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January 31, 2020

The Honorable Benjamin S. Carson, Sr., M.D.
Secretary
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington DC, 20410

*RE: Docket No. FR-6187-N-01: White House Council on
Eliminating Regulatory Barriers to Affordable Housing*

Dear Secretary Carson:

I am pleased to submit the following comments to the above referenced docket on behalf of Community Associations Institute (CAI).

CAI recommends:

- 1) Retention of state construction defect statutory frameworks. Construction defects persist in housing construction, particularly new condominium projects. A national government policy favoring states that adopt new constraints on the ability of community associations to seek damages for deficient construction is counter to construction of decent, safe, and sanitary affordable housing, and will increase future housing costs for households.
- 2) National government support to increase the supply of skilled labor in the building trades. The availability of skilled labor in the construction and homebuilding industries is severely constrained, directly contributing to construction defects. National government policy should support state and local government and private skills development programs to increase availability of skilled workers in the building trades.

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CAI is the only national organization dedicated to fostering competent, well-governed community associations (condominiums, cooperatives and planned communities) that are home to approximately one in every five American households. For more than 40 years, CAI has been the leader in providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI's 36,000 members include community association volunteer leaders, community managers, community management firms, and other professionals and companies that provide products and services to community associations.

- 3) Deemphasizing the commercialization of ownership housing. Peer-reviewed research has shown commercialization of single-family ownership housing increases the cost of housing by restricting supply. Commercialization of ownership housing contributes to higher rents and reduced rental housing availability for low-to moderate-income households, particularly those receiving Section 8 Housing Choice Voucher assistance. National government policy should not incentivize commercialization of single-family ownership housing by state or local governments.
- 4) No preemption of lawful community association covenants. Lawful covenants ensure community association residents may determine and pursue the community interest when considering issues like short-term rental and accessory dwelling unit policies. Community associations are responsive to homeowner and resident wishes and lawful housing traditions. The national government should not incentivize state and local governments to preempt community association covenants.

Background on Community Associations

Community associations are commonly referred to as condominium associations, homeowner associations, and housing cooperatives. Generally organized as private non-profit organizations, community associations operate pursuant to various state statutes and certain conventional real estate practices.¹

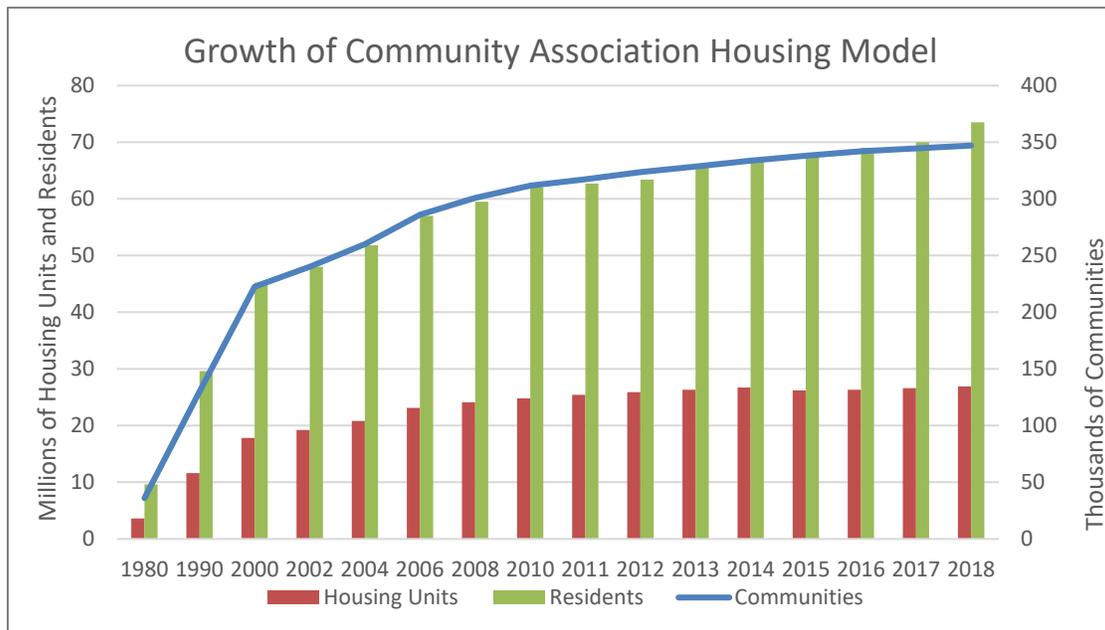
Growth of the Community Association Housing Model

The community association housing model has experienced continuous growth. In 1970, there were an estimated 10,000 community associations accounting for approximately 700,000 housing units and 2.1 million residents. In 2018, there were an estimated 26.9 million homes in community associations, and an estimated 73.5 million individuals resided in community associations. This accounted for 25%–27% of the national population.

Homeowners associations accounted for between 54% and 60% of community associations, condominium associations between 38% and 42%, and housing cooperatives between 2% and 4%. In 2018, the value of community association housing units was estimated at \$6.28 trillion.²

¹ See, for example, [Uniform Condominium Act](#), [Model Real Estate Cooperative Act](#), and the [Uniform Common Interest Ownership Act](#). More than half of states have adopted some form of these statutes. For additional information visit <https://www.caionline.org/Advocacy/StateAdvocacy/Laws/Pages/default.aspx>

² Foundation for Community Association Research: Statistical Review for 2018-2019 (Summary). Available at <https://foundation.caionline.org/wp-content/uploads/2019/07/2018-19StatsReview.pdf>.



Source: CAI Fact Book, 2018-2019

Economic Contributions of the Community Association Housing Model

In 2018, community association homeowners paid an estimated \$95.6 billion in association assessments to fund maintenance and operation of community infrastructure. To meet future needs, community association homeowners put aside \$27.3 billion in reserves for the repair, replacement, and enhancement of association assets such as roofs, streets, and elevators.³

The community association housing model creates jobs. Approximately 60% of community associations hire community association managers. Community association management is a specialized discipline with growing employment. Between 50,000 and 55,000 individuals worked as community managers in 2018, employed by an estimated 7,500 community association management firms.

Almost 100,000 jobs were directly related to community association management and community association management company operations in 2018.⁴ These data exclude the economic impact of other employment directly associated with the community association housing model, including landscaping, facilities maintenance and repair, and insurance, legal, and accounting services, among others.

³ Ibid.

⁴ Ibid.

Community associations are operated by homeowner volunteers elected by their neighbors. In 2018, 2.5 million association volunteers performed an estimated 90 million hours of service in their communities. The economic value of community association board members' and committee members' volunteerism for 2018 was an estimated \$2.289 billion.⁵

Community Association Legal Foundation

Housing units and lots in a community association are subject to a declaration of covenants, master deed, or proprietary lease recorded among land records. These legal instruments run with the land, defining a bundle of property owner rights that govern use of property. In purchasing a lot or unit in a community association, owners are bound by the declaration of covenants and other lawful documents having a basis in the declaration (e.g., by-laws and association rules).

Community associations are, by law, required to disclose association covenants to individuals purchasing a home, unit, or lot prior to closing.⁶ Individuals understand community association covenants are legally binding contractual obligations that govern the use of property (both common and homeowner) and establish rights and responsibilities of the association and property owners.⁷

Construction Defect Litigation and Housing Affordability

The purpose of a community association is to promote the community interest. Resources to meet this demand include statutory law, the declaration of covenants (master deed and/or master lease), other community documents, and the association's board of directors.

A community association's board of directors is empowered and burdened by law and the association's governing documents to act in the community interest. Board enforcement of agreements and exercising the association's rights in disputes is fundamental to the community association housing model. Efforts to erode the ability of

⁵ Ibid.

⁶ See *Uniform Common Interest Ownership Act (2008)* Section 4-103. Public Offering Statement; General Provision.; Section 4-108. Purchaser's Right To Cancel.; Section 4-109. Resales of Units. Twelve states have adopted a version of the Uniform Common Interest Ownership Act while most states have adopted statutes based on the Uniform Act.

⁷ See, e.g., *Mathis v. Mathis* (1948), 402 Ill. 66, holding in a conveyance of a real estate interest containing a covenant, "the covenant runs with the land and is binding upon subsequent owners." See additionally, *Rosteck v. Old Willow Falls Condominium Assn.*, 899 F.2d 694, "But the condominium declaration is a contract..."

association boards to act on the community interest are counter to the community association housing model.

Preserving Community Interest in Seeking Remedies for Construction Defects

In 2017, CAI members were surveyed on the prevalence of construction defects and association board actions to remedy faulty construction. The survey characterized construction defects by community association type, construction type, common defects, financial impacts on associations and homeowners, and remedies sought by associations. CAI's study on construction defects is appended to these comments as Appendix A. Construction defect data referenced in the following sections are derived from the CAI research.

Reported Construction Defect Rates

Survey data revealed 57.3% of new condominium projects had a construction deficiency. Compared to construction defect report rates in townhome communities (17.7%) and single-family homes (9.5%), the reported defect rate in new condominium projects is an outlier and signal to policymakers of the need for public and private investment in building trades unique to condominium construction. Across all respondents reporting construction deficiencies, 81.3% indicated poor workmanship as the underlying cause of defects.

The most common construction deficiency reported by CAI members was water intrusion, accounting for 48.2% of reported defects. Roof deficiencies were reported by 38.6% of respondents and 38.5% reported a structural deficiency (e.g., cracks in foundation).

Impact of Construction Defects on Association Households and Associations

Approximately 26% of respondents indicated a construction deficiency negatively impacted the ability to sell a home or unit in their association. A greater percentage of respondents, 35.5%, reported a negative effect on property values.

Individual respondents reported "When the board disclosed the situation, property values were slashed in half." Another respondent wrote, "Realtors did not want to show or even list the home because of construction issues." The impact of construction defects was quantified by a respondent who shared, "Two possible sales lost. Original cost \$249,000. Now one unit on sale for \$99,000." The community interest requires association boards to seek remedies from responsible parties as authorized by law and contract. Equity demands homeowner concerns be addressed.

Timeline of Construction Defect Discovery and Community Impact

Respondents reported a significant percentage of construction defects were revealed after a warranty expired. Approximately 47% of communities reported discovery of a construction defect post-warranty. This indicates the statutes of limitations may be too narrow.

In communities where a defect was revealed after the statute of limitations had passed, 44.4% adopted a special assessment to cover repair costs of the construction deficiency. Special assessments are levied against homeowners and are a known source of household financial distress. An almost equal percentage of respondents, 43.1%, indicated no action to correct the construction deficiency was taken when discovered after the statute of limitations had expired.

Association Construction Defect Claims and Claim Timelines

Respondents reported most construction defect claims were settled outside of court. Direct negotiation with the responsible party settled 44.2% of claims and 14% were resolved in pre-litigation settlements. Only 31.8% of claims were settled through court-ordered judgements. These data show most construction defect claims are resolved without litigation and rebut presumptions that community associations file frivolous lawsuits.

Recovery times for construction defect claims are lengthy, draining homeowner and association resources. Respondents reported only 12% of damages were recovered in less than one year. Data show 34.9% of damages were collected in one to two years and 19.3% within three to five years, and 8.4% of respondents reported damage recovery took in excess of six years.

Construction Defects and Housing Affordability

Some have sought to establish a direct link between construction defect litigation and the lack of housing production. This argument suggests new construction—condominiums in particular—is impeded due to construction defect litigation risk and high insurance premiums that make projects uneconomic. The proposed remedies for deficient construction offered by such groups generally fall in three categories: (1) shorten the statute of limitations for construction defect litigation; (2) mandate arbitration prior to litigation; and (3) impede association litigation authority. These remedies do nothing to address the underlying cause of construction defects: poor workmanship.

The USG Corporation + U.S. Chamber of Commerce Commercial Construction Index (CCI) offers insights into the main driver of construction defects. The Q4 2019 CCI report showed almost universal concern among commercial builders over the availability

of skilled labor. An astonishing 92% of contractors reported at least moderate concern over laborer skill levels with 50% reporting a high level of concern. Most contractors believe difficulty hiring appropriately skilled workers will continue, with only 1% of respondents expecting the issue to improve.⁸

The CCI data aligns with data produced from surveys conducted by the Associated General Contractors of America (AGC), the leading association in the construction industry. In 2019, AGC released results of a national survey of general contractors on key issues facing the construction industry. The AGC study revealed that 80% of general contractors experienced difficulties in hiring skilled craft positions. Consistent with the CCI data, 73% of respondents projected it will be more difficult to find skilled hourly construction labor in the coming year.⁹

Travelers Insurance Company cited the lack of available skilled workers as a leading cause of construction defects. Traveler's indicated 74% of its insureds faced difficulty hiring skilled labor and identified heightened risk of construction defect litigation associated with the use of unskilled labor in construction.¹⁰

These data show almost universal concern over the lack of workers with skills required to meet minimum construction standards. Rather than address the root of the policy problem, some parties propose to constrain the authority of association boards to act on the community interest. Proposals to constrain boards include removing the decision to pursue litigation from the board and imposition of super-majority homeowner voting requirements to initiate litigation. Other proposals include lengthy mandatory arbitration that CAI members report exhausts state statutes of limitations. These are not affordable housing policy solutions.

⁸ Q42019 USG Corporation + U.S. Chamber of Commerce Commercial Construction Index (Rel. Dec. 10, 2019).

https://www.usg.com/content/dam/USG_Marketing_Communications/united_states/product_promotional_materials/finished_assets/usg-commercial-construction-index-report-en-2019-q4.pdf

⁹ Associated General Contractors of America, Press Release, "Eight Percent of Contractors Report Difficulty Finding Qualified Craft Workers to Hire as Firms Give Low Marks to Quality of New Worker Pipeline," August 27, 2019.

<https://www.agc.org/news/2019/08/27/eighty-percent-contractors-report-difficulty-finding-qualified-craft-workers-hire-0>

¹⁰ Travelers Corporation, The continued evolution of construction defect, p. 4-5.

<https://www.travelers.com/iw-documents/resources/business-industries/construction/Continued-Evolution-of-Construction-Defect.pdf>

Removing liability for poor workmanship and foisting on homeowners the responsibility to repair poorly constructed roofs, incorrectly installed and leaking pipes, cracked foundations, and dangerous decks, patios, and stairwells contravenes Executive Order 13878. Such a policy will only compound the affordable housing crisis.

It should be national government policy to support efforts to ensure adequate investment in the construction trades, domestic production of quality building materials, proper inspection and controls of imported building materials, development of building codes, and code inspection during all phases of construction. Incentivizing production of shoddily constructed homes cannot be the national government response to the affordable housing crisis.

Single-Family Rentals, Short-Term Rentals, and Accessory Dwelling Units

Community associations are generally developed to increase the supply of owner-occupied housing. For example, master planned communities are not developed with the intent to lease homes but rather to sell these homes to owner-occupants. Community association declarations and other governing documents assume a critical mass of homeowners to manage the association and to promote the community interest. Recent developments in the housing market have called this into question while increasing housing costs.

Single-Family Rentals

The affordable housing crisis has been exacerbated by the fallout of the financial and housing crises of 2008–2012. The loss of homes to foreclosure led to rapid growth of single-family rental real estate investment trusts (SFR REITS). Peer-reviewed research has found SFR REITS have a distorting effect on housing markets. Ken Chilton, Robert Silverman, Rabia Chaudhry, and Chihaungji Wang found that SFR REITS tend to cluster in given markets such as Phoenix, Atlanta, Tampa, and Dallas.¹¹

The authors found commercialization of single-family homes removed large numbers of housing units from homeownership markets with rentals priced to target middle and upper-middle class households.¹² Only 1.14% of SFR REITS are rented by households that are recipients of federal housing subsidies.¹³ Desiree Fields, Rajkumar Kohli, and Alex Schafran investigated details of SFR bonds and found in 2016 that only one of the major SFR REIT firms included properties leased to tenants using Section 8 Housing

¹¹ Chilton, K., Silverman, R., Chaudhry, R., & Wang, C. (2018). The Impact of Single-Family Rental REITs on Regional Housing Markets: A Case Study of Nashville, TN. *Societies*, 8(4), p. 3. <https://doi.org/10.3390/soc8040093>

¹² Ibid, p. 2-3.

¹³ Ibid, p. 3.

Choice Vouchers.¹⁴ Fields, Kohli, and Schafran suggest SFR REITs may not sufficiently demonstrate an ability to manage Section 8 Housing Choice Vouchers to bond rating firms. This threatens lower ratings thereby discouraging lower income rentals.¹⁵

While not an exhaustive review of the literature, there is evidence that SFR REIT commercialization of housing in high homeownership areas is counter to affordable housing. This applies to both affordable ownership housing and affordable rental housing as rents are priced to target affluent households. The results are greater wealth concentration and higher housing prices, both contributors to the affordable housing crisis.

Community associations have an interest in the owner occupancy of housing units in the association. It is the experience of CAI members that properties that are owner occupied or leased by a local landlord contribute to the common interest. Absentee or distant corporate landlords are difficult to contact and unresponsive to community needs. That such activity reduces the supply of available housing thereby increasing prices and rents only compounds dislocation in community associations. CAI does not support national, state, or local government policy to increase commercialization of homeownership housing.

Short-Term Rentals, Accessory Dwelling Units, and Affordable Housing

Some parties have implied a solution to the affordable housing crisis may be found through short-term rentals (STRs). This strategy assumes that STRs consisting of formerly owner-occupied housing, subdivided owner-occupied housing, and construction of additional housing facilities on an existing lot—accessory dwelling units (ADUs)—will increase the supply of rental housing and lower costs.

Short-term leases for vacations and other temporary use of homeownership housing constrains the supply of affordable housing. As discussed, commercialization of owner-occupied housing limits the supply of ownership housing, increases rents, and negatively impacts low income households that qualify for federal housing assistance.

Many community associations find that allowing short-term leases and vacation rentals are in the community interest. CAI members support the authority of community associations to decide if short-term rentals will be permitted in the community subject to state law and the association's covenants. Likewise, CAI members support the authority

¹⁴ Fields, D., Kohli, R., & Schafran, A. (2016). The Emerging Economic Geography of Single-Family Rental Securitization, p. 8.

<http://eprints.whiterose.ac.uk/94673/1/SFR%20Working%20paper%20SF%20FED.pdf>

¹⁵ Ibid, p. 9.

of community associations to evaluate the benefits of short-term rentals and reach different conclusions. CAI strongly opposes any government action to preempt this decision authority, particularly at the national level.

The same policy position applies to the construction and leasing of ADUs within community associations. Many community associations across the country have embraced ADUs, finding this housing option compatible with owner views, area housing traditions, and the local housing market. In short, these communities have determined that construction and leasing of ADUs is in the community interest. Other communities have considered ADUs and for a variety of valid reasons determined ADUs to not be in the community interest. CAI supports maintaining this balance and allowing community associations to manage ADUs through their covenants and other governing documents.

Conclusion

Access to affordable housing is an ongoing crisis requiring attention of the national, state, and local levels of government. CAI members commend President Trump and the U.S. Department of Housing and Urban Development for leading efforts to address this crisis. Community associations are a growing component of the national housing stock and CAI members believe community associations can be part of the policy solution.

The first principle of an affordable housing policy should be to do no harm. Proposals that pressure states to further limit the ability of community associations to pursue claims against shoddily constructed housing will increase housing costs. It does not serve the public interest or an association's community interest for government to erect unnecessary barriers that limit access to damages for negligent workmanship in housing construction. It is contrary to the public interest to foster an environment where state and local governments feel pressure from the national government to shift the burden of construction defect costs from responsible parties to homeowners.

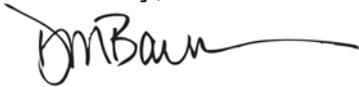
CAI members also urge that national government policy not pressure state government to modify existing community association covenants and governing documents. A form of federal preemption, such a policy is not compatible with the American legal tradition of state and local government control of land use and property law.

State governments have the primary responsibility to take land use decisions and the national government should not seek to eliminate geographical heterogeneous policies in favor of a nationalized approach. The risks of unintended consequences and

encountering “unknown unknowns” is high and unnecessary. Community associations must be allowed to continue the American tradition of taking decisions to govern the use of property consistent with lawful local values.

Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "DM Bauman", with a long horizontal flourish extending to the right.

Dawn M. Bauman, CAE
Senior Vice President, Government and Public Affairs
Community Associations Institute

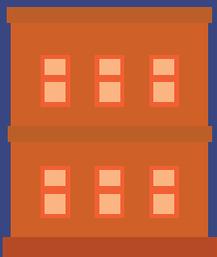
TOO CLOSE TO HOME:

PROTECTING A HOMEOWNER'S GREATEST INVESTMENT



Community Associations Institute partnered with members and industry stakeholders to conduct a survey on construction deficiencies to learn how they impact homeowners and community associations.

New condominium developments have the most construction deficiencies.



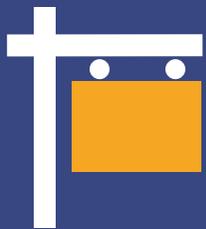
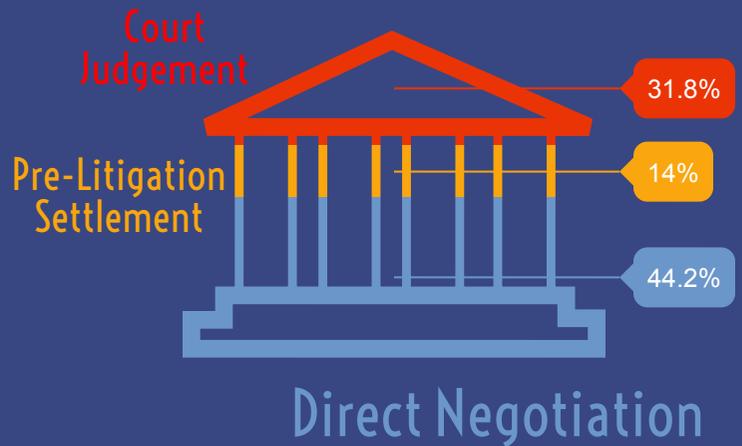
57.3 %
new
condominiums



17.7 %
townhouses and single
family homes

The most common deficiencies are water intrusion and structural defects and roof leaks.

Most warranty claims are resolved outside of courts.

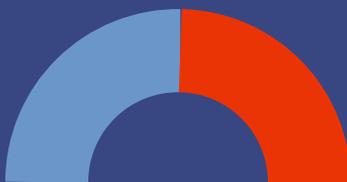


Construction deficiencies have negatively impacted owners' property value and their ability to sell their home.

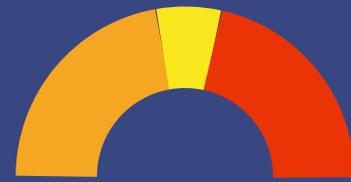
Negative Effect on Property Value 35.5%

Negative Effect on Ability to Sell 26.3%

It takes more than a year for the majority (62.3%) of communities that file suit to recover damages.



Sufficient (50.51%) Not Sufficient (49.49%)



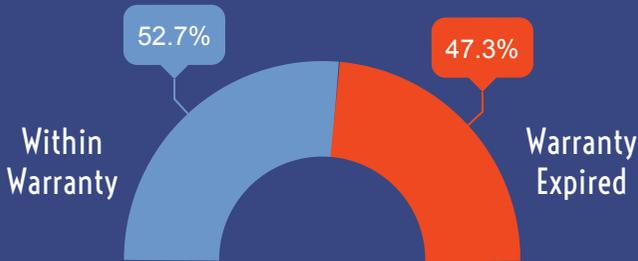
Special Assessment (44.40%) Reserve Funds (12.50%)
Did Not Repair (43.10%)

The amount of damages recovered may not be sufficient for the rebuild/replacement/repair.

Communities unable to recover damages often add special assessments to pay for the repairs, or do not repair the deficiency at all.

PROTECTING A HOMEOWNER'S GREATEST INVESTMENT

The warranty period expired in nearly half of all communities that had a construction deficiency.



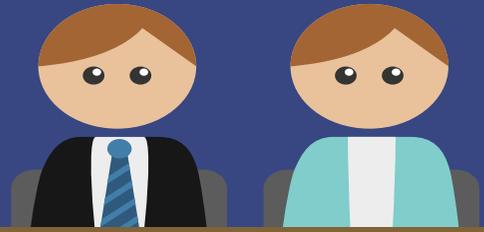
States should lengthen the statute of limitation or repose to account for deficiencies being found after expiration.

Poor workmanship is the most common cause of deficiencies...



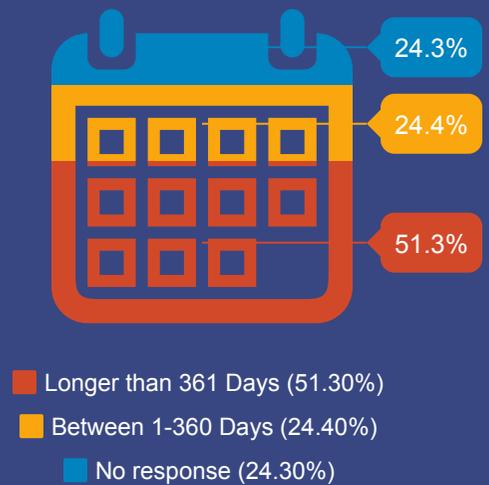
...resulting in plumbing leaks, electrical or mechanical problems, and cracks in foundation walls.

Most communities' declarations allow litigation (82.1%), but require the use of Alternative Dispute Resolution (ADR).



Mediation is the most common form of ADR used prior to filing a lawsuit.

The majority of pre-litigation processes lasted more than 361 days.



Lengthy or mandatory ADR processes may cause a community's ability to file a suit within its statute of repose to lapse, hurting community association members. Legislators should not require mandatory ADR prior to legislation or shorten periods of repose.



The survey respondents included 525 individual responses from condominium and homeowners associations across the country with the number of homes ranging from a couple dozen to more than 1,000. The survey responses clearly tell the story that even the current warranty protections and statute of repose are not adequate to ensure the homes/units within the community are properly and adequately repaired nor are they adequate to protect property values of homes in the community.



Protecting Homebuyers and Homeowners from Construction Deficiencies in Condominiums and Preserving Property Values Survey Report (February 2017)

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Introduction

Former quarterback and Hall-of-Famer Joe Montana is known for his Super Bowl wins with the San Francisco 49ers, but in August of 2016 his name was in the news for joining another team. He and a group of residents filed a class-action suit against Millennium Partners and Transbay Terminal Developers to recover the losses of property value suffered by the sinking and tilting of the Millennium Tower.

Towering 58 stories above San Francisco's Financial District, and what has come to be known as "Leaning Tower of San Francisco," the Millennium Tower has sunk 16 inches into the soil and tilted 2 inches to the northwest since opening in 2009. It is expected to sink an additional 8-15 inches in the coming years. The city's attorney Dennis Herrera called the situation "every homeowner's worst nightmare." (Robinson, 2016)

The Millennium Tower is a high-profile case highlighting construction deficiencies. It is because of its status and those involved that it received media attention. Unfortunately, the residents of the Millennium Tower are a few among thousands of homeowners every year discovering they are living their own worst nightmare. The consequences of builders' negligence and material deficiencies are causing thousands of homeowners around the country every year to file claims seeking repairs for damages of their most important investment: their home.

Yet many developers around the U.S. are seeking refuge from these claims by pushing legislation to weaken building warrant laws that protect consumers. To add insult to the attempts, many developers are encouraging this legislation under the guise that these protections are making it too costly to build affordable housing.

The legislation being pushed in the states has similar trends. The legislation will make it more difficult for homeowners to collect damages, either requiring them to pursue alternative dispute resolution or requiring higher percentages of homeowner approval before filing legal action. Not only do these requirements cause delay in repairs, but they permit developers to postpone repairs long enough to fall outside of the states' statute of limitations and repose. Further the legislation proposes to shorten the warranty period as well the deadline to file a claim once the defect is found. Legislation further attempts to redefine a defect as only those that cause physical harm, a would-be metaphorical punch to the gut of Millennium Tower residents.

It is because of this recent trend in legislation that Community Associations Institute (CAI) partnered with its members and industry stakeholders to create a survey about construction deficiencies to learn how they impact homeowners and community associations. This report details the responses of the survey.

Condominium and HOA Residents Experience with Consumer Protection Warranties - Summary of Findings

CAI partnered with its members and industry stakeholders to draft a survey on construction deficiencies to learn how they impact homeowners and community associations.

SURVEY RESPONDENTS: The survey respondents included 525 individual responses from condominium and homeowner associations across the country with the number of homes ranging from a couple dozen to more than 1,000.

The survey findings clearly tell the story that even the current warranty protections and statutes of repose are not adequate to ensure the homes within the community are properly repaired. Further, current protections are inadequate to maintain home property values and show that lowering these protections will only increase the cost and burden of homeownership, a stark contrast to builders' claims that these provisions prevent the construction of affordable housing.

Discovery and Impact of the Deficiency

1. The warranty period expired in nearly half of all communities experiencing a construction deficiency.

47.3% of communities identified a construction deficiency **after** its warranty period.

52.7% of communities identified a deficiency **within** its warranty period.

Recommendation: Since nearly half of deficiencies are being found *after* the statute of limitation expires, states should consider lengthening, not shortening, the statutory period.

2. Poor workmanship is the most common type of deficiency.*

81.3% identified the deficiency was in construction. Poor workmanship resulted in plumbing leaks, electrical or mechanical problems and cracks in foundation walls.

46.1% of respondents identified a deficiency in design. Architects and engineers may have designed buildings and systems that did not work as intended.

41.9% of respondents reported a deficiency in building materials. In this case the building materials were defective or damaged and lead to the deficiency.

3. In communities where the statute of limitation or repose had lapsed, communities most often collected a special assessment to fund the repair or did not repair the deficiency at all.

44.4% of respondents to this question paid for the repair through a special assessment. *Special assessments increase the cost of homeownership.*

43.1% did not repair the deficiency.

The remainder paid for the repairs by using reserve funds, if permissible. Association covenants generally require that reserve funds be spent on capital improvements, not repairs.

4. Construction deficiencies may negatively impact owners' ability to sell their home.

26.3% of respondents claimed a construction deficiency negatively impacted their ability to sell their home due to the lack of mortgage financing.

44.6% responded that the deficiency did not impact the sale of their home.

29.1% of respondents were unsure.

Respondents were allowed to comment on the question. Here are some notable comments:

- *"Due to litigation – owners were unable to refinance or sell."*
- *"When the board disclosed the situation, property values were slashed in half."*
- *"It has been horrible, but it hasn't stopped people from wanting to buy. They just can't get conventional financing."*
- *"Realtors did not want to show or even list the home because of the construction issues."*
- *"Due to the area of the community being a very desirable neighborhood, it has not currently affected any of the homes resale value or ability to arrange mortgage financing."*
- *"From the time we filed the suit until repairs completed it was over 3 years, so no one could refinance and no bank would loan while a suit was in place."*
- *"One home was demolished by a slide. No one could sell."*
- *"2 possible sales lost. Original cost \$249,000. Now one unit on sale for \$99,000."*

Recommendation: Consumer protections must remain intact so homeowners who buy into a community and are victim to a deficiency may retain the value of their most important investment: their home.

5. Construction deficiencies may have a direct, negative impact on property value.

35.5% of respondents reported the deficiency had a direct, negative impact on their property value.

36.2% claimed property values did not suffer a direct, negative impact.

28.1% were unsure.

Many comments explained that there was no impact on property value since homes were not sold during the litigation or repair process. Here are some other notable comments:

- *"With close to 60 units selling each year during the construction defect process, lending was challenging but sales continued and the impact on selling price was not drastic."*
- *"Owners who sold lost from 12% to 29% of their original investments at time of sale."*
- *"It is considered an affordable housing community, so they are in high demand, even with known issues."*
- *"Property value was negatively impacted by both the disclosure of the deficiency/repair and the drain on the reserve funds."*
- *"It's almost impossible to sell homes, everyone is trying to leave because they think there are a bunch of other major issues."*
- *"Tax relief obtained for diminished value based on initial engineer's report."*

Recommendation: Legislators must not be swayed by the argument that lessening warranty protections for homeowners will lead to the development of more affordable housing. Construction deficiencies cause property values to drop, sadly making housing affordable at the expense of the homeowner, not the builder. The goal in creating affordable housing is not to lessen current property values, but to create a pathway for new buyers to purchase new homes.

6. Communities with fewer than 250 homes are most affected by deficiencies. On average 75.7% of respondents live in a community with fewer than 250 homes. On average 35.1% of respondents live in a community with 101-250 homes. On average 18.8% of respondents live in a community with fewer than 50 homes.

7. Most common deficiencies included waterproofing, structure and roof problems.*
48.2% reported a deficiency in waterproofing.

38.6% and 38.5% of respondents reported a deficiency in their structure and roof, respectively.

Those respondents whose deficiency was discovered within their warranty period reported more deficiencies found in the roof (42.3% to 34.8%) and fewer deficiencies found in the structure (37.3% to 39.9%) than those respondents whose defects were found outside of their warranty period. Decks as well as common areas likely hallways, stairwells, and clubhouses, were reported less. Plumbing was also reported as an additional comment.

8. Most deficiencies occur in the development of new condominiums.

57.3% of respondents reported a deficiency occurred in a new condominium. This is opposed to converted condominiums, townhomes, mixed-use associations and single-family homes.

17.7% reported the deficiency was found in a townhome and 9.5% in single-family homes.

Claims Against Deficiencies During the Warranty Period

9. Most warranty claims are resolved outside of courts.*

14% of respondents whose deficiency was discovered during the warranty period resolved their claim by court judgement.

44.2% were resolved with direct negotiation.

31.8% were resolved with a pre-litigation settlement.

16.2% were resolved using alternative dispute resolution.

Recommendation: Legislators should not view communities as filing frivolous lawsuits. While the great majority of complaints are resolved without litigation, associations must have the ability to file suit if anything threatens resolution.

10. Most communities' declarations do not prevent litigation or require alternative dispute resolution (ADR).

82.1% of respondents whose deficiency was discovered during the warranty period reported their association declaration did not prevent them from filing a lawsuit or require ADR.

Recommendation: Legislators should not view communities as filing frivolous lawsuits. While a vast majority of communities have the right to litigate, most resolve their claims without a court judgement, as reported above. Associations must not be mandated to ADR prior to filing litigation.

11. Mediation was the most common form of ADR used prior to filing a lawsuit.

23.5% of respondents whose deficiency was discovered during the warranty period attempted mediation prior to filing suit.

57.1% of those who filed a lawsuit did not use any pre-litigation procedures.

12. The majority of pre-litigation processes lasted more than 361 days if cases did not settle.

51.3% of respondents whose deficiency was discovered during the warranty period reported the pre-litigation process as lasting longer than 361 days.

Recommendation: Legislators should not seek to limit periods of repose and should not require mandatory ADR prior to litigation. This is because community associations must file legal action within a statutory period. That period can expire during lengthy and mandatory ADR processes.

13. It takes more than a year for the majority of communities to recover damages.

62.3% of respondents whose deficiency was discovered during the warranty period did not recover damages within 1 year.

12.1% recovered damages in less than a year.

19.3% recovered damages in 3-5 years.

34.9% recovered damages in 1-2 years.

8.4% reported did not recover damages for than 6 years (6% reported 6-10 years to recover, and 2.4% reported more than 10 years to recover).

Recommendations: Association must be permitted alternative repair funding methods during the lengthy periods between suit and recovery. Further, attorney's fees should be paid for by the party at fault.

14. The amount of damages recovered may not be sufficient for the rebuild, replacement or repair.

34.1% of respondents whose deficiency was discovered during the warranty period reported the amount of damages recovered was not sufficient for repair.

34.8% reported it was sufficient for repair.

31.1% responded the question did not apply.

Conclusion – Summary of Recommendations

Boards of directors and managers (if applicable) should work directly and transparently with the association to identify the defects, gather evidence, document complaints, make temporary repairs and discuss the opportunities available to make the most informed decision on pursuing a claim. As the survey findings indicate, nearly half of all construction deficiencies are resolved through negotiation between the community association and the developer and do not require the expensive approach of litigation.

States or municipalities looking to amend their laws or ordinances should take the following into consideration:

- Lengthen the statutory period of limitation and repose.
- Strengthen overall warranty protections for homeowners.
- Permit associations to make alternative methods for funding repairs.
- Permit – not mandate – associations to resolve claims prior to litigation with alternative dispute resolution, specifically mediation.

As this study's finds, stripping the warranty protections for homeowners only increases the cost of homeownership following the sale and will not reduce purchase prices.

*Respondents were allowed to select more than one answer to the question.

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Additional Resources

Statement of Practice – Preferred Resolution Method Between Associations and Developers

Ross Feinberg, Esq., and Ron Perl, Esq. describe the complexities of construction deficiencies well in the introduction to their book, ***Construction Defect Litigation***:

“Developers and contractors are professionals whose businesses are challenging under even the most ideal conditions. Residential development and construction are made all the more complex by fierce competition for resources, a shortage of qualified labor, an erratic economy, and incessant market demands.

Developers and contractors dislike construction defect litigation as much as homeowners do, and most will make genuine efforts to resolve problems quickly and efficiently—if you let them.

Whether a defect is severe enough to warrant legal action depends on which side of the contract you signed. For the homeowner, understandably, all defects are serious; but, from a practical standpoint, most probably aren't serious enough to require a lawsuit. Constructive negotiations with the developer, builder, or contractor nearly always lead to resolution. In fact, most construction defects are resolved without legal action—and for good reason. Litigation is extremely costly. Associations and homeowners must compare the cost to repair construction defects against the cost to argue about them.

Although we are attorneys, we're not encouraging readers to rush to the courthouse at the first sign of damage. On the contrary, we encourage you to pursue friendly resolution with your developer or contractor, let them make repairs, and consider all non-legal options seriously before you file suit. However, for the unfortunate minority who find themselves faced with litigation, we intend this book to provide enough guidance to make the process as productive and positive as possible—not only for homeowners and associations, but also for developers, contractors, and others involved in the process.

For common-interest developments, also known as community associations, an already complex process can be aggravated by added layers of governance and operation. Thus, the association's manager and its board become key players in the litigation process. It's a complicated, time-consuming process they generally know little about. For self-managed associations, board members also serve as managers who not only aren't experts on litigation, but also may not have a firm grasp on governing *and* operating their associations.

In some cases, association boards consist of developer directors (because as owner of the unsold homes, the developer has a vested interest in governing the association) and homeowner directors. These are associations in transition. The balance of governance gradually shifts toward homeowner directors as properties sell, but resolving construction defects during the transition stage presents unique challenges because developers and homeowners are likely to have different interests. Addressing the specifics of the transition process is beyond the scope of this book; however, the process for resolving defect claims described here applies to those in transition and should prove very useful.”

CAI Public Policy - Protection of Association Claims in Construction Defect Legislation

Public Policy Summary

Builders that construct homes and common elements for purchase by consumers must be required to deliver a product that is free from material defects and exhibits good workmanship. Builders rely on design professionals and subcontractors (hereafter referred to as "Construction Affiliates") to deliver homes and common elements that meet those standards.

CAI recognizes the importance that homeowners have reasonable expectations of the quality of construction of their homes. CAI supports legislation and regulations concerning construction defects that adequately balance the rights and responsibilities of community associations, their governing boards, homeowners, builders and construction affiliates. [The full policy statement may be found here or at www.caionline.org/publicpolicies/.](http://www.caionline.org/publicpolicies/)