

Keep Moving Forward

OTTEN JOHNSON
ROBINSON NEFF + RAGONETTI, PC

>> ottenjohnson.com



OTTEN JOHNSON ALERT

A Possible Breakthrough: Construction Defect Reform Legislation Appears Headed for Passage, After Years of Failure

April 2017 • [David Brennan](#)

Metropolitan Denver's explosive population growth in recent years has fueled a housing construction boom. Rental apartment construction continues at a near-record pace: 3,246 apartment units were completed in the first quarter of 2017, and a total of over 11,000 units are projected for this calendar year.

At the same time, construction of condominiums is nearly nonexistent, accounting for roughly three percent of all housing starts in the state. Homebuilders in Colorado have turned away from building condos in recent years because they fear that they will be sued for construction defects – regardless of whether the units they build are really defective. Under current law, the homeowners' association, or HOA, of a condominium project can sue the developer or builder of the project without taking a vote of the condo unit owners. As the statutory deadline for construction defect claims (six years from completion of the project) approaches, members of the HOA board may be encouraged to bring a construction defect lawsuit to avoid any personal liability for failing to sue. Construction defect litigation is expensive for the developer or builder in every case, and the prospect of such litigation can add about \$15,000 per condominium unit to the cost of necessary insurance for the condo developer and builder. And the existence of that errors and omissions insurance coverage can, in turn, provide further incentive for HOA boards and plaintiffs' construction defect lawyers to sue for alleged defects.

Colorado's legislature has struggled to find solutions to the construction defect litigation issue, but the bills introduced over the past several legislative sessions have all failed. Now, a promising first step appears to be nearing passage. House Bill 1279 was passed by the House on April 24, and is being considered by the Senate. The bill has bipartisan sponsorship and support in both the House and Senate, and Colorado Governor John Hickenlooper has enthusiastically endorsed its passage.

The bill provides the following changes to the process for bringing a construction defect claim:

1. *Notice to Unit Owners and Construction Professionals.* Before commencing a construction defect claim, the HOA must send notice to every unit owner, and every "construction professional" who would be a defendant in the action (e.g., developers, contractors, and design professionals). The mailing of the notice starts a 90-day period for consideration and voting on the possible claim. The notice must describe the proposed construction defect claim, and the alleged defects, with "reasonable specificity." It must also contain a detailed disclosure of ten categories of information set forth in the statute: the statutory deadline to sue, the consequences of not suing or not repairing the alleged defects, the contingent fee arrangement with plaintiffs' counsel, and the like.
2. *Meeting of HOA, Unit Owners and Construction Professionals.* Within ten to fifteen days of mailing of the original notice, the HOA must hold a meeting among the HOA board, the condo unit owners, and the potential defendants in the construction defect action. The purpose of the meeting is to consider whether to bring a construction defect action. Both the HOA board and the construction professionals are given an opportunity to present relevant facts and arguments. The construction professionals may, but are not required to, offer a remedy for the alleged defects at the meeting.
3. *Voting on the Construction Defect Lawsuit.* The conclusion of the meeting kicks off the voting period, during which the condo unit owners will cast their votes in favor of, or against, bringing a construction defect claim. The voting concludes ninety days after the mailing of the original notice, or when a majority vote of the unit owners has been determined, whichever comes first. Upon conclusion of the vote, the HOA may commence a construction defect claim only if a majority of condo unit owners have authorized the claim.

The mailing of the notice "tolls," or pauses, the applicable statutes of limitation for a period of ninety days, or for the shorter period that it may take for the HOA to determine the vote. In determining the vote, the HOA must exclude certain votes, including any votes from units owned by the developer or builder.

House Bill 1279 is not a complete “fix” for the condominium construction issues, if such a fix even exists. Other bills, including proposals to require arbitration of construction defect claims and to limit the cost of insurance for condo developers and builders, have been proposed, but their passage appears much less likely than the passage of House Bill 1279. But House Bill 1279 is widely considered a good first step. As noted earlier, it has already passed the Colorado House, which is controlled by Democrats, who are sometimes viewed as favoring the interests of plaintiffs’ trial lawyers. In other words, it has likely passed in the chamber less likely to approve it. It is now being considered by the Senate, controlled by Republicans, who are sometimes viewed as a more receptive audience for legislation favoring developers and other business interests.

As House Bill 1279 makes its way toward the Governor’s desk, we’ll keep you posted on the latest developments on our Rocky Mountain Real Estate Blog.

Otten Johnson's attorneys have substantial experience with helping clients navigate business issues like those highlighted in this alert. For more information, or for help evaluating your current situation contact any of the attorneys in the [Real Estate Practice Group](#).

More Great Reads

Rocky Mountain Real Estate Blog

The latest real estate and land use news and updates. [Read More](#)

Rocky Mountain Sign Law Blog

Regulatory, best practices, and other First Amendment news. [Read More](#)

Our lawyers are pleased to present timely, topical issue alerts on the latest legal developments, trends and other subjects of interest to our clients and colleagues. Otten Johnson publishes Otten Johnson Alerts on a monthly basis. If you do not wish to receive future Otten Johnson Alerts, you may unsubscribe by clicking the "opt out" link below. This Otten Johnson Alert has been prepared for informational purposes only and does not constitute legal advice or the opinion of Otten Johnson. Receipt of this summary does not create an attorney-client relationship between you and Otten Johnson. You should not act or rely on any information in this article without seeking the advice of an attorney. Otten Johnson provides legal advice only after being engaged to do so by a client with respect to particular facts and circumstances.

Read our full disclaimer

950 Seventeenth Street, Suite 1600, Denver, CO 80202
Phone 303.825.8400 | Fax 303.825.6525 | ottenjohnson.com