

# Community Association Management *Insider*<sup>®</sup>

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## HUD: Vegas Association Discriminated Against Families with Children

The U.S. Department of Housing and Urban Development (HUD) recently charged a Las Vegas homeowners association and its management company with discriminating against families with children by restricting its housing to members who are 55 and older.

The charge stems from HUD's allegation that the association and management company enforced an age restriction policy for the community without taking the proper steps required to make the restriction legal. According to HUD's charge, a member was in the process of selling her home to a male buyer under the age of 55 when the deal was terminated because of the policy.

However, limiting housing to adults  
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## FEATURE

## Controlling Owners' Business Use of Their Units

Employees who have lost their jobs and are starting their own businesses, workers who are being encouraged to telecommute, parents of young children, and people trying to save on transportation expenses must find a place to set up shop. And for most of these people, their homes are the most convenient and cost-effective workplace. But homeowners in the community you manage may be subject to restrictions—or even a total ban—on the business use of their homes if the association has a policy that prohibits the use of residential units for commercial purposes.

Controlling owners' business use of their units is important: It prevents operations that could put an undue burden on the association's common elements, cause an increase in common expenses, increase risk or hazards, or create noise, odors, or other nuisances that interfere with other owners' enjoyment of the community.

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## BEST PRACTICES

## Help New Board Member Transition into Role

Inevitably, for one reason or another, a community association board member gives up his position. When this happens, the association has the sometimes difficult task of replacing the outgoing member. But the challenging part of replacing a member comes *after* the new member is found and elected to the board. That's because, depending upon the new member's experience with your association, or associations generally, there may be a lot of information for him to quickly get up to speed on—especially if big decisions are in the process of being made.

The more a new board member knows, the more he'll be able to contribute to the association in a meaningful way. Help your board's new member successfully transition into his role with these three tips.

### Tip #1: Rank Priorities

When a new member is elected to the board of directors, help him to distinguish items that are a high priority from those that are not, and advise him to tackle the time-sensitive issues first.

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## *Business Use of Unit* (continued from p. 1)

But because of the nationwide increase in the number of home-based businesses, your association's board may have to lift a total ban or loosen its restrictions on owners who want to use their units for work purposes. When making these changes to a business use policy, it's important to keep in mind the reasons a total or partial ban was imposed in the first place and make sure that new rules reflect those concerns. And make sure that you can adequately enforce the policy to control owners' business use of their units.

### Reasons for Ban on Business Use of Units

Generally, the reasons behind banning the business use of residential units are the preservation of the character of the community and its property values, and avoidance of overuse of the common areas and services, notes Boston-area real estate attorney V. Douglas Errico. In most associations, there would be no reason to ban *all* business uses, says management expert Clifford J. Treese.

However, certain businesses—for example, businesses that cause excess traffic, violate zoning laws, or change the exterior appearance of the community—typically are a concern for associations and may be subject to a ban.

The nature of the commercial use may be a deciding factor in whether an association agrees that a business use is permissible, adds Errico. For example, businesses like day care centers, catering and food preparation operations, and professionals who see clients in person—such as attorneys, accountants, or therapists—have the potential to:

- Congest parking areas and increase traffic;
- Necessitate frequent deliveries;
- Cause noise, odors, and pests where food preparation is involved;
- Create fire hazards;

## *Vegas Association Charged* (continued from p. 1)

over age 55 is permitted by the Fair Housing Act (FHA) only in specific circumstances: if 80 percent of the units are occupied by at least one person age 55 or older; the association's manager publishes and adheres to policies that demonstrate an intent to operate as housing for older people; and the manager verifies occupancy in accordance with the FHA's statutory and regulatory requirements. An association that meets all these requirements could enforce an age restriction policy.

HUD's investigation found that the association didn't meet the age exemption requirements of the FHA and therefore didn't have the legal authority to ban sales to persons under 55—including families with children. The association may have to pay damages if an administrative law judge finds that it engaged in this type of discrimination.

- Overuse water and other utilities that other owners may have to pay for;
- Disproportionately fill Dumpsters;
- Install objectionable signage; and
- Increase insurance premiums or claims, in some cases.

**Potential Problems Stemming from Ban**

When your community’s board is determining whether to continue a partial or total ban that is in effect or impose a new type of ban, remind board members that it could be difficult for you as the manager to enforce such a policy. And bans on business use of units can affect the sale of units.

**Enforcement and discipline.**

“In this day and age, home-based businesses may be hard to detect, and they may be relatively unobjectionable,” says Errico. He says that enforceability of a total ban will always be difficult where you can’t detect, let alone prove, that a home office or Internet-based business exists. Errico says that it may be difficult to draw the line in cases where enforcement of the ban might be viewed as overbearing or oppressive—a common complaint about condominium boards.

Errico warns against trying to implement or enforce a total ban without first applying a “common sense” test. “Without that, a rigid and absolute ban can be incredibly expensive and time-consuming, without any real benefit,” he says. “This sometimes happens when neighboring owners clamor for enforcement in minor cases,” he adds. The board, the manager, and

(continued on p. 4)

**MODEL FORM**

**Require Board Approval Before Using Unit for Business Purposes**

You can have an owner fill out and submit this form when she wishes to use her unit for other than residential use. By requiring owners to submit this application, the board can head off unwanted business uses before they begin.

**APPLICATION FOR BUSINESS USE OF UNIT**

I am a member of the [*insert name of community association*], residing at the address indicated below. I wish to use my unit for a purpose other than residential, and acknowledge that I require the prior, written consent of the Association’s Board of Directors in order to do so.

The type of business use to which I wish to put my unit is:

\_\_\_\_\_

\_\_\_\_\_

I represent that, in connection with this use:

1. The business use is consistent with the residential character of the community and complies with all applicable federal, state, and local ordinances.
2. I have all necessary approvals for the business from the appropriate local governmental agency.
3. The business use will not put an undue burden on any of the community association’s common elements or cause an increase in common expenses.
4. The business use won’t create noise, vibration, glare, fumes, odors, or electrical or electronic interference detectable by neighbors.
5. There will be no signs or displays indicating that the unit is being used as other than a residence.
6. The business will not generate significant traffic, foot or vehicular, or parking usage by clients, customers, delivery services, or others.
7. No equipment or other items related to the business will be stored, parked, or otherwise kept outside the unit or in any common area.
8. The business has no employees on-site, other than members of my family who also reside in the unit.
9. The business won’t involve the use, storage, or disposal of any materials classified as hazardous materials under federal, state, or local law.
10. The business use of my unit will be subordinate to its use as a residence, and won’t require any external modifications that detract from the residential appearance of the unit.
11. Should the business use of my unit increase the association’s insurance or other costs, I agree to pay the amount of that increase.

MEMBER’S NAME (PRINTED) \_\_\_\_\_

MEMBER’S ADDRESS/UNIT # \_\_\_\_\_

SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_

## Business Use of Unit

(continued from p. 3)

the association's attorney shouldn't succumb to these pressures, but rather continue to exercise good judgment and reasonable discretion, warns Errico.

"Many home-based businesses leave no footprint at all," says Treese. Someone would have to go into a unit to "catch" an owner, and the association would run the risk of making a false or erroneous accusation—not only invading privacy, but possibly bringing about a lawsuit, he adds.

**Prospective owners.** Bans can also be unattractive to prospective owners who want the option to work out of their homes. "Home-based businesses, either full or part time, appeal to several demographic segments," says Treese—for example, women with children, single parents, and disabled individuals with mobility or security concerns. If a prospective buyer absolutely must work out of her home, it won't be feasible for her to consider buying a unit. "A ban could wreak havoc on marketability," he warns.

## Regulation Due Diligence

When addressing a ban on the business use of units, encourage the board to do its due diligence to make sure that its plan doesn't conflict with state or local laws that trump the association's restrictions. For instance, some jurisdictions prohibit bans on certain businesses like group homes for the handicapped. And some state and local legislation dealing with child care may prohibit a ban on such activities in the home, as long as the appropriate licenses are obtained, says Treese.

If that's the situation, those laws must be respected, but they should also be carefully reviewed, because they still might allow for at least some degree of regulation by the board to lessen the adverse impacts on the community, says Errico. Due diligence can avoid unnecessary or time-consuming issues for you and the board later.

**PRACTICAL POINTER:** Remind the board that if a ban is set, it may have to change the governing documents. Requirements for changes to governing documents are spelled out in those documents

and/or in the state enabling statute, if there is one.

## Business Use Approval

Regardless of whether a ban is in effect at your community, have owners fill out an application before using their units for business purposes.

"I believe it's a good idea to require approval for business uses to screen out uses that might be borderline or clearly objectionable. Adopt an application process requiring the owner to spell out what will be done and what the possible impacts would be," says Errico. For an example of an application form you can adapt to determine whether an owner's proposed business use of her unit is appropriate for your community, see our Model Form: Require Board Approval Before Using Unit for Business Purposes.

### Insider Sources

**V. Douglas Errico, Esq.:** Marcus, Errico, Emmer & Brooks, P.C., 45 Braintree Hill Office Park, Ste. 107, Braintree, MA 02184; [www.meeb.com](http://www.meeb.com).

**Clifford J. Treese:** Association Information Services, Inc., 7724 Creekside Dr., Pleasanton, CA 94588; [www.associationis.com](http://www.associationis.com).

## RECENT COURT RULINGS

### ► Board Can Terminate Member's Proprietary Lease

**Facts:** An apartment building tenant entered into a written agreement with her then-landlords, who wanted to turn the building into a co-op. Under the terms of the agreement, the tenant was permitted to continue living in the apartment and was given one share in the co-op, making her a "proprietary lessee," in addition to being a co-op member.

Later, the co-op board contended that it received numerous complaints about the member. Despite the member's assurances that she would modify her

behavior, the complaints about her disruptive behavior continued. After a meeting with the member and her lawyer, the board voted unanimously to terminate her lease and cancel her unit's share.

The member asked a New York court to vacate the termination and eviction notice from the board.

**Decision:** The court denied the member's request.

**Reasoning:** The court decided that a co-op may properly terminate a proprietary lease of a member who engaged in a course of objectionable conduct—and such a decision was protected by the "business judg-

ment rule.” The court found that the co-op board’s decision was clearly protected by the rule, noting that both criteria to terminate a proprietary lease were satisfied.

“The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to the good faith decisions made by boards of directors in business settings,” the court explained. “Thus, a court will defer to a cooperative board’s decision to terminate a tenant-shareholder’s proprietary lease and cancel his or her shares as a result of ‘objectionable conduct’ without scrutinizing the underlying facts of such a decision, as long as the board has acted: (1) within the scope of its authority; (2) in the interests of the cooperative; and (3) in good faith,” the court added.

Here, the board’s decision to terminate the proprietary lease and cancel the member’s share is clearly protected by the business judgment rule. The member’s proprietary lease authorizes the board to ter-

minate a tenant-shareholder’s lease “at any time” if it has determined that his or her “objectionable conduct” has rendered his or her continued tenancy in the cooperative “undesirable.”

To terminate a tenancy, the proprietary lease requires that: (1) to be objectionable, the conduct must be repeated after the member first receives written notice thereof; and (2) the board must vote by a two-thirds’ majority to terminate the lease at a meeting called for that purpose.

Here, both of these criteria have been satisfied. Notably, the shareholder had at least eight different written notices of her objectionable conduct. Moreover, the board voted unanimously to terminate her tenancy, at a meeting during which she was “able to be heard and present her side of the story,” the court pointed out. Under these circumstances, the co-op board clearly acted within the scope of its authority, the court determined.

■ In the Matter of Perry v. 61 Jane Street Tenants Corp., May 2011

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## **Best Practices** (continued from p. 1)

“At Kiawah we encourage new directors to review and ask questions about the most immediate or recent actions the board has taken, and those that are coming up next,” says Tammy McAdory, director of governance and communications at Kiawah Island Community Association (KICA) in South Carolina.

KICA’s board operates under a “modified policy governance” model, so the board acts strategically, but the association’s staff members use a tactical approach, she points out. “As such, the strategic plan is an important instrument, with its goals and timelines, to become familiar with, as are our financials, including upcoming major asset projects,” McAdory explains.

Tactical information doesn’t require the same sense of urgency.

“While the covenants are the primary governing documents, they are less time sensitive because they provide a roadmap to how the organization functions, and are complex and generally take longer to absorb,” she notes.

### **Tip #2: Design Operations Manual**

Think about compiling important information in an operations manual that the new member can use initially to familiarize himself with need-to-know information—and then refer to in the future. There are several benefits to having an operations manual at the new board member’s—and your and the entire board’s—fingertips.

Having an operations manual may make board meetings run more smoothly. By including meeting minutes for the prior

12 months in each manual, the new board member can quickly review what has been discussed in past meetings before he arrives at new meetings. And an operations manual can shorten emergency response time. The new member will be aware of how he should act during coordinated efforts by you and the other board members to fix a problem.

“There are so many materials that govern an association, from statutes to covenants to resolutions, it’s helpful to assemble the most relevant information in an organized format for easy reference by the directors,” advises McAdory.

Your operations manual should include the governing documents in a hierarchy. (For example, KICA is subject to the South

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## Best Practices

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Carolina Nonprofit Corporation Act.) Your association's articles of incorporation, covenants and bylaws, general covenants, policy resolutions, and rules and regulations should be included in that order in the operations manual.

McAdory notes that KICA does not provide financials in this material because that information is updated monthly. However, an overview of the *type* of accounts and any guidelines—for example, KICA's "Financial Controls Policy"—are included in the manual.

Don't forget to provide orga-

nizational charts, helpful contact information, the association's annual calendar of recurring events, such as the annual meeting or audit, and board meeting and strategic planning meeting schedules.

Consider posting the information in the operations manual online so that it's accessible at all times for both new and incumbent board members. "Nearly all of KICA's materials are on our Web site, so we use this tool to provide materials that change frequently, such as financials and newsletters," says McAdory.

This is also a great opportunity to have all board members review this important information, which they may have forgotten or been unaware of. And it provides a chance for the association to make sure that all of the information still complies with the law, which may have changed since that information was first used.

Each board member should receive a copy of the operations manual. And remember that the chairperson of the board should have input because he may have certain areas he wants to focus on for the year.

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**PRACTICAL POINTER:** Use staff to assemble the first operations manual and to update it when necessary. Having one point person from your staff take care of the operations manual can provide continuity while directors rotate.

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### MODEL POLICY

## Require Information Sharing Between Old and New Board Members

Board members are only as good as the information they're given, so it's important to set a policy that facilitates information sharing between old and new members. Your policy should require the first official meeting of the new board to be a "transition" meeting between the old and new board members. It should require outgoing board members to attend and turn over information to incoming board members.

Don't forget to require board members to sign the policy to signify their agreement with it. Show this policy to your attorney before adapting it for your community.

### BOARD MEMBER TRANSITION POLICY

**PURPOSE:** It is the intent of this policy, established by the Board of Directors of *[insert community association's name]* to allow for a smooth transition of new responsibilities from outgoing Board members to incoming Board members. The Board has established this policy to include the following, to which each Board member agrees to adhere, as evidenced by his/her signature hereto.

1. Whenever the composition of the Board of *[insert community association's name]* changes, a transition meeting between outgoing Board members and incoming Board members shall be held during the first official meeting of the new Board.
2. Board members who are not re-elected to the Board, or who voluntarily retire from the Board, shall attend the transition meeting to share information and insights with incoming Board members.
3. At the Transition Meeting, outgoing Board members shall provide incoming Board members with all Board information gathered during the former's tenure.
4. All new Board members shall be obligated to attend a Board member orientation session to bring them current with Board policies.
5. The Board acknowledges the contributions of each Board member and has created this policy in order to help run the association in a cooperative spirit of sharing and openness. To that end, each Board member agrees to abide by this policy as evidenced by his/her signature below:

PRINT NAME \_\_\_\_\_

SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_

“We find that holding two orientation sessions is very valuable,” says McAdory, whose board replaces two seats out of seven each year. KICA holds one orientation session with the two new directors, the board’s chairperson, the vice-chairperson, and executive staff right after elections. A second orientation session is held with the full board of directors about a week later.

“The first session provides an

overview of Kiawah’s history, as well as the governing documents, and the second—full—session focuses greatly on the strategic plan,” McAdory says.

You can create a policy obligating new board members to attend any orientation sessions that are held. The policy may also require that the first official meeting of the new board be a “transition” meeting between the old and new boards, where outgoing board

members can share pertinent information. For an example of a well-worded policy that you can adapt for use at your community, see our Model Policy: Require Information Sharing Between Old and New Board Members.

#### *Insider Source*

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## DOS & DON'TS

### ✓ **Consider Four Options for Addressing Budgetary Shortfalls**

If your association is facing a budget shortfall, you can suggest options for the board to consider. Although each association’s specific circumstances are unique, using one or more of the following four options may close the gap:

- Utilize the prior year’s accumulated surplus. If such a surplus exists, then depending on the nature, magnitude, and timing of the expense, it may be appropriate to spend some or the entire surplus to resolve an outstanding obligation.
- You may also be able to use the prior year’s accumulated working capital contributions. At the time of closing on a home, many associations collect working capital contributions that are used for the association’s working capital needs. You should maintain approximately three months of operating expenses in this fund. If there’s an excess of three months of expenses in the fund, the board should consider using it to address an unexpected need.
- Think about reducing other expenses, which is always a good idea. However, it’s rare that an expense reduction by itself is enough to provide the needed funds for unforeseen circumstances. You may want to defer an expense, additionally. If the payment arrangement with a vendor can be renegotiated and deferred, it might assist with current cash flow needs.
- Amend your current year’s budget. Certain expenditures, such as a sizeable increase in insurance premiums, affect both current and future members. In this situation, it may be advisable to amend the

maintenance budget immediately and increase maintenance fees accordingly.

In certain circumstances it’s appropriate to obtain financing to address the association’s needs. But associations usually resort to obtaining a loan for only capital replacement projects, such as repairing or replacing roofs or sidewalks.

### ✓ **Require Signature When Distributing House Rules**

When enforcing your community association’s house rules, you’ve probably heard members claim they weren’t aware that they were in violation because they never received a copy of the house rules in the first place. This could lead to a sticky situation if a member’s violation has damaged common areas or other members’ units, but the member claims that he’s not liable because, without a copy of the house rules, he had no way of knowing that his behavior was prohibited. And if you can’t prove that you gave a copy of the house rules to the member, it may turn into a he-said/she-said battle.

To avoid this argument and ensure that the member won’t be able to claim that it’s *your* responsibility to remedy the damage he caused, require all members to sign a form stating that they’ve received a copy of the house rules when you distribute them. Also, require members who rent their units to acknowledge that they’ve received the rules *and* will give copies to their tenants.

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