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BLIGHTING THE WAY: URBAN RENEWAL, ECONOMIC DEVELOPMENT, AND THE ELUSIVE DEFINITION OF BLIGHT

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What is "blight"? Over half a century of federal and state urban renewal policy, and a slightly shorter history of local economic development policies, revolve around this question. These policies, ranging from the first stabs at federally-funded urban renewal in the 1940s[1] to the contemporary fascination of local and state governments with tax increment financing ("TIF"),[2] all involve, to some degree, public financing of private economic development or property transactions.[3] In effect, such policies extend the public credit and the public power of eminent domain to private interests—a combination that has often incurred the opposition of both taxpayers and property owners displaced by urban renewal or redevelopment.[4] The legal and political justification for such policies, as a result, leans heavily on an overarching public purpose: the elimination or prevention of blight.[5] But "blight" is rarely defined with any precision in such statutes, and the courts have granted local interests almost *carte blanche* in their creative search for

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1. *See* Jonathan M. Purver, Annotation, *What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes*, 45 A.L.R.3d 1096, § 2(a) (1972) (noting that "[t]he Housing Act of 1949 extended the scope of previous acts so as to permit a state unit, with federal assistance, to go beyond the establishment of low-rent projects and engage in broader urban development purposes").

2. Like most forms of property tax abatement, TIFs are enabled by state legislation and employed largely by local governments. A TIF freezes the assessed valuation of a redevelopment parcel for a specified period (in some states as long as 23 years). *See* NEIGHBORHOOD CAPITAL BUDGET GROUP, WHO PAYS FOR THE ONLY GAME IN TOWN? 3 (2002), [hereinafter NCBG, WHO PAYS] *available at* http://www.ncbg.org/tifs/game.htm. Conventional property taxes are levied on this pre-development valuation. *Id.* at 30. But taxes on the increase in property value (the "increment") accrue to a special fund, and are used to cover various costs of the redevelopment—including infrastructure and land acquisition. *See id.* at 32.

3. *See* Julie A. Goshorn, *In a TIF: Why Missouri Needs a Tax Increment Financing Reform*, 77 WASH. U. L.Q. 919, 922-26 (1999).

4. *See* Catherine Michel, *Brother, Can You Spare a Dime: Tax Increment Financing in Indiana*, 71 IND. L.J. 457, 463 (1996) (noting that a municipality's eminent domain power is an important component of redevelopment).

5. *See* Goshorn, *supra* note 3, at 919.

"blighted" areas eligible for federal funds or local tax breaks.[6] This political and statutory confusion is rooted in a long history of local anxiety surrounding inner city housing,[7] "slum clearance,"[8] and the fate of the central business district.[9] A blighted area, as a Philadelphia planner proposed cryptically in 1918, "is a district which is not what it should be,"[10] and it is woven through recent history, economic development and urban redevelopment policies.[11] The goals of such policies have always been to eradicate blight; however, as one California state legislator lamented in 1995, "Somewhere along the way . . . defining blight became an art form."[12]

A few examples underscore the problem. In affluent Coronado, California, local officials declared the entire town blighted in 1985.[13] The resulting TIF zone diverted property tax revenues from the local schools, making the district eligible for supplemental school funding from the state.[14] The city then used the revenues from the TIF to pay for school improvements.[15] In the St. Louis

6. *See id.* at 922-23 (noting that TIF statutes are "broadly-worded" and therefore allow many projects to fall under the definition of blight).

7. *See* Purver, *supra* note 1, § 2(a) (noting that the President's Advisory Committee in 1953 stated that blighted areas create insolvency, crime, fire, disease and delinquency).

8. *See id.*

9. *See id.* (noting that blighted areas are economic liabilities that impair the growth of towns and cities).

10. ROBERT FOGELSON, DOWNTOWN: ITS RISE AND FALL, 1880-1950, at 348 (2001) (quoting William A. Stanton, *Blighted Districts in Philadelphia*, Proceeding of the Tenth Nat'l Conference on City Planning 76 (1918)).

11. *E.g.*, *infra* notes 13-19 and accompanying text (explaining how blight designations are used in an array of broadly defined circumstances, to effectively subsidize suburban improvement projects in areas that may be under-performing economically, but are not blighted in the original sense and are not designed to service low-income interests).

12. Letter from Phillip Isenberg, Assemblyman, Ninth District, Cal. Legislature, to Hon. Tom Campbell, Chair, Cal. S. Hous. & Land Use Comm., and Hon. Charles Calderon, Chair, Cal. S. Select Comm. on Redevelopment (Dec. 13, 1995), *reprinted in Redevelopment and Blight: Joint Interim Hearing Before the Senate Comm. on Hous. & Land Use & Senate Select Comm. on Redevelopment*, 1995-1996 Leg., Reg. Sess. 831-S (Cal. 1995) (available in appendix of Written Materials Submitted to the Committees).

13. Peter Detwiler & John Dale, *Redevelopment and Blight: A Background Staff Paper for the Joint Interim Hearing, in Redevelopment and Blight: Joint Interim Hearing Before the Senate Comm. on Hous. & Land Use & Senate Select Comm. on Redevelopment*, 1995-1996 Leg., Reg. Sess. 831-S, at 11 (Cal. 1995) ("In November 1985, the City of Coronado adopted a redevelopment plan for the entire city. All property, except the land owned by the state and federal governments, was declared blighted for purposes of redevelopment.").

14. *See* George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 999 (2001).

15. *See* Detwiler & Dale, supra note 13, at 11-12.

suburb of Des Peres, local officials declared a thriving shopping mall "blighted" in 1997 because it "was too small and had too few anchor stores," and more specifically, because it didn't have a Nordstrom's.[16] The blight designation paved the way for a $ 30 million TIF deal that was used to attract the upscale retailer and other new tenants.[17] In Lancaster, California, local developers used a blight designation and the accompanying tax subsidies to develop a new mall in the mid-1980's around "anchor" stores including Costco, Wal-Mart, and 99 Cents.[18] When Costco threatened to relocate in 1998, Lancaster officials relying on the old "blight" designation moved to acquire the 99 Cents property through eminent domain—with the intention of giving it to Costco outright, a tack which the courts, in a rare check on local blighting, condemned as "nothing more than the desire to achieve the naked transfer of property from one private party to another . . . to satisfy the private expansion demands of Costco."[19]

Clearly "blight" has lost any substantive meaning as either a description of urban conditions or a target for public policy. Blight is less an objective condition than it is a legal pretext for various forms of commercial tax abatement that, in most settings, divert money from schools and county-funded social services.[20] Redevelopment policies originally intended to address unsafe or insufficient urban housing are now more routinely employed to subsidize the building of suburban shopping malls.[21] And such policies (especially state TIF programs) not only ignore the ongoing urban cri-

16. *See* Josh Reinert, *Tax Increment Financing in Missouri: Is it Time for Blight and But-For to Go?*, 45 ST. LOUIS U. L.J. 1019, 1019-21 (2001).

17. *See* JG St. Louis W. Ltd. Liab. Co. v. Des Peres, 41 S.W.3d 513, 516-17 (Mo. Ct. App. 2001); Reinert, *supra* note 16, at 1045-46; Dan Mihalopoulos, *West County Mall Wins Initial Backing; Panel Agrees Center is Blighted, Needs Subsidy*, ST. LOUIS POST-DISPATCH, Nov. 21, 1997, at C1 [hereinafter Mihalopoulos, *West County Mall Wins Initial Backing*]; Dan Mihalopoulos, *Developers Make Pitch for Tax Breaks in West County Mall Project; 200 Turn Out to Hear Pros and Cons of Allowing $30 Million in Subsidies*, ST. LOUIS POST-DISPATCH, Nov. 14, 1997, at C9.

18. 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1125 (C.D. Cal. 2001).

19. *Id.* at 1129.

20. *See* Lefcoe, *supra* note 14, at 998-1002 (finding that states and counties are the primary TIF losers).

21. *E.g.*, *supra* notes 16-19 and accompanying text (providing examples of abuses of the intended purposes of redevelopment policies).

sis, but by subsidizing sprawl, routinely contribute to blight in the cities under the pretext of fighting it in the suburbs.[22]

I. FIGHTING BLIGHT: THE LEGAL AND LEGISLATIVE BACKGROUND

The modern statutory definition of blight is rooted in our first urban crisis, the Progressive-era response to the urbanization and industrialization in the late nineteenth and early twentieth century.[23] Lamentable urban conditions, captured in the investigations of Jacob Riis and others,[24] included the encroachment of commercial or industrial properties on residential neighborhoods, the inadequacy of basic public services, and the threat of moral decay, fire, and disease posed by tenement housing of urban working families.[25] Cities, in the environmental determinism of urban reformers, had become "nurseries of crime, and of the vices and disorderly courses which lead to crime . . . perpetrated by individuals who have either lost connection with home life, or never had any, or whose homes had ceased to be sufficiently separate, decent, and desirable to afford what are regarded as ordinary wholesome influences of home and family."[26] Tenements, and substandard urban housing more generally, were considered "standing menaces to the family, to morality, to the public health, and to civic integrity."[27]

The political response to such conditions ranged widely, and included urban beautification campaigns,[28] the "model tenement" movement,[29]"managerial" reform of urban governance,[30] early efforts at urban planning and zoning,[31] and prohibition.[32] But, de-

22. *See* Goshorn, *supra* note 3, at 921-22 (describing how TIF statutes have been used to change thriving neighborhoods into busting commercial centers and create projects adverse to TIF's true redevelopment purpose).

23. *See* Purver, *supra* note 1, § 1(a).

24. FOGELSON, *supra* note 10, at 320.

25. *See* JACOB RIIS, HOW THE OTHER HALF LIVES 2-3 (Hill and Wang 1957) (1890).

26. *Id.* at 1-2 (quoting 1863 testimony of a New York prison official).

27. FOGELSON, *supra* note 10, at 323 (quoting E.R.L. Gould, *The Housing Problem*, MUN. AFFAIRS, Mar. 1899, at 109).

28. *See id.* at 338.

29. *See id.* at 326-29.

30. *See id.* at 340 (discussing how the Housing Act of 1937 was needed to clear slums and build new housing).

31. *See id.* at 160-66.

32. *See id.* at 355-56 (explaining that city planners would make sure that cleared sites were not reused in inappropriate ways—one of the principal causes of blight—but were instead put to the "best and highest use").

spite the progress of home rule in many states, municipal powers to regulate or rehabilitate urban blight were quite limited.[33] In part, this reflected political and fiscal constraints.[34] Reformers increasingly understood "blight" as a condition of entire blocks or neighborhoods,[35] but cities lacked the capacity to do much more than fine the occasional landlord or raze the occasional building.[36] And in part, this reflected legal constraints on the local regulation of private property.[37] Indeed, the only substantial legal footing for urban reform was the "police power" to safeguard the general welfare.[38] For this reason, local efforts to address urban conditions leaned heavily on the threats to health or safety or moral order that animated local police powers.[39] While efforts to eradicate blighted conditions were limited to land zoning and the authority of health departments and fire marshals, early definitions of "blight" did begin to crop up in local health and safety codes.[40]

Political attention returned to urban conditions during the Great Depression, accompanied by the efforts of local, state, and federal officials to refine the definition of urban blight.[41] Not surprisingly, such definitions drew largely on Progressive-era police powers.[42] At a 1930 Housing Conference, the Hoover Administration defined "a slum" as "a residential area where the houses and conditions of life are of such a squalid and wretched character and which hence has become a social liability to the community."[43] In 1937,

33. *See id.* at 328-29.
34. *See id.* at 332.
35. *See id.*
36. *See id.* at 331-33.
37. *See id.* at 332.
38. *See id.*
39. *See* Keith D. Revell, *The Road to Euclid v. Ambler: City Planning, State-Building, and the Changing Scope of the Police Power*, 13 STUDIES IN AM. POLITICAL DEV. 50, 51 (1999).
40. *See* FOGELSON, *supra* note 10, at 328-29 (noting that during the low-income housing movement of the early 1900s, the New York State Board of Housing made it illegal for a landlord "to maintain a tenement house in such a condition as to continually menace the health and safety of its occupants").
41. *See, e.g.*, MABEL WALKER, URBAN BLIGHT AND SLUMS 5 (1938) (defining a blighted area as "[a]n area in which deteriorating forces have obviously reduced economic and social values to such a degree that widespread rehabilitation is necessary to forestall the development of an actual slum condition); *see also* FOGELSON, *supra* note 10, at 354-58 (explaining that officials sought to reframe the characterization of blight so as to allow slum areas to be put to their "best and highest use," rather than to be slated solely for new and improved low-income housing).
42. *See* Revell, *supra* note 39, at 51.
43. WALKER, *supra* note 41, at 1 (quoting PRESIDENT'S CONFERENCE ON HOME BLDG. & HOME OWNERSHIP, REPORT OF THE COMM. ON BLIGHTED AREAS & SLUMS 1 (1931) [hereinafter PRESIDENT'S CONFERENCE, BLIGHTED AREAS & SLUMS]).

the National Association of Housing Officials defined a slum, in language echoed in the second National Housing Act later that year,[44] as "an area in which predominate dwellings that either because of dilapidation, obsolescence, overcrowding, poor arrangement or design, lack of ventilation, light or sanitary facilities, or a combination of these factors, are detrimental to the safety, health, morals, and comfort of the inhabitants thereof."[45] Blight was defined more broadly, because most viewed it not as synonymous with "slum," but as a set of conditions often analogized as a disease or a cancer, which resulted in slums.[46] At the 1930 Hoover Conference, blight was singled out as an "economic liability" whose demands upon the public purse outstripped its tax revenues.[47] "Structures become shabby and obsolete," as one observer wrote in 1938, "[t]he entire district takes on a down-at-the-heel appearance. The exodus of the more prosperous groups is accelerated. Rents fall. Poorer classes move in. The poverty of the tenants contributes further to the general air of shabbiness. The realty owner becomes less and less inclined or able to make repairs."[48]

Such efforts to define blight reflected not only the renewed urban crisis of the 1930s, but also the conviction, especially in the later New Deal, that urban conditions deserved federal and state political attention.[49] New York in 1926 and New Jersey in 1929, led the way with laws granting eminent domain to private developers in exchange for rent controls and other regulatory conditions, but could not overcome the pervasive obstacles to redevelopment: private interests had no incentive to facilitate public policy, and public interests had no money to acquire or assemble private property.[50] The National Housing Act of 1937 established a system of loans and grants-in-aid to local public housing authorities.[51] As a compromise between real estate interests and housing advocates, the 1937 law made federal funds available for the construction of low-income housing, but also required the clearance of an equal num-

44. *Id.* at 2 (quoting United States Housing Act, 42 U.S.C. § 1404 (1937)).

45. *Id.* at 1 (citing NAT'L ASS'N OF HOUS. OFFICIALS, HOUSING OFFICIALS YEARBOOK, 1936, at 243).

46. *See id.* at 4-5 (discussing several definitions of blighted areas); *see also* FOGELSON, *supra* note 10, at 348-49.

47. FOGELSON, *supra* note 10, at 347-48.

48. WALKER, *supra* note 41, at 17.

49. FOGELSON, *supra* note 10, at 334-35, 370-80.

50. *See id.* at 337-38.

51. *Id.* at 340.

ber of "blighted" properties.[52] Refined in 1941, the National Housing Act pressed state governments to pass enabling legislation—usually taking the form of sweeping urban redevelopment laws—under which municipalities could apply for federal funds.[53] New York in 1941 was the first to follow the federal lead,[54] and others followed as depression conditions were displaced by an equally troubling war-era housing shortage.[55] By 1947, about half of the states had passed urban redevelopment laws that created quasi-public redevelopment corporations and endowed them with the power of eminent domain to clear and prepare "blighted areas" for redevelopment by private interests.[56]

These redevelopment corporations were largely inactive until 1949, when a new Federal Housing Act made federal funds available for the redevelopment of large areas rather than merely the removal of discrete slum conditions.[57] Under the new law, local redevelopment corporations could buy and clear blighted areas with federal money, sell the land to private developers, and use the proceeds to cover the redevelopment costs.[58] This expansive delegation of eminent domain did not go unchallenged, especially by private interests threatened or displaced by urban redevelopment plans.[59] But state and federal courts persistently held that the broad public purpose of redevelopment over-rode the claims of individual property owners, and that resale of cleared properties to

52. GAIL RADFORD, MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA 189-90 (1996).

53. *See* 12 U.S.C. §§ 1702 et seq. (1937) (amended 1941); FOGELSON, *supra* note 10, at 364-66.

54. Jeff Chapman, *Tax Increment Financing and Fiscal Stress: The California Genesis*, *in* TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES AND IMPACT 113, 114 (Craig L. Johnson & Joyce Y. Man eds., 2001); *see* FOGELSON, *supra* note 10, at 364-66 (indicating that New York led the way in abolishing regulations banning insurance companies and other fiduciary institutions from investing in redevelopment projects).

55. *Id.* at 364-65.

56. DAVID F. BEATTY ET AL., REDEVELOPMENT IN CALIFORNIA 2-3 (1st ed. 1991); *see also* Chapman, *supra* note 54, at 114 (noting that "[i]n 1945, California was the first state to enact a Community Redevelopment Act that gave cities and counties the ability to establish redevelopment agencies" and that "[o]ther states followed California's lead").

57. FOGELSON, *supra* note 10, at 378.

58. *Id.* at 376-77; *see also* BEATTY ET AL., *supra* note 56, at 4; DANIEL R. MANDLEKER ET AL., REVIVING CITIES WITH TAX ABATEMENT 2-3 (1980).

59. BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 49-56 (1989).

private developers amounted to an appropriate public use.[60] As a Missouri court concluded in dismissing an "equal protection" challenge to that state's redevelopment law, "Any benefits to private individuals are merely incidental to the public purpose";[61] "[t]he public purpose. . .is accomplished when the blight is cleared and the area redeveloped, and it is to [the redevelopment corporation] and . . . the lessee that the city looks for accomplishment of that purpose."[62]

Federal law deferred the definition and determination of "blighted areas" to the state governments that enabled the redevelopment corporations and the local governments that administered them.[63] Most states, in fact, stopped short of defining blight and instead offered a descriptive catalogue of blighted conditions—often pasted *verbatim* from Progressive-era health or safety statutes.[64] In Missouri, for example, a blighted area was one in which:

> by reason of the predominance of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.[65]

In New Jersey, blight was defined as any one of a number of conditions, including buildings which were "substandard, unsafe, insanitary [sic], dilapidated, or obsolescent," discontinued industrial uses, unimproved vacant land "not likely to be developed through the instrumentality of private capital," and "lack of proper utilization."[66] In California, a blighted area was characterized

> by the existence of buildings and structures . . . which are unfit or unsafe to occupy for such purposes and are conducive to ill

60. *See* Berman v. Parker, 348 U.S. 26, 32-34 (1954); Land Clearance for Redevelopment Auth. of St. Louis v. St. Louis, 270 S.W.2d 58, 64 (Mo. 1954); Wilson v. Long Branch, 142 A.2d 837, 842-43 (N.J. 1958); *see also* Lefcoe, *supra* note 14, at 992-94.

61. Annbar Assoc. v. W. Side Redevelopment Corp., 397 S.W.2d 635, 643, 646 (Mo. 1965) (citing State v. Land Clearance Redevelopment Auth. of Kansas City, 270 S.W.2d 44, 53 (Mo. 1954)) (emphasis omitted).

62. *Id.* at 651.

63. *See* FOGELSON, *supra* note 10, at 378.

64. *See* Detwiler & Dale, supra note 13, at 3-5; *see also* Chapman, *supra* note 54, at 115.

65. MO. ANN. STAT. § 99.805 (West 1982) (amended 1986 and 1997).

66. N.J. STAT. ANN. 40:55-21.1 (West 1949) (repealed 1992) (replaced by N.J. STAT. ANN. § 40A:12A-5 (1992) (amended 2003)).

> health, transmission of disease, infant mortality, juvenile delinquency, and crime because of any one or a combination of the following factors: [d]efective design and character of physical construction[; f]aulty interior arrangement and exterior spacing[; h]igh density of population and overcrowding[; i]nadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities[; and a]ge, obsolescence, deterioration, dilapidation, mixed character, or shifting of uses.[67]

While federal urban renewal was replaced in 1974 with the Community Development Block Grant program ("CDBG"),[68]state redevelopment statutes and their Dickensian descriptions of "blight" persisted.[69] More importantly, the blight language was grafted into new laws, including the profusion of TIF laws in the 1970s and 1980s.[70] As a strategy for redevelopment, TIF is an innovative marriage of conventional local property tax abatement and publicly subsidized urban renewal.[71] Under a typical TIF statute, the costs or risks of redevelopment are borne by local government in the form of new infrastructure, land clearance, or construction loans.[72] This debt, which is often bond-financed, is then repaid with the property tax increase, or increment, that follows redevelopment.[73] California pioneered the TIF in 1952 as a way of coming up with matching funds for federal programs when local voters failed to approve local bonds.[74] Only six other states adopted TIF statutes before 1970,[75] but a flurry of circumstances—the end of

67. CAL. HEALTH & SAFETY CODE § 33031 (Deering 1974) (amended 1993).

68. *See* Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK L. REV. 861, 880 (2000); Jon C. Teaford, *Urban Renewal and its Aftermath*, HOUS. POL'Y DEBATE, Vol. 11, Issue 2, at 443, 459 (2000).

69. *See supra* notes 65-67 and accompanying text.

70. *See* Reinert, *supra* note 16, at 1024-25, 1046-47.

71. *See* NCBG, WHO PAYS, *supra* note 2, at 3; *cf.* MANDLEKER ET AL., *supra* note 58, at 5 (explaining that while TIF has some consequences similar to tax abatement, it cannot be properly characterized as such; property taxes are not actually abated as revenues are diverted to pay off bonds issued to finance redevelopment projects).

72. *See* Goshorn, *supra* note 3, at 927-28 (stating that a municipality typically bonds to pay the cost of the project whether for land clearance or to prepare for the developer).

73. *Id.*

74. *Id.* at 925; *see also* BEATTY ET AL., *supra* note 56, at 6-7; 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, 31 (Craig L. Johnson & Joyce Y. Man eds., 2001).

75. The six states to pass TIFs between 1951 and 1970 were Minnesota, Nevada, Ohio, Oregon, Washington and Wyoming. Johnson & Kriz, *supra* note 74, at 31.

federal urban renewal in 1974,[76] the protracted urban fiscal crisis of the 1970s,[77] and the property tax revolts of the late 1970s[78]—pressed the issue. By 2000, only three states did not have TIFs on the books.[79] TIF statutes echoed and expanded the older statutory definition of blight, typically grafting economic considerations, such as underutilization of land, uneven commercial development and insufficient tax revenues, onto the older "health and welfare" notion of urban blight.[80] The result, as I suggest below, was an almost complete debasement and deregulation of "blight" as a guiding designation for urban renewal and redevelopment.[81]

II. THE USE AND ABUSE OF "BLIGHT"

The pioneers of postwar urban renewal, let alone Jacob Riis and his contemporaries,[82] would be more than a little surprised at the ways in which public money is now dedicated to the cause of eradicating urban blight.[83] Part of the problem lies in the tangle of intergovernmental relations typical of urban public policy.[84] During the heyday of urban renewal, between 1949 and 1974, urban redevelopment corporations were established by state law, administered by local officials who were usually unelected, and funded

76. *See* McFarlane, *supra* note 68, at 880-81; *see also* FRIEDEN & SAGALYN, *supra* note 59, at 153 ("[T]he removal of most federal rules after urban renewal failed in 1974 invited cities to improvise their own ways of managing development.").

77. *See* Joyce Y. Man, *Detriments of the Municipal Decision to Adopt Tax Increment Financing*, *in* TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES AND IMPACT 87, 88 (Craig L. Johnson & Joyce Y. Man eds., 2001).

78. *Id.* at 92-93.

79. As of 2000, only Delaware and North Carolina had not passed TIF laws. Johnson & Kriz, *supra* note 74, at 31. And state courts held West Virginia's 1995 law unconstitutional. Boone County v. Cooke, 475 S.E.2d 483, 494 (W. Va. 1996).

80. *E.g.*, CAL. HEALTH & SAFETY CODE § 33031 (1993); MO. ANN. STAT. § 99.805 (West 1982) (amended 1986 and 1997); N.J. STAT. ANN. § 40A:12A-5 (1992) (amended 2003); *see also* Goshorn, *supra* note 3, at 928-29 (highlighting the expansive definition of "blighted area" in the Missouri statute, provided as an example of a typical TIF statute).

81. Goshorn, *supra* note 3, at 922 (noting that the expansion of the meaning of the word "blighted" leads to the "redevelopment" of areas neither intuitively nor rationally considered "blighted," contrary to the intent of the TIF statute as a tool of last resort); *see also supra* notes 13-19 and accompanying text (providing specific examples of TIF statutes' misuse).

82. *See generally* RIIS, *supra* note 25, *passim* (commenting on the problems of New York slum life to initiate reform).

83. *See infra* notes 86-88 and accompanying text.

84. *See infra* notes 85-88 and accompanying text; *see also* Chapman, *supra* note 54, at 114-15 (noting that although the states had the authority to regulate land use, the restrictions associated with federal money shaped the programs).

largely with federal money.[85] In more recent decades, state redevelopment statutes have been joined by a patchwork of state TIF laws; development is initiated by a combination of local officials, redevelopment corporations, and private developers; local projects are often effectively funded by other local tax entities, such as school districts and counties; and federal money and standards have largely evaporated.[86] Local governments, under cover of vague state laws and beguiled by the prospect of capturing federal grants or a larger tax base, have every incentive to define blight expansively.[87] And they have done so successfully, either by offering imaginative interpretations of older blight definitions, or by taking advantage of a more recent deregulation of those definitions.[88]

A. From Housing to Economic Development

Through the first half of the twentieth century, blight was understood as a condition of substandard housing, and "eradicating blight" meant providing decent homes for urban working families.[89] But even amidst the worries about a postwar housing crunch that animated state and federal efforts in the 1940s, urban housing policy was already adrift.[90] Federal urban renewal was compromised by a raft of more generous federal policies, including highway spending, mortgage insurance, and accelerated depreciation for new developments, which subsidized and facilitated suburban flight.[91] Federal housing policy, as we have seen, was already committed to improving the housing stock without increasing it.[92] And, under constant pressure from local and real estate interests, Con-

85. Chapman, *supra* note 54, at 114.

86. *See* Goshorn, *supra* note 3, at 926-28; *see also* Lefcoe, *supra* note 14, at 998-1000.

87. *See* Goshorn, *supra* note 3, at 923 (illustrating that "[m]unicipalities have an incentive to offer large TIF packages to private developers to entice them to build within the particular municipality").

88. *Id.* at 922-23.

89. EDITH ELMER WOOD, FEDERAL EMERGENCY ADMIN. OF PUB. WORKS, HOUSING DIVISION BULLETIN NO. 1: SLUMS AND BLIGHTED AREAS IN THE UNITED STATES 1-16 (1935) (describing substandard housing and the many social ills thought to be associated with such conditions).

90. *See* Chapman, *supra* note 54, at 114.

91. FOGELSON, *supra* note 10, at 317-19 (chronicling the unanticipated flight from the central business district as a result of urban renewal).

92. *See id.* at 340, 344-46 (noting that according to the Housing Act of 1937 "at least one substandard dwelling had to be eliminated for each new dwelling constructed in every project" and evidencing a shift from an intention to provide improved housing to an intention to improve urban areas generally).

gress opened the door for the use of federal funds for non-residential development.[93] While the Federal Housing Act of 1949 defined blighted areas as "predominantly residential," it did not require cities or developers to erect affordable housing on redeveloped districts.[94] And Congress gradually amended the "residential threshold," allowing up to ten percent of federal funds to be spent on commercial development in 1954, and increasing this percentage to thirty-five in 1965.[95]

As importantly, urban redevelopment policy was increasingly distracted by the concerns of realtors, developers, and business leaders representing the central business district ("CBD").[96] Between the wars, business interests had been wary of urban policy, especially given the threats to private interests posed by eminent domain and public housing.[97] Increasingly however, urban business leaders saw urban redevelopment as a means of loosening the "dirty collar" of substandard housing that encircled most central business districts.[98] These interests, however, had little patience with redevelopment plans that proposed to repopulate cleared slums with working families who neither shopped nor worked in the CBD.[99] Instead, slum clearance would pave the way for CBD expansion or higher-end housing.[100] At the same time, state and local politicians were leery of the costs of urban redevelopment and eager to reap its benefits.[101] Accordingly, they tended to agree with CBD leaders that low-income and middle-income housing did not match the immense acquisition costs or economic potential of urban redevelopment.[102] At the intersection of these private and

93. *See id.* at 355 (arguing that low income housing in the slums and blighted areas adjacent to the central business district was not necessarily the "best and highest" use of the land and suggesting alternative uses such as commerce, industry, parks, playgrounds, parking lots or garages).

94. *Id.* at 378; *see also* Teaford, *supra* note 68, at 444.

95. BEATTY ET AL., *supra* note 56, at 4; *see* Teaford, *supra* note 68, at 444-45.

96. *See* FOGELSON, *supra* note 10, at 342-43 (discussing concerns on the part of downtown business interests related to the unexpected effects of decentralization).

97. *See id.* at 337-39 (recounting the conflict between New York real estate and business interests and the nation's leading housing reformers, which resulted in the grant of the power of eminent domain by the city to private redevelopment companies for the purpose of slum clearance and low-income housing).

98. *See id.* at 344-45.

99. *See id.* at 345, 353-58.

100. *See id.* at 345-46, 353-58.

101. *See id.* at 346-50 (describing how central business district interests were able to encourage an expansive definition of blight in pursuit of urban renewal, sapping focus on and interest in improved low-cost housing).

102. *Id.* at 346-50, 353-58.

public anxieties, urban redevelopment policies took a decisive turn.[103] Slums were to be cleared not for better housing, but for a more abstract faith in local economic development and growth.[104] Targeted areas were identified less by demonstrable need than by the willingness of private interests to invest in redevelopment.[105] Redevelopment, in turn, rested on an increasingly elastic definition of "blight" that put the health of the CBD at the top of the urban agenda.[106]

Under state law, the drift from residential to commercial redevelopment was even more pronounced.[107] Most state laws echoed the federal presumption that blight and its rehabilitation were "predominantly residential" concerns, but also offered other pretexts for redevelopment.[108] New Jersey's 1949 Blighted Areas Act, for example, included in its expansive blight definition not only "substandard, unsafe, insanitary [sic], dilapidated, or obsolescent" buildings, but also "discontinued industrial uses," unimproved vacant land "not likely to be developed through the instrumentality of private capital," and "lack of proper utilization."[109] Indeed, the attention and resources of local redevelopment corporations, with the blessing of state courts, were increasingly devoted to office buildings and hotels and shopping malls.[110] As redevelopment plans were challenged, particularly by displaced commercial interests, the courts consistently held that urban redevelopment was "not solely to provide for slum clearance" and that designations of

103. *Infra* notes 104-106 and accompanying text.

104. *See* FOGELSON, *supra* note 10, at 355-56; *see also* FRIEDEN & SAGALYN, *supra* note 59, at 29-30 (noting the adverse effects of such policies on inner-city minority groups).

105. *See* MANDLEKER ET AL., *supra* note 58, at 4 (discussing the role of private interests in TIF financed redevelopment).

106. FOGELSON, *supra* note 10, at 345-50.

107. *See infra* notes 108-111 and accompanying text.

108. *See, e.g.*, Levin v. Bridgewater, 274 A.2d 1, 4 (N.J. 1971) (explaining that while the federal Housing Act of 1949 required that such land be redeveloped for "predominantly residential uses," subsequent amendments have provided that local governments can redevelop areas for nonresidential uses if they determine the use to be "necessary and appropriate to facilitate the growth of the community").

109. N.J. STAT. ANN. 40:55-21.1 (West 1949) (repealed 1992) (replaced by N.J. STAT. ANN. § 40A:12A-5 (1992) (amended 2003)); *see also* Wilson v. Long Branch, 142 A.2d 837, 842 (N.J. 1958).

110. *E.g.*, Michel, *supra* note 4, at 457, 462-63 (providing examples of the types of controversial development projects financed via TIF schemes in Indiana and explaining that the courts acquiesced and validated such uses by adopting a broad definition of blight).

blight were appropriate even if *no portion* of the redevelopment zone could reasonably be considered "a slum."[111]

Non-residential definitions of blight, and local discretion in interpreting them, exploded with the collapse of federal urban renewal in 1974 and the profusion of state TIF laws.[112] Local officials in St. Louis, for example, admitted in 1975 that the deterioration of non-residential property could not be shoehorned into the old police power definition of blight conditions as those conducive to ill health, transmission of disease, or crime.[113] But they did not hesitate to expand that definition to include any condition "conducive to the inability to pay reasonable taxes."[114] Most TIF laws added "economic development" clauses, essentially allowing local governments to add slow economic growth or the threat of future economic decline to their working definitions of blight.[115] In Missouri, for example, the 1982 TIF statute recommends the use of TIFs to "discourage commerce, industry or manufacturing from moving their operations to another state," "result in increased employment," or "result in the preservation or enhancement of the tax base of the municipality."[116] In Alaska, a 2002 revision added any "area that is capable of being substantially improved based on the property value" to its TIF-eligible definitions.[117] In Georgia, the TIF statute was amended in 2001 to include any previously developed parcel "in which the current condition of the area is less desirable than the redevelopment of the area."[118] In Virginia, the word "blight" was struck entirely from the state's TIF law in 1990,

111. *See* Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11, 15 (Mo. 1974); *Levin*, 274 A.2d at 19 (N.J. 1971); Cannata v. New York, 182 N.E.2d 395, 397 (N.Y. 1962).

112. *See generally* FRIEDEN & SAGALYN, *supra* note 59, at 153 ("[T]he removal of most federal rules after urban renewal folded in 1974 invited cities to improvise their own ways of managing development.").

113. *See* CITY PLAN COMM'N (St. Louis), BLIGHTING STUDY: AREA BOUNDED BY TWELFTH, CLARK, ELEVENTH, AND WALNUT BOX 9:123 (1969) (*on file* St. Louis Data Collection, W. Historical Manuscripts Collection, Jefferson Library, Univ. of Mo.-St. Louis).

114. *Id.*; MO. REV. STAT. § 353.020(2) (2003) (including "such conditions [as] are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes" in its definition of a blighted area).

115. *See* Goshorn, *supra* note 3, at 929-30.

116. *See id.* at 929; *see also* MO. REV. STAT. § 99.805(3), (5) (1982) (amended 1986, 1991 and 1997).

117. ALASKA STAT. § 29.47.460 (Michie 2003).

118. GA. CODE ANN. § 36-44-3(7)(F) (2002).

expanding the law's public purpose from combating blight to promoting "commerce and prosperity."[119]

Because TIFs use future tax revenues to finance redevelopment, they are actually ill-suited to conventional residential urban renewal, which usually involves significant up-front costs for land acquisition and clearance.[120] While early federal urban renewal policies sought to leverage investment in the rehabilitation of genuinely blighted areas, TIFs depend upon dramatic increases in property value, and as a result, are geared more toward new commercial investment—often in well-heeled suburban neighborhoods.[121]

Therefore, while TIFs generally require a finding of "blight," they often turn that notion on its head. In greater St. Louis, for example, TIFs are almost exclusively pursued by fringe communities competing for new shopping malls.[122] In such settings, TIF subsidies are sought because the property in question is too expensive for developers to assemble on their own.[123] This leads, as one observer notes, to "the odd phenomenon of blight selling for top dollar."[124] As the *St. Louis Post-Dispatch* concludes, "Twenty years ago, the Missouri Legislature passed the TIF law to give blighted, older communities a chance to compete for development with more affluent suburban areas like . . . well . . . the Galleria area[,] . . . [but] over the years developers learned to play TIF Roulette with municipalities."[125]

In some states, the economic development clauses are more restrictive.[126] In Iowa, for example, redevelopment under the economic development designation cannot subsidize new housing without setting aside a percentage of project costs equal to the local percentage of low and moderate income families for affordable

119. ALYSSA TALANKER ET AL., GOOD JOBS FIRST, STRAYING FROM GOOD INTENTIONS: HOW STATES ARE WEAKENING ENTERPRISE ZONE AND TAX INCREMENT FINANCING PROGRAMS 23 (Aug. 2003), *available at* http://www.goodjobsfirst.org/pdf/straying.pdf.

120. *See* Goshorn, *supra* note 3, at 920, 927-28.

121. Lefcoe, *supra* note 14, at 1004.

122. *See* THOMAS LUCE, BROOKINGS INST. CTR. ON URB. & METRO. POL'Y, RECLAIMING THE INTENT: TAX INCREMENT FINANCE IN THE KANSAS CITY AND ST. LOUIS METROPOLITAN AREAS 8-11 (2003), *available at* http://www.brookings.edu/es/urban/publications/lucetif.pdf.

123. *See A Tale of Two TIFs*, ST. LOUIS POST-DISPATCH, Feb. 20, 2003, at B6.

124. *Id.*

125. *Blight and the Galleria*, ST. LOUIS POST-DISPATCH, Apr. 24, 2002, at B6.

126. *See, e.g.*, IOWA CODE § 403.22 (2002) (requiring that projects include assistance for low and moderate income family housing).

housing.[127] In Indiana, redevelopment under the economic development designation cannot use the power of eminent domain.[128] In practice, however, such restrictions carry little weight.[129] In looking to fund a given proposal, local officials will typically shop around in the state code for the least restrictive designation—relying on findings of blight when they can, turning to economic development or conservation designations when a credible case for blight is hard to make, and falling back on the *tabula rasa* of blight if another designation threatens to complicate a proposed development.[130]

B. Local Discretion: What is Blight?

In practice, local governments or redevelopment corporations have enjoyed wide latitude in defining or determining blight.[131] In most states, this reflects the "laundry list" of health and safety concerns that often serves as the only statutory definition.[132] Under such laws, local officials or developers need only identify one of these problems in a redevelopment area in order to qualify the entire area as blighted.[133] Not only do most states lack any quantifiable baseline, such as household income, property value, or percentage of vacant buildings, for the determination of blight,[134]

127. *Id.*

128. Michel, *supra* note 4, at 459.

129. *See id.* at 463 (stating that in Indiana, any area that suffers from a lack of development, contains deteriorated buildings or has been abandoned is subject to the redevelopment commission's power of eminent domain).

130. *See generally* NCBG, WHO PAYS, *supra* note 2, at 12 (stating that as TIF programs have developed, more and more neighborhoods that do not meet a common sense definition of "blight" are being pulled into their reach).

131. *See* Goshorn, *supra* note 3, at 922-23 (explaining how TIF statutes are worded broadly in order to encompass many projects in the definition of blight).

132. *E.g.*, MO. REV. STAT. § 99.805(1) (1982) (amended 1986, 1991 and 1997) (including "defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, . . . the existence of conditions which endanger life or property by fire and other causes, [and] any combination of such factors [that] retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare" in the definition of a "blighted area"); *see also* DEL. CODE ANN. Tit. 31, § 4501 (2003) (providing that a "blighted" area is any "portion of a municipality or community which is found and determined to be a social or economic liability").

133. Michel, *supra* note 4, at 463; Reinert, note 16, at 1047-48.

134. Only seven states—Alabama, Arkansas, California, Massachusetts, Minnesota, Nebraska and South Dakota—hold the designation of "blighted area" to any quantifiable standard. *See* ALA. CODE § 11-99-4 (1975); ARK. CODE ANN. § 14-168-301 (Michie 2001); CAL. HEALTH & SAFETY CODE § 33030.1(b) (West 1999); MASS. GEN. LAWS ANN. Ch. 121B, § 1 (West 2003); MINN. STAT. ANN. § 469.002 (West

but there is also little sense as to whether such a baseline should reflect national, state, or local standards.[135] Indeed, redevelopment officials need not even find that a redevelopment area is demonstrably poorer or in worse condition than its surrounding area.[136] One 1969 effort in St. Louis to quantify blight using an elaborate "factor analysis" index weighing 1) local, or neighborhood, and regional, or census tract, patterns of land use; 2) crowding; 3) building quality; 4) average rents and assessed values; and 5) school and crime statistics—concluded that its empiricism was eroded by the fact that "virtually all of these . . . original measures were 'opinions' or 'judgments' about what constituted quality."[137]

For their part, the courts have been largely untroubled by this imprecision.[138] When plaintiffs argued, in a 1974 case in Missouri, that a municipality had violated its "customary standard of 'blight,'" the trial court found "no reference to any such standards or guidelines" in state or local law.[139] In a similar 1978 case in New Jersey, the court held that a municipality must make a formal determination of blight, including public hearings, but that there need not be any clear criteria for such a finding.[140]

What makes such local discretion all the more troubling is that fact that the designation of blight often occurs on a proposal-by-proposal basis, at the behest of developers.[141] Blighting, in other

2001); NEB. REV. STAT. 13-1101 (2003); S.D. CODIFIED LAWS § 11-7-3 (Michie 2003); *see also* Johnson & Kriz, *supra* note 74, at 38-39. But such standards generally only control the scale of the TIF or redevelopment region by requiring that a certain percentage of properties within the region are—in what is still a highly subjective determination—"blighted." Alabama, for example, requires that "[n]ot less than 50 percent, by area, of the real property within the tax increment district is a blighted area and is in need of rehabilitation." ALA. CODE § 11-99-4; *see also* Johnson & Kriz, *supra* note 74, at 38-39.

135. *See generally* Purver, *supra* note 1, § 2(b) (noting that what constitutes a blighted area "is a legislative question, political in nature and involving questions of public policy").

136. *See* MICHAEL DARDIA, PUB. POL'Y INST. OF CALIFORNIA, SUBSIDIZING REDEVELOPMENT IN CALIFORNIA 59-60 (1998), *available at* http://www.ppic.org/content/pubs/R_298MDR.pdf; Reinert, *supra* note 16, at 1033-34.

137. ALAN VOORHEES & ASSOC., TECHNICAL REPORT ON A RESIDENTIAL BLIGHT ANALYSIS FOR ST. LOUIS, MISSOURI Box 9:125 (1969) (*on file* St. Louis Data Collection, W. Historical Manuscripts Collection, Jefferson Library, Univ. of Mo.-St. Louis).

138. *Infra* notes 139-140 and accompanying text.

139. Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11, 16 (Mo. 1974).

140. Weehawken Env't Comm. v. Weehawken, 391 A.2d 968, 972-73 (N.J. Super. Ct. Law Div. 1978).

141. Oberndorf v. Denver, 900 F.2d 1434, 1438-39 (10th Cir. 1990); Allright Mo., Inc. v. Civic Plaza Redevelopment Corp., 538 S.W.2d 320, 322 (Mo. 1976); *Parking Sys. Inc.*, 518 S.W.2d at 13; Levin v. Bridgewater, 274 A.2d 1, 21 (N.J. 1971).

words, is driven not by objective urban conditions, but by the prospect of private investment.[142] In practice, this has meant that investment is actually steered away from the most dismal urban conditions, as private interests seek the "blight that's right"—an area with at least some of the conditions needed to make a plausible case for subsidized redevelopment, but not so run-down as to put private investment at risk.[143] As early as 1975, local development corporations in St. Louis understood their "public purpose" as little more than providing "interested developers with the incentive to revitalize the area with new and expanded facilities."[144] In the scramble to TIF new retail developments in the St. Louis suburbs, for example, the designation of blight was typically sought after local development officials had reached a tentative agreement with a new anchor store.[145] "A tame consulting firm hired by the city of Richmond Heights last week declared that the Galleria neighborhood is 'blighted' too," observed one local critic; "[a]s Yogi Berra said,[146] nobody goes there any more, it's too crowded."[147]

Not surprisingly, this piecemeal and often inventive pattern of blighting has sparked legal challenges—especially from commercial interests displaced by redevelopment, forced to compete with new businesses in the redevelopment area or unsuccessful themselves in their bids for redevelopment contracts.[148] But state courts have almost invariably upheld local designations of blight, deferring to local legislative authority in determining both the meaning of blight and the larger public purpose served by redevelopment.[149] As long

142. *See Oberndorf*, 900 F.2d at 1439; *Allright Mo.*, 538 S.W.2d at 322; *Parking Sys. Inc.*, 518 S.W.2d at 13; *Levin*, 274 A.2d at 21.

143. Lefcoe, *supra* note 14, at 995-96.

144. A.T. REDEVELOPMENT CORP. PROPOSAL BOX 16 (Apr. 1975) (*on file* John Poelker Papers, Wash. U. Archives, Clayton, Mo.).

145. *See, e.g.*, Mihalopoulos, *West County Mall Wins Initial Backing*, *supra* note 17, at C1 (explaining that in the case of the West County Mall, the developer sought a blight designation after reaching tentative agreements that "[t]he expanded mall would triple the number of specialty stores to 150 and add two new anchor stores, including the first Nordstrom department store in the St. Louis area").

146. *See* YOGI BERRA ET AL., THE YOGI BOOK: "I REALLY DIDN'T SAY EVERYTHING I SAID" 16 (Workman Publ'g Co. 1998).

147. JG St. Louis W. Ltd. Liab. Co. v. Des Peres, 41 S.W.3d 513, 514-20 (Mo. Ct. App. 2001); *Blight and the Galleria*, *supra* note 125, at B6.

148. *See* Reinert, *supra* note 16, at 1019-20.

149. *See, e.g.*, Allright Mo., Inc. v. Civic Plaza Redevelopment Corp., 538 S.W.2d 320, 324 (Mo. 1976) (holding that judicial review of legislative judgment that an area is blighted is limited to whether the legislative determination was arbitrary; the court cannot substitute its opinion for the city council's); Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11, 15 (Mo. 1974) (holding that judicial

as the local decision was not "clearly arbitrary or unreasonable,"[150] judges refused to second-guess the many ways local officials might determine that an area could "no longer meet the economic and social needs of modern city life."[151] Only rarely have the courts rejected local blight designations, usually in circumstances involving redevelopment areas that were substantially non-urban.[152] For their part, developers have appreciated the leeway afforded by state law, noting in one New Jersey case that even if an area was "not sufficiently blighted or developed enough" to qualify for federal grants, it was "a simple matter . . . to make a survey for eligibility [under state law] which will hold up in the Courts."[153]

C. Local Discretion: The "But For" Test

In many states, fourteen of those with TIF statutes[154] and more under older redevelopment laws,[155] the designation of blight is accompanied by a "but for" provision, intended to ensure that redevelopment, as one observer notes, "produce[s] the desired entrepreneurial response rather than merely subsidize[s] development which would have occurred without it."[156] Missouri's TIF statute, for example, requires that a prospective TIF zone "has not been subject to growth and development through investment by private enterprise and would not reasonably be anticipated to be developed without the adoption of tax increment financing."[157] In Indiana, the statute requires that a project not be feasible through the "ordinary operations of private enterprise."[158]

But there are many problems with such conditions.[159] Only a handful of states, including Kansas, require comprehensive feasibil-

review of legislative determination that an area was blighted is limited to whether that determination was arbitrary or was induced by fraud, collusion or bad faith, or whether the city exceeded its power).

150. Los Angeles v. Gage, 274 P.2d 34, 45 (Cal. Dist. Ct. App. 1954); *see also* Schweig v. St. Louis, 569 S.W.2d 215, 223 (Mo. Ct. App. 1978); *Allright Mo.*, 538 S.W.2d at 324; *Parking Sys.*, 518 S.W.2d at 16; Detwiler & Dale, supra note 13, at 3-4; MANDLEKER ET AL., *supra* note 58, at 83; Michel, *supra* note 4, at 462-63; Reinert, *supra* note 16, at 1039-42.

151. MANDLEKER ET AL., *supra* note 58, at 95 (citing Oliver v. Clairton, 98 A.2d 47, 52 (Pa. 1953)).

152. *See* Purver, *supra* note 1, §§ 3, 13.

153. Levin v. Bridgewater, 274 A.2d 1, 9 (N.J. 1971) (emphasis removed).

154. Johnson & Kriz, *supra* note 74, at 39.

155. *See id.*

156. MANDLEKER ET AL., *supra* note 58, at 21.

157. MO. REV. STAT. § 99.810 (2003).

158. Michel, *supra* note 4, at 459 (quoting IND. CODE § 36-7-14-15 (1993)).

159. *Infra* notes 160-172 and accompanying text.

ity studies to satisfy the "but for" test.[160] As a rule, the "but for" test is a purely local determination—meaning that there is no consideration of state or regional or metropolitan concerns—including the possibility that development might occur elsewhere without subsidy, or that "new" investment is merely being pirated from elsewhere.[161] In most states, "reasonable anticipation" of private development is calculated by the very interests vested in the proposed TIF deal—often in the form of affidavits from private developers attesting to their unwillingness to proceed without public subsidy.[162] In this sense, the "but for" test lets private developers define blight by letting them define the likelihood of natural economic growth in a given area.[163]

The "but for" test is further constrained by the fascination of local officials with a certain kind or quality of development.[164] This "edifice complex" presses urban and suburban legislators to favor large, often symbolic, development—"brick and mortar symbols to demonstrate their accomplishments" or their "competence to manage development."[165] It is not at all uncommon, for example, for development officials to rebuff unsubsidized private investment in an area because they are holding out for a given investor or tenant—often a "big box" chain retailer or an upscale department store.[166] Although local redevelopment powers flow from local police powers to protect public safety and morals, they have increasingly come to rely on an expansive definition of "the general public welfare" in which the goal is not simply to eradicate blight and stimulate development, but to control the pace and quality of development as well.[167]

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160. *See* Johnson & Kriz, *supra* note 74, at 39.

161. *See* LUCE, *supra* note 122, at 7.

162. *See* Jonathan M. Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 U. DET. J. URB. L. 405, 409 (1979) ("Most statutes require . . . findings that . . . private initiatives are unlikely to alleviate these conditions without substantial public assistance."); *see also* Goshorn, *supra* note 3, at 929-30 (using the example of Missouri's TIF statute to suggest that the law encourages private initiatives to receive public assistance).

163. *See* Goshorn, *supra* note 3, at 922-23 ("[T]he broadly-worded [Missouri TIF] statute allows many projects to technically fall under the statute's definition of 'blight,' when in fact the economic health of these areas is sufficient to garner adequate private investment.").

164. Michel, *supra* note 4, at 470.

165. FRIEDEN & SAGALYN, *supra* note 59, at 281; Michel, *supra* note 4, at 470, 470 n.99.

166. *See, e.g.*, Fred Faust, *Businesses Angry Over Use of TIF; Rival Redevelopment Plan Didn't Need Tax Subsidy*, ST. LOUIS POST-DISPATCH, Sept. 8, 1996, at 1E.

167. Levin v. Bridgewater, 274 A.2d 1, 24 (N.J. 1971) (Haneman, J. dissenting).

Finally, the very logic of tax-increment financing undermines the "but for" test.[168] In order to work, TIF zones must both minimize the up-front costs of land clearance and rehabilitation and prove their ability to begin paying off the underlying debt.[169] For these reasons, redevelopment authorities avoid genuinely blighted urban areas and devote their attention to those in which private developers are already poised to invest.[170] Neither the taxing municipality nor private investors, in other words, are likely to risk TIFs in areas in which economic growth is not already assured.[171] Not surprisingly, as careful studies of local TIF policy have suggested, it is often a stretch to attribute an increase in property tax assessments to the TIF rather than to an otherwise quite predictable trajectory of economic growth.[172]

D. Finding Blight: The Redevelopment Area that ate the City

Although local officials have considerable discretion in "blighting," they nevertheless must make a credible case that a given redevelopment area is deserving of public subsidy or public attention.[173] This is often accomplished as much by stretching the redevelopment area itself as it is by stretching the definition of blight.[174] The larger the urban renewal area of a TIF district, as a rule, the easier it is to find blighted conditions inside it and use public interest in planning to meet the objections of affected property owners.[175] This strategy emerged first in federal housing and urban renewal, which steadily expanded its focus from individual properties in 1934, to housing projects in 1937 and 1949, to neighborhoods in 1956, and then to entire urban areas in 1959.[176] State

168. *See infra* notes 169-172 and accompanying text.

169. *See* Goshorn, *supra* note 3, at 938; *see also* Lefcoe, *supra* note 14, at 1003-05.

170. Lefcoe, *supra* note 14, at 1003-05.

171. *See* Goshorn, *supra* note 3, at 938-42; Faust, *supra* note 166, at 1E.

172. *See* NCBG, WHO PAYS, *supra* note 2, at 21-24.

173. *See* Levin v. Bridgewater, 274 A.2d 1, 18 (N.J. 1971) (requiring "substantial evidence . . . to support the action taken").

174. *See, e.g.*, MANDLEKER ET AL., *supra* note 58, at 6 (explaining that although the "blighted areas" designated by the Missouri legislation arguably do not meet the intent of the definition of "blight," all of downtown St. Louis has been "blighted" anyway due to relaxed interpretations of the definition); *see also infra* notes 178-179 and accompanying text.

175. *See Levin*, 274 A.2d at 5; *cf.* Purver, *supra* note 1, § 2(a) ("Because of the economic and social interdependence of different communities and different areas within single communities, the redevelopment of land in such blighted areas is accomplished under urban renewal programs in accordance with comprehensive plans to promote the sound growth of the community.").

176. *Levin*, 274 A.2d at 5.

redevelopment laws and local redevelopment corporations followed this trend.[177] By the early 1970's, for example, virtually all of downtown St. Louis had been blighted under Missouri's "Chapter 353" urban redevelopment statute,[178] and by the late 1990s, more than half of the property in the entire city was either tax-abated, blighted for redevelopment, or tax-exempt. The extent of these conditions concerned even the St. Louis Development Corporation, which viewed them as evidence of a dangerous addiction to tax abatement and a serious threat to the city's finances.[179]

Local control over the size and boundaries of redevelopment areas resembles the politics of congressional re-districting,[180] and indeed redevelopment areas are often gerrymandered in such a way as to encompass both commercial parcels targeted for development and enough blighted area to justify the development.[181] *Berman v. Parker*, the Supreme Court case which upheld federal urban renewal policies in 1954, established the rule followed faithfully by state courts that "blight" was a characteristic of a given redevelopment area, and not necessarily of individual properties within it.[182] This gave local officials the incentive to draw expansive redevelopment areas, constrained only by the rule that such areas not be composed of non-contiguous parcels.[183] Nonetheless, in one New Jersey case, the redevelopment area reached twenty-three feet in the air at one point in order to reach a second parcel of land while blighting only the airspace between them.[184]

This strategy is exaggerated in TIF politics, because the boundaries of the redevelopment area simultaneously capture increases in

177. *See id.*; MANDLEKER ET AL., *supra* note 58, at 71-75.

178. MANDLEKER ET AL., *supra* note 58, at 6, 74.

179. *See* Linda Tucci, *City Addicted to Abatement Exacts Heavy Toll on Schools, Study Says*, ST. LOUIS BUS. J. (Jan. 12, 1998), *available at* http://stlouis.bizjournals.com/stlouis/stories/1998/01/12/story1.html.

180. *See, e.g.*, Jane Maslow Cohen, *Equality for Girls and Other Women: The Built Architecture of the Purpose of the Purposive Life*, 9 J. CONTEMP. LEGAL ISSUES 103, 131 (1998) (discussing the rigging of irrational districts to create a constituency of largely minority voters).

181. Oberndorf v. Denver, 900 F.2d 1434, 1438-40 (10th Cir. 1990) (noting that blight need not exist on every block in order to necessitate redevelopment).

182. Berman v. Parker, 348 U.S. 26, 35 (1954); Purver, *supra* note 1, § 3 (explaining that Congress looks to the need of the area as a whole).

183. *See, e.g.*, *Oberndorf*, 900 F.2d at 1438-39 (finding that fifteen consecutive blocks constituted a significant blighted area).

184. Purver, *supra* note 1, §§ 2(b), 3 (explaining that liberal use of the rules of construction allows airspace to be construed as blighted) (citing Jersey City Chapter of the Prop. Owners' Protective Ass'n v. City Council, 259 A.2d 698, 704 (N.J. 1969)).

property taxes, and sometimes, sales taxes.[185] The larger the TIF district, the easier it is to argue for redevelopment around "one big plan and one big developer."[186] And the larger the TIF district, the more stable the increment claimed to retire project costs.[187] This pattern was exaggerated by the property tax revolts of the late 1970s.[188] In California, for example, the average redevelopment area doubled in size—to over 800 acres—in the wake of the infamous "Proposition 13" clamp on property taxes.[189]

E. The Specter of Future Blight

Local development officials also had some success in raising the specter of "future blight" in arguing for redevelopment of areas not yet blighted, but likely to become so.[190] Such notions, in part, rested on a longstanding conviction that blight was not a physical description, but a set of circumstances or conditions: blight was the disease, slums were the result and redevelopment was the cure.[191] As one federal housing official suggested in the early 1930s, a blighted area was "on the down grade . . . a potential slum"[192] or "an insidious malady that attacks urban residential districts. It appears first as a barely noticeable deterioration and then progresses gradually through many stages toward a final condition known as the slum."[193] Federal urban renewal law picked up this reason-

185. *See* Lefcoe, *supra* note 14, at 1023-25.

186. Faust, *supra* note 166, at 1E (citing an area in St. Louis where various developers are competing to develop a large strip mall).

187. *Cf. id.*

188. *See* Lefcoe, *supra* note 14, at 1003-08; *see also* ARTHUR O'SULLIVAN ET AL., PROPERTY TAXES AND TAX REVOLTS: THE LEGACY OF PROPOSITION 13, 97-109 (1995) (explaining the California tax revolt of the late 1970's and discussing the effects of policies implemented thereafter).

189. Lefcoe, *supra* note 14, at 1004 (explaining the temptation to "ensure the requisite tax increments by delineating project boundaries to encompass enormous areas, hundreds of thousands of areas").

190. *See* Purver, *supra* note 1, § 3.

191. *See infra* notes 192-193 and accompanying text.

192. CLARENCE ARTHUR PERRY, THE REBUILDING OF BLIGHTED AREAS: A STUDY OF THE NEIGHBORHOOD UNIT IN REPLANNING AND PLOT ASSEMBLAGE 9 (1933); *see also* FOGELSON, *supra* note 10, at 347-48 (defining "blighted areas" as slums, or "areas in which land values after a period of increase are stationary or falling," areas in which buildings have become more or less obsolete, or areas characterized by building vacancies and the appearance of decay and dejection, where there is no prospect of a renewed market for its original use or for other purposes).

193. PERRY, *supra* note 192, at 8; *see also* FOGELSON, *supra* note 10, at 349 (explaining that the blighted districts discussed should've been razed because they were "incipient slums" and explaining that slums "represent[ ] an advanced case of blight"); WOOD, *supra* note 89, at 3 ("It has long been known to students of housing that the dwellings and neighborhoods in which a substantial fraction of the American people

ing.[194] The 1954 Housing Act expanded its blight definition to include the "conservation and rehabilitation of declining areas."[195] Federal courts held that federal urban renewal law was intended "to eliminate not only slums as narrowly defined . . . but also the blighted areas that tend to produce slums."[196] And local officials proceeded on the assumption that projected blight was sufficient; blight was "both a noun and a verb, both a condition and a cause."[197]

State redevelopment and TIF statutes, in turn, have used projected or future blight to justify a wide range of projects.[198] This is especially true in states that allow the designation of "conservation" areas.[199] In Missouri, for example, an area can qualify for redevelopment as a conservation district if fifty percent of the structures contained by the district are more than thirty-five years old—regardless of their condition.[200] "Such an area is not yet a blighted area," as the statute explains, "but is detrimental to public health, safety, morals or welfare and may become a blighted area."[201] Even when such "conservation" provisions are not explicit in state law, courts have generally supported the idea that redevelopment is as much a preventative measure as a corrective measure, and that the definition of blight is "broad and encompasses not only those areas containing properties so dilapidated as to justify condemnation as nuisances, but also envisions the prevention of deterioration."[202]

The idea of "future blight" gives developers and development officials in most states the power to blight virtually any urban parcel.[203] As with the "but for" test, projections of future growth or decline are left largely to the judgment of those pushing for a given

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live are of a character to injure the health, endanger the safety and morals and interfere with the normal family life of their inhabitants.").

194. Lefcoe, *supra* note 14, at 994.

195. *Id.*

196. *Id.* at 993 n.6 (quoting Berman v. Parker, 348 U.S. 24, 35 (1954)).

197. VOORHEES & ASSOC., *supra* note 137; Lefcoe, *supra* note 14, at 1008.

198. *See infra* notes 199-202 and accompanying text.

199. *See* Goshorn, *supra* note 3, at 929 n.53.

200. *Id.*; *see also* MO. REV. STAT. § 99.805(3) (1982) (amended 1986, 1991 and 1997); Reinert, *supra* note 16, at 1033-34.

201. MO. REV. STAT. § 99.805 (3). For an interpretation and discussion of the statute, see Goshorn, *supra* note 3, at 929 n.53 and Reinert, *supra* note 16, at 1033-34.

202. Oberndorf v. Denver, 900 F.2d 1434, 1439 (10th Cir. 1990) (citing Tracy v. Boulder, 635 P.2d 907, 909 (Colo. Ct. App. 1981)); Purver, *supra* note 1, § 3.

203. *Cf.* 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2001) (noting that under the doctrine of future blight, "no redevelopment site can ever be truly free from blight").

redevelopment project.[204] This has meant that even the relative prosperity of an area can be used as an argument for its redevelopment—on the assumption that such prosperity cannot last.[205] In the debate over the infamous "Nordstrom's TIF" in suburban St. Louis, all agreed that the mall in question was the region's greatest economic asset.[206] For those pushing the TIF deal, however, this prosperity was inherently fragile and projection of future competitive losses to newer malls was enough to justify a designation of blight.[207]

California is one of the few states to reject the idea of future blight, largely as a reaction to inventive abuses of its pre-1993 redevelopment laws.[208] In the Lancaster case, developers twisted the blight designation in two ways—by arguing that the original blight designation still applied despite the fact that the area had been completely redeveloped since that time, and by arguing that the departure of one of the mall's tenants, which the redevelopment proposal aimed to prevent, would create "future blight."[209] State courts rejected both arguments, in part because the proposal was such a bald abuse of eminent domain and in part because California law, before and after the 1993 reforms, hewed to a more restrictive and sensible view that "[d]eterminations of blight are to be made on the basis of an area's existing use, not its potential use."[210]

F. Who Gets the Taxes?

Finally, blighting and redevelopment, especially under TIF statutes, is distorted by an intense local competition for tax reve-

204. *Cf.* JG St. Louis W. Ltd. Liab. Co. v. Des Peres, 41 S.W.3d 513, 518 (Mo. Ct. App. 2001) (finding that a prosperous shopping mall could still be an economic liability where blighting factors exist and the mall is not "keeping its value relative to neighboring, similarly situated and similarly used properties").

205. *Cf. id.* (holding that while "there were reasonable theories supporting each side's position as to blighting," the court would not question the judgment of the City Board of Alderman).

206. *See id.*

207. *See id.*

208. 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1130, 1130 n.2 (C.D. Cal. 2001).

209. *Id.* at 1130-31.

210. *Id.* (citing Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 98 Cal. Rptr. 2d 334, 362 (Ct. App. 2000)); *see also* Sweetwater Valley Civic Ass'n v. Nat'l City, 555 P.2d 1099, 1103-04 (Cal. 1976) (stating that "the legislature made clear its intent that a determination of blight be made—not on the basis of potential alternative use of the proposed area—but on the basis of the area's existing use").

nues.[211] In this respect, the eradication of blight is clearly secondary to the larger goal of padding the tax base, and any opportunity to do so invariably stretches the definition of blight to any property not assessed at its fullest potential.[212] As early as the 1930s, local development officials were defining blight as an economic liability, an area in which "the taxes do not pay for public service."[213] And the Model Charter adopted by the National Municipal League in 1937 defined blight, in part, as the "stagnation of development and damage and loss to community prosperity and taxable values."[214] Such considerations were not common in the run of state redevelopment laws passed in the 1940s,[215] but they reappeared in state TIF statutes or "economic development" designations adopted in the 1970s and 1980s.[216] The Missouri TIF statute in 1982, for example, imported its definition of blight from that state's 1945 redevelopment law,[217] but also declared that redevelopment was in the public interest because it would "result in the preservation or enhancement of the tax base of the municipality."[218] In Iowa, the TIF statute in 1985 declared blight "an economic and social liability imposing onerous municipal burdens which decrease the tax base and reduce tax revenues."[219]

At the same time, of course, winning increased property tax revenues is a largely symbolic incentive because the public policy that leverages higher assessments also takes much of that assessed value

211. *See* Joyce Y. Man, *Effect of Tax Increment Financing on Economic Development*, *in* TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES AND IMPACT 101, 102 (Craig L. Johnson & Joyce Y. Man eds., 2001).

212. *See* Chapman, *supra* note 54, at 115 (stating that "TIF redevelopment could be a major revenue-producing instrument").

213. WALKER, *supra* note 41, at 4 (citing ARCHITECTS' CLUB OF CHI., REHABILITATING BLIGHTED AREAS, REPORT OF COMMITTEE ON BLIGHTED AREA HOUSING 9 (1932)).

214. *Id.* at 5 (quoting NAT'L MUN. LEAGUE, MODEL CITY CHARTER (1937)).

215. *Compare* MO. REV. STAT. § 353.020(2) (2003) (defining a "[b]lighted area" as "that portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration, have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes"), *with* WALKER, *supra* note 41, at 3 (providing several official definitions of "slum" from the 1930s, including "a residential area where the houses and conditions of life are of a squalid and wretched character and which hence has become a social liability to the community") (quoting PRESIDENT'S CONFERENCE, BLIGHTED AREAS & SLUMS, *supra* note 43, at 1).

216. *See* Chapman, *supra* note 54, at 130 (noting "little use of tax increment financing techniques prior to the mid-1970's" in most states).

217. MO. REV. STAT. § 353.020(2).

218. MO. REV. STAT. § 99.805(5)(c) (1982) (amended 1986, 1991 and 1997).

219. IOWA CODE § 403.2(1) (1999).

off the tax rolls for the life of the TIF (often over twenty years).[220] But, while increased property tax revenues are often a distant promise in TIF-based redevelopment, there are a number of ancillary benefits or strategies embedded in local redevelopment politics.[221] TIFs allow local governments to devote new monies to redevelopment without running up against municipal debt limits enforced by state constitutions.[222] Most states either exempt TIFs from local debt limits or establish separate limits for them;[223] only five states have held that TIFs are subject to local debt limits.[224]

In turn, TIFs can force other beneficiaries of local property taxes, including school districts, counties, sewer districts, and zoo or museum districts, to subsidize (often reluctantly) municipal redevelopment.[225] In only a few states do these other taxing bodies claim any substantive role or representation in the approval of new TIFs.[226] Although the municipality does not see any new revenues in its general fund, it does see a greater share of local taxes devoted to exclusively municipal projects.[227] In California, for example, TIFs have effectively doubled the property tax share claimed by cities.[228] The degree to which a redevelopment area is subsidized by other local taxing jurisdictions depends on its success in stimulating growth.[229] But local studies have found that, allowing for revenue adjustments such as "pass-throughs" and state aid, and natural patterns of growth, TIFs fall far short of their promise as

220. Johnson & Kriz, *supra* note 74, at 43-44.

221. *See id.* at 52.

222. *See id.* at 45-47.

223. *Id.* (indicating that thirty-nine states exempt TIFs from local debt limits or establish separate limits for them).

224. *Id.*; *see also* Goshorn, *supra* note 3, at 938-42 (discussing the debt limitations of TIFs in Missouri).

225. Johnson & Kriz, *supra* note 74, at 49.

226. Most states, in response to both the regional inequities of the property tax base and the effects of TIFs and abatements, provided direct state aid to schools. Robert G. Lehnen & Carlyn E. Johnson, *The Impact of Tax Increment Financing on School Districts: An Indiana Case Study*, *in* TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES AND IMPACT 137, 137-42 (Craig L. Johnson & Joyce Y. Man eds., 2001). But this too can encourage local governments to TIF. In Coronado, California, local officials used an expansive local TIF to make local schools eligible for state "backfill" aid—and then proceeded to dedicate local TIF proceeds to the schools as well. Detwiler & Dale, supra note 13, at 11-12.

227. *See* Lehnen & Johnson, *supra* note 226, at 137-42.

228. DARDIA, *supra* note 136, at 4.

229. *See* NCBG, WHO PAYS, *supra* note 2, at 14 (requiring a municipality seeking the benefit of tax increment financing to "show that using tax increment financing in such an area would result in stabilization of the property tax base or that improvements to the property in the district would result in an actual increase in valuation when the property is returned to the tax base after the TIF district expires").

self-financing growth machines.[230] In California, redevelopment agencies with new "but for" growth, generate only about half of the tax increments they receive.[231] In Chicago, less than one-quarter of projected TIF revenues ($ 1.6 billion for 2002-25) can be reasonably attributed to growth stimulated by the TIFs themselves.[232]

This municipal tax grab has become especially desperate given recent restrictions on property taxation.[233] Proposition 13 and its imitators have pressed local governments to create new assessed value, or use property tax-based inducements, such as TIFs and abatements, to pad the local sales tax base.[234] In a recent California case, for example, city officials denied a conditional use permit to a prospective church and moved to claim the land for retail redevelopment, on the explicit grounds that the latter would yield greater tax revenues than a (tax-exempt) church.[235] A District Court granted the church a temporary injunction, and pointedly punctured the city's blight designation—noting that the construction of either a church or a retail outlet would "eliminate the blight" claimed by city officials and that "[r]evenue generation is not the type of activity that is needed to 'protect public health or safety.'"[236] Even in affluent residential suburbs, caps on property taxation have encouraged local officials to retreat from long-standing patterns of exclusionary zoning, such as limiting commercial development, small residential lots and multi-family housing, to compete for new retail development.[237] This practice is especially prevalent in states, such as Missouri, in which sales taxes are a relatively important source of local revenue, and local governments can lay claim to local increase, or increment, in sales taxes as well.[238] In suburban St. Louis, for example, there are substantial

230. *See id.* at 14-15, 19-22.

231. Lefcoe, *supra* note 14, at 998.

232. NCBG, WHO PAYS, *supra* note 2, at 21.

233. *See* Lefcoe, *supra* note 14, at 998-1006.

234. *See, e.g.*, FRIEDEN & SAGALYN, *supra* note 59, at 144-47 (discussing the tax-limiting nature of Proposition 13).

235. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1213 (C.D. Cal. 2002). My thanks to Greg LeRoy for calling this case to my attention.

236. *Id.* at 1228 (quoting First Covenant Church of Seattle v. Seattle, 840 P.2d 174, 185 (Wash. 1992)).

237. *See* DARDIA, *supra* note 136, at 12, 24; Lefcoe, *supra* note 14, at 1011-18, 1029-31.

238. *See* John L. Mikesell, *Nonproperty Tax Increment Programs for Economic Development: A Review of the Alternative Programs*, *in* TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES AND IMPACT 57, 64 (Craig L. Johnson & Joyce Y. Man eds., 2001).

incentives to buy out middle-income housing and replace it with retail development—in effect trading properties that return low revenues and high demands to the local tax base with those promising high revenues and low demands.[239] This is true in both "point of origin" cities that get to keep local sales taxes and in other cities that can effectively use TIFs to become "point of origin" cities for the lives of the TIFs.[240]

III. "BLIGHT" AND TIF REFORM

Well-documented and often outrageous abuses of state redevelopment laws have pressed a number of states and interested parties to consider reform.[241] Some, recognizing the patent insincerity of both blight definitions and "but for" tests, have suggested severing TIF policy entirely from its roots in urban renewal and recasting it solely around economic development.[242] More commonly, reformers have sought to restrain and regulate TIFs in such a way as to tie their use more closely to the general welfare of the community.[243] Such reforms have included:

> Renewed attention to the provision of affordable housing, including, as in the 1999 reforms passed in Illinois,[244] rigorous housing impact studies, relocation assistance for displaced persons and an allowance for construction costs for affordable housing units;[245]

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239. *See* Goshorn, *supra* note 3, at 920-23.

240. *See id.* at 919-20; *End the Tax Giveaway*, ST. LOUIS POST-DISPATCH, Nov. 25, 1989, at 2B; *A Shell Game with Tax Money*, ST. LOUIS POST-DISPATCH, Oct. 6, 1989, at 2C.

241. *See infra* notes 242-251 and accompanying text.

242. *See, e.g.*, Reinert, *supra* note 16, at 1051-52 (suggesting that legislative reform of TIF will lead to a better use of municipal funds and public satisfaction).

243. *See* NEIGHBORHOOD CAPITAL BUDGET GROUP, NCBG'S TIF HANDBOOK 16-19 (2d ed. 2001) [hereinafter NCBG, TIF HANDBOOK], *available at* http://www.ncbg.org/documents/TIFhandbooksecondedition.pdf; McFarlane, *supra* note 68, at 930-31 (arguing that the community must be included in the decision-making process to broaden the definition of economic development to include the needs of the community).

244. ILLINOIS TAX INCREMENT ASS'N, 1999 TAX INCREMENT REFORMS INCLUDED IN SB 1032 6-7 [hereinafter ILL. TAX INCREMENT ASS'N, 1999 TAX INCREMENT REFORMS], *available at* http://www.illinois-tif.com/TIFreform.htm (last modified Oct. 21, 2003).

245. *See id.*; NCBG, TIF HANDBOOK, *supra* note 243, at 16-19; STATEWIDE HOUS. ACTION COALITION (Chicago), TAX INCREMENT FINANCING REFORM 64-65 (n.d.) [hereinafter SHAC, FINANCING REFORM]. The old law had prohibited any "bricks and mortar" use of TIF funds. Neighborhood Capital Budget Group, *Tax Increment Financing*, *at* http://www.ncbg.org/tifs/tifs.htm (last visited Feb. 10, 2004) (noting that

> Greater transparency and accountability, including impact studies, public notice, early and formal public hearings, formalized neighborhood representation, joint review boards representing all affected taxing jurisdictions and annual reports;[246]
> New rules requiring the distribution of funds, including mandatory compensation or reimbursement of affected school districts (following the California lead),[247] tighter restraints on TIF spending for many uses, such as retail development, municipal buildings and golf courses,[248] and looser rules regarding TIF spending on affordable housing, child care and job-training;[249] and
> Various inducements to "high road" economic development, including more careful "scoring" of proposed developments, such as assessment of job creation and retention, job quality and environmental impacts,[250] and protections against relocation or piracy.[251]

Overlapping all of these proposals, and integral to their success, is a substantial statutory redefinition of "blight."[252] Such a redefinition would, ideally, address all of the abuses touched on above; it

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under the current law TIF funds "cannot be used for the 'bricks and mortar' costs of construction [ ]except for affordable housing").

246. NCBG, TIF HANDBOOK, *supra* note 243, at 17-20; CTR. ON WIS. STRATEGY, PROPOSED ELEMENTS OF TIF REFORM 4-5 (2000) [hereinafter COWS, PROPOSED ELEMENTS OF TIF REFORM], *available at* http://www.cows.org/pdf/econdev/tif/rp-tif.pdf.

247. *See* Chapman, *supra* note 54, at 130 (noting that California schools receive a share of the increased tax revenue via a mandated formula).

248. NCBG, TIF HANDBOOK, *supra* note 243, at 19.

249. SHAC, FINANCING REFORM, *supra* note 245, at 64-65; *see also* COWS, PROPOSED ELEMENTS OF TIF REFORM, *supra* note 246, at 3 (recommending that job creation and retention and child care be considered during the assessment of new TIF proposals).

250. COWS, PROPOSED ELEMENTS OF TIF REFORM, *supra* note 246, at 1-4 (explaining that "high road" economic development "refer[s] to strategies that are associated with high productivity, high pay, reduced environmental damage, and greater commitment to the health and stability of surrounding communities" and advocating "[s]tronger mandatory scoring criteria [ ]for TIF applications" in order to consider whether proposed TIFs will foster "[j]ob [c]reation, [r]etention and [q]uality" as well as '[e]nvironmental [q]uality").

251. Reforms in Missouri, for example, would prohibit TIF-financing of both manufacturing relocation and "unfair competition" with existing businesses. *See* H.B. 1496, 91st Gen. Assem., 2nd Sess. (Mo. 2002) (unenacted), *available at* http://www.house.state.mo.us/bills02/biltxt02/perf02/HB1496.htm; Bill Bell, Jr., *Rep. Stokan Targets Subsidy for Rich Areas; She Cites Tax-Increment Financing of Mall Here; Plan Faces Opposition*, ST. LOUIS POST-DISPATCH, Apr. 20, 1998, at B2; *Blight Made Right*, ST. LOUIS POST-DISPATCH, Mar. 25, 2002, at B6; Terry Ganey, *Missouri House OKs Legislation to Restrict Use of TIF Tax Breaks; Bill Seeks to Limit Law's Use to Areas of Real Economic Decline*, ST. LOUIS POST-DISPATCH, Mar. 22, 2002, at B3; *see also* COWS, PROPOSED ELEMENTS OF TIF REFORM, *supra* note 246, at 4.

252. *See infra* notes 253-260 and accompanying text.

would restrict blighting to urban and residential areas, adopt clearer objective standards for both the determination of blight and the "but for" test, control the reach and scale of TIF or redevelopment areas and ensure that the eradication of blight, and not a short-sighted scramble to pad the local tax base, remains the organizing principle of redevelopment. Examples of such reforms, albeit less than ideal, can be found in three settings: the California reform of 1993,[253] the Illinois reform of 1999,[254] and the pending reform in Missouri.[255] To date, such reforms of the blight definition have included a rewording of the descriptive criteria in order to avoid the "double-counting" of similar factors;[256] the addition of new descriptive criteria;[257] a "check list" formula, as used in Illinois[258] and California,[259] and a tighter definition of eligible proper-

253. *See* CAL. HEALTH & SAFETY CODE § 33031 (Deering 2003); *see also* DARDIA, *supra* note 136, at 6, 28; Chapman, *supra* note 54, at 129.

254. 65 ILL. COMP. STAT. ANN. 5/11-74.4 (West 2003); *see also* ILL. TAX INCREMENT ASS'N, 1999 TAX INCREMENT REFORMS, *supra* note 244, at 5-8; NCBG, TIF HANDBOOK, *supra* note 243, at 16-20; SHAC, FINANCING REFORM, *supra* note 245, at 64-65; TALANKER ET AL., *supra* note 119, at 12-13.

255. *Blight Made Right*, *supra* note 251, at B6; Ganey, *supra* note 251, at B3. The 2002 version of this bill was passed by the Missouri House but died with the end of the 2002 session. H.B. 1496, 91st Gen. Assem., 2nd Sess. (Mo. 2002) (unenacted), *available at* http://www.house.state.mo.us/bills02/bills02/HB1496.htm. Essentially the same bill has been reintroduced in 2003. S.B. 172, 92d Gen. Assem., 1st Sess. (Mo. 2003) (unenacted), *available at* http://www.senate.state.mo.us/03INFO/billtext/SB172.htm.

256. In Illinois, for example, some older criteria, such as "age" and "depreciation of physical maintenance," were removed and others, such as "excessive land coverage" and "overcrowding," were collapsed to avoid the "double-counting" of similar factors. 65 ILL. COMP. STAT. ANN. 5/11-74.4-3(a) (West 2003) (amending 65 ILL. COMP. STAT. 5/11-74.4-3(a) (1999)).

257. In Missouri, the draft bill includes new "blight" indicators based on local unemployment or fiscal capacity. S.B. 172, 92d Gen. Assem., 1st Sess., §§ 99.805(7), (8) (Mo. 2003) (unenacted), *available at* http://www.senate.state.mo.us/03INFO/billtext/SB172.htm. In Illinois, "environmental clean-up" and declining tax assessments were added as leading indicators of blight. 65 ILL. COMP. STAT. ANN. 5/11-74.4-3(a)(1)(K), (M).

258. In Illinois, "a combination of [five] or more of the following factors" must be present in order for a blight designation to be appropriate: dilapidation; obsolescence; deterioration; code violations; illegal use; excessive vacancies; lack of ventilation, light or sanitary facilities; inadequate utilities; excessive land coverage and overcrowding; deleterious land use; environmental clean-up; lack of planning; and declining assessed values. 65 ILL. COMP. STAT. ANN. 5/11-74.4-3(a)(1).

259. In California, blighted areas must feature at least one of four "physical" conditions, and at least one of five "economic" conditions. *See* CAL. HEALTH & SAFETY CODE § 33031 (West 1999). The "physical conditions that cause blight" are listed as:

> [b]uildings in which it is unsafe or unhealthy for persons to live or work. . . . caused by serious building code violations, dilapidation and deterioration, defective design or physical construction, faulty or inadequate utilities, or other similar factors[; (2) f]actors that prevent or substantially hinder the economically viable use or capacity of buildings or lots. . . . caused by a

ties, checking abuses by restricting land eligible for designation as a blighted area.[260]

There remain, however, a number of problems.[261] As the California experience attests, more carefully descriptive criteria, and requirements that blighted areas satisfy a certain "check list" of such criteria, do not change the fact that judgments as to things like "obsolescence", "dilapidation", or "deleterious land uses" remain highly subjective.[262] Moreover, blight remains a designation sought by developers, and hence shaped not by public purpose, but by private interests seeking public subsidies.[263] Finally, state level reforms remain spooked by the prospect of interstate

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substandard design, inadequate size given present standards and market conditions, lack of parking, or other similar factors[; (3) a]djacent or nearby uses that are incompatible with each other and which prevent the economic development of those parcels or other portions of the project area[; and (4) t]he existence of subdivided lots of irregular form and shape and inadequate size for proper usefulness and development that are in multiple ownership.

Id. § 33031(a). The "economic conditions that cause blight" are listed as:

[d]epreciated or stagnant property values or impaired investments, including, but not necessarily limited to, those properties containing hazardous wastes that require the use of agency authority [as statutorily specified; (2) a]bnormally high business vacancies, abnormally low lease rates, high turnover rates, abandoned buildings, or excessive vacant lots within an area developed for urban use and served by utilities[; (3) a] lack of necessary commercial facilities that are normally found in neighborhoods, including grocery stores, drug stores, and banks and other lending institutions[; (4) r]esidential overcrowding or an excess of bars, liquor stores, or other businesses that cater exclusively to adults, that has led to problems of public safety and welfare[; (5) a] high crime rate that constitutes a serious threat to the public safety and welfare.

Id. § 33031(b).

260. Most state reforms have moved to check abuses by sharply restricting the definition of blight with respect to wetlands, vacant land and agricultural land. *See* TALANKER ET AL., STRAYING FROM GOOD INTENTIONS, *supra* note 119, at 7-23; *see also* COLO. REV. STAT. § 31-25-107(1) (2000) (amending COLO. REV. STAT. § 31-25-107(1) (1998)) (encapsulating a 1999 Colorado reform requiring the boundaries of a blighted area to be drawn as narrowly as possible).

261. *Infra* notes 262-267 and accompanying text.

262. *E.g.*, 65 ILL. COMP. STAT. ANN. 5/11-74.4-2(1) (West 2003) (defining "dilapidation" as "[a]n advanced state of disrepair or neglect of necessary repairs to the primary structural components of buildings or improvements in such a combination that a documented building condition analysis determines that major repair is required or the defects are so serious and so extensive that the buildings must be removed"; "obsolescence" as "[t]he condition or process of falling into disuse [whereby . . . s]tructures have become ill-suited for the original use"; and "deleterious land uses" as "[t]he existence of incompatible land-use relationships, buildings occupied by inappropriate or mixed-uses, or uses considered noxious, offensive, or unsuitable for the surrounding area").

263. *See* Goshorn, *supra* note 3, at 919-24; *Blight Made Right*, *supra* note 251, at B6.

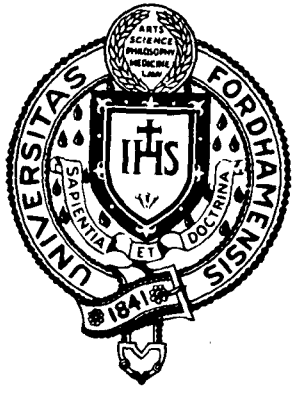
disadvantage.[264] The Missouri TIF reform, for example, was crafted largely by St. Louis area legislators interested in curtailing cutthroat competition for retail investment in that city's suburbs;[265] but because Kansas City faces suburban competition across a state line, the pending reform applies only to St. Louis and its suburbs and is not intended to be effective state wide.[266] Thus, problems revolve around both the law and its administration.[267] Meaningful reform must address both the imprecision and ambiguities of existing blight definitions and the incentives to twist those definitions created by fragmented federal and metropolitan governance.

264. *See, e.g.*, Bell, *Rep. Stokan Targets Subsidy*, *supra* note 251, at B2 (quoting a statement by a Missouri legislator expressing fear that amendments to the state's TIF program would ruin projects in Missouri and encourage development to move to Kansas and Illinois).

265. *Id.*

266. *See Blight Made Right*, *supra* note 251, at B6.

267. *See supra* notes 63-88 and accompanying text.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