



2020 Construction Conference
September 29 – October 1

Have you looked at your balcony lately?

I. California Civil Code 5551

California Civil Code section 5551 went into effect on January 1, 2020. Senate Bill 326 (“SB-326”) was in response to a number of high profile balcony collapses, the most notorious of which occurred in Berkley, California in which six (6) people died. The law requires all Exterior Elevated Elements (“EEE”) within a community be inspected every nine (9) years to ensure they are structurally sound. The initial inspection must occur prior to January 1, 2025. The bill further stipulates who can conduct the inspection, what elements must be in the report and defines a standard of care.

Exterior Elevated Elements defined

Exterior Elevated Elements or EEE means the load-bearing components together with their associated waterproofing system. Typically, these are wood framed load bearing components that are elevated above the surrounding ground. This would include decks, balconies, walkways, stairways and railings. The associated waterproofing systems include flashings, membranes, coatings, and sealants that protect the load-bearing components of exterior elevated elements from exposure to water. Other elements that will require inspection include fasteners, brackets as well as any waterproofing components that protect these elements.

Elements of the inspection report

The inspection report must include a list of all components that were inspected. Each component’s current physical condition and remaining useful life needs to be listed. In addition, the inspection needs to provide any recommendations for repair. It is intended that this report will become a resource for the community to proactively plan and phase funding of future repair work.

II. Reasons exterior elevated elements fail.

The reasons that exterior elevated elements fail is very diverse. These can include:

- Deferred Maintenance – various components that make up an EEE can degrade over time. If waterproofing or other water shedding elements are not maintained the degradation to these elements can be accelerated.
- Improper Flashings – the design, material selection or installation of flashing elements may allow water to bypass the waterproofing barriers in the system. This will allow water to contact and or degrade elements that were not designed to be exposed to water. Special care should be directed to transitions with interior space and penetrations in waterproof barriers.
- Slope Issues – EEE are designed as walking surfaces. These surfaces will be subjected to weather conditions including moisture Much like a roof these surfaces need to shed water to prevent ponding water on their surfaces. Ponding water will degrade components and seek out any imperfections in the waterproof barriers.
- Exposure to Sun – waterproofing elements including sealants degrade due to exposure to ultraviolet (“UV”) light (ie. Sunlight). Periodic maintenance must be performed to repair degraded sealants. In addition, UV susceptible components need to be protected from exposure.
- Heavy Elements Placed on EEE – Residents with access to EEE can place heavy objects such as Hot-Tubs or planters on EEE which may exceed the designed loading capacity of these elements. There are also instances where heavy carpets are placed on the surface of EEE which prevent water from shedding off of these surfaces.
- Use of Harsh Cleaning Materials – The use of harsh chemicals to clean various components of EEE can result in damage. These chemicals can cause premature corrosion of metal elements or react with waterproofing components.

III. Inspection

Inspections must be conducted by a licensed professional. Currently the list of acceptable licensed professionals is limited to Structural Engineers and Architects. The first inspection must be completed no later than January 1, 2025 with subsequent inspections occurring every nine (9) years. Typically, these inspections would be scheduled to coincide with reserve studies for the community.

The inspector is required to visually inspect 100% of all EEE elements. Destructive testing is not required but, in many instances, various finishes will prevent visibility of all elements. The use of Borescopes, moisture meters, thermal imaging and/or destructive testing may be necessary to comply with the intent of the law. Ultimately the inspector is required to provide an opinion which has a 95% confidence of findings. While this is statistical standard that can be calculated how one categorizes the various EEE elements affects this calculation. If one defines categories into smaller sub-groups such as north facing balconies versus all balconies, the smaller categories will require increased testing to meet the 95% threshold. The law does not define how categories should be defined and there could be claims of failing to meet the standard of care by the inspectors based on how these various sub-categories are defined.

The inspection report must be signed by the structural engineer or architect. The report must include a list of all EEE's inspected. The current condition of the EEE/s inspected, and the remaining useful life of the components inspected. The report must include repair recommendations which can be broken down further into:

- Urgent Repairs – Life Safety – preventative measures and/or repairs that must be performed immediately.
- Minor Repairs – Repairs which can be performed in a timely manner to prevent further damage.
- Future planned repairs – Phased repairs over a prolonged period of time to address the life expectancy of various elements.

IV. Post Inspection

If there are any Life Safety or Urgent repairs necessary, the inspector must notify both the owner as well as any local building enforcement agency within 15 days. There is no set reporting timeframe for other types of repairs established. The final report should be shared with the community reserve analyst and incorporated into the community's reserve study. Subsequent reports are required to evaluate the previous reports' recommendations and areas inspected.

It would not be unusual to expect these reports to be used as a basis for construction defect litigation. There may be a desire for other parties (attorneys, consultants, contractors, engineers, etc.) to be present during these inspections to gather information related to possible construction defects. There of course is the possibility that communities will submit a claim to their insurance carrier to cover the costs of repairs designated in the report. ASTM and other standards generally leave the amount of testing regarding building defects up to the discretion of the licensed professional. However, in this Section 5551 has established a statistical standard of care.

Will this become the accepted standard with regard to non-EEE elements in construction defect litigation?

The standard of practice for both engineers and architects preclude certifying construction elements during installation in the field. The requirements for these reports appear to be a certification by the inspecting professional. Does this create a significant increased risk for professionals who conduct these inspections if a collapse happens post inspection that was not addressed by the inspector?