

BY J. SPENCER EDGETT, ESQ.

SB 326: Compliance with The Balcony Inspection Bill

The impact of these new requirements will be less for associations that are prepared and start planning and budgeting now.



SB 326 was introduced in response to the 2015 Berkeley balcony collapse that killed six people and severely injured seven more. The intent of the law is to prevent future tragedies by requiring the following:

- Associations (with 3 or more units) must retain a licensed structural engineer or architect to perform a ‘reasonably competent and diligent’ inspection of exterior elevated elements, defined as load bearing components more than 6 ft above the ground with a walking surface (i.e., decks, balconies, walkways, stairways and their railings) supported in whole or substantially by wood or wood-based products,

and their associated waterproofing systems on a recurring basis (once every 9 years).

- The first inspection must be completed by January 1, 2025 (except for buildings with permit applications submitted on or after January 1, 2020 in which case the first inspection must be completed within six years following the issuance of the certificate of occupancy.)
- The inspection must consist of a random and ‘statistically significant sample’ as that term is defined in the statute (see, discussion below.)
- The inspector must submit a report to the board providing specified information about the

- physical condition and useful life of the elements inspected and any recommendations for repair or replacement.
- If the inspector determines that an exterior elevated element poses an immediate threat to safety of the occupants, the report must be provided to the local enforcement agency and the association is required to take immediate preventative measures.
- Local enforcement agencies have the ability to recover enforcement costs associated with these requirements.

The Scope and Cost of the Inspection

The cost of the inspection

will in large part be a function of the scope of the inspection, i.e., how many components need to be inspected? The statute does not provide a simple answer to this question. Rather, the statute requires a random and 'statistically significant sample' of each type of component be inspected.

The statute defines 'statistically significant sample' as follows:

"Statistically significant sample" means a sufficient number of units inspected to provide 95 percent confidence that the results from the sample are reflective of the whole, with a margin of error of no greater than plus or minus 5 percent.

Most laypeople will struggle trying to interpret and implement a testing protocol based on the foregoing. More problematic, even a statistician may have trouble trying to determine how to implement the testing procedure based on this language.

Anthony Hayter, PhD, a statistics professor at the University of Denver and former Chair of the Department of Statistics offers the following analysis:

"In the field of statistics, we use random sampling to answer a question of interest about a population when it is too expensive or otherwise impractical to examine each and every element in the population. Using techniques of statistical inference, the information obtained from the sample can be used as a basis for an extrapolation to the entire population. There are some questions, such as whether a balcony or an aircraft is safe in which using random sampling and extrapolation is not appropriate because any risk to life or safety is not acceptable.

However, purely for purposes of complying with the new statutory requirements, statistical probability analysis could be used in the following way: If a housing complex contains a total of 100 balconies, for example, then an inspector could randomly select 39 of these balconies and determine that all 39 are safe. It would then be possible to make the probability statement that at least 95 out of all 100 balconies are safe with the required 95% confidence level. Of course, this presents the problem that there could be up to 5 balconies out of the remaining uninspected 61 balconies that are unsafe, but the Association would be in compliance, and no further inspections would be mandated by the statute.

Note that this analysis is based on 'hypergeometric distribution' and assumes that the inspector designates an inspected balcony as being either 'safe' or 'unsafe', as the statistical analysis becomes more complex if the safety level is designated on a more detailed scale with different degrees of safety."

Putting aside the difficulty in determining the number of components that require inspection, from a practical standpoint, if an inspector finds that even a single balcony from the random sample inspection is deemed unsafe, the Board may have a fiduciary duty at that point to inspect all balconies in order to satisfy its obligation to protect homeowners and their guests from injury or death.

Budgeting for Inspections

Although the statute requires



inspections every nine years, Association's should consider more frequent inspections over shorter periods of time. If an association with 100 balconies must inspect 39 balconies over nine years, consideration should be given to inspecting, for example, 13 balconies every three years. This will allow for better planning and budgeting in addition to potential cost savings by combining the inspections with each reserve study.

Recommended Steps to Prepare for Inspections

Associations with components requiring inspection should start planning now so this future expense can be incorporated into the reserve budget. The following are suggested steps that Associations can take to ensure they are prepared to comply with the statutory requirements:

STEP 1 Retain a licensed architect or engineer that is qualified and willing to perform the inspections;

STEP 2 Develop an inventory of each type of component and group them together, i.e., 15 'Type A' decks and 10 'Type B' decks, etc.;

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STEP 3 Determine the number of each component that will need to be inspected (this will require a statistical analysis as outlined above unless the Association has a relatively small number of components to inspect in which case a determination could be made to inspect 100% of the components);

STEP 4 Estimate the cost of the inspection (obtain a bid from the inspector);

STEP 5 Include a line item in the reserve budget based on the Association’s desired approach to the inspections (i.e., 1/3 every 3 years or all components every 9 years).

Important Note for Newer Communities

Newer communities, built within the last 10 years, should consult with

a competent construction defect attorney to possibly assist with the initial inspection. This is important because if problems are identified it may be possible to pursue a claim for deficient construction and require the developer to implement, or pay for, repairs. The Association does not want to do anything that could jeopardize the claim and competent counsel can provide such protection as well as ensure the statutory requirements are met.

Conclusion

The requirements of SB 326 are designed to ensure the safety of individuals and avoid a reoccurrence of a tragedy similar to the Berkeley balcony collapse. Ultimately, although compliance may seem burdensome, the reality is that Associations should already be conducting these types of inspections to ensure such components are safe and being maintained. Associations that are not conducting such inspections are not only risking the potential safety of owners and their guests but may be exposed to potential liability in the event of a catastrophic failure. The impact of these new requirements will be less for associations that are prepared and start planning and budgeting now.

Executive Director’s Message

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good people, very good people serve on HOA boards and that overly restrictive and dictatorial statutes don’t help communities retain their most talented leadership. In fact, a continued focus on minutiae drives highly competent and talented homeowners away from volunteer leadership.

I’ve seen many amazing people who have taken up the responsibility of leadership in their communities and they do so with such wonderful success. I fear these leaders will be pushed beyond reason by unwitting legislative intent and step away from HOA leadership. I am concerned that this unfettered reality will result in a lack of competent leadership, as the best leaders resign and those considering leadership roles choose to stay away.

Legislative Member: Please don’t chase them away with laws and regulations that do little to enhance our communities and only add frustration to an increasing load of menial tasks and obscure processes.

We need to attract leadership and retain the competency of existing leaders, but from this vantage, we are only succeeding in frustrating sitting boards and discouraging the recruitment of new board members to lead our communities. We can – and should – do better.

J. Spencer Edgett, Esq. is a partner with Chapman & Intrieri, LLP and has represented community associations for more than 15 years both as general counsel and in pursuing claims against developers and contractors for construction defects. Mr. Edgett worked closely with Senator Jerry Hill’s office on SB 326, specifically pertaining to the aspect invalidating ‘poison pill’ anti-construction defect litigation provisions in governing documents. Mr. Edgett also testified in support of SB326 before the Senate Housing Committee.

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