

## Be Crystal Clear about Repair Rules

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Today's column is the third part of a series regarding amendment of governing documents for community associations.

Today's topic, allocating responsibility for maintenance, repair, and replacement of condominium property. Next week we will look at maintenance allocations in homeowners' associations.

Without a doubt, one of the most confusing areas in any set of condominium documents is the issue of who pays to fix what. With some exceptions, developer-generated documents are inadequate to address these questions, and even many amendments adopted after unit owner control of the Association leaves something to be desired.

In order to address maintenance issues (and generally, maintenance will also refer to repair and replacement), it is always necessary to first consider the demarcation of boundaries between the unit (sometimes called the "apartment") and the common elements. Basically, the unit is the space which is privately owned, and is defined in the original documents. Unit boundaries cannot be changed without unanimous approval of all unit owners and mortgage holders. Most documents define the unit as the "box of air" bordered by the floor slab, ceiling, and the interior of the boundary walls. However, this definition is not universal.

All portions of the condominium property located outside of the unit are known as "common elements." Common elements are divided into two sub-sets. "Limited common elements" are those portions of the common elements which are reserved for the particular use of one unit or group of units, to the exclusion of other units. Balconies and lanais are often defined as limited common elements, as well as a variety of other areas such as patios, courtyards, individual privacy fences, terraces, walkways, entry foyers, boat docks, assigned parking spaces, air conditioner compressors, and the like.

The allocation of maintenance responsibilities in the documents must be made within the parameters of the law. Common elements must be maintained by the association. Limited common elements can be maintained by the association as a common expense; by the association but only at the expense of the benefiting owner (sometimes called "limited common expense"); or by the individual unit owner. As to the unit, maintenance is to be performed by the owner unless the declaration delegates responsibility for maintenance of portions of the unit to the association (it should be noted that some debate whether Florida law permits a declaration to allocate responsibility for maintenance of the unit to the association).

Once the definitional scheme has been understood, it is my experience that the association is best served by specifically pinpointing which items are the responsibility of the association, and those which are the responsibility of the unit owner.

There are a number of items which often fall into gray areas, and are best handled through specific mention in the documents. Here's a sample of a few of the most common culprits:

**Plumbing:** It is helpful to try to specifically designate where the line between unit owner and association responsibility exists for both inbound and outbound plumbing. Many pipes which serve only one unit are located in interior walls (and would thus normally be the responsibility of the unit owner), even though the association has always repaired such areas. Conversely, many elements may serve only one unit, but lie in a common element area, such as a shower pan which is channeled beneath the lower unit boundary (concrete floor slab).

**Windows and Doors:** Many condominium documents do not specifically address responsibility for replacement of the building's windows, which can be a significant expense when they reach the end of their useful life. That issue is further complicated by the fact that many windows that are now in need of replacement are no longer manufactured, or do not meet current codes. While most documents are clear to the effect that the owner is responsible for interior apartment doors, the unit's entry door, sliding glass doors, and exterior screen doors all present occasional controversy which can be avoided by clear drafting.

**Lanais:** A standard feature in many condominiums is an area enclosed by screening at the rear of the apartment which is often called a lanai, but referred to in some documents by many other names

such as patio, balcony, or screen porch. In some cases, the lanai is designated as a limited common element, in other cases, it is defined as part of the unit. Areas of frequent debate for this space include maintenance responsibility for the screen frame assembly, screening, the slab itself, and improvements therein such as glass enclosures or tile floor covering.

Since every condominium is built a bit differently, and even different units in the same project will have varying lay-outs, this is one area where boilerplate documents "borrowed" from another association will not work. Usually, the board needs to set a policy on how it believes maintenance allocation should occur (which is often based on the "way it has always been done"), and an attorney experienced in document drafting can help bring you to the finish line. ⚖️

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## Legislation Clearly Sets Out Condo Insurance Liability

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**QUESTION:** I was told that the law in Florida is that each condominium unit owner is only responsible for insuring their individual unit. Is this correct and is there a web-site where I can find this information? M.M. (via e-mail)

**ANSWER:** You are probably referring to the amendments to Section 718.111(11), Florida Statutes, enacted during the 2003 Legislative Session. The scope of coverage was clarified to some degree, by this new legislation to reflect the current intent of the statute, that the association insure the structure of the building (whether part of the unit or common elements) as originally constructed. For example, an item like a closet door is typically to be maintained by the unit owner, but is to be insured by the association. Exempted from the association's master policy items are unit owner upgrades and "excluded items" which are specifically listed in the statute. All floor, wall, and ceiling coverings, electrical fixtures, appliances, air conditioner or heating equipment, water heaters, water filters, built-in cabinets and countertops, and window treatments, or replacements of any of the foregoing which are located within the boundaries of a unit and serve only one unit and all air conditioning compressors that service only an individual unit, whether or not located within the unit boundaries, are excluded from the association's master policy. All real or personal property located within the boundaries of the unit which is excluded

from the coverage to be provided by the association shall be insured by the individual unit owner's policy (usually called an H06 policy). Section 718.111(11), Florida Statutes can be found at the State of Florida's Legislative web-site, [www.leg.state.fl.us/](http://www.leg.state.fl.us/).

**QUESTION:** I belong to a homeowner's association. The board has called for a special meeting to approve an assessment for golf course renovation. Our bylaws state that an assessment may be approved by a majority of the members voting at any meeting of the voting members (annual or special) at which a quorum is represented. The board of directors must give sixty days notice of any meeting at which an assessment will be considered, along with an explanation as to the need of such assessment. Notice of the meeting was sent out sixty days prior and contains the reason for the assessment, but not the amount of the assessment, the method of payment, nor a method of voting. The board feels that they may send out a ballot or proxy at a later time or announce the amount at the special meeting and let people attending the meeting vote. Is this proper? D.G. (via e-mail)

**ANSWER:** It appears that the board has complied with the requirements in your bylaws, as it sent out the notice sixty days prior to the meeting. Many times, the exact amount of the assessment is not known until the contract is signed and the work is

ready to be done. Homeowners' associations are governed by Chapter 720, Florida Statutes. Section 720.306(4), Florida Statutes, provides that unless law or the governing documents provide otherwise, the notice of a special meeting must include a description of the purpose or purposes for which the meeting is called. In your case, it appears that the purpose of the meeting was included in the notice. Therefore, unless the bylaws require the proposed assessment amount to be included in the sixty day notice, then there is nothing in the law requiring such.

**QUESTION:** If our condominium documents require carpets in the unit, can the board of directors make an exception if an owner claims that he is allergic to the carpeting and wants to install tile instead? S.O. (via e-mail)

**ANSWER:** Based on the Federal Fair Housing Act and the Administrative Rules promulgated by the Department of Housing and Urban Development ("HUD"), an association must allow a "handicapped" unit owner to make reasonable modifications to his or her unit. The association must also make reasonable accommodations to its rules, policies, or practices. The term "handicapped" is defined as a "physical or mental impairment which substantially limits one or more major life activities." The extent of the limitation caused by the impairment must be substantial. In a case decided by the State's condominium arbitration program, an arbitrator found that a unit owner who suffered serious allergies to mold and mildew was considered handicapped for purposes of the Fair Housing Act. The arbitrator did not require the owner to

remove the tile, notwithstanding prohibitions against tile in the condominium documents. An association, however, can require a unit owner to present documentation of the handicap and how the modification will ameliorate the effects of the disability, such as letters from the owner's doctor. Legal counsel should be consulted in any situation involving an accommodation request from a disabled resident.

**QUESTION:** A number of years ago, my friend and I purchased two chaise lounge chairs for our own personal use, which we kept at the pool. The President at the time gave us permission to leave the lounge chairs at the pool with our name and unit number on them so that everyone would know that they were our personal chairs. The Board has now purchased additional chaise lounge chairs for use by all of the owners. The Board has asked us to remove the chairs from the pool area (in which case we would have to carry the chairs back and forth when we go to the pool) or donate them to the association so that everyone can use them. Do we have any rights in this regard? J.L. (via e-mail)

**ANSWER:** The Board cannot force you to "donate" the chairs, but can adopt a rule prohibiting personal items to be stored or kept on the common elements (assuming your governing documents give the Board the authority to adopt reasonable rules and regulations regarding the condominium property.) The fact that the President may have given you permission in the past to keep your personal lounge chairs at the pool does not, in my opinion, give you the right to keep them there if the Board adopts a rule prohibiting personal property on the common elements. ⚖️

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*Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.*

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