Condominium Dispute Resolution

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Why bother?

The Condominium Act includes provisions for alternative dispute resolution (ADR) for condominiums. Specifically, section 56 includes an item dealing with By-Laws which advises that: "The board may, by resolution, make, amend or repeal by-laws, not contrary to this Act or to the declaration,….. to establish the procedure with respect to the mediation of disputes or disagreements between the corporation and the owners for the purpose of section 125 or 132.

Section 125 covers sale the of common elements and is not likely to be an issue in the normal course of events. Section 132 deals with a variety of items that are pre-agreed to automatically include mediation and then on failure to resolve a dispute, arbitartion. The auto-ADR applies to agreements between a) declarants and corporations, b) two or more corporations, c) allocated costs and responsibilities for improvements by owners to comon elements, d) managament agreements, e) disputes between the corpopration and owners, as well as others. Basically, any dispute can be mediated and if failure to resolve results, arbitrated.

This trend to attempt to resolve disputes out of court is not new; however, in some parts of the industry it is still receiving a lot of resistance. "Sometimes the costs to prepare to mediate can be as high as preparing for a trial". That's an argument I've heard several times from well-known condominium lawyers. I've also heard lawyers and managers comment that "the Act provides no procedural rules to follow so there is no format for the mediation". And here is one of my favorites, "the by-law is clear, you are well within the rights of (a corporation) (an owner) to have it your way - so why not just litigate?"

Yes, the costs can be high and they likely would be if the dispute were a matter of some significant damages to one party or another. No, the Act has no explicit procedures; it has set timelines. And, yes, by-laws are often clear and someone is likely in the wrong.

But, these are all reasons to not settle a dispute. Mediation does not "decide" a dispute. It looks for ways to resolve a dispute. There are many instances every day in which following the rule is the correct thing to do but may not be the most appropriate thing to do. A case involving cat ownership that went to appeal at the supreme court of Canada is a prime example of an attempt to decide a dispute in accordance with rules whereas settling the dispute in accordance with reason was (I feel) really the appropriate thing to do. Incidentally, the final appeal was denied and the cat remains with the owner.

So why bother settling disputes when there are by-laws, construction law, prepared agreements, and contracts to rely on? Well, the court process is expensive, time consuming, and puts you into a process you may not find comfortable or convenient. Worse, by-laws can be "interpreted" by a judge and applied as they see fit. So after following a costly well-structured process, your "rights" as you saw them, may still be non-persuasive. On the other hand, a settlement process gives you latitude - you can make up your own rules for settling the dispute and they can be a simple or as complex as the parties wish. You can also minimize the long-term effects of conflict if you agree before hand how to settle disputes.

Old ways are still OK

I recall when I first began down the ADR route some 12 years ago, ADR meant Alternative Dispute Resolution – "alternative" to the "Adversarial" dispute resolution offered by the court system (as in, you're making enemies).

More recently, ADR practitioners prefer the term "alternative" be replaced with "appropriate", which, I assume means that the "adversarial" option is not off the table but rather that you look for the most "appropriate" means to resolve the matter. Most recently, the focus is turning to circle group facilitation or "articulated" dispute resolution. In some cases, the group facilitation does afford an articulation of the reasons for the dispute and can get less complex matters resolved in short order.

Well-conducted circle facilitation involves articulation of the ideas behind the conflict and assumptions by the various parties. It promotes a safe, structured environment where listening and feedback are important to develop party-to-party understanding of the basis of the conflict and the needs and expectations of the parties in conflict. The process respects the relationships and values of the parties and promotes those aspects as a basis for resolution. Elements such as trust, honesty, integrity, balance, empathy and emotional context have a place in circle facilitation, as does consensus building. There's no predetermined outcome either – no win-lose scenario for the participants. There are many styles available depending on the facilitator and the nature of the conflict.

Traditional, structured forms of conflict resolution and circle methods are not mutually exclusive and, of course, there are cases where circle methods are not appropriate. However, the circle process may be better suited in the context of the people/parking/pet-style disputes common in condominium living because that living environment, by its nature requires that sustained relationships be a high priority, a likely outcome of the circle process irrespective of any other result.

The circle group has its naysayers. Some are uncomfortable with its 'touchy-feely' aspects, but, in my experience, the adversarial conflict resolution process is also troubled by the fact that decisions are limited by the black or white adversarial process. The real world is in full colour with complex hues and textures, which are not always well captured in a black and white decision. Condominium residents in conflict may

benefit from a circle conflict resolution process focusing on resolving the conflict itself as opposed to spending time and money on making a better claim so that someone outside the conflict can choose who's rights will prevail.

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