Zoning for Home-Based Businesses in New York

Robin Wheeler
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IN NEW YORK

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I. Background

A. Introduction

What do Apple Computer, Microsoft, Hershey Chocolate, Mary Kay Cosmetics and the Ford Motor Company have in common? They are all companies that started as home-based businesses. According to the 2000 U.S. Census, over four million people work from their homes, but that number may actually be higher—between 18 and 20 million—depending on how “working from home” is defined.

What follows is an introduction to home-based businesses with an overview of the techniques local municipalities use to regulate home-based businesses through zoning, including special use permits and performance standards. A few New York cases are then discussed to explore how home occupations have been defined through case law, followed by a discussion of the public policy of encouraging home-based businesses through zoning. Lastly, President Obama’s economic plan is examined to determine how it affects such businesses.

B. Defining Home-Based Businesses

“Home-based businesses,” commonly referred to as HBBs, home businesses or home occupations, are typically defined as “an occupation, profession, activity or use that is clearly customary, incidental and secondary use of a residential dwelling unit and which does not alter the exterior of the property or affect the residential character of the neighborhood.” Zoning laws and ordinances define home-based businesses in slightly different ways. For example, the Town of Ontario defines a home occupation as “[a]ny use customarily conducted entirely within a dwelling, provided that such use is carried on solely by the residents of the dwelling and is
clearly incidental and secondary to the use of the dwelling for dwelling purposes," and meeting performance standards set forth elsewhere. The Village of Liverpool concisely defines a home occupation as a "nonresidential activity constituting an accessory use within a dwelling unit," while the Town of Orchard Park elaborately defines a home occupation as "[a]n occupation or a profession customarily carried on in a dwelling unit, which: (1) Actually is carried on wholly within the principal building or in a building or other structure accessory to the dwelling unit; (2) Is carried on by only members of the family residing in the dwelling unit; (3) Is clearly incidental and secondary to the use of the dwelling unit for residential purposes, with no exterior display, no exterior storage of materials and no exterior indication of the home occupation or variation from the residential character of the principal building; and (4) Produces no offensive noise, vibrations, smoke, dust, odors, heat, glare or traffic hazard or congestion."7

C. Types of Home-Based Businesses

The number of home-based businesses continues to grow.8 According to the Home-Based Business Council, there are nearly 200 potential home occupations, including advertising, art instruction, credit checking, auditing, fashion consulting, dating services, medical billing, travel consulting, market research services, tutoring, manicurist, massage therapy, and telephone answering service.9 Other common home occupations include art studios, dressmaking, teaching with musical or dancing instruction limited to a single pupil at a time, the offices of a clergyman, lawyer, physician, dentist, architect, engineer, optician, realtor or accountant, or plumbing and electrical contractors, barbershops, or beauty parlors.10

II. Methods of Regulating Home-Based Businesses

To ensure the compatibility of home-based businesses with the surrounding community, municipalities regulate home-based businesses through various zoning devices. Some zoning ordinances allow a limited number of home occupations as of right in specific districts, meaning that as long as the business meets all specified limitations the applicant will receive the requested permit.11 This approach, however, does not appropriately balance quality-of-life considerations for all district residents.12 Other municipalities may regulate home occupations by considering requests on a case-by-case basis through the zoning variance process, but the granting of use variances for home occupations may not meet statutory and common-law tests for this type of relief.13 The most preferable method of regulating home-based businesses is through performance standards.14

A. Special Use Permits

Municipalities may regulate home occupations through special use permits, sometimes referred to as special exceptions.15 Special use permits allow uses that are generally compatible with other uses in the district.16 To be certain that the use is compatible, the board adds another layer of criteria for review.17 Review discretion remains limited to the criteria set forth in the zoning ordinance.18

Some municipalities separate home occupations into categories of those that require special use permit review and those that do not.19 The Town of Princeton, for example, classifies home occupations as either major or minor; minor occupations attract small amounts of traffic, while major occupations attract greater numbers of people and traffic at one time.20 Based on these differences, the Town established different standards of review for each category.21

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B. Performance Standards

Municipalities often manage home-based businesses by developing performance standards, or limitations or restrictions, in their zoning laws to meet local goals, protect the character of the districts in which the businesses lie and reduce litigation. Examples of performance standards used to regulate home occupations include limiting the size of the home occupation, the number of occupations per dwelling, the number of employees, parking, traffic generation, signs, noise, and hours of operation. Municipalities must consider both the level and the quality of the negative effect to clarify the purpose of zoning regulations. Quality of the negative effect takes into account the effect’s inherent noxiousness, whereas level considers the amount of excess traffic or noise a neighborhood can tolerate without changing its basic nature. Some of the most common home occupation restrictions are discussed below.

1. Size and Number of Home-Based Businesses per Dwelling Unit

To ensure that a home is used primarily for a residence and secondarily as a business, some zoning ordinances restrict the size of home occupations by limiting them to no more than a certain percentage of the floor area of the dwelling, typically between 25% and 35%. For example, the Town of Guilderland prohibits a home occupation from using more than 25% of the floor area of the dwelling, the City of Rensselaer limits the size to 30% of the gross floor area of the dwelling, and the Town of Ontario prohibits the use from occupying more than 35% of the dwelling.

Other municipalities not only restrict the size of the home occupation by limiting it to a certain percentage of the dwelling, but also (or in the alternative) restrict it to a certain number of square feet, usually between 300 and 600 feet. For example, the City of Oneonta restricts the size to 30% of the total floor area of the dwelling unit or 300 square feet of floor area. A home occupation in the City of Albany may not utilize more than 25% of the gross floor area of the dwelling unit, and in no case shall it exceed 500 square feet, while the Town of Bethlehem limits the size of a home occupation to 30% of the total floor area of the dwelling unit or 600 square feet, whichever is less.

Some municipalities also restrict the number of home occupations per dwelling unit in order to prevent multiple business uses from occurring within a building. For example, the City of Albany and the City of Oneonta limit the number of home occupations per dwelling unit to one.

2. Employees

Since traffic and parking are two major concerns relating to home-based businesses, municipalities may restrict the number of employees that work on-site to help reduce the congestion in the surrounding area. The City of Albany, for example, restricts the number of employees on site to no more than one employee or assistant in addition to the home occupant, whereas the Town of Bethlehem limits employees to no more than two persons who are not residents of the dwelling unit. The Town of Guilderland and the City of Rensselaer restrict the number of employees to no more than one person outside the family. The Town of Colonie also restricts the amount of employees for home occupations. Level I home occupations may employ residents only, while Level II home occupations must allow no more than one nonresident assistant, intern, or employee at any one time per lot. The Village of Pleasantville prohibits nonresident associates, assistants or employees. The Town of Cazenovia regulates employees in an alternative way, permitting nonfamily members to be employed by the home occupation, but limiting the number of hours worked by nonfamily members to 80 hours per week.

3. Parking

Many zoning ordinances require owners of home-based businesses to provide a certain number of off-street parking spaces for employees or customers. The number of spaces varies depending on the business and the needs of the surrounding community. The Town of Colonie zoning ordinance states that Level I home occupations shall not provide any additional off-street parking above and beyond the parking already required, whereas Level II home occupations shall provide off-street parking for any and all anticipated increases in vehicles at the dwelling above and beyond the parking already required. According to the Town of Guilderland zoning ordinance, any need for parking generated by a home business shall be provided in an off-street area, other than in a front yard. The City of Rens-
selaer requires one parking space per 100 square feet of the home occupation. The ordinance for the Village of Liverpool prohibits on-site parking of commercial vehicles advertising the home occupation, unless housed in an enclosed residential garage.46

4. Traffic Generation

A primary concern of municipalities with regard to home occupations is the amount of traffic generated in residential areas.46 Some zoning ordinances address this concern by providing a maximum number of vehicles that may visit during the course of an average business day.47 For example, the Town of Bethlehem restricts the number of vehicle trips to no more than 20 per week, or five per day, generated by customers, clients or sales representatives, and further prohibits more than three trips per week for the delivery and pickup of material or commodities to and from the premises by a commercial vehicle.48 Other zoning ordinances are more general in their traffic restrictions. The Town of Guilderland, for example, prohibits home occupations from generating traffic beyond that normally expected in a residential neighborhood.49 According to the Town of Colonie zoning ordinance, a Level I home occupation “shall not generate automobile or truck traffic that would exceed the volume of traffic that would otherwise be generated by typical residential use.”50 whereas no traffic limitations are imposed on Level II home occupations. The City of Oneonta’s ordinance provides that “no traffic shall be generated by such home occupation in a volume that would create a need for parking greater than that which is consistent with the normal parking usage of the district,” and that “no traffic is generated by such use in any greater volume that would create a need for parking greater than that which is consistent with the normal parking usage of the district.”501

5. Signs

Some municipalities restrict signage displayed for home-based businesses. Some zoning ordinances completely prohibit signs, while others regulate the size of signs to ensure that they fit with the character of the surrounding community. The City of Albany allows a home occupation to have one unilluminated, nonilluminated flat or window sign having an area of not more than two square feet on each street front of the zone lot on which the building is situated,52 while the Town of Ontario permits one nonilluminated sign not more than three square feet in area.53 The City of Oneonta permits a single nonillighted sign, not exceeding one square foot in area and installed on the building.54 The Town of Bethlehem limits home occupation signs to one freestanding or wall sign not exceeding four square feet in area, and set back at least ten feet from the highway right-of-way or 35 feet from the highway centerline, whichever is greater, and further provides that no freestanding sign shall exceed six feet in height above the finished grade.55 The Town of Colonie prohibits Level I home occupations from having any sign or other indicia of the home occupation, but permits Level II home occupations to have one sign, which shall not exceed two square feet.56 A home occupation in the City of Rensselaer shall have no exterior display or exterior signs except as permitted for residential districts.57 The Town of Orchard Park permits “one unilluminated, nonilluminated flat or window sign having an area of not more than 60 square inches . . . on each street front of the lot on which the building is situated.”58 Other municipalities simply provide in their zoning ordinances that signage for home occupations shall conform to the requirements for signs as set forth in a particular chapter of the ordinance.

6. Storage

Some municipalities, such as the City of Albany,59 the City of Rensselaer,60 the Town of Bethlehem,61 and the Village of Liverpool62 prohibit exterior storage of materials used in connection with a home-based business. The Town of Colonie’s zoning ordinance provides that a Level I home occupation “shall have no external storage of materials, equipment, container, finished products or associated vehicles outside the home, outbuilding or garage other than that which is normally associated with residential use.”63 The City of Oneonta’s zoning ordinance provides that “no outdoor display of goods or outdoor storage of goods, equipment or material used in the home occupation shall be permitted.”64

7. Prohibiting Certain Home-Based Businesses

In addition to regulating home occupations through special use permits and performance standards, some municipalities prohibit certain home occupations by enumerating occupations that may not
be conducted as home occupations. For example, the Town of Bethlehem prohibits the use of a residence for certain occupations, including ambulance or taxi services, beauty salons and barbershops (except in the Rural District), dance studios, aerobic exercise studios, and gymnasiums or health clubs, kennels, laundry dry cleaning services, mortician, funeral home or hearse services, motor vehicle repair, sales or rental, parking garages or the rental of off-street parking spaces, restaurants, cafés or taverns towing services or tractor-trailer operations including parking, storage or repair. The City of Rensselaer prohibits the use of a residence for animal hospitals or dog kennels, automotive repair services, restaurants, clinics or hospitals or similar uses.

III. Defining a Home Occupation through Case Law

At times, it is up to the courts to determine whether a use constitutes a home-based business subject to a local zoning ordinance. What follows is a synopsis of a few New York cases in which the courts determined whether a home-based business at issue was permitted under a local ordinance.

In Mason v. Department of Buildings of City of New York, a tenant rented out part of his apartment to nonresident musicians as a recording studio, a use he claimed was a home occupation pursuant to the city's zoning ordinance. After the landlord's complaint, the New York Department of Buildings (DOB) issued a notice of violation, and an ALJ found that such use violated the home occupation regulations. The tenant appealed to the Environmental Control Board (ECB), which affirmed the findings of the ALJ. The tenant commenced an Article 78 proceeding, arguing that, among other things, the DOB and ECB findings were arbitrary and capricious. The Article 78 court transferred the case to the Supreme Court, Appellate Division, which (noting that the use of the premises as a recording studio was not carried on by the tenant, but rather by non-occupants for a fee) found that the use was not a valid home occupation under the zoning regulations.

In Baker v. Polsinelli, the petitioner appealed the decision of the town zoning board denying her request to use her home as a dance studio. The Supreme Court, Schenectady County, annulled the board's determination, but the Appellate Division reversed and reinstated the zoning board's decision, finding that it was not irrational for the zoning board to find that petitioner's dance studio, because of its size, was not an occupation "customarily carried on in a dwelling unit" and therefore did not constitute a home occupation within the meaning of the zoning ordinance.

Lastly, in Hughes v. Zoning Board of Appeals of Village of Waterville, the neighbors of a homeowner who was issued a permit to operate a funeral home from his residence brought an Article 78 proceeding challenging the village zoning board of appeals' interpretation of the zoning ordinance. The Supreme Court, Oneida County, held that operation of a funeral home was not a "customary home occupation" within the meaning of the ordinance permitting customary home occupations, because (1) a common thread in defining home occupation is that the occupation "is clearly incidental and secondary to the use of the dwelling unit for residential purposes," and (2) the operation of a funeral home could not be secondary to the use as a residence, because there would be external indications of the occupation which the ordinance specifically prohibited.

IV. Public Policy: Why Zoning Should Encourage Home-Based Businesses

With the concern of climate change and the future well-being of the planet, home-based businesses may help community residents in meeting challenges related to these issues. Environmental and energy conservation advocates support increased zoning efforts for home occupations, believing they will be a positive step towards protecting the environment by reducing daily commuter traffic, energy consumption, and air pollution. Similarly, the American Planning Association advocates reducing dependence on fossil fuels by promoting land use actions that allow for home-based occupations and thereby reduce the number of commuters.

The premise behind these theories is that if municipalities encourage home occupations through zoning by increasing the number and type of home occupations permitted under the ordinances, more people are likely to work from home, thus reducing the number of commuters and in turn reducing greenhouse gas emissions from vehicles that are associated with air pollution and climate change. Decreasing the need to commute daily will also decrease dependency on fossil fuels, another benefit to the environment.
V. President Obama's Economic Plan: How it Affects Home-Based Businesses

Communities may find an increased demand for home-based businesses as a result of the President's stimulus plan. According to tax experts who examined President Obama’s $787 billion stimulus package, benefits include expanded broadband internet access, a greater incentive to buy equipment, the “Making Work Pay” credit, and the option for business owners to carry-back losses for more years.72

According to Michael Lloyd, a tax attorney, the stimulus plan gives a “little shot” in the arm to people who work from home and want to buy equipment for their businesses.73 Lloyd stated that IRS guidelines generally dictate that businesses must depreciate equipment purchases over the economic life of the property, but the stimulus plan’s small-business equipment expense rules generally allow a business to immediately write off the cost of equipment up to $250,000 in the year of purchase.74 As a result, small businesses will pay significantly less income tax than they would otherwise pay if they make significant equipment purchases. The stimulus package increased this one-year deductible threshold from $125,000 to $250,000 for small businesses.75 The package also included separate bonus depreciation rules that will benefit larger businesses, Lloyd said. “It’s just a way to entice people to go out, buy equipment and make investments.”76

A. Expanded Broadband Internet Access

“Although it doesn’t save home workers any tax dollars, the stimulus package does include incentives to expand broadband Internet access to underserved areas, which may allow more people to work from home,” according to Kathleen Pakenham, a tax partner with the White & Case law firm.77 The incentives include grants and loans to local governments and nonprofit groups that are designed to improve broadband Internet access and service.78

B. Other Incentives

Another incentive of the plan is the new “Making Work Pay” credit, which is equal to 6.2% of an individual’s earned income, or $400 ($800 for married couples filing jointly), whichever is less.79 6.2% is the rate of Social Security tax. As a result, a person receives a credit equal to Social Security withhold-

ing. While many credits are not applicable to individuals who are self-employed, this credit is.

Additionally, under the new plan, small business owners can carry back losses for more years. Under previous law, small businesses could carry back their net operating losses for a maximum of two tax years.80 The stimulus package will permit owners of small businesses with gross revenue of $15 million or less to carry back losses for up to five years.81

VI. Conclusion

The number and type of home businesses has continued to rise over the past several years and it appears that this trend will continue. In order to ensure the compatibility of home businesses with the surrounding community, municipalities regulate them through zoning, and the modern approach relies heavily upon the use of special use permits and/or performance standards to regulate various aspects of the home business use to ensure that it does not disrupt or interfere with the surrounding community.

NOTES
1. Robin Wheeler (’10) is a 3L at Albany Law School and a research assistant at the Government Law Center.
2. See http://www.business.gov/start/home-based/
12. Salkin, supra n.11.
13. Salkin, supra n.11.
14. Salkin, supra n.11.
15. Salkin, supra n.11 at § 19.6.
47. Salkin, supra n.46 at § 19:12.
73. Blake, supra n.72.
74. Blake, supra n.72.
On appeal, the Appellate Division, Fourth Department, affirmed. The court rejected the contention that the ZBA's determination was arbitrary, capricious, an abuse of discretion, and clearly affected by errors of law. The Town's zoning law defined a family as "[a]ny number of individuals living together as a single housekeeping unit and doing their cooking on premises, as distinguished from a group occupying a boarding- or rooming house or hotel." It is well settled, noted the court, that under a zoning ordinance which authorizes interpretation of its requirements by the board of appeals, specific application of a term of the ordinance to a particular property is governed by the board's interpretation, unless unreasonable or irrational. The ZBA's determination that the Brotherhood did not use the property as a single-family residence or a church within the meaning of the Town's zoning law was not arbitrary or capricious, an abuse of discretion, or affected by errors of law, and the determination was supported by substantial evidence.

The court also held that the ZBA's interpretation of the zoning law did not place an unconstitutional restraint on the Brotherhood's exercise of religion. The ZBA's determination was in furtherance of the compelling governmental interest in maintaining the R-1 district as a single-family residential zone, and the Brotherhood's cause of action alleging the violation of the Religious Land Use and Institutionalized Persons Act failed, because it could not be said that the ZBA's determination—the denial of permission to operate a "Transitional Housing" facility under contract with "clients" who paid a fee of $25 per day for a room—imposed a substantial burden on religious exercise. Libolt v. Town of Irondequoit Zoning Bd. of Appeals, 66 A.D.3d 1391, 885 N.Y.S.2d 806 (4th Dep't 2009).