Conflict Resolution

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It should come as no surprise to all of you that life in a community association (or working for one) is fraught with conflict of all types: "You're playing favorites," "You're discriminating against me," "My neighbor is irrational and he's making my life a living hell and it's the association's job to fix it," "I'm not paying the assessments until you do what I want you to do," "Too late for architectural approval, I already finished construction!"

All too familiar. Unfortunately, it's going to fall onto board members and managers to resolve such conflicts. While some of these conflicts will end up in court, it's wise and a proper discharge of the board's business judgment and fiduciary obligation to consider how to resolve conflict within the community at the least social and economic cost. At a time in our country where the most basic civility is in short supply, there are pressures which exacerbate the conflict between associations and members, and between the members themselves. Most board members and managers aren't schooled in how to defuse conflict (and too many attorneys are better at litigating conflicts than facilitating conflict resolution by other means).

Here are some helpful guidelines to remember about the basic nature of a 'dispute':

"It takes two to tango."
For a conflict to really blossom into something ugly, it generally takes two egos, and mouths which operate better than ears. For conflict to be resolved, it's going to take someone with a better ability to listen than to talk. Find a board member or manager who is a good listener and you're halfway to resolving a dispute.

"Much conflict is sustained because no one wants to 'admit weakness'."
While volumes have been written about that, remember that 'when you're at the edge of a cliff, sometimes progress is a step backwards.' It's not weakness to search for some middle ground, and if it takes a good display of humility and an attempt to understand the other side of an argument, that's time (and energy) well spent.

"***Compromise is not a dirty word."***
Consider that a lawsuit is going to cost just about as much as the other side wants to make it cost. With some basic guidelines (the board can't give away common area, for example, nor can it afford to overlook egregious violations of architectural restrictions--but many disputes are

about far less), with some willingness to compromise, and some imagination ("No, you can't plant 60' species which within 5 years will block your uphill neighbor's view, but you can plant _____"), there's a compromise waiting to be found. Think outside that box!

"You can't always get what you want;
You can't always get what you want;
But, if you try sometimes,
You just might find,
You get what you need."
- Mick Jagger and Keith Richards

Because so many community association disputes end up in court, the legislature has over the years created pre-litigation dispute resolution procedures, some of which (ADR) is actually required before most association cases are filed. A quick refresher on "ADR" and "IDR" follows.

IDR

"IDR," or "internal dispute resolution," is a relatively new type of dispute resolution. It is unique to the Davis-Stirling Act. Essentially the Act allows an owner to compel a sit-down meeting with a board member to discuss a dispute. If a written demand is made to the association, the association must meet with the owner, in a reasonable period of time, and at no cost to the owner. (Conversely, if the association would like to convene an IDR session with an owner, the owner is not required to participate.) The parties may agree to use the services of a mediator, but it is not required. It is important to note that the Act does not necessarily require the association (or the member) to ask for IDR before moving on to mediation or arbitration, though that is often the case. The Act anticipates that each association will adopt its own IDR procedure, but if the association does not do so, the Act specifies a default procedure (currently found in Civil Code section 5915).

Some observations:

IDR is not a confidential proceeding (unlike mediation). What is said in an IDR proceeding can be repeated in any subsequent lawsuit.

Consider carefully the best candidate to represent the association in an IDR proceeding. It's not necessarily the president. In general, it's the director who can listen to an angry homeowner without taking umbrage, while at the same time effectively putting forth the association's concerns. (A FAQ is whether the board can attend in its entirety. While not absolutely clear from the statute, it's not generally a good idea. We do like to see more than one person attend, avoiding the "one-on-one swearing contest" scenario. Often times, attorneys are definitely not welcome. An IDR is supposed to be a meeting between the member and a director, leave the mouthpieces--on both sides--out of it.)

Make sure you understand the dispute when a homeowner asks for IDR. The demand is required to be in writing. If the written demand isn't clear, ask follow up questions before the

IDR begins. This is important so that the board can decide how much discretion the director has.

Even though the association isn't statutorily required to offer IDR before moving to the offer of ADR, it's a good idea (unless there's an emergency requiring some immediate court action). First of all, it makes the association look better if the matter later turns into litigation, and second, you just might get lucky, learn something, and avoid the lawsuit altogether. (It's also free discovery.)

ADR

California law and tradition recognize three types of alternative dispute resolution ("ADR"): binding arbitration, nonbinding arbitration, and mediation. "Arbitration" is a quasi-judicial proceeding, wherein a person selected by the parties (usually) acts as a judge of a dispute, hearing evidence and argument, and making a ruling. At the end of the proceeding (unless the parties settle in the meantime), a decision will be made.

If the arbitration was a "binding arbitration," the order may be filed with the court, and thereafter it will operate as a judgment. In general, there is no appeal from a binding arbitration order.

"Non-binding arbitration" is precisely that--non-binding. The arbitrator will make a ruling, but it does not bind either of the parties unless and until they agree to that.

"Mediation" is another form of ADR. It is not a quasi-judicial proceeding, but a facilitated negotiation. The mediator, who is chosen by the parties, has no authority to decide a dispute, only to assist the parties to the dispute in attempting to find some middle ground. If at the end of the mediation, the parties cannot agree, then everyone goes home.

For most disputes in a community association (that is, those involving a request for enforcement of the governing documents, the Davis-Stirling Act or the Corporations Code, as well as prior to recording a lien for unpaid assessments), the party anticipating filing a suit will be required to at least offer ADR to the other potential litigant before filing the suit. (Civ. Code §§ 5925, 5930, 5660)

There are exceptions:

If the suit involves damages in excess of the small claims court jurisdiction, the offer of ADR is not required.

If the suit involves a request for a TRO (temporary restraining order) or preliminary injunction, no pre-filing offer of litigation is required.

The Act provides that the offer of mediation shall be in writing, and the offer is to contain a brief description of the dispute between the parties, a request for ADR, a notice to the party receiving the offer that the respondent must reply within 30 days of receipt or the request will be deemed

rejected, and if the person receiving the offer is a homeowner, the association must include a copy of the relevant Civil Code provisions (§§5925-5965.)

If the homeowner agrees to the mediation, the mediation is to be held within 90 days of the acceptance, unless the parties extend that time by written agreement. (Civ. Code §5940(a).)

If a party seeking to file an enforcement action fails to first offer ADR, the complaint may be stricken by the court or placed on hold (stayed) to allow ADR. And, if the party who wins an action has refused to participate in ADR, the court may reduce the amount of fees awarded to that party. (Civ. Code §5960.) While the Act provides that the parties to the ADR are to be "borne" by the parties (Civ. Code §5940(c)), one recent case awarded a homeowner his legal fees incurred during the mediation. *Grossman v. Park Fort Washington* (2012) 212 Cal.App.4th 1128.

<u>Why we need conflict resolution that does not involve lawsuits</u>:

In a word, lawsuits are often times inefficient and a costly way of resolving disputes, as even attorneys agree:

> *"Lawsuits consume time, and money, and rest, and friends." - Sir Alan Patrick Herbert*
>
> *"The courts of this country should not be the places where resolution of disputes begins. They should be the places where disputes end after alternative methods of resolving disputes have been considered and tried." - Sandra Day O'Connor*

And in the context of communities, lawsuits are not the vehicle of choice for dispute resolution for another very good reason: even if you win, you lose because of the residual mistrust and animosity spawned by the court proceedings.

Finally, there are the lingering problems posed by the money. Of course most lawsuits over the CC&Rs will result in an award of attorney's fees to the prevailing party, but what happens when the loser cannot or will not pay those fees? Will the association pour more money down the drain, or consider settling instead for less than it "should" have received? It's difficult to explain to the owners that the association won at the same time the board is imposing an assessment to cover the costs of the lawsuit which remain unpaid by the losing owner (not to mention the catastrophic prospect of a fee award which pales in comparison with the actual costs expended or -- God forbid -- the loss of a case which seemed a "sure thing" way back when the case started.