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for use on Condominium Projects***INTRODUCTION**

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**INTRODUCTION****Purpose of this Guide**

This Guide serves two purposes: it provides guidance regarding issues unique to Condominium construction, and it provides model language that may be used to amend or supplement AIA Document B109™–2010, Standard Form of Agreement between Owner and Architect for a Multi-Family Residential or Mixed Use Residential Project for use on Condominium Projects.

AIA Document B109–2010, 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.

**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.**

**Arrangement of this Guide**

The information and model language presented in this Guide follows the article and section numbering of AIA Document B109–2010. 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 this Guide

AIA Document B109–2010, Standard Form of Agreement between Owner and Architect for a Multi-Family Residential Occupancy 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 B109–2010.

This Guide assumes that modifications will be made directly in the text of the Owner-Architect Agreement, typically 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.

This Guide is printed in two typefaces. Times New Roman 10-point 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 10-point typeface (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 B109–2010, Standard Form of Agreement between Owner and Architect for a Multi-Family Residential Occupancy 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 re-numbering of sections can play havoc with carefully coordinated internal references and cross references to other agreements.

# GUIDANCE AND MODEL LANGUAGE

## SUGGESTED INTRODUCTORY PARAGRAPH TO SUPPLEMENTARY CONDITIONS

If Supplementary Conditions will be placed in a separate document, an introductory paragraph to explain their purpose may be helpful, such as:

### Model Language

The following supplements modify AIA Document B109™–2010, Standard Form of Agreement between Owner and Architect for a Multi-Family Residential Occupancy or Mixed Use Residential Project. Where a portion of the Agreement is modified or deleted by these Supplementary Conditions, the unaltered portions of the Agreement shall remain in effect.

## ARTICLE 1 INITIAL INFORMATION

**§ 1.1.1** Questions regarding the entity with which the Architect is contracting often go unasked, but may be appropriate in order 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 the Owner 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. Additionally, if 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. Additionally, the Architect may obtain a guarantee from an adequately funded entity that will fulfill the Owner's obligations if the Owner fails to do so.

**§ 1.3 Special Definitions.** Various state and federal laws as well as common usage have developed a number of terms specific to Condominiums. The model language presented in this Guide often uses terms that are not otherwise defined in AIA Document B109–2010. 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 your particular inclusion of the model language in B109–2010 or use of 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 Section 1.3:

**Model Language**

**§ 1.3 SPECIAL DEFINITIONS**

**§ 1.3.1 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.

**§ 1.3.2 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.

**§ 1.3.3 HOMEOWNERS ASSOCIATION OR HOA BOARD**

The Homeowners Association 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.

**§ 1.3.4 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.

**§ 1.3.5 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.

**§ 1.3.6 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.

**§ 1.3.7 UNIT(S)**

A Unit(s) 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.

**§ 1.3.8 UNIT OWNER**

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

**§ 1.3.9 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.

**§ 1.3.10 COMMON ELEMENT**

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

**§ 1.3.11 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.

## **ARTICLE 2 ARCHITECT'S RESPONSIBILITIES**

**§ 2.3** Because AIA Document B109–2010 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 B109–2010 is used for Condominium construction, this section should be deleted.

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. However, varying circumstances may arise that make it commercially unreasonable to maintain this coverage. Premiums for Condominium work may increase or insurers may discontinue coverage for Condominium Projects. If the Architect is required to maintain coverage after completion, 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 Section 2.7:

**Model Language**

§ 2.7 The Architect shall attempt to maintain the coverage required under Sections 2.6.1 and 2.6.5 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.

## ARTICLE 4 SCOPE OF ARCHITECT'S SERVICES

### § 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.

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. Disagreement in the allowance of such testing, with approval of systems, or with requested revisions may be grounds for termination of services (see also B109–2009 section 4.1.6).

Add the following Section 4.3.4:

**Model Language**

§ 4.3.4 In addition to preparing the Design Development Documents, the Architect shall prepare a list of critical building systems that require the preparation of mock-ups. During the Construction Phase, mock-ups of those systems designated by the Architect shall be prepared by the Owner, or the Owner's designated contractor, and tested in accordance with the standards set forth in the Contract Documents. The results of such tests will be provided to the Architect.

### § 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 11.11 for sample indemnity language.

Add the following 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 ADDITIONAL SERVICES

**§ 5.1** Section 5.1 includes a chart listing Additional Services that may be performed by the Architect. Possible additional services are described in Section 5.2, below. If the Architect is to provide some or all of the Additional Services described in Section 5.2 below, Section 5.1 of B109–2010 should be modified to include each of the identified additional services and the description of each additional service should be inserted in Section 5.2 of B109–2010.

**§ 5.2** Section 5.2 can be used to describe certain Additional Services that the Architect may perform. These Additional Services are intended to 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, but may be necessary to the successful completion of the Project. In many instances, these Additional Services may increase the Architect's liability exposure. However, with these Additional 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.

**§ 5.2.1 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 roofing, flashing, caulk joints, and expansion control systems, among other 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 creation of this document, if undertaken by the Architect, may also include the efforts of the Architect's consultants. If the Owner retains some consultants, or some building systems are procured in a design-build fashion, access to and control of aspects of the required information may be made more difficult.

The benefit to the Architect of providing the Maintenance Manual is that the Architect is likely the most knowledgeable party regarding many of the elements of the Project that will require attention. The drawback is that the manual may not address every potential maintenance item and the Homeowners Association may use the omissions to justify subsequent claims.

If the Architect will prepare the Maintenance Manual, the following language may be inserted in Section 5.2 or the parties may furnish a description in an exhibit attached to the Agreement:

### **Model Language**

**§ 5.2.1 Maintenance Manual.** The Architect shall 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 assumes no responsibility for any failure to perform required maintenance on any portion of the Project and the Maintenance Manual shall be limited to those components specified below.

*(List components for which the Maintenance Manual will include specific maintenance procedures.)*

Other participants in the Project could prepare or supplement the Maintenance Manual. The most obvious choice is to require that the Contractor provide the information in an expanded version of the normally specified operation and maintenance submittals. The Architect may review the relevant individual specification sections to determine that the appropriate information is included in the operation and maintenance submittals. If the Owner will prepare the Maintenance Manual see Article 6, below. Also refer to the Sections in Article 6 regarding Condominium By-Laws.

**§ 5.2.2 Condominium Plat.** Typically a Condominium Plat is attached to the Condominium Declaration and reflects As-Constructed Record Drawings that are somewhat different from that included in the architectural drawings for the Project. If the Architect's scope of services requires preparation of As-Constructed Record Drawings pursuant to Section 5.1.15, preparation of the Condominium Plat is a potential Additional Service for the Architect. However, 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 explore the requirements applicable in the jurisdiction of the Project.

If the Architect will prepare the Condominium Plat, the following language may be inserted in Section 5.2 or the parties may furnish a description in an exhibit attached to the Agreement:

**Model Language**

§ 5.2.2 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.

**§ 5.2.3 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 annual inspection of the Project by the Architect. During its inspection, the Architect may note any observed deficiencies or failure to meet maintenance requirements. These annual inspections 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 testing of areas not readily accessible.

If the Architect will perform Post Occupancy Site Visits, the following language may be inserted in Section 5.2 or the parties may furnish a description in an exhibit attached to the Agreement:

**Model Language**

§ 5.2.3 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 will 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 of areas not readily accessible.

**§ 5.2.4 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™–2008, Standard Form of Architect's Services: On-Site Project Representation. B207–2008 is recommended for Condominium Projects because the Architect is required 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 recognize errors and notify the Owner as early as possible. AIA Document B207–2008 can be referenced and attached as an exhibit to B109–2010.

If the Architect will have a Construction Site Presence, designate the Architect as performing this additional service under Section 5.1.12 of B109–2010. The following reference to this additional service may be inserted in Section 5.2:

**Model Language**

§ 5.2.4 On-site Project Representation. The Architect shall provide those services described in AIA Document B207™–2008, Standard Form of Architect's Services: On-Site Project Representation, attached as Exhibit \_\_.

## ARTICLE 6 OWNER'S RESPONSIBILITIES

**§ 6.7 Owner's Consultants and Contractors.** Errors and omissions in Condominium construction can easily lead to claims from multiple parties, particularly when the Owner retains design consultants directly. It is important that the Owner require a professional level of consultant service and insurance protection for the development team. The Architect's exposure to liability is reduced if the Owner's consultants are licensed when required; stamp and sign Construction Documents when required by law; conduct a satisfactory level of site visitations including a site visit at Substantial Completion; and carry appropriate insurance, similar to that required of the Architect, covering their services during construction and for a period of time after the Project is complete.

In addition, Condominium development may include the use of design-build contractors and consultants, particularly in the areas of fire-protection, mechanical, electrical and plumbing systems. The Architect is generally required to coordinate the work of these design-build contractors and consultants although they

have no other contractual relationship to the Architect. The Architect, regardless of its contractual relationship with the Owner's contractors and consultants, may assume liability for the Owner's contractors and consultants if the Architect exercises authority over the contractors' or consultants' services, assumes responsibility for the adequacy or timeliness of the contractors' and consultants' services or if the Architect certifies progress payments or Substantial Completion for the Work designed by the Owner's contractors and consultants. Liability for the Owner's contractors and consultants may be avoided by limiting the Architect's review to assessing conformance with design concepts.

AIA Document B503™–2007, Section 7 contains additional language related to Owner's contractors and consultants that may be useful in this application.

Delete Section 6.7 and substitute the following:

**Model Language**

§ 6.7.1 The Owner shall retain only those contractors and consultants that are lawfully licensed to practice their profession in the jurisdiction where the Project is located.

§ 6.7.2 The Owner shall coordinate the services of its own consultants and contractors with those services provided by the Architect. Upon the Architect's request, the Owner shall furnish copies of the scope of services in the contracts between the Owner and the Owner's consultants and contractors. The Owner shall furnish the services of consultants and contractors other than those designated in this Agreement, or authorize the Architect to furnish them as an Additional Service, when the Architect requests such services and demonstrates that they are reasonably required by the scope of the Project.

§ 6.7.3 The contracts between the Owner and Owner's consultants and contractors shall require the consultants and contractors to coordinate their drawings and other instruments of service with those of the Architect and to advise the Architect of any potential conflict. The Architect shall have no responsibility for the components of the Project designed by the Owner's consultants and contractors. Review by the Architect of the consultants' or contractors' drawings and other instruments of service is solely for consistency with the Architect's design concept for the Project.

§ 6.7.4 Documents prepared by the Owner's consultants or Contractor's consultants providing professional design services shall bear such professionals' seal and signature as appropriate. The Architect shall be entitled to rely upon the technical sufficiency and timely delivery of documents and services furnished by the Owner's consultants and contractors, as well as on the computations performed by those consultants and contractors 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 consultants or contractors.

§ 6.7.5 The Owner shall indemnify and hold harmless the Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of the services performed by the Owners consultants and contractors or the subconsultants, subcontractors, vendors or suppliers of any of them.

§ 6.7.6 The Owner shall require that its consultants and contractors maintain professional liability insurance and other liability insurance as appropriate to the services provided with limits of coverage, at least equal to those required of the Architect under this Agreement.

**§ 6.9 Building Envelope Consultant.** Water intrusion poses one of the greatest liability risks on Condominium Projects. Given the ownership of the Condominium by multiple Unit Owners, multiple claims for the same or associated issues may arise. The potential for water intrusion may be reduced if the Architect requires that the Owner hire a building envelope consultant to advise the design team during the design process, to provide construction details and specifications and to review the Architect's Construction Documents for the prevention of water penetration.

Some jurisdictions may require that the Architect confirm or certify the suitability of the exterior envelope design for the climatic conditions of the Project's location. Third party inspection during construction and specific field testing of components may be required.

Delete Section 6.9 and substitute the following Section:

**Model Language**

§ 6.9 The Owner shall furnish the services of a building envelope consultant to advise the design team during the design process and to provide inspections of the Project during the construction phase and a final inspection at Substantial Completion. The Owner shall provide copies of the inspection reports to the Architect.

**§ 6.16 Contractor Qualification.** The success of the Project may be increased if the Contractor and its subcontractors have a combination of two significant categories of proven experience and qualifications. 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 abilities 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 6.16:

**Model Language**

§ 6.16 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 and shall confirm that the commercial general liability coverage ultimately provided by the Contractor does not contain exclusions for Condominium construction. 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.

**§ 6.17 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 request appropriate and adequate insurance coverage from the Contractor, with the Owner and Architect named as additional insureds. In addition to what would typically be requested of the Contractor in AIA Document A201™–2007, General Conditions of the Contract for Construction, 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.

Add the following Section 6.17:

**Model Language**

§ 6.17 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 the Contractor is providing professional design services, the Contractor shall provide incidental professional liability coverage. The Contractor shall be required to maintain such insurance for a period of \_\_ years following Substantial Completion of the Project.

**§ 6.18 Owner Financing.** The Owner's ability to finance the Project is critically important to the success of the Project. AIA Document A201–2007, 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 B109–2009 as follows.

Add the following Section 6.18:

**Model Language**

§ 6.18 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.

**§ 6.19 Owner's Responsibility for Maintenance Manual.** Rather than requiring that the Architect prepare the Maintenance Manual as set forth in Section 5.2.1 above, the Owner may provide the Maintenance Manual itself or through its contractors or consultants. If the Architect is not responsible for the Maintenance Manual, the Architect may have some protection against the inclusivity issues noted in Section 5.2.1. Recognize, however, that the intended benefit of the Maintenance Manual is not defensive in nature, but to identify potential problems early and perform maintenance before damage becomes widespread and expensive to repair.

If the Owner will prepare the Maintenance Manual, add the following Section 6.19:

**Model Language**

§ 6.19 Maintenance Manual. The Owner shall be responsible for preparing a building Maintenance Manual outlining the required maintenance procedures for the various components and systems of the Project. The Architect assumes no responsibility for any failure of the Owner or the Homeowners Association to perform required maintenance on any portion of the Project.

**§ 6.20** To ensure that the Homeowners Association is aware of the required maintenance of the building and as an additional protection against the failure of the Homeowners Association 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.

Add the following Section 6.20:

**Model Language**

§ 6.20 The Owner shall provide the Homeowners Association with a copy of the Maintenance Manual prepared by the [Architect] [Owner].

**§ 6.21 Owner's Quality Control Program.** 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 Owner's implementation of a quality control program will assist the Project participants in ensuring that overall Project quality is not reduced by opportunities for cost savings.

Add the following Section 6.21:

**Model Language**

§ 6.21 The Owner shall implement a quality control program on the Project. The Owner's quality control program will ensure that materials and equipment used, installed or affixed to the Project will meet or exceed the performance requirements specified by the Architect. The Architect shall not be responsible for any materials or equipment used which do not meet the Architect's specifications.

**§ 6.22 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 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 6.22:

**Model Language**

§ 6.22 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.

**§ 6.23 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

Add the following Section 6.23:

**Model Language**

§ 6.23 The Owner shall include the following provisions in the Condominium Declaration and Condominium By-Laws and take steps necessary to ensure that the Condominium Declaration and Condominium By-Laws make such provisions unalterable.

**§ 6.23.1 HOA's Maintenance and Repair Budget.** 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.

Add the following Section 6.23.1:

**Model Language**

§ 6.23.1 A requirement that the Homeowners Association develop a maintenance and repair budget sufficient to provide for the maintenance requirements set forth in the Maintenance Manual as well as a contingency for repairs and annual inspections of major systems, including the roof and curtain wall.

**§ 6.23.2 HOA's Maintenance Requirements.** 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 6.23.2:

**Model Language**

§ 6.23.2 A requirement that the Homeowners Association ensure performance of, at a minimum, all maintenance requirements described in the Maintenance Manual.

**§ 6.24 Right to Cure.** It is always in the interest of the Project participants to learn of construction defects sooner rather than later. In some cases, a small problem can be prevented from becoming a big problem.

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 law suit. 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 6.24:

**Model Language**

§ 6.24 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 Architect and Contractor in writing of the defect and provide the Architect or Contractor no less than thirty days to commence actions to investigate and, if appropriate, cure such defect.

**§ 6.25 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.

**§ 6.25.1** 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 and speedier 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 6.25.1:

##### **Model Language**

§ 6.25.1 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 9.2.2, 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. Typically, arbitration is a binding method of dispute resolution.

Mandatory arbitration may be prohibited in some jurisdictions. 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 6.25.1.1. If mediation is not desired prior to arbitration, add the following language as Section 6.25.1:

##### **Model Language**

§[ 6.25.1 or 6.25.1.1] 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.

**§ 6.25.2 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 born by the Unit Owners through assessments to the Unit Owners. 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 alternative dispute resolution.

Add the following Section 6.25.2:

##### **Model Language**

§ 6.25.2 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 arbitration or litigation against the Owner, Architect or Contractor.

**§ 6.26 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 without 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 that 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 6.26:

**Model Language**

**§ 6.26** 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.

## ARTICLE 9 CLAIMS AND DISPUTES

**§ 9.1.3 Indemnity.** Due to the higher risk of claims and litigation in a Condominium Project without a comparable increase in fee, the Architect may want to consider including additional indemnity language in the Owner-Architect Agreement. It is important to understand what is currently included in and absent from B109–2010. In B109, Section 9.1.3 requires the Architect to indemnify the Owner (limited to the extent of insurance coverage) for third party claims when caused by negligent acts or omissions of the Architect. The Model Language included below reduces the Architect's indemnity obligation to only those instances where damage or loss is caused by the sole negligence or willful misconduct of the Architect. In all other instances, Section 9.1.4 requires that the Owner indemnify the Architect. 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.

Delete Sections 9.1.3 and 9.1.4 and substitute the following:

**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 if such damage, loss or judgment is caused by the sole negligence or willful misconduct of the Architect, its employees and its consultants in the performance of professional services under this Agreement. The Architect's duty to indemnify the Owner under this provision shall be limited to the available proceeds of insurance coverage.

**§ 9.1.4** To the fullest extent permitted by law, the Owner shall indemnify and hold the Architect, and the Architect's officers, employees and consultants harmless from and against damages, losses and judgments, including reasonable attorneys' fees and expenses recoverable under applicable law, arising from any claims by third parties related to the design or construction of the Project except if such damage, loss or judgment arises from the sole negligence or willful misconduct of the Architect subject to the limitations set forth in Section 9.1.3.

**§ 9.1.7 Limitation of Liability.** The enforcement of limitation of liability provisions is a rapidly developing area of the law. When this type of provision is to be employed, care must be taken in the earliest stage of negotiation. Negotiations must clearly and plainly indicate that this provision has been agreed to by all parties. It may be advisable for the parties to specifically and separately sign this provision in the Agreement.

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.

If a limitation of liability provision is added to limit the Architects' liability, careful consideration should be given prior to its inclusion in the Contract. As the limitation of liability only protects the Architect from claims by the Owner, the Architect remains vulnerable to third party claims. The parties should check with local laws for specific application of this provision. If the Owner is not willing to sign a limitation of liability for a dollar amount, the Architect may consider a provision that limits the Architect and the Architect's consultants' liability to the amount of their available insurance. This will provide protection for the Owner, Architect and Architect's consultants.

#### **OPTION A: LUMP SUM**

Add the following Section 9.1.7 if the Architect's liability will be limited to a lump sum:

##### **Model Language**

§ 9.1.7 Neither the Architect, Architect's consultants, nor their agents or employees shall be jointly, severally or individually liable to the Owner in excess of the compensation to be paid pursuant to this Agreement or \_\_\_\_\_ Dollars (\$\_\_\_), whichever is greater, by any reason of any act or omission, including breach of contract or negligence not amounting to a willful or intentional wrong.

#### **OPTION B: AVAILABLE INSURANCE**

Add the following Section 9.1.7 if the Architect's liability will be limited to available insurance:

##### **Model Language**

§ 9.1.7 Neither the Architect, Architect's Consultants, nor their agents or employees shall be jointly or individually liable to the Owner for an amount in excess of the proceeds of the available insurance coverage.

## **ARTICLE 11 MISCELLANEOUS PROVISIONS**

### **§ 11.9 Remodeling and Renovation**

Remodeling, rehabilitation, renovation and restoration services often involve unforeseen conditions, including various conditions concealed within the walls and floors of an existing structure. These concealed conditions are not always discoverable before actual construction commences or may not be amenable to destructive materials testing. The decision of whether to have such testing performed is a business decision of the Owner. Moreover, the Owner may ask the Architect to proceed using the available documentation, and in turn, the Architect may wish to clarify responsibilities by using the model provisions that follow.

Add the following Section 11.9:

##### **Model Language**

##### **§ 11.9 Remodeling and Renovation**

§ 11.9.1 The Owner shall provide information regarding the existing facility, including destructive testing and investigation of concealed conditions, in a timely manner. In the event documentation or information furnished by the Owner is inaccurate or incomplete, any resulting damages, losses and expenses, including the cost of the Architect's Change in Services or Additional Services, shall be borne by the Owner.

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 to investigate concealed or unknown conditions. In such instances, the following model provision may be used to further clarify the parties' responsibilities:

Add the following Section 11.9.2:

##### **Model Language**

§ 11.9.2 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 Change in Services or 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.

An indemnification clause may also be inserted, as set forth below. However, the user should verify with legal counsel the enforceability of such a provision. Many states have statutes limiting or prohibiting the enforceability of indemnity clauses.

Add the following Section 11.9.3:

**Model Language**

§ 11.9.3 The Owner shall indemnify and hold harmless the Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, which arise as a result of inaccurate or incomplete documentation or information furnished by the Owner.

**§ 11.10 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 imply or exaggerate through verbiage, photos, and/or descriptions an expectation 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. Without the option to review and raise objections to the Owner concerning marketing materials, the Architect may wish to include a provision providing indemnity for any claims resulting from building materials, quality and performance that do not meet marketing expectations.

It is important to note that the indemnity language included in this section may be unenforceable in certain jurisdictions and should be reviewed by legal counsel. However, it is important that the Architect have the opportunity to review the Owner's marketing materials and document any objections to the materials. If the Architect is given the opportunity to review marketing materials, it will be very important to object to and document any language that the Architect disagrees with. Failure to object may imply acceptance.

Add the following Section 11.10:

**Model Language**

§ 11.10 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 at least 21 days in advance of publication and afford the Architect an opportunity to review, and raise any objection to, the description of materials, quality and performance. If the Architect makes reasonable objection to any of the descriptions of materials, quality and performance during the 21 day review period, the Owner shall revise the marketing materials to remove any descriptions objectionable to the Architect. If the Owner fails to revise the marketing materials in a manner acceptable to the Architect, the Owner shall not be entitled to use the Architect's name in connection with the marketing material. In the event the Architect is subject to any damage, loss, liability or expense arising from any representation of the Owner for which the Architect made a timely objection, the Owner, to the fullest extent of applicable law, shall indemnify, defend and hold the Architect, its employees and its consultants harmless from and against any such damage, loss, liability or expense.

**§ 11.11 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 the Architect's scope of service does not include services during construction or if the Architect's Construction Phase Services are reduced for any reason, indemnification by the Owner for claims arising from construction issues in which the Architect was not allowed to participate will offer additional protection from liability. In addition, carefully documenting any reduction in the Architect's Construction Phase Services will allow the Architect to show what services were eliminated and when, if a dispute does arise. This information will be important regarding the extent of the Owner's obligation to indemnify the Architect.

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 indemnity protection may not be necessary.

Add the following Section 11.11:

**Model Language**

§ 11.11 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 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, and any third parties, 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.

**§ 11.12 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 to the Unit. 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 11.12:

**Model Language**

§ 11.12 Unless the Architect is directly involved in the design and approval, 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 of the Project or performed by the Owner, Contractor, Unit Owner or another party following completion of the Project.