

ORDINANCE NO. 2060

INTRODUCED BY: BENSON, BULLOCK, CARSON, DOUGLAS, ELLIOTT, FORD, TETER

AN ORDINANCE AMENDING CHAPTER 5 OF THE COMMERCE CITY REVISED MUNICIPAL CODE BY THE ADDITION OF ARTICLE IX CONCERNING THE REPAIR OF CONSTRUCTION DEFECTS

WHEREAS, the City of Commerce City is a home rule municipality organized pursuant to Article 20 of the Colorado Constitution and the Charter of the City of Commerce City;

WHEREAS, by virtue of Article 20 of the Colorado Constitution, and as further authorized by state law, including but not limited to, Sections 31-15-401 and 31-23-301 of the Colorado Revised Statutes, the city has broad authority to exercise its police powers to promote and protect the health, safety and welfare of the citizenry;

WHEREAS, land use, planning, and general business regulation are well-established as matters of purely local concern and, therefore, subject to regulation by home rule municipalities;

WHEREAS, the city's zoning ordinance and comprehensive plan both contemplate a diverse housing stock, consisting of a mix of single-family and multifamily developments, and both owned and rented units, designed to serve the needs of all Commerce City residents;

WHEREAS, light rail service will intensify the need for owner-occupied units, particularly in transit oriented zones around light rail stations;

WHEREAS, despite a genuine demand for such housing options, statistics show that almost no owner-occupied multi-family developments, or condominiums, are being developed in the city;

WHEREAS, the general consensus is that the scarcity of condominiums available for sale in Commerce City is the result of a litigious environment that puts builders and developers at risk of substantial judgments, often including punitive damages, for alleged construction defects;

WHEREAS, that risk of exposure to large damage awards has led insurance companies who would normally insure development projects to stop writing policies for owner-occupied multi-family projects;

WHEREAS, construction defects claims frequently allege that such defects are violations of applicable building codes and, if violations of applicable building codes do exist, they are frequently not remedied for many months or years;

WHEREAS, the city council finds that the health, safety and welfare of residents of Commerce City are being negatively impacted by the lack of housing options;

WHEREAS, the city council further finds that allegations of violations of the city's building codes, and the likelihood that such violations may continue unremedied for many

months or years presents a material risk to the health and safety of residents of Commerce City, including the risk that unsafe conditions present as a result of construction defects may be exacerbated by long delays in remedying such conditions, and a material burden upon the city's building department, which has the authority and responsibility to enforce the city's building codes, and may result in increased cost to the city and a lower level of compliance with the city's building codes;

WHEREAS, the city council further finds that lawsuits brought on account of alleged construction defects in condominium projects and planned communities are often brought at the direction of the board of directors of the homeowners association, without the informed consent of the unit owners, thereby depriving the unit owners of the opportunity to become educated about the advantages and disadvantages of pursuing litigation, to have meaningful input regarding the consideration of such decision and to vote on such decision;

WHEREAS, the city council therefore desires to take reasonable steps within its power as a home rule municipality to encourage the development of owner-occupied multi-family residential projects through the adoption of regulations designed to reduce the risk and exposure to builders and developers of such projects, while still protecting homeowners from legitimate construction defect claims;

WHEREAS, the city council also desires to take reasonable steps within its power as a home rule municipality to encourage the prompt and voluntary correction of construction defects that may constitute violations of the city's building code in order to enhance the health and safety of residents of Commerce City and to minimize the burden upon the city's building department; and

WHEREAS, the city council also desires to establish that consumers that purchase residences within the city that are located within a community that is managed by a homeowners association have the right to participate in the consideration and determination whether to pursue litigation concerning alleged construction defects, and, for such purpose, the city council desires to take reasonable steps within its power as a home rule municipality to assure that such consumers have the opportunity to become educated about the advantages and disadvantages of pursuing litigation concerning alleged construction defects, to have meaningful input concerning the decision and to be able to vote on such decision.

NOW THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF COMMERCE CITY, COLORADO AS FOLLOWS:

SECTION 1. Chapter 5 of the Commerce City Revised Municipal Code is hereby amended by the addition of Article IX which shall read as follows:

ARTICLE IX: CONSTRUCTION DEFECTS REPAIR

Sec. 5-19001. Applicability

The provisions of this article shall apply only to new construction within the city that is commenced after August 1, 2015.

Sec. 5-19002. Definitions

For purposes of this article, the following definitions shall apply:

Builder means any entity or individual, including but not limited to a builder, developer, general contractor, contractor, subcontractor, architect, engineer or original seller who performs or furnishes the design, supervision, inspection, construction or observation of any improvement to real property that is intended to be occupied as a dwelling or to provide access or amenities to such an improvement.

Common interest community means real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvements of other real estate described in a declaration.

Condominium means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of the separate ownership portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

Construction Defect means any instance in which a structure or portion thereof does not conform in all material respects to the applicable section(s) of the Building Code, or does not conform to the manufacturer's specifications if those specifications are more strict than the applicable provisions of the Building Code.

Homeowner means any person who owns a unit in a condominium or in a multi-family building in a common interest community, but shall not include any declarant (as defined in C.R.S. § 38-33.3-103(12)) or any person having an interest in a unit solely as security for an obligation.

Homeowners Association means a unit owners' association formed to represent the interest of Homeowners owning units in a condominium or in a multi-family building in a common interest community.

Sec. 5-19003. Potential Claimants

An original homeowner or a subsequent homeowner or a homeowners association representing the interests of homeowners may provide the notice of a claim of a construction defect, provided the notice is sent within the applicable time period.

Sec. 5-19004. Potential Respondents

All builders who start any projects after August 1, 2015 shall be subject to the requirement of this article.

Sec. 5-19005. Notice of Construction Defects and Statutory Tolling.

- (a) *Notice.* Upon the discovery of any alleged construction defect, a claimant must provide written notice via certified mail or personal delivery to the party alleged to have

caused or contributed to the construction defect, in the manner prescribed in this section, indicating that one or more construction defect(s) exist(s) in his/her residence or, with respect to any homeowners association, that one or more construction defect(s) exist(s) in any residence or in any common area or facility. The notice must:

- (1) Provide the claimant's name, address and preferred method of contact;
- (2) State that the claimant alleges a construction defect pursuant to this article against the builder; and
- (3) Describe the claim in reasonable detail sufficient to determine the nature and location of the alleged construction defect.

(b) *Builder's Responsibilities.* After receiving notice of a potential construction defects claim, a builder must do each of the following:

(1) Acknowledge Claim in Writing.

- a. A builder who receives a notice under this article shall acknowledge receipt of the notice, in writing, within fourteen (14) days after receipt. The acknowledgement shall be sent to the claimant and to any attorney the builder knows to be representing the claimant in connection with the notice. If the builder has retained legal counsel, said counsel shall thereafter communicate with the claimant's legal representative, if any.
- b. If the builder fails to acknowledge receipt of a notice within the time specified, this article shall not apply and the claimant shall be released from the requirements of this article and may proceed with the filing of an action against the builder, unless notice and consent are required by section 5-19010.

(2) Maintain an agent for notice with the secretary of state; and

(3) If specifically asked to do so by the claimant, and within fourteen (14) days of such a request, provide the claimant or claimant's legal representative with:

- a. copies of all relevant plans, specifications, grading plans, soils reports and available engineering calculations pertaining to the claimant's residence, common areas and facilities that are the subject of the claim;
- b. all maintenance and preventative maintenance recommendations pertaining to the claimant's residence, common areas and facilities that are the subject of the claim; and
- c. contractual warranty information.

(c) *Copying Costs.* A builder responding to a claimant's request for documents may

charge reasonable copying costs and may require the copies of the documents to be made onsite.

- (d) *Builder's Election to Inspect Property.* In addition to the requirements set forth in this section, if the builder elects to inspect and conduct tests regarding the claimed construction defect, the builder shall complete the initial inspection and testing, if any, within thirty (30) days after the builder acknowledged receipt of the notice, and at a mutually agreeable date and time. The builder shall bear all costs of inspection and testing, including any damage caused by the inspection and testing. Before entering onto the premises for the inspection, the builder shall supply the claimant with proof of liability insurance coverage. The builder shall, upon request, allow the inspection to be observed and recorded or photographed. Nothing that occurs during a builder's inspection may be used or introduced as evidence to support a defense of spoliation of evidence by any potential party in subsequent litigation.
- (e) *Waiver.* A builder who fails to comply with any of the foregoing requirements within the time specified shall be deemed to have waived the protection of this article, and the claimant shall be released from the requirements of this article and may proceed with the filing of an action, unless notice and consent are required by section 5-19010.
- (f) *Statutory Tolling.* If a notice is sent to the builder in accordance with this section within the time prescribed for the filing of an action under any applicable statute of limitations or repose, then the statute of limitations or repose is tolled until sixty (60) days after the completion of the notice process. If the builder elects to repair pursuant to section 5-19006, then the statute of limitations or repose is tolled until sixty (60) days after the completion of repairs.

Sec. 5-19006. Builder's Right to Repair.

- (a) *Notice to Repair.* Within thirty (30) days of the initial inspection or testing, or within fourteen (14) days of builder's acknowledgment of the notice of claim, whichever is later, the builder may elect to repair the construction defect. If the builder elects to repair the construction defect, it has the right to do so and the claimant may not, directly or indirectly, impair, impede or prohibit the builder from making repairs. Any notice to repair shall offer to compensate the claimant for all applicable expenses, if any, incurred by the claimant within the timeframe set for repair, such as, without limitation, expenses for lodging if the repair requires the claimant to vacate his/her residence. Any notice of repair shall be accompanied by a detailed, step-by-step explanation of the particular construction defect being repaired and setting forth a reasonable completion date for the repair work. The notice shall also include the contact information for any contractors the Builder intends to employ for the repairs.
- (b) *Requirement of Good Faith and Cooperation.* Claimant shall promptly, and in good faith, cooperate with builder to schedule repair work by builder.
- (c) *Objection to Proposed Repairs.* Within ten (10) days after receipt of the builder's notice

to repair, a claimant may deliver to the Builder a written objection to the proposed repair if the claimant believes in good faith that the proposed repairs will not remedy the alleged construction defect. The builder may elect to modify the proposal, in whole or in part, in accordance with the claimant's objection, and proceed with the modified scope of work, or may proceed with the scope of work set forth in the original proposal.

- (d) *Failure to Comply.* If the builder fails to send a notice to repair or otherwise strictly comply with this article within the specified time frames, or if the builder does not complete the repairs within the time set forth in the notice to repair, the claimant shall be released from the requirements of this article and may proceed with the filing of an action against the builder, unless notice and consent are required by section 5-19010. Notwithstanding the foregoing, if the builder notifies the claimant in writing at least five (5) days before the stated completion date that the repair work will not be completed by the completion date, the builder shall be entitled to one reasonable extension of the completion date, not to exceed twenty (20) days.
- (e) *Completion of repairs.* The builder shall notify the claimant when repairs have been completed. The claimant shall have ten (10) days following the completion date to have the premises inspected to verify that the repairs are complete and satisfactorily resolved the alleged construction defects. A claimant who believes in good faith that the repairs made do not resolve the construction defects may proceed with the filing of an action, unless notice and consent are required by section 5-19010.

Sec. 5-19007. Warranty of Repairs.

The repair work performed by the builder shall be warranted against material defects in design or construction for a period of two years, which warranty shall be in addition to any express warranties on the original work.

Sec. 5-19008. Subsequently Discovered Defects

Any alleged construction defect discovered after repairs have been completed shall be subject to the same requirements of this article if the builder did not have notice or an opportunity to repair the particular construction defect.

Sec. 5-19009. Alternative Dispute Resolution Provisions

If a provision found in the declaration, bylaws or rules and regulations of a common interest community requires that construction defect claims be submitted to mediation or arbitration, that requirement constitutes a commitment on the part of the unit owners and the association upon which a developer, contractor, architect, builder or other person involved in the construction of the community is entitled to rely. Consequently, a subsequent amendment to the declaration, bylaws or rules and regulations that removes or amends the mediation or arbitration requirement shall not be effective with regard to any construction defect claim that is based on an alleged act or omission that predates that amendment.

Sec. 5-19010. Informed Consent of Homeowners

- (a) *Notice.* Homeowners are entitled to be kept informed by boards of homeowners associations of the board's consideration of actions regarding construction defects and to

have meaningful input and a right to make a considered judgment and give (or withhold) informed consent. Accordingly, if a board of a homeowners association considers or intends to institute an action asserting one or more construction defects, the board must, at least sixty (60) days before filing any action under section 13-20-803.5, C.R.S., mail or deliver to each homeowner at the homeowner's last known address written notice that:

- (1) Is signed by a person other than, and not employed or otherwise affiliated with, the attorney or law firm that represents or will represent the association in the construction defects claim.
 - (2) Describes the nature of the action and the relief sought.
 - (3) Details the amount of expenses and fees the board anticipates will be incurred, directly or indirectly, in prosecuting the action, including attorney's fees, consultant fees, expert witness fees and court costs, whether incurred by the association directly or for which it may be liable if it is not the prevailing party or if it does not proceed with the action.
 - (4) Contains the estimated cost of repairing the construction defect, or if the construction defect is not repaired, the estimated reduction in value of the unit.
 - (5) Explains the estimated impact on the marketability of units that are not the subject of the action, including any impact on the ability of the owners to refinance their property during and after the action.
 - (6) Describes the manner in which the association proposes to fund the cost of the action, including any proposed special assessments or the use of any revenues.
 - (7) Provides the anticipated duration of the action and describes the likelihood of success.
 - (8) Details whether the builder has offered to make any repairs and, if so, whether the builder has made repairs
 - (9) Explains the steps taken by the builder in accordance with this article to address the alleged construction defect, including any acknowledgement, inspection, election to repair or repairs.
- (b) *Written Consent Required.* A homeowners association may not commence an action unless the board obtains the written consent of homeowners holding at least a majority of the total voting rights in the association after giving the notice required by this section. Homeowners may vote either directly or through a written ballot signed by the homeowner. Such consent must be obtained within sixty (60) days after such notice is provided, otherwise the homeowners shall be deemed to have declined to provide their informed consent to such action.

SECTION 2. If any part, section, subsection, sentence, clause or phrase of Article IX is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of Article IX. The City Council hereby declares that it would have passed Article IX, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

SECTION 3. This ordinance shall take effect August 1, 2015.

INTRODUCED, PASSED ON FIRST READING AND PUBLIC NOTICE
ORDERED THIS 6TH DAY OF JULY, 2015.

PASSED ON SECOND AND FINAL READING AND PUBLIC NOTICE ORDERED
THIS 3RD DAY OF AUGUST, 2015_.

CITY OF COMMERCE CITY, COLORADO

Sean Ford, Mayor

ATTEST:

Laura J. Bauer, MMC, City Clerk