

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

Regarding an Appeal of a Planning Director)	Case File No.
Decision Approving an Application for a Home)	Z0131-20-HO Appeal
Occupation Permit for an Auto Body Business.)	(Villegas)

A. SUMMARY

1. The applicant and owner is Edgar Villegas.
2. The appellants are Kathryn Smith and Raymond Bucy.
3. The subject property is located at 10500 Southeast Schacht Road, Damascus, Oregon 97089. The legal description is T1S, R3E, Section 28C, Tax Lot 1500 W.M. The subject property is approximately 9.11 acres and is zoned AG/F – Agriculture/Forest
4. On July 16, 2020, 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 left open one week for the submission of new evidence, testimony, and legal argument; one additional week for responses to the new evidence, testimony, and legal argument; and one additional week for the applicant’s final legal argument.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing on this application on July 16, 2020. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. The public hearing was conducted virtually on the Zoom platform due to the corona virus. 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 and recommended affirming the decision.
3. Gary Willis testified in favor of the application.
4. The appellants, Kathryn Smith and Raymond Bucy, as well as neighbors Bill Patterson and Tim Mosier testified against the application.
5. At the conclusion of the public hearing, the Hearings Officer left the record open one week for the submission of new evidence, testimony, and argument; one additional week for responses to the new evidence, testimony, and argument; and one additional week for the applicant's final legal argument.

C. FACTS

This case involves the appeal of a Planning Director decision approving an application for a home occupation to operate an auto body repair shop. A home occupation application is subject to a type II procedure, whereby the decision is made by the Planning Director. The Planning Director approved the home occupation application.¹ This appeal followed.

The subject property is a 9.11-acre AG/F parcel located at 10500 Southeast Schacht Road, Damascus, 97089. The property is rectangular shaped with the long ends running east to west away from Southeast Schacht Road (Schacht Road). The back portion of the property contains a creek and is mostly covered with tress. The front portion of the property along Schacht Road has a residence and three outbuildings. Schacht Road is a substandard 15-foot one lane gravel road. The property takes access from two points along Schacht Road, a northern access point that is a shared access with neighbors and a southern access point. In addition to providing access to the back portion of the property, the northern access point also creates a loop in front of the existing residence with the southern access point. The applicant, in addition to a number of other violations, has been impermissibly operating the business in an existing outbuilding. The applicant proposes to build a new

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]."

building on the northwest corner of the property to take access from the southern access point.

D. DISCUSSION

The applicants' property is zoned AG/F, which allows home occupations pursuant to Clackamas County Zoning and Development Ordinance (ZDO) 822.04. The Planning Director reviewed the approval criteria of ZDO 822.04 and found that the applicant satisfied all of the approval criteria. Most of the Planning Director's findings were not challenged. It would be waste of the County's money and resources to review and repeat the unchallenged findings. I have reviewed the Planning Director's decision, and I agree with the unchallenged findings and conclusions. I therefore adopt and incorporate the findings and conclusions in the Planning Director's decision in this decision, except as discussed further.

ZDO 822.04(C)(1) requires that:

“From 8:00am to 6:00 pm, the average peak sound pressure level, when measured off the subject property, of noise created by the home occupation shall not exceed the greater of 60 dB(A) or the ambient noise level. During all other hours, the home occupation shall not create noise detectable to normal sensory perception off the subject property.”

Opponents argue that the applicant has consistently violated this requirement. According to opponents, the applicant regularly conducts operations that are extremely noisy and regularly works after 6:00 pm. Despite the applicant's protestations that such occurrences are few and far between, I am more than persuaded by opponents that such violations have been ongoing and regular. This home occupation application, however, is not primarily about past infractions, but whether the applicant can satisfy the approval criteria in the future. The applicant proposes to build a new structure with specifications recommended by a licensed acoustical engineer. The staff report explains that with the seven recommended conditions of approval (including restricting working hour to 8:00 am to 6:00 pm) ZDO 822.04(C)(1) can be satisfied.²

² This is a reasonably close call. The applicant apparently works on the home occupation business after returning to the property after working at another location. This is apparently why so much activity occurs after 6:00 pm. While opponents are persuasive in arguing that the after-hours work would continue, it is at least feasible that the applicant could not work after 6:00 pm.

I agree with the staff report and the applicant's acoustical engineer that with the recommended conditions of approval that the new building can ensure that the noise requirements of ZDO 822.04(C)(1) are satisfied. As discussed, however, the proposal is for a new building. The current operation has been occurring in an existing outbuilding. Clearly the applicant has not been satisfying the noise requirements of ZDO 822.04(C)(1) as the business is currently operating. In addition to access issues discussed alter, I find that the evidence is overwhelming that it is not feasible for the applicant to satisfy ZDO 822.04(C)(1) with the current set up. While the applicant seeks to be able to continue operating his business in its current state, there is no authorization in the ZDO to allow a non-allowed use to continue operating. The applicant may not continue operating the auto body shop in the existing outbuildings.

ZDO 822.04(D) requires that the home occupation:

“[s]hall not create vibration, glare, fumes or odors detectable to normal sensory perception off the subject property. Vehicles entering or exiting the subject property shall be exempt from this standards, but idling vehicles shall not.”

Opponents argue that the applicant has consistently violated this requirement. According to opponents, fumes, odors, and light regularly are detectable on neighboring properties. Despite the applicant's protestations, opponents' testimony is much more persuasive. As with ZDO 822.04(C)(1), the issue is whether the applicant can satisfy the approval criterion in the future rather than whether he has been violating it in the past. With the recommended conditions of approval for the proposed new building, I agree with the staff report that vibration, glare, fumes, and odors can be prevented from being detectable off the subject property. With conditions of approval, ZDO 822.04(D) can be satisfied.

ZDO 822.04(I) provides:

“If the subject property takes access via a private road or access drive that also services other properties, evidence shall be provided, in the form of a petition that all other property owners who have access rights to the private road or access drive agree to allow the specific home occupation described in the application. Such evidence shall include any conditions stipulated in the agreement. A new petition shall not be required for a renewal application.”

As discussed earlier, the only access to the property is from Schacht Road, which is a substandard gravel road. Opponents argue that Schacht is a private road and therefore the applicant needs their permission (which is not forthcoming) to use Schacht Road for access. There has been quite a bit of confusion about the status of Schacht Road, which was originally created as an access road to reach the applicant's property in 1924. The road was also under the jurisdiction of the City of Damascus until the city disincorporated and the jurisdiction over the road returned to Clackamas County. The County does not maintain the road. Although the road was created to reach the property and is not maintained by the County, it is nonetheless still a County rather than a private road. As the County Transportation Maintenance Division explains:

“As far as the current status of Schacht Rd, Clackamas County is the current custodian of the road, but is not the owner, Schacht was never a county maintained road, but a Public Access Road, which is described as:

“ROAD, PUBLIC: A public way dedicated or deeded for public use but not accepted into the County road maintenance system, intended primarily for vehicular circulation and access to abutting properties.

“All Public Access roads or Local Access roads are automatically transferred to a city when they expand their boundaries or in Damascus case, become a city. When Damascus disincorporated Clackamas County returned as the agency with jurisdiction over Schacht, but it still falls under the same guidelines as a Public Road as defined above.”

As the quote explains, Schacht is not a private Road. Therefore, the applicant does not need permission from other property owners to use the road for his home occupation. The northern entrance to the property, however, is a shared access with neighbors to the north who have not given permission to use the access easement. Therefore, the applicant may not use the northern access point for the home occupation business. As the northern access point is currently used to reach the outbuildings on the back of the property, the existing outbuildings may not be used for the home occupation business.³ As long as only the southern access point is used, ZDO 822.04(I) is satisfied.

ZDO 822.04(K) provides:

³ As discussed earlier, the existing outbuildings also do not satisfy the noise requirements of ZDO 822.04(C)(1).

“Hazardous materials shall not be present on the subject property in quantities greater than those normally associated with the primary uses allowed in the applicable zoning district, or in quantities greater than those exempt amounts allowed by the current edition of the Oregon Structural Specialty Code, whichever is less.”

The Planning Director’s decision initially states that the “proposed auto painting and body work will have use of hazardous materials such as paints and thinners that are not typically associated with an AGF District.” Planning Director’s Decision 17. Later, however, the Planning Director’s decision states “DEQ offers applicant does not propose to store hazardous materials not typical with primary uses allowed in the RRFF-5 District.” Planning Director’s Decision 18. I am not exactly sure what the second quoted sentence means. It may be that it is an inadvertent cut and paste from another decision as it references the RRFF-5 zone rather than the applicable AG/F zone. It is also possible the inadvertent cut and paste merely forgot to change the applicable zone. In any event, the Planning Director’s decision does not find that the applicant will have quantities of hazardous materials no greater than those normally associated with the primary uses in the AG/F zone. The Planning Director’s decision deals with *how* such hazardous materials should be stored, but it does not address the *amount* of such hazardous materials – and ZDO 822.04(K) involves the amount of hazardous materials not how they are stored.⁴

Appellant Kathryn Smith raised the issue of compliance with 822.04(K) in both the public hearing and in materials submitted during the open record period.⁵ The applicant has not really responded to this issue other than to state that hazardous materials will be properly stored and that no hazardous materials were burned during a fire that required the fire department to respond. As discussed earlier, how hazardous materials are stored is not the issue – the issue is the amount of the hazardous materials. Even assuming there were no hazardous materials in the fire, that has nothing to do with the amount of hazardous materials on the property.

In the home occupation permit application, there is a question that asks:

“Describe the type and amount of any hazardous materials stored or to

⁴ To be fair to the Planning Director, this issue was raised during the appeal.

⁵ The open record submission references ZDO 822.05(K) rather than ZDO 822.04(K), but the context makes clear she is talking about the hazardous materials provision of ZDO 822.04(K). In any event, during the public hearing she clearly referenced the hazardous materials provision of ZDO 822.04(K).

be used on the property in conjunction with the occupation.”

The applicant’s answer states:

“Paint and thinners will be stored in hazardous materials fire proof cabinet.”

As with the Planning Director’s decision, the applicant’s answer only discusses how the hazardous materials will be stored, it does not address the key issues of how much hazardous material will be stored on the property or how that compares to the amounts normally associated with the primary uses allowed in the AG/F zone. As far as I can tell there is no evidence in the record about what amounts are normally associated with primary uses in the AG/F zone. There also is no evidence in the record as to how much hazardous materials the applicant stores or plans to store on the property. Furthermore, as the proposed home occupation is an auto body business, paint and thinners (hazardous materials) are clearly a significant part of the business. Even if the applicant had supplied any evidence on these issues, it seems unlikely that the auto body business would not store more hazardous materials than primary uses allowed in the AG/F zone. In any event, the burden is on the applicant to satisfy this approval criterion, and the applicant has not supplied any evidence demonstrating compliance with the criterion. In fact, the only evidence in the record supports the proposition that the applicant cannot satisfy the approval criterion.

The Planning Director’s decision includes a condition of approval stating:

“No hazardous materials shall be stored on the subject property in quantities that exceed normal usage of a residential property.” Planning Director’s Decision 10.

Including a condition of approval that merely repeats the applicable approval criterion is not sufficient to demonstrate compliance with the criterion when there is no evidence that the applicant satisfies or can satisfy the approval criterion. In this case, opponents raised the issue of compliance with ZDO 822.04(K). The applicant did not respond to opponents’ argument. The evidence in the record does not support a finding that ZDO 822.04(K) is satisfied. On the contrary, the only evidence in the record strongly supports the proposition that ZDO 822.04(K) is and would be violated. A condition of approval can only be imposed to satisfy an approval criterion if the record demonstrates that it is feasible to satisfy the condition of approval. There is nothing in the record to

support the proposition that it is feasible to satisfy the condition of approval in the Planning Director's decision. Furthermore, the only evidence in the record supports the proposition that it is *not* feasible to satisfy the approval criterion with a condition of approval. While it is theoretically possible that the applicant could satisfy this approval criterion with additional evidence, the burden is on the applicant to satisfy the approval criterion and he has not really attempted to satisfy the approval criterion let alone satisfy it. ZDO 822.04(K) is not satisfied.

ZDO 822.04(L)(3)(b) provides:

“The maximum number of vehicles that are associated with a level three major home occupation and located on the property shall not exceed five at any time, including, but not limited to, employee vehicles, customer vehicles, and vehicles to be repaired. Vehicles to be repaired shall not be located within an enclosed building or an area not visible from off the subject property. No more than one of the five vehicles permitted to be located on the subject property at one time shall exceed a gross vehicle weight rating of 11,000 pounds.”

Opponents argue that the applicant has and continues to exceed the number of vehicles allowed with the proposed home occupation. Although the applicant disputes opponents' assertions, opponents' testimony and evidence is much more persuasive. Multiple opponents' testimony and pictures demonstrate that the applicant has been continually violating this provision. While the applicant has been violating this provision, it is at least possible that the applicant could comply with the requirements in the future. The applicant indicates that it is possible to comply with this provision and that he will comply with it in the future. With the Planning Director's condition of approval, it is feasible to comply with ZDO 822.04(L)(3)(b).

As the property is in an agricultural zone, the application must also comply with ZDO 406.05(A)(1) which requires that the “use will not impose a significant change in or significantly increase cost of acceptable farming or forest uses or increase fire hazards or costs to fire suppression personnel.” Opponents argue that the proposed home occupation would increase the risk of fires. According to opponents, the applicant has already started a fire on the property that required the fire department to respond to put out the fire. Although there was a fire on the property, as the applicant argues the fire was caused by burning materials as part of the residential use rather than as any part of the business. The

fire department issued a citation for burning on non-burn day. Although it is a reasonably close call as there may have been some hazardous materials included in the unauthorized burn and it is not entirely clear that the burn was not related to the home occupation, as long as the applicant does not burn any hazardous materials or other flammable materials from the home occupation business, the actual proposed home occupation should not increase the fire hazard. With conditions of approval, ZDO 406.05(A)(1) could be satisfied.

Opponents have persuasively explained that the applicant has been in continual violation of many applicable provisions. Opponents also persuasively argue that the applicant routinely disregards the rules imposed by the ZDO and is not likely to abide by any rules in the future. Although opponents may be correct, the County generally gives an applicant the benefit of the doubt and an opportunity to comply with the applicable provisions. The applicant, however, must still satisfy all of the applicable approval criteria. As discussed earlier, the applicant does not even come close to satisfying the hazardous materials requirement of ZDO 822.04(K). As also discussed earlier, there is not any evidence in the record to suggest that it is feasible to impose a condition of approval to satisfy ZDO 822.04(K). Therefore, the applicant has not satisfied all of the applicable approval criteria.

E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **DENIES** the application for a home occupation in Z0131-20-HO.

DATED this 26th day of August, 2020.

Fred Wilson
Clackamas County Hearings Officer

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 the decision (which date appears above my signature).