



Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

NOVEMBER 2017

FEATURE

Here's how to loosen a ban that prohibits members from working from home, while holding them accountable for any downsides from their business.

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Reevaluate Home Business Ban to Foster Community's Marketability

Telecommuting has become commonplace in many industries, with workers being encouraged to work from locations other than their company's office. Small business owners might try to save money initially by finding a solution to running their operation other than leasing commercial space that locks them into a lease and rent. And parents of young children sometimes decide to watch other children to bring in additional income. Seemingly diverse types of workers often have one thing in common: Their homes must sometimes double as work space. And if their homes are in a planned community, that can get complicated for both them and the association. Here's how the business use of units in your community affects you and the association, and the way you should deal with it.

Keep Past, Present, and Future Concerns in Mind

Although homes can be the most convenient and cost-effective workplace in some cases, 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.

This might seem harsh, but 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.

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

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Home Business Ban

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concerns. And make sure that you can adequately enforce the policy to control owners' business use of their units.

Revisit Reasons for Ban

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. In most associations, there would be no reason to ban all business uses, though.

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. Look at your association's past concerns about business use of homes, and whether the factors that came into play then are still relevant.

The nature of the commercial use may be a deciding factor in whether an association agrees that a business use is permissible. 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;

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Home Business Ban

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- 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.

But if your community has changed so that these are no longer an issue, or there is now a way to minimize negative effects, take that into account when making decisions about lifting or loosening a ban.

Don't Let Ban Wreak Havoc on Marketability

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 because so many employees work from home. Here are two points to consider:

Point #1: Enforcement and discipline. In this day and age, home-based businesses may be hard to detect, and they may be relatively unobjectionable. 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. 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.

Before you try to implement or enforce a total ban, first apply a “common sense” test. Without that, a rigid and absolute ban can be incredibly expensive and time-consuming, without any real benefit to the association. This sometimes happens when neighboring owners urge enforcement in minor cases. The board, the manager, and the association's attorney shouldn't succumb to these pressures, but rather continue to exercise good judgment and reasonable discretion.

Many home-based businesses leave no footprint at all. 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.

Point #2: 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, 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.

Perform Due Diligence for Regulations

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

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**MODEL
FORM****Require Owners to Submit Business Use Application**

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. Make sure the association's attorney reviews the form before putting it into practice.

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 _____

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Home Business Ban

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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.

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, if there are any. Due diligence can avoid unnecessary or time-consuming issues for you and the board later.

And remember to 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, like our *Model Form: Require Owners to Submit Business Use Application*, before using their units for business purposes. It's always 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. And as with all possibly complicated issues at your community, make sure to run the application and related issues by the association's attorney. ♦

Q&A

Getting Condo Building LEED Certified

Q I manage a condominium building that is out of date environmentally. We recently implemented a recycling program that has been successful and members have asked about other green initiatives that we can take. I'd like to push for the building to become LEED certified. Is it possible to bring older condominiums up to date environmentally? And what should I say to the board to explain LEED and convince them that it's a good idea?

A It's important for associations to take the environmental aspects of operating a condominium into account when setting procedures for members to follow or doing work on the building. Conversations about being environmentally responsible are ubiquitous these days—a debate about the state of global warming has been playing out in the news for months and was a hot topic during the last presidential election. More and more first-time condo buyers are seeking environmentally friendly features in units and buildings. And developers have been responding by incorporating various environmentally friendly elements into their buildings' designs that go beyond complying with legal requirements pertaining to the environment for residential buildings.

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Q&A

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These measures may include using nontoxic and recycled materials in the structure of the building, installing low-energy consumption fixtures, and having green roofs. (Green roofs are partially or completely covered with vegetation and soil planted over a waterproofing membrane.) Many new condo buildings are “LEED” certified, but just because your older building isn’t yet environmentally friendly, that’s not cause for you to worry. Here’s what you should tell the board about making upgrades and aiming for LEED certification.

Learn About LEED

Leadership in Energy and Environmental Design (LEED) is an internationally recognized green building certification system developed by the U.S. Green Building Council (USGBC). The voluntary LEED program provides third-party verification that a project meets guidelines set by the USGBC for achieving high performance and sustainability through green design, construction, operation, and maintenance. It encourages green building practices and recognizes those meeting the standards for improved:

- Energy saving;
- Water efficiency;
- CO2 emissions reduction;
- Indoor environmental quality;
- Stewardship of resources; and
- Sensitivity to the impact of development on natural resources.

A variety of LEED rating systems now exist, including LEED For Homes. Registered projects meeting prerequisites for achieving LEED certification are given points for each requirement on the checklist met. The total number of points determines the level of certification achieved. The basic level is LEED Certified. Additional points bring Silver, Gold, or Platinum certification, the highest level achievable. Reaching even the basic level requires tremendous dedication, but can pay off in a number of ways—helping the environment, having a selling point for prospective members, and saving money are just three of them.

Why Make Effort for LEED Certification

If the board isn’t yet convinced why you should aim for LEED certification, consider this:

- Developers of LEED certified condos create less of an impact on natural resources than those developing traditional condo homes—they responsibly try to conserve resources and work to help sustain the environment;
- A demand for LEED condos encourages other developers to pursue LEED certification;
- When a condo property is LEED certified, you know for a fact that it’s green and you can tell prospective members this;
- By making a condo building a LEED-certified building, you’re helping to sustain the environment;

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- The indoor air quality is better in LEED-certified condos; you, your staff, and residents can breathe easier and feel healthier;
- LEED condos require less energy and water usage, an environmental and financial benefit; and
- LEED condos often offer onsite recycling and other incentives that make it convenient for residents to live an eco-friendly lifestyle.

You Can Teach an Old Condo New Tricks

A common misconception is that LEED certification applies only to new developments, and the board might be under that impression. But a special LEED program for existing buildings, called the LEED-EB program, provides a list of steps that managers and condo associations can take to operate and manage their building more efficiently.

Generally, with an existing building, you have to make the most of what you have. Most buildings are not going to go through a gut rehab. The good news is that you can take basic actions to greatly improve a building's energy efficiency and effect on the environment.

Existing buildings can become certified without requiring the association and members to undertake major building rehabilitation.

The LEED program sets out certain standards that buildings must meet to be considered environmentally responsible. These standards were developed with input from experts in the industry. Buildings that want to participate can make improvements in six categories:

- Sustainable sites—that is, how well the building and its property are designed to protect or minimize the building's impact on the surrounding environment;
- Water efficiency;
- Energy and atmosphere;
- Materials and resources;
- Indoor air quality; and
- Innovations in operations—a catchall category that can include improvements not covered in the regulations.

Buildings earn points toward certification by making improvements in the six categories. Depending on the total number of points a building earns, it can be certified at one of several levels. The higher the certification level, the greener the building—and the more the building will save on energy costs and other operating expenses.

Most of the categories above include required improvements such as meeting a minimum water-efficiency standard. But under each heading are also optional ways to earn points. For example, buildings can get points for installing solar panels or purchasing solar-power credits.

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Other ways of gaining credits include having written environment-saving policies. If the association implements a policy stating that it will use only green contractors, it can earn a point toward a LEED designation.

Benefits of Certification

Among the benefits of making your building greener, LEED-EB certification:

- Reduces your building's energy usage and thus its impact on the environment;
- Increases home values by reducing the community's operating costs;
- Improves your building's indoor air quality, which may improve or protect members' health;
- Makes your building more marketable to prospective owners and tenants because lower energy costs will mean lower operating expenses;
- Demonstrates your community's leadership in helping to protect the environment; and
- May qualify your community for tax rebates and other local government incentives.

Visit the USGBC website at <https://new.usgbc.org/cert-guide> for a guide to getting your condo building LEED certified. The website also has many resources that are helpful for managers and information about conferences and events that might be of interest to association professionals.

In the meantime, there are many green initiatives worth pursuing, such as creating a community garden if there's room in the community and interest from residents in participating. For more information, see *"Take 10 Steps to Create a Successful Community Garden."* You can also undertake green landscaping practices—see *"Use Green Landscaping Practices to Save Money and Resources."* ♦

IN THE NEWS**► Feds Halt HOA Foreclosure Fraud Scheme**

A homeowners association foreclosure home-buying scheme has come to an end, after a nearly three-year investigation. Federal authorities seized gold, cash, and other property from a Raleigh, N.C., man accused of fraudulently scooping up homes in foreclosure. He was charged with multiple counts of bank fraud and engaging in monetary transactions involving criminally derived property, among other crimes.

In 2014, planned community neighbors called police when they saw the man drilling the locks on the front door of a home that had been foreclosed on. Police eventually dropped all charges against him when he showed that he had purchased the title of the \$300,000-plus home, which the association had foreclosed on for nonpayment of dues.

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But the arrest prompted a federal investigation into further real estate transactions by the man and turned up a disturbing scheme. The man allegedly obtained eight properties in various planned communities through homeowners association foreclosures, using aliases to bid on properties and funneling money through holding companies. He would produce fraudulent documents showing the mortgages had been paid off and that he had clean titles to the properties and would liquidate the holding companies as soon as the properties had been resold, according to an indictment.

A forfeiture order filed this week accuses the man of quickly turning almost all of his \$1.3 million in profits into cash to make it harder for authorities to find. But the IRS was able to track down \$44,000 in cash from various bank accounts, as well as \$225,000 in gold coins, \$100,000 in equipment for a recording studio, and numerous prepaid debit and gift cards. Additional items, such as his car and electronics were also seized. The neighbors who contacted the police in 2014 about the suspicious drilling activity said they were happy that someone taking advantage of associations is being held accountable for criminal behavior. ♦

RISK MANAGEMENT**Boost Security Without Increasing Liability for Security Camera System**

One of the major draws of living in a planned community is increased security. An association has the power to hire and direct security personnel, and you and your staff can keep an eye on the community and deal with any suspicious behavior. But not all communities are gated, with a perimeter that naturally makes it more challenging for criminals to cross. Some homes are spread throughout a large community, with common areas scattered throughout the area. One look at the news shows that, unfortunately, crime happens everywhere. Authorities in Tampa, Fla.—an area that's known for having many homeowners associations—are currently looking for a serial killer.

You can take proactive measures by working with your association's board of directors to review and update your community's security measures at regular intervals. One proposal you could consider is installing security cameras in parking lots and common areas on the property. Like any security measures, there are pros and cons to using security cameras to see suspicious activity before a crime is committed or using footage after a crime is committed to identify perpetrators and aid police in finding them. Before installing and using security cameras to monitor the community, weigh the benefits and downsides to doing so.

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Risk Management

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Benefits of Monitoring Community

Security cameras have become a more common sight in community associations across the country. However, associations that haven't been able to afford installing them may be considering it now that advances in technology have reduced the price of basic security camera systems. There are a few benefits to this, particularly in parking lots.

The mere presence of cameras in parking lots may help reduce crime in these locations. There are numerous reports from associations across the country that car thefts have dropped significantly after security cameras were installed in community parking lots. And studies have revealed that the presence of such cameras in parking lots and common areas have resulted in a significant reduction in other crimes.

Also, installing cameras in parking lots may be cheaper than other crime prevention measures. They range in price, depending on the type and size of the camera and any special features it offers, making them accessible even to associations that don't have much room to spare in their budgets, and desirable for associations that don't experience much crime but would still like to take some measures yet don't want to overspend.

Another benefit of installing cameras in parking lots is that if a crime occurs in those locations despite the presence of the cameras, the cameras may record evidence of the crime that could help the police investigate it. The cameras may also record other activity that could be problematic for your association, such as a slip-and-fall accident in your parking lot or garage. So the tapes generated could be valuable in future criminal prosecutions or civil lawsuits.

Downside to Installation

One downside to installing cameras is that, in some circumstances, they may need to be monitored—and small communities may not have the money or the manpower to do so. Should you have someone monitor your cameras? The answer will depend on several factors, including the amount of crime in your community and in the surrounding neighborhood. But if you tell members and visitors that the cameras will be monitored—for example, 24 hours a day, seven days a week—you'd better make sure that they're monitored as promised.

If you believe that you would have to monitor your cameras, but don't have the money or staff to do so, then don't install any. If you install cameras and don't monitor them sufficiently or as promised, you're giving members and visitors a false sense of security. And if someone is robbed or attacked, she may sue you, claiming that the cameras gave her a false sense of security. So a security consultant isn't the only professional that can be helpful with your strategy to stop crime; make sure that you consult with the association's lawyer as well to make sure that you decrease your liability for security situations that have the potential to go wrong. ♦

RECENT COURT RULINGS

► Homeowners' Disapproval of Election Doesn't Invalidate Results

FACTS: Two homeowners in a planned community complained about the election and qualifications of the people elected to the board of the association. They became concerned when the developer of the community, in accordance with the bylaws of the association, turned over certain common areas of real property to the association. The bylaws required that members of the association board resign and a new election be held by members of the association after that happened. However, that was not done. The homeowners' asked a circuit court to enjoin the board members from any further action until a new election was held in accordance with the bylaws. The circuit court ordered a new election, which was subsequently held. However, the homeowners didn't agree with the manner in which the election was conducted and continued to dispute the legitimacy of the newly elected board. The homeowners sued the association and the board of directors as officers of the association and in their individual capacities.

DECISION: A Kentucky appeals court ruled in favor of the association and board members.

REASONING: The court noted that the homeowners alleged that actions taken by the officers of the association after the court-ordered election were invalid, since the homeowners didn't agree with the election process. The court, however, determined that the election was in accordance with the association bylaws, and it approved the election and its results. "While the [homeowners] may not like the process or the campaigning by the various board members, they are nonetheless bound by the final results," the court concluded.

The court also pointed out that state law may allow a lawsuit for injunctive relief against the association as a corporation, but it does not allow an action against individual officers of a nonprofit organization, since the association's fiduciary duty is to the association and not to individual owners. Therefore, any claims against the board members individually were dismissed. ♦

- Thompson v. Lake Cumberland Resort Cmty. Assn., October 2017