



Risk Manager

SURVIVING A DPOR COMPLAINT

By: Justin Ward. *Wednesday, August 10th, 2011*

Here is a recent article written by Henry Spalding, a Sands Anderson litigation attorney, for the Home Builders Association of Richmond newsletter.

As a lawyer representing homebuilders and general contractors, I am sometimes asked to assist them in responding to complaints filed against them by dissatisfied homeowners with the Department of Professional and Occupational Regulation ("DPOR"). For builders, these complaints can be stressful, time-consuming, expensive and potentially detrimental to their licenses. Should you face a complaint, you should keep a few principles in mind.

DPOR regards its mission as, among other things, protecting the health, safety and welfare of the public by licensing qualified businesses and enforcing standards of professional conduct. Part of DPOR's job is to administer and investigate consumer complaints filed against businesses licensed by DPOR. The process begins when a consumer files a complaint. For our purposes, let's assume the consumer is an individual who has contracted with a builder for a new home. Once DPOR receives the complaint, its first step is to determine whether it is authorized to process the complaint. Assuming DPOR has jurisdiction, it will notify the builder of the complaint and request a written response, normally within a short period of time. In my experience, DPOR is generally willing to extend the time for responding.

Once the builder has responded, DPOR will typically investigate further. Often, if the circumstances so justify, the DPOR investigator will interview the homeowner, builder and other relevant witnesses. Such witnesses may include subcontractors and building inspectors. Frequently, DPOR will request documents from the parties. It is important to keep in mind that the file compiled by the DPOR investigator will likely be subject to disclosure under the Freedom of Information Act. As a result, information which the parties share with the investigator will typically not enjoy any anonymity. After its investigation, DPOR will decide whether or not a violation of a law or board regulation may have occurred. In the event that DPOR concludes that a violation did occur, the investigator will prepare a report of findings setting forth the facts in support of its conclusion that violations have occurred. If such findings are found, the next step involves the disciplinary process. Generally, DPOR will present the builder with a consent offer. The consent offer will usually include one or more forms

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of punishment. Disciplinary action can include a requirement that the builder undertake remedial education. A monetary fine may be imposed. In some circumstances, the builder's license can be suspended or revoked.

A builder facing a consent offer has some choices. The builder can accept the offer and the punishment which it entails. A builder needs to be careful in doing so because such could be construed as an admission of guilt. If a civil lawsuit is later filed by the homeowner, such an admission could be a real disadvantage to the builder. Another option which the builder has is to propose a counter-offer. In doing so, the builder may want to suggest a lower monetary fine and state that it is not in any way admitting guilt or liability. The builder also has the option of rejecting the consent offer outright. If the builder does so, the matter will move on to the Board for a hearing. If a builder has concerns during construction that the homeowner is not happy with the project and may be contemplating a lawsuit or DPOR complaint, it is important for the builder to properly document its files. Doing so could include taking extensive photographs of the construction, ensuring that pertinent e-mails are saved and writing letters to the homeowner. Keep in mind that a builder's access to the homeowner's property may be severely limited after the builder ends his involvement with the construction.

It is also important to be forthcoming and responsive to the DPOR investigator and his/her requests for information. Remember, the investigator is at the front line of making decisions on the complaint which could have serious implications for your business. Keep in mind also, because the investigator's file will likely be discoverable in any civil lawsuit, that the builder's statements are clearly thought out and well organized. What the builder says during the DPOR investigation could come back to haunt him during a later civil lawsuit.

DPOR has a helpful website which does a good job of explaining the complaint process. The site can be found at <http://www.dpor.virginia.gov/dporweb/dpormainwelcome.cfm> . Feel free to contact **Henry Spalding** should you have any questions about this article.

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