315 W. 11TH AVE., DENVER, CO 80204 | 720–328–1418 | www.LAWWEEKCOLORADO.com VOL. 15 | NO. 36 | $6 | SEPTEMBER 4, 2017

LAW WEEK COLORADO

The Times They Are A Changin'

Broomfield decision pushes debate over debate of "homeowner" for residential rental properties

BY **MATTHEW NINNEMAN**
HALL & EVANS

Al Stewart will tell you it's "The Year of the Cat." The Chinese calendar says it's the year of the Rooster. In Colorado construction, it's the year of the developer.

Construction is booming, housing demand is high, lenders are handing out money and the Denver skyline is littered with construction cranes; so much so there is a construction labor shortage. Not only are developers reaping the rewards of a strong Colorado economy and population growth, but they are also experiencing a boon in changing Colorado construction legislation and court decisions.

Indeed, the Colorado Legislature enacted HB 17-1279, a bipartisan construction defect reform bill passed in early May 2017. The new law amends the Colorado Common Interest Ownership Act, which governs the conduct of homeowners' associations. The new law requires HOA's members, not just the HOA board, to meet, discuss and vote on whether to pursue construction defect claims. Before any vote is taken, the HOA must notify the developer.

The Colorado Supreme Court also upheld a controversial Court of Appeals holding in Vallagio at Inverness Residential Condominium Association, Inc. v. Metropolitan Homes, Inc., upholding a developer-declarant's right of consent to certain proposed amendments to a common interest community's declaration, including dispute resolution procedures and venues, after it relinquishes declarant control, and regardless of whether a majority percentage of unit owners disagree.

And in Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co. d/b/a Brinkmann Constructors, the Colorado Court of Appeals held the Colorado Homeowner Protection Act extends to and protects sophisticated commercial entities who own residential rental properties, calling into question the impact of negotiated contracts on similar projects and the traditional notion of what constitutes a "homeowner."

Broomfield is a construction defect case involving a senior assisted and independent living facility. The Court of

Matthew Ninneman/**LAW WEEK FILE**

Appeals was asked to decide, inter alia, whether the senior housing facility constitutes "residential property" and whether the commercial owner is entitled to protection afforded residential property owners under the HPA.

The HPA exists as a portion of Colorado's Construction Defect Action Reform Act, codified at Colorado Revised Statutes Section 13-20-802, and provides in relevant part:

> In order to preserve Colorado residential property owners' legal rights and remedies, in any civil action or arbitration proceeding described in section 13-20-802.5(1) [CDARA], any express waiver of, or limitation on, the legal rights, remedies, or damages provided by the "Construction Defect Action Reform Act" … or on the ability to enforce such legal rights, remedies, or damages within the time provided by applicable statutes of limitations or repose are void as against public policy.

It is well-established that the HPA applies to traditional residential properties and owners, i.e., single-family homes, condominiums and townhomes purchased by the more unsophisticated, less knowledgeable individuals who buy them. However, the possibility of the HPA applying to properties considered "commercial," such as rental or leasehold properties, was a matter of first impression.

There is an important distinction in not only the sophistication of the parties in a commercial/residential transaction, but also in how those contracts are negotiated. Residential construction with a "commercial" owner often involves sophisticated entities negotiating at arm's length with a general contractor and design professional, routinely with the assistance of counsel, and almost always with a heavily negotiated written contract.

These contracts are developed either as custom contracts costing thousands of dollars to draft, or modified form contracts developed by well-known industry groups, such as the American Institute of Architects. Those sophisticated parties shift risk within the contract documents, often limiting warranty obligations, damage amounts and categories, claim accrual deadlines, imposing strict notice obligations, and establishing well-defined duties of care. To apply the HPA to such a contract would dismantle some of those efforts rendering them void as against public policy. And, that is exactly what occurred in Broomfield.

The general contractor, Brinkmann, and the commercial owner who developed the property, Sunrise Development, LLC, entered into an AIA contract, which included warranty limitations and modified claim accrual provisions and deadlines that differed from CDARA's claim accrual provisions and the applicable statute of limitations. Claims were specifically deemed to have accrued at the time of final completion, not the date the alleged defects manifested. Three years following construction, the new commercial owner, Broomfield Senior Living Owner, LLC, discovered broken sewer pipes below the development caused by expanding soils. The pipes obviously required repair. Following its investigation, Brinkmann argued the work was performed in accordance with the design and that there was no defective "work" requiring repair. Broomfield disagreed and filed suit.

Brinkmann argued that the claims were subject to summary judgment as they were not brought within two-years from the date of accrual, in this case the date of final completion. The trial court agreed, and also found that the owner failed to provide timely notice or a right to repair. The owner appealed.

In its reversal, the Court of Appeals employed the tenets of statutory construction, and spilled considerable ink exploring the generally accepted definitions of "residential property," "residence" and "residential,' as well as the legislative history surrounding the HPA's enactment. The court determined that the term "residential":

> … is unambiguous and means in improvement on a parcel that is used as a dwelling or for living purposes. … Here, the building is used to house senior residents. Neither Brinkmann nor the plaintiffs contest that the senior residents live in the building or use it for any purpose other than ordinary living.

Instead, all parties agree that the building is used as a home for senior residents. Moreover, the term 'residential' in [CDARA] is used to describe property owned, not to limit its applicability to any specific type of owner, whether an entity or a natural person." Nor was the court persuaded that the receipt of rental income from senior residents makes the building "commercial property" because the "receipt of income does not transform residential use of property into commercial use.

The court concluded that the facility was "residential property," that the owner was a "residential property owner," and, therefore, the contractual claim accrual limitations violated public policy and were void.

Naturally, petitions for certiorari have been filed and remain pending. Should the Supreme Court deny or otherwise uphold the decision, we can expect the debate to continue in future legislative sessions. General contractors, in particular, should be concerned about how the holding impacts their negotiated contracts on similarly situated rental income properties and the enforceability of hard-fought risk-shifting provisions. Ultimately, if the Legislature intended the HPA to protect only the traditional, unsophisticated home buyer, changes are necessary. People say change is good, but that always depends on your perspective. •

— Matthew Ninneman is special counsel at Hall & Evans, LLC and represents developers, contractors and design professionals in construction matters and trials.