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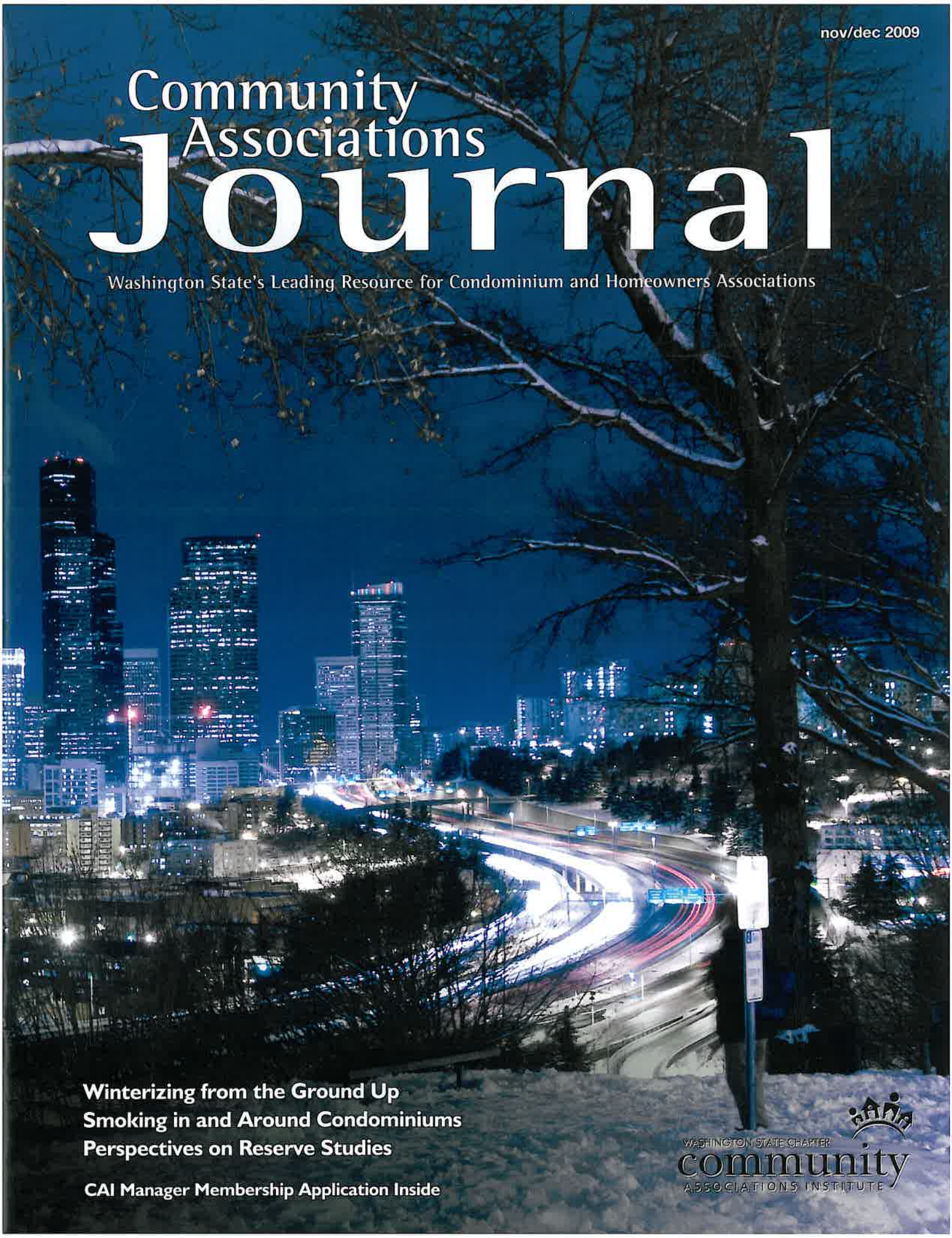

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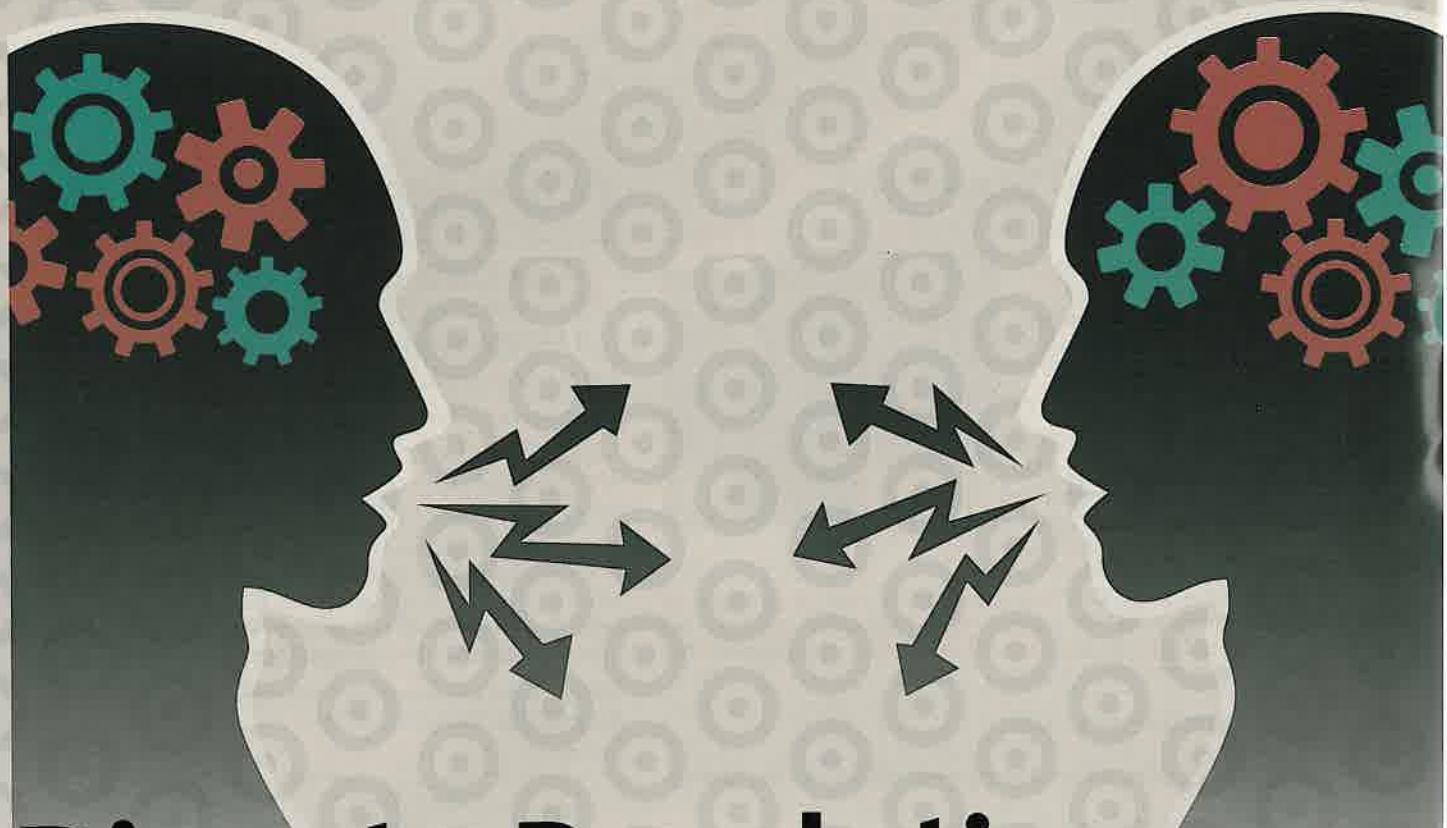

Dispute Resolution

The Many Methods for Getting Along (Legally Speaking)

Anthony Rafel and Cynthia Jones

If you have ever found yourself on one end of a dispute within your community—whether it be with a neighbor, a board member, your community association manager or even the developer of your building—chances are you engaged in one of four basic categories of dispute resolution: mediation, arbitration, litigation or negotiation. This article surveys these four types of dispute resolution and the key differences between them, including which methods are binding and which methods are voluntary.

Mediation

Washington's state court system defines mediation as a voluntary, confidential, informal and non-adversarial alternative to the legal system where a trained, neutral person helps people discuss and resolve problems.[1] While mediation is often voluntary, there are situations when it may be required by the Declaration or Bylaws or the unit owner's purchase and sale agreement. These documents should be consulted to see if mediation is required in a given instance. Mediation is not binding, which means that the mediator does not have authority to decide the case. Rather, the mediator tries to get the parties to understand the other's point of view and to narrow their differences so that settlement becomes possible. The mediator attempts this task by eliciting offers and counteroffers like a shuttle-diplomat between the parties until an agreement is reached or is within "striking distance." When that occurs, with the consent of both parties mediators often offer a "Mediator's Proposal"—a settlement figure somewhere between the parties' figures that the mediator thinks would constitute a fair settlement. If both parties agree, the dispute is settled on that basis. If either party disagrees, no settlement is achieved and the party that said "no" does not learn if the other party said "yes." This is a very successful, face-saving way to resolve a final impasse. If the mediation is successful, the mediator usually has the parties sign an enforceable, written agreement that ends the dispute. If the mediation is unsuccessful, by law the communications and offers that were made during the mediation are confidential and cannot be used against a party in court and the mediator cannot be called as a witness.

Arbitration

Arbitration may sound like mediation but it is very different. Normally, arbitration occurs only when both parties have agreed in writing to arbitrate. However, under RCW chapter 64.55 (passed in 2005), in any construction defect suit, the declarant, the association or a unit owner can demand arbitration. In that circumstance, therefore, arbitration is not voluntary or consensual—it is a requirement imposed by law.

But whether it is conducted by agreement or demanded pursuant to statute, arbitration has the following key features: (1) the arbitrator (whether one person or a panel of 3 people) hears evidence and makes a binding, final decision that ends the dispute; (2) there is no right of appeal except in extraordinary circumstances (such as when corruption is shown); (3) the arbitrator need not apply the rules of evidence or other rules of law strictly, but has discretion to relax the rules and do "rough justice"; and (4) the parties pay for the services of the arbitrator(s).[2] In other words, arbitration is like a trial without a right to a jury or a right of appeal, where the rules of law and evidence may or may not apply and the fees for the services of the arbitrator are ordinarily shared by the parties. Under RCW chapter 64.55, if either party is unhappy with the arbitrator's decision, it can request a "trial de novo" in court. A trial de novo is a new trial that is conducted as if the arbitration did not occur. In that scenario, however, if the party taking the case to court following arbitration does not improve its position or result, that party will ordinarily be forced to pay the other party's attorney's fees. This creates a significant disincentive to demand a trial de novo after arbitration. Arbitrations are typically conducted in a private rather than public setting and are generally not recorded or stenographically reported, but unlike mediation they are not confidential as a matter of statute and can be the subject of discovery if there is later litigation.

While arbitration is often assumed to be a fast and inexpensive way to resolve disputes, in practice it often turns out to be neither. Too often, because the parties have to bear the entire cost, and the arbitrator is not required to enforce rules of law or court scheduling requirements, arbitrations end up taking longer and costing more than ordinary court proceedings.

Litigation

We all know what litigation is—a courtroom with a judge and sometimes a jury—but how is it different from mediation and arbitration? Unlike mediation, litigation is not confidential and it is binding on all parties involved. Plus, all papers and proceedings in litigation are open to the public. Unlike arbitration and mediation, going to court is free because there is no charge for the judge and court staff where in mediation and arbitration the parties pay for the mediator's time and arbitrator's time in addition to their attorney's time. This is a significant difference. Mediation tends to be of limited duration, but disputes resolved by arbitration can involve a significant investment of time by the arbitrator, with the attendant costs to the parties. Also, there is a right to a jury trial in court and a right to appeal once the case is litigated and after the judgment is rendered. In addition, in a court action the evidence rules and rules of court created by our legislature and courts are applied to everyone equally (most of the time) to level the playing field between litigants.

Litigation often gets a bad name as something to be avoided at all costs. When seen as a dispute resolution method having a set of rules developed over centuries to assure fairness, and which is less expensive and more predictable than arbitration, litigation may be properly understood as the right tool for the job when mediation fails.

Negotiation

No discussion of dispute resolution options would be complete without mention of good, old-fashioned negotiation, in which the parties and/or their representatives talk to each other directly and seek to resolve the dispute through communication. Because of the profusion of mediation and arbitration services, and a culture that promotes mediation, negotiation is often ignored as a way to resolve a dispute. This is a mistake: negotiation is cheap and can often reveal that the parties are not as far apart as they assumed. And even if it does not fully resolve the dispute, negotiation can set the stage for a productive mediation.

Conclusion

Mediation, arbitration, litigation and negotiation are separate and distinct methods for resolving disputes. Each has its pros and cons, benefits and detriments. Before selecting or proposing a method for resolving a given dispute, consider the nature of the dispute, the amount of money at issue, the resources of the parties, and the objective of the association.

References

1 *See http://www.courts.wa.gov/court_dir/?fa=court_dir.dispute and RCW chapter 7.07.*

2 *In arbitration conducted pursuant to contract, the parties typically share the cost of the arbitrator(s) equally. This can be substantial—in the tens of thousands of dollars for a large dispute. Under RCW chapter 64.55, which party must advance and ultimately pay the cost of arbitration is set forth in rules that vary depending upon whether the building permit was issued before or after August 1, 2005. See RCW 64.55.140.*

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