

A House Divided: When Governing Documents Conflict

In this difficult economic climate, more associations are looking to lower expenses. Two effective ways to proactively manage the association's expenses are to ensure that the governing documents are clear regarding the allocation of those expenses and to shift the responsibility for some expenses to individual owners.

Avoiding disputes with individual owners is paramount to keep association expenses under control. Many disputes between associations and individual unit owners involve responsibility for damage or repair to the units, common elements and limited common elements. Typical examples include:

- Hot water tank leaks: Who pays for damage to the unit below? The association? The owner of the tank? The owner of the damaged unit?
- A drain pipe leaks: Who repairs the pipe? Who pays for resulting damage to another unit or to the common areas?
- Water damage to a unit from an outside leak or flood: Who pays?
- Condensation inside a double glazed window pane: Who pays?
- Weather-stripping on a unit front door that wears out: Who pays?
- A deck needs repair: If it is a limited common area, who pays?

In situations like these, there is often a difference between what an association board does and what a unit owner wants done and to compound things, often, even the governing documents are inconsistent with what can be done and how it is to be done. Our firm has handled a number of disputes where costs assessed to a unit owner were not supported by the governing documents. Even relatively minor repair costs, if improperly assigned to a unit owner, can result in extensive legal fees if the Association is sued and loses. Even if the dispute does not end up in court, the cost in stress, time and aggravation are substantial, and monetary costs can easily reach 10 to 20 times the initial amount in dispute.

The first step to avoiding disputes is to review the documents that define the relationship between the association (and the board that represents it) and individual owners. Most frequently these documents, listed in ranking order, are:

1. Laws (like the Washington Condominium Act)
2. Your Condominium Declaration
3. Your Articles of Incorporation
4. Your Association's Bylaws
5. Rules and regulations adopted by your association.

If the documents are properly constructed, disputes may be easily resolved. Unfortunately, the documents often conflict, making it impossible to accurately and fairly resolve the dispute between the owner and the association. If a conflict exists between the documents listed above, the higher level document always controls. Lower level documents can be enforced only if they are consistent with the higher level documents.

The greatest challenge occurs when the conflicts exist within a single document. Locate your Association's declaration from your files right now and look at how your unit and its limited common elements are defined. Who is responsible for their maintenance? Many of you will be surprised by what you find. Is the wallboard part of the unit or the common elements? If you have a garage or parking space, what are its boundaries? Is the association responsible for repairing damage to the unit interior if a pipe leaks? (Check the section related to "Utility Failure").

We have reviewed many declarations that assign windows and doors as limited common elements when defining the unit and common elements (often sections 4 and 7). The section regarding association powers (often section 11) may describe the association's responsibility to determine how the limited common areas are to be maintained, that the association will perform the maintenance, and may state that the cost shall be a common expense. However, in the section that defines unit maintenance, or in the section on common expenses (often section 12), it will then state that the cost of repair and maintenance of limited common elements is to be levied as a special charge against the unit owner to which it is assigned. These are direct conflicts that need to be resolved and surprisingly, there are large number of declarations that contain these direct conflicts.

Even if your declaration allows the board to determine how the limited common elements are repaired and requires the board to contract for their repair, it may assign the responsibility for the cost of the repair work to the unit owner. Some declarations define even more building components that serve only unit as limited common elements (like windows, doors, pipes, flues, wires, vents, etc.), whether that component is inside the boundary of the unit or not. While many declarations require that the unit owner pay for all limited common element maintenance and repair, many owners and boards assume, without reviewing the declaration, that the association pays for these costs. Many associations are paying for things that are the unit owner's responsibility, unnecessarily raising the cost to the association; and others are assessing owners for expenses that should be paid by the association subjecting the association to possible litigation.

Another challenge can be determining what portions of the limited common elements are unit owner responsibility. Limited common elements are typically either "things" (like windows, doors, pipes) or "spaces" (like patios, decks, and parking spaces). The declaration may define the boundaries of the space. Often the boundary is the unfinished surface of the components that define the space, like the handrail, walls or floor. This means the limited common element is actually a block of air surrounded by common elements on all sides.

Limited common area decks are an excellent example. They create uncertainty because a waterproof deck coating could be considered either a common element waterproof membrane protecting the structure (making it association responsibility) or the finished surface on top of the common element structure (making it the owner's responsibility).

So what to do?

First, review your declaration for direct conflicts and try to determine how unit owner responsibility is defined. Read your declaration's individual sections, and then read the declaration as a whole. Mixed use buildings, and multi-tiered condominiums may require additional expertise. An attorney who understands both condominium law and the construction of your building will be a huge asset to the association.

Second, make sure that your association is assessing costs as called for in your declaration. If the association members do not like the way responsibilities are defined and assigned, your association can amend the document to match the preferred scheme, but until then, you have to assess costs as the document provides. If the documents are unclear, the board may be able to adopt rules that clarify (but do not conflict with) your declaration.

Third, if your declaration has a direct conflict like the one described above (between section 11 and 12) the association should fix it by amending the declaration to delete one of the conflicting provisions. Some associations can adopt a rule to pick one of the two conflicting provisions, but that is subject to change by future boards, and subject to challenge by unhappy owners. Legal advice in this case is necessary to ensure that the conflicts are resolved and the desired outcome reached.

Should you care if your building is new, or you have no impending repair projects? One major reason you should, is your reserve study. State law requires that associations calculate reserves for anything that will require replacement or repair by the association in the next 30 years; you should care whether these expenses are paid by the association.

If windows and doors to a unit are limited common elements, and limited common element repair is the unit owner responsibility, then the association does not collect reserves for them. Windows, decks, and plumbing systems substantially increase required reserve contributions. Most reserve study professionals are not qualified to tell you which building components the association is legally required to account for in calculating reserves. The association probably should consult a qualified attorney to make this determination before obtaining or updating a reserve study.

Avoiding all disputes within an association is impossible, but with foresight, solid professional advice and clear governing documents, conflicts related to maintenance and repair costs can be prevented. Check your governing documents now, note the potential conflicts, get advice if you need it and resolve the before they become a problem. Your house – and your governing documents – need not be divided; they should (and need to be) be clear and consistent.
