



The Overweight Pet

Why Bother Mediating this Case?

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As a mediator and arbitrator who works a great deal in the condominium field, I am often told that some cases are not worth mediating as the breach of the Rules or Declaration is so obvious or blatant that there is no room for a compromise resolution.

Sometimes that is absolutely correct but even with this obviousness, in most cases mediation can still bring about a better solution for everyone involved. Condominiums are communities and communities are about relationships. Mediation is the only dispute resolution process that holds out hope of repairing and even improving relationships damaged through conflict. To illustrate the point, I will use a recent case that I mediated where mediation helped reach an agreement that all parties could live with.

The facts are basically as follows. A luxury high-rise condominium building had a 25 lb. weight restriction on dogs that was set out in the Declaration. While the courts have held that a “no dogs” rule may be unreasonable, they have generally held that a limitation on the weight of the animal is reasonable. In this case it really did not matter since the limitation was in the Declaration and courts have held

that while condominium rules must be reasonable, the same does not hold true for the Declaration, which can



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contain unreasonable terms and still be enforceable.

The unit owner had purchased two units in the building as investments with both units being occupied by tenants. Because of a change in his personal circumstances, the

owner moved in to one of the units and had a good relationship with the other occupants of the condominium. Shortly after moving in, the owner bought a puppy. At this stage there was no problem as the puppy was far under the weight limit.

Unfortunately, several months later the “puppy” had grown to almost almost 60 lbs. While the dog itself was good-natured, several people complained that the dog intimidated them and that it was clearly over the weight limit for the building.

The condominium board instructed its manager to write to the owner and demand that he comply with the Declaration and remove the dog. The owner ignored the first letter and several subsequent letters all of which became increasingly adversarial. Finally the board decided to involve its lawyers in the dispute. Their lawyer wrote a subsequent demand that was also ignored. At this stage, the board members were prepared to instruct their lawyer to go to court and obtain a compliance order. The lawyer advised the board to try and mediate the dispute as a quicker, less expensive alternative. Surprisingly the unit owner agreed to mediate. The mediation took place at the condominium in its boardroom approximately two weeks later. At the mediation, a lawyer did not represent the unit owner, who was a sophisticated business owner and used to negotiating. Several board members and the condominium’s lawyer were also in attendance.

The mediation started with a joint session with everyone present in the same room. This session quickly bogged down as the condominium insisted on its legal rights and the board’s obligation to enforce the Declaration. The condominium’s lawyer was did most of the talking for the board. The unit owner responded by alleging that there were several other dogs in the building that did not comply with the weight restriction and that as long as they were allowed to stay so would his dog. Both sides were entrenched in their positions.

I suggested that it might be more productive to continue the mediation in individual separate sessions (often called “caucuses” by mediators). The first caucus was with the unit owner. His position was that as long as there was selective enforcement he was keeping his dog and he was prepared to fight the condominium in court if necessary. He also said many other owners supported him and they might try to take over the board.

The next caucus was with the condominium board and its lawyer. The board admitted that there were several other dogs, which were over the limit, but none as large as this one. They also outlined complaints about this particular dog although they also admitted that the dog was not a problem except for its size. The condominium’s lawyer was confident that the case law supported their position and wanted the owner to comply. At the same time, one of the board members said that this dispute was causing problems in the condominium as other owners thought the board was being unfair although she did not understand why they felt that way. The board was also concerned that its legal obligation to enforce the Rules and declaration meant that even if they were sympatric to the unit owner they had no alternative open to them.

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The third caucus was with the unit owner. He agreed that the board was in a difficult position but so was he. After some time in general discussions the owner said that he had never intended to live in the building but had no option because of a difficult ongoing divorce case. He also said that he was looking for alternative accommodation but could not find anything because most of his assets were frozen by court order. He also shared that his lawyer expected the case to be resolved in the next few months but he was not so sure. He thought he would need six months to find a new home and was working towards that time frame. He also explained how important the dog had become to him and was helping him through a serious depression. While not a companion animal, which would be covered by the Human Rights Code, his dog did provide emotional comfort. He also said that his lawyer had told him that if the condominium tried to remove the dog through the courts then they would raise a human rights issue. I asked him if anyone in the building knew about his difficulties and he said no. I then asked him, since we were in a confidential mediation, if I

could tell the board and its lawyer what he had told me. After initially saying “no”, he then agreed except for the potential human rights issue.

In caucus with the board and its lawyer, I outlined the unit owner’s difficulties and the importance of the dog to him at this difficult time. Almost immediately the condominium’s lawyer raised the potential of a human rights claim being advanced by the owner, which of course changed the relatively simple enforcement proceeding into a more complex and costly process. The board then realized that while there were opposing positions, there were potential mutual interests in the dispute. After further discussion during which I left the room, the board asked me to return to the owner and see if he would agree to remove the dog if he was given four months to do so.

The owner was pleased that the board recognized his difficult position but was unwilling to commit to four months, as he was not sure he could move in that time. He also said that he wanted to be able to give the board his word that he would move out but could not do so in that time.

To make a long story short after a couple more times in caucus, everyone came back into joint session and an agreement was reached which allowed the owner six months to remove the dog. This way the owner’s interests in being able to move over a longer time were met as were the board’s interest in removing the dog and meeting their obligations to enforce the declaration.

The mediation took from 7 pm until 9:30. I recently spoke to the condominium’s lawyer and he mentioned that the unit owner had moved out within the agreed time frame.

As a result of mediating this dispute, the condominium community’s interests were met, as were the owner’s. It avoided the potential for a costly and divisive legal battle, which would have happened, had it gone straight to court, because no one knew the real facts behind the owner’s behavior or his difficult circumstances. In this case mediation was the right choice as a dispute resolution mechanism for all parties involved even though it did not seem that it could or was worth mediating. There are many other cases like this. ■

Colm Brannigan is a mediator and arbitrator specializing in condominium and commercial dispute resolution.



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