

FIRST READING **February 29, 2016**

SECOND READING _____

ORDINANCE NO. _____

AN ORDINANCE ADDING A NEW CHAPTER 15.58 TO THE LOVELAND MUNICIPAL CODE TO ENCOURAGE CONSTRUCTION OF CONDOMINIUMS

WHEREAS, the City of Loveland, Colorado (the "City"), is a home rule municipality organized pursuant to Article XX of the Colorado Constitution; and

WHEREAS, by virtue of Article XX of the Colorado Constitution, and as further authorized by state law, including but not limited to, Sections 31-15-401 and 31-23-301, C.R.S., home rule cities have broad authority to exercise police powers to promote and protect health, safety and welfare of the citizenry; and

WHEREAS, adoption, implementation, and enforcement of land use, zoning and building regulations are well-established as matters of purely local concern, subject to regulation by home rule municipalities; and

WHEREAS, the City's Code and comprehensive plan contemplate a diverse housing stock, consisting of a mix of single-family and multi-family developments, and both owned and rented units, designed to attract and serve the needs of all City residents; and

WHEREAS, the need for owner-occupied multi-family housing units (condominiums) has intensified; and

WHEREAS, the City Council ("Council") is aware of the general consensus that the scarcity of condominium projects in Colorado is highly attributable to a climate of increased and uncertain litigation risk due to risk of substantial judgments disproportionate to what is required to redress defects, if any, for alleged construction defects; and

WHEREAS, this uncertainty and inability to plan and allocate for risk has led insurance companies who would otherwise insure condominium projects to stop writing policies for such projects or to price such policies at levels that substantially increase the cost of condominium projects; and

WHEREAS, the Council finds that while the scarcity of new condominium projects is not unique to the City, the City nevertheless experiences some unique impacts because of growth and anticipated growth in the City's population, and the aging of its population, and

WHEREAS, the Council further finds that the lack of housing options negatively impacts the health, safety and welfare of the City and its residents; and

WHEREAS, plaintiffs in construction defect lawsuits have alleged that such defects are

violations of applicable building codes and, if such violations do exist, they are frequently not remedied for many months or years; and

WHEREAS, the Council finds that allegations of violations of the City's building codes and the likelihood that such violations may continue unremedied for many months or years present a material risk to the health and safety of City residents, including the risk that unsafe conditions as a result of construction defects may be exacerbated by long delays in remedying such conditions; and

WHEREAS, the Council further finds that lawsuits brought on account of alleged construction defects in condominium projects may often be brought at the direction of the board of directors of the homeowners' association, without the informed consent of the unit owners, thereby depriving the unit owners of the opportunity to become educated about the advantages and disadvantages of pursuing litigation, to have meaningful input regarding the consideration of such decision, and to vote on such decision; and

WHEREAS, the Council further finds that the use of alternative dispute resolution as a means to resolve construction defect claims, whether by arbitration or mediation, should be encouraged as a standard practice within the City; and

WHEREAS, the Council therefore desires to take reasonable steps within its power as the governing body of a home rule municipality to encourage the development of condominium projects in the City through the adoption of regulations designed to reduce the risk and exposure to builders and developers of such projects, while still protecting the rights of homeowners to pursue legitimate construction defect claims;

WHEREAS, the Council further desires to take reasonable steps within its power as the governing body of a home rule municipality to encourage the prompt and voluntary correction of any construction defects that may constitute violations of the City's building code in order to enhance the health and safety of City residents; and

WHEREAS, the Council further desires to assure that all consumers who purchase condominiums within the City located within a community managed by a homeowners' association have the opportunity to become educated about the advantages and disadvantages of pursuing litigation concerning alleged construction defects, to have meaningful input concerning the decision, and to be able to vote on such decision.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF LOVELAND, COLORADO, ORDAINS:

Section 1. Title 15 of the Loveland Municipal Code, entitled "Buildings & Construction", is hereby amended by adding a new Chapter 15.58, which chapter shall read as follows:

Chapter 15.58

REPAIR OF CONSTRUCTION DEFECTS

Sections:

- 15.58.010. Purposes and Applicability.**
- 15.58.020. Definitions.**
- 15.58.030. Potential Claimants**
- 15.58.040. Potential Respondents**
- 15.58.050. Claimant's Notice to Builder of Construction Defects; Builder's Acknowledgement; Inspection**
- 15.58.060. Builder's Right to Repair**
- 15.58.070. Warranty of Repairs**
- 15.58.080. Subsequently Discovered Defects**
- 15.58.090. Settlement by Payment of a Sum Certain**
- 15.58.100. Effect of Amendment of Alternative Dispute Resolution Provisions.**
- 15.58.110. Informed Consent of Homeowners.**

15.58.010. Purposes and applicability.

A. *Purposes.* The purposes of this Chapter are as follows: encourage the construction of owner-occupied, multi-family developments in the city; reassure homeowners that construction defects will be promptly investigated and addressed by builders; encourage prompt and voluntary correction of construction defects that may constitute violations of the city's building code in order to enhance the health and safety of residents of the city; motivate all parties to resolve disputes involving construction defects quickly to avoid the need for expensive and time consuming litigation; and provide homeowners in communities with homeowners' associations with an enhanced opportunity to participate in the governance of their community by empowering individual owners to give or withhold their informed consent with respect to actions the board of the homeowners' association may desire to pursue regarding construction defects.

B. *Applicability.* The provisions of this Chapter shall apply only to new construction commenced after the effective date hereof.

15.58.020. Definitions.

The following words, terms and phrases, when used in this Chapter, shall have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning:

Builder means any entity or individual, including, but not limited to, a builder, developer, general contractor, contractor, subcontractor, architect, engineer or original seller who performs or furnishes the design, supervision, inspection, construction or observation of any improvement to real property that is intended to be occupied as a dwelling or to provide access or amenities to such an improvement.

Building code means the several technical codes adopted in this Title 15 that govern the design, construction, alteration, addition, maintenance, repair, removal, demolition, location, use, and occupancy of buildings and structures in the city, as the same may be amended or modified.

City means City of Loveland, Colorado.

Common interest community means real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvements of other real estate described in a declaration.

Condominium means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of the separate ownership portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

Construction defect means any alleged defect in the design or construction of an improvement to real property which causes any damages to, or the loss of use of, real or personal property, or personal injury.

Homeowner means any person who owns a unit in a condominium or in a multi-family building in a common interest community, but shall not include any declarant or any person having an interest in a unit solely as security for an obligation.

Homeowners' association means a unit owners' association formed to represent the interest of homeowners owning units in a condominium or in a multi-family building in a common interest community.

15.58.030. Potential claimants.

An original homeowner or a subsequent homeowner or a homeowners' association representing the interests of homeowners may be a claimant by providing notice of a claim of a construction defect, provided the notice requirements of this Chapter are satisfied.

15.58.040. Potential respondents.

Any person or entity within the definition of a "builder" as defined in Section 15.58.010 of this Code is subject to the requirements of this Chapter.

15.58.050. Claimant's notice to builder of construction defects; builder's acknowledgement; inspection.

A. *Claimant's notice.* Upon the discovery of any alleged construction defect, a claimant must provide written notice to the party alleged to have caused or contributed to the construction defect, in the manner prescribed in this Section, indicating that one or more construction defects exist in claimant's residence or, with respect to any homeowners' association, that one or more construction defects exist in any residence or in any common area or facility. The notice must:

1. Provide the claimant's name, address and preferred method of contact;
2. State that the claimant alleges a construction defect pursuant to this Chapter against the builder;

3. Describe the claim in reasonable detail sufficient to determine the nature and location of the alleged construction defect; and
 4. Allow the builder the right to inspect and conduct tests regarding the claimed construction defect within 60 days after the builder acknowledged receipt of the notice, at a mutually agreeable date and time, and with the written consent of the claimant.
 5. Notice by a claimant shall be valid if sent by certified mail to the party's business address, post office box or registered agent, or if the party has personally received the claimant's notice.
- B. *Builder's responsibilities.* After receiving notice of a potential construction defects claim, a builder must do each of the following:
1. *Acknowledge the claim in writing.*
 - a. A builder who receives a notice under this Chapter shall acknowledge receipt of the notice, in writing, within 30 days after notice has been mailed in accordance with Section 15.58.050 A.5. The acknowledgement shall be sent to the claimant and to any attorney the builder knows to be representing the claimant in connection with the notice. If the builder has retained legal counsel, said counsel shall thereafter communicate with the claimant's legal representative, if any.
 - b. If the builder fails to acknowledge receipt of a notice within the time specified, this Chapter shall not apply and the claimant shall be released from the requirements of this Chapter and may proceed with the filing of an action against the builder, unless notice and consent are required by Section 15.58.110 of this Code.
 2. *Maintain an agent for notice.* Maintain an agent for notice with the secretary of state; and
 3. *Provide information to the claimant.* If specifically asked to do so by the claimant and within 30 days of such a request, provide the claimant or claimant's legal representative with:
 - a. Copies of all relevant plans, specifications, grading plans, soils reports and available engineering calculations pertaining to the claimant's residence, common areas and facilities that are the subject of the claim;
 - b. All maintenance and preventative maintenance recommendations pertaining to the claimant's residence, common areas and facilities that are the subject of the claim; and
 - c. Contractual warranty information.
- A. *Charge of copying costs.* A builder responding to a claimant's request for documents may charge reasonable copying costs and may require the copies of the documents to be

made on site.

- B. *Builder's election to inspect property.* In addition to the requirements set forth in this Section, if the builder, with the written consent of the claimant, elects to inspect and conduct tests regarding the claimed construction defect, the builder shall complete the initial inspection and testing, if any, within 60 days after the builder acknowledged receipt of the notice, and at a mutually agreeable date and time. The builder shall bear all costs of inspection and testing, including the cost to repair any damage caused by the inspection and testing. Before entering onto the premises for the inspection, the builder shall supply the claimant with proof of liability insurance coverage. The builder shall, upon request, allow the inspection to be observed and recorded or photographed.
- C. *Builders who fail to comply.* A builder who fails to comply with any of the requirements of this Section within the time specified shall not be entitled to the protection of this Chapter, and the claimant shall be released from the requirements of this Chapter and may proceed with the filing of an action, unless notice and consent are required by Section 15.58.110 of this Code.
- D. *Statute of limitations and repose.* If a notice is sent to the builder in accordance with this Section within the time prescribed for the filing of an action under any applicable statute of limitations or repose, then the statute of limitations or repose is tolled until 60 days after the completion of the notice process described in this Section. If the builder elects to repair pursuant to Section 15.58.060 of this Code, then the statute of limitations or repose is tolled until 60 days after the completion of repairs.

15.58.060. Builder's right to repair.

- A. *Elect to repair.* Within 30 days of the initial inspection or testing, or within 14 days of builder's acknowledgment of the notice of claim, whichever is later, the builder may elect to repair the construction defect and shall provide a notice to repair to the claimant. If the builder, with the written consent of the claimant, elects to repair the construction defect, it has the right to do so and the claimant may not, directly or indirectly, impair, impede or prohibit the builder from making repairs. Any notice to repair shall offer to compensate the claimant for all applicable expenses, if any, incurred by the claimant within the time frame set for repair, such as, without limitation, expenses for lodging if the repair requires the claimant to vacate his/her residence. Any notice of repair shall be accompanied by a detailed, step by step explanation of the particular construction defect being repaired and setting forth a reasonable completion date for the repair work. The notice shall also include the contact information for any contractors the builder intends to employ for the repairs.
- B. *Schedule of repair work.* Claimant shall promptly cooperate with builder to schedule repair work by builder. Builder shall make a good faith effort to develop a mutually agreeable schedule with claimant for the repair work.
- C. *Written objection to repair.* Within 10 business days after receipt of the builder's notice to repair, a claimant may deliver to the builder a written objection to the proposed repair if the claimant believes in good faith that the proposed repairs will not remedy the alleged

construction defect. The builder may elect to modify the proposal, in whole or in part, in accordance with the claimant's objection, and proceed with the modified scope of work, or may proceed with the scope of work set forth in the original proposal, subject to the written consent of the claimant.

D. *Builder's failure to comply.* If the builder fails to send a notice to repair or otherwise strictly comply with this Chapter within the specified time frames, or if the builder does not complete the repairs within the time set forth in the notice to repair, the claimant shall be released from the requirements of this Chapter and may proceed with the filing of an action against the builder, unless notice and consent are required by Section 15.58.110 of this Code. Notwithstanding the foregoing, if the builder notifies the claimant in writing at least five days before the stated completion date that the repair work will not be completed by the completion date, the builder shall be entitled to one reasonable extension of the completion date, not to exceed 60 days.

E. *Completion of repairs.* The builder shall notify the claimant when repairs have been completed. The claimant shall have 10 business days following the completion date to have the premises inspected to verify that the repairs are complete and satisfactorily resolved the alleged construction defects. A claimant who believes in good faith that the repairs made do not resolve the construction defects may proceed with the filing of an action, unless notice and consent are required by Section 15.58.110 of this Code.

F. *Claimant's failure to comply.* If the Builder elects to repair the construction defects, with the written consent of the claimant, -it has the right to do so and the Claimant may not, directly or indirectly, impair, impede or prohibit the Builder from making repairs. If the claimant, after providing written consent, directly or indirectly, impairs, impedes, or prohibits the builder from making repairs, the builder may enforce the claimant's obligations under this Chapter by seeking relief through the court system.

15.58.070. Warranty of repairs.

The repair work performed by the builder shall be warranted against material defects in design or construction for a period of two years, which warranty shall be in addition to any express warranties on the original work.

15.58.080. Subsequently discovered defects.

Any alleged construction defect discovered after repairs have been completed shall be subject to the same requirements of this Chapter if the builder did not have notice or an opportunity to repair the particular construction defect.

15.58.090. Settlement by payment of a sum certain.

Whether or not a builder elects to repair the alleged construction defect, a builder may offer to settle the claim by payment of a sum certain to the claimant. Whether or not a builder offers to settle a claim by payment of a sum certain, the claimant may make an offer to the builder to settle the claim by payment of a sum certain. An offer to settle by payment of a sum certain may also cover alleged construction defects that may be discovered after completion of the settlement. Neither a builder, nor a claimant is obligated to make or accept settlement by

payment of a sum certain. If an offer of settlement by payment of a sum certain is made, it shall be accepted by written notice of acceptance given to the party making the offer no later than 15 days after receipt of the offer or such longer period, if any, stated in the offer as the time for acceptance. If the offer is not accepted within the 15-day period (or such longer period, if any, stated in the offer as the time for acceptance), it shall be deemed to have been rejected. If an offer to settle is accepted, the monetary settlement shall be paid in accordance with the offer and such payment shall be in full settlement and release of all claims with respect to or arising out of the alleged construction defect. Execution of such offer and acceptance shall be acknowledged before a notary public if required by the terms of the offer. Upon such settlement, either party may record in the public records maintained by the clerk and recorder of the county in which the property is located a copy of the settlement offer and acceptance or a notice of the alleged construction defect and the settlement thereof, which shall provide notice to persons that thereafter acquire any interest in the property that all claims with respect to or arising out of the alleged construction defect have been settled. If the builder fails to make the payment in accordance with the offer, the claimant may proceed with the filing of an action against the builder for the claim arising out of the alleged construction defect, unless notice and consent are required by Section 15.58.110 of this Code.

15.58.100. Effect of amendment of alternative dispute resolution provisions.

If a provision found in the declaration, bylaws or rules and regulations of a common interest community requires that construction defect claims be submitted to mediation or arbitration, that requirement constitutes a commitment on the part of the unit owners and the association upon which a developer, contractor, architect, builder or other person involved in the construction of the community is entitled to rely. Consequently, a subsequent amendment to the declaration, bylaws or rules and regulations that removes or amends the mediation or arbitration requirement shall not be effective with regard to any construction defect claim that is based on an alleged act or omission that predates that amendment.

15.58.110. Informed consent of homeowners.

- A. Homeowners are entitled to be kept informed by boards of homeowners' associations of the board's consideration of actions regarding construction defects and to have meaningful input and a right to make a considered judgment and give or withhold informed consent. Accordingly, if a board of a homeowners' association considers or intends to institute an action asserting one or more construction defects, the board must do each of the following:
1. At least 60 days before filing any action under Section 13-20-803.5, C.R.S., the claimant must mail or deliver written notice to each homeowner at the homeowner's last known address.
 2. The notice must be signed by a person other than, and not employed or otherwise affiliated with, the attorney or law firm that represents or will represent the association in the construction defects claim.
 3. The notice required by this Section must contain the following information:
 - a. The nature of the action and the relief sought.

- b. The amount of expenses and fees the board anticipates will be incurred, directly or indirectly, in prosecuting the action, including attorney fees, consultant fees, expert witness fees and court costs, whether incurred by the association directly or for which it may be liable if it is not the prevailing party or if it does not proceed with the action.
 - c. The estimated cost of repairing the construction defect, or if the construction defect is not repaired, the estimated reduction in value of the unit.
 - d. The estimated impact on the marketability of units that are not the subject of the action, including any impact on the ability of the owners to refinance their property during and after the action.
 - e. The manner in which the association proposes to fund the cost of the action, including any proposed special assessments or the use of any revenues.
 - f. The anticipated duration of the action and the likelihood of success.
 - g. Whether the builder has offered to make any repairs and, if so, whether the builder has made repairs.
 - h. The steps taken by the builder in accordance with this Chapter to address the alleged construction defect, including any acknowledgement, inspection, election to repair or repairs.
- B. The homeowners' association may not commence the action unless the board obtains the written consent of homeowners holding at least a majority of the total voting rights in the association after giving the notice required by this Section. Homeowners may vote either directly or through a written ballot signed by the homeowner. Such consent must be obtained within 60 days after such notice is provided, otherwise the homeowners shall be deemed to have declined to provide their informed consent to such action.

Section 2. Severability. If any provision of this Ordinance, or the application of such provision to any person or circumstance, is for any reason held to be invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable. The City Council hereby declares that it would have passed this Ordinance and each provision thereof, even though any one of the provisions might be declared unconstitutional or invalid. As used in this Section, the term "*provision*" means and includes any part, division, subdivision, section, subsection, sentence, clause or phrase; the term "*application*" means and includes an application of an ordinance or any part thereof, whether considered or construed alone or together with another ordinance or ordinances, or part thereof, of the City.

Section 3. Codification Amendments. The codifier of the City's Municipal Code is hereby authorized to make such numerical and formatting changes as may be necessary to incorporate the provisions of Section 1 of this Ordinance within the Loveland Municipal Code.

Section 4. Effective Date. Except as otherwise expressly provided herein, the provisions of this Ordinance shall become effective thirty (30) days after publication following

final passage.

Section 5. Safety Clause. The City Council hereby finds, determines, and declares that this Ordinance is promulgated under the general police power of the City of Loveland, that it is promulgated for the health, safety, and welfare of the public, and that this Ordinance is necessary for the preservation of health and safety and for the protection of public convenience and welfare. The City Council further determines that the Ordinance bears a rational relation to the proper legislative object sought to be obtained.

Section 6. That this Ordinance shall be in full force and effect upon final adoption, as provided in City Charter Section 11-5(d).

ADOPTED this ____ day of March, 2016.

Cecil A. Gutierrez, Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:



City Attorney