

RECENT LAW CHANGES AFFECT CONDOS, CONSTRUCTION DEFECTS

By Jonathan Pray and Blair Lichtenfels

The spring of 2017 brought two changes to the legal landscape in Colorado, and they're both related to developer liability with respect to the construction of condominiums. First, the Colorado Legislature passed and Gov. John Hickenlooper signed into law House Bill 1279. Second, 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.*

These two recent developments — while not a panacea to the plague of expensive and risky construction defects lawsuits brought against developers of for-sale condominium projects — have sparked excitement in the Colorado multi-family development community. The question everyone is asking is whether it is still too risky to develop large-scale condominium projects in Colorado.

House Bill 1279

HB 1279, the result of four years of intense debate in the Colorado Legislature over appropriate and fair construction defects reform in the state, represents a compromise that both Democrat and Republican representatives overwhelmingly supported. Sponsored by Democratic Rep. Alec Garnett and Republican Rep. Lori Saine, the bill requires condo HOAs to adhere to more restrictive voting and notice requirements prior to initiating construction defect claims against developers.

Specifically, HB 1279 will require the executive board of any HOA, before bringing a construction defect claim against the developer on behalf of all unit owners, to:

- Notify all unit owners and the developer or builder against whom the lawsuit is being considered.
- Call a meeting at which the executive board of the HOA and the developer or builder will have an opportunity to present relevant facts and arguments. The developer or builder may make an offer to remedy the defect.
- Obtain the approval of a majority of the unit owners after giving them detailed disclosures about the lawsuit, its potential costs and benefits.

The required meeting starts a voting period during which owners can vote for or against filing the lawsuit.

The Vallagio Ruling

In the 5-2 *Vallagio* ruling, the Supreme Court upheld a developer consent requirement to mandatory arbitration requirements in an HOA declaration.

The declaration at issue was recorded in 2007 by Metro Inverness LLC ("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 the dispute resolution procedures without the Declarant's consent.

After failing to reach a settlement of construction defects claims made by the Vallagio at Inverness Residential Condominium Association ("Association"), the project's owners voted (without obtaining the Declarant's consent) to remove the dispute resolution provisions from the declaration. The Declarant moved to compel arbitration of the Association's complaint.

The Colorado Supreme Court determined that the Declarant consent provision did not violate the Colorado Common Interest Ownership Act ("CCIOA"), and that since the Association did not obtain the Declarant's consent to removing the dispute resolution provisions in the Declaration, the mandatory arbitration provisions in the Declaration remained in force.

Impact of House Bill 1279 and The Vallagio Decision

Lauded as a solid compromise on construction defects reform, but not a complete fix, supporters of House Bill 1279 hope it will jumpstart condominium development. This development has fallen to around 3 percent of all housing starts, compared with 20 percent just a decade ago. They're hoping it will jumpstart this development by allowing developers to offer to remedy defects prior to filing a suit and expanding the number of unit owners who must consent to a lawsuit before filing.

The Supreme Court's decision in *Vallagio* is also a significant and favorable result for condominium and planned community developers in Colorado. That said, developers should ensure their dispute resolution provisions are carefully drafted since the court refused to address various other arguments of the Association on procedural grounds. These include whether the Declaration's arbitration provision itself, as opposed to the consent-to-amend provision, was void under another provision of CCIOA.

The *Vallagio* decision, together with House Bill 1279, should provide Colorado condo developers with some comfort concerning construction defect litigation issues. However, 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.



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