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COMMENTARY

Resolving Real Estate Disputes: The Case for Collaborative Law

By R. Paul Faxon

APPROXIMATELY 90 PERCENT OF ALL CIVIL LITIGATION EVENTUALLY SETTLES out of court – literally and figuratively – often on the steps of the courthouse, usually years and hundreds of thousands of dollars later. Traditional litigation can eliminate potential settlement options, skewer relationships and become an end unto itself. As commercial real estate professionals who have been involved in litigation well know, it usually proves expensive and inefficient; often a Pyrrhic victory that can cost “winning” litigants precious project time, undermine company viability or erode critical business relationships.

There is a better way. Commercial (and residential) developers, lenders, landlords, contractors and related professionals need to examine their process options for resolving disputes both at the inception of the venture and when a dispute actually arises. All too often, parties reach for the “scorched earth” litigation option when a form of alternative dispute resolution, or ADR, would better serve all concerned. Even parties who consider ADR often tend to focus on just one of two options: arbitration or mediation. In binding arbitration, a private neutral, such as a retired judge, imposes a final judgment on the disputants after a private proceeding. In mediation, a neutral mediator tries to facilitate a voluntary settlement between the parties. While both these processes can prove to be the best option in certain types of conflict, a developing method of ADR known as collaborative law offers a superior choice in a wide range of situations.

Collaborative law, initially rooted in the realm of settling family disputes, is being introduced in a range of commercial situations, including resolving real estate conflicts. An emerging, powerful practice, collaborative law provides the vehicle for the parties in conflict, supported by their respective legal counsel, to build workable solutions to some of real estate’s most difficult disagreements in development, construction, finance, landlord/tenant relationships, restructuring of real estate entities and permitting.



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Simply defined, collaborative law is a process whereby each party to the dispute, and each attorney, consents in an enforceable agreement to initially attempt to settle the conflict without litigation in a confidential series of meetings in which both clients are present and actively involved. The parties promise to take a reasoned stand on every issue, to keep discovery informal and cooperative, to negotiate in good faith and to retain any necessary experts jointly. The final and critical component of the collaborative law agreement provides that either party, at any time, may give notice and terminate the collaborative process, but then both attorneys and their firms must withdraw from all future representation.

A New Paradigm

That both parties and their respective attorneys agree up front to negotiate, instead of litigate, and replace lawyers if they head to court, sets up a radically new dynamic, a fundamental change of mindset among all concerned. The focus shifts from adversarial to problem solving. Rather than jousting for position, attorneys and clients are motivated to search for mutual interests and real solutions in a spirit of cooperation.

Collaborative law is especially appealing to those real estate professionals and entrepreneurs who prefer to actively participate in shaping the settlement. There is no third party involved; no judge, jury, arbitrator or mediator. Clients are empowered to craft the best solution, drawing upon their own expertise and industry knowledge, and are not subject to a third party imposing a decision. Certainly, clients can seek expert testimony but there is no battle of the experts, which saves time and money. In short, collaborative law is an open, creative and more mutually satisfying process – with better long-term chances for permanent success – because the

clients are fully engaged and vested in the deal that is cut. Yet the clients have not relinquished the right to their own legal advocate or, if a private resolution is not reached, civil litigation or even another form of ADR.

Some of the more attractive incentives for employing collaborative law include:

- **Expeditious resolution:** In today’s real estate arena, money is time and time can’t wait. Clients can’t control the scheduling in a civil court system, which can grind on for years. Collaborative law will, in all likelihood, result in a much quicker settlement. The process pro-

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motes “sooner-better” outcomes in response to today’s time pressures, reducing lost opportunity costs, distraction and associated stress.

- Continuing relationships: It’s a small world and burning bridges is not good for anyone’s business. The collaborative law process can help clients preserve, or even enhance, important relationships. To be sure, clients can engage in collaborative law with those whom they don’t know, but where the parties in a dispute have a relationship, the collaborative process can keep important associations and affiliations intact.

- Judicious privacy: If clients have a particular need for privacy in their dispute resolution, then collaborative law is the best approach. The process ensures complete confidentiality. It is not a public record, nor does it set a precedent.

Conversely, there are certain legal cases and situations that do not lend themselves particularly well to dispute resolution via collaborative law. If a client needs an immediate injunction or wishes to use litigation as a club to intimidate or obfuscate, then collaborative law would not be in their best interests. There are players with deep pockets who embrace the expense and delay of litigation because it

serves a greater purpose of maintaining a certain status quo. Also, clients who are unwilling or unable to participate in the settlement process would not make the best candidates for collaborative law. Lastly, the use of collaborative law in resolving business disputes is a developing form of ADR and may require an education process for both parties and attorneys.

Pioneering Approach

A growing group of lawyers in Massachusetts, members of the Massachusetts Collaborative Law Council (www.massclc.org), are committed to resolving legal conflicts without litigation through collaborative law. This not-for-profit organization has taken a leadership role in moving collaborative law into the business-resolution context, and in training an increasing number of attorneys and allied professionals in this conflict-resolution solution.

This state law council and its practicing attorneys are working to promote the collaborative process and dispel the myths. One such commonly held misconception allows that collaborative law only works if you “love” the other side. Indeed, not love, but a driving desire to reach an efficient, effective, beneficial

solution is the only real requirement for success. The process can work even if both parties mutually dislike one another. Also, there’s a sense out there that real men and women litigate, preferring to step into the legal arena and duke it out until death. Fortunately, certain decision makers are beginning to realize that there are cases where collaborative law serves their interests best.

And what of the attorneys who are promoting the collaborative law process? Doesn’t a quicker resolution, without juicy litigation, hit lawyers squarely in the wallet? In fact, those of us practicing collaborative law welcome the opportunity to be creative thinkers and problem solvers, happy to lay down our adversarial arms. Business is more satisfying, clients are better served and, at the end of the day, happier clients are quicker to return and refer new business. They appreciate attorneys who are able to effectively facilitate their business goals in a legal context and who value the synergy that a true partnership with a client can create.

In keeping clients central to the process, and by focusing on a better outcome through positive negotiations, collaborative law generates “win-win” solutions for all parties involved. ■

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