

Condominium Conversions

The Legal Perspective

January 20, 2007

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Condominium Conversions

Res Ipsa Loquitor?

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*Quantum Meriut, Unjust
Enrichment in Perpetuity*

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Condominium Conversions

From the \$240 Per Hour
Billable Rate Perspective

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Legal Issues

- Declarant Liability
- Fiduciary Duty
- Recent Legislation
 - Notice Statute – RCW 64.50
 - Construction Defect Dispute – RCW 64.55
- Discuss “old” v. “new” Acts

Declarant Liability For Conversion Condominiums

- Statutory Warranties
- Duty to Disclose
- Public Offering Statement
- Breach of Duty During Declarant Control

What are the legal bases for the Association's claim?

Answer: The Condo Act, and in particular the implied warranties of quality (RCW 64.34.445), provides the Association with very strong rights. Under the implied warranties of quality, the Declarant provides two types of warranties.

A. Suitability for Ordinary Use

Your Declarant warranted that “a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type.”

Note: This warranty applies to the entire complex, whether the Declarant performed rehabilitation work or not.

What are the legal bases for the Association's claim?

B. Warranties of Quality

The Declarant also warranted to the Association and the unit owners that any improvements made or contracted for by the Declarant would be:

1. Free from defective materials;
2. Constructed in accordance with sound engineering standards;
3. Constructed in accordance with sound construction standards;
4. Constructed in a workmanlike manner; and
5. Constructed in compliance with all applicable laws.

Note: This warranty only applies to work done by or contracted for by the Declarant.

Duty to Disclose

- Common law duty separate from the Washington Condominium Act.
- Duty to disclose material facts not readily observable to the buyer.

Public Offering Statement Liability

- **RCW 64.34.410**
- **Public offering statement — General provisions.**
- (5) A declarant shall promptly amend the public offering statement to reflect any material change in the information required by this section.

Public Offering Statement Liability

RCW 64.34.405

Public offering statement — Requirements — Liability.

(3) Any declarant or dealer who offers a unit for the person's own account to a purchaser shall deliver a public offering statement in the manner prescribed in RCW [64.34.420](#)(1). Any agent, attorney, or other person assisting the declarant or dealer in preparing the public offering statement may rely upon information provided by the declarant or dealer without independent investigation. The agent, attorney, or other person shall not be liable for any material misrepresentation in or omissions of material facts from the public offering statement unless the person had actual knowledge of the misrepresentation or omission at the time the public offering statement was prepared. **The declarant or dealer shall be liable for any misrepresentation contained in the public offering statement or for any omission of material fact therefrom if the declarant or dealer had actual knowledge of the misrepresentation or omission or, in the exercise of reasonable care, should have known of the misrepresentation or omission.**

POS Requirements

RCW 64.34.415

Public offering statement — Conversion condominiums

(1) The public offering statement of a conversion condominium shall contain, in addition to the information required by RCW [64.34.410](#):

(a) Either a copy of a report prepared by an independent, licensed architect or engineer, or a statement by the declarant based on such report, which report or statement describes, to the extent reasonably ascertainable, the present condition of **all structural components and mechanical and electrical installations material to the use and enjoyment of the condominium**;

(b) A copy of the inspection and repair report prepared by an independent, licensed architect, engineer, or qualified building inspector in accordance with the requirements of RCW [64.55.090](#);

(c) A statement by the declarant of the expected useful life of each item reported on in (a) of this subsection or a statement that no representations are made in that regard; and

(d) A list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations. Unless the purchaser waives in writing the curing of specific violations, the extent to which the declarant will cure such violations prior to the closing of the sale of a unit in the condominium shall be included.

(2) This section applies only to condominiums containing units that may be occupied for residential use.

Duties During Declarant Control

- RCW 64.34.308
- Board of directors and officers.
- (1) Except as provided in the declaration, the bylaws, subsection (2) of this section, or other provisions of this chapter, the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors are required to exercise: (a) **If appointed by the declarant, the care required of fiduciaries of the unit owners**; or (b) if elected by the unit owners, ordinary and reasonable care.

Fiduciary Duties

- **General Financial Responsibility**
Audit. RCW 64.34.312(2).

- **RCW 64.34.328**
Upkeep of condominium.

(1) Except to the extent provided by the declaration, subsection (2) of this section, or RCW [64.34.352](#)(7), the association is responsible for **maintenance, repair, and replacement of the common elements, including the limited common elements, and each unit owner is responsible for maintenance, repair, and replacement of the owner's unit.** Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through the owner's unit and limited common elements reasonably necessary for those purposes. If damage is inflicted on the common elements, or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, shall be liable for the repair thereof.

New Legislation

- Recent legislation (RCW 64.50 and 64.55) apply to conversion condominiums.
- RCW 64.50 (notice of claim) applies if the notice required by RCW 64.50.050 was provided in the public offering statement.

RCW 64.50 Notice

- **RCW 64.50.050**
- **Construction professional right to offer to cure defects — Notice to homeowner.**
- CHAPTER [64.50](#) RCW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST THE SELLER OR BUILDER OF YOUR HOME. FORTY-FIVE DAYS BEFORE YOU FILE YOUR LAWSUIT, YOU MUST DELIVER TO THE SELLER OR BUILDER A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE YOUR SELLER OR BUILDER THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE BUILDER OR SELLER. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT.

Two Main Components of RCW 64.55

- Building Envelope Design and Inspections
- Dispute Resolution

Building Enclosure Design and Inspections

- Purpose:
 - Reduce water penetration problems by improving building envelope design details
 - Fix construction problems early, and before units are sold, by inspecting during the course of construction
- Inspection requirements apply to “multi-unit residential buildings”

Applicability – Multiunit Residential Building

- “A building containing more than two attached dwelling units”
 - Not just condominiums
 - Applies to conversions
 - Opt in and opt out provisions for developers
- Applies to rehabilitative reconstruction
 - Reconstruction/repair work that exceeds 5% of the assessed value of the building

Rehabilitative Construction

- Building Enclosure Design Documents. RCW 64.55.020.
- Qualified Building Inspector. RCW 64.55.030.
- Course of Construction Inspections and Window Testing. RCW 64.55.040.
- Certificate from Building Inspector. RCW 64.55.050.

Building Enclosure

- Beginning August 1, 2005, building permit applications must include building enclosure design documents
- Building enclosure: the parts of the building that separate the outside environment from the inside.
 - Roofs
 - Windows, walls and doors
 - Decks and balcony support columns
 - Other penetrations through exterior walls that weatherproof the building

Design Documents

- Building enclosure design documents: plans, specifications and details for water proofing the building
 - Flashing
 - Roof and eaves
 - Water-resistive membrane
 - Details around openings
- Must be stamped by architect or engineer to ensure quality control
- Building departments must ensure that no permit is issued unless plans are on file

Inspections

- Building enclosure inspections are required during initial construction and rehabilitative construction after 8/1/05
- Must be performed by a qualified building inspector
 - Substantial and verifiable training and experience in building enclosure design and construction
 - Independent
- Scope of Inspection
 - Window water penetration testing
 - Periodic review of building enclosure to make sure that construction complies with design documents

Inspection Certification

- Inspector must file document with building department
- As-built construction substantially complies with design documents
- No certificate of occupancy without certification
- Newly constructed condo units cannot be sold without inspection
- Compliance must be noted in the public offering statement

Inspection of Conversion Condos

- Units can be sold as condo units if:
 - There is intrusive inspection of building envelope
 - Inspector evaluates the condition and adverse impact on performance of the building enclosure
 - Inspector provides report, including recommendations for building enclosure repairs
 - All recommended repairs are actually made before units are sold
 - Inspection and repair report are included in the POS

Inspection Details

Whether intrusive investigations (e.g., removal/replacement of siding) is undertaken, the qualified building enclosure inspector must evaluate the exterior performance of the building.

(b) The inspection evaluates, to the extent reasonably ascertainable and in the professional judgment of the inspector, the present condition of the building enclosure including whether such condition has adversely affected or will adversely affect the performance of the building enclosure to waterproof, weatherproof, or otherwise protect the building or its components from water or moisture intrusion. “Adversely affect” has the same meaning as provided in RCW 64.34.445(7).

Repairs

The qualified building enclosure inspector also must make recommendations for repairs to the building, which are deemed necessary under two conditions:

- [to] Repair a design or construction defect in the building enclosure that results in the failure of the building enclosure to perform its intended function and allows unintended water penetration not caused by flooding; and
- [to] Repair damage caused by such a defect that has an adverse effect

Report (provided in POS)

The repair report must identify:

- The extent of the inspection performed . . .;
- The information obtained as a result of that inspection; and
- The manner in which any repairs required by this section were performed, the scope of those repairs and the names of the persons performing the repairs.

Statutes

- **RCW 64.34.073**
- **Application of chapter 64.55 RCW.**
- Chapter 64.55 RCW includes requirements for: The inspection of the building enclosures of multiunit residential buildings, as defined in RCW 64.55.010, which includes condominiums **and conversion condominiums**; for provision of inspection and repair reports; and for the resolution of implied or express warranty disputes under chapter 64.34 RCW.

Statute of Limitations

■ RCW 64.34.452(2)(b)

- Jan 2002 - First Unit Sold
- Jul 2003 - Re-siding Complete
- Aug 2004 - Last Unit Sold/Transition
- June 2007 - *File lawsuit?*

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Conversion Issues: Pre-Sale

- **Notice To Existing Tenants**
 - RCW 64.34.440
- **City or County Requirements**
 - RCW 64.34.440(6)
- **Compliance with RCW 64.55.090**
 - New inspection and disclosure requirements

Notice to Existing Tenants

RCW 64.34.440

- Notice and POS no later than 90 days prior to date they must vacate.
 - If tenant doesn't buy, the notice acts as a notice to vacate under RCW 59.18;
 - There are separate duties imposed by RCW 59.12 and 59.18;
- Tenant has 60 days from receipt of notice to purchase;
- If tenant does not buy, then:
 - Declarant can sell to third party for same or better price;
 - During the first 180 days after the deadline expires for the tenant to buy, the Declarant can sell to a third party for a lower price, only if:
 - they mail notice to the tenant of the offer, and
 - the tenant fails to accept within 10 days.
- Declarant may have to pay relocation assistance to qualified tenants that do not buy. RCW 64.34.440(6)(e).

City or County Requirements

RCW 64.34.440(6)

- **The City or County may require that:**
 - The public offering statement contain a copy of the written inspection report prepared by the appropriate city or county department;
 - Report shall list any violations of code or government regulation
 - All violations must be repaired;
 - City or County must certify repairs following re-inspection;

City or County Requirements Continued

- For repairs made as required by RCW 64.34.440(6) the Declarant:
 - warrants that repairs will be free of defects due to workmanship or materials for a period of one year.
- During the one-year warranty the declarant must:
 - Maintain an account with 10% of the repair costs;
 - The account can only be used to satisfy the one-year warranty obligation.
 - Notify the city, county and association of the account and any distributions.