TIF IN NEBRASKA: IS THE COMMUNITY DEVELOPMENT LAW BROKEN OR ARE PROponents OF REFORM MERELY PLAYING A BROKEN RECORD ON REPEAT?

I. INTRODUCTION

In 1978, Nebraska voters approved a constitutional amendment to allow the use of tax increment financing ("TIF") as a means to redevelop substandard and blighted areas.1 In 1979, the Nebraska Legislature added supplemental provisions to the existing Community Development Law2 (collectively, the "Statute") to grant local governments with the power and discretion to use TIF.3 TIF is a financing tool that involves the property taxes that are collected as the result of an incremental increase in property value generated by a redevelopment project in an area that has been declared substandard and blighted.4 The collected tax moneys from the incremental increase in property value are typically used to pay off a TIF bond, which is issued in order to provide up-front capital for public investments, such as public infrastructure, associated with the redevelopment project.5 The governing body of a city must complete certain steps, including conducting a cost-benefit analysis, before approving a redevelopment project.6 The governing body may approve a redevelopment project if it finds that the specific TIF project would not be economically feasible without TIF funds, the project would not occur in the substandard and blighted area without the use of TIF, and the costs and benefits of the

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The powers conferred by sections 18-2147 to 18-2153 shall be in addition and supplemental to the powers conferred by the Community Development Law . . . . The provisions of such sections and all grants of power, authority, rights, or discretion to a city or village and to an authority created under the Community Development Law shall be liberally construed, and all incidental powers necessary to carry into effect such sections are hereby expressly granted to an conferred upon a city or village or an authority created pursuant to the Community Development Law.
Id.
project would be in the long-term best interest of the community.\textsuperscript{7} This is known as the but-for test.\textsuperscript{8}

In recent years, senators in the Nebraska Legislature introduced twelve legislative bills amending the Statute and four constitutional amendments pertaining to TIF.\textsuperscript{9} Nebraska Legislative Bill 918 sought to place tighter limitations on cities’ abilities to declare land as blighted.\textsuperscript{10} If passed, Nebraska Legislative Resolution 376CA would have changed the Statute’s blighted and substandard requirement and extended the period allowed to pay off TIF indebtedness.\textsuperscript{11} Nebraska Legislative Bill 1132 would have permitted cities to develop vacant land outside of the city limits without the need to annex, provided the city obtained county approval.\textsuperscript{12}

Nebraska Legislative Resolution 29CA aimed to change the Statute’s blighted and substandard requirement and extended the payback period for TIF debt.\textsuperscript{13} Nebraska Legislative Bill 529 would have limited the use of TIF based on the valuation of previous TIF projects.\textsuperscript{14} Nebraska Legislative Bill 1095 and Nebraska Legislative Bill 596 sought to add further oversight at the local level while also creating power for a state-level agency to establish additional procedures for the use of TIF.\textsuperscript{15} Nebraska Legislative Bill 238 would have narrowed the Statute’s language with respect to expenditures stemming from TIF funds and tightened restrictions on TIF bond sales and interest rates.\textsuperscript{16} If passed, Nebraska Legislative Bill 445 would have empowered the state to conduct audits of TIF projects and restricted the use of TIF by local governments that were not compliant with the Statute.\textsuperscript{17} Nebraska Legislative Bill 539 provided state agencies the power to audit local entities established under the Statute.\textsuperscript{18}

\begin{footnotesize}
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\item[7.] \textit{Id.} § 18-2116(1).
\item[8.] \textit{See} Briffault, \textit{supra} note 5, at 77 (discussing the but-for requirement as it relates to TIF).
\item[10.] Neb. L.B. 918.
\item[11.] Neb. L.R. 376CA.
\item[12.] Neb. L.B. 1132.
\item[13.] Neb. L.R. 29CA.
\item[14.] Neb. L.B. 529.
\item[15.] Neb. L.B. 596; Neb. L.B. 1095.
\item[16.] Neb. L.B. 238.
\item[17.] Neb. L.B. 445.
\item[18.] Neb. L.B. 539.
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Nebraska Legislative Bill 719 was intended to prohibit the use of TIF funds for redevelopment projects on undeveloped vacant land.19 Nebraska Legislative Resolution 394CA would have permitted a taxing jurisdiction that overlapped the redevelopment project to opt out of having its taxes diverted as a result of TIF.20 Nebraska Legislative Resolution 399CA aimed to require cities to gain voter approval for TIF redevelopment projects.21 Nebraska Legislative Bill 1042 sought to require cities to obtain approval for TIF redevelopment projects from the relevant county board of equalization.22 Nebraska Legislative Bill 1059 would require redevelopers seeking TIF funds to disclose whether they intended to take advantage of the Nebraska Advantage Act23 and in what capacity.24 Nebraska Legislative Bill 1102 would have permitted performance audits of TIF redevelopment projects by the Legislative Performance Audit Committee.25

This Note will first discuss the procedural process of utilizing TIF as outlined in the Statute.26 It will then provide an overview of TIF legislation introduced in the Nebraska Legislature since 2012 and present the arguments for and against such legislation raised during committee hearings on the bills.27 Next, it will present academic research on the use of TIF and its effectiveness.28 It will then focus on an example of a successful taxpayer challenge to the use of TIF in the Nebraska court system.29 This Note will conclude by illustrating how recently presented legislative bills that create increased state oversight of local governments’ use of TIF in Nebraska are unnecessary.30 First, it will critique studies that are used to support arguments for TIF reform in Nebraska by questioning both the studies’ conclusions pursuant to the language of the Statute and the studies’ empirical findings.31 Second, it will outline and provide examples of the use of existing avenues of accountability that provide taxpayers with the ability to challenge their local governments’ use of TIF.32

26. See infra notes 33-53 and accompanying text.
27. See infra notes 54-144 and accompanying text.
28. See infra notes 145-185 and accompanying text.
29. See infra notes 186-197 and accompanying text.
30. See infra notes 198-260 and accompanying text.
31. See infra notes 207-226 and accompanying text.
32. See infra notes 227-260 and accompanying text.
II. COMMUNITY DEVELOPMENT LAW AND LEGISLATIVE HISTORY

A. ENACTMENT AND PROCEDURE

California became the first state to pass tax increment financing (“TIF”) legislation with the purpose of funding urban renewal in the 1950s. In 1978, Nebraska voters followed suit and adopted a constitutional amendment to allow the use of TIF for the rejuvenation of substandard and blighted property. The subsequent year, the State Legislature passed enabling legislation under the Community Development Law (collectively, the “Statute”). Now, forty-nine states and the District of Columbia have enacted TIF legislation. TIF involves the capture of property tax revenues on the value of property that is increased as a result of a redevelopment project in an area that has been declared substandard and blighted. The property tax revenues from that increased value are typically used to repay a TIF bond over a fifteen-year period that is issued, backed by the pledged future tax revenues, in order to provide the initial funding for public improvements required by the redevelopment project.

1. Declaring an Area as Substandard and Blighted

Under the Statute, cities and villages are granted the power to create a community redevelopment authority (the “Redevelopment Authority”) with the ability to enter into agreements for redevelopment plans. Before the Redevelopment Authority may enter into such an agreement, the governing body must prepare a general plan for the city’s development and request from the planning commission a recommendation of whether an area is substandard and blighted. The definition of substandard involves a predominance of buildings or improvements in the area that facilitate risks and cause detriment to the general public. To be declared blighted, an area must contain...
the presence of one or a combination of factors, such as insanitary or unsafe conditions or deterioration of improvements.\textsuperscript{42} Such factor(s) must substantially inhibit growth, limit housing accommodations, or present a social or economic liability and create a detriment to the general public.\textsuperscript{43} In order to be declared blighted, an area must also include high levels of unemployment, residential or commercial units the average age of which is at least forty years, land the majority of which has not been improved over a forty-year period, below average per capita income, or a stable or decreasing population.\textsuperscript{44} An additional limitation on substandard and blighted designations restricts the percentage of a city that may be declared blighted and substandard.\textsuperscript{45} Finally, before making the substandard and blighted determination, the governing body must hold a public hearing with notice as prescribed in the Statute.\textsuperscript{46}

2. Approval of a Redevelopment Plan

The redevelopment plan required for approval of a TIF project must include the contents set forth in the Statute, including a description of the current and future uses of the redevelopment project area in addition to proposed changes to the area.\textsuperscript{47} Before making a recommendation of a redevelopment plan to the governing body, the Redevelopment Authority must consider whether the redevelopment project proposes to accomplish the promotion of the public purposes which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime, (which cannot be remedied through construction of prisons), and is detrimental to the public health, safety, morals, or welfare.

\textit{Id.} \textsuperscript{42} \textit{Id.} § 18-2103(11).
\textit{Id.} \textsuperscript{43} \textit{Id.}
\textit{Id.} \textsuperscript{44} \textit{Id.}
\textit{Id.} \textsuperscript{45} \textit{Id.}

In no event shall a city of the metropolitan, primary, or first class designate more than thirty-five percent of the city as blighted, a city of the second class shall not designate an area larger than fifty percent of the city as blighted, and a village shall not designate an area larger than one hundred percent of the village as blighted.

\textit{Id.} \textsuperscript{46} \textit{Neb. Rev. Stat.} § 18-2109. Proper notice under the Statute consists of publication once per week for a two-week period with the last publication being no less than ten days before the hearing. \textit{Id.} § 18-2115(1). Actual notice is required to be given to each registered neighborhood association within a one-mile radius of the project as well as each “county, school district, community college, educational service unit, and natural resources district” that covers the redevelopment area. \textit{Id.} § 18-2115(2).

\textit{Id.} \textsuperscript{47} \textit{Id.} § 18-2111.
behind the Statute. 48 Moreover, the Statute also requires the Redevelopment Authority to conduct a cost-benefit analysis that analyzes factors including impacts on public service needs, local taxes, employers and employees within the community, and any other impacts the Redevelopment Authority deems relevant. 49

Once a redevelopment plan is prepared, the Redevelopment Authority must submit the plan to the planning commission for the commission’s recommendation on whether the plan is in conformity with the city’s general plan for development. 50 After receiving the recommendation from the planning commission, the Redevelopment Authority submits the plan to the governing body, which holds a public hearing after giving required notice, to determine whether the particular plan should be approved. 51 The governing body may approve a plan if it finds that the plan conforms to the Statute and the city’s general plan for development. 52 Additionally, the governing body must find that the specific TIF project would not be economically feasible without TIF funds, the project would not occur in the substandard and blighted area without the use of TIF, and the costs and benefits of the project would be in the long-term best interest of the community. 53

B. TIF UNDER FIRE IN THE NEBRASKA STATE LEGISLATURE

The use of TIF in Nebraska has surged throughout the years, with a twofold increase in the number of projects from 1997 to 2004, although that rate has decreased over the last decade. 54 This increase has been accompanied by the introduction of twelve bills and four constitutional amendments in the Nebraska Legislature since 2012, most of which would limit the use of TIF in Nebraska. 55 State senators who

48. Id. § 18-2113(1).
49. Id. § 18-2113(2).
50. Id. § 18-2112. If the planning commission holds a public hearing on the redevelopment plan, proper notice must be given. Id. § 18-2115(3).
51. Id. § 18-2115.
52. Id. § 18-2116(1).
53. Id. This is commonly known as the but-for test. See supra note 8 and accompanying text.
support these restrictive proposals claim that TIF has run amok and is being outrageously abused. These senators argue the use of TIF has strayed from its original purpose as an urban redevelopment tool and now serves as an all-purpose economic development tool with no oversight.

1. 102nd Legislature: The Urban Affairs Committee Hears Calls for Change Regarding TIF

On January 10, 2012, Senator Abbie Cornett introduced Nebraska Legislative Bill 918, which was subsequently referred to the Urban Affairs Committee. The bill would have removed language from the Statute that permits up to thirty-five percent of a metropolitan or first class city’s land to be declared blighted. That amendment then limited blight designations to seven percent of the value of property of a political subdivision covered by the proposed redevelopment project. During the committee hearing, Senator Cornett maintained she did not intend to shut down the use of TIF, but she rather sought greater inclusivity in the TIF process for political subdivisions affected by the Statute. On April 18, 2012, the bill was indefinitely postponed.

On January 17, 2012, Senator Heath Mello introduced Nebraska Legislative Resolution 376CA, which was subsequently referred to the Urban Affairs Committee. The proposed constitutional amendment would have replaced the terms substandard and blighted with in need of rehabilitation or redevelopment. The proposed amendment also extended the fifteen-year period limitation on a TIF bond to twenty...
years. The proposed amendment would have permitted extending that period to thirty years if more than one-half of the property had been previously owned by the state and a twenty-year period would not have been reasonable. On April 18, 2012, the bill was indefinitely postponed.

On January 19, 2012, Senator Amanda McGill introduced Nebraska Legislative Bill 1132, which was subsequently referred to the Urban Affairs Committee. The bill would have permitted cities to develop vacant land within a three-mile radius of the city without having to first annex the land, as is currently required by the Statute. The proposed changes, however, would have required the county to approve of such projects. On April 18, 2012, the bill was indefinitely postponed.

2. 103rd Legislature: Nebraska State Senators Call for State Oversight of the Use of TIF

On January 18, 2013, Senator Greg Adams introduced Nebraska Legislative Resolution 29CA, which was subsequently referred to the Urban Affairs Committee. The proposed constitutional amendment, just like L.R. 376CA proposed by Senator Mello in the previous session, sought to changed the substandard and blighted language of the Nebraska State Constitution to in need of rehabilitation and redevelopment and extended the fifteen-year limitation to twenty-years. Unlike the previously proposed constitutional amendment, however, L.R. 29CA did not provide for a possible thirty-year period for a TIF project on property previously owned by the state. On April 17, 2014, the proposed constitutional amendment was indefinitely postponed.

On January 23, 2013, Senator Annette Dubas introduced Nebraska Legislative Bill 529, which was subsequently referred to the Urban Affairs Committee. The bill restricted the use of TIF funds where the value of a redevelopment project, when added to the values of previously existing projects, would exceed 1.5 percent of the city’s

65. Id.
66. Id.
70. L.B. 1132 § 2.
73. L.R. 29CA § 1; L.R. 376CA, 102d Leg., 2d Sess. (Neb. 2012).
74. Neb. L.R. 29CA; Neb. L.R. 376CA.
76. L.B. 529, 103d Leg., 1st Sess. (Neb. 2013).
Moreover, the bill restricted the use of TIF funds where the total value of property in a city that was funded using such funds, minus the excess value generated by redevelopment projects within the city, exceeded five percent of the city's total taxable value. On April 17, 2014, the bill was indefinitely postponed.

On January 22, 2014, Senator Al Davis introduced Nebraska Legislative Bill 1095, which was subsequently referred to the Urban Affairs Committee. In its original form, the bill added a requirement that members of the Redevelopment Authority, appointed by the mayor (or other presiding officer of the governing body), consist of local stakeholders. The bill further required a Redevelopment Authority to maintain a website displaying established metrics and performance thresholds for TIF projects. Those metrics and performance thresholds would then be used to determine the effectiveness of such redevelopment projects.

The bill also created the Tax Increment Financing Division of the Department of Economic Development (the “TIF Division”). The purpose of this new division would be to create state oversight of the use of TIF by establishing procedures that must be followed by local authorities. Additionally, the bill tasked the TIF Division with establishing procedures for the required cost-benefit analysis, a power currently held by local authorities. Moreover, a city that used TIF would be required to publish names of TIF recipients that were not in compliance with their TIF agreements on the city’s website and to provide yearly reports to the TIF Division on the economic impact of redevelopment plans, subsequent year strategies and priorities for the use of TIF, and a summary of TIF’s contribution to the local community. The bill proposed to finance this new division by establishing a fee structure for projects that benefit from TIF.

During the Urban Affairs Committee Hearing on February 11, 2014, Senator Davis discussed potential amendments to the original bill that placed the Tax Increment Financing Division under the au-

77. Neb. L.B. 529 § 1.
78. Id.
79. LEGIS. JOURNAL, 103d Leg., 2d Sess. 1631 (Neb. 2014).
81. Neb. L.B. 1095 § 1. Local stakeholders “may include city staff, members of the governing body, representatives of other taxing bodies that levy property taxes, experts in the area of economic development, and members of the public.” Id.
82. Id.
83. Id.
84. Id. § 8.
85. Id. § 9.
86. Id. § 3.
87. Id. § 5.
88. Id. § 9.
authority of the Auditor of Public Accounts rather than the Department of Economic Development. 89 An amended version of the bill would have also contained a requirement that representatives from the local school district, county, or community college to be given a seat on the Redevelopment Authority. 90 Finally, Senator Davis discussed amending the bill to include a claw back provision for projects that failed to meet their TIF agreements and prorate the fee used to finance the division over the lifetime of the project. 91

On March 26, 2014, after it became clear L.B. 1095 would not be enacted into law, Senator Davis introduced Nebraska Legislative Resolution 599.92 The resolution tasked the Urban Affairs Committee with conducting an interim study into municipalities’ use of TIF and its impact on their communities.93 On April 17, 2014, the bill was indefinitely postponed.94

3. 104th Legislature: Attacks on the Use of TIF Pick Up Speed

On January 14, 2015, Senator Mike Groene introduced Nebraska Legislative Bill 238, which was subsequently referred to the Urban Affairs Committee.95 The bill amended the Statute to provide a definition for public works.96 This definition tightened restrictions on expenditures for which TIF bonds could be used.97 Moreover, the bill placed restrictions on the sale of bonds as well as their interest rates.98

On January 20, 2015, Senator Groene introduced Nebraska Legislative Bill 445, which was subsequently referred to the Urban Affairs Committee.99 The bill required the Department of Revenue to develop an audit plan for all TIF projects and to audit each project at least

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89. Hearing on L.B. 1095, supra note 56, at 1 (statement of Sen. Al Davis).
90. Id.
91. Id.
94. LEGIS. JOURNAL, 103d Leg., 2d Sess. 1631 (Neb. 2014).
95. L.B. 238, 104th Leg., 1st Sess. (Neb. 2015).
96. See Neb. L.B. 238 § 1 (stating “[p]ublic works means streets, roads, public utilities, other public infrastructure, and other public facilities.”).
97. See id. § 3 (stating “the funds received from the issuance of bonds or other indebtedness will only be used for expenditures by the city for land acquisition and site preparation and on public works.”). The bill also required municipalities to certify that funds were only used for such expenditures. Id. § 4.
98. See id. § 5 (declaring that “bonds that are issued and paid for through the use of tax-increment financing shall not have an interest rate exceeding the prime rate . . . plus two percentage points.”).
once every two years. If an audit uncovered that a project was not in compliance with the Statute, the bill prohibited the city in which that project was located from approving additional TIF projects until the Department of Revenue was satisfied that the requirements of the Statute were being met.

On January 21, 2015, Senator Davis introduced Nebraska Legislative Bill 596, which also was subsequently referred to the Urban Affairs Committee. The bill required the Redevelopment Authority to include representatives of the school district, county, and community college. The bill also created the Tax Increment Financing Division of the Auditor of Public Accounts and established a claw back provision for projects that failed to meet their TIF agreements.

On May 11, 2015, Senator Sue Crawford introduced Amendment 653 to Nebraska Legislative Bill 539. Prior to the amendment, L.B. 539 empowered the Legislative Audit Office and Auditor of Public Accounts to require audited entities to submit to audit requests in a timely and reasonably manner. The amendment provided the Auditor of Public Accounts the power to audit a Redevelopment Authority when deemed necessary by the auditor or when requested by the Redevelopment Authority. Governor Pete Ricketts approved the bill on May 27, 2015.

On January 6, 2016, Senator Mike Groene introduced Nebraska Legislative Bill 719, which was subsequently referred to the Urban Affairs Committee. The bill would have prohibited TIF funds to be used for redevelopment projects on undeveloped vacant land. The bill would have further prevented undeveloped vacant land from being declared blighted and substandard. After Senator Groene requested a vote by the committee, the bill failed five to two.

On January 11, 2016, Senator Dan Hughes introduced Nebraska Legislative Resolution 394CA, which was subsequently referred to the
Urban Affairs Committee.113 The proposed constitutional amendment would have permitted a taxing entity to opt out of having its taxes diverted to fund a TIF redevelopment project.114 On February 17, 2016, the proposed constitutional amendment was indefinitely postponed.115

On January 11, 2016, Senators Al Davis and Mike Groene introduced Nebraska Legislative Resolution 399CA, which was subsequently referred to the Urban Affairs Committee.116 The proposed constitutional amendment would have required cities to submit the final decision regarding TIF funds to a vote by registered voters of the city, school district, and county covered by the redevelopment project.117 Authorization would have required majority approval from such voters.118 On February 17, 2016, the proposed constitutional amendment was indefinitely postponed.119

On January 20, 2016, Senator Curt Friesen introduced Nebraska Legislative Bill 1042, which was subsequently referred to the Urban Affairs Committee.120 The bill would have required a city to obtain approval for a redevelopment project from the county board of equalization covering the redevelopment project area.121 Under the bill, the board of equalization would have been permitted, but not required, to approve the redevelopment project if the board determined the project met the Statute’s requirements.122 The bill further would have required the county assessor to include in a school district’s valuation the assessed value of a redevelopment project property rather than the base value of the property prior to the redevelopment project, as is currently the case under the Statute.123 On February 17, 2016, the bill was indefinitely postponed.124

On January 20, 2016, Senator Sue Crawford introduced Nebraska Legislative Bill 1059, which was subsequently referred to the Urban Affairs Committee.125 The bill would require an applicant for TIF funds to disclose whether the redeveloper has or intends to apply for tax incentives under the Nebraska Advantage Act, the amount of expected incentives from that application, and whether the application

118. Id.
119. Id.
120. L.B. 1042, 104th Leg., 2d Sess. (Neb. 2016).
121. Id. L.B. 1042 § 1.
122. Id.
123. Id. § 2; Neb. REV. STAT. § 18-2103(21).
includes a refund of revenues from the city’s local option sales tax. The bill is currently up for final reading by the legislature.

On January 20, 2016, Senators Al Davis and Bob Krist introduced Nebraska Legislative Bill 1102, which was subsequently referred to the Urban Affairs Committee. The bill would have permitted the Legislative Performance Audit Committee to conduct performance audits of TIF redevelopment projects.

4. Proponents of TIF Reform Face-Off Against Opponents During Public Legislative Hearings

Proponents of bills amending the Statute urged the Urban Affairs Committee that TIF use in Nebraska is fraught with abuse. These claims were backed by numerous references to studies on TIF use in Nebraska conducted by the Progressive Research Institute and the Platte Institute for Economic Research. One of the issues with TIF as it is currently used in Nebraska, according to proponents of reform, is the lack of oversight and subsequent lack of recourse available to citizens. Moreover, proponents of the bills assert there are fundamental errors with the but-for test as it is applied in Nebraska.

129. Neb. L.B. 1102 § 2. At the time of publication, L.B. 1102 was still pending before the legislature, but it had not been prioritized and was thus “unlikely to receive additional consideration.”
131. Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 12-13; Hearing on L.R. 599, supra note 56, at 6, 16; Hearing on L.B. 1095, supra note 56, at 3; KRIZ, supra note 54; JOHN J. DUNN, PROGRESSIVE RES. INST. OF NEB., WHAT IS TAX INCREMENT FINANCING (AND WHY SHOULD ANYONE CARE)? 6, 9 (2011).
132. Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 13 (statement of Renee Fry) (stating she was unaware of any instance where there had been a remedy in the case where statutory requirements may not have been met); Hearing on L.B. 1095, supra note 56, at 16 (statement of Sen. Mike Groene) (referring to a letter from the Nebraska Attorney General and characterizing the response as, “[t]here’s no oversight. If you think there’s a problem, take your own money and hire a lawyer and have a civic action.”).
133. Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 61 (statement of Sen. Mike Groene) (“Most of the projects I know that have been given [TIF] are going to build anyway.”); Hearing on L.R. 599, supra note 56, at 16 (statement of Dick Clark)
Supporters of amending the Statute argue that this flawed but-for test results in losses to communities across the state because of the subsequent increase in state aid in accordance with the Nebraska Tax Equity and Educational Opportunities Support Act ("TEEOSA") formula.134

Opponents of the proposed legislation counter that Nebraska is already among the strictest states when it comes to TIF.135 Moreover, opponents argue that current notice requirements have been proven to offer concerned taxpayers a successful avenue for changing the way local governments use TIF.136 Opponents contend that projects are often nixed before making it to the public hearing phase.137 Projects have also been subject to audit in the past.138 Opponents of amending the statute assert that taxpayers who are concerned with their local governments’ use of TIF can implement change through the electoral

134. Hearing on L.R. 599, supra note 56, at 3 (statement of Sen. Al Davis) (explaining that TIF projects are removed from “valuation purposes for the TEEOSA formula,” which resulted in increased state aid to Nebraska schools by $22 million in 2012); Hearing on L.B. 1095, supra note 56, at 14 (statement of Sen. Mike Groene) (“Every TIF in North Platte was going to be built . . . anyway. Every one of them.”).

135. Hearing on L.B. 1095, supra note 56, at 41 (statement of Lynn Rex) (“[T]he state of Nebraska has one of the most restrictive tax increment financing laws in the country, not just the region, in the country.”); Hearing on L.B. 529 and L.R. 29CA Before the Comm. on Urban Affairs, 103d Leg., 1st Sess. 38 (Neb. 2013) (statement of Sen. Lynn Rex) (noting that Nebraska is among only three states with a fifteen-year limitation on TIF while all others permit longer payback periods); Hearing on L.B. 1132 and L.R. 376CA Before the Comm. on Urban Affairs, 102d Leg., 2d Sess. 38 (Neb. 2012) (statement of Sen. Heath Mello) (discussing Nebraska’s strict statutory limitations in comparison to other states’ TIF statutes).

136. Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 32 (statement of Ervin Portis) (“[I]n the three projects we’ve approved, we sent or published notice 64 times.”); see also Hearing on L.B. 1095, supra note 56, at 38 (statement of Jack Cheloha) (describing the removal of a blighted and substandard designation in the Fairacres neighborhood in Omaha after the community spoke out against the designation).

137. Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 44-45 (statement of Andrew Willis) (stating he has advised clients not to pursue a “fair number” of TIF projects, usually at the application level); Hearing on L.R. 599, supra note 56, at 25 (statement of David Landis) (“We require in the city of Lincoln a blighted, substandard survey done by a planning firm . . . . And those professionals who are not part of the city government provide that to us and on occasion they will say, no, this is not ‘blightable.’”).

138. Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 105 (statement of Mike Bacon) (referencing the fact that 40 audits of TIF projects had occurred, two of which were his); Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 104 (statement of David Landis) (noting secondhand knowledge that 40 audits of TIF projects had occurred).
process. Additionally, TIF supporters argue that the process of funding a TIF project creates an inherent check on the types of projects that are ultimately awarded TIF funding. With respect to the but-for test, opponents of the proposed legislation argue the mere possibility that a different project might occur in the redevelopment area does not mean such a project will ever come to fruition, especially when considering a developer’s need to generate a worthwhile return on investment. In addition, the increased state aid to equalized school districts that contain TIF projects produces the need to evaluate the TEEOSA formula, not create more state oversight of TIF. According to one opponent, the proposed changes were recently cited by three companies as the reason for their decision to locate their companies outside of Nebraska. At least one senator on the committee was vocal about his agreement with the opponents of the proposed legislation by directing the bills’ introducers to fix TIF locally rather than telling the legislature to restrict economic development.

139. Hearing on L.B. 1095, supra note 56, at 19 (statement of Ervin Portis) (“There’s no shortage of folks running for those local offices. We got three people running for mayor [in Plattsmouth] right now. All of those city council seats are contested elections. That’s accountability at the local level.”); Hearing on L.B. 1095, supra note 56, at 43 (statement of Lynn Rex) (“[Taxpayers] simply don’t have to reelect . . . .

140. Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 75 (statement of Cassie Paben) (pointing to increased pressure from lenders on developers with respect to backing notes issued for TIF purposes “to ensure that the financial institution is able to get repaid”); Hearing on L.B. 1095, supra note 56, at 21-22 (statement of Ken Bunger) (explaining when a project is unsuccessful, “the bank and the developer who usually guarantees the loan is out of luck”); Hearing on L.B. 1095, supra note 56, at 41 (statement of Lynn Rex) (“Bond counsel has got to put their signature and the credibility of their law firm on the dotted line before bonds can be issued.”).

141. Hearing on L.R. 599, supra note 56, at 30 (statement of David Landis) (“That there is a viable alternative that you can conceive of on paper doesn’t mean there’s a person willing to do it and pony up the money . . . . [T]he notion that an intellectually attractive alternative might exist doesn’t mean that the kinds of buildings that existed and made our neighborhoods look bad are going to be torn down and replaced by new buildings.”); Hearing on L.R. 599, supra note 56, at 65 (statement of Cassie Paben) (“I don’t know a developer in their right mind that would truly develop a project with little or no return on their investment.”).

142. Hearing on L.R. 599, supra note 56, at 33 (statement of David Landis) (“[T]he solution, I think, to the problem that Senator Davis has raised lies in the state aid formula . . . . It doesn’t lie in creating a state oversight system, absolutely unprecedented in the nation . . . .”)


144. Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 38 (statement of Sen. Bob Krist) (“If your TIF is broken in your local area, fix your TIF in your local area. Quit bringing bills here and telling us to restrict community development, economic development.”).
III. BACKGROUND

A. Economic Analyses Yield Inconsistent Results on Impact of TIF

Tax Increment Financing ("TIF") is arguably the most popular economic development tool implemented by municipalities across the United States. In light of this widespread use, TIF's effects vary significantly across urban and rural contexts. While studies have shown TIF's effects on urban school district finances are minimal, rural school districts' finances experience a moderately positive effect where TIF is used. Municipalities experiencing financial woes are more prone to adopt TIF. In terms of effectiveness, TIF has been found to have its greatest impact in blighted areas. Regarding the decision-making process, competition for business investment with other local municipalities plays a significant role. Additionally, there is no indication that TIF adoption is the result of a desire to divert tax revenue away from an overlapping taxing jurisdiction.

The academic world has been unable to come to agreement with respect to the impacts TIF use has on economic growth. On the one hand, results suggest that TIF has a stimulative effect on residential property values within a TIF district as well as the surrounding community. TIF also results in greater growth in prices of commercial

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146. See id. at 37, 39 (highlighting inconsistent effects of TIF resulting from differences with respect to structural, political, and economical factors).
147. Id. at 39.
150. Byrne, supra note 148, at 298.
151. Id.
153. See Smith, supra note 149, at 231-32 (showing increase in prices in neighborhoods designated for TIF); Brent C. Smith, The Impact of Tax Increment Finance Districts on Localized Real Estate: Evidence from Chicago’s Multifamily Markets, 15 J. OF HOUSING ECON. 21, 35 (2006) (showing greater appreciation rates for multifamily housing within TIF districts when compared to areas not designated for TIF use, but admitting possibility of sample selection bias that could threaten validity of results); Joyce Man & Mark S. Rosentraub, Tax Increment Financing: Municipal Adoption and Effects
properties in TIF districts as opposed to areas not designated for TIF use.\textsuperscript{154} Further, the argument that TIF use displaces commercial development in other parts of a community lacks statistical support.\textsuperscript{155} On the other hand, some evidence illustrates cities that adopt TIF experience lower growth rates than those that do not.\textsuperscript{156} With respect to commercial property, other research indicates that the use of TIF results in a reduction of commercial property value growth in parts of a municipality that do not use TIF; however, no such offset has been found with respect to industrial property.\textsuperscript{157}

B. Omaha-Based Think Tanks Blast the Use of TIF in Nebraska

1. Progressive Research Institute of Nebraska

In 2011, the Progressive Research Institute of Nebraska issued a report focusing on the use of TIF funds to incentivize development by for-profit entities in Omaha and questioning whether the allocation of such funds served a private or public benefit.\textsuperscript{158} Citing the Community Development Law’s but-for requirement, the report noted that of the thirty-seven TIF projects approved in Omaha in 2008 and 2009, thirty lacked any evidence that the but-for test had been considered.\textsuperscript{159} John Dunn, the author, characterized two of the seven that

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\textsuperscript{154} Smith, supra note 149, at 231-32 (“TIF designation and the anticipated, or accompanying, public and private investment in TIF projects stimulates market interest” as shown by greater increase in price for commercial properties within a TIF district than those outside of a TIF district).

\textsuperscript{155} David F. Merriman et al., Do Tax Increment Finance Districts Stimulate Growth in Real Estate Values, 39 Real Est. Econ. 221, 241-43 (2011) (“We do not find any statistical support for the hypothesis that commercial development in TIF districts displaces commercial development elsewhere in the community. Rather, we find evidence of a substantial synergistic effect.”).

\textsuperscript{156} Richard F. Dye & David F. Merriman, The Effects of Tax Increment Financing on Economic Development, 47 J. of Urb. Econ. 306, 324 (2000). Three years later, a subsequent study did not find “the earlier provocative result of a significantly negative impact of TIF adoption on growth, but we still find no positive impact of TIF adoption on the growth in citywide property values.” Richard F. Dye & David F. Merriman, The Effect of Tax Increment Financing on Land Use, in THE PROPERTY TAX, LAND USE, AND LAND-USE REGULATION (Dick Netzer ed.).


\textsuperscript{158} Dunn, supra note 131, at 6, 9. The Progressive Research Institute of Nebraska has since changed its name to Policy Research and Innovation, which states its mission is to “conduct research and promote policies that advance opportunities and justice, expand and strengthen the middle class, and help all people achieve the American dream.” Hearing on L.R. 599, supra note 56, at 22; What We Do, POLICY RESEARCH & INNOVATION (May 14, 2015), http://www.prineb.org/Documents/PRI_Resume5-14-15.pdf.

\textsuperscript{159} Dunn, supra note 131, at 6. The but-for test asks whether a project would have been economically feasible and whether the project would have occurred in the redev-
did contain a clause in reference to the but-for test as questionable and pointed out that those two projects would still have been profitable without the use of TIF. Moreover, the report was critical of projects that were granted TIF funds where one company benefitting from TIF was a successful business venture and where another project was located near the University of Nebraska-Omaha’s recent development. With respect to TIF funds being allocated to for-profit TIF projects, the study found that just under $40 million in TIF funds had been approved during 2008 and 2009 combined, resulting in $2.6 million in diverted tax revenue when taking into account the fifteen-year lifespan of a TIF project. The report, however, acknowledged the lack of opposition to TIF projects in city council and planning board meetings. Determining that the required cost-benefit analyses for the TIF plans studied were inadequate, the report noted the city council’s responsibility to reject redevelopment plans associated with those inadequate analyses. Further, the report recommended that redevelopment plans be subjected to increased scrutiny so as to ensure TIF funds are allocated for public, rather than private, benefit.

In 2012, the Progressive Research Institute of Nebraska issued a research update to the 2011 report. The report expressed concern over the fact that a vast majority of TIF projects in Omaha are for commercial projects and market-rate housing. Moreover, the report claimed that the City of Omaha lost $28.6 million in tax revenues in 2011 and $179.5 million combined over the fifteen years prior to the report. Finally, the report argued the City of Omaha was obviously abusing the but-for test and suggested the City of Omaha was thumbing its nose at the statutory requirement.

opment area without the use of TIF. Neb. Rev. Stat. § 18-2116(1). About half of the states that allow TIF have the but-for requirement, but “a simple assertion that the project would not proceed without the TIF suffices.” Dunn, supra note 131, at 6.

160. Dunn, supra note 131, at 7. The report queried, “should the City be subsidizing projects beyond the break-even point?” Id.

161. Id. at 10 (referencing the Aksarben Village development’s location in relation to the University of Nebraska-Omaha’s extensive development).

162. Id. at 8-9. Dunn characterized these numbers as “tax expenditures” and money “lost to the City.” Id. at 9.

163. Id. at 10.

164. Id. at 11.

165. Id. at 12.


167. Id. at 7 (“Commercial projects and market-rate housing projects are less likely to promote long-term job gains than are industrial projects.”).

168. Id. at 11.

169. Id. at 13, 15 (suggesting that city council members were not properly educated on or were willfully ignorant of the Statute’s requirements).
2. Platte Institute for Economic Research

In July of 2013, the Platte Institute for Economic Research issued a policy study entitled *The Use of Tax Increment Financing in Nebraska*.\(^\text{170}\) In a review of the academic literature on the use of TIF, the study asserted that socio-economic factors, such as historical growth patterns, fiscal structure, and community characteristics, should be afforded more credit than TIF projects on the economic development of a local economy.\(^\text{171}\) That line of research was contrasted to studies that assert TIF projects lead to increased property values and gross income of residents, resulting in positive economic development.\(^\text{172}\)

The study also criticized the commonly used but-for test as it is written in the Statute and, through case studies on three TIF projects in Nebraska, as it is applied throughout the state.\(^\text{173}\) The use of TIF is often controversial because of the belief that TIF diverts funds from local authorities to which they otherwise would have been entitled.\(^\text{174}\) Where a project might in fact occur after a certain period of time, the funds that are diverted for the completion of that project through the use of TIF result in lost revenue after the point at which the project would have occurred.\(^\text{175}\) The author, Kenneth A. Kriz, asserts that the first issue with the but-for test is that it is most often applied as a question of whether the particular project in the redevelopment plan would occur without the use of TIF.\(^\text{176}\) This is the wrong way to approach the interpretation of the requirement, according to Kriz, because if any project of similar value would have occurred without the use of TIF, then the above-mentioned loss of revenue will result.\(^\text{177}\) The second issue with the but-for test is because of the potential that a project of similar value might occur without the use of TIF at a later

\(^{170}\) Kriz, supra note 54, at 1. The Platte Institute’s mission is to “[a]dvance public policy alternatives that foster limited government, personal responsibility and free enterprise in Nebraska.” Id. at 24. At the time the policy study was published, Mike Groene sat on the organization’s board of directors. Id. He has since become a state senator and has introduced legislative bills calling for more oversight on the use of TIF. L.B. 719, 104th Leg., 2d Sess. (Neb. 2016); L.B. 445, 104th Leg., 1st Sess. (Neb. 2015); L.B. 238, 104th Leg., 1st Sess. (Neb. 2015).

\(^{171}\) Id.

\(^{172}\) Id.

\(^{173}\) Id. at 4-5, 10-15. The but-for test asks whether a project would have been economically feasible and whether the project would have occurred in the redevelopment area with the use of TIF. Neb. Rev. Stat. § 18-2116(1).

\(^{174}\) Kriz, supra note 54, at 4.

\(^{175}\) Id.

\(^{176}\) Id.

\(^{177}\) Id.
date, local decision makers are left with the dilemma of making predictions about potential development years into the future.\textsuperscript{178} The third issue with the but-for test is that the existence of multiple interpretations of the vague statutory language setting forth the but-for requirement results in a race to the bottom approach by local governments.\textsuperscript{179}

The study determined there is minimal evidence that TIF has a strong impact on local economies despite presenting data that showed positive return on investment and job growth for cities even in instances where the project absolutely would have developed without the assistance of TIF.\textsuperscript{180} The study further found there are multiple systematic issues with the use of TIF in Nebraska because the case studies suggested the but-for test was not implemented correctly, the cost-benefit analysis was not documented, a conflict of interest may have been present in one case, and cities failed to monitor whether the projects reached the employment or investment targets.\textsuperscript{181} Kriz also characterized blighted and substandard designations by municipalities as excessive, citing one case study city where almost one-third of the city’s land had been declared blighted and substandard.\textsuperscript{182} Based on these findings, the study recommended the state implement oversight on the use of TIF and examine the blighted and substandard designations by local governments.\textsuperscript{183} The study further called for a review and change to the but-for test and cost-benefit analysis requirements.\textsuperscript{184} Finally, the study recommended that the state require local governments to monitor whether TIF project goals are being met and to enact a claw back provision for instances where they are not.\textsuperscript{185}

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\textsuperscript{178} Id. at 5 (noting “only a probabilistic assessment can be made,” because implementation of a parcel level model of development probabilities is “still years away”).
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 19-21 (analyzing data from one of the case study cities and concluding that “in a worst-case scenario the project would still break even for the city”). From the school district’s perspective, the data showed a positive impact on school district finances where the probability that the project would have occurred without the use of TIF reached as high as 80%. Id. at 20-21.
\textsuperscript{181} Id. at 21. “The impression left on the researcher by the interviews is that the projects . . . were destined for approval and the process steps were just pro forma.” Id.
\textsuperscript{182} Id. at 22 (“[M]unicipalities seemed to be using blighted and substandard designations strategically and in a manner which seems to be excessive—in one case study city almost 1/3 of the city land area was deemed to be blighted or substandard.”).
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\end{flushleft}
C. Fitzke v. City of Hastings: Taxpayers Successfully Challenge the Use of TIF

In Fitzke v. City of Hastings, the Nebraska Supreme Court held that land can only be added to a redevelopment area that is already in existence if (1) the added land is declared blighted and substandard in accordance with the Statute or (2) the addition of the land is reasonably necessary to successfully implement an existing redevelopment plan. In Fitzke, Ronald and Delores Fitzke (the “Plaintiffs”) sued the City of Hastings and the Community Redevelopment Authority of the City of Hastings (collectively, the “Defendants”), challenging the incorporation of undeveloped land into a redevelopment area that had previously been declared blighted and substandard. The Nebraska District Court for Adams County determined that land cannot be incorporated into an existing redevelopment area unless that additional land is declared blighted and substandard. The district court further provided that merely incorporating a piece of land into an existing redevelopment area, absent a showing that the incorporation is required to relieve blighted or substandard conditions, does not automatically result in a characterization of the land as blighted and substandard.

The Defendants appealed to the Nebraska Court of Appeals, claiming the district court erred by misconstruing or misapplying provisions of the Statute, and the Nebraska Supreme Court removed the case to its own docket. The Nebraska Supreme Court affirmed the ruling of the district court, but disagreed with the district court’s reasoning. Contrary to the district court, the Nebraska Supreme Court held that land added to an existing redevelopment area need not necessarily be declared blighted and substandard. Rather, the court held that an alternative approach to adding land requires a showing that the addition of the land is reasonably necessary to the successful implementation of an existing redevelopment plan. The Nebraska Supreme Court reasoned that simply revising an existing redevelopment plan to add a new project, and subsequently incorporating land for that project into the existing redevelopment area, is

186. 582 N.W.2d 301 (Neb. 1998).
188. Fitzke, 582 N.W.2d at 305-06. This incorporation was achieved by modifying an existing redevelopment plan, which had already been approved, to include the new project that consisted of the development of a campground. Id. at 305-06.
189. Id. at 306.
190. Id.
191. Id. at 306, 309.
192. Id. at 310, 312.
193. Id. at 312.
194. Id.
not a sufficient showing that the land was incorporated as a necessary part of the initial redevelopment plan.\textsuperscript{195} As a result, the court ultimately determined the district court did not abuse its discretion in declaring that the TIF grant was invalid and void because the record contained no evidence that the incorporation of the undeveloped cornfield into the existing redevelopment area was necessary for the carrying out of the initial redevelopment plan.\textsuperscript{196} With its holding in \textit{Fitzke}, the Nebraska Supreme Court validated the judicial avenue for citizens to successfully challenge decisions made by redevelopment authorities where those decisions are illegal or not supported by the evidence.\textsuperscript{197}

IV. ANALYSIS

The Community Development Law and supplemental provisions added in 1979 (collectively, the “Statute”) provide guidance for local governments’ use of tax increment financing (“TIF”), which was approved as a constitutional amendment by Nebraska voters in 1978 to redevelop substandard and blighted areas.\textsuperscript{198} TIF involves the capture of property taxes from the increase in property value generated by a redevelopment project in an area that has been declared substandard and blighted.\textsuperscript{199} The captured property taxes are typically used to pay off a TIF bond that is backed by the commitment of the captured tax revenues and issued in order to provide up-front capital for the project.\textsuperscript{200} Redevelopment projects that use TIF funds may only begin after a redevelopment plan has been recommended by a community redevelopment authority (“Redevelopment Authority”), reviewed by a city or village’s planning commission, and approved by the governing body.\textsuperscript{201} Before recommending a redevelopment project, a Redevelopment Authority must conduct a cost-benefit analysis, considering factors such as impacts on public service needs, local taxes, and employers and employees within the community.\textsuperscript{202} The governing body may approve a redevelopment project if it finds that the specific TIF project would not be economically feasible without

\begin{itemize}
\item \textsuperscript{195} \textit{Id.} at 311-12 (“If a private development project is ineligible for tax increment financing because it is located on land which is not blighted or substandard[,] . . . it logically follows that eligibility could not be created by simply incorporating the project site into an adjacent area which has been declared blighted or substandard and revising the redevelopment plan for that area to include the project.”).
\item \textsuperscript{196} \textit{Id.} at 312.
\item \textsuperscript{197} \textit{Id.} at 309.
\item \textsuperscript{198} \textit{Neb. Const.} art. VIII, § 12; \textit{Neb. Rev. Stat.} § 18-2102.
\item \textsuperscript{199} \textit{Neb. Rev. Stat.} §§ 18-2109, 18-2147.
\item \textsuperscript{200} Briffault, \textit{supra} note 5, at 68.
\item \textsuperscript{201} \textit{Neb. Rev. Stat.} §§ 18-2112, 18-2116.
\item \textsuperscript{202} \textit{Neb. Rev. Stat.} § 18-2113(2).
\end{itemize}
TIF funds, the project would not occur in the substandard and blighted area without the use of TIF, and the costs and benefits of the project would be in the long-term best interest of the community.203 This Analysis will illustrate how recent legislative bills that create increased state oversight of local governments’ use of TIF in Nebraska are unnecessary.204 First, it will critique studies that are used to support arguments for TIF reform in Nebraska and illustrate that those studies’ conclusions are not only contradictory to their own findings but also to the Statute.205 Second, it will outline and provide examples of the use of existing avenues of accountability, which show that taxpayers who wish to challenge their local governments’ use of TIF already have extensive recourse options.206

A. STUDIES RELIED UPON BY PROPONENTS OF INCREASED TIF OVERSIGHT PRESENT AN INCOMPLETE PICTURE OF THE USE OF TIF IN NEBRASKA

Proponents of TIF-reform bills frequently cite studies published by the Progressive Research Institute and the Platte Institute for Economic Research.207 John Dunn, author of the Progressive Research Institute study, questions the efficacy of approving TIF projects that would still be profitable without the use of TIF or that involve successful business ventures.208 Dunn also takes issue with the TIF grant to develop Aksarben Village in Omaha because of its proximity to developments undertaken by the University of Nebraska at Omaha.209 However, the Statute merely requires a showing that the project would not be economically feasible without TIF funds, not a showing that the project would not be profitable.210 As a result, Dunn’s impractical conclusion is off-base, because the Statute’s requirements do not preclude successful businesses or otherwise profitable projects from being granted TIF funds.211

203. Neb. Rev. Stat. § 18-2116(1). This test is commonly referred to as the but-for test. See supra note 8 and accompanying text.
204. See infra notes 207-260 and accompanying text.
205. See infra notes 207-226 and accompanying text.
206. See infra notes 227-260 and accompanying text.
207. Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 12-14; Hearing on L.R. 599, supra note 56, at 6, 16-17; Hearing on L.B. 1095, supra note 56, at 3.
208. Dunn, supra note 131, at 7, 10.
209. Id. at 10.
211. Compare id. (referring to economic feasibility with no mention of profitability), and Hearing on L.R. 599, supra note 56, at 65 (statement of Cassie Paben) (“I don’t know a developer in their right mind that would truly develop a project with little or no return on their investment.”), with Dunn, supra note 131, at 7 (“Should the City be subsidizing projects beyond the break-even point?”).
Kenneth Kriz’s Platte Institute for Economic Research’s study argues for increased oversight at the state level by contending there is little evidence that TIF has a strong impact on local economies.212 Using a statistical model to determine financial impact, Kriz claimed the project in his first of three case studies would have been financially burdensome in many cases to the school district overlapping the redevelopment project.213 This assertion is directly contradictory to the study’s analysis, which showed a positive impact on school district finances in all but a few scenarios.214 Kriz also characterized municipalities’ use of blighted and substandard designations as excessive, supporting his statement by referring to one case study city that had declared almost one-third of the land as blighted and substandard.215 This characterization is in direct conflict with the Statute, which permits the largest cities in the state to designate up to 35% of their land as blighted while placing even less restrictive caps on smaller cities and villages.216 Notwithstanding his conclusions, Kriz’s case study of three TIF projects in Nebraska is not statistically representative of the whole considering the 716 active TIF projects in Nebraska in 2014.217

A common argument raised by proponents of reform is that both studies have found TIF projects which, according to the authors, did not comply with the Statute’s requirements, such as conducting the cost-benefit analysis or meeting the but-for test.218 Recent legislation was also presented to the legislature that would permit a county board of equalization to determine whether a redevelopment plan complies

213. Id. at 22.
214. Compare id. at 19-21 (showing positive return on investment and job growth for cities even in instances where the project absolutely would have developed without the assistance of TIF and computing negative financial impact for school districts only in instances where the project was 80% or more likely to occur without the use of TIF), with id. at 22 (“[T]he project [in one of the case studies] was less advantageous financially to an overlapping school district and in many cases would produce a negative financial effect.”).
216. Compare Neb. Rev. Stat. § 18-2103(11)(v) (limiting blight designation to not more than 35% of metropolitan and first class cities, 50% of second class cities, and 100% of villages), with Kriz, supra note 54, at 22 (“[M]unicipalities seemed to be using blighted and substandard designations strategically and in a manner which seems to be excessive – in one case study city almost 1/3 of the city land area was deemed to be blighted or substandard.”).
218. Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 12-14 (testimony of Renee Fry); Hearing on L.B. 1095, supra note 56, at 3 (statement of Sen. Al Davis) (reading a letter from Kenneth Kriz to the Committee).
with the Statute. Moreover, state senators have characterized the use of TIF in Nebraska as fraught with abuse, likening the approval process to extortion, bribery, and a sloppily applied whitewash. All of these conclusions, however well-intentioned, are misleading to the public, and could result in severe damage to economic development in the state of Nebraska.

Rather than relying on senators’ and academics’ personal interpretations of the Statute, those wishing to assert that the Statute’s requirements have been violated should seek such a determination from an authority qualified to interpret the state’s laws—the court. This process proved effective for the taxpayers in Fitzke v. City of Hastings wherein the court nullified a redevelopment contract. As the Nebraska Supreme Court held in Fitzke, a district court may alter the decision of a redevelopment authority where the court determines that the redevelopment authority’s decision was illegal or unsupported by the evidence. As a result, rather than relying on studies that examine less than one-half of one percent of active TIF projects to support proposed bills restricting community development, senators should encourage taxpayers who are actually aggrieved by these alleged extensive violations of the Statute to seek justice from the system that was put in place to provide them just that.

221. See Hearing on L.B. 719, L.B. 1042, L.R. 394CA, and L.R. 399CA, supra note 143, (statement of Lynn Rex) (informing the legislature that three companies have cited pending legislation as their reason for choosing to locate in Iowa and Colorado over Nebraska).
222. See Fitzke v. City of Hastings, 582 N.W.2d 301, 309 (Neb. 1998) (considering whether the “district court misconstrued or misapplied provisions” of the Statute).
223. 582 N.W.2d 301 (Neb. 1998).
224. Fitzke, 582 N.W.2d at 312.
225. Id. at 309.
226. Compare Hearing on L.B. 1095, supra note 56, at 3 (statement of Sen. Al Davis) (reading a letter from Kenneth Kriz to the Committee), and Kriz, supra note 54, at 322 (showing 716 active TIF projects in Nebraska for 2014), and Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 38 (statement of Sen. Bob Krist) (“If your TIF is broken in your local area, fix your TIF in your local area. Quit bringing bills here and telling us to restrict community development, economic development.”).
B. Existing Avenues Sufficiently Hold Local Governments Accountable on the Use of TIF

Before a TIF project can be approved, the city’s governing body must prepare a general plan for the city’s development.\(^{227}\) The city must also request a recommendation from the planning commission as to whether an area is substandard and blighted.\(^{228}\) Prior to making the substandard and blighted determination, the governing body must hold a public hearing.\(^{229}\) Notice of this hearing is required by publication once per week for two weeks with the last publication being no less than ten days before the hearing.\(^{230}\) The Statute further requires notice to be given to each registered neighborhood association within a one-mile radius of the project as well as each taxing jurisdiction that covers the redevelopment area.\(^{231}\)

After an area is declared substandard and blighted, the community redevelopment authority may prepare a TIF redevelopment plan.\(^{232}\) The redevelopment plan must include a description of the current and future uses of the redevelopment project area as well as any proposed changes to the area.\(^{233}\) Before recommending a redevelopment plan to the governing body, the community redevelopment authority must conduct a cost-benefit analysis to determine the impacts of the redevelopment project.\(^{234}\)

Once a redevelopment plan is prepared, the community redevelopment authority must submit the plan to the planning commission for the commission’s recommendation on whether the redevelopment plan is in conformity with the city’s general plan for development.\(^{235}\) Moreover, if a planning commission holds a public hearing to consider the redevelopment plan, then notice as described below is mandated.\(^{236}\)

After the planning commission’s recommendation is received, the Statute then requires that the governing body to conduct a public hearing regarding the consideration of a redevelopment plan.\(^{237}\) Notice by publication is required once per week for two weeks with the

\(^{227}\) Neb. Rev. Stat. § 18-2110

\(^{228}\) Id. § 18-2109; see also id. § 18-2103(10) to 18-2103(11) (defining substandard and blighted).

\(^{229}\) Id. § 18-2109.

\(^{230}\) Id. § 18-2115(1).

\(^{231}\) See id. § 18-2115(2) (requiring notice to be given to “each county, school district, community college, educational service unit, and natural resources district”).

\(^{232}\) Id. § 18-2109.

\(^{233}\) Id. § 18-2111.

\(^{234}\) Id. § 18-2113(2).

\(^{235}\) Id. § 18-2112.

\(^{236}\) Id. § 18-2115(3).

\(^{237}\) Id. § 18-2115(1).
last publication being no less than ten days before the hearing.\textsuperscript{238} The Statute further requires notice to be given to each registered neighborhood association within a one-mile radius of the project as well as each taxing jurisdiction that covers the redevelopment project area.\textsuperscript{239} Any person wishing to express an opinion on the redevelopment plan at such public hearing must be afforded that opportunity.\textsuperscript{240}

The governing body may only approve a redevelopment plan if it finds that the plan conforms to the Statute and the city’s general plan for development.\textsuperscript{241} Additionally, the governing body must find that the specific TIF project would not be economically feasible without TIF funds, the project would not occur in the substandard and blighted area without the use of TIF, and the costs and benefits of the project would be in the long-term best interest of the community.\textsuperscript{242}

As an initial matter, the way in which a TIF bond is issued and financed presents an inherent check on a local government’s decision to approve a TIF project due to the risks faced by certain involved parties, namely the developer, bank, and bond counsel.\textsuperscript{243} Yet in the face of this arduous approval process, supporters of recent amendments to the Statute still contend that concerned citizens have no options when it comes to questioning their local governments’ use of TIF.\textsuperscript{244} To combat this alleged lack of recourse, recently proposed leg-

\begin{flushleft}
\textsuperscript{238} Id.
\textsuperscript{239} Id. § 18-2115(2) (requiring notice to be given to “each county, school district, community college, educational service unit, and natural resources district”).
\textsuperscript{240} Id. § 18-2115(1).
\textsuperscript{241} Id. § 18-2116(4).
\textsuperscript{242} Id. This is commonly known as the but-for test. See supra note 8 and accompanying text.
\textsuperscript{243} Compare Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 75 (statement of Cassie Paben) (pointing to increased pressure from lenders on developers with respect to backing notes issued for TIF purposes “to ensure that the financial institution is able to get repaid”), Hearing on L.B. 1095, supra note 56, at 21-22 (statement of Ken Bunger) (explaining that when a project is unsuccessful, “the bank and the developer who usually guarantees the loan is out of luck”), and Hearing on L.B. 1095, supra note 56, at 41 (statement of Lynn Rex) (“Bond counsel has got to put their signature and the credibility of their law firm on the dotted line before bonds can be issued. They don’t do that with reckless disregard because there are liabilities that are attached to them. This is not a situation where cities are going out willy-nilly declaring things substandard and blighted.”), with Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 3 (statement of Sen. Al Davis) (claiming the use of TIF funds are held out as “a sloppily applied whitewash to any developer wanting something for nothing” and chastising “the blanket adoption of TIF financing for each and every project a developer wants to undertake”), and Kanz, supra note 54, at 21 (opining that proposed projects “were destined for approval” with procedural steps merely serving as pro forma).
\textsuperscript{244} See Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 13 (statement of Renee Fry) (stating she was unaware of any instance where there had been a successful challenge to a TIF project where the challenger believed the Statute’s requirements had not been met); Hearing on L.B. 1095, supra note 56, at 16 (statement of Sen. Mike Groene) (“There’s no oversight. If you think there’s a problem, take your own money and hire a lawyer and have a civic action.”).
\end{flushleft}
islation would have required cities to obtain approval for a redevelopment project from the county board of equalization. Another proposed constitutional amendment sought to require each TIF decision to be submitted to a vote by local registered voters. Such proposed legislation ignores the fact that although dozens of notices are published or sent directly to these local registered voters, public disagreement throughout the TIF approval process is relatively non-existent. Moreover, where dissent arises in the public forum, the prescribed notice has proven to be an effective option in the past.

It is true that a dissenting member of the public will not always be able to sway the governing body in its decision regarding a TIF project, as was the case in *Fitzke v. City of Hastings* where the taxpayer’s objections at the required city council meeting did not prevent the approval of the project. Where the public forum is ineffective for the taxpayer, like in *Fitzke*, the Nebraska Supreme Court has determined that courts have the power to negate a community redevelopment authority’s decision with respect to TIF. Not only did the court in *Fitzke* rule that it had the power to impact a community redevelopment authority’s decision, but it also ruled in favor of the taxpayers in that case. *Fitzke* is thus a prime example of the judicial system providing a viable alternative route for aggrieved taxpayers to challenge the legality of their community leaders’ actions concerning TIF even after a redevelopment plan has been approved.

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246. L.R. 399CA, 104th Leg., 2d Sess. (Neb. 2016) (requiring approval by a majority of registered voters of the relevant city, school district, and county before utilizing TIF).
247. Compare Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 32 (statement of Ervin Portis) (“In the three projects we’ve approved, we sent or published notice 64 times.”), and Dunn, supra note 131, at 10 (“Little opposition has surfaced to TIF plans before the Planning Board or the City Council.”), with Neb. L.R. 399CA § 1 (amending the Nebraska Constitution add another step to the TIF approval process).
248. Compare Hearing on L.B. 1095, supra note 56, at 37 (statement of Jack Cheloha) (describing removal of blighted and substandard designation after neighborhood spoke out against the designation), with Fitzke v. City of Hastings, 582 N.W.2d 301, 308 (Neb. 1998) (noting the plaintiffs unsuccessfully objected to the modification of a redevelopment plan at a city council meeting).
249. 582 N.W.2d 301 (Neb. 1998).
250. Fitzke, 582 N.W.2d at 308.
251. Id. at 309, 312.
252. Id.
253. Compare id. at 312 (concluding the redevelopment contract that resulted from the unlawful incorporation of property into an existing redevelopment area was invalid and void ab initio), with Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 95-96 (statement of Sen. Mike Groene) (criticizing the recourse option of hiring a private attorney to challenge local governments’ use of TIF), and Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 13 (statement of Renee Fry) (stating she was unaware of any instance where there had been a successful challenge to a TIF project where the challenger believed the Statute’s requirements had not been met).
Proposed legislation has repeatedly called for direct state oversight of cities' TIF practices for ongoing projects that have already been approved. Nebraska Legislative Bill 596 and Nebraska Legislative Bill 1095 would have created a new state oversight division to establish procedures on the use of TIF and determine whether cities were complying with the Statute. Nebraska Legislative Bill 445 would have required the Department of Revenue to audit TIF projects every two years and sought to give the department the power to determine whether cities were complying with the Statute. Nebraska Legislative Bill 539, approved by the governor in May 2015, was effective in providing the Auditor of Public Accounts with the power to conduct audits of community redevelopment authorities. Finally, Nebraska Legislative Bill 1102 would have made redevelopment projects subject to performance audits. Each of these bills is redundant and unnecessary, though, because TIF projects have already been subjected to audits in the past. Moreover, such bills overlook the fact that elections present a consistent opportunity for citizens who are unhappy with their local governments' use of TIF to replace incumbents with new officials who may use TIF in a manner more in line with the citizens' desires.

254. See L.B. 1102, 104th Leg., 2d Sess. (Neb. 2016) (permitting performance audits of TIF projects); L.B. 596, 104th Leg., 1st Sess. (Neb. 2015) (creating a state oversight division for TIF projects); L.B. 445, 104th Leg., 1st Sess. (Neb. 2015) (requiring an audit to be completed once every two years); L.B. 539, 104th Leg., 1st Sess. (Neb. 2015) (giving the Auditor of Public Accounts authority to audit TIF projects); L.B. 1095, 103d Leg., 2d Sess. (Neb. 2014) (creating a state oversight division of TIF projects).


257. Amendment 653, 104th Leg., 1st Sess. § 1 (Neb. 2015); LEGIS. JOURNAL, 104th Leg., 1st Sess. 1892 (Neb. 2015).


259. Compare Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 105 (statement of Mike Bacon) (referencing the fact that 40 audits of TIF projects had occurred, two of which were his), and Hearing on L.B. 238, L.B. 445, and L.B. 596, supra note 130, at 104 (statement of David Landis) (noting secondhand knowledge that 40 audits of TIF projects had occurred), with Neb. L.B. 1102 § 2 (subjecting redevelopment projects to performance audits), and Neb. L.B. 539 (giving audit power to the Auditor of Public Accounts), and Neb. L.B. 445 § 1 (requiring audits to be conducted once every two years).

260. See Hearing on L.B. 1095, supra note 56, at 19 (statement of Ervin Portis) (“There’s no shortage of folks running for those local offices. We got three people running for mayor [in Plattsmouth] right now. All of those city council seats are contested elections. That’s accountability at the local level.”); Hearing on L.B. 1095, supra note 56, at 43 (statement of Lynn Rex) (“[Citizens] simply don’t have to reelect people back on the local level.”).
V. CONCLUSION

In 1978, Nebraska voters approved the use of tax increment financing ("TIF"), which provides a means to redevelop substandard and blighted areas, through the passage of a constitutional amendment. In 1979, supplement provisions to the Community Development Law (collectively, the "Statute") were enacted, enabling the use of TIF by local governments. TIF involves the capture of property taxes from the increase in property value generated by a redevelopment project in an area that has been declared substandard and blighted. The captured property taxes from the increase in property value are often used by developers to pay off a TIF bond that is backed by the commitment of those captured tax revenues and issued in order to provide up-front capital for the redevelopment project.

A total of twelve legislative bills and four constitutional amendments have been introduced in the Nebraska Legislature since 2012 with many calling for changes to the Statute that would provide more oversight at the state level and taking the power to control the use of TIF out of the hands of local governments. If passed, Nebraska Legislative Bill 918 would have further limited a city's ability to declare land as blighted. Nebraska Legislative Resolution 376CA would have changed the Statute's blighted and substandard requirement and extended the payback period for TIF debt. Nebraska Legislative Bill 1132 sought to permit cities to develop, without annexing, vacant land outside of the city limits but only if the city obtained county approval.

Nebraska Legislative Resolution 29CA would have changed the Statute's blighted and substandard requirement and extended the payback period for TIF debt. Nebraska Legislative Bill 529 aimed to limit the use of TIF based on the valuation of previous TIF

263. Id. §§ 18-2109, 18-2147.
264. Briffault, supra note 5, at 68.
266. Neb. L.B. 918.
267. Neb. L.R. 376CA.
269. Neb. L.R. 29CA.
Nebraska Legislative Bill 1095 and Nebraska Legislative Bill 596 sought to generate an oversight role from overlapping taxing jurisdictions and created power for a state-level agency to establish additional procedures for the use of TIF. If passed, Nebraska Legislative Bill 238 would have narrowed the breadth of items on which TIF funds could be expended and increased limitations on TIF bond sales and interest rates. Nebraska Legislative Bill 445 attempted to officially permit the state to audit TIF projects and restrict the use of TIF by local governments that were not complying with the Statute. Nebraska Legislative Bill 539 authorized state agencies to conduct audits of community redevelopment authorities.

Nebraska Legislative Bill 719 would have prohibited cities from pledging TIF funds toward redevelopment projects on undeveloped vacant land. Nebraska Legislative Resolution 394CA would have permitted an overlapping taxing jurisdiction to opt out of having its taxes diverted as a result of TIF. Nebraska Legislative Resolution 399CA aimed to require voter approval for TIF redevelopment projects. Nebraska Legislative Bill 1042 sought to require cities to obtain approval for TIF redevelopment projects from the relevant county board of equalization. Nebraska Legislative Bill 1059 would require redevelopers seeking TIF funds to disclose whether they planned to take advantage of the Nebraska Advantage Act. Nebraska Legislative Bill 1102 would have permitted performance audits of TIF redevelopment projects. Of all the proposed changes to the Statute since 2012, L.B. 539 was the only bill signed into law.

Because studies often cited by proponents of the proposed legislation do not present an accurate picture of the use of TIF in Nebraska, they should not be used to provide the foundation for arguments in support of increased TIF oversight at the state level. Moreover, because avenues for recourse currently in place have effectively been utilized to hold local governments accountable regarding their use of TIF, increasing state oversight by controlling the make-up of a community redevelopment authority or requiring a claw back provision is unnec-

276. Neb. L.R. 394CA.
277. Neb. L.R. 399CA.
281. Id.
282. See infra notes 207-226 and accompanying text.
The use of TIF is without doubt a controversial topic among academics, citizens, and state legislators, and it appears that this controversy is not destined to conclude any time soon. With newly imposed term limits in the Nebraska Legislature, this Article is a useful guide to state senators new to the TIF conversation. State senators, old and new, should bear in mind that local governments tasked with ensuring the successful development of their communities are given few tools, and arguably only one true tool known as TIF, to accomplish that endeavor. Exacerbating the issue, decisions regarding TIF projects made by urban communities will undoubtedly result from differing needs than those decisions made by communities in greater Nebraska. While increasing state oversight of the use of TIF may create more standardization in the area, legislators must continue to be mindful of the effect that such oversight would have on rural communities with decreasing populations.

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283. See infra notes 227-260 and accompanying text.