



# Federal Disaster Policy and Community Association Homeowners

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## About Community Associations Institute

With more than 33,000 members dedicated to building better communities, CAI develops and provides information, education and resources to association board members, community managers and other professionals who support community associations. CAI's mission is to inspire professionalism, effective leadership and responsible citizenship—ideals reflected in homeowners associations and condominium communities that are preferred places to call home.

CAI's mission of building better communities is achieved by:

- Advancing professionalism through national and chapter-based education programs.
- Publishing the largest collection of resources available on community association management and governance, including website content, books and periodicals.
- Conducting research and serving as an international clearinghouse for information, innovations and best practices in community association operations, governance and management.
- Advocating for public policies that protect associations and the investments that owners have made in their homes and communities.
- Giving community managers and other industry professionals the opportunity to earn professional credentials, which demonstrate to homeowners that these professionals have the training, knowledge and expertise needed to manage and guide communities.

For more information on CAI and the community association model of housing, please visit [www.caionline.org](http://www.caionline.org) or phone (888) 224-4321.

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## Executive Summary

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) is the preeminent governing authority for federal disaster response programs administered by the Federal Emergency Management Agency (FEMA). The Stafford Act provides FEMA an expansive toolkit to support state and local government disaster mitigation, planning, and response operations. The Stafford Act also establishes FEMA as a key partner for state and local governments in long-term disaster recovery, helping devastated areas rebuild stronger, safer, and more resilient communities.

As the conduit for federal disaster relief and recovery resources to households and communities, FEMA has failed to adapt its programs to the changing patterns of community development and consumer housing preference. Community association housing is one of the fastest growing forms of home ownership. Across the nation, more than 65 million people live in a condominium, housing cooperative, or homeowners association. FEMA's failure to adapt to this shift in housing preference has left a significant gap in federal disaster response and recovery programs.

Like other homeowners, community association residents protect their homes by purchasing insurance and working with local governments to prepare for natural disasters. Association homeowners also support disaster response and recovery assistance through local, state, and federal taxes. However, when disaster strikes, these taxpayers are told their communities do not qualify for disaster assistance. When disaster assistance is available for individual households, some association homeowners face significant restrictions on how this disaster assistance may be used.

CAI believes the Stafford Act authorizes FEMA to offer federal disaster assistance to community associations and association homeowners without imposing burdensome restrictions. FEMA must use the authority and flexibility of the Stafford Act to adjust its program requirements to account for changes in the organization and structure of neighborhoods in cities and towns across the nation.

Rather than using the flexibility of the Stafford Act to meet the disaster response and recovery needs of associations and association residents, FEMA routinely denies community association requests for federal disaster benefits. FEMA has developed an arbitrary "public interest" standard and applies other unique, cumbersome requirements that must be satisfied prior to authorizing disaster recovery work to clear

community association roads and waterways of threats to human health and safety and to prevent additional damage to property.

Homeowners living in a condominium association or a housing cooperative face burdensome restrictions on the use of home repair assistance. FEMA permits owners of single family homes to use disaster assistance to fund repairs to roofs and other vital elements necessary to restore a home to habitable condition. Condominium and cooperative homeowners are denied use of FEMA disaster assistance for comparable repairs due to the fact that key structural elements of condominiums and cooperatives are commonly owned.

Regulatory obstacles prevent the flow of federal disaster assistance to community association residents, forcing these households to absorb higher disaster recovery costs when compared to non-association households. FEMA's program rules deny equal treatment and access to federal disaster resources to taxpayers living in a community association in an arbitrary and capricious manner.

CAI members urge that Congress and the Administration require FEMA to follow both the letter and the spirit of the Stafford Act to ensure that all households in our nation's cities and towns have equal opportunity to recover from a natural disaster. Natural disasters do not discriminate between community association neighborhoods and non-association neighborhoods or between association households and non-association households. Neither should our nation's natural disaster response and recovery policy.

## About the Community Association Model of Homeownership

Often referred to as homeowners associations, planned communities, condominium associations, or housing cooperatives, community associations play a central role in meeting the nation's housing needs.

Today, there are more than 65 million individuals who call a community association home, with this number increasing significantly year-by-year.<sup>1</sup> Community associations come in many forms and sizes, but all associations share three basic characteristics: (1) membership in the association is mandatory and automatic for all property owners; (2) certain legal documents bind all owners to be governed by the community association; and (3) all owners pay mandatory lien-based assessments that fund association operations.

Community associations are overseen by a board of directors or trustees comprised of owners and residents elected by their neighbors to serve in this capacity. This board of homeowners guides the association in providing governance and other critical services for the community.

Boards of directors' responsibilities typically reflect the needs of the community as well as the community's size and property type. In planned communities, boards ensure that community infrastructure (roads, bridges, and storm water systems) and amenities are in good condition and protected from loss through appropriate insurance coverage and a capital improvement plan. A condominium association board of directors, in addition to maintaining and insuring common elements and building infrastructure, may also negotiate contracts or purchase utility services on behalf of residents.

The community association model of housing is attractive to today's homeowner and is actively supported, if not mandated, by local governments. The variety of homes and services provided by associations meet consumer demand, allowing owners and residents to maximize the enjoyment of their homes. Local governments favor community associations as this model of housing can allow certain municipal costs to be transferred to the association. Today, many community associations deliver services that once were the exclusive province of local government.

Recognizing a shift in housing and development preferences, state governments have updated or enacted statutes to support the community association model of housing. However, federal policymakers and federal agencies have largely failed to account for changes in housing preference, variation in property types, or evolution in state statutory and other legal structures that govern housing development. The failure of federal policymakers to identify and adjust to

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<sup>1</sup> Foundation for Community Association Research. National and State Statistical Review (2014). [http://cairf.org/research/factbook/2013\\_statistical\\_review.pdf](http://cairf.org/research/factbook/2013_statistical_review.pdf)

such societal change is exemplified by the Federal Emergency Management Agency's (FEMA) consistent denial of federal disaster assistance for community association homeowners.

## Disaster Assistance Restricted in Community Associations

The Robert T. Stafford Disaster Relief and Emergency Assistance Act<sup>2</sup> (Stafford Act) provides FEMA an expansive toolkit to respond to natural disasters and national emergencies. FEMA's disaster assistance toolkit helps communities and households in the immediate aftermath of a disaster and provides recovery resources to rebuild stronger, safer, and more resilient communities.

Two of the most critical FEMA disaster response and recovery programs are the **Public Assistance (PA) Program**<sup>3</sup> and the **Individuals & Households Assistance (IH) Program**.<sup>4</sup> The PA Program helps overwhelmed municipal governments clear streets and waterways of disaster debris and repair devastated infrastructure while the IH Program provides disaster victims shelter, food and financial assistance to repair their primary residences.

According to FEMA officials, the Stafford Act and the Act's implementing regulations prevent community associations and association residents from receiving the full benefit of federal disaster assistance through the PA and IH Programs. FEMA routinely refuses to reimburse municipal governments or community associations for the cost of removing disaster debris from community association roads. FEMA will not permit homeowners living in condominiums and cooperatives to use financial assistance to fund repairs to commonly owned building infrastructure.

Rather than acknowledge the need to update its program rules and regulations, FEMA has recommended that community associations look to other federal agencies to obtain disaster recovery resources. Specifically, FEMA has actively encouraged associations and association homeowners to work with the U.S. Department of Housing and Urban Development to seek out grants through a disaster recovery Community Development Block Grant (CDBG) allocation. This is neither a practical nor viable option for community associations and association residents.

Congress does not regularly appropriate disaster-related CDBG allocations. While states have significant flexibility over the design of disaster recovery CDBG programs, it is often several months after a disaster has occurred before substantial sums of assistance reach intended recipients. Community associations and association residents will have the greatest opportunity for recovery by having immediate access to disaster response and recovery programs administered by FEMA. Congress has tasked FEMA with coordinating disaster relief and

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<sup>2</sup> 42 U.S.C. § 5121 *et. seq.*

<sup>3</sup> 42 U.S.C. § 5170a, 5170b, 5172, 5173, and 5192

<sup>4</sup> 42 U.S.C. § 5174

response—community associations should have access to these taxpayer resources and to FEMA’s expertise.

## FEMA Condo/Co-op Report Confirms Disparate Treatment

A significant number of condominiums and cooperatives were severely damaged by Hurricane Sandy in October 2013. When condominium and cooperative homeowners sought federal disaster assistance to fund repairs to devastated building infrastructure, FEMA ruled that damages to condominium and cooperative common elements are ineligible for repair assistance through the Individuals and Households (IH) Program.

### *Congressionally Directed Study of Condominiums and Cooperatives*

In response to FEMA’s ruling, U.S. Representative Steve Israel (NY-03) introduced legislation (H.R. 2887, 113<sup>th</sup> Congress) to amend the Stafford Act to expressly qualify condominiums and cooperatives for IH Program assistance. Senator Charles Schumer (NY) and Senator Kirsten Gillibrand (NY) introduced companion legislation (S. 1480, 113<sup>th</sup> Congress) in the U.S. Senate. While neither H.R. 2887 nor S. 1480 became law, Rep. Israel secured a directive in the Consolidated Appropriations Act, 2014 (P.L. 113-76), requiring that FEMA study and report to Congress on the ability and eligibility of condominiums and cooperatives to access federal disaster benefits, including home repair benefits through the IH Program.

The Consolidated Appropriations Act of 2014 required that FEMA study and report to Congress on—

- The current eligibility of condominium and cooperative homeowners to receive disaster benefits through the IH Program.
- The current eligibility of condominium and cooperative homeowners to use IH Program benefits to cover the costs of repairing disaster-related damage to common elements.
- Any instances in which condominium and cooperative homeowners have received IH Program benefits to repair common elements.
- A discussion of options, including legislative recommendations, for making condominium and cooperative homeowners eligible for federal disaster assistance for the repair of common elements, either through existing or new programs.<sup>5</sup>

FEMA released the report mandated by Rep. Israel on May 22, 2014. In the agency’s report, which was more notable for its brevity than its substance, FEMA acknowledged that condominiums and cooperatives are a prevalent form of housing in the Hurricane Sandy impact area and that condominiums and cooperatives suffered significant damage as a result of the disaster.<sup>6</sup>

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<sup>5</sup> Consolidated Appropriations Act, 2014 (P.L. 113-76): Joint Statement of Managers, Division F—Department of Homeland Security Appropriations Act, 2014: Disaster Relief Fund.

<sup>6</sup> Federal Emergency Management Agency, *FY14 Federal Disaster Assistance for Housing—Fiscal Year 2014 Report to Congress*, May 22, 2014: p. 2.



Despite the documented, severe damage sustained by condominiums and cooperatives from Hurricane Sandy, FEMA—(1) defended its denial of assistance for repair of common elements; (2) reported the agency has not in the past permitted the use of IH Program assistance for repairs to condominium and cooperative common elements; (3) encouraged the use of other federal disaster programs; and, (4) expressed operational concerns should Congress amend the Stafford Act to qualify condominiums and cooperatives for IH Program assistance.

### *Denying Condominiums and Cooperatives Disaster Assistance*

FEMA justified the agency's denial of assistance to condominiums and cooperatives on the basis of a finding that condominiums and cooperatives are business entities. Pursuant to this finding, FEMA has determined IH Program home repair assistance may not be used to fund repairs to condominium and cooperative common elements. FEMA asserts the agency lacks statutory authority to assist condominium and cooperative homeowners with IH Program assistance for uninsured repairs to common elements, writing—

*Currently, housing cooperatives and condominium associations do not meet the legal definition of an individual or household and are considered a business association.<sup>7</sup>*

FEMA refined its justification for denying critical federal disaster benefits to condominium and cooperative homeowners by arguing that an owner occupant of a condominium or cooperative unit is not individually responsible for repairs to common elements. Noting that condominium and cooperative homeowners are currently permitted to use IH Program benefits for repairs to their individual units, FEMA wrote—

*Even though FEMA is authorized to provide assistance for the individual, owner-occupied unit, FEMA is not authorized to provide assistance for any damaged items or common areas that are the responsibility of the housing cooperative or condominium association and which are typically covered by a master insurance policy.<sup>8</sup>*

FEMA further stated the agency may review a proprietary lease or other governing documents to determine any common elements that are the responsibility of an owner occupant and to evaluate if the repairs are the responsibility of the individual owner occupant. However, FEMA reiterated the agency will not render assistance for repairs to common elements determined to be the responsibility of the condominium or cooperative.

### *Condominiums, Cooperatives Must Use Other Programs*

FEMA reported the agency found no past occurrences where a condominium or cooperative received IH Program assistance to repair damaged common elements. In discussing other sources of disaster recovery assistance for these communities, FEMA noted that condominiums

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<sup>7</sup> *Ibid.*, p. 2, footnote 3.

<sup>8</sup> *Ibid.*, p. 3.

and cooperatives may apply for assistance through a Community Development Block Grant disaster recovery program, subject to state approval. Additionally, FEMA recommended that condominiums and cooperatives apply for disaster recovery loans through the Small Business Administration.

### *Operational Concerns in Qualifying Condominiums & Cooperatives for Assistance*

FEMA stated that Section 408(c)(2) of the Stafford Act must currently prohibits the use of IH Program assistance to repair damaged condominium and cooperative common elements. FEMA additionally raised operational concerns if the IH Program were expanded by Congress, writing—

*FEMA needs to further explore the challenges such a change would likely present regarding inspection services, insurance, eligibility determinations, and impact on the maximum amount of assistance to individuals and households.<sup>9</sup>*

### *FEMA Study Demonstrates Agency Bias*

The determinations in FEMA’s report to Congress are emblematic of the institutional bias that limits community association access to important FEMA programs such as the Public Assistance (PA) Program and the IH Program. Community associations are comprised of homeowners, each of whom is individually responsible for funding association operations. To state as fact that community associations are businesses or separate entities from homeowners and residents, one must ignore language in deeds, covenants, and other recorded documents stating that each homeowner retains an equal and undivided interest in common property and that this interest conveys in a change of title.

When an association is unable to fund disaster response and recovery with existing resources, these homeowners face the burden of substantial special assessments. While the association may manage the process of completing recovery and repairs, homeowners directly fund these operations.

The PA and IH Programs constitute a substantial portion of federal disaster assistance and purposeful exclusion of community associations from program participation places the full cost burden of disaster recovery on association homeowners. This impedes recovery for community associations and association residents.

## **Community Associations and the Public Assistance (PA) Program**

FEMA’s PA Program is a frontline disaster assistance tool that helps states and municipalities manage the enormous cost of disaster response and recovery when local resources are insufficient to meet disaster response needs. Through the PA program, FEMA reimburses state and local governments for expenses related to removing disaster debris, addressing immediate threats to life and property, restoring emergency services, and repairing critical infrastructure.

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<sup>9</sup> *Ibid.*, p. 4.

PA Program reimbursement is limited to only eligible disaster response activities performed by eligible entities. By statute, state and local governments and certain private non-profit entities (e.g., schools, museums, zoos, entities providing essential services) are eligible to participate in the PA Program.<sup>10</sup> To be eligible for reimbursement, the city, town, or non-profit must show the disaster response work performed complies with FEMA reimbursement regulations. If a reimbursement request is denied, the results can be devastating and severely limit the disaster response capabilities and general budgets of local governments.

Notwithstanding clear authority evidenced through a plain language reading of the Stafford Act, FEMA routinely denies community associations federal disaster benefits under the PA Program. FEMA has developed an arbitrary “public interest” standard and other unique legal requirements that must be satisfied before authorizing debris removal from community associations under the PA Program. These regulatory obstacles force community association homeowners to absorb higher disaster recovery costs. Through its arbitrary application of Stafford Act eligibility standards, FEMA denies equal treatment and access to federal disaster resources to taxpayers living in community associations.

### Debris Removal from Private Lands Authorized by Stafford Act

Removal of disaster-related debris from private property is explicitly authorized by the Stafford Act. Specifically, sections 403 and 407 of the Stafford Act permit FEMA to provide essential assistance to respond to threats to life and property existent on public or private lands. Further, FEMA is permitted to make grants to state and local governments to fund debris removal activities on private lands. Excerpts from sections 403 and 407 read as follows—

#### *Section 403. Essential Assistance*

*(a) In General—Federal agencies may on the direction of the President, provide assistance essential to meeting immediate threats to life and property resulting from a major disaster as follows...*

*(3) Work and Services To Save Lives and Protect Property—Performing on **public or private lands or waters** any work or services essential to saving lives and protecting and preserving property or public health and safety, including—*

*(A) debris removal...<sup>11</sup>*

#### *Section 407. Debris Removal*

*(a) Presidential Authority—The President, whenever he determines it to be in the public interest, is authorized—*

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<sup>10</sup> 42 U.S.C 5122(10)

<sup>11</sup> 42 U.S.C. § 5170b(a)(3)(A) [***emphasis added***]

(1) through the use of Federal departments, agencies, and instrumentalities to clear debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters; and (2) to make grants to any State or local government or owner or operator of a private non-profit facility for the purpose of removing debris or wreckage resulting from a major disaster from publicly or privately owned lands and waters.<sup>12</sup>

Debris removal from private land is subject to an additional statutory requirement that state or local governments agree to indemnify the federal government from any claim that may arise from the debris removal operation.<sup>13</sup> Otherwise, the statutory limitations on debris removal from public and private lands emanate from the same language in the Stafford Act. The indemnification requirement for debris removal from private land is the only distinctive difference in the statute. Despite the singular origin of these authorities, FEMA, through regulation, has layered multiple eligibility requirements for the provision of essential assistance and debris removal in community associations. Of particular concern is FEMA's application of the "public interest" standard to PA Program operations in community associations.

#### *Higher "Public Interest" Standard Governs Debris Removal from Private Property*

A plain reading of the Stafford Act unambiguously shows FEMA has sufficient and broad statutory authority to remove disaster debris from improved private land such as a community association. Notwithstanding a singular statutory requirement that debris removal from public or private land be in the "public interest", FEMA has, in an arbitrary and capricious manner, devised a separate "public interest" standard for debris removal from community associations.

Disaster Assistance Policy (DAP) 9523.13, *Debris Removal from Private Property*, is the current administrative guidance regarding debris removal from private land for FEMA personnel administering the PA Program.<sup>14</sup> The policy outlined in DAP 9523.13 imposes significant constraints on debris removal from private property.

Pertinent portions of DAP 9523.13 include—

#### Section VI(C)

*"Generally, debris removal from private property following a disaster is the responsibility of the property owner. However, large-scale disasters may deposit*

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<sup>12</sup> 42 U.S.C. 5173(a) [**emphasis added**]

<sup>13</sup>Section 407(b) of the Stafford Act (42 U.S.C. 5173)—"Authorization by State or Local Government; Indemnification Agreement—No authority under this section shall be exercised unless the affected State or local government shall first arrange an unconditional authorization for removal of such debris or wreckage from public and private property, and, in the case of removal of debris or wreckage from private property, shall first agree to indemnify the Federal Government against any claim arising from such removal."— [**emphasis added**]

<sup>14</sup> [http://www.fema.gov/pdf/government/grant/pa/9523\\_13.pdf](http://www.fema.gov/pdf/government/grant/pa/9523_13.pdf)

*enormous quantities of debris on private property over a large area resulting in widespread immediate threats to the public-at-large...In these situations, debris removal from private property may be considered in the public interest and thus may be eligible for reimbursement under the Public Assistance Program (44 CFR 206.224)."*

Section VII(B)

*"Approval for FEMA Assistance. FEMA will work with states affected by a disaster to designate those areas where the debris is so widespread that removal of the debris from private property is in the "public interest" pursuant to 44 CFR 206.224, and thus is eligible for FEMA Public Assistance reimbursement on a case-by-case basis."*

DAP 9523.13 establishes a higher standard for PA Program eligibility for disaster debris deposited in community associations. Under this policy, notwithstanding a presidential finding that debris removal is in the "public interest" from state and municipal government maintained roads and water ways, residents of community associations must experience a catastrophic level of destruction and damage to potentially be eligible to receive a federal disaster benefit.

Under FEMA's arbitrary and capricious standard, homeowners living on a publicly maintained roadway benefit from a lower "public interest" standard while residents of community associations must demonstrate that a presidentially-declared disaster has resulted in "enormous quantities of debris," "so widespread that removal of the debris...is in the "public interest." Any decision to provide PA Program assistance to community associations is made pursuant to subjective, non-descript criteria and finalized on a "case-by-case basis". The lack of a clear standard consistently applied is the very definition of an arbitrary and capricious decision making process, leading to disparate treatment of similarly situated homeowners.

The discriminatory "public interest" standard for community associations enshrined in DAP 9523.13 is carried over to other FEMA publications and guidebooks. These publications clearly state that expenses for debris removal from private land are not eligible for reimbursement under the PA Program. An example of how the DAP 9523.13 standard is explained to PA Program participants may be found in FEMA's *Public Assistance Applicant Handbook (2010)*—

*Debris on private property **rarely** meets the public interest standard because it does not affect the public-at-large and most often is not the legal responsibility of a State or local government. Debris removal from private property is usually the responsibility of the individual property owner.<sup>15</sup>*

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<sup>15</sup> Public Assistance Applicant Handbook—FEMA P-323 (2010): p. 14. [**emphasis added**] A similar statement may be found in FEMA's Public Assistance Debris Management Guide (FEMA-325/July 2007).

Despite the fact that debris removal from community associations is permitted under the Stafford Act and even under restrictive FEMA regulations, the Agency furthers the disparity of access to federal disaster assistance by actively discouraging debris removal from roads or waterways not under the exclusive control of a state or local government.

### *Higher “Public Interest” Standards Discourages Local Government Response*

The general definition of “public interest” that guides the PA Program involves work FEMA deems is necessary to—

- Eliminate immediate threats to life and public health and safety; or
- Eliminate immediate threats of significant damage to improved public or private property; or
- Ensure economic recovery of the affected community to the benefit of the community-at-large<sup>16</sup>

In general, FEMA requires state and local governments and other eligible applicants to explain in writing how debris removal satisfies the public interest standard. Examples of this documentation requirement include listing the specific threats to life; a cost-benefit analysis that shows debris removal is more cost effective than not removing the debris; and documentation demonstrating that removal of debris will expedite recovery of the community-at-large.<sup>17</sup>

Pursuant to DAP 9523.13, in addition to providing general “public interest” justifications prior to engaging in debris removal from private property, a state or local government must supply information to overcome FEMA’s statement that “[d]ebris on private property *rarely* meets the public interest standard.” Additionally, FEMA administrative guidance states that debris removal from private lands may be in the public interest only when “enormous” amounts of debris are present over “widespread” areas and that such determinations will be made on a case-by-case basis. FEMA does not make a similar distinction in the public interest standard for debris removal from public lands.

### *Legal Responsibility Standard*

FEMA additionally requires that state or local governments demonstrate that removal of debris from a community association is mandated by a pre-existing legal obligation of the government. DAP 9523.13 provides that the obligation to remove debris must be ongoing and in force prior to the disaster and be sufficient to compel the unit of government to incur debris removal costs even if FEMA refuses reimbursement.<sup>18</sup>

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<sup>16</sup> 44 CFR 206.224(a)

<sup>17</sup> FEMA regulation (44 CFR 206.224) provides that all debris removal activity—including debris removal from public land—satisfy the public interest standard. DAP 9523.13 Section VI.B restates this requirement.

<sup>18</sup> DAP9523.13 VII(B)(b)(ii)

Additionally, DAP 9523.13 states that a contract or obligation for trash removal is not sufficient for a community to meet the legal responsibility standard. The local government must show a separate legal obligation to enter a community association for the purpose of removing storm or disaster-related debris from roads and waterways.<sup>19</sup>

The basis of this requirement is FEMA regulation limiting reimbursement for eligible work under the PA Program that is the “legal responsibility of an eligible applicant.”<sup>20</sup> This restraint on state and local government authority to respond to immediate threats to life and property in community associations appears to be based in regulation, but not as a direct requirement of statute.

Neither sections 403 or 407 of the Stafford Act require that a state or local government have a direct, continuing legal obligation to enter a community association to remove disaster-related debris. Rather, the statute permits federal agencies or state and local governments to remove debris from public or private lands and waters when such action is deemed “in the public interest.” FEMA’s administrative limitations and requirements constitute an additional, higher standard for community associations that does not appear to have an actual basis in statute and is applied in an arbitrary and capricious manner. Because FEMA has predetermined that debris removal from community associations is “rarely” in the public interest, state and local governments do not provide such services to these citizens.

The results are stark. Streets in non-association neighborhoods are quickly cleared of downed trees and limbs and storm drains, canals, and other waterways quickly cleared of disaster debris to mitigate the risk of post-disaster flooding. These services are provided at no out-of-pocket expense to non-association homeowners. Meanwhile community association homeowners face staggering costs to clear roads to enable passage of emergency vehicles and to begin the recovery process.

### Loopholes, Exceptions to FEMA Rules Exacerbate Disparities

Despite continuous evasion of FEMA’s responsibility to assist in disaster recovery for community associations, the plain language of the Stafford Act has occasionally compelled FEMA to reimburse state and municipal governments for PA Program work in associations. Disturbingly, examples of FEMA reimbursement for PA Program work in associations are limited. Further, due to FEMA’s consistent pattern of denying PA Program reimbursement requests related to community associations, local governments or the affected community association must have both the financial resources and the will to endure a lengthy appeals process.<sup>21</sup> In one documented instance, a local government incurred debris removal expenses in a community

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<sup>19</sup> DAP 9523.13 VII(B)(b)(i)

<sup>20</sup> 44 CFF.206.223(a)(3)

<sup>21</sup> Appendix A contains cases studies of instances in which the PA Program was used to remove disaster debris from community associations.

association in 2004, but did not receive reimbursement for these legitimate disaster expenses until 2012—a total delay of 8 years.<sup>22</sup>

That local governments and community associations must endure multiple appeals with uncertain outcomes before FEMA may reimburse *eligible* debris removal expenses in community associations harms the efficacy of disaster response. The mere possibility that FEMA will refuse to reimburse a local government for the cost of debris removal from community association roads and waterways is generally sufficient cause for local governments to decline debris removal requests from these communities.

FEMA's multi-part "public interest" test is *prima facie* evidence the Stafford Act permits debris removal and PA Program work in community associations. FEMA's restrictive exercise of this statutory authority through an arbitrary, *ad hoc* process leads to uneven access to federal benefits by community association homeowners and residents. By forcing higher recovery costs on a defined class of disaster victims who are eligible under the statute to receive assistance, FEMA's restrictive, arbitrary and capricious policy on debris removal from community associations impedes recovery—a result which is in direct contravention of the Stafford Act and FEMA regulation.<sup>23</sup>

## Community Associations and the Individual & Household Assistance (IH) Program

If FEMA determines a significant number of residential structures have sustained substantial damage as a result of a natural disaster, the President may authorize direct assistance to households in the disaster area. The IH Program is FEMA's primary programmatic resource to meet the basic, immediate needs of disaster victims. While disaster victims receive numerous emergency benefits through the IH Program, among the most important of these benefits is cash assistance to fund repairs to a disaster victim's primary residence when the cost to repair damages exceed the amount of insurance proceeds.<sup>24</sup>

A class of community association homeowners—those living in a condominium or housing cooperative—are restricted in the use of home repair benefits through the IH Program. The basis of such restrictions, as noted in FEMA's May 2014 report to Congress concerning the IH

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<sup>22</sup> See discussion of *City of Maitland* in Appendix A.

<sup>23</sup> Section 101(b)(6) (42 U.S.C. 5121) states the intent of Congress in enacting the Stafford Act is to provide "...Federal assistance programs for both public and private losses sustained in disasters". This purpose of federal disaster assistance programs is reflected in FEMA regulations concerning debris removal from public and private property, which provides that debris removal is in the public interest if such action will "Ensure economic recovery of the affected community to the benefit of the community at large..." (See 44 CFR 206.224(a)(3).

<sup>24</sup> Disaster victims may receive federal assistance to pay for medical, dental, funeral, temporary housing, home repair, and other specified services through the IH Program.



Program, is the agency's objection to the use of IH Program assistance for the repair of condominium and cooperative common elements.

FEMA's report to Congress concerning access of condominium and cooperative homeowners to the IH Program does not provide an analysis of the unique obstacles to disaster recovery such homeowners face nor take into consideration the legal structure of these forms of homeownership. Further, the report fails to offer sufficient justification for FEMA's conclusion that condominium and cooperative homeowners may not use IH Program benefits for repairs to common elements so their primary residences may be restored to a habitable, safe and sanitary condition.

### Classifying Condominiums and Cooperatives as Businesses

Rather than allowing disaster victims to use IH Program benefits in a similar, consistent manner, FEMA has actively sought to restrict access to IH Program benefits by classifying condominiums and cooperatives as business entities. Through this classification, FEMA limits the use of IH Program home repair assistance to only the interior of condominium and cooperative homes, even in circumstances where repairs to common elements are required for these homes to be habitable.

In justifying this conclusion, FEMA proffers two principle arguments. First, as in its 2014 report to Congress, the agency states that maintenance and repair of common elements is the responsibility of the condominium association or cooperative corporation, not the individual homeowner. Secondly, FEMA has, in rejecting applications for disaster relief, ruled that homeowner assessments are intended to support maintenance and repair of common elements and as a result constitute benefits that by law FEMA may not duplicate.<sup>25</sup>

### *Condominium and Cooperative Homes Meet the Definition of Primary Residence*

In its report to Congress, FEMA justifies the classification of condominiums and cooperatives as businesses as a requirement of Section 408 of the Stafford Act (42 U.S.C. § 5174), which authorizes the IH Program. In a footnote, FEMA further qualifies that classification of condominiums and cooperatives as businesses is a definitional requirement of regulations promulgated by the agency at 44 CFR § 206.111.

As FEMA does not explicitly clarify the specific definitional criteria that condominium and cooperative homeowners fail to meet, an examination of the definition of the term "primary residence" is instructive. The term is defined by FEMA regulation as follows—

*Primary residence means the dwelling where the applicant normally lives, during the major portion of the calendar year; or the dwelling that is required because*

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<sup>25</sup> See Appendix C: FEMA Email Response to Bob Milone, *Availability of Grants for Costs Not Covered by Insurance at Condominium Associations*, December 11, 2012.

*of proximity to employment, including agricultural activities, that provide 50 percent of the household's income.*<sup>26</sup>

FEMA's regulatory definition of "primary residence" is sufficiently broad to encompass the condominium and cooperative form of homeownership. FEMA IH Program regulations provide that financial assistance for repair of uninsured disaster-related damage for a property owner's primary residence is intended to facilitate returning the home to a safe and sanitary condition.

Specifically, FEMA regulations provide a disaster victim may use home repair assistance for repair of "[s]tructural components of the residence. This includes real property components, such as the foundation, exterior walls and roof."<sup>27</sup> IH Program home repair assistance may also be used to repair windows and doors; heating, ventilation and air conditioning systems; utility systems including electrical, gas, water, and sewage systems; the structure's access and egress, including privately owned roads and bridges. Indeed, a primary purpose of IH Program repair assistance is to fund repairs to a primary residence that ensures the safety or health of the occupant and to make the residence functional.<sup>28</sup>

In denying condominium and cooperative homeowners IH Program benefits for repairs to common elements, FEMA relies on an interpretation of its regulations that lead to absurd outcomes. A plain reading of the regulation would lead a reasonable person to understand that home repair assistance is intended to help a disaster victim restore their home to a habitable condition. Common elements must function for condominium and cooperative homes to be habitable, safe, and healthy for occupants.

A reasonable person understands it is not possible for a second floor condominium or cooperative unit to be habitable if there are no exterior walls or if there is no access point from the ground level to the second level. Indeed, FEMA regulation, on its face, agrees with this view. Notwithstanding, FEMA has taken the policy decision that all condominium and cooperative units are separate entities, lacking structural or legal connection, leading to the absurd conclusion that condominium and cooperative homes are habitable when common elements are severely damaged.

In the condominium and cooperative forms of homeownership, owners have a defined interest in common elements that is non-severable and transfers from owner to owner. The owner's interest in common elements is normally described either in the condominium's master deed or cooperative's master lease agreement or the deed for the unit in question. The interest is commonly expressed as a percentage ownership in the common elements and is legally no different than the owner's interest in their respective unit.

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<sup>26</sup> 44 CFR § 206.111

<sup>27</sup> 44 CFR § 206.177(b)(2)(ii)(A)

<sup>28</sup> 44 CFR § 206.117(b)(2)

That this ownership interest is joined with other similarly situated property owners in no way diminishes the fact that each individual owner requires functioning common elements to maintain a safe, sanitary, and habitable residence. If the critical infrastructure of a condominium or cooperative is badly damaged or non-functioning, local authorities condemn the building until the infrastructure is adequately repaired. In similar manner, local authorities condemn single family homes that suffer significant damage until the damage is repaired and the home restored to habitable condition.

In this there is no difference between condominium and cooperative homeowners and single family property homeowners. Each requires a roof that does not leak and walls that are structurally sound. The only difference between these homeowners is that FEMA will allow a single family property owner to use IH Program benefits to repair a roof, but will not allow condominium and cooperative homeowners to do the same.

FEMA's determination that condominiums and cooperatives are business entities ensures a longer and uneven recovery in communities. The determination lacks merit in fact and in the most basic elements of real property law. FEMA should discontinue its disparate treatment of condominium and cooperative homeowners and should determine that repair of common elements is an authorized and eligible activity under the IH Program.

#### *Owner Assessments Do Not Constitute a Benefit*

While the condominium association or cooperative corporation may, for any number of practical reasons, manage the maintenance and repair of common elements on behalf of all owners, homeowners are each individually responsible for the costs and performance of these duties. Each owner has the same interest in a working HVAC system, operational elevator, or structurally sound roof and has a defined legal and financial obligation to restore common elements when damaged. That the condominium or cooperative engages in the work does not diminish an owner's interest in the common elements, but rather reflects an arrangement for repair and maintenance that is convenient for the owner or required by law.

Disturbingly, FEMA has cited payment of condominium and cooperative assessments to fund maintenance and repair of common elements as benefits that FEMA may not, by law, duplicate. It is well known that all community associations—planned communities, condominiums, and cooperatives—each fund community operations through homeowner assessments. These assessments cover administrative costs of management, payment of insurance premiums, and other known and shared community costs.

This model of funding community association operations is strikingly similar to local governments raising revenue for community operations through sales and property taxes and user fees. Importantly, FEMA does not view taxes and fees as benefits non-association homeowners receive that may not be duplicated. Such a position is, on its face, preposterous.

Local taxes are not the only source of income FEMA has declined to categorize as a “benefit” the agency may not duplicate. For example, FEMA provides grants and assistance for repair of privately owned utilities. As with any FEMA grant program, these funds are subject to the agency’s statutory restriction concerning duplication of benefits. Yet FEMA does not classify a utility’s anticipated or actual revenues resulting from restoration of service for their customers (not owners) as a duplicate benefit.

Community associations face the same challenges as all neighborhoods affected by a natural disaster and should have access to the same resources as all communities and homeowners. The determination that association assessments are a homeowner “benefit” that FEMA may not duplicate is clearly arbitrary and contravenes treatment of tax revenues and earnings of private businesses.

In enacting the Stafford Act, Congress stated it’s clear, unambiguous interest in assisting state and local governments in managing the overwhelming costs of disaster response and recovery.<sup>29</sup> FEMA interprets its statutory mandate in broad fashion, except in those instances applicable to community associations. This raises questions about the formulation of FEMA regulations and guidance applicable not only to condominium and cooperative homeowners, but to all community association homeowners, generally.

### Section 408 of the Stafford Act Permits Repairs to Common Elements

Notwithstanding FEMA’s reliance on agency regulation as justification for denial of home repair assistance to condominium and cooperative homeowners, section 408 of the Stafford Act, which establishes the IH Program, clearly contravenes the agency’s position. The statute, *in pertinent part*, reads as follows—

#### ***Federal Assistance to Individuals and Households (42 U.S.C. 5174)***

##### *(a) In General—*

- (1) Provision of assistance—In accordance with this section, the President, in consultation with the Governor of a State, may provide financial assistance, and, if necessary, direct services, to individuals and households in the State who, as a direct result of a major disaster, have necessary expenses and serious needs in cases in which the individuals and households are unable to meet such expenses or needs through other means.*
- (2) Relationship to other assistance—Under paragraph (1), an individual or household shall not be denied assistance under paragraph (1), (3), or (4) of*

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<sup>29</sup> Section 101(42 U.S.C. 5121) states that Congress finds that disasters “disrupt the normal functioning of governments and communities” and expresses that congressional intent in enacting the Stafford Act is to provide assistance to state and local governments in alleviating suffering and damage caused by natural disasters.

subsection (c) of this section solely on the basis that the individual or household has not applied for or received any loan or other financial assistance from the Small Business Administration or any other Federal agency.

(b) Housing Assistance—

(1) Eligibility—The President may provide financial or other assistance under this section to individuals and households to respond to the disaster-related housing needs of individuals and households who are displaced from their predisaster primary residences or whose predisaster primary residences are rendered uninhabitable, or with respect to individuals with disabilities, rendered inaccessible or uninhabitable, as a result of damage caused by a major disaster.

(2) Determination of Appropriate Types of Assistance—

(A) In General—The President shall determine appropriate types of housing assistance to be provided under this section to individuals and households described in subsection (a)(1) based on considerations of cost effectiveness, convenience to the individuals and households, and such other factors as the President may consider appropriate.

(B) Multiple Types of Assistance—One or more types of housing assistance may be made available under this section, based on the suitability and availability of the types of assistance, to meet the needs of individuals and households in the particular disaster situation.

(c) Types of Housing Assistance—

(2) Repairs—

(A) In General—The President may provide financial assistance for—

(i) the repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition; and

(ii) eligible hazard mitigation measures that reduce the likelihood of future damage to such residences, utilities, or infrastructure.

(B) Relationship to other Assistance—A recipient of assistance provided under this paragraph shall not be required to show that the assistance can be met through other means, except insurance proceeds.

Section 408(a)(1) authorizes the President to provide financial assistance and direct services to individuals and households who “*have necessary expenses and serious needs in cases in which the individuals and households are unable to meet such expenses or needs through other means.*” This broad grant of authority by Congress allows FEMA to provide a wide array of disaster assistance to all individuals and households that have experienced disaster related losses and who lack the financial resources to meet necessary expenses.

Condominium and cooperative homeowners victimized by natural disasters most certainly fall within the scope of this authority—particularly those facing significant special assessments to fund repairs to critical common infrastructure. Indeed, FEMA acknowledges that condominium and cooperative homeowners meet the standard established by Section 408(a)(1) and state that such homeowners qualify for IH Program benefits, generally.<sup>30</sup>

Section 408(b) permits the President to provide financial and other assistance for disaster victims to meet their housing needs. Such assistance is directed to individuals and households whose primary predisaster residences have been destroyed or damaged in the natural disaster and as a result are uninhabitable, or in the case of persons with disabilities, inaccessible. FEMA acknowledges that with respect to a condominium or cooperative homeowner’s individual unit, Section 408(b) authorizes housing assistance such as temporary housing.<sup>31</sup>

Importantly, Section 408(b) provides the President expansive flexibility in determining the appropriate types of housing assistance to be made available through the IH Program. FEMA has not exercised the full extent of its authorities under the Stafford Act to facilitate home repair assistance for condominium and cooperative homeowners. The statute plainly provides that assistance should be made available on the basis of cost-effectiveness, convenience for disaster victims, and other factors determined by the President.

FEMA fails to acknowledge that providing home repair assistance under Section 408 is not cost effective if the assistance is rendered in an ineffective manner. Funding repairs to the interior of homes while preventing homeowners from also repairing an exterior wall or a roof is not cost effective, yet this is FEMA’s policy concerning repairs to condominium and cooperative homes.

It is not convenient for disaster victims to affect repairs to their homes only to have their home remain uninhabitable or inaccessible. Congress certainly understood that disaster damage and the circumstances arising from disasters would vary considerably, necessitating a flexible disaster response statute and attendant disaster response programs. Thus Congress provided ample statutory flexibility for the President, acting through FEMA, to implement programs that deliver effective housing assistance.

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<sup>30</sup> See note 13.

<sup>31</sup> See note 8.

*Section 408(c)(2)* additionally authorizes the President to provide financial assistance for the "repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition..." The language of the statute clearly provides that financial assistance for repairs to owner-occupied residences is intended to restore such residences to a safe and sanitary condition. This grant of statutory authority is reflected in FEMA regulations concerning repair assistance, which provide that the agency may "...authorize repair of items where feasible or replacement when necessary to insure the safety or health of the occupant and to make the residence functional."<sup>32</sup>

Despite this clear statutory directive that is reflected in regulation, in practice, FEMA refuses to acknowledge the practical fact that severe damage to or destruction of common elements renders condominium and cooperative homes uninhabitable, inaccessible, and non-functioning. Further, the statute plainly permits repairs to utilities and residential infrastructure, which describe the very nature of condominium and cooperative common elements. FEMA's position that the agency lacks sufficient statutory authority to authorize repair of condominium and cooperative common elements is not supported in statute, is contravened by the agency's own regulations, and lacks merit.

### FEMA Treatment of Condominiums & Cooperatives is Arbitrary and Capricious

A plain reading of the Stafford Act demonstrates Congress has authorized the President to act in a broad manner to effectively respond to and mitigate the impacts of natural disasters. FEMA clearly has sufficient statutory authority to permit condominium and cooperative homeowners to use IH Program benefits to repair their defined interest in common elements.

In FEMA's May 2014 report to Congress, the agency offers up parochial or minimal concerns as obstacles to using the IH Program to affect repairs to condominium and cooperative common elements. The agency expressed concern regarding inspection of damages and verifying insurance claim proceeds. FEMA exists to effectively administer disaster response and recovery programs duly authorized by Congress—central to this role is establishing managerial procedures to implement statute. Rather than placing the agency's parochial or minor operational concerns as obstacles to disaster recovery, FEMA should offer solutions so the agency can fulfill its statutory purpose.

In a somewhat confounding suggestion, FEMA has urged that condominium and cooperative homeowners seek out grants and assistance through disaster recovery Community Development Block Grant (CDBG) allocations. While this suggestion at first seems helpful, a casual review of such CDBG programs reveals this to not be a viable option.

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<sup>32</sup> 44 CFR § 206.117(b)(2)(ii)

Congress does not regularly appropriate disaster-related CDBG allocations. When such allocations are appropriated, funds flow through state governments. There is no guarantee condominium and cooperative homeowners will receive consideration for any such CDBG funding. Further, the length of time between a disaster and the release of disaster-related CDBG grants can be as long as 6 to 18 months.

FEMA's recommendations in its 2014 report to Congress, combined with a reasonable reading of the Stafford Act and implementing regulations, demonstrate the agency actively seeks to limit the access of condominium and cooperative homeowners to federal disaster assistance. The Stafford Act authorizes the use of home repair assistance to restore a disaster victim's primary residence to functional, habitable condition. FEMA regulations permit the use of home repair assistance to ensure that damaged homes are safe and functional.

Notwithstanding clear authority, FEMA relies on legal theories that ignore federal statute, established real property law, and practical considerations to deny condominium and cooperative homeowners access to home repair benefits. The result is an inconsistent, sometimes absurd, series of outcomes that denies a class of disaster victim access to recovery benefits. Such an arbitrary and capricious system of administering federal disaster benefits causes material harm condominium and cooperative homeowners and is an impediment to disaster recovery.

## Conclusion

The Stafford Act provides the President broad authority to respond to natural disasters. Congress intended this grant of authority to be exercised in a manner that assists state and local governments in the restoration and provision of essential services to alleviate human suffering caused by natural disasters. In community associations, FEMA has opted to exercise this authority in a limited, arbitrary and capricious manner.

FEMA has arbitrarily established public interest standards for debris removal from community associations and has crippled the ability of local governments to respond to disasters by refusing to reimburse legitimate disaster response expenses. FEMA has created arbitrary standards that prevent similarly situated homeowners from equally utilizing home repair assistance.

In large measure, these negative impacts occur due to FEMA's institutional failure to observe and understand fundamental shifts in housing development and consumer housing choice. FEMA must adapt to these changes if the agency is to fulfill its statutory mandate and fulfill its mission as the nation's premier disaster assistance agency.

Following appendices provide examples of community associations that have sought federal disaster assistance only to be turned away on the basis of a technicality or on a basis that is in



direct contravention of the Stafford Act. Community association residents, who number more than 65 million nationwide, deserve better from FEMA. As taxpayers and citizens, community association homeowners deserve respect and assistance—*proactive help from the federal government in disaster recovery*—rather than disqualification for disaster assistance on the basis of non-material technicalities, an agency’s internal staffing and operational structure, or legal theories that lack a basis in law.

**If FEMA fails to adequately respond to the needs of community association residents, Congress should enact H.R. 3238 the Disaster Assistance Equity Act.** This legislation amends the Stafford Act to designate community associations as eligible private non-profit entities, providing these communities access to the PA Program. H.R. 3238 further amends the Stafford Act to permit condominium and cooperative homeowners to use IH Program benefits to repair critical common infrastructure necessary to restore individual units to safe, sanitary, and habitable condition.

CAI members urge that Congress and the Administration require FEMA to follow both the letter and the spirit of the Stafford Act to ensure that all households in our nation’s cities and towns have equal opportunity to recover from a natural disaster. Natural disasters do not discriminate between community association neighborhoods and non-association neighborhoods or between association households and non-association households. Neither should our nation’s natural disaster response and recovery policy.

## Appendix A—Summaries of FEMA Appeals under the Public Assistance Program

FEMA maintains a database of appeals from eligible applicants where FEMA has denied reimbursement for work completed under the Public Assistance Program. CAI has reviewed a significant sample of these appeals and resulting determinations. A sample of appeals and determinations are attached. Selected appeals are summarized below.

### City of Maitland, FL

In 2004, the city of Maitland, FL was impacted by hurricane Charley which resulted in large quantities of storm-related debris being deposited on public and private roads. The city of Maitland had a contract for normal solid waste pick-up within the city, including from gated communities. The contract also obligated the pick-up of storm debris within the city limits, including from within gated communities. FEMA denied reimbursement to the city of Maitland for costs associated with debris removal from gated communities.

The city of Maitland appealed FEMA's denial noting that the gated communities were within the jurisdiction of the city and city ordinances legally compelled removal of debris from gated communities within its city limits. The appeal was denied on the basis that the city ordinances did not constitute a sufficient legal obligation for removal of debris from gated communities and that the city of Maitland did not demonstrate removal of storm debris was necessary to address an immediate threat to life or public health and safety.

The city of Maitland submitted a second appeal reiterating its position that city ordinances created a legal obligation for the city to remove storm debris from gated communities within its jurisdiction and that this obligation preceded hurricane Charley. The city also asserted that threats to life and public health and safety did exist and that the city was compelled to enter the gated communities to remove storm debris to mitigate these threats.

FEMA determined that the city of Maitland did in fact have a legal obligation to remove storm debris from gated communities within its jurisdiction and accepted the city's determination that an immediate threat to life and public health and safety did compel the city to remove storm debris from the gated communities in question.

*FEMA reimbursed the city of Maitland \$62,437 for debris removal services in gated communities.*

### Radisson Community Association, Inc.

In 2003 the state of New York experienced a severe ice storm resulting in a major disaster declaration. Radisson Community Association submitted a request for Public Assistance directly to FEMA, which was denied on the basis of the association not meeting the requirements of an eligible private non-profit entity.

Radisson appealed FEMA's denial of its eligibility status noting the association had a contractual obligation to the town of Lysander to clear debris from public roads within the association. FEMA denied Radisson's appeal on the basis that the association was not an eligible private non-profit entity and that facilities maintained by the association, such as roads, were therefore not eligible for Public Assistance.

Radisson submitted a second appeal reiterating its contractual obligation to the town of Lysander to clear debris from public roads within the association. Radisson further asserted debris removal from public roads within the association would have been eligible for reimbursement had the town conducted the work and therefore the association should be compensated for incurring expenses on the town's behalf.

*FEMA denied Radisson's second appeal on the basis that the agreement between the association and the town was not formalized at the time of the disaster and that the town of Lysander, the eligible applicant, did not seek reimbursement for the work performed.*

### Ellicott Meadows Community Association

In 2010 a severe snow storm affected the mid-Atlantic region, impacting Ellicott Meadows Community Association in the state of Maryland. Ellicott Meadows applied for reimbursement of snow removal costs under the Public Assistance Program. FEMA determined that Ellicott Meadows was not an eligible private non-profit entity applicant due to its failure to submit required documentation demonstrating its tax exempt status under federal or Maryland law.

Ellicott Meadows appealed FEMA's denial of eligibility status on the basis that the association's roads provided an emergency service as the roads are the only means of access to the community, which exclusively serves senior citizens. Ellicott Meadows reiterated its claim to be a State-recognized non-profit entity but did not offer verifiable evidence of its tax exempt status under either federal or Maryland law. Finally, Ellicott Meadows stated it met private non-profit eligibility standards as the association operates and maintains a waste water treatment facility. FEMA denied the appeal on the basis that Ellicott Meadows did not prove its tax exempt status under federal or Maryland law.

Ellicott Meadows submitted a second appeal, furnishing documentation of its non-profit status under Maryland law and its tax exempt status under federal law (obtained in 2011, but back dated by the IRS to 2005). Ellicott Meadows reiterated its claims that its operation and

maintenance of a waste water treatment facility meant the association met the eligible private non-profit test and that its roads should be considered emergency facilities.

FEMA denied Ellicott Meadows's second appeal on the basis that the association could not demonstrate it was legally responsible for the waste water treatment facility, the association was seeking reimbursement for snow removal rather than repairs to the waste water facility, and that the association did not meet requirements to be designated as an eligible private non-profit facility.

### Bridgewater at Plantation Community Association

In 2005 the city of Plantation, FL suffered damage from a declared major natural disaster. Bridgewater at Plantation Community Association (BCPA) requested reimbursement for debris removal costs under the Public Assistance program. The State of Florida determined the association did not meet FEMA private non-profit entity applicant criteria and therefore debris removal costs incurred by BCPA for its roads and facilities were ineligible for FEMA reimbursement.

BCPA appealed this determination stating that its roads were impassable due to storm debris and that the amount of debris constituted a public health concern. BCPA further asserted it incurred expenses for debris removal due to the fact that the city of Bridgewater refused to provide debris removal services for the community. The appeal was forwarded to FEMA for consideration. FEMA denied BCPA's appeal, ruling the association was not an eligible private non-profit entity and therefore the association was not eligible for reimbursement for debris removal costs. FEMA also denied BCPA's appeal on the basis that that legal responsibility for removing debris from private property lies with the property owner.

BCPA submitted a second appeal noting there are instances where costs to remove storm debris may be reimbursed by FEMA and due to the fact the association could find no other sources of assistance, its actions to remove storm debris were in the public interest. BCPA further noted that the association's roads were subject to the city of Bridgewater's jurisdiction for the purposes of garbage collection, code enforcement, and zoning restrictions.

FEMA denied BCPA's appeal on the basis that the association failed to demonstrate it met eligibility requirements to apply for Public Assistance as a qualified private non-profit entity. Accordingly the association was ineligible to apply for reimbursement for debris removal from its facilities, which include the association's roads.

### Whetstone Homes Corporation

In early 2010, the Washington, D.C., area was inundated with multiple snow events resulting in more than 4 feet of snow and prompting a federal disaster declaration. Whetstone Homes requested reimbursement of up to \$52,000 in emergency snow removal services from FEMA.

Despite public access to Whetstone Homes' roads, FEMA determined the community's roads were not public and refused reimbursement for the emergency snow removal services.

In June 2012, the Washington, D.C., area experienced a straight-line wind storm with wind speeds up to 80 miles-per-hour. The straight-line windstorm caused significant damage and resulted in a federal disaster declaration. Whetstone Homes' experienced the loss of numerous tall trees that were felled by the high winds and other community resources such as streetlights. The storm-related debris obstructed community roadways and trails, representing a clear threat to life and property.

*Whetstone Homes requested \$70,000 in disaster assistance through the PA Program but was ruled ineligible for reimbursement.*

### Community of Fairfield Harbor

In 2011, Hurricane Irene resulted in nearly \$400,000 in damages to the community of Fairfield Harbor in North Carolina, generating substantial amounts of storm-related debris. Fairfield Harbor arranged with local government officials for removal of disaster debris to a designated county debris disposal area. After three days of depositing disaster debris in the designated area, county officials notified Fairfield Harbor that the community could no longer dispose of its disaster debris at county sites as this constituted a violation of FEMA regulations.

Fairfield Harbor representatives invited FEMA and county officials to view the damage in the community as well as the substantial amount of disaster debris. Upon viewing the amount of disaster debris in Fairfield Harbor, FEMA and county officials permitted the community to continue removing debris to a designated site and waived "tipping fees" for the community.

## Appendix B—Sample of Condominium and Cooperative Communities Denied IH Program Assistance post-Hurricane Sandy

- The Landings at Berkeley Shores Condominium Association, a 90 unit townhome community located in Bayville, NJ.
- Oceanfront Condominium Association, a 16 unit condominium unit community located in Belmar, NJ.
- Executive House of Belmar Condominium Association, a 36 unit condominium community located in Belmar, NJ.
- Residences at Avon-by-the-Sea Condominium Association, a 26 unit condominium community located in Avon, NJ.
- Beachfront Condominium Association, a 6 unit condominium community located in Ocean Grove, NJ.
- Ocean Park Avenue Condominium Association, a 55 unit condominium community located in Bradley Beach, NJ.
- One Ocean Avenue Condominium Association, a 14 unit condominium community located in Ocean Grove, NJ.
- Port Liberte Condominium III, located in Jersey City, NJ.
- Holly Lake Residents Association, located in Little Egg Harbor Township, NJ.
- Port Imperial Property Owners Association, located in Mt. Arlington, NJ.
- Seaview at Shark River Island, located in Neptune, NJ.
- Lighthouse Bay Condominium Association, located in Highland Park, NJ.
- Renaissance at Raritan Valley, located in Somerset, NJ.
- The Smoke Rise Club, located in Kinnelon, NJ.
- Leisure Village East, located in Lakewood, NJ.

## Appendix C—Community Association Assessments Classified as “Benefit”

Availability of grants for costs not covered by insurance at condominium associations

Page 1 of 2

### Bob Milone

**From:** Ask FEMA [AskFEMA@mailps.custhelp.com]  
**Sent:** Tuesday, December 11, 2012 1:47 PM  
**To:** rmilone@dpm-nj.com  
**Subject:** Availability of grants for costs not covered by insurance at condominium associations [Question: 121211-000086]

Based on the information you provided, the answer below has been prepared for you.

If this information does not completely address your inquiry, please respond to this e-mail or follow the direction provided in the response.

Thank you for contacting FEMA.

### Nature of Inquiry

Availability of grants for costs not covered by insurance at condominium associations

### Discussion Thread

Response Via Email (Brandi50822)

12/11/2012 01:46 PM

Dear Robert,

Thank you for contacting the Individual Assistance Branch of the Federal Emergency Management Agency (FEMA) and giving us an opportunity to assist you.

Individuals may apply for assistance with the interior of their own home if they have damages as a result of the disaster. Individuals may also qualify for damages to their personal property.

However, the Condo or Townhouse Association collects dues for the maintenance of common areas and are responsible for the repairs of these areas. FEMA cannot duplicate what benefits the Condo or Townhouse Association covers. The Condo or Townhouse Association may apply for an SBA loan to assist with the recovery process.

You may contact the SBA at 1-800-659-2955 from 8am - 6pm, Monday - Friday or email them at [disastercustomerservice@sba.gov](mailto:disastercustomerservice@sba.gov).

Our "Help After a Disaster Applicant's Guide to Individuals and Households" pamphlet may provide valuable information. <http://www.fema.gov/help-after-disaster>

If you have any further questions or need additional clarification about anything in this e-mail, please contact the FEMA Helpline at 1-800-621-FEMA (3362). The helpline is open 24 hours a day, 7 days a week.

If you have a speech disability or hearing loss and use a TTY, call 1-800-462-7585 directly; if you use 711 or Video Relay Service (VRS), call 1-800-621-3362.

1/17/2013

## Appendix D—H.R. 3238, The Disaster Assistance Act Equity Act

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Disaster Assistance Equity Act of 2017”.

### SEC. 2. DEFINITIONS.

(a) DEFINITION OF PRIVATE NONPROFIT FACILITY.—Section 102(11)(B) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(11)(B)) is amended by adding at the end the following: “The term also includes any facilities (including roads, walkways, bridges, culverts, canals, sewer and wastewater systems, hazard mitigation systems, power, and other critical community infrastructure) owned or operated by a common interest community that provide essential services of a governmental nature.”.

(b) ADDITIONAL DEFINITIONS.—Section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122) is amended by adding at the end the following:

“(13) COMMON INTEREST COMMUNITY.—The term ‘common interest community’ means—

“(A) any nonprofit mandatory membership organization comprised of owners of real estate (other than a condominium or housing cooperative) described in a declaration or created pursuant to a covenant or other applicable law with respect to which a person, by virtue of the person’s ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements, other units, or any other real estate other than that unit described in the declaration; and

“(B) a condominium project—

“(i) comprised entirely of detached single family units; or

“(ii) comprised of 4 or more multi-unit housing structures, that owns or operates facilities (including roads, walkways, bridges, culverts, canals, sewer and waste-water systems, hazard mitigation systems, power, or other critical community infrastructure) that provide essential services of a governmental nature.



“(14) CONDOMINIUM.—The term ‘condominium’ means a multi-unit housing project in which each dwelling unit is separately owned, and the remaining portions of the real estate are designated for common ownership solely by the owners of those units, each owner having an undivided interest in the common elements, and which is represented by a condominium association consisting exclusively of all the unit owners in the project, which is, or will be responsible for the operation, administration, and management of the project.

“(15) HOUSING COOPERATIVE.—The term ‘housing cooperative’ means a multi-unit housing project in which each dwelling unit is subject to separate use and possession by one or more cooperative members whose interest in such unit, and in any undivided assets of the cooperative association that are appurtenant to such unit, is evidenced by a membership or share interest in a cooperative association and a lease or other document of title or possession granted by such cooperative as the owner of all cooperative property.”.

### SEC. 3. CONDOMINIUMS AND HOUSING COOPERATIVES DAMAGED BY A MAJOR DISASTER.

(a) INDIVIDUALS AND HOUSEHOLDS PROGRAM.—Section 408(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5174(b)(1)) is amended—

(1) by striking “The President” and inserting the following:  
“(A) IN GENERAL.—The President”; and

(2) by adding at the end the following:

“(B) CONDOMINIUMS AND HOUSING COOPERATIVES.—For purposes of providing financial assistance under subsections (c)(2) and (c)(3) with respect to residential elements that are the legal responsibility of an association for a condominium or housing cooperative, the terms ‘individual’ and ‘household’ include the association for the condominium or housing cooperative.”.

(b) MAXIMUM AMOUNT OF ASSISTANCE.—Section 408(h) of such Act (42 U.S.C. 5174(h)) is amended by adding at the end the following:

“(3) SPECIAL RULE FOR CONDOMINIUMS AND HOUSING COOPERATIVES.—

“(A) IN GENERAL.—In lieu of the limit established under paragraph (1), the maximum amount of assistance that an association for a condominium or housing cooperative may receive under this section with

respect to a single disaster shall be an amount to be determined by the President by regulation.

“(B) ADJUSTMENT OF LIMIT.—The amount determined by the President under subparagraph (A) shall be adjusted annually in accordance with paragraph (2).”.

#### SEC. 4. APPLICABILITY.

The amendments made by this Act shall apply to a major disaster or emergency declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) after the date of enactment of this Act.