

## Resolving Disputes with Commercial Tenants & Sponsors

### Payment Issues, Illegal Use, Odor & Noise

By Stephen M. Lasser, Esq.

Published in The Cooperator, October 2024



Many residential co-ops and condos have commercial retail space or parking garages in their buildings—but frequently, these spaces are not owned or controlled by the condominium or cooperative.

In condominiums, retail space and parking garages are often separate condominium units governed by a different subset of rules contained within the condominium’s declaration and bylaws. This is also true in what are known as cond-op buildings. In a cond-op, there is an umbrella condominium that typically consists of only two or three condo unit—a retail, garage, and residential unit, respectively. Ownership of the residential unit is then further subdivided and operated as a residential cooperative—hence ‘cond-op.’

In the context of a traditional residential co-op, where the cooperative corporation is technically the landlord of the building, retail and garage space is often governed by a long-term master lease between the cooperative corporation and the sponsor entity that created it—said lease having been drafted and implemented by the sponsor at the time it created the cooperative. In these situations, the sponsor entity sublets the retail or garage space to a commercial subtenant, and both the sponsor and the subtenant are generally exempt from most of the cooperative’s rules and use restrictions pursuant to the terms of the master lease.

Due to differing economic and quality of life interests, it's not uncommon for condominium and cooperative boards to end up in disputes with the commercial retail and garage unit owners or tenants in their buildings. Let's take a look at some reasons for those disputes, and how they can be resolved.

### **Payment Disputes**

No one likes to pay more than their fair share of their building's expenses, and retail and garage unit owners are no exception. Disagreements over the allocation of expenses are among the most common disputes that arise between residential condo and cond-op boards and the commercial owners and tenants operating within their buildings. These payment disputes frequently arise when the board implements a new operating budget or assessment that results in the commercial unit owners paying an increased percentage of the building's operating expenses.

Resolving these disputes requires a careful review of the applicable statutes, case law and the condominium's governing documents (i.e., the declaration, bylaws, and offering plan). Often, the governing documents are ambiguous or contradictory—but there is well-established case law to draw upon that can help explain how these documents should be read together and their hierarchy. Unfortunately, since there is potentially a lot of money at stake, and the impact of what is owed will impact future payments, these cases often result in litigation—but based on the applicable case law, the outcome should be pretty clear from the outset. ([Click here for video regarding a dispute between a condominium board and a commercial unit owner over the interpretation of the expense formula in the condominium's offering plan and by-laws.](#))

Utility bills are another common source of disputes over expense allocation. Electric and water metering and submetering protocols often do not comply with what's specified in a building's governing documents. Often, this is because the meters were not installed by the sponsor as specified in the offering plan. The solution in these situations often involves a careful interpretation of the governing documents and hiring a professional utility consultant to determine how to properly measure usage.

Lastly, it's not uncommon for sponsors in cooperative buildings to control the commercial retail space via a long-term master lease, or to own many apartments occupied by rent-stabilized tenants that are net cash-flow negative. While technically a sponsor failing to pay its commercial rent or the maintenance on its apartments is more of a cash-flow issue for the sponsor than a disagreement over expense allocation, thanks to the landlord-tenant relationship in play, the cooperative can start eviction proceedings against the sponsor and its commercial or rent-stabilized subtenants, as the case may be.

In addition, if the commercial space or cooperative apartments are encumbered by a loan, the cooperative's statutory lien for unpaid maintenance will be superior to the lender's loan lien, so the lender can be notified of the sponsor's payment default. In such a situation, the lender will typically pay the sponsor's arrears to protect its loan collateral from being adversely affected by an eviction proceeding. Frequently, pursuant to the terms of the master or proprietary lease, and statutorily in the case of sponsor-owned residential apartments, the cooperative corporation will have a legal right to collect rent directly from the sponsor's commercial or apartment tenants upon the sponsor's default in rent payment to the co-op.

## **Illegal Use**

Most condominium declarations and bylaws and cooperative master leases permit the commercial space in the building to be used for any legal use. Some of the illegal use cases my firm has successfully litigated have included an illegal massage parlor, cannabis dispensary, electric bike rental shop, nightclub, and a senior citizen day care center. Because the use provisions in condominium governing documents or cooperative master leases are typically so broad, these cases often hinge on whether the use is legally permitted under local zoning codes. Therefore, it is important to retain an attorney who has expertise in zoning in order to successfully litigate an illegal use case.

## **Odor & Noise**

Imagine you're the owner of a new multimillion-dollar loft apartment. Now imagine how you would feel if a critically acclaimed restaurant opens in the commercial space of your building, and despite its acclaimed food, the place emits noxious odors into the common hallways and into your apartment that causes you to choke on a daily basis. Or imagine the same set of facts, but instead of a restaurant, the bar and lounge operating in the commercial space turns into a full-blown nightclub on weekends, with speakers blasting music into the wee hours of the morning. Both of these scenarios have occurred in buildings represented by my firm, and variations of these scenarios are pretty common.

Odor disputes are generally more difficult to resolve than noise disputes because odor can be more subjective. Odors are also difficult to record, and the applicable statutes and case law in New York regarding odor are surprisingly sparse. The restaurant odor case described above litigated by my firm was ultimately settled, with the restaurant tenant agreeing to pay for an expert odor consultant to meet on-site with the affected parties. Based on the consultant's recommendations, the odors were successfully eliminated via a change in the type of ovens used, and a creative reconfiguration of the building's ventilation system. In an odor dispute case like this, it's helpful to first objectively confirm that there is a serious problem (does it pass the sniff test?) and then to retain an expert consultant who can actually record and quantify the offending odor.

Noise disputes are very common, especially in urban settings, but they can occur just about anywhere people live in close proximity to commercial spaces. As in odor disputes, in order to prevail in a noise dispute case, it is often necessary to hire an expert consultant to measure the type and frequency of the noise, and to determine whether any applicable statutes are being violated. Unlike odor laws, the statutes and case law regarding noise issues are robust, so once an expert is retained, it should be a relatively straightforward process for the expert to make recommendations for sound attenuation, and—if those recommendations are not voluntarily implemented—for the board to authorize their attorney to file a lawsuit to effectuate the commercial unit owner's or tenant's compliance.

Disputes with commercial unit owners, commercial tenants and sponsors regarding payment, illegal use, odor and noise are common issues that involve human behavior and human perceptions—so even artificial intelligence is probably not going to be able to resolve them anytime soon. When it becomes clear that the parties will not be able to work things out on their own, the key for boards to resolve these issues is being proactive and hiring consultants and legal advisors who have experience and expertise.