

First Regular Session
Seventy-first General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 17-0388.01 Duane Gall x4335

SENATE BILL 17-156

SENATE SPONSORSHIP

Hill,

HOUSE SPONSORSHIP

Wist and Saine,

Senate Committees

Business, Labor, & Technology

House Committees

A BILL FOR AN ACT

101 CONCERNING PREREQUISITES TO THE AUTHORITY OF A UNIT OWNERS'
102 ASSOCIATION TO PURSUE RESOLUTION OF DISPUTES INVOLVING
103 CONSTRUCTION DEFECTS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov/>.)

The bill states that when the governing documents of a common interest community require mediation or arbitration of a construction defect claim and the requirement is later amended or removed, mediation or arbitration is still required for a construction defect claim. These provisions are in **section 3** of the bill. Section 3 also specifies that the

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

mediation or arbitration must take place in the judicial district in which the community is located and that the arbitrator must:

- ! Be a neutral third party;
- ! Make certain disclosures before being selected; and
- ! Be selected as specified in the common interest community's governing documents or, if not so specified, in accordance with applicable state or federal laws governing mediation or arbitration.

Section 1 of the bill specifies that, in the arbitration of a construction defect action, the arbitrator is required to follow the substantive law of Colorado with regard to any applicable claim or defense and any remedy granted, and a failure to do so is grounds for a district court to vacate or refuse to confirm the arbitrator's award.

Section 4 of the bill requires that, before a construction defect claim is filed on behalf of the association:

- ! The parties must submit the matter to mediation before a neutral third party; and
- ! The board must give advance notice to all unit owners, together with a disclosure of the projected costs, duration, and financial impact of the construction defect claim, and must obtain the written consent of the owners of units to which at least a majority of the votes in the association are allocated.

Section 5 of the bill adds to the disclosures required prior to the purchase and sale of property in a common interest community a notice that the community's governing documents may require binding arbitration of certain disputes.

1 *Be it enacted by the General Assembly of the State of Colorado:*
2 **SECTION 1.** In Colorado Revised Statutes, 13-22-223, **amend**
3 (1.5) as follows:
4 **13-22-223. Vacating award.** (1.5) Notwithstanding ~~the~~
5 ~~provisions of~~ subsection (1) of this section, the fact that the relief was
6 such that it could not or would not be granted by a court of law or equity
7 is not grounds for vacating or refusing to confirm the award; EXCEPT
8 THAT, IN THE ARBITRATION OF AN ACTION AS DEFINED IN SECTION
9 13-20-802.5 (1), THE ARBITRATOR SHALL FOLLOW THE SUBSTANTIVE LAW
10 OF COLORADO WITH REGARD TO ANY APPLICABLE CLAIM OR DEFENSE AND

1 ANY REMEDY GRANTED, AND IF THE REMEDY IS SUBSTANTIALLY AFFECTED
2 BY THE ARBITRATOR'S FAILURE TO FOLLOW THE SUBSTANTIVE LAW OF
3 COLORADO, THE COURT SHALL VACATE OR REFUSE TO CONFIRM THE
4 AWARD OR REMAND THE CASE TO THE ARBITRATOR WITH DIRECTIONS, ON
5 THAT BASIS.

6 **SECTION 2.** In Colorado Revised Statutes, 38-33.3-103, **add**
7 (9.4), (9.7), and (16.3) as follows:

8 **38-33.3-103. Definitions.** As used in the declaration and bylaws
9 of an association, unless specifically provided otherwise or unless the
10 context otherwise requires, and in this article:

11 (9.4) "CONSTRUCTION DEFECT CLAIM" MEANS A CIVIL ACTION OR
12 AN ARBITRATION PROCEEDING FOR DAMAGES, INDEMNITY, OR
13 CONTRIBUTION BROUGHT AGAINST A CONSTRUCTION PROFESSIONAL TO
14 ASSERT A CLAIM, COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM
15 FOR DAMAGES OR LOSS TO, OR THE LOSS OF USE OF, REAL OR PERSONAL
16 PROPERTY OR PERSONAL INJURY CAUSED BY A DEFECT IN THE DESIGN OR
17 CONSTRUCTION OF AN IMPROVEMENT TO REAL PROPERTY, REGARDLESS OF
18 THE THEORY OF LIABILITY.

19 (9.7) "CONSTRUCTION PROFESSIONAL" HAS THE MEANING SET
20 FORTH IN SECTION 13-20-802.5 (4).

21 (16.3) "GOVERNING DOCUMENTS" MEANS:

22 (a) THE DECLARATION, ARTICLES OF INCORPORATION, BYLAWS,
23 RULES, REGULATIONS, POLICIES, AND PROCEDURES OF A COMMON
24 INTEREST COMMUNITY; AND

25 (b) IF A COMMON INTEREST COMMUNITY DOES NOT EXIST OR IF
26 ANOTHER FORM OF ORGANIZATION CONTROLS A BUILDING OR COMMON
27 ELEMENT, ANY PARTY WALL AGREEMENT, RECIPROCAL EASEMENT

1 AGREEMENT, OR OTHER AGREEMENT, HOWEVER DENOMINATED, THAT
2 PURPORTS TO ALLOCATE RIGHTS OR DUTIES REGARDING THE
3 CONSTRUCTION OR MAINTENANCE OF RESIDENTIAL REAL PROPERTY
4 AMONG PERSONS WHO OWN OR OCCUPY THE PROPERTY.

5 **SECTION 3.** In Colorado Revised Statutes, 38-33.3-124, **amend**
6 (3); and **add** (1)(a)(III) as follows:

7 **38-33.3-124. Legislative declaration - alternative dispute**
8 **resolution encouraged - policy statement required.** (1) (a) (III) THE
9 GENERAL ASSEMBLY FURTHER FINDS AND DECLARES THAT WHEN THE
10 GOVERNING DOCUMENTS CONTAIN A REQUIREMENT THAT CONSTRUCTION
11 DEFECT CLAIMS BE SUBMITTED TO MEDIATION OR ARBITRATION, THAT
12 REQUIREMENT REPRESENTS A COMMITMENT ON THE PART OF THE OWNERS
13 AND THE ASSOCIATION ON WHICH DEVELOPMENT PARTIES ARE ENTITLED
14 TO RELY. THEREFORE, A LATER AMENDMENT TO THE GOVERNING
15 DOCUMENTS THAT REMOVES OR AMENDS THE MEDIATION OR ARBITRATION
16 REQUIREMENT SHOULD NOT APPLY TO CLAIMS THAT WERE ORIGINALLY
17 DESCRIBED IN THE MEDIATION OR ARBITRATION REQUIREMENTS OF THE
18 GOVERNING DOCUMENTS.

19 (3) (a) The ~~declaration, bylaws, or rules of the association~~
20 GOVERNING DOCUMENTS may specify situations in which disputes ~~shall~~
21 ~~be resolved by binding arbitration under~~ MUST BE SUBMITTED TO A
22 MUTUALLY AGREED-UPON MEDIATOR OR, IN THE CASE OF AN ARBITRATION
23 SERVICE PROVIDER, AN ARBITRATION SERVICE PROVIDER QUALIFIED
24 PURSUANT TO the uniform arbitration act, part 2 of article 22 of title 13,
25 ~~C.R.S.~~, OR BY ANOTHER MEANS OF ALTERNATIVE DISPUTE RESOLUTION
26 UNDER THE FEDERAL ARBITRATION ACT, 9 U.S.C. SEC. 1 ET SEQ., or by
27 another means of alternative dispute resolution under the "Dispute

1 Resolution Act", part 3 of article 22 of title 13. ~~C.R.S.~~ IF THOSE
2 SITUATIONS INCLUDE A CONSTRUCTION DEFECT CLAIM AGAINST A
3 CONSTRUCTION PROFESSIONAL, A SUBSEQUENT AMENDMENT TO THE
4 GOVERNING DOCUMENTS THAT REMOVES OR AMENDS THE MEDIATION
5 REQUIREMENT IS NOT EFFECTIVE WITH REGARD TO A CONSTRUCTION
6 DEFECT CLAIM.

7 (b) (I) A CONSTRUCTION DEFECT CLAIM AGAINST A CONSTRUCTION
8 PROFESSIONAL MUST BE RESOLVED BY A QUALIFIED MEDIATOR IF THE
9 DISPUTE IS MEDIATED OR, IN THE CASE OF AN ARBITRATION SERVICE
10 PROVIDER, AN ARBITRATION SERVICE PROVIDER QUALIFIED PURSUANT TO
11 THE UNIFORM ARBITRATION ACT, PART 2 OF ARTICLE 22 OF TITLE 13. THE
12 PARTIES SHALL COOPERATE TO SELECT A MUTUALLY AGREED-UPON
13 MEDIATOR OR, IN THE CASE OF AN ARBITRATION SERVICE PROVIDER, AN
14 ARBITRATION SERVICE PROVIDER QUALIFIED PURSUANT TO THE UNIFORM
15 ARBITRATION ACT, PART 2 OF ARTICLE 22 OF TITLE 13, WITH A PREFERENCE
16 GIVEN TO THE MEDIATOR OR ARBITRATION SERVICE PROVIDER SPECIFIED
17 IN THE DECLARATION IF THAT PROVIDER IS QUALIFIED PURSUANT TO THE
18 UNIFORM ARBITRATION ACT, PART 2 OF ARTICLE 22 OF TITLE 13. IF NO
19 ARBITRATION SERVICE PROVIDER IS SPECIFIED IN THE GOVERNING
20 DOCUMENTS OR IF THE PARTIES ARE UNABLE TO AGREE UPON A MEDIATION
21 OR ARBITRATION SERVICE PROVIDER, THEN, WITH RESPECT TO MEDIATION,
22 THE PARTIES MAY PETITION THE DISTRICT COURT FOR THE JUDICIAL
23 DISTRICT IN WHICH THE COMMON INTEREST COMMUNITY IS LOCATED TO
24 APPOINT A MEDIATOR AND, WITH RESPECT TO ARBITRATION, THE
25 ARBITRATION SERVICE PROVIDER SHALL BE SELECTED IN ACCORDANCE
26 WITH THE UNIFORM ARBITRATION ACT, PART 2 OF ARTICLE 22 OF TITLE 13.

27 (II) NOTWITHSTANDING ANY PROVISION OF THE GOVERNING

1 DOCUMENTS TO THE CONTRARY, A MEDIATOR OR ARBITRATOR SELECTED
2 TO PRESIDE OVER THE CONSTRUCTION DEFECT CLAIM MUST BE A NEUTRAL
3 THIRD PARTY AS PROVIDED IN SECTION 13-22-211 (2). BEFORE BEING
4 SELECTED TO PRESIDE OVER THE CONSTRUCTION DEFECT CLAIM, A
5 PROPOSED MEDIATOR OR ARBITRATOR SHALL MAKE THE DISCLOSURES
6 REQUIRED BY SECTION 13-22-212.

7 (III) NOTWITHSTANDING ANY PROVISION OF THE GOVERNING
8 DOCUMENTS TO THE CONTRARY, UNLESS THE PARTIES OTHERWISE AGREE,
9 THE MEDIATION OR ARBITRATION MUST BE HELD AT A MUTUALLY
10 AGREEABLE LOCATION WITHIN THE JUDICIAL DISTRICT IN WHICH THE
11 PROPERTY IS LOCATED.

12 **SECTION 4.** In Colorado Revised Statutes, 38-33.3-303.5,
13 **amend** (1) and (2); and **add** (1.5) as follows:

14 **38-33.3-303.5. Commencement of construction defect action**
15 **by executive board - notice to unit owners - disclosure of projected**
16 **costs - consent.** (1) (a) ~~In the event~~ BEFORE the executive board,
17 pursuant to section 38-33.3-302 (1)(d), institutes ~~an action asserting~~
18 ~~defects in the construction of five or more units, the provisions of this~~
19 ~~section shall apply.~~ For purposes of this section, "action" shall have the
20 ~~same meaning as set forth in section 13-20-803 (1), C.R.S.~~ ANY A LEGAL
21 ACTION OR ALTERNATIVE DISPUTE RESOLUTION PROCEEDING THAT
22 ASSERTS A CONSTRUCTION DEFECT CLAIM,

23 ~~(b)~~ the executive board shall ~~substantially~~ comply with ~~the~~
24 ~~provisions of~~ this section.

25 (b) THIS SECTION APPLIES ONLY TO A COMMON INTEREST
26 COMMUNITY.

27 (1.5) AS A CONDITION PRECEDENT TO ANY CONSTRUCTION DEFECT

1 CLAIM, THE PARTIES MUST SUBMIT THE MATTER TO MEDIATION BEFORE A
2 NEUTRAL THIRD PARTY MUTUALLY SELECTED BY THE PARTIES TO THE
3 CONSTRUCTION DEFECT CLAIM. IF THE PARTIES ARE NOT ABLE TO AGREE
4 UPON A MEDIATOR, THEY MAY USE AN ALTERNATIVE SELECTION METHOD
5 SPECIFIED IN THE GOVERNING DOCUMENTS OR, IF NO ALTERNATIVE
6 SELECTION METHOD IS SPECIFIED, MAY PETITION THE DISTRICT COURT IN
7 THE JURISDICTION IN WHICH THE PROPERTY IS LOCATED TO APPOINT A
8 MEDIATOR FOR THE CONSTRUCTION DEFECT CLAIM.

9 (2) (a) ~~Prior to the service of the summons and complaint on any~~
10 ~~defendant with respect to an action governed by this section~~ WITHIN THE
11 TIME PERIOD SPECIFIED IN SUBSECTION (2)(c) OR (2)(d) OF THIS SECTION,
12 the executive board shall mail or deliver written notice of the
13 ~~commencement or anticipated commencement of such~~ THE action to each
14 unit owner at the OWNER'S last-known address described in the
15 association's records.

16 (b) WITH RESPECT TO A CONSTRUCTION DEFECT CLAIM, the notice
17 required by ~~paragraph (a) of this subsection (2) shall state a general~~
18 ~~description of the following~~ SUBSECTION (2)(a) OF THIS SECTION MUST
19 CONTAIN, AT A MINIMUM:

20 (I) A DESCRIPTION OF the nature of the ~~action~~ CONSTRUCTION
21 DEFECT CLAIM and the relief sought; and

22 (II) A GOOD-FAITH ESTIMATE OF THE BENEFITS AND RISKS
23 INVOLVED, INCLUDING the expenses and fees that the executive board
24 anticipates will be incurred BY THE ASSOCIATION in prosecuting the ~~action~~
25 CONSTRUCTION DEFECT CLAIM, IN SUBSTANTIALLY THE FOLLOWING FORM:

26 1. IF THE ASSOCIATION DOES NOT FILE A CLAIM BY
27 _____ [DATE], THE CLAIM CANNOT BE FILED AT ALL

1 UNDER THE APPLICABLE STATUTE OF LIMITATION, STATUTE
2 OF REPOSE, OR BOTH.

3 2. IF THE ASSOCIATION PREVAILS, THE EXECUTIVE
4 BOARD EXPECTS THAT THE ASSOCIATION MAY RECOVER
5 FROM THE DEFENDANT(S) AN AMOUNT BETWEEN \$ _____
6 AND \$ _____.

7 3. IF THE EXECUTIVE BOARD INTENDS TO ENTER INTO
8 A CONTINGENCY FEE ARRANGEMENT WITH THE ATTORNEYS
9 REPRESENTING THE ASSOCIATION, THE ATTORNEYS WILL BE
10 PAID A CONTINGENCY FEE EQUAL TO _____ PERCENT OF
11 THE (NET) (GROSS) RECOVERY. THE EXECUTIVE BOARD
12 ESTIMATES THAT, IN ADDITION TO ATTORNEY FEES, THE
13 ASSOCIATION WILL INCUR COSTS TOTALING APPROXIMATELY
14 \$ _____ FOR CONSULTANTS, EXPERT WITNESSES,
15 DEPOSITIONS, FILING FEES, AND OTHER EXPENSES OF
16 LITIGATION.

17 4. IF THE ASSOCIATION MAKES A CLAIM AND DOES
18 NOT WIN, THE EXECUTIVE BOARD EXPECTS THAT THE
19 ASSOCIATION WILL HAVE TO PAY FOR ITS OWN ATTORNEY
20 FEES, CONSULTANT FEES, EXPERT WITNESS FEES, AND OTHER
21 COSTS (THE AMOUNT LISTED IN PARAGRAPH 3 ABOVE) PLUS,
22 UNDER CERTAIN CIRCUMSTANCES, THE DEFENDANT'S
23 CONSULTANT FEES, EXPERT WITNESS FEES, AND COURT
24 COSTS.

25 5. IF THE ASSOCIATION DOES NOT RECOVER FROM
26 THE DEFENDANT(S), IT MAY HAVE TO PAY TO REPAIR OR
27 REPLACE THE CLAIMED DEFECTIVE CONSTRUCTION WORK. IN

1 ADDITION, UNDER CERTAIN CIRCUMSTANCES, THE
2 ASSOCIATION MAY HAVE TO PAY THE DEFENDANTS'
3 ATTORNEY FEES.

4 6. UNTIL THE CLAIMED DEFECTIVE CONSTRUCTION
5 WORK IS REPAIRED OR REPLACED, OR UNTIL THE
6 CONSTRUCTION DEFECT CLAIM IS CONCLUDED, THE MARKET
7 VALUE OF THE AFFECTED UNITS WILL BE ADVERSELY
8 AFFECTED.

9 7. UNTIL THE CLAIMED DEFECTIVE CONSTRUCTION
10 WORK IS REPAIRED OR REPLACED, OR UNTIL THE CLAIM IS
11 CONCLUDED, OWNERS OF THE AFFECTED UNITS WILL HAVE
12 DIFFICULTY REFINANCING AND PROSPECTIVE BUYERS OF THE
13 AFFECTED UNITS WILL HAVE DIFFICULTY OBTAINING
14 FINANCING. IN ADDITION, CERTAIN FEDERAL UNDERWRITING
15 STANDARDS OR REGULATIONS PREVENT REFINANCING OR
16 OBTAINING A NEW LOAN IN PROJECTS WHERE A
17 CONSTRUCTION DEFECT IS CLAIMED. IN ADDITION, CERTAIN
18 LENDERS AS A MATTER OF POLICY WILL NOT REFINANCE OR
19 PROVIDE A NEW LOAN IN PROJECTS WHERE A CONSTRUCTION
20 DEFECT IS CLAIMED.

21 (c) WITH RESPECT TO A CONSTRUCTION DEFECT CLAIM:

22 (I) THE NOTICE REQUIRED UNDER SUBSECTION (2)(a) OF THIS
23 SECTION MUST BE SENT AT LEAST SIXTY DAYS BEFORE SERVICE OF THE
24 NOTICE OF CLAIM UNDER SECTION 13-20-803.5; AND

25 (II) THE CONSTRUCTION DEFECT CLAIM IS NOT AUTHORIZED
26 UNLESS THE EXECUTIVE BOARD OBTAINS THE SIGNED, WRITTEN CONSENT
27 FROM OWNERS, OTHER THAN THE DECLARANT, OF UNITS TO WHICH AT

1 LEAST A MAJORITY OF THE TOTAL VOTES, EXCLUDING VOTES ALLOCATED
2 TO UNITS OWNED BY THE DECLARANT, IN THE ASSOCIATION ARE
3 ALLOCATED; EXCEPT THAT, IF THE GOVERNING DOCUMENTS SPECIFY A
4 GREATER MARGIN THAN A SIMPLE MAJORITY FOR APPROVAL OF THE
5 ACTION, THAT MARGIN APPLIES. THE SIGNED, WRITTEN CONSENT
6 ACKNOWLEDGES THAT THE OWNER HAS RECEIVED THE NOTICE REQUIRED
7 UNDER THIS SUBSECTION (2) AND APPROVES OF THE EXECUTIVE BOARD'S
8 PROPOSED ACTION.

9 **SECTION 5.** In Colorado Revised Statutes, 38-35.7-102, **amend**
10 (1) as follows:

11 **38-35.7-102. Disclosure - common interest community -**
12 **obligation to pay assessments - requirement for architectural**
13 **approval.** (1) On and after January 1, ~~2007~~ 2018, every contract for the
14 purchase and sale of residential real property in a common interest
15 community shall contain a disclosure statement in bold-faced type that is
16 clearly legible and in substantially the following form:

17 **THE PROPERTY IS LOCATED WITHIN A**
18 **COMMON INTEREST COMMUNITY AND IS**
19 **SUBJECT TO THE DECLARATION FOR SUCH THE**
20 **COMMUNITY. THE OWNER OF THE PROPERTY**
21 **WILL BE REQUIRED TO BE A MEMBER OF THE**
22 **OWNER'S ASSOCIATION FOR THE COMMUNITY**
23 **AND WILL BE SUBJECT TO THE BYLAWS AND**
24 **RULES AND REGULATIONS OF THE**
25 **ASSOCIATION. THE DECLARATION, BYLAWS,**
26 **AND RULES AND REGULATIONS WILL IMPOSE**
27 **FINANCIAL OBLIGATIONS UPON THE OWNER**

1 OF THE PROPERTY, INCLUDING AN
2 OBLIGATION TO PAY ASSESSMENTS OF THE
3 ASSOCIATION. IF THE OWNER DOES NOT PAY
4 THESE ASSESSMENTS, THE ASSOCIATION
5 COULD PLACE A LIEN ON THE PROPERTY AND
6 POSSIBLY SELL IT TO PAY THE DEBT. THE
7 DECLARATION, BYLAWS, AND RULES AND
8 REGULATIONS OF THE COMMUNITY MAY
9 PROHIBIT THE OWNER FROM MAKING
10 CHANGES TO THE PROPERTY WITHOUT AN
11 ARCHITECTURAL REVIEW BY THE
12 ASSOCIATION (OR A COMMITTEE OF THE
13 ASSOCIATION) AND THE APPROVAL OF THE
14 ASSOCIATION. THE DECLARATION FOR THE
15 COMMUNITY OR THE BYLAWS OR RULES AND
16 REGULATIONS OF THE ASSOCIATION MAY REQUIRE THAT
17 CERTAIN DISPUTES BE RESOLVED BY MANDATORY,
18 BINDING ARBITRATION. PURCHASERS OF
19 PROPERTY WITHIN THE COMMON INTEREST
20 COMMUNITY SHOULD INVESTIGATE THE
21 FINANCIAL OBLIGATIONS OF MEMBERS OF
22 THE ASSOCIATION. PURCHASERS SHOULD
23 CAREFULLY READ THE DECLARATION FOR
24 THE COMMUNITY AND THE BYLAWS AND
25 RULES AND REGULATIONS OF THE
26 ASSOCIATION.

27 SECTION 6. Effective date - applicability. (1) Except as

1 otherwise provided in subsection (2) of this section, this act takes effect
2 upon passage.

3 (2) Section 5 of this act takes effect January 1, 2018, and applies
4 to contracts executed on or after that date.

5 **SECTION 7. Safety clause.** The general assembly hereby finds,
6 determines, and declares that this act is necessary for the immediate
7 preservation of the public peace, health, and safety.