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Property Law—Tax Increment Financing—A Case for Bringing TIF Back to the State of Arkansas

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PROPERTY LAW—TAX INCREMENT FINANCING—A CASE FOR BRINGING TIF BACK TO THE STATE OF ARKANSAS

I. INTRODUCTION

In 2017, garnering massive publicity, Amazon.com, Inc. ("Amazon") announced that it would begin searching for a site for a second headquarters it called "HQ2."[1] Cities across the country immediately clamored for the attention of the technology giant and Amazon received two hundred and thirty-eight bids by October of the same year.[2] Amazon listed a number of requirements applicant-cities would have to meet, as well as a number of "preferences" the company would take into account in choosing a site.[3] One of these "Key Preferences and Decision Drivers" was that the new site be located somewhere with "[a] stable and business-friendly environment and tax structure."[4] "Incentives offered . . . to offset initial capital outlay and ongoing operational costs" were said to be "significant factors in the decision-making process."[5] In exchange for such incentives, Amazon promised "as many as fifty thousand new full-time employees with an average annual total compensation exceeding one hundred thousand dollars" and over five billion dollars in capital expenditures.[6]

Amazon eventually whittled the two hundred and thirty-eight bids down to two (New York and Virginia) and, while negotiations have broken down with the former,[7] at one point the company stood to recover over three billion dollars in tax breaks and incentives.[8] In Virginia, it has been reported that almost half of Amazon's total incentive package came in the form of government aid for infrastructure needs and property improvements.[9] While there were plenty of people in New York and Virginia outraged by the

1. Chloe Foussianes, *A Timeline of Amazon's "HQ2," from the First Announcement to a Failed Campus in New York City*, TOWN & COUNTRY (Feb. 14, 2019), https://www.townandcountrymag.com/society/money-and-power/a26345749/amazon-hq2-new-york-city-timeline/.

2. *Id.*

3. *Id.*; *Amazon HQ2 RFP*, AMAZON 5, https://images-na.ssl-images-amazon.com/images/G/01/Anything/test/images/usa/RFP_3._V516043504_.pdf (last visited Dec. 7, 2019).

4. *Amazon HQ2 RFP*, *supra* note 3 at 5.

5. *Id.*

6. *Id.* at 1.

7. Foussianes, *supra* note 1.

8. Arjun Panchadar, *Factbox: Amazon to Get Billions in Breaks for HQ2 Development*, REUTERS (Nov. 13, 2018, 1:40 PM), https://www.reuters.com/article/us-amazon-com-headquarters-factbox/amazon-to-get-billions-in-breaks-for-hq2-development-idUSKCN1NI2KR.

9. *Id.*

deals,[10] it should come as no surprise that Amazon leveraged offers in an effort to save money. Yes, it is a billion-dollar company, but it is still a *company*.

As evidenced by the Amazon story, a company's real estate needs often make up one of the biggest puzzle pieces in any business venture, and cost-saving with respect to real estate can play a huge role in where (or if) a business relocates. However, this tactic is not limited only to the business world. Complex real estate transactions also play an important role in the economic development plans of communities across the country. The two-hundred and thirty-eight cities that submitted bids to Amazon had job creation and economic stimulus in mind. Perhaps many of them saw an opportunity to invest in parts of their cities that they themselves could not afford to invest in. What is the harm in giving Amazon a discount if it will invest some of its billions in those areas? These mutual needs (those of the private business and those of the public entity) are what often lead to incentive packages like those offered to Amazon.

While Arkansas has made it abundantly clear that it was never going to (nor could it ever) court Amazon with such lavish incentives,[11] the reality is that the state must offer some sort of assistance for complex real estate transactions if it wants to foster economic development and become a national competitor. Government assistance becomes even more important in light of the overall business climate in Arkansas. A recent study ranked Arkansas in the bottom ten for "business friendliness" in the entire country.[12] This is not to say that businesses have zero government assistance available in Arkansas. The state offers a number of incentives, mostly in the form of tax credits and cash rebates based on a business's job creation capability,[13] but Arkansas lags far behind many other states in this area, particularly in the area of complex real estate transactions.

The climate for economic development in Arkansas, within the context of real estate transactions, was not always so dismal. Arkansas enjoyed roughly seven years of sensible, business-friendly economic policy from 2000 to 2007 in the form of tax increment financing.[14] In its most basic definition, tax increment financing (TIF) allows a local government to capture a

10. Foussianes, *supra* note 1.

11. Max Brantley, *LR Told D.C. Before It Told City Residents It Wasn't Going After Amazon*, ARK. TIMES: ARK. BLOG (Oct. 19, 2017, 10:18 AM), https://www.arktimes.com/ArkansasBlog/archives/2017/10/19/lr-told-dc-before-it-told-city-residents.

12. *Top States for Business: 40. Arkansas*, CNBC (July 10, 2018, 8:30 AM), https://www.cnbc.com/2018/07/10/top-states-for-business-arkansas.html.

13. *Job Creation Incentives in Arkansas*, ARK. ECON. DEV. COMMISSION, https://www.arkansasedc.com/why-arkansas/business-climate/incentives/pages/job-creation-incentives (last visited Dec. 7, 2019).

14. *See infra* Section III.

portion of an area's property taxes for a period of time and to make the revenue produced by that captured portion available to finance the development of the property from which the tax revenue was captured.[15] TIF is at once a way for businesses to mitigate the costs of satisfying their real estate needs and a way for local governments to revive parts of their towns and cities without shouldering the entire financial burden.

Unfortunately, TIF's tenure in the Natural State was relatively short lived. In *City of Fayetteville v. Washington County*, the Arkansas Supreme Court issued a ruling that effectively gutted TIF and left businesses and local governments with one less tool for redeveloping property.[16] The case marked a step in the wrong direction for Arkansas economic growth, resulting in the need for TIF to be revitalized in a major way, either by overturning *City of Fayetteville*[17] or by amending the Arkansas Constitution.[18]

Part II of this note will provide an overview of TIF basics as well as a brief history of TIF across the country. Part III will examine TIF in Arkansas, taking a close look at Arkansas's TIF statutes, offering a typical TIF example, and surveying TIF criticisms. Part IV highlights the main sources of contention over TIF. Part V focuses primarily on the *City of Fayetteville* opinion itself, providing the facts and procedural history leading up to the case as well as revisiting the current state of TIF in light of the court's decision. Finally, Part VI offers two ways that TIF could be renewed in Arkansas. First, arguing that *City of Fayetteville* was decided incorrectly, Part VI will show that TIF can be revitalized by overturning the case either completely or partially. Next, Part VI presents a plan for amending the Arkansas Constitution that includes (1) borrowing from previous efforts of the Arkansas legislature and (2) incorporating provisions from the American Planning Association's model TIF statutes.

II. WHAT IS TIF?

This section introduces a number of key concepts and definitions that will be important going forward and provides an overview of the typical TIF processes. Although this section covers concepts that are common to all states, definitions vary from state to state. Therefore, where possible, Arkansas-specific definitions are interspersed to avoid confusion in subsequent sections. This section will also briefly cover the history of TIF in the United States, providing a general idea of the policy underpinnings for the financing method.

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15. 6 ZONING AND LAND USE CONTROLS § 33B.01 (Matthew Bender & Co., Inc. 2020); *see infra* Section II.A.

16. *See* City of Fayetteville v. Washington Cty., 369 Ark. 455, 255 S.W.3d 844 (2007).

17. *See infra* Section VI.A.

18. *See infra* Section VI.B.

A. The Basics: Typical TIF Statutes and Procedures

A survey of the language used in typical TIF scenarios is necessary in order to follow the often convoluted TIF procedure without confusion. First, the area in which TIF is used is usually referred to as the "redevelopment area" or "redevelopment district."[19] The "redevelopment plan" or "project plan" refers to the actual undertaking that the local governing body and the property developer intend to carry out.[20]

TIF concepts are usually broken down in terms of pre-redevelopment and post-redevelopment. With regard to the former, the property tax revenue that all the property within a redevelopment area produces *prior* to any approval of a redevelopment plan is often called the "base revenue."[21] The base revenue is found by applying the property tax rate of the area to the "base value," the assessed value of all the property within the redevelopment district *prior* to any approval of a project plan.[22]

The property tax revenue that all the property within a redevelopment area produces *after* the approval of a redevelopment plan is called the "current revenue."[23] The current revenue is found by applying the property tax rate of the area to the "current value," the assessed value of all the property within the redevelopment district *after* the approval of the redevelopment plan.[24]

One of the most crucial concepts to grasp is that of the "increment." TIF statutes often apply the term "increment" in more than one context, leading to confusion. First, the term "incremental value" refers to the difference between the base value and the current value.[25] Applying the property tax rate of the redevelopment district to the incremental value yields the "tax increment."[26] Put another way, the tax increment is the difference between the base revenue and the current revenue.[27]

While the exact procedure varies from state to state, the TIF process usually begins with a public entity (often called the "redevelopment authority") submitting a project plan to a local governing body (usually a city).[28]

19. ZONING AND LAND USE CONTROLS, *supra* note 15.
20. *Id.*
21. *Id.*
22. ARK. CODE ANN. § 14-168-301(2) (2018).
23. ZONING AND LAND USE CONTROLS, *supra* note 15.
24. ARK. CODE ANN. § 14-168-301(5) (2018).
25. *Id.* § 14-168-301(7)(A) (2018).
26. *Id.* § 14-168-301(16) (2018).
27. ZONING AND LAND USE CONTROLS, *supra* note 15.
28. *Id.*

There is variation among the states as to whether an independent authority must initiate the TIF process[29] or whether a city can do so unilaterally.[30]

Once a redevelopment project is approved and the redevelopment district is established, the tax increment produced by the district is usually deposited into a fund that is kept separate from the general revenue fund.[31] This separate "special fund" is then used to pay costs associated with the redevelopment project.[32] The special fund may be used for direct payment of project expenses, but typically the city will use the tax increment to take out a loan or issue bonds.[33]

TIF concepts are easier to grasp by way of example. Consider the following scenario:

> [A] [local governing body] has adopted tax increment financing with respect to a redevelopment area. Prior to redevelopment, the assessments in the area produced $1,000,000 in real property tax revenue [the base revenue]. After redevelopment, the assessments will produce $3,500,000 in tax revenue [the current revenue]. The difference between the base revenue of $1,000,000 and the current revenue of $3,500,000 ($2,500,000) is the tax increment revenue.[34]

B. A Brief History of TIF

TIF has been in use across the United States for nearly seventy years as a means of incentivizing private investment in economically depressed areas.[35] The practice originated in California, but after the federal government made large cuts to state redevelopment funds in the 1960s, the rest of the country followed suit.[36] In light of the increased volatility of federal funding in the late 1960s and 1970s, states began embracing TIF as a local alternative to federal governmental assistance.[37] Not only does TIF insulate local redevelopment efforts from federal (and state) cutbacks, but TIF is also valued because:

> [I]t raises revenue without increasing the rate of taxation; it offers flexibility . . . both as to the types of projects financed and the ways in which those projects are financed; . . . and because it imposes no new taxes, the

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29. *See, e.g.*, OKLA. STAT. tit. 11, § 38-120 (Westlaw through Second Reg. Sess. of 2018).
30. *See, e.g.*, VT. STAT. ANN. tit. 24, § 1892 (Westlaw through 2019 Reg. Sess.).
31. ZONING AND LAND USE CONTROLS, *supra* note 15.
32. ARK. CODE ANN. § 14-168-301(15) (2018).
33. ZONING AND LAND USE CONTROLS, *supra* note 15.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*

> debt incurred by tax increment financing is not a general obligation of the local government . . . .[38]

III. TIF IN ARKANSAS

This section begins with an introduction and brief overview of Arkansas property taxes before discussing the specifics of the Arkansas TIF statutes. This section also presents an Arkansas-specific example, incorporating the TIF concepts and definitions discussed thus far. Finally, this section will consider the praises and criticisms of TIF both in Arkansas and nationwide.

A. Arkansas Property Taxes

In order to properly understand Arkansas TIF, a brief discussion about Arkansas property tax calculation is necessary. In Arkansas, property (or "ad valorem") taxes are levied by local governing bodies as opposed to the state.[39] The property tax rate is expressed in terms of "mills" or a "millage rate," with one mill being equal to $0.001.[40] The millage rate is applied to the assessed value of certain real property to calculate the tax revenue collected from that property annually.[41] For example, real property with an assessed value of $1,000,000 in an area with a millage rate of fifty (or, put another way, with fifty mills levied against it) would yield $50,000 annually.[42] The millage rate or number of mills (fifty) is multiplied by $0.001 and the assessed value ($1,000,000) is multiplied by that number ($0.05) to determine the annual property tax revenue ($50,000). Typically, local "taxing units" such as school districts and public libraries derive some portion of their funding from annual property tax revenues.[43]

B. Arkansas TIF Statutes and Their Key Provisions

TIF made its debut in Arkansas in 1999 when the 82nd General Assembly introduced H.J.R. 1012, a proposed amendment to the Arkansas Constitution to, in part, "authorize cities and counties to form redevelopment districts and to issue bonds for redevelopment projects in the district."[44] The people of Arkansas approved H.J.R. 1012 in the form of

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38. *Id.*
39. ARK. CONST. amend. XLVII.
40. Jerald "Cliff" McKinney, Complex Commercial Real Estate Transactions in Arkansas; Or a Grammatically Incorrect Tour of Real Estate Transactions in Arkansas 68 (August 2008) (unpublished manuscript) (on file with author).
41. *Id.*
42. *Id.*
43. *See* ARK. CONST. art. XIV, § 3.
44. H.J. Res. 1012, 82d Gen. Assemb., Reg. Sess. (Ark. 1999).

Amendment 78 in the regular election on November 7, 2000.[45] Amendment 78, the purpose of which was to inhibit the spread of blight and increase economic development within the redevelopment districts,[46] was structured in a similar fashion as TIF amendments in other states. It authorized a city or county to form a redevelopment district and authorized that city or county to issue bonds to secure financing for improvements within the district, those bonds secured and payable by "all or part of the ad valorem taxes levied against any increase in the assessed value of property" in the district.[47] Notably, Amendment 78 also contained a general "repealer" clause, stating that any part of the Constitution in conflict with the amendment "is repealed insofar as it is in conflict with [Amendment 78]."[48]

Act 1197 implemented Amendment 78 in 2001.[49] Act 1197, as codified in Title 14 of the Arkansas Code, established the procedure for forming a redevelopment district and approving a project plan and it conferred broad powers on local governing bodies in doing so.[50] Importantly, under Act 1197, the term "taxing unit" (those entities that derive at least part of their funding from property tax revenue) included cities, counties, school districts, and community college districts.[51] Another key provision of Act 1197 excluded from Amendment 78 any mills already dedicated to libraries, fire and police pension funds, and county hospitals.[52]

The definitions within the Arkansas TIF statutes vary slightly from those outlined above and it is important to understand them going forward. First, the "total ad valorem rate" is defined as "the total millage rate of all state, county, city, school, or other property taxes levied on all taxable property within a redevelopment district in a year."[53] In the previous example,[54] fifty mills would be the "total ad valorem rate." The "debt service ad valorem rate" means any portion of the total ad valorem rate that is already pledged to the payment of the debts of any taxing unit within the redevelopment district when the district is formed.[55] For example, any mills dedi-

45. Christian Harris, Survey of Legislation, *Constitutional Amendments*, 24 U. ARK. LITTLE ROCK L. REV. 635, 635 (2002).

46. ARK. CONST. amend. LXXVIII, § 1(c).

47. *Id.* § 1(a)–(b), (d).

48. *Id.* § 1(f).

49. Arkansas Community Redevelopment Act of 2001, No. 1197, 2001 Ark. Acts 1197 (codified as amended at ARK. CODE ANN. §§ 14-168-301 to -324 (2018)).

50. ARK. CODE ANN. § 14-168-305(a) ("The local governing body, up*on its own initiative*, . . . may designate the boundaries of a proposed redevelopment district." (emphasis added)).

51. *See* Arkansas Community Redevelopment Act, supra note 49 at § 2(16).

52. ARK. CODE ANN. § 14-168-301(18)(b).

53. *Id.* § 14-168-301(18)(A).

54. McKinney, *supra* note 40.

55. ARK. CODE ANN. § 14-168-301(6).

cated to libraries or county hospitals (and therefore excluded from TIF) could be considered part of the debt service ad valorem rate. The "applicable ad valorem rate" is the difference between the total ad valorem rate and the debt service ad valorem rate.[56] In Arkansas, it is the applicable ad valorem rate that is applied to the incremental value of a redevelopment district to determine the tax increment.[57]

C. An Arkansas Example

With this knowledge of Arkansas property tax calculation and TIF definitions in mind, another example of the TIF procedure is pertinent. For the sake of uniformity, the figures from the previous example will be recycled. As a refresher, the total ad valorem rate of the hypothetical redevelopment district is fifty mills and the base value of the district is $1,000,000.[58] This means the proposed district produces a base revenue of $50,000 annually.[59] Now assume that, after a city establishes the redevelopment district, the projected current value of the property becomes $10,000,000.[60] Applying the total ad valorem rate of fifty mills to this current value yields $500,000, the current revenue, making the increment $450,000 ($500,000-$50,000).[61] The same value can be calculated by applying the total ad valorem rate (fifty mills) to the incremental value of the property ($9,000,000).

Assume that this hypothetical redevelopment district has already pledged twenty mills to libraries and county hospitals when the district is formed (the debt service ad valorem rate). This yields an applicable ad valorem rate of thirty mills (fifty mills less twenty mills) for the district. The applicable ad valorem rate (thirty mills) would be applied to the increment ($450,000) to get $13,500.[62] This annual return of $13,500 would then be deposited into the "special fund" and made available to the city to finance the redevelopment project.[63]

D. Criticisms

Despite the many advantages of TIF, the practice has not been without its critics. At their most benign, these critics are skeptical of TIF's ability to actually foster new development, as opposed to shifting it from one commu-

56. *Id.* § 14-168-301(1).
57. *Id.* § 14-168-301(16).
58. McKinney, *supra* note 40.
59. *Id.*
60. *Id.* at 69.
61. *Id.*
62. *Id.*
63. *Id.*

nity to another.[64] At their most hostile, these critics regard TIF as a tool for evil capitalists to divert money away from the public good.[65] The chief concern of TIF opponents typically manifests itself in the form of some "government handout" or "government welfare" argument. As recently as 2015, media outlets have labeled efforts to get redevelopment districts off the ground again in Arkansas as "crony capitalism."[66] Others call TIF a "developer scam rammed through a compliant legislature that has fallen short of the miracles predicted."[67]

IV. CONFUSION OVER TIF

As is the case with many heated debates revolving around public-private business interactions, much of the TIF criticism can be explained by misunderstanding. Part IV considers one of the primary reasons for this misunderstanding. This section discusses Amendment 78's relationship with another seemingly conflicting amendment and the efforts previous Arkansas officials have made to reconcile that conflict.

A. Amendment 74

Amendment 74, approved by Arkansas voters in the 1996 general election, established a uniform property tax rate of twenty-five mills to be levied on all real property in the state for school maintenance and operation.[68] Amendment 74 provided that the tax revenue was to be collected by the state and distributed to the school districts.[69] Additionally, the amendment empowered the state legislature to propose increases and decreases to the uniform rate, with those proposals to be voted on in the general election.[70] Amendment 74 did not limit school districts to twenty-five mills, rather, twenty-five mills became the floor and individual school districts could vote to impose an additional property tax on top of that.[71]

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64. *See* Penelope Lemov, *Tough Times for TIFs?*, GOVERNING (Sept. 16, 2010, 3:00 AM), http://www.governing.com/topics/finance/tough-times-tax-increment-financing.html.

65. *See Crony Capitalism in Arkansas – HB 1410*, CONDUIT FOR ACTION (Mar. 5, 2015), https://www.conduitforaction.org/crony-capitalism-in-arkansas-hb1410/.

66. *Id.*

67. Max Brantley, *Those Miraculous TIF Districts*, ARK. TIMES: ARK. BLOG (Sept. 5, 2011, 6:54 AM), https://www.arktimes.com/ArkansasBlog/archives/2011/09/05/those-miraculous-tif-districts.

68. ARK. CONST. art. XIV, § 3(b)(1).

69. *Id.* § 3(b)(3).

70. *Id.* § 3(b)(4).

71. *Id.* § 3(c)(1).

B. Searching for Guidance

Soon after Amendment 78 was implemented, questions arose concerning whether any portion of Amendment 74's mills could be used by a redevelopment district.[72] The language of Amendment 78 (particularly before Act 2231, discussed below) and Amendment 74 made the answer unclear. While Amendment 78 (and its implementing legislation) expressly excluded mills pledged to the service of debt that pre-dates a redevelopment district, as well as the mills pledged to pension funds, libraries, and county hospitals,[73] it makes no mention of Amendment 74's uniform rate.

At least two Arkansas attorneys general were asked to issue some guidance on the subject between 2001 and 2005.[74] In December of 2001, three state senators requested an opinion "concerning the relationship between Amendments 74 and 78" from then-Attorney General Mark Pryor.[75] While Pryor found the answer to be "not entirely clear,"[76] he did offer at least two feasible arguments. First, the twenty-five mills imposed by Amendment 74 could potentially be considered a property tax "levied by the state itself" because Amendment 74 was approved by the people of Arkansas.[77] If this were the case, it could be argued that Amendment 74's mills would be shielded from Amendment 78's reach. The Attorney General wrote his opinion at a time when, under Act 1197, "the State" was not included in the definition of a "taxing unit."[78] Therefore, the uniform rate imposed by Amendment 74, levied by an entity outside of Act 1197's "taxing unit" definition, would not be available under section 1(d) of Amendment 78.[79]

Second, continuing with his analysis of the "taxing unit" definition under Act 1197, the Attorney General noted that if Amendment 74's uniform rate was *not* considered a tax imposed by the state, then it would have to be a tax imposed by a school district.[80] School districts were expressly considered "taxing units" under Act 1197,[81] and the Arkansas Supreme Court had construed the phrase to include school districts.[82] Therefore, in the Attorney General's opinion, Amendment 78 "clearly authorizes the diversion of some

72. *See* Op. Ark. Att'y Gen. No. 295 (2001).
73. ARK. CODE ANN. § 14-168-301(18)(b).
74. *See* Op. Ark. Att'y Gen. No. 359 (2005); Op. Ark. Att'y Gen. No. 295 (2001).
75. *Id.*
76. *Id.*
77. *Id.*
78. Arkansas Community Redevelopment Act of 2001, No. 1197, 2001 Ark. Acts 1197 (codified as amended at ARK. CODE ANN. §§ 14-168-301 to -324 (2018)).
79. ARK. CONST. amend. LXXVIII, § 1(d).
80. Op. Ark. Att'y Gen. No. 295 (2001).
81. ARK. CODE ANN. § 14-168-301(16).
82. *See* Frank v. Barker, 341 Ark. 566, 582, 20 S.W.3d 293, 296 (2000).

school tax revenues to support redevelopment districts."[83] Pryor's opinion set out these two possible arguments (as well as a discussion about Amendment 78's "repealer" clause[84]), but no definitive answer revealed itself. However, the opinion did note that, should Amendment 74 be considered a state-imposed tax, Amendment 78 vested the General Assembly with the ability to "amend the statutory scheme to clarify the matter as it sees fit."[85] In other words, according to Pryor, the General Assembly could simply pass legislation to include "the State" in the definition of "taxing unit" under Act 1197.

Apparently, Pryor's opinion was of little help and may have created even more confusion in its wake, for a little over three years later one of the same senators that wrote to Pryor wrote to Pryor's successor requesting an answer to the exact same question.[86] Pryor's successor, Mike Beebe, raised several of the same arguments in his opinion. However, in Beebe's opinion, the twenty-five mills imposed by Amendment 74 was indeed a state tax.[87] Therefore, in Beebe's opinion, because Act 1197 did not include the state as a "taxing unit," redevelopment districts could not redirect any revenue attributed to Amendment 74's uniform rate to the redevelopment project.[88] Beebe's opinion also discussed the possibility that the legislature could amend Amendment 78's enabling legislation to include "the State" in the "taxing unit" definition, but, as did Mark Pryor, Beebe opined that doing so might raise issues of constitutionality.[89]

Three months after Attorney General Beebe's slightly more definitive opinion, the General Assembly introduced House Bill 2735 for the main purpose of clarifying the definition of "taxing unit" under Act 1197.[90] Act 2231 enacted the bill on April 15, 2005.[91] Act 2231 made numerous changes to Act 1197,[92] but it mainly operated to include "the State of Arkansas" in the definition of "taxing unit."[93]

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83. Op. Ark. Att'y Gen. No. 295 (2001).
84. *Id.*
85. *Id.*
86. *See* Op. Ark. Att'y Gen. No. 359 (2005).
87. *Id.*
88. *Id.*
89. *Id.*
90. H.B. 2735, 85th Gen. Assemb. Reg. Sess. (Ark. 2005).
91. Act of Apr. 15, 2005, No. 2231, 2005 Ark. Acts 2231 (codified at ARK. CODE ANN. §§ 14-168-301 to -324 (2018)).
92. *See infra* Part VI.B.1.
93. ARK. CODE ANN. § 14-168-301(16).

V. *CITY OF FAYETTEVILLE V. WASHINGTON COUNTY*

This section introduces the Arkansas Supreme Court case that drastically altered TIF, highlighting the facts and procedural history of the case before discussing the Supreme Court's opinion. This section will also discuss the current state of TIF in Arkansas, providing an example of how TIF operates after the *City of Fayetteville* decision.

A. City versus County: Facts and Procedural History

Only one month after the Arkansas legislature enacted Act 2231, Amendment 78 was put to the test. From March 16, 2005 to April 26, 2007, a test case moved through the Arkansas court system challenging the extent of Amendment 78's reach.[94] On December 28, 2004, the City of Fayetteville, Arkansas ("the City") formed and approved the plan for the Highway 71 East Square Redevelopment District Number One ("the Highway 71 District").[95] The Washington County Assessor ("the Assessor"), pursuant to the Arkansas TIF statutes,[96] determined and certified the total ad valorem rate, debt service ad valorem rate, and applicable ad valorem rate for the Highway 71 District on January 24, 2005.[97] In March of 2005, the Fayetteville City Council passed an ordinance for the issuance of bonds to cover the cost of the project plan.[98] On March 16, 2005, the City filed a complaint against Washington County, the Assessor, and the Fayetteville School District ("the School), as well as the Fayetteville Public Library and the boards of trustees for the police and firemen's pension funds.[99] The complaint alleged, in relevant part, that the Assessor's ad valorem rate certifications were incorrect and that the rates should have included the twenty-five mills that Amendment 74 requires Washington County to levy on behalf of the School.[100] The City's complaint requested a declaratory judgment as to what the proper

94. *See* Complaint for Declaratory Judgment and Mandatory Injunction, City of Fayetteville v. Washington Cty., 369 Ark. 455, 255 S.W.3d 844 (2007) (No. CIV 05-559-2), 2005 WL 5524744 [hereinafter Complaint].

95. *Id.* para. 15.

96. ARK. CODE ANN. § 14-168-306(b)(5).

97. *See* Complaint, *supra* note 94, para. 20.

98. *Id.* para. 19.

99. *Id*. para. 1–5.

100. *Id.* para. 22; *see also* Brief Amicus Curiae the Arkansas Municipal League in Support of Appellant's Abstract and Brief at 1–2, City of Fayetteville v. Washington Cty., 369 Ark. 455, 255 S.W.3d 844 (2007) (Nos. 06-602, 02-177), 2006 WL 4540941 ("The Washington County Assessor certified the Total Ad Valorem Rate at 26.86 mills, the Debt Service Ad Valorem Rate at 23.7 mills, and the Applicable Ad Valorem Rate at 3.16 mills. The certification did not include in its calculations the 25 mills levied by the Fayetteville School District pursuant to Arkansas Constitutional Amendment 74.").

applicable ad valorem rate should have been.[101] The Washington County Circuit Court sided with the defendants, finding the Assessor's certifications correct and that Amendment 74's uniform rate could not be diverted to a redevelopment district under Amendment 78.[102]

The City appealed the circuit court's order to the Arkansas Supreme Court, arguing that Amendment 78 "worked a slight modification" to Amendment 74 to allow a redevelopment district to utilize the twenty-five mills only as to any increase in the assessed value of the property after the district is established.[103] On appeal, the City pointed to Amendment 78's failure to mention Amendment 74's uniform rate, the importance of the twenty-five mills for the financial viability of TIF, and the subsequent passage of Act 2231 (adding "the State of Arkansas" as a "taxing unit") as indicators that the legislature intended for Amendment 78 to be able to utilize Amendment 74's uniform rate.[104]

B. The Opinion

Taking up the issue of the supposed conflict between Amendments 74 and 78, the Arkansas Supreme Court ("the Court") focused most on what the drafters of Amendment 78 omitted from the text.[105] The Court reasoned that, because Amendment 78 expressly excepts certain mills (those making up the debt service ad valorem rate), the drafters could have easily provided for the inclusion of Amendment 74's twenty-five mills.[106] According to the Court, the drafters' failure to do so showed that the drafters did not intend to repeal, or even modify, Amendment 74.[107]

Having supplied the drafters' intent, the Court next determined that this was not a case of "repeal by implication."[108] Repeal by implication occurs when two statutes (or a constitutional amendment, for present purposes) cannot coincide with one another.[109] Given their strong disfavor, the bar for repeals by implication is high and they are only allowed "when there is such an invincible repugnancy between the provisions that both cannot stand."[110]

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101. *See* Complaint, *supra* note 94, para. 26.

102. *See* Letter Opinion, City of Fayetteville v. Washington Cty., 369 Ark. 455, 255 S.W.3d 844 (2007) (No. CV 2005-559-2), 2006 WL 4556782.

103. City of Fayetteville's Abstract, Appellant Brief, and Addendum, City of Fayetteville v. Washington Cty., 369 Ark. 455, 255 S.W.3d 844 (2007) (No. CV 2005-559-2), 2006 WL 4540936.

104. *Id.*

105. *City of Fayetteville*, 369 Ark. at 470, 255 S.W.3d at 855.

106. *Id*. at 470, 255 S.W.3d at 855.

107. *Id*. at 470, 255 S.W.3d at 855.

108. *Id.* at 471, 255 S.W.3d at 856.

109. Doe v. Baum, 348 Ark. 259, 274–75, 72 S.W.3d 476, 484–85 (2002).

110. *Id*. at 275, 72 S.W.3d at 485.

Amendments that contain general "repealer" clauses (such as Amendment 78[111]) are examined under this same "invincible repugnancy" framework.[112] Because the Court found that the intents behind Amendments 74 and 78 were not conflicting, it held that no "invincible repugnancy" existed between the two and that Amendment 74 was not repealed.[113]

The crux of the Court's holding in *City of Fayetteville* was that the Arkansas voters, in approving Amendment 78, "were never put on notice that Amendment 78 would effectively undo Amendment 74 by funding redevelopment projects with a portion of the uniform rate of twenty-five mills that had previously been designated *solely* for the maintenance and operation of the public schools."[114] The Court noted that the voters approved Amendment 74 just four years before approving Amendment 78 and that Amendment 78's approval came amidst a backdrop of school funding constitutionality questions.[115] The Court reasoned that Arkansas voters would not have approved Amendment 78 if they knew it would divert school funding to redevelopment projects.[116] Thus, the Court affirmed the decision of the circuit court, concluding that Amendment 74's uniform rate could not be touched by TIF.[117]

C. TIF After *City of Fayetteville*

The impact that *City of Fayetteville* had on TIF can be difficult to grasp at first. Essentially, the Court's holding excluded the first twenty-five mills from the applicable ad valorem rate.[118] Consider the previous example. Before *City of Fayetteville*, the hypothetical redevelopment district produced $13,500 annually for the city's financing needs.[119] After *City of Fayetteville*, another twenty-five mills must be subtracted from the applicable ad valorem rate, leaving the district with only five mills (thirty mills less twenty-five mills).[120] With only five mills remaining, the same redevelopment district would only produce $2,250 annually: a sixth of what it previously produced.[121] In this scenario, most cities would not even bother to pursue TIF in

111. ARK. CONST. amend. LXXVIII, § 1(f).
112. *City of Fayetteville*, 369 Ark. at 470–71, 255 S.W.3d at 855.
113. *Id.* at 471, 255 S.W.3d at 856.
114. *Id.* at 469–70, 255 S.W.3d at 854.
115. *Id.* at 471, 255 S.W.3d at 855–56.
116. *Id*. at 471, 255 S.W.3d at 855–56.
117. *Id.* at 472, 255 S.W.3d at 856.
118. McKinney *supra* note 40, at 69.
119. *Id.*
120. *Id.*
121. *Id.*

the first place, as the annual revenue would almost certainly be insufficient to service any debt or borrow money.[122]

VI. REVITALIZING TIF IN ARKANSAS

TIF financing remains effectively useless in Arkansas following the Supreme Court's decision in *City of Fayetteville*. A once-valuable tool for developers and cities that cannot shoulder the entire cost of redevelopment has been neutralized. However, there may be hope for TIF yet.

To foster economic growth and development in Arkansas, TIF must be revitalized in a major way. This section considers two ways that can be accomplished. The first would involve overturning the *City of Fayetteville* decision. The second would involve presenting a new TIF amendment to the Arkansas voters.

A. Overturning *City of Fayetteville*

This section begins with an analysis of the *City of Fayetteville* decision, arguing that the Court reached an incorrect conclusion. This section will also consider the possible implications of overturning the case completely versus overturning the case in part.

1. The Court's Ruling Was Incorrect

Closer inspection of the *City of Fayetteville* decision reveals that the Court's reasoning was flawed. The Court incorrectly found that Amendment 74's uniform rate was a tax levied by the state.[123] This conclusion runs afoul of another Arkansas constitutional provision: Amendment 47.[124] Amendment 47 expressly prohibits the state from levying taxes on real property.[125] If Amendment 74 was actually a tax levied by the state, by the Court's own logic,[126] there is no way it could be harmonized with Amendment 47. Interestingly, particularly in light of the important role that the doctrine of repeal by implication played in the Court's decision, the Court's opinion made zero mention of Amendment 47.[127] The logical next step after determining that Amendment 74 was a state tax would have been reconciling it with

122. *Id.*

123. City of Fayetteville v. Washington Cty., 369 Ark. 455, 462, 255 S.W.3d 844, 849 (noting the circuit court's rationale that Amendment 74 was a tax passed by the voters rather than a "local general property tax").

124. ARK. CONST. amend. XLVII ("No ad valorem tax shall be levied upon property by the State.").

125. *Id.*

126. *City of Fayetteville*, 369 Ark. at 471, 255 S.W.3d at 855–56.

127. *See City of Fayetteville*, 369 Ark. 455, 255 S.W.3d 844.

Amendment 47, and the Court's refusal to broach the subject would seem to indicate that the Court was not even confident that it characterized Amendment 74 correctly.

Even if Amendment 47 was not an issue, Amendment 74 should still be characterized as a local tax. While certain provisions of Amendment 74 share characteristics with other state taxes,[128] these are heavily outweighed by provisions that indicate Amendment 74 is a tax levied by local school districts.[129] Perhaps most indicative of Amendment 74's local character is the fact that the amendment permits variation in funding as between school districts.[130]

It should follow, having determined that Amendment 74 imposes a tax levied by individual school districts, that Amendment 78 allows for Amendment 74's twenty-five mills to be utilized by TIF. The language of Amendment 78 is clear. It provides that part or all of the ad valorem taxes in a redevelopment district, levied "by any taxing unit," may be used for redevelopment purposes.[131] Even before Act 2231, Amendment 78's enabling legislation included school districts in the definition of "taxing unit."[132] While Amendment 78 does except certain debt service taxes from TIF,[133] Amendment 78 and its enabling legislation make no mention of Amendment 74's uniform rate.

2. Implications of Overturning City of Fayetteville

While overturning *City of Fayetteville* would accomplish the ultimate goal—making TIF a viable option once more—the process would be highly volatile and could result in unexpected (and unintended) consequences. First, lower courts would need to ignore stare decisis in order to even get the issue before the Arkansas Supreme Court again. Plus, even if the issue made it before the court a second time, that court could decide to follow precedent and TIF would be back to square one. Finally, if *City of Fayetteville* is overturned, that could mean that Amendment 74 is repealed.[134]

Concerning the potential repeal of Amendment 74, where the *City of Fayetteville* court found no "invincible repugnancy" between Amendments

128. ARK. CONST. art. 14 § (b)(3) (providing that the 25 mills be remitted to the State Treasurer after collection).

129. *Id.* (requiring all revenues to be returned back to the local school districts from which they were received).

130. *Id.* § (a).

131. ARK. CONST. amend. LXXVIII, § 1(d).

132. The Arkansas Community Redevelopment Act of 2001, No. 1197, sec. 2(16), 2001 Ark. Acts 1197 (amended 2005).

133. ARK. CODE ANN. § 14-168-301(18)(b)(i).

134. *See* City of Fayetteville v. Washington Cty., 369 Ark. 455, 471, 255 S.W.3d 844, 855–56.

74 and 78,[135] an argument can be made that a different court could reach the opposite conclusion. A court hearing the issue could point to the fact that the legislature passed Act 2231 in response to Mike Beebe's opinion letter as an indicator that the two amendments are in conflict.[136] Another indicator could be that Amendment 78 expressly excludes certain mills from being used for TIF purposes without mentioning Amendment 74's uniform rate.[137] The *City of Fayetteville* court took this to mean that the drafters must have intended to exclude the uniform rate from Amendment 78's reach,[138] but another (more logical) interpretation could find that the drafters would have *included* the uniform rate among Amendment 78's other exclusions had they intended to shield it from TIF. The legislature drafted Amendment 74 for the purpose of channeling tax revenue to schools for "the sole purpose of maintenance and operation."[139] If the purpose of Amendment 78 was to utilize some of that same revenue for redevelopment purposes, then revenue would no longer be used for the "sole purpose" of school maintenance and operation. Therefore, a court could reasonably find that the intents of Amendments 74 and 78 are irreconcilable, thus repealing Amendment 74 by implication.[140]

Repealing Amendment 74 entirely would confirm TIF critics' worst accusations. Not only would TIF be fully operational (siphoning dollars away from the public good[141]), but local governments would no longer be required to levy Amendment 74's uniform rate. Left to their own devices, cities, perhaps in an effort to lower property taxes, might vote to eliminate all school maintenance mills. Before long, Arkansas could be dotted with TIF-backed big box stores and dilapidated school buildings—the stuff of nightmares for TIF naysayers touting "crony capitalism." However, the aim of this note is not to see funding wrested from a public-school system that so desperately needs it. Ideally, *City of Fayetteville* would be overturned only to the extent that it prohibits cities from utilizing Amendment 74's uniform rate for redevelopment purposes.

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135. *Id.*

136. H.B. 2735, 85th Gen. Assemb. Reg. Sess. (Ark. 2005).

137. ARK. CODE ANN. § 14-168-301(18)(b).

138. *City of Fayetteville*, 369 Ark. at 470, 255 S.W.3d at 855.

139. ARK. CONST. art. XIV.

140. *See* Chesshir v. Copeland, 182 Ark. 425, 32 S.W.2d 301, 302 (1930) ("[T]he amendment, being the last expression of the Sovereign will of the people, will prevail as an implied repeal to the extent of the conflict.").

141. *Crony Capitalism in Arkansas*, *supra* note 65.

B. A New TIF Amendment

While overturning *City of Fayetteville* could revitalize TIF, as discussed above, the process would be highly volatile and might not even end in the desired result. A more stable and direct way of bringing TIF back is by amending the Arkansas Constitution. This section offers several provisions that a new TIF amendment should include, drawing from both Act 2231 and the American Planning Association's model TIF statutes.

1. Don't Reinvent the Wheel: Borrowing from Act 2231

Thankfully, the 85th General Assembly noticed many of the original defects in Arkansas's TIF legislation and sought to cure them by way of Act 2231.[142] A number of these curative measures should be adopted and incorporated into a new TIF amendment. Specifically, drafters should be sure to include the sections of Act 2231 that (1) limit the use of TIF on undeveloped land,[143] (2) impose stricter requirements on redevelopment project plans,[144] and (3) provide for the termination of redevelopment districts within twenty-five years.[145]

a. Limitations on undeveloped property

One major criticism levied against TIF is that, rather than being used as a blight-fighting tool, it is used by affluent suburban areas to subsidize growth where subsidizing is not needed.[146] Worse still, TIF may be used to finance projects on property that was never developed in the first place (as opposed to "redevelopment"). The Arkansas legislature sought to prevent the misuse of TIF in this way, not only by refining the criteria for a "blighted area," but also by adding a section that deals with undeveloped land specifically.[147] This section, codified in Title 14 of the Arkansas Code, requires the TIF ordinance adopted by the local governing body to include findings as to "whether the property located in the proposed redevelopment district is in a wholly unimproved condition or whether [it] contains existing improvements."[148] Undeveloped land does not preclude the formation of a re-

142. *See* Act of Apr. 15, 2005, No. 2231, 2005 Ark. Acts 2231 (codified at ARK. CODE ANN. §§ 14-168-301 to -324 (2018)).

143. *Id.* sec. 2.

144. *Id*.

145. *Id*.

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

147. *See* 2005 Ark. Acts 2231 *supra* note 142, at sec. 2.

148. ARK. CODE ANN. § 14-168-305(c)(5).

development district, but "[v]acant or unimproved parcels" must be "substantially impairing or arresting" an area that *is* developed.[149] If the property in the redevelopment district *is* found to be "in a wholly unimproved condition," then any incremental revenue the district brings in "shall only be used for project costs incurred in connection with capital improvements of a public nature."[150] Such improvements include "any physical public betterment[s]."[151] In other words, a city cannot use TIF revenue to subsidize a developer's improvements on completely unimproved land unless those improvements would also be beneficial to the public (i.e. sewer lines, water lines, streets, etc.).

b. Project plan requirements

One of the biggest risks to TIF is that it only works if property values rise *because* of the redevelopment project itself.[152] If property values in the redevelopment district would have risen on their own, then TIF actually does cut into the local government's general revenue and deprives other taxing units of their due.[153] Therefore, it is imperative that a city and developer are confident that their plan will produce enough incremental revenue to finance the project. To that end, the 85th General Assembly imposed stricter requirements on project plans with the approval of Act 2231.[154]

When Amendment 78 was originally implemented, with the exception of a few general requirements, a redevelopment project plan only needed to include an "economic feasibility study."[155] Act 1197 provided no guidance for what these feasibility studies should include, who should conduct them, etc. Act 2231 did away with the "economic feasibility study," replacing it with a detailed procedure for conducting a cost-benefit analysis of the proposed redevelopment district. The new procedure required an independent third-party to analyze "the projected tax impact, if any, to taxing units as a result of the creation of a redevelopment district."[156] The analysis must compare the projected incremental revenue captured by the redevelopment district with "all projected sales, income, and ad valorem taxes received by

149. *Id*. § 14-168-305(d)(4).
150. *Id.* § 14-168-305(f)(3).
151. *Id.* § 14-169-303(a)(2).
152. *See* AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK 14–62 (Stuart Meck ed., 2002) [hereinafter "GUIDEBOOK"].
153. *Id.*
154. Act of Apr. 15, 2005, No. 2231, 2005 Ark. Acts 2231 (codified at ARK. CODE ANN. §§ 14-168-301 to -324 (2018)).
155. The Arkansas Community Redevelopment Act of 2001, No. 1197, sec. 7, 2001 Ark. Acts 1197 (current version codified at ARK. CODE ANN. §§ 14-168-301 to -324 (2018)).
156. ARK CODE ANN. § 14-168-306(b)(2)(A).

taxing units . . . as a result of the creation of the redevelopment district."[157] The economic analysis must then be submitted to the Arkansas Department of Economic Development and it must provide feedback to the local governing body within a month.[158] This procedure improves the accuracy with which a city can predict whether a redevelopment district will be successful and has the added benefit of building in another level of accountability.

c. Twenty-five-year limit

Originally, under Act 1197, redevelopment districts could theoretically last forever.[159] Act 1197 limited their existence to twenty-five years, but a city could unilaterally amend the redevelopment project plan to issue additional bonds with a maturity date extending beyond that twenty-five-year mark.[160] Allowing redevelopment districts to last indefinitely, particularly in light of Act 1197's other defects, posed a serious problem. For example, suppose that a city establishes a redevelopment district in a certain area, but property values do not increase (perhaps the city's "economic feasibility study" was lacking). Because property values have not risen, the district is producing no tax increment and no funds are available to finance the necessary improvements. A stubborn city could, in hopes that those property values eventually go up, amend the project plan in perpetuity. If property values did eventually increase, some factor *other* than the redevelopment district would probably be responsible. Then other taxing units within the district would be deprived of the increased tax revenue.[161] The 85th General Assembly eliminated this possibility by stripping cities of their ability to unilaterally issue additional bonds and extend the life of the district.[162] Under Act 2231, "no redevelopment district may be in existence for a period longer than twenty-five (25) years."[163]

2. The APA's Model TIF Statutes

Aside from borrowing from previous TIF legislation within Arkansas, drafters of a new TIF amendment should also look to the model TIF statutes promulgated by the American Planning Association. In 2002, the American Planning Association (APA) published the *Growing Smart Legislative*

157. *Id.* § 14-168-306(b)(2)(B).
158. *Id.* § 14-168-306(b)(2)(C).
159. ARK. CODE ANN. §§ 14-168-301 to -324.
160. *Id.*
161. *See* GUIDEBOOK, *supra* note 152, at 14–52.
162. Act of Apr. 15, 2005, No. 2231, 2005 Ark. Acts 2231 (codified at ARK. CODE ANN. §§ 14-168-301 to -324 (2018)).
163. *Id.*

Guidebook in an effort to synthesize and make available a set of uniform guidelines for effective city planning.[164] The guidebook includes an entire chapter dedicated to tax relief programs, as well as model TIF statutes.[165] The APA's model statute is particularly beneficial in that it is an amalgam of TIF statutes from across the country, drawing from those that have seen success as well as tweaking those that the APA determined were lacking.[166] The Arkansas TIF statutes and the model statutes converge on a number of issues, like whether or not TIF can utilize revenue collected from new ad valorem taxes, imposed *after* the formation of a redevelopment district (it cannot).[167] However, the APA's model statutes include two provisions not shared by current Arkansas TIF law that drafters would be wise to adopt. First, Arkansas should require that a redevelopment project plan be approved *before* a city can propose or create a redevelopment district. Second, Arkansas should adopt a "but-for" test that the project plan must satisfy.

a. Project plan approval

One of the APA's goals in synthesizing a model TIF statute was that "tax increment financing [be] intrinsically linked to the broader redevelopment program it is intended to finance."[168] To that end, the model statute requires that a project plan be drawn and approved *before* a city passes a TIF ordinance.[169] This may seem like a relatively insignificant procedural requirement, but it becomes important in light of a different procedural requirement found in the Arkansas statutes.

The Arkansas TIF statutes require a city to hold a public hearing prior to creating a redevelopment district.[170] Interested parties may attend the hearing to learn more about the proposed district, express their own views, ask questions, air grievances, etc. However, aside from the general purpose of the redevelopment district and its proposed boundaries, the hearing attendees almost certainly do not learn much. This is because, under current Arkansas TIF procedure, the city is not required to review and approve a redevelopment project plan until *after* a redevelopment district is formed.[171] The relevant section states that "[*u*]*pon creation of the redevelopment district*, the local governing body shall cause the preparation of a project plan for each redevelopment district, and the project plan shall be adopted by

164. GUIDEBOOK, *supra* note 152, at 14–37.
165. *Id.* at 14–38 to 14–51.
166. *Id.* at xli.
167. *Id.* at 14–56; ARK. CODE ANN. § 14-168-301(18)(B)(i).
168. GUIDEBOOK, *supra* note 152, at 14–55.
169. *Id.* at 14–58.
170. ARK. CODE ANN. § 14-168-305(b)(1).
171. *Id.* § 14-168-306(a).

ordinance of the local governing body."[172] Under this procedure, a governing body proposes a redevelopment district, a public hearing is held regarding the district, and only *then* is the governing body required to put together a project plan. What good is a public hearing if the answers to the attendees' questions do not even exist yet? The Arkansas statutes do provide that additional public hearings must be held before the project plan is enacted (and each time the project plan is amended),[173] but a more reasonable procedure would require the city to have a project plan drafted before taking the idea to the public in the first place. The statute does impose a number of important and beneficial requirements on the project plan itself,[174] but drafters should reverse the order so that the public has an opportunity to scrutinize that plan.

b. The "but-for" test

TIF can be a major gamble, as previously discussed,[175] but the model statutes' most valuable provision acts to mitigate some of the risk.[176] Section 14-302(4)(b) of the model statutes precludes the adoption of a TIF ordinance unless "redevelopment would not occur in the redevelopment area without employing redevelopment assistance tools as described in the redevelopment area plan" and the project plan "could not be implemented without tax increment financing."[177] This provision establishes a two-pronged "but-for" test that a redevelopment project plan must pass before a city can establish a redevelopment district. First, a city must show that an area could not be redeveloped without the proffered project plan. If the first prong is satisfied, then the city must show that the project plan would fail without TIF. Put another way, a city must show that the redevelopment efforts would produce a positive tax increment (due to rising property values) and that the redevelopment efforts would not be possible "but-for" the very tax increment they produce.

The Arkansas TIF statutes contain a similar provision, but it is much less stringent. That provision states that a city must adopt a TIF ordinance that "contains findings that the real property within the redevelopment district will be benefitted by" the redevelopment efforts.[178] While this provision runs in the same vein as the APA's "but-for" test, its requirements are far looser. Drafters of a new Arkansas TIF amendment should include the "but-for" test so as to avoid implementing TIF where it is not actually needed,

172. *Id.* (emphasis added).
173. *Id.* § 14-168-306(b).
174. *Id.* §§ 14-168-306(b)–(c).
175. GUIDEBOOK, *supra* note 152, at 14–52.
176. *Id.* at 14–58.
177. *Id.*
178. ARK. CODE ANN. § 14-168-305.

thus depriving local taxing units (usually school districts) of revenue they would have otherwise received.

VII. CONCLUSION

TIF used to be a mutually beneficial tool for Arkansas cities and developers alike. Unfortunately, TIF remains effectively useless in this state following the *City of Fayetteville* decision. Within the context of real estate transactions, TIF's disappearance leaves virtually no government assistance available, whether sought by a city in its redevelopment efforts, a local business wishing to reduce overhead, or an out-of-state company considering Arkansas for relocation. From any of these perspectives, reviving TIF is a necessary step toward making Arkansas nationally competitive.

TIF's revitalization can be accomplished in at least two ways. First, having shown its flawed reasoning, *City of Fayetteville* can and should be overturned to the extent that it prohibits TIF from utilizing Amendment 74's uniform rate. However, considering the volatility of the Arkansas court system and the possible adverse consequences of overturning that case, amending the Arkansas Constitution is a better plan for revitalizing TIF in the state. Drafters of a new Arkansas TIF amendment should reincorporate certain curative provisions from Act 2231 and should supplement those with portions of the APA's model TIF statutes. A new, well-drafted TIF amendment will cure many of TIF's alleged defects and extinguish many of its criticisms. Whether by way of the courts or by way of the legislature, the powers that be should not delay in getting TIF revitalization efforts off the ground. In a state without much going for it economically, TIF renewal will play an important role in Arkansas reaching economic vitality.

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