

**BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON**

Regarding an Appeal of a Planning Director)	Case File No.
Decision Denying an Application for a Home)	Z0256-18-HO Appeal
Occupation Permit for a Vehicle Repair Business.)	(Fritzler Appeal)

A. SUMMARY

1. The owners are Edwin and Nancy Fritzler. The applicant is Edwin Fritzler.
2. The appellant is Edwin Fritzler.
3. The subject property is located at 26355 Southwest 45th Drive, Wilsonville, Oregon 97070. The legal description is T3S, R1E, Section 07A, Tax Lot 104 W.M. The subject property is approximately 4.94 acres and is zoned RRF5-5 – Rural Residential Farm Forest 5-Acre District.
4. On September 20, 2018, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. At the conclusion of the public hearing, the record was closed.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing on this application on September 20, 2018. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearings, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the Planning Director’s decision, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.
2. At the hearing, county planner Lorraine Gonzales discussed the Planning Director’s decision.
3. The owners (Fritzlers), as well as a number of neighbors testified in favor of the application.

4. No one testified against the application.
5. At the conclusion of the public hearing, the Hearings Officer closed the record.

C. FACTS

This case involves the appeal of a Planning Director decision denying an application for a home occupation to continue a vehicle and equipment repair shop. The Fritzlars have been operating a vehicle and equipment repair shop on their property since 2005. The Fritzlars have received a number of re-authorizations of the use over the years, as approvals are only in effect for three years. The current application seeks to re-authorize the existing use. The Fritzlars have a history of not complying with the required conditions of approval. As the challenged decisions describes the situation, the Fritzlars' business has become too successful for the proposed home occupation. The Fritzlars have not complied with conditions of approval requiring the home occupation use be restricted to 1500 square feet and limiting the number of vehicles parked on the property. A home occupation application is subject to a type II procedure, whereby the decision is made by the Planning Director. The Planning Director denied the home occupation application.¹ This appeal followed.

D. DISCUSSION

The applicant's property is zoned RRFF-5, which allows home occupations pursuant to Clackamas County Zoning and Development Ordinance (ZDO) 822.05. The Planning Director reviewed the approval criteria of ZDO 822.05 and found that the applicant had not satisfied two of those approval criteria. Most of the Planning Director's findings were not challenged below. It would be waste of the County's money and resources to review and repeat all of the unchallenged findings. I have reviewed the Planning Director's unchallenged findings, and I agree with those findings. I therefore adopt and incorporate the findings and conclusions in the Planning Director's decision in this decision, except as discussed further.

¹ Under ZDO 1307.03(B), the Planning Director includes "any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO]."

1. ZDO 822.05(D)

ZDO 822.05(D) provides:²

“Building Space: The home occupation may be conducted in a dwelling unit, but—except in the case of a bed and breakfast homestay—is limited to incidental use thereof. A maximum of 1,500 square feet of accessory space may be used for the home occupation. If only a portion of an accessory building is authorized for use in the home occupation, a partition wall at least seven feet in height, or a height as required by the County Building Codes Division, whichever is greater, shall separate the home occupation space from the remainder of the building. A partition wall may include a door, capable of being closed, for ingress and egress between the home occupation space and the remainder of the building.”

The Planning Director found that this criterion had not been satisfied:

“The applicant states that a total of 3,000 square feet is used for the business. The submitted site plan shows a 40’X60’ (2,400 square feet) detached accessory structure that is used for the home occupation and indicated where a wall separated the square footage. A notation on the site plan states 1,500 square feet is used for the business. A Level 3 home occupation allows a maximum of 1,500 square feet of accessory building space to operate a home occupation business.

“During the site visit staff entered the accessory structure from a door located at the far right side. A wall has been installed from floor to ceiling, as shown in the site plan. Whereas a wall exists to separate 1,500 square feet from the remaining 900 square feet of the detached accessory structure, the 900 square feet is used not for domestic purposes but as the business office. In the 2015 land use review * * * the applicant stated as incidental square footage a 10’X10’ room in the single family dwelling was used for the business office.

“The maximum allowed square footage used for the home occupation is 1,500 square feet and should be an area of 37.5’X40’ of the 2,400 square foot (40’X60’) existing accessory structure. It is clear to staff that the home occupation business operation uses all or a portion of the walled off area which exceeds the allowed 1,500 square feet of accessory building space.” Planning Director Decision 4-5.

As the Planning Director’s findings state, the applicant has a history of not complying with the 1500 square foot requirement. The applicant explained that using the accessory building as the business office is much more convenient than having to use the

² The decision refers to this criterion as ZDO 822.05(A)(4). The ZDO has been renumbered, but the provisions are the same. In this decision I will refer to the current version of the ZDO.

residence, which is farther away from the shop. While that is certainly understandable, the ZDO is very clear that only 1500 square feet may be used for the home occupation, regardless of how inconvenient that may be. The Fritzlers testified that even though it would be an inconvenience, they would use their residence as the business office in order to comply with the ZDO. As discussed at the public hearing, moving the business office to the residence does not mean that the remaining 900 square feet of the accessory structure cannot be used for non-business purposes such as watching television. I conclude that it is feasible that the applicant can comply with a condition of approval requiring the business office be located in the residence.

ZDO 822.05(D) can be satisfied with conditions of approval.

2. ZDO 822.05(K)

ZDO 822.05(K) provides:

“Parking: Parking associated with the home occupation shall be regulated as follows:

“* * * * *

“2. The maximum number of vehicles that are associated with the home occupation and located on the subject property shall not exceed five at any time, including but not limited to, employee vehicles, customer/client vehicles, and vehicles to be repaired. Vehicles to be repaired shall be located within an enclosed building or in an area not visible from off the subject property.

“3. No more than five vehicles permitted to be located on the subject property at one time shall exceed a gross vehicle weight of 11,000 pounds.

“* * * * *”

The Planning Director found that ZDO 822.05(K)(2 & 3) had not been satisfied:

“The accessory structure used for the home occupation business is approximately 353 feet behind the front property line. There is a designated area approximately 34 feet back from the road frontage to SW 45th Dr. This area is used for employees and customers to park. This packed gravel surface area has sufficient square footage to accommodate parked employees and customer parking. There is no reason for vehicles associated with the home occupation business to be parked on the right-of-way for any purpose. Adequate parking is available on the property.

“Past [conditions of approval] required that vehicles to be repaired shall be stored inside the existing accessory structure. During the June 20, 2018 site check staff viewed inside the accessory structure. It is apparent that two or three vehicles can be parked within the structure. At the time of the site inspection one truck of 11,000 GVW was being repaired and another standard truck was located within the accessory structure.

“Outside of the structure twelve (12) vehicles, two of which likely exceed 11,000 GVW * * * were parked on the property. * * * .

“The number of home occupation related vehicles related on the property well exceeds the allowed five vehicles at any given time allowed on the property. * * * .

“As previously noted in past land use decisions the applicant has continuously failed to comply with this criterion. Notes in the 2015 file indicated staff discussed the issue of parked vehicles on site at length with the applicant and his wife during the land use review. Whereas the applicant finds it is difficult to comply he agreed to revisit his business plan and make arrangements with his customers to arrange pick up and drop off of vehicles so he can maintain compliance with the [ZDO]. Evidence during the site check indicated this criterion is not met.

“Whereas in the past the applicant stated he does not propose parking of vehicles in excess of 11,000 GVW during the site inspection staff observed two vehicles in excess of 11,000 GVW. Again the applicant shall have to comply with the required criterion of the [ZDO]. It is a matter of organizing a business plan to be alert to what inventory is on the premises at a given time. This criterion is not met.” Planning Director Decision 8-10.

As the Planning Director’s findings state, the applicant has a history of not complying with ZDO 822.05(K)(2 & 3). While I can understand the Fritzlars’ desire to be able to park repaired vehicles on site until they are picked up and to work on more than one 11,000 GVW vehicle at a time, the ZDO clearly prohibits such activities. Unless the Fritzlars move their business offsite to a zone that allows greater intensity use, they will have to comply with the provisions of ZDO 822.05. At the public hearing, the Fritzlars agreed to provide a vehicle inventory that has been requested by staff and to restrict the number of repaired vehicles to comply with the ZDO. The Fritzlars testified that they would work with customers to ensure vehicles were picked up when they were repaired rather than leaving on the property for extended periods of time. The Fritzlars also agreed to not work on more than one 11,000+ GVW truck at a time. While the past history of use on the

property does cast doubt on the Fritzlars' ability to comply with the required conditions of approval, the Fritzlars testified that they were aware that they had exhausted the County's good will on these issues and realize that future failure to comply with the required conditions of approvals would result in revocation of their permit. Given that the Fritzlars appear to recognize the gravity of the situation, I conclude that it is feasible that they can comply with the conditions of approval.

ZDO 822.05(K) can be satisfied with conditions of approval.

Therefore, all of the applicable approval criteria are satisfied.³

E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **APPROVES** the application for a home occupation in Z0256-18-HO, with the following conditions of approval.

F. CONDITIONS OF APPROVAL

1. Approval is for **THREE YEARS only**. Continuation of the use beyond the three year approval period will require renewal of this permit.
2. The home occupation must comply with all the requirements of Section 822. Failure to comply will be cause for revocation of this permit.
3. The owner of the business shall reside in a residence on the home occupation property.
4. The number of employees on the site at any given time for this home occupation shall not exceed five.
5. The applicant is limited to a total of no more than 1500 square feet of accessory building space for the home occupation. The 900 square feet of the accessory structure shall not be used as a business office.
6. The home occupation hours of operation shall be from 8am to 6pm.
7. Outdoor storage or exterior evidence of the home occupation is prohibited.

³ The Fritzlars currently have two signs on the property, which violates the ZDO sign provisions. The Fritzlars explained that they need the additional sign to direct customers to the shop area of the property. As discussed at the hearing, the Fritzlars may put up directional markers such as arrows to direct customers to the proper area, but they must remove the additional sign. The conditions of approval require compliance with the ZDO sign provisions.

8. Signs shall be in compliance with Subsection 1010.07(B) and Subsection 1010.06(B).
9. The home occupation shall not generate more than thirty (30) trips per day.
10. No vehicle associated with the home occupation shall be stored, parked, or repaired on any public right-of-way.
11. No vehicle maintenance or equipment repair shall occur between the hours of 6pm and 8am.
12. Noise from the home occupation when measured off the property shall not exceed 60 dba between the hours of 8am and 6pm. No noise detectable off the subject property shall be generated between the hours of 6pm and 8am.
13. No more than one vehicle permitted to be located on the subject property at one time shall exceed a gross vehicle weight of 11,000 pounds.
14. There shall not be more than five vehicles associated with the home occupation on the site at any given time. Other than vehicles being repaired inside the accessory structure, there may only be five total vehicles associated with the home occupation parked on the property – including employee vehicles and repaired vehicles.
15. The permit is granted for the proposed home occupation to be submitted; to the extent it is consistent with these conditions of approval
16. Approval is subject to the above stated conditions. Failure to comply with all conditions of approval shall be cause for revocation of this permit.

DATED this 15th day of October, 2018.



Fred Wilson
Clackamas County Hearings Officer

ENDANGERED SPECIES ACT NOTICE

The federal Endangered Species Act (ESA) is not a criterion for approval of this application. The County has reviewed the approval standards in light of the requirements of the ESA, believes that the criteria for approval are consistent with the terms of the ESA and has submitted the Development Ordinances for consideration for a "4(d)" programmatic limitation. However, the analysis included in this decision does not include an evaluation by the County of the applications for consistency with the ESA nor does the decision reach any conclusions concerning that federal law. The applicant are responsible for designing, constructing, operating and maintaining the activities allowed by an approval of this application in a manner that ensures compliance with the ESA. Any question concerning this issue should be directed to the applicant, their consultants and the federal agencies responsible for administration and enforcement of the ESA for the affected species.

APPEAL RIGHTS

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).