

O-2014-21  
AN ORDINANCE  
ADDING A NEW CHAPTER 26 TO ARTICLE 14 OF THE LAKEWOOD MUNICIPAL  
CODE CONCERNING REPAIR OF CONSTRUCTION DEFECTS

WHEREAS, the City of Lakewood is a home rule municipal corporation organized pursuant to Article 20 of the Colorado Constitution and the Charter of the City of Lakewood; and

WHEREAS, by virtue of Article 20 of the Colorado Constitution, and as further authorized by state law, including but not limited to, Sections 31-15-401 and 31-23-301 of the Colorado Revised Statutes, the City of Lakewood has broad authority to exercise its police powers to promote and protect the health, safety and welfare of the citizenry; and

WHEREAS, land use, planning and general business regulation are well established as matters of purely local concern, and therefore subject to regulation by home rule cities; and

WHEREAS, the City's zoning ordinance and Comprehensive Plan both contemplate a diverse housing stock, consisting of a mix of single-family and multifamily developments, and both owned and rented units, designed to serve the needs of students, families, empty nesters and seniors; and

WHEREAS, the advent of light rail service via the W Rail Line has intensified the need for owner-occupied units, particularly in transit-oriented zones around light rail stations; and

WHEREAS, despite a genuine demand for such housing options, statistics show that almost no owner-occupied multi-family developments, or condominiums, are being developed in and around Lakewood; and

WHEREAS, the general consensus is that the paucity of condominiums available for sale in Lakewood is the result of a litigation climate that puts builders and developers at risk of substantial judgments, often including punitive damages, for alleged construction defects; and

WHEREAS, that risk of exposure to large damage awards has led insurance companies who would normally insure development projects to stop writing policies for owner-occupied multi-family projects; and

WHEREAS, the City Council finds that the health, safety and welfare of Lakewood residents is being negatively impacted by the lack of housing options; and

WHEREAS, the City Council further finds that while the scarcity of new condominium projects is not unique to the City of Lakewood, the City nevertheless experiences some unique impacts because of its proximity to the light rail line and the graying of its population, among other factors; and

WHEREAS, the City Council therefore desires to take reasonable steps within its power as a home rule city to encourage the development of owner-occupied multi-family residential projects through the adoption of regulations designed to reduce the risk and exposure to builders and developers of such projects, while still protecting home-owners from legitimate construction defect claims.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Lakewood:

SECTION 1. The foregoing recitals are incorporated into and made part of this Ordinance.

SECTION 2. Title 14 of the Lakewood Municipal Code is hereby amended by the addition of a new Chapter 14.26, to read in full as follows:

**Chapter 14.26**  
**REPAIR OF CONSTRUCTION DEFECTS**

**14.26.010 Purpose**

The purposes of this Ordinance are to:

- (a) encourage the construction of owner-occupied multi-family developments in Lakewood.
- (b) facilitate the implementation of Lakewood's Comprehensive Plan and Zoning Ordinance, both of which contemplate owner-occupied multi-family developments in transit-oriented areas and throughout the City.
- (c) reassure homeowners that most, if not all, construction defects will be promptly investigated and repaired by builders.
- (d) motivate all parties to resolve disputes involving construction defects quickly and without the need for expensive and time-consuming litigation.

(e) 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.

#### **14.26.020 Definitions**

**Builder** means any entity or individual, including but not limited to a builder, developer, general contractor, contractor, 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.

**Construction Defect** means any instance in which a structure or portion thereof does not conform in all material respects to the applicable section(s) of the Building Code, or does not conform to the manufacturer's specifications if those specifications are more strict than the applicable provisions of the Building Code.

**Homeowner** means any person who owns a single-family residence or a unit in a condominium or planned community, but shall not include any declarant or any person having an interest in a unit solely as security for an obligation. As used in this Chapter, Declarant shall have the meaning set forth in C.R.S. § 38-33.3-103(12).

#### **14.26.030 Potential Claimants**

Original buyers or subsequent buyers of a detached or attached single-family dwelling or a unit in a multi-family building, or the governing homeowners association may send the notice of Construction Defect, provided the notice is sent within the applicable time period.

#### **14.26.040 Potential Respondents**

Any person or entity within the definition of a "Builder" as defined in Section 14.26.020 of this Ordinance is subject to the requirements of this Ordinance.

#### **14.26.050 Repair of Construction Defects**

A. Claimant's Notice. Upon the discovery of any alleged Construction Defect, a claimant must provide written notice via certified mail or personal delivery to the party alleged to have caused or contributed to the defect, in the manner prescribed in this Section, of the claimant's claim that one or more Construction Defects exists in his/her residence or, with respect to any homeowners association, that one or more Construction Defects exists in any residence or in any common areas or facilities.

1. The notice must:

- a. Provide the claimant's name, address and preferred method of contact;
- b. State that the claimant alleges a Construction Defect pursuant to this Chapter against the Builder; and
- c. Describe the claim in reasonable detail sufficient to determine the nature and location of the alleged Construction Defects.

2. A Claimant who fails to comply with any of the foregoing requirements within the time specified, including, without limitation, the requirement to describe the claim in reasonable detail sufficient to determine the nature and location of the alleged violation, shall not be entitled to the benefits of this Chapter and such failure shall be a complete defense to any action, including a demand for arbitration, filed by the Claimant.

B. Builder's Responsibilities. After receiving notice of a potential Construction Defects claim, a Builder must do each of the following:

1. Acknowledge Claim in Writing.

a. A Builder who receives a notice under this Chapter shall acknowledge receipt of the notice, in writing, within 14 days after receipt. The notice 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.

2. Maintain an agent for notice with the Secretary of State; and

3. If specifically asked to do so by the claimant and within 30 days of such a request, provide the claimant or his/her legal representative with:

a. copies of all relevant plans, specifications, grading plans, soils reports and available engineering calculations pertaining to the claimant's residence;

b. all maintenance and preventative maintenance recommendations pertaining to the claimant's residence; and

c. limited contractual warranty information.

4. A Builder may charge reasonable copying costs or may require the copies of the foregoing documents to be made onsite.

5. Builder's Election to Inspect Property. In addition to the requirements set forth in this Section, if the Builder elects to inspect the claimed Construction Defect, the Builder shall complete the initial inspection and testing, if any, within 14 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 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 adequate liability insurance coverage. The

Builder shall, upon request, allow the inspection to be observed and recorded or photographed. Nothing that occurs during a Builder's inspection may be used or introduced as evidence to support a defense of spoliation of evidence by any potential party in subsequent litigation.

6. A Builder who fails to comply with any of the foregoing requirements within the time specified is not entitled to the protection of this Chapter, and the homeowner is released from the requirements of this Chapter and may proceed with the filing of an action.

#### **14.26.060 Builder's Offer to Repair**

A. Within thirty (30) days of the initial inspection or testing, the Builder may offer to repair the Construction Defect. If the Builder offers to repair the Construction defects, 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 offer to repair shall offer to compensate the claimant for all applicable damages within the timeframe set for repair. Any offer shall be accompanied by a detailed, step-by-step explanation of the particular violation being repaired and setting forth a reasonable completion date for the repair work. The offer shall also include the contact information for any contractors the Builder intends to employ for the repairs.

B. Claimant shall promptly cooperate with Builder to schedule repair work by Builder.

C. Offer to Mediate. The Builder may, but is not required to, include an offer to mediate the dispute in the offer to repair.

D. Builder's Failure to Comply. If the Builder fails to make an offer 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 offer 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. Notwithstanding the foregoing, if the Builder notifies the claimant in writing at least 5 days before the stated completion date that the repair work will not be completed by the completion date, the Builder shall be entitled to a reasonable extension of the completion date, not to exceed ten days.

E. Completion of repairs. The Builder shall notify the claimant when repairs have been completed. The claimant shall have ten days following the completion date to have the premises inspected to verify completion of the repairs.

#### **14.26.070 Warranty of Repairs**

The repair work performed by the Builder shall be warranted against material defects in design or construction for a period of 2 years, which warranty shall be in addition to any express warranties on the original work.

#### **14.26.080 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 defect.

#### **14.26.090 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.

#### **14.26.100 Informed Consent of Homeowners**

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 an association considers or intends to institute an action asserting one or more Construction Defects, the board must do each of the following:

- A. At least sixty (60) days before notice in 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.
- B. 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.
- C. The notice required by this section must contain the following information:
  - i. The nature of the action and the relief sought;
  - ii. The amount of expenses and fees the board anticipates will be incurred, directly or indirectly, in prosecuting the action. Attorney's 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;

- iii. The estimated impact on the value of the units that are the subject of the action, both during the action and after its resolution;
- iv. 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;
- v. 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; and
- vi. The anticipated duration of the action and the likelihood of success.
- vii. Whether the Builder has offered to make any repairs and, if so, whether the Builder has made repairs.

D. The 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. Such consent must be obtained directly, and not as a result of proxy voting. Such consent must be obtained within 30 days after such notice is provided, otherwise the owners shall be deemed to have declined to provide their informed consent to such action.

SECTION 3. Severability. If any provision of this Ordinance should be found by a court of competent jurisdiction to be invalid, such invalidity shall not affect the remaining portions or applications of this Ordinance that can be given effect without the invalid portion, provided that such remaining portions or application of this Ordinance are not determined by the court to be inoperable.

I hereby attest and certify that the within and foregoing ordinance was introduced and read on first reading at a regular meeting of the Lakewood City Council on the 22<sup>nd</sup> day of September, 2014; published by title in the Denver Post and in full on the City of Lakewood's website, [www.lakewood.org](http://www.lakewood.org), on the 25<sup>th</sup> day of September, 2014; set for public hearing on the 13<sup>th</sup> day of October, 2014, read, finally passed and adopted by the City Council on the \_\_\_\_\_ day of October, 2014 and, signed and approved by the Mayor on the \_\_\_\_\_ day of October, 2014.

Bob Murphy,