
TIF 101:

ADVICE FOR MUNICIPALITIES CONSIDERING THE FIRST USE OF TAX INCREMENT FINANCING

Part 1 in a 3-part series: What is TIF and how is a TIF plan prepared?

by David Bushek and Rich Wood

This is the first article in a three-part series. This Part 1 will address questions regarding the preparation of a TIF plan and the appropriate use of TIF. Part 2 will discuss in detail the process for approval of a TIF plan. Part 3 will provide an overview of the effective use of a TIF contract and financing alternatives to implement a TIF plan.

Cities or counties that are considering the use of tax increment financing (TIF) for the first time, or that possibly approved a TIF plan in the past under different leadership, may have many questions about the potential use of TIF for a proposed project. These questions can involve numerous issues such as: what should be included in a TIF plan, the process of considering and approving a TIF plan, the best method to finance a project, the performance standards that a developer must satisfy to receive TIF assistance, and the best method of protecting the municipality when public financing occurs. Addressing these questions is a critical part of providing full and fair consideration of a proposed project.

This article is designed to address several fundamental questions that a city or county (collectively referenced as “municipalities”) may raise when considering the use of the Real Property Tax Increment Redevelopment Act, Sections 99.800 to 99.865 RSMo (TIF Act), for the first time. It is not intended to be a comprehensive list of all the various issues that may arise in the review of a TIF plan. Addressing these questions on a case-by-case basis allows a municipality to formulate public policy over time, which then guides the municipality for its consideration of future TIF plans.

What is tax increment financing?

Tax increment financing is a method of redirecting tax revenues to enable the redevelopment of property that is (1) blighted, (2) a conservation area, or (3) an economic development

area. The TIF Act authorizes the capture of 100% of the incremental increase in property taxes above the property taxes generated by the property prior to redevelopment, called “payments in lieu of taxes” (“PILOTs”) and 50% of the new economic activity taxes (“EATs”) generated from the redevelopment project through sales taxes, earnings taxes, and utility taxes.

PILOTs are calculated by first establishing the amount of real property taxes paid in the base year, which is the most recently ascertained assessed value of property in the redevelopment project area before the TIF project is approved. For each year during the term of TIF, up to 23 years, as property is developed and reassessed at a higher value, higher property taxes are paid. The increase in taxes over the base year is captured as PILOTs and deposited in the special allocation fund created by the municipality for the TIF plan to pay approved reimbursable project costs.

EATs are calculated by determining the sales taxes, earnings taxes, and utility taxes generated in the redevelopment project area in the calendar year prior to the year that the TIF project is approved. For each year during the term of the TIF project, as sales taxes, earnings taxes, and utility taxes are generated within the redevelopment area, 50% of the increase in such taxes over the base year is captured and deposited into the special allocation fund for the TIF plan to pay reimbursable project costs.

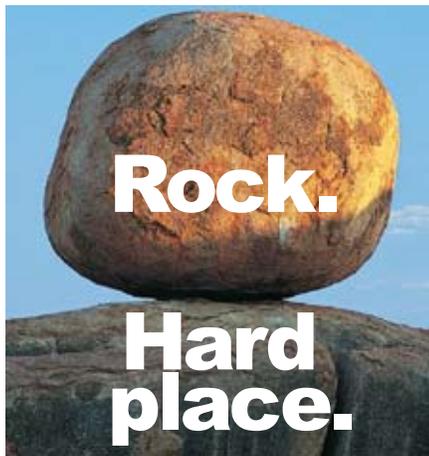
Captured PILOTs and EATs are used to reimburse the developer or the municipality for certain costs of redevelopment authorized by the TIF Act

and approved in the TIF plan. A common misconception is that TIF provides tax abatement. The property owners continue to pay the same amount that would have been imposed as property taxes, except that TIF allows 100% of the increased payments to be diverted to pay for approved project costs. TIF allows for the diversion or redirection of property taxes, but not the abatement of taxes.

Does a municipality have to capture the maximum PILOTs and EATs allowed by the TIF Act?

The technical answer is “yes,” but the practical answer is “no.” When a municipality approves a TIF redevelopment project, the ordinance which authorizes the collection of PILOTs and EATs cannot specify the initial capture of any amount other than 100% of the PILOTs and 50% of the EATs. However, the municipality can achieve the desired result – lower effective PILOTs or EATs – through other means. The most common method is for the TIF plan to require a declaration of surplus TIF revenues during each year of TIF collection that results in the desired effective TIF collection rate. Surplus TIF revenues are distributed on a pro rata basis to the applicable taxing districts, in proportion to their respective levy rates.

For example, if the goal is to achieve an 60% effective rate for the capture of PILOTs, the TIF plan could require that 40% of the PILOTs be returned as “Surplus PILOTs” to the taxing districts. The property owners would pay 100% of the incremental increase in property taxes as PILOTs



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during each year of TIF collection, and 40% would be distributed as surplus PILOTs to the taxing districts which impose real property taxes in the project area, on a proportional basis according to the levy rates of the affected taxing districts. This then annually leaves 60% of the PILOTs in the special allocation fund for use in accordance with the TIF plan.

What costs are eligible for reimbursement?

Costs which are reasonable and necessary, or incidental to, the implementation of a TIF plan are eligible for reimbursement from captured PILOTs and EATs. Within a blighted area, common reimbursable project costs include (1) public infrastructure, such as streets, water, sewer, and storm drainage, (2) private improvements within the redevelopment area, such as buildings, parking lots, and landscaping, (3) capital contributions to taxing districts, including the costs of taxing districts for capital improvements that are found to be necessary and to directly result from the redevelopment project (e.g., new school facilities), (4) property assembly and land purchase costs, (5) certain off-site improvements to public infrastructure outside the redevelopment area if they are essential to the preparation of the redevelopment area for use in accordance with a redevelopment plan, (6) professional fees associated with the preparation and implementation of the plan, such as attorneys' fees, engineering fees, and architect fees, and (7) costs of issuing notes or bonds. Municipalities have flexibility in deciding what costs may be eligible for reimbursement under a TIF plan.

Does the TIF Act require that a TIF Plan contain certain information?

The TIF Act sets out minimum requirements for what every TIF plan must contain. The municipal governing body is also required to make certain findings with respect to the TIF plan during the approval process, and information sufficient to support those findings should be set forth in the plan. The municipality's legal advisors should be consulted regarding the required contents of a TIF plan. A few of the more significant requirements are discussed more fully in this article.

Information which a municipality should require to be included in or accompany a TIF plan includes: (1) a general description of proposed development, (2) a blight study, (3) objectives of the plan (e.g., cure blighted conditions, provide needed services to municipal residents or provide additional employment), (4) a division of the redevelopment area into project areas and proposed land uses, including a schedule for development of each phase of development and public infrastructure to be constructed, if applicable, (5) sources of funds and commitments for financing project costs, including plans for any bonds to be issued, (6) a project budget showing project expenses to be funded privately by a developer and publicly by TIF revenues, (7) a market analysis showing the feasibility of the proposed development, (8) a cost-benefit analysis showing the impact of the TIF plan on taxing jurisdictions if the project is built and not built, (9) a statement regarding whether condemnation

is expected to be necessary, and (10) a relocation plan.

What conditions must exist to declare that property is "blighted"?

There are three basic types of TIF plans in Missouri, each of which focus on the conditions of the property. To approve a TIF plan, a municipality must find that the property is: (1) blighted, (2) a conservation area, or (3) an economic development area. The most common form of TIF plan is a "blighted area" TIF plan.

The definition of blight in the TIF Act has multiple parts that require a municipality to undertake a cause-and-effect analysis. A property may be declared blighted in an area which, by reason of -

- (1) the predominance of defective or inadequate street layout,
- (2) unsanitary or unsafe conditions,
- (3) deterioration of site improvements,
- (4) improper subdivision or obsolete platting, or
- (5) the existence of conditions which endanger life or property by fire and other causes,

or any combination of such factors, results in one of the following -

- (1) retards the provision of housing accommodations or
- (2) constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.

Although the Missouri TIF Act provides this elaborate definition of blight, local officials often apply a common-sense test to determine whether

property is blighted – “I know it when I see it.” The statutory definition should be applied in each instance, however, rather than the common view. In some circumstances, the presence of blight is obvious. In many cases, however, a blight declaration is at least fairly debatable, and reasonable minds could reach different conclusions on whether property is blighted. The Missouri courts typically defer to the local legislative decisions and will uphold a blight finding if there is evidence to support a blight finding. The recent judicial trend, however, is to more closely scrutinize municipal blight findings when challenged in a lawsuit, with particular attention to each component in the definition of blight. For this reason, municipalities should closely analyze the evidence of blight in light of the statutory definition.

Are there negative consequences to declaring property “blighted”?

A blight designation is a finding of fact that is made by a municipal governing body. This finding does not change the characteristics of the property, but rather is an official designation regarding the current state of the property. Declaring that property is blighted allows redevelopment of the property to become eligible for TIF reimbursement.

If blight is promptly cured through implementation of a TIF plan, the blight designation should have no lasting negative effects. The blight that exists in an area is usually what depresses property values, and not the declaration of blight. If property that has been declared blighted is not promptly redeveloped, some negative effect on the property values could result from the designation. For this reason, the municipality should ensure by contract that the property is promptly redeveloped according to an agreed schedule.

What is the “but for” test?

The “but for” test is an inquiry into whether the property would be redeveloped without TIF assistance – *but for the approval of TIF, the redevelopment would not occur*. More formally, the TIF Act requires a finding by the municipal governing body that the redevelopment area “has not been subject to growth and development through investment by private enterprise and would not reasonably be anticipated to be developed without the adoption of tax increment financing.” In most instances, this is demonstrated by a developer providing sufficient evidence that the developer is unable to make a reasonable rate of return on investment if required to bear all costs associated with redeveloping the property. A developer is required to sign an affidavit to this effect.

Does the municipality write its own TIF plan or does the developer write the TIF plan?

Either method can be used. A TIF plan is approved by legislative action of the municipality and serves as a municipal declaration regarding how a blighted or conservation area will be cleared of the blight or blighting influences and how the property will be redeveloped. In the strict sense, the municipality is approving its own plan for redevelopment. This does not mean, however, that the municipality must actually prepare the plan. Municipal staff or officials can prepare a TIF plan, or a TIF plan can be prepared by a developer or property owner and submitted to the municipality for consideration. A developer that prepares the plan is typically the advocate for its approval in order to achieve a mix of public and private financing for a redevelopment project, and in this sense the developer commonly takes ownership of the plan. However, even when proposed by a developer, a TIF plan is ultimately the

municipality’s plan for redevelopment of property.

What resources does a municipality need to properly consider a TIF plan?

Larger municipalities may have in-house staff that can assist with the preparation or analysis of a TIF plan. However, many municipalities may find it beneficial to hire outside consultants to assist with these functions. A market study may be beneficial for the governing body in its determination that there is a market to support proposed retail development. A financial feasibility analysis may be prepared to insure that the estimated redevelopment costs and revenue projections set forth in the TIF plan are accurate and that the redevelopment would not occur “but for” TIF assistance. A blight study is required to be prepared and included in the TIF plan. A municipality also needs legal assistance to ensure compliance with all procedural and substantive requirements of the TIF Act and to negotiate a TIF contract.

What if the municipality does not have the resources to hire outside consultants?

It has become common practice for municipalities to require that a proposed developer of a TIF project enter into a funding agreement with the municipality which requires the developer to pay for the costs of consultants incurred by a municipality which are necessary to properly prepare or analyze the TIF plan and negotiate a TIF contract. In most cases, the funding agreement requires the developer to post a cash deposit with the municipality which may be used to pay consultant bills as they become due. The developer is required to maintain the deposit at a certain level during the time the TIF plan is considered and a TIF contract is negotiated.

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A municipality should not rely exclusively on the consultants engaged by the developer for a TIF plan. While many of the studies and reports presented by a developer's consultants can be safely relied upon by a municipality (such as the blight study), many consultants are engaged for the purpose of persuading the municipality, on behalf of the developer, to approve a TIF plan. It is common for a municipality to engage its own financial advisor and legal counsel to review a TIF plan, both of whom have a fiduciary duty to the municipality and work exclusively for the municipality. In particular, an attorney engaged by a developer has an attorney-client relationship with the developer and represents only the developer throughout the TIF process, whose job is to persuade the municipality to adopt the TIF plan in a form that is most financially advantageous to the developer. The municipal attorney or special legal counsel should represent the municipality during the TIF process.

Is a municipality required to seek proposals from other developers?

The TIF Act requires that each municipality which is considering a TIF plan establish written procedures relating to bids and proposals for implementation of redevelopment projects and that all interested persons be given a reasonable opportunity to submit alternative proposals or bids. In order to comply with this requirement, municipalities must adopt written procedures for obtaining alternative proposals and invite the submittal of alternative proposals through the notice process for implementation of a TIF project.

How long should TIF be provided and when should the TIF plan terminate?

The TIF Act allows TIF revenues to be collected on any property for a maximum of 23 years. A municipality may establish a policy which provides more favorable consideration for a TIF plan that will terminate earlier than 23 years, but the municipality must consider each TIF plan on its own merits and make an independent decision regarding the duration of each TIF plan. The municipality may base its decision regarding the duration of a TIF plan on a number of factors about the project, including, for example, the type and

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quality of the development, the total project costs, the amount of equity provided by the developer to build the project, and the financial benefits on the local economy.

What evidence must be presented for a developer to demonstrate that a project can be privately financed?

The TIF Act provides that each TIF plan must include evidence of commitments to finance the project. Financing may be from public and private sources, and private financing can be from equity contributed by the developer or a private loan. If the developer proposes private financing, it is common to require a commitment letter from a financial institution which demonstrates that the bank is familiar with the project and will provide financing if the TIF plan is approved. This letter may be conditioned upon final loan approval and subject to typical loan documentation.

Is a developer required for a TIF plan?

The TIF Act requires that a TIF plan contain an affidavit signed by a developer or developers attesting that the redevelopment area is blighted, a conservation area, or an economic development area; has not been subject to growth and development through investment by private enterprise; and

would not reasonably be anticipated to be developed without the adoption of TIF. Although a municipality may prepare its own TIF plan, a developer affidavit is required to be included in the plan.

Under what conditions should bonds be issued by the municipality to finance the TIF project costs?

The most common minimum requirements for bond issuance is proof that the developer has secured signed leases or commitments for tenants; closing on any private financing with proof of available proceeds, final plans and specifications for the project; a signed construction contract; and the commencement of construction. Other performance standards may be required from the developer for bonds to be issued, such as that a specific portion of the stores are actually open for business. Market conditions may increase the requirements for a bond issuance. For example, the underwriter for the bonds may require that the project has some history of revenue production before bonds can be issued, or an annual appropriation pledge of the municipality might be required. The underwriter for the bonds will specify the conditions that must be met in order to sell bonds for the project, accounting for prevailing market conditions.

What is a “pay as you go” TIF?

As an alternative to the issuance of bonds to fund redevelopment project costs, a developer may be required to fund all project costs up front from private equity or a private loan and then receive reimbursement only as moneys become available in the special allocation fund established for the TIF plan. “Pay as you go” then means that the developer is paid (reimbursed from TIF revenues) as the project generates PILOTs and EATs over time. It is common in this situation for the developer to receive an agreed-upon amount of interest for accrued reimbursable project costs. These arrangements are set forth in a TIF contract between the municipality and developer.

Should other forms of public funding be provided in combination with TIF?

It is common for special funding districts, such as a transportation development district (TDD) or community improvement district (CID), to be proposed in connection with a

TIF plan. Typically, the TDD or CID will impose a sales tax to generate additional revenue to pay for a portion of reimbursable project costs. When a TDD or CID operates within a TIF area, one-half of the funding district sales tax revenues are captured as economic activity taxes (EATs) through operation of the TIF plan. The revenues which are captured as EATs are expended as directed in the TIF plan. This eases the impact of the TIF plan on the jurisdictions which impose property taxes in the TIF redevelopment area because it helps to retire the TIF plan at an earlier date, allowing all property taxes to flow normally at an earlier date.

Imposing a special sales tax within the boundaries of the TIF area can have some negative market affect on the project because it makes the total sales tax rate in the TIF area incrementally higher than in the surrounding community. A significant number of extra sales taxes in a municipality may also have a negative affect on the municipality’s ability to increase municipal sales tax rates. A municipality will need to weigh the

benefit of a special sales tax within a TIF area against any impact it may have on the community.

Does approval of one TIF plan increase the likelihood that TIF assistance will be provided for other projects?

Approving a TIF plan may create the perception that public assistance will or should be provided to similar redevelopment projects. The approval of each TIF plan, however, is a purely legislative decision, and approving a TIF plan in a community does not bind the municipality to approve a future proposed TIF plan for another proposed development. Adoption of a TIF policy, which sets forth the key performance standards that the municipality would like to see in any proposed TIF plan, will help establish conditions under which a municipality will most favorably approve a TIF plan in the future. □

David Bushek and **Rich Wood** are attorneys who practice with the Economic Development Group in the Kansas City office of Gilmore & Bell, P.C.

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TIF 101:

ADVICE FOR MUNICIPALITIES CONSIDERING THE FIRST USE OF TAX INCREMENT FINANCING

Part 2 in a 3-part series: How is the TIF Plan Approved?

By David Bushek and Rich Wood

This is the second article in a three-part series. Part 1 addressed questions regarding the preparation of a TIF plan and the appropriate use of TIF. This Part 2 will discuss the process for approval of a TIF plan. Part 3 will provide an overview of the effective use of a TIF contract and financing alternatives to implement a TIF plan.

Cities and counties that are considering the use of tax increment financing (TIF) for the first time, or that may have previously used TIF on a limited basis, frequently have several questions about the TIF plan approval process. This article is designed to address the most common questions that arise for approval of a TIF plan by a city or county (collectively referenced as “municipalities”) under the Real Property Tax Increment Redevelopment Act, Sections 99.800 to 99.865 (TIF Act). Additional specific procedural issues may arise during consideration of a TIF plan, and the municipality should consult with legal counsel in these cases.

Is A Public Hearing Required?

Yes. The TIF Act requires that the municipality’s TIF commission hold a public hearing before approval of a TIF plan, approval of redevelopment projects and designation of a redevelopment area. The TIF Act does not require the governing body of the municipality to also hold a public hearing.

What Are The Notice Requirements For The Public Hearing?

Notice of the public hearing must be provided to (1) all taxing jurisdictions located wholly or partially within the redevelopment

area at least 45 days prior to the date of the public hearing, (2) the persons in whose name the general taxes for the last preceding year were paid on property lying within the redevelopment project or redevelopment area at least ten days prior to the date of the public hearing, and (3) the public by publication at least twice in a newspaper of general circulation in the area of the proposed development with the first notice published not more than 30 days prior and the second notice not more than ten days prior to the date of the hearing. Copies of the notice must also be sent to the Missouri Department of Economic Development.

The public hearing notices are required to contain (1) the time and place of the public hearing, (2) a description of the general boundaries of the proposed redevelopment area or redevelopment project by street location, where possible, (3) a statement that all interested persons shall be given an opportunity

to be heard at the public hearing, (4) a description of the proposed TIF plan or redevelopment project and a location and time where the entire plan or project proposal may be reviewed by any interested party, and (5) any other matters that the TIF commission may deem appropriate.

At What Point In Time Should A Municipality Send Out The Initial (45-Day) Public Hearing Notices?

Ideally, the municipality should have a complete TIF plan on file that contains or is accompanied by all information and documentation required by the TIF Act prior to mailing the initial notices to the taxing districts. Some municipalities may send the initial notice when the TIF plan is nearly complete, however, because the initial notice is mailed so far in advance of the public hearing. If the TIF plan is not yet complete, the taxing district notices may provide that the complete TIF plan will be on file with the municipality

Chart 1

Number of members appointed by:	Entity Creating TIF Commission				
	City (outside St. Louis County)	City (inside St. Louis County)	County (other than St. Louis County)	St. Louis County	St. Louis City
City or county creating the Commission	6	6	6	6	6
School districts	2	2	2	2	2
County in which located	2	3	0	3*	0
Other taxing districts	1	1	1	1	1
Total members	11	12	9	12	9

* These members are appointed by three cities that have TIF districts in the county.

on a specific date that is stated in the initial notice.

What Is The Makeup Of The TIF Commission?

Before using TIF, a municipality must create a TIF commission by ordinance. The composition of the TIF commission depends on (1) whether a city or county is undertaking the redevelopment project, and (2) the location of the municipality undertaking the redevelopment project, as described in Chart 1.

What Happens If The Other Taxing Districts Do Not Coordinate For Appointment Of A TIF Commissioner?

In each of the various locations described above, the TIF Act requires that one member of the TIF commission be appointed, in any manner agreed upon by the affected districts, to represent all other districts (besides the school districts and the county) that levy ad valorem taxes within the area selected for a redevelopment project or the redevelopment area. These other taxing districts must appoint one commissioner using any method to which they mutually agree. Ideally, each of the other taxing districts represented by this person will confirm to the municipality in writing their consent to a particular individual to sit on the TIF commission. Disputes involving the manner in which this commissioner is appointed should be resolved by the districts that are represented by this provision.

What Happens If The Taxing Districts Fail To Appoint Commissioners?

The TIF commission is specifically authorized by the TIF Act to hold meetings and conduct business with less than all seats filled. The number of seats filled is used to determine whether a quorum exists for a TIF commission to hold a meeting and conduct business. A quorum is always one more than half of a public body's occupied seats, unless adopted procedural rules establish a different requirement. For example, if the TIF commission is statutorily authorized to have 11 members, but only nine seats have been filled, then five members of the TIF commission must be present at a meeting to have a quorum and conduct business on behalf of the TIF commission.

Must The Municipality Investigate Alternative Proposals For Development Before Approving A TIF Plan?

Yes. The TIF Act requires that each municipality, or its TIF commission, must establish written procedures relating to bids and proposals for implementation of TIF redevelopment projects. There is little guidance provided in the TIF Act regarding what must be contained in the written procedures, except that the procedures must provide reasonable opportunity for any person to submit alternative proposals or bids. The written municipal procedures commonly provide that, when a TIF plan is proposed by a developer, the municipality will publish notice that the municipality will accept alternative bids and proposals for a designated period of time. The notice period typically overlaps with a portion of the initial 45-day notice period prior to the TIF commission public hearing.

If any alternative development proposals are submitted, these can be compared to the proposed development that is already on file with the municipality. The challenge that may arise in this situation is that the persons who may submit alternative development proposals do not have ownership or the right to purchase the property that is proposed for the redevelopment project area. When a TIF plan is prepared by the municipality, the written procedures should serve as a vehicle for the municipality to receive proposals for redevelopment in a blighted or substandard area in need of TIF assistance.

What Happens At The Public Hearing?

Once the municipality has established the TIF commission, a TIF plan has been prepared, notice of a public hearing has been provided, and a notice for alternative bids and proposals has been provided in accordance with procedures adopted by the municipality, then the TIF commission may hold the public hearing to consider the TIF plan. At the public hearing, the commission receives evidence and testimony from the developer, the staff of the municipality, any representatives of affected taxing jurisdictions, any affected property owners, and the general public regarding the proposed TIF plan, redevelopment projects, and designa-

tion of the redevelopment area. Once all evidence and testimony has been received, the TIF commission can close the hearing and consider the proposed TIF plan, redevelopment projects, and redevelopment area.

What Is The Role Of TIF Commissioners And What Questions Can They Ask?

The TIF commission makes a recommendation on a proposed TIF plan to the governing body of the municipality. It does not have the power to grant final approval of TIF plans, redevelopment projects, or the establishment of redevelopment areas - that final approval rests with the governing body of the municipality. At the public hearing, TIF commissioners may ask questions of the developer, municipal staff, and any other persons present at the hearing regarding any topics relevant to the TIF commission's consideration of the TIF plan, redevelopment projects, and redevelopment area. Each individual TIF commissioner should participate in the public hearing and deliberations regarding a TIF plan, evaluate the evidence and testimony received in the public hearing, and vote on a recommendation to the governing body. The TIF commission has the power to negotiate and enter into a TIF redevelopment contract with a developer and issue bonds to implement a TIF plan, but in most municipalities these functions are performed by the governing body of the municipality.

May The TIF Commission Continue The Public Hearing?

The public hearing may be continued one or more times as deemed necessary by the TIF commission to another specific date, time, and location without further mailed or published notice, provided that the TIF commission adopts a motion for such continuance during the public hearing and enters the motion in the minutes of the meeting. However, for those counties that are required by Section 99.820.3 RSMo to have a county TIF commission, the hearing may not be continued for more than 30 days beyond the date on which the hearing is originally opened unless the longer period is requested by the chief elected official of the municipality creating the commission and approved by a majority of the TIF commission.



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Does The TIF Commission Also Review Other Requests For Public Funding Assistance, Such As A Request To Form A Transportation Development District (TDD) Within The TIF Redevelopment Area?

It is common for a developer to seek the formation of a special funding district, such as a transportation development district (TDD) or community improvement district (CID), along with the approval of a TIF plan. The special funding district may impose a sales tax, special assessments, or another authorized funding source, which may also be used to fund eligible reimbursable project costs or repay bonds that are issued for a TIF redevelopment project. The TIF commission's review of a special funding district is not required by statute, but the TIF commission may review the financial effect that a special funding district will have on the generation of TIF revenue and the repayment of bonds or reimbursement of redevelopment project costs. It is common for the TIF commission and governing body to review the projected revenue that is expected to be generated

by a special funding district in conjunction with the estimated TIF revenues. This will allow the TIF commission to fully analyze the duration of the TIF and the effect of all public funding sources for the redevelopment projects. A TDD and CID is ultimately formed by court order and municipal ordinance, respectively, and the statutory process for each is distinct from the TIF approval process.

What Happens If One Of The Commissioners Fails To Attend A Meeting?

In the event that the TIF plan, redevelopment projects, and redevelopment area are considered at multiple meetings, a TIF commissioner that is absent from one or more meetings can still participate in the final recommendation if all evidence and testimony are available to the commissioner prior to the vote.

What Action Must The TIF Commission Take Following The Public Hearing, And Are There Time Limitations For Taking These Actions?

After deliberating, the TIF commission typically considers adoption of

a resolution that makes a recommendation to the governing body regarding the findings required under the TIF Act, the proposed TIF plan and projects, and the proposed redevelopment area. The TIF commission is required to vote on a proposed TIF plan, redevelopment projects, and designation of a redevelopment area within 30 days after the close of the public hearing. Once the TIF commission has made a recommendation, the proposed TIF plan is forwarded to the governing body for consideration. The TIF commission is required to make its recommendation to the governing body within 90 days after the close of the public hearing.

Is A TIF Commission's Recommendation Binding On The Governing Body Of The Municipality?

No. However, the TIF Act requires that if the TIF commission makes a recommendation in opposition to a proposed TIF plan, redevelopment project or designation of a redevelopment area, then the governing body must approve the plan, project, or designation of a redevelopment area by a two-thirds majority vote.

What Findings Are Required To Be Made By The Governing Body?

Prior to the adoption of a TIF plan, the TIF Act provides that the governing body must make six specific findings by ordinance or resolution, as applicable:

(1) The redevelopment area on the whole is a blighted area, a conservation area, or an economic development area, and has not been subject to growth and development through investment by private enterprise and would not reasonably be anticipated to be developed without the adoption of tax increment financing. This includes, but is not limited to, a detailed description of the factors that qualify the redevelopment area or project as a blighted area, conservation area, or economic development area, and an affidavit, signed by the developer or developers and submitted with the TIF plan, attesting to the blight or other characteristics of the property. The second part of this finding is commonly referred to as the "but for" test, which means that "but for" public assistance through the use of TIF, development of the redevelopment area would not reasonably be expected to occur.

(2) The TIF plan conforms to the municipality's comprehensive plan for the development of the municipality as a whole.

(3) The estimated dates for completion of any redevelopment project and retirement of obligations incurred to finance redevelopment project costs, which cannot be more than 23 years from the adoption of the ordinance approving a redevelopment project.

(4) A plan has been developed for relocation assistance for businesses and residences.

(5) A cost-benefit analysis has been prepared showing the economic impact of the TIF plan on each taxing district that is at least partially within the boundaries of the redevelopment area. The analysis must show the impact on the economy if the redevelopment project is not built, and is built pursuant to the TIF plan under consideration. The cost-benefit analysis must include a fiscal impact study on every affected political subdivision, and sufficient information from the developer for the TIF commission to evaluate whether the redevelopment project as proposed is financially feasible.

(6) That the TIF plan does not include the initial development of any gambling establishment.

How Does The TIF Commission Decide If The "But For" Test Is Met?

The developer's affidavit should attest to the fact that the developer would not construct the project if TIF assistance is not provided. Some municipalities require submission of a pro forma or similar analysis showing the developer's expected rate of return on its investment in the proposed redevelopment project both with TIF assistance and without TIF assistance. If the rate of return without the use of TIF assistance is too low for the developer to undertake the project, this may be viewed as evidence that the "but for" test is met. If the report shows an acceptable rate of return if TIF assistance is provided, this may be viewed as evidence that the project is financially feasible for the developer.

Must A Redevelopment Project Be Approved At The Time Of Approval Of The TIF Plan?

No. A municipality may delay approval of a redevelopment project for up to ten years after the TIF plan is approved. In addition, the TIF Act requires that TIF bonds must be retired no more than 23 years from the date that the redevelopment project is approved by ordinance. If these maximum time periods are used, the result is that a TIF plan may remain in effect for up to 33 years.

What Action Is Required Of The Governing Body, And Are There Time Limitations For Taking These Actions?

Within 14 to 90 days after the completion of the public hearing by the TIF commission, the governing body must introduce ordinances that approve the TIF plan and redevelopment projects, and designate redevelopment project areas. The ordinances should also make the statutorily required findings, designate the redevelopment area, and designate the developer. If an ordinance for a redevelopment project is not introduced within 90 days after the initial public hearing, then another public hearing will need to be conducted to then introduce the redevelopment project ordinance within the required

14- to 90-day window after the conclusion of the public hearing.

May Changes Be Made To The TIF Plan, And If So, What Is Required?

Changes may be made to a TIF plan, redevelopment project, or redevelopment area, and the requirements that must be met to make such changes depend on the timing of the changes, as follows:

(1) Prior to the conclusion of the public hearing, changes may be made to the TIF plan, redevelopment project, or redevelopment area, provided that each affected taxing district is given written notice of the changes at least seven days prior to the conclusion of the hearing.

(2) After the public hearing but prior to the adoption of an ordinance approving a TIF plan or redevelopment project, or designating a redevelopment area, changes may be made without another hearing if the changes do not enlarge the exterior boundaries of the redevelopment area, do not substantially affect the general land uses established in the TIF plan or substantially change the nature of the redevelopment projects. If no hearing is required, notice of the changes must be given by mail to each affected taxing district and by publication in a newspaper of general circulation in the area of the proposed redevelopment not less than ten days prior to the adoption of the changes by ordinance. If a new public hearing is required, then all of the mailed and published notices discussed above must occur before the public hearing.

(3) After the adoption of an ordinance approving a TIF plan or redevelopment project, or designating a redevelopment area, no ordinance may be adopted altering the exterior boundaries, affecting the general land uses established pursuant to the TIF plan or changing the nature of the redevelopment project without complying with the procedures provided in the TIF Act pertaining to the initial approval of a TIF plan or redevelopment project and designation of a redevelopment area. □

David Bushek and **Rich Wood** are attorneys who practice with the economic development group in the Kansas City office of Gilmore & Bell, P.C.

TIF 101: ADVICE FOR MUNICIPALITIES CONSIDERING THE FIRST USE OF TAX INCREMENT FINANCING

Part 3 in a 3-part series: The TIF Contract and Financing Alternatives

By David Bushek and Rich Wood

This is the third article in a three-part series. Part 1 (issue May 2009) addressed questions regarding the preparation of a TIF plan and the appropriate use of TIF. Part 2 (issue June 2009) discussed the process for approval of a TIF plan. Part 3 is an overview of the effective use of a TIF contract and financing alternatives to implement a TIF plan.

Cities and counties that are considering the use of tax increment financing (TIF) for the first time, or that may have previously used TIF on a limited basis, frequently have several questions about the TIF contract and financing alternatives to implement a TIF plan. This article is designed to address the most common questions that arise regarding the TIF contract and financing alternatives that are available to a city or county (collectively referenced as "municipalities") under the Real Property Tax Increment Redevelopment Act, Sections 99.800 to 99.865 (TIF Act). Additional specific issues may arise during the drafting and negotiation of a TIF plan and the selection of a financing plan, and the municipality should consult with legal counsel in these cases.

THE TIF CONTRACT

What is the TIF contract?

In the most basic sense, a TIF contract is an agreement between a municipality and a developer that establishes the rights, duties, and obligations of the parties regarding the implementation of a TIF plan. It is most commonly a two-party agreement, involving the municipality and the developer that has been selected by the municipality to implement a TIF plan or a TIF proj-

ect. If a TIF plan has multiple project areas that will be constructed by different developers, then the municipality would commonly enter into a separate contract with each developer to govern the implementation of each project area within the larger TIF redevelopment area.

Is the TIF contract necessary?

Yes. While the TIF plan is the municipality's legislative declaration to provide TIF revenues for a project, the TIF contract is the key document that controls the expenditure of TIF revenues for the project. If a TIF plan is the heart of public financing for a project, then TIF revenue is the blood and the TIF contract makes the heart beat and regulates the flow of public funding. Carrying this analogy further, the TIF contract can also establish the arrangements under which the other organs of the public funding, as may be applicable to a project, will work in concert with the TIF plan. For example, if the project will also use a transportation development district (TDD) to impose a sales tax for road improvements, then the terms and conditions under which the parties will create and operate the TDD in conjunction with the TIF plan can be established in the TIF contract.

After a TIF plan is approved, a developer may proceed as if the assistance authorized in the TIF plan is an entitlement of the project. It is important to remember, however, that providing TIF assistance is a legislative and discretionary decision, and the adoption of a TIF plan does not establish all of the conditions under which TIF assistance is provided as the project is constructed and operated. In this regard, the TIF contract may be considered equally

as important, or possibly even more important, than the TIF plan.

How is a TIF contract prepared and approved?

The initial draft of the contract is typically prepared by the municipality, and negotiated between the developer and municipality. Missouri law governing TIF contracts is generally the same law that governs any municipal contract. The municipality must comply with the municipal statute of frauds (Section 432.070, RSMo) for all contracts, including a TIF contract, as well as all other laws that are generally applicable to municipal contracts. The process of negotiating the contract is typically a back-and-forth discussion until both parties reach agreement on a contract that they are willing to execute.

A municipality takes official action through its legislative body, but the initial negotiations for a TIF contract are frequently handled by the municipal staff and its special legal counsel. For this reason, it is important for the developer to remember that statements by staff in negotiations are not binding on the municipality, and all terms and conditions of a draft contract are ultimately subject to approval by the governing body before the municipality can become bound by the TIF contract. Most municipalities approve a contract by action of the governing body, although the TIF Act also grants authority to a TIF commission to approve and authorize the execution of a TIF contract.

When should the TIF contract be negotiated and approved?

The terms of the TIF contract typically start to take shape as the TIF plan is being considered by the municipality. An issue that is raised, discussed, and

resolved in front of the TIF commission or governing body can be reduced to a specific TIF contract provision that governs that particular aspect of the project. So, even though the parties may not be expressly negotiating the TIF contract in the early stages of the process when the TIF plan is being considered, the parties may nevertheless be discussing and reaching conclusions on key issues that will become TIF contract provisions.

In those situations where a developer has proposed a TIF plan to a municipality, some municipalities defer the TIF contract drafting and negotiations until after the TIF plan is approved, following a policy that resources should not be expended on the TIF contract until after the municipality and developer know that the TIF plan has been approved. Other municipalities take a completely different approach, where the governing body wants to see the final or near-final TIF contract at the same time that it considers final approval of the TIF plan, following a policy that the TIF plan should not be approved until the elected officials are comfortable with the specific terms and conditions under which the TIF plan will be implemented.

Each approach has advantages and drawbacks, and either approach can be used by a municipality. The best advice when considering a developer-proposed TIF plan is to clearly communicate which approach will be used, so that all private parties involved with the project (the developer and its lenders, tenants, and consultants) will know what to expect regarding the timing for TIF contract approval and execution. This will allow all parties involved to establish more accurate project schedules and proper budgets.

What is the authority to enter into a TIF contract?

Section 99.820.1(2), RSMo provides municipalities with broad authority to make and enter into contracts which are "necessary or incidental to the implementation and furtherance" of its TIF plan or project. This authority covers the TIF contract itself, along with any of the more specific agreements that may spawn from the TIF contract to implement the project. The authority for other contracts that are needed in connection with implementing a TIF plan may be found in other legislation, such as the authority granted to all Missouri political subdivisions in Section 70.220, RSMo to cooperate with any other political subdivision or private party for the development and construction of any public improvements or facility.

What does the TIF contract contain?

The TIF contract will typically contain provisions related to the following general topics:

- The developer's obligation to construct the project;
- The construction schedule, including any phasing;
- The municipality's obligation to pay for TIF-eligible project costs;
- The terms and conditions under which the municipality will issue debt, if applicable, to finance TIF-eligible project costs;
- Any particular land-use or tenant restrictions in the project;
- Any desired restrictions on ownership of the TIF property, control of the TIF project, and ownership and management of the developer during the life of the TIF plan;

- The developer's obligation to insure the project during construction and operation; and

- Various provisions that protect the municipality, such as indemnification by the developer for claims or damages suffered by the municipality as a result of the developer's actions in connection with constructing or operating the project.

Many other issues can be dealt with in the TIF contract, depending upon the circumstances of the project and the needs of the municipality.

What does a TIF contract not cover?

There can be many other types of contracts that are involved with implementation of a TIF project, but which are executed after the TIF contract is executed. The TIF contract may reference and establish the general subject matter of these separate contracts, but the specific terms and conditions of the other agreements may not be covered in detail in the TIF contract. For example, if another public funding source is involved with a project, such as a TDD or a CID, the municipality and funding district will commonly enter into a separate cooperative agreement governing the use of that separate funding source. If bonds are issued by the municipality to finance a TIF project, there will be several other agreements executed by the municipality that govern the issuance of the bonds and the use of the bond proceeds.

Public regulatory mechanisms that govern certain aspects of the project may not be covered in detail in the TIF contract. For example, if a municipality adopts a specifically-tailored "planned development" zoning ordinance that governs the zoning, subdivision and

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land uses of the project, the TIF contract may reference the zoning ordinance generally but not contain the specific regulations that are established by the zoning ordinance.

There may be other specific contracts that are executed after the TIF contract that govern particular aspects of the project that require more detailed contractual provisions. For example, if a developer is managing the construction of a large number of public improvements that will be built in connection with the TIF project, the municipality and developer may execute a separate "public improvements development agreement" that establishes the more specific rights, duties, and obligations of the developer to design, construct, and insure completion of the public improvements and the manner in which the municipality will reimburse the developer for such work from TIF revenues and possibly other public funding sources. A developer or related entity may also be requested to execute a contract that guarantees the completion of the project or other matters related to construction, since many of the development entities are single asset limited liability companies.

Should a municipality engage legal counsel to negotiate the TIF contract?

The same special legal counsel that assists the municipality with ap-

proval of the TIF plan would typically draft the TIF contract and assist the municipality with negotiating the TIF contract. While there are many forms of TIF contracts that have been used in the past, it is strongly recommended that an attorney who has experience with TIF contracts be involved in the process of drafting and negotiating the TIF contract, to protect the municipality's interests. A developer may be represented by legal counsel who is intimately familiar with the TIF process, but that law firm represents the developer at all times and has a fiduciary duty to achieve the best possible result for their client the developer. In the event that a lawsuit is filed against the municipality by the developer, a disgruntled taxing district, or an unhappy adjacent property owner that challenges the TIF plan or the TIF contract, the best defense is often having an experienced attorney involved for the municipality throughout the TIF process before the lawsuit is filed.

TIF FINANCING ALTERNATIVES

What are the basic TIF financing alternatives available to the municipality?

The two most common methods of implementing TIF financing are the issuance of bonds or using the "pay as you go" method of reimbursement. When TIF bonds are issued, most of the

proceeds generated from the issuance of bonds are deposited in a "project fund" that is a specific account managed by a trustee for the municipality. Payments are made from the project fund to the developer for certified TIF-reimbursable project costs. The bonds are then repaid over time as the project generates TIF revenues. When bonds are issued for a TIF project, the developer is typically reimbursed for all or a large portion of the TIF-reimbursable project costs early in the process. Multiple series of bonds can be issued, however; which provide for reimbursement in stages as bonds are issued.

Under the "pay as you go" reimbursement method, as it is commonly called, bonds are not issued. Instead, the developer is reimbursed for TIF-reimbursable project costs as TIF revenues are collected from the project over time. This reimbursement method commonly includes an interest calculation for reimbursable project costs that have been certified by the municipality and are due to the developer. For example, a developer may request and the municipality may certify \$3 million worth of TIF-reimbursable project costs for a particular project. If the TIF project generated \$400,000 in TIF revenues during the first year, a certain portion of these annual TIF revenues would reimburse the developer for certified project costs and another portion would reimburse the developer for carrying costs on the developer's funds initially used to pay for the projects for which reimbursement is being provided since typically the developer would have a loan that funded such costs.

What are more sophisticated financing options and when should they be used?

The nature of the project and the specific needs of the municipality may require some form of extra security for the debt that is issued by the municipality, and a wide range of creative options are available. The developer may be required to post a letter of credit that burns off after a specific period of time or after a certain development threshold has been satisfied, such as a designated amount of leased area of the project. The developer may provide a deed of trust for certain land within the project, as a form of security against an underperforming development. Special assessments may be imposed on the

project property through a TDD, CID, or neighborhood improvement district (NID) that serve to supplement any shortfalls in TIF revenues generated by the project. Each of these options should be carefully planned within the framework of the TIF plan, and a tax attorney should be consulted to determine what affect, if any, each option may have on any tax-exempt bonds that are issued by the municipality for the project.

Does the municipality have to issue TIF bonds after a TIF plan is approved?

This question is actually two questions rolled into one, but the answer to both is the same: (1) No, the municipality is not required to issue bonds of any type for a TIF project; and (2) No, if bonds are issued for a TIF project, they do not necessarily have to be TIF bonds, but can be other types of debt instruments. The issuance of bonds for a project is authorized by Section 99.835, RSMo, but the decision to issue bonds, even after a TIF plan has been approved, is always a legislative decision that carries the full legislative

discretion of the municipal governing body (or TIF commission).

If a municipality has decided that bonds should be issued for a project, the bonds do not necessarily need to be issued under the authority of the TIF Act, and the municipality itself does not necessarily need to be the issuer. A municipality might use its industrial development authority to issue bonds that would be repaid from several different sources of funds including TIF revenue. This option may provide added flexibility to blend the support of multiple funding sources for a single bond issuance for a particular project.

What is a TIF "note"?

The issuance of TIF notes is a method for a municipality to document its obligation to the developer to repay certified TIF reimbursable project costs. TIF notes are issued by a municipality to the developer in the amount of certified reimbursable project costs. Once a municipality makes a decision to issue TIF notes, the municipality is deemed to have:

- issued notes for the amount of

certified reimbursable project costs;

- deposited the funds necessary for payment of the project costs in a project fund;
- reimbursed the developer in full for the certified costs from the amounts on deposit in the project fund; and
- the developer is deemed to have advanced the funds necessary to purchase the notes.

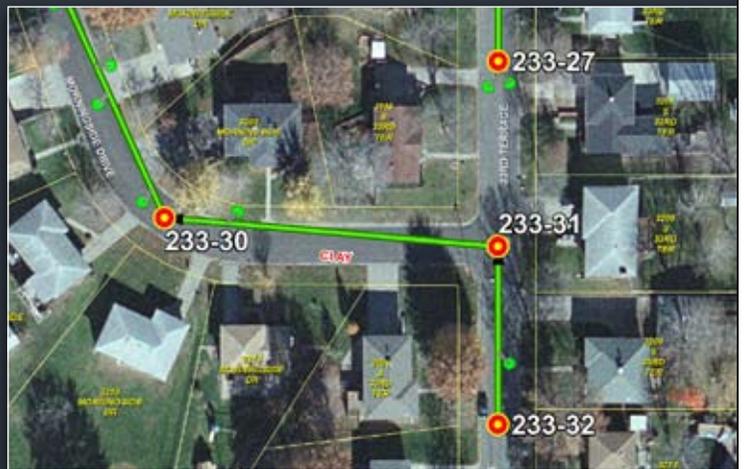
TIF notes generally provide for payment of interest on funds due to the developer. The notes may also provide for abatement of interest for failure to comply with certain provisions of the TIF contract. Once bonds are issued, TIF notes are subordinated to repayment of the bonds and bond proceeds may be used to reimburse the developer for project costs that were secured by the notes, thereby satisfying the municipality's obligations under the TIF notes.

What are the requirements for bonds to be issued?

The TIF contract can pre-define the conditions that must be satisfied

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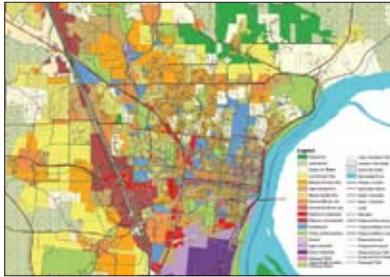


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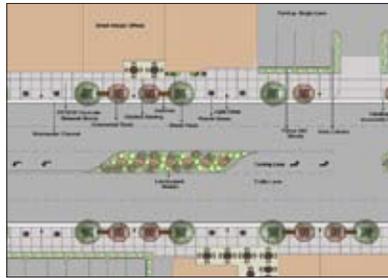
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in order to issue bonds. Some of the common conditions are:

- The developer having obtained leases or other binding occupancy commitments that would allow the underwriter and/or the municipality's financial consultant to determine that the projected TIF revenues from the business will cover debt service on the bonds, plus coverage.
- Proof that the developer has obtained a private loan sufficient, when combined with the developer's equity to be contributed to the project, to fund construction and completion of the private portion of the project.
- Proof that the developer has entered into a construction contract and commenced pouring foundations for the private improvements.
- The developer having received all necessary government approvals for the project.
- The underwriter and/or the city's financial consultant having determined that the bonds can be sold on terms acceptable to the municipality.

If a developer requests that the municipality "back the bonds," what does this mean?

This means that the municipality would back the bonds with a general annual appropriation pledge. This type pledge enhances the marketability of the bonds that results in a lower interest rate. In the event project revenues are not sufficient to pay debt service on the bonds in any particular year, the municipality may appropriate sufficient funds to pay the amount of the shortfall. There are a number of factors that could create a revenue shortfall that results in the municipality paying a portion of the debt service, including casualties to revenue producing businesses in the TIF area, revenue projections that do not materialize or do not assume other unanticipated events and circumstances that may occur after bond issuance and unanticipated changes in market conditions.

2009 CHANGES TO THE TIF ACT

Section 99.865 of the TIF Act requires municipalities to annually

"prepare a report concerning the status of each redevelopment plan and redevelopment project" and submit the report to the Missouri Department of Economic Development. House Bill 191, passed during the last legislative session, revised the TIF Act to prohibit the municipality from implementing new TIF projects for at least five years if the annual report is not filed.

This new provision should only apply prospectively to future TIF projects. Current TIF projects (including the capture of applicable TIF revenues) should not be affected.

A municipality may submit its annual report at any time during the year. The reporting period can be for any 12-month period ending any time prior to September 30 of the reporting year. A standard annual report will only cover a 12-month period. However, if a municipality has not previously filed annual reports, it is recommended that by August 28, 2009, the municipality either (1) prepare a report for each year that a report was not previously filed or (2) prepare a single report that covers all prior years for which reports were not filed.

The five-year penalty period should begin January 1 of the year following a municipality's failure to comply. It is not clear who will determine whether the penalty remains in effect for more than five years.

The TIF Act also imposes two other ongoing responsibilities for municipalities with existing TIF projects: (1) annually reporting information about any business that relocates to the TIF area to the Missouri Department of Economic Development by the last day of February; and (2) holding a public hearing every five years after approving a redevelopment plan to determine if the TIF project is making satisfactory progress. While the penalty for not filing the annual reports under Section 99.865.7 of the TIF Act does not currently apply to these two ongoing responsibilities, municipalities should complete these actions to ensure full compliance with the TIF Act. □

David Bushek and **Rich Wood** are attorneys who practice with the Economic Development Group in the Kansas City office of Gilmore & Bell, P.C.