

A Sandy headache that won't go away

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Superstorm Sandy flooding made Richard Heubeck's Selbyville condominium unit legally uninhabitable, but nonetheless he's been living there for years. This is no secret; Sussex County officials know he's living there without a necessary certificate of occupancy. State officials are aware, too.

What no one can agree on is how to get his condo building repaired to current flood-protection standards, much less fix the 23 other condo units like his that are in regulatory purgatory more than three years after Sandy — seemingly in good shape, but technically too flood-prone to be lived in.

"Legally, we're not supposed to be here," Heubeck says. "To lose all the equity you put into the house and be told you have to move out is something we don't even want to think about. We all know we're living day to day, and the county has been patient with us. But at some point something has to be done. We are really at the crossroads now."



For most Delawareans, Sandy — the strong Atlantic storm of 2012 that slowed to sub-hurricane status just before arriving off the coast here — [is firmly lodged in the history books](#). You would be hard-pressed to drive around coastal Delaware today and find a building or natural feature to point to as obviously damaged by Sandy.

The dunes around the Indian River Inlet have been re-formed with dredged sand; in South Bethany, boats have been towed from yards they floated into when canals overflowed. Homes with ripped-off shingles have gotten new roofs. For nearly all of us, it's as if the storm never happened.

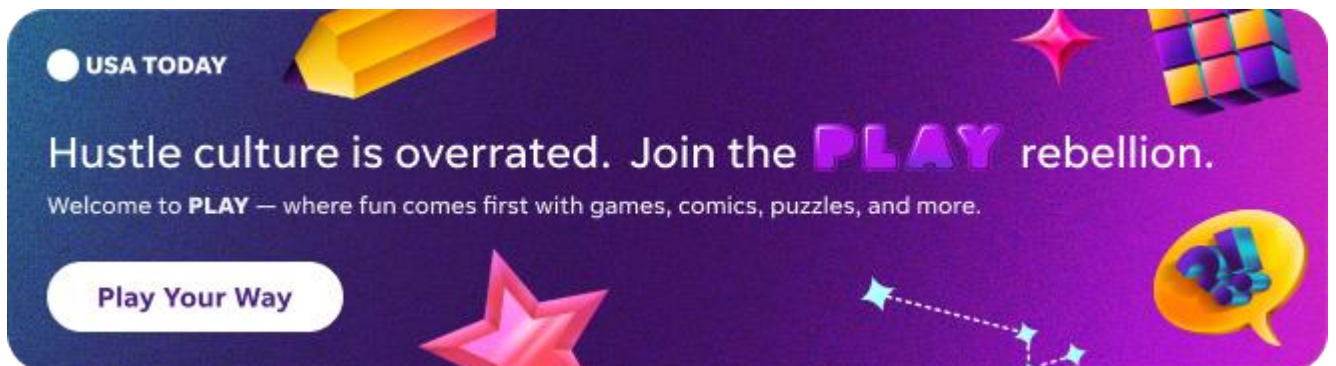
But for 24 of the 477 unit owners in Mallard Lakes, a 1980s-era condo complex a few miles west of Fenwick Island, nothing has been normal since Sandy arrived in late October 2012. Today, with the storm's

three-year anniversary come and gone, they are stuck in a building-code bind with no obvious way out.

"This is a legal quagmire of first impression for the county, and for me," said Todd Lawson, Sussex County administrator. "Are they in a situation where they are out of compliance per county codes and federal regulations? Yes, that's an accurate statement ... The only other option is to displace the residents, and to my mind, that's not an option."

What happened to put Heubeck and his neighbors in the position they're in?

- Before Sandy, Mallard Lakes had filed claims with the federally run National Flood Insurance Program three times. Then, when Sandy arrived, four Mallard Lakes buildings saw 9 to 12 inches of water enter their lower levels, damaging flooring, subflooring and insulation.



- Since Mallard Lakes is a community-interest organization, as most condo complexes are, unit owners don't own the basic structures of the buildings; instead, the condo association does. The Mallard Lakes condo association filed a fourth flood insurance claim, and used the

claim funds to make repairs to the four buildings, each of which contained six units.

- Old certificates of occupancy for the affected buildings were made obsolete, though, because the NFIP ruled Mallard Lakes could no longer be grandfathered past revisions to base flood elevations. And when the insured repairs were over, some residents now say, the association failed to make certain new occupancy certificates were obtained.

Nonetheless, affected owners began to move back in as early as February 2013, and the county has done nothing to keep them out.

Sussex County "refused to issue the Island Building units certificates of occupancy. Therefore, any use of the affected units by the owners is illegal and in violation of Sussex County Code," a group of affected residents claims in a Court of Chancery complaint filed against the Mallard Lakes Community Association on Oct. 30. "Conversely, Sussex County, as of this date, has taken no action to condemn the Island Buildings or otherwise prevent their owners from using same. Sussex County, upon information and belief, will be unable to indefinitely ignore the owners' lack of COs."

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Melissa Golden is a Lancaster, Pennsylvania, resident with a second home at Mallard Lakes. She says her sister in New Jersey, where Sandy did the worst damage, was perplexed when Golden told her, in early 2013, her damaged condo had been fixed and she had gotten an all-clear to begin using it just like before the storm.

"My sister kept saying, 'Why are you able to go in your houses? We had to stay out of our houses for, like, a year,'" Golden said. "We had never actually been told to move out. We didn't have any tape across our doors saying 'Do not enter, or caution.' There was one woman living there the whole time [after Sandy]. She never left."

Golden and other residents became suspicious about whether the repairs to their units had been good enough, and whether there were current occupancy certificates for their units. Subflooring that should have been replaced was instead only sealed, Heubeck said, and that led to warped floor coverings in subsequent storms. The contractor doing the work "did not complete the reconstruction and apparently abandoned the job," the Chancery complaint alleges.

The occupancy-permit quandary is one of two existential threats to the four condo units. The Federal Emergency Management Agency, which oversees the flood insurance program, delivered a mandate after the Sandy-related insurance claim: The four affected buildings must be raised higher off the ground than they are now, to comply with modern data models of how high flood waters there will rise. The requirement was triggered by Mallard Lakes's "repetitive loss" in the wake of rainstorms.

In essence, FEMA was saying it was tired of paying claim after claim on property too prone to flooding. Mallard Lakes had been grandfathered past required compliance with new flood maps, but after Sandy, FEMA ruled that grandfathering period had to end.

Mallard Lakes was the only multifamily housing site in Delaware FEMA ordered to be raised in Sandy's wake. "It's the first time I've

ever run into this scenario," said Michael S. Powell, a Department of Natural Resources and Environmental Control, said of Mallard Lakes in 2014. "Someone built to the code within the last 20-30 years, and then the code changed."

Lawson, Sussex County's top administrative official, said the difference between the building's current height and the FEMA-mandated height is only a matter of inches — about the height of a smartphone held sideways. But all involved agree that if the buildings are raised, it should be by several feet, to make the work worthwhile.



The Mallard Lakes Community Association — the condo board — pressed Sussex County for help meeting the new elevation requirement, and Sussex had reason to pitch in. If the buildings weren't raised, FEMA warned the county, property owners throughout Sussex would lose eligibility for getting flood insurance coverage.

There is a grant program, run by FEMA, that pays up to 90 percent of the costs of raising buildings like the ones at Mallard Lakes. To qualify its application, Mallard Lakes needed Sussex County's building officials to formally declare the four affected buildings "substantially damaged" by Sandy. Records show the county obliged in May 2013, the spring following the storm, and county and state officials helped Mallard Lakes seek the FEMA grant.

A year ago, though, Sussex County and Mallard Lakes learned their grant application had been rejected. Other, harder-hit communities had been awarded the funds instead.

That left Mallard Lakes in dire straits: Four of its buildings were "substantially damaged," and even though residents were living in them as normal, they lacked needed occupancy permits. And from FEMA's point of view, the mandate remained: Raise up the buildings, or everyone's flood insurance gets yanked. Lawson said Sussex County appealed the design of the flood maps and asked FEMA to make an exception in Mallard Lakes's case, to no avail.

The residents who sued in Chancery Court see one clear, fair way out of all of this. They suggest the condo association make a special assessment on all 477 unit owners in the complex to raise enough money to have the four buildings raised. Estimates for the work, according to the lawsuit, range from \$1.3 million to \$1.6 million.

Spread across all 477 owners, that would cost each Mallard Lakes owner about \$3,360 a unit. The plaintiffs argue the board has the authority to require that from each owner without needing a

community-wide vote, since the buildings are "common elements" of the condominium community.

But the condo association took the position that only the 24 unit owners in the four affected buildings should be responsible for the cost of raising those buildings. If the whole community is to bear the cost, the board has said in public notices, a majority of the owners would have to vote that way a community-wide referendum.



"The Board... believes that the cost to elevate is not a community-wide expense but instead a cost of Sandy reconstruction that was not covered by insurance," the condo board said in a notice to all 477 owners last month. "Under these circumstances, a special assessment [without needing a vote] can be levied against only the owners of the buildings to be elevated. It should be noted that not all owners want the buildings elevated."

Split only 24 ways, the capital cost to each owner would be sobering: \$66,600 apiece, perhaps more.

In October, the board put the question to all the owners in a vote, asking if they would accept a \$4,000 assessment on everyone to raise the affected buildings. The majority of voters said no, defeating the measure.

Another way forward, the board told residents, was an appeal to Sussex County to take back the "substantially damaged" designation it bestowed in 2013. "The Association believes reversal, if granted, would avoid the costly insurance premium increases and allow the buildings to return to a pre-Sandy (which includes grandfathering for some buildings) status," the notice to all owners read. "But, some of the affected owners believe that the buildings must be elevated to protect life and property and that retaining the designation is in their best interest to force elevation."

Lawson, the county administrator, said Sussex officials "have not received an official request from the association" to reverse the substantially damaged tag.

Chad Toms, an attorney for the community association, said the board saw an appeal to reverse as "one of the options that could lead to a resolution of the problem." Citing the pending legal complaint, he declined to talk in more specific terms.

"We recognize the current situation. However, there is stark disagreement as to how we got there," Toms said. "We don't believe

any wrongdoing has occurred, and the relief they're seeking is overreaching."

For some of the residents in the four buildings, the board appears to have walked away from its obligations as a common-interest community. The four low-lying buildings, they say, should not be treated like they're quarantined from the rest of Mallard Lakes. And they're bothered that the official notice describing what was at stake in the October fundraising referendum didn't point out they were legally barred from using their units, notwithstanding the fact that none of them have been sanctioned by the county for it.

"That's been our position: All of Mallard Lakes has a problem," said Golden. "Just because it's inconvenient now doesn't mean it's not still true."

[Rising seas threaten Delaware coastal areas](#)

The president of the Mallard Lakes Community Association, Fran Lazerow, declined to answer questions about the controversy.

"Right now we're dealing with this lawsuit, this complaint, and we intend to defend against this action," Lazerow said Thursday. "We believe it doesn't have any merit."

Heubeck says Mallard Lakes owners unaffected by the Sandy flooding don't understand the precariousness of his and his neighbors' situation.

"We feel they used an inflated cost to convince people not to vote for it," he said of the October vote on a whole-community special

assessment. "I don't think the other owners in the community understand what happened... The board is the one who applied for substantial damage. They obviously anticipated they were going to raise the buildings. The board wants us to get rid of 'substantially damaged' now, three years after the fact.

"But now, legally, we're not supposed to be here."

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