

# Alternative Dispute Resolution or Litigation?



Elysa Bergenfeld, partner at Ansell Grimm & Aaron, describes New Jersey condo law and explains that the best resolutions are always fair and efficient.

*Litigation ought to be a last resort, not a first one. It is expensive, it is burdensome, and when it involves a claim against a unit owner, it may well be counter-productive to the harmony and commonality required for successful community living.*

– Judge Sylvia Pressler, in *Billig v. Buckingham Towers Condominium Association I, Inc.*, 287 N.J. Super. 551, 564 (App. Div. 1996)

Even more than 20 years ago, Judge Sylvia Pressler had it right, especially in the state of New Jersey. Her words aren't just good sense, they're the law.

## THE MANDATE: BE FAIR AND EFFICIENT

New Jersey's Condominium Act mandates that condominiums "provide a fair and efficient procedure for the resolution of housing-related disputes between individual unit owners and the association, and between unit owners, which shall be readily available as an alternative to litigation." New Jersey's Planned Real Estate Development Full Disclosure Act contains the same mandate.

That alternative to litigation may be either mediation or arbitration; the choice between the two being made by the association. Whichever is selected, the alternative dispute resolution (ADR) need only be "fair and efficient."

## MEDIATION VS. ARBITRATION

What's the difference? In a mediation, the opposing sides attempt to reach an agreement that resolves the issues by consent. An arbitration involves a more formal proceeding that ends with a decision from a third party.

Regardless of what form the ADR takes, it should be offered as in New Jersey, a party in a litigation is able to have a complaint against them dismissed if an option for ADR was not made available prior.

From an association perspective and enforcement stance, a "mediation" is best when there is no doubt that a covenant or rule violation has occurred. On the other hand, "arbitration" is preferable when there are material facts in dispute that, without the fact dispute's resolution, no violation can be determined.

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By : Elysa Bergenfeld

In the case of a dispute between owners only, once a board has been contacted, it generally contacts both parties within a reasonable timeframe. They are told and/or reminded of the dispute and made aware of the association's ADR program. If both parties are amenable, an ADR will be scheduled. If one of the owners does not wish to participate, the Association's duty (in this scenario) to make ADR available has been satisfied.

## ASSOCIATION-DESIGNED ADR

New Jersey's Department of Community Affairs (DCA) is empowered to act to ensure that associations enact and properly administer [ADR procedures](#).

In its guide, the DCA states that each association is free to design its own ADR procedures depending on what it views as most appropriate. Boards can turn to the DCA for guidance on establishing the procedures if they wish. However, in general, other than a prohibition of the board, or any of its agents or employees, being the ADR's arbitrator or mediator, there are very few formal rules for setting up ADR processes and procedures.

By all accounts, board members, agents and representatives can appear in the proceeding to present the board's position (if it is taking one). Owners who feel aggrieved in respect of ADR can seek relief from the DCA.

It is worth noting that the DCA tends to discount the needs and interests of the association, and community as an entity. Rather, it leans toward limiting a community's discretion and maximizing its role in association affairs. For instance, although neither the Act or PREFDA require written ADA protocols or resolutions, the DCA believes that associations must have a written and/or published ADR-related protocol or resolution of some kind.

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*Elysa D. Bergenfeld is a partner in [Ansell Grimm & Ansell PC's](#) Community Association Practice Group. In her practice, focused on the representation of condominiums and homeowners associations, she advises community association boards and property managers on matters including daily operations, drafting of contracts, the creation and enforcement of rules and regulations, alternate dispute resolution (ADR), developer transition, fair housing compliance and litigation arising from construction defects, contractor service agreements, delinquent assessments and common charge recovery, governance, and the fiduciary duties of board members. She also has extensive experience in dealing with issues pertaining to the New Jersey Non Profit Corporation Act, the New Jersey Condominium Act, the New Jersey Planned Real Estate Development Full Disclosure Act*