



THE AFTERMATH

As Houston apartment professionals and owners work through the devastation of Harvey, many are asking a number of questions. Here are your answers.

MANY COMMUNITIES IN and around Houston suffered damages from the effects of Hurricane Harvey. Many lost power and numerous properties suffered substantial water damage. Roads turned into rivers. Cars were replaced with boats. Transistor radios replaced TVs.

As we work to recover from the devastation, apartment owners and managers have a number of questions with respect to various owner/resident issues. Here are some of the commonly asked questions, and some guidance with respect to the answers. Please note that the answers to these questions presume the resident has signed a standard TAA Apartment Lease Contract. If another lease is being used, the lease should be reviewed to determine whether the answers given should be modified.

If my property has substantial damage, do I have the right to terminate leases?

Yes. Section 26.5 of the lease states that if the owner believes that catastrophic damage is substantial or that performance of needed repairs poses a danger to the resident, the owner may terminate the lease by giving at least five (5) days written notice.

If I terminate leases, do I have to refund rent and security deposits?

Yes. Section 26.5 of the lease also states that if the lease is terminated, the owner will refund prorated rent and all deposits, less lawful deductions. The amount of prorated rent refunded will depend on the date the lease is terminated. Since the property would have been substantially damaged, chances are that most, if not all, of the security deposit should be refunded.

If the owner does not believe that the damage warrants the termination of the lease, does the resident still have

the right to terminate the lease?

Possibly. Pursuant to Section 92.054(b) of the Texas Property Code, if after a casualty loss the rental premises are as a practical matter totally unusable for residential purposes, either the owner or the resident may terminate the lease by giving written notice to the other any time before repairs are completed. If the lease is terminated, the resident is entitled to a pro rata refund of rent from the date the resident moves out and to a refund of any security deposit otherwise required by law.

Of course, the question is whether the loss rendered the rental premises "totally unusable for residential purposes." This will depend upon a number of factors, including the type of damage, how long repairs will take, and whether someone can live in the unit while repairs are being made. If you have damage that will take a couple of days to repair, the argument that the unit was totally unusable for residential purposes would probably not carry much weight. If, however, the unit cannot be lived in for a period of weeks, the resident might have a better argument that the unit is totally unusable for residential purposes.

If the unit is partially unusable, is the resident entitled to a rent abatement?

Probably not. Section 26.4 of the lease states that the owner will act with customary diligence to make repairs and reconnections, taking into consideration when casualty-insurance proceeds are received and that "rent will not abate in whole or in part."

Section 92.054(c) of the Texas Property Code states that if after a casualty loss the rental premises are partially unusable for res-

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idential purposes, the resident is entitled to reduction in rent in an amount proportionate to the extent the premises are unusable because of the casualty, **but only on judgment of a county or district court.** This section also states that an owner and resident may agree otherwise in a written lease.

Based on the language of the lease, rent will not abate in whole or in part. Since the statute allows an owner and resident to agree on this issue in the lease, the lease should prevail. Furthermore, even under the statute, if a resident is seeking a reduction in rent, the resident would only be entitled to a reduction if the resident proceeded to court and obtained a judgment allowing the reduction.

Can a resident terminate the lease only because the community lost power?

No. Although an argument might be made that the resident would have the right to terminate the lease if the loss of power rendered the unit "totally unusable for residential purposes," Section 92.052(c) of the Texas Property Code provides that this subchapter (the subchapter that includes the resident's right to terminate the lease after a casualty loss if the unit is totally unusable for residential purposes) does not require an owner to fur-

In determining whether a period of time is a reasonable time to repair or remedy a condition, there is a rebuttable presumption that seven (7) days is a reasonable time. To rebut the presumption, the date on which the owner received the resident's notice, the severity and nature of the condition and the reasonable availability of materials and labor and of utilities from a utility company must be considered.

nish utilities from a utility company if as a practical matter the utility lines of the company are not reasonably available.

If my community is up and running and I want to offer leases to residents displaced from other properties, how much rent can I charge?

Owners can't "price gouge." The Deceptive Trade Practices-Consumer Protection Act provides it is unlawful to take advantage of a disaster by selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price or demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.

How long do I have to make repairs?

There is not a clear answer to this question. Section 92.056(b) of the Texas Property Code provides that an owner is liable to a resident for failing to repair or remedy a condition if: (i) the resident has given the owner notice to repair a remedy the condition; (ii) the condition materially affects the physical health or safety of an ordinary resident; (iii) the resident has given the owner a subsequent written notice to repair or remedy the condition after a reasonable time following the resident's first notice (unless the resident gave the first notice by certified or registered mail); (iv) the owner has had a reasonable time to repair or remedy the condition after the owner receives the resident's notices; (v) the owner has not made a diligent effort to repair or remedy the condition after receiving the resident's notices; and (vi) the resident was not delinquent in the payment of rent at the time any notice required by this subsection was given.

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Section 92.054(a) provides that if a condition results for an insured casualty loss, the period for repair does not begin until the owner receives the insurance proceeds. As indicated above Section 26.4 of the lease provides that the owner will act with customary diligence to make repairs and reconnections, taking into consideration when casualty-insurance proceeds are received.

Based upon these statutory and lease provisions, it would appear to be reasonable for an owner to have at least seven (7) days to make repairs after the storm. However, the law allows an owner additional time if the failure to make repairs is due to the severity and nature of the condition or the unavailability of materials, labor or utilities. Therefore, the answer will depend on whether there are sufficient insurance proceeds to pay the cost of repairs, the circumstances relating to the extent of the damage and what the owner needs to do in order to make proper repairs. Of course, if you are electing to terminate leases, time to repair is more or less irrelevant.

Are there any restrictions to transferring residents to other units?

Yes. Pursuant to Section 92.062 of the Texas Property Code, if a rental premise is, as

a practical matter, totally unusable for residential purposes as a result of a natural disaster, an owner that allows a resident to move to another rental unit owned by the owner may not require the resident to execute a lease for a term longer than the term remaining on the resident's lease on the date the premises was rendered unusable as a result of the natural disaster.

This law would prevent you from requiring a resident who has two months left on the lease (pre-Harvey) to sign a new 12-month lease if the resident is transferring as a result of Harvey. The law does not prevent an owner from leasing for a longer term if the longer term is not required. However, there may be an issue proving that a longer term was not required. One approach might be to transfer the resident and have the resident sign a new lease for the same term as the resident's old lease, but then have the resident sign a longer term after the resident has transferred. Of course, this would have to be with the agreement of both parties that sign the new lease and the longer term could not have been a condition of the resident's ability to transfer for the remainder of the existing term.

Hopefully we have answered some of the questions you may have. Obviously, in this environment, there may be additional issues you may need to consider with any situation. Let's all hope the recovery process will go smoothly and we can look forward to getting back to a sense of normalcy. 🙏

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