

MCKENZIE RHODY & HEARN SECURES FAVORABLE RULING ON “ACTUAL DAMAGES” ISSUE

In 2001, the Colorado General Assembly passed the Construction Defect Action Reform Act (CDARA), which was intended to preserve adequate rights and remedies for property owners who bring and maintain construction defect actions. In 2003, the Colorado legislature expanded CDARA to define a homeowner’s “actual damages” as the lesser of the (1) fair market value of the real property without the construction defect; (2) replacement cost of the real property; or (3) reasonable cost to repair the construction defects. The statute, however, was silent on the issue of which party had the burden of proving which of the three alternatives was in fact the lesser amount.

MR&H recently confronted this issue in *Central Park Townhomes Condominium Association v. Central Park Townhomes, L.L.C. et. al.*, asserting that homeowners should not be required to calculate all three measures of actual damages under CDARA. Doing so would have required hiring of additional costly experts by the homeowners in order to gather the necessary data for each calculation. The defendants in *Central Park* claimed that plaintiffs in construction defect cases should be required to calculate all three amounts in order to prove that the requested amount of actual damages is indeed the lesser of the three. Instead, the District Court agreed with MR&H’s position and held that “once a plaintiff has established damages, it naturally falls to the defendant to present evidence to reduce or otherwise rebut the plaintiff’s damages.” In other words, a homeowner only has to establish damages under one of the measures and then the burden is on the builder/developer to prove that the Plaintiff’s calculation is not the lesser of the three values.

“This decision correctly interprets the burden on a homeowners association in establishing damages in a construction defect case, which is an important and costly step in the litigation process,” said Chris Rhody, the partner at MRH who pursued the case on behalf of Central Park Townhomes Condominium Association. Mr. Rhody added, “this decision should not only lead to reduced costs for construction defect plaintiffs; but also a more expeditious resolution of construction defect cases.”