

# Community Association Management *Insider*

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## How to Control Members' Business Use of Their Units . . . . . 1

If your community forbids all business use of the units, it's out of step with the times and may not be able to enforce its ban.

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## How to Control Members' Business Use of Their Units

For years, community associations that wanted to preserve the residential nature of their communities have banned all business use of the members' units. This might have made sense 20 years ago, but with the proliferation of telecommuters, Internet businesses, and home computers and fax machines, it no longer does.

Still, many community associations continue to use the same ban as they have in the past. This ban tends to forbid *all* business use of the units at *any* time. "I wish I could say it's just a problem of old documents, but covenants are still being written that way today," says Maryland attorney Thomas C. Schild.

Setting a total ban on business use can create a variety of problems. Instead, community associations today should create specific rules that account for things like telecommuting and other business uses that don't have a negative effect on community life. Below, we provide a Model Bylaw on business use that more accurately reflects contemporary life (see p. 3). You can use this bylaw to permit business uses that don't negatively affect your community. We also give you a Model Form (see p. 4) that you can have members fill out ahead of time if they want to use their units for business purposes. Show both of these to your attorney before adapting them for use at your community.

### Problem with Total Ban

There are several problems with creating a total ban on business use of members' units:

- 1) **It doesn't accurately reflect current lifestyles.** It's never a good idea to write a rule that ignores reality. It leads to resentment by your members, and they'll be less likely to obey a rule that makes little sense to them.
- 2) **It will be harder to enforce.** Not only will more members violate the rule, you'll probably have a harder time enforcing it if they do. "A rule banning all business use is often unenforceable, especially if any other members are using their units in nonresidential ways and the association isn't stopping them," says Washington, D.C., attorney Robert Jackson. Even if there are no other members being allowed to conduct business at home, it will be hard to enforce a total ban. Since a total ban isn't necessary to protect the residential nature of your community, a court is likely to be as unimpressed by the logic behind it as are your members.

- 3) **It makes life harder for the board.** Some communities stop short of setting a total ban. For instance, some associations ban all business use of units, but allow the board to make exceptions on a case-by-case basis. Other communities say in their bylaws that the only permissible business uses are

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**CONTROL MEMBERS' BUSINESS USE** (continued from p. 1)

those that don't have a negative effect on residential life (or some other vague description), then leave it to the board to create specific rules that interpret the bylaw. Either way, this approach makes the board's job much tougher, and it makes it harder for the board to act consistently. Such bans are also more susceptible to abuse, or at least the accusation of abuse by a disgruntled member.

**How to Improve Your Bylaw**

The key to creating an effective bylaw restricting members' business use of their units is to be specific about the behaviors and effects you want to avoid. These should be only those things that have a negative effect on community life or on running the community. For example, you would probably want to forbid a use that would cause the association's liability insurance to be cut off.

If your bylaw is reasonable and well thought out, you'll be able to protect the residential nature of your community while giving members the flexibility to use their units for business purposes that won't harm the community. And should one of your members violate the rule, you'll be able to enforce it.

*Insider Says:* Whether you use a bylaw, rule, or other format, incorporate the new restrictions in a way that allows you to record them in the public records of your state and/or locality. In some places, only declarations can be recorded; in others, bylaws can be recorded. The important thing is that your restrictions be recorded. In general, courts frown on any rule that materially restricts the use to which a property owner can put her property. The benefit of recording your new restrictions is that courts will be more deferential to them, since your members will have been given prior notice of their existence.

**What Business Uses to Ban**

It's important to specify—in either a bylaw, rule, or other format—what business uses are banned in your community. This will be better for your members and board than a total ban or vague rule. Your rule, like our Model Bylaw, should:

**1) Ban any business use that's inconsistent with the residential nature of the community.** The most important thing is that the member's business use not change the residential nature of your community. So although your rules will go on to forbid specific actions, use this one general rule in case something comes up that you didn't foresee [Bylaw, par. 2(i)].

**2) Ban any business for which the member hasn't gotten necessary government approvals.** Some businesses require licenses, approvals, zoning variances, or other documentation from the local, state, or federal government before they're considered legal. So make sure that anyone who plans to run a business in your community is doing so legally [Bylaw, par. 2(ii)]. This is especially important because an illegal use could even affect your community's liability insurance coverage, says Schild.

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### CONTROL MEMBERS' BUSINESS USE (continued from p. 2)

**3) Ban any business that puts an undue burden on your common areas or raises your common expenses.** For example, if a personal trainer ties up your gym equipment and makes it hard for other members to get a chance to exercise, you shouldn't allow that business in your community. You have an obligation to all your members to give them an equal opportunity to enjoy the common areas. If a business use interferes with that, it shouldn't be allowed [Bylaw, par. 2(iii)].

**4) Ban any business that creates noise, vibration, glare, fumes, odors, or electrical or electronic interference detectable by neighbors.** If a business creates noise, for instance, that bothers neighbors, you shouldn't allow it [Bylaw, par. 2(iv)]. But if the noise is confined to the member's unit, there's really no reason to confront the member.

Many bylaws say that home businesses may not *use any equipment or process that creates noise, vibration, glare, fumes, odors, or electrical or electronic interference detectable by neighbors*, points out Jackson. But you shouldn't concern yourself with what creates the noise or other disturbance, he says. "Associations should focus on the measurable impact," he advises, "and not worry as much about the how the member created it."

**5) Ban any displays or signs that would show that the unit is being used as other than a residence.** To maintain the residential nature of your community, don't let members put up business signs [Bylaw, par. 2(v)]. If you allow one member to do this, you'll have to allow others to, also. And in time, you could have a community inundated with commercial signs.

**6) Ban any business that would significantly increase traffic or put a strain on parking.** Increased traf-

fic—whether it's car, truck, or foot—will have a negative effect on community life. In particular, it can compromise security and increase the chance of crime. So ban any business that would increase traffic [Bylaw, par. 2(vi)]. Say the same about any business that would put too much strain on existing parking.

**7) Ban any business from storing equipment outside the member's unit or in any common area.** If a member keeps business equipment outside his unit, it will affect the residential nature of the community, so it should be banned [Bylaw, par. 2(vii)]. It might also be unsightly.

## MODEL FORM

### Have Members Fill Out Application Before Using Unit for Business Purposes

The following application form was created with the help of attorneys Thomas C. Schild and Robert Jackson. You can have members fill out and submit this form when any of

them wish to use their unit for other than a residential use. By requiring members 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 Shady Acres Community Association, residing at \_\_\_\_\_. I wish to use my unit for a purpose other than residential, and acknowledge that I require the prior, written consent of the Shady Acres Community Association Board of Directors in order to do so.

The type of use I wish to put my unit to is as follows: \_\_\_\_\_.

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 displays or signs 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 on 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.

SIGNED \_\_\_\_\_ DATE \_\_\_\_\_

**8) Ban any business that has on-site employees, unless they're family members who reside in the unit.** To maintain the residential nature of your community, and to avoid putting a strain on parking and increasing traffic, don't allow any business that has on-site employees, other than family members who reside in the unit. This also helps to avoid compromising security at your community [Bylaw, par. 2(viii)].

**9) Ban any business that involves the use, storage, or disposal of any hazardous materials.** It stands to reason that you don't want to invite dangerous materials into your community. So forbid any home business that involves these materials [Bylaw, par. 2(ix)].

**10) Require the home business use to be subordinate to the unit's residential use.** To maintain the residential nature of your community, say that whatever business use the member wants to put her unit to, it must remain subordinate to the unit's residential use [Bylaw, par. 2(x)]. The unit must therefore be mainly a home.

### **Get Right to Recoup Increased Costs**

A member's business use may result in an increase in the association's insurance premiums or other costs. So give your community the right to recoup those increased premiums or costs from the member. To do so, say in your bylaw that the board may condition its approval of the member's application for business use of her unit (discussed below) on her agreeing to pay those increased premiums or costs [Bylaw, par. 3].

### **Require Board's Prior Written Approval**

To enable your board to work proactively, your bylaw should require members to submit an application to the board *before* using their units in a nonresidential way, and have the members wait for the board's written approval before starting their business use [Bylaw, par. 1]. This will also benefit your members because they'll know in advance whether or not their intended use will be allowed. Otherwise, someone might spend money

setting up a home business that the board later decides violates the bylaw.

Your application form, like our Model Form, should have the member acknowledge that her proposed business use won't violate any of the bans set out in your bylaw. And have her promise that she'll pay for any increase in insurance premiums and other costs caused by her business use.

To avoid any unnecessary bureaucracy, have your bylaws and application form say that any member who uses her unit for business purposes for fewer than 10 days per year and doesn't otherwise violate the rules can do so without submitting an application or getting board approval [Bylaw, par. 4]. ■

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#### **Insider Sources**

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