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TAX INCREMENT FINANCING: A POTENTIAL REDEVELOPMENT FINANCING MECHANISM FOR NEW YORK MUNICIPALITIES

Gary P. Winter*

I. Introduction

The taking of private property for urban renewal has long been accepted as a valid public purpose.¹ However, public entities which undertake such endeavors are frequently faced with the difficulty of finding the means to finance such urban renewal projects. To assist these efforts, in 1984, the New York State Legislature provided local units of government with yet another mechanism for financing urban renewal by enacting the Municipal Redevelopment Law, also known as the Tax Increment Financing (TIF) law.²

The TIF law provides municipalities with a locally administered redevelopment financing tool which exploits the rise in economic value and hence the increase in tax receipts which accompanies urban redevelopment. Prior to the enactment of this law, municipalities were limited to federal urban renewal programs administered by the U.S. Department of Housing and Urban Development (HUD),³ state assistance in the form of capital grants,⁴ the intervention and assist-

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1. U.S. CONST. amend. V (taking of private property permitted upon payment of just compensation). Urban renewal was declared to be a valid public purpose by the United States Supreme Court in *Berman v. Parker*, 384 U.S. 26 (1954).

2. In November 1983, voters amended the New York Constitution by authorizing tax increment financing and the issuance of bonds or notes. N.Y. CONST. art. XVI, § 6. The effective date of the enabling legislation was August 6, 1984. 1984 N.Y. Laws 916. The "Municipal Redevelopment Law—Tax Increment Financing" law was originally codified at § 960-a to § 960-q of the General Municipal Law and was renumbered § 970-a to § 970-q by L. 1986 c. 686, effective July 30, 1986.

3. Federal involvement in municipal housing and redevelopment began with the enactment of the U.S. Housing Act of 1937, ch. 896, 50 Stat. 899 (current version at 42 U.S.C. § 1437 (1937, as amended 1990)). Title I of the Housing Act of 1949 broadened federal involvement by including funds for various categorical programs including slum clearance and urban renewal. Ch. 323, 63 Stat. 413 (current version at 42 U.S.C. § 1441 (1949, as amended 1983)). The Housing and Community Development Act of 1974 is the present federal redevelopment financing program. Pub. L. No. 93-383, 88 Stat. 633 (codified as amended in various sections of 42 U.S.C.).

4. New York municipalities may apply for capital grants administered by the State Department of Housing and Community Renewal. N.Y. GEN. MUN. LAW § 510 (McKinney 1961). These grants are awarded on a competitive basis and are subject to annual

ance provided by the Urban Development Corporation (UDC),⁵ locally funded urban renewal projects,⁶ locally financed improvements to the public infrastructures,⁷ tax abatements authorized by the state or local governments, or the issuance of industrial development bonds (IDBs) by a local industrial development agency.⁸

Although a recent addition to the New York arsenal of redevelopment financing tools, tax increment financing is not a new concept. It has been or is now authorized in thirty-eight states.⁹ While in some

appropriation by the legislature. N.Y. GEN. MUN. LAW § 510 1(b), 2, 4 and 5; and see § 512 (McKinney 1961), 1961 N.Y. Laws 402.

5. The UDC is a public benefit corporation, and in limited circumstances may overrule local zoning or other ordinances in order to facilitate development. New York State Urban Development Corporation Act, N.Y. UNCONSOL. LAWS §§ 6251, 6266 (McKinney 1968). See *Floyd v. New York State Urban Dev. Corp.*, 41 A.D.2d 395, 343 N.Y.S.2d 493, *aff'd*, 33 N.Y.2d 1, 300 N.E.2d 704, 347 N.Y.S.2d 161 (1973).

6. N.Y. GEN. MUN. LAW §§ 501, 503 (McKinney 1961) grants to the local governing body of a municipality the power necessary or convenient to carry out and effectuate urban renewal, including the power to locally contribute financial assistance to an urban renewal project.

7. N.Y. GEN. MUN. LAW § 6-c (McKinney 1941) provides for the creation of capital reserve funds by counties, cities, villages and towns for financing the construction or reconstruction of a specific capital improvement. N.Y. LOCAL FIN. LAW § 11 (McKinney 1942) provides for the contracting of indebtedness to finance these improvements over the period of their probable usefulness.

8. N.Y. GEN. MUN. LAW § 850-888 (McKinney 1969).

9. The following states have authorized tax increment financing: Arizona (ARIZ. REV. STAT. ANN. § 36.1471- § 36.1481 (1977)); California (CAL. HEALTH & SAFETY CODE § 33031- § 33039 (West 1963)); Colorado (COLO. REV. STAT. § 31-25-101- § 31-25-115 (1975)); Connecticut (CONN. GEN. STAT. § 8-124-8-134a and § 8-124-8-169n (1974)); Florida (FLA. STAT. § 163.387 (1984)); Georgia (GA. CODE ANN. § 36-44-1- § 36-44-23 (1985)); Illinois (ILL. REV. STAT. ch. 67-1/2, para. 63-91, 1001-1011 (1989)); Indiana (IND. CODE ANN. § 36-7-14-1-40, 41 (Burns 1981) and 36-7-15.1-26 (Burns 1989)); Iowa (IOWA CODE § 403.1- § 403.19 (1980)); Kansas (KAN. STAT. ANN. §§ 12-1770-1780, 17-4742-4762 (1976)); Kentucky (KY. REV. STAT. ANN. §§ 99-75-77 (Baldwin 1986)); Louisiana (LA. REV. STAT. ANN. § 33.9020- § 33.9037 (West 1990)); Maine (ME. REV. STAT. ANN. tit. 30-A, § 5101- § 5196 (1987)); Maryland (MD. CODE ANN. § 14.201- § 14.214 (1987)); Michigan (MICH. COMP. LAWS § 125.1651- § 125.1680 and § 125.1801- § 125.1828 (1981)); Minnesota (MINN. STAT. § 469.171- § 469.174 (1987)); Mississippi (MISS. CODE ANN. § 21-45-1 and § 43-35-1 (1986)); Missouri (MO. ANN. STAT. § 99.300 to § 99.865 (Vernon 1982)); Montana (MONT. CODE ANN. § 7-15-4201- § 7-15-4201 (1974)); Nevada (NEV. REV. STAT. § 279.010- 279.680 (1981), expires by limitation on July 1, 1991); New Hampshire (N.H. REV. STAT. ANN. § 205 (1977)); New Jersey (N.J. STAT. ANN. § 52.27D-250 to § 52.27D-273 (West 1986)); New Mexico (N.M. STAT. ANN. § 3-46-1 to § 3-46-45 (1977)); New York (N.Y. GEN. MUN. LAW § 970 (McKinney 1986)); North Dakota (N.D. CENT. CODE § 40-58-01 to § 40-58-20 (1973)); Ohio (OHIO REV. CODE ANN. § 1728.01- § 1728.23 (Baldwin 1984)); Oklahoma (OKLA. STAT. tit. II, § 38-101 *et. seq.* (1983)); Oregon (OR. REV. STAT. § 457.010- § 457.460 (1979)); Pennsylvania (53 PA. CONS. STAT. § 6930.1- § 6930.13 (1990)); Rhode Island (R.I. GEN. LAWS § 45-33.2-1- § 45-33-17 (1989)); South Carolina (S.C. CODE ANN. § 39-6-10- § 39-6-50 (Law. Co-op 1984)); South Dakota (S.D. CODIFIED LAWS ANN. § 11-9-1- § 11-9-47 (1990)); Tennessee (TENN. CODE ANN. § 13-20-

circumstances it may be the only source of public sector financial assistance, it is anticipated that this form of financing will be used in conjunction with other urban renewal or community redevelopment programs.¹⁰

This Article will analyze the New York Tax Increment Financing law and its suitability as a locally administered redevelopment financing mechanism. Part II explains the concept of tax increment financing. Next, Part III examines the New York TIF law in terms of the planning and implementation requirements for municipalities which choose to initiate redevelopment projects using the statute.

Part IV looks at the relationship between the TIF law and New York State constitutional provisions restricting municipal finances and further analyzes the ways in which these restrictions insure that the TIF redevelopment plan will be implemented in a responsible manner without overwhelming a municipality with debt. This section also examines the basis of any potential constitutional challenges to the TIF law.

Part V analyzes the TIF law in conjunction with other New York State statutes. The primary aim of this section is to determine the manner in which the TIF law can be used in conjunction with other statutes, including the General Municipal Law, the Local Finance Law, the Real Property Tax Law and others, to maximize municipal leverage in facilitating redevelopment.

The final section of this Article explores the policy arguments for and against tax increment financing as a method of financing urban redevelopment. Specifically, the fiscal policy implications of the concept are examined in light of the provisions of the TIF law and the effect of the 1986 Federal Tax Reform Act as it relates to tax-exempt bonds. This Article concludes by suggesting that there is a need for a comprehensive reexamination of the mechanisms currently available to municipalities interested in urban redevelopment, and further, that once a review of this magnitude is undertaken, public entities interested in urban redevelopment will more frequently pursue their goals through the use of tax increment financing.

201- § 13-20-216 (1978)); Texas (TEX. LOCAL GOV'T CODE ANN. § 374.031- § 374.037 and TEX. TAX CODE ANN. § 311.031 (Vernon 1987)); Utah (UTAH CODE ANN. §§ 17A-2-1122 to 1199.51 (1965)); Washington (WASH. REV. CODE § 39.88.010- § 39.88.915 (1982)); Wisconsin (WIS. STAT. § 66.46 (1975)); Wyoming (WYO. STAT. § 15-9-101- § 15-9-123 (1977)).

10. Memorandum of Senator Walter J. Floss, Jr., *Municipal Redevelopment—Tax Increment Financing*, N.Y. State Legislature Annual (N.Y. Legislature Service, Inc. 1984).

II. The Mechanics Of Tax Increment Financing

Tax Increment Financing is a funding mechanism which uses the increases in assessed valuation and property tax revenue attributable to redevelopment to pay for public urban renewal costs.¹¹ This financing method may be used to provide public funds for: (1) redeveloping or rehabilitating deteriorated areas of a city; (2) facilitating the construction of low-to-moderate income housing; and (3) promoting economic development and providing employment opportunities.¹² The public body which employs this technique can recover the cost of its investment and expenditures in acquiring and preparing a site for redevelopment through the increase in taxes it can realize once redevelopment is completed.¹³ The process involves the issuance of bonds and the collection of annual tax increments to pay the principal and interest until the bonds are retired.¹⁴ The proceeds of these bonds are used to acquire land for redevelopment and to finance public improvements.

The tax increment calculation is the first step in the plenary urban renewal process. As such, TIF depends on the tax increment or difference between typically low real property taxes generated by blighted properties and the higher real property taxes generated through the redevelopment of those formerly blighted properties. Initially, a municipality will designate a redevelopment project in an area characterized by blight and deterioration. Following this designation, the actual tax increment determination, which involves four steps, will begin.¹⁵

First, the assessor's market value for each tax parcel in the TIF district at its time of designation is determined from the municipality's assessment records.¹⁶ The aggregate of the assessor's market value of these parcels is the original valuation (OV) of the TIF district. Applying the local tax rate for the municipality to the OV produces the standard real property taxes shared annually by the affected local taxing jurisdictions (county, city, school district, local authorities, and special districts).

Second, the municipality will advertise for, and in other ways locate

11. *Tax Increment Financing: Funding Community Development With Future Tax Receipts*, Minnesota Department of Energy & Economic Development Division, in cooperation with League of Minnesota Cities, (St. Paul: State of Minnesota Printing Office 1984), at 8.

12. *Id.* at 1.

13. *See infra* notes 15-23 and accompanying text.

14. *See infra* notes 15-23 and accompanying text.

15. *See* N.Y. GEN. MUN. LAW § 970-p (McKinney 1986).

16. *Id.*

private developers and enter into contracts with the developer(s) for the redevelopment of the area.¹⁷ The municipality will agree to acquire land and improvements, relocate residents and businesses, demolish structures and clear the site. In consideration, the developer agrees to purchase the site from the municipality and construct improvements so as to generate sufficient annual tax increments to finance the cost of necessary public improvements.

At this point, the municipality will issue bonds in order to provide a source of capital for financing the immediate public redevelopment costs.¹⁸ These costs will typically include: (1) acquisition costs; (2) costs of relocating residents and businesses; (3) demolition of structures and site clearance costs; (4) costs for installation or replacement of utilities and public improvements; (5) financing costs, including the cost of issuance of bonds or notes and the interest payable on the bonds or notes; and (6) administrative costs including planning, consulting, and legal and maintenance expenditures incurred in the implementation and management of the project area.¹⁹

Finally, once the redevelopment process begins, the property comprising the TIF district will be reassessed annually to reflect the increased value due to redevelopment. This new market value (NV) of the improved property is then compared to the assessor's original valuation (OV) of the property, which was made before the redevelopment effort began. This difference between the NV and the OV is the captured value (CV). Applying the local tax rate to the CV produces what is called the "tax increment."²⁰ This tax collected against the CV would be put in a special fund held by the municipality or the public entity in charge of the redevelopment effort.²¹ From this fund, the revenue collected by the annual tax increment may be used to finance the costs incurred by the municipality in facilitating redevelopment. It is also distributed to the municipality for the retirement of notes, bonds and for any current expenses. Throughout this process, the local school district would continue to levy its tax rates against the total value (OV and CV) since it is not a participant in TIF.²²

17. See N.Y. GEN. MUN. LAW § 970-1 (McKinney 1986).

18. See N.Y. GEN. MUN. LAW § 970-o (McKinney 1986).

19. The TIF redevelopment plan may provide for the expenditure of money by the municipality to undertake and complete any proceedings necessary to carry out the project. *Tax Increment Financing: Funding Community Development With Future Tax Receipts*, Minnesota Department of Energy & Economic Development Division, in cooperation with League of Minnesota Cities, (St. Paul: State of Minnesota Printing Office 1984), at 11; N.Y. GEN. MUN. LAW § 970-f(k) (McKinney 1986).

20. *Id.* at 8.

21. *Id.*

22. N.Y. CONST. art. XVI, § 6 limits the legislative authorization for initiating a TIF

However, the county may participate in the plan through an agreement with the city.²³

III. The New York Tax Increment Financing Statute

The New York TIF statute²⁴ authorizes any municipality to plan and implement a redevelopment project using tax increment financing.²⁵ As written, the statute contains both planning and implementation requirements. The planning requirements in the statute consist of the procedures for adoption of a TIF-redevelopment plan.²⁶ Conversely, the implementation requirements consist of the activities authorized to execute the plan.²⁷

A. The Planning Process

The New York TIF statute provides a number of checks upon the municipal legislative body in the planning and designation of TIF districts. The checks described in this section assure forethought by the municipal governing body to prevent the overzealous establishment of TIF districts.²⁸ They are also designed to ensure that there is no corruption of the process of designating TIF districts and that public officials will be held accountable for the planning and implementation of the redevelopment scheme. For example, these checks will ensure that a TIF redevelopment plan is not initiated when a project appears economically feasible without public assistance.²⁹

1. The Survey Area Study

The first planning procedure required by statute is the preparation of a "survey area study."³⁰ The purpose of the study is to determine the feasibility of undertaking a redevelopment project in the municipality.³¹ While the municipal legislative body designates the survey

district to a county, city, town or village, or combination thereof acting together and excludes school districts.

23. N.Y. GEN. MUN. LAW § 970-n (McKinney 1986).

24. N.Y. GEN. MUN. LAW § 970 *et seq* (McKinney 1986).

25. N.Y. GEN. MUN. LAW § 970-c(e) defines a "municipality" as any city, village, town or county.

26. *See infra* 28-48 and accompanying text.

27. *See infra* notes 49-58 and accompanying text.

28. *See infra* notes 29-48 and accompanying text.

29. Davidson, *Tax Increment Financing As a Tool for Community Redevelopment*, 56 U. DET. J. URB. L. 405, 408 (1979).

30. N.Y. GEN. MUN. LAW § 970-d (McKinney 1986).

31. *Id.* The first sentence of § 970-d of the statute would seem to make no sense as written. However, the insertion of the words "is necessary" (i.e., "Upon a finding that a study . . . is necessary to determine if a redevelopment . . . project within a specific area is

area by resolution, any person, group, association or corporation may request the designation of a particular survey area.³² Based upon the results of the survey area study, the legislative body may, by resolution, select one or more project area for redevelopment and authorize the preparation of the second planning phase documentary requirement, the preliminary plan.³³

2. *The Preliminary Plan*

The preliminary plan justifies intervention by the public sector into the real property development process. In the plan, the public entity must vindicate the exercise of its eminent domain powers³⁴ in acquiring and assembling sites for development, and rationalize the use of public financial assistance to make private redevelopment feasible.³⁵ The preliminary plan should also predict the impact of the project on the environment³⁶ and on surrounding neighborhoods.³⁷

Finally, the preliminary plan must conform to the municipality's master plan.³⁸ The TIF statute directs the municipality to show how the redevelopment proposal conforms to the zoning ordinance and the future sale, intensity and service needs of the city. Thus, the municipal planning agency must review this preliminary plan in order to pass judgment on the proposed redevelopment's effect upon the municipality's master plan.³⁹

3. *The Redevelopment Plan*

The redevelopment plan is the third planning document required by the statute.⁴⁰ At the time the municipal legislative body approves the preliminary plan, it can authorize the preparation of the redevelopment plan since the latter plan guides the redevelopment project to

feasible . . .") would improve the meaning of the section. The term feasible is not clear, but it is presumed to mean not only feasible in terms of economic feasibility, but more importantly, feasible in terms of the physical, social and economic conditions present so as to allow the legislative body to find that the area is blighted.

32. *Id.*

33. N.Y. GEN. MUN. LAW § 970-e (McKinney 1986). The preliminary plan goes beyond an analysis of feasibility and measures the general impacts of the proposed project.

34. *See infra* note 49.

35. N.Y. GEN. MUN. LAW § 970-e(f) (McKinney 1986). This latter provision is in effect a test of the private sector's need for public financial assistance (i.e., "but for" the public assistance, the redevelopment project would not occur).

36. *Id.* § 970-e(g).

37. *Id.* § 970-e(e).

38. *Id.* § 970-e(d).

39. *Id.* § 970-e.

40. *Id.* § 970-f.

its completion.⁴¹ It must show the sources of financing for the project, demonstrate that the project is financially feasible,⁴² and indicate the amount of revenue bonds to be issued to provide capital financing for public redevelopment costs.⁴³ It must also indicate the term of any bond issued.⁴⁴

Before adopting the redevelopment plan which approves the project, the municipal governing body must submit the plan to the planning agency for its review and recommendation.⁴⁵ In addition, the statute requires that the plan be presented at a public hearing and that notice of the hearing be published in a newspaper of general circulation in the municipality, as well as posted in four designated public notice posting areas. Notice of the hearing must also be mailed to affected property owners.⁴⁶ In addition, any person may challenge the public purpose of the plan at the public hearing.⁴⁷ However, any modifications made in the redevelopment plan at this stage which affect project boundaries, land use, or expenditures, must be resubmitted in a new plan which must follow all the procedures and obtain all the approvals required for initial adoption.⁴⁸

B. Implementation of the Redevelopment Plan

Although the New York TIF law provides checks upon the legislative body in the planning phase, the statutes allow the municipality significantly more flexibility when implementation of the plan begins. The statute authorizes a municipality to acquire property,⁴⁹ clear the

41. *Id.* § 970-f(a)-(n). The plan contents are typically the same as the "boilerplate" requirements of an urban renewal plan. See N.Y. GEN. MUN. LAW § 500 *et. seq.* (McKinney 1986).

42. *Id.* § 970-f(d). Feasibility appears to mean an evaluation of the fiscal soundness of a project as it relates to the municipality's financial participation (i.e., will tax revenues from the project be sufficient to cover public expenditures?)

43. *Id.* § 970-f(i) (provides for the issuance of revenue bonds payable from tax increment revenues).

44. *Id.* § 960-o(c). The term of any bond issue is limited to the useful life of the object or purpose for which the bonds were issued.

45. *Id.* § 970-g. As was the case with the preliminary plan, the planning board reviews the redevelopment plan to determine if it conforms with the master plan. If the planning agency recommends against approval of the redevelopment plan, then a two-thirds vote of the membership of the entire legislative body is required to approve the plan (§ 970-h(f)).

46. *Id.* § 970-h.

47. *Id.* § 970-h(c) (permits any person to object to the redevelopment plan, the existence of blight in the redevelopment project area or the legality or appropriateness of any of the prior proceedings).

48. *Id.* § 970-m.

49. *Id.* § 970-i (providing for acquisition through eminent domain powers). The Emi-

property of buildings and structures,⁵⁰ prepare the site for development,⁵¹ install public improvements⁵² and dispose of the property purchased.⁵³ For example, a municipal corporation can purchase a structure, rehabilitate it using TIF funds and resell the structure.⁵⁴ Such provisions make possible the restoration of historic structures and rehabilitation of housing for low-to-moderate income households. These provisions may also invite abuse, however, by permitting a municipality to purchase and rehabilitate a structure using TIF funds and then resell the property to the former owners whose identity may be veiled in a corporate entity. The public hearing requirement for the disposition of property in the TIF law is designed to prevent this abuse.⁵⁵

Furthermore, the statute gives municipalities the flexibility to delegate the administrative powers to a public agency.⁵⁶ Alternatively, a joint municipal redevelopment agency may administer a redevelopment project for two municipalities.⁵⁷ A municipal department or a contracting public benefit corporation can administer, but not create, the project upon adoption by the local governing body of resolutions which: (1) adopt the redevelopment project; (2) designate the public benefit corporation as the implementing agency; (3) approve all plans

ment Domain Procedure Law provides the procedure for acquiring property using eminent domain powers. N.Y. EM. DOM. PROC. § 101 *et. seq.* (McKinney 1979).

50. *Id.* § 970-k.

51. *Id.*

52. *Id.*

53. *Id.* § 970-l. Although disposition of the publicly acquired property may be made without public bidding, it may only occur after a public hearing. *Id.* § 970-l (a). Since the statute does not require a public bidding, the administering municipality has flexibility in that it is not bound to sell property to the highest bidder or for the most profitable use. Instead, the municipality can dispose of land to the developer whose proposal conforms to the redevelopment plan. *Id.* On the other hand, the absence of public bidding would not prevent the municipality from disposing of land to the entity from which it originally purchased the property. The public hearing requirement is intended to prevent the municipality from structuring this type of "sweet deal."

54. *Id.* § 970-l(d).

55. *Id.* § 970-h.

56. N.Y. GEN. MUN. LAW § 503-a (McKinney 1986) permits a municipality to delegate its urban renewal powers to an urban renewal agency. The term "agency" is referred to in § 970-i, but not defined. It appears to mean urban renewal agency, from the context of its usage, and because § 970-i permits various powers to be carried out by the agency after adoption of the redevelopment plan by the municipal legislative body. Administer, for the purposes of this Article, refers to the day-to-day project management functions such as acquisition of property, relocation of owners and tenants, demolition of buildings and improvements, site clearance and preparation and relocation or installation of public utilities and improvements. It is clear that *only* the municipality may adopt the redevelopment plan and use the TIF statute to provide for the financing of the redevelopment project. *Id.* § 503-a(3).

57. *Id.* § 970-n.

such as the survey, preliminary and redevelopment plans and the modification of the redevelopment plan; and (4) approve all bond issues.⁵⁸ Thus, the local governing body controls the establishment and financing of the TIF district, but can delegate the administrative responsibilities to a municipal department, agency or public benefit corporation.

IV. Tax Increment Financing and the New York Constitution

A. Relationship to Article VII (Local Finance) and Article IX (Local Government)

The TIF law was enacted pursuant to an amendment to the New York Constitution.⁵⁹ This amendment permits a municipality to undertake a TIF project "[n]otwithstanding any provision of this or any other article of this [New York State] constitution to the contrary. . . ."⁶⁰ However, the TIF law does interact with provisions of the New York Constitution in several important ways.

The first example of how the TIF law supercedes the New York Constitution is with regard to the provisions of Article VIII, which prohibit municipalities from issuing gifts, loans or credits to individuals, private corporations or associations.⁶¹ Since the TIF law is virtually unchecked by the New York Constitution, municipalities may provide direct and indirect assistance under the auspices of a TIF redevelopment plan to these private entities, regardless of this constitutional prohibition.

Through the issuance of bonds or notes, a municipality can acquire real property, demolish structures, clear and assemble buildable sites and dispose of the property to a private redeveloper.⁶² An example of this in a redevelopment plan is when land is sold to a private developer at its lower vacant value with the balance of the acquisition costs paid out of bond proceeds. Even though the loss on the sale is recouped from annual tax increments, the result of this procedure is an indirect loan of municipal credit to a private redeveloper. However, even more direct assistance can be provided as the TIF law permits a municipality to acquire property, expend bond proceeds or impose tax increments for the purpose of rehabilitating and refurbishing the property. This property can then be offered for resale to pri-

58. *Id.* § 970-n(b)(v).

59. N.Y. CONST. art. XVI, § 6.

60. N.Y. CONST. art. XVI, § 6 (added 1983).

61. N.Y. CONST. art. VIII, § 1 (effective Jan. 1, 1966).

62. N.Y. CONST. art. XVI, § 6 (added 1983); N.Y. GEN. MUN. LAW § 970-o(i) (McKinney 1986).

vate entities.⁶³

Second, although the TIF law gives great latitude to public entities in financing redevelopment, the law does not permit the municipality to pledge its full faith and credit in the issuing of bonds.⁶⁴ Thus, redevelopment projects financed with the proceeds from tax increment revenue bonds may be amortized only from grants of money, or from the annual tax increment revenue generated by the parcels of land within the redevelopment project boundary. Were a municipality to pledge its full faith and credit in issuing the tax increment revenue bonds, those bonds would become general obligation bonds. However, the TIF law does allow local governments to issue bonds repayable from property taxes pledged from the increase in valuation attributable to redevelopment.

The New York Constitution also limits the amount of debt a municipality can incur.⁶⁵ These debt limits established by the legislature are measured as a percentage of the average full valuation of taxable real estate in the municipality.⁶⁶ However, bonds issued by a municipality for tax increment financing of a redevelopment project are excluded from the constitutionally imposed debt ceiling.⁶⁷

A limitation on the dollar amount municipalities may raise through the levy of taxes on real property⁶⁸ is a fourth New York constitutional provision affected by the TIF law. This limitation is also measured as a percentage of the average full valuation of taxable real

63. N.Y. GEN. MUN. LAW § 970-1(d) (McKinney 1986).

64. However, Article VIII of the New York State Constitution assures the holders of municipal bonds or notes that the municipality's full faith and credit is pledged to the repayment of the bonds or notes. Thus, a municipality will levy taxes or otherwise raise revenues to assure timely repayment of the annual principal and interest due on the bonds or notes. N.Y. CONST. art. VIII, § 2 (amended 1985). The Tax Increment Financing provision in the constitution only permits the contracting of indebtedness by a municipality without a pledge of its full faith and credit. *Id.*

65. N.Y. CONST. art. VIII, § 4.

66. *Id.* The New York Constitution provides that municipalities may contract indebtedness which shall not exceed an amount equal to the following percentages of the average full valuation of taxable real estate of the municipality:

- (a) the County of Nassau, for county purposes, 10%;
- (b) any county, other than the County of Nassau, for county purposes, 7%;
- (c) the City of New York, for city purposes, 10%;
- (d) any city, other than the City of New York, having 125,000 or more inhabitants according to the latest federal census, for city purposes, 9%;
- (e) any city having less than 125,000 inhabitants according to the latest federal census, for city purposes, excluding education purposes, 7%;
- (f) any town, for town purposes, 7%;
- (g) any village, for village purposes, 7%.

67. N.Y. CONST. art XVI, § 6.

68. N.Y. CONST. art VIII, § 10.

estate in the municipality.⁶⁹ The portion of the average full valuation of taxable real estate in each redevelopment project area gained through redevelopment is also excluded in ascertaining the power of the municipality to levy taxes for local purposes.⁷⁰ The increase in valuation of taxable real estate attributable to redevelopment (CV)⁷¹ is not counted as part of the percentage of the average full valuation of taxable real estate in the municipality upon which the levy limitation is based. However, the municipality's taxing capacity will be reduced as long as any bonds are outstanding. As a result, the municipality will not receive general real estate taxes from the portion of the CV using tax increment financing until all bonds, notes and current expenses have been amortized. Since the municipality cannot benefit from the increase in valuation attributable to redevelopment until the bonds are repaid, the CV is not included as part of the average full valuation of taxable real estate in the municipality upon which the levy limitation is based.⁷²

Finally, the local government portion of the New York Constitution authorizes municipalities to take private property through the exercise of the power of eminent domain.⁷³ Within the legislative history of the TIF law, the legislature noted the necessity of employing the power of eminent domain in order to redevelop or rehabilitate blighted areas.⁷⁴ The eminent domain power and the flexible financing authority granted to municipalities by the TIF law provide a means for a municipality to eradicate blight, promote public health and safety and maintain fiscal integrity as defined by the constitutional limitations of Article VIII which governs municipal finance.

69. N.Y. CONST., art. VIII, § 10 provides that no municipality shall levy real property taxes in excess of the following percentages of the average full valuation of taxable real estate of such municipality:

- (a) any county, for county purposes, 1 and 1/2%; provided, however, that the legislature may prescribe a method by which such limitation may be increased to not exceed 2%;
- (b) any city of 125,000 or more inhabitants according to the latest federal census, for city purposes, 2%;
- (c) any city having less than 125,000 inhabitants according to the latest federal census, for city purposes, 2%;
- (d) any village, for village purposes, 2%.

Exceptions to the tax levy limit occur where the tax levy is used to finance short term tax or revenue anticipation notes, *see* N.Y. CONST. art. VIII, § 5 (A), or a municipal pension fund, *see* N.Y. CONST. art. VIII, § 5 (D).

70. N.Y. GEN. MUN. LAW § 970-p(c) (McKinney 1986).

71. *See supra* note 20 and accompanying text.

72. *See supra* notes 11-23 and accompanying text.

73. N.Y. CONST. art IX, § 1 (e).

74. N.Y. GEN. MUN. LAW § 970-b (McKinney 1986).

B. Potential Constitutional Challenges to the TIF Law

Three theories have been used to challenge the constitutionality of tax increment financing statutes in other states: (1) tax increment financing violates the equal protection clause;⁷⁵ (2) tax increment financing violates the due process clause;⁷⁶ and (3) tax increment financing is an improper delegation of legislative authority.⁷⁷ These three possible grounds could also be raised to challenge the New York TIF law.

1. Equal Protection

A common basis for challenging tax increment financing statutes is to allege a denial of equal protection to taxpayers within a municipality. Thus, taxpayers outside the redevelopment area have charged that those within the area are specially advantaged.⁷⁸ The equal protection argument involves the division of real property taxes within the scope of the tax increment redevelopment project. Within the geographic area of the project, the taxes are divided as follows: (1) those levied against the assessed value of taxable real property before the redevelopment plan was established;⁷⁹ and (2) those taxes levied against the assessed value of taxable real property in excess of the pre-plan amount, which are paid into a fund for the payment of redevelopment costs identified in the redevelopment plan.⁸⁰ This division of assessed value and taxes causes taxpayers outside the boundaries of the tax increment redevelopment project to pay disproportionately more tax to respective taxing authorities.⁸¹ As long as those who redevelop property pursuant to the TIF plan pay taxes at the same rate as the other property owners in the municipality, no constitutional problem is created since tax revenues above the original assessed value

75. See *Richards v. City of Muscatine*, 237 N.W.2d 48, 61-62 (Iowa 1975); *Tribe v. Salt Lake City Corp.*, 540 P.2d 499, 505 (Utah 1975) (Crockett, J., concurring specially). See generally, Note, *Urban Redevelopment: Utilization of Tax Increment Financing*, 19 WASHBURN L. J. 536 (1980).

76. See *Richards v. City of Muscatine*, 237 N.W.2d at 57.

77. *Richards v. City of Muscatine*, 237 N.W.2d at 56. See generally Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 U. DET. J. URB. L. 405 (1979); Note, *Tax Increment Financing: A New Source of Funds for Community Redevelopment in Illinois*, 30 DE PAUL L. REV. 459 (1981).

78. Note, *Urban Redevelopment: Utilization of Tax Increment Financing*, 19 WASHBURN L. J. 536, 546 (1980).

79. See *supra* note 16 and accompanying text.

80. See *supra* notes 20 and 21 and accompanying text.

81. *Richards v. City of Muscatine*, 237 N.W.2d at 59-60. The Iowa Supreme Court held that "tax increment financing is sufficiently related to a legitimate governmental purpose of having an urban renewal project pay for itself to sustain the scheme against this apparent disparity."

are allocated to a special fund for use by the redevelopment agency.⁸² Thus, tax increment financing does not create a partial tax exemption; it merely affects the use of taxes after their collection. Owners of property inside the project pay property taxes at the same rate as property owners outside the project where classification and assessment procedures are uniform.

The equal protection clauses of both the state and federal constitutions require that taxes be assessed uniformly.⁸³ Under the New York TIF law, taxes are assessed uniformly against real property within and without the boundaries of the redevelopment project.⁸⁴ It is only the manner in which taxes are divided after their collection that distinguishes property located in a tax increment redevelopment project from other property in the municipality. Thus, the mere fact that some tax revenues collected from properties within the tax increment redevelopment project are diverted from financing municipal services during the life of the project will not sustain an equal protection challenge.⁸⁵

Furthermore, the tax increments, by providing a source of funds to eliminate blight and deterioration, reduce the need for municipal services in the area of the redevelopment project.⁸⁶ This reduction contributes to the health, safety and welfare of residents of the municipality and thereby promotes an essential governmental purpose.⁸⁷ For this reason as well, the New York TIF law would likely survive a challenge on equal protection grounds.

2. *Due Process*

Due process challenges to tax increment financing have been maintained on both procedural and substantive grounds. Procedural due process claims can be sustained if a municipality has failed to conduct public hearings or to provide adequate notice of hearings at which

82. *Tribe v. Salt Lake City Corp.*, 540 P.2d 499, 506 (Utah 1975) (Crockett J., concurring). ("the appropriate test is whether the property of all taxpayers, within and without the project area, was subject to equal assessment and uniform tax rates").

83. N.Y. CONST. art. I, § 11 provides for equal protection of the laws. N.Y. REAL PROP. TAX LAW § 305 (McKinney 1990) requires uniformity in assessment of real property. *See also Margeson v. Smith*, 41 A.D.2d 896, 342 N.Y.S.2d 727 (1973); N.Y. REAL PROP. TAX LAW § 900 (McKinney 1990) (providing for levy of real property taxes upon the uniformly or equalized assessed valuation).

84. N.Y. GEN. MUN. LAW § 970-p (McKinney 1986).

85. *See infra* notes 81 and 82.

86. *See infra* notes 198-206 and accompanying text.

87. *People Ex Rel. City of Canton v. Crouch*, 79 Ill.2d 356, 403 N.E.2d 242 (1980). (The court held that the elimination of blighted conditions is a valid public purpose worthy of the expenditure of public funds derived from tax revenue).

affected parties can criticize the municipality's redevelopment and finance plans.⁸⁸ However, a municipality can correct any procedural defect by repeating the process for valid adoption of the redevelopment plan and establishment of the project by resolution of the local governing body.⁸⁹

a. Substantive Due Process Challenges

Substantive due process challenges can be maintained on two fronts. First, a petitioner may challenge the legislative act creating the tax increment enabling statute on the basis that it serves no valid public purpose.⁹⁰ Second, accepting the statute as a valid legislative determination, the petitioner may also attack the contents of the redevelopment plan which forms the basis for municipal action.⁹¹ A successful challenge to a redevelopment plan on substantive due process grounds would render the plan null and void.⁹²

Generally, in considering challenges to statutes on substantive due process grounds, courts defer to the findings of the legislative body.⁹³ Courts evaluate a statute's validity by using the rational relationship test. Under this test, unless it can be demonstrated that there is no "rational relationship" between the TIF law's goal of eliminating blight and the public purpose of promoting health, safety and welfare, the TIF law is safe from substantive due process challenges.⁹⁴

A challenge to the use of tax increment financing on substantive grounds would attack the sufficiency of the local legislative body's findings in adopting the redevelopment plan.⁹⁵ Courts generally defer to legislative findings as long as such findings exist in the plan and the

88. N.Y. GEN. MUN. LAW § 970-h. See also N.Y. E.D.P.L. §§ 210-214 (McKinney 1977) for an example of how the statute satisfies both procedural and substantive due process requirements of Article I of the N.Y. Constitution and the 5th and 16th Amendments to the U.S. Constitution.

89. See *Fix v. City of Rochester*, 50 Misc.2d 660, 271 N.Y.S.2d 87 (Sup. Ct. 1966) (amending a resolution at a subsequent meeting was sufficient to correct an urban renewal plan adopted at an earlier date).

90. See *infra* notes 94-104 and accompanying text.

91. See *infra* notes 94-104 and accompanying text.

92. See *Card v. Community Redev. Agency*, 61 Cal. App. 3d 570, 131 Cal. Rptr. 153 (1976).

93. See *Saso v. State*, 20 Misc.2d 826, 194 N.Y.S.2d 789 (Sup. Ct. 1959). See generally Note, *Urban Redevelopment: Utilization of Tax Increment Financing*, 19 WASHBURN L. J. 535 (1980).

94. *Short v. City of Minneapolis*, 269 N.W.2d 331, 340-41 (Minnesota 1978). See generally Note, *Urban Redevelopment: Utilization of Tax Increment Financing*, 19 WASHBURN L. J. 536, 547-48 (1980). See also Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 U. DET. J. URB. L. 405 (1979).

95. *Richards v. City of Muscatine*, 237 N.W.2d at 57.

resolution adopted by the local governing body reveals that the necessary conditions required by statute actually exist.⁹⁶ Typically, a substantive challenge will be directed at findings which maintain that an area is blighted, a characteristic required by most redevelopment statutes.⁹⁷ If the local legislative body has made the findings of blight required in the redevelopment plan, courts will likely uphold the validity of the plan.⁹⁸ For example, New York follows the rule that legislative decisions are generally not reviewable by a court unless it appears that the determination was arbitrary or contrary to law.⁹⁹ Unless a tax increment redevelopment plan is devoid of any qualified findings of blight,¹⁰⁰ a neighborhood impact statement,¹⁰¹ a statement showing redevelopment would not occur without public assistance,¹⁰² and, to the extent required by Article VIII of the Environmental Conservation Law, an environmental impact statement,¹⁰³ courts in New York will be inclined to uphold the municipality's redevelopment plan and the decision to use tax increment financing.

b. Procedural Due Process Challenges

Procedural due process challenges to the use of tax increment financing are unlikely to be upheld unless the municipality has erred in complying with the procedure contained in the statute.¹⁰⁴ However, the New York TIF statute provides adequate procedural safeguards to all affected parties.¹⁰⁵ Specifically, no redevelopment plan can be

96. See *infra* note 93.

97. N.Y. GEN. MUN. LAW § 970-c(a) (McKinney 1986) defines a blighted area. A "blighted area" means an area within a municipality in which one or more of the following conditions exist: (i) a predominance of buildings and structures which are deteriorated or unfit or unsafe for use or occupancy; or (ii) a predominance of economically unproductive lands, buildings or structures, the redevelopment of which is needed to prevent further deterioration which would jeopardize the economic well being of the people.

98. *But see* *Card v. Community Redev. Agency*, 131 Cal. Rptr. at 162. (The court ruled the municipalities redevelopment plan null and void on substantive due process grounds).

99. New York courts are not disposed to question or review findings made by the legislative body of a municipality such as whether blight exists in an area contained in a local redevelopment plan unless the local legislative body or its agents have been shown to have made their determination in a corrupt manner or in bad faith. *Jacobs v. City of New York*, 54 Misc.2d 46, 52, 281 N.Y.S.2d 867, 872, *aff'd*, 28 A.D.2d 668, 282 N.Y.S.2d 633 (1966); *Sidell v. City of Oswego*, 91 Misc.2d 1041, 399 N.Y.S.2d 173 (Sup. Ct. 1977).

100. See N.Y. GEN. MUN. LAW § 970-c.

101. *Id.* § 970-e(e), 970-f(c).

102. *Id.* § 970-e(f).

103. *Id.* § 970-e(g).

104. See *supra* notes 24-58 and accompanying text.

105. See *infra* notes 106-09 and accompanying text.

upheld until a public hearing has been conducted by the legislative body.¹⁰⁶ This public hearing cannot be held until notice of the date and time of the hearing have been published, and affected property owners have received appropriate notice by mail.¹⁰⁷ In addition, the legislative body must, by resolution, authorize a survey area study to determine the feasibility of redevelopment¹⁰⁸ and approve the preparation of the project area's preliminary plans.¹⁰⁹ Failure to comply with this statutory procedure provides valid grounds for maintaining a procedural due process challenge.¹¹⁰ To validate the statutory procedure and negate such a due process challenge, however, the local governing body need only repeat the process, including the procedural steps previously omitted.¹¹¹

3. *Delegation of Authority*

Finally, tax increment financing statutes outside of New York State have been challenged as unconstitutional delegations of authority.¹¹² In all other states, the establishment of a tax increment redevelopment project by a municipality affects the CV levied by the municipality, county, school district, and other taxing jurisdictions.¹¹³ In New York, however, the constitutional amendment authorizing the enactment of tax increment finance legislation limits the allocation of taxes for redevelopment to those taxes raised by the municipality which initiates the tax increment redevelopment project.¹¹⁴ The taxes raised by

106. N.Y. GEN. MUN. LAW § 970-h(a) (McKinney 1986) (requiring that the legislative body conduct a public hearing where all interested parties may speak in favor of or against the redevelopment plan).

107. N.Y. GEN. MUN. LAW § 970-h(b) (McKinney 1986) (requiring that notice of the public hearing be posted in four places within the project area and published in a newspaper of general circulation in the municipality at least three weeks prior to the hearing date. A notice of the hearing must also be mailed to the last known owner of each parcel of land included in the proposed redevelopment plan).

108. N.Y. GEN. MUN. LAW § 970-d (McKinney 1986).

109. *Id.* § 970-e (McKinney 1986).

110. *See supra* notes 104-09 and accompanying text.

111. *Id.* § 970-m.

112. *Richards v. City of Muscatine*, 237 N.W.2d at 56. The court here dismissed the delegation attack, stating that the legislature could properly delegate its authority and that the applicable enabling statutes had prescribed tax allocation procedures in detail, leaving little discretion to the redevelopment authority.

113. *See supra* note 9.

114. N.Y. CONST. art. XVI, § 6 provides:

[a]ny county, city, town or village contracting indebtedness pursuant to this section for redevelopment of an economically unproductive, blighted or deteriorated area shall pledge to the payment thereof that portion of *the taxes raised by it* on real estate in such area which, in any year, is attributed to the increase in value of taxable real estate resulting from such redevelopment. (emphasis added).

the school district are therefore not affected, and the taxes of the county will only be influenced if the county elects to participate in a joint undertaking of the tax increment redevelopment project.¹¹⁵ Since the county's participation with the designating municipality is voluntary and the school district's participation is not permitted by statute or constitutional amendment, no question of delegation of authority could possibly arise.

V. Relationship of the Tax Increment Financing Law to Other New York Statutes

While the TIF law permits a municipality to carry out the redevelopment of one or more geographic areas within the municipality without state or federal assistance, the municipality cannot and indeed does not operate in a legislative vacuum. Other statutes must be considered in the planning and implementation of a redevelopment project using tax increment financing. Some constitutional provisions and statutes may limit the municipality's redevelopment activity.¹¹⁶ Other statutes may provide additional flexibility and a means of supplementary financial assistance in order to assure a successful project.¹¹⁷

A. General Municipal Law

The general municipal law encourages municipalities to promote health and safety.¹¹⁸ One way to further this end is through the TIF law, which provides municipalities with a financing tool for eliminating blight or blighting influences. A municipality has the option of administering a redevelopment project involving tax increment financing alone or, alternatively, the municipality could enter into a contractual agreement with one of its public benefit corporations, such as a municipal housing authority, to provide residential relocation acquisition, site clearance, and property disposition.¹¹⁹

Urban renewal agencies are created pursuant to the Urban Renewal Agency Act by a special act of the legislature¹²⁰ or may be designated by the governing body of the municipality.¹²¹ Each agency is empowered to plan and undertake one or more urban renewal projects.¹²²

115. N.Y. GEN. MUN. LAW § 970-n (McKinney 1986).

116. See *supra* notes 64-72 and accompanying text.

117. See *supra* notes 60-63 and *infra* notes 118-69 and accompanying text.

118. N.Y. GEN. MUN. LAW § 501 (McKinney 1961).

119. See *supra* notes 56-58 and accompanying text.

120. N.Y. GEN. MUN. LAW § 550 *et. seq.* (McKinney 1962).

121. *Id.* § 501 (McKinney 1961).

122. *Id.* § 554 (McKinney 1962).

The agency alone is responsible for developing, testing and reporting on its chosen methods and techniques of urban renewal. The agency may also carry out demonstration projects and other activities in relation to or in connection with one or more programs of urban renewal or other programs relating to the arrest and prevention of conditions of deterioration or blight.¹²³ The municipality then has the option of undertaking the redevelopment project, while utilizing the day-to-day project management skills of the urban renewal public benefit corporation. The municipality's legislative body can be responsible for the oversight of the redevelopment project including approval of the urban renewal and tax increment finance plans, issuance of revenue bonds, and approval of contracts with developers and for the construction of public improvements, such as parking facilities.¹²⁴

The contractual agreement between the urban renewal agency and the municipality can give the agency responsibility for planning and implementing the redevelopment project.¹²⁵ The urban renewal agency could receive the proceeds of the bond sale and acquire the property, relocate the owners and tenants, rehabilitate, or demolish and clear the substandard structures. The agency could also oversee the public works or negotiate the construction contracts with private contractors, and turn over the assembled parcels to private developers for rehabilitation or new construction.¹²⁶

Jointly, the municipality and its public benefit corporation are well suited to carry out urban renewal using tax increment financing. The municipality must approve all plans and plan modifications and only the municipality is empowered to issue tax increment-backed bonds.¹²⁷ The urban renewal agency, on the other hand, can be given authority to handle the day-to-day activities that are essential for good project management.¹²⁸ Here, the agency has the advantage of early acquisition powers¹²⁹ and is better suited than the local gov-

123. *Id.* § 554(15) (McKinney 1962), § 119-m (McKinney 1960), § 119-o (McKinney 1960), § 503-a (McKinney 1961) and § 970-n (McKinney 1986).

124. *Id.*

125. N.Y. GEN. MUN. LAW § 72-h (McKinney 1940), § 119-m, § 119-o, § 503-a, § 970-i, § 970-k, § 970-n (b)(i), (iii).

126. *Id.*

127. *Id.* § 960-o (McKinney 1984) (provides the municipality with the authority to issue revenue bonds to finance redevelopment).

128. *See supra* notes 120-123 and accompanying text.

129. N.Y. GEN. MUN. LAW § 555(1)(c) (McKinney 1962) (This provision grants the urban renewal agency the authority to acquire property prior to approval of the plan, upon obtaining the approval of the municipal planning commission. Early acquisition has two primary advantages. It permits acquisition prior to approval of the plan thereby reducing speculation and other actions which inflate the value of real property. It also permits the acquiring agency to demonstrate to private developers the municipality's de-

erning body to handle negotiations with property owners, contractors,¹³⁰ and redevelopers.

Finally, the establishment of a tax increment municipal redevelopment project could be coordinated with the creation of a Business Improvement District ("BID").¹³¹ The Business Improvement District Law permits municipalities to establish BIDs for the purpose of restoring deteriorated business areas of municipalities.¹³² The municipality's governing body may issue bonds for a number of projects, including: the provision of funds for the acquisition of property; the rehabilitation and removal of structures; the construction of parking lots, parking structures and pedestrian facilities; the construction and installation of landscaping, lighting and heating facilities; and the operation and maintenance of the BID.¹³³ The bonds are repaid with assessments levied against benefitting property owners and any other revenue sources.¹³⁴

The use of tax increment financing in these circumstances has two advantages. First, it reduces the level of assessments levied against benefitting business owners. Second, it reduces the amount of the general obligation bonds issued.¹³⁵ Since general obligation bonds issued to finance a BID are subject to constitutional debt limits,¹³⁶ the use of tax increment financing can therefore expand a city's ability to issue other improvement bonds. This combination gives cities two internal sources of revenue to combat blight and deterioration in commercial areas.

gree of commitment. Some early acquisition and land assembly will encourage the private sector to spend time and money preparing serious redevelopment plans).

130. N.Y. GEN. MUN. LAW § 103 (McKinney 1953) (This provides for competitive bidding for all publicly let contracts in excess of \$7,000 after advertising in the official newspaper or newspapers of the municipality).

131. *Id.* § 980 (McKinney 1990). (This legislation provides a means for municipalities to establish "Business Improvement Districts" as previously provided under Article 2-13 of the General City Law. It increases the types of improvements that may be constructed and maintained by the "special assessments" levied against real property in the district).

132. *Id.* § 980-c (McKinney 1990).

133. *Id.* § 980-j and 980-c (McKinney 1990). (Although on its face, the use of funds for the operation and maintenance of a BID seems to contravene the restriction on the gift loan of municipal credit (N.Y. CONST. art VIII, § 2), the fact that the BID operation and maintenance costs are financed through special assessments permits the financing scheme to comport with the constitutional provision).

134. *Id.* § 980-d,e,f,j (McKinney 1990).

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

136. N.Y. GEN. MUN. LAW § 980-k and 980-j (These provisions provide that BID bonds are general obligation bonds included in the calculation of a city's constitutional debt limits and may not exceed 10% of the dollar amount allowable under the applicable debt limitation).

B. Local Finance Law

The Local Finance Law governs the issuance of bonds,¹³⁷ the term to maturity of bonds,¹³⁸ and the limitations on the amount of debt a municipality can incur.¹³⁹

Examining the last of these provisions first, the amount of debt a municipality may incur is determined by a percentage of the average full valuation of the municipality.¹⁴⁰ This provision is inapplicable, however, for the same reason the constitutional limitation on debt is inapplicable.¹⁴¹ Revenue bonds are issued to finance a redevelopment project, for which tax increments are pledged to repay the bonds. Since such bonds are not backed by the full faith and credit of the municipality, they are not subject to statutory or constitutional debt limits.¹⁴²

The Local Finance Law also governs the term to maturity of municipal bonds. In addition, the TIF law stipulates that no bond issue's term shall exceed the probable useful life of the object or purpose for which the bond is issued.¹⁴³ The Local Finance Law defines this period of probable usefulness for the construction of various public improvements such as streets, bridges, parks, water and sewer systems, curbs and gutters, building construction, rehabilitation and demolition, the acquisition of land and the effectuation of an urban renewal program under the General Municipal Law.¹⁴⁴ Thus, the period of probable usefulness determines the legal maximum bond term. Market conditions, however, will usually dictate a shorter term than is legally permissible. In the municipal bond market today, for instance, no urban renewal bonds could be sold with a term to maturity approaching the legally permissible term of 50 years. In fact, current municipal improvement bond terms rarely exceed 20 years.¹⁴⁵ However, once the term of revenue anticipation notes, which may be issued and renewed for a period not to exceed five years from the

137. N.Y. LOCAL FIN. LAW § 101 (McKinney 1960).

138. *Id.* § 11 (McKinney 1942). (N.Y. LOCAL FIN. LAW § 11(36)(d) also permits the issuance of urban renewal tax/revenue anticipation notes having a term of not more than five years).

139. *Id.* § 104 (McKinney 1943).

140. *Id.*

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

142. N.Y. GEN. MUN. LAW § 970-o(b) (McKinney 1986).

143. *Id.* § 960-o(c) (McKinney 1986).

144. N.Y. LOCAL FIN. LAW § 11 (McKinney 1942). (This statute lists the periods of probable usefulness for various public improvements).

145. J. Peterson, *The Rating Game: Report of the Twentieth Century Task Force on Municipal Bond Credit Ratings*, (New York: Twentieth Century Fund), 133, (1974).

original note's date of issue,¹⁴⁶ is added to the actual term of the bond issue, the effective term of the bonds and notes for the redevelopment project extends to 25 years. Using the local finance law as a guide, project planners should base project feasibility calculations on the assumption that increment revenue will amortize project costs over a maximum probable useful life of 25 years.¹⁴⁷

The Local Finance Law also governs the legality of issuing municipal bonds. A municipality may not give or loan its credit or contract indebtedness except for a municipal purpose.¹⁴⁸ Both the Urban Renewal Law and the TIF law authorize the advancement and expenditure of public funds to promote sound development and to redevelop blighted areas, thus protecting and promoting the public safety, health, morals and welfare, which are all valid municipal purposes.¹⁴⁹ The Local Finance Law provides that issues of \$500,000 or less may be sold at private sale if sold for a single purpose, or for multiple purposes, if marketed as a single issue.¹⁵⁰ Bonds issued in amounts in excess of \$500,000 must be issued publicly.¹⁵¹ Thus, the Local Finance Law provides the rules for the issuance of tax increment revenue bonds.

C. Real Property Tax Law

The Real Property Tax Law determines the valuation and assessment dates for real property.¹⁵² On the valuation date, real property is evaluated by the local tax assessor who determines the property's value. That value determines the basis of the following year's amount of CV and tax increment. If January 1 is the valuation date, any con-

146. N.Y. GEN. MUN. LAW § 970-o(c) (McKinney 1986).

147. It should be noted that tax increment revenue will rarely be available during the first three to four years of a redevelopment project. A year to two years is usually required to acquire and clear sites with another year or more required to construct buildings and improvements. Once the buildings and improvements are constructed and assessed, another year passes before real estate taxes are due and payable for a total of three to four years before a tax increment is generated.

148. N.Y. CONST. art VIII, § 2; N.Y. LOCAL FIN. LAW § 101 (McKinney 1942).

149. N.Y. GEN. MUN. LAW § 303 (McKinney 1961), § 551 (McKinney 1962), § 970-b (McKinney 1986).

150. N.Y. LOCAL FIN. LAW § 63 (McKinney 1969). (Private sale involves placing the bonds or notes with a single buyer such as a bank at a negotiated interest rate. Public sale involves retaining an underwriter who purchases the bonds and trades them on the open market after determining the market interest rate for the bonds. Usually, a private sale is less costly since legal and underwriting fees are reduced).

151. *Id.* See also N.Y. LOCAL FIN. LAW § 57 (McKinney 1969).

152. N.Y. REAL PROP. TAX LAW § 301 (McKinney 1984). (The value of real property is to be determined on January 1 of each year. Real property must be assessed and placed on the assessment roll as of March 1).

struction during the calendar year after January 1 will not be assessed until the following year. For example, a building or improvement which is not completed until after January 1, 1992 will not be valued until January 1, 1993.¹⁵³ It will not be added to the assessment roll until March 1, 1993. No tax increment will be realized from the improvement until 1994.

In addition, on March 1 of each year the tax status of real property is determined.¹⁵⁴ However, certain private dwellings and improvements are exempt from local real property taxation.¹⁵⁵ Furthermore, municipalities may grant temporary abatements and exemptions to certain commercial and industrial properties.¹⁵⁶ A property benefiting from a real property tax exemption will not contribute tax increment revenue. Therefore, tax exempt property will not be included in a redevelopment project utilizing tax increment financing.

Finally, the real property tax law directs the procedure a municipal assessor should use in compiling the assessment roll for a municipal redevelopment project financed using the tax increment method.¹⁵⁷ The assessor must separate the amounts of real property taxes on the assessment roll and allocate them to the affected taxing jurisdiction and to the municipality administering the tax increment redevelopment project.¹⁵⁸ The amounts paid to the municipality administering the project may be used to retire bonds and meet current anticipated expenses.

D. State Finance Law

New York State provides per capita aid in support of a local government.¹⁵⁹ The money is allocated based on the full valuation of real property in the municipality.¹⁶⁰ A municipality with a large population and a low total assessed valuation relative to other municipalities with similar populations gets greater amounts of state aid. Municipalities with larger local tax bases are therefore allocated smaller amounts of state aid.

153. This fact should be noted by a redevelopment project planner when estimating tax increments and the bond amortization schedule.

154. N.Y. REAL PROP. TAX LAW § 302 (McKinney 1984).

155. *Id.* § 421-a (McKinney 1971) (new multiple-unit residential dwelling exemption in New York City); § 421-b (McKinney 1978) (Residential Rehabilitation Dwelling exemption in New York City); § 421-c (McKinney 1980) (Residential Dwelling exemption in cities other than New York City).

156. *Id.* See also § 485-a (McKinney 1972) and § 485-b (McKinney 1976).

157. *Id.* § 502(8) (McKinney 1984).

158. *Id.*; N.Y. GEN. MUN. LAW § 970-p(a) (McKinney 1986).

159. N.Y. LOCAL FIN. LAW § 54 (McKinney 1965).

160. *Id.* § 54(1)(c) (McKinney 1965).

The TIF law is designed to have a minimum effect upon state aid to local government. The full valuation of a municipality does not include the amount of CV in each tax increment redevelopment project.¹⁶¹ Since the CV is not included in the full valuation of a municipality, a municipality is not penalized if it establishes tax increment redevelopment projects.

The potential, however, to use the TIF law to abuse the state aid formula does exist. A municipality, by placing rapidly appreciating real property within a tax increment redevelopment project, can shield much of the future appreciation in value of such property from the state aid formula. As the property's value increases, this appreciation will be part of the project's CV which is not included in the municipality's full valuation for local government aid purposes.

E. General City Law

The General City Law also contains a provision that may be used in conjunction with the TIF law. The General City Law authorizes cities to issue bonds to finance public improvements including streets, curbs, gutters, sidewalks, and water and sewer systems.¹⁶² These bonds are repayable with special assessments levied against benefitting property owners. Combining the public improvements program with the establishment of a tax increment municipal redevelopment project, a city could improve public and private property. Two bond issues could be sold. A general obligation bond repayable from special assessments levied against benefitting property owners could finance public improvements, and a tax increment revenue bond could be issued to acquire and rehabilitate sites for off-street parking and other structures. Revenues from the sale of rehabilitated structures, fees from the off-street parking lot and tax increments generated by the increase in assessed value due to the rehabilitation of structures could, in combination, repay the tax increment revenue bond.

F. Town and Village Laws

The Town and Village Laws contain provisions similar to section 20 of the General City Law for the financing of local improvements. The Town Board is empowered to establish improvement districts pursuant to New York Town Law.¹⁶³ The Village Board has compa-

161. N.Y. GEN. MUN. LAW § 970-p(c) (McKinney 1986) (providing that the CV determined according to § 970-p(a)(ii) "shall not be included in the taxable value of real property when determining the tax rate for such municipality.").

162. N.Y. GEN. CITY LAW § 20 (McKinney 1989).

163. N.Y. TOWN LAW §§ 198, 231 (McKinney 1987).

rable powers pursuant to New York Village Law.¹⁶⁴ In either case, a municipality can combine a tax increment municipal redevelopment project and a town/village improvement district to build and finance public improvements as described in the preceding section dealing with the General City Law.

G. Private Housing Finance Law

Municipalities, with certain restrictions, may offer loans to limited profit housing companies for the construction of housing for low-to-moderate income persons and households.¹⁶⁵ Municipalities may also use the TIF law in conjunction with any of these limited profit or not-for-profit entities which may be created under the New York Private Housing Finance Law.¹⁶⁶ The municipality could loan municipal funds to any of the limited profit or not-for-profit corporations which the private housing law empowers to build or rehabilitate housing. Also, local governments could establish tax increment redevelopment projects to develop housing and to finance the necessary public improvements and the acquisition of property. Tax increments from the new housing could repay these costs of acquisition and improvement. The use of tax increment financing, however, precludes offering tax exemptions to the owners of the housing as permitted by statute.¹⁶⁷

164. N.Y. VILLAGE LAW § 22-2200 (McKinney 1973 & Supp. 1991).

165. N.Y. PRIV. HOUS. FIN. LAW §§ 11, 23 (McKinney 1976 & Supp. 1991) permits municipalities to loan up to 95% of project costs to limited profit housing companies and up to 100% of project costs to not-for-profit housing companies or public benefit corporations.

166. *Id.* §§ 40-61. The New York State Housing Finance Agency provides for state financed housing programs; §§ 70-97 (Limited dividend housing companies) provides for shareholder owned private housing companies limited to an annual return of 6%); §§ 100-126 (Redevelopment Companies Law); §§ 200-221 (Urban Redevelopment Corporations Law); §§ 250-261 (Community Development Corporations Act) provides for local not-for-profit corporation to redevelop in urban renewal areas. *See generally* Sweet & Hack, *Mitchell-Lama Buyouts: Policy Issues and Alternatives*, 17 *FORDHAM URB. L.J.* 117 (1989).

167. N.Y. PRIV. HOUS. FIN. LAW § 33 (McKinney 1976 & Supp. 1991) (This permits a total exemption from all local and municipal ad valorem taxes for up to 30 years on the housing owned by limited profit housing corporations. § 93 permits municipalities to grant an ad valorem tax exemption to the housing owned by limited dividend housing companies. They are also exempt from all state taxes. § 125 permits municipalities to grant an ad valorem tax exemption for up to 25 years to the extent the value of the property exceeds its value at the time it was acquired by the redevelopment company. § 211 permits municipalities to grant an ad valorem tax exemption for a maximum period of 10 years on property held by the urban redevelopment company. § 260 provides for an exemption of the property, income and operations of the community development corporation from taxation).

H. Public Housing Law

Public housing constructed, owned and managed by municipal housing authorities (MHAs) can also receive funds from redevelopment projects initiated under the TIF law. Municipal Housing Authorities are similar to urban renewal agencies created by the TIF law in that they have many of the same powers.¹⁶⁸ An MHA can manage a municipal housing revolving fund established pursuant to the Private Housing Finance Law.¹⁶⁹ Also, tax increments from the municipal housing revolving fund can be used to acquire and rehabilitate housing, to secure the MHA's bonds issued to finance housing projects or to purchase letters of credit guarantying MHA bonds or loans.

In summary, while some statutes restrict the municipality in implementing a tax increment financing plan to redevelop deteriorating sectors, others provide more flexibility in shaping a plan to meet the particular municipality's needs and requirements. With a little imagination on behalf of municipal planners, it is possible to use other statutes in conjunction with the TIF statute to mold a unique redevelopment plan for the municipality. However, a failure to recognize and/or take into consideration statutes which may restrict the redevelopment plan may be fatal to the endeavor.

VI. TIF: Is it Good Public Fiscal Policy?

Tax Increment Financing (TIF) offers a local financial alternative to federal¹⁷⁰ and state¹⁷¹ assistance for revitalizing blighted or deterio-

168. N.Y. PUB. HOUS. LAW § 37 (McKinney 1989) (This statute gives municipal housing authorities power to construct or rehabilitate housing, acquire property, demolish structures, clear parcels of land and arrange for the planning, construction or reconstruction of public improvements with federal, state and local government). See generally, Nolon, *Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing*, 17 FORDHAM URB. L.J. 383 (1989).

169. N.Y. PRIV. HOUS. FIN. LAW § 400- § 407 (McKinney 1976 & Supp. 1991), § 470- § 478 (McKinney 1976 & Supp. 1991), and § 800- § 805 (McKinney 1976 & Supp. 1991).

170. Federal Urban Renewal funds were originally provided to municipalities who submitted successful urban renewal applications under the HOUSING ACT OF 1949, Title I: Urban Renewal (42 U.S.C. §§ 1441-1490, 42 U.S.C.A. §§ 1441-1490 & Supp. 1991). Under the federal urban renewal program, funds were distributed on a two-thirds, one-third matching basis with the municipality responsible for one-third of the total project costs. This program was replaced by the HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974 (42 U.S.C. §§ 5301-5320, 42 U.S.C.A. §§ 5301-5320 & Supp. 1991). Federal money is distributed through a device known as the Community Development Block Grant (CDBG). The CDBG may be used to finance the rehabilitation of or redevelopment of housing, finance capital improvements in areas predominantly occupied by low-to-moderate income households, and finance urban renewal. CDBG money is allocated

rated areas of cities. It is a state authorized, locally administered means of financing redevelopment. In light of federal and state budgetary cutbacks,¹⁷² it is also a useful tool for municipalities seeking to

by the U.S. Department of Housing and Urban Development (HUD) to entitlement communities (metropolitan cities-central cities of standard Metropolitan Statistical Areas (SMSAS) as defined by the U.S. Department of Commerce, Bureau of the Census and other cities in SMSAS with a population of at least 50,000 and urban counties — counties which are in SMSAS and which have a population of 200,000 or more, excluding the metropolitan city(s) and other non-participating units of government) and non-entitlement areas (the balance of state government entities after excluding metropolitan cities, urban counties and Indian tribes. Non-entitlement funds are also described as Small City or State CDBG funds).

171. The General Municipal Law permits the State Commissioner of Housing and Community Renewal to make or contract to make a State capital grant to a municipality to assist in carrying out one or more programs of urban renewal. N.Y. GEN. MUN. LAW §§ 510, 557 (McKinney 1986).

172. The Federal CDBG funding program was reduced consistently during the 1980's.

<i>Appropriation</i>	<i>Fiscal Year</i>
3,600,000,000	1982-83
3,456,000,000	1983-84
3,500,000,000	1984-85
3,468,000,000	1985-86
3,124,800,000	1986-87
3,050,000,000	1987-88
3,037,000,000	1988-89
3,015,000,000	1989-90
3,004,000,000	1990-91

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, 1984 CONSOLIDATED ANNUAL REPORT TO CONGRESS ON COMMUNITY DEVELOPMENT PROGRAMS (Washington, D.C., Government Printing Office). *See also* SPECIAL BUDGET OF THE U.S. GOVERNMENT, Table H-11, "Federal Grants to State and Local Government, 1985-1990."

In New York State, CDBG Entitlement Grants and Small City Grant allocations have also been significantly reduced.

<i>Entitlement</i>	<i>Small Cities</i>	<i>Fiscal Year</i>
341,447,000	40,454,000	1983
328,567,000	42,732,000	1984
328,655,000	41,460,000	1985
276,888,000	36,004,000	1986
277,978,000	36,108,000	1987
263,438,000	34,605,000	1988
274,098,000	36,045,000	1989
261,221,000	34,039,000	1990
291,221,000	38,489,000	1991

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, BUFFALO AREA OFFICE, CONSOLIDATED ANNUAL REPORT TO CONGRESS ON COMMUNITY DEVELOPMENT PROGRAMS (Washington, D.C.: Government Printing Office and Buffalo Area Office 1991).

Only New York entitlement communities receive funding by simply submitting an annual application to HUD. 42 U.S.C. § 5306(b) (1981). Small Cities applicants must compete with other New York State small cities for a portion of the annual small cities appropriation. 42 U.S.C. § 5306(d) (1981). New York is one of only two states not administering the HUD small cities CDBG program. Small cities must therefore apply to the HUD office in Washington. Apparently, a political battle between the New York Senate, which wants CDBG funds distributed by the New York Commissioner of Hous-

finance redevelopment projects. However, few municipalities nationwide, and no municipalities in New York State, have initiated urban renewal projects which rely upon tax increment financing.¹⁷³ The reason that the TIF law is infrequently used may be due to the fact that only the municipality's tax levy against the CV is available to retire bonded indebtedness or repay project expenditures.¹⁷⁴ Without the county and school district levies against the CV, the municipality's annual tax increment may not generate enough revenue to meet principal and interest payments on a typical redevelopment bond issue. Moreover, without a guarantee or obligation by the state or municipality, it may be difficult to market the bonds since investors may see no present development to generate tax increments. Thus, investors and the public may consider TIF revenue bonds too speculative an investment. In analyzing the effectiveness of TIF as a local redevelopment financing device, the final section of this Article considers the soundness of using TIF to finance revitalization efforts.

A. Accountability

Municipal accountability for the expenditure of local property tax dollars is the primary issue associated with the use of TIF as a redevelopment financing mechanism. The use of TIF permits a municipality to finance redevelopment with dollars that do not originate from the general revenues of the municipal budget. As a result, local public officials need not consider alternative uses, such as capital improvements, fire and police protection, health, recreation and maintenance of the capital infrastructure, for the funds they spend for urban real estate development.¹⁷⁵ Since they are not forced to evaluate redevelopment expenditures in terms of other objects of municipal spending, public officials have less reason to review redevelopment expenditures as closely as they examine other budgetary items.

B. Limitations on Use

The fact that TIF permits a municipality to finance redevelopment

ing and Community Renewal, and the Executive Branch which wants funding directed through the Secretary of State, has prevented New York State from distributing CDBG funds allocated to New York State as part of the Small Cities Program.

173. No municipality in New York has utilized the TIF law as of the date of this article. Telephone interview with Joseph Hilton, Director of the Bureau of Municipal Affairs, Office of the Comptroller, Albany, New York.

174. *See supra* notes 64-72 and accompanying text.

175. Role of Cities in Real Estate Development Committee, Citizens League of Minneapolis-St. Paul Report, *Accountability for the Development Dollar*, 9 (1985). [hereinafter Citizens League Report].

without appropriating funds from its general revenues implicates another policy issue — the intensity of use of this redevelopment financing mechanism. Nonetheless, the New York TIF law does not limit the use of TIF as a redevelopment financing tool.¹⁷⁶ This absence of limitation on the percentage of assessed valuation that can be included in a TIF project could cause a municipality to fail to exercise selectivity in designating TIF redevelopment projects, as has been the case in the granting of tax abatements by industrial development agencies. Federal restrictions adopted as part of the 1986 Tax Reform Act, however, will limit the use of TIF by placing restrictions on the use of municipal bonds.¹⁷⁷ The 1986 Tax Reform Act classifies TIF bonds as “Qualified Redevelopment Bonds”, and as such, the bonds are subject to a per capita dollar limitation placed on each state.¹⁷⁸

In addition, the 1986 Tax Reform Act limits the assessed value of the aggregate blighted area designated by a governmental unit to 20 percent of the total assessed value of all real property located within the governmental unit.¹⁷⁹ Thus, both houses of Congress have done

176. Although the New York Municipal Redevelopment Law-Tax Increment Financing places no restriction on the number of projects or acres of land or percentage of the municipality's total assessed valuation that may be included in TIF projects, the findings required to categorize an area as blighted serve as an indirect limitation upon the use of TIF. N.Y. GEN. MUN. LAW. § 970-b (McKinney 1986).

177. See H.R. Rep. No. 426, 99th Cong., 1st Sess., (1985); See also H.R. Rep. No. 818, 99th Cong., 2d Sess., (1988); 26 U.S.C. §§ 141-147 (1986).

178. H.R. Rep. No. 841, 99th Cong., Vol. II, reprinted in Bureau of National Affairs Special Supplement, S-229 (1986). This report classifies TIF bonds as industrial development bonds (26 U.S.C. § 103, §§ 141-147) and subjects them to the annual private activity bond volume limitation. The annual volume limitation for each state is equal to the greater of (1) \$75 for every individual who is a resident of the state as determined by the most recent estimate of the state's population released by the Bureau of Census before the beginning of the calendar year to which the limitation applies or (2) \$250 million. These annual state volume limitations continue through December 31, 1987 after which time each state's volume limitation is reduced to an amount equal to the greater of (1) \$50 per resident of the state or (2) \$150 million.

179. *Id.* Under the conference agreement which became the 1986 Tax Reform Act, a number of limitations were placed on the designation of TIF redevelopment projects. The restrictions deal with the criteria for designating the TIF redevelopment projects and limitations on the size of TIF redevelopment projects.

Criteria for Designation:

Qualified redevelopment bonds may only be issued pursuant to (1) a state law which authorizes the issuance of such bonds to redevelop blighted areas, and (2) a redevelopment plan adopted by the governing body of the general purpose local governmental unit having a jurisdiction over the area before the issuance of the bonds. The New York Municipal Redevelopment Law comports with this requirement as it authorizes municipalities in accordance with a plan adopted by resolution of the local legislative body.

Size Limitations:

The 1986 Tax Reform Act provides both maximum and minimum size limitations for TIF redevelopment projects. The aggregate redevelopment projects designated by a gen-

what the New York State Legislature and other state legislatures have failed to do: they have restricted the use of tax increment financing. The federal limitation on the cumulative percentage of assessed valuation that may be included in TIF redevelopment projects should promote selectivity in the designation of proposed projects since the municipality that overzealously designates TIF redevelopment projects may be effectively precluded from commencing any further tax exempt, revenue bond-financed, redevelopment.

C. Effect Upon Other Taxing Jurisdictions

Unlike most of the other thirty-eight states that have authorized tax increment financing,¹⁸⁰ New York does not permit a municipality to incur obligations greater than the original assessed valuation for the repayment of notes and bonds issued to finance the project. Instead, in New York, a municipality may incur debt only to the extent of the municipality's tax levy,¹⁸¹ and excluding the school district's tax levy. Furthermore, the tax levy of any other political subdivision such as the county, may be included only if the municipality and the other governmental unit agree to undertake the project jointly.¹⁸²

Financing for TIF projects was limited to the originating municipality's tax levy because of the objections school districts raised to tax abatement. School districts have vehemently opposed granting tax abatements to property owners and developers¹⁸³ since the State Legislature has already authorized a plethora of statutes which enable municipalities to offer real property tax abatements to developers and owners of residential and business properties.¹⁸⁴ The TIF law accom-

eral purpose local governmental unit may not contain real property, the assessed value of which exceeds 20% of the assessed value of all real property located within the jurisdiction of the governmental unit. Designated redevelopment project areas cease to be counted for the purpose of the 20% test if no "qualified redevelopment bonds" are outstanding or if the project expenses were financed without qualified redevelopment bonds.

The minimum limitation requires a TIF redevelopment project to be comprised of at least 100 compact and contiguous acres or between 10 and 100 compact and contiguous acres and no more than 25% of the bond-financed land in the area is to be provided to any one person or related persons.

180. Of the other 38 states with TIF enabling legislation, only New Mexico requires the other affected taxing jurisdictions to give their approval before a TIF project may be established. N.M. STAT. ANN. § 3-46-1- § 3-46-45 (1978). Colorado municipalities can even obligate the state sales tax in order to repay bond indebtedness. COLO. REV. STAT. § 31-25-101- § 31-25-115 (1986).

181. N.Y. CONST., art. XVI, § 6.

182. N.Y. GEN. MUN. LAW § 970-n (McKinney 1986).

183. Interview with J.R. Drexilius, Counsel to New York State Senator Walter J. Floss (May 20, 1987).

184. See *Pyramid Co. v. Tibbets*, 76 N.Y.2d 148, 556 N.E.2d 419, (1990).

modates this objection by insulating school districts from the effect of the law. School districts may continue to levy against both the OV and CV of property located within the boundaries of a TIF redevelopment project as if no project existed.¹⁸⁵ According to New York State Senator Walter J. Floss, school districts are excluded from the TIF law's provisions because they do not attempt to encourage economic development.¹⁸⁶ Senator Floss believes that only the cities, towns, villages and counties should promote economic development,¹⁸⁷ and therefore, only these political subdivisions may undertake TIF projects, either singly or as joint actors.

Such an exclusion of certain political subdivisions from the provisions of the TIF law, however, is not logical. A political subdivision such as a school district benefits when new development joins its tax roll. If this increase in valuation occurs *solely* as a result of granting economic development incentives, such as TIF or tax abatement, then it would not exist, "but for" the extension of the incentive.

However, since the incentive was granted, the increase in assessed valuation that would otherwise not exist, is now on the tax roll benefiting each and every political subdivision entitled to levy a tax against the property. Since each political subdivision shares in the *benefits*, each political subdivision should share in the *burdens*. Although the benefits of a tax abatement or TIF program cannot immediately be realized by each political subdivision, once the term of the abatement or TIF redevelopment project has expired, the benefits of added assessed valuation are readily available. Therefore, the State Legislature should re-examine its faulty logic in excluding certain political subdivisions from the provisions of the TIF law. Similarly, the Legislature should attempt to make economic development incentives such as tax abatement¹⁸⁸ and TIF more uniform in their applicability and thus, more equally shared among political entities.

Finally, the State Legislature should scrutinize the use of incentives such as tax abatement to ensure that they are not used indiscriminately. In Erie County, for instance, any developer seeking industrial development bonds is automatically entitled to receive a tax abatement as a matter of policy.¹⁸⁹ The Legislature should review the criteria for granting tax abatements and determine if abatements or other

185. See *supra* note 22 and accompanying text.

186. Interview with New York State Senator Walter J. Floss (May 21, 1987).

187. *Id.*

188. See *infra* text at pages 60-63 for a discussion comparing TIF to tax abatement.

189. Interview with Rodney Conrad, Erie County Industrial Development Agency, May 11, 1987. Also, Interview with John C. Garas, Horowitz & Fine, P.C., legal counsel to the Erie County Industrial Development Agency, September 20, 1991.

incentives simply permit developers to play "beggar thy neighbor" with other political subdivisions.¹⁹⁰

If development would have occurred in another part of the municipality or somewhere within the same county without an incentive, it has been argued, then the incentive has been used needlessly to the detriment of local property taxpayers.¹⁹¹ Development that occurs without public assistance immediately becomes a part of the tax base and can theoretically reduce each individual's property tax burden by spreading the costs of municipal services over a larger tax base. This argument, however, neglects the importance of the location of development.

The use of an incentive to attract a manufacturing or commercial facility to an inner city location can be justified even if the firm would have located in another part of the region with little or no public assistance. The jobs associated with the firm and the firm's new facility, and the facility itself, as a replacement for blighted structures and non-productive land, can vindicate the use of the incentive to attract development to a specific location. The firm's location in an inner city area of high unemployment may supply jobs and reduce the city, county and state social services expenses. Furthermore, the replacement of blight and deteriorated structures with a new facility may reduce city service costs and may eventually reduce the city's dependence upon state aid.¹⁹² Thus, the use of public assistance in the forms of incentives and abatements can be justified.

The TIF law provides a mechanism for evaluating a developer's actual need for public assistance in section 960-e(f), which includes a "but for" clause.¹⁹³ This provision assures that a municipality will not provide public assistance, such as TIF, upon nothing more than a developer's request. Such a lack of selectivity in granting public assistance will lead to heavy use and in many cases, misuse, particularly if the development would have occurred without public assistance. The "but for" clause requires the municipality to study thoroughly each redevelopment proposal and to determine if assistance is really necessary. The municipality should seek a projected financial statement from the developer showing the development's

190. Citizens League Report, *supra* note 175, at 8.

191. Citizens League Report, *supra* note 175.

192. See *supra* notes 198-206 and accompanying text.

193. N.Y. GEN. MUN. LAW. § 970-e(f) (McKinney 1986) requires that each redevelopment plan contain a statement as to why redevelopment of the project area would not be undertaken were it not for the purposes and provisions of this article. The municipality must demonstrate that "but for the provision of public assistance, the development would not have occurred."

rate of return with and without public assistance. The effective enforcement of the "but for" provision by municipalities and the judiciary, and the extensive procedural requirements associated with the TIF law, will prevent the law's misuse to the detriment of other taxing jurisdictions.

D. Resistance to Reducing the Tax Rate

Tax Increment Financing is based fundamentally upon the application of the local tax rate of the municipality to the increase in assessed valuation in the project area attributable to redevelopment. Thus, it has been suggested that since a municipality knows the annual level of tax increment revenue that is necessary to meet debt service requirements, the municipality may have an incentive to keep its tax rate artificially high.¹⁹⁴ However, the municipality administering the TIF redevelopment project is only one of the many local taxing jurisdictions which independently control and set their own tax rates. The other taxing jurisdictions such as the county, school district and local authorities have no such incentive to keep their tax rates artificially high. Instead, they attempt to reduce the tax rate in order to remain below the legislatively mandated levy limitations.¹⁹⁵ Furthermore, keeping the tax rate higher than necessary to finance the municipal capital and operating budget would probably produce political fallout for the elected officials supporting such a measure.

Where property values in a redevelopment project decline to a point where bonds issued to finance public redevelopment costs are not fully amortized, however, public officials would be sorely tempted to keep the tax rate high so as to offset the decline in property values. Ordinarily, there would be no need to raise the tax rate, since bond underwriters and investors usually insist upon a sufficient tax increment to cover annual bond costs. In the event the coverage is inade-

194. Citizens League Report, *supra* note 175, at 10-11.

195. N.Y. CONST. art. VIII, § 10 limits a municipality to a maximum real property tax levy for:

- (a) any county, for county purposes, one and one-half percentum; provided, however, that the legislature may prescribe a method by which such limitation may be increased to not exceed two percentum;
- (b) any city of 125,000 or more inhabitants according to the latest federal census, for city purposes two percentum;
- (c) any city having less than 125,000 inhabitants according to the latest federal census, for city purposes, two percentum;
- (d) any village, for village purposes, two percentum;
- (e) Notwithstanding the provisions of subparagraphs (a) and (b) of this section, the City of New York and the counties therein, for city and county purposes, a combined total of two and one-half percentum.

quate, however, the municipality might attempt to keep its tax rate artificially high to compensate for lower property values. This temptation to raise tax rates could be eliminated by amending the TIF law to permit the municipality and redeveloper to negotiate an assessment agreement.¹⁹⁶

An assessment agreement would eliminate some of the uncertainty in tax increment financing transactions by permitting three-party agreements among the municipality, the redeveloper and the municipal assessor, which would govern the minimum fair market value needed to meet annual debt service requirements, based on construction plans and specifications.¹⁹⁷ The assessment agreement would guarantee that the property benefitting from the TIF would be assessed at a value high enough to provide tax revenues sufficient to meet the project's financial obligations. Furthermore, the municipality and the redeveloper could agree that, in return for the public assistance provided, the redeveloper would not contest any assessment below the minimum amount needed to service the project's debt. In this manner, the assessment agreement could guarantee the valuation necessary to provide a sufficient tax increment and eliminate the need to keep tax rates at artificially high levels.

E. Effect of TIF Upon Municipal Services

Generally, redevelopment of blighted areas reduces municipal services costs.¹⁹⁸ These costs tend to be higher in blighted areas because the infrastructure is old, often subject to breakdowns, and therefore in frequent need of maintenance and repair.¹⁹⁹ Municipal public works personnel must devote an inordinate amount of time to such tasks as repairing street "potholes", sewer and waterline breakages, and main-

196. MINN. STAT. § 469.177(8) permits a local authority . . . [to] enter into a written assessment agreement in recordable form with the developer or redeveloper of property within the tax increment financing district which enables a minimum market value of the land and completed improvements to be constructed later until a specified termination date, which date shall be not later than the date upon which tax increment will no longer be remitted to the authority.

197. J. Holmes, *The Minnesota Tax Increment Financing Act of 1979: Including 1980, 1981 and 1982 amendments* (annotated), (Minneapolis 1983) at 43, note 111.

198. Minnesota League of Cities (MLC) and the National Association of Housing and Redevelopment Officials, *Redevelopment and Tax Increment Financing: An Analysis of Minnesota's Redevelopment Financing Alternatives*, Volume II, at 42 (March 1977). [hereinafter MLC Task Force Report]. Greater efficiency and lower repair costs result when the infrastructure (streets, water, sewer and other utilities) is replaced. Furthermore, newer buildings require less police surveillance and few inspections by fire and building officials since code violations are less likely.

199. *Id.* at 66-68.

taining other public facilities such as parks, parking facilities, curbs, gutters and sidewalks.

In addition, municipal building, health and fire inspectors must devote many hours to inspecting and reinspecting older, deteriorated private dwellings and structures, since these buildings are more likely to be in violation of health, building and fire safety codes.²⁰⁰ Further, municipal inspectors often must spend a disproportionate amount of time on reinspection of older, blighted premises in an attempt to bring about compliance with local codes. Also, additional time and money must be expended upon recalcitrant violators, since resorting to judicial remedies may be necessary in these cases to enforce health, building and safety codes. To avoid the burden of repair and maintenance, the owner often sells or abandons the property. In either case, the municipality must assume an economic burden. If the property is sold, the municipality must reinitiate the entire inspection code compliance process with the new owner. In the case of abandonment, the municipality must secure or demolish the abandoned structures on the property. If the owner has other real property to which a lien can be attached, demolition costs may ultimately be recovered.²⁰¹ However, until the structure is legally abandoned for non-payment of real property taxes,²⁰² it may be a target for arson and other criminal activities requiring municipal action. These abandoned properties will eventually become publicly owned through tax foreclosure, yet they will not generate any tax revenues in their decrepit and uninhabitable condition.

Redevelopment fails to reduce municipal service costs only when a high density new development replaces a former low density land use.²⁰³ A higher density development produces more traffic and exerts higher demands per unit upon, for instance, sanitary and storm sewer and water facilities. The higher density development results in more storm water run-off, more sanitary sewage and higher water usage. Further, shortages of certain services may result during periods of peak demand. Offsetting these potential increases in service costs, however, are reduced public safety costs. Fewer health and fire inspections are needed because new developments often include supe-

200. *Id.* at 68-71.

201. N.Y. GEN. MUN. LAW § 78-b (McKinney 1980) permits a municipality to assess the costs of demolishing hazardous structures to the taxpayer of record. N.Y. CIVIL PRACTICE LAWS AND RULES, art. 4, governs any special proceeding commenced under the section.

202. N.Y. REAL PROPERTY TAX LAW § 1000 (McKinney 1958) permits a municipality to initiate sale proceedings to recover the unpaid tax.

203. MLC Task Force Report, *supra* note 198, at 6.

rior fire prevention and suppression systems and usually incorporate better lighting, design and security.²⁰⁴

The TIF law provides an effective tool for financing public improvements associated with redevelopment. Tax increment revenues are available not only to finance land acquisition, clearance, site assembly and preparation, but also to fund the construction or replacement of public facilities such as streets, sewer lines, water lines, and to provide public parking in congested residential and commercial areas.²⁰⁵ Where the cost of public facilities and improvements would otherwise have been financed through special assessments levied against the benefitting property owners, no tax benefit is realized by the general municipal population. However, in the case of public improvements or facilities producing a general municipal benefit, all municipal taxpayers benefit when tax increment financing is used. Under these circumstances, the CV and concomitant real estate taxes, rather than the general revenues of the municipality, finance the public improvement, thus restricting the cost to the area of the project.

The savings in municipal service costs due to the use of TIF to finance the replacement of public improvements generally exceeds the

204. *Id.*

205. N.Y. GEN. MUN. LAW § 970-k (McKinney 1986). (Parking facilities may no longer be financed from the proceeds of tax exempt IDBs). See H.R. Rep. No. 841, 99th Cong., Vol. II, reprinted in Bureau of National Affairs Special Supplement, S-218 (July 1986). See also 26 U.S.C. § 144. However, tax exempt "Qualified Redevelopment Bonds" can be used to finance urban renewal costs including land acquisition and public improvements. A municipality could use tax increment backed qualified redevelopment bonds to finance public improvements with the exception of a parking facility in a residential and/or commercial redevelopment project area. Tax exempt bonds may still be issued to finance traditional governmental activities. See HOUSE REPORT 99-426 at p. 515, and SENATE REPORT 99-313 at pp. 828-29. N.Y. GEN. MUN. LAW § 72-j (McKinney 1946) permits the construction of parking facilities since the acquisition of land and construction of parking facilities is a public use or purpose. See *Deniham Enters. v. O'Dwyer*, 197 Misc. 950, 97 N.Y.S.2d 326, *rev'd on other grounds*, 277 A.D. 407, 100 N.Y.S.2d 512, *aff'd*, 302 N.Y. 451, 99 N.E.2d 235 (1950). Therefore, the TIF law will provide a means to indirectly continue to use tax-exempt bonds to finance necessary parking facilities in urban renewal areas. The municipality would issue tax exempt general obligation bonds for which special assessments against properties located within the redevelopment project area would be pledged to repay the bonds. The bond proceeds would then be used to construct a parking facility. However, the parking facility would have to be governmentally owned if a general obligation bond was used to finance the facility. Otherwise, a taxable IDB would have to be issued to finance a privately owned parking facility.

The municipality would also issue TIF revenue bonds to finance acquisition, clearance, relocation and the cost of installing new or replacing existing public improvements such as roads, curbs and gutters, sewer and water lines, and sidewalks, but not the parking facility. These TIF redevelopment revenue bonds provide the proceeds to finance public improvements that would otherwise be paid via special assessments against the benefitting property owners. The bonds are amortized by tax increments generated by private properties located within the redevelopment project area.

temporary increase in the costs of municipal services in the TIF redevelopment project, which are financed from the municipality's general revenues.²⁰⁶ Once the redevelopment bonds are retired, the additional tax base provided by the former CV, now subject to the general tax levy, will slightly reduce the incidence of the general property tax levy upon all properties within the political subdivision.

The TIF law can also be used as a tool to deliver more efficient public services. Replacement of public facilities and the redevelopment of deteriorated private properties generally reduces municipal service expenditures in the form of code violation inspections. Financing public improvements using tax increment financing in urban renewal areas can limit the incidence of the cost of improvements to the redevelopment project area even though the benefits accrue to the entire municipality.

F. Comparison to Property Tax Abatement

The TIF law provides a mechanism for reducing the costs of redevelopment faced by the private developer. Compared to the simpler method of tax abatement, the tax increment financing redevelopment process appears to be an extremely complex way to achieve the same objective of providing an incentive to the developer. In brief, tax abatement involves granting the developer an exemption from real property taxes for a term of years. In New York State, municipalities are authorized to grant tax abatements of real property taxes for a maximum period of ten years for residential property located outside of New York City.²⁰⁷ Abatements of ten years are available for busi-

206. MLC Task Force Report, *supra* note 198, at 6.

207. N.Y. REAL PROPERTY TAX LAW § 421-a permits the City of New York to grant tax exemptions for new multiple dwelling rental structures. The duration of the exemption is 10 years plus an exemption during the period of time it takes to construct the building prior to occupancy. However, the duration of the exemption is 15 years if 20% of the dwelling units are reserved for low-moderate income households and 25 years if 20% of the dwelling units are reserved for low-moderate income households and the property is located in a neighborhood preservation area (1971, 1984). Section 421-b provides eight years of graded exemptions from local property taxes for dwellings rehabilitated for multi-family housing in the City of New York. Section 421-c provides an exemption of 10 years on new residential multiple dwellings in towns, villages, and cities of less than 1 million population (1980). Section 421-d provides a 15-year exemption on residential dwellings financed by the New York State Housing Finance Agency (1984). Section 421-e provides a 20-year exemption on cooperatives, condominiums and homestead and rental rehabilitation projects which receive financing through article 18 or article 19 of the private housing finance law (1985). Section 485 provides a 10-year exemption from local taxes on new business facilities (1972) and Section 485-b provides a 10-year exemption on new business investment (1976).

ness facilities.²⁰⁸

Although the TIF redevelopment process may be more complicated, it offers redevelopers a richer incentive. Compared to tax abatement, tax increment financing subsidizes redevelopment more effectively because it reduces a developer's capital requirements. Tax increment financing revenue bonds provide a source of funds for acquiring land, demolishing structures, clearing sites, assembling parcels large enough for redevelopment and installing or replacing public infrastructural components. Because these costs are financed from the proceeds of bonds, the developer does not have to finance them from capital and ultimately from the sale or rent of the improvements he has built. The developer will be able to take title to a parcel of land ripe for development at its fair market value as vacant land since the municipality will absorb the cost of acquiring properties from their owners, relocating property owners and tenants, and clearing and grading the sites. The municipality thus effectively absorbs the public improvement costs. The developer's capital requirements are lower since he does not have to finance these redevelopment costs himself. The developer has acquired a site, ready for construction, at a discount. The property taxes levied against the property will finance acquisition and improvement costs. Moreover, real property taxes are deductible for federal income tax purposes, and thus the developer can realize savings in his income tax owed.²⁰⁹

By comparison, tax abatement only improves a developer's annual cash flow.²¹⁰ The absence of annual real property taxes reduces annual costs including maintenance, administrative, insurance, and taxes. The developer, however, must finance acquisition, demolition and public improvement costs, which require large amounts of debt and equity capital. Thus, the developer using tax abatements has higher initial costs. These increased initial costs can be especially burdensome to smaller developers with limited access to capital. Tax increment financing, on the other hand, provides superior redevelopment incentives for the small, less experienced and less capitalized developer, as well as the major developer.

VII. Conclusion

Despite these benefits and advantages, the New York TIF law of-

208. *Id.*

209. G. Conley, *Attracting Private Investment In the Inner City Through the Use of Development Subsidies*, Submitted for Presentation to the Institute on Urban Economic Development, (Nov. 12, 1975) at 5-6.

210. *Id.* at 6.

fers a redevelopment financing mechanism of somewhat limited potential. Since the New York constitutional amendment authorizing TIF only allows the use of revenue bonds, rather than general obligation bonds, potential lenders may shy away from investing in tax increment redevelopment bond issues. In addition, the law limits the tax increment generated by excluding the school district's tax levy against the CV in all circumstances and the county's tax levy against the CV, when it does not join with the municipality in sponsoring the project. As a result, development projects may not generate sufficient annual tax increments to warrant employment of the cumbersome and costly procedure of designating a TIF redevelopment project and issuing bonds. Furthermore, the traditionally indiscriminate use of tax abatements in New York may discourage municipalities and developers from even bothering with tax increment financing. Finally, some municipalities have other redevelopment incentives such as tax abatement, CDBG money and Industrial Development Bonds to adequately finance urban renewal and redevelopment.

Yet, funding for some of these alternative programs is increasingly subject to restriction.²¹¹ As in other states, municipalities in New York may therefore come to rely upon tax increment financing as a primary redevelopment financing tool.²¹² As presently enacted, the role of tax increment financing will likely be limited to economic development projects on vacant land. In the case of an economic development project implemented in phases, assessed valuation and tax increments captured from the first phase of development can be used to help finance the second phase of public improvements. However, in its present version, the TIF law may never offer a viable urban renewal finance alternative.

In order for tax increment financing to play a greater economic development and urban renewal role, a modified constitutional amendment is needed, along with a change in philosophy regarding the way in which political subdivisions share the burdens and benefits

211. H.R. Rep. No. 841, 99th Cong., Vol. II, reprinted in Bureau of National Affairs Special Supplement, S-221, (July 1986). This reports, as previously indicated, that tax-exempt, private purpose IDBs will not be issuable for small projects (less than \$1 million in expenditures for land and improvements after 1988). Also, all IDBs will be subject to a state-wide dollar limitation of \$75 per capita in 1987 and \$50 per capita in 1988 and years thereafter or \$150 million per state, whichever is greater. *Id.* at S-229. For the reductions in the dollar volume of Federal Community Developments Block Grants, see *supra* note 172.

212. California has been the leader in the use of tax increment financing. Two hundred and fifty cities used tax increment financing in California between 1951 and 1978. Note, *Tax Increment Financing "Rational Basis" or "Revenue Shell Game"?*, 22 URBAN L. ANN. 283, n. 3.

of economic development and urban renewal. The realization that *all* affected political subdivisions eventually share in the benefits, and therefore *all* affected political subdivisions should share the burdens of economic development, is the capstone for reforming the tax increment financing constitutional amendment. If the law permitted the tax levy of each affected taxing jurisdiction to capture the new assessed value and tax revenue, tax increment financing could become an effective economic development and urban renewal tool. Such reform should take place within a greater framework through a comprehensive examination of New York's present urban renewal and economic development tools. This examination should include a fresh look at the Urban Development Corporation, the Department of Housing and Community Renewal, and the use of tax exempt financing and tax abatement. The objective of this comprehensive examination would be to determine how each of these economic development and urban renewal mechanisms is currently being used and how the State can effectively marshal its resources to provide economic incentives to private developers who, "but for" that assistance, would not otherwise develop within the State, region or political subdivision.