

BOARD OPERATIONS

New York City

Post-Sandy: Three Attorneys' Plain-English Guide for Co-op & Condo Boards

By Adam Leitman Bailey, Leonard H. Ritz and Dov Treiman

Jan. 15, 2013 — In the aftermath of superstorm Sandy, many condo and co-op board members have been facing unprecedented challenges, with little experience to guide them. In the first of two installments today, three leading attorneys answer eight questions at the top of every affected board members' mind.

Q: Is there any difference in the law between how co-ops and condo apartments are handled when they cannot be lived in because of storm damage?

A: Co-operative and condominium apartment buildings, though structurally similar, have fundamentally different legal structures. Owners of condominium apartments actually own their apartments. In contrast, "owners" of cooperative apartments are really tenants under a proprietary lease between themselves and the co-op corporation. The existence of the lease can lead to different results for the same types of damage.

Q: Is the Board obligated to repair damage to an apartment and/or rebuild the building after a storm?

A. Co-ops: Co-ops and condos are treated similarly. Though every cooperative building has its own form of lease, provisions typically found in New York City require the co-op corporation to repair or replace the building, the apartment and the means of access, unless the damage is so extensive that repairs cannot reasonably be made, in which case the shareholders may vote to terminate all of the leases in the building.

Condos: In a condominium, the law requires the Board to repair and/or rebuild, unless more than 75% of the building is substantially damaged, in which case the unit owners may vote not to do so and sell the property. In either case, there are procedures for selling the entire property and dividing the proceeds among the shareholders and/or unit owners.

Q: What if a building is subject to a vacate order?

A: Co-ops: In a co-op, the shareholder would have the option to walk away from the apartment. Theoretically, the apartment could still be sold by the shareholder, but it is doubtful anyone would want to buy it.

Condos: In a condominium, the law allows a unit owner to surrender ownership of his unit to the board (at any time, not just as a result of a casualty). However, in either case, as explained above, the Board would be required to repair the building so as to cause the vacate order to be rescinded.

Q: What if occupants won't be allowed back in the building for a month or more?

A: Co-op: In a co-op, this would be a valid reason for the shareholder to refuse to pay maintenance, even though it could (if too many shareholders were to do so) have the effect of causing the co-op to default on its mortgage and suffer foreclosure.

Condo: In a condo, this would be no defense to the payment of common charges. If the unit owner defaults on the common charges, the condo would be entitled to foreclose on the unit and, as a practical matter, would have to.

Q: What if occupants are allowed back in the building after a week or less?

A: Co-op: In a co-op, the shareholder would be entitled to a rent credit for each day of forced absence.

Condo: In a condo, there is no such entitlement. [*Note from Web Editor: Steven Wagner of Wagner Davis says courts have ruled both ways on the issue, though he believes common charges are due regardless. Another expert notes that a particular condominium's bylaws may require abatement.*]

Q: Does the Board have to pay for the unit owner's hotel or other emergency accommodations?

A: No, the Board does not have to pay for the unit owner's hotel, emergency accommodations, or eating-out expenses.

Q: Can the Board be compelled to repair the building?

A: In both co-ops and condos, shareholders / unit-owners are forced out of the building by storm damage can compel the Board to repair the building by bringing an HP action in Housing Court. While such proceedings can compel the Board to restore the building's ability to accept utilities (safe wiring, safe plumbing, etc.), it cannot compel the utility companies to restore those utilities.

Homeowners can also call in the City's Department of Buildings to place violations for storm related failures of the building's structure, such as sidewalks torn up by fallen trees. Such things are prosecuted before the Environmental Control Board (ECB), rather than the courts.

Generally, only the Board and the City participate in ECB hearings, but the ECB can allow unit owner testimony at the ECB's discretion. In the regular courts, homeowners normally testify.

We note that there are no appellate cases reported speaking to the issues in this answer, but there are several trial court cases on the subject and they are all in agreement that both co-ops and condos are subject to the Housing Court's jurisdiction in these matters.

Q: Does it make any difference if the Board did nothing wrong?

A: Except for damages that can actually be traced to the Board having failed to do proper repairs before the storm, the fact that there is no fault of the Board makes no difference in the legal rights and responsibilities of the parties.

Come back this afternoon for six more questions and answers.

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