COURT OF APPEALS, STATE OF COLORADO

Case No. 98 CA 836

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AN AMICUS CURIAE

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER,

Plaintiff-Appellee and Cross-Appellant

v.

CITY OF BROOMFIELD, COLORADO, CITY COUNCIL OF THE CITY OF BROOMFIELD, AND BROOMFIELD URBAN RENEWAL AUTHORITY

Defendants-Appellants and Cross Appellees

On appeal from the District Court, County of Boulder, Civil Action No. 95 CV 1430-3, Honorable Richard Hart, District Judge

COLORADO MUNICIPAL LEAGUE
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October 5, 1998

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Comes now the Colorado Municipal League (the "League") by its undersigned attorney, and, pursuant to Rule 29, C.A.R., submits this brief as an *amicus curiae* in support of the position of the Defendants-Appellants and Cross-Appellees, hereafter collectively referred to as "Broomfield.".

I. Interests of the League

The League is a voluntary non-profit association consisting of 262 of the 269 municipalities in the state of Colorado. The League's membership includes every home rule municipality and 184 of the 191 statutory municipalities in Colorado, which collectively represent 99.9% of the municipal population in the state. The League has for many years appeared before the courts as an *amicus curiae* to present the perspective of Colorado municipalities.

This case represents yet another opportunity for municipalities and other government entities to decipher the meaning and applicability of the Taxpayer's Bill of Rights (TABOR), Colo. Const. art X, § 20. Because municipalities are a form of "local government" they are included within the definition of "district" contained in art. X, § 20 (2)(b) and are therefore subject to the restrictions contained in the TABOR. However, a host of collateral questions about the basic applicability of TABOR have simply festered since the adoption of this constitutional amendment in 1992. Municipalities can and often do find themselves affiliated with a wide variety of entities which have their own, separate corporate existence, but which may or may not be deemed to be "local governments" in their own right under TABOR. This case squarely presents this court with a question of first impression related to one such entity--How does TABOR affect actions taken by or on behalf of urban renewal authorities?

Approximately twenty-five municipalities located throughout the state have formed urban renewal authorities. Moreover, innumerable other "special purpose authorities"[1] are associated to one degree or another with municipalities in Colorado. The ultimate determination of the TABOR issues in this case will be of critical importance to the collective understanding of how these authorities can and should be governed under TABOR.

II. Issues Presented for Review

Although the League supports Broomfield in all of the issues and arguments the city is presenting to the court in this case, the League will focus its own arguments as an *amicus curiae* on the following TABOR issues only:

1. Boulder County has no standing to sue under Colo. Const. Art. X, § 20 (TABOR).

3. Since the trial court ruled that an urban renewal authority is not a district under TABOR, the trial court erred in applying TABOR to the adoption of an urban renewal plan.

4. The allocation of tax increment financing pursuant to the Colorado Urban Renewal Law is not a tax policy change under TABOR.

5. If the allocation of tax increment financing revenues is a tax policy change under TABOR, the trial court erred in requiring a vote by the electorate of Boulder County.

III. Statement of the Case

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[1]Examples of other "special purpose authorities" in or associated with Colorado municipalities, many of which share characteristics in common with urban renewal authorities, include: downtown development authorities, §§ 31-25-801, *et seq*, C.R.S.; housing authrorities, §§ 29-4-201, *et seq.*, C.R.S.; water authorities, § 29-1-104.2, C.R.S.; power authorities, § 29-1-204, C.R.S.; municipal energy finance authorities, §§ 31-25-901, *et seq.*, C.R.S.; public airport authorities, §§ 41-3-101, *et seq*, C.R.S.; so called "E-911 Authorities," to fund emergency telephone services, § 29-11-102 (1)(b), C.R.S.; and other miscellaneous authorities formed pursuant to intergovernmental agreement as broadly authorized in § 29-1-103 (4), C.R.S.

The League hereby adopts by reference the statement of the case and statement of facts as contained in Broomfield's opening brief. However, to more clearly frame the TABOR issues in this case, the League would emphasize that the following are the most salient holdings by the trial court over the course of this litigation to date:

- A board of county commissioners is not precluded from bringing a TABOR enforcement suit against a municipality, i.e. a county has standing to challenge the constitutionality of the municipality's actions. (R: Vol. III, p. 558).
- An urban renewal authority is not itself a "district" under TABOR but is an "enterprise." (R: Vol. III, p.560).
- An action taken by a municipality on behalf of an urban renewal authority (apparently meaning the approval of an urban renewal plan containing a tax allocation scheme) can be subject to the election requirements of TABOR, notwithstanding the fact that the authority itself is not subject to TABOR. (R: Vol. III, p. 560-561).
- The tax allocation provisions of an urban renewal plan constitute a "tax policy change directly causing a net tax revenue gain to any district" within the meaning of TABOR § 4 (a) and therefor requires advance voter approval. (R: Vol. III, p. 560).
- The aforesaid voter approval must occur county-wide because county tax revenues are "implicated" by the approval of the tax allocation provisions of the plan. (R: Vol. IV, p. 632).

IV. Summary of Argument

The resolution of all the TABOR issues in this case turns upon whether or not this court determines that the approval of an urban approval plan containing a tax allocation provision (i.e. "tax increment financing") constitutes a "*tax policy* change resulting in a net tax revenue *gain* to

any *district"* within the meaning of TABOR § 4 (a). (Emphasis supplied.) The trial court erred in determining that § 4 (a) applied for several reasons. First, to the extent that any district "gains" tax revenue as a result of an urban renewal plan, that entity would be the urban renewal authority itself according to the express provisions of the statutes. An urban renewal authority is not a "district" either because it is an "enterprise" under TABOR (as determined by the trial court) or, more precisely, because it is a body corporate and politic that is not a "local government" at all.

Second, a county does not "gain" revenue as the result of an approval of an urban renewal plan with a tax allocation provision, and therefore certainly no TABOR election is triggered by such an approval at the county level by § 4 (a). Third, the approval of an urban renewal plan is essentially a land use policy decision, not a "tax policy" decision within the meaning of TABOR § 4 (a). Many municipal land use decisions may be said to incidentally cause an increase in tax revenue both to the municipality and to other local governments. If land use decisions that incidentally cause revenue gains or in any way "implicate" the revenues of another district somehow trigger an election under TABOR § 4(a), chaos would result for local governments throughout Colorado.

The county's TABOR claims against Broomfield are essentially based upon the premise that the statutory procedures that allow a municipality to approve an urban renewal plan *without* voter approval are now unconstitutional under TABOR. Counties have long been denied standing to challenge the constitutionality of statutes, and should be denied such standing in this case as well.

V. Argument

A. An urban renewal authority is not a local government and therefore is not subject to TABOR at all.

The restrictions of TABOR apply only to the actions of a "district," a term which is defined to include the state or any "local government," excluding enterprises. Colo. Const. Art. X, § 20 (2)(b). Critical to the resolution of the TABOR issues in this case is a clear understanding of the nature of urban renewal authorities, the purpose of an urban renewal plan, and the mechanics of how tax revenue "allocation" works under an adopted plan. These issues are fully discussed in *Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374 (Colo. 1980), and, arguably, that decision is dispositive of many of the key issues in the instant case. However, the League would also commend to the court's attention an excellent summary of urban renewal concepts as contained in *Colorado Land Planning and Development Law,* Colorado Chapter, American Planning Association (4th ed., 1992), an excerpt from which is attached hereto as Appendix C. Among other things, the treatise contains this statement, central to an understanding of the relationship between urban renewal and the "rights" of taxpayers under TABOR:

> The tax increment mechanism is one of allocation only. Tax rates are not increased by the use of this tool. Property taxpayers receive the tax bill they would normally receive and pay at the same rate as other taxpayers. Sales taxpayers pay the same rates of sales tax.

Id., at p. 466. Therefore, since individual taxpayers see no impact whatsoever from the adoption of a tax allocation scheme in an urban renewal plan, the obvious question becomes: How can the "Taxpayer's Bill of Rights" be implicated by the adoption of an urban renewal plan?

TABOR protects taxpayers by restraining the growth of "government" as discussed in *Bickel v. City of Boulder*, 885 P.2d 215, 231 (Colo. 1994). "Its preferred interpretation shall reasonably restrain most the growth of *government.*" Colo. Const. art. X, § 20 (1) (emphasis

supplied). "The principle purpose of TABOR is to limit the growth of *government* in general and the growth in public expenditures in particular." *Board of County Commissioners of Boulder County v. Dougherty Dawkins Strand & Bigelow Inc.*, 890 P.2d 199, 205 (Colo. App. 1994) (emphasis supplied). "As presented to the voters, it was designed to protect the citizens from unwarranted tax increases." *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1 (Colo. 1993). "The title of article X, section 20, itself, 'The Taxpayer's Bill of Rights,' strongly suggests that article X, section 20 emphasizes the ability of taxpayers to influence governing authorities with respect to *government* financing, spending and taxation." *Zaner v. City of Brighton*, 917 P.2d 280 (Colo. 1996) (emphasis supplied).

Thus, if TABOR is deemed to restrict activities by or on behalf of urban renewal authorities, a critical question in this case is whether or not an urban renewal authority is a government or, more precisely, a "local government"[2] within the meaning of TABOR.

Indeed, in this case the trial court held that an urban renewal authority itself is not a "district" or "local government" under TABOR but instead is an "enterprise." The county apparently does not dispute this holding as it has not appealed on this issue. The League would concur that an urban renewal authority may be considered an "enterprise" according to the applicable definition in TABOR § 2 (d) and the controlling precedents, in particular *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995) and *Board of County Commissioners of Eagle County v. Fixed Base Operators, Inc.*, 939 P.2d 464 (Colo. App. 1997).

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[2]An urban renewal authority is certainly not a part of *state* government for purposes of TABOR. It is not an "agency or authority of the state." *James v. Board of Commissioners of the Denver Urban Renewal Authority*, 611 P.2d 976 (Colo. 1980). Nor has the General Assembly defined local urban renewal authorities to be a part of the "state" for purposes of TABOR fiscal compliance. See: § 24-77-102 (15), C.R.S.

The League would assert, however, that it was unnecessary for the trial court to reach the conclusion that an urban renewal authority is an "enterprise" because a more cogent argument can be made that it is an independent body "corporate and politic" that simply is not a "local government" at all.

TABOR did not attempt to redefine the term "local government" or indicate that the term should be understood any differently than it has been in the past. The courts have shown a consistent willingness to interpret undefined terms in TABOR in relation to prior law. *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1113-1114 (Colo. 1996); *Dougherty Dawkins,* 890 P.2d at 203-205. Moreover, the supreme court has endeavored repeatedly to harmonize TABOR with prior statutes and case law. *Bickel*, 885 P.2d at 229; *Zaner*, 917 P.2d at 285; *Bolt v. Arapahoe County School District Number Six*, 898 P.2d 525, n. 21 (Colo. 1995); *Romer v. Board of County Commissioners of the County of Weld*, 897 P.2d 779, n. 6 (Colo. 1995).

The urban renewal statutes as they existed both before and after TABOR do not call urban renewal authorities "local governments." Instead they are called "a corporate body," § 31-25-103 (1), C.R.S., or "a body corporate and politic," § 31-25-104 (1)(b). Indeed, under prior case law they were not considered to be a form of "government" to the extent that term was defined to include "any branch, subdivision, institution, or agency of this state or any political subdivision within it." *Bailey v. People*, 617 P.2d 549 (Colo. 1980). The fact that special purpose authorities are not truly "governments" in Colorado is consistent with the law throughout the country. See: *McQuillen, Law of Municipal Corporations,* § 2.29 (a), 2.13.

After *DURA v.Byrne,* it is beyond dispute in Colorado that an urban renewal authority is separate and distinct from the "local government" (i.e. the municipality) which created it or with which it is affiliated. Moreover, since the adoption of TABOR, a strong signal was sent by the

Colorado General Assembly that special purpose authorities lie outside the definition of "government" and thus beyond the purview of TABOR. For purposes of calculating state fiscal year spending under TABOR, the legislature excepted out a host of state-level "special purpose authorities"[3] and thus implied that they are not "governments" subject to the restrictions contained in the constitution. See: § 24-77-102 (15)(a), C.R.S.

Recently the Colorado Supreme Court had occasion to delve for the first time into the meaning of the term "local government" under TABOR. *Campbell v. Orchard Mesa Irrigation District*, 97SA303, decided September 14, 1998. In deciding that certain irrigation districts, although "public corporations," are not "local governments" for purposes of TABOR, the court was careful to limit its holding to "irrigation districts operating under the provisions of the irrigation district law of 1921." Id., at n. 2. However, the route the court took to determining that irrigation districts are not local governments leads to the same conclusion for urban renewal authorities.

First, the court acknowledged once again that the purpose of TABOR is to protect taxpayers against government increases in taxes and spending without voter approval. The fact that irrigation districts do not impose taxes is therefore a strong indicator that they are not covered by TABOR. By the same token, urban renewal authorities neither have the authority to tax, § 31-25-113, C.R.S., nor do they have the authority to compel any other entity to impose a

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[3]The state's definition of "special purpose authorities" is, by analogy, remarkably descriptive of local urban renewal authorities: "any entity which is created pursuant to state law to serve a valid public purpose, which is either a political subdivision of the state or an instrumentality of the state, which is not an agency of the state, and which is not subject to the administrative direction by any department, commission, bureau, or agency of the state." The list of state "special purpose authorities" includes at least one which exists for purposes similar to municipal urban renewal authorities and operates like an urban renewal authority, i.e. the Pueblo Depot Activity Development Authority, § 29-23-101, *et seq.*, C.R.S.

tax, § 31-25-107 (9)(c). As noted above, neither the creation of an urban renewal authority, nor the adoption of an urban renewal plan, nor the inclusion of a tax allocation scheme in such a plan imposes a burden on any taxpayer.

Second, the court distinguished the specialized purposes of an irrigation district from the general purposes of "government," quoting approvingly from *C. B. & Q Ry. Co. v. School District*, 63 Colo. 159, 165, 165 P.260 (1917): recognizing that "(t)he meaning of the term 'government' . . . may be defined as 'the exercise of authority in the administration of the affairs of a state, community, or society; the authorization direction and restraint exercised over the actions of (people) in communities, societies, or states." In other words, under this conventional definition, government exists to serve general public purposes, traditionally through the exercise of legislative authority and police power. In contrast, an urban renewal authority exists to serve a relatively narrow and specialized range of purposes as set forth in the urban renewal statutes, particularly §§ 31-25-101 and -105.

Third, the supreme court focused on TABOR's heavy emphasis on elections and noted that irrigation districts do not conduct elections in the same sense as those contemplated by TABOR. Even more strongly in the instant case, it should be noted that, according to the statutes, urban renewal authorities do not conduct elections *at all.* Neither the creation of the authority, nor the selection of commissioners, nor the adoption of plans, nor the adoption of financing plans require an election. Indeed, the statutes are bereft of any indication of how an urban renewal authority would conduct an election even if it wanted to.[4]

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[4]Ironically, municipalities have been known to get in trouble for erring on the side of "direct democracy" and calling an election on an urban renewal matter when none is required by statute. *East Grand School District No. 2 v. Town of Winter Park*, 739 P.2d 862 (Colo. App. 1987).

Applying the criteria set forth in *Orchard Mesa,* this court could comfortably find that an urban renewal authority is not a "district" or a "local government" under TABOR. The ultimate importance of such a determination becomes apparent when the court considers the meaning of a "tax policy change causing a net tax revenue gain to any district."

B. The approval of an urban renewal plan does not constitute a "tax policy change causing a net tax revenue gain to any district" under TABOR and therefore does not require advance voter approval.

The holding by the trial court that the approval of an urban renewal plan with a tax allocation feature triggers a need for a TABOR election throughout Boulder county is based squarely, albeit erroneously, on the language in TABOR § 4 (a) which requires advance voter for any "tax policy change directly causing a net tax revenue gain to any district." This conclusion is in error on several counts, and would lead to some rather absurd consequences for local governments throughout Colorado if upheld on appeal.

Since the adoption of TABOR, both state and local government officials have struggled with the meaning of the undefined term, "tax policy change." It a minimum, it has been assumed that the term would include only changes that would directly affect taxpayers in the sense of causing them to pay new or increased taxes that they were not already incurring. Thus, if the government eliminates any tax credit, exemption, or refund mechanism that existed at the time TABOR was adopted, and if such a change would directly increase government revenue, it has been assumed that voter approval would be required to make such a change. Similarly, if the government were to expand its tax base (e.g. expand the circumstances under which a sales tax or other excise tax must be paid), it has been assumed that a vote would be required, even though the tax rate may remain constant. This theory has been reflected in two formal opinions of the

Colorado Attorney General, No. 95-2 and No. 96-1, attached hereto as Appendices A and B respectively. In the latter, the Attorney General observed:

> A change in tax policy occurs when a statutory modification is made to the standards or rules governing the imposition of a specific tax. For example, a modification might be made to the subject of a tax, the timing of a tax, or the determination of liability under a tax. If a change does not modify the standards or rules regarding the imposition of a tax, no tax policy is being changed.

As noted above, the adoption of an urban renewal plan, even one including tax increment financing, does not impose any new tax, increase any existing tax rate, or otherwise burden taxpayers, any of which may trigger the need for an election under TABOR. At most, the plan directs the allocation of monies derived from *existing* tax rates. TABOR is absolutely silent on the issue of reallocation of tax revenues between and among government entities. It neither expressly or impliedly creates any new standing or legal right for any political subdivision to protest the alleged "diversion" of its revenues (i.e. an issue that was thoroughly settled in the *Byrne* case.)

TABOR § 4 (a) triggers an election on a "tax policy change" only when it causes a net "gain" in revenue to any "district."

The only "gain" experienced as the result of a tax allocation provision in an urban renewal plan is to the urban renewal authority itself. The statute clearly states that the tax allocation is deposited "into a special fund *of the authority*," § 31-25-107 (9)(a)(II), (emphasis supplied) and indeed those funds exist solely to finance bonds issued by the authority under that section. As explained above, the authority itself is not a "district." It is either an "enterprise" (as determined by the trial court) or it is not a "local government" at all (as the *Orchard Mesa* case would tend to indicate). Thus revenue "gain" experienced by an urban renewal authority does not implicate TABOR § 4 (a).

Moreover, it cannot seriously be argued that the adoption of the tax allocation provision of the urban renewal plan causes a "gain" of tax revenue to the county, thus precipitating a county-wide vote. As in *Byrne,* counties and school districts have been arguing for years that tax increment financing for urban renewal projects somehow "diverts" county revenues and thereby impairs their revenue stream. The supreme court held in *Byrne* that the tax allocation scheme does not impair "the fiscal base" of other taxing entities. It would be the ultimate irony if a county were now to prevail on a right-to-vote theory under TABOR on the mistaken notion that tax allocation to an urban renewal authority somehow causes them to gain revenue.

More critically, the reasoning of the trial court seems to be that a county-wide vote would be required because, not the approval of the tax allocation element itself, but the approval of the urban renewal plan as a whole would somehow "implicate" county revenues. The word "implicate" appears nowhere in TABOR § 4 (a), and therefore the court's holding is unsupportable simply due to the plain language of the constitution. However, this aspect of the proceedings below must be carefully considered and addressed.

It is possible that the meaning and import of the trial court's ruling is that any action by a municipality which, now or in the future, may be deemed to enhance the tax revenues of the municipality itself or of other taxing entities would be deemed to trigger an election under TABOR § 4 (a). Thus, for example, the approval of an urban renewal plan which results in the mitigation of blight and precipitates redevelopment and new development will obviously improve the property tax base. From that action, not only counties but also school districts and all manner of special districts, not to mention the state of Colorado itself, may realize a tax revenue gain. According to this reasoning, every time a local government consummates an annexation, approves a re-zoning of property from residential to commercial, issues a building

permit for a new shopping center, or otherwise takes any action to promote economic development, such an action would trigger an election under TABOR § 4 (a).

The dire consequences of such a broad construction of the term "tax policy change" are obvious. Not only would such a construction make a mockery of the term "directly" in TABOR § 4 (a), it also confuses "tax policy" with all the other types of policy decisions made by state and local bodies, especially land use policies.[5] Moreover, since any particular location in Colorado where development or redevelopment may be permitted by a local government is typically subject to overlapping taxing jurisdictions (any of whom may realize a "gain" as a result of the development) it would be utterly impractical to conduct an election in every jurisdiction in order to comply with TABOR § 4 (a). Such a broad construction would effectively kill urban renewal in Colorado, and would put into place the most sweeping "no growth" policy imaginable.

C. Counties lack standing to challenge the statutory procedures for approval of an urban renewal plan on the theory that those procedures somehow violate TABOR.

The League joins Broomfield in arguing that the county lacks standing in this case. In particular, the League agrees with Broomfield that TABOR establishes "taxpayer enforcement suits" as the exclusive method for seeking compliance with TABOR, and that the county is not a "taxpayer." Furthermore, the League offers the following brief observations.

Both before and since the adoption of TABOR, the urban renewal statutes have allowed

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[5]It is important to note that the expressed purposes for which urban renewal authorities are created and urban renewal plans are adopted are almost exclusively related to land use planning and the entire statutory bent has a strong inclination toward land use policy, not tax policy. For example, see the criteria for approval of an urban renewal plan, codified at § 31-25-107 (4).

municipalities to approve urban renewal plans without a vote of the people. The county is now essentially arguing that the statute is unconstitutional. The Colorado courts have long held that counties lack standing to challenge the constitutionality of a state statute, and that political subdivisions of the state may not challenge a state statute unless specifically empowered to do so. See: *Denver Urban Renewal Authority v. Byrne*, 618 P.2d at 1380 and the numerous precedents cited therein. These principles have been explicitly adopted and carried forward in the context of TABOR litigation in *Romer v. Fountain Sanitation District*, 898 P.2d 37 (Colo. 1995), in which the supreme court held that a political subdivision of the state lacks standing to seek a declaratory judgment in order to adjudicate the rights and responsibilities of the entity under TABOR. Even in the one area where TABOR offers some semblance of "rights" to a local government, i.e. the right to eschew unfunded state mandates under TABOR § 9, counties have been denied relief in a TABOR "enforcement" action on the theory that they exist for little more than "the convenient administration of the state government." *Romer v. Board of County Commissioners of Weld County*, 897 P.2d at 782.

Finally, in recent years this court has denied local governments standing to assert substantive due process claims against one another in the land use context, noting that "the Fourteenth Amendment does not impose restrictions upon the relationships between one political subdivision of a state and another." *City of Colorado Springs v. Board of County Commissioners of the County of Eagle*, 895 P.2d 1105, 1119 (Colo. App. 1994). By the same token, TABOR neither expressly nor impliedly purports to regulate the relationships between political subdivisions of the state. This court should not permit TABOR to be used as a weapon by one local government against another, thus increasing the potential for internecine warfare between other counties and municipalities in Colorado.

VI. Conclusion

For the reasons set forth in this brief, the League supports Broomfield in its various claims for relief. In particular, the League urges this court to determine that an urban renewal authority is not a "district" or a "local government" under TABOR, and that the approval of an urban renewal plan is not a "tax policy change causing an net tax revenue gain," assuming the court grants the county standing to make these claims at all.

Respectfully Submitted this 5th day of October, 1998.

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Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing Brief of the Colorado Municipal League as an *Amicus Curiae* was placed in the U.S. Postal System by first class mail, postage prepaid, on the 5th day of October, 1998, addressed to the following:

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