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Still as Moonlight: Why Tax Increment Financing Stalled in North Carolina

Adam C. Parker

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Still as Moonlight: Why Tax Increment Financing Stalled in North Carolina

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INTRODUCTION

While traveling Interstate 95 in Eastern North Carolina, near the tributaries of Lake Gaston, passing motorists are often struck by an ornate building rising out of an otherwise barren field. This 35,000 square foot structure was, until very recently, known as the Roanoke Rapids Theatre, although in its brief six-year history North Carolina commentators have called the project many less-flattering names.¹

The Roanoke Rapids Theatre began with great promise—the \$21.5 million facility “was to be the anchor tenant of the Carolina Crossroads Music and Entertainment District, a 1,000-acre entertainment and retail development.”² The theatre was managed by Randy Parton, the less-famous brother of country singer Dolly Parton.³ On July 26, 2007, the 1,500-seat facility opened its doors to a

1. See, e.g., Don Carrington, *Randy Parton Theatre Still Haunts Roanoke Rapids: City Struggles with Debt from Failed Entertainment Project*, CAROLINA J. ONLINE (Oct. 31, 2011), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=8427 (characterizing the project as a “white elephant,” a “nightmare,” and a “cautionary lesson”); *Report Urges Tax Increment Financing Reforms: Parton Theatre Controversy Shows Need for Change*, CAROLINA J. ONLINE (June 16, 2008), http://www.carolinajournal.com/issues/display_story.html?id=4784 (quoting the John Locke Foundation’s Daren Baskt as saying, “North Carolina’s experience to date with TIFs has been nothing short of a disaster,” and describing the Roanoke Rapids Theatre as a “failure”).

2. See Carrington, *supra* note 1.

3. *Id.* (stating that the facility was originally named the “Randy Parton Theatre”); see also David Zucchini, *Show Goes On Without ‘Star,’* L.A. TIMES, Dec. 17, 2007, at A10 (describing the opening of the Randy Parton Theatre, which featured a duet between Dolly and Randy Parton, and a statement from Dolly Parton that her Tennessee theme park, where Randy had previously performed, would miss his services).

sold-out crowd⁴ anxious to hear the performance of Randy Parton and his newly formed ensemble, the Moonlight Bandits.⁵

Shortly thereafter, the music stopped for the Roanoke Rapids Theatre. The City of Roanoke Rapids dismissed Parton and his ensemble from their managerial duties in November 2007,⁶ and the debt incurred in financing the theatre began to loom large for the city, which had issued the bonds to finance the project.⁷ The city soon attempted to sell the theatre multiple times without success,⁸ and the facility struggled to attract performers.⁹ To offset its mounting debt service, Roanoke Rapids leased the facility to Arkansas-based HSV Entertainment, which has used the facility as an “internet sweepstakes and entertainment venue,” although its future is now in doubt.¹⁰

In many ways, the theatre’s history parallels that of the debt-financing instrument used to fund the project: tax increment financing

4. See Carrington, *supra* note 1.

5. See Don Carrington, *Parton Payback Incentive Dropped: State Treasurer’s Staff Had Asked That He Be Paid Last, Not First*, CAROLINA J. ONLINE (Sept. 10, 2007), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=4300 (describing attendance problems after Parton’s first show with the Moonlight Bandits on July 26, 2007).

6. See Carrington, *supra* note 1.

7. See *id.* (noting that Roanoke Rapids borrowed \$21.5 million to finance the theatre). Originally, Parton was to pay the debt for the TIF bonds from the theatre’s revenues, with an option to purchase the theatre for \$1 after the debt was retired. *Id.*

8. Compare Roger Bell, *New Theater Proposal on the Table: City Not Planning on Refiling Suit Against Gatling*, DAILY HERALD (Roanoke, N.C.), May 30, 2012, at 1 (noting that, according to Gatling’s lawyer, “Gatling is not a part of the latest theater proposal”), with Beau Minnick, *Roanoke Rapids Mayor Says Selling Theater is Best*, WRAL.COM (Dec. 2, 2011), <http://www.wral.com/news/local/story/10457812/> (reporting that the City of Roanoke Rapids had “unanimously approved” a sale of the Theatre to Chicago businessman Lafayette Gatling).

9. For example, in 2011, there were only four events scheduled for the entire year. See *Events for 2011*, ROANOKE RAPIDS THEATRE, <http://rrcitytheatre.com/Performances-Events/year.listevents/2011/10/19/> (last visited Sept. 21, 2012).

10. *The Royal Palace Theatre Opens Wednesday*, DAILY HERALD (Sept. 11, 2012), http://www.rrdailyherald.com/access/the-royal-palace-theatre-opens-wednesday/article_88088f1a-fc4a-11e1-b107-0019bb2963f4.html; see also Roger Bell, *Internet Café Concern Grows Locally*, DAILY HERALD (June 28, 2012), http://www.rrdailyherald.com/news/internet-cafe-concern-grows-locally/article_d2fc9f5a-c123-11e1-b4d4-001a4bcf887a.html (noting the opposition of several religious leaders to the use of the facility for online “gambling” and suggesting the theatre consider alternative purchasers). In December 2012, the Supreme Court of North Carolina upheld a state statute prohibiting Internet sweepstakes businesses in the state, which may hinder the Royal Palace’s viability. See *Hest Techs., Inc. v. State ex rel. Perdue*, No. 169A11-2, 2012 WL 6218202, at *11 (N.C. Dec. 14, 2012).

("TIF").¹¹ Nationally, TIF is used as a public finance tool by local governments to make public improvements that will spur private investment in a defined area.¹² These improvements are paid for through increases in property values (and property tax revenues) surrounding the public improvements and private investments in the TIF district.¹³ In 2004, voters approved an amendment to the North Carolina Constitution to allow local government entities to utilize TIF, making North Carolina the forty-ninth state to pass legislation allowing for its use.¹⁴ Some welcomed the passage of North Carolina's amendment with much acclaim;¹⁵ however, TIF has proven to be a sparsely used financing instrument in the state.¹⁶

This Comment argues that North Carolina's TIF statute is infrequently used for multiple reasons, including its complexity, the availability of alternative financing forms, the constrictive nature of TIF's statutory structure, and other ancillary factors such as a nationwide decrease in demand for municipal bonds and negative perceptions surrounding the Roanoke Rapids Theatre. This Comment further suggests revisions to the statute that could make TIF a more viable debt-financing instrument in the state. Possible revisions include eliminating current restrictions that limit a TIF district's size to no more than five percent of a municipality's total land, requiring or allowing cities and counties to pledge additional securities for repayment of TIF bonds, and increasing the scrutiny applied by the Local Government Commission when considering TIF projects. This Comment further argues that if North Carolina does not revise its TIF statute, it should either eliminate TIF as a public finance instrument or limit its use to projects supervised by developers who have undergone an extensive vetting process. This

11. Tax Increment Financing is known as "Project Development Financing" in North Carolina. See N.C. GEN. STAT. § 159-101 (2011).

12. Joseph Blocher & Jonathan Q. Morgan, Univ. of N.C. at Chapel Hill Sch. of Gov't, *Questions About Tax Increment Financing in North Carolina*, 5 COMMUNITY AND ECON. DEV. BULL. 1, 3 (2008), <http://sogpubs.unc.edu/electronicversions/pdfs/cedb5.pdf>.

13. *Id.* at 2-3.

14. See *id.* at 2.

15. See generally Ken Elkins, *North Carolina's New Deal*, CHARLOTTE BUS. J. (Feb. 21, 2005), <http://www.bizjournals.com/charlotte/stories/2005/02/21/focus1.html> (reporting the enthusiasm of various economic development officials at the TIF statute's passing).

16. As of June 2008, there were three total TIF project authorizations in North Carolina. See Blocher & Morgan, *supra* note 12, at 11. Only two of these projects actually used TIF debt financing. See Mike Legg, *Huge Milestone in Research Campus Funding*, KANNAPOLIS (Jan. 21, 2011), <http://www.cityofkannapolis.com/huge-milestone-in-research-campus-financing/> (explaining the City of Kannapolis's decision to choose a different form of financing to fund the North Carolina Research Campus, despite receiving authorization to use TIF debt).

Comment lastly suggests that reforms should focus on “synthetic” TIF, a structurally similar counterpart to TIF that does not confine revenues solely to increments and which uses various other financing structures to accomplish TIF’s ends.

Part I provides a general background of TIF, including its mechanics and the praise and common criticisms it has received. Part II offers a statutory analysis of the American Planning Association’s Model TIF Statute, TIF statutes in states where TIF has been used aggressively, and TIF statutes in states that have taken a more conservative approach. Part III provides a brief legislative history of North Carolina’s adoption of TIF, explains North Carolina’s statute in depth, and compares its elements to the various statutes discussed in Part II. Part IV provides brief summaries of the three authorized TIF projects to date in North Carolina as well as takeaway lessons from each. Finally, Part V provides a survey of non-statutory reasons that TIF may have stalled in North Carolina, including various alternative forms of debt financing available in North Carolina and other environmental factors. The Conclusion expands upon the arguments expressed above and highlights recent legislative and administrative developments that may impact the use of TIF in North Carolina.

I. WHAT IS TAX INCREMENT FINANCING?

A. *Brief History, a Typical Model, Praise and Criticisms*

TIF is a method of advancing community or economic development by allowing local governments to issue bonds to help develop, in conjunction with a private developer, a defined “TIF district” for commercial use.¹⁷ The TIF process often proceeds as follows. First, a TIF district’s geographic boundaries are identified.¹⁸ Then, the economic developers, city administrators, or other parties promoting the TIF must gain approval to establish a TIF district from the local government entity and/or a designated state agency.¹⁹ Then,

17. P. Michael Juby, Recent Development, *Tax Increment Financing in North Carolina: The Myth of the Countermajoritarian Difficulty*, 83 N.C. L. REV. 1526, 1526 (2005).

18. COUNCIL OF DEV. FIN. AGENCIES AND INT’L COUNCIL OF SHOPPING CENTERS, TAX INCREMENT FINANCING BEST PRACTICES REFERENCE GUIDE 2 (2007) [hereinafter CDFA BEST PRACTICES], <http://www.icsc.org/government/CDFA.pdf>.

19. See, e.g., OR. REV. STAT. § 457.085 (2007). See generally COUNCIL OF DEV. FIN. AGENCIES, ORIGINAL RESEARCH: TIF STATE-BY-STATE REPORT (2008) [hereinafter CDFA STATE-BY-STATE], [http://www.cdfa.net/cdfa/cdfaweb.nsf/0/8ee94afece08bc988257936006747c5/\\$FILE/CDFA-2008-TIF-State-By-State-Report.pdf](http://www.cdfa.net/cdfa/cdfaweb.nsf/0/8ee94afece08bc988257936006747c5/$FILE/CDFA-2008-TIF-State-By-State-Report.pdf)

the local government's finance officer will establish a base valuation of all property in the TIF district, which is used to determine the amount of incremental property tax value increases over time.²⁰ Next, the local government entity secures funds by issuing bonds to develop an asset or to address infrastructure needs that are designed to spur development in the TIF district.²¹ These bonds are secured by a local government's pledge of future increases in property tax increments within a defined TIF district.²² Finally, the local government entity uses the tax revenue from these incremental increases to repay the TIF bonds.²³ Repayment through increments is the central feature of TIF's structure and is what differentiates it from other forms of public debt.²⁴ Ideally, projects funded by TIF create increases in taxable property values, resulting in more tax revenue with which to repay the initial debt issuance.²⁵ TIFs are often passed without a vote,²⁶ and in many states, TIFs are one of the few options a municipality can use

(explaining approval mechanisms for forty-nine states with TIF statutes, where states utilize various combinations of state, municipal, commission, and school board approvals for TIF districts). Some states, including North Carolina, require not only that a local government approve the project, but also that a description of the TIF district and a development plan be submitted to a state agency for approval. *See, e.g.*, CONN. GEN. STAT. ANN. § 32-285 (West Supp. 2012); KAN. STAT. ANN. § 12-1771 (2001); ME. REV. STAT. ANN. tit. 30-A, § 5226 (West Supp. 2011); MASS. ANN. LAWS ch. 40Q, § 2 (LexisNexis 2006); MICH. COMP. LAWS ANN. § 125.1803 (West 2006); N.M. STAT. ANN. § 5-15-21 (West Supp. 2011); N.C. GEN. STAT. § 159-104 (2011); OR. REV. STAT. § 457.085(2), (3) (2007); UTAH CODE ANN. § 17C-1-405(2) (LexisNexis 2009); VT. STAT. ANN. tit. 24, § 1892 (West 2005); W. VA. CODE ANN. § 16-18-6 (LexisNexis 2011).

20. *See* CDFA BEST PRACTICES, *supra* note 18, at 2.

21. *See, e.g.*, Josh Reinert, Comment, *Tax Increment Financing in Missouri: Is it Time for Blight and But-For To Go?*, 45 ST. LOUIS U. L.J. 1019, 1020 (2001). As addressed in the following paragraphs, after obtaining the bond revenues, the local government can use the funds for numerous purposes—such as improvements to infrastructure, demolishing decayed infrastructure, and other up-front expenses—with the hope of spurring private development.

22. *See* Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 67–68 (2010).

23. CDFA BEST PRACTICES, *supra* note 18, at 2.

24. *See infra* Part V.A.

25. *See* Blocher & Morgan, *supra* note 12, at 3; *see also* William C. Rivenbark, Shea Riggsbee Denning, & Kara A. Millonzi, Univ. of N.C. at Chapel Hill Sch. Of Gov't, *2007 Legislation Expands Scope of Project Development Financing in North Carolina*, 36 LOC. FIN. BULL. 1 (Nov. 2007), <http://sogpubs.unc.edu/electronicversions/pdfs/lfb36.pdf> (“The debt incurred by funding the improvements is repaid . . . by tax increment revenue—the additional property taxes resulting from the district's new development.”).

26. *See* Juby, *supra* note 17, at 1527.

to incur debt without issuing general obligation bonds,²⁷ which often require a majority vote of citizens to pass.²⁸

TIF began in 1952 in California, and today every state except Arizona has adopted a TIF statute.²⁹ TIF has become an oft-used financing instrument in larger cities such as Chicago and San Diego, but it has also been utilized in mid-sized cities like Gahanna, Ohio and Kenosha, Wisconsin.³⁰ The use of TIF rose markedly after decreases in federal funding for redevelopment-related activities created an imperative for new, localized measures to address blight³¹ and stagnant development.³²

TIF's proponents state several benefits justifying its use, including the typical requirement that taxes raised within the TIF district be devoted exclusively to improving elements within the district.³³ This use as a steering mechanism for funding in successful districts is said to promote neighborhood stability and provide for targeted development of a geographic area.³⁴ Proponents also see TIF as a way to address environmental problems (such as brownfields),³⁵ to repurpose land whose previous use is now obsolete,³⁶ and to spur economic development.³⁷ Some government finance officials prefer TIF to other debt alternatives, in part because the tax increments generate revenues via property value increases (rather than tax rate

27. See George Lefcoe, *Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing*, 43 URB. LAW. 427, 438 (2011).

28. *Id.*

29. CDFA BEST PRACTICES, *supra* note 18, at 1.

30. *Id.*

31. The term "blight" is a specialized term within the land-use community. The American Planning Association describes blight as having evolved from "grotesque living conditions or deteriorated industrial areas" to "under-performing or obsolete land uses or buildings that exist where the rational private investment cannot overcome market forces." AM. PLANNING ASS'N, POLICY GUIDE ON PUBLIC REDEVELOPMENT 3 (2004), <http://www.planning.org/policy/guides/pdf/publicredevelopment.pdf>. The definition of blight is one that has changed significantly, as has the definition of "public use," to facilitate increased use of TIF in some states. See Blocher & Morgan, *supra* note 12, at 14.

32. See CDFA BEST PRACTICES, *supra* note 18, at 3.

33. *Id.* at 2.

34. See *id.* at 3.

35. *Id.* at 5. Brownfields are typically geographically attractive parcels within city limits, but because of decades of environmental abuse, they are unattractive to developers. *Id.* TIFs are used to rehabilitate these areas, which often suffer from considerable environmental degradation issues. *Id.*

36. See *id.* at 5-6 (describing a TIF project where a former military base was converted into new residential and commercial facilities).

37. *Id.* at 6-8 (describing various economic development projects where TIF was used to spur development, such as a \$364.5 million project in Kansas City to attract the Internal Revenue Service to place its headquarters there).

increases), TIFs freeze property values at the time of adoption,³⁸ and TIFs allow local governments to finance infrastructure improvements without placing a municipality's general fund (or full faith and credit taxing authority) at risk.³⁹ Proponents of TIF often point to many stories of success in redeveloping land that previously had lain dormant, or which contained environmental hazards that precluded development. Examples of success are numerous, even in states that have recently considered curtailing their use of TIF.⁴⁰

TIF's critics, on the other hand, point to a mixed record of success.⁴¹ Additionally, in many states, TIF district debt generally requires only the approval of a local government and is often issued without a voter referendum.⁴² Consequently, TIF is criticized for issuing public debt without the public's approval.⁴³ Some extend this critique further, arguing that when publicly funded debt is issued for economic development purposes (including TIF bonds used for such a purpose), this action runs afoul of state constitutional provisions,

38. *See id.* at 2.

39. *Id.*

40. For example, two TIF districts in Chicago, the Homan Arlington TIF district and the Stony Island TIF district, are widely viewed as successful developments and have resulted in positive economic outcomes. *See* David S. Silverman, *Illinois: TIF and the City of Chicago*, in *TAX INCREMENT FINANCING* 55, 67–71 (David Callies & W. Andrew Gowder, Jr. eds., 2012). The Homan Arlington TIF district is a redevelopment of a former Sears Roebuck and Company catalog building and administrative headquarters. *Id.* at 67. By Chicago's estimate, the district has produced two dollars of private investment for every one dollar of public assistance. *Id.* at 69. The Stony Island TIF district was targeted at a large blighted area in Chicago. *Id.* at 67. Estimates posit that for every dollar of public assistance, \$5.20 in private investment has occurred. *Id.* at 71. California also has several projects that are regarded as successes. *See* Matthew S. Gray & Cecily Barclay, *California: TIF and Community Development Law*, in *TAX INCREMENT FINANCING*, *supra*, at 37, 49–50.

41. *See* Blocher & Morgan, *supra* note 12, at 9–10 (warning that “[TIF] is not a silver bullet solution to development problems”); *TIF Needs Limits to Protect Taxpayers*, MINNEAPOLIS ST. PAUL BUS. J. (July 1, 2001, 11:00 PM), <http://www.bizjournals.com/twincities/stories/2001/07/02/editorial1.html> (critiquing a \$62 million capital outlay from a municipality in Minnesota, while noting other successes in Minnesota). For an example in North Carolina, see *infra* Part IV.A, which discusses the Roanoke Rapids Theatre. The theatre provides an example of the dire financial straits a town can find itself in if incremental increases in property taxes fall short of projections and the town has limited capital reserves to shore up the larger gap. *Id.*

42. *See, e.g.*, N.C. CONST. art. V, § 2(1) (“The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.”). *But see id.* § 14 (explaining that a local government may pledge any additional securities besides the issuing local government's taxing power to secure financing for development projects).

43. *See* Juby, *supra* note 17, at 1527 (explaining critics' concerns that “TIF options, because they do not require voter approval, reduce the fiscal accountability of local government officials and undercut basic democratic principles”).

although this notion was recently refuted in North Carolina.⁴⁴ Critics of TIF also allege that local governments provide only obscure information to voters so that a typical citizen cannot determine whether or not each TIF project is a net revenue producer.⁴⁵ Still other critics argue that modern TIF statutes do not reflect TIF's original focus—urban renewal of blight—and point to TIF's use by growing suburbs to lure jobs and residents away from inner-city neighborhoods to areas with more financial stability.⁴⁶ This move away from explicit blight requirements has led some to identify a trend in states to “dispens[e] with the formal but somewhat meaningless blight determination in favor of express recognition that the process is really just about economic development.”⁴⁷

TIF has been used to subsidize retail development and to increase flagging sales tax receipts in particular districts.⁴⁸ Critics contend that these sales tax increases merely displace sales tax revenues from other areas, potentially creating a new blight problem in place of the previous one.⁴⁹ Further, successful TIFs typically attract new residents while devoting significant property tax revenues to repayment of debt service, causing a diversion of financial

44. See *Maready v. City of Winston-Salem*, 342 N.C. 708, 729, 467 S.E.2d 615, 628 (1996) (stating that the legislature did not run “afoul” of constitutional limitations by offering economic development incentives to businesses). Justice Robert Orr dissented in *Maready*, stating that “little remains of the public purpose constitutional restraint on governmental power to spend tax revenues collected from the public.” *Id.* at 734, 467 S.E.2d at 631 (Orr, J., dissenting); see also N.C. CONST. art. V, § 2 (“The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.”). Justice Orr later became the Executive Director of the North Carolina Institute for Constitutional Law and helped lead an effort to declare economic development incentives and other uses of public funds to attract business as unconstitutional. See Richard Craver, *Robert Orr Reflects on Battles Fought as Head of N.C. Institute for Constitutional Law*, SCNOW.COM (Nov. 19, 2011), <http://www2.scnow.com/news/2011/nov/19/robert-orr-reflects-battles-fought-head-nc-institu-ar-2725397/>.

45. Lefcoe, *supra* note 27, at 428.

46. *Id.* at 427. In a specific example, two outdoor equipment providers, Bass Pro Shops and Cabela's, were offered incentives to place large retail stores in two towns just outside of Baton Rouge, Louisiana. See Kenneth M. Murchison, *Louisiana: From the Big Easy to the Suburbs, TIF and its Dangers*, in *TAX INCREMENT FINANCING*, *supra* note 40, at 95, 101–06. The suburban towns of Denham Springs and Gonzales lured the retail stores by paying for the costs of building construction and giving the corporations the option to purchase these facilities for “nominal” fees. *Id.* at 107.

47. H. Lawrence Hoyt, *What's the “TIF” All About?*, in *TAX INCREMENT FINANCING*, *supra* note 40, at 3, 21–22.

48. See Blocher & Morgan, *supra* note 12, at 9–10; *TIF Needs Limits to Protect Taxpayers*, *supra* note 41 (critiquing a \$62 million capital outlay from a municipality in Minnesota, while noting other successes in Minnesota).

49. Lefcoe, *supra* note 27, at 427.

resources that can put a strain on schools and other local agencies having to meet the increased demand for services without additional property tax revenues needed to address these new demands.⁵⁰ Agencies administering TIF also experience strain from the complicated structure of the project, as TIF tends to involve “an extensive, long-term, and costly administrative effort.”⁵¹ Lastly, commentators argue that governments have been overzealous in dispensing TIFs⁵² and other economic development devices, at least in proportion to the economic benefits they create.⁵³ These and other critiques have led some—including California Governor Jerry Brown⁵⁴—to call for the elimination of TIF, or, alternatively, for significant reformation of TIF statutes.⁵⁵

II. COMPARATIVE ANALYSIS OF TIF STATUTES

This Part analyzes how different states have modified TIF statutes to fit their unique needs. To establish a baseline of statutory features, this Part first discusses the American Planning Association’s model TIF statute. Next, this Part categorizes states as “aggressive” or “conservative” based on the frequency of TIF use. This Part ultimately lays the groundwork to compare the various statutory features of the considered state statutes to North Carolina’s TIF statute in Part III, which would be classified as conservatively used under the aforementioned rubric.⁵⁶ The ultimate goal of this comparative statutory analysis is to diagnose whether North Carolina’s sparse use of TIF can be attributed to statutory construction, ancillary factors, or a combination of both.

50. *Id.*

51. Craig L. Johnson & Kenneth A. Kriz, *A Review of State Tax Increment Financing Laws*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES, AND IMPACT 31, 32 (Craig L. Johnson & Joyce Y. Man eds., 2001).

52. Lefcoe, *supra* note 27, at 427.

53. See, e.g., Jeanette Doran, *Economic Development Incentives—Questionable Efficacy and Constitutional Infirmary*, N.C. INST. FOR CONST. L. (Mar. 22, 2011), <http://ncicl.org/article/592> (arguing that economic development incentives are “ineffective[] . . . at achieving the purported benefits of job creation and economic stimulation”).

54. See Randal O’Toole, *Crony Capitalism and Social Engineering: The Case Against Tax-Increment Financing*, 676 POL’Y ANALYSIS 1, 13 (May 18, 2011), <http://www.cato.org/pubs/pas/PA676.pdf>.

55. *Id.* (arguing that local governments should narrow the definition of “blight,” redefine TIF formulas to ensure a more narrow definition of tax revenue increments, allow opt-out provisions for overlapping tax entities, and require a public vote to create or extend a TIF district).

56. See *infra* Part IV (noting that North Carolina has approved three TIF projects, but that only two have been undertaken).

A. *Model TIF Statute: Basic Structural Requirements and Flexibility*

In an effort to standardize TIF statutes, the American Planning Association developed a model TIF statute based on features from TIF statutes around the nation.⁵⁷ One central item is a provision requiring TIF bonds to be linked to the broader redevelopment program they are intended to finance.⁵⁸ Additionally, the model TIF statute requires that a redevelopment area plan and ordinance be in place *before* a TIF ordinance is established.⁵⁹ The mandatory TIF ordinance also must include a citation to the enabling redevelopment plan ordinance, a statement of consistency with the redevelopment plan, a description of the limits and boundaries of the redevelopment area, and a procedure to review the determination of property tax increments.⁶⁰ There are also provisions to ensure that tax assessors are kept apprised of the TIF district's status⁶¹ and that the assessors create a base valuation for the TIF district.⁶² Lastly, the model statute creates a special account to collect tax increment revenues and to distribute these funds when the TIF district's redevelopment activities end.⁶³

The model TIF statute, however, includes several options for varying the statute, which highlight the diversity of states' TIF statutes and the lack of a uniformly accepted "best practice" for implementing TIF. The model statute allows for an optional "but-for" test to ensure that TIF is a *necessary* condition for property redevelopment (or that property would not be redeveloped "but for" the TIF).⁶⁴ The statute does not prescribe how TIF funds are to be spent, leaving that decision to the TIF plan and the redevelopment area ordinance implementing the plan.⁶⁵ The statute also allows

57. See AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, at 14-55 to 14-56 (2002).

58. See *id.* § 14-302(2), at 14-57.

59. *Id.* § 14-302(4)(a), at 14-58.

60. *Id.* § 14-302(5), at 14-59.

61. *Id.* § 14-302(7), at 14-60.

62. *Id.* § 14-302(8), at 14-60 to 14-61.

63. *Id.* § 14-302(10), at 14-61 to 14-62 (providing that the funds should be redistributed to an individual taxing unit's general fund—where sales and property tax revenues normally matriculate—and distributed pro rata when applied to multiple taxing units).

64. *Id.* § 14-302(4)(b), at 14-58. For an explanation of the but-for test employed in TIF statutes, see Reinert, *supra* note 21, at 1034. The Model TIF Statute authors, in their preface, note a lack of consensus on the but-for requirement and leave the but-for provision as an optional item for legislators. See AM. PLANNING ASS'N, *supra* note 57, at 14-56.

65. AM. PLANNING ASS'N, *supra* note 57, at 14-56.

flexibility in determining how the TIF district will be financed, including an option to use sales taxes, rather than property taxes, in a TIF project,⁶⁶ as well as an option to create either a district where *all* new property taxes are devoted to the TIF district or a district where only *additional* property tax increments for a specific layer of local government are included in the calculation.⁶⁷

Ultimately, the model TIF statute is a fairly flexible instrument with two key features: the requirement of both a development plan and a local ordinance *before* a TIF ordinance may be passed,⁶⁸ and the requirement of a separate accounting fund for TIF proceeds.⁶⁹ While illustrative of a few various components of TIF statutory construction, the model TIF statute does not identify which of its features are more likely to facilitate additional use of TIF, or which provisions discourage increased use, if any. Deliberate consideration of other states' practices may provide insight into those features and are considered in Parts II.A and II.B. The states examined are grouped by the frequency with which TIFs have been used to provide greater insights into which statutory features inhibit or promote TIF use.

B. Aggressively Used TIF Statutes

The use of TIF varies considerably by state, as does reporting of its use. While there is not a uniform system of reporting when a TIF district is established,⁷⁰ there are discernible trends showing that some states have created considerably more TIF districts than others. These states can be categorized as "aggressive" users of TIF.⁷¹ This Section considers the TIF statutes of several states that have used TIF aggressively in hopes of identifying common trends between their statutory structures.

66. *Id.* § 14-302(6), at 14-59 to 14-60.

67. *See id.* at 14-56.

68. *Id.* § 14-302(4), at 14-58.

69. *Id.* § 14-302(10), at 14-61 to 14-62.

70. At least one publication has produced a study identifying the number of TIF districts by state. Jennifer Petersen, *The State of Tax Increment Financing in the United States*, 45 ST. TAX NOTES MAG. 601, 602-03 (Aug. 27, 2007).

71. *Id.* (showing California (771 districts), Illinois (1,000 districts), Iowa (949 districts), Minnesota (2,184 districts), Ohio (747 districts), and Wisconsin (818 districts) as having the largest number of TIF districts). These states and their statutory frameworks will be used in this Comment's consideration of "aggressively" used TIF statutes. *See infra* Part II.B.1-II.B.3.

1. California: The First State and Its Struggles with TIF

California, the first state to use TIF,⁷² has used TIF aggressively since it passed its TIF legislation in 1952.⁷³ California's statute has several distinctive features, although drastic changes were made to the statute in 2011.⁷⁴ These changes were affirmed by the California Supreme Court,⁷⁵ and the state dissolved all 400 redevelopment agencies as of February 1, 2012.⁷⁶ Regardless, consideration of the original and oft-used TIF statute will prove valuable for the analysis of North Carolina's statute. California's TIF statute, which was embedded within a larger statute for community redevelopment, defined the state's TIF structure similarly to the model TIF statute.⁷⁷ California's statute only allowed TIF where it was necessary for effective redevelopment, employed the "but-for" approach,⁷⁸ but was unique in requiring that TIF-eligible redevelopment areas be predominantly "blighted."⁷⁹ The blighted areas within a TIF zone did not need to be contiguous and could include some non-blighted areas that were necessary for effective redevelopment.⁸⁰ California also used a fifty-year maximum lifespan for the TIF district,⁸¹ required a

72. See CDFA BEST PRACTICES, *supra* note 18, at 1.

73. California had approximately 771 TIF districts as of 2007. See Petersen, *supra* note 70, at 602.

74. See Gray & Barclay, *supra* note 40, at 50 (discussing California Governor Jerry Brown's proposals to disband all redevelopment agencies in the state).

75. Cal. Redevelopment Ass'n v. Matosantos, 267 P.3d 580, 588 (Cal. 2011) (affirming the redevelopment legislation).

76. *Transition of Redevelopment Agency to City and County of San Francisco*, S.F. REDEVELOPMENT AGENCY, <http://www.sfredevelopment.org> (last visited Oct. 17, 2012).

77. See CAL. HEALTH & SAFETY CODE § 33670 (West 1999) (providing that public entities, other than the redevelopment authority, are entitled to receive property tax revenues for the assessed property value prior to the effective date of the redevelopment plan, with the increments being allocated to the redevelopment authority to repay the earlier issued debt). Further, the California statute allows the traditional debt financing from tax increments and also requires that the property tax revenues be held in a special fund to repay bonds issued under TIF. *Id.* § 33670(b).

78. CAL. HEALTH & SAFETY CODE § 33037 (West 2010) (stating that the purpose of the statute is "[t]o protect and promote the sound development and redevelopment of blighted areas . . . by remedying such injurious conditions through the employment of all appropriate means").

79. See CAL. HEALTH & SAFETY CODE § 33030 (West 2010 & Supp. 2012) (providing a statutory definition of blight in California). Prior to 1993, California did not define blight by statute, and there were myriad court decisions struggling with the definition of blight. See Jeff Chapman, *Tax Increment Financing and Fiscal Stress: The California Genesis*, in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES, AND IMPACTS, *supra* note 51, at 113, 114–15.

80. CAL. HEALTH & SAFETY CODE § 33320.2 (West 2010).

81. CAL. HEALTH & SAFETY CODE § 33776 (West 1999) (stating that revenue bonds issued in the TIF district may not have a longer maturity date than fifty years).

redevelopment plan,⁸² and, if the development involved the exercise of eminent domain, the TIF district could not be in effect longer than twelve years.⁸³ Further, California required that at least twenty percent of the increment revenue be spent on low- and moderate-income housing for displaced residents, unless such housing needs were already being met elsewhere.⁸⁴

California has a long history of battles between local government entities for tax increment revenues—notably between school districts and redevelopment agencies.⁸⁵ Prior to reforms in 1994, school districts had to negotiate for a piece of the incremental tax revenues, but thereafter a mandatory formula was created to standardize the incremental amounts school districts received from the redevelopment authority.⁸⁶ Indeed, critics of TIF argued that it was sometimes “misused to subsidize a city’s economic development through the diversion of property tax revenues from other taxing entities.”⁸⁷ The use of TIF by redevelopment agencies allowed small cities in blighted areas to “shield virtually all of their property tax revenue from other government agencies” and tempted those agencies to use redevelopment as a financial weapon to divert property taxes away from other governmental units.⁸⁸ As a result of the statutory authority they wielded, redevelopment agencies were able to garner twelve percent of all property tax revenues in California by 2011.⁸⁹

82. CAL. HEALTH & SAFETY CODE § 33330 (West 2010) (requiring a development agency to create a redevelopment plan and to consult with the community’s planning commission and—if applicable—a project area committee).

83. CAL. HEALTH & SAFETY CODE § 33492.85(b)(2) (West 1999).

84. CAL. HEALTH & SAFETY CODE § 33334.6 (West 2010) (requiring that “not less than 20 percent of [all] taxes allocated to the agency” be used for a “Low Income and Moderate Housing Fund”); *see also id.* § 33492.16 (allowing for a deferment of the requirement to allocate twenty percent of TIF proceeds to the Low and Moderate Income Housing Fund).

85. *See* Chapman, *supra* note 79, at 130 (describing the complexity of the negotiations between school districts and redevelopment agencies).

86. *See id.*

87. Lancaster Redevelopment Agency v. Dibley, 25 Cal. Rptr. 2d 593, 594 (Ct. App. 1993).

88. WILLIAM B. FULTON & PAUL SHIGLEY, GUIDE TO CALIFORNIA PLANNING 263–64 (3d ed. 2005) (noting that “redevelopment proved to be one of the most powerful mechanisms for gaining an advantage” over other local government entities vying for property tax funds).

89. *See* Marriane O’Malley & Mark Whitaker, *The 2011–12 Budget: Should California End Redevelopment Agencies?*, LEGIS. ANALYST’S OFF. (Feb. 8, 2011), http://www.lao.ca.gov/analysis/2011/realignment/redevelopment_020911.aspx.

Despite the sophistication of its statute and its various provisions designed to protect against abuse, California enacted major structural changes to its TIF statute.⁹⁰ Recently passed legislation⁹¹ and court decisions will enact such significant changes to the state's redevelopment statute that the California Redevelopment Association (a TIF trade organization) says the legislation has "abolished" redevelopment in California.⁹² The legislation winds down the existence of redevelopment agencies, which administered TIF in the state.⁹³ The California Supreme Court upheld the legislation to wind down redevelopment agencies, and also struck down a compromise provision in a separate bill to allow the agencies to continue operating if they made payments to help aid in funding traditional government services.⁹⁴ Today, absent future legislative intervention, the state that invented TIF will no longer allow its use for any future development projects.⁹⁵

2. Illinois: Another Model State Considering Reform

Illinois has also utilized TIF extensively,⁹⁶ so much so that former Chicago Mayor Richard Daley took to calling TIF "the only game in town."⁹⁷ Illinois's statute has had wide influence in other states and

90. See *id.* (recommending that California's state legislature follow a modified version of Governor Jerry Brown's proposal to end California's redevelopment program and instead offer local governments alternative tools to finance economic development, since dissolution of redevelopment agencies would provide for additional state control of economic development initiatives and increase local governments' flexibility in spending property tax revenues).

91. See 2011 Cal. Legis. Serv. 1st Ex. Sess. ch. 5 (A.B.X1-26) (West); *id.* ch. 6 (A.B.X1-27).

92. *Supreme Court Announces Decision in CRA v. Matosantos*, CAL. REDEVELOPMENT ASS'N (Dec. 29, 2011), <http://www.calredevelop.org/External/WCPages/WCWebContent/WebContentPage.aspx?ContentID=1891>.

93. See Gray & Barclay, *supra* note 40, at 50 (discussing two pieces of California legislation, Assembly Bill 1X26 and 1X27, which were passed in response to Governor Jerry Brown's promise to abolish redevelopment agencies in the state).

94. *Cal. Redevelopment Ass'n v. Matosantos*, 267 P.3d 580, 588 (Cal. 2011) (affirming California's recent legislation forbidding redevelopment agencies from engaging in new business and providing for their windup and dissolution, and overturning a second bill that would allow for new business if certain payments were authorized).

95. The effects of this decision may be far-reaching, with some arguing that "[t]he end of redevelopment in California may have ripple effects on other states' redevelopment programs." Gray & Barclay, *supra* note 40, at 53. Further legal challenges may arise around issues such as the enforceability of contract obligations incurred by former redevelopment agencies and the liabilities and powers of their successors. *Id.*

96. Illinois had an estimated 1,000 TIF districts as of 2007. Petersen, *supra* note 70, at 602.

97. Briffault, *supra* note 22, at 65-66.

served as the model for TIF statutes in Missouri and South Carolina.⁹⁸ Like California's statute, the Illinois statute utilizes a blight requirement for TIF,⁹⁹ but also allows TIF for "conservation areas," defined as areas where at least half the housing is over thirty-five years old, is not currently blighted, but may become blighted because of several factors.¹⁰⁰ These are the two most common forms of qualifying an area as a TIF district¹⁰¹ and require that a number of the statutorily enumerated factors be met before a TIF district is approved.¹⁰²

The Illinois statute requires that the properties be contiguous,¹⁰³ that a redevelopment plan be produced,¹⁰⁴ and that property owners in a proposed TIF district be provided notice and a hearing.¹⁰⁵ Another procedural protection is the potential requirement of a feasibility analysis. A feasibility analysis is not always required; it becomes required when a TIF district creates a displacement of ten or more residential units.¹⁰⁶ Illinois imposes a time limit of thirty-five years for the TIF district, a shorter period than California's fifty-year maximum,¹⁰⁷ and allows for the acquisition of land in the redevelopment area via purchase, donation, lease, or eminent domain.¹⁰⁸ Illinois' TIF statute creates a special fund to hold the TIF proceeds, which are then applied to pay off the issued bonds,¹⁰⁹ and allows municipalities to create a commission to govern the

98. See AM. PLANNING ASS'N, *supra* note 57, at 14-54.

99. 65 ILL. COMP. STAT. ANN. § 5/11-74.4-3(a) (West Supp. 2012) (enumerating several factors contributing to blight, including dilapidation, obsolescence, building deterioration, excessive vacancies, and environmentally hazardous conditions, among others).

100. *Id.* § 5/11-74.4-3(b) (listing similar blighting factors, three or more of which combine to create the presumption that the conservation area will become a blighted area).

101. See Silverman, *supra* note 40, at 60-61.

102. § 5/11-74.4-3 (requiring at least five of thirteen factors be present to qualify an area as "blighted," and at least three of thirteen factors be present to create a "conservation area").

103. *Id.* § 5/11-74.4-4(a). The Illinois statutes also allow for a transfer of funds between contiguous TIF districts. See *id.* § 5/11-74.4-4(q).

104. 65 ILL. COMP. STAT. ANN. § 5/11-74.4-4.1 (West 2005) (outlining the requirements of the "feasibility study," which includes the boundaries of the redevelopment project area, the purpose of the plan and project, and a description of the TIF to be used).

105. 65 ILL. COMP. STAT. ANN. § 5/11-74.4-6 (West Supp. 2012).

106. 65 ILL. COMP. STAT. ANN. § 5/11-74.4-4.1(b) (West 2005).

107. 65 ILL. COMP. STAT. ANN. § 5/11-74.4-3.5(e) (West Supp. 2012).

108. *Id.* § 5/11-74.4-4(c).

109. *Id.* § 5/11-74.4-4.8(b) (describing characteristics of the "special tax allocation fund").

redevelopment area.¹¹⁰ The statute further allows the use of other tax revenues to secure the debt—including the full faith and credit of the local governmental unit.¹¹¹ However, sales tax revenues may not be pledged under Illinois' regime.¹¹²

Similar to California, Illinois' use of TIF has come under heavy criticism in recent years. This criticism led to the creation of a task force by Mayor Rahm Emmanuel to recommend changes to TIF use in Chicago, where former Mayor Richard Daley allegedly used TIF extensively to subsidize several private developments.¹¹³ Statewide TIF reform has been discussed—including promulgating new rules that would require training for municipal employees who administer TIFs, filing of annual TIF reports by municipalities to the state, establishing a thirty-five percent cap on total municipal land within TIF districts, eliminating transfers of funds between contiguous districts, and linking the maturity of TIF bonds with the TIF district's

110. *Id.* § 5/11-74.4-4(k) (describing a permissible commission consisting of between five and fifteen people—"appointed by the mayor or president of the municipality with the consent of the majority of [its] governing board"—who can exercise power over the redevelopment area, hold public hearings, and act with approval of the governing body or authorizing agent).

111. *Id.* § 5/11-74.4-7 (stating that "in addition to obligations secured by the special tax allocation fund," the "municipality may . . . pledge . . . (a) net revenues of all or part of any redevelopment project; (b) taxes levied and collected on any or all property in the municipality; (c) the full faith and credit of the municipality; (d) a mortgage on part or all of the redevelopment project; or (e) any other taxes or anticipated receipts that the municipality may lawfully pledge").

112. See Silverman, *supra* note 40, at 59 (noting a 1987 statutory change that removed the authority of Illinois municipalities to pledge sales tax revenues).

113. See *How to Salvage City's TIF Program*, CHI. TRIB., Sept. 2, 2011, at 43 (describing Daley's "paper[ing of] a third of the city with TIF districts," citizens' anger with TIF, and a move by current Mayor Rahm Emanuel to increase planning, oversight, accountability, and transparency of the TIF process). But see Juan-Pablo Velez, *TIF Aided Public and Private Projects Almost Evenly, Analysis Shows*, N.Y. TIMES (Aug. 6, 2011), <http://www.nytimes.com/2011/08/07/us/07cnc.tif.html?> (citing analysis by the Chicago News Cooperative finding that "TIF spending was allocated almost evenly between public works and subsidies for private interests"). Mayor Emmanuel's task force produced a report which suggested Mayor Emmanuel produce a multi-year economic development plan, to create a multi-year capital financing budget, to create metrics for TIF's performance in Chicago, and to create a governing organization within Chicago with "clear accountability for all aspects of TIF" and a staff to provide oversight. See TIF REFORM PANEL, FINDINGS AND RECOMMENDATIONS FOR REFORMING THE USE OF TAX INCREMENT FINANCING IN CHICAGO: CREATING GREATER EFFICIENCY, TRANSPARENCY AND ACCOUNTABILITY 3-4 (2011), <http://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2011/August/8.29.11TIFReport.pdf>. Presently, it appears that the reforms to TIF in Chicago have stalled. Matthew Blake, *TIF Reform Tabled*, PROGRESS ILL. (June 4, 2012), <http://progressillinois.com/posts/content/2012/06/04/tif-reform-tabled>.

lifespan.¹¹⁴ This legislation,¹¹⁵ and other pieces of legislation attempting to reform Illinois' TIF reporting scheme,¹¹⁶ have not passed to date.

3. Other Aggressive States' Use of TIF: Variance in Blight, "But-For," Land-Use, and More

California and Illinois are not the only aggressive users of TIF,¹¹⁷ but are perhaps the states whose use of the instrument has attracted the most attention. Other aggressive users of TIF have statutes structured quite differently than either of the two statutes discussed above. For instance, some states, such as Iowa, have broadly defined and lenient TIF statutes.¹¹⁸ In Iowa, municipal governments declare their TIF districts unilaterally¹¹⁹ and are granted considerable powers

114. See generally S.B. 0540, 97th Leg. (Ill. 2011) (making various revisions to the Illinois TIF statute); Megan Cottrell, *Three Days Left for TIF Reform in the Veto Session*, CHI. REP. (Nov. 8, 2011, 4:03 PM), <http://www.chicagonow.com/chicago-muckrakers/2011/11/three-days-left-for-tif-reform-in-the-veto-session/> (describing components of the proposed TIF legislation and arguing for legislators to support the provisions). The contiguous TIF transfer provision was designed to require that two adjacent or overlapping TIF districts, before transferring funds between one another, show that both TIF districts would benefit from the transfer of funds. See *id.* Other TIF reforms suggested in Illinois include printing all TIF districts on Illinois tax bills and describing the specifics of how the TIF districts are being funded. See KATE PIERCEY, ILL. POLICY INST., POLICY BRIEF: TAX INCREMENT FINANCING 4 (2010), <http://illinoispolicy.org/uploads/files/TIF10-12.pdf>. Additional suggestions include disclosing all parties involved in a TIF, including vendors and the party that authorized the TIF, as well as requiring a public vote to authorize new TIFs and a stricter blight definition. *Id.*

115. *Bill Status of SB0540*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=540&GAID=11&DocTypeID=SB&SessionID=84&GA=97> (last visited Oct. 15, 2012).

116. *Bill Status of HB5457*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=5457&GAID=11&DocTypeID=HB&LegId=65752&SessionID=84> (last visited Oct. 15, 2012). For an advocate's viewpoint of the legislation, see J. Thomas Johnson, *TIF Reform*, CHI. TRIB. (May 23, 2012), http://articles.chicagotribune.com/2012-05-23/news/chi-120523johnson_briefs_1_tif-reform-tax-increment-financing-districts-property-tax (advocating for passage of stricter reporting requirements of spending TIF funds).

117. As of 2007, California actually had fewer TIF districts than Iowa, which had 949, and Illinois had fewer TIF districts than Minnesota, which had 2,184. See Petersen, *supra* note 70, at 602.

118. See Dave Swenson & Liesl Eathington, TAX INCREMENT FINANCING GROWTH IN IOWA 1 (April 2006), http://www.econ.iastate.edu/research/webpapers/paper_12586.pdf.

119. See *id.*; see also IOWA CODE ANN. § 403.5(1) (West Supp. 2012) (allowing the municipality to declare an urban renewal project if it determines the area is "a slum area, blighted area, economic development area, or a combination of those areas" and designates the area "appropriate for an urban renewal project").

to achieve the goals of the urban renewal district.¹²⁰ One such power is a recently enacted provision allowing for a local-option sales tax that can be levied by municipalities to be included within TIFs.¹²¹ Moreover, Iowa does not employ a blight requirement or use a “but-for test” in determining whether to authorize TIF.¹²² Iowa’s TIF statute provides an example of a fairly deregulated statute, in contrast to the California and Illinois statutes, which have more specific provisions and regulations attached to their use.

Aggressively used TIF statutes also employ various means of determining the district lifespans, governing authorities, and financing mechanisms. Most of the aggressive states use sunset provisions for the TIF district in the twenty- to thirty-year span, although some simply do not specify a shelf life for TIF districts or specify several different time limits based on the type of development activity.¹²³ Some statutes create different types of development authorities for different types of projects. These can include TIFs to finance school development, brownfield development, downtown development authorities, and other project-specific development authorities.¹²⁴

120. See IOWA CODE ANN. § 403.6 (West Supp. 2012) (allowing municipalities “all the powers necessary or convenient to carry out and effectuate the purposes and provisions” of the urban renewal project statute, including the ability to acquire land via purchase, lease, or eminent domain, and to approve urban renewal plans).

121. IOWA CODE ANN. § 423B.1(6)(c) (West 2011); *A Step Backward in TIF Reform*, IOWA POL’Y PROJECT (May 21, 2008), <http://www.iowapolicyproject.org/TIF.html>.

122. See IOWA CODE ANN. § 403.5(1) (West Supp. 2012).

123. See *id.* § 403.17(10) (prescribing a maximum of twenty years for a TIF district in Iowa); MICH. COMP. LAWS ANN. § 125.2915 (West Supp. 2012) (prescribing a duration of thirty years, but allowing the governing body to extend the duration by resolution); MO. ANN. STAT. § 99.835 (West 2008) (prescribing a twenty-three-year limit); OH. REV. CODE ANN. § 5709.41 (LexisNexis 2011) (providing for a maximum of thirty years). Minnesota has a number of different time limits based on the type of TIF district. For example, an “economic development district’s” lifespan is limited to eight years from the receipt of the first tax increment. MINN. STAT. ANN. § 469.176 subd. 1b (West Supp. 2012). Redevelopment and housing districts, on the other hand, may have a duration of twenty-five years from receipt of the first tax increment. *Id.* Minnesota also uses what it calls the five-year rule, which requires development activity for a TIF district to be finished within five years. *Id.* § 469.1763 subd. 3. From the beginning of the sixth year forward, tax increments can only be used to pay off debt incurred to fund the work during the five-year period. *Id.* §§ 469.1763 subd. 4, 469.177 subd. 12(4). For a summary of Minnesota’s different types of TIF districts, see *TIF District Types: Applicable Limits and Characteristics*, MINN. H.R. (Feb. 8, 2010), <http://www.house.leg.state.mn.us/hrd/lissinfo/tifdist.htm>. Wisconsin also provides for a number of different time limits for TIF districts, ranging between twenty-three and twenty-seven years, depending on development type. See WIS. STAT. ANN. § 66.1105(7) (West Supp. 2011).

124. See Laura M. Bassett, *Tax Increment Financing as a Tool for Redevelopment: Attracting Private Investment to Serve a Public Purpose—The Example of Michigan*, 41 URB. LAW. 755, 757–58 (2009) (describing Michigan’s different types of TIF authorities, including Downtown Development Authorities, a Local Development Financing

Aggressive statutes also vary in their allowance of additional pledged securities: some allow for the use of any publicly-available security to finance the debt incurred from the TIF bonds,¹²⁵ while others constrict more narrowly the specific types of securities that may be used to pay down the issued debt.¹²⁶ Few states in the aggressively-utilized category allow for sales taxes as a base revenue source for a TIF; most opt for the traditional model of a property tax-based TIF instead.¹²⁷

Some aggressively used TIF statutes also employ the “but-for” test,¹²⁸ as well as blight requirements. The blighting requirement varies between states, although aggressively used TIF statutes seem to frequently provide for other uses of TIF beyond blight reduction. Minnesota’s TIF statute, for example, provides an array of options beyond simply addressing blight—such as the ability to use TIF in certain “redevelopment districts,” “housing districts,” and “economic development districts.”¹²⁹ Use of TIF for purposes other than redevelopment of blighted areas (such as economic development) has been met with criticism, as some consider these uses misaligned with the public redevelopment purpose originally envisioned for TIF districts.¹³⁰ To address these criticisms, some states have taken

Authorities, Corridor Improvement Authorities, Neighborhood Improvement Authorities, Water Resource Improvement Districts, and Brownfield Redevelopment Authorities).

125. See MINN. STAT. ANN. § 469.178 (West Supp. 2012) (allowing for the use of general obligation bonds from the municipality and the TIF authority, revenue bonds, temporary bonds, as well as “interfund loans,” which allow transfers from a government’s general fund to the TIF district). However, while a wide range of financing may be available to fund TIF districts, increment funds cannot be used for general governmental purposes. See *id.* § 469.178 subd. 4.

126. See, e.g., MICH. COMP. LAWS. ANN. §§ 125.1811, 125.1815(2) (West 2006) (allowing the municipality to pledge its full faith and credit by majority vote and to issue tax increment bonds, revenue bonds, and other sources of local income).

127. Of the states included in the “aggressively used” TIF category, both Iowa and Illinois allow for sales tax TIF districts. See 65 ILL. COMP. STAT. ANN. § 5/11-74.4-3(h) (West Supp. 2012) (defining the “Municipal Sales Tax Revenue Increment” as “an amount equal to the increase in the aggregate amount of taxes paid to a municipality from the Local Government Tax fund arising from sales by retailers”); IOWA CODE ANN. §§ 423B.1(6)(c), 423B.10(2) (West 2011) (allowing for local option sales taxes to be used, without a ballot provision, in TIF districts).

128. See, e.g., MINN. STAT. ANN. § 469.175, subd. 3 (West Supp. 2012) (stating that the municipality must make the but-for finding before approving the TIF plan); see also *id.* § 469.175, subd. 7(b) (stating that for hazardous substance subdistricts, the development authority must make a but-for finding).

129. See *id.* § 469.174, subd. 10–12 (providing descriptions and eligibility requirements for the different available districts).

130. See, e.g., Alyson Tomme, Note, *Tax Increment Financing: Public Use or Private Abuse?*, 90 MINN. L. REV. 213, 213–15 (2005) (describing a TIF deal in Minnesota which

remedial measures to give preference to redevelopment of blight, with mixed results.¹³¹

Some aggressively used statutes also require intergovernmental notifications prior to TIF issuance. Ohio's statute, for example, addresses property tax assessment issues TIF may create and the potential harms they might cause to other governmental units. In Ohio, a school district affected by a TIF must be notified of the TIF's creation.¹³² If the school district does not approve the TIF, a payment must be made to the school district in lieu of taxes.¹³³ Ohio also requires that a TIF district be created by ordinance and that the ordinance be filed with the state Department of Development.¹³⁴ Annual status report filings with that department are required,¹³⁵ which is not a feature of many other aggressively used TIF statutes.

As discussed in this Section, aggressively used TIF statutes have a wide variety of different features, but there does not appear to be a common thread that binds the aggressive states together in their heightened use of TIFs. However, a trend does become apparent when one compares aggressive TIF users with conservative TIF users specifically; unlike conservative TIF users, most aggressive users *do not* include within their statutes any requirement for intergovernmental notification and approval.

required a significant amount of land to be condemned and seized through eminent domain for the "public use" of housing Best Buy's corporate headquarters).

131. In Wisconsin, for example, tax increments may only be used in a district if one of three conditions applies: (1) the project costs are used to provide low-income housing or environmental rehabilitation; (2) at least fifty percent of the area is blighted; or (3) the recipient district is a mixed-use or industrial use district deemed distressed or severely distressed. *See* WIS. STAT. ANN. § 66.1105 (West Supp. 2011). However, at least in Wisconsin, these blight-alleviation requirements have not been consistently enforced, with TIF districts being created in recent years in non-blighted areas such as farmland. *See* David N. Farwell, *A Modest Proposal: Eliminating Blight, Abolishing But-For, and Putting New Purpose in Wisconsin's Tax Increment Financing Law*, 89 MARQ. L. REV. 407, 408–09 (2005) (arguing that TIF in Wisconsin has "evolved into a tool for municipalities to control the pace and direction of development as much as it is a tool of blight elimination").

132. OHIO REV. CODE ANN. § 1728.10(A) (LexisNexis 2009).

133. *Id.* The school district and the local government can also enter into agreements exempting a percentage of the assessed valuation. *Id.*

134. *Id.* § 1728.01(C)(1)(b).

135. *Id.* §§ 5709.40(I), 5709.41(E), 5709.73(I), 5709.78(H).

C. *Conservatively Used TIF Statutes: Variance Again, with Intergovernmental Notice*

There are several states that can be categorized as having used TIF conservatively or moderately.¹³⁶ These states' statutes have many of the same characteristics as the model statute and the aggressively used statutes, such as allowing for a broader range of tax revenue sources than simple property tax increments.¹³⁷ Conservative states also have varied lifespans for TIF districts.¹³⁸

Blight requirements are also similarly mixed. For example, Missouri's blighting requirement has been joined by conservation and economic development purposes,¹³⁹ while other conservative states have described appropriate blight conditions more stringently.¹⁴⁰

136. See Petersen, *supra* note 70, at 602–03 (showing Connecticut (less than five districts), Massachusetts (two districts), New Jersey (zero districts), Virginia (three districts), and Alaska (zero districts) as having a smaller number of TIF statutes). Missouri (263) and South Carolina (100) both have a middling number of authorized TIF districts, *id.*, and will therefore be included in this analysis as moderate TIF users.

137. See, e.g., MO. ANN. STAT. § 99.845 (West 2011) (allowing for a broad array of tax sources, including property tax, sales tax, and an “economic activities” tax). Thirteen states and the District of Columbia allow for non-property taxes to be utilized in paying development costs through sales tax increments, income tax increments, or non-property taxes that are coupled with property taxes in the tax increment. See COLO. REV. STAT. § 31-25-107(9) (2011); CONN. GEN. STAT. ANN. § 32-285(c) (West Supp. 2012); D.C. CODE § 2-1217.05 (2007); IND. CODE ANN. §§ 36-7-26-10, 36-7-27-8 (LexisNexis 2009); LA. REV. STAT. ANN. §§ 33:9033.3 (Supp. 2012), 33:9038.34 (2009); ME. REV. STAT. ANN. tit. 36, § 6753 (2010); MISS. CODE ANN. § 21-45-7 (West 1999); MO. ANN. STAT. § 99.845 (West 2008); N.J. STAT. ANN. § 52:27D-469 (West 2010); OKLA. STAT. ANN. tit. 62, § 861 (West 2010); 53 PA. CONS. STAT. ANN. § 6930.3 (West 2011); TEX. TAX CODE ANN. §§ 311.012–.0123 (West 2008 & Supp. 2012); UTAH CODE ANN. § 17C-1-409 (LexisNexis Supp. 2012); WYO. STAT. ANN. § 15-9-207 (2011). Indiana and Louisiana are the only two states that allow for a sales tax increment regime that is entirely divorced from a traditional property tax increment regime. Lauren Ashley Smith, Note, *Alternatives to Property Tax Increment Finance Programs: Sales, Income, and Nonproperty Tax Increment Financing*, 41 URB. LAW. 705, 707 (2009).

138. South Carolina provides an example of this variance. It does not prescribe a maximum length for the TIF district, but does set a limit of thirty years for issued debt in the TIF district. S.C. CODE ANN. §§ 31-6-40, 31-7-40 (2007). South Carolina also limits the amount of time local governments have to issue debt from the date of the authorizing TIF ordinance: counties have five years, *id.* § 31-7-70, while cities have ten. *Id.* § 31-6-70.

139. See MO. ANN. STAT. § 99.845 (West 2011) (allowing eligibility for TIF to blighted areas located either in “enterprise zones” or “federal empowerment zones, . . . provided that the [zone] contained one or more buildings at least fifty years old and . . . [s]uffered from generally declining population or property taxes”); Harold L. Lowenstein, *Redevelopment Condemnations: a Blight or a Blessing upon the Land?*, 74 MO. L. REV. 301, 302–03 (2009) (noting that while TIF was initially designed to only address blighted neighborhoods, the financing instrument has grown to be viewed by developers as an integral part of development projects).

140. South Carolina's definition of “blight” has several provisions and considers several factors:

Virginia employed a broader approach prior to 2006, allowing TIF to be used to “promote . . . commerce and prosperity” in any area designated by a local government.¹⁴¹ Virginia’s statute has since been reformed to provide specific examples of public purposes for which TIF may be used.¹⁴²

While conservatively used TIF statutes share trends with their more aggressively used counterparts in other states, they also exhibit distinct traits. Perhaps the most pronounced difference is that many states with conservatively used TIF statutes tend to require state approval of a local government’s plan to use TIF. Connecticut’s statute, for example, requires approval by a joint committee of the Connecticut General Assembly for the use of several types of taxes in TIF districts,¹⁴³ although the state does not require approval by the General Assembly for a traditional property tax TIF project.¹⁴⁴ Further, Connecticut requires approval by its State Bond Commission before any debt is issued for a TIF district.¹⁴⁵ Massachusetts, however, mandates a higher level of state involvement, requiring state approval for all TIF plans by a state “council,” an annual status report to a state agency (including all properties acquired by eminent domain), updates of district costs and financing, the status of the TIF for the

“Blighted area” means any improved or vacant area where if improved, industrial, commercial, and residential buildings or improvements, because of a combination of five or more of the following factors: age; dilapidation; obsolescence; deterioration; illegal use of individual structures; presence of structures below minimum code standards; excessive vacancies; overcrowding of structures and community facilities; lack of ventilation, light, or sanitary facilities; inadequate utilities; excessive land coverage; deleterious land use or layout; depreciation of physical maintenance; lack of community planning, are detrimental to the public safety, health, morals, or welfare or, if vacant, the sound growth is impaired by (a) a combination of two or more of the following factors: obsolete platting of the vacant land; diversity of ownership of such land; tax and special assessment delinquencies on such land; deterioration of structures or site improvements in neighboring areas adjacent to the vacant land; or (b) the area immediately prior to becoming vacant qualified as a blighted area.

S.C. CODE ANN. § 31-10-20(2) (2007).

141. Act of Mar. 17, 1999, 1999 Va. Acts 190 (amended 2006).

142. Act of Apr. 6, 2006, 2006 Va. Acts 784 (removing the “commerce and prosperity” language and listing roads, water, sewers, parks, and real estate as examples of improvements that may be made to help eliminate blighted conditions).

143. CONN. GEN. STAT. ANN. § 32-285(f)(6) (West Supp. 2012) (including incremental sales, hotel, cabaret, dues, and admissions taxes for use in a TIF district).

144. See CONN. GEN. STAT. ANN. § 8-134a (West 2010) (vesting TIF oversight in either the relevant municipality or the Connecticut Development Authority).

145. See CONN. GEN. STAT. ANN. § 32-285(g)(2) (West 2010 & Supp. 2012).

program, and a schedule of the program going forward.¹⁴⁶ New Jersey's statute similarly requires approval from a state commission before proceeding with a TIF project.¹⁴⁷

Although the conservatively used TIF statutes require some form of notice or state approval for TIF districts, not all of them require approval from a statewide body.¹⁴⁸ Further, some conservatively used statutes provide broad grants of authority that more closely parallel their aggressive counterparts.¹⁴⁹ For example, Alaska, which allows myriad financing options, requires oversight *only* from the municipality, does not require public hearings for the TIF, and does not make qualifications for the types of projects that are eligible.¹⁵⁰ Despite this lenity, Alaska has not had a TIF district declared since the establishment of the statute in 1988.¹⁵¹

III. TIF IN NORTH CAROLINA

In terms of use, North Carolina can be squarely categorized with states that use their TIF statutes conservatively, with only three approvals of its use and two total TIF districts in the state.¹⁵² Regardless, lessons can be drawn from a comparison of the statutory structure of TIF in North Carolina with the model statute, aggressive users of TIF, and conservative users of TIF to determine whether the infrequency of its use is attributable to the statutory structure, environmental determinants, available substitutes, or some combination of these factors. This Part first presents the history of TIF legislation in North Carolina, then describes the elements of North Carolina's statute in detail, and finally compares elements of North Carolina's statute to each category to document the similarities and differences across categories of TIF users.

A. *History of TIF Legislation in North Carolina*

There were several attempts to pass authorizing legislation and constitutional amendments to allow TIF in North Carolina prior to

146. MASS. ANN. LAWS ch. 40, § 59(vii) (LexisNexis Supp. 2011); 402 MASS. CODE REGS. 3.12 (2012).

147. See N.J. STAT. ANN. § 52:27D-460 (West 2010).

148. See *infra* note 150 and accompanying text.

149. Compare *supra* notes 121–22 and accompanying text, with ALASKA STAT. § 29.47.460 (2010) (exemplifying two broadly phrased statutory frameworks). While both of these statutes are phrased broadly, their usage is vastly different. See Petersen, *supra* note 70, at 602–03.

150. See ALASKA STAT. § 29.47.460 (2010).

151. See Petersen, *supra* note 70, at 602.

152. See *infra* Part IV.

the enacting legislation and amendment in 2003.¹⁵³ The General Assembly passed the North Carolina Tax Increment Financing Act in 1982¹⁵⁴ and the North Carolina Economic Development Financing Act in 1993.¹⁵⁵ Both the 1982 and 1993 legislation required passage of a constitutional amendment, which failed each time.¹⁵⁶ These pieces of legislation had many of the same characteristics as the ultimately-successful 2003 legislation.¹⁵⁷

In 2003 the General Assembly again passed TIF legislation, this time dubbed the North Carolina Project Development Financing Act,¹⁵⁸ and voters approved this iteration of the TIF via constitutional amendment.¹⁵⁹ The General Assembly's laudable purpose for the legislation was to be "actively engaged in economic development efforts to attract and stimulate private sector job creation and capital investors."¹⁶⁰

153. North Carolina Project Development Financing Act, 2003 N.C. Sess. Laws 1157 (codified as amended in scattered sections of N.C. CONST. art. V and N.C. GEN. STAT. §§ 105, 158 to 160A (2003)).

154. North Carolina Tax Increment Financing Act, 1982 N.C. Sess. Laws 172.

155. North Carolina Economic Development Financing Act, 1993 N.C. Sess. Laws 1933.

156. Blocher & Morgan, *supra* note 12, at 8; see Marshall Lancaster, *Those Starving Attorneys*, CAROLINA J. ONLINE (Nov. 1, 2004), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=1918.

157. For example, the 1982, 1993, and 2003 legislation all require approval by the Local Government Commission and provide seven similar criteria for the Commission to use when determining whether to approve the TIF project. *Compare* North Carolina Tax Increment Financing Act § 1, *and* North Carolina Economic Development Financing Act § 2, *with* North Carolina Project Development Financing Act § 2. All three laws also implemented a five percent maximum land area for TIF districts. *Compare* North Carolina Tax Increment Financing Act § 15, *and* North Carolina Economic Development Financing Act § 18, *with* North Carolina Project Development Financing Act § 18.

158. North Carolina Project Development Financing Act § 2.

159. See Blocher & Morgan, *supra* note 12, at 2.

160. North Carolina Project Development Financing Act § 2. The General Assembly also cited the forty-eight other states that were authorized to use a form of TIF, as well as other states' successes with TIF and the potential to increase North Carolina's competitiveness in attracting private sector job creation and capital investment. *Id.* An impressive group of proponents, including three former North Carolina governors and numerous high profile organizations, contributed cachet and finances to the constitutional amendment campaign. See Tom Ashcraft, Op-Ed., *Preserve Democracy; Reject Amendment One*, CHARLOTTE OBSERVER, Sept. 4, 2004, at 13A ("[P]roponents include former governors Jim Holshouser, Jim Hunt and Jim Martin; some counties, cities and towns; many chambers of commerce; real estate and banking groups; business organizations; and associations of local officeholders."); see also Mark Binker, *Amendment Backers Pitch in \$1.6 Million*, NEWS & REC. (Greensboro, N.C.), Oct. 27, 2004, at A1 ("Law firms, power companies and banks were among the largest and most frequent contributors to the Amendment One campaign. Blue Cross and Blue Shield of North Carolina, Wachovia and Bank of America were the highest contributors, donating \$100,000 each to the campaign.").

Passage of the amendment ultimately allowed local governments to create a TIF district without a referendum, which would otherwise be barred by the North Carolina Constitution.¹⁶¹ After passage, challenges were mounted against the amendment, alleging that it was mired in obfuscated language that swayed voters toward approval.¹⁶² These challenges were ultimately unsuccessful,¹⁶³ and TIF remains a public financing option in North Carolina today.¹⁶⁴

B. *Elements of North Carolina's TIF Statute*

North Carolina's TIF statute shares many characteristics with other states' statutes, but also introduces additional elements that add complexity to the process. First, like many states, North Carolina employs a list of approved uses for TIF by counties and cities, generally consistent with the use of general obligation bonds.¹⁶⁵ However, TIF specifically *cannot* be used for several purposes, including fire stations, police stations, jails, libraries, golf courses, swimming pools, marinas, general public buildings (such as city halls

161. See N.C. CONST. art. V, § 14 (authorizing TIF without a referendum). TIF would be barred otherwise without a referendum, as it represented a pledging of a portion of a local government's taxing authority. See *id.* § 4 (stating that the General Assembly may not allow a county, city, or town to contract debts secured by a pledge of "its faith and credit" without a popular vote except for emergency purposes or to repay prior debts).

162. See, e.g., *Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009) (affirming the district court's order to dismiss and finding the plaintiffs' complaint did not actually allege that voters were misled by the ballot language).

163. *Id.* at 422; see also *Orr, NCICL File Suit Against Amendment One*, TRIANGLE BUS. J. (Nov. 6, 2006, 2:17 PM), <http://www.bizjournals.com/triangle/stories/2006/11/06/daily3.html?page=all>.

164. See N.C. GEN. STAT. §§ 159-101 to 159-113 (2011). There were several further alterations made to North Carolina's TIF statute by a 2007 law, which expanded the permissible uses of TIF bonds and introduced a requirement that base property tax valuation be readjusted during revaluation years. See Rivenbark, Denning & Millonzi, *supra* note 25, at 1 (describing updates to North Carolina's TIF legislation).

165. N.C. GEN. STAT. §§ 159-48(b)-(d), 160A-536 (2011). This statute allows for TIF to be used to fund, among other things, airport facilities, auditoriums, coliseums, arenas, stadiums, civic centers, convention centers, hospitals, art galleries, museums, historic properties, parking facilities, parks, recreation facilities (such as playgrounds and recreation centers), land acquisitions, sewer systems, flood control facilities, water systems, industrial parks (including shell buildings), railroad corridors, community college facility construction, school facility construction, street and sidewalk improvements, housing projects for low to moderate income residents, electric facility capital costs, beach erosion controls, hurricane protections, downtown revitalization projects, urban area revitalization projects, drainage projects, sewage collection and disposal systems, and watershed improvement projects. *Id.* It also is a common approach in other states for public financing instruments, such as TIF, to have a prescribed list of uses. See generally CDFA STATE-BY-STATE, *supra* note 19 (explaining the different approved uses of TIF in forty-nine states and the District of Columbia).

and courthouses), public vehicles, and landfills.¹⁶⁶ This list of non-approved uses does not include interest on the TIF bonds, which may be paid for up to seven years after construction projects are completed, and the statutory framework also allows for the bond proceeds to be used outside the TIF district if used to benefit private development inside the TIF district.¹⁶⁷

The TIF district-creation process in North Carolina remains similar to the model used by other states and the model TIF statute. The city or county must establish a “Development Financing District,” which is a simple renaming of a TIF district from other states.¹⁶⁸ The statute also imposes requirements on the types of property that may comprise the TIF district.¹⁶⁹ The municipality or county must also adopt a “Development Financing Plan,”¹⁷⁰ similar to many other states’ requirement for a plan in their TIF statutes.¹⁷¹ The plan requires the satisfaction of ten elements¹⁷² and, if a manufacturing facility is built, approval by the Department of Environment and Natural Resources.¹⁷³

North Carolina’s statute differs from other TIF statutes in two primary ways: percentage-based land use restrictions and increased intergovernmental notification requirements. To the first item, if a TIF district is located outside of a city’s central business district, then no more than twenty percent may be used for retail, hotels, banking,

166. This list of excluded uses is created by the authority-granting statute, which states that if the proposed use is not included in section 159-48 or section 160A-536, then it is not allowed to be funded through a TIF regime. *See* N.C. GEN. STAT. § 159-103(a) (2011) (providing a broader list of purposes for which general obligation bonds may be used).

167. *Id.* § 159-103.

168. *Id.* §§ 158-7.3(b)–(c).

169. County TIF districts are required to consist of property that is (1) blighted; (2) suitable for rehabilitation or conservation; or (3) suitable for economic development. *Id.* § 158-7.3(c). Municipal TIF district property may meet any of the county criteria, *id.* § 160A-503, or may be deemed a “redevelopment area” by a city’s planning commission to qualify. *Id.* § 160A-515.1.

170. *Id.* §§ 158-7.3(d), 160A-515.1(c).

171. *See, e.g., supra* notes 82, 104, 146 and accompanying text.

172. These ten elements include: (1) a description of the district’s boundaries; (2) a description of the proposed public and private development in the district; (3) the costs of the proposed activities; (4) the sources and amounts of funds to pay for the activities; (5) the base property valuation in the district; (6) the projected increases in property value assessment in the district; (7) an estimate of the district’s lifespan; (8) a description of how the proposed development will benefit residents and businesses in the district; (9) a description of how to “ameliorate” harm if the projects negatively affect residents and business owners; and (10) a statement that any users of manufacturing facilities will be required to pay a wage above the average manufacturing wage in the county or not less than ten percent of the average weekly manufacturing wage statewide. § 158-7.3(d).

173. *Id.* §§ 158-7.3(g), 160A-515.1(f).

financial services offered to consumers, or other commercial use besides office space.¹⁷⁴ This provision, however, does not apply to lower-wealth counties¹⁷⁵ or to districts "created primarily for tourism-related economic development."¹⁷⁶ Additionally, the statute requires that the district not exceed five percent of the total land area in the city or county establishing a TIF.¹⁷⁷ This five percent limit may be overly constrictive on governmental units with a smaller amount of total land area or larger governmental units with multiple areas of blight scattered throughout the city or county. Ultimately, the five percent limit constrains cities from using TIF in many situations,¹⁷⁸ and upward revision would be one way to increase TIF use.

There are also considerable requirements for intergovernmental notice and approval in the North Carolina TIF statute. First, counties cannot locate a TIF district within city limits at the time the district is created unless both local government entities agree.¹⁷⁹ Second, before a municipality may adopt a TIF plan, it must provide notice to the county or counties where the district is to be located.¹⁸⁰ If a county does not act within twenty-eight days or approves the plan, the

174. *Id.* § 158-7.3(a)(1).

175. Low-wealth counties—called "development tier one counties" in North Carolina—are determined by population, percentage of population below the federal poverty level, average rate of unemployment, median household income, percentage growth in population, and property values. *See id.* § 143B-437.08.

176. *See id.* § 158-7.3(a)(1) (describing tourism related economic development as "developments featuring facilities for exhibitions, athletic and cultural events, show and public gatherings, racing facilities, parks and recreation facilities, art galleries, museums, and art centers").

177. *Id.* §§ 158-7.3(c), 160A-515.1(b). Note, however, that land annexed by a city does not count against the city's five-percent limit unless the city and county enter into an increment agreement. *Id.* § 159-107(e). Without an agreement, a city may annex land into the district without violating the five percent limit. *See id.*

178. *See id.* § 158-7.3(c) ("The *total land area within development financing districts* in a unit . . . may not exceed five percent (5%) of the total land area of the unit." (emphasis added)); *id.* § 160A-515.1(b). Because of this land requirement, for example, a smaller town with blight affecting more than five percent of its total area would not be able to declare a TIF district sufficiently large to combat the problem. Additionally, a larger town that had more than five percent of its total land area blighted would not be able to declare multiple TIF districts to address blight, as the wording of the statute states that the "total land area within development financing districts"—implying *all* TIF districts in the city—may not be more than five percent. *Id.* § 158-7.3(c). There is also some confusion regarding joint city and county districts and how the five percent limit applies, although some have said that the "most consistent interpretation of the act's provisions leads to the conclusion that when counties and cities jointly act to develop a developing financing district, . . . then the area included within the district counts against the 5-percent limitation for both the county and the city." Rivenbark, Denning, & Millonzi, *supra* note 25, at 5.

179. *See* §§ 158-7.3(c), 159-107(e).

180. *Id.* §§ 158-7.3(f), 160A-515.1(e).

governing body may adopt the TIF proposal; however, if the county disapproves of the plan, the city may not adopt a TIF plan approving a TIF district.¹⁸¹ City and county governing bodies must also hold a public hearing, making sure to first publish written notice within the taxing unit, as well as mail notice to property owners in the potential TIF district.¹⁸² After successfully navigating the process at the city and/or county level, the governmental unit must next gain approval for the TIF plan from North Carolina's Local Government Commission,¹⁸³ a division of the Department of the State Treasurer.¹⁸⁴ The Local Government Commission may consider several factors in determining whether to approve a TIF project, primarily relating to the local government unit's ability to pay the TIF bonds.¹⁸⁵

If the Local Government Commission approves the plan, then a typical TIF system is enacted. The tax assessor in the relevant unit of government must be notified of the TIF district's existence; thereafter, the tax assessor determines a base value of the property in the district.¹⁸⁶ The property values in the TIF district are then used as the base property valuation for the life of the TIF district, and the proceeds are used to pay the TIF bonds.¹⁸⁷ The base valuation of the TIF district may only be adjusted if the TIF plan is modified to add or remove property from the TIF district.¹⁸⁸ A special revenue fund must

181. *Id.* §§ 158-7.3(f), 160A-515.1(e).

182. *Id.* §§ 158-7.3(h), 160A-515.1(g).

183. *See id.* § 159-104. Note that prior to considering the TIF bonds, the Commission may require the local government unit to send representatives to a preliminary conference with the Commission to discuss the proposed bond issue, TIF district, and TIF plan. *Id.* Further, the local governmental unit must also "publish a public notice of the application in a newspaper of general circulation in the unit of local government." *Id.*

184. *Id.* § 159-3(e).

185. *Id.* § 159-105(a). The Local Government Commission considers (1) whether the projects are necessary to secure new project development (a "but-for test"), (2) whether the projects are feasible, (3) the debt management policies and procedures of the local government, (4) whether the local government is in default for any of its debt service, (5) whether the private development forecasts would occur without TIF instruments, (6) whether taxes gathered from the TIF district, along with any accompanying security, would be sufficient to pay the debt service on the TIF bonds, and (7) whether the Commission can market the proposed TIF bonds at "reasonable rates of interest." *Id.* If all of these are found, then the Commission will approve the TIF plan. *Id.* § 159-105(b).

186. *Id.* § 159-107(a).

187. *Id.*

188. *Id.* § 159-107(b). Prior to the 2007 amendments to the statute, property value increases could *only* be from improvements to the property, not including revaluation revenues, which required that the base value be modified to reflect the increase in property value due solely to revaluation. *See* Act to Modify the Project Developing Financing Act, § 2, 2007 N.C. Sess. Laws 1182, 1182-83 (codified as amended at N.C. GEN. STAT. § 159-107(b) (2011)); *see also* Rivenbark, Denning & Millonzi, *supra* note 25, at 7 n.53. Further, section 159-107(d) describes how, in a year with an incremental assessed

then be established to hold the incremental revenues and service the debt.¹⁸⁹ TIF revenues can be used to finance additional capital expenses outlined in the TIF plan, to pay down debt from TIF bonds, to repay other governmental funds used to pay down TIF debt, and to replenish reserve funds for TIF.¹⁹⁰

Additionally, a local governmental unit may pledge or grant a security interest in any of its revenue sources,¹⁹¹ including a city's ability to use its sales tax revenues to repay its debt.¹⁹² Local government units may also enter into an agreement with a developer for a minimum property tax assessment,¹⁹³ which can guarantee that increments are created over time, a feature that is unique to TIF and which has worked well in at least one North Carolina TIF project.¹⁹⁴ Banks may also issue a letter of credit to further securitize the debt.¹⁹⁵ Beyond revenue streams, the local government unit may also pledge a mortgage interest in the financed asset,¹⁹⁶ as well as other revenues collected by the unit, such as special assessments.¹⁹⁷ Lastly, a local government unit *may* pledge the "faith and credit" (or taxing

value, tax proceeds may be distributed to the local governmental unit. First, net proceeds are calculated, which are gross revenues net refunds, releases, and collection fees. N.C. GEN. STAT. § 159-107(d) (2011). Second, the net proceeds are paid to the taxing units levying specific taxes relating to (1) general obligation debt, (2) non-school taxes levied by a vote of the people, (3) taxes levied for a municipal or county service district, and (4) taxes levied by a taxing unit in a TIF district established by a different governmental unit without an increment agreement. *Id.* Third, the remaining taxes are multiplied by the base valuation of the district and then divided by the current valuation of the district. *Id.* Lastly, this amount is retained by the county, city, or special district and then turned over to the finance officer of the governmental unit, who places the funds in the special revenue increment fund. *Id.*

189. *Id.* § 159-107(c).

190. *Id.* § 159-107(f).

191. *Id.* § 159-111(b).

192. Rivenbark, Denning & Millonzi, *supra* note 25, at 8 (noting that because "sales tax revenue results from the taxing power of counties, cities, but not counties, may pledge sales tax revenues as security for repayment").

193. N.C. GEN. STAT. § 159-108(a) (2011).

194. *See infra* notes 274–82 and accompanying text.

195. For example, Bank of America provided a letter of credit for the City of Roanoke Rapids in its construction of the Roanoke Rapids Theatre. *Roanoke Rapids Project Summary*, U. N.C. CHAPEL HILL SCH. GOV'T, <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Roanoke%20Rapids%20TIF%20summary.pdf> (last visited Sept. 25, 2012).

196. N.C. GEN. STAT. § 159-111(b) (2011) (allowing local governments to pledge a security interest in the capital asset created with the TIF bonds, which gives investors the ability to foreclose upon the asset).

197. *Id.* §§ 159-111(b), 153A-210.4(b), 160A-239.4(b) (allowing for the pledging of special assessment revenues for additional TIF securities).

authority) of the unit as an additional security¹⁹⁸ if there is a successful voter referendum to issue general obligation bond debt.¹⁹⁹

C. *Comparison of North Carolina Statute to APA Model Statute*

Comparing the model TIF statute to the North Carolina statute reveals a number of differences, likely a result of their respective creators' attempts to reach different audiences. The American Planning Association created the model TIF statute as a way to show generalized practices throughout the United States,²⁰⁰ while the North Carolina General Assembly passed the Project Development Financing Act after two previous failed attempts at passage²⁰¹ and with the benefit of being the forty-ninth state to enact a TIF statute.²⁰² Perhaps because of the different audiences and precautionary tales of TIF gone wrong in other states,²⁰³ North Carolina's TIF statute contains more procedural and use restrictions than the model TIF statute.

There are certainly similarities between the North Carolina statute and the model TIF statute.²⁰⁴ However, while these similarities exist, differences abound between the open-ended model TIF statute

198. *Id.* § 159-111(a).

199. *Id.* ("Before such a pledge [of the faith and credit of the local government unit] may be given, the unit shall follow the procedures and meet the requirements for approval of general obligation bonds under Article 4 of this Chapter."); *id.* § 159-61(a).

200. *See supra* note 57 and accompanying text.

201. *See supra* notes 153–57 and accompanying text.

202. *See Blocher & Morgan, supra* note 12, at 2.

203. *See generally* Lefcoe, *supra* note 27 (describing myriad TIF project successes and failures and re-stating six oft-used criticisms against TIF regimes).

204. For example, North Carolina provides for the establishment of a similar special fund to account for TIF proceeds. *Compare* N.C. GEN. STAT. § 159-107(c) (2011), *with* AM. PLANNING ASS'N, *supra* note 57, § 14-302(10), at 14-61 (establishing separate accounting funds within each statute for property tax increments in TIF districts). North Carolina also allows the use of sales tax as part of the TIF (although North Carolina *only* allows sales tax to be an additional security for the debt, whereas the Model TIF statute allows independent sales tax TIFs). *Compare* N.C. GEN. STAT. § 159-111(b) (2011), *with* AM. PLANNING ASS'N, *supra* note 57, § 14-302(6), at 14-59 to 14-60 (highlighting differences between the statute's use of sales tax revenues as additional securities or as independent tax bases on which to base a TIF regime). Further, North Carolina requires a plan to be created prior to implementing a TIF district. *Compare* N.C. GEN. STAT. §§ 158-7.3(b), 160A-515.1(a) (2011), *with* AM. PLANNING ASS'N, *supra* note 57, § 14-302(4)(a), at 14-58 (requiring development of plans in both statutes before implementing a TIF). Both statutes also require that the local tax assessor be notified of the TIF district and create a base valuation, which is typical of TIF schemes in general. *Compare* N.C. GEN. STAT. § 159-107(a) (2011), *with* AM. PLANNING ASS'N, *supra* note 57, § 14-302(7)–(8), at 14-60 (requiring that base property valuations be created to determine the property tax increment); *see also* Blocher & Morgan, *supra* note 12, at 3–4 (discussing typical tax collection regimes in TIF districts).

and North Carolina's more restrictive iteration. The model TIF statute does not proscribe certain uses of TIF, while North Carolina's TIF statute does so extensively.²⁰⁵ The model TIF statute does not require the approval of a statewide finance board, while North Carolina requires notification of (and approval by) the Local Government Commission as well as other intergovernmental notifications.²⁰⁶ Further, the model TIF statute does not impose total land percentage ceilings like the North Carolina statute,²⁰⁷ nor does the model TIF statute create percentage limits on retail establishments that may be built in a TIF district.²⁰⁸

D. Comparison of North Carolina Statute to Aggressively Used Statutes

North Carolina and aggressive TIF states utilize similar TIF district revenue capture mechanisms,²⁰⁹ and at times require similar approval procedures for prospective TIF districts (such as a public hearing requirement for property holders in the TIF district).²¹⁰ Aggressive TIF states have similar "use" restrictions to North Carolina, although the aggressive users tend to allow for higher percentage limits on total TIF district land than North Carolina.²¹¹

205. Compare AM. PLANNING ASS'N, *supra* note 57, §§ 14-302(1)-(10), at 14-57 to 14-62, with *supra* note 166 and accompanying text (highlighting differences in use restrictions).

206. Compare AM. PLANNING ASS'N, *supra* note 57, § 14-302(1)-(10), at 14-57 to 14-62, with *supra* notes 179-185 and accompanying text (outlining relevant differences in intergovernmental notifications).

207. Compare AM. PLANNING ASS'N, *supra* note 57, § 14-302(1)-(10), at 14-57 to 14-62, with *supra* note 177 and accompanying text (pointing out the lack of "use ceilings" in the model statute, as well as upper thresholds in the North Carolina statute).

208. Compare AM. PLANNING ASS'N, *supra* note 57, § 14-302(1)-(10), at 14-57 to 14-62, with *supra* notes 174-176 and accompanying text.

209. Compare, e.g., N.C. GEN. STAT. § 159-107(c)-(d) (2011) ("When a unit of local government has established a development financing district, . . . the unit shall establish a separate fund to account for the proceeds paid to the unit from taxes levied on the incremental valuation of the district."), with CAL. HEALTH & SAFETY CODE § 33670(b) (West 1999 & Supp. 2012) ("[T]hat portion of the levied taxes each year in excess of [the base valuation] amount . . . shall be paid into a special fund of the redevelopment agency to pay the principal of and interest on loans . . . incurred by the redevelopment agency to finance . . . the redevelopment project.").

210. See N.C. GEN. STAT. §§ 158-7.3(h), 160A-515.1(g) (2011); 65 ILL. COMP. STAT. ANN. 5/11-74.4-5 (West Supp. 2012) (outlining Illinois public hearing requirement).

211. Compare *supra* note 114 and accompanying text (describing legislation imposing a thirty-five percent cap on total TIF land that falls within a municipality), with N.C. GEN. STAT. §§ 158-7.3(c), 160A-515.1(b) (2011) (establishing a five percent cap on total city or county land within a TIF district). Minnesota, at one time, also imposed a limitation that only five percent of the total land in a municipality may be used for a TIF district, but this has since been removed. See Christina G. Dudley, Comment, *Tax Increment Financing for*

Some aggressive users also allow for the use of TIF districts for projects other than “blighted” areas, such as subsidizing private developments²¹² and the development of a corporate headquarters.²¹³ North Carolina’s TIF legislation allows for myriad uses relating to economic development and also eschews an explicit blight requirement.²¹⁴ Many aggressive states, however, maintain the blight requirement or adopt a policy promoting TIF for blight removal.²¹⁵

Aggressively used TIF statutes also typically require that TIF plans be made before a district is approved,²¹⁶ and some of the aggressive states also require a more stringent feasibility study, outlining the locality’s ability to pay their debt service before a TIF district may be approved.²¹⁷ This stronger debt feasibility requirement is also found in North Carolina’s statute.²¹⁸ North Carolina differs from some aggressive states by not earmarking portions of TIF proceeds for certain items (such as affordable housing),²¹⁹ but the state retains a relatively similar lifespan for its TIF districts.²²⁰

Redevelopment in Missouri: Beauty and the Beast, 54 U. MO. KAN. CITY L. REV. 77, 87 (1985).

212. See *supra* note 113 and accompanying text.

213. See Tomme, *supra* note 130, at 213–15 (describing a Minnesota town’s use of TIF to attract Best Buy’s corporate headquarters).

214. See *supra* notes 165–166 and accompanying text. North Carolina’s prime example of using TIF to spur economic development is the construction of the Roanoke Rapids Theatre, discussed *infra* Part IV.A.

215. See, e.g., CAL. HEALTH & SAFETY CODE § 33037(a) (West 2010) (stating that in order “[t]o protect and promote the sound development and redevelopment of blighted areas,” it is the state’s policy to “remedy[] such injurious conditions through the employment of all appropriate means”); S.C. CODE ANN. § 31-10-20 (16) (West 2007 & Supp. 2012); S.C. CODE ANN. § 31-10-90 (West 2007) (listing “blighted or conservation areas” as the areas suitable for TIF development).

216. See, e.g., CAL. HEALTH & SAFETY CODE § 33330 (West 2010).

217. See, e.g., 65 ILL. COMP. STAT. ANN. § 5/11-74.4-4.1 (West 2005).

218. See *supra* notes 170–172, 185 and accompanying text (describing the elements of the TIF plan as well as the debt requirements examined by the Local Government Commission).

219. Compare Rivenbark, Denning & Millonzi, *supra* note 25, at 6 (providing a table of TIF plan requirements that includes a “description” of how the TIF district will benefit residents in terms of affordable housing, but setting no requirement as to the portion of the TIF proceeds to be allocated for it), with CAL. HEALTH & SAFETY CODE § 33334.2(a) (West 2010) (reserving “not less than 20 percent of all taxes . . . allocated to the [development] agency . . . for the purposes of increasing, improving, and preserving the community’s supply of low- and moderate-income housing”). When redevelopment agencies have not complied with this provision, California courts have enforced the twenty percent requirement. See, e.g., Fontana Redevelopment Agency v. Torres, 62 Cal. Rptr. 3d 875, 884 (Ct. App. 2007); Craig v. City of Poway, 33 Cal. Rptr. 2d 528, 535 (Ct. App. 1994).

220. Compare *supra* note 172 and accompanying text (describing North Carolina’s thirty-year maximum TIF district lifespan), with *supra* note 123 and accompanying text (describing various lifespans tending toward the twenty- to thirty-year range).

North Carolina's approval mechanisms, most notably the requirement of a state governing board's approval²²¹ (and county approval if a municipality is offering the TIF proposal²²²), are considerably more stringent than those of many aggressive TIF states.²²³ However, the lack of a state approval mechanism is not universal between the aggressive users of TIF; for example, Michigan imposes a state approval process similar to North Carolina's before authorization of TIF districts is granted.²²⁴ There are also different structural relationships between layers of government in North Carolina than in some other states. In Ohio, for example, schools have independent taxing authority and special provisions are required regarding TIF proceeds for school systems affected by the TIF district.²²⁵ In contrast, North Carolina schools receive local dollars through the vehicle of county governments, so this separate dialogue with the school system is unnecessary.²²⁶ On one hand, this insulation of municipalities from competitive tax structures can be a positive governance principle, as shown by the possible shielding of tax revenues from other governmental entities via TIF districts in California.²²⁷ On the other hand, creating myriad approval bodies for a public finance instrument may create unnecessary complexities for local government managers seeking streamlined community redevelopment through TIF.

The aggressive states also vary regarding the pledging of additional revenues or property interests to further securitize TIF debt.²²⁸ Some states, such as Illinois, allow for the general taxing power to be pledged,²²⁹ while other aggressive states, such as Iowa,

221. See N.C. GEN. STAT. § 159-104 (2011) (requiring TIF proposals to gain approval from the Local Government Commission); *id.* § 159-3(e) (defining the Local Government Commission as "a division of the Department of the State Treasurer").

222. See *supra* notes 179–182 and accompanying text.

223. For example, as of 2008, California required only the approval of the issuing local government. See CDFA STATE-BY-STATE, *supra* note 19, at 4. The same applies to Illinois, Iowa, and South Carolina. *Id.* at 13, 15, 40.

224. MICH. COMP. LAWS ANN. § 125.1818 (West 2006).

225. See *supra* notes 132–35 and accompanying text.

226. See generally Kara Millonzi, *County Responsibility for School Funding*, COATES' CANONS: NC LOC. GOV'T L. BLOG (Apr. 22, 2010), <http://sogweb.sog.unc.edu/blogs/localgovt/?p=2282> (discussing the constitutional and statutory framework governing the funding of North Carolina schools).

227. See *supra* notes 85–89 and accompanying text.

228. See generally CDFA STATE-BY-STATE, *supra* note 19 (describing various financing mechanisms for TIF and various revenues that may be pledged in each state that authorized TIF).

229. See 65 ILL. COMP. STAT. ANN. § 5/11-74.4-8(b)(3) (West Supp. 2012); see also MINN. STAT. ANN. §§ 469.178, 475.58 (West Supp. 2012).

allow general obligation bonds to be used as an additional form of security²³⁰ (though they require a referendum before the bonds are issued).²³¹ North Carolina requires a publicly voted bond referendum in the issuing governmental unit for such general obligation debt.²³² Lastly, states vary widely in whether sales tax is allowed as an additional form of security²³³; North Carolina allows the use of sales tax as additional security for TIF bonds, but does not authorize TIF districts based solely on sales tax revenue.²³⁴

E. Comparison of North Carolina Statute to Conservatively Used Statutes

Conservative states also use structural features similar to those of North Carolina's TIF statute, including the base valuation requirement, requirements for public hearings, and a requirement that the area be "blighted" or otherwise suitable for economic development.²³⁵ North Carolina's TIF statute shares a common theme with many conservatively used TIF state statutes: namely, a requirement of state approval before a TIF district is authorized.²³⁶ However, North Carolina's statute differs significantly from Alaska's, which includes little by way of state or county oversight of municipalities.²³⁷ In Alaska, no TIF districts currently exist,²³⁸

230. See IOWA CODE ANN. § 403.9 (West 1999 & Supp. 2012); IOWA CODE ANN. § 403.12(5) (West 2009); Webster Realty Co. v. City of Fort Dodge, 174 N.W.2d 413, 417 (Iowa 1970). For a list of voter referendum requirements among the states, see K.C. Tydgate, Voting Down the Debt or Voting Up the Cost: Unintended Effects of Referendum Requirements 9 (Spring 2009) (unpublished M.P.A. Capstone Paper, University of North Carolina at Chapel Hill), <http://www.mpa.unc.edu/sites/www.mpa.unc.edu/files/K.C.TygatsCapstone.pdf>.

231. See IOWA CODE ANN. § 384.28 (West 2011).

232. See N.C. CONST. art. V, § 4 (providing that a local government may not contract debts secured by "a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon"); N.C. GEN. STAT. § 159-45 (2011) (allowing for use of general obligation bonds subject to certain conditions).

233. See *supra* notes 121, 127 and accompanying text.

234. See N.C. GEN. STAT. § 159-111(b) (2011).

235. See *supra* notes 137–142 and accompanying text; *supra* notes 165–173 (describing mechanisms of increment capture, requirement of TIF plans, and other common characteristics of TIF regimes).

236. Compare *supra* notes 143–47 and accompanying text (discussing approval requirements of conservative TIF states), with *supra* notes 184–85 and accompanying text (describing North Carolina's approval requirements). But see ALASKA STAT. § 29.47.460 (2010) (granting oversight of the TIF obligations to the issuing municipality and not requiring state approval); VA. CODE ANN. § 58.1-3245.2 (2009) ("The governing body of any county, city or town may adopt tax increment financing by passing an ordinance designating a development project area . . .").

237. See *supra* note 221.

238. See Petersen, *supra* note 70, at 602.

suggesting that the use of TIF is not entirely a function of statutory construction, but is also influenced significantly by ancillary factors that contribute to whether TIFs are authorized and successful. Lastly, the conservatively used TIF statutes do not exhibit the same size (five percent) and use ceilings (retail limited to twenty percent) for TIF districts as the North Carolina statute,²³⁹ although use prescriptions are certainly present within some statutes.²⁴⁰

F. North Carolina's TIF Framework: Many Shared Features, but Additional Restrictions Stifle TIF

The basic structure of TIF in North Carolina is similar to the common practices of other states²⁴¹ as well as the model statute.²⁴² However, several elements of North Carolina's statute might reduce the prevalence of TIF in the state. While North Carolina's statute limits certain types of uses like other statutes,²⁴³ two unique features in the statute are the twenty percent limit on retail space in the TIF district²⁴⁴ and the five percent upper limit of total city or county area that may be within a TIF district.²⁴⁵ Further, while some states use notice and approval requirements by state or other government entities,²⁴⁶ North Carolina's Local Government Commission is a state-run approval entity, which enjoys wide discretion and turns a critical eye to a local government's ability to repay its issued debt.²⁴⁷ These additional features likely inhibit use of TIF, although other root causes may also contribute to its non-use. These potential causes are

239. N.C. GEN. STAT. §§ 158-7.3(a)(1)(c), 160A-515.1(b) (2011).

240. See, e.g., *supra* notes 139–142 and accompanying text (describing the blight requirement and other permitted TIF uses in Missouri, South Carolina, and Virginia).

241. See *supra* notes 209–10 and accompanying text (discussing similarities between North Carolina's financial structuring and approval mechanisms within the issuing governmental entity and of the government's affected citizens).

242. See *supra* note 204 and accompanying text (discussing similarities between the model TIF statute and North Carolina's provisions).

243. See *supra* notes 165–66 and accompanying text.

244. N.C. GEN. STAT. § 158-7.3(a)(1) (2011).

245. See *supra* note 164 and accompanying text.

246. See *supra* notes 143–47 and accompanying text.

247. See K. Lee Carter, Jr., *State Oversight of Local Government Finance*, in *STATE AND LOCAL GOVERNMENT RELATIONS IN NORTH CAROLINA: THEIR EVOLUTION AND CURRENT STATUS* 71, 77 (Charles D. Liner ed., 2d ed. 1995) (noting that during the approval process, the Local Government Commission will “review[] a local government's financial statements, budgets, and other documents to determine if there are financial or other problems that should be corrected by local officials before a unit of government issues debt”). For a history of the Local Government Commission, including the significant depression-era defaults leading to its formation, see JOHN ALEXANDER MCMAHON, N.C. ASS'N OF CNTY. COMM'RS, *THE NORTH CAROLINA LOCAL GOVERNMENT COMMISSION* 1–18 (1960).

explored further through three North Carolina case studies in Part IV. Other potential causes and available debt financing substitutes are considered in Part V.

IV. THREE NORTH CAROLINA CASE STUDIES

North Carolina has authorized three TIF districts to date, and each of these three examples has had a different level of success: one TIF district is widely acknowledged as a resounding failure, another TIF district appears to be successful, and a third was abandoned in favor of an alternate form of financing before a single TIF bond was issued. This Part explores these three case studies to find different statutory and environmental features that may have contributed to these vastly different outcomes, and to illustrate the strengths and weaknesses of North Carolina's approach to TIF.

A. *Roanoke Rapids*

The Roanoke Rapids Theatre, discussed at the outset of this Comment, is North Carolina's most widely discussed and criticized TIF deal.²⁴⁸ The City of Roanoke Rapids constructed a theatre intended to serve as the central feature of an economic development district focused on tourism and entertainment revenues: the Carolina Crossroads Music and Entertainment District.²⁴⁹ Prior to being developed, the property was 123 acres of rural land along Interstate 95 with an assessed base value of \$292,690.²⁵⁰

The City of Roanoke Rapids crafted a five-year plan to realize the Carolina Crossroads vision, anticipating \$257 million in investment and including multiple attractions: additional theaters, retail establishments, hotels, and a sports complex.²⁵¹ Roanoke Rapids then issued \$21.5 million in TIF bonds to bring the project to fruition.²⁵² The funds to repay these TIF bonds would come from

248. *Carolina Journal* widely panned the deal. See *Carolina Journal News Reports, Randy Parton Theatre*, CAROLINA J. ONLINE, <http://www.carolinajournal.com/exclusives/series.html?id=31> (last visited Sept. 26, 2012) (listing a number of *Carolina Journal* stories tracking the development of the Roanoke Rapids Theatre).

249. See Carrington, *supra* note 1.

250. *Roanoke Rapids Project Summary*, *supra* note 195.

251. *Id.*; see also RANDY PARTON THEATER FEASIBILITY STUDY, ECONOMIC RESEARCH ASSOCIATES 1 (Apr. 15, 2005), <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/RRdocumt-ERA%20market%20feasibility%20study-complete.pdf> (outlining key elements of the planned development, including two hotels, 200,000 square feet of retail space, and other entertainment opportunities).

252. *Roanoke Rapids Project Summary*, *supra* note 195 (listing the breakdown of the bond funds: approximately \$13 million to acquire the theatre, \$4 million to retire start up cost debt, \$2 million for debt service reserves, \$1.5 million for capitalized interest, and

multiple sources, primarily from lease payments by Moonlight Bandit Productions, Randy Parton's production company.²⁵³ As an additional security, the City of Roanoke Rapids pledged the increased property tax revenues from the Carolina Crossroads Entertainment and Music District if the lease payments proved insufficient, as well as its sales tax revenues.²⁵⁴ To further shore up the creditworthiness of the facility, Roanoke Rapids also obtained a letter of credit from Bank of America.²⁵⁵

The plan gained its final approval from the Local Government Commission in February 2007,²⁵⁶ and Randy Parton gave his first performance in July of that year.²⁵⁷ Yet by November, the city was displeased with the theatre's performance and assumed management control from Parton and Moonlight Bandit Productions.²⁵⁸ The city eventually terminated Parton's involvement in the theatre's operations entirely²⁵⁹ and has struggled to attract artists to perform in the venue,²⁶⁰ resulting in significant negative publicity.²⁶¹ Today, the theatre is occupied by HSV Entertainment, LLC, which is operating an entertainment and Internet gambling enterprise under a two-year lease, with an option to purchase after expiration of the lease.²⁶²

The Roanoke Rapids Theatre leaves several legacies in its wake. Political fallout was swift, as the Mayor and two members of the City

\$325,000 for expenses associated with issuance). The TIF bonds also had a maturity of twenty years. *Id.*

253. *Id.*

254. *Id.*

255. See *Minutes*, N.C. DEP'T OF STATE TREASURER, LOCAL GOV'T COMM'N (Feb. 6, 2007), <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/RRdocumt-LGC%20minutes-bonds%20approval.pdf>. A letter of credit is "[a]n instrument under which the issuer . . . agrees to honor a draft or other demand for payment made by a third party . . . as long as the draft or demand complies with specified conditions . . ." BLACK'S LAW DICTIONARY 987 (9th ed. 2009).

256. *Minutes*, *supra* note 255.

257. See Don Carrington, *Show Time for Parton Theatre: Wisdom of Local Government Commission to be Tested Soon*, CAROLINA J. ONLINE (May 30, 2007), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=4096.

258. See Carrington, *supra* note 1; see also *Roanoke Rapids Project Summary*, *supra* note 195 (noting that the city drafted a new set of agreements removing management responsibilities from Parton and Moonlight Bandit Productions, changed the theatre's name from the Randy Parton Theatre to the Roanoke Rapids Theatre, and reduced Parton's "artist fee" from \$1.25 million annually to \$250,000).

259. Carrington, *supra* note 1.

260. See *supra* note 9 and accompanying text.

261. See *supra* note 1 and accompanying text.

262. See Lance Martin, *Theater Lease Deal Approved*, RRSPI.COM (Aug. 8, 2012), <http://rrspin.com/News-from-Roanoke-Rapids-Weldon-and-Halifax-County/Theater-lease-deal-approved.html>.

Council were voted out of office shortly after the theatre began to falter.²⁶³ A Roanoke Rapids resident, in conjunction with the North Carolina Institute for Constitutional Law, filed suit against Randy Parton and others associated with the theatre,²⁶⁴ although the case was dismissed shortly thereafter.²⁶⁵ Several residents of the Brandy Creek community, a historically African-American community adjacent to Roanoke Rapids, have recently sued to recover past property taxes from the city after being annexed into Roanoke Rapids and receiving what amounted to property revaluations of 700 percent.²⁶⁶ The city continues to struggle financially as it services the debt created by the TIF bonds, and a recent agreement to sell the entire facility for \$7.1 million, which still would have left the city with \$12 million in debt after the sale,²⁶⁷ fell through.²⁶⁸ The city recently approved²⁶⁹ a new two-year lease proposal from a prospective tenant, which contains a provision allowing fifteen percent of the facility to be used for Internet gambling stations, although its future is now in doubt.²⁷⁰

263. Beau Minnick, *No Encore for Roanoke Rapids Mayor, Councilmen*, WRAL.COM (Nov. 4, 2009), <http://www.wral.com/news/local/politics/story/6349193/>.

264. See Jeanette K. Doran, *NCICL Files Lawsuit Against Randy Parton and Others for Fraud*, N.C. INST. FOR CONST. L. (June 19, 2008), <http://www.ncicl.org/article/11> (describing the lawsuit brought by Roanoke Rapids resident Milton James Garrett against Randy Parton, his production company, and several other defendants for their actions related to the Roanoke Rapids Theatre).

265. *Garrett v. Parton*, No. 08 CVS 922, slip op. at 17 (N.C. Bus. Ct. Jan. 30, 2009) (dismissing the aforementioned lawsuit), available at <http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=3&caseNumber=08CS922>.

266. See Bob Geary, *Residents Sue Over Jacked-Up Property Values*, INDYWEEK.COM (Sept. 19, 2012), <http://www.indyweek.com/indyweek/residents-sue-over-jacked-up-property-values/Content?oid=3151953> (noting the events leading to the annexation as well as the revaluations in the community of up to 1,400 percent of the previous values). For the UNC Center for Civil Rights' description of the lawsuit, as well as the filed complaint and presentation made to the Roanoke Rapids City Council, see Peter Hull Gilbert, *Brandy Creek Residents Sue for Refund of Taxes*, U. N.C. SCH. L. (Aug. 24, 2012), <http://blogs.law.unc.edu/civilrights/2012/08/24/brandy-creek-residents-sue-for-refund-of-taxes/>. The residents were de-annexed from Roanoke Rapids in 2011 by action of the North Carolina General Assembly. *Id.*

267. See Minnick, *supra* note 8. The individual to whom the theatre was sold, Lafayette Gatling, originally purchased the facility in 2009 for \$12.5 million, but fell behind on his payments to Roanoke Rapids, resulting in previous litigation between Gatling and the city. See *Roanoke Rapids Regains Control of Troubled Theater*, WRAL.COM (Aug. 31, 2010), <http://www.wral.com/news/local/story/8217472/>.

268. See *supra* note 8 and accompanying text.

269. See *supra* note 10 and accompanying text.

270. See Roger Bell, *Board OKs Gaming Change*, DAILY HERALD (Roanoke Rapids, N.C.), June 22, 2012, at 1 (noting the Roanoke Rapids Planning Board's approval of an amendment to the city's land use ordinance allowing for electronic gaming in the city's entertainment district, where the theatre is located). This development has drawn

North Carolina's Local Government Commission also received criticism as a result of the Carolina Crossroads episode, and some have questioned the scope and quality of its process of local government debt approval.²⁷¹ The Carolina Crossroads TIF district was approved "based primarily on an assessment of the city's capacity to repay the bond debt," rather than "the market feasibility or management capacity of the theater."²⁷² To address these concerns going forward, the Local Government Commission may need the additional power to scrutinize and disapprove of projects for reasons beyond inability to pay the debt service.²⁷³ However, providing these additional layers of scrutiny may discourage future developers from using TIF, even though it has been used quite successfully by a recent development in Woodfin in Buncombe County, North Carolina.

B. Buncombe County (Woodfin)

Woodfin was the second TIF project in North Carolina, and its financing included an initial \$12.9 million TIF bond issue—with an ultimate plan to issue as much as \$25 million.²⁷⁴ The TIF debt was issued by Buncombe County with the intent to finance various public improvements as part of a new town center in Woodfin, a small town just outside of Asheville.²⁷⁵ The TIF district's total land area is 205

significant criticism from local residents. See Titus Workman, *Our View: Gambling at Theater Will Tarnish City*, DAILY HERALD (June 21, 2012), http://www.rrdailyherald.com/opinion/our-view-gambling-at-theater-will-tarnish-city/article_bfed18b2-bbae-11e1-8817-001a4bcf887a.html (comparing the proliferation of Internet gaming facilities in Roanoke Rapids to the movie *It's a Wonderful Life*, and the movie's transformation of Bedford Falls into the "disreputable" Pottsville). The Internet sweepstakes portion of the business no longer appears viable, as the Supreme Court of North Carolina has prohibited Internet sweepstakes businesses in the state. See *Hest Techs., Inc. v. State ex rel. Perdue*, No. 169A11-2, 2012 WL 6218202, at *11 (N.C. Dec. 14, 2012). Further, a stay was not granted as sweepstakes operators consider appeals. See *Sweepstakes Protocol Sought Before Jan. 3*, DAILY HERALD (Dec. 24, 2012), http://www.rrdailyherald.com/access/sweepstakes-protocol-sought-before-jan/article_5403319c-4df4-11e2-a589-0019bb2963f4.html.

271. Lee Weisbecker, *Parton Saga Raises Questions about Oversight of TIF Bonds*, TRIANGLE BUS. J., Feb. 15, 2008, at 9 ("What the voting members of the [Local Government Commission] didn't consider was data about whether the theater had a chance of succeeding as an economic development project . . .").

272. Blocher & Morgan, *supra* note 12, at 13.

273. For further discussion of this argument, see generally JOHN LOCKE FOUND., SPOTLIGHT, COMMON-SENSE TIF REFORMS: WAYS TO AVOID RANDY PARTON THEATRE-LIKE DEBACLES AND OTHER DISASTERS (May 28, 2008), <http://www.johnlocke.org/acrobat/spotlights/spotlight-350-tifreforms.pdf>.

274. See *Woodfin TIF—Summary*, U. N.C. CHAPEL HILL SCH. GOV'T, <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Woodfin%20TIF-summary.pdf> (last visited Sept. 26, 2012).

275. *Id.*

acres adjacent to Interstate 26 in western North Carolina, and the developer with whom the county is working owns approximately three-quarters of it.²⁷⁶ The district's base value was initially set at \$13.8 million, and the TIF plan forecasts another \$230 million in private investment by 2015.²⁷⁷

The project is a multi-phase development project, primarily composed of residential and office space.²⁷⁸ The planned public improvements include street upgrades, water and sewer extensions, pedestrian walkways, and bike trails—all of which will be conveyed to the Town of Woodfin after the project's completion.²⁷⁹ Unlike the Roanoke Rapids TIF plan, which required an additional pledge of sales taxes in addition to the tax increments,²⁸⁰ the security pledged by Buncombe County for the TIF bonds was the incremental tax revenues, strengthened by a minimum assessment agreement between the developer, the Town of Woodfin, and Buncombe County to impose property tax valuations sufficient to pay the TIF bond debt.²⁸¹ Today, the project has progressed well, with significant development occurring in commercial, residential, and recreational facilities.²⁸² However, the story of North Carolina's third authorized TIF project—the North Carolina Research Campus—perhaps provides the best explanation for why TIF has stalled in North Carolina.

C. North Carolina Research Campus (Kannapolis)

The North Carolina Research Campus is a project housed on the site of a former mill in downtown Kannapolis.²⁸³ Cannon Mills, once the largest manufacturer of sheets and towels worldwide, and at one time an employer of 25,000 residents, owned the mill.²⁸⁴ Pillowtex Corporation, whose 2003 bankruptcy prompted the largest one-day layoff in North Carolina's history and cost 4,340 Kannapolis residents

276. *Id.* (noting that the developer owns all but 46.9 acres).

277. *Id.*

278. *Id.*

279. *See id.*

280. *See supra* note 254 and accompanying text.

281. *See Woodfin TIF—Summary, supra* note 274. This security option is available to all users of TIF in North Carolina. *See* N.C. GEN. STAT. § 159-108(a) (2011).

282. *See, e.g., Reynolds Village, REYNOLDSMOUNTAIN.COM, <http://www.reynoldsmountain.com/reynoldsmountain/index.php/village>* (last visited Sept. 25, 2012) (advertising Reynolds Village as “a unique opportunity to combine the flexibility of the planned unit development zoning (PUD) with a wide-variety of approved uses and the financing capability of a Tax Incremental Financing district”).

283. *NC Research Campus History, N.C. RES. CAMPUS, <http://www.ncresearchcampus.net/about-ncrc/ncrc-history.aspx>* (last visited Sept. 26, 2012).

284. *Id.*

their jobs, eventually purchased Cannon Mills.²⁸⁵ The vacancy resulting from the loss of Pillotex made downtown Kannapolis ripe for a TIF project, and TIF bonds were ultimately approved to finance a proposed \$168 million development project.²⁸⁶ The North Carolina Research Campus, designed as a joint venture between Dole Foods, Duke University, and the University of North Carolina System, was to use these TIF bonds in conjunction with several other state funding sources.²⁸⁷ This was to be a high water mark for TIF in North Carolina: a large project with excellent development partners in a location seeking new economic development.

The developers proceeded quickly and began construction at the Research Campus prior to receiving approval for the TIF bonds.²⁸⁸ However, rather than issuing the authorized TIF bonds, the Kannapolis City Council began to explore different financing mechanisms for the North Carolina Research Campus,²⁸⁹ eventually closing on the first set of bonds to finance portions of the project in December 2010 for several reasons.²⁹⁰ Rather than using TIF, however, the City of Kannapolis relied on two alternative forms of financing: Limited Obligation Bonds and Build America Bonds.²⁹¹ The \$1.5 billion North Carolina Research Campus complex opened in

285. *Id.*; see also *Easley Announces Rapid Response for Pillowtex Closing*, WRAL.COM (Jul. 31, 2003), <http://www.wral.com/news/local/story/106176/> (expressing the frustrations of former North Carolina Governor Mike Easley over the closing of Pillowtex and describing the creation of a “Rapid Response Team” to help address the loss of jobs in Kannapolis).

286. See Blocher & Morgan, *supra* note 12, at 11.

287. See Paul Chesser, *NCRC Seeks Millions in Public Funds*, CAROLINA J. ONLINE (July 2, 2007), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=4159 (noting additional state payments of \$6 million to UNC system universities involved with the Research Campus and \$2.2 million for community colleges operating at the Research Campus).

288. *Id.* (noting that the developer, Castle & Cooke, would build the North Carolina Research Campus regardless of whether the TIF bonds were approved by the Local Government Commission and that the TIFs would only determine how large the project would be).

289. Hugh Fisher, *Kannapolis Council Seeks Alternative Funding for Research Campus Projects*, SALISBURY POST (July 28, 2009), <http://www.salisburypost.com/Area/072809-kann-council-tif-plan>.

290. See Legg, *supra* note 16 (describing events leading to the issuing of the first public finance instruments by Mike Legg, Kannapolis City Manager, and noting “the downturn in the economy” as a significant factor in the decision).

291. See *id.* (describing a smaller initial debt issue of \$35 million, \$30 million of which would be devoted to specific capital projects). Build America Bonds are a form of debt security created by the American Recovery and Reinvestment Act that subsidize a larger portion of the debt borrowing costs for local government capital projects. See *Recovery Act: Build America Bonds*, U.S. DEPT. TREASURY, <http://www.treasury.gov/initiatives/recovery/Pages/babs.aspx> (last visited Sept. 25, 2012).

October 2008, and at least one large research project is already underway.²⁹² While this example could be seen as an aberration, it has proven to be one of many examples where a local government has chosen a different method of financing than TIF, often in a form with many characteristics of TIF, but without some of the unique constricting features of the North Carolina TIF statute.²⁹³

These three case studies provide three different tales of TIF in North Carolina. Roanoke Rapids provides a cautionary tale—for those considering TIF, it is best to consider the feasibility of the proposal as well as the capabilities of one's partners before issuing TIF debt. Woodfin provides a success story—the developer and the municipality cooperated, securitized the debt in a way that provided less risk exposure to Woodfin's residents (as the private developer guaranteed the security with a minimum assessment agreement), and built a phased project with a longer maturity period for the TIF bonds.²⁹⁴ However, perhaps the most important of these three narratives is the North Carolina Research Campus. The project dwarfs the others in terms of size and scope, and demonstrates two larger points considered in Part V of this Comment: there are myriad types of available debt financing substitutes for projects that might otherwise utilize TIF bonds, as well as many other non-statutory reasons that TIF has so far proven to be a tough sell in North Carolina.

292. See Celeste Smith, *Former NCSU Head Leads Research Campus*, CHARLOTTE OBSERVER, Sept. 15, 2011, at 2B (describing a \$35 million gift by Dole Foods owner David Murdock to Duke University to fund a study aiming to “better understand diseases that commonly affect the public health”).

293. See Blocher & Morgan, *supra* note 12, at 12 (describing a number of development plans in the works as of August 2008, including Raleigh's North Hills shopping center and other TIF proposals in Winston Salem, Greensboro, Cary, and Carolina Beach). The North Hills project, an \$800 million mixed use development, was approved by the Wake County Board of Commissioners in a form that has come to be known as a “synthetic TIF,” which differs from traditional TIF by requiring that the developer, not the city, borrow the money and take responsibility for paying it back. See Dan Bowens, *County Endorses Plans for New North Hills Development*, WRAL.COM (July 23, 2007), <http://www.wral.com/news/local/story/1624476/>.

294. Compare *supra* note 249 and accompanying text (noting Roanoke Rapids' TIF bond maturity date of twenty years, with an expected payment of interest on the TIF bond debt within the first year), with *supra* note 274 and accompanying text (describing Woodfin's TIF proposal of \$12.96 million in TIF bond issues, which may increase to as much as \$25 million over a twenty-six- to thirty-year period).

V. REASONS FOR INACTIVITY BEYOND THE TIF STATUTE²⁹⁵A. *Alternative Forms of Debt Financing*

While TIF is a popular form of financing for many local governments, there are many other forms of debt financing that local governments may use for economic development.²⁹⁶ In North Carolina, these can include synthetic TIFs using various forms of debt financing, government grants, federally subsidized bonds, and many others. Some of these financing mechanisms may accomplish the

295. Before discussing individual public finance options beyond TIF, it is worth noting that TIF developments are part of a larger group of public financing options, commonly referred to as Public-Private Partnerships. *See* URBAN LAND INST., TEN PRINCIPLES FOR SUCCESSFUL PUBLIC/PRIVATE PARTNERSHIPS, at v (2005), *available at* http://www.uli.org/wp-content/uploads/2005/01/TP_Partnerships.pdf (defining Public Private Partnerships as “‘creative alliances’ formed between a governmental entity and private developers to achieve a common purpose”). Public-Private Partnerships must be for a “public purpose” and cannot be joint ventures with mutuality of control, as that would violate article V of the North Carolina Constitution. *See* N.C. CONST. art. V, § 4(3) (prohibiting the lending of a local government’s credit to “any person, association, or corporation” for any non-public purpose, unless a majority of qualified voters in the local government unit approve the lending of credit); BLACK’S LAW DICTIONARY 915 (9th ed. 2009) (defining a joint venture as allowing each member an “equal voice in controlling the project”). The Supreme Court of North Carolina has determined that there is a presumption of constitutionality for whether legislation serves the “public purpose” required under Article V, *see* *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) (stating that there is a presumption of constitutionality that legislation favors the public purpose, that the legislature receives first responsibility for determining what constitutes a public purpose, and that the legislature has been clear that it considers expending public funds for economic development a public purpose), and has further held that development agreements without a defined principal-agent relationship do not constitute a joint venture. *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 560–63, 359 S.E.2d 792, 799–800 (1987) (holding that the development agreement was not a joint venture, as there was not a fiduciary relationship created between the developer and the city). There is also statutory authority allowing local governments to contract with private parties for various defined purposes contained in the General Statutes of North Carolina. N.C. GEN. STAT. § 160A-20.1 (2011) (“A city may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the city is authorized by law to engage in.”); *id.* §§ 158.7.1, 160A-488, 160A-489 (providing authority to fund economic development parks, museum and art programs, and coliseums and convention centers). Many of the following debt financing arrangements may be considered public-private partnerships, as they involve governments working closely with private developers to facilitate economic growth.

296. *See* Briffault, *supra* note 22, at 73 (“TIF, of course, is just one of many programs available for local economic development or redevelopment—including enterprise zones, tax abatements, special assessments and special benefit taxes, business improvement districts (‘BIDs’) and other special districts, and intergovernmental grants, loans, and tax credits.”). The North Carolina Research Campus is one example of a development project utilizing a different form of financing. *See supra* note 291 and accompanying text (describing the project’s use of federally subsidized bonds as well as limited obligation bonds).

same ends as a TIF while providing greater flexibility in repaying debt.

1. “Synthetic” TIFs Through Up-Front Developer and Installment Purchase Financing

One substitute for traditional TIF is “synthetic” TIF, which has two varieties that can achieve similar results.²⁹⁷ One form is a type of “reverse TIF,” where a private developer borrows money up front, invests the funds in a “public project,” and then receives a grant from the local government unit to repurchase the initial assets based on the tax increment increases—similar to some economic development incentives.²⁹⁸ A distinct advantage of this form of financing is that the developer bears the initial risk that there will be no property tax increases in the area; for example, if this form of synthetic TIF had been used as the financing instrument in Roanoke Rapids, Moonlight Bandit Productions would have been liable for the infrastructure costs rather than the city. A disadvantage is that a smaller municipality might have difficulties locating a developer to take the risk at the outset of a project.

Another form of synthetic TIF typically utilizes installment purchase financing, which requires the local government to take title to the asset once construction is completed or the asset is delivered to the local government unit.²⁹⁹ Liens or security interests in the capital asset funded by the special indebtedness secure the installment purchase debt.³⁰⁰ This debt is then used to construct an asset to spur development, similar to a traditional TIF district.³⁰¹ Installment purchases do not require a referendum,³⁰² although they do carry the traditional requirement of Local Government Commission approval

297. See Blocher & Morgan, *supra* note 12, at 5.

298. *Id.* This form of financing is treated similarly to the economic development incentives offered to companies to relocate or remain in North Carolina. See § 158-7.1(a).

299. See Blocher & Morgan, *supra* note 12, at 5; see also N.C. GEN. STAT. § 160A-20(b) (2011) (permitting the use of installment contracts to secure payments on behalf of the Local Government Commission to the private contractor making infrastructural improvements).

300. See § 160A-20(b). Land may also be used if the limited obligation bonds will be used to fund improvements on the land. *Id.* § 142-85(a)(2).

301. See Blocher & Morgan, *supra* note 12, at 5.

302. Compare § 160A-20 (providing statutory basis for installment purchase financing without a voter referendum), with *id.* § 159-61(a) (“If a bond order is to take effect upon approval of the voters, the affirmative vote or a majority of those who vote thereon shall be required.”).

in most cases.³⁰³ In this version of synthetic TIF, a municipality issues installment purchase debt to build infrastructure in a particular area and then may use whatever revenues it sees fit to pay off the bonds for the infrastructure.³⁰⁴

The advantages of using this form of synthetic TIF are that these forms of debt do not require a bond referendum, nor does the developer have to provide the funds up front as in the other form of synthetic TIF.³⁰⁵ There are downsides as well, as installment debt is traditionally more expensive than general obligation debt.³⁰⁶ Further, this form of debt does not allow minimum assessment agreements, as the North Carolina TIF statute does,³⁰⁷ which may lead a local government with higher credit risk to obtain other forms of securitization of the debt.³⁰⁸ This inability to secure minimum assessments may also lead to higher interest rates than a traditional TIF, as there is one less security (property tax increment revenue) to pledge for the TIF bonds.

General obligation bonds—a traditional form of debt that pledges a local government's full taxing power³⁰⁹—may also be used as a financing instrument for synthetic TIFs via a similar process.³¹⁰ Like the installment purchase debt discussed above, a synthetic TIF would issue general obligation bonds to create the public infrastructure for a defined area, and would then be able to repay the bonds through any collected governmental revenues.³¹¹ Since these

303. See *id.* §§ 159-51, 160A-20(e) (stating that bonds or installment contracts may not issue without approval from the Local Government Commission).

304. See *Wayne Cnty. Citizens Ass'n for Better Tax Control v. Wayne Cnty. Bd. of Comm'rs*, 328 N.C. 24, 31, 399 S.E.2d 311, 316 (1991) (holding that "[t]he possibility that appropriations which might include income from tax revenues will be used to repay the indebtedness under the contract is not a constitutionally significant factor" because the general taxing authority is not pledged).

305. See Blocher & Morgan, *supra* note 12, at 5.

306. See Clayton P. Gillette, *Direct Democracy and Debt*, 13 J. CONTEMP. LEGAL ISSUES 365, 382 (2004). Investors tend to prefer general obligation bonds because the source of the repayment stream is typically the governmental unit's full taxing power. For a recent discussion on municipal bond buying, see Nanette Byrnes, *Municipal Bonds: 4 Rules for Investors*, PORTFOLIOIST'S INSTABLOG (Feb. 1, 2011, 12:01 PM), <http://seekingalpha.com/instablog/763605-portfolioist/134777-four-rules-of-municipal-debt-investing>.

307. N.C. GEN. STAT. § 159-108(a), (c) (2011).

308. Cf. *id.* § 159-153(d) (describing the various factors the Local Government Commission takes into account when determining which financing arrangement to pursue).

309. *Id.* §§ 159-45, 159-46.

310. See Blocher & Morgan, *supra* note 12, at 5 (describing the wide possible uses of general obligation bonds for economic development purposes).

311. *Id.*

bonds are backed by the full faith and credit of the local government unit, they tend to incur lower debt service costs.³¹² However, general obligation bonds also require a voter referendum,³¹³ which can be a long process and may be less favorable than TIF bonds or other forms of debt that do not require a referendum.

Synthetic TIFs have been used to great effect by many North Carolina municipalities, most notably the City of Charlotte.³¹⁴ Charlotte lists eleven total projects that it has financed through synthetic TIFs in its 2011 budget, including road development for a recently opened IKEA.³¹⁵ In total, Charlotte estimates its synthetic TIF projects will generate a net investment of \$3.678 billion.³¹⁶ Like a standard TIF, synthetic TIF has also been met with some criticism, including claims that by devoting general fund revenues to repayment of synthetic TIF debt, Charlotte is “playing with fire” and that synthetic TIFs are simply a method of re-routing revenues away from the city’s general fund.³¹⁷

2. Special Assessment Improvement Districts

There are other ways to finance public infrastructure improvements in North Carolina as well, including special assessment districts. These districts have long existed,³¹⁸ impose assessments only on *benefitted* property owners whose property values are affected by the improvement,³¹⁹ and were traditionally levied to create and

312. *Id.*

313. *See supra* note 199 and accompanying text.

314. *See Synthetic Tax Increment Financing (TIF) Program*, CITY CHARLOTTE, <http://charmeck.org/city/charlotte/nbs/ed/Pages/TIFProgram.aspx> (last visited Sept. 26, 2012) (describing Charlotte’s synthetic TIF policies).

315. CITY OF CHARLOTTE, ADOPTED FY2011 STRATEGIC OPERATING PLAN AND FY2011-2015 CAPITAL INVESTMENT PLAN 123–24 (2011), <http://charmeck.org/city/charlotte/Budget/Documents/FY2011%20Strategic%20Operating%20Plan.pdf>.

316. *Id.* at 124.

317. Jeff. A Taylor, *Michael Smith is Insane*, MECK DECK, JOHN LOCKE FOUND. (Jan. 13, 2006, 5:13 PM), <http://charlotte.johnlocke.org/blog/?p=377> (recounting TIF experiences in Chicago and claiming Charlotte is “latch[ing] onto yesterday’s bad idea and . . . treating it like tomorrow’s wave of the future”). One may also argue that should property values not increase in the TIF district, other services that depend on general fund revenue would possibly have to be cut to meet the TIF obligation.

318. *See, e.g.,* *Londoner v. City of Denver*, 210 U.S. 373, 374, 381 (1908) (describing a controversial special assessment district imposed by the City of Denver, Colorado in 1893).

319. *See* Kara A. Millonzi, *An Overview of Special Assessment Bond Authority in North Carolina*, 40 PUB. FIN. BULL. 1, 1 (Nov. 2009) (describing traditional special assessment law and new authorities for special assessment districts that will sunset in July 2013), <http://sogpubs.unc.edu/electronicversions/pdfs/lfb40.pdf>.

purchase water systems, streetlights, and other limited local improvements.³²⁰ North Carolina's statutes also allow for a new form of special assessment to address "critical infrastructure needs,"³²¹ which allows for a much larger number of project types, including capital costs for auditoriums, airports, art galleries, parks, and many other capital assets.³²² Before the local government unit can issue this new, broader form of special assessment, it must receive a petition signed by a majority of owners in the district to be assessed, and this majority must control at least sixty-six percent of the property value to be subject to the special assessment.³²³ The two forms of special assessment also differ in another way: the newer form allows for the pledging of revenue bonds and other debt financing to provide upfront capital costs,³²⁴ while the older form does not typically allow the special assessment to be pledged as a security, except when used as an additional security for TIF.³²⁵ North Carolina has, as compared to some other states, used both the critical infrastructure and traditional form of special assessment lightly,³²⁶ and the ability to use special assessment backed debt through the critical infrastructure form of special assessment is set to expire on July 1, 2013.³²⁷

320. See, e.g., N.C. GEN. STAT. § 153A-185 (2011) (authorizing counties to use special assessments for a number of infrastructural improvements).

321. See *id.* §§ 153A-210.1, 160A-239.1.

322. See Millonzi, *supra* note 319, at 6.

323. N.C. GEN. STAT. §§ 153A-210.3, 160A-239.3 (2011). The original form of special assessment did not contain the same petition requirement. See Millonzi, *supra* note 319, at 4.

324. See N.C. GEN. STAT. §§ 153A-210.4, 160A-239.4 (2011) (authorizing the use of revenue bonds, TIF bonds, general obligation bonds, and "[g]eneral revenues" to be used for a special assessment district capital cost).

325. Millonzi, *supra* note 319, at 4-5 (noting that traditional special assessments cannot be used as a security for debt in project costs). Revenue bonds allow a local government to pledge the debt-financed asset as well as the revenues from the asset. N.C. GEN. STAT. § 159-82 (2011) ("The purpose of this Article is to . . . vest authority in and enable municipalities to secure and pay revenue bonds and the interest thereon solely out of revenues without pledging the faith and credit of the municipality."); see also *id.* §§ 159-83, 159-91 (allowing the local government unit a security interest in the financed capital asset).

326. For a comparison of special assessments' use in North Carolina, Florida, and Georgia, see ADAM C. PARKER & JEFFREY A. HUGHES, AN ASSESSMENT OF PACE LOCAL GOVERNMENT FINANCING ISSUES IN THREE STATES: HOW THE LOCAL GOVERNMENT FINANCE AUTHORITY AND CULTURE OF SPECIAL ASSESSMENTS IN NORTH CAROLINA, GEORGIA, AND FLORIDA IMPACT PROPERTY ASSESSED CLEAN ENERGY PROGRAMS IN EACH STATE 37-42 (2012), <http://www.efc.unc.edu/publications/2012/PACEassessment.pdf>.

327. Act of Aug. 3, 2008, § 5, 2008 N.C. Sess. Laws 642, 646.

3. Grants, Economic Development Incentives, and American Recovery and Reinvestment Act Bonds

Local governments have also pursued funding from grant-providing entities like the Golden Leaf Foundation.³²⁸ Golden Leaf recently pledged \$100 million of a total \$200 million in economic development incentives to attract Spirit Aerosystems to Kinston, North Carolina and to develop infrastructure for the aerospace manufacturing firm.³²⁹ The State also made a significant contribution to develop the rail infrastructure—vitiating the need for a municipality to use TIF in this economic development project.³³⁰ These incentive packages have recently proliferated, enticing Google to establish a server farm in North Carolina and Dell to build a computer-assembly plant in Winston-Salem.³³¹

In recent years, municipalities were also able to seek various types of low-interest debt via the American Recovery and Reinvestment Act—Build America Bonds, Recovery Zone Economic Development Bonds, Recovery Zone Facility Bonds, Qualified Zone Academy Bonds, Qualified School Construction Bonds, Qualified Energy Conservation Bonds, and Clean Renewable Energy Bonds.³³² Although many of these instruments are now expiring, North Carolina's local governments, perhaps at the expense of TIF development, utilized many of these subsidized bonds.³³³

328. See *About Us*, GOLDEN LEAF FOUND., <http://goldenleaf.org/about.html> (last visited Sept. 28, 2012) (noting Golden Leaf's creation by the North Carolina General Assembly to administer half of the Master Settlement Agreement tobacco settlement).

329. See John W. McCurry, *Spirit of Expansion: A Former Boeing Division Widens its 'Global Footprint'*, 53 SITE SELECTION MAG. 902, 904–905 (Nov. 2008).

330. John W. McCurry, *Spirit of Expansion: A Former Boeing Division Widens its 'Global Footprint'*, SITE SELECTION ONLINE, <http://www.siteselection.com/features/2008/nov/Aerospace/> (last visited Jan. 3, 2012).

331. Jonathan Q. Morgan, *Using Economic Development Incentives: For Better or for Worse*, POPULAR GOV'T, Winter 2009, at 16, 21, <http://sogpubs.unc.edu/electronicversions/pg/pgwin09/article3.pdf>. The Dell plant shut down four years after opening, resulting in the loss of over 900 jobs. Adam Owens, *Dell to Close N.C. Plant, Eliminate 905 Jobs*, WRAL.COM (Oct. 7, 2009), <http://www.wral.com/business/story/6156112/>.

332. See *IRS Releases Guidance on ARRA Bond Provisions*, IRS.GOV, <http://www.irs.gov/Tax-Exempt-Bonds/IRS-Releases-Guidance-on-ARRA-Bond-Provisions> (last visited Sept. 28, 2012) (providing guidance and information relating to the various tax-exempt and tax-credit bonds created by the 2009 American Recovery and Reinvestment Act).

333. See *Recovery Zone Bonds*, N.C. OFF. ST. BUDGET & MGMT. (Dec. 31, 2010), <https://ncrecover.gov/Opportunities/RecoveryZoneBonds.aspx> (noting the December 31, 2010 deadline for issuing bonds under the legislation, as well as \$417 million in Recovery Zone Economic Development Bonds and \$390 million in Recovery Zone Facility Bonds issued).

Lastly, many local governments may have opted for another form of redevelopment under the state's Urban Redevelopment Law.³³⁴ Prior to 2006, this law allowed for the exercise of eminent domain in blighted *areas*, but has since been changed to allow for exercise only in blighted *parcels*.³³⁵ Urban redevelopment areas were utilized frequently in North Carolina.³³⁶ Urban redevelopment commissions' ability to issue debt to fund projects in urban redevelopment areas,³³⁷ along with other economic development tools, may have reduced the need for TIF.³³⁸

B. Other Potential Reasons TIF Stalled in North Carolina

In addition to the multiple alternative financing schemes available in North Carolina, a number of other environmental factors may have contributed to TIF's non-use. For example, the financial crisis of 2008 stalled the municipal bond market considerably.³³⁹ The municipal debt markets have not rebounded significantly since the financial crisis, and some major investors who previously expressed faith in the municipal debt market, such as Warren Buffett, have

334. N.C. GEN. STAT. ch. 160A, art. 22 (2011).

335. See Tyler Mulligan, *Kelo Revisited: Eminent Domain for Economic Development in North Carolina*, COATES' CANONS: NC LOC. GOV'T BLOG, U. N.C. CHAPEL HILL SCH. GOV'T (Nov. 17, 2009), <http://canons.sog.unc.edu/?p=1288>. For an argument against the use of the "building by building approach," see generally Carolyn A. Pearce, Recent Development, *Forcing Urban Redevelopment to Proceed "Building by Building": North Carolina's Flaws Policy Response to Kelo v. City of New London*, 85 N.C. L. REV. 1784 (2006) (critiquing the North Carolina General Assembly's policy response to *Kelo* and arguing that the piece-by-piece approach will lead to inefficient redevelopment by practitioners).

336. For a historic example of urban redevelopment in North Carolina, see *Durham Urban Renewal Records*, DURHAM CNTY. LIBR., <http://digitalnc.org/collections/durham> (last visited Oct. 3, 2012) (providing a visual history of properties included in urban renewal efforts, as well as other documents such as property appraisals). The Durham Redevelopment Commission was created in 1958 to oversee seven projects of "urban renewal aimed at combating 'urban blight.'" *Id.*

337. N.C. GEN. STAT. § 160A-512(8) (2011). Use of the eminent domain power on unblighted parcels was also affirmed by the North Carolina Court of Appeals. *Redevelopment Comm'n of Greensboro v. Johnson*, 129 N.C. App. 630, 632-33, 500 S.E.2d 118, 120-21 (1998).

338. Note that cities may finance redevelopment projects using the proceeds of TIF debt along with other revenues available to the city. N.C. GEN. STAT. § 160A-515.1 (2011). Redevelopment commissions may act to include several redevelopment areas within a TIF district, subject to the land maximum thresholds found in the TIF statute. See *id.*

339. See TOM KOLZIK, MUNI RELATIVE VALUE 1 (Sept. 29, 2009), <http://www.janney.com/File%20Library/Muni%20Sector%20Scorecard/September%202009.pdf>.

recently made financial decisions which indicate doubts about the long-term viability of municipal debt offerings.³⁴⁰

North Carolina employs a broader scheme of regulating local government debt financing, even in buoyant financial times, which may also contribute to the non-use of TIF.³⁴¹ The Local Government Commission reviews all debt issued by municipalities, the state sells the securities, and the state ensures that local governments experiencing fiscal stress do not default on their bonds.³⁴² Such an exacting standard is not widespread in other states, but it has ensured that credit rating agencies hold North Carolina's local government debt in high regard.³⁴³ This policy choice has perhaps lowered the use of TIF in North Carolina, but has also contributed to favorable debt management practices in the state.

TIF may also have an image problem resulting from the Carolina Crossroads TIF district. As the first use of TIF in North Carolina, it created the first impression and has certainly received its share of scorn that may repel potential TIF users.³⁴⁴ Local governments may be more likely to look at TIF with a more skeptical eye than they would if the first impression had been a positive one, especially with so many other alternative financing instruments available that have not received as much negative press (such as synthetic TIFs).

CONCLUSION

A. *What is the Future of TIF in North Carolina?*

As discussed above, there are numerous reasons that economic developers and local government entities choose to eschew the statutory form of TIF in North Carolina.³⁴⁵ Some argue that the

340. Serena Ng & Michael Corkery, *Buffett's Move Raises a Red Flag: Some Investors Say Terminating Default Protection on Muni Debt May Signal Unease on Public Finances*, WALL ST. J., Aug. 21, 2012, at C1 (noting Berkshire Hathaway, Inc.'s recent termination of credit-default swaps, originally purchased in 2007, that insured \$8.25 billion of municipal debt).

341. See Charles K. Coe, *Preventing Local Government Fiscal Crises: The North Carolina Approach*, PUBLIC BUDGETING & FINANCE, Fall 2003, at 39, 41–45, available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1540-5850.2007.00879.x/full>.

342. *Id.* at 41.

343. *Id.* at 39–40.

344. Blocher & Morgan, *supra* note 12, at 13 (“The recent negative publicity garnered by the first approved TIF project in North Carolina—the Roanoke Rapids (Randy Parton) Theater—has not helped the cause of promoting TIF use.”).

345. See generally D. Shawn Purvis, *Tax Increment Financing in North Carolina: Great Expectations, Limited Use* (Feb. 3, 2008) (unpublished M.P.A. Capstone Paper, University of North Carolina at Chapel Hill),

limited uses permitted by the North Carolina TIF statute and the TIF district creation process have hindered TIF's use.³⁴⁶ Others laud North Carolina's conservative approach to debt financing,³⁴⁷ which keeps bond ratings strong, but might also foreclose some economic development opportunities in the state.³⁴⁸

However, it is clear that local governments *are* choosing to employ other public finance mechanisms to encourage economic development and build community infrastructure, and some of these devices, like synthetic TIF, are similar in structure to TIF.³⁴⁹ In some ways, TIF in North Carolina is the story of TIF in most states, particularly in the South and Southeast; TIF legislation is passed and touted as an essential "tool in the toolbox," but is instead used sparingly, if at all.³⁵⁰ Given the statutory complexity of TIF, the additional intergovernmental reporting requirements, the land-use restrictions, the negative recent history, and, perhaps most importantly, the availability of public financing substitutes which do not attempt to structurally constrict revenue sources to tax increments and a few additional pledged securities, TIF will likely remain a sparsely used financing instrument in North Carolina.

Of course, the world does not remain constant, and TIF use may be affected by recent legislation designed to decrease involuntary annexation within the state.³⁵¹ This legislation makes it more difficult for municipalities to involuntarily annex land without approval by property owners in unincorporated districts, while also allowing low-income residents easier access to municipal services.³⁵² Further,

<http://www.mpa.unc.edu/sites/www.mpa.unc.edu/files/ShawnPurvis.pdf> (finding, for example, that project scale, statute complexity, negative perceptions, and land area restrictions have hindered the use of TIF in North Carolina).

346. See David Jones, *Amendment One, Zero Deals*, CHARLOTTE BUS. J., Nov. 4, 2005, at 59, [available at http://www.bizjournals.com/charlotte/stories/2005/11/07/editorial1.html?s=print](http://www.bizjournals.com/charlotte/stories/2005/11/07/editorial1.html?s=print).

347. See Coe, *supra* note 341, at 40 ("The North Carolina system serves as a model to other states.").

348. See, e.g., Blocher & Morgan, *supra* note 12, at 11 (using a \$5 million TIF project in Cayce, South Carolina—for the creation of a riverfront park—as an example that TIF can work, even in smaller communities); Petersen, *supra* note 70, at 602 (counting 100 TIF districts in South Carolina).

349. See *supra* notes 297, 314–16 and accompanying text.

350. See Petersen, *supra* note 70, at 604 (stating that southern states have, on average, only thirty-nine TIF districts).

351. See generally An Act to Reform the Involuntary Annexation Laws of North Carolina, 2011 N.C. Sess. Laws 396 (overhauling substantial portions of N.C. GEN. STAT. § 160A-58).

352. See Frayda Bluestein, *Annexation Reform: A Summary of the New Law*, COATES' CANONS: NC LOC. GOV'T BLOG, U. N.C. CHAPEL HILL SCH. GOV'T (July 15, 2011, 8:15

accompanying legislation permitted several recently annexed communities to de-annex themselves, which may create problems for the respective local governments that often pledge significant debt service payments to finance water and sewer improvements after undertaking an annexation.³⁵³ This legislation distressed North Carolina's cities as well as the North Carolina League of Municipalities.³⁵⁴ Ultimately, additional strain may be placed on municipal budgets, causing municipalities to revisit alternative forms of financing for improvements, such as TIF.

Additionally, North Carolina local governments continue to maintain low debt-to-property-value ratios,³⁵⁵ which are likely influenced by a policy choice within the Local Government Commission to keep the amount of debt carried by each unit low.³⁵⁶ If the Local Government Commission maintains conservative debt ratio targets, municipalities will continue to have less access to TIF or other

AM), <http://sogweb.sog.unc.edu/blogs/localgovt/?p=4494> (noting that an annexation may be now terminated if sixty percent of residents within an annexed area sign a petition to deny annexation, and that voluntary annexation is allowed in areas where resident incomes are less than 200% of the poverty level and where fifty-one percent of the residents in the area petition for annexation).

353. See *id.* (“[Two other session laws] allow completed annexations in nine cities to be terminated by petition of the owners of 60% of the annexed parcels.”).

354. See Kelli Kukura, *Annexation Reform Becomes Law Without Governor's Signature*, N.C. LEAGUE MUNICIPALITIES (June 30, 2011), <http://www.nclm.org/legislative-advocacy/Pages/WhatsNewDetail.aspx?List=b431d83a-0059-4b54-b8aa-9382b5120a9a&ID=153> (“This is a major overhaul of annexation laws that have served North Carolina well for more than 50 years.”).

355. North Carolina counties have seen low totals of debt as a percentage of total property valuations: for example, counties with populations of 250,000 or larger have the highest percentage of debt to valuation, at just over 2.1%, while all counties are just over 1.4%. Municipalities have even lower debt to valuation ratios, with the average property valuation to debt percentage standing at .74%. See DEP'T OF STATE TREASURER, DIV. OF STATE AND LOCAL GOV'T FIN., ANALYSIS OF DEBT OF NORTH CAROLINA COUNTIES AND MUNICIPALITIES AT 6-30-2011, at 1 (2011), <https://www.nctreasurer.com/slg/Debt%20Management/DebtAnalysisReport.pdf>.

356. While not indicative of local government debt ratio targets, state debt ratio targets remain conservative. For example, the North Carolina State Treasurer (the parent organization of the Local Government Commission) has adopted a policy for the 2012–13 fiscal year that will keep North Carolina's total *state* debt capacity at current levels. See DEBT AFFORDABILITY ADVISORY COMMITTEE, STATE OF NORTH CAROLINA: DEBT AFFORDABILITY STUDY 1 (2012), https://www.nctreasurer.com/slg/Debt%20Affordability/2012_DAAC.pdf (outlining the target rate of four percent and noting that current debt levels exceed this target slightly); Lee Weisbecker, *Janet Cowell: Moratorium on Debt*, TRIANGLE BUS. J. (Feb. 3, 2012, 9:37 AM), <http://www.bizjournals.com/triangle/news/2012/02/03/janet-cowell-moratorium-on-debt.html> (discussing the North Carolina State Treasurer's Affordability Advisory Committee's conclusion that the state's current level of debt is manageable).

debt financing programs.³⁵⁷ Thus, any local governments that wish to begin publicly funded economic development projects will likely have to wait until market conditions improve, seek private investment via the “reverse” TIF variety of synthetic TIF, or seek grant funding.

B. What Reforms Can North Carolina Enact to Encourage More TIF Projects?

North Carolina could enact several reforms to simplify the TIF statute and increase its use. The first, and likely most effective, would be removal of the five percent land requirement and constrictions on land use.³⁵⁸ When counties issue debt, the five percent requirement becomes less of an impediment, as shown by Buncombe County’s use of TIF to create a town center in Woodfin,³⁵⁹ because counties typically have a larger landmass to work with than cities. Cities do not enjoy this same flexibility. The five percent requirement also appears to push North Carolina local government units toward a “project-specific TIF approach” rather than a “district-wide TIF approach.”³⁶⁰ Project-specific TIFs tend to be, as the name implies, geared toward a single developer or tract of land, much like the Carolina Crossroads TIF district.³⁶¹ Project-specific TIFs also tend to be riskier and create additional hurdles for those who would invest in TIF bonds, as repayment of the bonds is dependent on the single investor and whatever additional securities are pledged toward repayment of the TIF bonds.³⁶² The district-wide approach appears to be more favored nationally in situations where there is a larger area to develop, and it

357. See *supra* note 303 and accompanying text.

358. This Section addresses changes that can be made to the statutes and regulatory framework surrounding TIF. Local governments operating within the current framework can and should enact several measures to ensure that, should they decide to use TIF, they do so responsibly. For further discussion of steps to creating an effective TIF policy, see generally Laura Jensen, *Elements of an Effective Tax Increment Financing Policy for North Carolina Local Governments* (2008) (unpublished M.P.A. Capstone Paper, University of North Carolina at Chapel Hill), <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/MPA%20capstone08-effective%20TIF%20policy.pdf> (suggesting that local governments outline the elements of North Carolina’s TIF law, identify the policy goals of using TIF, determine how much risk a local government is willing to assume, explore what the costs of financing are and what alternatives exist, discover its citizens’ views on TIF, and establish evaluation criteria to determine how well TIF is meeting the goals of the community).

359. See *supra* note 274 and accompanying text.

360. See CDFA BEST PRACTICES, *supra* note 18, at 12–14.

361. *Id.* at 13.

362. *Id.* Another argument proffered against the project-specific approach is that it tends to be narrower in focus and does not stimulate the long range visioning that acts as a catalyst for broader redevelopment. *Id.*

brings the benefit of multiple developers so the TIF district's success is not placed in the hands of a single developer.³⁶³ However, use of the district-wide approach may also make TIF function similarly to special assessment districts, which are designed specifically to address infrastructure challenges in a broader area of a municipality or county.³⁶⁴ As noted above,³⁶⁵ traditional special assessment districts are limited in scope,³⁶⁶ and the broader authority granted to the new form of special assessment district expires in July 2013.³⁶⁷ Removing the five-percent requirement may allow TIF to bridge the gap created when or if the newer form of special assessment district expires.

Another way to increase the use of TIF would be to remove the ability to use alternative debt financing instruments, like "synthetic" TIFs. However, this seems more akin to cutting off one's nose to spite one's face—these alternative forms of financing have been utilized more frequently in North Carolina than TIF, with some degree of success.³⁶⁸ Removal of these alternative debt instruments seems unlikely as well as imprudent. Perhaps a more reasonable revision would be the removal of some limitations on what TIFs may be used for to better equalize the instruments. For example, "synthetic" TIFs are not subject to the same twenty percent maximum threshold that the TIF statute imposes on some TIF districts.³⁶⁹ More equalized allowances for use might make TIF a more attractive option than synthetic TIF to some, as TIF still retains a guaranteed property tax assessment agreement option that synthetic TIFs do not.³⁷⁰

Some might reform TIF by allowing for additional forms of security to be used in conjunction with TIF bonds, although nearly all options for financing—aside from general obligation bonds—are

363. *Id.* at 13–14.

364. *See* Millonzi, *supra* note 319, at 1.

365. *See supra* note 320 and accompanying text.

366. *See* Millonzi, *supra* note 319, at 6 (explaining how the scope of authority provided to special assessment districts under the General Assembly's 2008 legislation is broader than what was allowed under the traditional model).

367. *Id.* at 1.

368. *See supra* notes 314–16 and accompanying text.

369. *See* Kara Millonzi, *Local Gov't Debt Financing Primer: Enhanced Security for Project Development Financings*, COMMUNITY & ECON. DEV. N.C. & BEYOND, U. N.C. CHAPEL HILL SCH. GOV'T (Nov. 29, 2011), <http://sogweb.sog.unc.edu/blogs/ced/?p=3561> (describing additional options for debt security with North Carolina TIF, including minimum assessed value agreements, mortgage interests in the financed asset, additional revenues, and voted general obligation bond debt, none of which include the twenty percent threshold of TIF).

370. *See* N.C. GEN. STAT. § 159-108(a) (2011).

already available without a referendum.³⁷¹ An argument could be made for removing the voting requirement for pledging general obligation bonds,³⁷² but this would require amending the state constitution to repeal portions of article V.³⁷³ This would also run counter to the arguments of some who call for greater governmental and voter oversight of TIFs and public debt in general. The John Locke Foundation, for example, suggests TIFs should be voted upon, that the Local Government Commission should increase its scrutiny of TIF projects, that the TIF statute should include “protections against inappropriate private benefits and conflicts of interest,” and that the Local Government Commission should implement protections that deny a TIF project if it is not likely to generate increases in tax revenues.³⁷⁴

Last, but perhaps least realistically, North Carolina lawmakers could reduce procedural safeguards in the TIF statute that require intergovernmental notification and approval from the Local Government Commission. Not simply TIF debt, but all North Carolina debt, would be procedurally easier to issue if Local Government Commission approval was removed as a requirement for issuing debt. Especially for smaller communities, the amount of planning required for TIFs to pass the Local Government Commission’s scrutiny may be a discouraging factor—a simpler approval process might provide easier access to capital through TIF bonds. However, removal of these layers of approval may remove one of the provident features of municipal finance in North Carolina, one that has contributed to the state’s receipt of the high bond ratings and lower rates of interest for municipal debt.³⁷⁵ Further, the Local Government Commission sells and markets local government bonds

371. See Kara Millonzi, *Legality of Non-Voted Debt to Finance Capital Projects*, COATES’ CANONS: NC LOC. GOV’T L. BLOG, U. N.C. CHAPEL HILL SCH. GOV’T (June 30, 2010), <http://sogweb.sog.unc.edu/blogs/localgovt/?p=2720> (providing a general overview of non-voted debt requirements and limitations, as well as general obligation bonds).

372. See Tydgat, *supra* note 230, at 3 (finding that states with bond referendum requirements tend to issue a similar amount of debt per capita as states without a referendum requirement, while paying a higher rate of interest for this non-general obligation bond debt).

373. See N.C. CONST. art. V, § 4 (providing that a local government may not “contract debts secured by a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon”).

374. JOHN LOCKE FOUND., *supra* note 273, at 1.

375. See TOM KOZLIK & ALAN SCHANKEL, MUNICIPAL BOND MARKET MONTHLY 13 (Oct. 19, 2011), <http://www.janney.com/File%20Library/Fixed%20Income/October-2011.pdf> (noting that North Carolina retains a AAA rating from Moody’s, Standard and Poor’s, and Fitch rating agencies).

through its bond sales division,³⁷⁶ often helping find purchasers of local government bonds for smaller localities that might otherwise have difficulty placing their debt. While it may create procedural simplicity to remove Local Government Commission approval, it would create practical difficulties for these communities when searching for purchasers of their debt. Ultimately, it is highly unlikely that the Local Government Commission would be dispensed with—it has existed since a high number of government bond defaults in the wake of the Great Depression, and has consistently offered assistance to localities that have experienced difficulty in repaying their bond debt.³⁷⁷ In short, it is a well-regarded institution in North Carolina.³⁷⁸

C. Should North Carolina Retain TIF as a Public Finance Option?

A strong argument can be made to remove TIF entirely from public financing options in North Carolina. TIF is cumbersome to use, clutters the public finance statute “toolbox,” and other development methods, such as synthetic TIF, have proven easier to use. To the last point, TIF requires a freezing of property values within defined city boundaries to pay for capital assets through increases in TIF district property values.³⁷⁹ In practice, TIF constricts the funds that can be used to pay debt, unless the TIF debt is secured by another asset such as a sales tax, property lien, or a letter of credit.³⁸⁰ Thus, if a TIF district struggles in its early stages, it is crippled by not being able to shore up the project with other non-tax revenues to pay down the debt. Eventually, if a TIF has failed, local governments may be required to increase taxes to protect their credit ratings.³⁸¹ Synthetic TIFs, not explicitly secured by tax increments, do not have this structural disadvantage.³⁸²

To illustrate this point, Roanoke Rapids experienced the effect of using conscribed revenues to pay down TIF debt firsthand and quickly depleted the debt reserve for its theatre amidst already

376. See Carter, *supra* note 247, at 77–78.

377. See Coe, *supra* note 341, at 40, 43 (noting that North Carolina had the second highest number of bond defaults during the Great Depression era, with sixty-two counties, 152 cities, and around 200 special taxing districts defaulting on the principal, interest, or both). This high level of default provided the impetus for the General Assembly to create the Local Government Commission. *Id.* at 40.

378. One additional option would be removal of the requirement for county and city notification. This option may be worth exploring, but would likely create additional tensions between city and county governments.

379. See *supra* note 25 and accompanying text.

380. See Millonzi, *supra* note 371.

381. Blocher & Morgan, *supra* note 12, at 10.

382. See *supra* note 284 and accompanying text.

significant budget shortfalls.³⁸³ Without generalized revenues to rely on and lacking appreciable gains in tax increment, the debt service for the theatre loomed large for the city, prompting the city council to explore options for additional revenue, such as an ultimately unsuccessful one-cent sales tax increase.³⁸⁴ Likely facing a large amount of debt service and the specter of default, Roanoke Rapids attempted to sell the theatre for \$7 million to recoup some of its \$21.5 million expense,³⁸⁵ and is currently leasing the facility to a new tenant who operates an internet gambling and entertainment business with an uncertain future.³⁸⁶ This was not the story that Roanoke Rapids hoped to tell when it opened the theatre doors in 2007.

Conversely, North Carolina local governments are not similarly constricted when using increases in the generalized tax base to pay for an asset *without* a TIF. For example, if a city built a theatre with a form of debt besides TIF, such as a traditional general obligation bond, the city could use not only the potential incremental gains in property tax surrounding the theatre, but also other revenues of the governmental unit to pay off the capital asset. This flexibility is valuable, especially if things do not go as planned and the city hopes to retain its capital asset or to pay down the debt at an accelerated pace in order to move past mistakes and toward future projects. TIF's structure makes the city or county highly dependent on the continuation of property value increases. When such increases do not arise, the areas from which the local government may pay their debt service are either non-existent (due to the lack of an increment), limited to additional pledged securities (such as a sales tax or sale of the underlying asset), or would require a later pledge of the city's general taxing power through property tax increases, which is the constitutional issue that TIF was confronting in the first place.³⁸⁷

Perhaps rather than aiming to reform TIF, North Carolina lawmakers might aim to reform synthetic forms of TIF to meet policy

383. See Roger Bell, *Roanoke Rapids Budget Deadline Looming*, DAILY HERALD (June 23, 2011), http://www.rrdailyherald.com/news/roanoke-rapids-budget-deadline-looming/article_869b451e-9dbe-11e0-a44e-001cc4c03286.html.

384. See Carrington, *supra* note 1 (noting that the sales tax was not authorized by the General Assembly).

385. See *supra* note 267 and accompanying text.

386. See *The Royal Palace Theatre Opens Wednesday*, *supra* note 10; see also Hest Techs., Inc. v. State *ex rel.* Perdue, No. 169A11-2, 2012 WL 6218202, at *11 (N.C. Dec. 14, 2012).

387. See Juby, *supra* note 17, at 1534 (noting that if TIF district proves unsuccessful and the increments are not sufficient to service the bond debt, city officials might raise tax rates to cover the shortfall, creating a situation where a city's full faith and credit are pledged through tax increases).

goals. As synthetic TIF provides greater flexibility and is easier to implement, it will likely continue to enjoy greater use. Reforms to synthetic TIF may include formalizing the practice and providing similar procedural safeguards as TIF for these developer agreements, allowing synthetic TIFs to secure minimum assessed value agreements as an additional security for bonds in synthetic TIF zones, or, for those who oppose non-voted debt in general, voting requirements for the bonds used in synthetic TIFs. Each proposed reform will have its advantages and weaknesses, which are beyond the scope of this Comment.

The final, and perhaps best, option is simply to leave the TIF statute and the debt structures allowing for synthetic TIF as they are. North Carolina enjoys a favorable bond rating due in no small part to its debt management strategies and approval mechanisms.³⁸⁸ The state has devised a debt issuance strategy—synthetic TIF—that retains the benefits of TIF without, predominantly, the negative experiences seen in other states.³⁸⁹ While the State's model may be too conservative for some, it reflects a policy choice that keeps debt service rates low³⁹⁰ while still allowing for local governments to use public finance instruments to encourage growth and prosperity in their communities.

ADAM C. PARKER**

388. See Coe, *supra* note 341, at 39–40.

389. See *supra* note 41 and accompanying text.

390. See Coe, *supra* note 341, at 45–46.

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