

BY JEANNE M. KEMPTHORNE

CONFLICT Resolution

WHEN MANAGING DISPUTES BETWEEN OWNERS AND TRUSTEES, DON'T ARBITRATE, MEDIATE

Life in a condominium can be challenging when neighbors do not see eye to eye—and they very often don't. And when owners and trustees can't resolve their disagreements, the condominium community suffers. An efficient and effective means of managing disputes is key to avoiding the "condo hell" that causes owners to sue or sell.

Mediation is an approach that is well-suited to disputes among people who have an ongoing relationship and need to work together to make decisions and solve problems. Facilitated discussion assists people with competing positions to hear each other out,

prioritize issues, compromise and invent solutions, and ultimately to sign on to a deal they themselves make. Mediation offers more than a fix to an immediate problem. It can establish a mechanism for raising problems, communicating news, and triaging projects. The process itself can reestablish long-broken lines of communication, breaking through stony silences and entrenched patterns of withdrawal or instant escalation.

MEDIATION VS. ARBITRATION

Condominium associations are natural candidates for mediation. Parties who live together and who co-own property have strong incentives to make the condominium function well and to maintain at least cordial relationships with each other. This is particularly true of small-unit condominiums where the owners serve as both trustees and property managers. The costs of failing to reach agreement are very high, both in

financial and psychological terms.

And yet condominium documents in Massachusetts typically require that disputes between trustees and unit owners be submitted to binding arbitration. Why? There are at least three reasons. First, Massachusetts law specifies only arbitration as a permissible alternative to litigation. Mass. Gen. Laws ch. 183A, § 12(b) provides that the by-laws "may ... provide ... a procedure for submitting the disputes arising from the administration of the condominium to arbitration." No other means of alternative dispute resolution is mentioned. Second, some lawyers who draft condominium documents see arbitration as an effective means to resolve stalemates and automatically include them without careful consideration of alternatives. Third, Fannie Mae's guidelines require that the bylaws of condominiums with four or fewer units have mandatory arbitration clauses.

Arbitration is but one of several means of dispute resolution, and in cases involving condominiums, it is usually not the best choice—at least at the outset. It is often costly, cumbersome, and slow, and



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because it is extra-judicial, the outcome may not be accepted as authoritative. The process may well result in an award that is not workable or forward-looking. Almost certainly, it will do little or nothing to revive or repair the relationship or reestablish lines of communication between the disputants. Indeed, the reverse is true: arbitration is likely to escalate the conflict beyond repair.

And that is if the parties are even willing to submit to arbitration. Most do not. In many condominiums, the more viable option is simply to sell and move away from mismanagement or personality conflicts, leaving them to the hapless new buyer who may or may not be able to put the association back on track. The strategy of walking away from a dysfunctional condominium leads to frequent turnover, higher vacancy rates, lower market prices, and, ultimately, neighborhood instability. The property itself may well fall into disrepair through indecision and neglect. These problems may degrade not only the owners' property interests, but the public interest in a well-maintained housing stock.

Small-unit condominiums without professional property management are particularly hampered by the mandatory arbitration clause included in many condominium declarations of trust. In many cases, the owner-trustees settle into a pattern of non-cooperation, unproductive communication, or silence, not holding meetings, not discussing even necessary maintenance and repairs. Arbitration is not likely to change that dynamic.

Finally, there is something inherently unfair about forcing a buyer of a condominium unit to accept a mandatory and binding dispute resolution procedure that eliminates court review of the substantive fairness of the resolution. Public policy should militate caution in conditioning the purchase of a condominium unit on acceptance of a dispute resolution procedure that dispenses entirely with the right to seek the judgment of the courts.

A LEGISLATIVE FIX

A Massachusetts bill was filed this legislative session (H.1137) that would repeal the arbitration provision in § 12(b), and instead require bylaws to provide a "procedure for resolving disputes arising from the administration of the condominium." According to the bill's sponsor, Rep. John W. Scibak of South Hadley, Mass., the bill would provide for "alternative methods of dispute resolution (e.g., mediation) as opposed to [the] current statute which specifies arbitration as the procedure of choice." This bill was recently sent to study, and thus is effectively dead for this session. Perhaps it will be refiled in the future, and if so, the CAI Massachusetts Legislative Action Committee (MALAC) will continue to monitor its progress.

If the bill is refiled next year and passes, condominium and homeowner associations in the Common-

wealth will be faced with the question of what dispute resolution procedures to adopt. Ideally, bylaws should provide for a range of options, from an internal or external ombudsman to mediation. Owners and trustees should retain the option, if they are unable to resolve all issues through mediation, to consider whether resort to the courts or binding arbitration best meets their needs. Arbitration affords greater privacy and it can be quicker than litigation, but it is not necessarily cheaper and may be less accepted by the losing party as just.

Whatever menu of options is provided in the bylaws, mediation should be included. It offers the condominium association and unit owners the greatest potential for solving their own problems quickly, cheaply, and flexibly and without creating winners and losers.



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