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City of Lakewood Adopts Ordinance to Encourage Condominium Construction and Reduce Construction Defect Litigation

On Monday, October 13, 2014, the City of Lakewood became the first Colorado municipality to adopt legislation intended to encourage construction of “for sale” multifamily projects by mitigating the risks to developers and builders associated with construction defect litigation. While the impact of this new ordinance may not be known for some time, developers, builders, contractors, designers, homeowners associations, and condominium owners in the City of Lakewood need to be aware of the requirements of the new legislation. Additionally, this new law may influence the actions of other municipalities in Colorado seeking to encourage construction of “for sale” multifamily projects within their boundaries.

In recent years, construction of new “for sale” multifamily projects in Colorado has declined significantly. According to the City of Lakewood Planning Department, Lakewood currently has nearly 2,000 new multifamily projects in its development and planning pipeline—but none of those projects include any “for sale” units. According to Metrostudy, “for sale” multifamily projects represented only 4.6 percent of total new home starts in metro Denver during the second quarter of 2014, compared to more than 26 percent in 2008. This decline is often attributed to a rise in construction defect litigation and the resulting verdicts against developers, both of which have increased insurance costs and made construction of many “for sale” multifamily projects financially infeasible.

Earlier this year, the Colorado General Assembly considered three bills that were designed to promote construction of “for sale” multifamily projects by amending the Colorado Construction Defect Action Reform Act (CDARA); however, the General Assembly failed to take action on any of the bills before the end of the legislative session. Similar legislation will likely be introduced in the 2015 session.

Lakewood’s new ordinance, which will take effect next month, contains three primary components:

- First, the ordinance provides “builders” (which are defined as any entity “including but not limited to a builder, developer, general contractor, contractor, or original seller who performs or furnishes the design, supervision, inspection, construction or observation of any improvement to real property”) with an enhanced right to repair construction defects. The legislation requires claimants to provide builders with notice of alleged construction defects, an opportunity to inspect the alleged defects, and 30 days to make repairs.
- Second, the ordinance prohibits the amendment of the governing documents of any condominium or planned community to remove provisions requiring alternative dispute resolution (such as arbitration) of construction defect claims. Supporters of the ordinance argue that this provision will result in faster and less expensive resolution of construction defect disputes.
- Finally, the new law requires any homeowners association considering initiating a construction defect action to obtain written consent from a majority of the non-declarant owners prior to filing a

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claim. The consent—generally referred to as an “informed consent” due to the required disclosures to homeowners—must be obtained directly, and not via proxy voting. In obtaining informed consent, homeowners associations must deliver notices to homeowners that include, among other things: an estimate of the impact that the action will have on the values and marketability of units in the community (including any effects on the ability of owners to refinance their units during and after the action); an estimate of the duration of the action; an estimate of the likelihood of success; and a statement indicating whether the builder has offered to make any repairs.

The new Lakewood ordinance will almost certainly face legal challenges from its opponents, including lawsuits claiming that Lakewood exceeded its home rule authority by adopting legislation that modifies established state law. Proponents of the new ordinance will likely argue in response that it is consistent with Lakewood’s authority to regulate local land use and zoning issues. Regardless, Lakewood’s ordinance will impact developers, builders, contractors, designers, homeowners associations and condominium unit owners in the City of Lakewood—all of whom need to be aware of the requirements imposed by the new law. Additionally, developers and builders operating throughout Colorado should monitor the effects of the ordinance, which may well be used as a model by other municipalities across the state.

This document is intended to provide you with general information regarding the requirements of the new Chapter 14.26 of the Lakewood Municipal Code, as enacted in Ordinance O-2014-21. The contents of this document are not intended to provide specific legal advice. If you have questions about the contents of this document or if you need legal advice, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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