



COMMONWEALTH of VIRGINIA

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The Honorable Jeffrey L. McWaters
Member, Senate of Virginia
1207 Laskin Road
Virginia Beach, Virginia 23451

Dear Senator McWaters:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire who is responsible under § 55-79.79 of the Condominium Act for damage caused by a failure in the common elements, and whether the default rules in this section can be modified by agreement.

Response

It is my opinion that § 55-79.79 provides a default general rule that governs repairs and renovations in two circumstances: first, it allocates the responsibility for the maintenance, repair and renovation of the common elements to the owners' association, and, second, it provides that the maintenance, repair and renovation of a particular unit is the responsibility of the unit owner, unless the damage originated in or through the common elements or an apparatus located within the common elements. In that specific situation, when the damage originated in or through the common elements or an apparatus located within the common elements, the unit owners' association is responsible for repairs to the unit. It is further my opinion that both of these default rules can be modified by agreement.

Applicable Law and Discussion

Section 55-79.79 of the Condominium Act addresses the upkeep of condominiums. It provides in part (A) that

Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities, including financial responsibility, with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (i) to the unit owners' association in the case of the common elements, and (ii) to the individual unit owner in the case of any unit or any part thereof, except to the extent that the need for repairs, renovation, restoration or replacement arises from a condition originating in or through the common elements or any apparatus located within the common elements, in which case the unit owners' association shall have such powers and responsibilities.

Under subpart (i), unless “condominium instruments” provide otherwise, the unit owners’ association is responsible for the maintenance, repair, renovation and replacement of the common elements. The “common elements” mean “all portions of the condominium other than the units.”¹ Common elements include things like the roof or siding. In sum, subpart (i) of § 55-79.79(A) establishes a default rule that the unit owners’ association is responsible for repairs to the roof, siding, and other common elements, but the owners can agree to a different arrangement.

Subpart (ii) of § 55-79.79(A) establishes a default rule for damage to a unit, as opposed to damage to the common elements. Generally, when a particular unit is damaged or needs repair or renovation, the responsibility falls to the owner of that unit. If, however, the damage or repair “arises from a condition originating in or through the common elements or any apparatus located within the common elements,”² then the responsibility for the damage or repair to the unit falls to the unit owners’ association. For example, if leaks in the roof have damaged the ceiling of a unit, the owners’ association is responsible for the repair to the unit, unless the owners have agreed to a different arrangement. Similarly, if pipes that are not part of a specific unit, but are located underneath the roof, leak and damage the ceiling of a unit owner, the damage caused by such leaks to a particular unit would be the responsibility of the owners’ association because the pipes would constitute an “apparatus located within the common elements.”³ As with the rules governing common elements, this default provision can be modified by agreement. The introductory clause to subsection (A), allowing the condominium instruments to modify the default rules, applies to both subsection (i) and (ii).

Conclusion

Accordingly, it is my opinion that § 55-79.79 provides a default general rule that governs repairs and renovations in two circumstances: first, it allocates the responsibility for the maintenance, repair and renovation of the common elements to the owners’ association, and, second, it provides that the maintenance, repair and renovation of a particular unit is the responsibility of the unit owner, unless the damage originated in or through the common elements or an apparatus located within the common elements. In that specific situation, when the damage originated in or through the common elements or an apparatus located within the common elements, the unit owners’ association is responsible for repairs to the unit. It is further my opinion that both of these default rules can be modified by agreement.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

¹ VA. CODE ANN. § 55-79.41 (Supp. 2010).

² Section 55-79.79 (Supp 2010).

³ I further note that § 55-79.79(B) requires a declarant to “warrant or guarantee, against structural defects, each of the units for two years from the date each is conveyed, and all of the common elements for two years.” Therefore, for the first two years, regardless of any agreement to modify the default rule in subsection (A), the guarantee covers the unit buyer against structural defects to the unit or the common elements for the first two years.