Study H-851 May 3, 2002

Second Supplement to Memorandum 2002-10

Nonjudicial Dispute Resolution Under CID Law:
Alternative Dispute Resolution (Additional Information)

This supplemental memorandum provides additional information concerning a few issues discussed in Memorandum 2002-10, relating to alternative dispute resolution in common interest developments.

We have also received communications from Curtis Sproul, a Sacramento attorney and specialist in CID law, addressing various CID issues, including a number relating to Memorandum 2002-10. His points with respect to that memorandum are summarized here.

Some Statistics

One of the significant concerns in crafting remedies for CID disputes is that we have no sense of the magnitude of the problem in California, nor any data on how effective various forms of ADR have been in CIDs. We have plenty of horror stories, but not much in the way of hard data.

We now have an opportunity to take advantage of some empirical research. A research fellow at the Public Policy Institute of California has contacted us about a common interest development project they are beginning. Their report will be descriptive in nature, with information on the geographic distribution of CIDs as well as their legal organization, size, monthly fees, etc. "This project will provide an empirical basis for the popular debate using a variety of data sources merged to geographic information on the locations and attributes of common interest developments in California. Findings from this research will illuminate policy options for state and local governments, including enhanced regulation of common interest developments as well as modifications to local land use planning, zoning, subdivision, and permitting processes."

We have suggested to them that, for our purposes, it would be helpful to have information about the numbers and size of CIDs, the incidence and types of disputes that arise, the use of dispute resolution techniques, and the outcomes of the cases. We have also indicated that information about association board composition and turnover, and board recall experience, would be useful. If

Commissioners or others have further suggestions for the type of information that may assist us down the line, please let us know and we will pass that along.

Communication Between Board and Homeowner

At the March meeting the Commission discussed and rejected the concept of providing a statutory mechanism for a kind of "meet and confer" between a homeowner and a designated board member when a dispute arises. The sense of the Commission was that parties should be talking to each other, and ordinarily will be. The Commission decided not to try to mandate this for common interest development disputes.

Since then, the staff has had occasion to speak before interested groups about the Commission's project. People were generally dismayed to learn that the Commission had rejected this relatively innocuous step. Their reaction was that people should indeed talk to each other, but in fact they do not. A mandated meet and confer process was seen as beneficial.

The staff suggests that we bear this sentiment in mind as we look at the possibility of requiring an association to provide an internal dispute resolution mechanism. While we may not want to mandate a meet and confer process, we might want to provide a simple process of that type as a default procedure for an association that fails to adopt its own internal dispute resolution mechanism.

Procedures Provided in Governing Documents

At the March meeting the Commission expressed interest in the concept of requiring an association to provide an internal dispute resolution mechanism. Curtis Sproul indicated that some of the associations he works with have such mechanisms, and they have been effective in resolving disputes within the association. He offered to provide us information about these internal ADR mechanisms.

The examples provided to us by Mr. Sproul are designed for use in an association that wishes to enforce a governing document requirement against a noncomplying member. If preliminary efforts to resolve the matter fail, the board must issue a formal notice and request for resolution to the member. If the member accepts the request for resolution, the matter is brought before the association's "Covenants Committee". That committee is composed of association members appointed by the board to hear and decide any governing document enforcement case that may require a hearing. A member of the

committee is disqualified from serving on any case in which the member has a conflict of interest. Disinterested members of the committee hear the dispute and have 30 days in which to issue a decision. The decision must be in writing and include a description of the dispute, the committee's determination of the issue, and any remedy that should be imposed. The committee's decision binds the association. If the member is dissatisfied with the committee's decision, the member may appeal to the board of directors. The various procedures and standards are spelled out in detail in the association rules.

This sort of procedure, by interposing disinterested association members in an internal dispute, would appear to resolve many of the concerns we have heard about antagonism between a member and the board.

Mr. Sproul points out that because this a procedure does not require the association to hire a retired judge or other professional arbitration or mediation service, a routine CC&R dispute can be resolved in a cost-effective fashion. However, the procedure is useful primarily in a larger association. He notes that in a smaller association, the ability to assemble a hearing panel that is truly disinterested becomes problematic.

If the Commission wants to pursue the concept of requiring an association to provide a fair and reasonable dispute resolution procedure within the association, we need also to provide a default procedure or safe harbor that will satisfy that requirement.

At a minimum, the staff would provide "meet and confer" as a default procedure. Under that procedure, on demand of a homeowner the board must delegate a representative (with power to bind the board) to meet and confer with the homeowner in an effort to resolve the dispute. The homeowner probably also should have an appeal opportunity to the board.

The law could provide a more sophisticated default procedure in the form of a "committee" scheme along the lines described by Mr. Sproul. Such a scheme could be made applicable as a default procedure for an association over a certain size, or could be made applicable on an opt-in basis by the board.

ADR Prerequisite to Litigation

Scope of Requirement

Memorandum 2002-10 notes that the offer of ADR required by Civil Code Section 1354 applies in actions for enforcement of an association's "governing

documents". The memorandum suggests that this limitation may be unduly narrow, and suggests its expansion. It is worth noting, however, that Curtis Sproul indicates that Section 1354 was probably intended more to apply to enforcement of convenants contained in the CC&Rs than to such operational issues as corporate law elections and member inspection disputes.

Disputes Involving Small Amounts

Memorandum 2002-10 includes a discussion of the role of the small claims court in the dispute resolution process. Curtis Sproul suggests that Civil Code Section 1354 should clearly sanction the use of the small claims procedure as an alternative to the ADR process. "If the objective of 1354 is to save money and assure some sort of minimum due process, those objectives can also be achieved by resort to a small claims action." He notes that to implement this could require some adjustment of the jurisdiction of the small claims court.

The Commission has looked into the small claims possibility fairly carefully, and has concluded that the small claims procedure is not necessarily suited to resolution of CID disputes, other than monetary disputes. The Commission has been reluctant to recommend an expansion of the traditional small claims jurisdiction.

The staff can see some advantage to simply making clear that the ADR process is not required for any proceeding brought in the small claims division of the superior court. If the Commission agrees, we will work that concept into the draft in an appropriate way.

Manner of Service

Current law requires service of an ADR offer in the manner provided for service of summons in a small claim action. Memorandum 2002-10 suggests service of an ADR request by first class or certified mail be permitted. Curtis Sproul reinforces this suggestion with the observation that service under the small claims statute involves the court clerk, whereas at this point in the ADR process there is no action and no court clerk.

Respectfully submitted,

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Executive Secretary