



PERSPECTIVE

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NEIGHBORHOOD MEDIATION PROGRAMS AND HOMEOWNER ASSOCIATION DISPUTES

By Royi Moas, Esq.

“Parties to a mediation should participate by negotiating in good faith, seeking viable solutions, communicating openly and preparing accordingly.”

Neighborhood mediation should be incorporated into associations’ dispute resolution philosophy!

THE MEDIATION PROCESS AND THE ROLE OF THE MEDIATOR

According to the Clark County Neighborhood Justice Center (herein, “NJC”), which offers free mediation service, “mediation is a process that assists disputing parties to resolve their differences confidentially and reach a mutually satisfactory agreement with the help of a trained, neutral third party mediator.”² The process itself is voluntary. Typically, a party in a dispute files a request with the NJC for a mediation session and the other parties are thereafter invited. The parties schedule the mediation at a mutually agreeable place and time to meet with a trained mediator. Washoe County has a similar service called the Neighborhood Mediation Center.³

Most people have heard of mediation but are unsure of what to expect. A mediation involves all parties meeting together in a room and discussing the

dispute. It also includes private sessions with the mediator. A mediator acts as a neutral third party during a mediation and helps facilitate open dialogue about positions and goals. The mediation starts with an opening statement by the mediator. The opening statement familiarizes the parties with the process. The following is a small excerpt from a facilitative mediator’s opening statement.⁴

“I would like to start by thanking you for joining us and making this

In a neighbor to neighbor dispute, the issue being mediated is not normally the basic core of the dispute. Mediators have found that the disagreement started with something else.

effort to potentially resolve the dispute that has brought us here today. I am not a judge and this is not a formal proceeding. As you can see there is no jury present nor is there someone here to tell you that you are right or wrong for feeling how you feel. I am not here to criticize, evaluate or tell you if you are right or wrong. And, while I am

an attorney by profession, that does not change the fact that as a mediator I am not your attorney nor am I here to give you legal advice. I am here to facilitate conversation and discussion. Since this is not a formal proceeding, I would like you to simply call me by my first name.

After I am done explaining eve-

*Wolf, Rifkin, Shapiro,
Schulman & Rabkin,
LLP*

A Full Service Law Firm

*3556 E. Russell Rd, #200
Las Vegas, NV 89120
(702) 341-5200
(702) 341-5300 Fax
seblv@aol.com*

rything regarding the process, I will ask one party to start and tell us in joint session what has brought them here today. Following that I will ask the other party or parties to do the same. The purpose of this is so that all involved have an idea of why we are here. I ask that there be no interruptions during this time. I encourage the parties to talk about the events that have occurred, but more importantly to address the interests and concerns they have. After all parties have had an opportunity to speak, I may ask some questions. Thereafter, I will ask that we meet privately. During these private sessions everything that you tell me is confidential. It will be an opportunity for the parties to express things that they may not have felt comfortable expressing openly. I will have at least one private session with each party and most likely more than one. After these private sessions we will return to this meeting room and have a final discussion in hopes of resolving the issues.”

The mediator thereafter explains the benefits of mediation and what parties can expect. Also, a mediation will differ depending on whether the mediator follows an evaluative or facilitative method. A facilitative mediator strives not to evaluate the parties’ positions. Instead, the mediator tries to understand perceptions, interests, needs, wants and the like. Conversely, an evaluative mediator will give an opinion as to whether a position is reasonable and whether it would be successful in court. Neighborhood mediation programs tend to use the facilitative approach more often than the evaluative approach. The advantage to facilitative mediation in homeowner disputes is that the parties can reach a more sustainable resolution. Regardless of which approach is used, a mediator will seek out potential resolutions and compromises that may or may not be apparent.

THE ROLE OF THE PARTIES

Parties to a mediation should participate by negotiating in good faith, seeking viable solutions, communicating openly and preparing accordingly. Prior to the mediation, parties should think about potential resolutions to the dispute as well as the different scenarios included therein. Mediations are more often stalled because of the lack of preparation rather than a party’s stubbornness. Lack of preparation includes not having the correct parties present and not having the necessary information available. More often than not, certain documents are helpful to mediation participants in making decisions. While, it would be incorrect for a party to view these documents as evidence, these documents are

tools for the preparing party. For example, a party may want the most current amount owed on an account, or the most current version of the association rules. Being prepared means being ready, willing and able to engage in settlement conversation. Such preparation will allow association participants to reap the most benefits from the process.

COSTS AND BENEFITS ASSOCIATIONS SHOULD CONSIDER IN UTILIZING NEIGHBORHOOD MEDIATION

Associations should consider all the advantages and disadvantageous in utilizing a neighborhood mediation program. Throughout the last few decades, neighborhood mediation programs have been hailed for their success rates. Most counties have a free neighborhood mediation program available to the community. The Clark County Neighborhood Justice Center, established in 1991 offers free mediation services to residents, businesses and organizations alike. For associations it can provide numerous advantages in handling disputes.

Organizations like the Neighborhood Justice Center claim that they are: (1) Successful in that approximately 76% of mediated disputes result in a written agreement, (2) Effective in that mediated agreements are more likely to be fulfilled than court orders, (3) Cost effective in that there is no charge to the parties, (4) Time effective in that mediators are ready to mediate at the parties pleasure, (5) Convenient in that the mediators can mediate in a safe convenient location, and (6) Discrete in that mediations are conducted privately and with confidentiality provisions.

Moreover, mediation may occur at any stage of a dispute. Cases may be forwarded to mediation as early or late as the parties desire. Mediations have been conducted to prevent disputes from occurring, and to aid parties in avoiding disputes. Sometime, even after winning a legal case in court, a party that decides to appeal may be required to participate in a mediation settlement program. So, there is no doubt of the value obtained through swift sustainable resolution.

Also, a quick resolution may save associations the costs associated with hiring litigation attorneys, arbitrators, experts, and the like. Parties in litigation often overlook the fact that as litigation continues the parties’ positions become more polarized. Conversely, parties assume that the longer they wait and the closer they

come to trial, the better their position to reach settlement. In most instances the opposite is true. For example, when a homeowner has spent time and money on litigation, there is less of the same available for resolution as the case proceeds. Additionally, associations may face successful legal battles only to discover that the opposing party has become insolvent as a result of the litigation. To such extent, mediation is helpful in crafting sustainable resolutions and thereby building morale in the community instead of an eventual lose-lose situation.

Probably the most advantageous part with respect to associations is that neighborhood mediation can help build long term sustainable solutions. Unlike a court which awards money damages, a mediator can help the parties craft an agreement that is mutually advantageous and workable. As compared with being told what to do by a judge, parties are more likely to abide by an agreement they helped reach. For example, in an architectural dispute between a homeowner and the association, a court may be able to order the homeowner to pay the fine and fix the violation. However, a mediation may yield endless possible resolutions, including having the disgruntled homeowner help in modernizing the guidelines, serving on a committee, assisting the board, and developing a compromised resolution making it financially feasible for the homeowner and the association.

Also, since the mediator does not act as a judge, the parties are more comfortable sharing information with the mediator that might not otherwise be shared with the court. Such open dialogue has a tendency of developing more sustainable solutions. For example, at trial, attorneys for a homeowner will concentrate on an association's unreasonable policy rather than the notices their client received or their client's financial position. At a mediation parties are more comfortable conceding a point and discussing how to change the policy or comply with the policy in the future. The parties can work out a payment plan or a compromise that will work for all involved. Additionally, the association may discover that it needs to clarify ambiguities, and reach out to homeowners in the same position. Regardless, at a mediation, the parties feel more comfortable talking about the real issues, without having the fear of being judged.

While mediation offers advantages, an association should consider the disadvantages as well. Neighborhood mediation is a voluntary process and the parties are not compelled to participate. Therefore, get-

ting a homeowner to cooperate may be just as hard as getting them to comply with the rules or attend a hearing. Additionally, certain violations may require immediate court intervention, especially if they involve irreparable harm. In such a situation neighborhood mediation may not be quick enough to prevent the harm. On the same note, some associations are concerned that attempting to mediate a dispute will simply delay the already procedurally intensive process.

Currently, most actions between associations and homeowners require submission of the claim to mediation or arbitration through the Nevada Real Estate Division prior to litigation.⁵ A Board should consider that participating in a neighborhood mediation will not relieve the association of having to go through the Division's ADR Program if the process is unsuccessful. Additionally, if an association institutes a dispute resolution program it will be required to exhaust those avenues prior to filing a claim with the Division.

These advantages and disadvantages should be considered by the board prior to instituting a policy or pursuing a mediation. However, given the extremely high resolution rates of neighborhood mediation programs, most non-emergency disputes can be resolved through mediation. As such, for most associations, the benefits will far outweigh any costs.

DEVELOPING A PROACTIVE CULTURE FOR UTILIZING NEIGHBORHOOD MEDIATION

Community Association Managers and members of the Board can take advantage of the mediation programs offered to businesses and organizations with little to no cost. The first step begins with education. Convincing board members to consider the advantages of mediation can begin with a training session and demonstration. Programs such as the Neighborhood Justice Center, offer free conflict resolution training and mediation orientation sessions. Experienced mediators are available and commonly come to homeowner meetings to demonstrate the advantages of mediation. Second, the Association should consider giving mediation a chance to see if it is right for the particular association. As a mediator that has conducted mediations for organization, neighbors, companies, and homeowners, I can say that it is appropriate for most entities.

In preparing for a mediation, the board should consider the question of authority similar to if it were to

participate in a mediation through the Real Estate Division. The board should make sure that it does not undercut the process by sending a representative who does not have authority to compromise. Finally, based on the association's experience, the members of the board should consider instituting a policy for dispute resolution. Many times associations are unsure how to handle disputes that are not typical, and having a policy in place may effectively ensure avoidance of costly and timely mistakes by an other wise good intentioned board.

A MEDIATORS' PERSPECTIVE

As a mediator I strongly believe that the escalation of association related disputes can be avoided through mediation. My personal view is that at the end of the day homeowners, boards and mediators themselves have much to learn about what goes into building successful sustainable relationships in the community. Instead of concentrating on the fight and causing positions to become increasingly polarized a mediator can direct the parties to concentrate on goals. Typically, parties are willing to recognize a common goal and a dispute with one homeowner may signify a underlying concern in the community as opposed to an isolated incident. As such, I believe that homeowners in a Common Interest Community will benefit from participating neighborhood mediation programs.

Recently I participated as a mediator for a dispute between homeowners that were not part of an association. The most crucial part of the mediation was identifying the parties' goals as coinciding with each others. Once the parties came to an agreement that they both cared about the appearance of their properties, the safety in the neighborhood, and the property values of the community, it was easy to identify the common interests that resulted in working towards a solution. At the end of the day, both parties took upon themselves more responsibility than they had previously demanded from the other.

Regardless of the substance of the dispute, I always make it a point to remind the parties that it is their dispute, not the mediators, nor the courts. At the end of the day, it is the members of the association and the vendors of an association that have to live and work together, not the court, judge, arbitrator or mediator. This helps the parties appreciate the importance of coming together and building sustainable relationships and goals for the future.



1. This article is based on my experiences as a mediator for different organizations in California and Nevada and my general overall positive experiences with the process. I have been an attorney with the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP. for over two years. Prior to joining the legal field I volunteered as a neighborhood mediator for the Clark County Neighborhood Justice Center. In 2003 I started conducting mediation sessions for the NJC, and later attended law school at Pepperdine University School of Law in Malibu, California. While obtaining my law degree I completed my Master's in Dispute Resolution at the Straus Institute for Dispute Resolution at Pepperdine University. As part of the program I conducted hundreds of mediations for the California Center of Academic Mediation Professionals, the Los Angeles Superior Court, and as Law Clerk for the Honorable Judge Alexander H. William, III in Downtown, Los Angeles. Currently, I am a practicing litigation attorney for the firm as well as a Foreclosure Mediator for the Nevada Foreclosure Mediation Program which was instituted on July 1, 2009.
2. <http://www.clarkcountycourts.us/lvjc/NJC/NJC.htm>
3. Contact Information: (a) Clark County Neighborhood Justice Center, 330 S. 3rd Street, Suite 600, Las Vegas, Nevada 89101, c/o Malcolm White, Senior Mediator/Instructor (702) 455-3898; (b) Neighborhood Mediation Center, 124 Ridge Street, Reno, NV 89501, (775) 788-2127
4. A mediator's opening statement will be different every time, and some organizations may require their mediators to include certain disclaimers regarding confidentiality and other important elements that are not included in the example.
5. See NRS 38.300 through NRS 38.360