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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Appeal from Arapahoe County District Court Hon. Elizabeth A. Weishaupl Case No. 2018CV31387	
Plaintiffs/Appellants: Aurora Urban Renewal Authority; Corporex Colorado, LLC; Fitzsimons Village Metropolitan District No. 1; Fitzsimmons Village Metropolitan District No. 3 v. **Defendants/Appellees:** PK Kaiser, in his role as Arapahoe County Assessor; and Joann Groff, in her role as Colorado State Property Tax Administrator	**▲COURT USE ONLY▲**
Attorney for *Amicus Curiae* Colorado Municipal League: David W. Broadwell (#12177) Laurel Witt (#51188) 1144 Sherman St. Denver, CO 80203-2207 Phone: 303-831-6411 Fax: 303-860-8175 Email: dbroadwell@cml.org	Case no. 20CA1162

BRIEF OF *AMICUS CURIAE*, COLORADO MUNICIPAL LEAGUE, IN SUPPORT OF PLAINTIFFS/APPELLANTS

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 3068 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.

*/s/ David W. Broadwell*_____
David W. Broadwell
General Counsel
Colorado Municipal League

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Amicus Curiae Colorado Municipal League ("CML" or "the League") respectfully submits the following *Amicus* Brief in Support of the position of Plaintiffs/Appellants, 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 located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. Its members include all 103 home rule municipalities, 166 of the 168 statutory municipalities, and the lone territorial charter municipality. This membership includes all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

According to the records[1] of the Colorado Division of Local Government, at least 63 Colorado municipalities have formed urban renewal authorities (URAs) under the provisions of §§ 31-25-101, *et seq.*, C.R.S. (the urban renewal statutes). A total of 53 of the 63 URAs in Colorado, including the one in Aurora, were formed by home rule municipalities operating under the authority of their own

[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/

charters pursuant to Article XX of the Colorado Constitution as well as the urban renewal statutes.

Subject to the approval of the municipality that created each URA, any of the 63 URAs in Colorado may engage in tax increment financing (TIF) in order to carry out urban renewal projects. Thus, the manner in which tax increments are calculated is keenly important to municipalities throughout Colorado, as the feasibility of many redevelopment projects will hinge on an adequate flow of tax increment revenue to fund project costs.

This case presents the court with an important question of first impression. The core dispute in this case centers on the proper interpretation of a single sentence in the urban renewal statutes codified at § 31-25-107(9)(e), C.R.S., to wit:

> "In the event there is a general reassessment of taxable property valuations in any county including all or part of the urban renewal area subject to division of valuation for assessment under paragraph (a) of this subsection (9) . . . the portions of valuations for assessment . . . under both subparagraphs (I) and (II) of said paragraph (a) shall be proportionately adjusted in accordance with such reassessment . . . ."[2]

[2] Virtually identical language governing TIF calculations is included in the statutes governing downtown development authorities (DDAs) in Colorado. § 31-25-807(3)(e), C.R.S. According to records of the Division of Local Government, municipalities in Colorado have authorized the creation of at least 16 DDAs. Therefore, any ruling on the merits in this case will affect our understanding of TIF calculations in these entities as well.

Remarkably, this sentence was included in the legislation that originally added TIF powers to Colorado's urban renewal statutes in 1975, HB 75-1009. Moreover, according to the record in this case, the interpretation of this sentence by the Property Tax Administrator (PTA), as reflected in the PTA's Assessors' Reference Library has been essentially consistent since 1985, at least insofar as the meaning of the terms "general reassessment" and "proportionally adjusted" are concerned. *See* District Court Order page 12. But only now is the lawful interpretation of this sentence being tested in the courts, and ultimately the courts will determine the appropriate meaning of the language regardless of how long it has been interpreted by the PTA in a particular way. *Huddleston v. Grand Cty. Bd. of Equalization,* 913 P.2d 15, 17 (Colo. 1996).

Although a great deal of AURA's argument in this case to date has centered on the meaning of the term "general reassessment," CML believes the more pertinent question is whether the PTA's guidance in regard to how the "base" value and the "incremental" value of taxable property in a TIF area are "proportionally adjusted" is consistent with the governing law. In particular, the manner in which the "base" value of property is adjusted periodically during the life of a TIF plan may have a huge impact on the amount of tax increment revenue available to pay project costs.

Colorado municipalities want and need clarity, consistency, and predictability in the way tax increment revenues are calculated by county assessors. Obviously, municipalities and their URAs need predictability in order to assess the feasibility of any proposed TIF project, i.e. to see whether the project "pencils out." But municipalities and URAs are also under a statutory obligation 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 a project may be approved. § 31-25-107(3.5)(a), C.R.S.

The 63 urban renewal authorities in Colorado are actually located in a total of 29 different counties. Thus, municipalities depend on the interpretations and calculations of 29 different county assessors in apportioning TIF revenue. The so-called "Subjective Causation Methodology" whereby individual assessors make value judgements about whether increasing property values in a TIF area are attributable to the urban renewal project or instead to the general "market" changes in property value is opaque and subject to inconsistent application. By the PTA's own admission in her guidance manuals, the task of parsing the distinction between "reassessment" and "non-reassessment" changes in values is a "difficult" one for individual assessors to perform. ASSESSORS' REFERENCE LIBRARY VOL. 2, 12.15 (2020). Furthermore, although the PTA "recommends" that individual county

assessors develop a "tracking" system, the PTA's guidance notes that assessors are not required by state law to "calculate an increment value for each property. Rather the amount of the increment, if any, is based on the aggregate total valuation for assessment of the entire TIF area." ASSESSORS' REFERENCE LIBRARY VOL. 2, 12.14 (2020).

Colorado municipalities want the courts to resolve the question of whether or not the "Subjective Causation Methodology" for adjusting the "base" property valuation makes logical sense and, more importantly, comports with the letter of the law.

SUMMARY OF THE ARGUMENT

The trial court erred when it determined that AURA lacks standing to challenge the PTA's interpretation of the provisions of the urban renewal statutes governing proportional adjustment of the "base" valuation in a TIF district. In addition to the arguments made by AURA on this point, the Court should consider that the City of Aurora, in creating AURA in the first place, was legislating on a matter of local and municipal concern under its home rule authority.

To the extent the Court reaches the merits of the question of whether the PTA has correctly interpreted the statute and issued guidance to county assessors on the manner in which "base" valuation in a TIF district should be proportionally

adjusted, the Court should hold that the PTA's interpretation does not comport with the letter or spirit of the statute, or with previous case law interpreting the statute.

ARGUMENT

A. Understanding the basic relationship between urban renewal authorities and the municipalities that create them

From the outset shortly after the Colorado urban renewal statutes were adopted in Colorado, the courts recognized that both the state and municipalities have an interest in mitigating slum conditions and urban blight. However, the statute did not intrude on the authority of home rule municipalities to govern their own local affairs under Article XX, Colo. Const. because each city ultimately determines for itself whether to employ the tools made available in the urban renewal statutes. *Rabinoff v. District Court*, 360 P.2d 114 (Colo. 1961).

An urban renewal authority established under Colorado law has a legal identity that is separate and apart from the municipality that creates the authority. Although created in accordance with a state statute, an urban renewal authority is not considered a state agency and instead is formed to meet the local needs of the municipality that brings the authority into existence. An urban renewal authority is "statutorily defined as a 'body corporate and politic' established to carry out urban renewal projects **for a municipality**." *James v. Board of Commissioners*, 611 P.2d

976, 977 (Colo. 1980) (citing § 31-25-104(1)(b), C.R.S.) (emphasis supplied). Because an urban renewal authority enjoys a separate corporate existence, debt of the authority is not considered debt of the municipality that created the authority. *Denver Urb. Renewal Auth. v. Byrne*, 618 P.2d 1374, 1381-1382 (Colo. 1980).

Nevertheless, as a practical matter, urban renewal authorities have an intimate, hand-in-glove working relationship with the municipalities that create the entity. This reality is reflected in numerous provisions of the urban renewal statute. First and foremost, an urban renewal authority cannot exist unless the governing body of a municipality allows it to exist. § 31-25-104, C.R.S. Any urban renewal plan, including any TIF element in such a plan, must be approved by the governing body of the municipality. § 31-25-107, C.R.S. And any urban renewal plan must conform to the comprehensive land use plan of the municipality itself. § 31-25-107(4)(f), C.R.S.

Notwithstanding the separate corporate identity of urban renewal authorities, in many cities and towns throughout Colorado the administration of the authority is essentially nested within the operations of the municipality itself. The statutes allow the governing body of the municipality to act, *ex officio*, as the board of the urban renewal authority (and, indeed, in Aurora this is precisely the case, with the Aurora City Council performing this role). § 31-25-115(1), C.R.S. The legal

counsel for the municipality may also act as legal counsel for the urban renewal authority. § 31-25-104(2)(c), C.R.S. An urban renewal authority may typically be "quartered" within the offices of the municipality that created the authority, and logistically supported and staffed by employees of the municipality. §§ 31-25-105(1)(f); 31-25-112(1)(h), C.R.S.

All of this is to say that, when considering the question of whether or not AURA enjoys standing to challenge the statutory interpretations made by the PTA, AURA should be understood as acting in the interest of the home rule municipality that created AURA in the first place to serve the needs of the City of Aurora.

B. Home rule municipalities enjoy a special exception from the general rules governing political subdivision standing to sue state agencies

CML fully supports the arguments made by AURA in Section IV (E) of their Opening Brief, to the effect that AURA is not a subordinate agency to the PTA, and therefore should not be denied standing to challenge the interpretations of the urban renewal statutes made by the PTA. CML urges the court to consider the additional argument that AURA is a creation of a home rule municipality, and thus the issue of standing should be evaluated through a home rule lens.

Admittedly, the City of Aurora itself did not enter this case a party plaintiff. However, as explained above, AURA should be understood as representing the interest of the city in executing urban redevelopment projects.

In *DURA v. Byrne,* 618 P.2d at 1381 the Supreme Court held, "by virtue of Article XX, a home rule city is not inferior to the General Assembly concerning its local and municipal affairs. The Colorado Constitution confers upon a home rule city a legally protected interest in its local concerns." Thus *Byrne*, a case involving interpretation of the urban renewal statutes, coined a new standing rule for home rule municipalities, as distinct from the rules that normally apply to other political subdivisions of the state. The expanded standing of home rule cities to challenge state actions was later vividly illustrated in *City of Greenwood Village v. Petitioners for the Proposed City of Centennial,* 3 P.3d 427 (Colo. 2000), in which the court plainly stated, "we have recognized an exception to the rule [on political subdivision standing] when a state statute impacts a home-rule city's interest in the administration of local affairs." 3 P.3d at 438. Notably, in asserting standing to challenge a recently adopted state law limiting its ability to carry out pending annexations, Greenwood Village asserted interests that are remarkably similar to the interests that any municipality has in executing urban renewal plans: "Greenwood Village's interest in expanding its population and tax base in the provision of local services, including sharing the cost of its investments in infrastructure, is substantial and would be adversely affected if we uphold the 1999 statute . . . ." 3 P.2d at 437.

The PTA is a proper party in a lawsuit brought by a taxpayer challenging the administration of a property tax assessment statute. *Lucchesi v. State*, 807 P.2d 1185, 1194 (Colo. App. 1990). So, too, should a home rule municipality, or an entity like AURA acting on behalf of a home rule municipality, be able to name the PTA in a suit challenging her administration of laws related to the calculation and distribution of TIF revenues. The very existence and viability of any TIF project serving the interests of the municipality is dependent upon the lawful and appropriate distribution of incremental property tax revenue to the fund of the urban renewal authority created by that municipality.

C. There is no statute of limitations for challenging an *ultra vires* interpretation of a statute by a state administrative agency

CML acknowledges that the fundamental way the "base" property valuation is supposed to be periodically adjusted by county assessors has been addressed in the PTA's Assessor's Reference Library manuals for many years. Moreover, we understand it is axiomatic that the courts tend to defer to longstanding administrative interpretations of statutes by the officers charged with enforcing those statues. However, this sort of deference is not absolute. Sheer longevity does not render an administrative interpretation immune from challenge. A vivid illustration of this principle is provided by the decision in *Department of Transportation v. Amerco Real Estate Company*, 380 P.3d 117 (Colo. 2016). In

that case, the Colorado Transportation Commission (the Commission) adopted a resolution in 1994 delegating to the Colorado Department of Transportation (CDOT) personnel the authority to determine individual parcels to be condemned in an eminent domain action. This process went unchallenged for years. But when a plaintiff finally asserted a claim that the process violated the state statute governing eminent domain actions by CDOT, the Colorado Supreme Court ruled that the procedures being employed by the Commission for the previous 24 years did in fact violate the statute.

Although municipalities and their urban renewal authorities have never heretofore challenged the PTA's interpretation of the TIF allocation requirements of the urban renewal statutes, there is nothing that prevents them from doing so now in reaction to the allocation methods being utilized by one particular assessor in Arapahoe County.

D. A more rational way to periodically adjust the "base" valuation in a TIF area consistent with the statute and prior case law

In their Opening Brief and in their briefing in the trial court, AURA correctly shines a light on the way the "Subjective Causation Methodology" reflected in the PTA's guidance for county assessors is inconsistent with the way the courts have traditionally understood TIF and interpreted the urban renewal statutes. The most fundamental lynchpin of TIF, indeed the key to its legality, is the "but for" theory,

i.e. the principle that other taxing entities are not being injured due to "diversion" of their tax revenue because, (1) the other taxing entities will continue to derive property tax revenue from the "base" of property valuation that existed before the TIF was created; and (2) **presumptively**, future increases in property tax revenue in the TIF area are deemed to be catalyzed by the urban renewal project itself. In *Byrne,* the Supreme Court succinctly articulated the "but for" theory:

> "[N]or does Denver lose the benefit of its tax revenues which would have otherwise been available for its use. The portion of tax revenues allocated to DURA represent the amount generated by virtue of increased property valuation which would not have existed **but for** the project. In this light, it becomes clear that the fiscal base of Denver is not impaired."

618 P.2d at 1387 (emphasis supplied). Both the *Byrne* decision and the subsequent ruling by this court in *Board of County Commissioners of Boulder County v. City of Broomfield,* 7 P.3d 1033 (Colo. App. 1999) noted that another reason taxing entities are not injured due to an alleged revenue "diversion" caused by a TIF is because § 31-25-107(9)(e), C.R.S. requires "proportional adjustment" of the base valuation of properties in the TIF area every time there is a general reassessment of property in the entire county.

How must the term "proportional adjustment" be construed consistent with the "but for" theory articulated by the courts? CML submits that the "but for" theory is inevitably based upon the assumption that a blighted area of a

municipality would remain unchanged and un-redeveloped absent the urban renewal project. The properties would simply languish in their current condition absent the type of TIF investments that will catalyze changes in property value to occur. However, it is not reasonable to expect the value of even blighted properties to remain static for twenty-five years (*i.e.* the maximum lifespan of a TIF, § 31-25-107(9)(a), C.R.S.). Therefore, after each general reassessment of property in a county, it is necessary and appropriate to adjust the base valuation proportional to overall market trends in the county in which the TIF area is located. The original determination of "base" property valuation in a TIF area is rooted in known quantities and qualities of real and personal property in various classes of valuation in the year before the TIF is created. The periodic adjustment of this 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 and all other concerned parties than the current system of parsing "reassessment" and "non-reassessment" valuation changes as provided in the PTA's manuals.

To the extent this court or a future court reaches the merits of this question, CML will continue to urge a construction of the statute that comports with the "but for" theory previously articulated by the courts.

CONCLUSION

Wherefore, CML respectfully urges this court to reverse the June 18, 2019 Order of the district court and hold that the AURA does enjoy standing to challenge the interpretations of the urban renewal statute made by the PTA. If the court reaches the merits, CML urges the court to interpret § 31-25-107(9)(e), C.R.S. in a manner that comports with prior case law.

DATED this 15th day of September, 2020

By: s/ *David W. Broadwell*
David W. Broadwell (# 12177)
Laurel Witt (#51188)
1144 Sherman St.
Denver, CO 80203-2207

Attorney for *Amicus Curiae* Colorado Municipal League

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2020, a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE*, COLORADO MUNICIPAL LEAGUE, IN SUPPORT OF THE PLAINTIFFS/APPELLANTS** was served via Colorado Courts E-Filing to the following:

Attorneys for Plaintiff/Appellant Aurora Urban Renewal Authority:
Thomas W. Snyder
Daniel C. Lynch
Thomas A. Isler
KUTAK ROCK LLP
1801 California St., Ste 3000
Denver, CO 80202
Tel: 303-297-2400
Thomas.snyder@kutakrock.com
Daniel.lynch@kutakrock.com
Thomas.isler@kutakrock.com
Christine McKenney
Office of Aurora City Attorney
Aurora Municipal Center
15151 E. Alameda Pkwy., Ste. 5300
Aurora, CO 80012
Tel: 303-739-7030
CMcKenne@auroragov.org

Attorney for Plaintiffs/Appellants Corporex Colorado, LLC, Fitzsimmons Village Metropolitan District No. 1, Fitzsimmons Village Metropolitan District No. 2, Fitzsimmons Village Metropolitan District No. 3
Craig D. Joyce
FAIRFIELD and WOODS, P.C.
1801 California St., Ste. 2600
Denver, CO 80202
Tel: 303-830-2400
cjoyce@fwlaw.com
ahelm@fwlaw.com

Attorneys for Defendant/Appellee PK Kaiser, in his role as Arapahoe County Assessor
Ronald A. Carl, Arapahoe County Attorney
John R. Christofferson, Deputy County Attorney
Benjamin P. Swartzendruber, Assistant County Attorney
5334 S. Prince St.
Littleton, CO 80120
Tel: 303-795-4639
rcarl@arapahoegov.com
jchristofferson@araphoegov.com
bswartzendruber@arapahoegov.com

Attorneys for Defendant/Appellee Jo Ann Groff, in her role as the State of Colorado Property Tax Administrator
Phil Weiser, Attorney General
Robert H. Dodd, Assistant Solicitor General
John H. Ridge, Assistant Attorney General
Colorado Attorney General's Office
1300 Broadway, 8th Floor
Denver, CO 80203
Tel: 720-508-6325
Robert.dodd@coag.gov
John.ridge@coag.gov

/s/ David W. Broadwell
David W. Broadwell
General Counsel
Colorado Municipal League