



Real Estate Section Newsletter

A publication of the Real Estate Law Section of the Colorado Bar Association

**Special Issue:
Proposed Amendment 40
Term Limits for Appellate Court Judges**

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The Real Estate Section was requested by the Colorado Bar Association to contribute to the Vote No 40 campaign and after discussion, the Real Estate Section Council unanimously agreed to do so in the amount of \$20,000 (35% federal political contribution tax included). The Section Council, recognizing that real estate practitioners come in every political hue, has steered away from taking positions on political issues despite the numerous initiatives and proposed amendments that Council members individually have wished to support or condemn over the years. In reviewing Amendment 40, however, the Council members felt the negative impact the Amendment could have on the administration of justice in Colorado was an issue which members of the Bar, including real estate lawyers, had a particular responsibility to address. Understanding that there are two sides to every issue, however, the first part of this Newsletter is dedicated to a discussion of the pros and cons of Amendment 40.

**Support of Amendment 40
Kenneth R. Buck,
Weld County District Attorney**

The history of term limits in this country dates back to our nation's infancy. George Washington understood that the future success of our government would depend on democratic, not autocratic, leadership. He set the precedent for term limits when he relinquished the office of president after two terms. In 1947, Congress passed the 22nd Amendment, limiting the president to two terms in office. Since then, term limits have been used by the people of this country as an effective means to curb the abuse of power.

Amendment 40 returns to this idea as it proposes term limits for the Colorado Judiciary.

With job performance evaluations effectively run by the judiciary for the judiciary, and little public scrutiny for 40 years, Colorado appellate judges have overstepped their proper role with increasing frequency. A recent case involving the attempted marriage

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**Vote No on 40
by Willis Carpenter,
Carpenter & Klatskin, P.C.**

At the July Real Estate Symposium I asked the audience of 300 or more Colorado real estate attorneys how many were practicing in 1966 when the State Constitution was amended to provide for merit selection of judges. I admit I was shocked when only three hands were raised. Then I realized that, after 40 years, the vast majority of Colorado lawyers has no experience under the pre-1966 law requiring the election of judges by popular vote.

It was the system for electing judges that caused the lawyers of Colorado to spearhead a successful effort to introduce merit selection of judges in this State. I assume you know that an independent nominating commission composed of lawyers and non-lawyers interviews candidates for the judiciary and forwards two or three names to the Governor for appointment. Insofar as the nominating commission can determine, each of the candidates is well qualified. Those of us who practiced before 1966 can assure you that the quality of our judiciary increased

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Support of Amendment 40

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of a 34-year-old man to a 15-year-old girl highlights the insularity enjoyed by appellate judges.

In that case, the appeals court reversed a lower court and approved common-law marriages for girls as young as 12. The judges said: "In the absence of a statutory provision to the contrary, it appears that Colorado has adopted the common law age of consent for marriage as fourteen for a male and twelve for a female, which existed under English common law."

The court's blessing of child marriage defies not only common sense but abundant legislative precedent. For example, to obtain a valid marriage certificate, the legislature requires a female to be 18 years old or 16 years old with parental consent.

Other statutory guidelines abound: a 12-year-old girl can't consent to sexual intercourse under Colorado law for four more years. She can't purchase real property, make enforceable contracts, drive an automobile, drink alcohol, vote, smoke, or even drop out of middle school. The Colorado Legislature has passed dozens of laws that reflect the will of the people: a 12-year-old is too immature to evaluate a marriage proposal. Yet the Court of Appeals applied 500-year-old precedent from England to reach a different result. Fortunately the Colorado Legislature quickly reversed the law established by the courts.

This fall, few voters will know the names of the judges responsible for this bizarre interpretation of our marriage laws. In fact, only a small percentage of voters can even name a judge on the Colorado Supreme Court or the Court of Appeals. It is not because their jobs are unimportant, but rather because judges serve in relative obscurity. Why is that important? Because it means that Colorado's system of having judges stand for periodic retention votes does not produce effective oversight of the judiciary. The personal anonymity and institutional prestige of the judiciary combine to produce unanimous retention of appellate judges.

Amendment 40 addresses this problem. The measure limits the terms of Supreme Court Justices and appellate judges to 10 years. It does not reduce judicial independence, politicize the courts, return us to the days of electing judges or change the merit selection process. The Amendment does not make it easier to remove an incompetent or unpopular judge.

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substantially and quickly after 1966. There were, of course, many excellent judges in Colorado prior to the adoption of merit selection; but, there were also many judges who owed their position to political partisanship. Democrats were elected in Denver, Republicans were elected in Arapahoe County. The election process had nothing whatsoever to do with qualifications for judicial service.

Suffice it to say that merit selection under the 1966 constitutional amendment has served the public extremely well compared with the prior system. Of course, improvements can always be made. Not every judge is perfect, not every judicial decision is above criticism. However, the thrust of the present initiative to place term limits on appellate judges arises, in my opinion, from two motives: (1) dissatisfaction with several well-publicized decisions, both at the appellate and trial court level; and (2) a desire to exercise a measure of political control over the judiciary.

As to the first objection (unpopular decisions), winners and losers are present in every case. If disappointed litigants and their friends and allies can utilize term limits to change the constitutionally-decreed procedure for the selection of judges, we the citizens, suffer the loss, surrendering initially, and all at one time, five of seven experienced and knowledgeable members of the present Colorado Supreme Court. We should be passing laws to encourage our judges to remain on the bench until mandated retirement at age 72, not giving them the boot after ten years of on-the-job training. The idea of limiting judges to 10 years on the bench is as counter-productive as removing a teacher from the classroom after 10 years, or forcing a surgeon to return to general practice despite the expertise and skill accumulated during the preceding 10 years.

The second motive (political control) is even more troublesome. High school civics teaches us that an independent judiciary is an indispensable institution in any viable democracy. This initiative gives the next Governor – and future Governors – the power to appoint nearly the entire Supreme Court all at once, making judicial appointments a centerpiece of future elections and stacking the deck with judges who share the Governor's political views, be they conservative or liberal.

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It does not reduce the average length of appellate court tenure, which is currently about eight years.

Amendment 40 treats all three branches of state government equally, requiring term limits for all. Coloradans have favored rotation in office as an important check against the abuse of power. Amendment 40 recognizes term limits are especially appropriate for the unelected judicial branch.

The retention system has been in place for the past 40 years and during that time there has not been a single Supreme Court Justice or appellate judge voted out of office. Less than 1% of all judges ever get dismissed by voters. The retention system is superficial and ineffective. It leads to virtual life tenure with little accountability. Amazingly, despite many publicized poor decisions, all 106 judges on the ballot this year have received a positive retention recommendation from the Judicial Performance Evaluation Committees.

Opponents of Amendment 40 have once again wheeled out the same tired and discredited arguments against term limits: Colorado will lose years of valuable experience and the most talented lawyers will not seek judicial appointments. Experience, however, has taught us that these arguments were not true before and they are not true now. Talented lawyers sought district attorney positions across the state after the voters term limited entrenched incumbent DAs. While it is true that the new Supreme Court Justices will not be as experienced, there is no evidence they will be less qualified to interpret the law with common sense.

Opponents also argue that lawyers will not seek judgeships that are limited to only 10 years. They argue that it will be too difficult for judges to find employment once their term is up and thus Amendment 40 will deter lawyers from ever considering let alone taking the position. Again, experience tells a different story. Justice Gregory Kellam Scott resigned from the Colorado Supreme Court in 2000 after he accepted an appointment as Vice President and General Counsel of Kaiser-Hill, L.L.C. Justice Rebecca Love Kourlis resigned from the Colorado Supreme Court in 2006 and went on to establish and lead the Institute for the Advancement of the American Legal System.

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It is my suspicion (call me a cynic if you will) that success in term limiting the appellate judges, should it occur, would soon be followed by an initiative to term limit our trial judges, followed by a call to abandon merit selection of judges altogether and return to political elections.

Just to give you the flavor of the pre-1966 courtroom, can you imagine trying a case to the court before a judge of the opposite political party to which you or your client belong, a judge whose campaign fund was not fattened by any contributions from your side of the lawsuit, but possibly was from the other side? Even worse, think of trying a case before a judge who would never have been selected by any merit system but who became a judge only by working his or her way up through, not the legal system, but a political party hierarchy. I do not believe there are many lawyers in this State who would ever advocate a return to the election of judges, and I question the agenda of those who would.

The concept of term limits for judges is far different from term limits for legislators and governors. Judges need job security to gain the confidence and wisdom we require of them to act as the final check on excessive powers that may be claimed by the other two branches of government.

As indicated at the beginning of this article, most of the lawyers who worked tirelessly in 1966 to bring this State a judicial merit selection process that is admired nationwide are no longer aboard. It is now incumbent on us "younger" practitioners to pick up the cudgels and beat back the barbarians who would return our constitution to barbaric times.

Our justice system in Colorado is not perfect, and we must be constant in our efforts to make it better. Term limits is a step backward. The concept must be rejected, and rejected soundly at the November general election.

For more information, go to www.voteno40.org.

Support of Amendment 40

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The author of the child marriage case wrote on the Court's website, "...Government is based on three independent, but equal, branches of government, and it is the third branch, the judicial branch, that is the least visible and the least understood." The case for term limiting the judiciary could not be stated more clearly. It is the lack of visibility and public understanding of judicial performance that makes the current retention system ineffectual. Requiring term limits is a reasonable check on judicial power. Amendment 40 appropriately balances judicial independence and public accountability.

DUE DILIGENCE FOR ENDANGERED SPECIES

PART ONE

By Steve Paulson, aci consulting &
James Borgel, Of Counsel, Holland & Hart LLP

Introduction

Over the course of the past few decades, environmental awareness and activism has transformed the role of the federal government in commercial and residential land development. Whether it is the role of the U.S. Army Corps of Engineers (USACE) in protecting wetlands that may occur within a commercial or residential subdivision or the role of the State of Colorado in mandating federal best management practices for stormwater runoff on construction sites, daily land development activities are receiving a great deal more scrutiny. This transformation has increased federal government involvement in land development projects and the requisite level of information needed to document impacts resulting from land development on the natural environment.

The land development community (i.e. landowners, developers, brokers, contractors, builders, end users, and their financial partners) has become cognizant of the need to be thorough in analyzing environmental constraints and reducing the risks associated with these constraints. All of these groups need to be acutely aware that federal environmental constraints can severely affect the economic viability of a project and expose all parties to financial and legal liability.

One of the environmental laws that can severely reduce locally vested development rights is the Endangered Species Act of 1973, 16 U.S.C. Section 1531, et. seq., as amended (ESA). In Part One of this Article, we will provide a general overview of the regulatory requirements affecting real estate that relate to the protection of threatened or endangered species. Part Two (to appear in the next Newsletter) will provide a checklist

that can be used by owners of real property, their attorneys and consultants, when attempting to assess the risk associated with the possible presence of an endangered or threatened species in connection with the acquisition or development of real property.

The ESA can add millions of dollars in protection cost to properties where listed endangered or threatened species are known or suspected to occur. In the last few years, for example, there have been tens of thousands of acres of land along the Front Range of Colorado affected by the proposed or actual listings of several threatened or endangered species, including the Preble's Meadow Jumping Mouse (listed as threatened) and the black-tailed prairie dog (determined not to warrant listing at this time). The listings of species can create great uncertainty regarding land transactions or the ability to construct a development project because they can limit the size, scope, and timing of development regardless of the legal vesting of rights garnered through the local land use approval processes.

There has been an entire cottage industry that has burgeoned in the last 15 years on resolving constraints imposed by the federal ESA. Attorneys and consultants in the field are expert at identifying the potential constraints imposed by federally listed species and in providing opportunities to resolve such constraints. This article was not drafted to substitute for the excellent advice provided by these professionals.

Endangered Species Act Overview

The ESA is a federal law intended to protect species whose existence may be in danger of extinction. The ESA protects federally listed threatened or endan-

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gered species by prohibiting any activity that would jeopardize the existence of the species. Specifically, the ESA outlaws activities that may result in the “take” of listed species by directly killing or injuring a listed species, or by destroying or degrading occupied or critical habitat that significantly alters the breeding, feeding or sheltering behavior of the listed species.

Generally, “take” of listed species can be obvious (i.e. hunting or trapping) or abstruse (i.e. impacts to the ecosystem from an anthropogenic activity that are not easy to measure). The power to define take rests with the U.S. Fish and Wildlife Service (USFWS), an agency within the Department of Interior. The rules and policies establishing what constitutes take are not always as clear as a landowner would desire, and frequently are designed to “err on the side of the species.”

USFWS establishes what constitutes take as a part of the listing decision package published in the Federal Register at the time a species is listed. USFWS may also establish additional take guidelines when critical habitat is designated for a species, when a recovery plan is finalized for a species, or during status reviews conducted periodically for the species. USFWS will maintain a list of the scientific reports that were the basis for establishing what activities result in take of a particular species (as well as information on threats, population estimates, and habitat requirements) in the Ecological Services office where the species is located.

Occasionally, the scientific literature supporting a listing and establishing take are convincing and supported with a wealth of data. Frequently, however, the scientific literature does not provide a clear basis for such determinations and USFWS is often left to make decisions on a worst case scenario. The ongoing scientific debate over whether the protected Preble’s Meadow Jumping Mouse constitutes a distinct subspecies or is merely an isolated population of a commonly found species is an example of this quandary. The land development community is often left with little guidance on what constitutes take or what process can resolve the uncertainty that results from such scant guidance. This can make the due diligence process for resolving ESA constraints very cumbersome and time consuming.

In addition to the general prohibition against the “take” of threatened or endangered species, certain projects that require federal involvement will automatically trigger the need to undertake certain steps relating to protected wildlife. Any project that utilizes federal funding (such as the construction of an interchange or highway improvements) or that requires the issuance of a federal permit (such as the issuance of a permit to fill wetlands under section 404 of the Federal Clean Water Act, 13 U.S.C. Section

1344), will require consultation with USFWS to determine if any threatened or endangered species will be affected by the project. A landowner with these types of projects should have a heightened sensitivity to endangered species issues.

State Protections

The State of Colorado also maintains a list of threatened or endangered species that are subject to protection under state law. The state listing can be viewed at <http://wildlife.state.co.us/WildlifeSpecies/SpeciesOfConcern/ThreatenedEndangeredList/ListOfThreatenedAndEndangeredSpecies.htm>. Although state regulations concerning threatened or endangered wildlife are far less comprehensive than federal law, the possession or taking of an animal that is on the state listing can subject a landowner to criminal penalties, including fines and jail.

Local Regulations

Many local jurisdictions have adopted ordinances and regulations that protect endangered wildlife. These may consist of relatively straightforward prohibitions against the taking or harassment of state or federally listed species, or may require a landowner to assess the possible presence of endangered species during the land use approval process. For example, many local jurisdictions will require a landowner to protect and preserve sensitive habitat and wildlife migration corridors as part of the planning process. Frequently, local regulations will require that a landowner provide referral copies of their development plans to the Colorado Division of Wildlife (DOW) for review and comment as a means for determining whether the plan will have any effects on protected wildlife or significant wildlife habitat. DOW’s comments must then be addressed as part of the approval process and may require the plan to be modified significantly.

Conclusion

In today’s regulatory environment, an assessment of issues related to threatened or endangered species should be part of any decision to acquire or develop property. In Part Two of this Article, we will provide a due diligence system for determining whether endangered or threatened species occur on a property scheduled for purchase and/or development and what to do if a threatened or endangered species is found.

AMENDED AND RESTATED TITLE STANDARD 7.1.1

The CBA Board of Governors has approved the Amended and Restated Title Standard 7.1, as proposed by the Title Standards Committee of the CBA's Real Estate Law Section. The revised standard addresses issues regarding proof of death of co-tenants and the use of supplementary affidavits under Colo. Rev. Stat. §38-31-102 and §38-31-103.

7.1 Cotenants

7.1.1 Cotenants—Proof of Death

Problem:

(A) Following the death of a person holding a record interest as a joint tenant or life tenant in Colorado real property, (i) a certificate of death, verification of death, or other similar instrument issued by the public entity responsible for issuing such certification or verification of death in the jurisdiction in which the death occurred, is recorded in the real estate records in the county in which the property is located, together with (ii) a supplementary affidavit containing the information set forth in C.R.S. § 38-31-102. Assuming title is otherwise marketable, is title marketable in the surviving joint tenant or remainderman?

(B) The documents described in (A)(i) and (A)(ii) above are recorded, but the supplementary affidavit is recorded at some time subsequent to the recording of the document described in (A)(i). Assuming title is otherwise

marketable, is title marketable in the surviving joint tenant or remainderman?

(C) Following the death of a person holding a record interest as a joint tenant or life tenant in Colorado real property, an affidavit containing the information set forth in C.R.S. § 38-31-103 is recorded. Assuming title is otherwise marketable, is title marketable in the surviving joint tenant or remainderman?

Answer: Yes, in each case.

Note: The same analysis would apply to establish the death of an "Owner" under a "Beneficiary Deed," as those terms are defined in C.R.S. § 15-15-401.

The Real Estate Section Council appoints the members of the Title Standards Committee each year. The Committee is responsible for analyzing real property title problems and for proposing title standards or legislation to solve the title issue.

If you are aware of a title matter that may be appropriate for consideration by the committee, please contact the Committee Chairperson, Diane Davies of Faegre & Benson at ddavies@faegre.com.

In addition, Attorneys Title Guaranty Fund, Inc. has generously offered to provide a copy of The Real Estate Title Standards to each real estate practitioner in Colorado. To receive your copy, please send an email to Diane Davies at the address noted above. Thank you Attorneys Title!

Author! Author!

The Real Estate Section will honor the best article published in the Real Estate Section's column in *The Colorado Lawyer* during the year beginning July 1, 2006 and ending June 30, 2007 with a prize of **\$500.00**. Please submit your ideas to Louise Staab at Holme Roberts & Owen LLP, louise.staab@hro.com



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DUE DILIGENCE FOR ENDANGERED SPECIES

Part Two

By Steve Paulson
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(Note: Part One of this Article, which appeared in the fall Newsletter, provided a general overview of federal, state and local regulations affecting endangered species. This Part Two will provide real estate practitioners with a proposed methodology for conducting due diligence on these issues in connection with a real estate transaction).

Introduction

A buyer of real estate, or an owner of real estate with intentions to develop the property, should always be aware that the presence of endangered or threatened species on the property may have a significant impact on plans to develop or use the property. As discussed in Part One of this article, the development of property may be subject to regulation under the Federal Endangered Species Act (ESA) if the proposed project results in the "take" of a listed species through the killing of protected animals or the destruction of habitat, or if the proposed activity requires a federal permit. In some cases, the presence of threatened or endangered species, or the existence of habitat for such species, may result in a complete prohibition against development. Because of these regulations, a prudent buyer of real property, or an owner planning to develop property, should always be prepared to: 1) undertake appropriate due diligence efforts that will identify the presence of any endangered or threatened species on the property; and 2) develop a program for addressing any issue caused by the presence of any threatened or endangered species.

Due Diligence for Federally-Listed Endangered or Threatened Species

A sample due diligence method for determining: 1) whether endangered or threatened species occur on a property scheduled for purchase and/or development; and 2) what to do if an endangered species is found, is shown below. It is a simple process designed to identify risks, utilize methods to resolve identified risks, and estimate costs associated with resolving identified risks.

Level One-- Information Gathering

Suppose you are about to purchase property, and the lender asks: "Are there any endangered species in the area?" Suppose you are in the process of obtaining zoning, subdivision, or site development approvals from the local jurisdiction, and you are required to identify and mitigate any effects the proposed project may have on wildlife, including threatened or endangered species. Suppose you are applying for a storm water protection plan permit in connection with a development or construction project, and you are asked if there are any impacts to federally-listed species. What do you do to resolve the transaction concern? How should you respond to the regulator, or complete the required application paper work?

The first step is to seek out publicly available information on endangered species in your area. There are many different sources of information; however, it is important to remember that the more public your request, the more exposure your request will receive. A buyer could be exposed to potential liability to the owner if the buyer's investigation identifies an endangered species issue on the property which then comes to the attention of the public or applicable regulatory authorities and negatively affects property values. A buyer who is investigating a potential property for purchase should generally obtain the seller's consent before asking regulatory agencies such as the United States Fish and Wildlife Service (USFWS) or the Colorado Division of Wildlife (DOW) to review the specific property in any detail. In addition, private land development activities do not generally need approval by USFWS unless the proposed development requires a federal permit, such as a Section 404 permit for the disturbance of wetlands issued by the United States Corps of Engineers.

USFWS

The simplest and most direct way of gathering ESA information is to contact the USFWS. USFWS maintains Ecological Services field offices throughout the country with lists of all federally-listed endangered and threatened species for each county in the state. Colorado has two such offices— one in the Federal Center in Lakewood, with authority over the East Slope, and one in Grand Junction, with authority over the West Slope. USFWS can also provide documentation on recently petitioned species and candidate species for listing. Petitioned species are species for which USFWS has recently received a request to list a species as endangered or threatened from any individual. Candidate (or at risk) species are species which USFWS believes may warrant listing, but are precluded from making a determination because there is little scientific information available to support such a conclusion. There are currently 279 candidate species in the United States.

USFWS may also be able to conduct an assessment of the potential for federally-listed species to exist on your property by examining aerial photography, geological or soils maps, and topographic maps that may be submitted for review. Keep in mind that USFWS is not well funded, and may not have available staff for such an assessment. USFWS also maintains a list of private scientists in the field who have been approved by USFWS to conduct certain activities, and may be able to provide such information.

State of Colorado Resources

DOW also maintains listings of potential habitat for federally listed species, species that are candidates for federal listing, recently petitioned species, and state-listed endangered and threatened species. Local DOW wildlife officers are also generally very familiar with endangered species issues in their area, and can provide a great deal of information on this topic. While the state endangered species law lacks the teeth of its federal counterpart, any landowner/developer or agent should be aware of state law requirements.

Elected Officials--U.S. Senators/Representatives

While elected officials may not be the repository of specific information regarding endangered species locations and habitat, their offices can be very helpful in directing you to the appropriate person in the government, or to a research scientist with expertise on the species of concern. Many of the Senators' or Representatives' offices are very aware of the ESA and endangered species in their area, especially in the west, and have staff with previous ESA experience. These individuals can often provide insight on the subject beyond the scientific information you may be requesting.

City/County

Local governments may not possess specific information regarding endangered species locations. However, many larger municipalities and counties utilize GIS mapping techniques to determine environmentally sensitive areas. In many cases these maps can also be used to show potential habitat for endangered species. Many of these jurisdictions have staff contacts familiar with ESA and wildlife issues within their area. In addition, some localities may be in the process of drafting, funding, and/or implementing regional habitat conservation plans for endangered species. These localities will have information regarding endangered species, and may also have a program already in place to implement advanced planning concepts on how to resolve endangered species issues on a regional basis. Utilizing this resource would certainly be less expensive, more timely, and more certain than you could achieve by yourself.

Trade Associations

All of the national trade groups with state and local affiliates, such as the National Association of Realtors and the National Association of Home Builders, have retained staff members who are very familiar with federally-listed species. These individuals will have access to documentation related to federally listed species, or will be able to recommend someone in the field who may have such documentation.

Environmental Advocacy Organizations

While an environmental advocacy organization may be the last place a member of the land development community would venture to gather information on endangered species, some environmental organizations are very knowledgeable about range, populations, habitat criteria, known locations, and threats to listed species. Some groups, such as The Nature Conservancy, are in close contact with state heritage programs, which

comprise the database for many endangered, threatened, and candidate species. In some states, The Nature Conservancy manages the database.

Level Two—Site Assessments

If data collected during the Information Gathering process suggests that potential or occupied habitat for endangered or threatened species may be located on, adjacent to, or in the general area of a property you own or are considering for purchase, the next level of due diligence may require a field analysis specific to the subject property and/or areas immediately adjacent to the subject property. The level of analysis will depend on many factors, including scientific factors such as the proximity of known locations of endangered or threatened species to the subject property and the proximity of potential habitat to the subject property. Other factors may include state and local regulations; and the level of public awareness of any ESA issues. Habitat evaluations and censusing surveys are two types of analysis commonly utilized in the next level of due diligence.

Habitat Evaluations

A habitat evaluation is conducted to assess the botanical, geological, hydrological, soils, and topographical elements of a property to determine the probability of endangered species. A qualified scientist, hired by the person requesting the information, will utilize industry standards acceptable to the regulatory oversight agencies to conduct the habitat evaluation.

Information gathered in habitat evaluation can then be compared to areas where listed species are known to occur. The comparison will determine the probability that a protected species will be found on the site. Private habitat evaluations are generally confidential, and the contract with the individual or firm conducting the evaluation should clearly state that the information generated by the study is to be kept confidential. In addition, a habitat evaluation will generally require entry onto the property, and therefore the landowner's express permission for such activity should always be obtained.

Censusing Surveys

Censusing surveys are conducted to determine if a listed species actually exists on or immediately adjacent to, the property. The ESA only protects habitat for a species if it is occupied or critical to the recovery of the species. Critical habitat (if designated by USFWS) is public information and clearly delineated on maps.

Techniques utilized for censusing surveys are usually regulated by USFWS and clearly defined. Scientists who conduct censusing surveys are permitted by USFWS. All censusing surveys conducted by permitted scientists must be provided to USFWS in annual reports. Accordingly, the confidentiality regarding this data is limited. The report summarizing the results of a censusing survey should include a habitat evaluation. Combining censusing surveys and habitat evaluations will be helpful in determining avoidance, minimization, and mitigation strategies.

Level Three—Options Analysis

Unless there is federal involvement (i.e. federal funding and/or federal agency approval or authorization) or you are developing in designated critical habitat for an endangered or threatened species, the ESA is a "self-regulating" law. A good analogy is that you do not contact local law enforcement officials to seek permission for driving under the speed limit. You are not mandated to seek USFWS approval if it has been determined by scientists and attorneys with expertise in the field that "take" will not result from the development of the property.

However, science and the law do not always possess linear decision-making processes and, in many instances, scientists and attorneys will have distinctly different opinions and serious disagreements over what constitutes habitat, and what level and type of development will result in "take." Some scientists and attorneys will have a very broad perspective on protection for particular species, while others will define that protection through available science and a literal interpretation of the law. When you combine this debate with the lack of clear guidance from USFWS, the course of action for the land development community is not always clear.

This is why it is always advisable to assemble the best available data within the parameters of good legal advice, and then analyze the risks associated with making certain land development density and use decisions within the costs associated with reducing those risks. Identifying and analyzing risks (i.e. the likelihood of an enforcement action by USFWS or legal action by environmental groups), and an analysis of the costs associated with reducing those risks (i.e. loss of developable land or uses, cost of purchasing mitigation land), will clarify and quantify your choices for going forward with the sale or development of property.

Conclusion

In today's regulatory environment, any person who is considering the development of land should be aware of endangered species issues. Although the development risk associated with the presence of an endangered species will vary, depending on the location of the property and the type of development anticipated, an endangered species review should always be part of a thorough due diligence process.

PRACTICE POINTER

Reliance Upon Prior Environmental Assessments

By Rebecca Wilcox Dow
Holland & Hart, LLP

The CERCLA All Appropriate Inquiries Final Rule became effective on November 1, 2006. This rule expands the scope of commercial environmental due diligence and sets limits on the use of prior environmental assessments.

* Be careful about relying on old environmental assessments. In order to use a prior environmental assessment for a property it must have been in compliance with rulemaking in effect at the time it was completed, and the information from the previous assessment must have been collected or updated within one (1) year before the date of purchase. Certain information in the assessment must be obtained or updated within 180 days before the date of purchase, including interviews, lien searches, governmental record searches, visual inspection of the property and adjoining property and the Environmental Professional Declaration. The collected information must be updated to include changes in conditions and specialized knowledge of the property and surrounding areas. There are additional requirements if the assessment is being conducted for a third party.

* In requesting that a new environmental assessment be provided by a seller, the purchaser may want to request the following:

"A Phase I and/or II environmental audit, certified to the Purchaser, performed by a qualified environmental professional and which, as of the Closing, meets at a minimum the standards required by ASTM E 1527-05 and the Final Rule for conducting "all appropriate inquiry" as set forth in 70 Federal Register 66070, which shall include, without limitation, an examination of the following factors of the Property:

(i) the current and historical use of the Property, for not less than the past 50 years;

(ii) the presence of asbestos or asbestos-containing materials in, under or upon the Property;

(iii) the presence of PCBs in, under or upon the Property;

(iv) the presence of underground or above ground storage tanks in, under or upon the Property;

(v) the presence of liquid or solid wastes in, under or upon the Property;

(vi) the sources and uses of potable and processed water in, under or upon the Property; and

(vii) other factors required under the All Inquiries Final Rule."
[Note--other factors may include radon, lead-based paint, wetlands, cultural and historical resources, endangered species, biological agents, mold, and compliance with activity and use limitations , i.e., institutional controls.]

For more information regarding the Final Rule: <http://www.epa.gov> and the ASTM Standard E 1527-05: <http://www.astm.org>

DIVISION OF INSURANCE REGULATION 3-5-1 CONCERNING
TITLE INSURANCE AND AFFILIATED BUSINESS
ARRANGEMENTS

By Peter J. Griffiths
Vice-President and Counsel
Land Title Guarantee Company

House Bill 06-1141 “Concerning the Authorization of Affiliated Business Arrangements” (the “Bill”) became effective July 1, 2006. The Bill required the Commissioner of Insurance to promulgate rules concerning the “creation and conduct of an affiliated business arrangement, including, but not limited to, rules defining what constitutes a sham affiliated business arrangement.”

As a result, the Commissioner of Insurance formed a task force with the mandate to revise Regulation 3-5-1, and incorporate the affiliated business arrangement requirements. The task force consisted of representatives from the title insurance industry, Colorado Association of Realtors, Colorado Real Estate Commission, Department of Regulatory Agencies and the Real Estate Section Council of the Colorado Bar Association. Due to the substantial changes that were recommended by the task force, the entire Regulation was repealed and re-promulgated, effective January 1, 2007. The full text of the Regulation can be found at the Division of Insurance website, <http://www.dora.state.co.us/Insurance/regs/3-5-1.pdf>. Almost all of the revisions concern the new rules for affiliated business arrangements.

Under Section 6 (Rules regarding Standards of Conduct for Title Insurance Entities) a new Section 6B has been added for Affiliated Business Arrangements. Underlying this Section is the basic premise that payment for the referral of business is illegal under 10-11-124(1) C.R.S. and RESPA, except for services actually performed. Section 6B sets out the factors that the Division of Insurance will consider in determining whether a particular business arrangement is prohibited or not. The general principle is whether the title entity is operated independently with its own separate business identity. Examples of the factors to be considered include, but are not limited to, (1) arrangements in which the ownership interests are conditioned on the volume of referrals, (2) whether the title entity is structured and operated in a way that indicates that it maintains a separate and distinct identity in compliance with the applicable title insurance laws, (3) whether the title entity's employees are shared with another title entity, and (4) whether the title entity actually performs title services for the revenue earned. If there is an affiliated business arrangement, then proper written disclosure must be made to each person whose business is being referred.

Section 12 of the Regulation incorporates, by reference, inter alia, certain HUD Policy Statements (1996-2, Sham Controlled Business Arrangements, and 1996-4, Statement of

Enforcement Standards: Title Insurance Practices in Florida; Final Rule) as well as RESPA, in such form as the Policy Statements and RESPA are in force at the effective date of the Regulation (January 1, 2007). By means of this incorporation by reference, it appears that the Division of Insurance is bringing the full power and weight of RESPA to bear on the title insurance industry in Colorado, especially in regard to Section 8 of RESPA, which deals with the elimination of kickbacks and referral fees with the concomitant enforcement provisions.

As part of a companion rule making, the Colorado Real Estate Commission revised Rule E-22 (Inducement from settlement producers prohibited) and promulgated a new Rule E-46 (Affiliated Business Arrangements) to cover the same issues for real estate brokers.

Finally, it is important to note that both sets of rules are not independent of each other but are intended to be read and enforced as a unified approach by the Department of Regulatory Agencies to the regulation of affiliated business arrangements.

REPORT

Real Estate Section Council Response
to
Snowmass Land Company v. Two Creeks Homeowners Association, Inc.

By Russell W. Kemp
Ireland, Stapleton, Pryor & Pascoe, P.C.

Many in the real estate bar are already familiar with the Colorado Court of Appeals decision in Snowmass Land Company v. Two Creeks Homeowners Association, Inc. (2006 WL 1914076), decided July 13, 2006. The decision interprets the Colorado Common Interest Ownership Act, C.R.S. Sec. 38-33.3-101, et seq. ("CCIOA"), in particular, the required contents and the interrelationship of declarations, plats and maps. At Real Estate Section Council meetings, Snowmass has generated much discussion and concern, and the Section Council has decided to propose legislation to clarify CCIOA in the wake of this decision.

In Snowmass, a developer created a common interest community ("Community") under CCIOA (as in effect in 1994) and reserved certain development rights, including the right to withdraw property from the Community, in the recorded declaration of covenants, conditions and restrictions. The Community's association asserted that the developer did not properly reserve the right to withdraw the property. The trial court ruled in favor of the association in response to a motion for summary judgment. In confirming, the Court of Appeals held that the Community did not have a map (as defined in CCIOA) containing information required by CCIOA § 209 for the developer to reserve the right to withdraw property.

The Section Council found consensus that the Snowmass decision creates uncertainty regarding several core concepts central to CCIOA and creates potential problems for parties (including developers, buyers and lenders) who have taken action, often involving substantial investment, in reliance on what the Section Council believes to have been the common and reasonable understanding of CCIOA among the real estate bar prior to Snowmass. In particular, the Section Council believes the Snowmass decision fails to distinguish between plats and maps under CCIOA, which is especially significant because of changes to CCIOA § 209 in 1998 (not at issue in Snowmass). The decision also rejects the common understanding among real estate lawyers, based on the language of CCIOA, that a plat or a map is a part of the declaration for a community and that there is equivalent effect for terms or disclosures made in any one of a declaration, plat or map. Finally, the Section Council is concerned that Snowmass will create inconsistency and tension between CCIOA and the recording act.

Initially, the Section Council was preparing an amicus brief to file in an appeal of the Snowmass decision. However, the Colorado Supreme Court denied the petition for certiorari review on November 13, 2006. The Section Council has drafted proposed

legislation to amend CCOIA § 209 (i) to clarify the distinction between plats and maps, (ii) to create equivalency among the plat, map and declaration of a community, such that if any material required by CCOIA § 209 is contained in any one of the plat, map or declaration, the requirements of § 209 are satisfied and (iii) to make the changes retroactive to July 1, 1998, the effective date of the 1998 amendments to CCOIA, such that if material required by § 209 was previously included in a declaration recorded after July 1, 1998 but was not contained in a map, § 209 is satisfied.

Bill sponsors are being sought to introduce the legislation in the 2007 session.

VOLUNTEERS NEEDED FOR LAWLINE 9

Real Estate lawyers will staff the phones at Lawline 9 on June 6, 2007 to answer questions from the public on housing issues. Topics will include landlord/tenant, homeowners associations, foreclosure, and other general real estate questions. Please contact Meghan Seck at the CBA (303-824-5301 or mseck@cobar.org.) for more information and to volunteer.

BE A MENTOR

The University of Denver Construction and Real Estate Law Society (CRLS) is looking for attorney mentors in the real estate law community. The club is hoping to establish lasting relationships with attorneys in the field of real estate law in order to create specific networking opportunities and guidance for club members. The format for the program would consist of a series of informal social gatherings and lecture events. This program allows students to make contact with real estate practitioners while allowing firms to informally meet potential interns or new hires from a pool of students dedicated to real estate law. If interested in participating, please contact DU student Josh Lanzetta at jlanzetta07@law.du.edu.

GET THE REAL DIRT AT THE 25TH ANNUAL REAL ESTATE SUMPOSIUM

The 25th Annual Real Estate Symposium will be held in Steamboat Springs, Colorado, July 19-21, 2007.

Featured speakers include Professor Joyce Palomar, Erin Toll, Anthony Davis, John Moye, and other real estate experts. Mark your calendar now, and visit the Real Estate Section's Web page (<http://www.cobar.org/group/index.cfm?EntityID=REALES>) later this spring for more program information and registration materials.