LAW WEEK COLORADO

State Faces Obstacles To Some Homebuilding

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DURING RECENT YEARS, there has been much discussion about the lack of attached ownership housing construction in Colorado. The main culprit, according to several sources within the community, seems to be our state's construction defect laws.

Since 2001 there has been a periodic series of legislative fixes to our construction defect laws that saw the pendulum swing back and forth between the interests of the consuming public who purchase the homes and certain protections of the developers and homebuilders from excessive and unnecessary litigation.

Some say that the current state of the law is more onerous than necessary on the developers and homebuilders and is artificially inhibiting the development of multifamily ownership housing in a time of high demand and low supply.

A Sept. 29 Denver Post opinion article stated:

"No one is suggesting that developers escape liability for construction defects or that homeowners be denied the right to sue. But under the state's current defect laws, the scales have tilted too far in favor of litigation as the default tool for resolving disputes. And this appears to be the biggest reason for the collapse in the number of new multifamily [ownership] dwellings in recent years …"

Rather than the typical conflict between the plaintiff's bar (representing the homebuyer) and the homebuilding industry that has produced the back-and-forth nature of our construction defect laws in the past, this 2014 legislative session found new constituents and a different perspective on the issue.

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 percent or more of construction of attached housing was in the ownership format throughout

JAMES MULLIGAN

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 were also 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 collateral. 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 TOD communities that are expected to be developed around these transit stops.

Rather than engage the battle of creating more contention in the various aspects 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, including those communities where there are units that are attached and contain common elements.

These communities 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 is also 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 their concerns through a bill including a couple of changes in the state laws governing common interest communities, 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:

1. Majority Owner Vote Re: Litigation Rather than allow two owners plus a vote of the HOA board to determine whether to file litigation alleging construction defects in a common interest community, 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 community in such litigation.

This approach also included a provision for advance notice to the owners of such pending litigation accompanied by several disclosures regarding the potential litigation and its potential impact on the respective owner.

This approach to protecting the rights of homeowners in a common interest community seemed to be in line with everyone's interests, while not preventing an individual consumer orunit owner to advance its own claims.

2. Alternative Dispute Resolution This proposal clarified the stated intent of the common interest community 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 community shall not be changed or deleted without the permission of the declarant (e.g.; the developer of the community).

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 communities.

Notwithstanding the curative nature of these proposals, the legislation did not pass through a legislative maneuver that did not allow for its consideration during the waning days of the session.

This issue has not receded into the back room, and we will see a continuing crusade from an updated coalition to address these reasonable modifications to our state laws that will at least provide some protections to the common interest community homeowner regarding unwanted litigation and some relief to the homebuilding industry from excessive litigation. •

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