

Q&A REGARDING PROPERTY DAMAGE CAUSED BY A NATURAL DISASTER

Question: The utilities have been cut off to our property due to a recent natural disaster. We have no electricity, no water, and no sewer service at this time due to the inability of the utility companies to provide service. It may be several days or weeks before the utilities are fully restored. What are our obligations to the residents?

Answer: There is no simple answer. Neither the TAA Lease Contract, the statutes, nor the common law give guidance on this issue. The answer may depend in large part on the actual or anticipated duration of the lack of utilities.

The TAA Lease Contract. Nothing in the lease addresses owner duties or residents rights when utilities are unavailable because of utility company problems.

Limited scope of the habitability statute. If a dwelling becomes uninhabitable because of damage to the dwelling from a casualty loss such as fire, smoke, hail, or explosion, the Texas habitability statute (Property Code, Section 92.051 *et seq*) contains specific duties and rights of the owner and residents regarding lease termination and rent abatement. For example, the statute gives either party the right to terminate the lease if the entire premises are uninhabitable because of such casualty damage to the premises. Lease termination notice may be given any time “before repairs [to the dwelling] are complete.” If the premises are only partially uninhabitable from the casualty damage to the dwelling, neither party has the right to terminate the lease; but the resident is entitled to partial rent abatement and the owner has a duty of repair, as provided in the statute.

The statute, however, simply does not address uninhabitability because of the government’s or utility company’s inability to get the utilities back on after major equipment breakdowns or malfunctions, regardless of the cause. If the statute were to be interpreted to cover such utility interruptions, it would have rather ridiculous and unfair results, i.e., owners could use a one-day utility interruption to terminate the resident’s lease and the resident could move out with impunity if the premises were uninhabitable for one day due to a power interruption or water plant break down.

The statute does not give either party the right to terminate the lease when uninhabitability results from utility problems that are not the fault of the owner and that cannot be repaired by the owner. Nor does it give the resident the right to rent abatement in such situations.

The common law. There are no reported case decisions under the common law dealing with uninhabitability of a rental premises due to utility company inability to restore utilities for an extended period of time. In the opinion of TAA general counsel, it is likely that a judge would interpret the common law to allow either party to terminate the lease if the dwelling lacks utilities for *an extended period of time*. What is an “extended period of time”? Is it one, two or three days? Probably not. Is it three, four, or five weeks? Maybe yes. But it is anyone’s guess since there is no case law on the subject. Therefore if a resident asks to terminate a lease due to total interruption of utilities, the owner’s business decision to grant or deny the request needs to take into consideration this ambiguity and unsettled nature of the law in this area. The same practical approach needs to be taken by the resident when considering an offer of rent abatement from the owner.

Some practical solutions. An owner could offer to abate the rent during the time the dwelling is without utilities due to utility company problems. Such a gesture would give the owner maximum opportunity to retain residents who otherwise might insist on leaving the property permanently, and it would promote goodwill throughout the

community. On the other hand, it might break the typical owner to give a three- or four-week rent abatement to all residents in a large community since the expenses of the project continue, such as employee salaries, insurance, repairs and maintenance, office overhead, mortgage payments, etc. It would seem wise that if extended rent abatement is contemplated, the owner should contact his mortgagee and ask that payment of the mortgage for that month be postponed for some period of time. It would also be wise to discuss the rent abatement under these circumstances with the owner's insurance agent.

Question: Our apartment buildings or rent houses suffered significant damage in a recent natural disaster. Water entered many of the dwellings, soaking the residents' furniture and other personal belongings. We need to access the dwellings to start repairs and remove the wet items which now pose an odor and potential health hazard and which will impede repairs to the units. What should we do about the residents' furniture and other wet items?

Answer: Paragraph 28 of the TAA Lease Contract describes when you may enter the unit. If the residents are still living in the unit, you may peacefully enter the unit for reasonable business purposes, which would include activities such as removing health or safety hazards, including wet items posing potential health and safety risks or removing perishable food if electricity is cut off. The lease does not give you the right to remove the resident's personal items that do not pose a potential health or safety threat.

You have similar rights under paragraph 28 if no one is in the dwelling, but you must leave written notice of your entry in a conspicuous place in the dwelling immediately after you enter (preferably taped to the inside of the main entry door). Do not wait until you leave to post the notice.

Paragraph 24.4 of the TAA lease makes it clear that you are not liable for damage from a natural disaster to residents' personal possessions (unless of course your negligence was also a cause of the damage). You should nonetheless exercise reasonable caution while handling the residents' possessions during the course of any repair work—regardless of whether the items are left in the dwelling or removed from the dwelling because of health considerations.

You should try to obtain the resident's permission before removing such personal property by contacting, if possible: (1) the emergency persons listed on the resident's rental application; (2) the resident's employer; or (3) other known telephone numbers for the resident. If you have the resident's email address, try an email message to the resident. However, if the resident is unavailable due to a government evacuation or is simply missing and cannot be reached after reasonable efforts, you may lawfully remove the water-soaked items to begin the repair work as long as you use reasonable care while handling and storing the items. For example, you should store the items in a secure place if feasible. You have no obligation to dry the resident's personal property or otherwise mitigate damages from the water, but the resident may be grateful if you choose to do so.

If it becomes necessary to remove a resident's personal possessions from the dwelling, you should fill out and post the inventory of those possessions in the dwelling when you leave (again preferably on the inside of the main entry door.) You should keep a copy of the inventory in your files to avoid any future disputes regarding what items were removed. It would seem best to have a witness with you when making the inventory and removing such property. Taking photographs of the condition of the dwelling's interior and the resident's personal property is not legally necessary—but it certainly would seem to be the smart thing to do.

Question: We did not have insurance that covered damage from a recent natural disaster. What are our obligations?

Answer: Because the Texas Property Code only does not obligate you to begin repairs until you receive payment from an insurance company (see paragraph *Insurance and Liability* in the article beginning on page

4), you are under an obligation to begin repairs as soon as reasonably possible to the property when your insurance policy does not cover the damage.

If the property is totally uninhabitable, you will need to make a business decision about whether you should exercise your right to terminate the leases to the property in order to expedite the repair process rather than try and hold the residents to the terms of the lease while the property is uninhabitable.

Question: The damage to many of the units in our building is so extensive that the units have become uninhabitable. We would like to exercise our rights under the property code and the TAA Lease Contract to terminate the lease. How do we do that?

Answer: Use the form “Termination Notice due to Natural Disaster” to terminate the lease. Paragraph 26.5 of the TAA Lease Contract as well as Section 92.054 of the Texas Property Code gives you the right to do so if the rental premises as a practical matter has become totally unusable for residential purposes after a casualty loss, and the casualty loss was not caused by the negligence of the resident, a member of the resident’s family, or a guest or invitee of the resident. Paragraph 26.5 of the TAA Lease Contract says that you may terminate the lease by giving the residents at least five days written notice. It would seem reasonable in the opinion of TAA’s General Counsel to offer an additional five days to residents who have legitimate reasons why they may not be able to comply with the five-day time limit. The form suggests that residents who have difficulty complying with the five-day period specified in the notice contact management about other arrangements. You could offer an additional five days to residents who have legitimate reasons, such as difficulty in returning to the property, when the residents contact you asking for additional time.

The Texas Property Code does not dictate how the notice should be delivered. It is likely that the residents will not be readily available at the property itself. Therefore, you should attempt to deliver the notice to the resident by the best available means that will allow you an opportunity to prove that notice was delivered. For example, you could call the emergency persons listed on the resident’s rental application, the resident’s employer, or other known telephone numbers for the resident and ask for current contact information for the resident. If you can reach the resident via telephone, you should first ask for contact information such as a fax number, mailing address, and email address. Once you have the information, you should inform the resident that due to the extensive damage to the property, you are forced to terminate the lease. You should then follow up the telephone conversation with delivery of the written notice via fax or overnight mail. Email delivery of the notice should be used as a last resort because it is difficult to prove. Be sure to retain copies of transmission verification information for any delivery methods.

If you have no contact information for the resident, and the resident is unavailable, you may be left with no choice but to post notice on the unit’s door. You could publish the notice in a local newspaper, but the additional proof of delivering notice would probably not justify the cost.

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

Answer: Yes. Paragraph 26.5 of the TAA Lease Contract states that if an 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 days written notice.

Question: If I terminate the lease, do I have to refund rent and security deposits?

Answer: Yes. Paragraph 26.5 of the TAA Lease Contract states that if the lease is terminated, the owner will refund prorated rent and all deposits less lawful deductions. Since the property would have been substantially damaged, it is likely that most, if not all, of the security deposit would be refunded.

Question: Can the resident terminate the TAA Lease Contract only because the apartment community lost power?

Answer: No. Although an argument could be made that the resident has a 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 the subchapter (which addresses resident’s rights to terminate the lease after a casualty loss if the unit is totally unusable for residential purposes) does not require an owner to furnish utilities from a utility company if, as a practical matter, the utility lines of the company are not reasonably available.