

**CONSTRUCTION DEFECT – PRE-LITIGATION NOTICE**

**Summary**

D.R. Horton, Inc. built the First Light at Boulder Ranch Community in Henderson, Nevada, which consists of 138 buildings, with three residential units in each building, totaling 414 residences. There are three different floor plans, each with two possible elevations, for a total of six different types of homes. First Light believed that constructional defects may have existed in each residence, and hired experts to assist it in preparing a NRS 40.465,<sup>2</sup> pre-litigation notice of constructional defects. In order to prepare this notice, the experts used visual and invasive testing of a small representative sample of homes, and then extrapolated the percentage of homes in which they believed each defect was present throughout the community. The experts failed to provide D.R. Horton with the addresses or the expert report of the homes they had tested. The notice stated that approximately 160 defects may have existed in various combinations; and estimated that anywhere from 2 to 100 percent of the 414 homes had any combination of the 160 defects. Additionally, First Light did not specify the floor plans, elevations, or addresses of the homes in which it alleged that a particular defect may have existed.

First Light, unsatisfied with D.R. Horton's response to its notice, filed a constructional defect action with the district court. D.R. Horton moved for declaratory judgment, arguing that First Light's notice was unreasonable and, therefore, statutorily insufficient. The district court denied the motion, and refused to declare First Light's NRS 40.645 notice statutorily insufficient.<sup>3</sup> D.R. Horton filed a petition challenging the

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<sup>1</sup> By Meredith Holmes

<sup>2</sup> NEV. REV. STAT. § 40.645 states, in pertinent part,

2. The notice given pursuant to subsection 1 [of NRS 40.645] must:

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(b) Specify in reasonable detail the defects of any damages or injuries to each residence or appurtenance that is the subject of the claim; and

(c) Describe in reasonable detail the cause of the defects if the cause is known, the nature and extent that is known of the damage or injury resulting from the defects and the location of each defect within each residence ... to the extent known.

3. [The notice may include] expert opinion concerning the cause of the constructional defects and the nature and extent of the damage or injury resulting from the defects which is based on a valid and reliable sample of the components of the residences or appurtenances ... as notice of the common constructional defects within the residences to which the expert opinion applies.

4. [O]ne notice may be sent relating to all similarly situated owners of residences ... within a single development that allegedly have common constructional defects if:

...

(b) [Among other things,] it is the opinion of the expert that those similarly situated residences ... may have ... common constructional defects.

<sup>3</sup> The record showed that the district court was reluctant in its decision because although it could not hold that the notice was technically insufficient, it expressed concern that the notice did not adequately notify D.R. Horton of which defects existed in each house.

district court's order on the grounds that First Light's notice was not given in "reasonable detail" as required by NRS 40.645(2), and that the inadequacy of the notice frustrated its opportunity to repair under NRS 40.647.<sup>4</sup>

After concluding that NRS 40.645 was ambiguous,<sup>5</sup> the Nevada Supreme Court reviewed the legislative history behind the statute. The Court held that it was clear that the Legislature intended for contractors to have an opportunity to repair defects, and that contractors are entitled to reasonable notice of alleged defects in order to decide whether to verify and repair those defects.<sup>6</sup> The Court noted that there is not an exact formula for determining whether a pre-litigation notice is reasonable, and that the district courts have wide discretion when making that determination. The Court went on to "establish[] a 'reasonable threshold test,' which every pre-litigation notice must satisfy, but only if challenged by the contractor."<sup>7</sup> The Court also held "that NRS 40.645(4)(c) requires a claimant to disclose the expert opinions and reports in his possession that were used to prepare his pre-litigation notice."<sup>8</sup> As a result, the Court granted D.R. Horton's petition in part so that the district court could determine whether First Light's notice provided the detail necessary to pass the "reasonable threshold test," and granted the petition to the extent asking the Court to require First Light to disclose the expert reports concerning the alleged defects.

## **Issue and Disposition**

### **Issue**

The question addressed by the court was:

How should district courts determine the sufficiency of a pre-litigation notice of constructional defects under NRS 40.645?

Are claimants required to disclose supporting documents and information supporting the alleged defects?

### **Disposition**

Pre-litigation notices of constructional defects must satisfy a reasonable threshold test in order to meet the "reasonable detail" requirement of NRS 40.645. So long as these requirements are met, district courts have wide discretion to determine the adequacy of a pre-litigation notice on a case by case basis.

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<sup>4</sup> NEV. REV. STAT. § 40.647 requires that a claimant "allow inspection of the alleged constructional defect ... and allow the contractor ... a reasonable opportunity to repair the constructional defect..."

<sup>5</sup> *D.R. Horton v. Dist. Ct.*, 123 Nev. Adv. Op. 45 (2007) ("While the statute sets forth requirements for a pre-litigation notice, we are unable to determine from the statute's plain language the exact meaning of those requirements.")

<sup>6</sup> The legislative history showed that the Legislature approved NRS 40.645 based on the contractors' approach, which advocated these two positions.

<sup>7</sup> *D.R. Horton*, 123 Nev. Adv. Op. 45 (2007).

<sup>8</sup> *Id.*

Yes. NRS 40.645(4)(c) requires claimants to disclose expert opinions and reports in their possession that were used to prepare the pre-litigation notice.

## **Commentary**

### **State of Law Before *D.R. Horton v. Dist. Ct.***

The issue presented in *D.R. Horton v. Dist. Ct.* is one of first impression. Although NRS 40.645 required that a pre-litigation constructional defect notice specify in “reasonable detail” the defects, any known causes, and the defects’ locations, before *D.R. Horton* the law in this area was governed by the district courts’ interpretations of the “reasonable detail” requirement of NRS 40.645.

### **Other Jurisdictions**

Other jurisdictions are not uniform in their treatment of what satisfies sufficient notice of construction defects. Some jurisdictions have statutory provisions regarding pre-litigation notice that read very similar to Nevada’s,<sup>9</sup> and require “reasonable detail,” but what constitutes “reasonable detail” has not been determined. On the other hand, there are jurisdictions that have specified in the statutory language exactly what “reasonable detail” entails and what must be included in pre-litigation notices of construction defects.<sup>10</sup>

### **Effect of *D.R. Horton v. Dist. Ct.***

The Nevada Supreme Court held that a pre-litigation notice must contain reasonable detail that a contractor can inspect and repair the alleged defects in compliance NRS 40.600 through NRS 40.675. The Court went on to hold that pre-litigation notices are presumed valid under NRS 40.645, and that a contractor who wishes to challenge such a notice bears the burden of doing so with specificity.

The Court established a “reasonable threshold test” that every pre-litigation notice must satisfy if challenged by the contractor. This test was established to help guide the district courts in their use of discretion when determining the reasonableness of pre-litigation notices. Extrapolation of representative tests is permitted, but the scope of this extrapolation must be narrow. Homes within this scope will be considered similarly

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<sup>9</sup> WASH. REV. CODE § 64.50.020 (“In every construction defect action brought against a construction professional the claimant shall serve notice of claim on the construction professional. The notice of claim shall ... describe the claim in reasonable detail...”)

<sup>10</sup> See ARIZ. REV. STAT. § 12-1363 (“...the purchaser shall give written notice ... specifying in reasonable detail the basis of the dwelling action... ‘reasonable detail’ includes a detailed and itemized list that describes each alleged defect and the location that each alleged defect has been observed by the purchaser in each dwelling that is subject of the notice.”), CAL. CIV. CODE § 1375 (“...(c) The notice shall include all of the following: (1) the name and location of the project. (2) An initial list of defects sufficient to apprise the respondent of the general nature of the defects at issue. (3) A description of the results of the defects, if known. (4) A summary of the results of a survey or questionnaire distributed to homeowner to determine the nature and extent of defects... (5) Either a summary of the results of testing conducted to determine the nature and extent of defects or the actual test results...”).

situated only if they are part of a subset of homes in the community, and this subset must be identified.<sup>11</sup> The district courts should require the expert to test and verify the alleged defect in at least one home in each subset. The claimant must provide the address of each home tested and identify the subset of homes to which the pre-litigation notice applies. The district courts must use their discretion in determining whether the sample was of sufficient size and representation, and may determine that the notice is not reasonable unless the defect is verified in more than one house in each subset. Once these minimum requirements are met, the “contractor bears the burden of verifying and repairing the alleged defects in every home in the subset of homes identified in the extrapolated notice.”<sup>12</sup> However, the contractor may opt not to repair and the claimant can commence litigation, at which point the burden will be on the claimant to prove the existence of each defect.<sup>13</sup>

Finally, the Court held that a “claimant cannot utilize the phrase ‘to the extent known’ in NRS 40.645(2)(c) to justify withholding pertinent information from a pre-litigation notice.”<sup>14</sup> Claimants are now required to disclose expert opinions and reports that were used to prepare the pre-litigation notice.

## **Conclusion**

The Nevada Supreme Court held that all pre-litigation notices, if challenged by the contractor, must meet a reasonable threshold test in order to meet the statutory requirements of NRS 40.465. The district courts are to use their discretion in determining whether these requirements are met in each case. Additionally, claimants are required to produce expert opinions and reports used in creating the pre-litigation notice.

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<sup>11</sup> D.R. Horton v. Dist. Ct., 123 Nev. Adv. Op. 45 (2007) (subsets of homes for extrapolation purposes may include those of a particular floor plan, elevation, or a combination of the two, or may be limited to those in which a particular product or type of construction was used).

<sup>12</sup> *Id.*

<sup>13</sup> See Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 855-57, 124 P.3d 530, 543-44 (2005).

<sup>14</sup> D.R. Horton, 123 Nev. Adv. Op. 45 (2007).