

CASE NO. 3-48



CITY OF WICHITA  
BUILDING INSPECTION DIVISION

To Charles Rinaldo Owner Address 1127 North Spruce

To Blase & Pettis Applicant Address Central Bldg.

Dear Sir:

Your ~~Application~~<sup>request</sup> Dated March 8, 1948

For ~~to permit to operate~~ permission to operate a restaurant  
\_\_\_\_\_ at the premises designated as  
1127 North Spruce

Is hereby refused on this 8th day of March, 1948,

Under Section 16 of the Zoning Ordinance.

For the reason that this property lies within the "A" district, where  
businesses are not permitted.

Respectfully,

  
Chief Building Inspector

NOTE: Any appeal from this refusal must be filed with the Board of Zoning Appeals (Room 304, City Hall) within ninety (90) days after the date of this refusal. For further information, take this notice to the Planning Department, Room 304, City Hall.

THE CITY OF WICHITA

OFFICE OF Planning and Research DATE April 7, 1948

TO Fred W. Aley, City Attorney

FROM David D. Rowlands, Planning and Research Assistant

SUBJECT Board of Zoning Appeals  
Case No. 3-48

This case involves a Mr. Charles Rinaldo, who operates a home food service at the premises known as 1127 North Spruce, located in an "A" use district. The Chief Building Inspector is of the opinion that this type of business should be operated in an "LC" zoning district, and that the appellant is therefore in violation of the zoning ordinance.

The appeal was based on the fact that in Section 1 of Ordinance 14-432 City of Wichita, under Definitions, a Home Occupation is defined as follows:

Any occupation or profession engaged in by the occupants of a dwelling not involving the conduct of a retail business, manufacturing business, or a repair business of any kind on the premises, and not including any occupation conducted in any building on the premises excepting the building which is used by the occupant as his or her private dwelling. Home occupations shall include, in general, personal services such as furnished by a physician, surgeon, dentist, musician, artist, barber, beauty operator and seamstress when performed by the person occupying the building as his or her private dwelling and not including the employment of any additional persons in the performance of such services. And further that a home occupation is permitted in "A" Districts as provided by said Section 16, of the above ordinance.

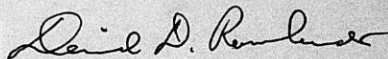
It is contended that the appellant's home food service does fit the definition for the reason that the service is carried on entirely within the home of the appellant, and that he serves his spaghetti dinners and home cooked Italian food only by reservation or appointment. Furthermore, only such small parties as can be accommodated in Mr. Rinaldo's front room are served.

The Board of Zoning Appeals has requested that the Legal Department prepare an opinion as to whether or not the operation of this type of enterprise constitutes a home occupation or whether such a service of this type is in violation of the zoning ordinance.

Page 2 - Fred W. Aley  
April 7, 1948

Appended herewith is the complete file on this case which has  
been designated as Case 3-48.

It would be appreciated if an opinion could be submitted on this  
appeal by Wednesday, April 21, 1948.



David D. Rowlands  
Planning and Research  
Assistant

DDR:la  
Encls.  
CC: Lawrence Curfman  
E. N. Smith



1127 North Spruce Case # 3-48  
- looking west at front of house

Jan 29, 1948 - ~~Hein~~ ~~Seam~~

Jan 28, 1948 - appeal

Refiled Feb. 19, 1948

BOARD OF ZONING APPEALS

Case No. 3-48

Filed March 18 1948

A P P E A L   U N D E R   T H E   Z O N I N G   O R D I N A N C E

TO THE BOARD OF ZONING APPEALS  
Room 304, City Hall  
Wichita, Kansas

The undersigned, Charles Rinaldo, hereby appeals  
from the decision of the Building Inspector wherein a ~~Building Permit~~  
~~has been issued for~~ permission to operate a restaurant at 1127 N. Spruce  
was denied.

OR

Order Or Decision Rendered Because \_\_\_\_\_

The Plans, application, and all data heretofore filed with said Build-  
ing Inspector are attached hereto and made a part of this appeal.

I have not made a previous application or appeal under the Zoning  
Ordinance affecting these premises.

I hereby declare that all the statements contained in all of the  
information transmitted herewith are true.

Charles Rinaldo  
Appellant.

NAMES AND ADDRESSES

Appellant Charles Rinaldo Address 1127 North Spruce

Owner Mrs. Charles Rinaldo Address 1127 North Spruce

Lessee \_\_\_\_\_ Address \_\_\_\_\_

The above property is being purchased under an escrow agreement from  
C.D. Garrison at 234 North Emporia, Wichita, Kansas

INSTRUCTIONS

1. This appeal must be typewritten and filed within ninety (90) days  
after the date of the decision of the Building Inspector from  
which this appeal is taken.
2. The appellant must file an explicit Typewritten statement setting  
forth:
  - (a) The principal points on which this appeal is made. These  
points shall be the same as those under which the Building  
Inspector issued a refusal, order, or decision.
  - (b) A clear and accurate description of proposed work or use.
  - (c) Specific reference to that Section of the Zoning Ordinance  
under which it is claimed permit should be issued.
  - (d) Names and addresses of all owners and residents within a  
distance of 200 feet of the property concerned.

To The Board of Zoning Appeals  
Room 304  
City Hall  
Wichita, Kansas

Your appellant, Charles Rinaldo, offers this statement in support of his appeal from an order dated March 8, 1948, issued by the Chief Building Inspector of Wichita, Kansas, wherein he denied this appellant permission to continue the operation of his home food service, for the reason that he classified it as a restaurant, which is banned under Section 16, of the Zoning Ordinance, which controls the "A" districts.

This appeal is based on the fact that in section 1, of Ordinance 14-432, of the City of Wichita, under definitions, a home occupation is defined as follows:

*copy*

HOME OCCUPATION: Any occupation or profession engaged in by the occupants of a dwelling not involving the conduct of a retail business, manufacturing business, or a repair business of any kind on the premises, and not including any occupation conducted in any building on the premises excepting the building which is used by the occupant as his or her private dwelling. Home occupations shall include, in general, personal services such as furnished by a physician, surgeon, dentist, musician, artist, barber, beauty operator and seamstress when performed by the person occupying the building as his or her private dwelling and not including the employment of any additional persons in the performance of such services. And further that a home occupation is permitted in "A" Districts as provided by said Section 16, of the above ordinance.

The appellant's home food service does fit that definition for the reason that this service is carried on entirely within the home of the appellant, he serves entirely by reservation or appointment. The house has not been enlarged nor changed, no outside help is used, he furnishes specially prepared Italian home cooked foods, he serves only small parties, such as he can accommodate in his own front room.

The interpretation placed by the Chief Building Inspector will work a particular hardship on this appellant for the reason that the City of Wichita did grant to this appellant a meat permit and allowed him to commence this service after having been notified of his intentions and desires. The appellant did expend several hundred dollars in procuring the necessary equipment to conduct properly this service.

Your appellant further respectfully offers for your consideration a petition, signed by his neighboring property owners, urging your favorable acceptance of his request for the reason that they have no objections to its continuance and would like this allowance made.

Attached hereto is a list prepared by a bonded abstractor showing the names and addresses of all owners and residents within a distance of 200 feet of the property concerned.

BLASE AND FETTIS

By *Everett C. Feltis*  
Attorneys for Appellant

STATE OF KANSAS  
ss.  
SEDGWICK COUNTY

CERTIFICATE OF OWNERSHIP  
FOR A ZONING CHANGE.

The Undersigned, duly bonded and qualified Abstractor within and for the County and State aforesaid, does hereby certify;

That we have examined the records in the Office of the Register of Deeds of Sedgwick County, Kansas, for the Record Owner of all the property (exclusive of Streets and Alleys) lying within 200 feet of the following tract of land in said County, viz:

Lots 21 and 23 on Spruce Street, in Tenth Street  
Addition to Wichita, Kansas.

and from such examination find the owners as set out opposite the description of the land, viz:

Property	OWNERS.
Lot 1, Tarlton's 2nd Addition (except the West 30 ft. for street)	✓ The Board of Education of the City of Wichita. 428 S. Brady.
Lots 5 & 7 Spruce St. 10th Street Add.	✓ V. H. Wolf. 1151 N. Spruce
Lots 9 & 11 " "	✓ E. H. Schul & Ethel Schul 1011 Jackson
Lots 13 & 15 " "	Zelma E. Joslin Lamb. ?
Lots 17 & 19 " "	Henry McKay & Velda McKay. ?
Lots 21 & 23 " "	✓ C. D. Garrison. <del>220 Wichita</del> ?
Lots 25, 27, 29, 31 " "	✓ Harry R. Horner 115 S. Kutan
Lots 33 & 35 " "	✓ Otto A. Stoltz & Anna Stoltz. 1117 N. Spruce
Lots 6, 8 & 10 Madison Ave. "	✓ R. H. Garvey. 126 Circle Dr.
Lot 12, " "	Bessie I. Wilson. ?
Lots 14 & 16 " "	✓ J. E. Alexander 352 N. Brady.
Lots 18 to 28 " "	James Chapman, Percy Chapman & Edith Matthews, ?

Continued.

Certificate of Ownership for a Zoning Change (Cont'd.)

Property

Owners.

Lots 30 & 32 Madison Avenue, 10th Street Add.

✓ William R. Boswell &  
Emma F. Boswell.

Lots 34 & 36 " "

1127 N. Madison  
✓ Aubrey Holder.

Lots 38 & 40 " "

1240 Cleveland  
Y. W. Spuires.


(All lots in Tenth Street Addition are 25' x 130')

2

Dated at Wichita, Kansas, this 15th day of March, 1948 at 7 O'clock A. M.

THE FIDELITY TITLE COMPANY.

By

  
Vice President.

C  
O  
P  
Y

THE CITY OF WICHITA

OFFICE OF Ass't. City Attorney      DATE April 19, 1948

TO David D. Rowlands, Planning & Research Assistant

FROM Lawrence E. Curfman

SUBJECT Board of Zoning Appeals  
Case No. 3-48  
Charles Rinaldo, 1127 N. Spruce

FACTS

Mr. Charles Rinaldo, the appellant, operates a home food service at the above property located in an "A" District. The Chief Building Inspector was of the opinion that such a business could be conducted only in an "LC" District.

It is the appellant's contention that under Section 1 of the zoning ordinance, No. 14-432, the definition of "Home Occupation" covers this type of operation and further that under Section 16 of this same ordinance, Home Occupations are permitted.

The facts appear to be that the structure is an ordinary residence property and that Mr. Rinaldo serves spaghetti dinners to small parties and by appointment only. Dinners are served in the front room of his residence. The dinners are apparently cooked in the residence.

QUESTION SUBMITTED

Is the home food service operation described above a violation of the Wichita zoning ordinance?

OPINION

It should be noted that the definition of Home Occupation contains this language:

"Home Occupations shall include \*\*\*when performed by the person occupying the building as his or her private dwelling and not including the employment of any additional persons in the performance of such services."

David D. Rowlands  
Page 2  
April 19, 1948

The file submitted to the Department of Law does not show whether or not Mr. Rinalde and his family do all of the cooking and serving in connection with their business or whether other persons are employed. If this information has not yet been brought to the attention of the Board, I believe it should be ascertained.

Home Occupations under the various zoning ordinances have been the subject of a great deal of litigation and dispute. Unfortunately, there are enough differences in the language of the various zoning ordinances to make decisions of other courts of doubtful value. However, I have been able to find a few cases involving Home Occupations, one in particular involving a home food service as a home occupation.

In the case of Devaney v. Board of Zoning Appeals of the City of New Haven, 1946, 45 Atl. 2d (Conn.) 828, the facts were that one Miglaro, in 1944, purchased a one-family dwelling in New Haven, for the purpose of conducting a restaurant business, such business being forbidden in the zone in which the residence was located. The Building Inspector denied a permit to alter the first floor of the structure; the Board of Zoning Appeals, on appeal, overruled the decision of the Building Inspector and interested property owners, then took the case to the Court of Common Pleas and, finally, to the Supreme Court of Errors of Connecticut. A great deal appears in the opinion by way of general discussion of the subject. The appellant apparently did not rely upon a Home Occupations section in the zoning ordinance, or there was not such a section. Undue hardship was the principal ground of the appeal. The court not only sustained the original decision of the Building Inspector, but held that the action of the Board of Zoning Appeals, in granting permission to proceed with the restaurant, was without authority and unlawful.

The case of Jones vs. Robertson, 1947, 160 Pac. 2d (Calif.) 929, involved the question of whether or not a real estate broker's office could properly be regarded as a Home Occupation, under a county zoning ordinance in Placer County, California. The Home Occupation section of this ordinance permitted

"Uses customarily incidental to and subordinate to residential use and not involving the maintenance of store, shop or commercial enterprise, including home occupations and professional offices and studios maintained within dwellings, providing no name plate or sign exceeding three square feet in area shall be displayed in connection therewith."

The real estate broker contended he was engaged in a profession, and

David D. Rowlands  
Page 3  
April 19, 1948

the court somewhat summarily disposed of this contention by holding real estate not to be a profession. The court goes on to hold the business to be a commercial enterprise rather than a Home Occupation. The decision was, however, a three to two decision of the court. It is also fair to say that the court was a District Court of Appeal, a subordinate court; and, while I have attempted to determine whether the case was appealed to the Supreme Court of California, because it is such a recent case, I cannot be certain.

Still a third and somewhat analogous case is that of State v. Holskamp, 1941, 151 S.W. 2d. (Mo.) 685, decided by the St. Louis Court of Appeals, involving the zoning ordinance of Webster Groves, Missouri, a suburb of St. Louis. The situation there was that the property owners desired to remodel the first floor of a three-story residence into a dancing academy. The owners occupied the remainder of the structure as their residence and gave the actual dancing instructions themselves. The Home Occupation section of the ordinance in question read as follows:

"Uses customarily incident to any of the above uses when situated in the same dwelling, including home occupation, or the office of a physician, surgeon, dentist, musician, or artist, using the dwelling as his place of residence."

The court first decided that the dancing school could not be regarded as a home occupation, then went on to decide that the defendant owner could not be regarded as an artist merely because she was a professional and trained dancer, and would give the dancing instruction. The opinion does have some very enlightening language on the general purpose of home occupation sections in zoning ordinances. The opinion reads in part as follows:

"The important thing is, however, that under both the terms of the ordinance and the common sense of the matter, an occupation which will be permitted in a home in a district set apart for residential purposes must be one 'customarily incident to' the use of the premises as a dwelling place, and not one in which the use of the premises as a dwelling place is largely incidental to the occupation carried on. For example, a woman might do sewing or dressmaking in her home (as it is common knowledge that many women do), and such usage of the premises would be a legitimate home occupation of the character permitted by the ordinance so long as she did not maintain objectionable signs or displays on the exterior of the premises; keep a stock in trade

David D. Rowlands  
Page 4  
April 19, 1948

or sell commodities on the premises; employ persons other than members of the immediate family residing on the premises; or make use of mechanical equipment other than that, such as a sewing machine, which is permissible for purely domestic or household purposes. It is true that her work would be done for remuneration, but it would be none the less a recognized use of a home as such, and not a business or undertaking foreign to any ordinary home purpose and to which her living on the premises would be merely incidental."

All three cases cited above decided against the use sought to be made of the properties in question. It does not follow that the use being made by Mr. Rinaldo is necessarily a violation of the Wichita zoning ordinance. I think it would be well for the Board to read carefully the exact language used in Section 1 of the Wichita ordinance, particularly the words "occupation or profession." Obviously, home food service cannot be a profession. Can it be said to be an occupation? To the writer it would appear to be more in the nature of a commercial enterprise. The definition of home occupation goes further to list a number of so-called home occupations and it is to be noted that they all involve the personal services of the occupant of the dwelling. Home food service involves the processing of the food and is both a sale of food and service. The same, of course, can be said of several of the listed home occupations -- for example, a dentist or a seamstress who sells both their personal services and the merchandise which they process. It would appear, however, that the service is by far the more important item.

Further, it would be well to comment upon the authority of the Board as set out in Section 33 of the ordinance. It is the opinion of the writer that the third paragraph of Section 33 is the paragraph under which this appeal is brought and that it is not necessary for the four conditions appearing in the fourth paragraph to exist; that is, this application is not one for variance, but is merely an appeal from an order of interpretation rendered by the Building Inspector. The Board of Zoning Appeals, therefore, has power, in the writer's opinion, to reverse the decision of the Building Inspector provided, of course, that its ruling is within the reasonable meaning and intent of the zoning ordinance. The Board cannot depart from the ordinary and reasonable meaning of the words used in the ordinance.

It should be borne in mind that the ultimate decision in the subject case rests with the Board of Zoning Appeals, and not only should not, but cannot, be made by the City Attorney. The City Attorney should not usurp the Board's power nor should the Board abdicate in his favor. It is the considered opinion of the

David D. Rowlands  
Page 5  
April 19, 1948

writer that the Board of Zoning Appeals in the subject case can lawfully and properly either sustain or overrule the decision made by the Building Inspector.

S U M M A R Y

It would appear that home food service use is not properly a Home Occupation within the meaning of the Wichita zoning ordinance and as the term "Home Occupation" is customarily employed. It is, however, an open question and the Board of Zoning Appeals has authority and power to find such a use either to be a Home Occupation or not.

Respectfully submitted,

(Signed)  
Lawrence E. Gurfman

LEG:dr

APPROVED:

(Signed)  
Fred W. Aley, City Attorney

BOARD OF ZONING APPEALS  
Room 203, City Hall  
Wichita, Kansas

NOTICE TO PROPERTY OWNERS

May 5, 1948

An appeal has been filed by Mr. Charles Rinaldo  
(Address) 1127 North Spruce on behalf of same  
\_\_\_\_\_  
(Address) \_\_\_\_\_  
as provided by the Zoning Ordinance Section 33  
desires to operate a restaurant  
\_\_\_\_\_ on the premises  
located at 1127 N. Spruce

This appeal has been given Case No. 3-48,  
and a hearing will be held by the Board of Zoning Appeals on Wednesday,  
May 12, 1948 at 1:30 p. m., 201 City Bldg.  
at which time you may appear, if you so desire, either in person or  
by agent or attorney.

By order of the Board of Zoning Appeals.

May-7-48  
We still do not see why, zoning  
should be changed in this block  
--right across from school, then  
too we understand there is commercial  
zoning just a 2 or 3 block, both north and  
south, we own the low feet of vacant ground just south of above  
location, and do protest a change in zoning.

Eugene N. Smith  
Secretary.

Harry R. Horner

Harry R. Horner

C  
O  
P  
Y

THE CITY OF WICHITA

OFFICE OF Ass't. City Attorney      DATE April 19, 1948

TO      David D. Rowlands, Planning & Research Assistant  
FROM    Lawrence S. Curfman

SUBJECT    Board of Zoning Appeals  
            Case No. 3-48  
            Charles Rinaldo, 1127 N. Spruce

FACTS

Mr. Charles Rinaldo, the appellant, operates a home food service at the above property located in an "A" District. The Chief Building Inspector was of the opinion that such a business could be conducted only in an "LC" District.

It is the appellant's contention that under Section 1 of the zoning ordinance, No. 14-432, the definition of "Home Occupation" covers this type of operation and further that under Section 16 of this same ordinance, Home Occupations are permitted.

The facts appear to be that the structure is an ordinary residence property and that Mr. Rinaldo serves spaghetti dinners to small parties and by appointment only. Dinners are served in the front room of his residence. The dinners are apparently cooked in the residence.

QUESTION SUBMITTED

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David D. Rowlands  
Page 2  
April 19, 1948

The file submitted to the Department of Law does not show whether or not Mr. Rinaldo and his family do all of the cooking and serving in connection with their business or whether other persons are employed. If this information has not yet been brought to the attention of the Board, I believe it should be ascertained.

Home Occupations under the various zoning ordinances have been the subject of a great deal of litigation and dispute. Unfortunately, there are enough differences in the language of the various zoning ordinances to make decisions of other courts of doubtful value. However, I have been able to find a few cases involving Home Occupations, one in particular involving a home food service as a home occupation.

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David D. Rowlands  
Page 3  
April 19, 1948

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David B. Howlands  
Page 4  
April 19, 1948

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David D. Rowlands  
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Respectfully submitted,

(Signed)  
Lawrence E. Curfman

LEC:dr

APPROVED:

(Signed)  
Fred W. Aley, City Attorney

THE CITY OF WICHITA

OFFICE OF Ass't. City Attorney      DATE      April 19, 1948

TO      David D. Rowlands, Planning & Research Assistant

FROM      Lawrence E. Curfman

SUBJECT      Board of Zoning Appeals  
Case No. 3-48  
Charles Rinaldo, 1127 N. Spruce

FACTS

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David D. Rowlands  
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April 19, 1948

The file submitted to the Department of Law does not show whether or not Mr. Rinaldo and his family do all of the cooking and serving in connection with their business or whether other persons are employed. If this information has not yet been brought to the attention of the Board, I believe it should be ascertained.

Home Occupations under the various zoning ordinances have been the subject of a great deal of litigation and dispute. Unfortunately, there are enough differences in the language of the various zoning ordinances to make decisions of other courts of doubtful value. However, I have been able to find a few cases involving Home Occupations, one in particular involving a home food service as a home occupation.

In the case of *Devaney v. Board of Zoning Appeals of the City of New Haven*, 1946, 45 Atl. 2d (Conn.) 828, the facts were that one Miglaro, in 1944, purchased a one-family dwelling in New Haven, for the purpose of conducting a restaurant business, such business being forbidden in the zone in which the residence was located. The Building Inspector denied a permit to alter the first floor of the structure; the Board of Zoning Appeals, on appeal, overruled the decision of the Building Inspector and interested property owners, then took the case to the Court of Common Pleas and, finally, to the Supreme Court of Errors of Connecticut. A great deal appears in the opinion by way of general discussion of the subject. The appellant apparently did not rely upon a Home Occupations section in the zoning ordinance, or there was not such a section. Undue hardship was the principal ground of the appeal. The court not only sustained the original decision of the Building Inspector, but held that the action of the Board of Zoning Appeals, in granting permission to proceed with the restaurant, was without authority and unlawful.

The case of *Jones vs. Robertson*, 1947, 180 Pac. 2d (Calif.) 929, involved the question of whether or not a real estate broker's office could properly be regarded as a Home Occupation, under a county zoning ordinance in Placer County, California. The Home Occupation section of this ordinance permitted

"Uses customarily incidental to and subordinate to residential use and not involving the maintenance of store, shop or commercial enterprise, including home occupations and professional offices and studios maintained within dwellings, providing no name plate or sign exceeding three square feet in area shall be displayed in connection therewith."

The real estate broker contended he was engaged in a profession, and

David D. Rowlands  
Page 3  
April 19, 1948

the court somewhat summarily disposed of this contention by holding real estate not to be a profession. The court goes on to hold the business to be a commercial enterprise rather than a Home Occupation. The decision was, however, a three to two decision of the court. It is also fair to say that the court was a District Court of Appeal, a subordinate court; and, while I have attempted to determine whether the case was appealed to the Supreme Court of California, because it is such a recent case, I cannot be certain.

Still a third and somewhat analogous case is that of *State v. Molekamp*, 1941, 151 S.W. 2d, (Mo.) 685, decided by the St. Louis Court of Appeals, involving the zoning ordinance of Webster Groves, Missouri, a suburb of St. Louis. The situation there was that the property owners desired to remodel the first floor of a three-story residence into a dancing academy. The owners occupied the remainder of the structure as their residence and gave the actual dancing instructions themselves. The Home Occupation section of the ordinance in question read as follows:

"Uses customarily incident to any of the above uses when situated in the same dwelling, including home occupation, or the office of a physician, surgeon, dentist, musician, or artist, using the dwelling as his place of residence."

The court first decided that the dancing school could not be regarded as a home occupation, then went on to decide that the defendant owner could not be regarded as an artist merely because she was a professional and trained dancer, and would give the dancing instruction. The opinion does have some very enlightening language on the general purpose of home occupation sections in zoning ordinances. The opinion reads in part as follows:

"The important thing is, however, that under both the terms of the ordinance and the common sense of the matter, an occupation which will be permitted in a home in a district set apart for residential purposes must be one 'customarily incident to' the use of the premises as a dwelling place, and not one in which the use of the premises as a dwelling place is largely incidental to the occupation carried on. For example, a woman might do sewing or dressmaking in her home (as it is common knowledge that many women do), and such usage of the premises would be

David D. Rowlands  
Page 4  
April 19, 1948

"a legitimate home occupation of the character permitted by the ordinance so long as she did not maintain objectionable signs or displays on the exterior of the premises; keep a stock in trade or sell commodities on the premises; employ persons other than members of the immediate family residing on the premises; or make use of mechanical equipment other than that, such as a sewing machine, which is permissible for purely domestic or household purposes. It is true that her work would be done for remuneration, but it would be none the less a recognized use of a home as such, and not a business or undertaking foreign to any ordinary home purpose and to which her living on the premises would be merely incidental."

All three cases cited above decided against the use sought to be made of the properties in question. It does not follow that the use being made by Mr. Rinaldo is necessarily a violation of the Wichita zoning ordinance. I think it would be well for the Board to read carefully the exact language used in Section 1 of the Wichita ordinance, particularly the words "occupation or profession." Obviously, home food service cannot be a profession. Can it be said to be an occupation? To the writer it would appear to be more in the nature of a commercial enterprise. The definition of home occupation goes further to list a number of so-called home occupations and it is to be noted that they all involve the personal services of the occupant of the dwelling. Home food service involves the processing of the food and is both a sale of food and service. The same, of course, can be said of several of the listed home occupations -- for example, a dentist or a seamstress who sells both their personal services and the merchandise which they process. It would appear, however, that the service is by far the more important item.

Further, it would be well to comment upon the authority of the Board as set out in Section 33 of the ordinance. It is the opinion of the writer that the third paragraph of Section 33 is the paragraph under which this appeal is brought and that it is not necessary for the four conditions appearing in the fourth paragraph to exist; that is, this application is not one for variance, but is merely an appeal from an order of interpretation rendered by the

David D. Rowlands  
Page 5  
April 19, 1948

Building Inspector. The Board of Zoning Appeals, therefore, has power, in the writer's opinion, to reverse the decision of the Building Inspector provided, of course, that its ruling is within the reasonable meaning and intent of the zoning ordinance. The Board cannot depart from the ordinary and reasonable meaning of the words used in the ordinance.

It should be borne in mind that the ultimate decision in the subject case rests with the Board of Zoning Appeals, and not only should not, but cannot, be made by the City Attorney. The City Attorney should not usurp the Board's power nor should the Board abdicate in his favor. It is the considered opinion of the writer that the Board of Zoning Appeals in the subject case can lawfully and properly either sustain or overrule the decision made by the Building Inspector.

S U M M A R Y

It would appear that home food service use is not properly a Home Occupation within the meaning of the Wichita zoning ordinance and as the term "Home Occupation" is customarily employed. It is, however, an open question and the Board of Zoning Appeals has authority and power to find such a use either to be a Home Occupation or not.

Respectfully submitted,

LBC:dr

Lawrence E. Curfman

APPROVED:

Fred W. Aley, City Attorney

**Horner Company** MANUFACTURERS'  
REPRESENTATIVES

MERCHANT AND INDUSTRY SUPPLIES

110 N. EMPORIA

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DIAL 2-3331

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WICHITA 2, KANSAS

March 25, 1948

Board of Zoning Appeals  
Room 304 City Hall  
Wichita, Kansas

Good Morning:--

Att: Eugene Smith

Replying to your notice of 22nd.

Re.:--Rinaldo request to operate restaurant at  
1127 North Spruce--surely there is NO need for  
restaurant in the middle of this resident block  
and request should not be granted.

As I understand this block is zoned for residence, only  
and should not be changed at this time.

Sincerely

Harry R. Horner

*June 2nd 1947*

## BUILDERS REALTY

PHONE 4-2315 - DERBY BUILDING  
WICHITA 2, KANSAS

March 23, 1948

Mr. Eugene N. Smith, Secretary  
Board of Zoning Appeals  
Room 304 City Hall  
Wichita, Kansas

Dear Sir:

In reply to your notice of March 22 relative to the appeal of Mr. Chas. Rinaldo who desires to operate a restaurant at 1127 N. Spruce. Builders, Inc. manages a number of houses and apartments in the tenth and eleventh block on Spruce and Madison and, while none of us would care to discourage a man entering a business, we hardly think it would be advisable to make this section a business section. Perhaps Grove or 9th or 13th Street would serve the purpose better.

With best wishes.

Very truly yours,

BUILDERS, INC.



RHCarvey/ic

RECEIPT FOR REGISTERED ARTICLE No. 3977

Fee paid, 1c class postage paid, 3 2 2 1948

Declared value, \$ \_\_\_\_\_ Surecharge paid, \$ \_\_\_\_\_

From County of ...

Addressed to ...

Accepting employee will place initials in space below, indicating restricted delivery

Return receipt fee \_\_\_\_\_ Special delivery fee \_\_\_\_\_  
Delivery restricted to addressee \_\_\_\_\_ Postmaster, per \_\_\_\_\_



\*\*\* 16-12206