

Tolling agreements:

Use them to Preserve Association Claims Against Developers During Lengthy Construction Defect Negotiations

By: Nicholas D. Cowie

Too often, condominium associations unknowingly allow their legal claims to expire during lengthy construction defect negotiations with developers. If negotiations fail, the association may turn to an attorney for legal representation only to find their legal claims are time barred. This article explains how condominium 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 association can bring in its own name and on behalf of its homeowner members. These include express and implied warranties, consumer protection act claims (for which attorneys fees may be recoverable), and negligent construction. It is often only by reason of the fact that the association could bring these legal claims that a developer is willing to negotiate. Thus, it is essential that the association preserve these claims or lose its bargaining power.

In many cases, by the time homeowners take control of their condominium association from the developer, some claims may already be barred and others are about to expire. It is customary for the initial "homeowner controlled" 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 an 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. 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 association and developer agree that the statute of limitation will stop running (or "toll") while they attempt to negotiate a resolution of their dispute. Thus, tolling agreements provide a "time out" period that allows the 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.

An example of the importance of tolling agreements is provided by the case of *Milton Company v. Council of Unit Owners of Bentley Place Condominium*¹. In that case, a condominium association entered into a tolling agreement with the condominium developer while negotiating the repair of construction defects identified in an engineering report. Ultimately, negotiations failed and suit was filed before the tolling agreement expired. The Developer argued that the tolling agreement did not apply and that the claims brought by the association were barred by statute of limitations. The Court rejected the developer's argument and upheld the tolling agreement. Subsequently, following a four week trial the jury entered a judgment against the Developer for approximately 6.6 million dollars and the Court awarded \$500,000 in attorney's fees. Without the tolling agreement the association's case might have been dismissed on grounds of statute of limitations before ever going to trial. Thus, the importance of tolling agreements is apparent.

In sum, a condominium association faced with significant construction deficiencies should seek legal advice at the early stages regarding the negotiation of construction deficiencies. An attorney versed in condominium construction law should be willing to advise the association of its rights and the applicability of the statute of limitations without charge or obligation.

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