

*Nearly a year after the balcony collapse that killed 6 in Berkeley,
What are regulators doing to improve oversight of firms with a history
of construction defect settlements?*

Background

On June 16, 2015, a balcony at Library Gardens Apartments in Berkeley, CA collapsed, killing six students and injuring seven others. The company that constructed the apartment complex, Segue Construction Company, had a history of questionable work. Notably, over the past three years, the company paid out \$26.5 million dollars in construction defect settlements. State law, however, does not require contractors to report defect settlements to the Contractors State License Board (CSLB).

In relation to other trade professions, licensees such as architects and engineers are required to report settlements and judgements to their appropriate regulator. While the Board for Professional Engineers, Land Surveyors, and Geologists receives roughly 60 settlement reports per year, the California Architects Board receives 29 settlement reports per year. Both boards underscore that there are minor, absorbable costs associated with this enforcement measure and underline that they conduct their own independent analysis of the settlement reports.

In response to this incident, the City of Berkeley tightened and approved new building standards. The City Council voted to require that new balconies be made of corrosion-resistant material and be ventilated to prevent a buildup of moisture. The council also mandated that all balconies be inspected within the next six months and every three years after that.

Additionally, an investigation by the CSLB underscores that five contractors involved in the balcony collapse were in “probable violation of law”. The CSLB has referred its investigation to the state Attorney General’s Office to determine whether to bring a case in administrative court, which could lead to suspension or revocation of the contractors’ licenses. CSLB reports:

“What we’re investigating is did the contractors deviate from the accepted trade standards. CSLB’s investigation is still open. We are at a point where our enforcement staff have determined that a probable violation of California law has occurred that would lead to either the suspension or revocation of the licenses of the five contractors involved in the construction of the balcony.”¹

Last month, the Alameda County District Attorney’s Office concluded that there was insufficient evidence to bring criminal manslaughter charges against any one individual or company. Experts investigating the balcony believe that the primary reason the balcony collapsed was because water had been trapped in the balcony deck during construction, leading to extensive dry rot damage. The D.A.’s Office press release reports, “There appear to be many

¹ Knobel, Lance. “Five Contractors Face Possible License Revocation in Berkeley Balcony Collapse Review.” *Berkeleyside*. N.p., 11 Apr. 2016. Web. 20 Apr. 2016.

contributory causes of this encapsulation, including the types of material that were used (none of which are prohibited by building code) and the very wet weather Berkeley experienced during the months of construction. The responsibility for this failure likely extends to many of the parties involved in the construction or maintenance of the building.”

On April 19, 2016, the California Building Standards Commission formally voted to assemble an ad hoc committee to examine the facts of the case and determine whether the Building Standards Code needs to be updated. In July 2015, the Berkeley City Council sent a letter to the California Building Standards Commission urging the commission to revise California Building Standards Code to require steel reinforcements on all new balcony designs, after experts determined dry rot was the cause of the balcony collapse.

Attached are news articles and press releases detailing updates on the case and actions taken by various state agencies.

Where Do We Go From Here?

In response to the Berkeley balcony collapse, Senators Hill and Hancock introduced SB 465, which is currently pending in the Assembly Committee on Business and Professions on reconsideration. This measure would require contractors to report certain settlements to CSLB and provide that these settlements be disclosed, under specific conditions, to the public. Over the past year and a half, stakeholders, committee staff, and industry representatives have had discussions and stakeholder meetings on amendments to SB 465 to address opposition concerns.

Consumer advocates mainly assert that, upon receiving a settlement report, CSLB would conduct its own independent investigation to determine whether or not the licensee deviated from his or her practice. Additionally, proponents point to the fact that CSLB’s sister boards have these additional settlement reporting requirements. On the other hand, industry representatives mainly underscore that construction defect settlements are not a clear indication of fault, since contractors are held to strict liability. While the settlements may not be a clear indication of who is at fault, CSLB would review such information appropriately and at least be made aware of settlements. David Fogt, CSLB’s Chief of Enforcement, highlighted in an interview with the *Sacramento Bee* that, “Had we known about the suits and the underlying reasons for them, we would have absolutely taken action.”²

Given the competing analyses of what SB 465 should require, the panelists and other various stakeholders should explain to the Committee what steps need to be taken to ensure that CSLB has the proper information to license competent and trustworthy contractors. During the course of this oversight hearing, the Committee should reflect on the following questions:

- 1) If CSLB were not to receive construction defect settlements, then how might the regulator improve settlement transparency so that homeowners, building officials, and the general public are aware of previous contractor settlements?

² "Balcony Collapse Points to Loophole in Law." *The Sacramento Bee*. N.p., 8 July 2015. Web. 20 Apr. 2016.

- 2) If CSLB's Chief of Enforcement has underscored that this information would be valuable to the Board's enforcement efforts, why has there been opposition to this measure - given that it would enable CSLB to take swift action against licensees who may not be complying with the law and pose a threat to public safety?
- 3) If modeling language after the Engineering and Architects settlement reporting requirements does satisfy all parties, what direction should SB 465 take to ensure that this information is disclosed to CSLB?

By creating a meaningful dialogue between industry and consumer representatives, the Legislature hopes to create a path where both parties can come together and decide what measures need to be taken to increase public safety.

If you have any questions, please do not hesitate to contact Mark Mendoza with the Senate Committee on Business, Professions, and Economic Development at Mark.Mendoza@sen.ca.gov or (916) 651-1868.

Berkeley balcony collapse: State investigators move to revoke licenses of companies for failing to meet trade standards

By Thomas Peele and Matthias Gafni, Staff writers
San Jose Mercury News

Posted: Fri Apr 08 14:51:32 MDT 2016

BERKELEY – Five contractors who worked on a downtown apartment building where six people died in a balcony collapse last year could lose their state licenses for failing to follow construction guidelines, a state watchdog agency announced Friday afternoon.

The Contractors State License Board found that "poor workmanship" in the waterproofing of the balcony resulted in water damage that caused it to rot and eventually collapse.

"They didn't do the work (on the balcony) to trade standards," said Dave Fogt, the board's chief of enforcement, in a phone interview Friday. The collapse was caused "definitely by water incursion that caused dry rot."

The companies include the project's main contractor, Segue Construction of Pleasanton, said Rick Lopes, a spokesman for the license board.

The others are Etter and Sons Construction in Dana Point, R. Brothers Waterproofing in San Jose, North State Plastering in Fairfield and The Energy Store of California in Sacramento. A person who answered the phone Friday at R. Brothers declined to comment. Calls and emails to the other companies were not returned.

The contracting board will now forward the results of its long investigation to the state Justice Department for prosecution in state Administrative Court. Penalties range from a license suspension to outright revocation.

Details of the state investigation will not be released until charges are formally filed. The board is also asking the Justice Department to charge Etter and Sons with failing to cooperate with its investigation.

Six people, five of them Irish college students working in the country for the summer on visas, died June 16, 2015, when the fifth-floor balcony supported by rotted wood beams gave way at the Library Garden Apartments, sending the students plunging on to Kittredge Street. Seven others who fell were seriously injured.

Bill Leys, who runs the website DeckExpert.com and is a Central Coast contractor, called the regulatory action against the five companies "pretty unprecedented."

"It is rare to see a waterproofed deck have a sudden, catastrophic collapse" and a government response, he said.

Last month, Alameda County District Attorney Nancy O'Malley announced that she would not file criminal charges against the contractors. She said an investigation by her office found that water proofing applied to wood supporting the balcony 10 years ago had an unintended and tragic consequence: The material had been soaked by heavy rain, and water was sealed inside it with no way out, setting off a slow process of rotting.

It continued until the night the 13 young friends crowded onto the balcony during a birthday party, and the beams holding up the deck snapped.

While O'Malley did not find grounds to file a manslaughter case based on criminal negligence, the state licensing board built a civil case seemingly on the same fact -- that the waterproofing was not done to professional standards.

Leys said it appears, based on O'Malley's recent statements, that waterproofing company R. Brothers "covered over wet wood" rather than waiting for it to dry and then testing its moisture content. In such trade work, he said, "When you cover it, you own it."

Families of each of the dead as well as each of the survivors are suing Segue and the other companies, alleging tenants had complained to managers for weeks that mushrooms were growing on the wooden balcony and that other residents reported a slant in the deck a year before the collapse, but that those warning signs were ignored.

A lawyer for the plaintiffs, Mike Kelly, wrote in an email Friday that "we are aware of (the state's) current course of action" but declined to discuss it specifically until charges are filed. He said his clients' primary goals are "uncovering the truth, publicly identifying the wrongdoers, and holding accountable those responsible for the damage, loss and suffering they have caused."

They also hope to force "changes to residential construction industry practices that will prevent such a needless tragedy from recurring in the future," he said.

Staff writer David DeBolt contributed to this story. Follow Thomas Peele at [Twitter.com\thomas_peele](https://twitter.com/thomas_peele).

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Berkeley: Roommates who nearly fell off balcony sue

By Matthias Gafni, mgafni@bayareanewsgroup.com
San Jose Mercury News

Posted: Mon Apr 11 17:32:52 MDT 2016

BERKELEY -- Three young women who stepped off a fifth-floor balcony seconds before it collapsed last year, killing six college students and injuring seven others, have sued the builders, owners and property managers of the Library Gardens apartment complex.

The suit offers new allegations of negligence in the decade before the tragedy.

Joining the 13 victims and families of the June 16, 2015, collapse, Caroline Conlan, Clíodhna Maloney and Aisling Tallon sued the contractors, owners and property managers last month in Alameda County Superior Court, alleging that the wooden balcony had poor workmanship and that warning signs of extensive water damage to the structure were ignored.

Allegations in the claim, if true, reveal the clearest timeline as to when critical mistakes were made in the building and maintenance of Unit 405's deck.

If not for pure luck, the three roommates claim, they could also have been killed or injured.

"These young ladies happened to step off the balcony and into their fourth-floor apartment just before the balcony broke away from the building and fell," the lawsuit alleges. "During the initial chaos of the collapse, the three young ladies looked down in horror at the heap of bodies and rotted balcony lying on the ground 40 feet below."

Conlan, Maloney and Tallon had moved into the apartment only two weeks before the tragedy with their fourth roommate, Aoife Beary, who was celebrating her 21st birthday the night of the collapse. Beary fell, and was seriously injured.

According to the lawsuit, witnessing the carnage resulted in the three physically uninjured roommates suffering from "severe mental and emotional harm when they were endangered by and forced to bear witness to the horrific accident that killed and disabled their closest friends."

"As you can imagine, it has been a nightmare and tragedy for all of those involved," the women's attorney Timothy McMahon said in a statement. "Above all else, my clients (who witnessed these unspeakable events, and feared for their own lives) continue to mourn and pray for the loss of their dear friends and those that suffered the horrific injuries from the collapse."

The roommates' suit alleges that mistakes were made by contractors as early as October 2005, when Segue Construction and its subcontractors began framing and building the balcony. The approved design plans called for plywood installed on top of the wooden joists; however, the contractors "purposefully disregarded" the plan's specifications and installed three layers of the cheaper oriented strand board, a type of compressed particle board. OSB is more susceptible to water damage and infiltration than plywood.

After using the wrong material, the contractors waited months to waterproof the balcony despite industry best practices to do so immediately. At the earliest, the balcony was waterproofed in January 2006, the suit claims.

Between the framing and the waterproofing, the "uncompleted balcony was exposed to harsh and wet conditions, including extensive rainfall," the women allege. From Nov. 1, 2005, to Dec. 31, 2005, while the deck sat unprotected, Berkeley experienced 21 days of rain and more than 13 inches of precipitation, they claim.

The Alameda County District Attorney's Office did not pursue criminal charges in the collapse, but it confirmed that the deck collapsed because of catastrophic dry rot caused by water infiltration partially brought on by a rainy construction period.

Despite the soggy wood, the contractors waterproofed it, creating a "concealed and hidden trap," the roommates' lawsuit alleges. The women claim the contractors didn't make the changes because it would have delayed completion of the building.

Bill Leys, who runs the website DeckExpert.com and is a Central Coast contractor, said a \$100 moisture meter would have alerted crews if the wood was dry enough to waterproof. It would take months for three layers of OSB to dry out properly, he said, adding that the manufacturer of the bituthene waterproofing membrane used on the Berkeley balcony approves useage only with plywood, not the stand board.

"It's not uncommon for these types of large projects to sit and remain open until they are signed off," Leys said, emphasizing the importance of checking for moisture when a crew arrives to do such work. "The industry needs to get earlier inspections (by cities) ... and contractors' incentive is 'don't tell me about this, let's just get it done.' That needs to change."

The Contractors State License Board last week announced that the five contractors who worked on the downtown apartment building could lose their state licenses for failing to follow construction guidelines. The state agency found that "poor workmanship" of the waterproofing led to the water damage, which eventually caused the collapse.

The five companies are Segue Construction of Pleasanton, the main contractor; The Energy Store of California of Sacramento; Etter and Sons Construction of Dana Point; R. Brothers Waterproofing of San Jose; and North State Plastering of Fairfield.

The contractors have either declined to talk about lawsuits or have not responded to requests for comment.

The negligence at Library Gardens continued after its October 2006 completion, the three roommates allege.

When BlackRock purchased the building in June 2007, the women allege that the company failed to perform a proper Property Condition Assessment, a standard procedure in commercial property acquisition. A PCA would have included a comprehensive review of architectural design plans and a thorough physical inspection that would have included the Unit 405 balcony.

As early as seven years before the collapse, tenants complained to property management firm Greystar that mushrooms were growing on the balcony surface, but nothing was done, the suite alleges.

The balcony had obvious signs of distress, the three women claim in the suit, including "areas of fungal bloom and biologic growth developed on the exterior stucco surfaces of the balcony." They also mention the bending deck floor, which dropped when people stood on it. The suit alleges that should have been discovered during inspections conducted with each new tenant.

BlackRock and Greystar did not return emails requesting comment.

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For Immediate Release

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ORDINANCES INCREASE SAFETY OF EXISTING AND FUTURE BALCONIES

Berkeley, California (Wednesday, July 15, 2015) - The Berkeley City Council on Tuesday evening unanimously approved a series of ordinances that will require examination of all existing residential balconies in Berkeley while tightening requirements on the materials and design of future structures.

The items were passed as urgency ordinances, meaning that they went into effect immediately Tuesday night – roughly a month after a tragic balcony collapse killed six people and hospitalized seven others.

The events of June 16 were horrific, and the grief is not over. These measures aim to prevent incidents like June 16 from ever happening again.

The changes for future construction were prompted by a staff analysis of the failed balcony. The changes are detailed as follows:

- **Materials:** Section 1404.13 **Projections exposed to weather.** Balconies, landings, decks, stairs and similar floor projections exposed to the weather shall be constructed of naturally durable wood, preservative-treated wood, corrosion resistant (e.g., galvanized) steel, or similar approved materials.
- **Materials:** Section 2304.11.3 **Laminated timbers.** The portions of glued-laminated timbers that form the structural supports of a building, other structure, projecting element or appurtenance and are exposed to weather shall be pressure treated with preservative or be manufactured from naturally durable or preservative-treated wood.
- **Materials:** Section 2304.11.5 **Supporting members for permanent appurtenances.** Naturally durable or preservative-treated wood shall be utilized for those portions of wood members that form the structural supports of buildings, balconies, porches or similar permanent building appurtenances where such members are exposed to the weather
- **Ventilation and Inspection Access: Section 1203.6 Ventilation of weather exposed enclosed assemblies.** Balconies, landings, decks, stairs and similar exterior projecting elements and appurtenances exposed to the weather and sealed underneath shall have cross ventilation for each separate enclosed space by ventilation openings protected against the entrance of rain and snow. Blocking and bridging shall be arranged so as not to interfere with the movement of air. The net free ventilating area shall not be less than 1/150th of the area of the space ventilated. Ventilation openings shall comply with Section 1203.2.1. An access panel of sufficient size shall be provided on the underside of the enclosed space to allow for periodic inspection.

Exceptions:

1. An access panel is not required where the exterior coverings applied to the underside of joists are easily removable using only common tools.
2. Removable soffit vents 4 inches minimum in width can be used to satisfy both ventilation and access panel requirements.

In addition, the vast majority of residential buildings will have increased inspections. The following changes will affect all buildings with three or more units and similar residential occupancies with the exception of one- or two-family dwellings.

- **Structural Maintenance and Inspection.** All exterior elevated wood and metal decks, balconies, landings, stairway systems, guardrails, handrails, or any parts thereof in weather exposed areas of Group R-1 and R-2 Occupancies, as defined in the most recent edition of the California Building Code, shall be inspected within six months of adoption of this section, and every three years thereafter, by a licensed general contractor, structural pest control licensee, licensed architect, or licensed engineer, verifying that the elements are in general safe condition, adequate working order, and free from hazardous dry rot, fungus, deterioration, decay, or improper alteration. Property owners shall provide proof of compliance with this section by submitting an affidavit form provided by the City. The affidavit shall be signed by the responsible inspecting party and submitted to the Housing Code Enforcement Office. For the purpose of this section, elevated "weather-exposed areas" mean those areas which are not interior building areas and are located more than 30 inches above adjacent grade

In addition to the changes imposed by ordinances, the City has also made several administrative changes.

- For construction projects that are currently underway, the City is requiring a special inspection by third party qualified waterproofing inspectors of water- and moisture-resistant barriers and associated components within the weather-exposed and enclosed walking surfaces. Those include decks, balconies, stairway systems, any parts thereof in weather exposed areas. These third-party inspectors must be approved by the city and must file special inspection reports with the city
- For rental units under the Residential Housing Safety Program, balconies and similar weather-exposed elevated exterior elements have been added to the annual inspection required of property owners. This visual annual inspection is in addition to the more intensive inspection required every three years that was imposed by ordinance on Tuesday night.

Even with these measures in place, the City will continue to look for other ways to improve the safety of these and other buildings.

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