

MINUTES

CBA Real Estate Law Section Council

Date: Tuesday, November 21, 2017 – 3:00 p.m.

Colorado Bar Association Offices

1900 Grant Street, 9th Floor

Denver, Colorado

Attendees: See attendance sheet attached hereto.

1. Call to Order

Mr. Calvin called the meeting to order at 3:05 pm.

2. Introduction of Guests

No guests were in attendance.

3. Approval of October Minutes

Mr. Cox moved approval of the October minutes. Mr. Schwartz seconded the motion. The minutes were unanimously approved as presented.

4. Financial Report

Ms. Leff reported that the current balance in the Real Estate Section's account as of October 31, 2017, is \$79,289.11. This balance puts the Section just a little ahead of where it was last year at this time. Mr. Calvin reminded everyone that the dues did not increase for Section members in 2017.

5. Chair's Report

a. Mr. Calvin reminded Council about the RESC Holiday Party scheduled for November 30th at Nicole Nies' home. Ms. Sreenen asked everyone to please indicate plans to attend as soon as possible. The last guest count was 45 to 50 people. Ms. Nies stated that 75 to 80 people usually attend. Mr. Calvin requested that Ms. Sreenen send a reminder.

b. CU Law Legal Community Fair

Mr. Calvin noted the invitation in the agenda materials for a January 12th event at CU Law. This is a Friday afternoon/early evening introduction of CU Law students to members of the Bar. Please respond with your intent to attend, by name and organization, by December 12th. You will get a name tag, a visit to Boulder, and drinks. Mr. Chris Payne introduced a challenge to Real Estate Section from the Business Law Section (BLS): BLS plans to bring tchotchkes.

c. Bylaws Revision Update

Mr. Calvin thanked Ms. Brimah and Mr. Schwartz for responding to the request for help on the Bylaws revision project. Mr. Calvin plans to circulate a draft revised document after the Thanksgiving holiday weekend, with the anticipated need to approve Bylaws revisions in December. RESC may need to vote by email on Bylaws changes. Council members will get to review redlined changes and offer comments prior to the vote.

d. Committee Roles

Mr. Calvin brought to Council's attention past discussions focused on CBA Best Practices and the need for the committees to conform to the Best Practices recommendations and requirements. In particular, Membership and Practice Development Committee will need to pay attention to the Best Practices mandates and recommendations.

e. December Meeting and Decisions by Email

Mr. Calvin announced that RESC does not plan to hold a December meeting unless Mr. Schupbach indicates a need due to legislative issues.

REPORTS AND INFORMATIONAL ITEMS

6. Legislative Update

a. Proposed Changes to Foreclosure Statutes

Mr. Lubinski reported on the foreclosure working group meetings during October that yielded a draft document for review. The draft does not necessarily capture all of the issues identified by the working group from an initial list of over 60 concerns. Per Mr. Calvin, the Denver Public Trustee's office has spearheaded the work up to this point, without clear support from the Public Trustees' Association of Colorado (PTAC). Per Mr. Schupbach, not a lot of insight is available as to PTAC's position. In response to a question about the problems addressed by the proposed changes, Mr. Calvin reported that the revisions would address primarily procedural issues and how to handle singular incidents, including those involving redemption and successive foreclosures – such as the desire by the holder of a certificate of purchase from a foreclosure sale under a junior lien to redeem as a junior lienor following a later foreclosure sale under a senior lien. Mr. Lubinski recounted that the topics initially got divided into procedure, substance, and typographical errors. Mr. Toft asked whether Rich Krohn was involved as PTAC's attorney. Mr. Krohn's involvement is not yet apparent, according to Mr. Calvin.

b. Remote Notarization Draft Bill

Mr. Calvin shared that RESC received a draft bill, but that draft has not yet been reviewed and compared to the last version submitted by RESC. Per Mr. Schupbach, this draft bill remains a work in progress and everyone will likely feel like they won a little and lost a little. Mr. Schupbach will determine the follow-up meeting date with the Secretary of State and report back to the working group.

c. Uniform Laws 2018

Mr. Schupbach indicated that no Uniform Laws other than the Uniform Trust Code (UTC) need attention from the RESC. Mr. Calvin noted comments from Mr. Chris Payne about BLS concerns regarding business trusts and the importance of excluding business trusts from the UTC. Trust and Estate Section agrees, according to Mr. Kirch. Per Mr. Schupbach, the language from BLS has already gone to the bill drafter for inclusion.

d. Title 12 Recodification Update

Per Mr. Schupbach, the Title 12 Recodification will not occur during the 2018 legislative session.

e. Review of Legislative Spreadsheet

Ms. Leff presented an overview of the legislative spreadsheet, tracking process, and expectations for RESC members' review and comment on bills once the legislative session starts.

7. Off-Record Title Exceptions and Recording Surveys

Ms. Kube reported that she has started seeing more off-record matters as exceptions to title. The first example involved an ESI document that was the assessor's aerial photo of the property. Another title commitment referenced two unrecorded ALTA surveys without a clear way to obtain them. Subsequently, on the High Altitude listserv, a person provided a document indicating that title companies can link to these ESI and ALTA documents through a central depository. Discussion ensued about the depository and the appropriateness of recording surveys. Conversation then turned to the propriety of including exceptions as part of the deed, which leads back to the Section 13/Warranty Deed task force. Mr. Calvin noted that recording off-record matters because the title company finds the matters to be potentially important and includes them in exceptions does not seem like a good enough reason to include reference to them in a recorded deed. Questions were posited about this practice migrating from other states that require recording of surveys. Surveys present different issues for insurance versus deeding. Mr. Chris Payne expressed hope that Section 13 of the contract will address this issue rather than a new practice of including surveys on the list of exceptions and recording the surveys. Mr. Cox reported that the Real Estate Commission meets on December 5th to decide what to do with the Section 13 language in the contract. If approved by the Commission, the language will go back to forms committee for further revision. Per Mr. Cox, no one is sure how the language will look after this process. The proposed language would have the deed match the title commitment exceptions.

Mr. Calvin highlighted a few other potential legislative issues, including (1) those arising from Steck's Addition maps superseded by later maps, with some discrepancies between the two; (2) situations where people and entities change their names without clear records of the name change and ties to property. Mr. Calvin and Mr. Schupbach are working on setting a meeting to discuss receptiveness to a legislative fix.

Mr. Calvin also explained concerns about bargain and sale deeds under the current statutory language, which applies common law and may negatively affect the intended legal effect of bargain and sale deeds due to the common law application of a "covenant of seisin" and requirement that grantee give the grantor actual payment or other valuable consideration. The issue arises under the Statute of Uses. Mr. Calvin mentioned that a 1906 law review article had discussed the possible risks of failure to comply with common law requirements but had noted that

American court decisions often declined to enforce some common law requirements. Given the statutory language, concerns exist about the use of bargain and sale deeds generally and how they may operate in the context of gifts or to distribute assets of a trust or decedent's estate. Mr. Chris Payne added that water lawyers use bargain and sale deeds for water rights. The after-acquired title piece aspect of bargain and sale deeds adds utility, as does the removal of the quitclaim stigma.

8. Department of Regulatory Agencies Sunset Reviews

Mr. Calvin told Council members to expect bills on the following issues in 2018: Civil Rights Division; Community Association Managers; Conservation Easements; and Mortgage Loan Originators.

9. Board of Governors

Ms. Dunn reported that the next Board of Governors meeting is scheduled for May 5, 2018.

10. Education/Topical Lunches Committee

Ms. Alderman reported that the November topic was due diligence around special districts. Eben Clark will provide the January program, titled, "Ground Leases: A Few Basics, A Few Specifics, and How to Make Them Financeable," which will offer a survey of basic issues in ground leasing, specific characteristics that differentiate ground leases, and certain provisions that are key to leasehold financing. Tracey Clark will speak about 1031 exchanges in February.

11. Interprofessional Committee

Mr. Cox reported that the IPC met twice since the last RESC meeting. Notes from the October meeting were included with the agenda. The November meeting included lobbyists. Mr. Schupbach attended. With the upcoming election year, groups will have a hard time getting bills passed. The Colorado Association of Realtors (CAR) may introduce some affordable housing stuff. CAR has looked at the deed fee issue as a way of funding affordable housing even though CAR had opposed this approach in the past. The Denver "green roofs" and affordable housing "first right" ordinances also came up. The "first right" ordinance issue looks problematic. So far, Denver has not exercised its right of first refusal. Lenders have voiced concern about priority when Denver can step in and acquire a property and title issues arising from this right. Written waivers from Denver have satisfied title companies in some transactions. Ms. Alderman recommended making receipt of the waiver a condition of closing. She will circulate the ordinance that gives the City the right of first refusal on any affordable unit. CMLA expressed concern about legislation that speeds up the PACE liens subordinate to first lender; California is starting to have issues on this front. CAR will probably initiate their squatter bill again but with a different name.

12. Communications Committee

This is the newsletter, listserv, and website committee. Per Ms. Arnold, the fall newsletter is ready. Mr. Lubinski will provide the newsletter again to the committee members.

13. Education/CLE Committee

Ms. Arnold reported that the October Fall Update CLE was well attended. The topic was landlord-tenant issues. Matt Crohn and Dan Sweetser presented on the fair housing act at the end of the day, and people stayed for 20 minutes after the presentation. The Liens and Claims

Handbook publication date is approaching, with a companion CLE in January. This Handbook is a re-write of Jack Greenwald's book edited by Gilbert Egly (with Ms. Arnold as a co-author).

14. Colorado Housing Council

Ms. Leff reported on the Denver Green Roof Ordinance presentation at the November meeting. Mr. Sonnenshein attended the October meeting where a "What's Really Driving Housing Affordability in Colorado?" study was introduced. Many general factors were discussed, with some obvious and some not so obvious. Population growth is a big factor. If the current pace continues, demand will continue to exceed supply for another five years. Someone pointed out the preference for commercial development by municipalities because the commercial tax base increases. The study asserts that the construction industry does not offer any "value-add," meaning that another hour of labor does not increase the output—highlighting the difficulty of speeding up construction inputs. Mr. Sonnenshein will circulate an article about the study and the study if he can track it down after its formal release. The December Housing Council meeting is traditionally a "bring your lobbyist" event.

15. *Colorado Lawyer* Committee

Ms. Arnold reported on two articles in the pipeline: (1) common questions in bonding over mechanics' liens; (2) an Eben Clark article about which deed to use in various circumstances. Ms. Arnold will circulate the articles to the officers for decisions about how to submit for publication.

16. Community Service/Charitable Committee

Ms. Kube did not have anything to report. She has not yet connected with Joel Mayo about LawLine9. Ms. Arnold suggested partnering with DBA and its Meet a Lawyer Day or Senior Law Day. Mr. Calvin asked for follow-up on this and for a review of the Bylaws mandate for the committee to determine whether to keep or revise the committee's objectives.

17. Membership and Practice Development Committee

Mr. Starritt, Mr. Tueller, and Ms. Mowry reported that they met to discuss the committee's purpose. They thought the Western Slope location of two committee members seemed noteworthy. The committee will propose mixers and CLEs on the Western Slope and north metro area. They also thought about working with local and specialty bars to "cross-pollinate" with Real Estate Section. The committee will meet again in December to determine next steps for partnering with CLE and scheduling mixers.

18. CBA ADR/Mediation Committee

Mr. Anderson reported that nothing new has occurred since last month. The committee is waiting for the next draft of the guide. It should come back in mid-December, and Mr. Anderson will circulate it to RESC.

19. CBA Cannabis Law Committee

Mr. Sonnenshein reported that Ms. Dunn attended the November 2nd meeting. Ms. Dunn raised the issue of title companies not closing on or insuring properties with cannabis uses. Mr. Sonnenshein separately reached out to a Fidelity underwriter on this issue. After thinking more about the issue, Mr. Sonnenshein understands this title company position as more of a business decision. Some

parties take a “don’t ask/don’t tell” approach to title companies and these transactions, but Council members expressed interest in engaging title companies on the topic. Mr. Calvin noted that open discussion of this issue is not likely to cause title companies to think about an issue they would otherwise overlook, so conversations with title companies makes sense. Mr. Calvin and Ms. Dunn offered to reach out to title company contacts.

20. CBA Ethics Committee

Ms. Stodden provided what she deemed the most exciting report from Ethics Committee in a long time. For the past year, Ms. Stodden worked on a re-write of Opinion 80. This is the only opinion related specifically to real estate issues. The update does not really change the substance of the opinion but does update the citations and internal references. Ms. Stodden presented the update to the Ethics Committee, and the committee approved the update. She relayed that the Committee review covered everything from seemingly innocuous updates to discussion about the appropriateness of the opinion outcome. Ms. Stodden recommended including Opinion 80 in the RESC’s spring newsletter. New opinions on clients with diminished capacity and will drafter materials also came out recently. The Rules Committee is working on a rule regarding flat fees and changes to the Ethics Committee rules.

21. CBA Forms Committee

Mr. Anderson reported that the Commission will decide what parts of the standard real estate contract will get revised in 2018. Square footage disclosures and a personal property contract will also get reviewed and developed.

22. CBA Legislative Policy Committee

The first LPC meeting is scheduled for January 5, 2018, and will primarily consist of an orientation of new members. Jon Vogt will join as President-elect. Will Trachman and Lucy Denson (family law) are other new members. Mr. Schupbach has promised everyone burritos for this initial meeting.

23. CBA Tax Section

Mr. Griffin reported that he planned to defer a full report until we have more information on changes to the Internal Revenue Code.

24. CBA Trust and Estate Section

Mr. Kirch commented on Ethics Opinion 132 and stated that, for attorney-client privilege in the situation where an attorney drafted documents for a deceased client, attorneys can provide information to ensure the client’s intent, per existing case law. The Ethics Committee opinion does not track case law in this regard. Trust and Estate Section will need to review. Mr. Kirch also opined that a *Colorado Lawyer* article on beneficiary deeds that name testamentary trusts would make sense; Mr. Kirch has a probate attorney who would like to co-author on this topic with a real estate attorney. Ms. Arnold said that the Eben Clark article may fit the bill. Mr. Kirch also recommended that someone with wills and trust experience serve in the capacity as a liaison for the deed forms committee as Diana Wendell previously did.

25. Young Lawyers Division

No report from the Young Lawyers Division.

ADJOURN

The meeting was adjourned at 5:08 pm.