

***Dover Village Association v. Jennison:* Making the Determination of Maintenance Responsibility for Sewage Pipes Less Messy**

By: Carrie M. Timko, Esq.

Consider the following facts: a sewage pipe is leaking under the slab floor of a unit located in a condominium association. As a result of the leak, sewage seeps up through the floor of the unit causing about \$15,000 in damage. The association hires a plumber to repair the leaky pipe. The plumber determines that the leaky pipe only serves one unit and connects the unit to the sewer main line. The association, having determined that the leaky sewage pipe is “exclusive use common area” pursuant to Civil Code § 1351(i), assesses the owner of the unit the cost of repair, as it is entitled to do under the CC&Rs. If the association’s CC&Rs do not specifically assign maintenance responsibility for the sewage pipe to either the association or the owner, is the association correct in determining that the sewage pipe is exclusive use common area under Civil Code § 1351(i)?

While the answer to this question may have previously been the subject of debate, the recent case of *Dover Village Association v. Jennison*¹ provides a clear answer: no – sewage pipes will not automatically be deemed “exclusive use common area” pursuant to Civil Code § 1351(i). Based upon the court’s reasoning, unless the CC&Rs provide otherwise, by either clearly defining sewage pipes servicing only one unit as “exclusive use common area” or specifically assigning maintenance of such sewage pipes to the owner, a sewage pipe that connects a unit’s plumbing to a main sewer line is common area for which the association has maintenance responsibility.

Civil Code § 1364 provides that an association is responsible for maintaining and repairing the common area, and the owner of each separate interest is responsible for maintaining the separate interest and the appurtenant exclusive use common areas. Civil Code § 1351(i) defines “exclusive use common area” as “a portion of the common areas designated by the declaration for the exclusive use of one or more, but fewer than all, of the owners of the separate interests and which is or will be appurtenant to the separate interest or interests.” Section 1351(i) goes on to provide under subsection (1)

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San Diego

9980 Carroll Canyon Rd., Suite 200
San Diego, California 92131
858.527.0111 • fax 858.527.1531

Inland Empire

41870 Kalmia St., Suite 160
Murrieta, California 92562
951.461.1181 • fax 951.461.2916

Coachella Valley

44-875 Deep Canyon Rd., Suite 3
Palm Desert, California 92260
760.836.1036 • fax 760.836.1040

that unless the declaration provides otherwise, any fixtures, such as patios, awnings, or door frames, that are designed to serve a single separate interest, but are located outside the boundaries of the separate interest, are exclusive use common areas. Based on these statutes, it could have been previously argued that if a sewage pipe exclusively services one unit, it should be the owner's responsibility to maintain. However, the court in *Dover Village* rejected this argument.

In *Dover Village*, the association's CC&Rs provided that "pipes" and "other utility installations" were not part of the unit. Even though it was argued that the portion of pipe that needed repair "exclusively serviced" the unit, the court found that this interpretation was unreasonable. First, the CC&Rs specified that garages and patios were exclusive use common area. The court reasoned that because the CC&Rs provided specific examples of what constituted exclusive use common area, the absence of a component from the list meant it was not part of the exclusive use common area. Because sewage pipes were not included in that definition, they were excluded. Second, the court determined that because a sewage pipe is interconnected to a network of other pipes that run to the main sewer line, it cannot be differentiated as "exclusive use" common area. (However, the court did note that a drain pipe designed to serve a single interest can be considered an "exclusive use" fixture).

Lastly, the court held that it was not within the board's discretion to make determinations regarding legal conclusions in the application of the CC&Rs. Although boards will be afforded deference to determine the method of maintenance for the common areas,² it does not have the discretion to determine what is common area or separate interest under the CC&Rs. This is a legal determination, which *Dover Village* holds should not be subject to a board's discretion.

Boards should be careful when evaluating whether utility pipes are the association's or the owner's responsibility to maintain and repair. While *Dover Village* addressed sewage pipes, a similar argument can be made for water lines. If the CC&Rs do not specifically make owners responsible for water and sewage lines that exclusively service their units, then there is a good chance under the *Dover Village* analysis that they will be the association's responsibility to maintain and repair.

² See *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249.