



**DENVER**  
THE MILE HIGH CITY

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## CITY AND COUNTY OF DENVER

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TO: Denver City Council

FROM: David W. Broadwell, Assistant City Attorney  
Skye Stuart, Office of the Mayor

RE: Supplemental information on proposed construction defect ordinance

DATE: November 2, 2015

This memorandum is intended to supplement information contained in our memo dated October 8, 2015 and to respond to a couple of questions raised in the Business Development Committee meeting of October 27, 2015.

Some questions arose in regard to the following key provision of the proposed ordinance at subsection 10-202(c):

*Code compliant improvements shall not be considered defective. The building codes adopted in Article II of this Chapter 10 are intended to establish a minimum standard for safe and sound construction in Denver. Therefore, any particular element, feature, component or other detail of any improvement to real property that is specifically regulated under the city's codes and is constructed or installed in substantial compliance with such codes shall not be considered defective for purposes of proving any construction defect claim.*

As we previously explained, the purpose of this provision is to provide an element of certainty to both plaintiffs and defendants as to the standard of care in the event a builder or design professional is sued under a construction defect theory.

During the committee discussion on the proposed construction defects bill the committee heard testimony from a constituent who had issues with the installation of her windows during construction of her building. She described a situation where her windows had been installed to code, but not to manufacturer's specifications resulting in damage to her property. She stated that the draft proposal would have prevented her from

being able to address the problem in her unit. Several council members have reached out to us to clarify.

While it is correct that the proposed ordinance is intended to protect builders from claims based upon hypothetical standards of care external to our building codes (e.g. codes from other jurisdictions; so-called “standards in the industry,” etc.), it is important to recognize that ***our building codes do incorporate by reference manufacturers specifications for certain elements of construction.***

Here are some additional points of clarification from our building official and CPD staff:

- The current code in fact *does* require windows to be installed to manufacturer's specifications. IRC Section R612.1 specifies: “*Windows and doors shall be installed and flashed in accordance with the fenestration manufacturer's written installation instructions.*” ... “*Written installation instructions shall be provided by the fenestration manufacturer for each window or door.*” As such, if windows were installed that do not meet the manufacturer’s specifications, they would also not be in compliance with the code.
- Generally speaking, the code does require installation of products per the manufacturer's instructions. Though not explicitly stated in all cases, it is commonly listed throughout the code.
- Additionally, even if a product is installed per code but not per the manufacturer’s specifications, the manufacturer would likely void the warranty, so there is no advantage to a contractor *not* meeting minimum code and the manufacturer’s specifications simultaneously.
- Defendants' attorneys have shared with us that commonly contract documents between developer and contractor state that all products must be installed per manufacturer's specifications. Therefore, if a builder did not follow those specifications, they would be in breach of contract.
- Finally, as we noted in committee, even if a particular element of construction has been built or installed in strict compliance with the applicable codes, a plaintiff may still be able to link alleged construction defect damages to some other deficiency in the materials or workmanship ancillary to that element

We hope the foregoing information provides some additional context and reassurance on the protections that condominium owners and HOAs will continue to enjoy in future construction defect litigation. Code violations, including those that cross-reference manufacturer’s specification, resulting in actual damage to property will remain fully actionable under the proposed ordinance,

At the October 27 meeting, Councilwoman Susman also asked for a more detailed breakdown of the figure used in our committee presentation that cited condo resales at 29.3% of the market.

Based on information provided by Patty Silverstein of Development Research Partners, the breakdown is as follows:

- Of 31,337 home resales closed YTD through July of this year, 22,141 were single family detached product. 9,196 were single family attached (condos and townhomes).
- This reflects a higher percentage of the market than new home starts in the same time period, with condos/townhomes making up only 19% (Townhomes = 16%; Condos =3%) of all new home starts