

HOUSE BILL REPORT

HB 2831

As Reported by House Committee On:
Judiciary

Title: An act relating to construction defect actions.

Brief Description: Concerning construction defect actions.

Sponsors: Representatives Senn, Chapman, Clibborn, Vick, Springer, Appleton and Barkis.

Brief History:

Committee Activity:

Judiciary: 1/31/18, 2/1/18 [DPS].

Brief Summary of Substitute Bill

- Requires increased notice, a meeting, and a majority vote of the homeowners before the board of a condominium or homeowners' association may commence a construction defect action.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Jinkins, Chair; Graves, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Muri, Orwall, Shea and Valdez.

Staff: Cece Clynch (786-7195).

Background:

Construction Defect Action.

In 2002 a mandatory prelitigation claim process was adopted for claims brought against a construction professional for property damage due to alleged defects in the construction of a residence. These requirements apply to the new construction of a residence and to any remodel that costs more than half of the assessed value of the residence and must be met before a lawsuit can be filed.

Requirements Before Suit is Filed: Notice and Opportunity to Cure.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Before a lawsuit can be filed alleging a defect in the construction or substantial remodel of a residence, a claimant must serve notice on the construction professional alleged to be responsible for the defect. The claimant's notice must be given at least 45 days before a suit is filed and must describe the claim in reasonable detail.

Within 21 days of receiving the notice, the construction professional must respond to the claimant. In the response, the construction professional must do one of the following:

- offer to inspect the alleged defect and then, based on the inspection, either remedy the defect, pay for it, or dispute the claim;
- offer to settle the claim by paying for the defect, including possibly buying the residence back from the homeowner; or
- dispute the claim.

If the construction professional fails to respond, or disputes the claim, or the claimant rejects an offer of inspection or settlement, then the claimant may file a lawsuit. Procedures are also laid out for situations in which the claimant agrees to an inspection or agrees to an offer of settlement. If the construction professional fails to perform agreed repairs, or fails to meet an agreed timetable, the claimant may file the lawsuit.

If a claimant discovers another defect after a suit has been commenced, the claimant must notify the construction professional and give the construction professional an opportunity to respond in the manner described previously. The new claim may then be added to a pending lawsuit.

The timely service of a notice of claim tolls any applicable statutes of limitations and repose until 60 days after the end of the notice and opportunity to cure period during which bringing a lawsuit is barred.

Additional Requirements Applicable to Condominium and Homeowners' Associations.

Prior to serving a summons and complaint in a construction defect action, the board of directors of a condominium or homeowners' association must substantially comply with a requirement to mail or deliver written notice of the commencement or anticipated commencement of the action to each homeowner. The notice must include a general description of:

- the nature of the action and the relief sought; and
- the expenses and fees that are anticipated to be incurred in prosecuting the action.

Summary of Substitute Bill:

Prior to the service of a summons and complaint in a construction defect action, the board of directors of a condominium or homeowners' association is required to mail or deliver notice to homeowners that includes a general description of the notice and opportunity to cure process that has occurred and the nature of the action and the relief to be sought in the event that the homeowners vote to authorize proceeding with a construction defect action. The notice must call a meeting of the homeowners at which certain information must be provided, and after which voting as to whether to proceed with suit commences. With limited

exceptions, the board may initiate the action only if authorized to do so by a majority vote of the homeowners. (Neither governing documents nor contracts may require that more than a simple majority is needed to authorize an action to be brought.)

The notice must:

- state that at the conclusion of the meeting the voting period will commence;
- state that the construction professionals (which includes declarants) will be invited to attend and have an opportunity to address the homeowners concerning the alleged defects;
- contain a description of the nature of the action, identification of the alleged defects, relief sought, a good faith estimate of the benefits and risks involved, the expenses and fees that the board anticipates will be incurred, and any other pertinent information; and
- include disclosures that:
 - the construction defects might result in increased costs in maintenance or repair or cause an increase in assessments;
 - if the association does not file a claim before applicable legal deadlines, the claim will expire;
 - until the alleged defects are repaired, sellers might owe buyers a duty to disclose known defects;
 - if the association does not prevail, a court or arbitrator might order the association to pay the opposing party's costs and fees;
 - outline any fee agreements between the association and its attorneys;
 - there is no guarantee that the association will recover enough funds to repair the defects;
 - until the defects are repaired, or the action concluded, the market value of the residences might be adversely affected; and
 - until the defects are repaired, or the action concluded, homeowners might encounter difficulties refinancing.

At least five business days before the mailing of the notice, the association must notify each construction professional against whom suit is proposed of the date and time of the meeting. Additionally, the notice provided the homeowners must also be provided to construction professionals against whom suit is proposed to be brought. The association must maintain a verified homeowner mailing list that identifies the homeowners to whom the notice was mailed.

The meeting must be held no less than 20 and no more than 30 days after the mailing date of the notice. A failure to hold the meeting within the prescribed time period voids the subsequent vote. A quorum is not required at the meeting. In no event must the time period for providing the notice, holding the meeting, and voting exceed 90 days.

For purposes of calculating the total number of eligible votes and the number of votes needed for the required majority vote, the votes allocated to residences owned by a development party, such as a contractor, subcontractor, developer, or builder responsible for any part of the design, construction, or repair, are excluded. A vote allocated to a residence owned by a banking institution is excluded unless it is actually received by the association.

A majority vote is not required before commencing an action:

- if the alleged defect pertains to a facility that is intended and used for nonresidential purposes and if the cost to repair does not exceed \$100,000; or
- if the association was the contracting party for the performance of labor or purchase of services or materials.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following additions and corrections:

- neither the governing documents nor a contract may require more than a simple majority vote in order to authorize the initiation of a construction defect action;
- language is added to clarify that for purposes of calculating the total number of eligible votes and the number of votes needed for the required majority vote, residences owned by development parties are excluded in all cases and residences owned by banks are excluded unless a vote is actually received;
- express language is added to indicate that a construction professional may be the declarant or any other person included within the definition of the term "construction professional;"
- detailed information regarding any agreement between an association and its attorneys is required to be included in the notice; and
- strikes the requirements that a copy of the verified homeowner mailing list be provided to construction professionals and that it be filed with the court.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) There are not enough condominiums being built, and this is impacting many persons' ability to buy a home, particularly working families and first time buyers. This is patterned after Colorado legislation. If a condominium association becomes involved in a construction defect action, that decision should not be driven by just one or two of the owners. Some owners may not want to sue, but would prefer that a fix be put in place instead. There should be a means whereby developers can engage with the owners. The bill currently provides that a quorum is not required at the meeting; this should be changed to require a quorum. The notice that must be sent to owners should also indicate whether the association has performed all required and recommended maintenance. This will incentivize that maintenance. Condominiums are a missing part of the market. Statistics for King County show that in the last six months 2,522 condominiums have sold under \$500,000, while 1,179 condominiums have sold over that amount. Currently, 135 condominiums (six under 10 years old) are for sale under that \$500,000 mark, while 132 (93 under 10 years old) are for sale over that mark. There are zero condominiums built in the last 5 years for sale

under the \$500,000 mark. People who no longer need a large house have no options to downsize, other than renting. In order to afford a \$500,000 home, a person would need a \$120,000 annual income and have no other payments. Portland is building condominiums at a much heavier pace. Under current law, boards of directors have tremendous responsibility and power. This bill would allow owners to be part of the decisionmaking process by requiring clear notice and a majority vote. It will create pressure to avoid litigation. There is a shortage of housing for low-income persons and a shortage of land near transportation. There is a need for a vertical environment, and there is simply no opportunity here right now. This is in contrast to Chicago and Atlanta, where there are condominiums available for all sorts of income levels.

(Opposed) This legislation is opposed for many reasons. The intent seems to be to decrease the number of lawsuits, but it will have the opposite effect. The point of the current notice and opportunity to cure process is to create a time-out during which the claimant and construction professional attempt to resolve the construction claim. This bill will change that from a cooperative process into a battle, pitting the construction professional against the association to win owners' votes. It will trip up associations in many places, particularly with respect to the notice and voting processes. Procedurally, the timelines in this bill will not work. Currently, service of a notice of claim tolls the statutes of limitation for 60 days after the 45-day ban on filing a suit, for a total of 105 days. The new language in this bill requires a minimum 20-day notice before the meeting and a 90-day voting period, which is presumably supposed to occur after the notice and opportunity to cure process. There is no way that it can be completed within the 105 days. The voting requirements are unclear with respect to situations in which the developer owns a large number of units. A missing component is what to do about nonresponsive owners. They should not be able to prevent the association from proceeding with viable claims. Colorado had a provision to deal with that, but this bill does not. This is a very invasive process, preventing suit until and unless the construction professionals are invited in and allowed to say whatever they want. An owner that is planning to sell his or her residence may choose to vote no. If this owner happened to be a board member, the situation is worse because a board member must act in the best interest of the association.

Persons Testifying: (In support) Representative Senn, prime sponsor; Jeffrey Hamlet, American Institute of Architects Washington Council; Shane Davies, Seattle King County Association of Realtors; Bill Stauffacher, Building Industry Association of Washington; and Gail Luxenberg, Habitat for Humanity.

(Opposed) Jeremy Stilwell, Washington State Community Association Institute.

Persons Signed In To Testify But Not Testifying: None.