

## MINUTES

**CBA Real Estate Section Council**  
**Date: January 19, 2016 – 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 3:03 p.m.

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

Mr. Sweetser welcomed guests Alex Pankonin and Miro Kovacevic.

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

The minutes of the November 17, 2015 RESC meeting were approved, subject to corrections noted by Mr. Alt and Mr. Sweetser.

### **IV. Financial Report**

Mr. Calvin reported that the Real Estate Section had \$61,012.48 in its account as of November 30, 2015 and \$57,293.53 in its account as of December 31, 2015.

### **V. Action Items**

#### **A. TD1000/Documentary Fee Legislation**

Mr. Sweetser reported on the background of the proposed legislation and the lack of uniform practices among various counties. He noted that after numerous meetings and multiple drafts, the RESC working group had been unable to persuade the proponents – mostly LTAC, with support from the Clerks' association – to accept any changes RESC could support. Eventually, LTAC had proposed a bill as to which the RESC group had been prepared to recommend neutrality rather than opposition; this would basically have provided that in the case of residential property, the form TD1000 would be disregarded and the documentary fee would be computed based on the aggregate purchase price for both real and personal property.

The bill as introduced, however, included a new subsection (d), which provided that all property would be presumed to be residential unless it was somehow “clearly indicated” when a deed was presented for recording that the property was

industrial or commercial. The new subsection was a departure from the language that had been agreed upon, and was of concern to agricultural interests, among others, who did not want property classified as residential merely because it was not industrial or commercial. The language also left unclear how the parties to a transaction would be able to “indicate” the nature of the property at the time of recording.

Mr. Calvin suggested that the new subsection (d) should be deleted or amended to allow for other classifications of non-residential property and specify a method of communicating the information to the recorder’s office. Mr. Schupbach noted that the bill would be coming up for committee hearing soon and that RESC needed to provide the Legislative Policy Committee with a recommendation in time for its next meeting.

Ms. Nies moved that the Council recommend to LPC that the Bar oppose the bill if the new subsection (d) remains in the bill, or stay neutral if the subsection is removed. The motion was seconded and was adopted on a voice vote.

B. Mortgage Loan Originator/CMLA Bills

Mr. Sweetser noted that although RESC members had been working on language that would remove intrafamily and other “casual” residential loans from the Colorado mortgage loan originator statutes, the immediate issue was a request by the Colorado Mortgage Lenders Association for support of two bills that would more broadly eliminate redundant and inconsistent regulation of mortgage lenders under federal and Colorado law. Mr. Schupbach commented that although CMLA would like to have Bar support for its bills, neutrality would be acceptable to them. He added that he had not heard indications that the CMLA bills would be opposed by consumer or other interest groups.

Mr. Payne suggested that if the goal is to eliminate redundant regulation, the Colorado statutes should simply be repealed. Mr. Killean responded that the federal statutes required states to adopt and maintain regulatory systems meeting at least the minimum standards specified in the federal laws; he added that if possible, RESC should try to seek CMLA support for the mortgage loan originator exemption amendment in return for Bar support of the CMLA bills. Mr. Sweetser suggested that RESC ask CMLA to include the exemption language in one of their bills, but, if CMLA declined to do that, RESC should support an independent bill to enact the exemption. Mr. Schupbach indicated that the CMLA bills might be heard before the exemption language could be included, meaning that RESC would have to decide whether to support the CMLA bills without knowing whether the exemption provision would be included or not.

Ms. Arnold moved to recommend to LPC that the Bar support the CMLA bills, and Mr. Payne seconded the motion. After brief discussion, the motion was adopted by voice vote.

## **VI. Reports**

### **A. Petition for Certiorari in *Zeke's Coffee Case***

Mr. Sweetser reminded the Council of the background of the case, and commented that for timing reasons, among others, RESC does not get involved as amicus before certiorari is granted. If the Supreme Court grants certiorari, the Council will need to revisit the question whether to recommend filing an amicus brief.

### **B. HELOC Release Proposal**

Mr. Schupbach reported that the bill as introduced has changed somewhat from the version previously seen by RESC. Mr. Sweetser explained that the additional provision allows a title company to release a HELOC deed of trust if the lender is obligated to release but has failed to do so. Ms. Dunn moved to reaffirm the Council's support for the bill and Ms. Nies seconded the motion. Ms. Stodden asked why the bill allowed for the possibility that a HELOC lender could, at the borrower's request, send the canceled note and release documents to the borrower rather than recording the release. Mr. Calvin commented that this approach could assist a lender who refinanced a HELOC debt and wanted to be subrogated to the HELOC lender's lien priority. The motion was adopted on a voice vote.

### **C. Uniform Residential Landlord/Tenant Act**

Mr. Schupbach reported that the Colorado Uniform Law Commissioners will not pursue enactment this year. Mr. Sweetser described the work done by Ms. Arnold, Ms. Alderman and a legal intern on compiling a detailed analysis of the changes adoption of this uniform act would make in Colorado landlord/tenant law, and said that the commissioners appreciated this work and realized that more time was needed to lay the groundwork for changes of this magnitude.

### **D. Uniform Recognition of Substitute Decision-Making Documents Act**

Mr. Schupbach reported that the bill had been amended to remove real and personal property transactions, so that the bill now applied only to healthcare decisions. As a result, the Council no longer had any stake or interest in the bill.

E. Uniform Voidable Transactions Act

Mr. Schupbach reported that this bill had also been removed from consideration in this legislative session. According to the ULC liaison, objections to the bill's treatment of series entities was the most significant concern.

F. Uniform Commercial Real Property Receivership Act

Mr. Schupbach reported that this bill would not be going forward in this legislative session. Mr. Lubinski added that the real property section of the American Bar Association had endorsed the act, which would be considered by the ABA House of Delegates this spring. He noted that he would be participating in a conference call among the Colorado ABA delegates, and asked whether he should identify himself as a member of RESC. Mr. Sweetser responded that it was important that the ABA know the Council was opposed to adoption of the act in Colorado, and why.

G. Address Confidentiality Program

Mr. Sweetser reported that although it had appeared earlier that this bill would not be going forward this year, it now appeared that it might have new life. Some of the stakeholders had participated in a conference call with representatives of FNMA and FHLMC, who had said their primary concern was that any change in recording laws and practices not interfere with the availability of title insurance for loans purchased or insured by those agencies. Since opposition from the GSEs did not appear to be an insurmountable obstacle, Rep. Carver had scheduled another stakeholder meeting for next week.

H. Spring Meeting

Mr. Sweetser noted that last year's meeting in Fort Collins had been great for the participants and reasonably well attended by members of the local bar, but he was concerned about the cost/benefit ratio. Past meetings had been poorly attended, and he wanted to invite comments and suggestions as to the location and format of this year's meeting. One possibility would be to have a social event/party for RESC members in the Denver or Boulder area, without making an outreach attempt. Another possibility would be to have a local outreach event in Grand Junction, or perhaps Glenwood Springs. General discussion did not produce a consensus, and Ms. Collier Smith pointed out that for logistical reasons, a decision needed to be made before the next RESC meeting. Mr. Sweetser said that he would consult with Ms. Collier Smith and make a decision.

I. Budget Committee

Mr. Sweetser said that the committee would begin meeting in March. At this point, the Section's expenses were over budget, largely on expenses for special promotions, *i.e.* gift certificates for CLE events.

J. 2016 Symposium Update

Ms. Nies reported that plans were proceeding apace, and that all but one of the speakers' spots had been filled.

K. FinCEN Report re Manhattan & Miami

Mr. Toft reported on a press release that was recently issued by the Financial Crimes Enforcement Network, which has issued a GTO (geographically targeted order), directing title companies to determine the identity of the natural persons behind entities who purchase expensive residential real estate for all cash. The GTO applies only to Manhattan and Miami-Dade, so far. For Manhattan, the "expensive" threshold is \$3 million; for Miami-Dade, it is \$1 million. The GTO is temporary and goes into effect April 1, 2016. ALTA has responded with request for changes in the order. The order has no immediate impact in Colorado, but it is easy to see how that could change.

L. Legislative Policy Committee

Mr. Toft reported that the committee met last Friday for the first time this legislative session. The only action was to vote to oppose a bill that would require that materials provided by a government agency in response to an open records request be in digital form and in the specific format specified by the requesting party.

M. Membership and Practice Development Committee

Mr. Payne outlined a proposal for breakfast meetings for new lawyers, addressing nuts and bolts practice issues, similar to the sessions organized by the Business Law Section. He noted that the committee wanted to float the proposal for discussion: does the Real Estate Section want to pursue the idea; how would it be paid for; would it overlap with or detract from the real estate fundamentals course that Willis Carpenter has traditionally taught in the fall? Mr. Killean reported that Mr. Osborn is investigating costs and who how costs were covered for the Business Law meetings. Mr. Lubinski commented that the ABA introductory real estate course is a top seller, and that the Real Estate Section could probably borrow both materials and speakers from the ABA. Mr. Sweetser said he thought this was to a large extent a CLE issue, and that it was also important to consider the effect on whomever would be continuing with Willis Carpenter's class.

Ms. Alderman suggested that a shorter-term program, designed to introduce new lawyers to practice issues, perhaps using a Q&A approach, might be useful and avoid overlapping with the substance provided by the real estate fundamentals course. Ms. Arnold commented on the great value she had derived from the real estate fundamentals course, especially in specialized areas such as foreclosures and landlord/tenant disputes.

N. Publications/Newsletter, Website, Discussion Group

Mr. Killean reported that the next newsletter would be out in late March or early April. Ms. Arnold is working on a decision-tree article discussing local ordinance law sources for construction issues. Mr. Lubinski has proposed an article speculating on the effects a future Manhattan/Miami-Dade style Geographically Targeted Order might have if issued with respect to resort areas in Colorado.

Ms. Collier Smith pointed out that the next newsletter should include a piece reminding readers to request information and submit applications for this summer's new openings on the Real Estate Section Council.

O. Education/CLE

Mr. Mayo reminded the group that the Spring 2016 CLE program, which will focus on the anatomy of residential real estate transactions, will be held on March 17. He passed out copies of the brochure for the program.

P. Education/Topical Lunches

Ms. Alderman reported that the January presentation on solar and wind energy projects had been very well received. The next topic will be water rights, on February 4. The lunches have been well booked up.

Q. Business Law Section Liaison

Mr. Bergstrom reported that the Business Law Section Council is meeting tomorrow, but has nothing to report today.

R. Interprofessional Committee

Ms. Leff reported that the last meeting, in November, had been a "bring your lobbyist" event. She added that it was clear that the Bar was a leader within the group and that the Bar's lobbyist was highly regarded by other members. She will submit a written report.

S. Supreme Court Civil Rules Committee Liaison

Mr. Sweetser reported that the proposed new Rule 120 was out for comment, and that at least one comment had been submitted. It is unclear how long it will be before a final version of the rule is promulgated.

T. Publications/Colorado Lawyer

Mr. Killean reported that a proposed article on 1031 exchanges is being rewritten by the author. Another article, on restrictive covenants in bankruptcy, is in the works, as is an article on “friendly” foreclosures by Corey Zurbuch.

U. Community Service/Charitable Committee

Mr. Mayo said that the committee has three volunteers for the next LawLine 9 event on February 24, but needs at least one more. Eben Clark, Jody Alderman and Jeff Bergstrom have volunteered. Julie Waggener offered to fill the empty spot. Mr. Mayo noted that the set used by the program is being redone, so the physical setup would be new to all.

V. Colorado Housing Council

Ms. Dunn said she had nothing to add to the written report *attached* that Ms. Wendel had circulated before today’s meeting.

W. Trusts & Estates Section Liaison

Mr. Kirch mentioned that he had circulated the Colorado Supreme Court’s opinion in *Baker v. Wood, Ris & Hames*, 2016 CO 5, earlier in the day. Much to the relief and pleasure of the trust and estate bar, the court reaffirmed its previous holdings that persons not in privity with a lawyer have no claim for legal malpractice, even if they were arguably among those who might foreseeably be affected by malpractice.

X. Young Lawyers Division Liaison

Mr. Osborn was unable to attend, but Mr. Sweetser noted that the Denver Young Lawyers Division have scheduled a get-together with their young-broker counterparts on February 18. He urged RESC members, young or not, to attend.

Y. Cannabis Law Committee Liaison

Ms. Dunn reported that the committee seemed to be focused largely on developing CLE programs for interested members of the Bar. Members of the committee seemed to be very knowledgeable, but had not yet expressed much

interest in the legislative process, or recognized how important it might be for them to participate in the process.

Z. Tax Section Liaison

Mr. Murray reported that the section had met in December; the January meeting will be next week. He added that Fred Skillern had given a case law update at the last meeting, and had been a great hit with members.

AA. Title Standards Committee

Ms. Waggener reported that the committee had discussed a 2013 Court of Appeals case, *Anderson v. Garfinkel*, regarding the application of C.R.S. 38-35-108 and the effect of a reference in a recorded document to an unrecorded (and actually non-existent) document.

BB. Forms Sub-Committee Liaison

Mr. Anderson reported that the sub-committee had met last week. The major topic of discussion was the provision in commission-approved listing agreement forms, to the effect that in case of a forfeiture of a buyer's earnest money, the earnest money would be split between seller and broker. In past discussions, brokers had resisted the idea of changing this provision, but last week's discussion had explored the possible use of check-boxes to specify whether all earnest money would be paid to the seller; seller and broker would split 50-50; or "other". If no box were checked, all earnest money would be retained by the seller. Ms. Waggener commented that the last meeting of the Real Estate Commission had involved a complaint by a seller against a broker who had insisted on enforcing the 50-50 split provision, so the forms sub-committee discussion was less abstract than it might otherwise have been.

CC. Board of Governors

No report this month.

DD. CBA Ethics Committee Liaison

Ms. Stodden reported that the Ethics Committee had met the previous Saturday. The Committee discussed the possible revision of an existing opinion on lawyers' charging interest on unpaid invoices, and also discussed the possible need to address the effects of changes in the concept of office-sharing with shared-space, open floor buildings where a lawyer might not have exclusive control over specific premises.

She added that the Committee was sensitive to complaints that its work was not as relevant and helpful to the Bar as it could be, because it took the Committee too long to respond to requests for ad hoc guidance. The Committee is working on developing a set of guidelines for trust and estate lawyers, and is open to comments and suggestions as to how it might be more helpful to lawyers in other practice areas. She suggested that the Real Estate Section newsletter could remind readers of the availability of Ethics Committee resources such as its hotline and its willingness to issue informal opinion letters.

EE. Eminent Domain Committee

No report this month.

FF. New Matters/Legislation

Mr. Lubinski mentioned that, as previously reported, the sponsor of last year's anti-receiver bill is working on a new bill calling for extra-judicial oversight of judicially-appointed fiduciaries, especially in the probate/guardianship/conservatorship area. Mr. Kirch commented that the Trust and Estate Section was aware of this proposed bill and would appreciate support from the RESC in opposing the bill. Mr. Schupbach added that the LPC was well aware of the proposed bill and was prepared to oppose it, so RESC would probably not need to do much more than indicate to LPC that RESC was also opposed.

Mr. Schupbach added that over 300 bills had been introduced in the 2016 legislature to date.

## VII. Adjournment

The meeting was adjourned at 5:06 p.m.



Charles D. Calvin, Secretary