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INCLINE LAW GROUP



CURRENTS

Foreclosures and the Real Property Transfer Tax – Recent Questions and Answers with the Washoe County Recorder’s Office

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By John Rogers

Recent foreclosure and “deed-in-lieu” activity prompted discussions with the Washoe County Recorder concerning the Real Property Transfer Tax (“RPTT”). This should be of interest to persons involved in real estate investments and anyone interested in the costs to transfer, acquire, or reacquire property.

The RPTT is a tax collected on recording of real property transfers. In Washoe County the rate of the tax is not insubstantial. The county collects \$2.05 per \$500.00, or \$4.10 per \$1,000, of value transferred or of the purchase price. RPTT is collected on foreclosure transfers and deed-in-lieu transfers. The tax is generally described in Chapter 375 of the NRS. There are a number of exemptions from the RPTT found at NRS 375.090. Those exemptions are not pertinent to this discussion.

The information dis-

cussed herein includes relatively recent developments. There may be other developments or clarifications as this area of the recorder’s duties increases, so be sure and investigate before you conclude a sale, if the RPTT is of concern to you. This discussion focuses the calculation of the RPTT on (1) the foreclosure of a second trust deed and (2) where there is a deed-in-lieu of foreclosure.

1. How is the RPTT calculated on the foreclosure under a second deed of trust?

Let’s look at the question using a simple example: Borrower (B) buys a property for \$1,000,000 making a down payment of \$200,000 and borrowing \$600,000 from a bank and \$200,000 from a private lender (L). A RPTT of \$4,100 is paid on the transaction (\$4.10 x 1,000). The property is seriously impacted by the economy and is now only worth \$500,000.

B is unable to make his payments and defaults on both loans. (Assume that there have been no principal payments on either loan.) L, holder of the second deed of trust, forecloses first and proceeds to sell the property. There are no other buyers at L’s sale because no one wants to acquire the property subject to the \$600,000 first loan, which is more than the property is worth. L bids \$10,000 and buys the property from the trustee and proceeds to record the trustee’s deed. Having paid (or credit bid) only \$10,000, L expects to pay a RPTT of \$41.00 (\$4.10 x 10). Is he correct?

One would think because L only transferred \$10,000 of value, he should only pay RPTT on that value. That does make sense, but the Recorder sees it differently.

The Recorder will charge a RPTT of \$2,501! Yes, there is a \$41.00 tax on

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Foreclosures and the Real Property Transfer Tax – Recent Questions and Answers with the Washoe County Recorder’s Office

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L’s \$10,000. But the Recorder also charges \$2,460 for a RPTT based on the full value of the bank’s first loan of \$600,000! ($\4.10×600.)

It is the Recorder’s position that L, as the buyer, has also acquired property valued at the amount of the first deed of trust! Thus, L must pay a RPTT based on his bid plus the amount of the underlying deed of trust.

It pays to be cautious if you hold a second deed of trust and proceed to sale first.

And, as you know, L acquires the property subject to the default under the first loan of \$600K. Unless L chooses to take over the first loan or cure defaults under the first, the bank can go to sale and wipe out L’s position. This would certainly discourage L from going to sale first and pouring additional good money (\$2,460 for the RPTT plus fees and costs for the foreclosure) into a property not worth the balance on the first.

2. How is the RPTT calculated on a “deed-in-lieu” transaction?

Let’s use the same example, slightly changed.

Now there is only a first loan by L of \$800,000. B desires to have L agree to take the property back voluntarily instead of foreclosing on the loan. That is, B wants L to accept a deed in lieu of his further performance of the \$800,000 loan. Remember again that the property is now only worth \$500,000.

What will the RPTT be if L agrees to accept a deed-in-lieu?

The Recorder takes the position that subtracting Fair Market Value (“FMV”) from the amount of the debt determines the issue. This formula is dictated by the Declaration of Value form that is submitted with each transfer deed.

If the debt is greater than the FMV for the property, which is the case described here (\$800,000 is greater than the FMV of \$500,000), subtracting the FMV results in a “positive amount”: \$300,000. The RPTT must be paid on this positive amount. So, the RPTT is $\$4.10 \times 300$.

Apparently, the Recorder views the excess debt given up or forgiven as the amount being “transferred” to complete this transaction.

On the other hand, if the debt is less than FMV

then subtracting FMV from the debt yields a negative result. According to the Recorder, No RPTT is due. Let’s change the example to show this. Now assume the debt is only \$500,000 and the property is worth \$800,000 (FMV). FMV subtracted from debt results in a negative \$300,000, so no RPTT is due.

To this writer that result is illogical. Here, it seems, value of \$300,000 (the excess FMV over debt) is actually being transferred from B to L, but the Recorder takes the position that no RPTT is due under these facts.

One other thought on a “deed-in-lieu” transaction is worth noting. The Recorder will insist on proof that the party acquiring the property by a “deed-in-lieu” is the same party as the original lender, or the lender’s successor. So, if there have been intervening transfers and assignments, be prepared to show the chain of ownership back to the original lender.

As was said before: It pays to be cautious and investigate if the amount of the RPTT is of concern to you!

This is an area worth watching for further developments!

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“The Recorder will insist on proof that the party acquiring the property by a “deed-in-lieu” is the same party as the original lender, or the lender’s successor.”

Personal Liability Of Corporate Agents Under The Fair Labor Standards Act

By: Jamie L. Winter

Most managers and directors are aware of the potential for personal liability for torts they commit while at work. Many, however, may be surprised to learn that they can be held personally liable for their actions or decisions which result in violations of federal wage and overtime laws under the Fair Labor Standards Act. What may be even more surprising for corporate agents to learn is that the potential for personal liability continues even if the corporate agent's employer has filed for bankruptcy and/or ceased operations.

The Fair Labor Standards Act (FLSA) governs, among other areas, minimum wage, the timely payment of wages, overtime, and recordkeeping and penalties for violation of the FLSA which include liability to the employee for the unpaid wages or unpaid overtime and an equal amount in liquidated damages.

In July of 2009, the Ninth Circuit Court of Appeals announced in *Boucher v. Shaw*, 572 F.3d 1087, that an individual manager can be held personally liable for wage and

hour violations under the FLSA even if the manager's employer has closed its doors and/or filed for bankruptcy. The facts in the *Boucher* case were as follows: Employer Castaways, a hotel/casino/bowling center, filed for protection under Chapter 11 and subsequently ceased all operations. While operating as a debtor-in-possession, Castaways terminated three employees. Subsequently, the three discharged employees filed a class-action suit in Nevada State court not against the hotel/casino operation but against three senior management employees (the CEO, CFO and the manager of employment issues) contending that each of the three individual corporate executives was an "employer" under the applicable state and federal statutes.

The case ultimately ended up in federal court after which the CEO, CFO and employment manager moved to dismiss the plaintiffs' claims. In the motion to dismiss, the corporate agents maintained that they should receive the same bankruptcy protections as their now defunct corporate employer. The lower federal court agreed and dis-

missed not only the plaintiffs' state law wage and hour claims but the plaintiffs' federal claims under the FLSA. The plaintiffs appealed to the Ninth Circuit.

Upon receiving the case, the Ninth Circuit Court of Appeals certified a question to the Nevada Supreme Court. Specifically, the Ninth Circuit asked the Nevada Supreme Court to address whether individual managers could be deemed "employers" under Nevada Revised Statute 608.011. The Ninth Circuit looked to the Nevada Supreme Court on the issue because of the potential implications the federal circuit court's opinion might have on Nevada's wage protection laws. The Nevada Supreme Court provided its opinion on the issue holding that individual managers could not be held liable as "employers" under the pertinent Nevada Revised Statutes. As a result, the Ninth Circuit dismissed the plaintiffs' claims under Nevada law leaving only the plaintiffs' claims under the FLSA.

Earlier Ninth Circuit Court of Appeals decisions had given an expan-

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"the three discharged employees filed a class-action suit in Nevada State court not against the hotel/casino operation but against three senior management employees"

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Personal Liability Of Corporate Agents Under The Fair Labor Standards Act

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sive interpretation to the definition of an “employer” under the FLSA so it was no surprise that the plaintiffs did not challenge their status as “employers” under the Act. But one question remained to be answered: whether the bankrupt status of the company relieved the duty of the individual corporate agents to pay wages. The defendants contended that because they stood in the shoes of the corporate employer for purposes of the plaintiffs’ FLSA claim, they should benefit from

the same bankruptcy protections (automatic stay) from the FLSA claim as the corporate entity. Not so said the three judge panel of the Ninth Circuit. Instead, the panel held that a company’s bankruptcy has no effect on the claims against individual corporate agents.

So how can corporations and individual managers, directors or owners themselves limit the potential liability of corporate agents under the FLSA? One way is by focusing on the proper training of managers about wage and hour laws, and the obligations

of managers under those laws. Employers should also train their individual managers about the importance of maintaining accurate and appropriate time records for employees. Internal audits can also be conducted to ensure compliance with wage and overtime obligations. Finally, when issues or questions arise about wage and hour or overtime requirements, corporate employers or their agents should consult with human resources professionals or employment attorneys before making any questionable decisions.

Divorce Rate at a 30 Year Low

By Stacey F. Herhusky

Historically, divorce rates have always increased when the economy has weakened. This is due to the fact that financial problems and disputes about money are one of the primary causes of divorce. However, it is interesting to see that one side effect of our most recent economic downturn is that the divorce rate is actually the lowest it has been in 30 years according to the National

Vital Statistics Report (Volume 58, Number 9). This report indicates that in 2009 the divorce rate was down to 3.4 divorces per 1000 population. It bears mentioning that this report does not include data from California, Georgia, Hawaii, Indiana, Louisiana, and Minnesota which do not track divorce rates; however, it is likely that the trend is affecting those states as well. In fact, Orange County and Sacramento

County have both reported a 9-10% decrease in divorce filings. Even Google has noted a decrease in the amount of times users have entered the search term “divorce” in its search engine over the last year which probably also supports these findings.

It seems clear that the severity of this particular financial crisis has caused troubled couples

“Even Google has noted a decrease in the amount of times users have entered the search term “divorce” in its search engine over the last year”

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Divorce Rate at a 30 Year Low

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to think twice about proceeding with a divorce or perhaps to put their minds toward finding ways to reduce the costs by utilizing alternative dispute resolution such as mediation instead of litigating through the courts. In many situations, couples are at odds and “separated” for all intents and purposes but are forced to stay in the same house. Many people simply can't afford to divorce in the current economic climate. The deepening recession, increased unemployment and a stalled housing market have negatively impacted most households. The divorce process itself can be expensive and people cannot afford to maintain one household, much less two. With decreased home values and loss of equity, huge stock market losses, and rising credit card debt there has been a need for great creativity in managing and splitting the finances. Many clients' homes are upside down because of declining values. Other divorcing couples who are fortunate enough to have equity in their home can not sell their house or qualify for

a loan to buy out their spouse. Combine that with the plummeting values of retirement accounts and increasing unsecured debt and we are looking at marital asset balance sheets that are nothing less than bleak.

To further complicate matters, the courts are struggling as well. Budget cuts at state levels have left courts short staffed and in some cases with mid week closures (e.g. “furlough Fridays” in California) which have created even more delay and inefficiency. Case management is suffering as a result. All of this combines to allow individuals to feel justified to bury their heads in the ground and wait for things to improve before making a move. However, this can be a big mistake for some individuals. When the marital residence or small business is the most significant marital asset, the party who is able to retain the house or business may reap a significant benefit down the road by proceeding with the divorce when the economy is weak, because the value of the house or business is likely to be at its lowest and will only increase once the econ-

omy recovers. Since the “buy out” will be calculated on current values, not future values, significant advantage can result from filing for divorce when things are at their lowest values. Also, spouses in community property states who are concerned about the increasing amount of debt should consider proceeding to minimize the amount of community property liability which will be shared at divorce. Finally, a spouse with normally high earnings whose earnings have been dramatically impacted by the economy (such as a builder, realtor or mortgage broker) would benefit from a determination on spousal support or child support based on current earnings as opposed to future earnings which may show increases once the economy improves.

If a decision is made to proceed, it is still important to try to find ways to minimize costs and acrimony and there are many options such as counseling, mediation or collaborative law which are available to accomplish this goal. Please contact Stacey Herhusky for further information.

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State of the Foreclosure State

While many economists try to forecast where we are in the current economic crisis, and perhaps more importantly, where we are going, the fact remains that we just don't have that crystal ball. I wouldn't even propose to make predictions

at this point, but I do often receive interesting statistics that show pretty clearly how the economic and housing market crisis has impacted our county and our state. I will let you draw your own conclusions.

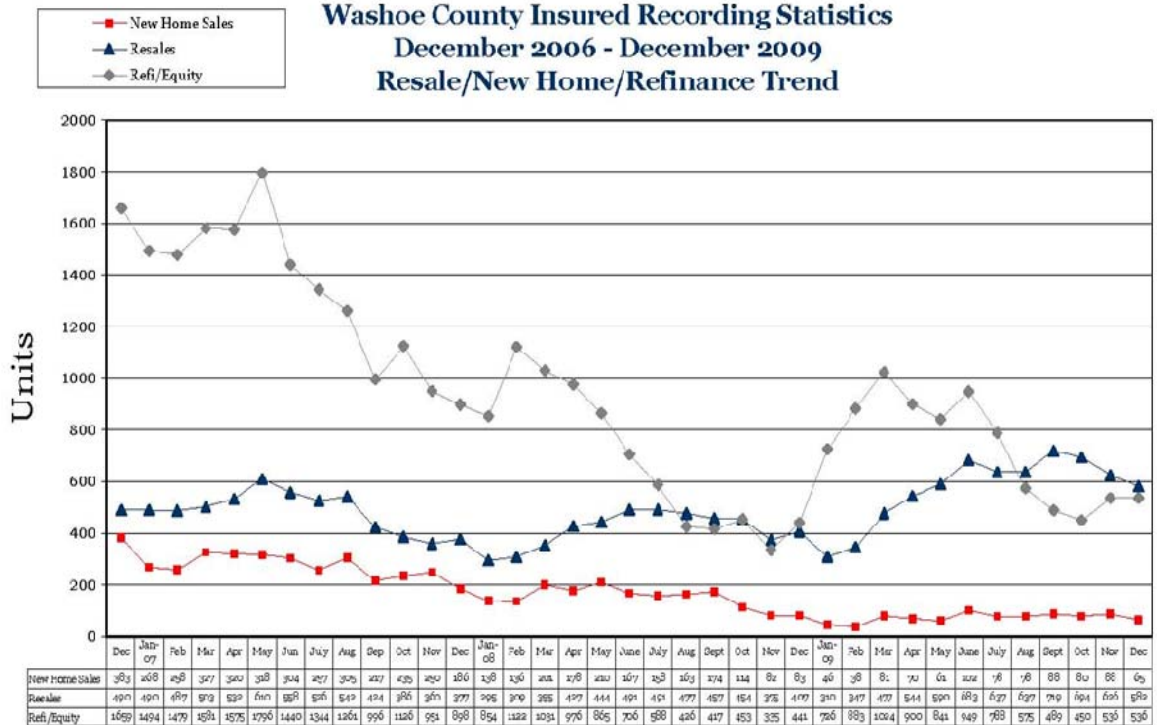
Following are graphs showing the trend lines for residential home sales in Washoe County between December, 2006, and December, 2009 (thank you to Tigor Title for their generous permission to reprint their data):

For More Information Contact:
Tigor Sales Department @ (775) 324-7400



“The foreclosure process takes a minimum of four months from the date of filing of a Notice of Default (at which point a borrower has usually been in default two or more months)...”

**Washoe County Insured Recording Statistics
December 2006 - December 2009
Resale/New Home/Refinance Trend**



*Source: Dataquick Information Systems. Tigor does not guarantee the accuracy of this data. This is for informational purposes only and is intended to view the general market trend in Washoe County.

The next graph depicts the foreclosure trend line in Washoe County from May, 2007, to December, 2009. The foreclosure process takes a minimum of four

months from the date of filing of a Notice of Default (at which point a borrower has usually been in default two or more months) to the date of the actual foreclosure sale

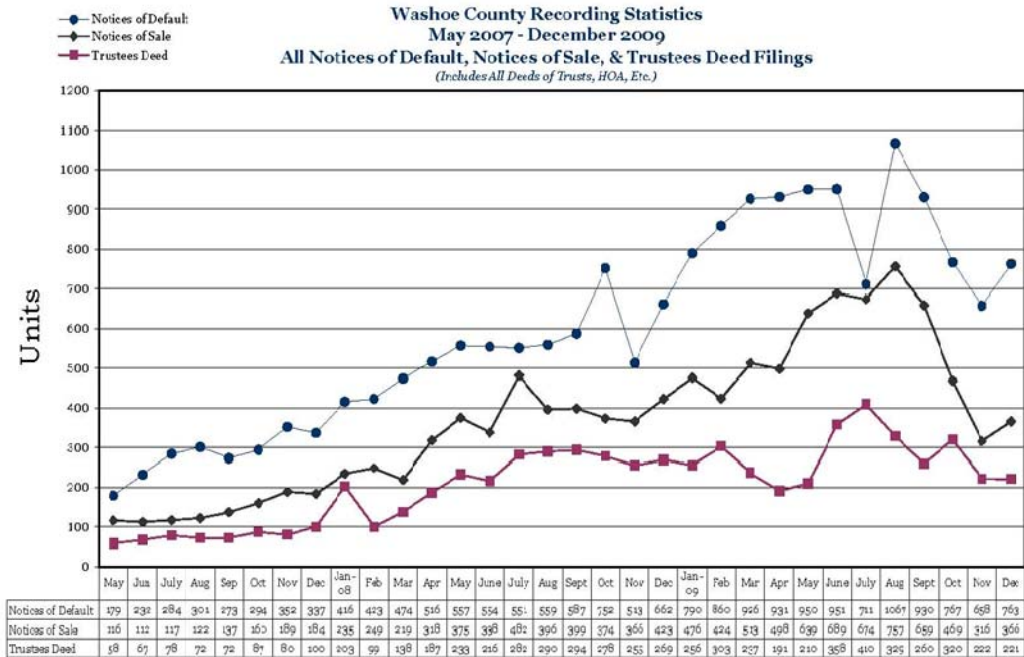
(represented on the graph as the date of recording of the “trustees’s deed”).

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State of the Foreclosure State

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*Source: Washoe County Recorder's Office. Ticor does not guarantee the accuracy of this data. This is for informational purposes only and is intended to view the general market trend in Washoe County.

“AB 149 gives homeowners (living in owner occupied primary residences) the opportunity to elect mediation with their lenders in an effort to modify loans or otherwise reach some sort of resolution to a loan default other than foreclosure sale.”

As mentioned in previous newsletters, in our last legislative session Nevada adopted a foreclosure mediation program, often referred to by its bill number: AB 149. AB 149 gives homeowners (living in owner occupied primary residences) the opportunity to elect mediation with their lenders in an effort to modify loans or otherwise reach some sort of resolution to a loan default other than foreclosure sale.

The Foreclosure Mediation Program (FMP) started up the day AB 149 went into effect, July 1, 2009. As of November 16, 2009, the FMP reported that between July and October, 2009, a total of 29,242 Notice of Default were filed statewide (this number includes commercial and non-owner occupied homes which are not eligible under the FMP). Out of those, just under 12% lead to a request for mediation (3,446 requests). As of

the November 16, 2009 reporting date, only 372 mediations had been conducted with approximately another 2,200 in process for scheduling. Only time will tell how AB 149 will ultimately impact the look of the foreclosure trend lines. But from this author's perspective, at least it is a start. For more information on FMP please check out: <http://www.nevadajudiciary.us/index.php/foreclosuremediation>

Nevada Supreme Court Allows Citizens' Challenge of Reno Annexation

By Andrew N. Wolf

Citizens for Cold Springs v. City of Reno, 125 Nev. Adv. Op. No. 48 (October 15, 2009):

Annexation is the process by which a city expands to take control of land outside the city limits. A quick look at a map of Reno's city boundary reveals a starfish-like shape with legs -- tentacles some would say -- pointing long distances from the city's original center, stretching along freeway corridors. In certain cases, annexation may occur when 100% of the owners of land abutting the city's border request annexation into the city (NRS 268.670; "voluntary annexation"). (In Washoe County, recent history has seen land owners abutting the City of Reno seeking annexation. This is largely due to Reno's city zoning code which typically allows more intense land use and denser zoning.) As a result, the City of Reno's boundary extends to the state line near Verdi, and elsewhere along area highways. This owner-controlled means of expansion has been the source of great controversy, a controversy in

which the Nevada Supreme Court has just written an important chapter.

In Citizens for Cold Springs v. City of Reno, the Nevada Supreme Court examined whether citizens have standing (aka sufficient interest) to challenge a land annexation if they do not own the property subject to annexation. The court determined that citizens may challenge an annexation even if the annexation does not include their property. The court's decision is rooted in the language of NRS 268.668, which confers the right to seek judicial review to "any person" claiming to be adversely affected by an annexation.

Landowners collectively named "Lifestyle" initiated a voluntary annexation by requesting that the City of Reno annex approximately 7,000 acres of land in the Cold Springs Valley and adjacent areas. On March 9, 2005, the City held a hearing regarding the annexation. Some property owners and residents of Cold Springs, an area that borders the subject land, were at the hearing to oppose the annexation (we'll

call them "Cold Springs"). The Reno City Council voted to approve the annexation.

On April 1, 2005, Cold Springs challenged the annexation in state court, claiming it would have an adverse effect on its rural community. The City and Lifestyle moved to dismiss Cold Springs' case based on the claimants' lack of standing. The Second Judicial District Court, Washoe County (Judge Steve Elliot), granted the City's and Lifestyle's dismissal motions, finding that all of Cold Springs' claims were speculative. The district court also determined that Cold Springs lacked standing to sue because it had not shown that it had personally, substantially, and adversely been affected by the annexation. Judge Elliot further noted that, "[e]very allegation made in the Complaint is based on some possible future damage that might occur on some future date and not a substantial and adverse damage that currently and particularly

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affects Cold Springs differently than the general public.”

Cold Springs appealed and argued that it had standing to challenge the annexation. The Nevada Supreme Court agreed and accordingly reversed the early dismissal of the case, so that the Cold Springs parties might have a chance to prove their case – i.e., have “their day in court.”

The Supreme Court held that NRS 268.668 conferred standing to Cold Springs because the NRS states that “any person or city claiming to be adversely affected,” by an annexation decision can challenge it. The court determined that Cold Springs falls within NRS 268.668’s “any person” language. In making this determination, the court then concluded that

citizens who are not property owners of the subject land may challenge land-annexation decisions pursuant to NRS 268.668.

Next, the court addressed what someone challenging an annexation must allege and prove to be “adversely affected” as required by the statute. The court ruled that proof of such “adverse effects” of an annexation contemplates both current and reasonably ascertainable future adverse effects. In other words, a reasonable degree of speculation will be allowed.

In the end, the Nevada Supreme Court concluded that the district court judge (Judge Elliot) erred when he granted the City’s and Lifestyle’s motions to dismiss. Cold Springs had standing to challenge Reno’s land annexation and must be given an opportunity to

make a proper showing of adverse effect or an abuse of discretion in the City’s annexation decision. In making this proof, Cold Springs will be allowed to demonstrate “reasonably ascertainable future adverse effects,” i.e., it can engage in some reasonable speculation.

The recognition of standing in land use and environmental challenges is significant. The Cold Springs decision will affect the playing field in all future annexation disputes, which are already quite close to home. This dispute, and others like it, will shape the appearance of Northern Nevada and will affect a multitude of life-quality and economic issues. It is not far-fetched to predict that this particular land annexation will find its way back to the Nevada Supreme Court in a future case.

“The Supreme Court held that NRS 268.668 conferred standing to Cold Springs because the NRS states that “any person or city claiming to be adversely affected,” by an annexation decision can challenge it. ”

Incline Law Group, LLP, is pleased to announce that Cassell von Baeyer, Esq. has recently been appointed by the Nevada Supreme Court to act as a foreclosure mediator in the Nevada Foreclosure Mediation Program. This landmark program has been established by the Legislature to aide financially struggling Nevada residents in their efforts to stay in their homes during these challenging financial times. Ms. von Baeyer views this opportunity to help distressed homeowners as a great honor and looks forward to contributing all that she can to the program.

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Rogers, Wolf, von Baeyer & Herhusky, LLP is a boutique law firm located on the North Shore of Lake Tahoe.

The firm, founded in 1973 by John C. Rogers, has earned a reputation for professionalism, discretion, diligence and positive results.

In short, we are personally committed to excellence and to our clients' success.

Our areas of practice include change of residency, creation and management of entities, contracts, real estate, asset protection, family law, commercial transactions, civil litigation and estate planning.

All of our attorneys are licensed in Nevada and California.

A Law Firm Committed to Excellence & Committed to You.



From left to right: John C. Rogers, Esq.; Catrina Jenkins; Jamie L. Winter, Esq.; Heidi Shaughnessy; Cassell von Baeyer, Esq.; Stacey F. Herhusky, Esq.; Vicki Munns; Angelina Calafiore; Willow Cornelius; Andrew N. Wolf, Esq.; not pictured: Vera Ann Struc, Esq., of counsel