



COOPERATIVES AND CONDOMINIUMS

BY

Impact of New York City's Amended Noise Control Code

Although noise is a reality of modern urban living, it is also considered the leading quality of life issue in New York City.¹ After nearly 40 years, the New York City Noise Control Code (the Code) was amended, effective July 1, 2007 (the Amended Code).²

The amendments define unreasonable noise as sound that disturbs the peace or comfort of a reasonable person of normal sensitivities, but recognize that activities necessary for the city's physical and economic growth will produce higher than desirable noise levels. The Amended Code therefore employs a three-pronged approach: prohibiting sound that exceeds a decibel-cap; limiting the hours, days and distances at which excessive sound can be heard; and requiring best-practices for temporary noise, such as construction and repair sites.

This column discusses the Amended Code and expands on an earlier column³ dealing with whether excessive noise breaches the warranty of habitability when it emanates from a co-op or condominium building system, an apartment or from activities outside the building. We also make recommendations to assist boards and managers in responding to noise complaints from occupants.

Before its amendment, the Code was considered inadequate by both residents disturbed by noise and businesses that tried to comply with the Code. The Amended Code adopts a flexible rationale—to “keep New York's businesses thriving while addressing the number one quality of life complaint in New York”—using practical standards which are easier to enforce and understand.⁴

Construction Sites

The Amended Code reduces

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construction noise by establishing uniform best practices and mandating adoption of a “noise management plan” by the building owner or contractor. The plan must be posted at the construction site and detail the noise attenuation protection being utilized to mitigate noise typical of construction activities, including pile driving, blasting and the like.⁵ The Amended Code thus accepts the reality that construction noise is unavoidable and seeks to mitigate it on a best efforts basis.

The Amended Code also imposes practical regulations and specific limits on commercial music sources. The Code prohibited sound emanating from bars, clubs, and restaurants louder than 45 decibels. This standard failed to address intrusive bass music and vibrations, which the Amended Code corrects and also establishes more flexible enforcement for first offenses to encourage implementation of noise abatement plans.⁶

Circulation Devices

The Code prohibited sound emission from individual units in excess of 45 decibels. However, this permitted excessive noise to be generated because clusters of air conditioning units could cumulatively emit noise far in excess of 45 decibels, which did not violate the Code if no single unit exceeded 45 decibels. The Amended Code reduces the permitted sound level for each unit to 42 decibels but requires that where circulation devices are installed or replaced on a building lot, the cumulative sound from all devices may not exceed 45 decibels.⁷

However, even this provision may not protect all occupants. For example, the Western Union Building houses a large number of heat-generating computers and switching devices cooled by air conditioners which produce excessive noise in the residential neighborhood of Tribeca. But, because there is no way to separately measure the noise output from each air conditioning unit and because the noise condition was created before the effective date of the Amended Code, this condition does

not violate the Amended Code.⁸

Enhanced Enforcement

To facilitate enforcement, the Amended Code adds to violations issued by Department of Environmental Protection inspectors using decibel meters, an additional standard for unreasonable noise: “plainly audible” at a specified distance. Summonses for violations may now be issued by police officers who are authorized to determine whether noise from car stereos, loud music, barking animals, car mufflers and the like are “plainly audible.” Decibel testing is no longer required for a violation to issue.⁹

Warranty of Habitability

The statutory warranty of habitability imposes a nonwaivable covenant and duty on all residential landlords to ensure that premises are fit for human habitation, in accord with the uses reasonably intended by the parties, and tenants are not subjected to conditions that are dangerous, hazardous, or detrimental to their life, health or safety.¹⁰ Because of the proprietary lease component of co-op ownership, boards must comply with the warranty of habitability.¹¹ Conditions that may breach the warranty include: noxious fumes, odors, light, excessive dirt and debris in common areas, water leaks, and second-hand smoke.¹² Courts have also held that unreasonable, excessive, and continuous noise may breach the warranty, relying on expert testimony and sound tests, tempered by the reality of city living in a multiple dwelling.¹³

Noise Attributable to Co-op or Condo

Boards may breach the warranty of habitability by failing to reduce building equipment noise that exceeds the Amended Code's decibel limit. Violations most likely occur when equipment is located near a residential apartment. In *Misra v. Yesid*,¹⁴ plaintiff prevailed on a breach of warranty of habitability claim when noise from the coop's ventilation system directly above plaintiff's unit emitted

noise and vibrations exceeding the Code's decibel limit and made her apartment uninhabitable.

Importantly, the Amended Code imposes heightened responsibility on boards to comply with the cumulative noise limitations on the building's mechanical equipment such as air compressors, circulation devices, and exhaust systems, coupled with the cumulative impact of circulation devices such as air conditioners installed by apartment owners.¹⁵

Noise: Residential Occupants

Even when an occupant causes the excessive noise condition that interferes with another occupant's use of an apartment, the board may be in breach of the warranty of habitability. However, courts are loath to extend the warranty to include ordinary household noise or noise created by young children.¹⁶ In *Hayes v. Housing Authority*,¹⁷ a residential tenant was evicted without warning or probation because her children made excessive noise. The court overturned the eviction as disproportionate to the offense.

To circumvent court reluctance to apply the warranty to noisy neighbors, co-op residents have relied on other legal theories to obtain relief. In *Pinehurst Constr. Corp. v. Schlesinger*,¹⁸ the Appellate Division affirmed the eviction of an elderly woman who repeatedly banged on the ceiling of her rent-stabilized apartment through the night and yelled epithets at tenants living directly overhead. Although the court did not determine whether this behavior violated the warranty of habitability, it did find it a nuisance under the Rent Stabilization Code, warranting eviction.

Similarly, in *Medows v. Stern*,¹⁹ plaintiffs alleged their downstairs neighbor banged on his ceiling with a baseball bat and broomstick all day and night to harass them and their three-month old son. The court held plaintiffs were third-party beneficiaries of defendant's proprietary lease and denied defendant's motion to dismiss the claim. And in *Paul v. Rokosz*,²⁰ the court held that excessive noise from a restaurant tenant's rooftop air conditioning system which was audible in a residential apartment violated the Code and directed the landlord to remediate.

Third-Party Activities

Courts will apply the warranty of habitability to excessive noise emanating from conditions over which a landlord or board has no control. In *Itskov v. Rosenblum*,²¹ decided before enactment of the Amended Code, tenant claimed that landlord (an individual condominium unit owner) breached the warranty of habitability because noise caused by vibra-

tions and jack-hammering during a neighboring building's construction work deprived him of the use and enjoyment of the apartment. The Appellate Term held the warranty was breached and awarded tenant a 25 percent rent abatement. Under the Amended Code, if a Noise Mitigation Plan had been developed by the neighboring building, posted and adhered to, the outcome may have been different and no rent abatement awarded.

In *54-56 Management Corp. v. Birmingham*,²² tenant leased an apartment above a restaurant and bar and two months later received a rent abatement based on noise penetrating her apartment from below. She thereafter renewed her lease, but stopped paying rent after a month, arguing that the commercial tenant operated an illegal cabaret show, creating excessive noise that dangerously affected her life, health, and safety. The court held the commercial tenant's activities did not automatically breach the warranty of habitability because the tenant knew of the intended commercial use when she renewed her lease.

And a recent criminal court case looked to the Amended Code and determined that defendant did not knowingly falsely report an incident under the N.Y. Penal Law 240.50 by calling in 268 noise complaints to the city's 311 system concerning noise from a bar next door to her apartment. Although a police officer visited the bar on multiple occasions and concluded the noise level was not excessive, the court found no evidence the officer did so at the time of the complaints or under similar conditions.²³

Recommendations

The Amended Code imposes greater responsibilities on boards to address excessive noise, but also establishes more flexible and clearer standards and enhanced enforcement procedures. When a board has notice or receives complaints of a noise problem, it must take prompt action. First, management should inspect the condition. If warranted, the board should retain professionals (such as acoustical engineers) to determine whether the noise is excessive and, if so, the board's professional should develop a remediation plan. Management should maintain records of complaints and measures employed to evaluate and, if appropriate, alleviate the noise problem. Further, the cumulative decibel levels of building equipment and other circulation devices in the building, including apartment air conditioners, should be periodically monitored to ensure that they fall within permissible ranges. In addition, when buildings undertake noisy construction projects, boards should ensure that the general

contractor and supervising architect develop, post and adhere to the Amended Code's mandated Noise Mitigation Plan.

To prevent sound generated by apartment occupants from rising to the level of excessive noise, and to ensure that apartment owners are legally obligated to remedy the same, boards should specifically address noise attenuation obligations and remediation in their proprietary leases, house rules, bylaws and apartment alteration agreements. House Rules typically address quality of life issues and can be adopted by boards without shareholder or unit owner action. Boards may prohibit occupants from making noise that interferes with the rights, comfort, or convenience of other occupants by detailing appropriate hours for playing musical instruments, radio, or television and may provide that a certain percentage of an apartment be carpeted.

Boards can also use apartment alteration agreements to minimize noise by requiring compliance with the Amended Code's regulations, including those that apply to construction sites. Occupants who plan to do construction work may be required to submit Noise Mitigation Plans to the building's reviewing architect for approval. Installation of mechanical systems should be assessed by an acoustical engineer to determine that they will not create a noisy condition when completed. Also, boards should not permit alterations that change the functions of rooms so as to move a noisy room (such as a kitchen or bathroom) above a bedroom below. These techniques should assist boards in preventing excessive noise from developing and effectively addressing a noise problem if it nonetheless occurs.

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1. New York City Department of Environmental Protection Website, http://www.nyc.gov/html/dep/html/air_and_noise/index.shtml.
2. New York City Local Law 2005/113 §2. The stated purpose of the Amended Code is to "reduce the ambient sound level in the city, so as to preserve, protect and promote the public health, safety and welfare, and the peace and quiet of the inhabitants of the city, prevent injury to human, plant and animal life and property, foster the convenience and comfort of its inhabitants, and facilitate the enjoyment of the natural attractions of the city."
3. See Siegler and Talel, "Noise and the Warranty of Habitability," *NYLJ*, March 1, 2006, at 1, col.1.
4. New York City Office of the Mayor Web site, <http://www.nyc.gov/mayor> (follow "News and

Press Releases” hyperlink; then follow “2005 Events” hyperlink; then follow “August 2005” hyperlink; then follow Aug. 17, 2005 “Read the Press Release” hyperlink).

5. New York City Local Law 2005/113 §10, eff. July 1, 2007.

6. *Id.*

7. *Id.*

8. The telecommunications equipment in this building may not be turned off. Therefore, all air-conditioning units must be running at all times. This eliminates the possibility of turning all but one of the air-conditioning units off in order to test the sound output of the one air-conditioning unit that remains running.

9. New York City Local Law 2005/113 §10, eff. July 1, 2007.

10. N.Y. Real Property Law §235-b (McKinney Supp. 2008).

11. See Siegler and Talel, “Noise and the Warranty of Habitability,” *NYLJ*, March 1, 2006, at 1 col.1, and cases cited therein.

Condominiums are not legally obligated to comply with the warranty of habitability.

12. *Regensburg v. Rzonca*, *NYLJ*, Feb. 14, 2007 at 22, col. 1 (Suffolk Dist. Ct.).

13. See *Bethune Realty Co. v. Adams*, 2002 WL 2018682 (App. Term 1st Dept.); see also *Kaniklidis v. 235 Lincoln Place Housing Corp.*, 305 AD2d 546 (2nd Dept. 2003). Factors considered include: the intrusive nature of the noise, time of day, unpredictability and duration of the noise, and the number of similar complaints. See *Stiglianese v. Vallone*, 168 Misc.2d 446, 456 (Civ. Ct. Bronx Co. 1995), *rev'd*, 174 Misc.2d 312 (App. Term 1st Dept. 1997), *rev'd* 255 AD2d 167 (1st Dept. 1998).

14. 37 AD3d 284 (1st Dept 2007).

15. Boards may soon face additional responsibilities to mitigate noise from construction. The Amended Code authorizes the formation of an advisory committee with responsibility for implementing additional Noise Mitigation Rules including rules regarding the use of perimeter fences with acoustical insulation, portable barriers with acoustical insulation, acoustical blanket insulation, and the testing of exhaust mufflers. Additional mitigation measures may also be adopted for “sensitive receptors” such as hospitals or schools.

16. See e.g., *Kaniklidis*, 305 AD2d 546; *Bethune Realty Co.*, 2002 WL 2018682.

17. 2006 WL 1493113 (Sup. Ct. N.Y. Co.).

18. 12 Misc.3d 26 (App. Term 1st Dept. 2006), *aff'd* 38 AD3d 474 (1st Dept. 2007).

19. *NYLJ*, May 18, 2007 at 22, col. 1 (Sup. Ct. N.Y. Co.).

20. 2006 WL 3228399 (N.Y. City Civ. Ct.).

21. 2005 WL 1226130 (App. Term 1st. Dept.).

22. 2006 WL 2620534 (N.Y. City Civ. Ct.).

23. *People v. Bender*, 2007 WL 258290 (Crim. Ct. N.Y. Co.).