Study H-851 June 29, 2001

Third Supplement to Memorandum 2001-54

Nonjudicial Dispute Resolution Under CID Law: Administrative Hearing Procedure (Comment Letters)

The following materials were received by the Commission at its meeting on June 29, 2001, in connection with its consideration of nonjudicial dispute resolution under CID law:

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

June, 2001

THE TEMPLE OF BLAME:
The Nonjudicial Dispute Resolutions Under Common Interest Development Laws, are Fundamentally Flawed

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Please lodge this correspondence with the discussions at this meeting. Thank you.

Common Interest Development Case Example

Of the hundreds of letters and phone calls I receive each month, complaints about mediation, mediators, and the process abound, as do complaints with respect to arbitrators. Neither process is "free" and Claimants ***more often than not***, are lumbered with attorney and mediator bills ***and*** in keeping with the trend, ordered to share in the costs of the Respondent's attorney's fees.

An example indicative of the mail I receive regarding the topic involves one unfortunate common interest development homeowner who, after finding several tens of thousands of dollars in homeowner association funds unaccounted for, demanded review of the association's records. The board denied his request and after doing so, arbitrarily, albeit, retaliatorily, relinquished his voting rights as a homeowner. He states "I hastily agreed to mediation. I made a big mistake agreeing to mediation. I was ordered to pay for my own attorney and the board hired a 'team of attorneys' which I was ordered to pay [part of as well as my own fees]." He describes an atmosphere where the mediator, attorneys, board members, and various uninterested third parties were allowed to participate in the proceedings, yet not be bound by the agreement. These same parties, were more interested in congregating in the mediator's snack room, inventorying the refrigerator contents, and worse of all, making sure they ran up the hourly billing fees, "than they were with fairness or the process itself. . .I buckled under pressure

and signed [the agreement]. . . I do not recommend mediation . . . it is not what it is cracked up to be . . . and it cost me a lot!"

Mediation/Arbitration School Comments

Perhaps those who know most if not all of the pitfalls relating to mediation and arbitration are those who judge and teach in the process. Judge Arbitrator, Dennis Ryan, of the Mediation-Arbitration department of California School of Notary Public, states "ADR began as a system separate from the litigation process, but within recent years, the community has witnessed disturbing changes in the mediation and arbitration process. Why are there so many new complaints from people who have used ADR? Why is this system, born out of the communities need for fairness and justice, evolving backward toward the same kind of litigation process the community rejected? Part of the answer may be due to . . . questionable retired [career legal professionals] . . . who managed the courts [and] have quietly moved into and are now firmly managing 'their' [own type of] system of mediation and arbitration. * * * It appears that instead of fixing their court-related problems, in order to make the court process more appealing to the public, they packed their litigation baggage and moved into ADR and turned the process into a free for all. * * * What is it that attracted the good and the bad to ADR? Why money of course! ***Billions have been shifted from civil courts to community ADR administrators.***"

He goes on to state that "the annual ADR caseload processed by one agency alone has surpassed 70,000 cases, a staggering figure [which is] equivalent to one fourth of the cases now handled each year in Federal Court." This clearly shows one thing, there is a need for resolving disputes, but perhaps not in the traditional sense and formality associated with the term "litigation." This does nothing however, for the owner of real estate located within a Common Interest Development. That owner is systematically denied rights that all other real estate owners in California have at their immediate disposal. The fundamentals of fairness appear only to apply to those perceived to be "***real***" real estate owners, owners of separate single-family dwelling units ***outside of*** the tainted common interest development schemas. As Mr. Ryan clearly notes, "virtually every dispute that could be litigated in a court of law can now be mediated or arbitrated," presumably with a presumption of "fairness" ***except*** those with common interest development disputes. Common interest development owners

have become prey to these and a variety of imposed quasi-procedures, these owners are looked upon as bottomless money pits, desperate in their attempts to resolve disputes they are ***forced to pay*** whatever it takes to get a resolution to problems affecting their quality of life, value of property, and violation of equal protection and due process issues. Often, after mortgaging their homes, losing their jobs and paychecks to the process, they learn it was ***all to no avail.***

Inherent Flaws in the Mediation-Arbitration Process as it relates to Common Interest Developments

1. **No Caps on Costs for Mediator or Arbitrator Fees**
2. **Neither Mediation nor Arbitration is *Per Se* Free**
3. **No Mandatory Rule that Due Process or Precedents be Taken into Account During Proceedings, Deliberation, and/or Rendering of Judgment**
4. **Neither Mediation nor Arbitration Tolls the Statute for the Claimant**
5. **No Mandatory Disclosure of Educational Requirements for Mediators or Arbitrators**
6. **Both Processes are Confusing for the CID Homeowner-Complainant**
7. **The Pressure on Homeowners of being "Forced" to Choose Mediation or Arbitration to Resolve Their Dispute, Places Homeowners in an Inferior Position to Exercise Their Rights**
8. **Homeowners Can and Do, End Up Paying the Respondent's Costs!**

Anyone can become a Mediator. It is my understanding that to qualify to be an arbitrator, one must have a Juris Doctor. This is however, not always the case.

A common interest development homeowner may have the need for immediate remedy, but by law, is "forced" into the arbitration arena, i.e. forced to seek a ***preliminary redress*** if you will, ***prior to*** exercising their rights as a citizen to file a lawsuit representing and protecting their interests. Why is this? What does this accomplish? There is no satisfactory answer as to why the legislature

has imposed such an arbitrary imposition on this particular group of homeowners other than industrial strength pressure in the districts where these developments exist.

One homeowner paid over $5,000 in mediation fees and described it as "an unmitigated hell" that resulted in a $155,000 lawsuit that he was trying to avoid. Another homeowner stated that she thought if the mediation did not work, she could still file her lawsuit. Afterward she faced a mediation judgment ordering her to share the homeowner association's costs as well as her own, totaling over $10,000 in mediation, judgment and attorney fees, only to find the statute of limitation had run and she was barred from suing on that claim. Thoroughly disgusted, she stated "I feel like I was raped. This has ruined our lives. I have grown to hate where I live."

The California Law Revision Commission needs to swing open the doors to California's Small Claims Courts and level the law to afford ***every*** common interest development homeowner access to the judicial system. To do this, you must first recognize that if the CLRC continues to refer to these home-purchases as "investments" then you must afford the owners of these so-called investments the right to do everything a regular, normal, home-buyer-purchaser of a single family residence, or a stock holder under the SEC would be able to do to protect ***their*** interests. Misleading CID homeowners into believing they have an "investment" in a CID borders fraudulent misrepresentation of the transaction itself. It does this because CID-homeowners believe that fiction, and by believing it, believe that they have protections under the law to protect their "investment." Which in reality, they do not. So decide, which is it? An investment? If so, afford CID-homeowners the same protections under the law as you do every other so-called investment/investor in America. The right to protect ***their*** interests. Would you force a securities holder into arbitration or mediation?

Sincerely,

D. Vanitzian

Donie Vanitzian
Arbitrator