

# ZONING PRACTICE

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## PRACTICE HOME OCCUPATIONS



# Modernizing Zoning for Home Occupations

By Patricia E. Salkin, AICP

According to the 2000 U.S. Census report, over four million people—3.3 percent of the nation’s population—work from home.

That number can actually range between 18.8 million to 20.3 million, depending on how one defines “working from home.” The Small Business Administration reported that in 2000, nearly 20,000 entrepreneurs grossed more than \$1 million operating from a home-based environment. Labeled by some as an “explosion of home-based businesses,” a number of organizations implore local officials to reassess their antiquated zoning laws to address this trend. Zoning codes, traditionally designed to separate incompatible land uses, led to the establishment of distinct zoning districts for businesses and residential areas. However, with the growth in home-based businesses and home occupations, municipalities must creatively balance public health, safety, and welfare in residential districts against the pressures necessitating the accommodation of appropriate home-based businesses.

Environment and energy conservation advocates tout zoning for increased home occupations as a positive step towards reducing daily commuter traffic, energy consumption, and air pollution. The American Planning Association advocates reducing dependence on fossil fuels by promoting land-use actions that allow for home-based occupations, and thereby reducing the number of commuters. On the APA website, one planner recently commented:

Twenty-five years ago, planners and zoning regulations focused on segregating uses in different zones. With the advent of computers, decentralization of the workplace, work-at-home environments, footloose industry leaving the country, and the abandonment of employees to fend for themselves for retirement planning and health care protection, individuals and families are faced with doing everything from home—multitasking and being self-reliant.

One of the leading smart growth and land-use advocates observed that as telecommuting and home offices become a way of life, local zoning codes should reflect, rather than deny, the reality. In a recent law review article, Professor Nicolle Stelle Garnett, law professor in property and land use at Notre Dame University, urged local officials to tackle the home-based business dilemma. She explained that working from home can help parents balance work and family, enable low-income individuals to achieve economic self-sufficiency, and alleviate social and environmental problems resulting from sprawl. The Town of Floyd, New York, Comprehensive Plan echoes these sentiments:

Home occupations can provide numerous benefits for both home-based workers and the town. Home-based businesses provide useful services and encourage business growth by eliminating the initial need for some small businesses to rent commercial space, an important factor to someone who is just starting a new venture. Working at home also saves commuting and childcare costs and reduces traffic congestion. Home occupations can also provide many people who might be unable to work outside the home (including single parents, the elderly, and the disabled) an opportunity to earn a living. And by creating activity in residential neighborhoods that might otherwise be deserted during the day, home occupations help to reduce crime.

Professor Garnett points out that many people currently engage in home occupations despite the fact that in many cases these uses violate zoning codes. While she acknowledges that in some situations individuals may not know the restrictive zoning laws, she suspects that many believe they can avoid detection by circumscribing their activities. However, the prospect of unhappy

neighbors running to the local zoning enforcement officer to complain puts home-based business operators at constant risk for civil or criminal sanctions and the possibility of needing to cease operations immediately if found in violation of the local zoning law. Professor Garnett concludes that the “widespread defiance of zoning laws itself suggests that the rules governing home businesses may be candidates for reform.”

This issue of *Zoning Practice* offers planners ideas and examples of ways to modernize local zoning laws to balance the growing demand by residents to engage in legitimate home-based businesses, while protecting community character and the health, safety, and welfare of neighbors in residential zoning.

## DEFINING “HOME OCCUPATION”

The U.S. Supreme Court established zoning as a constitutionally valid exercise of state police power in *Village of Euclid v. Ambler Realty Co.* (272 US 365 (1926)). Euclid, Ohio, sought to prevent hotels, retail establishments, or apartments from cropping up around residential areas for the purposes of limiting building height and promoting residential safety. Ambler Realty fought Euclid’s zoning, claiming it violated due process. However, the court supported the zoning as rational under the 14th Amendment’s due process requirements and therefore within the states’ police power. In “Modernizing Your Zoning Ordinance to Regulate Home-Based Businesses,” Andrew Cates of the University of Connecticut asserts that courts now presume zoning ordinances fall within the states’ police powers. However, municipalities—not state entities—create zoning laws.

Local zoning laws and ordinances define “home occupation” in slightly different ways. For example, officials in Cochise, Arizona, define home occupation as “an activity carried on by

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the occupant of a dwelling as a secondary use, including personal and professional services . . . ” subject to certain limitations. Similarly, the City of Albany, New York, defines the term as “a business, profession, occupation or trade conducted by the occupant of a dwelling unit or accessory structure” . . . “incidental and secondary to the use of the dwelling unit.” Other definitions include “the secondary use of a person’s residence for a business activity carried on for profit (Torrance, California)” or “any gainful occupation engaged in by an occupant of a dwelling unit (Boise, Idaho).” The zoning ordinance in the Town of Old Saybrook, Connecticut, simply provides that a home occupation consists of an activity conducted for gain. The zoning code sets forth a number of standards and requirements that applicants must satisfy prior to receiving a home occupation permit.

they do not possess the discretion to determine whether to permit home occupations not specifically listed in a zoning ordinance. As a result, municipalities should regulate home occupations based not on the type of business, but

rather on factors such as percent of floor area dedicated to business use, number of employees, number of parking spaces, and other criteria discussed in greater detail in the following sections of this article.

What constitutes a home occupation differs among jurisdictions, and allowable home occupations may vary depending upon the character of the community. For example, in one Wyoming municipality a meat processing operation qualified as a home occupation. Operating child day care programs in one’s home may also constitute a home occupation. The Town of Alfred, Maine, identified four types of home occupations in its zoning ordinance:

1. *Office in the home.* A home office creating or manufacturing home crafts without

‘Widespread defiance of zoning laws itself suggests that the rules governing home businesses may be candidates for reform.’

—NICOLLE STELLE GARNETT  
PROFESSOR OF PROPERTY AND LAND-USE LAW  
NOTRE DAME UNIVERSITY

### TYPES OF HOME OCCUPATIONS

While the number and variety of home occupations has increased over the years, local zoning did not keep pace with this expansion. For example, the Home Based Business Council lists roughly 200 potential home occupations, including advertising, art instruction, credit checking, auditing, fashion consulting, dating service, medical billing, travel consulting, market research services, tutoring, manicurist, massage therapy, and telephone answering service. The zoning enforcement authority for New Rochelle, New York, determined that a resident could not maintain a home-based management consulting business because the zoning in effect at the time only permitted offices of architects, artists, and teachers or a “similar professional person” as home occupations. In that case, a number of neighbors complained about the use, alleging that it resulted in increased traffic and excessive parking. Although code enforcement officers and building inspectors must strictly enforce zoning,



Nicky Gordon



Jeroen Peys

Common home occupations: studios for artists and photographers. Cities now desire such uses to bolster economic and cultural development.

Kelly Connor



on-site sales; no on-site parking of commercial vehicles; and no more than three client contacts in the home per week. This does not include on-site manufacturing, warehousing, and sales, or home occupations which employ anyone not related by blood or marriage to the business owner, or who does not reside on the premises.

2. *Home crafts.* Creating or manufacturing an item, including, but not limited to, dress-making, knitting, the manufacture of crafts, woodworking, drawing, painting, and sculpting. This does not include those home occupations which employ more than one person not related by blood or marriage to the business owner, or who does not reside on the premises. No more than three client contacts in the home per week are permitted.
3. *In-home sales and service.* A home occupation that does not meet the definition of “office in the home” or “home crafts” but does not include those home occupations that employ more than one person not related by blood or marriage to the business owner, or who does not reside on the premises.
4. *Home-based business.* Any home occupation that employs more than one person not related by blood or marriage to the business owner or who does not reside on the premises.

Some municipalities choose to list the types of business uses that do not qualify for home occupation status in the jurisdiction. For example, the ordinance for the City of Deephaven, Minnesota, provides the following prohibited home occupations: service, repair, or painting of any motorized vehicle, including, but not limited to, motor vehicles, trailers, boats, personal watercraft, recreation vehicles, and snowmobiles; dispatch centers; medical or dental clinics; rental businesses; contracting, excavating, welding, or machine shops; commercial kennels and veterinary clinics; tow truck services; the sale, lease, trade, or other transfer of firearms or ammunition; sale or use of hazardous materials in excess of consumer quantities packaged for consumption by individual households for personal care or household use; and any other use of residential property deemed detrimental or inconsistent with the residential character of the neighborhood.

## METHODS OF REGULATING HOME OCCUPATIONS

While zoning ordinances may allow a limited number of home occupations as-of-right in specific districts, this approach does not appropriately balance quality-of-life considerations for all district residents. Some home occupations leave neighbors unaware that the residence contains a business. Other uses may attract cars and delivery trucks and could involve signage on residential property that could raise legitimate neighborhood concerns. Other municipalities may deal with home occupations by considering requests on a case-by-case basis through the zoning variance process. The granting of use variances for home occupations may not meet statutory and common law tests for this type of relief. Preferably, municipalities should allow home-based business uses through performance standards.

In Ames, Iowa, the special use permit application lists the regulations and asks that the applicant explain in writing how the proposed home occupation use meets those standards. Doing so educates applicants, arguably promoting greater compliance.

Some municipalities separate home occupations by categories, whereby one category requires special use permit review, but another does not. For example, the Town of Princetown, New York, designates minor and major home occupations. It appears from the list (doctors, artists, lawyers, plumbers, and instructors of dance, music, or art) that minor occupations attract small amounts of traffic while major occupations attract greater numbers of people at one time. Major home occupations, such as repair shops, offices of doctors who see patients, and hair salons, may create a nuisance or alter the residential appearance of the neighborhood. Focusing on



Paige Foster

Changes in technology and lifestyles now demand that zoning codes follow suit with modern provisions for home occupations. This “minor” home occupation is in a Seattle residential neighborhood.

**Special use permits—standards and requirements.** As-of-right means that as long as the business meets all specified limitations the applicant will receive the requested permit. Special use permits (sometimes referred to as special exceptions) grant those uses generally compatible with other uses in the district. To be certain, the board adds another layer of criteria for review. Review discretion in these cases remains limited to the criteria set forth in the zoning ordinance.

these differences, the town established different standards of review for each category.

**Performance standards.** Zoning can effectively manage the surge in home-based businesses by developing performance standards to regulate home occupations. Municipalities can employ a variety of standards to accomplish local goals and reduce the amount of litigation. Some municipalities regulate zoning by limiting negative effects such as signage; traffic; number of employees;

clientele; odor, noise, or smoke nuisances; and restricting changes to the building structure or neighborhood appearance.

According to Cates, however, municipalities must consider both the level and the quality of the negative effect to clarify the purpose of zoning regulations. Quality indicates the effect's inherent noxiousness whereas level considers the amount of excess traffic or noise a neighborhood can tolerate without changing its basic nature.

### REGULATING THE SIZE OF THE HOME OCCUPATION

Zoning ordinances may provide for the maximum allowable floor area in a home used for a home occupation to ensure that the residence remains primarily a dwelling. For example, the ordinance in the Borough of Kane, in Pennsylvania, provides that a home occupation shall not use more than 25 percent of the gross floor area of the dwelling unit. The City of Papillion, Nebraska, provides that “for all residential and agricultural zoning districts, a maximum floor area of 30 percent of the dwelling may be devoted to the home occupation, inclusive of any detached accessory buildings used for the home occupation.” Albany restricts the size of the use to a maximum of 500 square feet regardless of the size of the dwelling, and the Old Saybrook ordinance restricts the home occupation to one floor of the dwelling unit and provides that “therein, not more than 25 percent of such floor may be used for this purpose.”

### REGULATING THE NUMBER OF HOME OCCUPATIONS PER DWELLING UNIT

Since more than one working-age person may occupy a dwelling, multiple businesses can occur within the building. Some municipalities proactively approach this situation by restricting the number of home occupations per dwelling unit. For example, Albany limits the number of home occupations per dwelling unit to one.

### RESTRICTING THE NUMBER OF EMPLOYEES ON SITE

Traffic and parking remain two major neighborhood concerns with home occupations. To reduce traffic, municipalities restrict the number of on-site employees that may work in one home-based business. Municipalities should carefully determine whether the maximum number of employees includes all resi-



🕒 Live-work units and home occupations—both mandated through zoning controls—offer new hope for aging former industrial buildings in many American cities. This is a photograph of New York's famous SoHo district.

Some municipalities regulate zoning by limiting negative effects (signage, traffic, clientele noise, pollution) and restricting changes to the building structure or neighborhood's appearance.

dents, only nonresident employees, or some combination thereof. For example, the Borough of Kane provides that no more than three nonresidents shall be employed at a home-based business. Papillion addresses full-time and part-time employees by requiring employers to provide parking for employees. The ordinance provides, in part, that “the home occupation shall employ no more than one full-time or part-time employee on site other than the residents of the dwelling unit, provided that one off-street parking space is made available and used by that nonresident employee.”

### PARKING

Zoning ordinances may require home occupations to provide a specified number of off-street parking spaces for employees or patrons. The number varies depending on the business and the surrounding neighborhood's residential needs. The Borough of Kane ordinance requires that “a sufficient number of paved off-street parking spaces shall be provided as deemed necessary by the zoning hearing board.” Alfred requires sufficient off-street parking within 100 feet of the premises for customer use without creating any traffic or safety hazards.

### TRAFFIC GENERATION

The amount of traffic generated in a residential neighborhood as a direct result of the business use remains a primary concern. Some zoning ordinances address the issue of traffic by providing a maximum number of vehicles that may visit during the course of an average business day, specifying, for example, that no more than five or 10 cars of employees or clients can drive to the home. Papillion provides specific criteria tied to trip generation. Its ordinance states that home-based businesses may generate no more than the greater of 30 vehicle trips per day or five percent of the average daily traffic volume of the adjacent street. Peak-hour traffic generation may not exceed 16 vehicle trips, and deliveries or service by commercial vehicles or trucks over 10 tons gross empty weight cannot

visit any home-based business located on a local street.

### SIGNS

Some residential districts restrict home occupation signage. Municipalities may regulate the use of signs for home occupations without violating the First Amendment as an exercise of state police power. Papillion outright prohibits home occupation signs, as does Hillsboro, Oregon. The zoning ordinance of the Village of Olympia Fields, Illinois, provides, in part that, “there shall be no exterior display, no exterior sign except as allowed by the sign regulations for the district in which such home occupation is located . . .”

Municipalities may choose to regulate the size of signs related to home occupations to ensure they fit in with the character of the community. For example, the zoning ordinance for the Borough of Kane provides, in part, that “there shall be no exterior display or no sign larger than two feet by three feet (unlit) . . . and no other exterior indication of the home occupation.” In addition, localities may regulate the number of signs advertising the home occupation on each lot zoned for such use. For example, the zoning ordinance for Albany provides that residents “shall not display or create outside the building any evidence of the home occupation, except . . . one unanimated, non-illuminated 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.” Alfred combines these two approaches to sign regulation and provides that “home occupations signs relating only to goods or services available on premises, which may be surface mounted or freestanding . . . may not exceed three square feet in surface area and the top edge six feet in height. Only one home occupation sign is permitted per premises. Any home occupation sign displayed inside a window is considered a sign and is counted in the sign area allowed for home occupations.”

### OTHER REQUIREMENTS

While the discussion above focuses on the major issues involved with the regulation of home-based businesses, municipalities may find it desirable to adopt additional requirements to protect the character of the residen-

tial neighborhood. For example, some ordinances limit the type of alterations made to the residential building housing the home occupation. Albany prohibits alteration of the principal residential building where such changes alter the character and appearance of the dwelling. Papillion prohibits any change in the exterior appearance of the building or premises housing the home occupation. Old Saybrook prohibits external evidence of the home occupation, except for permitted signs and required off-street parking.

Still other zoning regulations prohibit the outdoor storage of equipment or materials used in the home occupation, or restrict the number of commercial vehicles a home-based

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business can use. For example, the Albany zoning ordinance provides that any home occupation cannot use more than one commercial vehicle and must store it in an enclosed garage. The Papillion zoning ordinance prohibits the outdoor storage of materials or equipment used in the home occupation other than motor vehicles used by the owner to conduct the occupation, and prohibits the parking or storage of heavy commercial vehicles in connection with the home occupation. Albany also restricts “mechanical, electrical, or other equipment which produces noise, electrical, or magnetic interference, vibration, heat, glare, or other nuisance outside the residential or accessory structure.” Papillion limits such equipment supporting the home occupation to only self-contained equipment within the structure and that is normally used for office, domestic, or household purposes.

Quality of life remains an overarching theme in the regulation of home occupations. For example, Alfred’s zoning ordinance provides that home occupations may not adversely affect any natural resource or environmentally sensitive area such as a wetland, aquifer, watercourse, water body, etc. To address quality-of-life concerns, Papillion provides that “no noise, odors, bright lights, electronic interference, storage, or other external effects attributable to the home occupation shall be noticeable from any adjacent property or public right-of-way. No home occupation shall discharge into any sewer, drainage way, or the ground any material which is radioactive, poisonous, detrimental to normal sewer plant operation, or corrosive to sewer pipes and installations.” The ordinance in Old Saybrook states that “the home occupation and the conduct thereof shall not impair the residential character of the premises nor impair the reasonable use, enjoyment, and value of other residential property in the neighborhood.”

### TERMINATION OF HOME OCCUPATIONS

Municipalities may provide for the eventual termination of a permitted home occupation. Any change in use would undergo similar review to ensure compatibility with the neighborhood. The municipality may communicate to the occupant that the allowed home occupation, once permitted, remains unique to the applicant only, and that a new owner would need to apply for permission to operate the previous home-based business. For example, Old Saybrook requires that the person operating the home occupation sign the permit application and attach a detailed description of the proposed use. Each certificate of zoning compliance allowing the use automatically terminates when the applicant no longer resides in the dwelling unit.

### CONCLUSION

Planners are increasingly being challenged to design ways to legitimize home occupation uses in previously residential-only zoning districts while also preserving the character of the traditional residential community. Flexible zoning techniques, including special use permits and performance standards, as methods of regulating home-based business uses offer opportunities for creativity in the design of effective regulations.





## NEWS BRIEFS

### INCLUSIONARY ZONING IN SAN DIEGO: SECURE AT LAST?

By Max Eisenburger

The City of San Diego and developers appear to have finally resolved a four-year legal battle that threatened to invalidate the city's inclusionary housing ordinance.

The settlement, approved by the city council on July 25, reinstates several provisions favored by developers in exchange for an end to court proceedings against the city.

In 2002, the city council voted to adopt an inclusionary housing ordinance as part of its response to a mounting crisis of housing affordability. The ordinance included a 10 percent set-aside requirement for all new development, but provided developers with the option of paying an in-lieu fee instead of setting aside affordable units. It also included several exemption provisions, including exemption of units sold to owner-occupants with no other property earning 150 percent of area median income or less. At the time, San Diego was probably the largest city in the country to adopt such an ordinance.

Almost immediately, the Building Industry Association (BIA) of San Diego filed suit against the city. The organization claims to represent over 1,400 developers and, according to its website, "has been described as 'arguably one of the most powerful interest groups in San Diego.'"

For the next four years, the case has gone from court to settlement proceedings and back again. Agreement between the city council and developers seemed at hand this past April when the council suddenly backed out over a provision that would have allowed the suit to resume if the city made any changes to the ordinance within two years. Some council members felt that the in-lieu fees were too low and had proposed removing them, which would have forced developers to comply with the 10 percent affordable set-aside requirement. Had the city accepted the settlement with the no-amendment provision it would have forgone the option of annulling in-lieu fees for at least another two years.

By not accepting the settlement, however, the city landed itself in court again. On May 24, Judge John S. Meyer delivered his verdict against the council, finding the ordinance

unconstitutional because it did not allow developers to argue that their projects did not contribute to the affordability crisis and should thus be exempted.

According to the San Diego magazine *City Beat*, while the court battle "was similar to lawsuits filed by building-industry groups in other cities and counties that have inclusionary housing laws . . . San Diego's is the only lawsuit developers have beaten in court."

The ruling led to a brief split within city government. While the council vowed to convince Judge Meyer to overturn his original ruling at a second hearing on July 14, city attorney Michael Aguirre argued for a quick amendment to incorporate the exemption the

The inclusionary housing ordinance was ruled unconstitutional because it did not allow developers to argue that their projects did not contribute to the affordability crisis and should thus be exempted.

judge had found lacking. The council later decided (once again) to attempt a settlement with the building industry out of court, and on July 25 a compromise was reached.

The new compromise is similar to the compromise announced in April. One key provision is that in-lieu fees will be calculated when developers submit permit applications rather than when issuing building permits. Since the fees were designed to increase over time builders will be able to save money if the fees are assessed earlier in the process. The two-year moratorium on amendments to the ordinance has also been reinstated.

Many inclusionary housing proponents have reluctantly accepted the new settlement. Councilwoman Toni Atkins said that while she was "not particularly happy [the city is] in this position, and that [San Diego] inclusionary housing ordinance has been challenged . . .

it's important we preserve the constitutionality of the ordinance." Nico Calavita, professor of city planning at San Diego State University and a founding member of the San Diego Housing Coalition, concurs: while the city could forego close to \$10 million in affordable housing financing under the settlement, the inclusionary ordinance will be preserved.

Other cities with inclusionary housing ordinances have encountered less heated opposition from developers despite the imposition of more onerous demands. In Berkeley, California, the affordable set-aside ratio is 20 percent. Calavita attributes San Diego's prolonged and heated controversy to a more aggressive, conservative building industry. The San Diego Housing Coalition had initially sought support from the BIA of San Diego when it was lobbying for the inclusionary ordinance, but the latter was fundamentally opposed. In the Bay area, by contrast, initial confrontation between the Home Builders Association of Northern California and the housing advocates eventually led to a joint policy brief that agreed on the basic tenets of inclusionary housing. *Max Eisenburger is a researcher with the American Planning Association*

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# WILL HOME OCCUPATIONS SAVE THE ENVIRONMENT?



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