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CONSTRUCTION RISKS

The economic downturn has resulted in substandard construction projects, unfinished jobs and related financial burdens for Associations.

SURETY BOND PROTECTION

Surety bonds are becoming a more important tool to provide Associations with financial protection from construction risks.

COST / BENEFIT

The insurance that surety bonds provide ultimately outweighs their attending cost when dealing with Association construction projects.

Construction Issues: Surety Bonds; Height Restrictions

THE RISING IMPORTANCE OF SURETY BONDS

Surety Bonds & Construction Projects. The economic downturn has had a deleterious effect on construction. Many prior subcontractors ("subs"), and those with even less experience, are obtaining contractors licenses or are holding themselves out as licensed contractors. This has resulted in many cases of substandard construction work, unfinished jobs, and labor and materials paid for but not received. In such cases the Association must find a properly licensed and reliable contracting company to complete the job—many times at an expense above the original contract price. However, these situations can be avoided.



When dealing with a contracting company, the Board of Directors ("Board") should consider requiring the contractor to purchase one or more surety bonds. Regardless of past experience with the company, these bonds should be sought to ensure the Association is financially protected. Securing this protection is especially prudent when dealing with a large and expensive project such as re-roofing or painting. The bond protection available to the Association is as follows:

-Bid Bond. A "Bid Bond" is typically the first one obtained. It provides insurance guaranteeing that the contract price from a bidder will be the same as his bid. It also provides a basis for required Payment and Performance Bonds.

-Payment Bond. A "Payment Bond" guarantees that the insuring company will pay any unpaid bills to subs and suppliers who were not paid by the contractor, even though the Association provided the money in its payments to the contractor. An Association is generally unaware that the contractor is not fulfilling his payment obligations to his subs or suppliers until the project has ended and a "Notice of Mechanics Lien" is received.

-Performance Bond. A "Performance Bond" (or "Construction Bond") guarantees that the project will be completed even if the contractor fails to do so, experiences significant delays, and/or leaves the job. Should this occur, the bonding company pays to complete the project.

The costs of these bonds will increase the total expense for the project because the bonding fee is included within the contractor's fee. However, the insurance they provide is generally well worth it—particularly in this economic climate.

Associations cannot bear the risk of ending up with a partially completed project and/or Mechanics Liens encumbering the property. In addition to securing one or more security bonds, either an Association's management personnel or their attorney should be

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CSLB VERIFICATION

Either an Association's management personnel or their attorney should be instructed to contact the CSLB to verify that bidding contractors are bonded with the state and have no pending claims against their state licensed bond.

HEIGHT RESTRICTIONS

The adoption and enforcement of height restrictions by an Association may be necessary to protect the views of member homeowners.

The record of how height restrictions were adopted and enforced in the past may be crucial in future enforcement actions.

Homeowners that construct or modify homes in violation of height restrictions may be forced to comply regardless of the required expense.

instructed to contact the [California Contractor's License Board](#) ("CSLB") to confirm that the bidding contractors being considered are (1) bonded with the state, (2) licensed in the type of work to be performed and (3) have no pending claims against their state licensed bond. This information can be also be accessed online from the CSLB [website](#) at www.cslb.ca.gov. The maximum amount available under these state bonds is currently \$12,500; additional pending claims against the contractors may seriously limit the amount of money available to the Association if it was necessary to file a claim with a surety company.

HEIGHT RESTRICTIONS

Adoption & Enforcement. In *Clear Lake Riviera Comm. Assn. v. Cramer*, 182 Cal.App.4th 459 (2010), circumstantial proof that an Association's height restriction was properly adopted was found sufficient to allow enforcement of the height restriction.



Homeowner obtained approval to build a home on a sloping lot he owned in a common interest development. Association sued Homeowner for exceeding the height limitations contained in the governing documents that protected the views of neighboring residents. Association was successful in obtaining an order requiring Homeowner to bring the home into compliance with the guidelines even though there was some ambiguity as to when and how the height restriction was adopted.

The restriction at issue limited the height of structures to a maximum of 17 feet above the "control point" (the center) of the lot. Homeowner received approval of their plans from the Architectural Control and Planning Committee ("Committee"); the Committee printed on each page of the plans that the structure height was not to exceed 17 feet from the control point of the lot. Homeowner, acting as his own general contractor, was aware of the Committee's notations and was informed by the Committee that he would need to remove a substantial amount of soil from the lot in order to comply with the height restriction—to which Homeowner agreed. After a complaint had been

received by a neighbor, the Committee put Homeowner on notice that his construction appeared to depart from the approved plans and would result in a violation of the height restrictions. Homeowner never responded. The completed house ultimately exceeded the height restriction by nine feet and interfered with the views of at least two neighboring homes.

Association filed an action against Homeowner and the trial court found (1) that the completed home had caused irreparable injury to neighboring homeowners and (2) that Homeowner knowingly built the home in violation of the Committee guidelines. The trial court ordered Homeowner to bring his home into compliance, regardless of the substantial expense that would be borne on Homeowner.

Homeowner was unsuccessful on appeal in challenging the adoption of the height restriction and the validity of the Committee. The Court of Appeal upheld the trial court's determination, citing circumstantial evidence supporting the restriction's proper adoption. The Court of Appeal emphasized that if Homeowner was permitted to use his home's completion to "avoid enforcement of the height guideline, the Association would effectively lose the ability to enforce any of its guidelines. Members could build their homes in any manner they pleased, arguing afterward...that compliance would be unreasonably expensive."

This case impacts every association with architectural guidelines that place restrictions on new construction and improvements. It is important for Associations to (1) document the adoption of restrictions and any amendments to those restrictions, (2) document the appointment of committee members and (3) provide written notice when homeowners are in violation of the governing documents.

"...the Committee put the Homeowner on notice..."

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