FINAL BILL REPORT
EHB 1848

C 456 L 05
Synopsis as Enacted

Brief Description: Addressing construction defect disputes involving multiunit residential buildings.

Sponsors: By Representatives Springer, Tom, Lantz, Priest, Hunter, Jarrett, Clibborn, Serben, Fromhold, Rodne, Williams, Flannigan, Kessler, O'Brien and Simpson.

House Committee on Judiciary
Senate Committee on Judiciary

Background:

The Washington Condominium Act (WCA) controls the creation, construction, sale, financing, management, and termination of condominiums.

A condominium consists of real property that has individually owned units and also has commonly held elements in which all the individual unit owners have an undivided common interest. A condominium may be created for any of a number of purposes, including residential use. A condominium is created by the recording of a "declaration." The person creating a condominium is referred to as the "declarant." A condominium may be created at the time of the construction of a new condominium building, or a condominium may be created by the conversion of an existing building, such as an existing apartment building.

The WCA also creates specific rights and responsibilities. The WCA creates implied warranties and authorizes the use of express warranties regarding the quality of materials and construction in a condominium. The WCA gives certain rights to owners and their associations regarding these warranties.

Express warranties are assertions that are made by the declarant with respect to a condominium and that are relied upon by a buyer.

Implied warranties are statutorily created in the WCA. Implied warranties by the seller of a condominium include warranties of quality that the units and common areas are:

- suitable for the ordinary uses of real estate of that type;
- free from defective materials;
- built in accordance with sound engineering and construction standards;
- built in a workmanlike manner; and
- built in compliance with applicable laws.

The WCA provides that any right or obligation under the WCA is enforceable by judicial proceeding. In a 2001 decision, *Marina Cove Condominium Owners Association v. Isabella*

Estates, the Washington State Court of Appeals held that binding arbitration clauses in condominium agreements are unenforceable under the WCA. The Court held that the WCA does not authorize parties to agree to binding arbitration that prevents an appeal to a judicial process.

As part of condominium legislation passed in 2004, a Condominium Study Committee was created to look at two issues related to condominiums: (1) the use of independent third-party inspections during the construction of condominiums in order to reduce water penetration problems; and (2) the use of alternative dispute resolution procedures in condominium cases.

The Condominium Study Committee delivered its report to the Legislature at the beginning of the 2005 legislative session.

Summary:

Inspections are required for the building enclosures of multiunit residential buildings during initial construction or rehabilitation, or during conversion of a building to condominium ownership.

The WCA is amended to provide for alternative dispute resolution mechanisms including arbitration, case schedule planning, mediation, and the use of neutral experts in resolving disputes over alleged breaches of condominium warranties.

Inspections.
The changes in the inspection provisions apply to construction for which an initial or rehabilitative building permit is issued on or after August 1, 2005.

Building enclosure design documents must be submitted with any application for a building permit for the construction of a multiunit residential building. The documents must be stamped by an architect or engineer and must address waterproofing, weatherproofing, and other protections of the building from water or moisture intrusion. A building department may not issue a building permit unless the design documents have been submitted, but the department need not review or approve the documents.

The building enclosures of all multiunit residential buildings must be inspected during the course of construction. The inspection must determine through periodic review whether construction is in compliance with the enclosure design documents. In addition, the inspection must include testing windows and window installations for water penetration problems. The inspections must be performed by a person who has training and experience in design and construction of building envelopes, who is free of improper interference or influence, and who has not been an employee of the developer. Notwithstanding these restrictions, however, the inspections may be done by the architect or engineer who prepared the design documents or who is the architect or engineer of record on the project.

A building department may not issue a certificate of occupancy for a multiunit residential building until a building enclosure inspection report has been submitted. However, the department need not determine the adequacy of the inspection.

The design document and inspection requirements do not create a right of action or any liability against any architect, engineer or inspector. However, the developer and any architect, engineer, or inspector on a project may contractually agree on the extent of possible liability to the developer.

No evidentiary presumption is created regarding an inspection report.

No condominium unit may be sold without the required enclosure design documents and inspection report. In addition, in the case of a conversion of a building to residential condo units, special inspection provisions apply. Every condo conversion for which a public offering statement is issued after August 1, 2005, must undergo an intrusive inspection of the building envelope. The inspection is to include testing such as removing siding to check for construction quality and for water penetration. A conversion inspection must include a report of the findings of the inspection and must include any recommended repairs. The report must be made a part of the public offering statement for the condo. If the building was subject to a covenant prohibiting conversion to condo units for at least five years, and less than five years have passed, any recommended repairs must be completed before the condo units may be sold.

For purposes of these inspection requirements, a multiunit residential building is a building with more than two attached dwelling units, but does not include hotels, motels, dormitories, care facilities, floating homes, or buildings with attached dwelling units each on a single platted lot. However, a developer may elect to have the inspection requirements apply to a building with only two attached dwelling units, a condo without attached dwelling units, or a building with attached dwelling units each on a single platted lot.

Condominium Act Alternative Dispute Resolution.
Once a lawsuit has been commenced alleging a breach of warranty under the WCA, several alternative dispute resolution provisions apply. These alternative dispute resolution provisions apply to any such lawsuit that is filed and served on or after August 1, 2005.

Case schedule plan. At least 10 days after filing and service, the parties must meet and confer on a case schedule to be proposed to the court. The proposed plan for the case is to cover schedules for the mandatory mediation process, possible selection of arbitrators, joinder of parties, investigations of the case, disclosure of repair plans and estimated costs, and each party's settlement demand or response.

Arbitration. Any party may demand arbitration not less than 30 nor more than 90 days after the lawsuit has been filed and served. Unless the parties agree otherwise, the case is to be heard within 14 months by a single court-appointed arbitrator if the case involves less than $1 million or by three court-appointed arbitrators if the case involves more than $1 million. Within 20 days after the arbitrator's decision is filed, either party may demand a trial de novo on appeal.

If the judgment of the court in a trial de novo is not more favorable to the appealing party than the arbitration award, the appealing party must pay the costs and fees, including reasonable attorney fees, of an adverse party. If the judgment is more than the arbitration award, the

court may award those costs and fees to the appealing party unless the judgment is not more favorable than the most recent of any offers of judgment made. If both the trial de novo provisions and the offer of judgment provisions would result in the award of costs and fees, the offer of judgment provisions control.

Subcontractors may be joined in an arbitration upon the demand of any party who has a legal claim against the subcontractor if the work performed by the subcontractor is an issue in the arbitration.

Mandatory mediation. Unless the parties agree otherwise, mediation must begin within seven months of filing and service. The court or arbitrator will appoint the mediator unless the parties agree otherwise. Before mediation, the parties must meet and confer to attempt to resolve or narrow disputed issues. Each party must agree to provide a decision maker who has the authority to settle a dispute and who will be available throughout the mediation. Mediation ends upon written notice of termination by any party.

Neutral experts. If, after the parties have met and conferred, issues still remain, any party may request the court or arbitrator to appoint a neutral expert. Unless the parties agree otherwise, the neutral expert may not have been employed as an expert by a party within the previous three years. Unless the parties agree otherwise, the court or arbitrator will select the neutral expert and will determine matters such as the scope of the neutral expert's duties, the timing of inspections of the property by the neutral expert, and coordination of inspections by the neutral expert and the parties' experts. Unless the parties agree otherwise, the neutral expert is not to decide issues of the amount of damages or the costs of repair.

A neutral expert is not liable to the parties regarding his duties. There is no evidentiary presumption created regarding a neutral expert's report.

Payment of arbitrators, mediators, and neutral experts. Different rules apply regarding payment of arbitrators, mediators, and neutral experts depending on whether a condominium was built pursuant to a building permit issued before or after August 1, 2005. For the earlier built cases, the party who demands arbitration pays for both the arbitrator and the mediator, and the party who requests a neutral expert pays for the expert. If arbitration has not been demanded, the court decides on payment of the mediator. These payments are not subject to the cost shifting offer of judgment provisions discussed below. For the later cases, the same parties under the same situations must "advance" payment, but those payments are subject to possible shifting under the offer of judgment provisions.

Offers of judgment. Ultimate responsibility for the fees and costs of trial or arbitration may be affected by the acceptance or rejection of offers of judgment. Within 60 days after mediation is terminated, a condo declarant, condo association, or condo unit owner who is a party to the dispute in trial or arbitration may make an offer of judgment. Any such offer not accepted within 21 days is considered rejected and withdrawn.

A declarant's offer must include a demonstration of the ability to pay the judgment and any costs and fees, including reasonable attorney fees, within 30 days of entry of the judgment. An

association or owner who accepts an offer is considered the prevailing party and is entitled to the judgment and costs and fees.

If an offer or offers have been made, and the final judgment of the court or arbitrator is not more favorable to the offeree than was the last offer, then offeror is considered the prevailing party. If the final judgment is more favorable to the offeree, then the court is to decide any award of costs and fees in accordance with otherwise applicable law.

If a condo association has brought a claim, no award of costs and fees against the association may exceed 5 percent of the assessed value of the condo as a whole. If an individual unit owner has brought a claim, no such award against the owner may exceed 5 percent of the unit's assessed value.

If an association is a party to the dispute, then the association has sole responsibility for accepting or rejecting offers with respect to common elements of the condo.

Votes on Final Passage:

House	97	0	
Senate	46	1	(Senate amended)
House	98	0	(House concurred)

Effective: August 1, 2005