

THE ALTERATION PASS-ALONG

Making sure today's apartment upgrades are the responsibility of tomorrow's owner

BY PAULA CHIN



It was a simple oversight, but one with expensive consequences.

In 2005 a shareholder at an Upper East Side co-op renovated his apartment. Following the co-op's protocol, he signed an alteration agreement in which he took responsibility for any damages that might result from the work done in the apartment. The co-op's alteration agreement carried an additional requirement: If the apartment was ever sold, the new purchaser had to agree to take responsibility for these alterations, even though he or she hadn't made them.

IRONCLAD CONTRACT

Boards need to make sure that a new apartment buyer signs a document, the “Purchaser’s Assumption of Alteration Agreement,” (available at the New York City Bar website <https://bit.ly/AltAgrForm>). The document, which can be modified for co-ops, references the seller’s alteration agreement and binds the buyer to all of the obligations in it.



EXHIBIT "F"

PURCHASER'S ASSUMPTION OF ALTERATION AGREEMENT⁷

WHEREAS, simultaneously with its execution and delivery of this Assumption of Alteration Agreement, the undersigned is becoming the fee owner of Unit _____ (the “Unit”) of the _____ Condominium (the “Condominium”) in the building located at _____; and

WHEREAS, a prior owner of the Unit (the “Unit Owner”) and the Condominium’s Board of Managers (the “Board”) entered into an Alteration Agreement dated _____ (the “Alteration Agreement”), a copy of which is attached hereto,

WHEREAS, the Alteration Agreement (1) provides that any person acquiring Unit shall assume the obligations of the Unit Owner under the Alteration Agreement and (2) authorizes the Board to refuse to recognize or deem the information required under the Governing Documents as complete for the application for the waiver of the Right of First Refusal unless and until such person assumes the obligations of the Unit Owner under the Alteration Agreement.

NOW, THEREFORE, the undersigned hereby ASSUMES AND AGREES TO PERFORM AND OBSERVE all the terms, covenants and conditions of the Alteration Agreement to be performed or observed by the Unit Owner thereunder (including the provisions of Paragraph 15 thereof pertaining to future transfers).

Henceforth, the term “Unit Owner” as used in the Alteration Agreement shall mean the undersigned with the same force and effect as though the undersigned had been the original Unit Owner thereunder. Any breach of this Assumption of the Alteration Agreement or of the Alteration Agreement shall constitute a breach of the Condominium’s Governing Documents. This Assumption of Alteration Agreement shall be binding on, and enforceable against, the undersigned and the undersigned’s estate, heirs, executors, administrators, personal representatives, successors and assigns.

_____, New York _____

Date: _____

State of New York }
County of New York } ss.:

On this _____ day of _____, 20____, before me personally came _____, to me known and known to me to be the individual described in and who executed the foregoing instrument, and duly acknowledged to me that [she][he] executed the same.

⁷ To be executed by a purchaser where the apartment being acquired is the subject of an Alteration Agreement in the managing agent’s files.

Fast forward a number of years, and there was a new owner living in the unit. When the previous alterations caused a massive leak resulting in extensive damage to the unit directly below as well as flooding the hallways on two floors, the board turned to the current owner to foot the repair bill. He refused to pay it, and when the co-op looked for the signed assumption agreement, it was not there. The reason? Because it was not signed when the transfer closing took place, even though the stipulation was in the co-op’s alteration agreement. Instead, the board had to foot the \$2.5 million repair bill and impose an assessment on the rest of the shareholders at the 79-unit building to help cover the cost.

It’s a cautionary tale. “An agreement isn’t simply, ‘Someone wants to do this scope of work today, we are going to approve it, and then they’re liable going forward if something goes wrong,’” says Leni Morrison Cummins, chair of cooperatives and condominiums at the law firm Cozen O’Connor. “What many directors don’t realize is that without an assumption contract with future buyers, those obligations will literally disappear into thin air.”

A Promise of Protection

A standard alteration agreement typically includes a clause saying that the current owner is required to inform prospective purchasers of any alterations and obtain the buyer’s agreement to assume responsibility for them going forward. While that seems to provide protection to the co-op or condo association, it doesn’t. What’s needed is for the purchaser to actually sign a document that references the

alteration agreement by date and binds the buyer to all of the obligations in it. An example of this is the “Purchaser’s Assumption of Alteration Agreement,” (available at the New York City Bar website <https://bit.ly/AltAgrForm>).

As for when the document has to be given to the purchaser, there are several options. “A co-op, which won’t approve a transfer until it has a completed application package, could make the assumption a required part of that package,” says Chris Tumulty, a partner at the law firm Fox Rothschild. Similarly, a condo can require an assumption agreement before waiving its right of first refusal and allowing the sale to go forward. Boards can also ask the seller to deliver the signed document prior to closing, or the document could be signed at closing. If the latter, “it better not come as a surprise to the buyer,” Cummins says. “If someone suddenly learns there were alterations that they are liable for, you’d better believe they are going to demand a price concession or even walk away.”

Document Management

Whatever method is chosen, it’s the board’s responsibility to keep meticulous records of the alterations for every apartment — what was changed, when and by which owner. That’s important, because with each change of ownership, the subsequent owner who signs an assumption agreement is responsible for the alterations made by every previous one. If there’s a leak, say, from a branch line to the kitchen and the owner claims not to be responsible because it wasn’t renovated by the previous owner, the board will



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have the documents to prove that the alterations were made by an owner before that.

The challenge is that there is no consistent, agreed-upon way to record each successive set of alterations or make buyers aware of the changes made to their units. “No one is really keeping track of these agreements,” says Stu Saft, a partner at the law firm Holland & Knight. “It’s just not being done on a broad scale.”

Record-keeping is often left to managing agents, but since management might change, it can’t be assumed that the information is passed along. “Things really can get lost in the transition,” says Pierre Debbas, a partner at the law firm Romer Debbas who specializes in co-op and condo closings. “I had an apartment where someone had installed a hot tub in the bathroom back in the ’80s and we had no clue whether it was done with board approval, because it was three property managers later and no one had a record of anything.” The board succeeded in getting the buyer to assume responsibility if the tub caused any damage or had to be brought up to code, he adds, but the seller did have to slash the sale price to close the deal.

Building a Better System

“Basically, you have to treat alteration and assumption agreements like corporate documents and make sure they’re retained for safekeeping,” says Ken Jacobs, a partner at the law firm Smith, Buss & Jacobs. “And when there is a sale, the board has to make sure that management checks the agreements for that unit, and for management to inform the transfer agent. The right hand has to know what the left hand is doing.”

One way of doing that is by creating a dedicated file for each apartment that contains all of its alteration agreements, with the corresponding assumption contracts stapled to them. These files are usually maintained at a managing agent’s office, but a spreadsheet with each unit’s alteration history could be maintained by the board and used as a quick reference. Then, when an apartment goes up for sale, all parties would know which documents need to be pulled. “It’s a way for boards to show that alterations are being handled properly,” Debbas says. “And not having those documents is going to hurt the salability of apartments. It’s all part of a board’s fiduciary duty.” ■