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The “Turnover Release”- Avoiding Treacherous Waters

While not new, the “Turnover Release” is a situation that poses serious risks for both associations and their managers. The firm has recently run into this issue in several cases while representing homeowners associations with claims against their builders because of significant construction defects in their communities. In these instances, the associations signed “releases” in exchange for minor common area repairs. Later, when the associations were forced to pursue litigation to address more serious problems, the builders argued that the releases constituted a full waiver of all of the associations’ claims and demanded the cases be dismissed. While we were successful in defeating the releases on legal grounds, the fact that they are being used by builders in this context raises issues for board members and association managers.

The Common Scenario

Here is the typical situation: just before (or after) turnover, the builder approaches the board of directors and offers to perform a walk-through to identify outstanding construction issues in the new community. This offer is usually in response to complaints by association members about problems they are having with their units, the common areas, or both.

A walk-through (or series of walk-throughs) is then performed by one or more builder representatives, one or more homeowner board members, and the association manager. In addition, the builder may or may not agree to pay for a third-party to participate in the walk-through (more about this below).

After the walk-through, a punch list is created identifying items to be repaired. The builder then undertakes to repair the items on the list. It sounds simple enough, but here comes the dangerous part. Upon completion of the repairs, the builder requires that the association execute a written release of all claims that the association had or could have pursued against the builder (in one case the builder even required the association manager sign the release).

Depending on the circumstances, this written release might act as a complete release of all claims the association may have against the builder for construction defects in the community ... even for hidden defects the association was unaware of at the time of the walk-through. As you might expect, if a court finds that the release is valid, it could have



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disastrous effects on the association's ability to address problems related to improper initial construction within its community.

Not in the Association's Best Interest

While at first glance it may seem like a reasonable course of action, the process described above is seldom in the best interest of the association. This is true for several reasons:

- 1) The association and its manager are almost never in the best position to evaluate the nature or severity of construction defects at the community. At best, the walk-through identifies only cosmetic issues, and does not address serious construction defects requiring costly repairs;
- 2) The process requires the association to identify and/or approve the list of defects to be repaired *and* to approve the repairs conducted by the builder. The association *should not* bear this burden ... the builder should.
- 3) Sometimes, the builder offers to pay (or share the cost) for a third-party to perform the walk-through. Even assuming the third-party is truly independent -- which sometimes it is not -- the process is often still not in the association's best interest. This is true primarily because the association is again put in the position of being responsible for identifying defects in original construction that are the builder's responsibility to identify and repair. In addition, if the association engages a third-party to assist in identifying defects and/or to monitor repairs, the builder's later argument that the association has waived even unknown construction defect claims may be stronger. Finally, a comprehensive construction defect evaluation of a multi-unit residential project takes considerable time and money. It is unlikely the association has the resources at its inception to perform such an investigation. It is also unlikely a builder would agree to such an expense.

Avoiding the Trap

So what does a homeowner board member or association manager do when presented with this situation? While each case is different, here are some general guidelines to keep in mind: a) First, as discussed above, the builder is required to build the community free from construction defects. Therefore, an association does not waive its rights to pursue later claims for construction defects simply because it does not engage in a walk-through process at, or shortly after, turnover; b) Second, as also discussed above, the repairs performed as the result of this process are usually minor or cosmetic in nature. So, the Board must weigh the benefits to be gained from the process against the risks associated with it; c) Third, the Board (and its manager) should *never* sign any type of release agreement without consulting a qualified attorney; and d) Fourth, if the Board truly believes engaging in this type of process is in the association's best interest, it should



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assure that a comprehensive evaluation of the community is performed by qualified experts, and it should assure that it has adequate legal representation to guide it through the process.