



HOW PUNCH LISTS AFFECT PROJECT CLOSEOUT AND COMPLETION

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By Robert G. Campbell, partner, Cox Castle & Nicholson

When a commercial real estate project is almost complete, a punch list of items to be finished is usually provided. Here, Cox Castle & Nicholson LLP's Robert G. Campbell explains how the punch list affects the final outcome of a project from a legal perspective.



Robert G. Campbell | Courtesy a representative of Cox Castle & Nicholson LLP

A punch list provides the contractor, architect and owner an opportunity to identify remaining work at substantial completion. It is usually provided for by contract. It is the final step in the collaborative process of assuring that the project is delivered in accordance with the design intent. As such, the punch list intersects with a number of project completion and close-out issues. This article explores that intersection.

An industry standard, AIA Document A-201, "General Conditions of the Contract for Construction" (2007 edition), assigns to the contractor the initial responsibility for preparation of a punch list as part of achieving "substantial completion." The document says, "When the contractor considers that the work, or a portion thereof which the owner agrees to accept separately, is substantially complete, the contractor shall prepare and submit to the architect a comprehensive list of items to be completed or corrected prior to final payment." (Subparagraph 9.8.2.)

The project architect is then tasked with making an inspection and is afforded the opportunity to add to the list. (Subparagraph 9.8.3.) When the architect presents a certificate of substantial completion to the contractor, the certificate is accompanied by a list of items that must be completed prior to final payment. (Subparagraph 9.8.4.) Commentary by the AIA to this subparagraph provides that the punch list should be attached to the certificate of substantial completion, and a statement should be included identifying a deadline by which all punch items will be completed. The payment of retainage will be adjusted to reflect the cost of the incomplete items. (Subparagraph 9.8.5.)

Most contracts define "substantial completion" as the date upon which the work is sufficiently complete so as to allow the owner to occupy and fully use the project for its intended purposes. Punch list items will not prevent substantial completion. Contracts may differ on whether final completion can occur when punch work remains. Usually, final completion and the release of retainage require completion of all punch-list work or, where punch items remain incomplete, allow the owner to retain from the contractor the estimated cost to complete the punch work. Therefore, the existence of incomplete punch-list work will prevent the full release of retention after substantial completion.

In addition, substantial completion should usually end the accrual of liquidated damages or, in the absence of a liquidated damages provision, consequential and other actual damages due to delay. Liquidated or consequential damages for delay, therefore, should not continue just because minor punch-list work exists.

Many construction professionals generalize that a punch list consists of minor work to be completed during project closeout. The slang definition of a punch list typically combines minor incomplete work and corrective work. While the distinction between incomplete and corrective work may seem trivial, it may not always be. In certain contexts, the existence of minor incomplete work included on a punch list may prevent completion under relevant legal standards.

Punch lists are important to resolving the thorny question of completion. In California and other jurisdictions, mechanic's lien claims, payment bond claims, stop-payment notices, and notices of completion must be furnished within a specified time following "completion." Statutes of limitation applicable to actions for defective work are also triggered by completion. While the definition of completion may differ under relevant state laws, in private works it is usually defined to mean actual completion or occupancy combined with a cessation of labor. California law once held that "trivial imperfections" would not prevent completion. Thus, completion existed despite ongoing punch work. However, present law interprets "actual completion" in a more literal sense. Actual completion arguably does not exist where even minor items of incomplete or corrective work exist.

Completion triggers the lien filing period. In one case the application of missing grip tape from stair treads was deemed sufficient to prevent "completion" under California law, thus extending the mechanic's lien filing period. Instructively, the court also noted a qualitative difference between "a few strokes of paint or turning a screw" and the missing grip tape. Such nuanced distinctions, however minor, illustrate the importance of a punch list as a tool in deciphering completion — whether a cracked window, a missing switch plate, misaligned tile, or the like qualifies as incomplete or corrective work and whether it is sufficient to prevent completion turns on the context, facts, and law. Because courts examine punch lists to assess completion, care should be taken in their preparation. The contents of a punch list may impact a determination of completion and important legal rights under relevant state laws.

Robert G. Campbell is a partner at Cox, Castle & Nicholson LLP, a full-service law firm focused on real estate. Based in the firm's Los Angeles office, he is one of Southern California's leading construction lawyers helping his clients resolve a wide range of construction-claims disputes on projects ranging from hospitals to highways, high-rises to hotels and resorts, solar to sewage treatment, and retail to residential.