

A Modest Proposal: Eliminating Blight, Abolishing But-For, and Putting New Purpose in Wisconsin's Tax Increment Financing Law

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A MODEST PROPOSAL: ELIMINATING BLIGHT, ABOLISHING BUT-FOR, AND PUTTING NEW PURPOSE IN WISCONSIN'S TAX INCREMENT FINANCING LAW¹

I. INTRODUCTION

The year 2005 marks the thirtieth anniversary of Wisconsin's Tax Increment Financing Law ("TIF").² Enacted in 1975,³ Wisconsin's TIF law was part of a growing movement amongst states to provide their cities with creative ways to finance urban redevelopment and revitalize blighted urban areas⁴ during a time when the availability of federal money for such purposes was declining.⁵ At its base, TIF finances current development by leveraging future increases in property tax revenue expected to result from such development. Wisconsin was certainly not the first state to adopt TIF,⁶ but the state's municipalities have been prolific in implementing it—over one thousand⁷ TIF districts⁸

1. Apologies to Jonathan Swift.

2. WIS. STAT. § 66.1105 (2003–2004). Wisconsin's Tax Increment Law authorizes a process known as tax increment financing, or TIF. This Comment refers to the law as Wisconsin's TIF law, or simply TIF, throughout.

3. Act of Nov. 20, 1975, ch. 105, 1975 Wis. Sess. Laws 464.

4. Wisconsin's TIF law was not limited to this purpose. The law was also intended to cure various "inequities and disincentives" that resulted when cities and villages bore the entire cost of public improvements that ultimately benefited surrounding communities through an increase in the regional tax base. Act of Nov. 20, 1975, ch. 105 § 1(1), 1975 Wis. Sess. Laws 464, 465. By allowing the increased tax revenues to pay for the public improvements first, TIF provides an incentive for municipalities to undertake such improvement projects.

5. J. Drew Klacik & Samuel Nunn, *A Primer on Tax Increment Financing*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES, AND IMPACT 15, 18 (Craig L. Johnson & Joyce Y. Man eds., 2001).

6. In 1952, California became the first state to pass a TIF law. Craig L. Johnson & Kenneth A. Kriz, *A Review of State Tax Increment Financing Laws*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES, AND IMPACT 31 (Craig L. Johnson & Joyce Y. Man eds., 2001). Over the next twenty years or so, TIF laws passed in six additional states: Minnesota, Nevada, Ohio, Oregon, Washington, and Wyoming. *Id.*

7. AL RUNDE, WIS. LEGIS. FISCAL BUREAU, INFORMATIONAL PAPER 17: TAX INCREMENTAL FINANCING 12 (Mar. 2005).

8. The term "TIF district" is used throughout this Comment. TIF districts (or "TIDs") are geographic areas of a municipality within which the development or redevelopment

have been created since 1975.

The history of Wisconsin's TIF law is one marked by change, both in the statute itself,⁹ and in the ways it has been implemented. For example, in its early years, TIF was used to facilitate urban projects such as the redevelopment of a dilapidated city block in Brillion and the revival of the Menomonee Valley Industrial Area in Milwaukee.¹⁰ In more recent years, TIF has facilitated the construction of a Wal-Mart Superstore in Baraboo¹¹ and a distribution center for the Target retail chain on formerly agricultural land in suburban Oconomowoc.¹²

Such change in TIF usage shows that the law, as applied, has evolved into something more comprehensive than a mere tool of blight elimination. Certainly, municipalities have used TIF to finance the redevelopment of blighted urban areas. In Milwaukee, for example, TIF was used to convert an abandoned property into housing for low-income families.¹³ However, the state's municipalities have also used TIF to finance projects presumably aimed at general economic development. For instance, Oconomowoc used TIF to facilitate a mixed-use residential and commercial development on formerly agricultural land known as Pabst Farms.¹⁴ Opponents of the TIF district argued that the area proposed for the project was "anything-but-blighted."¹⁵ Arguably, it is a stretch to classify rolling Wisconsin farmland as "blighted" under the common meaning of that term.¹⁶ And yet, the proposed development of Pabst Farms was desirable from an economic standpoint—at least in the estimation of Oconomowoc's city

occurs. This term is intended as a convenient shorthand to describe the area in which a TIF project or TIF projects will occur. The term "tax incremental district" is defined in the statute. WIS. STAT. § 66.1105(2)(k) (2003–2004).

9. The TIF statute has been amended or altered more than fifty times since its inception. See WIS. STAT. § 66.1105 hist. (2003–2004).

10. WIS. DEP'T OF DEV., BIENNIAL REP. ON TAX INCREMENTAL FINANCING 7 (1981).

11. See, e.g., Kathleen Knavel, *Wisconsin's Tax Incremental Finance Law: How Wisconsin's Cities Subsidize Sprawl*, 8 WIS. ENVTL. L.J. 115, 128 (2002).

12. See Tom Daykin, *Pabst Farms Development in Works; Wispark Reportedly to Propose Massive Mixed-Use Project, Including Homes, Retail Shops and Offices.*, MILWAUKEE J. SENTINEL, May 21, 1998, at 1D.

13. 1,000 FRIENDS OF WISCONSIN, WISCONSIN'S TAX INCREMENTAL FINANCE LAW: LENDING A HAND TO BLIGHTED AREAS OR TURNING CORNFIELDS INTO PARKING LOTS? (1999), http://www.1kfriends.org/Publications/Online_Documents/TIF.htm [hereinafter 1000 FRIENDS OF WISCONSIN].

14. See Amy Rinard, *Changes Sought for Tax Districts; Pabst Farms Aid Called Absurd*, MILWAUKEE J. SENTINEL, Sept. 7, 2001, at 1W.

15. *Id.*

16. See, e.g., Knavel, *supra* note 11, at 120.

council¹⁷—and the city used TIF to make it happen. In a way, TIF has evolved into a tool for municipalities to control the pace and direction of development as much as it is a tool of blight elimination.¹⁸

City councils, local planning commissions, and private developers have driven the evolution of TIF.¹⁹ The most important threshold questions for any TIF project proposed under the current scheme are (1) what the project proposes to do (e.g., eliminate blight, develop industry), (2) where the proposed development will occur, and (3) whether the proposed development would occur without the incentive TIF provides. In practice, local legislative bodies have almost complete discretion in answering these questions.²⁰ The state legislature has attempted to solve problems caused by such local discretion by placing limits on the types of projects eligible for TIF²¹ and by creating a joint review board to oversee local TIF decisions.²² However, these controls have proven ineffective.²³ In passing them, the legislature took incremental steps when comprehensive review was needed.

Examining the history of Wisconsin's TIF law shows that the legislature has always taken this piecemeal approach.²⁴ The frequent amendments to the law²⁵ display a case-by-case method for solving problems that arise and for acknowledging evolving implementations of TIF.²⁶ For example, in addition to the limits on local discretion

17. See 1000 FRIENDS OF WISCONSIN, *supra* note 13 (quoting the project plan for the Pabst Farms TIF district under the section entitled "TIF At Its Worst: Subsidies For Big Box Retailers").

18. See discussion *infra* Part V.C.

19. TIF can be viewed as a means for municipalities to go out and entice developers. However, in practice it works the other way around. Dean Mosiman, *A TIF Crowd; Developers' Requests for Public Financing Assistance are Raining Down the City*, WIS. ST. J., Aug. 7, 2004, at B1. In 2004, for example, Madison was inundated with developer-driven proposals for TIF projects. As one reporter put it, developers were "stacking up like planes at O'Hare International Airport." *Id.*

20. See discussion *infra* Part III.B.2.

21. Section 66.1105 (4)(gm)4.a. of the Wisconsin Statutes requires that a TIF project plan contain findings that at least fifty percent of the subject area is a blighted area (defined in section 66.1105(2)(a)1.), is in need of rehabilitation, is suitable for industrial sites, or is suitable for mixed-use development. As will be argued, these are largely illusory strictures.

22. Section 66.1105(4m) of the Wisconsin Statutes requires municipalities to convene a joint review board with the power to approve or deny a TIF proposal based on, among other things, whether development would occur without TIF. § 66.1105(4m)(c)1. As will be argued, this test is largely ineffective.

23. See discussion *infra* Part III.

24. See discussion *infra* Part IV.

25. See WIS. STAT. § 66.1105 hist. (2003–2004).

26. See WIS. DEP'T OF REVENUE, REP. OF THE GOVERNOR'S WORKING GROUP ON

described above, the legislature has restricted the types of project costs eligible for TIF²⁷ required increased auditing of TIF projects,²⁸ and restricted the definition of a “blighted area.”²⁹ At other times, the legislature has acknowledged, again on a case-by-case basis, the ways in which TIF was being used. For instance, in 1989 the legislature increased the statutory cap on TIF use in recognition of the fact that most municipalities were already exceeding it.³⁰ Instead of assessing the reasons why so many municipalities were exceeding the cap,³¹ the legislature merely took another incremental step towards accommodating the evolving nature of TIF.

The piecemeal legislative approach to TIF intensified in the late 1990s.³² Numerous proposals for changes to TIF were made that would create various narrow exceptions to the law.³³ In 2000, Governor Thompson, concerned about the “frequency of case-by-case exemptions from [TIF],” formed a Governor’s Working Group on TIF (the “Group”) to evaluate the law and propose changes.³⁴ After extensive discussion, the Group produced a report making recommendations to

TAX INCREMENTAL FINANCE 2 (2000).

27. Act of July 30, 1981, ch. 20 § 1023s, 1981 Wis. Sess. Laws 46, 258. This amendment was passed, in part, to stop the use of TIF to finance the construction of government buildings. *Id.*

28. RICHARD MEGNA, WIS. LEGIS. FISCAL BUREAU, INFORMATIONAL PAPER 16: TAX INCREMENTAL FINANCING 5 (Jan. 1993).

29. *Id.* at 5. This amendment was passed under Act of Apr. 27, 1990, No. 336, § 133b, 1989 Wis. Sess. Laws 1535, 1574.

30. Act of Apr. 27, 1990, No. 336, § 133d, 1989 Wis. Sess. Laws 1535, 1574. The original law included a cap on the amount of property that a municipality was allowed to put in TIF districts. Act of Nov. 20, 1975, ch. 105, § 3, 1975 Wis. Sess. Laws 464, 465-72 (codified as WIS. STAT. § 66.46(4)(c)4.c. (1975)). Under this section, the property value of all a municipality’s TIF districts could not exceed five percent of its total property value. By 1989, two-thirds of the municipalities using TIF had exceeded this cap. WIS. DEP’T OF DEV., 1978-89 BIENNIAL REP. ON TAX INCREMENTAL FINANCING 11-12 (1989). In response, the legislature increased the cap to seven percent and introduced an additional threshold a municipality would have to exceed before the TIF district would be disallowed. Act of Apr. 27, 1990, No. 336, § 133d, 1989 Wis. Sess. Laws 1535, 1574. Under the new threshold, the total property value of all TIF districts could exceed the seven percent cap as long as the total value of the proposed TIF district plus the value of all the increments from existing TIF districts (this excludes the base value of the district) did not exceed five percent of the municipality’s total property value. *Id.* If only one threshold was exceeded, the TIF district could still be created. *Id.*

31. Perhaps municipalities had begun to view TIF as a general tool of economic development and were eager to implement it wherever they could. This is speculation, but it would explain why so many cities exceeded the cap.

32. See WIS. DEP’T OF REVENUE, *supra* note 26, at 2.

33. *Id.*

34. *Id.* (quoting Governor Thompson’s veto message on the 1999–2001 Biennial State Budget).

the legislature.³⁵ In response to the Group's report, the legislature passed amendments to the TIF law in the 2003 regular legislative session.³⁶

Unfortunately, instead of solving the problem of piecemeal legislation, these amendments are just more of the same. The legislature once again displayed its incremental method for solving problems and accommodating the evolving nature of TIF. Two problematic provisions of the law were particularly ripe for comprehensive review.³⁷ First, the broad definition of "blighted area"³⁸ in the statute had facilitated controversial designations of blight.³⁹ Second, the so-called "but-for" test⁴⁰ had proven utterly ineffective at reining in local legislative discretion.⁴¹ However, instead of recognizing that these problems required comprehensive solutions, the legislature opted for more incremental change.⁴² Furthermore, in an ostensible attempt to accommodate the type of development exemplified by the Pabst Farms project, the legislature added a new "mixed-use" category to the types of projects eligible for TIF.⁴³ The legislature approached the challenges posed by evolving uses of TIF, not with a comprehensive review of the law's purpose, but with yet another set of piecemeal amendments.⁴⁴

The Wisconsin Legislature's current approach to TIF is broken.

35. *See id.* at 5.

36. Act of Feb. 20, 2004, No. 126, 2003 Wis. Sess. Laws 642; Act of Feb. 20, 2004, No. 127, 2003 Wis. Sess. Laws 648; Act of April 17, 2004, No. 194, 2003 Wis. Sess. Laws 772. Act 126 in particular was aimed squarely at the recommendations of the Governor's Working Group on TIF.

37. *See* discussion *infra* Part III.

38. WIS. STAT. § 66.1105(2)(a) (2003–2004).

39. *See* Rinard, *supra* note 14.

40. In its report, the Group refers to this test as the "but-for" test. WIS. DEP'T OF REVENUE, *supra* note 26, at 19.

41. *See* discussion *infra* Part III.B.2.

42. For example, the amendment supposedly strengthened the but-for test by requiring joint review boards to make a "positive assertion" that a proposed development would not occur without TIF. Act of Feb. 20, 2004, No. 126, § 18, 2003 Wis. Sess. Laws 642, 645. Prior to the amendment, joint review boards were required to apply this test merely as one criteria for approving TIF districts. WIS. STAT. § 66.1105(4m)(c)1.a. (2001-2002). This incremental step fails to address the real reasons for the problems caused by an ineffective but-for test. *See* discussion *infra* Part III.B.

43. Act of Feb. 20, 2004, No. 126, §§ 1, 9, 2003 Wis. Sess. Laws 642, 642-43.

44. In 2005, the legislature passed two more amendments that once again make minor adjustments. *See* Act of May 2, 2005, No. 6, <http://www.legis.state.wi.us/2005/data/acts/05Act6.pdf>; Act of June 6, 2005, No. 13, <http://www.legis.state.wi.us/2005/data/acts/05Act13.pdf>. Alas, the piecemeal approach continues.

Incremental changes are insufficient to solve the problems caused by the broad definition of blight and the ineffectiveness of the but-for test. Piecemeal amendments are inadequate to address the fact that TIF has evolved into something beyond a mere tool of urban renewal. The legislature needs a new approach that provides comprehensive solutions to the challenges facing TIF. This Comment presents a modest proposal to solve the problems of blight and but-for and to recognize a new purpose for TIF.

Part II of this Comment briefly describes how TIF works so as to acquaint the reader with what may be an unfamiliar law and to provide context for understanding the argument that follows. Part III analyzes the two most problematic parts of the current law: (1) the definition of blight as it is used in the statute, and (2) the but-for test. An analysis of the general controversy nationwide over these elements provides context for understanding why blight and but-for are so problematic for Wisconsin's TIF law. Part IV then assesses the recent amendments to TIF to show why the piecemeal approach is inadequate to provide comprehensive solutions to the challenges facing the law. Finally, Part V presents a modest proposal that should solve the problems with the current law and free TIF to reach its full potential.

II. HOW TIF WORKS: THE STATUTORY SCHEME

Although the legislature has tinkered extensively with the TIF law over the last thirty years, the basic scheme has remained largely the same.⁴⁵ At its heart, TIF provides municipalities with a method of financing to develop or redevelop, in cooperation with private interests, unused or underused land.

First, a municipality⁴⁶ charges its planning commission⁴⁷ with the task of identifying and drawing the boundaries of a proposed TIF district.⁴⁸ A public hearing must then be held, with notice to all interested parties, at which such parties are "afforded a reasonable opportunity to express

45. Many of the operational details have changed over the years, but the basic system of funding a current project with expected future increases in tax revenues has been in place since the TIF law was enacted. *Compare* Act of Nov. 20, 1975, ch. 105, 1975 Wis. Sess. Laws 464 with WIS. STAT. § 66.1105 (2003–2004).

46. The term "municipality" is used because both cities and villages can implement TIF. Recent legislative action has added towns to the list of eligible entities that are allowed to create TIF districts, albeit with different requirements. *See* WIS. STAT. § 60.85 (2003–2004).

47. For a definition of "planning commission," see section 66.1105(2)(e) (2003–2004).

48. § 66.1105(4)(b).

their views on the proposed creation of a [TIF] district and the proposed boundaries of the district.”⁴⁹ The planning commission then submits the proposed boundary recommendation to the local legislative body.⁵⁰

Next, the planning commission submits a proposed project plan for the district to the local legislative body.⁵¹ That body then approves the plan through a “resolution which contains findings that the plan is feasible and in conformity with the master plan, if any, of the city.”⁵² The municipality must then adopt a resolution that describes the boundaries of the district,⁵³ creates and names the district,⁵⁴ and contains findings that no less than fifty percent of the district is “blighted,” is “in need of rehabilitation or conservation work,” is “suitable for industrial sites,” or is “suitable for mixed-use development.”⁵⁵ The statute itself defines “[b]lighted area”⁵⁶ and “[m]ixed-use development”⁵⁷ but leaves the definitions of the other terms to other statutes.⁵⁸

The TIF law also requires municipalities to convene a joint review board consisting of one member of the public and one representative each from the overlying entities that have the authority to levy taxes on property within the proposed TIF district.⁵⁹ The overlying taxing entities include the school district, the technical college district, the county, and the municipality in which the TIF district is located.⁶⁰ The purpose of the joint review board is to ensure that the development proposed by the project plan would not occur but for the creation of the TIF district and to assess the economic benefits likely to accrue to the overlying taxing districts.⁶¹

Once the proposed TIF district boundaries and the project plan are approved by all the statutorily required bodies, the tangible effects of tax increment financing begin. In general, TIF allows a municipality to

49. § 66.1105(4)(a).

50. § 66.1105(4)(b).

51. § 66.1105(4)(d)-(f).

52. § 66.1105(4)(g).

53. § 66.1105(4)(gm)1.

54. § 66.1105(4)(gm) 2., 3.

55. § 66.1105(4)(gm)4.a. For a TIF district to be “suitable for industrial sites” under the TIF law, the land in the district must also be zoned for industrial use. *Id.*

56. § 66.1105(2)(a).

57. § 66.1105(2)(cm).

58. An area “in need of rehabilitation” is defined by section 66.1337(2m)(b). Suitability for industrial sites is defined by section 66.1101.

59. § 66.1105(4m)(a).

60. *Id.*

61. § 66.1105(4m)(c).

leverage future growth in property value (and, hence, tax revenue) to finance development, repair, or rebuilding of the infrastructure needed to attract and support private development within the TIF district. TIF most often finances the costs of improving streets, power mains, sewer systems, and sidewalks and the like, but it can also finance legal fees and plan development costs.⁶² By developing or repairing such infrastructure, the municipality provides an incentive for developers to invest money in a depressed or underdeveloped area. The money for such projects, like any municipal public works expenditure, would normally have to come from the general revenue fund of the municipality; however, TIF authorizes municipalities to use other financing techniques,⁶³ most often the issue of bonds,⁶⁴ to pay for the project. When the development occurs, the end result, at least in theory, is that the taxable value of the area will rise.⁶⁵ The increased tax revenue generated by the increased taxable value of property within the TIF district is then used to repay the financing costs, such as the bond debt.⁶⁶ The TIF district remains in existence until the end of the time period prescribed by statute, or until all of the project costs are repaid, whichever occurs earlier.⁶⁷

The TIF statute provides the method for determining the increased tax revenue available for repaying financing costs. First, the Wisconsin Department of Revenue ascertains the aggregate tax valuation of all taxable property within the boundaries of the TIF district, excluding municipality-owned property; this figure is called the “tax incremental base.”⁶⁸ For every year following the establishment of the tax incremental base, the Department of Revenue determines the “equalized value”⁶⁹ of the property within the TIF district and compares

62. § 66.1105(2)(f)1.d.

63. § 66.1105(9).

64. AL RUNDE, WIS. LEGIS. FISCAL BUREAU, INFORMATIONAL PAPER 17: TAX INCREMENTAL FINANCING 7 (Jan. 2001).

65. Knavel, *supra* note 11, at 117.

66. § 66.1105(9)(b)4.

67. § 66.1105(6), (7).

68. § 66.1105(5)(b), (bm); *see also* § 66.1105(2)(j).

69. § 66.1105(5)(g). “Equalized value” is a term of art used in property tax law. The *Corpus Juris Secundum* defines the purpose of equalization:

The function or purpose of equalization is the adjustment of aggregate valuations of property, as between the different counties of the state or between the different taxing districts of the same county, so that the share of the whole tax imposed on each county or district shall be justly proportioned to the value of taxable property

it to the tax incremental base; the amount of property tax levied on the difference between the two figures is called the “tax increment.”⁷⁰ All governmental entities with the power to levy taxes on property within the TIF district (including, among others, the school district and county) must then relinquish tax revenue applicable to the tax increment to the municipality.⁷¹ Effectively, the creation of a TIF district freezes the amount of property tax that can be collected by overlying taxing authorities until the termination of the TIF district, which in some cases can be as long as twenty-seven years.⁷²

In summary, through the TIF statutory process, municipalities attract development in blighted or underdeveloped areas by improving infrastructure. The improvements are financed through any of a number of methods, but most often the issuance of municipal bond debt. As private development occurs, the costs of the improvements are repaid with the increased tax revenue generated by the increased property value within the TIF district.

III. BLIGHT AND BUT-FOR: TIF’S PROBLEMATIC PROVISIONS

As noted above, the statutory definition of blight and the continued inclusion of a but-for test are the two most problematic parts of Wisconsin’s current TIF law.⁷³ The broad definition of blight in the statute, coupled with broad interpretations of the term by local legislative bodies, have rendered “blight” a useless concept. Also, weak statutory language, immense local control, and judicial deference to local legislative decisions have made the but-for test utterly ineffective. These two elements are problematic also because they engender controversy where there need not be any. The legislative approach in the recent amendments was to make a few more incremental changes

within its limits, in order that one county or district shall not pay a higher tax, in proportion to the value of its taxable property, than another. The object to be accomplished by equalization is to produce relative equality among the several taxing districts.

84 C.J.S. *Taxation* § 622 (2001).

70. § 66.1105(5)(g). For example, imagine that the “tax incremental base” of a TIF district is \$1,000,000. Next, suppose that after five years the value of the property within the district raises to \$1,500,000. The “tax increment” is the amount of tax levied on \$500,000, or the difference between the base and the new value.

71. § 66.1105(6)(b).

72. § 66.1105(7)(am). It should be noted that sections 66.1105(7)(ar) and 66.1105(7)(as) provide for a period of thirty-five years in very particular circumstances.

73. See *supra* Part I.

where drastic measures were needed. As will be argued in Part V, the solution is to eliminate blight and but-for from the TIF statute entirely.

Wisconsin's TIF law is not the only one for which blight and but-for have become a problem. Other states implementing TIF have run into similar challenges, and their experience provides context for understanding why Wisconsin's TIF law is in need of reform. As such, this Part analyzes, in turn, the difficulties that blight and but-for pose for other jurisdictions generally and the corresponding problematic provisions of Wisconsin's TIF law.

A. Defining Blight

1. The Problem in General⁷⁴

Broad definitions of blight in the statutes, and broad interpretations of the term by courts and local governing bodies, render it conceptually useless as a means to distinguish between those projects that are worthy of TIF funds and those that are not.⁷⁵

Some statutory definitions of blight are replete with broad, undefined terms. For example, in Ohio a "blighted area" can be any area of a city where a majority of the structures "are detrimental to the public health, safety, morals and general welfare" because they are located "in an area with inadequate street layout, incompatible land uses or land use relationships."⁷⁶ No attempt is made in the statute to define what makes a street layout "inadequate" or what makes one land use "incompatible" with another. In Missouri, a "[b]lighted area" can include any area that has become an "economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use" due to "improper subdivision," "obsolete platting," or "deterioration of site improvements."⁷⁷ Almost anything, it seems,

74. This Comment gives a brief overview of the general problem of defining blight to put in context its modest proposal for Wisconsin's TIF law. The following two articles provide a much more in-depth analysis of this topic: Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305 (2004); Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of "Blight" in Ohio*, 73 *U. CIN. L. REV.* 207 (2004).

75. For example, some have argued that the use of TIF in the wealthy community of Palm Springs, California, has "pushed [the term 'blight'] to a meaningless extreme." Johnson & Kriz, *supra* note 6, at 36-37.

76. OHIO REV. CODE ANN. § 1728.01(E) (LexisNexis 2004).

77. MO. ANN. STAT. § 99.85(1) (West 2005).

could be deemed a menace to the public welfare. Further, no attempt is made to define what might constitute an “economic or social liability.” Although there are numerous other examples,⁷⁸ these two statutory definitions of blight are indicative of the broadness with which the term is often defined.

Another statute, at least in the past, had not defined blight at all, but rather listed a series of criteria for what constitutes an area in need of redevelopment.⁷⁹ From its genesis in the 1940s until 1993 when California revised its Community Redevelopment Law, blight went undefined in the statute.⁸⁰ As one commentator has noted, the statute’s “language was such that almost any parcel of land could be termed blighted,” which led to attempted redevelopment of golf courses and farm land, and which led, in one extreme case, to an entire city being declared blighted even though sixty percent of the city’s land was vacant or agricultural.⁸¹ The controversy and frequent litigation prompted by such broad statutory language caused the California Legislature to “narrow[] the scope” of the Community Redevelopment Law over a series of reform bills.⁸²

In addition to statutes, broad definitions have also come from courts that liberally construe the term “blight” in deciding cases.⁸³ For instance, in a fairly early case, a Colorado court held that “blighted area” does not simply mean a “slum area,” but that it also included an area in which “‘deteriorated or deteriorating’ structures . . . constitute[] a social or economic liability.”⁸⁴ A New Jersey court construed “blighted area” very liberally in order to serve what the court saw as the “beneficent legislative design” of not only slum clearance, but also “urban, suburban, and rural redevelopment . . . by private enterprise or by public agencies in accordance with approved redevelopment plans.”⁸⁵ Here, the court appeared to embrace an expansive definition of blight in

78. See, e.g., Gordon, *supra* note 74.

79. See Jeffrey I. Chapman, *Tax Increment Financing as a Tool of Redevelopment*, in LOCAL GOVERNMENT TAX AND LAND USE POLICES IN THE UNITED STATES 182, 192 (1998).

80. Jeff Chapman, *Tax Increment Financing and Fiscal Stress: The California Genesis*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURE, AND IMPACT 113, 115 (Craig L. Johnson & Joyce Y. Man eds., 2001).

81. *Id.* at 192-93.

82. *Id.* at 193.

83. See generally Jonathan M. Purver, Annotation, *What Constitutes “Blighted Area” Within Urban Renewal and Redevelopment Statutes*, 45 A.L.R.3d 1096, 1106-10 (1972).

84. *Id.* at 1107 (citing *Rabinoff v. Dist. Ct. of Denver*, 360 P.2d 114 (Colo. 1961)).

85. *Id.* at 1107 (citing *Levin v. Township Comm. of Bridgewater*, 274 A.2d 1 (N.J. 1971)).

order to serve a larger, presumably unstated, legislative intent of general economic development. Finally, in a more recent case from Ohio, the court noted that “[d]efining a ‘blighted area’ . . . involves an evaluation of whether the land is being used in the best and most efficient manner in relationship to the surrounding area.”⁸⁶ Although this language appears nowhere in Ohio’s statutory definition of “blighted area,” the court interpreted the term broadly and held that a surface parking lot could be declared blighted if it “was not the best and most efficient use of the land, which would otherwise be useful and valuable and contribute to the public interest.”⁸⁷ These cases suggest that at least part of the problem of too-broad definitions of blight is traceable to liberal interpretations of the term by courts.

The effect of such broad statutory definitions and liberal court interpretations is that almost complete discretion is left to local governing bodies to determine what constitutes blight. One commentator has argued that the Ohio statute’s “broad definition [of blight] gives local governments considerable discretion in determining whether the subject area is blighted.”⁸⁸ Indeed, the Ohio Court of Appeals in the above cited case held “abuse of discretion” to be the proper legal standard for reviewing the blight determinations of local legislative bodies.⁸⁹ Another commentator, remarking on Missouri’s TIF statute, has argued that the state’s “definition of ‘blight’ is too broad to provide any significant restriction on the discretion of private developers and municipalities in choosing redevelopment sites.”⁹⁰ The level of discretion allowed local legislative bodies thus fuels controversy over defining blight.

There are problems for TIF inherent in such broad statutory and interpretive definitions of blight. First, as noted above, when just about anything can be defined as “blighted,” it becomes a useless measure for distinguishing between worthy and unworthy TIF projects. Also, expanding the definition of “blighted” to include farm fields and wealthy suburbs undercuts the political and ideological justifications of TIF in the urban renewal legislation of the post-World War II era.⁹¹

86. AAAA Enters., Inc., v. River Place Cmty. Urban Redev. Corp., 598 N.E.2d 711, 713 (Ohio Ct. App. 1991).

87. *Id.* at 714.

88. Brown, *supra* note 74, at 211.

89. AAAA Enters., Inc., 598 N.E.2d at 714.

90. Julie A. Goshorn, Note, *In a TIF: Why Missouri Needs Tax Increment Financing Reform*, 77 WASH. U. L.Q. 919, 944 (1999).

91. For example, if blight is defined too broadly, the TIF development that occurs “may

Abandoning these justifications may cause problems in jurisdictions that presume to adhere to TIF's role as a tool of urban blight elimination. Finally, without clear and objective standards for what constitutes blight, a local legislative body is free to define the term in any way that suits its immediate needs. Such ad hoc judgment calls invite controversy and litigation and may erode public confidence in TIF as a valuable financing tool.

2. The Wisconsin Experience

The definition of blight in Wisconsin's TIF statute has created difficulties that reflect the larger problem nationwide—that is, the broad definition of blight in the TIF statute has allowed broad interpretations of the term by local legislative bodies. These interpretations have rendered blight useless as a means of distinguishing between worthy and unworthy TIF projects and have created controversy where none need exist.

Section 66.1105(2)(a) of the Wisconsin Statutes defines “[b]lighted area” for purposes of the TIF law.⁹² The definition is divided into two parts, the first of which tracks the language in other states’ urban renewal statutes.⁹³ It describes an area with dilapidated, deteriorated or obsolete buildings, overcrowded conditions, or a combination of factors that are “detrimental to the public health, safety, morals or welfare.”⁹⁴ The statute fails to define what constitutes a dilapidated or deteriorated building, and also it fails to provide clear standards for what is detrimental to the public welfare. Still, this portion of the definition does not appear to have been controversial, perhaps because local

not be consistent with [TIF's] political and legal foundations” as a tool of blight elimination. Chapman, *supra* note 79, at 186. For a brief discussion of the genesis of TIF in early urban renewal laws, see Chapman, *supra* note 80, at 114-15.

92. WIS. STAT. § 66.1105(2)(a) (2003-2004).

93. See, e.g., *supra* notes 76-77.

94. § 66.1105(2)(a)1.a. The full text of this subdivision is as follows:

An area, including a slum area, in which the structures, buildings or improvements, which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of these factors is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime, and is detrimental to the public health, safety, morals or welfare.

Id.

legislative bodies have understood it to define the traditional idea of an urban slum.

The second part of the definition allows for even broader interpretations. It describes “[a]n area which is predominantly open and which . . . consists of land upon which buildings or structures have been demolished and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise, substantially impairs or arrests the sound growth of the community.”⁹⁵ The statute does not define what “predominantly open” means, nor does it give any further indication of what might impair the “sound growth of the community.”⁹⁶ The broadness of this definition has led one commentator to suggest that “a municipality could conceivably consider a golf course from which a tool shed has been removed to be ‘blighted.’”⁹⁷ At any rate, the legislature has left the door open for municipalities to define blight in any manner that suits their needs.

Such a high level of local discretion, coupled with a decided lack of oversight of municipal TIF decisions,⁹⁸ has engendered controversy over the broad definition of blight in Wisconsin’s TIF statute. For instance, one commentator has expressed concern that allowing such broad interpretations of blight has led to the development of 30,000 acres of open, non-urban land.⁹⁹ “The broad definition of ‘blighted,’” she notes, “has serious implications on the development of greenspace in Wisconsin.”¹⁰⁰ Criticism of the broad definition of blight has even come from within the Wisconsin Legislature itself. In 2001, State Senator Brian Burke described the Pabst Farms area as “anything-but-blighted,” and called the development a “poster child for what’s wrong with the [TIF] law.”¹⁰¹ “[T]he current TIF law,” he said, “is overly broad in defining eligible projects.”¹⁰² At the time, Senator Burke was proposing

95. § 66.1105(2)(a)1.b.

96. *Id.*

97. Knavel, *supra* note 11, at 120.

98. A 1989 Biennial Report on TIF from the Wisconsin Department of Development suggests this lack of oversight. WIS. DEP’T OF DEV., *supra* note 30, at 20. The report notes that “most TIF applications are not sufficiently detailed to accurately determine the extent to which proposed TIF projects will result in the elimination of blighted areas. Moreover, on-site visitations to assess this would be prohibitively expensive.” *Id.*

99. Knavel, *supra* note 11, at 121.

100. *Id.*

101. Rinard, *supra* note 14 (quoting State Senator Brian Burke (D-Milwaukee)).

102. *Id.*

to “remove the fuzzy language” from the TIF statute,¹⁰³ ostensibly to solve the problem of too-broad interpretations of blight. His bill never made it into law,¹⁰⁴ and the recent amendments failed to achieve its goals.¹⁰⁵

The projects enabled in Wisconsin municipalities by such broad interpretations of blight are not necessarily undeserving of public assistance. In fact, even those projects that have been the most controversial, such as the Pabst Farms development, are arguably worthy of the financing TIF provides.¹⁰⁶ The problem with broad definitions of blight is not that they allow non-urban projects to receive TIF funds—such projects are perfectly consistent with TIF’s evolved role as a tool of general economic development. Instead, the problem with broad definitions of blight is that they strain the bounds of credibility and cause controversy where none need exist. In truth, it really does not make much sense to describe an area like Pabst Farms as blighted. Doing so draws criticism, and rightfully so, from anyone who interprets blight according to its common meaning. To solve the definitional problem of “blight,” this Comment proposes removing the concept of blight from Wisconsin’s TIF statute entirely.¹⁰⁷

B. The “But-For” Test

1. The Problem in General

Many states implementing TIF require some sort of finding by the local legislative body that a proposed development project would not occur without the incentive TIF provides.¹⁰⁸ These but-for tests are meant to ensure that public funds are spent for the public purpose of encouraging development in blighted or underdeveloped areas that would otherwise remain a social and economic liability.¹⁰⁹ The problem with but-for tests, however, is that in practice they are not really tests at

103. *Id.*

104. S.B. 311, 2001 Leg., Reg. Sess. (Wis. 2001).

105. None of the 2003 amendments to TIF deal with the definition of “blighted area.” Furthermore, Senator Burke’s criticism of “fuzzy language” was hardly assuaged by the addition of the new “mixed-use development” category.

106. Certainly, the City of Oconomowoc viewed the Pabst Farms development as worthy of TIF. Daykin, *supra* note 12.

107. See discussion *infra* Part V.A.

108. Johnson & Kriz, *supra* note 6, at 39.

109. See *id.*

all. Many TIF statutes contain very weak requirements for passing the but-for test. The “low hurdles”¹¹⁰ set by the statutes lead to local legislative bodies having almost complete discretion to determine whether a given development would occur without TIF. Thus, the but-for test is rendered utterly ineffective as a check on municipal TIF decisions.

Statutory but-for tests, where they exist, often contain very fuzzy language. For example, in Minnesota municipalities are required to find that a proposed development would not occur in the “reasonably foreseeable future.”¹¹¹ No indication is given in the statute as to what constitutes “reasonably foreseeable.” The Texas TIF statute contains substantially identical language.¹¹² In Texas, a municipality can create a “reinvestment zone” if it “determines that development or redevelopment would not occur solely through private investment in the reasonably foreseeable future.”¹¹³ Other states, as one commentator has noted, “have required findings that come close to a but for test but lack some of the specificity” of states like Minnesota.¹¹⁴ Michigan merely requires municipalities to state reasons why the proposed development would not otherwise occur.¹¹⁵

The weak nature of these statutory but-for tests opens the door for almost complete discretion at the local level. The Minnesota statute itself allows the but-for decision to be subject to “the opinion of the municipality.”¹¹⁶ One commentator has observed that “[a]s a rule, the ‘but for’ test is a purely local determination.”¹¹⁷ Further exacerbating this problem is the fact that most local determinations of the but-for

110. *Id.*

111. *Id.* (quoting MINN. STAT. § 469.175 (3)(b)(2)(i) (1996)). The current Minnesota law is largely unchanged. *See* MINN. STAT. ANN. § 469.175(3)(b)(2)(i) (West 2005). The entire pertinent part of the statute reads as follows:

Before or at the time of approval of the tax increment financing plan, the municipality shall make the following findings, and shall set forth in writing the reasons and supporting facts for each determination: . . . that, in the opinion of the municipality: (i) the proposed development or redevelopment would not reasonably be expected to occur solely through private investment within the reasonably foreseeable future . . .

Id.

112. TEX. TAX CODE ANN. § 311.003(a) (Vernon 2005).

113. *Id.*

114. Johnson & Kriz, *supra* note 6, at 39.

115. *Id.*

116. MINN. STAT ANN. § 469.175(3)(b)(2) (West 2005).

117. Gordon, *supra* note 74, at 324.

criteria are “calculated by the very interests vested in the proposed TIF deal.”¹¹⁸ All that a private developer needs to do, it has been noted, is claim that TIF is a necessary component of its decision, and the but-for test is passed.¹¹⁹

The real problem with but-for tests, then, is that they are largely illusory. The weakness of statutory tests and the resulting level of discretion allowed local legislative bodies to undercut whatever effect the test is supposed to have as a check on TIF use.

2. The Wisconsin Experience

As with the problem of defining blight, Wisconsin’s problems with the but-for test in its TIF law reflect the larger problems that face other jurisdictions. Weak statutory language, local control, and judicial deference to local legislatures have combined to render the but-for test utterly ineffective.

Prior to the 2003 amendments,¹²⁰ the but-for test in Wisconsin’s TIF law was defined solely by one statutory provision. The statute merely required that a joint review board assessing a TIF proposal “base its decision to approve or deny [the] proposal on . . . [w]hether the development expected in the tax incremental district would occur without the use of tax incremental financing.”¹²¹ There was no requirement that the joint review board conduct any studies, quantify its findings or, indeed, even make any findings. In addition, only the joint review board was required to make the but-for determination; the local legislative body was not at any point required to make a similar statement. Combined, these weak statutory provisions created a low barrier for passing the but-for test.

The statutory test’s weakness has resulted in almost total local legislative control in determining whether a given development would occur without TIF. Few developments, perhaps, exemplify this better than the Pabst Farms project in Oconomowoc.¹²² Some have pointed out that the area was highly desirable to developers and did not need the

118. *Id.*

119. *Id.*

120. Act of Feb. 20, 2004, No. 126, 2003 Wis. Sess. Laws 642. The change to the but-for test in these amendments is discussed in *infra* Part IV.

121. WIS. STAT. § 66.1105(4m)(c)1.a. (2003–2004). The 2003 amendments did not alter this provision.

122. See *supra* notes 12, 14.

financing TIF provides. For example, one critic of the development was quoted as saying that Pabst Farms was “the last undeveloped interstate intersection in Waukesha County. It’s highly valuable real estate. It would have developed anyway without the public subsidy.”¹²³ Indeed, it is arguably a stretch to claim that no development would have occurred on such pristine, underdeveloped land close to Waukesha and the Milwaukee metropolitan area. However, it is equally arguable that the particular development proposed under the Pabst Farms TIF plan would not have occurred without the incentive TIF provides. Under the then-existing statutory scheme, the joint review board could have determined that the exact, specific development proposed in the project plan would not occur without TIF and still have been in compliance with the law.¹²⁴ Thus, because the statute did not require consideration of whether *no* development would occur, but merely the *expected* development,¹²⁵ the but-for test left almost complete control over TIF in local hands.

Finally, judicial deference to local legislative decisions destroyed whatever effectiveness remained in the but-for test. In the summer of 1999, the City of Baraboo and its joint review board approved a TIF district in which the Wal-Mart Corporation was planning to build a super-store.¹²⁶ A local man, Bartlett Olson, sued to enjoin the creation of the TIF district on, among others, the ground that the joint review board violated the statute because “the TIF District included property owned by Wal-Mart Corporation that would have been developed regardless of its inclusion in the TIF District.”¹²⁷ Olson’s contention is supported by a letter written by a Wal-Mart representative that “clearly indicated that Wal-Mart would build the new store with or without the TIF benefits.”¹²⁸ The court, however, in finding against Olson held that,

123. Rinard, *supra* note 14 (quoting Dave Cieslewicz, then-executive director of 1000 Friends of Wisconsin).

124. Indeed, it appears that this is exactly how the but-for test works in practice. When asked whether the but-for test was understood to require that no development would occur in a given area, or rather that the particular, proposed development would not occur, Mayor Dave Cieslewicz of Madison indicated the latter. Interview with Dave Cieslewicz, Mayor of Madison, in Madison, Wis. (Aug. 10, 2005). He pointed to a grocery store development in a wealthy Madison neighborhood that was assisted by TIF. He was not prepared to say that no development would ever occur there. *Id.* However, without TIF the area could have taken much longer to develop, and in the meantime it would have been vacant. *Id.*

125. § 66.1105(4m)(c)1.a.

126. See 1000 FRIENDS OF WISCONSIN, *supra* note 13.

127. State *ex rel.* Olson v. City of Baraboo Joint Review Bd., 643 N.W.2d 796, 799 (Wis. Ct. App. 2002).

128. Knavel, *supra* note 11, at 128.

even assuming that Wal-Mart would have developed anyway, “it does not follow that the Joint Review Board is barred from approving a TIF District if there is any land within the district that would have otherwise been developed.”¹²⁹ Furthermore, the court found that “Olson [had] not produced any evidence that would show that the property in the TIF District not owned by Wal-Mart would have been developed without the district.”¹³⁰ The court’s decision in this case demonstrates the level of deference courts are willing to afford local legislative decisions. This deference provides yet another barrier to the effectiveness of the but-for test.

The two above elements, the definition of blight and the statutory but-for test, are thus problematic. Blight is so broadly defined as to render it a useless distinction. Furthermore, before the recent amendments the but-for test was so weak as to be utterly ineffective. These two elements also engender controversy where there need not be any. Tortured designations of blight strain credibility and provoke criticism. The ineffectiveness of the but-for test invites skepticism of assertions that no development would occur without TIF. These were among the problems facing the legislature when it passed its amendments to Wisconsin’s TIF law.

IV. ASSESSMENT OF RECENT AMENDMENTS TO TIF¹³¹

In 2003, the Wisconsin Legislature, with the recommendations of Governor Thompson’s Working Group in hand,¹³² had perhaps its best

129. *State ex rel. Olson*, 643 N.W.2d at 804.

130. *Id.*

131. In all, the Wisconsin Legislature in the 2003 regular legislative session amended or altered TIF under eight different acts. Act of July 24, 2003, No. 34, 2003 Wis. Sess. Laws 462; Act of August 11, 2003, No. 46, 2003 Wis. Sess. Laws 491; Act of Feb. 20, 2004, No. 126, 2003 Wis. Sess. Laws 642; Act of Feb. 20, 2004, No. 127, 2003 Wis. Sess. Laws 648; Act of April 7, 2004, No. 194, 2003 Wis. Sess. Laws 772; Act of April 13, 2004, No. 231, 2003 Wis. Sess. Laws 848; Act of May 27, 2004, No. 320, 2003 Wis. Sess. Laws 1044; Act of May 27, 2004, No. 326, 2003 Wis. Sess. Laws 1069. These amendments ran from small technical changes to major additions. *Id.* For example, Act 320, section 24 merely renumbered section 66.1105(7)(as) to be 66.1105(7)(at). Act of May 27, 2004, No. 320, § 24, 2003 Wis. Sess. Laws 1044, 1048. At the same time, Act 231 created a more limited TIF program for towns, which was a fairly major addition. Act of April 13, 2004, No. 231, 2003 Wis. Sess. Laws 848.

132. See WIS. DEPT OF REVENUE, *supra* note 26. In the preamble to Act 126, the legislature stated that the Act related to, among other things, “making technical and policy changes in the tax incremental financing program based in part on the recommendations of the governor’s December 2000 working group on tax incremental finance.” Act of Feb. 20, 2004, No. 126, 2003 Wis. Sess. Laws 642.

opportunity in years to correct the problems that had plagued Wisconsin's TIF law.¹³³ It also had the opportunity to abandon the piecemeal and incremental approach it had previously taken and to adopt a bold new vision of TIF.¹³⁴ Unfortunately, despite the hopes of Governor Thompson, the legislature failed on both accounts. The amendments passed do little or nothing to solve the problems of blight and but-for. Also, they provide only tacit acceptance of the evolving purpose of TIF instead of a forceful recognition of it.¹³⁵ The problems facing Wisconsin's TIF law need comprehensive solutions, but the legislature's continued adherence to its piecemeal approach has not provided them.

First, the legislature addressed the problems caused by its broad definition of blight by sidestepping the definition entirely. Although broad interpretations of blight at the local level had caused considerable controversy,¹³⁶ the legislature did not attempt to refine or otherwise restrict the definition of "blighted area."¹³⁷ Instead, whether this was intentional or not, the legislature gave municipalities the opportunity to avoid "blight" by adding the "mixed-use development"¹³⁸ category of eligible TIF projects. In doing so, the legislature provided a safer haven

133. In 1991, the Legislative Audit Bureau completed its second of two substantive evaluations. Compare WIS. LEGIS. AUDIT BUREAU, AN EVALUATION OF TAX INCREMENTAL FINANCING (1991) with WIS. LEGIS. AUDIT BUREAU, REP. ON THE TAX INCREMENTAL FINANCING LAW: SECTION 66.46 WISCONSIN STATUTES (1981). 1991 was the last time the legislature had an independent audit of TIF upon which it could base amendments.

134. In all, the Governor's Working Group on TIF made thirty-three proposals for "technical" and "policy" changes. WIS. DEP'T OF REVENUE, *supra* note 26, at 3-27. Taken together, these proposals could have been converted into a comprehensive overhaul of TIF. Unfortunately, they were not.

135. To be fair, the Wisconsin Legislature did take one bold move in this area—it passed TIF for towns. Act of April 13, 2004, No. 231, 2003 Wis. Sess. Laws 848. Prior to this, only Wisconsin's cities and villages were permitted to use TIF. In a 1975 letter accompanying his veto of a bill applying TIF to towns, Governor Lucey observed that "[i]f, as we gain experience with tax increment financing, it becomes apparent that this new development tool would serve a useful purpose in rural areas, then it can be expanded to include towns." Letter from Patrick J. Lucey, Governor, to the Wisconsin Senate 2 (Nov. 13, 1975) (on file with the Wisconsin Legislative Reference Bureau in the drafting records for Act of Nov. 20, 1975, ch. 105, 1975 Wis. Sess. Laws 464). With Act 231, the legislature did exactly that. Unfortunately, in doing so the legislature only compounded the problem. Because it failed to address the larger problems of blight and but-for, the legislature assured that these problems would now plague towns as well.

136. See, e.g., *supra* note 99 and accompanying text.

137. Compare WIS. STAT. § 66.1105(2)(a) (2003–2004) with WIS. STAT. § 66.1105(2)(a) (2001–2002).

138. Act of Feb. 20, 2004, No. 126, §§ 1, 9, 2003 Wis. Sess. Laws 642, 642-43.

for municipalities that do not wish to pound the square peg of suburban development into the round hole of blight. While perhaps helpful to some degree, this incremental alteration fails to address the root of the problem.

The addition of the “mixed-use” category is inadequate to solve the problem of defining blight—and in fact compounds it—because it still leaves no principled distinctions to be made between those projects worthy of TIF and those not. The statute defines “[m]ixed-use development” as that which “contains a combination of industrial, commercial, or residential uses.”¹³⁹ To create a TIF district, the local legislative body must adopt a resolution that, among other things, contains findings that at least fifty percent of the proposed TIF district qualifies as one of a set of property types, including “suitable for mixed-use development.”¹⁴⁰ One has a difficult time imagining what kind of property would not be suitable for a combination of industrial, commercial, or residential uses. After all, are not all cities made up of such a combination of uses? Taking this new designation to its logical conclusion, a local legislative body could determine that just about any property is worthy of TIF. This begs the question, then, of whether distinctions like “suitable for mixed-use development,” or indeed, “blighted,” are needed at all.¹⁴¹

Second, unlike its approach to the definition of blight, the legislature in 2003 did confront head-on the but-for test. Under the amended TIF law, a joint review board, as a condition of approving a TIF proposal, is now required to make a “positive assertion that, in its judgment, the development described in the [TIF project plan] would not occur without the creation of a [TIF] district.”¹⁴² Bearing in mind the essential purpose of a but-for test—that is, to make sure that scarce public resources are not committed where there is no need for them—the legislature’s attempt at strengthening the but-for test is perhaps admirable. However, in practice the supposedly strengthened test does not change anything and, in fact, only compounds the problem.

The new but-for test requires a joint review board to use its judgment when making its positive assertion that the development

139. WIS. STAT. § 66.1105(2)(cm) (2003–2004). Under the statutory definition, no more than thirty-five percent of the lands proposed for development can contain newly-platted residential area. *Id.*

140. § 66.1105(4)(gm)4.a.

141. See discussion *infra* Part V.A.1.

142. § 66.1105(4m)(b)2. This amendment was a direct application of a recommendation of the Governor’s Working Group on TIF. WIS. DEP’T OF REVENUE, *supra* note 26, at 19.

outlined in the TIF project plan would not occur without TIF.¹⁴³ Under the old but-for test, the joint review board had to consider “[w]hether the development expected in the tax incremental district would occur without the use of [TIF].”¹⁴⁴ What was implicit under the old test (i.e. that “the development expected” *could* mean the development in the TIF plan) is now made explicit. The joint review board’s positive assertion, again made with its own judgment, now merely confirms that the development in the TIF project plan would not occur without TIF. Given the number of actors involved, the lengthy process for creating a TIF plan, and the compromises that are sure to arise out of such a collaborative process, it seems unlikely that the exact development proposed in a given project plan would have occurred had the developer been acting alone. If joint review boards are in favor of a proposed TIF project (and given the number of TIF districts that have been created, it seems they often are), then their “judgment” will nearly always be in favor of the TIF project, and the but-for test will be toothless, notwithstanding any “positive assertion.”¹⁴⁵

Finally, as Pabst Farms (a development in a very arguably nonblighted area) shows, the purpose of TIF in Wisconsin has evolved into something much more comprehensive than a mere tool of blight elimination.¹⁴⁶ The 2003 amendments addressed this evolution in two ways: (1) by adding the “mixed-use development” category,¹⁴⁷ and (2) providing a TIF program for towns.¹⁴⁸ As noted above, allowing TIF to be used for “mixed-use development” provides a safe haven for municipalities that do not wish to torture the definition of blight to justify a TIF project. The new category also anticipates the kind of general economic development opportunity for other municipalities that Pabst Farms provided the City of Oconomowoc. Additionally, by adding towns to the list of entities that can use TIF, the legislature displayed a willingness to allow TIF as a means of general economic development.¹⁴⁹

143. § 66.1105(4m)(b)2.

144. § 66.1105(4m)(c)1.a.

145. § 66.1105(4m)(b)2.

146. In fact, it is arguable that Wisconsin’s TIF law was not even originally intended to be limited to blighted urban areas. See discussion *infra* Part V.A.2.

147. Act of Feb. 20, 2004, No. 126, §§ 1, 9, 2003 Wis. Sess. Laws 642, 642-43.

148. Act of April 13, 2004, No. 231, 2003 Wis. Sess. Laws 848. See also WIS. STAT. § 60.85 (2003–2004).

149. See WIS. STAT. § 60.85(2)(b) (2003). This section provides that towns may create TIF districts for agricultural projects, forestry projects, manufacturing projects, tourism projects, residential projects associated with the previous four types of projects, and retail

Unfortunately, instead of boldly embracing a new vision for TIF, in addressing the law's evolving purpose the legislature opted to continue its customary piecemeal approach. First, the addition of the "mixed-use" category acts as a mere tacit acceptance of the law's evolving uses. Concerned citizens, whether for or against the law, are forced to read between the lines to divine legislative intent for TIF, and their debates can only be fueled by the resulting uncertainty. Furthermore, the adoption of TIF for towns, although arguably a bold move in and of itself, is also an incremental step towards recognizing TIF's evolved purpose. By explicitly adopting a TIF program for towns that is aimed at general economic development,¹⁵⁰ while tacitly embracing such a view for the main TIF law, the legislature has merely begged the question of what, exactly, is its overall vision for TIF. The legitimacy of the evolving uses of TIF depends greatly upon a forceful legislative recognition of those uses instead of indirect endorsement.

In summary, the 2003 amendments to TIF afforded the legislature an opportunity to reflect upon, and address boldly, the problems facing the law. Unfortunately, the legislature took baby steps where great strides were needed.

V. A MODEST PROPOSAL

Jonathan Swift, the great eighteenth century satirist, once wrote that the twin evils of overpopulation and poverty in Ireland could be eliminated if the poor would sell their babies to the wealthy to be eaten.¹⁵¹ To put Swift's basic premise another way, solving a truly intractable problem requires drastic measures. The definition of blight and the ineffective but-for test in Wisconsin's TIF statute present an intractable problem that requires a solution more drastic than the legislature's usual piecemeal approach. Its incremental, case-by-case amendments are insufficient to deal with the problematic provisions of blight and but-for and with the evolving nature of TIF. With the above

development limited to the sale of products created by the first three. All of these types of projects are defined in the statute, and all appear to be aimed at economic development. § 60.85(1).

150. *See id.*

151. JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF THE POOR FROM BEING A BURTHEN TO THEIR PARENTS, OR THE COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLIC (1729), reprinted in JONATHAN SWIFT 492 (Angus Ross & David Woolley eds., Oxford Univ. Press 1984).

problems in mind, this Comment presents its modest proposal.¹⁵²

A. Eliminate Blight

1. The Proposal

The legislature should eliminate all references to, and considerations of, blight from the statute.¹⁵³ At the same time, the legislature should eliminate all of the other supposed justifications for TIF projects, including “suitable for mixed-use development.”¹⁵⁴ Even before the 2003 amendments that added the “mixed-use” category,¹⁵⁵ the definition of blight was so broad as to make any designation of blight essentially arbitrary. Now, with the addition of “mixed-use,” a designation without any standards beyond suitability for the types of development that occur in all cities anyway (i.e. commercial, industrial, residential), there is truly no principled basis, on the face of the statute, to distinguish between worthy and unworthy TIF projects. Indeed, the “mixed-use” development category is broad enough to sweep in almost any conceivable type of TIF project. This, then, begs the question of whether such distinctions are needed at all.

Under the current system, at least as applied, municipalities have enough discretion to decide to adopt a TIF project first, and only then find a justification under the broad terms of the statute. It would be better to have a system that embraces a municipality’s ability to decide for itself, through the process of public comment and legislative debate, what types of projects it wants to encourage. Forcing municipalities to then make justifications, which are essentially unreviewable anyway,¹⁵⁶

152. Another commentator has made a similar proposal, though certainly not an identical one, in Missouri. Josh Reinart, Comment, *Tax Increment Financing in Missouri: Is It Time for Blight and But-For to Go?*, 45 ST. LOUIS U. L.J. 1019 (2001). Mr. Reinart proposes dropping blight and but-for from Missouri’s statute, although he does not really explore the implications of doing so. *Id.* at 1051-52. Alternatively, he suggests replacing the blight and but-for elements with a list of justifications that municipalities can choose from when implementing TIF. *Id.* at 1052. As will become evident, this Comment’s approach is somewhat different.

153. The main references to blight in the statute are the definition of “blighted area” under section 66.1105(2)(a) of the Wisconsin Statutes, and the requirement that the local legislative body pass a resolution that finds fifty percent of the proposed project area to be blighted (or one of the other designations) under section 66.1105(4)(gm)4.a.

154. § 66.1105(4)(gm)4.a. Again, the other designations are property “in need of rehabilitation or conservation work” and “suitable for industrial sites.”

155. § 66.1105(4)(gm)4.b.

156. As the Baraboo case shows, judges are likely to defer to legislative discretion in TIF cases. *See, e.g., State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 643 N.W.2d 796 (Wis.

serves no purpose. Keeping blight, or indeed any of the designations, in the statute serves only to impose an artificial stricture on TIF that leads to arbitrary distinctions. It is time to eliminate blight.

2. Potential Criticisms

Eliminating the concept of blight from Wisconsin's TIF statute will no doubt create controversies of its own. After all, some commentators see blight elimination (particularly the urban variety) as the original intent of the drafters of TIF.¹⁵⁷ While they might agree that TIF has become something other than a tool of blight elimination, they would likely advocate a solution that makes the definition of blight, and the requirements of finding it, even stricter.¹⁵⁸

There are two main problems with these expected criticisms. First, the original intent of the drafters of Wisconsin's TIF law is not so easily characterized as advocating a mere tool of blight elimination. True, alleviating blighted areas and providing a solution for urban renewal were among the main original justifications for the law.¹⁵⁹ Such goals fit within the general purpose of TIF as it was enacted around the country at that time.¹⁶⁰ However, these were not the only goals of the drafters of Wisconsin's TIF law. The first stated purpose of the TIF law was to cure "inequities and disincentives" in the then-existing system of property tax allocation between tax levying authorities.¹⁶¹ Further, promoting industry was among the initial allowable uses of TIF, and it is thus

Ct. App. 2002). Usurping the role of legislatures also brings up separation of powers concerns. For these reasons, local TIF designations of blight (or any of the other categories) are essentially unreviewable.

157. *E.g.*, Rinard, *supra* note 14 (citing State Senator Brian Burke as saying, "[t]he original intent of the state's [TIF] law was to bring redevelopment to blighted urban areas").

158. *See* S.B. 311, 2001 Leg., Reg. Sess. (Wis. 2001) (limiting the uses of TIF to traditionally blighted areas).

159. The second stated purpose of the TIF law was to provide municipalities with the power to finance projects to achieve the "laudable objectives" of other statutes aimed at urban and industrial renewal and redevelopment. Act of Nov. 20, 1975, ch. 105, § 1(2), 1975 Wis. Sess. Laws 464, 465. This section lists the following statutes as having those objectives that TIF was intended to help achieve: WIS. STAT. § 66.405-25 (1975) ("Urban Redevelopment Law"); § 66.43 ("Blighted Area Law"); § 66.431 ("Blight Elimination and Slum Clearance Act"); § 66.435 ("Urban Renewal Act"); and § 66.52 ("Promotion of Industry").

160. *See generally* Klacik & Nunn, *supra* note 5.

161. Act of Nov. 20, 1975, ch. 105 § 1(1), 1975 Wis. Sess. Laws 464, 465. The legislature found that Wisconsin's municipalities were putting up all the money to rebuild infrastructure so as to increase property values from which other taxing authorities would benefit. *Id.*

“evident that the use of TIF was expected to include development as well as redevelopment.”¹⁶² In any event, one commentator has noted that “it appears that many legislators did not envision a strictly urban use of TIF.”¹⁶³

The second problem with the expected criticisms is that, whatever the virtues of limiting TIF to traditionally blighted areas, the legislature has not chosen to go that route.¹⁶⁴ The evolution of TIF displays a steady broadening of the law to include all manner of economic development projects. The continued inclusion of an increasingly arbitrary concept of blight in the statute requires municipalities to engage in a kind of cognitive dissonance and engenders controversy where none need exist.

B. Abolish But-For

1. The Proposal

The legislature should abolish the but-for test entirely. Weak statutory language, nearly limitless local discretion, and judicial deference to the but-for decisions of local legislative bodies have combined to make the but-for test an ineffective and largely illusory stricture. There is a basic and intractable disconnect between two reasonable interpretations of the but-for test. The test could either mean that *no* development would occur without TIF or that the *exact* development proposed in the TIF project plan would not occur. The continued existence of the but-for test invites criticism whenever those in opposition to a TIF project see the test as the former, and the people making the decisions see it as the latter. The bottom line is that TIF projects are put in motion to serve larger economic and development interests, and the effectiveness of the but-for test is lost in the midst of these overarching concerns. It is time to abolish but-for.

2. Potential Criticisms

Critics of abolishing the but-for test would likely point out that doing

162. See WIS. LEGIS. AUDIT BUREAU, *supra* note 133, at 19.

163. *Id.* at 20.

164. In fact, when a bill was proposed to limit TIF to blighted areas, it failed to pass. S.B. 311, 2001 Leg., Reg. Sess. (Wis. 2001).

so would remove one of the primary justifications of TIF. After all, if development would occur in a given area without TIF, then a public subsidy is not needed and the larger public purpose is not served.¹⁶⁵ Admittedly, this concern is not lightly set aside. The response, some might say, is to make the but-for test even stronger, not to get rid of it. However, as the Governor's Working Group on TIF acknowledged, there are significant "difficulties of making such a definitive statement [about whether development would occur anyway] in a complex world of many actors and changing circumstances."¹⁶⁶ The group was concerned about making the but-for test "impossibly all-encompassing."¹⁶⁷ The bottom line is that a stronger test will do nothing if the final decision is not effectively reviewable due to practical or separation of powers concerns. There are other ways to ensure that the public purpose is served without resorting to ineffective and illusory tests like but-for. This requires, however, a comprehensive review and new vision for TIF's purpose.

C. Put New Purpose in Wisconsin's TIF Law

1. The Proposal

The legislature should develop and embrace a new purpose for Wisconsin's TIF law beyond blight elimination, and even beyond mere general economic development. If one sees the fundamental purpose of TIF as providing an incentive for private development in areas in which it would not otherwise occur, then the view of TIF as a tool of general economic development is called into question. Under the "incentive" view of TIF's purpose, municipalities are not justified in using TIF merely because it promotes general economic development if such development would have occurred anyway.¹⁶⁸ Undoubtedly, blight elimination and general economic development are worthy and worthwhile concerns. However, there is a new purpose for TIF that could serve these interests while at the same time provide the law with a

165. Johnson & Kriz, *supra* note 6, at 39.

166. WIS. DEP'T OF REVENUE, *supra* note 26, at 19.

167. *Id.*

168. For example, it is a stretch to assert that Pabst Farms in Oconomowoc would not have been developed and added to the local tax base without TIF. See Rinard, *supra* note 14 (quoting Dave Cieslewicz that Pabst Farms was "highly valuable real estate [that] would have developed anyway without the public subsidy").

more solid justification and conceptual foundation.

The purpose of TIF should be to promote and provide for the ability of municipalities to control the pace and direction of their development. There is no serious question that Pabst Farms, a pristine stretch of land in an area close to a major metropolitan region, would not have developed without TIF. However, by accepting proposals from developers and adopting a TIF plan, Oconomowoc was able to exercise greater control over what would eventually develop than would have been possible under traditional Euclidean zoning.¹⁶⁹ Furthermore, developers are more likely to agree to specific municipal development desires if the municipality is providing an incentive by paying for the costs of building necessary infrastructure. Because municipalities are restricted from providing property tax breaks as an incentive due to the uniformity requirement of the Wisconsin Constitution,¹⁷⁰ TIF remains one of the few tools a municipality can use to control the pace and direction of its development.

The other advantage of this new purpose is that it does not preclude traditional blight elimination projects that TIF has facilitated in the past. Surely, it is in the best interests of many municipalities to remove blight and revitalize urban areas, and casting TIF as a tool of control over the pace and direction of development will allow for such projects. This new purpose for TIF, then, will provide for the beneficial projects already allowed but also allow greater municipal control over the pace and direction of development.

2. Potential Criticisms

There are criticisms of this new purpose that one can anticipate. Some may argue that allowing municipalities to use TIF whenever and wherever they see fit will lead to rampant, unfettered development, will deprive overlying taxing authorities the increased tax revenue they would otherwise receive from such development, and will hasten the

169. One commentator has noted that “[a]s with any system of centralized economic planning, conventional zoning’s rigid provisions do not make sufficient allowance for flexibility in dealing with local needs.” Frederick W. Acker, Note, *Performance Zoning*, 67 NOTRE DAME L. REV. 363, 363 (1991).

170. *Sigma Tau Gamma Fraternity v. City of Menomonie*, 288 N.W.2d 85, 94 (Wis. 1980) (“[T]he constitutional requirement of uniformity [can]not be circumvented by a system of tax credits offered to a certain class of property owners for the purpose of offsetting increased property taxes.” (citing *State ex rel. La Follette v. Torphy*, 270 N.W.2d 187 (Wis. 1978))).

destruction of greenspace and contribute to undesirable urban sprawl.¹⁷¹

As to the danger of unfettered use, there are already controls in place to curb this in the form of a cap on the maximum amount of property that can be in TIF districts at any given time.¹⁷² The Department of Revenue is already required to refuse certification of a TIF district if a municipality exceeds the cap,¹⁷³ and, if necessary, additional funding could be provided for the department to make these determinations. Furthermore, the cap is a bright-line rule that is much easier to administer than a test for whether a given TIF project meets some arbitrary criteria.

As to the deprivation of property tax revenues to the overlying taxing authorities, there are ways to deal with this as well. First, some states' TIF statutes include provisions that return excess increments (i.e. tax increments beyond what is needed to pay immediate project costs) to the overlying jurisdictions.¹⁷⁴ Something like this could be implemented in Wisconsin. Second, some states require that the overlying taxing authorities approve of any TIF project before it is passed.¹⁷⁵ The advantages of increased legitimacy for TIF projects and a more deliberative allocation of TIF resources would outweigh the disadvantages of the increased administrative costs of this approach.

Finally, as to the danger this broad purpose of TIF poses to greenspace, other solutions are possible without unduly hampering TIF's value as an economic development tool. For instance, some commentators in other states have proposed the use of a so-called "Super TIF" to provide increased incentives for urban renewal than are available for other types of TIF districts.¹⁷⁶ In practice, this would require a two-tiered system of tax increment allocation: "normal" TIF districts could apply only a fraction of the tax increment to paying off project costs, and "Super TIF" districts (allowed only in urban areas) could apply the full increment to such costs.¹⁷⁷ While there are no doubt other potential incentives, it is evident that even under the broader purpose proposed for TIF, the law can be a carrot to encourage urban renewal rather than a stick to try and control the development of

171. See, e.g., Knavel, *supra* note 11, at 127.

172. WIS. STAT. § 66.1105(4)(gm)4.c. (2003–2004).

173. § 66.1105(5)(d).

174. Johnson & Kriz, *supra* note 6, at 48.

175. *Id.* at 42–43.

176. Reinart, *supra* note 152, at 1052–53.

177. *Id.* at 1053 n.252.

greenspace.

VI. CONCLUSION

Thirty years ago, in 1975, the Wisconsin Legislature embarked upon a worthwhile endeavor; that is, to give municipalities the tools to fund needed urban renewal and economic development projects and to spread the cost of such projects amongst all the taxing entities that benefit from them. As anticipated, TIF has become a positive force for change in Wisconsin and has helped the state's municipalities become more desirable places to live and work. Over the years, the law has been put to new, perhaps unanticipated uses, and municipalities have been instrumental in that evolution. At the same time, the law has not been without its problems. The legislative response to the evolution of TIF and its approach to the problems that have arisen have been piecemeal. In 2003, the legislature had a great opportunity to provide comprehensive solutions to the problems facing TIF (particularly those of blight and but-for) and to embrace a new vision for TIF that matched with the reality of its evolved purpose. Instead, the legislature continued with an incremental approach that neither solved the problems nor clarified the purpose of TIF. Wisconsin's Tax Increment Law can be a powerful vehicle for economic development and for improving the state's municipalities. Adopting the modest proposal set forth in this Comment will help the law to reach its full potential.

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