

ALTERNATIVE DISPUTE RESOLUTION FOR THE COMMUNITY ASSOCIATION

by
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In my fifteen years as a lawyer, one thing has become resoundingly clear to me: litigation; i.e., a court trial or hearing, should be the choice of last resort in dispute resolution, particularly in the community association context. This is because litigation is expensive and, even more importantly, because litigation causes animosity within the community. If a Board of Directors is seeking to enforce the Association's governing documents, it is best to consider non-judicial alternatives first.

Non-Judicial Enforcement of Rules and Restrictions. Arizona's Planned Communities Act and the Condominium Act (the "Acts") allow the imposition of reasonable penalties after notice to the non-compliant Owner and an opportunity to be heard. Unless there is a specific procedure set forth in the Declaration of Conditions, Covenants and Conditions, the Board of Directors or a Hearing Committee may meet with the Owner in a closed session to hear testimony and look at evidence that supports the Owner's position that a fine or penalty should not be imposed. The advantage of using a Hearing Committee is that a two-tier process would then be possible. If the Owner does not agree with the decision of the Hearing Committee, the decision could be appealed to the Board of Directors. In the proposed state legislation of last term, a procedure was included whereby the Board of Directors would conduct the initial hearing, with the right of appeal to an Appeals Committee comprised of Association members, who are not Board members. In any event, if there is not a well-defined procedure in the Declaration, the Board should adopt an Enforcement Policy that sets out the notice and hearing procedure and addresses the amount of fine that might be levied. The Policy should be given to each Lot or Unit Owner.

The Acts also state that any penalties that are levied against an Owner are collectible like an assessment. This means that late fees may be charged if the penalty is not paid by its due date, and a notice of lien could be recorded against the property to secure payment of the penalty.

If a tenant is non-compliant, the Owner still is the party that must be given notice and must appear at the hearing. The tenant might be a witness for the Owner, but the Association's legal relationship is with its members, meaning the owners of units or lots.

If the Owner does not appear at the hearing, the Minutes should reflect how notice was given, the nature of the infraction, and the penalty that is being levied. Written notice of the penalty must be sent to the Owner.

Of course, in instances of flagrant and ongoing disregard for the Association's rules and restrictions or when the safety or health of other residents is at risk, an injunction (court

order) should be sought immediately.

Mediation. Mediation is the facilitated compromise of a dispute. The mediator's role is to maintain objectivity and assure that all sides of the dispute are heard and understood by the other. Once the "cards are all on the table," a mediator can often bring enhance communication among the disputants by pointing out the issues that are common to all sides and by clarifying the unmet needs of the parties. It may then be possible to negotiate a resolution, or at least some movement out of a stalemate.

For example, I have acted as a mediator for several different Boards of Directors that were embroiled in so much animosity that they could not proceed with the business of the Association. In each case, when the directors took turns summarizing their individual points of view and opinions on the issue in dispute, it became clear early on that there was a lot of commonality in the outcome that was desired. In most cases, the majority of Board members were put off by one director, who believed that he or she had to be strident and demanding to get his or her point across. The meetings became so unpleasant that the directors were threatening to resign. Once we spent some time allowing uninterrupted reporting by each of the members, we were then able to create ground rules for future meetings that each director agreed to abide by. Although continued commitment is required to assure civil and productive communication, the mediation session allowed a bad pattern to be broken.

Mediation also is useful in disputes between neighbors over annoying floodlights, barking dogs, noisy stereos. Usually if people are willing to come to the mediation table, some amount of resolution or, at least, more understanding, will be the outcome. Although the Association may not be legally responsible to resolve disputes between two neighbors, it would be helpful for the Board or the property manager to suggest mediation with a trained mediator when such disputes are brought to their attention. Our Town is a local non-profit agency that mediates neighborhood disputes as well as personal disputes. Alternatively, a private mediator may be used.

Mediation also is useful in resolving boundary or property disputes between two adjacent Associations, in resolving ongoing covenants violations by an Association member, and in resolving differences between two factions within an Association.

Whenever a Board of Directors is faced with an enforcement issue or communication breakdowns, alternative dispute resolution should be the first approach that is considered.

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