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## Year-end review of legislation, case law affecting real estate

With the storm clouds of a double-dip recession fading and economic news hinting that gradual recovery is the more probable course, commercial real estate trends will be watched carefully in 2012. As we approach year-end, this article will briefly review some of this year's important developments in legislation and case law that may affect the real estate industry:

### ■ Indemnity provisions in commercial lease agreements.

Indemnity agreements can be a powerful risk-shifting tool in commercial lease agreements. The recent Colorado Supreme Court decision in *Constable v. Northglenn LLC*, 248 P.3d 714 (Colo. 2011), provides guidance in drafting enforceable indemnity provisions. The case involved a dispute between the owner of a shopping center and its tenant in the context of a third-party injury lawsuit. The tenant claimed that an indemnity provision in favor of the landlord for the landlord's own negligence was unenforceable because such provisions violate public policy. The Colorado Supreme Court disagreed. The court addressed enforceability of indemnity provisions and articulated several rules applicable in this context: 1) An agreement purporting to indemnify a party against liability for its own negligence will be enforced, as written, as long as it contains a clear and unequivocal expression that the parties intended that result; and 2) an agreement to indemnify against liability for breach of a duty (e.g., keep a common area in "good order, condition and repair"), was not the



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equivalent of delegating that duty to another.

■ **Payment retainage in public entity construction projects.** The Legislature, recognizing that the construction industry is a significant component of the state's

economy, adopted House Bill 11-1115, which was intended to improve cash flow to and stability of Colorado's construction industry and its ability to create jobs. This measure amends CRS § 24-91-103 and related provisions to reduce the amount of permitted retainage on public construction projects from 10 percent to 5 percent of the value of the work completed. Final settlement must be made within 60 days after contract completion.

### ■ Conservation easements: adjudication process.

The Legislature has declared that the conservation easement program is an important preservation tool to balance economic needs with natural resource preservation. HB 11-1300 was adopted by the Legislature to streamline the dispute-resolution process related to contested conservation easement claims. Although the Department of Revenue has allowed a great majority of claims, a significant backlog has developed because disputed credits have not been finally adjudicated through the exist-

ing administrative process. As a result, CRS § 39-22-522.5 has been amended to allow waiver of an administrative hearing in order to proceed with a direct appeal to the district court for resolution of state income tax credit issues related to conservation easements. The amendments relate to tax credits officially disputed by the Department of Revenue as of May 1, 2011.

### ■ Condemnation of land subject to a conservation easement.

In another legislative measure relating to conservation easements, Senate Bill 11-050 adds provisions to § 38-30.5-108 providing that if land subject to a conservation easement is condemned, the condemning authority must pay no less than the fair market value of the property as if unencumbered by the conservation easement, with proceeds to be apportioned between the grantor and grantee of the conservation easement.

■ **Bond vs. *lis pendens*.** SB 11-264 was adopted to clarify the law concerning when a *lis pendens* is required to be recorded when a bond or undertaking is utilized as a substitute for the filing of a mechanics' or real estate brokers' lien. The intent of the legislation, in part, was to reverse the holding in *Weize Company LLC v. Colorado Regional Construction Inc.*, 09CA1396 (Colo. App. June 10, 2010), requiring recording of a *lis pendens* prior to commencement of an action on a substituted bond. CRS § 38-22-132, as amended, provides that once a bond or undertaking is appropriately substituted for a recorded lien, no *lis pendens* or notice of commencement of

action is required to be recorded. Furthermore, no *lis pendens* or notice of commencement shall thereafter be permitted against the property. Similar changes were made to the brokers' lien statute CRS § 38-22.5-111(3).

### ■ Rule against perpetuities.

A decision by the Colorado Court of Appeals late last year addresses the rule against perpetuities in the context of a real estate purchase option. In *Whiting Oil & Gas Construction v. Atlantic Richfield Co.*, 2010 Colorado LEXIS 1223 (Colo. App. 2010), Whiting's predecessor sought to exercise a purchase option on several parcels of land owned jointly by the parties (both surface and mineral interests). The purchase option was part of an agreement that was more than 23 years old. ARCO refused to honor the option, claiming that, among other things, the option violated the common law rule against perpetuities and was therefore unenforceable. The trial court disagreed, noting that in 1991 the Legislature adopted the Colorado Statutory Rule Against Perpetuities Act, CRS. § 15-11-1101 et seq. in order to limit the application of the rule against perpetuities to "donative transfers" of property. The purpose was intended to free commercial transactions from the "rule's arcane vesting requirements." Pursuant to CRS § 15-11-1106, the trial court "reformed" the option and this ruling was upheld by the Court of Appeals. The Colorado Supreme Court accepted a petition for review on Aug. 1, 2011. Stay tuned.▲