



## HOMEOWNER ASSOCIATION DECLARATIONS: Developers/Builders Stack the Deck Against Homeowners

Developers write “declarations” or rules for HOAs and homeowners before homes are even built. Declarations are long, documents *written in confusing legalese, designed to protect developers, NOT homeowners.*

**Fair or Not Fair?** Colorado examples of declarations that stack the deck against homeowners:

### PENTERRA PLAZA, DENVER

- Forbids any testing for defects in construction unless there is “readily observable evidence or condition”
- Forces HOA/homeowners to give builders access to the inspect and fix the problem BEFORE testing
- Requires the developer AND 80% of homeowners to vote to start any official action
- Gives developer another opportunity to inspect, fix or redesign any part of the complex
- Limits HOA/homeowners to only 15 days to submit to arbitration or they “abandon” their claim
- Strips homeowners’ ability to receive attorney’s fees or special/consequential/punitive/exemplary damages

### 9300 E. FLORIDA, FORT COLLINS

- Prevents homeowners from pursuing jury trial, mandating binding arbitration
- Intimidates homeowners voting for mediation/arbitration by requiring possible defeat language
- Complicates arbitration by preventing arbitrating with more than one owner at a time
- Allows developer to post public signs that an action is happening and could decrease property values
- Bars homeowners from amending the rules without developer consent
- Strips homeowners’ ability to receive attorney’s fees or special/consequential/punitive/exemplary damages

### VILLAS AT HIGHLAND PARK, ENGLEWOOD

- Intimidates homeowners voting for action by mandating possible cost and future marketability communications
- Bans homeowners from suing seller’s managers, officers or shareholders for construction defects
- Mandates binding arbitration by a specific provider, requiring homeowners to pay

### PRAIRIE MEADOWS CONDOMINIUMS, PARKER

- Demands that homeowners give up any option outside of rules in declaration
- Requires a 75% vote of homeowners to take action for construction defect claim
- Requires 80% vote of homeowners to amend declaration rules
- Intimidates homeowners voting for action by mandating possible cost and other negative communications

### PRESIDIO AT BRIARGATE, COLORADO SPRINGS

- Bans all claims for construction defects against any person including the developer
- Creates a legal presumption that the construction is not defective – this makes it harder for homeowners to prove that something is defective
- Mandates mediation and binding arbitration – waiving the right to a jury trial
- Homeowners have to use arbiter that the developer chooses
- Prevents homeowners from amending their declarations/rules without developer written consent

[www.BuildOurHomesRight.com](http://www.BuildOurHomesRight.com)

For more information: Carolyn Siegel, (303) 710-2856, [carolyn@siegelpa.com](mailto:carolyn@siegelpa.com)

Below are excerpts from the actual condo declarations. In the interest of brevity, anything below written in *(italics)* is paraphrased. Section citations are provided in case further reading is useful. The number in parentheses at the end of each paragraph refers back to the number of the question listed above.

#### PENTERRA PLAZA, DENVER

- **7.1 Testing for Construction Defects:** The Association shall not undertake or authorize any testing...of any kind for defects in construction...without first determining, based upon the presence of some readily observable evidence or condition, that a defect may exist. **(3)**
  - **7.1 (b):** In the event the Board undertakes or authorizes testing...then prior to any testing taking place, Declarant and others responsible for the construction shall be entitled to notice of the alleged defect, access to the area of the defect, and an opportunity to inspect the area and repair any defect that is found to exist. **(3)**
  - **7.1 (c):** In the event that testing discloses any defects, Declarant *(and others)* shall be given a reasonable amount of time, based on the nature and extent of the defect, to repair or correct the condition. **(3)**
- **7.2 Consensus for Association Litigation:** Except as provided...the Association shall not commence a judicial or administrative proceeding...without: (a) the approval of at least 80% of the Owners; and (b) the affirmative vote of Declarant so long as Declarant owns any unit. **(2)**
- *(Prior to any judicial or administrative proceeding...Declarant and others have the right)* to be heard by the Owners and to access, inspect, correct the condition of, or redesign any portion of the Common Elements or the Units **(3)**
- **7.5 (i) Mandatory Procedures:** *(If the parties don't agree to a settlement within 15 days of end of Mediation),* the Claimant shall have 15 additional days to submit the Claim to arbitration...If not timely submitted or if the Claimant fails to appear...the Claim shall be deemed abandoned, and Respondent shall be released and discharged from any and all liability to Claimant. **(4)**
  - **7.5 (e) Limitation on Damages:** *(all parties have)* waived their right to receive any damages in a Dispute other than actual damages, including, without limitation, attorney's fees *(with exceptions)*, special damages, consequential damages, and punitive or exemplary damages. **(4)**

#### 9300 E. FLORIDA, FORT COLLINS

- **2.2 Methods of Resolution:** All Parties hereby agree to the mediation and arbitration of all Claims, and irrevocably waive any right to trial of any Claim by jury or otherwise in a court of law. **(4)**
- **2.4 Consensus for Association Action:** *(No action shall be pursued)* unless first approved by at least a majority of the Board of Directors, Owners to which at least 67% of the votes are allocated and 51% of First Mortgagees. **(2)**
  - **2.4 (d):** *(Before any action is pursued, Board must deliver notice with information, including)* a statement that any recovery from the Action may not result in receipt of funds to pay all costs of remedying the Defect Claim as estimated by experts retained by the Association. **(2)**
- **6.11 Participation of Other Parties:** ...the arbitrator shall not have the authority to join in any arbitration more than one Owner (without Declarant's consent) nor shall these procedures permit the assertion of any Claim in the nature of a class or collective action...being expressly waived by each Owner and the Association. **(4)**

- **7.1 Recovery for Actual Damages Only:** In no event shall Declarant, regardless of the nature of the Claim...be liable for treble or other multiplier of damages pursuant to CRS 6-1-113(2)(a)(III) or otherwise for damages for non-economic loss or injury as defined in CRS 13-21-102.5. **(4)**
- **7.2 No Incidental or Consequential Damage:** *(Declarant shall not be liable)* for incidental or consequential damage...including costs of shelter, transportation, moving, storage...those relating to relocation or displacement during any work performed... **(4)**
- **7.4 No...Award of Attorney's Fees:** *(the arbitrator shall not)* have the power to award attorney's fees and/or costs to any Party for any reason... **(4)**
- **7.5 Limited Recovery on Rejection of Settlement Offer:** *(If arbitrator determine)* that Claimant unreasonably rejected an offer made...or did not permit Respondent a reasonable opportunity to repair, Claimant may not recover any amount in excess of (a) the reasonable costs of the offered repairs...and (b) the amount of a reasonable monetary settlement offer..., whichever is greater. **(4)**
- **8.5 Public Notification:** *(Declarant has authority to erect a sign on the property, which could say the outcome of an action)* may have a negative impact on property values...and containing such other related information as Declarant...shall determine. **(2)**
- **8.6 Amendment:** ...these Procedures shall not be subject to amendment...Any amendment made without Board and Owner's vote and Declarant's consent...shall be null and void... **(1)**

#### VILLAS AT HIGHLAND PARK, ENGLEWOOD

- **(2) (A):** ...the Board shall not be authorized to commence, institute or maintain any arbitration or litigation of such Non-Operational Controversy until the Board has fully complied with the following procedures: **(4)**
  - **(D):** No Non-Operational Controversy may be pursued or prosecuted by the Association...unless such action is specifically authorized...by Owners holding at least two-thirds of the votes. **(2)**
  - **(D):** *(Written statement to owners must include information saying):* (iii) a statement advising Members that the cost and fees of prosecuting any claim may increase the amount of assessments payable by the Owners to the Association...(iv) the potential impact of the Claim on the marketability of the Owner's property **(2)**
- **(12):** ...each Owner hereby agrees that it shall not sue...any individual managers, officers, shareholders (etc.) of the Association, Declarant (etc.) for any matters arising out of or relating to this Declaration or the Community. **(4)**
- **(II): Mandatory Binding Arbitration:** To the fullest extent permitted by law, all Non-Operational Controversies...shall be submitted to final and binding arbitration. **(4)**
- **(II)(1):** *(Claimants must notify Respondents in writing several points, including):* (iv) that Claimant wishes to resolve the Dispute by mutual agreement with Respondent, and is willing to meet in person with Respondent at a mutually agreeable time and place to discuss in good faith ways to resolve the Dispute. **(2)**
  - **(1)(c):** The arbitration shall be conducted by Construction Arbitration Services, Inc., or such other reputable arbitration service (which shall be selected by PWC, at its sole discretion, if the arbitration involves a claim under the Limited Warranty....**(4)**
  - **(1)(e):** Each Bound Party shall bear its own costs... **(4)**
- **(II)(4):** ...there shall be no presumption that an alleged construction defect is prevalent or consistently present in other Lots or portions of the Common Element.... **(4)**

#### PRAIRIE MEADOWS CONDOMINIUMS, PARKER

- **15.1.1:**...each Party agrees that the provisions contained in this Article shall be the sole and exclusive remedy that each Party shall have for any Claim. **(1)**
- **15.3:**...the approval of 75% of a quorum...must be obtained before the Association shall have the power to institute action... **(2)**
- **15.4:**...*(a statement must go out to all members saying)*:...any recovery may not result in the receipt of funds that are sufficient to repair a defect...the costs and fees of prosecuting any Claim may substantially increase the amount of assessments **(2)**
- **15.5** *(Ballots or proxies must contain the following)*: "Despite the fact that my annual assessments may be significantly increased by the costs and fees associated with the proposed claim, I/we APPROVE the authority of the Association to bring such claim." **(3)**
- **15.8:**...*(the arbitrator)*...shall not have the power to award punitive damages, attorney fees and/or costs to the prevailing Party **(4)**
  - *(This Article)* shall not be amended unless such amendment is approved by *(80% of voting Members)*. **(1)**

#### **PRESIDIO AT BRIARGATE, COLORADO SPRINGS**

- **7.16:** This section imposes an absolute bar to and waiver of the right of way of any Owner and/or the Association to proceed against Declarant or other protected party for any defect or deficiency whatever (sic) in the design or construction of any unit or the common elements. **(4)**
  - **(A):** The Association and the Owners shall indemnify any protected party from any liability, claims and expenses, including without limitation, reasonable attorney's fees, resulting from any breach of this section. **(4)**
  - **(G):** ...the protected parties make no representations or warranties, express or implied, of any nature regarding the project...the Owners and the Association accept the foregoing disclaimer of warranties and waive, release and indemnify the protected party from all claims related thereto... **(4)**
  - **(H):** No protected party shall be liable for claims for consequential and/or punitive damages...and the owners *(& heirs, successors, Association)* expressly waive and release all rights to sue for a defect...agree that this declaration waives and/or limits their rights and remedies... **(4)**
  - **(I):**...no other amendment, modification, or change of this section and/or the declarant's rights under this declaration shall be valid or enforced without the Declarant's prior written consent. **(1)**
- **7.17 (C):** ...owner and declarant shall first proceed in good faith to submit the matter to mediation...and the parties will share equally in the cost of such mediation. **(4)**
  - **(D):** If the above procedure fails to resolve the dispute...Declarant, its successors and assigns may submit the dispute to arbitration. **(a)** Litigation, except to enforce the provisions hereof, shall not be commenced or continued if arbitration has been requested. **(4)**
  - **(D)(b):** The Declarant shall select the arbitrator **(4)**
  - **(F):** ...by using arbitration to resolve disputes they are giving up any right that they may have to a judge or jury trial...both Owner and Declarant also waive any right to jury trial in the event of any litigation. **(4)**