

## **PARTICIPANTS IN THE MEDIATION PROCESS**

Participants in mediation include the parties, their attorneys or representatives, the mediator, the mediation service, and the administrator.

**Parties.** Parties need to be directly and actively involved in the mediation because they must mutually agree to any resolution. The more receptive parties are to the belief that mediation will work for them, and the more effort they are willing to invest in the process, the more successful they will be. Generally, the very presence of a party at a mediation displays a willingness to consider mediation, and the continued involvement of a party strengthens this resolve.

Parties are also best at communicating their interests and needs. An attitude of understanding and compromise often results in the attainment of some of these needs. The more forthright and honest the parties are in presenting their real interests, the more likely they will get something of what they want.

An individual who is a party obviously has the authority to agree to a settlement. An agent or employee of a corporation or organization must obtain the authority to reach an agreement. Insurance companies which insure a party often send or are required to send an agent to the mediation. This agent must also have full settlement authority; otherwise, the mediation will be unsuccessful.

**Attorneys or representatives.** The parties usually are entitled to have a lawyer or representative participate in the mediation process. A lawyer may provide helpful legal advice and counseling to the parties. Another representative may provide information or support to the parties.

The primary role of lawyers in mediations is to promote the best interests of their client and to increase the chances of a favorable settlement. Lawyers can discuss with their clients the legal issues involved and the legal ramifications of a settlement. Lawyers can bring their negotiation skills and experiences to the mediation and provide the parties with alternative strategies and suggest to the mediator approaches that may help in resolving the dispute.

A lawyer can explain the expenses and procedures involved in arbitration and litigation, should mediation fail. The lawyer may also advise parties regarding tax consequences, enforceability of an agreement, and the effect that a release will have upon the issues. The lawyer can also assist in drafting an agreement or reviewing proposed settlement terms.

Lawyers need to remain aware of the effect their financial interest in settling or not settling may have upon a party. A client may no longer need the services of an attorney after a mediated settlement. This loss of potential income may affect the lawyer's judgment in rendering advice to the client. On the other hand, litigation and arbitration, to a lesser extent, may pose unpleasant experiences for a client. It is critical for lawyers to determine whether their financial interest adversely affects their attitude toward the mediation, and to make certain that their ethical obligation to do what is best for the client is maintained.

**Mediator.** Mediators can serve various roles during a mediation. An effective mediator can:

- Clarify what the parties want and why.
- Talk openly with the parties about the dispute and gain an understanding of each party's position.
- Remain neutral and impartial and be a source of trust and confidence for the parties.
- Decrease the level of posturing on the part of the parties and remove barriers to settlement.
- Defuse hostilities and deal with the emotions between the parties.
- Maintain discussions without requiring one party to initiate or continue discussions.
- Focus on the needs and interests of the parties and not positions.
- Serve as a catalyst, educator, diplomat, translator, interpreter, bearer of good news and bad news, and communicator.
- Explain to the parties how far apart or how close they are to settlement.
- Explain to the parties the costs they will bear through arbitration or litigation.
- Assist in scheduling a time and place for future mediation sessions.
- Separate the parties before they can punch each other.

**Mediation service.** The mediation service is the organization selected and used by the parties to administer the mediation. The service has procedures designed to provide all parties with fair and uniform treatment. The organization does not provide legal advice or counseling to any party. Various organizations provide mediation services including private organizations, public agencies, community organizations, governmental agencies, and neighborhood groups.

The name and identity of the mediation service ought to be included in a pre-dispute mediation agreement. The inclusion of a specific provider makes this service readily available to the parties and avoids subsequent disagreements by the parties regarding who should mediate. Mediation services provided by different organizations vary. Parties need to review the services provided and select a mediation organization that best serves their interests.

**Administrator.** Mediations may involve an administrator. This person may appoint the mediator, assist the parties in preparing for the mediation, answer their questions, schedule the mediation, and handle any administrative matters not handled by the mediator. The administrator is usually an employee of the mediation service responsible for the mediation. The title of this individual may be Director of Mediation, or Mediation Administrator, or a similar title.

## **REASONS TO MEDIATE**

Mediation can be a very effective method to resolve a dispute. Whether or not a case can or should be mediated depends on multiple factors. The following list details some of those considerations.

**Time considerations.** Mediation may be able to create an agreement or resolve a problem faster than other methods.

**Cost considerations.** A mediated agreement may make or save the parties money. The substantial costs of litigation and attorney's fees can also be avoided in the mediation process.

**Party preferences.** One party may prefer or be eager to engage in mediation and should do so. Another party may also want, need or prefer to mediate the situation or problem. Lawyers or representatives may inform parties of the option to mediate and encourage and assist them.

**The effect of no agreement.** Parties may lose an opportunity to create a relationship or produce a profit if no agreement is reached. Mediation may allow the parties to get together and mutually gain.

**Relief sought.** A jury verdict, a judge's order or an arbitration award may not provide the relief a party wants. A mediated settlement may be the only way parties can have their needs met.

**Problems initiating or sustaining negotiation discussions.** Parties may have difficulties initiating negotiation discussions. Neither side may want to suggest negotiation talks or negotiation efforts may have failed. Mediation may be the best way for the parties to start or continue this process.

**Substantially different perspectives.** There maybe substantial gaps between the positions asserted by the opposing sides. These differences may be so significant that the skills of a mediator are necessary to reduce these differences of perceptions.

**The relationship between the parties.** Opposing parties may have, or hope to have, a continuing relationship after the dispute is resolved. Mediation may offer the parties a better opportunity to maintain or create a relationship often not possible with litigation.

**Complex problems, issues, or solutions.** Some matters may be very difficult, time-consuming, and expensive to litigate or otherwise resolve. Mediation may provide a much more efficient and economic way to resolve problems.

**The need for confidentiality.** The process and results of mediation are more private and much less public than litigation or other efforts. Parties who want matters to remain confidential may prefer to mediate.

**The effect of obtaining a judgment.** It may be best for a party to avoid the adverse effect of a judicial determination or judgment in a case. Mediation can avoid the permanent effect of a judgment and its precedential value for similar future cases.

**Unusual considerations.** Some mediators consider some other rather unusual factors:

Have fun. It can be a delight resolving problems.

Stop pouting. It sure beats staring in a mirror and complaining.

### **REASONS NOT TO MEDIATE**

The following factors suggest that mediation may not be useful and also need to be considered:

**Substantial party resistance.** A party may be so opposed to mediation that it would be useless to mediate. Mediation requires the cooperation of a party to engage in serious and good faith discussions.

**Unavailability of significant participants .** In a multi-party case involving significant persons not interested or available or in a situation involving insurance coverage with the insurance company refusing to participate, mediation efforts may be unsuccessful because those who are affected are not involved.

**Non-negotiable positions.** If a party takes an intractable position regarding a critical mediation issue and states that nothing will change that position, mediation may not be successful. However, simply stating an unyielding position does not necessarily reflect an inflexible position. A party may only be “posturing” and may change a position when faced with “reality.”

**Sabotaging the mediation.** Usually, the parties want a mediation to succeed. There may be occasional situations when a party approaches a mediation with no intent or hope the mediation will succeed. This party may attempt to sabotage the mediation process, and it makes little sense to attempt to mediate with a party who has this attitude.

**Financially destitute party.** Mediations that involve the payment of money or distribution of assets between parties may be unsuccessful if a party does not have the ability to make the necessary payments or distribution. The goal of some mediations may not be necessarily to collect payment but only to establish liability and have a party admit a debt. Mediation may expedite the achievement of this goal.

**Necessary information.** Mediation scheduled before investigation or discovery is completed may need to be postponed and rescheduled if one or both parties need to obtain or exchange information to be able to evaluate all the issues in the case. Oftentimes, early mediation assists in resolving discovery disputes and helps the parties exchange needed information.

its obligation of compliance therewith on and after that effective date.

## NEW JERSEY'S CONDOMINIUM ACT

### 46:8B-14. Duties of the association

The association, acting through its officers or governing board, shall be responsible for the performance of the following duties, the costs of which shall be common expenses:

- (a) The maintenance, repair, replacement, cleaning and sanitation of the common elements.
- (b) The assessment and collection of funds for common expenses and the payment thereof.
- (c) The adoption, distribution, amendment and enforcement of rules governing the use and operation of the condominium and the condominium property and the use of the common elements, including but not limited to the imposition of reasonable fines, assessments and late fees upon unit owners, if authorized by the master deed or bylaws, subject to the right of a majority of unit owners to change any such rules.
- (d) The maintenance of insurance against loss by fire or other casualties normally covered under broad-form fire and extended coverage insurance policies as written in this State, covering all common elements and all structural portions of the condominium property and the application of the proceeds of any such insurance to restoration of such common elements and structural portions if such restoration shall otherwise be required under the provisions of this act or the master deed or bylaws.
- (e) The maintenance of insurance against liability for personal injury and death for accidents occurring within the common elements whether limited or general and the defense of any actions brought by reason of injury or death to person, or damage to property occurring within such common elements and not arising by reason of any act or negligence of any individual unit owner.
- (f) The master deed or bylaws may require the association to protect blanket mortgages, or unit owners and their mortgagees, as their respective interest may appear, under the policies of insurance provided under clauses (d) and (e) of this section, or against such risks with respect to any or all units, and may permit the assessment and collection from a unit owner of specific charges for insurance coverage applicable to his unit.
- (g) The maintenance of accounting records, in accordance with generally accepted accounting principles, open to inspection at reasonable times by unit owners. Such records shall include:

(i) A record of all receipts and expenditures.

(ii) An account for each unit setting forth any shares of common expenses or other charges due, the due dates thereof, the present balance due, and any interest in common surplus.

(h) Nothing herein shall preclude any unit owner or other person having an insurable interest from obtaining insurance at his own expense and for his own benefit against any risk whether or not covered by insurance maintained by the association.

(i) Such other duties as may be set forth in the master deed or bylaws.

(j) An association shall exercise its powers and discharge its functions in a manner that protects and furthers or is not inconsistent with the health, safety and general welfare of the residents of the community.

(k) An association shall 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. A person other than an officer of the association, a member of the governing board or a unit owner involved in the dispute shall be made available to resolve the dispute. A unit owner may notify the Commissioner of Community Affairs if an association does not comply with this subsection. The commissioner shall have the power to order the association to provide a fair and efficient procedure for the resolution of disputes.

**46:8B-15. Powers of the association**

Subject to the provisions of the master deed, the by-laws, rules and regulations and the provisions of this act or other applicable law, the association shall have the following powers:

(a) Whether or not incorporated, the association shall be an entity which shall act through its officers and may enter into contracts, bring suit and be sued. If the association is not incorporated, it may be deemed to be an entity existing pursuant to this act and a majority of the members of the governing board or of the association, as the case may be, shall constitute a quorum for the transaction of business. Process may be served upon the association by serving any officer of the association or by serving the agent designated for service of process. Service of process upon the association shall not constitute service of process upon any individual unit owner.

(b) The association shall have access to each unit from time to time during reasonable hours as may be necessary for the

**APPENDIX 3.**  
**PLANNED REAL ESTATE DEVELOPMENT FULL**  
**DISCLOSURE ACT.**

**Statutes and Regulations.**

**A. Statute.**

<i>Section</i>	
45:22A-21	Short title.
45:22A-22	Declaration of policy.
45:22A-23	Definitions.
45:22A-24	Administration of act.
45:22A-25	Act not applicable.
45:22A-26	Registration of development with agency; delivery to purchaser of current public offering statement; cancellation of contract; notice to purchaser.
45:22A-27	Application for registration; filing; contents; availability to interested parties; registration of additional property; report of material changes; fee.
45:22A-28	Public offering statement; form and contents; use as promotional material.
45:22A-29	Investigation by agency.
45:22A-30	Notice of filing to applicant; acceptance or rejection by agency.
45:22A-31	Annual report; filing.
45:22A-32	Agency's powers and duties.
45:22A-33	Temporary cease and desist orders; grounds.
45:22A-34	Revocation of registration; notice and hearing; grounds; findings of fact; issuance of in lieu cease and desist order.
45:22A-35	Rules and regulations; injunctive relief or temporary restraining orders; suits.
45:22A-36	Application for registration deemed submission to jurisdiction; service of process; conduct prohibited by act; authorization to receive service.
45:22A-37	Violation of act or making untrue statement; liability to purchaser; void provisions.
45:22A-38	Violation of act; fine; levy and collection of penalties.
45:22A-39	Application of act.
45:22A-40	Partial invalidity.
45:22A-41	Retirement subdivision or community deemed subject to provisions of act.
45:22A-42	Inapplicability of act.
45:22A-43	Developer to organize association to manage common elements and facilities.
45:22A-44	Powers of association.
45:22A-45	Administration and organization of association.
45:22A-46	By-law provisions.
45:22A-47	Surrender of control of association to owners.
45:22A-48	Explanatory materials to be distributed.
45:22A-48.1	Homeowners' association prohibited from limiting, prohibiting display of U.S. flag, yellow ribbons, signs in support of troops.

## APPENDIX 3A

**45:22A-44. Powers of association.** a. Subject to the master deed, declaration of covenants and restrictions or other instruments of creation, the association may do all that it is legally entitled to do under the laws applicable to its form of organization.

b. The association shall exercise its powers and discharge its functions in a manner that protects and furthers the health, safety and general welfare of the residents of the community.

c. The association shall provide a fair and efficient procedure for the resolution of disputes between individual unit owners and the association, and between unit owners, which shall be readily available as an alternative to litigation.

d. The association may assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners individually.

**Adopted.** L. 1993, c. 30, §2, effective July 29, 1993.

**45:22A-45. Administration and organization of association.** a. The form of administration of an association organized pursuant to section 1 of P.L.1993, c.30 (C.45:22A-43) shall provide for the election of an executive board, elected by and responsible to the members of the association pursuant to section 4 of P.L.1993, c.30 (C.45:22A-46), through which the powers of the association shall be exercised and its functions performed.

b. Subject to the master deed, declaration of covenants and restrictions, bylaws or other instruments of creation, subsection d. of this section, and the laws of the State, the executive board may act in all instances on behalf of the association.

c. The members of the executive board appointed by the developer shall be liable as fiduciaries to the owners for their acts or omissions.

d. During control of the executive board by the developer, copies of the annual audit of association funds shall be available for inspection by owners or their authorized representative at the project site.

**Adopted.** L. 1993, c. 30, §3, effective July 29, 1993.

**45:22A-46. By-law provisions.** The by-laws of the association, which shall initially be recorded with the master deed shall include, in addition to any other lawful provisions, the following:

a. A requirement that all meetings of the executive board, except conference or working sessions at which no binding votes are to be taken, shall be open to attendance by all unit owners, and adequate notice of any such meeting shall be given to all unit owners in such manner as the by-laws shall prescribe; except that the executive board may exclude or restrict attendance at those meetings, or portions of meetings, dealing with (1) any matter the disclosure of which would constitute an unwarranted invasion of individual privacy; (2) any pending or anticipated litigation or contract negotiations; (3) any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer, or (4) any matter involving the employment, promotion, discipline or dismissal of a specific officer or employee of the association. At each meeting required under this subsection to be open to all unit owners, the participation of unit owners in the proceedings or the provision of a public comment session shall be at the discretion of the executive board, minutes of the proceedings shall be taken, and copies of those minutes shall be made available to all unit owners before the next open meeting.

b. The method of calling meetings of unit owners, the percentage of unit owners or voting rights required to make decisions and to constitute a quorum. The bylaws may, nevertheless, provide that unit owners may waive notice of meetings or may act by written agreement without meetings.

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### Practice Areas

Community Associations

David J. Byrne, Shareholder, is a member of the Business Law Group and concentrates his practice in the area of Community and Condominium Association Law. David Byrne provides community, condominium associations and cooperatives with a full range of legal advice and services including the drafting and negotiation of association service contracts, rules and regulations and alternative dispute resolution, collections, transition negotiations with developers, construction defect litigation, municipal services and relations, fair housing compliance, restrictive covenant enforcement and interpretation, and any necessary litigation-related services.

Mr. Byrne successfully secured the Appellate Division's reversal of a trial court's refusal to apply the Municipal Services Act ("Kelly Bill") to a community association in development, a decision reported at 330 N.J. Super. 345 (App. Div. 2000). Mr. Byrne also appeared before New Jersey's Appellate Division, arguing in favor of a community association's right to tow vehicles, enforce restrictive covenants, protect owners' privacy and the collection of assessments and attorneys' fees. Mr. Byrne successfully secured the dismissal of the complaint of several condominium owners in the United States District Court, District of New Jersey, regarding the United States Fair Housing Act, parking issues and allegations of retaliation, a decision reported at 173 F. Supp 2<sup>nd</sup> 244 (D.N.J. 2001). Mr. Byrne successfully represented the association in the landmark New Jersey Appellate Court decision upholding parking-related rules on public roads in a private community and protecting that board from a defamation suit, a decision reported as *Verna v. Links at Valleybrook Neighborhood Association, Inc.* at 371 N.J. Super 77 (App. Div. 2004). He also testified before the 2003 New Jersey State Committee on Investigations inquiring into home construction and inspection abuses.

Mr. Byrne frequently lectures for the New Jersey Chapter of CAI, South Jersey Condominium Managers Association and the New York/New Jersey Cooperator Annual Conference. He has lectured extensively on a variety of topics, including the collection of community association assessments, a developer's obligations pursuant to New Jersey's Planned Real Estate Full Disclosure Act ("PREDDFA"), alternative dispute resolution, mediation, insurance, contract law and construction defects. He has written numerous articles for both CAI's Community Trends magazine, the national publication Community Association Law Reporter and the New York/New Jersey Cooperator, addressing issues such as affordable housing units, collections, and free speech concerns and issues of importance to cooperatives. Mr. Byrne is also a member of the Advisory Committee of the Community Association Manager, a publication serving the

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needs of the country's community association managers. He is currently the chair of the Office of Attorneys Ethics, District VII Ethics Committee.

## **Education**

- J.D. – Rutgers University School of Law – Camden (1994)
- B.A. – Political Science and History; Rutgers College (1991)

## **Professional Organizations**

- Mercer County Bar Association
- New Jersey Chapter of Community Associations Institute (CAI)
- Office of Attorney Ethics, District VII Committee; chair
- South Jersey Condominium Managers Association
- 2003 CAI Conference Committee; chair

## **Bar Admissions**

- New Jersey

## **Community Associations**

Homeowner and condominium associations and cooperatives have multi-faceted legal needs. These needs include drafting and negotiating service contracts, rule and regulation enforcement and creation, alternative dispute resolution, assessment collection, developer transition, negotiation, construction defect litigation, general litigation, municipal relations and reimbursement, fair housing compliance and covenant enforcement and interpretation. Using both a team and cross-disciplinary approach, Stark & Stark's Community Associations Group brings together attorneys with expertise in corporate law, bankruptcy, collections, real estate and litigation. The Group is thus able to counsel as well as advocate for its clients.

Stark & Stark provides businesses with the ability to have top-notch legal counsel at their disposal on an "as-needed" basis. Our clients contact us to help them to structure their new ventures and to help them to address any legal concerns along the way. We act proactively, to ensure that our clients are protected from unnecessary risks. We manage our clients' legal problems so that they can focus on building their businesses.

## ***General Business Counsel***

The Community Associations Group attorneys regularly appear before the Appellate, Chancery and Law Divisions of the Superior Court, arguing in favor of community associations' rights to tow vehicles, enforce restrictive covenants, recover condominium attorney fees and their rights to a correct interpretation of an insurance policy. Stark & Stark has tried, before both judges and juries, many types of matters including:

- Construction Defects and Developer Fraud
- Enforcement of Restrictive Covenants
- Complex Collection Cases
- Association v. Unit Owner Responsibilities
- Bankruptcy Matters

The Group's attorneys are active lecturers and authors. They have lectured and given seminars with respect to age-restricted communities. They have lectured and written articles concerning collections, insurance, bankruptcy, rules and regulations, alternative dispute resolution, a developer's obligations pursuant to New Jersey's Planned Real Estate Development Full Disclosure Act, free speech and affordable housing issues.

Stark & Stark's Community Associations Group also understands the practical challenges faced by community associations every day. They support, help and educate property managers, board members and other professionals – privately and in the context of open meetings. They work closely with engineers, insurance professionals, accountants and other professionals.

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## *Experience*

Stark & Stark's attorneys are recognized for their experience. The Group includes a member of the New Jersey General Assembly's blue ribbon panel created to study New Jersey's community associations. One of its attorneys serves on the New Jersey Community Associations Institute's Board of Directors. Another of its attorneys is a member of the Advisory Committee of the *Community Association Manager*, a publication serving the needs of the country's community association managers. Further, the Group is an active participant of the New Jersey Chapter of the Community Associations Institute (CAI), a trade organization dedicated to the concerns and advancement of community associations, as well as the Delaware Valley and Hudson Valley Chapters. The Group includes a former CAI Speaker of the Year and CAI Author of the Year. Its attorneys have served on almost all of CAI's committees, including its legislative action and editorial committees. Its attorneys have chaired CAI's conference, membership and public relations committees. Stark & Stark's Community Associations Group was named CAI - New Jersey's 2002 Member of the Year.

The Group's attorneys volunteer their time to mediate suits filed in the Superior Court of New Jersey, Special Civil Part. One member of the Community Associations Group is the Chairperson of the Office of Attorney Ethics, District VII Committee. The Group's attorneys actively volunteer in civil, charitable, educational and religious organizations and groups, as well as county and state bar associations.

## *Clients*

Stark & Stark represents over 200 community associations in New Jersey, Pennsylvania and New York. Our clients receive prompt and personal attention. No community association is too large or too small. Our clients range in size from 6 to 1400 homes and units. They range in type from small, single family home communities to many unit condominiums and cooperatives to townhome developments. From Pennsylvania to New York, our clients can be found from Cape May to Bergen County, from Camden to Mercer County, from Mercer to Ocean County, from Monmouth to Hudson County, from Queens, New York to the eastern part of Pennsylvania. Stark & Stark's Community Associations Group is committed, through its wide range of expertise and depth of experience, to providing exceptional legal services to community associations.

## *Shareholders*

The Group is led by its two shareholders, A. Christopher Florio and David J. Byrne. Between them, they have over 25 years of experience representing community associations.

*Recent Experience*

- *Verna v. The Links at Valleybrook Neighborhood Association, Inc.*- successfully defended homeowner's association's right to retain its authority to enforce their parking rules and regulations even though it had previously ceded the jurisdiction of its streets to the municipality.
- *Briarglen II Condominium Association v. Township of Freehold* - successfully secured the Appellate Division's reversal of a trial court's refusal to apply New Jersey's Municipal Services Act ("Kelly Bill") to a community association in development.
- *Sporn v. Ocean Colony Condominium Association* - successfully secured the dismissal of several condominium owners' complaint, filed in the United States District Court, District of New Jersey, regarding the United States Fair Housing Act, parking issues and allegations of retaliation.
- Represented a condominium which successfully litigated a condominium's right to recover legal fees in collection cases in excess of the amount of assessments in dispute.
- Aided a condominium in avoiding Department of Environmental Protection fines associated with private beach rights.
- Assisted a cooperative in extending the term of its proprietary lease.
- Helped a client in resolving a longstanding collection case in Queens (NY) Courts.
- Successfully negotiated and litigated over 75 separate transitions, resulting in damages paid to clients and repairs made for clients.
- Secured many court orders compelling developers to turn over plans, drawing specifications, funds and receipts.
- Represented a hotel condominium in an action involving all 100 units and mortgagees to reform that hotel condominium's master deed.
- Forced insurance carriers to defend cooperatives and condominiums to defend those clients against suits by homeowners.
- Successfully protected a client's name, trademark, and website from a local realtor's "squatting."
- Handled a cooperative's conversion to a condominium.