

## MINUTES

**CBA Real Estate Law Section Council**  
**Date: August 18, 2015 (Tuesday) 3:00 p.m.**

**Colorado Bar Association Offices**  
**1900 Grant Street, 9<sup>th</sup> Floor**  
**Denver, Colorado**

### **I. Call to Order**

Mr. Sweetser called the meeting to order at 3:05 p.m.

### **II. Introduction of Guests**

Alex Pankonin and Heidi Ray were welcomed as guests at the meeting.

### **III. Approval of Minutes**

The minutes of the June 16, 2015 RESC meeting were approved as circulated.

### **IV. Financial Report**

- A. Mr. Calvin reported that the Real Estate Section has \$67,605.40 in its account as of July 31, 2015, reflecting recent receipt of dues from Section members.
- B. Mr. Sweetser noted that the budget committee had targeted \$45,000 as a minimum level of reserves, which appeared to be achievable in light of the amount on hand.
- C. Ms. Ray reported that the Symposium had been a financial success, with 403 registered attendees.
- D. In the context of discussion of the Symposium, Ms. Nies asked for a straw vote regarding the venue for the 2016 Symposium. She noted that the available venues appeared to be Vail (in which case the Symposium would need to be held on July 7), Snowmass, or Breckenridge (likely at the Beaver Run resort). The straw vote was inconclusive, although there was little enthusiasm for scheduling the Symposium as early as July 7.

### **V. Action Items**

- A. Mr. Sweetser welcomed the new members of the Council, Jean Arnold, Suzanne Leff, Mike Payne and Sam Starritt, to their first official meeting of the Council.

- B. Mr. Sweetser noted that he had made new committee and task force assignments, reflected on the *attached* schedule, which had been distributed before the meeting. He said that he had tried generally to follow the preferences expressed by Council members in their questionnaire responses, and invited anyone who strenuously objected to his or her appointment to let him know. He added that he had intentionally not designated committee chairs or task force leaders, believing that the members of each group should decide whether formal leadership was needed, and if so, who should provide it.
- C. Mr. Sweetser announced that he will propose changes to the Bylaws of the Section at a future meeting. Among other things, the suggested changes will formalize the existence and duties of the budget committee and the nominating committee.
- D. Mr. Sweetser reported that Catherine Hance, the immediate past Chairperson of the Section, had been appointed as a new member of the Title Standards Committee, with the approval of the Co-Chairs of the Committee and of Ms. Hance.
- E. Mr. Sweetser commented on the formation of a couple of new task forces and the continuation at least one of last year's task forces.
1. A new *warranty deed task force* will consider the practice of some title companies of preparing warranty deeds with warranty exceptions linked to the language of unrecorded purchase and sale agreements or title commitments.
  2. Last year's *recording act task force* will remain available to work with legislative proposals that would affect the Colorado real property recording system, if such proposals are introduced.
  3. A *documentary fee or TD1000 task force* consisting of Kristin Decker and Mike Payne will work with LTAC to address title companies' concerns regarding logistical problems caused by the documentary fee statutes, which call for exclusion of amounts allocated to personal property on real property transfer declarations from the real property documentary fee, when title companies are expected to prepare closing statements that disclose the documentary fee before the transfer declaration has been finalized and signed. Alex Pankonin commented LTAC would like the joint RESC-LTAC working group to begin meeting in September in order to determine whether a mutually acceptable solution can be found. One solution might be to treat residential transactions differently than commercial transactions; another might be a legislative change that eliminates the personal property break-out on transfer declarations and permits title companies to assume the entire purchase price is subject to

the documentary fee unless the purchase contract allocates part of the price to personal property and the title company is given a copy of the purchase contract before closing. Mr. Calvin commented that this task force may want to work with the warranty deed task force, since both involve title company concerns and solutions in both situations may involve title companies' early access to purchase and sale contracts.

- F. Mr. Sweetser noted that the term of Andrew Pi as liaison to the Real Estate Section from the Young Lawyers Division had expired, and the Real Estate Section was waiting to hear from the Young Lawyers Division as to who the new liaison would be.
- G. Mr. Sweetser commented that the preliminary schedule of meeting dates shows an incorrect date for the September meeting. The September meeting will be held on Wednesday, September 16, to avoid conflict with the second day of Rosh Hashanah on September 15.
- H. Mr. Sweetser reported on a request he had received, from an attorney for the losing party in a recent Court of Appeals case, that the Real Estate Section persuade the Bar to file an amicus brief in support of a reversal of the Court of Appeals ruling. The case, *Zeke Coffee, Inc. v. Pappas-Alstad Partnership*, imposed substantial restitution damages on a commercial landlord who had obtained and enforced a trial court eviction decree that was subsequently reversed on appeal. Mr. Sweetser observed that the CBA typically does not consider filing an amicus brief unless and until the Colorado Supreme Court grants certiorari, but asked for an expression of views as to whether the Section should consider amicus involvement if the Supreme Court does take the case. No strong views were expressed, and Mr. Sweetser said the issue might be revisited if cert is granted.
- I. Mr. Sweetser discussed a request that had been submitted by Colorado Attorneys for the Arts to multiple CBA sections for pro bono legal assistance to Colorado artists with a variety of business and intellectual property problems. Mr. Sweetser asked Joel Mayo to consider whether this request might be an appropriate expansion of the Section's traditional pro bono contributions through programs such as Law Line 9. Mr. Mayo reported that the pro bono committee was also considering possible involvement with a Habitat for Humanity project.
- J. In the pro bono context, Mr. Sweetser mentioned that in a recent meeting with a Colorado legislator and others, he had assured those present that the Bar was prepared to provide pro bono assistance to participants in the Address Confidentiality Program (ACP) who wished to acquire residential property in the name of a trust or limited liability company to avoid disclosing in public records a link between their individual names and the location of specific property.

Ms. Waggener and Mr. Tyler each commented that for tax reasons, a trust might be preferable to an LLC for this purpose.

- K. Mr. Sweetser reported that members of the Section had been working with the Trust and Estate Section on changes in the Determination of Heirship provisions of the Probate Code proposed by T&E, and asked Mr. Kirch for an update.

Mr. Kirch explained that Colorado has an unusual determination of heirship statute, codified with the Probate Code but not part of the Uniform statute. The Colorado statute, which originally had been intended to deal only with intestacy proceedings but had later been expanded to deal with unprobated or missing wills and other unplanned situations, was last revised in 1985. Trust and estate practitioners felt that changes were necessary. Julie Waggener and Geoff Anderson had reviewed and suggested changes in the T&E draft, and their proposed changes will be submitted to the T&E legislative committee this week, but other changes that the Council might like to suggest would be welcome as well.

Ms. Waggener commented that when the proposed new statute referred to a “description” of property, the word “legal” should be added to make it clear that a formal legal description rather than a shorthand reference was intended. She also noted that the existing statute called for notice to anyone with an “interest” in the affected property, but the proposed changes referred to persons with an “ownership interest”, which could lead to situations where parties with economically significant interests might not be given notice of a proceeding that could impair their interests, and that this result should be avoided.

Mr. Calvin mentioned that the Uniform Laws Commission had promulgated the Uniform Partition of Heirs Property Act, which might be the subject of a legislative push in the next year or two, and that the notice to affected parties provision of that potential uniform act might be considered as T&E refined its proposed amendments.

Mr. Sweetser noted that some reviewers had questioned the appropriateness of relaxing venue standards to the extent contemplated by the proposed legislation, allowing a determination of heirship proceeding to be brought in counties other than the county in which a specific affected property was located. Mr. Anderson responded that a requirement that each proceeding be brought in the county where the affected property was located could lead to a multiplicity of actions if a decedent had owned property in multiple counties, and that different courts could arrive at different conclusions as to the identity of the decedent’s heirs – a result less desirable than allowing a court outside the county where a given property is located make decisions concerning ownership of the property.

- L. Mr. Sweetser reported that he had attended a couple of meetings of the Cannabis Law Committee, as had past Section Chairperson Chris Payne, but that the Real Estate Section needs to have a formal liaison to the Committee. Katy Dunn volunteered for that task, and Mr. Sweetser appointed her to the position of liaison to the Cannabis Law Committee.
- M. Julie Waggener reported on a recent spate of comments and questions on the High Altitude discussion list regarding the lack of an exemption to federal and state mortgage loan originator licensing requirements for common types of intra-family transactions. The proposed federal regulations, which were enacted as statutes in Colorado, provide limited exemptions for seller carryback loan transactions, but not for situations where, for example, one family member loans money to another family member to enable the latter to pay cash in buying property from a third party.

Nicole Nies mentioned that Kent Levine had pointed out the existence of an exemption where both parties to such a transaction were represented by the same attorney and did not themselves negotiate the terms of the transaction. This exemption seems to be of limited value, as most attorneys would be prudent enough not to try to represent both sides in such a transaction.

Jean Arnold reported that she had recently attended a seminar in which the speaker addressed these issues and appeared to have significant expertise in the area. The speaker had also commented that the federal rules had not been implemented, and that the current October 2015 implementation date might well be extended again. The possibility of some relief on the federal level suggested that the Section would not be wasting its time in pursuing a possible legislative fix at the state level. She will provide Mr. Sweetser with contact information for the seminar speaker, and he will also try to enlist Tom DeVine, a past Section Chairperson, in exploring the possibility of legislative action.

## **VI. Reports**

### **A. Uniform Laws.**

Mr. Schupbach reported that several uniform acts are likely to be pushed in the legislature this year, including the Uniform Voidable Transactions Act, the Uniform Substitute Decision-Making Documents Act, the Uniform Commercial Real Property Receivership Act, and the Uniform Residential Landlord Tenant Act. Bills to adopt the voidable transactions act and the substitute decision-making act were introduced last session. The CBA opposed both and both, coincidentally or otherwise, were defeated last year. They may be opposed again, unless changes in the language of the uniform acts are made in the Colorado bills. In the case of the voidable transactions act, the changes sought by the Bar were

the deletion any reference to “series” entities, and a change in the choice of law provision. The substitute decision-making documents act would require face-value acceptance of powers of attorney executed in other countries, and the Bar hoped to exclude property-related agencies from the bill, leaving it applicable to medical-care situations. The Colorado members of the Uniform Laws Commission have appointed a representative to interface with Bar groups on each of the bills that is likely to be introduced.

Mr. Sweetser said he anticipated that the Uniform Residential Landlord Tenant Act would go forward, with some changes but not extensive ones, in view of the fact that it had been adopted in substantially uniform form in a significant number of other states. He also asked for volunteers for a task force to review and comment on this uniform act. Ms. Arnold volunteered and was appointed.

In response to Mr. Schubach’s comment that in addition to local representatives, the Uniform Laws Commissioners had offered to make available drafters or others involved nationally in formulating the uniform acts, Joey Lubinski reported that he and Mr. Calvin had had a long telephone conference with Tom Hemmendinger, principal drafter of the Commercial Real Property Receivership act. This call led to a better understanding of the objectives of the drafters, but not to any change in the view that adopting the uniform act in Colorado would be unwise and unnecessary. Mr. Schubach added that the receivership issue might become entangled legislatively with bills like last session’s “anti-receiver” bill and a possible bill to restrict the powers of other court-appointed fiduciaries such as guardians.

B. DORA/Real Estate Commission.

Ms. Waggener reported that the Real Estate Commission had adopted a position statement on disclosure of adverse material facts. The position statement notes that while C.R.S. 38-35.5-101 specifies that there can be no cause of action against a real estate broker or salesperson for failing to disclose that “psychologically stigmatizing” events – such as a past homicide – have occurred on a particular property, the statute does not indicate whether a broker or salesperson is permitted to inform a prospective buyer of such events. The position statement provides that disclosure is neither required nor permitted.

Ms. Waggener also reminded that the Commission has approved new standard forms for purchases and sales and other transactions, and use of the new forms by real estate brokers will become mandatory on January 1, 2016. She added that just as the new forms were receiving final approval, someone had pointed out to the Commission that they contain language to the effect that if a form provision contains a box that may be either checked or left unchecked by the parties and the box is unchecked, the provision containing the checkbox is deemed to be inapplicable. Depending on the location of a checkbox, this may result in a

provision that the parties understood was part of their agreement being denied effect. Resolving this issue may require the Commission to revisit and perhaps revise forms before the next “regular” revision date in 2019.

Mr. Sweetser noted that the period for comments on the Insurance Commission’s proposed new rules on rates and consumer protection had expired, though new rules had not yet been promulgated. The next aspect of title insurance regulation on the Insurance Commission’s agenda is standards of conduct. Alex Pankonin reported that the Colorado working group on this topic had attempted to be sure that the Colorado rules would be consistent with the new RESPA standards of conduct provisions, and would not be as extreme as those adopted in some states, such as Washington.

Mr. Sweetser congratulated Mr. Pankonin on his recent appointment as a member of the newly-created Title Insurance Commission.

C. Rule 120 Update.

Mr. Sweetser asked Deanne Stoddard to report, in the absence of Fred Skillern, on the status of proposed changes in Rule 120. She reported that the proposed Rule had been approved with minor changes by the Supreme Court Civil Rules Committee, and was awaiting editorial action by the Style Committee before going to the Supreme Court for final action.

D. Skylights v. Byron (FHFA lien priority case).

Suzanne Leff reported on the holding of this case from the U.S. District Court for the District of Nevada. The holding was limited to cases involving loans held by a GSE (FNMA or FHLMC) for which the FHFA is conservator, but that involves a significant proportion of all residential mortgages in the U.S. The case was discussed by Mr. Lubinski, Mr. Sweetser and Ms. Waggener, and it seems clear that the case has implications for all states, including Colorado, that allow homeowners’ or condominium owners’ associations a superpriority lien to secure any portion of their claims for assessments against their members.

E. Legislative Policy Committee.

Mr. Schupbach reported that the LPC has not met over the summer but would begin meetings this fall. At this point, 21 pieces of likely legislation have been identified as subjects the LPC may be asked to consider at the request of one or more sections of the Colorado Bar Association.

F. Publications/Newsletter, Website and Discussion List Committee.

Mr. Killean reported that the committee would meet on August 21. They will be looking at a proposed article on 1031 exchanges, and some other articles are in the pipeline. Ms. Waggener suggested that the next newsletter should include an alert regarding the Mortgage Loan Originator licensing requirement discussed earlier, as this may be a requirement of which some practitioners are not aware.

G. Education/CLE Committee.

Mr. Mayo reported that arrangements for the fall “Hot Topics” program on October 16 have been finalized, and handed out copies of the brochure that had recently been mailed to Section members. Featured topics will include HOA assessment lien priorities, property insurance, and a presentation by the Office of Attorney Regulation Counsel.

H. Education/Topical Lunch Committee.

Ms. Alderman reported that the fall schedule is well in hand. The September 3 topical lunch will deal with using bankruptcy to restructure golf course communities. On October 3, the topic will be new disclosure rules under RESPA and the CFPB. Environmental issues will be featured on November 5. Mr. Clark commented that Jim Borgel of Holland & Hart had offered to give a presentation at a topical luncheon on “Real Estate Issues in Solar Array Development”. Ms. Alderman invited suggestions from other Council members, as well as Section members at large, for other topics and other speakers.

I. Business Law Section Liaison.

Mr. Bergstrom reported that the Business Law Section had not met since the last RESC meeting.

J. Interprofessional Committee.

Ms. Alderman reported that the Interprofessional Committee had not met in July.

K. Supreme Court Civil Rules Committee Liaison.

No report.

L. Publications/Colorado Lawyer Committee.

Mr. Clark reported that the Committee had an unusually strong set of articles in the pipeline, though none was quite ready for publication.



M. Community Service/Charitable Committee.

Mr. Mayo reported that the committee is exploring the possibility of a project with Habitat for Humanity, though it is not clear that Habitat needs more unskilled labor, which is generally what lawyers are able to provide. He also reported that the next Law Line 9 event would be September 23<sup>rd</sup>; volunteers would need to be available from 3:45 to 6:00 p.m. Deanne Stodden, Dan Sweetser, Jeff Bergstrom and Eben Clark volunteered.

N. Young Lawyers Division Liaison.

Mr. Sweetser noted that the RESC is awaiting the appointment of a new liaison by the Young Lawyers Division.

O. Tax Section Liaison.

Tyler Murray reported that the Tax Section had not met since the last RESC meeting, and the next meeting would not be held until October. He invited RESC members to attend that meeting, and to offer topics for discussion if they had any issues that should be addressed by the Tax Section.

P. CBA Ethics Committee Liaison.

Deanne Stodden reported that the last meeting of this committee conflicted with the Real Estate Symposium, so she had been unable to attend. She understood from other members that the meeting had been poorly attended and uneventful.

Q. Title Standards Committee.

Ms. Waggner observed that recent activities of the Title Standards Committee had been addressed with the announcement that Ms. Hance was now a member of the Committee, and in the discussion of the Determination of Heirship statute earlier in the meeting.

R. CBA Board of Governors Liaison.

Randy Alt reported that the Board of Governors had not met since the last RESC meeting, and the next meeting would not be held until October.

S. Membership and Practice Development Committee.


Jim Killean noted that he had just been appointed to this committee, which had not had a chance to meet yet, and thus had nothing to report.

T. Forms Sub-Committee Liaison.

Geoff Anderson reported that the subcommittee had not met since the last RESC meeting, and therefore had nothing new to report.

**VII. Adjournment**

The meeting was adjourned at 4:50 p.m.



---

Charles D. Calvin, Secretary