

- 1 (1) The person, or a person employed by any other legal
2 entity, performing the work as described in this
3 section, has completed not less than five years of
4 verifiable experience in the appropriate field and has
5 obtained certification as a building inspector,
6 combination inspector, or combination dwelling
7 inspector from the International Conference of
8 Building Officials and has successfully passed the
9 technical written examination promulgated by the
10 International Conference of Building Officials for
11 those certification categories; or
- 12 (2) The person, or a person employed by any other legal
13 entity, performing the work as described in this
14 section, has completed not less than five years of
15 verifiable experience in the appropriate field and is
16 a licensed professional engineer, licensed general
17 contractor, or a licensed architect rendering
18 independent quality review of the work of improvement
19 or plan examination services within the scope of the
20 licensee's license.



1 The immunity provided under this section does not apply to
2 any action initiated by the applicant who retained the qualified
3 person.

4 A "qualified person" for purposes of this section means a
5 person holding a valid certification as one of those inspectors.

6 (b) Except for qualified persons, this section shall not
7 relieve from, excuse, or lessen in any manner, the
8 responsibility or liability of any person, company, contractor,
9 builder, developer, architect, engineer, designer, or other
10 individual or entity who develops, improves, owns, operates, or
11 manages any residential building for any damages to persons or
12 property caused by construction or design defects. The fact
13 that an inspection by a qualified person has taken place
14 including any reports or other items generated by the qualified
15 person may not be introduced as evidence in a construction
16 defect action. This subsection shall not apply in any action
17 initiated by the applicant who retained the qualified person.

18 (c) Nothing in this section, as it relates to construction
19 inspectors or plans examiners, shall be construed to alter the
20 requirements for licensure, or the jurisdiction, authority, or
21 scope of practice, of architects, professional engineers, or
22 general contractors.



1 (d) Nothing in this section shall be construed to alter the
2 immunity of employees of the State under chapter 661.

3 (e) The qualifying person shall engage in no other
4 construction, design, planning, supervision, or activities of
5 any kind on the work of improvement, nor provide quality review
6 services for any other party on the work of improvement.

7 (f) The qualifying person, or other legal entity, shall
8 maintain professional errors and omissions insurance coverage in
9 an amount not less than two million dollars.

10 (g) The immunity provided by subsection (a) does not inure
11 to the benefit of the qualified person for damages caused to the
12 applicant solely by the negligence or wilful misconduct of the
13 qualified person resulting from the provision of services under
14 the contract with the applicant.

15 § -2 **Definitions.** As used in this chapter unless the
16 context clearly indicates otherwise, the following words shall
17 mean as follows:

18 "Actual moisture barrier" means any component or material,
19 actually installed, that serves to any degree as a barrier
20 against moisture, whether or not intended as such.

21 "Builder" means a builder, developer, or original seller.



1 "Claimant" or "homeowner" includes the individual owners of
2 single-family homes, individual unit owners of attached
3 dwellings and, in the case of a common interest development, any
4 association.

5 "Close of escrow" means the date of the close of escrow
6 between the builder and the original homeowner. With respect to
7 claims by an association, "close of escrow" means the date of
8 substantial completion, or the date the builder relinquishes
9 control over the association's ability to decide whether to
10 initiate a claim under this chapter, whichever is later.

11 "Designed moisture barrier" means an installed moisture
12 barrier specified in the plans and specifications, contract
13 documents, or manufacturer's recommendations.

14 "Structure" means any residential dwelling, other building,
15 or improvement located upon a lot or within a common area.

16 "Unintended water" means water that passes beyond, around,
17 or through a component or the material that is designed to
18 prevent that passage.

19 § -3 **Actionable defects.** (a) In any action seeking
20 recovery of damages arising out of, or related to deficiencies
21 in, the residential construction, design, specifications,
22 surveying, planning, supervision, testing, or observation of



1 construction, a builder, a subcontractor, material supplier,
2 individual product manufacturer, or design professional, shall,
3 except as specifically set forth in this chapter, be liable for,
4 and the claimant's claims or causes of action shall be limited
5 to violation of, the following standards, except as specifically
6 set forth in this section. This section applies to original
7 construction intended to be sold as an individual dwelling unit.
8 As to condominium conversions, this section does not apply to or
9 does not supersede any other statutory or common law.

10 (b) With respect to water issues:

11 (1) A door shall not allow unintended water to pass
12 beyond, around, or through the door or its designed or
13 actual moisture barriers, if any;

14 (2) Windows, patio doors, deck doors, and their systems
15 shall not allow water to pass beyond, around, or
16 through the window, patio door, or deck door or its
17 designed or actual moisture barriers, including,
18 without limitation, internal barriers within the
19 systems themselves. For purposes of this paragraph,
20 "systems" include, without limitation, windows, window
21 assemblies, framing, substrate, flashings, and trim,
22 if any;



- 1 (3) Windows, patio doors, deck doors, and their systems
2 shall not allow excessive condensation to enter the
3 structure and cause damage to another component. For
4 purposes of this paragraph, "systems" include, without
5 limitation, windows, window assemblies, framing,
6 substrate, flashings, and trim, if any;
- 7 (4) Roofs, roofing systems, chimney caps, and ventilation
8 components shall not allow water to enter the
9 structure or to pass beyond, around, or through the
10 designed or actual moisture barriers, including,
11 without limitation, internal barriers located within
12 the systems themselves. For purposes of this
13 paragraph, "systems" include, without limitation,
14 framing, substrate, and sheathing, if any;
- 15 (5) Decks, deck systems, balconies, balcony systems,
16 exterior stairs, and stair systems shall not allow
17 water to pass into the adjacent structure. For
18 purposes of this paragraph, "systems" include, without
19 limitation, framing, substrate, flashing, and
20 sheathing, if any;
- 21 (6) Decks, deck systems, balconies, balcony systems,
22 exterior stairs, and stair systems shall not allow



- 1 unintended water to pass within the systems themselves
2 and cause damage to the systems. For purposes of this
3 paragraph, "systems" include, without limitation,
4 framing, substrate, flashing, and sheathing, if any;
- 5 (7) Foundation systems and slabs shall not allow water or
6 vapor to enter into the structure so as to cause
7 damage to another building component;
- 8 (8) Foundation systems and slabs shall not allow water or
9 vapor to enter into the structure so as to limit the
10 installation of the type of flooring materials
11 typically used for the particular application;
- 12 (9) Hardscape, including paths and patios, irrigation
13 systems, landscaping systems, and drainage systems,
14 that are installed as part of the original
15 construction, shall not be installed in such a way as
16 to cause water or soil erosion to enter into or come
17 in contact with the structure so as to cause damage to
18 another building component;
- 19 (10) Stucco, exterior siding, exterior walls, including,
20 without limitation, exterior framing, and other
21 exterior wall finishes and fixtures and the systems of
22 those components and fixtures, including, but not



1 limited to, pot shelves, horizontal surfaces, columns,
2 and plant-ons, shall be installed in such a way so as
3 not to allow unintended water to pass into the
4 structure or to pass beyond, around, or through the
5 designed or actual moisture barriers of the system,
6 including any internal barriers located within the
7 system itself. For purposes of this paragraph,
8 "systems" include, without limitation, framing,
9 substrate, flashings, trim, wall assemblies, and
10 internal wall cavities, if any;

11 (11) Stucco, exterior siding, and exterior walls and their
12 systems shall not allow excessive condensation to
13 enter the structure and cause damage to another
14 component. For purposes of this paragraph, "systems"
15 include, without limitation, framing, substrate,
16 flashings, trim, wall assemblies, and internal wall
17 cavities, if any;

18 (12) Retaining walls and site walls, and their associated
19 drainage systems, shall not allow unintended water to
20 pass beyond, around, or through its designed or actual
21 moisture barriers including, without limitation, any
22 internal barriers, so as to cause damage. This



1 standard does not apply to those portions of any wall
2 or drainage system that are designed to have water
3 flow beyond, around, or through them;

4 (13) Retaining walls and site walls, and their associated
5 drainage systems, shall only allow water to flow
6 beyond, around, or through the areas designated by
7 design;

8 (14) The lines and components of the plumbing system, sewer
9 system, and utility systems shall not leak;

10 (15) Plumbing lines, sewer lines, and utility lines shall
11 not corrode so as to impede the useful life of the
12 systems;

13 (16) Sewer systems shall be installed in such a way as to
14 allow the designated amount of sewage to flow through
15 the system;

16 (17) Shower and bath enclosures shall not leak water into
17 the interior of walls, flooring systems, or the
18 interior of other components; and

19 (18) Ceramic tile and tile countertops shall not allow
20 water into the interior of walls, flooring systems, or
21 other components so as to cause damage.

22 (c) With respect to structural issues:



1 (1) Foundations, load bearing components, and slabs shall
2 not contain significant cracks or significant vertical
3 displacement;

4 (2) Foundations, load bearing components, and slabs shall
5 not cause the structure, in whole or in part, to be
6 structurally unsafe;

7 (3) Foundations, load bearing components, slabs, and
8 underlying soils shall be constructed so as to
9 materially comply with the design criteria set by
10 applicable government building codes, regulations, and
11 ordinances for chemical deterioration or corrosion
12 resistance in effect at the time of original
13 construction; and

14 (4) A structure shall be constructed so as to materially
15 comply with the design criteria for earthquake and
16 wind load resistance, as set forth in the applicable
17 government building codes, regulations, and ordinances
18 in effect at the time of original construction.

19 (d) With respect to soil issues:

20 (1) Soils and engineered retaining walls shall not cause,
21 in whole or in part, damage to the structure built
22 upon the soil or engineered retaining wall;



1 (2) Soils and engineered retaining walls shall not cause,
2 in whole or in part, the structure to be structurally
3 unsafe; and

4 (3) Soils shall not cause, in whole or in part, the land
5 upon which no structure is built to become unusable
6 for the purpose represented at the time of original
7 sale by the builder or for the purpose for which that
8 land is commonly used.

9 (e) With respect to fire protection issues:

10 (1) A structure shall be constructed so as to materially
11 comply with the design criteria of the applicable
12 government building codes, rules, and ordinances for
13 fire protection of the occupants in effect at the time
14 of the original construction;

15 (2) Fireplaces, chimneys, chimney structures, and chimney
16 termination caps shall be constructed and installed in
17 such a way so as not to cause an unreasonable risk of
18 fire outside the fireplace enclosure or chimney; and

19 (3) Electrical and mechanical systems shall be constructed
20 and installed in such a way so as not to cause an
21 unreasonable risk of fire.



1 (f) With respect to plumbing and sewer issues, plumbing and
2 sewer systems shall be installed to operate properly and shall
3 not materially impair the use of the structure by its
4 inhabitants. However, no action may be brought for a violation
5 of this subsection more than four years after close of escrow.

6 (g) With respect to electrical system issues, electrical
7 systems shall operate properly and shall not materially impair
8 the use of the structure by its inhabitants. However, no action
9 shall be brought pursuant to this subsection more than four
10 years after close of escrow.

11 (h) With respect to issues regarding other areas of
12 construction:

13 (1) Exterior pathways, driveways, hardscape, sidewalls,
14 sidewalks, and patios installed by the original
15 builder shall not contain cracks that display
16 significant vertical displacement or that are
17 excessive. However, no action shall be brought upon a
18 violation of this paragraph more than four years after
19 close of escrow;

20 (2) Stucco, exterior siding, and other exterior wall
21 finishes and fixtures, including, but not limited to,
22 pot shelves, horizontal surfaces, columns, and plant-



1 ons, shall not contain significant cracks or
2 separations;

3 (3) To the extent not otherwise covered by these
4 standards, manufactured products, including, but not
5 limited to, windows, doors, roofs, plumbing products
6 and fixtures, fireplaces, electrical fixtures, HVAC
7 units, countertops, cabinets, paint, and appliances
8 shall be installed so as not to interfere with the
9 products' useful life, if any. For purposes of this
10 paragraph, "useful life" means a representation of how
11 long a product is warranted or represented, through
12 its limited warranty or any written representations,
13 to last by its manufacturer, including recommended or
14 required maintenance. If there is no representation
15 by a manufacturer, a builder shall install
16 manufactured products so as not to interfere with the
17 product's utility. For purposes of this paragraph,
18 "manufactured product" means a product that is
19 completely manufactured offsite. If no useful life
20 representation is made, or if the representation is
21 less than one year, the period shall be no less than
22 one year. If a manufactured product is damaged as a



1 result of a violation of these standards, damage to
2 the product is a recoverable element of damages. This
3 paragraph does not limit recovery if there has been
4 damage to another building component caused by a
5 manufactured product during the manufactured product's
6 useful life. This chapter does not apply in any
7 action seeking recovery solely for a defect in a
8 manufactured product located within or adjacent to a
9 structure;

10 (4) Heating, if any, shall be installed so as to be
11 capable of maintaining a room temperature of seventy
12 degrees Fahrenheit at a point three feet above the
13 floor in any living space;

14 (5) Living space air-conditioning, if any, shall be
15 provided in a manner consistent with applicable size
16 and efficiency design criteria;

17 (6) Attached structures shall be constructed to comply
18 with inter-unit noise transmission standards set by
19 the applicable government building codes, ordinances,
20 or regulations in effect at the time of the original
21 construction. If there is no applicable code,
22 ordinance, or regulation, this paragraph does not



1 apply. However, no action shall be brought pursuant to
2 this paragraph more than one year after the original
3 occupancy of the adjacent unit;

4 (7) Irrigation systems and drainage shall operate properly
5 so as not to damage landscaping or other external
6 improvements. However, no action shall be brought
7 pursuant to this paragraph more than one year after
8 close of escrow;

9 (8) Untreated wood posts shall not be installed in contact
10 with soil so as to cause unreasonable decay to the
11 wood based upon the finish grade at the time of
12 original construction. However, no action shall be
13 brought pursuant to this paragraph more than two years
14 after close of escrow;

15 (9) Untreated steel fences and adjacent components shall
16 be installed so as to prevent unreasonable corrosion.
17 However, no action shall be brought pursuant to this
18 paragraph more than four years after close of escrow;

19 (10) Paint and stains shall be applied in such a manner so
20 as not to cause deterioration of the building surfaces
21 for the length of time specified by the paint or stain
22 manufacturers' representations, if any. However, no



1 action shall be brought pursuant to this paragraph
2 more than five years after close of escrow;
3 (11) Roofing materials shall be installed so as to avoid
4 materials falling from the roof;
5 (12) The landscaping systems shall be installed in such a
6 manner so as to survive for not less than one year.
7 However, no action shall be brought pursuant to this
8 paragraph more than two years after close of escrow;
9 (13) Ceramic tile and tile backing shall be installed in
10 such a manner that the tile does not detach;
11 (14) Dryer ducts shall be installed and terminated pursuant
12 to manufacturer installation requirements. However,
13 no action shall be brought pursuant to this paragraph
14 more than two years after close of escrow; and
15 (15) Structures shall be constructed in such a manner so as
16 not to impair the occupants' safety because they
17 contain public health hazards as determined by a duly
18 authorized public health official, health agency, or
19 governmental entity having jurisdiction. This
20 paragraph does not limit recovery for any damages
21 caused by a violation of any other paragraph of this



1 section on the grounds that the damages do not
2 constitute a health hazard.

3 § -4 **Functions and components of a structure.** The
4 standards set forth in this chapter are intended to address
5 every function or component of a structure. To the extent that
6 a function or component of a structure is not addressed by these
7 standards, it shall be actionable if it causes damage.

8 § -5 **Builder obligations.** As to fit and finish items, a
9 builder shall provide a homeowner with a minimum one-year
10 express written limited warranty covering the fit and finish of
11 the following building components: cabinets, mirrors, flooring,
12 interior and exterior walls, countertops, paint finishes, and
13 trim, but shall not apply to damage to those components caused
14 by defects in other components governed by the other provisions
15 of this chapter. Any fit and finish matters covered by this
16 warranty are not subject to the provisions of this chapter. If
17 a builder fails to provide the express warranty required by this
18 section, the warranty for these items shall be for a period of
19 one year.

20 § -6 **Enhanced protection agreement.** (a) A builder may,
21 but is not required to, offer greater protection or protection
22 for longer time periods in its express contract with the



1 homeowner than that set forth in section -3. A builder may
2 not limit the application of section -3 or lower its
3 protection through the express contract with the homeowner. This
4 type of express contract constitutes an "enhanced protection
5 agreement".

6 (b) If a builder offers an enhanced protection agreement,
7 the builder may choose to be subject to its own express
8 contractual provisions in place of the provisions set forth in
9 section -3. If an enhanced protection agreement is in place,
10 section -3 no longer applies other than to set forth minimum
11 provisions by which to judge the enforceability of the
12 particular provisions of the enhanced protection agreement.

13 (c) If a builder offers an enhanced protection agreement
14 in place of the provisions set forth in section -3, the
15 election to do so shall be made in writing with the homeowner no
16 later than the close of escrow. The builder shall provide the
17 homeowner with a complete copy of section -3 and advise the
18 homeowner that the builder has elected not to be subject to its
19 provisions. If any provision of an enhanced protection
20 agreement is later found to be unenforceable as not meeting the
21 minimum standards of section -3, a builder may use this
22 chapter in lieu of those provisions found to be unenforceable.



1 (d) If a builder has elected to use an enhanced protection
2 agreement, and a homeowner disputes that the particular
3 provision or time periods of the enhanced protection agreement
4 are not greater than, or equal to, the provisions of section
5 -3 as they apply to the particular deficiency alleged by the
6 homeowner, the homeowner may seek to enforce the application of
7 the standards set forth in this chapter as to those claimed
8 deficiencies. If a homeowner seeks to enforce a particular
9 standard in lieu of a provision of the enhanced protection
10 agreement, the homeowner shall give the builder written notice
11 of that intent at the time the homeowner files a notice of claim
12 pursuant to section -10.

13 **§ -7 Actionable defects in lieu of enhanced protection**
14 **agreement.** If a homeowner seeks to enforce section -3 in lieu
15 of the enhanced protection agreement in a subsequent litigation
16 or other legal action, the builder shall have the right to have
17 the matter bifurcated, and to have an immediately binding
18 determination of the builder's responsive pleading within sixty
19 days after the filing of that pleading, but in no event after
20 the commencement of discovery, as to the application of either
21 section -3 or the enhanced protection agreement as to the
22 deficiencies claimed by the homeowner. If the builder fails to



1 seek that determination in the timeframe specified, the builder
2 waives the right to do so and the standards set forth in this
3 chapter shall apply. As to any subsequent homeowner, that
4 homeowner shall be deemed in privity for purposes of an enhanced
5 protection agreement only to the extent that the builder has
6 recorded the enhanced protection agreement on title or provided
7 actual notice to the subsequent homeowner of the enhanced
8 protection agreement. If the enhanced protection agreement is
9 not recorded on title or no actual notice has been provided, the
10 standards set forth in this chapter apply to any subsequent
11 homeowner's claims.

12 **§ -8 Election regarding prelitigation procedures.** A
13 builder's election to use an enhanced protection agreement
14 addresses only the issues set forth in section -3 and does not
15 constitute an election to use or not use section -10. The
16 decision to use or not use section -10 is governed by section
17 -10.

18 **§ -9 Homeowner obligations.** A homeowner is obligated to
19 follow all reasonable maintenance obligations and schedules
20 communicated in writing to the homeowner by the builder and
21 product manufacturers, as well as commonly accepted maintenance
22 practices. A failure by a homeowner to follow these



1 obligations, schedules, and practices may subject the homeowner
2 to the affirmative defenses of this chapter.

3 **§ -10 Prelitigation procedures.** Prior to filing an
4 action against any party alleged to have contributed to a
5 violation of the standards set forth in section -3, the
6 claimant shall initiate the following prelitigation procedures:

7 (1) The claimant or the claimant's legal representative
8 shall provide written notice via certified mail,
9 overnight mail, or personal delivery to the builder,
10 in the manner prescribed in this section, of the
11 claimant's claim that the construction of the
12 claimant's residence violates any of the standards set
13 forth in section -3. The notice shall provide the
14 claimant's name, address, and preferred method of
15 contact, and shall state that the claimant alleges a
16 violation pursuant to this chapter against the
17 builder, and shall describe the claim in reasonable
18 detail sufficient to determine the nature and
19 location, to the extent known, of the claimed
20 violation. In the case of a group of homeowners or an
21 association, the notice may identify the claimants
22 solely by address or other description sufficient to



1 apprise the builder of the locations of the subject
2 residences. That document shall have the same force
3 and effect as a notice of commencement of a legal
4 proceeding; and

- 5 (2) The notice requirements of this section do not
6 preclude a homeowner from seeking redress through any
7 applicable normal customer service procedure as set
8 forth in any contractual, warranty, or other builder-
9 generated document; and, if a homeowner seeks to do
10 so, that request shall not satisfy the notice
11 requirements of this section.

12 § **-11 Builder obligations.** (a) A builder shall do all
13 of the following:

- 14 (1) Within thirty days of a written request by a homeowner
15 or the homeowner's legal representative, the builder
16 shall provide copies of all relevant plans,
17 specifications, mass or rough grading plans, final
18 soils reports, public reports, and available
19 engineering calculations, that pertain to a
20 homeowner's residence specifically or as part of a
21 larger development tract. The request shall be
22 honored if it states that it is made relative to



1 structural, fire safety, or soils provisions of this
2 chapter. However, a builder is not obligated to
3 provide a copying service, and reasonable copying
4 costs shall be borne by the requesting party. A
5 builder may require that the documents be copied
6 onsite by the requesting party, except that the
7 homeowner may, at the homeowner's option, use the
8 homeowner's own copying service, which may include an
9 offsite copy facility that is bonded and insured. If
10 a builder can show that the builder maintained the
11 documents, but that they later became unavailable due
12 to loss or destruction that was not the fault of the
13 builder, the builder may be excused from the
14 requirements of this paragraph, in which case the
15 builder shall act with reasonable diligence to assist
16 the homeowner in obtaining those documents from any
17 applicable government authority or from the source
18 that generated the document. However, in that case,
19 the time limits specified by this section do not
20 apply;

- 21 (2) At the expense of the homeowner, who may opt to use an
22 offsite copy facility that is bonded and insured, the



1 builder shall provide to the homeowner or the
2 homeowner's legal representative copies of all
3 maintenance and preventive maintenance recommendations
4 that pertain to the homeowner's residence within
5 thirty days of service of a written request for those
6 documents. Those documents shall also be provided to
7 the homeowner in conjunction with the initial sale of
8 the residence;

9 (3) At the expense of the homeowner, who may opt to use an
10 offsite copy facility that is bonded and insured, a
11 builder shall provide to the homeowner or the
12 homeowner's legal representative copies of all
13 manufactured products maintenance, preventive
14 maintenance, and limited warranty information within
15 thirty days of a written request for those documents.
16 These documents shall also be provided to the
17 homeowner in conjunction with the initial sale of the
18 residence;

19 (4) At the expense of the homeowner, who may opt to use an
20 offsite copy facility that is bonded and insured, a
21 builder shall provide to the homeowner or the
22 homeowner's legal representative copies of all of the



1 builder's limited contractual warranties in accordance
2 with this chapter in effect at the time of the
3 original sale of the residence within thirty days of a
4 written request for those documents. Those documents
5 shall also be provided to the homeowner in conjunction
6 with the initial sale of the residence; and

7 (5) A builder shall maintain the name and address of an
8 agent for notice pursuant to this chapter with the
9 director of commerce and consumer affairs or,
10 alternatively, elect to use a third party for that
11 notice if the builder has notified the homeowner in
12 writing of the third party's name and address, to whom
13 claims and requests for information under this section
14 may be mailed. The name and address of the agent for
15 notice or third party shall be included with the
16 original sales documentation and shall be initialed
17 and acknowledged by the purchaser and the builder's
18 sales representative.

19 (b) This section applies to instances in which a builder
20 contracts with a third party to accept claims and act on the
21 builder's behalf. A builder shall give actual notice to the



1 homeowner that the builder has made such an election, and shall
2 include the name and address of the third party.

3 (c) A builder shall record on title a notice of the
4 existence of these procedures and a notice that these procedures
5 impact the legal rights of the homeowner. This information
6 shall also be included with the original sales documentation and
7 shall be initialed and acknowledged by the purchaser and the
8 builder's sales representative.

9 (d) A builder shall provide with the original sales
10 documentation, a written copy of this chapter which shall be
11 initialed and acknowledged by the purchaser and the builder's
12 sales representative.

13 (e) As to any documents provided in conjunction with the
14 original sale, the builder shall instruct the original purchaser
15 to provide those documents to any subsequent purchaser.

16 (f) Any builder who fails to comply with any of these
17 requirements within the time specified is not entitled to the
18 protections of this chapter, and the homeowner is released from
19 the requirements of this chapter and may proceed with the filing
20 of an action, in which case the remaining provisions of this
21 chapter shall continue to apply to the action.



1 § **-12 Receipt of notice.** A builder or the builder's
2 representative shall acknowledge, in writing, receipt of the
3 notice of the claim within fourteen days after receipt of the
4 notice of the claim. If the notice of the claim is served by
5 the claimant's legal representative, or if the builder receives
6 a written representation letter from a homeowner's attorney, the
7 builder shall include the attorney in all subsequent substantive
8 communications, including, without limitation, all written
9 communications occurring pursuant to this chapter, and all
10 substantive and procedural communications, including all written
11 communications, following the commencement of any subsequent
12 complaint or other legal action, except that if the builder has
13 retained or involved legal counsel to assist the builder in this
14 process, all communications by the builder's counsel shall only
15 be with the claimant's legal representative, if any.

16 § **-13 Intent of prelitigation procedures.** (a) The
17 prelitigation procedures establish a nonadversarial procedure
18 which, if the procedure does not resolve the dispute between the
19 parties, may result in a subsequent action under other
20 provisions of the law. A builder may attempt to commence
21 nonadversarial contractual provisions other than the
22 nonadversarial procedures and remedies set forth in this



1 chapter, but may not, in addition to its own nonadversarial
2 contractual provisions, require adherence to the nonadversarial
3 procedures and remedies set forth in this chapter, regardless of
4 whether the builder's own alternative nonadversarial contractual
5 provisions are successful in resolving the dispute or are
6 ultimately deemed enforceable.

7 (b) At the time the sales agreement is executed, the
8 builder shall notify the homeowner whether the builder intends
9 to engage in the nonadversarial procedure of this chapter or
10 attempt to enforce alternative nonadversarial contractual
11 provisions. If the builder elects to use alternative
12 nonadversarial contractual provisions in lieu of this chapter,
13 the election is binding, regardless of whether the builder's
14 alternative nonadversarial contractual provisions are successful
15 in resolving the ultimate dispute or are ultimately deemed
16 enforceable.

17 (c) Nothing in this chapter is intended to affect existing
18 statutory or decisional law pertaining to the applicability,
19 viability, or enforceability of alternative dispute resolution
20 methods, alternative remedies, or contractual arbitration,
21 judicial reference, or similar procedures requiring a binding
22 resolution to enforce the other provisions of law or any other



1 disputes between homeowners and builders. Nothing in this
2 chapter is intended to affect the applicability, viability, or
3 enforceability, if any, of contractual arbitration or judicial
4 reference after a nonadversarial procedure or provision has been
5 completed.

6 § -14 **Failure to acknowledge receipt of notice.** If a
7 builder fails to acknowledge receipt of the notice of a claim
8 within the time specified, elects not to go through the process
9 set forth in this chapter, or fails to request an inspection
10 within the time specified, or at the conclusion or cessation of
11 an alternative nonadversarial proceeding, this chapter does not
12 apply and the homeowner is released from the requirements of
13 this chapter and may proceed with the filing of an action.
14 However, the standards set forth in other provisions of the law
15 shall continue to apply to the action.

16 § -15 **Election to inspect claimed unmet standards.** (a)
17 If a builder elects to inspect the claimed unmet standards, the
18 builder shall complete the initial inspection and testing within
19 fourteen days after acknowledgment of receipt of the notice of
20 the claim, at a mutually convenient date and time. If the
21 homeowner has retained legal representation, the inspection
22 shall be scheduled with the legal representative at a mutually



1 convenient date and time, unless the legal representative is
2 unavailable during the relevant time periods. All costs of
3 builder inspection and testing, including any damage caused by
4 the builder inspection, shall be borne by the builder. The
5 builder shall also provide written proof that the builder has
6 liability insurance to cover any damages or injuries occurring
7 during inspection and testing. The builder shall restore the
8 property to its pretesting condition within forty-eight hours of
9 the testing. The builder shall, upon request, allow the
10 inspections to be observed and electronically recorded,
11 videotaped, or photographed by the claimant or the claimant's
12 legal representative.

13 (b) Nothing that occurs during a builder's or claimant's
14 inspection or testing may be used or introduced as evidence to
15 support a spoliation defense by any potential party in any
16 subsequent litigation.

17 (c) If a builder deems a second inspection or testing
18 reasonably necessary, and specifies the reasons therefor in
19 writing within three days following the initial inspection, the
20 builder may conduct a second inspection or testing. A second
21 inspection or testing shall be completed within forty days of
22 the initial inspection or testing. All requirements concerning



1 the initial inspection or testing shall also apply to the second
2 inspection or testing.

3 (d) If the builder fails to inspect or test the property
4 within the time specified, the claimant is released from the
5 requirements of this section and may proceed with the filing of
6 an action. However, the standards set forth in other provisions
7 of law shall continue to apply to the action.

8 (e) If a builder intends to hold a subcontractor, design
9 professional, individual product manufacturer, or material
10 supplier, including an insurance carrier, warranty company, or
11 service company, responsible for its contribution to the unmet
12 standard, the builder shall provide notice to that person or
13 entity sufficiently in advance to allow them to attend the
14 initial or, if requested, second inspection of any alleged unmet
15 standard and to participate in the repair process. The claimant
16 and the claimant's legal representative, if any, shall be
17 advised in a reasonable time prior to the inspection as to the
18 identity of all persons or entities invited to attend. This
19 subsection shall not apply to the builder's insurance company.
20 Except with respect to any claims involving a repair actually
21 conducted under this chapter, nothing in this subsection shall
22 be construed to relieve a subcontractor, design professional,



1 individual product manufacturer, or material supplier of any
2 liability under an action brought by a claimant.

3 § -16 **Post-inspection.** Within thirty days of the
4 initial or, if requested, second inspection or testing, the
5 builder may offer in writing to repair the violation. The offer
6 to repair shall also compensate the homeowner for all applicable
7 damages within the timeframe for the repair set forth in this
8 chapter. Any such offer shall be accompanied by a detailed,
9 specific, step-by-step statement identifying the particular
10 violation that is being repaired, explaining the nature, scope,
11 and location of the repair, and setting a reasonable completion
12 date for the repair. The offer shall also include the names,
13 addresses, telephone numbers, and license numbers of the
14 contractors whom the builder intends to have perform the repair.
15 Those contractors shall be fully insured for, and shall be
16 responsible for, all damages or injuries that they may cause to
17 occur during the repair, and evidence of that insurance shall be
18 provided to the homeowner upon request. Upon written request by
19 the homeowner or the homeowner's legal representative, and
20 within the timeframes set forth in this chapter, the builder
21 shall also provide any available technical documentation,
22 including, without limitation, plans and specifications,



1 pertaining to the claimed violation within the particular home
2 or development tract. The offer shall also advise the homeowner
3 in writing of the homeowner's right to request up to three
4 additional contractors from which to select to do the repair
5 pursuant to this chapter.

6 § -17 **Authorization to repair.** Upon receipt of the
7 offer to repair, the homeowner shall have thirty days to
8 authorize the builder to proceed with the repair. The homeowner
9 may alternatively request, at the homeowner's sole option and
10 discretion, that the builder provide the names, addresses,
11 telephone numbers, and license numbers for up to three
12 alternative contractors who are not owned or financially
13 controlled by the builder and who regularly conduct business in
14 the county where the structure is located. If the homeowner so
15 elects, the builder is entitled to an additional noninvasive
16 inspection, to occur at a mutually convenient date and time
17 within twenty days of the election, so as to permit the other
18 proposed contractors to review the proposed site of the repair.
19 Within thirty-five days after the request of the homeowner for
20 alternative contractors, the builder shall present the homeowner
21 with a choice of contractors. Within twenty days after that



1 presentation, the homeowner shall authorize the builder or one
2 of the alternative contractors to perform the repair.

3 **§ -18 Offer to mediate.** The offer to repair shall also
4 be accompanied by an offer to mediate the dispute if the
5 homeowner so chooses. The mediation shall be limited to a four-
6 hour mediation, except as otherwise mutually agreed, before a
7 nonaffiliated mediator selected and paid for by the builder. At
8 the homeowner's sole option, the homeowner may agree to split
9 the cost of the mediation, and if the homeowner does so, the
10 mediator shall be selected jointly. The mediator shall have
11 sufficient availability such that the mediation occurs within
12 fifteen days after the request to mediate is received and occurs
13 at a mutually convenient location within the county where the
14 action is pending. If a builder has made an offer to repair a
15 violation, and the mediation has failed to resolve the dispute,
16 the homeowner shall allow the repair to be performed either by
17 the builder, its contractor, or the selected contractor.

18 **§ -19 Failure to offer to repair.** If the builder fails
19 to make an offer to repair or otherwise strictly comply with
20 this chapter within the times specified, the claimant is
21 released from the requirements of this chapter and may proceed
22 with the filing of an action. If the contractor performing the



1 repair does not complete the repair in the time or manner
2 specified, the claimant may file an action. If this occurs, the
3 standards set forth in the other provisions of this chapter
4 shall continue to apply to the action.

5 § -20 **Repair by builder.** (a) In the event that a
6 resolution under this chapter involves a repair by the builder,
7 the builder shall make an appointment with the claimant, make
8 all appropriate arrangements to effectuate a repair of the
9 claimed unmet standards, and compensate the homeowner for all
10 damages resulting therefrom free of charge to the claimant. The
11 repair shall be scheduled through the claimant's legal
12 representative, if any, unless the legal representative is
13 unavailable during the relevant time periods. The repair shall
14 be commenced on a mutually convenient date within fourteen days
15 of acceptance or, if an alternative contractor is selected by
16 the homeowner, within fourteen days of the selection, or, if a
17 mediation occurs, within seven days of the mediation, or within
18 five days after a permit is obtained if one is required. The
19 builder shall act with reasonable diligence in obtaining any
20 such permit.

21 (b) The builder shall ensure that work done on the repairs
22 is done with the utmost diligence, and that the repairs are



1 completed as soon as reasonably possible, subject to the nature
2 of the repair or some unforeseen event not caused by the builder
3 or the contractor performing the repair. Every effort shall be
4 made to complete the repair within one hundred and twenty days.

5 § **-21 Observation and recordation of repair.** The
6 builder shall, upon request, allow the repair to be observed and
7 electronically recorded, videotaped, or photographed by the
8 claimant or the claimant's legal representative. Nothing that
9 occurs during the repair process may be used or introduced as
10 evidence to support a spoliation defense by any potential party
11 in any subsequent litigation.

12 § **-22 Availability of copies.** The builder shall provide
13 the homeowner or the homeowner's legal representative, upon
14 request, with copies of all correspondence, photographs, and
15 other materials pertaining to relating in any manner to the
16 repairs.

17 § **-23 Partial repair.** If the builder elects to repair
18 some, but not all, of the claimed unmet standards, the builder
19 shall, at the same time it makes its offer, set forth with
20 particularity in writing the reasons, and the support for those
21 reasons, for not repairing all claimed unmet standards.



1 § **-24 Failure to complete repairs.** If the builder fails
2 to complete the repair within the time specified in the repair
3 plan, the claimant is released from the requirements of this
4 chapter and may proceed with the filing of an action. If this
5 occurs, the standards set forth in the other provisions of the
6 law shall continue to apply to the action.

7 § **-25 Release or waiver prohibited.** The builder may not
8 obtain a release or waiver of any kind in exchange for the
9 repair work mandated by this chapter. At the conclusion of the
10 repair, the claimant may proceed with filing an action for
11 violation of the applicable standard or for a claim of
12 inadequate repair, or both, including all applicable damages
13 available.

14 § **-26 Extension of statute of limitations.** If the
15 applicable statute of limitations has otherwise run during this
16 process, the time period for filing a complaint or other legal
17 remedies for violation of any provision of law, or for a claim
18 of inadequate repair, is extended from the time of the original
19 claim by the claimant to one hundred days after the repair is
20 completed, whether or not the particular violation is the one
21 being repaired. If the builder fails to acknowledge the claim
22 within the time specified, elects not to go through this



1 statutory process, or fails to request an inspection within the
2 time specified, the time period for filing a complaint or other
3 legal remedies for violation of any provision of this chapter is
4 extended from the time of the original claim by the claimant to
5 forty-five days after the time for responding to the notice of
6 claim has expired. If the builder elects to attempt to enforce
7 its own nonadversarial procedure in lieu of the procedure set
8 forth in this chapter, the time period for filing a complaint or
9 other legal remedies for any violation is extended from the time
10 of the original claim by the claimant to one hundred days after
11 either the completion of the builder's alternative
12 nonadversarial procedure, or one hundred days after the
13 builder's alternative nonadversarial procedure is deemed
14 unenforceable, whichever is later.

15 § -27 **Obligatory request for mediation.** If the builder
16 has invoked this chapter and completed a repair, prior to filing
17 an action, if there has been no previous mediation between the
18 parties, the homeowner or the homeowner's legal representative
19 shall request mediation in writing. The mediation shall be
20 limited to four hours, except as otherwise mutually agreed
21 before a nonaffiliated mediator selected and paid for by the
22 builder.



1 At the homeowner's sole option, the homeowner may agree to
2 split the cost of the mediation and if the homeowner does so,
3 the mediator shall be selected jointly. The mediator shall have
4 sufficient availability such that the mediation will occur
5 within fifteen days after the request for mediation is received
6 and shall occur at a mutually convenient location within the
7 county where the action is pending.

8 In the event that a mediation is used at this point, any
9 applicable statute of limitations shall be tolled from the date
10 of the request to mediate until the next court day after the
11 mediation is completed, or the one-hundred-day period, whichever
12 is later.

13 § -28 **Cash offers without repair.** (a) Nothing in this
14 chapter prohibits the builder from making only a cash offer and
15 no repair. In this situation, the homeowner is free to accept
16 the offer, or the homeowner may reject the offer and proceed
17 with the filing of an action. If the latter occurs, the
18 standards of other provisions of law shall continue to apply to
19 the action.

20 (b) The builder may obtain a reasonable release in
21 exchange for the cash payment. The builder may negotiate the
22 terms and conditions of any reasonable release in terms of scope



1 and consideration in conjunction with a cash payment under this
2 chapter.

3 § -29 **Time periods to be strictly construed.** (a) The
4 time periods and all other requirements in this chapter are to
5 be strictly construed, and, unless extended by the mutual
6 agreement of the parties in accordance with this chapter, shall
7 govern their rights and obligations. If a builder fails to act
8 in accordance with this section within the timeframes mandated,
9 unless extended by the mutual agreement of the parties as
10 evidenced by a postclaim written confirmation by the affected
11 homeowner demonstrating that the homeowner has knowingly and
12 voluntarily extended the statutory timeframe, the claimant may
13 proceed with filing an action. If this occurs, the standards of
14 the other provisions of the law shall continue to apply to the
15 action.

16 (b) If the claimant does not conform with the requirements
17 of this chapter, the builder may bring a motion to stay any
18 subsequent court action or other proceeding until the
19 requirements of this chapter have been satisfied. The court, in
20 its discretion, may award the prevailing party on such a motion,
21 the prevailing party's attorney's fees and costs in bringing or
22 opposing the motion.



1 § -30 **Joined causes of action.** If a claim combines
2 causes of action or damages not covered under this chapter,
3 including, without limitation, personal injuries, class actions,
4 other statutory remedies, or fraud-based claims, the claimed
5 unmet standards shall be administered according to this chapter,
6 although evidence of the property in its unrepaired condition
7 may be introduced to support the respective elements of any such
8 cause of action. As to any fraud-based claim, if the fact that
9 the property has been repaired under this chapter is deemed
10 admissible, the trier of fact shall be informed that the repair
11 was not voluntarily accepted by the homeowner. As to any class
12 action claims that address solely the incorporation of a
13 defective component into a residence, the named and unnamed
14 class members need not comply with this chapter.

15 § -31 **Subsequently discovered claims of unmet standards.**
16 Subsequently discovered claims of unmet standards shall be
17 administered separately under this chapter, unless otherwise
18 agreed to by the parties. However, in the case of a detached
19 single family residence in the same home, if the subsequently
20 discovered claim is for a violation of the same standard as that
21 which has already been initiated by the same claimant and is the
22 subject of a currently pending action, the claimant need not



1 reinitiate the process as to the same standard. In the case of
2 an attached project, if the subsequently discovered claim is for
3 a violation of the same standard for a connected component
4 system in the same building as has already been initiated by the
5 same claimant, and is the subject of a currently pending action,
6 the claimant need not reinitiate this process as to that
7 standard.

8 § **-32 Admissibility of repair effort.** If any
9 enforcement of these standards is commenced, the fact that a
10 repair effort was made may be introduced to the trier of fact.
11 However, the claimant may use the condition of the property
12 prior to the repair as the basis for contending that the repair
13 work was inappropriate, inadequate, or incomplete, or that the
14 violation still exists. The claimant need not show that the
15 repair work resulted in further damage nor that damage has
16 continued to occur as a result of the violation.

17 § **-33 Introduction of conduct.** Evidence of both
18 parties' conduct during the process contained in this chapter
19 may be introduced during a subsequent enforcement action, if
20 any, with the exception of any mediation. Any repair efforts
21 undertaken by the builder shall not be considered settlement



1 communications or offers of settlement and are not inadmissible
2 in evidence on such a basis.

3 **§ -34 Applicability of standards described in other**
4 **laws.** Each and every provision of any other chapter shall apply
5 to subcontractors, material suppliers, individual product
6 manufacturers, and design professionals to the extent that the
7 subcontractors, material suppliers, individual product
8 manufacturers, and design professionals caused, in whole or in
9 part, a violation of a particular standard as the result of a
10 negligent act or omission or a breach of contract. In addition
11 to any affirmative defenses, a subcontractor, material supplier,
12 design professional, individual product manufacturer, or other
13 entity may also offer common law and contractual defenses as
14 applicable to any claimed violation of a standard. All actions
15 by a claimant or builder to enforce an express contract, or any
16 provision thereof, against a subcontractor, material supplier,
17 individual product manufacturer, or design professional is
18 preserved. Nothing in this chapter modifies the law pertaining
19 to joint and several liability for subcontractors, material
20 suppliers, individual product manufacturer, and design
21 professionals that contribute to any specific violation of this
22 chapter. However, this section does not apply to any



1 subcontractor, material supplier, individual product
2 manufacturer, or design professional to which strict liability
3 would apply.

4 § -35 **Limitations period.** (a) Except as specifically
5 set forth in this chapter, no action may be brought to recover
6 under this chapter more than ten years after substantial
7 completion of the improvement but not later than the date of
8 recordation of a valid notice of completion.

9 (b) As used in this section, "action" includes an action
10 for indemnity brought against a person arising out of that
11 person's performance or furnishing of services or materials
12 referred to in this chapter.

13 (c) The limitation prescribed by this section shall not be
14 asserted by way of defense by any person in actual possession or
15 control, as owner, tenant or otherwise, of such an improvement,
16 at the time any deficiency in the improvement constitutes the
17 proximate cause for which it is proposed to make a claim or
18 bring an action.

19 (d) Existing statutory and decisional law regarding
20 tolling of the statute of limitations shall apply to the time
21 periods for filing an action or making a claim under this
22 chapter. If a builder arranges for a contractor to perform a



1 repair pursuant to section -10, as to the builder the time
2 period for calculating the statute of limitation shall pertain
3 to the substantial completion of the original construction and
4 not to the date of repairs under this chapter. The time
5 limitations established by this chapter do not apply to any
6 action by a claimant for a contract or express contractual
7 provision. Causes of action and damages to which this chapter
8 does not apply are not limited by this section. In order to
9 make a claim for violation of the standards set forth in section
10 -3, a homeowner need only demonstrate, in accordance with the
11 applicable evidentiary standard, that the home does not meet the
12 applicable standard, subject to the affirmative defenses set
13 forth in section -39. No further showing of causation or
14 damages is required to meet the burden of proof regarding a
15 violation of a standard set forth in section -3, provided
16 that the violation arises out of, pertains to, or is related to,
17 the original construction.

18 § -36 **Other actions barred.** (a) Except as provided in
19 this chapter, no other cause of action for a claim covered by
20 this chapter or for damages recoverable under section -37 is
21 allowed. This chapter does not apply to any action by a
22 claimant to enforce a contract or express contractual provision,



1 or any action for fraud, personal injury, or violation of a
2 statute. Damages awarded for the items set forth in section
3 -37 in such other cause of action shall be reduced by the
4 amounts recovered pursuant to section -37 for violation of the
5 standards set forth in this chapter.

6 (b) As to any claims involving a detached single-family
7 home, the homeowner's right to the reasonable value of repairing
8 any nonconformity is limited to the repair costs, or the
9 diminution in current value of the home caused by the
10 nonconformity, whichever is less, subject to the personal use
11 exception as developed under common law.

12 § -37 **Recoverable damages.** If a claim for damages is
13 made under this chapter, the homeowner is only entitled to
14 damages for the reasonable value of repairing any violation of
15 the standards set forth in this chapter, the reasonable cost of
16 repairing any damages caused by the repair efforts, the
17 reasonable cost of repairing and rectifying any damages
18 resulting from the failure of the home to meet the standards,
19 the reasonable cost of removing and replacing any improper
20 repair by the builder, reasonable relocation and storage
21 expenses, lost business income if the home was used as a
22 principal place of a business licensed to be operated from the



1 home, reasonable investigative costs for each established
2 violation, and all other costs or fees recoverable by contract
3 or statute.

4 § **-38 Parties bound.** The provisions, standards, rights,
5 and obligations set forth in this chapter are binding upon all
6 original purchasers and their successors-in-interest. For
7 purposes of this chapter, condominium associations shall be
8 considered to be original purchasers and shall have standing to
9 enforce the provisions, standards, rights, and obligations set
10 forth in this chapter.

11 § **-39 Builder's affirmative defense.** A builder, under
12 the principles of comparative fault pertaining to affirmative
13 defenses, may be excused, in whole or in part, from any
14 obligation, damage, loss, or liability if the builder can
15 demonstrate any of the following affirmative defenses in
16 response to a claimed violation:

17 (1) To the extent it is caused by an unforeseen act of
18 nature which caused the structure not to meet the
19 standard. For purposes of this section an "unforeseen
20 act of nature" means a weather condition, earthquake,
21 or event of human origin such as war, terrorism, or
22 vandalism, in excess of the design criteria expressed



1 by the applicable building codes, regulations, and
2 ordinances in effect at the time of original
3 construction;

4 (2) To the extent it is caused by a homeowner's
5 unreasonable failure to minimize or prevent those
6 damages in a timely manner, including the failure of
7 the homeowner to allow reasonable and timely access
8 for inspections and repairs under this chapter. This
9 includes the failure to give timely notice to the
10 builder after discovery of a violation, but does not
11 include damages due to the untimely or inadequate
12 response of a builder to the homeowner's claim;

13 (3) To the extent it is caused by the homeowner or the
14 homeowner's agent, employee, subcontractor,
15 independent contractor, or consultant by virtue of
16 their failure to follow the builder's or
17 manufacturer's recommendations, or commonly accepted
18 homeowner maintenance obligations. In order to rely
19 upon this defense as it relates to a builder's
20 recommended maintenance schedule, the builder shall
21 show that the homeowner had written notice of these
22 schedules and recommendations and that the



1 recommendations and schedules were reasonable at the
2 time they were issued;

3 (4) To the extent it is caused by the homeowner or the
4 homeowner's agent's or an independent third party's
5 alterations, ordinary wear and tear, misuse, abuse, or
6 neglect, or by the structure's use for something other
7 than its intended purpose;

8 (5) To the extent that the time period for filing actions
9 bars the claimed violation;

10 (6) As to a particular violation for which the builder has
11 obtained a valid release;

12 (7) To the extent that the builder's repair was successful
13 in correcting the particular violation of the
14 applicable standard; and

15 (8) As to any causes of action to which this statute does
16 not apply, all applicable affirmative defenses are
17 preserved."

18 SECTION 2. Chapter 672E, Hawaii Revised Statutes, is
19 repealed.

20 SECTION 3. This Act does not affect rights and duties that
21 matured, penalties that were incurred, and proceedings that were
22 begun, before its effective date.



1 SECTION 4. This Act shall take effect upon its approval,
 2 and applies to the sale of residential units on and after
 3 January 1, 2008.

4

INTRODUCED BY:



Rider T. P. Caball

Marilyn B. Lee

Jennifer

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JAN 24 2007



Report Title:

Construction Defects

Description:

Specifies the rights and requirements of a homeowner to bring an action for construction defects, including applicable standards for home construction, the statute of limitations, the burden of proof, the damages recoverable, a detailed prelitigation procedure, and the obligations of the homeowner.

