

# **POST LITIGATION REPAIRS**

Guidelines on How To Avoid The Mistakes Made By Your Developer  
and  
Properly Repair Your Building

By Dean Martin  
Barker Martin & Merchant, P.S.

**BARKER MARTIN & MERCHANT**

A Professional Services Corporation  
720 7<sup>th</sup> Avenue, Suite 200 ♦ Seattle, WA 98104  
Phone (206) 381-9806 ♦ Fax (206) 381-9807

## Introduction

Congratulations! The construction defect lawsuit is over. It is the end of depositions, the end of uncertainty, and a time to celebrate. It is also time to begin the repair process. That process begins with the question “What must we do to avoid the errors made by the developer and make sure the condominium is fixed properly?” The short answer is to avoid the urge to go cheap and make sure you hire only qualified and experienced professionals. To use a common phrase, “Don’t be penny wise and pound foolish.” The longer answer is provided below.

### Questions to Ask Prior To or During Settlement

Your association should start planning for the repairs prior to any settlement. Asking questions of your litigation attorney and experts will help with this preliminary planning.

#### Just when you thought you were free from attorneys.

Believe it or not, your association will need an attorney for the repair process. At a minimum, it will need an attorney to review the various contracts with the architect, engineer, construction manager and general contractor. *Do not enter into any repair contract without having an attorney review it.*

What attorney will the association use? Your association may want to use the attorney from the construction defect litigation. If so, ask the attorney whether they are willing to do the work and whether the current fee agreement covers post-settlement work. In those cases where the attorney is working on a contingent fee agreement, the association may incur hourly charges for work after the settlement. The association should address these issues up front.

If your association does not wish to use another attorney then select one that is experienced with construction. As with every aspect of the repair process, qualifications and experience are more important than saving a few dollars.

#### Understand What The Settlement Means

In order to properly evaluate a settlement offer, you and your association must know what the net settlement (how much the association will receive after deducting attorneys’ fees and costs) and the total projected cost to perform the repairs including construction costs, permits, and architectural and engineering (“A&E”) fees. Will the net settlement be enough to properly repair the building? If not, what will the Association do to obtain the additional necessary funds? A candid evaluation of any potential settlement will allow the association to properly manage expectations and begin the repair process immediately after a settlement is in place.

#### **BARKER MARTIN & MERCHANT**

A Professional Services Corporation  
720 7<sup>th</sup> Avenue, Suite 200 ♦ Seattle, WA 98104  
Phone (206) 381-9806 ♦ Fax (206) 381-9807

## Post Settlement

The case has settled, the association has received the money and now the repair process can begin. What should your association do first?

### Earn Interest On Your Money

There will be a period of time from several weeks to several months during which the association will do a lot of planning, interviewing, and during which the architect will prepare the construction drawings. During this time the association will only be spending a small portion of its money. The association should put the bulk of the settlement in an interest bearing account or a Certificate of Deposit (“CD”). The type of the account or the duration of the CD will depend on when construction will begin. Talk to your trial attorney and construction experts. They should be able to provide the association with a rough timeline for the repair process. Then, talk to the bank about how to obtain the best return in light of your timeline.

### Begin Planning the Repair Process

To help ensure that repairs go smoothly and the work is done properly the association must first understand what caused the original defects. The problem goes far beyond defective workmanship or missing flashing and includes:

- Insufficient architectural details and specifications. Most developers ask their architects to provide the most basic construction drawings (also known as plans) possible that will allow the developer to obtain a building permit. These minimalistic permit plans do not have sufficient details that show how to construct the building. For example, most plans do not contain details on how to weatherproof the condominium. Absent directions in the plans on how to perform the work, the general contractor and subcontractor’s do the work like they have always done it and usually that means it is done defectively. The association’s repair plans must include proper repair details.
- Insufficient coordination, supervision and inspections by the general contractor. Coordination, supervision, and inspections by the general contractor are essential. There are usually multiple subcontractors involved in the repairs and their work must be performed in the proper order. Sequencing their work is only the first step. The general contractor must also supervise and inspect its work and the work performed by its subcontractors. There are two main reasons for inadequate coordination, supervision and inspections – lack of experience and the profit motive. Some contractors do not have enough experience to manage the complex task of constructing a condominium. Their lack of experience, when combined with minimalistic architectural plans, inevitably leads to construction defects. In addition, the profit motive conflicts with the requirements for quality construction. For example, a general contractor may not have enough supervision on site because the cost of the extra supervision cuts into its profits. Your association must make sure that the general contractor is going to provide adequate coordination, supervision and inspections.

### BARKER MARTIN & MERCHANT

A Professional Services Corporation  
720 7<sup>th</sup> Avenue, Suite 200 ♦ Seattle, WA 98104  
Phone (206) 381-9806 ♦ Fax (206) 381-9807

- Inadequate inspections by the architect and building department. The building department performs inspections, but they are not required to inspect the building envelope. Even when they do inspect a certain aspect of the work, they do not look at that work at every location on the building. Washington law does not hold the building department accountable if it fails to inspect or negligently inspects your building. Instead, it is the responsibility of the owner, developer and contractors to make sure the building complies with code. Even though the building department will inspect your building during the repairs, the association should not rely on those inspections.

The architect rarely inspects the building during the original construction. They are called out when there are problems, but they are not paid to inspect the work to make sure that it complies with the architect's plans and specifications. The association should pay to have the architect perform periodic inspections to ensure the work is being done correctly.

Remember – those that ignore history are doomed to repeat it. You can avoid repeating the developer's mistakes by hiring experienced qualified design professionals, paying for detailed construction drawings, paying for inspections by your architect or owners representative (sometimes called a construction manager), and by hiring an experienced and well insured contractor.

#### Assemble Your Team of Design Professionals

Your association will need to assemble its team of design professionals.

Retain an Architect: Your association will be working closely with the architect and should make sure it is comfortable not only with their experience, expertise and qualifications, but with their personality. If the association is inclined to use the architect that was retained as part of the litigation, the association should be prepared to interview other experienced architects for comparison purposes. **Check the architect's references!** Ask your attorney about them. If possible, look at other repair projects in which the architect has been involved. Also, review plans for prior repairs to see whether they have provided adequate details and specifications. The association should also use the interview process to make sure that the proposed contract and fees are reasonable.

Have all architects that you interview provide an estimate for their work, both on an hourly basis and based on a guaranteed maximum fee. Make sure that the estimate includes time for periodic inspections. In addition to the periodic inspection, we recommend that the architect inspect and approve the first installation of any crucial component. For example, when the first window that is replaced or weatherproofed, the architect should review how the window is wrapped, how the flashing is installed and the installation of the building paper. If approved, that installation will act as the model for all subsequent installations.

Each architect should provide a sample contract for the association to review. Most architects' contracts contain a limitation of liability provision that limits the association's ability to recover damages from the architect. The damages are usually limited to the total fee paid to the architect. Most architects will modify the limitation of liability provision for an additional fee. Consult with your attorney on how to handle this issue.

The architect plans a key role. The plans they prepare and the inspections they perform will go a long ways towards ensuring a proper repair. Qualifications, experience, and a devotion to proper construction should be the driving factors in the association's decision.

#### **BARKER MARTIN & MERCHANT**

A Professional Services Corporation  
720 7<sup>th</sup> Avenue, Suite 200 ♦ Seattle, WA 98104  
Phone (206) 381-9806 ♦ Fax (206) 381-9807

Retaining a Structural Engineer. The association should have a structural engineer involved even if there are no obvious structural issues involved in the repair. Having a structural engineer available will minimize any delays during construction. Follow the same guidelines as you would for the architect – interview, check references and review the proposed contract.

Retain a Construction Manager. A construction manager is responsible for coordination between the general contractor and the association and homeowners. The construction manager will also provide another layer of inspection and quality assurance and will evaluate the construction draw requests submitted by the contractor. The construction manager should not be someone who works for the contractor because the association needs someone who, when they walk the site and inspect the work is only concerned about the association’s best interest. Follow the same guidelines as you would for the architect – interview, check references and review the proposed contract. The construction manager should make sure you have a reasonable retainage. Retainage is a percentage of the construction contract that is held back by the owner until the end of the project. It is an effective method of ensuring performance and responsiveness by the contractor.

### Hiring A Contractor

What contractor should the Association hire? This is an important question and one that the typical layperson is not qualified to answer until they consult with their experts and attorneys and conduct a thorough interview process. To start, get recommendations. Your attorney, your architect and the other experts used during the litigation can provide informed recommendations. Use their expertise to help you in the decision making process.

Your association should already be in contact with at least one contractor, the contractor the association hired during the litigation to provide an estimate of the cost to repair the complex (your “litigation contractor”). The litigation contractor was going to testify as an expert witness and thus should be qualified to do the repair work. The Association should consider the litigation contractor for the repairs. The litigation contractor may have been involved in investigating your building, they will have detailed knowledge about the as-built conditions at the building, and they will be familiar with your proposed repair plan.

While the Association should consider their litigation contractor, they should not hire them without going through a very thorough screening process. We cannot emphasize enough the need to properly interview and critique prospective contractors. Not only will they be responsible for performing all of the work properly, they must deal with the human element. You and the other unit owners will probably live in the condominium during the repairs. This raises a multitude of questions including:

- Has the contractor done repair work before?
- Is the contractor set up to deal with special homeowner needs?
- What will they do to provide safe access to and exiting from the building?
- What type of access to hallways and units will they need?
- What space will the contractor need for its tools and supplies?
- Will the Association have to give up parking space so that the contractor will have a “lay down” area for tools and supplies?
- Have they performed repairs in the past that are comparable to the size and complexity of your repair?

### **BARKER MARTIN & MERCHANT**

A Professional Services Corporation  
720 7<sup>th</sup> Avenue, Suite 200 ♦ Seattle, WA 98104  
Phone (206) 381-9806 ♦ Fax (206) 381-9807

- Can they perform the work during inclement weather? If so, what steps will they take to protect the condominium from the weather and make sure there is proper heat for the units?

The board should have each potential contractor make a presentation on what they propose to do and how they will handle the unique issues related to your repair. The project supervisor who would be assigned to your project should attend the meeting. The board should be comfortable with the contractor in general and the project supervisor in particular.

The board should obtain references from prior projects. If the contractor has not done a prior construction repair project that is similar in size and complexity as yours, do not use them even if they are less expensive. It is not your association's responsibility to provide on-the-job training. Quite the opposite, it is the board and the association to act in the best interest of the association. Check the contractor's references. Look at the quality of their work on prior buildings and speak to board members who dealt with the contractor. This will require hard work by the board, but it is essential to help minimize future problems. The last thing the Association wants is another lawsuit or to be stuck with an uncooperative contractor during a multi-month repair project.

There are some additional questions or steps the board should take:

- Do not assume that the cheapest contractor is the best contractor.
- Do demand that the contractor provide proof of insurance for itself and any subcontractor it intends to use for the project.
  - The contractor will try and provide a certificate of insurance. That is not enough. The certificate demonstrates that the contractor has insurance, but does not establish that the insurance will provide coverage for the work they are performing. For the general contractor and the key subcontractors, the Association should obtain copies of the insurance policy itself and have its attorney review the coverage they provide.
- When can the contractor begin work?
- What is their proposed construction schedule?
- Be sure to interview and approve the individuals (superintendents and foremen) who will have primary day-to-day responsibility for getting the work done. Do this before signing the contract.
- What is the contractor's liability if the work goes beyond the scheduled completion date?
- Can they staff the project effectively?
- Will they repair the elevations/buildings all at once or will they perform the work in stages?
- Has the contractor been sued for defective work?
- Has the contractor worked with the association's architect before? If so, ask both the architect and the contractor how it went. Find out the name of the project, contact the owners, and get their input.

- Do not believe the board member or unit owner who “knows someone who can do this for half the price.” Quality work by experienced people comes at a price, but that price is cheap compared to defective work and another lawsuit. If you believe the price is too high, obtain competitive bids among qualified people. Do not risk your building by selecting the cheap, but inexperienced alternative.
- Have your attorney review the contract. Not all contracts are the same. Your attorney can advise you on whether the contract is appropriate and whether any changes are necessary.

### **Conclusion**

Ultimately, your design professionals, construction manager, and your contractor must be experienced, qualified and able to work well together. Do not let your desire to begin the process overcome your need to be thorough when selecting your construction team. Once they are selected, let the construction begin and don't be afraid to raise any concerns you may have. Remember it is your home and they work for you.