Like the evil spirits in the 1980s big screen trilogy, “Poltergeist,” condominiums are back. No longer on life support, condominiums are once again, a viable market for design professionals. Since 2009, multifamily construction, including condominiums, has been on a meteoric ascent. See Figure 1.

The MPI measures builder and developer sentiment about current conditions in the apartment and condominium market on a scale of 0 to 100. The index and all of its components are scaled so that any number over 50 indicates that more respondents report conditions are improving than report conditions are getting worse.

*Multifamily Starts: U.S. Census Bureau, New Residential Construction.*
Now that condos are back, design professionals need to reload the management practices so important to the design and construction of condos – maybe the most litigious of all project types. Like riding the ghosts in “Poltergeist”, there are steps design professionals can take to keep the “condo demons” at bay. This guide is offered as a tool to help project managers stay on top of condo risks and out of costly professional liability claims.

Firm Capabilities
Design firms need to assess their ability to perform condominium projects. This includes evaluating the project management skills needed to work with developers on what will likely be projects with very aggressive timelines and extremely tight budgets. Project managers (PM) make or break projects. Moving forward without the right PM is a risk that can’t be ignored. Developers can set arbitrary completion dates with little or no appreciation for what’s doable in the real world. Compressed design and construction schedules increase risk. To meet the pressures of “getting to market” developers may demand fast-track construction. Some firms have success with fast-track construction; others do not perform, at all well, outside the world of design-bid-build.

Client Selection
Condominiums are challenging for even the most experienced developers. Working for a developer with a successful track record in condominiums is paramount. Avoid the one off companies that come knocking including “single purpose” entities that may vanish once the project is constructed and turned over to the condo homeowners association. These players far too often don’t have the financials and skill sets needed to effectively perform their duties and responsibilities. Reach out to other design professionals and contractors. They can be a great resource in evaluating potential clients.

Money matters. Does the client have the funds needed for the project? Cash flow matters. Do they have a track record for paying their bills on time?

Project Dynamics
Not all condominium projects are created equal. Evaluate the client’s budget and timeline with a critical eye. Condominium metrics that are driven more by market pressures than a real-world view of construction costs and project schedules should be avoided. Not even the most skilled and experienced design professional can overcome an underfunded project with an impossible timeline. Developers have a lot riding on every condominium project and there is nothing more important than completing construction on time. The developer’s marketing plan, pre-leasing and move-in dates all rely on the construction going according to plan. Therefore, the overall project schedule including design and construction timelines must be doable in a world where things rarely, if ever, go exactly as planned. Work with the developer’s contractor or seek advice from a construction professional that can help develop a manageable project schedule.

Managing the design process and delivering adequate construction phase services become more and more difficult with each mile that separates the project, the client and the consultants. Remember distant project sites often come with different building codes, different design criteria and different construction practices.

The Condominium Declaration, By-laws and the Funding of Maintenance Costs
Condominium developers are required to file the condominium declaration and by-laws prior to the sale of the first condo unit. These documents are drafted by legal counsel retained by the developer and often establish initially low homeowner dues to attract prospective buyers and limit the developer’s responsibility for funding maintenance costs while marketing and selling units. Design professionals should evaluate whether the developer-drafted declaration and by-laws adequately address maintenance costs including the developer’s strategy for maintaining the condo before relinquishing control of the day-to-day operations to the homeowners association.
Building Site
More and more projects are being built on “recycled” sites where the history of previous construction and usage is sketchy at best. Design professionals should resist the developer’s request to provide the geotechnical report or perform any services related to demolition or hazardous waste removal. Assuming the vicarious liability for these subconsultants can needlessly put your insurance deductible and policy at risk. The condo developer should contract directly for any demolition and hazardous waste removal that is needed. The geotechnical report should address recommendations for all shoring, soil stabilization and embankment protection needed to safeguard the structural integrity of adjacent properties.

Codes/ADA
Unless well-versed in the ADA requirements and their local interpretation, design professionals should consider retaining someone that is. Failing to meet ADA requirements often comes down to a fraction of an inch.

Cathedral & Vaulted Ceilings
Condensation and moisture problems are inherent in ceilings that fit tight to the structure. If not properly insulated and ventilated condensation and moisture damage is likely to occur during the winter months especially in colder climates.

Utilities
Extending utilities to the construction site can take time and impact the project. Accessible fire hydrants usually need to be in place before starting any construction above the foundation. Counsel the developer on the role that utilities play in the construction process so a realistic timeline can be developed.

Design-Build Subcontractors
Condo developers often rely on subcontractors to provide the design as well as the construction for key building components including mechanical, electrical, plumbing, fire protection and life safety systems. This makes design performance requirements critically important. Design professionals must work closely with developers and their design-build contractors to clearly define the operational requirements for the condominium. Disputes over zoning of HVAC systems, maintenance access, and excessive noise levels are all too common and can be avoided with a detailed project program document.

Providing design-build contractors electronic files for use in preparing their design drawings can also be problematic. All design-build contractors should be required to execute an electronic file agreement that limits the design professionals’ liability for unauthorized changes to electronic files and protection against file corruption.

Additionally, design-build contractors should be experienced in condo design and construction. Contractors moving from residential to condominium construction may not have the resources or expertise for the larger, more complex condominium market. Before signing the contract, have the developer identify their design build contractors. These players should be required to carry appropriate professional liability insurance for their design liability exposures.
Wood Frame Construction
Condominiums constructed using wood framing come with unique quality concerns. Wood is more susceptible to moisture problems than concrete or steel. The contractor should provide a moisture mitigation plan that addresses the steps that will be taken to assure that moisture is controlled including a protocol for identifying and removing water damaged wood materials. The quality of the wood framing also influences the quality of interior finishes. Out-of-plumb walls can impact windows, wall coverings and millwork.

Developers should pre-qualify contractors with special attention given to the quality of their wood framing. Condominium projects have more complex structural requirements than a typical single family dwelling. Any contractor that proposes using a framing subcontractor with limited condominium framing experience should be questioned.

Moisture Intrusion/Mold
Reducing the growth of mold during and after construction starts with addressing the issue at the very beginning of the design process. There are numerous cost and time tradeoffs that need to be considered. First and foremost is developing a design, than when properly constructed, will minimize moisture infiltration. This includes paying close attention to the building envelope, roof, roof penetrations, skylights and windows. Using mold-resistant materials for duct chases, elevator shafts and other moisture prone areas are also a consideration.

Construction sequencing also plays a significant role in managing moisture problems and limiting mold growth. Construction schedules that have drywall and interior finishes starting when the construction is still exposed to the elements involves more risk than delaying these activities until the structure is enclosed and given ample time to “dry out.”

Developers need to choose between extending the construction time or accepting the risk of increased moisture and mold. This decision is best made with input from the contractor or construction professional that can provide the time and cost impacts for an extended construction schedule. Design professionals, however, should not make any recommendations or warrant that any decision made by the developer will provide a solution to moisture and mold problems. There are simply too many variables outside the designer’s control to make any guarantees.

Be extremely careful not to get stuck in the middle of a dispute over who’s responsible for what someone might consider to be “excessive” mold. Savvy developers and contractors understand the risks and are skilled at deflecting the liability exposures.

Jobsite Safety
Condominium construction involves safety risks that can lead to serious jobsite injuries. Contractors that do not have or enforce site safety requirements put everyone at risk including the design team. Injured employees are usually limited to benefits subscribed by state workers’ compensation regulations and are prohibited, by law, from suing their employer. This leaves the developer and design team as prime targets for a lawsuit. Developers should be encouraged to qualify condominium contractors based, in part, on their safety record. Design professionals need to be extremely careful not to assume any responsibility for anything related to jobsite safety including supervision of the work, contractor means/methods and stop work authority.

Mockups
Mocking up a typical condominium unit early-on in construction can go a long way to clarify construction details and implement needed changes. The repetitive nature of condominium construction makes mockups well worth the effort. Solving problems once at the front end is far better than correcting the same mistake over and over again, one condominium at a time at the back end.
Millwork
The quality of installed millwork is influenced by more than the quality of the craftsmanship. To assure a good result millwork materials should be acclimatized before installation starts. A controlled environment close to post-occupancy indoor temperature and humidity is desirable during millwork installation. A conditioned space limits excessive expansion and contraction that can lead to quality problems including open joints in millwork and buckling of wood floors.

Acoustics
Excessive noise is a reoccurring problem for multifamily dwellings. Retaining the services of an experienced sound consultant can go a long way to eliminating excessive noise.

Pre-installation Meetings
Even the most detailed set of construction documents benefit from meeting in the field prior to the start of key construction activities. These pre-installation meetings provide an opportunity for everyone to get on the same “sheet of music”. The responsible design professionals, general contractor, subcontractors, suppliers, superintendent, foremen and craftspeople should be in attendance. Reviewing the drawings, specifications, approved shop drawings and submittals assures there is a clear understanding of what’s required and by whom. Construction activities to consider for pre-installation meetings include:

• Waterproofing
• Framing
• Building Envelope
• Roof/Roof Penetration
• Skylights
• All Flashings
• Windows/Exterior Doors

Site Drainage
Site drainage in and around condominium complexes can be tricky. Failing to consider the impacts that sidewalks, patios, barbeques, ADA ramps and playgrounds have on site drainage can lead to standing water. Design coordination is critical. To assure that all changes occurring throughout the design process are addressed, a detailed interdisciplinary review of the final design should occur before releasing the drawings for construction.

Swimming Pools
Swimming pools should be designed by qualified professionals experienced with the safety demands and requirements of a condominium complex. These professionals, like all consultants, should carry sufficient professional liability insurance coverage. Specific attention must to be given to humidity control and non-slip surfaces in all wet areas.

O&M Training
Many claims made against design professionals involve debates over whether the problem is design-related or due to faulty construction or operational and maintenance failures. To mitigate liability to these types of claims, design professionals need to “over manage” the operational and maintenance training to assure that the owner’s maintenance staff receives adequate training. The training should address the use of chemicals for snow and ice removal on stairways, sidewalks and balconies. The use of salt to melt ice should be prohibited. Videoing all training sessions is a good idea.

Warranty-Ending Inspections
Scheduling and conducting warranty ending inspections is good risk management. These inspections are designed to identify material and equipment problems while still under warranty and provide an opportunity for condominium owners to evaluate the adequacy of the maintenance staff.
Invoicing
Development of any kind is risky. Getting paid is one of the risks. Don’t help developers finance their condominium projects. Making the situation worse, efforts to collect overdue invoices may lead to threats of a professional liability claim. Stay on top of your accounts receivables or risk the chance of having a problem collecting at the end of construction including being surprised by a questionable professional liability claim.

Construction Phase Services
Construction phase services are always advisable and certainly for condominium projects. Hanover’s “Constructing the Case for Construction Phase Services” white paper provides guidance on convincing clients of the value of construction phase services and how to deal with those that don’t see any need for your participation in the construction process. This paper can be downloaded at Agent Solutions under the Risk Management section of the Hanover Professional Liability page.

Right to Cure
The majority of states have passed right to cure laws which require condominium homeowner associations/owners to notify the developer of alleged design/construction defects and provide reasonable time for the developer, contractors and design professionals to correct the defect before taking legal action. Applicable right to cure provisions should be addressed in design contracts and condominium bylaws.

See Appendix A which is an excerpt from California’s right to cure legislation. This list of actionable construction defects provides a good quality control checklist for design professionals.

Additional Insured Status
All contracts for construction should include the requirement that the contractor specifically name the developer and design team members as additional insureds on the contractors’ commercial general liability insurance policy. The American Institute of Architects addresses this in its construction contract general conditions:

“§11.1.4 The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Client, the Architect and the Architect’s Consultants as additional insureds for claims caused in whole or in part by the Contractor’s negligent acts or omissions during the Contractor’s operations.”

AIA A201 -2007 General Conditions of the Contract for Construction

The Developer’s Consultants
Developers must retain complete responsibility for their consultants including design coordination and requiring insurance coverages comparable to those required of the design team.

Building Envelope Consultants
Building envelope failures are a leading cause of construction defect litigation. Marrying a wide range of exterior building materials, assemblies and components to form, not only a barrier to water infiltration, but to allow for the drainage of unwanted moisture is a daunting task for even the most experienced design professional. Retaining a qualified consultant skilled in evaluating building exterior designs is money well spent.
Acoustical Consultants
Excessive building noise can turn an otherwise successful project into a never-ending battle over what’s acceptable and who, if anybody, is at fault. A qualified acoustical consultant can provide valuable input during the design process, specify objective and measurable sound level requirements, monitor construction and assist in resolving post-construction noise problems.

Marketing Materials, Scope, Quality and Cost
Every design involves an ongoing review of project costs which, more often than not, requires making cost tradeoffs which impact scope, quality or both. Design professionals, however, need to say no when cost cutting violates what the design professional believes to be acceptable design practices. Similarly, condominium sales brochures and websites must accurately reflect the level of quality achievable based on the developer’s scope and budget parameters. Design professionals should seek contractual protection against claims based on the failure of the condominiums to measure up to a developer’s overzealous marketing campaign.

Contractual Protection
In 2010, the American Institute of Architects published B509™ Guide for Supplementary Conditions to the AIA Document B109™-2010 Standard Form of Agreement Between Owner and Architect for a Multi-family Residential or Mixed Use Residential Project. The B509™ provides model contract language addressing issues specific to condominiums including:

- Definitions specific to condominiums
- Insurance
- Mock-ups
- Construction Phase Services
- Condominium Maintenance Responsibilities

- Post Occupancy Site Visits
- On-site Project Representation
- Owner’s Consultants and Contractors
- Building Envelope Consultants
- Contractor Qualifications
- Contractor’s Insurance
- Owner Financing
- Owner’s Quality Control Program
- Notice of Unit Owner Concerns
- Right to Cure
- Architect’s Recommended Materials
- Indemnity
- Limitation of Liability
- Remodeling and Renovation
- Market Materials
- Custom Units

The B509™ can be accessed on line at: http://www.aia.org/groups/aia/documents/pdf/aiab085986.pdf.

Condominiums are the riskiest of all project types. Professional liability claims against design professionals are far too frequent. Condominium homeowners associations are notorious for joining forces with overly zealous plaintiff’s attorneys in a crusade to find as many villains as possible when alleged construction defects raise their ugly heads. Unfortunately, design professionals are an easy target. Hanover encourages its design professional clients to enter the condo market with eyes wide open and be ready to “over manage” the multitude of risks that haunt condominium projects. Just because they’re back, don’t allow condominiums to become your firm’s worst nightmare!
Appendix
Excerpts from California Senate Bill SB 800

CHAPTER 2. ACTIONABLE DEFECTS

896. In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with Section 910), a subcontractor, material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this title, be liable for, and the claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title. This title applies to original construction intended to be sold as an individual dwelling unit. As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law.

(a) With respect to water issues:

(1) A door shall not allow unintended water to pass beyond, around, or through the door or its designed or actual moisture barriers, if any.

(2) Windows, patio doors, deck doors, and their systems shall not allow water to pass beyond, around, or through the window, patio door, or deck door or its designed or actual moisture barriers, including, without limitation, internal barriers within the systems themselves. For purposes of this paragraph, “systems” include, without limitation, windows, window assemblies, framing, substrate, flashing, and trim, if any.

(3) Windows, patio doors, deck doors, and their systems shall not allow excessive condensation to enter the structure and cause damage to another component. For purposes of this paragraph, “systems” include, without limitation, windows, window assemblies, framing, substrate, flashing, and trim, if any.

(4) Roofs, roofing systems, chimney caps, and ventilation components shall not allow water to enter the structure or to pass beyond, around, or through the designed or actual moisture barriers, including, without limitation, internal barriers located within the systems themselves. For purposes of this paragraph, “systems” include, without limitation, framing, substrate, flashing, and sheathing, if any.

(5) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow water to pass into the adjacent structure. For purposes of this paragraph, “systems” include, without limitation, framing, substrate, flashing, and sheathing, if any.

(6) Decks, deck systems, balconies, balcony systems, exterior stairs, and stair systems shall not allow unintended water to pass within the systems themselves and cause damage to the systems. For purposes of this paragraph, “systems” include, without limitation, framing, substrate, flashing, and sheathing, if any.

(7) Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to cause damage to another building component.

(8) Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to limit the installation of the type of flooring materials typically used for the particular application.

(9) Hardscape, including paths and patios, irrigation systems, landscaping systems, and drainage systems, that are installed as part of the original construction, shall not be installed in such a way as to cause water or soil erosion to enter into or come in contact with the structure so as to cause damage to another building component.
(10) Stucco, exterior siding, exterior walls, including, without limitation, exterior framing, and other exterior wall finishes and fixtures and the systems of those components and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall be installed in such a way so as not to allow unintended water to pass into the structure or to pass beyond, around, or through the designed or actual moisture barriers of the system, including any internal barriers located within the system itself. For purposes of this paragraph, “systems” include, without limitation, framing, substrate, flashings, trim, wall assemblies, and internal wall cavities, if any.

(11) Stucco, exterior siding, and exterior walls shall not allow excessive condensation to enter the structure and cause damage to another component. For purposes of this paragraph, “systems” include, without limitation, framing, substrate, flashings, trim, wall assemblies, and internal wall cavities, if any.

(12) Retaining and site walls and their associated drainage systems shall not allow unintended water to pass beyond, around, or through its designed or actual moisture barriers including, without limitation, any internal barriers, so as to cause damage. This standard does not apply to those portions of any wall or drainage system that are designed to have water flow beyond, around, or through them.

(13) Retaining walls and site walls, and their associated drainage systems, shall only allow water to flow beyond, around, or through the areas designated by design.

(14) The lines and components of the plumbing system, sewer system, and utility systems shall not leak.

(15) Plumbing lines, sewer lines, and utility lines shall not corrode so as to impede the useful life of the systems.

(16) Sewer systems shall be installed in such a way as to allow the designated amount of sewage to flow through the system.

(17) Shower and bath enclosures shall not leak water into the interior of walls, flooring systems, or the interior of other components.

(18) Ceramic tile and tile countertops shall not allow water into the interior of walls, flooring systems, or other components so as to cause damage.

(b) With respect to structural issues:

(1) Foundations, load bearing components, and slabs, shall not contain significant cracks or significant vertical displacement.

(2) Foundations, load bearing components, and slabs shall not cause the structure, in whole or in part, to be structurally unsafe.

(3) Foundations, load bearing components, and slabs, and underlying soils shall be constructed so as to materially comply with the design criteria set by applicable government building codes, regulations, and ordinances for chemical deterioration or corrosion resistance in effect at the time of original construction.

(4) A structure shall be constructed so as to materially comply with the design criteria for earthquake and wind load resistance, as set forth in the applicable government building codes, regulations, and ordinances in effect at the time of original construction.

(c) With respect to soil issues:

(1) Soils and engineered retaining walls shall not cause, in whole or in part, damage to the structure built upon the soil or engineered retaining wall.

(2) Soils and engineered retaining walls shall not cause, in whole or in part, the structure to be structurally unsafe.

(3) Soils shall not cause, in whole or in part, the land upon which no structure is built to become unusable for the purpose represented at the time of original sale by the builder or for the purpose for which that land is commonly used.
(d) With respect to fire protection issues:
(1) A structure shall be constructed so as to materially comply with the design criteria of the applicable government building codes, regulations, and ordinances for fire protection of the occupants in effect at the time of the original construction.

(2) Fireplaces, chimneys, chimney structures, and chimney termination caps shall be constructed and installed in such a way so as not to cause an unreasonable risk of fire outside the fireplace enclosure or chimney.

(3) Electrical and mechanical systems shall be constructed and installed in such a way so as not to cause an unreasonable risk of fire.

(e) With respect to plumbing and sewer issues:
Plumbing and sewer systems shall be installed to operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action may be brought for a violation of this subdivision more than four years after close of escrow.

(f) With respect to electrical system issues:
Electrical systems shall operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action shall be brought pursuant to this subdivision more than four years from close of escrow.

(g) With respect to issues regarding other areas of construction:
(1) Exterior pathways, driveways, hardscape, sidewalks, sidewalks, and patios installed by the original builder shall not contain cracks that display significant vertical displacement or that are excessive. However, no action shall be brought upon a violation of this paragraph more than four years from close of escrow.

(2) Stucco, exterior siding, and other exterior wall finishes and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall not contain significant cracks or separations.

(3A) To the extent not otherwise covered by these standards, manufactured products, including, but not limited to, windows, doors, roofs, plumbing products and fixtures, fireplaces, electrical fixtures, HVAC units, countertops, cabinets, paint, and appliances shall be installed so as not to interfere with the products’ useful life, if any.

(3B) For purposes of this paragraph, “useful life” means a representation of how long a product is warranted or represented, through its limited warranty or any written representations, to last by its manufacturer, including recommended or required maintenance. If there is no representation by a manufacturer, a builder shall install manufactured products so as not to interfere with the product’s utility.

(3C) For purposes of this paragraph, “manufactured product” means a product that is completely manufactured offsite.

(3D) If no useful life representation is made, or if the representation is less than one year, the period shall be no less than one year. If a manufactured product is damaged as a result of a violation of these standards, damage to the product is a recoverable element of damages. This subparagraph does not limit recovery if there has been damage to another building component caused by a manufactured product during the manufactured product’s useful life.

(3E) This title does not apply in any action seeking recovery solely for a defect in a manufactured product located within or adjacent to a structure.

(4) Heating, if any, shall be installed so as to be capable of maintaining a room temperature of 70 degrees Fahrenheit at a point three feet above the floor in any living space.

(5) Living space air-conditioning, if any, shall be provided in a manner consistent with the size and efficiency design criteria specified in Title 24 of the California Code of Regulations or its successor.
(6) Attached structures shall be constructed to comply with interunit noise transmission standards set by the applicable government building codes, ordinances, or regulations in effect at the time of the original construction. If there is no applicable code, ordinance, or regulation, this paragraph does not apply. However, no action shall be brought pursuant to this paragraph more than one year from the original occupancy of the adjacent unit.

(7) Irrigation systems and drainage shall operate properly so as not to damage landscaping or other external improvements. However, no action shall be brought pursuant to this paragraph more than one year from close of escrow.

(8) Untreated wood posts shall not be installed in contact with soil so as to cause unreasonable decay to the wood based upon the finish grade at the time of original construction. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.

(9) Untreated steel fences and adjacent components shall be installed so as to prevent unreasonable corrosion. However, no action shall be brought pursuant to this paragraph more than four years from close of escrow.

(10) Paint and stains shall be applied in such a manner so as not to cause deterioration of the building surfaces for the length of time specified by the paint or stain manufacturers’ representations, if any. However, no action shall be brought pursuant to this paragraph more than five years from close of escrow.

(11) Roofing materials shall be installed so as to avoid materials falling from the roof.

(12) The landscaping systems shall be installed in such a manner so as to survive for not less than one year. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.

(13) Ceramic tile and tile backing shall be installed in such a manner that the tile does not detach.

(14) Dryer ducts shall be installed and terminated pursuant to manufacturer installation requirements. However, no action shall be brought pursuant to this paragraph more than two years from close of escrow.

(15) Structures shall be constructed in such a manner so as not to impair the occupants’ safety because they contain public health hazards as determined by a duly authorized public health official, health agency, or governmental entity having jurisdiction. This paragraph does not limit recovery for any damages caused by a violation of any other paragraph of this section on the grounds that the damages do not constitute a health hazard.

897. The standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage.

The Complete text of SB 800 can be accessed at: http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0751-0800/sb_800_bill_20020920_chaptered.html.