

Report to the Judiciary Committees of the
Washington State Senate and House of
Representatives

of the Condominium Act Study Committee
Created by Chapter 201, Laws of 2004

January 2005

**REPORT OF THE CONDOMINIUM ACT STUDY COMMITTEE
CREATED BY CHAPTER 201, LAWS OF 2004**

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Introduction

The 2004 legislature, along with earlier legislatures, found that Washington's condominium industry had faltered. Condo owners have suffered from water penetration. The resulting litigation led to court decisions that expanded the scope of insurance policies beyond the insurers' expectations and damage awards that exceeded their anticipated exposures. Insurers reacted by fleeing the State's condo market or narrowing coverage and hiking premiums. Partisans in these battles disagreed about the relative contributions of poor construction practices and overzealous litigants to these problems. In addition to the financial hardships these problems caused for both developers and condo owners, the decline of the condo market threatened the legislature's desire to expand home ownership opportunities for low income families and for growth management.

The legislature has tackled this problem with amendments to the State's Condominium Act and new laws. These enactments have included the creation of an obligation of condo owners to give developers notice of and an opportunity to cure construction defects. Partisans debate the utility of that provision, but, whatever its merits, it has not solved the problem. In 2003, the legislature established additional affirmative defenses that builders can use to avoid or reduce liability. In 2004 the legislature again amended the Condo Act to require a higher standard of proof for construction defect claims and to create a new warranty insurance program. It is too soon to tell whether the new proof standard will have a beneficial effect. The new warranty program, patterned after similar legislation adopted in British Columbia in 1999, purported to free developers from the "implied warranty" and liability regime of the Condo Act if they would provide insurance to homeowners with legislatively prescribed coverage. Developers offering warranty insurance would also be allowed to include binding arbitration clauses in their sales documents, something that Washington courts had concluded was not otherwise permitted under the Condo Act. The potential of the warranty program has not been tested to date because no insurance company has yet offered it in the few months since enactment.

The 2004 legislature also considered two other topics: mandatory course-of-construction inspection of condominium building envelopes and alternative dispute resolution mechanisms for condo construction defect cases. Unable to reach agreement on those issues, the legislature created a study committee to examine them. Specifically, section 8 of SB 5536 provided:

- (1) A committee is established to study:
 - (a) The required use of independent third-party inspections of residential condominiums as a way to reduce the problem of water penetration in residential condominiums; and

- (b) The use of arbitration or other forms of alternative dispute resolution to resolve disputes involving alleged breaches of implied or express warranties under chapter 64.34 RCW.
- (2) The committee consists of the following members who shall be persons with experience and expertise in condominium law or condominium construction:
 - (a) A member, who shall be the chair of the committee, to be appointed by the governor;
 - (b) Three members to be appointed by the majority leader of the senate; and
 - (c) Three members to be appointed by the speaker of the house of representatives.
- (3) The committee shall:
 - (a) Examine the problem of water penetration of condominiums and the efficacy of requiring independent third-party inspections of condominiums, including plan inspection and inspection during construction, as a way to reduce the problem of water penetration;
 - (b) Examine issues relating to alternative dispute resolution, including but not limited to:
 - (i) When and how the decision to use alternative dispute resolution is made;
 - (ii) The procedures to be used in an alternative dispute resolution;
 - (iii) The nature of the right of appeal from an alternative dispute resolution decision; and
 - (iv) The allocation of costs and fees associated with an alternative dispute resolution proceeding or appeal;
 - (c) Deliver to the judiciary committees of the senate and house of representatives, not later than December 31, 2004, a report of the findings and conclusions of the committee, and any proposed legislation implementing third-party water penetration inspections or providing for alternative dispute resolution for warranty issues.

The legislature and the governor appointed the committee members at the end of June 2004, and the committee met for the first time in July. The committee's meetings were open to the public and were regularly attended by interested individuals, including plaintiffs' attorneys and representatives of the Washington Homeowners Coalition, the Master Builders Association, the Community Association Institute, the East King County Chambers of Commerce Legislative Coalition, the Building Industry Association of Washington, and HomeSight. These organizations were provided every opportunity to participate in our proceedings. While we don't speak for them, it is our understanding that they have all accepted our recommendations with varying degrees of enthusiasm.

The committee met a total of 10 times between July and December. The free time contributed to this effort was in the range of 1,000 hours. In the first several meetings, the committee tried to explore the scope and nature of the problems affecting Washington's condo industry, without explicitly formulating solutions. During this phase,

the committee heard from insurance companies and brokers, a mediator/arbitrator who specializes in construction defect cases, design professionals with expertise in building envelope inspections, and a plaintiffs attorney from Vancouver, B.C. familiar with condo defect litigation and practices there.¹ In addition we drew on the experiences of our members and other meeting attendees. To some degree, we also explored the practices of other jurisdictions, including British Columbia, Texas, Alaska, California and Nevada. Of these, British Columbia's experiences were the most useful.

The committee made no thorough effort to confirm the legislature's findings about the extent or severity of the decline in the condo construction industry. The members' anecdotal accounts generally confirmed the legislature's conclusions, though there were disagreements about the magnitude of the decline. Also, Washington's condo markets did not match the post-reform rebound in British Columbia, suggesting that more than the recession was at work. But we had our hands full with the two jobs we were given and did not pursue this issue.

The voting members of the committee (the chair did not vote) were by and large individuals who were professionally interested in the outcome of the committee's work, including developers, attorneys representing homeowners and developers, and an engineer specializing in building envelope design and inspection. Their professional interests gave them substantial background in, if not always completely dispassionate views about, the questions posed by the legislature. Since the committee's membership was neither democratically selected nor demographically representative, the chair decided that all recommendations would have to be unanimous. It was his view that the legislature wanted a compromise that could be supported by these well-informed individuals with their different points of view, rather than competing recommendations from self-interested alliances.

The committee members worked hard to rise above their economic interests, while being informed by them. Their unanimous recommendations are testimony to their success in doing so. Unanimity was not easily achieved. We arrived at many seeming dead-ends. But the committee scheduled several extra meetings and had many out-of-meeting conversations that ultimately allowed us to avoid failure. The resulting compromises were carefully crafted and are interdependent in ways that may not be obvious to those who did not participate in our deliberations. We recognize that the legislature bears the final responsibility for turning our recommendations into law, if it chooses to do so. As the legislature takes up that responsibility, we emphasize that these recommendations are the product of countless hours by and hard-won compromises of the legislature's uncompensated appointees. We urge the legislature to consider these recommendations carefully, to honor the compromises that were reached, and not to cherry-pick the easier recommendations from among those that are more controversial. Because of the hard work that went into forging these recommendations, as well as our shared interest in building a healthy, dynamic and

¹ Despite our appreciation for their contributions and the fact that our meetings were open to the public, we have chosen to leave these individuals nameless in this report. We encouraged and believe we got complete candor from them. But we have only ourselves to blame for these recommendations.

high-quality condo industry that serves the needs of homeowners, developers and the State, we are all willing to continue our involvement through the legislature's deliberations.

The legislature specifically requested that we draft legislation to implement our recommendations, and we attempted to do that. But time ran out on those efforts. We consumed and exceeded our allotted time period in arriving at our recommendations. Legislative staff, however, helped us with initial efforts to convert these recommendations into bill form. Those efforts progressed further in the case of course-of-construction inspection than with the alternative dispute resolution process. In neither case, however, did the committee finally bless the specific form of those bills. The alternative dispute resolution bill does little more than wrap the committee's bullet point recommendations with a preamble and enacting clause. We would be happy to consult individually with legislative members and staff in drafting implementing legislation and believe the involvement of committee members in that effort is essential to its success.

Goals and Objectives Underlying Our Recommendations

Although we did not develop formal criteria against which to measure our recommendations, our discussions made plain that our common goals were to increase the confidence of homeowners, developers and insurers in the Washington condo industry and liability systems by:

- Improving and demonstrating improvements in construction,
- Promoting early and meaningful settlement of disputes, and
- Increasing the role of design professionals in the construction and dispute resolution process.

Recommendations

Our recommendations follow. In addition, we have provided commentary, which is not part of our recommendations, but which may be helpful in understanding what we intended or why we did what we did.

- I. Recommendations regarding “The required use of independent third-party inspections of residential condominiums as a way to reduce the problem of water penetration in residential condominiums”*

Recommendations	Commentary
<p>1. Inspections. All multi-unit residential building enclosures for which building permits are issued after enactment shall be inspected by a qualified inspector during the course of construction, whether initial construction or rehabilitative construction of the building enclosure.</p>	<p>This recommendation reaches beyond condominiums to all multi-unit buildings, since it is not always apparent whether a building under construction will be for apartments or condominiums and also because buildings are often converted from apartments to condos. The recommendation applies to newly constructed buildings and buildings that undergo rehabilitative construction of the building enclosure, but does not otherwise apply to pre-existing buildings.</p>
<p>2. Design Documents. Building enclosure design documents shall be submitted to the appropriate building department prior to the start of construction of the building enclosure. The design documents shall be stamped by a licensed design professional and contain an appropriate level of information to allow construction of the building enclosure. The submission shall be updated (either through individual updates or a cumulative or as-built update) to reflect changes made to the design during construction.</p>	<p>The committee debated at length whether new standards were needed for building envelopes. In the end, we concluded that design complexities precluded the use of prescribed or even presumptively adequate building enclosure details. We also believed that too much specificity might thwart useful design innovations. Our conclusion was that design professionals should be free to specify building enclosure details that were appropriate in their professional judgment. They would, however, be required to prepare plans specifically for the building enclosure at a high level of detail and to submit those plans to the building department. The building department would have no obligation to review or approve those plans. The committee understands that the nature and details of the design documents will vary significantly depending on the project being built and its location. For example,</p>

	<p>we would ordinarily expect a greater level of building enclosure design details for projects built in Western Washington than in Eastern Washington. We discussed the possibility of only requiring design documents and inspections for marine climate zones, but rejected that approach in favor of one that allows for substantial flexibility in its implementation.</p>
<p>3. Qualifications. To be qualified, a building enclosure inspector must either be a licensed architect or engineer with verifiable training and experience in building enclosure design and construction, or any person with verifiable training and experience in building enclosure design and construction. This recommendation shall not be construed to alter the requirements for licensure, or the jurisdiction, authority, or scope of practice of architects, professional engineers, or general contractors.</p>	<p>The committee presumes that most inspectors will be licensed design professionals with substantial training and experience in building enclosure design and construction. We recognized, however, that there are several individuals without those credentials performing building envelope inspections in Washington. We also recognized that specific design issues may not require a licensed professional. For those reasons, we believe the legislation should permit the use of non-design professionals as inspectors where they are able to demonstrate that they have the necessary training and experience. Since there is no generally recognized training program for building envelope design and inspection, the committee’s recommendation is necessarily general in that regard.</p>
<p>4. Independence. A qualified building enclosure inspector shall be free from any interference or influence relating to the inspections. The qualified inspector may not be an employee or subsidiary of, nor have any pecuniary interest in, the declarant or developer of the project in question or any party providing services or materials for the project, except that the inspector may be the architect or engineer who approved the building envelope design documents or the architect or engineer of record. The qualified inspector may, but is not required</p>	<p>The committee recognizes that many individuals employed by declarants may have the necessary training and experience to be inspectors. Even so, the committee concluded that inspectors who were employees of a declarant may suffer from the appearance of a lack of independence and compromise the confidence of homeowners. We recognize that this may, in some instances, create an unfair burden on developers with in-house design professionals, though we also believe that impact can be mitigated by contracting with outside professionals for supervision and final approval of inspections performed in substantial part</p>

<p>to, assist with the preparation of such design documents.</p>	<p>by employees. While the committee believed that the best practice is that the inspector be involved in a meaningful way in the preparation of the building design documents, the Committee elected not to require such involvement legislatively. We were concerned that this would hinder the ability of builders to hire and fire consultants, and might forestall evolution of useful design/inspection paradigms.</p>
<p>5. Scope of Inspection. Any course of construction inspection program for a multi-unit residential building shall include at a minimum the following:</p> <ul style="list-style-type: none"> a. Water penetration resistance testing of a representative sample of windows and window installations. Such tests shall be conducted according to industry standards. Where appropriate, tests shall be conducted with an induced air pressure difference across the window and window installation. Testing would not be required if the same assembly had previously been tested <i>in situ</i> in the project under construction by that builder, other members of the construction team (e.g., the architect or engineer), or by an independent testing laboratory. b. An independent periodic review of building enclosure construction activities during the course of construction to ascertain whether that the multi-unit residential building has been constructed in general compliance with the building enclosure design documents. 	<p>The committee believed that the small additional expense of resistance testing was warranted by the valuable results it would produce. We recognize, however, that the type of testing may vary according to the type of structure and windows and the climate in which the building is constructed. We assume inspectors will visit construction projects between one and three times a week, depending on the stage of construction.</p>
<p>6. Certification. A qualified inspector shall prepare a letter certifying that the building enclosure has been</p>	<p>The committee recognized that the building envelope design might be modified during the course of construction.</p>

<p>inspected during the course of construction and has been constructed in substantial compliance with the building envelope design documents. The letter of inspection shall be provided to the appropriate building department prior to final acceptance by the building department.</p>	<p>The inspector will inspect the construction in accordance with the modified design. This recognizes the need for flexibility in addressing design issues as they arise during the course of construction. It also emphasizes the need for the inspector's involvement in the design process. There is no requirement that the inspector submit his or her notes or inspection records to the building department. The committee assumes that design professionals will develop professional standards for their inspections and certifications, including reports to accompany their certifications. Such reports might prove useful to both declarants and homeowners.</p>
<p>7. Liability. The qualified inspector is only liable to the declarant. The inspector and the developer may contractually agree to limit the inspector's liability to the fee or contract price actually paid.</p>	<p>The committee concluded that it was not practical to make an inspector directly liable to homeowners for his or her errors or omissions. Design professionals and inspectors are not typically liable to homeowners under current law. The committee believed that making them liable under this new regime would scare away inspectors and their insurers, inhibiting successful implementation of these recommendations. Moreover, the committee did not believe that the solution to the problems in the condominium industry would be improved by creating new and greater opportunities for litigation. Declarants would remain liable to homeowners for construction defects to the same extent as they are under existing law, so homeowners would not be deprived of an opportunity to sue if they were damaged.</p>
<p>8. No Presumption. The course of construction inspection will not be entitled to any evidentiary presumption, but the inspector will be permitted to testify at trial under current evidentiary rules.</p>	<p>To testify at trial, the inspector's testimony would have to satisfy the usual evidentiary rules governing experts and other matters, but the inspector would not be precluded from testifying because of his or her role as the inspector.</p>
<p>9. Definitions. Several new definitions are required in connection with the</p>	<p>These were working definitions used by the committee. We recognize that they will</p>

<p>recommendations above:</p> <p>“Building enclosure” means that part of any building, above or below grade that physically separates the outside or exterior environment from the interior environment(s). Interior environments include unheated enclosed spaces (including balconies and decks, guardwalls, balcony support columns, chimneys, garages, etc. that interface with the building).</p> <p>“Building enclosure design documents” means plans, details and specifications for the building enclosure stamped by a licensed engineer or architect.</p> <p>“Dwelling unit” means a suite operated as a housing unit, used or intended to be used as a residence or usually containing cooking, eating, living, sleeping and sanitary facilities.</p> <p>“Multi-unit residential building” means a residential building containing more than two dwelling units, excluding the following classes of buildings: (a) hotels and motels; (b) dormitories; (c) care facilities; (d) floating homes; (e) any multi-unit building in which all of the dwelling units are held under one ownership and constructed for rental purposes, if the building is subject to a covenant restricting the sale or other disposition of any dwelling units for ten years from the date of first occupancy.</p>	<p>have to be harmonized with the Condo Act.</p> <p>The qualified inspector will inspect for water penetration related issues involving decks, guardwalls, balcony support columns, chimneys, garages, etc., but shall not be responsible for inspecting for health and safety or similar issues.</p>
<p>10. Effective Date. The foregoing requirements would be effective for all buildings for which a building permit is issued on or after July 1, 2005.</p>	<p>The committee recognizes that building departments may not be prepared to receive the building enclosure design documents as early as July 1, 2005, but believes that these requirements should be effective notwithstanding that possible</p>

	<p>deficiency. The role of the building department in implementing these recommendations is strictly ministerial and delays in creating a process for the receipt of design documents and inspection letters should not impede implementation of the other requirements suggested in these recommendations.</p>
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II. *Recommendations regarding “The use of arbitration or other forms of alternative dispute resolution to resolve disputes involving alleged breaches of implied or express warranties under chapter 64.34 RCW”*

Recommendations	Commentary
<p>1. Arbitration.</p> <p>a. Election. At the election of either the homeowner or the declarant made within 90 days from service of the complaint regarding a dispute involving alleged breaches of implied or express warranties under RCW Ch. 64.34 (or seeking relief that could be awarded for such breaches pursuant to RCW Ch. 64.34, regardless of the legal theories pled) would be referred, as a matter of right, to mandatory arbitration, regardless of the size of the dispute.</p> <p>b. Number of arbitrators</p> <p>i. Unless otherwise agreed, claims for less than \$1 million will be heard by a single arbitrator.</p> <p>ii. Unless otherwise agreed, claims for \$1 million or more will be heard by three arbitrators.</p> <p>c. Qualifications. All arbitrators should be attorneys with experience as attorneys, judges, arbitrators or mediators in construction defect disputes.</p> <p>d. Trial <i>de novo</i>. A party may, as a matter of right, request a trial <i>de novo</i> in Superior Court pursuant to RCW Ch. 7.06, the trial date for which should be given priority. If the judgment in the trial <i>de novo</i> is not more</p>	<p>Either party may elect to arbitrate, but the decision is postponed until a complaint has been filed. At this point, the parties should have better information to make this decision and the insurance companies should be involved in the decision making process.</p> <p>Having multiple arbitrators is especially useful where there is no right of appeal. Here, there is a right to a trial <i>de novo</i>. Nonetheless, we have provided for three arbitrators for larger cases, but have allowed the parties to agree to use a single arbitrator if they wish.</p> <p>The intent of the committee was to design a dispute resolution process that would lead to better, quicker and cheaper results. This is accomplished by requiring or permitting case scheduling, early intervention of a neutral expert and incentives through the offer-of-judgment rules for early and meaningful settlement. But, if the new procedures – mediation, arbitration, and trial <i>de novo</i> – were fully exhausted, the process could be longer than it is now. We believe this possibility should be mitigated by requesting a priority trial date for trials <i>de novo</i>.</p> <p>These procedures do not affect any notice and cure rights under RCW § 64.50.050.</p>

<p>favorable to the appealing party than the arbitration award, that party shall pay the other party(ies)'s fees and costs incurred after the filing of the appeal.</p>	
<p>2. Modifications to Procedures. Whether in arbitration or court, new procedural rules along the lines of those suggested in Exhibit A should be adopted.</p>	<p>The committee understands that there may be "separations of powers" issues that affect whether these rules may be adopted by statute.</p>
<p>3. Mediation.</p> <p>a. Whether in arbitration or court, the parties must participate in mandatory mediation before a mediator agreed to by the parties or, in the absence of an agreement, appointed by the arbitrator(s) or court.</p> <p>b. The parties and their experts shall be required to meet and confer in an attempt to resolve or narrow the scope of the disputed issues. The parties' obligations to mediate and meet and confer should be governed by timelines such as those provided in Exhibit A.</p>	<p>Most cases now settle before trial, many in mediation. We have attempted to design a mediation process that promotes early settlement. The parties would be referred to mandatory mediation whether they are in court or in arbitration. The use of a neutral expert and the offer-of-judgment recommendations should further assist the parties in narrowing the issues in dispute and settling cases.</p> <p>Exhibit A is illustrative only. Mediation should be required as early as possible in the case.</p>
<p>4. Neutral Expert.</p> <p>a. If, after meeting and conferring, disputed issues remain, at the request of a party, the arbitrator/court may (but shall not be required to) appoint a neutral expert.</p> <p>b. The neutral expert shall be a licensed architect or engineer with substantial experience in the disputed issue or shall have other suitable experience and training. The neutral expert shall not have been employed as an expert by either party within</p>	<p>The use of a neutral expert should help the parties narrow the issues in dispute early in the course of a law suit. We opted for this approach rather than a specialized construction defect "science court" because we believed there would not be enough cases to justify the creation of an entirely new court, but believed it would yield many if not all of the same benefits. We also preferred this approach to Texas' creation of a state agency that employs and assigns inspectors to assist in dispute resolution. The Texas system has been criticized (rightly or wrongly we don't know) for being a captive of the building industry. We believe our neutral expert</p>

<p>three years before the commencement of the present dispute, unless the parties agree otherwise.</p> <p>c. The parties shall be given an opportunity to recommend neutral experts to the arbitrator/court and have input to the arbitrator's or court's appointment.</p> <p>d. The parties shall agree to, or, in the absence of agreement, the arbitrator/court shall determine, matters such as:</p> <ul style="list-style-type: none"> i. Who will serve as the neutral expert. ii. The scope of the neutral expert's duties (provided that the neutral expert shall only make findings regarding costs if that assignment is agreed to by the parties). iii. The number and timing of inspections of the property. iv. Coordination of inspection activities with the parties' experts. v. The neutral expert's access to the work product of the parties' experts. vi. The product to be prepared by the neutral expert. vii. Whether the neutral expert should participate personally in the parties' mediation. viii. Other matters relevant to the neutral expert's assignment. <p>e. The neutral expert will not make findings regarding the amount of damages or cost of repair unless agreed by the parties.</p>	<p>recommendation does not lend itself to that criticism and avoids the creation of a new state agency.</p> <p>The parties will have a substantial opportunity for input to the selection of the neutral expert, the neutral expert's scope of work, and the neutral expert's report.</p> <p>The qualifications for the neutral expert are the same as for the course-of-construction inspector.</p> <p>The arbitrator/court will determine whether and to what extent the neutral expert's report can be used as evidence against a later-joined party who did not participate in the selection of the neutral expert and also who will pay if additional experts are appointed because of later-joined parties.</p> <p>The committee recognized that it would not be possible to design a "one size fits all" standard for the neutral expert's role. But we assume that the neutral expert will generally prepare a report that specifies the building enclosure problems and suggested corrective measures in sufficient detail to permit the parties to obtain bids for the suggested repairs based on the report. If so, the neutral expert's report, if accepted by the parties, will leave open only the issue of the cost of the recommended repairs. Our experience suggests that repair cost estimates should be within 10% of one another if based on detailed plans.</p> <p>The neutral expert's report will not be entitled to any evidentiary presumption, but the report and the expert's testimony would be admissible at the arbitration hearing or at trial (including the trial de novo) for whatever weight it may have.</p>
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<p>f. A party may, by motion to the arbitrator(s) or court, object to the individual appointed to serve as the neutral expert and the determinations regarding the neutral expert's assignment.</p> <p>g. The neutral expert shall have no obligation to participate in the repairs recommended by the neutral expert. The homeowners shall have no obligation to accept any low bid submitted as part of the determination of damages. The neutral expert shall have no liability to the parties for the performance of his or her duties.</p> <p>h. Except as agreed by the parties, the parties shall have a right to review and comment on the neutral expert's report before it is made final.</p> <p>i. The neutral expert's report and testimony shall be admissible at the arbitration hearing, trial <i>de novo</i> or trial subject to the usual evidentiary rules (qualification as expert, prejudicial testimony, etc.). The neutral expert's report and testimony shall not be entitled to any presumptive effect.</p> <p>j. The arbitrator(s) or court shall determine the significance of the neutral expert's report and testimony for parties joined after the neutral expert's appointment and whether additional neutral experts should be appointed or other measures taken to protect later-joined parties from undue prejudice.</p>	
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<p>5. Costs of Arbitration, Mediation and Neutral Expert. The electing party must advance the fees of the arbitrator(s), mediator and neutral expert.</p> <p>a. If the building permit is issued on or after July 1, 2005, then the non-prevailing party (determined under existing standards) in the ADR process shall be liable for the fees of the arbitrator(s), mediator and neutral expert. If the appropriate building department has not promulgated the necessary filing requirements, a declarant may nonetheless be deemed to have complied with the new course-of-construction inspection procedures if it satisfies all of the related requirements other than ministerial filings with the building department (this still requires permit issuance on or after July 1, 2005). The arbitrator/judge shall determine the declarant's compliance in the event of a dispute.</p> <p>b. If the building permit is issued prior to July 1, 2005, then the party that elected the ADR process shall be liable for the fees of the arbitrator(s), mediator and neutral expert.</p>	<p>The reference to issuance of the "building permit" is to final action by the appropriate building department following payment of all required fees and satisfaction of any "stamping" or similar requirements.</p> <p>In all cases, the party that elects arbitration will advance the costs of the arbitrator and mediator and the party that requests a neutral expert will advance the costs of the neutral expert.</p> <p>As a general rule, the electing party will bear the costs of these ADR activities in disputes involving buildings that were not subject to the course-of-construction inspections, whether or not that party prevails. In disputes involving buildings that were subject to such inspections, the non-prevailing party will be required to bear these costs. While this is the general rule, we opted for a bright-line test based on the date of issuance of the building permit to minimize ambiguities.</p>
<p>6. Subcontractors. Upon the demand of a party to the ADR proceedings, any subcontractor or supplier against which such party has a legal claim and whose work or performance becomes an issue in the ADR proceedings shall join in and become a party to and be bound by the ADR proceedings.</p>	

<p>7. Effective date for ADR process. The new ADR process is available at the election of a party only for disputes in which a complaint is served or filed after July 1, 2005.</p>	
<p>8. Offers of Judgment and Attorneys' Fees.</p> <p>a. Either party may submit an offer of judgment on or prior to the 60th day following completion of mediation (as determined by a notice from one party to the other terminating mediation). The offer in judgment will specify the amount of damages (not including attorneys' fees or costs) the party is willing to pay or receive and also indicate the party's willingness to pay fees awarded as provided below. There can be more than one offer so long as the offer is timely made.</p> <p>b. An offer by the defendant must include a demonstration of ability to pay both damages and fees.</p> <p>c. If the plaintiff accepts the defendant's offer of judgment, the plaintiff shall be the prevailing party and, in addition to the amount of the offer, be entitled to recover its fees in an amount to be determined by the arbitrator/judge using existing standards.</p> <p>d. If the final judgment on damages (without consideration of attorneys' fees and costs) is not more favorable to the offeree than the offer of judgment, then the party making the offer shall be the prevailing party for purposes of a fee award. The</p>	<p>These recommendations are intended to promote early settlement. To qualify, an offer-of-judgment can be made at any time up to the 60th day following completion of mediation, including prior to or during the mediation. A party may make more than one qualifying offer-of-judgment.</p> <p>Since defendants are not always able to pay the amounts they owe, the offer must be accompanied by a demonstration of ability to pay the amount it offers, so the plaintiffs will have assurance that they will be paid the offered amount if they accept the offer.</p> <p>If the plaintiff accepts the defendant's qualifying offer, it will also be entitled to receive a fee award using existing standards with no new limitations.</p> <p>If an offer of judgment is not accepted, but the judgment is ultimately less favorable to the offeree than the offer, that party will be the non-prevailing party and will be required to pay the other party's attorneys' fees, using existing standards, except that the plaintiff's obligation to pay a defendant's fees will not exceed 5% of assessed value.</p> <p>The obligation of the non-prevailing party to bear the costs of arbitration, mediation and the neutral expert is addressed in Section II, 5, above.</p> <p>The committee was aware that it is possible to plead multiple legal theories which would lead to overlapping damage awards. We did not want the parties to avoid the fee shifting provisions of these recommendations by seeking a damage award under some theory (common law or statutory) other than the Condo Act that</p>

<p>amount of the fee award shall be for the period following the date of the offer of judgment and shall be determined by the arbitrator/judge using existing standards. The non-prevailing party shall not be entitled to receive any award of fees.</p> <p>e. If the final judgment is more favorable to the offeree than the offer of judgment, then the arbitrator/judge shall determine which party is the prevailing party and the amount of the fee award using existing standards.</p> <p>f. Notwithstanding the above, the amount of the defendant's fees payable by the plaintiff shall not exceed 5% of the assessed value of the condo project as a whole, allocated among the owners in proportion to the assessed values of their individual units.</p> <p>g. These attorney fee provisions will apply to any damages that could have been awarded pursuant to RCW 64.34.445, regardless of the legal theories pled.</p>	<p>could have been obtained under the Condo Act. Our recommendations provide that these rules apply to damage awards that could have been obtained under the Condo Act, even if they were obtained under other theories.</p>
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Conclusion

Given the makeup of the committee, it may be stating the obvious to say that no member is happy with all of these recommendations. But, collectively, the recommendations are supported by us all. We did not reach this consensus easily. It will break down quickly if these recommendations are split apart or significantly modified. All members made significant concessions in order to make gains elsewhere.

We appreciate this opportunity to be of service to the legislature and especially appreciate the support we received from legislative and gubernatorial staff. We also thank the many other individuals who were not members of the committee, but who contributed their time and talents to the successful conclusion of our efforts.

Study Committee Members

Todd Bennett, Bennett Homes

Abbie Birmingham, Murray-Franklyn

Marcus Dell, RDH Building Engineering, Inc.

Vince DePillis, Real Property Law Group

Marion Morgenstern, Strichartz Morgenstern

Mark O'Donnell, Preg O'Donnell and Gillett

Steven Seward, attorney, chair

Exhibit A
Rules of Procedure

The Plan:

The Case Schedule/ADR Plan includes the following deadlines:

1. Deadline to add third and fourth parties or stipulate that third or fourth parties will not be added.
 - a. NOTE: While the third and fourth party defendants are often essential, their addition to the case results in some necessary delays and will force the mediation to take place at a later date. If the developer decides not to add third or fourth parties to the lawsuit, an even earlier mediation would be possible.
 - b. If third parties are not added, it may also be possible to require or allow an accelerated trial date, further reducing the time required to resolve a claim.
2. Deadline to select mediator. Good mediators are very busy and must be booked months in advance.
3. Deadline for completion of plaintiff's investigation.
4. Deadlines for disclosure of investigation plans of the defendants, and third- and fourth-party defendants' ("the Parties Defendant").

This is necessary to coordinate access to the site and comply with CR 34. These deadlines may need to be staggered because the third and fourth parties must respond to the upstream parties' claims and will likely want to wait until the upstream parties have performed their investigation and disclosed their list of defects and proposed repairs.

5. Deadlines for Parties Defendant to complete their investigation. These dates may need to be staggered as well.
6. Deadlines for each party to disclose their list of defects and proposed scope of repair.
7. Deadlines to petition for and utilize neutral expert.
8. Deadline for each party to produce and disclose its estimated cost of repair.
9. Deadline for plaintiff's written settlement demand.
10. Deadline for defendant's response to plaintiff's written settlement demand.
11. Deadline for defendant's and third party defendants' demands on downstream parties and related deadlines for their respective responses.
12. Deadline for submission of mediation materials.

This deadline should be 30 days prior to mediation to ensure that all parties and their insurers have time to receive and review necessary materials.

13. Deadline for each party to submit a declaration that: (1) a decision maker with authority will be available for the duration of the mediation, (2) the decision maker has been provided with and reviewed the requisite mediation materials provided by its own counsel, as well as the materials

submitted by the opposing parties.

These last two deadlines are aimed at ensuring a productive and ultimately successful mediation session. When mediation does not result in agreement, it is generally for one of two reasons: (1) either the parties are unable to reach an agreement, or (2) more commonly, one or more of the parties is not prepared, and thus is unable to fully engage in the process. The foregoing deadlines require advance preparation which will, in turn, maximize the potential for a successful outcome.

Deadline for mediation. Courts, are authorized to, and should perhaps be required to penalize the failure to comply with the deadlines established. Sanctions are particularly important with respect to items 11 and 12, as they are so close to mediation that it will be impossible to correct the problem and still have a meaningful mediation.

Below is a sample case schedule that assumes a lawsuit was filed on January 1, 2004, which assumes there will be third- and fourth-party defendants. For reference, when a lawsuit is filed in King County, the court issues a case schedule that sets a trial date generally 18 months from the date suit is filed. The current mediation deadline is one month prior to trial, by which point the parties will have incurred significant attorneys' fees to comply with other pre-trial deadlines.

Event or Deadline	Date	Time From Filing	King County's Standard Case Schedule
Lawsuit Filed	January 1, 2004	0	0
Deadline for Plaintiff to submit preliminary list of defects	February 1, 2004	1 month	Not addressed in case schedule, but required by RCW 64.50.030
Deadline to File Motion to Compel Arbitration	No later than 45 days after service of process.		
Deadline to add third-parties	April 1, 2004	3 months	Not addressed
Deadline for Plaintiffs to complete its main investigation	May 1, 2004	4 months	Not addressed
Deadline to select mediator.	May 1, 2004	4 months	Not addressed

Event or Deadline	Date	Time From Filing	King County's Standard Case Schedule
Deadline for Plaintiff to disclose its list of defects and scope of repair.	June 1, 2004	5 months	Not addressed
Deadline to add 4 th parties.	June 1, 2004	5 months	Not addressed
Deadline for Defendants' investigation plan.	July 1, 2004	6 months	Not addressed
Deadline to complete Defendants' Investigation.	August 1, 2004	7 months	Not addressed
Deadline for 3 rd and 4 th party defendants' to disclose their proposed investigations.	August 1, 2004	7 months	Not addressed
Deadline for Plaintiff to disclose its estimated cost of repair.	August 1, 2004	7 months	Not addressed
Deadline for 3 rd and 4 th party defendants' investigation.	September 1, 2004	8 months	Not addressed
Deadline for Defendants to disclose their list of defects and scope of repair.	September 1, 2004	8 months	Not addressed
Deadline for Plaintiffs and Defendants' expert to meet and determine the repairs, if any, about which they do not agree.	October 1, 2004	9 months	Not addressed
Deadline for Defendants to disclose their estimate.	October 1, 2004	9 months	Not addressed
Deadline for 3 rd and 4 th Parties to disclose their list of defects, scope of repair, and cost estimate.	October 1, 2004	9 months	Not addressed
Deadline for Motion to appoint neutral expert	October 15, 2004	9.5 months	Not addressed

Event or Deadline	Date	Time From Filing	King County's Standard Case Schedule
Deadline for Plaintiff's written settlement demand	October 15, 2004	9.5 months	45 days before trial
Deadline for Defendants' written response to Plaintiff's settlement demand.	November 15, 2004	10.5 months	35 days before trial
Deadline for neutral experts' opinions regarding those repair items in dispute.	November 22, 2004	10.75 months	Not addressed
Deadline for all parties to exchange mediation materials.	December 1, 2004	11 months	Not currently addressed
Deadline for all parties to submit declaration of preparedness.	December 25, 2004	11.8 months	Not currently addressed
Mediation (settlement/mediation/ADR conference)	December 31, 2004	12 months	30 days before trial, approx. 17 months from filing
Trial Date Note: An accelerated trial date may be possible if third or fourth parties are not added to the lawsuit.	November 1, 2005	18 months	18 months from filing date

There are several methods to shorten this schedule and have an earlier mediation. The schedule can be shortened by several months if third- and fourth- party defendants are not brought into the lawsuit. Time can also be reduced if the parties are able to agree to a joint investigation rather than staggered investigations.