

MINUTES

CBA Real Estate Section Council

Date: April 8, 2016 – 3:00 p.m.

**Inverness Hotel
200 Inverness Drive West
Englewood, Colorado**

I. Call to Order

Mr. Sweetser called the meeting to order at 3:23 p.m.

II. Introduction of Guests

Mr. Sweetser welcomed guests Damian Cox and Ryan Wilcox.

III. Approval of Minutes

The minutes of the March 15, 2016 RESC meeting were approved, subject to corrections noted by Mr. Alt.

IV. Financial Report

Mr. Calvin reported that the Real Estate Section had \$56,027.87 in its account as of March 31, 2016.

V. Action Items

There were no agenda items requiring a vote by the members of the Council at this meeting.

VI. Reports

A. CBA Staff Liaison.

Mr. Sweetser introduced Leah Achen, who is a long-time CBA staff member and has replaced Dana Collier Smith as the CBA Staff Liaison to the Real Estate Section.

B. Mortgage Loan Originator Legislation

Mr. Schupbach reported that HB 1306, one of the bills sponsored by the Colorado Mortgage Lenders Association, was moving through the legislative process and seemed likely to pass. He had spoken with Marcia Waters, the Director of the Division of Real Estate, who had asked whether the CBA had a response to the

position expressed in her e-mail message to Mr. Schupbach and others on March 15. He had told her that the Bar was still considering the issues, but assured her that the Bar would not oppose or try to amend HB 1306. Ms. Waters had commented that she remained interested in the Bar's position.

C. HB16-1005 (Rain barrel bill)

Mr. Schupbach reported that the bill had been passed and sent to the Governor, who was expected to sign it.

D. HELOC Release Proposal

Mr. Schupbach reported that the bill was moving through the legislative process and seemed likely to pass.

E. Supreme Court Rules Committee (C.A.R. 8(d))

Mr. Sweetser reported that the Rules Committee proposal to move the substance of Colorado Appellate Rule 8(d) to C.R.C.P. 121 had been tentatively adopted. The Committee had not concurred with the suggestion that the existing rule be retained (in addition to being replicated in C.R.C.P. 121) to permit appellate courts as well as trial courts to consider the effect of a stay on property titles. However, the discussion seemed to have led the Committee to recognize that having a member with real estate expertise might be useful. This appeared to have reopened the possibility of dialog on that subject.

F. *McMullin v. Hauer* (implied common interest community declaration).

Mr. Anderson described the basic facts of the case as recited in the Court of Appeals opinion, and noted that the Colorado Supreme Court had granted review. Mr. Skillern circulated copies of the subdivision plat that the Court of Appeals had held to be sufficient to establish a common interest community, despite the absence of any declaration or agreement for sharing of maintenance costs or other responsibilities. Mr. Sweetser observed that the case raised the question whether the Bar should volunteer an unsolicited amicus brief to make sure the Supreme Court understood the extent to which the Court of Appeals' decision challenged widely accepted legal views. He asked whether any of those present had an interest in working on an amicus brief, and Messrs. Lubinski and Skillern both expressed such an interest. Mr. Sweetser said he would discuss the matter with them after the meeting, and would then contact the CBA amicus committee.

G. Request to Oppose Changes in IRC § 1031.

Mr. Sweetser explained the background of the request from a member of the Federation of Exchange Accommodators that had been distributed with the meeting materials. He said that to his knowledge, the group had succeeded so far in attracting organized bar support only from the Connecticut Bar Association,

and added that in his view, the future of § 1031 exchanges was a tax issue, not a real estate issue. Mr. Clark commented that it was more a political issue than any kind of substantive legal issue, and that the Real Estate Section should not get involved. No one expressed disagreement with that view.

H. Department of Insurance Working Groups

Mr. Anderson reported that the Division of Insurance is contemplating a change in its bulletin relating to closing protection letters, to make the bulletin more understandable to consumers.

I. Real Estate Commission “Standard Forms” Proposal

Ms. Waggener reported that the Real Estate Commission had met on April 5 to discuss the proposed revision of Rule F-7 which, among other things, would define what makes a form a “standard” form. The proposed revision was a product of discussions between the Division of Real Estate and the Attorney General’s office as to the lack of guidance as to what is a standard form. Property managers, in particular, often had dozens of forms that affected legal rights of HOAs, owners, landlords and tenants, without any clear trail as to who had prepared the forms or how they were intended to be used. Response to the proposed change in Rule F-7 from brokers and property managers had been highly negative because, they asserted, the new definitions were too restrictive. The proposed amendment remains on the Commission’s agenda for further consideration.

J. 2016 Symposium Update

Ms. Nies reported that the first draft of the Symposium brochure was under review, but that there was no other news to report.

K. Nominating Committee

Mr. Calvin reported that a good but not overwhelming number of applications for the four seats on the Section Council had been received. These applications will be distributed shortly to the members of the nominating committee for review. Within a couple of weeks after that, the committee will meet and attempt to come up with a slate of proposed new Section Council members, and a new secretary, vice chairperson and chairperson, for the year that will begin July 1.

L. Legislative Policy Committee

Mr. Schupbach reported that overall, the Committee has been tracking some 46 bills, including real estate-related bills discussed earlier in today’s meeting. He expects SB 115, the electronic recording technology fund bill, to pass. He anticipates there will be some kind of construction defects reform bill, but it may not look much like those introduced in the last couple of years; proponents are

talking with the judicial branch about a possible solution. SB 133, the probate-related bill that the Section Council reviewed for determination of heirship and supplementary affidavit provisions, seems to be moving forward steadily; SB 131, the other probate-related bill, is facing some technical issues but may still pass.

M. Membership and Practice Development Committee

Mr. Starritt reported that Mr. Osborn has been working with Nicole Smith of the Young Lawyers Division to plan another joint event.

N. Publications/Newsletter, Website, Discussion Group

Mr. Lubinski reported that the next newsletter was about ready to go out.

O. Education/CLE

Ms. Leff reported that the Spring 2016 CLE program on March 17 had been well attended and well received. The speakers seemed to build impressively on one-another's talks. Mr. Mayo added that a fall CLE event is being planned with the assistance of Ms. Ray.

P. Education/Topical Lunches

Ms. Alderman reported that the April 7 topical lunch, at which Corey Zurbuch spoke on friendly foreclosures, had gone well. The May 5 topical lunch will be downtown, and will feature Jamie Baker Roskie on creative solutions for the affordable housing crisis. The June topical lunch, on an ethics topic, will be southeast again. No topical lunches are planned for July or August.

Q. Business Law Section Liaison

Mr. Bergstrom reported that the annual Business Law Institute was scheduled for September 15 and 16. The Business Law Section is seeking nominations for the Jim Bye Award for outstanding tax attorneys. Herrick Lidstone is serving on the ABA committee that is about to release a major new report on local counsel opinions.

R. Interprofessional Committee

Ms. Decker noted that she had submitted a written report, *attached*, and much of what she could report orally is covered in that document. LTAC has been working with the Division of Insurance on new defalcation regulations. Forms, standard and otherwise, continue to be topics of discussion. LTAC does not object to the idea of a residential deed form, but thinks it should be based on an existing form rather than a new one. Ms. Leff reported on HOA and CAM licensing developments. There were relatively few complaints regarding homeowners' associations as such, but there seemed to be many complaints about community

association managers, including assertions of unlicensed or incompetent operators, and even instances of financial misappropriation. The Director of the Real Estate Division is recommending legislation to discourage retaliation against owners who file complaints. The Division will focus additional resources on education for HOA boards and association managers.

S. Publications/Colorado Lawyer

Mr. Clark reported that a new article, on friendly foreclosures, had been proposed, and the committee was working with the author to turn it into a publishable piece.

T. Community Service/Charitable Committee

Mr. Mayo reported that there will be another LawLine 9 event soon. He has also been reestablishing contacts with Habitat for Humanity, in an effort to line up a summer activity, and will circulate possible dates before long.

U. Colorado Housing Council

Ms. Leff reported that the last meeting had been focused on statewide water supply issues. Next month will involve a discussion of the challenge of providing housing for Millennials.

V. Trust & Estate Section Liaison

Mr. Kirch commented that after observing several legislative hearings, he sensed there was a widespread suspicion that fiduciaries are running wild and that more statutory restrictions are needed on conservators, guardians, personal representatives, public administrators and other fiduciaries. The Trust & Estate Section hopes that people realize that problems involving fiduciaries are actually rare and that a few instances of seeming abuse had been overblown.

W. Young Lawyers Division Liaison

Mr. Osborn reported that an event will be scheduled soon.

X. Cannabis Law Committee Liaison

Mr. Schupbach reported that the last meeting had been devoted entirely to an explanation to committee members of how the legislative process works. This presentation seemed to have been well received, and the committee was in the process of sending out its first e-mail message to committee members, soliciting their views on particular bills.

Y. Forms Sub-Committee Liaison

Mr. Anderson reported that there had been no meeting since the last Section Council meeting, but the Sub-Committee will meet next week. In the context of unauthorized practice of law issues, the meeting will focus on whether brokers, as opposed to buyers or buyers' attorneys, could register objections to appraisals, inspection reports, title documents or other items delivered in the course of a typical transaction. His comments led to a spirited discussion of unauthorized practice issues among members of the Section Council and guests. Mr. Cox argued forcefully that once a transaction was underway with parties who lacked legal counsel, it was unrealistic and unfair to the parties to adopt a rule that would forbid a broker from responding to issues that were bound to arise, given the subjects that are addressed in commission-approved contract forms.

Z. CBA Ethics Committee Liaison

Ms. Stodden reported that Opinion 93 had been modified in recognition that Rule 4.2 of the Rules of Professional Conduct applies to contacts with represented governmental organizations as well as with private individuals and entities. In general, she said, a lawyer and those working for the lawyer in connection with a dispute with a governmental organization cannot engage in *ex parte* contacts regarding the dispute with the organization's decision-makers or with organization personnel who regularly consult with the organization's lawyer. Everyone is cautioned to read the revised opinion, which appeared in the last issue of The Colorado Lawyer. Ms. Stodden also mentioned that the same issue of The Colorado Lawyer had a good article regarding a lawyer's ethical obligations when acting as a lobbyist. The next opinion to be released will probably be one dealing with lawyers' charging of interest.

AA. Supreme Court Civil Rules Committee Liaison

No report this month.

BB. Tax Section Liaison

No report this month.

CC. Title Standards Committee

No report this month.

DD. Board of Governors

No report this month.

EE. Eminent Domain Committee

No report this month.

FF. Budget Committee

No report this month.

VII. Adjournment

The meeting was adjourned at 5:09 p.m.



Charles D. Calvin, Secretary