



HindmanSanchez

## Written Testimony of William H. Short Regarding SB 15-177

April 27, 2015

To the Members of the General Assembly, and in particular, the House State, Veterans and Military Affairs Committee.

I respectfully request that you consider these written comments as testimony to supplement my oral testimony before your Committee on April 27, 2015. My testimony and these comments are submitted in opposition to Senate Bill 15-177 concerning construction defect reforms.

I have been practicing law in Colorado continuously for 32 years. I am employed by HindmanSanchez, PC, a law firm which emphasizes the representation of homeowners associations (HOAs). We serve as general counsel for HOAs, and we have extensive experience with the problems confronting condominium owners from defectively built condominiums. Nevertheless, our law firm does not generally handle construction defect lawsuits nor derive substantial revenue from such types of cases.

For most Coloradans, their home represents the most important and most valuable single investment. A safe, secure and well-built home is essential to the well-being of all citizens. Our Colorado Constitution and statutes guarantee equal access to the courts to all persons. Our Colorado statutes and case law expressly recognize the importance of properly constructed homes by specifically guaranteeing all homeowners' rights to a remedy or appropriate compensation against developers and builders for improperly constructed homes. (See Appendix of Authorities below).

If passed, SB 15-177 will deprive condominium owners of equal access to justice by an objective Judge, jury or arbitrator. If passed, SB 15-177 will render condominium owners as second-class citizens who do not have the same rights to ensure a well-built home as other citizens enjoy. If passed, SB 15-177 will deprive condominium owners of the right to a jury trial, and will require them to arbitrate before an arbitrator chosen solely by the developer-builder. If passed, SB 15-177 will impose onerous and unfair barriers to a fair remedy or compensation.

The core purpose of a democratic government is to provide equal protection to all citizens under the law. Each citizen should stand on an equal footing with all other citizens. The basic function of government is to ensure equality under the law. Government must protect a citizen's rights in the legal system, and must not interfere with those rights or discriminate among citizens.

Senate Bill 15-177 undermines the concept of equal protection under the laws. This proposed legislation will completely deprive condominium purchasers of the right of access to a court of law when a developer builds a defective condominium. This bill interferes with equal access to justice and discriminates against condominium owners.

This bill will permanently deprive condominium owners of the right to go to a court of law to obtain compensation for a poorly built condominium. This legislation would create a less-favored class of citizens for purposes of access to justice. Condominium owners would be forever required to use only arbitration, whereas all other property owners are able to go to court if their poorly built home is not repaired under a warranty claim. Moreover, the bill requires condominium owners to use an arbitrator hand-picked by the developer-builder.

Developers and builders insert dispute resolution provisions which favor the developers into the covenants for a new project. The developer prepares those covenants before anyone has built or bought any homes. When condominium owners assume control of the community, and become aware of these unfavorable provisions, they may decide to vote, as property owners in this democracy of ours, to change those covenants in favor of a dispute resolution process of their own choosing. SB 15-177 provides that, even after all the owners purchase their condominiums and discover that they are defective, they will never have the opportunity to amend their covenants to go to court to seek fair compensation.

Every condominium community in Colorado has a right to amend their declaration of covenants. Those covenants are akin to a constitution, and the property owners can change their "constitution" if they want. But Senate Bill 15-177 states that the provisions inserted by the developer and the builder which protect them are in everybody's best interests, and that the owners don't ever have the right to change their covenants. Is that equal protection under the law, or is that discriminatory treatment of condominium owners? This bill pushes the pendulum too far in the opposite direction.

The bill creates a legislatively-imposed requirement that construction defect claims be submitted to arbitration instead of court, and surprisingly claims that path "represents a commitment on the part of the unit owners and the association" on which the developers are entitled to rely. This statement ignores the fact that when the covenants are written and filed, there are no unit owners, and there is no association. How can a unit owner, who hasn't yet purchased a condominium, commit to such limited, one-sided access to justice? (SB 15-177, by its terms, applies not just to condominiums, but to single family homes.)

The Colorado Constitution protects the right to a jury trial for all citizens. SB 15-177 would deprive the right to a jury to an entire class of people, simply because they were condominium owners. There is nothing wrong with parties voluntarily agreeing to arbitrate disputes. But condominium owners have no bargaining power whatsoever, and absolutely no voice when the covenants are first created. Allowing the developer-builder to insert an arbitration provision, select the arbitrator, and then forever deprive condominium owners of the right to change those covenant provisions, forever shuts the courthouse doors to all condominium owners.

The reason for all of the publicity concerning construction defect settlements is not because of construction defect litigation; it is because of defectively constructed condominiums. Developers, builders and their insurance companies are not paying settlements merely because of litigation; they are paying settlements because reliable engineers and other experts have concluded that the condominiums were poorly built and not in compliance with existing industry and building codes. There would be no construction defect settlements if the units were properly built. Developers and builders need to prevent the construction defect problems on the front end, through quality assurance and quality controls. It is undemocratic and unfair to allow them to minimize their liability through an onerous dispute resolution process.

The single largest investment for most citizens is their home. Their life savings should not be jeopardized because the developers and builders are able to minimize their responsibility and liability by forcing the owners to arbitrate. The developers and builders have the right to go to court. Why should the condominium purchasers be forced into a construction-friendly arbitration process?

The bill goes even further in its discrimination against condominium owners. Every other person has a right to hire and pay experts and consultants to investigate whether the problems in a building are caused by defective construction. Such a preliminary investigation is a prudent and responsible first step before claiming that construction defects exist. But Senate Bill 15-177 will prevent a homeowners association from hiring experts and consultants to conduct such an investigation until 60 days after a very detailed notice is provided to the owners. That notice requires the association to describe the costs of litigation,

the impact on market values and marketability, and describe how the association intends to pay for a lawsuit. In other words, the construction industry is requiring homeowners associations to send out a letter which they worded to scare and deter homeowners from pursuing construction defect litigation, while at the same time depriving the homeowners association of the very ability to fund an investigation about whether there are defects in the first place.

This bill also goes far beyond the perceived problems it purports to solve. First, it has been suggested that this bill is limited to condominium projects, but it will also affect any common interest community including townhomes and single-family homes. Second, it stops homeowners associations from filing any legal action, not just construction defect claims, until there has been mediation and a disclosure to all owners. Does the General Assembly really intend to force all homeowners associations to have a mediation and a written disclosure to all owners concerning every single legal action which it may file? (See SB 15-177 page 6, lines 17-18)

Senate Bill 15-177 creates improper incentives and imposes improper solutions. If this bill becomes law, developers and builders would have even less incentive to build condominiums properly. They would know that any claim for defects would be steered into arbitration, using arbitrators they selected. Such arbitration services are preferred by developers and builders because the arbiters usually come from the construction industry.

Developers and builders have the right to go to court in their legal disputes. The owners of single-family homes have a right to go to court for their building defects. The owners of commercial buildings, apartment buildings, farms and ranches all have the right to go to court to resolve their legal disputes about defective construction. People have the right to agree to arbitrate, but this bill forces condominium owners to arbitrate. Senate Bill 15-177 creates a new subclass of citizens who don't ever get to go to court: condominium owners.

Access to an impartial judicial system and equal protection under the law are rights guaranteed by our Constitution. Senate Bill 15-177 completely undermines the rights of equal access to justice and equal protection under the law for condominium owners. Please vote against this bill.

Respectfully submitted,

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The Appendix of Authorities is found on the following pages.

## Appendix of Authorities

**Equality of justice.** Courts of Justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; right and justice should be administered without sale, denial or delay.

Colorado Constitution, Bill of Rights, Article II, Section 6.

**Trial by jury.** The right of trial by jury shall remain inviolate; the jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law.

Colorado Constitution, Bill of Rights, Article II, Section 23; C.R.C.P. 38.

**Due process of law.** No person shall be deprived of life, liberty or property, without due process of law.

Colorado Constitution, Bill of Rights, Article II, Section 25.

**Arbitration laws.** It shall be the duty of the general assembly to pass such laws as may be necessary and proper to decide differences by arbitrators, to be appointed by mutual agreement of the parties to any controversy who may choose that mode of adjustment. The powers and duties of such arbitrators shall be as prescribed by law.

Colorado Constitution, Article XVIII, Section 3 (Emphasis added)

**Legislative declaration.** It is the intent of the general assembly that this part 8 apply to these types of civil actions while preserving adequate rights and remedies for property owners who bring and maintain such actions.

("CDARA") C.R.S. § 13-20-802

**Legislative declaration.** The general assembly hereby finds, determines and declares, as follows: ... That the continuation of the economic prosperity of Colorado is dependent upon the strengthening of homeowners associations in common interest communities financially...

("CCIOA") C.R.S. § 38-33.3-102(1)(b)

**Unfair housing practices prohibited.** It shall be an unfair housing practice and unlawful and hereby prohibited: [describing broad restrictions on the sale or transfer of any housing because of familial status and other protected classifications].

C.R.S. § 24-34-502 et seq.

**Legislative declaration.** It is hereby declared that there exists in the state the need for adequate, safe ... new and rehabilitated dwelling units; and that, unless the supply of housing units is increased, a large number of residents of the state will be compelled to live under ... unsafe conditions to the detriment of their health, welfare and well-being....

C.R.S. § 24-32-702

The implied warranty of habitability affords "home buyers protection from overreaching by comparatively more knowledgeable builder-vendors. An experienced builder who has erected and sold many homes is in a far better position to determine the structural condition of the house than most buyers. Even if the buyer is sufficiently knowledgeable to evaluate a home's condition, he rarely has access to make any inspection of the underlying structural work, as distinguished from the merely cosmetic features."

"The ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet, the purchaser makes the biggest and most important investment in his or her life and, more times than not, on a limited budget. The purchaser can ill afford to suddenly find a latent defect his or her home that completely destroys the family's budget and have no remedy for recourse."

Cosmopolitan Homes v. Weller, 663 P.2d 1041, 1045 (Colo. 1983) (Recognizing the implied warranty of habitability.)

The right to equal protection of the law guarantees that all parties who are similarly situated received like treatment by the law. This constitutional provision ensures the availability of the judicial forum to effectuate a property right.

Estate of Stevenson v. Hollywood Bar, 832 P.2d 718, 721 (Colo. 1992)

The public policy of Colorado is to allow private parties to arrange for binding arbitration in such cases by contract, not to make arbitration binding in situations where the parties have not agreed to do so.

Huizar v. Allstate Ins. Co., 952 P.2d 342, 354 (Colo. 1998) (dissent)

See Colorado Constitution, Article XVIII, Section 3, quoted above. Constitution Colorado provides that arbitration shall be chosen by the parties, not imposed upon the parties.

**If it is the declared statutory and legislative policy of the State of Colorado to have nondiscriminatory access to safe housing, jury trials and the court system, why should condominium owners be classified differently?**

**Why should the General Assembly force arbitration upon a class of citizens in view of the foregoing Constitutional provisions and legislative declarations?**