

CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

Date: August 5, 2009

TO: Mayor Dave Cieslewicz

FROM: Michael P. May, City Attorney
Anne P. Zellhoefer, Assistant City Attorney

RE: Legal Limitations on Tax Incremental Financing (TIF)

You have asked for our opinion on certain limitations under the state Tax Increment Law, Sec. 66.1105, Wis. Stats., (TIL).

Specifically, the question is whether the City legally could change its analysis of when a Tax Increment District (TID) may be created or TIF financing provided. The City currently uses the so-called "gap analysis" which examines a specific project to determine whether financial assistance from the City is required in order for the project to be financially viable. This is under the TIL statute's so-called "but for" analysis, that is, that the project could not proceed but for the financing provided through the TID. The proposed change to be considered is whether competitive concerns might also meet the legal requirements of the "but for" analysis, that is, could the City agree to provide TIF financing to match or exceed incentives offered by other jurisdictions, regardless of whether the financial gap analysis justified such financing, because the development would not take place in Madison "but for" the additional financial incentives provided by the City.

This memorandum will first provide a summary of the questions involved and our legal conclusions. In the discussion section, this memo will take up the TIL statutory scheme, the relevant case law, and the City's current TIF policy. The memo will then turn to the application of the law to the specific questions presented. The memo concludes with a section on important public policy issues that are raised by the issues presented.

In this memorandum, we will refer to the consideration of incentives offered by a competing state or municipality as the "Competition factor."

Questions Presented:

1. Does the But-For test set out in the state TIL, Sec. 66.1105, Wis. Stats., require that the analysis be limited to a financial gap analysis as the City of Madison currently uses, or does the state law also allow consideration

of Competitive factors such as the competition for the development from other municipal bodies?

2. Assuming the consideration of Competitive factors is allowed under the TIL, is such a consideration a violation of the Public Purpose doctrine under the Wisconsin Constitution?

Short Answers:

1. The TIL does not specify exactly how the analysis is to be conducted under the But-For test. Although not clear under the law, we conclude that a court likely would allow consideration of Competitive factors, particularly if there was other independent evidence to meet the But-For test.
2. Although there is no Wisconsin case law specifically addressing such a question, the use of Competitive factors raises significant questions under the Public Purpose doctrine; and we conclude the City should recognize those legal risks in assessing whether to change current policy.

DISCUSSION

A. General Structure of the State Tax Increment Law (TIL).

The State TIL is found at Sec. 66.1105, Wis. Stats. Although often called the TIF or TID law, the title set out in sec. 66.1105(1) is the "Tax Increment Law." The general purpose and structure of the law allow municipalities to expend funds, either through construction of public improvements, or through loans for private development, that will allow new developments within a specified district delineated by the City. There are certain requirements with respect to findings of either blight, rehabilitation or industrial use in order to use the TIL; sec. 66.1105(4)(gm)(4), Wis. Stats. The City must prepare and approve a project plan, which then must also be reviewed and approved by a joint review board (JRB), containing representatives of the overlying taxing jurisdictions (the City, Dane County, MATC and the local school district). Sec. 66.1105(4) and (4m), Wis. Stats. The positive tax increment generated by the new development is then used to reimburse the City for its expenditures for private and public project costs in the TID¹

In two places, the TIL imposes what is commonly known as the "But-For" test: the requirement that the JRB determine that the development within the TID would not take place without the creation of the TID and the TIF financing provided. In particular, the statute provides as follows in Sec. 66.1105(4m)(b)2:

¹ A more detailed description of the operation of the TIL can be found in the Wisconsin Department of Revenue's "City/Village Tax Incremental Finance Manual" on the DOR website (www.revenue.wi.gov/pubs/slf/tif/cvmanual.html) and in the Supreme Court decision in *Hartford v. Kirley*, 172 Wis. 2d 191, 493 N.W. 2d 45 (1992).

... no tax incremental district may be created and no project plan may be amended unless the [joint review] board approves the resolution adopted ... [by the Common Council] by a majority vote within 30 days after receiving the resolution. The board may not approve the resolution under this subdivision unless the board's approval contains a positive assertion that, in its judgment, the development described in the documents the board has reviewed . . . would not occur without the creation of a tax incremental district. (Emphasis added).

Similarly, under Sec. 66.1105(4m)(c), the Joint Review Board is given the following direction:

1. The board shall base its decision to approve or deny a proposal on the following criteria.
 - a. Whether the development expected in the tax incremental district would occur without the use of tax incremental financing. (Emphasis added).

These requirements are imposed on the Joint Review Board. A project plan for each TID is developed by the municipality and must be approved by its Common Council before being sent to the JRB for approval²

Sec. 66.1105(2)(f) defines the project costs that may be made by the municipality in the TID. This includes a number of the costs for public works improvements, but also allows, under Sec. 66.1105(2)(f)1.i., other payments "which are found to be necessary or convenient to the creation of tax incremental districts or the implementation of project plans" This authority has been used to provide loans through TIF financing to developers within the TID.

B. Case Law Interpreting the Tax Increment Law.

The cases interpreting the TIL do not directly address the questions presented. A review of those cases does, however, provide some insight into the issues facing the City.

In *Sigma Tau Gamma Fraternity House v. City of Menomonie*, 93 Wis. 2d 392, 288 N.W. 2d 85 (1980), the State Supreme Court held that the TIL did not itself provide the power to condemn property, but a municipality must find that authority in other statutes.

² As originally approved by the Legislature (1975 Wis. Act 105), the TIL did not contain the JRB or the But-For test. The JRB and the But-For test were added by 1983 Wis. Act 31, and amended by 2003 Wis. Act 126. The legislative history of these Acts shed no light on the application of the But-For test.

The court also upheld the TIL from constitutional challenges under the uniformity of taxation clause and the public purpose doctrine.

The public purpose doctrine discussion is relevant here. The Court explained the two elements of the public purpose doctrine (at 413):

As enunciated by this court, the public purpose doctrine has two aspects:

- "1. The tax must be for a public -- not a private -- purpose."
- "2. The purpose of the tax must be one which pertains to the public purpose of the district within which the tax is to be levied and raised." *Buse v. Smith*, 74 Wis. 2d at 590, 247 N.W.2d at 160.

The Court went on to hold that, because the governmental bodies that did not receive the tax increment when it was used to pay for the improvements in the TID still obtained the benefit once the tax increment district was ended, there was no violation of the second test under the Public Purpose doctrine, that is, the tax was used within the district where the tax was levied for all relevant governmental bodies.

As to the first prong of the test, that the funds must be for a public and not private purpose, the Court only stated that "the elimination of blight" satisfied the first prong of the Public Purpose doctrine. 93 Wis. 2d at 414. The Court did not address the other purposes for TID, an industrial TID or mixed-use TID. Thus, although the *Sigma Tau Gamma* Court upheld the TIL from a challenge under the Public Purpose doctrine, it failed to address whether making a payment based on Competitive factors satisfies the doctrine. The decision was rendered before the But-For test was added to the TIL.

In *State ex rel. Olson v. City of Baraboo Joint Review Board*, 2002 WI APP 64, 252 Wis. 2d 628, 643 N.W.2d 796 (Ct. App. 2002), the Court of Appeals dealt with a challenge to a TID in the Baraboo area. The court addressed a challenge to a TID based on failure to meet the But-For test. Mr. Olson challenged the TID, which was used to finance public infrastructure, on the basis that the Wal-Mart which developed within the area would have been constructed anyway. The Court stated that, assuming Olson was correct that Wal-Mart was going to develop with or without the TID, it did not invalidate the decision to approve the TID. The court stated (§ 29; 252 Wis. 2d at 646):

The Joint Review Board's task was to look at the TIF district as a *whole* and determine whether development would occur without the use of tax incremental financing. . . . Olson has 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.

The *Olsen v. Baraboo* case stands for the proposition that the But-For test need not be applied to each and every piece of property within the district, so long as the Joint Review Board can conclude that some of the development would not occur without the creation of the TID and the application of TIF. The case is also important because it emphasizes that the But-For test ultimately is applied by the JRB, not the City. This does not change the City's obligation to develop its plans and projects in such a manner that the JRB can find that the But-For test has been met.³

Other cases discussing the TIL are not relevant to the issues here. In *City of Hartford v. Kirley*, 172 Wis. 2d 191, 493 N.W.2d 45 (1992), the Supreme Court found that TIF bonds constitute debt within the constitutional debt limit. In *Town of Brockway v. City of Black River Falls*, 285 Wis. 2d 708, 702 N.W.2d 418 (Ct. App. 2005), the court was dealing with a challenge to an annexation and found that discussions about creating a TIF district did not invalidate the annexation of the property.

We will discuss additional cases under the Public Purpose doctrine below.

C. The City's TIF Policy.

The City recently revised its TIF policy. A copy of the policy can be found at www.cityofmadison.com/planning/TIF.html. Section 4.1(6) of the City's policy sets forth the But-For standard as follows:

(6) **"But for" Standard.** Each project must demonstrate sufficient need for the City's financial assistance, so that without that assistance, the proposed project would not occur. Every other financial alternative is to be exhausted prior to the use of TIF, including equity participation, other federal and state funds, bonds, tax credits, loans, etc. TIF assistance will be utilized as gap financing. Each project must demonstrate probability of economic success.

The City's policy is clear that it uses a financial gap analysis to determine whether or not it is appropriate to create a TID and to provide TIF financing to a potential developer. In other words, the City's policy requires objective and verifiable proof that the development would not occur without the provision of a certain amount of funding to that development. The policy does not consider Competitive factors.

If the City wished to consider Competitive factors in the TIF analysis, the City should change its existing policy to explicitly recognize that, and to establish the standards by which such factors could be considered. Without such a clear statement of policy, the City may face charges that it applies the Competitive factors in a discriminatory manner.

³ One commentator has criticized the But-For test as being so toothless that it should be repealed, and relies on the deferential role of the Court in the *Baraboo* case in support of that conclusion. See, 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 (2005). Dave Cieslewicz is quoted in the law review article.

The City also should recognize the fundamental difference between the use of a Competitive factors and a financial gap test in the TIF analysis. Unlike the financial gap analysis, the City will not be able to state with certainty that the amount of TIF financing provided under the Competitive factor analysis was necessary for the development. This is due to the very nature of the use of Competitive factors. The City will rarely, if ever, know the exact nature and amount of the incentives offered by the competing jurisdiction. The City is essentially placing a bet or participating in a blind auction. The City may eventually offer financing to assure that the development occurs, but the City will never know if the development would have occurred with a lesser amount of TIF financing. In some circumstances, the City may not know whether any TIF financing was necessary to lure the development into the City's TID. The private business or developer will have significant motives to convince the competing cities that the offer of TIF financing must be increased or the developer will take the development elsewhere.

The following scenarios demonstrate the potential issues for the City:

Scenario A: Developer approaches the City of Madison with a proposal for a development and seeks TIF funding. The City's gap analysis shows a need for \$500,000. The Developer states that it is considering another city or state for the development and that other location has offered "much more than this." Concerned about losing the development, Madison offers \$1 million. Developer accepts the \$1 million and develops in Madison. The City never knows if the threat was real, if the other city had offered only \$750,000, or if the Developer might have chosen Madison based on other factors.

Scenario B: The same as Scenario A, except Madison later learns that the other city had offered \$600,000.

Scenario C: The same as Scenario A, except Madison's gap analysis shows no financial gap at all. Because of the Competitive factors, Madison still offers \$1 million and the Developer develops in Madison.

Scenario D: The same as Scenario A, except Madison sticks with the offer justified by its gap analysis. The Developer chooses to locate the expansion in the competing jurisdiction.

D. The Tax Increment Law Does Not Forbid the Consideration of Competitive Factors, So Long as There is Some Other Justification Under the But-For Test.

The Tax Increment Law does not by its language forbid the use of Competitive factors when the Joint Review Board makes the determination that the creation of a TID and provision of Tax Incremental Financing is necessary for a development to occur. The language itself is broad, simply imposing the duty of determining that such financing is necessary for the development:

“ . . . the development described in the documents the Board has reviewed . . . would not occur without the creation of a Tax Incremental District.”

And

“whether the development expected in the Tax Incremental District would occur without the use of Tax Incremental Financing.”

Sec. 66.1105(4m)(b)2. and (c)1.a., Wis. Stats.

If a developer is considering two separate sites for development, and the provision of some (unknown) amount of TIF financing will be a factor in the developer's choice, the argument is that the Joint Review Board could reasonably conclude that the provision of TIF is “necessary” for the development to occur within the TID, or, But-For the provision of TIF financing, the developer will go to another location.

As noted above, this may be a different determination than the level of TIF financing provided. The TIL does not itself place a specific limitation on the amount of TIF under the But-For test, however, the project plans must designate the project costs to be covered. This is highlighted by the *Olson v. Baraboo* case, above, where the court indicated that the But-For test must be met for some, but not all, of the development in the district. Other parts of the law do place limits on the total amount of project costs to be provided.⁴

The Wisconsin Department of Revenue (DOR) publishes a guide for municipalities in the use of TIF. (See reference in footnote 1 of this memo). Attached to this memorandum are the three pages addressing the But-For test. Like the statute, the DOR does not address whether Competitive factors are appropriate; however, the DOR uses examples related to the need for a specific amount of financing for specific improvements, and whether a proposed development would be profitable.

That the TIL itself may not bar the use of Competitive factors does not mean, however, that the use of such factors is not problematic under the TIL. For example, despite *Olson v. Baraboo*, if the City were to use only Competitive factors (see Scenario C above), there would be no way to demonstrate objectively that the But-For test was met. The City would be applying much more subjective and less verifiable standards. Moreover, there is no way to determine the upper limit of TIF funds to be provided. Finally, as noted below, the use of Competitive factors becomes more problematic under the Public Purpose doctrine and under the policy issues raised by the use of Competitive factors.

4 Note that some project plans may have specific developments and the But-For test can be applied prior to presentation of the plans to the JRB, but it is possible that some specific development proposals may come after the JRB approval. In either event, the City currently applies the financial gap analysis to be sure that the But-For test has been met. Some limit on the total amount of TIF provided in any TID is set by the definition of project costs in the law, and the requirement that that the benefits of the plan must outweigh the tax increments created.

These issues will be discussed in greater detail below. For purposes of the TIL, we conclude that Competitive factors are not barred. However, because there is no way to determine the amount of TIF to provide under Competitive factors, we recommend that the City only consider the use of Competitive factors if it can be certain that the But-For test is met through some other objective analysis, such as the gap analysis.

E. The Public Purpose Doctrine May Place a Limitation on the Use of Competitive Factors in TIF Financing.

In contrast to the TIL, the constitutional limitation that public funds must be spent for a public purpose may limit the use of competitive factors in TIF financing.

As noted in the *Sigma Tau Gamma* case, above, the first prong of the Public Purpose doctrine is that tax must be used for a public and not a private purpose. In early cases applying the doctrine, the Wisconsin Supreme Court was rather strict. For example, in *Heimerl v. Ozaukee County*, 256 Wis. 151, 40 N.W. 2d 564 (1949), the Court invalidated the expenditure of public funds by the County to improve private roads or driveways. In *Hermann v. City of Lake Mills*, 275 Wis. 537, 82 N.W. 2d 167 (1957), the Court held that a City violated the Public Purpose doctrine when it sold property at less than fair market value to an industry so that the business could expand. The Court stated (275 Wis. at 541):

The law is well established in this state that a city or village may not make a gift of municipal property to an industrial corporation for the purpose of aiding the industrial growth of the community.

However, in recent years, the Wisconsin courts have been much more lenient in the application of the Public Purpose doctrine, often deferring to the legislative findings as to the public benefit from taxpayer expenditures. As noted above, the Court found a public purpose in the TIL due to its blight elimination goals in the *Sigma Tau Gamma* case. With the Court's blessing of the stadium district tax for the Milwaukee Brewers baseball club in *Libertarian Party of Wisconsin v. State*, 199 Wis. 2d 790, 546 N.W. 2d 424 (1996), the definition of public purpose has become quite malleable. In the Brewers Stadium case, the Court accepted the legislative determination that construction and leasing of the stadium would encourage economic development and tourism and reduce unemployment, and found that this met the Public Purpose doctrine even though a private entity also benefitted. 199 Wis. 2d at 434.

In *Alexander v. City of Madison*, 2001 WI APP 208, 247 Wis. 2d 576, 634 N.W. 2d 577 (Ct. App. 2001), a taxpayer raised a Public Purpose doctrine challenge to the City of Madison's determination to give new alcohol licensees a \$10,000 "economic development grant" that exactly offset a state law requirement that licensees had to pay a \$10,000 fee for a license. The Court of Appeals upheld Madison's actions and accepted Madison's stated purpose, to increase the property tax base and encourage tourism, as meeting the Public Purpose doctrine. ¶ 9; 247 Wis. 2d at 585. The Court seemed to accept the idea that, if Alexander had provided proof that the licensees

would have proceeded even without the grants, he might have shown a Public Purpose violation. But Alexander presented no evidence on that issue. *Id.* at ¶ 10; 247 Wis. 2d at 585-86.

In *Bishop v. Burlington*, 2001 WI APP 154, 246 Wis. 2d. 879, 631 N.W. 2d 656 (Ct. App. 2001), *pet. for review denied*, 2001 WI 117, 247 Wis.2d 1035, 635 N.W.2d 783 (2001), the Court of Appeals upheld Burlington's decision to swap some land with a developer so that the business of the developer could be expanded; the Court distinguished the case from the *Hermann* case, above, because a land swap was involved. And, in *Town of Beloit v. Rock County*, 2003 WI 8, 259 Wis. 2d 37, 657 N.W. 2d 344 (2003), the Supreme Court upheld a Town's right to itself develop some land after it rejected proposals from private developers, on the grounds that such action increased the tax base.

From that brief summary of cases, it is fair to say that the Wisconsin courts have greatly expanded the concept of Public Purpose – some Supreme Court justices have suggested the doctrine has been expanded beyond recognition, e.g., the dissent by Justices Abrahamson and Bradley in the *Beloit v. Rock County* case – and generally accept a legislative body's determination thereof. Nonetheless, the situations closest to use of Competitive factors are the early decision on giving property to a corporation and the warning from *Alexander v. Madison* that the case might have gone differently if the challenger had shown licensees would have applied even without the City's largesse.

The problem with the use of Competitive factors in TIF financing is, as noted above, that the City will not know whether it has spent more on TIF financing than was necessary to develop the project. Since it is the project development that must satisfy the Public Purpose doctrine, there is a strong argument that the City has spent public funds for a private purpose, namely, to reduce the amount of private funds that would otherwise have been put into the development regardless of the amount spent by the City.

There is a counter-argument that the legislature has determined that any expenditure up to the amount which would be recovered in taxes would meet the public purpose test. This is because the Joint Review Board, in addition to reviewing the But-For test, also must determine that the economic benefits are sufficient to compensate for the costs of improvements and that the benefits of the proposal exceed the tax increments. Sec. 66.1105(4m)c.1.b. and c, Wis. Stats. In other words, it is possible that a court might say that the But-For test is not the determinative factor in assessing the Public Purpose doctrine, so long as the public benefits outweigh the costs.

We cannot predict with much certainty how a Public Purpose challenge to the use of Competitive factors might come out. The Courts' increasing deference to legislative determinations of Public Purpose suggests that the City could present strong arguments if it could show the benefits outweighed the costs; the ability of a challenger to show that those benefits might have been obtained for lower or no costs could result in a successful challenge. We can advise that the City should be aware that there are

risks that the Public Purpose doctrine might be violated if Competitive factors are used, and should take steps to bolster the demonstrated need for the funding.

F. Public Policy Concerns.

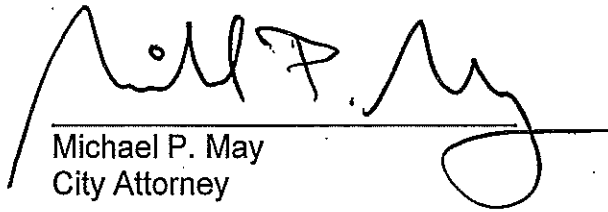
The City is surely aware of the significant public policy issues surrounding any potential change in its TIF policies and it is not the role of our office to argue those policy issues. The following policy issues, however, directly relate to the legal analysis provided herein:

1. Competitive factors and the uncertainty of need. As noted extensively above, it is this very uncertainty that leads to many of the legal issues raised by a change in policy.
2. Fairness in application of the policy. We believe this is a very important concern. Without specific standards, how will the City determine when to increase TIF funding based on Competitive factors? How will the amount of TIF funding be justified on an objective basis? This public policy concern is not hypothetical and does have legal ramifications. A few years ago, some City of Madison employees were interviewed by the Dane County District Attorney's office upon a complaint that the City was misusing its TIF policies to show favoritism to certain developers. The existence of a verifiable and objective test such as the gap analysis was significant in convincing the District Attorney that there was no misuse of public funds.

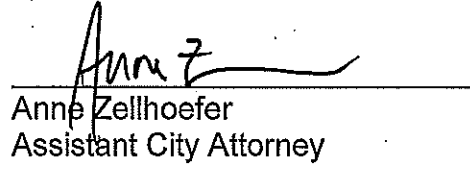
CONCLUSION

Our analysis of the law indicates that there is no clear-cut answer as to whether the use of Competitive factors would violate Wisconsin law. We conclude that such factors might well be allowed under the But-For language of the TIL, especially due to the deference shown by Wisconsin courts in applying the TIL. However, we think that if Competitive factors are to be considered, the safer legal route is that they be considered along with some more objective analysis.

Under the Public Purpose doctrine, we think there are risks that the use of Competitive factors would open the City to a potential legal challenge, although the strength of such a challenge is less today with the Wisconsin courts' more deferential legal analysis. If the City changes its policy to allow the use of Competitive factors, we think that the standards for use of Competitive factors in the City's TIF policy should be clearly delineated and tied to accepted public purposes, to increase the City's chances of surviving a legal challenge.



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5.1 The "but for" Test

For Tax Incremental Financing (TIF) to benefit municipalities as it is supposed to, developments that get TIF assistance must meet a standard called the "but for" test. The name comes from the expression, "The development would not occur *but for* the use of TIF." To say this means that the proposed development would not happen if the financial support available from TIF was not used. This could be true for many reasons. For example, new development may not happen in a certain area because there are not enough streets, sidewalks, sewer lines or other pieces of physical infrastructure. After using TIF to provide these improvements, the development becomes desirable and will go ahead. This section includes a discussion of who makes the "but for" finding, what it means to make that finding, and why that finding is so important for TIF to work properly.

Making the "but for" Finding

It is important for all local officials to understand, accept, and be able to defend the "but for" finding. When the Plan Commission is considering developments, they should ask about the need for public assistance, and how that help will affect the projected profits for the developer. The Town or Village Board or City Council should also examine these facts. They need to support the "but for" finding, and understand it well enough to defend that finding to skeptics.

TIF Law requires the Joint Review Board (JRB) to make the "but for" finding in the resolution that they adopt approving the creation resolution (for more details on the creation process see Chapter 2, and for the JRB see Chapter 3). This is actually one of three findings they must make in that resolution. In the TIF

Law, s. 66.1105 (4m)(c) lists the three criteria upon which the JRB must base its decision, the first of which is "[w]hether the development expected in the [TID] would occur without the use of [TIF]". Two other criteria are included in that paragraph, and together with "but for" they form the basis for TIF to work.

Please note: The JRB is empowered to receive planning documents, and even hold additional public hearings if needed.

Members of the JRB should give great care and thought to this finding. The significance of this finding to TIF is discussed below, but as representatives of taxing jurisdictions it is important for JRB members to understand what the "but for" finding means. When JRB members agree to make that finding it means that they have seen or heard evidence that convinces them of the vital need for TIF assistance to make this development a reality. By making the finding, they are sacrificing some amount of tax revenue for many years into the future. If TIF assistance is not needed to make a development happen, the JRB members should not agree to make the "but for" finding. They must make their findings within the established timeline, but the findings of the JRB are very important and they should be taken seriously.

Please note: JRB members should not be afraid to ask tough questions and get documentation to backup claims related to this finding.

What the "but for" Finding Means

Let's imagine a JRB meeting where a developer is addressing the members and he says, "There is no way we can make this development happen without funding assistance through TIF." Sounds like the "but for" standard has been met. But what does that statement mean? It can mean many different things in different scenarios, but quite often it is a matter of profitability. When a development is considered, there is usually substantial risk involved for the developer. As a reward for taking the risk, a developer will expect a certain level of return on the project, called profit. Even if a profit is expected from a project, the return may not be large enough to make the risk worth taking for that developer.

TIF can alter the profit picture by shifting some of the costs of the development from the developer to the taxpayer. In an urban redevelopment setting, for example, a site may require environmental clean-up, which can be quite costly. If a municipality will clean up the site, and pay for it with TIF, the cost is not borne by the developer and his potential profit will rise. In the example used above, the cost of installing improvements like roads, sewer lines, curbs and gutters, or sidewalks can be taken on by the municipality, using TIF. That means that the property owner or site developer will not have to bear those costs, and as a result the forecast return on the project will be greater.

Why would a municipality want to take on expenses and risks in order to increase the profits of a private developer? Well, the basis of TIF is that there may be some projects that the municipality finds desirable, but that aren't profitable enough for private developers to take on. By accepting increased risk, and paying for physical investment in the short-run, the municipality will benefit from an increased tax base and more jobs, which help the local economy in the long-run. The balance between the near-term risks and the long-run benefits must be evaluated to determine if a TIF project is worthwhile. The JRB has to make a finding on that matter, in addition to the "but for" finding.

Why the "but for" Finding is Important

When creating a TIF, the JRB must make a finding that the development would not happen but for the assistance of TIF. This is important because that finding is critical to ensuring that the TIF tool works as intended.

Let's examine a few scenarios:

1. First, a developer wants to put up a strip mall on some vacant parcels near a freeway interchange, but she requests TIF assistance to pay for roads and the sewer line connections. The TIF funding is denied, but the development proceeds anyway. The roads and sewer lines are paid for by the developer, along with the cost of constructing the building, advertising the space, and putting up signage. The increase in property value resulting from the site improvements goes onto the tax roll, and the tax payments from the development go into the general fund, increasing collections.
2. Next, let's imagine that same scenario, but after the TIF assistance is denied the developer decides not to proceed with the project. The parcels are not developed

by anyone and remain vacant. The small tax revenue from the vacant parcels continues to go to the general fund as they had before.

3. Finally, let's imagine this same developer with the strip mall on vacant parcels. This time, after hearing the proposal from the developer, the local governing body negotiates with the developer, and agrees to finance some of the desired projects. The request for TIF assistance is approved because the developer shows how the public funding of some infrastructure will make the project profitable. The municipality writes up a project plan and goes through creating the TIF. The value of the vacant land will be the base value of the TID, and once the infrastructure goes in, the construction of the mall is completed. This large increase in value constitutes the value increment, and the tax revenue from that value goes into the TIF fund to pay for the roads and sewer lines.

In our first scenario the tax base of the municipality is growing due to private investment. This is the way growth usually happens, and as a result of growth the tax burden can be distributed over more property value. In the second scenario the development doesn't happen because the project isn't profitable. The tax base doesn't grow, no new jobs are created, and the tax burden stays about the same. In the last scenario, where TIF is used, the development happens, but it costs the municipal taxpayers money (for the infrastructure improvements) to make it happen. In the end the tax base grows, but at the cost of higher tax burdens during the TID life. But this doesn't mean that TIF increases taxes!

If a proposed development will happen without TIF, then TIF should not be used because it would cost taxpayers more than it should for the growth that results. But, if TIF can be used to encourage a development that wouldn't otherwise happen, the tax base can be increased, thereby limiting the growing tax burden. The "but for" test is critical to this distinction; that is what makes it so important. Finding "but for" means that the JRB believes that the development will not happen without some assistance. They are endorsing the use of tax dollars to help bring growth that otherwise would not occur. A large tax base helps keep everyone's tax bills down, so growth is key. By helping to encourage growth, TIF can be a useful tool to grow the tax base while controlling increasing tax burdens.