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An Act

HOUSE BILL 17-1279

BY REPRESENTATIVE(S) Garnett and Saine, Wist, Duran, Arndt, Becker K., Beckman, Benavidez, Bridges, Buck, Buckner, Carver, Catlin, Coleman, Covarrubias, Danielson, Esgar, Exum, Ginal, Gray, Hamner, Hansen, Herod, Hooton, Humphrey, Jackson, Kennedy, Kraft-Tharp, Landgraf, Lawrence, Lee, Leonard, Liston, Lontine, Lundeen, McKean, McLachlan, Melton, Michaelson Jenet, Mitsch Bush, Navarro, Neville P., Nordberg, Pabon, Pettersen, Rankin, Ransom, Rosenthal, Sias, Singer, Valdez, Van Winkle, Willett, Williams D., Wilson, Winter, Young;
also SENATOR(S) Tate and Guzman, Williams A., Hill, Aguilar, Baumgardner, Cooke, Coram, Court, Crowder, Fenberg, Fields, Gardner, Holbert, Jahn, Kagan, Kefalas, Kerr, Lambert, Lundberg, Martinez Humenik, Merrifield, Moreno, Neville T., Scott, Smallwood, Sonnenberg, Todd, Zenzinger, Grantham.

CONCERNING THE REQUIREMENT THAT A UNIT OWNERS' ASSOCIATION OBTAIN APPROVAL THROUGH A VOTE OF UNIT OWNERS BEFORE FILING A CONSTRUCTION DEFECT ACTION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 38-33.3-303.5, **amend** (1); **repeal** (2); and **add** (4) as follows:

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

38-33.3-303.5. Construction defect actions - disclosure - approval by unit owners - definitions - exemptions. (1) (a) ~~In the event BEFORE the executive board, pursuant to section 38-33.3-302 (1)(d), institutes an A CONSTRUCTION DEFECT action, asserting defects in the construction of five or more units, the provisions of this section shall apply. For purposes of this section, "action" shall have the same meaning as set forth in section 13-20-803 (1), C.R.S.~~

~~(b) the executive board shall substantially comply with the provisions of this section.~~

(b) FOR THE PURPOSES OF THIS SECTION ONLY:

(I) "CONSTRUCTION DEFECT ACTION":

(A) MEANS ANY CIVIL ACTION OR ARBITRATION PROCEEDING FOR DAMAGES, INDEMNITY, SUBROGATION, OR CONTRIBUTION BROUGHT AGAINST A CONSTRUCTION PROFESSIONAL TO ASSERT A CLAIM, COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM FOR DAMAGES OR LOSS TO, OR THE LOSS OF USE OF, REAL OR PERSONAL PROPERTY OR PERSONAL INJURY CAUSED BY A DEFECT IN THE DESIGN OR CONSTRUCTION OF AN IMPROVEMENT TO REAL PROPERTY, REGARDLESS OF THE THEORY OF LIABILITY; AND

(B) INCLUDES ANY RELATED, ANCILLARY, OR DERIVATIVE CLAIM, AND ANY CLAIM FOR BREACH OF FIDUCIARY DUTY OR AN ACT OR OMISSION OF A MEMBER OF AN ASSOCIATION'S EXECUTIVE BOARD, THAT ARISES FROM AN ALLEGED CONSTRUCTION DEFECT OR THAT SEEKS THE SAME OR SIMILAR DAMAGES.

(II) "CONSTRUCTION PROFESSIONAL" HAS THE MEANING SET FORTH IN SECTION 13-20-802.5 (4).

(c) Meeting to consider commencement of construction defect action - disclosures - required terms. (I) THE EXECUTIVE BOARD SHALL MAIL OR DELIVER WRITTEN NOTICE OF THE ANTICIPATED COMMENCEMENT OF THE CONSTRUCTION DEFECT ACTION TO EACH UNIT OWNER AT THE OWNER'S LAST-KNOWN ADDRESS DESCRIBED IN THE ASSOCIATION'S RECORDS AND TO THE LAST-KNOWN ADDRESS OF EACH CONSTRUCTION PROFESSIONAL AGAINST WHOM A CONSTRUCTION DEFECT ACTION IS

PROPOSED; EXCEPT THAT THIS NOTICE REQUIREMENT DOES NOT APPLY TO:

(A) CONSTRUCTION PROFESSIONALS IDENTIFIED AFTER THE NOTICE IS MAILED; OR

(B) JOINED PARTIES IN A CONSTRUCTION DEFECT ACTION PREVIOUSLY APPROVED BY OWNERS PURSUANT TO SUBSECTION (1)(d) OF THIS SECTION.

(II) THE NOTICE GIVEN PURSUANT TO THIS SUBSECTION (1)(c) MUST CALL A MEETING OF THE UNIT OWNERS, WHICH MUST BE HELD NO LESS THAN TEN DAYS AND NO MORE THAN FIFTEEN DAYS AFTER THE MAILING DATE OF THE NOTICE, TO CONSIDER WHETHER TO BRING A CONSTRUCTION DEFECT ACTION. A FAILURE TO HOLD THE MEETING WITHIN THIS TIME PERIOD VOIDS THE SUBSEQUENT VOTE. A QUORUM IS NOT REQUIRED AT THE MEETING. IN NO EVENT SHALL THE TIME PERIOD FOR PROVIDING THE NOTICE REQUIRED PURSUANT TO SUBSECTION (1)(c)(I) OF THIS SECTION, HOLDING THE MEETING REQUIRED PURSUANT TO THIS SUBSECTION (1)(c)(II), AND VOTING AS REQUIRED BY SUBSECTION (1)(d) OF THIS SECTION EXCEED NINETY DAYS. THE NOTICE MUST STATE THAT:

(A) THE CONCLUSION OF THE MEETING INITIATES THE VOTING PERIOD, DURING WHICH THE ASSOCIATION WILL ACCEPT VOTES FOR AND AGAINST PROCEEDING WITH THE CONSTRUCTION DEFECT ACTION. THE DISCLOSURE AND VOTING PERIOD SHALL END NINETY DAYS AFTER THE MAILING DATE OF THE MEETING NOTICE OR WHEN THE ASSOCIATION DETERMINES THAT THE CONSTRUCTION DEFECT ACTION IS EITHER APPROVED OR DISAPPROVED, WHICHEVER OCCURS FIRST.

(B) THE CONSTRUCTION PROFESSIONAL AGAINST WHOM THE CONSTRUCTION DEFECT ACTION IS PROPOSED WILL BE INVITED TO ATTEND AND WILL HAVE AN OPPORTUNITY TO ADDRESS THE UNIT OWNERS CONCERNING THE ALLEGED CONSTRUCTION DEFECT; AND

(C) THE PRESENTATION AT THE MEETING BY THE CONSTRUCTION PROFESSIONAL OR THE CONSTRUCTION PROFESSIONAL'S DESIGNEE OR DESIGNEES MAY, BUT IS NOT REQUIRED TO, INCLUDE AN OFFER TO REMEDY ANY DEFECT IN ACCORDANCE WITH SECTION 13-20-803.5 (3) OF THE "CONSTRUCTION DEFECT ACTION REFORM ACT".

(III) THE NOTICE GIVEN PURSUANT TO THIS SUBSECTION (1)(c) MUST ALSO CONTAIN A DESCRIPTION OF THE NATURE OF THE CONSTRUCTION DEFECT ACTION, WHICH DESCRIPTION IDENTIFIES ALLEGED DEFECTS WITH REASONABLE SPECIFICITY, THE RELIEF SOUGHT, A GOOD-FAITH ESTIMATE OF THE BENEFITS AND RISKS INVOLVED, AND ANY OTHER PERTINENT INFORMATION. THE NOTICE SHALL ALSO INCLUDE THE FOLLOWING DISCLOSURES:

1. THE ALLEGED CONSTRUCTION DEFECTS MIGHT RESULT IN INCREASED COSTS TO THE ASSOCIATION IN MAINTENANCE OR REPAIR OR CAUSE AN INCREASE IN ASSESSMENTS OR SPECIAL ASSESSMENTS TO COVER THE COST OF REPAIRS.

2. IF THE ASSOCIATION DOES NOT FILE A CLAIM BEFORE THE APPLICABLE LEGAL DEADLINES, THE CLAIM WILL EXPIRE.

3. UNTIL THE ALLEGED DEFECTS ARE REPAIRED, SELLERS OF UNITS WITHIN THE COMMON INTEREST COMMUNITY MIGHT OWE UNIT BUYERS A DUTY TO DISCLOSE KNOWN DEFECTS.

4. THE EXECUTIVE BOARD (INTENDS TO ENTER) (HAS ENTERED) INTO A FEE ARRANGEMENT WITH THE ATTORNEYS REPRESENTING THE ASSOCIATION, UNDER WHICH (THE ATTORNEYS WILL BE PAID A CONTINGENCY FEE EQUAL TO _____ PERCENT OF THE (NET) (GROSS) RECOVERY OF THE AMOUNT THE ASSOCIATION RECOVERS FROM THE DEFENDANT(S)) (THE ASSOCIATION'S ATTORNEYS WILL BE PAID (AN HOURLY FEE OF \$ _____) (A FIXED FEE OF \$ _____)).

5. IN ADDITION TO ATTORNEY FEES, THE ASSOCIATION MAY INCUR UP TO \$ _____ FOR LEGAL COSTS, INCLUDING EXPERT WITNESSES, DEPOSITIONS, AND FILING FEES. THE AMOUNT WILL NOT BE EXCEEDED WITHOUT THE EXECUTIVE BOARD'S FURTHER WRITTEN AUTHORITY. IF THE ASSOCIATION DOES NOT PREVAIL ON ITS CLAIM, THE ASSOCIATION MAY BE RESPONSIBLE FOR PAYING THESE LEGAL EXPENSES.

6. IF THE ASSOCIATION DOES NOT PREVAIL ON ITS CLAIM, THE ASSOCIATION MAY BE RESPONSIBLE FOR PAYING ITS ATTORNEY FEES.

7. IF THE ASSOCIATION DOES NOT PREVAIL ON ITS CLAIM, A COURT OR ARBITRATOR SOMETIMES AWARDS COSTS AND ATTORNEY FEES TO THE OPPOSING PARTY. SHOULD THAT HAPPEN IN THIS CASE, THE ASSOCIATION MAY BE RESPONSIBLE FOR PAYING THE OPPOSING PARTY'S COSTS AND FEES AS A RESULT OF SUCH AWARD.

8. THERE IS NO GUARANTEE THAT THE ASSOCIATION WILL RECOVER ENOUGH FUNDS TO REPAIR THE CLAIMED CONSTRUCTION DEFECT(S). IF THE CLAIMED DEFECTS ARE NOT REPAIRED, ADDITIONAL DAMAGE TO PROPERTY AND A REDUCTION IN THE USEFUL LIFE OF THE COMMON ELEMENTS MIGHT OCCUR.

9. UNTIL THE CLAIMED CONSTRUCTION DEFECTS ARE REPAIRED, OR UNTIL THE CONSTRUCTION DEFECT CLAIM IS CONCLUDED, THE MARKET VALUE OF THE UNITS IN THE ASSOCIATION MIGHT BE ADVERSELY AFFECTED.

10. UNTIL THE CLAIMED CONSTRUCTION DEFECT(S) ARE REPAIRED, OR UNTIL THE CONSTRUCTION DEFECT(S) CLAIM IS CONCLUDED, OWNERS IN THE ASSOCIATION MIGHT HAVE DIFFICULTY REFINANCING AND PROSPECTIVE BUYERS MIGHT HAVE DIFFICULTY OBTAINING FINANCING. IN ADDITION, CERTAIN FEDERAL UNDERWRITING STANDARDS OR REGULATIONS PREVENT REFINANCING OR OBTAINING A NEW LOAN IN PROJECTS WHERE A CONSTRUCTION DEFECT IS CLAIMED, AND CERTAIN LENDERS AS A MATTER OF POLICY WILL NOT REFINANCE OR PROVIDE A NEW LOAN IN PROJECTS WHERE A CONSTRUCTION DEFECT IS CLAIMED.

(IV) THE ASSOCIATION SHALL MAINTAIN A VERIFIED OWNER MAILING LIST THAT IDENTIFIES THE OWNERS TO WHOM THE ASSOCIATION MAILED THE NOTICE REQUIRED PURSUANT TO THIS SUBSECTION (1)(c). THE VERIFIED OWNER MAILING LIST SHALL INCLUDE, FOR EACH OWNER, THE ADDRESS, IF ANY, TO WHICH THE ASSOCIATION MAILED THE NOTICE

REQUIRED PURSUANT TO THIS SUBSECTION (1)(c). THE ASSOCIATION SHALL PROVIDE A COPY OF THE VERIFIED OWNER MAILING LIST TO EACH CONSTRUCTION PROFESSIONAL WHO IS SENT A NOTICE PURSUANT TO THIS SUBSECTION (1)(c) AT THE OWNER MEETING REQUIRED UNDER SUBSECTION (1)(c)(II) OF THIS SECTION. THE OWNER MAILING LIST SHALL BE DEEMED VERIFIED IF A SPECIMEN COPY OF THE MAILING LIST IS CERTIFIED BY AN ASSOCIATION OFFICER OR AGENT. IF THE ASSOCIATION COMMENCES A CONSTRUCTION DEFECT ACTION AGAINST ANY CONSTRUCTION PROFESSIONAL, THE ASSOCIATION SHALL FILE ITS VERIFIED OWNER MAILING LIST AND RECORDS OF VOTES RECEIVED FROM OWNERS DURING THE VOTING PERIOD WITH THE APPROPRIATE FORUM UNDER SEAL.

(V) THE SUBSTANCE OF A PROPOSED CONSTRUCTION DEFECT ACTION MAY BE AMENDED OR SUPPLEMENTED AFTER THE MEETING, BUT AN AMENDED OR SUPPLEMENTED CLAIM DOES NOT EXTEND THE VOTING PERIOD. THE EXECUTIVE BOARD SHALL GIVE NOTICE TO UNIT OWNERS OF ANY AMENDED OR SUPPLEMENTED CLAIM AND SHALL MAINTAIN RECORDS OF ITS COMMUNICATIONS WITH UNIT OWNERS. OWNER APPROVAL PURSUANT TO SUBSECTION (1)(d) OF THIS SECTION IS NOT REQUIRED FOR AMENDMENTS OR SUPPLEMENTS TO A CONSTRUCTION DEFECT ACTION MADE AFTER THE NOTICE PURSUANT TO THIS SUBSECTION (1)(c) IS SENT.

(d) Approval by unit owners - procedures.

(I) (A) NOTWITHSTANDING ANY PROVISION OF LAW OR ANY REQUIREMENT IN THE GOVERNING DOCUMENTS, THE EXECUTIVE BOARD MAY INITIATE THE CONSTRUCTION DEFECT ACTION ONLY IF AUTHORIZED WITHIN THE VOTING PERIOD BY OWNERS OF UNITS TO WHICH A MAJORITY OF VOTES IN THE ASSOCIATION ARE ALLOCATED. SUCH APPROVAL IS NOT REQUIRED FOR AN ASSOCIATION TO PROCEED WITH A CONSTRUCTION DEFECT ACTION IF THE ALLEGED CONSTRUCTION DEFECT PERTAINS TO A FACILITY THAT IS INTENDED AND USED FOR NONRESIDENTIAL PURPOSES AND IF THE COST TO REPAIR THE ALLEGED DEFECT DOES NOT EXCEED FIFTY THOUSAND DOLLARS. SUCH APPROVAL IS NOT REQUIRED FOR AN ASSOCIATION TO PROCEED WITH A CONSTRUCTION DEFECT ACTION WHEN THE ASSOCIATION IS THE CONTRACTING PARTY FOR THE PERFORMANCE OF LABOR OR PURCHASE OF SERVICES OR MATERIALS.

(B) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, AN OWNER'S VOTE SHALL BE SUBMITTED ONLY ONCE AND MAY BE OBTAINED IN ANY WRITTEN FORMAT CONFIRMING THE OWNER'S VOTE TO APPROVE OR REJECT

THE PROPOSED CONSTRUCTION DEFECT ACTION. THE ASSOCIATION SHALL MAINTAIN A RECORD OF ALL VOTES UNTIL THE CONCLUSION OF THE CONSTRUCTION DEFECT ACTION, INCLUDING ALL APPEALS, IF ANY.

(II) (A) NOTHING IN THIS SECTION ALTERS THE TOLLING PROVISIONS OF SECTION 13-20-805.

(B) ALL STATUTES OF LIMITATION AND REPOSE APPLICABLE TO CLAIMS BASED ON DEFECTS DESCRIBED WITH REASONABLE SPECIFICITY IN THE NOTICE, WHICH MAY BE SUPPLEMENTED OR AMENDED PURSUANT TO SUBSECTION (1)(c)(IV) OF THIS SECTION, ARE TOLLED FROM THE DATE THE NOTICE SENT PURSUANT TO SUBSECTION (1)(c) OF THIS SECTION IS MAILED UNTIL EITHER THE NINETY-DAY VOTING AND DISCLOSURE PERIOD ENDS OR UNTIL THE ASSOCIATION DETERMINES THAT THE CONSTRUCTION DEFECT ACTION IS EITHER APPROVED OR DISAPPROVED, WHICHEVER OCCURS FIRST.

(C) THE APPLICABLE STATUTES OF LIMITATION AND REPOSE THAT APPLY TO CLAIMS BASED ON A DEFECT DESCRIBED IN THE NOTICE WITH REASONABLE SPECIFICITY ARE TOLLED PURSUANT TO THIS SUBSECTION (1)(d)(II) ONCE, AND MAY NOT EXTEND THE STATUTES OF LIMITATION AND REPOSE THAT APPLY TO CLAIMS BASED ON THAT DEFECT FOR MORE THAN A TOTAL OF NINETY DAYS, RESPECTIVELY. IF A DEFECT NOT INCLUDED IN THE NOTICE SENT PURSUANT TO SUBSECTION (1)(c) OF THIS SECTION IS THE SUBJECT OF A LATER VOTE, TOLLING PURSUANT TO THIS SUBSECTION (1)(d) APPLIES UNLESS THE CLAIM BASED ON THAT DEFECT IS OTHERWISE BARRED BY THE STATUTE OF LIMITATIONS OR STATUTE OF REPOSE.

(III) **Vote count - exclusions.** FOR PURPOSES OF CALCULATING THE REQUIRED MAJORITY VOTE UNDER THIS SUBSECTION (1)(d) ONLY, THE FOLLOWING VOTES ARE EXCLUDED:

(A) ANY VOTES ALLOCATED TO UNITS OWNED BY A DEVELOPMENT PARTY. AS USED IN THIS SUBSECTION (1)(d)(III)(A), "DEVELOPMENT PARTY" MEANS A CONTRACTOR, SUBCONTRACTOR, DEVELOPER, OR BUILDER RESPONSIBLE FOR ANY PART OF THE DESIGN, CONSTRUCTION, OR REPAIR OF ANY PORTION OF THE COMMON INTEREST COMMUNITY AND ANY OF THAT PARTY'S AFFILIATES; AND "AFFILIATE" INCLUDES AN ENTITY CONTROLLED OR OWNED, IN WHOLE OR IN PART, BY ANY PERSON THAT CONTROLS OR OWNS A DEVELOPMENT PARTY OR BY THE SPOUSE OF A DEVELOPMENT PARTY.

(B) ANY VOTES ALLOCATED TO UNITS OWNED BY BANKING INSTITUTIONS, UNLESS A VOTE FROM SUCH AN INSTITUTION IS ACTUALLY RECEIVED BY THE ASSOCIATION;

(C) ANY VOTES ALLOCATED TO UNITS OF A PRODUCT TYPE IN WHICH NO DEFECTS ARE ALLEGED, IN A COMMON INTEREST COMMUNITY WHOSE DECLARATION PROVIDES THAT COMMON EXPENSE LIABILITIES ARE NOT SHARED BETWEEN THE PRODUCT TYPES.

(D) ANY VOTES ALLOCATED TO UNITS OWNED BY OWNERS WHO ARE DEEMED NONRESPONSIVE. IF THE STATUS OF THE NONRESPONSIVE UNIT OWNERS IS CHALLENGED IN COURT, THE COURT SHALL CONSIDER WHETHER THE EXECUTIVE BOARD HAS MADE DILIGENT EFFORTS TO CONTACT THE UNIT OWNER REGARDING THE VOTE AND MAY CONSIDER: WHETHER A MAILING WAS RETURNED AS UNDELIVERABLE; WHETHER THE OWNER APPEARS TO BE RESIDING AT THE UNIT; AND WHETHER THE ASSOCIATION HAS USED OTHER CONTACT INFORMATION, SUCH AS AN ELECTRONIC MAIL ADDRESS OR TELEPHONE NUMBER FOR THE OWNER.

(e) **Notice to construction professional.** AT LEAST FIVE BUSINESS DAYS BEFORE THE MAILING OF THE NOTICE REQUIRED BY SUBSECTION (1)(c) OF THIS SECTION, THE ASSOCIATION SHALL NOTIFY EACH CONSTRUCTION PROFESSIONAL AGAINST WHOM A CONSTRUCTION DEFECT ACTION IS PROPOSED BY MAIL, AT ITS LAST-KNOWN ADDRESS, OF THE DATE AND TIME OF THE MEETING CALLED TO CONSIDER THE CONSTRUCTION DEFECT ACTION PURSUANT TO SUBSECTION (1)(c) OF THIS SECTION.

~~(2) (a) Prior to the service of the summons and complaint on any defendant with respect to an action governed by this section, the executive board shall mail or deliver written notice of the commencement or anticipated commencement of such action to each unit owner at the last known address described in the association's records.~~

~~(b) The notice required by paragraph (a) of this subsection (2) shall state a general description of the following:~~

~~(i) The nature of the action and the relief sought; and~~

~~(ii) The expenses and fees that the executive board anticipates will be incurred in prosecuting the action.~~

(4) **Provisions not severable.** NOTWITHSTANDING SECTION 2-4-204, THE GENERAL ASSEMBLY FINDS, DETERMINES, AND DECLARES THAT IF ANY PROVISION OF THIS SECTION OR ITS APPLICATION TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID, THE ENTIRE SECTION SHALL BE DEEMED INVALID.

SECTION 2. In Colorado Revised Statutes, 38-33.3-117, **add** (1.9) as follows:

38-33.3-117. Applicability to preexisting common interest communities. (1.9) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, SECTION 38-33.3-303.5 APPLIES TO ALL COMMON INTEREST COMMUNITIES CREATED WITHIN THIS STATE ON, BEFORE, OR AFTER JULY 1, 1992, WITH RESPECT TO EVENTS AND CIRCUMSTANCES OCCURRING ON OR AFTER SEPTEMBER 1, 2017.

SECTION 3. Applicability. This act applies to construction defect actions filed on or after the effective date of this act.

SECTION 4. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Crisanta Duran
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Kevin J. Grantham
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Effie Ameen
SECRETARY OF
THE SENATE

APPROVED _____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO