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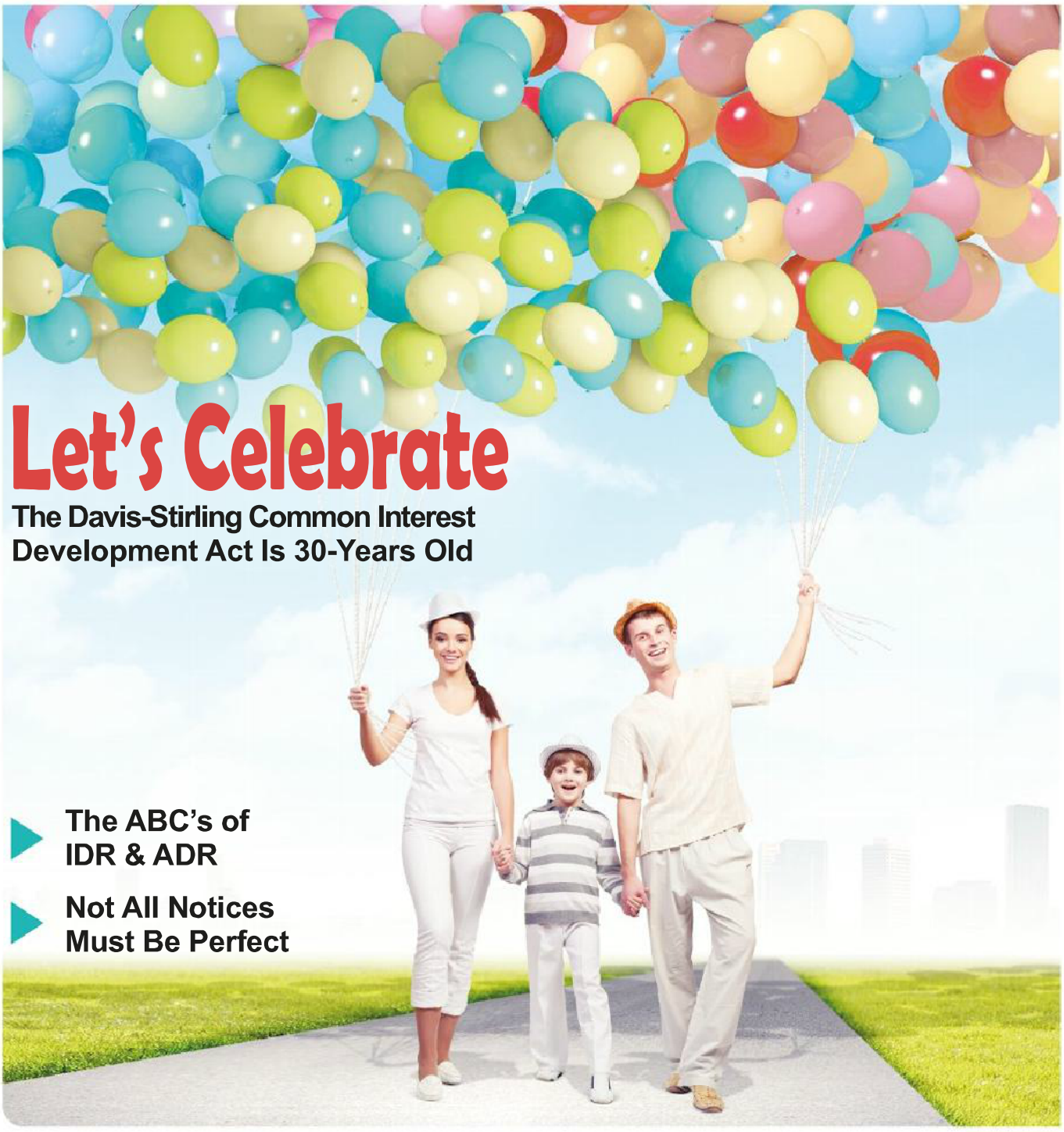

Let's Celebrate

The Davis-Stirling Common Interest Development Act Is 30-Years Old

- **The ABC's of IDR & ADR**
- **Not All Notices Must Be Perfect**

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By Robert M. DeNichilo, Esq.

THE ABC's OF IDR & ADR

Disputes between owners and associations can easily spin out of control. When those disputes result in a lawsuit, the costs, both in terms of time and money, can be significant. That is why attorneys often encourage parties to first meet and try to resolve those issues through some form of dispute resolution process before a lawsuit is filed. In fact, the law often requires that parties at least offer to meet in some form of alternative dispute resolution setting before they file a lawsuit, or they may lose the right to recover attorney's fees even if they win the suit.

California's *Davis-Stirling Act* contains several sections that address, and sometimes require, the use of the dispute resolution process before litigation can be filed. The statutory process includes (1) Internal Dispute Resolution and (2) Alternative Dispute Resolution.

Internal Dispute Resolution or "IDR" is an informal process where one or two representatives of the association (typically a board member and the association's community manager) meet with the owner of the property at issue and try to resolve the issue informally. *Civil Code* section 5905 requires that associations provide a "fair, reasonable, and expeditious procedure for resolving a dispute" with members.

Offering guidance on what is a "fair, reasonable, and expeditious dispute resolution procedure" in the IDR process, *Civil Code* section 5915 provides that (1) the procedure can be invoked by either party to a dispute, (2) the request to invoke the IDR procedure must be in writing, (3) if a member of the association requests IDR, the association must participate, but if the association is the one offering IDR, a member may choose whether to participate, (4) if the member participates, but the issue is resolved without that member's agreement (such as when there are multiple members involved), then the non-agreeing member must have a right to appeal the matter to the board of directors. In addition, if the parties

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reach an agreement, it is legally binding so long as the agreement is not in conflict with the law or the governing documents, is in writing and signed by all parties, and is consistent with the authority the board gave the board member before the IDR or is ratified by the board afterwards.

There is one new requirement for IDR which has led many associations to revise their IDR policies. IDR was initially designed to be an informal process where a board representative and an association member could meet and attempt to solve an issue. For many people this meant that attorneys should be excluded from the IDR process. Some IDR policies were drafted to specifically state that the parties were not permitted to bring attorneys to IDR meetings. In 2014, the California legislature amended the IDR statutes to state that the parties may be assisted in the IDR meeting by “an attorney or another person” at their own cost. This means that parties now cannot only bring attorneys to IDR meetings, but also other individuals as well, such as a family member or friend with knowledge of the issue, or perhaps to translate if the member does not speak English.

Associations should review their current IDR polices to determine the need for removing any prohibition against the parties bringing attorneys or other third parties to the IDR meeting. In addition, IDR policies should state that a party bringing an attorney to the meeting must provide at least five business days’ notice prior to the meeting or the meeting will be cancelled and rescheduled. This gives the party’s an opportunity to determine if they want their own attorney to also attend the meeting. Once at the IDR meeting, if the member has brought an attorney without providing the association prior notice, the board representative should cancel the meeting and state that it will be rescheduled. Generally speaking, it is not advisable for an association to proceed with an IDR meeting without legal counsel present if the other party has brought an attorney to the meeting. The decision to proceed with the IDR meeting without legal counsel should be made by the board, not an individual director who appears at the meeting.

If an association fails to adopt an IDR procedure, the *Civil Code* provides a default process. While the default procedure may be adequate, associations should consider that the statute states that the board shall designate a single director to meet and confer. This can lead to confusion as to whether anyone else (such as the community manager) can or should attend the IDR meeting. Also, allowing a single board member to attend the IDR meeting may not be good practice. It can lead to a “he said/she said” situation if the issue is not resolved, or the director may face several residents at the meeting, and may not be prepared to address them alone. A preferable IDR policy states that the board will designate a board member and another individual, which could be a board member or the community manager, to attend the IDR meeting. This provides at least one witness to the meeting, and supports the board member before attending a meeting with what could be an upset, or even confrontational, homeowner.

The other form of dispute resolution required under the *Davis-Stirling Act* is Alternative Dispute Resolution or “ADR.” In fact, absent some sort of emergency situation such as the need to immediately stop unapproved construction on a property, the *Civil Code* requires that this more formal process at least be offered before filing a lawsuit to enforce the governing documents. *Civil Code* section 5925 defines ADR as mediation, arbitration, conciliation, or other nonjudicial procedure that involves a neutral party in the decision-making process. Not only does the *Civil Code* require the parties at least offer to participate in ADR before filing suit, an association’s governing documents may also require the parties to use ADR

either before, or sometimes instead of, filing a court action. Such requirements are generally enforceable, and will be upheld if the provision is properly followed.

Most parties submitting to ADR typically agree to mediation, which is a process where the parties hire a neutral third party to meet and work with the parties to resolve any issues. Because attorneys are involved in ADR, and some mediators require a written brief setting out the issues and legal positions of the parties, the costs for ADR can be considerably higher than IDR.

As with IDR, the *Civil Code* imposes specific requirements with respect to initiating the ADR process. The request to submit the matter to ADR must be in writing, describe the issue, and notify the other party that they have 30 days to respond to the request, or they will be deemed to have rejected the offer to submit the dispute to ADR. Also, if the association is making the demand, the request must include a copy of the relevant portion of the *Civil Code*.

Unlike IDR, an association is not required to agree to participate in ADR if it is requested by a member. However, if a party refuses to participate in ADR, in any subsequent lawsuit where attorney's fees and costs may be awarded to the prevailing party, the court can consider the reasonableness of the party's refusal to participate in ADR in determining whether to award attorney's fees and costs. Therefore, while neither party is required to participate in ADR, they probably should. Not only will they possibly give up their ability to recover attorney's fees after any lawsuit, but they may miss a good opportunity to resolve the dispute at a fraction of the time and cost that litigation requires.

It benefits both associations and members to employ these dispute resolution processes, especially if they resolve a disagreement early. Given how quickly a seemingly minor issue can result in expensive and protracted litigation, the costs of participating in dispute resolution are often a good investment. ☼

This article was written and submitted by Robert M. DeNichilo, Esq. of Nordberg | DeNichilo, LLP.

WARNING:

IDR meetings are not provided the same confidentiality protections explicitly granted ADR proceedings. Participants should be aware that their adverse statements and the documents they provide at the IDR may be held against them in subsequent proceedings in California's courts. One may offer to sign a mutually-binding confidentiality agreement prior to the IDR, however the IDR must proceed even if a party refuses to sign the proposed confidentiality agreement. Parties to an IDR should also keep in mind that any written resolution or agreement signed at the IDR by all parties to a dispute may be judicially enforceable.

By: Dan Ernst, Esq.
Feldsott & Lee