As appeared in...

CREJ online
www.crej.com

COLORADO REAL ESTATE JOURNAL
THE COMMUNICATION CHANNEL OF THE COMMERCIAL REAL ESTATE COMMUNITY
JULY 18-JULY 31, 2001

Law & Accounting

Do homeowners associations receive implied warranty of habitability?

Doug Benson
Partner, Burdman & Benson LLP, Arvada

Jesse Witt
Burdman & Benson LLP, Arvada

The increasing prevalence of homeowners' associations and shared community resources may require the re-examination of some of the fundamental legal remedies available to the unfortunate purchaser who discovers that his new home was built in a substandard manner. The law is not clear to what extent the established protections, borne of an era where homes were sold as discrete property, are applicable to condominiums, townhomes, and other creatures of 21st century property management.

■ **The implied warranty of habitability.** When a builder sells a home in Colorado, the purchaser receives an implied warranty of habitability: an assurance that the builder has complied with the local building code, built the home in a workmanlike manner, and constructed a dwelling suitable for habitation. The courts have held that the warranty is not limited to the structure of a house itself but also includes those externalities that are necessary for useful occupancy. Remedy is available only to the original purchaser of a home, however; a subsequent buyer cannot assert such a claim against a builder.

■ **Common property.** Does an association receive an implied warranty when it takes title to common property? If the homeowners' association holds title to the common elements of a property, then it can argue that it received the same implied warranty from the developer that a natural person would have taken. Although the Colorado Court of Appeals, in the 1980 case of *Summerhouse Condominium Ass'n v. Majestic Savings & Loan Ass'n*, 44 Colo. App. 495, 615 P.2d 71, held that a homeowners' association was not the proper party to assert a claim for breach of the implied warranty of habitability. The General Assembly subsequently passed the Colorado Common Ownership Interest Act in 1991, which overruled the bulk of the *Summerhouse* decision and greatly expanded the powers of homeowners' associations to institute litigation on behalf of their members. It remains to be decided whether any of *Summerhouse* remains good law after CCIOA's passage.

Summerhouse's underlying logic — that there can be no implied warranty absent a contract between the developer and the association — is not without merit. The English case of *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113, the first case ever to recognize an implied warranty of habitability, focused entirely on contractual relationships, finding that "it was an implied term between the parties that the defendants should complete the house in a good and workmanlike manner with materials of good quality and description, so as to be fit for habitation." Nonetheless, a court facing this same question today would likely weigh more heavily the developer's role in forming an association. Under CCIOA, the developer must establish the homeowners' association and appoint fiduciaries to its board of directors. This presents a situation starkly different from that noted in *Summerhouse*, where the court expressly found that no fiduciary relationship existed between the developer and the association.

Moreover, the contractual origins of the implied warranty of habitability notwithstanding, later interpretations have found strong policy issues to be implicit in the doctrine. Therefore, even though there is no bargained-for exchange in the traditional sense, a court may nonetheless determine that sufficient public policy issues exist to support treating the contractual transfer of property from a developer to an association as giving rise to the same implicit terms as those which the early courts contemplated in the purchase of a new home.

Similarly, the relationship between a developer and an association today might be analogized to two bargaining parties negotiating a contract. Since the developer must create an association, it may be said that the association and the developer represent two bargaining parties, but the two possess the maximum disparity of bargaining power. Not only is the association unable to object to the developer's terms, but the developer itself is the entity which defines the scope of the association's powers. Subsequent legal action by the association is thus the only real deterrent to a developer seeking to take advantage of its position, and the courts should therefore not hesitate to recognize liberal remedies in such a situation.

■ **Claiming breach.** Can an association claim a breach of the implied warranty of habitability when the homeowners hold title to the common property? If the project in question is a condominium, then the residents own undivided interests in the common elements. In this case, although the homeowners' association does not own the property, it does have the right to seek redress for breach of an implied warranty to its members as to the common elements under CCIOA's grant of representative standing. Premising an action on this ground raises the question, however, of to what extent the association can pursue a claim that a substantial constituent of its membership — those who were not original purchasers — might not themselves be able to assert. A court might therefore need to decide whether the association can obtain damages for the entire common area, or just some fraction representative of the original owners' interests.

However, while each homeowner may be said to have only a fractional ownership interest in the common areas as a whole, they each enjoy use of the entire common area, sharing their interests as necessary for all to traverse the property, seek shelter, and the like. Since the original owners can only be made whole again by effecting repairs on all common areas, it would defeat these original owners' claims to reduce the recovery by an artificial fractional multiplier. Again, policy supports recognition of a remedy for the homeowners, provided that at least one original purchaser remains in the association.

Any vestiges of *Summerhouse* that have survived the enactment of CCIOA should be overruled so that the courts may effectively adapt these historic protections to the modern realities facing today's homeowners and the associations that serve them.▲