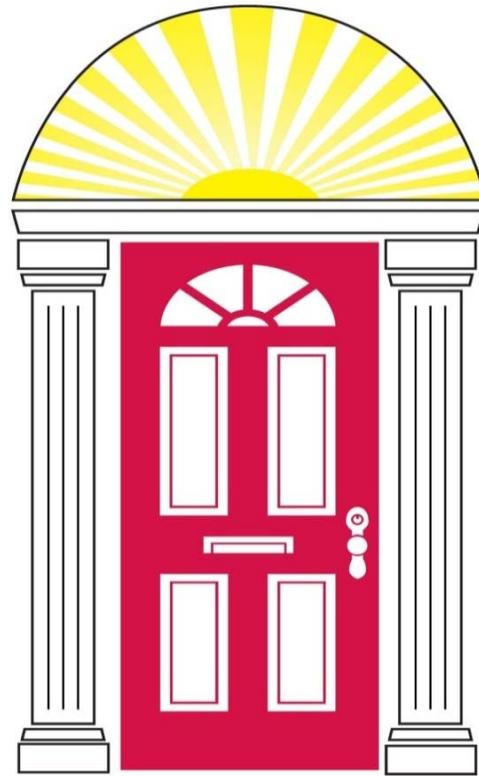


BREAKFAST BRIEFS



NAVIGATING THE MAINTENANCE RESPONSIBILITY MATRIX

**Tips on Deciphering Maintenance Responsibility and Liability
in the Condominium Community**

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Typical Maintenance Scenarios

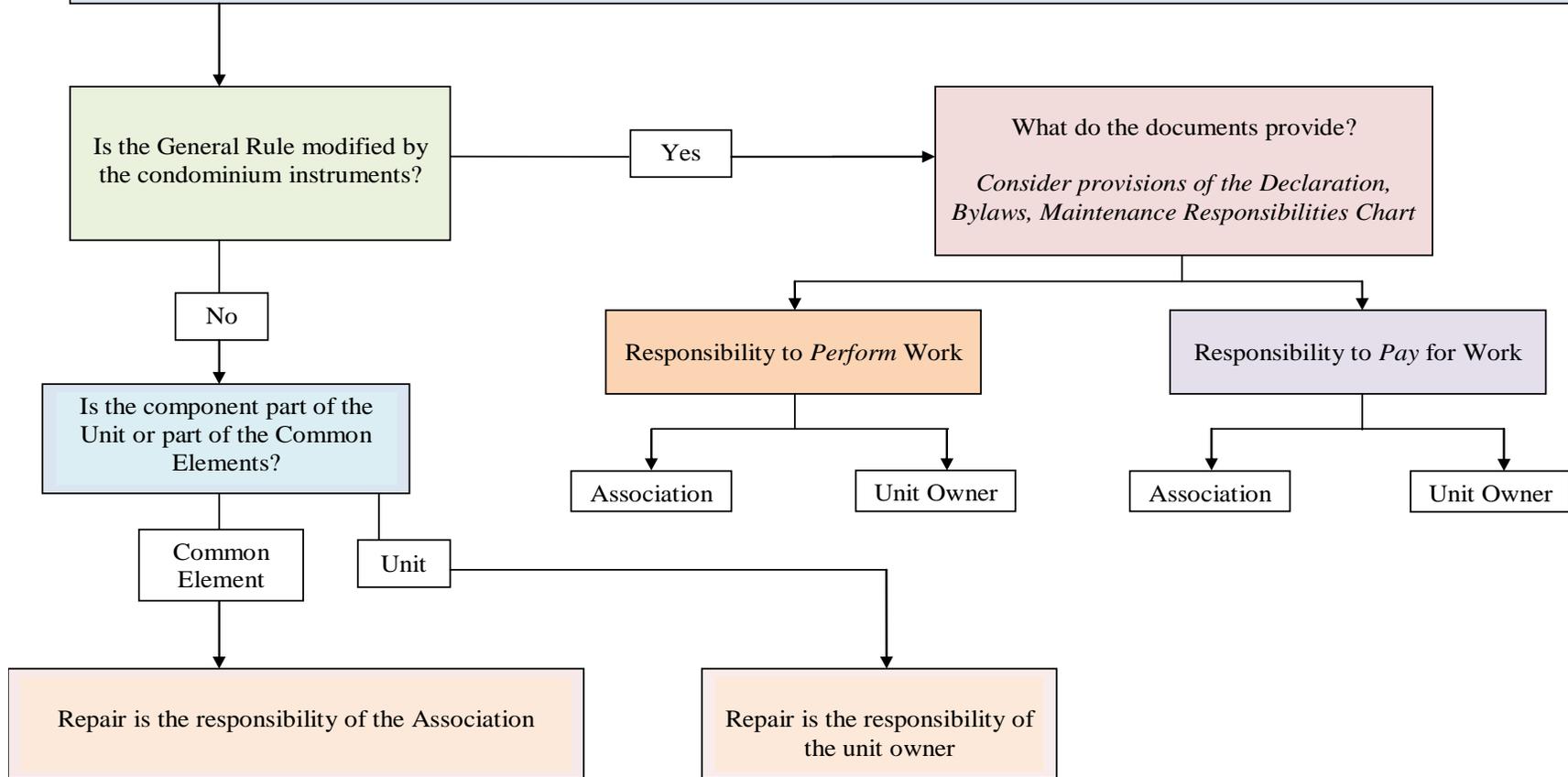
- ✦ Windows and doors serving units are old and need to be replaced.
- ✦ Unit HVAC systems are failing and need to be repaired.
- ✦ Dryer vents need to be cleaned.

The Question(s)

- Who is responsible for performing maintenance?
- Who bears the costs performing maintenance?

RESPONSIBILITY DETERMINATION MATRIX

General Rule. Section 55-79.79 A of the Act provides, in part: *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.*



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What Must Be Considered

- ★ Virginia Condominium Act (“Act”)
- ★ Condominium Instruments
 - Declaration
 - Bylaws
 - Maintenance Responsibilities Chart
 - Plats and Plans

General Rule

Section 55-79.79 A of the Act provides that ***except as otherwise provided in the condominium instruments***, all powers and responsibilities (including financial responsibility) for maintenance, repair, renovation, restoration, and replacement in the Condominium belongs to:

- ✦ the **association** for **common elements**; and
- ✦ the **unit owner** for **unit or any part thereof**.

General Rule (Exception)

- ✦ Unit owner responsible for maintenance, repair, renovation, restoration, and replacement in Unit *except to the extent that the need for such work arises from a condition originating in or through the common elements or any apparatus located within the common elements, in which case, the association is responsible.*

Determine Unit Boundaries

- ✦ Condominium Instruments
 - Declaration, or
 - Plats and Plans (older Condominiums)
- ✦ Section 55-79.50 of the Act (if condominium instruments are silent).

Determine Unit Boundaries (Continued)

- ✦ Section 55-79.50 of the Act (if condominium instruments are silent):
 - If walls, floors and/or ceilings are designated as unit boundaries, all lath, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished surfaces thereof, are part of the unit part of such units; all other portions of such walls, floors and/or ceilings shall be deemed a part of the common elements.

Determine Unit Boundaries (Continued)

- ✦ Section 55-79.50 of the Act (if condominium instruments are silent):
 - If any chutes, flues, ducts, conduits, wires, bearing walls, bearing columns or any other apparatus lies partially within and partially outside of the designated boundaries of a unit, any portions thereof serving only that unit shall be deemed a part of that unit, while any portions thereof serving more than one unit or any portion of the common elements shall be deemed a part of the common elements.

Determine Unit Boundaries (Continued)

- ✦ Section 55-79.50 of the Act (if condominium instruments are silent).
 - All space, interior partitions and other fixtures and improvements within the boundaries of a unit shall be deemed a part of that unit.
 - Any shutters, awnings, doors, windows, window boxes, doorsteps, porches, balconies, patios and any other apparatus designed to serve a single unit, but located outside the boundaries thereof, are considered a limited common element (exception – master electrical switch)

Modification of General Rule

The condominium instruments may modify the general rule established by the Act:

- ✦ Bylaws – Maintenance, repair, and replacement section.
- ✦ Maintenance Chart – Sometimes an exhibit to the Bylaws.

Sample Bylaw Provision (Good Example)

Section 5.5. Maintenance, Repair, Replacement and Other Common Expenses.

(a) Chart of Maintenance Responsibilities. Notwithstanding the general provisions for maintenance set forth in subsections (b) and (c), specific maintenance responsibilities and the costs attributable thereto shall, to the extent set forth thereon, be determined pursuant to the Chart of Maintenance Responsibilities attached as Exhibit B to these Bylaws.

(b) By the Unit Owners Association. The Unit Owners Association shall be responsible for the maintenance, repair and replacement of all of the common elements (including the limited common elements) as defined in the condominium instruments, whether located inside or outside of the units, the cost of which shall be charged to all unit owners as a common expense; provided, however, that the Board of Directors may elect not to do so if in the opinion of a majority of the Board of Directors such maintenance, repair or replacement was necessitated by the act, neglect or carelessness for which a unit owner is responsible pursuant to Subsection 9. 1(a); and provided, further, that each unit owner shall perform normal maintenance on the limited common elements appurtenant to such unit owner's unit and any portion of the remaining common elements which the Board of Directors pursuant to the rules and regulations has given such unit owner permission to utilize, including without limitation the items enumerated in subsection (c).

(c) By the Unit Owner.

(1) Each unit owner shall keep the unit and its equipment, appliances and appurtenances in good order, condition and repair and in a clean and sanitary condition. Each unit owner shall perform this responsibility in such manner as shall not unreasonably disturb or interfere with the other unit owners. Each unit owner shall promptly report to the Board of Directors or the managing agent any defect or need for repairs for which the Association is responsible.

What happens when an
incident occurs?

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Possible Problems

- ✦ *A common element pipe breaks causing damage to several units.*
- ✦ *The unit owner is responsible for maintaining the unit hot water heater, but fails to do so. The hot water heater leaks causing damage to the common elements and another unit.*
- ✦ *The pipes behind the shower wall spring a leak causing damage to the common elements and another unit.*

Who Repairs?

- ✦ What to the condominium instruments say?
- ✦ Many condominium instruments contain language similar to:

If all or part of any building is damaged or destroyed as a result of fire or other casualty, the Board of Directors shall arrange for and supervise the prompt repair and restoration thereof (including without limitation any damaged units, and the floor coverings, fixtures and appliances initially installed therein by the Declarant, and replacements thereof installed by the unit owners up to the value of those initially installed by the Declarant, but not including any furniture, furnishing, fixtures, equipment or other personal property supplied or installed by the unit owner in the units unless covered by insurance obtained by the unit owners Association). (Emphasis added.)

Who Repairs?

The Association Board of Directors has the obligation to promptly supervise repairs.

- ✦ No exceptions,
- ✦ No exclusion for damage caused by an owner,
- ✦ Applies to all units, even the unit wherein the problem originated.
- ✦ Does not include furniture or fixtures (Betterments)

Who Pays?

Consider:

- ✦ The circumstances
- ✦ Liability and other provisions contained in the condominium instruments
- ✦ Association insurance coverage
- ✦ The Act
- ✦ Virginia common law

Nido Line of VA Cases

Nido v. Ocean Owners' Council, 37 Va. 664 (1989)

In Nido, a unit owner filed a lawsuit to recover for the damage to his unit caused by the water coming from the common elements. The Virginia Supreme Court held that the association was not liable for the water damage. In so doing, the Virginia Supreme Court relied on the following provision in the Ocean Owners' Council bylaws:

The Council shall not be liable for any failure of water supply or other services ... or for injury or damage to person or property caused by the natural elements ... or resulting from electricity, **water**, snow or ice which may leak or flow from any portion of the Common Elements. (Emphasis in original).

Nido Line of VA Cases

Samuels v. Treebrooke Condominium Association,
41 Va. Cir. 109 (1996)

In Samuels, the Fairfax Circuit Court considered a bylaw provision similar to the clause relied upon in Nido. The Treebrooke provision stated:

The Association shall not be liable for injury or damage to person or property caused by the elements or ... resulting from electricity, **water**, snow or ice which may leak or flow from any portion of the common elements. (Emphasis added.)

The Fairfax Circuit Court held that this provision precluded a claim for damage resulting from water run-off from the common elements.

Insurance

The Nido line of cases, do not address the association's obligations under the insurance provisions of the condominium instruments.

A Nido provision may affect the Association's liability for expenses not covered by association insurance.

Insurance

To help ensure that funds are available to allow the association to meet this obligation, the Bylaws usually provide:

The Board of Directors shall obtain and maintain a policy of insurance against Special Causes of Loss (formerly “all-risk”), including without limitation fire damage, vandalism, malicious mischief, sprinkler leakage (if applicable), cost of demolition, debris removal, and water damage coverage, insuring the entire Property (including without limitation all of the units and the fixtures initially installed therein by the Declarant, and replacements thereof up to the value of those initially installed by the Declarant, but not including furniture, wall coverings, improvements and additions, furnishings or other personal property supplied or installed by unit owners), together with all air conditioning and heating equipment and other service machinery contained therein and covering the interests of the Unit Owners Association, the Board of Directors and all unit owners and their Mortgagees, as their interests may appear. (Emphasis added `

Insurance

Consider exclusions to coverage apply:

- ✦ Personal property
- ✦ Mold remediation

The Deductible

The liability of the unit owner becomes a consideration in determining who is responsible for the costs not covered by the proceeds of Association insurance. Some condominium instruments provide:

The deductible or self-insured retention (if any) on any insurance policy purchased by the Board of directors shall be a common expense (or a Limited Common Expense, as appropriate); provided, however, that the Association may, assess any deductible amount necessitated by the act, neglect or carelessness for which a unit owner is responsible against such unit owner. (Emphasis added.)

Negligence

Even if the condominium instruments do not have the preceding language, most condominium instruments have a provision similar to the following:

Each unit owner shall be liable to the Association or to any affected unit owner for the expense of all maintenance, repair or replacement rendered necessary by such unit owner's act, neglect or carelessness of any member of such unit owner's household or such unit owner's guests, invitees, tenants, agents or employees, but only to the extent that such expense is not covered by the proceeds of insurance carried by the Board of Directors.
(Emphasis added.)

Negligence

The determination that the unit owner was negligent is not automatic. Generally, the Association Board of Directors must act.

The Unit Owners Association shall be responsible for the maintenance, repair and replacement of all of the common elements (including the limited common elements) as defined in the condominium instruments, whether located inside or outside of the units, the cost of which shall be charged to all unit owners as a common expense; provided, however, that the Board of Directors may elect not to do so if in the opinion of a majority of the Board of Directors such maintenance, repair or replacement was necessitated by the act, neglect or carelessness for which a unit owner is responsible.

Negligence

- ✦ The Board's determination should be reflected in the Board meeting minutes.
- ✦ A formal due process hearing is generally not required.
- ✦ However, a formal due process hearing gives the unit owner a chance to present his side of the story and may help avoid complaints about surprise.

Negligence

Remember our examples:

- ✦ *A common element pipe breaks causing damage to several units.*
- ✦ *The unit owner is responsible for maintaining the unit hot water heater, but fails to do so. The hot water heater leaks causing damage to the common elements and another unit.*
- ✦ *The pipes behind the shower wall spring a leak causing damage to the common elements and another unit.*

Negligence

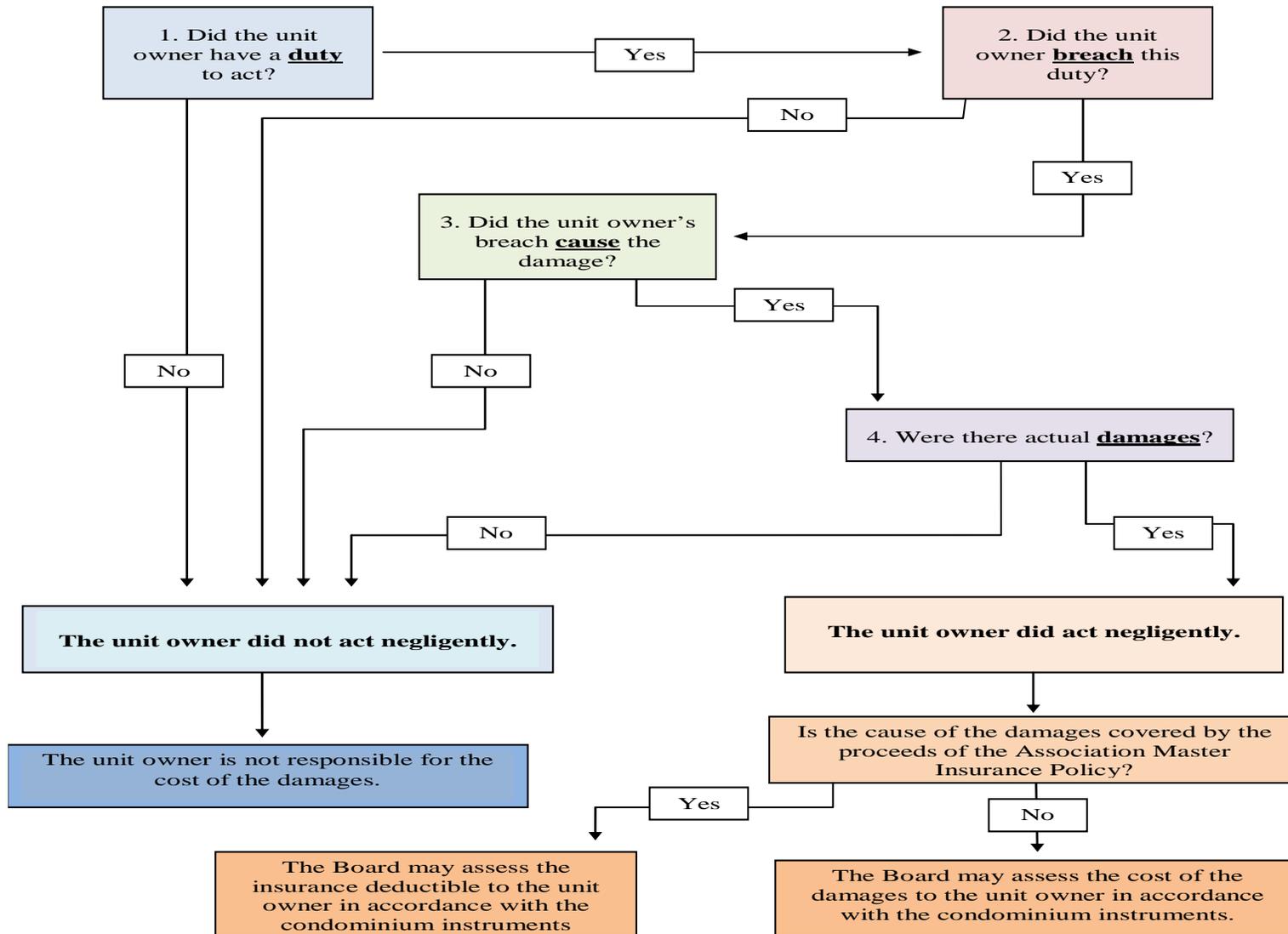
For example:

The association is responsible for maintaining the common element garage, a unit owner backs this car into the garage door;

Negligence

- ✦ Again, the Board makes a determination that the unit owner was negligent.
- ✦ The Board's determination should be reflected in the Board meeting minutes.
- ✦ A formal due process hearing is generally not required, but gives the unit owner a chance to present his side of the story and may help avoid complaints about surprise.

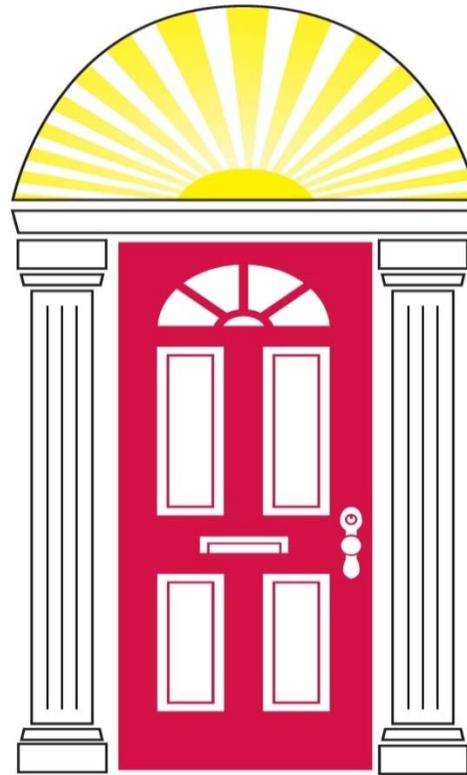
NEGLIGENCE DETERMINATION MATRIX



Other Considerations

- ✦ When in doubt, involve association legal counsel and insurance carrier.
- ✦ Amend condominium instruments to address ambiguities or inconsistencies.
- ✦ Adopt resolution to address negligence *per se* and insurance deductible.

B R E A K F A S T B R I E F S



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M E R C E R T R I G I A N I

