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**SUBSTITUTE HOUSE BILL 2831**

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**State of Washington 65th Legislature 2018 Regular Session**

**By** House Judiciary (originally sponsored by Representatives Senn, Chapman, Clibborn, Vick, Springer, Appleton, and Barkis)

AN ACT Relating to construction defect actions; and amending RCW 64.50.040, 64.34.304, and 64.38.020.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**Sec.**  RCW 64.50.040 and 2002 c 323 s 5 are each amended to read as follows:

(1)(a) In the event the board of directors, pursuant to RCW 64.34.304(1)(d) or 64.38.020(4), institutes an action asserting defects in the construction of two or more residences, common elements, or common areas, this section shall apply. For purposes of this section, "action" has the same meaning as set forth in RCW 64.50.010.

(b) The board of directors shall substantially comply with the provisions of this section.

(2)(a) Prior to the service of the summons and complaint on any defendant with respect to an action governed by this section, the board of directors shall mail or deliver written notice ((~~of the commencement or anticipated commencement of such action~~)) to each homeowner at the last known address described in the association's records and to the last known address of each construction professional against whom an action is proposed; except that this notice requirement does not apply to:

(i) Construction professionals identified after the notice is mailed; or

(ii) Joined parties in an action previously approved by homeowners under subsection (3) of this section.

(b) The notice required by (a) of this subsection shall state a general description of the ((~~following:~~

~~(i) The nature of the action and the relief sought; and~~

~~(ii) The expenses and fees that the board of directors anticipates will be incurred in prosecuting the action~~)) process and outcome following service of the notice of claim under RCW 64.50.020 and the nature of the action and the relief to be sought in the event that the homeowners vote to authorize proceeding with an action.

((~~(3)~~)) (c) The notice given under this subsection (2) must call a meeting of the homeowners, which must be held no less than twenty days and no more than thirty days after the mailing date of the notice, to consider whether to bring an action. A failure to hold the meeting within this time period voids the subsequent vote. A quorum is not required at the meeting. In no event shall the time period for providing the notice required under (a) of this subsection, holding the meeting required under this subsection (2)(c), and voting as required by subsection (3) of this section exceed ninety days. The notice must state that:

(i) The conclusion of the meeting initiates the voting period, during which the association will accept votes for and against proceeding with the action. The disclosure and voting period shall end ninety days after the mailing date of the meeting notice or when the association determines that the action is either approved or disapproved, whichever occurs first;

(ii) The construction professional against whom the construction defect action is proposed, who may be the declarant or any other person or entity included within the definition of "construction professional" as defined in RCW 64.50.010, will be invited to attend and will have an opportunity to address the homeowners concerning the alleged construction defect; and

(iii) The presentation at the meeting by the construction professional or the construction professional's designee or designees may, but is not required to, include an offer to remedy any defect in accordance with this chapter.

(d) The notice given under this subsection (2) must also contain a description of the nature of the action, which description identifies alleged defects with reasonable specificity, the relief sought, a good faith estimate of the benefits and risks involved, the expenses and fees that the board of directors anticipates will be incurred in prosecuting the action, and any other pertinent information. The notice shall also include the following disclosures:

(i) The alleged construction defects might result in increased costs to the association in maintenance or repair or cause an increase in assessments or special assessments to cover the cost of repairs.

(ii) If the association does not file a claim before the applicable legal deadlines, the claim will expire.

(iii) Until the alleged defects are repaired, sellers of residences might owe buyers a duty to disclose known defects.

(iv) If the association does not prevail on its claim, the association may be responsible for paying its attorneys' fees.

(v) If the association does not prevail on its claim, a court or arbitrator sometimes awards costs and attorneys' fees to the opposing party. Should that happen in this case, the association may be responsible for paying the opposing party's costs and fees as a result of such award.

(vi) There is no guarantee that the association will recover enough funds to repair the claimed construction defect(s). If the claimed defects are not repaired, additional damage to property and a reduction in the useful life of the common elements or common areas might occur.

(vii) Until the claimed construction defects are repaired, or until the action is concluded, the market value of the residences in the association might be adversely affected.

(viii) Until the claimed construction defect(s) are repaired, or until the action is concluded, homeowners in the association might have difficulty refinancing and prospective buyers might have difficulty obtaining financing. In addition, certain federal underwriting standards or regulations prevent refinancing or obtaining a new loan in projects where a construction defect is claimed, and certain lenders as a matter of policy will not refinance or provide a new loan in projects where a construction defect is claimed.

(ix) A detailed explanation of any and all fee agreements between the association and its attorneys, including whether the fee is fixed or contingent, the basis or rate of the fee, and the expenses for which the association will be responsible. If the fee is contingent, there must be included a detailed explanation of the method by which the fee is to be determined, including: The percentage or percentages that shall accrue to the attorney in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.

(e) The association shall maintain a verified homeowner mailing list that identifies the homeowners to whom the association mailed the notice required under this subsection (2). The verified homeowner mailing list shall include, for each homeowner, the address, if any, to which the association mailed the notice required under this subsection (2). The homeowner mailing list shall be deemed verified if a specimen copy of the mailing list is certified by an association officer or agent.

(f) The substance of a proposed action may be amended or supplemented after the meeting, but an amended or supplemented claim does not extend the voting period. The board of directors shall give notice to homeowners of any amended or supplemented claim and shall maintain records of its communications with homeowners. Homeowner approval under subsection (3) of this section is not required for amendments or supplements to an action made after the notice under this subsection (2) is sent.

(3)(a)(i) Notwithstanding any provision of law or any requirement in the governing documents, the board of directors may initiate the action only if authorized within the voting period by homeowners of residences to which a majority of votes in the association are allocated. More than a simple majority vote may not be required in the governing documents or in any contract or agreement. Such approval is not required for an association to proceed with an action if the alleged construction defect pertains to a facility that is intended and used for nonresidential purposes and if the cost to repair the alleged defect does not exceed one hundred thousand dollars. Such approval is not required for an association to proceed with an action when the association is the contracting party for the performance of labor or purchase of services or materials.

(ii) Notwithstanding any other provision of law, a homeowner's vote shall be submitted only once and may be obtained in any written format confirming the homeowner's vote to approve or reject the proposed action. The association shall maintain a record of all votes until the conclusion of the action, including all appeals, if any.

(b) For purposes of calculating the total number of eligible votes and the number of votes needed for the required majority vote under this subsection (3) only, the following residences are excluded:

(i) Residences owned by a development party. As used in this subsection (3)(b)(i), "development party" means a contractor, subcontractor, developer, or builder responsible for any part of the design, construction, or repair of any portion of the common interest community and any of that party's affiliates; and "affiliate" includes an entity controlled or owned, in whole or in part, by any person that controls or owns a development party or by the spouse of a development party; and

(ii) Residences owned by banking institutions, unless a vote from such an institution is actually received by the association.

(4) At least five business days before the mailing of the notice required by subsection (2) of this section, the association shall notify each construction professional against whom a construction defect action is proposed by mail, at its last known address, of the date and time of the meeting called to consider the construction defect action under subsection (2) of this section.

(5) Nothing in this section may be construed to:

(a) Require the disclosure in the notice or the disclosure to a unit owner of attorney-client communications or other privileged communications;

(b) 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

(c) Limit or impair the authority of the board of directors to contract for legal services, or limit or impair the ability to enforce such a contract for legal services.

**Sec.**  RCW 64.34.304 and 2008 c 115 s 9 are each amended to read as follows:

(1) Except as provided in subsection (2) of this section, and subject to the provisions of the declaration, the association may:

(a) Adopt and amend bylaws, rules, and regulations;

(b) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from unit owners;

(c) Hire and discharge or contract with managing agents and other employees, agents, and independent contractors;

(d) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium. With respect to construction defect actions under chapter 64.50 RCW, the board of directors shall comply with RCW 64.50.040;

(e) Make contracts and incur liabilities;

(f) Regulate the use, maintenance, repair, replacement, and modification of common elements;

(g) Cause additional improvements to be made as a part of the common elements;

(h) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, but common elements may be conveyed or subjected to a security interest only pursuant to RCW 64.34.348;

(i) Grant easements, leases, licenses, and concessions through or over the common elements and petition for or consent to the vacation of streets and alleys;

(j) Impose and collect any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in RCW 64.34.204 (2) and (4), and for services provided to unit owners;

(k) Impose and collect charges for late payment of assessments pursuant to RCW 64.34.364(13) and, after notice and an opportunity to be heard by the board of directors or by such representative designated by the board of directors and in accordance with such procedures as provided in the declaration or bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule thereof adopted by the board of directors and furnished to the owners for violations of the declaration, bylaws, and rules and regulations of the association;

(l) Impose and collect reasonable charges for the preparation and recording of amendments to the declaration, resale certificates required by RCW 64.34.425, and statements of unpaid assessments;

(m) Provide for the indemnification of its officers and board of directors and maintain directors' and officers' liability insurance;

(n) Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration provides;

(o) Join in a petition for the establishment of a parking and business improvement area, participate in the ratepayers' board or other advisory body set up by the legislative authority for operation of a parking and business improvement area, and pay special assessments levied by the legislative authority on a parking and business improvement area encompassing the condominium property for activities and projects which benefit the condominium directly or indirectly;

(p) Establish and administer a reserve account as described in RCW 64.34.380;

(q) Prepare a reserve study as described in RCW 64.34.380;

(r) Exercise any other powers conferred by the declaration or bylaws;

(s) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and

(t) Exercise any other powers necessary and proper for the governance and operation of the association.

(2) The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

**Sec.**  RCW 64.38.020 and 1995 c 283 s 4 are each amended to read as follows:

Unless otherwise provided in the governing documents, an association may:

(1) Adopt and amend bylaws, rules, and regulations;

(2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from owners;

(3) Hire and discharge or contract with managing agents and other employees, agents, and independent contractors;

(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more owners on matters affecting the homeowners' association, but not on behalf of owners involved in disputes that are not the responsibility of the association. With respect to construction defect actions under chapter 64.50 RCW, the board of directors shall comply with RCW 64.50.040;

(5) Make contracts and incur liabilities;

(6) Regulate the use, maintenance, repair, replacement, and modification of common areas;

(7) Cause additional improvements to be made as a part of the common areas;

(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property;

(9) Grant easements, leases, licenses, and concessions through or over the common areas and petition for or consent to the vacation of streets and alleys;

(10) Impose and collect any payments, fees, or charges for the use, rental, or operation of the common areas;

(11) Impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association;

(12) Exercise any other powers conferred by the bylaws;

(13) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and

(14) Exercise any other powers necessary and proper for the governance and operation of the association.

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