



Discussion Forum

The comments and opinions expressed herein do not necessarily reflect those of the Retirement Village Residents Association (RVRA) or its Members.

Clause 5.1 (a) - Capital Maintenance

Posted: Thursday, 4 Mar 2010 12:06pm - By **Mike**

Congratulations to the RVRA and Shadow Minister for Fair Trading Greg Aplin in having Regulation 5.1(a) removed from the Retirement Villages Regulation 2009 (Regulations).

It does appear however that the Operators are now worse off than they would have been when the original compromise position was reached.

For my own part I found the explanation of the basic philosophy as explained in the OFT Regulatory Impact Statement:

The funding split in the Act is based on the premise that the operator owns the capital items in the village and the residents use them. That is, work resulting from the residents' use of the items in the village is able to be funded by residents, and work which replaces, or significantly enhances the value of, the operator's property, or which would need to be done regardless of whether any residents lived in the village, should be paid for by the operator.

to be quite sensible and I would have no trouble going back - or is it now coming forward - to that which was proposed in the Public Consultation Draft but I assume that that is for the RVRA to decide.

Again; thanks RVRA for all your hard work.

Mike

Re: Clause 5. 1(a) - Capital Maintenance

Posted: Saturday, 10 April 2010 11:37am - By **Ken**

While congratulations to Greg Aplin are probably in order, can somebody tell me what the deletion of 5.1a means when considering the painting of external surfaces. My opinion is that if the clause when in, mandated that this cost was to be borne by residents and when removed relieved residents and passed the cost back to operators. My village operator disagrees. As we are trying to finalise our budget we need clarification from the minister NOW

Ken

Re: Clause 5. 1(a) - Capital Maintenance

Posted: Tuesday, 13 April 2010 12:14pm - By **jrc**

The responsibility for external painting being placed on the owner/operator was in the "Draft Regulation" which was approved by the Minister and put out by the Office of Fair Trading (OFT) for public consultation in September 2009.

My recollection is that at no time during the various meetings held between representatives of the RVRA, the RVA, the OFT and the Minister, was Clause 4 (1) (b) (i) of the Draft Regulation, which prescribed that external painting was not capital maintenance, discussed nor was there any suggestion that this sub-clause would be removed.

As a result of the said sub-clause being removed from the 2009 Regulation by the Minister on the 18th December 2009, the RVRA lobbied the Opposition and Cross Benches of the Legislative Council to have Clause 5 (1) (a) disallowed in the 2009 Regulation. There are differing opinions as to the effect of this action which has thrown open the interpretation of " What Is and What Is Not Capital Maintenance? ".

The RVRA have addressed the "Question of Capital Maintenance" as follows:

What are legitimate charges against recurrent income and what are not legitimate charges?

The problem seems to be that when it comes to capital maintenance, the question of what is legitimate and what is not is anything but clear. There will be varying approaches to this issue from individual operators. Some will have been prudent and retained sufficient of the funds provided by residents from entrance and departure fees, to meet the operator's obligation for capital replacement. However, many operators will not have been prudent and used the funds provided by the residents to meet their commercial goals. Hence we hear that there is no money to carry out necessary tasks.

When confronted with this approach to spending money, it is a proper question to ask the operator: "What has the operator done with the funds provided by the residents from which the cost of doing these tasks could reasonably be paid?"

What response should residents and their committees take if their operator decides to attempt to get the residents to pay for a range of works that go well beyond routine maintenance?

If we respond, "Don't be too hard on the operator who after all has to make a profit."

This could seem to reward the operator's incompetence and send the message that residents are too weak to demand their rights.

But, what should the average resident do?

It is now part of the amended law that the operator must show all items in the budget.

The RVRA advocates that each village needs to have a strong committee with the residents' interests uppermost in their mind to meet with the operator and negotiate their way through the "maintenance" items in the budget and try to achieve some agreement together on firm guidelines for what is, and what is not, going to be able to be included in recurrent charges.

If an equitable solution is not reached at this stage, the only recourse at the moment is for the residents to go to CTTT hearing through OFT.

This is not a costly exercise, and the operators will be trying to avoid this because the law now also states that any CTTT hearing must be shown in disclosure statement so is like a "black mark" against the operator. The threat of the lodgement of a claim for a Tribunal hearing can be enough to bring them into a negotiating frame of mind.

The RVRA personnel are willing to assist in any way they can and we can ask Peter Hill for legal assistance at a reduced cost for legal services in some cases.

We are investigating the possibility of the RVRA, in the future, offering some kind of mediation service that could help the committees negotiate a better outcome than many are getting now. We would like to have a service which may have help from one of the recognised mediation bodies. Mediation would need to be without prejudice to the right to go to the CTTT if mediation is not successful.

But this will not be set up in time for this year's budget deliberations.

The OFT in response to a question "on the effect of the repeal of clause 5 (1) (a) of the Regulation in relation to the financing of capital maintenance" by a Village Resident, gave the following opinion:

It is not anticipated that there will be any effect on the costs paid by residents, and the provisions in the Retirement Villages Act and Regulation concerning capital maintenance and replacement will still operate.

As you know, the Retirement Villages Act 1999 contains a broad definition which states that

capital maintenance means 'works carried out for the purpose of repairing or maintaining an item of capital'. The Act also enables additional detail to be prescribed in the Regulation.

The purpose of clause 5 (1) (a) of the Regulation was simply to add further detail to the definition to provide some guidance for residents and operators in their discussions about whether or not proposed work is capital maintenance. The removal of clause 5(1)(a) means there is less guidance for residents and operators about what is meant by the term 'capital maintenance', but otherwise retains the status quo.

The Regulation and the Act are silent in relation to the financing of non-fixed capital items. As such, it will be up to residents and operators to discuss and agree on how capital maintenance and replacement of non-fixed capital items should be paid for. In the event the parties are unable to reach agreement, an application can be made to the Consumer, Trader and Tenancy Tribunal for determination.

Gadens Lawyers, Sydney in a report titled "Retirement Villages Regulation 2009 commence, without Regulation 5.1(a). - Government stops funding of replacement for non-fixed items of capital from recurrent charges" by Arthur Koumoukelis and John Fairgray on the 2nd March 2010 is as follows:

On Thursday 25 February 2010, in a dramatic last minute twist to the protracted commencement to the Retirement Villages Regulation 2009 (Regulations), the Shadow Minister for Fair Trading, Greg Aplin, moved a Motion of Disallowance to the New South Wales Parliament that Regulation 5.1(a) be removed from the Retirement Villages Regulation 2009 (Regulations). The motion was successful by a narrow margin and Regulation 5.1(a) has been removed.

The Regulations and the amendments to the Retirement Villages Act 1999 commence on Monday, 1 March 2010.

Gadens has prepared a powerpoint presentation and operator checklist to assist operators and village managers to understand the changes made to the Retirement Villages Act. You can receive a copy of the presentation and checklist by sending an email to Arthur Koumoukelis or John Fairgray at atakoumoukelis@nsw.gadens.com.au or jfairgray@nsw.gadens.com.au.

What is Regulation 5.1(a)?

The Amendment Act made fundamental changes to Part 7 of the Retirement Villages Act. The Retirement Villages Act defined and allowed recurrent charges to fund work on items of capital, including to fund the replacement of non fixed items of capital.

The Amendment Act then changed the definition of 'capital maintenance' at section 4 to simply mean:

“works carried out for the purpose of repairing or maintaining an item of capital and includes works prescribed by the regulations as being capital maintenance, but does not include works

that are prescribed by the regulations as not being capital maintenance.”

Regulation 5.1(a) had been drafted to expand the definition of capital maintenance to include:

1. work done to prevent or repair defects in, damage to, or deterioration of, an item of capital;
2. replacement of a non-fixed item of capital; and
3. replacement of a component of an item of capital that is necessary for the proper operation of an item of capital.

By removing this Regulation 5.1(a), the definition of capital maintenance is limited to the definition under the Retirement Villages Amendment Act 2008 and the words in Regulation 5.1(b).

The definition remains further expanded by operation of Regulation 5.1(b) to explain what is not capital maintenance being:

1. work done to substantially improve an item of capital beyond its original condition;
2. work done to maintain or repair an item of capital in circumstances where it would have been more cost effective to replace the item of capital.

What does this mean to an operator?

The key effect of this late change is to stop village operators funding replacement of non-fixed capital items from recurrent charges collected from residents or from the capital works fund.

This means items as minor as a chair or a lawn mower or non fixed water heaters and items as significant as say a village bus which previously could be funded from recurrent charges and long term maintenance funds can no longer be funded from resident contributions.

This is a fundamental change not only to the proposed Amendments but in fact puts the funding of capital maintenance to a position that was not even the case under the existing Act. It effectively leaves the definition of what constitutes repairs and maintenance, as opposed to replacement, squarely in the common law and income tax definitions.

This means determining whether replacing some pavements on a path is a repair or a replacement.

By keeping Regulation 5.1(b), there is a further complication for operators in that work done to ‘substantially improve’ or work done beyond the cost effectiveness of repair is excluded from the definition of ‘capital maintenance’.

Given the experience of the majority of Tribunal decisions being related to defining ‘capital maintenance’ such a change in the legislation will mean the likelihood of disputes will increase especially in relation to what is work done to ‘substantially improve’ and ‘cost effectiveness of repairs’.

This puts additional pressure on operators to reach agreement with residents on levels of

recurrent charges and budgets. Under the new Amendment Act this can be achieved through fixed formula recurrent charges and increases for non fixed formulas by no more than CPI.

Operators will need to reconsider their financial models and immediately plan to fund replacement of non fixed items of capital items from funds other than recurrent charges and capital works fund.

This change will invariably have a significant financial impact on certain operators, and in particular put increased pressure on the smaller operators in the industry.

What is an item of capital?

Items of capital are defined at section 4(1) of the Act as:

- a. any building or structure in a retirement village, and
- b. any plant, machinery or equipment used in the operation of the village, and
- c. any part of the infrastructure of the village, and
- d. any other item prescribed by the regulations,

Regulation 4 of the Regulations expands this definition at paragraph (d) to include:

- a. fixtures (for example, bench tops, built-in cupboards and wardrobes, floor coverings, hot water systems and stoves),
- b. fittings (for example, light fittings, taps and sanitary fittings),
- c. furnishings (for example, curtains and blinds), and
- d. non-fixed items (for example, whitegoods, portable air conditioners, fans, tables and chairs).

Regulation 4 has not been removed and remains in place.

Next steps for operators and the industry.

Operators must now take steps to re-assess their costs of operating in this industry carefully and make necessary provision for replacement of items of capital from their own funds.

They should consider their financial model and consider how replacement of items of capital is to be funded. In circumstances where the financial elements of a village are ingoing contribution levels, deferred management fee levels and recurrent charges, the options are limited.

It would be a bitter irony if the Government's intention of removing Regulation 5.1(a) and retaining Regulation 5.1(b) in order to make the cost of living in a retirement village cheaper in fact means moving into a retirement village becomes less affordable for many people.

Arthur Koumoukelis is the partner in charge of Gadens Lawyers Sydney and national aged care retirement village practice, John Fairgray is a senior associate of Gadens Lawyers, Sydney specialising in retirement village and aged care law. This publication is provided to clients and correspondents for their information on a complimentary basis. It represents a brief summary of

the law applicable as at the date of publication and should not be relied on as a definitive or complete statement of the relevant laws.

As can be seen from the above opinions there is confusion as to " What Is and What Is Not Capital Maintenance? ". If the OFT and Gadens are of different opinions, what hope does the Resident of a Retirement Village have in trying to sort out and understand the convoluted legislation known as the Retirement Villages Act 1999 (as amended) and the 2009 Retirement Villages Regulation.

My advice to Residents and their Committees is to try and negotiate an acceptable result with your village operator regarding all items contained within the forthcoming budget. If this outcome cannot be achieved then the only recourse is for the matter to be taken before the Consumer, Trader & Tenancy Tribunal.

John Cooper
Queens Lake village, Laurieton.

Re: Clause 5. 1 (a) - Capital Maintenance

Posted: Tuesday, 13 Apr 2010 1:28pm - By **Ken**

Thanks John. I appreciate your detailed reply, but you've probably only confirmed how wide open the situation is.

As well as posting my query on this website I also emailed Greg Aplin. He replied the next day as follows.

Thank you for your email concerning the painting of external surfaces.

In moving to disallow clause 5.(1)(a) of the Retirement Villages Regulation 2009 I was conscious of the revision to the Act and specifically discussed this with the RVRA. It was important that there be no hole left by the disallowance but there could also be an impact on some residents.

I have today discussed your case with the president of the RVRA Malcolm McKenzie. Mr McKenzie believes that if your village had accepted the provision for capital maintenance from recurrent charges or a capital works fund in the past then this would now continue until a new clause is agreed and legislated. If no such provision of funding has previously occurred then the matter is one for the CTTT.

This might be of interest to other members.

Ken
