

## **DESIGN PROFESSIONAL CHECKLIST FOR CONDOMINIUM PROJECTS**

### **INTRODUCTION**

Design professional firms involved in condominium projects should consider using a Risk Management Checklist to evaluate potential risks and to negotiate appropriate risk allocation provisions in professional services contracts.

While generic risk management checklists exist, we recommend that design firms develop their own tailor-made internal checklist, adapted to the needs of the firms' individual practices and recognizing the risks and protections under the Washington Condominium Act and Washington construction law. Risk tolerance will vary from firm to firm and project to project. Risk tolerance will also depend on intangibles that can change over time, including the overall state of the residential real estate market, competition for work, changing insurance limitations, and other factors.

Firms doing this kind of work should carefully consider the issues below, designate appropriate lead principals to approve any condominium assignments, and prepare their own "go / no go" evaluation forms to manage the intake process for new work in this area. We offer the following topics as examples to be considered by your firm for its risk management checklist.

- 1. Know the client.**
- 2. Develop your scope of work with due regard for foreseeable risks.**
- 3. Coordinate your work with others.**
- 4. Know the general contractor.**
- 5. Get paid.**
- 6. Understand your insurance.**
- 7. Understand your contract.**

### **Know the client.**

- What is the track record of the developer from prior projects? Is there a history of claims? Is the developer adequately capitalized to handle claims?
- Will you be contracting with a project-specific entity (generally an LLC) that will go out of business when the project is turned over to a homeowners' association? Will the principals in the project-specific entity personally guarantee your contract?
- Does the developer have a reasonable approach to assuring basic building quality?
- Is the project budget sufficient to produce a quality design and also to allow for quality construction? Is there a reasonable design and construction contingency in the budget?

**Develop your scope of work with due regard for foreseeable risks.**

- Will you be allowed to develop a design that incorporates current state-of-the-art features to address proper weather protection?
- Have you identified foreseeable problem areas (unstable soils, steep slopes, excessive ground water, lack of roof overhangs, unprotected flat decks, etc.)?
- Who else will be on the design team and will these other design team members be able to deliver their responsibilities for a quality design? Are they adequately insured?
- Will you be responsible for coordinating and integrating all design elements?
- What will be your responsibilities for obtaining necessary permits?
- Will there be a waterproofing or building envelope consultant, and if so, will this entity be under contract to you or to the developer? Will you be allowed to select or approve the waterproofing consultant? Will the waterproofing consultant be providing monitoring services during construction? Is the waterproofing consultant adequately insured?
- What will be your role during the course of construction? Will you be asked to review and approve shop drawings? Will you be making periodic inspections of the work? Will you be attending weekly job site meetings during construction?
- Will you be afforded the opportunity to develop a punch list of construction issues at substantial completion and will you be assigned the role of reviewing completion of punch list items prior to final completion and the sale of any units?
- Is the construction timeline for your work reasonable?
- Will you be allowed to recommend and to approve all building elements that could affect quality, such as windows, doors, roofing systems and waterproofing?

**Coordinate your work with others.**

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- Will the developer retain a separate Construction Manager? If so, what will be the division of responsibilities between you and the Construction Manager? Will the Construction Manager play any role during the design phase? Is the division of labor between you and the Construction Manager adequately documented?
- If other design firms have separate contracts with the developer, are those contracts uniform and integrated with regard to scope of work, risk allocation and dispute resolution?
- Will there be design-build elements in the project delivery, such as: HVAC, elevators, fire suppression, electrical, plumbing? If so, will you be expected to review and comment on design-build submittals? Will those submitting design-build plans be required to carry professional errors and omissions insurance?
- How will change order requests be handled?
- How will submittals be logged, reviewed and approved?

### **Know the general contractor.**

- Will you be assisting the Owner in selecting a General Contractor?
- If the Owner is acting as the General Contractor, is the Owner up to this task? Does the Owner have a track record for actually constructing projects of comparable scope?
- Will the Owner require that the General Contractor enter into a detailed construction contract? Will you be allowed to comment on the contract form?
- Will the Owner require that the General Contractor have written contracts with all subcontractors and that principal risk allocations of the Prime Contract flow down to the subcontracts? Will the Owner be allowed to approve all principal subcontracts?

### **Get paid.**

- Does the Owner have the funding to pay you for design services, especially prior to the construction loan?
- Do you have adequate copyright protection for the conceptual design you prepare in case the Owner terminates your services prior to finalization of construction documents?
- Does the Owner have a funding commitment? Does the building need to be pre-sold before funds will be released by the lender?
- Do you have the right under your contract to request assurances about funding throughout the project? Does your contract allow you to stop work if you are not being paid?
- Have you discussed your lien rights with the Owner?

### **Understand your insurance.**

- How will the project be insured?
- Do you have professional errors and omissions coverage for condo work?
- Is your coverage adequate for the foreseeable risks?
- Will the Owner be providing an OCIP? Does the OCIP cover design services? Is your professional errors and omissions policy at risk before the OCIP comes into play? Are you responsible for a high deductible under the OCIP?
- Is the OCIP policy large enough to cover foreseeable claims?
- Is there a waiver of subrogation within the OCIP?
- Will the Owner and the Architect be “Additional Insureds” under the General Contractor’s General Liability policy?
- Who will carry Builder’s Risk coverage during the course of construction? Will the Builder’s Risk coverage be on an “All Risk” form?

**Understand your contract.**

- Do you have a signed design professional contract in place before commencing any work?
- Have you asked your professional liability insurance broker, carrier or your attorney to review your proposed contract before it is signed?
- If your role or scope changes, will your contract be amended?
- Are all indemnity obligations imposed upon you in the design professional contract limited to incidents of your own professional negligence?
- Can you obtain a meaningful limitation of liability clause in your contract?
- Is there a waiver of consequential damages?
- Are you satisfied with the disputes resolution provisions in the contract, including prevailing party attorney’s fee clauses?
- Are you protected against the unauthorized re-use of your documents for other projects?
- Does your design professional contract address all of the above issues?
- Can you obtain a waiver of subrogation clause from the Owner? Can the Owner include a waiver of subrogation clause in the Declarations, binding the Homeowner’s Association and Unit Owner.

