

# When is enough?

*by Mickey McGuire*

Mail carriers have a saying that goes something like this: “You can trust a barking dog because he can only get better, the friendly dogs are the ones to watch out for.” That advice came to mind recently as a metaphor for the legal situation that the Lomas Santa Fe Villas HOA found itself in after several years of “friendly and very amicable” negotiations with the developer of their condominiums. As nice as the HOA thought they were, the association came close to getting bitten by letting the statute of limitations run on their complaints.

They had an interesting case. The project was originally built as an apartment complex in 1978 and then converted to 220 condominiums and sold in April 1985. After conversion and during the process of selling the conversions, the original developers and owners of the apartment complex maintained control of the HOA and its board of directors until, in 1987, most of the units were sold. The new owners soon complained of a problem with the restrained retaining walls and corroded roof tile nails. The game of “We Can Work This Out” began.

In California you have an absolute statute of limitations of 10 years for construction defects. If you haven’t filed a suit in that time, you forever lose your right to collect for damages. Since the original construction occurred in 1978, the developer knew that he had the advantage. The clock was ticking in the developer’s favor as long as he remained warm and fuzzy with the association. Fortunately for the Lomas Santa Fe Villas HOA, they had Ray Lynn as president of the association. Ray advised the HOA to get professional help when he realized that his clients were about to negotiate themselves out of luck. “When the developer began pulling up slabs and digging 6 foot pits beneath, then we knew something was wrong,” he later said. In fact, the developer was trying to hide major repairs from the condo owners — they even went so far as to attempt the repairs without getting the proper permits from the city and county in order to keep them hidden. Ray had enough.

At our firm, cases are assigned in team meetings according to the facts given in the initial interview with the client. Because of prior experience, Mitch Golub’s team earned the task of working up their case. When Mitch got the case, his

first reaction was to put aside all assumptions and take a new look at the situation. The HOA had been complaining about a problem with the restrained retaining walls and corroded nails. The developer was offering to “fix” the restrained retaining wall (about \$100,000) and give the HOA \$50,000 to take care of the rest of its problems.

When Mitch’s experts finished examining the property, it turned out that the problem with the corroding roof tile nails was a false issue. The geotechnical defect was minor compared to other, hidden, defects that the HOA had missed. Our expert’s investigation during discovery also turned up information that the developer knew of the defects going back to when the unit was an apartment. The leaking roof (all 17 flat roofs were incorrectly sloped), water intrusion in the stairs and ponding on the balconies were evidence that larger problems were yet to be found. Looking ahead, it was clear to our firm that major damages would occur if there was ever a strong earthquake. The damages would turn out to be 30 times greater than the \$150,000 the developer had wanted to settle for during their original talks with the HOA.

New negotiations began, this time from the perspective of pending litigation. We began a heavy series of depositions — up to four a day at the peak. The defendants soon learned that our client’s weren’t going to give up and that we no longer took their word for anything.

The result was a settlement on behalf of the Lomas Santa Fe Villas HOA worth nearly \$6,000,000. The lesson in this case is that you may not know how bad your situation really is if you are depending on a potential defendant to be forthcoming. In Ray Lynn’s words, “Developers will attempt to find the easiest way out of their problems and the repairs may be only temporary.” Negotiated settlements are certainly preferable to a long, drawn out courtroom battle, but only if you are negotiating from strength. Construction defect and related problems are technically and legally complex issues. Make sure the team you pick to solve them has both the expertise and resources to do the best job for your clients. Anything less could wind up costing them more than they imagined.