

*This article originally appeared in the August 2006 issue of Community Trends, the monthly magazine of the New Jersey Chapter of the Community Associations Institute.*

## **SPOLIATION CONCERNS IN TRANSITION**

### **Important Steps To Preserve Evidence of Construction Defects**

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*Your association has been negotiating with the developer for months about several critical construction defects, including water penetration through the brick facade of the building. The association's engineers have told you that the brick needs to be repaired before winter to avoid worsening damage from snow and ice, but a resolution with the developer is nowhere in sight. What should the association do? DONT just go ahead with the repair, or you may eliminate your ability to pursue any claims against the developer for these defects!*

As community associations proceed through the transition from developer control to self-governance, invariably issues arise concerning the developer's remediation of construction defects in the complex. In smoother transitions, the developer and association work together to ensure that the developer honors all of its legal obligations and turns over control of a structurally and financially sound complex and set of common elements. In other cases, the process may be contentious, with seemingly endless negotiations between the association and the developer that ultimately lead the association to file a lawsuit against the developer.

In either case, the resolution of the construction defect claims and other transition disputes normally takes time – often a very long time, indeed. During that time, associations are frequently faced with the dilemma of needing to remedy a construction defect that threatens the health and safety of the complex and its residents, while also preserving the evidence of the defect that will be needed if the association's defect claim winds up in court. How to accomplish these seemingly incongruous goals requires an association to follow certain procedures to protect against claims by the developer that the association wrongfully destroyed evidence, which is called "spoliation." These procedures translate into some significant "do's and don'ts" when approaching the repair or remediation of any construction defect for which the developer or another party may be liable.

### **THE LEGAL BACKGROUND**

Why should any association take special precautions when trying to repair a construction defect for which the developer is believed to be liable? The answer is simple: a failure to exercise caution can lead to claims by the developer that the association has destroyed evidence of the defect. Without an adequate opportunity to inspect and observe the repair of the defect, a developer may claim – successfully – that he or she lacked the ability to determine whether the developer was actually responsible for the defect. This "spoliation of evidence" defense can lead to a court barring the association from presenting any evidence of the defect in a suit against the developer, effectively resulting in the loss of the association's claim entirely.

## RULES FOR HANDLING CONSTRUCTION DEFECT REPAIR

In light of the potentially severe consequences for destroying or damaging evidence, it is important for associations to adopt a set of rules, or a framework, for handling the repair or remediation of construction defects prior to the resolution of any claims against the developer or other responsible parties. To limit the developer's ability to claim any interference with such evidence, observe the following rules:

1. Notify the developer promptly, via the association's counsel, of all construction defects found. (This is usually accomplished during the transition process through the engineering report.)
2. Give the developer notice of, and an opportunity to inspect, the defect prior to any remediation.
3. If repairs must be done prior to the resolution of the defect claim, give the developer notice of, and an opportunity to attend, the repair procedure.
4. Fully document the condition of the defective item before repair, during repair, and after repair. Such documentation should include, as appropriate, photographs, videotape, written narratives describing the damage, samples of damaged or defective materials, and expert reports as to the cause of damage.
5. Fully document the testing methodology used to evaluate the defective item, as well as the methodology used to repair the item.
6. Preserve, to the degree possible, the actual physical evidence. This can be accomplished by:
  - a. keeping the defective item in an appropriate storage medium, such that it does not unduly decay; and/or
  - b. taking samples from the defective item, in conjunction with the developer's representatives, such that both parties are satisfied they have a representative sample.
7. If the developer seeks access to the evidence of the defect, require the developer to agree, in writing, to preserve the evidence and to refrain from doing any testing which would destroy or degrade the evidence without seeking written consent from the association. Demand notice of, and an opportunity to observe, any testing done by the developer.
8. Prohibit any evidentiary testing that completely destroys the evidence, which would require the parties to then rely on the testing results or an expert's report in lieu of the actual evidence itself.

## **RULES FOR INVASIVE TESTING**

Some of the same concerns arise when an association needs to perform invasive testing to determine the exact nature and scope of a construction defect or other deficiency. In these cases, the association wants to prevent the developer (or, potentially, individual unit owners) from asserting that the testing caused defects in the construction of the complex, in either individual units or common elements. The association can be best protected if the following rules are followed when invasive testing is required:

- A. Give notice of and an opportunity to attend any initial expert inspection of the suspected defect.
- B. Give the developer notice of the type of invasive testing that the association wishes to perform, along with any expert opinions as to the impact of such testing and what, if any, remediation will be required afterwards.
- C. Permit the developer to respond with any questions and concerns to be addressed prior to the invasive testing. (This could be framed within the notice of testing communication, by giving the developer a set period of time to reply with such feedback.)
- D. Give notice of and an opportunity to attend the actual invasive testing procedure.
- E. If applicable, give the developer notice of and an opportunity to attend any remedial work required to correct the impact of the invasive testing.
- F. If applicable, have an expert evaluate the remediated testing site for any impact. Ideally, this opinion should establish that no impact was created by the invasive testing, or that the impact created has been remedied such that there is no structural or other impact as a result of the invasive testing. Give the developer notice of and an opportunity to attend the expert's evaluation visit, or to engage his or her own expert, allowing the association notice and access to that expert's evaluation visit and report.
- G. Thoroughly document, with reports, photographs, videotape, and other means, the condition of the test site prior to invasive testing, during invasive testing, after invasive testing, and after remediation of testing damage.

## **CONCLUSION**

When handling evidence of construction defects, performing invasive testing, and repairing construction defects, careful compliance with the rules described above can minimize any exposure to claims by the developer that evidence was improperly destroyed or withheld, protecting the ability of associations to make strong construction defect claims when the developer inadequately responds to repair requests in transition. These same rules can also be applied after the period of transition, for any construction defects for which the association believes a contractor or other person is responsible.

In summary: if someone else is responsible for a defective condition, be sure to give that responsible party plenty of notice and opportunity to observe any repairs which need to be made before the claims the association has against that party are resolved. The consequences of failing to do so could be that the association becomes the responsible party!