MYTHS VS. FACTS

Construction Defects and Balcony Inspections

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There is a lot of information about construction defects that come out for managers and board members every day. Now, there are new companies who provide opinions and services about the new balcony inspections requirements under SB 326 and how they relate the construction defects process, so much so that it can be hard to know what is fact and what is a myth. We have identified some common myths, and attempt to "de-myth-if-y" them in this article. The following is not meant to be an entire list of myths, but representative of the most common construction defects and balcony inspections requirements myths.

MYTH 1

Stucco and concrete slabs always crack and roofs, windows, and doors leak. It's normal and not a defect.

Defects can result from any number of design and construction problems. What constitutes a construction defect is wide-ranging. The presence of inadequate drainage, leaking roofs, bad plumbing, faulty wiring, cracked slabs, structural failures, electrical problems, safety code violations, siding, and stucco failures, failing foundations, poor soil compaction can all be considered defects. While hairline cracks may occur, cracks can and often increase in size and can be caused by poorly compacted or expansive soils, structural problems, or other building performance standards violations. Defects should be identified and independently investigated. Many construction defects law firms can arrange for independent investigations free of charge for an association. With the results of an investigation, however, do not just send a letter to the builder claiming defects without the guidance of counsel as this may trigger statutes of limitations that could impact the association's construction defects claim.

MYTH 2

The builder will fix the problem.

Builders may try to lull boards and owners into a false sense of security by claiming that the problems are normal or that they will fix the problem. Builders, their customer service staff, and repair contractors rarely really fix the underlying problem. They will patch, plug, and paint over the problem. Often, the problem reappears and the time to file a claim against the builder may have passed. Builders do not tell boards and owners what is really causing the roof to leak, the plumbing to fail or electrical fixtures to flicker. Builders frequently make only "Band-Aid" or cosmetic repairs. Boards and owners should not believe that the builder has the association's best interest in mind. Afterall, the builder created the problems and may be made to pay to fix the defects by a diligent board or vigilant owners.

MYTH 3

Construction defects lawyers solicit owners and association boards and trump up frivolous claims.

Statistically, over fifty percent of all homes and condominiums present building performance standards violations and have significant construction defects.

Boards of directors of associations have a fiduciary duty to investigate failing common area conditions and take timely and appropriate action. Builders have insurance for construction defects claims and every year insurance companies pay out millions of dollars to fix construction defects.

MYTH 4

A construction defects claim goes against the association's insurance.

Construction defects claims are not made against the association's insurance. Rarely, if ever, will association's insurance policy cover damages for defective design, faulty construction, or soil settlement. Consult with association corporate counsel before filing a claim with an insurance carrier. Filing a claim can result in increased premiums or non-renewal of a policy, placing a high-risk category on the association, even if the insurance company pays nothing on the claim. Experienced construction defects attorneys explore the ability of the builder's insurance coverage to pay a claim early in the construction defects claim process. Construction defects attorneys should make sure the builder, or any other potential defendant has the resources to pay a settlement or judgment. Even if the developer or defendants are no longer in business, there should be insurance available to satisfy a judgment. Construction defects attorneys would agree that it makes little sense to expend the time, effort, and expense of construction defects litigation if it is impossible to collect.

MYTH 5

Your association will be tied up for years in litigation.

Ninety percent of construction defects claims are resolved within 24 months of filing, and of those, over ninety-five percent will settle and never go to trial. Most construction defects attorneys will work on a contingency fee basis. They get paid when they win. They are motivated to resolve your construction defects litigation matter sooner rather than later. Cases handled on an hourly basis and/or by attorneys with little to no track record and unwilling to take on the risk of financing may take 3-5 years to resolve the case and in the end the association may be left with a hefty bill.

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MYTH 7

Builders will bury associations in legal fees and costs and the association will not win enough to repair the defects.

Experienced construction defects law firms will take association cases on a contingency fee basis, advance the significant expert costs, and take the risk if the association loses. A well-financed construction defects litigation firm will hold its ground against any builder or insurance company with seemingly endless resources. An association's corporate counsel should not pursue a construction defects claim on behalf of the association. Conflicts exist and the board should require separation and accountability. Specialty counsel such as construction defects attorneys may be able to circumvent the need for prolonged litigation. Insurance companies and insurance defense counsel usually know the top construction defects attorneys and knowing your construction defects attorney's reputation, insurance companies may decide to cut its losses and settle the case early through mediation.

MYTH 8

Owners will have to disclose that defect and the value of their house or condo will suffer and they will not be able to sell or refinance their house or condo.

Construction defects clams are common. The defects must be disclosed, but the owners did not cause the defects, the builder did and there is no stigma attached to the owners. Professional real estate agents, mortgage brokers, and home loan professionals know how to deal with disclosures and financing for owners wanting to sell or refinance their home during the construction defects claim process. Also, know that the sooner a construction defects claim is made, the quicker resolution can be reached, and the faster the association will receive the money to fix the defects.

MYTH 9

The Balcony Bill only requires balconies to be inspected.

The Balcony Bill now codified as California Civil Code Section 5551 requires association's to conduct inspections of a random sampling of the association's exterior elevated elements, such as decks, balconies, stairways, walkways, and their railings, that have a walking surface elevated more than six feet above ground level, that are designed for human occupancy or use, and that are supported in whole or in substantial part by wood or wood-based products by 2025 and every 9 years thereafter.

MYTH 10

A leaky balcony is not a construction defect.

For condo associations that are 10 years old or younger and have not yet pursued construction defects claims, then the required visual inspection under Civil Code Section 5551 may coincide with a site inspection conducted for purposes of identifying possible SB 800 violations and construction defects, including decks, balconies, stairways, walkways, and their railings. The builder may be presented with these inspection and subsequent repair costs under SB 800. The ability to conduct the required inspections in connection with potential construction defects claims may relieve those associations that are 10 years and younger and have not yet pursued construction defects claims, the significant costs associated with the inspections, and subsequent required repairs. In California, under Civil Code Section 944 builders are responsible and associations are entitled to all "reasonable investigative costs". If there are defects, and the association presents a claim to the builder under SB 800, the inspection requirements in Civil Code Section 5551 are a recoverable cost.

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