

Published in the Fall, 2006 Edition of CIC Midwest Magazine

When Construction Defect Claim Resolution Requires Legal Action.

In my previous article, I pointed out that an association needs to do the following to achieve resolution of a construction defect claim without a lawsuit: first, retain a qualified consultant to document construction defect conditions and how to correct them. Second, submit a claim to the developer while the association still retains all of its statutory warranty rights. In this article, I will explain when this approach is likely to result in resolution of a construction defect dispute without a lawsuit, and when it still may become necessary to take legal action to achieve dispute resolution.

There is a relatively simple rule of thumb that determines, in most situations, whether a defective construction claim is likely to be resolved without legal action. That rule of thumb is as follows: a single claim involving a relatively simple, minor defect that can be corrected easily and at little expense to the developer is not likely to end up in litigation. As the number of claims increases and as defects become more difficult and expensive to correct, the willingness of the developer to voluntarily “step up to the plate” and agree to appropriate long-term fixes diminishes.

From the developer viewpoint, he acquired the land, hired an architect to design the project, got the plans through the city, obtained construction financing, hired the contractors and scheduled the work of the various trades. However, from his perspective, he didn't do the actual construction. His contractors did. So he will want them to deal with any construction related problems. Getting the contractors to deal with expensive corrective work is very difficult.

After paying for labor and materials, a contractor who had a \$100,000 contract probably made \$10,000 or less in profit on the job. By the time a defect claim is made, he has already spent the money. Now the developer comes along and tells him he may have to re-do his work. In doing so, he may have to remove the work of other trades to get at his own work. The cost becomes horrendous. Rather than committing to do it, he is going to look around for someone or something to blame; i.e., the plans were poor. The developer's job superintendent told him to do it that way. The trades that followed him on the job screwed up his work, etc., etc.

With a wide range of defects, there will be a lot of finger pointing among the various contractors, and it is unlikely that any of the contractors will take responsibility for the role they played in the creation of the defects.

Assuming that the above is an accurate description of the contractor reaction when confronted with a claim of multiple defects that will be exceedingly expensive to correct, what is the developer likely to do? Will he hire other contractors to do the corrective work, or pay the association what it will cost to get the corrective work done, and then chase the subcontractors for reimbursement? Perhaps, but it is not likely.

The bottom line is that none of the contractors are likely to face up to the problems until forced to do so. This usually means a lawsuit. The developer isn't likely to take legal action against the

contractors unless the association has taken legal action against him. So that puts the ball in the association's court. It is cheaper for the developer and contractors to ignore serious problems than to deal with them. So they may offer inspections that always seem to get put off, or fixes that either don't work at all or that work temporarily, hoping to placate the Board so that the problem will simply go away.

Eventually the association will get fed up and will have to take the necessary legal action to force the developer and its contractors to deal with the problems.

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