

The Need to Use “Repair” Agreements

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Condominium/homeowner associations should be careful about accepting verbal offers from developers to make unspecified “repairs” in response to complaints about construction defects. The informal nature of such an agreement may not be appropriate given the circumstances. Moreover, problems may arise when the developer’s definition of “repair” differs from what is required by code, contract or industry standard. For example, when a developer agrees to informally repair a window or roof leak, the “repair”, as far as the developer is concerned, may consist merely of sending out a worker with a caulk gun to seal gaps that should have been protected with a solid flashing material during the original construction. Caulk is generally not an appropriate substitute for flashing. In this example, caulk is a temporary fix that conceals the underlying absence of flashing until the caulking seal breaks and the leak reappears six months later.

This example demonstrates the need for written clarity as well as the opportunity to seek the assistance of a construction expert. The condominium/homeowner association does not have to accept whatever repair the developer is offering. Instead, the condominium/homeowner association can request a written description of the proposed repair. That description can then be evaluated by a construction consultant working for the condominium/homeowner association. The consultant can review the applicable drawings, field conditions and advise the condominium/homeowner association whether the repair is reasonable and appropriate under the circumstances. In addition, the consultant can suggest alternatives or request additional information, if necessary. In this manner, the condominium/homeowner association makes an informed decision rather than accepting whatever the word “repair” means to the developer. In effect, the written description of the developer, if accepted, becomes a written repair agreement and creates a standard by which the repair can be judged.

This model can be employed on a larger scale when the condominium/homeowner association is negotiating the repair of defects discovered during a “warranty study”. Repairs agreed upon by the parties should be specified in writing, including a description of the method

of repair, the scope of repair (i.e., locations where it is to be performed), and any construction standards by which the repair is to be judged. These written understandings can then be incorporated into a larger ongoing draft repair agreement. Where repetitive repairs are concerned, it is often appropriate for the parties to agree upon a prototype repair in the field that will serve as a standard for all other repairs.

Work agreements can also take into consideration certain future contingencies. For example, should there be a dispute as to whether a repair was performed properly under the repair agreement, a mutually agreed upon third-party can be designated to resolve the dispute, with the losing party paying the expense of the successful party involved in the resolution process. A provision can also be provided for unforeseen defective conditions that are discovered during the repair process. For example, if a repair involves removing siding, which reveals an unknown latent defect, it should be repaired and not simply built over. The parties can agree that such unforeseen defective conditions will be repaired by a mutually agreed method of repair, and if unable to agree, have a third-party resolve the dispute on their behalf.

Repair agreements should have a provision for the condominium/homeowner association's expert consultant to inspect the developer's repair work for approval purposes. This helps provide finality and acceptance of the work. During the approval process, punch lists can be created setting forth miscellaneous items that need to be addressed before the work is deemed finally completed. In short, proper documentation and agreements of what is required, what is to be done and final approval will permit an amicable resolution to a construction defect claim without the need for extensive and expensive litigation.