Real Property Law

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

This article summarizes approximately 33 Colorado appellate court decisions issued during 2002, 11 of which are from the supreme court, relating to real property law. The article concludes with a brief descriptive list of related 2002 legislation.

CASE LAW

Annexation — Boundaries

In *Board of County Commissioners v. City of Aurora*,[1] a developer, Gartrell Investment Company, LLC, petitioned for annexation of three parcels of its land located immediately adjacent to the City of Aurora. The city annexed the parcels over Douglas County's and others' objections. Thereafter, the county filed suit for judicial review under C.R.S. § 31-12-116. The county argued that county roads designated as "open space" between and adjacent to two of the parcels defeated contiguity requirements; that two "special districts" were not provided notice of the annexation hearing; that the city's annexation impact report was deficient; and that the annexation petition lacked necessary signatures. The district court agreed with the county as to the first three issues and held that the city had abused its discretion and exceeded its jurisdiction. The annexation was voided. The court found that the signature requirements had been followed.

The court of appeals reversed. Under the Municipal Annexation Act of 1965,[2] judicial review of annexation is a special statutory proceeding limited to determining whether the governing body that approved annexation exceeded its jurisdiction or abused its discretion. The reviewing court must give great latitude to the city's discretion and indulge every reasonable presumption in favor of the annexation's validity. The act required a finding that at least one-sixth of the annexed property's perimeter be contiguous with the city's boundaries. Platted streets or alleys, public or private rights-of-way, and publicly owned lands, except county-owned open space or waterways, do not effect "contiguity." The court of appeals held that the county's designation of the contiguous roadways as "open space" in a resolution passed shortly before the annexation hearing did not make the roadways

LESLIE GARTRELL TOEPFER, ESQ., is currently of counsel to Pendleton Friedberg Wilson & Hennessey, P.C. She concentrates her practice in the area of commercial real estate law. She has handled a wide variety of complex commercial real estate transactions, including commercial land and building development, acquisition and sale of investment and user properties and farm and ranch properties, leasing and common ownership, zoning, and other land use matters. Ms. Toepfer has lectured on commercial real estate topics for the lending community in connection with continuing banking education and has contributed to significant published works in her areas of practice. She received her undergraduate degree in 1979 from the University of Central Oklahoma and her J.D. from the University of Denver College of Law in 1988. She is a member of the Denver, Colorado, and American bar associations as well as Women in Real Estate.

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.

open space within the generally understood meaning of the term or within the definition of open space in other statutes. Because the county roads were not open space, they did not affect the contiguity under the terms of the act. The court further held that the city and the developer had standing to assert that the county's resolution designating the roads as open space was invalid because they were parties defending against the county's claim and were entitled to respond to the county's argument.

The court of appeals further held that the city's impact report, filed pursuant to the act, substantially complied with applicable requirements and that

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the city was not required to provide notice of the annexation hearing to the Regional Transportation District and Douglas County Soil Conservation District. With regard to the notice requirement, the court held that RTD and DCSCD were not special districts within the meaning of the act. It concluded that because RTD and DCSCD were not created and do not act pursuant to the Special District Act,[3] they did not require notice of the annexation hearing.

Finally, the court of appeals rejected the county's cross-appeal, in which the county argued that the requirement for signatures "comprising more than fifty percent of the landowners in the area" must be calculated by including public streets and alleys. In rejecting the county's argument, the court upheld the trial court's determination that owners of roads located within the area to be annexed, including Public Service Company, which had an interest in land under one of the public streets, did not need to sign the annexation petitions.

Applications for Individual Sewage Disposal Systems — Reduction of Lot Size by Private Right-of-Way — Arbitrary and Capricious Action by Board of Health

In *C Bar H, Inc. v. Board of Health in and for Jefferson County*,[4] a contractor and an owner appealed from the judgment of the district court affirming a decision of the Jefferson County Board of Health denying them Individual Sewage Disposal System (ISDS) permits to construct two sewage disposal units. The contractor had applied for permits for the installation of two on-site disposal systems on two one-acre lots. Each lot was an aggregation of 14 smaller lots of a subdivision. While both applications were recommended for approval by the board's staff because they met all appropriate regulatory requirements, ultimately both applications were denied because the lots did not meet the minimum size requirements. The contractor and the owner then sought judicial review under C.R.S. § 25-1-513, which provides that any person aggrieved or affected by the decision of a board or a public health administrator may seek a review by filing an appropriate action in the district court.

The board contended that, because the review of the owner's and contractor's applications was a quasi-judicial proceeding, their appeal was governed exclusively by C.R.C.P. 106(a)(4). The court of appeals found C.R.C.P. 106(a)(4) inapplicable to this case. The court then considered the standard of review provided by C.R.S. § 25-1-513 and determined that the case was subject to *de novo* review. The court therefore undertook the review of the decision of the board.

In their appeal, the contractor and the owner contended that the board improperly determined that private rights-of-way should be subtracted from building sites in calculating lot size for purposes of ISDS permits. The court of appeals agreed, noting that the definition of building sites in the ISDS regulations requires only that a lot must comply with the standard set forth in that regulation and independently comply with the applicable zoning and planning statutes and regulations. The regulation defining building sites did not authorize the board to use the zoning and planning regulations (which required the exclusion of private rights-of-way that are essentially the equivalent of public roads from the minimum lot size calculations) to determine lot size for ISDS purposes. Noting that the zoning regulations address different concerns and serve different purposes than do the ISDS regulations, the court stated that what may be a reasonable regulation for one purpose is not necessarily reasonable for another. The court found that the board had no authority to import and rely upon the zoning and planning regulations for purposes of deciding whether private rights-of-way must be excluded when calculating

the lot size of a building site on which an ISDS was to be constructed. Summarizing its finding, the court stated that a provision in one regulatory scheme requiring compliance with another does not, without more, incorporate the standards and criteria of the other. Therefore, the court found the board's application of the zoning regulation criteria to calculate lot size for ISDS or sanitation purposes was arbitrary and capricious and reversed the district court's judgment. The case was remanded for further proceedings.

Breach of Contract — Mitigation of Damages

In *Westec Construction Management Company v. Postle Enterprises I, Inc.*,[5] Westec had contracted to build a fast-food restaurant for Postle. After the foundation was built, Westec discovered that it encroached on neighboring property and stopped construction. The surveyor, not a party to this action, acknowledged its mistake and offered to pay the cost of relocating the foundation, with any consequential damages to be negotiated later.

Postle refused to accept the surveyor's offer, demanding instead that any settlement encompass the entire controversy, including claims for lost profits, staffing costs, and other damages caused by the delay in completing the restaurant. The parties also discussed possibly acquiring part of the neighboring property to cure the encroachment problem, an option preferred by Postle.

The next month, Postle's lender notified Postle that it would accelerate the balance of the loan if construction did not resume. Postle failed to respond and a foreclosure followed. Westec subsequently redeemed the property and the surveyor purchased part of the neighboring lot. The surveyor suggested that Postle allow construction to resume and negotiate consequential damages later. Postle rejected the offer. Westec commenced suit for payment but conveyed the property back to Postle and the restaurant was completed approximately 27 months after the original contract completion date.

Postle counterclaimed for breach of contract. Westec's claims were settled before trial and, after a bench trial, the court entered judgment for Postle for $168,371, which primarily represented damages for what would have been the cost of relocating the foundation, staffing costs, and lost profits. The court declined an award of additional damages for the 27-month delay because Postle failed to give notice to Westec as provided in the contract. An earlier court of appeals' decision held that failure to give notice was not a proper basis to limit damages, but remanded the case for determination of whether Postle otherwise failed to mitigate its damages and for an award of prejudgment interest. On remand, the trial court again found Postle failed to mitigate its damages and made no additional award. It did award prejudgment interest, certain post-judgment costs, and attorney fees, and post-judgment interest on the prejudgment interest. Both parties appealed portions of the judgment. The court of appeals upheld the trial court's determination that Postle had failed to mitigate its damages, rejecting Postle's argument that signing Westec's change order would have required it to abandon its right of action against Westec and therefore was not a reasonable mitigation alternative. The trial court properly found that the surveyor's offer to correct the placement of the foundation, while reserving issues of additional damages, was a reasonable solution and would have avoided much of the delay and consequential damages arising therefrom. Postle violated its duty to mitigate damages by refusing to authorize relocation of the foundation. The court distinguished cases in which a remedial offer was found to be an attempt to settle rather than an attempt to mitigate and was clearly conditioned on waiving rights.

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Breach of Lease — Breach of Sales Contract — Easement — Meeting of the Minds — Merger

In *Brush Creek Airport, LLC v. Avion Park, LLC*,[6] Avion bought a commercial lot in Brush Creek's Crested Butte subdivision. The lot abutted a private runway that ran diagonally across a larger parcel owned by Brush Creek, which granted Avion a non-exclusive easement for the use of the runway. Avion's lot contained a terminal and hanger building that were excluded from the sales contract. In a separate document, Avion leased the buildings. If

and when Avion chose to terminate its lease of the buildings, Brush Creek had the option of moving the buildings or letting Avion have them.

After the lease of the buildings ran out, the parties disagreed about their removal. In addition, a dispute arose over whether Brush Creek could extend a road over a portion of the runway in order to access and develop part of its subdivision. Brush Creek contended that it had retained an easement reserved by its predecessor-in-interest, which allowed it to build the road. The trial court found generally in Brush Creek's favor on continued ownership of the hanger and terminal buildings and on its easement for a roadway over the runway. However, the trial court also found that because the parties' minds had not met on the length of the runway easement in favor of Avion, the sales contract should be rescinded. Attorney fees were awarded to Brush Creek on its claim for replevin of the two buildings. Both sides appealed.

The court of appeals reversed the award of attorney fees, finding that the lease agreement contained no provision for such an award. It rejected Brush Creek's argument that the attorney fees provision in the sales contract required that the parties enter into the lease. The court found that there were two distinct contracts and that the attorney fees provision in one did not authorize an award of such fees in the other. The court of appeals discussed at length the runway and roadway easement issues. While the runway initially was designed to be 4,000 feet long in the original application and sketch plans submitted to the county, the easement granted to Avion was for a larger parcel described as the "runway envelope," and the actual runway itself was 4,500 feet long. In ordering rescission, the trial court found that each party had a different interpretation of the size of the easement to be granted pursuant to the sales contract.

The court of appeals reversed, holding that any indefiniteness was cured by the execution of the actual easement document, which described the entire runway envelope. The case was returned to the trial court to determine whether Brush Creek's plan to build a road across the runway envelope was consistent with its retained rights to use the runway envelope in a manner that does not unreasonably interfere with the easement granted to Avion Park consistent with *Lazy Dog Ranch v. Telluray Ranch Corp.*,[7] and/or whether or not Brush Creek's easement across the runway was extinguished by merger when Brush Creek came into ownership of both the dominant and subservient estates. The latter issue arose because Brush Creek was relying upon a roadway easement granted to its predecessor-in-interest. "When common ownership of the dominant and servient estates occurs, 'the easement is terminated to the extent the ownership of the servient estate permits the uses authorized by the easement.'"[8] The issue upon remand was whether any exceptions to the rule applied, such as a claimed agricultural lease by a third party of some of the property involved.

The case involved several other issues not discussed here.

Colorado Common Interest Ownership Act — Statutory Lien — Immaterial Variation of Corporate Name or Misnomer

In *Sunstone at Colorado Springs Homeowners Association, Inc. v. White*,[9] the Homeowners Association appealed the trial court's judgment denying its claim for foreclosure and attorney fees. The association was a nonprofit homeowners association, duly incorporated under the name "Sunstone at Colorado Springs Homeowners Association, Inc." The defendants, Joseph and Patricia White, purchased a townhome in the Sunstone Subdivision in 1993. In 1993, the developer of the subdivision filed a declaration of covenants stating that the term "Association" referred to "Sunstone Homeowners Association of Colorado Springs, Inc., its successors and assigns." Pursuant to the declaration of covenants, the owners of each of the lots within the subdivision were required to pay the association's annual assessments.

The association, using its corporate name, commenced an action for judgment for unpaid assessments, plus attorney fees, expenses, costs, and interest, and to foreclose the assessment lien, when the Whites failed to pay levied assessments. In their answer, the Whites alleged that the amount claimed was overstated and inaccurate, but did not deny that the unit was bound by the declaration of covenants or otherwise contest the association's right to bring this action or foreclose its lien.

It was not until the trial that the discrepancy between the association's name as stated in its articles of incorporation and its name as described in the declaration of covenants was discovered. The

court denied the association's motion to amend the complaint to correct the association's name in the caption, and denied the Whites' motion to dismiss the complaint based on the name discrepancy. The trial court held that the association named in the declaration of covenants was an unincorporated association that did not exist, that there had been no change of the association's corporate name, and that the covenants in the declaration therefore did not apply to the Whites' property. However, the Whites were ordered to pay assessment fees under a theory of implied contract between the association and the Whites for the payment of assessments.

C.R.S. § 38-33.3-101 of the Colorado Common Interests Ownership Act provides for the creation of a statutory lien for any assessment levied or fine imposed against an owner.

On appeal, the association argued that it should not be precluded from enforcing the declaration and foreclosing on the lien simply because its corporate name differed slightly from that contained in the declaration. The court agreed, citing treatises stating that, if the identity of the corporation is reasonably clear or can be ascertained by proof, a misnomer of a corporation generally will not be treated by the courts as material.

The court noted that the Whites did not allege a lack of identity of the proper corporation, that they stipulated that the covenants applied to their property, and that they had paid assessments to the association at other times. The court found that the trial court erred in finding that the covenants did not apply and that, because the identity of the association as the entity described in the covenants was supported by the evidence, the variation or misnomer in the association's name contained in the declaration of covenants was immaterial.

The association also argued that the use of the name "Sunstone Homeowners Association" in its recorded lien statement did not affect its right to foreclose because neither the covenants nor C.R.S. § 38-33.3-316 required the association to record a statement to perfect the lien. The court agreed, noting that the validity of the lien was not challenged before the trial court, and noting that C.R.S. § 38-33.3-101 of the Colorado Common Interests Ownership Act provides for the creation of a statutory lien for any assessment levied or fine imposed against an owner. Thus, the association had a statutory lien against the Whites' property premised on its claim for assessments. The judgment of the trial court was therefore reversed to the extent that the trial court denied the association's claims for attorney fees and foreclosure, and the case was remanded for entry of an amended judgment consistent with the court of appeals' opinion.

Condemnation — Remainder Property — Damages Award — Sufficiency of Evidence to Support Damages to Remainder Award

In *Jagow v. E-470 Public Highway Authority*,[10] E-470 had condemned a portion of the Hellerstein property for construction of the E-470 highway. At a trial on damages, the valuation commission had entered a condemnation award for the value of the property taken, an additional award for alleged damages to the remainder property, and a third award for special benefits. On appeal, the court of appeals overturned the remainder property damages award as unsupported by the evidence and excessive as a matter of law. The supreme court granted certiorari to review the court of appeals' judgment.

In examining the record, the supreme court noted that, prior to the valuation trial, the trial court held an *in limine* evidentiary hearing regarding alleged damages to the remainder property. Hellerstein's experts were prepared to testify at the valuation trial that the remainder property would be significantly diminished by the loss of access that would result from the construction of the E-470 highway. Hellerstein's expert witnesses were prepared to assign a significantly reduced post-taking value to the property. E-470's expert, to the contrary, was prepared to testify that the remainder property had not been damaged by the E-470 highway project, but rather had benefited from it. The trial court ruled that the E-470 highway project did not substantially impair access to the remainder of the property. The trial court therefore ordered Hellerstein not to present evidence concerning impairment of access to the remainder property and held that any evidence concerning that factor of damage would be deemed inadmissible at the valuation trial before the commissioners. As a result, the offer of proof at the valuation hearing did not

include any testimony on the access issue, and the only testimony offered by Hellerstein went to the costs to redo the subdivision plat.

The supreme court held that the $2.88 million award for damages to the remainder property had no support in the evidence and was excessive as a matter of law, and therefore affirmed the court of appeals' judgment. Hellerstein had the burden of proof to establish (1) the existence of damages to the remainder property; (2) that the E-470 highway project caused the damages; and (3) the amount of compensation owed. The court noted that, other than the $100,000 cost to redo the subdivision plat, Hellerstein had identified no compensable, quantifiable damages to the remainder property unrelated to loss of access, the damage factor which was held inadmissible by the trial court. Although one of Hellerstein's experts had mentioned a loss of visibility, neither he nor any other witness for Hellerstein offered any opinion or evidence regarding whether the loss of visibility caused damage to the remainder property and, if so, the amount of damages.

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The supreme court also found that the award was not made based on sufficient evidence to demonstrate that the difference between the before-taking valuation of the remainder property and the after-taking valuation was caused by the E-470 highway project. The only evidence linking damages to the remainder property to the E-470 highway project was in regard to the $100,000 to replan the remainder property. In his closing argument, Hellerstein's attorney advised the valuation commission to ascertain damages by mechanically subtracting the after-taking valuation of the property stated by E-470's expert from the before-taking valuation offered by Hellerstein's expert. He sought to discredit the E-470 expert's before-taking valuation, yet he urged the commission to accept the same expert's after-taking valuation. The only after-taking value presented to the valuation commission came from the E-470's expert, who found that no damages occurred to the property in question. In examining the record, the supreme court opined that the valuation commission incorrectly combined incompatible valuation testimony (Hellerstein's before-taking value and E-470's after-taking value) to produce a damages amount.

Two justices dissented in the court's opinion, stating that the majority improperly substituted its factual determination for those of the valuation commission, and therefore failed to afford appropriate deference to the valuation commission's finding.

Condemnation — Taking for a Public Use — Bad Faith

In *Silver Dollar Metropolitan District v. Goltra*,[11] the district decided to pursue a tunnel project to connect U.S. Highway 6 and State Highway 119 at the I-70/U.S. 6 interchange. The district contacted Goltra with an offer to purchase two parcels of land. Although Goltra had previously allowed the district access to other portions of his property for geotechnical core drilling, he refused to sell the two parcels, and the district commenced this condemnation action. The petition for condemnation stated that the taking was necessary to acquire a fee simple interest for construction, operation, and maintenance of a roadway and tunnels. However, the tunnel project was but one of five transportation alternatives being evaluated by agencies of the state and federal governments for access to the gaming areas, including Blackhawk, and at the time the condemnation action was filed, no one alternative had been selected.

The trial court held a hearing on the district's request for immediate possession. At that hearing, the district argued that it needed immediate possession of the property to conduct core drilling and obtain geotechnical information to facilitate the design of the transportation improvements. At the hearing, the district acknowledged that it would be very difficult to return the property to its pre-existing condition because the testing would most likely cause substantial damage to the steep topography of the property.

Goltra argued that the district could not show that the condemnation action was for a public purpose, that the condemnation action was premature because the district had not yet obtained a number of permits and approvals needed to construct the project, and that the district instituted the condem-

nation action in bad faith. At the conclusion of the hearing, the trial court found that the Goltra property was not being taken for a public use and that the district would be acting in bad faith by proceeding with the condemnation at that point in time. The court denied the district's request for immediate possession.

On appeal, the district contended that a court may inquire whether property is necessary for the intended purpose, but that a court may not inquire whether the proposed project is either feasible or practical. The district argued that the trial court had erred in inquiring into the feasibility of the project and had substituted its judgment for the district's legislative decision on the feasibility of the project. The court of appeals did not agree. Noting that the determination of necessity is not reviewable by the judiciary absent a showing of fraud or bad faith, and that the question of necessity simply involves the necessity of having the property sought to be taken for the purpose intended, the court of appeals found that the trial court focused on the question of whether or not there would ever be a project for which the property could be lawfully condemned, not the feasibility of the project itself. Noting that no definition of public use had been formulated that is applicable to all eminent domain cases, the court of appeals relied on previous Colorado case law indicating that the likelihood that a condemning authority will obtain the necessary permits and approvals may be relevant to a trial court's determination of public use.

A number of factors must be examined in determining whether a use is a public use.

The district also argued that core drilling for road and tunnel construction to determine whether a public project can be constructed on the property constitutes a public use, even if the project is not ultimately constructed. The court of appeals disagreed, stating that a number of factors must be examined in determining whether a use is a public use. In the case at hand, the court found that the needs of the community, the character of the benefit, and the necessities for the project were matters yet to be determined, and that the condemnation was premature, as stated by the trial court, because all of the transportation alternatives (of which the proposed project was only one) were still under consideration and no preferred alternative had been identified. Finding that no decree granting immediate possession can be entered without a designation and determination of the property involved, the court affirmed the trial court's decision.

In a dissenting opinion, one judge expressed a view that the trial court and the majority of the appellate court confused public purpose and necessity, which are subject to judicial review, with feasibility, which is not.

Constitutional Law — Eminent Domain and Takings — Moratoria

In *Tahoe - Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[12] the U.S. Supreme Court ruled on the question of whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constituted a *per se* taking of property requiring compensation under the Takings Clause of the U.S. Constitution. Tahoe Regional Planning Agency (TRPA) imposed two moratoria, totaling 32 months, on development in the Lake Tahoe basin, while it formulated a comprehensive land-use plan for the area. The petitioners, real estate owners affected by the moratoria, and an association representing such owners, filed parallel suits, later consolidated, claiming that TRPA's actions constituted a taking of their property without just compensation. The district court found that TRPA had not effected a "partial taking" under the analysis set out in *Penn Central Transportation Co. v. New York City*;[13] however, it concluded that the moratoria did constitute a taking under the categorical rule announced in *Lucas v. South Carolina Coastal Council*[14] because TRPA temporarily deprived petitioners of all economically viable use of their land. On appeal, TRPA successfully challenged the district court's taking determination. Finding that the only question in the challenge was whether *Lucas*' rule applied, the Ninth Circuit held that, because the regulations had only a temporary impact on the petitioners' fee interest, no categorical taking had occurred; that *Lucas* applied to the relatively rare case in which a regulation permanently denies all productive use of an entire parcel, whereas the moratoria in this case involved only a temporal slice of the fee interest; and that *First English Evangelical Lutheran Church*

of Glendale v. County of Los Angeles[15] concerned the question whether compensation is an appropriate remedy for a temporary taking, not whether or when such a taking has occurred. The Ninth Circuit also concluded that *Penn Central*'s *ad hoc* balancing approach was the proper framework for analyzing whether a taking had occurred, but that petitioners had not challenged the district court's conclusion that they could not make out a claim under *Penn Central*'s factors. The U.S. Supreme Court held that the moratoria ordered by TRPA were not *per se* takings of property requiring compensation under the Takings Clause. The Supreme Court expressly limited its discussion in the case to the lower courts' disposition of the claims based on the moratoria.

The petitioners contended that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of its property gives rise to an unqualified constitutional obligation to compensate the owner for the value of the property's use during that period. The supreme court stated that, under the petitioners' proposed rule, there would be no need to evaluate the landowners' investment–backed expectations, the actual impact of the regulation on any individual, the importance of the public interests served by the regulation, or the reasons for imposing the temporary restriction. The crux of the petitioners' argument was that a regulation imposing a temporary deprivation (no matter how brief) of all economically viable use would trigger a *per se* rule that a taking had occurred. The petitioners argued that the Supreme Court's opinions in *First English* and *Lucas* had already endorsed their view, and that it was a logical application of the principle that the Takings Clause was "'designed to bar government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.'"[16]

The Supreme Court opined that its previous decisions in *First English* and *Lucas* were not dispositive. In examining the district court's segmentation of the petitioners' property into temporal segments corresponding to the regulations at issue was in error because it ignored *Penn Central*'s admonition that in regulatory takings cases the court must focus on "the parcel as a whole." Rather, the starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.

The Supreme Court found that a temporary restriction that merely causes a diminution in value is not a permanent deprivation of an owner's use of its property sufficient to constitute a taking of the parcel as a whole, and that a fee simple estate can not be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. The Supreme Court declined to adopt the extreme categorical rule championed by the petitioners that any deprivation of all economic use, no matter how brief, constitutes a compensable taking, opining that a rule which required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision making.

The Supreme Court declined to adopt the extreme categorical rule championed by the petitioners that any deprivation of all economic use, no matter how brief, constitutes a compensable taking.

The Court found the better approach (in analyzing claims that a regulation has affected a temporary taking) requires careful examination and weighing of all of the relevant circumstances. In rejecting the petitioners' *per se* rule, the Supreme Court specifically stated that it was not holding that the temporary nature of a land-use restriction precluded finding that it affects a taking; the Court was simply recognizing that it should not be given exclusive significance one way or the other. The Supreme Court affirmed the judgment of the court of appeals, finding that claims seeking compensation based upon temporary moratoria on land use should be considered on a case-by-case basis, taking into account a number of considerations.

Contracts — Risk of Casualty Loss

In *Brush Grocery Kart, Inc. v. Sure Fine Market, Inc.*,[17] the supreme court granted certiorari on the issue of whether or not the court of appeals had erred in its determination that, under Colorado law, a purchaser of real property assumes the risks and burdens of casualty loss to that property as of the

date of the execution of the contract under which the purchaser has agreed to purchase and the seller has agreed to sell the real property, even though neither possession nor title has passed to the purchaser. Brush Grocery Kart petitioned for review of the court of appeals' judgment affirming the district court's determination that Brush was not entitled to a price abatement for damage caused to the property by hailstorm that occurred during the contract's executory period and while possession of the property remained with the seller, Sure Fine. The court of appeals had affirmed on the grounds that equitable title to the property vested in Brush at the time the contract was formed, whether or not Brush had a right of possession at the time, and that therefore Brush bore the risk of any casualty losses from that time forward.

It is important that contracts for purchase or sale, including option contracts, specifically address the allocation of risk for casualty loss between the parties.

The court discussed C.R.S. § 38-30-167, which grants purchasers the right to partial specific performance of conveyance of property, plus damages, where the seller is no longer capable of conveying the entire property. It held that the statute was not intended to assign liability for a casualty loss in every situation. If it were, a vendee might recover damages even if the casualty loss were its fault. The supreme court examined Colorado case law, including *Wiley v. Lininger*,[18] in which the supreme court adopted a rule, characterized as the "majority rule," that "the vendee under a contract for the sale of land, being regarded as the equitable owner, assumes the risk of destruction of or injury to the property *where he is in possession* and the destruction or loss is not proximately caused by the negligence of the vendor." (emphasis added) The supreme court found that the rule articulated in *Wiley* specifically limited the transfer of the risk of loss to vendees who are already in possession. In the *Brush* case, Brush was not in possession of the real estate at the time of the casualty loss, and had expressly notified Sure Fine that it was no longer carrying casualty loss insurance on the property. The court therefore found that, in the absence of a right of possession, a vendee of real property that suffers a material casualty loss during the executory period of the contract through no fault of its own must be permitted to rescind and recover any payments he or she has already made. Also, where a vendee is entitled to rescind as a result of casualty loss, the vendee should generally also be entitled to partial specific performance of the contract with an abatement in the purchase price reflecting the loss. Where the damage is ascertainable, permitting partial specific performance with a price abatement allows courts as nearly as possible to fulfill the expectations of the parties expressed in the contract, while leaving each in a position that is equitable relative to the other. The judgment of the court of appeals was therefore reversed, and the case was remanded for further proceedings.

This case is, of course, good news for many prospective purchasers of real estate under executory contracts. However, it is important that contracts for purchase or sale, including option contracts, specifically address the allocation of risk for casualty loss between the parties. Buyers are well advised to negotiate for the inclusion of language in a purchase contract requiring seller to maintain adequate limits of all-risk insurance pending the closing.

Conveyance of Tort or Contract Claims — Fraud — Non-disclosure and Concealment — Misrepresentation — Promissory Estoppel

In *Ford v. Summer Tree Lane LLC*,[19] the court of appeals examined the trial court's decision in a case brought by the Fords claiming fraud, non-disclosure and concealment, negligent misrepresentation, and promissory estoppel against the developer of a residential subdivision, its brokers, and employees. The Fords bought a residential building site in the subdivision overlooking a lake created by a dam, and built a new home on the site. The Fords bought the lot because of its lake views and location on the water. After they moved into their home, the lake was drained. Upon investigation, the Fords learned that before their purchase of the property, government officials had issued warnings that the dam holding the water in the lake was deficient and that either it would have to be replaced or the lake would have to be drained. Neither the developer nor its real estate agents provided this information to the Fords before their closing. The Fords sold the property in question, and then initiated this action along

with other purchasers (who were not parties to this appeal) based on the developer's failure to disclose the unstable condition of the dam. The Fords sought, among other damages, the difference between their actual sales price and the price for which they could have sold their property had the lake not been drained. The developer filed a motion for summary judgment arguing that, when the Fords conveyed their interest in the real property, the deed also conveyed all claims for relief that the Fords had asserted. The trial court agreed with the developer and dismissed the Fords' claims. The Fords appealed that decision.

The Fords argued on appeal that the trial court erred in granting summary judgment because a general warranty deed conveying a parcel of real property cannot inadvertently convey tort or contract claims that arise from the developer's alleged misrepresentations in connection with the earlier purchase and sale of the real property. The court of appeals examined the language of the deed and reviewed case law on the construction and meaning of a general warranty deed. The court also examined law on choses in action, noting that the right to bring an action for damages, based in tort, is a chose in action and that a chose in action is a personal right, not real property, and belonged to the party who suffered the injury. The court found that, while choses in action are transferable, to constitute an assignment of a chose in action there must be a purpose to assign it, and the subject matter must be described with such particularity as to render it capable of identification.

The court also noted that by custom in Colorado, when real estate is conveyed, and personal property is also transferred or used as security with that real property, two separate documents accomplish the tasks, *i.e.*, a deed for the real property and a bill of sale for personal property. In this case, the warranty deed only contained traditional language used to convey real estate, and was not intended to convey any interest except the real property interest. Also, the deed neither set forth the description of the chose in action nor any compensation for the tort claims belonging to the Fords. Finally, the record does not contain a separate document conveying the chose in action to the buyers of the property. The court therefore concluded that the trial court erred in granting summary judgment in favor of the developer and vacated the judgment, remanding the case to the trial court for further proceedings.

Election of Remedies — Judgment — Waiver or Abandonment of Counterclaim

In *Lakeside Ventures, LLC v. Lakeside Development Company*,[20] under a somewhat complex set of facts, the court of appeals confirmed that a secured party may sue on a note and also proceed with a Public Trustee foreclosure. The court rejected the argument that the secured party's decision to pursue foreclosure must be considered an election of remedies that bars it from seeking recovery on the note. It reasoned that reduction of the note to judgment simply changes the form of the debt. Where the debt was originally evidenced by the note, it becomes evidenced by the judgment. The deed of trust then provides security for the judgment and can be foreclosed to pay the judgment. The suit on the note and foreclosure of the property may be pursued concurrently or consecutively.

The Worrels originally sold the property at issue to an individual and an entity not involved in the case. The buyer transferred the property to the plaintiff, Lakeside Ventures. Before the Worrels obtained judgment on their note counterclaim, the plaintiff conveyed the property to DLMT, LLC. After judgment entered, the Worrels started a second Public Trustee foreclosure. DLMT, LLC and two individuals affiliated with DLMT agreed to pay the Worrels $160,000 and gave them a promissory note for $184,751.79. They agreed that the DLMT note would be secured by the original deed of trust. In exchange, the Worrels assigned their interest in the judgment against Lakeside Ventures to the individual affiliates of DLMT. The individuals subsequently executed on the judgment and collected approximately $50,000.00 from Lakeside Ventures.

Lakeside Ventures contended that the judgment on the original note was satisfied by the Worrels' receipt of the cash and note from DLMT. The trial court found that DLMT had cured delinquencies on and assumed obligations for the judgment, but denied Lakeside Ventures' motion for relief from the judgment because DLMT was not a party to the case. The court of appeals, however, held that DLMT's absence from the case did not preclude a determination of whether the cash and DLMT note constituted a satisfaction of the judgment. It held that the cash payment was a partial satisfaction and

the promissory note, under C.R.S. § 4-3-310 was "taken for an obligation," thereby suspending the obligation until the note was either dishonored or paid. The court stated that, "because the agreement contained no provisions limiting the effect of the DLMT note on the judgment, upon the Worrels' receipt of that note the judgment was suspended to the extent of the amount of the note, and it remains suspended until the DLMT note is dishonored or paid." Because the DLMT note was suspended, but not discharged, the Worrels could still assign the judgment. However, to the extent it had been satisfied by the cash payment and was suspended by the DLMT note, it could not be executed upon. It appears that the Worrels and DLMT intended and understood that DLMT was purchasing an assignment of the judgment against Lakeside Ventures rather than satisfying the judgment. They apparently did not write their agreement clearly enough to effectuate their purpose. The court of appeals, in remanding the case to the trial court, stated that the trial court should give Lakeside Ventures an opportunity to join DLMT as a party in order to "decide whether DLMT purchased the property from plaintiff at a discount because of the judgment and, therefore, whether it is inequitable to permit DLMT to hold the property free from foreclosure while persons affiliated with DLMT collect the judgment from plaintiff."

The issue in the case was whether the limitation on development based on the flood hazard designation could be considered in valuing the property.

Eminent Domain — Project Influence Rule

In *City of Boulder v. Fowler Irrevocable Trust 1992-1*,[21] the court of appeals affirmed the judgment entered in condemnation proceedings brought by Boulder to acquire property owned by the Fowler Trust. Boulder petitioned to condemn a 3.01-acre parcel of undeveloped land needed to construct flood control and drainage facilities along Goose Creek. At the time of the petition, most of the property was designated by the Federal Emergency Management Agency (FEMA) on its flood insurance rate map as being in an area of high flood hazard. It was similarly designated in Boulder's flood plain ordinances. Development of the property was essentially prohibited.

The issue in the case was whether the limitation on development based on the flood hazard designation could be considered in valuing the property. The trust argued and presented evidence that the high flood hazard designation resulted from the project for which the property was being taken. Boulder argued and presented evidence that the designations did not result from its project. Under the "project influence rule," just compensation under Article II, § 15, of the Colorado Constitution for takings of private property must not include any enhancement or reduction in value that arises from the project for which the property is being acquired.

After hearing evidence and expert testimony from both sides, the trial court found that the high hazard designations resulted from the Goose Creek channelization project, which had begun in the 1970s. The court found that, prior to the 1980s, the Fowler Trust property had been designated as being in a flood plain by Boulder and FEMA, but that there were no significant limitations on development and building on the property. At the valuation trial, the parties therefore did not present evidence of the prohibitive effect of the floodway and high hazard designations. However, the commissioners were allowed to take into account "the existence of flooding and drainage which may occur on the property." The commission awarded the Fowler Trust $2,092,351 as compensation.

In upholding the trial court, the court of appeals stated that the project influence rule

> promotes fairness in valuing property by preventing a windfall to the property owner based on speculative potential enhancements in value while, at the same time, protecting the property owner from the injustice of assessing against it a diminution in the property's value caused by the same project for which it is being taken.

The court concluded that the trial court had applied the correct legal principles and that its factual findings were not clearly erroneous.

Fee-Shifting Clause in Real Estate Sales Contract — No Merger into Deed at Closing

In *Coe v. Crady Davis Corp.*,[22] the defendant, Crady Davis Corporation, appealed that portion of the trial court's judgment declining to award it attorney fees under a fee-shifting provision in the real estate contract. The Coes had purchased a large parcel of property from Crady Davis under a contract that provided for the calculation of the purchase price based upon the number of square feet in the property sold. After closing, the Coes obtained a survey that showed that the property contained significantly fewer square feet than had been represented in the contract. The Coes sought damages for the alleged deficiency in the size of the property, and Crady Davis denied liability and requested an award of attorney fees and costs pursuant to the fee-shifting clause in the sales contract. That clause provided for the award of costs and expenses, including attorney fees, to the prevailing party in any litigation arising out of the contract. The trial court had dismissed the complaint, finding that the Coes had failed to meet their burden of proof on their claims for relief, and awarded Crady Davis its costs and expenses, excluding attorney fees. Crady Davis filed a motion pursuant to C.R.C.P. 59 arguing that, as the prevailing party in the action, it was entitled to recover attorney fees pursuant to the terms of the contract for sale. The trial court denied its motion.

Generally, the critical issue in deciding whether a contract provision merges into the deed is whether the provision in question relates to title, quantity, possession, or emblements of the land.

The court of appeals agreed with Crady Davis. It rejected the Coes' argument that Crady Davis had waived its right to seek fees by failing to present evidence of those fees at trial, based upon its review of the record.

The Coes also argued that Crady Davis was not entitled to seek attorney fees under the contract because the fee-shifting provision merged into the deed upon the closing of the sale. The court of appeals, referring to previous Colorado case law, noted that generally the critical issue in deciding whether a contract provision merges into the deed is whether the provision in question relates to title, quantity, possession, or emblements of the land. Because the fee-shifting provision at issue in this case did not relate to any of those issues, the court of appeals concluded that the fee-shifting provision did not merge into the deed at closing, and that the fee-shifting provision on which Crady Davis sought recovery of its attorney fees had survived the closing. The portion of the judgment declining to award Crady Davis its attorney fees under the fee-shifting provision was reversed, and the case was remanded for further proceedings on Crady Davis' request for attorney fees incurred in the trial court and in the appeal.

Forcible Entry and Detainer Action — Prevailing Party — Award of Attorney Fees Under C.R.S. § 13-40-123

In *Integra Financial, Inc. v. Grynberg Petroleum Company*,[23] an FED action brought by Integra against Grynberg, there were claims for damages and counterclaims for possession and damages. Both sides sought awards of attorney fees pursuant to C.R.S. § 13-40-123, part of the forcible entry and detainer statute. The trial court declined both sides' requests, holding that both parties had prevailed on a significant issue and that there was thus no prevailing party. The court of appeals reversed, holding that because the FED statute provides that "the prevailing party in any action under the provisions of this article is entitled to recover damages, reasonable attorney fees, and costs of suit," the only issue was which party prevailed on the issue of possession. The damages claims did not bear on the right to possession and therefore were irrelevant for purposes of attorney fees awards, even where the defendant was successful on one or more counterclaims. The court of appeals remanded the case to the trial court to determine and award Integra's reasonable attorney fees incurred on the issue of possession only. It is important to note that the case involved an oral sublease and there was apparently no agreement for an award of attorney fees in the event of a contractual dispute.

Implied Profits — Easement by Prescription — Easement by Estoppel — Easement From Prior Use

In *Lobato v. Taylor*,[24] volunteers through the Colorado Lawyers Committee represented landowners asserting rights to use the Taylor Ranch property in Costilla County for hunting, fishing, recreation, grazing, firewood, and timber. The case was in litigation for 21 years and reached the supreme court for the second time. The claims were based on 100 years of use of the property by the landowners, old treaties and agreements with Mexico when it ceded the territory, land grants, and other agreements providing for access by settlers in the region.

Jack Taylor bought about 77,000 acres (the mountain tract) of the Sangre de Cristo grant in 1960, receiving a deed stating he took the land subject to "claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlement rights in, to, and upon the land." He fenced the property and denied local landowners access to the property. In 1965, in a Torrens Title Registration Act[25] action by Taylor, the U.S. District Court held that the landowners had no rights in the mountain tract. The Tenth Circuit affirmed in 1967. In 1973, Taylor bought an additional 2,500 acre parcel, which had also been the subject of a Torrens title action determining that the landowners had no rights in it. Together, the two tracts comprised the Taylor Ranch.

The document relied upon by the landowners for the grant of such rights was not effective because it did not identify specific locations or grantees.

The landowners brought suit in Costilla County in 1981, asserting their historic settlement rights in the Taylor Ranch. The case was dismissed on *res judicata* grounds in 1986. The court of appeals affirmed in 1991. The supreme court, in 1994, reversed and remanded on the question of whether notice in the Torrens action was constitutionally adequate. On remand, the trial court decided that several plaintiffs could proceed, but denied certification of a class action. After a trial on the merits, the trial court found that the landowners and their predecessors had used the property for grazing, timber, firewood, fishing, hunting, and recreation from the 1800s through Taylor's purchase in 1960, but that they had no prescriptive rights because the use was not adverse. The document relied upon by the landowners for the grant of such rights was not effective because it did not identify specific locations or grantees. The court of appeals affirmed in 2000.

A divided supreme court reversed in part. In a majority opinion written by Chief Justice Mullarkey, the court held that the landowners had a "profit a prendre," defined as an easement conferring the right to enter and remove timber, minerals, oil, gas, game, or other substances from land possessed by another. The court concluded that the easement claimed by the landowners was an "easement appurtenant," one which runs with the land, rather than an "easement in gross," which is a personal right to use another's property. The court found that the landowners had established a prescriptive easement, an easement by estoppel, and an easement from prior use. The opinion explains in detail the bases for establishing such easements. It places emphasis on a strong policy "to be true to parties' intentions," "judicial recognition of implied rights in land" and "avoiding injustice." Based on its analysis of the history and documentation, the court limited the easement to grazing, firewood, and timber, and those only to the extent reasonable and necessary to certain landowners, to be determined. Easements for hunting, fishing, and recreation were denied, although Justice Martinez would have granted them as well. Justices Kourlis and Rice would have affirmed the lower courts and not granted the landowners any rights in the Taylor Ranch.

Lis Pendens — Out-of-State Action that Affects Title — Constructive Trust

In an original proceeding, the supreme court vacated a trial court ruling that a litigant in an out-of-state action could not file a lis pendens on property in Colorado. In *Kerns v. Kerns*, [26] the Colorado trial court held that a foreign action seeking to impose a constructive trust on Colorado property lacked *in rem* jurisdiction. The supreme court held that C.R.S. § 38-35-110 did not except litigants in out-of-state actions affecting title to real property in Colorado from the right to file notices of lis pendens. Based on the plain meaning of the statute, the

supreme court held that the procedure for filing a notice of lis pendens set forth in C.R.S. § 38-35-110 is available to a party in any action "wherein relief is claimed affecting the title to real property" regardless of the jurisdiction in which the action is brought. The court found that, even though the action to impose a constructive trust was a personal action, it would indirectly affect title to the real estate, and that notice of lis pendens was proper.

See information on SB 02-084, below, clarifying that a lis pendens may be filed only with respect to an action brought in a Colorado state court or in a federal district court in this state.

Notice of Problems with Property — Seller's Fraud and Concealment — Attorney's Imputed Knowledge

In *Nielson v. Scott*,[27] the purchasers of an RV park appealed the trial court's grant of summary judgment for the sellers on the purchaser's claims of fraud and concealment in the sale. Sellers cross-appealed the trial court's refusal to award them attorney fees. The case was based on the 1997 purchase by the Nielsons of the Scotts' RV park. When the Nielsons first visited the RV park, they noticed standing water and the smell of sewage. The Nielsons were told that the septic system serving the RV park needed to be enlarged. The Scotts told the Neilsons that the enlargement would be relatively easy and would result in relatively modest expense. The Scotts also told the Nielsons that the septic system would be fine after the enlargement was completed. The Nielsons submitted a total of four written offers to the Scotts. The second and third offers were submitted by legal counsel, who represented them during the preparation and submittal of the first three offers. The sellers rejected all of the first three offers, which contained provisions that made the Scotts responsible for remedying problems with the septic system. The fourth offer submitted was accepted by the Scotts. In the contract, the Nielsons acknowledged that their due diligence inspection, including any matters relating to water and sewage, had been completed to their satisfaction, and that seller had not made any representations, warranties, or guaranties to the purchaser. The buyer also acknowledged relying solely on its own investigation of the property and agreed that the sale of the property was made on an "as is" basis.

Prior to the execution of the fourth and final offer, the Nielsons had counseled with their attorney, who suggested that they hire an engineer familiar with septic and sewer system issues. The engineer had expressed concerns to the attorney about the need to obtain a permit and site approval for expansion of the septic system, along with associated costs and problems. The Nielsons met with the engineer, but chose not to hire him. The sellers had submitted a permit application in 1995, but a permit had never been issued to them. The attorney also consulted with the Colorado Department of Health and Water Quality Control Division directly, and learned, among other things, that the official at the Water Quality Control Division was suspicious that the RV park was not in compliance with state standards and would likely impose significant requirements on the RV park in order to bring it into compliance with state law.

After the sale closed, the Nielsons filed a lawsuit alleging that the Scotts had fraudulently misrepresented that the problems with the septic system could be remedied by the expansion. The Nielsons also alleged that the Scotts had concealed the facts that the septic system lacked a permit and was not in compliance with governmental regulations. The trial court granted the Scotts' motion for summary judgment as to both claims, but denied the Scotts' request for recovery of attorney fees. On appeal, the Nielsons contended that summary judgment was improper because of disputed factual issues. The trial court had concluded that, although the parties offered different interpretations of the facts, the material facts were not in dispute. The court of appeals agreed, finding that the Nielsons' claims failed because the undisputed evidence showed either that they knew of the Water Quality Control Division issues and other problems with the septic system or that they had sufficient notice of the problems with the septic system that they should have conducted an investigation that would have disclosed the problems with the septic system.

The court also found that the information obtained by the Nielsons' attorney clearly showed a need for further investigation, that the information obtained by their attorney was imputed to them (even though they later proceeded without counsel when making their fourth and final offer of purchase), and that the Nielsons should have acted on the information that the attorney obtained by inves-

tigating the septic problem. Accordingly, the court of appeals affirmed the trial court's summary judgment order dismissing the fraud and concealment claims.

The Scotts cross-appealed the trial court's denial of their request for attorney fees pursuant to C.R.S. § 13-17-101. The trial court had concluded that the Nielsons' suit was not frivolous and denied the request. Noting that a trial court's decision whether to award attorney fees under that statute is discretionary and will not be disturbed on appeal if the evidence supports the ruling, the court of appeals perceived no abuse of discretion and confirmed. The Scotts separately argued, for the first time on appeal, that they were entitled to recover attorney fees pursuant to the terms of the contract for purchase and sale. The court of appeals declined to entertain that argument because it was an issue raised for the first time on appeal.

Premises Liability Statute — Definition of Landowner — Independent Contractor

In *Pierson v. Black Canyon Aggregates, Inc.*,[28] petitioner John W. Pierson drove over a 17-foot embankment into a gravel pit when the roadway on which he was traveling abruptly ended at the edge of the pit. His vehicle landed on its roof, and he sustained injuries. The property where the gravel pit was located was owned by Donald C. and Nellie L. Neal, and was under lease to Montrose County at the time of the accident. Pierson brought this action under the premises liability statute[29] against the respondents, Black Canyon Aggregates, Inc. and Chauncey Luttrell, the independent contractor operators of the gravel pit, pursuant to an agreement with Montrose County. The trial court granted summary judgment for the respondents, concluding that Montrose County, and not the respondents, was the party in possession of the property for purposes of the statute and, thus, the landowner.

In interpreting the premises liability statute, the supreme court understood the overriding purpose of the statute as clarifying and narrowing private landowners' liability to persons entering upon their land, based upon whether the entrant is a trespasser, licensee, or invitee. Noting that the General Assembly intended a broad definition of "landowner" who can claim the protections of the premises liability statute, the court held that such protection is available to (1) authorized agents or parties in possession of the property in question, and also (2) parties legally responsible for the condition of the property or activities conducted on it. The court also found that, as to the element of possession included in the definition of landowner, a "landowner" is "any person in possession of real property" and that such possession need not necessarily be to the exclusion of all others. Moreover, as to the second definition of "landowner" under the statute, the court held that the statute offers its protection to a person who is legally conducting an activity on the property or legally creating a condition on the property. Such a person or entity is "responsible" for the activity or condition and, therefore, prospectively liable to an entrant onto the property. For purposes of summary judgment, the court concluded that the respondents were sufficiently in possession to fall within the definition of "landowner" under C.R.S. § 13-21-115(1), and were also persons legally conducting an activity on the property that allegedly injured Pierson. Therefore, the court reversed the trial court's grant of summary judgment as to that issue.

It will be important for practitioners representing independent contractors to counsel their clients on their potential risks under the premises liability statute.

In view of the court's findings, it will be important for practitioners representing independent contractors to counsel their clients on their potential risks under the premises liability statute and to style independent contractor agreements to address the issue of "possession" so as to attempt to mitigate any premises liability of the independent contractor.

Prepayment Penalty — Amounts Due in Public Trustee Foreclosure Bid — Acceleration of Loan Obligation

In *Kirk v. Kitchens*,[30] the court of appeals addressed the enforcement of a prepayment penalty upon a note that had been accelerated by a lender in conjunction with the foreclosure. The promissory note and deed of trust in question provided that the lender was not obligated to accept any prepayment of the indebtedness evidenced by the note in whole

or in part at any time prior to a specified date. The borrowers stopped making payments well in advance of the October 2004 deadline for the prepayment penalty. In submitting its bid at the ensuing foreclosure, the lender included in its bid an amount described as a prepayment penalty representing the sum of all interest payments the lender would have received through the October 2004 deadline, as if the promissory note had been paid off according to its terms.

Prior to the expiration of the borrowers' redemption period, the borrowers transferred the property to Kirk. Kirk filed this action for a declaratory and injunctive relief to challenge the amount required for redemption based on the lender's bid. Kirk was granted a temporary restraining order extending the redemption period and restraining the Public Trustee from issuing a Public Trustee's deed. However, Kirk's motion for preliminary injunction and its motion to reinstate the temporary restraining order were denied, the trial court holding that the lender should not be prevented from realizing the benefit of the provisions of the promissory note and deed of trust. Kirk then appealed.

On appeal, Kirk argued that, upon the lender's acceleration of the entire loan obligation, the lender had waived and was no longer entitled to recover the contested amounts that would constitute an impermissible prepayment penalty. The court of appeals agreed, finding that, upon acceleration of the note, the lender had no rights to collect future interest or to include the amounts of such interest in the lender's foreclosure bid as "amounts due." The court reviewed cases from other jurisdictions which have found that a note holder may refuse an early tender of the principal balance remaining due, but when the note holder waives the right to refuse early payment, any prepayment penalty or premium must be specifically provided in the contract. The court found that, in the absence of an acceleration, if borrowers attempt to tender payments of principal before the date any prepayment expires, the lender may refuse the tender under the terms of the note. However, since such a tender did not occur in this case, a prepayment penalty was not permitted where the note was accelerated at the option of the holder. The cases on which the court relied stated that no liability for a prepayment penalty arises from a default; rather, it arises only upon a prepayment as specified in a prepayment penalty provision. Upon the note holder accelerating the due date of the loan and demanding full payment, the entire unpaid balance becomes due under the terms of the note itself, and there is no "prepayment" to which a prepayment penalty would attach. The note and deed of trust subject of the court's opinion did not provide for the collection of future interest in the event of foreclosure. Though the court did note that other jurisdictions have permitted recovery by the lender when the prepayment penalty language in a note allows for the collection of the prepayment penalty in the event of foreclosure, the court of appeals expressly declined to express an opinion on the enforceability of such a provision.

Lenders should be counseled on the risks of accelerating indebtedness during the period of time that a prepayment penalty applies.

In any loan documentation anticipating a right of the lender to a prepayment penalty, practitioners will want to review their documents to assure that the language of the prepayment penalty expressly provides that it becomes due and payable in full upon any acceleration of the indebtedness and that the lender is entitled to recover same through any foreclosure sale. In any event, lenders should be counseled on the risks of accelerating indebtedness during the period of time that a prepayment penalty applies.

Prescriptive Easement — Change in Route — Permissive Use — Intermittent Use

Weisiger v. Harbour[31] examines a decision granting a prescriptive easement. Since 1970, the Weisigers owned interests in several mining claims that were entirely surrounded by national forest land, except for one point of contact with a tract of land to the east owned by the Harbours since 1983. The Weisigers brought this action in 1998, alleging that they had been crossing the Harbours' property on a historic mining road since 1970 and were therefore entitled to a prescriptive easement or easement by necessity for access to their property over the Harbours' property, as well as an injunction preventing the Harbours from interfering with their access. In a bench trial, the court found that the

Weisigers had established open, continuous, and hostile use for more than the 18-year prescriptive period. The court entered a decree granting the Weisigers a prescriptive easement across the Harbours' property but did not address the Weisigers' claims for easement by necessity or for injunctive relief.

The Harbours appealed the decision, arguing that the Weisigers had changed their route across the Harbours' property during the prescriptive period, that the Weisigers' allegedly hostile use was interrupted by a period of use to which the Harbours consented, and that the Weisigers' use was neither open and notorious nor hostile to the Harbours' use.

The court of appeals rejected each of the Harbours' arguments. First, the court of appeals noted that, while a party claiming a prescriptive easement must confine his or her use to a single, definite and certain path, minor deviations do not defeat the claimed easement. In this case, the Weisigers had partly changed their route because a new subdivision, bordering the Harbours' property on the east, blocked the Weisigers' direct access to the mining road where they had crossed the eastern boundary of the Harbours' property for 13 years. While the Harbours argued that the trial court should have found this change substantial, thus breaking the statutory period, the court of appeals noted evidence in the record that a circumstance beyond the Weisigers' control had required them to change their point of entrance to the Harbours' property, concluding that the record supported the trial court's determination that the Weisigers adequately proved their use of a definite path across the Harbours' property for more than 18 years.

The Harbours also argued that the trial court was mistaken in according the Weisigers' use a presumption of adversity for the 18-year period, because the Harbours gave the Weisigers permission to cross their property for an approximately two-year period beginning in 1989. The court dismissed this argument, finding the alleged permissive use for 1989 to 1991 irrelevant because by 1988 the Weisigers had already established 18 years of adverse use.

Lastly, the Harbours argued that even if the Weisigers' period of prescriptive use was not interrupted by either the changed route or an interval of permissive use, the trial court had nevertheless erred because the Weisigers' use was hidden, not open, and notorious. The Harbours contended that the Wesigiers' use was not open and notorious because the Weisigers did not tell the Harbours they were crossing the Harbours' land and the Harbours did not know the Weisigers were cutting the chain on the gate, removing the gate from its hinges, and creating a two-track road across the Harbours' property to intersect with the mining road. However, the court of appeals found evidence in the record that the Harbours were, in fact, aware that the Weisigers' access had been discussed and that the Weisigers had sent the Harbours a written access proposal that the Harbours had rejected. The Harbours also argued that the Weisigers' use was not open and notorious because the Weisigers used the route only 10 to 12 times per year and did not prohibit the Harbours from using the route. Citing Colorado case law which provides that intermittent use on a long-term basis satisfies the requirements of open, notorious, and continuous use, and that the holder of a prescriptive easement need not exclude the owner of the servient estate, the court of appeals found in favor of the Weisigers and confirmed the judgment of the trial court.

Procedural Due Process — Property Right — Land Use — Special Use Permit

In *Hillside Community Church v. Olson*,[32] Hillside Church built an addition without obtaining a special use permit before construction began, thus depriving neighbors of a public hearing. One issue was violation of height limitations. The neighbors sued the church and the City of Golden and its council for injunctive relief under C.R.C.P. 106(a)(2), damages under 42 U.S.C. § 1983, and attorney fees under 42 U.S.C. § 1988.

After the church addition was substantially complete, the city attorney had acknowledged that the building permit should not have been issued because the addition was a nonconforming use under the Golden Municipal Code and a special use permit hearing should have been held. However, the city attorney declined to revoke the permit or require that the addition be modified or torn down, relying on the doctrine of relative hardship. The trial court ordered the city to set aside the height variance, vacate the certificate of occupancy, and hold a public hearing on the special use permit. However, it held that the church had relied in good faith on the city's assurances and declined to order it to modify

or tear down the addition, citing the doctrine of relative hardship. The trial court held that the neighbors' right to a public hearing was a property right warranting due process protection under 42 U.S.C. § 1983 and awarded attorney fees under § 1988.

The court of appeals affirmed the § 1983 claim and award of fees, but reversed on the relative hardship doctrine, finding that the church had not acted in good faith. It remanded to the trial court to require the church to modify the addition to conform to GMC ordinances.

The supreme court granted certiorari on the issue of whether failure to conduct a hearing for a special use permit pursuant to the municipal code violated the adjacent landowners' procedural due process rights, even though they sued successfully for *mandamus* to remedy the mistake. In an opinion authored by Justice Rice, it reversed, holding that "procedural guarantees stemming from state law or local ordinance do not create a constitutionally cognizable property interest," and therefore cannot give rise to a § 1983 claim or an award of attorney fees under § 1988. The court emphasized that the discretionary nature of the permit approval process militated against a finding that the procedural rights equated to substantive rights of life, liberty, and property protected by the Due Process Clause of the Constitution. The court further supported its holding with a finding that the neighbors had adequate remedies under state law.

Public Road — Restrictive Use — Abandonment — Evidence of Nonuse — Common Law Abandonment

In *Board of County Commissioners v. Kobobel*,[33] the Kobobels appealed a summary judgment entered in favor of the plaintiff, the Board of County Commissioners of Morgan County, declaring a road along the northern boundary of the Kobobels' property to be a public road. The Kobobels owned a section of land in Morgan County. Several parties owned a section of land immediately north of the Kobobel property, part of which was a cemetery. At issue was a road allegedly located along the section lines between the Kobobels and the other property owners in the adjacent section. The western half of the alleged road was the subject of a 1902 road petition, which was accepted by the county. The eastern half of the alleged road was a two-track field lane on the Kobobels' property running east and west immediately south of the section line. When the Kobobels erected a locked gate at the west end of the existing road lying on their side of the section line and excavated ditches across the road, the county brought this action to declare the road a public road and to enjoin the Kobobels from obstructing it. The trial court determined that there were no genuine issues of material fact and granted the county's motion for summary judgment and request for injunctive relief, concluding that the western portion of the road remained part of the primary county road net. In so finding, the court noted that the road had been in use for at least 20 years and was therefore a public road because it had been properly dedicated to Morgan County and was open to public traffic pursuant to C.R.S. § 43-1-202. The court also concluded that the road was not abandoned or vacated and that abandonment would leave a neighboring landowner and the cemetery without access to a public road.

> ***C.R.S. § 43-2-201 (1)(c) provides that all roads over private lands that have been used adversely without interruption or objection on the part of the owners of such lands for 20 consecutive years are declared to be public highways.***

On appeal, the Kobobels contended that there were disputed issues of material fact as to the use of the field lane across their land adjacent to the north section line. The Kobobels asserted that the only evidence of record related to use of the road over the years was a neighbor's deposition testimony that the field lane was occasionally used for access to the cemetery. The neighboring landowners offered contradictory evidence that the road was used as a shortcut a few times a year, and the county offered evidence intended to demonstrate that there was no other route to the cemetery. However, that evidence was contradicted by an affidavit of the county's own witness, who testified to traveling another route to the cemetery. In reviewing the evidence on this issue, the court of appeals concluded that there was sufficient evidence to raise material questions of fact as to the use of the field lane.

The court also favorably considered the Kobobels' assertion that there was insufficient evidence to support the trial court's conclusion that the entire length of the road was established as a public road by prescriptive use under C.R.S. § 43-2-201 (1)(c). That section provides that all roads over private lands that have been used adversely without interruption or objection on the part of the owners of such lands for 20 consecutive years are declared to be public highways. Though evidence demonstrated that the road had been used for the statutory 20 years, the court did not find sufficient evidence of the establishment of a public road by prescriptive use under that statute because the evidence did not demonstrate that the entire road was used under a claim of right or that the Kobobels or their predecessors knew of the use and made no objection to it, as is required under the statute.

The court, however, rejected the Kobobels' contention that, if the road was ever a dedicated public road under C.R.S. § 43-2-201(1)(b), the relocation of the county road system which occurred in the 1930s effected as a matter of law a statutory abandonment of the western half of the road under C.R.S. § 43-2-113 concerning abandonment of public roads. The fact that no regular maintenance on the western half of the road had occurred was not sufficient to establish abandonment or vacation by the public, and the question of abandonment or nonabandonment could not be determined as a matter of law on a summary judgment basis. The court stated that, ordinarily, public highways remain public unless and until vacated or abandoned by some appropriate action. The court also noted that the terms "abandonment" and "vacation" are often used interchangeably, but are not synonymous and that C.R.S. § 43-2-303 addresses methods of vacation of public roads. The Kobobels did not provide sufficient evidence pursuant to C.R.S. § 43-2-113 concerning abandonment, and raised no arguments or evidence pursuant to C.R.S. § 43-2-303(2)(b) concerning vacation, and therefore did not establish statutory abandonment or properly raise statutory vacation as a matter of law.

However, the court did agree with the Kobobels that evidence of nonuse creates a material issue of fact as to whether there had been common law abandonment of the public road. Abandonment of a public road requires proof of intent to abandon and proof of nonuse. Generally, whether the public road has been abandoned is a question of fact. Since the evidence presented to the trial court did not establish whether the eastern half of the road ever was a public road and, if it was, whether it had since been abandoned, material issues of fact remained. After considering briefly an issue with regard to indispensable parties, the court reversed the summary judgment decision and remanded the case to the trial court for further proceeding to determine disputed issues of fact.

Quiet Title — Decree of Dissolution — Joint Tenancy

In *Camack v. Camack*,[34] the parties' marriage was dissolved in 1989. The parties' separation agreement, incorporated into the dissolution decree, provided:

> [E]xcept as otherwise set forth herein, the parties have effected to their mutual satisfaction a division of all other property, real and personal, in which they had an interest, either singly or jointly. All such property which Husband and Wife now has [sic] in his or her control and possession shall be and remain his or her property respectively, free from any claim whatsoever on the part of the other.

The agreement also provided that the parties would execute necessary deeds and other documents. The family residence, which had been purchased in joint tenancy with right of survivorship, was retained by the husband, but the wife never deeded her interest to him. After he died in 1995, the wife brought a quiet title action, claiming the property under the joint tenancy right of survivorship.

The trial court received evidence that the husband had told a friend shortly before his death that he wanted the wife to have the property. The wife testified that the husband's sister gave her the 1987 deed to the property and told her that the property was hers. She also testified that she did not understand or speak English well and did not understand the divorce proceedings and the separation agreement/decree. She had left the property in fear of the husband and his sons. The trial court quieted title in the wife.

The court of appeals reversed, holding that the separation agreement and decree were self-execut-

ing and that no further action was required to accomplish the transfer of the residence to the husband. The agreement required the wife to execute a deed, but the wife's interest in the property terminated with execution of the separation agreement and its incorporation into the decree. To the extent the trial court relied on testimony of the husband's expression of intent that the wife have the property after his death, the court noted that the statute of frauds[35] required any such conveyance to be in writing. In addition, the statute of wills[36] requires written conveyance of any interest to take effect upon death.

Quiet Title — Forcible Entry and Unlawful Detainer — Non-Negotiable Instrument — Contingency on Promissory Note

In *Reid v. Pyle*,[37] Reid and Pyle were business partners and longtime friends. The defendant, Pyle, helped the plaintiff, Reid, with the financing and construction of a house, and at various times both Reid and Pyle lived in the house with their respective families, sometimes simultaneously. Reid and Pyle also pooled their funds in Reid's bank account, which they used as a joint account for household and personal expenses. Reid executed a promissory note in favor of Pyle, due on the transfer or sale of the property, together with a quitclaim deed transferring the property to Pyle for nominal remuneration and other consideration.

Over time, the relationship deteriorated, and Pyle recorded the quitclaim deed from Reid and commenced a forcible entry and unlawful detainer action to remove Reid from the property. Reid responded by filing a quiet title action. In the quiet title action, Pyle counterclaimed against Reid to recover money he allegedly lent to Reid to construct the house and purchase a motor home. The two cases were consolidated for trial.

On appeal, Pyle argued that the trial court erred in concluding that the parties had not formed a partnership with respect to the property. The court of appeals upheld the trial court's finding that there was no agreement to share profits and losses in the house venture and that the quit claim deed and promissory note indicated that Pyle's contribution was a loan collateralized by the house. Pyle also argued that, because the promissory note did not specify a time for performance, the trial court erred by concluding that it was due only upon sale or other transfer of the property. On this issue, the court of appeals found that the promissory note was not a negotiable instrument and that therefore Pyle would generally be required to prove that a sale or transfer of the property had occurred. However, the court of appeals stated that Pyle might be entitled to recover before the occurrence of a sale or transfer if Reid's lack of diligence in attempting to sell the house could be proved. While the court noted evidence that Reid had made some effort to sale the property before he executed the promissory note, it was apparent from the record that he had not attempted to sell the property after the execution of the promissory note and in fact had expressly refused to do so. The court therefore remanded the case to the trial court to determine whether Reid had made and was continuing to make a reasonable and good faith effort to market the property. If not, the trial court should order the promissory note immediately due and payable.

The statute of wills requires written conveyance of any interest to take effect upon death.

The remainder of the opinion discusses the purchase of the motor home. The court of appeals found error in the trial court's conclusion that Pyle's participation in vandalism of the motor home precluded his claim that Reid owed him for the purchase of the motor home. On remand, the trial court was to determine the nature of the transaction involving the purchase and financing of the motor home and whether Pyle had any rights in the motor home.

Lastly, the court declined to address a standing issue, which was not preserved. The court also found that Reid was not collaterally estopped from asserting a claim that Pyle vandalized the motor home simply because Reid's subrogated insurer dismissed its action against Pyle with prejudice. The court of appeals also found error in the admission of a police officer's affidavit of probable cause to arrest Pyle, but the error was deemed harmless. The judgment was affirmed in part, reversed in part, and the case was remanded.

Quiet Title — Public Road — Prescriptive Easement — Estoppel

In *Alexander v. McClellan*,[38] a buyer, Alexander, appealed the trial court's judgment dismissing his quiet title claim against the seller-defendant McClellan and the Board of County Commissioners of Douglas County. The dispute involved two lots located in the Town of Sedalia. Alexander's property was bounded on the north by Platte Avenue, which had been dedicated as a public road. A gravel road known as Karcher Street ran north and south over the adjacent lot near the western boundary of Alexander's property. As it neared Platte Avenue, Karcher Street crossed the extreme northwest corner of Alexander's property to connect with Platte Avenue. In 1986, the Board adopted a resolution vacating the portion of Platte Avenue abutting Alexander's property. No mention was made of Karcher Street in the resolution. After the resolution vacating a portion of Platte Avenue was passed, McClellan acquired title to vacated Platte Avenue, and several months later separately acquired title to the lot. Subsequently, McClellan conveyed the property to Alexander, but the conveyance made no reference to vacated Platte Avenue. As a result, Alexander acquired the lot but had no interest in vacated Platte Avenue to the north. Alexander filed an action against McClellan, the board, and the title insurance company (not a party to this appeal) seeking, in part, to prevent further use of that portion of Karcher Street that crossed his property. The board asserted that it was entitled to a prescriptive easement across the property for Karcher Street pursuant to C.R.S. § 43-2-201(1)(c). In response, Alexander argued that (1) the public's use had to be exclusive to support a claim under C.R.S. § 43-2-201(1)(c) and that the use had not been exclusive; (2) the board had abandoned Karcher Street when it vacated Platte Avenue; and (3) estoppel precluded the board's claim to Karcher Street. The trial court found that the board had established by the evidence that Karcher Street was a public highway pursuant to C.R.S. § 43-2-201(1)(c) and rejected each of Alexander's arguments.

Abandonment of a public road requires proof of intent to abandon and proof of nonuse.

On appeal, Alexander argued that the trial court erred in declaring Karcher Street a public highway because the public's use of Karcher Street had not been exclusive. In examining previous Colorado case law regarding prescriptive easements, and having examined C.R.S. § 43-2-201(1)(c), the court upheld the trial court's decision, stating that there was no requirement to show that the public's use of the property for road purposes had been its only use. Alexander also argued that the trial court erred in determining that the board had not abandoned Karcher Street, based on his interpretation of the resolution vacating Platte Avenue. The court of appeals stated that abandonment of a public road requires proof of intent to abandon and proof of nonuse. In examining the record, the court of appeals found that the evidence established only that the board had vacated Platte Avenue, north of Alexander's property. Thus, the court of appeals concluded that the vacation resolution and the board's minutes did not establish abandonment as a matter of law, and that the record supported the trial court's finding that the board had not abandoned Karcher Street. Alexander also argued that the trial court erred in finding that the board was not estopped from claiming Karcher Street as a public highway. The court rejected this argument, finding that Alexander was aware of the public's use of Karcher Street despite any language in the vacation resolution on which he allegedly relied. Further, the board was not a party to the transaction between McClellan and Alexander, and therefore could not be bound by any representation contained in the deed by which Alexander took title.

Revocation of Developer's Zoning Permit — Timeliness of Appeal — De Novo Review

In *City and County of Denver v. Board of Adjustment for the City and County of Denver*,[39] the plaintiffs, the City and County of Denver, Brian Volkman, and AGR, LLC, the developer of a multi-family residential development (developer), brought a proceeding under C.R.C.P. 106(a)(4) against David P. Spencer, a neighboring landowner, concerning a Board of Adjustment decision on the developer's proposed project. In November of 1999, the Zoning Administrator for the City and County of Denver approved the developer's zoning permit for construction of the development. The application for the permit was submitted as a small develop-

ment under Denver Revised Municipal Code § 59-49.9(d)(1), which excused the developer from providing notice to all landowners in the Glencourt/Stonemans Row subarea of the Platte River Valley Zoning District. The adjoining landowners were therefore not notified of the developer's application, nor of its approval. The developer began construction on February 11, 2000, and on February 16, 2000, the neighbor filed an objection with the Zoning Administrator, requesting that the permit be revoked because the project violated the Code. The Zoning Administrator denied the request in a letter the next day, which informed the neighbor that he could appeal to the Board of Adjustment. On February 24, 2000, the neighbor appealed from the denial of his request for revocation and asked that the Board of Adjustment revoke the permit and direct the developer to cease construction pending the outcome of the review. Following the evidentiary hearing held by the board, the board unanimously reversed the Zoning Administrator's decision and revoked the zoning permit. The City and County of Denver then sought review under Rule 106(a)(4), and the developer intervened. The district court reversed the findings and conclusions of the Board of Adjustment, and the neighbor appealed that decision.

Noting that its review was based solely on the record that was before the Board of Adjustment, the court of appeals stated that its decision must be affirmed unless there was no competent evidence in the record to support it such that it was arbitrary or capricious. The district court had found that the neighbor's appeal to the board was untimely. The court of appeals reversed, noting that an appeal must be filed in the office of the Board of Adjustment within 15 days of the action appealed. The developer argued that the "action" at issue was the decision of the Zoning Administrator to approve the developer's zoning permit for construction, while the neighbor contended that his February 24 appeal was timely from the Zoning Administrator's February 17 letter. The court of appeals agreed with the neighbor's argument, and declined to hold that the neighbor's right of appeal was extinguished 15 days after the issuance of the permit because the neighbor was not notified of the application for permit or the Zoning Administrator's decision to approve it until after the expiration of the 15-day period.

The neighbor also argued that the trial court erred by concluding that the board lacked the authority and power to review the Zoning Administrator's decision *de novo*. The City and County of Denver argued on appeal that the board applied an erroneous legal standard by reviewing the Zoning Administrator's decision *de novo* and that the board's decision was arbitrary and capricious because the neighbor introduced no evidence of error by the Zoning Administrator. The court disagreed with both arguments, referring to sections of the Code that expressly provide that the board has all of the powers of the officer or department from whom the appeal is taken. The court reviewed the record before the board and found ample competent evidence supporting its findings and conclusions, including admissions by both the developer and the Zoning Administrator that they did not follow the height measurement requirement of the Code; that the proposed project would have a density of approximately 22 units per acre, in violation of the Platte River Valley Subarea Code calling for low density residential development; and that the Zoning Administrator had promoted the goals of flexibility in the Platte River Valley Code at the expense of technical guidelines in the neighborhood plan. The court of appeals found a reasonable basis for the board's interpretation that the Platte River Valley Zoning District's allowance for flexibility may not circumvent the Code's technical requirements as a whole. The judgment in favor of City and County of Denver and the developer was reversed, and the case was remanded for entry of judgment affirming the trial court's decision.

Right to Redeem — Discharge of Lien by Payment to Attorney — Satisfaction of Judgment

In *National Real Estate Investment, LLC v. WYSE Financial Services, Inc.*,[40] National Real Estate Investment, LLC, the assignee of a judgment lien, appealed a summary judgment in favor of WYSE Financial Services, Inc. (the original judgment lienor and National's assignor), the assignor's attorney, the Douglas County Public Trustee, and the purchaser of Douglas County property at a foreclosure sale. The property was subject to a first deed of trust and was also encumbered by a junior judgment lien in favor of WYSE. The holder of the deed of trust foreclosed, and the Douglas County Public Trustee sold the property to RealAmerica at a fore-

closure sale and issued a certificate of purchase. The owner did not redeem the property. On the very date that the owner's right to redeem expired, WYSE assigned its judgment lien to RealAmerica and the assignment was promptly recorded. On that same day, RealAmerica filed a notice of intent to redeem the property. Three days later, National tendered to the Public Trustee the redemption funds for the property, and the Public Trustee issued a certificate

Once a lienor is issued a certificate of redemption, a purchaser at a foreclosure sale who is not the debtor is precluded from effecting the lienor's redemption rights.

of redemption to National. National did not file a substitution of parties or counsel after obtaining the assignment, and WYSE's attorney remained the attorney of record. The certificate of redemption issued to National was recorded a few days later, but before National's redemption period expired.

The day immediately prior to the expiration date of National's redemption period, RealAmerica requested that the county court accept payment in satisfaction of WYSE's judgment. The court refused the tender and instructed RealAmerica to tender the funds to the attorney of record for the judgment creditor of record, which was still WYSE. WYSE's attorney accepted the funds and executed a satisfaction of judgment on behalf of WYSE on the day National's redemption period expired. RealAmerica filed an acknowledgement of satisfaction of judgment with the county court and lodged the certificate of satisfaction with the Public Trustee that same day. The Public Trustee then refused to issue a deed after National's redemption because of conflicting demands made upon her by RealAmerica and National. National filed a motion to vacate the satisfaction of judgment with the county court, which was denied. National then filed an independent action with the district court, again seeking to vacate the satisfaction of judgment, to require the Public Trustee to issue a Public Trustee's deed to National, and to recover damages against WYSE, WYSE's attorney, the Public Trustee, and RealAmerica on various grounds. The district court denied WYSE's motion for summary judgment and later granted summary judgment in favor of WYSE, holding that the judgment was satisfied by the tender, without acceptance, of the funds to the county court. The court further held that the judgment lien was satisfied prior to the expiration of National's redemption period and therefore extinguished National's right to redeem.

On appeal, National contended that the district court erred by holding that RealAmerica extinguished National's right to redeem by satisfying the judgment through the tender of funds to the county court, without acceptance and deposit into the court registry. The court of appeals agreed, stating that a debtor or debtor's agent has the right to pay the judgment and therefore prevent a redemption by the assignee of a judgment. RealAmerica argued that pursuant to the terms of C.R.S. § 38-38-302(2), a certificate of redemption may be issued only after the expiration of the redemption period. Finding that statute inapplicable to judgment lienors, the court turned to C.R.S. § 38-38-303 pertaining to the time of redemption by a lienor, noting that that statute contains no limitation on when the certificate of redemption may be issued. The court thus held that once a lienor is issued a certificate of redemption, a purchaser at a foreclosure sale who is not the debtor is precluded from effecting the lienor's redemption rights. The purchaser was entitled only to recover the redemption funds, and National's redemption was subject only to the rights of persons subsequently entitled to redeem.

The court of appeals briefly entertained WYSE's argument that RealAmerica's action in the district court was barred by the principles of *res judicata* and collateral estoppel. The court of appeals found that the county court denied National's initial motion to vacate the satisfaction of judgment because it lacked jurisdiction over the subject property. As the county court refused to adjudicate the dispute because of subject matter jurisdiction, there had been no litigation and no adjudication on any substantive issue other than the county court's jurisdiction. National's independent action in the district court was therefore not barred by collateral estoppel. The case was remanded with directions that the trial court order the Public Trustee to execute and deliver to National a deed confirming the transfer of title to the property to National and to consider National's claims for damages against WYSE, *et al.*

Roadway — Vacation — De-Annexation — Disclaimer of Interest

Martini v. Smith[41] addresses a dispute concerning the ownership and permissible use of a platted road adjoining the plaintiff's properties. The road was first dedicated to public use in a subdivision plat in 1955. The subdivision was, at that time, part of the Town of Palmer Lake. In 1964, the town de-annexed the subdivision containing the road. The plaintiffs initiated this litigation against Smith (whose property abutted the road) and El Paso County seeking a judicial determination that they owned the road by virtue of the vacation and abandonment of the road or, alternatively, through adverse possession. In response to the complaint, El Paso County filed a disclaimer under C.R.C.P. 105(c) stating that it "hereby disclaims all right, title and interest in and to the property . . . denoted as the 'Former Simpson Road.'" Smith responded by filing a counterclaim asserting that he owned one-half of the road under Colorado's vacation statute[42] or, alternatively, that he had acquired rights in the road by adverse possession. The parties filed cross-motions for summary judgment on their claims to ownership of the road. The trial court granted the plaintiff's summary judgment motion, finding that Palmer Lake vacated the road upon de-annexation and that, at that point, the road ceased existence as a public road. The trial court also found that as a result of the vacation, the plaintiff, and not the defendants, owned the road. On appeal, the court of appeals concluded that the trial court erred in granting summary judgment to plaintiffs on the basis of the de-annexation. Specifically, the court of appeals held that an ordinance purporting to de-annex a subdivision does not conclusively vacate the public roads within the subdivision. That court remanded the case to the trial court to resolve the factual issue of whether the county had abandoned the road. The plaintiffs appealed that decision and the supreme court granted certiorari.

The supreme court held that a de-annexation ordinance, which does not include any language of vacation or language otherwise indicating that the city intended to vacate the public roadways, does not, by itself, vacate the public roadways in the de-annexed area. Rather, control of those roadways merely passes to the political subdivision in which the roadways are then located. Further, the supreme court held that, in the event the road had been used as a public roadway, the county's disclaimer of interest under C.R.C.P. 105(c) could not effect a vacation of the road because such a disclaimer would circumvent the provisions of the vacation statute. The plaintiffs argued that the county's expressed disavowal of all right, title, and interest in and to the road should preclude it from asserting any future rights over the road, contending that the supreme court should interpret C.R.C.P. 105(c) in accordance with a 1998 supreme court decision under which a litigant who had filed a disclaimer of interest under C.R.C.P. 105(f)(3) was forever barred from making further claims to that property. The court first noted that the record showed that there was no lis pendens filed on the road and therefore the disclaimer filed by the county was properly a C.R.C.P. 105(c) disclaimer and not a C.R.C.P. 105(f)(3) disclaimer. The court stated that C.R.C.P. 105(c) does not provide a specific bar to claims, unlike a disclaimer of an interest in property affected by notice of lis pendens under C.R.C.P. 105(f)(3). The court went on to hold that, in the event the road had been used as a public roadway, the county's disclaimer of interest under C.R.C.P. 105(c) could not effect a vacation of the road because such a disclaimer would circumvent the provisions of the vacation statute. The court remanded the case to the trial court for resolution of the remaining factual and legal issues.

C.R.C.P. 105(c) does not provide a specific bar to claims, unlike a disclaimer of an interest in property affected by notice of lis pendens under C.R.C.P. 105(f)(3).

Royalty Interest in Oil and Gas — Laches — Statute of Limitations

In *Keller Cattle Co. v. Allison*,[43] the Kellers bought a 6,200-acre ranch in Yuma County from the Allisons in 1972. The purchase contract provided that "sellers reserve ½ of royalties now owned by sellers. Also reserve ½ of royalties reverting back to ranch in 1973. Such reservations will expire 7-1-97." The deed more specifically described the reservation of oil, gas, or other mineral rights as

> an undivided one-half of the one-eighth royalty interest in and to all eight-eighths of such oil, gas and other minerals . . . free and clear of all costs into pipeline or other receptacles. . . . Provided, however, that in the event the royalty interest provided for in any future leases shall be greater or less than one-eighth, said Sellers shall own, hold and be entitled to receive an undivided one-half of said royalty interest. . .

However, the deed did not contain an expiration date for the reservation of the royalties.

In 1993, Keller Cattle, successor-in-interest to the Kellers' ownership of the ranch, requested that Allison sign a document confirming that the royalty reservations would expire on July 1, 1997. Allison refused to sign. Keller filed its action in 1999 for declaratory judgment that the contract language controlled over that of the deed, for reformation of the deed, and for damages for breach of contract and unjust enrichment. Keller also asked the court to declare that the royalty provision in the deed was either void under Colorado law or created only a fee mineral interest of six and one-quarter percent. The trial court granted summary judgment to Allison. It held that even if there were a factual dispute regarding the parties' intention to limit the Allisons' royalty share to 25 years, Kellers' claims were barred by the doctrine of laches and applicable statutes of limitation. The court held that, as a matter of law, the non-participating royalty interests were valid.

The court of appeals reversed the summary judgment, finding that there were genuine issues of material fact with regard to the elements of laches and the statutes of limitation issues. It recited the elements of laches as (1) full knowledge of the facts, (2) unconscionable or unreasonable delay in asserting an available remedy, and (3) intervening reliance by and prejudice to another. It held that Keller had raised factual issues as to each of the elements and was entitled to trial on the merits. With regard to statutes of limitation, the court noted that the statute of limitations argument was raised for the first time in Allisons' reply to Kellers' response to the summary judgment motion and that Keller had not had adequate opportunity to respond.

The court of appeals did uphold the trial court's determination that the non-participating royalty interests at issue were legally valid, rejecting Kellers' argument that the cases of *Simson v. Langhoff*[44] and *Corlett v. Cox*[45] precluded creation of a royalty interest claimed by Allison. It was also unpersuaded by Kellers' argument that the 1991 passage of C.R.S. § 38-30-107.5, which expressly permitted creation of a non-participating royalty interest, evidenced a change in the law, which Keller argued had prohibited such interest prior to 1991. It recognized that enactment of a statute may evidence a change in the law, but sometimes merely clarifies or codifies pre-existing law.

Because the trial court had not ruled on whether the doctrine of merger barred Kellers' claim or whether the deed should be reformed to conform to the terms of the contract, the court of appeals noted that the trial court should deal with those issues on remand.

Rule Against Perpetuities — Charitable Contribution Exception — Present, Reversionary Interest in Property

The court of appeals discussed the common law rule against perpetuities in *E-470 Public Highway Authority v. Argus Real Estate Partners, Inc.*[46] Britton Ranch owned certain real property in Arapahoe County, a portion of which was donated by Britton to the E-470 Public Highway Authority for the purpose of constructing the highway, pursuant to an Agreement to Donate Property, which was apparently entered into prior to the enactment of the Colorado Uniform Statutory Rule Against Perpetuities Act in 1991. However, the authority did not build any portion of E-470 on the property noted in the agreement, and the highway was constructed one-half mile from the property.

Pursuant to the agreement, Britton Ranch and the authority executed a gift deed that provided, in pertinent part, for the transfer of all of Britton Ranch's interest in the property, including "all the hereditaments and appurtenances belonging to the property, in anywise appertaining, and the reversion and reversions, remainder and remainders, . . . , and all the estate, right, title, interest, claim and demand whatsoever of [Britton Ranch], either in law or equity. . . ." Britton Ranch later assigned its rights in the agreement to Argus. The agreement contained a provision providing that, if the authority no longer had a need for all or any portion of the property acquired by it pursuant to the agreement, after passing an appropriate resolution, the authority would

offer the property for which it no longer had a need to Britton Ranch, or its successors and assigns, by quitclaim deed without charge.

The authority brought this action to remove a potential cloud on its title to the property caused by the language in the agreement. Argus counterclaimed, alleging that the language in the agreement required the authority to deed the property back to it. Both parties moved for summary judgment, and

Language in the agreement violated the rule against perpetuities because the provision did not establish when, if ever, the authority may determine that it no longer had need for the subject property rights.

the district court entered summary judgment for the authority and denied Argus' motion. The court found that the language in the agreement violated the rule against perpetuities because the provision did not establish when, if ever, the authority may determine that it no longer had need for the subject property rights.

On appeal, Argus contended that the trial court erred in applying the rule against perpetuities to invalidate its interest in the property. The court of appeals perceived no error. Argus first argued that it retained a present, vested interest in the property at all times by virtue of the reconveyance provision of the agreement. It characterized the subject provision as a present, reversionary interest in the property that would not be subject to the rule against perpetuities. The court agreed, citing case law that a reversion is certain to happen and is not subject to a condition precedent. The court found the interest contingent because the reconveyance language contained several conditions precedent to the quitclaim of the property to Argus, and that those contingencies prevented the absolute certainty of Argus' right to the property.[47]

Argus also argued that the agreement created a public charitable gift and was therefore not subject to the rule against perpetuities by reason of an exception to the rule for charitable gifts. Since neither party to the agreement was a charitable entity, the court determined that this argument failed.

Argus contended, in the alternative, that if the agreement violated the rule against perpetuities, public policy required that Argus' interest in the property be upheld, relying upon a Colorado Supreme Court decision holding that the rule against perpetuities would be applied to preemptive rights only where the purposes of the rule, such as presenting a practical restraint upon alienation or encouraging improvement of the property, are served. The court found Argus' reliance upon that previous ruling misplaced because the reconveyance language in the agreement did not ensure a sale at full market value upon the authority's determination that it no longer had a need for the property. Rather, the authority was required either to use the property or to give it away. The court stated that, because it was plainly in the authority's interest to keep and use the property pursuant to its broad statutory powers, transfer of the property would be restrained for all time by enforcement of the reconveyance provision.

During oral arguments, counsel for Argus raised the provisions of the Colorado Uniform Statutory Rule Against Perpetuities Act, under which the general assembly strongly turned away from the rule against perpetuities with respect to commercial property. Because Argus did not raise that argument in the trial court, the court of appeals declined to address it. Argus further argued that enforcement of the terms of the agreement would actually promote the policy of encouraging the property's improvement. Reasoning that, except for the cloud on title created by the reconveyance language in the agreement, the authority possessed a fee simple interest in the land which it may improve, convey, or retain for future sale or use, the court of appeals opined that the enforcement of the reconveyance language in the agreement would prevent the authority from selling the land for its fair market value by triggering Argus' rights under that provision.

Lastly, Argus argued that the trial court erred in denying its motion for summary judgment because the agreement requires the authority to return the property to Argus if the authority no longer needs the property for the purpose of constructing E-470. Because the court had already determined that the agreement was subject to the rule against perpetuities, and Argus had no remaining interest in the property, the court declined to consider this issue.

Since this decision was issued, Argus has filed an action under C.R.S. § 15-11-1104, under which a court may reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution. However, the complaint was dismissed last fall by the trial judge, who held that the reformation claim was barred by *res judicata*. The decision in that case opposes the holding in *Atchison v. City of Englewood*.[48] Advice from members of the Colorado bar to litigants of real property interests potentially affected by the rule against perpetuities is to plead a reformation claim in the alternative. No doubt the bar will hear more about this case in the future.

Sales Tax — Statutory Interpretation — Foreclosure by a Lienholder — Taxable Event

In *Telluride Resort & Spa, L.P. v. Colorado Dep't of Revenue*,[49] the supreme court affirmed a court of appeals' judgment upholding a sales tax assessment by the Colorado Department of Revenue. Sumitomo Trust and Banking Company, Ltd. held a wrap-around deed of trust encumbering the former Dorral Hotel and related personal property in Telluride. The mortgagee, not a party in this case, defaulted on its obligations and Sumitomo commenced foreclosure proceedings through the Public Trustee's office. Sumitomo successfully bid for the property at the public sale and subsequently assigned its interest in the certificate of purchase (prior to the expiration of the redemption period) to Telluride Resort & Spa, L.P. The Colorado Department of Revenue determined that Telluride had purchased an ongoing hotel business and therefore owed state and county sales taxes on hotel furniture, fixtures, equipment, and supplies totaling $175,680.11, together with $69,690.10 in interest. Telluride paid the taxes under protest and sought a refund of the entire amount, based upon a tax exemption under C.R.S. § 39-26-102(10)(j), which exempts the repossession of personal property by a chattel mortgage holder or foreclosure by a lienholder from the terms "sale" or "sale and purchase" set out in the statute. The trial court had held that Telluride, by virtue of Sumitomo's assignment of the certificate of purchase to it, had assumed Sumitomo's place as a lienholder and was therefore entitled to the exception to the "sale and purchase" definition of C.R.S. § 39-26-102(10). The court of appeals reversed the trial court, reasoning that Telluride had no interest in the personal property prior to the assignment of the certificate together with the promissory notes, security interests, and deeds of trust, and that Telluride was not a chattel mortgage holder or lienholder at the time of the foreclosure sale.

The supreme court upheld the court of appeals' decision, because Telluride did not repossess the property as a chattel mortgage holder or a foreclosing lienholder. Instead, Telluride purchased its interest in the personal property from Sumitomo, the holder of the public trustee certificate of purchase resulting from a foreclosure and public sale of the real and personal property. Thus, Sumitomo was the foreclosing lienholder, not Telluride. In making its determination, the court reviewed the definition of "sale" or "sale and purchase" under the statute and noted that it includes installment and credit sales and the exchange of property as well as the sale thereof for money, and every such transaction, conditional or otherwise, for a consideration, constituting a sale. The court then ruled that the assignment of the certificate of purchase met the definition of "sale and purchase" set out in C.R.S. § 39-26-102 (10).

"Every certificate of purchase . . . shall be assignable . . . and such assignee shall be treated for all purposes as the original holder of such certificate."

Telluride argued that its acquisition of the certificate of purchase from Sumitomo qualifies for the statutory exemptions available for repossession of personal property by a chattel mortgage holder or foreclosure by a lienholder under C.R.S. § 39-26-102(10)(j), referring to C.R.S. §§ 38-38-403 of the Colorado foreclosure statute, which states that "every certificate of purchase . . . shall be assignable . . . and such assignee shall be treated for all purposes as the original holder of such certificate." However, the court opined that the foreclosure statutes do not address the property sales tax consequences of a purchase transaction such as Telluride's and were not dispositive as to the tax issue. In examining the exception for repossession of personal property by a chattel mortgage holder or foreclosure by a lienholder, the court concluded

that, when the public sale occurred, Telluride was neither a chattel mortgage holder nor a lienholder, and therefore did not qualify for the exception.

Telluride also argued that, because the sale was conditioned on non-redemption, sales tax should not apply. However, the fact that the sale of the hotel property to Telluride became effective only upon expiration of the redemption period, and was conditional until then, did not remove the department's authority to tax the sale of the personal property. Had redemption occurred prior to the issuance of the deed, no sales tax would have been owed and any tax paid would have been subject to refund.

Based on the ruling of this case, it will be critical for purchasers of certificates of purchase to evaluate the property rights being transferred under an assignment of a certificate of purchase and to understand their obligation to file a sales tax return and pay the sales tax due on any personal property the purchaser may ultimately acquire under the certificate of purchase.

Statute of Reposed Effective Survey — Statutory Notice — C.R.S. § 13-80-105

In *Cornforth v. Larsen*,[50] Cornforth engaged the defendant surveyors to survey a 600-acre tract of land in San Miguel County and to prepare a subdivision plat for 35 acre lots. The survey, completed in October 1983, relied on monuments from a 1974 survey. The 1974 survey was corrected by the original surveyor in 1985. From 1983 through February 1992, the plaintiff sold some individual lots and, in February 1992, sold the rest of the subdivision property to a partnership. In 1995, the partnership learned that the 1983 survey was defective and sued Cornforth. That case was settled in 1997.

In 1998, Cornforth sued the surveyors for breach of contract and negligence. The defendant surveyors moved for summary judgment, asserting that the claims were barred by the 10-year statute of repose in C.R.S. § 13-80-105(1). Summary judgment was denied because C.R.S. § 13-80-105(3)(a) states that the limitations periods do not apply unless the documentary evidence of the survey contains a statement disclosing the three-year statute of limitation and the 10-year statute of repose. The survey in question did not contain the required language. The court of appeals affirmed the trial court's judgment.

Tax Deed — Deed of Trust — Assignment — Right of Redemption

In the case of *Columbus Investments v. Lewis*,[51] the supreme court granted certiorari on the issue of whether the original beneficiaries of a note and deed of trust retain an interest in the real property sufficient to warrant notice of the impending issuance of a treasurer's deed pursuant to C.R.S. § 39-11-128 when the original beneficiaries subsequently transferred the note and deed of trust to a third party pursuant to an agreement of which the stated purpose is for security for indebtedness of the original beneficiaries to the third party, but purports to assign to the third party all of the original beneficiary's right, title, and interest in and to the deed of trust. The court was asked to determine whether the county treasurer correctly followed the notice procedures of C.R.S. § 39-11-128(1)(a) in issuing notice of a pending tax deed following sale of a tax lien. The McClellans had loaned the Lewises money to finance the acquisition of a parcel of real property in Fruita. The loan was evidenced by a promissory note payable to the McClellans that was secured by a deed of trust on the property. The McClellans recorded the deed of trust. A few years subsequent, the McClellans transferred both the Lewises' note and deed of trust to Norwest Bank in connection with a loan from the bank. The McClellans signed a collateral assignment of interest in the deed of trust that provided, in part, that the McClellans were assigning to the bank all of their right, title, and interest in and to the deed of trust and assignment of rents as additional security for their indebtedness to the bank. Norwest subsequently recorded the assignment. In the meantime, the Lewises failed to pay the property taxes levied against the Fruita property, and the Treasurer of Mesa County sold a tax lien on the Fruita property. Columbus Investments purchased the tax lien, and after the statutory redemption period expired, Columbus

The court was asked to determine whether the county treasurer correctly followed the notice procedures of C.R.S. § 39-11-128(1)(a) in issuing notice of a pending tax deed following sale of a tax lien.

Investments requested that the county treasurer issue it a tax deed for the property. Based on a title report obtained from a title company, the treasurer provided notice of the pending issuance of the tax deed to the Lewises, Columbus Investments, Norwest, and certain other parties but not to the McClellans. Following the expiration of the redemption period, the treasurer issued the tax deed to Columbus Investments. When the Lewises learned of the issuance of the tax deed, they filed a quiet title action, asserting that the treasurer's deed

An assignee may acquire all of the rights formerly held by the assignor even absent endorsement.

was void because the treasurer had not given notice to all persons having an interest or title of record in and to the real estate pursuant to C.R.S. § 39-11-128(1)(a).

Clearly, the notice provisions of C.R.S. § 39-11-128(1)(a) require the treasurer to notify all persons having "an interest or title of record" in real property who have the right of redemption. Recognizing that a deed of trust does constitute a legal or equitable interest in real property for the purposes of the notice requirement, and noting that the treasurer properly gave Norwest notice pursuant to the assignment that had been recorded, the court examined the question of whether the McClellans were also entitled to notice. The Lewises argued that the McClellans retained an interest in the property entitling them to notice because the assignment of Norwest was only a security arrangement.

The Lewises contended that the agreement between the McClellans and Norwest took place in the context of a security transaction under Article 9 of the UCC, and therefore the McClellans transferred only a security interest and retained their right to the notice under C.R.S. § 39-11-128(1)(a). The court of appeals had found that the McClellans had retained a property interest in the property for purposes of C.R.S. § 39-11-128(1)(a) notification purposes because the record did not show whether the McClellans had endorsed the note itself over to Norwest Bank. The supreme court held that Article 9 governed only that part of the transaction involving personal property and did not affect rights in the underlying real estate. The supreme court also noted that an assignee may acquire all of the rights formerly held by the assignor even absent endorsement.

The supreme court further noted several policies of the general assembly that support its position that the McClellans did not require notice. First, C.R.S. § 4-9-207 of the Uniform Commercial Code protected the McClellans from any loss that might occur if Norwest had failed as the security holder to exercise reasonable care in the custody and preservation of the note and deed of trust. Second, the court stated that deeds of trust are frequently sold and assignments made and that the treasurer looks to "interests of record" when conducting his or her diligent inquiry under the notice provision. The court opined that the treasurer had reasonably relied on the language in the assignment of record when she performed her inquiry.

The court further stated that there was no question from the real estate records that the assignment, while made as security, was a complete conveyance of all of the McClellans' legal and equitable interests in the property to Norwest Bank. Because the agreement included the comprehensive assignment language, Norwest Bank had obtained the right of the McClellans, the original holders of the deed of trust, to the treasurer's notice under C.R.S. § 39-11-128(1)(a). The court also found that statutory notice under C.R.S. § 39-11-128 was not necessary to protect the McClellans' interest because the grantee of the tax deed takes the property subject to deeds of trust of record such as the one the McClellans assigned to Norwest Bank in this case. The court therefore reversed the judgment of the court of appeals and remanded the case with instructions to enter summary judgment in favor of Columbus Investments.

Transaction Broker — Real Estate Commission

In *Hoff & Leigh, Inc. v. Byler*,[52] a real estate broker sued the seller of real property to recover a brokerage commission. The seller had agreed to pay the broker a commission if the broker procured a purchaser for the seller's property that resulted in the sale of the property. The broker did procure a buyer for the property. The parties agreed that the broker would act as a transaction-broker for the sale. After a few delays, the sale closed. The seller, however, did not pay the broker a commission, and the broker filed this action. At trial, the court found

that the broker had satisfied the only two requirements for receiving a commission: the procurement of a buyer and the resulting sale of the property. The court rejected the seller's argument that alleged insufficiencies in the broker's performance warranted forfeiture of the commission and entered judgment for the broker.

On appeal, the seller argued that the broker had not performed the duties imposed by statute on transaction-brokers and therefore was not entitled to a commission. The court of appeals disagreed. The court found that, though a transaction broker has certain statutory obligations and responsibilities, including performing the terms of any written or oral agreement with any party to the transaction, exercising reasonable skill and care as a transaction-broker in performing duties including presenting offers and counteroffers in a timely manner, accounting for monies and property received, assisting the parties in complying with contractual terms and conditions, and disclosing certain information, the statute does not prescribe any remedy for any nonperformance of these obligations. Even though the broker admitted taking a very passive role in the consummation of the transaction, the court declined to find a forfeiture of the commission as a remedy for nonperformance.

The court also found that the seller was not entitled to an offset against the judgment for damages incurred because of the broker's nonperformance of statutory duties. The seller had not asserted a counterclaim and had not offered any evidence in the amount of damages, including the incurrence of legal fees because of the broker's nonperformance. The court affirmed the judgment in favor of the broker.

LEGISLATIVE DEVELOPMENTS

SB 02-084 — Concerning real property subject to judicial process (effective March 21, 2002)

This bill modifies several statutes, including C.R.S. §§ 13-52-102, 13-52-104, and 38-35-110.

- The bill makes certain technical changes to the requirements for entering and processing judgment liens.
- The bill specifies that a judgment lien may be filed against Colorado real estate only if it arises from a Colorado judgment or a foreign judgment that has been domesticated under the Uniform Enforcement of Foreign Judgments Act.
- The bill provides for the expiration of a lien after six years and for a procedure to continue the lien (the previously existing statute did not provide guidance on extending a lien).
- The statute addresses circumstances under which a property subject to a judgment lien is annexed or incorporated into another county.
- The bill clarifies that a lis pendens may be filed only with respect to an action brought in a Colorado state court or in a federal district court in this state.
- The bill modifies the length of time by which the one-year notice for options is extended by a notice of lis pendens in order to conform to previous revisions to C.R.S. § 38-35-110.

SB 02-161 — Concerning the modification of procedures for the foreclosure of deeds of trust (effective July 1, 2002)

This bill makes significant changes to the statutory provisions of the public trustee foreclosure statutes, and applies to all proceedings for the foreclosure of deeds of trust commencing on or after July 1, 2002.

- C.R.S. § 38-38-101(1) was amended to allow certain types of defined institutions to commence a foreclosure by producing a copy of the evidence of debt and a certified statement from the institution or its agent or attorney, which certified statement must, among other things, include a statement that the foreclosing party will be bound by the statutory indemnification provided for in C.R.S. § 38-38-101(1.6). By making this certification, the certifying institution is deemed to have agreed to indemnify and defend any person liable for repayment of any portion of the debt for any amount sought to be collected, other than the amount of any deficiency created at the foreclosure sale. The foreclosing institution is also deemed to

be indemnifying and defending any person who sustains a loss due to any title defect that results from reliance on a foreclosure sale at which the original evidence of debt was not presented.

- The bill changes the deadlines for the date by which the public trustee must send out the notice of right to cure or redeem from 10 days to 20 days after recording of the notice of election and demand. Additionally, the owner's notice of intent to cure is now required to be filed with the public trustee's office 15 days before the sale date. The owner's notice of intent to redeem now is required to be filed with the public trustee's office 15 days prior to the expiration of the redemption period. The legislation also limits the number of junior lienors who can redeem based on consensual liens recorded after the notice of election and demand is recorded. The statute allows only the three most senior lienors redemption rights.
- C.R.S. § 38-38-303 has been expanded to include additional types of costs and expenses that a redeeming lienor may incur (and therefore be reimbursed for) by redeeming junior lienors.
- A revision to the statutes requires that post-foreclosure liens on property must be recorded at least 15 days from the end of the owner's redemption period.
- Cure and redemption procedures were altered by the bill.
- The bill adds a new C.R.S. § 38-35-124.5 providing that parties providing closing and settlement services in connection with a real estate transaction are reasonably entitled to rely on written payoff statements that are addressed to them. This new section also creates liability for lenders who have provided a written payoff statement and received the funds identified in such statement, but do not timely comply with the release provisions of C.R.S. § 38-35-124. Further, a revision to C.R.S. § 13-80-103.5(1)(a) requires that causes of action under C.R.S. § 38-35-124.5(3) must be commenced within one year of their discovery, rather than the six-year time limitation normally specified for similar matters under C.R.S. § 13-80-103.5(1)(a).
- The bill allows an officer conducting a foreclosure sale to calculate the amount necessary to redeem the property, including the accrued interest, if the holder of the certificate of purchase fails to submit a statement of the sums necessary to redeem.
- An officer conducting a sale must promptly transmit to the holder of a certificate of purchase or the holder's attorney a written request for a statement of all sums necessary to redeem the sale.
- All practitioners whose practices include (directly or tangentially) foreclosure matters will want to read the entire bill.

SB 02-196 – Regarding designated brokerage (effective January 1, 2003)

This bill amends statutes concerning real estate broker licensure and real estate commission law.

- The bill amends C.R.S. § 12-61-801 to permit an employing broker to designate one or more brokers in a company to act as a single agent or transaction broker for a buyer or tenant, while designating one or more other brokers in the same company to act as single agent or transaction broker for a seller or landlord (referred to as "Designated Brokers").
- The amended statute provides that there is no imputation of knowledge from the Designated Brokers to the employing broker, although the employing broker has a duty to supervise the Designated Brokers.
- The bill prohibits dual agency arrangements.
- The bill creates a new C.R.S. § 12-61-803(7) which limits vicarious liability created under common law. Specifically, the new statute provides that no seller, buyer, landlord, or tenant shall be vicariously liable for a broker's acts or omis-

sions that have not been approved, directed, or ratified by the seller, buyer, landlord, or tenant.

SB 02-230 — Concerning the designation of the county in which specified actions related to the activities of a public trustee may occur (effective June 1, 2002, and applies to documents issued or recorded and to acts performed on or after November 15, 2001)

This bill clarifies which public trustee may perform his or her obligations when county boundary lines change or new counties come into being.

- The bill amends C.R.S. § 38-37-112 to provide that the public trustee of the county where the property is located at the time of execution of documents (such as releases of deeds of trust) by the public trustee, or the county in which the property was located at the time the deed of trust was recorded, is the proper public trustee to issue releases of deeds of trust or other documents issued by the public trustee.
- The bill also provides that such documents may be recorded in either county.

HB 02-1085 — Regarding changes in the deadlines for taxpayers to give notice of objection to valuation of real property by assessors (effective August 6, 2002, and applies to property tax years beginning January 1, 2003)

- This bill amends C.R.S. § 39-5-121 to provide that June 1 is the date by which any taxpayer may notify the county assessor of his or her objection and protest to the value of land and improvements.
- As to personal property, a taxpayer's notice of protest to the valuation of personal property (requiring a postmark by June 30 or a personal delivery by July 5) did not change.

HB 02-1088 — Regarding notaries public not licensed to practice law (effective August 7, 2002)

- This bill adds a new paragraph to C.R.S. § 12-55-107(1), which allows the secretary of state to deny an application for appointment or reappointment of, or revoke the commission of, any notary public if the notary public knowingly uses false or misleading advertising to represent a level of authority not permitted to a notary public by law.
- The bill adds a new section under C.R.S. § 12-55-110.3, which requires a notary public who is not a licensed attorney in Colorado and who advertises his or her services in a language other than English to include in the advertisement a notice (both in English and the other language) stating that he or she is not an attorney licensed to practice law and may not give legal advice or accept fees for legal advice.
- The bill also requires a notary public who advertises in a language other than English to post a list (both in English and the other language) of fees permitted by law for notarial services. The list is to be posted in a highly visible location at the notary's place to business.

HB 02-1111 — Concerning future advance provisions secured by deeds of trust or mortgages (effective August 6, 2002, and applies to mortgages securing future advances entered into on or after the applicable effective date)

This bill adds a new C.R.S. § 38-39-106 concerning future advances.

- The bill grants priority from the date of recording to advances made (both obligatory and optional) up to the stated maximum amount set forth in the mortgage, as if the total maximum principal amount had been fully disbursed on the date of recording.
- In addition, the amount of increased principal from negative amortization or deferred interest, disbursements made to pay taxes, levies, or insurance on the property, or disbursements made to protect the property from waste, damage, or abuse, reasonable expenses for collecting the debt and foreclosing, if the mortgage so provides for such expense, and interest

earned on any of those items listed is also expressly secured and enjoys the same priority, regardless of whether the amounts exceed the maximum principal amount stated in the mortgage.

HB 02-1119 — Concerning electronic documents (effective August 7, 2002)

- The bill adds a new C.R.S. § 30-10-405.5, which permits clerks and recorders to accept all documents by electronic filing.
- The bill requires clerks and recorders who decide to accept electronic filings to establish procedures for such filings.
- The bill establishes a surcharge of $1.00 (in addition to other fees) for each document received for recording or filing in the clerk's office. One-half of the surcharge is to be remitted to the state treasurer for the Electronic Filing Technology Fund, and the other one-half may be retained by the clerk and recorder to be utilized to defray the costs of implementing and providing electronic filing and recording.
- The bill modifies the Notaries Public Act to allow notaries to attest electronic records; sets forth the elements of an electronic signature of a notary public; and requires the secretary of state to establish rules for standards, procedures, practices, forms, and records relating to a notary's electronic signature.

HB 02-1130 — Concerning the Board of Real Estate Appraisers (effective April 12, 2002)

- This bill repeals the subsection of C.R.S. § 24-34-104 that provided for the termination of the Board of Real Estate Appraisers on July 1, 2002, and adopts a new subsection providing for the board's continuation until July 1, 2013.
- The bill provides that complaints in the office of the board and the results of staff investigations shall be closed to public inspection during the investigatory period, except as provided by court order.

HB 02-1139 — Concerning protections for persons on state military duty (effective July 1, 2002)

This bill adds a new Part to Article 3 of Title 28, entitled the Colorado State Military Service Civil Relief Act. The new Act generally provides relief in civil matters for persons called to state military service or active duty for more than 30 days.

- The statute allows a court to stay proceedings involving military personnel for the duration of the service or duty, and for up to 30 days after, or to otherwise dispose of the case in order to conserve the interests of the parties.
- The types of cases subject to the statute are civil proceedings, proceedings involving residential property, actions involving installment contracts, and actions to enforce mortgage obligations or other secured interests in property.
- The statute requires the court to stay the proceedings, unless the ability of the person to proceed or to fulfill his or her legal obligations is not materially affected. The person in question must furnish a copy of his or her orders and a statement from the adjutant general verifying continuous service in order to receive any of these stays.

HB 02-1191 — Amending the Colorado Common Interest Ownership Act (effective August 6, 2002)

This bill revises some of the provisions of the Colorado Common Interest Ownership Act.

- The bill allows court-approved amendments to a declaration of a pre-existing common interest community, notwithstanding any limitations in the governing documents.
- The bill clarifies that common elements may be transferred in certain circumstances.
- The bill extends the time limit for an executive board of a common interest community to notify unit owners of a proposed budget from 30 days to 90 days after adoption.
- The bill allows a proposed budget to be deemed approved, unless the unit owners

veto it at the meeting set for the owners to consider the budget.
- The description of what matters may be discussed in executive session have been expanded to include the managing agent's contract and review or discussion of communications from legal counsel.

HB 02-1259 — Regarding protection of consumers' home ownership equity (effective June 7, 2002)

This statute amends the Uniform Commercial Credit Code to address certain predatory lending practices.

- The bill includes new consumer equity protection for high-cost first-mortgage loans by prohibiting or limiting prepayment penalties, balloon payments, and certain other contract terms that were previously legal.
- The bill prohibits higher interest rates upon default on "Covered Loans" as defined in the statute.
- The bill requires that a specific consumer notice be given in writing to the obligor under a "Covered Loan."

Practitioners whose practices include consumer credit matters will want to review the entire bill carefully, as this brief summary is not all-inclusive of each of the significant changes to the Code.

HB 02-1265 — Concerning clarification of the property tax status of certain residential real property (effective August 6, 2002, and applies to the taxation of residential units for property tax years 2002 forward)

This statute modifies the classification of condominiums and timeshare units by excluding them from the definition of hotels and motels under C.R.S. § 39-1-102(5.5)(a). Thus, condominiums and timeshare units will be classified as residential property only.

HB 02-1288 — Concerning the assessment of property for property tax purposes (effective August 6, 2002)

- This bill adds a new paragraph to C.R.S. § 39-5-132 requiring the county assessor of each county to apply the residential assessment rate to both the residential improvements and the land formerly classified as vacant land for the taxable year in which the tax assessor adds the valuation of new improvements to the abstract for assessment.
- The bill also specifies that, when the market approach is used to determine the value of residential real property, the conversion from one residential use to a different residential use will create a rebuttable presumption that the sale of the property is not a comparable sale for purposes of establishing the value of a property having a similar prior residential use.

HB 02-1358 — Concerning the assessment of a bed and breakfast for property tax purposes (effective January 1, 2003)

- This bill adds a new subsection to C.R.S. § 39-1-102 to define the term "bed and breakfast."
- The bill adds a new subsection to C.R.S. § 39-1-103 describing how a bed and breakfast is to be assessed. Recognizing that bed and breakfasts are unique mixed-use properties, the statute provides for assessment depending on the type of area within each bed and breakfast (*e.g.*, commercial lodging area, residential).

Ordinance No. 7158 (codified as § 12-2-4 of the Boulder Revised Code) concerning landlord's responsibility to educate tenants (effective April 19, 2002)

- Under this ordinance, landlords of real property located within the City of Boulder are now required to provide each tenant with written information that discloses certain city regulations, including information on occupancy limits, noise, trash and snow removal, fireworks, and certain parking regulations.
- As to leases already in force, a letter explaining the relevant ordinances will satisfy the landlord's responsibility. Otherwise, landlords are encouraged to make required disclosures when lease agreements are executed in order to pro-

mote discussion of these regulations. Property managers, however, are allowed to make the written disclosures at any time.
- The ordinance prescribes a maximum penalty for violation of $500.00.

NOTES

1. *Board of County Comm'rs v. City of Aurora*, 62 P.3d 1049 (Colo. App. 2002).
2. C.R.S. §§ 31-12-101, *et seq.*
3. C.R.S. §§ 32-1-101, *et seq.*
4. *C Bar H, Inc. v. Board of Health*, 56 P.3d 1189 (Colo. App. 2002), *cert. denied* Oct. 21, 2002.
5. *Westec Constr. Mgmt. Co. v. Postle Enterprises I, Inc.*, 32 Colo. Law. No. 1, p. 164 (Colo. App. 2002).
6. *Brush Creek Airport, LLC v. Avion Park, LLC,* 57 P.3d 738 (Colo. App. 2002).
7. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234 (Colo. 1998).
8. *Brush Creek Airport, LLC*, *supra* n. 6, *citing Freeman v. Rost Family Trust*, 973 P.2d 1281, 1284 (Colo. App. 1999).
9. *Sunstone at Colorado Springs Homeowners Ass'n, Inc. v. White*, 56 P.3d 127 (Colo. App. 2002).
10. *Jagow v. E-470 Public Highway Auth.*, 49 P.3d 1151 (Colo. 2002).
11. *Silver Dollar Metro. Distr. v. Goltra,* 31 Colo. Law. No. 12, p. 180 (Colo. App. 2002).
12. *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).
13. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).
14. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
15. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).
16. *Tahoe-Sierra Pres. Council*, 535 U.S. 302, *citing Armstrong v. U.S.*, 364 U.S. 40, 49 (1960).
17. *Brush Grocery Kart, Inc. v. Sure Fine Market, Inc.*, 47 P.3d 680 (Colo. 2002).
18. *Wiley v. Lininger*, 204 P.2d 1083 (Colo. 1949).
19. *Ford v. Summertree Lane Ltd. Liab. Co.*, 56 P.3d 1206 (Colo. App. 2002), *cert. denied* Nov. 4, 2002.
20. *Lakeside Ventures, LLC v. Lakeside Dev. Co.*, 31 Colo. Law. No. 12, p. 168 (Colo. App. 2002).
21. *City of Boulder v. Fowler Irrevocable Trust*, 53 P.3d 725 (Colo. App. 2002), *cert. denied* Aug. 26, 2002.
22. *Coe v. Crady Davis Corp.*, 60 P.3d 794 (Colo. App. 2002).
23. *Integra Fin., Inc. v. Grynberg Petroleum Co.,* 31 Colo. Law. No. 12, p. 159 (Colo. App. 2002).
24. *Lobato v. Taylor*, 31 Colo. Law. No. 8, p. 203 (Colo. 2002).
25. Now C.R.S. §§ 38-36-101, *et seq.*
26. *Kerns v. Kerns*, 53 P.3d 1157 (Colo. 2002).
27. *Nielson v. Scott*, 53 P.3d 777 (Colo. App. 2002), *cert. denied* Sept. 16, 2002.
28. *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215 (Colo. 2002).
29. C.R.S. § 13-21-115.
30. *Kirk v. Kitchens*, 49 P.3d 1189 (Colo. App. 2002).
31. *Weisiger v. Harbour*, 62 P.3d 1069 (Colo. App. 2002).
32. *Hillside Cmty. Church v. Olson*, 58 P.3d 1021 (Colo. 2002).
33. *Board of County Commissioners v. Kobobel,* 32 Colo.Law. No. 2, p. 153 (Colo. App. 2002).
34. *Camack v. Camack*, 62 P.3d 1097 (Colo. App. 2002).
35. C.R.S. § 38-10-106.
36. C.R.S. § 15-11-502.
37. *Reid v. Pyle,* 51 P.3d 1064 (Colo. App. 2002).
38. *Alexander v. McClellan*, 56 P.3d 102 (Colo. App. 2002).
39. *City & County of Denver v. Board of Adjustment*, 55 P.3d 252 (Colo. App. 2002), *cert. denied* Oct. 15, 2002.
40. *National Real Estate Inv., LLC v. WYSE Fin. Services, Inc.*, 31 Colo. Law. No. 6, p. 177 (Colo. App. 2002).
41. *Martini v. Smith*, 42 P.3d 629 (Colo. 2002).
42. C.R.S. § 43-2-301.
43. *Keller Cattle Co. v. Allison*, 55 P.3d 257 (Colo. App. 2002).
44. *Simson v. Langhoff*, 293 P.2d 302 (Colo. 1956).
45. *Corlett v. Cox*, 333 P.2d 619 (Colo. 1958).
46. *E-470 Public Highway Auth. v. Argus Real Estate Partners, Inc.*, 31 Colo. Law. No. 5, p. 176

(Colo. App. 2002).

47. Interestingly, the court did not, in its opinion, consider whether Argus' rights are another type of interest in real property that is not subject to the rule against perpetuities.

48. *Atchison v. Englewood*, 506 P.2d 140 (Colo. 1973).

49. *Telluride Resort & Spa, L.P. v. Colorado Dep't. of Revenue*, 40 P.3d 1260 (Colo. 2002).

50. *Cornforth v. Larsen Surveying*, 49 P.3d 346 (Colo. App. 2002), *cert. denied* July 1, 2002.

51. *Columbus Investments v. Lewis* 48 P.3d 1222 (Colo. 2002).

52. *Hoff & Leigh, Inc. v. Byler*, 62 P.3d 1077 (Colo. App. 2002).

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