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Home-Based Business Law in China: Is There a Seven-Year Itch

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Home-Based Business Law in China: Is There a Seven-Year Itch

Cover Page Footnote

Symposium - Chinese Real Estate Investment: Transnational Perspectives

HOME-BASED BUSINESS LAW IN CHINA: IS THERE A SEVEN-YEAR ITCH?

DONG JIANG*

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I. INTRODUCTION

China has the largest population in the world as well as an intensive population density, especially in its cities.¹ Building condominium rather than single-family houses in China is an understandably more efficient way to accommodate more people in less land. However, as a Chinese proverb says – “distance makes heart grow fonder” (距离产生美); the more people living in the same building, the more likely disputes between or among neighbors arise. People naturally hate nuisance, but there is a high likelihood it will happen if your neighbor in the condominium runs in his unit a restaurant, a karaoke, etc. Can the annoyed resident stop his nuisance neighbor from doing the undesirables? Yes, his attorney at law can advise him that he will win the lawsuit based on the right of adjacent owners. But can he prevent the establishment of the nuisance business? Up until 2007, his attorney could not give a firm positive or negative response, because before the enactment of the first Law of Real Rights in 2007, no Chinese law struck a clear answer to whether a business can be established and operated in a residential condominium. Article 77 of the 2007 enacted Law of Real Rights for the first time in China addressed at the level of national law the issue of home-based business. It reads as follows:

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1. See World Development Indicators: Size of The Economy, THE WORLD BANK (2014), <http://wdi.worldbank.org/table/1.1>. The population density of China in 2014 is 145 people per sq. km., while the world average is 56 and the figure for the US is 35.

No owner may change a residential house into a house used for business purposes by violating any law, regulation or stipulation on building management. When changing a residential house into a house for business purposes, the owner shall, in addition to observing laws, regulations and stipulations on building management, obtain the consent of all the other owners who have interests in the change.

This is absolutely not the final say. Article 77 is silent on who should be the interested party and how such interested party should be defined. The blurred statutory language invites another source of law in China, the judicial interpretation of the Supreme People's Court to fill in the gap. In 2009, the Supreme People's Court issued an *Interpretation on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Partitioned Ownership of Building Areas*.² Article 10 of the Judicial Interpretation provides:

Where an owner uses his house for business purposes without getting the permit of any other owner with an interest therein as mentioned in Article 77 of the Real Right Law, the request made by the owner for removing impairment, eliminating danger, restoring to the original state or compensating for losses shall be upheld by the people's court.

If the owner who uses his residential house for business purposes makes a claim under the pretext that he has acquired permit from a majority of owners with an interest therein, it shall not be upheld by the people's court.

This article set the tone of the court that unanimity of the interested party is necessary to establish the business. The following Article 11 clarifies to some extent who should be the interested party:

Where an owner uses his house for business purposes, the other owners of the building shall be the "owners with

2. (最高人民法院关于审理建筑物区分所有权纠纷案件具体应用法律若干问题的解释)

[Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Partitioned Ownership of Building Areas No. 7] No. 7 [2009] of the Supreme People's Court (Sup. People's Ct. 2009) [hereinafter Judicial Interpretation].

an interest therein” as mentioned in Article 77 of the Real Right Law. Any other owner of another building within the building area who claims that it has an interest relationship with him shall prove that it has exerted or might exert an adverse impact on the value of his house or quality of his life.

Seven years have passed from the promulgation of the Judicial Interpretation, but has it functioned well to solve the problem of the home-based business? This article will depict the legal history of the Chinese laws governing business operations in residential condominiums and analyze how Article 77 of the Law of Real Rights and the related Judicial Interpretation really work. Part II will showcase the context of how the home-based laws were born. Part III and Part IV will respectively address two essential components of the judicial interpretation: who is the interested party capable of initiating a lawsuit against the home-based business, and what are legitimate businesses operated in residential buildings?

II. THE LEGAL HISTORY OF HOME-BASED BUSINESS IN CHINA

Condominium ownership has a comparatively short history in China. From the birth of the People's Republic of China in 1949 until the 1980's, individual ownership of housing was not allowed in the cities. City residents lived in the state-owned houses either allocated by or leased from the government or their employers, which were state or collectively owned. Even though China started abolishing the planned economy with the policy of open-up and reform in the late 1970's, housing reform in the cities lagged far behind. In 1998, the State Council issued the Notice on Furthering the Housing Reforms and the Construction of the Housed in the Cities and Towns, which for the first time in China abrogated the housing allocation and adopted the monetization of housing (住房分配货币化), meaning that the city residents had to buy their houses from the market³ and then the individual ownership of the housing was established.⁴ The

3. (进一步深化城镇住房制度改革加快住房建设的通知, 国发 [1998] 23 号) [Notice on Furthering the Housing Reforms and the Construction of the Housed in the Cities and Towns] (issued by the State Council, effective July 3, 1998) at art. 2.

4. (城市房屋权属登记管理办法) [Measures on the Administration of the Registration of Urban House Title No. 57 (2001 Amendment)] (promulgated by Ministry of Constr., Aug. 15, 2001, effective Oct. 27, 2001). In 2001, the Ministry of Construction amended the Measures on the Administration of the Registration of Urban House. Article 4 provides that the State shall practice a system of registration and certification of the house ownership. The applicant shall, in accordance with the relevant provisions of the State, apply to the administrative

individualization of housing ownership triggered the booming of the real estate market in the next decade.⁵ But it also stimulated the rapid growth of home-based businesses.⁶

The housing reform was accompanied by the measures to legalize and vitalize small-sized, privately-owned businesses in the early twenty-first century. To prop up the robust economic growth and push forward the reform, the Chinese government encouraged the establishment of privately-owned small businesses. In 2002, China enacted the *Law of the People's Republic of China on the Promotion of Small and Medium-Sized Enterprises*. Taking into consideration that the start-up small businesses were normally short of funding compared to larger companies, and the limits on their venue would result in the increase of their operating costs, its Article 26 provides that the incorporation authorities shall, in accordance with the legal conditions and procedures, handle the incorporation procedures of the establishment of small and medium-sized enterprises, and improve the work efficiency to provide convenience for the applicants. Once the small businesses, in the incorporation of their businesses, can provide a specific place for operation, no matter in a residential condominium or a commercial building, they will acquire the approval of business operation from the authority. For example, in 2003, Shenzhen Municipality issued a *Decision on Promoting the Private Owned Business*, which articulated that loosening the incorporation criteria shall play an important role in the establishment of the

department in charge of real estate under the people's government at the locality of the house, for the registration of the house title, and shall obtain the certificate of house title. Article 5 grants the certificate of house title the status as the only lawful document on the basis of which the right-holder shall, in accordance with the law, have the ownership of the house, i.e. the rights to possess, utilize, profit from and dispose of the house.

5. China's Property Market Soars to New Highs, GLOBAL PROPERTY GUIDE (2016), <http://www.globalpropertyguide.com/Asia/China/Price-History>. See *The Housing Prices Have Gone Wild in China for 10 Years: An Unbroken Vicious Circle of "More Regulation, More Price Rising"*, CHINA DAILY (2014), http://www.chinadaily.com.cn/dfpd/jingji/2014-01/07/content_17219507.htm. Property prices in China rose rapidly from 2000 to 2008, fueled by low interest rates and cheap credit. The price index for second-hand homes in Shanghai soared 121% (85% inflation-adjusted) from Q1 2003 to Q2 2008. China's property boom continues relentlessly. Nationally, the average property price is 2,759 RMB Yuan in 2004 and it soared to 6,312 in 2013.

6. *Guiding Suggestions on Accelerating China's Community Business Development*, (商务部关于加快我国社区商业发展的指导意见, 商改发[2005]223号) (promulgated by the Ministry of Commerce, effective May, 10, 2005) (Alibaba). With the rapid urbanization, what ensues is the lack of business facilities, especially for services in the residential communities such as catering, laundry, recycling, even though most of the cities witnessed an explosive emergence of shopping malls in the downtown areas. The Ministry of Commerce Department then issued guidance in 2005, according to which, in the next 3 to 5 years, the 166 cities with more than 1 million population shall provide in the residential communities the network for delivering the services necessary for a convenient day-to-day life.

small business.⁷ A year later, in the *Decision on Enforcing Provincial Government's Opinion of Accelerating the Development of the Private Owned Business* adopted by AIC of Jiangsu Province, a flexible requirement for the venue of small businesses was applied: once meeting the safety and environmental standard, they can be operated in the domicile of the business owners.⁸

Society responded to the policy encouragement promptly. For example, in Beijing, which also issued a *Regulation of Promoting the Development of the Privately and Individually-Owned Business* in 2001,⁹ even a year before the above mentioned similar national law was enacted, the number of privately-owned businesses was 224,569, witnessing a 20.26% growth from the number of 186,805 in 2003. In 2004, one-third of the privately-owned businesses were operated in a residential building. And in the first quarter of 2006, more than 90% of the newly incorporated companies in Chaoyang District of Beijing used residential buildings to run their businesses.¹⁰

The economic concern plays another important role. In big cities like Beijing, the floor areas of a unit for rent in a commercial building are usually around 200-400 square meters. The rental is about 4.5 RMB per square meter per month. The hundreds of thousands RMB Yuan per month rental is too much of a burden for a small business to bear.¹¹ A survey in 2010 shows that in Wudaokou (五道口), a business area of Beijing Haidian District,

7. (关于加快民营企业发展的意见, (深发[2003]5号)) [Decision on Promoting the Private Owned Business] (promulgated by Shenzhen Mun., effective 2005). Article 2.4 provides that after getting the approval of the property owner committee, businesses such as software development or designing, which have no negative impact on the neighboring environment, shall be incorporated regardless of the nature of the real estate where they were under operation.

8. (江苏省工商局贯彻省委省政府关于进一步加快民营经济发展的若干意见的实施意见) [Decision on Enforcing Provincial Government's Opinion of Accelerating the Development of the Private Owned Business] (promulgated by AIC of Jiangsu Province, effective Nov. 2004) at art. 1.5.

9. (北京市促进私营个体经济发展条例) [Beijing Municipality Regulation of Promoting the Development of the Privately and Individually-Owned Business] (promulgated by the Standing Comm. of Beijing Mun. People's Cong., effective Aug. 3, 2001).

10. *Are the Medium or Small Sized Companies Pushing up Housing Prices through Buying Residential Building for "Public Use"?* (中小公司买住宅“公用”推高楼市?), BEIJING YOUTH (北京青年报), Apr. 20, 2006, at A13.

11. *The Prohibition of Commercializing the Residential Building Stimulates the Hot Selling of the Office Building with Small Units* (住宅禁商刺激小户型写字楼热销), CHINA ECONOMIC TIMES, July 19, 2006, http://lib.cet.com.cn/paper/szb_con/62456.html.

the rental for an office building was around 133 RMB Yuan per square meter per month, while the counter-part of the residential building was around 50-60.¹²

However, in the late twentieth century and early twenty-first century, China had a legal vacuum to regulate explicitly whether a business could operate in a residential building. Some local authorities issued chameleon regulations. Beijing Municipality can serve as a very good example. Article 26 of the 2001-issued *Beijing Municipality Regulation of Promoting the Development of the Privately and Individually-Owned Business* provides that venues of such businesses, mostly of small size at the time the regulation was issued, if acquired in accordance with law, shall be under the protection of the law. It implied that the privately or individually-owned business could be incorporated in a residential condominium, for at that time there was no restriction on where to operate a small business. But one year later, Beijing Municipal Administration of Industry and Commerce (AIC) issued a *Notice on Registering a Business in the Residential Building*, which prohibited operating five categories of business in a residential building such as catering, entertainment, net browsing, processing, and manufacturing, and permitted the operation of business for technology development, consulting, market survey, enterprise image design, typing, copying, graphic design, animation production and advertising. For the businesses permitted, the business owner was not required to submit any document certifying the approval from the committee of property management.¹³ In 2006, Beijing Municipal AIC issued the *Notice on Scrutinizing the Certifying Documents on the Uses of the Residential Buildings*, which put a halt as a whole on the incorporation of the home-based business.¹⁴

Once a nuisance occurred, courts could not rely on any specific provisions prohibiting the residence-based business. Due to this legal vacuum, they were forced to rethink of a way to partially fill in the gap. Usually, if the businesses modified and reconstructed parts of the common area of the condominium, the courts would rule against them based on Article 4 of the Interim Measure of

12. See Liu Yuechun, *Some Legal Issues on Restricting the Commercialization of the Residential Building* (限制住宅商用的若干法律问题), 269 ACADEMIC FORUM (学术论坛) 78, 78 - 79, (2013) (discussing a survey made from July to Aug. of 2010).

13. (北京市工商行政管理局关于在居民住宅楼内设立企业有关问题的通知, (京工商发[2002] 109号)) [Notice on Registering A Business in the Residential Building] (promulgated by Beijing Mun. AIC, effective 2005) at art. 1.

¹⁴ (北京市工商局关于从严审查住所使用证明文件的通知, 北京市工商局 [2006] 第 14 号) [Notice on Scrutinizing the Certifying Documents on the Uses of the Residential Buildings] (promulgated by Beijing Mun. AIC, effective 2006) at art. 1.

Maintenance of the Privatized Public House,¹⁵ which provided that the part of the load bearing structure, the exterior wall, belongs to the common area of the condominium rather than the individual unit. On July 18, 2006, the Chaoyang District Court of Beijing Municipality entered the judgment of 14 cases in favor of the plaintiffs, in which the business operating in the residential condominium renovated and reconstructed part of the common area through dismantling and reconstructing walls under the windows, an act ruled by the court as damage to the common area and thereby a violation of the above mentioned provision and an abuse of ownership. The court decreed that the 14 businesses, as the losing defendants, should restore the dismantled and reconstructed walls under the window, in order to make them meet the safety requirement. But the court was helpless to make a ban on the business operation.¹⁶

Article 77 of the Law of Real Rights and the ensuing Judicial Interpretation finally gave a definitive answer to whether a residence can be commercialized. China then adopted the mechanism of conditional permission, an approach putting more

15. (公有住宅售后维修养护管理暂行办法) [Interim Measure of Maintenance of the Privatized Public House] (promulgated by the Ministry of Constr., effective June 16, 1992) (repealed Sept. 21, 2007).

16. The Research Group of Law of Real Rights of The Supreme People's Court of China, How to Understand and Apply the Articles of Law of Real Rights of People's Republic of China (《中华人民共和国物权法》条文理解与适用), PEOPLE'S COURTS PRESS, 249 (2007) [hereinafter The Real Rights Research Group]. Interestingly, the plaintiff in this case was not the annoyed neighbors of the businesses, but the Housing and Construction Commission of the Chaoyang District, the authority of housing management and supervision. The cause of action was that the losing defendant disregarded its executive order to restore the wall under the window. The court also issued three judicial advices respectively to Beijing AIC, Beijing Zoning Commission, and Beijing Construction Commission, suggesting that those three administrations, that deal with the commercialization of residential buildings, should strengthen their supervision and carry out more effective cooperation with other administrations. The court also proposed that Beijing Zoning Commission and Beijing Construction Commission should be more active in punishing, in accordance with the law, activities such as occupying the common area as part of the renovation of the individual unit, building or erecting some annex to the individual unit, changing the external wall, or adding doors or windows to the load bearing walls. Those activities usually were accompanied with opening a small business in the residential condominium.

See also *The Housing and Construction Commission Won the Lawsuit Against 14 Residents Unauthorized Dismantling the Wall in Commercializing Their Residence* (擅自拆墙“住改商”建委告赢14住户), LEGAL DAILY (July 19, 2006). The way the court handled this case revealed the dilemma the court was faced with: the increase of businesses established in the residential condominium would definitely cause more similar disputes, but the doctrine of the rule of law prevented the court from solving this problem once and for all, that is saying no to the business operating in the residential condominium, due to the lack of specific provisions of law. But the court had to do something once the case was filed to protect the innocent annoyed residents. Besides rendering the judgment of restoration, the court then relied on the administrative branch to be more active to stop the illegal modification of the building, mainly occurring in home-based businesses, to reduce the caseload of this type and then try to avoid the incapability of solving this problem as much as possible.

restrictions than that of some American States, where home-based businesses are generally permitted unless they break the regulation of a homeowner association.¹⁷ Its essentials are who are the interested parties who can vote for the establishment of the business, and what kind of business should be operated in the residential condominium.

III. WHO ARE THE INTERESTED PARTIES TO SUE THE HOME-BASED BUSINESS

A. The Capability of Being an Interested Party

Article 11 of the Judicial Interpretation manifested that the unit owner of the residential condominium, in which the home-based business is established, should certainly be the interested party, as are the tenants. Article 16 of the Judicial Interpretation stipulates that:

Where any dispute over the partitioned ownership of building areas concerns the lessee, borrower or any other realty user of the exclusive parts, this Interpretation shall analogically apply. The lessee, borrower or any other realty user of the exclusive parts shall enjoy their rights and fulfill their obligations according to laws, regulations, management stipulations, the decisions made by the owners' assembly or the homeowners' association according to law or the agreements reached with owners.

Therefore, the tenants and the owners should have the equal status to vote against establishing a business in the condominium.¹⁸

17. See, e.g., The Virginia Property Owners' Association Act, Home-Based Business Permitted; Compliance with Local Ordinances, Va. Code §55-513.2 ("Except to the extent the declaration provides otherwise, no association shall prohibit any lot owner from operating a home-based business within his personal residence. The association may, however, establish (i) reasonable restrictions as to the time, place, and manner of the operation of a home-based business and (ii) reasonable restrictions as to the size, place, duration, and manner of the placement or display of any signs on the owner's lot related to such home-based business. Any home-based business shall comply with all applicable local ordinances.").

18. Article 1 of the Judicial Interpretation gives the term—"the owner"—a coverage including persons who have acquired ownership over the exclusive parts of a building by registration or those who have legally possessed the exclusive parts of a building based on the civil juristic act of commercial house trading with the construction entity but have not registered their ownership. Article 16 is an expansion of the coverage of "the owner." However, most of the cases against the home-based businesses are brought by the owners. An online search was conducted and twenty cases were randomly selected from the Supreme People's Court's website for searching legal opinions (<http://www.court.gov.cn/wenshu.html>) concerning disputes over home based business, and only one was initiated not by the owner but by the residents (住户). See (原告范XX诉被告叶XX物权保护纠纷案) [Fanv. Ye A] 官民一初

Also, they could both file a lawsuit against the nuisance business. Similarly, once a tenant or an owner runs a business without the consent of any owner or tenant, both of them should also be sued as the defendants.¹⁹

In a word, the Judicial Interpretation grants all residents, including the owner, the tenants, etc., in the condominium the status of an interested party. In terms of judicial efficiency, this approach can obviously simplify the burden of proof for both the plaintiff and the defendant. In addition, since the home-based business could use or even occupy the common area of a condominium, such as a corridor, the lifts, etc., it is reasonable for the residents, the co-owners of the common area, in the condominium to be empowered to initiate a lawsuit if their rights upon the common areas were trespassed, let alone if the home-based business brings any harmful effect on the residents' normal life in their own units.²⁰

But for the residents not living in the condominium, two elements are embedded in Article 11 of the Judicial Interpretation for them to claim themselves as the interested party. They need to prove:

- i. the existence or likelihood of certain adverse impact,
- ii. such adverse impact was exerted on the value of his house or quality of his life.

No doubt, the plaintiff should bear the burden of the proof. If the adverse impact can be proven to exist with virtual certainty, the innocent interested parties can seek remedies from the court to remove such impact, and if there is a high possibility the adverse impact will happen, they can seek for a judicial decision to prevent its occurrence.

字第1854号 (Kunming Guandu Dist. People's Ct., Aug. 25, 2014) (case about Real Rights). The legal opinion refers to the plaintiff as residents, meaning the person who lives in the unit, and to the defendant as the owner. Therefore, the plaintiff should be the real property's user rather than owner.

19. Usually, a plaintiff will choose the owner of the unit in which the nuisance business was established and operated as the defendant. The court will add the tenants who actually ran the business in the unit as a third party. See (原告吴某某与被告杨某某建筑物区分所有权纠纷案) [Zhang v. Yang] 武侯民初字第1194号 (Wuhou Dist. People's Ct., Apr. 5, 2015) (case arising from a dispute over partitioned ownership of residential buildings).

20. See Xiong Bingwan, On 'Commercial Use of the Dwelling House' (论住宅商用法律制度--兼评建筑物区分所有权司法解释第10条、第11条), 8 POL. SCI. & L. (政治与法律) 11, 14-15 (2009) (a review on Articles 10 and 11 of the Supreme People's Court's *Interpretation on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Partitioned Ownership of Building Areas*).

The rationale of the adverse impact element echoes the indigenous meaning of residence, including houses and residential condominiums. A residence is a domicile for people to live within. It functions to provide shelter for people and should be distinguished from the work place. A residence should provide sufficient privacy and comfort for the resident, which could be guaranteed by independency of space from the outer environment. A residence should also provide convenience for the residents. The lifts, for example, can illustrate a convenience and a necessity a high-rise condominium should provide. No doubt, the unit ownership endows the owner to make use of the unit. But it should have a limit. The meaning of residence reveals a general expectation that residents desire to live decently in the condominium. Therefore, running a home-based business, a way that owners exert their right of unit ownership, violates the general expectation that the tranquility of the life in the condominium shall not be prohibited or stopped. No one shall abuse this right. According to Article 90 of the Law of Real Rights, a holder of real property may not discard solid wastes or discharge atmospheric pollutants, water pollutants, or such harmful substances as noise, light and magnetic radiation by violating the relevant provisions of the state. The court could rely on this provision to rule against the nuisance business.²¹

The expansion of the coverage of the interested party from the residents in condominium to the non-residents reflects the legislative concerns of Article 77 of the Law of Real Rights. Home-based businesses sometimes will ignite disputes and even confrontations between or among neighbors: fewer and fewer space will be left in the already packed parking lot for residents if home-based businesses attract more customers; the influx of strangers will increase the feeling of unsafety among the residents, and even the convenience of the lifts will be deteriorated.²² In terms

21. In *Ni Jin v Wu Chunchang* (a case of *Actio Negatoria*), the court relied on Article 90 to rule the defendant should close the game room for chess, poker and Mahjong operated in his basement, for the noise accompanied with the operation of the game room annoyed the plaintiff. (倪晋等与吴春昌等排除妨害纠纷上诉案) [*Ni Jin v. Wu Chunchang*], 蚌民一终字第00087号 (Bengbu Mun. Intermediate People's Ct. of Anhui Province, Mar. 27, 2014).

22. In a report about the adverse effect the home-based business, the residents complained, "we have to wait for dozens minutes to take the lifts. It is impossible for us to take the lifts for they will be occupied for a long time by the businesses to replenish their inventory." See *The Business Flocked in the Residential Condominiums and the Unit Owners are Helpless* (经营单位扎堆住宅小区业主束手无策), *LEGAL DAILY* (法制日报) (Sept. 3, 2008).

of zoning, the development of a home-based business may turn a residential community into a business district, resulting in jammed traffic and an overcrowded stream of people.²³

As for whether adverse impact was exerted on the value of a house or quality of a resident's life, it is comparatively easy to define the value of the house. If the value decreases due to the operation of the business, the adverse impact then came into being. Another reasonable explanation can also result in the value decrease: the lower price or slower increase of the price due to the emergence of the business in the condominium. However, the quality of life is a very abstract standard and, to some degree, is connected with the standard of house value: on one hand, house owners are very willing to enjoy the price increase of their houses; on the other hand, if the life quality for living in the house deteriorates, the plummet of the house value is certainly unavoidable.

In practice, not many cases were initiated by the residents not living in the building that accommodated the home-based business.²⁴ In the *Appeal by Lin Tao, Jiang Xiaoli Against an Administrative Ruling*, an appellate case about whether the plaintiff was qualified to bring an administrative action against the local ICA issuing the license for a home-based grocery, the intermediate municipal court (the court of appeal) reversed the trial court's decision that the plaintiff shall not be the interested party because the nuisance grocery was not operated in the same building where he lived. The trial court's reasoning was that the grocery was run in a compound separated from the plaintiff's condominium, therefore the plaintiff was not an interested party who lived in the same building holding the home-based grocery. However, the intermediate court found that the grocery was not far apart from the plaintiff's condominium, but just fenced off by a wall. The grocery produced a lot of noise, smelly odors and smoke, materially impairing the normal life of the plaintiff, who lived a wall away. The intermediate court entered the judgment in favor of the plaintiff, granting him the status of the interested party to bring the lawsuit against the local ICA.²⁵

23. See the Real Rights Research Group, *supra* note 16, at 247-48; SUN XIANZHONG, *Real Rights Law of China: Theory Interpretation and Legislative Intent Revelation* (中国物权法: 理论释义和立法解读), ECONOMIC MANAGEMENT PRESS 253 (Sun Xianzhong ed., 2008).

24. However, the courts rarely rely on the decrease of house value or deterioration of the quality of life to enter its judgment against the defendant. Once the court found some virtual negative impact on the plaintiff's life due to the defendant's nuisance business, the court would rule in favor of the plaintiff.

25. (林涛、江晓莉行政其他诉讼不予受理案) [Appeal by Lin Tao, Jiang Xiaoli Against an Administrative Ruling] 遵市法立行字第16号 (Zun Yi Mun. Intermediate People's Ct. of Guizhou Province Dec. 10, 2014) (a case about whether the plaintiff is qualified to bring

In another case, the defendant managed a kindergarten in his ground floor unit and his garage, and the plaintiffs, residents from the same condominium and the adjacent ones, complained that the kindergarten affected their lives. In particular, the plaintiffs living in the same condominium of the kindergarten complained mostly that the screaming and crying of the kids from morning to night made it hard for them to rest, for they lived just one floor above the kindergarten, and the other plaintiffs from the adjacent condominium were very worried about the noises and the crowds for pickup and drop-off of the kids from 7:00 to 16:30. The court entered a judgment against the defendant. Interestingly, the court did not address the issue of whether the two plaintiffs not sharing the same condominium of the defendant should have the status of "interested parties." The fact that the court did not deprive those two plaintiffs of the right of action acquiesced that once a plaintiff can present sufficient evidence to prove that the defendant's nuisance business does affect his life and the proximity of his residence to the nuisance business, it will provide a high likelihood of the court's acceptance of the case.²⁶

B. The Way of the Interested Parties' Consent

To prevent any possible disputes over home-based businesses, it is rational for the owner of the business to acquire the consent from the interested parties as provided by the Judicial Interpretation. But how should consent be acquired? Should the acquiescence of the interested parties constitute the consent required by the Judicial Interpretation? For example, if the residents living upstairs frequently bought bread and butter from the home-based grocery downstairs, should the residents' consumption of goods purchased from the grocery meet the requirement of the interested parties? The answer has to be negative.²⁷ On one hand, the frequent consumption of goods

an administrative action against the local ICA). In this case, the plaintiff sued the local ICA rather than the home-based grocery, because the ICA granted the license to the grocery. His claim was that the ICA should revoke the license, uprooting the legitimacy of the grocery's further business operation.

26. (金文虎等诉陈朝军等所有权纠纷案) [Jin Wenhui v. Chen Chaojun] 台椒民初字第2986号 (Shujiang Dist. People's Ct. of Taizhou Mun. of Zhejiang Province Dec. 23, 2013) (case about title disputes).

27. See (穆桂兰诉李宝恩等所有权纠纷案) [Mu v. Li] 本民三终字第00085号 (Benxi Mun. Intermediate People's Ct. of Liaoning Province Apr. 23, 2014) (an appellate case about title disputes). In *Mu v. Li*, the defendant as well as the appellant contended she and the plaintiff were neighbors in the same condominium since 1998 and in 2001 she renovated her unit into a grocery store. Since then, the plaintiff never conveyed any objection and furthermore

purchased by the residents shall not be interpreted as evidence of the non-existence of a negative effect on the interested parties, nor the acceptance of such negative effect; on the other hand, the incorporation of the home-based business should be examined and approved by the local ICAs by presenting the consent of the interested party, otherwise the business is operating illegally.²⁸

Another issue is whether the unanimity of the interested party is the best precondition for the establishment of a home-based business. Theoretically, the common interest of all unit owners in a condominium shall not be infringed by any single one of them. Any unit owner's usage of his unit against the original function of the purpose is an infringement on the common interest,²⁹ an implication that the purpose of the condominium building should be protected and respected by the unit owners and the realization that the individual interest shall not strike against the common interest. Unanimity rule in the Judicial Interpretation to some degree guarantees judicial efficiency, for this sweeping approach can promise an all-or-nothing solution. Otherwise, the majority rule will cause a dilemma for the legislature or court to confront: should the majority be the simple majority or two-thirds majority or three-fourths majority? Eventually, the unanimity rule does set up a high-level of protection for the unit owners' right to enjoy the living environment. But it may go too far. First, the feasibility of the unanimity rule is under challenge. In a high rise condominium accommodating 50 or even 100 units, it is an impossible mission in the stranger-society of the urban cities to acquire the permission from every unit owner.³⁰ The unanimity rule has a born defect: any single resident then in fact enjoys the "peremptory challenge" to strike down any home-based business, even if the business will not exert

he frequently consumed food from the defendant's grocery. The defendant then argued that those facts should prove the acquiescence of the plaintiff. But both the trial court and the intermediate court refused to accept the defendant's contention. Explicit consent of the interested parties is necessary for the establishment of a home-based business.

28. (国家工商管理总局关于住所(经营场所)登记有关问题的通知) [The Notice of Some Issues Relating to The Registration of the Business Venue] (promulgated by the State Admin. for Indus. and Commerce, Nov. 6, 2007) at art. 2 (stating the companies, the individually-owned business should present to the local ICAs the consent of the interested parties once they change the residence into a business venue).

29. WU DAOXIA, A COMPARATIVE STUDY ON LAWS OF REAL RIGHTS (物权法比较研究), PRESS OF PEOPLE'S PUB. SEC. U. OF CHINA 333 (2004).

30. See Liu Yuechun, *Some Legal Issues on Restricting the Commercialization of the Residential Building* (限制住宅商用的若干法律问题), 269 ACAD. F. (学术论坛) 78, 83 (2013). The author exemplifies this "impossible mission" with a very common high-rise condominium in Beijing, which has 20 floors with 7 units on each floor. The impact of the home-based business on the first floor varies enormously from the first floor to the top floor, and it is extremely difficult to get permission from the overall 140 unit owners.

any negative effect. His personal dislike of the business or the business owner will be a “reasonable” reason for him to say no. The unanimity rule also hurdles the growth of the small business, which in reality can provide economic stability for owners and their families, create jobs for workers in addition to the owner, and stimulate innovation because these businesses’ employees usually work in close proximity to consumers and learn firsthand about their needs. In June of 2015, the State Council issued the *Opinions of the State Council on Several Policies and Measures for Vigorously Advancing the Mass Entrepreneurship and Innovation*, which encourages both big businesses and small businesses to be more active in opening new enterprises, developing new products, exploring new markets, and cultivating new industries.³¹ The veto of a single resident then will close the door for some starters to set up their small businesses, which will not annoy the normal life of the neighbors.

To balance the interests of the residents and the business owner, a possible solution will be that the home-based business owner bears the burden of proof to prove that his business will not produce the nuisance effect while applying for the incorporation. And even more, the property owner’s association shall play a more active role in determining whether the home-based business should be established. Under the current system, the government stretches its arm to the territory where community self-governance should take the lead. Theoretically, in a modern society, the cooperation has turned into a pattern of action for citizens. The unit owners are able to decide for themselves what could be done in the condominium and what could not. For example, the no-pets policy in many countries shows the property owners’ association can reach an agreement on the living environment. So should be the home-based business policy.

31. (国务院大力推进大众创业万众创新若干政策措施的意见) [Opinions of the State Council on Several Policies and Measures for Vigorously Advancing Mass Entrepreneurship and Innovation], Art. 1, 国发[2015]32号 (June 16, 2015). As to the significance of mass entrepreneurship and innovation,

“Premier Li Keqiang said that big enterprise employees and grassroots entrepreneurs can both create and gain more wealth through entrepreneurship and innovation, which is an important part of adjusting the income distribution structure and an engine that drives social equality and justice.

Mass entrepreneurship and innovation will create fair opportunities for everyone and provide upward mobility for competent and industrious people, the Premier said.”

See also The State Council, *Premier Li Keqiang: Mass Entrepreneurship and Innovation Creates Fair Opportunities* (Oct. 19, 2015), http://english.gov.cn/premier/news/2015/10/19/content_281475215309502.htm.

However, that theory only works on paper. The reality tells a different story. In China, no more than 50% of the residential buildings have a property owners' association and of those no more than 15% of the associations function well.³² The unanimity rule then seems to be a secondary best way, even though it cannot provide a solution to harmonize the individual interest of the interested party and the social interests for innovation and wealth accumulation, as well as the individual interests of the interested party and the home-based business owner.

IV. WHAT BUSINESSES TO BE OPERATED

A. *The Scope of Business to be Legally Operated*

In theory, to operate a home-based business, the business scope shall not be as extensive as a normal business. Some businesses will definitely impair the living environment and thereby should be excluded from being operated in residential buildings, such as the manufacture and storage of the toxic substances. What should be the proper coverage of the business operated at home? Before the birth of the Law of Real Rights and the Judicial Interpretation, a wide range of businesses were accommodated within residential buildings. A news report in April of 2006 evidenced that five categories of businesses were operated at home: production and processing, office space rental, shop-operating, entertainment, and training. It was not surprising to encounter within a condominium a law firm, a convenience store, a KTV, a hair salon, a cram school for pupils and even a small size garment factory.³³ Such wide usage of the residential condominium can easily disrupt the tranquility of the living environment. The legislature then had a much narrower vision on the business scope. If the unit owner was faced with straitened circumstances, for example he was laid off, he then could transform his unit into a venue for business. The reason behind it was that the home-based business not only affects the quality and interest of the residents living in the condominium

32. *A Survey Made by the Journalists: Why are the Property Owners' Associations So Stillborn?*, CENTRAL BROADCASTING NETWORK (Dec. 1, 2015), http://china.cnr.cn/yxw/20151201/t20151201_520644607.shtml. Actually, the failure to establish the property owners' association and its failure to function is a common phenomenon in China. See also Lu Haiyan, *The Property Owners' Association: Origin, Dilemma and System Choice* (业主委员会制度的缘起、现实困境与制度选择), 139 URBAN PROBLEMS (城市问题) 79, 80-81 (2007).

33. *Two People's Representatives Making An Investigation and Survey on Home-Based Business in the Communities* (两位人大代表昨到小区调研民宅商用问题), *Beijing Youth* (Apr. 22, 2006), <http://news.qq.com/a/20060422/000459.htm>, at A8.

but also leads to tax erosion.³⁴ The narrowing-down of the business scope deserves a second thought: firstly, the reason to operate a home-based business is a very remote cause because of the impact on the living environment—to overcome the straitened circumstances shall not outweigh the desire to make a decent life better off,³⁵ then the business owner shall not be confined to those who encountered difficulties in life, the criteria to examine whether to establish a home-based business shall focus on its impact on the living conditions; secondly, once the home-based business is incorporated, it will be treated impartially with other businesses in terms of taxation, the tax erosion will not favor the home-based business more than their counterparts.

Actually, the Chinese laws have set up a threshold for what businesses shall not be operated in residential buildings or areas. Article 7 of *the Regulation on the Administration of Entertainment Venues* provides that no entertainment venues may be established in residential buildings, museums, libraries or buildings within cultural relic protection entities as verified, or the surroundings of residential areas, schools, hospitals or governmental organs.³⁶ Article 40 of *Regulation on the Safety Administration of Explosives for Civilian Use* stipulates that explosives for civilian use shall be stored in a special warehouse, wherein the technical prevention facilities shall be installed according to state provisions.³⁷ Article 9 of *the Regulations on the Administration of Business Sites of Internet Access Services* prohibits any business site of Internet access services from being set up within 200 meters of the campus of any secondary

34. See LEGIS. AFFAIRS COMM'N OF THE STANDING COMM. OF THE NAT'L PEOPLES CONG., *Article Explanation, Legislative Intent and Relevant Provisions of The Law of Real Rights of People's Republic of China*, BEIJING UNIV. PRESS 121 (2007).

35. Actually, one of the spirits of the Law of Real Rights is to “encourage millions of Chinese people to respect the property, build wealth and promote the rapid growth of the social wealth.” Wang Liming, *Property Law is the Basic Law of the Socialist Market Economy* (物权法是社会主义市场经济的基本法律), QIUSHI (求是), (2007), http://www.npc.gov.cn/npc/xinwen/rdlt/fzjs/2007-05/17/content_365460.htm. In addition, some home-based businesses will bring much convenience to the residents: such as a barber's shop, a day care, etc. The court also refuses to accept the hardship of life as a defense for the nuisance home-based business. See also (穆桂兰诉李宝恩等所有权纠纷案) [Mu v. Li] 本民三终字第00085号 (Benxi Mun. Intermediate People's Ct. of Liaoning Province Apr. 23, 2014) (the intermediate court rejected the defendant's motion to dismiss because she was aging and valetudinarian and had to rent her unit for the business to make up for her living and medical cost).

36. (娱乐场所管理条例) [Regulation on the Administration of Entertainment Venues] (promulgated by State Council, Jan. 29, 2006, effective Mar. 1, 2006), CLI.2.73419 (EN).

37. (民用爆炸物品安全管理条例) [Regulation on the Safety Administration of Explosives for Civilian Use] (promulgated by State Council, May 10, 2006, effective Sept. 1, 2006), CLI.2.76619 (EN) (PKULAW).

or elementary schools, or in any residential buildings.³⁸ Therefore, if the business owner abides by such law and acquires consent from the interested parties, the home-based business should be incorporated.

In judicial practice, a court held that the legislative intent of Article 77 of the Law of Real Rights targets home-based businesses, such as the manufacturing, large scale restaurants, entertainment and bath industry, or other businesses that will produce noise, sewage, peculiar smells or any inconvenience of a normal life.³⁹ In reality, the court will face some complicated situations about whether some acts should be considered business. The rationale is that if not, the defendant naturally can do what he is doing without acquiring the unanimous consent from the interested parties.

In *Fan v. Ye* (a case about the protection of the title of property), the defendant rented his unit to a merchant as a warehouse for shoes and did not acquire the consent of the plaintiff, the interested party living in the same condominium.⁴⁰ The plaintiff complained that the merchant tenant piled a lot of shoes in his unit. The defendant argued that the storage of the shoes did not impair the life of the plaintiff for they were kept within his unit rather than the common area. Five fire extinguishers were also placed inside the unit. The shoes were contained in cases, each of which was less than 10 kilograms, causing no damage to the floor. Most importantly, the merchant tenant himself also lived in the unit. The defendant then presented his case that the function of the unit was not transformed from a residential unit into a warehouse. The court pointed out that the issue of this case was whether the facts supported the plaintiff's claim that the unit was used for business purposes as a warehouse. The court ruled in favor of the defendant. The court held that storage of the shoes in the unit did not change the function of the residential unit, for the tenant did not operate any business within the unit. In addition, the tenant did his utmost, placing five fire extinguishers in the unit to prevent any possible danger of fire, thereby imposing no negative effect on the safety of the plaintiff's unit.

38. (互联网上网服务营业场所管理条例) [Regulations on the Administration of Business Sites of Internet Access Services] (promulgated by State Council, Sept. 29, 2002, effective Nov. 15, 2002), CLI.2.42724 (EN) (PKULAW).

39. (张某与郑某等所有权纠纷上诉案) [Zhang v. Zheng] 鄂武汉中民终字第01019号 2014 SUP. PEOPLE'S CT. GAZ. 11 (Wuhan Mun. Intermediate People's Ct. of Hubei Province Jan. 1, 2014) (an appellate case about property disputes).

40. (原告范某某诉被告叶莫某物权保护纠纷案) [Fan v. Ye] 官民一初字第1854号 (Guandu Dist. Ct. of Kunming Mun. of Yunan Province Aug. 25, 2014) (a case about the protection of the title of property).

B. Is Public Interest Concern a Useful Defense?

Another issue the court has to deal with is the defense of “public interest,” that is, whether a business could be considered to enhance the public interest and thereby does not need to observe the unanimity rule of consent. With the enormous expansion of WiFi, courts have to deal with the issue of whether the massive-oriented telecom service should be defined as a public interest. The following two cases showed that the court held a negative attitude toward this conception of a public interest.

In *Zhang v. Zheng* (an appellate case about property disputes), the issue was whether a unit of a condominium where the optical fiber transmission cabinet was installed as a sink node was transformed from a residential unit into a venue for business. The intermediate municipal court held that a residential unit was a place of shelter and a space of freedom for individuals or families to enjoy a meaningful daily life; whilst a venue for business is a place for commerce, industry, tourism, and office space. They are in nature distinguishable. In this case, the installment of the cabinet aimed to build the broad-brand cable for relevant businesses, such as the WLAN, the fixed-line telephone, the public security surveillance, etc. The unit then functioned not as a residential unit but a venue for business. Even though the defendant argued that the businesses were public interest oriented, the court still entered a judgment in favor of the plaintiff, for the defendant did not acquire consent from the plaintiff.⁴¹

In *Zhao v. Jingmen Branch of China United Network Communications Group Co., Ltd.* (an appellate case about abatement of nuisance), the plaintiffs, eight residents in a condominium, complained that the defendant, a telecom company, installed on the roof of the condominium a base station communication signal launching tower without the consent of the plaintiffs.⁴² The defendant argued that it bought a unit on the top floor where signal transmitter and antenna were installed with the approval of the authorities. The defendant contended that since the maintenance engineers also lived in

41. (张某与郑某等所有权纠纷上诉案) [Zhang v. Zheng] 鄂武汉中民终字第01019号 2014 SUP. PEOPLE'S CT. GAZ. 11 (Wuhan Mun. Intermediate People's Ct. of Hubei Province 2014) (an appellate case about property disputes).

42. (赵春钢等诉中国联合网络通信有限公司荆门市分公司排除妨害、恢复原状纠纷再审案) [Zhao v. Jingmen Branch of China United Network Comm'ns Grp.] 鄂荆市民再终字第00006号 (Jinmen Mun. Intermediate People's Ct. of Hubei Province 2014) (an appellate case about the abatement of nuisance.)

the unit, it was not transformed into a venue of business. They pointed out that the facilities did not produce any radiation beyond the national safety and health standard. Therefore, the lives of the plaintiffs were not disturbed. The defendants emphasized that all the telecom facilities were built for public interests. The trial court rejected the defendant's contention and ruled it should dismantle all of the facilities. The defendants then appealed. The intermediate court iterated the issue for appeal was whether the installment and utilization of the telecom facilities was an operation of business. In this case, the court stated that the telecom company was a business establishment and made full use of the advantages of the unit for its business, for the condominium was built on the high ground and the unit was on its top floor, a very good place for the installment of the telecom signal launching facilities. Therefore, to buy the unit manifested a strong business concern. Even though the engineers also lived in the unit, there was no denying the fact that the unit was not used for residence but for business. In addition, the court also denied the defendant's argument of public interests. The court maintained that in spite of the massive people the defendant delivered service to, its service did not specialize in areas of public interests, such as public defense, etc. Furthermore, the defendant did charge for its service. Therefore, the intermediate court affirmed the decision of the trial court.

To sum up, the Chinese laws draw a red line of what businesses definitely shall not be operated in places of residence. And the courts interpret the meaning of business broadly and only in very rare situations the business connected acts will not be considered a part of a business. In addition, the court will normally refuse the claim of public interest as a defense for the home-based business.

V. CONCLUSION

To some degree, the Judicial Interpretation failed to solve the issue of the home-based business with one blow. The recent news reports evidence that even now the nuisance home-based business is still a big controversy throughout China.⁴³ Therefore,

43. See *In Nanning Municipality, the Home-based Business is a Common Phenomenon and the One-Vote Veto is Nominal* (南宁市住改商现象普遍一票否决权却有名无实), NETEASE (Mar. 29, 2015), <http://news.163.com/15/0329/09/ALS7HEEC00014AED.html?f=jssearch> (Nanning is the capital city of Guangxi Province in south-west China); *In Jinan Municipality, Home-based Business Became the Focus of Residents' Complaints to the AIC and Controversies Arose about How to Provide the Consent of the Interested Parties* (济南“住改商”成居民投诉焦点证明认证引争议), FANG (May 1, 2015), <http://news.jn.fang.com/2015-05-01/15769808.htm> (Jinan is the Capital City of Shandong Province in east China); *Six Hundred Home-based*

the home-based business laws are succumbing to the seven-year itch. As for the provisions of the interested parties, the sweeping approach of the one-vote veto has little feasibility, resulting in the business owners' resistance to apply for the incorporation in the local AICs, and in turn causing complaints from residents. As for what businesses should be operated at home, the Judicial Interpretation gives much leeway for a court to decide.

Working from home may be a dream for many job seekers. But for some people who cannot find jobs, they have to employ themselves and work at home. The current Chinese home-based business laws are neither friendly for the dream seekers nor the underclasses. It might work if the unanimity rule and the acquiescence rule meet in the middle: if the property owner association, the property management, or even the business owners themselves should publicize the intent to establish a home-based business in a residential community, the business should be deemed to have acquired the consent from the interested parties, if within a reasonable time period no objection was made. If disputes come up after the establishment of the business operation, the court can also rely on the law of right of adjunct owners to render the judgment. In addition, a list of encouraged businesses that could operate at home may be produced to guide the sound development of the home-based business. For businesses such as grocery stores, restaurants and convenient stores, stricter sanitary or noise-proof requirements may be applied if they will be operated in residential condominiums.

In general, the law shall harmonize the conflicting interests. The current Chinese home-based business laws lean toward protecting the interests of the residents. Some efforts should be made to grant business owners more power to operate business at home, which is not only beneficial to them but also to society.

Businesses Established in Liuyun Residential Community of Canton, The Citizens Protested the Non-Action of the Government (广州六运小区住改商已有几百家市民投诉政府不作为) (Aug. 20, 2015), http://wap.ycwb.com/2015-08/20/content_20571881.htm (Canton is the Capital City of Guangdong Province in South China); *The Hotline of Life: Home-based Business Consistently Complained* (民生热线：住改商频遭投诉) (Dec. 11, 2015), <http://jingji.radiotj.com/system/2015/12/10/000537897.shtml> (from Tianjin Municipality directly under the State Council of China in North of China).