Dirt in the Courts

A Summary of Recent Colorado Real Estate Caselaw

BY JOEY LUBINSKI AND REAGAN LARKIN

This article discusses recent real estate cases decided in Colorado appellate courts.

Real property, real people, real problems.[1] Over the course of the last year, courts in Colorado continued to weigh in on a variety of unique, often complex, real estate issues. This article summarizes some of the more recent notable appellate decisions from state and federal courts arising out of Colorado real estate transactions and ownership.[2] For ease of reference, cases are grouped by category.

Common Interest Communities

Several recent decisions dealt with issues related to condominium management and homeowners associations.

Condominium Associations

In *Accetta v. Brooks Towers Residences Condominium Ass'n*, the Colorado Court of Appeals addressed whether a pre-existing condominium community may be subject to the Colorado Common Interest Ownership Act (CCIOA) without following the exact statutory process for opting in to the statute.[3] As part of a longstanding dispute between a condominium unit owner and the condominium association regarding allocation of assessments for common expenses, Accetta argued the association's declaration violated three CCIOA provisions. Those claims, however, hinged on whether the condominium is subject to CCIOA, because only certain provisions of CCIOA apply to condominiums and other common interest communities formed before 1992. The condominium building was first subjected to a condominium declaration in 1979. However, the declarant did not sell any units and instead operated the project as an apartment complex. In 1995, the declaration was amended and restated in its entirety, and the amended declaration appeared to subject the community to CCIOA. Individual condominium units were then sold.

If CCIOA applied, then it appears the declaration allocation provisions were inconsistent with CCIOA's requirements. Accetta made two arguments for the applicability of CCIOA. The first was that by amending and restating the condominium declaration, a new common interest community was created in 1995 that was automatically subject to all provisions of CCIOA. The court rejected this argument on the basis that while the new declaration supplanted the 1979 declaration, it did not nullify it. Additionally, the court noted that both declarations covered the same real estate. Accetta's second argument was that the express references to CCIOA in the amended and restated declaration served to opt in to CCIOA. The court rejected this argument on the basis that section 118 of CCIOA provides the exclusive method for a preexisting community to opt in to CCIOA. Because the association had not followed all of the requirements of that statute, the amended and restated declaration failed to subject the regime to the provisions of CCIOA.

Notably, this is the second appellate decision resulting from a dispute between the same parties regarding the interpretation and application of the project's condominium declaration. The other decision—which also addressed whether dues allocations violated CCIOA—held that the association could adequately represent the interest of all 500 members of the association (without every member being joined as an indispensable party).[4]

Local Ordinances and CCIOA

The court of appeals took up another CCIOA issue in *Town of Vail v. Village Inn Plaza-Phase V Condominium Ass'n*,[5] addressing a 1987 ordinance passed by the Town of Vail that created use restrictions on certain property within the Village Inn Plaza development. Specifically, the ordinance required the following for condominiums created within the development: (1) the units must "remain in the short-term rental market," (2) the owners' personal use of the units must be limited during "high season," and (3) fines would be imposed for violation of the aforementioned restrictions.

In 1988, the association recorded a condominium declaration that included the restrictions of the 1987 ordinance. In 2013 and 2014, the board of directors of the condominium association amended its rules and regulations to state that the association would not enforce the provisions of the condominium declaration that incorporated the ordinance requirements. A commercial unit owner in the condominium then filed suit, alleging that the rule violated the condominium declaration. The town was joined as an indispensable party and then cross-claimed, alleging violation of the town ordinance. The association defended against the town's cross-claim on the basis that the ordinance in question violates section 106 of CCIOA, which prohibits any local ordinance that would "impose any requirement upon a condominium or cooperative which it would not impose upon a physically identical development under a different form of ownership."

The town first argued that this CCIOA provision was inapplicable because both the ordinance and condominium predated CCIOA's 1992 effective date. The district court and the court of appeals both determined that section 106 of CCIOA does apply retroactively under these circumstances because of the town's attempted present enforcement of the ordinance's restrictions.

The town next argued that even if CCIOA applied, the ordinance in question did not violate section 106 because it did not discriminate against the condominium form of ownership. Again, the court of appeals disagreed, finding that the ordinance's explicit applicability to only property that has been condominiumized was facially discriminatory against condominiums.

Finally, the town argued that CCIOA's restriction did not apply because the town is a home-rule municipality and the ordinance reflected a matter of solely local concern. Again, the court of appeals disagreed, finding that enforcement of the 1987 ordinance was a matter of mixed local and statewide concern, specifically that CCIOA's attempt to create a uniform framework for condominiums implicated statewide concern and the potential for extraterritorial impact (i.e., the potential effect on other communities from Vail's enforcement) also implicated statewide concern.

Discrimination Claims and Housing Permits

The Tenth Circuit rejected allegations of discrimination under various federal and state laws in *Sandy v. Baca Grande Property Owners Ass'n*.[6] In this case, Sandy owned property in a planned community where the governing documents required owners to obtain architectural control committee approval for construction of residences and outbuildings. Sandy applied for and received approval to build a residence. The permit was valid for only 18 months. Sandy started construction but did not complete the work before the permit expired. After four, six-month extensions and a separate one-year moratorium after suffering an injury, Sandy still had not finished construction. The architectural control committee then denied Sandy's request for a fifth extension.

Sandy alleged he was treated differently due to his race and nationality and alleged violations of 42 USC §§ 1981, 1983, and 1985; the Fair Housing Act; and similar Colorado laws. The court rejected Sandy's claims on the basis he had failed to show (1) joint action with a state official in violation a federal right (the Lugar test) and (2) that the alleged discrimination involved a real estate transaction or brokerage service covered by the Fair Housing Act (finding instead that the community's architectural control permitting and approval process did not implicate the FHA).

Condemnation

CORE Electric Cooperative v. Freund Investments, LLC involved an electric cooperative's condemnation for a permanent easement over 26 acres of property and a temporary construction easement.[7] The landowner's appraiser used two methods of valuing the property—the sales comparison approach and the subdivision development method. The cooperative objected to the landowner's appraisal on the basis that (1) with respect to the sales comparisons, the appraiser did not communicate with the parties to the comparable sales to verify the sales amounts in the manner required by a condemnation statute,[8] and (2) the subdivision development method was not a permissible valuation method. The trial court excluded six of the seven comparable sales, finding that while the appraiser had personally examined the records for each comparable sale, he had verified the sale price with the parties to only one of the transactions. The trial court also ruled the subdivision development appraised valuation inadmissible as not permitted under the Colorado Supreme Court's rulings in prior cases finding that method to be too speculative.

> "On appeal, based on Colorado Supreme Court precedent, the court of appeals agreed that the subdivision development method was not an allowed appraisal methodology in condemnation."

On appeal, based on Colorado Supreme Court precedent, the court of appeals agreed that the subdivision development method was not an allowed appraisal methodology in condemnation. Although the court of appeals determined—notwithstanding the language of the condemnation statute—that the six excluded sales should have been admitted under the hearsay exceptions for public records, the court found no reversible error.

Property Damage

In *Gregory v. Safeco Insurance Co. of America*,[9] the Colorado Court of Appeals considered whether the notice-prejudice rule applies to a notice-of-loss provision in a homeowners' policy. Gregory's roof was damaged in a hailstorm, but she was unaware of the damage caused until a contractor inspected the roof 18 months later. Gregory subsequently submitted an insurance claim to her insurer, Safeco. Under Gregory's homeowners' policy, in the case of hail damage, the insured was required to provide notice of the claim within 365 days after the loss (i.e., the storm). Based on this clause, Safeco denied the claim as untimely.

Gregory sued, alleging that Safeco's notice requirement violated both (1) Colorado's notice-prejudice rule, and (2) the Colorado Homeowner's Reform Act of 2013, which prohibits insurers from shortening statutes of limitation. Application of the notice-prejudice rule would require Safeco to show it was prejudiced by Gregory's late notice. However, the court noted that the rule has only been applied

in car insurance and comprehensive general liability insurance policies. Recognizing a split of authority from other states on this issue and the lack of Colorado Supreme Court precedent in the property insurance context, the court found the notice-prejudice rule inapplicable. The court further found that the notice requirement did not operate to shorten the statute of limitations because the notice requirement did not, in and of itself, affect the time in which Gregory could have brought her claims.

Contracts, Purchase and Sale, Transactions

Courts examined various issues related to business transactions, including the economic loss rule, provisions in a letter of intent, and fiduciary duties.

Economic Loss Rule in a Lender/Borrower Relationship

The Tenth Circuit determined that the economic loss rule prevented the plaintiff's ability to seek tort remedies in connection with a mortgage in *Mayotte v. U.S. Bank Nat'l Ass'n*.[10] Mayotte brought tort claims against the holder of the note secured by her property and the mortgage loan servicer in the US District Court for the District of Colorado. Mayotte alleged that when she requested a mortgage modification, the servicer advised her to skip three loan payments (presumably to facilitate obtaining the modification). She skipped the payments and the note holder proceeded to foreclose.

Thereafter, Mayotte sued. Defendants moved for dismissal on the basis that the economic loss rule precluded Mayotte's tort claims. The economic loss rule precludes a plaintiff from pursuing tort claims if the alleged wrongful conduct arose solely from a contractual duty.

The Tenth Circuit, applying Colorado law, affirmed the district court's dismissal of Mayotte's claims on the basis that Mayotte had failed to establish that the defendants owed any "independent duties" to her outside the terms of the loan contract and that the lender/borrower relationship does not constitute a recognized "special relationship" (each being an exception to the strict application of the economic loss rule).

Economic Loss Rule, Defective Products, and Warranties

The court in *Dream Finders Homes LLC v. Weyerhaeuser NR Co.* addressed whether the economic loss rule protects a vendor who sells a defective product under a contract that includes warranties against negligence and fraud tort claims.[11] Weyerhaeuser sold joists to builders and developers, including Dream Finders. The sales were made pursuant to written agreements (or a series of written agreements) that included express warranties for manufacturing defects. The manufacturer notified its customers of a defect in its joist product and pursuant to the warranty remediated the homes in which the defective joists had been installed, including those built and developed by Dream Finders. Dream Finders demanded that in addition to the remediation performed pursuant to the warranty, Weyerhaeuser also reimburse Dream Finders for the various additional damages caused by the defect. Those additional damages included labor costs, lost return on equity, the cost of incentives that had to be offered to home buyers, default damages for having defaulted on homebuyer contracts, carrying costs, and lost profits.

The court of appeals held that the economic loss rule barred negligence, negligent misrepresentation, and fraudulent concealment claims, in part, because the contractual warranty specifically excluded liability for those types of damages. The court reasoned, in part, that fraud claims were precluded by the economic loss rule because Dream Finders received the full benefit of its bargain under the contract through Weyerhaeuser's performance of its warranty obligations. The court also reasoned that the implied duty of good faith and fair dealing was subsumed within the contract terms and, as such, could not be the basis for an independent duty of Weyerhaeuser outside of the contract (and thus susceptible to tort claim).

Letter of Intent

In *Orderly Health, Inc. v. NewWave Telecom & Technologies, Inc.*, the Tenth Circuit reviewed a contract dispute that arose between the parties in the course of a potential business purchase.[12] Plaintiff Orderly Health (seller) and NewWave (buyer) entered into a letter of intent that was non-binding except for provisions regarding confidentiality and exclusivity. With respect to exclusivity, the buyer had a 60-day exclusivity/"no shop" period. The letter of intent stated:

> At the expiration of the 60-day no shop period with each Party negotiating utilizing commercial best efforts, the Purchaser agrees to pay the Company a non-refundable earnest money deposit of $250,000 (hereinafter "Earnest Money") if the Closing is [sic] has not occurred at such time. For the avoidance of doubt, upon payment of Earnest Money payment the Exclusivity Period shall be extended for 30 days and the Closing Payment balance due will be reduced by $250,000.

Before the 60-day period expired, NewWave notified Orderly Health that it would not be proceeding with the transaction. Thereafter, Orderly Health demanded payment of the $250,000 earnest money on the theory that payment of the earnest money was an enforceable covenant. NewWave argued that the payment of the earnest money was conditioned on the parties still negotiating.

The Tenth Circuit reviewed the other provisions of the letter of intent in detail and determined, based on the placement of the earnest money deposit provision and the lack of reference to the earnest money deposit in other provisions of the letter of intent, the earnest money was intended to be deposited only if the parties were still negotiating when the 60-day period expired. Having found that the payment of the earnest money was not an unqualified covenant but instead conditioned on continued negotiation, the Tenth Circuit rejected Orderly Health's argument that NewWave had frustrated satisfaction of the condition by terminating negotiations before expiration of the 60-day period. The Tenth Circuit found that because the letter of intent contained no duty to negotiate through the entirety of the 60-day period, the buyer was not precluded from terminating those negotiations early.

Fiduciary Duties

A decade-long dispute between former partners in a Loveland shopping center development

ended up before the Colorado Court of Appeals in *McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*.[13] At its core, the dispute arose from the managing member's failure to obtain appropriate financing, which caused the property to be foreclosed and the venture to lose its investment. The issues on appeal involved the extent to which the managing member owed fiduciary duties to the other member under Delaware law in light of the terms of the venture's operating agreement and whether Colorado's economic loss rule barred claims for intentional torts.

The court first analyzed the fiduciary duties owed by the managing member of the venture, noting that, while Delaware imposes duties of loyalty and care to the venture, those duties can be modified or eliminated via the terms of the operating agreement. Any such intent to eliminate fiduciary duties must be plain and unambiguous. Although the operating agreement included typical language allowing the managing member to participate in competing business activities and limiting scope and extent of liability for the managing member's performance of its duties, it did not affirmatively disclaim the managing member's fiduciary duties to the venture. As a result, the court determined that the managing member's duty of loyalty and care to the venture had been modified, but not eliminated, by the terms of the operating agreement.

Having found that fiduciary duties existed, the Colorado Court of Appeals affirmed the trial court's determination that the managing member had breached its fiduciary duties because the conduct taken was not in the best interest of the venture and was not protected by the business judgment rule, acknowledging that some actions were "aggressive" and "unnecessarily risky," while other actions were concealed from the other member of the venture.

Turning to its analysis of whether the economic loss rule applies to claims for intentional torts, the court of appeals departed from other court of appeals divisions (including the one that issued a previous interlocutory decision in this case) and found that the rule does not bar claims for intentional torts such as fraudulent concealment, intentional interference, and intentional breach of contract (but the economic loss rule does bar claims for civil conspiracy). In so holding, the court observed that its "conclusion today is contrary to a trilogy of conclusions from divisions of this court that concluded the economic loss rule barred common law intentional tort claims similar to the claims raised in this case" and that the "conclusion is also largely contrary to another division's conclusions on interlocutory appeal from this case."[14] The court of appeals relied on *Bermel v. BlueRadios, Inc.*, to make this departure, noting its "significant developments in the law pertaining to the economic loss rule's applicability to intentional torts."[15]

Estates and Partition

A family dispute involving a deed restriction came before the court in *Mindock v. Dumars*.[16] In 1987, the Mindocks conveyed to two of their children equal 15/64 tenant-in-common interests in the family cabin, reserving a life estate to themselves. In 2007, they conveyed the remaining 34/64 interest to two of their grandchildren as joint tenants. The deed to the grandchildren included a condition that if either of the joint tenants attempted to partition the property or convert the joint tenancy to a tenancy in common without the other's consent, full title to the property would automatically transfer to the other joint tenant. Put differently, a joint tenant's attempt to sever the joint tenancy would have the effect of divesting that party of any ownership interest in the cabin.

After the grandparents' death, one of the grandchildren acquired one of his uncle's tenant-in-common interests (through an LLC), and thereafter that grandchild and his other uncle (the holder of the other tenant-in-common interest) sued his sister for a declaration that the 2007 deed restriction constituted an unreasonable restraint on alienation and was unenforceable. The defendant sister argued that the covenant was not a restraint on alienation, but instead a permissible use covenant that was intended to effectuate their grandparents' intent that the cabin "remain in the family."

Acknowledging that use restrictions are permissible, the Tenth Circuit concluded that the deed restriction was on its face a prohibition on conveyancing and, as such, constituted a restraint on alienation rather than a restriction on use. Applying Colorado precedent, the Tenth Circuit found the restraint to be unreasonable because of its lifetime duration and because it contravenes the recognized right of a joint tenant to unilaterally terminate the joint tenancy.

Foreclosure, Debtor-Creditor, and Lender Liability

The Colorado Court of Appeals handed down rulings addressing due process and statutes of limitation in foreclosure matters, as well as an opinion regarding whether a credit agreement is a negotiable instrument. Notable opinions from the Tenth Circuit dealt with appreciation of property and transfer of a deed of trust during bankruptcy proceedings.

Homeowners Associations and Notice of Foreclosure

In *C & C Investments, LP v. Hummel*, the court of appeals voided a sheriff's sale when it determined a homeowners association's notice did not meet due process requirements.[17] Hummel was a homeowner within a common interest community who, for 15 years, paid her common expense assessments via automatic withdrawals from her checking account. She was also a recluse who did not leave her house (even to pick up the mail) for long stretches of time and only answered the door to get her daily delivery of pizza. When the homeowner's association changed management companies, residents of the community were required to update their automatic withdrawal information. Hummel was unaware of the change and did not observe that the assessments were no longer being deducted from her account. She also did not receive the association's various notices to her about her delinquent account.

Ultimately, the association elected to exercise its statutory right to judicially foreclose its assessment lien on Hummel's house. The association mailed the complaint and summons to Hummel, but the package was returned as undeliverable—the post office had discontinued home delivery because Hummel never picked up her mail. The association thereafter sought an extension of time to serve Hummel personally

based on a process server's affidavit stating that he had unsuccessfully attempted personal service four times. Notably, however, after an extension was granted, there was no evidence that the association in fact attempted additional personal service. The association then sought permission to serve by publication, which was granted. While the notice was published in the newspaper, it was uncontested that Hummel neither received delivery of nor had online access to the newspaper. The association then sought a default judgment and a decree of foreclosure.

At the hearing, which (like prior hearings) Hummel did not attend, the court and counsel for the association discussed the attempts at personal service made by the association and the court ordered that the association post notice on Hummel's front door. Thereafter, the association filed an amended motion for default judgment that stated all defendants were properly served. In granting the default judgment, the court did not reference its previous posting order but noted that the association was neither required by law to post at the property nor had it done so. A sheriff's sale was then held, and a third party purchased the property for less than 10% of its estimated fair market value.

The third-party purchaser then sought to evict Hummel and posted a notice to quit on her front door. Almost immediately, Hummel engaged counsel to contest both the eviction and the foreclosure. Before the hearing on the motion to set aside the default judgment, the association and Hummel settled the underlying assessment payment dispute and the association agreed not to oppose the motion to vacate the default judgment. Given its interest in the property, the third-party purchaser was allowed to participate in the hearing. Following the hearing, the trial court sua sponte issued an order giving Hummel a 15-day period to file a notice of intent to cure the foreclosure sale and if the cure amount was tendered, the court would declare the sheriff's sale and confirmation deed void. The cure funds were tendered, and the court entered the order quieting title in Hummel.

The third-party purchaser appealed, placing two issues regarding the trial court's authority before the court of appeals. First, the court of appeals determined that, consistent with prior precedent, the trial court was without the equitable authority to grant a post-foreclosure cure right. Because Colorado's foreclosure statutes provide the timing and conditions for cure and redemption, those rights "may not be expanded by judicial interpretation."[18]

Second, the court of appeals addressed whether the trial court had jurisdiction to enter the default judgment in the first place. The court

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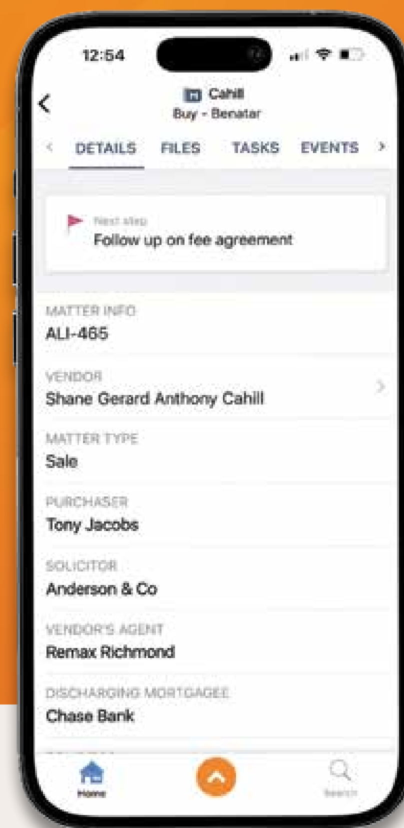


of appeals found that the trial court lacked such jurisdiction because the association had used inadequate efforts to serve Hummel. The court of appeals began by noting that because the association serves a "quasi-governmental function," it must abide by due process requirements.[19] Citing a 2006 US Supreme Court case[20] regarding an Alabama tax lien sale, the court of appeals determined that the association was obligated to take additional service steps beyond simply attempting service by mail (which was returned) and publication. Further, the court of appeals noted that the trial court had found the association's process server not credible. Notably, the court of appeals also highlighted the fact that the association knew Hummel was "eccentric" and a "recluse." The court went on to suggest that because the association's board was comprised of "volunteers who live in the same neighborhood," they would have "insight into the intangible circumstances of the homeowner who is the subject of the foreclosure action."[21] As a result, "it is not unreasonable to require a homeowners association to make a good faith, rather than a highly technical, effort to effectuate actual notice to a fellow neighbor before foreclosing on their property."[22]

Having determined that the association did not make sufficient efforts at personal service that satisfied the requirements of due process, the court vacated the default judgment and foreclosure order, the foreclosure sale, and the confirmation deed that issued to the third-party purchaser.

Discharge in Bankruptcy and Deadline for Deed of Trust Foreclosure

In a case that resulted in a reversal of the trial court's dismissal of a homeowner's claim, the court of appeals in *Silvernagel v. US Bank National Ass'n* considered whether a discharge in bankruptcy affects a bank's deadline for foreclosing on a deed of trust.[23] Silvernagel and his spouse executed a deed of trust to secure a loan obtained only by Silvernagel. Thereafter, Silvernagel's personal liability on the promissory note was discharged in bankruptcy and he made no additional payments. Seven years later, the lender sought payment on the debt and threatened foreclosure. Silvernagel then sought declaratory relief against the bank on the basis that the lender had failed to commence a foreclosure within the six-year statute of limitations for enforcement of promissory notes. The lender moved to dismiss the complaint because, among other reasons, the debt had not been accelerated and because each missed regular installment payment constituted a new default, the statute of limitations had not yet begun to run, much less expire. The district court granted the lender's motion and Silvernagel appealed.

The court of appeals disagreed that the statute of limitations had not yet run, and following precedent from Washington state, determined that the bankruptcy court's order discharging Silvernagel's liability under the promissory note was the equivalent of the note having matured because no more payments were due and owing. The court of appeals reversed and remanded the matter to reinstate Silvernagel's complaint. A petition for writ of certiorari was granted in this case on September 12, 2022.[24]

Credit Agreement and the Colorado Uniform Commercial Code

Though some procedural issues were at play in *CadleRock Joint Venture LP v. Esperanza Architecture & Consulting, Inc.*, the heart of the dispute was whether a credit agreement was a negotiable instrument under the Colorado Uniform Commercial Code (UCC).[25] CadleRock sued Esperanza Architecture for breach of a revolving line of credit issued by a purported predecessor in interest to CadleRock. The parties did not appear to dispute that the line of credit was issued, drawn upon, and not repaid. However, Esperanza Architecture argued that the credit agreement evidencing the revolving line of credit constituted a negotiable instrument under the UCC and, on that basis, asserted various defenses to enforcement under article 3 of the UCC.

The principal issue to be resolved on this appeal was whether a credit agreement for a revolving line of credit creates an obligation "to pay a fixed amount of money" as required by the definition of a negotiable instrument under the UCC. Following the reasoning of the Nebraska Supreme Court, the court of appeals concluded that a revolving line of credit does not require payment of a fixed amount of money because the amount owed by the borrower may fluctuate significantly and periodically over the course of the loan as the line is drawn, repaid, and redrawn. As a result, the credit agreement was not a negotiable instrument and, as such, not subject to article 3 of the UCC.

Appreciation of Value During Bankruptcy Proceeding

In *Rodriguez v. Barrera*,[26] the court dealt with the appreciation in value of a debtors' home in a bankruptcy case. Here, the debtors filed a Chapter 13 bankruptcy action and proceeded under an approved reorganization plan. At the time the Chapter 13 action was filed, the combination of the liens on the home plus the homestead exemption exceeded the value of the debtors' home, rendering the debtors' equity exempt. The plan was confirmed, and the debtors made the necessary payments under the plan, including paying their mortgage.

When the home was sold two years later (while the plan was still in effect), the debtors netted over $140,000 in proceeds. Two weeks later, the debtors sought to convert their Chapter 13 action into a Chapter 7. The Chapter 7 trustee then filed a motion to compel the debtors to turn over the nonexempt portion of the home sale proceeds, which the court denied. The trustee appealed. The Tenth Circuit Bankruptcy Appellate Panel (BAP) affirmed the bankruptcy court's denial of the motion to compel, and the trustee appealed that decision to the Tenth Circuit.

Interpreting the Bankruptcy Code, the Tenth Circuit determined that when the home was sold, the debtors were in compliance with the Chapter 13 plan and the home had revested in the debtors. As such, the home was not part of the Chapter 13 estate and, as a result, the proceeds from the sale were also not part of the estate. The Tenth Circuit reasoned that while this interpretation could give rise to strategic conversions by debtors, other provisions of the Bankruptcy Code protected creditors against "bad faith" conversions.

Transfer of Deed of Trust in Bankruptcy Proceeding

In *Walters v. Cates (In re Cates)*, the Tenth Circuit reversed the bankruptcy court in a matter involving the lien of a deed of trust encumbering a debtor's assets.[27] In this case, a trustee in a Chapter 7 bankruptcy sought to avoid a deed of trust encumbering a debtor's real estate as a preferential transfer on the basis that the transfer occurred during the 90-day pre-petition period. In 2012, the bankruptcy debtor executed a promissory note to a relative, which was secured by a deed of trust that was recorded several months after execution.

Between the time the deed of trust was executed and subsequently recorded, the debtor transferred title to the property by quitclaim deed to a self-settled revocable trust. Two years later, the trust quitclaimed the property back to the debtor, and the debtor filed a Chapter 7 bankruptcy eight days after that. The bankruptcy trustee sought to avoid the 2012 deed of trust under section 547(b) of the Bankruptcy Code on the theory that the interest was not perfected until title to the property had revested in the debtor/grantor of the deed of trust. The bankruptcy court rejected the trustee's argument on the basis that the debtor retained an ownership interest in the property by virtue of debtor's status as beneficiary under the trust and that such interest was subject to the deed of trust when recorded in 2013.

On appeal to the BAP, the trustee again lost, but on different grounds. The BAP, applying Colorado law, determined that while the deed of trust was outside the chain of title, the use of a quitclaim deed to convey the property would have put a bona fide purchaser on notice that additional search of the public records was warranted. The Tenth Circuit reversed the BAP's decision, holding that the use of a quitclaim deed is not on its face suspect and the deed of trust was outside the chain of title.[28]

> "The Colorado Supreme Court reversed the court of appeals, finding that the income generated from the rental management fees was generated from the separately owned condominium units and not from the hotel."

Property Taxation and Assessments

The Colorado Supreme Court ruled on whether property management fees can be included in property tax valuations. A case in the Colorado Court of Appeals determined when a county assessor can correct errors in valuations.

Management Fees and Property Tax Valuation

Lodge Properties, Inc. v. Eagle County Board of Equalization addressed the issue of whether rental management revenue and fees derived from condominium units in a condo-hotel should be considered in the real property tax valuation of the associated hotel.[29] Lodge Properties, Inc. owns the Lodge at Vail, a condominium hotel comprised of both hotel rooms (all owned by a single owner) and condominium units owned by individual unit owners. Condominium unit owners may rent their units on a short-term basis and, in so doing, may choose to engage an affiliate of the hotel owner to provide rental management services for a fee.

In 2017, the Eagle County assessor began including in the valuation of the hotel the net income that the affiliate rental manager derived from rental of the separately owned condominium units. As a result, the assessed value of the hotel dramatically increased. On appeal to the Board of Assessment Appeals, the board agreed with the hotel owner that the rental management income should not be included.

The county appealed, and a division of the court of appeals vacated the board of adjustment's order. The Colorado Supreme Court reversed the court of appeals, finding that the income generated from the rental management fees was generated from the separately owned condominium units and not from the hotel. As a result, the Court found it was improper to include such income in the valuation of the hotel.

Correcting Errors in Property Valuations

The court of appeals looked at when county tax assessors can correct errors in property valuations in *Yen, LLC v. Jefferson County Board of Commissioners*.[30] By law, county assessors must send notices of valuation to property owners on or before May 1 of each year. Yen timely received a notice of valuation that reflected a 5% increase from the prior year's valuation, but then several weeks later (after May 1) received a revised notice after the county assessor determined that it had significantly undervalued the property. Yen protested the second notice of valuation, which was denied by the county. Yen then sought an abatement or refund from the county, which was also denied.

On appeal to the Board of Assessment Appeals, the board concluded that the second

notice of valuation was void because the assessor lacked statutory authority to unilaterally correct perceived undervaluation. The county appealed to the court of appeals, arguing that it possesses the authority to correct notices of valuation at any time before tax warrants are sent to the state treasurer in January.

The court of appeals evaluated the various statutory bases upon which an assessor may correct notices of valuation or send notices after the May 1 deadline, but it determined that those statutory bases did not include errors in valuation. Instead, the statutory reasons for correction were limited to circumstances discovered during a taxpayer protest (which had not occurred here) and instances where a property was wholly omitted from the tax roll. The court of appeals further determined that counties lack plenary constitutional authority to correct errors in notices of valuation.

Tax Sales and Treasurer Deeds

In *Overton v. Chess*,[31] the court of appeals considered when interest accrues for certain types of expenditures in connection with an action to recover land. Chess owed unpaid property taxes, and the tax liens were sold at tax sale. After the requisite three-year period, the county treasurer conveyed the property to the purchaser of the tax liens. Chess challenged the validity of that treasurer's deed on the basis that he had not received all required statutory notices. The district court agreed and ordered that the property be reconveyed to Chess, subject to Chess reimbursing certain costs to the tax sale purchaser as required by statute. Each party appealed components of the judge's order.

The first issue before the court of appeals was whether Colorado statutes governing tax lien sales require the property owner to pay interest on the required reimbursements from the date the expenditures were made or the date the order for reimbursement was entered. On this issue, the court of appeals determined that the statutes require payment of prejudgment interest (i.e., interest accruing from the date the cost was incurred), with the exception of improvements, which do not accrue interest until the court order for reimbursement is entered. The court's distinction between improvements and other reimbursable amounts was based on a slight difference in statutory language—the reimbursement for improvements is to be made based on the value of the improvements, which cannot be determined until ascertained by the court, whereas the other reimbursable amounts are based on cost (which is not based on ascertainment by the court).

The second issue was whether the amount required to be paid by Chess should have been offset by the value of a utility easement that was granted after the tax deed was issued. The trial court determined that no credit or offset was appropriate because at the time the easement was granted, the apparent owner of the property was the party granted the treasurer's deed and there was no evidence showing a negative impact on the value of the property. The court of appeals rejected this conclusion, however, because the beneficiary of the utility had provided an offer letter for the easement based on the "fair market value" of the property interest to be acquired. As a result, the court of appeals remanded that portion of the case for additional findings regarding the easement.

Zoning and Land Use Control

Notable decisions affecting zoning and land use covered ripeness of various constitutional claims and campaign contributions.

Zoning Regulations, Eminent Domain, and Ripeness

In *North Mill Street, LLC v. City of Aspen*,[32] the Tenth Circuit looked at the validity of a lawsuit commenced after the City of Aspen denied a rezoning application. North Mill Street, LLC (NMS) owned property in Aspen. The city amended its land use code to remove "free market residential" as a conditional use within the zone district in which the property was located. Following the amendment to the land use code, NMS sought to rezone the property into a zone district in which "free market residential" remained a permitted use; however, the rezoning application was denied. NMS thereafter commenced a lawsuit in federal court alleging the city's change to the zoning code and refusal to rezone the property constituted a regulatory taking and impermissible spot zoning.

On appeal, the Tenth Circuit determined the claim was not yet prudentially ripe because the plaintiff had not met the "finality rule" established by US Supreme Court precedent, finding there were still "avenues" for the government to "clarify or change its decision." Specifically, the Tenth Circuit found that the plaintiff must first pursue planned development review from the city, which, if approved, would permit a variation from the permitted and prohibited uses within the existing zone district.

Campaign Contributions and Recusal

In a matter of first impression in Colorado, the court of appeals in *No Laporte Gravel Corp. v. Board of County Commissioners of Larimer County* confirmed that the mere receipt of campaign contributions does not create a conflict of interest requiring an elected official's recusal.[33] In this case, a Larimer County Commissioner received campaign contributions from the stockholders of Loveland Ready-mix Concrete, Inc., which shortly thereafter submitted a land use application for review by the county. Opponents of the land use application (No Laporte Gravel Corporation, Robert Havis, and Peter Waack; collectively NLGC) requested that the commissioner recuse himself from the application, contending that the receipt of the campaign contributions created a conflict of interest. The commissioner did not recuse himself and, instead, cast the deciding vote approving the land use application.

NLGC then sued the county and its Board of County Commissioners alleging due process violations in light of the US Supreme Court's decision in *Capterton v. A.T. Massey Coal Co.* In *Caperton*, the Court held that "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent" the Due Process Clause requires recusal.[34] The district court dismissed NLGC's claim, and NLGC appealed.

Here, the total campaign contributions received by the commissioner from the applicant's stockholders accounted for 7.65% ($4,100) of the total contributions raised by the

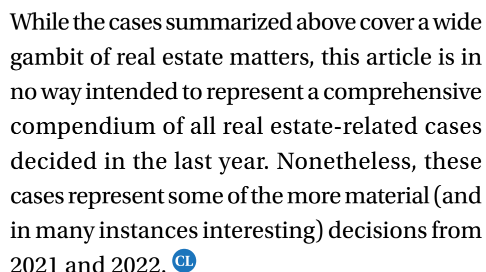
commissioner, an amount the court of appeals did not deem significant. Additionally, the court held that receipt of campaign contributions could, under extraordinary situations, give rise to a due process violation based on the bias created from the receipt of the contributions, but that NLGC had failed to meet that burden of proof in this case.

Metropolitan Districts

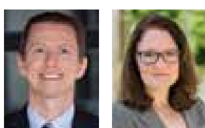
Using the Assessors' Reference Library in connection with financing of urban renewal projects was addressed in *Aurora Urban Renewal Authority v. Kaiser*.[35] This case presented a challenge to the way that the Colorado property tax administrator differentiated between increases in property value for purposes of determining base and incremental values for tax increment financing (TIF). Specifically, the Assessors' Reference Library used by county assessors distinguishes increases in property value attributable to "indirect benefits resulting from market perceptions that properties located in a TIF plan are more or less desirable/valuable . . . appl[y] proportionately to both the base and increment."[36] This rule resulted in only a small percentage of the property value increase being allocated to the urban renewal authority.

The court of appeals found that this distinction, which is not contemplated by Colorado's Urban Renewal Law, does not effectuate the purposes of the urban renewal law and therefore must be removed from the Reference Library. Separately, the court of appeals found that property owners, metropolitan districts, and the urban renewal authority possessed standing to sue the administrator, contrary to what the trial court had determined. A petition for writ of certiorari was granted in this case on October 4, 2022.[37]

Conclusion



While the cases summarized above cover a wide gambit of real estate matters, this article is in no way intended to represent a comprehensive compendium of all real estate-related cases decided in the last year. Nonetheless, these cases represent some of the more material (and in many instances interesting) decisions from 2021 and 2022.



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NOTES

1. This line was shamelessly stolen from one of the author's clients.
2. This article covers cases decided between July 2021 and July 2022.
3. *Accetta v. Brooks Towers Residences Condo. Ass'n.*, 496 P.3d 821 (Colo.App. 2021).
4. *Accetta v. Brooks Towers Residences Condo. Ass'n.*, 434 P.3d 600 (Colo.App. 2019).
5. *Town of Vail v. Vill. Inn Plaza-Phase V Condo. Ass'n*, 498 P.3d 1123 (Colo.App. 2021).
6. *Sandy v. Baca Grande Prop. Owners Ass'n*, No. 20-1413, 2021 WL 4164064 (10th Cir. Sept. 14, 2021).
7. *CORE Elec. Coop. v. Freund Invs.*, 517 P.3d 697 (Colo.App. 2022).
8. CRS § 38-1-118 requires a testifying appraiser to have "personally examined the record and communicated directly and verified the amount of such consideration with either the buyer or seller."
9. *Gregory v. Safeco Ins. Co. of Am.*, 514 P.3d 971 (Colo.App. 2022).
10. *Mayotte v. U.S. Bank Nat'l Ass'n*, 985 F.3d 1248 (10th Cir. 2021).
11. *Dream Finders Homes LLC v. Weyerhaeuser NR Co.*, 506 P.3d 108 (Colo.App. 2021).
12. *Orderly Health, Inc. v. NewWave Telecom & Techs*, No. 20-1441, 2021 WL 4592268 (10th Cir. Oct. 6, 2021).
13. *McWhinney Centerra Lifestyle Ctr. LLC v. Poag & McEwen Lifestyle Ctrs.-Centerra LLC*, 486 P.3d 439 (Colo.App. 2021).
14. *Id.* at 455.
15. *Id.*
16. *Mindock v. Dumars*, No. 20-1236, 2022 WL 1410017 (10th Cir. May 4, 2022).
17. *C & C Invs., LP v. Hummel*, 514 P.3d 328 (Colo.App. 2022).
18. *Id.* at 334.
19. *Id.* at 335.
20. *Jones v. Flowers*, 547 U.S. 220 (2006).
21. *Id.* at 337.
22. *Id.*
23. *Silvernagel v. US Bank Nat'l Ass'n*, 503 P.3d 165 (Colo.App. 2021).
24. *US Bank Nat'l Ass'n v. Silvernagel,* 2022 WL 4238208 (Colo. Sept. 12, 2022). The Supreme Court granted certiorari as to "[w]hether the court of appeals erred in determining the six-year statute of limitations period during which a lender may foreclose on a security instrument accrued upon the borrower's bankruptcy discharge."
25. *CadleRock Joint Venture LP v. Esperanza Architecture & Consulting, Inc.*, 500 P.3d 402 (Colo.App. 2021).
26. *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217 (10th Cir. 2022).
27. *Walters v. Cates (In re Cates)*, No. 18-1355, 2021 WL 4438141 (10th Cir. Sept. 28, 2021).
28. The summary of this decision is intentionally abbreviated as a much more thorough account (and analysis) is provided in Obert, "You've Got an Amicus Curiae In Me (or Two)," 51 *Colo. Law.* 30 (Mar. 2022), https://cl.cobar.org/features/youve-got-an-amicus-curiae-in-me-or-two.
29. *Lodge Properties, Inc. v. Eagle Cnty. Bd. of Equalization*, 504 P.3d 960 (Colo. 2022).
30. *Yen, LLC v. Jefferson Cnty. Bd. of Comm'rs*, 498 P.3d 1140 (Colo.App. 2021).
31. *Overton v. Chess*, 516 P.3d 53 (Colo.App. 2022).
32. *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021).
33. *No Laporte Gravel Corp. v. Bd. of Cnty. Comm'rs of Larimer Cnty.*, 507 P.3d 1053 (Colo. App. 2022).
34. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 870 (2009).
35. *Aurora Urban Renewal Auth. v. Kaiser*, 507 P.3d 1033 (Colo.App. 2022).
36. *Id.* at 1046 (citing Div. of Prop. Tax'n, Dep't of Loc. Affs., *Assessors' Reference Library* § 12, at 12.15 (rev. Oct. 2021)).
37. *Kaiser v. Aurora Urban Renewal Auth.*, 2022 WL 5219671 (Colo. Oct. 4, 2022). The Supreme Court granted certiorari as to "[w]hether the majority's invalidation of the Administrator's long-standing methodology for implementing the Colorado urban renewal law's tax increment financing provision impermissibly overrides the General Assembly's delegation of authority to the Administrator and conflicts with this court's precedent."