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## A perspective on the continuing saga of construction defects law

Ever since 2003, when comprehensive legislation was passed to address abuses in the pursuit by the plaintiff's bar of windfalls from massively overstated litigation claims regarding alleged construction defects in the construction of residential property in Colorado, there has been a constant "chipping away" at the spirit and letter of that legislation, again by the plaintiff's bar. That battle has been traditionally voiced as one between the homebuilding industry and the plaintiff's bar, dealing with the right to contract vs. allegations of consumer abuse.

This past legislative session, however, found new constituents and a different perspective on what was previously a traditional battle at the statehouse between the above-mentioned foes. This year, a broad-ranging coalition that included the Metro Mayors Caucus, major segments of the affordable housing community and the general business community came together to address what their research showed as an astonishing lack of construction of ownership attached housing. There was a continuing boom going on in the development of multifamily "rental" housing, but an even more unusual deficit in multifamily "ownership" housing. Research apparently showed that, although about 20-plus percent of construction of attached housing was in the ownership format throughout the Rocky Mountain West, Colorado was only producing about 2 percent. Interviews conducted by the research group that was retained by this coalition revealed that the development and homebuilding community were not willing to commence construction of ownership attached housing because of the continuing threat of litigation available under current interpretations of our state's construction defect laws. Lenders also were reluctant to provide financing for such projects faced with the apparent real threat of litigation that could shut down their projects and materially impact their loan viability and the value of the loan's col-



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lateral. Moreover, insurance premiums to cover such claims were so high, and many times unavailable, as to make such projects unfeasible.

This lack of available multifamily ownership housing was creating an ever-increasing concern over the resulting imbalance of housing options in and around the metro area, where the urban character of the metro region would need such ownership options in the attached housing format in order to address the more dense character of the urban setting. This imbalance of ownership attached housing was thwarting the advancement of "community" in the context of creating opportunities for all options of housing so important for a community balance. This included ownership options in this format that address the need for the younger professionals entering the workforce, newly forming households, seniors desiring to scale down their housing size and location, as well as the segment of the market who have limited means and need to address the affordability of homeownership. This was being most clearly felt along the FasTracks lines where attached ownership housing was an important element in originally advancing the transit-oriented development communities that are expected to be developed around these transit stops.

Rather than engage the battle of creating more contention in the various aspect of construction defect legislation, per se, this coalition attempted to temper their approach and address specific issues that seemed to advance protection of the consuming homeowner while, at the

same time, advocating a method of dispute resolution encouraged in the state's laws regarding such issues.

Normally, attached ownership housing is developed under our state laws governing the creation of Common Interest Communities (CICs), including those communities where there are units that are attached and contain common elements. These CICs will be encumbered by certain recorded documents (normally referred to as "declarations") that structure the "community" within which the units are located and set up certain rules and restrictions that are intended to respect the common interests of the unit owners within that community. There also is a homeowners' association organized for the common interest community that is charged with the management of the common elements and the enforcement of the rule and regulations governing the community.

The coalition chose to address its concerns through a bill including couple of changes in the state laws governing CICs, which would provide further protection to the homeowner and advance alternative dispute resolution as an expedient approach to resolving disputes should they arise. Those changes included:

■ **Majority Owner Vote Regarding Litigation.** Rather than allow two owners plus a vote of the HOA Board to determine whether or not to file litigation alleging construction defects in a CIC, the proposed change would require a simple majority vote of the unit owners who are members in the respective HOA where the alleged defect occurred. This approach addressed the increasing concern of unit owners whose homes are unmarketable and not financeable during the course of any such litigation. This does not prevent an aggrieved owner from pursuing claims regarding that person's own unit, it just requires a majority of the owners to vote for litigation that affects the entire CIC in such litigation. This approach also included a provision for advance notice to the owners

of such pending litigation accompanied by a several disclosures regarding the potential litigation and its potential impact on the respective owner. This approach to protecting the rights of homeowners in a CIC seemed to be in line with everyone's interests, while not preventing an individual consumer/unit owner to advance its own claims.

■ **Alternative Dispute Resolution.** This proposal clarified the stated intent of the CIC statutes that advances alternative dispute resolution by providing that any mandatory arbitration provisions that are already contained in the Declaration that encumbers the respective unit in a CIC shall not be changed or deleted without the permission of the declarant (e.g., the developer of the CIC). This provision was to affirm a provision that the purchasing unit owner was aware of at the time of purchase and one that follows the spirit and intent of the state statutes governing such CICs.

Notwithstanding the curative nature of these proposals, the plaintiff's bar once again exerted its influence over the democratic party-controlled legislative leadership for whom it provides substantial financial support, and secured a defeat of the proposed measure. By parading out witnesses who have been harmed by alleged construction defects, the plaintiff's bar once again ignored and manipulated around the fact that the issue was not about the rightful claims of those who were wronged by any such defects but, rather, about the correct process to assure that others were not harmed by specific claims within a CIC, and to address the retention of alternative dispute resolution within the context of existing encumbrances for the respective CICs. Notwithstanding the merits, the politics of the day won out over the merits.

We will be carefully watching how this particular effort continues and whether politics continues to be the game of the day or whether our Legislature can address the real substance of the issue, a purpose for which they were elected.▲