

Successful Resolution of Cooperative, Condominium and Homeowners Association Disputes

By Gail R. Davis and Walter Goldsmith

Arbitration and mediation are so widely used that they should no longer be thought of as "alternative." We review the benefits of mediation and arbitration generally and how they can serve to improve your client's experience in resolving disputes in the field of Cooperatives, Condominiums and Homeowners Associations and lead to a better outcome.¹

Although arbitration is used in a variety of commercial disputes, it has not been a first choice in disputes involving cooperatives and condominiums.² Among other obstacles, the parties are often reluctant to give up their day in court. Boards, in particular, may not wish to broaden the limited grounds permitted for challenging their decisions, pursuant to the "business judgment" rule.³

Mediation, on the other hand, has broad potential for effective use. Unlike commercial disputes, which are often (but not always) centered on money, cooperative and condominium conflicts can span a broad spectrum of legal and non-legal issues. Controversies may involve powers and duties of Boards, contents of bylaws, cooperative proprietary leases and condominium declarations, responsibilities of managing agents, contractors, suppliers and professionals, and law and regulation regarding use and division of space, etc. Also, powerful emotions may be involved, notably those of owners, whose spaces are used as homes for the owners and their families, who each may believe that "my home is my castle," and may not consider the impact of behavior on a neighbor.

1. *Disputes among Owners.*⁴ Disputes among owners such as those concerning smoking, noise, cleanliness, use of apartments or other annoyances, are some that frequently arise and are particularly well-suited to mediation. Each party would have an opportunity to express his/her point of view, and to hear and understand the other's concerns. Also, the parties would retain control of the process and craft a solution which would fit their lifestyles, interests and concerns.

An example of a dispute between owners resolved in mediation involves cigar-smoking on the terrace by an owner which affected the owner of the identical unit with a terrace in the same line directly above. The owner above had asthmatic children who were badly affected by the smoke rising from the lower unit. Prior attempts to talk with each other had resulted in shouting matches and insults. In mediation, the parties expressed their anger and were able to hear each other's concerns. The mediator quickly helped resolve the issue, with the

smoker agreeing to smoke only at designated times on weekends, when the other family was generally away, and establishing a procedure to communicate with each other should future difficulties arise.

2. *Disputes between Owners and Boards.* Mediations often involve multiple parties, such as owners, managing agents, boards and insurance companies. In a dispute involving a shareholder and the Board, workers hired by the Board left a tarp off the roof during roof repair. The roof flooded and caused major leaking into the shareholder's apartment. Dampness and mold spread through the apartment, which was confirmed by the Board's tester. Ultimately, the mold was abated, which required that the shareholder move out of her apartment and live in a hotel. The parties negotiated a restoration/repair schedule. Thereafter, a second dispute occurred—who was responsible for repair to faulty windows—and the parties reached an impasse. The Board sued the shareholder for eviction in New York City Civil Court based on nonpayment of maintenance which had been withheld since shortly after the roof flood. During the court dispute and negotiations, the Bank agreed to pay the shareholder's maintenance and to suspend foreclosure since the parties were attempting resolution, which relieved pressure for both the shareholder and the Board. With the effective help of the mediator and the commitment of the parties, the parties settled the case. The mediator was skilled at discerning each party's points, finding areas of compromise, and facilitating performance by the parties of work needed to resolve the problem. After these important details were resolved, the parties and lawyers finished negotiating the agreement and the case settled.

Another dispute between the Board and an owner involved a small condominium in which one owner used the unit as a short-term boarding house or hotel, allowing unscreened, unsupervised people to stay for short periods of time. This caused serious safety, noise and wear and tear issues as well as potential problems with laws regarding occupancy for the condominium. The Board sued the owner. The owner counterclaimed alleging that the Board failed to make necessary repairs and properly maintain the common areas and refused to provide required financial reports, making the apartment difficult to sell. In mediation, the persistent guidance of the mediator helped the parties craft a solution satisfac-

tory to both parties in which the owner decided to put the unit on the market and to abide by some restrictions until it sold, and the Board agreed to make basic repairs and furnish reports to the unit owners. The dispute was successfully resolved, and the litigation was settled.

3. **Disputes among the Board, Contractors and Third Parties.** These most often are connected with construction and repairs of units or common areas. Leaks are frequent culprits. In a recent case spanning five years, the owner of a penthouse unit constructed a "greenhouse" in his unit. The greenhouse consisted of enclosure by the unit owner of terrace space already appurtenant to the apartment. The construction was done with the consent of the Board, conditioned on the provisions of an "Alteration Agreement" between the Board and the owner, which contained various rules and limitations regarding the work. A leak occurred, allegedly emanating from the greenhouse into the apartment of the owners on the floor below. The leak caused substantial damage to the apartment, including falling plaster in a bedroom intended for the owners' new born child. The owners of the apartment below sued the Board, the penthouse owner, the managing agent, the contractors, architects and engineers hired by the Board to correct the problem. The penthouse owner also sued, alleging damage to his unit resulting from failure to cure the leak. Of course, multiple insurers were also involved. Obviously, mediation of these matters is complex and difficult. Favorable results, however, can often be obtained by joint negotiations with the insurers. The insurers must be induced to agree on their respective liabilities regarding the loss so as to generate funds required to resolve the case. In cases where global settlement cannot be accomplished, separate settlements may be reached with individual parties. Obviously the process may be protracted, and requires considerable skill and persistence of the mediator.

Conclusion

Joint ownership/living arrangements, such as cooperatives, condominiums and homeowners associations, are fertile fields for knotty disputes that may disrupt orderly administration, impose debilitating costs upon owners and reduce the value of units. Resolution of disputes by means other than litigation is economical, efficient and avoids bitterness that can arise from long term, virulent feuds. Mediation gives parties an opportunity to be heard in a confidential setting, and to participate in crafting solutions fitted to their interests and lifestyles. The mediation process enables the parties to maintain and perhaps enhance their relationships promoting peaceful co-existence in the community. Mediation affords a powerful tool, thus

far under utilized, to promote efficient and harmonious operation, and add to the quality of life of owners.

Endnotes

1. The Cooperative & Condominium Committee of the New York City Bar has developed a Model Mediation Provision for adoption by Boards as a House Rule of a Co-op or Rule and Regulation of a Condominium which will be posted on its website which states: "It is Board policy that all disputes between or among residential unit owners or occupants be submitted to non-binding mediation. Parties are encouraged to speak with their respective insurance companies and may engage legal counsel. All parties are required to act in good faith including attendance by an individual with full settlement authority at the initial session of mediation for up to one full business day. Any written agreement entered into between or among the parties shall be enforceable in accordance with its terms provided it does not conflict with the proprietary lease or condominium by-laws." The committee also endorses the use of mediation in other appropriate disputes such as those involving owners, boards and third parties. See www.nycbar.org and click on Media & Publications—Real Estate Forms.
2. Much of the following applies to homeowner association disputes. However, unlike cooperatives and condominiums, homeowner associations consist of individually owned homes, with owners sharing the expenses of maintaining common areas, such as roads and recreational facilities. Despite compartmentalized ownership of units, association by-laws may contain restrictive provisions regarding such items as the nature, composition and color of exteriors of homes; detailed requirements regarding use of recreational facilities; and use and maintenance of lawns, porches and other areas appurtenant or adjacent to homes. These arrangements introduce a panoply of potential disputes, including those connected with permitted uses of homes and common areas by owners and boards; displays of holiday decorations, religious articles and even American Flags in and around exteriors of homes; issues arising from subleasing; respective rights and obligations of Boards and owners, notably those involving structural items such as roofs and unit exteriors; and remedies available to boards where owners violate governing documents or rules and regulations of the association. As with disputes within cooperatives and condominiums, mediation is of potential use, bearing in mind differing emphasis and dynamics arising from restrictions and limitations placed by associations on rights and prerogatives traditionally associated with ownership of real property.
3. The "business judgment" rule (*Matter of Levandusky v. One Fifth Ave., Apt. Corp.*, 75 N.Y.2d 530 [1990]) applicable to the board of directors of cooperative and condominium corporations, limits a court's inquiry "to whether the board acted within the scope of its authority under the bylaws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision." *Schoninger v. Yardarm Beach Homeowners' Assn., Inc.*, 134 A.D. 2d 1, 9 (1987).
4. Some of these examples of Disputes among Owners and Disputes Between Owners and Boards are taken from disputes heard and resolved in mediation through the New York City Bar Association's Coop/Condo Mediation Project. See www.nycbar.org/pdf/mediate.pdf.

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