



# Termites, Fumigation and Resident Relocation

## It's Not That Complicated

AT SOME POINT IN THE LIFE OF A CONDOMINIUM OR planned development association, there will come a time when fumigation (tenting) will become necessary. Many say that fumigation is not necessary, as there are several alternative treatments that can be utilized. However, localized treatments are really only effective for the termites that the treatment can reach, and they cannot always reach every nook and cranny in attics, etc. Even the State of California suggests that a wood-framed building should be fumigated every ten years to really eliminate the termites – and if an association does not eliminate the termites, eventually those termites will eat through the joists and beams and will undoubtedly impair the structural integrity of the buildings.

Most owners understand the need to fumigate, but there are other owners (and sometimes residents) who believe that fumigation is bad, that it will kill them (only if they stay in the tent when the buildings are being fumigated) or that it will cause them serious illness – claims which are largely not supported by science. There is no question that the concept of fumigation can create controversy at a condominium association.

One of the bigger issues is gaining access to a unit, especially when owners or their tenants are non-communicative or are steadfastly opposed to the fumigation process.

Fortunately, many of the questions that are raised when fumigation is an issue are answered by the *California Civil Code*. Unfortunately, there are some questions for which there are no answers in the *Civil Code*.

*Civil Code* Section 1364(b) states in relevant part as follows regarding termites and other wood destroying organisms:

(1) In a community apartment project, condominium project, or stock cooperative, as defined in Section 1351, unless otherwise provided in the declaration, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms.

(2) In a planned development as defined in Section 1351, unless a different maintenance scheme is provided in the declaration, each owner of a separate interest is responsible for the repair and maintenance of that separate interest as may be occasioned by the presence of wood-destroying pests or organisms. Upon approval of the majority of all members of the association, the responsibility for such repair and maintenance may be delegated to the association, which shall be entitled to recover the cost thereof as a special assessment.

The *Civil Code* seems fairly clear until the hard questions are asked. For example, if the CC&Rs for a planned development provide that the association is responsible for the maintenance and repair of “exterior building surfaces” or “siding” and termites are found in the siding, is the Association responsible for maintenance and repairs? What happens if the word



“termite” is not found in the CC&Rs? And what about an association that has treated termites over the years when the CC&Rs do not impose that responsibility on the association (which comes up a lot)? Is the association subject to a continuing duty to deal with termites when the *Civil Code* would suggest otherwise? Frankly, there are no easy answers to these questions. If it is absolutely determined by the association’s legal counsel that a planned development is not responsible for dealing with termites, then perhaps the association needs to advise the owners that it has been mistakenly dealing with termites over the years and this is really the homeowners’ responsibility.

If the board of directors has determined that localized treatment is not going to be successful and it is time to fumigate and tent the building(s) to eliminate termites, getting the residents to relocate for a few days is often a challenge. Most owners will grumble about the inconvenience, but they will undoubtedly cooperate. It only takes one resident who refuses access to cause the project to be rescheduled. More often than not, a letter from management or perhaps the association’s attorney letting them know the consequences of their refusal to cooperate will be effective. If not, then the association will likely have to consider the remedy provided by *Civil Code* Section 1364(d). That section empowers an association to temporarily re-

nance of the areas within the responsibility of the association shall be borne by the owner of the separate interest affected.

The statutory procedure involves the preparation of a “notice of need to temporarily vacate” which is served 15-30 days prior to the relocation date. The statute specifies methods of serving the notice. The notice must state: (1) the reason for the relocation; (2) a date and time that the treatment will begin and end; and (3) the fact that the occupant is responsible for his or her own accommodations during the relocation (meaning that the occupant will have to pay for the relocation at occupants own expense). *Civil Code* Section 1364(c) provides that the cost of temporary relocation during repair and maintenance of areas within the responsibility of the association shall be borne by the owner of the affected separate interest.

The requirement that an occupant of a condominium unit relocate if necessary for the association to effectuate common area repairs is, by the language of the *Civil Code*, limited to termites or other wood destroying organisms. Sometimes, an association will need to have the occupants of a condominium unit vacate for a temporary period of time to deal with structural repairs or even mold abatement. *Civil Code* Section 1364 deals with maintenance and repair responsibilities. Subsection (c) of that code section deals with the cost of relocation, does not refer

to termites and can be read on its own, but it is subsection (d) that requires that the occupant of a unit vacate if necessary for common area repairs related to wood destroying organisms.

Most courts will grant an association a court order requiring the owner to relocate if required for common area repairs.

So what happens if an occupant or a group of occupants and owners contest the need to fumigate and claim that they think they know better than the board

**The State of California suggests that a wood-framed building should be fumigated every ten years to really eliminate the termites**

move the occupants “as may be necessary for prompt, effective treatment of wood destroying pests or organisms.” It is not recommended that the association try to relocate the owner using self-help; legal action may be required.

And note *Civil Code* Section 1364(c) clearly states that the costs of temporary relocation during the repair and maintenance

*(Continued on page 14)*



(Continued from page 13)

and that the localized treatment will not be effective? This question was answered by the California Supreme Court 1999 decision in the *Lamden v. La Jolla Shores Clubdominium Homeowners Association*. The board at La Jolla Shores came to the conclusion that localized treatment was all that was necessary; Mrs. Lamden disagreed and felt that fumigation was required. The California Supreme Court held that courts (and thus the homeowners) should defer to the business judgment exercised by the board of directors of a homeowners association, acting within the scope of its authority, under the declaration and governing statutes, to select among means for discharging its obligation to maintain and repair the development's common areas occasioned by the presence of wood destroying pests or organisms. The Su-

preme Court supported the finding of the trial court that the board acted upon reasonable investigation, in good faith, and in a manner that the board believed was in the best interest of the association and its members.

In summary, boards of directors and management should rely on *Civil Code* Section 1364 for determining the responsibility for dealing with termites and other wood-destroying organisms. Boards of directors should do their due diligence and investigation, and if fumigation is recommended, perhaps getting a second opinion would be appropriate. Remember, the company recommending fumigation is the very company that is going to be profiting from that work. Unfortunately, there are not that many independent termite experts out there, so careful analysis of the information is important. If fumigation

is required, *Civil Code* Section 1364(d) does give the board of directors the right to access for those repairs, but that may take court action. And if the board of directors is confronted with an owner or owners who oppose the association's plans for fumigating, the *Lamden* decision invests the board with good faith discretion concerning the means to address termite infestation, and if the board had done its homework and due diligence, neither the owners nor the courts can second-guess the board of directors' decision. ⚙

---

*This article was written and submitted by David Swedelson. He is a name partner in the law firm of Swedelson & Gottlieb and a principal of Association Lien Services in West Los Angeles. He can be reached at [dcs@sghoalaw.com](mailto:dcs@sghoalaw.com).*

---