
HOUSE BILL 1848

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

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1 AN ACT Relating to managing construction defect disputes involving
2 multiunit residential buildings; amending RCW 64.34.100; adding new
3 sections to chapter 64.34 RCW; adding a new chapter to Title 64 RCW;
4 creating a new section; providing an effective date; and declaring an
5 emergency.

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

7 NEW SECTION. **Sec. 1.** DEFINITIONS. Unless the context clearly
8 requires otherwise, the definitions in this section apply throughout
9 this chapter.

10 (1) "Building enclosure" means that part of any building, above or
11 below grade, that physically separates the outside or exterior
12 environment from interior environments. Interior environments consist
13 of both heated and unheated enclosed spaces, and also include, but are
14 not limited to balconies, decks, guardwalls, balcony support columns,
15 chimneys, garages, and other structures that interface with the
16 building.

17 (2) "Building enclosure design documents" means plans, details, and
18 specifications for the building enclosure that have been stamped by a
19 licensed engineer or architect.

1 (3) "Developer" means an individual, group of individuals,
2 partnership, corporation, association, municipal corporation, state
3 agency, or other person and their successors and assigns undertaking
4 the construction or reconstruction of a multiunit residential building.

5 (4) " Dwelling unit" means a suite operated as a housing unit, used
6 or intended to be used as a residence or usually containing cooking,
7 eating, living, sleeping, and sanitary facilities.

8 (5) "Multiunit residential building" means a residential building
9 containing more than two dwelling units, including a residential
10 condominium under chapter 64.34 RCW, but excluding the following
11 classes of buildings:

12 (a) Hotels and motels;

13 (b) Dormitories;

14 (c) Care facilities;

15 (d) Floating homes;

16 (e) Any multiunit building in which all of the dwelling units are
17 held under one ownership and constructed for rental purposes, if the
18 building is subject to a covenant restricting the sale or other
19 disposition of individual dwelling units for ten years or more from the
20 date of first occupancy.

21 (6) "Stamped" means bearing the stamp and signature of the
22 responsible registered architect or engineer on the title page and
23 every sheet of the documents, drawings, or specifications, including
24 modifications to the documents, drawings, and specifications that
25 become part of change orders or addenda to alter those documents,
26 drawings, or specifications.

27 NEW SECTION. **Sec. 2.** INSPECTIONS. All multiunit residential
28 building enclosures for which building permits are issued after the
29 effective date of this act shall be inspected by a qualified inspector
30 during the course of construction, whether the permits are for initial
31 construction or rehabilitative construction of the building enclosure.

32 NEW SECTION. **Sec. 3.** DESIGN DOCUMENTS. (1) Any person applying
33 for a building permit subject to section 2 of this act shall submit
34 building enclosure design documents to the appropriate building
35 department for filing prior to the start of construction of the
36 building enclosure. The design documents shall be stamped and shall

1 contain an appropriate level of information to allow construction of
2 the building enclosure. The submitted documents shall be updated to
3 reflect changes made to the design during construction. Such updates
4 shall be stamped and may be provided through individual updates,
5 cumulative updates, or as-built updates.

6 (2) The signature and stamp of a registered architect or engineer
7 constitute a certification that the document, drawing, or specification
8 was prepared by the registered architect or engineer or under the
9 supervision and control of that architect or engineer. Nothing in this
10 section requires a building department to review, approve, or
11 disapprove enclosure design documents.

12 (3) If the appropriate building department has not instituted
13 necessary filing requirements and procedures, a declarant under chapter
14 64.34 RCW or a developer may nonetheless be deemed to have complied
15 with applicable course of construction inspection requirements, so long
16 as the declarant or developer has satisfied all other requirements of
17 this chapter. If a dispute arises about compliance with the inspection
18 requirements, an arbitrator appointed pursuant to section 10 of this
19 act shall determine whether the declarant or developer has complied.
20 If such a dispute arises and an arbitrator has not been appointed, the
21 court shall determine such compliance.

22 NEW SECTION. 4. INSPECTORS--QUALIFICATIONS--INDEPENDENCE. (1)

23 For purposes of section 2 of this act, a qualified building enclosure
24 inspector:

25 (a) Must be either: (i) A licensed architect or engineer with
26 verifiable training and experience in building enclosure design and
27 construction; or (ii) any person with verifiable training and
28 experience in building enclosure design and construction; and

29 (b) Shall be free from any interference or influence relating to
30 the inspections. The qualified inspector may not be an employee or
31 subsidiary of, nor have any pecuniary interest in, the declarant or
32 developer of the project in question or any party providing services or
33 materials for the project, except that the qualified inspector may be
34 the architect or engineer who approved the building enclosure design
35 documents or the architect or engineer of record. The qualified
36 inspector may, but is not required to, assist with the preparation of
37 such design documents.

1 (2) Nothing in this section alters requirements for licensure of
2 any architect, engineer, or other professional, or alters the
3 jurisdiction, authority, or scope of practice of architects, engineers,
4 other professionals, or general contractors.

5 NEW SECTION. **Sec. 5.** SCOPE OF INSPECTION. Any inspection
6 required by section 2 of this act shall include at a minimum the
7 following:

8 (1) Water penetration resistance testing of a representative sample
9 of windows and window installations. Such tests shall be conducted
10 according to industry standards. Where appropriate, tests shall be
11 conducted with an induced air pressure difference across the window and
12 window installation. Testing is not required if the same assembly has
13 previously been tested in situ in the project under construction by the
14 builder, by another member of the construction team such as an
15 architect or engineer, or by an independent testing laboratory; and

16 (2) An independent periodic review of building enclosure
17 construction activities during the course of construction to ascertain
18 whether the multiunit residential building has been constructed in
19 general compliance with the building enclosure design documents.

20 NEW SECTION. **Sec. 6.** CERTIFICATION. Upon completion of an
21 inspection required by section 2 of this act, the qualified inspector
22 shall prepare a letter certifying that the building enclosure has been
23 inspected during the course of construction and has been constructed in
24 substantial compliance with the building enclosure design documents, as
25 updated pursuant to section 3 of this act. The letter of inspection
26 shall be provided to the appropriate building department prior to
27 issuance of a certificate of occupancy or other similar final
28 acceptance by the building department.

29 NEW SECTION. **Sec. 7.** LIABILITY. With respect to an inspection
30 performed pursuant to section 2 of this act, a qualified inspector is
31 immune from liability to anyone other than the declarant or developer
32 of the project inspected. The qualified inspector and the declarant or
33 developer may contractually agree to limit the qualified inspector's
34 liability to the fee or contract price actually paid, or to limit or
35 modify such liability in such other manner as they agree to.

1 NEW SECTION. **Sec. 8.** NO EVIDENTIARY PRESUMPTION--ADMISSIBILITY.

2 A qualified inspector's report or testimony regarding an inspection
3 conducted pursuant to section 2 of this act is not entitled to any
4 evidentiary presumption in any arbitration or court proceeding.
5 Nothing in this act restricts the admissibility of such a report or
6 testimony, and questions of the admissibility of such a report or
7 testimony shall be determined under the rules of evidence.

8 **Sec. 9.** RCW 64.34.100 and 2004 c 201 s 2 are each amended to read
9 as follows:

10 (1) The remedies provided by this chapter shall be liberally
11 administered to the end that the aggrieved party is put in as good a
12 position as if the other party had fully performed. However,
13 consequential, special, or punitive damages may not be awarded except
14 as specifically provided in this chapter or by other rule of law.

15 (2) Except as otherwise provided in sections 10 through 17 of this
16 act or in chapter 64.35 RCW, any right or obligation declared by this
17 chapter is enforceable by judicial proceeding.

18 NEW SECTION. **Sec. 10.** ARBITRATION--ELECTION--NUMBER OF
19 ARBITRATORS--QUALIFICATIONS--TRIAL DE NOVO. (1) A court shall refer a
20 dispute involving a residential condominium under this chapter for
21 arbitration if:

22 (a) A complaint has been served or filed that alleges a breach of
23 an implied or express warranty under this chapter, or that seeks relief
24 that could be awarded for such a breach under this chapter, regardless
25 of the legal theory pled; and

26 (b) A demand for arbitration is made by a party within ninety days
27 after filing of the complaint.

28 (2) Unless otherwise agreed by the parties, claims for less than
29 one million dollars shall be heard by a single arbitrator and all other
30 claims shall be heard by three arbitrators.

31 (3) Unless otherwise agreed by the parties, the court shall appoint
32 all arbitrators. Any arbitrator shall be an attorney with experience
33 as an attorney, judge, arbitrator, or mediator in construction defect
34 disputes.

35 (4) Following an arbitration hearing conducted in accordance with
36 rules prescribed pursuant to section 11 of this act, the arbitrator

1 shall file the decision and award with the clerk of the superior court,
2 together with proof of service thereof on the parties. Within twenty
3 days after the filing of the decision and award, any aggrieved party
4 may file with the clerk a written notice of appeal and demand for a
5 trial de novo in the superior court on all issues of law and fact.
6 Upon such a demand, a trial de novo shall be held. The right to a
7 trial de novo includes the right to a jury, if demanded. The court
8 shall give priority to the trial date for the trial de novo. Except as
9 otherwise provided for in section 16 of this act, if the judgment in
10 the trial de novo is not more favorable to the appealing party than the
11 arbitration award, the appealing party shall pay any nonappealing
12 party's costs and fees, including reasonable attorneys' fees, incurred
13 after the filing of the appeal.

14 NEW SECTION. **Sec. 11.** RULES OF PROCEDURE. The supreme court
15 shall by rule adopt procedures to implement arbitration, mediation, and
16 the use of neutral experts under sections 10 through 17 of this act.

17 (1) The legislature respectfully requests that those rules provide
18 for:

19 (a) As expedited a process in both arbitration and court
20 proceedings as possible, including commencement of mediation within six
21 months, and arbitration or trial within twelve months, following filing
22 of the complaint; and

23 (b) Sanctions against a party who fails to meet a deadline imposed
24 by the rules.

25 (2) The rules should also include, but need not be limited to,
26 provisions for a case plan schedule with deadlines regarding:

27 (a) Joining additional parties in the claim;

28 (b) Referring a case to arbitration and the appointment of
29 arbitrators;

30 (c) Selection of mediators;

31 (d) Completion of a claimant's investigation;

32 (e) Completion of a defendant's investigation;

33 (f) Disclosure of each party's lists of defects and proposed scope
34 of repair;

35 (g) Requesting the use of a neutral expert, assigning a neutral
36 expert, and receiving the report of a neutral expert;

37 (h) Disclosure by each party of estimated costs of repair;

- 1 (i) Claimant's settlement demand;
- 2 (j) Defendant's response to the settlement demand;
- 3 (k) Defendant's demands on other parties and responses by those
- 4 parties;
- 5 (l) Submission of mediation materials; and
- 6 (m) Submission by each party of a declaration that:
- 7 (i) A decision maker with authority will be available for the
- 8 duration of any mediation; and
- 9 (ii) The decision maker has been provided with and reviewed the
- 10 requisite mediation materials provided by its own counsel, as well as
- 11 the materials submitted by the opposing parties.

12 NEW SECTION. **Sec. 12.** MANDATORY MEDIATION. (1) Any dispute that
13 involves an alleged breach of an implied or express warranty involving
14 a residential condominium under this chapter, or that seeks relief that
15 could be awarded for such a breach under this chapter, regardless of
16 the legal theory pled, shall be submitted to mediation. If the dispute
17 has been referred to arbitration under section 10 of this act, and
18 unless otherwise agreed by the parties, the mediator shall be appointed
19 by the arbitrator. If the dispute has not been referred for
20 arbitration under section 10 of this act, and unless otherwise agreed
21 by the parties, the mediator shall be appointed by the court.

22 (2) The parties and their experts are required to meet and confer
23 in an attempt to resolve or narrow the scope of the disputed issues.
24 The parties' obligations to mediate and meet and confer are governed by
25 this chapter and the rules adopted pursuant to section 11 of this act.

26 (3) Completion of mediation occurs upon notice from one party to
27 the other terminating mediation.

28 NEW SECTION. **Sec. 13.** NEUTRAL EXPERT. (1) If, after meeting and
29 conferring under section 12 of this act, disputed issues remain with
30 respect to a residential condominium, a party may request the
31 appointment of a neutral expert. Upon such a request, if the dispute
32 has not been referred for arbitration under section 10 of this act, the
33 court shall decide whether or not to appoint a neutral expert. If the
34 dispute has been referred to arbitration under section 10 of this act,
35 the arbitrator shall decide whether or not to appoint a neutral expert.

1 (2) The neutral expert shall be a licensed architect or engineer
2 with substantial experience in the disputed issue or shall have other
3 suitable experience and training. The neutral expert shall not have
4 been employed as an expert by a party to the present dispute within
5 three years before the commencement of the present dispute, unless the
6 parties agree otherwise.

7 (3) All parties shall be given an opportunity to recommend neutral
8 experts to the court or arbitrator and shall have input regarding the
9 appointment of a neutral expert.

10 (4) Unless the parties agree on the following matters, the court or
11 arbitrator shall determine:

12 (a) Who shall serve as the neutral expert;

13 (b) Subject to subsection (5) of this section, the scope of the
14 neutral expert's duties;

15 (c) The number and timing of inspections of the property;

16 (d) Coordination of inspection activities with the parties'
17 experts;

18 (e) The neutral expert's access to the work product of the parties'
19 experts;

20 (f) The product to be prepared by the neutral expert;

21 (g) Whether the neutral expert should participate personally in the
22 parties' mediation; and

23 (h) Other matters relevant to the neutral expert's assignment.

24 (5) If the parties fail to agree otherwise, the neutral expert
25 shall not make findings regarding the amount of damages to be awarded
26 or cost of repair. However, the parties may agree that the neutral
27 expert is to make such findings in addition to other findings, or may
28 agree that the neutral expert's findings are to be limited to the
29 amount of damages to be awarded or cost of repair.

30 (6) A party may, by motion to the court or arbitrator, object to
31 the individual appointed to serve as the neutral expert and to
32 determinations regarding the neutral expert's assignment.

33 (7) The neutral expert has no obligation to participate in the
34 repairs recommended by the neutral expert. The claimants have no
35 obligation to accept any low bid submitted as part of the determination
36 of damages. The neutral expert has no liability to the parties for the
37 performance of his or her duties.

1 (8) Except as otherwise agreed by the parties, the parties have a
2 right to review and comment on the neutral expert's report before it is
3 made final.

4 (9) A neutral expert's report or testimony regarding the report is
5 not entitled to any evidentiary presumption in any arbitration or court
6 proceeding. Nothing in this act restricts the admissibility of such a
7 report or testimony, and questions of the admissibility of such a
8 report or testimony shall be determined under the rules of evidence.

9 (10) The court or arbitrator shall determine the significance of
10 the neutral expert's report and testimony with respect to parties
11 joined after the neutral expert's appointment and shall determine
12 whether additional neutral experts should be appointed or other
13 measures should be taken to protect such joined parties from undue
14 prejudice.

15 NEW SECTION. **Sec. 14.** PAYMENT OF FEES OF ARBITRATORS, MEDIATORS,
16 AND NEUTRAL EXPERTS. (1) A party who demands arbitration under section
17 10 of this act is responsible for advancing the fees of any appointed
18 arbitrator and any mediator appointed under section 12 of this act. If
19 an arbitrator has not been demanded, the court shall determine the
20 responsibility for advancing fees for any such mediator. A party who
21 requests the appointment of a neutral expert under section 13 of this
22 act is responsible for advancing the fees of any appointed neutral
23 expert.

24 (2) With respect to a dispute that involves a residential
25 condominium for which a building permit that authorized commencement of
26 construction was issued on or after the effective date of this act:

27 (a) That is referred to arbitration under section 10 of this act,
28 the party who does not prevail in the arbitration is liable for the
29 fees of any arbitrator, mediator, or neutral expert appointed in the
30 arbitration; or

31 (b) That is not referred to arbitration, the party who does not
32 prevail at trial is liable for the fees of any mediator or neutral
33 expert appointed in the trial.

34 (3) With respect to a dispute that involves a residential
35 condominium for which a building permit that authorized commencement of
36 construction was issued before the effective date of this act:

1 (a) If the dispute is referred to arbitration under section 10 of
2 this act, a party who demands arbitration is liable for the fees of any
3 appointed arbitrator and any mediator appointed under section 12 of
4 this act;

5 (b) If the dispute has not been referred to arbitration, the court
6 shall determine liability for the fees of any mediator appointed under
7 section 12 of this act; and

8 (c) Whether or not the dispute is referred to arbitration, a party
9 who requests a neutral expert under section 13 of this act is liable
10 for the fees of any neutral expert appointed.

11 NEW SECTION. **Sec. 15.** SUBCONTRACTORS. Upon the demand of a party
12 to an arbitration conducted pursuant to section 10 of this act, any
13 subcontractor or supplier against whom such party has a legal claim and
14 whose work or performance becomes an issue in the arbitration shall
15 join in and become a party to and be bound by the arbitration.

16 NEW SECTION. **Sec. 16.** OFFERS OF JUDGMENT--COSTS AND FEES. (1)
17 Either party may submit an offer of judgment to the court or arbitrator
18 on or prior to the sixtieth day following completion of mediation under
19 section 12 of this act. The offer of judgment shall specify the amount
20 of damages, not including costs or fees, that the party is willing to
21 pay or receive. The offer shall also indicate the party's willingness,
22 where applicable, to pay costs and fees that may be awarded as provided
23 in this section. There may be more than one offer of judgment
24 submitted so long as each offer is timely made.

25 (2) An offer by the defendant must include a demonstration of
26 ability to pay both damages and costs and fees. If the parties dispute
27 the adequacy of the defendant's demonstration of ability to pay, the
28 court or arbitrator shall determine whether the defendant's
29 demonstration of ability to pay is adequate.

30 (3) If the claimant accepts the defendant's offer of judgment, the
31 claimant is deemed the prevailing party for purposes of this section
32 only and, in addition to recovery of the amount of the offer, is
33 entitled to a costs and fees award, including reasonable attorneys'
34 fees, in an amount to be determined by the court or arbitrator in
35 accordance with applicable statutes and court rules.

1 (4) If a final judgment on damages, not including costs or fees, is
2 not more favorable to the party receiving the offer than is the offer
3 of judgment, then the party making the offer is deemed the prevailing
4 party for purposes of this section only and is entitled to a costs and
5 fees award, including reasonable attorneys' fees. The award shall be
6 for costs and fees, including reasonable attorneys' fees incurred after
7 the date of the offer of judgment and shall be determined by the court
8 or arbitrator in accordance with applicable statutes and court rules.
9 The nonprevailing party shall not be entitled to receive any award of
10 costs and fees, except as may be provided for in section 14 of this
11 act.

12 (5) If the final judgment on damages, not including costs or fees,
13 is more favorable to the party receiving the offer than is the offer of
14 judgment, then the court or arbitrator shall determine which party is
15 the prevailing party and shall determine the amount of the costs and
16 fees award, including reasonable attorneys' fees.

17 (6) Notwithstanding any other provision in this section, the amount
18 of defendant's costs and fees, including reasonable attorneys' fees,
19 payable by the claimant pursuant to this section may not exceed five
20 percent of the assessed value of the residential condominium project as
21 a whole, and such costs and fees shall be allocated among unit owners
22 in proportion to the assessed values of their individual units. If not
23 all units in the project are involved in the dispute, such five percent
24 costs and fees limit shall be calculated on the aggregate assessed
25 value of those units that are involved, together with an allocable
26 portion of the assessed value of the common areas of the project, and
27 such costs and fees shall be allocated among unit owners in proportion
28 to the assessed values of their individual units.

29 (7) This section applies to any damages that could have been
30 awarded for a breach of an express or implied warranty under this
31 chapter, regardless of the legal theories pled.

32 NEW SECTION. **Sec. 17.** APPLICATION OF SECTIONS 10 THROUGH 16 OF
33 THIS ACT. Sections 10 through 16 of this act apply only to disputes in
34 which a complaint is served or filed on or after July 1, 2005.

35 NEW SECTION. **Sec. 18.** Sections 1 through 8 of this act constitute
36 a new chapter in Title 64 RCW.

1 NEW SECTION. **Sec. 19.** Sections 10 through 17 of this act are each
2 added to chapter 64.34 RCW.

3 NEW SECTION. **Sec. 20.** CAPTIONS. Captions used in this act are
4 not any part of the law.

5 NEW SECTION. **Sec. 21.** This act is necessary for the immediate
6 preservation of the public peace, health, or safety, or support of the
7 state government and its existing public institutions, and takes effect
8 July 1, 2005.

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