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# FOREWORD

It is with great pride that I offer up some thoughts about this publication. It is a complete revision of previous League-produced materials on the municipal use of urban renewal — one of the most important tools cities and towns in Colorado have for revitalization, redevelopment, and economic development. This tool has stood the test of time, and is a well understood part of municipal governance.

This publication provides a clear explanation of the law and other topics connected to urban renewal. There is also a brief chapter on downtown development authorities.

The principal author is well-known Boulder-based urban renewal attorney Paul Benedetti. There are few individuals more closely associated with the subject than Paul. I want to give him a special shout out for his leadership and guidance over many years.

The League also wishes to recognize and express sincere appreciation to the following additional authors:

Chapter 2 on current case law, David M. Neville of Kraemer Kendall Rupp Deen Neville LLC in Colorado Springs. David serves as counsel to the Colorado Springs Urban Renewal Authority.

Chapter 3 on urban renewal impact reports, Graham T. Anderson, a senior analyst with Anderson Analytics LLC.

Chapter 4 on selling tax increment bonds, Dee Wisor, a partner with Butler Snow LLP.

Nothing in this publication should substitute for the advice of your own legal counsel. The intent of this publication is to provide a broad overview of the topic and the many considerations which need to be made in using urban renewal and tax increment finance.

Sam Mamet
retired CML Executive Director
August 2019

This publication is available for purchase at *www.cml.org*.

# CHAPTER 1: URBAN RENEWAL

*By Paul C. Benedetti, attorney at law*

## INTRODUCTION

Since the adoption of the Colorado Urban Renewal Act in 1958, urban renewal has evolved from mostly large federally funded projects to local projects of varying size financed with tax increment (TIF) revenues.

According to the Department of Local Affairs, there are urban renewal authorities (URAs) in 61 Colorado municipalities (one URA per municipality) as of the date of this publication.

Since CML published its 2004 handbook on the topic, the laws governing urban renewal have been extensively amended prompting this update of the law and procedure. Included is practical advice and experience from professionals serving both the public and private sectors that should prove helpful to those using this publication.

A word of advice: Urban renewal law is complex. Caution is always advisable, and a general publication of this kind is no substitute for advice from legal counsel familiar with the statute and procedure.

## NATURE AND ORGANIZATION

URAs are independent single-purpose statutory bodies "corporate and politic" authorized to carry out urban renewal projects and regional tourism projects under the Colorado Urban Renewal Law, C.R.S. §§ 31-25-101 through 116. There is only one URA authorized to be organized in a municipality, but each URA can carry out multiple urban renewal projects anywhere in the municipality that qualifies as a slum or blighted area, discussed below.

The act itself creates the URA under the police power of the state, but each URA can only operate if the city council or town board (governing body) of the municipality makes the required findings and declarations, and complies with the organizational requirements of the act.[1]

The legislature declares in § 31-25-102 (1) that the prevention and elimination of slums and blight is a matter of public policy and statewide concern. The first case to consider possible conflict with the municipal home rule provisions of Article XX of the Colorado Constitution cited the legislative declaration and held that in the absence of local legislation the state has power to adopt a uniform state-wide urban renewal law.[2] Subsequently, the Colorado Supreme Court found and declared that urban renewal is a matter of mixed statewide and local concern and that both home rule governments and the legislature can act to alleviate blight, provided there is no conflict between the two.[3]

The Colorado Sunshine Act applies to URAs,[4] but Article X, § 20 of the Colorado Constitution (commonly known as the Taxpayer Bill of Rights or TABOR) does not.[5]

URAs are organized pursuant to C.R.S. §§ 31-25-104 or 115. At least 25 registered electors of a municipality must file a petition with the municipal clerk stating there is a need for a URA to function in the municipality. The governing body holds a public hearing to determine the need for the URA. The act requires notice of the hearing to be published in a newspaper of general circulation at least 10 days before the hearing stating the time, place, and purpose of the hearing.

Before approving the establishment of the URA, the governing body must make several findings, including that at least one or more slum or blighted areas exist within the municipality, and that the development or redevelopment of the area is necessary in the interest of the public health, safety, morals, or welfare of the residents of the municipality.

Because there are few slum areas in Colorado, most, if not all, findings related to organizing URAs and approving urban renewal projects rely on meeting the requirements, findings, and declarations contained in the definition of "blighted area" in § 31-25-103 (2) of the act, which are discussed in the section "URAs Operate in Blighted Areas," below.

After the public hearing on the petition, if the governing body decides against making the required findings and declaration, it must adopt a resolution denying the petition. After six months have expired from such denial, subsequent petitions may be filed with the clerk and new hearings and determinations made.

If the governing body adopts the resolution authorizing the URA, it must appoint a board of commissioners to govern the URA and carry out its statutory duties.

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1 C.R.S.§ 31-25-104.

2 *Rabinoff v. District Court*, 360 P.2d 114, 122 (Colo. 1961).

3 *Pillar of Fire v. DURA*, 509 P.2d 1250 (Colo. 1973); *Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374, 1385 (Colo. 1980).

4 C.R.S. § 24-6-402.

5 *Olson v. City of Golden*, 53 P.3d 747 (Colo. App. 2002).

### Effect of HB 15-1348 on Organization

Colorado House Bill 15-1348 altered the composition of URAs by amending §§ 31-25-104 and 115 of the act. To represent the collective interests of counties and all affected taxing entities, the membership of URA boards of commissioners and directives requiring specific appointments of commissioners were expanded.

For URAs organized on or after Jan. 1, 2016, the following procedure applies. Application of the appointment requirements to URAs in existence prior to that date is discussed in "Effect of HB 15-1348 on Boards of Urban Renewal Authorities Formed Before Jan. 1, 2016," below.

Note that for URAs formed after Jan. 1, 2016, the rights of the taxing entities to make appointments to the URA commission exist regardless of any intention by the governing body or URA to use property tax increment financing described in "Tax Increment Financing and Other Revenue Sources," below.

There is no specific notice or procedural direction given to municipal and URA officials on implementation of the new membership requirements. The usual procedure is to advise the relevant taxing entities by mail of the opportunity to make the appointments. It is up to the taxing entities to make the required appointments. The position remains vacant unless and until the taxing entities act to make the required appointments.[6] Local officials may provide advice and assistance to facilitate the appointments, but do not have the right or power to compel any appointment.

### Urban Renewal Authorities Organized on or after Jan. 1, 2016, where the Governing Body Is Appointed as the Board of Commissioners

For URAs organized on or after Jan. 1, 2016, where the governing body designates itself as the authority under § 31-25-115, the following procedure applies.

HB 15-1348 added § 31-25-104 (2.5) to the act and mandates that, if the governing body designates itself as the URA, one additional commissioner each may be appointed by the county commissioners in the county or counties where the municipality is located, from the collective elected boards of special districts, and from the relevant elected school district boards of education that levy property taxes within the "boundaries of the urban renewal authority area," which is an undefined term that can be interpreted to mean the URA's area of operation (the municipal limits) or within the boundaries of a proposed or existing urban renewal plan area.

There is no specific notice required to be given to the taxing entities about the right to appoint the three additional commissioners to the URA board. The usual procedure is to notify the affected entities by mail. The decision as to how many special districts should be contacted about the right to make an appointment may depend on the size of the municipality and how many separate special districts operate within the municipal boundaries. Some municipalities confine notice to those projected to be included in a specific UR Plan area while others notify all special districts in the municipality that the opportunity to make the appointment representing their collective interests exists.

Note that the county representative does not have to be a county commissioner, but the school district and special district representatives must be an elected member of a board of education or special district board.

If adding the three taxing entity representatives results in an even number of commissioners, the mayor appointments an additional commissioner to restore an odd number of commissioners.[7]

If the municipality is within the boundaries of multiple counties, school districts, and will affect multiple special districts, the relevant taxing bodies must decide among themselves which individual will represent each of their interests.

### Urban Renewal Authorities Organized on or after Jan. 1, 2016 where a Separate Board of Commissioners Is Appointed

The statute also provides for appointment of a separate board of 13 commissioners.[8] One commissioner each may be appointed by the county commissioners, from the collective boards of special districts, and from the relevant elected school district boards of education. If no county, special district, or school district appoints a commissioner, the seat remains vacant until the applicable appointment is made.

The mayor, with concurrence of the municipal governing body appoints the additional ten members required by the statute.

The other requirements and comments listed in "Urban Renewal Authorities Organized on or after Jan. 1, 2016, Where the Governing Body is Appointed as the Board of Commissioners," above, apply to appointments to a separate board of commissioners.

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6 C.R.S. § 31-25-104 (2)(a)(II).
7 C.R.S. § 31-25-104 (2.5).
8 C.R.S. § 31-25-104 (2).

## Procedure to Complete Urban Renewal Authority Organization

The commissioners must sign and file a certificate regarding the organization of the URA with the Colorado Department of Local Affairs (DOLA) to complete the organization process.[9] The filing of the certificate is the official act that constitutes the commissioners as the URA in the relevant municipality. The URA is authorized to operate within the boundaries of the municipality, except that, with the cooperation and approval of a county, unincorporated areas adjacent to an area included in a urban renewal plan (also referred to as urban renewal area) in a municipality may be made part of an urban renewal plan. See discussion below in "Inclusion of Unincorporated Land in Urban Renewal Area."

If the procedure for appointment of commissioners is complete, and one or more of the taxing entities entitled to make appointments has not acted, the statute does not state that filing with DOLA must be delayed. Therefore, it is recommended that the certificate signed by those commissioners duly appointed should be filed to complete the process. The other seats or seats will remain vacant until filled by the taxing entities.

If the governing body denies the petition to organize a URA, it must wait at least six months to consider a subsequent petition.[10]

## Effect of HB 15-1348 on Boards of Urban Renewal Authorities Formed before Jan. 1, 2016

When and how HB 15-1348 affects the composition of those URAs already in existence on Jan. 1, 2016 has been clarified by SB 17-279, which amended C.R.S. § 31-25-107 (7). When and if a new urban renewal plan is approved or an existing plan (as of Jan. 1, 2016) is modified substantially as discussed in "Modification of Urban Renewal Plans Approved Before Jan. 1, 2016," the above requirements for expansion of the urban renewal commission will be required. If the governing body of the municipality is operating as the URA, the requirements for expanding the URA board are the same as when the URA is organized with the governing body as the board of commissioners. Similarly, if an existing plan is substantially amended or a new plan is approved and the URA is governed by a separate board of commissioners, the URA board must be expanded by the same procedure as applicable when the separate board is appointed upon organization of a new URA.

## Transfer of Governance of Urban Renewal Authorities and Abolishment

Governance of an existing URA may be transferred to the governing body only by majority vote at a regular general election. The city council or town board may abolish a URA if adequate arrangements have been made for payment of any outstanding indebtedness and other obligations of the URA under C.R.S. § 31-25-115.

However, if the governing body serving as the URA commission decides to transfer governance to a separate board of commissioners, nothing in the urban renewal law appears to prevent this if the procedure for appointment of the separate board is followed by the mayor and governing body.

As a practical matter, if the URA is abolished with existing financial obligations in place, the ability to use tax increment financing to pay those obligations would also be abolished creating a problem for the governing body and the municipal electorate.

## Conflicts of Interest and Removal of Commissioners

The procedure governing conflicts of interest is found in § 31-25-104 (3). No commissioner, officer, or employee of the URA nor any immediate member of the family of any such commissioner, officer, or employee is permitted to acquire any interest, direct or indirect, in any urban renewal project or any property included or planned to be included in any urban renwal project or in any contract or proposed contract for materials or services to be furnished or used in connection with any such project.

Any such interest is required to be disclosed in writing to the board of commissioners and entered into the official minutes of the URA. Thereafter, the party who has such potential conflict is prohibited from participating in any planning or undertaking of the project unless the URA determines that any such participation would not be contrary to the public interest. Acquisition or retention of such interest or willful failure to disclose such interest constitutes misconduct in office.

The mayor, with the consent of the governing body, may remove a commissioner for inefficiency or neglect of duty or misconduct in office but only after the commissioner has been given a copy of the charges and has had an opportunity to be heard in person or by counsel before the governing body. Upon such removal the mayor is required to file with the municipal clerk a record of the charges, proceedings, and findings made.[11]

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9 C.R.S. § 31-25-104 (b).

10 C.R.S. § 31-25-104(1)(c).

11 C.R.S. § 31-25-104 (4).

## POWERS AND DUTIES OF URBAN RENEWAL AUTHORITIES

The powers and duties of URAs has not changed appreciably in recent years, except for a court's interpretation of the requirements when the URA exercises the power of eminent domain. See "Provisions of the Plan and Plan Approvals Related to Acquisition of Private Property by Eminent Domain for Subsequent Transfer to a Private Party for Redevelopment" on page 8.

URAs have the following powers under § 31-25-105 of the act:

1. The powers necessary to carry out the purposes of the act.
2. Sue and be sued; adopt and have a seal; perpetual existence; and adopt bylaws, orders, rules, and regulations.
3. Undertake urban renewal projects, execute contracts and other documents, including advances, loans, grants, and contributions from the federal government or other sources.
4. Provide for public facilities and improvements; dedicate property for public facilities, improvements and purposes; and agree to contract conditions related to such powers, including those attached to federal financial assistance.
5. Arrange for planning and zoning of an urban renewal area with the municipality.
6. Enter private property with the consent of the owner to make surveys and appraisals and to obtain a court order to do so if the owner refuses permission.
7. Acquire property by purchase, lease, option, gift, grant, bequest, devise, or otherwise or by eminent domain, but the power to exercise eminent domain must be approved as part of an urban renewal plan or modification of an existing plan by majority vote of the governing body. Other requirements related to use of eminent domain are discussed in more detail in "Provisions of the Plan and Plan Approvals Related to Acquisition of Private Property by Eminent Domain for Subsequent Transfer to a Private Party for Redevelopment." The URA must have the consent of the owner of public property to condemn property devoted to a public use.
8. Hold, improve, clear, or prepare any property for redevelopment.
9. Mortgage, pledge, or otherwise encumber or dispose of property in accordance with the urban renwal plan.
10. Insure property and operations of the URA.
11. Invest funds.
12. Borrow money and apply for loans, grants and contributions and give security therefore.
13. Appropriate and spend funds and establish separate accounts.
14. Prepare and submit proposed plans, including urban renewal plans, to the governing body.
15. Make relocation plans/arrangements/payments to residents, individuals and businesses displaced by urban renewal projects.
16. Rent or use equipment and office facilities for the URA.
17. Prepare plans for a program of voluntary repair and rehabilitation of buildings and improvements and enforcement of applicable codes and regulations.
18. Create and report methods and techniques for the prevention and elimination of blight within the municipality.
19. Issue bonds for debt. The definition of "bonds" in § 31-25-103 (3) includes a broad range of financial obligations.
20. A URA does not have the power to levy or assess taxes of any nature, including special assessments or to compel any taxing entity to levy taxes.[12]

These powers are not limited by any other law with respect to the planning or undertaking of projects or the acquisition, clearance or disposition of property unless specifically stated by the legislature.[13]

Other significant limitations on URA powers regarding redevelopment activities, other than those that may be imposed by the governing body in an urban renewal plan, are in the federal tax code, and regulations related to the tax-exempt status of financing of the URA's activities in furtherance of an urban renewal plan. These matters are beyond the scope of this handbook and require specialized advice from bond counsel.

12 C.R.S. § 31-25-107(9)(c).
13 C.R.S. § 31-25-105(1)(e).

## URBAN RENEWAL AUTHORITIES OPERATE IN BLIGHTED AREAS

URAs are created to prevent and eliminate conditions of slum and blight in Colorado municipalities. Few, if any, urban renewal projects in Colorado include conditions that qualify as a slum area under the statute. Rather, the establishment of URAs and urban renewal plans commonly is based on the definition of "blighted area" in C.R.S. § 31-25-103(2).

In making the determination as to whether an area is blighted, any particular condition found to be present may satisfy as many of the factors in C.R.S. § 1-25-103(2), as are applicable to each condition. For example, presence of a building that is included in a list of deteriorated structures and also poses a danger by fire may further qualify as an unsafe condition and again as a condition that endangers life or property by fire or other causes.

A blighted area means an area that, in its present condition and use, contains at least four of the following factors (or five if eminent domain is approved as part of the urban renewal plan). See "Provisions of the Plan and Plan Approvals Related to Acquisition of Private Property by Eminent Domain for Subsequent Transfer to a Private Party for Redevelopment" on page 8

To make sure small areas may qualify for urban renewal treatment, a condition that qualifies under one of the following factors also may qualify if there is no objection by the owners or tenants of the proposed area (see factor (l) from the following list). The letter designation matches the subsection listed for each factor in C.R.S. § 31-25-103(2).

The conditions listed are not complete, but merely illustrate conditions that qualify under the listed statutory category or factor.

(a) Slum, deteriorated, or deteriorating structures. It is the process of deterioration or the existence of substandard structures that constitutes blight. Under this factor, the emphasis is upon the condition of structures in the proposed urban renewal area as a whole.

(b) Predominance of defective or inadequate street layout. This factor includes such conditions as lack of streets; inadequate street widths; dead ends; poor conditions of existing streets; poor provisions or unsafe conditions for the flow of traffic, including pedestrians and bicycles; traffic congestion; inadequate emergency vehicle access; missing, obsolete and impractical street layout; or inadequate facilities for traffic flow or movement through the area.

(c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness. Included here are such problems as long and narrow or irregularly sized properties; fractional lots; obsolete and impractical lot layout; and configurations resulting in stagnant and unproductive conditions of the land by misuse or nonuse.

(d) Unsanitary or unsafe conditions. The area does not have to contain slums to qualify as blighted and require redevelopment. Elements of this factor may include the existence of a floodplain or flood prone area; dangerous traffic or pedestrian conditions; inadequate storm drainage systems; poor fire protection facilities; high or unusual crime statistics; above average incidences of public safety responses; inadequate utility systems or lack of water or sanitary sewer systems; or existence of contaminants or hazardous materials or conditions on the ground or in buildings or other structures.

(e) Deterioration of site or other improvements. Elements of this factor may include deteriorated or obsolete streets or other public infrastructure; damaged or missing public utilities; and conditions listed in factors (b) and (d).

(f) Unusual topography or inadequate public improvements or utilities. Severe and significant slopes making use of property difficult, very expensive, or impractical may be included in this factor; and some of the aspects of factors listed under (b), (d), and (e) may also apply to this factor.

(g) Defective or unusual conditions of title rendering the title unmarketable. This factor includes diversity and multiplicity of ownership making assemblage of land or redevelopment of a site difficult or impossible; land restrictions that inhibit redevelopment; and title problems such as the interruption of the chain of ownership or tracing of the ownership of the property.

(h) The existence of conditions that endanger life or property by fire or other causes. Factors such as buildings or property not in compliance with fire codes, building codes or environmental regulations (asbestos or soil contamination) and conditions found in other factors (such as unsanitary or unsafe conditions) also may apply here.

(i) Buildings that are unsafe or unhealthy for persons to live or work in because of building code violations, dilapidation, deterioration, defective design, physical construction, or faulty or inadequate facilities. Some of the factors listed in (a), (d), (e), and (h) also may apply here.

(j) Environmental contamination of buildings or property. Aspects of the site qualifying as blight under (d) or (h) may also qualify here.

(k.5) The existence of health, safety, or welfare factors requiring high levels of municipal services or substantial physical underutilization or vacancy of sites, buildings, or other improvements. Many of the conditions listed above can also apply here. In addition, evidence of higher than normal fire and other public service calls can be listed as well as the presence of numerous vacant buildings (regardless of physical condition).

(l) If there is no objection by the property owner(s) and tenants of such owner(s), if any, to the inclusion of such property in an urban renewal area, "blighted area" also means an area that, in its present condition and use, and by reason of the presence of any one of the blight factors, substantially impairs or arrests the sound growth of the city, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a menace to the public health, safety, morals or welfare.

An area may be eligible for urban renewal if it meets the legal criteria as a slum or blighted area; however, qualifying as a slum area alone is extremely rare in Colorado. To qualify as a blighted area, it is not individual or separate conditions, facilities, structures, properties, or improvements that are the determinant of such designation, but rather the area taken as whole. An entire designated urban renewal area does not have to be blighted; the existence of at least four (or five if eminent domain is authorized in an urban renewal plan or one if there is no objection from property owners and tenants) blight factors within an area is all that is required to substantiate a designation as a urban renewal area.

When it added factor (k.5) in 2005, the Colorado General Assembly deleted a previous factor that read "inadequate public improvements or facilities" and combined it with "unusual topography." Thus, the absence of public improvements or facilities alone may not constitute a factor that can contribute to a finding of blight. No court has ruled on whether use of the disjunctive "or" makes unusual topography and inadequate public improvements separate factors. However, as stated above, if there is no objection by a property owner and any tenants, only one of the factors (a) through (k.5) is necessary to qualify as a blighted area.

## URBAN RENEWAL PLANS

Within 30 days of commissioning a study to determine if an area qualifies as an urban renewal area, § 31-25-107(1)(b) states that the URA must notify by mail any owner of private property in the study area that the URA is commencing a study to determine if the area is a slum or blighted area. If the URA determines that the area does not qualify, a similar notice must be mailed within 30 days of that determination. If the municipality commissions such a study, it is recommended that the municipality send the notices.

A URA exercises its powers by planning and carrying out urban renewal plans in specifically described urban renewal areas. Before an urban renewal plan for a urban renewal area can be approved, the governing body must find the area to be a slum area or a blighted area (or both) as defined in the act. "Slum areas" are defined as areas containing a predominance of dilapidated buildings. "Blighted areas" are defined more broadly. The definition of blight encompasses not only properties so dilapidated as to justify condemnation as nuisances, but also envisions the prevention of deterioration.

When determining whether slum or blight conditions are present, the area as a whole should be considered, even if the area includes properties or buildings to be acquired by the URA by eminent domain that are not themselves slum or blighted.

The requirements and prerequisites of including the power to acquire property in the urban renewal area by eminent domain are discussed in "Provisions of the Plan and Plan Approvals Related to Acquisition of Private Property by Eminent Domain for Subsequent Transfer to a Private Party for Redevelopment" on page 8. Recent court cases involving the exercise of eminent domain by a URA are discussed in Chapter 2.

The definition of "urban renewal plan" in § 31-25-103(9) states that it is a "plan for an (singular) urban renewal project" that conforms to a municipality's general or comprehensive plan. The urban renewal plan should be "sufficiently complete" to indicate such land acquisition, demolition, and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed. The urban renewal plan also should include zoning and planning changes, if any, land uses, maximum densities, building requirements, and the plan's relationship to definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational, and community facilities and other public improvements.

These activities and undertakings take time to accomplish, which makes it important to emphasize that it is all of the undertakings and activities over the life of the urban renewal plan that constitutes the urban renewal project, which is broadly defined and consists of multiple undertakings and activities listed in § 31-25-103(10). There is only one urban renewal project for each urban renewal plan.

The urban renewal act permits flexible plans that can be tailored to fit the needs of individual urban renewal areas. However, except if the owners or tenants in the urban renewal area do not object, the area must be drawn as narrowly as the governing body determines feasible to accomplish the planning and development objectives of the proposed urban renwal area.[14]

Urban renewal plans approved or substantially modified after June 1, 2010, must include a legal description of the boundaries of the urban renewal area and a separate legal description of any land classified by the county assessor as agricultural land within the last five years included within the plan boundaries.[15] . A map showing the same information should also be included.

It is necessary to meet with the county assessor before undertaking an urban renewal project using property tax increment financing. The assessor must be notified if the municipality has adopted an urban renewal plan or amendment that uses or adds property tax increment financing (TIF) to finance the project.

To make sure TIF provisions are implemented, the URA must furnish to the assessor a legal description of the urban renewal area, a map showing specific area boundaries, a copy of the urban renewal plan, and copies of relevant municipal ordinances or resolutions approving the plan. In addition, the assessor must be notified when an outstanding TIF obligation is paid off. Care must be taken, however, to advise the assessor if any other debt dependent upon TIF exists to pay other financial obligations of the urban renewal project in question.[16]

### Inclusion of Agricultural Lands in Urban Renewal Plan Areas

According to § 31-25-107(1)(c)(II), urban renewal areas may not include any land that has been classified as agricultural by a county assessor for property tax collection purposes at any time during the five-year period prior to adoption of a new urban renewal plan or any modification of an existing plan, unless one of the following exceptions applies.

1. The agricultural land is designated as a brownfield site by the U.S. Environmental Protection Agency; or
2. At least one-half of the urban renewal area consists of parcels of land characterized by a predominance of either permanent structures or above-ground or at-grade infrastructure and at predominance of either permanent structures or above-ground or at-grade infrastructure and at least two-thirds of the perimeter of the urban renewal area is contiguous with parcels of land characterized by a predominance of either permanent structures or above-ground or at-grade infrastructure; or
3. The agricultural land is an enclave within the municipality and the entire perimeter of the enclave has been contiguous with land characterized by a predominance of either permanent structures or above-ground or at-grade infrastructure for at least three years; or
4. Each public body that levies property taxes in the urban renewal area agrees in writing; or
5. The agricultural land was included in an approved urban renewal plan prior to June 1, 2010; or
6. The agricultural land is contiguous with an urban renewal area in existence as of June 1, 2010, and both areas are owned by the same person; and both areas are to be developed solely for the purpose of creating primary manufacturing jobs and related ancillary supporting jobs.

The municipality is required to "timely" notify the county assessor of the inclusion of agricultural land in a proposed or amended urban renewal area;[17] provide the assessor with a legal description of the proposed area; and include a separate legal description of any agricultural land included in the proposed plan area.[18] The assessor has 30 days to notify the municipality in writing that agricultural land has been improperly included in the proposed urban renewal area.[19] Thereafter the municipality may file suit to show that the land in question falls within any of the exceptions listed above.

If agricultural land is properly included in an urban renewal and property tax TIF (as described in "Tax Increment Financing (TIF) and Other Revenue Sources" on page 11) is part of the financing for the urban renewal project, the projected fair market value (not the current lower assessed value as agricultural land) the county assessor would place on the property for assessment as vacant land (a higher assessed value) becomes part of the base value for the purpose of calculating future TIF valuation, but the amount of taxes paid by the owner does not increase. This calculation is solely for the purposes of establishing an enhanced Base Value in the UR Area that contains agricultural land.[20]

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14 C.R.S. § 31-25-103(2)(l).
15 C.R.S. § 31-25-107(1)(d).
16 C.R.S. § 31-25-107(10).
17 C.R.S. § 31-25-107(10).
18 C.R.S. § 31-25-107(1)(d).
19 C.R.S. § 31-25-107(13).
20 C.R.S. § 31-25-107(9)(g).

## Provisions of the Plan and Plan Approvals Related to Acquisition of Private Property by Eminent Domain for Subsequent Transfer to a Private Party for Redevelopment

Eminent domain must be approved as part of an urbann renewal plan or substantial modification thereof by a majority vote of the governing body.[21] If the acquired property is to be dedicated to public use such as streets or public infrastructure the normal requirements for eminent domain by a public body under the Eminent Domain Procedure Act at C.R.S. §§ 38-1-101 *et seq.* apply. Section 31-25-105.7 states that in the event of a conflict between the Urban Renewal Act and the Eminent Domain Procedure Act, the provisions of the Eminent Domain Procedure Act apply.

If property acquired by eminent domain is to be transferred to a private party (for redevelopment or otherwise), the following provisions of the Urban Renewal Act and the Eminent Domain Procedure Act are among the applicable requirements.[22]

C.R.S. § 31-25-105.5(1) permits transfer of private property acquired by eminent domain to other private parties if one of the following conditions is met:

- The owner of the property consents to acquisition by the URA.
- The URA determines the property is no longer required and gives the original owner a first right of refusal.
- The property has been abandoned by its owner.
- The URA agrees to acquire additional property that the owner claims would be an economic remnant if it were not acquired.

If none of the forgoing provisions apply, the Urban Renewal Act and appellate decisions permit eminent domain to be used for subsequent transfer to a private party for redevelopment provided important requirements and special procedures are followed and specified notices are given. These requirements are generally found in § 31-25-105.5. Other statutory provisions are cited in the following discussion.

Some of the following provisions apply to the governing body when approving the plan. Others apply later, when the URA must make findings or meet requirements as part of an eminent domain action.

- Prior to commencement of the acquisition of property by eminent domain for transfer to a third party for redevelopment, the governing body must hold a public hearing on the use of eminent domain after providing written notice of the hearing to each fee owner of property at least 30 days prior to the date of the public hearing.[23]
- The same provision requires the governing body to base its authorization of eminent domain on a finding of blighted or slum conditions without regard to the economic performance of the property to be acquired.[24]
- The governing body must find that the principal public purpose for adoption of the urban renewal plan is to facilitate redevelopment to eliminate or prevent blight.[25]
- When an owner does not consent to the use of eminent domain, the governing body must determine that the property is within a blighted area or the property itself is blighted, and the urban renewal project shall be commenced no later than seven years from the date the blight determination is made. The blight designation must be based upon "reasonably current" information.[26]
- The governing body must find that at least five factors in the definition of "blighted area" are present in the area or on the property to be condemned and the area substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare.[27]
- Within seven days of a blight determination, the governing body must notify any property owners located in the area by regular mail at the last known address of record.[28]
- Within 30 days after the blight finding any fee owner of property subject to the finding may bring suit to challenge the finding.[29] If the suit is successful, the owner is entitled to recover reasonable attorney fees from the URA.[30]

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21 C.R.S. § 31-25-105(1)(e).
22 C.R.S. §§ 31-25-105(1)(e), 105.5, 105.7, 107(3)(b), 107(4.5), and § 38-1-101.
23 C.R.S. § 31-25-107(3)(b).
24 C.R.S. § 31-25-107(3)(b).
25 C.R.S. § 31-25-107 (4.5).
26 C.R.S. § 31-25-105.5(2)(a)(I).
27 C.R.S. § 31-25-105.5(5)(a).
28 HB 19-1084.
29 C.R.S. § 31-25-105.5(2)(b).
30 C.R.S. § 31-25-105.5 (3).

- The Eminent Domain Procedure Act states "A public use shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. This should be a finding by the governing body when the plan authorizes eminent domain."[31]
- Prior to commencing negotiation of an agreement for redevelopment of the property, the URA must invite proposals for redevelopment or rehabilitation of the property to be acquired by giving notice by mail to all owners, residents, or owners of business concerns acquired or to be acquired by eminent domain located on the property.[32]
- If the property to be acquired by condemnation is one of a set of parcels to be acquired, the URA must make a finding that redevelopment or rehabilitation of the remaining parcels is not viable under the plan without the holdout property.[33]
- The URA has the burden to prove by clear and convincing evidence that the taking of the property is necessary for the eradication of blight.[34]
- The URA must adopt relocation and land acquisition policies in accordance with C.R.S. Article 56 of Title 24, which means the same policies as are required for federal programs. In addition, the URA must agree to make a business interruption payment not to exceed the lesser of $10,000 or one-fourth of the average annual taxable income shown on the three most recent federal income tax returns of the displaced business.[35]
- Section 31-25-105.5(4)(b) states that where eminent domain displaces individuals, families, or business concerns, the URA must make reasonable efforts to relocate such parties within the urban renewal area if consistent with the uses provided in the plan or in areas within reasonable proximity of, or comparable to, the original location of such parties.

## Plan Approval Findings and Other Requirements

The procedure for approval of an urban renewal plan requires attention to the Urban Renewal Act, particularly if property TIF or eminent domain is to be authorized as part of the plan, which mandate additional notices, findings, and requirements discussed elsewhere in this chapter.

- The proposed urban renewal plan must be submitted to planning commission for review and recommendations as to conformance with comprehensive plan of the municipality.[36]
- A public hearing on the plan must be held by the governing body. Notice of public hearing must be published at least 30 days prior to the date of hearing. The notice must describe time, date, place, purposes of hearing, and generally outline the proposed urban renewal plan.[37]
- Written notice of the public hearing must be given to all property owners, residents, and owners of business concerns in the proposed urban renewal at their last known addresses at least 30 days prior to the public hearing. This requirement is part of the findings required to be made by the governing body and may be overlooked because of its location in the act.[38]
- The proposed plan or substantial modification of an existing plan must be delivered to the county commissioners. If TIF is approved as part of the urban renewal plan, the proposed plan and impact report that conforms with §§ 31-25-107(3.5) and (9.5) (a) must be submitted to the county commissioners and other affected taxing entities. These requirements are discussed in more detail in "Impact Report Related to Property Tax Incremennt Financing."
- If property TIF is included in the plan, the school district that includes the urban renewal area must be consulted if residential uses are included in the area.[39]
- If relocation by the URA is required, a feasible method exists for the relocation of individuals and families in decent, safe, and sanitary dwelling accommodations within their means and without undue hardship to such individuals and families.[40]

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31 C.R.S. § 38-1-101(1)(b).
32 C.R.S. § 31-25-105.5(2)(a)(II).
33 C.R.S. § 31-25-105.5(2)(a)(III).
34 C.R.S. § 38-1-101 (2)(b).
35 C.R.S. § 31-25-105.5(4)(a).
36 C.R.S. § 31-25-107(2).
37 C.R.S. § 31-25-107(3)(a).
38 C.R.S. § 31-25-107(4)(c).
39 C.R.S. § 31-25-107(9)(d).
40 C.R.S. § 31-25-107(4)(a).

- If relocation by the URA is required, a feasible method exists for the relocation of such business concerns in the urban renewal area or in other areas that are not generally less desirable with respect to public utilities and public commercial facilities.[41]
- The plan must afford maximum opportunity, consistent with the sound needs of the municipality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise.[42]
- The urban renewal plan must be approved within 120 days since the commencement of the first public hearing on the plan.[43]
- Except where all owners and tenants agree, if property in an urban renewal area was included in a proposed urban renewal plan that was not approved, at least 24 months must have elapsed since the commencement of the prior public hearing concerning such unapproved plan.[44]
- If the urban renewal area consists of open land, special findings are required depending on redevelopment of the open area as residential or nonresidential uses.[45]

### Exclusion of Mineral Resources from Tax Increment Financing Provisions of Urban Renewal Plan

Because the inclusion of mineral resources and oil and gas well equipment has caused wild fluctuation in the allocation between the base value and TIF value as described in "Tax Increment Financing and Other Revenue Sources" on page 11, the governing body is given the option of excluding valuation attributable to the extraction of mineral resources, including equipment, from the TIF valuation provisions of the Urban Renewal Act.[46]

### Inclusion of Unincorporated Land in Urban Renewal Area

Section 31-25-112.5 of the Urban Renewal Act authorizes inclusion of an area outside the municipal boundaries in a urban renewal area under the following circumstances that are in addition to all other provisions applicable to approval of a urban renewal plan.

- The unincorporated land is contiguous to a portion of urban renewal area that is within the municipal boundaries.
- The board of county commissioners consents.
- Each owner and holder of a recorded mortgage or deed of trust consents and the county commissioners make a finding that confirms such consent.
- The county commissioners make a finding that the proposed urban renewal area is a slum or blighted area.
- The county planning commission determines the urban renewal plan conforms with the county's general or comprehensive plan.
- The county commissioners hold a public hearing and make findings and a determination to approve inclusion of unincorporated land in the urban renewal area in accordance with the procedures in C.R.S. § 31-25-107(3), (4), (5), and (6).
- The county commissioners decide if property TIF provisions will be authorized in the unincorporated area included in the urban renewal plan and, if so, notifies the county assessor of the inclusion.

No impact report authorized by § 31-25-107(3.5) is required, but the other provisions related to other taxing entities will apply as applicable.

## MODIFICATION OF URBAN RENEWAL PLANS APPROVED BEFORE JAN. 1, 2016

Upon its passage, HB-15-1348 essentially halted new financings and created multiple additional uncertainties as to when and how it applied to existing urban renewal and projects. Some of the questions were answered by SB 16-177, and, in 2017, SB 17-279 clarified uncertainties about how and when the requirements created by HB 15-1348 apply to urban renewal plans approved before Jan. 1, 2016. The new requirements are codified in C.R.S. § 31-25-107 (7).

Any proposed modification of an urban renewal plan in effect prior to Jan. 1, 2016 must be submitted to the governing body of the municipality for approval. At least 30 days prior to the date any plan modification is to be considered by the governing body, either the governing body or the URA must give notice to each taxing entity that levies property taxes in the urban renewal area providing a detailed description of the proposed modification along with the date and time of the meeting at which the governing body will consider the modification.

The modification will be deemed substantial by statute id any of the following change:

41 C.R.S. § 31-25-107(4)(b).
42 C.R.S. § 31-25-107(4)(g).
43 C.R.S. § 31-25-107(4)(d).
44 C.R.S. § 31-25-107(4)(e).
45 C.R.S. § 31-25-107(5) and (6).
46 C.R.S. § 31-25-107 (9.6).

- land area,
- land use,
- authorization to collect incremental tax revenue (triggers taxing entity appointments to the URA board even if confined to municipal sales tax),
- the extent of the use of tax increment financing (same comment – triggers taxing entity appointments),
- the scope and nature of the urban renewal project,
- the scope or method of financing,
- design,
- building requirements,
- timing,
- procedure, as previously approved, or
- where such modification will substantially clarify a urban renewal plan that, when, approved, was lacking in specificity as to the urban renewal project or financing.

Although the decision to modify any urban renewal plan is within the discretion of the governing body of the municipality, any taxing entity may file an action in the district court for a *de novo* review of whether the modification is substantial and will require compliance with the requirements to expand the board of commissioners in accordance with C.R.S. § 31-25-104, discussed above, and, if property tax increment is involved, the negotiations with affected taxing entities required by C.R.S. § 31-25-107, discussed in "Tax Increment Finance Sharing and Other Agreements" below.

Where TIF revenue deposited in the special fund created by § 31-25-107(9) has been pledged by an indenture or other legally binding document, a pledge to secure refunding bonds is not a substantial modification subject to the above requirements.[47]

An additional provision was recently added to the act as § 31-25-107(7.5) to provide additional certainty when the URA issues bonds, incurs any other financial obligations, pledges revenue, clarifies other aspects of carrying out the urban renewal plan. If the URA publishes and mails a written notice to each taxing entity that levies taxes in the urban renewal area of its intention to issue bonds or engage in any specified undertaking or activity, and further specifies that any action to enjoin any such activity must be brought within 45 days after the date of the notice or is barred, no such action may be brought after the date the notice is provided.

## TAX INCREMENT FINANCING AND OTHER REVENUE SOURCES

Urban renewal projects may be financed in a variety of ways. URAs are authorized to borrow money, issue bonds, and accept grants from public or private sources. The principal method for financing urban renewal projects is through obligations secured by property and/or municipal sales tax increment revenues from the area included in urban renewal plans (tax increment financing or TIF). TIF is implemented by including the statutory language authorizing it in the provisions of an urban renewal plan.

The statutory description of tax increment or tax allocation financing is found at C.R.S. § 31-25-107(9). As described in the Urban Renewal Act, TIF seems relatively simple. The revenue produced by the levy of taxing entities against the increase in assessed valuation of real and personal property resulting from taxable valuation increases in the urban renewal area and revenue from municipal sales tax growth that occurs in that area are the sources of TIF revenue. The resulting revenue is paid into a special fund to be used by the URA for payment of urban renewal project debt obligations for a period not to exceed 25 years.

### Municipal Sales Tax Increment Financing

If the urban renewal plan authorizes municipal sales TIF a base valuation (base value) is established by calculating the total municipal sales taxes, not including any sales taxes for remote sales as specified in C.R.S. § 39-26-104 (2), collected in the boundaries of the urban renewal area in the 12-month period ending on the last day of the month prior to the effective date of approval of the urban renewal plan is the base value for the purposes of municipal sales tax increment financing.

Any increase in the portion of municipal sales taxes that the governing body of the municipality elects to allocate to the urban renewal project (the TIF value) is paid into the special fund to pay urban renewal project obligations.

If there is a change in the sales tax percentage levied by the municipality in a tax increment project, both the base value and TIF value and the sales tax allocation between the municipality and the URAs must be proportionately adjusted in accordance with the sales tax change.[48]

### Property Tax Increment Financing

47 C.R.S. § 31-25-107(7).
48 C.R.S. § 31-25-107(9)(e).

HB 15-1348 amended C.R.S. § 31-25-107(9)(a) to state that the urban renewal plan may contain a provision that the property taxes of specifically designated public bodies, if any, may be divided as stated in the Urban Renewal Act to provide funds to pay urban renewal project costs. If and to the extent that property taxes are authorized for TIF in the urban renewal plan (or by amendment of an existing plan), the total certified assessed value (base value) of all real and personal property subject to property TIF in the proposed urban renewal in effect when an urban renewal plan (or a plan amendment containing the required tax allocation wording) is adopted is used to determine the base year for calculating how much, if any, revenue is available for deposit into the special fund established in connection with the plan for the urban renewal project.

There are two dates when a county assessor certifies assessed value. The first is on August 25 of each year, which is the value used by taxing entities to set their budgets for the following year. The second is an adjusted value certified on December 10, which accounts for changes and adjustments made after August 25.

Urban renewal approved after December 10 and before the succeeding August 25 have the calendar year of the December 10 certification as the base year, and, according to the wording in the Urban Renewal Act, those urban renewal plans approved by the governing body between August 25 and December 10 of each calendar year would have the current calendar year as the base year because of the August 25 certification. There may be some question about which certification date applies under the current regulations of the property tax administrator. Municipal officials are advised to consult with the county assessor before any property TIF language is made part of any urban renewal plan to clarify how the assessor will establish the base year.

If agricultural land is properly included in an urban renewal plan and property TIF is part of the financing for the urban renewal project, the projected increased assessed value (not the current lower assessed value as agricultural land) as vacant land that the county assessor would place on the property becomes part of the base value, but the amount of taxes paid by the owner does not increase from the agricultural land valuation. This calculation is solely for the purposes of establishing the base value in the urban renewal area.[49]

Each year following adoption of the urban renewal plan, the tax revenues produced by the assessments of those taxing entities that levy in the urban renewal area against the base value, as adjusted for general reassessments in accordance with C.R.S. § 31-25-107(9)(e), are paid to the taxing entities as are all other property taxes. The increase in revenue produced by the adjusted value (TIF value) or the amount of municipal sales tax (excluding any sales taxes collected for remote sales[50]) that exceeds the base value, or both, are paid into a special fund established by the statute to be used by the URA for repayment of urban renewal project debt for the costs of the project created by the urban renewal plan.

After Jan. 1, 2016, where HB 15-1348 applies, it excludes from TIF revenue any voter authorized retention and spending by the affected taxing entity pursuant to Section 20(7)(d) of Article X of the Colorado Constitution (the Taxpayer Bill of Rights, or TABOR), and any voter-approved mill levy increase for affected taxing entities not in effect at the time of plan approval or substantial modification of an urban renewal plan that provides for TIF. These amounts cannot be pledged by the URA to pay project debt. How to account for and calculate these amounts is a subject of continuing discussion and possible future legislation.

As stated above, if there is a general reassessment of taxable property valuation affecting an urban renewal project using TIF, or if there is a change in the sales tax percentage levied by the municipality in a tax increment project, both the base value and TIF value and the sales tax allocation between the municipality and the URAs must be adjusted proportionately in accordance with the property tax assessment or sales tax change.[51]

For urban renewal plans approved before Jan. 1, 2016 (and not substantially modified after that date), if a pledge of revenues deposited in the special fund created by § 31-25-107(9) was made by an indenture or other legally binding document that is separate from the urban renewal plan itself, the provisions of HB 15-1348 will not apply, and all such pledged revenues may be used to repay URA debt if the required tax increment provisions are included in the urban renewal plan. If there has been no such pledge, local officials are urged to consult with bond counsel or other qualified legal counsel to determine if and how the requirements apply to such existing urban renewal plan taking into account the provisions of C.R.S. § 31-25-107(9.7)(b).

After Jan. 1, 2016, the allocation of property tax increments is subject to the negotiation and mediation requirements described in "Tax Increment Finance Sharing and Other Agreements." An URA may not itself levy taxes or compel any other public body to levy taxes.[52]

49 C.R.S. § 31-25-107(9)(g).

50 C.R.S. § 39-26-104(2).

51 C.R.S. § 31-25-107(9)(e).

52 C.R.S. §§ 31-25-113; 107(9)(c).

In urban renewal areas containing single- and multiple-family residences, school districts that include all or part of those areas must be permitted to participate in an advisory capacity with respect to the use of tax increment financing in the urban renewal plan.

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 rates as other taxpayers. Sales taxpayers pay the same rates of sales tax. Once paid, property taxes are allocated so that each taxing entity obtains the product of its tax rate times the base value, as adjusted for reassessment changes. The URA receives the total of all participating taxing agency property tax rates times the TIF value, if any, and any incremental sales taxes, if made available by the municipal governing body.

Urban renewal project debt is broadly defined as "Bonds" in the Urban Renewal Act to include bonds, notes, certificates of indebtedness, debentures, or other obligations.[53]

Urban renewal project debt is payable from tax increments from the specific urban renewal plan area that creates the urban renewal project (unless other sources of revenue are pledged to repay the bonds), and in the absence of actual receipt by the URA of sufficient pledged TIF revenues to pay debt service, no other funds of the URA or of the municipality need be advanced for repayment. The debts of the URA are entirely its own and not those of the municipality, state, or any other public body.[54]

There is a limit of 25 years on the use of TIF for urban renewal projects. As stated above, when the property tax increment language is included in the urban renewal plan or in a substantial modification of a plan, the assessor certifies the aggregate value of all property included in the urban renewal area as of the date of the last certification of those values to establish the base year. The following year is the first year that an increment, if any, can be calculated and distributions of property tax revenue follow the year after that. Upon the earlier of payment of all urban renewal project debt or the expiration of the 25-year TIF period, property tax revenue remaining in the special fund allocated by the TIF provisions in the urban renewal plan must be repaid to each affected taxing body (but not the municipality) in the ratio contributed in the last year the assessment roll was divided.[55]

If existing bonds are in default or about to go into default, a municipality may extend the 25-year period with respect to municipal property and sales tax increments for a period of time required to repay urban renewal project debt.[56]

A recent amendment authorizes the county treasurer to offset the URA's *pro rata* share of property taxes that are subsequently refunded to a taxpayer against any subsequent payments due the URA for the urban renewal project; the amendment also requires the URA to make adequate provision for the return of overpayments by taxpayers, including establishing a reserve fund or entering into an agreement with the municipality to provide such funds.[57]

It is necessary to meet with the county assessor before undertaking a project using property tax increment financing. The assessor must be notified if the municipality has adopted an urban renewal plan or amendment that uses or adds property tax increment financing. The URA should furnish to the assessor a map showing specific area boundaries of the urban renewal area, a copy of the urban renewal plan, and copies of relevant municipal approval ordinances or resolutions. In addition, the assessor must be notified when an obligation payable from property TIF revenue is paid off.[58] Care must be taken, however, to advise the assessor if any other debt dependent upon property tax increment financing exists for the urban renewal project in question. It may be the better practice to interpret this provision as applying only when all debt obligations payable from property TIF revenue have been paid.

The Division of Property Taxation of the Colorado Department of Local Affairs has adopted procedures applicable to calculation and allocation of property tax valuations where property tax TIF is authorized in the urban renewal plan. The regulations are found on the division website.

In addition, it is advisable to meet with the assessor each year to advise of changes in value resulting from changes that add assessed value to the urban renewal area other than vertical construction (land use entitlements, increases in value from sale of property) to assure such increases are not allocated to the base value rather than the TIF value.

HB 15-1348 changed the procedure for TIF for both new and existing urban renewal plans by adding § 31-25-107(9.5) to the Urban Renewal Act. Before property TIF can be included in the urban renewal plan (or when a plan adopted before Jan. 1, 2016, is substantially modified), negotiations with each affected taxing body are required for a period of 120 days regarding impacts of the plan on services of the taxing entities that levy in the urban renewal area.

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53 C.R.S. § 31-25-103(3).

54 C.R.S. § 31-25-109(6).

55 C.R.S. § 31-25-107(9)(a)(2).

56 C.R.S. § 31-25-107(9)(f).

57 C.R.S. § 31-25-107(9)(a)(III).

58 C.R.S. § 31-25-107(9.7)(b).

### Other Revenue Sources

Urban renewal projects frequently are financed by combining TIF revenues with other revenue pledged by the municipality or other taxing entities to increase revenue available to carry out the project. These include metropolitan or other special districts. General authorization for agreements to accomplish such financing is found in C.R.S. § 31-25-112; § 31-25-107(9.5) authorizes any taxing entity, such as a county, that levies a sales tax in the urban renewal area, to pledge any incremental sales tax revenues to the relevant urban renewal project. In addition, developers often impose a public improvement fee (PIF) on retail developments to help pay for public improvements.

Discussion of these revenue sources are beyond the scope of this document. Please consult knowledgeable municipal financing institutions, bond counsel, or other experienced legal experts for help with these financing sources.

## IMPACT REPORT RELATED TO PROPERTY TAX INCREMENT FINANCING

One effect of HB 15-1348 is to elevate and expand the importance of the urban renewal impact report described in C.R.S. § 31-25-107(3.5). If a proposed urban renewal plan will use TIF that involves property taxes, C.R.S. § 31-25-107(9.5) requires an URA to give the same 30-day notice to all taxing entities that levy property taxes in the proposed urban renewal area as required by § 31-25-107(3.5) for a county. Although § 31-25-107(9.5) does not require an impact report, it requires the notice and a requirement to negotiate agreements that address the impacts of the proposed use of property tax revenues for TIF on the services of the county and each taxing district on the services "associated solely" with the proposed urban renewal plan.

The Urban Renewal Act provides some guidance on how to properly assess impacts on the taxing entities in C.R.S. §§ 31-25-107(3.5) and (9.5)(d)(III). At a minimum, the report should cover the list of factors in both subsections, including the estimated time to complete the urban renewal project; amount of property tax increment revenue to be generated; estimate of the impact of the project on the infrastructure and services of the taxing entities; nature of the project; nature and relative size of the revenue and other benefits that are expected to accrue to the municipality and other taxing entities; and any legal limitations on the use of revenues that are expected to result from the project.

For an expanded discussion of the use and efficacy of the impact report see Chapter 3.

## TAX INCREMENT FINANCE SHARING AND OTHER AGREEMENTS

In addition to the expanded board membership, where property tax TIF is included in urban renewal plans approved after Jan. 1, 2016 (or a major modification of a pre-2016 urban renewal plan after that date), § 31-25-107(9.5) requires the URA to negotiate an agreement with each taxing entity that levies property taxes in the urban renewal area. An impact report describing the benefits as well as the burdens of the urban renewal project serves as a starting point in these negotiations.[59]

The agreement(s) with the taxing entities can serve several purposes. It can cover inclusion of agricultural land in the urban renewal area; waive notice and filing requirements; irrevocably pledge and protect property tax increment revenue to payment of URA obligations, including bonds (as defined in the Urban Renewal Act).

If after 120 days there is no agreement with any taxing body, mediation is authorized as a means of reaching agreement. The mediator must consider the nature of the urban renewal project, burdens and benefits of the project, legal limitations on the use of revenues, and capital costs of the project. Within 90 days the mediator must issue a report. The URA and/or municipality may accept the report and include its determination in the urban renewal plan or continue negotiations. If included, the mediator's report appears binding on the taxing body at least until the plan is amended or modified. In that case it appears the negotiations begin all over again.

Another provision of HB 15-1348 added subsection (i) to C.R.S. § 31-25-107(9) that applies to new or existing plans modified after Jan. 1, 2016, that entitles any taxing entity to reimbursement from the special TIF fund of any "moneys" that such taxing body "pays to, contributes to, or invests in the authority for the project" in the 12-month period prior to approval of the new urban renewal plan or the modification of an existing plan. How or if this affects or includes tax increment funds collected the year prior to modification of an existing plan is subject to interpretation. Normally, it is the municipality that bears expenses related to new or amended urban renewal plans and those costs are incurred over a period of years.

A separate provision, C.R.S. § 31-25-107(11), provides that if a county where the urban renewal area is located has notice and appears at the public hearing on the urban renewal plan and elects to enforce the agricultural land exclusions in C.R.S. § 31-25-107(4)(h) or presents evidence that redevelopment will create costs for additional county infrastructure and services, the municipality or the URA may enter into an agreement with the county for payment of those costs. If no agreement is reached, in addition to the mediation requirements added by HB 15-1348, an arbitration procedure is authorized by C.R.S. § 31-25-107(12) unless less than 10 percent of the urban renewal area has been classified as agricultural land for property taxes and currently is identified for agricultural uses in the municipal master plan and has been for more than one year prior to the date of adoption of the urban renewal plan.

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59 *See also* C.R.S. § 31-25-107(11).

## SALE OR OTHER DISPOSAL OF PROPERTY BY THE URBAN RENEWAL AUTHORITY

If the URA acquires real property as part of an urban renewal project, C.R.S. § 31-25-106 sets forth the requirements related to the sale or other disposition of such property.

The URA may sell, lease, or otherwise transfer its real property in accordance with the urban renewal plan subject to such covenants and conditions as determined by the URA. The purchasers, lessees, and transferees must use the property only as allowed by the urban renewal plan.

To encourage redevelopment the URA may transfer property for its "fair value" (not fair market value), as determined by the URA. In establishing fair value, the URA must consider the uses permitted by the urban renewal plan, the restrictions upon and the covenants, conditions, and obligations assumed by the purchaser or lessee. More on these provisions in "Redevelopment and Financing Agreements."

The URA must transfer property it acquires for purposes of conveyance as soon as reasonably feasible, which may be determined by such factors as market and economic conditions. In the interim, the URA may operate temporarily and maintain its property even if such use is not in accordance with the urban renewal plan.

Property of the URA sold to private persons (developers) may be sold only under reasonable competitive bidding procedures as described by the URA or by the Urban Renewal Act, which requires publication of a notice for requests for proposals to redevelop the property to be transferred. The URA is required to consider the financial and legal ability of persons making proposals to carry them out.

At least 15 days prior to executing a contract of conveyance of property, the URA is required to give notice to the governing body of its intent to convey the property. The notice is for information only.

The URA may transfer, dedicate, or devote its property for public uses in accordance with the urban renewal plan with or without compensation, subject to such terms, conditions, and covenants as the URA determines to be in the best interest of the community and in compliance with the urban renewal plan. Property acquired by eminent domain and conveyed for public uses is not subject to the requirements applicable to transfer to private persons.

## REDEVELOPMENT AND FINANCING AGREEMENTS

The Urban Renewal Act requires that urban renewal plans and projects afford maximum opportunity, consistent with the sound needs of the municipality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise.[60] Whether as part of a land disposition agreement or a redevelopment or rehabilitation agreement to improve property in the urban renewal area, the URA will be engaged in redevelopment agreement with the private sector. A more detailed discussion of these agreements from the developer perspective is found in Chapter 5.

Redevelopment agreements that include sale or lease of land usually contain provisions involving a purchase price based on fair value, description of the improvements that the buyer must construct, schedule of construction, provisions for recapture of the land if the buyer defaults, insurance requirements, restriction on uses, and restriction on transfer of the land or agreement prior to completion of construction. For its part, the URA usually delivers a clean title and may agree to deliver a site ready for redevelopment.

Either as part of a disposition agreement or by other redevelopment agreements with private developers or by agreement with public bodies such as a special district, the URA may agree to provide TIF revenue to reimburse the developer or special district for provision of public improvements or activities compensable as eligible URA costs under the Urban Renewal Act. The improvements typically are described in detail with cost estimates subject to reimbursement limitations. The URA also may issue bonds or other financial obligations to finance construction activities under the Urban Renewal Act. URA bond financing is discussed in detail in Chapter 4.

## REGIONAL TOURISM PROJECTS

Section 31-25-116 authorizes the URA in any municipality to act as a financing entity pursuant to Part 3 of Article 46 of Title 24, C.R.S. (the Regional Tourism Act, or RTA). The RTA authorizes use of state sales tax increment revenue from a specific area to be used to finance reginal tourism projects defined in the RTA.

Receipt of state sales tax revenue by the URA is not a substantial modification of any existing UR Plan and corresponding provisions of the plan may be changed to accommodate the use of such revenue without triggering the provisions of §§ 31-24-104(1) or 107(7). However, establishment of a new URA to use RTA state sales taxes is subject to the requirements of HB 15-1348 and other recent amendments added to the Act.

- State sales tax increment revenue may not be used to acquire property by eminent domain.
- Other requirements related to regional tourism projects are detailed in the RTA.

60 C.R.S. § 31-25-107(4)(g).

# CHAPTER 2: RECENT COLORADO URBAN RENEWAL CASE LAW UPDATE

*Written by David Neville, Kraemer Kendall Rupp Deen Neville LLC partner*

State and federal courts in Colorado decided especially significant urban renewal cases in 2017 and 2018, discussed in more detail below. In *City of Aurora v. Scott*, 410 P.3d 720 (Co. App. 2017), the Colorado Court of Appeals held that the 25-year TIF period begins running on the date of adoption of the TIF provision regardless of whether a future effective date is stated in the urban renewal plan. In *M.A.K. Investment Group, LLC v. City of Glendale*, 897 F.3d 1303 (10th Cir. 2018), the United States Court of Appeals for the 10th Circuit held that a property owner had a federal due process right to notice of a blight determination where the property was subject to transfer as a result of the blight determination.

## CITY OF AURORA V. SCOTT

*410 P.3d 720 (Co. App. 2017), Colorado Court of Appeals, Division I, Feb. 23, 2017*

This case involved a dispute between the City of Aurora and the Aurora Urban Renewal Authority, on the one hand, and the Arapahoe County Assessor, on the other hand. The dispute primarily involved the timing of the start of the 25-year tax increment financing (TIF) period, specifically whether a municipality could state an effective date of a TIF provision after the date of adoption of the provision by the city council. The Court held that the date of the adoption of a TIF provision started the 25-year TIF period. The Court also made certain other holdings relevant to Colorado urban renewal practice.

The City of Aurora adopted the Fitzsimons and Iliff urban renewal plans in 2014. Each of those plans was to be implemented in phases, with TIF provisions for later phases becoming effective, and thereby starting the 25-year TIF period for those phases, upon certain triggering events to happen in the future. Upon the adoption of each of the plans, the Arapahoe County assessor immediately established the TIF base for all phases, not just the initial phases. The City of Aurora challenged the assessor's decision to establish the base for the later phases prior to the stated triggering events.

The Court held in favor of the Arapahoe County Assessor on the grounds that a municipality does not have the authority to alter the 25-year TIF period by approving an effective date sometime in the future at the time of the adoption of the TIF provision. Citing C.R.S. § 31-25-107(9)(a), the Court held that the plain language of the statute requires the TIF period to run "when the TIF provision is adopted," and that "a TIF provision is adopted on the date the plan or modification containing that provision was approved."[61] The Court held that the City of Aurora did not have the authority to establish its own TIF timeline. "Nothing in the [Urban Renewal Act] authorizes a municipality or an urban renewal authority to extend the twenty-five year limit simply by deeming parts of the plan 'approved' on a later date."[62]

The Court rejected Aurora's defenses, one of which was that Arapahoe County's sole remedy was arbitration as set forth in C.R.S. § 31-25-107(12)(f). In rejecting that defense, the Court examined that provision and held that the exclusive nature of the remedy of arbitration for a county was applicable solely with respect to challenges relating to C.R.S. § 31-25-107(3.5)(a)(III), (IV), and (4)(h).

Finally, although not dispositive to the Court's holding, it is notable that the Court in this case stated that the adoption of an urban renewal plan is not a legislative act. The Court stated that adoption of a plan includes factors that suggest a quasi-judicial decision. This statement is potentially at odds with common practice and certain authority suggesting that adoption of a plan is a legislative act. C.R.S. § 31-25-105.5(2)(b) specifically states that making a blight determination pursuant to subsection 105.5(2)(a) "shall be deemed a legislative determination and shall not be deemed a quasi-judicial determination," and the Court in *Tracy v. City of Boulder*, 635 P.2d 907 (Co. App. 1981), held that a determination of whether an area is blighted is a legislative question. Legislative actions are subject to lesser judicial scrutiny, e.g. no due process rights attach to legislative actions (see *M.A.K. Investment Group*, below). If adoption of an urban renewal plan becomes viewed as a quasi-judicial action, there could be wider implications.

## M.A.K. INVESTMENT GROUP, LLC V. CITY OF GLENDALE

*897 F.3d 1303 (10th Cir. 2018), July 31, 2018*

This case involves a federal due process claim by the plaintiff (M.A.K.) against the City of Glendale and the Glendale Urban Renewal Authority. M.A.K. asserted that the Colorado Urban Renewal Act violates due process and equal protection because it does not require municipalities to notify property owners about an adverse blight determination or the 30 days owners have to seek review of that determination. The U.S. District Court dismissed M.A.K.'s claims.

61 410 P.3d at 727.

62 410 P.3d. at 729.

In particular, the District Court dismissed the due process claims based on the legislative nature of the blight determination. However, the Court of Appeals for the 10th Circuit disagreed with regard to the due process claim and held that the Urban Renewal Act violates due process "as applied" to M.A.K..

In reaching its holding, the Court noted that a blight determination is not "a complete taking in the constitutional sense, but it slates the property for possible condemnation in the future."[63] The Urban Renewal Act requires certain findings to be made at a public hearing prior to making a blight determination. If a blight determination is made pursuant to C.R.S. § 31-25-105.5(2)(a)(I), a property owner may challenge a blight determination by filing a civil action within 30 days of the date the determination is made, as provided in C.R.S. § 31-25-105.5(2)(b). The Urban Renewal Act requires notice of the commissioning of a conditions study and notice of the public hearing, but does not require notice of a blight finding to be made to property owners after the fact. In this case, M.A.K. received actual notice of the conditions study and the blight hearing but was told by a representative of Glendale that it did not have to worry about the notice of the hearing. Glendale made a blight determination and did not inform M.A.K. of such determination or the 30-day period to challenge the determination.

The Court held that M.A.K. had a protected property right in the state-created statutory right to judicial review of the blight determination under C.R.S. § 31-25-105.5(2)(b). The Court further held that Glendale violated due process by not notifying M.A.K. that a blight determination had been made with regard to its property. Procedural due process requires a two-step inquiry: whether a party has a protected property interest, and if so, whether the party was afforded an appropriate level of process.[64] After a thorough analysis of whether M.A.K. had a protected property interest (while also declining to decide whether a blight determination is a legislative decision), the Court held that "M.A.K. clearly has a protected property interest in the statutory right to judicial review of the blight determination."[65] The Court then held that due process required "Glendale to provide M.A.K. with direct notice of the adverse blight determination. In contemporary terms this means notice had to be mailed, emailed, or personally served."[66] However, the Court held that Glendale did not have to provide specific notice of the 30-day time frame in which to seek review.

The Court issued its initial opinion in May 2018. The Court denied rehearing of the appeal en banc but reissued its amended opinion in July 2018 upon denial of the rehearing. The reissued opinion clarified, in Footnote 10, that the Court's decision "only concerns the notice due when a property owner has a right to challenge a blight determination that can lead to transfer of the property. We do not here decide how much notice due process would require if a property owner had a cause of action to challenge a blight determination, but that blight determination could not lead to the transfer of the property."

The Court also concluded its opinion by stating:

> *We take care to note the limits of our holding, however. This is not a case in which the property owner attended the blight hearing and learned of the determination there. M.A.K. alleges it asked about the significance of the blight hearing and was told not to worry about it. We only hold that where, as alleged here, a property owner does not otherwise learn about the blight determination, it violates due process for a City not to send direct notice.*

The extent of the M.A.K. Investment Group holding may be limited by the fact that the result is an "as-applied" decision (as compared to a facial decision), the limitation established by Footnote 10 to the notice due when a blight determination could lead to transfer of the property, and the fact that the property owner did not otherwise learn of the blight determination. Although there is no statutory notice requirement in the Urban Renewal Act after a blight determination, federal due process requires actual notice after a blight determination if the blight determination could lead to a transfer of property. It remains an open question whether notice is required if no transfer of property is authorized. Practitioners should bear this in mind when preparing and implementing urban renewal plans.

In light of the 10th Circuit Court of Appeals decision, legislation was passed in the 2019 legislative session that requires local governments to notify all impacted property owners of a blight designation. The notification must be conducted within seven days by regular mail to the property owners last-known address of record.[67]

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63 897 F.3d at 1306.
64 897 F.3d at 1308-09.
65 897 F.3d at 1311.
66 897 F.3d at 1312.
67 HB 19-1084.

# CHAPTER 3: URBAN RENEWAL IMPACT REPORTS

*Written by Graham T. Anderson, Anderson Analytics LLC senior analyst*

As provided in C.R.S. § 31-25-107 3.5(a) an "urban renewal impact report" must be prepared and considered as a part of the review and approval of any urban renewal plan that authorizes property tax increment financing (TIF). The act generally requires the impact report to include an estimate of annual property tax increment revenues. It also requires the report include an estimate of the impact on county revenues as well as the cost of providing county infrastructure and services required to serve development within the proposed urban renewal area.

However with the passage of HB 15-1348, the governing body of the municipality (and/or the urban renewal authority, or URA) in which an urban renewal plan is proposed is now required to negotiate with any affected counties, school districts, and special districts to attempt to reach agreements concerning how much of the various property tax increments will be allocated to the urban renewal project. If the parties cannot reach agreement within 120 days, then the parties must submit to mediation on the issue.

This new provision requiring the negotiation of an agreement regarding use of property tax increment revenues to be captured for use in an urban renewal area has raised the importance of the impact report and effectively increased the requirements and content of that report.

Prior to HB 15-1348, the impact report was intended to inform all the parties of the likely fiscal impacts of a proposed urban renewal project on the finances and operations of affected counties. However, the impact report is now an essential tool to facilitate the negotiation of the allocation of property tax increment revenues with the various taxing entities overlapping the proposed urban renewal area. The impact report now has added importance because it serves to inform that negotiation process with all taxing entities including the county, and the report should provide adequate data regarding the likely fiscal and economic impacts to each of the affected taxing entities. By making comprehensive and reliable information regarding the likely fiscal and economic impacts readily available, the impact report helps enable each of affected taxing entities to make an informed decision regarding any costs and impacts as well as the benefits of the urban renewal project on revenues and services of each taxing entity. The object is to determine if a portion of the property tax increment revenues should be paid to the taxing entity to offset such impacts, if any.

To provide relevant and comprehensive information for each of the affected taxing entities, it is critical that the impact report include not just the impacts occurring on-site within the urban renewal project area, but the off-site impacts as well. Recent experience has shown that the impact report process can also help refine a project's development plan as a quantitative picture of the economic, fiscal, and financial implications emergency in relation to the goals and interests of the various stakeholders.

A complete urban renewal impact report that contains the necessary information to ensure an informed negotiation process usually includes five key elements, described as follows.

## DEVELOPMENT PHASING AND ESTIMATES OF ON-SITE EMPLOYMENT AND POPULATION

The impact report usually begins with an overview of the project's development program, which typically includes metrics such as square footages and building units by use, project schedule, and project costs. The next component of the impact report is usually a projection of on-site employment and residential population in the urban renewal project area. The population and employment projection is also the first of many components of the impact report that must usually account for economic displacement, commonly known as "cannibalization." For example, any existing jobs or residents in the project area that will be displaced by its development should be accounted for in this projection. But more subtly — and sometimes with significant impact on a local economy — new development and economic activity can result in displacing existing jobs and residents from adjacent areas. On one extreme might be a local, one-of-a-kind specialized manufacturer that has announced that it will relocate its facility to the urban renewal area. Those jobs simply move from one neighborhood to another, resulting in zero net new jobs in that particular local economy — unless moving to a new facility enables that manufacturer to expand and hire more employees. On another extreme might be the development of new homes in a growing town with a healthy real estate market. In that instance, most or all of the portion of new residents who move from another part of the town will leave behind homes that will likely soon be occupied with new residents, resulting in a net new population increase.

## PROJECTION OF TAX INCREMENT REVENUES BY TAXING ENTITY

The impact report also includes a projection of the total property and often sales tax revenues, along with the eligible tax increment revenues, generated on-site due to the project's development and ongoing economic activity. The eligible and proposed tax increment revenues to be used in the finance of eligible costs usually represent only a portion of the total fiscal impacts. The impact report is an opportunity to communicate the fact that if tax increment revenues are generated, then the taxing entity will continue to realize the "base" tax revenues. If property values or sales activity in the proposed urban renewal area have been declining, then the continued realization of "base" tax revenues can be an important fiscal impact attributable to the project. There are also usually additional types of revenues generated on-site that will be realized by the stakeholder governments. For example, a hotel might generate lodging taxes, certain retail types may generate excise taxes, building owners may pay for public utilities, and a public parking garage may generate fees or even parking fines. If the state is a stakeholder in the project, then the report may estimate individual and corporate income taxes generated by workers, residents, and businesses on-site. Finally, there may be additional municipal sales taxes or some property taxes generated that are not eligible for tax increment financing. In all types of the fiscal impacts, potential "cannibalization" should be analyzed and included in the revenue projections. For example, some or all of the sales taxes generated at a new establishment in the urban renewal area may simply represent sales activity displaced from another part of the city, county, or other taxing jurisdiction.

## IMPACTS ON OPERATIONS AND EXPENDITURES OF LOCAL TAXING ENTITIES

The impact report also includes analysis of impacts on the cost of government services, particularly if the stakeholder governments have expressed concerns about the project's impact on certain services. For example, a change in population and land uses in an urban renewal area can affect the demand for service calls for fire and other emergency services. This projection of government service demand should be sensitive to thresholds requiring jumps in the marginal cost of service, such as an increase in calls for fire service necessitating purchase of another engine or even construction of another station. An increase in demand for government services also can be a net positive financial impact, as in the case of school districts competing for additional enrollment and the associated per-pupil state funding. By addressing and quantifying these service cost impacts, the impact report can provide information on both sides of the cost-benefit equation for the stakeholder governments.

## OFF-SITE REVENUE IMPACTS

In addition to the revenues generated on-site, there will be revenues generated off-site due to the project's development and ongoing economic activity. Categories of off-site fiscal impacts resulting from on-site activity may include new residents' consumer spending at establishments located elsewhere within the municipality, county, or state. Similarly, new workers employed on-site may spend a portion of their income at establishments elsewhere within a particular taxing jurisdiction. Geographical organization is critical for projecting the off-site economic activity to determine which taxing jurisdictions will realize which impacts. And, like on-site fiscal impacts, there are usually additional types of revenues generated off-site that will be realized by the project's stakeholder governments. These may include revenues such as road tolls; fines and forfeitures; facility and recreation user fees; and excise taxes associated with fuel, tobacco, liquor, and marijuana. An increasingly important variable in the impact analysis is e-commerce, with the state and many local governments collecting sales taxes on purchases from establishments located outside of their respective physical boundaries. E-commerce activity may result in a fiscal impact but little to no economic impact within any of the urban renewal area's government jurisdictions.

## ECONOMIC IMPACTS AND CONTRIBUTIONS

Another important component of the impact report is the economic impact analysis, which encompasses both on- and off-site impacts. Typical metrics in the economic impact analysis include the number of jobs, total amount of labor income or income per job, value added (newly created goods and services resulting from the direct spending, akin to gross domestic product), and output (total sales or revenues generated by firms, governments, and households).

These metrics usually are organized by the type of industry in which they occur. These metrics are also the result of three different types of economic effects: the direct effect, the indirect effect, and the induced effect. The direct effect is the first-round impact generated by the spending that takes place as a direct result of events and activities that occur within a defined area or facility. For example, the activity of new business establishments located on-site in a project are direct effects. The indirect effect consists of respending of the initial or direct expenditures, or, the supply of goods and services resulting from the initial direct spending in the facility. The induced effect represents changes in local consumption due to the personal spending by employees and proprietors whose incomes are affected by direct and indirect spending. The indirect and induced effects are usually mostly off-site effects, although some may be on-site if, for example, a new restaurant and its employees purchase some of its food from a new grocery store in the same project.

It is important to define the duration of the economic effects as, for example, the jobs associated with the construction of a project occur only during the time the project is under construction. An economic impact analysis usually is performed to look at the impacts resulting from the new ongoing economic activity (e.g. new direct jobs and spending) occurring on-site. But it is also often useful to include a similar analysis of the one-time economic impacts resulting from the new construction activity proposed to occur in the urban renewal area. It is important to ensure that the analysis of construction impacts includes both the public infrastructure and private "vertical" building components of the proposed project, particularly since urban renewal often is used as a financing tool for constructing costly infrastructure.

Although it is called economic "impact," an objective analysis should quantify both economic impacts and economic contributions attributable to the project. Economic "impacts" should be reserved for those cases in which an industry, event, or policy has the result of either bringing new revenues into the region that would otherwise not occur in the region, or keeping revenues in the region that would otherwise be lost to another region. Economic impacts are defined as the net changes to the economic base of a region that can be attributed to the industry, event, or policy that would otherwise not be there. Economic impacts essentially can be viewed as net additions or subtractions to the overall size of the regional economy. An economic "contribution," though, is defined as the gross change in a region's existing economy that can be attributed to a given industry, event, or policy. Economic contributions measure the portion of overall economic activity in the region that is attributable to a particular economic event or activity. It can be useful for the impact report to note if an "impact" is technically an impact or a contribution if the distinction might have consequences on how the report's results are interpreted. These are factors the mediator is directed to consider in assessing the impact of the proposed urban renewal project on the operation and finances of the taxing entities.

Finally, the economic impact analysis yields several more components of the fiscal impact as well. For example, the direct, indirect, and induced jobs will result in some of their labor income being spent within the relevant taxing jurisdictions, generating additional sales tax and other revenues generated both on- and off-site. These fiscal projections are an instance where the distinction between "impact" and "contribution" can be consequential. Likewise, some of the activities modeled in the fiscal impact, like new household spending at local establishments, also have an economic impact that translates into new jobs, labor income, etc., in an economic area.

In sum, economic and financial projections are as much an art as a science. An important art of the impact report is striking the right balance between specificity and generality to achieve realistic projections. Finding this balance is not only important for achieving accuracy, but also for presenting information that is meaningful to policymakers and other stakeholders. Almost every project will have a combination of positive and negative impacts. It is important that the report honestly and comprehensively include a fair analysis of both positive and negative impacts on the revenues and services of each taxing body. A misleading or unrealistic impact report can undermine the credibility, and thus feasibility, of a project. On the other hand, a diligent and comprehensive impact report can play a critical role in the success of an urban renewal project. Rather than being a statutory hurdle, the hard numbers and balanced analysis in the impact report can serve to facilitate communication among the urban renewal project's various stakeholders and hopefully result in informed policy and business decisions.

# CHAPTER 4: SELLING TAX INCREMENT BONDS

*Written by Dee Wisor, Partner, Butler Snow LLP*

This chapter will discuss how tax increment bonds are sold, including some of the features unique to tax increment bonds, and the participants in the transaction. The Municipal Securities Rulemaking Board provides educational materials for bond issuers at *www.msrb.org/educationcenter/issuers/issuing.aspx*. The Government Finance Officers Association also has many useful resources for bond issuers at *www.gfoa.org/best-practices* under the Debt Management tab.

## VOTER APPROVEL

Based upon a decision of the Colorado Court of Appeals, tax increment bonds issued by an urban renewal authority may be issued without a vote, but tax increment bonds issued by a downtown development authority must be approved by the voters of the authority.

## METHODS OF SALE

Tax increment bonds, like other municipal bonds, are sold to investors that include individuals, banks, insurance companies, mutual funds, and other financial institutions. This usually is accomplished through a public offering of the bonds by an investment banking firm that purchases the bonds from the authority. Bonds are sold by a negotiated sale or a competitive sale. A negotiated sale is where an underwriter assists the issuer in structuring the bonds and then offers to purchase the bonds on the day the bonds are offered to investors. A competitive sale features a financial advisor (either an investment banker or independent financial advisor) who assists the issuer in structuring the offering. Then the issuer publishes a notice to investment banking firms that the bonds will be sold to the bidder bidding the lowest rate of interest on the bonds on a specified date. Increasingly, competitive sales are being accomplished by use of electronic bidding platforms. There is debate about which method of sale is best, but it is not the purpose of this publication to elaborate on the pros and cons of negotiated and competitive sales. However, many tax increment bonds are sold at negotiated sale because of the credit quality of such bonds during the early stages of the redevelopment project, as discussed below.

Occasionally, tax increment bonds are sold in a private placement to one investor, such as a commercial bank, or a limited number of investors. This may occur when the redevelopment project is first starting and there is a high degree of risk that the tax increment revenues will not develop in the time and amount projected. This placement may also be with the developer who is redeveloping the project. Another variation is for the urban renewal authority (URA) to not issue bonds, but rather enter into an intergovernmental agreement (IGA) with a special taxing district, such as a metropolitan district or business improvement district, formed by the developer of the property in the redevelopment project. Pursuant to the agreement, the authority will pay all or a portion of the tax increment revenues to the district. The district will then use the tax increment revenues it receives from the authority to secure the repayment of bonds that the district sells to investors. Developers sometimes prefer this approach when bonds may have to be issued over a period of years to complete the project. The developer may be concerned that political changes in the municipality or the URA will mean that bonds will not be issued when the developer requires the improvements to be funded. By using the district approach, the developer controls the district board and consequently the timing of bonds issuance.

## CREDIT ENHANCEMENT

Tax increment bonds sold in the early stages of a redevelopment often involve a high degree of risk. In redevelopment of an urban area, the assessed value actually may fall below the base value used in determining the tax increment. This may occur as a result of the demolition of existing structures during the redevelopment process. Consequently, there may be no tax increment until new buildings are constructed. In development of vacant property, incremental revenues will not develop until buildings are constructed. The construction risk involved in both types of redevelopment activities are difficult for investors to accept. As a result, investors may demand that the credit of the bonds be enhanced.

Credit enhancement takes the form of bond insurance, a letter of credit, cash deposits, escrowed bond proceeds, or a guaranty of some type. The credit enhancement can be provided either by the principal developer of the property in the tax increment area or by the municipality that authorizes the tax increment plan. This is a matter of negotiation between the developer and the municipality.

The purpose of bond insurance is to assure the investors in municipal bonds that they will be repaid. This is available from several specialty insurance companies that only insure municipal bonds. Since the recession of 2008–2009, there are fewer companies providing bond insurance. In a tax increment bond issue, insurance will be available only during the initial years of the development if the municipality or developer provides credit enhancement as the insurance companies will not accept the corporate credit risk presented by developer guaranties. After the new buildings proposed in the redevelopment plan are constructed and tax increment revenues are being paid with regularity, a bond insurer may be willing to insure the payment of the tax increment bonds based upon the tax increment credit alone. This will depend largely upon how much tax increment revenues exceed the debt service on the bonds.

A letter of credit is an instrument issued by a foreign or domestic bank that entitles the beneficiary to draw specified amounts on the bank upon the occurrence of certain events. In a tax increment financing (TIF), a bank will issue a letter of credit based on the strength of the increment alone or based upon the credit of the developer or the municipality. If a letter of credit is available, this presents the opportunity for a variable interest rate financing that is discussed below. However, since the recession of 2008–2009, letters of credit have not been as available as they previously were. Also, the fees paid to the provider of the letter of credit have increased since before the recession.

Sometimes a TIF will be secured, in part, by escrowed bond proceeds. In this approach, a portion of the proceeds will be set aside and not available to pay for project costs until a financial test is met. For example, the bond proceeds might be available when buildings with a certain amount of square footage are completed or when tenants have signed leases on a specified amount of leasable space. If the condition does not occur, then the proceeds will be used to redeem a portion of the bonds prior to their maturity. Occasionally, bonds are secured by a cash deposit posted by a developer or a municipality.

A developer which itself has a strong credit can provide a guaranty of the debt service on the bonds. This may present federal tax issues and securities law issues, so counsel should be consulted before pursuing a developer guaranty. A municipality also may credit enhance a tax increment bond issue; although, due to TABOR or other constitutional or statutory requirements, such a guaranty cannot generally be for a multiple fiscal year terms without an election. A credit enhancement available from a municipality that does not require an election is called a moral obligation pledge. A moral obligation from a municipality usually takes the form of a resolution adopted by the city council or board of trustees where the municipality makes a statement that it will consider a request to appropriate funds to replenish a reserve fund established for a tax increment bond issue after it falls below a certain level. Since the municipality is not obligated to make the appropriation, no debt is created so no election is required. A similar type of credit enhancement was approved by the Colorado Supreme Court in a csae involving the Colorado Housing and Finance Authority[68]. Rating agencies, bond insurers, and letter of credit banks believe that the municipality will honor the request and are willing provide an investment grade rating or credit enhancement on the bond issue on the basis of the moral obligation and the credit rating of the municipality.

## FIXED OR VARIABLE INTEREST RATES

Bonds are sold with a fixed interest rate or a variable interest rate. With fixed interest rate bonds, the interest rate does not change. Fixed interest rate bonds commonly are sold with limits on when the bonds may be redeemed. Usually, fixed interest rate bonds cannot be redeemed at all for a period of eight to 10 years from the date of issue. Redemption after that date may be with or without a redemption premium of one to three percent of the principal amount redeemed.

Interest rates on variable rate bonds change on a periodic basis (daily, weekly, monthly, annually, etc.). With variable rate bonds, the issuer will benefit from borrowing at low interest rates. For example, the interest rate on weekly interest rate bonds may be 1.40 percent while the interest rate on 25-year fixed rate bonds sold at the same time may be 5 percent. The issuer will have to pay the fees of a letter of credit bank and the costs of periodic remarketing of the bonds. But the interest and costs associated with a variable rate financing are usually less than fixed interest rates. However, the issuer of variable rate bonds also may be subject to interest rate volatility since rates will change periodically. Variable rate bonds also are usually redeemable on a more favorable basis. For example, weekly interest rate bonds are redeemable every month without a premium. Variable rate bonds often are sold at the beginning of the redevelopment project when the municipality or developer may have to provide credit enhancement. As soon as the tax increment develops to such a level that will permit bonds to be sold without that credit enhancement, the bonds may be easily refinanced and new bonds sold without that credit enhancement. In summary, variable rate bonds offer two significant advantages in a tax increment setting: low interest rates when tax increment revenues are first developing, and favorable redemption provisions, which allow the bonds to be refunded and the credit enhancement to change when the tax increment has developed to a sufficient level.

## PARTICIPANTS IN A BOND FINANCING

There are several participants in a bond financing in addition to the urban renewal authority. These include an underwriter, municipal advisor, issuer's counsel, bond counsel, disclosure counsel, underwriter's counsel, credit enhancer, rating agencies, trustee, and feasibility consultant. The roles of each will be briefly discussed in this section.

The underwriter is an investment banking firm that is a registered broker-dealer. The underwriter assists the issuer in structuring the bond issue including the maturity schedule and credit features, coordinates with rating agencies

68 In re Interrogatories by Colorado State Senate (Senate resolution no. 13) Concerning House Bill No. 1247, Fifty First General Assembly, 566 P2d 350, § 55 (Colo. 1977).

and credit enhancers, participates in the preparation of documents authorizing the bonds and to be used in offering the bonds to the public, and conducts due diligence on the credit of the issuer and the bonds issue. Ultimately, the underwriter purchases the bonds from the issuer and sells the bonds to investors. Sometimes in a private placement of bonds, an investment banking firm will act as a placement agent who identifies potential purchasers and negotiates the terms with the purchaser.

A municipal advisor or financial advisor is either an investment banking firm or an independent advisor who provides advice to the issuer on the structure of the transaction. A municipal advisor is an agent of the issuer and owes a fiduciary duty to the issuer whereas the underwriter is principal acting for itself and does not have a fiduciary duty to the issuer. A municipal advisor will always be involved in a competitive sale. An issuer may use a municipal advisor in a negotiated sale to review the structuring recommendations of the underwriter and the proposed interest rates, underwriting discount, and other terms of the bonds.

Issuer's counsel is the lawyer or firm of lawyers that represents the urban renewal authority in the financing. Issuer's counsel is expected to opine on matters related to the creation of the authority, the creation of the urban renewal area, and various matters related to the bond financing.

Bond counsel is a lawyer or firm of lawyers that is nationally recognized as having expertise with respect to the issuance of municipal bonds. This expertise will include knowledge of state laws applicable to the issuance of bonds, federal tax laws applicable to the issuance of bonds the interest on which is exempt from federal income taxation, and securities laws that are applicable to municipal bonds. Investors will generally not buy municipal bonds unless a nationally recognized bond counsel has delivered an unqualified opinion that the bonds are valid, enforceable obligations of the issuer and addressing whether the interest on the bonds will be exempt from federal income taxation.

Disclosure counsel is a lawyer or firm of lawyers that is retained to prepare the offering document, commonly referred to as an official statement, which will be used to offer the bonds to investors. The official statement is similar to a prospectus used in a corporate securities offering. Although counsel prepares the official statement, according to the Securities and Exchange Commission statements and positions taken in litigation, the governing body of the issuer is responsible for its content. The members of the governing body and the issuer's staff should review the official statement before it is finalized. Disclosure counsel may be the same lawyer or firm of lawyers as issuer's counsel or bond counsel.

Underwriter's counsel is a lawyer or firm of lawyers that represents the underwriter in a negotiated sale transaction. Underwriter's counsel may prepare the official statement (in which case there will not be disclosure counsel). Underwriter's counsel will review the documents prepared by other counsel and will usually prepare the bond purchase agreement between the underwriter and the issuer.

As more fully discussed above, credit enhancers usually will be an insurance company or commercial bank that issues a letter of credit. Occasionally, a developer or municipality will provide some form of credit enhancement.

Rating agencies evaluate the credit of the transaction and assign a rating reflecting that evaluation. Investors rely on the credit ratings in making decisions about what bonds to buy and at what interest rates. There are currently three credit rating agencies active in the municipal market. Tax increment bonds sold with insurance or a letter of credit will bear an investment grade credit rating. Tax increment bonds sold at the early stage of the redevelopment project and sold without insurance or a letter of credit may be sold without a credit rating. These unrated bonds often are sold at high interest rates and are often referred to as high yield bonds.

A trustee is a commercial bank having corporate trust powers. The trustee will hold funds including the debt service fund and the reserve fund, if there is one, and perhaps the proceeds of the bonds. The trustee also will make payments to bondholders. The trustee also has duties on behalf of bondholders including the duty to act if an event of default occurs.

A feasibility consultant often will prepare a projection of the tax increment revenues. This projection will be used by credit enhancers, rating agencies, and investors in evaluating the bond issue. The consultant's report will need to set forth assumptions on when development will occur and the type of development. From this, the consultant will project when revenues will be received.

# CHAPTER 5:
# DEVELOPERS AND DEVELOPMENT AGREEMENTS

*By Paul C. Benedetti, attorney at law*

## INTRODUCTION AND BACKGROUND

The Colorado Constitution contains strong prohibitions against the state and local governments providing loans, pledges of credit, donations, or grants in aid, directly or indirectly, to any private person or entity.[69]

By contrast, both the Urban Renewal Act, C.R.S. §§ 31-25-101 through 116, and the Downtown Development Authority (DDA) law, C.R.S. §§ 31-25-801 through 822, mandate that an urban renewal plan and a plan of development must afford maximum opportunity, consistent with the sound needs of the municipality, for the rehabilitation or redevelopment of the urban renewal area and the downtown development district by private enterprise in C.R.S. §§ 31-25-107(4)(g), and 807(4)(d), respectively.

To encourage private investment in their redevelopment areas (and comply with law), urban renewal authorities (URAs) and DDAs contract with developers and owners to redevelop blighted areas and usually provide reimbursements or land write downs in return for construction of specific improvements. Such agreements may be viewed as donations or grants in aid conflicting with constitutional prohibitions. However, courts, including the Colorado Supreme Court, have stated that while community redevelopment projects may benefit private parties, the benefit is incidental and secondary to the public purpose of achieving the objective of remediation of slum or blighted areas.[70] Therefore, so long as public officials and private developers and owners charged with executing redevelopment projects follow the statutes, they will avoid constitutional pitfalls.

**A word of caution.** The material here is basic and general in nature. While there are similarities, each proposed development has its own particularities, complexities, and challenges. No single discussion will cover all the issues that are likely to arise. As noted in other chapters, the following discussion is no substitute for the advice of legal counsel and other professionals experienced in redevelopment law and financing. That advice is more relevant in the case of redevelopment agreements as the relationship between the public and private sectors is frequently complex, involves public funding, and necessarily contractual in some form.

## CHARACTERISTICS OF REDEVELOPMENT AGREEMENTS

Redevelopment agreements are not like other real estate contracts. DDAs and URAs are public entities governed by statutes, official plans, and other documents that govern their scope of authority and operation. That may seem obvious, but any developer that deals with them must realize and accept the requirements that apply to such transactions. The parties negotiating with private developers must also communicate the goals and expectations that apply to the contract and development in question. All conditions, covenants, and obligations that the developer is expected to assume should be clear from the outset. Developers should know and accept that, except for matters permitted to be kept confidential (such as certain financial and proprietary information), the transaction will be public and (frequently) the subject of public comment and criticism from residents. Redevelopment projects are high profile matters in any community.

Delays and changing or adding new developer obligations are the primary killer of development plans and proposals. The parties must trust one another and deal in good faith. The developer needs predictability and consistency from the URA or DDA. Changes in the scope of the project, new unexpected requirements, or rejection of submissions that are consistent with previous approvals are unfair and deal killers. Public officials sometimes fear that acceptance of deal points by the developer means they should have asked for more.

Where the public side is expected to reimburse or pay for items to help make the project work for the developer, the developer's financial projections and cost estimates are critical. Any financial gap should be documented and explained. The developer's expected rate of return is subject to examination and testing. There likely will be a limit on reimbursements or payments to be made to or on behalf of the developer. However, it is unrealistic to expect the developer to take on the redevelopment and the covenants, conditions, and obligations that go with it and not make a reasonable profit, although profit should not be permitted unless and until the developer completes the redevelopment for which both parties bargained. What is reasonable is sometimes difficult to establish but requires a knowledgeable and realistic recognition of the risks and difficulties presented by the circumstances of the transaction.

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69 Colo. Const. Article XI, §§ 1 and 2.

70 *See e.g.*, *Rabinoff v. District Court*, 360 P2d 114 (Colo. 1961); *Denver Urban Renewal Authority v. Byrne*, 618 P2d 1374 (Colo. 1980).

## FAIR VALUE VERSUS FAIR MARKET VALUE

Both the Urban Renewal Act and the DDA law permit the URA and DDA to transfer property to a private party for development or redevelopment for "fair value" rather than "fair market value" that applies to other governmental sales to the private sector.

Fair market value generally is described as the actual cash market value for which the owner is willing to sell and the buyer is willing to buy, but neither is under any compulsion to do so. Fair value, by contrast, is a more flexible standard that may or may not require payment of cash. Both statutes (§31-25-106(1) for URAs and §31-25-808(2) for DDAs) state that in determining "fair value" the URA and DDA must take into account the uses required by the urban renewal plan or plan of development; the restrictions upon and the covenants, conditions, and obligations assumed by the transferee. It is the burdens imposed on the developer by contract that are crucial for compliance with constitutional and statutory requirements.

The same standards provide a handy checklist of provisions to be included in agreements with developers and owners that do not include transfer of land.

## TYPES OF REDEVELOPMENT (OR DEVELOPMENT) AGREEMENTS

Although often referred to as public–private partnerships, redevelopment agreements are not partnerships in the strict legal sense. They are specialized agreements that represent close cooperation between the parties to achieve a common goal of redevelopment of a blighted area. The agreements can be relatively simple to complex, depending on factors such as size of the urban renewal plan or plan of development area, control of the property by either party, degree of blight, time remaining on period for collection of tax increment financing (TIF) revenue, status of market, scope of development, cost of improvements, financial ability of the developer or owner, complexity of financing, and terms of the redevelopment agreement.

## BASIC REDEVELOPMENT AGREEMENTS

**Parties.** The agreement is usually between the URA or DDA and a development entity. Sometimes the municipality or a metropolitan district is included for a particular reason related to financing, land use, or provision of public improvements. These matters often are best included in a separate agreement with these entities as part of the overall transaction.

**Recitals and Definitions.** The recitals describe the urban renewal plan or plan of development and any preliminary matters such as solicitation for proposals (where applicable). It is frequently useful to have an alphabetical list of defined terms that are used in the agreement.

**Description of Property.** The contract is related to a particular property that is the subject of the agreement. A description of the property may be in the body or attached as an exhibit with provisions that either the URA/DDA or the developer must own or control the property to assure redevelopment. Where the URA or DDA owns property to be transferred to a developer, all the provisions applicable to any land transfer are part of the agreement plus other terms important to redevelopment of the property before and after conveyance. These are mainly financing, compliance with all applicable land use, design, and construction requirements, time deadlines to start and complete construction, reports, insurance provisions, and cost certification of certain listed eligible improvements where applicable.

**Financial and Legal Ability of the Developer.** C.R.S. § 31-25-106(2) states that in considering transferring URA-owned land to a private developer, the URA must advertise for proposals in a newspaper of general circulation in the municipality once each week for two consecutive weeks (or develop its own reasonable competitive bidding procedure). In considering any proposal it receives, the URA must consider the financial and legal ability of the developer to carry out the proposal. There are no similar provisions in the DDA law.

**Scope of Redevelopment, Developer's Responsibilities.** The agreement typically includes a development plan of all improvements, public and private, that the developer is expected to construct or install on the property and a schedule of dates for the developer to submit more detailed plans and construction documents required to start construction. An important condition to conveyance of property to a private developer or committing to reimburse an owner for certain eligible items is evidence that the developer has the necessary financing (equity and/or a construction loan) is secured to complete construction of all agreed improvements within a specified time period and that all requirements for a building permit have been met.

**Schedule of Performance.** The agreement should contain a schedule requiring the submission of various project documents and obtain approvals at specified times. The usual milestones are submission and approval of project plans and evidence of construction financing, commencement and completion of construction, and other dates that are important in the particular transaction.

**Developer's Financing.** The developer must be able to complete the required development within the time negotiated. The developer's ability to finance the development project requires an examination of the developer's confidential cost and other financial projections, including an expectation of a fair profit after completing all required construction obligations. This is where a financing gap is identified frequently followed by lengthy negotiations of what constitutes a reasonable return on investment that a contribution from the URA or DDA is required. For most projects, 12 percent to 17 percent might be fair, but where projects are profoundly blighted, contaminated, or require a long construction time, an experienced and qualified developer may require returns exceeding 20 percent.

**Authority's Contribution.** Each urban renewal area and plan of development district has unique physical and economic challenges. Some developments may require the developer or owner to fund some or all the costs of conditions surveys, plan preparation, impact reports to be reimbursed from TIF revenue or other funds that may become available, including concessions on fees and costs from the municipality. The developer may form a metropolitan district or impose a public improvement fee (PIF) on retail sales to help pay for public improvements. The URA or DDA may be able to issue TIF revenue bonds at some point or agree to reimburse the owner/developer from TIF revenues as they become available. On occasion, the developer may pledge the right to receive reimbursement to obtain a loan. Many projects use all or any combination of these methods to finance a project.

**Eligible Project Costs.** Redevelopment agreements frequently include an agreement to reimburse or pay for a list of items legally eligible for reimbursement, such as public infrastructure. These items usually are listed on an exhibit with an estimate for each line item and a total at the end of the list. The developer or metro district is required to submit cost certifications for each item and as those are approved, the certified amounts become eligible for payment upon completion of construction of all public and private improvements required in the agreement. There is usually a limit on the total reimbursement that helps resolve disputes related to financing gaps and rates of return sought by the developer.

**Restrictions on Transfer.** One important provision in agreements is a limitation of the ability of the developer to assign the redevelopment agreement without full disclosure and approval of the URA or DDA prior to completion of all improvements required by the agreement. This provision prevents land speculation and assures that the public knows the identity of the other party to the agreement, particularly where the financial and legal ability of the developer is required by C.R.S. § 31-25-106 (2).

**Remedies and Other Provisions.** The liability of the authority should be limited to payment of the specific reimbursement or funding covenant from the revenue sources identified in the agreement. The authority should not be liable for any special or punitive damages and the individual board members and municipality should not be subject to any liability. Other provisions include compliance with all applicable land use controls and design requirements, insurance coverages, no waiver of governmental immunity (except for willful or wanton conduct), and other provisions common to similar agreements.

# CHAPTER 6: DOWNTOWN DEVELOPMENT AUTHORITIES

*By Paul C. Benedetti, attorney at law*

## INTRODUCTION

While downtown development authorities (DDAs) bear some similarities to urban renewal authorities (URAs), they differ significantly in organization and operation. DDAs are created pursuant to the provisions of the Downtown Development Authority Law, C.R.S. §§ 31-25-801 through 822. DDAs are established by the municipal governing body to promote the health, safety, prosperity, security, and general welfare of the municipal central business district. By contrast, URAs can undertake projects anywhere in the municipality that qualifies as an urban renewal area. URAs are bodies "corporate and politic" while DDAs are "corporate bodies." URAs are not subject to the Taxpayer's Bill of Rights (TABOR) under Colo. Const., Article X, § 20, but DDAs are. Both URAs and DDAs are subject to the Colorado Sunshine Law.[71]

Historically, DDAs are less controversial than URAs. URAs have generated extensive litigation over time. By contrast, there are no appellate decisions cited in the annotations to DDA law.

The DDA law has not been as amended extensively by the legislature as is the case with urban renewal legislation. However, the following discussion is no substitute for advice from legal counsel familiar with the statute and procedure.

## ORGANIZATION

DDAs are organized to operate in a downtown development district which is an area in the "central business district" of the municipality established by the governing body. The central business district is defined as the area in a municipality that is and traditionally has been the location of the principal business, commercial, financial, service, and governmental center and is zoned and used accordingly.[72]

DDAs are established by the governing body of a municipality by submitting the question to qualified electors at a regular election or at a special election called for that purpose. A "qualified elector" means a landowner, resident, or a lessee of real property included in the proposed area included in the district.[73]

- "Landowner" means the owner in fee of any undivided interest in real property or any improvement permanently affixed thereto within the district. "Owner in fee" includes a contract purchaser obligated to pay general taxes, an heir, and a devisee under a will admitted to probate and does not include a contract seller of property with respect to which the contract purchaser is deemed to be the owner in fee.
- "Lessee" means the holder of a leasehold interest in real property within the district. "Leasehold interest" does not include a license or mere contract right to use real property within the district.
- "Resident" means one who is a citizen of the United States and a resident of the state of Colorado, 18 years of age or older, who makes his or her primary dwelling place within the district.

If TABOR issues are to be submitted to the voters, the election requirements of Article X, § 20 of the Colorado Constitution apply.[74]

In the ordinance submitting the question, the governing body is required to establish the boundaries of the district. The qualified electors of the district vote on the question if the DDA is authorized to exercise its powers in the district.

A landowner or lessee that is not a natural person may vote only if it designates by some formal action a representative to cast its ballot. No qualified elector may cast more than one vote, even though any person qualified or lawfully designated may be entitled to cast the vote of more than one qualified elector.[75]

Any ordinance creating a DDA shall provide that any ordinance or resolution by which bonds are issued shall specify the maximum net effective interest rate of such bonds.[76]

If a majority of the qualified electors voting at the election approve the establishment of a DDA, the DDA is deemed established.

71 C.R.S. §§ 24-6-101 *et seq.*
72 C.R.S. § 31-25-802 (3).
73 C.R.S. § 31-25-802 (9).
74 C.R.S. § 31-25-80.
75 C.R.S. § 31-25-802 (9).
76 C.R.S. § 31-25-804 (2).

The affairs of a DDA are supervised and controlled by a board of directors consisting of not less than five nor more than 11 members appointed by the governing body. A majority of the members appointed must reside or own property in the district. At least one member must also be a member of the governing body of the municipality.[77]

## POWERS AND PURPOSES

DDAs are empowered to halt or prevent deterioration of property values or structures within their districts and to redevelop such districts in conformance with an overall plan of development. DDAs have authorization to promote economic development.[78] The board has all the powers customarily vested in the board of directors of a corporation.[79]

The legislative declaration in C.R.S. § 31-25-801 finds and declares that because of atypical factors and special conditions concerning downtown development unique to each locality, the rule of strict construction shall have no application to the DDA law, but it shall be liberally construed to accomplish the purposes and objects for which it is intended. See also the liberal construction provisions of C.R.S. § 31-25-820.

The statutory powers of DDAs generally are listed in C.R.S. §§ 31-25-807 and 808. Among the powers are to:

- hire and fire a director and other staff, retain legal counsel, and set salaries and compensation;
- make economic studies, prepare plans for public facilities and other improvements, and prepare economic growth plans;
- plan and implement plans of development for public facilities and other improvements to public or private property of all kinds, including removal, site preparation, demolition, renovation, repair, remodeling, reconstruction, or other changes in existing buildings;
- make and enter into all contracts necessary or incidental to the exercise of its powers and the performance of its duties;
- acquire property or any interest therein, but a DDA does not have the power of eminent domain; and
- sell or otherwise dispose of property subject to such covenants, conditions, and restrictions as the DDA may deem necessary or desirable for uses or for public use in accordance with the plan of development.

Any sale or letting of property by the DDA shall be at not less than its fair value (as determined by the DDA and the governing body) for uses in accordance with the plan of development. In determining the fair value of real property for such uses, the DDA must take into account and give consideration to the uses provided in the plan; the restrictions upon and the covenants, conditions, and obligations assumed by the purchaser or lessee; and the objectives of the plan of development.[80] Note that this is not a fair market value standard.

## THE PLAN OF DEVELOPMENT

A plan of development is broadly defined in C.R.S. § 31-25-802 (6.6) as a plan for the development or redevelopment of the district, including any amendments. The DDA cannot undertake a development project for a plan of development area unless the governing body, by resolution, has first approved the plan of development which applies to such development project.

C.R.S. § 31-25-807(4) details the steps for approval of a plan of development. Prior to its approval of a plan of development, the governing body must submit the plan to the planning board of the municipality, if any, for review and recommendations. The planning board shall submit its written recommendations with respect to the proposed plan of development to the governing body within 30 days after receipt of the plan for review. Upon receipt of the recommendations of the planning board or, if no recommendations are received within said 30 days, without such recommendations, the governing body may proceed with the hearing on the proposed plan of development.

The governing body must hold a public hearing on a plan of development or substantial modification of an approved plan of development after public notice of the hearing by publication once during the week immediately preceding the hearing in a newspaper of general circulation in the municipality. The notice shall describe the time, date, place, and purpose of the hearing; shall generally identify the plan of development area covered by the plan; and shall outline the general scope of the development project under consideration.[81]

"Development project" or "project" is broadly defined in C.R.S. § 31-25-802(3.5) to mean undertakings and activities of the DDA or municipality authorized by the DDA law in a plan of development area for the development or redevelopment of the area in accordance with the plan of development.

Following such hearing, the governing body may approve a plan of development if it finds that there is a need to take corrective measures in order to halt or prevent deterioration of property values or structures within the plan of

77 C.R.S. § 31-25-805(2)(a).
78 C.R.S. § 31-25-807(2)(f).
79 C.R.S. § 31-25-807(1).
80 C.R.S. § 31-25-808(2).
81 C.R.S. § 31-25-808(4)(c).

development area or to halt or prevent the growth of blighted areas therein, or any combination thereof, and if it further finds that the plan will afford maximum opportunity, consistent with the sound needs and plans of the municipality as a whole, for the development or redevelopment of the plan of development area by the authority and by private enterprise.[82]

A "blighted area" is defined in the DDA law as an area within the central business district that by reason of the presence of a substantial number of deteriorated or deteriorating structures; predominance of defective or inadequate street layout; faulty lot layout in relation to size, adequacy, accessibility, or usefulness; unsanitary or unsafe conditions; deterioration of site or other improvements; unusual topography; defective or unusual conditions of title rendering the title nonmarketable; the existence of conditions that endanger life or property by fire and other causes; or any combination of such factors, substantially impairs or arrests the sound growth of the central business district, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use.[83] Note that this definition is not the same as that used for URAs.

## MILL LEVY AND TAX INCREMENT FINANCING

A municipality (not the DDA) is authorized to levy an *ad valorem* tax, not to exceed five mills, on all real and personal property in the district for the use and benefit of the DDA. The funds raised by this levy must be used for the statutory purposes stated in the DDA law.[84] The operations of the DDA are to be financed principally from the proceeds of this tax and donations or other funds borrowed and to be repaid from other funds received by the DDA under the authority of the DDA law and such other sources listed in or approved by the governing body of the municipality.[85]

With some notable exceptions, the tax increment provisions of the DDA law are virtually identical to those in the Urban Renewal Act. A plan of development may include a provision for financing that includes property taxes or municipal sales taxes (but not sales taxes from remote sales) or both.[86] For a better understanding of tax increment financing (TIF), see the discussion in Chapter 1.

Generally, the increase in assessed valuation of real and personal property in the district and municipal sales tax growth from new development that occurs in the district are the sources of TIF revenue. The total certified assessed value of real and personal property in the district (the base value) in effect when a plan of development (or a plan amendment containing the required tax allocation wording) is adopted is used to determine the base year for calculating how much, if any, revenue is available to pay DDA debt in connection with the project for an initial period of 30 years.

If a new area is added to an existing plan area, the total certified assessed value as of the time the plan is modified to include such area is used as the base value for the new area. Each year following adoption of the plan, the taxes generated by the incremental assessed valuation above the base value (the TIF value) or the amount of municipal sales tax that exceeds the base year level, or both, are paid to a special fund for repayment of project debt.

If there is a general reassessment of taxable property valuation in the area or if there is a change in the sales tax percentage levied by the municipality, both the base value and TIF value and the sales tax allocation between the municipality and the special DDA fund must be proportionately adjusted in accordance with the assessment or change.[87]

For discussion of some practical problems and concerns with TIF and the need to monitor TIF calculations, see Chapter 1.

As in the case of URAs, the legislature recently authorized the county treasurer to offset the DDA's *pro rata* share of property taxes that subsequently are refunded to a taxpayer against any subsequent payments due the DDA for the project, and the new law requires the DDA to make adequate provision for the return of overpayments by taxpayers, including establishing a reserve fund or entering into an agreement with the municipality to provide such funds.[88]

Legislation in 2008 authorized an extension of the original TIF period for DDAs from a maximum of 30 years to 50 years, which may be enacted by a municipality at any time during the last 10 years of the initial 30-year period.[89] For the first 10 years of an extension, the initial base value is advanced forward by 10 years. For each of the remaining 10 years of an extension, the base value is advanced by one additional year for each year of the extension. During each year of the 20-year extension, 50 percent of the TIF revenue from each taxing body, or some greater percentage as agreed upon by the DDA and each taxing body, is paid into the special fund established for the DDA and the remainder

82 C.R.S. § 31-25-807(4)(d).
83 C.R.S. § 31-25-802(1.5).
84 C.R.S. § 31-25-817.
85 C.R.S. § 31-25-816(2).
86 C.R.S. § 31-25-807(3).
87 C.R.S. § 31-25-807(3)(e).
88 C.R.S. § 31-25-807(3)(a)(III).
89 C.R.S. § 31-25-807 (3)(a)(IV).

is distributed to each taxing body. No later than August 1 of each year, the municipality certifies to the assessor the distribution percentages attributable to the special fund from the mill levies of each taxing body. The assessor must certify and apply the appropriate percentage to the increment value pledged to the DDA special fund.

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 rates as other taxpayers. Sales taxpayers pay the same rates of sales tax. Once paid, property taxes are allocated so that each taxing body obtains the product of its tax rate times the Base Value. The special fund receives the total of all taxing agency tax rates times the TIF Value, if any, and any incremental sales taxes, if made available by the governing body.

While all *ad valorem* property tax increments are allocated automatically to repay DDA debt if the required tax increment provisions are included in the plan, none, all, or any portion of the municipal sales tax increment may be pledged, depending on the governing body's decision. A DDA cannot compel any other public body to levy taxes.[90]

School districts that include all or part of the plan area must be permitted to participate in an advisory capacity with respect to the use of tax increment financing in the plan of development.[91]

The project debt is usually in the form of bonds but can be any form of financial obligation.[92] If bonds are issued, the municipality issues them on behalf of the DDA pursuant to an ordinance adopted by the governing body.[93] The DDA has no independent power to formally issue bonds, but may enter into agreements to use bond proceeds or TIF revenue in accordance with a TABOR election authorized by the governing body.

Tax increment bonds are special revenue bonds, payable only from tax increments described in the plan of development (unless other sources of revenue are pledged to repay the bonds), and in the absence of actual receipt of sufficient pledged tax increment revenues to pay debt service, no other funds of the DDA or of the municipality need be advanced for repayment. The debts of the DDA are entirely its own and not those of the municipality, the state, or any other public body.[94]

Although not required by law, it is advisable to meet with the county assessor before undertaking a project using property tax increment financing. The Colorado Division of Property Taxation has adopted a policy that requires a DDA to furnish to the assessor a map showing specific area boundaries, a copy of the plan of development area, and copies of relevant municipal approval ordinances or resolutions. In addition, the division has adopted guidelines for assessors to follow in calculating and allocating assessed valuation between the base assessment roll and the increased valuation roll. It is advisable to become familiar with these guidelines and to review the assessor's annual calculations to avoid mistakes in the allocation of revenues.

## INCLUSION OF ADDITIONAL PROPERTY IN A DISTRICT

Additional property may be included in an existing district by a petition to the DDA board signed by the fee owner or owners of each parcel of land adjacent to the existing district sought to be included. The petition must include evidence satisfactory to the board concerning title to the property and an accurate legal description of the property to be added. If the Board approves the application, it is submitted to the governing body of the municipality for approval. If the governing body approves the addition, it adopts an ordinance redescribing the district to include the additional property, which shall thereafter be subject to all taxes imposed by the municipality for the benefit of the DDA.

## COLORADO CONSTITUTION, ARTICLE X, § 20 (TABOR)

There has been no court decision dealing directly with the effect of the Taxpayers Bill of Rights (TABOR) on DDAs. One decision has held that an entity similar to a DDA was a "district" and not an "enterprise" under TABOR because it had the unilateral power to levy taxes.[95] A DDA does not have the power to unilaterally levy taxes, but the municipality is authorized to levy a tax, the proceeds of which are held by the municipality to the credit of the DDA to be used solely for the authorized purposes of the DDA.

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90 C.R.S. § 31-25-807(3)(c).

91 C.R.S. § 31-25-807(3)(d).

92 C.R.S. §§ 31-25-807(3)(b); 808(1)(i).

93 C.R.S. § 31-25-809.

94 C.R.S. § 31-25-813.

95 *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859 (Colo. 1995).