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Construction Defects

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Overview

- Board's Legal Duties
- Building Envelope Studies
- Understanding Legal Rights
- Procedure for Asserting the Claim
- What to Expect in Litigation
- Repairs



Board's Legal Duties

WHY THE BOARD CAN'T IGNORE CONSTRUCTION DEFECTS

- Duty to maintain, repair and replace common elements
- Board is required to act on behalf of the Association and to make decisions based on the business judgment rule.
 - In the performance of their duties, the officers and members of the board of directors are required to exercise ordinary and reasonable care



How to Fulfill Those Duties

- Monitor
- Inspect
- Take prompt action
- Obtain and Rely on advice of experts
 - Building Envelope Consultants
 - Counsel



Building Envelope Studies

What is the Building Envelope?

- The Building Envelope is comprised of the elements of your building that protect the units from the weather.
- They are generally common elements
- Roofs, siding, windows, decks, etc.



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Hiring A Consultant

- cost considerations
- qualifications & experience
- plan review
- maintenance history review
- questionnaire
- meet with owners to discuss findings
- representative sample of all construction conditions in the building envelope (common elements)
- repair recommendations
- Can consultant assist you in designing a repair, hiring a contractor, and providing quality control during the repair process

Building Envelope Investigation & Report

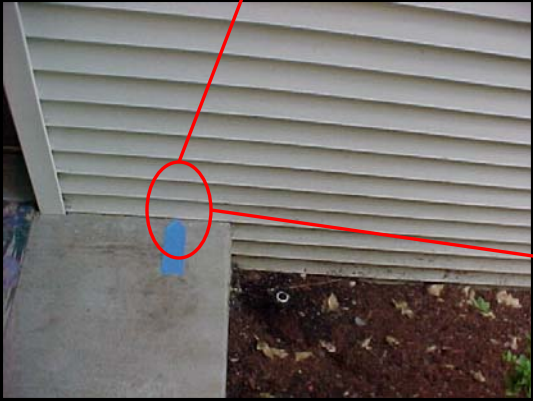
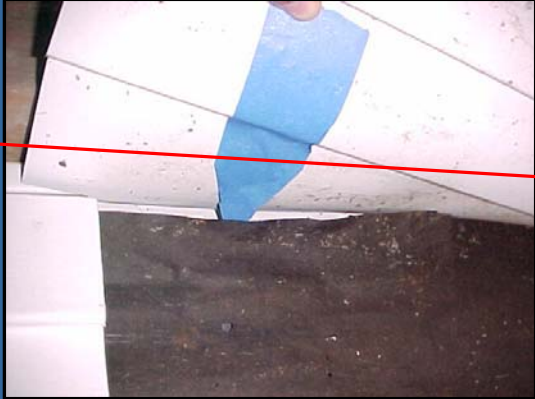
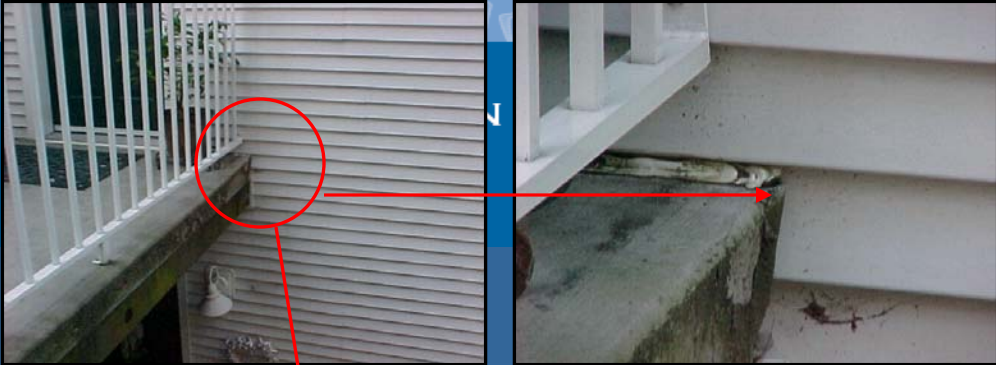
Building Envelope Investigation

- Should look at elements that are common throughout the site from building to building
- Should look at elements that are most likely found to fail
- Include before and after documentation
- Should be done without permanent damage to building

Report Should Contain

- Defects (violations of Condo Act)
- Resulting Property Damage from these violations
- Suggestion of frequency or magnitude of problem

Example of Investigation Documentation



The Next Step



- Provide the building envelope investigation for use in preparing your reserve study and maintenance plan
- Find out what the Association's legal rights are for getting the defects repaired

Understanding the Association's Legal Rights WHAT IS A WARRANTY?

- “An express or implied promise that something in furtherance of the contract is guaranteed.”
- Typically a promise of performance:
 - That the product will perform, and/or
 - They will fix the problem if the product fails to perform.
- Condo Act creates IMPLIED warranties for condo owners IN ALL CONDOS

New Condo Construction Warranties

A declarant impliedly warrants that a unit and common elements are:

- Suitable for intended purpose of real estate of its type;
- Free from defective materials;
- Constructed in accordance with sound engineering and construction standards;
- Constructed in a workmanlike manner; and
- Constructed in compliance with all laws then applicable.

Defect must have an adverse effect (more than technical and significant to a reasonable person)

Liability for Conversions

- Warranty of suitability
- Condo warranties for developer's improvements
- Liability for misrepresentation, fraudulent concealment
- For condos after August 1, 2005, building enclosure inspection required (RCW 64.55)
- For all condos, public offering statement must contain
 - A copy of a report prepared by an architect or engineer describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the condominium
 - A statement by the declarant of the expected useful life of each item or a statement that no representations are made in that regard; and
 - A list of any uncured violations of building code, together with the estimated cost of curing those violations.



Deadlines for Warranty Claims

- Action must be commenced within 4 years of accrual
- Action Accrues on date of possession for a **unit**
- For common elements, latest of conveyance of first unit; completion of the common element; or date common element was added to the condominium
- Can't be less than one year after termination of declarant control.

Other Legal Theories



- Implied Warranty of Habitability
 - Available to first purchaser of a new home constructed for sale and for residential use
 - Need not be uninhabitable, water intrusion has generally been found to qualify as a habitability violation
- Breach of Contract
- Breach of Fiduciary Duty
- Failure to Disclose (Duty to disclose material facts not readily observable to the buyer)

Association's "Standing" or Legal Authority

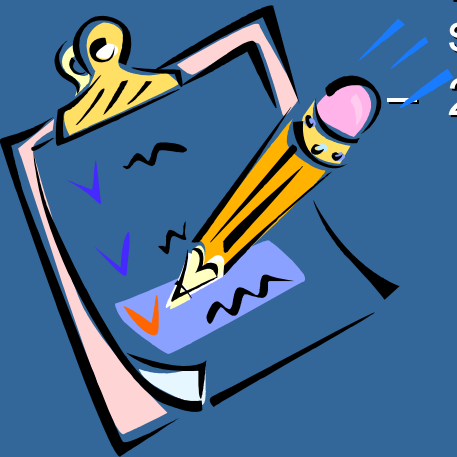
- Association has standing to initiate or intervene in any litigation regarding:
 - On behalf of itself, or on behalf of two or more members
 - On matters "affecting the homeowners' association"; includes commonly owned and commonly maintained property
 - Not on behalf of owners involved in disputes which aren't the responsibility of the HOA

Can't We Just Work it Out?

- Worth trying as long as you can do it without prejudicing your legal claims
- RCVW 64.50 provides process
- Reasons why it might not work:
 - Developer is represented by counsel
 - Developer is a corporation
 - Insurance considerations
 - Subcontractor considerations

Procedure for Asserting the Claim

- Before filing suit:
 - Individual owners be notified of lawsuit
 - Check governing documents for voting requirements and other provisions which may need to be amended so you can proceed.
- RCW 64.50
 - No later than 45 days before bringing the action, must serve written notice of claim
 - 21 days for written response propose to inspect
 - If they offer to inspect, have 14 days following inspection to offer to repair, compromise the claim
 - Can reject the offer and proceed with suit



What to Expect in the Litigation Process

- Discovery Process
 - Depositions
 - Investigations
 - Document requests
 - Multiple parties
- Mediation/Settlement Negotiations
- RCW 64.55 arbitration
- Trial



Before Settling

- What are the defects and resulting damage to the building
- What it will take to fix the building
- What it will cost to fix the building
- Any other damages, i.e. loss of use, relocation expenses, etc.
- Litigation expenses, i.e.; expert fees, depositions, copies, etc.; and
- Attorneys' fees?



You've Settled the Case Now What?

- Do you have enough money to pay for all of the repairs?
- Do you need to change the scope of repair or face a special assessment?
- Proceeding with Repair
 - Update concerns
 - Design
 - Construction
- Reserve Studies



Performing the Repairs

- Washington RCW 64.55 requirements
 - If repair costs are more than 5% of appraised value of project, must submit building enclosure design details for approval. Must have course of construction inspections. Must have window testing.
- Quality Control
 - Photos, videos
 - Course of Construction Inspections



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Q & A

Thank You!