

When Facing Homeowner Disputes, There's No Substitute for Early Resolution

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More than five years ago, a homeowner in a local association removed some trees without permission in an association easement at the rear of his property. The homeowner claimed the trees were damaging his rear yard wall, creating a danger of collapse. The association countered that the trees were not the cause of any wall problems and pursued legal action to get its trees back or at least monetary compensation for them.

Litigation ensued for four years. And, although the association likely would have won the case had it gone to trial, it was forced to settle on less than optimum terms due to financial pressures after spending more than 100,000 in legal fees, expert fees and litigation costs.

The biggest problem with the legal handling of that case was that not enough attention and effort was spent at the beginning to resolve it. Community managers, members of Boards of Directors and association lawyers need to be acutely aware of the importance of attempting to resolve homeowner disputes early on. The longer these disputes persist, the more difficult they become to resolve. The legal costs inevitably rise, making settlement less likely because parties want to get their money back from the other side through attorneys fees and cost entitlements set forth in the CC&Rs. And once a lot of money has been spent, it is hard to justify a compromise. And of course the more time that elapses, the more intransigent all of the parties become.

There are many methods that can be utilized to resolve a dispute early on. Oftentimes, the disputes are caused by unreasonable homeowners who just don't want to comply with the rules. Yet, the association must act reasonably at all times in attempting to resolve the dispute with the homeowner. All requirements of the CC&Rs should be followed so that the homeowner is afforded every required opportunity to have his side of the story told. **Community Association Managers and members of the Board** can be creative in trying to resolve the dispute. For example, there is nothing that says a designated Board member can't go beyond the minimum requirements of the CC&Rs in sitting down one-to-one with a homeowner to privately discuss a dispute. The Board should propose all reasonable solutions to get the homeowner in compliance. If this means giving homeowners more time or some financial incentive, such strategies can save large amounts of money in the long run. Board members who are too inflexible can cost their associations lots of money.

If the homeowner still won't comply after informal attempts at resolution, then the association can pursue the options provided by the Nevada Department of Business and Industry, Real Estate Division (NRED). State law requires that any dispute involving "interpretation, application or enforcement" of CC&Rs, bylaws or rules must first be submitted to NRED before filing a lawsuit. The law provides the association with three choices in handling a dispute before NRED: binding arbitration, non-binding arbitration and mediation. This choice should not be made lightly. If the association wants to resolve the dispute quickly, binding arbitration or

mediation should be seriously considered.

Binding arbitration has the benefit of preventing a lawsuit after the arbitrator's decision. The parties must live with the decision, whatever that might be. But there are many instances where binding arbitration is appropriate. If the dispute involves, for example, a question whether a homeowner was or was not leaving his garbage on the street for more than 24 hours, why not let an NRED arbitrator decide what the truth is, knowing that – one way or the other – the dispute (and the legal costs) will quickly end? Even if the association loses in such a dispute, there is no major harm. If, on the other hand, the dispute involves interpretation of an important CC&R provision that might affect many homeowners or set a precedent, then the association probably won't want to roll the dice in a binding arbitration. It would likely want non-binding arbitration so that it would maintain the option of filing a lawsuit in district court after the arbitrator's award, so that a district court judge or the Nevada Supreme Court can decide the issue. Obviously, the Board should discuss with legal counsel ahead of time any decision to agree to binding arbitration.

Mediation also provides many benefits if the goal is resolution. Mediation is a process whereby the parties come together under the direction of a professional mediator who is skilled and experienced in resolving disputes. It is less formal than arbitration and most of the time far less costly. It also provides an atmosphere that is conducive to resolving the dispute, rather than the "fight" that goes on in arbitration or a lawsuit. Oftentimes, all the parties need is a middleman to sort through the dispute and propose solutions. This is particularly true with recalcitrant homeowners. One obvious advantage of mediation is that – even if it fails and the association is then forced to expend a large amount of money to litigate – the Board can always say to its members: 'We tried every method to resolve it, but we couldn't get agreement on any reasonable solution.' Of course, a wise Board will sometimes decide to compromise to get a matter resolved early, so as to avoid the possibility of a lengthy and costly legal fight.

If these early attempts at resolution fail, the association may be unable to avoid a lawsuit in district court. But this is where efforts should be redoubled to resolve the dispute. If mediation was unable to resolve it earlier, maybe try a new mediator.

In one recent case, an all-out litigation war broke out over the construction of a large detached garage in a homeowner backyard. All the elements were present for a long and costly legal war. But the correct approach was to push for mediation – as soon as possible – before legal costs started to skyrocket. And if mediation is unable to resolve the lawsuit, at least the Board and the association members will know that they are litigating because they have to -- and not because they failed to explore early on all available options to resolve the dispute.