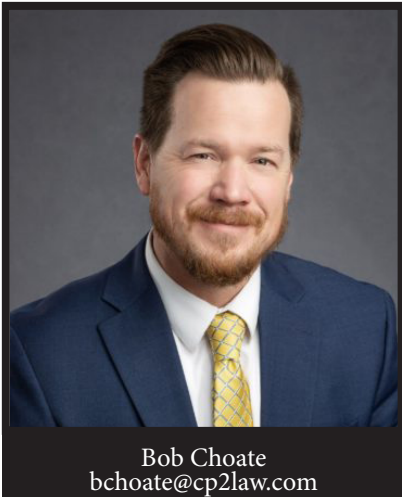


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Fort Collins' new Land Development Code is back to the drawing board, but not really.

Written by: **Bob Choate**



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In November of 2022, Fort Collins City Council approved the new Land Development Code (LDC) after years of preparation, study, and public participation. As permitted by Fort Collins' Charter, an opposition group gathered enough signatures to require a vote to approve or reject the new LDC, but City Council decided to repeal it and try again instead of submitting it to the voters.

The Fort Collins Coloradoan reported in January that the City Council's 7-0 vote sends the staff back to the drawing board - but don't expect them to start over entirely. The proposed LDC was intended to comply with the City Plan, which is Fort Collins' Comprehensive Plan to guide development in the City, sometimes colloquially referred to as a "Master Plan". The City Plan contains many goals, some of which are inherently contradictory. But the City Plan expressly encourages a wider variety of housing options and denser development in appropriate locations, which supports the goal of encouraging development of attainable housing for all of Fort Collins' residents. The current City

Council is not going to give up entirely on that goal. Allowing for development and redevelopment to have greater density will increase supply, which generally results in lower costs, or at least less aggressive cost growth. Obviously, it doesn't always work that way. After all, Fort Collins is a great place to live, and so demand for homes will likely be high for a long time.

Not all of the proposed LDC provisions are treated equally. Opponents voiced numerous concerns, but some were repeated more often than others.

The proposed LDC allowed for duplex zoning in existing residential neighborhoods which already contained covenants restricting the lots to single family homes. The idea was to allow a greater density in these zone districts in order to increase housing supply, but the LDC went so far as to state that such existing covenants were unenforceable. While the State of Colorado has public policy authority to prohibit the State courts from enforcing contractual provisions that the State deems against public policy (e.g. covenants that discriminate based on race, sex, gender, nationality, etc.), the City of Fort Collins has no such authority. Covenants are a private contractual agreement between neighbors, and the City will

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Amy brings experience in estate planning,
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"No one likes to prepare their wills or business succession, but as Benjamin Franklin accurately stated- failing to plan is planning to fail. By meeting with families and learning about their priorities for their personal assets or business assets, I am able to help clients plan for the future and help their families navigate challenges that occur at death."



likely reconsider this issue in the coming year as increasing density remains.

The proposed LDC significantly limited redevelopment in the Downtown zone districts, in an effort to discourage scrape-and-build homes (which are generally quite large in comparison to the historic houses of the area), and to encourage “carriage houses” and similar structures, with the intent of increasing supply of smaller (and therefore more affordable) rental options. Property owners in the Downtown zone have expressed concern about the significant financial impact that the proposed LDC has on their properties, over and above its effects on other zone districts. Expect the City to engage closely on this issue.

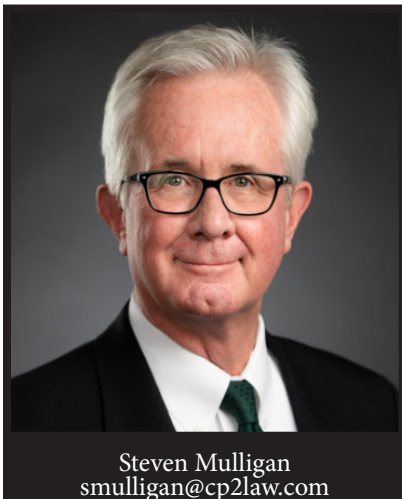
Finally, and likely most importantly, the proposed LDC significantly reduced opportunities for the public to provide input on any given development application. Most such applications are either “Type 1”, which require staff review and approval by an administrative hearing officer, or “Type 2”, which require a public hearing process and approval by the Planning and Zoning Commission. The proposed LDC moved many applications that previously required Type 2 review, to instead require Type 1 review, thus significantly limiting the public opportunities to comment on pending development applications.

This issue is likely the most difficult for the City to accommodate while still aggressively pursuing the goals provided in the City Plan. Developers have lamented the significant costs associated with development in the City, especially when an organized opposition group can kill a project that is otherwise permitted in the zone district. In some circumstances this has occurred multiple times on the same property. By reducing the number and types of applications that are subject to Type 2 review, the proposed LDC provided more predictability to developers, with the intention to increase the supply of housing in the City. However, residents are unsurprisingly concerned about any action which diminishes their voice. The City has planned a robust schedule of public outreach on these and other issues with the LDC over the remainder of 2023.

The coming changes may affect your property, your neighborhood, or your business. As a current and former legal advisor to property owners, developers, and municipal governments on all facets of land use and development, and as a current member of the Larimer County Planning Commission, I enjoy digging into the details and separating the wheat from the chaff. Please feel free to reach out – I’d love to discuss your plans and goals.

Opposing A Subchapter V Entity’s Discharge

Written by Steve Mulligan



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My previous article for this newsletter discussed the discharge of a debtor’s debt that was incurred by violating Colorado’s Mechanic’s Lien Trust Fund Statute. In this article, I examine whether a creditor can oppose the discharge of an entity’s debt when the debtor elects to proceed under Subchapter V of chapter 11.

In a bankruptcy case, creditors can file a complaint in the bankruptcy court seeking to have debts declared non-dischargeable under 11 U.S.C. § 523. Reasons include false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition; false financial statements; fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny, or; willful or malicious injury. There are a number of other reasons but these are the most common, in my experience. There is a limitation in § 523 on who can be sued – specifically, “a discharge . . . does not discharge *an individual* from any debt . . .” 11 U.S.C. § 523(a) (emphasis added). Entities cannot be sued under § 523 in a traditional chapter 11 bankruptcy case.

In 2019, Congress passed the Small Business Reorganization Act creating a new chapter 11 bankruptcy known as Subchapter V codified at 11 U.S.C. § 1181 *et seq.* Subchapter V was created for persons engaged in commercial or business activities that have aggregate noncontingent liquidated secured and unsecured debts in an amount not more than \$7.5 million. Originally, the debt limit was \$2,725,625.00 but was temporarily increased to \$7.5 million by the Coronavirus Aid, Relief, and Economic Security Act. In March 2022, the debt limit reverted to \$2,725,625.00 but in June 2022, Congress increased the debt limit to \$7.5 million again through June 21, 2024. Subchapter V is intended to be the faster, easier,

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and cheaper version of Chapter 11 bankruptcy, allowing small businesses to reorganize like mid-size and large companies.

Discharge of debts under Subchapter V is governed by 11 U.S.C. § 1192(2) which provides: “If the plan of the debtor is confirmed ... the court shall grant the debtor a discharge of all debts ... except any debt ... of the kind specified in section 523(a) of this title.” Section 523(a) is limited to “individuals” but § 1192(2) applies to “debtors” which, under bankruptcy code, includes both individuals and corporations. In interpreting the language in §§523(a) and 1192 and the definition of “debtor,” the 4th Circuit Court of Appeals held that a creditor can oppose the discharge of a corporate Subchapter V debtor. *In re Cleary Packaging, LLC*, 2022 WL 2032296 (4th Cir. June 7, 2022). In *Cleary Packaging*, a creditor obtained a \$4.0 million judgment against the debtor who subsequently filed a Subchapter V bankruptcy. The debtor proposed paying the judgment creditor 2.98% of the judgment with the remainder being discharged. The creditor objected to the debtor’s discharge under §§ 1192 and 523(a)(6) for willful and malicious injury. The bankruptcy

court dismissed the case holding that the discharge exceptions in § 523(a) do not apply to corporate debtors. On appeal, the 4th Circuit concluded that in Subchapter V cases where the debtor does not confirm a consensual plan, the discharge exceptions in § 523(a) apply to both individual and corporate debtors.

This is a significant shift from traditional chapter 11 cases where corporate debtor’s do not face actions from creditors opposing the discharge of debt. To date, the 4th Circuit is the only appellate court to decide the issue of whether creditors can file actions opposing a corporate debtor’s discharge. Four other bankruptcy courts, like the *Cleary Packaging* bankruptcy court, have held that exceptions to discharge are applicable to individuals only and not to corporations under Subchapter V. *Jennings v. Lapeer Aviation, Inc. (In re LaPeer Aviation, Inc.)*, Adv. No. 22-03002, 2022 Bankr. LEXIS 1032, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021); *Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.)*, 626 B.R. 871 (Bankr. D. Md. 2021); *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 647 B.R. 337, 346 (Bankr. W.D. Tex. 2022). All four bankruptcy courts granted motions to dismiss under Fed. R. Bankr. P. 12(b)(6) for failure to state a claim upon which relief can be granted. On February 3, 2023, the bankruptcy court in *Avion Funding* granted a direct appeal to the 5th Circuit.

I am aware of five complaints opposing the discharge of a Subchapter V debtor’s debt being filed in Colorado although there could be others. Of the five, one debtor’s case was converted to chapter 7 ending the adversary proceeding given the limitations in § 523(a). The other four are currently being held in abeyance although the debtors filed answers and not motions to dismiss the cases. I am curious to see how the bankruptcy court in Colorado will address this issue and practitioners and Subchapter V debtors and creditors should be aware of the possibility of having debts declared non-dischargeable and of the strict deadlines for filing such actions.

Choosing the Right Trustee

provided by: Richard M. Hess Jr., K. Michelle AmRhein, William “Bill” Garcia, Amy Wegner Kho, Chris Schmidt, John Seebohm, and J.P. Stouffer

Whether you are reviewing your existing trust or creating a new trust, you should understand the important role that a trustee plays not only in handling trust matters but also in providing for and protecting your loved ones.

What is a trust?

A trust is an agreement between an owner of accounts and property (trustmaker) and another person (trustee) who agrees to manage the accounts and property on behalf of a third party (beneficiary). In most situations, there is a written

document, called a trust agreement, that lays out the specific instructions or rules that govern the trust relationship.

What is a trustee?

A trustee is a trusted decision maker who is tasked with handling all matters that relate to your trust. Depending on the type of trust, you could be the trustee in the beginning and need someone else to act as trustee only when you are unable to manage the trust, or you could select a trustee to act immediately.

What types of trustees are there?

When creating an estate plan, there are several types of trustees to consider. An initial trustee is the decision maker that immediately starts managing the trust's accounts and property. You may choose to be the initial trustee if you create a revocable living trust. However, for some types of irrevocable trusts, you will need to select someone else to be the initial trustee.

The successor trustee is the next in line to manage the trust. This person may need to act because the initial trustee becomes incapacitated, dies, or steps down from their role.

You could choose to have one trustee handle the entire trust. You could also choose to name a separate trustee for any subtrusts that you later create. For example, you may name your children as the trustees for the subtrusts that are created for their benefit at your death. In this instance, there may be several trustees acting once the subtrusts are created. However, they will only be responsible for their separate trust and will have no control over other subtrusts that have their own trustees.

What does a trustee do?

Being a trustee involves many different important tasks, including the following:

- Managing accounts and property owned by the trust or subtrust. Although the trust owns your accounts and property, a person needs to carry out most transactions. If the trust owns an investment account, the trustee must watch the investments and request any adjustments that may be needed to ensure the best outcome for the trust and its beneficiaries.

- Keeping the trust beneficiaries informed about the trust. Although the trustee decides how trust accounts and property are used, they do so on behalf and in the best interests of the trust beneficiaries. A trustee is required to periodically inform the trust beneficiaries about the status of the trust—what the trust owns, how much the trust is worth, what income the trust has received, and what expenses the trust has paid.

- Acting as a point person for trust matters. If beneficiaries have questions about the trust, the trustee is usually best suited to answer them. The trustee is also in charge of filing tax returns and participates in any lawsuits involving the trust.

What should you look for when selecting trustee?

While it may be advantageous for a trustee

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to be financially savvy or have a background in tax, law, or finance, they are not required qualifications. When considering potential trustees, we recommend looking for someone with following qualities:

- Ability to ask for help when needed. The trustee does not have to be an expert in every area of trust administration. They can get assistance from financial advisors, tax preparers, and attorneys at the trust's expense to fully carry out their responsibilities.

- Be detail oriented. Trust administration is a process with specific legal steps that must be taken. The trustee will be asked to compile a list of everything that the trust owns and keep accurate records of income and expenses. Being too general with this information can cause tension between the trustee and beneficiaries and could lead to legal action.

- Be organized. Depending on what the trust owns, how many beneficiaries there are, and the trust distribution plan, there may be a lot of moving parts. In addition to managing the trust, the trustee will need to make sure that they do not mix their personal affairs with those of the trust.

- Have good communication skills. Although the trustee has authority over the trust, they are supposed to act in the best interests of the beneficiaries. It is important that the trustee clearly communicate with the beneficiaries, deliver necessary information, and be available to answer any questions that the beneficiaries may have in a timely manner. A trustee must also be able to get along with the beneficiaries.

- Follow rules. State and federal laws, as well as instructions within the trust, must be followed. While a trust may have provisions that allow a trustee to use their discretion in some matters, there are other instances in which the trustee is required to do certain things a specific way. Failing to comply with the rules can subject the trustee to potential civil and criminal penalties.

Who can you choose to be your trustee?

Although the choice of trustee is a very serious matter, you have several options available to you depending on your circumstances and what matters most to you.

- Family members. It is common for clients to select family members (spouse, child, parent, sibling, etc.) to be their trustees. Family members likely have an intimate knowledge of your wishes and values, making trust administration easier if you want to leave decisions to your trustee's discretion. If your trustee is also a beneficiary, they could choose not to accept any compensation for acting as trustee because they will already be receiving something as a beneficiary of your trust. However, allowing the beneficiary to be the trustee of your trust could jeopardize or limit protection of their inheritance.

- Close friends. Close friends likely understand your values and wishes, making any discretionary decisions easier; however, depending on your family dynamics, your close friends may not want to get involved in any conflicts that arise. Also, if they are not trust beneficiaries, they may want to be compensated for the work they do, which could leave some beneficiaries feeling disgruntled that your trustee is getting money from the trust (even though the trustee is legally entitled to it).

- Professional third party. If protecting your beneficiaries' inheritances is important to you, a professional may offer additional protection. Because administering trusts is their profession, they will likely understand every step that must be taken and have the tools to efficiently and accurately do so. However, because trust administration is their job, they will require compensation and will inform you of their fee. This amount will likely be higher than what a family member or close friend would seek for compensation.

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