HB 14-1375 Passes Senate; Veto Request in the Works

HB 14-1375, a bill that will negatively impact the use of the urban renewal tool of tax increment financing throughout the state, passed the Senate on Wed., May 7, 2014, and is headed to Gov. Hickenlooper's desk for signature. Upon receipt, the governor will have 30 days to sign the bill, veto the bill, or allow it to pass into law without his signature.

Following is an overview of some of the key provisions in the bill. Many of our clients and fellow stakeholder groups are discussing the submittal of a veto request. Please let us know if you would like to participate in that effort, or if you would like an individualized analysis of how this legislation is likely to affect your existing or planned urban renewal community, area or project.

Many individuals and stakeholders from the public and private sectors participated in the coalition to defend urban renewal at the Capitol this legislative session. While we were successful in obtaining amendments that clarified or mitigated a few of the imprecise and confusing provisions of the bill, several problematic provisions remain.

The final version of the bill passed by the Senate still includes the same three core provisions:

- a "seat at the table" provision for counties;
- a "return surplus funds" provision for all taxing bodies; and
- a "skin in the game" requirement that cities must pledge 100 percent of all sales tax revenues in order to authorize the use of 100 percent of all property tax revenues within an urban renewal plan.

Each of these provisions creates a number of policy, logistical and financing problems for urban renewal authorities and developers of urban renewal projects, although certain details of such issues have been addressed through amendment. This client alert focuses on the provision of the bill that is likely to create the most concern and confusion, Section 9.5, the so-called "skin in the game" requirement, and the effective date.

In the absence of any credible third-party independent study conclusions, municipalities, counties, and other taxing bodies are not likely to reach agreement as to whether the pre-HB 1375 process is "unfair" or whether HB 1375 makes it fairer. But in the meantime, for practitioners of urban renewal—authorities, consultants, and developers—the issue will be first, to determine whether HB 1375 applies to any given project or urban renewal area, existing or proposed, and second, if so, how to comply.

The language of the bill describing the effective date, usually a standard and boilerplate component of most legislation, in this case contains substantive provisions. The language is confusing, and introduces concepts that are not presently part of the Colorado Urban Renewal Law, such that it is not immediately clear which projects or urban renewal areas will be subject to the legislation.

Below is excerpted the effective date language of the rerevised version of the bill, with emphasis added to highlight some of the most questionable language:

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(2) Section 1 of this act applies to urban renewal ***authorities created or modified on or after January 1, 2015,*** *and to such authorities* ***considering*** *urban renewal plan amendments or modifications, including, without limitation, an* ***addition of urban renewal projects****, an alteration of urban renewal area boundaries, or an extension of an urban renewal plan or the* **duration of specific projects regardless of whether such changes require actual alteration of the terms of the urban renewal plan.**

(3) Section 2 of this act applies to urban renewal plans adopted on or after January 1, 2015, and to amendments or modifications of such plans, including, without limitation, an ***addition of urban renewal projects****, an alteration of urban renewal area boundaries, or an extension of an urban renewal plan or the duration of specific projects* ***regardless of whether such changes require actual alteration of the terms of the urban renewal plan****.*

Although the statute currently does include a definition of an "urban renewal project," at present, an urban renewal plan is only required to be amended when a proposed change constitutes a "substantial modification" in the determination of the governing body of the municipality. There is an exceedingly wide variation in how plan areas and projects are defined throughout the state. For example, for a downtown-wide plan, an authority's approval of a $500 grant for a new awning or planter box for a downtown business could be considered the addition of a "project," which would trigger applicability of HB 1375. If the plan has already been adopted and the tax increment already authorized, or perhaps even bonded or otherwise committed, it will be difficult, if not impossible, to retroactively comply with HB 1375. An authority might have to amend the tax increment provision of the plan, or a municipality might have to pledge sales tax revenue from its general fund, in order to comply.

If compliance is required, determining whether such compliance has occurred will also be questionable, for several reasons. First, many municipalities have voter-approved or other types of earmarks that apply to portions of their sales tax. It is not clear whether such earmarks must be included or excluded in calculating the percentages required by Section 9.5 of the bill.

Additionally, while standing to challenge legislative determinations made by a governing body relative to an urban renewal plan has traditionally been limited by the courts, it is not clear whether Section 9.5 creates new standing for a taxing body, taxpayer, or other entity to file a lawsuit or to otherwise challenge the calculation performed in order to determine compliance with Section 9.5. This will raise the specter of potential legal challenges arising weeks, months, or even years after urban renewal plans have been approved and bonds issued for an urban renewal plan or project.

Consequently, it will be extremely difficult to obtain needed legal opinions confirming that an authority has complied with the statute in adopting an urban renewal plan. Such opinions are required in order to pledge tax increment for bonds or other debt. It is likely that both existing projects and plans, and future projects and plans, will encounter challenges in obtaining "clean" opinions to support the issuance of debt, even when the authority has attempted to comply with the formula by pledging a percentage of sales tax increment equal to the percentage of property tax increment authorized in the plan.

In the coming weeks, we will be conducting further analysis of how this legislation will affect the urban renewal and redevelopment markets in Colorado. In the meantime, please contact Carolynne White if you have specific questions about the legislation, or a particular project or plan, existing or proposed.

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Finally, despite overwhelming opposition, the urban renewal community made a valiant effort during the last several weeks to preserve urban renewal in Colorado. The following legislators deserve thanks for their opposition to HB 1375 and their support for urban renewal and infill redevelopment.

Representatives: Buckner, Duran, Fields, Foote, Garcia, Gerou, Holbert, Humphrey, Kagan, Kraft-Tharp, Landgraf, Lebsock, May Moreno, Pabon, Peniston, Pettersen, Priola, Rosenthal, Saine, Salazar, Schafer, Szabo, Tyler and Young

Senators: Baumgardner, Cadman, Guzman, Herpin, Hill, Hodge, Jahn, Johnston, Kerr, Rivera, Scheffel, Todd, Ulibarri and Zenzinger

This document is intended to provide you with general information regarding the Urban Redevelopment Fairness Act. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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