



# COLORADO REAL ESTATE JOURNAL

THE COMMUNICATION CHANNEL OF THE COMMERCIAL REAL ESTATE COMMUNITY

JANUARY 7, 2015 – JANUARY 20, 2015

## Condo development in Colorado: a perspective on current issues

As we begin to contemplate the forthcoming state legislative session here in Colorado, one of the leading issues that continues to arise is possible legislation regarding how our construction defect laws are applied in the context of multifamily ownership housing (condominiums and planned communities), particularly as they relate to providing a measure of advance notice to those impacted by potential litigation and possible alternative dispute resolution in the context of related claims.

There has been much discussion, posturing and claims asserted around this issue and several attempts have been made, and are continuing to be made, regarding potential solutions to what has been widely asserted as one of the major roadblocks to the development of residential attached ownership housing in Colorado during recent years.

Without delving into much of the background that has been described and written about recently concerning this issue, there are certainly disputes publically asserted about whether such reforms as proposed to date (whether at the state or local level) would be helpful or hurtful to the consumer, the person who had purchased and owns such multifamily attached housing.

Let us take a brief look at the major elements of proposals that have been discussed as measures to initially address some of the barriers to the development of this much-needed housing product.

The context is mainly applicable within communities where there exists a homeowners association that is established in the community's governing documents to manage the affairs of that community, including the common areas contained within the condominium or planned community. Under



**James M. Mulligan**  
Senior real estate partner, Snell & Wilmer, Denver

our current statutory scheme (Colorado's Common Interest Ownership Act), if more than one unit owner has claimed a defect in their unit, then the HOA has the standing to pursue such claims against the developer on behalf of

the unit owners.

This authority of the HOA has created circumstances whereby the HOA's board of directors may decide, on behalf of all unit owners who may be similarly impacted, to pursue litigation against the developer. Notwithstanding the well-intentioned actions of the HOA's board of directors in this context, the remaining unit owners are now burdened with an inability to refinance or sell their units in the face of such pending litigation, at least until the claims are fully vetted through the courts.

One reasoned solution being proposed in this particular circumstance is to provide for the informed consent of the unit owners within the community who are impacted by such a decision. Such informed consent would include a couple of measures. First, the HOA board would be required to notify the unit owners of a request for the HOA to pursue litigation against the developer, along with information regarding the claim itself, the relative cost and time estimates and the reasoned probability of success. Second, following such notices to the unit owners, such a measure would require an affirmative vote of a majority of the unit owners within the com-

munity before commencing actual litigation, rather than leaving such a major decision solely up to the HOA's board of directors. Since such a decision has the real possibility of impairing all of the unit owners, this approach would fairly allow for the informed consent of the unit owners before actual litigation is filed. This measure does not prevent any aggrieved unit owner from filing its own separate claim against the developer; it just prevents the HOA board of directors from pursuing such claims without the informed consent of the majority of impacted unit owners. Reserving certain actions of the HOA board to unit owner approval is not a unique matter in the context of representative management when such actions have a material impact on all owners, as would be the case in this instance.

It appears as though this measure is actually one that is a balanced protection of impacted consumers, while not preventing other consumers from pursuing their individual claims. There are claims by some that such a measure is, in reality, a disguised (or maybe not so disguised) protection of the developer from the pursuit of valid claims. Since the proposed measures that I have seen provide that the majority vote be made by the nondeveloper-owned units such that the developer-owned units would not be counted in such a vote, I do not see that this approach is one that is geared to protect the developer so much as to protect the other impacted unit owners who, without such informed consent provisions, have no ability to protect their respective interests in such matters.

A second issue is one that addresses alternative dispute resolutions in the context of existing provisions in the respective com-

munity's governing documents. This measure would provide that, to the extent that the governing documents of the respective community contain, at the time that a buyer purchases a unit within that community, provisions that require a mandatory arbitration process to settle disputes and claims with the developer, those provisions are not subject to later elimination from those governing documents by way of amendment by the HOA. This issue is intended to address the state statutory provisions that encourage alternative dispute resolution in this context. Importantly, however, it also is intended to honor the basic contract provisions between the developer and the unit buyer that provided this means of dispute resolution, and not allow that agreement to be taken away unilaterally by one of the parties (or that party's successor). Again, this appears to be an issue of honoring the original agreement between the parties and not allowing that agreement to be subject to later unilateral change without the agreement of both of the parties to the original arrangement. This is a basic premise in contract law and practice, not a device to protect the developer as against the consumer. Impairing the freedom to contract is a very slippery slope that should require close scrutiny in terms of its true impact.

There are other issues that are being discussed and proposed at the state level and some that have been put in place at the local level. The above two issues are the ones that seem to be at the core of the issue regarding consumer protection and deserve attention if we are to begin to address the issue of stalled development that all seem to desire to address. Stay tuned as the session commences.▲