



# Negotiating Development Agreements and Mitigating Risk

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# Key Takeaways

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1. What are the forms of TIF assistance & what are the best practices to evaluate TIF Requests?
2. What are the important safeguards to protect municipalities in a developer agreement?
3. What are the key components to TIF policies?

# Public Assistance For Development

How much is Enough?



# Promote Development. Protect Resources.

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1. Develop strategic plan & policy



2. Analyze financial assistance requests carefully



3. Identify appropriate funding sources

# 1. Develop Strategic Plan & Policy

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**Identify  
community  
needs**

**Prioritize focus  
for limited  
resources**

**Consider  
available  
financing tools**



## 2. Analyze Assistance Requests: *pro forma*

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Compare  
developer's  
numbers against  
industry standards

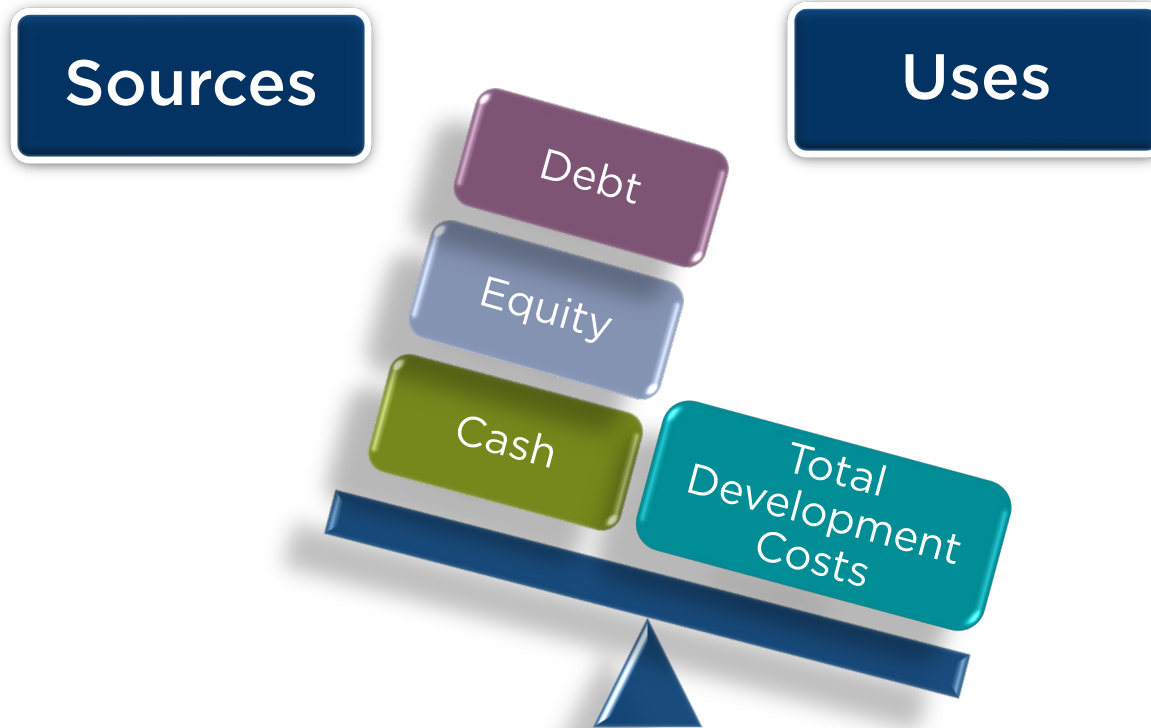
- Land acquisition
- Construction
- Project costs
- Return on Investment

Ensure  
development  
components  
accounted for  
correctly

- Revenues
- Expenditures
- Debt service

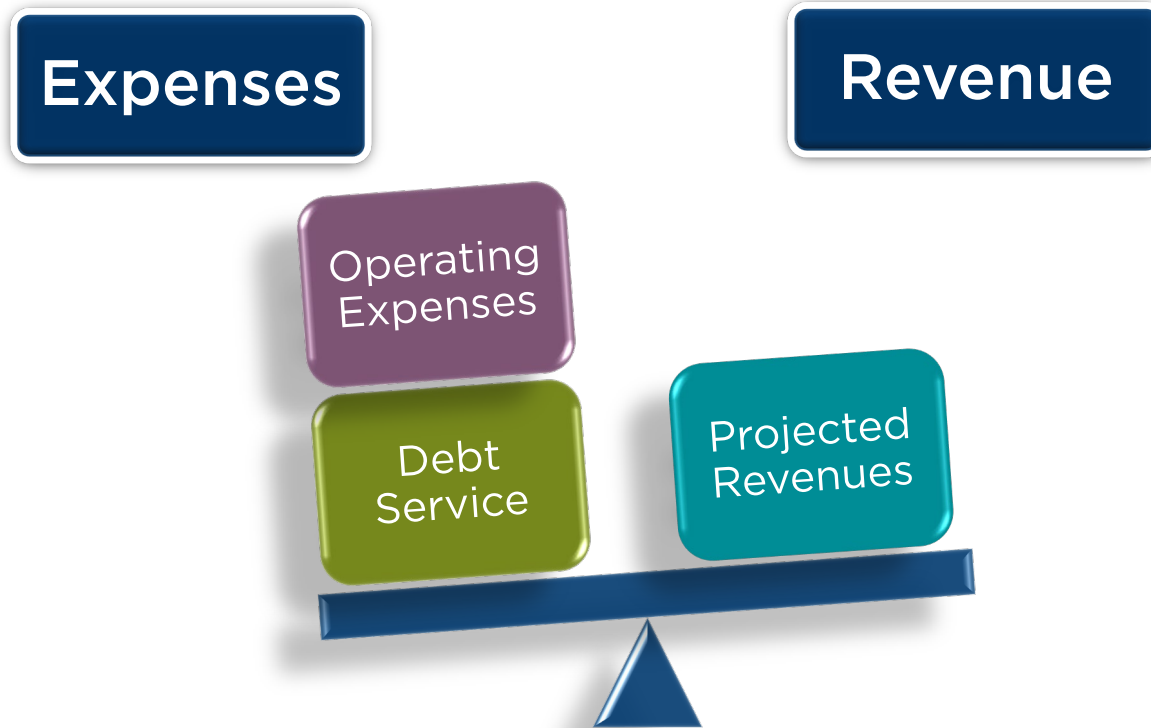
# The Financial Gap: Sources & Uses

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# The Financial Gap: Ongoing Operations

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# Developer Transparency

- Project plans
- Budgets
- Forecasts & projections

# Return on Investment (ROI) Calculations

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## Cash-on-Cash

Net Cash Flow/Equity = ROI

Reasonable return generally 8%-12%

## Internal Rate of Return – Discounted Present Value

Annual cash flows + net proceeds after sale over investment period

Reasonable return generally 12%-18%

### 3. Identify Appropriate Funding Sources

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**Tax incremental  
financing (TIF)  
upfront/phased  
contribution**

**Tax Incremental  
Financing Pay-as-  
you-go  
contribution**

**Grants**

**Existing fund  
balances**

**Public land  
contributions,  
write-downs**

**Local regulatory  
requirements  
(zoning, etc.)**

# Development Agreements

Negotiation and  
Risk Mitigation



## Negotiating the Agreement

You Need a Team:

- Municipal Leadership
- Development Director/Planner
- Internal Finance
- Outside Financial Consultant
- Municipal Engineer
- Municipal Lawyer



# Draft to Mitigate the Municipal Risk

- Consider
  - TIF Guidelines & Policies
  - Risk / Reward / Tolerance
  - TIF Projects Planned (This and Others)
  - Past Practices / Consistency
  - How will this be funded
  - Implications on General Fund / Taxpayers
  - Recognize the Need for Contract Administration



# Definitions Set the Rules and Framework



## Key Definitions

- Include key definitions in your TIF Guidelines and Policies
- Definitions often are the subject of negotiations
- Definitions help you interpret and understand the agreement during contract administration and later when memories have faded or individuals have moved on to other endeavors
- The following are examples of typical definitions that you will want to have in your development agreements to set the rules and framework

## Key Definitions

- **“TIF District”** - the [Municipality] Tax Incremental District No. XX. A map showing the boundary of TID should be an Exhibit
- **“Property”** - the real property as legally described on an Exhibit
- **“Tax Incremental Base Value”** - the amount that is certified by the Wisconsin Department of Revenue as being the base value for the Property
- **“General Property Taxes”** - as defined in Wis. Stat. Section 74.01
- **“Substantial Completion”** - the date when the Developer is granted an occupancy permit by the Municipal Building Inspector



## Key Definitions

- **"Guaranteed Minimum Investment"** - \$XXX minimum capital investment by Developer in building construction on the Property by the time of Substantial Completion, which includes the hard costs, including installation of brick and mortar and fixtures and utilities, and includes soft costs of construction (such as permit fees, impact fees, design fees and contractor overhead and profit, and contractor general conditions).
- **"Minimum Guaranteed Value"** - the additional equalized value of the Expansion of not less than \$XXX as of [Date] and thereafter during the Term of this Agreement.



## Key Definitions

- **"Development Increment"** - the total assessed value of the improvements on the Property in a given year minus the Development Tax Increment Base Value.
- **"Property Tax Increment"** - the gross amount of Village/City, County, school and all other General Property Taxes levied and received by the Village/City on the Development Increment in a given year.

# Drafting for Types of Incentives

- Identify your goals and priorities with your Municipal Team
- Discuss your risk tolerance on the development
- Identify what will guide and direct decision-making:
  1. Ordinance/Statutory
  2. Policy
  3. Business / Risk Decisions



# Mitigate Municipal Risk

- Once essential terms have been agreed to by the Developer, put together a term sheet before you draft the Development Agreement
- Consider Conditions Precedent and Contingencies including the Entitlement Process
- Establish clear timelines / phasing expectations for improvements

# Upfront TIF Incentives

- How will the municipality fund an upfront incentive
- If you borrow for the incentive, how do you help ensure the municipality has revenue to pay the money back
- Security Options:
  - Upfront Letter of Credit/Cash Deposit
  - Special Assessment
  - Mortgage (priority and foreclosure)
  - Corporate/Parent/Personal Guarantees
- Guarantees:
  - Minimum Capital Investment
  - Minimum Assessed Value

# PayGo Incentives

- Less Risk
- Funded from Property Tax Increment (Revenues)
- Percentage share of the Property Tax Increment
- Best Practice is to pay back any Municipal Debt first
- Set a time period for payments
- Doesn't require a letter of credit / other security if no municipal debt
- Requires guarantees of capital investment and/or minimum assessed values

# Land Incentives

- Land already owned by the Municipality; Or
- Upfront incentives to purchase land; reimburse for land costs
- Eminent Domain /  
Condemnation Considerations
- Implications on taxable  
Municipal bonding
- Need security and guarantees  
similar to upfront incentives

# Look back Provisions

- Requires periodic review of the developer's progress
- Address the rate of return the Developer can achieve and how the rate of return is calculated for a specific project
- May require adjustments to any incentives not yet received or a claw back on funds received previously if the rate of return exceeds the level agreed upon
- May require the sharing of profits with the Municipality in an agreed upon ratio going forward

# Default Provisions

- Define TIF Default versus non-TIF Default
- Agreement must specify process and remedies
- For example, the following would be considered a TIF Default:
  - Failure to purchase the Property within 1 year after the effective date of this Agreement;
  - Failure to commence construction of a first building within 1 year after the effective date of this Agreement;
  - Failure to meet the Minimum Investment Test within 24 months after the effective date of this Agreement;
  - Nonpayment of property taxes on the Property or Parcel when due, regardless of who bears responsibility for such payment



# The Municipal Lawyer's Role

- Know the Rules of TIF: Statutory and Local Policy
- Understand the Municipality's TIF Project Plan, Ordinances, Goals and Risk Tolerance
- Advise on the structure of the incentives, definitions, framework and risks
- Identify the business decision within the requirements of the law
- Draft the term sheet as directed by the Municipal Team
- Assist in negotiations and draft the development agreement as directed by the Municipal Team and Governing Body

# TIF Guidelines & Policies

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Each project must  
satisfy “but for  
test”

Use proforma  
review especially  
for development  
ready sites

Specify  
preferences for  
types off financial  
assistance

Require  
developers to  
reimburse review  
costs

Outline types of  
security provisions

Formalize  
commitments in  
developer  
agreement

# Final Thoughts

- **Where there's a will, there's a way!**
  - ✓ Gain detailed understanding of developer's request
  - ✓ Demand developer transparency
  - ✓ Identify appropriate funding sources
  - ✓ Balance need for development & protection of local resources
- **Seek professional guidance**



# Let's Talk!

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# Your Presenters

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