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How the Law Fails Condo Owners

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Condominiums are a nice concept, but the reality has been less than perfect.

Before the fatal Berkeley, California, balcony failure in 2015 and the 2021 Champlain Towers South collapse that killed 98 people in Surfside, Florida, significant gaps in the statutory underpinnings of condominium ownership were affecting the long-term sustainability of the buildings.

This weak legal authority makes maintaining these projects difficult, leaving their future in doubt. So how has the law failed these owners, and can it be fixed?

Introduction

There were few condominiums in the U.S. before 1961. Except for some cooperatives, most multifamily apartments were rentals.

Condominiums took off when the Federal Housing Administration could insure mortgages on units sold rather than rented or leased. Land developers, seeking more density on a single parcel and higher returns, convinced the federal government to guarantee loans on condominiums.

No one questioned the wisdom of doing that then, and few question it now.

Condominiums are priced lower than a similar detached home giving first-time homebuyers, empty nesters and transient owners an alternative to the single-family home with its maintenance and repair demands. No lawn to mow. No house to paint. A community of like- minded people who, by consensus, happily fund, cooperatively manage and maintain the property, keeping its values high and expenses low.

It sounds nice, but it isn't reality.

The Problem

Many condominium associations responsible for maintaining and repairing these projects have nowhere near the cash to deal with known long-term repair needs, let alone undiscovered problems.

This systemic underfunding means that necessary repairs are delayed or deferred. At the same time, the situation worsens, and the cost to deal with it grows until it requires drastic fundraising measures, which are often beyond the owners' means.

The law regulating condominiums is part of the problem.

California recognized the condominium form of ownership in 1963 with the passage of the California Condominium Act. However, that law was spread between the civil and corporate codes and was challenging to navigate.

As a result, in 1986, California enacted the Davis-Stirling Common Interest Development Act, a consolidated collection of statutes in the civil code that provided a more organized legal framework for condominium management and ownership. While the more comprehensive approach is helpful, some provisions of the act are responsible for the lack of funding that affects the service life of these projects.

California Civil Code Section 5600

Assessment funding is the lifeblood of condominium projects. While boards and management must maintain the project and protect people, raising funds is another matter. Directors must leap significant hurdles to increase regular assessments. Imposing large, unexpected, special assessments for major repairs can be political suicide.

In California, raising revenue from owners to maintain a project adequately is a mandatory obligation of the board of directors, although few understand the law that way.

Section 5600 states:

> "*The association shall levy regular and special assessments sufficient to perform its obligations under the governing documents and this act.*"

The choice by the Legislature of the word "shall" instead of "may" means the obligation is not discretionary. In practice, however, owner assessments are voluntary.

That doesn't mean owners can pay them or not. Instead, it means the board of directors can set assessments at whatever level is politically comfortable and without adequate consideration, or even knowledge, of the long-term funding needs of the corporation. Boards of directors can ignore the law because there is no oversight by any government agency.

Whether they understand the law or not, most boards try to follow the funding recommendations of management and other experts, but those efforts often meet with stiff resistance from owners due to their cost.

Political pressure from owners is usually enough to keep assessments artificially low, not just for a year but for decades. Meanwhile, the cost of eventual rehabilitation of the building rises exponentially, quickly outdistancing saved cash.

Not helpful in funding arguments is other language in Section 5600:

> "*An association shall not impose or collect an assessment or fee that exceeds the amount necessary to defray the costs for which it is levied.*"

This provision gives directors cover if they believe recommended repairs are expensive or unnecessary, leading to arguments with experts and management about the cost and necessity of certain repairs, often delaying what's necessary. The members want the lowest possible assessments, and directors will accede to those demands by choosing low bids on a limited scope of work or choosing no bid at all.

The result? Maintenance and repairs remain deferred or unknown for many years amid a growing deficit. These factors conspire to shorten the service life of a building drastically. They also make it potentially unsafe.

We are not dealing with simple lapses of judgment by volunteer directors, but flaws in the statutes that govern condominium projects. Board members want to succeed but are constrained by available funding and their knowledge of the condition of the building.

Also, it is impossible to budget for future repairs that are unknown or unanticipated. Adequate funding for future maintenance demands thorough investigations and substantial and increasing financial contributions from every owner annually.

That's a challenging concept for many owners to swallow but more formidable yet if the board lacks basic information about the condition of the building and the actual cost of future maintenance and repairs. That requires periodic inspections and a proper analysis of the association's reserve program.

California Civil Code Section 5550

Few states mandate a reserve analysis to project future funding needs of the association and to give boards of directors the tools necessary to determine what monthly or special assessments are required. California, however, has Civil Code Section 5500 that requires inspections and a reserve analysis.

Section 5550 of the act requires:

> "*At least once every three years, the board shall cause to be conducted a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore, or maintain as part of a study of the reserve account requirements of the common interest development. … The board shall review this study, or cause it to be reviewed, annually and shall consider and implement necessary adjustments to the board's analysis of the reserve account requirements as a result of that review.*"

A visual-only inspection of just those areas readily accessible to the inspector in a complex, multifamily building will not uncover some of the building's more critical maintenance and repair needs.

For example, where wall cavities harbor moisture over a long period, rot and deterioration can develop in the framing of a building. If not caught in time, this can lead to massive reconstruction costs for the owners.

But more critical is rot in load-bearing components — those beams, columns and joists that support structures intended for human occupancy — balconies, stairways and decks, for example.

The statute continues

> "*The study required by this section shall at a minimum include:*
>
> 1. *Identification of the major components that the association is obligated to repair, replace, restore, or maintain that, as of the date of the study, have a remaining useful life of less than 30 years.*
> 2. *Identification of the probable remaining useful life of the components identified in paragraph (1) as of the date of the study.*"

It is impossible to comply with this section of the statute unless you can inspect all the components of the building and determine their useful life. But Section 5550 assumes that the only components in the reserve analysis are those with a known or identifiable replacement cycle, usually determined by reference to the manufacturers' specifications.

However, hidden components also have service lives, depending on their condition. These are not necessarily products with a generally accepted service life. Instead, they are components like weather barriers, shear walls, roof sheathing, concrete, waterproof membranes and plumbing that the builder expected would last the life of the building.

But as we have discovered, many will not last that long and will require replacement. And, if they do, they should be included in the reserve calculations regardless of how long their service lives.

The 30-year statutory cutoff is arbitrary and reflects the drafters' misunderstanding of how building components age. The service lives of a few building components are predictable.

Products like roof shingles may have specified lives of 20 or 30 years, and paint has 5 to 7 years. The builder expects the joists that hold up a balcony or a staircase to last the life of the building. But they often do not, and their condition can only be determined by intrusive inspections like those required by Civil Code Section 5551.

California Civil Code Section 5551

To partially remedy the inadequacy of Section 5550 and to address catastrophic balcony failures like what happened in Berkeley in 2015, the California Legislature added Section 5551 to the act, relating to balcony safety. That statute requires condominium associations to inspect specific elevated structures for safety, including intrusive testing where indicated.

The economic impact of repairing damage from long-deferred maintenance is enormous. Rot hidden within walls slowly damages the structural framing. Moisture seeping into balcony supports weakens them sometimes to the point of collapse. Yet, even without injuries to occupants, the cost of this damage is frequently out of reach of most condominium associations.

In newer projects, when experts find problems early, claims are possible. For example, the Berkeley balcony failure occurred in an 8-year-old building, and there was recourse available from the builder. But with older projects, it is often difficult to hold anyone responsible other than the owners themselves.

Investor-owned buildings incentivize good maintenance with increased rents and market value. That incentive is irrelevant to a condominium owner because unknown damage and an accumulating repair cost deficit are rarely known and is not reflected in the unit's sales price.

In a single-family home, the buyer's inspector can quickly identify deferred maintenance, and a true-up happens as a discount from the purchase price. But condo home inspections are usually confined to the interior of the unit. They do not consider the overall condition of the project or the funding available to attend to deficiencies. The purchase price, therefore, reflects a market unaware of any accumulating deficit.

This situation leads to unfair consequences for those owners who find themselves unlucky enough to own a unit when this damage and these deficits are realized. Hidden deterioration discovered in year 35 didn't happen in year 35. That deterioration likely began earlier in the building's life and lay hidden for decades. It is costly to repair when it finally becomes obvious or dangerous.

No prior owner, those who owned and sold their units years ago, will pay any part of the cost of the eventual rehabilitation of that building due to the prior lack of adequate inspections and years of artificially low assessments. Instead, the present owners will be handed the tab for several decades of deferred maintenance or hidden damage — the last people standing when the music stops.

Lending agencies have recently attempted to understand the extent of this growing deficit to protect themselves and their borrowers. Post the Surfside disaster, Fannie Mae and Freddie Mac developed a list of new questions that need to be answered by prospective condo buyers in order for their mortgage to be processed.

The goal of the questions was to obtain info regarding deferred maintenance that may pose structural habitability issues and obtain information on possible special assessments on a particular property. In the end, Fannie and Freddie's new questionnaire opened itself to even more questions from condo associates, lawyers, and condo buyers and sellers, and thus Fannie and Freddie are going back to the drawing board to revise their initial questionnaire.

Can this growing deficit be reversed? As condominium buildings age and deterioration continues, the funding deficit can increase dramatically. But to reverse that trend and reduce the deficit, someone must know what damage exists and be willing to address it. That requires more robust inspections early in the building's life and potentially higher assessments to address decay.

California Civil Code Section 5605

But even if a board takes a proactive approach to inspecting the building and discovers significant hidden damage that now requires an increase in regular or special assessments, the act puts up hurdles that boards of directors cannot often overcome.

Section 5605 puts limits on the board's fundraising powers:

> "*Notwithstanding more restrictive limitations placed on the board by the governing documents, the board may not impose a regular assessment that is more than 20 percent greater than the regular assessment for the association's preceding fiscal year or impose special assessments which in the aggregate exceed 5 percent of the budgeted gross expenses of the association for that fiscal year without the approval of a majority of a quorum of members.*"

This provision may appear a reasonable restriction until you know how difficult it is to get a quorum of members to vote.

A quorum is defined in the act as more than 50% of the association's members. In a 100- unit association, at least 51 members must cast a vote. Many community managers will tell you that getting half of the members to cast ballots is problematic, given the apathy in many community associations. While everyone is more alert to structural failure post- Surfside, approval is not a foregone conclusion if, for example, a $50,000 per unit or greater special assessment is required.

There are ways to circumvent these limitations with evidence of an emergency condition or to challenge the lack of a quorum in court, but these options require legal action a board may not be willing to take.

Conclusion

Beyond statutory issues, a community association has other legal problems. For example, the Champlain Towers South collapse has alerted insurance companies and financial institutions to potential risks in the multifamily buildings they insure or hold as security for loans, raising insurance premiums, making mortgage loans harder to get and decreasing the value of owners' interests.

The law governing condominium projects has flaws to fix. California should consider legislation to impose minimum funding for maintenance and repairs and robust, whole- building inspections on new and existing projects.

In addition, provisions in the law that allow directors to avoid correctly funding future repairs should be tightened or removed. The present system is not staying even with the deterioration of many buildings, and that is just not safe anymore.
