



Space Coast Communities Association

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18 March 2026



WHYNOT LAW FIRM

**COMMUNITY ASSOCIATION
EDUCATION SERIES**

Erik F. Whynot, Esq.



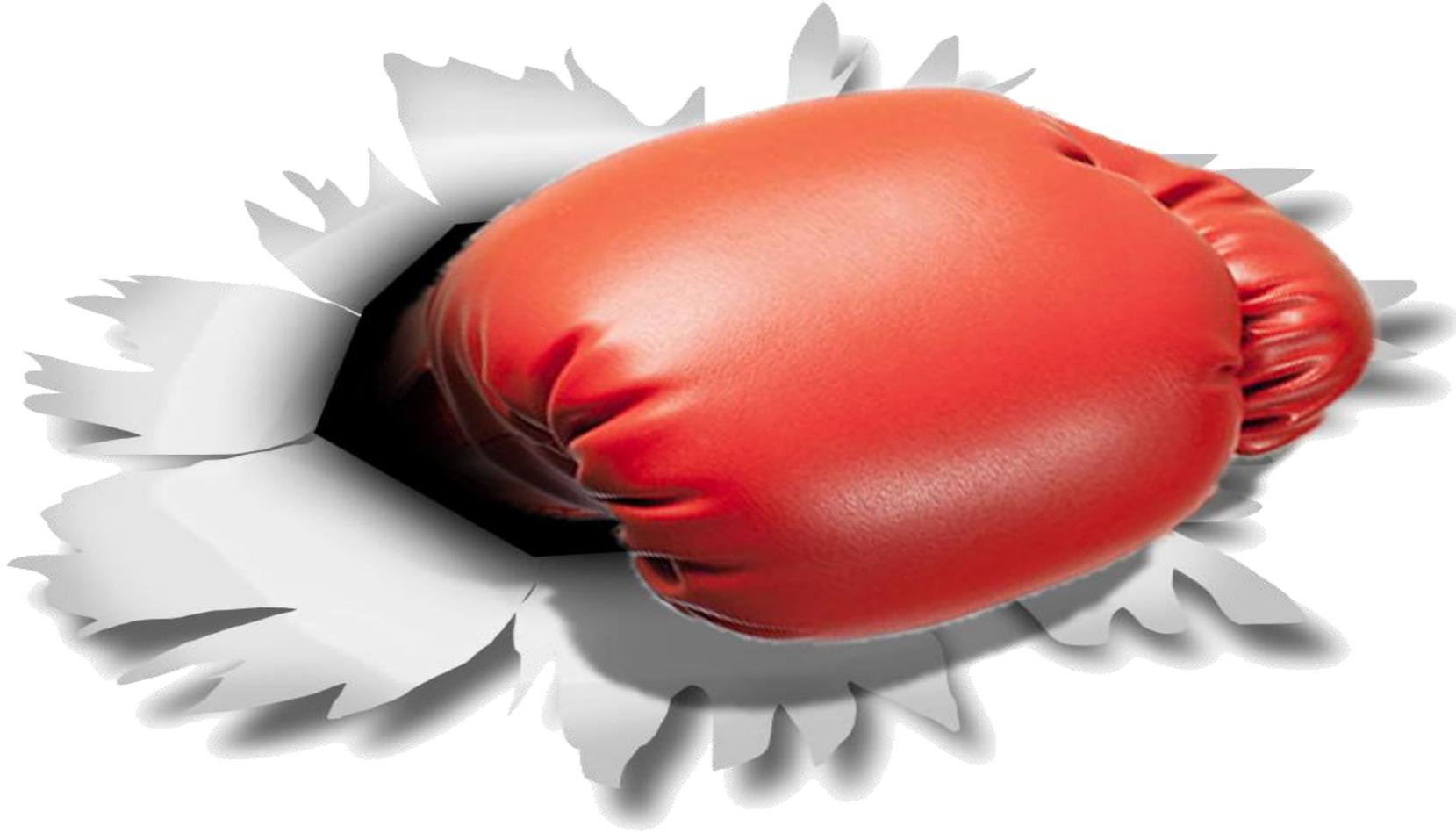
**CONDOMINIUM
AND PLANNED
DEVELOPMENT LAW**

**2003 Longwood Lake Mary Rd
Suite 1007
Longwood, Florida 32750**

Telephone: 407-541-0050

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CONFLICT RESOLUTION FOR THE COMMUNITY ASSOCIATION BOARD



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Community Association Living

The community association style of living can sometimes promote conflicts. Most disputes surround the common interest, ownership, and common expenses each member has in common with other members. However, to call these interests “common” is a misnomer. If they were indeed “common” there would be no dispute, would there?

But yet, as every board member and property manager is acutely aware, disputes and conflict abound in community living.

How a director or manager addresses or responds to these disagreements truly determines whether or not the community is “communal” with each other.



Parties to a Dispute

Owners -vs- Association

- Enforcement of Governing Documents

Association -vs- Employees

- Association as an “employer”

Owner -vs- Owner

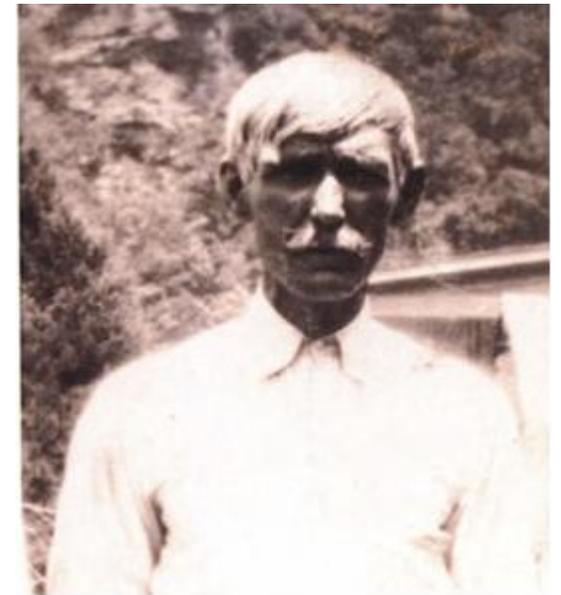
- The Hatfields and the McCoy

Director -vs- Director

- Don't show “Mom” and “Dad” fighting



Devil Ance Hatfield



Randolph McCoy



Competing Interests



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Argument is Good

“Disagreements are an inevitable, normal, and healthy part of relating to other people.”

Amy Gallo, *Why We Should Be Disagreeing More at Work*, HARVARD BUSINESS REVIEW (January 3, 2018)
(<https://hbr.org/2018/01/why-we-should-be-disagreeing-more-at-work>)

No matter who you are, what you are good at, where you went to school or what you think you know, you CAN'T know everything

- ✓ Helps develop “thick skin” (emotional resiliency)
- ✓ Helps ability to think critically
- ✓ Helps develop and test theories or ideas
- ✓ Helps to recognize shortfalls to better the finished product



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Board of Directors

- **Obligation to Enforce**
 - Declaration mandates it
- **Objective/Consistent**
 - Selective Enforcement
- **Enforcement Policy**
 - Engenders consistent enforcement



Board of Directors (cont...)

➤ Fiduciary Duty

- **Duty of Care**

Discharge duties in good faith, with the care of a reasonably prudent person in a similar position, and in the best interest of the corporation.

- **Duty of Loyalty**

Director must not “self-deal”, must avoid/disclose conflicts, and maintain confidentiality.

❖ **Business Judgment Rule**

Favorable to the board – Corporate governance, hiring/firing, investment.

❖ **Reasonableness Standard**

Tends to favor the owner – Application of rental restrictions, ARC guidelines, covenant enforcement.



Approaches to Conflict

➤ Avoidance

- “*Not My Problem...*”
 - ✓ Don’t cry “over spilt milk” or “make a mountain out of a molehill.”

➤ Accommodation (*Lose/Win*)

- Satisfy opposing concerns at the expense of your own.
 - ✓ The issue is more important to the opposing party (BIG picture).
 - ✓ The relationship is more important than the issue.

➤ Compromise (*Lose/Lose*)

- Meeting in the middle.
 - ✓ Benefits of resolution outweigh alternatives.

➤ Collaboration (*Win/Win*)

- Working together to address all concerns.
 - ✓ Utilizing the experience and knowledge of both sides to craft a mutually beneficial agreement.

➤ Competition

- Satisfy own concerns at the expense of others.
 - ✓ When all else has failed.
 - ✓ Parties are resolute.
 - ✓ IT’S THE PRINCIPLE!!!



Communicating & Negotiating

Communication Skills

- Passive aggressive jabs (they hurt)
- Stay focused
- Don't interrupt
- Stick to your key points

Emphasis and Passion

- Not WHAT you say, but HOW you say it...

Becoming a Better Listener

- Lessons Epictetus taught you...



“We have two ears and one mouth so we can listen twice as much as we speak.”



Root Causes of a Dispute

Information and/or Misinformation

- “Due” your diligence

The Rumor Mill

- Do not “knee jerk” a response

Personality Conflict

- Check emotion at the door

Communication

- Clear and concise
- Avoid inadvertent condescension



IT'S THE PRINCIPLE OF IT!!!!



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Common Causes of Dispute

Covenants

- Use restrictions in the Declaration
- The dangers of **ambiguity**

Rules & Regulations

- Restrictions established by the Board

Procedural Issues

- ***POINT OF ORDER!!***

Transparency

- Notice everything (**closed or open**)
- Take accurate minutes

Attach supportive information/documents to the minutes



Resolving Disputes

Day-to-Day Resolutions: Memorialize the agreement.

Statutory Mandates

➤ **Chapter 718:** Before a formal lawsuit is filed, claimants have the option to either, (1) demand pre-suit mediation pursuant to the HOA Act, or (2) file for non-binding arbitration with the Division of Condominiums. Election and recall disputes are not subject to mediation and may be filed for non-binding arbitration or directly with a court of competent jurisdiction.

➤ **Chapter 720:** Pre-suit mediation requirement for most covenant disputes.

Mediation

- Benefits
- Mediator's Role

Arbitration

- Binding –vs– Non-Binding
- Contractual or Statutory



Litigation

- Put your gloves on...



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De-Escalating Strategies

If Its Hysterical, Its Historical

- Prior experience with this specific issue
 - Often times may have beneficial research on matter that could assist the Board.
- Prior experience with Board
 - May immediately approach issue defensively due to experience with prior board of directors.
- May simply be having a bad day



- ✓ **STAY CALM!!!**
- ✓ **Breathe**
- ✓ **Know Your Room**
- ✓ **Manage Your Response**
- ✓ **Be Patient**
- ✓ **Listen...Listen, and...Listen some more**

Negotiations

Conditions for a Successful Negotiation

- **Why parties negotiate**
 - Solve a Problem
 - Bring about change
- **Why parties refuse to negotiate**
 - Perception of weakness
 - Negotiating may intensify the dispute

Styles:

- **Empathizing**
 - Walk a mile in another's shoes.
- **Assertive**
 - Stick to and defend the quality of YOUR shoes.



Negotiations

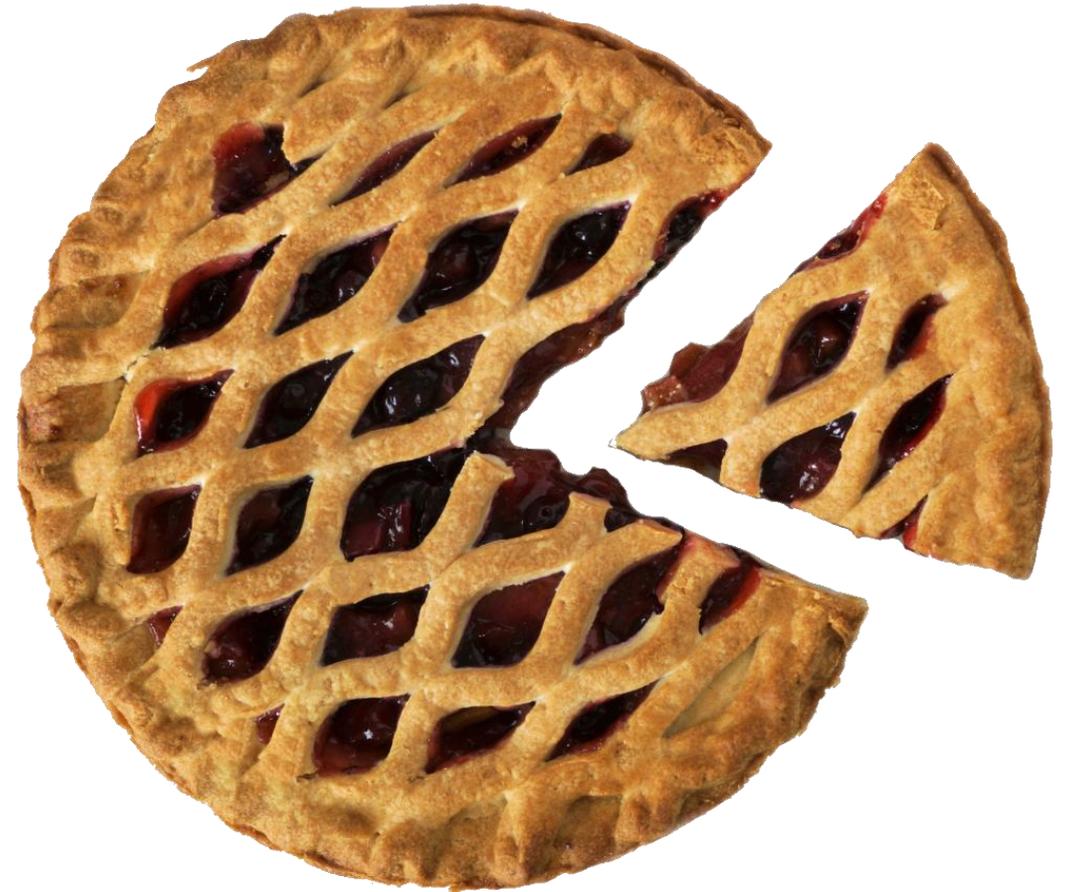
Approaches:

➤ **Distributive Negotiation**

- Positional Based
- Focused on the “WHAT”
- There is only so much pie to go around
- Claiming Value

➤ **Integrative Negotiation**

- Interest Based
- Focused on the “WHY”
- Cooperative or collaborative effort
- Maintain or develop ongoing relationships
- Creating Value



Covenant Enforcement Process

CONDOMINIUMS

➤ **Determine Dispute Type:**

✓ **Election or Recall**

- Issue either a Pre-Arbitration Demand or file suit in Florida courts.

✓ **Other Covenant Violation**

- Issue a Violation Demand and either,

1) Pre-Suit Mediation Demand

- If not resolved at mediation, lawsuit can be filed.

2) Pre-Arbitration Demand

- If Owner does not comply, file a Petition for Non-Binding Arbitration with the Division of Condominiums

➤ **Establish a Fining Committee**

(Section 718.303, Florida Statutes)

❖ *Provide a reasonable amount of time under the circumstances for compliance.*



Covenant Enforcement Process

HOMEOWNERS' ASSOCIATIONS

- Issue a Violation Demand and Demand for Pre-Suit Mediation.
- If not remedied through demand or mediation, file a lawsuit.
- Election or recall disputes can be handled through arbitration with the Division or may be filed directly with the Florida courts.
- Establish a Fining Committee
(Section 720.305, Florida Statutes)



❖ *Provide a reasonable amount of time under the circumstances for compliance.*



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Finning Committee

Finning Committee

➤ CONDO

3 people who are not directors or reside with a director.

➤ HOA

3 people who are not officer, directors, employees of the association, or the spouse, parent, child, brother or sister of an officer or director.

- Owner must be provided with an opportunity for a hearing, with at least 14-days notice, before a finning committee at which the fine will be considered.
- 48-hour notice should be provided to the membership.
- Owner may present testimony and be represented by counsel.
- If finning committee does not recommend a fine, fine cannot be issued.



Finning Committee (cont...)

- **CONDO** - Fine may not exceed \$100 per violation per day with a maximum aggregate of \$1000.

- **HOA** – *Unless the documents provide otherwise*, fine may not exceed \$100 per violation per day with a maximum aggregate of \$1000.
 - *“A fine of less than \$1000 may not become a lien against a parcel.”*

 - ❖ HOA’s may, and should, amend their governing documents to specifically set a maximum fine amount higher than the \$1000 statutory maximum

- Fine/violation should be supported by dated photographs and violation should be well documented



Fining Process

- ✓ CAM inspects the community and reports covenant violation to the Board.
- ✓ Board puts the fine issue on the agenda for the next Board meeting.
- ✓ At meeting, board recommends a fine amount supported by the information provided by the CAM.
- ✓ Owner is provided with notice of the fine recommendation and a meeting of the Fining Committee to consider the recommendation of the Board.
- ✓ Fining Committee conducts a hearing, and the owner presents their case.
- ✓ Fining committee can either APPROVE or DENY the fine recommendation.
- ❖ **If APPROVED:**
 - Owner is provided with notice. Payment of fine must be set for a date at least 30-days after the date of the notice.
- ❖ **If DENIED:**
 - The matter is closed and fine does not issue.



Suspension of Use and/or Voting Rights

➤ Condominium:

✓ **Suspension of Use Rights:**

- Through Fining Committee process.
- Where Owner is more than 90-days delinquent.

✓ **Suspension of Voting Rights:**

- May only suspend an owner's rights where they are more than 90-days delinquent **and** the debt is more than \$1000.
- Proof of the delinquency must be provided to the owner 30-days before the suspension can take effect.
- Right is reinstated when debt is paid in full.



Suspension of Use and/or Voting Rights

➤ Homeowners Association:

✓ **Suspension of Use Rights:**

- Through Fining Committee process.
- Where Owner is more than 90-days delinquent.

✓ **Suspension of Voting Rights:**

- Where Owner is more than 90-days delinquent.
- Right is reinstated when debt is paid in full.

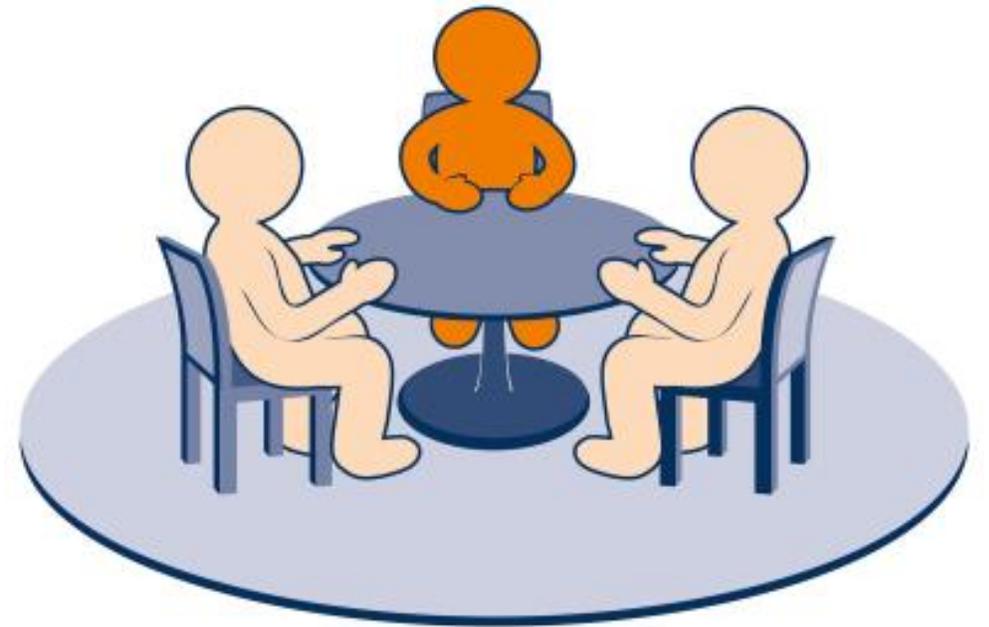


Mediation

- **Mediation is voluntary (*most of the time*)**
- **Private and Confidential**
- **Comparatively inexpensive**
- **Each party has control over the ultimate resolution/agreement**
- **Higher rate of agreement compliance**
- **Helps preserve ongoing relationships**

Mediator:

- Acts as more of a guide for the parties
- Neutral?



Pre-Suit Mediation in a CONDO

Matters Subject to Pre-Suit Mediation:

- Authority of the Board to require owner action or inaction in relation to his unit or appurtenances thereto.
- Authority of the Board to alter or add common area.
- Failure to give adequate notice of meetings or actions.
- Failure to properly conduct meetings.
- Failure to provide access to the official records.

Matters NOT Subject to Pre-Suit Mediation:

- Title to a Unit or Common Element.
- Interpretation or enforcement of a warranty.
- Collection of any assessment, fine, or other financial obligation owed to the association.
- Eviction of a tenant.
- Alleged breaches of fiduciary duty.
- Alleged failure to maintain common elements.
- Election or recall disputes.



Pre-Suit Mediation in an HOA

Matters Subject to Pre-Suit Mediation:

- Use of or changes to the parcel or the common areas.
- Covenant enforcement disputes.
- Amendments to the association documents.
- Meetings of the board, committees and membership, not including election meetings.
- Access to the official records.

Matters NOT Subject to Pre-Suit Mediation:

- Collection of any assessment, fine, or other financial obligation owed to the association.
- Any action to enforce a prior pre-suit mediated settlement agreement between the parties.
- Election or recall disputes.



Arbitration

Contractual (*Declaration*) Arbitration Clauses:

Enforceability

- There is a presumption in Florida that contractual arbitration clauses are enforceable.
- The clause must directly cover the dispute alleged.

TEST

- (1) Does a valid agreement to arbitrate exist;
- (2) Does an arbitrable issue exist; and
- (3) Was the right to arbitrate waived.

- **The validity of an Arbitration Clause must be challenged in any response or else risk being waived.**



Arbitration (*cont...*)

PROS

- **Its Cheaper...Maybe**
 - Generally, less complicated procedures.
- **Resolution is Usually Quicker**
 - Arbitration proceedings average about 15 months to reach conclusion.
 - Litigation proceedings range anywhere from 18 months to 3 years.
- **Scheduling Flexibility**
 - It is a lot easier to work with an arbitrator's calendar and availability to hear issues or motions than a judge.
- **Simplified Rules of Evidence and Procedure**
 - Rules of evidence and discovery practices are simplified in arbitration proceedings.
- **Arbitration is Private**
 - Filings in an arbitration are not public record.

CONS

- **Appeal is very limited**
 - The ruling was obtained by corruption or fraud.
 - There was impartiality, corruption or misconduct by the arbitrator.
 - The arbitrator exceeded his or her powers.
 - The arbitrator refused to postpone the hearing or hear evidence, or improperly conducted the hearing.
 - There was no arbitration agreement.
- **Cost of initiating arbitration proceedings**
 - Initial filing fee is much higher than court filing fees.
- **Pre-trial discovery is extremely limited**
 - Tougher to determine strength or weakness of case.
- **Enforcement**
 - Must get arbitration order confirmed by the court to enforce its provisions.



Non-Binding Arbitration Through the Division

CONDOMINIUMS:

“DISPUTE” means any disagreement between 2 or more parties concerning:

- The authority of the board to require an owner to take any action involving that owner’s unit
- The authority of the board to alter or add common area or element
- The board’s failure to properly conduct elections
- The board’s failure to give adequate notice of meetings or other actions
- The board’s failure to properly conduct meetings
- The board’s failure to allow inspection of official records

Appeal:

- Request a Trial *De Novo* and file a lawsuit with the State Court.



Section 718.1255, Florida Statute

Rule 61B-45, Florida Administrative Code (Rules of Arbitration Procedure)



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Non-Binding Arbitration Through the Division

HOMEOWNERS ASSOCIATIONS:

“DISPUTE” means any disagreement between 2 or more parties concerning:

- The board’s failure to properly conduct elections (**BINDING!**)
- Recall disputes

Appeal:

- Election disputes – Generally none absent the presence of rare circumstances.
- Recall disputes – Trial *De Novo* request.

Section 720.311, Florida Statutes

Rule 61B-81, Florida Administrative Code (Rules for HOA Recalls)

Rule 61B-82, Florida Administrative Code (Rules for HOA Mediation)



Litigation

When all else fails

- Look to Declaration Provisions
- Look to Statutory Obligations (Condo or HOA)
- Ensure all conditions precedent have been met or waived.

When the Line MUST Be Drawn

- Association Rights and Obligations
- Enforcement of Covenants



STATE COURTS

County Courts

- **Jurisdiction:** Disputes of \$30,000 or less; additional matters defined by statute.

Circuit Courts

- **Jurisdiction:** Disputes of more than \$30,000; additional matters defined by statute.

FEDERAL COURTS

U.S. District Courts

- **Jurisdiction:** General Federal Questions; Diversity (\$75,000)





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