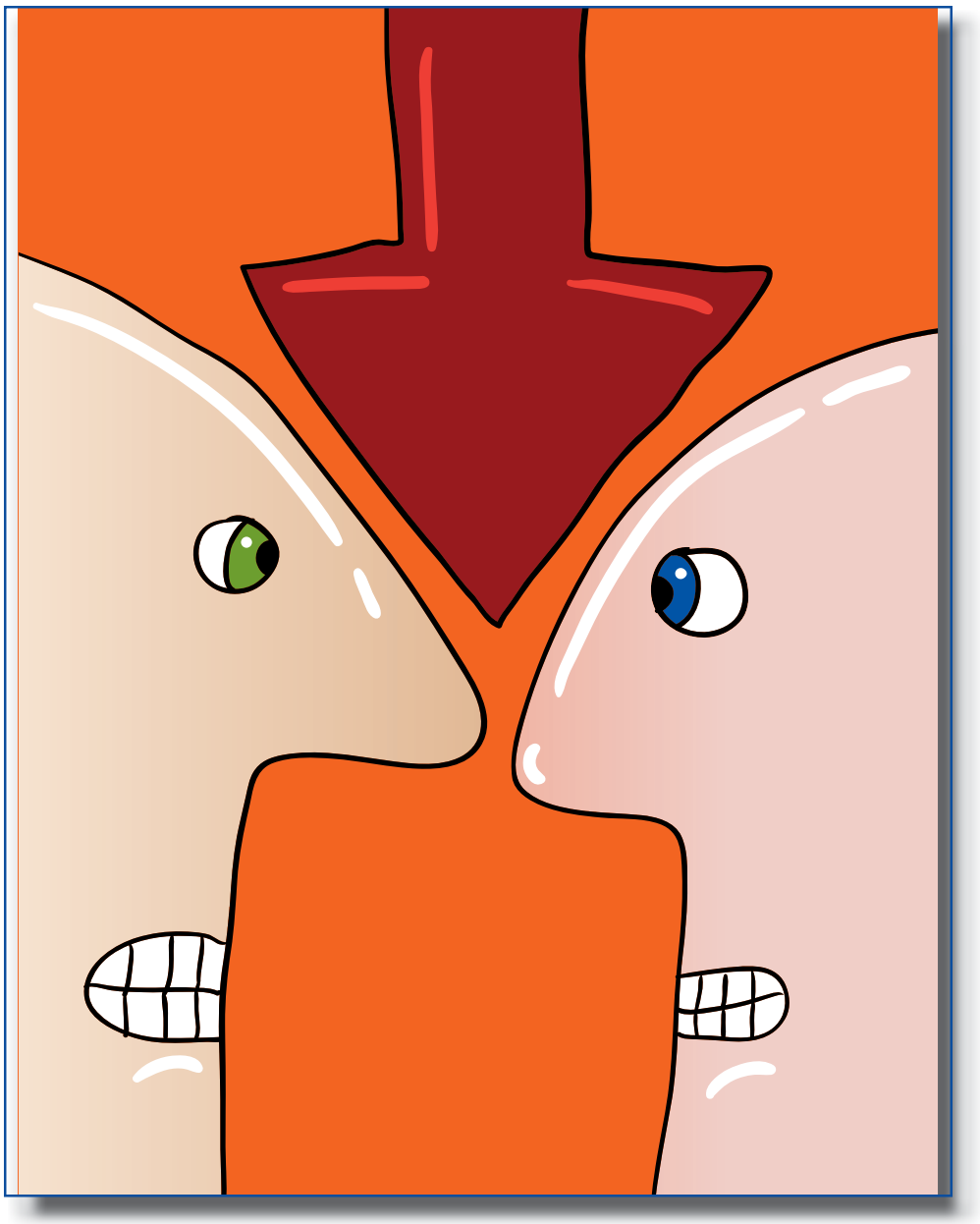
BUILDING BRIDGES, NOT FENCES

Resolving Community Disputes in a Neighborly Manner Without Litigation.

By Gregory S. Cagle, Esq.

Enforcement of restrictive covenants can be one of the most challenging endeavors faced by a homeowners association. Frequently, restrictive covenant enforcement can generate high emotions and even generate full blown "neighborhood disputes" or lead to physical confrontations between neighbors; after all, it is well known that emotions run higher and tempers shorter the closer an issue gets to a person's front door.



In most cases of restrictive covenant enforcement, the form of all communications from a homeowners association to a homeowner regarding a perceived restrictive covenant violation are demand letters from the association's manager or its legal counsel. Often, such correspondence is viewed by homeowners as offensive or heavy-handed. By the time there is an actual meeting between the Board of Directors and a homeowner, if one even occurs, the homeowner and/or the board has often already become so entrenched in a hostile or defensive position that it is difficult for either party to resolve the dispute on their own and inevitably litigation becomes the sole means of resolving the dispute.

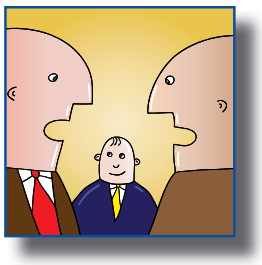
Litigation is an expensive and limited mechanism for resolving disputes where the subject of the dispute is not solely pecuniary. In addition, litigation is divisive and not conducive to building communal relationships between homeowners and neighbors. Unlike litigation between two parties to a business contract, at the end of a lawsuit between a homeowners association and a homeowner, the parties do not simply walk away, but must continue to be neighbors and live together in the same community.

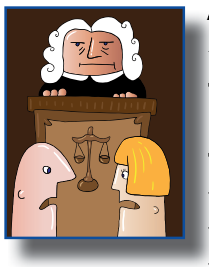
Alternative Dispute Resolution

To address these issues, a growing trend among legal practitioners who draft governing documents for master-planned communities and condominiums is to include mandatory alternative dispute resolution procedures for resolution of restrictive covenant violations and most other disputes that may arise in an association-governed community. In addition, many states outside of Texas have enacted statutory laws requiring existing homeowners associations to adopt alternative dispute resolution procedures.

So what are alternative dispute resolution procedures? How do they work and why should Texas homeowners associations consider making alternative dispute resolution procedures a part of resolving disputes with homeowners? Well, there are many forms of alternative dispute resolution, but the two most common are mediation and arbitration. While most people have heard of such terms, it is commonly thought that such terms are somewhat synonymous and mean the same thing. Such terms, however, refer to two very distinct alternative processes for resolving disputes.

In simple terms, mediation refers to a facilitated settlement negotiation between the parties to a dispute which is conducted by an independent facilitator called a "mediator." A mediator has no authority to make a "ruling" on the merits of the dispute. The mediator's role is to assist the parties in reaching an amicable agreement that resolves the dispute. While the participation of parties in the mediation process can be either voluntary or mandatory, the reaching of a resolution or agreement between the parties at mediation is completely voluntary. In other words, a party can be forced to participate in the mediation process but he or she cannot be required to actually reach an agreement with the other side.



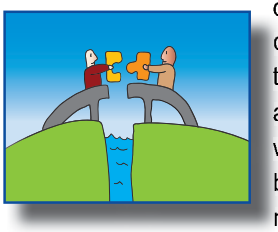


Arbitration, on the other hand, is in its simplest description a private trial overseen by a privately retained judge, called an "arbitrator," which may consist of a single arbitrator or a panel of arbitrators. Unlike a public trial process at the local courthouse, the parties in arbitration have some control over the selection of the arbitrator or arbitrators who will hear the case and make a ruling, who are often industry experts (instead of judges) that may or may not even be lawyers. Unlike mediation, the arbitrator or panel of arbitrators hears evidence presented by both parties and makes a ruling deciding the case. While the participation of parties in the arbitration process can also be either voluntary or mandatory, the agreement to arbitrate can provide for either non-binding arbitration (in which the parties can choose to accept the arbitration ruling or disregard it and proceed to litigation) or binding arbitration (whereby the parties are required to accept the arbitration ruling and which has the same affect as a judgment rendered by a judge).

While arbitration is considered an alternative method to traditional litigation for resolving disputes, many of the same problems with resolving disputes by litigation equally apply to the arbitration process as well. Mediation, on the other hand, is an ideal method for resolving community disputes in a neighborly manner and, most importantly, without the toxic affects generally created by litigation. First, the mediation process is designed to allow the parties to express their feelings or thoughts without derailing the resolution process. The parties are generally separated into separate rooms and the mediator serves as a go-between, moving

from room to room communicating the other side's respective position. A trained mediator is also well-equipped to assist parties involved in emotional and divisive disputes with working through the obstacles that generally obstruct parties from seeing beyond their immediate feelings and coming up with solutions for reaching a mutually agreeable resolution of a dispute.

More importantly, the mediation process gives parties more control over the ultimate form of the resolution of the dispute and an opportunity to develop a creative win-win resolution that would otherwise be unobtainable through litigation. The trial process involves submitting the form of the resolution to a judge or jury of people who are not vested in the community or in the long-term effects of their determination. Moreover, judges and juries are very restricted in the type of remedy that may be awarded to the prevailing party in a lawsuit, and such remedy is never a win-win for both parties and generally leaves even the "winning" party with a resolution that fails to fully resolve the dispute. Mediation, however, provides an opportunity for both the homeowners association and the homeowner to retain control over the outcome, to formulate as creative a resolution as necessary to amicably resolve the dispute, and most importantly, to pave the way for repairing or continuing to build a better relationship between neighbors.



It is often said "good fences make good neighbors," but it is also equally well known that when you "build bridges instead of walls, you will have a friend." While it is inevitable that disputes will arise in association-governed communities between homeowners associations and homeowners, such disputes do not have to result in derision and divisiveness. If an association-governed community does not already have alternative dispute resolution procedures in place, it should consider their adoption. It could save the community from not only the high cost of legal fees normally incurred in litigation, but also from the erosion of its "community" spirit and character that will make its homeowners long for good fences.

Gregory S. Cagle is a partner in the law firm of Armbrust & Brown, PLLC, in Austin Texas and has been representing Texas Homeowners Associations and homeowners for more than ten years. He is a member of the Community Associations Institute and a frequent speaker on topics related to association-governed communities.