

1 **BY AUTHORITY**

2 ORDINANCE NO. \_\_\_\_\_  
3 SERIES OF 2015

COUNCIL BILL NO. 15-0811  
COMMITTEE OF REFERENCE:  
4 Business Development

5  
6 **A BILL**

7  
8 **For an ordinance adopting a new Article XII in Chapter 10 of the Denver Revised**  
9 **Municipal Code, concerning construction defect claims in common interest**  
10 **communities**  
11

12 WHEREAS, the City and County of Denver has a compelling local and municipal interest in  
13 promoting a diverse housing supply that gives residents the opportunity to rent or purchase homes in a  
14 wide range of styles, location and affordability within the city; and  
15

16 WHEREAS, as the most populous and urbanized city in Colorado with very limited authority to  
17 annex new territory, Denver must inevitably accommodate much of its population growth in mid-rise  
18 and high-rise residential buildings; and  
19

20 WHEREAS, as the hub of the transportation and transit networks in the greater Denver  
21 metropolitan area, the city enjoys unique opportunities to promote residential development oriented  
22 toward transit sites, thereby reducing automobile dependency and creating more sustainably urban  
23 neighborhoods; and  
24

25 WHEREAS, although Denver is currently experiencing an unprecedented construction boom in  
26 mid-rise and high rise residential buildings in its more urbanized neighborhoods and in transit-oriented  
27 development locations, almost all of the new construction consists of apartment buildings, very few  
28 new-for sale residential condominium projects are being built, and the percentage of new housing  
29 starts represented by condominiums has plummeted in the last decade; and  
30

31 WHEREAS, to the extent new residential condominium projects are currently being constructed  
32 in Denver, condominium units are being offered for sale only at higher price points; and  
33

34 WHEREAS, even though thousands of new apartment units have been constructed and offered

1 on the rental market in recent years, Denver has experienced rapid inflation in average rents and is  
2 among the nation's leading cities in the average increase in housing costs overall in both the for-sale  
3 and rental markets; and

4

5 WHEREAS, an increase in the number of residential condominiums constructed and offered for  
6 sale in Denver may have a positive effect on overall housing costs in Denver by providing more  
7 attainable for-sale housing stock and by providing housing consumers with an alternative to paying  
8 high rents; and

9

10 WHEREAS, an increase in the number of residential condominiums constructed and offered for  
11 sale in Denver would improve consumer choice by providing residents greater opportunity to invest  
12 and develop equity in their homes in urban and transit-oriented locations, rather than renting in these  
13 locations; and

14

15 WHEREAS, the relative dearth of new residential condominium construction in Denver is  
16 attributable, in part, to trends in construction defect litigation brought by condominium homeowners  
17 associations in common interest communities, with the sheer volume and magnitude of such claims in  
18 recent years causing new condominium projects to be uninsurable, un-financeable, or both,  
19 particularly at more affordable price points for housing consumers; and

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21 WHEREAS, the purpose of this ordinance is to encourage more residential condominium  
22 construction in Denver through the efficient and fair settlement or adjudication of construction defect  
23 claims, without compromising the rights and remedies condominium homeowners associations and  
24 individual condominium owners currently enjoy under state law to seek redress for construction  
25 defects in common interest communities; and

26

27 WHEREAS, Colorado courts recognize the authority of legislative bodies to determine how their  
28 regulatory codes adopted under the police power, including building codes, may or may not be used in  
29 private civil litigation, and this ordinance is intended to clearly express the intention of the Denver City  
30 Council in regard to how compliance with or violation of Denver's adopted codes may be invoked by  
31 private litigants in the course of construction defects claims brought by common interest communities;  
32 and

33

34 WHEREAS, Colorado law and public policy strongly supports the use of alternative dispute

1 resolution in lieu of litigation, and the purpose of this ordinance is to likewise support the use of ADR  
2 and reinforce requirements for arbitration to the extent that the parties have agreed to such  
3 requirements in the declaration of covenants in a common interest community; and

4  
5 WHEREAS, because the initiation of a construction defect claim in a common interest  
6 community significantly affects the economic interests of all condominium owners, potentially positively  
7 or negatively, this ordinance is intended to promote and require informed consent by the affected  
8 homeowners prior to the initiation of such claims in the future; and

9  
10 WHEREAS, nothing in this ordinance is intended to conflict with or supersede the requirements  
11 of any state statute governing construction defects claims, including by way of example the notice of  
12 claim provisions set forth in the Colorado Construction Defect Action Reform Act, Part 8 of Article 20  
13 of Title 13, C.R.S.

14  
15 **NOW, THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF**  
16 **DENVER:**

17  
18 **Section 1.** That a new Article XII shall be adopted and added to Chapter 10, D.R.M.C., to read  
19 as follows:

20  
21 **Article XII: CONSTRUCTION DEFECT CLAIMS IN COMMON INTEREST**  
22 **COMMUNITIES**

23  
24 **Sec. 10-201. Definitions.**

25  
26 As used in this article, the following terms shall have the following meaning:

- 27  
28 (1) "Association" shall be defined as provided in the Colorado Common Interest  
29 Ownership Act, Article 33.3 of Title 38, C.R.S., as amended.  
30  
31 (2) "Common interest community" shall be defined as provided in the Colorado  
32 Common Interest Ownership Act, Article 33.3 of Title 38, C.R.S., as amended.  
33

- 1 (3) "Construction defect claim" means a civil action or an arbitration proceeding  
2 for damages, indemnity, or contribution brought against a development party to  
3 assert a claim, counterclaim, cross-claim, or third-party claim for damages or loss  
4 to, or the loss of the use of, real or personal property or personal injury caused by  
5 a defect in the design or construction of an improvement to real property that is  
6 part of a common interest community.
- 7
- 8 (4) "Declarant" shall be defined as provided in the Colorado Common Interest  
9 Ownership Act, Article 33.3 of Title 38, C.R.S., as amended.
- 10
- 11 (5) "Declaration" shall be defined as provided in the Colorado Common Interest  
12 Ownership Act, Article 33.3 of Title 38, C.R.S., as amended.
- 13
- 14 (6) "Development party" means an architect, contractor, subcontractor, developer,  
15 declarant or affiliates of a declarant, builder, builder vendor, engineer, or  
16 inspector performing or furnishing the design, supervision, inspection,  
17 construction, or observation of the construction of any improvement to real  
18 property that is part of the common interest community or any other party  
19 responsible for any part of the design or construction of any portion of the  
20 common interest community, or any of such parties' affiliates, or the officers,  
21 directors, partners, shareholders, members, managers, employees or servants of  
22 any of them.
- 23
- 24 (7) "Executive Board" shall be defined as provided in the Colorado Common  
25 Interest Ownership Act, Article 33.3 of Title 38, C.R.S., as amended.
- 26
- 27 (8) "Governing documents" means the declaration, articles of incorporation,  
28 bylaws, rules and regulations, policies and procedures of a common interest  
29 community.
- 30
- 31 (9) "Unit" shall be defined as provided in the Colorado Common Interest  
32 Ownership Act, Article 33.3 of Title 38, C.R.S., as amended.
- 33

1 (10) "Unit owner" shall be defined as provided in the Colorado Common Interest  
2 Ownership Act, Article 33.3 of Title 38, C.R.S., as amended.  
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7 **Sec. 10-202. Relationship of city building codes to construction defect claims.**  
8

9 (a) *In general.* A violation of any city building code as adopted in Article II of this  
10 Chapter 10, or a failure to substantially comply with any such code shall not create a  
11 private cause of action. A violation of any city building code as adopted in Article II of  
12 this Chapter 10, or a failure to substantially comply with any such code may not be used  
13 to support or prove any construction defect claim, regardless of the statutory or common  
14 law theory under which the claim is asserted, unless the violation or failure to  
15 substantially comply results in one or more of the following:  
16

17 (1) Actual damage to real or personal property;

18 (2) Actual loss of the use of real or personal property;

19 (3) Bodily injury or wrongful death; or  
20

21 (4) A risk of bodily injury or death to, or a threat to the life, health, or safety of, the  
22 occupants of residential real property.  
23

24  
25  
26 (b) *No strict liability for building code violations.* Under no circumstances shall a  
27 violation of any city building code as adopted in Article II of this Chapter 10, or a failure  
28 to substantially comply with any such code, support or prove a construction defect claim  
29 based upon a theory of strict liability, or under the common law doctrine of negligence  
30 *per se*.  
31

32 (c) *Code compliant improvements shall not be considered defective.* The building codes  
33 adopted in Article II of this Chapter 10 are intended to establish a minimum standard for

1 safe and sound construction in Denver. Therefore, any particular element, feature,  
2 component or other detail of any improvement to real property that is specifically  
3 regulated under the city's codes and is constructed or installed in substantial compliance  
4 with such codes shall not be considered defective for purposes of proving any  
5 construction defect claim.

6  
7 **Sec. 10-203. Informed consent for construction defect claims associated with**  
8 **common interest communities.**

9  
10 (a) *Additional information required in notice to unit owners.* Before the executive board  
11 of a common interest community institutes any legal action involving a construction  
12 defect claim, the executive board shall include in the notice to unit owners required by  
13 §38-33.3-303.5, C.R.S. the following additional information to more fully advise the unit  
14 owners of the nature of the action and the relief sought, in substantially the following  
15 form:

16  
17 (1) If the association does not file a claim by \_\_\_\_\_ (DATE), the claim cannot be filed  
18 at all under the applicable statute of limitations, statute of repose, or both.

19  
20 (2) If the association prevails, the executive board expects that the association may  
21 recover from the defendant(s) an amount between \$\_\_\_\_\_ and \$\_\_\_\_\_.

22  
23 (3) The executive board intends to enter into a contingency fee arrangement with the  
24 attorneys representing the association, under which, of the amount the association  
25 recovers from the defendant(s), the attorneys will be paid a contingency fee equal to  
26 \_\_\_\_\_ percent of the (net) (gross) recovery. The executive board estimates that, in  
27 addition to the attorney fees, the association will incur costs totaling approximately \$  
28 \_\_\_\_\_ for consultants, expert witnesses, depositions, filing fees, and other expenses  
29 of litigation.

30  
31 (4) If the association makes a claim and does not win, the executive board expects that  
32 the association will have to pay for its own attorney fees, consultant fees, expert

1 witness fees, and other costs (the amount listed in paragraph 3, above)plus  
2 defendant's consultant fees, expert witness fess, and court costs.

3  
4 (5) If the association does not recover from the defendant(s), it may have to pay to  
5 repair or replace the claimed defective construction work.

6  
7 (6) Until the claimed defective construction work is repaired or replaced, or until the  
8 construction defect claim is concluded, the market value of the affected units will be  
9 adversely affected.

10  
11 (7) Until the claimed defective construction work is repaired or replaced, or until the  
12 claim is concluded, owners of the affected units will have difficulty refinancing and  
13 prospective buyers of the affected units will have difficulty obtaining financing. In  
14 addition, certain federal underwriting standards or regulations prevent refinancing or  
15 obtaining a new loan in projects where a construction defect is claimed. In addition,  
16 certain lenders as a matter of policy will not refinance or provide a new loan in  
17 projects where a construction defect is claimed.

18  
19 (a) *Timing for delivery of notice to unit owners.* The notice to unit owners required by §38-  
20 33.3-303.5, C.R.S., including the additional information set forth in subsection (a) of this  
21 section, must be sent at least sixty days before service of the notice of a construction defect  
22 claim under the Colorado Construction Defect Action Reform Act, section 13-20-803.5,  
23 C.R.S.

24  
25 (b) *Majority consent of unit owners required.* A construction defect claim is not authorized  
26 unless the executive board obtains the signed, written consent from owners, other than the  
27 declarant, of units to which at least a majority of the total votes, excluding votes allocated to  
28 units owned by the declarant, in the association are allocated, which written consent  
29 acknowledges that the owner has received the notice required under §38-33.3-303.5,  
30 C.R.S., including the additional information set forth in subsection (a) of this section, and  
31 approves of the executive board's proposed action.

32  
33 (c) *Preservation of privileged information.* Nothing in this section shall be construed to:  
34

- 1 (1) Require the disclosure in the notice or disclosure to a unit owner of attorney-client  
2 communications or other privileged communication.  
3
- 4 (2) Permit the notice to serve as a basis for any person to assert the waiver of any  
5 applicable privilege or right of confidentiality resulting from, or to claim immunity in  
6 connection with, the disclosure of information in the notice.  
7

8 **Sec. 10-204. Enforcement of covenants requiring alternative dispute resolution for**  
9 **construction defect claims.**

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11 Whenever a declaration in a common interest community requires any form of  
12 alternative dispute resolution for construction defect claims asserted by the association, by  
13 the executive board, or by any unit owners, and the declaration expressly prohibits any  
14 future amendment to the declaration that would modify or eliminate the requirement for  
15 alternative dispute resolution without the consent of the declarant, then any attempt to  
16 modify or eliminate the requirement for alternative dispute resolution by the association, by  
17 the executive board or by the unit owners absent the consent of the declarant shall be  
18 deemed ineffective, an abrogation of a contractual obligation, and void as against public  
19 policy. This section shall apply if and only if:

- 20
- 21 (1) The declaration contains a provision substantially in the following form:

22 "The terms and provisions of the Declaration requiring alternative dispute  
23 resolution for construction defect claims inure to the benefit of Declarant, are  
24 enforceable by Declarant, and shall not ever be amended without the written  
25 consent of Declarant and without regard to whether Declarant owns any portion  
26 of the Real Estate at the time of such amendment. BY TAKING TITLE TO A  
27 UNIT, EACH OWNER ACKNOWLEDGES AND AGREES THAT THE TERMS OF  
28 THE DECLARATION REQUIRING ALTERNATIVE DISPUTE RESOLUTION OF  
29 CONSTRUCTION DEFECT CLAIMS ARE A SIGNIFICANT INDUCEMENT TO  
30 THE DECLARANT'S WILLINGNESS TO DEVELOP AND SELL THE UNITS AND  
31 THAT IN THE ABSENCE OF THE ALTERNATIVE DISPUTE RESOLUTION  
32 PROVISIONS CONTAINED IN THE DECLARATION, DECLARANT WOULD  
33 HAVE BEEN UNABLE AND UNWILLING TO DEVELOP AND SELL THE UNITS



1 FOR THE PRICES PAID BY THE ORIGINAL PURCHASERS.”

2  
3 and,

4  
5 (2) The provisions of the declaration requiring alternative dispute resolution for  
6 construction defect claims inures to the benefit of other development parties in  
7 addition to the declarant; and

8  
9 (3) The provisions of the declaration requiring alternative dispute resolution for  
10 construction defect claims are consistent with the requirements of the Colorado  
11 Uniform Arbitration Act, Part 2 of Article 22 of Title 13, C.R.S., including but not  
12 limited to the requirement that any mediator or arbitrator selected to preside over a  
13 construction defect claim must be a neutral third party as required by §13-22-211 (2),  
14 C.R.S., and that the mediator or arbitrator shall make the disclosures required by §  
15 13-22-212, C.R.S.; and

16  
17 (4) The provisions of the declaration requiring alternative dispute resolution for  
18 construction defect claims require that any mediation or arbitration must be held at a  
19 mutually agreeable location within the City and County of Denver; and

20  
21 (5) The provisions of the declaration requiring alternative dispute resolution for  
22 construction defect claims requires that any arbitration shall be governed by the  
23 substantive law of Colorado with regard to any remedy granted, and if the remedy is  
24 substantially affected by the arbitrator’s failure to follow the substantive law of  
25 Colorado, a court may vacate or refuse to confirm the arbitrator’s award on that  
26 basis.

27  
28 **Sec. 10-205. Effective Date.**

29  
30 This Article XII shall be effective January 1, 2016, and shall apply to any common  
31 interest community created in the city on and after that date.  
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COMMITTEE APPROVAL DATE: October 27, 2015.

MAYOR-COUNCIL DATE: November 3, 2015.

PASSED BY THE COUNCIL \_\_\_\_\_ 2015  
\_\_\_\_\_ - PRESIDENT

APPROVED: \_\_\_\_\_ - MAYOR \_\_\_\_\_ 2015

ATTEST: \_\_\_\_\_ - CLERK AND RECORDER,  
EX-OFFICIO CLERK OF THE  
CITY AND COUNTY OF DENVER

NOTICE PUBLISHED IN THE DAILY JOURNAL \_\_\_\_\_ 2015; \_\_\_\_\_ 2015

PREPARED BY: David W. Broadwell, Asst. City Attorney; DATE: November 12, 2015

Pursuant to section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of the City Attorney. We find no irregularity as to form, and have no legal objection to the proposed ordinance. The proposed ordinance **is not** submitted to the City Council for approval pursuant to § 3.2.6 of the Charter.

D. Scott Martinez, City Attorney

BY: \_\_\_\_\_, Assistant City Attorney DATE: November 12, 2015