 to municipalities, not specifically to cities and villages throughout its analysis of the LDFA Act. To avoid any misreading of the express constitutional language, however, it is important to stress that the exception to the constitutional lending of credit limitation would most likely be upheld only for authorities created by cities and villages in Michigan. MICH. CONST. of 1963, art. VII, § 26.

When the *In re Request* opinion was issued in 1988, TIF was authorized in Michigan only under the DDA, TIFA, and LDFA Acts.⁵¹ The TIFA Act expressly provides that the governing municipality may pledge its full faith and credit for repayment of the authority's tax increment bonds.⁵² The LDFA Act and the Neighborhood Improvement Authority Act, require voter approval for a municipality to pledge its full faith and credit to secure certain tax increment bonds.⁵³ The DDA Act, along with the Historical Neighborhood Authority Act and Corridor Improvement Act, in contrast, do not authorize the governing municipality to pledge its full faith and credit to support tax increment bonds.⁵⁴ The DDA Act, Historical Neighborhood Authority Act, and Corridor Improvement Act do, however, provide that the governing municipality may issue general obligation bonds as part of a TIF plan, and may pledge its credit to support those bonds.⁵⁵ These three acts also provide that tax increment proceeds may be used to repay general obligation bonds issued as part of a TIF plan.⁵⁶

Thus, recognizing the need for voter approval under the LDFA Act and Neighborhood Improvement Authority Act, any development authority may, nonetheless, effectively borrow money, secured by increases in property tax revenues, and additionally by the municipality's credit, to finance development in an approved TIF district.⁵⁷ Again, where TIF

51. The DDA Act was enacted in 1975, the TIFA Act in 1980, and the LDFA Act in 1986. *See supra* notes 11 and 15.

52. MICH. COMP. LAWS ANN. § 125.1815(2) (West 2006) (stating that the municipality "by majority vote of the members of its governing body may pledge its full faith and credit for the payment of the principal of and interest on the authority's tax increment bonds").

53. MICH. COMP. LAWS ANN. § 125.2926(2) (West 2006) (both stating that the municipality "may make a limited tax pledge to support the authority's tax increment bonds or, if authorized by the voters of the municipality," pledge its full faith and credit for the repayment of the bonds).

54. MICH. COMP. LAWS ANN. §§ 125.1666(2), .2859(2), .2890(2) (West 2006).

55. The DDA Act provides that the governing municipality is the issuer of limited obligation pledges. *See* MICH. COMP. LAWS ANN. § 125.1666(1) (West 2006); *see also* MICH. COMP. LAWS ANN. §§ 125.2859(1), .2890(1) (West 2006).

56. All three acts state that the municipality may pledge as security for general obligation bonds issued as part of a TIF plan "any money received by the authority or the municipality pursuant to" the section listing authorized financing sources for the TIF authority. MICH. COMP. LAWS ANN. §§ 125.1666(1), .2859(1), .2890(1) (West 2006). This includes "proceeds of a tax increment financing plan." MICH. COMP. LAWS ANN. §§ 125.1661(e), .2853(d), .2884(d) (West 2006).

57. Note that DDA tax increment bonds may be secured by, in addition to tax increment revenues of the development area, "donations to the authority for the performance of its functions"; proceeds of ad valorem taxes not exempt by law, and levied for purposes of the authority; money borrowed in exchange for a revenue bond; "revenues

is held to constitute a loan of credit in Michigan, a TIF plan may be exempt from constitutional lending of credit prohibitions by meeting the two-prong test recognized by the Michigan Supreme Court in *In re Request*, that the plan be (1) authorized by law, and (2) for a public purpose.⁵⁸ As the *In re Request* court explained, because the LDFA Act authorizes local development authorities to issue bonds and to use revenues derived from captured assessed value for purposes of the act, a TIF plan established in an approved district will meet the first prong of the constitutional lending of credit exemption test.⁵⁹

The Michigan Court of Appeals subsequently applied the two-prong test in *School District of the City of Pontiac v. City of Auburn Hills*.⁶⁰ In that case, the LDFA of the City of Auburn Hills approved a development plan and TIF plan for a proposed Chrysler Technology Center and Supplier Park.⁶¹ The school district brought suit challenging, in part, the use of public tax revenues to fund the construction of barrier-free access for a private entity.⁶² The court held, based on the reasoning of the Michigan Supreme Court in its advisory opinion, that because Auburn Hills developed and approved its TIF plan in accordance with the LDFA Act,

from any property, building, or facility owned, leased, licensed, or operated by the authority or under its control"; proceeds from a special assessment district; "money obtained from other sources approved by the governing body of the municipality or otherwise authorized by law for use by the authority or the municipality to finance a development program"; money available from the state if insufficient tax revenues result from the reduction of certain school district tax levies; revenue from the Federal Facility Development Act, Act 275 (1992); and revenue from the Federal Data Facility Act, Act 126 (1993). See MICH. COMP. LAWS ANN. §§ 125.1661(1)-.1666(2), 3.931-.940, 3.951-.961 (West 2006). DDA general obligation bonds issued as part of a TIF plan may be secured by, in addition to tax increment revenues and the full faith and credit of the municipality, any funding sources listed above that are authorized to secure DDA tax increment bonds. MICH. COMP. LAWS ANN. § 125.1666(1) (West 2006). A similar list of sources may be used to repay bonds issued as part of TIF plans under other Michigan development authorities. See for TIFA, MICH. COMP. LAWS ANN. §§ 125.1811-.1815 (West 2006); for LDFA, MICH. COMP. LAWS ANN. §§ 125.2160, .2164 (West 2006); for Neighborhood Improvement Authorities, MICH. COMP. LAWS ANN. §§ 125.2921-.2926 (West 2006); for Historical Neighborhood Tax Increment Finance Authorities, MICH. COMP. LAWS ANN. §§ 125.2853-.2859 (West 2006); for Corridor Improvement Authorities, MICH. COMP. LAWS ANN. §§ 125.2884-.2890 (West 2006). Brownfield plans may be financed by additional sources, though, similar to the LDFA Act and Neighborhood Improvement Authority Act, tax increment bonds issued as part of a brownfield plan may pledge the municipality's credit only with voter approval. See MICH. COMP. LAWS ANN. §§ 125.2661-.2667 (West 2006).

58. 422 N.W.2d at 200-01.

59. *Id.* at 199 (citing MICH. COMP. LAWS ANN. § 125.2164 (West 2006)).

60. *School District of the City of Pontiac v. City of Auburn Hills*, 460 N.W.2d 258 (1990).

61. *Id.* at 259.

62. *Id.*

the plan was appropriately provided for by law.⁶³ The court acknowledged a provision of the LDFA Act limiting the use of public funds to authorized public facilities.⁶⁴ The court, nonetheless, held that the TIF plan met the first prong of the constitutional lending of credit test, because the project satisfied the statutory definition of “public facility” as defined in the LDFA Act and in the barrier-free design requirements of the state construction code.⁶⁵

The limit on the use of tax increment revenues to statutorily-defined “public facilities” applies to LDFA-authorized TIF plans. *City of Auburn Hills* and *In re Request* provide more generally that a TIF plan that constitutes a loan of credit will meet the first prong of the test if the plan is established pursuant to an act authorizing the capture and use of tax increment revenues.⁶⁶ The DDA Act, for example, authorizes any municipality in the state of Michigan to establish a DDA in a designated downtown area, and to use revenues captured as part of a TIF plan to promote economic growth and halt property value deterioration.⁶⁷ Thus, a DDA’s financing plan that furthers such purposes satisfies the first prong of the constitutional lending of credit test. The DDA Act does not expressly limit the use of revenues derived from a TIF plan to “public facilities.” To be exempt from constitutional lending of credit limitations, however, a TIF plan authorized by a DDA, LDFA, or any other development authority must meet the second prong of the test, that the tax increment revenues be intended for a public purpose.

B. *Tax Increment Financing and the Public Purpose Doctrine*

The theme of public purpose has received considerable attention in recent years, both nationally and in Michigan, because of controversial court decisions regarding the use of eminent domain for economic development projects. The U.S. Supreme Court, in *Kelo v. City of New London*,⁶⁸ upheld the decision of the city of New London, Connecticut,

63. *Id.* Section 14 of the LDFA allows the authority to issue tax increment bonds, to pledge tax increment revenues from eligible properties to secure the bonds, and, if approved by voters of the municipality, to pledge the municipality’s full faith and credit for the payment of the bonds. MICH. COMP. LAWS ANN. § 125.2164 (West 2006).

64. *City of Auburn Hills*, 460 N.W.2d at 260 (citing MICH. COMP. LAWS ANN. § 125.2162(2) (West 2006)).

65. *Id.* (citing MICH. COMP. LAWS ANN. §§ 125.2152(aa), .1501-.1531 (West 2006)).

66. *In re Request*, 422 N.W.2d at 201.

67. MICH. COMP. LAWS ANN. §§ 125.1653-.1664 (West 2006).

68. *Kelo v. City of New London*, 545 U.S. 469 (2005).

to condemn private property for an economic revitalization scheme as a valid public purpose under the U.S. Constitution.⁶⁹ The Court emphasized that states were free to set stricter eminent domain standards, and indeed following *Kelo*, thirty-four states passed ballot initiatives or adopted laws restricting the use of eminent domain.⁷⁰

Many of the initiatives had little effect on state eminent domain law, though Michigan, for example, enacted one of the most restrictive takings laws, by passing a proposal to amend the state constitution to prohibit the use of eminent domain for purposes of economic development.⁷¹ The Michigan amendment was motivated largely by members of the state legislature who wanted to solidify the Michigan Supreme Court decision in *County of Wayne v. Hathcock*,⁷² which closely preceded *Kelo*, and in which the court held that eminent domain could not be used to transfer private property to another private entity for the purpose of “alleviating unemployment and revitalizing the economic base of the community.”⁷³ The legislature was concerned, in part because of the *Kelo* decision, that Michigan would return to the principles of the oft-cited and controversial *Poletown Neighborhood Council v. City of Detroit*, in which the court upheld the use of eminent domain as an “essential public purpose” to stimulate desperately needed economic revitalization in the City of Detroit.⁷⁴

69. The Court used “public purpose” and “public use” interchangeably in finding that the “public use” requirement, under the U.S. CONST. amend. V, for the exercise of eminent domain, was met. *Id.* at 485-86 (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

70. See Terry Pristin, *Voters Back Limits on Eminent Domain*, N.Y. TIMES, Nov. 15, 2006, at C6. Pristin quoted John D. Echeverria, Executive Director of the Georgetown Environmental Law and Policy Institute, as saying that of all the voter approved measures, “about half of them are purely procedural or largely symbolic,” noting in Florida, for example, that a vote by three-quarters of the state legislature could make an exception to a ban on transferring condemned property from one private entity to another. *Id.*

71. By approving Proposal 2006-04, Michigan voters amended the MICH. CONST. of 1963, art. X, § 2. The new provisions took effect December 23, 2006.

72. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

73. *Id.* at 787 (citing *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459 (Mich. 1981); see S.J. Res. E, 93rd Leg., Reg. Sess. (Mich. 2005) (submitted to and approved by Michigan voters as Proposal 2006-04); H.B. 5060, 93rd Leg., Reg. Sess. (Mich. 2006); S.B. 693, 93rd Leg., Reg. Sess. (Mich. 2005)).

74. *Poletown* pitted the residents of an established, but low-income, Detroit neighborhood against the corporate giant, General Motors, and was highly controversial. As the *Poletown* court noted, however, the city of Detroit was facing an economic crisis that it reasonably felt could be alleviated only by acquiring a tract of land sufficient to meet General Motors’ requirements to build a new plant. 304 N.W.2d at 459. The city first offered landowners a chance to sell their property voluntarily, before resorting

The *Hathcock* court based its decision on its interpretation of article X, section 2 of the Michigan Constitution.⁷⁵ Article X, section 2 governs only the use of eminent domain, however, and thus *Hathcock's* determination of public use within the takings context does not apply to a municipality's financing plans.⁷⁶ Moreover, the *Hathcock* court acknowledged the liberal scope of the public purpose doctrine in Michigan.⁷⁷ In *Hays v. City of Kalamazoo*,⁷⁸ cited by *Hathcock*,⁷⁹ the court was asked to decide whether general funds of a city could be used to pay for the city's membership in the Michigan Municipal League, a private nonprofit corporation established to advise and lobby for cities and villages throughout the state.⁸⁰ The *Hays* court declined to limit the legislative determination of public purpose before it, and held that the use of the funds constituted a valid public purpose.⁸¹ The *Hays* court noted the general rule that a public purpose promotes the "public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation."⁸² Indeed, the *Hathcock* court applied the same rule in finding that Wayne County's plan to create jobs and encourage investment would promote prosperity and the general welfare of the state, and therefore fell within the generally accepted definition of public purpose.⁸³

to the use of eminent domain. See John E. Mogk, *Eminent Domain and the "Public Use": Michigan Supreme Court Legislates an Unprecedented Overruling of Poletown in County of Wayne v. Hathcock*, 51 WAYNE L. REV. 1331, 1337-39 (2005).

75. MICH. CONST. of 1963, art. X, § 2.

76. The *Hathcock* court was unwilling to recognize the dynamic quality of public use in the history of Michigan takings jurisprudence, but nonetheless made clear that the narrow interpretation of public use for eminent domain did not apply to determinations of public purpose within the context of a government's taxing and spending powers. 684 N.W.2d at 785 (citing *Poletown*, 304 N.W.2d at 473-75 (Ryan, J. dissenting)). Furthermore, in distinguishing financial activities from property takings, Justice Ryan, in his *Poletown* dissent, stated that a determination of the constitutionality of governmental involvement in internal improvements, under MICH. CONST. of 1963, art. 3, § 6, would involve the same analysis as that for public purpose. 304 N.W.2d at 473. Tax increment financing has not been challenged in Michigan as a violation of the prohibition against state involvement in private internal improvements under MICH. CONST. of 1963, art. III, § 6.

77. *Hathcock*, 684 N.W.2d at 785.

78. *Hays v. City of Kalamazoo*, 25 N.W.2d 787 (Mich. 1947).

79. *Hathcock*, 684 N.W.2d at 776.

80. *Hays*, 25 N.W.2d at 788-89.

81. *Id.* at 796.

82. *Id.* at 790-91 (quoting 37 AM. JUR. *Municipal Corporations* § 120, at 734 (1941)); see also *Gregory Marina, Inc. v. City of Detroit*, 144 N.W.2d 503, 516 (Mich. 1999) (holding that a public purpose furthers the prosperity and general welfare of a municipality and that the construction of a port marina constituted a valid public purpose).

83. *Hathcock*, 684 N.W.2d at 776.

The public purpose doctrine has been addressed more recently by the Michigan Supreme Court in *City of Mt. Pleasant v. State Tax Commission*.⁸⁴ In *City of Mt. Pleasant*, the city purchased land and made infrastructure improvements to attract low-income residential developments, along with commercial and industrial projects which would enhance the tax base of the city.⁸⁵ The court, asked to decide whether the land acquired by the City of Mt. Pleasant and prepared for resale to private entities met a public purpose requirement to be exempt from taxation, looked to the language of the relevant statute, the General Property Tax Act, which exempts from taxation property owned by a municipality and “used for public purposes.”⁸⁶ The court based part of its holding that the public purpose requirement was indeed met on the statement in *Hathcock* that drawing commerce to an economically depressed area, to stimulate redevelopment and private investment, promotes a valid public purpose.⁸⁷ The *City of Mt. Pleasant* court emphasized that while *Hathcock* discussed the scope of the public purpose doctrine within the context of eminent domain, and eventually struck down Wayne County’s proposed condemnation action as unconstitutional, *Hathcock*’s broad definition of public purpose does not change when it is applied within the context of taxation.⁸⁸

City of Mt. Pleasant focuses on the issue of tax exemption, and therefore does not address the use of TIF, nor did the court explicitly discuss the extent to which private interests may benefit from a plan deemed to constitute a public purpose. Mt. Pleasant, nonetheless, acquired the land at issue with the express intent of making improvements to the property, reselling it to private developers, and thereby stimulating private investment in the area.⁸⁹ By treating the land as tax-exempt, for serving a valid public purpose, the court implied that the definition of public purpose could be satisfied even if some incidental benefits are conferred on a private entity.⁹⁰ Since TIF involves the use of public tax revenues to attract private businesses by freeing them from the financial obligation of infrastructure and building improvement costs, *City of Mt. Pleasant* provides some guidance in determining whether a TIF plan satisfies the

84. *City of Mount Pleasant v. State Tax Comm’n*, 729 N.W.2d 833 (Mich. 2007).

85. *Id.* at 834.

86. *Id.* at 835 (citing MICH. COMP. LAWS ANN. § 211.7m (West 1998)).

87. *Id.*

88. *Id.*

89. *City of Mount Pleasant*, 729 N.W.2d at 834.

90. *Id.* at 60.

second prong of the constitutional lending of credit test defined by the Michigan Supreme Court.⁹¹

In its analysis of LDFA-authorized TIF, for example, the Michigan Supreme Court in *In re Request* also noted that a public purpose requirement may still be met when private interests benefit from the plan at issue.⁹² The court determined that the TIF provision of the LDFA met the public purpose requirement to be exempt from constitutional lending of credit limitations because the stated purpose of the LDFA is “to eliminate the causes of unemployment, underemployment, and joblessness therefore benefiting the economic growth of the state.”⁹³ The court held that an LDFA-authorized TIF plan may constitute a public purpose even if the LDFA plan indirectly benefits private interests.⁹⁴ Similarly, the court in *City of Auburn Hills*⁹⁵ found that the City of Auburn Hills LDFA’s use of TIF to fund the construction of barrier-free access satisfied the second prong of the constitutional lending of credit test, even though a private entity, Chrysler, would benefit from the construction.⁹⁶ The court held that as part of an incentive package to promote economic growth, the LDFA-authorized TIF fell within the scope of the generally recognized definition of public purpose.⁹⁷

Michigan courts have analyzed TIF as a public purpose only within the context of the LDFA Act.⁹⁸ An equally broad definition of public purpose should, nonetheless, apply to TIF schemes authorized by other development acts. As the Michigan Supreme Court established in *In re Request*, a TIF plan that uses revenues from captured increases in assessed property value is exempt from constitutional lending of credit limitations that may otherwise apply if the plan meets the two-prong

91. *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 422 N.W.2d 186, 197 (Mich. 1988).

92. *Id.* at 202 (citing *Sinas v. City of Lansing*, 170 N.W.2d 23, 26 (Mich. 1969)); see also THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 659-60 (5th ed. 1998) (stating that “the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprise”).

93. *In re Request*, 422 N.W.2d at 208 (quoting MICH. COMP. LAWS ANN. § 125.2151(1)(b) (West 2006)).

94. *Id.*

95. *School Dist. of City of Pontiac v. City of Auburn*, 460 N.W.2d 258 (Mich. Ct. App. 1990).

96. *Id.* at 259.

97. *Id.*

98. *In re Request*, 422 N.W.2d at 208-11; *City of Auburn Hills*, 460 N.W.2d at 260-61.

test that it be (1) authorized by law, and (2) for a public purpose.⁹⁹ Furthermore, courts have granted broad deference to the legislature on determinations of public purpose, particularly with respect to public financing schemes.¹⁰⁰ Under *City of Mt. Pleasant*, unambiguous statutory language is presumed to express legislative intent, to which a court must defer.¹⁰¹ An analysis of the constitutionality of any TIF plan will therefore focus on the language of the statute authorizing the use of TIF.

Municipalities may establish DDAs, for example, in areas in which property values are found to have deteriorated to an extent “detrimental to the state economy and the economic growth of the state and its local units of government.”¹⁰² A DDA tax increment scheme, similar to an LDFA scheme, may include bonds supported by a pledge of the municipality’s credit, and must therefore meet the two-prong test to be exempt from constitutional lending of credit limitations under Article VII, section 26 of the Michigan Constitution.¹⁰³ The DDA Act states that legislative authorization of TIF is necessary to provide financing to designated areas to “eliminate property value deterioration and to promote economic growth.”¹⁰⁴ The DDA Act further provides that “halt-ing property value deterioration and promoting economic growth in the state are essential governmental functions and constitute essential pub-

99. 422 N.W.2d at 197.

100. *Id.* at 202 (stating that “[l]ike the courts of other states, we decline to second-guess the wisdom of the Legislature in the area of public purpose determinations”); see also *Gregory Marina, Inc. v. City of Detroit*, 144 N.W.2d 503, 516 (Mich. 1966) (holding that “[t]he determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpable and manifestly arbitrary and incorrect”); *City of Gaylord v. Beckett*, 144 N.W.2d 460, 467 (Mich. 1966); *Hays v. City of Kalamazoo*, 25 N.W.2d 787, 788 (Mich. 1947).

101. *City of Mount Pleasant v. State Tax Comm’n*, 729 N.W.2d 833, 835 (Mich. 2007) (citing *In re MCI Telecom. Complaint*, 596 N.W.2d 164, 179 (Mich. 1999), and stating that for all cases involving an issue of statutory interpretation, “[i]f the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible”).

102. MICH. COMP. LAWS ANN. § 125.1651a(a) (West 2006). A similar analysis could be applied to TIF plans of other development authorities that allow a pledge of the municipality’s credit to secure bonds in furtherance of the plan. Financing plans which do not constitute a lending of state or municipal lending of credit will not be subject to constitutional lending of credit limitations, and may be treated more like revenue bonds. See *In re Request*, 422 N.W.2d at 206.

103. MICH. COMP. LAWS ANN. § 125.1663b(9) (West 2006) (allowing a municipality to pledge its full faith and credit for general obligation bonds as part of a DDA-authorized TIF plan, though not for tax increment bonds); see also MICH. CONST. of 1963, art. VII, § 26; *In re Request*, 422 N.W.2d at 197.

104. MICH. COMP. LAWS ANN. § 125.1651a(e) (West 2006).

lic purposes.”¹⁰⁵ The use of public funds to finance improvements in a designated DDA district is, therefore, authorized by law.

The second prong, that the financing of the DDA plan be for a public purpose, may be satisfied if the plan funds improvements, as the act provides, to halt property value deterioration and promote economic growth.¹⁰⁶ Moreover, a DDA-authorized TIF plan may meet the public purpose requirement even if economic growth does not result from the improvements.¹⁰⁷ The court in *In re Request* defined tax increment schemes as loans of credit because TIF is usually used to fund development projects with unpredictable rates of success.¹⁰⁸ It is the promotion, rather than the achievement, of economic development within a designated development area that constitutes a valid public purpose, as provided by the legislature in the DDA Act, and recognized under Michigan’s broad public purpose doctrine.¹⁰⁹ Therefore, a DDA, or otherwise authorized, financing plan may be found constitutionally sound, regardless of benefits to private entities, if the primary purpose of the improvements is to promote economic development.¹¹⁰

The question then raised is where to draw the line between TIF schemes that lie clearly within the scope of legislative intent with regard to public purpose and schemes that provide financial rewards to private investors without *primarily* serving the public goals of TIF legislation, namely to promote economic development and revitalize deteriorating communities.¹¹¹ Street lighting, water and sewer system repairs, and environmental remediation, for example, may easily be acknowledged as

105. MICH. COMP. LAWS ANN. § 125.1651a(f) (West 2006).

106. MICH. COMP. LAWS ANN. § 125.1653(1) (West 2006); *see also* School Dist. of City of Pontiac v. City of Auburn Hills, 460 N.W.2d 258, 261 (Mich. Ct. App. 1990) (holding that as part of an incentive package to promote economic growth, the LDFA-authorized TIF fell within the scope of the generally recognized definition of public purpose).

107. *See In re Request*, 422 N.W.2d at 203.

108. *Id.*

109. MICH. COMP. LAWS ANN. § 125.1651a (West 2006); *see also In re Request*, 422 N.W.2d at 203; Hays v. City of Kalamazoo, 25 N.W.2d 787, 795 (Mich. 1947) (quoting 37 AM. JUR. *Municipal Corporations* § 120 (1941)). The court in *City of Mount Pleasant v. State Tax Comm’n*, 729 N.W.2d 833, 838 (Mich. 2007), addressed the General Property Tax Act, rather than a TIF-authorizing act. The General Property Tax Act expressly provides that tax-exempt property be “used for public purposes.” MICH. COMP. LAWS ANN. § 211.7m (West 1998) (emphasis added). Nonetheless, the *City of Mount Pleasant* court held that while the city had to improve or prepare the land to meet the public purpose requirement, the requirement could be satisfied regardless of whether private investment actually occurred. *City of Mount Pleasant*, 729 N.W.2d at 838.

110. *In re Request*, 422 N.W.2d at 208; *City of Auburn Hills*, 460 N.W.2d at 261.

111. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 125.1653, .2151, .2911, .2841 (West 2006).

improvements that benefit existing residents in a TIF district and help to promote that district to potential residents.¹¹² The use of TIF is also generally accepted to fund streetscaping and the construction of public parking structures, in other words to improve the appearance and quality of spaces used by the public.¹¹³ Similarly, building renovations and new building construction may be necessary for businesses to choose to locate in a TIF district.¹¹⁴

The extent to which tax increment revenues may be used to fund ongoing improvements, however, particularly for structures already occupied by private businesses capable of paying structural upkeep costs is hard to define.¹¹⁵ Façade improvements, for example, have long occupied the grey area of what constitutes a valid public use of tax increment funds and what does not. Façade improvements may affect the public perception and marketability of a structure which is nevertheless privately used, and therefore arguably define the line, not only between physical public and private space, but between improvements which serve a constitutional and statutory public purpose of promoting economic development, and improvements which primarily benefit a private entity.

Many municipalities have, absent clear statutory or judicial authority, authorized a DDA to offer financial assistance to property owners, and sometimes tenants, for façade improvements within TIF districts.¹¹⁶

112. See Iams, *supra* note 2 (listing as common uses of TIF: sewer expansion and repair, storm drainage, street construction and expansion, water supply, park improvements, curb and sidewalk work, traffic control, street lighting, landscaping, environmental remediation, bridge construction and repair, and parking structures).

113. *Id.*; see also Sally Barber & Tanya Berkebile, *DDAs a Good Deal for Development*, CADILLAC NEWS, Oct. 17, 2007, available at <http://www.cadillacnews.com/articles/2007/07/17/news/news01.txt> (last visited Sept. 11, 2009) (discussing the use of TIF in Cadillac, Michigan, to fund street and parking lot improvements and for hanging flower baskets along sidewalks to make the downtown area more attractive).

114. Most TIF plans in Detroit have included renovations to existing buildings or new building construction. See generally City of Detroit, Proposed Capital Agenda FY 2005-06 through 2009-10, available at <http://www.ci.detroit.mi.us/DepartmentandAgencies/PlanningDevelopmentDepartment/Planning/LongRangeandCommunityPlanning/CapitalAgenda/tabid/2095/Default.aspx>. TIF may also be used to fund land acquisition and demolition. See Iams, *supra* note 13.

115. MICH. COMP. LAWS ANN. § 125.1651a(d)-(e) (West 2006).

116. For example, the Detroit Economic Growth Corporation has offered property owners and tenants within the DDA district funds to assist with façade improvements. The Detroit DDA Façade Improvement Program is part of the Lower Woodward Improvement Program, which has relied in part on the TIF plan approved by the DDA and city in 2003. See Detroit Economic Growth Corporation, Lower Woodward Façade Program (Aug. 6, 2007), <http://www.degc.org/rfp-detail.aspx?nid=ac5b95de-9da7-41b0-895a-d2908b9c9d92> (last visited Sept. 11, 2009); see also Barber & Berkebile, *supra* note 113 (discussing the City of Cadillac's DDA façade improvement program).

Reasonable façade improvements are consistent with the stated general purpose of the DDA Act, to “eliminate property value deterioration and to promote economic growth”¹¹⁷ by eliminating a cause of property value deterioration with respect to the condition of the building. Indeed, the Michigan legislature, recognizing a need for improvements to the appearance of downtown buildings to encourage growth, and perhaps also the ambiguous legality of public funding of such improvements, amended the DDA Act in July 2008 to allow a DDA to fund physical improvements to existing buildings to “make them marketable for sale or lease.”¹¹⁸ The amended DDA Act does not mention façades specifically, but the language provides some additional basis for a DDA to fund building improvements, like façades, that can increase the appeal of a downtown district to visitors and investors.

Façade improvement funds are useful to free private businesses and building owners from financing the upkeep of structural elements that are immediately noticeable to the public, and the quality of which may influence public perceptions about the social and economic health of the area. By improving the outer appearance and maintenance of buildings in an economically deteriorating area, façade improvements may encourage existing building owners and tenants to stay in the area, and may attract additional businesses or residential developments to the area. The visually noticeable improvements may also attract additional visitors to the area, resulting in an increased revenue stream for business owners. In other words, the improvements may, as one part of a DDA development plan, promote economic growth throughout the designated area, which in turn can generate additional revenues for the municipality.¹¹⁹ The use of TIF funds to finance these improvements, therefore, arguably promotes the prosperity and general welfare of the municipality under the generally recognized definition of public purpose.¹²⁰

117. MICH. COMP. LAWS ANN. § 125.1651a(e) (West 2006).

118. MICH. COMP. LAWS ANN. § 125.1657(1)(q) (West 2008). The amendment provides the authority for a DDA to “[c]reate, operate, and fund a loan program to fund improvements for existing buildings located in a downtown district,” which is the type of funding program used by municipalities to finance façade improvements prior to the amendment of the DDA Act. *Id.*

119. MICH. COMP. LAWS ANN. § 125.1653(1)(b) (West 2006) (stating that public programs such as TIF “are desirable and necessary to eliminate the causes of property value deterioration thereby benefitting the economic growth of the state”).

120. See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 781 (Mich. 2004); *City of Gaylord v. Beckett*, 144 N.W.2d 460, 494 (Mich. 1966); *Hays v. City of Kalamazoo*, 25 N.W.2d 787, 798 (Mich. 1947); *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 422 N.W. 2d 186, 207 (Mich. 1988) (citing 37 AM. JUR. *Municipal Corporations* § 120 (1941)).

Another way to clarify the public purpose test and define the threshold at which private benefits outweigh the public benefit of economic development, regardless of whether a particular type of improvement is identified by statute, is to look to language used to define public purpose in eminent domain law. The *City of Mt. Pleasant* court, for example, cited *Hathcock* in finding that “creating jobs for Michigan’s citizens and stimulating private investment and redevelopment to ensure a healthy and growing tax base are examples of goals that advance a public purpose.”¹²¹ The *Hathcock* court declined to uphold the use of eminent domain for “generalized economic benefit” under the constitutional parameters of public use,¹²² but did not diminish the broad scope of the public purpose doctrine, including application where necessary for economic development, as it has been recognized in Michigan.

A finding of the *need* to promote economic development, where such development is essential to the welfare of an economically deteriorating community, yet predicted not to occur absent incentives, would, it seems, be appropriately applied to a determination of public purpose for a TIF plan. Any determination of public purpose should, nonetheless, be based on a case-specific balancing test between the economic advantages that a development project will provide for a community, and the costs of the incentive package necessary for the development to occur that may be borne by the community. TIF plans that are constitutionally and statutorily sound should, therefore, be examined as public policy decisions by municipalities committed to long-term goals of economic stability.

III. Tax Increment Financing as a Matter of Public Policy

A. Public Policy Implications of Tax Increment Financing Schemes

Public response to TIF around the country has been mixed. TIF is appealing to a population generally opposed to tax increases because it does not create a new tax, or divert existing, and already stretched, municipal revenues to fund a new project.¹²³ Furthermore, any property tax

121. *City of Mount Pleasant v. State Tax Comm’n*, 729 N.W.2d 833, 837 (Mich. 2007).

122. *Hathcock*, 684 N.W.2d at 789.

123. See DEVINE, *supra* note 10, at 4. Challenges to TIF as an unconstitutional diversion of taxes have been struck down based on the reasoning that captured tax increment revenues would not exist without the TIF plan, and therefore taxing units do not

increases that result from development within a TIF district are arguably offset by the benefits the community receives from tax increment funded improvements.¹²⁴

TIF has been criticized, however, for providing financial benefits to private entities without providing commensurate benefits for the community, or even to the community's detriment. Opponents of TIF have pointed out, for example, that TIF plans which succeed in drawing new businesses to the district subsequently force existing small businesses and low-income residents, who are unable to afford the increases in property taxes, out of the area.¹²⁵ Moreover, the types of businesses that frequently locate in a TIF district are divisions of large, national corporations, that may not have a genuine stake in the future of the community.¹²⁶ Often, as critics of TIF argue, such operations, particularly retail outlets, generate only low-wage, high-turnover service jobs.¹²⁷ The businesses are relieved of some of the costs of site improvements, while nearby residents, who are far less able to pay for the costs, end up doing so in higher property taxes.¹²⁸ TIF has also been criticized for creating a zero-sum game, in which jobs are simply shifted from one place to another within a region, with no net economic growth.¹²⁹ Finally, a municipality may run into trouble when actual tax increment revenues fail to meet expectations of the TIF plan, and the municipality must therefore turn to other sources to refund bond obligations.¹³⁰

forego any tax revenues that they would otherwise receive. *See In re Request*, 422 N.W.2d at 194 (citing *Kelson v. City of Pensacola*, 483 So. 2d 77, 79 (Fla. Dist. Ct. App. 1986)); *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 288 N.W.2d 85, 95 (Wis. 1980).

124. *See* DEVINE, *supra* note 10, at 4. Property tax increases in a TIF district are subject to the limits imposed on taxable value as part of Proposal A of 1994, which amended the MICH. CONST. of 1963, art. IX, § 3.

125. *See* DEVELOPING NEIGHBORHOODS ALTERNATIVES PROJECT, THE RIGHT TOOL FOR THE JOB? AN ANALYSIS OF TAX INCREMENT FINANCING, EXECUTIVE SUMMARY (2003), available at <http://www.heartland.org/Article.cfm?artId=11868>; *see also* Eschbacher, *supra* note 8.

126. DEVELOPING NEIGHBORHOODS ALTERNATIVES PROJECT, *supra* note 125. *But see* Eschbacher, *supra* note 8 (noting that corporations that have chosen to locate in Indianapolis because of TIF have in turn invested heavily in the community).

127. DEVELOPING NEIGHBORHOODS ALTERNATIVES PROJECT, *supra* note 125; *see also* Eschbacher, *supra* note 8 (presenting concerns that TIF schemes may shift financial responsibility for services from corporate entities to residential property owners).

128. *See* DEVELOPING NEIGHBORHOODS ALTERNATIVES PROJECT, *supra* note 125.

129. *See* London, *supra* note 3, at 787-90. *See generally* Montarti & Haulk, *supra* note 8; Penelope Lemov, *Tough Times for TIF*, GOVERNING, Feb. 1994, available at <http://www.governing.com/archive/archive/1994/feb/tif.txt>.

130. *See, e.g.*, DEVINE, *supra* note 10, at 4. According to Devine, the problem is particularly acute in New York, where tax increment bonds may not be secured by the governing municipality's credit. Thus, if a TIF district fails to generate tax increment

The last concern has been raised with respect to Detroit's TechTown development, located in an LDFA district near Wayne State University. TechTown was established as a technology incubator to bring additional high-tech businesses and research entities to a once vacant stretch of land just north of the university.¹³¹ Though the development does not rely only on tax increment proceeds for its success,¹³² by October, 2007, tax increment revenues had nonetheless fallen short of initial projections, due to the prevalence of nonprofit tenants, who do not pay property taxes.¹³³ Nonprofit entities are valuable to a development project such as TechTown because they occupy building space, pay rent, and may be quite successful at attracting spinoff investment in the area, particularly given the development's proximity to and relationship with public university research efforts. TechTown planners relied on grants to offset what they predicted to be low tax increment revenues from the project, a strategy that other public entities should consider for districts unlikely to see a strong jump in property tax values.¹³⁴

In Pittsburgh, by contrast, TIF was used to fund a project in an area in which property values were *predicted* to decline, in other words where TIF may not have been an appropriate redevelopment financing tool.¹³⁵

revenues sufficient to repay the bond obligation, the municipality risks default. *Id.*; see N.Y. GEN. MUN. LAW § 970-a (1984). For a summary of funding sources to which a municipality may turn if tax increment revenues are insufficient to repay bonds issued as part of a TIF plan, see *supra*, note 66.

131. Henderson, *supra* note 9, at 1.

132. TechTown financing includes, in addition to the LDFA-authorized TIF plan, grants and some private investment. See Henderson, *supra* note 9, at 29. While TechTown has thus far failed to meet tax increment expectations, Ann Arbor Spark, an LDFA-financed business incubator, located in a smaller and financially stable Michigan city, captured tax increment revenues are on target to meet predictions. *Id.*

133. Henderson, *supra* note 9, at 29.

134. See Henderson, *supra* note 9, at 29. Property tax increases can be very difficult to predict, even in areas which have consistently experienced growth. See, e.g., Kathleen Gray, Christy Arboscello & Zlati Meyer, *A First: Oakland's Property Value Falls*, DET. FREE PRESS, Nov. 2, 2007, at A-1, 10 (discussing the impact of the mortgage foreclosure crisis on property values in Oakland County and across the state of Michigan). This concern is particularly relevant for a TIF plan set to expire a long time from its implementation, and explains why bonds issued as part of a TIF plan are secured by a loan of the municipality's credit. See *In re Request for Advisory Opinion on Constitutionality of 1986 PA 186*, 422 N.W.2d 186, 204 (Mich. 1988). Michigan Renaissance Zone tax abatements, in contrast, are set to diminish over time, and may be extended for only fifteen years. See MICH. COMP. LAWS ANN. § 125.2684 (West 2006). See generally John T. Schuring, *Detroit's Renaissance Zones: The Economics of Tax Incentives in Metropolitan Location Decisions, the Results of the Zones to Date, and Thoughts on the Future* 83 U. DET. MERCY L. REV. 329, 334 (2006). Both incentives have pros and cons, and therefore remain useful options for municipalities to consider for any given development project.

135. Haulk & Montarti, *supra* note 8, at 14. Tax increment financing plans in Pennsylvania are governed by the Tax Increment Financing Act, PA. CONS. STAT. § 6930.1

In 1995, Pittsburgh created a TIF district to fund the conversion of an old Lazarus department store into mixed-use retail and office space.¹³⁶ TIF funds were also used to demolish adjacent structures, and construct a parking garage to serve a new Lazarus store nearby.¹³⁷ The goal of the TIF plan was to encourage the development of a downtown shopping district.¹³⁸ Critics of the plan noted that the project failed to both generate sufficient tax revenues to repay the TIF bonds, and increase employment in the area.¹³⁹ Instead, jobs in the new office building were predominantly service jobs that simply replaced service jobs that had existed in the demolished structures, or that had moved from other areas of the city and neighboring suburbs.¹⁴⁰

The same critics complained when a TIF plan to fund a shopping center in Washington County, also in western Pennsylvania, was proposed in 2005.¹⁴¹ The use of TIF incentives for the Washington County Victory Center retail project was particularly suspect because the planned site was “uninhabited and wooded,” and in no need of redevelopment.¹⁴² Opponents of the plan also questioned the use of public incentives to attract retail outlets when Pittsburgh area retail was already hurting.¹⁴³ County leaders, however, responded to the latter concern by explaining that a retail center can stimulate further development by drawing customers to the area and creating an appealing, high-traffic area in which

(1990). TIF plans in Pennsylvania have also been criticized for failing to document pre-TIF job numbers or taxes paid by businesses, thus making it impossible to determine the value of the TIF plan for the area. *Id.* TIF-enabling statutes in Michigan require that TIF authorities submit annual reports to the governing municipality and the state tax commission, including, among other things, the initial assessed value of the district, the captured assessed value, and the number of jobs “created as a result of the implementation of the tax increment financing plan”). MICH. COMP. LAWS ANN. § 125.2163(3) (West 2006). *See, e.g.,* MICH. COMP. LAWS ANN. §§ 125.1665(3), .2925(3) (West 2006).

136. Haulk & Montarti, *supra* note 8, at 13-14.

137. *Id.*

138. *Id.* at 13.

139. *Id.* at 13-14.

140. *Id.* at 13.

141. Montarti & Haulk, *supra* note 8. The Victory Center project was, like the Lazarus project, expected to generate primarily low-wage jobs, and add businesses which would simply compete with existing businesses nearby, rather than contributing to the overall economic growth of the area. *Id.* Similarly, a 2004 TIF plan in Fort Worth, Texas, was criticized for bringing in a Cabela’s hunting and fishing megastore, which would only compete for business with smaller, locally-owned sporting goods stores. *See* McGraw, *supra* note 21.

142. Montarti & Haulk, *supra* note 8.

143. Ron DaParma, *Debate Rages over Business Subsidies*, PITTSBURGH TRIBUNE-REVIEW, Oct. 23, 2005, available at http://www.pittsburghlive.com/x/pittsburghtrib/s_385874.html.

other types of businesses want to locate.¹⁴⁴ Indianapolis municipalities have used a similar argument to support the use of TIF to fund projects that will offer only low-wage jobs, but that are likely to create spin-off development.¹⁴⁵

The Pennsylvania Victory Center project raises legitimate concerns about the potential misuse of TIF to fund new construction that neither contributes to the revitalization of an existing, distressed city, nor directly jumpstarts the growth of a new industry to help the state's economy.¹⁴⁶ Certainly in Michigan, where the stated aim of TIF-enabling statutes is to prevent further deterioration of cities and neighborhoods and to promote economic growth,¹⁴⁷ a TIF plan to finance a new greenfield retail center seems to violate at least the intent, if not also the letter, of the law.¹⁴⁸ Any new shopping district, whether in a city or suburb, may create a zero-sum game. Even if such a project succeeds at creating more jobs, consumer spending may simply shift from one area to another within a geographic region.¹⁴⁹ The new district may

144. *Id.*

145. See Eschbacher, *supra* note 8.

146. Similarly, municipalities have been criticized for designating very large portions of the city as TIF districts in order to generate increments which are not connected to the project. See Haulk and Montarti, *supra* note 8, at 8. On the other hand, a municipality may lessen concerns about repaying TIF bonds by establishing extensive boundaries for the district, since bonds backed by an economically stable community in addition to one that is currently economically distressed will have a better rating and be more likely to sell. See Standard & Poors, Public Finance, *U.S. Tax Increment Bond Issuance Grows; Credit Quality Remains Stable*, Feb. 23, 2006, at 3, available at <http://www.cdfa.net/cdfa/cdfaweb.nsf/pages/tifcenterheadlines.html>.

147. See, e.g., MICH. COMP. LAWS ANN. § 125.1651a(a) (West 2006) (finding that "there exists in this state conditions of property value deterioration detrimental to the state economy and the economic growth of the state and its local units of government"); MICH. COMP. LAWS ANN. § 125.2151(a) (West 2006) (finding that there exists in this state conditions of unemployment, underemployment, and joblessness detrimental to the state economy and the economic growth of the state economy).

148. According to critics of the Victory Center TIF plan, the project site could meet Pennsylvania statutory requirements that land be designated as blighted to be deemed in need of redevelopment, by qualifying as "economically and socially undesirable land use." Montarti & Haulk, *supra* note 8. A finding of blight is not necessary to designate a TIF district in Michigan. A site may qualify for TIF under the Brownfield Redevelopment Authority Financing Act as "functionally obsolete" property. MICH. COMP. LAWS ANN. § 125.2651 (West 2006). Functionally obsolete property refers to property that can no longer function as intended because of changes in technology, design deficiencies, or other factors that affect the adequate use of the property, but would not cover unused land. See MICH. COMP. LAWS ANN. § 125.2652(q) (West 2006).

149. See Jim Lynch, *Mall Makeover: Lakeside Mall Looks to Raise Improvement Funds*, DETROIT NEWS, Oct. 11, 2007, available at <http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20071011/METRO/710110375/1409> (citing concerns that a new upscale shopping mall in Macomb County, The Mall at Partridge Creek, will compete for shoppers with the forty-year old Lakeside Mall, located just two miles away).

also entice non-retail businesses to relocate from an aging site within the same metropolitan area.¹⁵⁰ The region will thus fail to experience economic growth, and deteriorating communities will continue to deteriorate, hardly a desirable outcome either under the language of most TIF-enabling statutes, or for a state like Michigan, which is experiencing economic depression and a population exodus.¹⁵¹

Alternatively, if TIF is used to fund a development project in a growth area, where public incentives are not clearly needed to attract investment, increases in property taxes would arguably be better directed to the municipality's general fund and used to improve community services such as police and fire protection and sanitation services.¹⁵² This problem, again, is one that may be alleviated by more aggressive state and municipal efforts to document criteria necessary to effectively evaluate a proposed TIF plan, and enforce statutory requirements for any TIF scheme.¹⁵³ To help ensure the appropriate use of TIF, many states have adopted "but-for" provisions in TIF-enabling legislation.¹⁵⁴ "But-for" clauses require a municipality to show, before effectuating a TIF plan,

150. See, e.g., Schuring, *supra* note 134, at 340, n.91 (citing TIMOTHY J. BARTIK, WHO BENEFITS FROM STATE AND LOCAL ECONOMIC DEVELOPMENT POLICIES? (1991), and stating that tax incentives generally play a larger role in the decision of a business to relocate within a metropolitan area, than to move from another region of the state or from a different state).

151. See SOUTHEAST MICHIGAN COUNCIL OF GOVERNMENTS, A REGION IN TURBULENCE AND TRANSITION: THE ECONOMIC AND DEMOGRAPHIC OUTLOOK FOR SOUTHEAST MICHIGAN THROUGH 2035, at 17 (2007), available at <http://library.semco.org/inmagicgenie/DocumentFolder/TurbulenceTransition2035.pdf> (noting that Southeast Michigan's economic health continued to deteriorate in 2004 and 2005, and that population also continued to decline. The state is forecast to lose additional population between 2013 and 2025, which may be offset only by an increase in international in-migration). Notably, SEMCOG also forecasts a decline in retail jobs in Southeast Michigan between 2004 and 2035. *Id.* at 20, 28, 47.

152. See DEVINE, *supra* note 10, at 5; McGraw, *supra* note 21 (arguing that infrastructure costs that come with growth should be covered by private businesses, and not by individual residents through property tax increases).

153. Useful documentation includes criteria that must be reported annually by Michigan TIF authorities to the governing municipality and the state tax commission. The reports must contain, among other things, the initial assessed value of the district, the captured assessed value, and the number of jobs "created as a result of the implementation of the tax increment financing plan." See, e.g., MICH. COMP. LAWS ANN. §§ 125.1665(3)(h), .2163(3), .2925(3) (West 2006).

154. See generally London, *supra* note 3, at 805-10 (discussing Minnesota's "but-for" provision, and recommending a "but-for" test in Virginia's TIF legislation). States with an express statutory "but-for" requirement are Delaware, Illinois, Indiana, Kentucky, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming and the District of Columbia. For a summary, see Council of Development Finance Agencies (CDFA), 2008 TIF State-By-State Report, available at <http://www.cdfa.net/cdfa/cdfaweb.nsf/pages/TIFStatebyState.html>.

that economic development, and thus property tax increases, would not occur without the TIF incentive.¹⁵⁵ In other words, and in furtherance of the constitutional requirement of public purpose, if the area would have attracted private investment without the TIF incentive, then TIF would not have been needed to promote economic development, and increased tax revenues would indeed be more appropriately used for general municipal improvements and services.

Michigan TIF-enabling statutes vary with respect to the inclusion and language of “but-for” provisions. The LDFA Act includes a “but-for” clause, requiring any LDFA TIF plan to include, among other things, “a statement of the reasons that the plan will result in the development of captured assessed value that could not otherwise be expected.”¹⁵⁶ Neither the DDA Act nor the more recently enacted Neighborhood Improvement Authority Act include the “but-for” clause found in the LDFA Act. Both, nonetheless, require that a TIF plan contain “a statement of the estimated impact of tax increment financing on the assessed values of all taxing jurisdictions in which the development area is located,”¹⁵⁷ thus providing a comparable measure of assessment of the need to establish a TIF district in a particular locale, and the DDA Act requires a showing of deteriorating property values in order to create a DDA district.¹⁵⁸

Any provision requiring a statement of pre-TIF and predicted post-TIF values is useful to force a municipality to carefully evaluate the potential for property value increases in a proposed TIF district, and its ability to repay debt associated with a TIF plan.¹⁵⁹ Such provisions thus offer some protection against misuses of TIF. “But-for” clauses can be ambiguous, though, and may require municipalities to effectively predict continued market failures in an area in order for a TIF plan to be approved.¹⁶⁰ “But-for” provisions also address only the *need* for TIF in a particular location.¹⁶¹ Except for evaluating the burden that may

155. See London, *supra* note 3, at 805-08.

156. MICH. COMP. LAWS ANN. § 125.2162(1)(a) (West 2006).

157. MICH. COMP. LAWS ANN. §§ 125.1664(1), .2924(1) (West 2006).

158. MICH. COMP. LAWS ANN. § 125.1653 (West 2006).

159. For a summary of funding sources to which a municipality may turn if tax increment revenues are insufficient to repay bonds issued as part of a TIF plan, see *supra* note 66.

160. Market predictions are, arguably, easier in some areas than in others. See London, *supra* note 3, at 806-08 (stating that some local officials may interpret a “but-for” clause to require a TIF plan to attract private investment earlier than the investment would occur without TIF, while other officials may interpret a “but-for” requirement to mean that a TIF plan must encourage a type of development that would not have occurred otherwise).

161. *Id.*

be placed on a municipality to repay debt obligations in the event that property values do not increase, “but-for” provisions do not address the general economic and social *impact* of an appropriately evaluated TIF plan on the TIF district and on the greater regional area.

A TIF plan appropriately implemented in an area predicted otherwise to experience limited or no economic growth may still draw businesses from neighboring communities in the same region, and may still contribute to resident displacement. The problem, however, with criticizing TIF for creating a zero-sum game, or for encouraging gentrification in districts without considering the effect of rising property values on low-income residents, is that all municipally-financed business incentives may be criticized for the same reasons. In other words, any incentive package may move businesses around a region, arguably preventing those businesses from leaving the region, but creating no net economic growth. All incentives also have the end result, if successful, of higher property taxes. Indeed, an area that experiences economic growth due to either a mix of public and private actions, or that is purely market driven, will, normally, subsequently experience an increase in property values, which may result in gentrification of the area.¹⁶²

What likely makes some people uncomfortable about TIF is that, because bonds issued as part of a TIF plan rely specifically on increases in property taxes for repayment, TIF may appear as a government effort aimed at rewarding big business at the expense of individual taxpayers.¹⁶³ Rather, TIF provides municipalities that have experienced consistent market failures another option for economic revitalization.¹⁶⁴ The solution for redeveloping and maintaining economically viable cities and states, therefore, is not to focus criticism on a particular type of incentive such as TIF, but instead to create development plans that effectively balance economic needs with the interests of the existing community.

B. *The Importance of Tax Increment Financing Schemes in Detroit and Michigan*

It is important to emphasize that TIF, like any other municipal financing scheme, will not be appropriate for every development project, nor will

162. See generally WILLIAM GRIGSBY, MORTON BARATZ, GEORGE GALSTER & DUNCAN MACLENNAN, *THE DYNAMICS OF NEIGHBORHOOD CHANGE AND DECLINE* 63-73 (1987).

163. See, e.g., DEVELOPING NEIGHBORHOOD ALTERNATIVES PROJECT, *supra* note 125 (arguing that companies based outside a community tend to be the winners of a TIF plan in the community, while existing small business owners and low-income residents tend to be the losers when a TIF plan is implemented).

164. See generally Schuring, *supra* note 134, at 330-33.

TIF alone solve the more extensive economic, social, or educational shortcomings of a municipality.¹⁶⁵ A TIF plan must be carefully chosen for particular needs, where increased tax revenues are likely to result, and in combination with other incentives, or where it is part of larger public-private partnership efforts already underway.¹⁶⁶ Most development authorities in Michigan, like other states, use a variety of financing tools, including TIF, tax abatements, block grants, and money from private foundations to effectuate development plans.¹⁶⁷ Moreover, TIF has successfully been used for numerous projects in Detroit, a partial list of which includes, in addition to the TechTown development, the downtown Campus Martius Redevelopment, the theater district, Comerica Park, and the refurbished Book Cadillac Hotel. All of these projects are valuable contributions to the continued revitalization of Detroit and other Michigan cities.¹⁶⁸

While incentive programs ideally draw new investment from outside a state, there is value, nonetheless, in focusing on the revitalization of large central cities, to improve the overall social and economic health of the state.¹⁶⁹ Efforts focused on Detroit, for example, like other central

165. Similarly, Renaissance Zone tax abatements will not solve all of the economic or social problems faced by the City of Detroit. *See, e.g.,* Schuring, *supra* note 134, at 367.

166. *See, e.g.,* Henderson, *supra* note 9, at 29 (discussing the public-private partnerships involved in TechTown financing).

167. *See generally* City of Detroit, Proposed Capital Agenda FY 2005-06 through 2009-10, *supra* note 114.

168. *Id.* The Campus Martius Redevelopment project, in a Detroit TIF district, brought the Compuware Corporation headquarters downtown. The theater developments included, in part, the Fox Theater and the Michigan Opera Theater. The DDA assisted the Wayne County Stadium Authority with financing for Comerica Park, home to the Detroit Tigers. *See* Jenette Smith & Robert Ankeny, *Downtown Rentals Gain More Attention*, CRAIN'S DET. BUS., Mar. 18, 2007, available at <http://www.craainsdetroit.com/article/20070318/SUB/703160309> (discussing the rising interest in both owner-occupied condominiums and rental apartments in Detroit). *See generally* Schuring, *supra* note 134.

169. *See, e.g.,* MICH. COMP. LAWS ANN. § 125.1651a (b) (West 2006) (finding that "government programs are desirable and necessary to eliminate the causes of property value deterioration thereby benefitting the economic growth of the state"); MICH. COMP. LAWS ANN. § 125.2151(b) (West 2006) (finding that "government programs are desirable and necessary to eliminate the causes of unemployment, underemployment, and joblessness therefore benefitting the economic growth of the state"); *see also* Louis Aguilar, *City Pegs Growth on Quicken*, DET. NEWS, Nov. 14, 2007, available at http://www.downtowndetroit.org/ddp/newsroom/detroit_news_nov_14_2007.htm (discussing the incentive package offered to Quicken Loans, Inc. to move from a suburban to a downtown Detroit site. The incentive package includes Renaissance Zone tax breaks and a \$45 million Michigan Economic Growth Act tax credit, in addition to \$40 million in city-subsidized parking. City leaders defend the incentives, estimating that the move will bring \$65 million in city tax revenue over twenty years, and will add at least 4,000 new workers to the downtown area, who are expected to spend up to \$600 million in the city).

city districts, help to contain sprawl throughout Michigan, and thereby halt a process that continues to negatively impact the economic health of the state. As middle-income and commercial establishments move out of older cities into newer areas, city property values decline, the city's tax base shrinks, and the city becomes less able to provide necessary services to its remaining residents and to visitors.¹⁷⁰ Indeed, while TIF has been criticized for contributing to problems of gentrification, and for funneling property tax increases into particular projects instead of improving municipal services and educational opportunities, without incentives like TIF to stimulate in-migration and investment, the outlook for a state and its existing cities is far bleaker.

Also, as Michigan leaders have recognized, without vibrant, livable central city areas, the state remains at an enormous disadvantage in trying to attract a population that is necessary to realize economic growth.¹⁷¹ As manufacturing, whether of autos or other products, becomes a less reliable source for Michigan's economic stability, as well as the economic stability of other manufacturing centers around the country, knowledge-based industries present a potentially prosperous addition to a state's economy.¹⁷² Young, highly educated professionals working in knowledge-based industries, however, tend to be mobile, and are increasingly attracted to urban communities.¹⁷³ Established core cities tend to offer a combination of historical, cultural, and artistic resources which appeal to a diverse population, enrich the quality of life throughout the entire metropolitan area, and therefore are worth preserving.¹⁷⁴ Since TIF and other incentives are now commonplace across the country, an aging city like Detroit is at a disadvantage in attracting population and sustaining a high quality of life if it does not make ample use of such incentives.¹⁷⁵

170. See MICHIGAN LAND USE LEADERSHIP COUNCIL, MICHIGAN'S LAND, MICHIGAN'S FUTURE: FINAL REPORT 14, 31 (2003), available at http://www.michiganlanduse.org/MLULC_FINAL_REPORT_0803.pdf.

171. *Id.* at 31.

172. Knowledge-based industries include information services, finance and insurance, professional and technical services, and company management. See Southeast Michigan Council of Governments, *supra* note 157, at 17; Aguilar, *supra* note 169.

173. SOUTHEAST MICHIGAN COUNCIL OF GOVERNMENTS, *supra* note 151, at 31; see also Bruce Mason, *Stores, Transit, Walkability: To Attract Millennials, Appeal to Their Desires*, CRAIN'S DET. BUS.: LIVING AND INVESTING IN THE D, Aug. 12, 2007, at 15; Aguilar, *supra* note 169.

174. MICHIGAN LAND USE LEADERSHIP COUNCIL, *supra* note 170, at 32; see also Schuring, *supra* note 134, at 333 (citing Robin Paul Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 VAND. L. REV. 67, 67-68 (1987)).

175. See, e.g., Eschbacher, *supra* note 8 (arguing that because incentives are used by most municipalities to encourage development, they are necessary for Indianapolis

IV. Conclusion

Tax increment financing has grown as an appealing and constitutionally sound method for municipalities to fund economic development projects.¹⁷⁶ In Michigan, while the state supreme court has analyzed the use of TIF only under the LDFA Act,¹⁷⁷ the court's holding is useful for determining the extent to which a municipality may capture and use tax increment revenues as part of a development plan under any Michigan TIF-enabling statute, including, among others, the DDA Act, the TIFA Act, and the most recently enacted Neighborhood Improvement Authority Act.¹⁷⁸ In Michigan, a TIF plan may be held constitutionally sound, and thus be exempt from municipal lending of credit limitations, if the plan is (1) authorized by law, and (2) for a public purpose.¹⁷⁹ Michigan, like other states, recognizes a broad public purpose doctrine, particularly with respect to financing plans, and grants deference to the legislature on determinations of public purpose.¹⁸⁰ The public purpose requirement may be satisfied if the TIF plan is implemented to promote economic development in an area shown to be in need of revitalization.¹⁸¹

TIF carries some financial risk to a municipality because it relies on anticipated economic growth to fund redevelopment projects.¹⁸²

to remain competitive for jobs and investors); Schuring, *supra* note 134, at 343 (stating that while the prevalence of business incentives may have reduced the weight given to such incentives by businesses considering relocating, a municipality that does not offer some form of incentive will likely not succeed in attracting investment in the area). Also, in enacting the Renaissance Zone Act in 1996, Michigan leaders further recognized the continued need for public incentives to attract businesses to the state's urban centers, and to halt the movement of people and commercial establishments to the suburbs. *See* MICH. COMP. LAWS ANN. § 125.2682 (West 2006); S. Res. 668, 87th Leg., Reg. Sess. (Mich. 1996); H. Res. 5193, 89th Leg., Reg. Sess. (Mich. 1996). Businesses and Residents in a Renaissance Zone are eligible to receive a waiver of the Michigan Single Business Tax, Michigan Personal Income Tax, Michigan's State Education Tax, Detroit Personal Property Tax, Detroit Real Property Tax, Detroit Income Tax, and Detroit City Utility Users Tax. *See* Detroit Economic Growth Corporation, Business Zones: Renaissance Zones, available at <http://www.degc.org/financing.aspx>; *see also* Barber & Berkebile, *supra* note 113 (quoting Dan Elliott, director of the Ewart, Michigan DDA, saying that TIF is the best economic tool for Michigan. "The city gains. The county gains and everyone else by the economic development and growth.").

176. *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 422 N.W.2d 186, 199-201 (Mich. 1988).

177. MICH. COMP. LAWS ANN. §§ 125.2151-.2174 (West 2006).

178. MICH. COMP. LAWS ANN. §§ 125.1651-1681, .1801-1830, .2841-2866 (West 2006).

179. *See In re Request*, 422 N.W.2d at 209.

180. *See, e.g., id.* at 208.

181. *See generally id.* at 203-08.

182. *See Hipler, supra* note 2, at 69; London, *supra* note 3, at 808-09; *see also In re Request*, 422 N.W.2d at 203-06.

A TIF scheme may also be abused if private sector gains outweigh public benefits from the project.¹⁸³ TIF, therefore, should not be overused, nor should it be the only incentive used to lure businesses to a depressed area. TIF, however, is a valuable financial component of programs that encourage partnerships between the public and private sectors, to effectively draw private investment to an area to maintain a population and quality of life that can then continue to support critical public needs and services. This is particularly true in aging cities like Detroit that are in desperate need of public incentives to effectuate revitalization. This analysis of TIF in Michigan is applicable generally to show that, as an incentive tool, TIF can, when implemented within constitutional and statutorily-defined parameters, serve as a viable redevelopment option for depressed and transitioning economies nationwide.

183. See, e.g., London, *supra* note 3, at 790; Haulk & Montarti, *supra* note 8, at 7.