

## Limited Common Elements

Limited common elements is a term that is heard and used without a real understanding of what it means. Limited common elements and common elements are terms that identify physical components of property. Although the term limited common elements is used in many instances, to describe parts of property, the definition and the term is a condominium definition and term. Limited common elements are defined in the Condominium Property Act ("Act") at Section 2 (s). Section 2 (s) states: ***"Limited Common Elements" means a portion of the common elements so designated in the declaration as being reserved for the use of a certain unit or units to the exclusion of other units, including but not limited to balconies, terraces, patios and parking spaces or facilities."***

Section 2.1 of the Act states that the provisions of the Act are applicable to all condominiums in the state; and that any provisions of a condominium instrument that contains provisions inconsistent with the provisions of the Act are void as against public policy and ineffective. Consequently, the definition for limited common elements that is present in the statute is a controlling definition. It supercedes any definition in any condominium declaration that is inconsistent with its wording. Any provisions in a declaration that are inconsistent are void as against public policy.

That does not mean that all definitions in a declaration are void. Many of the definitions, and many specifics in definitions or in declarations that further define limited common elements may not be inconsistent, but may be further definitions or identifications of specific limited common elements that are considered to fall within the definition of Section 2(s). Those further definitions are not inconsistent with the Act. The Act itself further identifies general and specific limited common elements at Section 4.1 (a)(5). This Section is entitled "Construction, Interpretation And Validity Of Condominium Instruments" and states:

(a) Except to the extent otherwise provided by the declaration or other condominium instruments - - (5) any shutters, awnings, window boxes, door steps, porches, balconies, patios, perimeter doors, windows, and perimeter walls and any other apparatus designed to serve a single unit shall be deemed a limited common element appertaining to that unit exclusively.

Thus, specific portions of property in a condominium are as a matter of law, and by definition, limited common elements. However, it is again noted that these definitions control only to the extent that the declaration or other condominium instruments do not otherwise define these components. To the extent the declaration does not otherwise define these components, they are limited common elements.

Limited common elements are a specific defined type of common element. The Act at Section 2 (e) defines common elements. It states:

"2 (e) "Common Elements" means all portions of the property except the units, including limited common elements unless otherwise specified."

Because the limited common elements are also common elements, all of the general rights and obligations associated with common elements apply to limited common elements, except to the extent otherwise specifically provided or applied in the Act, and except to the extent specified in the declaration or other instruments.

Section 4 of the Act identifies in outline form those things that should be in a declaration. At paragraph (g), it provides that the declaration should include:

(g) A description of both the common and limited common elements, if any, indicating the manner of their assignment to a unit or units.

Although that statement is specified in Section 4 of the Act, in many condominium declarations there is no detailing of the common elements or the limited common elements. Only the definitions are given.

It is important to remember that common elements and limited common elements are always under the direct supervision and control of the board of directors of the Association. That means the board can limit or control their use, operation, maintenance, and repair, but again subject to any limitations that exist in the Act, and any limitations or requirements in the declaration. For example, boards can control what can be placed on balconies and patios even though they are limited common elements. They can control what is done with, on or in limited common elements such as, for example prohibiting barbecuing on balconies. They can prevent windows and doors and window trim from being painted, covered, or modified. Of course, no modifications may be made to limited common elements unless approved or authorized by the board.

The board must maintain this control. It does not make a difference what physical characteristics of the property exist. This control is fundamental in condominiums. The board will be in breach of its duties if that control is not maintained.

Although the board exercises control and authority over the limited common elements, the unit owner that has a particular limited common element is entitled to the exclusive use and enjoyment of that, limited common element. Again however that is subject to the board's control, the owners proper use as a limited common element, the declaration requirements and rules and regulations applicable to the limited common element. Typically for example, a limited common element parking space is utilized only by the owner to whom it is assigned. It is only used for parking a car. A balcony or patio is utilized as a balcony or patio only by the unit owner to whom it is assigned. Obviously, windows, doors and peripheral parts of units are for the exclusive use and benefit of the unit owner. They cannot paint them, decorate them or cover them except as allowed by the board.

Another important reason for defining limited common elements is to allow transfer of the responsibility for the cost of maintenance or repair of a component to the owner. Clearly, if a limited common element is damaged or destroyed by an owner as a result of an intentional or negligent act or omission, that owner is responsible for the cost of maintenance and repair associated with the damage or destruction caused. That is basic law. Now many declarations also transfer maintenance, repair and replacement, or the cost of maintenance, repair and replacement, to the unit owner to whom the limited common element is assigned. The declaration can identify specific limited common elements such as doors, windows, and window components that are to be painted, maintained or repaired, at the expense of the individual unit owner, or by the unit owner, subject to the rules, requirements, limitations and controls of the board. Similarly, the declaration can specify other limited common element maintenance and repair to be the responsibility of the unit owner to whom that limited common element is assigned such as parking spaces, balconies and patios. Alternately and/or in addition, the declaration can specify that the board has the right to decide whether the maintenance, repair or replacement of any one or more of the limited common elements is to be at the expense of the unit owner, or by the unit owner; or whether it should be a common expense to be paid by the association. The declaration can provide that the board may have discretionary authority to decide who is to pay for or perform maintenance, repair or replacement for each limited common element. In this case, the board can exercise its discretion separately with respect to each limited common element.

In each case, the declaration wording will control. The board must follow that wording. If the declaration allows, the board can tell the unit owners that the cost of painting the front door will be charged to each separate owner or will be a common charge. It can also tell each owner that the cost of replacing a door or performing any repairs on a door is the unit owners expense.

As noted previously, the board can have the owners perform maintenance, repair or replacement on limited common elements. However, it is important to know all such authorizations are completely subject to board authorization and approval of the specific work; the board's right to oversee and supervise the work, the board's right to require that the work is done in accordance with their policies, procedures and standards; and by competent trades people that are insured and that have provided insurance certificates to the Association, in accordance with Section 12 of the Act, naming the association as an additional insured. The fact that an association may authorize unit owners to do repair and replacement does not give the owner absolute or unlimited authority or power to do as they wish in the repair or replacement, or do it by themselves. Should a unit owner proceed in a fashion that is not acceptable, the Association can and should require removal of whatever was done that does not comply, and require replacement with what is allowed or authorized.

The limited common elements that are identified in declarations are parking spaces, balconies and patios. Fireplaces within a unit would be considered to be limited common elements if they serve only a single unit, as well as the chimney for that fireplace however they are seldom identified.

Boards can and should consider creating a list of items that would be limited common elements, and other items that would be common elements. It should further consider establishing policies as to which limited common elements are to be maintained at the expense of the association, and which are to be maintained at the expense of the individual unit owner. To the extent that the Association is either obligated to require the unit owner to maintain, repair or replace limited common elements, or authorizes the unit owner pursuant to the declaration provision to maintain, repair or replace; the association should establish standards and guidelines for that work including authorized and approved contractors, authorized and approved replacement components and materials, and a form that must be completed by the unit owner and approved by the board before the work is performed. Again do not forget to require the work to be performed by an independent contractor that is insured and provides a certificate of insurance to the association, naming the association as an additional insured.

The one limited common element that is most often identified in declarations is parking spaces that are assigned to unit owners. If there are parking spaces assigned that are separate and separately identified, and that are not attached to a unit (such as individual garages or individual parking pads in front of individual garages); those other types of parking spaces must be transferred in accordance with the requirements of the declaration and also in accordance with Section 26 of the Act. There are very specific requirements set forth in Section 26 for transfer of limited common elements, which must be followed in order to effectively transfer a limited common element. Normally, parking spaces that are limited common elements spaces are assigned to a particular unit. They are listed as a limited common element assigned to that unit in a deed conveying the unit. The declaration may say they pass with title to the unit. In that case, when the unit is sold, the deed selling the unit should also assign that parking space. However, if the parking space can be separately assigned, it must be done before the sale of the unit and in accordance with Section 26 of the Act.

Limited common elements can add much flexibility to associations boards and unit owners' rights and responsibilities. However, they are still limited common elements and the board is charged with exercising responsibility over them and over every unit owners use of that property.