

HABITAT

C o n d o P o w e r

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t o f i g h t d e v e l o p e r d e f e c t s

Owners of newly-constructed condos are facing ghastly developer defects after they move in: faulty heating systems, leaky roofs, poor ventilation, and more. But these unit-owners are turning to their condominium board, and the attorney general, for help. This article explains why so many buildings are faced with defects, and what boards can do to protect their investments.

Five years ago, when Jodie Garay, her husband, and her daughter moved from their apartment in Park Slope to a condo in Cobble Hill, both Brooklyn neighborhoods, they were overjoyed with the change. Not only were they thrilled with the space - the 2,000 square feet, the high ceilings, the views of Manhattan and the East River - but they were very pleased with their financial investment as well. For \$400,000, they had increased their living space by nearly a third, were in walking distance of their daughter's school, and, last but not least, they had a guaranteed parking spot for their car.

Nothing, they thought, could be better. That was until the defects started to show. First, it was an issue with the windows. Then, there were the floors. After that, they started hearing complaints from other owners about the building's heating and cooling systems. Finally, there was the kicker: when it rained, the roof leaked. From daydream to nightmare - all in 12 months. "They cut corners every place they could," says Garay about the building's sponsor.

It has taken nearly five years for the condominium board to negotiate a settlement on the major problems in the building, and, with luck, the repairs will start this summer. Under the terms of the agreement, the board will fix the windows

and the roof, and the sponsor will pick up the tab. There are upsides and downsides to the deal. While the board won't have to levy an assessment to fix the major structural issues, the drawn-out negotiating process has drained the seven board members and the unit-owners alike. "It's really been a test of endurance," says Garay, the board's co-president.

With the cost and demand of new housing rising side-by-side, would-be condo buyers are facing tremendous pressure in the residential market. Often they are purchasing units before the apartments are completed, or they are first-time buyers who don't know what to ask about the building's systems and warranties. For anyone looking to buy a condominium in a newly constructed or converted building, it's a case of buyer beware. For boards and owners dealing with the aftermath of such purchases, what you don't see can hurt you, so it is crucial to take the right steps when dealing with defects that arise after purchase. If you do, the whole buying process can often go from one of disenfranchisement to one of owner empowerment.

Where It Begins

...Rosengart, an engineer by training, attributes the problems to three factors: "The drive for profits is greater today, the skill levels of workers has declined, and materials are more expensive. I get a jaundiced view of this, because I see only the problems."...

Band of Brothers

When it comes to dealing with a sponsor who is reluctant to address problems in the building, board members need to go on the offensive. First, they should contact the building's managing agent and make a list of complaints that have

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been reported to the managing agent, and then seek their own list. They should put up a notice in the lobby or send out an e-mail and tell all the unit-owners to send them a list of all the problems in their units.

Occasionally, say managing agents, the complaints start rising right away, after people have moved into their units and realize that the unit's operating systems are faulty - the exhaust fan in the kitchen doesn't work, or the heating and cooling unit isn't providing enough heat or air conditioning.

The board then needs to determine whether the complaints are cosmetic or pertain to the building's overall operating systems. Some people want more than they paid for. If a sponsor puts down a carpet and someone doesn't like the color or texture they will complain, sometimes vehemently. Well, says one attorney, "no one promised them \$100 a square yard [carpet]."

"When boards members start getting these complaints, they should absolutely bring it up with the managing agent, because the managing agent, hopefully, has the kind of experience to know if they are valid," observes David Goodman, director of business development with Tudor Realty.

After that, the board members should instruct the building's superintendent to go door-to-door with a pen, pad, and digital camera, and make written and photographic notes of all the problems that residents are reporting. The board members should then call a special meeting with the super and managing agent and go over the defects, breaking them down into cosmetic issues, operational issues, and physical plant issues.

Once the board members have collected and collated the complaints, they need to send a

certified letter to the sponsor, including the list of complaints and demanding that the problems be fixed. A copy of both should also be sent to the Office of the Attorney General, Real Estate Financing Bureau, so the sponsor knows that the board is serious about seeking redress.

The next step is up to the sponsor. Some will respond positively, especially on minor items. "It's like when you buy a new car - sometimes you have to bring it back to have it adjusted. From time to time, once you complete a building, there are some things that have to be adjusted, until it runs smoothly," says one architect who works with sponsors. "Nothing structural, nothing of importance - the a/c doesn't give enough cooling, flooring problems, the windows are hard to close. I consider them routine and usually our clients take care of these."

"They want to protect their reputation," attorney **Adam Leitman Bailey** notes. "They don't want to see their name in The New York Times."

But the sponsor may well ignore you, in effect saying, "So sue me," knowing that many boards don't have the financial resources to engage in a lawsuit. If the sponsor balks over making repairs on big-ticket items - a leaking roof, a deteriorating façade, a broken boiler - you have two options: go to the attorney general's office or sue.

The AG and You

Stuart Saft says his advice to boards is to work through the attorney general's office. Lawsuits take a long time, and there are no guaranteed outcomes. Ellen Sykes, a member of the board at Empire Condominium, says that the board chose to go through the attorney general's office rather than threatening a lawsuit, because it was less costly. "And that's the driving concern, because

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no one wants to look at \$2 million worth of assessments.” The condo recently reached a \$2.5 million settlement with the developer over repairs to the buckling floors, leaks, and other defects.

When condominium boards ask the attorney general’s office for help in addressing their problems, Rosengart, the assistant attorney general, says he first goes to the building to make his own inspection. Then he recommends that the board and the sponsor split the cost of an independent engineer to make a full report. “We get a joint engineer to write a report, which presumably becomes the basis for the settlement. Usually it works. Like all of these things, it’s slow,” which is the main drawback to following this route.

Sue You Blues

Taking the step of filing a lawsuit is serious, and board members should present that option, with its potential drawbacks, to the unit-owners before doing it. While the threat can be potent, the reality can be sobering. Not only is it expensive and time-consuming but some courts have also held that condominium boards don’t have even have standing to represent individual unit-owners.

Threatening a lawsuit should only be an option of last resort, note attorneys. “First the boards should try to sit down with the sponsor. If that doesn’t work, then they should try to negotiate through the attorney general’s office,” says Andrew Brucker, a partner in the law firm of Schecter & Brucker. Threatening a lawsuit “smacks of desperation. But unfortunately, it’s the only way you can get the attention of the sponsors sometimes.”

How much does it cost initially for an attorney’s retainer and an engineer? Owners are looking at an initial contribution of a few hundred dollars to

a few thousand-dollar pledges, depending on the size of the building. While some attorneys will initially waive the cost of a retainer, an engineer’s report is crucial, and that examination of the building’s exterior and interior operating systems can cost anywhere from \$8,000 to \$15,000 for a multi-story luxury high-rise.

It may sound like a lot of money initially, but “the only way such an association will make headway and have credibility, and be able to retain the people necessary to document the claim, and get the sponsor to take action, is going to be the ability to raise money and put a down payment toward the retention of an attorney and an engineer to substantiate and document their claims of defect,” says an attorney representing condominium owners seeking redress.

While some unit-owners may balk at digging into their own pockets, attorneys point out that most times the sponsor will not take complaints seriously unless the unit-owners have put money in escrow to show the sponsor they are serious about hiring an attorney and an engineer to get redress for their complaints. “The sponsors always think that unit-owners won’t spend money to go against them. If you show the sponsor that you have \$50,000 to \$100,000, it definitely scares the sponsor every time,” maintains Bailey...

...At the meeting, the board members should present the issues: that there are defects in the building, that the sponsor has refused to cure the problem and that the homeowners have one of two choices. They can go their separate ways and try to seek redress on their own, or they can band together, hire an attorney, and seek redress with the power of their collective voice.

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Power to the People

While the Declaration of the Condominium and the building's bylaws give a condo board the power to act on behalf of the building, boards should let the residents know what they are doing. Keeping people informed makes sense, because rumors will be swirling anyway. And well-informed unit-owners will be much calmer if they know what the board is doing.

"Communicate with the unit-owners as much as possible and as quickly as possible," says Shmulewitz. While that will not eliminate all the frustration that the unit-owners will feel, "it will dampen their frustration." That's important, stresses the attorney, because it prevents the unit-owners from making it the condo board's fault if the defects haven't been addressed.

Take One Main Street, a condominium in Brooklyn. Rob Brofman, president of the board, says that the slow pace of negotiations has led some of the owners in the converted factory known as the Clock Tower to complain that the board isn't on top of the issues, which range from a leaking roof to a deteriorating façade.

The board, which began negotiating through the attorney general's office two years ago, is only now beginning to see a resolution. There was no way, says Brofman, it would risk going to court. "Taking someone to court will not give you the result you want. It takes a lot of money, a lot of years, and it's the kind of thing people can't support. The community tires of it and moves on. A negotiated claim with the attorney general will hopefully bring some kind of recompense, and a faster result."

In the meantime, adds Brofman, "the advice from the attorney is that we can't fix anything until the

[independent engineer's] report is in. We've had to endure leaks, and all sorts of things. It's increased the pain for the building, and makes the people think the board is doing nothing."

Amish Patel, a spokesman for the sponsor, One Main Street LLC, says that the company is "participating in the process" of negotiating a settlement through the AG's office.

In the end, boards and unit-owners do best when they appreciate the power of their collective voice. That's the tack the residents of the Empire Condominium at East 78th Street in Manhattan took. Although it has been an arduous process, the residents say they are finally starting to see redress.

When they first moved into their luxury condominium three years ago, the homeowners discovered that the construction was not complete. The windows had not been sealed properly and cold air was blowing in. First it was uncomfortable, then it got serious: during the new homeowners' first winter, the frigid temperatures caused pipes to burst, flooding some rooms in the multi-million-dollar luxury high-rise.

First, the unit-owners tried to complain to the managing agent, to no avail. Then, some of them tried contacting the sponsor directly. No response there. Finally, fed up, the unit-owners decided to take action. They got together, formed a homeowners' association, put several thousand dollars into a bank account, and hired an attorney to threaten legal action against the sponsor. It has taken nearly two years since the time the Empire's unit-owners first formed an association, but recently, the two parties reached an agreement through the attorney general's office to fix the problems. A spokesperson for the sponsor says outstanding repairs are expected to be completed shortly.

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“A number of us saw it would not be resolved by talking nice with the sponsor, so the unit-owners took control,” recalls one resident. “We all contributed money out-of-pocket.” At the end of the day, by taking power into their own hands, the owners were able to change the state of their investment. As one Empire condominium board member put it, if you want redress, “you can have the board do it, or you will have 70 people going to the sponsor and it wreaks havoc.”

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