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REAL ESTATE PRACTICE GROUP | OCTOBER 2015

## Otten Johnson Alert -

### What Mayor Hancock's Local Ordinance Means for Condo Construction in Denver

On October 8, 2015, Mayor Michael [Hancock](#) released a draft ordinance that would significantly change how condominium construction defect suits are pursued in Denver. If it passes, Denver will become the ninth city in Colorado to craft its own rules for lawsuits arising from condominium construction projects. But will it make a difference? [Lakewood](#) was the first Colorado municipality to pass an ordinance on construction defects in October 2014. Despite interest by developers, so far [no condominium projects](#) have broken ground, in Lakewood. The Denver ordinance is based on the same "home rule" authority as the Lakewood ordinance, and has three main components.

First, it de-links city code violations and construction defects, in that a city code violation could no longer be used as support for any private lawsuit unless the violation resulted in actual damage to or loss of use of real or personal property, bodily injury or wrongful death, a risk of bodily injury or death, or a threat to the life, health, or safety of the occupants of residential real property. In fact, compliance with Denver's regulatory code would be *prima facie* evidence that the improvements in question are not defective.

Second, the ordinance requires HOAs to give notice to homeowners on a number of issues for any lawsuit being considered, including how much it might cost, what might happen if the HOA loses, and the impact on the marketability of condos. After such notice, a majority of homeowners must vote in favor of litigation for the lawsuit to move forward.

Third, the ordinance codifies a recent Colorado decision, [Vallagio at Inverness Residential Condominium Association, Inc. v. Metropolitan Homes, Inc.](#) in that it would bar HOAs from removing mandatory arbitration or mediation provisions from HOA declarations without the consent of the Declarant.

These measures closely track some of the provisions in SB 177, which [failed](#) in committee earlier this year. Opponents of that bill asserted that it was too pro-developer and builder, while not guaranteeing an increase in affordable housing. However, if Denver can pass its ordinance, then the four largest cities in Colorado will all have ordinances in place to try and mitigate the perceived impact of Colorado's current construction-defect laws. This kind of uniform push might help get state-wide reform enacted during the next Colorado session, which begins in January 2016.

But the questions remain: will these municipal-level measures be enough to entice developers and builders to wade back in to condominium construction? Is it enough to convince insurers to start insuring such projects at affordable rates? While the Denver ordinance is a strong signal that cities in Colorado want to promote condo development, it is likely that wherever the first condominium project occurs, a construction defect plaintiff will argue that the General Assembly has preempted a municipality's authority to undertake such regulation. It is therefore going to take a brave developer diving in and facing suit – alongside the municipality in which it tries to build – to reshape the landscape for condominium development in Colorado.

**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](#).**

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