FAQs Regarding SB326, California Civil Code Sections 5551 and 5986 and the Balcony Bill

By David C. Swedelson, Esq. CCAL, Senior Partner at SwedelsonGottlieb

On August 30, 2019, Governor Newsom signed SB326 and it became law January 1, 2020. This law requires all California condominium associations with "exterior elevated elements" to have those elements inspected. We have been getting a lot of questions and this article is intended to address and answer those that we hear most frequently.

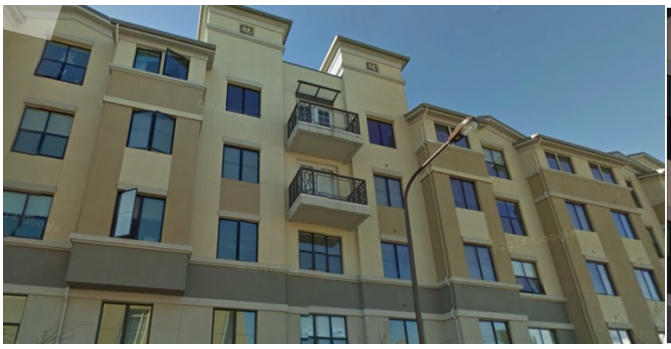
WHY DID THE LEGISLATURE CREATE THIS NEW LAW THAT WILL BE EXPENSIVE FOR CONDOMINIUM ASSOCIATIONS TO COMPLY WITH?

SB326 was introduced in response to the collapse of a balcony at Library Gardens Apartments in Berkeley on June 16, 2015, when thirteen students fell forty feet when the fifth-floor balcony they were partying on collapsed, killing six and injuring seven.

The cause of collapse was determined by the California Contractors State License Board to be "dry rot along the top of the joists which suggests long-term moisture saturation... of Oriented Strand Board (OSB) in direct contact with the joists. Additional locations of water damage and dry rot were found on the wall OSB sheathing and the face of the doubled deck joists along the deck edge to wall interface by severely rotted structural support joists."

And it was determined that the weight of the 13 students was "well within the design limits of the balcony structure."

Below is a photo before the collapse and one taken shortly after the balcony collapsed.



From our perspective and based on our experience, this new law and the new Code required inspections may seem onerous, but it is important these inspections take place. We have seen

many balconies at condominium associations all over California that appeared not to have serious issues, but had been subjected to years of deferred maintenance and water intrusion. After the deck surface was removed, dry rot had caused the balcony to be structurally impaired. And because many of the conditions that would cause a balcony to collapse are hidden below paint, waterproofing and stucco, the invasive inspections that this new law mandates are appropriate and necessary.

It should also be noted that this is not the only high-profile case of a balcony failure. A second-floor balcony at a UC Santa Barbara fraternity fell during a street festival celebration in April 2013, badly injuring five students. Some sued, alleging that dry rot contributed to the collapse. The 1996 collapse of a fourth-floor balcony during a cocktail party in San Francisco left one woman dead and 14 others injured. Prosecutors said the landlord's neglect of the building was so terrible that they brought manslaughter charges in the case, and a lawsuit resulted in a $12 million judgement against that landlord.

The point is that the balcony issues at the Library Gardens Apartments are not unusual, and the inspections mandated by this new law, while onerous and expensive, have found and will likely find other balconies that are structurally impaired. What happened at Library Gardens can happen to any condominium association with balconies and walkways.

WHAT INSPECTIONS ARE REQUIRED?

SB326 added new California Civil Code Sections 5551 and 5986 and amended Section 6150. The new law only applies to condominiums with three or more multifamily dwelling units and thus excludes commercial and industrial condominiums. It applies to buildings with three or more multifamily units which contain “exterior elevated elements.”

While many are calling SB326 and the changes to the Code the “Balcony Bill,” the fact is that it applies to more than balconies, and requires inspections “of the load-bearing components and associated waterproofing elements of exterior elevated elements.” Load-bearing components are defined as “components that extend beyond the exterior walls of the building to deliver structural loads from the exterior elevated element to the building.” And the definition of exterior elevated elements (EEEs) includes “decks, balconies, stairways, walkways, and their railings that have a walking surface that is elevated more than 6 feet above ground level, and are designed for human occupancy or use, and that are supported in whole or in substantial part by wood or wood- based products.”

Some condominium buildings have balconies and/or walkways that do not extend beyond the exterior walls of the building and/or are not cantilevered and/or are not elevated separately from the building itself, and would not be subject to the new law. And while some associations do not have balconies that extend beyond the exterior walls of the building, they may have exterior walkways that are elevated separately from the building itself. And some associations report having some, but not all, balconies that are cantilevered. Some associations were built with steel-

based construction and may not be subject to the inspection requirements. So, be careful to fully evaluate your EEEs. And while the new law may not apply to an association that does not have EEEs, this does not mean that the association should not have the balconies or walkways periodically inspected.

WHO CAN MAKE THE REQUIRED EEE INSPECTIONS?

This new law is clear that the inspections must be made by a licensed architect or structural engineer. And while a contractor may be involved in the inspection process when opening up areas for the inspection, a licensed general contractor is NOT qualified to make these inspections.

We have heard about contractors who are telling associations that they will do the inspections and have their inspections signed off by a licensed architect or structural engineer. We are pretty sure that that will likely not comply with the new law. The licensed architect or structural engineer has to perform the inspections and determine how many balconies to inspect.

WHAT IS THE SCOPE AND PURPOSE OF THE EEE INSPECTION?

The Code makes it clear that the purpose of the inspection is to "determine whether the exterior elevated elements are in a generally safe condition and performing in accordance with applicable standards." The expert – an architect or structural engineer - performing the inspection is required to make a visual inspection in what this new law calls a "statistically significant" random sample of locations to provide 95 percent confidence the sample results are reflective of the whole project's condition. This means that the expert will have to determine how many EEEs or portions thereof to inspect and that will likely to be based on the condition of the building and EEEs, and what is found once the inspections are underway. And this means that a contractor cannot make the inspections and determine how many EEEs need to be inspected.

The required visual inspection is defined as "the least intrusive method necessary to inspect load-bearing components, including visual observation only or visual observation in conjunction with, for example, the use of moisture meters, borescopes, or infrared technology." To see inside the structure of the EEEs may require the opening of a portion of the EEE so that the wood structural elements are exposed for the inspection.

But if the expert performing the inspection observes conditions that indicate water intrusion, further inspection is required, and the expert "shall exercise their best professional judgment in determining the necessity, scope, and breadth of any further inspection."

IS A REPORT REQUIRED?

A written report stamped by the engineer or architect is required. And the new law requires that this report be incorporated into the reserve study of the association which must be maintained for two inspection cycles (the Civil Code requires a reserve inspection every three years, so two

inspection cycles would be, at the minimum, six years) in the association records and is required to contain the following information:

- An identification of the load-bearing components and associated waterproofing system.
- The current physical condition of the load-bearing components and associated waterproofing system, including whether the condition presents an immediate threat to the health and safety of the residents.
- The expected future performance and remaining useful life of the load-bearing components and associated waterproofing system.
- Recommendations for any necessary repair or replacement of the load-bearing components and associated waterproofing system.

WHAT HAPPENS IF THE EXPERT FINDS DRY ROT OR OTHER CONDITIONS AFFECTING THE STRUCTURAL INTEGRITY OF THE EEE?

If the expert advises that any of the association's EEEs pose an immediate threat to the safety of the building's occupants, the expert is required to provide a copy of the inspection report to the association, as well as a copy to the local code enforcement agency, and this is to be done within 15 days of completion of the report.

IS AN ASSOCIATION REQUIRED TO MAKE REPAIRS FOR DEFECTS IDENTIFIED BY THE EXPERT?

After receipt of the report, an association is required to take "preventive measures immediately," including preventing occupant access to the exterior elevated element (and/or shoring) until repairs have been made, inspected and approved by the local enforcement agency.

SB 326 and the changes to the Code also require that associations make continued and ongoing maintenance and repair of the load-bearing components and associated waterproofing systems in a safe, functional, and sanitary condition as required by the association's governing documents and the Civil Code.

WHEN ARE ASSOCIATIONS REQUIRED TO MAKE THESE EEE INSPECTIONS?

The initial inspections must be completed by January 1, 2025 and every nine years thereafter. For buildings where the construction was completed after January 1, 2020, the first inspection must be completed within 6 years of the certificate of occupancy. We recommend that associations start the process sooner than later as it is likely that as it gets closer to the 2025 deadline, the experts are going to get booked up. And associations need to start saving for these inspections as they are likely to cost $500 to $1000 or more, depending on the nature of the construction and the conditions.

DOES THIS NEW LAW AFFECT RESERVE STUDIES?

As mentioned above, this new law requires that the experts report's findings be "incorporated into the study required by [Civil Code] Section 5550." The new law is not all that specific on what is required to be incorporated into the reserve study. But the new law does require that the expert's inspection report include a statement of the remaining useful life of the load-bearing components and waterproofing systems. We should expect that the association's reserve analyst will need to update the reserve study report to reflect any changes to the useful life of the common area EEEs inspected and included in the report. This could result in an association being underfunded where the useful life of the components is less than originally planned for in the reserve study. In many cases, associations may not have as a reserve category the repair or replacement of dry-rotted joists or other wood elements that were expected to have an unlimited useful life. These are components that associations have not in the past included as part of reserves.

An association's reserves will also be impacted because of the cost of performing these inspections (the cost of the expert and the testing as well as any required repairs) related to the EEEs.

WHAT IF A BOARD FAILS TO COMPLY WITH THE NEW BALCONY INSPECTION LAW?

Under California law, the board owes a fiduciary duty to the association to do what is in the best interests of the association. That duty includes the duty to maintain the common area so it is safe for its intended use, to make a reasonable inquiry regarding maintenance issues and to enforce the CC&Rs and other governing documents. A board cannot determine what maintenance or repair is required without having some sort of inspection of the EEEs.

There are other express requirements for regular inspections of the common area. For example, some associations' governing documents require annual inspections of the common area by a third party independent inspector. The Davis-Stirling Act requires an inspection of major building components at least every three years as part of the reserve study. And associations are required to follow maintenance requirements from the builder and product manufacturer.

And there is a concern that there could be a lack of coverage for claims for failing to investigate. Some insurance policies have exclusions for any such claims that arise from or pertain to construction defects.

There should be no doubt that a board has an obligation to comply with this new law. It is the law and the consequences for not complying could be significant, especially if there were to be a balcony failure. Although boards of directors are relying more and more on the protection that is provided to them under the rule of judicial deference (a.k.a. the business judgment rule), this rule doesn't eliminate liability in all circumstances, and may not protect an association or its board from liability for not inspecting or dealing with repair recommendations following the

inspection of the balconies and walkways now required by the Civil Code. This was made clear in the 2010 case *Affan v. Portofino Cove Homeowners Association*.

In the *Lamden v. La Jolla Shores Clubdominium Homeowners Association* case, the California Supreme Court declined to second-guess the board's decision to spot treat rather than tent for termites, and first set forth the following rule of judicial deference: "Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise."

Courts have since applied this rule to all sorts of situations other than common area maintenance and repair, and it has (to some extent rightfully) been a guiding factor to many associations' boards when making decisions. The *Affan* case tells us that the judicial deference rule will not protect boards under all circumstances and that the conditions required for courts to apply the rule of judicial deference do have meaning to them. It is possible for a court to find that these prerequisites have not been met, in which case the rule does not apply and the court will decide as to whether the board's decision was appropriate.

In *Affan*, the plaintiffs owned a unit at the association, which they used as a vacation home for a few weeks each year. Beginning in 1999, every single time that they visited their condo, they found sewage residue in the sinks and/or tubs. Every time this happened (nine times total between 1999 and 2005), the Affans reported the problem to the community manager. While the association took some actions, those actions did not provide a long-term solution. Despite the board finally deciding to take action, the Affans suffered a major sewage backup throughout the their unit. It was later determined that the association's plumber had acted negligently and taken the wrong approach.

Although the trial court was willing to apply the judicial deference rule of *Lamden* and limit the board and association's liability, the appellate court disagreed, instead applying an objective standard of reasonableness. The court stated that *Lamden* requires deference to "reasoned decision making" that meets certain qualifications, and that it is not a blanket immunity for all acts taken by association boards. Here, the appellate court held that the board didn't make an informed decision, but rather spent several years avoiding the problem and failing to do anything about it. There was no investigation or deliberative process regarding what was in the best interests of the association. Interestingly, the court held that even the board's decision to begin regular maintenance in 2005 did not invoke the judicial deference rule, viewing it as too little, too late.

WHY IS THE AFFAN COURT DECISION RELEVANT TO THE BALCONY INSPECTION LAW?

It is relevant because this case serves as a reminder that courts are not blindly going to defer to board decisions (or lack thereof) if the required criteria are not met. If a board fails to have the required inspections made, that decision would be in violation of the Code and there is no excuse. And if a board receives a report that there are issues and problems that need to be addressed and the board fails to address those issues timely, that decision will be second-guessed by a court, especially if there is a claim of injury or damage (including claims of diminished value of the unit). The board's decision must be made in good faith, based on reasonable investigation, and with the best interests of the association in mind for judicial deference to apply.

WILL THERE BE INSURANCE COVERAGE IF THE ASSOCIATION IS SUED FOR NOT PERFORMING THE REQUIRED INSPECTIONS AND/OR FAILING TO MAINTAIN AND REPAIR THE EEES?

We have heard that some managers and attorneys are telling boards that there will probably be no insurance coverage for a claim or lawsuit if the board intentionally fails to comply with the new EEE inspection law. We checked with one insurance expert who said: there is no stupidity exclusion in an insurance policy, and even if a board makes a decision not to do the required EEE inspections, there will most likely be insurance coverage for any claims or lawsuits filed against the association, even if the claim involves one for personal injuries. But considering that the failure to do the inspections or required repairs may result in injury or death, insurance coverage should not be the primary motivator of board action (or inaction).

CAN THE ASSOCIATION AMEND THE CC&RS TO MAKE THE OWNERS RESPONSIBLE FOR BALCONY INSPECTIONS, MAINTENANCE AND REPAIR?

Maybe, but the better question might be, is this even a good idea? Ultimately, the association is responsible for the common area, and the structural elements supporting a balcony are part of the common area. An association is not going to escape liability by shifting responsibility for the maintenance and repair of balconies to the owners. In fact, from our experience, associations that have transferred maintenance and repair responsibility to the owners have found that the owners often fail to deal with their balconies, leading to leaks and dry rot. And since the dry rot is damage to the structural components of the balcony which is the association's responsibility to repair or replace, the association is going to be responsible to address the problem.

David Swedelson is a founding and senior partner at SwedelsonGottlieb, California Community Association Attorneys. He can be reached at 800-372-2207 Ext 201 or via email at dcs@sghoalaw.com.