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## MINNESOTA LEGISLATURE REVISES MINNESOTA COMMON INTEREST OWNERSHIP ACT

In recent years, very few condominium projects have been developed in Minnesota despite strong demand from potential condominium homeowners. Many developers attribute their reluctance to build condominiums to litigation risk and difficulty obtaining insurance and financing for condominium developments at a reasonable cost.

During the last two sessions, developers and contractors have requested the Minnesota legislature to amend the Minnesota Common Interest Ownership Act (MCIOA) to minimize litigation risk and to promote condominium development. Homeowners associations and property management companies opposed the amendments, noting that adverse changes could hinder recovery for valid construction defect claims. This year, the developers and contractors were successful, but they didn't get everything they wanted. It is too soon to determine whether the revisions will spur the kind of development experienced 10 years ago, but developers are encouraged. The key changes are summarized below.

### MCIOA NOW INCLUDES BROAD DEFINITIONS

The Minnesota legislature added broad definitions of "Construction Defect Claim" and "Development Party." This change will make it difficult for claimants to get around new protections in the statute by creative pleading.

- "Construction Defect Claim" means a civil action or an arbitration proceeding based on any legal theory for damages, indemnity, or contribution brought against a Development Party to assert a claim, for damages or loss to, or the loss of use of, real or personal property or personal injury caused by a defect in the design or construction of an improvement to real property that is part of a common interest community.
- "Development Party" means an architect, contractor, construction manager, subcontractor, developer, declarant, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, coordination, or observation of the construction of any improvement to real property that is part of a common interest community, or any of the person's affiliates, officers, directors, shareholders, members, or employees.

### HOMEOWNERS MUST RECEIVE WRITTEN NOTICE OF CLAIMS, AND VOTE TO APPROVE LITIGATION BEFORE FILING SUIT

Before a homeowners association can commence litigation, the association must provide each unit owner with written notice of any proposed claim. The notices must include (1) the nature of the construction defect claim to be alleged; (2) the relief sought; and (3) the manner in which the association proposes to fund the construction defect claim.

After sending these notices, the association must obtain the approval of the majority of eligible unit owner votes. The homeowners association can obtain the votes either at an annual meeting or a special meeting. In addition, proxy votes are allowed. Initially, the proposed legislation required that any suit could only commence with 2/3 of the eligible unit owner votes, and that proxy votes would be disallowed. The final version of the statute, however, did not incorporate these two provisions. If a majority does not vote in favor of pursuing the claims, the association may not commence litigation.

### MEDIATION IS NOW A CONDITION PRECEDENT TO LITIGATION

Before commencing litigation for any Construct Defect Claim, the parties must attempt to mediate the claim before a neutral third party. The statute of limitations is also tolled for the later of (a) 5 business days after mediation is complete; or (b) 180 days. The parties do not have to mediate if the parties have already attempted to resolve the dispute pursuant to an informal home warranty process described in Minn. Stat. § 327A.051.

### HOMEOWNERS ASSOCIATION MUST CREATE AND FOLLOW A DETAILED MAINTENANCE PLAN

Homeowners associations must now prepare and approve a written maintenance plan and maintenance schedule for all common elements. The association must provide all individual unit homeowners with a copy of the maintenance plan and must follow the plan. If the common interest community was created before August 1, 2017, it need not prepare a maintenance plan until January 1, 2019. If the association fails to comply with the maintenance plan, and that failure causes damage, the development parties cannot be held liable. This is a significant change to the association's duties. However, the revised statute also requires the declarant (i.e., the developer) to prepare an initial plan and budget that fully funds the required maintenance.

### ATTORNEY'S FEES AND PUNITIVE DAMAGES ARE STILL RECOVERABLE

Proponents of the changes to MCIOA attempted to eliminate the power to award attorney's fees and punitive damages to prevailing parties. However, that proposed language was not incorporated into the final version of the bill. Accordingly, the prevailing party in any construction defect litigation under Minn. Stat. § 515B is still eligible to receive an award of attorney's fees, and, in some circumstances, punitive damages. Most defendants' attorney's fees are covered by their insurance carriers anyway.

### EXCEPT FOR MAINTENANCE PLAN REQUIREMENTS, REVISIONS APPLY ONLY TO CONDOS DEVELOPED AFTER AUGUST 1, 2017

The changes to MCIOA become effective August 1, 2017, and apply to common interest communities created on or after that date. However, all common interest communities, regardless of when they were formed, must still prepare a maintenance plan, as required under Minn. Stat. § 515B.3-107(b)), starting January 1, 2019.

It remains unclear what impact the new revisions will have on condominium development. It should be easier for developers and contractors to approach insurers and lenders in order to obtain favorable financing and/or rates for developing condo projects. On the other hand, the statute still retains significant protections for homeowners and property managers and should afford them opportunities to seek redress for real and significant construction defects.

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