Maine Law Review

Volume 70 | Number 1 Article 5

January 2018

Tax Increment Financing in Maine

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ABSTRACT

Tax Increment Financing ("TIF") is a statutorily authorized mechanism which enables municipalities to earmark the property tax revenue from designated areas to pay for things such as infrastructure improvement. Lately, Maine municipalities have been using TIF to refund tax revenues directly to private developers in an effort to attract new business. This Comment will begin by briefly explaining the development of TIF in the United States and how it has evolved over time. It will then summarize how TIF works in Maine and the criticism and praise it has received throughout its existence. Next, it will look at research examining the efficacy of TIF around the country and in Maine. This Comment will argue that (1) TIF should be used for infrastructure improvements and job training, not to reimburse developers; (2) the maximum time limit for a TIF agreement should be lowered from thirty years to twenty years; (3) the state should limit the use of TIF to mitigate the impact it has on surrounding communities; and (4) the state should set job standards for business that benefit from TIF. Finally, this Comment will end by suggesting strategies for small Maine towns to make the most of TIF as it currently exists.

I. INTRODUCTION

Littleton is a small hypothetical town located somewhere in the western foothills of Maine. Like many towns in Maine, Littleton has been economically stagnant since the last local mill closed in the late 1980s and has seen almost no new development or job growth in the past twenty-five years. Most residents must commute some distance to find work, and although their property values are depressed, their property taxes continue to increase each year as the town struggles to maintain its aging infrastructure and contribute its share of the school budget.

Recently, a BigMart company representative contacted Littleton's board of selectmen and expressed interest in building a large retail store in the town. The store, the representative claimed, would create about eighty new jobs and draw customers from all over the surrounding area to Littleton. BigMart has already found a suitable vacant lot, but has indicated that in order to proceed with the project, it will need the property placed in a tax increment financing ("TIF") district for a period of thirty years. Under this arrangement, Littleton would return 85% of the property taxes it collects from the BigMart shopping center to BigMart for thirty years to offset the development costs, and use the remaining 15% to fund an economic development program aimed at attracting more businesses.

News of BigMart's interest has spread fast, and many townspeople have contacted the selectmen to express their excitement and support. The selectmen,

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however, are concerned that the arrangement is too generous to BigMart. But when they inquire with the company representative about more favorable terms, the representative makes it very clear that BigMart will go to a neighboring town with the same deal if the proposed TIF arrangement is not approved as quickly as possible.

Faced with pressure from their constituents and almost no bargaining power, the Littleton selectmen must make a decision that will affect their town for thirty years. They face questions the answers to which they can only guess. Will the benefit from the TIF outweigh the negative aspects? What will the impact of the TIF be on the school budget? Will the TIF be difficult to administer? In all likelihood, despite this lack of information, they will vote to approve the TIF with the hope that they are making some progress in reinvigorating their stagnant local economy.

This Comment will explain how Littleton came to be faced with such a decision. It will start by briefly explaining the development of municipal tax increment financing in the United States and how it has evolved over time. It will then summarize how TIF works in Maine and the criticism and praise that it has received throughout its existence. Next, this Comment will look at research examining the efficacy of TIF both around the country and in Maine. It will argue that (1) TIF should be used for infrastructure improvements and job training, not to reimburse developers; (2) the maximum time limit for a TIF agreement should be lowered from thirty years to twenty years; (3) the state should limit the use of TIF to mitigate the impact it has on surrounding communities; and (4) the state should set job standards for business that benefit from TIF. Finally, the Comment will end by providing suggestions for small towns and briefly examining the future outlook of targeted economic development programs in Maine and across the country. The overarching argument of this Comment is that TIF has advantages and disadvantages, but reform is needed to ensure that the benefits of such programs outweigh the costs.

II. TIF GENERALLY

Before discussing TIF in Maine, it is important to understand the evolution of the program from one designed to fund urban renewal into a general purpose economic development tool. This section will explain the basic origins of TIF and how it works in the typical municipal property tax system. It will go on to explain how the concept of blight impacts TIF arrangements and how changing blight standards have signaled a shift in the use of such programs.

A. The Theory Behind TIF and Its Basic Structure

Tax increment financing, in theory, is a mechanism which "allows local governments to freeze" the property tax value on a particular area, known as a TIF district, and specifically earmark any subsequent increase in value and tax revenue "to pay for infrastructure, remediate blight, and make other improvements" within the district.[1] At its most basic level, TIF is a tool that municipalities use to encourage economic growth by incentivizing developers to build in certain underperforming

[1] Phillip J.F. Geheb, Tax Increment Financing Bonds as "Debt" Under State Constitutional Debt Limitations, 41 URB. LAW. 725, 725 (2009).

areas that they would otherwise probably avoid.[2] Municipalities approve TIF arrangements with the hope that the development or redevelopment will increase property values and benefit the public.[3]

TIF began in the mid-twentieth century as part of an effort to revitalize blighted urban areas.[4] California developed tax increment financing in 1952 as a means of providing matching funding for federal urban renewal grants.[5] But it was not until the late 1970s, when federal funding for urban renewal began to dry up, that TIF really began to take off as an alternative method for economic development.[6] In 1970, only seven states authorized TIF, but "twenty-eight states approved TIF by 1984, thirty-three by 1987, and forty-four by 1992. By the early 1990s, 56 percent of cities with populations over 100,000 had used TIF. [By 2010], every state but Arizona authorize[d] TIF."[7] According to Columbia Law School Professor Richard Briffault, tax increment financing has become "the most widely used local government program for financing economic development in the United States."[8]

To understand TIF, it is important to understand the basic model of property taxation used by most states: *ad valorem* taxation.[9] *Ad valorem* taxation is a system in which property taxes are assessed based on property values.[10] Properties are appraised and their combined values make up the total assessed value for a specific jurisdiction.[11] Then, the total budget for a jurisdiction for a given tax year is divided by the total assessed value to determine a mill rate, which is often called a tax rate.[12] "Each mill produc[es] $1 of property tax for every $1,000 of assessed value"; therefore, to calculate the taxes owed by the owner of each parcel, the assessed values are multiplied by the mill rate.[13]

Professor Briffault expertly summarizes how TIF generally works within the *ad valorem* taxation system:

> TIF laws vary from state to state, but the basic idea is straightforward. A territorial district is created within a city, and the assessed valuation of the property within the district—known as the base value—is determined. Property taxes continue to be levied, and the revenues generated by applying the tax rate to the base value continue to be paid to the local governments—including the municipality, county, school district, fire district, park district, and any other special districts—entitled to receive them. But revenues generated from applying the property tax to any increased property value within the district are, for the life of the district, set aside and paid to

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[2] *Id*. at 727.

[3] Todd A. Rogers, A Dubious Development: Tax Increment Financing and Economically Motivated Condemnation, 17 REV. LITIG. 145, 162 (1998).

[4] Alyson Tomme, Note, *Tax Increment Financing: Public Use or Private Abuse?,* 90 MINN. L. REV. 213, 218 (2005).

[5] Richard Briffault, The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government, 77 U. CHI. L. REV. 65, 69 (2010).

[6] Tomme, *supra* note 4, at 218-19.

[7] Briffault, *supra* note 5, at 69-70.

[8] *Id*. at 65.

[9] H. Lawrence Hoyt, *What's the "TIF" All About?*, *in* TAX INCREMENT FINANCING 5, 5 (David Callies & Andrew Gowder, Jr. eds., 2012).

[10] *Id.* at 5-6.

[11] *Id.* at 6.

[12] *Id.* at 7.

[13] *Id*.

> the municipality or an economic development agency (which typically is controlled by the municipality) to be used for public improvements and other economic development programs within the district. These expenditures may be made, as the incremental revenues are received, on a pay-as-you-go basis. More commonly for larger TIF districts, the district may issue bonds backed by the projected incremental revenues. The bond proceeds are then used to make major public investments upfront, thus jumpstarting the development process.[14]

B. How TIF Has Changed from Its Original Purpose

The vast majority of states included blight as a requirement in their original TIF legislation.[15] Some states also allowed for TIF in areas that were at risk of becoming blighted or in industrially zoned areas in need of development.[16] Blight, although often left ambiguous by statutes, has been described as "conditions which endanger public health or welfare such as overcrowding, dilapidated or deteriorating buildings, or faulty street layout."[17] The blight requirement "relates to the basic nature of TIF as a tool for redevelopment" and "[a] finding of blight in an area creates the link between the activities of private developers and the public purpose necessary for government to . . . fund a project using tax revenues."[18]

The notion of blight stemmed originally from federally funded low income housing programs, which, before TIF and other incentive programs, was the only way a community could "engage in redevelopment."[19] To qualify for federal funding for new projects, communities "had to furnish a 'workable program' including a redevelopment plan for dealing with slums and blight."[20] This public interest standard was further "expanded to include private development of areas before they reached a point of disrepair that required widespread condemnation."[21]

Although when TIF began it was intrinsically tied with urban redevelopment and blight, it has now mostly morphed into a general purpose economic development tool. In most states, blight has become a less meaningful prerequisite for the use of TIF, either through statutory changes that relax the requirement[22] or through court decisions that have interpreted blight broadly.[23] This has caused some controversy, particularly when previously undeveloped areas are placed into TIF districts, leading to so-called greenfield development.[24] Such development, critics argue, "undermines the usefulness of TIF to the older, poorer neighborhoods which were the original focus of TIF. If every locality can offer an incentive, then the advantages

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[14] Briffault, *supra* note 5, at 67-68.

[15] Alyssa Talanker & Kate Davis, Straying From Good Intentions: How States are Weakening Enterprise Zone and Tax Increment Financing, Good Jobs First, 3 (2003).

[16] *Id.*

[17] *Id.* at 4.

[18] CRAIG L. JOHNSON & KENNETH A. KRIZ, *A REVIEW OF STATE TAX INCREMENT FINANCING LAWS, in* TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT 37 (Craig L. Johnson & Joyce Y. Man eds., 2001).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See* Talanker, *supra* note 15, at 37-38.

[23] *See* Johnson & Kriz, *supra* note 18, at 38.

[24] *See* Briffault, *supra* note 5, at 91.

of undeveloped sites over poor urban areas are not offset by government subsidies."[25]

III. TIF IN MAINE

A. Development of TIF in Maine

Maine's first TIF laws were passed in 1977 by the 108th Legislature.[26] Although it is beyond the scope of this Comment to do a complete legislative history, it is worth noting that there have been dozens of revisions to Maine's TIF laws since. Like TIF in other parts of the country, Maine's TIF laws have evolved away from the blight standard. For example, the legislative findings from 1977 state: "It is found that there is a need for a new development in areas of municipalities *which are already built up*, to provide new employment opportunities, to improve and broaden the tax base and to improve the general economy of the State."[27] The development districts were required by the original law to consist of "[n]o less than 60% of the total area of the district . . . which has been plotted and developed."[28] These provisions stand in stark contrast to the current law, which merely requires that 25% of the area in a district "[m]ust be a blighted area; [m]ust be in need of rehabilitation, redevelopment or conservation work . . . ; or [m]ust be suitable for commercial or arts district uses."[29]

B. Current Statutes and Rules

Chapter 206 of Title 30-A of the Maine Revised Statutes lays out the statutory basis for tax increment financing and authorizes municipalities to designate development districts ("TIF districts") within their boundaries.[30] The Department of Economic and Community Development ("DECD") is the agency tasked with regulating and approving TIF programs.[31] Before creating a TIF district, a municipality's legislative body "must consider whether the proposed district or program will contribute to the economic growth or well-being of the municipality . . . or to the betterment of the health, welfare or safety of the inhabitants of the municipality."[32] "At least 25%" of the area to be designated as a TIF district "must be a blighted area; must be in need of rehabilitation, redevelopment or conservation work . . . ; or must be suitable for commercial or arts district uses."[33] The area of the TIF district "may not exceed 2% of the total acreage of the municipality," and the total area of all TIF districts "may not exceed 5%" of a municipality's total acreage.[34]

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25 *Id.*

26 *See* Public Laws of the State of Maine, ch. 397, 546 (1977).

27 *Id.* § 4861 (emphasis added).

28 *Id.* § 4863.

29 ME. REV. STAT. ANN. tit. 30-A, § 5223(3) (2011 & Supp. 2016). It is hard to imagine a potential TIF district which would not have at least 25% which meets one of these criteria.

30 *Id.* § 5223(1).

31 *See id.* § 5226(2) (stating the DECD commissioner shall review TIF proposals to ensure statutory compliance); *see also id.* § 5229 (giving the DECD commissioner the authority to promulgate rules for TIF district designation).

32 *Id.* § 5223(2).

33 *Id.* § 5223(3)(A).

34 *Id.* § 5223(3)(B).

A TIF arrangement may last no longer than thirty tax years.[35]

A municipality must have a development plan for each TIF district, which should include, among other things, a financial plan and a description of what is going to be financed through the program; the requirements for the plan are laid out explicitly in the statute.[36] The financial plan must lay out the cost estimates, amount of public indebtedness to be incurred (if the town will use the TIF revenue to secure a municipal bond), and a description of the terms and conditions of any related agreements or contracts.[37] The municipality may *only* spend the TIF district money according to the financial plan.[38] Interestingly, as part of their financial plans, municipalities are also required to calculate the tax shifts or how their TIF will affect county taxes, state revenue sharing, and school budgets.[39] None of those calculations will impact the state's approval of the TIF, which suggests that such a requirement is merely a way for the legislature to gather data and encourage municipalities to consider the impact of the TIF arrangement.[40]

TIF revenues may only be spent on authorized project costs.[41] Table A gives non-exhaustive examples of project costs which are specifically authorized by statute.[42] The statute provides three general categories of acceptable project costs; it is worth noting that any costs outside of the TIF district which are not economic development costs must be substantially related to the district to qualify.[43] DECD notes in its TIF manual that it may approve project costs which are not specifically enumerated if they are consistent with the legislative purpose to create and retain jobs and broaden the tax base.[44]

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[35] *Id*. § 5224(2)(H).

[36] *Id*. § 5224(2).

[37] *Id*. § 5224(3).

[38] *Id*. § 5224(5).

[39] *Id*. § 5224(4).

[40] *See id*. §§ 5221-5235 (showing that no part of the TIF approval process depends on the outcomes of tax shift calculations).

[41] *Id.* § 5225 (2011 & Supp. 2016).

[42] *Id.*

[43] *Id.* § 5225(B) (2011 & Supp. 2016).

[44] Department of Economic and Community Development, *Municipal Tax Increment Financing*, at 10 (Feb. 2010) [hereinafter TIF Manual].

Table A: Authorized Project Costs Examples		
Costs Within TIF District	Costs Outside TIF District	Other Costs
• acquisition of land • construction of buildings, structures, and public fixtures • transit development • signs and railing	• sewage and water treatment facilities • costs of public safety improvements • mitigation of adverse impact of district	• economic development • environmental improvements • skill development and training • quality child care • recreational trails

The most common form of TIF arrangement in Maine is called a credit enhancement agreement ("CEA"); out of the 380 active TIF districts in the state, 207 involve CEAs.[45] A CEA is essentially a contract between a municipality and a company to set aside "all, or a percentage of, the tax revenues generated by the new investment to pay certain authorized project costs with payments made directly to the company."[46] DECD lists several advantages of CEAs, the foremost of which is that they are far less risky than issuing municipal bonds to fund TIF projects.[47] Other advantages include the ability to use a CEA to provide direct incentives to businesses, the fact that they are generally easier to garner public support for than municipal bonds, and that they provide flexibility throughout the life of the TIF district.[48] A large disadvantage is that the amount of revenue generated by a CEA is directly tied to the amount of new investment within a district.[49]

The other form of TIF arrangement involves a municipality issuing general obligation bonds which are then repaid through TIF revenue.[50] The advantage of this style of TIF arrangement is that it provides quicker access to the money necessary to complete projects within the TIF district and that it fixes a municipality's obligation for a specific amount and term.[51] The glaring disadvantage, according to DECD, is that issuing municipal debt creates a great deal of risk exposure because the municipality will continue to be obligated to pay back the debt even if the TIF revenues decline.[52]

C. Delogu v. State: Maine's TIF Laws Survive a Constitutional Challenge

The only real challenge to Maine's TIF laws came in the 1998 case *Delogu v.*

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[45] Aaron Twombly, *TIF: Positive Development or Tax Giveaway?*, WCSH 6 (Nov. 7, 2016), http://www.wcsh6.com/news/local/tif-positive-development-or-tax-giveaway-/349576520 [https://perma.cc/H4FC-MS9X].

[46] TIF Manual, *supra* note 44, at 6-7.

[47] *Id.* at 7.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

State, in which taxpayers brought an action which claimed, among other things, that a TIF arrangement and the resulting credit enhancement agreement between the City of Bath and the ship manufacturer Bath Iron Works ("BIW") violated the equal assessment requirement of the Maine Constitution and was not authorized by the TIF legislation.[53] Under the TIF's credit enhancement agreement, Bath would reimburse BIW $85 million that came from an increase in value due to an expansion.[54]

The Maine Constitution states that "[a]ll taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof."[55] The plaintiffs alleged that Bath's reimbursement through the credit enhancement agreement led to unequal taxation.[56] The trial court found that the TIF arrangement did not violate the equal assessment requirement, and the Law Court affirmed, saying:

> The reimbursement to BIW is a distribution of tax revenues. A critical distinction exists between the assessment of taxes and the spending of tax revenues. As we held in *McBreairity*: "Although Article IX, Section 8 requires equal assessment of property taxes, it does not apply to the manner in which the government chooses to spend its tax revenues. There is no requirement that the Legislature distribute tax revenues equally."[57]

As for the challenge to the statutory authority for a town to grant a credit enhancement TIF, the trial court found that the statutes did enable such an arrangement.[58] The Law Court affirmed that decision, noting that the DECD had "interpreted the TIF enabling legislation to allow the credit enhancement TIF."[59] DECD's interpretation, the Court said, was entitled to deference absent a clear legislative intent to the contrary.[60]

IV. CRITICISM, PRAISE, AND WHETHER TIF WORKS

A. A Lot of Criticism

A criticism levied nearly constantly at TIF programs in Maine and other states is that such arrangements amount to little more than public subsidies of private businesses. University of Maine School of Law Professor Emeritus Orlando Delogu is a critic of TIF districts that rebate directly to businesses.[61] "Once you're not talking infrastructure," he says, "you're talking corporate subsidy."[62] Early TIFs focused on infrastructure improvements, which Delogu says "benefit industry and society and the public will own it. It's the sort of improvement that municipal

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53 1998 ME 246, ¶ 8, 720 A.2d 1153, 1155.
54 *Id.* at ¶ 6, 1154.
55 ME. CONST. art. IX, § 8.
56 *Delogu*, 1998 ME 246, ¶ 8, 720 A.2d at 1155.
57 *Id.* ¶ 18, 720 A.2d at 1156.
58 *Id.* ¶ 24, 720 A.2d at 1157.
59 *Id.* ¶ 21, 720 A.2d at 1157.
60 *Id.*
61 *See* Naomi Schalit, *Maine's TIF Law Lets Businesses Avoid Paying for Local Services, Schools*, PORTLAND PRESS HERALD (Feb. 19, 2014), http://www.pressherald.com/2014/02/19/maines-tif-law-allows-businesses-to-avoid-paying-for-local-services-schools/ [https://perma.cc/8GW7-K4ZR].
62 Twombly, *supra* note 45.

government was created to put in place."[63]

Journalist Naomi Schalit points to an early TIF in Auburn to show the focus on infrastructure.[64] In 1984 the City of Auburn created a TIF in which the captured revenue paid off a municipal bond used to extend the public sewer to a desirable commercial area near a highway.[65] In stark contrast, Schalit then points to a TIF in Millinocket created in 2001 with a paper company.[66] In that case, the mill agreed to keep a certain amount of workers employed at the mill and in return would receive nearly $2 million back through the TIF.[67] After failing to keep the agreed-upon number of workers, the mill was still able to petition the town and keep the TIF.[68]

A 2011 study on TIF that Schalit quotes in her article shows that this perceived over-eagerness of municipalities to enter into TIFs is not solely a Maine phenomenon:

> The failure to restrict TIF to appropriate settings and to impose sufficient public oversight and budgeting rules over TIF funds have allowed what should be a mundane tax policy to instead become a temptation that too many municipal officials find themselves unable to resist—an immediate infusion of cash that often comes with little consideration of long-term costs. Egged on by developers eager for subsidies, cities have pushed the boundaries of TIF far beyond what common sense or good policy would dictate.[69]

Further adding to the pressure municipalities face is that businesses have the upper hand in negotiating, with companies often creating bidding wars between neighboring towns and exploiting municipal officials' lack of technical expertise.[70] "The thing is, if you deny them, they make the threat of going down the street to another town," says Frenchville town manager John Davis.[71] According to Delogu, "[t]he TIF granting towns are in this competition where they win the more they give away."[72]

In fact, this trend might trace its roots to the expansion of TIF away from blighted urban areas. Such expanded eligibility has certainly increased the use of TIF and "[i]n Maine, any district in which 70 percent of the land is zoned for commercial or industrial use is eligible for TIF."[73] The "lack of clear criteria to guide the use of TIF" leads to inexpert municipalities fighting against each other to the detriment of the public and existing businesses.[74]

Adding fuel to the fire is something that Professor Briffault describes as "interlocal conflict," which is the conflict between municipalities that share authority

63 Schalit, *supra* note 61.
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 Rob Kerth & Phineas Baxandall, Tax Increment Financing: The Need for Increased Transparency and Accountability in Local Economic Development Subsidies, U.S. PIRG EDUC. FUND, 4 (Fall 2011).
70 *Id.* at 10.
71 Schalit, *supra* note 61.
72 Twombly, *supra* note 45.
73 Kerth, *supra* note 69, at 11.
74 *Id.*

over entities such as counties and school districts.[75] This conflict occurs because "[i]n a substantial majority of states, the city that adopts a TIF program may commit to it the incremental property tax revenues that would have gone to overlapping governments, such as school districts."[76] Indeed, to add insult to injury, if a town loses a TIF agreement to a neighboring town, because of the way county budgets, revenue sharing, and school budgets operate, they may end up subsidizing the other town's TIF.[77]

Maine's TIF laws have received criticism as being a method "for municipalities to underwrite revenues so that they can receive more funds from the state."[78] This is because TIF shields new values and the resulting revenues that stem from within the district. State revenue sharing "depends on how much revenue a town produces"[79] and, under Maine's *ad valorem* tax system, revenue is intrinsically tied with the overall assessed value of all the properties in town. Some argue that this essentially forces less savvy towns to subsidize the more successful towns, which tend to be larger and have less actual need for economic incentives to attract business.[80] The obvious response from TIF proponents would be that these problems stem from revenue sharing and not from TIFs, and that any town can create a TIF.[81] Schalit argues, however, that TIFs have a disproportionate impact because "it's mostly urban towns or mill towns that have TIFs in Maine—thus shifting the burden to mostly rural communities," which are unlikely to have the need or the resources to create TIFs.[82]

B. Some Praise and Widespread Endorsement Through Use

TIF in Maine and throughout the country is certainly not without its proponents, which is clear from the widespread adoption of TIF laws and programs. In a sense, the extensive use of TIF speaks for itself, which may explain the lack of editorializing on its benefits; clearly many municipalities and businesses view it positively. Responding to Schalit's two-part series highlighting the criticisms of TIFs in Maine, Andrew Hamilton and John Porter, both members of the Bangor Region Chamber of Commerce, were disappointed that "there [was] little or no acknowledgment that TIFs have made the difference in many critical economic development projects in Maine."[83] They highlight the importance of TIF projects such as the General Electric

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75 Briffault, *supra* note 5, at 88.

76 *Id.*

77 *Id.*

78 Michael Havlin, *Maine Voices: TIF Helps Communities That Don't Need It*, PORTLAND PRESS HERALD (May 26, 2013), http://www.pressherald.com/2013/05/26/tif-helps-communities-that-dont-need-it_2013-05-26/ [https://perma.cc/PTS5-CYQP].

79 *Id.*

80 *Id.*

81 Naomi Schalit, *Maine Tax 'Game' Allows Towns to Protect State Aid at Expense of Neighbors*, PORTLAND PRESS HERALD (Feb. 20, 2014), http://www.pressherald.com/2014/02/20/maine-tax-game-allows-some-towns-to-protect-their-state-aid-at-expense-of-other-towns/ [https://perma.cc/7AZX-8TF2].

82 *Id.*

83 Andrew Hamilton & John Porter, *Don't Forget, Tax Increment Financing Deals Can Make the Difference in Attracting Business*, BANGOR DAILY NEWS (Feb. 26, 2014), http://bangordailynews.com/2014/02/26/opinion/dont-forget-tax-increment-financing-deals-can-make-the-difference-in-attracting-business/ [https://perma.cc/D55Y-J5ZT].

plant in Bangor or the Texas Instrument plant in South Portland.[84] They dismiss Schalit's argument that TIFs force other municipalities to subsidize the arrangement by pointing out that "often projects undertaken with TIF benefit whole regions, not just one community."[85] They also reject Schalit's depiction of TIF "as a program run amok," countering with the procedural safeguards that limit the amount of property a municipality can place into a TIF district.[86]

C. Unanswered Questions

As ubiquitous as TIF is in this country, there is a surprising dearth of research on how effective it is at growing local economies. Amongst the relatively small pool of researchers who have examined the issue, there is little consensus whether the net impact of TIF arrangements is positive, negative, or neutral.[87] Indeed, there is an almost call-and-response like pattern of conclusions with one study finding one way while a later study finds the other way and criticizes the methods of the first study.[88]

Professors Richard Dye and David Merriman have conducted two prominent studies[89] of the economic impact of TIF in Illinois, concluding that:

> Tax increment financing is an alluring tool. TIF districts grow much faster than other areas in their host municipalities. TIF boosters or naive analysts might point to this as evidence of the success of tax increment financing, but they would be wrong. Observing high growth in an area targeted for development is unremarkable. The issues we have studied are (1) whether the targeting causes the growth or merely signals that growth is coming; and (2) whether the growth in the targeted area comes at the expense of other parts of the same municipality. We find evidence that the non-TIF areas of municipalities that use TIF grow no more rapidly, and perhaps more slowly, than similar municipalities that do not use TIF . . . . Our evidence [also] shows that commercial TIF districts reduce commercial property value growth in the non-TIF part of the same municipality.[90]

Dye and Merriman urge policymakers to use caution when developing TIF, because "[i]t is . . . merely a way of financing economic development and does not change the opportunities for development or the skills of those doing the development

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84 *Id.*

85 *Id.*

86 *Id.*

87 *See, e.g.*, JOYCE Y. MAN, *Effects of Tax Increment Financing on Economic Development*, *in* TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT 102-05 (Craig L. Johnson & Joyce Y. Man eds., 2001) (discussing the disparate results of two prominent studies on the effectiveness of TIF).

88 *See, e.g.*, Dan McGowan, *To TIF or Not to TIF*, INSIDE INDIANA BUSINESS (June 27, 2016), http://www.insideindianabusiness.com/story/32319245/ieda-chief-lauds-tif-districts [https://perma.cc/3VPN-XFAX] (detailing how the Indiana Economic Development Association responded to a study which criticized TIF in Indiana with its own study which found TIF to have a positive impact on communities).

89 *See* RICHARD F. DYE & DAVID F. MERRIMAN, *The Effects of Tax Increment Financing on Economic Development*, 47 J. OF URB. ECON. 306-28 (2000); RICHARD F. DYE & DAVID F. MERRIMAN, *The Effect of Tax Increment Financing on Land Use*, in THE PROPERTY TAX, LAND USE, AND LAND-USE REGULATION 37 (Dick Netzer ed., 2003).

90 Richard F. Dye & David F. Merriman, *Tax Increment Financing*, LINCOLN INSTITUTE OF LAND POLICY (Jan. 2006), http://www.lincolninst.edu/publications/articles/tax-increment-financing [https://perma.cc/V2TQ-AS7H].

planning."[91]

Professor Joyce Man, on the other hand, is skeptical of Dye and Merriman's conclusions.[92] In her own research focusing on TIF in Indiana, Man has reached much more positive conclusions, such as that "TIF programs have increased the median owner-occupied housing value by 11.4 percent in the TIF-adopting cities relative to what it would have been without the program."[93] She has also found that "TIF programs have a statistically significant positive impact on local employment [and] . . . that the targeted public investment in a TIF district yields a substantial positive impact on economic activity."[94] "TIF," she says, "is an effective local economic development tool."[95] Man is not alone in her conclusions, as other earlier studies have also shown that "TIF projects do stimulate economic development."[96] A 1993 study that surveyed 300 municipalities found that "78 percent of [the cities using TIF] experienced increases in property values, and only 2 percent of the respondents actually experienced a decline in property taxes after the establishment of the TIF district."[97]

It seems that most TIF researchers would agree that there is at least a correlation between TIF usage and increased assessed property values. The core disagreement is the degree to which TIF is responsible for the increased values and whether its economic benefits extend further. Second Circuit law clerk Joseph Blocher and Professor Jonathan Morgan, in reviewing the various economic studies of TIF, have this to say:

> Many of the studies that show a positive connection between TIF and local development have been criticized for attributing outcomes to TIF that may have happened on their own without public investment. If a TIF-designated district experiences major growth, there is a tendency to credit that growth to whatever investments the city or county made as part of its development plan. However, it is entirely possible that TIF did nothing but "capture" the natural growth that would have occurred without it.[98]

Similarly, a 2015 study on the impact of TIF in Indiana found that while "TIFs are associated with small but positive growth in assessed value," they had "negative impacts . . . on traditional measures of economic development such as employment, the number of business establishments, and sales tax revenue."[99] These findings led the authors of that study "to conclude that the Indiana TIF is not an economic

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91 *Id.*

92 *See* Man, *supra* note 87, at 105.

93 *Id.* at 104.

94 *Id.*

95 *Id.* at 105.

96 *Id.* at 103.

97 *Id.* (citing F.A. Forgey, *Tax Increment Financing: Equity, Effectiveness, and Efficiency*, *in* THE MUNICIPAL YEARBOOK 25-33 (Int'l City Mgmt. Ass'n ed., 1993)).

98 Joseph Blocher & Jonathan Q. Morgan, *Questions About Tax Increment Financing in North Carolina*, 5 U. OF N.C. COMMUNITY & ECON. DEV. BULL. 15 (2008), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2597&context=faculty_scholarship [https://perma.cc/S4HE-7S8B].

99 MICHAEL J. HICKS ET AL., *Some Economic Effects of Tax Increment Financing in Indiana*, Ball State University Policy Brief 1, 1 (2015), http://projects.cberdata.org/reports/TifEconEffects-012815.pdf [https://perma.cc/L729-S6D9].

development tool, but a county budget management tool."[100]

Given the lack of conclusive studies nationally, it is unsurprising that there is little information available on the efficacy of Maine's TIF programs. In 1999, Marc Breslow, PhD, analyzed six major economic development programs, including TIF, in Maine to determine their impact on employment.[101] Using data from 1998, he found that when TIF is isolated it "actually seems to be associated with a loss of jobs. This is of particular concern since the TIF program has been expanding rapidly—from 37 districts in 1993 to about 120 in 1999—and its annual cost is expected to rise to $15 million by 2001."[102] A 2001 report by the Bureau of Labor Education at the University of Maine summarized the trend:

> [R]ecent state data indicate that while the amount of municipal TIF dollars going toward infrastructure has been increasing slowly since 1995, the TIF dollars returned directly to corporations has increased far more rapidly; from $1.8 million in 1995 to 18.7 million in 1998—an increase of 1,039 percent in only five years.[103]

Breslow also notes that the limited employment data from companies makes it "impossible to determine when or if tax breaks [such as TIF] actually create new jobs, as opposed to subsidizing jobs that would have been created without taxpayer assistance."[104]

V. DISCUSSION

There are both advantages and disadvantages to the use of TIF, but they have proven difficult to measure with any degree of certainty. The following arguments are made with the presumption that the impact of TIF in Maine and the rest of the country remains opaque. An obvious solution, therefore, would be for the Maine legislature to gather more data about the impact of TIF on economic growth both at a local and state level; armed with clearer data it would be much easier to perform a cost/benefit analysis of the program as a whole. However, even without such analysis it is clear there are areas of the law which can be improved and steps municipalities can take to ensure the program is actually producing positive results.

This section will make the following recommendations: (1) TIF laws should limit reimbursements to private developers; (2) the maximum time period a TIF arrangement can exist should be shortened; (3) businesses benefiting from TIF arrangements should be held to concrete standards; and (4) the negative impact that one municipality's TIF arrangement has on neighboring communities should be

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100 *Id.; see also* David Swenson & Liesl Eathington, *Do Tax Increment Finance Districts in Iowa Spur Regional Economic and Demographic Growth?*, Iowa State University, 1 (June 2002), http://www2.econ.iastate.edu/research/webpapers/NDN0138.pdf [https://perma.cc/SS5K-Y5LX] (concluding that "the evidence . . . analyzed suggests that net positions are not being enhanced – that the overall expected benefits [of TIF] do not exceed the public's costs.").

101 *See* Marc Breslow, *Economic Development Subsidies in Maine: Modest Job Gains at High Cost*, COMMONWEALTH INST. (Dec. 15, 1999).

102 *Id.* at 11.

103 BUREAU OF LABOR EDUC., UNIV. OF ME., MAINE'S DEVELOPMENT DILEMMA (Winter/Spring 2001) (citing MARK BRESLOW & ERICA SCHWARZ, TAX INCREMENT FINANCING IN MAINE: RAPID GROWTH AND SUBSTANTIAL COSTS, (October 2000)).

104 Breslow, *supra* note 101, at 11.

mitigated as much as possible. Finally, this section discusses how smaller municipalities can avoid the "race to give away the most" absent major legislative changes.

A. Limit Reimbursements to Developers

As previously discussed, TIF as a concept was intended to entice developers into building businesses in areas they might have otherwise avoided due to conditions such as narrow streets, worn out buildings, or lack of public utilities, that might fall under the umbrella of the term "blight."[105] Using TIF as a de facto property tax abatement by refunding taxes to offset private development costs obfuscates what should be a relatively simple idea. It makes sense when a municipality, after identifying an area that needs infrastructure improvements in order to attract new businesses, designates the taxes from the ensuing new development to offset the costs of installing that infrastructure. It makes far less sense for a municipality to make a deal with a single business to reimburse property tax revenue in exchange for abstract assurances of new jobs and economic growth.

The simplest way to alleviate concerns that TIF is too often being used to subsidize private business (rather than merely encouraging it) is to limit the percentage of tax dollars that a municipality may reimburse developers. Extending a public sewer system or widening a road with TIF results in tangible and long-term benefits for an entire community even if such improvements serve only a single business initially. Reimbursements, on the other hand, have much murkier benefits and raise questions about the long-term viability of a project if it is truly operating on such a slim margin (e.g., even TIF could not save the paper mill discussed above). Most municipalities would likely prefer to limit their use of TIF to infrastructure improvements (or other costs outside the private development itself), but because of the intense competition for new business feel obligated to offer as much of a reimbursement as possible.

Limiting reimbursements or restricting the use of TIF funds at the state level to costs external to the private business would be a simple way to ensure that communities in Maine are less inclined to engage in what Professor Delogu would describe as a race to give the most away.[106] Returning to the Littleton hypothetical, BigMart would be less inclined to pit towns against each other if it knew that no town

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[105] *See* discussion *supra* Section II.A. It is also worth mentioning that the term "blight" has been used by municipalities to exercise eminent domain powers to clear the blighted area for private development. *See* Kelo v. City of New London, 545 U.S. 469 (2005) (holding that a municipality may take private property for use by private entities pursuant to an economic development plan without violating the Fifth Amendment). Professor Briffault notes:

> Although some of that controversy [surrounding TIF] has been due to the use of TIF funds to pay for *Kelo*-type eminent domain proceedings, many TIF plans do not involve eminent domain, and many conflicts over TIF have little to do with takings. Rather, TIF has been challenged with respect to the type of development it supports, its impact on other local governments, and its broader effect on local government planning and policymaking.

Briffault, *supra* note 5, at 66.

[106] Twombly, *supra* note 45.

could reimburse its tax dollars to offset the cost of constructing its store. It might ask Littleton to earmark TIF funds for new sidewalks to the store or to create job training programs, but those expenditures fall on the concrete/tangible side of the benefit spectrum. These benefits will remain with the community regardless of whether BigMart is successful.

B. Reasons for Shorter TIF Arrangements

Under current Maine law, a municipality may enter into a TIF agreement for as long as thirty years. This raises concerns because economic conditions, both at a community level and nationally, will likely fluctuate through several boom and bust periods over the course of thirty years and a town's economic standing will almost certainly change significantly even by the halfway point of such a lengthy arrangement. Although it is not unusual for municipalities to make decisions that will have long-term impacts, given the uncertain benefits of TIF, shortening the amount of time a TIF can exist would be a simple way to prevent towns from entering into shortsighted TIF agreements in their haste to attract new business. A TIF agreement may initially appear beneficial, but later become less favorable due to changing economic circumstances; a shorter time limit would reduce the risk of unforeseen changes and mitigate the effect of such changes.

When considering an ideal time-frame it is necessary to weigh the benefits of longer TIF agreements against the benefits of shorter agreements. One key benefit of longer agreements is that they better enable a community to make efficient use of municipal bonds by giving the municipality a longer period of time to pay off the debt.[107] As Johnson wrote in 2001:

> Twenty-four states have . . . set[] maximum time limits for . . . the use of TIF by an authority. There is a great amount of variation in the number of years one can use TIF financing for a specific project. For example, California places an effective thirty-year time limit on projects. Contrasted with this *very liberal policy*, New Mexico places strict five-year (ten years for projects initiated under the metropolitan redevelopment provisions of the statutes) time limits on the tax increment financing method. Under this restriction, the redevelopment area can live on perpetually, but the tax increment is restricted. This may act to focus effort early in the development undertaking, but may preclude efficient use of debt financing.[108]

Indeed, it is a central tenet of TIF that "TIF districts must be . . . temporary . . . with a defined time limit at which point the property's tax revenue will once again be used for general public purposes."[109] The lengthier a TIF is, the further it strays from its original purpose as a temporary corrective measure intended to rehabilitate an area, and the more it becomes a corporate subsidy.

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[107] *See* Johnson & Kriz, *supra* note 18, at 53 (noting that a five-year limitation on TIFs in New Mexico limited the effective use of debt financing).

[108] *Id.* (emphasis added) (citations omitted). It is, admittedly, beyond the scope of this Comment to fully survey the current TIF laws of each state, but it is worth noting that TIF laws tend to change frequently. This quote is included primarily to show that Maine's thirty-year time limit for TIFs is at the higher end of the spectrum of states which set TIF time limits.

[109] Kerth, *supra* note 69, at 2.

Weighing these considerations, it seems like a time limit between fifteen and twenty years would be the appropriate compromise. Such a time limit would still enable municipalities to effectively use debt financing or to earmark funds for certain large infrastructure projects. Although towns currently have the option of entering shorter term TIF arrangements, given the competition between towns, a company seeking a TIF (which appears to be the most common scenario, at least in Maine) can shop around for thirty years.

C. Addressing the Need to Mitigate Impact on Surrounding Communities by Narrowing the Scope of TIF Projects

As discussed above, one of the biggest criticisms of TIF is that it affects more than just the TIF-adopting community. This is because of the way school and county budgets work and, in Maine particularly, the way that state revenue-sharing functions. Because the tax revenues from TIF districts are shielded from these calculations, surrounding towns and the state as a whole can end up paying more to a municipality while reaping little to no benefit from the TIF.

Professor George Lefcoe has identified several ways that states have attempted to protect school and county budgets from the TIF decisions of individual municipalities:

> (1) A few states authorize payments in lieu of taxes (PILOTs) to schools, counties and other taxing entities. PILOTs never fully replace revenues lost to TIF. Some states make up all or most of the local school district revenue loss due to TIF by the formulas they use to distribute state funding for schools.
> (2) Generally, the schools, counties or other districts receive notice of proposed TIF-funded projects that would divert revenues from schools and the opportunity to comment.
> (3) In some states, school districts and counties take a seat on a TIF joint review board.
> (4) In Florida, Kentucky, and New York, school districts are barred from contributing any of their property taxes.
> (5) A handful of states allow schools, counties, and other taxing entities the choice of opting in or out of sharing their tax increments for any particular redevelopment or economic development plan.[110]

The concern, however, with giving other entities power over a municipality's ability to enter TIF agreements is that instead of making the process fairer, they might abuse their power to achieve their own ends.[111] It is easy to imagine how involving schools and counties would muddy the waters and bring the already complex TIF process to a complete standstill.

It would significantly undermine TIF to force municipalities to pay their share of the school and county budgets based on the value of a TIF district because doing so would leave very little money. School budgets are almost universally the biggest portion of any municipality's expenditures and would eat up a large chunk of the revenue that a TIF district generates, which in turn would lessen the ability of the

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[110] George Lefcoe, Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing, 43 URB. LAW. 427, 464-65 (2011).

[111] *Id.* at 465-66.

municipality to obtain debt financing or undertake large infrastructure projects. Without severely undercutting TIF programs, it is nearly impossible to completely mitigate the impact that such programs have outside the granting municipality.

Because of this inherent subsidization, the better solution is to limit the parameters of properties that can qualify for TIF. If TIF districts met the but-for test (but for the subsidization there would be no new development) and had to show actual economic benefits (e.g., new jobs, increased tourism, etc.), the inherent subsidization would be a much easier pill to swallow for the surrounding towns. As it is, however, TIF districts are often used in greenfield development for new businesses or expansion of existing businesses—often in communities where such development would have occurred anyway even without the incentive. Without making the process much more complicated, municipalities have little incentive to consider the impact of a TIF arrangement on surrounding communities and should therefore be more limited in their use. By forcing companies to satisfy the but-for test and meet certain requirements (discussed below), there is a much greater likelihood a TIF arrangement will actually benefit an entire region as its proponents claim.[112]

D. Leveraging TIF to Achieve Specific Goals

In the fall of 2016 the Portland City Council approved a twelve year TIF for an expansion of the biotechnology firm ImmuCell.[113] The chairman of the Economic Development Committee "said the tax break was the only incentive [Portland] could offer to keep the company in Maine. Most of its business is in the Midwest."[114] Mayor Ethan Strimling opposed the TIF because he "didn't think that ImmuCell truly needed the public funds to move forward with the project."[115] Before he voted to deny the TIF,

> Strimling made a last-minute attempt . . . to set conditions on the agreement that would have imposed new rules for building contractors [working on the ImmuCell expansion] . . . . The new rules would have required that 25 percent of the work hours be performed by Portland residents and another 25 percent by ethnic minorities, women, veterans and disabled, economically disadvantaged or LGBT workers. They would also have required that all workers be paid wages and benefits which meet or exceed the Maine Department of Labor's "prevailing wage" rates for their professions and that contractors participate in a state- or federally-approved apprenticeship program for all relevant trades.[116]

Although Strimling failed to get the conditions he wanted, his idea of putting certain conditions on the use of TIF is an idea that other municipalities can and should emulate. It is an option that falls under the old adage, "if you can't beat them, join them." Of course, as the largest city in Maine, Portland enjoys both better

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[112] Hamilton & Porter, *supra* note 83.

[113] Randy Billings, *Portland Approves $375,000 Tax Break for ImmuCell Expansion*, PORTLAND PRESS HERALD (September 19, 2016), http://www.pressherald.com/2016/09/19/portland-approves-375000-tax-break-for-immucell [https://perma.cc/T5A3-95Q7].

[114] *Id.*

[115] *Id.*

[116] *Id.*

bargaining power and more resources to negotiate TIF conditions than a small rural town like Littleton. It might make sense, therefore, to include certain criteria within the TIF statutes as conditions for all future TIF arrangements. Such criteria could focus first on ensuring that any development uses local labor and builds in an environmentally responsible way. It could also require an actual showing (not merely an estimation) by the benefiting company that the development has added and maintained a certain amount of new jobs (a formula could be developed that requires a certain amount of jobs for different levels of reimbursement).

In 1998, Breslow found when analyzing economic development programs that programs with specific employment performance standards "had much better results in terms of employment and cost per job [added] than the . . . programs without standards [like TIF]."[117] The programs with standards "require that in order to receive funds a company must be hiring new workers, or show that training is needed in order to retain workers."[118] The data showed that the program with the weakest standards had the highest cost per job added of all of the programs with standards, which suggests a correlation.[119]

The Bureau of Labor Education had the following recommendation for economic development programs like TIF:

> The state needs to develop and implement additional mechanisms to ensure corporate accountability. These mechanisms must be effective and enforceable. Rather than simply hoping that our public resources will be used wisely and effectively, every business receiving a corporate tax incentive or any other economic development resources from the state should be required to account for how those resources were used, and how many permanent quality jobs were created, at appropriate levels of pay and benefits. If a company does not follow through on its promises or obligations, and instead uses public resources to lay off workers or reduce its employment, it should return any development incentives or tax breaks back to the state coffers.[120]

Such conditions, if made a statutory requirement, are an obvious solution to the dilemma of trying to measure the success of TIF districts in creating and maintaining employment opportunities for Mainers. Rather than argue in the abstract, by setting measurable conditions it will be easy for any municipality, large or small, to hold TIF-benefiting companies accountable. By creating a mechanism whereby companies would either be forced to return money or no longer qualify to receive TIF money if they significantly reduce their workforce, it would incentivize companies to maintain jobs.

Although companies are likely to oppose such restrictions and conditions on the use of TIF, the addition of employment standards would recognize the partnership element of credit enhancement TIF arrangements. The standards reallocate some of the risk that was previously almost entirely on the TIF-granting municipality onto the benefiting private business and give the municipality at least some say in how their investment is used. The administrative costs of ensuring

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117 Breslow, *supra* note 101, at 8.
118 *Id.*
119 *Id.*
120 Bureau of Labor Education, *supra* note 103, at 6.

compliance with the conditions would be relatively low because the state already has mechanisms in place that track jobs (e.g., state income taxes).

To further recognize the business partner-like relationship between municipalities and the businesses in TIF districts, there should be strict reporting requirements for the information from TIF projects that should be readily available to anyone. For an area of municipal law that has such a large impact on both local and state budgets, TIF is not well understood by the general public and this issue is exacerbated by the dearth of readily accessible information about (a) which companies receive TIF benefits and (b) how much those benefits are. A new TIF arrangement may make the news when it is first discussed and approved, but if it lasts thirty years it will likely fall off the radar of anyone who does not work in city hall. Residents of municipalities should be able to easily track how much value is captured by TIF districts in their community and how that money is spent (particularly if it is spent on reimbursements to developers). A well-informed public, armed with the knowledge that a local business has a thirty-year TIF agreement that reimburses most of the tax amount back to that business, will be a good watchdog for any actions that could be viewed as the business taking advantage of the TIF funds it receives (e.g., laying off workers). The court of public opinion is a strong tool in and of itself.

E. What Smaller Towns can do Right Now

Changing Maine's TIF laws will not be a fast process if it happens at all. Even if some of the suggested reforms are adopted, smaller, more rural Maine towns will continue to face challenges that are different from those faced by urban areas like Portland. Towns like Littleton will always have to account for disparate bargaining power and limited resources when deciding whether to create a TIF district, but that is not to say they are completely powerless. This section will discuss steps and suggestions that any municipality can follow to better use TIF as it exists today.

The first thing any municipality should do is to create and adopt a TIF policy. Ideally this policy would exist before any TIF districts are created, but at any juncture in the process, whether a town is anticipating its first TIF district or creating its twentieth district, it is worth taking a serious look at how to best utilize TIF within a community. Even communities that do not expect to utilize TIF should preemptively examine their positions so they are not caught off guard when a business approaches them with a proposal. Things to include in the plan are the town's overall economic development goals, whether the town will deal with individualized TIF districts, and what percentage (if any) the town is willing to reimburse to businesses to offset development costs.

Portland made significant revisions to its TIF policy in 2013, which resulted in a policy that:

> [P]laces a greater emphasis on neighborhood-wide redevelopment zones, meaning the city would invest that money on area infrastructure improvements, such as roadways, sidewalks and utilities. The city could still grant property-specific TIFs, but there would be limits. Developers would be allowed to get back a maximum of

> 65 percent of property taxes from new development over 20 years.[121]

While small towns may not be able to create a TIF policy as comprehensive as Portland's, creating a policy that addresses the big issues discussed above would at the very least serve as a framework through which to build a better TIF district should the issue arise.

Maine municipalities should also consider the various ways they might leverage a TIF agreement to achieve specific goals such as job growth. The conditions to ask for will depend on a variety of factors, but even conditions like using local labor to construct new buildings within a TIF district are small concessions on the business's part that will have concrete benefits in the local community. Further, if a business wants a long term TIF arrangement that results in a lot of the captured value being reimbursed to it, it is worth trying at least to condition the TIF on a certain level of new jobs and/or continued employment opportunities. If a business is particularly motivated, it may be worth including a claw back provision which would require a company that has not met its end of the bargain to pay back the money it has received through the arrangement.

Of course, a municipality's ability to set conditions on TIF arrangements is significantly limited by the fierce competition between towns for new development. One non-legislative way to combat this competition is to create binding regional pacts that establish a TIF policy for a whole region. For example, if eight towns within a particular region got together and agreed to only accept TIF arrangements that met certain criteria, it would increase their ability to bargain with businesses similar to BigMart that want to locate in a general area, but are willing to shop around for the best TIF arrangement. Because such an agreement might encourage some towns to hold out and offer more favorable terms, it will be incumbent upon the sponsoring towns to clearly explain the benefits of increased bargaining power and the pitfalls of overly generous TIF arrangements.

Finally, municipalities should be wary of situations, similar to what Portland faced with ImmuCell, where an existing business explicitly or implicitly threatens to leave a municipality if a favorable TIF arrangement is not reached. While there may be legitimate reasons to help an existing business with an expansion, municipalities should carefully verify that the business actually needs the money that would be reimbursed and is not simply using TIF to strategically lower the costs of an expansion that would have occurred anyway. If such a business is unwilling to cooperate in reaching a mutually beneficial agreement, the municipality should walk away from the negotiating table.

VI. CONCLUSION

The criticisms of TIF and the struggles Maine municipalities face when using it and other economic development incentives are part of a larger debate about the role

[121] Randy Billings, *City Council Bans Smoking in Portland Parks*, PORTLAND PRESS HERALD (Feb. 5, 2013), http://www.pressherald.com/2013/02/05/council-bans-smoking-in-portland-parks_2013-02-05/ [https://perma.cc/LUZ5-YPV2]. Interestingly, City Council did not follow this policy when approving the ImmuCell expansion three years later. Billings, *supra* note 113. It approved a project-specific TIF which was strongly discouraged by the policy. *Id.*

that government should play in subsidizing private development. When General Motors experienced an existential crisis during the 2008 recession, the *New York Times* noted:

> In the end, the money that towns across America gave General Motors did not matter. When the automaker released a list of factories it was closing during bankruptcy . . . , communities that had considered themselves G.M.'s business partners were among the targets. For years, mayors and governors anxious about local jobs had agreed to G.M.'s demands for cash rewards, free buildings, worker training and lucrative tax breaks. As late as 2007, the company was telling local officials that these sorts of incentives would "further G.M.'s strong relationship" with them and be a "win/win situation," according to town council notes from one Michigan community. Yet at least 50 properties on the 2009 liquidation list were in towns and states that had awarded incentives, adding up to billions in taxpayer dollars . . . .[122]

Businesses, the *Times* said, have expertly capitalized on Americans' economic fears:

> A portrait arises of mayors and governors who are desperate to create jobs, outmatched by multinational corporations and short on tools to fact-check what companies tell them. Many of the officials said they feared that companies would move jobs overseas if they did not get subsidies in the United States. Over the years, corporations have increasingly exploited that fear, creating a high-stakes bazaar where they pit local officials against one another to get the most lucrative packages. States compete with other states, cities compete with surrounding suburbs, and even small towns have entered the race with the goal of defeating their neighbors. While some jobs have certainly migrated overseas, many companies receiving incentives were not considering leaving the country, according to interviews and incentive data.[123]

Maine, both at the municipal and state levels, should seek to avoid being played for a fool when doling out economic development programs like TIF. It can do this by setting mandatory standards and limiting spending to things such as infrastructure and education, which have more universal benefits than rebates to private developers. Incentives that target specific businesses risk falling into the buzzword category of "crony capitalism" and raise questions of whether it is fair for the state to subsidize some businesses, but not others. Any substantial economic development reform should account for the aforementioned problems and avoid setting off races to give away tax dollars for questionable returns.

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[122] Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price*, N.Y. TIMES (Dec. 1, 2012), http://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html?pagewanted=print [https://perma.cc/VVV8-UFVT].

[123] *Id.*