

June 7, 2017

Vallagio Ruling Favorable for Condominium and Planned Community Developers

On June 5, 2017, the Colorado Supreme Court issued its eagerly anticipated ruling in *Vallagio at Inverness Residential Condominium Association, Inc. v. Metropolitan Homes, Inc., et.al.* (217 CO 69) (“Vallagio”). In its 5-2 ruling, the Supreme Court upheld a developer-declarant consent requirement to mandatory arbitration requirements in a common interest community declaration. The court also ruled that the Colorado Consumer Protection Act (the “CCPA”) does not preclude arbitration of claims asserted under the CCPA. The court’s decision is a significant, favorable result for condominium and planned community developers in Colorado.

Factual Summary

The Vallagio at Inverness Residential Condominium Declaration (the “Declaration”) was recorded in 2007 by Metro Inverness, LLC (the “Declarant”). The Declaration contained dispute resolution procedures for construction defect claims, including a mandatory arbitration provision. The Declaration also contained a provision prohibiting amendment of such dispute resolution procedures at any time without the Declarant’s consent, irrespective of whether the Declarant owned any property within the project.

After failing to reach a settlement of construction defects claims made by the Vallagio at Inverness Residential Condominium Association, Inc. (the “Association”), but before the Association filed its complaint with the district court, at least 67 percent of the project’s owners voted to amend the Declaration to remove the dispute resolution provisions, without obtaining the Declarant’s consent. The Declarant moved to compel arbitration of the Association’s initial complaint. The district court denied the Declarant’s motion, but upon appeal, a division of the court of appeals reversed the district court’s denial.

Supreme Court Rationale

In upholding the court of appeals’ decision, the court determined that the Declarant consent provision did not violate the Colorado Common Interest Ownership Act (“CCIOA”), and that since the Association failed to obtain the Declarant’s consent to the amendment removing the dispute resolution provisions in the Declaration, that the mandatory arbitration provisions therein remained in force.

Specifically, the court determined that the consent-to-amend provision did not violate Section 217(i)(a)(I) of CCIOA (relating to the owner voting percentage threshold for amending a common interest community declaration), Section 104 of CCIOA (which provides that “A declarant may not act under a power of attorney or use any other device to evade the limitations or prohibitions of this article or the declaration”) or Section 302(2) of CCIOA (which provides that “The declaration may not impose limitations on the power of the association to deal with the declarant that are more restrictive than the limitations imposed on the power of the association to deal with other persons”). In the other issue certified to the court, the court ruled that nothing in the CCPA precludes arbitration of the Association’s claims, concluding that the right to a “civil action” under the CCPA is waivable and was waived by the Declaration’s mandatory arbitration provision.

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Impact of the *Vallagio* Decision

The court refused to address various other arguments of the Association on procedural grounds, including whether the Declaration's arbitration provision itself, as opposed to the consent-to-amend provision, was void under Section 302(2) of CCIOA. As such, developers should ensure that their dispute resolution provisions are carefully drafted.

Additionally, we note that while the dissenting justices, the Association and various supporting homeowner groups have expressed concern that the court's ruling will permit developers to include consent provisions as to other matters and exert indefinite control over homeowners' associations, a footnote in the ruling indicates that the court's ruling should not be read to apply to developer consent provisions other than those solely related to construction defect disputes. Accordingly, developers should utilize this tool sparingly and within the context of the court's ruling.

While the *Vallagio* decision, together with the recently adopted HB 1279, should provide Colorado condominium and planned community developers with some comfort concerning construction defect litigation issues, we note that these developments should not be viewed as a substitute for a developer including other protections in its community formation documents, utilizing appropriate insurance programs, minimizing construction defects through proper construction and taking other recommended actions to avoid and defend against construction defect claims.

If you have questions with respect to the *Vallagio* decision or HB 1279, and their impact on mitigation of risk in connection with common interest community development, feel free to reach out to a member of [Brownstein's Condominium and Planned Community Group](#), [Bryce Beecher](#), [Blair Lichtenfels](#) or [Jonathan Pray](#).

Bryce H. Beecher
Of Counsel
bbeecher@bhfs.com
303.223.1124

Jonathan G. Pray
Shareholder
jpray@bhfs.com
303.223.1211

Blair E. Lichtenfels
Shareholder
blichtenfels@bhfs.com
303.223.1190

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