

# Post Litigation Repairs - Guidelines on How To Avoid the Mistakes Made By Your Developer and Properly Repair Your Building

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**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 chooses 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 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.

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**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 subcontractors 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.

- **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.

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