

Commentary

Homeowner Association Construction Defect Litigation Against Developers

by Richard H. Levin

With the explosive increase in condominium development due to the reduced availability of land for detached single family home construction, there has been a corresponding explosion in the amount of construction defect litigation resulting from such development. The purpose of this commentary is to explain some of the things that a developer can do to minimize the extent of such homeowner association lawsuits, and to suggest approaches to minimize the financial impact of such litigation on the developer.

There is of course no sure way to avoid a lawsuit being filed by an association. However, there are things that you can do to reduce the chances of a lawsuit being filed, and what you can do starts with the design process. The most commonly voiced complaints by associations probably relate to water intrusion and sound problems. You should make sure that your architect designs adequate slope for external surfaces, so that water will not pond, and that there is sufficient slope in the design so that minor deviations from the plans will not result in ponding problems.

There are also ways to reduce plumbing, footfall and airborne sound transmission, and a competent acoustic consultant can make many valuable and cost effective suggestions for reducing sound transmission.

But regardless of how prudently a project is designed, unless it is constructed in accordance with the design, there still will be problems. Therefore, you should use quality subcontractors, and should weigh the risks of an inferior product against the cost savings involved in accepting the lowest bid from a subcontractor who has not demonstrated a commitment to quality.

And regardless of the presumed competence of your team of subcontractors, there is no substitute for adequate supervision.

Finally on the subject of construction, a developer should think twice before relying solely on his project superintendent. An Architect, waterproofing consultant, mechanical engineer and acoustic consultant can and should be brought onto the site periodically to review construction quality.

After construction is completed and units are sold, there will be complaints. If a developer is not adequately responsive to these complaints, the association is likely to turn to an attorney out of frustration. Once an attorney becomes involved the chances of a dispute going into litigation increase.

The facts of life are that in spite of a developer's best intentions and conscientious efforts to avoid a lawsuit with an association, litigation with an association may become unavoidable. The financial impact of such a suit on the developer can be minimized if the developer has taken the following additional precautions:

1. First, he used subcontractors who were likely to still be in business.
2. He made sure that during construction the subcontractors who worked on the project gave him certificates of insurance showing not only that they had liability insurance, but also that the insurance included completed operations coverage, and that the developer was included as an additional insured under the subcontractor policies.
3. The developer also maintained his own liability insurance.

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It is rare that a subcontractor will have the financial resources to respond to an adverse judgment for a substantial sum as a result of a major construction defect. This means that the developer may have to rely on the subcontractor's insurance. However, the fact that the subcontractor may have insurance during the course of construction is no guaranty that the subcontractor's insurance will be in effect when damage to the project first occurs. In addition, a subcontractor's insurance will provide only limited coverage for construction defects and the damages that result.

Because of the tendency of subcontractors to go out of business and of the limited protection afforded to the developer by whatever subcontractor insurance may exist, the developer often must rely on his own financial resources and insurance coverage to provide protection against the consequences of an association suit. However, it is unlikely that even a developer's own insurance will cover all of the claims being asserted in the suit.

Thus, the best way that a developer can avoid or minimize the impact of construction defect litigation is to take reasonable precautions to insure that the project is properly designed and constructed. Insurance coverage should be viewed as only a second and somewhat less than perfect line of defense.

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