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On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2020CA1162 Opinion by Judge Berger; Roman, C.J., concurs Yun, J., concurs in part, dissents in part	
Petitioners: PK Kaiser, in his role as Arapahoe County Assessor; and Joann Groff, in her role as Colorado State Property Tax Administrator v. **Respondents:** Aurora Urban Renewal Authority; Corporex Colorado, LLC; Fitzsimons Village Metropolitan District No. 1; Fitzsimmons Village Metropolitan District No. 3	**▲COURT USE ONLY▲**
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BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENTS

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

☑ It contains 3,425 words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in C.A.R. 29.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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TABLE OF CONTENTS

IDENTITY OF THE LEAGUE AND ITS INTEREST IN THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

I. Tax increment was intended to finance the primary purpose of the URL – the remediation of blight in municipalities. 4

II. Municipalities and URAs must be able to depend on a predictable allocation of TIF revenue to perform urban renewal work.....6

III. No deference is required to a methodology that is premised on a faulty interpretation of the URL that oversteps the Administrator's delegated role. 10

CONCLUSION.....16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Constitutional Provisions

COLO. CONST. art. X, § 15 10

Cases

Aurora Urban Renewal Auth. v. Kaiser, 2022 COA 5 ..... 3, 16

Bd. of Cnty. Comm'rs of Cnty. of San Miguel v. Colo. Pub. Utilities Comm'n, 157 P.3d 1083 (Colo. 2007) 16

Bd. of Cnty. Comm'rs of Boulder Cnty. v. City of Broomfield, 7 P.3d 1033 (Colo. App. 1999) 5

City of Aurora v. Scott, 410 P.3d 720, 725-26 (Colo. App. 2017) 15

Denver Urb. Renewal Auth. v. Byrne, 618 P.2d 1374 (Colo. 1980) 5, 7, 14

Huddleston v. Grand Cnty. Bd. of Equalization, 31 P.3d 155 (Colo. 2001) 10, 15

James v. Bd. of Comm'rs of Denver Urb. Renewal Auth., 611 P.2d 976 (Colo. 1980) 1

People v. Cross, 127 P.3d 71, 73 (Colo. 2006) 13

Statutes

C.R.S. § 31-25-101, *et seq.* 1

C.R.S. § 31-25-102(1) 4, 5

C.R.S. § 31-25-102(2) 5

C.R.S. § 31-25-103(10) 13

C.R.S. § 31-25-104(1) 2

C.R.S. § 31-25-104(2)(c) 2

C.R.S. § 31-25-105(2) 12

C.R.S. § 31-25-105(2.5) 12

C.R.S. § 31-25-105(*l*) 2

C.R.S. § 31-25-107 2

C.R.S. § 31-25-107(1)(a) 11

C.R.S. § 31-25-107(11) 12

C.R.S. § 31-25-107(12) 12

C.R.S. § 31-25-107(3.5) 12

C.R.S. § 31-25-107(3.5)(a) 8, 11

C.R.S. § 31-25-107(4) 14

C.R.S. § 31-25-107(4)(f) 2

C.R.S. § 31-25-107(7) 14

C.R.S. § 31-25-107(9) 4

C.R.S. § 31-25-107(9)(a) 11, 13, 14

C.R.S. § 31-25-107(9)(a)(I) 14

C.R.S. § 31-25-107(9)(a)(II) 14

C.R.S. § 31-25-107(9)(e) 7

C.R.S. § 31-25-107(9)(h) 10

C.R.S. § 31-25-107(9.5) 12, 14

C.R.S. § 31-25-112(1)(h) 2

C.R.S. § 39-2-109 10

Other Authorities

2 Div. of Prop. Taxation, Dep't of Local Affairs, *Administrative and Assessment Procedures*, p. 12.15 (rev. Jan. 2017).....9

2015 Colo. Sess. Law, ch. 261.....11

Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 66 (Winter 2010) 6

The Colorado Municipal League ("CML") respectfully submits the following *amicus curiae* brief in support of the position of Respondents, particularly the Aurora Urban Renewal Authority ("AURA").

IDENTITY OF THE LEAGUE AND ITS INTEREST IN THE CASE

CML, formed in 1923, is a non-profit, voluntary association of 270 of the 272 municipalities in the state of Colorado, comprising nearly 99 percent of the total incorporated state population. CML's members include all 105 home rule municipalities, 164 of 166 statutory municipalities, and the lone territorial charter city. CML's members include all municipalities with a population greater than 2,000 and most having a population of 2,000 or less.

According to the records of the Colorado Division of Local Government,[1] 65 Colorado municipalities have formed urban renewal authorities ("URAs") under the provisions of the Urban Renewal Law, C.R.S. §§ 31-25-101, *et seq.* ("URL"). Although considered a separate legal entity, a URA is formed "to carry out urban renewal projects for a municipality." *James v. Bd. of Comm'rs of Denver Urb. Renewal Auth.*, 611 P.2d 976, 977 (Colo. 1980) (citing C.R.S. § 31-25-104(1)(b)).

[1] A complete public database of local government entities in Colorado, as maintained by the Division of Local Government, may be found at https://dola.colorado.gov/lgis/.

URAs also have intimate working relationships with their associated municipalities. First, URAs cannot exist until created by a municipality and urban renewal plans, including tax increment financing ("TIF") elements, must be approved by the municipality. C.R.S. § 31-25-107. Urban renewal plans must conform to the municipality's comprehensive land use plan. C.R.S. § 31-25-107(4)(f). Second, even though they are separate entities, the administration of the authority essentially is nested within the operations of the municipality itself. The URL allows the governing body of the municipality to act, *ex officio*, as the board of the URA (as in the City of Aurora) and the URA can rely on the municipality's legal counsel, staff, and facilities. *See* C.R.S. §§ 31-25-104(1); 31-25-104(2)(c); 31-25-105(*l*); 31-25-112(1)(h).

The manner of tax increment calculation is keenly important to municipalities throughout Colorado. The feasibility of many redevelopment projects and the redevelopment of blighted properties will hinge on an adequate and predictable flow of revenue to attract development and fund project costs. The improper calculation of tax increment and the misdirection of tax revenue threatens the viability of urban renewal projects and the availability of urban renewal as a tool to revitalize Colorado's communities.

SUMMARY OF THE ARGUMENT

The methodology contained in the Assessor's Reference Library manual ("ARL") created by the Property Tax Administrator ("Administrator") is inconsistent with the express language and stated purposes of the URL and is based on erroneous assumptions about the nature and purpose of TIF. The URL contains adequate safeguards to protect the tax base of other taxing entities. The Administrator's methodology, which misallocates tax revenue generated by an urban renewal project, is contrary to law and exceeds the authority granted by the General Assembly. Such a methodology deserves no deference.

ARGUMENT

CML supports AURA in its principal arguments that the Administrator's methodology for adjusting the "base" property valuation after a general reassessment deviates from the both the letter and express purpose of the URL. Accordingly, the Court of Appeals correctly held that the ARL's differential treatment of direct and indirect benefits of an urban renewal project is contrary to law, for all the reasons set forth in AURA's Answer Brief. *See Aurora Urban Renewal Auth. v. Kaiser*, 2022 COA 5, ¶ 97 .

CML submits this brief to articulate the importance of ensuring that urban renewal projects receive the full benefit of the tax revenue they generate, in the

manner intended by the URL. Moreover, CML seeks to emphasize how the Administrator's methodology effectively shortens the statutory time period during which TIF must be allocated to a URA in contravention of the URL. The Administrator's methodology goes far beyond the mandate to implement TIF and improperly seeks to add protections for the tax base of taxing entities that the General Assembly did not intend.

I. Tax increment was intended to finance the primary purpose of the URL – the remediation of blight in municipalities.

Any construction of the ambiguities in the URL's TIF allocation provisions, C.R.S. § 31-25-107(9), should begin with the purposes of the General Assembly in enacting the URL. These purposes, coupled with the General Assembly's express direction to allocate tax increment derived from urban renewal to a URA, reflect two simple concepts that are lost in the Administrator's methodology: the General Assembly intended that TIF fund urban renewal and that the Administrator implement TIF in a manner that furthers the URL's purposes.

In the URL's legislative declaration, the General Assembly acknowledged the existence of "a serious and growing menace, injurious to the public health, safety, morals, and welfare" of the residents of the state and its municipalities. C.R.S. § 31-25-102(1). Blighted areas are an "economic and social liability" that contribute "substantially to the spread of disease and crime" and impair "the sound

growth of municipalities." *Id.* Such conditions inhibit the availability of housing and aggravate traffic problems, including making it harder to eliminate traffic hazards or improve facilities. *Id.* In addition, the General Assembly found that a any municipalities is endangered by such conditions that consume "an excessive proportion of its revenues because of the extra services required for police, fire, accident, hospitalization, and other forms of public protection, services, and facilities." *Id.* To that end, the General Assembly enacted the URL to allow public action and the use of public funds to clear or rehabilitate blighted areas to eliminate, remedy, and prevent the identified public problems. C.R.S. § 31-25-102(2).

By authorizing the use of TIF, the General Assembly expressly intended that TIF be available as a mechanism for financing urban renewal to achieve these purposes. Despite urban renewal's salutary goals and the General Assembly's endorsement of TIF, the use of tax increment to finance that urban renewal has never been without controversy or resistance. The use of TIF has been challenged by taxing entities as a misappropriation of their tax revenues – challenges that Colorado courts have rejected. *See, e.g., Denver Urb. Renewal Auth. v. Byrne,* 618 P.2d 1374, 1387 (Colo. 1980); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. City of Broomfield*, 7 P.3d 1033, 1036 (Colo. App. 1999). As discussed at pages 9-15,

below, the General Assembly already took sufficient steps to safeguard the revenue base of taxing entities by ensuring that not all future revenue increases would be allocated to urban renewal and, more recently, by implementing numerous opportunities for taxing entities to exercise influence and control over the use of TIF. Nevertheless, a belief appears to remain that the Administrator must implement TIF in a manner that prioritizes protection of taxing entities' revenue from TIF, even if that manner reduces the availability of tax increment generated by urban renewal activity.

II. Municipalities and URAs must be able to depend on a predictable allocation of TIF revenue to perform urban renewal work.

TIF is neither a reallocation nor a redistribution of tax revenue, but an allocation of new tax revenue to a URA to finance urban renewal work for the betterment of the municipality and the state at large. TIF is not merely "the division of property tax revenue for a set period." (Op. Br. 3). TIF is focused on "revenue growth." Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 66 (Winter 2010). Specifically, TIF is the allocation to a URA of revenue growth over a base amount that is subject to some statutory adjustment. In Colorado, the constitutionality of TIF depends, in part, on this Court's previous determination that taxing entities would not lose tax revenue because the tax revenue in question

in that case would not have existed "but for" the urban renewal project. *Byrne*, 618 P.2d at 1387. The proper allocation – not reallocation – of this new property tax revenue is critical to legality and success of urban renewal.

Of course, the General Assembly did not intend to deprive taxing entities of all property tax revenue during the existence of an urban renewal plan with a TIF component because it is not reasonable to expect the value of even blighted properties to remain static for 25 years (*i.e.*, the maximum lifespan of a TIF). It is unreasonable, however, for the implementation of TIF to use the URL's mandate for proportional adjustment under C.R.S. § 31-25-107(9)(e) to deprive a URA of tax revenue that the General Assembly intended would fund the URA's work. For the reasons argued by AURA, the Administrator's methodology misallocates revenue derived from property in an urban renewal area to the wrong entity. That result is inconsistent with *Byrne*'s essential "but for" holding and the express intention of the legislature that URAs receive those allocations.

Colorado municipalities and their URAs want and need clarity, consistency, and predictability in the way tax increment revenue is calculated and allocated by county assessors. Consider the reality of any urban renewal project funded by TIF: The inclusion of a TIF component in an urban renewal plan begins a strict 25-year "clock" for the allocation of TIF. A TIF component is frequently included when a

plan is approved initially. Before approving the use of TIF, municipalities and their URAs need to assess the feasibility of any proposed TIF project's financing in light of the proposed work and the limited period to recover tax increment. To maximize available financing to ensure a successful project, the municipality cannot start the TIF clock until a developer commits to the project, and a developer cannot commit to perform a project until the financing mechanism is approved. Not only is this a practical necessity, but municipalities and URAs are required to predict anticipated TIF revenue over a 25-year period and include this information in the "urban renewal impact report" submitted to the county before approving an urban renewal plan with a TIF component. C.R.S. § 31-25-107(3.5)(a).

The consequence of an unpredictable TIF allocation system is that URAs and prospective developers cannot accurately schedule financing to achieve the purposes of urban renewal. At this time, Colorado's URAs are located in at least 29 different counties. Municipalities must depend on the interpretations and calculations of 29 different county assessors in calculating and allocating TIF revenue. The Administrator's methodology, which invites individual assessors to make subjective value judgements about whether increasing property values in a urban renewal area are attributable to urban renewal or to general "market" changes, is opaque and subject to inconsistent application. By the Administrator's

own admission in the ARL at page 12.15, an assessor's task of parsing the distinction between "reassessment" and "non-reassessment" changes in values is a "difficult" one for individual assessors to perform. 2 Div. of Prop. Taxation, Dep't of Local Affairs, *Administrative and Assessment Procedures*, p. 12.15 (rev. Jan. 2017) (CF, p. 689). A subjective, difficult to apply system varying across counties where URAs operate is neither consistent nor uniform.

Colorado's municipalities and their URAs must be able to rely on a TIF structure that consistently and completely provides the revenue promised by the URL to remedy blight and to create housing and jobs. Although Petitioners demand deference to a complex methodology they see as the only available option, alternatives exist that are more consistent with the URL's plain text and express purposes. For example, a periodic adjustment of the urban renewal area's base valuation number in future years should be a simple matter of applying a percentage market adjustment to the base number. This approach would make TIF revenue calculations far more transparent and predictable for municipalities, other taxing entities, and developers than the current "difficult" system of parsing "reassessment" and "non-reassessment" valuation changes. The existence of such an alternative reveals the error in the Administrator's methodology.

III. No deference is required to a methodology that is premised on a faulty interpretation of the URL that oversteps the Administrator's delegated role.

The Administrator's role is to facilitate the implementation of the URL. *See* C.R.S. § 31-25-107(9)(h) (authorizing the Administrator to prepare and publish "the manner and methods by which the requirements of this subsection (9) are to be implemented by county assessors"); *see also Huddleston v. Grand Cnty. Bd. of Equalization*, 31 P.3d 155, 160 (Colo. 2001) (indicating the Administrator position was created "to oversee the administration of the property tax valuation system and insure its uniformity"). Neither the URL nor other laws setting forth the Administrator's authority direct the Administrator to ensure that urban renewal projects proceed rapidly or to advance the interests of taxing entities over URAs. *See* COLO. CONST. art. X, § 15; C.R.S. § 39-2-109.

The URL can adequately and effectively prevents the misallocation of taxing entities' revenue without the need for a complex and difficult to administer methodology. The URL's explicit protections have become more robust over time, as discussed in more detail below, yet Petitioners suggest that the Administrator's methodology and technical expertise is necessary to avoid misuse of TIF. CML submits that such actions and any corresponding motivations exceed and are contrary to the Administrator's delegated administrative role in the implementation

of TIF allocations for the purpose of financing urban renewal.

Even before an urban renewal plan financed with TIF can be adopted, the General Assembly has assured against perceived abuses or delays by a URA or developer. First, urban renewal cannot be done in secret, as the URL requires that a municipality adopt a finding of blight after a public hearing before even adopting a plan. C.R.S. § 31-25-107(1)(a). Second, urban renewal projects are incentivized to proceed promptly because the URL establishes a 25-year time limitation on the availability of TIF, running from the adoption of the provision in an urban renewal plan. C.R.S. § 31-25-107(9)(a). Third, before adopting or modifying a plan that includes a TIF component, the municipality must provide an impact report to the board of county commissioners that includes, among other things, the estimated tax increment to be generated and the portion to be allocated to the project. C.R.S. § 31-25-107(3.5)(a).

Perhaps most importantly, other taxing entities are directly involved in the inclusion and scope of a TIF component in any plan adopted or modified by a municipality after 2015. Through House Bill ("HB") 15-1348, the General Assembly subjected the use of TIF to detailed negotiation and mediation requirements. 2015 Colo. Sess. Law, ch. 261. The municipality and taxing entities that levy taxes in the urban renewal area must negotiate the impacts of the use of

tax increment; these impacts are subject to a form of binding mediation. C.R.S. § 31-25-107(9.5). Moreover, municipalities may agree to fund the costs of additional county infrastructure or services required by an urban renewal project, subject to a form of arbitration. C.R.S. §§ 31-25-107(11-12). HB15-1348 also elevated the importance of the urban renewal impact report that counties must receive before a plan can be considered. C.R.S. § 31-25-107(3.5). Finally, other taxing entities are now represented on URA boards. C.R.S. §§ 31-25-105(2) and (2.5). The URL effectively prevents any perceived abuse of TIF, refuting any suggestion that the Administrator has an extra role to play to preserve taxing entities' revenue.

Despite these safeguards, Petitioners appear to assert that, during a gap between what they term "potential" and "actual" redevelopment, the Administrator has some obligation to prevent undue harm to taxing entities' tax base. *See, e.g.*, (Op. Br. 41) ("the procedures ensure that the local tax base is not deprived of revenue that would have been created regardless of whether there has been any actual redevelopment or remediation of blight"). Petitioners contend that the URL requires that only increases "directly attributable to actual (not proposed) redevelopment . . . should go to pay for [the redevelopment." (Op. Br. 41); *see also* (Op. Br. 46, n.4) ("a 'project constitutes actual redevelopment, while a 'plan' merely describes potential opportunities"). These statements have no basis in the

URL and are contrary to both the reality of redevelopment projects and the URL's express provisions that focus on the date of approval or modification of the urban renewal plan – not physical redevelopment.

Contrary to Petitioners' unsubstantiated characterizations, the URL makes no distinction between "actual" and "potential" redevelopment. All "undertakings and activities" over the life of the urban renewal plan constitute part of the urban renewal project, including those undertakings that the Administrator or an assessor might consider to be only "potential" in their subjective views. An "urban renewal project" is defined to mean "undertakings and activities for the elimination and for the prevention of the development or spread of slums and blight." C.R.S. § 31-25-103(10) (including a non-exhaustive list of examples that include both physical and non-physical actions). Petitioner adds the word "actual" to this definition to justify the methodology's inherent misallocation of tax revenue. Courts may "not add or subtract statutory words that contravene the legislature's obvious intent." *People v. Cross*, 127 P.3d 71, 73 (Colo. 2006).

Other language in the URL directly relating to urban renewal plans with TIF components negates Petitioners' construction. The authorization for TIF and the 25-year limitation run from "the effective date of the approval of" the plan and the "effective date of adoption of" the TIF provision. C.R.S. § 31-25-107(9)(a); *see*

also Byrne, 618 P.2d at 1379 (the fund pledged to the payment of a URA's bonds "would benefit from the increased valuation of taxable property within the project area after the effective date of the plan's approval"). The preservation of a portion of taxes to a taxing entity is premised on a base valuation "last certified prior to the effective date of approval of the urban renewal plan" or "the effective date of the modification of the plan." C.R.S. § 31-25-107(9)(a)(I). Mentions of the "project" in Subsection (9)(a) refer to the authorized uses of such funds allocated to the URA, not to the calculation or allocation of TIF. *See* C.R.S. § 31-25-107(9)(a)(II) (allocating tax increment to an authority to make certain payments related to "an urban renewal project"). If the General Assembly intended for TIF to be delayed until some sort of "actual" changes to land in the urban renewal area occurred, or to restrict increments to such changes, it could have said so explicitly.

The Administrator's methodology also has the effect of shortening the period that TIF is available to an urban renewal project, thereby reducing opportunities to conduct urban renewal work. The URL intends that the allocation of TIF begin upon the adoption of a TIF provision. C.R.S. § 31-25-107(9)(a). The URL places authority for the adoption of a TIF-financed plan with the municipality, with substantial control and influence given to other taxing entities. C.R.S. §§ 31-25-107(4), (7), and (9.5). Neither the Administrator nor an assessor

has a statutorily designated role in the approval of a TIF component. The Administrator cannot evade or alter the mandate that TIF allocations begin when the TIF provision is adopted, whether as part of an initial urban renewal plan or a later modification. *Cf. City of Aurora v. Scott*, 410 P.3d 720, 725-26 (Colo. App. 2017) (a municipality cannot "alter or evade the 25-year time limit on TIF provisions by denominating parts of the plan 'effective' after the plan is approved"). The delegation of authority to the Administrator to implement TIF should not be construed to authorize regulations designed to defeat or hinder the purpose of the URL and its mandate that TIF be allocated to a URA during a 25-year period.

CML submits that this Court should not defer to an erroneous administrative interpretation that is based on a statutory construction that mischaracterizes the role of the Administrator and ultimately serves to defeat the purpose of urban renewal. The Administrator's interpretations of the URL, as expressed through the ARL, are not binding on courts "particularly when the law has been misapplied or misconstrued" or when the interpretation "contravenes legislative intent." *Huddleston*, 31 P.3d at 160 (Colo. 2001) (internal citations omitted). As the Court of Appeals understood, an administrative standard is legally untenable if it contravenes the statute it is meant to serve, even if by merely frustrating the

statute's express purpose. *See Kaiser*, ¶ 91 (citing *Bd. of Cnty. Comm'rs of Cnty. of San Miguel v. Colo. Pub. Utilities Comm'n*, 157 P.3d 1083, 1089 (Colo. 2007)).

CONCLUSION

In conclusion, the Court of Appeals properly invalidated the Administrator's methodology that deprives URAs of property tax revenue generated by urban renewal projects. Any alternative conclusion restricts municipalities from fully engaging in urban renewal as intended by the General Assembly.

Wherefore, CML respectfully urges this Court to affirm the holding of the Court of Appeals.

DATED this February 28, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this February 28, 2023, a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENTS** was served via Colorado Courts E-Filing to the following:

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