

# THE PROPERTY LINE

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## Recipe for Successful Post-Construction Defect Litigation Remedial Repairs

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**Whew, it's over! Think again. Once the construction defect litigation is over, the community association will face different challenges.** During litigation, the focus of the board members was to maximize recovery for their community through their attorneys and litigation experts. Upon settlement of the case, the mind-set of the board members must shift to maximizing construction defect repairs. The shifting of the mind-set is not easy when the board members struggled with a complex case for a long time and became accustomed to receiving litigation information from their attorneys and litigation experts. In order to ensure timely completion of necessary remedial repairs, which is often the number one expectation of owners coming out of defect litigation, the board members need to shift their emphasis from a passive role to a proactive role by effectively utilizing the resources around them.

There are plenty of resources available to assist the board members. They can rely on existing litigation inspection reports and repair recommendations from litigation experts to preliminarily evaluate the remedial repair needs of their community. The board may rely on the expertise of their community manager and consult with the association's reserve analyst to evaluate feasible financial options (e.g., construction loan or special assessments) to help pay for the repairs if necessary. They may also rely on the association's construction defect attorneys for initial guidance on how to move forward with the board's decision to perform remedial or corrective repairs.

Next, the board needs a competent remedial repair team to formulate the most cost effective repair options, and each team player needs to timely perform the assigned tasks for the overall success. In relatively large repair projects (>\$1,000,000), the remedial repair team should consist: community manager, attorney, architect (or construction manager), engineer, reserve specialist, and general contractor. Sometimes, litigation experts also provide post-litigation design and engineering services. Often, litigation attorneys have experience in construction contracts and are familiar with the operational style of certain architects, engineers, and/or contractors. Thus, there should be no need to recruit a team of brand new players.

By virtue of being a member of the remedial repair team, the community manager may end up wearing multiple hats: student, liaison, leader, and strategist. By attending numerous meetings and phone conferences and being exposed to numerous technical writings, the manager inherently becomes a student of construction and legal terminologies. The manager becomes the liaison to the board with respect to inquiries from the owners, lenders, and potential purchasers concerning the repair status. Sometimes, the manager is the point person for coordinating and leading the efforts of the team. The manager is also involved in a funding strategy to ensure continued financial viability of the association going forward. Because this takes time away from the manager's day-to-day workload, the association should expect to reasonably compensate the manager for this additional work.

The primary responsibility of the attorney is to assist the board with the contract negotiation and timely execution of contract documents. The contract documents may consist of the contract terms, construction schedule, and several hundred pages of the project manual (e.g., specifications and drawings). The responsibility of the project architect, construction manager, or engineer is to timely assist the board with the preparation of the project manual, to timely assist the board with the bid process to select the most qualified general contractor, and to oversee the timely completion of the repairs. The primary responsibility of the general contractor is to timely perform all required repairs. The association's reserve specialist performs a post-repair reserve study to ensure that the study reflects actual conditions of the project with an accurate useful-life analysis and identify any potential shortcomings resulting from the impact of litigation.

Once a competent remedial repair team is formed, timeliness is the key ingredient in a recipe for a successful end result. It is also the most challenging aspect of major construction projects when the team consists of highly qualified "super-busy" architects and engineers who must work with the most qualified and yet "super-busy" general contractor who won the bid. Further, unusual weather conditions and unexpected labor shortages can become the major causes for delaying the progress of the contract negotiation, execution, and performance of the work.

Although construction contracts often contain various clauses (e.g., liquidated damages - sum of money specified as the total amount of compensation to be paid in the event of a breach) to motivate or penalize the parties from deviating from the contractual requirements, the team "chemistry" seems to be an effective way to ensure timely completion of a long-duration repair project. The team "chemistry" reflected in each player's willingness to cooperate with each other with the common goal of serving the best interest of the association and place the association at the top of their priority list is essential for successful remedial repairs. A project completed by a team of credible players is a helpful ingredient that may avoid the association from ending up in another construction defect litigation.

Most importantly, the homeowners need to be kept in the loop. Communication is key here, especially when the home interiors are impacted during the reconstruction. Also, there may be several other inconveniences the homeowners will have to deal with during this process (e.g., temporary loss of parking spaces, walkways, clubhouse access, project access, etc.). Frequent communication from the management to the homeowners will help set expectations so stress levels are kept in check.

In conclusion, a team of credible players ready and willing to act in the best interest of the association in timely fashion is the key ingredient for successful completion of post-construction defect litigation remedial repairs. Frequent communication with the homeowners is necessary to ensure that the overall repair experience is seamless to everyone involved.