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The Road Not Often Taken: Alternative Dispute Resolution for Common Interest Communities in North Carolina

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The Road Not Often Taken
Alternative Dispute Resolution for Common Interest
Communities in North Carolina

INTRODUCTION

With the global warming debate continuing to brew, homeowners who hang their clothes out to dry can be considered either model citizens for conserving energy, or renegades who should be fined, or even sued. The perspective may just depend on where the homeowner lives. In an association-governed community that prohibits clotheslines, the homeowner is probably looked at as a renegade. This “right to dry” debate is one of many conflicts raging as the number of homeowner associations increases across the nation and more residents become aware of the restrictions they accepted when they purchased their home within their community. “Private governments” run by homeowner associations have become a ubiquitous part of the real estate landscape. The issues of inherent conflict within a community cut across racial and socioeconomic boundaries since private neighborhood associations are created in low income neighborhoods as well as wealthy gated communities. At the heart of the issue is not so much whether drying clothes outdoors will significantly affect global warming, but rather how neighbors with different values can work through their differences and still live together in community.

This Comment will seek to identify the need for an effective alternative to litigation to resolve disputes originating in the context of a common interest community, specifically under the Planned Community Act of North Carolina. A “common interest community,” or CIC, is a residential development where a homeowners association manages commonly-owned areas or amenities, enforces rules and regulations, and collects assessments in support of the common elements. The North Carolina Planned Community Act defines “planned community” as real estate where a lot owner is obligated by a declaration to contribute to expenses to “maintain, improve, or benefit other lots or other real estate” in the community. While a broad variety of disputes may

1. Anne Marie Chaker, Battle Lines Drawn over Drying Clothes Outside, News & Observer, September 28, 2007, at 10E.
affect these communities, the focus here will be primarily on conflicts that arise between homeowners, or between a homeowner and his or her association. This Comment will consider what other states have done to address the need to effectively resolve these disputes, and offer recommendations on the role the State of North Carolina should play in implementing alternative dispute resolution (ADR) for common interest communities.

I. WHY ADR FOR COMMON INTEREST COMMUNITIES?

The nature of living in a community lends itself to the idea of working out disputes in a collaborative, rather than adversarial way. When neighbors are joined together by common interests, it is to their benefit to seek to resolve any thorny issues in a manner that builds relationships, rather than tearing them down.

The potential for conflict within and without CICs is significant and likely to increase as homeowners associations proliferate. Internal conflicts are often the most disruptive of community, involving board members, owners, and managing agents. The types of conflicts can include architectural rules and regulations, use of common property and common elements, the collection of assessments, and a variety of other concerns regarding the operation of the community. External disputes can also generate conflict, such as disputes between vendors and the association. While ADR is likely to be helpful when dealing with external parties as well, their lesser relevance to statutory application will exclude them from consideration here.

A. The Structure of Collective Ownership

Collective ownership of CICs is typically in one of three forms: a planned community, a condominium, or a cooperative. In a planned community, the owner of a lot automatically becomes a member of the community's homeowners association when the property is purchased. The homeowners association operates as a separate legal entity and is organized as a non-profit in most jurisdictions. The association holds title to the common areas and has the responsibility of managing these areas, which can include streets, swimming pools, parks, or other shared assets.

In a condominium, the individual unit owners hold a percentage interest in the common areas as “tenants in common.” Since the ownership of a unit typically does not include the land underneath the unit or dividing walls, stairways, roofs, etc., these elements are part of the common areas, which also may include any green space, pools, tennis courts, or other neighborhood amenities. The condominium association, made up of unit owners, is governed similar to a homeowners association.

A cooperative is a form of ownership where the entire property is jointly held by all the owners, usually comprising a single building complex. Although this paper will focus primarily on homeowners associations in planned communities, it is recognized that all three types of ownership share similar challenges of community living, including the need for effective dispute resolution.

B. The Nature of Common Interest Communities

Homeowners associations have been likened to “private governments.” As such, they have remarkable power to affect the quality of the lives of those who live in the community. In particular, homeowners associations have the power to regulate behavior in the community through the use of covenants, conditions, and restrictions (CC&Rs), which are part of the legal documents of the association and are in place by the time the owner purchases the property.

Some have said that the rise of common interest communities may have restricted individual freedom more than any other social development in the second half of the twentieth century. There are millions of people who have chosen to live in a community governed by a homeowners association, although there is some question as to whether the typical home buyer has any idea of the impact the CC&Rs will have on his or her life. The rules that a homeowner accepts when he or she purchases property in a planned community can be extremely invasive, from requirements for architectural designs to the number and maximum weight of an owner's pets. The CC&Rs can

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9. Id.
10. Id.
11. Id.
12. Id.
15. French, supra note 13, at 364.
be enforced by any owner in the planned community, as well as by the
association itself.16

The board of a CIC is comprised of volunteers who are members
of the association by virtue of their ownership of a lot. Board officers
and directors serve without pay and most do not have training for their
positions, including training in dispute resolution.17

Common interest communities have been increasing over the past
40 years, with approximately 58.8 million Americans now living in
295,700 association-governed communities.18 In North Carolina,
there are over 15,206 homeowners associations representing more
than two million households.19 Fifty-three percent of owner-occupied
households in North Carolina are members of homeowners associa-
tions.20 Surveys by Zogby International in 2005 and 2007 indicate
that the great majority of members in homeowners associations get
along well with their immediate neighbors.21 However, many home-
owners do not.22 The 2005 survey indicated that almost one in four
homeowners who belong to associations (23%) have brought a com-
plaint about another member to the association board or the man-
ager.23 Of these, 24% were resolved unsatisfactorily.24 Discontent
with community managers, in particular, has risen according to the
more recent survey.25 As the number of CICs increases, disputes
among residents, associations, and managers are likely to increase as
well.

16. Id.
17. See id. at 363-64.
about/facts.cfm (last visited Jan. 16, 2008) (including homeowners associations,
condominiums, cooperatives and other planned communities).
c.com/about.aspx (last visited Jan. 31, 2008) (including townhome, condominium
and single family homeowner associations in North Carolina).
20. Id.
21. ZOGBY INT'L, NATIONAL SURVEY OF HOMEOWNER SATISFACTION 14 (Community
Associations Institute 2005); ZOGBY INT'L, FOUNDATION FOR COMMUNITY ASSOCIATION
22. Id. (indicating 5% and 3% of members in a homeowners association do not get
along with their neighbors, according to the 2005 and 2007 surveys, respectively).
When the numbers are applied to the 58.8 million Americans now living in
association-governed communities, this means that at least 1.76 million people are
unhappy with their neighbors. See supra note 18.
23. ZOGBY INT'L, NATIONAL SURVEY OF HOMEOWNER SATISFACTION, supra note 21, at
25.
24. Id.
25. ZOGBY INT'L, FOUNDATION FOR COMMUNITY ASSOCIATION RESEARCH TRACKING
POLL, supra note 21, at 6.
Homeowners who are upset about the actions of their homeowners association often have no option other than to sue. The North Carolina Real Estate Commission advises owners to sue their association and/or other property owners if the association is not performing its duties or if restrictive covenants or bylaws have been violated. The comments to the Restatement (Third) of Property: Servitudes note that “the quantity of litigation arising out of homeowner challenges to association actions in recent years may be regarded as excessive.” In some cases, this litigation is encouraged by other homeowners through the internet. The American Homeowner Resource Center was founded by disgruntled homeowners in California, and provides an online forum for irate homeowners to air their concerns. The Center’s mission is to help citizens “take back their homes” and to preserve constitutional and legal rights of owners. Some have referred to this type of reaction by homeowners as a “backlash” against what is perceived to be aggressive homeowners associations.

As more states have begun to recognize the proliferation of common interest communities and the impact they have on the lives of their citizens, legislatures have begun to pass statutes to help regulate common ownership policies and procedures. While these statutes have been helpful in setting standards, most are still relatively new and untested. North Carolina’s Planned Community Act was enacted in 1998, but relatively few cases have been appealed to the North Carolina Supreme Court regarding the Act.

C. The Option of Alternative Dispute Resolution

1. What is ADR?

The term “alternative dispute resolution” (ADR) encompasses a variety of opportunities to resolve conflict outside of court. The three most commonly used methods of ADR are negotiation, mediation, and arbitration. Other hybrids and non-judicial approaches are available


29. Id.


along the continuum of ADR options, with all tending to focus on similar goals and results.

Negotiation is an informal process of discussion and bargaining that is handled by the parties themselves. The individual parties identify the issues they want resolved, and then share their needs and interests related to the dispute, working together to craft a final agreement that is mutually acceptable.32 An example of negotiation is when neighbors contact each other directly when they have a dispute and attempt to work out a solution on their own rather than complain to their association.

Mediation also allows the parties control over their agreement, but involves the aid of a neutral third party who serves as a facilitator to help the parties move toward a solution. Although there are various models of mediation, two are of particular note. In the first, a mediator meets separately with each of the parties to discuss their interests and positions, and then continues to alternate back and forth between the parties until an agreement is reached. This format is commonly used in civil cases through the mediated settlement process of the Superior Court of North Carolina. The second is a community based model where both parties are present in the same room with the mediator facilitating the discussion and encouraging the parties to listen to each other and address each other’s interests. This method has the potential to be particularly helpful in reconciling neighborhood relationships which are likely to continue, since both parties have the opportunity to directly hear the other and correct any misperceptions. Both models can be effective in achieving the result of a mutually agreeable resolution to the dispute, and a signed agreement is usually held to be enforceable. Mediation has a strong record of success, with an eight-to-one chance of producing an agreement that satisfies both parties.33

The third method of ADR is arbitration, where the parties present their case to a neutral third party or panel who hears the evidence presented and makes a decision that is legally binding and enforceable in most jurisdictions.34 By agreement, the parties are able to control the issues to be resolved and the scope of the relief, as well as much of the procedure of the arbitration.35

33. Id. at 15.
35. Id.
2. Advantages and Disadvantages of ADR for CICs

A key advantage of ADR over litigation is the ability to focus on restoring or maintaining neighborhood relationships while dealing with the substantive facts of the dispute. Litigation tends to be "highly divisive" and has the potential to engender dissatisfaction beyond the original disputants. A conflict in a community that escalates to litigation can lead to disgruntled residents, resulting in people leaving the neighborhood or members foregoing the benefits of the common areas. It is thought that "the mere presence of a community association often prevents neighbors from attempting to work out their differences." It becomes easier to simply file a complaint with the association instead of dealing with neighbors directly. However, the result is not any better if homeowners and associations choose not to address the conflict at all because they think litigation is the only option and they are afraid of the emotional and financial risks of a lawsuit. In that case, a dispute is left to simmer without resolution and can later erupt with damaging results. If and when the dispute does go to court, the most serious damage may be to the CICs' sense of community. "The bad feelings and turmoil inflamed by the legal process may haunt an association for years, long after the original dispute has become a dim memory." In contrast, ADR helps "preserve and repair relationships and a sense of community," and "promotes creativity and flexibility" to deal with disagreements.

Other advantages of ADR include party control, cost, speed, and confidentiality. Depending on the type of ADR process, the parties are able to have varying degrees of control over the result. Negotiation and mediation allow complete control over the solution. This power is given up when one moves from mediation to arbitration and the decision is made by a neutral third party. However, the disputing parties are still usually able to maintain control over the selection of the arbitrator and can select a decision-maker with experience in homeowner or association-related disputes. Parties may also identify which issues they want the arbitrator to address and determine the procedural rules that govern the arbitration.

36. French, supra note 13, at 366.
37. Id.
39. See French, supra note 13, at 366.
40. Elisha & Wiltgen, supra note 5, at 15.
41. Id.
42. Id.
An advantage often cited by advocates for ADR is the relative cost-effectiveness and speed when compared to litigation.\textsuperscript{43} Since the parties control the process, there is no need to wait for court procedures which may result in delays. Arbitration, for example, may be completed in a matter of months rather than years, is less formal than litigation, and involves a limited range of discovery.\textsuperscript{44} The savings of time often result in financial savings for the parties, as well.

Confidentiality is another advantage for many homeowners and their associations, since bad publicity about a particularly rancorous squabble might deter others from buying into the community and lead to depressed home values. In contrast to the public nature of litigation, ADR is private and confidential.

Mediation and arbitration have been encouraged and even mandated by courts in many jurisdictions under certain circumstances. From a judicial standpoint, the main advantage is a reduction in court dockets. If litigants are able to resolve their issues outside of the courtroom, it allows for smoother and quicker processing of the cases that do need adjudication.

ADR is not without its detractors, however, and it is agreed that it is not appropriate in every situation. Some critics have expressed concern about the lack of legal representation and traditional civil procedures.\textsuperscript{45} Mandatory binding arbitration is of particular concern since its acceptance in the courts has been based on a mutually agreed contract between the parties to arbitrate. Lacking this mutual agreement, a party cannot be assumed to have waived its rights to a trial.

Generally, both parties must be willing to participate in the resolution process. This can be a challenge if one party simply wants to fight. Some people prefer to outspend and outlast their opponent for reasons that transcend the dispute at issue. An example is \textit{Campbell v. Lake Hallowell Homeowners Association}, where homeowners persistently fought their association about seemingly minor issues such as where to park their cars and the placement of a basketball hoop.\textsuperscript{46} The litigation escalated in spite of the fact that it occurred in ADR-friendly Montgomery County, Maryland, where the parties were required to


\textsuperscript{44} American Arbitration Association, \textit{supra} note 43.


\textsuperscript{46} 852 A.2d 1029 (2004).
utilize an ADR process in the early stages of the conflict. When the quarrel made it to the Maryland Court of Appeals, the court went so far as to call it “the litigatory equivalent of road rage.”

Also, whether ADR is the most efficient option in all circumstances has been questioned. If the goal is simply to force a homeowner to follow the regulations, then litigation or threat of litigation may quickly ensure that the homeowner follows the rules. “Settlement is more likely to occur when both disputing parties foresee a particular, official disposition that is imminent. Settlement so induced and thus reached ‘in the shadow of the law’ may be the best possible method of resolving disputes; it is, or at least may be, agreeably just, speedy, and cheap.” However, litigation does not necessarily solve the underlying issues of the conflict. For example, a neighbor may erect a fence in order to protect his garden from a neighbor’s dog, but the only issue addressed by the association’s regulations may be the height of the fence. Litigation in this case may result in the fence being removed or reconstructed, but it will not deal with the underlying problem of the dog and is likely to damage the relationship between neighbors even further. While it is important for the association to maintain its rights to enforce its rules and regulations, the homeowner must also have a reasonable and effective way to manage disputes with neighbors and protect against arbitrary and unfair practices by the homeowners association.

II. DISPUTE RESOLUTION UNDER NORTH CAROLINA’S PLANNED COMMUNITY ACT

The North Carolina Planned Community Act does not mention ADR, although the Act gives broad powers to homeowners associations. For example, the association may “institute, defend or intervene in litigation or administrative proceedings” whenever an issue affects the planned community. It has the power to impose charges for the late payment of assessments, and suspend privileges or services such as access to common areas if the amounts due remain unpaid for thirty days or longer. More important to homeowners who may be in conflict regarding alleged violations of CC&Rs, their association

47. Id. at 1032.
50. N.C. GEN. STAT. § 47F-3-102(4).
51. § 47F-3-102(11).
has the power to “impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association.”

The Act allows an association to craft its own procedure for imposing fines or suspending privileges, but identifies a default provision if the association’s declaration does not provide one. The process begins with a hearing before the executive board or an adjudicatory panel. If the board decides to use an adjudicatory panel, it appoints the panel which is comprised of members of the association who are not officers of the association or members of the executive board. The charged lot owner is given notice of the hearing and allowed the opportunity to be heard and to present evidence. When a decision is made, the board or panel must give notice of the decision to the owner. If a fine is imposed, it cannot exceed $100 for each day that the violation continues beyond the first five days, and it can be imposed without further hearing. A suspension of privileges or services of the planned community may also be imposed, and can be continued without further hearing until the violation is cured. The fines may be secured by a lien on the owner’s property, but the association is restricted from foreclosing on the property if the lien consists solely of fines or interest on fines.

The charged homeowner may appeal the decision of the adjudicatory panel to the full executive board if he or she gives written notice to the executive board within fifteen days after the date of decision. At that point, the board may affirm, vacate, or modify the decision of the adjudicatory panel. There is no provision for appeal beyond the executive board. If the association decides to sue the homeowner for the amount outstanding, and the homeowner loses in court, he is responsible to pay all costs and reasonable attorneys’ fees for the association.

A similar process applies when ascertaining responsibility for damages inflicted by a homeowner or an agent of the association on a common element. The specific process depends on the amount of

52. § 47F-3-102(12).
54. Id.
55. Id.
57. § 47F-3-107.1.
58. Id.
59. § 47F-3-116(e).
damages, with anything under $5,000 being covered by a hearing. There are no other provisions for the resolution of disputes in the Act.

What is most characteristic about this process is that it puts the association board squarely in a judicial role. While many association boards do a good job of trying to be impartial and fair, the nature of a private community can create a conflict of interest for board members who are also friends and neighbors. This conflict of interest may be magnified in a smaller association, where it is more likely that board members know and have personal opinions about the owners who come before them in this judicial setting. Further, the lack of experience and training in dispute resolution processes can make a board of directors cautious in their actions, especially when litigation may be involved. Resort to litigation can precipitate damage that lingers long after the final decision is made by a judge.

If a homeowner does not believe the process is fair, he or she is encouraged to sue in court. The North Carolina Real Estate Commission advises a homeowner to sue if their association is not performing its duties or if other owners violate restrictive covenants or bylaws. However, taking the dispute to court represents a significant commitment of time and money for the homeowner, as well as emotional and social risk. For the average homeowner, it is likely not worth the risk, and conflicts may be allowed to fester, impacting others in the community.

An alternative method is needed to address conflict in CICs, specifically in the North Carolina Planned Community Act. Association board members are volunteers who generally do not have the training or experience in dispute resolution to be able to manage disputes confidently and effectively. Professional managers of planned communities in North Carolina are under no requirement to be trained in methods to resolve conflict. Under the current statutory scheme, homeowners are expected to work out disputes between themselves or their association, or else litigate in court. While an ADR clause may be included in the association's governing documents, it is not required.

62. Id. at 15.
64. Bills have recently been proposed in both the North Carolina House and Senate that would license community association managers, but they do not refer to ADR. The bills would require continuing education for managers, and it is hoped that ADR will be one of the options considered in the future if they are passed. H.B. 1535, Gen. Assemb., 2007-2008 Sess. (N.C. 2007); S.B. 1315, Gen. Assemb., 2007-2008 Sess. (N.C. 2007).
The default option of North Carolina’s Planned Community Act is not adequate, especially considering that public policy favors ADR.

NORTH CAROLINA HAS A PUBLIC POLICY IN FAVOR OF ADR

North Carolina has a public policy favoring alternate methods of dispute resolution, and ADR continues to expand in its application throughout the state. Mediated settlement conferences are now required in all superior court civil actions prior to trial.65 The North Carolina Legislature established this program to facilitate the early settlement of civil cases and to make the litigation process more economical, efficient, and satisfactory.66 ADR has also been encouraged in various arenas including the family financial settlement program, as well as custody and visitation.67 District courts have utilized, and even ordered, non-binding arbitration.68 And in 2005, the North Carolina General Assembly established a new mediation program for matters referred by Clerks of Superior Court.69 The goal is to make the courts in North Carolina “a place of last, rather than first, resort.”70

Private contractual agreements to resolve disputes using ADR also have been generally upheld. When parties agree to ADR, such as when the governing documents of a homeowners association include a mediation or arbitration clause, the resulting contract is valid and enforceable by the courts. In particular, “North Carolina has a strong public policy favoring the settlement of disputes by arbitration.”71

Community mediation centers, also called dispute settlement centers, have been promoted and supported by the state, as well. North Carolina’s General Assembly found these centers to be in the public interest and promoted the “widest possible use” of them by courts and law enforcement officials.72 The first center in North Carolina was established in 1978 in Orange County, and the number of centers across the state has grown to twenty-five since then.73 The centers are

67. Id. at 104.
68. Id. at 130.
70. N. C. Bar Found., supra note 66, at 304.
involved in facilitating communication, reconciliation, and settlement of conflicts in communities, courts, and schools.\textsuperscript{74}

With this strong background in ADR and an emphasis on utilizing alternative methods of dispute resolution in North Carolina, it is instructive to look at what other states are doing to apply these concepts to the area of common interest communities.

III. Other Models and Levels of State Involvement

As CICs proliferate throughout the country, more states are reviewing their relevant statutes and making modifications to encourage the use of ADR.\textsuperscript{75} In general, the levels of government involvement in regulating the process of ADR fall into three categories: 1) silence regarding ADR; 2) statutory requirements to mediate and/or arbitrate prior to litigation; and 3) the establishment of a state ombudsman office. States have developed individualized approaches, and those that include ADR have created their own hybrid of negotiation, mediation, and arbitration that applies to CICs. While the emphasis in this comment is on the North Carolina Planned Community Act, other states have incorporated ADR into related statutes that cover other forms of CICs, such as condominiums. These related forms of CICs have similar application when it comes to dispute resolution, so they will be included in this analysis.

A. Silence on ADR

A state without an ADR provision in its statutes covering common interest communities has essentially allowed homeowners to either work out disputes between themselves or resort to litigation. Although states like North Carolina provide a procedure for imposing fines and suspending planned community privileges or services when a homeowner does not abide by the association's rules, the Planned Community Act does not address other conflicts that are likely to arise in a private neighborhood.\textsuperscript{76}

It can be argued that silence is the best option to encourage party autonomy because it allows, and may actually encourage, an ADR clause to be incorporated into the association's governing documents. However, the option to craft one's own ADR preferences is available in any state. An ADR clause is an excellent alternative if drafted properly,

\textsuperscript{74} § 7A-38.5(a).
\textsuperscript{75} Franzese, supra note 30, at 347.
\textsuperscript{76} North Carolina Planned Community Act, N.C. GEN. STAT. §§ 47F-1-101 to -3-121 (2005 & Supp. 2007).
but it does not provide for a default in the case that an appropriate clause is left out of the organizing documents. Attorneys who draft the documents are not always aware of the best ADR options. Declarants, while they may be generally supportive of resolving disputes out of court, may not consider the possibility when putting together the myriad of other details involved in developing a planned community.

Similarly, access to mediation and arbitration services is available on a voluntary basis at community dispute settlement centers or among professional attorneys and mediators. However, it is not clear how many homeowners are aware of those options and the advantages they offer.

B. Statutory Requirement for Mediation and Arbitration Prior to Litigation

Several states have included mandatory mediation or arbitration in their statutes covering common interest communities. A common thread is the acknowledgement that ADR can be helpful in navigating the challenges of collective ownership. It is important to note that in most cases, not all types of disputes are covered. This demonstrates that ADR is not a “cure all” and has its place in the menu of options for addressing grievances. Some states give homeowners and their associations the option to determine for themselves what form of ADR serves their particular needs. The key here is the flexible nature of ADR, which represents an important advantage of ADR over the court system.77

Florida is of particular interest since the state served as a model for North Carolina in 1990 when the Mediation Subcommittee of the North Carolina Bar Association’s Dispute Resolution Commission was evaluating options for ADR in superior court actions.78 Florida has provisions for ADR in its condominium statutes79 as well as in its statutes covering homeowners associations.80 For condominium disputes voluntary mediation is encouraged,81 but the parties must participate in non-binding arbitration as a condition precedent to bringing a lawsuit between unit owners and the association for certain civil actions.82 For homeowners associations, the key difference is that

77. See FLA. STAT. ANN. § 718.1255(3)(c) (West 2005).
78. N.C. BAR FOUND., supra note 66, at 41-42.
80. §§ 720.301-720.312.
81. § 718.1255(2).
82. § 718.1255(4).
mediation is required, but non-binding arbitration is not.\textsuperscript{83} The application of non-binding arbitration has been confusing to many, and has been likened to a "minefield" because of its complexity.\textsuperscript{84} The procedure is covered in detail in Chapter 44 of the Florida Statutes. It seems the most contentious part has been whether a trial de novo should be allowed after nonbinding arbitration or if an order or judgment should be entered to confirm the arbitration.\textsuperscript{85} In practice, Florida lawyers prefer mediation to non-binding arbitration.\textsuperscript{86}

The Florida legislature has found that ADR has been effective in reducing court dockets as well as giving residents a more "efficient, cost-effective option to litigation."\textsuperscript{87} It also recognized that a "flexible means of alternative dispute resolution" is needed in order to focus disputes on the most efficient way to resolve them.\textsuperscript{88} One size does not fit all disputes.

The emphasis on mediation as a positive alternative in CICs has been echoed by other states. Hawaii's condominium statutes have recently been expanded to insist on mediation as the preferred method of dispute resolution.\textsuperscript{89} Any party to a conflict between one or more unit owners and an association, the board, the manager, or another unit owner may request mediation, and once requested, the other party is required to participate.\textsuperscript{90}

In Nevada, ADR is also required before parties may bring a dispute to court, but parties have the option to choose mediation, binding arbitration, or non-binding arbitration to resolve CIC disputes.\textsuperscript{91} If the action concerns a planned community, then all administrative procedures delineated in the CC&Rs or bylaws must have been exhausted first. Time is a factor, and mediation must be completed within sixty days after the parties agree to mediate.\textsuperscript{92} If the parties choose binding arbitration, the award may be vacated and a rehearing held only upon

\textsuperscript{83} § 720.311 (2)(a), (c); see also Daniel Morman & Jonathan Whitcomb, \textit{Navigating the Nonbinding Arbitration Minefield in Florida}, 81 FLA. BJ. 19, 26 (May 2007).

\textsuperscript{84} Morman & Whitcomb, \textit{supra} note 83, at 19.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} N.C. BAR FOUND., \textit{supra} note 66, at 42 (indicating that the preference of Florida lawyers for mediation influenced the Mediation Subcommittee's decision to limit its consideration to court-ordered mediation for North Carolina).

\textsuperscript{87} FLA. STAT. ANN. § 720.311(1) (West 2005); see also § 718.1255(3)(b).

\textsuperscript{88} § 718.1255(3)(c).

\textsuperscript{89} \textit{See} HAW. REV. STAT. § 514B-161 (2007).

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} NEV. REV. STAT. ANN. § 38.310(1)(b) (West 2007).

\textsuperscript{92} § 38.330(1).
narrow grounds. In the case of either binding or non-binding arbitration, if a party fails to get a more favorable award or judgment after having the arbitration award vacated or commencing a civil action based on the arbitrated claim, the party must pay court costs and attorney’s fees.

California recently expanded their system of ADR for common interest developments (CIDs) to require each homeowners association in the state to have a “[f]air, reasonable, and expeditious procedure to resolve disputes.” In an attempt to provide a low-cost option for homeowners, the California statutes encourage the use of local dispute resolution centers, including community mediation programs. If the association does not provide a fair, reasonable, and expeditious procedure, then either of the parties may invoke a statutory procedure that requires the homeowners association to “meet and confer” with the disputing homeowner to try to reach an agreement. If the homeowner’s dispute is against another member of the community, the statute does not require the other homeowner to utilize this method, although some form of ADR must be used prior to litigation.

California has also addressed the difference between the procedures used internally within an association as distinct from the ADR process involving a neutral third party that is required prior to litigation. The internal association procedure is intended to be simple, efficient, and at no or low cost to the parties. In any case, the initiating party must first pursue some type of ADR before they can bring a dispute beyond the association and into court. This process begins when one party serves a Request for Resolution to the other. At that point, the parties are able to choose the ADR process they prefer. They have the option of mediation, arbitration, or “other [non-judicial] procedure” involving a neutral party, which may be either binding or non-binding at the discretion of the parties. This flexible approach allows the parties to tailor the process to their particular situation.
matter what method is chosen, the ADR process is to be completed within ninety days. ¹⁰¹

States have crafted their own variations on the theme of ADR in CICs. In general, the trend has been to incorporate some form of negotiation, mediation, or arbitration into statutes covering CICs.

C. State Ombudsman Office

State ombudsman programs have been more controversial. An ombudsman is generally an official who addresses the concerns of private citizens who have complaints against the government. ¹⁰² Ombuds, as they are often called, can also be found in non-governmental organizations. They have the power to receive, investigate, and report on citizens' grievances, and are frequently involved in the resolution of the disputes. ¹⁰³

Although California has been very supportive of ADR for common interest developments (CIDs), the state declined to implement a state ombudsman office. A bill was proposed in the California Assembly in 2005 that would have created an Office of the Common Interest Development Ombudsperson within the Department of Consumer Affairs which would have provided education, collected data, and resolved disputes regarding CIDs. ¹⁰⁴ Although passed by the Assembly and the Senate, the Governor vetoed the bill, stating it was "unnecessary at this time." ¹⁰⁵ He held that the effects of other recently passed legislation requiring CIDs to provide dispute resolution options were not yet known, and likely will address many of the concerns without creating the need for an entirely new state office. ¹⁰⁶

A related bill was proposed in the Senate that year which included an ombudsperson office, but was later amended to create a "full-fledged Bureau to deal with problems relating to CIDs." ¹⁰⁷ The bill

¹⁰¹ § 1369.540(a).
¹⁰² BLACK'S LAW DICTIONARY 1121 (8th ed. 2004).
¹⁰³ Id.
¹⁰⁶ Id.
was never passed. One of the most controversial aspects of the proposal was the authority given to the Bureau to remedy violations of law regarding CIDs. The Common Interest Development Bureau would have had the authority to cite homeowners associations for up to $1,000 if a dispute was submitted to the Bureau but was not resolved. Some felt it would dissuade volunteers from participating on homeowner boards. Other concerns revolved around the funding of the Bureau, saying the requirement of an annual fee would be a burden on homeowners. The Community Associations Institute instead recommended that providing more information to homeowners and volunteer directors was a better first step.

The question of whether a separate state office is needed for CICs is a matter of dispute. A study by the California Law Revision Commission in March of 2005 found that experience in Florida and Nevada had shown there was significant public demand for ombudsman services in the context of CICs. Both Florida and Nevada provide a wide range of services to homeowners and their associations through an ombudsman office for CICs. Nevada's office was created in 1997 and assists owners and associations to better understand their rights and responsibilities, as well as assisting them in processing claims under the Nevada statutes requiring mediation and arbitration. The office also maintains registration of each association in the state. It is funded by an assessment of no more than $3.00 per year per unit.

One of the advantages of a state-run ombudsman office is the potential for effective dissemination of information and training to the public. It is important that homeowners and association boards have access to information regarding options other than litigation; a state office creates a central location for the public to access this information. An argument can also be made that a central office can maintain information and statistics on CICs in the state, with the additional benefit of providing an element of control over the quality of mediation.

108. Id. at 8.
109. Id.
110. Id. at 9.
111. Id. at 10.
112. Id.
115. French, supra note 13, at 367.
and arbitration services. It is questioned, however, whether these issues could be better handled in other ways.

Montgomery County, Maryland has incorporated an ombudsman office for CICs as part of a comprehensive approach to ADR. In 1991, Montgomery County created a Commission on Common Ownership Communities (COCs) and an Office of COCs which is part of the Department of Housing and Community Affairs. All COCs are required to register. The Commission and Office offer programs to resolve disputes, as well as provide assistance with regulating association elections, budget adoptions, and enforcement procedures. They also provide information on ADR to homeowners and board members. Parties must have made a good faith effort to resolve the matter through association procedures before filing a formal dispute with the COC Office. The Office’s jurisdiction is limited to certain types of disputes, including fines and assessments, alteration of a common area, or failure of the association to properly conduct elections or maintain financial records. The regulation explicitly excludes disputes involving title, percentage of interest or voting rights in a unit, warranties, collection of assessments “validly levied” against a party, or the business judgment of an association deciding whether or not to take action on a matter.

Montgomery County has the advantage of being supported by a broad state-wide concerted effort to acculturate ADR into the judicial life of the state. Led by the Chief Judge of Maryland’s Court of Appeals, the Maryland ADR Commission created an action plan and report in 1999 that called for innovative ways to incorporate ADR in all levels of state and community life. Lou Gieszl, Executive Director of Maryland Judiciary’s Mediation and Conflict Resolution Office (MACRO), advocates an approach for common interest communities that recognizes homeowners associations as business entities and puts the ADR process in the context of an integrated conflict management system. An integrated system would ensure that information for effective dispute resolution is available at the earliest possible point. Multiple ADR options would be presented, with parties allowed to select the option

117. Id.
118. Id.
119. Id.
121. Gieszl, supra note 38, at 17.
that best serves their needs. The emphasis is on fostering a culture that "welcomes good faith dissent" and encourages people to take a problem-solving approach to conflict, rather than a litigious one.\textsuperscript{122}

Much can be said about the advantages of an integrated approach, especially when applied to CICs. It may be the most effective when it is supported by a coordinated state-wide effort boosting ADR methods. The question still remains, however, what level of government support is necessary to encourage and implement greater use of ADR in CICs.

IV. APPLICATION TO NORTH CAROLINA: MOVING FORWARD WITH ADR

It is clear that the number of homeowners associations will continue to grow in North Carolina, since the Planned Community Act requires a homeowners association for planned residential communities created after January 1, 1999 and consisting of twenty or more lots.\textsuperscript{123} Along with this increase of "private governments" will come an increased number of volunteer association board members and homeowners who are likely to face conflict. The court system in North Carolina will continue to feel pressure from overloaded court dockets and will look for ways to embrace effective and appropriate alternatives. The way forward may involve a "menu" of settlement procedures offered to potential litigants.\textsuperscript{124} ADR is particularly appropriate to CICs, and should be pursued in North Carolina, particularly in the light of the state's public policy in its favor.

As California has recognized, there are two levels of resolving disputes in the context of CICs. One is the internal process of the homeowners association, and all efforts should be made to encourage the resolution of conflicts at the lowest possible level. This requires information, education, and training for volunteer board members, as well as for professional managers of CICs. Local dispute settlement centers are positioned to serve this need well, although their role should be acknowledged by the state through increased funding so they are able to maintain low-cost training options as the need increases. These centers are available to directly assist homeowners and associations in the resolution of disputes as well. Professional mediators and attorneys trained in ADR will also be important in assisting homeowners and associations with out-of-court dispute resolution.

In addition, a state statute is needed that would require mandatory negotiation or mediation prior to any litigation for CIC dis-

\textsuperscript{122} Id.
\textsuperscript{123} N.C. GEN. STAT. § 47F-1-102 (2005).
\textsuperscript{124} N.C. BAR FOUND., supra note 66, at 314.
disputes. In particular, the statute should apply to the Planned Community Act. Without leadership from the state, it is likely that these "private governments" will continue to view litigation as the only viable option for resolving disputes. A mandatory statute will not only reduce court dockets, now and in the future, but will help set the standard for a positive view of community living. A mandatory default procedure is likely to increase the number of declarants who include ADR clauses in their organizing documents as well. The statute should, of course, allow declarants or associations to maintain their autonomy and control by creating their own procedure if they prefer.

It is important to identify certain issues that should be considered in more depth prior to the proposal and implementation of a statute mandating ADR in CICs. First, it seems clear that the statute should be as flexible as possible, allowing the parties to select the mode of ADR that fits the needs of their dispute. But what if the parties cannot even agree on this? Should a default option of "med/arb" be instituted? This would mandate that the parties must make a good faith attempt to work toward a mutual agreement on the substantive issues, but if an impasse is declared, the dispute must be submitted to arbitration. Arbitration could be binding or non-binding at the discretion of the parties.

How does the state ensure that each party retains his or her right to a trial? If the parties voluntarily choose binding arbitration, any decision will generally be upheld by a court. However, if one party dissents, or non-binding arbitration is chosen, either party should be able to continue to court if they are dissatisfied. The question then arises whether the party bringing the action should have the risk of receiving a less favorable judgment in court and paying court costs and attorneys fees if they lose.

Another consideration is the type of disputes to be included. Most states limit the types of conflicts that can be brought under an ADR statute for CICs. While it is beyond the scope of this paper to analyze the types of disputes included or excluded in ADR statutes for CICs and the reasons behind their inclusion or exclusion, it would be necessary to evaluate these considerations before a statute is proposed.

The question of controlling the quality of ADR processes is another consideration, although the pieces are already in place for North Carolina to be able to handle the addition of CIC-related disputes. Over 1,200 certified mediators, including attorneys and non-

125. The term "med/arb" refers to a requirement to move to arbitration if the parties cannot resolve the issue voluntarily.
attorneys, already provide court-based mediation services throughout the state. Mediators are certified and regulated by the North Carolina Dispute Resolution Commission, a state run organization that is active in expanding the role of ADR in many areas. In addition, community dispute resolution centers are already in place in many local communities and serve as a source of valuable information and expertise. There are currently twenty-five centers with forty-five office locations in North Carolina, coordinating over 2,000 trained volunteer mediators. These current resources should be utilized and augmented to support an expanded role of ADR relating to CICs.

It is because of this current foundation of ADR that the creation of an ombudsman office is not necessary at this point. It is of note that the Community Associations Institute, a respected trade group, has argued successfully against ombudsmen offices in California and Virginia. A spokesman for the organization indicated that they believe "it makes more sense to give residents and associations the tools to resolve their problems without placing this burden on state government." While a statute requiring ADR would be beneficial in encouraging out-of-court alternatives for homeowners and their associations, an ombudsman office would create an additional bureaucratic layer. It seems more efficient to put mandatory ADR statutes into place first, utilizing the foundational resources that currently exist and augmenting them as needed. A state office may be appropriate at a later time, especially if it is part of a comprehensive coordinated statewide effort to advance ADR.

**CONCLUSION**

Common interest communities have changed the landscape of residential real estate in America, and they will continue to increase in number in North Carolina. As neighbors learn to live within the bounds of their communities, North Carolina has a special role to play in ensuring peace and harmony among its citizens. The state is also well served by ensuring that the courts are used as a last resort, rather than the first step, in the process of resolving conflict. With this in

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127. Mediation Network of North Carolina, supra note 73.
129. Id.
mind, North Carolina should create a statute mandating ADR prior to litigation for CICs, particularly under the Planned Community Act. A related statute should address the need for information, education, and training for homeowners and their associations. In this way, CICs will be better able to deal with conflict at the lowest possible level.

North Carolina has the opportunity to assist its citizens as they navigate the waters of homeowners associations and CICs. It is to North Carolina’s advantage if people desire to move here, not just for the jobs or the climate, but because the state is known as a place that supports and encourages community.

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