In "Case" You Missed It

Recent Real Estate Case Law Highlights

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This article highlights significant recent real estate cases affecting Colorado practitioners.

This article highlights significant real estate cases decided in 2019 and 2020. The major themes and landmark rulings for this time period fall into four categories: (1) homeowners' association (HOA) rights and easements, (2) the standard of care in construction matters and CRCP 55, (3) what constitutes a "lien" and what makes a lien or document "spurious," and (4) taxation/land use analysis.

HOA Rights and Easements

The Court of Appeals published several noteworthy opinions examining HOA and easement issues.

Construing Declarations

FD Interests, LLC v. Fairways at Buffalo Run[1] was an appeal from the Adams County District Court of a dispute centered around the interpretation and reformation of a residential development's common interest community declaration.

In 2005, a developer purchased 12.5 acres of real property adjacent to the Buffalo Run Golf Course in Commerce City (the Property) through FD Interests, LLC (FDI) and Fairways Land, LLC for a residential development of patio homes. The developer carried out the project through several entities: FDI; Fairways Builders, Inc. (Builders); Buffalo Run Fairways, LLC (BRF); and Fairways Homes, LLC (Homes) (collectively, the Developer Entities). In January 2006, Builders recorded the "Amended and Restated Declaration of Covenants, Conditions and Restrictions for Fairways at Buffalo Run Homeowners Association, Inc." (the CCR), which created the HOA for the common interest community, "The Fairways at Buffalo Run." As required by CRS § 38-33.3-205(1)(h), the CCR set a deadline for development activity, which provided that development rights would expire if there was a gap of more than five years between construction projects.

Development of the Property began after the CCR was recorded, but construction stalled during the Great Recession. On December 31, 2009, the Developer Entities recorded their most recent supplemental declaration, thereby starting the five-year clock on the development deadline. When the Developer Entities were ready to resume construction, the time limit to develop the Property had expired. After development began again in January 2016, the HOA blocked the developers from entering the Property. The Developer Entities sued the HOA, seeking, among other things, a declaratory judgment that FDI and Homes owned the undeveloped portion of the property. The HOA and the unit owners, who were HOA members, filed counterclaims for a declaratory judgment determining ownership of the undeveloped portion of the Property and reformation of the CCR and other documents governing the common interest community.

The trial court found that the "parties d[id] not dispute the fact that the [CCR] was intended to govern the common interest community now known as The Fairways at Buffalo Run" and concluded that the Property was subject to the CCR.[2] But after identifying inconsistencies in the Property's chain of title, the court reformed the CCR by adding BRF to the CCR's signature line, because despite its sole ownership of the Property at the time, it had not executed the CCR. The court reasoned that this reformation would cure the title defects.

The Court of Appeals framed two issues for resolution: (1) whether the CCR encompassed the entire Property from the outset or excluded the undeveloped portions of the Property from the community until they were specifically annexed into the development through recordation of supplemental plats and declarations, and (2) whether errors in the chain of title for the Property and the units built on it warranted reformation of the CCR.

On appeal, the Developer Entities argued that the trial court (1) incorrectly interpreted the CCR because the undeveloped portions of the property were never annexed into the common interest community and were not encumbered by the CCR; (2) lacked the power to reform the CCR to add BRF as a signer of the same; and (3) erred by ordering conveyance of the subdivision roads to the HOA by FDI.

This case is noteworthy because the Court of Appeals held in pertinent part that the trial court accurately determined the CCR encompassed the entire property when the community was established, and this resolved the HOA's title concerns. Thus, it was unnecessary for the trial court, in equity, to reform the CCR. However, "because the trial court's erroneous exercise of its equitable powers did not affect any party's substantial rights . . . this error was harmless . . ."[3]

The Court affirmed the judgment and remanded the case to address the HOA's request for attorney fees and costs.

The Colorado Supreme Court has granted certiorari on whether the Court of Appeals:

1. erred by concluding that a common interest community's declaration encumbered the entire undeveloped property at the time of filing, even though the record owner of the undeveloped property was not the party who signed or recorded the declaration;
2. properly determined that a non-owner's signature on the declaration was legally sufficient to encumber the Property, where all of the Developer Entities controlled by the same individual were acting in concert and intended to subject the entire Property to the declaration; and
3. erred in concluding that the district court's equitable reformation of the declaration was unnecessary and erroneous.[4]

Easement Requirements

Turning from association covenants to association easements, *Kroesen v. Shenandoah Homeowners Ass'n*[5] examined what it takes to meet the requirements of both common law and the Colorado Common Interest Ownership Act (CCIOA)[6] to create an easement.

In *Kroesen*, a developer divided a property into two subdivisions, Shenandoah (created in 1989) and Highlands (created in 1994), by recording declarations for each. The developer also recorded plats that depicted two roads, Blue Ridge Road and Colonial Road, portions of which follow the boundary between the two subdivisions. The plats also created an alleged easement (Subject Easement) that purportedly allowed owners in the Highlands to access their properties over the roads. The amendments to the Shenandoah plat that took place before 1994 referred to the Subject Easement in general terms such as an "access road easement."[7] None of the pre-1994 plats describe "adjacent subdivisions" with specificity.[8]

The developer established a homeowners' association for each subdivision. The developer later filed another plat that created new tracts within Highlands, including Tracts A and B. A subsequent owner of Tracts A and B recorded a plat consolidating them into Tract AB. Tract AB is adjacent to Shenandoah and abuts Blue Ridge Road.

Before Tracts A and B were consolidated, the Shenandoah HOA board of directors approved an easement over Blue Ridge Road to benefit Tract A, but no recorded document reflects the board's approval of the Subject Easement. The HOA members did not ratify the board's approval of the easement or otherwise authorize an easement to benefit Tract AB.

The Kroesens purchased Tract AB from the former owner in 1999 and signed a contract to sell it in 2015. Before the closing, however, the president of the Shenandoah HOA board of directors told the Kroesens' real estate agent that the owners of Tract AB had no right to use either road to access the property. The purchasers refused to close on the property after learning of the easement issue.

The Kroesens brought claims against the Shenandoah HOA and its board of directors' president (collectively, defendants) for (1) a declaratory judgment that the owners of Tract AB have an easement over the roads, (2) a permanent injunction enjoining the Shenandoah HOA from interfering with their access to Tract AB over the roads, (3) an award of their expenses and lost profits for intentional interference with their purchase contract, and (4) damages for slander of title from the HOA statement that there was no easement.

The district court granted summary judgment for the Kroesens on their declaratory judgment claim. After a bench trial, the court awarded the Kroesens damages on the intentional interference with contract claim to compensate them for their inability to sell the property pending litigation, but it did not award them lost profits. The court resolved the slander of title claim against the Kroesens because they had not proved the element of malice. The permanent injunction was dismissed.

On appeal, defendants argued that under common law principles, the plats amending the declaration for Shenandoah Subdivision did not contain sufficient specificity to create an easement over the roads benefiting Tract AB. The amendments to the declaration for Shenandoah Subdivision describe the nature of the easement with reasonable certainty. The plats also provide reasonable certainty as to the identity of the servient estate, Shenandoah Subdivision, where the roads are located. The Court of Appeals determined that although the description in the plats amending the declaration for the Shenandoah Subdivision of "'adjacent subdivisions, and future subdivisions' is a thin description of a dominant estate,"[9] the language is sufficient given the circumstances surrounding the easement's creation, the purpose for which the easement was created, and the record notice in Shenandoah Subdivision's chain of title describing the easement, which places good faith purchasers of tracts in Shenandoah Subdivision on notice of the easement. Therefore, under the common law test for creating an easement, Tract AB benefits from an easement over the roads.

The Court also considered whether the developer complied with the CCIOA requirements for creating an easement. The developer reserved for itself a development right to "establish a non-exclusive easement and right of way [over] all or any portion of the [original property]"[10] in the declaration for Shenandoah Subdivision and later exercised that right in plats amending the declaration. The CCIOA did not require the developer to expressly reference the easement in each plat, so the developer's descriptions of the easement satisfied the CCIOA requirements. Thus, the district court did not err by granting summary judgment on the declaratory judgment claim.

The Kroesens appealed the district court's denial of their request for lost profits. Because the expert's testimony was unclear as to the comparative value of Tract AB and the other lot, and the evidence showed that Tract AB retained market value and would eventually sell at or above the contract price specified in the terminated contract, the subject property had not become unmerchantable, so the Court held that the Kroesens were not entitled to recover lost profit damages.

The judgment was affirmed.

Community Interest Property

Woodbridge Condo Ass'n, Inc. v. Lo Viento Blanco, LLC[11] continued the easements theme, examining them within the context of community interest property.

This case involved a 0.452-acre piece of property in Snowmass Village (Disputed Property). In the 1970s, L.R. Foy Construction Co., Inc. (Foy) built several condominium buildings on a larger parcel that included the Disputed Property, though none of the buildings are situated on the Disputed Property.

In 1975, Foy conveyed the larger parcel, not including the disputed parcel, to Woodbridge Condominium Ass'n, Inc. (Woodbridge). From 1975 through 2012, Woodbridge used the Disputed Property in a variety of ways. As the Court of Appeals noted, "[a]ll this would seem, considered in a vacuum, to make out a case for adverse possession of the disputed parcel."[12] But a letter from "Woodbridge to Foy in 1992 offering to buy the disputed parcel doomed that idea."[13] Foy did not respond to the offer. No record owner of the disputed parcel used it for any purpose from 1975 until 2011.

Lo Viento Blanco, LLC (Lo Viento) then purchased the Disputed Parcel at auction in 2010 and presented plans to Woodbridge to build on it. Woodbridge then filed this case claiming adverse possession to prevent the construction. Alternatively, Woodbridge claimed to have a prescriptive easement over the disputed parcel. Lo Viento counterclaimed to reform the deed it

had received in 2010 and to quiet title. At that time, the trial court found that Woodbridge "had acquired title by possession," prompting Lo Viento to appeal in 2016.[14] A Court of Appeals division reversed. On remand, the trial court found that Woodbridge was entitled to a prescriptive easement over most of the disputed parcel, and it issued another order identifying the bounds, uses, and nature of the easement.

Lo Viento appealed the orders issued on remand. It challenged the finding that Woodbridge was entitled to a prescriptive easement, relying on the prior division's conclusion that Woodbridge's offer to buy the disputed parcel defeated Woodbridge's claim for adverse possession because the letter rebutted the presumption of adversity raised by Woodbridge's possession. The Court found that Woodbridge proved adverse use by consistently treating the Disputed Property as if it belonged to Woodbridge and did so "without express or implied authorization."[15] The Court further found that the prior appeal and the previous treatment of the 1992 letter were irrelevant because the prior appellate division "addressed only the requirement of adversity in the adverse possession context."[16] The Court also rejected an argument that correspondence granted Woodbridge permissive use to landscape the Disputed Parcel, because the letter's language was conditional and Woodbridge never agreed to its terms. Woodbridge established its entitlement to a for prescriptive easement.

Alternatively, Lo Viento challenged the scope of the easement. However, the Court determined that the trial court properly applied the legal principles governing the determination of permissible use under a prescriptive easement and did not err in its determinations as to the four types of permissible uses.

Lastly, the Court rejected Lo Viento's argument that Colorado law doesn't recognize exclusive easements, relying on real property treatises cases from California.

The judgment was affirmed. A Petition for Writ of Certiorari was partially granted in this case on September 8, 2020.[17]

Standard of Care in Construction and CRCP 55

In *Ferraro v. Frias Drywall, LLC*,[18] the Court of Appeals made a few (perhaps surprising) first impression determinations in the world of construction, which also have application to general litigation. First, it considered whether a court may sua sponte reconsider liability to determine the viability of a claim after entry of a clerk's default under CRCP 55 but before entry of default judgment. Second, it decided the extent of a homeowner's and/or contractor's duty to inspect a property for asbestos.

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The Ferraros entered into an oral contract with Frias Drywall, LLC (Frias) to remove a popcorn ceiling from their home. After Frias completed the work, the Ferraros discovered asbestos. They hired a mitigation company to remove the asbestos and sued Frias, alleging that it negligently failed to test for asbestos before beginning construction. Frias did not respond to the Complaint and the clerk entered a default.

The trial court then sua sponte held a hearing on damages. Because the default issue was novel, the trial court relied on federal authority interpreting Fed. R. Civ. P. 55, which is similar to CRCP 55, and determined that it had authority to "examine the sufficiency of a legal claim after a default is entered."[19] The trial court further determined that although the Department of Public Health and Environment's amended regulations created an inspection duty with respect to single-family residences, there was no guidance on "who owes that duty."[20] In applying common law negligence principles, the trial court found that the duty rests with the homeowner, not the contractor, and it denied the motion for default judgment and dismissed the case.

On appeal, the Ferraros argued that the clerk's entry of default established liability as a matter of law and precluded the court from further considering the issue. The Court of Appeals noted that "a default judgment comprises two steps: 'entry of default' by the clerk and 'entry of judgment' by the court."[21] The entry of default accepts the complaint's allegations and establishes the defendant's liability but does not establish damages, so entry of a default is nothing more than "an interlocutory order that, alone, determines no rights or remedies,"[22] and until damages are determined and judgment is entered, the judgment is not final. As a matter of first impression, the Court determined that authority exists under CRCP 55(c) to set aside entry of a default and dismiss a case for a complaint's legal insufficiency, because such a finding is consistent with the rule's "good cause" requirement.[23]

The Ferraros also argued that the trial court erroneously found that homeowners of single-family dwellings have a duty to inspect for asbestos and contractors do not. The Court found no common law tort duty that would otherwise protect the homeowners in this circumstance because Colorado asbestos control

statutes operate to protect the "general public from friable asbestos in public areas."[24] Further, the asbestos regulations the Ferraros relied on excluded single-family residences.

The judgment was affirmed.

What is a "Lien" and What Makes it "Spurious"?

The Court of Appeals issued several interesting decisions regarding liens. What constitutes a "lien" and what exactly makes it "spurious" were discussed in the following cases.

Judgment Liens

Franklin Credit Management Corp. v. Galvan[25] involved Franklin Credit Management Corp.'s (Franklin) efforts to execute on a judgment and whether a valid judgment lien is a condition to obtaining a writ of execution on real property. The undisputed facts revealed that Franklin obtained a default judgment against Galvan in 2007 for $43,037 and then recorded a transcript of judgment in Adams County. However, Franklin did not execute on the judgment and it expired in 2013.

In 2016, Franklin re-recorded the transcript of judgment but did not revive the judgment under CRS § 13-52-102(1). In 2018, Franklin obtained a writ of execution and delivered it to the Adams County Sheriff. The Sheriff recorded a certificate of levy and served Galvan. Galvan moved to set aside the writ of execution, arguing that because the judgment lien expired in 2013 and had not been revived, Franklin's writ of execution was "improper."[26] In response, Franklin asserted that although the lien had expired, the judgment itself was still valid, and it had the right to execute on the judgment.

The trial court found that the judgment lien had expired and was not revived, and it set aside the writ of execution. Interestingly, the trial court did not consider whether a judgment lien was required and whether Franklin could execute on its judgment via writ of execution and certificate of levy; the Court of Appeals noted that "[i]n fairness to the district court, these arguments were not clearly presented," even though Galvan did not dispute that these issues were preserved.[27] Galvan was awarded his attorney fees and costs under CRS § 13-17-102.

Franklin appealed, arguing that a valid judgment lien is not a prerequisite to obtain a writ of execution. In examining the relevant rules and statutes that govern execution of a judgment, the Court found that "none [of them] contemplates or requires a judgment lien to obtain a writ of execution and certificate of levy or execute on the judgment."[28] In reciting CRS § 13-52-102, the Court noted that if a creditor seeks to record a certified copy of the transcript of judgment, it becomes a judgment lien on all of the debtor's nonexempt real property owned or later acquired in that county. Such a judgment lien expires after six years, per the statute. However, the expiration of the lien "does not extinguish the debt."[29] Because a judgment is valid for 20 years, a creditor may execute on such judgment through other means. The Court further noted that "a lien itself is not a method to execute on a judgment; rather, it secures the judgment creditor's right to collect on its judgment from the equity in a judgment debtor's real property."[30] The district court thus erred in setting aside the writ of execution.

Franklin also argued that the trial court erred in setting aside the writ of execution because an execution lien is different than a judgment lien, and Franklin had a valid execution lien. The Court agreed with the first contention and did not consider the second because the district court had not yet addressed the issue.

The order setting aside the writ of execution and awarding Galvan attorney fees and costs was reversed and the case was remanded.

Is It Spurious?

While there was no doubt about what a "lien" was in *Franklin Credit Management Corp.*, the issue of how to characterize a unique recordation against husband's real property was front and center in *Evans v. Evans*.[31] For those who thought the spurious lien and document statute was pretty straightforward, read on. Practitioners should also note that *Evans* is relevant to both real estate and general litigation, because the practical effect of *Evans* is that recording an accurate document based on a court order is no different than recording the order itself and is even more appropriate if recording the document is required to perfect a lien otherwise entered by the order.

Evans arose out of a dissolution of marriage. Four years after the decree was entered, wife petitioned for modification alleging that husband had failed to disclose his interest in certain business assets. Ruling without the parties' consent, a district court magistrate granted wife's petition and ordered husband to pay to wife half of the value of the assets in monthly installments of $50,000, with interest to accrue at the statutory rate until the entirety of wife's portion ($1,168,639.00) was paid in full. Significantly, the Order provided that "[husband's] payments toward this obligation must commence not later than 45 days from the date of this order, *and [this order] shall create a lien against all [husband's] rights, title and interest in [the subject assets] and any other assets in his name.*"[32] Husband timely sought review of the order.

Less than one week after husband filed his petition for review, wife's counsel created and recorded a summary of the Order titled "Abstract of Court Order" (Abstract) with the clerk and recorder. Husband was not aware of the Abstract until months later, when he discovered that it appeared in the real property records in Douglas County as an encumbrance against real property he owned. Husband thereafter petitioned the trial court to invalidate the Abstract under CRS § 38-35-204 and CRCP 105.1 as a "spurious lien" or "spurious document."[33] The trial court denied the petition, finding that the Abstract did not meet either definition.

On appeal, husband argued that the magistrate's Order was not an "order" when the Abstract was recorded; rather, it was a "recommendation" only, until such time as the district court reviewed it. The Court of Appeals examined CRS § 38-35-201(4)(c), which states that a lien cannot be spurious if it is "imposed by order, judgment, or decree of a state court."[34] It also pointed to CRS § 13-5-201(3), which empowers magistrates to modify permanent orders in dissolution cases without the parties' consent, and such orders are enforceable. Accordingly, the Court concluded that the Abstract was not a spurious lien.

Further, no separate transcript of judgment was required to create a lien against husband's property. However, wife still needed to record documentation of her lien to "perfect her interest

in husband's real property," though "Colorado law does not limit the documents that can be recorded to enforce a judicially created lien to 'certified copies of an enforcement order,'" [35] nor must a lien under § 201(4)(c) specifically take the form of a judgment lien.

Husband alternatively argued that the Abstract constituted a "spurious document" because it did not accurately reflect the terms of the Order and was therefore misleading under CRS § 38-35-201(3). The Court rejected these arguments, finding that the Abstract very closely matched the wording of the Order and was not misleading. Further, the Court found that the Abstract must be "patently invalid" to be considered a "spurious document" under CRS § 38-35-201,[36] and because wife advanced a rational argument that the Abstract reflects an enforceable order, it is not patently invalid and is thus not a spurious document.

The order was affirmed.

Lis Pendens

Shortly after *Evans* was decided, the Court of Appeals had occasion to evaluate the "spuriousness" of a lis pendens in *Better Baked, LLC v. GJG Prop. LLC*.[37] This case has some curious factual twists but provides practitioners with the nuts-and-bolts analysis of how CRS §§ 38-35-201 to -204 apply to a lis pendens. The bottom line for practitioners is that if a lis pendens is filed in connection with a present lawsuit in which the relief sought affects the title to real property, the lis pendens is not "spurious," regardless of the likelihood of success on the merits.

Better Baked, LLC (tenant) leased commercial space in a warehouse owned by GJG Property, LLC (landlord). The lease gave tenant a right of first refusal (ROFR) for the five-year lease term. Under the ROFR, if landlord received an offer to sell the property or received and wanted to accept an offer to purchase the property, landlord was required to send tenant a copy of the contract and notice of its intent to make or accept an offer. Tenant would then have the right to purchase the property on the same terms and conditions.

In 2016, tenant brought an action for declaratory relief regarding certain charges under the lease. The parties settled and the case was dismissed. In August 2017, the Reeds sought to purchase the property. As part of this anticipated sale, tenant and landlord amended tenant's lease to waive and terminate the ROFR. In February 2018, another tenant, Peak Holdings Group, LLC (Peak), then entered into a different purchase agreement with landlord for tenant's property. Peak assigned its rights to Dorenka, LLC. Landlord asserted that tenant's ROFR waiver applied to the pending Dorenka purchase, which tenant disputed. Tenant's counsel recorded a lis pendens against the property that referenced the dismissed action. A few days later, tenant commenced new litigation against landlord and recorded a second lis pendens referencing that action. The new action sought damages and a declaratory judgment that tenant was entitled to exercise the ROFR. Landlord, Peak, and Dorenka (collectively, petitioners) sued tenant to remove both lis pendens as "spurious documents."[38]

> "Practitioners should also note that *Evans* is relevant to both real estate and general litigation, because the practical effect of *Evans* is that recording an accurate document based on a court order is no different than recording the order itself and is even more appropriate if recording the document is required to perfect a lien otherwise entered by the order."

The trial court determined that even if the claims asserted in tenant's second action were meritorious, this "would not affect title to or the right of possession of the Property."[39] It concluded that the lis pendens were "goundless, and as such, are spurious and invalid," released both, and assessed fees against tenant.[40]

On appeal, tenant argued that the trial court erred in declaring both lis pendens spurious. Tenant maintained that even if the first lis pendens was invalid due to the earlier dismissal, the second lis pendens was not. The Court of Appeals agreed with tenant's argument that rather than reaching the merits of landlord's waiver defense, the trial court should have asked "only whether, based on the allegations in the complaint concerning the ROFR," the tenant advanced a rational argument based on the evidence or the law that the second action could affect title to real property.[41]

The Court noted that CRS § 38-35-110(1) authorizes the recording of a lis pendens in an action where the relief sought "affects title to real property," and the Colorado Supreme Court interprets this phrase broadly. The recording is proper if the claimant shows that the claim relates to a right of possession, use, or enjoyment of real property. The Court of Appeals found

that an ROFR is more than a mere contract right and may affect title to real property within the meaning of the statute.

The Court then examined the spurious liens and documents statute, noting that it "protects property owners from frivolous claims used to cloud title as a means of protest or harassment."[42] A lis pendens can be a "spurious document" under CRS § 38-35-201(3), but it is not groundless just because the underlying claim may fail.[43] Here, although the first lis pendens was groundless (due to the dismissal of the earlier action), the second lis pendens required "more careful examination."[44] While this examination required the district court to conduct a show cause hearing, the trial court should have stopped short of reaching the merits of the claims. The Court stated that the trial court "should have focused only on whether the second lis pendens was filed in connection with a present lawsuit in which the relief sought 'affect[s] the title to real property.'"[45] Because the second lis pendens was filed in connection with such a lawsuit, it was not groundless or spurious.

The order was affirmed as to the first lis pendens and reversed as to the second.

Taxation/Land Use Analysis

Continuing its consideration of related concepts, in February 2020 the Colorado Supreme Court, on certiorari review, decided three tax abatement cases[46] involving the definition of "residential land" under CRS § 39-1-102(14.4)(a) and what qualifies as such for tax purposes.

In these three consolidated cases out of Summit County, *Mook v. Board of County Commissioners*, *Kelly v. Board of County Commissioners*, and *Hogan v. Board of County Commissioners*, the Court "unravel[ed] the mysteries of what constitutes 'residential land'" under CRS § 39-1-102(14.4)(a).[47] The Court then applied its analysis to a fourth case. This analysis matters because residential land is taxed at a much lower rate than vacant land, and many Colorado property owners assert that their combined residential/vacant parcels qualify as residential land in seeking corresponding tax abatements.

The statute defines "residential land" as "a parcel or contiguous parcels of land under common ownership upon which residential improvements are located and that is used in conjunction with the residential improvements located thereon."[48] For undeveloped property to qualify as residential land, "it must be (1) *contiguous* with residential land; (2) *used as a unit* with residential land; and (3) *under common ownership* with residential land."[49]

> "The bottom line for practitioners is that if a lis pendens is filed in connection with a present lawsuit in which the relief sought affects the title to real property, the lis pendens is not 'spurious,' regardless of the likelihood of success on the merits."

Contiguous Parcels

In *Mook*, the parties had an agreement that the residential parcel and the subject parcel did not physically touch because the HOA owned an approximately 17-foot-wide strip of land that completely separated the two properties. An aerial photograph of the parcels at issue is included in the opinion.

The Supreme Court held that this clear lack of contiguity defeated the Mooks' claim to reclassify the subject parcel as residential, affirming the Board of Assessment Appeals (BAA) and Court of Appeals decisions that the plain and ordinary meaning of contiguous is "touching along boundaries often for considerable distances."[50]

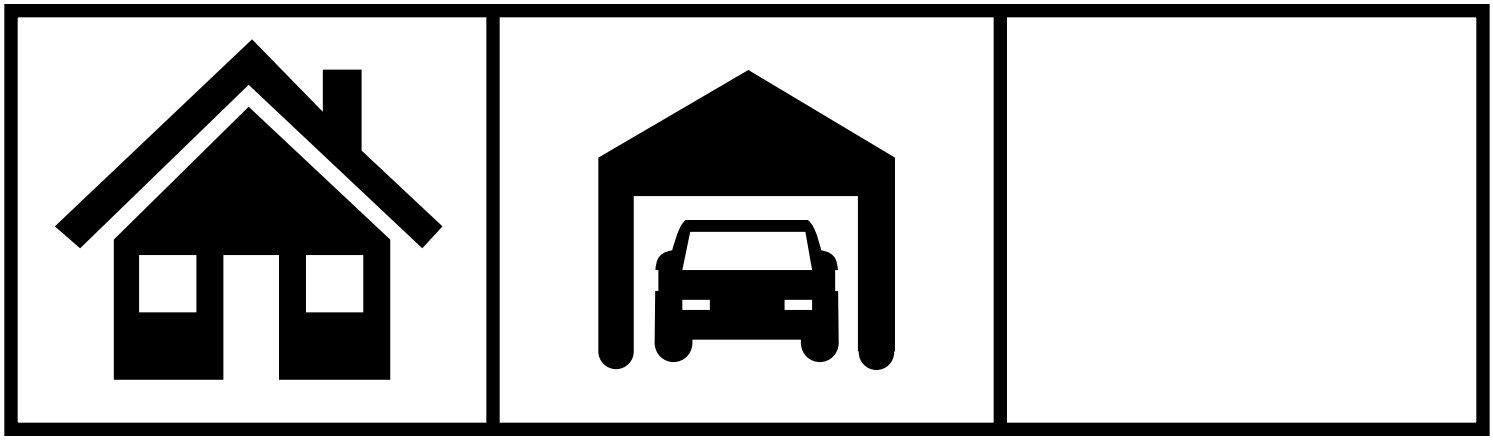
The judgment was affirmed.[51]

Used as a Unit

In *Hogan*, the Hogans owned three parcels of land that formed an "L" shape. One parcel contained their house (residential parcel). A second directly touched the residential parcel and part of their deck extended onto it. The Hogans successfully petitioned to have this parcel's classification changed from vacant to residential (reclassified parcel). The third parcel was the subject of this case. It touched the reclassified parcel, contained an unpaved driveway, but was otherwise undeveloped. It was classified as vacant land. The opinion includes an aerial photograph of the Hogan properties.

The Hogans testified that they used the subject parcel "to walk their dog, gather firewood, park vehicles and a trailer, and secure scenic views with a privacy buffer."[52] The county assessor concluded these uses did not constitute using the subject parcel as a unit with the residential and reclassified parcels, and the Board of County Commissioners (BCC) and BAA upheld the vacant land classification.

The Court of Appeals reversed the BAA, holding that the assessor went beyond the



statutory language in following Assessors' Reference Library (ARL) guidelines, and the statute does not require "active" property uses to satisfy the "used as a unit" element.[53] It also concluded that each parcel does not have to contain a residential improvement. The case was remanded with directions, but the Supreme Court granted the BCC's petition for certiorari review.

The Supreme Court noted the conflicting conclusions on the "used as a unit" issue in a number of opinions issued by various Court of Appeals divisions.[54] The Supreme Court then agreed with the Court of Appeals' rejection of the legal standards used by the assessor and the BAA and tried to provide some guidance for assessors going forward. In short, the Court held that to satisfy the "used as a unit" requirement a landowner must use multiple parcels of land together as a collective unit of residential property.

The case was remanded to the BAA to make a determination under that standard.

Common Ownership

In *Kelly*, Karen L. Kelly served as the trustee for two separate trusts that each owned a parcel of land. A house was on the residential parcel and the other parcel was undeveloped and classified as vacant land. Title to the residential parcel was held in a qualified personal residence trust, while title to the subject parcel was held in a revocable family trust. Kelly was the settlor, trustee, and beneficiary of both trusts.

Kelly petitioned the BCC to reclassify the subject parcel as residential land. The BCC denied the petition for lack of "common ownership."[55] The BAA upheld the BCC, finding the two trusts were separate and distinct legal entities. The Court of Appeals reversed, relying on a broader reading of the word "ownership" and holding that county records establish a presumption of ownership, but that presumption may be rebutted by evidence of a person or entity's right to possess, use, and control the contiguous parcels.[56]

The Supreme Court held that property ownership is determined according to record title, and assessors are to rely on county records when deciding whether properties are held under "common ownership."[57] Because it was undisputed that a different trust owned each parcel, the parcels weren't held under common ownership, and the subject parcel did not qualify as residential land.

The judgment was reversed.

Application to Ziegler

In *Ziegler v. Park County Board of County Commissioners*, the Supreme Court considered the "contiguous parcels of land" and "used as a unit" requirements of the "residential land" definition in CRS § 39-1-102(14.4)(a).[58]

Ziegler owned four parcels of land in Park County. One parcel was classified as residential land. The other three were classified as vacant land and taxed at the higher rate. Ziegler petitioned to reclassify the three parcels as residential land. It was undisputed that Ziegler owned the four parcels under common ownership, but it was unclear whether they were contiguous or used as a unit. The opinion includes an aerial photograph of the parcels at issue.

Ziegler testified that he used the property as a recreational mountain ranch for only about four to six weeks a year. The BCC denied Ziegler's petition, and the BAA upheld the determination, finding that the uses of the subject parcels were not essential to the residential improvements, and the parcels did not meet the "used as a unit" requirement.

The Supreme Court applied *Mook* to analyze the contiguity requirement. The Court first held that because parcels 2 and 3 did not touch the residential parcel, they could only be classified as residential if they touched another parcel containing a residential improvement that is "an integral part of the residential use."[59] In an amusing "quick example, complete with highly sophisticated clipart," reproduced at the top of this page, the Court demonstrated how a multi-parcel assemblage with an undeveloped parcel would satisfy the contiguity requirement.[60]

The right parcel remains undeveloped but physically touches the middle parcel, which contains a residential improvement that is an integral part of the residential use in the left parcel. However, the BAA didn't make findings on whether the parcels at issue in *Ziegler* satisfy this contiguity test.

The Court then analyzed the "used as a unit" requirement under *Hogan* and found that the BAA and assessor made the same error discussed in *Hogan* by interpreting the "used as a unit"

prong to require that the landowner's use be "essential" to the enjoyment of the residential parcel. The prong's only requirement is that the residential and subject parcels be used as a collective unit of property for residential purposes.

The order was reversed and the case was remanded for the BAA to determine whether the parcels were contiguous and whether Ziegler's use of the subject parcels satisfied the used as a unit requirement under the appropriate standards.

Other Cases of Note

Additional real estate cases worth reviewing were mentioned at the 2020 Real Estate Symposium involving condemnation/eminent domain;[61] real estate contracts, rights of first refusal, and property distribution;[62] foreclosure and debtor/creditor matters;[63] mining;[64] sales and use tax;[65] treasurer's deeds/quiet title matters;[66] and zoning.[67] Practitioners can obtain the 38th Annual Real Estate Symposium materials through the CBA-CLE Dashboard, by selecting "Real Estate" as the Practice Area and searching for "Symposium." CL



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NOTES

1. *FD Interests, LLC v. Fairways at Buffalo Run Homeowners Ass'n*, 2019 COA 148, *writ of cert. granted in part*, 2020 Colo. LEXIS 519 (June 1, 2020).
2. *Id.* at ¶¶ 2 and 3.
3. *Id.*
4. *Buffalo Run Fairways, Ltd. Liab. Co. v. Fairways at Buffalo Run Homeowners Ass'n*, No. 19SC865, 2020 Colo. LEXIS 519 at *1 (June 1, 2020).
5. *Kroesen v. Shenandoah Homeowners Ass'n, Inc.*, 461 P.3d 672 (Colo.App. 2020).
6. CRS §§ 38-33.3-101 et seq.
7. *Kroesen*, 461 P.3d at 675.
8. *Id.*
9. *Id.* at 678.
10. *Id.* at 680.
11. *Woodbridge Condominium Ass'n, Inc. v. Lo Viento Blanco, LLC*, 2020 COA 34.
12. *Id.* at ¶ 7.
13. *Id.*
14. *Id.* at ¶¶ 1 and 12.
15. *Id.* at ¶ 30.
16. *Id.* at ¶ 27.
17. *Lo Viento Blanco, LLC v. Woodbridge Condo Assoc., Inc.*, 2020 Colo. LEXIS 777. The Supreme Court granted certiorari only as to "whether, under Colorado law, an adverse occupier's acknowledgement or recognition of the owner's title during the occupant's claimed prescriptive period interrupts the prescriptive use and defeats the presumption that any use was adverse."
18. *Ferraro v. Frias Drywall, LLC*, 451 P.3d 1255 (Colo.App. 2019).
19. *Id.* at 1258.
20. *Id.*
21. *Id.* at 1259.
22. *Id.*, quoting *Singh v. Mortensun*, 30 P.3d 853, 855 (Colo.App. 2001).
23. *Id.*
24. *Id.* at 1261.
25. *Franklin Credit Mgmt. Corp. v. Galvan*, 457 P.3d 749 (Colo.App. 2019).
26. *Id.* at 750.
27. *Id.* at 751 n.3.
28. *Id.* at 751.
29. *Id.* (quoting *Mortg. Invs. Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1186 (Colo. 2003)).
30. *Id.* at 752.
31. *Evans v. Evans*, 469 P.3d 498 (Colo.App. 2019).
32. *Id.* at 501 (emphasis in original).
33. *Id.*
34. *Id.* at 502.
35. *Id.* at 505. *See* CRS § 38-35-109(1); *Nile Valley Fed. Sav. & Loan Ass'n v. Sec. Title Guarantee Corp of Balt.*, 813 P.2d 849 (Colo. App. 1991).
36. *Id.* at 506.
37. *Better Baked, LLC v. GJG Prop., LLC*, 465 P.3d 84 (Colo. 2020).
38. *Id.* at 87.
39. *Id.*
40. *Id.*
41. *Id.* at 87–88.
42. *Id.* at 88.
43. *Id.* at 89.
44. *Id.* at 90.
45. *Id.* at 91.
46. *Mook v. Bd. of Cty. Comm'rs*, 2018SC434; *Kelly v. Bd. of Cty. Comm'rs*, 2018SC499; *Hogan v. Bd. of Cty. Comm'rs*, 2018SC544. All three cases are consolidated at 457 P.3d 568 (Colo. 2020).
47. *Id.* at 571.
48. *Id.*
49. *Id.* (emphasis in original).
50. *Id.* at 572. *See also* 574–78 for further in-depth discussion.
51. Practitioners are encouraged to read *Lannie v. Bd. of Cty. Comm'rs*, 471 P.3d 1207 (Colo.App. 2020), which answered a question left open in *Mook*: whether the phrase "common ownership" requires identical ownership or merely overlapping ownership. The Court of Appeals concluded that identical ownership is required.
52. *Mook*, 457 P.3d at 573.
53. *Id.*
54. *Id.* at 578.
55. *Id.* at 574.
56. *Id.* at 574–75.
57. *Id.* at 583. *See also* 582–84 for more detailed discussion.
58. *Ziegler v. Park Cty. Bd. of Cty. Comm'rs*, 2020 CO 13, ¶ 1.
59. *Id.* at ¶ 23.
60. *Id.* at ¶ 22.
61. *Nesbitt v. Scott*, 457 P.3d 134 (Colo.App. 2019); *Forest View Co. v. Town of Monument*, 464 P.3d 774 (Colo. 2020).
62. *Filatov v. Turnage*, 451 P.3d 1263 (Colo.App. 2019); *In re Marriage of Blaine and He*, 2019 COA 164; *In re Marriage of Wright*, 459 P.3d 757 (Colo.App. 2020).
63. *Igou v. Bank of America, N.A.*, 459 P.3d 776 (Colo.App. 2020); *Sedgwick Props. Dev. Corp. v. Hinds*, 456 P.3d 64 (Colo.App. 2019).
64. *Info. Network for Responsible Mining v. Colo. Mined Land Reclamation Bd.*, 451 P.3d 1245 (Colo.App. 2019).
65. *Am. Multi-Cinema, Inc. v. City of Aurora*, 471 P.3d 1139 (Colo.App. 2020); *IBM Corp. v. City of Golden*, 461 P.3d 659 (Colo.App. 2020); *Rare Air Ltd. v. Prop. Tax Adm'r*, 459 P.3d 547 (Colo. App. 2019).
66. *Actarus, LLC v. Johnson*, 451 P.3d 1270 (Colo.App. 2019); *Moeller v. Ferrari Energy, LLC*, 471 P.3d 1258 (Colo.App. 2020).
67. *Hajek v. Bd. of Cty. Commr's for Boulder Cty.*, 461 P.3d 665 (Colo.App. 2020).