
Civil Rights & Judiciary Committee

ESSB 5024

Brief Description: Reducing barriers to condominium construction.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Padden, Pedersen, Brown, Gildon, Holy, Mullet, Short and Van De Wege).

Brief Summary of Engrossed Substitute Bill

- Excludes, until June 30, 2031, buildings with 10 or fewer units and no more than two stories from the definition of "multiunit residential building" and thereby exempts these smaller buildings from: (1) building enclosure design and inspection requirements; and (2) the alternative disputes resolution process applicable to actions alleging breaches of implied or express warranty under the Washington Condominium Act.
- Allows deposit funds for the purchase of a unit in a common interest community under the Washington Uniform Common Interest Ownership Act (WUCIOA) to be withdrawn from escrow and used for construction costs if a surety bond is maintained in favor of the purchaser in the amount of the deposit to be withdrawn.
- Limits earnest money deposits under the WUCIOA to no more than 10 percent of the purchase price and excludes these deposits from statutes guaranteeing enforcement of earnest money forfeiture provisions.

Hearing Date: 3/17/21

Staff: Yelena Baker (786-7301).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

A condominium consists of real property that has individually owned units and also has commonly held elements in which all the individual unit owners have an undivided common interest. Two main statutes that govern the creation, construction, management, and termination of condominiums are the Washington Uniform Common Interest Ownership Act (WUCIOA) and the Washington Condominium Act (WCA).

The WUCIOA took effect on July 1, 2018, and is applicable to residential common interest communities (CIC) created after that date. A CIC includes condominiums, cooperatives, leasehold CICs, miscellaneous communities, and plat communities. A CIC created prior to July 1, 2018, may choose to opt in to the WUCIOA. The WCA controls the creation, construction, management, and termination of condominiums created after July 1, 1990, but before the effective date of the WUCIOA.

Under both the WUCIOA and the WCA, a condominium is created by the recording of a "declaration," and the person creating a condominium is referred to as the "declarant." A condominium may be created by the construction of a new condominium building, or by the conversion of an existing building, such as an existing apartment building.

Building Enclosures in Multiunit Residential Buildings — Design and Inspection Requirements. Specific requirements with regard to building enclosure apply when constructing or rehabilitating a multiunit residential building, or when converting a multiunit residential building to a condominium ownership. For purposes of these requirements, a multiunit residential building is a building with more than two attached dwelling units, but does not include hotels, motels, dormitories, care facilities, floating homes, or buildings with attached dwelling units each on a single platted lot.

Building enclosure design documents must be submitted with any application for a building permit for the construction of a multiunit residential building. The documents must be stamped by an architect or engineer and must address waterproofing, weatherproofing, and other protections of the building from water or moisture intrusion. A building department may not issue a building permit unless the design documents have been submitted, but the department need not review or approve the documents.

The building enclosures of all multiunit residential buildings must be inspected during the course of construction. The inspection must determine through periodic review whether construction is in compliance with the enclosure design documents. In addition, the inspection must include testing windows and window installations for water penetration problems. The inspections must be performed by a person who has training and experience in the design and construction of building envelopes, who is free of improper interference or influence, and who has not been an employee of the developer. Notwithstanding these restrictions, the inspections may be done by the architect or engineer who prepared the design documents or who is the architect or engineer of record on the project.

A building department may not issue a certificate of occupancy for a multiunit residential

building until a building enclosure inspection report has been submitted. However, the department need not determine the adequacy of the inspection.

No condominium unit may be sold without the required enclosure design documents and inspection report. In addition, in the case of a conversion of a building to residential condominium units, special inspection provisions apply. Every condominium conversion must undergo an intrusive inspection of the building envelope. The inspection is to include testing, such as removing siding to check for construction quality and for water penetration. A conversion inspection must include a report of the findings of the inspection and must include any recommended repairs. The report must be made a part of the public offering statement for the condominium.

Alternative Dispute Resolution for Breaches of Warranties Under the Washington Condominium Act.

The WCA creates implied warranties and authorizes the use of express warranties regarding the quality of materials and construction in a condominium. Express warranties are written assertions, including descriptions, that are made by the declarant or dealer with respect to a condominium and that are relied upon by a purchaser in purchasing the unit. The implied statutory warranties provide that the condominium unit and the common areas are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by the declarant or the dealer will be:

- free from defective materials;
- constructed in accordance with sound engineering and construction standards;
- constructed in a workmanlike manner; and
- constructed in compliance with all laws then applicable to such improvements.

All of a declarant's or dealer's implied warranties of quality transfer to the purchaser upon any conveyance of the condominium unit.

Several alternative dispute resolution (ADR) provisions apply once an action alleging a breach of warranty under the WCA is filed, including case schedule plan, arbitration, mandatory mediation, and the use of neutral experts in resolving disputes over alleged breaches of condominium warranties under the WCA. The ADR provisions do not apply to actions asserting any claim regarding a building that is not a multiunit residential building.

Earnest Money Deposits in General.

Many contracts for the purchase and sale of real estate use an earnest money forfeiture provision in which one party, typically the purchaser, agrees to deposit a sum of money. A party forfeits the deposit by breaching the contract, allowing the other party to keep the money. Courts treat these arrangements as a form of liquidated damages, which are the specific amounts of damages that parties to a contract agree to pay as damages if they breach the agreement.

A liquidated damages clause is enforceable if it does not constitute a penalty and is not otherwise unlawful. In determining whether the amount of liquidated damages constitutes a penalty, courts

consider whether the amount of liquidated damages is a reasonable forecast of just compensation for the harm caused by the breach and whether the harm caused by the breach is impossible or very difficult to ascertain. The reasonableness of a liquidated damages clause is determined not by its correspondence with actual damages, but by reference to the prospective difficulty of estimating the possible damages that would flow from a breach. The greater the prospective difficulty of estimating possible damages, the greater the range of reasonableness used in assessing a liquidated damages clause.

State law guarantees enforcement of an earnest money forfeiture provision regardless of the seller's actual damages if:

- the agreement designates a payment as an earnest money deposit;
- forfeiture of the deposit is the seller's exclusive remedy; and
- the amount of earnest money to be forfeited does not exceed 5 percent of the purchase price.

An earnest money forfeiture provision that does not satisfy these requirements is interpreted and enforced under the common law liquidated damages requirements.

Earnest Money Deposits Under the Washington Uniform Common Interest Ownership Act.

Any deposit made in connection with the right to purchase a unit from the declarant or dealer of the common interest community under the WUCIOA must be placed in escrow until delivered to the declarant at closing or because of the purchaser's default under the purchase contract, refunded to the purchaser, or delivered to a court in connection with certain actions.

Summary of Engrossed Substitute Bill:

Until June 30, 2031, buildings with 10 or fewer units and no more than two stories are excluded from the definition of "multiunit residential building" and thereby are:

- exempt from the building enclosure design and inspection requirements; and
- not subject to the ADR provisions applicable to actions alleging breaches of implied or express warranty under the WCA.

Deposits made in connection with the right to purchase a unit from a declarant or dealer under the WUCIOA are not to exceed 10 percent of the purchase price. A declarant may withdraw escrow funds when construction of improvements has begun if:

- the purchase agreement provides that deposit funds may be used for construction; and
- the declarant obtains and maintains a surety bond in favor of the purchaser in an amount adequate to cover the amount of the deposit to be withdrawn.

The declarant may not withdraw more than the face amount of the bond. The bond must be payable to the purchaser if the purchaser obtains a final judgment against the declarant requiring the declarant to return the deposit pursuant to the purchase agreement. The bond may be either in the form of an individual bond for each deposit accepted by the declarant or in the form of a blanket bond assuring the return of all deposits received by the declarant.

State law guaranteeing the enforcement of earnest money forfeiture provisions does not apply to deposits made in connection with the right to purchase a unit from a declarant or dealer under the WUCIOA.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.