

4 years after Sandy, it's a no-win situation at Mallard Lakes

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When you own property in a common interest development (CID), you will share maintenance, repair, and capital improvement costs as well as insurance and other financial liabilities with other members of your homeowner's, condo, or cooperative association.

In a condo association, you may assume that those costs are divided by all owners based upon share of ownership. But that's not always the case.

The dispute over costs to repair and improve some condominiums at Mallard Lakes, Fenwick Island (Sussex County), Delaware, is a typical example of the type of financial conflict that can arise following a catastrophic loss by some, but not all, members of the Association.

I took the time to read the complaint filed by condo owners, and the Association's answer. More details follow.

THE FLOOD THAT STARTED IT ALL

The problem began when Superstorm Sandy walloped the Delmarva coastline in October 2012.

As a result of Sandy, 24 condo units out of 477 total units in Mallard Lakes were damaged by flood waters. As usual, insurance policies only covered a portion of the damages.

At the time, FEMA was offering policy holders the option of applying for funds to help offset the cost of future flood prevention. Those funds were made available to qualified applicants through FEMA's Increased Cost of Coverage (ICC) program.

In order to qualify for ICC grants, a property had to be designated as "substantially damaged" according to FEMA standards, and certified by the appropriate County official.

Five condominium structures were designated “substantially damaged,” thereby qualifying for FEMA grants, but only under the condition that policy holders take certain steps to modify their properties to prevent future claims for flooding. One of those conditions requires elevating the first floor of all structures above the FEMA designated flood plain.

In the case of Mallard Lakes, FEMA would require 4 of the 5 damaged buildings to be elevated, at a cost of \$330,000 – \$400,000 per building. Sussex County is not able to issue valid occupancy permits unless and until the elevations are raised.

As it turns out, however, condo owners were told they could move back into their units following repairs. After the owners moved back in, they discovered lingering moisture was causing their new floors to warp. They also discovered that their homes had not been elevated as required by FEMA and Sussex County.

Therefore, owners of 24 units are illegally occupying condos. Those condo owners may be forced to vacate their homes until the matter is resolved and occupancy permits are issued.



WHO IS RESPONSIBLE TO PAY?

Now, you might think that, because Mallard Lakes is a condo association, owners of all 477 units would be required to share in the expense to elevate the four buildings containing 24 flood-damaged condos.

But, as it turns out, it's not that simple. The governing documents are somewhat ambiguous and inconsistent on the matter of who pays under these circumstances.

Attorney for Mallard Lakes HOA, Chad Toms, argues that only the members who own the affected units in those four buildings would be financially responsible for the cost of elevating their buildings.

But that would mean that, instead of spreading out the estimated price tag among 477 units, it would be divided among 24 units.

If all units were to contribute, Mallard Lakes would face a \$4,000 per unit special assessment. But, doing the math, if only 24 units must bear the cost, each unit owner would have to come up with \$79,500!

A quick search of homes for sale in Mallard Lakes reveals list prices ranging between \$175,000 and \$225,000.

So unit owners have engaged their own attorney, Dean A. Campbell, to fight for their rights.

WHAT DOES THIS MEAN FOR CONDO OWNERS?

No matter what the outcome, all condo owners will bear additional expense.

Even if the \$4,000 per unit special assessment is not ordered by the court, Association members will have to bear the cost of a complex lawsuit that will extend for at least another year, perhaps longer. In addition to legal costs, add on increased costs for insurance.

Of course, unit owners of the 24 previously flooded condos bear the greatest financial risk. They could potentially lose all of the equity in their homes, between FEMA required costs to elevate them, and their share of legal costs.

If condo owners prevail in court, they will save more than \$70,000 per unit. But their victory will be bittersweet,

because the plaintiffs will undoubtedly face complaints and harassment from their neighbors, many of whom will be very unhappy about paying a special assessment to elevate 4 buildings.

While the lawsuit is pending, it will become very difficult to sell homes in Mallard Lakes.

And the Plaintiffs will be most likely be blamed for bringing down property values, even though they are simply protecting their individual property rights after suffering a loss in a historic flood.

All in all, it's a horror story no one expects when purchasing a condominium.

UPDATE:

JUDGE WON'T PUT GAG ORDER ON SANDY-DAMAGED CONDO OWNERS

[HTTP://WWW.DELAWAREONLINE.COM/STORY/NEWS/LOCAL/2016/07/22/JUDGE-WONT-PUT-GAG-ORDER-SANDY-DAMAGED-CONDO-OWNERS/87379894/](http://www.delawareonline.com/story/news/local/2016/07/22/judge-wont-put-gag-order-sandy-damaged-condo-owners/87379894/)



More details for interested readers:

Summary of Mallard Lakes HOA legal dispute:

*Plaintiff's (condo owners) **Lawsuit** contends that:*

Following flood damage from Superstorm Sandy, Mallard Lakes HOA contracted with Lincoln-Hancock, an affiliate of HOA management firm Legum & Norman (A division of Associa), without obtaining competitive bids.

Following a disagreement between Lincoln-Hancock and the HOA, repairs were never completed and the contractor was never fully compensated. Nevertheless, unit owners were told their units were fully repaired and that they were ready for occupancy.

Because of the “substantially damaged” classification in order to obtain FEMA assistance, 4 condo buildings must have their first floor elevations raised above the 100-year base flood elevation level. However, that correction has not been made, thus residents are living in their condo units without valid Certificates of Occupancy.

Costs to elevate structures would be \$330K-\$400K per each building, and HOA wants to assess only 24 unit owners directly affected. However attorney for owners says that the governing documents make clear that ALL 477 unit owners must share the cost of elevating the affected buildings. (Special assessment per unit owner if all contribute would be \$4000 per unit.)

The HOA could have pursued additional funding from FEMA or other sources to avoid a special assessment, but for unexplained reasons, they have chosen not to pursue those revenue sources.

HOA conducted a membership vote on the issue of approval of a special assessment of all owners, however the suit alleges that the board failed to disclose pertinent facts and provided misinformation to association members, who then voted against the special assessment necessary for elevation of 4 buildings.

The HOA used information obtained during mediation – which was supposed to remain confidential – to make arguments against voting in favor of a special assessment.

Defendant Mallard Lake HOA's answer to lawsuit denies many of the Plaintiff's claims and contends that:

The committee of owners affected by flooding were the ones to initiate a FEMA claim and to seek “substantially damaged” status. President of HOA claims that he merely communicated with FEMA and Sussex County upon the request of and on behalf of the owners.

President of HOA makes a similar claim with regard to hiring the engineer to conduct a feasibility study and create an estimate for elevating three buildings as required by FEMA and Sussex County.

The governing documents state that after a casualty (in this case, a flood), any damage that is not covered by insurance is the financial responsibility of only the directly affected owners.

Furthermore, community wide special assessments exceeding \$20,000 require a membership vote, and members voted not to approve the \$4,000 per unit special assessment.