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Opinions mixed on construction-defect law

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A 2003 law intended to curb construction defect litigation in Las Vegas has accomplished little to improve the availability of affordable housing, legal experts said.

"In general, miserable failure," David Lee, a Las Vegas attorney who represents developers and general contractors, said of Senate Bill 241.

The amendment to NRS Chapter 40, known as the "right to repair" law, gives builders 105 days to address alleged defects before homeowners can contact a lawyer and file a lawsuit.

Developers curtailed production of entry-level condominiums and townhomes in the late 1990s, leery of being sued over alleged defects, even after buildings had passed code inspections and received certificates of occupancy.

They said "frivolous" litigation was making it difficult to obtain construction liability insurance. The pool of companies willing to underwrite condo projects in Las Vegas had shrunk to two or three and they were tripling their premiums.

Some observers say builders have yet to bring significant attached housing onto the market, with apartment conversions accounting for most of last year's new condo sales. The median price of a conversion is about \$186,000, compared with \$310,000 for a new single-family detached home, Home Builders Research reports.

Lee said a few new condo projects have been built since the law was enacted. But he also said that insurance is still difficult to buy and rates have increased significantly.

Although opinions vary on the law's outcome, some observers are cautiously optimistic that it will reduce the number of lawsuits, lower the cost of construction insurance and slow rising home prices, said Robert Aalberts, professor for the Lied Institute for Real Estate Studies at University of Nevada, Las Vegas and author of a 2005 Nevada Law Journal report, "To Sue or Not To Sue."

"Plaintiffs' attorneys will tell you home builders are using it to slow things down for settlement," he said. "They'll come out and fix it a little bit, but not to the complete satisfaction of the homeowner. Some homeowners are a little bit fussy, you know."

Aalberts said the success of the construction defect statute, like many laws, will depend on effective communication and the exercise of good faith and fair dealing by both homeowners and home builders.

"However," he added, "if contractors do not repair the defects in a reasonable and professional manner, (and) instead use this time to stall and to prepare their defenses, Chapter 40 (amendment) will fail."

George Ogilvie, a construction attorney with McDonald Carano Wilson in Las Vegas, said attorneys that practice in construction defect litigation are unsatisfied with the law.

"It hasn't achieved everything the industry wanted it to achieve," he said. "There was some give and take at the last minute, like all legislation. I'm not saying life would be perfect for the industry if it got what it wanted, but there were some flaws in the legislation."

One flaw, he suggested, is that the statute has an "unworkable time frame" of 105 days for five or less homes in a subdivision and 155 days for more than five homes, Lee said.

Say an entire subdivision has roof problems. Those problems must be reported to the homeowners association and inspections must be done and notice must be given to subcontractors and paperwork must move from desk to desk. It may be about the 90th day when news of the roof problems reaches the developer.

"We then have a limited time to make repairs. It's virtually impossible," Lee said. "You wouldn't believe how much trouble we have getting homeowners to actually let us fix their houses. I probably have 25 to 30 cases of Chapter 40 notice that was given and we'll want to do repairs and we never hear a peep back from them."

Part of the problem there, he said, is plaintiffs' lawyers expecting to be paid their legal fees even when repairs are made.

Construction defect litigation can be lengthy and expensive, Aalberts said.

Defending a defect lawsuit all the way to trial can incur costs and burdens for all parties possibly greater than the trouble and cost of a settlement, Aalberts said. Accordingly, insurance companies often find it prudent to settle before the trial, he added.

Condo complexes may be easy targets for defect attorneys partly because of large, aggregate amounts of insurance coverage. Nearly every condo complex built in Las Vegas since 1990 has been litigated.

In some cases, the awards have exceeded the original sales prices of all of the attached homes in the community. About half of the award goes to attorneys and inspection costs.

In 2003, the Canyon Willow homeowners association, representing 720 units at 5205 Caspian Springs Drive in southeastern Las Vegas, won a \$20.5 million defect award from Torino Construction. It was the largest award in Nevada at the time, plaintiffs' attorney Scott Canepa said.

Jeromy Slater, owner of Environmental Assurance in Las Vegas, said prevention and remediation of any

problems with a home should be considered as an alternative to class action lawsuits.

"In most cases, residents want to restore their homes as soon as possible and home builders want to preserve their reputations," he said. "Considering insurance premiums already add more than \$8,500 to the cost of an average single-family home, every class-action lawsuit has the potential to drive home prices up."

Developers and contractors complained to Nevada Insurance Commissioner Alice Molasky-Arman in 2002 that "frivolous" defect litigation was driving them out of business. Condo developer Jim Gair blamed mounting insurance costs in Las Vegas when he folded his business and moved to Hawaii.

A 2003 report from the Nevada Trial Lawyers Association on SB 241 found no evidence of frivolous lawsuits and no correlation between increased insurance premiums and housing starts in Las Vegas.

The lawyers asked a construction liability task force appointed by the insurance commissioner how many builders or subcontractors create legal entities to build homes and then collapse or dissolve the entities after construction is complete. They also questioned the effect of such activity on a homeowner's ability to get defects repaired and the effect on price and availability of insurance.

"The task force did not undertake to study this issue and does not know the answer," the lawyers' report said.

Russell Swain, president of GLB Insurance of Nevada, said contractors and developers need to look at "wrap policies" in which one insurance policy covers the owner or general contractor along with all subcontractors.

Most developers don't carry enough coverage on these policies since they last for about 10 years, he said. Also, many developers don't realize that the original contractor is still responsible for defects for a certain amount of time, even if they have sold the property. This makes recent condo conversions especially vulnerable.

Swain said the insurance market is starting to loosen up with more companies taking on residential projects. Multiple quotes make the market more competitive and some rates have dropped, he said.

"(SB) 241 helped. The idea was good," he said. "Unfortunately, it hasn't taken on as much bite as we needed."

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