Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

*We'll explain four ADR techniques to help your association settle conflicts without going to court.*

IN THIS ISSUE



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# How to Avoid Court by Using 'Alternative Dispute Resolution'

Inevitably, in any homeowners association or condominium, there will be community-related conflicts. The bad news for associations when a dispute arises is that going to court can be extremely expensive, and the association might end up paying for litigation costs in the end. The good news when a homeowners association is asked to resolve conflicts is that there are ways to avoid costly legal battles: Alternative dispute resolution (ADR) can address issues that don't truly require a trip to court.

But ADR isn't as simple as it may sound. There are multiple ADR techniques, and whether you choose the right one for your circumstances will affect the outcome, whether positive or negative. So it's important for an association to consider the appropriate ADR techniques—which include, but aren't limited to, conciliation, mediation, and non-binding or binding arbitration—for each situation. Here's what you need to know about ADR and how to make it work for the association you manage.

## Technique #1: Use Conciliation for Assessment Collection Disputes

Associations shouldn't automatically jump to the two widely known ADR methods of mediation and arbitration when facing a dispute with an owner over whether he owes association assessments or other fees. There are ADR techniques beyond mediation and arbitration that can be used in community associations. Conciliation, which is one of the least formal methods of ADR, really just involves a more formalized consultation—a meeting—in an attempt to resolve a dispute.

To use arbitration or mediation to collect assessments would be overly and unduly burdensome and would affect one of the most important things for an association—assessments. So make sure that your association offers ADR in the form of conciliation for assessment disputes, such as those over whether an assessment is owed or the

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payment was late. (Note, though, that conciliation isn't useful in cases where the amount is undisputed but an owner asserts that the assessment is illegal.)

During the conciliation process, a homeowner makes an appointment with a member of the management company's bookkeeping staff and brings with him all of the documentation showing proper payment. The bookkeeping staff member has the association records at hand and is able to compare, on the spot, cancelled checks with the association's bookkeeping entries.

Conciliation is a productive, but much overlooked, ADR technique in the community association world. It works well because it creates a "meeting of the minds"—the owner and the association's manager must have all of their data readily available during this conference; if all of the necessary data is together it should be clear exactly what's owed, if anything, whether late charges were properly assessed, or whether the payment was on time. These issues can all be worked out efficiently using conciliation, rather than the unproductive scenario where a homeowner calls the management company to argue about an alleged discrepancy.

While as the day-to-day manager of the community, you will play a role in some aspects of ADR situations, you should familiarize yourself with what will be expected of you in specific circumstances. For example, should you attend the meeting for conciliation? Not necessarily. Whether you need to attend the meeting will largely depend on how much access to or control over the association's financial records and other relevant information you have. The person representing the association in conciliation is generally a member of the management

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company's accounting or bookkeeping staff, not the site manager, and needs to be familiar with the accounting aspect of things. If a site manager who doesn't have familiarity with the association's account records has to check with other parties about necessary information during the meeting, it undermines the whole purpose—to quickly and efficiently settle the matter at once.

The ideal system is one where the management company designates a knowledgeable person who has full access to the records, knows them, can do the necessary research on the spot if possible, and can actually come to some resolution with the owner. If you have a person with control over the financial records, that person can resolve that kind of thing or at least agree where the difference is, in which case it's not settled but at least the issue has been narrowed.

**PRACTICAL POINTER:** A conciliation meeting can also be conducted by phone, but if the management company is local, it should be done at the management company's office where both parties have access to a computer in case it becomes necessary to access information that way. Statewide management companies can't send managing agents all over the state for conciliations, so it's reasonable to give the option of doing this by phone or going to the management company.

### Technique #2: Use Internal Process for Neighbor Conflicts, Rules Violations

In many states, neighbor-to-neighbor disputes, such as conflicts over things like noise and parking, fall under "housing-related disputes," which can be resolved less formally. (Ask your association's attorney for state-specific information that would affect which ADR techniques you're able to use.)

Typically, association rules and covenant enforcement issues also fall in this category. When the association becomes aware of an alleged violation, it puts the owner on notice, and she may dispute whether it's really a violation. An internal process can resolve arguments over whether an owner's actions have truly conflicted with the association's rules. It could be used, for example, when an owner, by law, can't be stopped by an association from making an environmentally beneficial modification to his unit, but the association argues that the aesthetics of the equipment or the manner in which it was installed doesn't comply with its regulations governing the installation or use of that equipment.

There should be an internal process that allows an owner to contest an alleged violation and state the reasons why he thinks his actions conformed to the association's regulations, and also allows the association's representative (in the example above, the architectural control committee) to say why it thinks the owner has been noncompliant with regulations.

Usually, this process involves a separate covenants committee comprised of other unit owners—but not board members—who have volunteered making a determination one way or another. Alleged rules or covenant violations are areas where this type of ADR is widely used.

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### Techniques #3 & #4: Use Mediation, Arbitration for Developer Claims

Mediation and arbitration can be used for many kinds of association disputes, including those with contractors, builders, and developers. ADR should be available for everything from contractor disputes to developer construction defect lawsuits. In a somewhat controversial move, some builders are actually including mandatory ADR in their governing documents and sales contracts. A process for dealing with transition-related disputes—that is, alleged construction defects or alleged monetary claims—between associations and builders that arise from the development process is often put right in the master deeds or declarations.

Cases where the association has had to arbitrate its transition claims because of provisions in the unit sales contracts have become more prevalent. That's because under certain circumstances, these provisions may be held to affect not only the owner who's purchasing the unit, but also the association of the community where it's located. When a developer signs a sales contract with a purchaser, it can put in the sales contract that any dispute arising from the contract involving construction or other claims must be arbitrated. And courts have sometimes held that if all or most of the owners' sales contracts contain such an arbitration provision, where the association is merely acting as the representative of the owners, even claims brought by the association, not an owner, have to be arbitrated.

Many declarations now contain not only a requirement for ADR, but also a specific process the association has to go through. (This is state-specific, however, so consult with the association's attorney about these issues before taking any action.)

For example, some states have "right to cure" legislation. Under this legislation, the documents contain a process for dispute resolution that's outside the court system and is mandatory before an association can go to a court system there. Once the developer relinquishes control and the project is completed, the association is required to hire a professional engineer, architect, or licensed inspector to do an inspection of the property and make any and all claims that result from that inspection during a specific time period (usually much shorter than the statute of limitations). The builder must respond during a certain time period and based on that response, there must be some kind of ADR process that attempts to resolve any conflicts or outstanding disputes. But legislation isn't necessary; builders can build that process into a declaration, and owners, by accepting title to that unit, may be deemed to have agreed to that process.

### Be Aware You Can Include ADR in Service Contracts

Associations, which are in essence like businesses, can't afford to be in court frequently. In service contract disputes, arbitration and mediation are two ADR techniques that can be used to settle matters to the association's and the service provider's satisfaction without costly litigation. Arbitration and mediation

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provisions encourage the parties. Although mediation is voluntary in the sense that the parties don't have to accept the outcome, it's a good option to offer.

There is rarely a disadvantage to mediation—if you can sit down across the table with a facilitator and try to work something out, it's a no-lose situation because all you've invested is a relatively small amount of money: your lawyer's fees and half the mediator's cost. This is certainly worth it if you can resolve a case, and the mediation alternative is a great way of attempting to do this.

If your association chooses to use mediation to try to settle certain types of disputes, ask your attorney about how to adapt our *Model Contract Clause: Try Mediation Before Jumping to Arbitration for Disputes,* to use in your contracts to require that the matter be mediated before using arbitration or litigation to settle it.

While mediation is very low risk, keep in mind that "binding" arbitration has some disadvantages as compared to litigation. For example, the right to appeal is limited. There has to virtually be fraud or a gross misapplication of the law by the arbitrator to be eligible for an appeal. But it can stop a party with deeper pockets from using the strategy of dragging out a case to exhaust the other side's resources.

While successful appeals from binding arbitration are exceedingly rare because the grounds for which a court can overturn an arbitration award are extremely limited, that's also a good thing—there is finality. You get to an arbitrator, you get a resolution, and it gets done. And without an appeal, you can file the arbitration award as a judgment in court, and it's enforceable as if it had been tried through the judicial system, which is an added bonus.

If the parties are leery about committing to binding arbitration, another option is non-binding arbitration. There, the arbitrator hears the evidence and renders a decision, but either party is free to reject it and move on to another form of ADR or to court. The advantage of non-binding arbitration, though, is that it informs the parties of how at least one neutral person views their case and so may convince them to accept the arbitrator's non-binding decision or otherwise settle the matter.

It's important to understand that if the association makes ADR an option—or mandatory—for all contractors, it will probably apply to association disputes with you or your management company, because a management company is a contractor. So check your contract with the association to see if ADR is mentioned.

You should also weigh the pros and cons of arbitration. Arbitration has many advantages, but it's not always faster or less expensive than other resolution options. A significant case can drag on for years and wind up being more expensive than litigation, especially with a three-arbitrator panel, because arbitrators typically charge high hourly rates. And if you use a dispute resolution organization to oversee and conduct your arbitration,

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you'll probably pay filing and administrative fees. It's a costly process and sometimes takes longer.

Coordinating the schedules of lawyers and arbitrators can also be tricky. And while pretrial discovery isn't as extensive as in the court system, it's still allowed at the discretion of the arbitrator or arbitrators. (Note that in a complicated case it's usually allowed.)

So associations need to be careful if they are going to write arbitration provisions into their agreements. First, consider whether, in light of the advantages and disadvantages, arbitration is an appropriate alternative for your organization's needs. Then write the actual provisions carefully and make sure that if they're needed, the performance is actually what you anticipate it'll be. You can do that by controlling how the arbitrators are selected and who can serve as an arbitrator. For example, in smaller contracts write a provision that provides for mediation and, if the parties can't settle the matter that way, then arbitration.

For smaller types of disputes, a single arbitrator mutually agreed upon by the parties may be acceptable. However, in larger disputes it's common to use a three-arbitrator panel. When a three-arbitrator panel is desired, make sure that the arbitrators are selected in the following way: Each party to the dispute selects a qualified arbitrator, and these two arbitrators pick a third arbitrator to serve with them. If a third arbitrator can't be agreed upon, an assignment judge of the county where the association exists will assign an arbitrator.

The process is designed to make it simple, efficient, and cost effective. Associations should consider where the process worked or didn't work in the past. For instance, if your association has dealt with cases moving slowly, setting timelines within which certain aspects of the process must be completed, such as scheduling the arbitration hearing within so many days and requiring a decision to be issued within so many days thereafter, helps keep the process on track.

You should also customize contracts. Associations can be creative when deciding which ADR methods to choose. It's a mistake to take an arbitration provision off the shelf and just use it in every contract. Instead, think about what the nature of the contract is, who the parties to the contract are, what services will be performed, and what kinds of disputes could arise.

For example, put short time frames into smaller contracts, such as landscaping contracts. If there's a dispute with a landscaping contract, the hearing gets scheduled within 30 days and the decision is issued within 15 days thereafter. On the other hand, those time frames won't work for a complicated construction defect case. Really think about what the contract is that you're inserting the provision into, which will help you customize it. ♦

➤ ➤ ➤ *Model Contract Clause follows* ➤ ➤ ➤

MODEL CONTRACT CLAUSE

# Try Mediation Before Jumping to Arbitration for Dispute

Using the alternative dispute resolution (ADR) techniques of mediation and arbitration can help your association avoid costly litigation and the unpleasantness of going to court when there are association-related conflicts with a construction contractor. Ask your association's attorney about adapting this language to draft a provision for contracts that can be used to require mediation before resorting to arbitration or litigation to solve these types of problems.

## MEDIATION

Claims, disputes, or other matters in controversy arising out of or related to the Contract shall be subject to mediation as a condition precedent to binding dispute resolution.

1. The parties agree to attempt to resolve any dispute, claim, or controversy arising out of or relating to this Agreement by mediation, which shall be conducted by a mediator selected in the manner provided below. In addition, the parties agree that their good faith participation in mediation is a condition precedent to pursuing any other available legal or equitable remedy, including litigation, arbitration, or other dispute resolution procedures.
2. Either party may commence the mediation process by providing to the other party written notice, setting forth the subject matter of the dispute or claim as well as the relief requested. Such notice shall also contain the name of that party's Designee as hereafter defined. Within ten (10) days after the receipt of the foregoing notice, the other party shall deliver a written response to the initiating party's notice, together with the name of the responding party's Designee.
3. The mediator shall be selected in the following manner: Each party shall designate an individual as its "Designee," who shall be an architect, attorney, or engineer licensed to practice in [*insert state name, e.g., New York*] and experienced in the practice of commercial or construction mediation ("the Designees"). The Designees shall confer within seven (7) days after the responding party appoints its Designee and in good faith appoint an individual with experience in commercial or construction mediation, to serve as the mediator pursuant to this agreement. Each party shall pay any fees due to its respective Designee. If the Designees cannot in good faith agree upon a mediator, then the parties agree to ask the Assignment Judge of [*insert county name, e.g., Westchester County*] to appoint a mediator. Notwithstanding the foregoing, the parties may waive this appointment process by agreeing upon a mediator within the ten (10)-day period after the initial notice of mediation.
4. The initial mediation session shall be held within forty (40) days after the initial notice. The parties agree to share equally the costs and expenses of the mediation (which shall not include the expenses incurred by each party for its own legal representation in connection with the mediation).
5. The parties acknowledge and agree that mediation proceedings are settlement negotiations, and that, to the extent allowed by applicable law, all offers, promises, conduct, and statements, whether oral or written, made in the course of the mediation by any of the parties or their agents shall be confidential and inadmissible in any subsequent proceeding. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.
6. The provisions of this section may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees, and expenses, including reasonable attorneys' fees, to be paid by the party against whom enforcement is ordered.

# RECENT COURT RULINGS

## ➤ Homeowner Must Stick to Specific Palm Tree Species Approved by ARB

**FACTS:** The restrictive covenants and bylaws for a homeowners association set out that no homeowner should "decorate, change or otherwise alter the appearance of any portion of the exterior of a dwelling or the landscaping, grounds or other improvements within a lot" unless approved by the association's architectural review board (ARB), to "preserve the architectural and aesthetic appearance of the development."

In order to apply for a change, a homeowner was required to submit two copies of the proposed plans and specifications to the ARB, which then had to approve the plans in writing. But, in the event the ARB determined that the plans and specifications had not been approved, and the homeowner went ahead with them nonetheless, the association was entitled to require the removal of the work. The association was also entitled to remove any changes that didn't comply with approved plans and specifications. This included landscaping.

A homeowner wanted to change the landscaping of his property. He got approval for the changes, including a certain type of palm tree, but planted a different type instead, which deviated from the plan that had been submitted to the ARB.

The association asserted that the type of palm tree the homeowner planted didn't fit the aesthetic of the community. When he refused to remove the unapproved palm tree, the association sued him. He asked a trial court for a judgment in his favor without a trial. The trial court ruled in the association's favor, and the homeowner appealed.

**DECISION:** An Alabama appeals court affirmed.

**REASONING:** The homeowner claimed that the ARB hadn't warned him that the type of palm tree he ultimately planted wasn't permitted. He asserted that because a type of palm tree had been approved, he felt that a different type would be permissible because it also was a palm tree and not another type of tree or plant. He claimed that the ARB should've spelled out the types of palm trees that were and weren't allowed.

The appeals court sided with the ARB and association, stating that, "the law does not place the onus on the enforcer of restrictive covenants to warn violators thereof that they may not be in compliance, particularly in circumstances such as those in the present case, where restrictive covenants require homeowners to gain preapproval of any improvements." The appeals court pointed out that, "had the homeowner obtained such preapproval [for the specific type of palm tree he intended to plant], any resulting damages could have been avoided." It ordered that the homeowner remove the palm tree at issue. ♦

- Esfahani v. Steelwood Prop. Owners' Assn., August 2018

Q&A

## Fighting Challenge to Maintenance Fee Changes

**Q** The association for the community I manage is a nonprofit corporation where all lot owners are members of the corporation. The association recently decided to assess higher maintenance fees for those lots that have better and nearly sole access to some of the community's amenities. The vote was taken at our annual meeting and the board followed all requirements under the governing documents to adjust the fees.

Now, a homeowner is claiming that the lots with the higher fee should see an even greater increase while lots that are charged less should pay nothing at all. He claims that the changes to maintenance fees made at the meeting (which were voted in by a majority of the homeowners) are in violation of the governing documents and that altering maintenance fees changes the structure of the corporation. The board would like to avoid litigation over the matter. Are changes to maintenance fees for a community a violation of governing documents or do they change the nature of the corporation?

**A** This will depend on the language in your governing documents. First, whether the change is valid will depend on the voting requirements, which should be included in the governing documents. For example, if you need a majority vote and you got one there shouldn't be a challenge. Second, the issue of whether a change in maintenance fees would affect the status of the corporation will also depend on what is provided in the governing documents.

### Case on Point

A recent Wisconsin community association court case is similar to your situation. There, the governing documents were the deciding factor in the association prevailing.

In that case, in addition to residential lots, a planned community also had "common" property consisting of two lakes, beaches, parks, golf courses, and playgrounds. In order to maintain the common property, the association was incorporated under state statutes as a nonstock, nonprofit corporation. Each lot owner was a member of the corporation. The affairs of the association were to be managed by a board of directors, which had the right "to assess all members on an equal basis for the maintenance, management, or other improvement of community lands."

Thirty of the 127 lots were "on-lake" lots. Prior to 2015, all lots were assessed in an "equal" amount to pay for maintenance of all common property within the subdivision. For example, in 2013 and 2014 respectively, each member was assessed $230. The $230 included funds for maintenance of the lakes. In 2015,

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disputes arose that "on-lake" lot owners should pay more in assessments than "off-lake" lot owners.

At the annual meeting in 2015, the members were presented with a proposal that lake maintenance would be an assessment apart from the assessment for all other common property and that the assessment for lake maintenance would provide that "on-lake" members would pay a lake assessment three times the amount that "off-lake" members would pay and set the 2015 lake assessment for "on-lake" members at $225 and $75 for "off-lake" owners. Seventy-four members voted in favor and 21 members voted against.

An "off-lake" owner didn't believe the $75 assessment, nor how it was arrived at, was fair and sued the association as well as individuals who served on the board.

The homeowner and the association each asked a trial court for a judgment in their favor without a trial. The trial court ruled in favor of the association and dismissed the homeowner's claims. The homeowner appealed.

## No Change in Purpose of Corporation

A Wisconsin appeals court affirmed the decision of the trial court. The appeals court first addressed the homeowner's argument that the 2015 amendment to the bylaws breached the association's governance documents as the 2015 amendment adopting an assessment for lake maintenance "substantially changed the purpose of the corporation." The association is required both by its own bylaws as well as state statute to have an "annual meeting" in which all members are entitled to vote on properly noticed issues. The appeals court noted that the articles of incorporation for the association indicate that the purpose of the association is "to own, manage, and maintain, as well as improve, for private use, certain lands" in the subdivision and that "such ownership, management, maintenance, and improvement of the community lands shall be for the use and enjoyment of the members of the corporation, their family and guests."

The bylaws, established in 1970, explained that "common property shall hereinafter mean and refer to parks, playgrounds, lakes, swimming pools, golf courses" and that the association was created "to provide for the maintenance and beautification of the two lakes included in the properties." The appeals court stated that, clearly, the governing documents of the association have, since inception, considered the lakes for community use and have established that it is the association's responsibility to maintain the lakes.

## Tradition of Maintenance Is Key Factor

Additionally, the association has always maintained the lakes and a portion of the annual dues have always been used for that purpose. The appeals court determined that the homeowner failed to establish a breach of the governing documents.

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**Q&A**

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The appeals court also noted that the articles of incorporation provide that "the Board of Directors shall have the right to assess all members for the maintenance, management, or other improvement of the community lands owned by the corporation" and that "any assessment or charge, when not paid, shall become a lien on the property owned by the member in default."

## Appeals Court References Democracy in Voting

The appeals court noted that, while the homeowner "can despair in having to pay $75 annually to help maintain the two lakes within the community," he has no legal claim to avoid the assessment. It pointed out that the homeowner "failed to understand or appreciate that what he complains of is solely attributable to the actions of the majority decision of the lot owners within the community [Godec v. Hidden Lakes Cmty. Assn., Ltd.]. ♦