

Protecting Low Income Residents During Tax Increment Financing Redevelopment

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INTRODUCTION

In 1997, tax increment financing (TIF) was used to fund the addition of a high-end department store to a suburban mall located in a wealthy outer suburb of St. Louis, Missouri.¹ Over a decade later, another TIF project is in the works in the blighted, burned out, and mostly abandoned north St. Louis city, seeking to bring development, as well as vibrancy and affluence, back to that neighborhood.² These two projects are examples of the uses to which tax increment financing, generally designed for redevelopment of blighted inner cities,³ has been put. Both projects also showcase potential problems associated with their use. On the one hand, TIF has been used rather effectively in wealthier communities to fund large commercial retail development. However, development using TIF in these wealthier

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1. Dan Mihalopoulos, *West County Mall Wins Initial Backing; Panel Agrees Center is Blighted, Needs Subsidy*, ST. LOUIS POST-DISPATCH, Nov. 21, 1997, at C1.

2. Tim Logan, *McKee Scales Back TIF Request for Northside*, ST. LOUIS POST-DISPATCH, Sept. 10, 2009, at A1.

3. The legislative findings or purposes that introduce many states' TIF statutes demonstrate this goal of redevelopment of blighted communities. For example, Iowa's statute allows municipal governments to conduct redevelopment programs using a combination of private and public resources to "eliminate slums and prevent the development or spread of slums and urban blight and to encourage needed urban rehabilitation." IOWA CODE ANN. § 403.3 (West 1999). Nebraska's TIF statute begins with legislative findings stating that there exist "areas which have deteriorated and become substandard and blighted because of the unsafe, insanitary, inadequate, or overcrowded condition of the dwellings therein," and that "the prevention and elimination of blight is a matter of state policy, public interest, and statewide concern." NEB. REV. STAT. § 18-2102 (2007).

communities has been criticized⁴ because it is argued that these wealthy communities are less in need of tax incentives to stimulate retail development, and this kind of development takes growth opportunities from poor, blighted communities, which are seriously in need of such tax incentives. On the other hand, when TIF funding has been used to redevelop poor communities, problems have occurred when the lower-income residents of these communities are displaced to make room for higher-income residential and commercial development.⁵

This Note will examine urban redevelopment and the use of TIF, particularly focusing on its impact on low-income individuals, families, and communities. Part I describes the history of urban redevelopment. Part II provides a definition of tax increment financing and a description of its purpose and function. Part III analyzes state TIF statutes, the present-day use of tax increment financing, and the current need for responsibility towards lower-income individuals in its use. Finally, Part IV proposes modifications to the use of TIF so that development might occur more responsibly in poor communities and respond to the needs of the lower-income residents of those communities.

I. HISTORY OF CITIES AND URBAN REDEVELOPMENT

During the 1950s, 60s, and 70s, a substantial increase occurred in the concentration of inner-city poverty, which has continued to plague city cores since.⁶ With the advent of school desegregation, families with financial means, aided by the construction of interstate highways, moved to the suburbs.⁷ Those who were left in the inner

4. See, e.g., Julie A. Goshorn, *In a TIF: Why Missouri Needs Tax Increment Financing Reform*, 77 WASH. U. L.Q. 919, 920–23 (1999).

5. Keasha Broussard, *Social Consequences of Eminent Domain: Urban Revitalization Against the Backdrop of the Takings Clause*, 24 LAW & PSYCHOL. REV. 99, 109–10 (2000).

6. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 140 (1987).

7. *Id.* at 135–36. In addition, many upper- and middle-income minority families who had the means to move out of the inner cities did so. In the 1940s and 1950s, when all minority families were confined by segregation (state-sponsored in some parts of the country or de facto segregation in others) to the same central city neighborhoods, those communities were socioeconomically diverse, and the upper- and middle-class minority families contributed to neighborhood stability and ensured the communities had adequate services. As desegregation

cities were those without the means to relocate easily.⁸ Moreover, zoning was used in the suburbs to prevent the poor from relocating there.⁹

In recent years, some inner cities have begun to revitalize themselves as middle- and upper-income residents have begun to move back,¹⁰ resulting in the relocation of some lower-income residents into neighboring poor communities¹¹ or into older, decaying inner-ring suburbs.¹² Areas into which the lower-income residents move subsequently face a rise in poverty.¹³ As a result, inner cities today are often characterized by extreme polarization in wealth: rich,

began and suburbs grew, these wealthier minority families also moved out of the urban minority areas, leaving exclusively the poor and most disadvantaged in the central cities. *Id.* at 143.

8. *Id.*

9. For example, zoning in the suburbs was used to prevent the construction of multi-family and rental residences, which essentially barred lower income families or individuals from being able to afford housing in those areas. See Erica Frankenberg, *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 LAW & SOC. INQUIRY 869, 871–72 (2009).

10. See J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 405–07 (2003). This movement of upper- and middle-income residents back into inner cities is generally considered to be gentrification. Gentrification is defined as the process by which middle- and upper-income people move into previously lower-income neighborhoods to redevelop, revitalize, and rebuild the community in a way that best fits their own needs. It is disputed whether gentrification necessarily implies that the lower-income people who live in the neighborhood are pushed out, but often lower-income residents are relocated to make room for the new higher-income residents. *Id.*

11. Broussard, *supra* note 5, at 109–10.

12. Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States?*, 8 CONN. PUB. INT. L.J. 37, 47 n.44 (2009). These inner-ring suburbs are where white flight initially was directed. However, as urban sprawl has continued, middle and upper income residents have moved to outer suburbs from the old inner ring suburbs, leaving these older suburbs as the new locus of poverty. *Id.*

13. John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 610 n.41 (2008). This movement of poverty caused by gentrification has come with an overall decrease in the number of neighborhoods of concentrated poverty. *Id.* However, the decrease in the number of neighborhoods of concentrated poverty does not mean there has been a corresponding decrease in poverty as a whole. Studies have shown that in the early years of the twenty-first century, poverty rates have actually increased in the central cities. *Id.* at 610.

As poverty rises in inner-ring suburbs, those municipalities are beginning to exhibit similarities to the impoverished central city. These older suburbs face increased demands for education and health care as their populations, particularly their lower-income populations, increase. Furthermore, because these municipalities are smaller than their central city counterparts, inner-ring suburbs' municipal governments face even greater struggles to provide the infrastructure and services to meet the needs of the poor. *Id.*

newly developed downtowns bordered by extremely poor neighborhoods.¹⁴

Present-day revitalization is part of the redevelopment movement, started in the mid-twentieth century with the purpose of improving the appearance and economy of poverty-stricken inner cities.¹⁵ Initially, the federal government took a leading role in funding urban redevelopment; in 1949, the federal Housing Act was created to provide funds for urban redevelopment.¹⁶ The primary purpose of this law was slum clearance,¹⁷ yet the law contained little in the way of protections for the poor whose neighborhoods were the targets of the slum clearance.¹⁸ The law allowed redevelopment in low-income residential areas, but lacked any requirement for the replacement of low-cost housing that redevelopment destroyed.¹⁹

Over the second half of the twentieth century, redevelopment projects gradually shifted from being federally funded to being locally funded and controlled.²⁰ In the 1970s, The Housing and

14. Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 332 (1999).

15. Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REF. 689, 699–701 (1994).

16. *Id.* at 700.

17. *Id.* at 700–01. The assumption behind the theory of slum clearance was that the destruction of slum housing would end the problems associated with the slum housing, such as crime and poverty, benefitting both the residents of that housing and the city as a whole. *Id.*

18. Barbara L. Bezdek, *To Attain “The Just Rewards of So Much Struggle”: Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 40 (2006) (noting that criticism of recent redevelopment efforts that have pushed the poor out of their neighborhoods is ironic given that urban redevelopment has never been concerned with protection for the poor).

19. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (originally codified at 42 U.S.C. §§ 1451–1460 (2006)), omitted by Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (current version as amended at 42 U.S.C. § 1441 (2006)). Low-income housing that was cleared under the U.S. Housing Act was often replaced with high-cost housing, a process that did clear the slums, but the Act did not provide replacement housing options for former slum residents. The lack of a connection between slum clearance and protection for the poor and affordable housing was expressed in a statement made by an Ohio senator commenting on an early version of this bill: “I am in favor of the slum elimination section. I am opposed to the public housing section.” Quinones, *supra* note 15, at 700.

20. See Quinones, *supra* note 15, at 704. Another shift that has taken place in redevelopment has been the transition from redevelopment of residential areas to economic redevelopment focused on commercial and industrial growth. Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 316–17 (2004). This shift has led to less destruction of affordable housing. Quinones, *supra* note 15, at 703 n.36. However, when affordable housing is destroyed now, it is

Community Development Act²¹ replaced the Housing Act. This new federal statute created Community Development Block Grants (CDBGs), which provided blocks of money to be used for redevelopment or other city purposes.²² CDBGs were often used for downtown redevelopment,²³ as their primary purpose was “the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.”²⁴ The Act continued to authorize slum clearance.²⁵ Through these block grants, local governments were provided with more control in the redevelopment process, allowing them to allocate money according to local priorities.²⁶

During the last several decades, funding from CDBGs has declined, with no offsetting increase in federal funding for local redevelopment.²⁷ As a result, greater control and funding responsibility has shifted to local governments.²⁸ During those same decades, property tax revolts occurred in most states, and as a result of those revolts, voters placed limits on property tax rates, tax assessments, and debt.²⁹ The rise of the use of TIF funding for

far less likely that it will be replaced by another residential development and more likely that it will be replaced by commercial and industrial development. *See* Gordon, *supra*, at 316–17.

21. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (current version as amended at 42 U.S.C. §§ 5301–18 (2006)).

22. *Id.*

23. Quinones, *supra* note 15, at 704.

24. Housing and Community Development Act of 1974, P.L. 93-383, 88 Stat. 633 (current version as amended at 42 U.S.C. § 5301–18 (2006)).

25. *Id.*

26. Quinones, *supra* note 15, at 704.

27. *Id.* at 705. The new method by which the federal government financially supports urban redevelopment is through offering federal tax breaks on interest paid on bonds used to finance redevelopment. *Id.*

28. *Id.* at 704.

29. The property tax revolts were heralded by California’s Proposition 13 in 1978, which required that property tax levels be decreased to 1975 levels and put strict limitations on increases in the tax rate and in the assessment rate. Voters in other states followed suit by limiting tax rates or state revenues. DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 355–57 (6th ed. 2006). For example, Missouri’s Hancock Amendment sets forth a formula that limits the amount of revenue that can be raised by the state through taxes. MO. CONST. art. X, § 18(a). Further restrictions are placed on state and local governments through limitations on the amount of debt that the government may incur. *See* MANDELKER, *supra*, at 391–94.

redevelopment can be explained by the decrease in federal funding provided to local governments, the resulting increase in demand for local funds for these projects, and a simultaneous refusal to pay higher taxes. Tax increment financing allows local governments to raise funds for the redevelopment that voters demand, without having to raise taxes or incur debt.³⁰

II. TAX INCREMENT FINANCING: THE BASICS AND HISTORY

A. Definition and How TIF Works

Tax increment financing is a tool used to attract developers in order to restore blighted areas through private development.³¹ In a tax increment financing scheme, it is assumed that private redevelopment will cause an increase in the tax base, which will be used to pay for the development—in other words, redevelopment under TIF is supposed to pay for itself.³² Because it does not put a large financial burden on the municipality, TIF has become a primary method for funding urban redevelopment.³³

The TIF process begins with an area being designated as a TIF district.³⁴ Tax exempt bonds are issued to private investors to fund the project.³⁵ The property tax base in the TIF district is assessed at

30. P. Michael Juby, *Tax Increment Financing in North Carolina: The Myth of the Countermajoritarian Difficulty*, 83 N.C. L. REV. 1526, 1529 (2005).

31. Frank S. London, *The Use of Tax Increment Financing to Attract Private Investment and Generate Redevelopment in Virginia*, 20 VA. TAX REV. 777, 778–79 (2001). TIF funds can be used for a broad range of activities associated with redevelopment, including: staff costs to implement and administer the redevelopment plan; services such as planning, architectural, and legal; training costs; property assembly; relocation; demolition; site preparation; rehabilitation of buildings; bond financing and interest payments. Michael T. Peddle, *TIF in Illinois: The Good, the Bad, and the Ugly*, 17 N. ILL. U. L. REV. 441, 443 (1997).

32. London, *supra* note 31, at 778–79 (2001). London argues that this set-up makes TIF a low risk redevelopment method. *Id.*

33. Christina G. Dudley, *Tax Increment Financing for Redevelopment in Missouri: Beauty and the Beast*, 54 UMKC L. REV. 77, 202 (1985).

34. London, *supra* note 31, at 778–79.

35. *Id.* at 780–81. The federal government has limited the use of tax exempt bonds by municipalities in the Tax Reform Act of 1986. MANDELKER, *supra* note 29, at 387–88. Bonds used for redevelopment are only tax exempt if they are qualified redevelopment bonds, which are defined as bonds designed so that at least 95 percent of proceeds will be used for redevelopment of an area that is blighted and the bonds will be paid off from tax revenue. *Id.*; 26 U.S.C. § 144(c) (2006). Because the interest on these bonds is tax exempt, municipalities or

the time the project begins, and the property tax that will be received by the government and special districts is frozen at that level for the life of the project (typically twenty to forty years).³⁶ As development occurs, property taxes should rise, and the increase in tax revenue above the frozen level, known as the tax increment, is paid to the redevelopment agency or authority to pay off bonds and invest in further development.³⁷

TIF districts are understood to attract businesses in two ways. First, funds from bonds can pay for write-down costs to developers as they begin redevelopment and to pay for other incentives to attract businesses.³⁸ Second, funds are used to improve infrastructure in the blighted area, which it is assumed will attract additional business to the area.³⁹ The tax exempt nature of the bonds provides further incentive to developers because interest rates paid on the bonds can be lower, saving money for the developer.⁴⁰

B. Current TIF Statutory Requirements

Many states' TIF statutes require that the area to be redeveloped be blighted in order for TIF to be used.⁴¹ "Blight" is a term generally

developers can pay lower interest rates, making them more affordable for local governments. Catherine Michel, *Brother, Can You Spare a Dime: Tax Increment Financing in Indiana*, 71 IND. L.J. 457, 461 (1996).

TIF bonds can be backed by the full faith and credit of the local government, which would make the bonds even less risky and thus further decrease the interest rate. However, most municipalities do not back TIF bonds with their full faith and credit so as to avoid debt limitations. When bonds are not backed by a municipality's full faith and credit, they do not count as debt for the purposes of limitations on municipal debt. MANDELKER, *supra* note 29, at 393. TIF bonds are generally not considered to be bound under state constitutional debt limitations, so municipalities can issue TIF bonds without having to reduce other forms of debt. *See, e.g.*, *Fults v. City of Coralville*, 666 N.W.2d 548 (Iowa 2003) (holding that TIF bonds are not constitutional debt).

36. London, *supra* note 31, at 780–81.

37. Todd A. Rogers, *A Dubious Development: Tax Increment Financing and Economically Motivated Condemnation*, 17 REV. LITIG. 145, 162–64 (1998).

38. London, *supra* note 31, at 787.

39. *Id.*

40. However, the interest rate of TIF bonds does tend to be higher than general obligation bonds issued by municipal governments, which are less risky because they are backed by the full faith and credit of the local government, which means that the government promises to pay off the bonds from the government's own general revenue. In contrast, TIF bonds are riskier because they are backed only by the tax increment. *Id.* at 781.

41. *See, e.g.*, MO. ANN. STAT. § 99.810(1) (West 2008); NEB. REV. STAT. § 18-2109

used to mean that the area is deteriorated. For example, Iowa's TIF statute provides a typical definition of blight:

[A] substantial number of slum, deteriorated, or deteriorating structures; defective or inadequate street layout; . . . insanitary or unsafe conditions; . . . the existence of conditions which endanger life or property by fire and other causes; . . . constitutes an economic or social liability and is a menace to the public health, safety, or welfare⁴²

Furthermore, many states also require that the project pass a "but for" test, which requires that the area would not have been redeveloped but for the TIF project.⁴³ However, in practice, both of these tests have proven easy to pass. Developers have been able to easily prove blight, as courts have generally upheld determinations of blight made by redevelopment authorities.⁴⁴ Determinations that a TIF district

(2007). Some state statutes require that the area be deteriorating but do not use the term "blight." *See, e.g.*, TEX. TAX CODE ANN. § 311.005 (2008) (requiring that the area contain "a substantial number of substandard, slum, deteriorated, or deteriorating structures").

An interesting development that has occurred in blight requirements is the statutory provision allowing TIF not only in currently blighted areas, but in other areas, known as conservation areas, that may become blighted in the future. Statutes with conservation district provisions allow TIF (and eminent domain) to be used in older areas, even if they are not blighted. Missouri's TIF statute describes a conservation district as an area "in which fifty percent or more of the structures in the area have an age of thirty-five years or more. Such an area is not yet a blighted area but is detrimental to the public health, safety, morals, or welfare and may become a blighted area." MO. ANN. STAT. § 99.805(3) (West 2008). Missouri's only requirement for designating an area as a conservation area is that more half of the structures are over thirty-five years old. This statute encompasses thriving, viable older communities that could be taken for redevelopment only because of their age. Redevelopment was proposed using this provision for an older, middle-class neighborhood in St. Louis County that did not contain homes that were empty or blighted, but that were merely older than surrounding areas. Goshorn, *supra* note 4, at 920.

Some states, primarily Minnesota and Michigan, have completely done away with the blight requirement. In Minnesota, for example, the TIF statute places almost no requirements or limitations on its use. Dudley, *supra* note 33, at 87; *see also* MINN. STAT. ANN. § 479.1781 (West 2008).

42. IOWA CODE ANN. § 403.17 (West 1999 & Supp. 2010).

43. Juby, *supra* note 30, at 1530-31; *see also* MO. ANN. STAT. § 99.810 (West 2008) (requiring that the TIF district "has not been subject to growth and development through investment by private enterprise and would not reasonably be anticipated to be developed without the adoption of tax increment financing").

44. *See* Gordon, *supra* note 20, at 321. In fact, in St. Louis, a suburban shopping mall in one of the more affluent suburbs was found to be blighted because the developer would be able to triple the number of shops and add a Nordstrom's. Mihalopoulos, *supra* note 1.

passes the “but for” test have also generally been upheld by courts because of the difficulty of proving whether development would have happened without the TIF district.⁴⁵

Most state statutes providing for the use of TIF to finance redevelopment have limited protections for lower-income populations,⁴⁶ although several states have enacted more extensive protections for low income residents.⁴⁷ Protections for the poor in TIF statutes generally fall into one of several categories: relocation assistance,⁴⁸ (re)building of affordable housing,⁴⁹ citizen participation,⁵⁰ or provision of funding for schools.⁵¹ California’s TIF statute is an example of a statute that provides more extensively for the needs of lower-income people. California gives incentives to developers who produce low-income housing or services to aid low-income residents,⁵² requires that at least 20 percent of the tax increment be set aside to create or maintain low-income housing,⁵³

45. Gordon, *supra* note 20, at 323–24.

46. The primary requirement, and in many states the only requirement, for where TIF may be used is that an area be designated as blighted. *See, e.g.*, MO. ANN. STAT. § 99.810(1) (West 2008); NEB. REV. STAT. § 18-2109 (2007). As noted above, some states allow not just blighted areas, but also conservation areas at risk of blight in the future to be taken for redevelopment. *See, e.g.*, MO. ANN. STAT. § 99.805(3) (West 2008).

47. *See* CAL. GOV’T CODE § 65915 (West 2009); CAL. HEALTH & SAFETY CODE § 33334.2 (West 2009); CAL. HEALTH & SAFETY CODE § 33413 (West Supp. 2010).

48. *See* MO. ANN. STAT. § 99.810(1)(4) (West 2008); 20 ILL. COMP. STAT. ANN. 620/3(e)(8) (West 2008). Wisconsin’s statute requires the redevelopment authority to create a plan to ensure that residents displaced by the redevelopment are provided with opportunities for temporary relocation. WIS. STAT. ANN. § 66.1333(10) (West Supp. 2010). Michigan also requires a redevelopment plan that establishes a relocation assistance priority system. MICH. COMP. LAWS ANN. § 125.1816 (2)(m)-(n) (West 2006). Finally, the Texas statute requires the redevelopment authority to make a statement concerning the proposed method for relocation. TEX. TAX CODE ANN. § 311.011 (West 2008).

49. *See* WIS. STAT. ANN. § 66.1331(7) (West 2003 & Supp. 2010). Iowa’s statute contains provisions both for the relocation of displaced residents and for the rebuilding of lower-income units destroyed in the redevelopment process. IOWA CODE ANN. § 403.22 (West Supp. 2010). The Iowa courts have construed this statute to require the rebuilding of low-income housing only when the redevelopment is residential in nature. If redevelopment is for commercial or industrial purposes, low-income housing need not be replaced. *See McMurray v. City Council of Des Moines*, 642 N.W.2d 273, 280–81 (Iowa 2002); *Knudson v. City of Decorah*, 622 N.W.2d 42, 49–50 (Iowa 2000).

50. MICH. COMP. LAWS ANN. § 125.1820 (West 2006).

51. WIS. STAT. ANN. § 66.1333(5r) (West 2003 & Supp. 2010).

52. CAL. GOV’T CODE § 65915 (West 2009).

53. CAL. HEALTH & SAFETY CODE § 33334.2(a) (West 2010). California courts have enforced this provision. *See Craig v. City of Poway*, 28 Cal. Rptr. 2d 528, 535 (Cal. Ct. App.

and requires timely replacement of low-income housing destroyed by redevelopment.⁵⁴

C. History of the Use of TIF

The first TIF statute appeared in California in 1952.⁵⁵ For decades, few other states created TIF statutes of their own, until the 1970s and 1980s when direct federal funds for redevelopment dried up. Today almost every state has a TIF statute.⁵⁶ TIF was originally intended as a tool for redevelopment of distressed urban communities to create better housing, as evidenced by the blight standard most TIF statutes employ.⁵⁷ Over time, though, courts have concluded that TIF need not be used solely for the development of low-cost housing for impoverished communities.⁵⁸ For example, most TIF statutes provide the redevelopment authority with the power to use eminent domain,⁵⁹ and many courts allow eminent domain in TIF to be used merely for economic reasons, rather than strictly for a public purpose such as providing low-income housing.⁶⁰

4th 1994); *Fontana Redevelopment Agency v. Torres*, 62 Cal. Rptr. 3d 875, 884 (Cal. Ct. App. 4th 2007).

54. CAL. HEALTH & SAFETY CODE § 33413 (West 1999 & Supp. 2010). This provision has also been enforced by California courts. *See Price v. City of Stockton*, 394 F. Supp. 2d 1256, 1264 (E.D. Cal. 2005).

55. *Gordon*, *supra* note 20, at 313.

56. *Id.* at 313–14.

57. The legislative findings and purposes that introduce many states' TIF statutes demonstrate their commitment to revitalizing blighted neighborhoods. *See IOWA CODE ANN.* § 403.2 (West Supp. 2010); *NEB. REV. STAT.* § 18-2102 (2007).

58. *Rogers*, *supra* note 37, at 161. Courts have generally upheld the constitutionality of the use of TIF even in situations in which there was no direct public benefit. *Id.*

59. *See, e.g., MO. ANN. STAT.* § 99.330 (West 2008).

60. *Rogers*, *supra* note 37, at 152. In *Kelo v. City of New London*, the Supreme Court held that eminent domain may be used for purely economic purposes, rather than strictly for public purposes. Moreover, the court held that eminent domain may be used to transfer private property into the hands of private individuals. *Kelo v. City of New London*, 545 U.S. 469 (2005). The use of eminent domain in TIF statutes to transfer private property to private developers or commercial and industrial entities reflects similar ideas. However, after *Kelo* was decided, many state governments have sought to restrict the broad reach of its holding to prevent takings that would transfer private property from one private owner to another simply in the name of economic development, even though TIF itself continues to be used for private development. George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 74–75 (2008).

In practice, TIF funding has been used in two distinct ways: to revitalize poor urban communities, replacing blighted areas with middle and upper-income residential development or commercial and industrial development,⁶¹ and to finance commercial development in wealthy or middle-income suburban areas.⁶² These uses of TIF can be traced both to municipal residents' desire to avoid paying additional property tax⁶³ and to reduced federal funding for redevelopment and services for the poor, such as affordable housing.⁶⁴ At the same time that cities have faced reduced federal funding, they have been less able to increase property tax rates to replace lost federal funding, forcing them to rely more on sales taxes or increases in the property tax base.⁶⁵ Therefore, cities have chosen to replace low-income residential communities with high-income residential⁶⁶ and commercial redevelopment in order to increase both the property tax base and sales taxes.⁶⁷

III. ANALYSIS: IRRESPONSIBLE USE OF TIF

When TIF has been used to redevelop distressed urban neighborhoods, development has often occurred in ways that are not

61. Quinones, *supra* note 15, at 692.

62. *See* Gordon, *supra* note 20, at 317–20.

63. Quinones, *supra* note 15, at 696–701.

64. *Id.* at 705–06.

65. Property taxes are determined by multiplying the tax rate by the tax base. If governments are unable to raise the tax rate, they can increase overall tax revenue by increasing the tax base. *See* MANDELKER, *supra* note 29, at 256.

66. In addition to the basic idea that higher-income residential units increase property tax revenue, the replacement of lower-income units with higher-income homes can be explained by the assumption that homeownership is superior to tenancy, an idea that is fundamental to gentrification. The problem that arises is that many tenants do not have the resources to become homeowners, so rental units will still be needed. *See* Broussard, *supra* note 5, at 109–10.

67. *See* Gordon, *supra* note 20, at 332–33. This effort to replace residential development with commercial development to increase sales tax revenue has been most frequently used in states that depend to a great extent on sales taxes to raise local revenue. *Id.* To allow municipalities to further benefit from increased sales tax revenue during TIF projects, sales taxes have been included as part of the increment of the TIF so that increased sales taxes can go back into development of the TIF district. *Id.* Courts are willing to uphold the replacement of lower-income housing with upper-income residential and commercial development under the theory that it benefits the larger community and in this way contributes to the public purpose needed to satisfy the blight tests. Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841, 859 (2006).

responsible to lower-income residents. For example, redevelopment has been used to gentrify neighborhoods by removing lower-income residents.⁶⁸ Low-cost residential units are demolished under the guise of slum clearance, but they are generally not replaced with more low-cost units. Instead, middle- and upper-income housing is built in its place,⁶⁹ or more often, commercial⁷⁰ and industrial development replaces what was once residential.⁷¹ As a result, lower-income residents who originally lived in the neighborhoods and were relocated during demolition and construction are unable to move back once the redevelopment is complete.⁷²

The forced migration of lower-income residents out of their neighborhoods has several negative consequences. First, this relocation generally results in increasing concentrations of poverty in

68. See Lefcoe, *supra* note 60, at 95.

69. Parlow, *supra* note 67, at 848. As Parlow notes, this process “directly benefits the wealthy and powerful at the expense of poor and often ethnic minority communities.” *Id.* at 859.

70. The argument has been made that using TIF exclusively for commercial development, such as shopping malls and hotels, rather than industrial development, is not beneficial to the entire region. Commercial development, it is argued, does not infuse new capital into the regional economy; rather it only relocates businesses that would have been built somewhere else in the region. Therefore, TIF that focuses merely on commercial development may not provide benefits on a regional level. Lefcoe, *supra* note 60, at 94. At the same time, the relocation of commercial enterprises to a poorer neighborhood may serve to infuse more money and jobs into that local economy, benefitting the community on a local level, as long as poorer residents are not displaced as a result of the commercial development.

An additional concern with commercial TIF projects is that they tend to be politically driven rather than influenced by the needs of the community. It is argued that politicians use TIF to bring in large scale projects, such as convention centers, designed to enhance their own prestige, rather than focusing on community needs. Michel, *supra* note 35, at 469–70.

71. See Bezdek, *supra* note 18, at 38.

72. *Id.* The pushing out of lower-income residents occurs when the redevelopment attracts higher-income individuals. As higher-income people move in, prices rise for both housing and consumer goods. As a result, lower-income residents can no longer afford to live in the neighborhood and must seek housing elsewhere. Michel, *supra* note 35, at 468. The reason for this expulsion of lower-income residents from cities can be explained in part by decreased federal funds to provide services to the poor and the resulting pressure on municipal governments to finance services for the poor. Cities have few incentives to care for the poor because voter turnout among low-income people is limited. Byrne, *supra* note 10, at 421. Also, there is a general perception in municipal government that services for the poor are costly. Quinones, *supra* note 15, at 696. Instead of providing services, cities often choose to either ignore the needs of the poor or attempt to remove them from city boundaries entirely through redevelopment that replaces poor communities with wealthy ones. See *id.* According to Quinones, many municipal governments believe that “the ideal city population contains several large sales tax generators, but no low income population.” *Id.*

impoverished city neighborhoods as residents must relocate to other low-income areas to find affordable housing.⁷³ Second, it makes the lives of those lower-income families more costly. As affordable housing is destroyed without replacement, the market of affordable housing constricts,⁷⁴ causing the cost of affordable housing to rise and forcing lower-income families to pay higher rents for the same low-quality housing.⁷⁵ Relocated residents also may lose access to their jobs, as well as networks of neighbors, friends, and family that provided economic support such as child care arrangements or food sharing.⁷⁶ Third, the forced migration can have a negative psychological and emotional impact on relocated families and

73. Michel, *supra* note 35, at 468. A potential result of this out migration is the development of illegal slums or squatter villages. If areas of the city with sufficient affordable housing do not exist, the lower-income groups may be forced to create their own settlements. See James A. Kushner, *Smart Growth, New Urbanism, and Diversity: Progressive Planning Movements in America and their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL. L. & POL'Y 45, 71 (2002/2003). On the other hand, the forced migration may simply increase poverty in surrounding neighborhoods. Studies have shown that the majority of residents forced out by redevelopment projects generally only move within one mile of their original home. However, residents who once formed tight-knit communities generally end up dispersed within that radius. Quinones, *supra* note 15, at 737 n.175.

74. Parlow, *supra* note 67, at 848. Statistics demonstrate that there is a great unmet need for affordable housing that continues to grow. From 1973 to 1995, over 2 million affordable housing units in large U.S. cities were removed from the market. *Id.* at 847. During that same time period, the number of people in need of affordable housing increased. By 1999, only 4.9 million affordable housing units existed, but 7.7 million extremely low-income households were in need of affordable housing. Even as the number of low income households was rising, local governments were actually lessening the total amount of affordable housing available. *Id.* at 847–48. These issues become even more pressing in the wake of the 2008 economic recession. A Center on Budget and Policy Priorities study shows that in 2008, the poverty rate rose to 13.2 percent, with 39.8 million people living below the poverty line, the highest number since 1960. In addition, median household income has declined. It is estimated that the poverty rate will continue to rise for several years following the recession, leaving more and more households in need of low cost housing. Arloc Sherman, Robert Greenstein, Danilo Trisi & Paul N. Van de Water, *Poverty Rose, Median Income Declined, and Job-Based Health Insurance Continued to Weaken in 2008*, CTR. ON BUDGET & POLICY PRIORITIES, 1 (Sept. 10, 2009), <http://www.cbpp.org/files/9-10-09pov.pdf>.

75. Quinones, *supra* note 15, at 737 n.176.

76. Bezdek, *supra* note 18, at 67–68. These networks of “mutually shared values and mutually shared concern and support is a necessary condition, not just to psychic well-being, but to physical survival itself.” Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of Community*, 25 IND. L. REV. 685, 702 (1992). Lower-income individuals and families “often depend on a web of mutual support consisting of a nonmonetary exchange of goods and services with each individual contributing to the others whatever meager abundance and special talents he might have.” *Id.*

individuals.⁷⁷ In spite of commonly held views that lower-income individuals are extremely transient, many have lived in certain neighborhoods for much of their lives.⁷⁸ Those forced to relocate experience grief and helplessness when their personal relationships are disrupted and their communities are dissolved.⁷⁹

The second irresponsible use of TIF funding is its application in suburban commercial redevelopment. Because blight and “but for” standards have been fairly easy to satisfy,⁸⁰ municipalities have used TIF to finance commercial redevelopment projects, such as shopping malls and big box stores, in affluent suburban areas.⁸¹ The use of TIF for suburban, commercial projects is contrary to and undermines the stated purpose of TIF to redevelop blighted areas. First, development in cities’ far-flung suburbs only increases suburban sprawl. If the suburban development does not include construction of affordable housing in the suburbs or improved transportation to the suburbs, it further reduces impoverished communities’ residents’ ability to access jobs, retail, and services, which are more often located in the suburbs. Because most suburban redevelopment does not include

77. See Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 359, 359–61 (James Q. Wilson ed., 1966).

78. See Quinones, *supra* note 15, at 738–39. In addition, economic circumstances may prevent lower-income residents from moving from their communities. Rent in these lower-income neighborhoods is often significantly lower than in other parts of municipalities, tying many low-income residents to their communities. *Id.*

79. Fried, *supra* note 77, at 359–61. When relocating, individuals and families leave behind important social relationships such as those formed with neighbors or in religious institutions. Bezdek, *supra* note 18, at 67–68. The effect of being displaced in this manner has been compared to losing a close friend. Broussard, *supra* note 5, at 111.

80. See Gordon, *supra* note 20, at 305–06. The term blight in most statutes lacks a precise definition, giving developers and municipalities “almost *carte blanche* in their creative search for ‘blighted’ areas.” *Id.* For a discussion of the lack of enforcement of the “but for” provisions, see *id.* at 323–25. In addition, some states have even done away with the blight requirement. See *supra* note 41.

81. See Goshorn, *supra* note 4, at 920. Two projects in St. Louis typify this type of development. In one suburban municipality, commercial development was planned to replace a well-established, middle-class neighborhood. TIF funds were requested to finance one-third of the total cost of the project to purchase the residential homes at two-and-a-half times their fair market value. Critics of this project felt that it was simply an effort to replace a residential neighborhood with a commercial district. *Id.* The second project was the expansion of one of the area’s major suburban malls. See *id.*; see also Mihalopoulos, *supra* note 1. The Missouri court upheld both of these projects as satisfying the blight standard in the state’s TIF statute. Goshorn, *supra* note 4, at 922.

affordable housing or transportation, the increasing suburban sprawl only heightens the isolation and poverty of poor urban communities.⁸² Second, the use of TIF financing in middle- and upper-income suburban communities lessens the incentive for developers to use TIF in impoverished communities; if developers can receive the same financial incentives offered by the government through TIF in a wealthier location better suited to development, then they will choose those wealthier locations over lower-income areas to carry out their development projects.⁸³ Third, if TIF is used in areas that are not blighted, in which development would likely have occurred without it, the project will take increased tax revenue but will create no real benefit to the community, as the development would likely have occurred anyway.⁸⁴ Therefore, the use of TIF in such circumstances is not cost-efficient for local governments.⁸⁵

Even if TIF is used responsibly in poor communities, another problem that could negatively affect low-income residents is the limited tax revenue available to the community during the TIF project.⁸⁶ During the project, the tax base is frozen at pre-redevelopment levels while the tax increment repays bonds.⁸⁷ While the community continues to receive the amount of tax revenue it had received before the project, the redevelopment might (and is expected

82. Gordon, *supra* note 20, at 306–07. The use of TIF for this type of suburban development exacerbates blight in the inner cities. *Id.* at 307–08.

83. Michel, *supra* note 35, at 466.

84. *Id.* at 466–67.

85. *Id.* It has recently been argued that the use of TIF in poor, blighted communities is itself not efficient. In order for TIF bonds to be paid off quickly, the tax increment should rise quickly. Blighted areas may require a great deal of land clearing that could delay the time when the tax base, and thus the increment, starts to increase from the development. Moreover, if there is not already enough demand for growth in those areas, tax revenues may not increase quickly enough in order to raise a sufficient tax increment to pay off the bonds. This argument concludes that TIF should only be used in blighted neighborhoods if they are near areas that would create a high demand for new retail and growth. Lefcoe, *supra* note 60, at 68–70. A response to this argument is that redevelopment and gentrification have begun to occur already in many inner cities, so further development in nearby blighted areas could benefit from the demand for growth created by the influx of income and affluence into some parts of inner cities. In addition, many inner ring suburbs have become blighted as wealthy residents move further out to outer suburbs and as poverty from the inner cities bleeds outwards. These inner ring suburbs might be ideal places for TIF development because there is demand in more affluent suburbs just beyond the inner rings that could drive the development.

86. Michel, *supra* note 35, at 468.

87. London, *supra* note 31, at 780–81.

to) result in a higher population and more commercial or industrial development in the area, leading to a rising need for municipal services such as fire and police.⁸⁸ School districts, in particular, suffer from increased population coupled with a lack of increased tax revenue to meet the need.⁸⁹ The initial frozen tax base is likely insufficient to pay for these increased needs, leaving many of the needs unmet.⁹⁰ Low income residents in particular rely on the provision of public services and will likely suffer if they are insufficient. In the alternative, to meet the increased needs, revenue can be raised from other parts of the city outside the redevelopment area. In that case, the rest of the city suffers as costs are externalized, but the benefit is only received in the redevelopment area.⁹¹

A. Analysis of TIF Statutes

Protections for the poor in TIF statutes generally include relocation assistance, (re)building of affordable housing, citizen

88. *Id.* at 809.

89. *Id.* Special districts and special purpose governments, like school districts, are often the hardest hit by increased demand for services without a corresponding increase in revenue. Peddle, *supra* note 31, at 452. Because many TIF projects run for upwards of twenty years, school districts may lose out on increased revenue for two generations of students or more. Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 429 (2004). A common argument in response to concerns about school districts is that the property taxes in these redevelopment areas were declining before the TIF project began, so the freeze actually aids the school districts because it prevents the tax revenue from falling further. In addition, after the project is completed, the schools will benefit from much higher taxes. Peddle, *supra* note 31, at 445.

90. Dudley, *supra* note 33, at 82–83. Initially, the frozen tax base may benefit the redevelopment area because while land is being cleared and prepared for development, the land may decline in value, making the frozen tax base higher than what it would be given the land's value at that point. *Id.* at 83. Once development begins to bring in new businesses and property owners, however, the frozen tax revenue often becomes insufficient to meet demands for services. *Id.* Furthermore, if the city must raise property taxes in the area in response to changed conditions, residents would pay more in taxes, but still receive no increased benefit; rather, the redevelopment agency would obtain all of the benefit. *Id.* A common response to concerns about insufficient revenue when the tax base is frozen is that the community is not receiving any less revenue than it would have had without the project. Any increase in tax revenue since the project began resulted only from the redevelopment, so the area loses nothing it would have had without the redevelopment. Quinones, *supra* note 15, at 735. Still, if there is an increased demand for services as a result of redevelopment and no increased revenue, residents end up receiving fewer services for the same amount of tax paid. *Id.* at 734.

91. London, *supra* note 31, at 809.

participation, or provision of funding for schools.⁹² However, many of these provisions do not provide adequate protection for lower-income residents of redevelopment districts.

Relocation assistance, such as payments to displaced families for moving costs, is essential for lower-income residents displaced by redevelopment projects because these lower-income groups lack resources such as time, money, and interpersonal networks to locate adequate low-cost housing and to pay for moving expenses and security deposits.⁹³ Many state statutes contemplate relocation assistance, but often fall short of providing effective support. For example, both Missouri and Illinois provide that relocation costs can be paid by developers or the local government to those relocated by the project; however, in both cases, the statute says only that the costs are to be paid if federal, state, or local law requires.⁹⁴ These requirements are ineffective if none of the three levels of government compels assistance.⁹⁵ Some states also require that developers create relocation plans, which describe how the displaced individuals will be relocated.⁹⁶ Such plans may still be ineffective if the state does not

92. See *supra* notes 48–51 and accompanying text.

93. Broussard, *supra* note 5, at 110. Low-income residents face even more difficulty in obtaining the resources needed to relocate if they reside in areas with tight housing markets. *Id.*

94. See MO. ANN. STAT. § 99.805(15)(i) (West 2008); 20 ILL. COMP. STAT. ANN. ADV. 620/3(e)(8) (West 2008). Wisconsin also provides that the housing authority involved in the redevelopment “may” make relocation assistance payments to displaced residents, but such payments are not required. WIS. STAT. ANN. § 66.1333(10) (West Supp. 2010).

95. These requirements are likely ineffective at all three levels of government. Municipalities are unlikely to require themselves to pay relocation costs or to ask developers to do so, which might be a disincentive for development. The state government had the opportunity to require payment of these costs by including such a provision in the TIF statute itself, but in failing to do so, the state government signaled it is also unlikely to require such payments. Finally, there are some federal regulations that require the payment of relocation assistance, but these regulations apply only to federal projects or projects receiving federal funds. See Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs, 49 C.F.R. § 24.1 (2009). TIF funding is primarily used by municipalities in place of federal funding.

96. Michigan requires the redevelopment authority to create a plan that includes information about the people being displaced, including their income and race, and a description of the housing supply in the community. The proposal must also include a plan for “establishing priority for the relocation of persons displaced by the development in any new housing in the development area.” MICH. COMP. LAWS. ANN. § 125.1816(2)(m)-(n) (West 2006). The effectiveness of this statute is limited by a lack of precise standards for ensuring that the creation of the plan will in fact lead to the re-housing of displaced individuals at costs they can afford.

simultaneously require relocation assistance payments or the replacement of low-cost housing destroyed in the redevelopment.

The Iowa TIF statute demonstrates the limited effectiveness of requirements for protection of low- and moderate-income individuals. Iowa's statute requires both relocation assistance and the re-building of low-income units taken in the redevelopment.⁹⁷ This broad protective language is severely limited, though, by several loopholes in the statutory language and in case law construing the statute. First, a later section of the statute states that municipalities will not be required to meet the low-income assistance requirements if the municipality can demonstrate that it "cannot undertake the project if it has to meet the low and moderate income assistance requirements."⁹⁸ Low-income assistance requirements may put a strain on many development projects, and developers for these strained projects may be able to claim that they would not be able to complete the development and meet the low-income requirements. Thus, redevelopment that destroys lower-income housing may be

Wisconsin's statute goes further by actually stating that the plan must ensure that individuals are re-housed. The housing authority's plan in Wisconsin must include a feasible method for temporary relocation of displaced persons and must ensure that "decent, safe, and sanitary dwellings substantially equal in number" to those taken through the redevelopment, at rent or prices "within the financial reach of the income groups displaced," will be available WIS. STAT. ANN. § 66.1331(7) (West 2003 & Supp. 2010). Still, the rebuilding of affordable housing units in sufficient numbers is questionable given the qualifying language that the units must be replaced in "substantially" equal numbers. Moreover, requiring the cost of alternative housing to be "within the reach" of the displaced residents does not require that the cost be equal to the previous cost, and will allow the housing authority or developer to make a discretionary decision about what is within the reach of the lower income individuals' income. *See id.*

Finally, some states' statutes are quite limited in their requirement of a relocation plan. Texas states only that the project plan must include "a statement of a method of relocating persons to be displaced as a result of implementing the plan," with no further mention of assistance in relocation nor of protections for those being relocated. *See* TEX. TAX CODE ANN. § 311.011(b)(4) (West 2008). A requirement merely for a statement of the method to relocate does nothing to ensure that the proposed relocation assistance is sufficient to meet the needs of lower-income residents or that relocation assistance actually occurs.

97. The statute requires that redevelopment may only occur if a "method exists for the location of families who will be displaced . . . into decent, safe and sanitary dwelling accommodations within their means and without undue hardship to such families." IOWA CODE ANN. § 403.5(4)(a) (West 2000 & Supp. 2010). This method can include the construction of low-income units either inside or outside the redevelopment area, payments to a housing fund, or direct assistance to families. IOWA CODE ANN. § 403.22 (West Supp. 2010).

98. IOWA CODE ANN. § 403.22 (West 2009).

permitted to move forward with no requirement that affordable housing be replaced. Second, the Iowa Supreme Court has construed the low-income requirements to apply only to residential development. Thus, development that is commercial or industrial, even if it destroys low-income residences, is not required to assist low-income families displaced by the redevelopment.⁹⁹

In addition to protections in TIF statutes specifically directed toward low- and moderate-income residents, some states have requirements designed to protect entire communities facing redevelopment, including citizen participation requirements and funding set aside for schools.¹⁰⁰ While not explicitly aimed at lower-income residents, these statutes may nevertheless serve to protect them. Michigan's TIF statute contains a requirement that in redevelopment areas in which more than one hundred people live, a development area citizens' council must be formed.¹⁰¹ Many scholars argue that providing a venue for citizen participation is central to redevelopment that is responsible to the original residents,¹⁰² and such requirements can protect low-income residents if they are represented on the citizens' council. However, historically, citizen participation efforts have faced difficulty in capturing the voices of the lowest-income residents, leaving them without the protection a citizens' council could provide.¹⁰³ Another community-wide protection involves the setting aside of a portion of the bond

99. Compare *McMurray v. City Council of Des Moines*, 642 N.W.2d 273 (Iowa 2002) (holding that the city must provide for low- and moderate-income assistance only when the redevelopment is for housing or residential redevelopment and that because this development's purpose was commercial, no low- or moderate-income assistance was required), with *Knudson v. City of Decorah*, 622 N.W. 2d 42 (Iowa 2000) (holding that the city must provide low- and moderate-income assistance because the redevelopment was residential in nature).

100. See, e.g., MICH. COMP. LAWS ANN. § 125.1820 (West 2006); WIS. STAT. ANN. § 66.1333 (5r) (West Supp. 2010).

101. MICH. COMP. LAWS ANN. § 125.1820 (West 2006). One limitation on this body is that it acts only as an advisory board to the redevelopment authority. Therefore, the authority is not required to follow the advice and suggestions of the citizens' board. *Id.*

102. See, e.g., Lefcoe, *supra* note 60, at 83 (arguing for the use of Community Benefit Agreements in redevelopment plans, in which community groups and developers negotiate contracts; in return for their support in the project, community groups can require developers to meet specific community needs); Quinones, *supra* note 15, at 698 (calling for "resident-controlled redevelopment" by which two thirds of the redevelopment agency board is composed of residents who have full decision-making authority).

103. MANDELKER, *supra* note 29, at 231.

payments or the tax increment to be used to pay for school district improvements.¹⁰⁴ These types of requirements counterbalance the negative effect on schools and other municipal bodies when the tax level they will receive is frozen at pre-redevelopment levels.¹⁰⁵

B. TIF in California

Over the last decade, California has enacted a series of statutory provisions to encourage the protection of lower-income residents. Before these changes, California TIF projects were shown to have little to no community benefit, instead taking millions of property tax dollars from local governments and special districts such as school districts.¹⁰⁶

The redefined statutory provisions first provide that local governments must offer incentives or concessions to developers who produce affordable housing and child care facilities or who set aside certain percentages of their units for moderate-, low-, and very low-income housing or elderly housing.¹⁰⁷ The provisions also require that at least 20 percent of the increment be used for “increasing, improving, and preserving” low- and moderate-income housing at affordable prices.¹⁰⁸ California courts have enforced this provision to ensure that sufficient money is provided for affordable housing.¹⁰⁹

104. See WIS. STAT. ANN. § 66.1333(5r) (West Supp. 2010). Based on legislative findings that new public schools will help lessen the poor conditions of the communities in need of redevelopment, the statute allows the city to issue bonds to “finance or refinance the development or redevelopment of sites and facilities to be used for public school facilities.” *Id.*

105. See *supra* notes 86–90 and accompanying text.

106. See Lefcoe, *supra* note 60, at 98. The same has been true of TIF projects in many other states. *Id.*

107. CAL. GOV'T CODE § 65915 (West 2009). In order to receive incentives, developers should set aside 10 percent of units for low income, 5 percent for very low-income, or 10 percent for moderate-income. *Id.*

108. CAL. HEALTH & SAFETY CODE § 33334.2 (West 2009). This provision does contain a loophole. The developer does not need to follow this requirement if it can be shown that no need for affordable housing exists or that less than 20 percent of the increment is needed to provide adequate affordable housing. *Id.*

109. See *Craig v. City of Poway*, 33 Cal. Rptr. 2d 528, 535 (Cal. Ct. App. 4th 1994) (holding that a redevelopment agency cannot take money from an affordable housing fund to pay for other costs, such as sidewalks, and that 20 percent of all taxes allocated to the agency and 20 percent of proceeds from the tax increment go to affordable housing); see also *Fontana Redevelopment Agency v. Torres*, 62 Cal. Rptr. 3d 875, 884 (Cal. Ct. App. 4th 2007) (invalidating the redevelopment bond in question and noting that one reason for doing so was

Finally, California law requires that if a redevelopment plan destroys low- and moderate-income homes, they must be replaced in equal numbers within four years.¹¹⁰

Under these provisions, redevelopment has occurred in California that does provide for the needs of lower-income people. For example, over the past two decades, City Heights Community Development Corporation in San Diego has built or rehabilitated over 700 affordable housing units and provides services such as employment support for lower-income residents of that community.¹¹¹ In addition, the Public Interest Law Project out of Oakland, California, has used the statutory provisions to negotiate with developers to ensure that they provide the required amount of affordable housing in redevelopment projects.¹¹²

C. The Need for Responsible Redevelopment

Cities cannot continue to ignore what happens to lower-income residents and allow redevelopment to displace them. Such relocations have negative consequences not just for residents, but for the city as a whole. Displaced lower income residents generally do not move far from their former neighborhood.¹¹³ Therefore, the problems found in

its lack of a provision requiring 20 percent of the increment to be contributed to affordable housing).

110. CAL. HEALTH & SAFETY CODE § 33413 (West Supp. 2010). A federal court construing this statute held that a redevelopment agency must replace low-income housing, even when it was low-income hotels for homeless people that had been destroyed, and the city itself had requested their removal. *Price v. City of Stockton*, 394 F. Supp. 2d 1256, 1264–67 (E.D. Cal. 2005).

111. *Economic Self-Sufficiency and Investment*, CITY HEIGHTS COMMUNITY DEVELOPMENT CORP., <http://www.cityheightscdc.org/community.html> (last visited Feb. 12, 2011); *Housing Operations*, CITY HEIGHTS COMMUNITY DEVELOPMENT CORP., <http://www.cityheightscdc.org/housing.html> (last visited Feb. 12, 2011).

112. In 2009, the California Affordable Housing Law Project reached a settlement with a redevelopment agency that required the agency to fulfill the statutory requirements for affordable housing by building replacement units and inclusionary housing as well as making payments into the low- and moderate-income housing fund. *Affordable Housing Litigation: Ongoing Litigation*, PUB. INT. L. PROJECT, <http://www.pilpca.org/www/litigation/housing.html> (Rogel V. Lynwood Redevelopment Agency) (last visited Feb. 12, 2011).

113. Quinones, *supra* note 15, at 737 n.175. Lower-income residents forcibly relocated from their communities during urban redevelopment generally do not move far from their original residences. For example, a study in Minneapolis demonstrated that 70 to 80 percent of these residents relocated within a one-mile radius from their original home; another study in

lower-income neighborhoods do not disappear; they simply move down a few blocks.¹¹⁴ Also, lower-income individuals' movement out of certain neighborhoods and into others increases the burden on their new neighborhoods, which are generally poor neighborhoods themselves.¹¹⁵ The relocation increases the concentration of poverty in these communities, which can increase social isolation and social disruption, leading to decreased education and increased joblessness and crime.¹¹⁶ In addition, what were already poor communities with few resources to aid lower-income families become even more financially burdened by the influx of increasing numbers of lower-income individuals and families for whom they also must provide services.¹¹⁷ The increasing concentration of poverty in areas with insufficient social services creates social problems, like crime, that generally cannot be contained in one area of the city.¹¹⁸ Therefore, for the sake of the entire city, local governments should ensure that lower-income residents are lifted as their communities are redeveloped.¹¹⁹

New Jersey similarly demonstrated that the majority of relocated residents (74 percent) moved within six blocks of their original home. *Id.* Therefore, without improved efforts to retain lower-income residents in their original communities during redevelopment, the surrounding areas will absorb them and may begin to face the problems associated with poverty.

114. *Id.* at 736–37.

115. Michel, *supra* note 35, at 468.

116. Quinones, *supra* note 15, at 739; *see also* WILSON, *supra* note 6, at 55–62. Concentration of poverty has been increasing for several decades. In his work on poverty, the city, and the “underclass,” Wilson notes that in the five largest cities in the United States during the 1970s and 1980s, the number of poor living in areas considered high-poverty rose 69 percent and in areas considered extreme-poverty rose 161 percent. *Id.* at 46. Poverty increased in these areas through two different types of migrations: middle- and upper-income individuals and families moved out of these communities, and lower-income individuals moved in. *Id.* at 49–55. Wilson explained that the resulting social problems were caused by the lack of the social buffer created by the presence of middle- and upper-income individuals who helped to maintain the social institutions of the community, such as churches, schools, stores, and recreational facilities. Without these institutions, and without the model of an educated middle class working in stable jobs, social problems such as joblessness, the underground economy, and crime, increased. *Id.* at 56–57.

117. *See, e.g.*, Powell, *supra* note 13, at 610.

118. St. Louis provides a good example of the spread of crime from poverty-stricken areas to other parts of the city. For several decades, gangs have been a problem in the northern part of the city of St. Louis. Recently, the gang activity has begun to spread into the southern part of the city. Chad Garrison, *Battle Lines*, RIVERFRONT TIMES, Aug. 23, 2006, <http://www.riverfronttimes.com/2006-08-23/news/battle-lines/1>.

119. The victims of natural disasters, who often lose both their homes and communities,

D. Strengths of TIF

In spite of its weaknesses, there are reasons that TIF should be reformed and salvaged, the most important being that it may be one of the few viable tools that local governments have to do comprehensive urban redevelopment. Redevelopment powers like TIF have been called “some of the few arrows left in the quiver of cities which must fend off economic decline.”¹²⁰ The costs of economic revitalization have increasingly shifted to cities, so financing schemes such as TIF are necessary to aid cities in economic revitalization.¹²¹ With certain statutory limits on TIF and its use in combination with other funding and service provision mechanisms, the worst of its problems may be overcome.

TIF allows municipalities to fund urban redevelopment without a great deal of financial stress.¹²² The city is able to issue tax exempt bonds with low interest rates that will be paid from the increment rather than from the general funds of the city.¹²³ In addition, after the bonds have been paid, the local municipal government as well as local non-municipal districts, such as school districts, will benefit from increased taxes from the revitalized area.¹²⁴

As long as revitalization occurs, TIF projects bring benefits both to the TIF development area itself and to surrounding areas. While there may be decreases in services or increases in taxes during the life

have been compared to the victims of gentrification, who essentially lose the same as they are pushed out of their communities. However, “[a]lthough the devastation of community, family, and lives is just as complete when the disaster is the government-sanctioned wrecking ball, comparable sympathy is not commonplace for urban redevelopment refugees.” Bezdek, *supra* note 18, at 37–41.

120. Quinones, *supra* note 15, at 692. Quinones goes on to point out that as few of the redevelopment projects have been successful in revitalizing cities, a fundamental change must occur in the method of redevelopment. *Id.* at 693.

121. *See id.* at 705.

122. Peddle, *supra* note 31, at 445.

123. London, *supra* note 31, at 780.

124. *See* Peddle, *supra* note 31, at 445. It is possible to view the tax increment allocation that takes increased tax revenue away from non-municipal governments and special districts as a payment to the municipality, which supported the majority of the initial cost of the infrastructure and development. The payment arguably produces net gains to all, in that after the TIF project has run, all local governments and special districts benefit from an increased property tax base which would likely not have developed without the TIF, if the area were truly blighted. *Id.*

of the TIF project, the project can bring benefits in the long term such as decreased crime and poverty and improved health.¹²⁵ However, given the fact that low-income residents pushed out of neighborhoods when TIF is used irresponsibly do not move far, benefits from TIF will only accrue to surrounding areas if measures are taken to allow low income residents to remain in the TIF district and benefit from the redevelopment as well.¹²⁶

Finally, gentrification that occurs with TIF redevelopment may be good for impoverished communities to the extent that lower-income individuals are not displaced, and sufficient affordable housing is maintained. In fact, some level of gentrification may be necessary, in that it brings in residents of higher-income levels who increase the district's tax base and can improve the economy, thus reversing the drain of resources that occurred from middle- and upper-income families' movement to the suburbs.¹²⁷ First, the influx of higher-income individuals creates more jobs as there is increased demand for services, both private and public.¹²⁸ Second, migration of higher-income residents into poor communities may bring political benefits. If the higher- and lower-income residents are seeking the same goals, such as good city services and schools, then the increase in wealthy voters may bring a corresponding increase in political power for

125. London, *supra* note 31, at 809–10. To the extent that surrounding areas were required to bear the costs of providing services to meet increasing needs in the TIF district during the life of the TIF project, these costs might be outweighed by benefits accruing to surrounding areas from the redevelopment itself. Benefits of improved safety and welfare in the formerly blighted area will likely extend to the surrounding areas. On the other hand, without the development in the blighted area funded through the TIF project, these surrounding areas would have felt the effects of crime and poverty in the blighted area that spilled outside of its boundaries. *Id.*; see also Peddle, *supra* note 31, at 445; 65 ILL. COMP. STAT. ANN. 5/11-74.4-2 (West 2005). Illinois' legislative findings note that local taxing districts will all benefit from the "removal of blighted conditions." *Id.*

126. Quinones, *supra* note 15, at 737 n.175.

127. Byrne, *supra* note 10, at 418–19.

128. *Id.* at 419–20. Typically, low-income individuals are better able to locate employment in the suburbs where higher-income communities create demand for goods and services. However, many low-income residents of the inner-city and inner-ring suburbs are unable to access those jobs because of limited transportation. *Id.* at 419. Introducing higher-income residents into the central city and inner-ring suburbs replicates those employment opportunities but in locations more easily accessible to lower-income workers. *Id.* at 419–20. Furthermore, because these jobs are often low-paying and require few skills, the higher-income individuals moving into these neighborhoods will likely not compete with the lower-income residents for these jobs. *Id.* at 419.

lower-income residents.¹²⁹ Finally, the movement of more affluent residents into lower-income communities reverses the social isolation that resulted from the flight of middle- and high-income residents to the suburbs.¹³⁰ However, in order for gentrification to be truly beneficial to low-income people, redevelopment must include provisions for affordable housing and other supportive social services to help the lower-income residents thrive from the redevelopment project as well.

IV. PROPOSAL

The current TIF funding scheme in most states needs to be reformed in order to redevelop declining inner cities and inner-ring suburbs in a manner that is responsible to the current residents of those communities. First, the blight standard should be enforced so that TIF will be used primarily in the neediest areas.¹³¹

Next, statutory reforms should be made to protect low income residents. Other states should emulate California and enact statutes that require that affordable housing be rebuilt in at least equal numbers if it is destroyed in the redevelopment process.¹³² In addition, redevelopment projects in higher-income areas should be required to include affordable housing, even if none was destroyed in the project.¹³³ In order to fund the construction of affordable housing,

129. *Id.* at 421.

130. *See* WILSON, *supra* note 6, at 143. It has been argued that because of the great cultural gap between wealthy, white new residents and the poor minorities who already live in these central cities, there will be little real interaction between the two groups that could reverse the problems of social isolation of the poor. Byrne, *supra* note 10, at 421–23. Even if this is the case, the benefits to lower income residents may still accrue in the form of improved economic and political power.

131. If the blight standard is enforced, developers will have an incentive to build in those neediest areas because they will only be able to receive the tax benefits of TIF for those areas. The blight standard also protects the municipality from unnecessarily losing tax revenue from TIF projects in wealthier areas that would have been developed even without the tax incentive from TIF. *See* Michel, *supra* note 35, at 466.

132. *See supra* notes 107–10.

133. The actual number of affordable housing units available has been declining over the last several decades even as the number of people in need of low-cost housing has risen over the same time period. Parlow, *supra* note 67, at 847–50. It may be necessary for more than the number of affordable housing units that are destroyed to be rebuilt in order to make up for the current insufficiency of low-cost housing units.

developers should be given the choice of either using a certain percentage of their redevelopment funds to produce the housing themselves or paying a slightly higher percentage of their funds directly to the municipal government as a penalty for failing to build affordable housing in their project.¹³⁴ The government would then use the penalty funds to build affordable housing itself.¹³⁵ The developer would set aside funds for affordable housing either from the original amount of money raised from selling bonds, which could be put into an escrow account reserved for affordable housing, or from reserving a portion of the tax increment after the project has begun.¹³⁶ Statutory

134. One of the concerns that may arise in requiring developers to pay for the construction of affordable housing is that it may be costly to force developers to shoulder this burden. However, developers are receiving a benefit from the government in return for their investment—namely tax exempt bonds, which allow developers to save money by paying a lower interest rate on the bonds.

There may also be the concern that requirements to fund affordable housing will act as a disincentive to developers doing projects in blighted areas. A potential solution to this problem would be to require inclusionary housing, by which any developer would be obligated to either construct or pay a fee for affordable housing, whether or not their project destroyed any low-cost housing. *See id.* at 861. Inclusionary housing could also be encouraged by conditioning building permits on the construction of a certain amount of affordable housing in development. Michèle Alexandre, “*Love Don’t Live Here Anymore*”: *Economic Incentives for a More Equitable Model of Urban Development*, 35 B.C. ENVTL. AFF. L. REV. 1, 38 (2008). An inclusionary housing requirement would remove the disincentive for developers working in low-income areas because they would be required to set aside funds for affordable housing no matter where the development occurred. Moreover, developers would have an incentive to do projects in low-income neighborhoods, where they would have access to the tax exempt bonds through TIF, rather than in higher-income areas, where bonds would not be tax exempt, as the federal government only provides tax exempt bonds if redevelopment is in a blighted area. MANDELKER, *supra* note 29, at 387–88.

135. This funding scheme would allow developers to choose whether to build the housing or pay the fee, based on the needs of the development project. The purpose is to incentivize the developers to build the housing, which they may be able to do more efficiently than the government. But if the developers choose not to build the housing, the government can avoid some costs of enforcement by simply extracting a fee, rather than trying to force the developers to build the housing, and through the fee, the government earns additional funds to build the housing.

136. The difficulty in setting aside money from the original bond amount is that the beginning of the project may be delayed since more money will have to be raised initially. On the other hand, the problem in reserving a portion of the increment instead is that the time needed to pay off the bonds, and thus the project’s life, will lengthen because the full increment will not be available to pay the bonds. It may be least harmful to the community to set aside money initially from the bonds, which will delay the start of the project, but during which time the community will continue to receive the full amount of their tax revenue. In contrast, reserving a portion of the tax increment and extending the life of the project would cause the community to receive only the tax revenue at its frozen level for that extended period of time,

provisions such as those in California statutes requiring replacement affordable housing have been successful in holding developers accountable to providing sufficient affordable housing.¹³⁷

While essential to responsible development that protects low-income residents, the existence of affordable housing alone is not sufficient to ensure that displacement does not occur during redevelopment. Statutes should also include provisions that require relocation assistance to help support lower-income residents. Monetary assistance, while important, may be insufficient to help low-income residents return to their communities. A better option would require the municipal government or development agencies¹³⁸ to be responsible for keeping track of lower-income families who express a desire to return to their communities, helping them relocate during the construction and also assisting them in moving back into the community once the development has been completed.¹³⁹

an amount which may be inadequate to meet its needs after the development is completed. London, *supra* note 31, at 809.

137. See CAL. HEALTH & SAFETY CODE § 33413 (West 2009); see also *supra* note 112.

138. Either the development agency or the municipal government could be responsible for relocation assistance. It may be more logical to require the government to take on this responsibility both because it will be the entity negatively affected if displacement injures the lower-income residents and because it will stand to benefit in the long run if lower-income residents are able to successfully remain in their community. If low-income residents are not provided assistance and simply pushed into other low-income neighborhoods, the municipal government will face the negative economic effects of increasing concentrations of poverty in the municipality. Quinones, *supra* note 15, at 739. On the other hand, if the lower-income residents are successfully integrated into a redeveloped neighborhood that can provide them with better educational opportunities and jobs, the municipal government will benefit from increased tax revenue and decreased need for government-funded social services. The long-term benefit to the municipality of a strong, viable community will outweigh the initial cost of providing effective relocation assistance that allows low-income residents to return to their communities and benefit from the redevelopment.

139. An example of an organization that tracks and supports lower-income families in this manner is Urban Strategies, an affordable housing provider out of St. Louis, Missouri. After Hurricane Katrina, Urban Strategies located families that were displaced from the affordable housing complex they were redeveloping. Those families who wished to return to their previous neighborhoods were provided with services to help them move back to New Orleans. Tanu Henry, *Four Years After Katrina*, 90 "Magnolia" Housing Project Families Get Ready for Homecoming, BET.COM, http://www.bet.com/News/Four_Years_After_Katrina_New_Orleans_Residents_Prepare_for_Homecoming.htm (last visited Feb. 12, 2011). In order for the tracking of families and relocation assistance to work, the number of affordable units demolished must be exactly matched or exceeded by the number rebuilt. Furthermore, the developer should not require families to meet stringent conditions to be allowed to move back into the neighborhood; rather, the invitation should be open to almost all. A poor example of allowing families to move

Alternatively, the development agency should conduct the development in phases, with the first phase including housing for lower-income residents. Thus, residents displaced by later phases of the redevelopment could move straight into the project's affordable housing units rather than having to first move out of the project area and then back into the area.¹⁴⁰

TIF funding for overall redevelopment should be supplemented with federal money dedicated specifically to affordable housing, which will both decrease the amount of local development funds required for affordable housing and provide greater protection for low-income residents. The National Housing Trust Fund, created in 2008 by the Housing and Economic Recovery Act,¹⁴¹ and the Neighborhood Stabilization Program are two examples of current federal funding programs targeted at increasing housing for moderate-, low-, and extremely low-income residents.¹⁴² In addition

back occurred in Metropolitan Gardens, a housing project in Birmingham, AL. In 1999, the projects were demolished and lower-income residents who wished to return to the rebuilt affordable housing were required to meet certain strict conditions such as good rent payment history. Furthermore, the number of affordable and elderly housing units available in the new development was only one-third of that provided in the original projects. Broussard, *supra* note 5, at 108.

140. While containing few to no provisions for affordable housing, Paul McKee's plan to revitalize the north side of St. Louis city demonstrates the feasibility of conducting a large-scale development project in phases. See Logan, *supra* note 2, at A1. One potential concern with having the first phase of the project contain affordable housing is that the affordable housing may not create a large enough initial tax increment to begin paying off the project's bonds. To avoid this problem in repaying the bonds, it may be necessary for the first phase to also include development that will create a larger tax increment, such as commercial, industrial, or higher-income housing.

141. Kathie Soroka, *A Brief Analysis of the National Housing Trust Fund*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 13, 13 (2008). This act is the first federal act in over twenty years that specifically targets extremely low-income people and the first in over thirty years to provide for the production of extremely low-income housing. *Id.*

142. U.S. Department of Housing and Urban Development, NEIGHBORHOOD STABILIZATION PROGRAM GRANTS, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/> (last visited Feb. 12, 2011). The grant program was originally authorized under the Housing and Economic Recovery Act of 2008. Grant money was re-allocated to the program in 2009 under the American Recovery and Reinvestment Act. Twenty-five percent of these funds must be used for "purchase and redevelopment of abandoned or foreclosed homes or residential properties that will be used to house individuals or families whose incomes do not exceed 50 percent of the area median income." Moreover, all of the funds from the Neighborhood Stabilization Program grants must be used to benefit individuals and families with incomes not exceeding 120 percent of area median income, focusing the grants toward low and moderate income households. *Id.*

to providing more money for affordable housing, federal money provides increased protection for low-income residents. For any individual displaced by federal or federally-assisted projects, the Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs regulation¹⁴³ requires that before a person can be removed from his or her housing, there must be a comparable replacement dwelling available, and relocation assistance payments must be made. The regulation also requires one-to-one replacement of low income units destroyed in the project.¹⁴⁴

Finally, in order to ensure continued provision of adequate services during TIF projects, developers should set aside a portion of the tax increment or of the initial bond amount to provide funds for police protection and special districts, particularly school districts, whose burden may increase as the community grows from redevelopment.¹⁴⁵ Ensuring adequate education in the TIF district is essential to creating an economically viable community with a job-ready population.¹⁴⁶ Money should also be set aside from the tax increment or initial bond amount to provide social services to aid lower-income individuals in fully integrating into the revitalized community and economy, such as job training, child care, and business incubators for small businesses.¹⁴⁷

143. 49 C.F.R. § 24 (2004).

144. *Id.*

145. Paying the entire tax increment to the development agency limits tax revenue available to the TIF district for social services and schools, even if the population grows during the project. London, *supra* note 31, at 809.

146. Recognizing that adequate education in particular is essential for an economically viable community, some states have provisions that allow for funding specifically for school districts. WIS. STAT. ANN. § 66.1333(5r) (West 2009). In Wisconsin, development authorities may issue bonds to finance development of facilities for schools. *Id.* Other states' plans to protect resources for education include payments in lieu of taxes paid by developers to school districts to offset lost revenue, payments from state governments to return lost revenue from the tax freeze, and opportunities for school districts to take part in the decision-making about TIF projects. Lefcoe, *supra* note 60, at 83–84. Missouri provides for payments in lieu of taxes. Michigan, Minnesota, and Ohio require the state to make up lost revenue and allow school districts to comment on any TIF projects that may redirect funds away from school districts. Missouri, Nevada, Ohio, Wisconsin, and Utah allow school districts to participate in the planning and decision-making process. *Id.* at 83–84 nn.179–81.

147. Michel, *supra* note 35, at 478. An example of this kind of set aside at the federal level is found in Community Development Block Grants, which require that funds be used to benefit low income groups and list activities such as “those concerned with . . . crime prevention, child care, health, drug abuse, education, energy conservation, welfare, or recreation needs” or

CONCLUSION

With few funding options available for cities to engage in redevelopment of poor communities, tax increment financing provides a method for redevelopment that cities can financially support. However, tax increment financing can be used in ways that injure lower-income residents of those poor communities. Care must be taken that TIF projects are designed to meet the needs of those residents, to support them in moving out of poverty at the same time that the neighborhood itself is being lifted up. Cities should not ignore their lowest-income residents and force them from their communities in the name of urban redevelopment and revitalization.

payments to local non-profit organizations to do community revitalization. 42 U.S.C. § 5305 (2006). In the 1980s and 1990s, successful redevelopment occurred in South Beach, Florida, that allowed lower-income residents to remain in their communities by providing social services from redevelopment funds. See Michelle S. Viegas, *Community Development and the South Beach Success Story*, 12 GEO. J. ON POVERTY L. & POL'Y 389 (2005).

Another method to protect lower-income residents' needs during redevelopment is to require citizen participation in the TIF proposal and redevelopment planning. Lefcoe suggests the creation of Community Benefit Agreements, or contracts between community groups and developers, in which groups can negotiate for benefits that specifically address the area's needs, such as job training or child care. Other negotiated benefits could include affordable housing units, requirements to employ local workers, and commitments to develop adequate numbers of living wage jobs. Lefcoe, *supra* note 60, at 96. Some states, such as California, allow resident participation in planning committees for the projects, but often do not give residents the right to vote on development plans. Citizens involved in the planning for their own communities should be given the power to vote on redevelopment proposals. Michel, *supra* note 35, at 473.