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PYRRHIC VICTORY: TAX INCREMENT FINANCING, “BUT FOR,” AND DEVELOPER CAPTURE IN THE DALLAS ARENA DISTRICT

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“When there’s no basketball or hockey, it can seem like a ghost town. One broker says you can scream, and no one will hear you.”¹

I. INTRODUCTION

Typically understood in the infrastructure finance context, public-private partnerships (PPPs) are a conceptual catch-all for structures where the risk and benefit of a public project is shared with a private-sector partner.² One particularly well-trodden variety of PPP in the United States is tax increment financing (TIF), which has been used at some point by every state, except Arizona,³ and has become increasingly common in the professional sports facility context. TIF is a form of local economic development partnership, historically intended to alleviate blight and to spur urban redevelopment that “but-for” the TIF subsidy would not have happened as quickly. From these roots, TIF has expanded to being a one-stop development solution, due in large part to its saleability as self-financing.

This Article broadly evaluates the Dallas Sports Arena TIF District (SATD), which was created to reimburse public improvements surrounding the American Airlines Center (AAC), as well as the Victory Park real estate development that has been constructed within the SATD since the arena’s 2001 opening. Specifically, the SATD is viewed through two common TIF

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1. Mitchell Schnurman, *Why Victory Park Was a Bust*, D MAG, Jan.–Feb. 2010, <https://www.dmagazine.com/publications/d-ceo/2010/january-february/why-victory-park-was-a-bust/>.

2. See EMANUEL S. SAVAS, *PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS* (2d ed. 2000).

3. Kenneth A. Kriz, *The Use of Tax Increment Financing in Nebraska*, PLATTE INST., POL’Y STUDY, 2 (Jul. 2013), https://www.platteinstitute.org/Library/docLib/20130710_my_Platte-TIF.pdf.

criticisms that the literature has identified as especially valid: that many TIF projects lack a legitimate “but-for” element and that sub-optimal transparency allows projects to escape sufficient scrutiny.

After a conceptual overview of TIF, TIF in Texas, and local Dallas TIF policy, the SATD story is set out prior to an analysis of results through these two critical lenses. This Article argues that the weak legal standard of “but-for” in Texas has allowed TIF to subsidize SATD projects that would have gone ahead in much the same way absent TIF. Further, the transparency issue has manifested itself in a form of regulatory capture where the developer parties have garnered the spoils at the cost of the greater polity through timely leveraging of bargaining power, contractual structure, and alignment of interests with the local economic development agency. Ironically, the built-in failure of the framework emerging from this developer capture has provided the SATD its most legitimate claim to “but-for” in resolving a completely manufactured brake on development and area success.

II. TAX INCREMENT FINANCING

A. An Overview of TIF

At its most basic, TIF involves designating a geographic area within a jurisdiction where a revenue baseline is established.⁴ Revenue below the baseline will continue to flow as before, but new “incremental” revenues are retained and spent within the geographic zone.⁵ TIF districts are usually term limited by statute and after a district sunsets, revenues will revert to the general fund.⁶ Common targets for captured increment include streetscape and public realm improvements, as well as infrastructure and site preparation.⁷

As incremental revenue will often take years to materialize, many TIF projects will borrow against anticipated revenues to speed up the redevelopment process. For those jurisdictions either adverse to or statutorily barred from issuing TIF-backed debt, a pay-as-you-go approach will be taken where TIF funds are allocated to reimburse up-front developer investments.⁸ The benefit to the developer-financed variant of this second form is that the

4. Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 66, 67 (2010).

5. *Id.*

6. Nicholas Greifer, *An Elected Official's Guide to Tax Increment Financing*, GOVERNMENT FINANCE OFFICERS ASSOCIATION OF THE UNITED STATES AND CANADA, 18 (2005), <http://www.gfoa.org/sites/default/files/EOGTIF.pdf>.

7. *Id.* at 9.

8. *Id.* at 33.

impact is received in the early life of the TIF zone, and is ostensibly useful in the pursuit of further investment within the zone, while the risk of underperformance is shifted to the private developer.⁹ This developer-financed pay-as-you-go form of TIF spending is used in the Dallas SATD. As we will later see, the benefits of this model are complicated by the “but-for” issue—if a developer can finance the TIF improvements out of pocket, why is TIF necessary?

The sprawling TIF literature has been well subcategorized by Greenbaum and Landers under three headings respectively focused on property valuation, economic development, and fiscal outcomes.¹⁰ With property valuation and economic development, the literature is mixed. Anderson,¹¹ Man and Rosentraub,¹² Smith,¹³ and Carroll¹⁴ all indicate a positive relationship between TIF use and property valuation, although a similarly persuasive roster of works argue that TIF has had limited or more mixed results.¹⁵ Likewise, there is contrary evidence on whether TIF-using cities grow more quickly.¹⁶ The fiscal literature highlights the threat of TIF being more effective in capturing revenue from overlapping jurisdictions (such as school boards) than creating new increment,¹⁷ the dividing a city into “haves and have-nots,”¹⁸ as

9. *Id.*

10. See Robert T. Greenbaum & Jim Landers, *The Tiff Over TIF: A Review of the Literature Examining the Effectiveness of the Tax Increment Financing*, 67 NAT'L TAX J. 655 (2014).

11. See John E. Anderson, *Tax Increment Financing: Municipal Adoption and Growth*, 43 NAT'L TAX J. 155 (1990).

12. See Joyce Y. Man & Mark S. Rosentraub, *Tax Increment Financing: Municipal Adoption and Effects on Property Value Growth*, 26 PUB. FIN. REV. 523 (1998).

13. See Brent C. Smith, *The Impact of Tax Increment Finance Districts on Localized Real Estate: Evidence from Chicago's Multifamily Markets*, 15 J HOUSING ECON. 21 (2006).

14. See Deborah A. Carroll, *Tax Increment Financing and Property Value: An Examination of Business Property Using Panel Data*, 43 URB. AFF. REV. 520 (2004).

15. E.g., Kevin Kane & Rachel Weber, *Municipal Investment and Property Value Appreciation in Chicago's Tax Increment Financing Districts*, 36 J PLAN. EDUC. RES. 167 (2016); David F. Merriman et al., *Do Tax Increment Finance Districts Stimulate Growth in Real Estate Values?*, 39 REAL EST. ECON. 221, (2011); Rachel Weber et al., *Does Tax Increment Financing Raise Urban Industrial Property Values?*, 40 URB. STUD. 2001 (2003).

16. E.g., Anderson, *supra* note 11; Man & Rosentraub, *supra* note 12; Joyce Y. Man, *The Impact of Tax Increment Financing Programs on Local Economic Development*, 11 J PUB. BUDGETING 417 (1999); cf. Paul Byrne, *Does Tax Increment Financing Deliver on Its Promise of Jobs? The Impact of Tax Increment Financing on Municipal Employment Growth*, 20 ECON DEV. Q. 1 (2009); Richard Dye & David Merriman, *The Effects of Tax Increment Financing on Economic Development*, 47 J URB. ECON. 306 (2000); T. William Lester, *Does Chicago's Tax Increment Financing (TIF) Program Pass the 'But-for' Test? Job Creation and Economic Development Impacts Using Time-series Data*, 51 URB. STUD. 655 (2014).

17. See Jack R. Huddleston, *Local Financial Dimensions of Tax Increment Financing: A Cost-Revenue Analysis*, 2 PUB. BUDGETING AND FIN. 40 (1982); Kenneth Kriz, *The Effect of Tax Incre-*

well as a tendency to over credit assessment gains to TIF.¹⁹

Beyond the categories of Greenbaum and Landers, this Article specifically builds upon the work that has covered the issue of TIF disproportionately serving the interests of private developers.²⁰ This avenue is an extension of the theory on regulatory capture (itself a branch of public choice theory) which outlines that private interests can become the dominant objective of public regulatory agencies due to the cost-benefit imbalance between prospective capturing actors (with high potential gains) and the general public (with a relatively minimal and diffused stake in outcomes).²¹ As later explained, in combination with basic bargaining theory, the use of TIF in the SATD can be fairly well understood through this aspect of the literature and its theoretical parents.

B. TIF Statute in Texas

Chapter 311 of the *Texas Tax Code* governs TIF in Texas.²² Both municipalities and counties can create TIF zones, initiated through either private petition or local government discretion.²³ While focused on property tax increment, the sales-tax increment may also be included in a TIF zone pursuant to section 311.0123.²⁴ The two core traditional components of TIF, “but-for” and “blight,” are respectively addressed by sections 311.003 through 311.005.²⁵ The former describes that a “reinvestment zone” requires local government determination “that development or redevelopment would not occur solely through private investment in the reasonably foreseeable future” and that an ordinance creating a “reinvestment zone” must clearly describe the

ment Finance on Local Government Financial Condition, 22 MUN. FIN. J 41 (2001); David B. Lawrence & Susan C. Stevenson, *The Economics and Politics of Tax Increment Financing*, 26 GROWTH AND CHANGE 105 (1995); Gary Sands et al., *Tips for TIFs: Policies for Neighborhood Tax Increment Financing Districts*, 38 COMMUNITY DEV. 68 (2008).

18. See generally Alison Felix & James Hines, *Who Offers Tax-Based Business Development Incentives?*, 75 J. URB. ECON. 80 (2013).

19. Greenbaum & Landers, *supra* note 10, at 660.

20. E.g., Briffault, *supra* note 4; George Lefcoe, *Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing*, 43 URB. LAW. 427 (2011).

21. See Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089 (1991); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990).

22. TEX. TAX CODE ANN. § 311 (2017).

23. § 311.005.

24. § 311.0123.

25. § 311.003–005.

geographical boundaries, create a board of directors, as well as outline effective and termination dates for the zone.²⁶

Section 311.005 then provides a number of avenues for a finding of “blight.” At its most basic, only one of the blight sub-conditions needs to be made out in addition to the general “blight” chapeau.²⁷ Combined with the lack of further definition or detailed quantitative thresholds, the requirements are not difficult to meet and are evaluated in the subjective opinion of the jurisdiction.²⁸ Yet there are additional paths, including a petition by property owners accounting for over fifty percent of assessed values in a proposed district, and for being a primarily open or undeveloped area substantially “impairing” the jurisdiction’s growth.²⁹ This latter provision means that a greenspace site can be designated a TIF area, which the literature has viewed as being less than best practices,³⁰ and makes the test more one of underdevelopment than strictly blight. Finally, a reinvestment zone can be designated simply because an existing or proposed mass transit rail system passes through, which further simplifies the process for transit-oriented development.³¹

Section 311.006 places some restrictions on the composition of a TIF zone, the most notable being a cap for TIF at twenty-five percent of a jurisdiction’s assessed value.³² This precludes a Chicago-like situation, where over thirty percent of the city was inside of a TIF district as of 2014.³³ Section 311.015 explicitly limits TIF bond repayment to funds from the TIF zone that the debt was incurred for, meaning that there is no claim against general

26. § 311.003.

27. § 311.005. The chapeau reads:

substantially arrest or impair the sound growth of the municipality or county designating the zone, retard the provision of housing accommodations, or constitute an economic or social liability and be a menace to the public health, safety, morals, or welfare in its present condition and use because of the presence of . . .

28. *Id.*

29. *Id.*

30. See Kathleen Knavel, *Wisconsin’s Tax Increment Finance Law: How Wisconsin’s Cities Subsidize Sprawl*, 8 WIS. ENVTL. L.J. 115 (2002); Briffault, *supra* note 4, at 91.

31. TEX. TAX CODE ANN. § 311.005.

32. § 311.006.

33. Meredith Wilson, *In a TIF: Chicagoans Angry About Obscure Funding Method*, MEDILL REP. CHI., Mar. 18, 2015, <http://news.medill.northwestern.edu/chicago/in-a-tif-chicagoans-angry-about-obscure-funding-method/>.

revenues of the issuing jurisdiction.³⁴ Effectively limiting the debt pool to the TIF area reduces local government risk, but makes the debt a riskier proposition for investors.³⁵ In turn, interest rates will be higher and the project becomes more costly to the local government in the long-term.³⁶

The Texas TIF law may however be more notable for the restrictions not present. First, there is no time limit for a TIF district,³⁷ allowing a jurisdiction to reinvest increment within the TIF zone indefinitely, which is important because the eventual reversion to general revenues is a commonly cited benefit to TIF. Also absent is a sufficient limit on the “but-for” test. While there is indeed a “but-for” requirement, it can be solely and subjectively determined by the local authority, meaning that there is little objective limit. The obvious issue is that TIF may merely be capturing the increment that was likely, or even certain to occur, in any event as opposed to spurring new investment.³⁸ Similarly, the Texas statute lacks quantitative means for evaluating the presence of the blight pre-requisites that are present, allowing local interpretation whims and preferences to prevail in both traditional core components of a TIF use test.

Still, Texas does incorporate some less explicit TIF brakes. First, as TIF does not capture state revenues, the intent of the legislature may have simply been to provide local governments leeway to use TIF within the twenty-five percent cap as a percentage of assessed value, trusting that local governments would have the incentive to develop best practices from collective experience. Likewise, participation in a TIF zone by overlaying jurisdictions such as school districts and counties is negotiated, meaning that it is up to the TIF proposing jurisdiction to sell the benefits of capture to an inherently skeptical audience. Without overlaying capture, TIF has been seen as less attractive relative to other economic development schemes,³⁹ meaning that counties and school districts can act as a further check beyond the assessed value share cap.

34. See TEX. TAX CODE ANN. § 311.015 (one slight wrinkle to this is that municipalities can by contract with debt holders also place revenue from municipal owned facilities in the TIF plan into the pool of funds for repayment).

35. See generally A. James Heins, *The Interest Rate Differential Between Revenue Bonds and General Obligations: A Regression Model*, 15 NAT'L TAX J. 399 (1962).

36. *Id.* at 405.

37. See TEX. TAX CODE ANN. § 311 (although TIF bonds must mature within twenty years under § 311.015).

38. Lefcoe, *supra* note 20, at 467-69.

39. George Lefcoe & Charles W. Swenson, *Redevelopment in California: The Demise of TIF-Funded Redevelopment in California and Its Aftermath*, 67 NAT'L TAX J. 719 (2014).

C. Case Law on Texas TIF

Although the thirty years since TIF's arrival in Texas have seen numerous TIF-related lawsuits, none has provided substantial direct guidance on the issue of "but for." The most interesting case from a blight and "but-for" perspective concerned the TIF subsidization of a Cabela's in a prosperous and fast growing area of Fort Worth (ironically as we will see, on land bought from Hillwood Development).⁴⁰ Here the legitimacy of the section 311.005 designation was based upon a stream and pond on the property⁴¹ and it was unsuccessfully challenged by a citizen's group, although only the issue of blight was tried.⁴² While in the context of the traditional TIF concept of blight, the conditions found in Fort Worth did not pass muster, this decision highlights the many possible routes through which the Texas blight test has effectively become one of underdevelopment.

In terms of reviewing perceived local government over-permissiveness in TIF zone creation, the appellate court in *Hardwicke v. City of Lubbock* outlined that absent arbitrary or "capricious" and willful "disregard of the facts and circumstances," a local decision will be maintained.⁴³ Applied to the "but-for" element in the creation of a TIF zone, it appears that any challenge will have the substantial hurdles of a wide scope within which local government decisions will be deemed defensible, as well as a broader judicial reluctance to intervene in such determinations.

The relatively limited case law on Texas TIF is complemented by a series of advisory opinions from the Attorney General's Office. Of the fifteen-plus opinions on record, the most relevant to the SATD context outlines that a petitioned for TIF zone must meet the standard of "unproductive, underdeveloped or blighted" in section 311.005.⁴⁴ However the assessment of whether this standard has been met is in the "good faith" judgment of the local government, although subject to (the relatively weak standard of) judicial review.⁴⁵ Yet despite over ten unique issues being addressed through these opinions, there is no coverage of "but-for," although it may implicitly be seen in the same way

40. Dave Montgomery, *Cabela's in Fort Worth Becomes Lightning Rod in Governor's Race*, STAR TELEGRAM, Oct. 4, 2014, <http://www.star-telegram.com/news/politics-government/article3876110.html>.

41. Daniel McGraw, *Giving Away the Store to Get a Store*, REASON, Jan. 2006, <http://reason.com/archives/2006/01/01/giving-away-the-store-to-get-a>.

42. *Id.*

43. *Hardwicke v. City of Lubbock*, 150 S.W.3d 708, 716 (Tex. App. 2004).

44. TEX. TAX CODE ANN. §311.005 (2017).

45. TEXAS MUNICIPAL LEAGUE, ECONOMIC DEVELOPMENT HANDBOOK, 238 (2015).

as blight.⁴⁶

D. Literature on TIF in Texas and Dallas

There have been several works on TIF in Dallas and other major Texas cities. Loessberg evaluated the relative roles and merits of TIF, tax abatements, and HUD Section 108 loan guarantees in the Dallas in-town housing program, an initiative designed to convert underused office space to both populate urban areas and reduce the glut of office square footage on the market.⁴⁷ Although TIF was intended to be a supporting instrument, Loessberg argues that TIF has been by far the most successful form of assistance, in large part due to its flexibility in being adapted to the infrastructure needs of a particular project.⁴⁸

In a survey of Dallas TIF district outcomes using data from the City's Office of Economic Development (OED), Bland and Overton found that public participation through TIF was an essential element to TIF success.⁴⁹ In particular, they argued that the public side allowed for value maximization through leveraging the impact of private investment via "operational and institutional knowledge" and project credibility.⁵⁰ This built upon their previous work evaluating the impact of the post-2008 recession on TIF zone assessment growth.⁵¹ Here Bland and Overton concluded that pre and post-recession private investment in a TIF zone were strongly related to the total planned TIF expenditures over the district's lifetime as opposed to annual disbursements.⁵² The recession years however saw a different pattern, whereby public outlays of TIF dollars became an important source of tangible reassurance to developers of the City's ongoing investment in TIF success.⁵³ The findings in both of these articles are quite relevant this Article's primary discussion concerning the SATD.

At the statewide level, Scott found that adoption of TIF by neighboring

46. *Id.*

47. Rick Loessberg, *Eighteen Years Later*, 11 ECON. DEV. J. 11, 11–13 (2012).

48. *Id.* at 16.

49. See Robert L. Bland & Michael Overton, *Assessing the Contributions of Collaborators in Public-Private Partnerships: Evidence from Tax Increment Financing*, 46 AM. REV. PUB. ADMIN. 418, 431 (2016).

50. *Id.* at 431–32.

51. Michael Overton & Robert L. Bland, *The Great Recession's Impact on Credible Commitment: An Analysis of Private Investment in Tax Increment Financing*, 46 ST. & LOC. GOV'T REV. 282 (2014).

52. *Id.* at 295.

53. *Id.*

jurisdictions had a measurable positive impact on TIF district size.⁵⁴ Arvidson et al., in a high-level review and survey of TIF use across Texas, set out that TIF using jurisdictions have been fairly successful in their primary objectives of tax base expansion and business attraction.⁵⁵ The authors here also noted an average private to public spending ratio of 8:1 and the majority of TIF projects being funded on some form of a pay-as-you-go basis, as well as TIF being more of a petition-driven (as opposed to municipality-driven) exercise in most jurisdictions.⁵⁶ These findings are consistent with the early TIF experience in Dallas, the relative success of which has set the stage for significant TIF expansion since the article was written, including in the SATD at the core of this Article.

As for how Texas TIF compares across state lines, the broader TIF literature has repeatedly placed Texas on the more permissive end of statutory TIF schemes.⁵⁷ However, because of this flexibility, the Texas framework has been cited as a template for solving issues in other jurisdictions. For instance, Lefcoe asserts that many of California's TIF problems could be addressed by adopting the Texas process of negotiation with overlaying jurisdictions for their increment, and cap for increment percentage of a local government's assessment base.⁵⁸

E. Local TIF Policy

1. City of Dallas

Both the City and County of Dallas have detailed TIF policies. The City policy outlines a detailed scoring system for prospective TIF districts based on a series of financial and policy objectives. The financial measures include up to fifty points for new tax generation exceeding public investment, twenty points based on a review of financial projections, and fifteen points for each participation from overlaying jurisdictions and whether at least \$100 million

54. Brendan S. Scott, *Factors That Influence the Size of Tax Increment Financing Districts in Texas* (Spring 2013) (unpublished M.P.A dissertation, Texas State University–San Marcos) (on file with Texas State University Library).

55. ENID ARVIDSON ET AL., *Tax Increment Financing in Texas: Survey and Assessment*, in *TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES, AND IMPACTS* (Craig L. Johnson & Joyce Y. Man eds., 2001).

56. *Id.*

57. *Id.* at 176; David N. Farwell, *A Modest Proposal: Eliminating Blight, Abolishing But-For, and Putting New Purpose in Wisconsin's Tax Increment Financing Law*, 89 MARQ. L. REV. 407, 422 (2005).

58. See George Lefcoe, *Redevelopment in California: Its Abrupt Termination and a Texas-Inspired Proposal for a Fresh Start*, 43 URB. LAW. 767, 802–05 (2012).

of new development will occur within five years.⁵⁹ Policy benefits are then scored on eight criteria. Twenty-five points are available based on enhancement of “core City assets,” twenty points apiece can be had for “direct benefits” to distressed areas and enhancement of the public realm, ten points for affordable housing provision and design guidelines, and five points for impact on green space and compliance with affirmative action guidelines.⁶⁰ Financial and policy scores are each maximized at 100 points, with a minimum of seventy points in each category needed to move forward. The City also requires a ten percent affordable housing component for all TIF districts.⁶¹

While State statute has no TIF sunset requirement, the City standard is twenty years. Where an extension of the City standard is contemplated, another list of boxes must (literally) be checked, these concerning new market conditions, an extension of financial benefits, and preconditions.⁶² A TIF district can then be extended for a maximum of one additional ten-year period, although the TIF plan can be amended on an ongoing basis in response to market conditions.⁶³

Likewise it is worth noting is that sub-districts within existing TIF districts can be established. Here the expiry is linked to the sub-district creation date as opposed to the TIF district sunset,⁶⁴ a model that has been used in the SATD.⁶⁵ New sub-districts can draw on the increment of more established districts for the remaining life of the senior district until development allows the new sub-district to generate greater (and implicitly self-sustaining) increment in its later years. This is effectively a TIF bond issue for a pay-as-you-go TIF model absent the risk of debt.

2. Dallas County TIF Policy

Dallas County’s policy is framed by its status as a participant in the TIF schemes of its constituent municipalities. As of December 2016, the County participated in twenty-four TIF districts, seventeen of which are within the

59. *Criteria for Evaluating Proposed TIF Districts*, DALL. OFF. ECON. DEV., <https://www.dallasecodev.org/DocumentCenter/Home/View/309> (last visited Dec. 14, 2017).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. TEX. TAX CODE ANN. § 311.005.

65. *See* DALL. OFF. ECON. DEV., SPORTS ARENA TIF DISTRICT: AMENDED AND RESTATED PROJECT PLAN 5–8 (2012).

City of Dallas, accounting for all but one of the City's active TIF projects.⁶⁶ In evaluating prospective TIF participation, the County will first assess a proposal against five core gatekeeper criteria. These criteria are: statutory eligibility, an increase in County tax base within three years of final plan approval by at least \$15 million, a present value analysis demonstrating additional tax revenues will equal forgone increment "within a reasonable period of time," sufficient safeguards for the failure of proposed development to occur, and no diversion of firms or facilities from another County municipality.⁶⁷ Of these requirements, the "no diversion" requirement is particularly notable for explicitly precluding predatory use of TIF within the County, but not extending a collaborative approach to neighboring counties, the absence of which some suggest predicates a race to the bottom.⁶⁸

Upon passing these gatekeepers, the County can elect to provide up to thirty-five percent of increment with an additional ten percent able to be committed, up to a maximum of seventy-five percent, for meeting each of the following: location in a distressed area, an 8:1 ratio of increment to public investment over a twenty year period, an exclusive purpose of creating at least 450 single-family homes with thirty-five percent or more being affordable by HUD standards, facilitation of rapid transit use or trail extension, "regional economic implications," and a determination that County participation will expedite proposed public investments by a minimum of two years.⁶⁹ Although not all of these criteria are easily met, meeting some is not overly burdensome. The County will then more broadly consider impacts on transportation, services, the nature of the investment and development, geography, as well as the generation of sales and hotel taxes.⁷⁰ With these latter two components, since sales and hotel tax increment are excluded from the County's participation, the ability for a TIF district to offset property tax diversion through increased hotel and sales tax revenues seems especially pertinent.

In Dallas, the natural brake on TIF risk is the County. A TIF project becomes far more powerful with County participation, but the County has a different incentive structure and far less of a vested stake than the Dallas OED in being viewed as successful. Instead, the County has to evaluate a project as

66. DALL. CTY. DEPT. PLANNING & DEV., 2016 TIF DISTRICT STATUS REPORT 1-2 (2016), <https://www.dallascounty.org/department/plandev/documents/2016TIFDistrictStatusReport.pdf> (the County will begin participation in the remaining TIF district in 2020).

67. DALL. CTY., DALLAS COUNTY TAX INCREMENT FINANCE POLICY 2-3 (Aug. 2 2011), <http://www.dallascounty.org/department/plandev/documents/2011tifpolicy.pdf>.

68. See Lefcoe, *supra* note 20, at 427.

69. DALL. CTY. DEPT. PLANNING & DEV., *supra* note 66, at 3-4.

70. *Id.*

being beneficial in the long run to County revenues and if there is no “but-for” threshold met, then its revenue is being transferred from non-Dallas City taxpayers to the City for no net benefit. Thus the extent of County participation can be seen as a less biased evaluation of “but-for” and to some extent a functional closing of the statutory “but-for” gap.

III. THE AMERICAN AIRLINES CENTER AND TIF IN THE DALLAS SATD

A. Overview of the Arena Framework and the SATD

Passing a 1998 city-wide referendum by a mere 1,642 votes and completed in 2001, the AAC was financed and developed under an Arena Master Agreement by the City and the Center Operating Company (the COC), the latter a joint-venture between the arena’s two major league tenants, the Stars of the NHL and the Mavericks of the NBA. Following the referendum, the same year saw the creation of the SATD to reimburse infrastructure and public improvements in relation to arena development. Running parallel to the Stemmons Freeway and a DART light rail line, the original SATD ran roughly 2000 feet north and south of the arena, extending south to the edges of downtown and the infamous Texas School Book Depository.⁷¹ Formerly a railyard and power plant, seventy percent of the site was considered a highly contaminated brownfield.⁷² The geography was also notable for its exclusion of entire blocks surrounded by included streets, although this is best explained by these blocks already being built-out with public housing and market apartments and the City seeing no point in capturing the non-arena related market development or the exempt public housing.

TIF funds were not part of the formula for funding the arena itself, which instead saw a public contribution in the form of rental car and hotel taxes, with the remaining costs split between the Stars and Mavericks ownership groups.⁷³ Additional bonds for infrastructure were approved previous to the SATD, but insufficiently covered planned improvements. In terms of *Texas Tax Code* section 311.005, the City went with a deteriorating structures blight determination,⁷⁴ although any number of subsections could have been made out considering the legitimately blighted state of the area. Dallas County

71. See DALL. OFF. ECON. DEV., *supra* note 65, at 9.

72. See DALL. OFF. ECON. DEV., REIMAGINING VICTORY PARK: ECONOMIC DEVELOPMENT COMMITTEE 3 (Oct. 7, 2013), https://dallascityhall.com/government/Council%20Meeting%20Documents/2014/ECO_Combined_100713.pdf.

73. CITY OF DALL., ARENA MASTER AGREEMENT 18–21 (Dec. 10, 1997).

74. TEX. TAX CODE ANN. § 311.005.

contributed one-third of County (and County-controlled Hospital District) increment for ten years or until a net present value of \$1.93 million was achieved.⁷⁵ The Dallas Independent School District, seemingly a party where the benefit experienced would be more tenuously connected, allocated fifty percent of its increment with a sunset scheduled for 2013.⁷⁶

Alongside the SATD's creation, the City entered into agreements with the COC for certain infrastructure improvements (primarily roadways) to be paid for from the TIF fund.⁷⁷ Instead of borrowing against the projected increment through TIF bonds, the COC paid for these costs as they were incurred and received priority reimbursement plus agreed interest as increment was generated.⁷⁸ As noted, the interest aspect makes this similar to borrowing from a financial perspective, but moves risk from the TIF zone and the City to the developer insofar as a priority reimbursement is only valuable if sufficient increment is created.

Beyond the arena and TIF agreements also came three contracts and accompanying easements concerning parking rights (the PRAs) between the City, the COC, Hillwood Development Company (Hillwood), and the COC's lender.⁷⁹ The PRAs required 3,000 spaces on Hillwood controlled lots within the SATD and 841 of those spaces to be 400 feet or less from the arena.⁸⁰ These PRAs also included an easement over the designated lots to the benefit of the COC, meaning that lots could only be released from the agreement for development upon COC approval. Further, the PRAs outlined that any subsequently displaced parking spaces had to be relocated on the designated parking lots prior to a City building permit or certificate of occupancy being issued.⁸¹

B. Initial Development in the SATD

Victory Park, the seventy-five-acre luxury real estate development adjoining the AAC, was the grand vision of Ross Perot Jr., the then Mavericks owner and principal of Hillwood. While the first phase of Victory brought

75. DALL. OFF. ECON. DEV., *supra* note 65, at 5.

76. *Id.*

77. *Id.*

78. *Id.*

79. DALL. OFF. ECON. DEV., SPORTS ARENA TIF DISTRICT—NEXT STEPS TIER ONE GARAGE AND DISTRICT STUDY 22–25 (June 4, 2012), http://www3.dallascityhall.com/committee_briefings/briefings0612/ECO_SportsArenaTifDistrict_060412.pdf.

80. *Id.* at 22.

81. *Id.* at 24.

hundreds of millions of dollars in assessed value to a blighted urban location, the project followed a common course for real estate in the late 2000s—insolvency. Accordingly some of its more ambitious elements were axed, including a forty-three-story Mandarin Orient hotel.⁸² The stalling in progress, combined with overbuilt luxury components relative to market demand, contributed to a sterile and largely empty environment on non-event nights.⁸³ An almost exclusively upscale retail mix was also a poor match for the consumption tastes of both lunchtime and game-night traffic, further impacting the viability of retail and restaurant businesses.⁸⁴

The property tax picture was far less bleak, however, with the OED claiming that assessed value increased by over 2,000 percent between 1998 and 2012.⁸⁵ The most significant year-over-year increases occurred between 2006 and 2008, where anticipated captured value leapt from \$37 million in 2005, to \$163 million in 2006, \$361 million in 2007, and \$557 million in 2008, before a decline consistent with the recession.⁸⁶ This timeline runs parallel to the completion of the first major phase of Victory Park, including the W Hotel, several office towers, a twenty-eight story residential tower, and multiple lower-rise apartment complexes.⁸⁷ These overwhelmingly high-end developments accounted for almost 800 apartments and condos, 250 hotel rooms and 200,000 square feet of retail space.⁸⁸

The projects initially reimbursed concerned what was contemplated by the original TIF fund agreements, with approximately \$32 million spent on road construction, extension or revitalization and the remainder of almost \$5 million primarily going to storm drainage and the West End Plaza.⁸⁹ The total cost of the reimbursement by the time of completion in 2012 was over \$38 million, of which roughly \$15 million was interest.⁹⁰ While interest has eaten a significant share of generated increment, the SATD has been able to fund its intended list of infrastructure projects with reduced risk relative to a TIF bond issue (for instance, the post-2008 downturn would not have been experienced by the City on this project the same way as if debt had been issued).

82. Schnurman, *supra* note 1.

83. *Id.*

84. *Id.*

85. DALL. OFF. ECON. DEV., *supra* note 65, at 6.

86. *Id.* at 36.

87. DALL. OFF. ECON. DEV., SPORTS ARENA TIF DISTRICT FY 2016 ANNUAL REPORT 8 (2016), <https://www.dallasecodev.org/DocumentCenter/Home/View/630>.

88. Schnurman, *supra* note 1.

89. DALL. OFF. ECON. DEV., *supra* note 65, at 41.

90. *Id.* at 23.

C. SATD Redux 2012

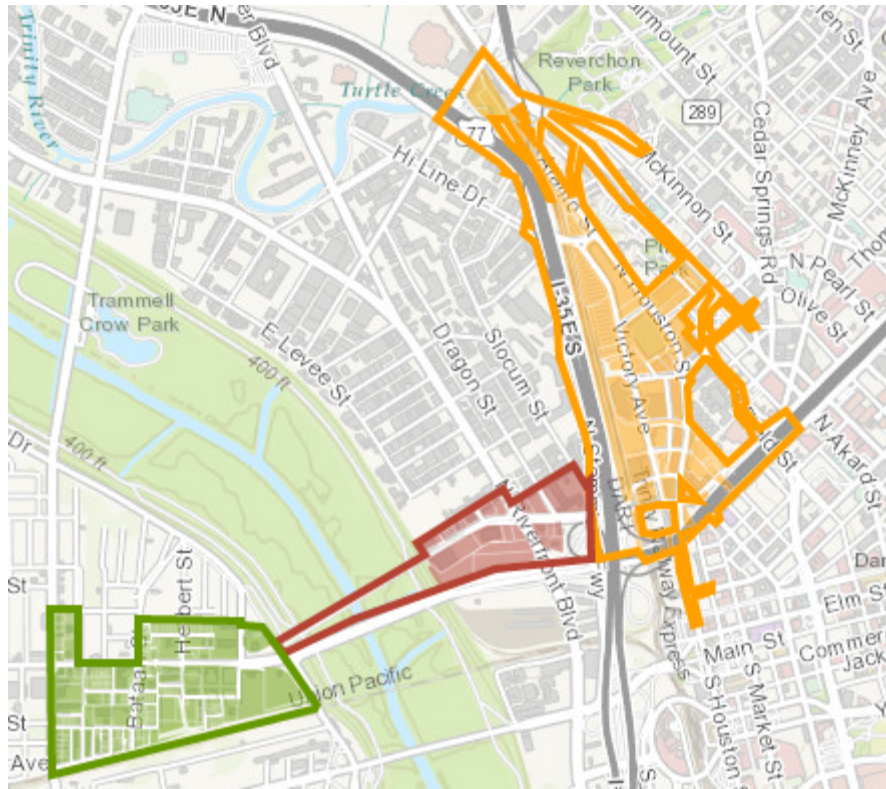
The 2012 Amended TIF Plan (Amended Plan) is far more ambitious in scope and directed to address the very mixed development experience of Victory Park to date. Beyond major investments in the immediate vicinity of the AAC, the geography expanded to two entirely new sub-districts, Riverfront Gateway and West Dallas, with the original SATD being re-designated as the Victory sub-district.⁹¹ The Amended Plan saw the Victory sub-district extended through 2028 and the new Riverfront Gateway and West Dallas sub-districts set to run until the end of 2042, with an earlier sunset possible for all sub-districts if the full project costs are paid.⁹² Dallas County also amended its participation—now the County provides fifty-five percent of increment in the new West Dallas and Riverfront Gateway sub-districts through 2028, and Victory sub-district increment has increased to forty-five percent through 2022.⁹³

Figure 1: The post-amendment Dallas SATD (screen capture from map on Dallas OED website)

91. *Id.* at 9.

92. *Id.* at 7–8.

93. DALL. OFF. ECON. DEV., *supra* note 87, at 3.



Orange/Right/East: Victory sub-district
 Red/Center: Riverfront Gateway sub-district
 Green/Left/West: West Dallas sub-district

As seen in Figure 1, Riverfront Gateway extends from the southwest edge of the Victory sub-district, across the Trinity River, narrowly connecting to the West Dallas sub-district and avoiding the neighboring Design District TIF area opposite the freeway to Victory altogether. This creative mapmaking has produced a new SATD, which bears more than a passing resemblance to a gerrymandered political ward. When viewed in the context of the Amended Plan TIF, where West Dallas accounts for one-third of projected spending and Riverfront Gateway less than five percent,⁹⁴ the objective seems to be to leverage development in Victory Park for the benefit of West Dallas. In fact, the Amended Plan document explicitly outlines that ten percent of Victory

94. DALL. OFF. ECON. DEV., *supra* note 65, at 22.

increment will be reallocated to West Dallas,⁹⁵ a traditionally poor, blighted, and contaminated neighborhood.⁹⁶

The Amended Plan had ten primary goals, overwhelmingly focused on rectifying Victory's previously mentioned planning and development shortcomings.⁹⁷ With the former, the OED outlined that the street network was designed to move event traffic and cut-off Victory from neighboring clusters of development,⁹⁸ with attendees having no reason to travel down the development's commercial spine. Combined with a poorly designed retail landscape that failed to attract business from the event and office traffic Victory did garner,⁹⁹ the development's issues were punctuated by an absence of sufficient density, in large part due to the PRA restrictions. On a quantitative plane, the Amended Plan also proposed attracting new private investments totaling almost \$1 billion, including at least 250,000 square feet of new retail space and 3,000 additional housing units, while ensuring that this time there was a diversity in retail, commercial, and residential mixes.¹⁰⁰ With over 243,000 square feet of retail space and 3,151 residential units completed or under construction through 2016, these construction objectives are well on their way to being greatly exceeded.¹⁰¹

The OED and City Planning Department believed that the SATD development objectives could be best facilitated through using increment to build parking structures to eliminate over twelve acres of surface lots effectively mandated by the PRAs.¹⁰² Thus, the overwhelming increment focus in the Amended Plan was on parking garages, with the two completed in 2014 and 2015 lifting the SATD to over 3,600 garage spaces.¹⁰³ One of these garages was built on the abandoned Mandarin Oriental site and includes a street-facing retail component that will soon provide a more complete block of Victory Park Lane across from both the W Hotel and AT&T Plaza (the local

95. *Id.* at 35.

96. *See id.* at 6; *see also* Valerie Wigglesworth, *The Burden of Lead: West Dallas Deals With Contamination Decades Later*, DALL. MORNING NEWS, Dec. 2012, <https://www.dallasnews.com/news/news/2012/12/14/the-burden-of-lead-west-dallas-deals-with-contamination-decades-later>.

97. DALL. OFF. ECON. DEV., *supra* note 65, at 10.

98. *See id.* at 10, 15; DALL. OFF. ECON. DEV., *supra* note 65, at 7, 16, 20.

99. Schnurman, *supra* note 1.

100. DALL. OFF. ECON. DEV., *supra* note 65, at 10.

101. DALL. OFF. ECON. DEV., *supra* note 87, at 13.

102. *Id.* at 12.

103. *Id.* at 9 (however the original 2,000-space Platinum Garage does not count towards the 3,000-spot requirement under the PRAs; *see* DALL. OFF. ECON. DEV., *supra* note 79, at 22).

attempt to replicate Times Square,¹⁰⁴ minus sustained vibrancy and human presence).¹⁰⁵

Most of the remaining TIF spend has gone to street improvements focused on placemaking; sidewalk widening on key pedestrian thoroughfares to allow for flow; and ancillary uses (such as patios), traffic calming, and bike lanes.¹⁰⁶ However the first almost \$2.7 million of increment has flowed to reimbursing planning and consulting fees from the COC and Hillwood under the TIF grant program, authorized by section 311.010(h) of the Texas Tax Code.¹⁰⁷ These priority allocations strongly relate to the discussions of “but-for” and capture below.

IV. CRITICAL LENSES OF TIF AND THE SATD

A. “But-For” and Developer Capture

In the most comprehensive review of six common TIF criticisms, Lefcoe isolates two interrelated sets of “convincing” issues, the first and most relevant to this Article being that a “but-for” standard is often not adhered to, leading to developer-driven TIF projects that capture unnecessary subsidies.¹⁰⁸ Secondly, Lefcoe sets out that these transactions are often accompanied by a lack of public transparency that benefits the cause of welfare-seeking developers, as well as politicians and development agencies in pursuit of specific development and political objectives.¹⁰⁹ In Dallas, both these criticisms exist accompanied by the transparency issue, but the local overlap lends to a better-organized conversation under the intertwined headings of “but-for” and developer capture.

1. “But-For”

Starting with “but-for,” most jurisdictions that have an explicit “but-for” test set out that without public subsidy private investment would not occur at the site in the “reasonably foreseeable future.”¹¹⁰ With some tests, the

104. David S. Jones & Harold D. Hunt, *V For Victory: Development Transforms Industrial Wasteland*, 1877 TIERRA GRANDE, 3 (Oct. 2002), <https://assets.recenter.tamu.edu/documents/articles/1877.pdf>.

105. DALL. OFF. ECON. DEV., *supra* note 87, at 6.

106. *Id.* at 10.

107. DALL. OFF. ECON. DEV., *supra* note 65, at 31.

108. Lefcoe, *supra* note 20, at 467.

109. See *id.* at 471–73.

110. *Id.* at 467.

standard is weakened with caveats that development would not happen as quickly, or with the same scale and benefit to the public.¹¹¹ In Dallas, TIF is subject to the blanket test that “but-for” the incentives sought, the proposed project would be “substantially altered such that the economic returns to the city would be reduced or the project would not otherwise occur in the city.”¹¹² This mirrors the State statutory standard, and as far as the strict language goes, this test is far from the most permissive end of the spectrum.¹¹³ However, strict language matters less than standards of interpretation and enforcement.

Lefcoe outlines that ideally “but-for” will be assessed with detailed financial data, checked by outside auditors, and then presented alongside specific explanations on why particular aspects of the development justify a TIF subsidy and why such a subsidy is the most efficient prospective use for public monies.¹¹⁴ In Dallas, the OED provides in-depth and easy to access information on year-to-year TIF results, but the TIF plan explanation of how the “but-for” standard was measured and deemed met is lacking. Beyond outlining that the SATD was created to reimburse public improvements “necessary or beneficial for the development of the American Airlines Center and private development within the surrounding area, which such development or redevelopment would not otherwise occur solely through private investment in the reasonably foreseeable future,” there is no further detail on why TIF was necessary.¹¹⁵

While the TIF plan imports the “but-for” language from section 311.003 of the *Texas Tax Code* to meet the statutory standard, and thus formal legality, from a strict interpretation perspective, instead of satisfying that a detailed assessment of “but-for” has been undertaken, it merely highlights the permissive and subjective standard, as well as the lack of “but-for” enforcement in Texas. Although there have been multiple decisions on the issue of blight or underdevelopment, as noted, there has been a lack of judicial guidance on “but-for.”¹¹⁶ Where there has been direction on the TIF issue, case law and reference opinions from the Texas Attorney General have shown deference to specific local government determinations of blight under section

111. *E.g. id* at 467–68.

112. DALL. OFF. ECON. DEV., PUBLIC/PRIVATE PARTNERSHIP PROGRAM REVIEW 13 (Dec. 5, 2016), http://dallascityhall.com/government/Council%20Meeting%20Documents/eco_3_publicprivatepartnershipprogramreview_combined_120516.pdf.

113. *See* Farwell, *supra* note 57.

114. Lefcoe, *supra* note 20, at 468.

115. DALL. OFF. ECON. DEV., *supra* note 65, at 4.

116. *See infra* Part I Section C.

311.005 so long as the necessary elements can be made out in the first-place under a literal and plain meaning statutory interpretation.¹¹⁷ Combined with judicial deference to local government decisions on land use in general,¹¹⁸ even TIF-opposing elected officials from large cities operated (contemporaneously to the SATD project) on the assumption that broad local discretion exists on the process and finding of “but-for” and that this represents a “real open hole in the statute.”¹¹⁹

Yet beyond the State statutory standard, the SATD project does not seem to necessarily meet the City standard for project assistance “that ‘but for’ the incentives sought, the proposed project would be substantially altered such that the economic returns to the city would be reduced or the project would not otherwise occur in the city.”¹²⁰ Even if there was a legitimate finding under the City standard, neither the TIF plan nor readily available OED documents provide any detail or discussion on how this decision was made. Combined with weak State “but-for” enforcement, a transparency-based critique of the SATD gains credibility.

With the Arena Master Agreement and Perot ownership options over, and vision for, most of the surrounding parcels,¹²¹ it seems that much of the initial phase of development would have occurred with the construction of the arena. The question, based on the formal justification provided by the City, then becomes threefold:

1. Would the arena have occurred as it did without the TIF district being part of the Arena Master Agreement with the City?
2. Would the Victory development have happened with only the arena being subsidized?
3. Did the use of TIF facilitate faster or more substantial development than would have otherwise occurred in the absence of TIF after the formal authorization in 1998 of the TIF contemplated in the Arena Master Agreement?

117. See, Texas Municipal League, *supra* note 45, at 238.

118. John J. Hightower, *Selected Issues in Land Use Litigation*, 7–13 (2007), <http://www.olsonllp.com/wp-content/uploads/2012/07/landuseleg.pdf>.

119. Lynn J. Cook, *Turmoil in the Summer of TIRZ*, HOUS. BUS. J., August 8, 1999, <http://www.bizjournals.com/houston/stories/1999/08/09/story1.html>.

120. DALL. OFF. ECON. DEV., *supra* note 112, at 13.

121. CITY OF DALL., *supra* note 73, at 31.

On the first count, it seems unlikely that the absence of a \$24 million infrastructure contribution would cause the Stars and Mavericks to walk away from their preferred location and \$125 million in direct arena subsidies. Despite on-ice success, the Stars were hemorrhaging money in the AAC's predecessor, Reunion Arena, and ownership was eyeing new revenues from luxury boxes to close the deficit and then sell the team at a profit.¹²² Combined with Hillwood having acquired rights to (contingent on a successful arena referendum) forty-six acres of land surrounding this preferred location,¹²³ the argument that if the City failed to provide a TIF district that the first phase of Victory Park would not have materialized is highly questionable, especially considering that Victory was something of a vanity project for one of the state's wealthiest families.

In fact, the reason Perot acquired the Mavericks in 1996 was to realize a vision for a master-planned urban district centered on a new arena—without the team, Perot had little leverage¹²⁴ and without the prospect of a major downtown development Perot had little interest in basketball.¹²⁵ Although several sites were supposedly considered, Perot himself noted that a location at the south end of the Dallas North Tollway was important as eighty percent of season ticket customers at Reunion Arena lived within one mile of this road.¹²⁶ The only sufficient concentration of urban land at its south end was the contaminated brownfield-turned Victory site. According to Perot, “[w]e picked that area north of the West End because it was the last blighted area . . . it was an area where you could have a big impact.”¹²⁷ Once Perot achieved his arena deal, the Mavericks were sold to Mark Cuban for a reported \$285 million prior to the AAC even opening, more than doubling Perot's investment in less than four years,¹²⁸ and inadvertently setting the stage for future clashes

122. Dan McGraw, *Is Tom Hicks Going Broke?*, D MAG., July 2002, <https://www.dmagazine.com/publications/d-magazine/2002/july/is-tom-hicks-going-broke/>.

123. CITY OF DALL., *supra* note 73, at 31.

124. Jones & Hunt, *supra* note 104, at 2.

125. Mark Donald, *Business: The Education of Tom Hicks*, D MAG., Nov. 1997, <https://www.dmagazine.com/publications/d-magazine/1997/november/business-the-education-of-tom-hicks/>.

126. Jones & Hunt, *supra* note 104, at 2.

127. Michael Brick, *Commercial Real Estate: Downtown Dallas Project Mired in Disputes*, N.Y. TIMES, May 1 2002, <http://www.nytimes.com/2002/05/01/business/commercial-real-estate-downtown-dallas-project-mired-in-disputes.html>.

128. Dwain Price, *Timeline: It Was 15 Years Ago that Mark Cuban Bought the Mavericks*, STAR-TELEGRAM, Jan. 3, 2015, <http://www.star-telegram.com/sports/nba/dallas-mavericks/article5394174.html>.

over parking.

Likewise, in the absence of TIF subsidies and given the structure of the Arena Master Agreement, it is hard to accept that Perot and Hillwood would simply let controlled land adjacent to the arena with hundreds of millions of dollars in planned construction lay fallow because a comparatively minimal infrastructure subsidy was not reimbursed. The entire point of acquiring the Mavericks was to build an arena near downtown Dallas that could be the anchor of a major real estate development¹²⁹—again, why would Perot turn away after the arena anchor was funded? The TIF as a development accelerant argument is further undermined by the funds for infrastructure being spent out of pocket years in advance of TIF reimbursement. While it may be suggested that the priority repayment guarantee provided collateral upon which the developer could borrow and thus accelerate access to capital for subsequent development, Perot was seemingly not lacking for finance at the time. Instead, the more likely brake would seem to be market demand, which is supported by the first phase outcomes.

However, the development accelerant argument is not without some merit. There are newspaper reports from the 1998–2003 period showing continued wrangling between the City, the COC, and the involved development companies on what would be built by whom, on what timeline, what share of public infrastructure subsidy would be granted, and whether that subsidy would be reimbursed or paid for via bond issue.¹³⁰ Although the development had \$600 million in financing by 2002, ground had not been broken, and the proposed structure of the deal whereby the COC would actually sell the land, upon which the first phase of Victory was built to a third-party developer (Palladium) and retain a minority stake, fell through.¹³¹ It took until 2003 for

129. Jones & Hunt, *supra* note 104, at 2.

130. E.g., Thomas Korosec, *The Thing That Ate Downtown: Downtown's Real Estate Barons Are Terrified That Perot-Hicks Slick Victory Project Could Wreak Havoc on Their Own Tax-Funded Plans to Fix the City's Core*, DALLAS OBSERVER, Nov. 29 2001, <https://search.proquest.com/docview/407196068?pq-origsite=summon&accountid=14667>; Dave Michaels, *Developer Cuts Request for Dallas Funding of Downtown Project*, DALLAS MORNING NEWS, Mar. 30, 2002, <http://infoweb.newsbank.com/resources/doc/nb/news/0F08578130A6320E?p=AWNB>; Lisa Sanders, *Deal in Focus: After Years of Wrangling, Dallas is Coming Through With Bonds for Arena*, BOND BUYER, June 16 1998, <https://search.proquest.com/docview/407196068?pq-origsite=summon&accountid=14667>; Mitchell Schnurman, *Deal Too Good for Dallas to Ignore*, FORT WORTH STAR-TELEGRAM, Dec. 19 2001, <http://infoweb.newsbank.com/resources/doc/nb/news/0F08578130A6320E?p=AWNB>; Richard Williamson, *Dallas City Council Agrees to Funding for Pair of TIF Projects*, BOND BUYER, May 24 2002, <http://infoweb.newsbank.com/resources/doc/nb/news/0F08578130A6320E?p=AWNB>.

131. Brick, *supra* note 127.

the first post-arena construction to commence and the parties involved cited the first round of \$24 million in TIF commitments as being an insufficient incentive and floated multiple bond issue scenarios that would either exceed or replace the TIF commitment.¹³² In this sense, the argument can be made that the project returns (increased property assessments and economic activity in the zone) were delayed by the absence of subsidy, although the problem is that the subsidy in question (approved in 2000) was deemed insufficient by the developers to influence them to start construction before they eventually did so in 2003.¹³³

Instead, it seems that market conditions were far more influential than TIF or other subsidies on the actual commencement of construction. Dallas, at the time, had a glut of competing office space and a luxury apartment surplus.¹³⁴ Combined with 9/11 impacting the perceived viability of new hotel projects,¹³⁵ an issue as the Victory centerpiece was the W Hotel. As well as the actual performance of Victory's first post-arena phase, it seems that market demand was more of a brake and influence on development timelines than the presence or absence of TIF. To this end (then Stars owner and forty-three percent partner in the arena-adjacent land holdings¹³⁶) Tom Hicks noted in 2005 that construction would commence on the primary office element once fifty percent was pre-leased.¹³⁷

So while the City's "but-for" standard may have to a certain extent been met at various points after the fact, it did not seem to reasonably exist at the time of the TIF authorization ordinance in 1998, which is the point that the City's own documents seem to have evaluated "but-for." The "but-for" argument is further undermined by the TIF subsidy guarantee not being a sufficient incentive to spur the initial post-arena development faster than market demand dictated. Yet with no precedent to indicate that local government prerogative to assess the State or local government standards of "but-for" is at issue, and little propensity for judicial review of such standards in Texas,¹³⁸ there is no foreseeable legal consequence to a loose interpretation that serves a desired political outcome. Indeed the laissez-faire judicial approach to TIF review has helped create the scope for further and

132. *Id.*

133. *Id.*

134. *Id.*

135. *See* Schnurman, *supra* note 1.

136. Brick, *supra* note 127.

137. Christine Perez, *A Tale of Two Office Markets*, NAT'L REAL EST. INVESTOR, July 1, 2005, <http://nreionline.com/mag/tale-two-office-submarkets>.

138. *See* Hightower, *supra* note 118, at 7–13.

self-reinforcing proliferation of loose standards—cities are effectively free to do what they wish within the fifteen percent of their assessment base that can be included in a TIF zone.

There is also a somewhat different element of “but-for” in the post-recession phase of the SATD with the Amended Plan. The aftermath of 2008 saw Hillwood’s German financiers take control of Victory, leaving Hillwood with ownership of undeveloped SATD land at the time bound by the PRAs, and only in a management role over what had been built.¹³⁹ Considering the financial uncertainty of the recession, the oversupply of luxury residential, the perception of initial failure, and the primary ownership interest now residing with a party other than that which was the visionary driving force, there were legitimate questions concerning the speed of further development. In turn, the State standard of “but-for” (that in the reasonably foreseeable future private finance alone would not solely cause development) is more likely to have been met in the post-2008 years leading up to the 2012 Amended Plan.

Beyond the recession and finance issues however, even as the economy has recovered and strong development has been seen in Victory and neighboring areas, the PRAs have still limited the speed of build-out by necessitating parking replacement within the SATD. Typically the construction of parking garages is a less efficient investment for a developer, and this may be accentuated where the build-out of uses that can make for a strong internal rate of return on parking (such as commuter commercial office space) is incomplete and there are ample lower cost alternatives (such as surface lots).¹⁴⁰ While event periods provide obviously stronger demand, they overlap with downtimes for commuter parking, allowing commuter parking to undercut the event premium. In the SATD, the mandated space requirements have retained a glut of surface lots, which has reduced the viability of parking garages.

Thus the City’s TIF subsidization of a necessary but less attractive investment for the private sector (especially considering the change in Victory’s ownership), may be the strongest fulfillment of “but-for” in the entire twenty-year exercise. However, this is undermined by the driving cause of “but-for” being artificially imposed minimum parking requirements.

139. Robert Wilonsky, *Now Victory is Theirs, as Hillwood Officially Hands Over Victory Park to Germans*, DALLAS OBSERVER, July 7, 2009, <http://www.dallasobserver.com/news/now-victory-is-theirs-as-hillwood-officially-hands-over-victory-park-to-germans-7122918>.

140. See generally Richard Arnott, *Spatial Competition Between Parking Garages and Downtown Parking Policy*, 13 TRANSP. POL’Y 458, (2006); VICTORIA TRANSP, POL’Y INST., TRANSP. COST & BENEFIT ANALYSIS II—PARKING COSTS (2017), <http://www.vtpi.org/tca/tca0504.pdf>.

Absent the PRAs many of the surface lots would not have had to await the construction of garages for development to commence. In turn, especially considering the strong construction market immediately outside of where the PRAs apply,¹⁴¹ surface lots would have likely been more rapidly built upon and garages would have more quickly become financially viable due to the reduced surface lot competition and increased demand from build-out.

2. Capture

Intertwined with the analysis of “but-for” is the issue of capture throughout the SATD development, including the arena construction, as well as the pre and post-recession phases of Victory Park. In each period the incentives, objectives, and options present for the driving government and development parties have uniquely altered the form and outcomes of capture. However, the oscillating phases of bargaining have seen the underlying theme of the City’s actions framed by its competition with other jurisdictions for desirable forms of development and population, and the ability of the involved developer parties to exploit, capture, and monetize the City’s pursuit of those ends. Furthermore, this sequence and the subsequent outcomes can be largely viewed through the lens of basic bargaining theory, namely that the involved developer parties used the timely exercise of both “outside” then “inside” options to leverage public means (such as TIF) to their benefit, with the City left to make the most out of ever more limited and unattractive alternatives.¹⁴²

a. What Is Capture?

There is little consensus on the definition and conceptual scope of capture. Wilson views capture as occurring “when most or all of the benefits of a program go to some single, reasonably small interest (and industry, profession, or locality) but most or all of the costs will be borne by a large number of people (for example, all taxpayers).”¹⁴³ Capture can also be thought of as a spectrum between more broad and narrow definitions.¹⁴⁴ Dal Bo proposes that broadly “regulatory capture is the process through which special interests

141. See DALL. OFF. ECON. DEV., DOWNTOWN CONNECTION TIF DIST. FY 2016 ANN. REPORT 7 (2016), <http://www.dallasecodev.org/DocumentCenter/Home/View/654> (on the Map of Projects, the Victory sub-district is immediately adjacent to the west of the concentration of purple).

142. Abhinay Muthoo, *A Non-Technical Introduction to Bargaining Theory*, 1 WORLD ECON. 145, 149 (2000).

143. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 76 (1989).

144. Liam Wren-Lewis, *Regulatory Capture: Risks and Solutions* § 7.1 (2010).

affect state intervention in any of its forms,” while it is more “specifically the process through which regulated monopolies end up manipulating the state agencies that are supposed to control them.”¹⁴⁵ Closely related to capture is the principal-agent problem whereby an agent acting for a principal is incentivized to act in its own best interests as opposed to those of its principal.¹⁴⁶ This problem is often compounded by information asymmetry where the agent’s position becomes further entrenched through the absence of an informational basis for the principal or third parties to attack questionable practices.¹⁴⁷

In the case of the SATD, this section argues that the developer interests leveraged their bargaining position and asymmetric information to create a de-facto monopoly within the SATD, which was able to affect the range of options available to the City, and allowed for the subsequent manipulation of the City’s local economic development agency (the OED). In turn, the agency itself was able to use information asymmetry to implement outcomes that benefited the agency’s own interests more than those of the general polity. However, the benefit to the agency’s welfare was eclipsed by the upside that the special-interest group (the developer parties) experienced.

b. Capture in the SATD

The initial arena deal phase saw the City seemingly driven by two related objectives: retaining the teams within the City and transforming its central core neighborhoods from a commuter office cluster to a more diversified urban experience with a stronger tax base that could compete with the suburbs. By 1995 Dallas had elected Ron Kirk, who had explicitly prioritized a new downtown arena as central to the fight against tax base erosion.¹⁴⁸ While the previous ownership of the Stars and Mavericks had lobbied hard for a new facility and threatened suburban relocation, public professional sports subsidies were a hard sell with taxpayers still paying debt from the then fifteen year-old Reunion Arena.¹⁴⁹ These difficulties were consistent with literature showing that high-growth western and southern “frontier” cities lack the entrenched local growth coalitions and economic desperation of older cities in

145. *Id.*; Ernesto Dal Bo, *Regulatory Capture: A Review*, 22 OX. REV. ECON. POL. 203, (2006).

146. See Frederic Boehm, *Regulatory Capture Revisited – Lessons from Economics of Corruption* 10 (Internet Centre for Corruption Research, Working Paper No. 22, 2007); JEAN-JACQUES LAFFONT & JEAN TIROLE, *A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION* 486 (1993).

147. See Boehm *id.*

148. Scott Pendleton, *How Ron Kirk Plans to Captain Dallas*, CHRISTIAN SCI. MONITOR, May 8 1995, <http://www.csmonitor.com/1995/0508/08041.html>.

149. *Id.*

the Northeast and Midwest that drove publicly funded projects in these locales.¹⁵⁰ The same study outlined that arena proposals pushed primarily by teams and local government figures, as opposed to strong local growth coalitions, faced more substantial hurdles through more directly visualized corporate welfare.¹⁵¹

For Dallas then, with the absence of an entrenched local growth coalition to take the lead, the answer came in much the same form as it had for Reunion Arena—a promise of major master-planned private real estate development centered on a publicly funded arena.¹⁵² This sort of promised ancillary real estate development has also been successful in helping to bring new facilities to cities such as San Diego and St. Louis.¹⁵³ Despite the uneven outcomes of the Reunion project, Perot’s acquisition of the Mavericks to facilitate an arena-driven urban development was the value-add needed to build a sufficient political coalition to surmount the structural obstacles and move the process forward.¹⁵⁴

In the stops and starts of deal-making, with lingering memories of losing the Cowboys to suburban Irving and failed development promises around Reunion Arena,¹⁵⁵ TIF was a relatively benign addition to both sweeten the deal for the teams and add incentive that would only be realized upon delivery of the promised real estate development. Although with the stated goal of using public funding sources, which would supposedly not be borne by local taxpayers through so-called “tourist taxes,”¹⁵⁶ there were alternatives more directly tied to the arena to increase the upfront public funding package. However, options such as ticket or arena parking taxes would have cost the teams more on the backend through limiting their room for price increases.¹⁵⁷

150. See Kevin J. Delaney & Rick Eckstein, *Local Growth Coalitions, Publicly Subsidized Sports Stadiums and Social Inequality*, 30 HUMANITY & SOC. 84, 100 (2006).

151. *Id.* at 97.

152. *A History of the Tower*, D MAG., May 2013, <http://realestate.dmagazine.com/wp-content/uploads/2013/05/Historical-Timeline.pdf>.

153. Anna O. Bentley, et al., *It Takes a Ballpark Village: Stadiums, Coalitions, and Growth in Two Cities*, MIT DEP’T URB. STUD. PLAN. 71 (June 2006); see Michael B. Cantor & Mark S. Rosen-
traub, *A Ballpark and Neighborhood Change: Economic Integration, a Recession, and the Altered
Demography of San Diego*, 3 CITY CULTURE & SOC. 219 (2012).

154. See generally Wick Allison, *Out Front Will Dallas Blow It Again? Why the New Arena Must
Be Downtown*, D MAG., July 1996, [https://www.dmagazine.com/publications/d-
magazine/1996/july/out-front-will-dallas-blow-it-again-why-the-new-arena-must-be-downtown/](https://www.dmagazine.com/publications/d-magazine/1996/july/out-front-will-dallas-blow-it-again-why-the-new-arena-must-be-downtown/).

155. See Laura Miller, *Priced to Sell Out*, DALL. OBSERVER, Nov. 6, 1997, <http://www.dallasobserver.com/news/priced-to-sell-out-6402427>.

156. See DALL. OFF. ECON. DEV., *supra* note 65, at 4.

157. See Miller, *supra* note 155.

Thus TIF can be seen as the next best option for both the clubs and the City, with the theory being that the subsidy would only arise if development were delivered, regardless of whether or not the subsidy spurred faster development.

With eyes fixed on first building the arena to retain the teams and using the promise of adjacent development to build an arena coalition, the City was primed to be captured by the developer parties in ways that did not cost the taxpayer up-front and that were not likely to be issues in the near future. The manifestation of this capture was the TIF subsidy that had questionable relation to spurring development on a “but-for” standard, and the PRAs that hamstrung build-out in more recent years. Yet at the time, the political objective of building the arena and retaining the teams was achieved alongside the likely realization of a potentially transformational neighboring development—efficiency or mitigating against what should have been foreseeable but longer-horizon problems were not likely to get in the way of the primary objectives.

Further, while these issues should have been foreseeable by sophisticated parties, less sophisticated opponents (or the public) would have more difficulty identifying both the possible issues and their adverse consequences. However, the problem of capture driven by asymmetric information took a unique turn in this instance as Hillwood itself partially miscalculated—the primary issue with the PRAs has debatably inflicted greater pain on Hillwood than the City.¹⁵⁸ Namely, the PRAs were to the benefit of the City and the lease-holding clubs, the Stars and Mavericks.¹⁵⁹ At the time of the PRAs, since the teams were owned by parties directly invested in and driving ancillary development, making the PRAs to the benefit of the clubs seemed to be a means of protecting club resale value by ensuring that the teams would have sufficient nearby parking. However in the context of Perot’s initial interest in the Mavericks stemming solely from real estate development, when Perot sold the club to Mark Cuban in 2000 (albeit at a hefty profit), the benefit of the PRAs passed to an owner far more concerned with ensuring adequate event parking¹⁶⁰ than sacrificing fan convenience for someone else’s grand real estate ambitions.

158. See Brendan Case, *Ross Perot Jr., Mark Cuban Battle Over American Airlines Center Parking*, DALLAS NEWS, Dec. 2011, <https://www.dallasnews.com/business/business/2011/12/22/ross-perot-jr.-mark-cuban-battle-over-american-airlines-center-parking>.

159. DALL. OFF. ECON. DEV., *supra* note 79.

160. See Case, *supra* note 158.

c. Bargaining and Capture After Arena Construction

The initial post-arena deal problem however stemmed from Hillwood and Perot being able to dictate the pace of development as they saw fit, made evident when shovels failed to break ground on projects beyond the arena. As Hillwood attempted to extract a more generous subsidy package than had already been authorized, the City Council, now with the arena built and vocal arena opponent Laura Miller¹⁶¹ in the mayor's pulpit, had far less will to give in. Combined with no contractual obligation¹⁶² to provide adjoining real estate development as was the case in San Diego (generally regarded as one of the more successful facility centered real estate developments in the United States),¹⁶³ as well as the less attractive post-9/11 finance and market landscape, the parties were at an impasse.¹⁶⁴

In this instance there was a mutual breakdown driven by two exogenous interventions:¹⁶⁵ the election of the arena deal's strongest public opponent as mayor and the change in market conditions. Instead of spurring impatience (the valuing of time over money) from one or both of the parties to cause a deal to close quicker,¹⁶⁶ the breakdown did the opposite. Here the developer was willing to wait out the recession or receive a further subsidy to move more quickly, and the City Council at this point was not open to new subsidies.¹⁶⁷ This impasse was accentuated by the developer parties' "inside" option¹⁶⁸—their control of the undeveloped SATD lands allowed them to benefit through increased demand for both developed and bare land if the recession was waited out.

Hillwood's inside option can likewise be viewed as a form of capture over the OED insofar as the COC and Hillwood, through their exclusive ownership of developable SATD lands, were the only means through which the OED could achieve what would appear to be its best outcome. While the OED is City Council's agent, it has an institutional incentive for success in its economic redevelopment programs,¹⁶⁹ the most significant and localized of

161. See Miller, *supra* note 155.

162. CITY OF DALL., *supra* note 73.

163. See generally Cantor & Rosentraub, *supra* note 153.

164. See Muthoo, *supra* note 142, at 148.

165. See *id.* at 152–53 (for an explanation of exogenous driven breakdown).

166. See *id.* at 150–52 (for a discussion of impatience).

167. See Brick, *supra* note 127.

168. See Muthoo, *supra* note 142, at 149 (for an overview of an "inside option").

169. See Mark Schneider, *Fragmentation and the Growth of Local Government*, 48 PUBLIC CHOICE 3 255, 256 (1986).

which are TIF and Public Improvement Districts.¹⁷⁰ Thus, while the City at this point had leadership far less politically interested in further subsidizing Hillwood, and the optimal public benefit outcome would have likely been expedient development with no new subsidies, the OED's internal incentive was to assist in the execution of a successful TIF district in terms of both visual transformation and assessed value increases.

For the OED, a bolstered TIF incentive could demonstrate the validity of "but-for" and showcase a TIF success story directly prompting development. However, when the developer parties revealed their preferred further subsidy to be some form of general bond issue as opposed to expanded TIF, or even in lieu of TIF altogether,¹⁷¹ there became far less institutional incentive for the OED to desire, let alone actively pursue a non-TIF centered outcome. Thus, no further development occurred until a market recovery repaired the "breakdown."¹⁷²

While all parties were generally pleased with the market-prompted development from 2003 to 2008 period, the Great Recession changed matters significantly. Beyond the stalling of construction leaving Victory in a seemingly half-finished state, the previously noted urban planning failures and the transfer of ownership interest for the completed portions of Victory contributed to a second breakdown.¹⁷³ Here the entry of new ownership for Victory and the sports teams, the weakening of the original developer parties, and natural turnover in elected officials, all still bound by the original framework, left the City as the party with the greatest capacity to rectify the situation. With newly-elected officials having a questionable political stake in decisions made more than a decade prior, the operationalization of the City's capacity to act came from the institutional interest of the OED in seeing a successful SATD project.

d. The Amended Plan

The 2012 Amended Plan was the core element of this course correction. This Plan had two primary objectives: first to rectify the public realm shortcomings, and secondly to build parking garages to free surface lots for

170. The OED currently has eighteen TIF districts and fourteen PIDs, which make up the overwhelming bulk of its economic redevelopment programs in terms of investment and exposure. See DALL. OFF. ECON. DEV., *Programs*, <https://www.dallasecodev.org/251/Programs> (last visited Dec. 14, 2017).

171. See Brick, *supra* note 127.

172. *Id.*

173. Schnurman, *supra* note 1.

construction.¹⁷⁴ Alongside the obvious perception that public funds were being used to correct Hillwood's mistakes to the primary benefit of Hillwood (still the owner of most undeveloped surface lots in the SATD) implicitly came the inclusion of a third objective to construct the necessary political coalition. This third objective was to divert increment from the SATD to fund a new sub-district in West Dallas, a long blighted and traditionally poor neighborhood on the other side of the Trinity River. To solve the problem of a Texas TIF district needing to be geographically contiguous, a second long and narrow new sub-district, Riverfront Gateway, was also added.¹⁷⁵ With almost all of the non-Victory increment allocated to West Dallas,¹⁷⁶ Riverfront Gateway can be literally viewed as a money funnel to West Dallas.

The benefit of attaching a West Dallas sub-district to the SATD amendment as opposed to creating a new TIF district is that increment has flowed much faster than it otherwise would have for an area where developer interest is weak. In West Dallas, while assessed value has increased from the 1998 base of \$11.6 million to \$25 million in 2016, this translates into less than \$100,000 in increment for the City¹⁷⁷ and is well below the 2012 projections.¹⁷⁸ Compared to the hundreds of millions of dollars in increment generated by the SATD, the up-front effect is similar to that of a TIF bond issue without the corresponding interest or risk.

This approach to West Dallas TIF was likely informed by the challenges of the Grand Park South TIF district, which shares similar demographics and core proximity with West Dallas, and has been rated by Dallas County as the least successful TIF district that the County participates in.¹⁷⁹ Despite the opening of a light rail station in the district, developer interest has been lacking, leading to assessment gains not meeting projections¹⁸⁰ and the stalling of improvements that could theoretically spur developer interest. Ironically enough, in the process of political logrolling to attach the West Dallas sub-district, the SATD perhaps found its strongest organic component of "but-for" —West Dallas was truly blighted and there was seemingly little prospect for major development in the near future without public subsidy.

With the siphoning of a significant share of increment to West Dallas, the

174. DALL. OFF. ECON. DEV., *supra* note 65, at 22.

175. *Id.*

176. DALL. OFF. ECON. DEV., *supra* note 65, at 22.

177. DALL. OFF. ECON. DEV., *supra* note 87, at 23.

178. DALL. OFF. ECON. DEV., *supra* note 65, at 37.

179. DALL. CTY. DEPT. PLAN. & DEV, *supra* note 66, at 6.

180. *Id.* at 3.

political coalition was in place to fund the triage job necessary to transform Victory into a completed TIF success story. The importance of West Dallas, alongside the residue of previous developer capture, can be seen through the priority of TIF reimbursement in the Amended Plan. After pre-existing obligations, the first priority went to interest bearing grants in equal amounts to Hillwood and the COC for parking-related consulting, and the West Dallas “set-aside” received second priority.¹⁸¹ These priorities were most notably in advance of funding for the parking garages that would negate the adverse impacts of the PRAs.¹⁸²

While the West Dallas priority can be logically attributed the necessity of political coalition building for the Amended Plan, the consulting fees were more puzzling. In a strengthening nearby real estate market, Hillwood seemingly had even more to gain from a quick resolution of the parking situation and no real bargaining power over the City to extract the priority concession. On their face, the parking consulting fees were a direct public subsidy to study a mostly private problem mainly created by the private parties subsidized to study the problem. By 2012 however, arena parking had become the subject of multiple lawsuits between Perot and Cuban,¹⁸³ and the COC, instead of being a joint venture between Perot and Hicks, had passed along with the majority stakes in the Mavericks and Stars to Cuban and Tom Gaglardi respectively. Thus, the priority can be seen as a “children play nice” grant—an attempt to facilitate a solution to the parking issue that could satisfy all parties with the City, through the OED, trading the reimbursement priority for expediency.

While rewarding the spats of billionaires may not seem like a subsidy that would pass public scrutiny, it can be explained through the concept of slack. As described by Levine, in the broader regulatory capture context, “slack” is created by “high information, monitoring and organization costs” that protect bureaucrats and politicians from being held accountable—the public has insufficient “incentive to learn issues well enough to comprehend their impact or to monitor and discipline the behavior of all those officials whose acts might affect them.”¹⁸⁴ While Levine asserts that slack can be used to benefit special interests in return for campaign contributions, support for appointment, or future private sector opportunities,¹⁸⁵ there is nothing to suggest anything as

181. DALL. OFF. ECON. DEV., *supra* note 65, at 31–33.

182. *Id.*

183. *See* Case, *supra* note 158.

184. Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 185 (1990).

185. *Id.*

nefarious in the SATD context. Instead, slack was more likely used to move a project forward that the OED could honestly believe was of benefit to the greater polity, while also promoting the OED's institutional utility.

Thus the slack-covered sausage-making process to provide \$50 million in funding to the most crucial aspect of the Amended Plan, parking garages, came at the expense of more than \$3 million in "children play nice" grants to the COC and Hillwood, and over \$90 million in increment syphoning to West Dallas.¹⁸⁶ While in 2012 this may have been the most expedient way to spur new construction and assessment gains for the City and correct previous public realm shortcomings, the benefit for municipal coffers is a fraction of that to be seen by the very parties responsible for underperformance and through which an effective monopoly capture was created. However for the OED, the ultimate success of a flagship incentive project and execution of a typically once-in-a-metro area development opportunity (a major professional sports arena district),¹⁸⁷ could sell its value in making Dallas a more complete and attractive destination in the competition for firms, talent, and tax base.¹⁸⁸

In the end though, the Amended Plan has been a success in its primary Victory Park objectives. As of 2015, available garage spaces have released many of the remaining Hillwood surface lots for development.¹⁸⁹ With a strong market for land in the vicinity, a complete, connected, and sustainably vibrant urban community is beginning to emerge twenty years after the major arena negotiations took place. However, the success in neighborhoods immediately outside of the Hillwood-dominated TIF zone leaves the glaring question of whether a far more efficient and taxpayer-friendly result could have been achieved without the false barriers imposed by the PRAs.

V. CONCLUSION

In the twenty years since the Arena Master Agreement, the original SATD lands have gone from a contaminated brownfield to the home of one of the busiest sports arenas in North America and an estimated \$1.6 billion in new construction. Yet as a neighborhood, Victory Park is locally regarded as a bust and development has been uneven at best, especially when compared to certain nearby areas.¹⁹⁰ While TIF has paid for substantial public

186. DALL. OFF. ECON. DEV., *supra* note 65, at 22, 31–33.

187. See generally Samuel Nunn & Mark S. Rosentraub, *Sports Wars: Suburbs and Center Cities in a Zero-Sum Game*, 21 J. SPORT & SOC. ISSUES 65 (1997).

188. See Lefcoe, *supra* note 20, at 428–32.

189. See DALL. OFF. ECON. DEV., *supra* note 87, at 14.

190. Wick Allison, *The Failure of Victory Park*, D MAGAZINE, June 2009,

improvements, the SATD has fallen victim to two common, and in this case overlapping, TIF criticisms. First, there is little to indicate that prior to the 2008 recession there was “but-for” present—instead, market conditions as opposed to TIF subsidy drove developer timelines. Secondly, the issue of TIF transparency manifested itself through regulatory capture. Here the developer parties were able to leverage bargaining power and overlapping interests with the local economic development agency to garner unnecessary subsidies that the broader polity had less individual interest in and capacity to challenge. Once the capture framework was established, the decisions available to the City were limited to making the best of a flawed existing structure. Although TIF funds later became important in correcting mistakes and freeing surface lots to be built upon, this iteration of “but-for” was manufactured out of poor decisions driven by the developer parties at the project’s inception.

This faux “but-for” and use of TIF as an instrument of developer capture was incubated by Texas’ highly-permissive TIF statute as well as the will of elected municipal leadership and the City’s agents to compete for firms and talent through the provision of the amenities and built forms that these targets were perceived as desiring, as noted in the literature.¹⁹¹ At the end of the day however, Dallas will broadly get what was originally envisioned, but on a longer and more painful timeline, and with a TIF subsidy that appears to have not been truly necessary beyond its role in removing artificially imposed parking restrictions.

For other cities considering similar projects, the Dallas SATD experience demonstrates how TIF can be a relatively low-risk throw-in if a subsidy package requires bolstering to complete a facility deal insofar as the subsidy (in a pay-as-you-go TIF) will only materialize proportionate to new development. However, for both cities and citizens, the Dallas case also underlines the importance of initial deal frameworks. The SATD serves as a warning that unintended consequences (in Dallas, the PRAs) and sub-optimal bargaining positions can result in the capture of public agents and the provision of unnecessary subsidies to private parties. More specifically, if the facility project is premised on the promise of ancillary real estate development, a legal commitment to that end with penalty clauses for non-compliance places the public jurisdiction in a stronger position relative to an instance, like Dallas, where there was no such obligation.

<https://www.dmagazine.com/publications/d-magazine/2009/june/the-failure-of-victory-park/>; *see* Schnurman, *supra* note 1; *see also* DALL. OFF. ECON. DEV., *supra* note 133, at 7.

191. *See* Lefcoe, *supra* note 20, at 428–32.