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Who Maintains What?

A Guide to Assist in Determining Maintenance Responsibilities For California Community Associations

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Determining the maintenance responsibility of building and other components in common interest developments (CID) is an often-misunderstood, sometimes even over-looked, process. This article, and the accompanying decision-making flow chart, is intended to help demystify this process.

When we use the term "maintenance" in this article, we mean the responsibility to maintain, repair, replace or restore. These terms are used interchangeably both in this article and in the California Civil Code. While these terms were used in order to eliminate debate on this issue, we on occasion see board members or homeowners trying to argue that these are different concepts. Certainly your documents may in some cases say that one legal entity may be responsible for "maintaining" an item, and another entity responsible for "replacing" this item. However, such delineation is rarely seen, as it does not make much sense. In the absence of such differentiation in your association's documents, these terms should be used interchangeably.

The most common error in determining maintenance responsibility is usually made by going directly to the association's governing documents, usually the Covenants, Conditions, and Restrictions (CC&Rs), to look for language that will clarify the issue. If you do

this without first understanding key provisions in the California Civil Code, and the type of common interest development you are considering, you will most likely find the documents confusing, and may well make an error in judgment. This is because the documents are written with two things in mind—the California Civil Code and the type of property ownership. This article is split into three major sections in order to help you understand this process:

1. "What type of common interest development is this?"
2. "What are the separate interests for this property?"
3. "Who has maintenance responsibility for the components?"

It is important that you understand each of these sections as it pertains to your property before moving to the next section.

What type of common interest development is this?

There is a common law assumption that, in the absence of evidence to the contrary, the owner of a piece of property is responsible for maintaining it. In the case of common interest developments, this may be the individual homeowner or the association, depending on ownership. In California, there are four types of common interest developments: condominium projects, planned developments, stock cooperatives and community apart-

ments. Note specifically that there are no "townhomes" or "townhouses." These terms are marketing terms and not legal descriptions. Many types of buildings, to include what would appear to be single family homes, may well be condominiums. Properties referred to as townhomes may be attached-product planned developments or condominiums. The legal definitions of the four types of California common interest development projects are explained below. In most cases it will be immediately clear to you what type of common interest development you live in. In some cases, however, you may need to look at your CC&Rs and your title to determine exactly which one of the following definitions applies to your development.

A **condominium** project is a development consisting of condominiums. A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit, the boundaries of which are described on a recorded final map, parcel map, or condominium plan in sufficient detail to locate all boundaries thereof. The area within these boundaries may be filled with air, earth, water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support. The description of the unit may refer to:

1. Boundaries described in the recorded final map, parcel map, or condominium plan,
2. Physical boundaries, either in existence or to be constructed, such as walls, floors, and ceilings of a structure or any portion thereof,
3. An entire structure containing one or more units, or
4. any combination thereof.

The portion or portions of real property held in undivided interest may be all of the real property, except for the separate interests, or may include a particular three-dimensional portion thereof, the boundaries of which are described on a recorded final map, parcel map, or condominium plan. The area within these boundaries may be filled with air, earth, water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support. An individual condominium within a condominium project may include, in addition, a separate interest in other portions of the real property.

A **planned development** is one in which the owners have fee title to a lot, with or without improvements on that lot. These developments have either or both of the following features:

- 1 The common area is owned either by the association or in common by the owners of the separate interests who possess appurtenant rights to the beneficial use and enjoyment of the common area.
- 2 A power exists in the association to enforce an obligation of an owner of separate interest with respect to the beneficial use and enjoyment of the common area by means of an assessment which may become a lien upon the separate interests in accordance with applicable law.

A planned development is normally a development of detached or attached single family homes. The owner owns the lot and the building on the lot even if the building shares a roof or walls with other homes.

A **stock cooperative** is a development in which the corporation is formed or availed of primarily for the purpose of holding title, either in fee simple or for a term of years, to improved real property, and all or substantially all of the shareholders of the

corporation receive a right of exclusive occupancy in a portion of the real property, title to which is held by the corporation. The owners' interest in the corporation, whether evidenced by a share of stock, a certificate of membership, or otherwise, shall be deemed to be an interest in a common interest development and real estate development in California (Section 25100 of the Corporation Code).

A **community apartment** is a development in which an undivided interest in land is coupled with the right of exclusive occupancy of any apartment located thereon.

What are the Separate Interests for this Property?

All of the above descriptions refer to the term "separate interest". This term has various meanings depending on the type of common interest development, but it is important that you understand what it means for your particular type of property.

1. In a community apartment project it means the exclusive right to occupy an apartment as specified in applicable law.
2. In a condominium project it means an individual unit as specified under applicable law.
3. In a planned development it means a separately owned lot, parcel, area, or space.
4. In a stock cooperative it means the exclusive right to occupy a portion of the real property as specified under applicable law.

Who has Maintenance Responsibility for the Components?

The remainder of this article is intended to be a useful guide in assisting board members, managers, contractors, homeowners and others in determining the association's maintenance responsibilities. It is not designed to be read from start to finish; rather it is a resource document to be used in conjunction with the accompanying flow chart—after you understand what type of property you live in and what the separate interests for that property are. We have not yet discussed portions of the

Civil Code that also delineate responsibility, but those sections will be discussed as you get to the appropriate decision points in the chart.

Each decision point in the flow chart is in the form of a Yes/No question. Each decision point also has a note number to reference an appropriate paragraph following the flow chart. Readers are encouraged to read the referenced paragraph before answering the question because, in some cases, the answer is not as simple as it may first appear to be.

Related Issues

There are a few related issues that always come up relative to determining the maintenance responsibility for homeowners associations. The first relates to the fact that Sections 1351 and 1364 of the Davis-Stirling Act define and discuss exclusive use common area responsibilities. Some persons whose associations predate these Civil Codes (1986) are concerned about whether these code sections are retroactive. The answer is "Yes, they are retroactive." Section 1352 of the Act specifically states that fact. Another often raised concern is whether the documents state if the association is a condominium or a planned development. In most cases, in the first few pages of the CC&Rs you will see language pertaining to "Condominium" or "Lots." However, if your CC&Rs have no such reference, you should go to any owner's grant deed. The grant deed is a recorded document, and it will clearly show the property that is the separate interest. If it refers to a "lot," the property is a planned development. If it refers to a "condominium," that is self-explanatory. If in doubt, ask the association's attorney. This is not a subjective issue—title companies do not write title insurance on subjective issues.

Conclusion

We hope this article, and the accompanying flow chart and table, assist you in clearing up maintenance responsibility issues. This issue is often misunderstood. While it is not really as simple as many think, it is also not as complicated as others think. If you understand the principles delineated above and in the flow chart and table, you can, in most cases, reach a clear understanding for any, or every, component.

A GUIDE TO ASSIST IN DETERMINING MAINTENANCE RESPONSIBILITIES FOR CALIFORNIA HOMEOWNERS ASSOCIATIONS

This table is designed for use with the accompanying flow chart. Reliance on any given item number below without getting to that number through the flow chart may result in an incorrect result. The table is not designed to be read sequentially.

- 1** Do the Covenants, Codes and Restrictions (CC&Rs), plans, or maps indicate specifically that the item in question is the association's responsibility to maintain? This seems simple and often is. If the documents say that the association will maintain the roofs, or all fences, or such language that is clear and concise there should be no problem. However, if the documents say, for example, that the association will maintain the exterior surfaces of the building, then there can be some room for confusion. Is the exterior surface the paint, or is it the surface of the siding as well as the paint? If the documents say that the association will maintain the siding exterior, how deep is the exterior? If you are not certain that it is a clear-cut association responsibility, you should obtain a legal opinion on this issue. You may also want to consider amending your documents to clarify the nebulous issue. If the answer to this question is a clear cut "Yes," proceed to Item #2. If it is "No," proceed to Item #3.
 - 2** Is the item internal or external telephone wiring designed to serve a separate interest but located outside the boundaries of the separate interest? Section 1351(i)(2) of the California Civil Code states "Notwithstanding the provisions of the declaration, internal and external telephone wiring designed to serve a single separate interest, but located outside the boundaries of the separate interest, are exclusive use common areas allocated exclusively to that separate interest." Section 1364(a) states "...and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to that separate interest." The bottom line is, if it is a phone line that services a single unit only, it is the owner's to maintain even if the documents say otherwise. If the answer to this question is "Yes," it is the homeowner's responsibility; if the answer is "No," it is the association's responsibility.
 - 3** Is the item located inside the separate interest? If the property is a planned development, the separate interest is the lot itself. If it is a condominium, it is the individual unit as specified in the condominium plan. If it is a community apartment, it is the apartment the owner has the exclusive right to occupy as defined in the documents. If it is a stock cooperative, it is that portion of the real property the owner has the exclusive right to occupy. (See California Civil Code Section 1351(l)). Section 1364(a) of the California Civil Code states "...and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to that separate interest." If the answer to this question is "Yes," proceed to Item #6; if "No," proceed to Item #4.
- Special Note: There are only four types of common interest properties in California: condominiums, planned developments, stock cooperatives, and community apartments. Note that there are no townhomes. Townhouse, or town home, is a marketing term. It is not a legal description. A townhouse may be either a condominium or a planned development (PD), sometimes incorrectly called a planned unit development (PUD). If in doubt, you can check which type of property your association is by checking the CC&Rs or any homeowners grant deed. If the homeowner owns a lot, the property is a planned development. If in doubt, you should obtain a legal opinion. Believe it or not, many boards of directors are unaware of the type of property they own. Furthermore, it is this lack of knowledge that often causes boards to maintain items for
- which they have neither the authority nor the duty to maintain, or not to maintain items they do have a duty to maintain.
- 4** Is the item part of exclusive use common area? Section 1364(a) of the California Civil Code states "...and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to that separate interest." If the answer to this question is "Yes," proceed to Item #6; if "No," proceed to Item #5.
 - 5** Is the item a shutter, awning, window box, doorstep, stoop, porch, balcony, patio, exterior door, door frame, hardware for doors or frames, window screen, window or any other fixture servicing a separate interest but located outside the boundaries of that separate interest? Section 1351(i)(2) states that the above listed items "are exclusive use common areas..." even if "outside the boundaries of the separate interest" unless the declaration provides otherwise. In short, unless your documents say differently, these items are the maintenance responsibility of the owner. If they say otherwise, you would not be at this step in the decision-making process. If "Yes," proceed to Item #6; if "No," go to Item #9.
 - 6** Was the damage occasioned by the presence of wood-destroying pests or organisms? Is the damage due to termites, dry rot or other fungus/insects? If your answer is "Yes," proceed to Item #7; if it is "No," go to Item #10.
 - 7** Is this a planned development? You should have resolved this issue at Item #3. In accordance with Section 1364 of the California Civil Code, in a planned development, unless a different maintenance scheme is provided in the declaration, the owner of a separate interest is responsible for this repair. In all other types of properties, the association is responsible. If the answer is "Yes," proceed to Step #8; if "No," go to Item #9.

8 Has a majority of the members delegated repair and maintenance of damage caused by wood-destroying organisms to the association? Section 1364 of the California Civil Code does state that even if the declaration does not provide for repair of damage by wood-destroying organisms, upon approval of the majority of the members such maintenance may be delegated to the association. If the members have delegated this responsibility by such majority vote, proceed to Item #9. Otherwise, go to Item #10.

9 Did an action or a failure to act by a homeowner cause the damage? Assuming you got to the step through the flow chart beginning at Item #1, this item would normally be the maintenance responsibility of the association. However, there are circumstances where an act of the owner, or the failure to act, may be the cause of damage. In such cases, the owner may be responsible for the damage. For example, if a homeowner allowed a toilet leak or shower leak to continue to the extent that there is dry rot in the structure itself, that owner may be responsible for the repair. In these situations, it is best to discuss the issue with the association's attorney prior to proceeding and requiring the owner to repair the damage. If the answer to this question is "No," then it is the association's responsibility. If "Yes," it is the owner's responsibility.

10 Did the association's failure to maintain, or the failure of any element for which the association has maintenance responsibility, cause the damage? Assuming you got to the step through the flow chart beginning at Item #1, this item would normally be the maintenance responsibility of the individual owner. However, there are circumstances in which the association's failure to maintain an element for which it has responsibility or the failure of a common area element causes damage to elements that would normally be the responsibility of the owner. In such cases, the association may then have a responsibility to repair such damage. For example, if the association did not maintain a roof properly or if a roof was not properly constructed, thus causing damage to items normally the responsibility of the owner of a separate interest, the association may have a responsibility to make the repair. A legal opinion is rec-

ommended if there is any doubt about such an issue. If the answer to this question is "No," repair is the responsibility of the homeowner. If "Yes," it is the responsibility of the association.

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