

LAW WEEK

COLORADO

Denver Pursues Local Construction Defects Reform

The city is the latest to join a coalition of local governments with their own rules to encourage condo development

BY TONY FLESOR
LAW WEEK COLORADO

On Oct. 8, Denver stood up as the latest city to propose construction defects reform in hopes to spur condominium construction.

The city joins a growing coalition of local governments along the Front Range passing their own construction defects rules after similar reform attempts have failed in the state legislature for three consecutive years.

As the economic hub for the state, Denver's ordinance, if passed, could likely send a strong message to lawmakers that unifying changes are needed.

But, as there was in the legislature, strong opposition is mounting against the city's proposal.

SHAKY FOUNDATION

Colorado's construction defects law framework has long been blamed for the slowdown in condominium

development for the state, especially for cities along public transit arteries that have seen an influx of young residents in recent years.

According to the 2013 Denver Regional Council of Governments' Denver Metro Area Housing Diversity Study, the favorite document for supporters of construction defects reform, condo development makes up only 4 percent of new development of the state.

Last spring, the best effort to change the state's construction defects rules came as legislators from both sides of the aisle introduced three bills that would have prevented homeowners' associations

from removing arbitration agreements from their governing documents and required informed consent from a majority of homeowners for any attempts at construction defect litigation.

The end of the legislative session came with a fizzle, though, as Democratic leadership blocked the bills before they had a chance to become law.

Some direction came out of the courts instead in the Colorado Court of Appeals' ruling in *Vallagio at Inverness Residential Condominium Association v. Metropolitan Homes*, which prevents homeowners associations from amending their covenants to remove arbitration clauses without

the consent of a developer.

Since then, local ordinances have taken up the issue as advised by Rep. Dan Thurlow during testimony for the primary construction defects bill, Senate Bill 177.

To date, seven municipalities have passed their own rules.

CHANGE AT THE LOCAL LEVEL

A key issue for each of the local governments is development around the light rail lines connecting each of those areas to Denver. As the state's economy grows and new residents continue to flood in, the light rail corridor has been built up, but so far primarily with apartment buildings.

According to the 2013 DRCOG study, and echoed in the ordinances for nearly every city, only about 4 percent of new construction has been condo development.

The cover memo for the Denver



JEFF KERRANE



KRISTIN BRONSON



DENVER ANNOUNCED A NOVEL PLAN FOR CONSTRUCTION DEFECTS REFORM OCT. 8. THE PROPOSAL FOCUSES ON THE TYPES OF CLAIMS THAT CAN BE BROUGHT IN CONSTRUCTION DEFECTS COMPLAINTS.

PHOTO: LAW WEEK FILE

ordinance cites the slowdown in the condo market and transit concerns as well.

Denver assistant city attorney David Broadwell wrote, "As a landlocked city with no ability to annex, Denver has no choice but to grow 'up' rather than 'out' in order to accommodate new residential growth.

"Furthermore, with the build-out of FasTracks, Denver enjoys unprecedented opportunities to encourage transit-oriented development, particularly the clustering of housing opportunities near many of the rail stations that either exist or are planned for the city."

Prior to the release of Denver's proposed ordinance, Kristin Bronson, a partner with Lewis Roca Rothgerber,

homeowners to provide notice of a construction defects claim to builders and builders then have the right to inspect and offer to repair defects.

Also, most of the localities adopted rules that say any litigation requires the informed consent of a majority of homeowners.

And in all areas, arbitration has become the preferred means of dispute resolution, with many places requiring it for new developments and limiting the ability to remove arbitration agreements for existing developments.

Denver, however, is pursuing a different tack by focusing on the types of claims that may be pursued in the first place.

Broadwell said Lakewood and Parker instituting their ordinances is

Jeff Kerrane, managing partner of Benson Kerrane Storze & Nelson, said he believes Denver's proposal would be worse for homeowners than those used in other municipalities.

By tying construction defects claims to building codes, Denver is "lowering construction standards" for builders. He fears builders would no longer have to comply with manufacturers' installation instructions or standard of care.

The other side of the coin, he said, is that a claim would not be actionable if a builder violates the building code but doesn't cause damage.

"It allows builders to violate the code as long as it doesn't damage the building," Kerrane said.

Broadwell, however, said that the

useful diversion from what is used in other cities. "I'm really encouraged to see Denver took the additional step of trying to connect the requirement of showing actual injury to proceed with a claim," she said. "It does help eliminate or discourage the type of cases where there isn't a real injury or real injury is hard to identify."

Denver's proposed ordinance would codify the Colorado Court of Appeals decision in the Vallagio case.

The city's proposal also follows suit of other municipalities by requiring informed consent of a majority of homeowners before opening construction defects litigation.

The bill will go to the city's business development committee on Tuesday for its first committee hearing.

If Denver passes its own construction defects laws in the near future, it could mark the tipping point for legislative change. All parties involved seem to favor having the state weigh in to provide clear direction rather than relying on a regulatory jigsaw puzzle throughout the state.

Bronson said the city's role as the economic engine of Colorado should provide enough of a push for the legislature to act.

She also added that the government affairs department at Lewis Roca Rothgerber has heard that Denver's efforts to create a local rule buoyed the legislative forces seeking statewide reform.

Kerrane agreed: "The state should be looking to address issues of construction defects." But he said he also hopes statewide action includes licensing for contractors and inviting homeowner advocates to the table to discuss any reform attempts prior to their introduction. •

— Tony Flesor, TFlesor@circuitmedia.com

"THE STATE SHOULD BE LOOKING TO ADDRESS ISSUES OF CONSTRUCTION DEFECTS."

Jeff Kerrane, construction defects plaintiff's attorney

said she anticipated the city releasing something "with teeth." After the proposal was made public on Oct. 8, the city showed that it was pursuing construction defects reform through a different avenue than other municipalities around Colorado.

The other municipalities with their own local laws for construction defects reform — Lakewood, Lone Tree, Littleton, Parker, Aurora and Arvada — focused on very similar criteria that was rolled out in each area over the past year, beginning with Lakewood and Parker in October 2014.

In most, the rules require

now "ancient history" and that Denver's provisions were designed to withstand a court challenge that he believes will inevitably come for any of the ordinances.

The primary provision of Denver's proposed ordinance limits technical building code violations that can be used in construction defects litigation. Specifically, the ordinance follows Colorado Construction Defect Action Reform Act by saying proof of a building code violation can be used in private litigation only if it is linked to actual property damage or injury or the risk of damage or injury.

provision is not intended to restrict claims only to what is included in the building code, only to limit claims that involve "technicalities."

"The language in the draft is not intended to preclude a situation where there's an assertion that there was bad workmanship on a subject that is not regulated by the code," Broadwell said. "It's intended to say that if you've met our code on a particular detail, some external standard can't be used for code compliance versus a hypothetical higher standard."

Bronson, however, said she believes the building code provision is a

CONSTRUCTION DEFECTS ORDINANCES AROUND COLORADO

Denver departed from other local governments around Colorado in its pursuit of construction defects reform.

DENVER

- Limits technical building code use in construction defects litigation.
- Supports binding arbitration and prohibits removal of arbitration requirements from covenants.
- Litigation requires informed consent of a majority of homeowners.

LAKESWOOD

Passed Oct. 13, 2014

- Requires notice of claims and gives developers the right to repair defects.
- Supports binding arbitration and does not allow litigation for any defects that arise before arbitration agreements are removed from covenants.
- Litigation requires informed consent of a majority of homeowners.

PARKER

Passed Oct. 20, 2014

- Amended Parker Municipal Code to require binding arbitration be included in plat notes for new developments in lieu of submitting claims for litigation.

LONE TREE

Passed Feb. 3

- Requires notice of claims and gives developers the right to repair defects.
- Supports binding arbitration and does not allow litigation for any defects that arise before arbitration agreements are removed from covenants.
- Litigation requires informed consent of a majority of homeowners.

LITTLETON

Passed May 5

- Requires notice of claims and gives developers the right to repair defects.
- Supports binding arbitration and does not allow litigation for any defects that arise before arbitration agreements are removed from covenants.
- Litigation requires informed consent of a majority of homeowners.

COMMERCE CITY

Passed July 6

- Requires notice of claims and gives developers the right to repair defects.
- Supports binding arbitration and does not allow litigation for any defects that arise before arbitration agreements are removed from covenants.
- Litigation requires informed consent of a majority of homeowners.

ARVADA

Passed Oct. 5

- Amended Arvada Land Development Code to require binding arbitration be included in plat notes for new developments in lieu of submitting claims for litigation.

AURORA

Passed Sept. 24

- Requires notice of claims and gives developers the right to repair defects.
- Supports binding arbitration and does not allow litigation for any defects that arise before arbitration agreements are removed from covenants.
- Litigation requires informed consent of a majority of homeowners.