



## **An attorney discusses exterior walls and roof repairs in co-ops and condos - by C. Jaye Berger**

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The exterior walls and roofs of buildings are like the “new frontier” people think about when they have run out of space and need to expand. I have been hearing more and more lately about equipment being located on the roof when the unit owner or the building has run out of space for locating its air conditioning equipment and related pipes. It can be wall mounted or on a pole, but is that really a good idea? The walls of the building are common space and are not there for use by shareholders and unit owners to mount their equipment. These installations create openings for water damage and rodents. This is usually done with no formal license agreement or thought about the possible consequences and payment of expenses. If this additional equipment causes holes in the walls and damage, who is going to pay for that? If it has not been discussed and negotiated in a signed agreement, there will likely be a dispute. Equipment also has a way of growing and expanding.

In addition, if the equipment needs to be taken down to allow repairs, how will it be stored in the interim and who will pay for repairs? If there is vagueness about ownership and expenses, the shareholders or unit owners may seek an order to show causes to ensure that the equipment can be relocated in the same place once the work is done, condominiums cannot sell common space. At best they can offer a revocable license. However, that must be negotiated before there is a lawsuit. Who will be paying for the architects, engineers and contractors? It may involve several apartments, including board members, permits and sharing expenses.

Organizing and coordinating these repair projects requires a lot of time, energy and funding. These projects also require a lot of planning in advance. Let’s say a building has leaks on the roof and cracks in various locations. The building will need to first retain engineers to survey the building and the work that needs to be done. There will need to be a contract. Plans and specifications will need to be drawn up and bids will need to be obtained from contractors for pricing. The plans will need to be filed with the New York City Department of Buildings and approved.

Even after all of this work is done to prepare in advance, it is commonplace to find “hidden conditions” requiring additional work and money that are not yet in the plans or the budget. Therefore, whatever money is allocated for the project, there must be additional money set aside for these contingencies. Some buildings need to refinance their mortgages to obtain funds. In those instances, the advance planning can occur over a couple of years. This is why sometimes we see

buildings in obvious need of repair and wonder why no work has been done. The answer may be that the owner is still trying to arrange for the financing. However, that is not really an excuse.

Since the repair work is hazardous and will take a while to complete, there will probably need to be a sidewalk shed and other protection in place to protect the public and workers from any falling debris. Sheds are part of the cost of the project. They usually extend 20 ft. or so onto neighboring property. Despite the need for such safety measures and protection, sidewalk sheds are often met with hostility by neighboring businesses and buildings claiming that they block the view of stores and buildings and scare people and customers away. In extreme cases, there can be sheds that have been left in place for long periods of time while the building owners try to obtain the necessary funding for the repair work or work out other issues. In one case, the sidewalk shed was protecting people from hazards due to falling debris, but was preventing the installation of a handicap access ramp by a commercial tenant to help deal with that issue. Sometimes neighbors threaten to take such issues to court. Given the balancing of the issues and the need for such repairs, it is doubtful a court would require scaffolding to be removed without the work being fully completed.

There must be a fully thought out, well-drafted, negotiated and signed contract with the contractor. It should have the full scope of work, including plans and specifications, and the legal terms and conditions regarding the project. All too often people show me what they are calling the "contract," but it is only a list of the work they want to have done and a payment schedule. More often than not, the payment schedule requires payment at specific intervals of time, with no regard to the amount or percentage of work performed at that time. In a worst case scenario, payment could be due according to the terms of the contract, but the work is way behind schedule. That should not be the case and usually the consultants determine that.

There may also need to be an Access Agreement with neighboring buildings. Since this can take time to negotiate, this should be part of the advance planning. The nature and location of the work may be such that materials will need to be moved up to the roof and stored, possibly on a neighboring roof, for easy access. Permission for that type of access needs to be requested, negotiated by knowledgeable legal counsel and obtained in advance in a written license agreement. A fee may need to be paid to the neighboring building allowing the access. There may also be liquidated damages in the agreement for each day the building is late in completing the work, to give more incentive to keep the project on track.

Having the right insurance in place naming the correct parties as additional insureds is essential. One building owner at a seminar I gave, told me that on their project, just when the work was ready to begin, they realized they did not have an 'action over' insurance provision and had to delay the commencement to sort out obtaining it and who would pay for the additional cost.

People need to know who is responsible for performing various tasks, when and who is paying for it. On one project, the engineer was supposed to obtain the permit after the expeditor filed the plans. The engineer mistakenly thought the contractor was handling that and time was wasted until it was resolved.

Contracts and specifications for this work should be prepared by legal counsel knowledgeable in this area, in conjunction with the project engineer. Consulting with the building's insurance broker is a good idea as well.

One client told me that the contractor had failed to obtain a building permit and the property manager did not realize this until the contractor had walked off the job. The shareholder claimed they did not even know about the need for a permit until the new property manager pointed it out. The shareholder's reaction was, "Why didn't the building check on this and tell me there was no permit?" There was also no electrical or plumbing inspection, which meant that the new contractors would need to open walls and perhaps re-do work in order to pass inspection.

These are only a few of the many things that need to be done with the guidance of experienced legal counsel to prevent things from going wrong on capital improvement projects and to keep them on track for a timely completion.

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