

Re: Working from Home

**Analysis and commentary by David Neal
(Presented to B. Dyer, January 17, 2018)**

I believe the current Merriam home office/home occupation licensing is overly restrictive, burdensome, and outdated.

The relevant ordinances no longer work to achieve the desired aims of the law in a way that balances the worthiness of the intent against the compliance burden on residents.

The language also is ambiguous in key places, creating inconsistent and non-equitable administration of the law.

During the campaign, I raised the following general principles in terms of municipal ordinances and striking a proper balance between the needs of the property owner and the rights or wishes of other stakeholders in the community:

"Having been a resident and business owner interacting with Merriam across a variety of matters, I believe there are areas where municipal ordinances and codes should be reviewed in view of the changing needs of residents and the blurring of lines between home and work.

Some ordinances that I have encountered over the years need to be reviewed, possibly updated, and made clearer in terms of the language to better reflect modern conditions and make compliance clearer.

Currently, some ordinances have to be interpreted at the staff level for new situations that the ordinances were not intended to address. The City Council should be making many of those decisions about policy to insure consistent treatment is provided to members of the public.

Good clear understanding and presentation of city rules is important for residents and businesses considering a move to our community.

Similarly the city should balance the needs of the property owners against overly restrictive zoning constraints..."

The following discussion about my policy concerns (as compared to my concerns with ambiguous language) was adapted from my campaign web site (<http://www.nealformerriam.com/homesNeighborhoods.html#HomeOffice>).

After that is a more detailed discussion of the problems in the current language, whatever policy is actually desired as the outcome of the ordinance review under consideration.

Policy Concerns

'Home Occupation' Licensing for work performed at home using personal computer devices (which I will refer to as "Computer Work")

One area of the Merriam Municipal Code that needs to be updated are the zoning ordinances related to residents performing work from home, as is increasingly common in the modern digital age.

When these municipal statutes were developed in the late 1950s and 1960s, most people didn't even use computers at work, and there were no computers located in residences. Now people routinely perform work from home on micro computers of various forms as well as "smart" communication devices.

A reading of relevant ordinances essentially could be interpreted as requiring anyone working from home using a computer on even a part-time basis to obtain from the City of Merriam the appropriate permits and licenses necessary to conduct ('in whole or part') a 'home occupation.'

Arguably under a literal reading of the existing language, if any resident, including City Council members, performs any of their work from home, they would be required to obtain an 'occupational license' with a 'home occupation permit' with the residence approved for a 'home office' 'conditional use.'

The rationale for regulating property owners' usage of their residential property emphasizes preserving the residential character of residential neighborhoods while reasonably allowing residents to use their property to fulfill personal economic goals.

Such economic activities are considered to fall under the rather broad designation of 'home occupations.'

According to the Merriam Municipal Code, Chapter 74 - Zoning, Article X. - Home Occupations:

Sec. 74-467. - Authorization.

A home occupation that is customarily incidental to the principal use of a dwelling and may be permitted as a conditional use when approved by the planning commission. The expressed intent behind regulating home occupations is as follows:

1. To preserve the residential character of neighborhoods.
2. To preserve the residential rights of neighbors, while reasonably allowing residents to utilize their residences to enhance or fulfill personal economic goals.
3. To establish reasonable criteria for the operation of home occupations in dwelling units.
4. To preserve and protect municipal and utility services such as streets, sewers and water systems against increased utilization typical in commercial districts.

5. To preserve tranquility in neighborhoods and prevent non-residential activities typically found in commercial districts.

Drilling down into Article X the city code attempts to define the distinction between receiving city permission to conduct a 'home occupation' within a residential property and a 'conditional use' permit to use a portion of a residential structure as a 'home office' which is a more restricted/limited use.

According to the Merriam Municipal Code, Chapter 74 - Zoning, Article X. - Home Occupations:

Sec. 74-468. - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Home occupation means a business, profession, occupation or trade conducted, wholly or in part, within a residential building or within a structure accessory to a residential building.

Home office means a home occupation involving no customers or employees on premises, no outdoor signage, no storage of goods for sale on premises and no storage of tools or equipment for use on or off premises.

'Use limitations' are further specified in section 74-469 which also get to the intent of the 'home occupation' zoning regulations.

According to the Merriam Municipal Code, Chapter 74 - Zoning, Article X. - Home Occupations:

Sec. 74-469. - Use limitations.

The planning commission may place such use limitations upon a home occupation which it deems appropriate under the circumstances; however, the following minimum use limitations shall apply to all home occupations:

- (1) No visible or audible evidence of the home occupation shall be apparent from the street or the surrounding area.

- (2) No alteration of the residential building shall be made which changes the character thereof as a dwelling, or advertises or calls to the attention of the public a home occupation.
- (3) The home occupation shall be conducted by persons residing on the premises with no assistance from other individuals or groups. There shall be no nonresident employees.
- (4) There shall be no outdoor storage of stock, stock in trade, equipment, machinery or materials used in the business of the home occupation.
- (5) No more than 20 percent of the floor area of a dwelling unit shall be devoted to a home occupation.
- (6) No parking in the public right-of-way shall occur as a result of the home occupation. If parking for home occupation occurs in a manner or frequency causing disturbance to the normal traffic flow for the neighborhood, the home occupation shall be considered a business best operated in a commercial district, and will no longer be permitted.
- (7) No mechanical or electrical equipment other than customary domestic or household equipment shall be used in the home occupation.
- (8) A home occupation shall not create excessive noise, dust, dirt, smoke, odor, vibration, glare, heat or lighting that would be in excess of that created in the customary use of a residential dwelling.
- (9) A home occupation shall not create interference with, or fluctuations of, radio or television transmissions in the neighborhood.
- (10) No signage or other forms of advertising the home occupation may be placed or painted anywhere on the residential property, unless specifically permitted elsewhere in this chapter.
- (11) Signs on vehicles advertising the business being conducted as a home occupation shall contain only the name of the business and the telephone numbers of the business, and shall not provide an address where the home occupation is being conducted or information inducing, enticing or inviting the public to visit the property upon which the home occupation is being conducted.
- (12) Home occupations shall comply with all local, state and federal regulations pertinent to the business activity pursued, including the requirement of a business license as set forth in this chapter, and the granting of a permit under this section shall not be construed as an exemption from such regulations.
- (13) No alteration of the residential property, including buildings and structures, shall be permitted that would cause the property to lose its residential character or detract from the residential character of the neighborhood.

- (14) Group gatherings and meetings (involving more than one business patron) may be held on the residential premises no more frequently than one time per month, and shall be held within the dwelling unit or accessory structure in which the home occupation is conducted.
- (15) Patrons of the home occupations may visit the residential property only between the hours of 7:00 a.m. and 9:00 p.m., Monday through Saturday.
- (16) With home occupations involving repairs, the permittee shall pickup from and deliver to the owner items to be repaired; patrons shall not be allowed to deliver or pickup such items at the residential premises of the permittee.
- (17) No production, burning, dumping or storage of combustible, toxic or hazardous substances shall be allowed.
- (18) No waste, refuse, trash, or waste byproduct generated off of the residential premises shall be dumped, disposed of, incinerated, burned or stored on the residential premises.

Commentary

I would argue that someone working in their home on a computer does not possibly threaten any of the stated intents behind regulating 'home occupations.'

This is not the kind of distinction that the Merriam Municipal Code makes when considering the most common class of 'home occupation' performed within residential structures in 2017.

No distinction is made between intellectual work performed on a personal computer at home or similar computer-based personal electronic device such as a laptop, tablet, or smart phone. and a home occupation like a lawnmower repair business operating out of a resident's garage.

Digital work on a computer is similar in character to and fully consistent with recreational uses of a computer within a residence. This type of 'work' or 'economic activity' is a completely different regulatory problem compared to regulating other home occupations which might use fully commercial-use equipment, or which might create excess noise, increase traffic, or involve other activities that could potentially affect close proximity neighbors.

Policy Position 1: I believe that economic activity conducted at home but conducted solely with the assistance of computing and telecommunications devices (hereinafter "Computer Work") should be exempt from the requirement of obtaining a 'home office conditional use permit' since the activities are functionally indistinguishable from recreational use of those same devices.

Under current law, any 'person' with a home occupation permit working in their home office is required to obtain a \$40/yr (now raised to \$50/yr) occupational license from the city. According to the Merriam Municipal Code, Sec. 74-473, "The requirements for an occupational license for a home occupation shall apply."

According to the Merriam Municipal Code, Chapter 74 - Zoning, Article X. - Home Occupations:

Sec. 74-473. - Home office application.

Any provision in this article to the contrary notwithstanding, the community development director may approve a conditional use for a home office. The applicant shall provide to the community development director satisfactory written evidence that the owners of all property within 200 feet of the premises of the applicant have been notified of the application and been afforded a period of no less than ten days to object in writing to the community development director thereto. ***The requirements for an occupational license for a home occupation shall apply.*** In the event an application for a conditional use permit for a home office is denied, the applicant may appeal to the planning commission by written notice of appeal to the community development director within ten days of the date upon which written denial was issued.

According to the Merriam Municipal Code, Chapter 14 - Businesses and Business Regulations, Article II. - Licenses, Permits and Occupational Taxes:

Sec. 14-27. - Occupational license fees.

Every person engaged in any business, occupation, pursuit, profession, institution, establishment, utility or commodity specified in this article shall pay for a license from the city. The fee for such license shall be in the respective amounts set forth in the fee schedule maintained by the city clerk and updated annually.

Policy Position 2: Whether or not a license or some other form of fee is needed from a city revenue perspective, is another matter. I do not think that self-employed individuals should be treated any differently than individuals employed by other companies which expect/require those resident employees to perform part of their work duties from their residence locations. For that reason, I believe that the idea of requiring an occupational license for Computer Work that treats all residents equitably is probably an unworkable idea.

Home Office Conditional Use Permit Application Process

The granting of a 'conditional use' 'home office' permit that allows a resident to use part of his/her home as a 'home office' is an overly cumbersome process that involves sending registered letters to all neighbors with property lines within 200 feet (used to be 500 feet) of the home office resident's property line at least 10 days prior to the Planning Commission taking up the application for a 'home office' 'conditional use' permit at a public Planning Commission hearing.

The Merriam Municipal Code, Chapter 74 - Zoning, Article X. - Home Occupations also references Sec. 50-48. - Zoning Regulations of the Merriam Code

According to the Merriam Municipal Code, Chapter 74 - Zoning, Article X. - Home Occupations:

Sec. 74-471. - Application process; new.

Application for a home occupation permit shall be *subject to the notice and hearing requirements of section 50-48(f)*. The planning commission shall have the right after the applicant has had an opportunity to be heard, to deny any application based upon the activities conducted or to be conducted in the home occupation, and shall consider in making such determination the existing character of the neighborhood, availability of municipal and other utilities, geographic or topographic features, size and characteristics of the dwelling or structure in which the home occupation is being or will be conducted, and such other matters as may be relevant and consistent with the expressed intent of this article.

Language Clarification 1: Sec. 74-471 refers to section 50-48(f) which is described as "notice and hearing requirements." Section 50-48(f) actually refers to application fees. The correct citation based on intent is likely to be section 50-48(g) which details the notification requirements to nearby property owners for public hearings of matters before the Planning Commission.

Under current practice and administration interpretation, the regulation of 'home occupations' and 'home offices' requires specific regulatory action under the city's zoning ordinances for a broad range of business activities (defined in both Sec. 74-468 and Sec. 14-27) that may be undertaken by property owners at their residential dwellings. The rationale and process for making changes to the city's zoning ordinances is contained in to section 50-48, subsection (e).

According to the Merriam Municipal Code, Chapter 50 - Planning and Development, Article III. - Developmental Plans, Section 50-48. - Zoning Regulations:

Sec. 50-48. - Zoning Regulations, subsection (e).

The city council, from time to time, may supplement, change or generally revise the boundaries or regulations contained in zoning regulations by amendment. A proposal for such amendment may be initiated by the city council or the planning commission. If such proposed amendment is not a general revision of the existing regulations and affects specific property, the amendment may be initiated by application of the owner of property affected. Any such amendment, if in accordance with the land use plan or the land use element of a comprehensive plan, [sic] presumed to be reasonable. The city council shall consider the following matters when approving or disapproving a rezoning request:

- (1) The character of the neighborhood;
- (2) Whether the proposed use will result in increasing the amount of vehicular traffic to the point where the capacity of the street network is exceeded;

- (3) Whether the proposed use is reasonably necessary for the convenience and welfare of the public and will not substantially or permanently injure the appropriate use, visual quality or marketability of adjoining property;
- (4) Whether the noise, vibration, dust or illumination that would normally be associated with such use is of such duration and intensity as to create problems for nearby property;
- (5) Whether the proposed use would pollute the air, land or water;
- (6) The relative gain to the public health, safety and welfare as compared to the hardship imposed upon landowners;
- (7) Whether the proposed use would result in overcrowding of land or overcrowding population;
- (8) The zoning uses of properties nearby;
- (9) The suitability of the subject property for the uses which it has been restricted;
- (10) The length of time the subject property has remained vacant as zoned;
- (11) Recommendations of professional staff; and
- (12) Conformance of the requested change to the adopted or recognized comprehensive plan adopted by the city.

Language Clarification 2: Sec. 50-48(e) appears to be missing the word "is" where I have inserted a [sic] in the subsection's main paragraph.

Subsection (g) of the same Sec. 50-48. details the notification requirements to nearby property owners for public hearings before the Planning Commission to make recommendations for 'amendments' to the city zoning ordinances. This apparently includes the issuance of 'conditional use' permits for 'home offices.'

According to the Merriam Municipal Code, Chapter 50 - Planning and Development, Article III. - Developmental Plans, Section 50-48. - Zoning Regulations:

Sec. 50-48. - Zoning Regulations, subsection (g).

(g) All such proposed amendments first shall be submitted to the planning commission for recommendation. The planning commission shall hold a public hearing thereon, shall cause an accurate written summary to be made of the proceedings, ***and shall give notice in like manner as that required for recommendations on the original proposed zoning regulations.*** Such notice shall fix the time and place for such hearing and contain a statement regarding the proposed changes in regulations or restrictions or in the boundary or

classification of any zone or district. If such proposed amendment is not a general revision of the existing regulations and affects specific property, the property shall be designated by legal description or a general description sufficient to identify the property under consideration. ***In addition to such publication notice, written notice of such proposed amendment shall be mailed at least 20 days before the hearing to all owners of record of land located within at least 200 feet of the area proposed to be altered.*** When the notice has been properly addressed and deposited in the mail, failure of a party to receive such notice shall not invalidate any subsequent action taken by the planning commission or the city council. Such notice is sufficient to permit the planning commission to recommend amendments to zoning regulations which affect only a portion of the land described in the notice or which give all or any part of the land described a zoning classification of lesser change than that set forth in the notice. A recommendation of a zoning classification of lesser change than that set forth in the notice shall not be valid without republication and, where necessary, re-mailing, unless the planning commission has previously established a table or publication available to the public which designates what zoning classifications are lesser changes authorized within the published zoning classification. At any public hearing held to consider a proposed rezoning, an opportunity shall be granted to interested parties to be heard.

Policy Position 3: If the 'home office' 'conditional use' permit for Computer Work activities is retained in this review process (which I hope is not the case), then the process for granting such a permit should be accomplished administratively rather than as a zoning function of the Planning Commission. I would note that the intent of the current Planning Commission hearing process can be inferred from the phrase "of the area proposed to be altered" in the above subsection. Computer work does not require the 'alteration' of any part of the property. It is ridiculous for the city to regulate residents' use of their home in order to perform Computer Work there. Such activities certainly are not altering the residential character of an area and should not be considered as a zoning change requiring noticeable formal action by the Planning Commission. Such use of residents' private property has no material effect on other property owners, city infrastructure or public safety and should not fall under zoning ordinances.

Additional Commentary

Is it really necessary for a resident who needs to perform Computer Work at home to go look up property plats to determine which tracts are within 200 feet of their property, look up the owners names and addresses, prepare notices informing such nearby residents that the notifying resident intends to work on his/her computer in his/her residence, send such nearby residents registered letters noticing them that the home office application will be heard in a hearing of the Merriam Planning Commission 20 days hence if they wish to object, just in order to get the City of Merriam's permission to utilize a portion of their time at home, working on a computer?

Is it appropriate for a resident to be required to disclose to all his neighbors the nature of the type of work that the resident performs in generating his/her income if such work is all performed on a computer with no manifestations of that work discernible to those neighbors?

I would further argue that as a resident, it should be that resident's personal right to disclose (or not) to neighbors what industry he/she works within or what vocation he/she practices professionally or even what is the name of the business entity that he/she may (or may not) derive income from, if the activities do not impact such neighbors. This is a personal privacy issue. Without a compelling reason, a person's employment, business interests, and thus potentially inferred income should not be required to be disclosed to the resident's neighbors or even to the city.

Administrative Issues in Enforcement of Current Home Occupation/Home Office Regulations in Merriam

Whether or not to enforce this collection of interworking ordinances and exactly how they are enforced is up to the discretion of Merriam city staff in ways that are not necessarily equitable or proper. This is not due to any fault of staff. Rather it is because the ordinances do not adequately address modern work/home paradigms.

Indicators of business activity at a Merriam residence

Currently Merriam staff actively seek out instances of business mailings that use Merriam residential addresses as the business address of record with the Kansas Secretary of State in order to require those residents to obtain home occupation permits, home office conditional use permits and occupation licenses. The City also uses sales tax collection filings as another indicator.

Sales tax collection is tied to the collection location and if that location corresponds to the address of a Merriam residential property, such data appropriately indicates that sales transactions have occurred at that location. Sales tax filings data is probably a reasonable way of determining whether someone residing there is conducting business activity at that residential address.

The fact that Secretary of State business mail is sent to a Merriam residential address is currently used as evidence to city staff that someone may be operating an illegal 'home occupation' without an 'occupational license'. The use of a residential address in business filings is not a reliable indicator of conducting business from the Merriam residential address however.

Ambiguous Language

What follows is a further discussion that addresses problems I see in the ambiguous language contained in the current Merriam city ordinances rather than problems with the policy. This leads to difficulty in administering the current ordinances. Various residents who have been caught up in these unclear regulations want to see clarity and consistency.

1. What is a Home Occupation?

From " Sec. 74-468. - Definitions." is found the legal definition a 'home occupation' in the Merriam city code:

Sec. 74-468. - Definitions."

"Home occupation means a business, ***profession, occupation*** or trade conducted, wholly ***or in part***, within a residential building or within a structure accessory to a residential building."

From " Sec. 14-27. - Occupational license fees." is found the legal description of activities requiring an occupational license in the Merriam city code:

Sec. 14-27. - Occupational license fees.

Every ***person engaged in*** any business, ***occupation, pursuit, profession***, institution, establishment, utility or commodity specified in this article shall pay for a license from the city. The fee for such license shall be in the respective amounts set forth in the fee schedule maintained by the city clerk and updated annually.

A comparison of the list of activities in the 'home occupation' definition as compared to the 'occupational license' section (Sec. 14-27) shows some differences in what are both designed to be all encompassing lists of words associated with economic activities. The terms "business," "profession," and "occupation" are found in both lists.

The 'home occupation' section also includes "trade."

The 'occupational license' section has the additional words "institution," "establishment," "utility," and "commodity."

All the words in the 'home occupation' section seem to more closely apply to activities of 'a person' even though the word 'person' only appears in the 'occupational license' activity description.

Some of the activities listed in the 'occupational license' activity description sound more like they apply to a business legal entity rather than a person. This ambiguity leads to a question of the intent of the language which in turn makes administrative interpretation of the ordinances more difficult.

In addition to differences in the list of 'home occupation' activities (Sec. 74-468) as compared to the 'occupational license' section (Sec. 14-27), the 'home occupation' language introduces the idea of including activities that are primarily conducted at some other non-residential location but are conducted 'in part' at home. This opens up the interpretation that expands the requirement for obtaining a home occupation permit and occupational license to employees bringing home work from the office, etc.

2. Who needs an occupational license? How many?

Major problems with the combination of sections of the Merriam code which are used to implement the administrative enforcement of home occupational licenses involve inconsistent language referring to a "person" needing to obtain a (home) occupational license if they conduct a variety of ambiguous activities at least partly from home:

From "Sec. 14-27. - Occupational license fees." is found the authority basis requirement for an occupational license.

"Every *person* engaged in *any* business, *occupation, pursuit, profession*, institution, establishment, utility *or* commodity specified in this article shall pay for *a license* from the city."

A reasonable reading of this language indicates 'a' single license is required for each 'person' engaged in 'any' of a variety of overly broadly constructed terms for activities including 'occupation,' 'pursuit,' and 'profession.'

Pretty much any Merriam resident that uses an electronic device at home such as a computer, tablet, or smart phone at home to engage 'in part' of their 'occupation' activities would seem to satisfy the criteria for needing an occupational license. Work-related (i.e. engaged in an 'occupation,' 'pursuit,' or 'profession') activities even as common and trivial as making business related phone calls, responding to emails related to their employment ('occupation,' 'pursuit,' or 'profession') would be covered.

Under such an interpretation, each household member that performs any activity related to their income producing activities (whether they are self-employed or not) would be required to obtain an individual occupational license.

Under current Merriam administrative practice, a separate license is required for each business entity (not person) that appears to be receiving mail at a Merriam home address. The ordinance talks about 'persons', not business entities.

Which 'persons' the licensing requirement applies to is also ambiguous. The administrative interpretation through recent practice clearly does not apply to all 'persons' who conduct some business activities from within Merriam residences. For example, many residents that are professionally employed with non-Merriam employers perform at least some work from home, but are not required to obtain an occupational license.

Such residents may perform computer work from home for a business entity that does not use the residence as a business address. The nature of the work is the same so the need (if there is any) for regulation from a zoning perspective would be the same.

A self employed individual or business owner is not treated equitably as compared to employees of a business entity in which such resident does not own the controlling interest. Under this

practice the decision about which 'person' is required to obtain an occupational license is solely based on the financial structure between the person and their source of income.

Asking a resident who earns his/her living as an independent contractor to ask the city for permission to work on the computer from home while other workers doing the same thing are not treated the same way is wrong in my opinion.

Requiring only Merriam residents who earn their living as independent contractors to put forth in public records details of their means of earning a living seem out of bounds from a privacy standpoint as well. Should we also require all Merriam residents who work at home sometimes but are merely employees of another company to disclose in public records the nature of the work they do for their employer? I believe the answer is we should treat all residents equitably.

Secondly, the enforcement mechanism for determining which 'persons' meet the definition of conducting activities that meet a rather ambiguous list of characteristics that warrant obtaining an 'occupational license' for a 'home occupation' is flawed in my opinion. My concerns about the inconsistencies in language about those definitions about what constitutes a 'home occupation' are discussed in the next section, but here I will discuss a flawed approach in the current staff enforcement practice that needs mentioning.

The current staff enforcement interpretation that a Merriam residence is likely a business location based on the use of a Merriam residential address on Kansas Secretary of State (KSOS) business filings does not adequately prove operation of an actual business at a Merriam residential location. KSOS business filings actually just contain the legal noticing address for a newly formed business entity.

In the case of a new business entity formation, before such a business can actually contract (sign a lease) for a business location for conducting the activities envisioned for the business in terms of actual operations, the legal entity must be formed with the state.

The address used on the business filing is an address of record for communication with the State of Kansas about that business legal entity. It is not necessarily an actual business activity address, beyond receiving legal notices from the State of Kansas. Use of the KSOS filings as reliable proof of someone engaging in the types of activities from their residence that would require a home occupancy license is not an adequate test for determining if a residence is being used for a 'home occupation.'

Summary - What is the appropriate entity to be the occupational licensee?

The occupational license requirement in the current ordinances do not refer to an individual business legal entity. They specifically state that 'every person' is required to obtain an occupational license, suggesting that the ordinances were written before the various modern

business legal entity types were created. A sole proprietorship and the person owning the business were one and the same back in the 1960s when these ordinances were crafted.

Now there are all kinds of legal business structures that residents can be involved in including the old sole proprietorships, s-corporations, limited liability corporations, limited liability partnerships, professional service entities of various types, and regular c-corporations, etc.

Many residents also work from home for business entities in which they have no ownership interests.

The business entity receiving mail at a Merriam residence address may not be owned entirely by the resident and may not have all or any of its business activities conducted there.

A resident may also perform work from home for a business entity that does not use the residence as a business address. The work is the same so the need (if there is any) from a zoning perspective would be the same.

Policy Position 4:

So from a practical matter, the business entity should not be the licensee. The occupational license grant to a resident (as a person) is the correct party that should obtain the license in my view rather than a business legal entity..

Administrative Recommendation 1: Under the current ordinances, I believe city staff should be interpreting the law to require a single license for home office use by the residents living in a dwelling or for each individual resident working from home. If the city wants to regulate on a business legal entity basis rather than by person, then the language should clearly reflect that.

Additional Commentary

As a small business owner, I pay for two occupational licenses which cover computer work performed at home on behalf of three business entities that I theoretically own or partially own.

One original occupational license includes two legal entities, a software company and a construction company. A second occupational license was required when I filed incorporation papers for a new LLC using my home address as the address of record with the State of Kansas for the digital media business.

I am not actively engaging in business operations through all of these business legal entities at the present time.

Occupational License Continuity Concerns

Current ordinances are silent on what happens if a resident does not conduct business from his/her residence during a particular year. If the resident fails to renew the occupation license for

a year during which no business activities are conducted, but for which the resident may wish to resume business activities in later years, what would be required to reinstate the home occupation permit, the home office conditional use permit and the occupational license?

Would the resident need to go through the whole cumbersome application process again, including the Planning Commission hearings?

Administrative/Policy Recommendation 2: Either through additional language in the municipal codes, or through some reasonable administrative policy that makes it easy to re-activate an non-renewed occupational license, the policy should reflect the fact that residents may cease to conduct business activities from their residences for a period of time. Currently, residents may be maintaining licenses that they are not really using in order to preserve the ability to work from home in the future.

Conclusion

Inconsistent interpretation, overly cumbersome compliance, and non-equitable application of these ordinances make Merriam an unfriendly place for small business startups where the work performed is limited to Computer Work in an increasingly digital economy. This kind of arbitrary administration of ambiguous and practically unenforceable city ordinances also has a psychological impact on some residents giving them the feeling that the city is persecuting them unfairly.

Overall Recommendation

I think that working from home on a computer or similar device ("Computer Work") by residents should be exempt from 'home office' and 'home occupation' regulation and the occupational license fees since the computer activities have no impact on neighbors, city infrastructure, or city services and are substantially the same as non-business computer activities also performed on the same equipment by residents.

The regulatory purposes of zoning don't apply for this category of activity, since they are not 'altering' the area in any way. If the city needs the revenue from the occupational license fees from residents currently doing computer-based work from home, then that revenue should be raised in a different manner. The current processes surrounding regulation of residents' Computer Work by the city is a waste of staff time and the residents' time. Fixing those processes seems to be more trouble than it is worth.

The administrative enforcement trigger is reflected by the address used by the business entity.

The occupational license requirement in the current ordinance does not refer to an individual business legal entity. It specifically states that 'every person' is required to obtain an occupational license, suggesting that the ordinances were written before the various modern business legal entity types were created.

A sole proprietorship and the person owning the business were one and the same back in the 1960s when these ordinances were crafted. Now there are all kinds of legal business structures that residents can be involved in including the old sole proprietorships, s-corporations, limited liability corporations, limited liability partnerships, professional service entities of various types, and regular c-corporations, etc.

Many residents also work from home for business entities in which they have no ownership interests.

The business entity receiving mail at a Merriam residence address may not be owned entirely by the resident and may not have all or any of its business activities conducted there.

A resident may also perform work from home for a business entity that does not use the residence as a business address. The work is the same so the need (if there is any) from a zoning perspective would be the same.

So from a practical matter, the business entity should not be the licensee.

According to the Merriam Municipal Code, Chapter 14 - Businesses and Business Regulations, Article II. - Licenses, Permits and Occupational Taxes:

Sec. 14-27. - Occupational license fees.

Every person engaged in any business, occupation, pursuit, profession, institution, establishment, utility or commodity specified in this article ***shall pay for a license from the city***. The fee for such license shall be in the respective amounts set forth in the fee schedule maintained by the city clerk and updated annually.

Even though the municipal code refers to a 'person,' city staff are interpreting the occupational license requirement for a home office/home occupation inconsistently and I believe improperly.

As discussed in a later section on ambiguous language, I believe that current city codes require a license issued to be issued to *the person* living at a residential address who wishes to perform 'business or professional activities' from that residence regardless of the ownership status of the business entity or entities that the resident is performing work on behalf of.

Further it is not a reasonable administrative interpretation of the language in the city code to require a separate occupational license for each entity that receives mail at the Merriam residential address.

The occupational license requirement in the current ordinance does not refer to an individual business legal entity. It specifically states that 'every person' is required to obtain an occupational license, suggesting that the ordinances were written before the various modern business legal entity types were created.

A sole proprietorship and the person owning the business were one and the same back in the 1960s when these ordinances were crafted. Now there are all kinds of legal business structures that residents can be involved in including the old sole proprietorships, s-corporations, limited liability corporations, limited liability partnerships, professional service entities of various types, and regular c-corporations, etc.

Many residents also work from home for business entities in which they have no ownership interests.

The business entity receiving mail at a Merriam residence address may not be owned entirely by the resident and may not have all or any of its business activities conducted there.

A resident may also perform work from home for a business entity that does not use the residence as a business address. The work is the same so the need (if there is any) from a zoning perspective would be the same.

So from a practical matter, the business entity should not be the licensee.

Administrative Recommendation 1: Under the current ordinances, I believe city staff should be interpreting the law to require a single license for home office use by the residents living in a dwelling or for each individual resident working from home. If the city wants to regulate on a business legal entity basis rather than by person, then the language should clearly reflect that.

As a small business owner, I pay for two occupational licenses which cover computer work performed at home on behalf of three business entities that I theoretically own or partially own.

One original occupational license includes two legal entities, a software company and a construction company. A second occupational license was required when I filed incorporation papers for a new LLC using my home address as the address of record with the State of Kansas for the digital media business.

I am not actively engaging in business operations through all of these business legal entities at the present time.

Current ordinances are silent on what happens if a resident does not conduct business from his/her residence during a particular year. If the resident fails to renew the occupation license for a year during which no business activities are conducted, but for which the resident may wish to resume business activities in later years, what would be required to reinstate the home occupation permit, the home office conditional use permit and the occupational license?

Would the resident need to go through the whole cumbersome application process again, including the Planning Commission hearings?

Administrative/Policy Recommendation 2: Either through additional language in the municipal codes, or through some reasonable administrative policy that makes it easy to re-activate an non-renewed occupational license, the policy should reflect the fact that residents may cease to conduct business activities from their residences for a period of time. Currently, residents may be maintaining licenses that they are not really using in order to preserve the ability to work from home in the future.

Inconsistent interpretation, overly cumbersome compliance, and non-equitable application of these ordinances make Merriam an unfriendly place for small business startups. This kind of arbitrary administration of ambiguous city ordinances also has the psychological impact on some residents giving them the feeling that the city is persecuting them unfairly.

Ambiguous Language

What follows is a further discussion that addresses problems I see in the ambiguous language contained in the current Merriam city ordinances rather than problems with the policy. This leads to difficulty in administering the current ordinances. Various residents who have been caught up in these unclear regulations want to see clarity and consistency.

1. Who needs an occupational license? How many?

Major problems with the combination of sections of the Merriam code which are used to implement the administrative enforcement of home occupational licenses involve inconsistent language referring to a "person" needing to obtain a (home) occupational license if they conduct a variety of ambiguous activities at least partly from home:

From "Sec. 14-27. - Occupational license fees." is found the authority basis requirement for an occupational license.

"Every *person* engaged in *any* business, *occupation, pursuit, profession*, institution, establishment, utility *or* commodity specified in this article shall pay for *a license* from the city."

A reasonable reading of this language indicates 'a' single license is required for each 'person' engaged in 'any' of a variety of overly broadly constructed terms for activities including 'occupation,' 'pursuit,' and 'profession.'

Pretty much any Merriam resident that uses an electronic device at home such as a computer, tablet, or smart phone at home to engage 'in part' of their 'occupation' activities would seem to satisfy the criteria for needing an occupational license. Work-related (i.e. engaged in an 'occupation,' 'pursuit,' or 'profession') activities even as common and trivial as making business related phone calls, responding to emails related to their employment ('occupation,' 'pursuit,' or 'profession') would be covered.

Under such an interpretation, each household member that performs any activity related to their income producing activities (whether they are self-employed or not) would be required to obtain an individual occupational license.

Under current Merriam administrative practice, a separate license is required for each business entity (not person) that appears to be receiving mail at a Merriam home address. The ordinance talks about persons, not business entities.

Which 'persons' the licensing requirement applies to is also ambiguous. The administrative interpretation through recent practice clearly does not apply to all 'persons' who conduct some business activities from within Merriam residences. For example, most residents that are professionally employed with non-Merriam employers perform at least some work from home, but are not required to obtain an occupational license.

A self employed individual or business owner is not treated equitably as compared to employees of a business entity in which such resident does not own the controlling interest. Under this practice the decision about which 'person' is required to obtain an occupational license is solely based on the financial structure between the person and their source of income.

Asking a resident who earns his/her living as an independent contractor to ask the city for permission to work on the computer from home while other workers doing the same thing are not treated the same way is wrong in my opinion. Requiring only Merriam residents who earn their living as independent contractors to put forth in public records details of their means of earning a living seem out of bounds from a privacy standpoint as well. Should we also require all Merriam residents who work at home sometimes but are merely employees of another company to

disclose in public records the nature of the work they do for their employer? I believe the answer is we should treat all residents equitably.

Secondly, the enforcement mechanism for determining which 'persons' meet the definition of conducting activities that meet a rather ambiguous list of characteristics that warrant obtaining an 'occupational license' for a 'home occupation' is flawed in my opinion. My concerns about the inconsistencies in language about those definitions about what constitutes a 'home occupation' are discussed in the next section, but here I will discuss a flawed approach in the current staff enforcement practice that needs mentioning.

The current staff enforcement interpretation that a Merriam residence is likely a business location based on the use of a Merriam residential address on Kansas Secretary of State (KSOS) business filings does not adequately prove operation of an actual business at a Merriam residential location. KSOS business filings actually just contain the legal noticing address for a newly formed business entity.

In the case of a new business entity formation, before such a business can actually contract (sign a lease) for a business location for conducting the activities envisioned for the business in terms of actual operations, the legal entity must be formed with the state. The address used on the business filing is an address of record for communication with the State of Kansas about that business legal entity. It is not necessarily an actual business activity address, beyond receiving legal notices from the State of Kansas. Use of the KSOS filings as reliable proof of someone engaging in the types of activities from their residence that would require a home occupancy license is not an adequate test for determining if a residence is being used for a 'home occupation.'

2. What is a Home Occupation?

From " Sec. 74-468. - Definitions." is found the legal definition a 'home occupation' in the Merriam city code:

*"Home occupation means a business, **profession, occupation** or trade conducted, wholly **or in part**, within a residential building or within a structure accessory to a residential building."*

In addition to differences in the list of activities as compared to the 'occupational license' section (Sec. 14-27), this language introduces the idea of including activities that are primarily conducted at some other non-residential location but are conducted 'in part' at home. This opens up the interpretation that expands the requirement to employees bringing home work from the office, etc.

