"Don't Let Good Intentions Produce Bad Results"

Often, after condominium and townhome projects are completed, the developer must return to repair or correct construction defects that can range from isolated, minor problems to major construction issues involving the entire project. Many times the relationship between homeowner associations and the developer or general contractor is a good one and the repair of the defects is the result of a positive, collaborative effort.

But even if everyone has the best of intentions in attempting to remediate problems in the defective construction of multi-family projects, the homeowners, association Boards and property managers *must still be aware* of potential legal pitfalls if the defects are not properly repaired in a timely manner. Some of these negative results may include the loss of warranty protections and the right to bring a claim in civil court.

For example, let's say in 2004 the control of your townhome association's Board transitioned from the developer to the homeowners. Beginning in 2006, homeowners began experiencing the loss of shingles from their roofs during storms with high winds. The association contacted the property manager who in turn contacted the developer who promptly sent personnel out to replace any blown off shingles. These occurrences of blow-offs, followed by prompt repair, continued through 2009, when the developer told the property manager that he would start charging a fee for any future repairs. The homeowners and the association's Board had been very pleased with the developer's response to the defects up to that point in time.

After additional shingles blew off in 2010, the association decided to have an independent contractor look at the roofs. The contractor informed the Board that the shingles were initially installed incorrectly and that all of the roofs in the project had to be replaced. The association contacted the developer who said that his warranty period had expired, and he was not going to make any further repairs.

Similar scenarios could be played out concerning windows, decks, concrete patios, siding and any other component of the units and common areas. In our example above, six years of apparent cooperation from the developer as repairs were made, could result in the homeowners and the association actually losing future rights or the ability to bring certain claims in court. *The parties' initial good intentions could produce some real bad results*.

In projects involving multi-family homes, the homeowner and/or association may bring civil claims under such theories as breach of contract, negligence, or breach of warranties under Minn. Stat. Ch. 327A or MCIOA. But by waiting for years while partial repairs were made, the right to bring any of these claims may have been lost.

Prior to bringing a lawsuit, each of these claims has elements that must be present or requirements that must be satisfied. Some of these include:

- Contract and/or Negligence: A lawsuit must be served within two years after the date when the injury was discovered, or should have been discovered, with the exercise of due diligence.

- Minn. Stat. Ch. 327A: A lawsuit must be served within two years of the discovery of the breach *and* written notice was provided to the builder within six months of discovery.

- Minn. Stat. Ch. 515B: A lawsuit must be served within six years after the cause of action accrues (the parties may agree to reduce the six year period to as little as two years). As to common areas, a cause of action accrues at the latest of completion of the common element, or the termination of the period of declarant control, which is when 75% of the units have been sold.

While partial repairs are being made, the time period in which claims might be brought could be running out. The root of the problem with warranties and some potential claims is that *repairs may lull homeowners, association Boards, and/or property managers into ignoring the fact that they have a finite amount of time to pursue their legal rights.*

In most cases, the developers' intentions may be honorable as they are putting forward their best efforts to remediate the defects. In other situations, they may be offering a temporary fix while the clock runs on warranties. Property managers and association Boards who represent the unit owners, must recognize that they only have so much time to have the defects corrected before rights are lost and the financial burden for the repairs becomes the association's responsibility.

In the scenario mentioned above, four or five years were allowed to go by from the time the association initially became aware of shingle blow-off problems, to the time the independent contractor discovered the roofs all needed to be replaced. This could create substantial legal problems for the unit owners and the association Board. In reviewing the requirements that must be met in order to bring claims, a question would be whether the defects were discovered or should have been discovered more than two years prior to any legal action being commenced.

The developer could argue that a lawsuit for negligence should have been started in 2008 (within two years of discovering the injury). Similarly, if the parties had agreed to reduce the warranty period provided under Minn. Stat. Ch. 515B down to two years, the developer could also argue that MCIOA statutory warranties had already expired. If no *written notice* of the claims was provided to the developer within six months of discovery, it could also be argued that a Minn. Stat. Ch. 327A claim should be rejected by the court on that basis.

In some situations where the developer has made representations that the defect or the injury will be repaired, the court may have some discretion to allow a longer period of time for the homeowners or association to bring legal claims. One of the legal principles that would allow a court this discretion is called "equitable estoppel." The principle of equitable estoppel is intended to prevent a party from inducing another to rely on promises, and then failing to fulfill the promises to the prejudice the other party.

The court will look at what representations or promises were made by the developer indicating that the defect would be remedied, and whether it was reasonable for the homeowners or their association to rely on those representations in not bringing an earlier claim. If the court analyzes the developers' statements, and allows claims to proceed after they were technically barred by the statute of limitations, it may do so only for a limited time period. The court may also

consider whether the representations or promises were in writing and how often they were made.[1] Clearly, it is preferable to preserve the unit owners' rights to bring their claims within the initial statute of limitations period without seeking the court's discretion in the matter.

Even if the developer is prevented from raising an applicable statute of limitations defense, the contractors who did the actual defective work may not be prevented from raising the bar of the statute of limitations if they didn't make the repair promises the developer made. And a promise to repair one defect doesn't bar asserting a statute of limitations defense as to other defects the developer didn't promise to repair. While promising to make repairs, has the developer claimed he has no legal obligation to do so? Disclaiming legal liability while making repairs may enable the developer to avoid application of the estoppel doctrine.

If your condominium or townhome project has construction defects, it is advantageous to work with the developer to correct those issues. But even in the most congenial situations, key questions must be asked:

- How long has the association known about the existing defects?
- Have complaints been made in writing, and has the developer committed in writing to make the repairs?
- Have the actions by the developer been prompt and responsive?
- Have prior repairs taken care of the problems, or are they re-occurring?
- What is the real extent of the defects and related damage?
- Has the association relied on the developer's opinion of how defects should be corrected, or has the association verified from an independent consultant that the proposed "fix" is adequate, and not merely temporary?

If you are unsatisfied or unsure as to the answer of these questions, do not let the situation continue without further investigating the defects and exploring your options and your rights. This may include consultations with independent contractors, engineers, and/or a law firm. If the right steps are not taken, even the best of intentions can produce very bad results!

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[1] Minnesota law on estoppel in the field of construction defect law is well-developed and clear. Specifically, "Continuous promises to repair that discontinue only after the limitations period has run equitably estop the defendant from asserting the statute of limitations." *Bethesda Lutheran Church v. Twin City Constr. Co.*, 356 N.W.2d 344, 350 (Minn. Ct. App. 1984). In *Bethesda Lutheran*, defendant contractor "made numerous promises to repair the roof [of plaintiff's church] including a two-year warranty" and attempted to repair the roof "over the next six years." Eventually, the defendant "refused further repair attempts…just over six years after it completed the church building." The court held that because "the evidence showed continuing promises to cure the leaks until shortly after the statute ran. . . .. [t]he trial court found this written representation and other oral promises to repair the roof induced delay of legal action."

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