
Determining Damages under CDARA

Actual Status and Intended Use
Trump Zoning Designations

BY NICHOLAS SNOW AND CHLOE MICKEL

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This article examines Opus I, LLC v. Stepneski, which clarifies how to determine actual damages under Colorado's Construction Defect Action Reform Act.

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In 2003, Colorado's Construction Defect Action Reform Act (CDARA) was amended to define and limit the remedies available to claimants seeking recovery for property damage. Although CDARA makes it clear that a construction professional may not be liable for more than "actual damages" unless there is a violation of the Colorado Consumer Protection Act (CCPA), defining "actual damages" has challenged practitioners and judges alike over the past 15 years.

In a recent construction defect case in Denver District Court, *Opus I, LLC v. Stepneski*, the issue was whether a building's classification under its original zoning designation, or its later-modified designation, should be considered in establishing available damages.¹ Taking a common sense approach, the district court held that the present, intended use of the building determines its classification under CDARA, thus clarifying how actual damages are determined.

Opus I: Facts and Claims

Before renovating and redeveloping a historic building in Denver, a developer purchased a mixed-use building (the property) that contained apartments on the second floor and a previously prominent, but recently abandoned, night club² on the ground floor. The developer intended to renovate the ground floor for use as a restaurant and bar.

The construction, and its ultimate failure, occurred in two phases. Initially, the developer

engaged design and construction professionals to analyze the existing building, provide structural engineering services, and construct the shell of the property, ready for tenant finish. After construction, the prospective tenant inspected the property and noted several structural issues that needed to be addressed before it would take possession and complete the tenant finish work.

The second phase of construction addressed the prospective tenant’s identification of structural distress. The developer retained a new architect, structural engineer, and contractor to evaluate and address the tenant’s concerns. The architect and engineer began analyzing the structural integrity of the building and designing a functional remediation plan. After the demolition had begun, but before the design team was able to implement any of the newly designed remediation plan, the building collapsed. The collapse occurred during preliminary demolition of the interior of the building, caused by removal of floor joists, which ran through an interior brick wall. As each joist was removed, portions of the 100-year-old brick wall continually crumbled around each hole left by removing a joist, until the wall collapsed. Several hours later, the second floor directly above the area of the first collapse also failed. The second-story collapse caused portions of the roof to collapse in the areas where it was no longer supported.

The prospective tenant soon cancelled its lease with the developer and the building was classified as a complete loss. As a result, the developer alleged construction defect claims under CDARA against every subcontractor involved in both phases of construction, seeking damages for diminution in value, lost rent, and loss of use of the property.

History of Damages under CDARA

In 2001, Colorado enacted CDARA at CRS §§ 13-20-801 et seq. to address the increasing volume of claims involving homeowners and construction professionals, with a specific aim at “preserving adequate rights and remedies for property owners who bring and maintain” claims of construction defects.³

CDARA applies to “all civil actions claiming damages, indemnity, or contribution in

connection with alleged construction defects” and is designed to regulate and streamline litigation between claimants and construction professionals. An “action” is

a civil action or an arbitration proceeding for damages, indemnity, or contribution brought against a construction professional to assert a claim, counterclaim, cross-claim, or third-party claim for damages or loss to, or the loss of use of, real or personal property

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or personal injury caused by a defect in the design or construction of an improvement to real property.⁴

To increase efficiency in construction defect litigation actions, CDARA initially (1) limited claimants to damages for actual or probable damages to real property, loss of use, or bodily injury; (2) required owners to serve on the construction professional an initial list containing the alleged defective construction within 60 days of serving the complaint; and (3) allowed

construction professionals to reserve claims against subcontractors or design professionals until after settlement or judgment, preserving their claims under the statute of limitations.⁵

In 2003 CDARA was amended (CDARA II) primarily to limit the potential liability of construction professionals by limiting damages available to claimants under CDARA. The 2003 revisions included (1) a mandatory notice of claim procedure intended to provide the construction professional an opportunity to resolve the dispute before litigation can be filed; (2) limitations on the damages available for alleged construction defects; and (3) limiting actions against construction professionals under the CCPA, CRS §§ 6-1-101 et seq.

Colorado law does not treat all construction professionals the same. Significant differences exist between design professionals, general contractors, subcontractors, and builder/vendors that lead to separate and different claims and defenses. Typically, claimants raise claims for breach of contract, breach of warranty (express and implied), professional negligence, negligence, indemnification, contribution, misrepresentation, concealment, and CCPA violations. While a claimant may recover under various claims in construction defect cases, CDARA II created defenses for construction professionals, including specifically enumerating the types of damages available to claimants and establishing the circumstances under which they apply.

CDARA’s Limitation on Damages

CDARA II reveals the legislative intent to limit the damages available to claimants in construction defect litigation. CRS § 13-20-806, Limitation of Damages, states:

A construction professional otherwise liable shall not be liable for more than *actual damages*, unless and only if the claimant otherwise prevails on the claim that a violation of the “Colorado Consumer Protection Act”, article 1 of title 6, C.R.S., has occurred; and if:

1. The construction professional’s monetary offer, made pursuant to section 13-20-803.5 (3), to settle for a sum certain a construction defect claim described in a notice of claim

- is less than eighty-five percent of the amount awarded to the claimant as actual damages sustained exclusive of costs, interest, and attorney fees; or
2. The reasonable cost, as determined by the trier of fact, to complete the construction professional's offer, made pursuant to section 13-20-803.5, to remedy the construction defect described in the notice of claim is less than eighty-five percent of the amount awarded to the claimant as actual damages sustained exclusive of costs, interest, and attorney fees. (Emphasis added.)

CDARA further defines "actual damages" to mean

the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the

reasonable cost to repair the alleged construction defect, *whichever is less*, together with relocation costs, and, *with respect to residential property*, other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law. "Actual damages" as to personal injury means those damages recoverable by law, except as limited by the provisions of section 13-20-806 (4).⁶

Reading these statutory provisions together indicates the legislature's intent to apply CDARA to all civil actions involving direct or consequential damages claims (including loss of use damages and personal injury) against construction professionals "in connection with" alleged construction or design deficiencies. CDARA is, and was intended to be, a sole remedy

for damages sought against construction and design professionals for damages related to defective construction or design.

The Actual Damages Arguments in *Opus I*

The developer's claims related to the collapse of the building included diminution in the property's value resulting from the collapse, the anticipated damages associated with the loss of use of the property, lost rent due to the prospective tenant canceling its lease, and various other damages allegedly caused by the collapse.⁷

The second structural engineer (defendant) challenged the availability of the loss of use and lost profits damages under CDARA's definition of "actual damages."⁸ In this case of first impression under Colorado law, defendant argued the developer could not recover such damages



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regardless of the original zoning because the building was “commercial” in nature when it collapsed.⁹

Defendant specifically challenged the developer’s damages for loss of use, including any lost rent, caused by construction defects in a property that was zoned for residential and commercial use, but was being converted into a restaurant.¹⁰ The developer argued that the property’s partial residential zoning, receipt of a variance for nonconforming use, and the renovations to accommodate a restaurant, were not determinative of whether the property should be classified as a commercial space under CDARA.¹¹ The developer also claimed that CDARA should not limit the damages for loss of use, including lost rent, because those damages constitute “general damages.”¹² Finally, the developer argued that CDARA should not be applied differently to commercial and residential properties, asserting that it was unconstitutional to treat the property owners differently according to a property’s residential versus commercial property designation.¹³

In support of the lost rent and loss of use damages, the developer argued that the property should be considered a residential property, because it was originally zoned exclusively for residential use and the variance did not change the zoning of the property, as the term was intended under CDARA. The developer argued that, while CDARA does not expressly define “residential property,” it defines “commercial property” as “property that is zoned to permit



commercial, industrial, or office types of use.”¹⁴ The developer took it a step further and argued that if commercial property is property zoned for commercial use, then residential property must be property zoned for residential use. The developer requested that the court define the property as solely residential, despite the variance and the developer’s intended use of the property.¹⁵

Next, the developer argued that because the loss of use and lost profits were a “predictable result” of the failure of construction professionals to properly perform upgrades, the damages should be recoverable because they flow “naturally from the breach” and would “be known to the ordinary person.”¹⁶

Finally, the developer argued that nothing in CDARA’s legislative history distinguished between commercial and residential property owners or offered greater protection to construction professionals, who were responsible for defects to commercial property.¹⁷

In response, defendant argued that the variance was, on its face, enough to show that the property should be considered commer-

cial under CDARA’s definition, which states “property that is zoned to permit commercial, industrial, or office types of use.”¹⁸ Once a building obtains a variance allowing use as a restaurant, the zoning law permits it to be used in a “commercial, industrial, or office” manner.¹⁹ Further, defendant argued that deeming a restaurant to be a residential use contradicts not only CDARA’s definition but also common sense; the property simply cannot be zoned as residential property where the zoning commission allows it to be used as a restaurant.²⁰ In rebutting the developer’s claims that the legislature did not intend to treat residential property differently than commercial property, defendant argued that CDARA’s definition of “actual damages” demonstrates that CDARA was written with that specific intent in mind.

Finally, in response to the developer’s claims that the lost profit and loss of use damages were a predictable result of the failure of the building, defendant argued that CDARA, as a comprehensively written and revised statute, was intended to be the sole remedy for claimants in construction defect cases, and the developer’s recovery was limited to those damages outlined in CDARA.²¹

The Court’s Analysis

Relying heavily on the language of CDARA and its goals, the Denver District Court agreed with defendant and denied the developer any damages not explicitly available for a commercial building under CDARA. The court held that the

actual status and intended use of the property *with the variance*, rather than the original zoning status, controls; that CDARA treats commercial and residential property differently; and therefore, the developer could only recover those damages enumerated in CDARA.²²

The court concluded that principles of statutory construction and common sense dictated that the word “zoning” in CDARA’s definition of “commercial property” refers to the zoning at the time of the alleged construction negligence, *including any then-existing variances*.²³ The court reasoned that to “look to zoning uses but ignore any then-applicable variance is not suggested by the statute and could lead to an absurd result.”²⁴ The court opined that “given that the [property] was intended to be operated as an ‘eating and drinking establishment,’ it defies both common usage and common sense to consider it to be ‘residential’ property.”²⁵ Ultimately, the court held that “the actual status and intended use of the property *with the variance*, rather than the original zoning status, should control.”²⁶

The court clarified that while CDARA does not specifically define “residential” in terms of its definition of “actual damages,” the term “[r]esidential” plainly means using or designed for use as a residence.²⁷ Citing *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, the court explained “[r]esidence,’ in turn, plainly means a structure where people live . . . the term ‘residential’ [as used in CDARA] is unambiguous and means an improvement on a parcel that is used as a dwelling or for living purposes.”²⁸ Thus, the developer’s claim for loss of use and/or loss of rent was statutorily barred by CDARA.²⁹

Finally, in dismissing the developer’s contrary assertion, the court concluded that CDARA limits a commercial property owner’s recovery by its terms.³⁰ Quoting *Town of Alma v. AZCO Construction, Inc.*, the court reasoned, “[t]he apparent objective of CDARA’s damage caps and the exception for ‘residential property’ is to differentiate between owners of residential property damaged by construction negligence and owners of commercial property.”³¹ Residential owners are treated differently due to the difference in bargaining power and industry sophistication between individual homeowners

and commercial operations when dealing with construction professionals.³² The court’s reasoning follows a long line of Colorado cases that places a special emphasis on the duties required of those engaged in residential design and construction.³³ Colorado courts have time and again affirmed the strong public policy favoring a heightened standard of care for residential construction, which has manifested itself through CDARA in the exception to recoverable damages under CDARA specifically for “residential property.”³⁴

Conclusion

Opus I clarified that when determining damages, the actual status and intended use of a property should control, given the purpose of CDARA and based on a common sense application of the law. The Denver District Court’s reasoning should apply whenever a construction project is subject to a variance or a change of zoning classification, particularly where the property is converted between residential and commercial uses. Construction attorneys should be mindful that a plaintiff’s actual damages under CDARA

may be limited if a variance is granted to convert the property from residential to commercial use. On the other hand, the court’s analysis may be applied to the opposite situation (a change from commercial to residential use) to argue that the full range of damages available to residential homeowners should be awarded. [CL](#)



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The authors were counsel for the defense in *Opus I, LLC v. Stepneski*.

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NOTES

1. *Opus I, LLC v. Stepneski*, Denver Dist. Court Case No. 2016CV33858 (Nov. 9, 2017), Order on Plaintiff’s Motion for Determination of Question of Law (Order) at 2. *Opus I* settled before trial, after entry of this Order.
2. The property was home to the popular Tico Tico Club from 1969 through the late 2000s. The club was known for the bold, colorful murals that covered the walls.
3. CRS § 13-20-802.
4. CRS § 13-20-802.5(1).
5. CRS § 13-20-80-807. See *CLPF-Parkridge One, L.P. v. Harwell Invs., Inc.*, 105 P.3d 658, 664 (Colo. 2005) (CDARA’s purpose is to streamline construction defect litigation).
6. CRS 13-20-802.5(2) (emphasis added).
7. Order at 2.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 6.
12. Plaintiff’s Motion for a Determination of a Question of Law (Plaintiff’s Motion) at 2.
13. Plaintiff’s Reply; Order at 7 n.8.
14. Plaintiff’s Motion at 3; CRS § 13-20-802.5(4).
15. Plaintiff’s Motion at 5-6.
16. *Id.* at 8.

17. *Id.* at 7.
18. CRS § 13-20-802.5(4).
19. Order at 3.
20. *Id.* at 6.
21. *Id.* at 2.
22. *Id.* at 6-8.
23. *Id.* at 6 (emphasis added).
24. *Id.*
25. *Id.* at 6.
26. *Id.* a 7 (emphasis in original).
27. *Id.*
28. *Id.* at 7-8 (citing *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 2017 COA 31 ¶ 22).
29. *Id.*
30. *Id.* at 3, 8.
31. *Id.* at 7.
32. *Town of Alma v. AZCO Constr. Inc.*, 10 P.3d 1256, 1261 (Colo. 2000).
33. *Yacht Club II Homeowners Ass’n v. A.C. Excavating*, 94 P.3d 1177, 1181 (Colo.App. 2003); *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1045 (Colo. 1983).
34. *Broomfield Senior Living Owner, LLC*, 413 P.3d at 224.