

# **OPEN RECORDS — A DENVER SOAP OPERA**

By Lloyd Rain, February, 2002

## **Introduction**

In public purchasing, it is an article of faith that everything we do is open to public scrutiny. I don't think any of us would have it any other way. However, there are some aspects of purchasing that demand closed sessions and inaccessible records. Security issues are, of course, one of those. Quizzically, real estate transactions are another in some states. Oregon is one of those. We may declare a real estate transaction and associated minutes leading up to purchases and sales, as closed to the public until the transaction is complete. The reason, of course, is that real estate transactions usually involve only one item and many offerors. Negotiation is the preferred method of arriving at fair market value and full disclosure before the transaction is complete could jeopardize the sale or increase the costs.

Assuming all parties are acting in good faith, this is probably an appropriate stance. However, it does give rise to the possibility that all parties may not be acting in good faith and may well be trying to swindle the public. Such a case is currently being played out in Denver, Colorado. On its surface, it's reminiscent of Boss Tweed and 1870 Tammany Hall politics. Unfortunately, it has overtones which cast a deep shadow on permitting closed records during real estate transactions. At issue is the refusal of a public board to turn over the operating documents of a city asset which has been owned by the city for over seventy years.

## **The Main Characters**

Just in case some of these interactions are a little hard to follow, here is a list of the main characters in this tomfoolery (in order of appearance).

- Gary DeFrance, CEO of the Winter Park Recreational Association (villain)
- Tom Kelley, Attorney (innocent bystander)
- Don Mares, City Auditor (hero)
- William Dean Singleton, publisher of the Denver Post (villain's accomplice)
- Judge Richard Doucette, Grand County District Judge (village idiot)

You can see that this cast has all the characteristics of an 1890 melodrama.

## **Background Of The Case**

The City of Denver owns the Winter Park ski area. A 21-member board of trustees, called the *Winter Park Recreational Association* (henceforth "**Association**"), oversees the resort on behalf of the city's Parks and Recreation Department.

The Association held back real estate transaction documents from public disclosure on grounds that the documents contain proprietary information that would put the ski area at a competitive disadvantage if revealed.

In response, City Auditor Don Mares filed a lawsuit under the Colorado Open Records Act, seeking access to the documents. The Colorado Open Records Act is known affectionately by public officials in Colorado by its acronym, CORA, and pronounced as it is spelled.

Mares' interest began when he audited the Association books. His audit focused on a series of land purchases totaling \$1.1 million carried out by the Association to acquire land for a proposed gondola base area in the town of Winter Park.

The gondola project has been in the planning stage for decades but there's never been enough money to get it started. The project would link the town of Winter Park to the base of the resort and be a catalyst for real estate development, considered a key element to the future financial success of several ski areas — Winter Park, of course, being one of them.

The Association set up a separate, for-profit company to negotiate the purchase of land for the proposed gondola base area. Association CEO, Gary DeFrange, said only a few members of the Association's board knew about the land company. He said the resort needed anonymity in the gondola land deal because the land in question was partly owned by one of the Association's other board members. DeFrange also didn't want it known that the resort was trying to buy the land because that might have driven up the seller's price.

An adjacent parcel was purchased in December of 1998 and the final piece in January 2000.

The Association has long complained that it can't compete with privately owned ski resorts such as Vail without an infusion of cash. Last year, the resort deferred its \$2 million annual payment to the city citing disappointing financial results.

That's why Denver City Auditor Mares was so interested in the land deal. The same year the Association deferred contractual payments to the city, the resort was engaging in multi-million dollar real estate deals for projects that were, in all likelihood, in the distant future and might never actually be brought to fulfillment.

So far, so good. But then things got complicated.

### **Disclosure Snarls**

Don Mares wanted access to board minutes and other documents of the Association as part of a comprehensive audit of ski-resort operations, triggered when he learned about the land deals undertaken by the board at the same time it deferred its annual payment to the city.

Although Mares said he's received some information, some documents about resort operations and land purchases are still missing.

"I cannot say with assurance that Winter Park land deals have been consummated in compliance with contracts or in a way that has ensured the protection of the city," Mares said. "I do not have the documents to do the audit I need to do."

When the Association balked at Mares initial attempts to get at the documents, Mares retained Denver lawyer Thomas B. Kelley to file a lawsuit forcing disclosure of all Association documents under CORA.

Kelley is perhaps the most experienced lawyer in Denver on First Amendment and

open-records cases. Earlier this year, he won a judgment on behalf of The Denver Post in an open-records case involving the Stapleton Redevelopment Authority where the arguments closely resembled those of Mares' suit against Winter Park.

The court ruled in the Stapleton case that private nonprofit groups acting on behalf of the city — in certain instances — are subject to CORA just the same as the government.

"That's why I hired Tom Kelley," said Mares. "He is clearly the most knowledgeable attorney in Denver on these matters and just won a big case that's very similar to the one we brought against Winter Park."

But just after Kelley filed the complaint on behalf of Mares and the City, Kelley notified Mares that he had to withdraw because of Kelley's nearly 30-year relationship with the Denver Post. The Post is owned by William Dean Singleton, the same William Dean Singleton who is a board member of the Association. Since 1997 Singleton has been on the board of the nonprofit Association that operates Winter Park for the Denver Parks and Recreation Department. He has substantial real estate holdings in the Winter Park area, including a million-dollar penthouse at the base of the ski resort.

Kelley said he was unaware of Singleton's position on the Association's board when he signed on as Mares' attorney. When it was brought to his attention, he called to see how Singleton felt about it.

Singleton told Kelley that his law firm had a conflict of interest because it was simultaneously representing Mares and Singleton's Post. The newspaper, however, is not a party in the dispute. Nor is Singleton named as an individual defendant in the case.

"Dean felt that it was a conflict of interest for us to represent his newspaper and at the same time be suing him in his capacity as a board member of the Association," Kelley said. Or perhaps, could it possibly have been a maneuver to get the best lawyer in the state off the case?

Kelley said there was nothing more than the appearance of conflict that caused the firm to withdraw from the case. But others familiar with the situation said the law firm might have put its lucrative legal contract with the Post in jeopardy if it had bucked Singleton's wishes for the lawfirm to withdraw.

Singleton declined comment on all Association issues.

The outcome of Mares' lawsuit was watched closely in Grand County, (Winter Park is located in Grand County). For years, the Association argued that it was a public entity and therefore not subject to taxes. In the open records case, however, the resort argued it needed the confidentiality of a private company in order to compete — clearly the best of both private and public worlds.

Mares obtained alternate counsel for the lawsuit in the form of one John Paddock, a local, highly respected attorney.

## **The Hearing**

The Winter Park Resort Association case was heard on Oct. 19, 2001, in Hot Sulphur Springs, Grand County, Colorado before District Judge Richard Doucette.

On December 14, 2001, Judge Doucette ruled that Mares would not be permitted access to the records of the Association!

Doucette's brief ruling said only that he agreed with the argument of the Winter Park Recreational Association, which had maintained that CORA's definition of a "natural person" doesn't include "a public official acting in his or her capacity." Specifically, the ruling dismissed the lawsuit.

### **Repercussions**

Public records are, by definition, available to everyone. You can't bar some people from access and still call it a public document. The Association argued that the Denver auditor has no business auditing its transactions, and that he was using the open records law to make an end run around the city's parks department. The Association argued that the law's intent is to expand access to government records by the public — and is "not generally intended to expand the duties and powers of public officials." In addition, the Association argued that the Denver auditor lacks legal standing under Denver's charter to audit Winter Park, whether he employs open-records laws or not — in an obvious misunderstanding of the statute's purpose and to the dismay of all, Judge Doucette agreed!

His conclusion perplexed legal experts, who said they've never heard of such an interpretation in Colorado. "I don't know why the auditor — who is a natural person — can't file an Open Records Act claim," said Denver media attorney Bruce Jones. "It seems kind of a strange way to deny records," he said.

Local First Amendment lawyers roundly criticized the ruling that the Denver auditor isn't a "natural person" under CORA. As part of his inquiry, Mares sought Association documents, among which are minutes of the Association's board of trustees meetings. Doucette ruled that Mares, as a public official, didn't qualify as a "natural person" and, therefore, couldn't make use of the law. "Natural person" is the phrase the law uses to describe someone seeking documents.

The judge's dismissal means the larger question of whether the documents are public records under CORA remains unresolved.

The Association trustees maintained that financial oversight of the Association falls not to Mares, but to Denver Parks and Recreation Manager James Mejia, who is an Association trustee (kind of like the wolf watching the henhouse).

"The whole purpose of the open-records law is 'sunshine' — it's open access," said Mares' attorney, John Paddock. "To prevent a public official from getting public records is ridiculous. It's the complete antithesis of open government."

Nowhere, said critical attorneys, does CORA exclude public officials. They pointed to the opening language of the act: "It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times."

Unless an appeals court upholds the ruling, it has no effect outside the immediate case.

Mares could appeal the dismissal, or as one attorney suggested, simply refile the case as an individual, instead of on behalf of the city of Denver. More importantly, say lawyers following the case, is that Doucette's ruling delays resolving the underlying question of whether Winter Park must release the documents (and whether or not it is fleecing the public purse by deferring its tribute to the city).

Critics of the ruling point out that CORA doesn't require anyone seeking public records to justify the request. "You can request public records because you want insulation in your attic," said one exasperated attorney.

The Denver Rocky Mountain News reported:

"We've been in the company of Don Mares a few times and are prepared to testify indeed, that he is a 'natural person,' if it comes to that. He certainly seems like a natural person. Why, we even seem to recall sitting in a restaurant with Mares a few years ago while he enjoyed the sort of carb-laden special that only a natural person would dare to ingest. (We were busy with a similar mound of food, we must in fairness admit.) So what's with Grand County District Judge Richard Doucette? Why can't he see that the Denver city auditor is a natural person? Why did he issue a ruling stating precisely the opposite?"

"We're not exactly sure when Doucette thinks Colorado public officials shed their human identities and became the equivalent of political pod people, but that appears to be his belief. Or at least it would explain his ruling, which states that the Colorado Open Records Act cannot be used by Mares to obtain the records he sought because Mares is not a 'person within the meaning of [the act].'"

"Now, this is an extraordinary interpretation of the language of the statute, which applies to 'any natural person, corporation, limited liability company, partnership, firm or association.' It is extraordinary in part, because the state appeals court has said that exceptions to the open records law 'must be narrowly construed,' and because the purpose of the legislature in passing the law is not in doubt."

Mares' attorneys explained in their brief that lawmakers were determined that "all public records shall be open for inspection by any person at reasonable times" unless a specific exemption applies. By eliminating the old common-law requirement that someone requesting public records must demonstrate a special interest in the documents requested, the act swept away traditional limitations on who could obtain access to public records. "Moreover," their legal brief dryly notes, "Politicians' status as elected officials does not strip them of their existence as natural persons. In fact, only 'natural persons' may hold elected office in Colorado."

"So what does that leave Mares as? A potted plant?"

What Judge Doucette's ruling suggests instead, is that anybody except a public official may invoke the open records law to obtain public documents. That has got to be abysmally stupid. Under this judge's logic, even convicted terrorists would have greater access to government documents than a duly elected official.

Throughout the nation, open records laws were meant to expand the reach of every citizen. For his complete lack of understanding of even the most basic of American civil

rights, may Judge Richard Doucette be taken out onto the back forty and forced to read “Basic American Law 101,” then dismissed from his position of public trust, and possibly, like Sisyphus, sentenced to reread the Constitution forever.

### **Current Affairs**

In January of this year Don Mares filed a Motion to Reconsider in the Grand County Court. On February 28 Judge Doucette refused to reconsider his December decision; thus, the decision stands.

Meanwhile, there has been a bill introduced in the Colorado Legislature (HB 1342) which revises the Colorado Open Records Act to define *public officials* as actual, honest to goodness, *natural persons*. Truly remarkable that the State had to go so far as to codify this definition! — all because of a senseless decision by a backwoods, country judge.

As for Don Mares and his mission to unearth the Winter Park Recreational Association records? Mares is no slouch. He has been a state legislator and is well skilled in the machinations of public legalities. The word on the street is that he’s going directly to the Colorado Supreme Court with his appeal to reverse the village idiot’s decision.

Stay tuned!

### **Credits**

I have shamelessly copied sections of the wonderful articles written by Mr. Neil Westergaard and Mr. Todd Hartman, both of the Rocky Mountain News, with, of course, the kind permission of editor, Mr. John Temple. Excerpts are quoted throughout my article.

Additionally, my thanks to Ms. Lu Terry, Purchasing Agent at the University of Montana (Missoula), for bringing these articles to my attention.

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