

IN THE MATTER OF : BEFORE THE  
  
SHARON BENKO & MICHAEL : HOWARD COUNTY  
BENKO, T/A AMERICA STOREFRONT :  
GLASS & DOOR PRODUCTS : BOARD OF APPEALS  
  
Petitioners : HEARING EXAMINER  
  
: BA Case No. 12-011C

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**DECISION AND ORDER**

On September 10, 2012, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Sharon Benko & Michael Benko, t/a American Storefront Glass & Door Products, Inc., for a retroactive Home-Based Contractor conditional use in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District, filed pursuant to Section 131.N.27 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioners certified to compliance with the notice and advertisement requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Thomas Meachum, Esquire, represented the Petitioners. Sharon Benko, Patrick Richardson, Ralph Stroud and Brian Boats testified in support of the petition. Thomas Bauer, Margaret Bauer, Claude Flagg, Karen Swajian, Ernest Wright, Bud Bittel, Bill King, Sandie Flagg, Paulette Lutz, George Tye and Joe Stanley testified in opposition to the petition.

Petitioners introduced into evidence the exhibits as follows.

1. Amended Conditional Use Plan, September 5, 2012
- 2A. Freight tracing details, American Storefront, various dates
3. Coral Architectural Products shipment acknowledgement, August 23, 2012
- 4-20. Photographs of property

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Opponents introduced into evidence the exhibits as follows.

- 1-2A. Photographs of parked vehicles on Property
- 3-5. Aerial images of Property and Conditional Use Area

A Preliminary Matter

Petitioner's counsel delivered a copy of an amendment to the Conditional Use Plan and cover letter (the Amended Plan letter) to the Hearing Examiner on September 6, 2012. At the outset of the hearing, Petitioner introduced into evidence this amended Conditional Use Plan (dated September 5, 2012) (the Amended Plan) as Petitioner's Exhibit 1.<sup>1</sup>

The Amended Plan addresses Technical Staff Report (TSR) issues by adding a nine-foot high temporary fence and plant screening on the south side of the Conditional Use parking area. The Amended Plan letter also requests the Hearing Examiner to consider a reduction in the parking area setback from 100 to 80 feet, if this was not apparent in the petition. The overall area for indoor and outdoor storage and parking is decreased from the 4,500-square feet initially proposed to 2,850-square feet. Patrick Richardson, the conditional use civil engineer, explained that this reduction in use area is the result of the elimination of outdoor storage on the side of the garage that faces Wellworth Way. A storage area is now depicted on the west side of the Storage Garage.<sup>2</sup>

Because the Amended Plan is not substantive, the Hearing Examiner determined it could be introduced into evidence in accordance with Hearing Examiner Rule 9.5.<sup>3</sup> Accordingly, the

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<sup>1</sup> Pursuant to Hearing Examiner Rule 9.4, when a petitioner proposes to amend a petition during the course of the proceedings, the petitioner must submit the amendment as an exhibit.

<sup>2</sup> The letter supplements the petition.

<sup>3</sup> Rule 9.5 requires the hearing examiner to suspend the hearing for at least three weeks if the amendment is substantive, i.e., the amendment proposes a use that is likely to impact vicinal properties adversely.

term "Amended Plan" referenced in this decision and order refers to the September 5, 2012 plan.

#### **FINDINGS OF FACT**

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. Property Identification. The subject property is located in the 3<sup>rd</sup> Election District on the west side of Wellworth Way about 1,950 feet southwest of MD 144. It is referenced as Tax Map 15, Grid 17, Lot 20 and is also known as 2622 Wellworth Way (the Property).

2. Property Description. The Property is Lot 20 of the Friendship Manor Section 2 subdivision. It is an irregularly shaped pipestem lot. The pipestem itself more than 400 feet long and about 25 feet wide. The improved area is therefore set back a significant distance from Wellworth Way. The Property rises in elevation from Wellworth Way to about the area where the pipestem driveway turns in a northerly direction toward the bulk of the lot.

The principal building on the Property is a one-story, brick, single-family detached dwelling with a side-loading garage located more than 100 feet from all lot lines. The driveway ends at a large parking and circulation area next to the side-loading garage on the dwelling's northeast side. This parking/circulation area also extends beyond the side-loading garage to provide an additional parking/circulation area in front of what the TSR identifies as a Storage Garage.

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North of the Storage Garage are four sheds partially located within the thirty-foot side setback.<sup>4</sup> The front, eastern portion of the Property is generally open lawn with a few scattered trees. Evergreen trees run along the northwest, north and south lot lines.<sup>5</sup> Behind the dwelling, where the Property drops in elevation are a lawn area and beyond this, woods.

3. Vicinal Properties. All adjacent properties are also zoned RR-DEO and part of the same Friendship Manor Section 2 subdivision. To the north, Lot 26 is improved with a two-story frame, single-family detached dwelling and a large detached garage. A 7-foot high stockade fence runs along a portion of the common lot line with Lot 26. To the northeast, Lot 22 is improved with a two-story, frame, single-family detached dwelling fronting on Wellworth Way. This house sits about 270 feet from the Property, with much landscaping in between. To the east of Lot 22, Lot 21 in front of the main portion of the Property is improved with a two-story, frame, single-family detached dwelling fronting on Wellworth Way. On the Property's south side, the pipestem Lot 19 is improved with a two-story, frame, single-family detached dwelling fronting on Wellworth Way and located about 70 feet from the Property.

4. Roads. Wellworth Way has one marked travel lane and about 21 feet of paving within an existing 50-foot right-of-way. The TSR reasons sight distance is not an issue along this local road.

5. Water and Sewer Service. The Property is served by private well and septic facilities.

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<sup>4</sup>The TSR notes the Conditional Use Plan incorrectly applies a 20-foot setback. It further comments that the three of the four sheds do not comply with Zoning Regulations Section 128.1.e, which excepts sheds from side and rear setback requirements in the RR district if a shed's lot coverage encroaching into the setback does not exceed a cumulative total of 100 square feet per lot and no animals are sheltered.

<sup>5</sup> The TSR is uncertain as to whether these trees are principally on the Property or principally on the adjoining lots.

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6. General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as "Rural Residential." The General Plan Transportation Map depicts Wellworth Way as a Local Road.

7. The Proposed Conditional Use. Petitioners are seeking retroactive conditional use approval for a home-based contracting operation. According to the petition narrative, Ms. Benko and Mr. Richardson's testimony, and the Amended Plan and letter, the home based contracting operation involves an office in the residence and a Storage Garage with employee parking and outdoor storage.

a) Residence office. The home-based contractor office is located in the residential sunroom.<sup>6</sup>

b) Storage Garage, outdoor storage and employee parking. Per the Amended Plan and Amended Plan letter, this proposed conditional use area is given as 2,850 square feet, including the 30'x22' Storage Garage. This square footage does not include the office area. Parking for the home-based contractor use would be located on the southwesterly side of the Storage Garage. This area would accommodate three commercial vans, two of which are used by four subcontractors. Per Ms. Benko's testimony, the office assistants would park on the side of the dwelling. This parking area is not included in any square footage calculation of the proposed conditional use area.

c) Other uses. The Amended Plan letter states that Petitioners occasionally assemble glass doors (putting railing on a glass door to create a finished product) and an aluminum

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<sup>6</sup> Exclusive of bathrooms, which are in the main residence.

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storefront door may be laid on a table to be joined with a piece of tempered glass. A stock mirror sheet may be cut down to a customer's custom size with a diamond wheel hand-held glasscutter, which makes no noise. Petitioners also assemble doorframes.

d) Employees. According to the petition, one full-time and one-part time employee work in the office. The evidence indicates that Ms. Benko manages the office and that Mr. Benko works for American Storefront (the Business), although it is unclear in what capacity. The Business also employs four subcontractors, one of whom resides with the Benkos. Mr. Benko's father comes over every day, according to the petition narrative.

e) Screening. Recently erected board-on-board fencing runs along the southeasterly side of the parking area and outdoor storage area behind the garage. The board on board fence along the parking area is temporary and will be removed when the six recently planted arborvitae trees provide sufficient screening.

f) Hours of operation. The two non-resident office employees arrive in separate vehicles at 6:30 a.m., and leave at different times in the afternoon. The petition states four subcontractors leave the site in two of the vans between 6:00 a.m. and 7:00 a.m. and return between 2:00 p.m. and 4:00 p.m. During the proceeding, Ms. Benko agreed to instruct all employees not to arrive before 6:30 a.m. The Business normally operates Monday-Friday. On occasion, there is a Saturday job.

g) Requested Reduction in Setbacks. Petitioners are seeking two reductions in the 100-foot outdoor parking or storage area setback, to 80 feet for parking and 40 feet for outdoor storage behind the Storage Garage.

8. TSR Comments and Recommendation. The TSR recommends the petition be denied.

The TSR first notes the 7-foot high stockade fence along a portion of the common lot line is noncompliant to setback requirements. In its evaluation of the petition, the TSR acknowledges the need to evaluate the proposal based on Petitioner-submitted information. The TSR nonetheless expresses an "element of concern that the petition may not adequately describe all the activities of the Business on the property," including large trucks making deliveries and possible outdoor fabrication not mentioned in the petition. The TSR therefore suggests the contractor use has reached an operational level that may be more appropriate for a commercial property. The TSR also concludes the requested reduction in setbacks is inappropriate, given the nature of the Business.

9. Mr. Richardson testified to the screening of the use from adjoining properties by a large shed and seven-foot fence between Lot 26 and the conditional use area. A row of tree running along the common property line adds additional screening. Vegetation and several trees run along the south side to screen the use from Lot 19. The total use area is 2,850-square feet. The acreage allows 10,000 square feet.

10. On cross-examination by Mr. Bud Bittel, Mr. Richardson testified to not knowing whether a permit was required for the seven-foot fence along Lot 26 (the Stroud property). Mr. Bittel noted the TSR comment that this fence does not comply with setback requirements. Mr. Bittel also questioned Mr. Richardson about the location of assistant parking, which the Amended Plan does not address.

11. On cross-examination by Ernest Wright about the visibility of the Business from his

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property, Mr. Richardson explained no screening is necessary because the Business is not visible, as the Property's high point runs along the Wright's rear property line,

12. Sharon Benko testified to purchasing the property in 2007. When the Business first started, she and her husband took every job they could. Over the last five years, the Business has changed and she is more selective in bidding on jobs. She described an older big job at the Cheesecake Factory and the need to store materials outside. In the past, tractor-trailers made on-site deliveries, as did box trailers delivering framing materials. Currently, however, the Business has deliveries made to a freight company on Washington Blvd. Petitioners Exhibit 2 references four deliveries in October/November 2011. Petitioners Exhibit 2 is an acknowledgement of a Business delivery to the same freight company in September 2012.

13. Ms. Benko also explained a past visit by a county zoning inspector who instructed the Benkos to apply for a home-based contractor accessory use permit. The county later discovered it had mistakenly issued the permit and informed the Benkos they actually needed conditional use approval for the home-based contractor operation.

14. Ms. Benko further testified that the subcontractors depart in two vans soon afterward arriving and return home in mid- or later afternoon. On occasion, they may not return until 7:00 p.m. Every few days, the subcontractors may go out again to fuel the vans.

15. Referring to Petitioners Exhibits 4-20, Ms. Benko explained they depict the parking spaces and screening, the Storage Garage, the seven-foot fence along the common lot line with the Stroud property, the outdoor storage area and the driveway.

16. The four sheds on the Property are used to house two 4-wheeler ATVs, and the



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large shed is her father's workshop, where he tinkers, explained Ms. Benko, emphasizing the workshop's independence from the Business. On further questioning by the Hearing Examiner, Ms Benko stated that her father-in-law comes over every day to use the workshop. During cross-examination by Mr. Bauer, she acknowledged that her father-in-law picks up trash, moves and disassembles materials, but not every day.

17. Ralph Stroud testified to being the adjoining property owner on Lot 26. The Benkos allowed several large well-drilling vehicles to drive through their property to access his well site, which may explain the noise and traffic heard by some neighbors. He has no objections to the use, never hears noises from the shop and does not find the use to be a nuisance.

18. Brian Boats testified to residing next to Mr. Stroud. The Benkos' use of their property poses no imposition on his use of the property.

19. Thomas Bauer challenged the Petitioners' statements that the Storage Garage is not used for any fabrication, reading into the record a Webster dictionary definition of "fabrication": construction, manufacture, or building by assembly. Based on this definition, the home-based contractor operation is in the fabrication business, which he opined is not permitted. He also believes that Ms. Benko's father-in-law is an employee, even if he is not paid, owing to the nature of the work he performs when on-site.

20. Mr. Bauer introduced into evidence Opponents Exhibits 1-2A, his personal photographs of several vehicles parked in front of the residence, the Storage Garage, and on grassed areas. Opponents Exhibits 1-5 are "Bing" aerial images of similar parking arrangements at three different times. Some vans are not in the parking area, and materials can be seen on

the southwesterly side of the Storage Garage.<sup>7</sup> Mr. Bauer also testified to excessive noise, a high volume of traffic in and out of the Property, and early morning employee arrivals. In his view, these observations support the TSR's concerns. He recognizes that the noise has lessened somewhat, but believes the Business should move to an appropriate commercial zone.

21. Margaret Bauer believes the Business has grown too large for the neighborhood. She does not object to the office use. She is concerned about the loss of property values owing to the Business. During Ms. Bauer's cross-examination of Ms. Benko, Ms. Benko said the Business would find another location if it had to hire two more people. Some of the weekend noise Ms. Bauer referenced might have been her husband building a bed.

22. Bill King testified that an SUV with an American Storefront sign drives up and down the driveway making noise. During the day, about 25 cars, vans, FedEx, UPS and other trucks visit the site. The three company vans come and go during the day. There is also fabrication on the Property because he hears a motor running several hours a day. He has also seen a tractor-trailer drive up backwards on the driveway, as well as a very large truck carrying glass, a tractor-trailer truck parked on Wellworth Way and persons picking up materials.

23. Karen Swajian testified has to leave between 5:30-6:00 a.m. to avoid driving behind the vans because the subcontractors arrive very early in the morning. Employees sometimes park on the street.

24. Sandy Flagg testified to seeing heavy traffic related to the use on the street.

25. Ernest Wright, whose property lies between the Benko property and Wellworth

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<sup>7</sup> Bing map imagery permits multiple views of a site over time, not just the current map.

Way, testified in opposition to the proposed use. He observes a high level of traffic entering and leaving the Property.

26. Paulette Lutz testified to observing a large sheet of broken glass near the elementary school on Frederick Road. It stayed there a long time.

27. George Tye cross-examined Ms. Benko about her testimony concerning 24-hour service and Ms. Benko stated this service stopped when an employee quit about a year ago. He observed trucks stopping on the street since he moved to the neighborhood about ten months ago. He has observed all three vans entering and leaving the site several times a day.

28. Bud Bittel testified to seeing several trucks visiting the Property every day. He can see them from his bay window. He observed the broken glass that Ms. Lutz referenced fall from one of the Business vans.

29. Joe Stanley testified to being concerned about the volume of vehicles associated with the home-based contractor use affecting the safety of neighborhood children. In his opinion, a contractor is a plumber, carpenter or drywall person, not a commercial establishment that advertises visits by customers.

30. On rebuttal, Ms. Benko testified to one job involved outside drilling, but this practice does not normally occur. Company vehicles do not come in and out several times a day because the subcontractors normally go from job to job. She also agreed that no vehicle would be parked beyond the front of the house. The magnetic Business signs observed by some neighbors are no longer used because a county inspector told them to remove them. The Business no longer offers 24-hour service.

**CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, the Hearing Examiner concludes as follows.

**I. Background Issue – Is the Benko Business a permissible Home-Based Contractor Use?**

The Zoning Regulations define a "home-based contractor" as follows.

The accessory use of a residential property for a contracting Business which is operated by a person residing on the same lot and which includes at least one of the following activities: storage of equipment, visits to the lot by non-resident employees, or parking of more commercial vehicles than allowed under the provisions of the applicable zoning district for parking of commercial or unregistered motor vehicles. Home-based contractors may include building maintenance, construction, electrical, excavation, heating/air conditioning, home improvement, landscaping, painting, paving, plumbing, septic system, snow removal, well drilling, or similar Businesses. (Zoning Regulations Section 103. A.102).

Though the first sentence defines a home-based contractor as an "accessory" use meeting the requirements of Section 128.C.2 (which provides for home-based contractor accessory uses by permit, subject to certain criteria<sup>8</sup>), the activities permitted as part of the use are repeated in

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<sup>8</sup> Section 128.C.2 provides for a home-based contractor as a permitted accessory use in the RC and RR Districts, and on lots larger than two acres in the R-ED, R-20, AND R-12 Districts, provided that:

- a. The site shall have at least 60 feet of frontage on a public road.
- b. In addition to the commercial or unregistered vehicles which may be parked on the lot according to the accessory use requirements of the applicable zoning district, the following is allowed:
  - (1) In the RC and RR Districts, one additional commercial vehicle may be parked on lots larger than two acres.
  - (2) In the R-ED, R-20, and R-12 Districts, one additional commercial vehicle may be parked on lots larger than three acres.
- c. Employees who do not live on the lot may visit the lot for the sole purpose of picking up or returning vehicles or equipment. Such trips shall be limited to:
  - (1) In the RC and RR Districts, no more than four trips per day for lots two acres or less, eight trips for lots larger than two and less than three acres, and twelve trips for lots of three or more acres.
  - (2) In the R-ED, R-20, and R-12 Districts, no more than eight trips per day for lots larger than one acre.
- d. In addition to the employee visits allowed by Paragraph 2.c, one non-resident, full-time equivalent office employee, not to exceed two individuals, may work on site. Nonresident employees are not permitted to perform non-office functions (e.g. equipment repair, loading, etc.).

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the Home-Based Contractor conditional use criteria set forth in Section 131.N.27, (which references the home-based contractor accessory use). Read together, the definition of home-based contractor and the home-based contractor conditional use criteria tightly restrict the activities in which home-based contractors may engage on their residential property. These activities include: 1) maintaining a home office in the residence, 2) parking and storing

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e. No nonresident employees shall be on the lot and no commercial vehicles or equipment shall be taken from or returned to the lot between 7:00 p.m. and 6:30 a.m.

f. The total area used for parking and storage of commercial vehicles, equipment and supplies, whether outdoors or indoors, shall be limited to the following:

(1) In the RC and RR Districts, no more than two percent of the gross lot area or 5,000 square feet, whichever is less.

(2) In the R-ED, R-20, R-12 and R-SC Districts, no more than two percent of the gross lot area or 1,000 square feet, whichever is less.

g. Parking and storage areas shall be restricted as follows:

(1) In the RC and RR Districts, supplies shall be stored within a building, except that mulch, compost, soil, sand, stone and other natural materials may be stored outdoors. Supplies stored outdoors must be screened from surrounding properties and roads by vegetation, fencing or other appropriate means. Equipment shall be either stored within a building or screened from surrounding properties and roads by vegetation, fencing or other appropriate means.

(2) In the R-ED, R-20, AND R-12 Districts, vehicles, supplies and equipment shall be parked or stored within a building, except that one commercial vehicle may be parked outdoors on lots of less than three acres, and two commercial vehicles may be parked outdoors on lots of three or more acres. Equipment and supplies may be stored on the commercial vehicles.

h. All storage areas shall meet the accessory structure setback requirements, except that structures used for parking, storage or loading of commercial vehicles larger than 5.0 tons gross vehicle weight, or excavating, paving or similar construction equipment shall be at least 50 feet from all property lines and outdoor parking or storage areas for these items shall be at least 100 feet from property lines.

i. No major repairs of vehicles or equipment shall be permitted on the lot. Major repairs include body work, engine rebuilding, painting, and similar activities.

j. Where two or more adjacent lots are under common ownership and used as a single homesite, home-based contracting uses may be located on a different lot than the principal dwelling, if the Director of Planning and Zoning determines that this will allow more effective screening to be provided by using existing features of the site, or will result in decreased impacts on neighboring lots due to noise, dust or fumes. Parking surfaces, fencing and landscaping may be installed; however, no new accessory building shall be constructed and no existing accessory building shall be enlarged unless located on the same lot as the principal dwelling.

k. A home-based contractor shall operate only upon approval of a permit by the Department of Planning and Zoning, based upon compliance with the requirements listed above. The permit application shall include a plot plan showing the location and dimensions of structures, parking and storage areas, screening, and driveways, and a description of the proposed use.

l. Certain home-based contractors which do not comply with the requirements of this section may be permitted as conditional uses, subject to the provisions of Section 131.N.27 and other applicable regulations.

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commercial vehicles on the conditional use site, (2) storing commercial equipment and supplies in a combined interior and exterior area on no more than 5 percent of the lot area, or 10,000 square feet, whichever is less, and (3) making minor repairs to vehicles or equipment inside a building.

The Hearing Examiner does not find convincing Petitioners' claims that the Business is limited to this narrow range of activities where the record evinces a commercial operation exceeding what is contemplated and permissible.<sup>9</sup> The Business operates with eight employees and one unpaid assistant. Six employees arrive early in the morning, four return in the afternoon and leave in their own vehicles. Two office assistants leave at various times. (It is unclear whether Ms. Benko uses a vehicle as part of the Business use.)

Importantly, Petitioners use the Property and Storage Garage, apparently, to assemble doorframes, glass doors, join aluminum storefront doors, and cut mirror sheets with a diamond wheel hand-held glasscutter. Additionally, Mr. Benko's father, although allegedly not a Business employee, assists several days a week with trash and moving or disassembling product.

The Hearing Examiner's conclusions about the Business are supported by the legislative history of the home-based contractor use. ZB928R&M, the 1992 Comprehensive Zoning Plan (CZP), created new rural residential zoning districts outside the planned service area for public

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<sup>9</sup> The Hearing Examiner's first considered the scope of activities permitted in association with a retroactive home-based contractor use in Board of Appeals Case No. 08-039 (decided March 2009) and denied the petition in part because the existing operation involved manufacturing and fabricating.

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water and sewer.<sup>10</sup> Importantly for this case, the CZP created the home-based contractor accessory use and what was then the home-based contractor "special exception" use classification. The ZB928R&M Technical Staff Report explained the purpose of these new uses.

. . . . [a] proposal to allow small contracting Businesses to operate as accessory uses on residential lots in the RC and RR District. This proposal would accommodate very small Businesses which are currently permitted only in the M-1 or M-2 Districts, or in some cases, in the B-2 Districts. With the restriction on the number of vehicles, storage area, hours of operation and employees, and the other requirements included in the proposed regulations, a small Business would be able to operate out of a home without noticeably impacting the residential neighborhood. *A special exception category is also proposed to allow slightly larger home-based contractors in the RC and RR District subject to Board of Appeals approval.*

The proposals for home-based contractors are part of the broader effort to accommodate in Western Howard County the types of Business traditionally located in rural areas. *Larger contracting Businesses which are not operated out of a home* would be permitted as a matter of right in the proposed BR District. ZB928R&M Report, Page 9 (emphasis added.)

The Zoning Board clearly intended the home-based contractor special exception (now conditional use) use category to be a relatively modest business operated out of a home with a dedicated area for parking and storage, and possibly a home office. The intended limited nature of the use is reflected in a later amendment to the home-based contractor conditional use classification, which reduced the five percent maximum area for parking and storage of commercial vehicles, equipment and supplies, whether exterior or interior, to 10,000 square feet or five percent, whichever is less. Accommodation for larger contracting Businesses, such

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<sup>10</sup> Because the amendments predate the Zoning Regulations Amendment process, there was no "Council Bill." Instead, the Zoning Board adopted the regulations by Decision and Order dated September 18, 1992.

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as the Benko Business, was authorized through the new BR District, where these uses could locate as a matter of right.<sup>11</sup>

To paraphrase the Technical Staff Report, a home-based contractor conditional use is intended to have a lesser impact on a residential neighborhood than a larger contractor business, such as the Benko Business.

## **II. General Criteria for Conditional Uses (Section 131.B)**

1. **Harmony with the General Plan.** Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

**General Plan Policies.** The now superseded Howard County General Plan 2020 designates the area in which the Property is located as a "Rural Residential" land use area.<sup>12</sup> A home-based contractor is presumptively compatible and appropriate in a Rural Residential area if the Petitioner adduces evidence that the proposed use is contemplated or addressed in the

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<sup>11</sup> According to the January 7, 1992 ZB928R&M Technical Staff Report (the "ZB928R&M Report"), the home-based contractor use proposed in the RR and RC zones was "oriented toward Businesses which serve and are typically found in rural and agricultural communities." The BR (Business: Rural) commercial zoned would permit contractor storage facilities and welding shops.

<sup>12</sup> Policy 4.5 of PlanHOWARD 2030 (Pgs. 34-35), which became effective subsequent to the hearing on the petition, acknowledges the need to review the list of accessory and conditional uses in the RC and RR districts, and to refine uses and standards for approval.



General Plan through its land use policies, furthers its recommendations or if the use is positively evaluated under Sections 131.B.1.a and b. In this case, the General Plan's Rural West Policies resulted in the enactment of the home-based contractor conditional use in the RR and RC (Rural Conservation) zoning district, as discussed below.

a. The Nature and Intensity of the Use.

Having determined that the Benko Business, which has operated at the Property since 2007, does not comport with Zoning Regulations restrictions on home-based contractor conditional uses, it follows that the proposed use will result in a more intense land use. Nine persons are actively involved in daily Business operations, which the Hearing Examiner finds to be an excessive number because it involves a high level of traffic to the site, with a noticeable impact on the residential neighborhood. Moreover, the nature of the Business—door and window construction—entails what in the Hearing Examiner's opinion is a level of delivery activity not associated with the type of home-based contractor operation contemplated by the Zoning Board, despite Petitioners' efforts to redirect very large deliveries to off-site locations. All this evinces a nature and intensity of use resulting in an absence of harmony with the General Plan.

The size of the site in relation to the use. The Property is 5.02 acres in size. Even with the additional square-footage for employee parking, the existing Business is less than the 10,000-square foot maximum home-based contractor conditional use area. Nonetheless, the TSR concludes (based on lesser square-footage), as does the Hearing Examiner, that the need for significant reductions in structure and use setbacks to accommodate the type of Business

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now operating at the Property is further evidence of a level of operation that is disharmonious with the General Plan.

Consequently, the Hearing Examiner concludes the size of the site in relation to the use is inharmonious with the General Plan, it being contrary to what is permissible under the home-based contractor conditional use classification.

The location of the site with respect to streets giving access to the site. Because the Business is a more intense use than contemplated by the General Plan, the location of the site with respect to streets giving access to the site is disharmonious with the General Plan. This disharmony was echoed in the testimony of area residents, who consistently spoke to the impact of Business traffic on a local street.

The appropriateness of the conditional use in combination with a permitted use on the site. The proposed conditional use would be combined with a permitted use, a residential dwelling. Because the Business operation is more intense use than contemplated by the General Plan, the combination of uses is inappropriate.

2. **Adverse Effect.** Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

The assessment of a proposed conditional use under these criteria recognizes the potential for adverse impact from virtually every human activity. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the

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beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an RR district. The proper question is whether those inherent adverse effects are greater at the proposed site than they would be generally elsewhere within the RR district. *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, the Hearing Examiner concludes the Petitioners have not met their burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a home-based contractor in an RR district.

**a. Physical Conditions.** The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

Because the Petitioners propose to use the Site for a Business that does not comport with the limited nature of a home-based contractor conditional use, the Hearing Examiner concludes these adverse effects will be greater at the subject site than elsewhere in the zone or applicable other zones.

**b. Structures and Landscaping.** The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

Because the Petitioners propose to use the site for a commercial operation that does not comport with the limited nature of a home-based contractor conditional use, the Hearing

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Examiner necessarily concludes the adverse effects of the Storage Garage, regardless of any landscaping on the site will hinder the use of adjacent land and structures more at the subject site than elsewhere in the zone or applicable other zones.

Assuming arguendo the Business was a permissible home-based contractor operation, this standard requires the landscaping intended to mitigate the impact of the use to be located on the Property itself. It is unclear whether the trees along the common lots lines with Lot 26 and the Boats property are located wholly on the Property. Additionally, the seven-foot tall fence on which Petitioners rely to mitigate adverse impacts may be located on a neighboring property.

**c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.**

Because the Petitioner's testimony includes parking areas which the Amended Plan does not depict, the Hearing Examiner is unable to evaluate whether these areas are properly located and screened. No refuse area is proposed, even though Mr. Benko's father picks up Business refuse.

**d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.**

The ingress and egress drives appear to provide safe access, with adequate sight distance.

### **III. Specific Criteria for Home-Based Contractors (Section 131.N.27)**

The Hearing Authority may grant a Home-Based Contractor conditional use in the RC District if it meets the following criteria.

**a. The number of commercial vehicles parked on the site shall be limited to one commercial vehicle for lots one acre or smaller, two commercial vehicles for lots between one and three acres, three commercial vehicles for lots at least three and not more than 20 acres, and five commercial vehicles for lots larger than 20 acres.**

The site is 5.02 acres in size. The Business uses three commercial vans. The petition accords with Section 131.N.27.a.

**b. The area used for parking and storage of commercial vehicles, equipment and supplies, whether exterior or interior, shall be limited to no more than five percent of the area of the lot or 10,000 square feet, whichever is less.**

Although the area of the two office employee parking spaces is not depicted on the Amended Plan, this additional space would still result in a complying use area. The Amended Plan indicates the use area, excluding office parking, is 2,850-square feet. Concerning the workshop on the property, the Hearing Examiner does not find credible Ms. Benko's testimony that her father only "tinkers" in the workshop located within the side setback, when her testimony during cross-examination revealed his involvement with the Business. However, absent sufficient evidence in the record to link his use of the workshop to the Business, the Hearing Examiner may not factor in the workshop area in her evaluation of the use under this standard. The use area itself—but not all activities carried on therein--complies with Section 131.N.27.b.

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**c. Structures used for the conditional use shall be at least 50 feet from lot lines and all outdoor parking or storage areas shall be at least 100 feet from lot lines, unless the Hearing Authority finds that a lesser setback is more appropriate and will not adversely affect neighboring properties due to visual impact, activity, noise, dust, fumes, or other cause.**

The petition requests the Hearing Authority to reduce the 100-foot parking and storage area setback to 80 feet for parking and 40 feet for outdoor storage behind the Storage Garage. Because the activities associated with the current Business operation on the Property do not fall within the activities permitted by the home-based contractor use classification, the Hearing Examiner concludes a lesser setback is inappropriate.

**d. The location and design of the operation shall be such that the use will not be a nuisance to residents of neighboring properties due to noise, dust or fumes. Particular consideration shall be given to the location of loading areas, parking and circulation areas, and driveways in relation to neighboring properties.**

Because the activities associated with the Business operation on the Property do not fall within the activities permitted by the home-based contractor conditional use the Hearing Examiner is unable to evaluate the proposed use under this criterion.

**e. If the driveway providing access to the proposed site is shared with other properties, the petitioner shall demonstrate that the use will not result in damage to or deterioration of the shared driveway or in increased hazards to other users of the driveway.**

This section does not apply, as no shared driveway is proposed.

**f. Parking and other outdoor uses shall be screened from adjoining properties and public roads by landscaping or other appropriate means.**

The evidence demonstrates the existing Business operation encompasses three parking spaces for commercial vans and two office assistant parking spaces not depicted on in the

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Amended Plan. Hence, the Hearing Examiner is unable to assess whether these uses are appropriately screened from all adjoining properties. It appears that all parking spaces or outdoor uses would not be visible be screened from Wellworth Way, based on area topography.

**g. New structures or additions to existing structures shall be designed to be compatible in appearance with other residential or agricultural structures in the vicinity, as demonstrated by architectural elevations or renderings submitted with the petition.**

No new addition is proposed. The six-foot fence structure is compatible with typical residential fences. If the seven-foot fence along Lot 26 is located on Petitioner's Property, it is incompatible, being noncomplying to county regulations.

**h. Minor repairs to vehicles or equipment shall be permitted, provided such activities take place inside a building. Bodywork, engine rebuilding, engine reconditioning, painting and similar activities shall not be permitted.**

The petitions states Petitioners will make only minor repairs to vehicles or equipment inside the building, in accordance with Section 131.N.27.h.

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**ORDER**

Based upon the foregoing, it is this 4<sup>th</sup> day of **October 2012**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petition of Sharon Benko & Michael Benko, t/a American Storefront Glass & Door Products, Inc., for a retroactive Home-Based Contractor conditional use in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District, is **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**



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Michele L. LeFaivre

**Date Mailed:** \_\_\_\_\_

**Notice:** A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.