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Reviewing 2013 CRE legal issues

In Colorado, 2013 was an interesting, if not bountiful, year for real estate in the courts and at the state Legislature. Following are a few issues that did arise and impact the way different aspects of real estate are conducted.

■ **Entitlements: Water Supply Plans Update.** In 2012, the Douglas County District Court decided *Chatfield Community Association v. Board of County Commissioners of Douglas County*, Case No. 2011CV1437, invalidating Douglas County's approval of the Sterling Ranch Planned Development ("Sterling Ranch") because Sterling Ranch LLC failed to demonstrate an adequate water supply for the entire development in its initial plans. As anticipated, the court's decision triggered legislative action. In early 2013, Colorado legislators passed Senate Bill 13-258, which clarifies that a developer does not have to show water adequacy for an entire development up front, but may demonstrate sufficient water supply in phases throughout the approval process. Further, the new law provides that "the local government, in its sole discretion, not only makes the determination but also possesses the flexibility to determine at which stage in the development permit approval process the determination will be made." The bill's passage gave the Sterling Ranch application another chance at approval. In July, Douglas County affirmed its original decision and again approved Sterling Ranch. However, Sterling Ranch may be halted once more. A community association challenged the new approval, alleging that: 1) Sterling Ranch still does not have an adequate water supply; and 2) Douglas County approved a closed, not pending, application. The court has yet to address this new challenge.

■ **Construction Trust Fund Statute.** The recent Supreme



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

Court decision in *Yale v. AC Excavating Inc.*, 2013 CO 10, clarified the scope of Colorado's construction trust fund statute, C.R.S. § 38-22-127. The trust fund statute requires all funds disbursed to a contractor on a construction project to be held in trust until subcontractors are paid. The case involved a development company that exhausted its construction financing mid-project, leaving subcontractors unpaid. A company manager deposited his own money into the company's account to pay operating expenses and keep the company in business. The issue was whether the deposited funds fell within the scope of C.R.S. § 38-22-127 and must be held in trust to pay subcontractors. The court concluded that the manager's capital contribution did not constitute "funds disbursed on a construction project" under the trust fund statute. The capital was instead disbursed to finance general operations and therefore was not required to be held in trust. The court explained that to construe §38-22-127 to encompass all funds loaned to a development company, regardless of the purpose for which the funds were advanced, would discourage managers from investing in a struggling company.

■ **Municipal District Financing.** In *Todd Creek Village Metropolitan District v. Valley Bank & Trust Co.*, 2013 COA 154. No. 12CA1302, the Colorado Court of Appeals held that the Todd Creek Village Metropolitan District (the "district") had both consti-



Jason Brinkley
Real estate associate, Snell & Wilmer LLP, Denver

tutional and statutory authority to enter into loans with Valley Bank & Trust Co. In *Todd Creek*, the district obtained and defaulted on a general obligation loan from Valley Bank. The district attempted to void the loan and its repayment, arguing that the loan did not meet constitutional and statutory requirements for municipal district financing. First, Article XI, Section 6(1) of the Colorado Constitution requires local governments to receive voter approval before issuing debt. Here, the district's voters approved issuance of general obligation debt. However, the district argued that its loans were invalid because the approved proposal did not identify the specific collateral. The Court of Appeals disagreed, holding that the Colorado Constitution requires the ballot initiative to inform voters of the district's intent to issue general obligation debt, but does not require identification of the specific assets to be pledged. Such a narrow interpretation of Section 6(1) would restrict districts from asking voters to approve debt until specific collateral was identified. Second, C.R.S. §§ 32-1-101, et. seq. require a potential municipality to file a financial plan with the board of commissioners and conform to the plan "so far as practicable." The district argued that its plan, approved by the Adams County Board of Commissioners, did not provide for the issuance of general obligation debt. The court again disagreed, finding that the plan did not explicitly disallow general obligation debt. There-



Andrea Fitzgerald
Real estate associate, Snell & Wilmer LLP, Denver

fore, the loan substantially conformed to the approved plan, as it did not go against its provisions. Overall, the district could not avoid its loan.

■ **Colorado State Land Board Legislation.** In 2013, House Bill 13-1274

was enacted to provide the State Board of Land Commissioners with a consistent mechanism to invest in large commercial real property holdings and to generate revenue for the state school lands by leasing the acquired property. To accomplish this purpose, the legislation granted the board authority to instruct the state treasurer to enter into lease-purchase agreements on behalf of the state school lands for the acquisition, construction and renovation of commercial real property. The board will then lease the property as office space to state agencies or other tenants. HB 13-1274 authorizes the issuance of \$50 million of lease-purchase agreements per year.

Space limitations prevent covering unreported cases unless they result in subsequent legislation, such as the *Chatfield Community Association* case referenced above. Accordingly several trial cases cannot be covered (e.g., *Landmark Towers Ass'n, Inc., et. al. v. Marin Metro. District, Colorado Bondshares, et. al.*, Case No. 11CV1076; etc.) that may become important if appealed or otherwise result in legislation.

The impact of these laws and cases will be felt during the ensuing year and attention to them is likely to be helpful. Stay tuned as these matters become implemented.▲