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Resolving Disputes With and Between Homeowners: The “Ins and Outs” of Notice and Hearing, Internal Dispute Resolution and Alternative Dispute Resolution

INTRODUCTION

We are frequently contacted by managers and board members about disputes between associations and their members. Often the questions involve the differences between the association’s notice and hearing process, internal dispute resolution (“IDR”) (or “meet and confer”) and alternative dispute resolution (“ADR”), and which methods must be used by the association to resolve a dispute. Unfortunately, as with many legal issues, the answer is “it depends” – on the parties involved, the nature of the dispute, the history of the dispute and the desired end result.

The purpose of this article is to: 1) explain the differences between these dispute resolution methods; 2) explain when the association must use certain methods; and 3) explain when it might make sense to “skip” a method or “combine” methods in order to resolve the dispute. Given the alternatives and complexities, it is always a good idea to consult with the association’s counsel regarding these issues.

NOTICE AND HEARING

What Is “Notice and Hearing”?

“Notice and hearing” is the “due process” procedure described in Civil Code § 1363(h) (and almost always in the bylaws of the association) that must be followed before a board may take disciplinary action (e.g., imposition of fines, suspension of voting rights and/or rights to use the recreational facilities) against a member for violations of the governing documents. The association’s governing documents should be analyzed to determine whether notice and hearing is also required before other actions may be taken, such as levying a reimbursement assessment.

What Is Required by Law and the Governing Documents for Due Process?

Civil Code § 1363(h) requires the board of an association to give notice to a member and an opportunity to be heard before discipline may be imposed against a member. Written notice must be provided to the member at least ten (10) days prior to the “meeting” (i.e. hearing) at which the board will decide whether to take disciplinary action against the member. If the association’s bylaws provide for a longer notice period, the most prudent practice is to comply with the notice requirement of the bylaws.

Note: The association’s governing documents may require the association to send a “violation letter” or “warning letter” before a notice of hearing is sent. The association should follow the procedures set forth in the governing documents and send such a letter if required. Even if the governing documents do not require that such a letter be sent, nothing prohibits the association from sending a warning letter that may result in the violation being corrected.

The written notice of the hearing must contain, at a minimum, the following information:

- The date, time and place of the hearing
- The nature of the alleged violation for which the member may be disciplined
- A statement that the member has a right to attend and may address the board at the hearing

The board may decide to take disciplinary action at or following the hearing, regardless of whether the owner appeared for the hearing or submitted a written statement prior to the hearing. If the board imposes discipline against a member, the board must provide written notification to the member of the disciplinary action within 15 days following the action.

When Does the Notice and Hearing Process Not Apply?

The association may not use the notice and hearing process to attempt to resolve disputes regarding non-payment of assessments (there are specific procedures to follow regarding collections). Notice and hearing also should not be used to resolve disputes between two homeowners (should the board decide to get involved in such disputes).

INTERNAL DISPUTE RESOLUTION (“IDR”)

What is IDR?

IDR is a process designed to resolve disputes between associations and their members regarding their “rights, duties, or liabilities” under the Davis-Stirling Act, the Nonprofit Mutual Benefit Corporation Law or the governing documents of the association. The law on “dispute resolution” is set forth in Civil Code §§ 1363.810 through 1363.850. The process is referred to as “internal” dispute resolution to distinguish it from “alternative” dispute resolution and is also referred to as “meet and confer.” The law was designed to provide a way for members to informally attempt to resolve disputes with their associations in a neutral, non-threatening forum.

What is Required by Law?

As of 2005, each association is required to provide its members with a summary of the association’s IDR policy/procedure on an annual basis (when the association distributes the pro forma budget). If an association fails to adopt such a policy, the law provides that the “default”

procedure set forth in Civil Code § 1363.840 will apply. Civil Code § 1363.830 sets forth the minimum requirements for an association's adopted IDR procedure, as follows:

- The procedure may be invoked by either party to the dispute. A request to invoke IDR must be **in writing**.
- The procedure must provide for prompt deadlines, and must state the maximum time for the association to act on a request from a member invoking the procedure. In light of other provisions of the Davis-Stirling Act, we believe it is reasonable to require that the party receiving the request respond within 15 days and that the "meet and confer" take place within 45 days of receipt of a request for IDR.
- The procedure must provide a means by which the member and the association may explain their positions.
- If a member requests IDR, the association must participate.
- If the association requests IDR, the member does not have to participate. Additionally, if the member does participate but the dispute is resolved other than by agreement of the member, the member shall have a right to appeal to the association's board of directors.
- An agreement reached between the parties is judicially enforceable so long as it is not in conflict with the law or the governing documents. (We strongly recommend that association IDR policies require agreements to be in writing.)
- A member of the association shall not be charged a fee to participate in the process.

Who Participates in IDR on Behalf of the Association?

The "default" IDR procedure set forth in Civil Code § 1363.840 provides that the association's board shall designate a member of the board to meet and confer. At the very least, then, one member of the board must participate. We recommend, however, that an association adopt a policy that provides the association with the flexibility to designate one or more board members, the entire board, committee members (as relevant), the association's manager and/or the association's attorney to participate in the "meet and confer." As discussed above, if the procedure is invoked by the association and the member does not like the result, he or she has the right to appeal to the entire board. The law does not address whether a member loses his or her right to appeal if the entire board participated in IDR.

The IDR statutes do not prohibit attorneys from participating in IDR. As stated above, we recommend that associations' IDR policies give both parties the right to request attorney participation, but require notice to the other party of the intent to involve an attorney.

When Are Mediators Used?

Civil Code § 1363.820(b) provides an association "shall make maximum, reasonable use of available local dispute resolution programs involving a neutral third party. . . ." The use of a mediator in IDR is not required, however. The association will have to evaluate the particular dispute to determine whether it is in the association's best interest to use the services of a mediator. If the member (either who has invoked the procedure or has agreed to participate)

requests the participation of a mediator, the association should work with the member to select a mediator. Anytime a mediator is used, the mediator should be mutually agreed upon by the parties and the parties should share the costs of the mediator.

When Does the Association Have to Participate in IDR?

The only time an association has to engage in IDR is if a member requests IDR. The law regarding IDR does not exclude assessment disputes, so if a member has a dispute with the association over assessments, he or she may request IDR and the association must participate¹.

Are IDR and ADR Prerequisites for Filing Suit?

The law on dispute resolution requires that the parties endeavor to submit their dispute to alternative dispute resolution prior to filing a lawsuit that is solely for declaratory and injunctive relief and/or a claim for money damages less than \$7,500.00. (Civil Code § 1369.520.) There is no legal requirement that an association (or member) participate, or attempt to participate in, IDR and ADR before filing a lawsuit. Unless it is very important that a dispute be resolved immediately, the most prudent practice is for an association to offer to meet and confer and offer ADR prior to filing a lawsuit against a member. Although it sounds like extra work for the association, in our experience IDR successfully resolves many disputes if members are willing to participate. If a member has no interest in participating, the expense to the association in serving a request for IDR and an ADR Request for Resolution (described in Civil Code § 1369.530) is minimal. Additionally, a judge is likely to look favorably upon an association that has clearly exhausted all available methods to resolve a dispute before resorting to litigation.

With that said, however, where it simply does not make sense for the association to go through the “due process” procedure of a notice and hearing, IDR and ADR prior to filing a lawsuit. This is especially true if the dispute is of such a nature that it requires quick resolution, such as a dispute or violation of the governing documents that poses a threat to health or personal safety. We recommend that you consult with the association’s counsel on these issues. If an owner requests the involvement of a mediator in the IDR process, the association may request that the member stipulate that the “IDR” mediation will, in all respects, also serve as ADR as described in Civil Code §§ 1369.510 to 1369.590 so the association does not have to go through the ADR process prior to filing suit.

If the association is involved in a dispute with an owner that looks like it will require dispute resolution (internal and/or alternative) and/or litigation, the association’s legal counsel should be consulted to advise the association about the best method(s) for pursuing the matter.

¹ Note that *Civil Code* section 1367.1(c)(1) requires that an association offer to participate in IDR before recording a lien for delinquent assessments. An association must offer to participate in IDR or ADR prior to initiating a foreclosure for delinquent assessments, pursuant to *Civil Code* section 1367.1(c)(2). The association’s obligation is to offer dispute resolution; it must participate if the owner accepts the association’s offer or requests dispute resolution.

When Does it Make Sense for the Association to Initiate IDR, Other Than as a Prerequisite to Filing Suit?

It may be wise for an association to consider IDR instead of immediately noticing a “due process” hearing in some circumstances. With IDR, the member is being asked to sit down and talk about the problem, as opposed to being called before the Board because of an alleged violation. The fact that the IDR process seems less formal may serve to better resolve some disputes. For example, when disputes involve “aesthetics” and are, arguably, based on subjective criteria, sitting down to resolve the dispute (rather than bringing the member to a hearing before the Board and disciplining him or her) may work to bring about a resolution that suits everyone.

It might also make sense for the association to initiate IDR if it wants to bring the parties to a dispute to the table. Usually this would involve “nuisance” disputes that rise above the “private nuisance” level (discussed below). For instance, members may complain about another member’s barking dog, and the dog owner member may claim that the complaining members just don’t like him or her and/or the dog. If a dispute like this rises to a level where the association decides it needs to get involved, IDR might be an inexpensive, informal forum for resolving the dispute.

Keep in mind that one of the benefits of IDR is that an agreement or resolution of the dispute can be negotiated and enforced in a court of law if it does not conflict with the governing documents or the law. We strongly recommend that any agreement reached as a result of IDR be in writing to maximize the possibility of judicial enforcement of the agreement.

Can the Association Impose Discipline Following a “Meet and Confer” Meeting?

Depending on the nature of the dispute, it may make sense for the association to reserve the right to impose discipline against a member if IDR does not resolve the dispute. The disciplinary action would be imposed for a violation of the governing documents, however, not solely because the dispute did not resolve via IDR.

The law requires that, before an association imposes discipline upon a member, the member be given notice and an opportunity to be heard before discipline is imposed. A member can be given notice and an opportunity to be heard at the meet and confer meeting just as the member can be given notice and an opportunity to be heard at a hearing before the board. We recommend that an association’s IDR policy provide that the association may impose discipline on a member if attempts at IDR are not successful. This way, if the association chooses to request IDR to informally discuss an alleged violation of the governing documents and IDR does not solve the problem, the association does not have to then notice a hearing before the board to decide whether to take disciplinary action against a member.

If the board is considering disciplinary action against a member, the request for IDR should include a description of the alleged violation(s) of the governing documents and the disciplinary

action to be considered by the board should IDR not resolve the dispute (to comply with the requirements of Civil Code § 1363(h), discussed above). In order for the board to take disciplinary action, at least a majority of the board must participate in the meet and confer meeting.

How Does a Party Request IDR?

A request for IDR does not have to be formal. The only requirement is that it be in writing. An association may create a form to provide to members who want to participate in the IDR process, but may not require a member to submit a form to participate in the program. Any request, so long as it is in writing, is sufficient. The association may also use a form, or it can send an IDR request in the form of a letter that is very similar to a hearing notice. As discussed above, if the association is considering imposing discipline on a member if IDR is not successful, the association should include a description of the alleged violation(s) of the governing documents and the disciplinary action to be considered by the board in order to comply with Civil Code § 1363(h).

When Does IDR Not Apply?

IDR specifically applies to “a dispute between an association and a member.” (Civil Code § 1363.810.) IDR, therefore, does not apply to disputes between members of the association. Usually, we advise our association clients to try not to get involved in disputes involving “private nuisances” – i.e. nuisances that are unique to the individual or individuals being adversely affected by it. One of the most common “private nuisance” matters involves a complaint from a downstairs neighbor about an upstairs neighbor regarding noise (music, footsteps, etc.). If the alleged nuisance is a nuisance to only one member, the association may not have to get involved. If, however, the complaining member complains to the association and the association does not get involved the association usually ends up trapped eventually. The complaining member might then request IDR claiming a dispute with the association over the association’s failure to enforce the “anti-nuisance” provision of the CC&Rs.

The law does not prohibit an association from participating in IDR to attempt to resolve a dispute between members. As discussed above, IDR may be an appropriate forum to resolve a nuisance dispute when the nuisance becomes “public” rather than “private.”

ALTERNATIVE DISPUTE RESOLUTION (“ADR”)

What is ADR?

ADR is an umbrella term for dispute resolution methods that are “alternative” to resolving a dispute in a court of law. There are primarily two types of ADR – mediation and arbitration. Both involve a neutral person (either a mediator or an arbitrator) who is hired to help resolve the dispute. Mediation is less formal than arbitration, and usually less expensive. You should consult with your counsel to determine the most appropriate form of ADR for your dispute.

When is ADR Required?

ADR should be considered a prerequisite to filing lawsuits. Civil Code § 1369.520(a) provides that a member or association may not file suit to enforce the governing documents unless the parties “have endeavored to submit their dispute to alternative dispute resolution. “Alternative dispute resolution” is defined, in Civil Code § 1369.510(a) as mediation, arbitration, conciliation, or “other nonjudicial procedure that involves a neutral party in the decision-making process” (which probably includes IDR if a mediator is involved). However, if the enforcement action that has lead to litigation is solely for declaratory relief (the court declares a party’s legal rights), injunctive relief (the court orders a party to do something or stop doing something), or solely in conjunction with a claim for money damages not in excess of \$5,000 (if the association files suit) or \$7,500 (if a member files suit), the party initiating the lawsuit does not have to engage in dispute resolution prior to filing suit.

With all this said, even if the dispute involves money damages in excess of \$5,000, we strongly recommend that an association serve a Request for Resolution (described in Civil Code § 1369.530) requesting some form of ADR prior to filing suit. Politically, ADR seems more “friendly” than filing a lawsuit and may resolve the dispute. Financially, ADR is cheaper than filing a lawsuit and engaging in litigation. Additionally, even if a lawsuit is filed, the court will often force (or at least strongly encourage) the parties to attempt some form of ADR. It is likely that a court will look more favorably on a party that has attempted to resolve the dispute out of court before filing a lawsuit than a party that has headed straight for court.

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If you have an enforcement matter you would like to discuss with us, or would like an IDR policy prepared for your association, please contact us at (925) 926-1200.

