

**PRESENTATION TO THE LEGISLATIVE COMMITTEE ON DISPUTE
RESOLUTION OPTIONS FOR HOMEOWNERS, ASSOCIATIONS AND GOVERNING
ENTITIES**

March 28, 2018

My name is Henry W. Jones, Jr. and I am here on behalf of the North Carolina Chapter of Communities Associated Institute ("CAI"). CAI is an international organization with more than 33,000 members, including homeowners, managers, attorneys and other service providers dedicated to building and maintaining better communities. The North Carolina Chapter has been in existence for more than 30 years.

I am pleased to provide comments on behalf of CAI regarding alternative dispute resolution in community associations. I have practiced community association law for more than 35 years and have seen many kinds of cases and controversies. I was also a member of the Bar Association Committee in 1995 and 1996 which drafted the Planned Community Act, which has governed the creation and administration of planned communities since 1999.

The kinds of disputes that arise in these associations are generally relatively small. They involve questions of land use violations, parking, disposal of waste, noise, unauthorized architectural improvements, maintenance and disclosure of association records (which is likely governed by the Association's Bylaws and G.S. §§ 55A-16-1 thru 5 and G.S. § 47C-3-118 or G.S. § 47F-3-118. While these disputes are relatively uncomplicated and involve small amounts of money in controversy, they involve people's property and can become quite emotional. These disputes may be unattractive to some attorneys, and for this reason and others, they may not always be well suited for litigation in Court.

Community Associations are governed by a set of covenants that contain a number of provisions governing the affairs of the association, frequently including classes of memberships, assessments, remedies for non-payment of assessments, maintenance and architectural control. I have encountered a few sets of covenants – drafted by the original developer, which contain mandatory mediation and/or arbitration provisions. Some are binding and limit litigation, but most were non-binding. These provisions were written at the behest of and for the protection of the original developer, but there were carry through provisions that applied in the post development period as well. Most of these provisions specifically provided that they did not apply to certain kinds of controversies, such as assessment collection and cases involving injunctive relief. My experience with these documents and cases that arose under these documents was that the mandatory dispute resolution provisions were unwieldy, were not popular, but they were successful in limiting litigation.

In 2013, I worked with Rep. Deborah Ross in the drafting of G.S. § 7A-38.3F (Pre-Litigation Mediation of Condominium and Homeowner Association Disputes.) This statute is intended to set up a quick and inexpensive form of mediation of condominium and HOA disputes. The statute requires each association to, in writing, notify all members of the association each year that they may initiate mediation under the statute to resolve any dispute with the association. The clients my firm represents, uniformly comply with this statute. Nevertheless, in the five years since the enactment of the statute, I am only aware of two cases that have used the statute to resolve a pending dispute.

As a result of what we think is an increasing number of disputes between members and their associations, CAI moved two years ago to set up a CAI sponsored mediation program to provide a fast and relatively inexpensive alternative to litigation. In December of 2017, CAI

completed and announced this new mediation program, called the Community Association Mediation Program ("CAMP"), which is intended to assist disputing parties in resolving their conflict through a neutral third party. Mediators are experienced professionals in the field of association management or law. They work to encourage discussion between a community association board representative and an owner toward a mutually acceptable outcome. This mediation is voluntary and non-binding. Both parties to the dispute must agree between themselves to submit it to mediation before submitting any mediation request.

The significant features of the CAMP program are as follows:

- Cost is \$500 for a two-hour mediation session, to be split equally between the two parties.
- Both parties must complete the online mediation request form and pay \$250 by credit card.
- Upon receipt of both parties' completed forms and payment, both will be contacted by an assigned mediator within 30 days.
- Mediation will take place at a mutually agreed location on a mutually agreed date.
- Additional subsequent mediation can be requested by both parties and will be billed at \$300.00 per hour, split equally between the parties, and payable directly to the mediator, provided the mediator agrees to provide additional mediation services. (Just as in NC's Superior Court mediation program, a mediator may declare the mediation to be at an impasse and not warranting further expense for the parties).

An explanation of the program and access to application to submit to mediation is readily available on a sponsored website. A group of experienced community association professionals

have already agreed to perform services as mediator. They are available to work, as called upon, across the state.

This program is still new and needs more exposure. We would prefer to give the new program an opportunity to be perfected and to produce results before new statutory requirements are imposed. It does not at this time address the issue of arbitration.

Thank you for the opportunity to come and speak with you today. On behalf of CAI, I would hope that CAMP will be allowed to develop some experience that can be monitored and brought back in the form of a report to you or a similar group in the future. CAI and I stand ready to assist this Committee as it studies this issue.

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waiver in writing. No costs shall be assessed to any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

(f) **Certification That Mediation Concluded.** — Immediately upon a waiver of mediation under subsection (e) of this section or upon the conclusion of mediation, the mediator shall prepare a certification stating the date on which the mediation was concluded and the general results of the mediation, including, as applicable, that the parties waived the mediation, that an agreement was reached, that mediation was attempted but an agreement was not reached, or that one or more parties, to be specified in the certification, failed or refused without good cause to attend one or more mediation meetings or otherwise participate in the mediation. The mediator shall file the original of the certification with the clerk and provide a copy to each party.

(g) **Time Periods Tolloed.** — Time periods relating to the filing of a claim or the taking of other action with respect to a public records dispute, including any applicable statutes of limitations, shall be tolled upon the filing of a request for mediation under this section, until 30 days after the date on which the mediation is concluded as set forth in the mediator's certification, or if the mediator fails to set forth such date, until 30 days after the filing of the certification under subsection (f) of this section.

(h) **[Other Remedies Not Affected.]** — Nothing in this section shall prevent a party seeking production of public records from seeking injunctive or other relief, including production of public records prior to any scheduled mediation.

History.

2010-169, s. 21(a).

section effective October 1, 2010, and applicable to actions filed on or after that date.

Editor's Note.

Session Laws 2010-169, s. 21(d), made this

The bracketed catchline in subsection (h) was inserted at the direction of the Revisor of Statutes.

§ 7A-38.3F. Prelitigation mediation of condominium and homeowners association disputes.

(a) **Definitions.** — The following definitions apply in this section:

- (1) **Association.** — An association of unit or lot owners organized as allowed under North Carolina law, including G.S. 47C-3-101 and G.S. 47F-3-101.
- (2) **Dispute.** — Any matter relating to real estate under the jurisdiction of an association about which the member and association cannot agree. The term "dispute" does not include matters expressly exempted in subsection (b) of this section.
- (3) **Executive board.** — The body, regardless of name, designated in the declaration to act on behalf of an association.
- (4) **Mediator.** — A neutral person who acts to encourage and facilitate a resolution of a dispute between an association and a member.
- (5) **Member.** — A person who is a member of an association of unit or lot owners organized as allowed under North Carolina law, including G.S. 47C-3-101 and G.S. 47F-3-101.

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(6) **Party or parties.** — An association or member who is involved in a dispute, as that term is defined in subdivision (2) of this subsection.

(b) **Voluntary Prelitigation Mediation.** — Prior to filing a civil action, the parties to a dispute arising under Chapter 47C of the General Statutes (North Carolina Condominium Act), Chapter 47F of the General Statutes (North Carolina Planned Community Act), or an association's declaration, bylaws, or rules and regulations are encouraged to initiate mediation pursuant to this section. However, disputes related solely to a member's failure to timely pay an association assessment or any fines or fees associated with the levying or collection of an association assessment are not covered under this section.

(c) **Initiation of Mediation.** — Either an association or a member may contact the North Carolina Dispute Resolution Commission or the Mediation Network of North Carolina for the name of a mediator or community mediation center. Upon contacting a mediator, either the association or member may supply to the mediator the physical address of the other party, or the party's representative, and the party's telephone number and e-mail address, if known. The mediator shall contact the party, or the party's representative, to notify him or her of the request to mediate. If the parties agree to mediate, they shall request in writing that the mediator schedule the mediation. The mediator shall then notify the parties in writing of the date, time, and location of the mediation, which shall be scheduled not later than 25 days after the mediator receives the written request from the parties.

(d) **Mediation Procedure.** — The following procedures shall apply to mediation under this section:

- (1) **Attendance.** — The mediator shall determine who may attend mediation. The mediator may require the executive board or a large group of members to designate one or more persons to serve as their representatives in the mediation.
- (2) All parties are expected to attend mediation. The mediator may allow a party to participate in mediation by telephone or other electronic means if the mediator determines that the party has a compelling reason to do so.
- (3) If the parties cannot reach a final agreement in mediation because to do so would require the approval of the full executive board or the approval of a majority or some other percentage of the members of the association, the mediator may recess the mediation meeting to allow the executive board or members to review and vote on the agreement.

(e) **Decline Mediation.** — Either party to a dispute may decline mediation under this section. If either party declines mediation after mediation has been initiated under subsection (c) of this section but mediation has not been held, the party declining mediation shall inform the mediator and the other party in writing of his or her decision to decline mediation. No costs shall be assessed to any party if either party declines mediation prior to the occurrence of an initial mediation meeting.

(f) **Costs of Mediation.** — The costs of mediation, including the mediator's fees, shall be shared equally by the parties unless otherwise agreed to by the

parties. Fees shall be due and payable at the end of each mediation meeting. When an attorney represents a party to the mediation, that party shall pay his or her attorneys' fees.

(g) **Certification That Mediation Concluded.** — Upon the conclusion of mediation, the mediator shall prepare a certification stating the date on which the mediation was concluded and a statement that an agreement was reached or that mediation was attempted but an agreement was not reached. If both parties participate in mediation and a cause of action involving the dispute mediated is later filed, either party may file the certificate with the clerk of court, and the parties shall not be required to mediate again under any provision of law.

(h) **Inadmissibility of Evidence.** — Evidence of statements made and conduct occurring during mediation under this section shall not be subject to discovery and shall be inadmissible in any proceeding in a civil action arising from the dispute which was the subject of that mediation; except proceedings to enforce or rescind a settlement agreement reached at that mediation, disciplinary proceedings before the State Bar or Dispute Resolution Commission, or proceedings to enforce laws concerning juvenile or elder abuse. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediation under this section.

No mediator shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediation pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind the settlement agreement; except in disciplinary hearings before the State Bar or Dispute Resolution Commission and proceedings to enforce laws concerning juvenile or elder abuse, and except in proceedings to enforce or rescind an agreement reached in a mediation under this section, but only to attest to the signing of the agreement.

(i) **Time Periods Tolloed.** — Time periods relating to the filing of a civil action, including any applicable statutes of limitations or statutes of repose, with respect to a dispute described in subsection (a) of this section, shall be tolled upon the initiation of mediation under this section until 30 days after the date on which the mediation is concluded as set forth in the mediator's certification. For purposes of this section, "initiation of mediation" shall be defined as the date upon which both parties have signed the written request to schedule the mediation.

(j) **Association Duty to Notify.** — Each association shall, in writing, notify the members of the association each year that they may initiate mediation under this section to try to resolve a dispute with the association. The association shall publish the notice required in this subsection on the association's Web site; but if the association does not have a Web site, the association shall publish the notice at the same time and in the same manner as the names and addresses of all officers and board members of the association are published as provided in G.S. 47C-3-103 and G.S. 47F-3-103.

Chapter launches mediation service for Boards, Owners

"the act or process of mediating; especially : intervention between conflicting parties to promote reconciliation, settlement, or compromise..."

Merriam-Webster

CAI-NC is proud to introduce a new public service designed to provide a faster and less expensive alternative to litigation.

This Community Association Mediation Program (CAMP) assists disputing parties in resolving their conflict through a neutral third party. The new program's goal is to provide a resolution framework for HOA or condo disputes between owners and their North Carolina association, and deliver an efficient, economic and fair proceeding for the parties.

Our mediators are experienced professionals in the field of association management or law. They work to facilitate discussions between a community Board representative and an owner toward a mutually acceptable outcome.

It's important that both parties to a dispute must agree between themselves to submit it to mediation before submitting any mediation request.

Highlights of the CAMP program:

- Cost is \$500 for a two-hour mediation session, to be split equally between the two parties.
- Both parties must complete the online mediation request form and pay \$250 by credit card.
- Upon receipt of both parties' completed forms and payment, both will be contacted by an assigned mediator within 30 days.
- Mediation will take place at a mutually agreed location on a mutually agreed date.
- Any additional subsequent mediation requested by both parties will be billed at \$300 per hour, split equally between the parties, and payable directly to the mediator; however, there is no obligation for the mediator to provide additional mediation.

For more information please visit http://bit.ly/MEDIATE_NC.

For member attorneys or PCAM-designated managers who may be interested in serving as a mediator, please email office@cai-nc.org.