

Real Property Law

Alan C. Friedberg, Esq.
Elin P. Harrington-Schreiber
Pendleton Friedberg Wilson & Hennessey, P.C.
Denver



This article summarizes approximately 50 Colorado appellate court decisions issued in 2001, 17 of which are from the supreme court, relating to real property law. Of particular interest is the Fowler case, which is making its way back to the supreme court after remand in early 2001, and the Animas Valley Sand and Eagle County/Vail cases, which contain strong dissenting opinions. A brief descriptive list of related 2001 legislation is also provided.

CASE LAW

Adverse Possession/Quiet Title

In *Ocmulgee Props. v. Jeffery*,¹ the court of appeals determined, on an issue of first impression, whether a record owner's successful application to subdivide property and for an exemption from county subdivision regulations constitutes an exercise of control over property sufficient to disrupt the period of adverse possession by a claimant in actual possession of the property. The case was tried to the trial court on the parties' stipulation of facts that provided, *inter alia*, that (1) Ocmulgee had been in actual possession of the property for more than 18 years, (2) Jeffrey's predecessor in interest had successfully applied to the board of county commissioners to subdivide certain property, which included the disputed property, and for exemption from county subdivision regulations, and (3) Ocmulgee's predecessor in interest had received notice of the application but did not appear

at the public hearing on the application and did not object to the application. The trial court concluded that the application and the notice constituted, as a matter of law, an interruption of the period of adverse possession. The court of appeals disagreed.

The court stated that where the claimant has been in possession for the required period, the record owner must show an interruption of some aspect of the possession to defeat the claim. Mere assertion of a claim of record ownership is not sufficient, noting that the claimant's recognition of the owner's record title while remaining in possession of the property strengthens the adverse possession claim. The record owner must assert a claim to the land or perform an act *that would reinstate his possession*. The application proceedings did nothing to dispossess Ocmulgee of the property nor did it constitute an entry on the land to regain possession or the equivalent of such an action.

In a quiet title action, *Alexander v. McClellan*,² the court of appeals affirmed the trial court's determination that a grantor's (McClellan) deed to a grantee (Alexander) conveyed title to portions of two vacated county roadways that adjoined the lot described in the deed. McClellan acquired the property at issue by separate transactions: the first, in 1995, for a large parcel of property (not at issue in this case), together with the disputed portions of the vacated roadways, which were described by street name in the deed, and, the second, in 1996, the deed for which described the affected property as "Lot 1, Block 19, Town of Sedalia." The 1996 deed made

ALAN C. FRIEDBERG, ESQ., is a shareholder and commercial trial lawyer with Pendleton, Friedberg, Wilson & Hennessey, P.C., with a practice emphasizing commercial disputes, securities, and real estate litigation.

ELIN P. HARRINGTON-SCHREIBER, a graduate of Mount Holyoke College, has been a paralegal with Pendleton, Friedberg, Wilson & Hennessey, P.C. since 1993.

no reference to the vacated roadways. Contiguous to the lot are the two vacated county roadways: Jones Street, which was vacated by Douglas County no later than February 1976, and Platte Avenue, which was vacated in May 1986. In 1998, McClellan conveyed to Alexander a parcel of property described in the warranty deed as "Lot 1, Block 19, Town of Sedalia." The deed did not refer to the vacated roadways. Alexander brought suit claiming that, as a matter of law, McClellan's conveyance of "Lot 1, Block 19, Town of Sedalia," included the portions of the vacated roadways up to the respective center lines. The trial court disagreed and granted summary judgment in McClellan's favor. The court of appeals agreed.

Citing the supreme court's decision in *Morrissey v. Achziger*³ and other supporting treatises, the court noted that when a roadway is vacated, the abutting property owners become fee owners of the roadway up to the center line. Any deed relevant to the property drafted subsequent to the vacation of the roadway, which does not *specifically* include any portion of the roadway, does not transfer title any portion of the roadway ("it will not be construed to include any portion of the vacated strip not specifically described therein unless the conveyance shows an evident intention to include same"). In support of this rule, the court noted that the vacated roadway may have independent value, especially where, as here, it is contiguous to another parcel of property retained by McClellan.

Other quiet title decisions. In *McKenzie v. Pope*,⁴ the court of appeals vacated the trial court's judgment and remanded the case with directions for further findings on the issue of whether or not the property owners, Pope, had actually granted the McKenzies permission to use the property, which they claimed through adverse possession, and, if permission was granted, whether the McKenzies took appropriate action to disclaim it.

Brokers

At issue in *Johnson Realty v. Bender*,⁵ was the status of Johnson as the Benders' real estate agent and whether Johnson was entitled to recover attorney fees and costs incurred in defending an action brought by the purchasers of the Benders' property, the sale of which was brokered by Johnson. After expiration of a listing agreement between the parties for the sale of the Benders' ranch, Johnson showed the ranch to the eventual buyers and negotiated the

sale of the ranch to them, with the Benders' knowledge and permission. The buyers sued the Benders and Johnson for misrepresentation, negligence, and unjust enrichment based on a brochure they received from Johnson, which Johnson had prepared and distributed prior to the expiration of the listing agreement. The buyers' suit ended with judgment entered in favor of the Benders and Johnson. Johnson then filed the underlying suit to this appeal against the Benders for indemnification for attorney

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fees and costs incurred in defending against the buyers' suit. The trial court determined that Johnson was not entitled to indemnification under the terms of the expired listing agreement, but did have such a right under common law agency principles. The trial court determined that while Johnson failed to give timely notice to the Benders of his claim for indemnification, the claim was not barred and entered judgment in Johnson's favor in the amount of \$45,000, plus interest and costs.

The Benders appealed contending that there was no agency relationship between them and Johnson. The court of appeals affirmed the trial court noting that under common law agency principles, a real estate broker working for a seller in a real estate transaction stands in an agency relationship with the seller, regardless of whether there is a written listing agreement in place, if the parties agreed to enter into a relationship to which the law attaches the legal consequences of agency. While the relationship at issue here was entered into prior to (though the sale of the property occurred after) the Colorado General Assembly's enactment of legislation modifying certain common law applicable to brokerage relationships, the court of appeals addressed the issue of whether Johnson was, in fact, a "transaction-broker," rather than an agent of the Benders. The court stated that regardless of the timing of the sale, the buyers' claims arose from the preparation and distribution of the brochure (or by its presentation to the buyers), prior to the legislation. Johnson was acting as the Benders' agent when these incidents occurred. The Benders contended that even if an agency relationship existed, Johnson was barred from seeking indemnification because

he did not notify them timely of his claim to give them an opportunity to participate in or assume his defense. The court remanded this issue to the trial court to consider whether Johnson's recovery of attorney fees and costs should be reduced or denied based on two issues. First, where an agent is a co-defendant with the principal, should the agent's right to recover be reduced to the extent the defense was unreasonable or to the extent the principal suffered a loss because it was deprived of the opportunity to settle or mitigate defense costs? Second, in an action such as this in which the principal was also a defendant and each party provided its own representation, whether by not providing its own representation, the principal's defense would have left the agent's interests unprotected.

The case of *Mabry v. Tom Stranger & Co.*⁶ involved two listing agreements between the broker, Tom Stranger & Co., and the collective sellers, denoted as the Absent Sellers and the Jenkins, for the terms February 1, 1993, to February 1, 1994, and February 21, 1993, through February 21, 1994, respectively. The property was marketed as a single parcel with a \$3.5 million purchase price. After the listing agreements were signed, several offers on the property were received. The broker did not deliver all of the offers to all of the sellers, rather some were just delivered to the Jenkins' attorney. On February 17, 2001, the broker received a full price offer on the property, which offer was to expire by its terms on or before February 21, 1994. The broker contacted the Absent Sellers about the offer and asserted an entitlement to a commission under the terms of the listing agreement, regardless of whether or not the sellers accepted the offer. The Absent Sellers agreed to accept the offer with minor changes. The broker then told the Jenkins that the Absent Sellers had accepted the offer, and again asserted entitlement to a commission under the terms of the exclusive listing contract regardless of whether sellers accepted. The Jenkins' attorney prepared a counterproposal to the buyers' offer. At this time, the broker also provided the Absent Sellers with a document that acknowledged the Jenkins' desire to make a counterproposal and agreed to submit the counterproposal as an "accommodation" to the Jenkins, but asked the Absent Sellers to agree to be bound by the original offer if the counterproposal was not accepted by the buyer. After the second counterproposal, all of the parties agreed to the terms of a sale contract. Following two extensions

to the closing date, negotiations between the parties failed and the sale contract terminated. The sellers then notified the buyer that they were ready to perform. The buyer did not respond and, instead, recorded a notice of claim of interest in the property.

The sellers then brought suit seeking declaratory judgment and quiet title relief and asserting breach of contract and slander of title claims against the buyer and breach of contract and breach of fiduciary duty claims against the broker. The broker filed a counterclaim against the sellers for its commission, and the buyer asserted a counterclaim against the sellers for specific performance and breach of contract. The sellers and the buyer settled their claims, with the buyer agreeing to quiet title in favor of the sellers. The trial court found that the broker had breached his duties of loyalty and to exercise skill and care by, *inter alia*, pressuring the sellers and failing to disclose material information (receipt of other offers and expiration of one of the listing agreements). The court of appeals affirmed.

Building Defects/Premises Liability

In *Olson v. Hillside Community Church*,⁷ the court of appeals affirmed in part, reversed in part, and remanded with directions, all to the detriment of the defendants, Hillside Community Church, First Bank of Arvada, the City of Golden, and the City Counsel of Golden. The plaintiff owned property and resided in homes adjacent to Hillside. Hillside, over the course of about two years, (1) graded without a permit, (2) began constructing an addition to the church beyond the scope of the "Foundation Only" permit it received (the "Foundation Only" permit was granted in May 1997; it wasn't until October 1997 that Hillside bothered to apply for, and was granted, a building permit), (3) constructed the addition higher than the 30-foot height limitation for the residential zone, and (4) failed to obtain a special use permit for the addition. In May 1998, after being advised by Olson's attorney, the Golden City Attorney determined that the addition was a nonconforming use under the Golden Municipal Code (GMC) and that a special use permit should have been applied for and granted prior to issuance of the building permit. Regardless, because the addition had already been constructed, the City did not revoke the building permit. A month later, the city granted Hillside a five-foot height variance to the residential zoning requirement, without follow-

ing the procedures for variances in the GMC and without making a finding in conformance with the GMC's criteria. In November 1998, the city issued a certificate of occupancy.

In June 1998, the plaintiffs filed suit asserting claims (1) for a prescriptive easement across the Hillside property for access to their backyards; (2) that the construction of improvements by Hillside was in violation of numerous city ordinances and requesting removal of the improvements; (3) requesting the city require Hillside to comply with the city's zoning ordinances; (4) that

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the city exceeded its jurisdiction and abused its discretion in granting Hillside the height variance; and (5) that the city denied the plaintiffs due process by denying them the opportunity to participate in the special use permit process. After trial, the trial court entered judgment that: (1) the city should vacate the certificate of occupancy for the addition, and should not issue a new certificate absent approval of a special use permit issued in compliance with the GMC and the building code; (2) Hillside should file an application for special use permit and request a public hearing thereon; (3) the city should conduct a hearing on Hillside's application; (4) the height variance was vacated; (5) under the doctrine of relative hardship, the addition need not be removed or altered provided a special use permit was issued after hearing; and (6) the plaintiffs, as prevailing parties, were awarded reasonable attorney fees to be paid by the city.

The court of appeals found that the city had denied the plaintiffs due process by circumventing their rights under the GMC, specifically by not requiring a public hearing for the issuance of a special use permit to Hillside and proper notice thereof. The city contended that its actions under the applicable provisions of the GMC were discretionary, not mandatory. The court, agreeing with the trial court, stated that the city's interpretation of the GMC provisions as allowing them discretionary powers was "simply incredible." The various provisions at issue

contain the word "shall," which, in an administrative regulation, is presumed to indicate a mandatory, not discretionary, action. In disagreeing with the trial court with respect to the issue of relative hardship, the court determined that Hillside did not act in good faith, specifically identifying a number of the "plethora of zoning, planning, and code provisions" ignored by Hillside. Hillside's actions should not be protected by application of the equitable doctrines of estoppel and relative hardships and, on remand, the trial court was to require Hillside to modify the addition to comply with existing GMC ordinances. Briefly dealing with the issue of vacating the height variance, the court noted that the trial court properly found that insufficient evidence was presented at the variance hearing concerning certain conditions to allow the granting of Hillside's request. The court affirmed the trial court with respect to the plaintiffs' cross-appeal on the issue of the number of on-site parking requirements for Hillside's property. It remanded for reconsideration and clarification the issue of whether the trial court erred in failing to order the removal of the eight-foot fence along Hillside's north property line. The GMC provides for a buffer fence, though the trial court concluded that the specific provision was inapplicable but determined that a fence was required without specific findings of fact and conclusions of law. Finally, the court agreed that the trial court had applied the incorrect standard of proof in denying the plaintiffs' claim for a prescriptive easement, specifically, a preponderance of the evidence standard. This issue was remanded for reconsideration.

The court of appeals affirmed the trial court's decision in *Beeftus v. Creekside Ventures LLC*.⁸ The Beeftus appealed the (1) judgment entered on a jury verdict on their negligence claim against the defendant, Creekside Ventures LLC, the developer of the subdivision in which the plaintiffs lived, and (2) summary judgment entered in Creekside's favor on the Beeftus' claim for breach of implied warranty of habitability. The Beeftus contracted with a builder to construct a home with a walkout basement in the Creekside Estates. According to the grading plan submitted by Creekside to the city, the Beeftus' lot was unsuitable for walkout basements. The builder constructed the house one foot lower than shown on the plans submitted to the city for purposes of issuance of a building permit. The Beeftus sued the builder and Creekside for damages and for contract rescission after their basement

flooded repeatedly, and settled with the builder prior to trial. At trial, Creekside was allowed to introduce evidence of non-party acts, even though it was the dismissed co-defendant builder who had designated the non-party (the builder of the homes on two lots adjacent to the plaintiffs'), pursuant to C.R.S. § 13-21-111.5(3)(b). The jury returned a verdict finding that Creekside was negligent but had not caused any of the Beeftus' damages.

On appeal, the Beeftus argued that the trial court erred in granting Creekside's motion for summary judgment on their claim for breach of implied warranty of habitability. The trial court assumed that an implied warranty of habitability extended from the developer to plaintiffs, but concluded that the developer did not breach the warranty because "there is no evidence . . . that the [Beeftus'] lot . . . was not suitable for residential construction." The court of appeals reasoned that while the Beeftus' lot was unsuitable for a home with a walk-out basement, there was no evidence that the lot was unsuitable for other types of homes. Creekside graded and sold the lot, but played no part in the construction of the house. Therefore, even if an implied warranty of habitability existed between Creekside and the Beeftus, there was no breach of that warranty. The Beeftus also argued that the trial court erred in allowing Creekside to rely on the builder's designation of a non-party at fault, without having noticed the designation prior to trial. The court of appeals determined that because the jury's verdict addressed causation but did not apportion fault for liability purposes, any error that occurred as to designation of the non-party did not prejudice the Beeftus and was, therefore, harmless.

In *Pierson v. Black Canyon Aggregates, Inc.*,⁹ a case decided at the end of 2000, the Piersons appeal the trial court's order granting summary judgment on their claims against the defendants, Black Canyon and Luttrell. John Pierson was seriously injured when he drove off a 17-foot cliff into a gravel pit, which allegedly was located in the middle of a designated county road. The gravel pit was operated by Black Canyon, a company owned by Luttrell, which had contracted with Montrose County to crush gravel at various locations, including the gravel pit where Pierson was injured. Montrose County, in turn, leased the gravel pit from a third party. The lease gave the county the exclusive right to mine, excavate, and stockpile gravel on the property. The agreement between the county and

Black Canyon primarily concerned the quantity and quality of the gravel to be mined. It did not transfer possession of the property to Black Canyon, but allowed Black Canyon to enter the property to perform the work required under the contract. The Piersons asserted four claims against Black Canyon and Luttrell: (1) negligence in creating a dangerous condition; (2) breach of a contract between Black Canyon and the county requiring Black Canyon to obtain liability insurance and to name the county as

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an additional insured; (3) negligence relating to Luttrell's failure to name the county as an additional insured under the insurance policy; and (4) loss of consortium. The county was not named as a defendant.

Black Canyon and Luttrell filed two motions for summary judgment. The first asserted, *inter alia*, that the premises liability statute¹⁰ controlled the determination of liability and, therefore, because the county was in "possession" of the property under the third-party lease, Black Canyon was not a "landowner" and could not be liable. Further, the Piersons were not third-party beneficiaries under the agreement between Black Canyon and the county. Black Canyon was therefore entitled to judgment as a matter of law on the breach of contract and negligence claims for the Piersons' failure to name the county as an insured. The trial court found that, for purposes of the premises liability statute, the county, not Black Canyon, was the landowner, and granted the defendants' motion as to the premises liability claim. As to the Piersons' breach of contract claim, the trial court found that, given the express terms and the circumstances of the agreement between Black Canyon and the county, the Piersons had standing as third-party beneficiaries. The Piersons' negligence claim for failure to name the county as an additional insured was dismissed because their sole remedy was under the breach of contract claim. The loss of consortium claim also survived. The defendants' second motion for summary judgment asserted that even if the county had

been named as an additional insured, the Piersons would not have been covered due to the county's immunity from liability under the Colorado Governmental Immunity Act (GIA),¹¹ and the county had not waived immunity by resolution, as required by the GIA. The trial court agreed and dismissed the Piersons' remaining claims.

The court of appeals affirmed the trial court stating that pursuant to its lease with the owners of the gravel pit, the county retained exclusive possession of the gravel pit for purposes of mining, excavating, and stockpiling of gravel, and therefore it was the party in "possession" of the property and the "landowner" for purposes of the statute. Absent some type of ownership or leasehold interest in the property, a party does not fall within the definition of a "landowner" for purposes of the premises liability statute. The court noted that Black Canyon had only a contractual right to mine, excavate, and stockpile gravel under the county's supervision and, therefore, likened its status to a general contractor who enters a property to perform work pursuant to agreement with the property owner. With respect to the county's immunity under the GIA, the Piersons argued that by entering into the contract with Black Canyon, which required Black Canyon to obtain insurance and to name the county as an additional insured, the county waived immunity by resolution. The court disagreed, noting that the GIA provided that the type or resolution contemplated by the statute was "a formal legislative action approved by a majority vote of the governing body."

The supreme court granted the Piersons' petition for a writ of certiorari on the issue of whether the trial court properly construed the meaning of "landowner" under the premises liability statute.¹²

Contracts

In *Brush Grocery Kart v. Sure Fine Market, Inc.*,¹³ the court of appeals affirmed the trial court's ruling that the risk of damage to real property that occurred after an option to purchase the property was exercised and before transfer of legal title, fell to the optionee.

Brush leased the real property from Sure Fine Market, Inc. The lease granted Brush an option to purchase the real property, which Brush exercised. The action in the trial court commenced when the parties could not agree on a purchase price, requiring the appointment of a master. While the action was pending, the lease expired. Brush vacated the

premises and allowed the insurance to lapse. Brush sent notice of this to Sure Fine. The lease contained no provision requiring either party to insure the premises. A hail storm caused substantial damage to the property, raising the issue of allocation of the risk of this loss. The trial court allocated the loss to Brush under the doctrine of equitable conversion.

The court of appeals affirmed, noting that the equitable conversion occurs when an option is exercised, not when the contract becomes effective, because there is no duty to buy or sell until the option is exercised. After the option is exercised, the contract has the same effect as an agreement to buy

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and sell property. Under the theory of equitable conversion, the buyer becomes the equitable owner because it has acquired an enforceable right to obtain legal title to the property. Therefore, because the risk of loss is an attribute of ownership, the buyer must assume the risk of loss, regardless of possession of the property. Brush also argued unsuccessfully that C.R.S. § 38-30-167 applied, since the building was part of the real property. Since the building was damaged, it was impossible for Sure Fine to convey that portion of the real property under the agreement. The court disagreed, stating that the statute speaks only to conveying property, not allocation of loss.

The supreme court granted Brush's petition for a writ of certiorari as to whether, under Colorado law, a purchaser assumes the risk and burden of casualty loss to real property as of the date of execution of the contract or other instrument whereby a purchaser has agreed to purchase and the seller has agreed to sell even though neither possession nor title has passed to the purchaser.

The court of appeals reversed the trial court's decision in *Sandstone Investment I, LLC v. A. Everett Williams 1963 Trust*¹⁴ and entered a decree of specific performance. The defendant trusts, through their common trustee, entered into a contract to sell certain real property. The trustee also entered into a "backup" contract with Sandstone that acknowl-

edged the existence of the original contract to sell and provided that if the original contract was not consummated, the real estate agent was to notify Sandstone, which would be required to pay certified funds to the agent by a certain date. The original contract did not close as scheduled and was extended, without consultation with Sandstone. Prior to the extension, Sandstone was notified that the original contract did not close as scheduled and that the closing date was extended. Regardless, Sandstone delivered the certified funds required by its “backup” contract to the agent. In the end, it was determined for tax purposes that the trusts would not sell the property, but rather would exchange properties. Sandstone was advised that the property was no longer for sale and its funds were returned. Sandstone then sued for specific performance of its “backup” contract. The trial court concluded that the original contract was consummated and, therefore, the “backup” contract did not become effective.

The court of appeals disagreed. The “backup” contract had specific terms and obligations, subject only to an express condition precedent — the failure of the original contract to be consummated. The trusts did not reserve the right to extend the closing date of the original contract in the “backup” contract. Even if they had, the extension could not affect Sandstone’s rights under the “backup” contract unless Sandstone consented to the extension. Since the original contract was not consummated in accordance with its original terms, Sandstone was entitled to specific performance.

Other contract decisions. In *Filho v. Rodriguez*,¹⁵ the owners were entitled to enforce the lease entered into on their behalf by their management company agent, despite not being named in the lease agreement.

In *Kellum v. RE Servs., LLC*,¹⁶ the successful bidder at a foreclosure sale had no further right to challenge the validity of a lien because it was undisputed that redemption funds were timely tendered to and accepted by the bidder as the holder of a certificate of purchase.

In *Schreck v. T & C Sanderson Farms, Inc.*,¹⁷ the terms of purchase option in a real estate lease agreement were sufficiently definite to support an award of specific performance.

In *Washburn v. Thomas*,¹⁸ the high bidders at an auction for real property had no claim for specific performance and consequential damages as the

terms of the auction were subject to a written sales contract limiting the bidders’ remedies.

Development and Zoning

In *Schneider v. Drake*,¹⁹ regarding a lot owner’s right to create additional lots in a subdivision, the Schneiders appealed the trial court’s judgment prohibiting further subdivision of the M.E.B. Subdivision. In 1976, the owners of the seven lots of the M.E.B. Subdivision filed and recorded the M.E.B. Covenants, which provided, *inter alia*, that (1) “[n]o lot shall be resubdivided into smaller lots or parcels of land to obtain additional building sites,” (2) the covenants would be effective for 20 years and would renew automatically for 10-year periods, unless the lot owners amended them, and (3) by majority vote, the lot owners could modify or nullify the covenants by amendment before the expiration of the 20-year period, and such amendment would be valid after that period expired. In 1977, the lot owners of at least six lots signed amendments to the M.E.B. Covenants. The amendments, *inter alia*, deleted the provision prohibiting further subdividing. These amendments were *not* recorded as required by the covenants.

After the 1977 amendments were signed, the Schneiders, the owners of Lots 3, 4, 5, 6, and 7, five of the seven lots in the Subdivision, began subdividing Lot 3 to create the “Schneider M.E.B. Subdivision,” which created five lots on Lot 3. The final plat was recorded. In addition, the Schneiders filed a second plat, creating a sixth lot on Lot 3, and further subdividing Lots 4 through 7. In about 1980, the original owner of Lot 1 subdivided that lot into Lots A and B. All of this subdividing was done in apparent violation of the original M.E.B. Covenants, because the 1977 amendments were not recorded. The Schneiders did not carry out their plans to subdivide their lots in accordance with the plans recorded in 1977 until 1994. On January 23, 1995, Helen V. Schneider and eight other individuals signed an amendment to the M.E.B. Covenants, which was intended to make the covenants inapplicable to the Schneider’s lots (Lots 3, 4, 5, 6, and 7), effective at the end of the 20-year period. The nine individuals who signed the amendment constituted a majority of the lot owners of the original seven lots, as well as a majority of all the lot owners at that time. This amendment was recorded on February 9, 1995. In January 1996, just prior to the end of the 20-year period, 14 individuals signed and recorded

an amendment to the M.E.B. Covenants, “cancel[ling] and annul[ling] all previous purported amendments,” with the intent to nullify the 1995 amendment and make effective the original 1976 M.E.B. Covenants that prohibited further subdividing.

In 1995, the Drakes, owners of one of the lots subdivided from Lot 1, obtained a permanent injunction against the Schneiders prohibiting them from further subdividing their property in violation of the M.E.B. Covenants. In 1997, the Schneiders brought a declaratory judgment action, seeking (1) a determination that the 1995 amendment was valid, (2) the 1996 amendment was invalid, and (3) for equitable reasons, the M.E.B. Covenants were no longer operative. The Drakes and the Moores (collectively, the other lot owners) each filed an answer and counterclaims against the Schneiders, seeking (1) injunctive relief, (2) clarification or declaration of the significance of the Drakes’ 1995 permanent injunction, and (3) attorney fees. The trial court concluded that: (1) the 1977 amendments were invalid because they were not recorded; (2) the 1995 and 1996 amendments were void *ab initio*; (3) under the doctrine of equity, the Schneiders could continue to subdivide Lot 3, but not Lots 4, 5, 6, or 7; and (4) the defendants were the prevailing parties and, thus, were entitled to attorney fees. The court of appeals upheld the trial court’s rulings regarding the 1977 amendments and the Schneiders’ continued subdivision of Lot 3, but reversed the rulings on the 1995 and 1996 amendments and on the attorney fee issue.

Relying on *Buick v. Highland Meadow Estates*,²⁰ the court of appeals noted that it must construe covenants as a whole, keeping in mind the covenants’ underlying purpose. When a covenant is clear on its face, courts will enforce it as written. The original covenants required that an amendment be executed by the “then owners of the majority of the lots.” First, the term “then owners” necessarily refers to the existing owners of lots *at the time of the 1996 amendment*. Further, the original covenants contemplated that they could be amended to allow subdividing. So, although the 1977 amendments were not recorded, the then lot owners proceeded on the assumption that subdividing was now allowed, based upon those amendments. In fact, the Drakes and the Moores lived on Lots A and B, originally Lot 1, and there were six separately owned residences on the original Lot 3. The court concluded

that although the subdivision of Lots 1 and 3 was in violation of the Covenants, the subdividing occurred with the acquiescence of the owners of all the lots in the subdivision. Given this *de facto* resubdivision and acquiescence, the subdivision now consists of 14 lots. To view the subdivision in any other way would deprive the two present owners of the original Lot 1 and the six present owners of the original Lot 3 of the full benefits of the covenants, including the right to vote on any amendments. Based on this determination, the court determined that the 1996 amendment was approved by a majority (14 lots, with eight lots constituting a majority (nine lots signed the 1996 amendment)).

Neither the 1995 amendment nor the 1996 amendment, which was adopted on January 25, 1996, became effective until January 26, 1996, the date the original 20-year period expired. Because the amendments became effective at the same time, they must be read together in order to discern the actual intent of the parties. As such, the 1996 amendment effectively overrode the 1995 amendment.

With regard to the equitable relief granted the Schneiders with respect to Lot 3, the court determined that the trial court properly applied the test set forth in *Zavislak v. Shipman*,²¹ in which the supreme court held that a trial court may exercise its equitable powers when a restrictive covenant no longer serves the purpose for which it was imposed or when the circumstances have changed and the enforcement would impose an oppressive burden without any substantial benefit. The Schneiders had already subdivided the lot into six lots, created a street and installed some utilities in anticipation of further subdividing. Also, a majority of the lot owners realized that further subdividing might take place.

*Board of County Commissioners v. Gartrell Investment Co., LLC*²² is a case involving a dispute among (1) Gartrell, a developer wishing to build approximately 1,500 houses on over 1,000 acres in the greater Denver metropolitan area, (2) the City of Aurora, which had been asked to annex the developer’s land, and (3) the Board of County Commissioners of Douglas County, seeking to enforce its land use regulations to restrict the development. The appeal had two intervenors, the City of Aurora, which aligned with Gartrell, and the Coalition of Northeastern Douglas County Against Annexation (CONDAA), which aligned with

Douglas County. The principal issue was whether Douglas County could require Gartrell to obtain a permit under the county's land use regulations before it could develop its property, notwithstanding the efforts of Gartrell to annex the property to the City of Aurora.

Douglas County and CONDAA appealed the trial court's denial of the county's request to enjoin Gartrell from seeking the annexation or proceeding with the development without first applying for and securing a permit pursuant to the Areas and Activities of State Interest Act (AASIA). Under the Douglas County Master Plan, Gartrell's property is designated as Anon-urban," suitable only for low intensity uses, including agriculture or residences on lots of 35 acres or more. After issuing a temporary restraining order against Gartrell and granting, in part, Douglas County's motion for preliminary injunction, following a trial on Douglas County's motion for a permanent injunction, the trial court ruled in favor of Gartrell, concluding that Douglas County did not have authority under AASIA to include within its regulations a provision concerning the annexation of an existing or proposed urbanized growth center.

AASIA authorizes local governments, including individual counties, to designate matters of state interest within its jurisdiction. Included as "activities of state interest" are local governments' designations of "[s]ite selection and development of new communities." AASIA defines "new communities" to mean "the major revitalization of existing municipalities or the establishment of urbanized growth centers in unincorporated areas." Further, AASIA requires local governments to develop guidelines for the administration of designated matters of state interest and permits the local government to adopt regulations interpreting and applying its adopted guidelines in relation to specific activities of state interest. Once a local government's regulations have been adopted, any person desiring to conduct an activity of state interest must file an application for a permit with the local government where such activity is to take place. Upon submission of an application, the local government may approve it, deny it, or seek an injunction against any person desiring to conduct a designated activity of state interest who does not obtain a permit. Douglas County adopted such regulations, which, *inter alia*, define the terms Anew communities" ("an urbanized growth center in unincorporated Douglas

County"), and "urbanized growth center" ("any residential development with a gross density greater than 1 dwelling unit per 2.5 acres or greater than 250 total residential units"). Urbanized growth centers included "[a]ny incorporation or annexation of an existing or proposed urbanized growth center in Douglas County when located outside the [municipal planning areas] as identified on the Douglas County Master Plan Land Use Map, as amended."

As it was undisputed that Gartrell's property was located outside the municipal planning areas identified on the Douglas County Master Plan Land Use Map, the dispositive question before the court of appeals was whether Douglas County could require Gartrell to obtain a permit to pursue its annexation to the City of Aurora pursuant to the provisions of AASIA. The court concluded that Douglas County could not. Under AASIA, a county may regulate Anew communities," which refers to "the major revitalization of existing municipalities or the establishment of urbanized growth centers in unincorporated areas." AASIA authorizes counties and other local government entities to "designate certain activities of state interest" from among a statutorily prescribed list and to designate only those activities expressly listed within the statute. The general assembly did not expressly list annexation as an activity of state interest that counties are authorized to regulate. Rather the general assembly provided for comprehensive regulation of annexation by municipalities through the provisions of the Municipal Annexation Act.

In *Fire House Car Wash, Inc. v. Board of Adjustment for Zoning Appeals*,²³ a C.R.C.P. 106 review, Fire House appealed the judgment of the trial court affirming the administrative decision and action of the Board of Adjustment for Zoning Appeals of the City and County of Denver revoking a non-conforming use. Fire House operated a multi-faceted business which included a car wash, gasoline station, retail area, and detail shop, located in a primarily residential area of central Denver. The car wash is a non-conforming use. The business was acquired by Fire House in 1997 from the property owner, who retained ownership of the real property. The car wash has been in existence since 1966, when the property owner obtained a permit to operate a coin-operated car wash as a non-conforming use. In the intervening years, the business expanded to include more land, equipment, and services, including the purchase of adjacent properties and

demolition of residences to facilitate the growth. The business operated on two lots zoned B-2, and expanded onto a lot zoned R-2. B-2 zoning permits, as a use by right, the operation of a service, or gasoline filling, station with some limitations, and an auto polishing business with the restriction that any vehicle washing be limited to those vehicles which are polished. R-2 zoning permits residential uses only.

In response to Fire House's installation of a polishing machine, without consulting or seeking a use permit from Denver, and the use of the R-2 lot for commercial purposes, Denver issued two cease and desist orders. Fire House appealed the orders to the board, which upheld both orders after extended hearings. Fire House sought review of the board's decision by the trial court pursuant to C.R.C.P. 106 (a)(4), claiming that the board exceeded its jurisdiction and abused its discretion. It asserted that the applicable ordinances do not authorize termination of the non-conforming use as a remedy for the cited and proved violations and require Denver first to issue an order providing Fire House an opportunity to bring its operations into compliance. Fire House also sought declaratory and injunctive relief pursuant to C.R.C.P. 57 and 65, on a number of grounds, including, an assertion that Denver Revised Municipal Code (D.R.M.C.) 59-631(b) is unconstitutional as applied in that it constitutes an impermissible delegation of legislative power, is void for vagueness, and violates procedural due process rights.

The trial court granted Denver's motion for summary judgment on the Rules 57, 65, and 106 claims, which the court of appeals affirmed, holding that there was evidence and authority for the board's termination of the non-conforming use. The court declined to address Fire House's arguments regarding the scope and enforcement of D.R.M.C. 59-631(b). In ruling, the court of appeals noted that "[c]ontinued non-conforming uses are disfavored because they reduce the effectiveness of zoning ordinances, depress property values, and contribute to urban blight Non-conforming uses should be reduced to conforming uses as speedily as possible." The case was remanded to the trial court for an award of costs, an issue which the Board and Denver had brought on cross-appeal.

In *Bainbridge, Inc. v. Board of County Commissioners*,²⁴ a continuation of a dispute over building fees,²⁵ the plaintiffs appealed the trial court's judg-

ment on remand in favor of the Board of County Commissioners. In adopting the 1991 Uniform Building Code, Douglas County imposed on the plaintiffs the Code's recommended building permit fees, relying on C.R.S. §§ 30-28-114 and 30-28-205(1), which permit counties to fix a reasonable schedule of fees for the issuance of building permits. The plaintiffs asserted that the permit fees were illegal because the county building department's revenue exceeded its direct costs. The trial court concluded that the general assembly did not intend to limit the schedule of fees authorized by those sections to only the direct costs of operating the building department. The plaintiffs appealed asserting that the fees constituted an unlawful tax in violation of Article X, § 3, of the Colorado Constitution, which mandates uniform property taxes unless the fees approximate the direct costs of operating the building department. On remand, the trial court held an evidentiary hearing limited to the issue of whether the fees charged were approximately required to offset the direct and indirect operating costs. The trial court ruled in favor of the county, finding that the building fees charged were approximately required to offset the direct and indirect costs of operating the building department. The plaintiffs appealed only the provisions of this order relating to costs allocated from the county commissioners, county manager, and county attorney, and the engineering and planning departments.

The court of appeals affirmed the trial court, holding, *inter alia*, that the trial court properly used the beyond a reasonable doubt burden of proof, and even if it did not, any error was harmless. The trial court did not err on remand by concluding that general governmental expenses relating to growth management are recoverable as indirect costs through permit fees. In reviewing the expert evidence presented by the parties, the court of appeals stated that the county's evidence demonstrated that use of growth management as a component of indirect costs analysis was reasonable and appropriate and supported the finding that (1) the fees charged by the building department were approximately required to offset the direct and indirect operating costs of the department and (2) portions of the growth costs were permissibly allocated to the building department as indirect costs. Further, Federal Office of Management and Budget document A-87 did not control the allocation of costs as it pertained to federal grants and, therefore, had no

application to the cost of allocation issue before the trial court on remand.

In *Town of Erie v. Eason*,²⁶ the supreme court reversed the court of appeals. A writ of certiorari was granted on the question of whether the court of appeals erred “in ruling, contrary to the Uniform Building Code, that a ‘structure’ intended for public use must be ‘permanently affixed’ to the land before

**Semi-trailers used for
public storage are “structures”
under the Uniform Building Code.**

a local government may require its owner to apply for a building permit?” The supreme court held that semi-trailers used for public storage are “structures” under the Uniform Building Code (Code), adopted in the Erie Building Code, despite not being affixed to the land, because they were intended to be used as public rental storage units. The trial court correctly looked to the intended use of the semi-trailers to determine whether they were structures within the meaning of the Code, which requires a permit for “any structure used or intended for supporting or sheltering any use or occupancy.” While recognizing that this definition is very broad, the supreme court still did not find anything in the Code to support the court of appeals’ opinion that a “structure must be permanently affixed to the land” for a permit to be required. The supreme court did not address the issue of whether semi-trailers used for private storage fall within the scope of the Code.

Other related decisions. In *Board of County Commissioners v. City of Greenwood Village*,²⁷ the court of appeals affirmed the trial court’s judgment upholding the annexation of certain real property stating that the city’s division of the property into multiple one-foot strips of land, while unusual, satisfied the one-sixth contiguity requirement of the Municipal Annexation Act,²⁸ and once the one-sixth contiguity requirement was satisfied, the community of interest requirement was also satisfied.

**Easements, Liens, Subdivisions,
and Other Title Restrictions**

In an action involving the “spurious lien” statute,²⁹ *Turkey Creek v. Anglo American Consol. Corp.*,³⁰ the court of appeals affirmed the trial court’s ruling in favor of the plaintiff, Turkey Creek. In an earlier action,³¹ Turkey Creek had successful-

ly sued various business entities and individuals other than the defendants in this case for decrees of foreclosure and quiet title to certain property in Eagle County, and, in a supplemental proceeding, was awarded damages from the named businesses that had filed invalid deeds of trust on the property. In this action, Turkey Creek sought actual or statutory damages of at least \$1,000 for each of 405 deeds of trust that had been declared void and invalid in the previous action and supplemental proceeding. The only difference between the earlier case and this case was the named defendants. On summary judgment, the trial court found that the defendants’ actions fell under the ambit of the statute and ordered the defendants to pay Turkey Creek damages in the amount of \$405,999. Tucker, the individually named defendant, who was the controlling officer and/or sole owner of the four named corporate defendants, appealed, contending (1) that the trial court erred in denying the defendants’ motion for summary judgment on the doctrine of res judicata, (2) that the trial court erred in granting summary judgment because the undisputed facts did not support a finding that he “offered” the invalid deeds of trust to be recorded, within the meaning of the statute, and (3) the trial court erred in determining that he knew or had reason to know that the deeds of trust were invalid. The court of appeals affirmed on all issues.

On the first issue of res judicata, the court noted that it was undisputed that there was identity of the subject matter and identity of the causes of action between the earlier and present case, but Tucker failed to present any evidence to establish that he was in privity with the defendants in the previous case, except for the fact that all were involved in filing invalid deeds of trust. Also, during the supplemental proceedings, in a letter on the record in this case, Tucker’s attorney confirmed that Tucker was not a party to the previous action and that his interests were not represented by any other party in that action. On the third issue of whether or not Tucker knew that the deeds of trust were invalid, the record showed that one year before Tucker’s invalid deeds of trust were filed, the deed by which Turkey Creek acquired the property had been recorded. Thus, Tucker was on constructive notice that his deeds of trust were groundless.

Tucker’s second issue, whether he “offered” the invalid deeds of trust to be recorded pursuant to the “spurious lien” statute, was an issue of first impres-

sion for the court of appeals. Since all of the parties to the case conceded that the invalid deeds of trust at issue created liens on the subject properties, the statute applied to the issues before the court. The trial court based its ruling on (1) testimony that Tucker gave at deposition in a related proceeding, in which he conceded that he paid the recording fees and had authorized the issuance of the invalid deeds of trust; and (2) that he was the controlling officer of

The conveyance benefited a nonexistent dominant estate, making any claimed easement appurtenant invalid.

the grantor corporation and the sole owner, officer, and director of the three grantee corporations (*i.e.*, the four corporate defendants). The court stated that an “offer” is “an action indicating a purpose or intention of doing something.” The undisputed fact that Tucker paid for the filing and authorized the issuance of the deeds of trust indicated his purpose or intent to have them recorded, *i.e.*, he “offered” the deeds of trust for recording.

*Buick v. Highland Meadows*³² involves the interpretation of a restrictive covenant and whether that covenant prevents construction and use of an easement over two lots in a subdivision to access a third lot outside of the subdivision. The supreme court agreed with the court of appeals that the single-family dwelling restrictive covenant at issue precluded the owners of the two lots from constructing a road to serve the third lot, holding that the language of the covenant created a “use” restriction that curtailed the uses an owner may make of his or her lot. The covenant under review states “[a]ll lots shall be used exclusively for single-family dwellings which shall not exceed two residences (a primary and secondary residence).” The court determined, based on the plain language of the covenant and a complete reading of the balance of the covenants, that the restrictions govern not only residential construction, but also attendant uses, such as driveways and parking areas. Having made this determination, the court then concluded that a road built across the lots to serve as a byway or thoroughfare, not to serve a single-family residence on the lots, would violate the use restriction.

In another restrictive covenant case, *West v. Evergreen Highlands Association*,³³ a case of first impression, the court of appeals reversed the trial

court’s ruling that a 1995 amendment to the protective covenants for the subdivision was valid and enforceable against West. The protective covenants were recorded originally in 1972 and amended in 1982. West purchased his property in 1986, subject, therefore, to the 1972 protective covenants and the 1982 amendment thereto. In 1995, Evergreen recorded an amendment to the covenants, signed by 75 percent of the subdivision lot owners, but not by West, adding a new Article 16, which, *inter alia*, required all lot owners to be members and pay dues to Evergreen, subject to liens for non-payment. The court of appeals, after a review of the 1972 protective covenants, the 1982 amendment, and cases from other jurisdictions, determined that the 1972 protective covenants allowed 75 percent of the lot owners to *change or modify* any of the existing covenants but did not allow the *creation or addition* of new covenants that had no relation to the existing covenants. The court declared Article 16 of the 1995 amendment invalid.

The court of appeals reversed the trial court’s order granting summary judgment in favor of the Trust in *Lewitz v. Porath Family Trust*³⁴ and remanded the matter for further proceedings. At issue were three adjacent parcels of land: Parcel X, owned by the Lewitzes; Parcel Y, owned by Auger (a non-party); and Parcel Z, owned by the Trust. By a single warranty deed, Auger conveyed Parcels X, Y, and Z to H.E. Richey, III, who ultimately defaulted under a promissory note secured by Parcels X and Y. The easement in controversy is described in the deed as

an easement for a 20 foot wide road, together with an easement for utilities to be placed immediately adjacent to said easement for said road, no further than 5 feet from the edge of the road, said easement to service any land owned by Grantor to the West of the land herein conveyed Grantor also reserves an easement on the following described property

The description recited the metes and bounds of Parcel Z. After Richey’s default, Auger assigned the note and the deed to Burton, who purchased Parcels X and Y at a sheriff’s sale. Burton assigned the certificate of purchase to Lewitz, who took title to both parcels pursuant to a sheriff’s deed. Lewitz subsequently conveyed both parcels to himself and

his wife in joint tenancy by quitclaim deed. They then conveyed Parcel Y back to Auger. During this same time period, Richey conveyed Parcel Z to the trust. In the trial court, the Lewitzes sought a judgment declaring their right to use an easement across Parcel Z to Parcel X. The parties filed cross motions for summary judgment. The trial court granted the Trust's, determining that the easement did not pass by conveyance or otherwise to the Lewitzes but remained in the ownership and title of Auger when he originally conveyed the three parcels to Richey. Since Richey did not receive any easement interest from Auger, he could not have passed it on to subsequent owners of Parcels X and Y.

The court of appeals disagreed, determining, based on the clear language of the conveyance, that the access right reserved by Auger in the original deed of trust to Richey was an easement appurtenant, an incorporeal right attached to and belonging with some other parcel of land which runs with the land and is incapable of existing apart from that parcel. The Trust argued that the deed language failed to describe a dominant estate, especially since Auger did not own the "land to the West" of the three parcels. As such, the conveyance benefited a nonexistent dominant estate, making any claimed easement appurtenant invalid. The issue of interpretation of the deed was not resolved by trial court. The court of appeals, finding the language of the deed ambiguous with respect to the description of a dominant estate, remanded the matter for further proceedings. The court disagreed with the trust's final argument, that even if the court determined that Parcels X and Y were sufficiently described in the deed as the dominant estate, because title to both the dominant and the servient estates was acquired under the deed, the claimed easement interest was extinguished under the doctrine of merger. The court held that the mortgage exception to the merger doctrine prevented any extinguishment of the easement.

In *Roaring Fork Club, L.P. v. St. Jude's Co.*,³⁵ the supreme court clarified the law trial courts should apply when determining whether or not to order restoration of an altered easement. In doing so, the court affirmed in part and reversed in part the court of appeals' decision and remanded the matter with directions to determine whether a unilateral alteration to a ditch caused damage under the test set forth in the "Restatement rule."³⁶

The case deals with the unilateral alteration of an irrigation ditch by Roaring Fork Club, L.P., after negotiations to alter the ditch course with St. Jude's Company, with which Roaring Fork shared an interest in the ditch, failed. The trial court, acting in equity, determined that Roaring Fork had trespassed on St. Jude's easement but that St. Jude's suffered little to no damage. The trial court determined that Roaring Fork must do one of two things: restore the ditch to its original condition, as demanded by St. Jude, or assume responsibility for the ditch maintenance and delivery of water to St. Jude. Roaring Fork had the right to choose between the alternative remedies. The court of appeals reversed,

The right to inspect, operate, and maintain a ditch easement is a right that cannot be abrogated by alteration or change to the ditch.

in part, the remedy crafted by the trial court, holding that the remedy did not comport with Colorado law and that it unjustifiably rewarded the bad faith actions of Roaring Fork.

The supreme court held that the owner of property burdened by a ditch easement may not move or alter that easement unless the owner has the consent of the easement owner or unless that burdened owner first obtains a declaratory determination from a court that the proposed changes will not significantly lessen the utility of the easement, increase the burdens on the easement owner, or frustrate the purpose for which the easement was created. Further, the court clarified that the right to inspect, operate, and maintain a ditch easement is a right that cannot be abrogated by alteration or change to the ditch.

The declaratory judgment alternative stems from the court's adoption of the Restatement rule, which would provide as much freedom of use as possible to the burdened owner. Under the rule, the burdened estate owner may move an easement (unless it is specified in deeds or otherwise to have a location certain), subject both to a reasonableness test and to the constraints delimited in the rule. In the event a party seeking to alter an easement cannot secure the consent of the other estate, it may petition the court for permission to make the alterations in line with the test. In the event a party unilaterally alters an easement without either the court's or other estate's permission, the court will apply the reasonableness test to evaluate the legiti-

macy of the alteration, but may also impose equitable and legal remedies to rectify the trespass.

Other related decisions. In *Bob Blake Builders, Inc. v. Gramling*,³⁷ a foreign corporation not qualified to do business in the state is still a "person" entitled to file a mechanic's lien under C.R.S. § 38-22-101. The mechanic's lien is not void if it encompasses an excessive amount of property.

In *Lee v. Masner*,³⁸ under the relation back doctrine, property was removed from the public domain when the Homestead Entry form was certified by the U.S. Land Office, after the road crossing the property was established; therefore, since the road was used by the public prior to this date, the road was a public road pursuant to R.S. 2477.

*Littlefield v. Bamberger*³⁹ was a trespass case in which the court of appeals upheld the trial court's order to the Bambergers to return a strip of land on which they had built a road to its original condition; the strip was a private easement, not a public road by virtue of a 1921 road petition, adverse use, or acquiescence.

In *Strole v. Guymon*,⁴⁰ the court of appeals affirmed the trial court's judgment denying the Stroles access to a water delivery ditch on the Guymon's property, that the Stroles have no right to continuation of a water rotation system with the Guymons and that the parties pay their pro rata share of a new water delivery system to the Stroles' property, including continuation of the current rotation system until the new water delivery system is in place.

Financing

In *GE Life & Annuity Assur. Co. v. Fort Collins Assemblage*,⁴¹ Fort Collins Assemblage Ltd. (FCAL) missed monthly payments on a note secured by a deed of trust. GE Life & Annuity Assurance Co. (GE) sent FCAL a notice of default accelerating the amount due under the note and threatened to initiate foreclosure and seek appointment of a receiver.

The deed of trust provided

In the event of a default in any of Loan Documents, Trustees and Noteholder, individually or collectively, as Noteholder shall determine, are hereby vested with the power to seek and obtain the appointment of a receiver as a matter of right and regard-

less of the adequacy of the security for the indebtedness hereby secured.

GE filed a verified complaint and ex parte motion for appointment of a receiver. Although GE claimed in its complaint that it had sent FCAL notice of its motion for appointment of a receiver, FCAL denied that it received such notice. The trial court appointed a receiver, who was later discharged after FCAL cured the alleged default with a replacement loan. FCAL objected to the discharge of the

In the event a party seeking to alter an easement cannot secure the consent of the other estate, it may petition the court for permission to make the alterations in line with the test.

receiver, counterclaimed against GE, and filed a third-party complaint against the receiver. FCAL alleged that GE had initiated a wrongful foreclosure and a wrongful receivership and that the receiver had breached his fiduciary duties. The trial court dismissed all claims against the receiver and GE.

The court of appeals agreed with FCAL that the trial court abused its discretion when it appointed a receiver pursuant to GE's ex parte motion. It cited Colorado law, holding that "a receiver should not be appointed unless the requesting party can demonstrate that the security is clearly inadequate or that the subject property is in danger of being dissipated," unless "a contract allows the parties to appoint a receiver under different circumstances." Because the contract in this case did not contain language allowing a receiver to be appointed "without notice to Grantor," notice and an opportunity to be heard were required. The court of appeals would not assume that GE was entitled to appointment of a receiver as a matter of right. It therefore remanded the case to the trial court for further proceedings on issues related to FCAL's counterclaims.

The supreme court in *ALH Holding Co. v. Bank of Telluride*⁴² reviewed Colorado's recording statute⁴³ and considered whether the court of appeals properly applied the statute with respect to the priority of interest of a vendor's deed over a third party's deed.

ALH sold certain real property to the buyers and lent funds to the buyers in exchange for a

promissory note secured with a vendor's purchase money deed of trust. The buyers also borrowed funds from the Bank of Telluride and signed a promissory note secured with a purchase money deed of trust. Both ALH and the bank knew, prior to the closing, that the other would be lending money to the buyers and that both loans would be secured by deeds of trust conveying interests in the same property. The title company closed the transaction for both parties and, on the following day, recorded

***In the absence of
a statutory determination of
the priority of the two deeds,
the vendor's deed has priority over
the third-party lender's.***

the deeds of trust, with the bank's recorded before ALH's. The buyers defaulted on both notes and the bank commenced a foreclosure action on its interest in the property, claiming its deed of trust to be superior to ALH's. ALH brought an action against the Bank seeking a preliminary injunction and a declaratory judgment to resolve the priorities of the two deeds of trust. The trial court concluded that as a matter of Colorado law, a vendor's purchase money deed of trust takes priority over a third-party's purchase money deed of trust, and entered judgment in favor of ALH. The court of appeals reversed, holding that because the bank's deed was recorded first, it was entitled to priority absent an agreement to the contrary.

The supreme court noted that the statute protects a later grantee with rights in real property against a prior executed but unrecorded instrument to which it is not a party, if the later grantee lacks notice of the prior unrecorded instrument and records first; but, it cannot benefit from the recording statute if it had notice of the earlier unrecorded instrument. Under the facts in this case, the bank clearly had notice of ALH's deed of trust. The court further noted that if a later grantee has notice of an earlier unrecorded instrument, the statute does not provide a mechanism for determining the priority of the competing interests. In this regard, the court examined two cases, *Bray v. Trower*⁴⁴ and *Bank of Denver v. Legler*,⁴⁵ and the RESTATEMENT (THIRD) OF PROPERTY § 7.2, and determined that in the absence of a statutory determination of the priority of the two deeds, the vendor's deed has priority over

the third-party lender's. The court noted that it found nothing in its examination to suggest that the parties could not avoid the effect of the priority afforded vendor purchase money deeds by agreement, but found that no such agreement existed between ALH and the bank.

Government Takings: Condemnation and Inverse Condemnation

In *Animas Valley Sand & Gravel v. Board of County Commissioners*,⁴⁶ Animas Valley Sand & Gravel, Inc. (AVSG) purchased land in 1961 for sand, gravel, and heavy mineral mining. In 1993, the county adopted a land use plan that designated all but about 10 of 46.57 acres as "river corridor district," allowing uses such as agricultural, residential, office, and tourism, but not mining. AVSG asked the county to designate additional acreage for industrial use, including mining, but was turned down. It sought relief under C.R.C.P. 106(a)(4) in the trial court, lost, and did not appeal. AVSG then filed this inverse condemnation action and lost again. The trial court held against AVSG on the basis that regulation must foreclose all reasonable use of property to be a taking. Because AVSG's land was not economically idle and there was not total deprivation of its reasonable use, there was no inverse condemnation. The court of appeals upheld the trial court's decision.

The supreme court reversed. The majority opinion, by Chief Justice Mullarkey, provides an extensive history of the law of inverse condemnation under both the United States and Colorado constitutions. Both constitutions prohibit taking private property without just compensation. However, the Colorado constitution contains the phrase "or damaged" along with the word "taken." The majority held that, in Colorado, there can be a compensable regulatory taking even where some limited economically viable use remains for the property. The majority held that the trial court must consider both the governmental action's economic impact on the affected property to determine whether it leaves the owner with no value or value "slightly higher than *de minimus*" and the plan's impact on investment-backed expectations. There must be a case-by-case factual inquiry. The majority further stated that the trial court must determine the regulation's effect on full rights in the land, as opposed to just mineral rights, for example. The trial court must also consider all of the contiguous property under the same

ownership and not just a carved-out parcel, to determine the economic impact.

In dissent, Justice Kourlis wrote that the majority did not go far enough in expanding the property owner's rights. There should be more emphasis placed on investment-backed expectations. There should not have to be an economic impact leaving the owner with no value or value "slightly higher than *de minimus*" before a landowner is entitled to compensation. Because the Colorado Constitution gives greater protection to landowners than does the United States Constitution, a property owner should

In Colorado, there can be a compensable regulatory taking even where some limited economically viable use remains for the property.

be compensated for diminution in value measured by the difference between the market value of the property before and after the taking. Justice Kourlis also discussed the effect of a "master plan" and questioned whether a master plan can by itself impose upon or regulate use of private property. She cited *Theobald v. Board of County Commissioners*⁴⁷ for the proposition that a master plan is a guide to development rather than an instrument to control land use and is generally held to be advisory only. She suggested that "the trial court should carefully examine the legitimacy of the governmental action based on whether the master plan properly governed the use of AVSG's property, absent further implementing regulation or zoning."

In *Krupp v. Breckenridge Sanitation District*,⁴⁸ the supreme court granted certiorari on "[w]hether an impact fee levied against a development by a special district is a development exaction subject to a constitutional takings analysis" under *Nollan v. California Coastal Commission*⁴⁹ (there is no taking where the government implements a land use regulation which 'substantially advance[s] legitimate state interest' and does not 'den[y] an owner economically viable use of his land), and *Dolan v. City of Tigard*⁵⁰ (development exactions will be deemed takings requiring just compensation unless they satisfy a two part test: (1) there must be an 'essential nexus' between the legitimate government interest and the exaction demanded, and (2) there must be

'rough proportionality' between the governmental interest and the required dedication).

The Krupps petitioned for review of the court of appeals' ruling on a C.R.C.P. 106 review of the district's assessment of a "plant investment fee" (PIF) on the Krupps' new residential townhouse project. The PIF is a one-time charge designed to defray the cost of expanding the district's infrastructure as development increases demand for the district's services. The court spent some time in its opinion on an interesting recitation of the historical context of the Sanitation District, including the Colorado Water Quality Control Commission's classification of the Blue River waters and the Dillon Reservoir, specifically in connection with the Colorado River Compact waters. The PIF must be paid to the District before the Town of Breckenridge will issue a building permit or certificate of occupancy for a new building.

The court of appeals noted that the district had no statutory or regulatory authority to deny or condition the issuance of building permits, and therefore, could not leverage or extort fees under the threat of denying the permit, concluding that "the essence of a *Nollan/Dolan* violation is the demanding by the governmental authority of a concession, especially a dedication of an interest in real property, for its own benefit and not to offset the impact of the proposed development." Regardless, the district was assessing a charge that was primarily of benefit to the Krupps and directly related to their project development and, therefore, the court found *Nollan* and *Dolan* inapplicable. The supreme court affirmed, holding that the PIF was a valid, legislatively established fee, not a dedication of real property for public use, reasonably related to the district's interest in expanding its infrastructure to account for new development, was fairly calculated, based on the report of an independent expert, and rationally based. As such, the PIF did not fall into the narrow category of charges subject to the *Nollan/Dolan* takings analysis, which analysis, based on recent decisions of the United States Supreme Court, is limited to exactions involving the dedication of property to public use.

In *E-470 Public Highway Authority v. Jagow*,⁵¹ a partial taking condemnation case tried to a commission, the Authority appealed the decision that an annexation agreement did not require a portion of the owners' land to be dedicated for E-470. After a

valuation trial, it was determined that the value of the property taken was \$1,323,691.15, damages to the residue were \$2,888,272.80, and the value of the special benefit to the residue was \$297,000. The trial court entered judgment in accordance with the commission's determinations. The court of appeals affirmed in part and reversed in part.

On appeal, the authority claimed that a 1987 annexation agreement executed by Jagow and other property owners required dedication of the land for the purpose of construction of the E-470 highway. The provision relied on states,

ANNEXOR also agrees to dedicate principal arterials and highways within the Property to CITY

The court held that the authority's interpretation of the meaning of "highways" was determined in a vacuum, without consideration of the circumstances existing at the time the agreement was entered into and without consideration of a summary of the agreement that stated that dedication was *not* required under the agreement. Further, the general development plan attached to the agreement contemplated construction of a multi-lane highway 1.5 miles away from the property, not across it.

The court reversed the trial court's award for damages to the residue because it was unsupported by the evidence and excessive as a matter of law. Despite testimony of expert witnesses from both sides, the court held that there was no basis in the record for a damages award in the amount awarded.

The supreme court granted a cross petition for a writ of certiorari as to whether the court of appeals erred by requiring the award of damages to the remainder to be supported by the opinion of an individual witness, rather than recognizing that the award can be supported by direct comparable sales evidence and the combination of several witness opinions.

In *City of Boulder v. Fowler Irrevocable Trust 1992-1*,⁵² the supreme court granted certiorari to review the court of appeals' decision regarding just compensation in an inverse condemnation action between the trust and Boulder.

Without obtaining a construction easement, Boulder occupied 3.09 acres of vacant, grass-covered land owned by the trust for a 26-month period for use as a staging area for construction of a channel improvement project. The trust's property was

entirely in a 100-year floodplain and approximately 70 percent of the property was contained in the high-hazard area. Boulder's land use regulations prohibit development in this area and restrict uses in the rest of the floodplain area. The channel improvement project would remove the property from the floodplain. The trial court allowed the jury to hear evidence on valuation for a parcel of the property based on the assumption that the development restrictions did not exist during the temporary takings period and based on sales of commercial properties located outside the floodplain. The trial court determined that the measure of just compensation

The trust was entitled to just compensation for the fair rental value "at its highest and best use during the historic period of Boulder's temporary taking."

for Parcel B would be the fair rental value of the parcel during the 26-month period, regardless of the development restrictions for the floodplain. The jury awarded just compensation for the permanent taking of Parcel A, the temporary taking of Parcel B, and restoration to the pre-taking condition of Parcel B. The court of appeals upheld the jury's liability award in the trust's favor, but reversed its award of just compensation and attorney fees.

The supreme court considered the compensation awards only to Parcel B and held that the trust was entitled to just compensation for the fair rental value "at its highest and best use *during the historic period of Boulder's temporary taking.*" By allowing the jury to hear evidence of rental values of property outside the floodplain, it took into account changes in the land use restrictions that would occur *after* the temporary taking period. The jury should have been instructed to consider only the then-existing restrictions on the property's use, rather than be allowed to consider speculative valuation of use.

In *Regional Transportation District v. Outdoor Systems, Inc.*,⁵³ the supreme court reviewed and reversed the court of appeal's decision regarding billboard leases. Specifically, the court addressed the applicability of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and the Colorado Relocation Assistance and Land Acquisition

Policies Act (collectively, the Acts) to certain acquisitions of property by state agencies and political subdivisions of the state.

The RTD terminated billboard leases, which provided for termination without cause on 30 days' notice, and ordered the billboards removed from RTD land. The leaseholder, Outdoor Systems, refused to remove the billboards and the RTD brought a declaratory judgment action seeking their removal, without payment of any compensation to Outdoor Systems. Outdoor Systems sought declaratory judgment seeking compensation. The trial court entered declaratory judgment in favor of the RTD, reasoning that, in acquiring its land, the RTD had acquired an "equal interest in all . . . structures, or other improvements" in conformity with the pertinent sections of the Acts. The court of appeals held that the billboards were "structures and other improvements" for purposes of the Acts. Even though the billboard tenants could have been ejected for no reason, because the purchase of the lessor's interest was done in anticipation of the federal funds that required compliance with the Acts, and the billboards were "structures" under the Acts, the billboard tenants were entitled to compensation as a matter of law.

The supreme court reversed, holding that the Acts were inapplicable. The RTD purchased the land on the open market for land-banking purposes in anticipation of future development. At the time of purchase, the RTD had no specific purpose for the land. Therefore, it possessed the same rights as a private purchaser, which included the right to terminate the billboard leases. The RTD did not acquire an equal interest in the billboards pursuant to the Acts because it did not acquire the land for a project for which federal funds might be made available. Therefore, termination of the leases was not a taking requiring compensation.

Other takings decisions. In *City and County of Denver v. Qwest Corp.*,⁵⁴ the supreme court affirmed the Denver District Court's decision declaring §§ 10.5-1 and 10.5-41 of the Denver Municipal Code, requiring Qwest (and other telecommunications companies) to obtain a Private Use Permit prior to occupying or using public rights-of-way in Denver, in that key provisions of the ordinance conflicted with Senate Bill 96-10 (which grants telecommunications providers a right to occupy public rights-of-way without additional authorization or franchise from local municipalities)

on a matter of mixed state and local concern; further the supreme court upheld the trial court's dismissal of Denver's inverse condemnation claim for failure to state a claim for relief because the property allegedly taken was public property.

In *City of Holyoke v. Schlachter Farms*,⁵⁵ the court of appeals affirmed the trial court's order denying Schlachter attorney fees under an eminent domain proceeding brought by the city; the trial court awarded costs, but not attorney fees not finding a specific provision, statutory or otherwise, allowing such an award, including Schlachter's assertion of a "just compensation" guarantee under the Article II, § 15, of the Colorado Constitution and Schlachter's assertion that the city negotiated in bad faith and vexatiously under C.R.S. § 13-17-101.

In *Public Service Co. v. Van Wyk*,⁵⁶ the supreme court affirmed in part and reversed in part the court of appeals' decision reversing the trial court's dismissal of the Van Wyks' claims: inverse condemnation (a question of property rights), nuisance, and trespass (both tort claims related to property rights and damages to property and property owners) pursuant to C.R.C.P. 12(b)(5). Approvals by the Colorado Public Utilities Commission in a quasi-judicial proceeding could not adjudicate property rights. The court determined that the material facts and allegations contained in the Van Wyks' complaint did not support the inverse condemnation (encroachment by electromagnetic fields and radioactive particles) and trespass (by those same fields and particles) claims as the invasions were intangible and not appreciable. The court found that their claim for intentional nuisance was sufficiently plead.

In *Risen v. Cucharas Sanitation & Water District*,⁵⁷ the court of appeals affirmed the trial court's grant of summary judgment to the water district, finding that the district made a valid determination of public health necessity and reasonably exercised its general powers to regulate the public's health, safety, and welfare and had the statutory authority to compel property owners to connect to the district's water and sewer lines and assess fees and charges.

Landlord-Tenant

In *Beeghly v. Mack*,⁵⁸ a forcible entry and detainer action, the supreme court issued a rule to show cause pursuant to C.A.R. 21 and held that the trial court abused its discretion by entering default judgment based on the defendants' failure to post

bond pursuant to C.R.S. § 13-40-114. That section of the FED statute requires posting of a bond by a party requesting a delay of trial of more than five days. Further, making the rule set forth under *Lindsay v. District Court*⁵⁹ absolute, the court ruled that when ownership issues are raised, the trial court must first resolve the issue of ownership before determining entitlement to possession.

The underlying facts of this case, including the issue of ownership of the property, were contested by all parties. On February 29, 2000, Beeghly closed on the property and obtained a warranty deed from the trust, an intervenor in the trial court action.

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to possession.**

In March 2000, Beeghly and Mack entered into a lease agreement, whereby Mack would pay a monthly rental in an amount equal to the monthly mortgage payments to be made by Beeghly. Due to a disagreement between the Beeghly and Mack, Mack stopped making rental payments. In July 2000, Mack became trustee of the trust. In November 2000, Beeghly filed the underlying FED action seeking possession of the property, back rent, late fees, costs, and attorney fees. On December 5, 2000, Mack filed an answer to the complaint, denying that Beeghly was the beneficial owner of the property. On December 7, 2000, the trust filed a motion to intervene, claiming that it was the rightful owner of the property and thus, had an interest in the outcome of the litigation. On that same date, Mack and the trust also filed an amended answer, asserting counterclaims for, *inter alia*, quiet title, declaratory judgment, breach of contract, unjust enrichment, and breach of fiduciary duty. In addition, Mack and the trust filed a motion to continue the trial of the issue of possession of the property. On December 8, 2000, the trial court granted both the trust's motion to intervene and the motion to continue conditioned upon the collective payment of a bond by Mack and the trust, on or before December 12, 2000. During settlement negotiations, the parties entered into a stipulation to extend the time for filing the bond to December 15, 2000. Mack and the trust did not post a bond by that date. Regardless, it did not appear

from the record that the trial court approved the stipulation. In January 2001, when settlement negotiations broke down, Beeghly moved for default judgment for possession based upon Mack's and the trust's failure to post the required bond. After a January 11, 2001, hearing on the motion for default judgment, the trial court granted the motion for default judgment, holding that Beeghly was entitled to possession since Mack and the trust failed to post the bond. The trial court denied Mack's and the trust's request for a stay of the possession order.

The supreme court determined that the bond provision in the FED statute served the purpose of protecting a party who might suffer harm due to an opposing party's request to delay the proceedings. An immediate trial for failure to post the bond would serve the statute's purpose, since an immediate trial on the merits would resolve the dispute between the parties, thus eliminating the need for payment to the opposing party of a sum that would compensate that party for a delayed trial. The FED statute only authorizes the trial court to enter default judgment when a named defendant fails to file an answer to the FED complaint. Mack and the trust filed a timely answer, and thus were not subject to the default provisions of the statute. By entering the default judgment, the trial court did not allow the parties to litigate their dispute on the merits, thereby precluding each party from having its day in court, as provided for in the FED statutory scheme.

In addressing the ownership issue, the supreme court, citing *Lindsay*, stated that when the issue of ownership is validly raised in an FED action, and directly affects the right to possession, ownership must be determined prior to a ruling on possession. Mack argued that the transaction in which Beeghly obtained title was really an equitable mortgage, and contended that Beeghly merely agreed to refinance the property and was therefore only the record, not equitable, owner of the property. Not surprisingly, Beeghly argued otherwise. Because there were factual issues to be determined by the trial court, the supreme court did not address these claims.

In *Vu, Inc. v. Pacific Ocean Marketplace*,⁶⁰ another FED action, the court of appeals affirmed the trial court's entry of judgment in appellees' favor. In this case, Pacific, the tenant, alleged breach of contract and promissory estoppel claims against Vu and unfair competition and intentional interference with contract claims against appellee Asian Supermarket. The dispute centered around whether

a lease agreement between a predecessor landlord and tenant contained an enforceable exclusive-use right that forbade Vu, as successor landlord, from leasing space to another Asian supermarket. Pacific alleged that the parties agreed that it would have a right to exclusive use, but the provision was never put in writing. Pacific relied heavily on extrinsic evidence to support this claim. On de novo review, the court determined that the lease agreement was clear and unambiguous, contained all of the essential terms, and provided that it was the entire agreement between the parties at the time of execution. The agreement did not contain either express or implied language which would demonstrate that Pacific had been granted, either explicitly or implicitly, a right to exclusive use.

With regard to its promissory estoppel claim, Pacific asserted that Vu, as successor landlord, failed sufficiently to inquire, beyond the unambiguous language of the agreements, as to the rights and obligations of the parties. The court did not agree, based primarily on the fact that Pacific provided Vu with a “tenant estoppel certification,” setting forth all of the rights and obligations of the parties and stating specifically that the “lease agreement represents the entire agreement between the parties.”

With regard to Pacific’s allegations that the oral agreements were in place when the lease agreement was entered into, the court of appeals agreed with the rationale of the Alabama Supreme Court in *Sports World, Inc. v. Neil’s Sporting Goods, Inc.*⁶¹ The court noted that not only candor and fair dealing should prevail in transactions concerning leases, but also that oral agreements that affect the rights of parties to a written agreement should be put in writing so that fair, actual notice is given to all parties to the lease, and to their legal representatives, successors, and assigns. Failure to commit such oral agreements to writing properly bars their enforcement, and excuses any duties or obligations that would accrue to others had actual notice of the oral agreement been given. By presenting Vu with the “tenant estoppel certification,” and by failing to commit any alleged oral agreement to writing, Pacific ratified the prior lease agreement.

In another FED action, *Wilcox v. Clark*,⁶² the court of appeals reversed and remanded with directions the trial court’s denial of the landlord’s (Wilcox) claim for attorney fees. Clark constructed a house with detached garage, incorporating an apartment. Clark sold the property but leased back

the garage apartment, becoming the tenant. The then-owner discovered that the apartment was illegal as it violated city ordinances in that the city had issued a building permit for the garage which did not include construction of an apartment. The property was sold to Wilcox, subject to Clark’s lease. After inquiry to the city, the apartment was determined to be illegal. Wilcox initiated this FED action

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in the county court, alleging alternative claims that if there were a lease, it was illegal and void, or that the tenant had breached the lease. Wilcox requested possession and damages, including costs, interest, and attorney fees. He obtained service on Clark by posting a notice to quit on the garage/apartment. Clark did not appear and a default judgment awarding possession of the garage/apartment to landlord was entered and a writ of restitution was issued. Clark moved to set aside the default and for stay of execution. Clark also filed a counterclaim for damages exceeding the county court’s jurisdiction, resulting in the matter being removed to the district court, which set aside the default judgment because of inadequate service of process.

Clark lost on his counterclaim after trial to a jury. Wilcox’s claims were tried to the court, which found against Wilcox on his breach of the lease and damages claims, but ordered that possession of the premises be restored because the lease was illegal and violated the municipal ordinances. Pursuant to C.R.S. § 13-40-123, Wilcox requested an award of attorney fees in excess of \$90,000. The trial court denied the fees, finding that Wilcox’s claims did not fall within the scope of the FED statute because he did not prevail on a theory of forcible entry and detainer. Rather, Wilcox’s claims were based in equity or declaratory judgment. Only the attorney fee issue was raised on appeal. The court of appeals disagreed with the trial court, stating that Wilcox’s action commenced as an FED action for possession. While the adequacy of service pursuant to the statute was disputed, the trial court ultimately returned possession to Wilcox. The fact that the res-

olution of Wilcox's claim involved the interpretation or determination of the validity of the lease, did not change the character of the proceedings. The court remanded the case to the trial court with directions for a determination and award of reasonable attorney fees.

Property Taxes

In *Padre Resort Inc. v. Jefferson County Board of Equalization*,⁶³ Padre Resort challenged the Jefferson County Assessor's 1999 valuation of its hotel property. The Jefferson County Board of Equalization (BOE) affirmed the assessor's decision. The Board of Assessment Appeals (BAA) reduced the property's valuation somewhat. Padre Resort then sought judicial review, but the court of appeals affirmed the BAA's decision.

The Jefferson County Assessor and BOE used a 75 percent occupancy rate for Padre Resort's hotel property in arriving at the property's value. The BAA, after conducting a de novo hearing, used an occupancy rate of 70 percent. The parties all agreed that the income approach, which entailed estimating net income and applying a capitalization rate thereto, was the proper method to determine taxable value.

Padre Resort argued for a lower 52.5 percent occupancy rate because it took into account "present" conditions such as hotel rooms under construction, building permits that had been issued, and development plans submitted as of June 30, 1998. The court of appeals upheld the higher occupancy rate used by the BAA because C.R.S. § 39-1-103(5) requires that the assessor use "the one and one-half year period immediately prior to July 1 immediately preceding the assessment date," the "base period." The court held that it would be improper to consider prospective rooms because those rooms would come into use outside of the "base period" despite the argument that a purchaser of the property would take those factors into account in determining a price for the property.

In *Steamboat Ski & Resort Corp. v. Routt County Board of Equalization*,⁶⁴ Steamboat Ski & Resort appealed an order from the Board of Assessment Appeals (BAA) valuing a 181-acre parcel of unplatted land near the base of the ski area. The respondent-appellee, the Routt County Board of Equalization (BOE), cross-appealed the BAA's decision. C.R.S. § 39-8-108(2) allows the taxpayer 45 days within which to seek judicial review of a

final order of the BAA. The BOE had the same amount of time to appeal, but only if the BAA had found that the case involved an issue of statewide concern or that its ruling would result in a significant decrease in the county's total valuation. Without such a recommendation, the BOE had only 30 days to appeal. The BOE's cross-appeal was therefore dismissed with prejudice. The 14-day period for cross-appeals under C.A.R. 4(a) does not

The legislature could not create an exemption for holders of possessory interests without violating the state constitution.

apply to appeals taken from an administrative agency. The taxpayer was wise to wait until the BOE's 30 days passed before filing its appeal.

In *Board of County Commissioners v. Vail Associates, Inc.*,⁶⁵ the supreme court considered whether the state legislature could create an exemption from property taxes of holders of possessory interests. Vail Associates operates a ski resort on U.S. Forest Service property under a permit granting it occupancy, use, and enjoyment of the property through October 2031. Eagle County wants to tax Vail's possessory, as opposed to fee ownership, interest in the property.

Article X of the Colorado Constitution creates specific categories of exemptions from taxation, including religious organizations, charitable organizations, and federal property. The Colorado legislature enacted C.R.S. § 39-3-136, to allow exemption of possessory interests of private users of public lands from property taxes. The statute was enacted to overrule prior supreme court decisions, including one in which the private concession operator at Mesa Verde National Park was taxed on its possessory interest in federal property. The legislation specifically declares that Article X, § 3, of the Colorado Constitution does not require taxation of possessory interests. The majority, through Justice Hobbs, essentially said, "we'll be the judges of that," holding that the legislature could not create an exemption for holders of possessory interests without violating the state constitution.

In dissent, Justice Kourlis, joined by Justices Rice and Coates, disagreed entirely. She wrote that the legislation did not contravene the constitution and fell within the legislative prerogative. The

framers of the Colorado Constitution intended to leave the definition of real property to the legislature and the constitution's enumerated exemptions were intended to limit, not mandate, taxation.

In *City and County of Denver v. Board of Assessment Appeals*,⁶⁶ the supreme court considered another taxation issue under the Colorado Constitution: whether the City and County could tax the ownership interests of the Fire and Police Pension Association (FPPA) in real and personal property located within the City and County's limits.

From 1993 to 1997, the FPPA paid *ad valorem* taxes on the property. At the end of 1997, it filed petitions for abatement or refund of the taxes it had paid for the years 1995 to 1997, claiming its ownership interests were exempt under Article X, § 4, of

The property of a political subdivision serving statewide interests is tax exempt, if the legislature sufficiently has provided for the political subdivision's property to be property of the state for purposes of Article X, § 4.

the Colorado Constitution and C.R.S. § 39-3-104. The City and County denied all of the petitions and the FPPA appealed to the Board of Assessment Appeals (BAA). The BAA entered an order for exemption in favor of the FPPA, which the City and County appealed.

The court reversed the decision of the BAA. Citing case law that determined that an airport authority was exempt from taxation, the court noted that the property of a political subdivision serving statewide interests is tax exempt, if the legislature sufficiently has provided for the political subdivision's property to be property of the state for purposes of Article X, § 4. In creating the FPPA, the legislature declared it to be a political subdivision of the state established for a public purpose and benefiting the state as a whole as well as local government. However, the legislature made no provision for the FPPA to be exempt from *ad valorem* taxation under the state property exemption.

The supreme court in *Brotman v. East Lake Creek Ranch, L.L.P.*,⁶⁷ reversed the court of

appeals' determination that East Lake Creek Ranch had direct standing as a taxpayer to sue the State Board of Land Commissioners and the underlying trial court's determination that the Ranch had standing to sue the Land Board as an adjacent land owner. At issue was an agreement to exchange real property entered into by the Land Board with Brotman whereby the Land Board would convey certain real property to Brotman, who would deposit money into an escrow account for the eventual purchase of replacement property by the Land Board. The Ranch owned one of several properties adjacent to the subject property.

In this case, the supreme court had three standing issues before it: whether the Ranch had standing as an adjacent property owner under *Wimberly v. Ettenberg*,⁶⁸ as a taxpayer under *Dodge v. Department of Social Services*,⁶⁹ or as a beneficiary of the school trust under *Branson School District v. Romer*.⁷⁰ The supreme court reviewed, *inter alia*, the history of the Colorado Enabling Act by which the federal government granted lands to the states for the support of public education in exchange for the states' pledge not to tax federal lands. It determined that the Ranch did not have standing under any of these categories.

Other property tax decisions. In *Huddleston v. Board of Equalization*,⁷¹ the court found that personal property exemption, C.R.S. § 39-3-119.5, when read in conjunction with the entire statutory scheme, provides an exemption for businesses owning not more than \$2,500 in otherwise non-exempt personal property in the same county, and did not delegate to the county property tax administrator the discretion to determine which personal property would otherwise have to be listed on a single schedule.

In *Wilber v. Board of County Commissioners*,⁷² (ballot measures did not supersede the mill levy limitations of C.R.S. § 29-1-301(1)(a), which was principally designed to relieve the county of the restrictions imposed by Article X, § 20, of the Colorado Constitution.

LEGISLATIVE DEVELOPMENTS

SB 01-027, adding C.R.S. § 38-38-102.5, concerns the requirement that an owner of a consumer loan secured by residential real property give writ-

ten notice to each person liable on the loan that the owner intends to foreclose on the deed of trust prior to the commencement of foreclosure proceedings.

SB 01-038, adding C.R.S. § 30-28-133, concerns the authority of counties to adopt subdivision regulations that entitle subdividers to fair-share reimbursement of the cost of improvements from owners of property that benefit from the improvements.

SB 01-040, amending C.R.S. §§ 38-30-108 and 38-30-166(1), (2), (3), and (6); adding C.R.S. § 38-30-108.5; and repealing C.R.S. § 38-30-109; amends the notice requirements for persons holding title to property in a representative capacity.

SB 01-115, adding C.R.S. § 39-3.5-119, concerns the release of information identifying individuals who defer the payment of property taxes pursuant to the State Elderly Property Tax Deferral Program.

SB 01-130, amending C.R.S. § 30-4-101, concerns the reclassification of counties for purposes of fixing certain county fees.

SB 01-145, amending C.R.S. § 25-15-101 and adding C.R.S. §§ 25-15-317, *et seq.*, concerns environmental remediation projects and the enforceability of environmental covenants.

HB 01-1055, amending C.R.S. § 10-11-118(2) (b), concerns a requirement that title insurance companies file new or amended rates or fees with the Commissioner of Insurance.

HB 01-1056, amending C.R.S. § 24-92-102 (8)(b), concerns construction contracts for public projects, raising the exclusion from \$50,000 to \$150,000.

HB 01-1060, amending C.R.S. §§ 38-25.5-102(1) and 38-25.5-105, concerns the fee collected by a state agency for issuing a certificate of taxes due.

HB 01-1063, amending C.R.S. §§ 29-1-204.2 (1), (2)(e), (3)(a), (3)(d), (3)(e), (3)(n), (3)(o), (5), and (9), concerns the authorization of governmental entities to establish drainage authorities by inter-governmental agreement for the purpose of developing drainage facilities.

HB 01-1067, amending C.R.S. §§ 12-61-103 (1); the introductory portion to 12-61-103(4)(a), 12-61-103(7) and (8); 12-61-104; 12-61-107(2) and (3); 12-61-108; 12-61-109(1) and (3); 12-61-110(5); and 12-61-113(1)(i), (1)(m), (1)(w); and (2), concerns real estate broker licenses, and, in connection therewith, facilitating electronic transactions, elimi-

nating the requirement that a designated broker be an officer, director, or member of a licensed entity, and adjusting disciplinary provisions.

HB 01-1082, amending C.R.S. § 39-11-136(3), concerns a clarification that the easements that are not affected by the execution of a tax deed to the purchaser of a tax lien include conservation easements.

HB 01-1132, adding C.R.S. §§ 32-9-106.8, 32-13-104.7, and 32-15-104.5, concerns the annexation by a special statutory district of unincorporated territory that is entirely surrounded by the district.

HB 01-1133, amending C.R.S. § 8-19-102.5, concerns the eligibility criteria for resident bidders given bid preference on construction contracts for public projects.

HB 01-1166, adding C.R.S. §§ 13-20-801, *et seq.*, amending C.R.S. § 13-80-104, and adding C.R.S. § 38-33.3-303.5, concerns actions asserting construction defect claims for property loss and damage, and, in connection therewith, creating a disclosure requirement in certain actions, restricting construction defect negligence claims, modifying the statute of limitations for certain claims, and requiring the disclosure of construction defect litigation by the executive board of a unit owners' association to the unit owners.

HB 01-1172, amending C.R.S. §§ 29-1-204.5 and 29-2-108(3), concerns multi-jurisdictional housing authorities.

HB 01-1211, amending C.R.S. § 30-28-403(1), concerns the modification of land use requirements for cluster developments.

HB 01-1224, adding C.R.S. §§ 39-3-201, *et seq.*, concerns the administration of the property tax exemption for qualifying seniors created under § 3.5 of Article X of the Colorado Constitution by a vote of the people at the 2000 general election.

HB 01-1250, amending C.R.S. § 37-89-101, concerns the interference with the flow of water in a ditch.

HB 01-1254, amending C.R.S. § 37-92-302(3) (c)(I), concerns the requirement for notice to owners of land directly affected by water rights adjudication applications.

HB 01-1281, adding C.R.S. § 38-35-109, concerns the use and recording of master form mortgages or deeds of trust.

HB 01-1321, amending C.R.S. § 39-11-136(3), concerns the effect of the execution of a tax deed on a preexisting equitable servitude that runs with land.

HB 01-1334, amending C.R.S. §§ 39-3-112(1), 39-3-112(3)(a)(II), and 39-3-112, concerns the property tax exemption for properly used low-income household residential facilities that are occupied by low-income households and for orphanages, disabled persons, and others.

HB 01-1358, amending C.R.S. §§ 38-37-104(1) (a), (1)(b), (1)(c), (1)(d), (1)(e), and (2)(b); C.R.S. § 38-37-105(1)(c); C.R.S. §§ 38-37-105(1)(b) and (1)(c); and C.R.S. § 38-38-107(2), concerns the fees and financing of offices of public trustees.

HB 01-1366, amending C.R.S. § 39-1-104.2(3), concerns the adjustment of the ratio of valuation for assessment for residential real property.

NOTES

1. *Ocmulgee Props. v. Jeffery*, 30 COLO. LAW. No. 12, p. 234 (Colo. App. 2001).

2. *Alexander v. McClellan*, 31 COLO. LAW. No. 2, p. 151 (Colo. App. 2001).

3. *Morrissey v. Achziger*, 364 P.2d 187 (Colo. 1961).

4. *McKenzie v. Pope*, 33 P.3d 1277 (Colo. App. 2001).

5. *Johnson Realty v. Bender*, 30 COLO. LAW. No. 11, p. 199 (Colo. App. 2001).

6. *Mabry v. Tom Stranger & Co.*, 33 P.3d 1206 (Colo. App. 2001).

7. *Olson v. Hillside Cmty. Church*, 30 COLO. LAW. No. 11, p. 166 (Colo. App. 2001).

8. *Beeftu v. Creekside Ventures LLC*, 37 P.3d 526 (Colo. App. 2001).

9. *Pierson v. Black Canyon Aggregates, Inc.*, 32 P.3d 567 (Colo. App. 2000), *cert. granted* (whether the trial court properly construed the meaning of “landowner” under the premises liability statute, C.R.S. §§ 13-21-115, *et seq.*).

10. C.R.S. § 13-21-115.

11. C.R.S. §§ 24-10-101, *et seq.*

12. C.R.S. §§ 13-21-115, *et seq.*

13. *Brush Grocery Kart v. Sure Fine Mkt., Inc.*, 30 P.3d 810 (Colo. App. 2001), *cert. granted* (Sept. 10, 2001).

14. *Sandstone Invs. I, LLC v. A. Everett Williams 1963 Trust*, 31 COLO. LAW. No. 1, p. 207 (Colo. App. 2001).

15. *Filho v. Rodriguez*, 36 P.3d 199 (Colo. App. 2001).

16. *Kellum v. RE Servs., LLC*, 30 P.3d 875 (Colo. App. 2001).

17. *Schreck v. T & C Sanderson Farms, Inc.*, 37 P.3d 510 (Colo. App. 2001).

18. *Washburn v. Ronald W. Thomas & Raymond Wayne Thomas Charitable Remainder Annuity Trust*, 37 P.3d 465 (Colo. App. 2001).

19. *Schneider v. Drake*, 30 COLO. LAW. No. 9, p. 180 (Colo. App. 2001).

20. *Buick v. Highland Meadow Estates at Castle Peak Ranch, Inc.*, 21 P.3d 860 (Colo. 2001).

21. *Zavislak v. Shipman*, 362 P.2d 1053 (Colo. 1961).

22. *Board of County Comm’rs v. Gartrell Inv. Co., LLC*, 33 P.3d 1244 (Colo. App. 2001).

23. *Fire House Car Wash, Inc. v. Board of Adjustment for Zoning Appeals*, 30 P.3d 762 (Colo. App. 2001).

24. *Bainbridge, Inc. v. Board of County Comm’rs*, 30 COLO. LAW. No. 10, p. 286 (Colo. App. 2001).

25. *Bainbridge, Inc. v. Board of County Comm’rs*, 964 P.2d 575 (Colo. App. 1998).

26. *Town of Erie v. Eason*, 18 P.3d 1271 (Colo. 2001).

27. *Board of County Comm’rs v. City of Greenwood Village*, 30 P.3d 846 (Colo. App. 2001).

28. C.R.S. §§ 31-12-101, *et seq.*

29. C.R.S. §§ 38-35-109, *et seq.*

30. *Turkey Creek v. Anglo Am. Consol. Corp.*, 30 COLO. LAW. No. 12, p. 228 (Colo. App. 2001).

31. *Mortgage Invs. Corp. v. Battle Mt. Corp.*, 30 COLO. LAW. No. 9, p. 153 (Colo. App. 2001) (judgment *aff’d* in part, *rev’d* in part and remanded with directions), *modified and reh’g denied* *Mortgage Invs. Corp. v. Battle Mt. Corp.*, Jan. 17, 2002.

32. *Buick*, 21 P.3d 860.

33. *West v. Evergreen Highlands Ass’n*, 31 COLO. LAW. No. 1, p. 227 (Colo. App. 2001).

34. *Lewitz v. Porath Family Trust*, 36 P.3d 120 (Colo. App. 2001).

35. *Roaring Fork Club, L.P. v. St. Jude’s Co.*, 36 P.3d 1229 (Colo. 2001).

36. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8(3) (2000).

37. *Bob Blake Builders, Inc. v. Gramling*, 18 P.3d 859 (Colo. App. 2001).

38. *Lee v. Masner*, 31 COLO. LAW. No. 2, p. 157 (Colo. App. 2001).

39. *Littlefield v. Bamberger*, 32 P.3d 615 (Colo. App. 2001).

40. *Strole v. Guymon*, 37 P.3d 529 (Colo. App. 2001).

41. *GE Life & Annuity Assur. Co. v. Fort Collins Assemblage*, 31 COLO. LAW. No. 2, p. 149 (Colo. App. 2001).

42. *ALH Holding Co. v. Bank of Telluride*, 18 P.3d 742 (Colo. 2001).

43. C.R.S. § 38-35-109(1).

44. *Bray v. Trower*, 286 P. 275 (Colo. 1930).

45. *Bank of Denver v. Legler*, 350 P.2d 1059 (Colo. 1960).

46. *Animas Valley Sand & Gravel v. Board of County Comm'rs*, 38 P.3d 59 (Colo. 2001).

47. *Theobald v. Board of County Comm'rs*, 644 P.2d 942 (Colo. 1982).

48. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001).

49. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

50. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

51. *E-470 Pub. Highway Auth. v. Jagow*, 30 P.3d 798 (Colo. App. 2001).

52. *City of Boulder v. Fowler Irrevocable Trust 1992-1*, 17 P.3d 797 (Colo. 2001).

53. *Regional Transp. Dist. v. Outdoor Sys., Inc.*, 34 P.3d 408 (Colo. 2001).

54. *City and County of Denver v. Qwest Corp.*, 18 P.3d 748 (Colo. 2001).

55. *City of Holyoke v. Schlachter Farms*, 22 P.3d 960 (Colo. App. 2001).

56. *Public Serv. Co. v. Van Wyk*, 27 P.3d 377 (Colo. 2001).

57. *Risen v. Cucharas Sanitation & Water Dist.*, 32 P.3d 596 (Colo. App. 2001).

58. *Beeghly v. Mack*, 20 P.3d 610 (Colo. 2001).

59. *Lindsay v. District Court*, 694 P.2d 843 (Colo. 1985).

60. *Vu, Inc. v. Pacific Ocean Marketplace*, 30 COLO. LAW. No. 7, p. 227 (Colo. App. 2001).

61. *Sports World, Inc. v. Neil's Sporting Goods, Inc.*, 507 So. 2d 480 (Ala. 1987).

62. *Wilcox v. Clark*, 30 COLO. LAW. No. 11, p. 191 (Colo. App. 2001). The court of appeals' original decision in this matter, issued November 24, 2000, was withdrawn, and the plaintiff-appellant's (Wilcox) petition for rehearing was granted; the defendant-appellee's petition was denied.

63. *Padre Resort Inc. v. Jefferson County Bd. of Equalization*, 30 P.3d 813 (Colo. App. 2001).

64. *Steamboat Ski & Resort Corp. v. Routt County Bd. of Equalization*, 23 P.3d 1258 (Colo. App. 2001).

65. *Board of County Comm'rs v. Vail Associates, Inc.*, 19 P.3d 1263 (Colo. 2001).

66. *City and County of Denver v. Bd. Of Assessment Appeals*, 30 P.3d 177 (Colo. 2001).

67. *Brotman v. East Lake Creek Ranch, L.L.P.*, 31 P.3d 886 (Colo. 2001).

68. *Wimberly v. Ettenberg*, 570 P.2d 535 (Colo. 1977).

69. *Dodge v. Department of Social Services*, 600 P.2d 70 (Colo. 1979).

70. *Branson Sch. Dist. RE-82 v. Romer*, 958 F. Supp. 1501 (D. Colo. 1997).

71. *Huddleston v. Board of Equalization*, 31 P.3d 155 (Colo. 2001).

72. *Wilber v. Bd. of County Comm'rs*, 30 COLO. LAW. No. 10, p.

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