In "Case" You Missed It—2020–21

Real Estate Case Law Highlights

BY LINDSAY J. MILLER, NATHAN G. OSBORN, AND PAUL SACHS

This article summarizes recent noteworthy Colorado appellate opinions that affect real estate practice.

This article highlights Colorado real estate opinions published in 2020 and 2021. It considers notable decisions from Colorado's appellate courts on the authority of homeowners' association boards to act on behalf of owners in litigation, the interplay between the common law and the statutory after-acquired title doctrine in the context of implied easements, regulatory takings, the scope of collection remedies under CRCP 69(g), standing in relation to oil and gas interests, mineral interests, water rights, taxation and land use issues, and search and seizure of real property.

Homeowners' Association Rights

In 2021, the Court of Appeals published an opinion extending the authority of homeowners' associations to bring lawsuits on behalf of owners in breach of implied warranty and negligence lawsuits. Practitioners should note this ruling for its apparent expansion of rights and powers of common interest communities.

Brooktree Village Homeowners Ass'n, Inc. v. Brooktree Village, LLC concerned the Brooktree Village Townhomes (development), a residential common interest community organized under the Colorado Common Interest Ownership Act (CCIOA).[1] The development's original owner sought protection under the Bankruptcy Code after it had completed and sold several townhomes to residential purchasers but before it finished constructing the development. The project's lender took possession of the development and conveyed the common areas to Brooktree Village Homeowners Association, Inc. (Association), which had been formed by the original developer. Association owns and manages the development's common areas for the use and benefit of its members pursuant to the Declaration of Covenants, Conditions, Restrictions, and Easements of Brooktree Village Townhomes. Association members were the townhome owners at the development.

A second developer, Brooktree Village, LLC (Developer), later purchased the remaining undeveloped portions of the development other than the common areas. Rivers Development, Inc. (Builder), a construction company affiliated with Developer, completed construction of the development, and Developer sold all the newly constructed townhomes to individual homeowners. After discovering construction defects throughout the development, Association sued Developer and Builder. Association sought damages for the cost of repairing both the construction defects in the common areas and damage to one of the townhomes caused by construction defects in the common areas. Association asserted claims on behalf of itself and its members under CRS § 38-33.3-302(1)(d). Following a trial, a jury found Developer and Builder liable for breach of implied warranty and negligence and awarded Association $1.85 million in damages. The trial court awarded the entire amount to Association on the breach of implied warranty claim.

On appeal, Developer and Builder argued it was error to allow Association to pursue implied warranty claims on behalf of Association members. They contended that because the direct purchasers bought their townhomes from Developer, not Builder, Builder lacked contractual privity with the direct purchasers. The Court of Appeals found, among other things, that under CCIOA a homeowners' association has standing to bring a breach of implied warranty claim on behalf of itself and its members to redress construction defects in the common areas of the community. It may also bring an action for breach of implied warranty to redress construction defects in individual units.

Here, Builder created Developer to market and sell the townhomes that Builder constructed at the development, and both Builder and Developer signed the purchase agreements providing express warranties. Accordingly, Builder provided implied warranties to the direct purchasers. Further, the fact that Developer and Builder never owned the common areas and fewer than half of Association's members purchased townhomes from Developer does not preclude Association's standing to pursue implied warranty claims for construction defects in common areas. Although Developer and Builder were not in privity with Association or with townhome owners that did not purchase from them, the 23 direct purchasers from Builder and Developer have implied warranties of workmanship and habitability from them, and those purchasers have easement rights to use the common areas. Consequently, a defect in the common areas affects the rights of every owner in the Development, and Association could recover damages to repair such defects.

Developer and Builder also contended that the trial court erred by not reducing the jury's damage award by 10% to reflect Association's comparative negligence. However, the jury found that Association prevailed on its breach of implied warranty claim, to which comparative fault does not apply, so Association was entitled to a judgment in the full amount the jury awarded.

The judgment was affirmed.

What Constitutes a Regulatory Taking?

In *Bridge Aina Le'a, LLC v. Hawaii Land Use Commission*, the US Supreme Court offered some insight on regulatory takings.[2] In this case, the Hawaii Land Use Commission (Commission) downzoned a large area of land from urban use to agricultural use. At the time, Bridge Aina Le'a had a sale of the land pending for $40.7 million. Removal of the urban designation ended

the buyer's ability to finance and purchase, and the sale fell through. Bridge Aina Le'a subsequently filed suit, and a jury found that the Commission's action was a compensable regulatory taking under the US Constitution. The district court concluded that there was an adequate factual basis for the taking. But the Ninth Circuit considered the same facts under the same legal tests and concluded that no reasonable jury could find a taking.

Bridge Aina Le'a petitioned for a writ of certiorari. The issues presented included a request to clarify the rules for recovery for regulatory takings in light of confusion caused by *Lucas v. South Carolina Coastal Council* and *Penn Central Transportation Co. v. City of New York*.[3] While the Court denied the petition, Justice Thomas's dissent included the following instructive thoughts on the state of the law in this area:

> Our current regulatory takings jurisprudence leaves much to be desired. A regulation effects a taking, we have said, whenever it 'goes too far.' . . . As one might imagine, nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this standardless standard.[4]

He concluded: "If there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs."[5] Practitioners should thus remain attuned for further developments in this area.

Implied Easements

In 2021, in *Amada Family Limited Partnership v. Pomeroy*, the Colorado Court of Appeals continued to weigh in on implied easement issues by clarifying the interplay between the common law after-acquired title doctrine and the related Colorado statute.[6]

In this case, the McGees owned Parcels A, B, C, and D. Amada Family Limited Partnership (Amada) purchased Parcels A and D from the McGees through a series of transactions. Because the land to the east of Parcels A and D is impassable, these parcels lack any feasible means of ingress and egress except across Parcels B and C, which are owned by the Pomeroys. In 2017, Amada built a spur road and began using it to access its parcels. The spur road connected to the existing access road on Parcel C and passed through an elk fence on Parcel C that was installed by the McGees' predecessor in interest. After Amada built the spur road, and without Amada's consent, the Pomeroys unilaterally constructed a gate across the spur road blocking access. The Pomeroys also locked a gate at the entrance to the old access road, which blocked Amada's access to Parcels A and D. In response, Amada filed an action for declaratory judgment and trespass. Amada claimed that it owned an express access and utility easement over Parcels B and C in favor of Parcel A, and an implied access and utility easement over Parcels B and C in favor of Parcel D to access the existing public road. The Pomeroys counterclaimed for, among other things, a decree of an easement on Parcel A in favor of Parcels B and C, claiming that this was necessary to access a headgate on Parcel A that is essential to their irrigation system.

> "He concluded: 'If there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs.' Practitioners should thus remain attuned for further developments in this area."

The trial court concluded that (1) when the McGees sold Parcel A to Amada in 2007, Amada obtained an express access and utility easement over Parcel B in favor of Parcel A; (2) in 2012, under the common law after-acquired interest doctrine, Amada obtained an express access and utility easement over Parcel C in favor of Parcel A; and (3) Amada holds an implied access easement over Parcels B and C in favor of Parcel D based on the McGees' prior use, and an implied easement by necessity, for access and utilities, over Parcels B and C in favor of Parcel D. The trial court enjoined the Pomeroys from gating the spur road at the elk fence, and it denied Amada's trespass claim. The trial court also recognized an easement over Parcel A in favor of Parcels B and C for access to the headgate.

On appeal, the Pomeroys contended that the district court erred by granting an express easement over Parcel C in reliance on the common law after-acquired interest doctrine, arguing that the after-acquired interest statute abrogated the common law doctrine. The Court found that the after-acquired interest statute does not abrogate the common law doctrine and that easement rights are property interests that may be conveyed under it. Here, the covenant in the 2007 deed provided that although the McGees didn't own Parcel C at the time, the easement would include the land currently permitted for access if the McGees acquired that land. Based on that understanding, Amada acquired Parcel A, from which no feasible means of access exists without the easement over Parcel C. Amada therefore reasonably relied on the McGees' promise to allow an easement over Parcel C if they could acquire it, which they later did. Therefore, the district court did not err by recognizing the claimed easement.

The Pomeroys also challenged the district court's recognition of an implied access and utility easement over Parcels B and C in favor of Parcel D, contending that the evidence did not support the court's conclusion that the McGees' prior use of the access road to enter

Parcel D created an implied easement, and any implied easement arising by necessity did not include utility rights. The Court determined that easements may arise by implication, and when a party conveys property, there is a presumption that the party has conveyed whatever is necessary to provide for the property's beneficial use. Further, an easement may be appurtenant to land even when the servient estates are not adjacent to the dominant estate. Here, the evidence supported the trial court's conclusion that the McGees' prior use of the access road to enter Parcel D was apparent and, accordingly, the district court did not err by recognizing Amada's implied access easement over Parcels B and C in favor of Parcel D.

The Court also clarified that the scope of an easement by necessity is set according to the purpose of the conveyance. Here, because Parcel D was conveyed for residential purposes, the court did not err by recognizing that Amada's easement on Parcels B and C in favor of Parcel D included utility rights. There was also sufficient evidence to support the district court's conclusion that the gate on the spur road at the elk fence must be removed because it is an unreasonable interference with Amada's easement.

On cross-appeal, Amada contended that the district court erred by declining to award economic damages to remedy the Pomeroys' trespass. The Court held that damages for violation of easement rights are available to an easement holder whose right of way is obstructed. In this case, Amada alleged that the Pomeroys trespassed by locking the gate at the entrance to the access easement and installing a gate on the spur road at the elk fence. The Pomeroys may be liable for damages under Colorado law for this trespass.

The judgment was affirmed in part and reversed it in part, and the case was remanded for a hearing on Amada's trespass claim.

Collections Law

The Court of Appeals considered the scope of remedies available under CRCP 69(g) in *AA Wholesale Storage, LLC v. Swinyard, LLC*. The lesson here for practitioners is when one collection remedy fails, consider all other options.

"In a matter of first impression, the Court considered whether a nonoperating fractional interest owner in an oil and gas unit who pays real property taxes on its leasehold interest has standing to claim that its due process rights were violated when it did not receive individual notice of or an opportunity to challenge a retroactive assessment and increased tax."

In this case, AA Wholesale Storage, LLC (AA) obtained a default judgment against Swinyard for nonpayment of a debt on a commercial lease. AA was unsuccessful in collecting the judgment and learned that Swinyard was prosecuting a civil action against unrelated third parties. AA moved under CRCP 69(g) for a turnover of Swinyard's claims in the hope of applying the proceeds of that litigation to satisfy its judgment. The district court denied the motion.

On appeal, AA argued on the merits that the district court abused its discretion in denying its motion. The Court recognized a number of practical problems associated with the turnover of Swinyard's claims to AA, which included Swinyard's required participation in the case to prove the value of services rendered, Swinyard's lack of motivation to pursue the case if the funds were going directly to AA, and consideration of pending counterclaims against Swinyard. The court also invited AA to consider alternative relief in the form of a lien on the proceeds of Swinyard's litigation. These considerations were proper exercises of the court's discretion.

The order was affirmed.

Oil and Gas Law

The Court of Appeals considered the issue of standing related to oil and gas interests in *CO_2 Committee, Inc. v. Montezuma County*.[7] In a matter of first impression, the Court considered whether a nonoperating fractional interest owner in an oil and gas unit who pays real property taxes on its leasehold interest has standing to claim that its due process rights were violated when it did not receive individual notice of or an opportunity to challenge a retroactive assessment and increased tax.

Plaintiff CO_2 Committee, Inc. (CO_2) is a nonprofit corporation whose members include nonoperating fractional interest owners in the McElmo Dome Unit (the Unit), an oil and gas unit, who pay real property taxes in Montezuma County (County). After an audit, the County retroactively increased the assessed value of the taxable real property in the Unit for tax year 2008. During the audit and subsequent proceedings contesting the assessment initiated by the Unit's operator, Kinder Morgan, the County communicated only with Kinder Morgan. The County did not provide individual notice to any other fractional interest owner, and no other fractional interest owner participated in the proceedings initiated by Kinder Morgan, which resulted in increased tax liability. Kinder Morgan billed the nonoperating fractional interest owners,

including CO_2, for their proportionate shares of the increased taxes.

CO_2 unsuccessfully objected to the assessment with the County assessor, the board of equalization, and the County commissioners. CO_2 filed a complaint alleging the County had violated its members' due process rights by failing to provide each member individual notice of and an opportunity to challenge the retroactive assessment. The district court dismissed the case for lack of standing.

On appeal, CO_2 contended that the district court erred by dismissing its complaint for lack of standing. Here, CO_2 sufficiently alleged that its members suffered an injury in fact based on the denial of their due process rights and economic loss. Further, the injury was to a legally protected interest, because each nonoperating fractional interest owner who pays taxes is entitled to the rights afforded to property owners, persons, or taxpayers under the review, audit, protest, abatement, and appeal procedures. Accordingly, CO_2's members have standing to sue in their own right. However, the district court did not determine whether CO_2 met the criteria for organizational standing, which is required for it to bring the asserted claims on behalf of its members.

The order dismissing the complaint for lack of standing was reversed and the case was remanded for further proceedings consistent with this opinion.

Property Taxes

The Colorado Court of Appeals clarified what revenue can be considered for purposes of property tax valuation in *Lodge Properties, Inc. v. Eagle County Board of Equalization*.[8]

Lodge Properties, Inc. (Lodge) is the sole owner of the Lodge at Vail Resort and Hotel (LAV) and is a subsidiary of Vail Resorts, Inc. (Vail Resorts). LAV is located at the base of Vail's ski area and has approximately 160 guest rooms, including 80 that are owned by Lodge and 74 that are privately owned residential condominium units. The condo units are physically connected to and integrated with the LAV property, so LAV regularly uses them as hotel rooms. A reciprocal easement allows hotel guests and guests who rent a condominium access to the same amenities.

RockResorts International LLC (RockResorts) is another subsidiary of Vail Resorts and manages LAV's hotel operations and homeowners' association. RockResorts and another Vail Resorts subsidiary, Vail/Beaver Creek Resort Properties, Inc. (VBC), provide rental management services to more than two-thirds of LAV's condo owners. VBC contracts with condo owners to rent their condos to transient guests, and RockResorts manages the LAV rental program under which condos are managed and operated as rental units within the hotel. VBC retains 40% of gross rental proceeds from condos it manages. Neither RockResorts nor VBC maintains separate financial statements for the condo operations at LAV, and the revenues from Lodge, RockResorts, and VBC all flow into Vail Resorts' net income.

For tax year 2017, Eagle County (County) assessed LAV's taxable real property at $41,104,470. The County included VBC's net operating income from the rental management services it provides to the LAV condos (condo net income). Lodge contested the assessment, and the Eagle County Board of Equalization (BOE) denied its petition. The Board of Assessment Appeals (BAA) then determined that condo net income should not be included for valuation purposes because it is an intangible asset that must be excluded from the calculation of LAV's actual value. The BAA ordered the BOE to reduce the 2017 actual value of LAV to $26,245,000.

Actual versus Market Value

On appeal, the BOE argued that the BAA did not accurately appraise the property when it differentiated between the actual value and the market value of the property. The Colorado Supreme Court has defined market value as "what a willing buyer would pay a willing seller under normal economic conditions."[9] Thus, to determine what a willing buyer would pay a willing seller a court must consider whether the feature in question would be taken into consideration by a willing buyer and seller. Here, condo net income provides an income stream to VBC, and ultimately to Vail Resorts, that can transfer with a sale of the LAV property. Thus, the market value necessarily includes the condo net income, which should be included in LAV's actual/market value for property tax calculations, so the BAA erred.

Is Revenue an Intangible Asset?

The BOE also contended that the BAA erred in classifying condo net income as an intangible asset. An intangible asset cannot be taken into consideration when appraising a piece of property. If a particular feature of a piece of property has an impact on the property's capacity to generate revenue, that feature cannot be defined as intangible. Condo net income is an identifiable, measurable, and continual source of revenue, so it is not an intangible asset, and the BAA should not have excluded it from the actual value determination.

Other Amenities

Lastly, the BOE argued that the BAA erred by excluding hotel resort fees from its valuation. The evidence clearly showed that hotel resort fees are a revenue stream directly generated by LAV and should therefore be included under the income approach to LAV's valuation. Accordingly, the BAA erred.

The order was vacated and the case was remanded for further proceedings.

Deeds

In *Hess v. Hobart*, the Court of Appeals analyzed a life estate deed for mineral interests.[10] The Hesses purchased 160 acres of vacant land from Hobart by warranty deed (the deed). The purchase contract provided that Hobart reserved a life estate in all mineral rights on the property, and the deed contained a reservation clause reserving a life estate for grantor in all mineral rights on the property including oil, gas, and hydrocarbons. Hobart then entered into numerous oil and gas leases on the property. The Hesses later learned that they might possess rights to income and bonuses as remaindermen of Hobart's life estate in the minerals, and they sued Hobart. Hobart moved to dismiss under CRCP 12(b)(5). The district court found that the deed unambiguously conveyed a life estate in the mineral interests to Hobart and granted the motion.

On appeal, the Hesses argued that the district court erred in dismissing their complaint because

it ignored their rights under various principles of oil and gas law and the Uniform Principal and Income Act (UPIA). However, the phrase "a life estate in all mineral rights" unambiguously conveys a life estate in exactly that to Hobart. This broad language does not contemplate any surrender of those rights to the Hesses or any sharing of income with them that Hobart receives from minerals during her life. Further, (1) the open mines doctrine applies only when a lease is created before the creation of the life estate, which did not occur here; (2) the UPIA only applies in the context of wills, trusts, and estates; (3) the general practice of dividing rights between a life tenant and a remainderman does not apply here because the parties did not agree to divide the mineral rights; and (4) the Hesses were not entitled to damages for waste, and the deed and contract unambiguously gave Hobart unfettered rights concerning the minerals during her life tenancy. As a matter of law, the Hesses made no plausible claims, and the district court did not err by dismissing the complaint.

The judgment was affirmed and the case was remanded to determine the amount of Hobart's reasonable appellate attorney fees.

Water Law

The Colorado Supreme Court waded into the ever-important realm of water law in *United Water and Sanitation District v. Burlington Ditch Reservoir and Land Co.* to examine application of the anti-speculation doctrine.[11] There, United Water and Sanitation District (United), a special water district, filed numerous applications for water rights in Weld County. Its initial applications sought, in part, conditional water storage rights for two reservoirs, conditional and absolute storage rights for a third reservoir, and conditional recharge rights. These filings were consolidated, and opposer Farmers Reservoir and Irrigation Company (FRICO) filed a motion for determination of questions of law. The water court concluded that United's applications failed to demonstrate a non-speculative intent to appropriate water.

In response, United withdrew its applications and, a week later, filed a new application for a conditional water storage right that was the subject of this appeal. In the new filing, United sought to appropriate water for use in a proposed residential development in another county and in support presented a purportedly binding contract with the landowners of the proposed development (Highland Owners). It also claimed, for the first time, that its status as a special district qualified it for the governmental planning exception to the anti-speculation doctrine. FRICO filed another motion for determination of questions of law, and the water court again concluded that United failed to demonstrate non-speculative intent to appropriate water. Further, the water court found that United was acting as a water broker and not as a governmental agency seeking to procure water to serve its own municipal customers. The water court entered summary judgment for FRICO. United moved for reconsideration, which the water court denied. Thereafter, the court granted United's motion to dismiss its remaining claims and entered final judgment.

> "The Colorado Supreme Court waded into the ever-important realm of water law in *United Water and Sanitation District v. Burlington Ditch Reservoir and Land Co.* to examine application of the anti-speculation doctrine."

United appealed the water court's judgment directly to the Colorado Supreme Court pursuant to CRS § 13-4-102(1)(d). To obtain a conditional water right, an applicant must demonstrate, among other things, that it has a non-speculative intent to appropriate. To qualify for the governmental planning exception to the anti-speculation doctrine, an appropriator must be a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation. Thus, United would have to show that it has a "firm contractual commitment" or an "agency relationship justifying its claim to represent those whose future needs are asserted."[12]

As a special district, United is a quasi-municipal corporation and political subdivision and thus falls within the meaning of "governmental agency" under CRS § 37-92-103(3)(a)(I). However, United had to demonstrate that it has a governmental agency relationship with the end users proposed to be benefited by the water it seeks to appropriate in Weld County. Here, United's service plan indicates that it does not intend to provide water to individual users or to expand its territorial boundaries to encompass the proposed development or begin providing water to end users within that area. Lacking a connection to end users, United cannot demonstrate that is has a governmental agency relationship to the person proposed to be benefited by its conditional appropriation. Rather, United is acting as a water broker to sell water to end users, not as a governmental agency serving its own municipal customers. Therefore, it does not qualify for the governmental planning exception to the anti-speculation doctrine.

Further, the water supply agreement between United and the Highland Owners involves no commitment from the Highland Owners to purchase any water and it is thus insufficient to overcome the anti-speculation doctrine.

The judgment was affirmed.

Land Use and Development

Both the Colorado Supreme Court and Court of Appeals considered issues related to land

development in a series of opinions covering special district boundaries, culvert maintenance, and lapse of a permitted special use.

Special District Boundaries

In *Bill Barrett Corp. v. Lembke*, the Colorado Supreme Court considered whether a special district can expand its boundaries and subsume a piece of property if a party with a pecuniary interest in the property does not consent.[13]

The owners of 70 Ranch LLC (70 Ranch) successfully petitioned to include their tract of land in a special district (district). The district then began taxing the leaseholders of subsurface mineral rights. In response, the lessees filed suit.

The district court issued a temporary restraining order enjoining disbursement of taxes already collected and collection of any further taxes. Lessees moved for a preliminary injunction, arguing that because neither the owners of the severed mineral interests nor lessees had given their assent to inclusion within the district, and because mineral rights are "real property," the inclusion of 70 Ranch did not comply with the Special District Act (Act). The district court denied the request for a preliminary injunction, and the Court of Appeals affirmed.

Lessees petitioned for certiorari, and the Supreme Court granted the petition to determine the proper construction of CRS § 32-1-401(1)(a). The Act addresses the inclusion of "territory" within a special district. It requires the assent of all owners of surface property whose inclusion would expand the boundaries of a special district, and inclusion is only appropriate if the surface property can be served by the district. The assent of the owners or lessees of subsurface mineral estates underlying that property is not required; the subsurface estates are not the "real property" contemplated by the procedural mechanism that the Act creates for "inclusion of territory" within a special district. After a special district's boundaries are expanded in conformity with CRS § 32-1-401, the Act provides that all taxable property within those boundaries is subject to ad valorem taxation by the district. Here, the surface estate owners properly published notice of the inclusion petition and public hearing in a local newspaper, following the CRS § 32-1-401(1)(b) notice process. Accordingly, the district court properly entered summary judgment against lessees, and the division properly affirmed the order.

The Court of Appeals' decision was affirmed and the case was remanded for consideration of any outstanding questions.

> "In *People v. Garcia-Gonzalez*, the Court of Appeals considered whether an enclosed, secure structure on a residential property qualified as 'land' in accordance with a statute regulating the cultivation of medicinal and recreational marijuana."

Who Pays for Culverts?

Montezuma Valley Irrigation Co. v. Board of County Commissioners tackled statutory interpretation concerning who has responsibility to replace a culvert.[14] Montezuma Valley Irrigation Company (MVIC) is a ditch and reservoir company. It owns and maintains the U Lateral Ditch, which passes under County Road W in Montezuma County (County). A culvert was installed under County Road W where it intersects with the U Lateral Ditch to allow water from the ditch to pass. In 2017, the County determined the culvert needed to be replaced, and it asked MVIC to pay for a new culvert. MVIC declined, and the County replaced the culvert and sought reimbursement from MVIC.

MVIC filed a complaint for declaratory judgment, arguing that CRS § 43-5-305(1) assigns responsibility for replacing the culvert to the County. The district court granted summary judgment in favor of MVIC.

On appeal, the County argued that the district court ignored genuine issues of material fact in granting summary judgment and misinterpreted CRS § 43-5-305(1) to require the County's maintenance obligation to include replacement of a culvert. Specifically, the County contended that there were issues of material fact surrounding the meaning of the word "maintain" in the statute. However, the issues the County raised involve questions of law, so the district court did not err in deciding the legal issues on summary judgment.

The County also argued that it was error to interpret CRS § 43-5-305(1) to require the county's maintenance obligation to include the obligation to replace the culvert. The Court of Appeals determined that the duty to "maintain" in CRS § 43-5-305(1) unambiguously includes the duty to replace.

The judgment was affirmed.

Lapsed Special Use

In *Save Our Saint Vrain Valley, Inc. v. Boulder County Board of Adjustment*, the Court of Appeals considered whether compliance with a single condition would prevent a "lapse" of a "permitted special use."[15]

Western Mobile Boulder, Inc. (Western Mobile) obtained approval from Boulder County (County) through an approval resolution to engage in open pit gravel mining as a special use. The mining was to commence on January 1, 2003 and take place in several phases over 30 years, plus an additional three years to complete all post-mining reclamation work. From 1998 to 2006, Western Mobile worked with its successor in interest Lafarge West, Inc. (Lafarge) to operate

under the approval resolution at the mining site, and Lafarge eventually took over the site. In 2010, Lafarge requested a temporary cessation, citing adverse economic conditions. Lafarge's request disclosed that active mining had not occurred at the site since 2006. Several months later, Lafarge sold its interests in the site to Martin Marietta Materials, Inc. (Marietta). After the purchase, Marietta maintained and paid for permits and annual reports; inspections and maintenance for air, water, and weeds; construction of buildings that would be needed for mining; and reclamation work. But it never performed any gravel mining.

In 2017, plaintiffs requested that the County determine whether the approved special use had lapsed due to inactivity for longer than five years under the Boulder County Land Use Code (Code). The County's land use director determined that the approved special use had not lapsed, and the Boulder County Board of Adjustment (BOA) affirmed the decision. Plaintiffs appealed to the district court, which affirmed the BOA's decision.

On appeal, plaintiffs argued that the district court erred because any activity other than actual open pit gravel mining is unambiguously beyond the scope of what was contemplated by the Code, which provides that a special use permit lapses when a site is inactive for five years. Here, even though accessory uses are allowed, the permitted special use was to mine gravel, and any permitted accessory use must comply with the same conditions for approval as the main use, which is open pit gravel mining. Because the County director did not form his determination under the correct definition of "special use permit," his decision was an abuse of discretion. However, the Court could not discern whether the County director would have reached a different conclusion under the correct construction of the law.

The judgment was reversed and the case was remanded for further proceedings.

Searches and Seizures Involving Real Property

In *People v. Garcia-Gonzalez*, the Court of Appeals considered whether an enclosed, secure structure on a residential property qualified as "land" in accordance with a statute regulating the cultivation of medicinal and recreational marijuana.[16]

The Pueblo Police Department found 32 mature marijuana plants in a home's detached garage while executing a search warrant. As relevant here, defendant was charged with cultivating marijuana in violation of CRS § 18-18-406(3)(a)(I) and (III)(A). Defendant filed a motion to dismiss, and the district court dismissed the CRS § 18-18-406(3)(a)(I) charge.

The People appealed, arguing that the district court interpreted the term "land" in CRS § 18-18-406(3)(a)(I) too narrowly, to mean "open land," such as farmland or unsheltered fields. The People contended that the legislature intended "land" to broadly include residential property, buildings, and structures. CRS § 18-18-406(3)(a)(I) provides that it is unlawful for a person to knowingly cultivate, grow, or produce a marijuana plant on land the person owns, occupies, or controls, and a violation of this statute is a level 3 drug felony if the offense involves more than 30 plants. While a residence, including a garage, may be on land, the residence or garage could be an "enclosed, locked space" where marijuana can be grown pursuant to Colo. Const. art. 18, § 16(3)(b). Therefore, the use of "land" in this statute does not contemplate an "enclosed, locked space" because that would eviscerate the constitutional protection. Accordingly, the district court properly dismissed the CRS § 18-18-406(3)(a)(I) charge.

The judgment was affirmed.

Conclusion

These highlighted appellate opinions impact a number of areas within the real estate realm. Practitioners should review them and note important takeaways. CL



Lindsay J. Miller is a senior associate at Folkestad Fazekas Barrick & Patoile, P.C. in Castle Rock. She specializes in real estate litigation, with an emphasis on landlord/tenant law—miller@ffcolorado.com. **Nathan G. Osborn** is a shareholder with Montgomery Little & Soran, PC. His practice focuses on real estate litigation, real estate transactions, and commercial litigation. Osborn also serves as an expert witness and a mediator in cases involving real estate issues—nosborn@montgomerylittle.com. **Paul Sachs** of Paul Sachs, P.C. in Steamboat Springs is a general practitioner focusing on real estate, business, trust and estate, and water law. He has been the municipal judge for the City of Steamboat Springs for 27 years—psachs@paulsachspc.com.

Coordinating Editor: Christopher D. Bryan, cbryan@garfieldhecht.com

NOTES

1. *Brooktree Vill. Homeowners Ass'n, Inc. v. Brooktree Vill., LLC*, 2020 COA 165.
2. *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 592 U.S. __(2021).
3. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).
4. *Bridge Aina Le'a, LLC*, slip op. at 1–2.
5. *Id.* at 3.
6. *Amada Family Ltd. P'ship v. Pomeroy*, 2021 COA 73.
7. *CO_2 Comm., Inc. v. Montezuma Cty.*, 2021 COA 36.
8. *Lodge Props. v. Eagle Cty. Bd. of Equalization*, 2020 COA 138.
9. *Id.* at ¶ 1.
10. *Hess v. Hobart*, 2020 COA 139M2.
11. *United Water and Sanitation Dist. v. Burlington Ditch Reservoir and Land Co.*, 2020 CO 80.
12. *Id.* at ¶ 18.
13. *Bill Barrett Corp. v. Lembke*, 474 P.3d 46 (Colo. 2020).
14. *Montezuma Valley Irrigation Co. v. Bd. of Cty. Comm'rs*, 2020 COA 161, *cert. denied,* No. 20SC987, 2021 WL 2188647 (May 24, 2021).
15. *Save Our Saint Vrain Valley, Inc. v. Boulder Cty. Bd. of Adjustment*, 2021 COA 44.
16. *People v. Garcia-Gonzalez*, 478 P.3d 1288 (Colo.App. 2020).