



COLORADO REAL ESTATE JOURNAL

THE COMMUNICATION CHANNEL OF THE COMMERCIAL REAL ESTATE COMMUNITY

DECEMBER 19, 2012 – JANUARY 1, 2013

2012: Reviewing legal issues for CRE

Although 2012's Colorado legislative session did not produce significant legislation impacting real estate, a few cases sent some interesting signals to those involved in real estate here in Colorado. As we approach year-end, let's briefly review some of this year's important case law developments that may affect the real estate industry.

■ **Water Supply Plans.** In *Chatfield Community Association v. Board of County Commissioners of Douglas County*, Case No. 2011CV1437, the Douglas County District Court invalidated Douglas County's approval of the Sterling Ranch Planned Development. The court overturned the approval of the 3,000-acre development on the basis that the applicant, Sterling Ranch LLC, failed to present and demonstrate an adequate water supply for the entire development when it submitted its initial plans. The court found that because Sterling Ranch failed to provide an adequate water supply plan, the county's approval of the planned development was an abuse of discretion. Specifically, the court noted that Douglas County regulations and Colorado law both require a developer to present an adequate water supply plan at the time of the PD application rather than during a subsequent development phase. Douglas County and Sterling Ranch argued that it was appropriate to present the water supply plan during a subsequent development phase because, during subsequent stages in the development process, the plans for land-use type and project density become clearer. The water demand, in turn, also becomes clearer and the need for water more immediate. Moreover, requiring a water supply plan at the initial development stage requires the developer to make a significant capital investment for water acquisition and/



James M. Mulligan, Esq.
Senior real estate partner, Snell & Wilmer LLP, Denver

or reservation that may not be necessary or appropriate for many years, if ever, and requires significant speculation regarding the actual future water demand. Although the court conceded that the county could determine when during the review process the water supply plan was required, the county could not postpone the submission of a water supply plan until a future development application. We do not believe we have seen the last of this issue, either in the courts or at the statehouse.

■ **Oil and Gas Regulations.** The state of Colorado sued the city of Longmont in Boulder County District Court seeking to invalidate a portion of Longmont's oil and gas regulations that conflict with state rules. Specifically, the state asserted that Longmont's regulations stepped on the state's authority to regulate the oil and gas industry and that the development of oil and gas resources is a matter of statewide concern and should be dealt with at the state level and not locally. While the litigation is still in the preliminary stages, it will be fascinating to watch the collaboration between state and local officials to address all the land-use issues that go along with and are affected by oil and gas development along the Front Range and across the state, particularly in light of Longmont's recent ballot measure last month that prohibits the use of hydraulic fracturing. More to come.

■ **Marijuana-Related Businesses.** In *Haeberle v. Lowden*,

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Jason B. Brinkley, Esq.
Real estate associate, Snell & Wilmer LLP, Denver

retail medical marijuana dispensary, for breach of contract after Blue Sky failed to pay for the marijuana it received from the grower. Although the court found that the parties entered into a valid contract under Colorado law, and that the contract had been breached, the court found in favor of Blue Sky. The court's ruling was based on the well-established legal principle that any contract that contravenes public policy is not enforceable. Under that court's reasoning, any contract concerning or addressing illegal activities, whether those activities are illegal under state or federal law, violates public policy and cannot be judicially enforced. While not directly a real estate-related case, the case underscores both the risk and uncertainty of conducting marijuana-related business (including leasing property to marijuana related businesses) and the conflict between state and federal marijuana laws and enforcement. In the words of Colorado Gov. John Hickenlooper, "Federal law still says marijuana is an illegal drug so don't break out the Cheetos or Goldfish too quickly."

■ **Pipeline Condemnation Authority.** In *Larson v. Sinclair Transportation Co.*, 2012 CO 36, the Colorado Supreme Court ruled that C.R.S. § 38-5-105 does not

provide condemnation authority to a company for the construction of a petroleum pipeline. Sinclair, a company constructing a petroleum pipeline, sought to acquire a 50-foot easement on Larson's property to install a pipeline that would transport petroleum products. Larson refused to grant the easement, and Sinclair petitioned the trial court for immediate possession of the desired property. The trial court found that Sinclair had authority to condemn Larson's property under C.R.S. § 38-5-105, one of several Colorado statutes providing authority to condemn. The court of appeals affirmed, and Larson appealed to the Colorado Supreme Court. On appeal, the Supreme Court held that C.R.S. § 38-5-105, did not grant Sinclair the power of eminent domain for the purpose of constructing a petroleum pipeline. Instead, the Supreme Court held that C.R.S. § 38-5-105 was intended to authorize condemnation for the purpose of constructing electric power infrastructure. Accordingly, the Supreme Court reversed and remanded the case to the District Court. While the case expressly deals with petroleum pipelines, it did not address condemnation authority under the many other statutes providing for condemnation authority under various scenarios. Larson illustrates the need for companies and entities to look to these other condemnation statutes and consider invoking additional bases for condemnation authority.

■ **Legislation Forecast for 2013.** While the courts were busy this past year, it was a relatively quiet year for real estate issues at the Capitol; however, 2013 looks to be a different story. We anticipate legislation to address many real estate issues, including all, or most, of these issues noted above. Stay tuned.▲