



Construction Law Update

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Highlight Article Summary

The Nevada Supreme Court recently issued two opinions arising out of construction defect litigation. The first, *Westpark Owners' Association v. Eighth Judicial District Court*, dealt with rights under NRS 40.600, *et seq.* involving apartments that had been converted to condominiums. The second, *D.R. Horton v. Eighth Judicial District Court*, attempted to strike a balance between a contractor's right to reasonable detail in the Chapter 40 Notice and the Association's right to utilize extrapolation testing in the pre-litigation process.

NEVADA CONSTRUCTION DEFECT CASE LAW UPDATE

Westpark Owners' Association v. Eighth Judicial District Court, 123 Nev. Adv. Op. 37 (2007)

By John R. Bell

Petitioner Westpark Owners' Association ("Association") provided notice pursuant to NRS 40 to Westpark Associates, LLC and Oxbow Construction, LLC (collectively "Westpark"). Westpark filed a declaratory relief action seeking a judicial determination that Association could not proceed against it under Chapter 40 or otherwise. The district court granted partial summary judgment in favor of Westpark.

Park Lake Partnership initially developed the project, completing common areas and 36 condominium units before it declared bankruptcy. Westpark acquired the property and built an additional 108 units. However, Westpark did not sell the additional 108 units directly to the public. Instead, it rented the units as apartments from 1997 to 2003. In 2003, Westpark began to offer the units for sale. Following the completion of the sale of the units, the Association served notice of construction defects in accordance with NRS Chapter 40.

NRS 40.615 defines a "constructional defect" as a "defect in the design, construction, manufacture, repair or landscaping of a **new** residence, or an alteration or addition to an existing residence or an appurtenance . . ." NRS 40.615, emphasis added. The issues addressed by the Court on appeal were whether or not the 108 condominiums that were rented by Westpark for several years prior to their sale were "new" and the rights of the Association against Westpark pursuant to Chapter 40.

The Court held that because the 108 units constructed and sold by Westpark were occupied as rental dwellings from 1997 to 2003 before they were sold, the units were not "new" and, therefore, the remedies of Chapter 40 do not apply to the Association's claims as to those units. However, the

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Court noted that any work done to the units by Westpark immediately prior to the sale of the units could be considered an "alteration" that would trigger the Association's rights under Chapter 40.

The significant impact of this matter is yet to be seen. Two to three years ago, when the real estate market in Nevada, particularly within the Las Vegas Valley, was extremely hot, many apartment complexes were converted to condominiums. This case limits the rights of a homeowners' association that is made up of former apartments under Chapter 40.

Though the opinion does allow an Association to recover **under Chapter 40 for any defects that exist in** any alterations made by the owner immediately prior to the sale, such alterations are typically limited to painting or installation of new floor coverings and similar cosmetic "touch-ups." This decision supports the notion that an Association has no or extremely limited Chapter 40 rights for issues related to original plumbing, HVAC, roof or window installation.

D.R. Horton v. Eighth Judicial District Court, 123 Nev. Adv. Op. 45 (2007)

Petitioners, D.R. Horton and several of its subcontractors (collectively "Horton"), challenged the sufficiency of the Chapter 40 Notice provided by First Light at Boulder Ranch Homeowners' Association ("First Light").

D.R. Horton built and sold the First Light at Boulder Ranch project, which consists of 414 units in 138 buildings. First Light provided Horton with a pre-litigation notice pursuant to NRS 40.645. The notice was supported by expert reports. These expert reports utilized extrapolation, where a limited number of units were inspected and tested and the alleged defects found to exist in each of tested and inspected units were projected to the community as a whole. First Light's experts identified approximately 160 alleged defects which were projected to exist anywhere from 2% to 100% of the homes. Horton brought a declaratory relief action challenging the sufficiency of the Chapter 40 Notice. Horton argued that the Chapter 40 Notice did not provide Horton with the "reasonable detail" to allow Horton to make repairs required by NRS 40.645(2). The district court denied Horton's Motion for Declaratory Relief.

The Supreme Court began by examining both the text and the legislative history behind the 2003 amendments to NRS 40.600, *et seq.*, which provided a contractor the right to repair. The Court concluded that the 2003 amendments clearly authorized a claimant to utilize extrapolation for purposes of its Chapter 40 Notice. The Court noted that determination of the sufficiency of a Chapter 40 Notice is within the sound discretion of the district court.

The Court then established the "reasonable threshold" test to guide the district courts in their determination of the sufficiency of Chapter 40 Notices. The Court indicated that a project such as First Light must be broken down into subsets (e.g. each plan type at the project) rather than the project as a whole. The Court also held that if less than 100% of the homes are inspected and/or tested, the district court must determine if the sample is a valid and representative sample. Finally, the Court ruled that the alleged defect must be confirmed to exist in at least one residence of each sub-set.

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The Court ordered that the district court reconsider Horton's Motion for Declaratory Relief utilizing the "reasonable threshold" test.

This case is unlikely to have significant impact on construction defect claims in Nevada. It forces Plaintiffs to conduct more of their investigation on the "front end" of the process. However, as very few contractors invoke their right to repair in cases involving condominiums (due largely to the combination of the costs associated with repair of 200+ unit condominium developments and the limited time the statute allows for a contractor to conduct these repairs), it is doubtful that this case will represent anything more than an additional hurdle for Plaintiffs in construction defect litigation to clear early on in their investigation.

Should you have any questions regarding this article, please contact Partner John Bell at (702) 260-9500. Thank you.

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** The information contained herein is for informational purposes only and should not be relied upon in reaching a conclusion in a particular area. The legal principles discussed herein were accurate at the time this article was authored but are subject to change with time. Applicability of these same legal principles may differ substantially in individual situations. Please consult an attorney before making a decision in a particular area using only the information provided in this article.

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