

# RCW 64.55

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## Benefits, Detriments, and Pitfalls of the Recent Condominium Legislation

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Presented by:

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# Background

## ■ Background and Legislative Climate

- ❑ Rising Insurance Premiums
- ❑ Increase in condominium construction defect claims
- ❑ Previous legislation

## ■ Goals

- ❑ Encourage high-quality condominium industry
  - ❑ Continued opportunities for home ownership, and affordable housing
  - ❑ Improve quality of construction
  - ❑ Promote early resolution of construction defect disputes
  - ❑ Reduce transactional costs
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# EFFECTIVE DATE: August 1, 2005

- Signed into law as EHB 1848.
  - Codified as RCW 64.55.
    - Majority of new law is not in the Condo Act.
  - Amends portions of the Condo Act.
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# TWO MAIN COMPONENTS

- **COURSE OF CONSTRUCTION**
    - (EHB 1848 §§ 2-10, RCW 65.55.010-.090)
  
  - **DISPUTE RESOLUTION**
    - (EHB 1848 §§ 11-17; RCW 65.55.100-160)
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# COURSE OF CONSTRUCTION

RCW 64.55.010-.090

- **Course of Construction Sections apply to:**
    - ❑ Any **multiunit residential buildings** for which the permit for construction or **rehabilitative construction** was issued on or after effective date of statute; and
    - ❑ Conversion condominiums for which a public offering statement was delivered prior to August 1, 2005.
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# Building Enclosure Design and Inspection

- **Purpose:**

- Reduce water penetration problems by improving building envelope design details, and
- Fix construction problems early, and before units are sold, by inspecting during the course of construction

- **Inspection requirements apply to “multiunit residential buildings”.**

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# Multiunit Residential Building

RCW 64.55.010(6)

- “A building containing more than two attached dwelling units”.
    - Applies to conversions.
    - Applies to apartment buildings unless developer opts out.
    - Developer can opt in as well.
  - Applies to rehabilitative reconstruction.
    - Reconstruction/repair work on the building enclosure that exceeds 5% of the assessed value of the building.
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# Developer Opt Out Provisions

RW 64.55.010(10)

“Sale Prohibition Covenant”

- Inspections apply to all new multiunit residential construction unless developer covenants not to sell units as condo units for 5 years.
  - Allows construction of apartment buildings without inspection.
  - Can convert apartments to condo's after 5 year period if certain conditions are met (Section 10, RCW 64.55.090).
  - Additional requirements apply if apartment is converted during the 5 year period (Section 10(1)(d), RCW 64.55.090(1)(d)).
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# Building Enclosure

RCW 64.55.010(2)

- 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; and
    - Other penetrations through exterior walls that weatherproof the building.
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# Design Documents

RCW 64.55.020

- Building enclosure design documents are 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 cannot issue a permit unless building enclosure design documents are on file.
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# Inspections

RCW 64.55.030-.060

- Building enclosure inspections are required during initial construction and certain types of rehabilitative construction.
  - Must be performed by a qualified building inspector
    - Substantial and verifiable training and experience in building enclosure design and construction
    - Independent. Cannot use in-house architect, engineer, or QA or QC personnel
  - Scope of Inspection:
    - Periodic review of building enclosure;
    - Window water penetration testing of a representative number of windows; and
    - Periodic review of building enclosure to make sure that construction complies with design documents.
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# Repairs By Association

## Practical Issues.

- If repairs are subject to new law, it is necessary to factor in costs for:
    - Building envelope design documents
    - Inspections
    - Window testing
  - Factor in additional time for permits
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# Inspection Certification

RCW 64.55.060

- Inspector must file a signed letter certifying that:
    - Building was inspected during the course of construction;
    - As-built construction substantially complies with design documents.
  - No certificate of occupancy without certification.
  - Newly constructed condo units cannot be sold without inspection.
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# No Sale of Unit Absent Compliance

RCW 64.55.090

- Condominium Units can be sold only if:
    - You comply with RCW 64.55.010-080
  
  - If you fail to comply or you are doing a conversion, you must:
    - Conduct an 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; and
    - Inspection and report are included in the POS.
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# Inspector, Architect and Engineer Liability

RCW 64.55.070

Nothing in this Act is intended to:

- Create a private right of action against any inspector, architect or engineer based upon compliance or noncompliance with its provisions
  - Create any independent basis for liability against an inspector, architect or engineer
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# Public Offering Statement (POS) Disclosure Requirements

## ■ **New Condominiums**

- POS must include:
  - A statement that the building enclosure has been designed and inspected as required by the act, and, if required by RCW 64.55.090, repaired in compliance with .090.
- What about the common law duties to disclose and liability for POS misrepresentation?

## ■ **Conversion Condominiums**

- POS must include the inspection and repair reports required by RCW 64.55.090.
  - Failure to deliver the inspection and repair report constitutes a failure to deliver a POS.
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# POS Liability

## ■ **Failure to Provide POS**

- Damages are the greater of:
  - 10 % of sales price if willful failure, or 3% for any other failure (RCW 64.34.420(3)); or
  - Actual damages.

## ■ **Misrepresentation or Omissions in POS**

- Liability for misrepresentations or omissions in POS regarding material facts about which the declarant knew or in the exercise of reasonable care should have know. RCW 64.34.405(3).

## ■ **Longer Statute of Limitation!**

- The 4 year limitation period in the WCA only applies to the statutory warranties. Arguably, the three year discovery rule applies to failure to provide the POS or failure to disclose information required in the POS.
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*"Would everyone check to see they have an attorney? I seem to have ended up with two."*

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# DISPUTE RESOLUTION

RCW 64.55.100 - 160

- **The dispute resolution sections apply to:**
    - Any action that alleges breach of implied or express warranties under chapter 64.34 RCW, EXCEPT
  
  - **RCW 64.55.100-160 shall not apply to:**
    - Actions filed or served prior to August 1, 2005;
    - Actions for which a notice of was served pursuant to 64.50 prior to August 1, 2005; or
    - Actions regarding a building that is not a multiunit residential building (i.e. single family homes).
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# Dispute Resolution

RCW 64.55.0100-160

- Applicability - Condo Act Warranties
  - Arbitration
  - Case Schedule
  - Mediation
  - Neutral Expert
  - Payment Provisions
  - Offers of Judgment
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# Applicability

RCW 64.55.050(2)

- Applies to cases relating to Condo Act Warranties
  - Applies even if complaint does not specifically plead breach of Condo Act warranties
  - What about cases beyond 4-year statute?
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# Deadline to Demand Arbitration

RCW 64.55.100(1)

- Only the declarant, association, or a party unit owner can demand arbitration.
- The Arbitration Demand must be filed no earlier than **30** and no more than **90 days** after filing or service of the complaint, whichever is later.
  - Insurance implications.

**See** unpublished decision: MacLean Townhomes, LLC, v. American States Insurance Company, Westlaw Cite # 1176886.

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# Arbitrators: Number & Qualifications of

RCW 64.55.100(2) and (3)

- **Claims < \$1,000,000 = one arbitrator**
  - **Claims > \$1,000,000 = three arbitrators**
  - **Arbitrators must be:**
    - Current or former attorney with
    - Experience as attorney, judge, arbitrator, or mediator in construction defect disputes involving Washington law.
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# Arbitration

RCW 64.55.100(4)-(7)

## Deadline for Arbitration

- 14 months from later of filing or service of lawsuit, unless otherwise agreed.

## Upon Conclusion of the Hearing...

- File decision and award with clerk of superior court; and
- Within **20 days** after filing of the decision, any aggrieved party may file a written notice of appeal.

## Trial de Novo – RCW 64.55.100

- If the appealing party does not improve its position, the appealing party **shall pay** the non-appealing adverse party's costs and fees, including attorneys fees.
    - Arbitration costs cannot be shifted in certain circumstances.
    - See RCW 64.55.140(2).
  - If the appealing party does improve their position then the court determines costs and fees.
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# Payment Provisions

RCW 64.55.140

- If permitted before August 1, 2005
    - Party demanding arbitration **pays** for arbitration and mediation
    - Party requesting neutral expert **pays**
    - What is meaning of “the building permit that authorizes commence of construction of a building...” See RCW 64.55.140.
  
  - If permitted on or after August 1, 2005
    - Party demanding arbitration **advances** fees for arbitration and arbitrator and mediator
    - Party requesting neutral expert **advances** fees
    - Fees and costs **advanced** are subject to shift based on prevailing party rule in Offers of Judgment.
  
  - What happens on conversions where permit for original construction was issued before August 1, 2005?
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# SUBCONTRACTORS

RCW 64.55.150

- If Arbitration has been demanded under RCW 64.55, the Declarant can join any subcontractor or supplier against whom the Declarant has a claim.
  - ***HOWEVER***, joinder **shall not** be allowed if it would require the arbitration hearing to be continued beyond the 14 month deadline, unless the existing parties agree otherwise.
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# Case Schedule Plan

RCW 64.55.110

**Not less than 60 days after the later of filing or service of the complaint, parties shall confer and create a proposed case schedule plan that includes the following deadlines:**

- **Selection of mediator**
  - **Commencement of mandatory mediation**
  - **Selection of arbitrator**
  - **Joinder of additional parties**
  - **Completion of investigation**
  - **Disclosure of proposed repair plan**
  - **Disclosure of estimate costs of repair**
  - **Meeting of parties and experts to confer in accordance with section 13**
  - **Disclosure of each party's settlement demand**
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# Mandatory Mediation

RCW 64.55.120

- The parties to an action subject to this act **shall** engage in mediation.
  - The mediation **shall** commence **within seven months** of the later of the filing or service of the compliant.
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# Mandatory Mediation

RCW 64.55.120

- **Pre-mediation conference required.**
    - Parties and experts must make good faith attempt to narrow scope of disputed issues.
  
  - **Prior to the mediation, the parties shall file and serve a declaration that...**
    - A decision maker with authority to settle will be available for the duration of the mediation; and
    - The decision maker has been provided with and has reviewed the mediation materials provided by all parties
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# Neutral Expert

RCW 64.55.130

- If, after the pre-mediation conference there are still disputed issues, a party may file a motion requesting the appointment of a neutral expert to address all or any of the disputed issues.
  - The motion shall be filed no later than **60 days** after the first day of the meeting.
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# Mandatory Mediation

RCW 64.55.120

- **Termination of Mandatory Mediation.**
    - Upon written notice by any party.
    - Termination date triggers 60 day window to make offer of judgment under RCW 64.55.160.
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# Neutral Expert

RCW 64.55.130

## ■ Qualifications:

- ❑ Licensed architect or engineer, or any other person with substantial relevant experience.
  - ❑ The expert shall not have been employed as an expert by a party to the present action **within three years** before the commencement of the present action (unless the parties agree otherwise).
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# Offers of Judgment

RCW 64.55.160

- Must be served on adverse party within **60 days** of termination of the mandatory mediation
  - Only primary parties, subcontractors are excluded.
  - Declarants' offers must include evidence of ability to pay judgment, costs and fees.
  - Offer should not include costs and fees.
  - **21 day** deadline to accept.
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# Offers of Judgment – Fee Shifting

RCW 64.55.160

- If association accepts, it is prevailing party
    - Court **shall** award fees and costs to association.
  
  - If association rejects and does no better, declarant is prevailing party
    - Court **must** award fees and cost to declarant
    - Subject to 5% cap.
    - Court cannot award any fees or costs to Association
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# Offer of Judgment

Before RCW 64.55

- \$3,000,001 offer of judgment by declarant
- \$3,000,000 verdict. Association is prevailing party.

\$3,000,000

900,000

\$3,900,000

1,300,000

\$2,600,000

Fees awarded as prevailing party

Contingent Fee

Net to Association

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# Impact of Offer of Judgment

Pre-64.55

- \$3,000,001 offer of judgment by declarant
- \$3,000,000 verdict. Declarant is prevailing party

\$3,000,000

(600,000)

Fees & Cost to Declarant

\$2,400,000

(800,000)

Contingent Fee

\$1,600,000

Net to Association

Miss by a dollar, miss by a million.

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# Other Sections of Interest

RCW 64.55

- **64.44.060**     **Certification- Certificate of Occupancy**
  
  - **64.55.080**     **No Evidentiary Presumption- Admissibility**
  
  - **64.55.140**     **Payment of Arbitrators, Mediators and Neutral Experts**
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# Q&A

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*Thank you for attending!*