

## **What is the Purpose of a Tolling Agreement?**

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Tolling agreements need to be used to preserve condominium/homeowner association claims against developers during lengthy construction defect negotiations. Too often, condominium/homeowner associations unknowingly allow legal claims to expire during lengthy construction defect negotiations with developers. If negotiations fail, the condominium/homeowner association may turn to an attorney for legal representation only to find out that their legal claims are time barred. This article explains how condominium/homeowner associations can avoid this scenario by the use of tolling agreements to preserve their legal claims while engaged in potentially lengthy negotiations with developers to correct construction defects.

There are a variety of potential legal claims for construction defects that a condominium/homeowner association can bring in its own name and on behalf of its unit owner/homeowner members. These include, express and implied warranties, consumer protection act claims, (for which attorneys' fees may be recoverable), and negligent construction claims. It is often, only by reason of the fact, which the condominium/homeowner association could bring these claims that a developer is willing to negotiate. Thus, it is essential that the condominium/homeowner association preserve these claims or lose its bargaining power.

In many cases, by the time unit owner/homeowner members take control of their condominium/homeowner association from the developer, some claims may be very obvious and the statute of limitations about to expire on these claims. It is customary for the initial "unit owner/homeowner controlled" condominium/homeowner association to commission an engineering report to assess construction before warranties and other legal claims expire. In most cases, a developer should be asked to sign a "tolling agreement" in connection with any attempt to negotiate a serious construction defect dispute.

A tolling agreement is important because a condominium/homeowner association's legal claims are limited in duration and must be brought within a time period known as the "statute of

limitations”. The “statute of limitations” refers to the time period within which a particular legal claim must be brought in a court of law or it shall be forever barred. This issue is complex, since different legal claims have different statute of limitations periods, and those time periods can also vary depending on the factual circumstances of the case. In general, there are only two ways to stop the statute of limitations from running: (1) file a law suit asserting the legal claim in court; or (2) have the responsible parties sign a “tolling agreement”.

A “tolling agreement” is a private contract that courts will enforce. Pursuant to such an agreement, the condominium/homeowner association and developer agree that the statute of limitations will stop running (or “toll”) while they attempt to negotiate a resolution of their disputes. Thus, tolling agreements provide a “time out” period that allows the condominium/homeowner association to negotiate and preserve its legal claims without having to file a lawsuit. A tolling agreement does not harm a developer, and its willingness to enter into such an agreement is evidence of its intentions to negotiate in good faith.

In sum, a condominium/homeowner association faced with significant construction deficiencies should seek legal advice at the early stages regarding the negotiation of construction deficiencies. An attorney versed in construction law should be willing to advice the condominium/homeowner association of its legal rights, the applicability of the statute of limitations and other applicable law.