
SUBSTITUTE HOUSE BILL 2831

State of Washington

65th Legislature

2018 Regular Session

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

READ FIRST TIME 02/02/18.

1 AN ACT Relating to construction defect actions; and amending RCW
2 64.50.040, 64.34.304, and 64.38.020.

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

4 **Sec. 1.** RCW 64.50.040 and 2002 c 323 s 5 are each amended to
5 read as follows:

6 (1)(a) In the event the board of directors, pursuant to RCW
7 64.34.304(1)(d) or 64.38.020(4), institutes an action asserting
8 defects in the construction of two or more residences, common
9 elements, or common areas, this section shall apply. For purposes of
10 this section, "action" has the same meaning as set forth in RCW
11 64.50.010.

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

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

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

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

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

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

8 ~~(ii) The expenses and fees that the board of directors~~
9 ~~anticipates will be incurred in prosecuting the action)) process and~~

10 outcome following service of the notice of claim under RCW 64.50.020
11 and the nature of the action and the relief to be sought in the event
12 that the homeowners vote to authorize proceeding with an action.

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

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

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

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

39 (d) The notice given under this subsection (2) must also contain
40 a description of the nature of the action, which description

1 identifies alleged defects with reasonable specificity, the relief
2 sought, a good faith estimate of the benefits and risks involved, the
3 expenses and fees that the board of directors anticipates will be
4 incurred in prosecuting the action, and any other pertinent
5 information. The notice shall also include the following disclosures:

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

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

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

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

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

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

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

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

38 (ix) A detailed explanation of any and all fee agreements between
39 the association and its attorneys, including whether the fee is fixed
40 or contingent, the basis or rate of the fee, and the expenses for

1 which the association will be responsible. If the fee is contingent,
2 there must be included a detailed explanation of the method by which
3 the fee is to be determined, including: The percentage or percentages
4 that shall accrue to the attorney in the event of settlement, trial,
5 or appeal; litigation and other expenses to be deducted from the
6 recovery; and whether such expenses are to be deducted before or
7 after the contingent fee is calculated.

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

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

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

37 (ii) Notwithstanding any other provision of law, a homeowner's
38 vote shall be submitted only once and may be obtained in any written
39 format confirming the homeowner's vote to approve or reject the

1 proposed action. The association shall maintain a record of all votes
2 until the conclusion of the action, including all appeals, if any.

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

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

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

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

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

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

27 (b) Permit the notice to serve as a basis for any person to
28 assert the waiver of any applicable privilege or right of
29 confidentiality resulting from, or to claim immunity in connection
30 with, the disclosure of information in the notice; or

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

34 **Sec. 2.** RCW 64.34.304 and 2008 c 115 s 9 are each amended to
35 read as follows:

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

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

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

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

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

11 (e) Make contracts and incur liabilities;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 **Sec. 3.** RCW 64.38.020 and 1995 c 283 s 4 are each amended to
28 read as follows:

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

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

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

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

37 (4) Institute, defend, or intervene in litigation or
38 administrative proceedings in its own name on behalf of itself or two
39 or more owners on matters affecting the homeowners' association, but

1 not on behalf of owners involved in disputes that are not the
2 responsibility of the association. With respect to construction
3 defect actions under chapter 64.50 RCW, the board of directors shall
4 comply with RCW 64.50.040;

5 (5) Make contracts and incur liabilities;

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

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

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

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

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

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

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

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

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

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