Annual Colorado Construction Law Review

Year-End 2023

December 20, 2023 | Written by Bret Gunnell, Michael Zehner, Cassie Dufon and Roni Vogt

I. Legislative Update:

A. Colorado Prohibits Land Use Laws That Restrict Growth

House Bill 23-1255 ("HB-1255"), effective as of August 7, 2023, preempts and prohibits enforcement of existing anti-growth laws and prohibits the enactment and enforcement of new anti-growth laws.[1] Specifically, HB-1255 disallows any land use law designed to limit population growth, including efforts to limit the number of building permit applications for residential or mixed-use developments. The law includes a carve-out for governmental entities that have experienced a "disaster emergency", have developed or amended land use plans or land use laws covering residential development or the residential component of a mixed-use development, or are extending or acquiring public infrastructure, public services, or water resources. A government entity that experiences one of these carve-out events may implement a growth cap for up to twenty-four months in a five-year period.

B. Colorado Increases Public Notice Threshold for Special District Construction

On March 17, 2023, Governor Polis signed House Bill 23-1023 ("HB-1023") into law.[2] Effective August 7, 2023, HB-1023 increases the threshold dollar amount to $120,000 where public notice is required to solicit bids for special district construction projects. Previously, the law required public notice for projects with a contract amount of $60,000 or more.[3] The bill also adjusts the threshold amount according to the rate of inflation every five years beginning on July 1, 2028.[4] The Colorado legislature defined inflation, for purposes of HB-1023, as "the percentage change in the United States Department of Labor Bureau of Labor Statistics Consumer Price Index for Denver-Aurora-Lakewood for all items paid by all urban consumers, or its applicable successor index."[5]

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[1] H.B. 23-1255, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).
[2] H.B. 23-1023, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).
[3] Colo. Rev. Stat. § 31-1-1001(1)(d)(I).
[4] *Id.*
[5] *Id.*

C. Landlords Must Remediate Property Damage Caused by an Environmental Public Health Event

On May 12, 2023, Governor Polis signed House Bill 23-1254 ("HB-1254") into law.[6] It became effective that same day. Through this bill, the Colorado legislature sought to change the laws surrounding the implied warranty of habitability in the wake of the December 2021 Marshall Fire, which burned 6,000 acres, destroyed approximately 1,100 homes, and resulted in $500 million in damages. Following the fire, renters faced challenges securing safe housing free from smoke, ash, and other air contaminants in fire-impacted areas.

The legislature made changes in three main areas:

First, HB-1254 expands the implied warranty of habitability to include damages caused by an "environmental public health event."[7] The legislature defined an environmental public health event as "a natural disaster or an environmental event, such as a wildfire, a flood, or a release of toxic contaminants, that could create negative health and safety impacts for tenants that live in nearby residential premises."[8] The prior version of the statute did not include any reference to an environmental event.

Second, residential landlords must improve their properties to a condition that complies with applicable standards for the remediation and clean-up of residential premises after damage due to an environmental public health event.[9] Colorado will now follow the standards set by the American National Standards Institute ("ANSI"). Additionally, tenants must still properly notify their landlord of habitability issues in writing or electronically. Landlords generally have twenty-four (24) hours to respond but may have up to seventy-two (72) hours. Once a landlord receives notice that the property is uninhabitable, they are responsible for remediating damage to the property, at the landlord's expense, so it will meet the ANSI "habitable standard."

Lastly, HB-1254 updates the prior existing law to prohibit landlords from retaliating against tenants when they make a good faith complaint about the habitability of the residence.[10] Prohibited actions include increasing rent or decreasing services, terminating a lease or contract without the tenant's consent, bringing or threatening to bring an action for possession, and taking an action that threatens or intimidates the tenant. Additionally, HB-1254 provides a tenant the ability to terminate their lease if the landlord fails to address the habitability claim or retaliates against them for asserting a lack of habitability claim, and further provides a tenant defense to a

[6] H.B. 23-1254, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).
[7] *Id.*; codified in Colo. Rev. Stat. § 38-12-502(4.5).
[8] *Id.*
[9] H.B. 23-1254, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).
[10] *Id.*; codified in Colo. Rev. Stat. § 38-12-509(1)(b)

landlord's action for possession.[11]

D. Multifamily Construction Must Comply with New Electrical Vehicle Charging and Parking Requirements

House Bill 23-1233 ("HB-1233"),[12] effective May 23, 2023, requires the state electrical board to adopt rules requiring compliance with electric vehicle ("EV") power transfer infrastructure requirements. Enforcement of compliance with these requirements begins March 1, 2024. Specifically, the state electrical board is tasked with creating rules to ensure compliance with the "model electric ready and solar ready code." The goal is to ensure multifamily buildings meet electric vehicle infrastructure requirements.

Additionally, HB-1233 prohibits landlords or management associations of common interest communities from unreasonably prohibiting the installation of EV charging equipment. The bill also prohibits local governments from adopting ordinances that restrict parking based on a vehicle being an EV or hybrid unless the ordinance addresses a "bona fide safety concern." It also exempts EV charging systems from the levy and collection of property tax until 2030.

Finally, the bill establishes a plan for future changes to federal law allowing the construction of EV charging systems along highway rights-of-way and specifies when such changes occur, the department of transportation may collaborate with public or private entities for the construction of EV charging systems.

E. Public Buildings Must Have a Non-Gendered Restroom

Effective January 1, 2024, House Bill 23-1057 ("HB-1057")[13] requires all newly constructed buildings (along with qualifying restroom renovations), that are at least partly owned by a state government, city, municipality, or institution, to provide a non-gendered restroom facility on each floor where restrooms are publicly accessible. Further, it requires a safe, sanitary, and convenient diaper changing station. Beginning July 1, 2024, but no later than July 1, 2026, a public building must ensure signage for the diaper changing station and include the locations of the changing station and the non-gendered restrooms on a central building directory.

HB-1057 allows employees in a public building to submit a complaint for alleged discriminatory or unfair practices, including failure to comply with the non-gendered bathroom requirement under the Colorado Anti-Discrimination Act.

[11] *Id.*; codified as Colo. Rev. Stat. § 38-12-509 .
[12] H.B. 23-1233 74th Gen. Assemb., Reg. Sess. (Colo. 2023).
[13] H.B. 23-1057, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).

F. Colorado Urges Municipalities to Make Sales and Use Tax on Construction Materials and Building Permits Uniform

In Colorado, the local sales and use tax collection system for construction material and building permits is cumbersome and difficult for contractors. Thus, in Senate Joint Resolution 23-004,[14] the General Assembly urged municipalities and counties that locally collect sales and use taxes to work together through the Colorado Municipal League to standardize information as a means of simplifying the determination of jurisdiction, permit number, job address, and proof of sale or use tax payments.

II. Case Law Update:

A. Limits of Liability in Residential Construction, Including Commercial Construction Used as a Residence, are Void under the HPA

In *Heights Healthcare v. BCER*[15], the Colorado Court of Appeals reversed in part the holding of the *Broomfield Senior Living* case.[16] The Court of Appeals determined that the residential living quarters of a senior living community located on a parcel zoned "commercial" or "mixed use" constitutes "residential property" for the purposes of protection under the Homeowners Protection Act ("HPA"). Contrary to the conclusion by the trial court, the Court of Appeals found the contractual limitation of the liability clause at issue void and unenforceable due to the residential property right protections of HPA.

In this case, Heights Healthcare ("Heights") owned a senior living center. Heights hired BCER Engineering, Inc.("BCER"), to install a type of air conditioner in each of the 84 rooms. After installation, Heights discovered that only 7 of the 84 units could work at once before tripping the breaker and shutting down the system. Heights sued BCER for breach of contract. BCER sought to enforce the limitation of liability clause it had bargained for in its contract. The trial court held the limitation of liability clause as valid and enforceable and reduced the damages awarded to Heights accordingly. Heights appealed. The Colorado Court of Appeals reversed, clarifying that zoning categorization is not determinative and because the senior living center was not used for "any purpose other than ordinary living," it was residential for the purposes of HPA. Because HPA is intended to preserve rights and remedies for residential property owners who bring construction defect actions under Colorado's Construction Defect Action Reform Act ("CDARA"), the limitation of liability clause in the contract between Heights and BCER infringed upon these rights, thus making it unenforceable. The Court of Appeals remanded the case for determination of damages.

[14] S.J.R. 23-004, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).
[15] *Heights Healthcare v. BCER Engineering*, 2023 COA 44 (Colo. App. 2023).
[16] *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 2017 COA 31 (Colo. App. 2017).

This case may still be appealed to the Colorado Supreme Court and, although it is binding on trial courts, other courts of appeals panels may decide this issue differently. Until then, contractors working on senior living, college dorm, or multifamily construction projects should consider the potential for expanded liability when estimating or accepting a job. In light of this decision, BBG is working with various industry groups to support contractors by working to develop legislation that will help address the concerns this case raises.

B. The Economic Loss Rule May Bar Willful and Wanton Conduct

In *Mid-Century Insurance Co. v. HIVE Construction, Inc.*,[17] HIVE Construction Inc. ("HIVE"), was hired to serve as the general contractor for the buildout of a restaurant. HIVE did not follow the architectural drawings and specifications that called for the installation of two layers of drywall in the kitchen, specifically directing its subcontractor to install a single layer of fire-resistant drywall. A fire subsequently destroyed the space. After paying out on the resulting insurance claim, the insurance company sued HIVE for negligence. HIVE asserted, among other defenses, that the economic loss rule prevented recovery.

Relying on the decision in *McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*, the trial court determined that the economic loss rule did not apply to willful and wanton conduct. The Colorado Court of Appeals reversed, holding that *McWhinney* does not prohibit application of the economic loss rule where willful and wanton conduct is alleged provided the claim is based solely on contractual duty. In this instance, because HIVE's duties were only as delineated in the contract, any tort claim was indistinguishable from its contract duty. Because the negligence arose solely from an alleged breach of a contractual obligation, the economic loss rule did serve as a bar to recovery, and a directed verdict was entered for HIVE.

C. Mechanics' Liens and Process

In *Home Improvement, Inc. v. Villar*,[18] Home Improvement, Inc. ("Home") did work on property owned by Jose Villar ("Villar"), was not paid, and then sent notice of intent to record a mechanics' lien. The mailed notice was sent to the property address that Home had on file for Villar, but it was returned as undeliverable. When the dispute resulted in litigation to foreclose the mechanics' lien, the process server was unable to serve Villar in person. Home moved to proceed against the property *in rem* and to serve by mail and publication. The mailed summons was again returned undeliverable, however notice was published in the newspaper and copies of the complaint were posted at the property where the work was done.

Villar never appeared in the case and Home was awarded a default judgment and decree of foreclosure. Following a sheriff's sale, Villar's spouse was served with eviction notices and

[17] *Mid-Century Insurance Co. v. HIVE Construction, Inc.*, 2023 COA 25 (Colo. App. 2023).
[18] *Home Improvement, Inc. v. Villar*, 2022 COA 129 (Colo. App. 2023).

Villar then moved to set aside the mechanics' lien judgment. The district court held that the property address used by Home for the mailed notices was Villar's last known address and denied the attempt to set aside the judgment. On appeal, the Colorado Court of Appeals reversed, holding that once Home's original notice of intent to record a mechanic's lien was returned as undeliverable, Home should have mailed the notice to Villar's last known address, a separate P.O. box that Home had previously used to mail Villar an insurance check. The default was thus set aside based on defective service of process.

Parties Can Contract Around the CDARA Statute of Limitations

In *South Conejos School District RE-1 v. Wold Architects Inc.*,[19] the South Conejos School District RE-1 ("District") sued Wold Architects ("Architect") for construction defects. The Architect and other contractors were hired to build a K-12 grade school. After a flood at the school, the resulting damage led the District to believe there were construction defects.

The Architect moved for summary judgment, asserting that under the Construction Defect Action Reform Act ("CDARA") the statute of limitations had run. CDARA defines accrual of a claim (and the start of the limitations clock) as "when the injured party discovered, or through reasonable diligence should have discovered, the physical manifestations of the defect." The parties' contract, however, defined the point of accrual more generously, stating that "the time of accrual [is] when the injured party "discovered," by way of "detection or knowledge," a defect "of a substantial or significant nature." The Architect filed an interlocutory appeal on the question of whether a contract can change the point of accrual for the statute of limitations under CDARA.

The Colorado Court of Appeals answered "yes," holding that a contract can change the requirements under CDARA. The Court explained that parties can agree to whatever terms they want, so long as they are not void against public policy. As CDARA does not prohibit contrary terms, the contractual change did not violate public policy nor the intent of CDARA. Further, to apply CDARA over the negotiated and agreed upon contract would impede the parties' rights to contract freely. Thus, the Court affirmed the district court's ruling that contracting parties may agree to extend the accrual period and remanded for further proceedings.

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[19] *S. Conejos Sch. Dist. RE-10 v. Wold Architects Inc.*, 2023 COA 85 (Colo. App. 2023).