

ORDINANCE NO. 15-_____

AN ORDINANCE CREATING A NEW ARTICLE 14 (CONSTRUCTION DEFECT CLAIMS IN COMMON INTEREST COMMUNITIES) OF CHAPTER 6 (NEIGHBORHOOD VITALITY/COMMUNITY HEALTH) OF THE CODE OF THE CITY OF COLORADO SPRINGS 2001, AS AMENDED, PERTAINING TO REQUIRED HOMEOWNER CONSENT FOR CONSTRUCTION DEFECT CLAIMS RELATED TO COMMON INTEREST COMMUNITIES, BUILDER RIGHTS TO REPAIR CONSTRUCTION DEFECTS IN COMMON INTEREST COMMUNITIES, AND THE EFFECT OF THE CITY BUILDING CODE IN CONSTRUCTION DEFECT CLAIMS RELATED TO COMMON INTEREST COMMUNITIES.

WHEREAS, the City of Colorado Springs is a home rule municipal corporation organized pursuant to Article 20 of the Colorado Constitution and the Charter of the City of Colorado Springs; and

WHEREAS, by virtue of Article 20 of the Colorado Constitution, and as further authorized by state law, including but not limited to, C.R.S §§ 31-15-401 and 31-23-301, the City of Colorado Springs has broad authority to exercise its police powers to promote and protect the health, safety and welfare of the citizenry; and

WHEREAS, land use, planning, adoption, implementation and enforcement of building codes, and general business regulation concerning neighborhood vitality and community health are well-established as matters of purely local concern and, therefore, subject to regulation by home rule cities; and

WHEREAS, the City's Zoning Code and Comprehensive Plan both contemplate a diverse housing stock, consisting of a mix of single-family and multi-family developments, with both owned and rented units, designed to serve the needs of all Colorado Springs residents; and

WHEREAS, almost no owner-occupied multi-family developments, townhomes or condominiums, are being developed in Colorado Springs; and

WHEREAS, the construction of condominiums and other common interest communities in Colorado Springs has been adversely affected by a litigation climate that puts builders and developers at risk of claims for alleged construction defects; and

WHEREAS, the risk of exposure to large damage awards has increased insurance related costs for the development of owner-occupied, common interest communities; and

WHEREAS, the health, safety and welfare of residents of Colorado Springs is negatively affected by the lack of condominium and townhome, common interest communities, available as affordable, owner-occupied housing options; and

WHEREAS, C.R.S. § 13-20-801, *et seq.*, the Construction Defect Action Reform Act, provides procedures for the remedy and litigation of construction defects that generally work equitably for homeowners and construction professionals in the context of single family homes; and

WHEREAS, lawsuits brought for alleged construction defects in common interest, townhome and condominium projects are often brought at the direction of an executive board of a homeowners association, without the informed consent of the unit owners; this deprives the unit owners of the opportunity to: (i) become educated about the advantages and disadvantages of pursuing litigation, (ii) give meaningful input regarding the consideration of such decision, and (iii) vote on such decision; and

WHEREAS, claims for construction defects frequently allege violations of applicable building codes that may not be remedied, if at all, until after the conclusion of litigation, which can take many months or years; and

WHEREAS, construction that is inconsistent with the Pikes Peak Regional Building Code, as adopted under City Code 7.10.101, *et seq.*, may in some circumstances present risks to the health, safety, and economic well-being of the residents of Colorado Springs; and

WHEREAS, C.R.S. § 38-33.3-101, *et seq.*, the Colorado Common Interest Ownership Act, provides that private, recorded instruments known as "declarations," being defined in C.R.S. § 38-33.3-103(13), may govern the rights of homeowners in common interest communities; moreover, *subject to the provisions of such declarations*, a homeowners association may file lawsuits on behalf of the association and the homeowners pursuant to C.R.S. § 38-33.3-302(1); and

WHEREAS, the Colorado Common Interest Ownership Act also "encourages" the use of alternate dispute resolution, including mediation and arbitration, for the resolution of disputes under C.R.S. § 38-33.3-124, and declaration provisions requiring arbitration have been upheld by Colorado courts. *See, Vallagio at Inverness Residential Condo Ass'n v. Metro. Homes*, 2015 CAO 65; and

WHEREAS, the City Council encourages builders and developers to avail themselves of the legal protections afforded under state law to assist in managing the litigation risks associated with the construction of condominiums and other common interest communities; and

WHEREAS, the City Council desires to take reasonable steps within its power as a home rule city 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' rights to pursue legitimate construction defect claims; and

WHEREAS, the City Council also desires to establish that consumers purchasing residences within the City that are located within a common interest community, managed by a homeowners association or similar governing body, have the right to participate in the consideration and determination of whether to pursue litigation concerning alleged construction defects; furthermore, for such purposes, the City Council desires to take reasonable steps within its power as a home rule city 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; and

WHEREAS, the City Council also desires to take reasonable steps within its power as a home rule city to encourage the prompt and voluntary correction of construction defects that may constitute violations of City building codes in order to enhance the health and safety of residents of Colorado Springs.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Colorado Springs:

Section 1. The foregoing recitals are incorporated by reference into and made part of this ordinance as legislative findings.

Section 2. A new Article 14 (Construction Defect Claims in Common Interest Communities) of Chapter 6 (Neighborhood Vitality/Community Health) of the Code of the City of Colorado Springs 2001, as amended, shall be added as follows:

ARTICLE 14 CONSTRUCTION DEFECT CLAIMS IN COMMON INTEREST COMMUNITIES

PART 1 CONSENT TO COMMENCE CONSTRUCTION DEFECT ACTION

SECTION:

- 6.14.101 Legislative Declaration**
- 6.14.102 Applicability**
- 6.14.103 Definitions**
- 6.14.104 Notice to Homeowners**
- 6.14.105 Consent of Homeowners**

6.14.101 LEGISLATIVE DECLARATION:

The purposes of this ordinance are to:

- A. Encourage the construction of owner-occupied, multi-family, townhome and condominium common interest communities in the City of Colorado Springs;
- B. Facilitate the implementation of the City's Comprehensive Plan and Zoning Code, both of which contemplate owner-occupied, multi-family developments in and throughout the City;
- C. Provide homeowners in common interest communities with an enhanced opportunity to participate in the governance of their communities by empowering individual owners to give or withhold their informed consent with respect to homeowners association actions to pursue construction defects claims; and
- D. Encourage prompt and voluntary correction of construction defects in order to enhance the health and safety of residents of Colorado Springs.

6.14.102 APPLICABILITY:

This article shall apply only to construction in residential, common interest communities created after the effective date of this ordinance. The provisions of this article are not intended to abrogate or limit obligations under any building code, warranty or contract. To the extent a claim involves a construction defect as defined herein, this article shall apply to a breach of implied warranty, express warranty, and/or contract. This article shall not, however, be deemed to require a beneficiary of an express warranty or contract to comply with the provisions of parts 1 and 2 hereof for ordinary warranty service requests in accordance with the terms and conditions of such warranty or ordinary requests for performance in accordance with such contract. Moreover, this article shall not be deemed to affect or limit any requirement imposed by the terms and conditions of an express warranty or contract that is applicable to a beneficiary.

6.14.103 DEFINITIONS:

This article is to be construed harmoniously with C.R.S. § 38-33.3-101, *et seq.*, the Colorado Common Interest Ownership Act, and C.R.S. § 13-20-801, *et seq.*, the Construction Defect Action Reform Act, and words and phrases in such acts shall have the same meaning in this article, unless the context of this article specifically indicates otherwise, or unless the meaning is expressly set forth herein. The following terms, as used in this article, shall have the meanings designated, unless the meaning is modified by an express provision herein:

BUILDER: 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: A community as defined in C.R.S. § 38-33.3-103(8).

CONSTRUCTION DEFECT: A defect in the design or construction of any improvement to real property that causes: (i) actual damage to real or personal property, (ii) actual loss of use of real or personal property, (iii) bodily injury or wrongful death, or (iv) a substantial risk of bodily injury or death to, or a threat to the life, health, or safety of, the occupants of residential real property.

DECLARANT: Any person or entity as defined in C.R.S. § 38-33.3-103(12).

HOMEOWNER: Any person or entity that is a unit owner in a residential, common interest community, including the homeowners association, but excluding any declarant or any person having an interest in a unit solely as security for an obligation.

HOMEOWNERS ASSOCIATION: An entity or association defined in C.R.S. § 38-33.3-103(3).

6.14.104 NOTICE TO HOMEOWNERS:

Homeowners shall be informed by the executive boards of homeowners associations of actions regarding construction defects and shall have the right to: (i) give meaningful input, (ii) make well considered judgments, and (iii) give, or withhold, informed consent, as provided herein. Accordingly, if a governing board of a homeowners association intends to institute an action asserting one or more construction defects that affects five (5) or more units, the board must do each of the following:

- A. Before filing any action under C.R.S. § 38-33.3-303.5, mail or deliver a written notice to each homeowner at the homeowner's last known address.
- B. The notice required by this section must contain the following information:
 1. The nature of the action and the relief sought;
 2. The amount of expenses, fees, and attorney's fees the executive board anticipates will be incurred in prosecuting the action;
 3. The last date(s) upon which a claim(s) may be filed under applicable statutes of limitation or repose;
 4. The expected range of recovery if the association prevails, excluding attorney's fees and other fees and expenses associated with litigation;
 5. If the executive board has, or intends, to enter into a contingency fee arrangement, the percentage of the gross or net recovery for the attorney's fee,

and other fees and expenses of litigation that are in addition to the contingency fee;

6. The estimated amount of attorney's fees and costs for which the homeowners association may be liable if it is not the prevailing party, including the opposing party's attorney's fees and costs;

7. A statement that if the association does not prevail, it may also have to repair the construction defects;

8. A statement that until the construction defects are repaired, and while the construction defect claim is pending, (i) the market value of units may be adversely affected, (ii) unit owners may experience problems with refinancing, and (iii) prospective purchasers may experience problems with financing;

9. An estimated range of time during which the construction defect claim may remain pending;

10. Whether the builder has offered to make any repairs and, if so, whether the builder has made any repairs; and

11. The steps taken by the builder to address the alleged construction defects, including any acknowledgments, inspections or repairs.

C. Nothing in this section shall: (i) require the disclosure in the notice or the disclosure to a homeowner of attorney-client communications or other privileged communications; (ii) permit the notice to serve as a basis for any person to assert the waiver of any applicable privilege or right of confidentiality resulting from, or to claim immunity in connection with, the disclosure of information in the notice; or (iii) limit or impair the ability of the executive board to contract for legal services, or limit or impair its ability to enforce such a contract for legal services, consistent with consent provided under section 6.14.105.

D. To the extent the forgoing notice includes information that is an amount, estimate, or range, the notice must provide either the basis for such determination, which may be the good faith belief of the executive board of the homeowners association, or a statement that such information is unknown.

6.14.105 CONSENT OF HOMEOWNERS:

The homeowners association may not commence an action under C.R.S. § 38-33.3-303.5 and such an action is not authorized unless such homeowners association complies with this part.

A. The homeowners association must obtain the written consent of homeowners holding at least a majority of the voting rights in the homeowners association; however, such percentage of voting rights shall be determined without including units or interests owned by the declarant or persons not otherwise defined as homeowners in this article.

B. Homeowners may vote either directly or through a written ballot signed by the homeowner, which written ballot must specifically recite the contents of the executive board notice under this section.

ARTICLE 14 CONSTRUCTION DEFECT CLAIMS IN COMMON INTEREST COMMUNITIES

PART 2 MONETARY SETTLEMENT OR BUILDER RIGHT TO REPAIR

SECTION:

- 6.14.201 Homeowners Association Notice of Claim to Builder**
- 6.14.202 Builder Responsibilities After Notice**
- 6.14.203 Monetary Settlement or Builder Right to Repair**
- 6.14.204 Warranty of Repairs**
- 6.14.205 Subsequently Discovered Defects**

6.14.201 HOMEOWNERS ASSOCIATION NOTICE OF CLAIM TO BUILDER:

Upon the discovery of any alleged construction defect affecting more than one (1) unit, or affecting common areas or facilities within a common interest community, a homeowners association shall, if duly authorized, give written notice of such claim to a builder under this section.

A. A notice of claim under this section shall be provided by either personal delivery or by certified mail, return receipt requested, to the builder's last known address or the builder's registered agent if there is one.

B. The notice of claim must state that one or more construction defects exist in units or in common areas or facilities.

C. The notice of claim must provide the following information:

1. The homeowners association's name, address and preferred method of contact;
2. An allegation of a construction defect pursuant to this article against the builder; and

3. A description of each construction defect in sufficient detail to allow the builder to determine the nature and location of each of such defect.

6.14.202 BUILDER RESPONSIBILITIES AFTER NOTICE:

Following the receipt of a notice of claim under this part, a builder must do the following:

A. A builder must acknowledge the notice of claim in writing. Such acknowledgement must be mailed within fifteen (15) days after receipt of the notice of claim. The acknowledgment shall be sent to the homeowners association or to its attorney, if any, noted on the notice of claim. If the builder has retained legal counsel, the builder's counsel shall communicate with a homeowners association's legal representative, if any.

B. Unless the builder is a sole proprietor, the builder shall maintain a registered agent with the Colorado Secretary of State to whom the homeowners association's notice of claim may be sent.

C. If requested in the notice of claim, the builder must, within forty-five (45) days from receipt thereof provide to the homeowners association, or its attorney, the documents requested pursuant to this subsection; provided, however, that this subsection shall not limit the homeowners association's rights to request other documents as authorized by law. A builder may charge reasonable copying costs for the documents provided under this subsection, which shall be paid by the homeowners association upon delivery. The following documents may be requested:

1. Copies of all relevant plans, specifications, grading plans, soils reports and available engineering calculations pertaining to the alleged construction defects;
2. All maintenance and preventative maintenance recommendations pertaining to the alleged construction defects; and
3. Information concerning any applicable warranty provided by the builder, or otherwise.

D. In addition to the foregoing requirements, if the builder elects to inspect the alleged construction defects, the builder shall notify the homeowners association, or its attorney, in writing of such election and shall complete the initial inspection and testing, if any, within forty-five (45) days after the builder's receipt of the notice of claim. Such inspection shall be made at a mutually agreeable date and time. The builder shall bear all costs of inspection and testing, including the costs to repair any damage caused by the inspection and testing. Before entering onto the premises for the inspection, the builder shall supply the homeowners association 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, except as otherwise permitted by law. Within three (3) days after completion of both the inspection and the provision of any documents requested pursuant to the notice of claim, the builder shall provide the homeowners association, or its attorney, written notice that the inspection and testing is completed and that requested documents have been provided, if applicable.

E. A builder who fails to comply with any of the foregoing requirements within the time specified may not elect to proceed under section 16.14.203, and the homeowners association shall not be subject to any obligation under such section.

6.14.203 MONETARY SETTLEMENT OR BUILDER RIGHT TO REPAIR:

Within thirty (30) days after the initial inspection or testing is completed, the builder may, in writing, offer to settle the claim by payment of a sum certain and/or provide a notice that the builder will repair the construction defects. If the builder elects to repair the construction defects, it has the right to do so and the homeowners association and affected homeowners may not, directly or indirectly, impair, impede or prohibit the builder from making repairs. For purposes of this article, an "affected homeowner" means a unit owner with alleged construction defects to, or affecting the use and enjoyment of, any portion of such owner's unit that is not commonly owned or possessed. Any notice to repair shall offer to compensate the homeowners association and any affected homeowner for the reasonable expenses, if any, which will be incurred by the homeowners association or affected homeowners, such as, without limitation, expenses for lodging, moving, and storage. Any notice of repair shall include: (i) an explanation of the particular construction defect being repaired, (ii) the method by which the defect is being repaired, (iii) a reasonable completion date for the repair work, (iv) the contact information for any contractors the builder intends to employ to complete the repairs, (v) a statement that the builder waives and will not assert any statute of limitation or repose as a defense to any action that could be brought by the homeowners association or affected homeowners within the time prior to the actual completion, inspection, and acceptance of the repairs under subsection F below, and any warranty period provided hereunder, and (vi) a statement that the builder indemnifies and will hold harmless the homeowners association and affected homeowners from any lien or claim for materials or labor

A. Within fifteen (15) days after receipt of a builder's offer to settle the claim by payment of a sum certain, or such longer period, if any, stated in the offer, the homeowners association may, to the extent duly authorized, accept such offer by delivering to the builder written acceptance thereof. Moreover, the homeowners

association, to the extent duly authorized, may make a written offer to the builder to settle the claim by payment of a sum certain at any time prior to the builder's commencement of repair, with acceptance to be made by the builder in writing within fifteen (15) days after the offer, or such longer period, if any, stated in the offer. The monetary settlement shall be paid in accordance with the terms of the accepted offer. Neither the builder nor the homeowners association shall be obligated to make or accept a settlement by payment of a sum certain. Any offer to settle for payment of a sum certain shall be made and accepted in full settlement and release of all claims with respect to, or arising out of, the alleged construction defects. An offer to settle for payment of a sum certain may, to the extent permitted by law, apply to construction defects that are discovered after settlement; moreover, such offer may require execution of a settlement agreement, in recordable form, to be filed in the office of the Clerk and Recorder of El Paso County, Colorado, so that constructive notice of a binding settlement may be provided to persons acquiring any interest in the subject property.

B. Within fifteen (15) days after receipt of the builder's notice to repair, a homeowners association may deliver to the builder a written objection to the proposed repairs if it believes in good faith will not remedy the alleged construction defects. The builder may elect to modify its proposal, in whole or in part, in accordance with the objection, and proceed with the modified scope of work, or may proceed with the scope of work set forth in the original notice to repair. Provided the builder notifies the homeowners association in writing at least five (5) days before the required completion date that the repair work will not be completed on time, the builder shall be entitled to one (1) extension of the completion date, not to exceed forty-five (45) days.

C. The homeowners association and any affected homeowner must cooperate with the builder to schedule any repair work.

D. If the homeowners association or affected homeowners, directly or indirectly, impair, impede, or prohibit the builder from making any repairs, the builder may seek such relief as is available under Colorado law.

E. If the builder, within the time required, fails: (i) to provide an offer to settle by payment of a sum certain or notice to repair in compliance with this section, (ii) to make payment of a monetary settlement as provided in an accepted offer to settle, or (iii) to complete repairs within the time set forth in the notice to repair with any applicable extension, or as otherwise agreed, the homeowners association shall be released from the requirements of this part and may proceed with the filing of any available action against the builder, subject to applicable notice and consent as required by sections 6.14.104 and 105.

F. Within three (3) days after substantial completion of the repairs, the builder shall notify the homeowners association of such substantial completion. The homeowners association shall have forty-five (45) days following the substantial completion date to have the premises inspected to verify that the repairs are complete and satisfactorily resolve the alleged construction defects. A homeowners association or affected homeowner who believes in good faith that the repairs do not resolve the construction defects may proceed with the filing of an available action, subject to applicable notice and consent as required by sections 6.14.104 and 105.

G. The builder and homeowners association may by written mutual agreement alter the time requirements and procedures set forth in this part.

6.14.204 WARRANTY OF REPAIRS:

The repair work performed by the builder shall be warranted against material defects in design or construction for a period of one (1) year after the repairs are substantially completed, which warranty shall be in addition to any express warranties on the original work. In the event the builder fails to perform any warranty work with respect to any construction defect that has been previously repaired within a reasonable time after the builder's receipt of written notice of a warranty claim, the homeowners association or an affected homeowner may proceed with the filing of an action, subject to applicable notice and consent as required by sections 6.14.104 and 105.

6.14.205 SUBSEQUENTLY DISCOVERED DEFECTS:

Any alleged construction defect discovered after repairs have been completed shall, to the extent not covered in a settlement agreement or barred by applicable statutes of limitation or repose, be subject to the same requirements of this part if the builder did not have previous notice or an opportunity to repair the particular defect.

ARTICLE 14 CONSTRUCTION DEFECT CLAIMS IN COMMON INTEREST COMMUNITIES

PART 3 CITY BUILDING CODE, EFFECT ON CONSTRUCTION DEFECT CLAIMS IN COMMON INTEREST COMMUNITIES

SECTION:

6.14.301 City Building Code, Effect on Construction Defect Claims in Common Interest Communities

6.14.301 CITY BUILDING CODE, EFFECT ON CONSTRUCTION DEFECT CLAIMS IN COMMON INTEREST COMMUNITIES:

With respect to construction in residential, common interest communities, covered by this article, a violation of, or failure to substantially comply with, the Pikes Peak Regional Building Code, as adopted under City Code 7.10.101, *et seq.* (the "City Building Code"), shall not: (i) create a private cause of action or (ii) support or prove any construction defect claim, regardless of the statutory or common law theory under which the claim is asserted, unless such defect constitutes a construction defect as defined under this article or such defect constitutes a breach of an express warranty or contract.

A. A violation of, or failure to substantially comply with, the City Building Code shall not under any circumstances support or prove any construction defect claim based upon a theory of strict liability or under the common law doctrine of negligence *per se*.

B. The City Building Code is intended to establish a minimum standard for safe and sound construction. Therefore, any particular element, feature, component or other detail of any improvement to real property that is specifically regulated under the City Building Code, which is constructed or installed in substantial compliance with such code, shall not be considered defective for purposes of proving any construction defect claim. Provided, however, that higher standards than those established by the City Building Code may imposed through the provisions of an express warranty and/or contract, so nothing in this article shall prevent the enforcement of such warranty or contract standards.

Section 3. If any provision of this ordinance should be found by a court of competent jurisdiction to be invalid, such invalidity shall not affect the remaining portions or applications of this ordinance that can be given effect without the invalid portion; provided, however, that such remaining portions or application of this ordinance are not determined by the court to be inoperable.

Section 4. This ordinance shall be in full force and effect after its final adoption and publication as provided by Charter.

Section 5. Council deems it appropriate that this ordinance be published by title and summary prepared by the City Clerk and that this ordinance be available for inspection and acquisition in the office of the City Clerk.

Introduced, read, passed on first reading and ordered published this ____ day of _____ 2015.

Finally passed: _____ Council President

Delivered to Mayor on _____.

Mayor's Action:

- Approved on _____.
- Disapproved on _____, based on the following objections:

Mayor

Council Action After Disapproval:

- Council did not act to override the Mayor's veto.
- Finally adopted on a vote of _____, on _____.
- Council action on _____ failed to override the Mayor's veto.

Council President

ATTEST:

Sarah B. Johnson, City Clerk