

COMMON INTERESTS



SUMMER EDITION 2021

A SEGAN MASON & MASON, P.C. PUBLICATION
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FAIRFAX COUNTY UPDATES ITS ZONING ORDINANCE

by AIMÉE T. H. KESSLER

The purposes of residential communities keep evolving, at least according to Fairfax County. The modified Zoning Ordinance (“ZMod”) adopted by Fairfax County Board of Supervisors which became effective July 1, 2021 more fully accommodates home-based businesses and accessory living units. It defers to the recorded governing documents of a community association; however, the Supreme Court of Virginia has already decided that the term “residential purposes only” when used in the recorded governing documents of a community association is not sufficient to ban businesses from a community association. *Scott v. Walker*, 274 Va. 209 (2007).

In addition, many recorded governing documents refer to the uses of the property as permitted by the local laws as the permitted uses of the Lots or Units. And,

even if the community association has specific language in its recorded governing documents to prevent home-based businesses, the County has explicitly stated that it will not enforce those covenants.

Home-Based Businesses

Home-based businesses, which do not include teleworking, home day cares, or short-term rentals, can apply for an “administrative permit” instead of a “special permit” in order to operate. An administrative permit is much easier because a special permit requires adjacent property owners to be notified of the application and that a hearing be held before the Board of Zoning Appeals. Home-based businesses can include:

1. general retail sales, where the sale and delivery of items occurs exclusively online or offsite;
2. a health and exercise facility, small;
3. a household repair and rental service, limited to repairing small household items such as musical instruments, sewing machines, radios, and watches;
4. an office;
5. a personal service, limited to sewing or tailoring;
6. a music, photography, or art studio;
7. small-scale production, limited to items created on-site and home-based food production, where the sale and delivery of items occurs exclusively online or off-site; and
8. a specialized instruction center.

The house where the home-based business is located can only use a maximum of four hundred (400) square feet for the business, including storage, and can only be operated by the person whose residence, or accessory structure, the business is located in. If the home-based business is being operated in a single-family detached dwelling, it may have one non-resident as an employee, who can work on-site from 7:00 AM to 6:00 PM.



Otherwise, all employees must be residents of the home where the home-based business is conducted.

Except for a health and exercise facility or a specialized instruction center, home-based businesses cannot have customers come to the home unless the business first obtains a special permit. A health and exercise facility or a specialized instruction center can have up to four students at a time or eight in one day without a special permit. Customers are only allowed between the hours of 8:00 AM and 9:00 PM.

If the home-based business has customers, then one off-street parking space must be provided by the business owner for the customer(s). The ordinance “counts” reserved spaces and driveways as “off-street parking.” It remains to be seen, however, whether unreserved Common Area parking is sufficient under the ZMod to qualify as “off-street parking.”

Accessory Living Units (ALUs)

An administrative permit can approve an Accessory Living Unit, rebranded from Accessory Dwelling Unit, however, they can only be located inside a principal dwelling unit and can only be within a single-family detached dwelling. Townhouse and condominiums cannot have ALUs. ALUs outside the principal dwelling unit (i.e., separate structures) are only permitted if the lot is two acres or more in size and requires a special permit.

The internal ALU can be either the lesser of eight hundred (800) square feet or forty percent (40%) of the gross floor area or the entire basement/cellar at the size it is as of July 1, 2021. A special permit is required for a larger area of the dwelling to be used as the ALU.



The requirement that the ALU residents be over a certain age or that they be disabled has been removed, meaning anyone can now reside in an ALU; however, an ALU can only have at most two bedrooms, house only up to two people, and cannot be used as a short-term rental. The owner of the single-family dwelling must live on-site – either in the principal dwelling unit or ALU – and there are additional limitations on who can occupy the principal dwelling unit.

If an ALU is to be approved, one parking space in addition to those already provided for the principal dwelling unit must be provided by the owner and, before anyone can occupy the ALU, a copy of the administrative permit must be recorded in the Fairfax County land records by the owner of the principal dwelling unit.

As with home-based businesses, ALUs still have to comply with the recorded covenants of the community association in which they are located. The case law from the Virginia Supreme Court suggests that the County ordinance will not take precedence over the Association's covenants. However, the County explicitly provides that it will not enforce the Association's covenants.





CH-CH-CHANGES...

(WITH THANKS TO DAVID BOWIE)

The minimum wage in Virginia increased to \$9.50 an hour on May 1, 2021. It will increase again to \$11.00 an hour on January 1, 2022 and \$12.00 an hour in 2023.



VARIANTS, VIRTUAL MEETINGS & VOTING

by AIMÉE T. H. KESSLER

In our Winter 2021 newsletter, we told you of the coming legislation enabling community associations to conduct partially or wholly virtual membership, Board and committee meetings as well as to vote electronically unless the association's documents prohibited it. The legislation, which went into effect July 1, 2021, requires an association to adopt guidelines before using the powers granted by this legislation. In other words, an association needs to adopt guidelines under the new legislation and its governing documents before it can meet or vote virtually even if it already had a resolution under previous law.

Until June 30, 2021, the board of a community association was empowered to meet virtually by legislation that went into effect in 2020 in response to the COVID-19 pandemic as long as they met certain requirements until the legislation expired or the Governor ended the State of Emergency. That State of Emergency has ended, so that law can no longer be

used as a basis for community association boards to meet virtually. They must go back to meeting in person unless and until they adopt the guidelines required under the new law.

The need for virtual meetings is not going away. The new variants of COVID-19 are causing infection rates to rise and causing localities and stores to institute masking requirements. In addition, virtual meetings have become popular in many communities. The ever-changing COVID-19 landscape, the possibility of a meeting being snowed out in the winter, and the positive feedback from community members who like the convenience of attending meetings virtually, mean the demand for Board, committee, and membership meetings to occur virtually continues.

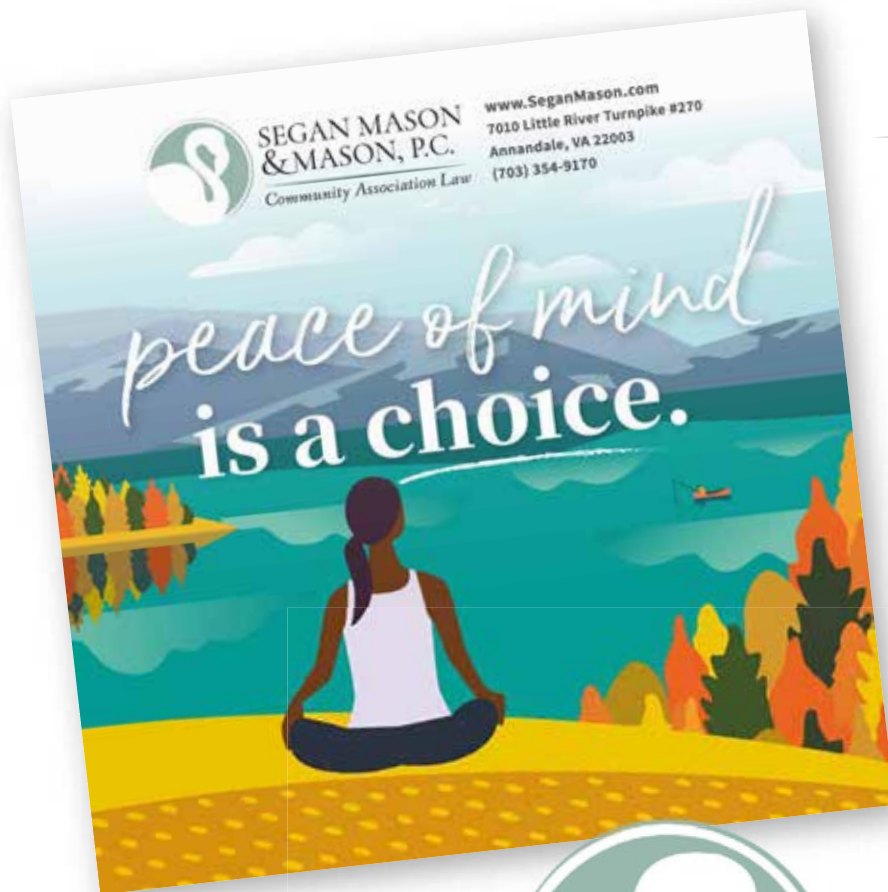
The guidelines now required by the legislation must be tailored to each community association's Declaration, Master Deed, Bylaws, and Articles of Incorporation. They must address topics such as whether a secret ballot is required, whether there is a mandatory agenda for a meeting – be it Board, committee, or membership, whether Robert's Rules of Order applies to the conduct of the meetings and which ones, as well as simply what the association calls its documents – Founding, Governing, Association – and what it calls its Board – Directors or Trustees, for example. An association's documents may include specific rule making powers for voting or meetings which may conflict with provisions of the statute which therefore have to be taken into consideration when drafting the guidelines.

In addition, to what extent and how the powers that have been granted to members such as, public comment, points of order, objections, viewing the Board package or candidate materials, will be translated to an electronic format need to be addressed.

We strongly recommend that legal counsel draft these guidelines for the association, and sooner rather than later. We all care about our safety and that of our neighbors, so enabling – without requiring -- your association to conduct business virtually by enacting these guidelines should be a high priority for Board members.

THANKS FOR READING!

Check out our [Winter 2021 Newsletter](#) for details on the **legislation authorizing fully virtual Board, committee and membership meetings** and electronic voting. It has now been signed into law by the Governor and goes into effect July 1, 2021!



Our
Fall 2021
Ad in Quorum
Magazine

