

EHB 1848 - S COMM AMD
By Committee on Judiciary

ADOPTED 04/08/2005

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** APPLICABILITY. (1)(a) Sections 2 through
4 10 of this act apply to any multiunit residential building for which
5 the permit for construction or rehabilitative construction of such
6 building was issued on or after the effective date of this act.

7 (b) Sections 2 and 10 of this act apply to conversion condominiums
8 as defined in RCW 64.34.020, provided that section 10 of this act shall
9 not apply to a condominium conversion for which a public offering
10 statement had been delivered pursuant to chapter 64.34 RCW prior to the
11 effective date of this act.

12 (2) Sections 2 and 11 through 18 of this act apply to any action
13 that alleges breach of an implied or express warranty under chapter
14 64.34 RCW or that seeks relief that could be awarded for such breach,
15 regardless of the legal theory pled, except that sections 11 through 18
16 of this act shall not apply to:

17 (a) Actions filed or served prior to the effective date of this
18 act;

19 (b) Actions for which a notice of claim was served pursuant to
20 chapter 64.50 RCW prior to the effective date of this act;

21 (c) Actions asserting any claim regarding a building that is not a
22 multiunit residential building;

23 (d) Actions asserting any claim regarding a multiunit residential
24 building that was permitted on or after the effective date of this act
25 unless the letter required by section 7 of this act has been submitted
26 to the appropriate building department or the requirements of section
27 10 of this act have been satisfied.

28 (3) Other than the requirements imposed by sections 2 through 10 of
29 this act, nothing in this chapter amends or modifies the provisions of
30 RCW 64.34.050.

1 NEW SECTION. **Sec. 2.** DEFINITIONS. Unless the context clearly
2 requires otherwise, the definitions in RCW 64.34.020 and in this
3 section apply throughout this chapter.

4 (1) "Attached dwelling unit" means any dwelling unit that is
5 attached to another dwelling unit by a wall, floor, or ceiling that
6 separates heated living spaces. A garage is not a heated living space.

7 (2) "Building enclosure" means that part of any building, above or
8 below grade, that physically separates the outside or exterior
9 environment from interior environments and which weatherproofs,
10 waterproofs, or otherwise protects the building or its components from
11 water or moisture intrusion. Interior environments consist of both
12 heated and unheated enclosed spaces. The building enclosure includes,
13 but is not limited to, that portion of roofs, walls, balcony support
14 columns, decks, windows, doors, vents, and other penetrations through
15 exterior walls, which waterproof, weatherproof, or otherwise protect
16 the building or its components from water or moisture intrusion.

17 (3) "Building enclosure design documents" means plans, details, and
18 specifications for the building enclosure that have been stamped by a
19 licensed engineer or architect. The building enclosure design
20 documents shall include details and specifications that are appropriate
21 for the building in the professional judgment of the architect or
22 engineer which prepared the same to waterproof, weatherproof, and
23 otherwise protect the building or its components from water or moisture
24 intrusion, including details of flashing, intersections at roof, eaves
25 or parapets, means of drainage, water-resistive membrane, and details
26 around openings.

27 (4) "Developer" means:

28 (a) With respect to a condominium or a conversion condominium, the
29 declarant; and

30 (b) With respect to all other buildings, an individual, group of
31 individuals, partnership, corporation, association, municipal
32 corporation, state agency, or other entity or person that obtains a
33 building permit for the construction or rehabilitative reconstruction
34 of a multiunit residential building. If a permit is obtained by
35 service providers such as architects, contractors, and consultants who
36 obtain permits for others as part of services rendered for a fee, the
37 person for whom the permit is obtained shall be the developer, not the
38 service provider.

1 (5) " Dwelling unit " has the meaning given to that phrase or similar
2 phrases in the ordinances of the jurisdiction issuing the permit for
3 construction of the building enclosure but if such ordinances do not
4 provide a definition, then " dwelling unit " means a residence containing
5 living, cooking, sleeping, and sanitary facilities.

6 (6) " Multiunit residential building " means:

7 (a) A building containing more than two attached dwelling units,
8 including a building containing nonresidential units if the building
9 also contains more than two attached dwelling units, but excluding the
10 following classes of buildings:

11 (i) Hotels and motels;

12 (ii) Dormitories;

13 (iii) Care facilities;

14 (iv) Floating homes;

15 (v) A building that contains attached dwelling units that are each
16 located on a single platted lot, except as provided in (b) of this
17 subsection.

18 (vi) A building in which all of the dwelling units are held under
19 one ownership and is subject to a recorded irrevocable sale prohibition
20 covenant.

21 (b) If the developer submits to the appropriate building department
22 when applying for the building permit described in section 3 of this
23 act a statement that the developer elects to treat the improvement for
24 which a permit is sought as a multiunit residential building for all
25 purposes under this chapter, then " multiunit residential building " also
26 means the following buildings for which such election has been made:

27 (i) A building containing only two attached dwelling units;

28 (ii) A building that does not contain attached dwelling units; and

29 (iii) Any building that contains attached dwelling units each of
30 which is located on a single platted lot.

31 (7) " Party unit owner " means a unit owner who is a named party to
32 an action subject to this chapter and does not include any unit owners
33 whose involvement with the action stems solely from their membership in
34 the association.

35 (8) " Qualified building inspector " means a person satisfying the
36 requirements of section 5 of this act.

37 (9) " Rehabilitative construction " means construction work on the

1 building enclosure of a multiunit residential building if the cost of
2 such construction work is more than five percent of the assessed value
3 of the building.

4 (10) "Sale prohibition covenant" means a recorded covenant that
5 prohibits the sale or other disposition of individual dwelling units as
6 or as part of a condominium for five years or more from the date of
7 first occupancy except as otherwise provided in section 10 of this act,
8 a certified copy of which the developer shall submit to the appropriate
9 building department; provided such covenant shall not apply to sales or
10 dispositions listed in RCW 64.34.400(2). The covenant must be recorded
11 in the county in which the building is located and must be in
12 substantially the following form:

13 This covenant has been recorded in the real property records of
14 County, Washington, in satisfaction of the
15 requirements of sections 2 through 10 of this act. The
16 undersigned is the owner of the property described on Exhibit
17 A (the "Property"). Until termination of this covenant, no
18 dwelling unit in or on the Property may be sold as a
19 condominium unit except for sales listed in RCW 64.34.400(2).

20 This covenant terminates on the earlier of either: (a)
21 Compliance with the requirements of section 10 of this act, as
22 certified by the owner of the Property in a recorded supplement
23 hereto; or (b) the fifth anniversary of the date of first
24 occupancy of a dwelling unit as certified by the Owner in a
25 recorded supplement hereto.

26 All title insurance companies and persons acquiring an interest in the
27 Property may rely on the forgoing certifications without further
28 inquiry in issuing any policy of title insurance or in acquiring an
29 interest in the Property.

30 (11) "Stamped" means bearing the stamp and signature of the
31 responsible licensed architect or engineer on the title page, and on
32 every sheet of the documents, drawings, or specifications, including
33 modifications to the documents, drawings, and specifications that
34 become part of change orders or addenda to alter those documents,
35 drawings, or specifications.

1 NEW SECTION. **Sec. 3.** DESIGN DOCUMENTS. (1) Any person applying
2 for a building permit for construction of a multiunit residential
3 building or rehabilitative construction shall submit building enclosure
4 design documents to the appropriate building department prior to the
5 start of construction or rehabilitative construction of the building
6 enclosure. If construction work on a building enclosure is not
7 rehabilitative construction because the cost thereof is not more than
8 five percent of the assessed value of the building, then the person
9 applying for a building permit shall submit to the building department
10 a letter so certifying. Any changes to the building enclosure design
11 documents that alter the manner in which the building or its components
12 is waterproofed, weatherproofed, and otherwise protected from water or
13 moisture intrusion shall be stamped by the architect or engineer and
14 shall be provided to the building department and to the person
15 conducting the course of construction inspection in a timely manner to
16 permit such person to inspect for compliance therewith, and may be
17 provided through individual updates, cumulative updates, or as-built
18 updates.

19 (2) The building department shall not issue a building permit for
20 construction of the building enclosure of a multiunit residential
21 building or for rehabilitative construction unless the building
22 enclosure design documents contain a stamped statement by the person
23 stamping the building enclosure design documents in substantially the
24 following form: "The undersigned has provided building enclosure
25 documents that in my professional judgment are appropriate to satisfy
26 the requirements of sections 1 through 10 of this act."

27 (3) The building department is not charged with determining whether
28 the building enclosure design documents are adequate or appropriate to
29 satisfy the requirements of sections 1 through 10 of this act. Nothing
30 in sections 1 through 10 of this act requires a building department to
31 review, approve, or disapprove enclosure design documents.

32 NEW SECTION. **Sec. 4.** INSPECTIONS. All multiunit residential
33 buildings shall have the building enclosure inspected by a qualified
34 inspector during the course of initial construction and during
35 rehabilitative construction.

1 NEW SECTION. **Sec. 5.** INSPECTORS--QUALIFICATIONS--INDEPENDENCE.

2 (1) A qualified building enclosure inspector:

3 (a) Must be a person with substantial and verifiable training and
4 experience in building enclosure design and construction;

5 (b) Shall be free from improper interference or influence relating
6 to the inspections; and

7 (c) May not be an employee, officer, or director of, nor have any
8 pecuniary interest in, the declarant, developer, association, or any
9 party providing services or materials for the project, or any of their
10 respective affiliates, except that the qualified inspector may be the
11 architect or engineer who approved the building enclosure design
12 documents or the architect or engineer of record. The qualified
13 inspector may, but is not required to, assist with the preparation of
14 such design documents.

15 (2) Nothing in this section alters requirements for licensure of
16 any architect, engineer, or other professional, or alters the
17 jurisdiction, authority, or scope of practice of architects, engineers,
18 other professionals, or general contractors.

19 NEW SECTION. **Sec. 6.** SCOPE OF INSPECTION. (1) Any inspection
20 required by this chapter shall include, at a minimum, the following:

21 (a) Water penetration resistance testing of a representative sample
22 of windows and window installations. Such tests shall be conducted
23 according to industry standards. Where appropriate, tests shall be
24 conducted with an induced air pressure difference across the window and
25 window installation. Additional testing is not required if the same
26 assembly has previously been tested in situ within the previous two
27 years in the project under construction by the builder, by another
28 member of the construction team such as an architect or engineer, or by
29 an independent testing laboratory; and

30 (b) An independent periodic review of the building enclosure during
31 the course of construction or rehabilitative construction to ascertain
32 whether the multiunit residential building has been constructed, or the
33 rehabilitative construction has been performed, in substantial
34 compliance with the building enclosure design documents.

35 (2) Subsection (1)(a) of this section shall not apply to
36 rehabilitative construction if the windows and adjacent cladding are
37 not altered in the rehabilitative construction.

1 (3) "Project" means one or more parcels of land in a single
2 ownership, which are under development pursuant to a single land use
3 approval or building permit, where window installation is performed by
4 the owner with its own forces, or by the same general contractor, or,
5 if the owner is contracting directly with trade contractors, is
6 performed by the same trade contractor.

7 NEW SECTION. **Sec. 7.** CERTIFICATION--CERTIFICATE OF OCCUPANCY.
8 Upon completion of an inspection required by this chapter, the
9 qualified inspector shall prepare and submit to the appropriate
10 building department a signed letter certifying that the building
11 enclosure has been inspected during the course of construction or
12 rehabilitative construction and that it has been constructed or
13 reconstructed in substantial compliance with the building enclosure
14 design documents, as updated pursuant to section 3 of this act. The
15 building department shall not issue a final certificate of occupancy or
16 other equivalent final acceptance until the letter required by this
17 section has been submitted. The building department is not charged
18 with and has no responsibility for determining whether the building
19 enclosure inspection is adequate or appropriate to satisfy the
20 requirements of this chapter.

21 NEW SECTION. **Sec. 8.** INSPECTOR, ARCHITECT, AND ENGINEER
22 LIABILITY. (1) Nothing in this act is intended to, or does:

23 (a) Create a private right of action against any inspector,
24 architect, or engineer based upon compliance or noncompliance with its
25 provisions; or

26 (b) Create any independent basis for liability against an
27 inspector, architect, or engineer.

28 (2) The qualified inspector, architect, or engineer and the
29 developer that retained the inspector, architect, or engineer may
30 contractually agree to the amount of their liability to the developer.

31 NEW SECTION. **Sec. 9.** NO EVIDENTIARY PRESUMPTION--ADMISSIBILITY.
32 A qualified inspector's report or testimony regarding an inspection
33 conducted pursuant to this chapter is not entitled to any evidentiary
34 presumption in any arbitration or court proceeding. Nothing in this

1 chapter restricts the admissibility of such a report or testimony, and
2 questions of the admissibility of such a report or testimony shall be
3 determined under the rules of evidence.

4 NEW SECTION. **Sec. 10.** NO SALE OF CONDOMINIUM UNIT ABSENT
5 COMPLIANCE. (1) Except for sales or other dispositions listed in RCW
6 64.34.400(2), no declarant may convey a condominium unit that may be
7 occupied for residential use in a multiunit residential building
8 without first complying with the requirements of sections 1 through 9
9 of this act unless the building enclosure of the building in which such
10 unit is included is inspected by a qualified building enclosure
11 inspector, and:

12 (a) The inspection includes such intrusive or other testing, such
13 as the removal of siding or other building enclosure materials, that
14 the inspector believes, in his or her professional judgment, is
15 necessary to ascertain the manner in which the building enclosure was
16 constructed;

17 (b) The inspection evaluates, to the extent reasonably
18 ascertainable and in the professional judgment of the inspector, the
19 present condition of the building enclosure including whether such
20 condition has adversely affected or will adversely affect the
21 performance of the building enclosure to waterproof, weatherproof, or
22 otherwise protect the building or its components from water or moisture
23 intrusion. "Adversely affect" has the same meaning as provided in RCW
24 64.34.445(7);

25 (c) The inspection report includes recommendations for repairs to
26 the building enclosure that, in the professional judgment of the
27 qualified building inspector, are necessary to: (i) Repair a design or
28 construction defect in the building enclosure that results in the
29 failure of the building enclosure to perform its intended function and
30 allows unintended water penetration not caused by flooding; and (ii)
31 repair damage caused by such a defect that has an adverse effect as
32 provided in RCW 64.34.445(7);

33 (d) With respect to a building that would be a multiunit
34 residential building but for the recording of a sale prohibition
35 covenant and unless more than five years have elapsed since the date
36 such covenant was recorded, all repairs to the building enclosure
37 recommended pursuant to (c) of this subsection have been made; and

1 (e) The declarant provides as part of the public offering
2 statement, consistent with RCW 64.34.410 (1)(nn) and (2) and
3 64.34.415(1)(b), an inspection and repair report signed by the
4 qualified building enclosure inspector that identifies:

5 (i) The extent of the inspection performed pursuant to this
6 section;

7 (ii) The information obtained as a result of that inspection; and

8 (iii) The manner in which any repairs required by this section were
9 performed, the scope of those repairs, and the names of the persons
10 performing those repairs.

11 (2) Failure to deliver the inspection and repair report in
12 violation of this section constitutes a failure to deliver a public
13 offering statement for purposes of chapter 64.34 RCW.

14 NEW SECTION. **Sec. 11.** ARBITRATION--ELECTION--NUMBER OF
15 ARBITRATORS--QUALIFICATIONS--TRIAL DE NOVO. (1) If the declarant, an
16 association, or a party unit owner demands an arbitration by filing
17 such demand with the court not less than thirty and not more than
18 ninety days after filing or service of the complaint, whichever is
19 later, the parties shall participate in a private arbitration hearing.
20 The declarant, the association, and the party unit owner do not have
21 the right to compel arbitration without giving timely notice in
22 compliance with this subsection. Unless otherwise agreed by the
23 parties, the arbitration hearing shall commence no more than fourteen
24 months from the later of the filing or service of the complaint.

25 (2) Unless otherwise agreed by the parties, claims that in
26 aggregate are for less than one million dollars shall be heard by a
27 single arbitrator and all other claims shall be heard by three
28 arbitrators. As used in this chapter, arbitrator also means
29 arbitrators where applicable.

30 (3) Unless otherwise agreed by the parties, the court shall appoint
31 the arbitrator, who shall be a current or former attorney with
32 experience as an attorney, judge, arbitrator, or mediator in
33 construction defect disputes involving the application of Washington
34 law.

35 (4) Upon conclusion of the arbitration hearing, the arbitrator
36 shall file the decision and award with the clerk of the superior court,
37 together with proof of service thereof on the parties. Within twenty

1 days after the filing of the decision and award, any aggrieved party
2 may file with the clerk a written notice of appeal and demand for a
3 trial de novo in the superior court on all claims between the appealing
4 party and an adverse party. As used in this section, "adverse party"
5 means the party who either directly asserted or defended claims against
6 the appealing party. The demand shall identify the adverse party or
7 parties and all claims between those parties shall be included in the
8 trial de novo. The right to a trial de novo includes the right to a
9 jury, if demanded. The court shall give priority to the trial date for
10 the trial de novo.

11 (5) If the judgment for damages, not including awards of fees and
12 costs, in the trial de novo is not more favorable to the appealing
13 party than the damages awarded by the arbitrator, not including awards
14 of fees and costs, the appealing party shall pay the nonappealing
15 adverse party's costs and fees incurred after the filing of the appeal,
16 including reasonable attorneys' fees so incurred.

17 (6) If the judgment for damages, not including awards of fees and
18 costs, in the trial de novo is more favorable to the appealing party
19 than the damages awarded by the arbitrator, not including awards of
20 fees and costs, then the court may award costs and fees, including
21 reasonable attorneys' fees, incurred after the filing of the request
22 for trial de novo in accordance with applicable law; provided if such
23 a judgment is not more favorable to the appealing party than the most
24 recent offer of judgment, if any, made pursuant to section 17 of this
25 act, the court shall not make an award of fees and costs to the
26 appealing party.

27 (7) If a party is entitled to an award with respect to the same
28 fees and costs pursuant to this section and section 17 of this act,
29 then the party shall only receive an award of fees and costs as
30 provided in and limited by section 17 of this act. Any award of fees
31 and costs pursuant to subsections (5) or (6) of this section is subject
32 to review in the event of any appeal thereof otherwise permitted by
33 applicable law or court rule.

34 NEW SECTION. **Sec. 12.** CASE SCHEDULE PLAN. (1) Not less than
35 sixty days after the later of filing or service of the complaint, the
36 parties shall confer to create a proposed case schedule plan for
37 submission to the court that includes the following deadlines:

- 1 (a) Selection of a mediator;
- 2 (b) Commencement of the mandatory mediation and submission of
3 mediation materials required by this chapter;
- 4 (c) Selection of the arbitrator by the parties, where applicable;
- 5 (d) Joinder of additional parties in the action;
- 6 (e) Completion of each party's investigation;
- 7 (f) Disclosure of each party's proposed repair plan;
- 8 (g) Disclosure of each party's estimated costs of repair;
- 9 (h) Meeting of parties and experts to confer in accordance with
10 section 13 of this act; and
- 11 (i) Disclosure of each party's settlement demand or response.
- 12 (2) If the parties agree upon a proposed case schedule plan, they
13 shall move the court for the entry of the proposed case schedule plan.
14 If the parties cannot agree, either party may move the court for entry
15 of a case schedule plan that includes the above deadlines.

16 NEW SECTION. **Sec. 13.** MANDATORY MEDIATION. (1) The parties to an
17 action subject to this act shall engage in mediation. Unless the
18 parties agree otherwise, the mediation required by this section shall
19 commence within seven months of the later of the filing or service of
20 the complaint. If the parties cannot agree upon a mediator, the court
21 shall appoint a mediator.

22 (2) Prior to the mediation required by this section, the parties
23 and their experts shall meet and confer in good faith to attempt to
24 resolve or narrow the scope of the disputed issues, including issues
25 related to the parties' repair plans.

26 (3) Prior to the mandatory mediation, the parties or their
27 attorneys shall file and serve a declaration that:

28 (a) A decision maker with authority to settle will be available for
29 the duration of the mandatory mediation; and

30 (b) The decision maker has been provided with and has reviewed the
31 mediation materials provided by the party to which the decision maker
32 is affiliated as well as the materials submitted by the opposing
33 parties.

34 (4) Completion of the mediation required by this section occurs
35 upon written notice of termination by any party. The provisions of
36 section 17 of this act shall not apply to any later mediation conducted
37 following such notice.

1 NEW SECTION. **Sec. 14.** NEUTRAL EXPERT. (1) If, after meeting and
2 conferring as required by section 13(2) of this act, disputed issues
3 remain, a party may file a motion with the court, or arbitrator if an
4 arbitrator has been appointed, requesting the appointment of a neutral
5 expert to address any or all of the disputed issues. Unless otherwise
6 agreed to by the parties or upon a showing of exceptional
7 circumstances, including a material adverse change in a party's
8 litigation risks due to a change in allegations, claims, or defenses by
9 an adverse party following the appointment of the neutral expert, any
10 such motion shall be filed no later than sixty days after the first day
11 of the meeting required by section 13(2) of this act. Upon such a
12 request, the court or arbitrator shall decide whether or not to appoint
13 a neutral expert or experts. A party may only request more than one
14 neutral expert if the particular expertise of the additional neutral
15 expert or experts is necessary to address disputed issues.

16 (2) The neutral expert shall be a licensed architect or engineer,
17 or any other person, with substantial experience relevant to the issue
18 or issues in dispute. The neutral expert shall not have been employed
19 as an expert by a party to the present action within three years before
20 the commencement of the present action, unless the parties agree
21 otherwise.

22 (3) All parties shall be given an opportunity to recommend neutral
23 experts to the court or arbitrator and shall have input regarding the
24 appointment of a neutral expert.

25 (4) Unless the parties agree otherwise on the following matters,
26 the court, or arbitrator if then appointed, shall determine:

27 (a) Who shall serve as the neutral expert;

28 (b) Subject to the requirements of this section, the scope of the
29 neutral expert's duties;

30 (c) The number and timing of inspections of the property;

31 (d) Coordination of inspection activities with the parties'
32 experts;

33 (e) The neutral expert's access to the work product of the parties'
34 experts;

35 (f) The product to be prepared by the neutral expert;

36 (g) Whether the neutral expert may participate personally in the
37 mediation required by section 13 of this act; and

38 (h) Other matters relevant to the neutral expert's assignment.

1 (5) Unless the parties agree otherwise, the neutral expert shall
2 not make findings or render opinions regarding the amount of damages to
3 be awarded, or the cost of repairs, or absent exceptional circumstances
4 any matters that are not in dispute as determined in the meeting
5 described in section 13(2) of this act or otherwise.

6 (6) A party may, by motion to the court, or to the arbitrator if
7 then appointed, object to the individual appointed to serve as the
8 neutral expert and to determinations regarding the neutral expert's
9 assignment.

10 (7) The neutral expert shall have no liability to the parties for
11 the performance of his or her duties as the neutral expert.

12 (8) Except as otherwise agreed by the parties, the parties have a
13 right to review and comment on the neutral expert's report before it is
14 made final.

15 (9) A neutral expert's report or testimony is not entitled to any
16 evidentiary presumption in any arbitration or court proceeding.
17 Nothing in this act restricts the admissibility of such a report or
18 testimony, provided it is within the scope of the neutral expert's
19 assigned duties, and questions of the admissibility of such a report or
20 testimony shall be determined under the rules of evidence.

21 (10) The court, or arbitrator if then appointed, shall determine
22 the significance of the neutral expert's report and testimony with
23 respect to parties joined after the neutral expert's appointment and
24 shall determine whether additional neutral experts should be appointed
25 or other measures should be taken to protect such joined parties from
26 undue prejudice.

27 NEW SECTION. **Sec. 15.** PAYMENT OF ARBITRATORS, MEDIATORS, AND
28 NEUTRAL EXPERTS. (1) Where the building permit that authorized
29 commencement of construction of a building was issued on or after the
30 effective date of this act:

31 (a)(i) If the action is referred to arbitration under section 11 of
32 this act, the party who demands arbitration shall advance the fees of
33 any arbitrator and any mediator appointed under section 13 of this act;
34 and

35 (ii) A party who requests the appointment of a neutral expert
36 pursuant to section 14 of this act shall advance any appointed neutral
37 expert's fees incurred up to the issuance of a final report.

1 (b) If the action has not been referred to arbitration, the court
2 shall determine liability for the fees of any mediator appointed under
3 section 13 of this act, unless the parties agree otherwise.

4 (c) Ultimate liability for any fees or costs advanced pursuant to
5 this subsection (1) is subject to the fee- and cost-shifting provisions
6 of section 17 of this act.

7 (2) Where the building permit that authorized commencement of
8 construction of a building was issued before the effective date of this
9 act:

10 (a)(i) If the action is referred to arbitration under section 11 of
11 this act, the party who demands arbitration is liable for and shall pay
12 the fees of any appointed arbitrator and any mediator appointed under
13 section 13 of this act; and

14 (ii) A party who requests the appointment of a neutral expert
15 pursuant to section 14 of this act is liable for and shall pay any
16 appointed neutral expert's fees incurred up to the issuance of a final
17 report.

18 (b) If the action has not been referred to arbitration, the court
19 shall determine liability for the fees of any mediator appointed under
20 section 13 of this act, unless the parties agree otherwise.

21 (c) Fees and costs paid under this subsection (2) are not subject
22 to the fee- and cost-shifting provisions of section 17 of this act.

23 NEW SECTION. **Sec. 16.** SUBCONTRACTORS. Upon the demand of a party
24 to an arbitration demanded under section 11 of this act, any
25 subcontractor or supplier against whom such party has a legal claim and
26 whose work or performance on the building in question becomes an issue
27 in the arbitration may be joined in and become a party to the
28 arbitration. However, joinder of such parties shall not be allowed if
29 such joinder would require the arbitration hearing date to be continued
30 beyond the date established pursuant to section 11 of this act, unless
31 the existing parties to the arbitration agree otherwise. Nothing in
32 sections 2 through 10 of this act shall be construed to release,
33 modify, or otherwise alleviate the liabilities or responsibilities that
34 any party may have towards any other party, contractor, or
35 subcontractor.

1 NEW SECTION. **Sec. 17.** OFFERS OF JUDGMENT--COSTS AND FEES. (1) On
2 or before the sixtieth day following completion of the mediation
3 pursuant to section 13(4) of this act, the declarant, association, or
4 party unit owner may serve on an adverse party an offer to allow
5 judgment to be entered. The offer of judgment shall specify the amount
6 of damages, not including costs or fees, that the declarant,
7 association, or party unit owner is offering to pay or receive. A
8 declarant's offer shall also include its commitment to pay costs and
9 fees that may be awarded as provided in this section. The declarant,
10 association, or party unit owner may make more than one offer of
11 judgment so long as each offer is timely made. Each subsequent offer
12 supersedes and replaces the previous offer. Any offer not accepted
13 within twenty-one days of the service of that offer is deemed rejected
14 and withdrawn and evidence thereof is not admissible and may not be
15 provided to the court or arbitrator except in a proceeding to determine
16 costs and fees or as part of the motion identified in subsection (2) of
17 this section.

18 (2) A declarant's offer must include a demonstration of ability to
19 pay damages, costs, and fees, including reasonable attorneys' fees,
20 within thirty days of acceptance of the offer of judgment. The
21 demonstration of ability to pay shall include a sworn statement signed
22 by the declarant, the attorney representing the declarant, and, if any
23 insurance proceeds will be used to fund any portion of the offer, an
24 authorized representative of the insurance company. If the association
25 or party unit owner disputes the adequacy of the declarant's
26 demonstration of ability to pay, the association or party unit owner
27 may file a motion with the court requesting a ruling on the adequacy of
28 the declarant's demonstration of ability to pay. Upon filing of such
29 motion, the deadline for a response to the offer shall be tolled from
30 the date the motion is filed until the court has ruled.

31 (3) An association or party unit owner that accepts the declarant's
32 offer of judgment shall be deemed the prevailing party and, in addition
33 to recovery of the amount of the offer, shall be entitled to a costs
34 and fees award, including reasonable attorneys' fees, in an amount to
35 be determined by the court in accordance with applicable law.

36 (4) If the amount of the final nonappealable or nonappealed
37 judgment, exclusive of costs or fees, is not more favorable to the
38 offeree than the offer of judgment, then the offeror is deemed the

1 prevailing party for purposes of this section only and is entitled to
2 an award of costs and fees, including reasonable attorneys' fees,
3 incurred after the date the last offer of judgment was rejected and
4 through the date of entry of a final nonappealable or nonappealed
5 judgment, in an amount to be determined by the court in accordance with
6 applicable law. The nonprevailing party shall not be entitled to
7 receive any award of costs and fees.

8 (5) If the final nonappealable or nonappealed judgment on damages,
9 not including costs or fees, is more favorable to the offeree than the
10 last offer of judgment, then the court shall determine which party is
11 the prevailing party and shall determine the amount of the costs and
12 fees award, including reasonable attorneys' fees, in accordance with
13 applicable law.

14 (6) Notwithstanding any other provision in this section, with
15 respect to claims brought by an association or unit owner, the
16 liability for declarant's costs and fees, including reasonable
17 attorneys' fees, shall:

18 (a) With respect to claims brought by an association, not exceed
19 five percent of the assessed value of the condominium as a whole, which
20 is determined by the aggregate tax-assessed value of all units at the
21 time of the award; and

22 (b) With respect to claims brought by a party unit owner, not
23 exceed five percent of the assessed value of the unit at the time of
24 the award.

25 **Sec. 18.** RCW 64.34.415 and 1992 c 220 s 22 are each amended to
26 read as follows:

27 (1) The public offering statement of a conversion condominium shall
28 contain, in addition to the information required by RCW 64.34.410:

29 (a) Either a copy of a report prepared by an independent, licensed
30 architect or engineer, or a statement by the declarant based on such
31 report, which report or statement describes, to the extent reasonably
32 ascertainable, the present condition of all structural components and
33 mechanical and electrical installations material to the use and
34 enjoyment of the condominium;

35 (b) A copy of the inspection and repair report prepared by an
36 independent, licensed architect, engineer, or qualified building

1 inspector in accordance with the requirements of section 10 of this
2 act;

3 (c) A statement by the declarant of the expected useful life of
4 each item reported on in (a) of this subsection or a statement that no
5 representations are made in that regard; and

6 ~~((e))~~ (d) A list of any outstanding notices of uncured violations
7 of building code or other municipal regulations, together with the
8 estimated cost of curing those violations. Unless the purchaser waives
9 in writing the curing of specific violations, the extent to which the
10 declarant will cure such violations prior to the closing of the sale of
11 a unit in the condominium shall be included.

12 (2) This section applies only to condominiums containing units that
13 may be occupied for residential use.

14 **Sec. 19.** RCW 64.34.410 and 2004 c 201 s 11 are each amended to
15 read as follows:

16 (1) A public offering statement shall contain the following
17 information:

- 18 (a) The name and address of the condominium;
- 19 (b) The name and address of the declarant;
- 20 (c) The name and address of the management company, if any;
- 21 (d) The relationship of the management company to the declarant, if
22 any;

23 (e) A list of up to the five most recent condominium projects
24 completed by the declarant or an affiliate of the declarant within the
25 past five years, including the names of the condominiums, their
26 addresses, and the number of existing units in each. For the purpose
27 of this section, a condominium is "completed" when any one unit therein
28 has been rented or sold;

29 (f) The nature of the interest being offered for sale;

30 (g) A brief description of the permitted uses and use restrictions
31 pertaining to the units and the common elements;

32 (h) A brief description of the restrictions, if any, on the renting
33 or leasing of units by the declarant or other unit owners, together
34 with the rights, if any, of the declarant to rent or lease at least a
35 majority of units;

36 (i) The number of existing units in the condominium and the maximum
37 number of units that may be added to the condominium;

- 1 (j) A list of the principal common amenities in the condominium
2 which materially affect the value of the condominium and those that
3 will or may be added to the condominium;
- 4 (k) A list of the limited common elements assigned to the units
5 being offered for sale;
- 6 (l) The identification of any real property not in the condominium,
7 the owner of which has access to any of the common elements, and a
8 description of the terms of such access;
- 9 (m) The identification of any real property not in the condominium
10 to which unit owners have access and a description of the terms of such
11 access;
- 12 (n) The status of construction of the units and common elements,
13 including estimated dates of completion if not completed;
- 14 (o) The estimated current common expense liability for the units
15 being offered;
- 16 (p) An estimate of any payment with respect to the common expense
17 liability for the units being offered which will be due at closing;
- 18 (q) The estimated current amount and purpose of any fees not
19 included in the common expenses and charged by the declarant or the
20 association for the use of any of the common elements;
- 21 (r) Any assessments which have been agreed to or are known to the
22 declarant and which, if not paid, may constitute a lien against any
23 units or common elements in favor of any governmental agency;
- 24 (s) The identification of any parts of the condominium, other than
25 the units, which any individual owner will have the responsibility for
26 maintaining;
- 27 (t) If the condominium involves a conversion condominium, the
28 information required by RCW 64.34.415;
- 29 (u) Whether timesharing is restricted or prohibited, and if
30 restricted, a general description of such restrictions;
- 31 (v) A list of all development rights reserved to the declarant and
32 all special declarant rights reserved to the declarant, together with
33 the dates such rights must terminate, and a copy of or reference by
34 recording number to any recorded transfer of a special declarant right;
- 35 (w) A description of any material differences in terms of
36 furnishings, fixtures, finishes, and equipment between any model unit
37 available to the purchaser at the time the agreement for sale is
38 executed and the unit being offered;

- 1 (x) Any liens on real property to be conveyed to the association
2 required to be disclosed pursuant to RCW 64.34.435(2)(b);
- 3 (y) A list of any physical hazards known to the declarant which
4 particularly affect the condominium or the immediate vicinity in which
5 the condominium is located and which are not readily ascertainable by
6 the purchaser;
- 7 (z) A brief description of any construction warranties to be
8 provided to the purchaser;
- 9 (aa) Any building code violation citations received by the
10 declarant in connection with the condominium which have not been
11 corrected;
- 12 (bb) A statement of any unsatisfied judgments or pending suits
13 against the association, a statement of the status of any pending suits
14 material to the condominium of which the declarant has actual
15 knowledge, and a statement of any litigation brought by an owners'
16 association, unit owner, or governmental entity in which the declarant
17 or any affiliate of the declarant has been a defendant, arising out of
18 the construction, sale, or administration of any condominium within the
19 previous five years, together with the results thereof, if known;
- 20 (cc) Any rights of first refusal to lease or purchase any unit or
21 any of the common elements;
- 22 (dd) The extent to which the insurance provided by the association
23 covers furnishings, fixtures, and equipment located in the unit;
- 24 (ee) A notice which describes a purchaser's right to cancel the
25 purchase agreement or extend the closing under RCW 64.34.420, including
26 applicable time frames and procedures;
- 27 (ff) Any reports or statements required by RCW 64.34.415 or
28 64.34.440(6)(a). RCW 64.34.415 shall apply to the public offering
29 statement of a condominium in connection with which a final certificate
30 of occupancy was issued more than sixty calendar months prior to the
31 preparation of the public offering statement whether or not the
32 condominium is a conversion condominium as defined in RCW
33 64.34.020(10);
- 34 (gg) A list of the documents which the prospective purchaser is
35 entitled to receive from the declarant before the rescission period
36 commences;
- 37 (hh) A notice which states: A purchaser may not rely on any
38 representation or express warranty unless it is contained in the public

1 offering statement or made in writing signed by the declarant or by any
2 person identified in the public offering statement as the declarant's
3 agent;

4 (ii) A notice which states: This public offering statement is only
5 a summary of some of the significant aspects of purchasing a unit in
6 this condominium and the condominium documents are complex, contain
7 other important information, and create binding legal obligations. You
8 should consider seeking the assistance of legal counsel;

9 (jj) Any other information and cross-references which the declarant
10 believes will be helpful in describing the condominium to the
11 recipients of the public offering statement, all of which may be
12 included or not included at the option of the declarant;

13 (kk) A notice that addresses compliance or noncompliance with the
14 housing for older persons act of 1995, P.L. 104-76, as enacted on
15 December 28, 1995;

16 (ll) A notice that is substantially in the form required by RCW
17 64.50.050; (~~and~~)

18 (mm) A statement, as required by RCW 64.35.210, as to whether the
19 units or common elements of the condominium are covered by a qualified
20 warranty, and a history of claims under any such warranty; and

21 (nn) A statement that the building enclosure has been designed and
22 inspected as required by sections 2 through 10 of this act, and, if
23 required, repaired in accordance with the requirements of section 10 of
24 this act.

25 (2) The public offering statement shall include copies of each of
26 the following documents: The declaration, the survey map and plans,
27 the articles of incorporation of the association, bylaws of the
28 association, rules and regulations, if any, current or proposed budget
29 for the association, (~~and~~) the balance sheet of the association
30 current within ninety days if assessments have been collected for
31 ninety days or more, and the inspection and repair report or reports
32 prepared in accordance with the requirements of section 10 of this act.

33 If any of the foregoing documents listed in this subsection are not
34 available because they have not been executed, adopted, or recorded,
35 drafts of such documents shall be provided with the public offering
36 statement, and, before closing the sale of a unit, the purchaser shall
37 be given copies of any material changes between the draft of the
38 proposed documents and the final documents.

1 (3) The disclosures required by subsection (1)(g), (k), (s), (u),
2 (v), and (cc) of this section shall also contain a reference to
3 specific sections in the condominium documents which further explain
4 the information disclosed.

5 (4) The disclosures required by subsection (1)(ee), (hh), (ii), and
6 (ll) of this section shall be located at the top of the first page of
7 the public offering statement and be typed or printed in ten-point bold
8 face type size.

9 (5) A declarant shall promptly amend the public offering statement
10 to reflect any material change in the information required by this
11 section.

12 **Sec. 20.** RCW 64.34.100 and 2004 c 201 s 2 are each amended to read
13 as follows:

14 (1) The remedies provided by this chapter shall be liberally
15 administered to the end that the aggrieved party is put in as good a
16 position as if the other party had fully performed. However,
17 consequential, special, or punitive damages may not be awarded except
18 as specifically provided in this chapter or by other rule of law.

19 (2) Except as otherwise provided in sections 11 through 17 of this
20 act or chapter 64.35 RCW, any right or obligation declared by this
21 chapter is enforceable by judicial proceeding. The arbitration
22 proceedings provided for in sections 11 through 17 of this act shall be
23 considered judicial proceedings for the purposes of this chapter.

24 NEW SECTION. **Sec. 21.** A new section is added to Article 1 of
25 chapter 64.34 RCW to read as follows:

26 Chapter 64.-- RCW (sections 1 through 17 of this act) includes
27 requirements for: The inspection of the building enclosures of
28 multiunit residential buildings, as defined in section 2 of this act,
29 which includes condominiums and conversion condominiums; for provision
30 of inspection and repair reports; and for the resolution of implied or
31 express warranty disputes under chapter 64.34 RCW.

32 NEW SECTION. **Sec. 22.** CAPTIONS. Captions used in this act are
33 not any part of the law.

1 NEW SECTION. **Sec. 23.** Sections 1 through 17 of this act
2 constitute a new chapter in Title 64 RCW.

3 NEW SECTION. **Sec. 24.** EFFECTIVE DATE. This act takes effect
4 August 1, 2005."

EHB 1848 - S COMM AMD
By Committee on Judiciary

ADOPTED 04/08/2005

5 On page 1, line 2 of the title, after "buildings;" strike the
6 remainder of the title and insert "amending RCW 64.34.415, 64.34.410,
7 and 64.34.100; adding a new section to chapter 64.34 RCW; adding a new
8 chapter to Title 64 RCW; creating a new section; and providing an
9 effective date."

EFFECT: The striking amendment substantially rewrites the bill. Most of the changes are of a structural or technical nature, or represent an elaboration or clarification of a provision already in the bill. The more substantive changes include the following:

1. All condominium conversions are made subject to building enclosure inspections for water penetration problems, regardless of whether the building had been made subject to a nonconversion covenant. The conversion inspection must include testing such as the removal of siding to determine the manner in which the building was constructed. The inspection must also include an evaluation of water penetration issues, and the inspection report must also recommend any needed repairs. The inspection must be disclosed in the condo public offering statement. In addition, in the case of a building that is converted to a condo before the expiration of a 5-year covenant not to convert, any recommended repairs must be performed before the units may be sold as condos. (The original bill exempts a noncondo multiunit residential building from the inspection requirements completely if the building is not converted until after a 10-year covenant against conversion.)

2. Builders and developers who are not required to comply with the course of construction requirements of the bill are given the option of electing to do so. This option applies to residential condominiums without attached units, to buildings which have attached units on

separately platted lots, and to any buildings with two attached dwelling units (the inspections remain mandatory for multiunit residential buildings of three or more units).

Other changes made by the striking amendment include:

1. Providing a section that expressly sets out the applicability provisions of the bill with respect to when building permits are issued and when legal actions are filed;

2. Clarifying definitions of terms such as "multiunit residential building" and "building enclosure," and providing a definition for a "sale prohibition covenant" that includes a statutory form of the covenant;

3. Providing that additional testing of window assemblies is not required if the same assemblies have already been tested on the same project site within two years;

4. Requiring the parties to a dispute to attempt to agree on a case schedule plan that includes specific deadlines for various events in alternative dispute resolution or trial; and

5. Clarifying the interaction among the prevailing party cost and fees provisions of the bill with respect to arbitration, trial de novo, and offer of judgment.

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