ball janik LLP

101 SW Main Street, Suite 1100
Portland, Oregon 97204

balljanik.com

t 503.228.2525
f 503.295.1058

April 30, 2019

Adele J. Ridenour
Admitted in Idaho, Oregon, Utah, and Washington
503.944.6062
aridenour@balljanik.com

House Committee on Rules
Oregon House of Representatives
900 Court St. NE
Salem, Oregon 97301

Re: Oregon H.B. 3432 (2019)

Dear Members of the House Committee on Rules:

Thank you for the opportunity to comment on H.B. 3432. For the record, my name is Adele J. Ridenour, and I am a partner with Ball Janik, LLP, an Oregon law firm founded in 1982, with offices in Portland, Oregon and Orlando, Florida. Ball Janik specializes in a variety of fields of law, including land use, real estate, insurance recovery on behalf of policy holders, commercial litigation, and construction law. Although my practice primarily involves representing property owners in construction defect disputes, I along with others at Ball Janik, also represent developers and contractors in numerous matters, including payment dispute/lien claims as well as negotiating and drafting construction contracts for various projects throughout Oregon and Florida.

I have reviewed H.B. 3432 in its current form and have several concerns. I have organized my concerns based on the separate functions which I believe the bill seeks to achieve, which are to: (a) shorten the statute of repose for negligent construction claims for condominiums and townhomes that go through a vague and still to-be-determined special inspection process, (b) require a majority vote of the membership of condominium and townhome associations before the board may proceed forward with a construction defect lawsuit; and (c) amend the statutory notice of defect process for condominiums and townhome associations.

A. Reducing the Statute of Repose

As currently drafted, H.B. 3432 seeks to shorten the statute of repose for negligent construction claims involving a condominium or townhome project from 10 to 6 years, so long as the condominium or townhome goes through a "to-be-determined" and virtually undefined "special inspection" process. My understanding is that the purpose of the bill is to ease the burden on developers and contractors with respect to their insurance premiums and lending requirements for these projects, so that more first-time homebuyer/entry level housing may be built. This in turn is intended to alleviate Oregon's lack of affordable housing. Setting aside my sincere doubts that shortening the statute of repose will suddenly make building these projects more affordable, the bill

could have unintended consequences which could harm developers and contractors.

In Oregon, a condominium or townhome association which finds itself suffering from construction defects may have several available claims against the original developer and/or contractor that participated in building the project. An example of the typical claims brought by an association are breach of contract/breach of warranty, negligent construction, and breach of fiduciary duties on the part of the developer/declarant for failing to properly manage the association pre-turnover and/or adequately finance and set reserves. By reducing the statute of repose for negligent construction claims from 10 to 6 years, developers and contractors will still face liability for breach of contract/warranty claims, and potentially breach of fiduciary duty claims, for the full 10 years.[1] Insurance carriers on behalf of developers and contractors often argue such claims are not covered by a typical commercial general liability (CGL) policy, either because a breach of contract/warranty is not an "accident" as defined under their policy, and/or because a breach of fiduciary duty requires a showing of gross negligence-conduct insurers argue is not covered under a typical CGL policy. These are just two examples of how carriers argue such claims are not covered, however, there are many more examples I could give you on this front.[2] Thus, by reducing the statute of repose for negligent construction claims from 10 to 6 years, the legislature risks leaving developers and contractors exposed to multi-millions in liability with potentially no available insurance to help resolve such claims.

In addition to the above, the alleged "special inspection process" seems to be left intentionally vague. There are virtually no reassurances that the to-be-determined special inspections process will make construction of condominiums and townhomes safer and better. Moreover, the bill states that the special inspections process will be conducted by a design professional (i.e. engineer or architect) but fails to require that such design professional be properly insured to complete such work (and design professionals, unlike contractors in Oregon, are not required to carry liability coverage in order to be licensed). I believe this will be a critical step in preserving a proper inspection process were this bill to proceed forward through the Oregon legislature.

Finally, the bill suggests that it will apply to any negligent construction claim, including a claim for negligent repairs. However, the as of yet and to-be-

---

[1] Breach of contract claims are subject to a 6-year statute of limitation under ORS 12.080(3). Recent case law from the Oregon Supreme Court indicates this claim is subject to a discovery rule. See *Rice v. Rabb*, 354 Or 721 (2014)(finding a claim for conversion under ORS 12.080(4) is subject to a discovery rule). Washington County trial courts have applied the decision in *Rice v. Rabb* to breach of contract claims as well under ORS 12.080(3).

[2] Please note I am not suggesting or arguing these claims are not covered; rather, I am alerting you to the fact many insurance carriers argue such claims are not covered under their policies.

determined special inspections process appears to apply only to original construction (at least based on how the current bill language is drafted).

B. Requiring a Majority Vote of All Members

In addition to the above, H.B. 3432 requires the boards of condominium and townhome associations to get a majority vote of their membership before instituting any litigation involving a defect in either common property or common elements. The board must also notify their members of the identity of those parties the association intends to sue and send certified copies of such notice to the potentially adverse parties. I take issue with each of these requirements.

First, this is an unnecessary piece of legislation as both Oregon's Condominium and Planned Community Act already require boards to send notice of their intent to file litigation before instituting a construction defect lawsuit. Further, voting requirements are often already part of an association's governing documents and are placed in the governing documents by the developer of these projects.

Second, the bill does not provide that the association's claims are tolled while it seeks to establish a vote of its membership. This harms not only the association, but potentially the developer and general contractor against whom the association intends to make a claim. An association which achieves the requisite votes it needs to move forward with a claim under this bill may end up filing their claim on the eve of the statute of limitation/repose, leaving no time left for the newly sued developer and/or general contractor to bring in downstream liable parties, including relevant subcontractors. This means the developer and/or general contractor may be the only party against whom recovery is sought on a potentially multi-million dollar claim.

Third, as currently drafted the bill does not exclude any developer-owned lots from voting. If an association is seeking to pursue a claim against the developer, it should not have to include the lots of a party who is self-interested against voting in favor of litigation. Furthermore, even if the association is only looking to pursue a claim against the general contractor initially, a developer may be self-interested not to vote in favor of litigation out of concern the general contractor will then turn around and file a third-party claim against the developer, thereby bringing the developer into the lawsuit.

Fourth, and finally, as non-profit corporations, condominium and townhome associations are intended to be managed similar to for-profit companies. An association is managed by a board of directors, duly elected from its own membership and which governs and makes decisions on behalf of its members. It's entirely appropriate that the decision to file a construction defect lawsuit be left to the discretion of the association's board. Often these decisions need to be made quickly to preserve timing of the association and unit owner's claims. This legislature would not ask a for-profit company to get the vote of a majority of its shareholders before being able to file a lawsuit on the company's behalf, and especially one which its board has already deemed in the best interests of the company. Why should the situation be any different for a non-profit association?

If a majority of the association's members are unhappy with the board's decision to pursue a construction defect lawsuit, the association's governing documents and Oregon law already provide a satisfactory remedy. Members can elect a new board of directors at the next board election. Those newly elected board members can then instruct the association's attorney to stop the litigation.

C. Amending the ORS 701 Notice of Defect Process

Finally, H.B. 3432 seeks to amend ORS 701.560 *et. seq*. as it relates to condominium and townhome association claims. I must confess, the majority of the proposed amendments to the ORS 701 process are a bit of a mystery to me and will certainly do nothing to assist in either making housing more affordable in Oregon or in reducing claims. If anything, it will cause all parties to incur additional expense on the front-end of litigation.

For one, the bill states that a developer or contractor that receives a notice of construction defects from a condominium or townhome association may seek to involve an expert to conduct an investigation of the project.[3] Under the proposed bill, if the association does not like the developer/contractor's expert, the association can suggest an alternate expert. If the developer/contractor does not like the association's choice of expert, then the two experts select a third expert. As a practical matter, experts are rarely hired under the current statutory notice of defect process. This is because hiring an expert is expensive and usually developers and contractors like to wait for their insurance company to get involved to hire and pay for an expert to investigate the claim. Some insurance companies, however, will not officially step in to defend a developer or contractor until an actual lawsuit is filed. Thus, the bill's proposal about selecting experts will likely never come to fruition as a matter of practice. Additionally, even if an insurance company did step in, the bill as drafted is ripe to create referral fees and adverse impacts on associations, developers, and contractors alike. Experts will likely vie to refer each other in the event a choice cannot be made between two sides. Experts can seek to increase their rates and charge all parties involved more money to do these front-end inspections. In short, it's a lose-lose proposal for all involved (other than the experts).

Furthermore, the bill, like the current notice of defect process, states that a developer/contractor will have the right to respond to the notice letter and offer a repair or money for the association to hire someone else to conduct repairs. However, the association has no control over whether the developer/contractor makes an offer of repair versus a cash offer. Likewise, there is no mechanism to protect the association should the developer/contractor's proposed repair fail. Instead, the bill suggests the claim will be considered resolved. So if the repair does fail, will the association have a right of relief for the repair? Also, will there be insurance coverage for the repair if it fails, or will the developer/general contractor now face the problem of a denial of insurance because the claim is now considered a "known loss" or "expected or intended injury," two typical

---

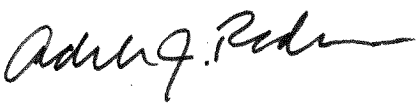
[3] Developers and contractors may already invite or hire experts under the current statute. Rarely is this done, however, due to expense.

exclusions often triggered by insurance companies where a failed repair is at issue.

As you can see, there are many issues with H.B. 3432 as currently drafted. I am happy to discuss the above concerns in more depth should you wish to do so. I can be reached at 503-228-2525 or at aridenour@balljanik.com.

Thank you for your time and attention in reviewing my concerns.

Sincerely,



Adele J. Ridenour