

DISPUTE RESOLUTION ALTERNATIVE FOR THE MICHIGAN CONDOMINIUM AND OTHER
COMMON INTEREST COMMUNITY (CIC) PROPERTIES: A Case for Drafting Comprehensive ADR
Provisions into CIC Documents

By

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Evolution of the Common Interest Community: An Overview

A man's home is his castle aptly described the character of the dwelling place staked out by many of the 19th-century American pioneers. A fence and a rifle (and perhaps an accessible sheriff) provided these settlers with security while living as rugged individualists.¹ Unencumbered by governmental zoning and use restrictions, these adventurous souls built their dwellings and outbuildings, worked the ground, and raised livestock. Intrusion on their autonomy occurred when others trespassed, adversely possessed their land, or broke the peace. During this same period and into the 20th century, the emergence of municipalities, with attendant real estate use laws enforced by executive branches of municipal government, marked the beginning of modern urban living where citizens lived in close—and sometimes crowded—conditions. Nevertheless, the urban homeowner clung to her or his desire to remain autonomous, albeit in a shrinking castle.

The need to harness the energies and dynamics generated by heavily populated urban areas prompted municipalities to intervene with legislation that increasingly restricted the individual's autonomy. Laws concerning order, public health, building codes, and visual harmony were enacted. Infractions of these ordinances and laws produced citations often followed by sanctions imposed by a court or government agency. Disputes among neighbors that affected community harmony were left to the governmental executive branch (including the police) to control and resolve—and to the courts if executive intervention failed to bring closure to the feuding parties. Autonomy continued to shrink while responsibilities to the community increased.

Around 1970, ownership of a few residences in Michigan began to take the form of condominium or cooperatives (i.e., “common interest community” or “CIC”) ownership, with the habitation of units in these communities controlled and governed in significant measure by the community's governing body (“community regime”). By the late 20th century, CIC ownership became quite popular. The community regimes operated under rules and regulations that were created by developers and that were enforced by democratically-elected representatives—usually board members of an association—resulting in an additional layer of regime control over the unit owner. CIC unit owners found themselves not only responsible to their over-arching governmental unit (the municipality), but also to a community regime. Living together in a CIC required further compromise of personal autonomy—an adjustment that many found troublesome. To them, the idea that a home is a person's castle lingered, making it difficult to reconcile the imperative of community responsibility with the ideal of individualism, which was also equated by many with the idea of liberty. The continuing struggle to reconcile individualism and collectivism has spawned a plethora of community disputes: between owner and owner; owner and the community regime; and faction against faction within the CIC.

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¹ Alexis de Tocqueville, in his 1830s book *Democracy in America*, spoke of “habits of the heart” of Americans whose individualism makes it difficult for them to connect to their community. One hundred fifty years later, Robert N. Bellah, in his book, *Habits of the Heart—Individualism and Commitment in American Life*, developed de Tocqueville's observation.

Today, 44 years after the Michigan Horizontal Real Property Act (replaced by the 1978 Condominium Act) became law, countless, and often fractious, disputes have surfaced over the unreconciled notions of privacy and group responsibility, resulting in many communities rife with discord. This article posits the idea that an ADR procedures clause incorporated into CIC documents that requires mediation as a first step will significantly reduce the discord found in all too many communities.

The Common Interest Community (CIC)

The "CIC" is defined in the Uniform Common Interest Ownership Act promulgated by the National Conference of Commissioners on Uniform State Laws. In part, it reads:

Common interest community means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration.²

To this definition, I would add:

and with respect to which the unit owner assumes individual responsibilities to other unit owners and their collective governing body.

The condominium, the popular choice of many Michigan real estate developers, is a CIC. It is created by the recording of a master deed, which establishes a condominium. The master deed (which in some jurisdictions are called a "declaration") sets forth the rights and obligations of unit owners to each other and to their community regime. There are similarities between a community regime and the municipal governing agencies in which the CIC is located. In each, services are provided to the owner and money is paid by the owner to each of them as dues, assessments, or taxes. In both, restrictions are imposed upon the building, use, and maintenance of a unit. However, unlike the independent branches of municipal government, the community regime acts through its board of directors, who are almost always unit owners, and who also serve as interpreters and enforcers of the rules--hardly independent or objective roles. Subjectivity, factionalism, and personal agendas often influence the implementation of the police and the judicial functions vested in the CIC board, giving rise to contentious and fractious community-related disputes.

Community Discord

Disagreements between the unit owner(s) and the community regime (and sometimes between owners) range from the trivial (except to the involved parties), such as issues of a unit's exterior colors, and to the more material (and often substantial) issues of advisability of undertaking expensive improvements, of changing the very character of the community, and over master deed and declaration amendments. These disputes frequently end up in litigation (or arbitration) which, when concluded, will resolve the immediate contended issue, but may divide the community long after the lawsuit is over. Because unit values are increased by community harmony and decreased by discord, the best interests of all unit owners are served when harmony reigns. Thus, engagement in alternative dispute resolution procedures that create an environment where conversations are about resolution instead of litigation or arbitration is well-advised.

² National Conference of Commissioners on Uniform State Laws, Uniform Common Interest Ownership Act (1994), at § 1-103(7).

The Legislative Solution

Legislation that promotes out-of-court resolution of community disputes has been enacted in many state jurisdictions. In my opinion, these laws are useful but minimally effective.

Some state legislatures, aware of the problems of discord in CICs, have incorporated a variety of ADR provisions in their CIC statutes. While the legislative efforts to ameliorate the problems that produce community discord are a positive trend, they are not a substitute for a CIC regime document mediation-arbitration (med-arb) ADR provision.

Mediation is a Michigan Court Rule (MCR) option. Primarily concerned about overcrowded litigation dockets, the Michigan Supreme Court incorporated a mediation function into the litigation system in MCR 4.10 and 4.11. Application of these two rules can only become operative after a lawsuit has been filed, and if the judge orders it. But by then hostilities have been heated, and not all judges issue the order.

The Michigan Condominium Act (Section 144) encourages arbitration by agreement. But arbitration is an adversarial process much akin to court litigation. Besides, an agreement to arbitrate doesn't require an enabling statute to be effective. At best, Section 144 encourages arbitration, which is often a better alternative to a lawsuit. For example, the arbitration will lighten court dockets overflow, and if properly structured, an arbitration can be less adversarial, quicker, and less costly than a lawsuit—particularly when counsel and the arbitrator structure an arbitration with these goals in mind.

If pre-lawsuit mediation has the potential of enhancing community harmony, why not legislate the requirement into a CIC-related statute? One reason that mitigates against doing so is that the essence of mediation is that it is non-coercive—or minimally so. Another reason is that a statute calling for mandatory mediation as a first step would require definitions of what it is, how it is fulfilled, and what the consequences of non-compliance are. As a matter of course, procedures mandated by law will become institutionalized and arguably unenforceable because due process is denied to the prospective unit owner who wishes to live in a CIC but who wants unfettered access to the courts—a choice not available if every CIC, by legislative fiat, requires mediation first.

The Med-Arb Solution

These are some of the reasons for including a med-arb ADR clause in CIC documents:

- A prospective unit owner placed on notice prior to acquiring ownership that a mediation requirement will be involved before filing a lawsuit will understand the community's aversion to litigation. Thus, litigious parties (and others who just don't like mediation) informed of the mediation-first requirement will be discouraged from buying into the community.
- Aggrieved parties will be forced to pause, reflect, and meet with the adversary before going to court.
- The unit owners can always amend or remove an unpopular or unworkable provision from their regime documents—a much easier task than repealing or modifying legislation.
- The privately-mandated mediation is viable and clearly workable if handled by skilled professionals who understand community dynamics, and who are able to intervene as mediators to the benefit of the community and its individual unit owners. Without the pre-lawsuit mediation requirement, the disputants are likely to bypass an opportunity to avoid

the consequences of litigation. Forced to enter the mediation decompressing chamber, the disputants are in an environment that can dampen the fire of anger and begin to focus on resolution without a lawsuit.

Drafting Comprehensive Dispute Resolution Provisions in CIC Documents

Our culture now embraces mediation as an integral part of the legal system. But resistance to the use of mediation continues to manifest itself in common misperceptions. Three of these are:

- It costs money to mediate, whereas it is perceived (although incorrectly) that litigation does not because the use of the court presided over by a judge is free. Often, the cost of legal fees, personal time, and emotional toll are ignored by the disputants until it's late in the battle.
- It is uncomfortable, if indeed not impossible, to proceed in good faith when you have been injured, are dubious of your adversary's motives and attitudes, and believe that the line of least resistance is to remain hostile.³
- The aggrieved party may not get a fair shake from mediation, the field of fairness may not be level, or the aggrieved party would be in better hands if he or she placed his or her fate in the hands of a judge or arbitrator.

These myopic perceptions are held by a large segment of an uninformed public. A visionary developer who requires the mediation/arbitration solution by incorporating an ADR provision in the CIC documents can overcome these common misunderstandings by explaining to the prospective owner the many benefits of pre-lawsuit mediation. The goal of community harmony can be an added amenity, which should be marketed and explained to prospects by developers and other sellers of CIC units.

A Sample CIC ADR Clause⁴

The author's sample ADR clause follows. This provision is sometimes referred to as "med-arb" (mediation-arbitration):

Mediation Arbitration.

Disputes (subject to exceptions stated below) between co-owners or between the Association and its co-owners shall not be litigated in courts of competent jurisdiction. Instead, they shall be resolved outside of court action in the following manner if the disputants are unable to reach a negotiated settlement:

The Association or co-owner who has a complaint or a grievance (herein sometimes "complaint" and sometimes "dispute") that but for this provision would be justiciable in a court of law, and the complaining party ("complainant") wishes to resolve the complaint, the following procedures (which first requires mediation) must be used.

³ The issue of good faith is discussed in this author's article, *Drafting ADR Provisions for Real Estate Transaction Documents*, , 30 Mich Real Prop Rev, (Fall 2003), page 127.

⁴ Legal arguments can be made that a provision of mandatory mediation/arbitration clause in a regime document doesn't bind an owner who is deemed to agree to it only by accepting ownership in a CIC. This problem can be ameliorated by requiring that a person acquiring an interest in a Michigan condominium that requires mediation/arbitration acknowledge in writing that he or she accepts the provision. The provision should also be clearly explained in the disclosure book.

- *The complainant shall concurrently with a written notice to mediate state the complaint in writing and deliver it timely to the other party ("respondent") with a copy delivered to the secretary of the Association. Timely means within one year of the occurrence of the "event(s)" giving rise to the complaint. The "event(s)" are those that would begin the running of the applicable statute of limitations if the complaint was litigated in a court of competent jurisdiction. Failure to meet the statute of limitations deadline shall bar the claim forever. The complaint need not follow any prescribed format, such as a court pleading. It need only state the complaint. Written request for relief is discretionary.*
- *The complainant shall also include a written notice to the respondent that his/her/their complaint will be submitted to mediation, including a list of acceptable mediator(s). The respondent shall reply within seven (7) business days of receipt of notice with an acceptance of one of the mediator designees or shall submit a revised list.*
- *If the parties are unable to agree within seven (7) business days of respondent's first response as to who will serve as the mediator, each party shall submit a mediator's name with the determination of who serves to be made by a coin flip.*
- *The complaint and notice to mediate must be delivered either by hand delivery; or by fax to the respondent's home or place of business; or by registered mail as defined by the Michigan Court Rules. The complainant shall, within ten (10) business days of the selection of the mediator request that one of the following facilitative mediation (herein "mediation") procedures be employed: (a) the rules prescribed by a private provider of community dispute resolution services; or (b) the mediation services of a community dispute resolution center serving the county within which the condominium is situated; or (c) to a mediation process that is acceptable to the mediator, the complainant and respondent. If the parties are unable to agree on the mediation process within thirty (30) business days following delivery of the complaint, the community dispute resolution agency serving the area in which the community is located shall handle the mediation according to its procedures. If such an agency is not located within the county of the community's location, the closest center shall be engaged.*
- *The respondent shall reply to the complaint in writing within thirty (30) business days of delivery according to the procedural requirements of the selected mediation process.*
- *The dispute will be mediated within ninety (90) days following submission.*
- *Either party may engage legal counsel to represent them in the mediation.*
- *Mediation costs, which include filing fees, administrative fees and mediator fees, will be shared equally by both parties. Each party shall pay their respective legal counsel's fees incurred prior to and during the mediation process.*
- *Neither party is bound to settle during mediation, but all of them are required to act in good faith.*
- *A mediated settlement agreement shall be reduced to writing, which agreement shall be enforceable in a court of competent jurisdiction.*

If the mediation fails to produce a dispositive resolution of all of the issues in dispute, then the unresolved issues shall be resolved by a single arbitrator selected by the parties who shall establish

liberal rules of evidence and procedures; who shall determine the amount and kind of discovery, if any; who shall be empowered to issue subpoenas; and who shall agree to render a written and reasoned decision enforceable in a court of competent jurisdiction. The arbitrator will be an attorney, experienced in real estate common interest ownership law selected by agreement of all disputants. The panel of eligible arbitrators shall consist of the attorneys who are members of the Real Property Section of the Michigan State Bar. By agreement of all parties, an arbitrator who does not meet these criteria may be selected. If the parties are unable to agree on the arbitrator, the mediator shall make the choice. The mediator may not serve as the arbitrator.

The arbitration shall be initiated within thirty (30) days following the mediator's written determination that some of the issues are unresolved; and the arbitration shall be completed within thirty (30) days thereafter.

The following disputes are exempt from resolution under this dispute resolution provision:

Disputes relating to (a) title to real estate; or (b) the developer or declarant of the CIC enabling documents; or (c) a default by an owner in payment of any regular or special assessments or dues.

The arbitrator may assess costs, excluding arbitration and pre-arbitration attorney fees, in an amount he/she deems appropriate.

A document shall be recorded in the public real estate records that references the existence of this provision and sets forth its entire content, thus placing a prospective owner of a unit on notice that this provision exists.

This provision becomes binding upon the Association and the co-owner (and between other co-owners) when the co-owner acquires title to the unit by deed or land contract.

Good Faith

This provision faces the often-discussed and never to be resolved definition of "good faith." If the term is indefinable, why employ it? These are some of the reasons:

- A person engaged in the process in bad faith may modify his or her attitude with the guidance of a skilled neutral third party, the mediator.
- Arbitration can't begin until the mediation occurs. The bad faith party who may wish to act out a mediation charade before a neutral third party mediator will be concerned that his or her bad faith conduct may adversely affect the arbitration outcome.
- The bad faith party, or parties, will be less likely to garner CIC support if they act in bad faith. The support may be important if changes to the board of directors are on the bad-faith party's long-range agenda. Most people do not wish to suffer community ostracism or rejection.

Another ADR Clause

ADR clauses commonly used in CIC documents are available through the Michigan Real Property ADR Committee, which has developed a bank of ADR clauses for real property transactional documents. A sample of one of these clauses is the following:

ARBITRATION AND LITIGATION

Section 1. Scope and Election. *Disputes, claims, or grievances arising out of or relating to the interpretation or the application of the Condominium Documents, or any disputes, claims or grievances arising among or between the Co-owners and the Association, upon the election and written consent of the parties to any such disputes, claims or grievances (which consent shall include an agreement of the parties that the judgment of any circuit court of the State of Michigan may be rendered upon any award pursuant to such arbitration), and upon written notice to the Association, shall be submitted to arbitration and the parties thereto shall accept the arbitrator's decision as final and binding, provided that no question affecting the claim of title of any person to any fee or life estate in real estate is involved. The American Arbitration Association Rules applicable to the type of dispute being arbitrated in effect at the time the Arbitration begins shall apply, All Disputes between Co-owners, Developer, Association and Unit Purchasers shall be subject to the provisions of Section 144 of the Act, as amended.*

Section 2. Judicial Relief. *In the absence of the election and written consent of the parties pursuant to Section 1 above, no Co-owner or the Association shall be precluded from petitioning the courts to resolve any such disputes, claims or grievance unless a superseding statute is enacted in the future.*

Section 3. Election of Remedies. *An election and written consent by Co-owners and the Association to submit any such dispute, claim or grievance to arbitration shall preclude such parties from litigating such dispute, claim or grievance in the courts other than to enforce the arbitration award.*

Section 4. Litigation.

- (a) *Prior to commencing a civil action on behalf of the Association, other than an action to enforce the Condominium Documents or to collect delinquent assessments, the Board of Directors shall (i) issue a written report to all members at least ten (10) days prior to the Evaluation Meeting as hereinafter defined, outlining their recommendation that a civil suit be filed, including full disclosure of all attempts to settle the controversy, (ii) call a special meeting of the Co-owners for the express purpose of evaluating the merits of the proposed litigation ("Evaluation Meeting"); (iii) present to the Co-owners prior to or at the Evaluation Meeting the litigation attorney's proposed written fee agreement including the total estimated cost of the civil action through a trial on the merits, a written estimate of the amount of the Association's likely recovery in the suit net of legal fees, court costs, expert witness fees and all other expenses expected to be incurred in the litigation, the billing and payment policies of the litigation attorney and a commitment to provide written status reports of the litigation, settlement progress and updated cost and recovery estimates no less than every sixty (60) days.*
- (b) *At the Litigation evaluation meeting the Co-owners shall vote on whether to authorize the Board of Directors to proceed with the proposed civil action and whether the matter should be handled by the litigation attorney proposed by the Board of Directors. The commencement of any civil action by the association (other than a suit to enforce these Bylaws or collect delinquent assessments) must be approved by sixty-six and two-thirds percent (66 2/3%) in number and value of the Co-owners.*
- (c) *All fees estimated to be incurred in pursuit of any civil action subject to paragraphs (a) and (b) above shall be paid only by special assessment of the Co-owners, which special assessment must be approved at the Evaluation Meeting. The total amount of the litigation special assessment shall be collected monthly over a period not to exceed twenty-four (24) months.*

The above provision forces the association to deliberately and thoughtfully, before engaging in litigation, consider the ramifications of such a lawsuit. It holds the board responsible for a pre-lawsuit comprehensive analysis of the cost and consequences of embarking on litigation. Under this provision, consent of two-thirds (2/3) of the owners is required before filing. In order to address runaway and costly litigation expenses, many draftspersons use Section 4 of the above-quoted ADR clause by requiring informed owner review, thus vesting the power to make the ultimate decision in the co-owners.

Community Harmony

Skilled mediators are able to neutralize bitterness and anger that stems from community disputes. In community-related disputes the winners are often also losers. Community disputants, unlike business disputants, cannot walk away from each other easily. Short of uprooting a family, the contestants will continue to live in the same community after resolution. Enlightened CICs, aware that inchoate discord is inherent in community living, can, and I believe wisely, engage a private dispute resolution service provider who is always on call—just like the plumber who is on call when a plumbing problem arises. Some of these providers exist ready to counsel communities even before disputes ripen into controversies requiring a med-arb, arbitration or litigation solution. Community harmony is the ultimate objective. A mediation requirement that builds in a mandatory cooling-off period before an owner or association pulls the litigation trigger is desirable. Avoiding litigation will promote harmony, with the attendant benefit of relieving overcrowded dockets. Light—not heat—is the environment that people of good-will seek in their communities. The med-arb process provides that environment.

Conclusion

CIC ADR legislation is desirable but, to be most effective, these statutes should encourage (rather than mandate) the incorporation of ADR provisions in community regime documents. They should also provide that an ADR provision in a master deed or declaration is binding on a party who purchases a unit provided that the prospective purchaser has been informed of its content.

In the aspirational world of community living, a seller of a CIC property may someday soon advertise a condominium for sale in the following way:

“Spacious 1900 square foot condominium, complete with many modern amenities; sharing beautiful common areas with other owners who live together in harmony.”

Hopefully, this article will contribute to the hastening of that day.