AIA
Contract
Documents

Guide for Supplementary Conditions to B109–2020

for use on Condominium Projects

AIA Document B509™–2020

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Introduction

The model language included in this guide is drafted to provide general guidance and is not intended to provide legal advice. Laws regarding the use and enforceability of the model language vary from jurisdiction to jurisdiction. Users of this guide are encouraged to familiarize themselves with the condominium statutes applicable in the jurisdiction where the project is located and to consult with an experienced attorney.

Purpose of this Guide

This guide serves two purposes:

(1) it provides guidance regarding issues unique to condominium construction, and

(2) it provides model language that may be used to amend or supplement AIA Document B109™–2020, Standard Form of Agreement Between Owner and Architect for a Multi-Family Residential or Mixed Use Residential Project, to tailor it for use on condominium projects.

AIA Document B109-2020, provides the basic legal framework for the agreement between owner and architect. Because of the unique risks of condominium construction, requirements of the condominium developer (owner) and variations in specific legal requirements from jurisdiction to jurisdiction, standard form agreements typically require modifications to adapt them to individual projects. The modifications in this guide are intended to foster cooperation and mitigate risks for all parties involved in the condominium project.

Arrangement

The information and model language presented in this guide follows the article and section numbering of AIA Document B109–2020. However, the guidance and model language presented may be relevant to other AIA agreements. This guide is not a standard form supplementary conditions document. Model language is sometimes presented in several alternative versions, and some language presented may not be appropriate for a particular project. Because of its flexibility, this guide is intended to be used as a working tool to help the user develop and present, in an orderly way, the additional information needed as part of the owner/architect agreement for a specific project.

How to Use

AIA Document B109–2020, Standard Form of Agreement Between Owner and Architect for a Multi-Family Residential or Mixed Use Residential Project, is used as the framework to which all of the items discussed in this guide are related. The numbering in this guide follows the numbering of the relevant provisions in B109–2020.

This guide assumes that modifications will be made directly in the text of the owner/architect agreement through the use of AIA Contract Documents software. Alternatively, supplementary conditions may be assembled as a separate document cross-referenced to the owner/architect agreement.

Please note: Times New Roman typeface (for example, Architect) indented from the body text of the guide is used only for material that is intended as actual model language which may be used for a specific project, and

represents material which may be added to, deleted or revised, and then incorporated into the owner/architect agreement or supplemental conditions document. Arial typeface (for example, Owner) is used for explanatory notes and identifies items needing attention or issues that should be considered.

Modifications to the Contract for Construction

Because AIA Document B109–2020, Standard Form of Agreement Between Owner and Architect for a Multi-Family Residential or Mixed Use Residential Project is coordinated with agreements and other documents in the A201 family of documents, the complete deletion of a particular provision in the owner/architect agreement should be avoided. Section deletions and/or re-numbering can play havoc with carefully coordinated internal references and cross references to other agreements.

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Guidance and Model Language

Before undertaking a condominium project, an architect should develop an understanding of applicable laws and regulations governing the development, sale, and operation of condominiums. Certain obligations, rights, remedies, and reliefs may exist at law which may not be apparent in the language of the owner/architect agreement. A thorough understanding of local condominium law, statutes of limitation, statutes of repose, and right to repair statutes may be useful in evaluating what, if any, supplemental language is necessary or advisable.

Questions regarding the entity with which the architect is contracting often go unasked, but may be appropriate for the architect to evaluate its exposure on condominium projects, such as whether the owner is a special purpose entity that has been created solely for the project or whether will be able to satisfy its financial, indemnity, and other obligations under the contract. As risky as a condominium project might be, the risk is heightened when dealing with an inexperienced owner or one who rarely develops condominium projects.

Below are questions architects should ask of every owner considering condominium development:

- How many condominium, mixed-use or other residential developments has the owner successfully completed in the past?
- Is the owner a single-purpose entity? Who is/are the beneficial owner(s)?
- Does the owner own the property to be developed?
- What is the owner's litigation history?
- What is the owner's source of financing? Is it committed to the project?
- Does the owner have condominium sale documents that it has used on past projects or intends to use on this project?
- How has the owner managed unit-owner complaints on past projects?
- What is the owner most important priority: quality, costs, schedule, or something else?
- Will the owner retain ownership in the property? If so, what percentage?
- Will the owner maintain responsibility for maintenance of the project? If so, on what portions or elements of the project?

Answers to these questions can reveal a great deal about the owner's sophistication, experience, and seriousness about the project. They also can reveal areas of risk the architect may need to specifically address with supplemental language set out in this guide.

Financing of the owner's obligations on a condominium project following turnover to the homeowners association can be a significant concern for the architect and contractor. Unfortunately, there are few contractual solutions for addressing this risk. When the owner dissolves the entity created for development of the project after the homeowners association takes over, the architect, contractor, and others may be left without an entity to fulfill

the owner's obligations. Adequate evidence that the owner is well funded, familiar with the community where the project is located, and in business for more than this project can provide the architect with additional assurance that the owner will be able to meet its obligations. These assurances, however, are not contractual obligations.

The architect may approach financing of the owner's post-turnover obligations with contract language in a couple of ways. One way would be for the architect to obtain a separate contractual guarantee from an adequately funded entity or individual that will fulfill the owner's obligations if the owner fails to do so. This may be in the form of a parent company guarantee or in a personal guarantee from an individual. The guarantee would be a contractual pledge from one party (a *"guarantor"*) to satisfy the debts and obligations of another, in this case the project owner, in the event the owner is incapable of doing so. Owners of condominium projects typically create single-purpose entities for the purpose of limiting exposure to post-turnover liabilities. The single purpose entity usually has few, if any, assets. They are often dissolved following turnover of the project. An architect may consider asking for a guarantee that provides some financial backing to the owner's indemnity obligations over a limited time period. For example, the guarantor may guarantee the owner's indemnity obligations in the owner/architect agreement up to a stipulated sum for a period extending from turnover through the applicable statutes of limitation or statute of repose. Guarantees are complex instruments with significant legal implications for both the guarantee and the guarantor. Those considering guarantees should consult an attorney practicing in the jurisdiction where the project is located for advice.

Another contractual approach to financing the owner's post-turnover obligations may be to require the owner to obtain a project-specific professional liability policy. See § 6.29 of this guide for further discussion on these types of policies.

Article 1 – Initial Information

§ 1.1.14 Section 1.1.14 of B109 now includes a list of consultants that each address aspects of the design of a multi-family project subject to increased risk. The parties are given the discretion to decide who will contract with each consultant. For condominium projects, these consultants should be designated as the responsibility of the owner. Owners are encouraged to retain these consultants to ensure they can provide an independent, third-party review of those aspects of the design that are most likely to result in claims, disputes, and other risks following occupancy. If the architect retains any of these consultants, then the architect should ensure that the terms of this owner/architect agreement flow down to the consultant in the corresponding architect/consultant agreement.

Regardless of who retains these consultants, the responsible party should verify that they maintain adequate insurance that does not exclude coverage for condominium projects.

§ 1.4 Special Definitions. Various state and federal laws, as well as common usage, have given rise to a number of terms unique to condominium projects. The model language presented in this guide often uses terms that are not otherwise defined in AIA Document B109–2020. Included below are a number of terms that are specific to condominium projects and used as defined terms throughout the model language included in this guide. The list of defined terms may be tailored to the particular supplemental terms

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you chose to include in B109–2020 or use in supplementary conditions. In addition, terms may have different meanings or may be used differently in your jurisdiction. Users are encouraged to consult with an attorney experienced in condominium law in the jurisdiction where the project is located regarding the use of specific defined terms.

Add the following new Section 1.4:

Model language:

§ 1.4 Special Definitions

§ 1.4.1 Condominium

The Condominium is the multi-family or mixed use residential property comprising all or part of the Project, the Units of which are individually owned by Unit Owners who share in joint ownership of any Common Elements. The Condominium is established as a condominium pursuant to a Condominium Declaration recorded in accordance with the requirements of the jurisdiction where the property is located.

§ 1.4.2 Homeowners Association or HOA

The Homeowners Association or HOA is an entity consisting of Unit Owners and which governs the affairs of the Condominium after the first Unit is sold.

§ 1.4.3 Homeowners Association Board or HOA Board

The Homeowners Association Board or HOA Board is the person(s) to whom some or all of the powers of the Homeowners Association have been delegated under the Condominium By-Laws.

§ 1.4.4 Condominium By-Laws

The Condominium By-Laws are the written by-laws recorded with the Condominium Declaration governing the administration and operation of the Homeowners Association and use and management of the Condominium.

§ 1.4.5 Condominium Declaration

The Condominium Declaration is a written document recorded in accordance with the requirements of the jurisdiction where the Project is located which establishes the Condominium and may include the Condominium By-Laws, Condominium Plat, and other required documents.

§ 1.4.6 Condominium Plat

The Condominium Plat is the document recorded in accordance with the requirements of the jurisdiction where the Project is located which may describe the boundaries of the Condominium, diagrammatic floor plans of the Project, elevations of the Project, designation of Units, a surveyor's certificate and other required information.

§ 1.4.7 Unit(s)

A Unit is the three-dimensional space identified as a unit in the Condominium Declaration or Condominium Plat and all improvements in the space except those specifically excluded in the Condominium Declaration. Units refers to more than one Unit.

§ 1.4.8 Unit Owner

A Unit Owner is the person or persons holding legal title to a Unit.

§ 1.4.9 Purchase Agreement

The Purchase Agreement is any contract for sale of one or more Units within the Condominium including any ownership interest in the Common Elements or Limited Common Elements of the Condominium as may be applicable.

§ 1.4.10 Common Element

A Common Element is any of the Condominium property excluding the Units.

§ 1.4.11 Limited Common Element

A Limited Common Element is any Common Element designated in the Condominium Declaration as reserved for the use of a certain Unit or Units to the exclusion of other Units.

The remainder of this guide uses the terms as defined above and presumes that those terms have been added into the owner/architect agreement.

Article 2 - Architect's Responsibilities

§ 2.3 It cannot be overstated that, when entering into an agreement for a mixed-use or multi-family residential project, the architect must know whether any units will be sold as condominiums.

Because AIA Document B109–2020 is intended for use on multi-family projects other than condominiums, Section 2.3 includes an explicit representation by the owner that the project will not include a residential condominium. When B109–2020 is used for condominium construction, Section 2.3 should be deleted in its entirety.

Delete Section 2.3 in its entirety.

Model language:

§ 2.3 Intentionally Deleted

§ 2.7 Insurance. While common practice, the architect's maintenance of insurance following completion of the project is a critical component of the architect's risk management program. Claims on condominium projects often arise after completion and it is important that the architect have insurance available to offset this risk.

In every state, a unit-owner's right to bring a claim against an owner or architect is governed by statutes of limitation and a statute of repose. Statutes of limitation provide a limited time period, which varies from state to state, during which a unit-owner may initiate legal action to recover damages for negligence and/or breach of contract by the owner or architect. This period typically begins to run for an apparent defect at substantial completion of the project. An *"apparent defect"* is one that the unit-owner discovered or, exercising reasonable diligence, should have discovered during the limitations period. Statutes of limitation are generally subject to an important exception that is commonly relied upon by unit-owners on condominium projects. The time period for initiating legal action to recover damages resulting from a *"latent defect,"* one that could not have been discovered during the limitations period through reasonable diligence by the unit-owner, does not begin to run until the defect is actually discovered. This exception, which exists in most jurisdictions in one form or another, is generally referred to as the *"discovery rule"* and could extend the liability of the owner and architect many years beyond substantial completion of the project when a defect is concealed or the damage is not readily observable by the unit-owner. A statute of repose serves to fully and completely terminate the liability of the owner and architect at a fixed point in time [typically around ten (10) years following substantial completion] regardless of whether the defect is apparent or latent or when it was discovered.

However, varying circumstances may arise that make it commercially unreasonable to maintain the owner's required level of coverage for the full-duration of potential liability. Premiums for condominium work may increase on an annual basis or insurers may discontinue coverage.

If the architect is required by the owner to maintain coverage for a specific term beyond a year or two following substantial completion, the architect

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should insert language in this agreement to clarify that this obligation should only continue if coverage is reasonably available at rates similar to those available at the time of entering the owner/architect agreement.

Add the following new Section 2.7:

Model language:

§ 2.7 The Architect shall attempt to maintain the coverage required under Sections 2.6.1 and 2.6.6 for a period of _____ (__) years following the final completion of the Project or any earlier termination of this Agreement; provided, such coverage is reasonably available at rates substantially similar to rates available as of the date of this Agreement.

§ 2.8 Additional Professional Liability Insurance. Alternatively, if the architect is required by the owner to maintain professional liability coverage in excess of its ordinary practice policy for a specific term, the architect should insert language in the owner/architect agreement to clarify the amount of the excess coverage and the owner's obligations to pay the premiums required to maintain the required level of coverage. Architects and owners should note that the project-specific endorsement offered below is not the same as a project-specific professional liability policy discussed in Section 6.29. These endorsements add limits on the architect's practice policy that are specific to a particular project. These limits must be renewed on an annual basis and, therefore, carry an annual premium.

Add the following new Section 2.8:

Model language:

§ 2.8 The Owner acknowledges the Architect's ability to achieve the limits of Professional Liability coverage stated in Section 2.6.6 requires the Architect to procure and maintain a project-specific endorsement in the amount of ($) per claim and ($) in the aggregate for a period of _____ (__) years following the substantial completion of the Project or any earlier termination of this Agreement. The Owner further acknowledges and accepts that the premium for this project-specific endorsement is ($) per year. The Architect's obligation to maintain this project-specific endorsement is conditioned on and subject to the Owner's payment of this premium no later than 60 days prior to the date the Architect's Professional Liability policy expires as set forth in the certificate of insurance provided by the Architect pursuant to Section 2.6.8.

Article 3 – Pre-Design Services

§ 3.1 If the architect will be providing fiduciary services in connection with assisting the owner in determining the viability of the project and developing pre-design options for the project, the architect should consider adding appropriate language to disclaim fiduciary liability.

Article 4 – Scope of Architect's Services

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§ 4.3 Design Development Phase Services

§ 4.3.4 Mock-ups. Acoustics and water penetration are particularly important in condominium projects. Development of mock-ups and the subsequent testing of specific systems is especially beneficial to the design of condominiums. The architect may want to specify field or laboratory testing for certain acoustic, envelope, and mechanical systems prior to their

installation on the project. If the owner does not agree with the architect, then the architect should document its concern in writing to the owner (see also B109–2020 section 4.1.5).

The purpose for including a mock-up requirement in the design development phase is to encourage the parties to engage in a conversation regarding the scope and type of mock-ups, and also to complete the mock-ups and related testing early in the design process to allow adjustments, if necessary, in the contract documents. It is important that the parties involved in the project reach a consensus with regard to major assemblies, materials, systems, and specifications used on the project. Accordingly, all parties must agree to an acceptable level of performance and identify appropriate testing standards in the contract documents.

§ 4.6 Construction Phase Services

§ 4.6.1 General

§ 4.6.1.4 Construction phase services allow the architect to observe the progress and quality of the work, to identify potential sources of claims, and to work with the contractor and owner to take proper corrective actions during construction. Condominiums create additional risk for the parties if the architect's construction phase services are limited by the owner. For projects where the architect is not obligated under its contract to provide full construction phase services, the architect may wish to request indemnity from the owner for construction related claims, including claims brought by the homeowners association and other third parties. See Section 11.12 for sample indemnity language.

Add the following new Section 4.6.1.4:

Model language:

§ 4.6.1.4 The Architect's Construction Phase Services shall not be modified or reduced except by written modification to this Agreement signed by the Owner and Architect.

Article 5 – Supplemental and Additional Services

§ 5.1. Particularly in the case of a condominium project, the following potential supplemental services can address common sources of problems, such as deferred maintenance, that may result in claims. These provisions are not intended to be protective of the architect or the owner, but may be necessary to the successful completion of the project. In many instances, these supplemental services may increase the liability exposure of the party providing them. However, by providing these supplemental services, the owner and architect may be able to mitigate potential problems at an early stage, thus reducing the potential for claims and increasing the potential for a successful project.

Condominium Plat. Typically a condominium plat is attached to the condominium declaration. The requirements for the condominium plat may vary depending on the jurisdiction where the project is located. For example, some jurisdictions may require the use of a surveyor in preparation of the condominium plat. The architect is encouraged to understand the requirements applicable in the jurisdiction of the project.

Condominium plat should be added to the table in Section 5.1.1. If the architect is designated as the party responsible for providing the

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supplemental services, then the following language may be inserted in Section 5.1.2.1 or the parties may furnish a description in an exhibit attached to the agreement:

Model language:

Condominium Plat. The Architect shall prepare a Condominium Plat for the Owner that comports with the requirements of the jurisdiction in which the Project is located.

Post-Occupancy Site Visits. Design or construction defects or failure to perform required maintenance activities can lead to damage and costly repairs many years after substantial completion. The potential for suits may be mitigated by regular post occupancy project site visits by the architect. During its site visit the architect should note any observed deficiencies or failure to meet maintenance requirements. These site visits may facilitate proper periodic maintenance by the homeowners association. Additionally, early discovery of defects may allow for prompt remedial action, minimizing damage, repair costs, and legal action. It should be noted that the post-occupancy site visit is not intended to be an exhaustive check or detailed inspection and will not include invasive testing or observation of areas not readily accessible.

If the architect will perform post-occupancy site visits, it should be added to the table in Section 5.1.1 with the architect designated as the party responsible for providing the supplemental services. The following language may be inserted in Section 5.1.2 or the parties may furnish a description in an exhibit attached to the agreement:

Model language:

Post-Occupancy Site Visits. The Architect shall perform a one-day site visit not more than once annually for a period of _____ (__) years following Substantial Completion of the Project. The Architect shall note deficiencies observed in the Project, including failure to meet maintenance requirements, if observed by the Architect, and provide a written report to the Homeowners Association. The Architect's site visit shall not include invasive testing, or testing or observation of areas not readily accessible.

While continuous or regular post-occupancy site visits for a period of time following substantial completion may help mitigate potential suits, the architect should also understand that providing these on-going services as part of their underlying owner/architect agreement may extend the period of time in which a suit can be brought against the architect. In many jurisdictions, but not all, the statute of limitations, which is the time period in which a lawsuit must be filed, does not begin to run until the architect last provides services for the project. Therefore, in those jurisdictions, post-occupancy site visits extending out after occupancy may effectively toll the running of the statute of limitations for the duration of those site visits. Accordingly, an architect considering this service as a supplemental service to the underlying agreement would be well served to discuss the impact on-going services will have on the applicable statute of limitations with a local attorney in order to fully weigh the potential benefits and detriments of ongoing post-occupancy site visits.

As an alternative approach with regard to post-occupancy site visits, the architect may want to enter into a separate arrangement to provide on-

going site visits. This approach would allow the underlying owner/architect agreement to run its normal course, thereby allowing the statute of limitations related to the architect's design services for the project to begin to run. The site-visits would then be a separate set of services unrelated to the original design services the architect provided for the project. Again, the architect should consult with a local attorney in order to evaluate the effectiveness of this alternative approach as it relates to the running of the statute of limitations, as each state's law are nuanced on this issue.

On-Site Project Representation. The architect may consider providing a full-time representative at the project site during the construction process using AIA Document B207™–2017, Standard Form of Architect's Services: On-Site Project Representation. B207–2017 is recommended for condominium projects because it establishes the parameters by which the architect provides additional resources and time to attend job-site meetings, monitor the contractor's construction schedule, observe systems and equipment testing, prepare a log of activities at the site, and maintain on-site records. This on-site presence can afford the architect the opportunity to respond to issues in a more proactive manner, interface more frequently with other project participants, recognize errors, and notify the owner as early as possible. AIA Document B207–2017 can be referenced and attached as an exhibit to B109–2020. The architect should ensure that the B207 provides for increased on-site presence for key project consultants during appropriate stages throughout construction.

If the architect will have a construction site presence, designate the architect as performing this supplemental service under Section 5.1.1.12 of B109–2020. The following reference to this supplemental service may be inserted in Section 5.1.2.1:

Model language:

On-site Project Representation. The Architect shall provide those services described in AIA Document B207™–2017, Standard Form of Architect's Services: On-Site Project Representation, attached as Exhibit _____.

Article 6 – Owner's Responsibilities

§ 6.9 Owner's Consultants. For the reasons stated above, the owner should contract separately for the services of consultants, including, in some cases, licensed professionals such as engineers. Coordination of the architect's documents with those of the consultants is critically important and requires careful handling. The owner's consultants should be required to coordinate their drawings with those prepared by the architect. The architect's review must be limited to general conformance with design concepts. Full review by the architect would involve duplication of the consultant's services by the architect and thus negate any cost savings anticipated by the owner. The architect, on the other hand, does not have authority over the consultants' services, should not be held responsible for their adequacy, and cannot certify progress payments or substantial completion for the portion of the work designed by the owner's consultants.

Add the following paragraph at the end of existing Section 6.9:

Model language:

Unless otherwise indicated, consultants retained by the Owner shall be licensed

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professionals, who shall affix their seals on the appropriate documents prepared by them. The contracts between the Owner and Owner's consultants shall require the consultants to coordinate their drawings and other instruments of service with those of the Architect and to advise the Architect of any conflict. The Architect shall have no responsibility for the components of the Project designed by the Owner's consultants. Review by the Architect of the consultants' drawings and other instruments of service is solely for consistency with the Architect's design concept for the Project. The Architect shall be entitled to rely upon the technical sufficiency and timely delivery of documents and services furnished by the Owner's consultants, as well as on the computations performed by those consultants in connection with such documents and services. The Architect shall not be required to review or verify those computations or designs for compliance with applicable laws, statutes, ordinances, building codes, and rules and regulations, or certify completion or payment for the Work designed by the Owner's consultant.

Section B-4 of AIA Document B503™–2017, Guide for Amendments to AIA Owner/Architect Agreements, contains additional language related to owner's contractors and consultants that may be useful in this application.

§ 6.18 Contractor's Correction of Non-Complying Work Identified by the Architect. The owner's responsibilities should include requiring the contractor to closeout reported issues in the architect's and consultants' field observation reports, as they can be a critical source of "smoking guns" in future claims if there is no documented closeout. It is unreasonable or impossible for the architect or consultant to close them out if they are not on site every day. Architects will often try to specify this owner responsibility in the specifications, but owners often fail to comply and require the architect to work with the contractor to closeout reported issues.

Add the following Section 6.18:

Model language:

§ 6.18 The Owner shall require the Contractor to create, maintain, and periodically update a Field Report Log documenting corrections to non-complying work identified during construction. The Owner shall require the Contractor to submit corrective proposals to the Architect for approval if the correction requires a change to the Contract Documents.

§ 6.19 Contractor Qualification. The success of the project may be increased if the contractor and its subcontractors have proven experience and are qualified to perform work on condominium projects. First, it is important that the contractor and its subcontractors have residential condominium experience. Generally speaking, condominiums are expected to have a higher level of quality, complexity, and finish than other types of residential construction. Therefore, a greater amount of skill and coordination ability is required. Second, it is important that the contractor and its subcontractors have experience in the particular type of construction that is proposed for the project.

Add the following Section 6.19:

Model language:

§ 6.19 The Owner shall solicit information from potential contractors for the Project to determine if those possible contractors have demonstrated experience in the construction of Condominium Projects. The Owner shall provide the information

received from contractors to the Architect and solicit recommendations from the Architect on the most suitable contractor for the Project. The Owner, however, is solely responsible for selection of the Contractor.

§ 6.20 Contractor's Insurance. Errors and omissions on the part of the contractor are possible on all construction projects. However, the ownership structure of a condominium provides the potential for class action claims or claims brought by the homeowners association that usually affect all parties involved in the construction process. Therefore, it is imperative that the owner require appropriate and adequate insurance coverage from the contractor, with the owner and architect named as additional insureds. In addition to what would ordinarily be required of the contractor in an AIA owner/contractor agreement, the contractor's insurance coverage for a condominium should include endorsements to the general liability insurance for residential construction, mold, mildew, and EIFS. Many contractors may not carry this type of insurance as part of their traditional insurance program and this coverage may come at an additional cost to the owner. The requirement to maintain the specific insurance coverages should extend beyond the date of substantial completion. In 2014 AIA Contract Documents for design-build projects introduced an insurance exhibit for use in conjunction with the either A141–2014, Standard Form of Agreement Between Owner and Design-Builder or A142–2014, Standard Form of Agreement Between Design-Builder and Contractor. Since then, 2017 and 2019 AIA owner/contractor or owner/CM as constructor agreements that might be used for the construction of condominium projects also have insurance exhibits. Care should be used in completing those exhibits and selecting required coverage for condominium projects.

Add the following Section 6.20:

Model language:

§ 6.20 The Owner shall require any contractors performing work on the Project to obtain and maintain endorsements to their general liability insurance to include residential construction, mold, mildew, and EIFS if required by the Project. If any contractor is providing professional design services, the Owner shall require that contractor to provide professional liability insurance covering those services. The Owner shall require the contractor to maintain such insurance for a period of __ years following Substantial Completion of the Project. The Owner shall also confirm that the commercial general liability coverage ultimately provided by the Contractor does not contain exclusions for Condominium construction.

See § 6.29 for further discussion on owner insurance requirements.

§ 6.21 Owner Financing. The owner's ability to finance the project is critically important for success. AIA Document A201–2017, General Conditions of the Contract for Construction, provides for owner disclosure of financing information to the contractor under specified circumstances and can be adapted for use in B109–2020 as follows.

Add the following Section 6.21:

Model language:

§ 6.21 Prior to commencement of the Architect's services under this Agreement, the Architect may request in writing that the Owner provide reasonable evidence that the

Owner has made financial arrangements to fulfill the Owner's obligations under this Agreement. Thereafter, the Architect may only request such evidence if (1) the Owner fails to make payments to the Architect as this Agreement requires; (2) a change in the Architect's services materially changes the scope of the Architect's services; or (3) the Architect identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Architect's services or the portion of the services affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Architect.

Maintenance Manual. Failure to provide regular maintenance of building systems, especially elements of the exterior envelope, is a common source of building failures. Homeowners associations may be unfamiliar with the complex construction components that comprise a multi-family residential structure, and may not be prepared for the costs and assessments necessary to accomplish both recurrent and periodic maintenance. Failure to regularly inspect and maintain building elements and systems, such as roofing, flashing, caulk joints, and expansion control systems may result in damage to the property and costly repairs.

Risk may be mitigated by preparing a maintenance manual that details the maintenance procedures needed for the project. These manuals differ from the normally specified operation and maintenance submittals in that they describe maintenance activities for building systems and prescribe preventative maintenance and inspection activities not normally included in the operation and maintenance submittals. Care should be taken to accurately define the scope of the maintenance manual; for example, whether the maintenance manual is an all-inclusive, exhaustive document, or whether it is focused primarily on building systems, elements or components that are often overlooked. The contractor or a building maintenance specialist are the parties best situated to prepare a maintenance manual. Model language should be added to Section 6 as part of the owner's responsibilities.

To ensure that the homeowners association is aware of the required maintenance of the building and as an additional protection against the homeowners association failure to perform proper maintenance activities, a provision specifically requiring that the owner provide the homeowners association with a copy of the maintenance manual may be included. The architect may review the relevant individual specification sections to determine that the appropriate information is included in the operation and maintenance submittals. The owner is responsible for obtaining a maintenance manual from the contractor. To ensure this occurs, insert the language below and refer to the sections in Article 6 regarding condominium by-laws.

Add the following new Section 6.22:

Model language:

§ 6.22 Maintenance Manual. The Owner shall require the Contractor to prepare and furnish to the Owner a building Maintenance Manual outlining the required maintenance procedures for the various components and systems of the Project. The Architect shall review the Maintenance Manual, but assumes no responsibility for the sufficiency and adequacy of the Maintenance Manual or any failure to perform required maintenance on any portion of the Project. The Owner shall provide each Unit purchaser with a Maintenance Manual as it relates to their home, and will provide a complete Maintenance Manual pertaining to all Common Elements to the HOA

for their use in maintaining the building's Common Elements and Limited Common Elements. The Owner shall maintain each Unit in accordance with the Maintenance Manual until the Unit is sold and turned over to the first Unit Owner. The Owner shall maintain the Common Elements in accordance with the Maintenance Manual until operation and governance of the Common Elements is transferred to the HOA.

§ 6.23 Owner's Cost Reduction Proposals. The consideration of construction quality versus cost, including opportunities for cost savings, is a concern on any project. An over-leveraged owner may affect the trade-off to a greater degree than typical in condominium projects. Value-engineering, long-term maintenance and the use of quality materials should be taken into consideration by the project participants. Short-term savings can often invite higher long-term costs and increased risk for the design team. The architect's involvement in the owner's cost reduction proposal process will assist the project participants in ensuring that overall project quality is not reduced by opportunities for cost savings.

Add the following Section 6.23:

Model language:

§ 6.23 All cost reduction proposals considered by the Owner shall be given to the Architect for review. The Architect shall be provided adequate time to review and respond to such proposals. If the Architect reasonably objects to any cost reduction proposal, it shall so state in writing to the Owner, along with its objections. If the Owner proceeds with a cost reduction proposal against the recommendation or objection of the Architect, the Owner assumes all risk arising out of or related to such decision. The Architect shall have no liability for the Owner's decision to use or substitute any material, equipment, assembly, or other aspect of the Work made against the recommendation, or without the knowledge, of the Architect.

§ 6.24 Owner to Provide Notice of HOA or Unit Owner Concerns. It may be useful for the architect to know when there is a concern by the owner, homeowners association, or individual unit-owner that may give rise to a claim against the architect by any of those entities. With prompt notification the architect may be able to adequately address the issue, thus avoiding a costly claim and preventing potential related damages.

Add the following Section 6.24:

Model language:

§ 6.24 If the Owner becomes aware of any issue, defect, error, or omission that may give rise to a potential claim or dispute by the Owner, the Homeowners Association, or a Unit Owner, the Owner shall provide the Architect with prompt written notice of the potential for such claim or dispute.

§ 6.25 Condominium By-Laws and Condominium Declaration. The condominium by-laws and condominium declaration are typically recorded after substantial completion and can establish responsibilities and procedures that may help to reduce the architect's exposure to homeowners association claims. The architect may not be accustomed to influencing the language of documents other than the owner/architect agreement. However, in this case it may be appropriate for the architect to negotiate these types of provisions with the owner since the architect's exposure relative to condominium claims

may extend beyond the owner to the homeowners association and individual unit-owners. In some circumstances, these entities may pursue claims against the architect after the owner is no longer in the picture.

The protections afforded to the architect by these provisions may not be particularly useful if the provisions are not accurately incorporated. With the exception of a possible breach of contract action against the owner, ensuring the provisions are actually included and acknowledged by the HOA board and unit-owners, is out of the architect's control. However, as a risk management tool, there is a benefit to at least attempting these strategies as the condominium by-laws and condominium declaration may be difficult to amend after they are recorded.

Regular maintenance of a condominium project may go unattended because the homeowners association has not established an adequate maintenance budget and the unit-owners do not wish to pay additional assessments. Particularly when a building is new, unit-owners may not budget for maintenance costs. It may be necessary to take the provision of the maintenance manual one step further by requiring that the homeowners association establish and maintain a sufficient budget to complete annual maintenance, repair, and inspection activities.

With the maintenance manual in hand and a budget established for the execution of maintenance, the owner should require that maintenance activities be conducted in compliance with the requirements of the maintenance manual.

Remember that the fundamental premise of the maintenance manual is to encourage the kind of regular inspection and maintenance that will prevent the real damage that often leads to claims. When negotiating these provisions be sure to emphasize that the language protects all the participants in the design and construction of the project, not just the architect.

Add the following Section 6.25:

Model language:

§ 6.25 The Owner shall include provisions in the Condominium Declaration and Condominium By-Laws to ensure that the Homeowners Association develops a maintenance and repair budget and adheres to the requirements described in the Maintenance Manual. The Owner shall also ensure that the Homeowners Association establishes a contingency for annual inspections and repairs of major systems, including the exterior envelope.

§ 6.26 Pre-Purchase Inspection and Right to Cure. It is always in the interest of the project participants to learn of defects sooner rather than later. In some cases, a small problem can be prevented from becoming a big problem. Requiring a pre-purchase inspection is a good way to identify and remediate apparent defects that may be present at the time of purchase.

Several states have established Right to Cure laws, some of which may be applicable to the architect. In states with established Right to Cure laws, the unit-owner or homeowners association is required to give the developer, and sometimes the other parties that are claimed to be responsible, notice of a defect and an opportunity to cure the defect prior to bringing a lawsuit. Regardless of whether the architect is statutorily protected, it may be wise to require that right to cure provisions be included in the condominium by-laws

and the purchase agreement for each unit. If the claimed defects are the fault of the architect, this provides an opportunity to cure the defect and avert the filing of a lawsuit.

Add the following Section 6.26:

Model language:

§ 6.26 The Owner shall include in the Condominium By-Laws and Purchase Agreement for each Unit a requirement that before the Unit Owners or the HOA Board may take any action or make any claim related to a defect discovered in the design or construction of the Project or any of the Units or Common Elements, the HOA Board shall be notified of the defect, if discovered by a Unit Owner, and the HOA Board shall notify the Owner, Architect, and Contractor in writing of the defect and provide the Owner, Architect, and Contractor no less than thirty days to commence actions to investigate and, if appropriate, cure such defect. The Owner shall include in each of the Unit Purchase Agreements a requirement that the Unit Owner have the Unit inspected by a qualified inspector prior to completion of the sale, and an acknowledgment by the Unit Owner that the Unit is acceptable at the time of the real estate closing with any defects noted or remedied by the Owner prior to purchase.

§ 6.27 Impediments to Lawsuits. Whereas the owner has a relationship with the architect that includes some level of communication, unit-owners do not typically share that same relationship with the architect and might therefore see a lawsuit as the means to resolve disputes. Litigation almost always proves to be expensive for all parties and a slow path to resolution of a problem. The owner and architect are encouraged to discuss various forms of dispute resolution and consider a dispute resolution approach that will be included in both the condominium by-laws and purchase agreements for the benefit all project participants. Some approaches are discussed below. Architects should consult with local attorneys experienced in condominium laws prior to selecting language.

§ 6.27.1 Because litigation may be costly and slow, inclusion of non-binding mediation as a prerequisite to litigation or binding arbitration in the condominium by-laws may result in a more cost effective resolution of claims.

OPTION A

Requirement for Mediation. Mediation as a prerequisite to litigation can provide the parties with an opportunity to address grievances brought by unit-owners. Mediation serves to acquaint the parties to a dispute with one another and provides a venue for them to hear another side of the story.

Add the following Section 6.27.1:

Model language:

§ 6.27.1 The Owner shall include in the Condominium By-Laws and the Purchase Agreement for each Unit a requirement that any dispute involving one or more Unit Owners, or the Homeowners Association, for itself or through the HOA Board, and the Architect, Owner, Contractor, or the contractors, subcontractors, or consultants of any of them, shall be first submitted to mediation in accordance with the procedures agreed upon by the Owner and Architect pursuant to Section 9.2, prior to submitting the claim or dispute to binding dispute resolution.

OPTION B

Requirement for Mandatory Arbitration. Opinions differ as to the merits of arbitration versus litigation. If arbitration is the preferred method of dispute resolution, the condominium by-laws should require arbitration. Arbitration is a method of dispute resolution.

Mandatory arbitration may be prohibited in some jurisdictions. Again, the user should consult with an attorney located in the applicable jurisdiction regarding inclusion of this provision.

If mediation is desired prior to arbitration, add the model language in Option A and then add the following language as Section 6.27.1.1. If mediation is not desired prior to arbitration, add the following language as Section 6.27.1:

Model language:

§ [6.27.1 or 6.27.1.1] The Owner shall include in the Condominium By-Laws and the Purchase Agreement for each Unit a requirement that any dispute involving one or more Unit Owners, the Homeowners Association, or the HOA Board and the Architect, Owner, Contractor, or the contractors, subcontractors, or consultants of any of them, shall be subject to mandatory arbitration in accordance with the American Arbitration Association's Construction Industry Arbitration Rules, current at the time of initiating arbitration.

§ 6.27.2 Requirement for Super-Majority Approval. Often the HOA board will have authority to institute a lawsuit. In many jurisdictions, suit may be initiated by majority approval of the HOA board members without consulting the other unit-owners. However, if the homeowners association brings suit, the cost of the suit will be borne by the unit-owners through assessments. By requiring that a super-majority (more than two-thirds) of homeowners association members consent to the filing of a lawsuit, the unit-owners may demand further investigation into the claim or propose other cost effective means of dispute resolution. Again, the user should consult with an attorney located in the applicable jurisdiction regarding inclusion of this provision.

Add the following Section 6.27.2:

Model language:

§ 6.27.2 The Owner shall include in the Condominium By-Laws and the Purchase Agreement for each Unit a requirement that the Homeowners Association obtain approval of more than two thirds (2/3) of all Unit Owners prior to initiating binding dispute resolution against the Owner, Architect, or Contractor.

§ 6.28 Architect's Recommended Materials. Because the architect's agreement in a condominium project may be with an owner that no longer has assets, or is no longer in existence once the project is fully sold, the influence that such an owner has on the design process creates more risk for an architect than in other types of projects. Decisions regarding quality, redundancy, and serviceability may be made with limited consideration of potential long term problems. With this in mind, the architect should take special care in documenting owner deviations from architect-recommended building systems, products, and applications. As a means of discouraging the owner from making decisions that might ultimately lead to claims against the architect after the owner has ceased to exist, consider including aggressive

indemnification language for building systems, products, or applications the owner selects against the recommendation of the architect. Practically speaking, this language may not prevent a third party claim brought against the architect by the homeowners association or unit-owners for a perceived defect, even if that defect is a specific result of the owner's decision. By the time the defect is discovered, the owner may no longer be in business. Nonetheless, the intent of this language is to give the architect an additional defense to claims from the homeowners association or unit-owners.

Add the following Section 6.28:

Model language:

§ 6.28 If the Owner requires the use of any systems, products, or applications, contrary to, or without, the recommendation of the Architect, the Architect shall not be liable for the use of those systems, products, or applications. The Owner shall indemnify, defend, and hold the Architect harmless from and against any damages, losses, and judgments, including reasonable attorneys' fees and expenses recoverable under applicable law, arising out of or resulting from the use of such systems, products, or applications, except to the extent such damage, loss, judgment, or expense is the result of the sole negligence or willful misconduct of the Architect.

§ 6.29 Owner's Insurance Requirements. The owner and architect's liabilities to third parties, including unit-owners, may extend long past completion of a condominium project. It is not uncommon, however, for there to be limited or no financial resources retained by the owner following turnover of the building to the homeowners association. Without the backing of financial resources of some kind, the owner's obligation to indemnify the architect in the owner/architect agreement offers little protection in subsequent claims by unit-owners or the homeowners association. The architect may consider requiring the owner, in the owner/architect agreement, to procure certain insurance policies and to extend reporting periods under those policies to cover the duration of liability imposed by law.

Alternatively, the architect may consider requiring the owner, in the owner/architect agreement, to procure a project-specific professional liability policy with an extended reporting period to cover claims arising during the project and for some period following its completion. Project-specific policies, however, can be quite difficult to obtain, as they can be expensive (potentially prohibitively expensive) and are not typically commercially available. If a project-specific policy is contemplated for a particular project, architects should consult with their insurance representative to more fully understand the impact, limitations, and preferred terms and provisions, of these types of policies.

To further elaborate on project-specific insurance, a properly procured project-specific professional liability policy will cover the negligent acts, errors, and omissions of the architect and its consultants through the policy period which typically begins with the first performance of professional services and ends on the date of substantial completion of the project. This coverage should be written as *"primary"* coverage of the professional liabilities of the insureds, with the practice policies of the architect and its consultants providing *"excess"* coverage. On condominium projects, an extended reporting period is highly advisable. This allows the architect and its consultants to report claims under the project policy which are discovered after substantial completion and, possibly, turnover of the project to the homeowners association.

Additionally, premiums on project policies consider several factors including the claim histories of the insureds; the project type; policy limits, policy period, and length of the extended reporting period; and the value of the deductible or self-insured retention (SIR). Owners and architects considering a project policy should engage their attorneys and insurance brokers to ensure the policies are properly underwritten and the conditions to coverage are understood and met. These include timely notifying the insurer of claims and cooperating with the insurer in resolving those claims. Architects should become fully acquainted with the terms and conditions of a project policy and treat these policies with same degree of care and attention they would treat their practice policy.

Also, project policies are typically *"eroding limits"* policies; which means that attorneys' fees, expert costs, and other claim expenses reduce the policy limits and the ultimate coverage available for payment of damages. It is important to note that claims on condominium projects often involve multiple parties which tends to result in higher claim costs. Therefore, those considering a project policy should take into account the probable costs of defense and damages when setting the policy limits. Additional terms may be required in the architect/consultant agreements establishing the conditions to coverage under the project policy, the right to opt-out of coverage (if permitted), and allocation of the deductible or SIR among insureds prior to final resolution of a claim.

To develop appropriate language to insert into the B109-2020, the architect should thoroughly discuss the desired and required insurance with all applicable parties, which could include the owner, the architect's insurance representatives, and counsel.

§ 6.30 Waiver of Subrogation. The right of subrogation is the right to pursue someone else's claim. That right can arise out of an agreement between the parties, or in some circumstances automatically by operation of law. In the context of insurance, the right of subrogation may arise when an insurance company (the subrogee) pays its insured (the subrogor), or pays a third party on behalf of its insured, for a covered loss. The insurance company then has the rights of the insured to pursue claims against third parties who are responsible for, or contributed to, the loss. However, the subrogee obtains no greater rights than those of the subrogor. In this regard, Section 9.1.2 in B109-2020 contains a broad waiver of claims between the owner and architect, to the extent damages are covered by property insurance. This same section requires "the contractors, consultants, agents, and employees of any of them" to similarly waive claims. The intent of these provisions is to bar subrogation claims, thereby avoiding the time and expense associated with protracted multi-party litigation, and to place the risk of loss with the compensated property insurer. After condominium projects transfer ownership to the unit-owners and condominium association, however, the waivers in the owner/architect agreement provide minimal protection to the architect. Therefore, architects may consider adding language in B109 requiring the owner to incorporate similar broad waivers of subrogation into the transfer documents (condominium by-laws, purchase agreements, etc.):

Add the following Section 6.30:

Model language:

§ 6.30 Waiver. Owner shall incorporate language in the Condominium By-Laws stating that the Condominium Association and its insurers waive all rights of

subrogation against the Owner, the Architect, and the Architect's Consultants to the extent that any insurer pays a claim for damages on behalf of the Condominium Association. Owner shall incorporate language in the Purchase Agreements with Unit Owners stating that each Unit Owner and their insurers waive all rights of subrogation against the Owner, the Architect, and the Architect's Consultants to the extent that any insurer pays a claim for damages on behalf of the Unit Owner.

Note: The obligation of the owner to include the waiver of subrogation in the purchase agreements pertains only to the first purchasers of the units. Subsequent unit-owners may not be subject to the waiver.

Article 9 – Claims and Disputes

§ 9.1.3 Indemnity. The indemnity framework in B109-2020 contemplates that the parties might use the agreement for a condominium project. There are three major components that apportion the risk appropriately between the parties, to include (i) the architect's negligence-based indemnity that is limited to the lesser of the stated amount of professional liability insurance coverage required of the architect under the agreement or a fixed amount stated in Section 9.1.6; (ii) mutual indemnity of the architect by the owner; and (iii) a mutual waiver of consequential damages. Some state laws prohibit certain forms of contractual indemnification. Therefore, the user should have any indemnification provision reviewed by legal counsel prior to inclusion in the owner/architect agreement. Here again, while these provisions limit the amount the owner might recover, they provide little protection from claims by the condominium association or unit-owners individually.

Architects should understand that the "stated amount of the professional liability insurance coverage required of the architect under this agreement" will not change over the life of the project, but the available insurance proceeds may decrease. Most professional liability polices are eroding policies, meaning any costs and expenses the carrier incurs in defending its insured (e.g. paying defense counsel) are charged against the policy limit, thereby eroding the total amount available to pay for damages under the policy. In addition, if the amount of professional liability insurance coverage required of the architect under the agreement is equal or close to the total amount of professional liability coverage carried by the architect, claims on other projects might also eat into the available coverage and create a deficit between the stated amount of coverage required under the agreement and the amount of coverage actually available to pay for damages. If these types of reductions happen, the architect may be placed in a situation where they are responsible for the difference between the available insurance proceeds and the stated amount of professional liability insurance coverage required under the agreement. If the architect wishes to avoid this potential situation, they can consider replacing Section 9.1.3 with the following suggested language:

Replace Section 9.1.3 with the following new Section 9.1.3:

Model language:

§ 9.1.3 The Architect shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this

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Agreement. The Architect's obligation to indemnify and hold the Owner and the Owner's officers and employees harmless does not include a duty to defend. The Architect's duty to indemnify the Owner and the Owner's officers and employees under this Section 9.1.3 shall be limited to the lesser of (1) the amount of the Architect's available professional liability insurance proceeds or (2) the amount stated in Section 9.1.6.

§ 9.1.6 Limitation of Liability. Because of the legally sensitive nature of limitation of liability provisions, the parties are cautioned to consult with legal counsel as to the specific application of local laws to this provision. Certain states may require statutory language be added to the contract to ensure enforceability.

A non-exhaustive list of potential options for completing Section 9.1.6 includes, for example, the following:

(i) A dollar amount, written as, for example, "One Million Dollars ($1,000,000)";

or

(ii) An amount equal to the Architect's compensation, written as, for example, "The compensation of the Architect for Basic Services as stated in Section 12.2."

When determining the appropriate amount to enter into Section 9.1.6, the architect should consider an objective description of a quantifiable sum less than the architect's available professional liability insurance proceeds.

Article 11 - Miscellaneous Provisions

§ 11.10 Remodeling and Renovation. Remodeling, rehabilitation, renovation, and restoration services often involve unforeseen conditions, including conditions concealed within components of an existing structure. These concealed conditions are not always discoverable before actual construction commences or circumstances may not be amenable to destructive materials testing. The decision of whether or not to have such testing performed is a business decision of the owner. If the owner undertakes the duty to investigate, the owner's responsibilities may be clarified by using the following model language, which should be added in the section on *Owner's Responsibilities*:

Model language:

The Owner shall conduct an investigation, including the use of destructive testing, if appropriate, of concealed conditions and shall provide the results of that investigation to the Architect for purposes of the Architect's preparation of the Instruments of Service. In the event documentation or information furnished by the Owner is inaccurate or incomplete, any damages, losses and expenses resulting from the inaccurate or incomplete information, including the cost of the Architect's Additional Services, shall be borne by the Owner.

In other instances, the owner may ask the architect to proceed using the available documentation, which may not be accurate and/or complete. The architect may wish to clarify responsibilities by using the following:

Model language:

The Architect shall utilize documentation regarding existing conditions furnished by the Owner in the preparation of the Architect's Instruments of Service and, in doing so, the

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> Architect shall be entitled to rely on the accuracy and completeness of the information provided. If the existing conditions materially differ from the documentation furnished by the Owner, the Architect shall have no responsibility for any costs or expense incurred by the Owner as a result of the differing conditions. In addition, if the Architect is required to make changes to the Architect's Instruments of Service, the Owner shall compensate the Architect for such services as an Additional Service.

In other instances, the owner may not have documentation and information for the existing facility and may not wish to engage the architect or others to perform destructive testing or investigate concealed or unknown conditions. In such instances, the following model provision may be used to further clarify the parties' responsibilities:

Model language:

> If the Owner does not provide documentation or information beyond that which is apparent by non-intrusive observations of the existing facility and the Owner does not perform destructive testing or investigate concealed or unknown conditions, the Owner shall assume sole responsibility, including the cost of Additional Services of the Architect, if any, for all unknown or concealed conditions that are encountered during construction that require changes in the design or construction of the Project.

If the owner requires the architect to investigate and document existing conditions, the architect should consider including the following model language to clarify its responsibility.

Model language:

> The Architect shall conduct a reasonable investigation of concealed conditions, including the use of reasonable destructive testing the Architect deems appropriate, and shall provide the results of that investigation to the Owner. However, the Architect cannot warrant or guarantee that the Architect's investigation will disclose all concealed conditions that may exist. The Architect shall not be liable to the Owner in the event the Architect's reasonable investigation fails to reveal existing conditions that later result in a change in the Work or other costs to the Owner.

§ 11.11 Marketing Materials. Potential claims may be avoided if marketing materials provided by the owner for the sale of the condominium(s) convey a realistic expectation of building materials, quality, and performance. It is not unusual for the owner, however unintentional, to create an expectation, through verbiage, photos, and/or descriptions, greater than what may be delivered (i.e., luxury, convenience, excellence, etc). The unit-owner's expectation may inadvertently transfer to the architect in the form of future claims due to misconceptions arising from the owner's marketing materials.

Early communication with the owner about the marketing materials will create a realistic understanding regarding the images and message the owner creates. This could create liability for the architect if the marketing materials include portions of the architect's *Instruments of Service*. The architect should include the following model language requiring the owner to provide samples of marketing materials for review if they are based upon the architect's instruments of service.

If the architect is given the opportunity to review marketing materials, it will be very important to object to and document any language with which the

architect disagrees, as failure to object may imply acceptance.

Add the following Section 11.11:

Model language:

§ 11.11 The Owner shall prepare marketing materials that set realistic expectations of building materials, quality, and performance. The Owner shall provide the Architect with samples of proposed marketing materials that include the Architect's Instruments of Service at least 21 days in advance of publication, and afford the Architect an opportunity to review the proposed marketing materials and raise any objections. If the Architect makes reasonable objections, the Owner shall revise the marketing materials to remove any descriptions objectionable to the Architect.

§ 11.12 Termination or Reduction of Architect's Construction Phase Services. Termination or reduction of all or any portion of the architect's construction phase services puts the architect at additional risk on any project. Furthermore, the architect's absence from the construction phase may cause greater risk for the owner when the architect is not available to advise the owner of defects and deficiencies in the work. If there is a reduction or termination of the architect's construction phase service, the architect should carefully document any reduction in the architect's construction phase services to show what services were eliminated and when, if a dispute arises.

If the model language in Section 4.6.1.4 of this guide is used, the architect's construction phase services cannot be reduced without the architect's consent. In this case, additional protective language may not be necessary if the architect's services under the agreement do not include construction phase services, or if the owner terminates, modifies, or reduces all or any portion of the architect's construction phase services, since such action will only be done with the architect's consent.

If it is unclear at the time the owner/architect agreement is signed whether the architect will provide construction phase services, either because the owner is awarding the project by phase or the owner and architect are unable to agree to appropriate compensation, the architect may consider adding additional protective language.

Add the following Section 11.12:

Model language:

§ 11.12 The Architect's commitments set forth in this Agreement are based on the expectation the Architect shall perform the Construction Phase Services described in Section 4.6. The Owner acknowledges that the Contract Documents prepared by the Architect may require additional development based upon information provided by the Contractor during the Construction Phase, including differing field conditions, substitutions, Shop Drawings, Product Data, Samples, and other similar submittals and information. Further, performance of the Construction Phase Services by the Architect is the most efficient and cost-effective way to achieve construction of the Work in accordance with the Contract Documents prepared by the Architect. If the Architect's services under this Agreement do not include Construction Phase Services, or if the Owner terminates, modifies, or reduces all or any portion of the Architect's Construction Phase Services, the Owner acknowledges that there may be time and/or cost impacts to the Project which could have been avoided by the Architect's performance of the Construction Phase Services and for which the Architect is not responsible. The Owner releases the Architect from any claims, demands, or other actions related to such time

and/or costs impacts and shall indemnify and hold the Architect, its employees and its consultants harmless from and against damages, losses, and judgments arising from any claims by a Homeowners Association, Unit Owners, Contractor, and any other third party, including reasonable attorneys' fees and expenses recoverable under applicable law, related to Construction Phase issues, services, or activities the Architect did not provide or in which the Architect did not participate because Construction Phase Services were not included as part of the Architect's services or were subsequently deleted or modified at the request of the Owner.

§ 11.13 Custom Units. The customization of individual units by the owner or contractor or future unit-owners during and after construction is quite common. The architect cannot assume responsibility for unit customization unless the architect is specifically responsible for the custom revisions. Therefore, it is important to provide a disclaimer stating that the architect is not responsible for any changes to individual units either during construction or after occupancy. This includes changes of finishes, built-in furnishings, fixtures, and partitions.

Add the following Section 11.13:

Model language:

§ 11.13 Unless the Architect is directly involved in the design, the Architect shall not be responsible for changes to Units, including changes to materials, built-in furnishings, fixtures, partitions, or spaces, performed by or at the request of the Owner, Contractor, Unit Owner, or another party during construction or following completion of the Project.

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