

**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)	Z0473-18-HO Appeal
Occupation Permit for a Mobile Dentistry Business.)	(Koch Dental Appeal)

A. SUMMARY

1. The applicants and owners are Beth and Brian Koch.
2. The appellants are Rick and Roberta Dean.
3. The subject property is located at 16319 South Moore Road, Oregon City, Oregon 97045. The legal description is T3S, R2E, Section 14B, Tax Lot 400 W.M. The subject property is approximately 1.03 acres and is zoned RRRF-5 – Rural Residential Farm Forest 5-Acre District.
4. On December 6, 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 December 6, 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 Lisbeth Dance discussed the Planning Director’s decision.
3. The applicants and Marie Gassler testified in favor of the application.
4. Rick Dean and Corey Elder 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 approving an application for a home occupation to operate a mobile dentistry business. 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 applicants are proposing a 484 square foot home occupation space to be located on the second floor of a proposed new garage. The applicant proposes to operate out of a temporary 320 square foot structure located northeast of the residence until the new garage and office is completed. The applicants operate a mobile dentistry business that performs all dental work on patients offsite. The home occupation involves accounting, paperwork, and cleaning of instruments. The property is located on an approximately one-acre parcel zoned RRFF-5, near the intersection of South Moore Road and South Ferguson Road. The property is an area of RRFF-5 properties developed with single family residences.

D. DISCUSSION

The applicants' property is zoned RRFF-5, 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 applicants 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 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. ZDO 822.04(C)

ZDO 822.04(C) provides that "[t]here shall be no more than five employees." In the application, the applicants stated that there would be nine employees. The Planning

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]."

Director apparently understood the applicants to not have more than five employees working at the property at once.

“The applicant stated the business will continue to operate with a total of five employees, two of whom are the owners of the subject property, Brian Koch and Beth Koch and 3 additional employees one full time and 2 alternately at the property one or two times a week. The number of employees proposed by the applicant does not exceed five and is consistent with Subsection 822.04(B). A condition of approval is warranted to this effect. As conditioned this criterion is met.” Planning Director Decision 9.

Opponents argue that the applicants have nine employees when ZDO 822.04(C) clearly restricts the number of employees allowed to five. While it is not entirely clear from the Planning Director’s decision, the Planning Director apparently understood the applicant to have a number of part time employees, such that no more than five employees would ever be at the site at once. At the appeal hearing, the applicants explained that there are two employees that will regularly be at the site (the applicants). The applicants explained that they have two assistants who never come to the site, one hygienist who never comes to the site, one hygienist that works two days a week and comes to the site once a week, two hygienists that work two days a month at the site, and one hygienist that works a few times a year at the site. The applicants explained that they could ensure that that there were never more than five employees at the site at once.

The County has consistently interpreted ZDO 822.04(C) as restricting an applicant to five employees at a home occupation at a time rather than a total of five employees no matter how often they come to the site. That is a plausible interpretation. Opponents’ argument that ZDO 822.04(C) does not distinguish between employees at the site versus employees not at the site is also plausible. The purpose of the restriction of five employees is to minimize the impacts on neighbors of the home occupation. The more employees working at the property, the more impact on neighbors. The practical impact of five full time employees would be same as ten half-time employees. As long as there are no more than five employees working at the site at one time, I do not see that it makes a difference whether there are five or nine total employees. *See Green v. Douglas County*, 67 Or LUBA 234, 244-46 (2013) (interpretation that five employee restriction refers to five employees “at one time” is permissible). The proposed conditions of approval limit the applicants to

no more than five employees at one time, and the applicants testified that they can meet that condition. ZDO 822.04(C) is satisfied.

2. Other Issues

Opponents also expressed concern about vehicle trips to the property. ZDO 822.04(J) provides that “[t]he home occupation shall not generate more than 20 trips per day.” The Planning Director found that ZDO 822.04(J) could be satisfied with conditions:

“The applicant states that the home occupation business generates 6-10 round trips, which equates to a maximum of 20 trips per day including UPS Truck deliveries, employee vehicle trips, and customer vehicles. The home occupation business will continue to use the one vehicle that is used in association with the home occupation business. For clarification one trip is considered as a vehicle trip to or from the property in compliance with Subsection 822.02(I). A condition of approval is warranted to this effect. As conditioned this criterion is met.”
Planning Director Decision 10.

The Planning Director’s decision explains how ZDO 822.04(J) can be satisfied. Opponents do not challenge that findings, and I agree with the Planning Director that ZDO 822.04(J) is satisfied. Opponents, however, also argue that the transportation system is not safe enough for the proposed home occupation. Opponents cite to an earlier decision by a different Clackamas County Hearings Officer that denied a design review and conditional use application to site a cell tower further down South Moore Road. Z0330-06-C & Z0331-06-D (T-Mobile), December 14, 2006. The Hearings Officer denied the applications because of traffic concerns regarding the intersection of South Moore Road and South Ferguson Road. Due to reduced sight distances at the intersection, the Hearings Officer found that “even the most minimal traffic at that intersection cannot be adequately served with safe transportation facilities.” T-Mobile Decision 6.

Even assuming conditions have not changed in 12 years (which opponents testify they have not), the T-Mobile case was denied under conditional use approval criteria, which required, among other things, that the “safety of the transportation system must be adequate to serve the proposed development.”² Unfortunately for opponents, there is no equivalent approval criterion for home occupations. The only requirement regarding traffic is the 20 vehicle trips per day limit of ZDO 822.04(J). As the Hearings Officer stated in T-Mobile,

² That conditional use approval criterion is presently codified at ZDO 1203.03(C).

the County would not be able to restrict permitted uses such as a single-family residence even though the safety of the transportation system is inadequate. Absent some requirement that the applicants satisfy a provision similar to ZDO 1203.03(C), opponents' arguments do not provide a basis to deny the application.

Therefore, all of the applicable approval criteria are satisfied.

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 Z0473-18-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 submittal of a home occupation renewal application ZDO 841.08 A.
2. Compliance with Zoning and Development Ordinance (ZDO) Sections 401, 822.04 and 1010.06B must be met. Failure to comply will be cause for revocation of this permit. Home Occupations require review as Type II applications pursuant to table 401-1 and Section 1307, *Procedures*.
3. *The applicant shall provide to the Planning and Zoning Division staff for submittal into case file Z0473-18-HO* evidence that all signage on the property is in compliance with Subsection 1010.06(B) of the Zoning Development Ordinance (ZDO). If signage is installed the signs shall be consistent with ZDO section 1010.06(B).
4. *Prior to operation of the home occupation business the applicant shall* provide a confirming statement from the Soils Division that the proposed home occupation and submitted floor plan meets the Soil Division requirements, or provide the necessary permits.
5. *Prior to operation of the home occupation business the applicant shall provide within 45 DAYS, from the date of this decision a written statement from Deana Mulder of the Clackamas County Engineering Division to the Planning and Zoning Division for submittal into case file Z0473-18-HO that the following conditions have been met :*
 - a. All frontage and on-site improvements shall be in conformance with the *2013 Clackamas County Roadway Standards*.
 - b. The applicant shall provide adequate on site circulation for the parking and maneuvering of all vehicles anticipated to use the site. Adequate areas shall be provided so vehicles can turn around on-site.

6. ***The applicant shall maintain compliance with the Beaver Creek Fire District #1 standards and regulations for the continued operation of the proposed home occupation.***
7. The home occupation shall continue to maintain compliance with Subsection 822.04.
 - a. The home occupation shall be located on a property where a minimum of 50 percent of abutting properties are greater than two acres. A renewal application shall be evaluated on the basis of the parcel size analysis first applied to the home occupation.
 - b. The operator of the home occupation shall continue to reside in a dwelling on the property.
 - c. There shall be no more than **five** home occupation **employees** on the property at any given time.
 - d. The allowed square footage of accessory building space for the home occupation use shall not exceed 500 square feet. 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.
 - e. Between the hours of **8AM to 6 PM the home occupation shall not generate noise levels that exceed 60dBA as measured off the property lines**. During all other hours the home occupation shall not create noise that is detectable to normal sensory perception off the property.
 - f. No glare from security or other lighting, fumes, vibrations, or electrical interference detectable by normal sensory perception off the subject property shall be caused by the home occupation.
 - g. No more than **four** passenger vehicles licensed in the state of Oregon and associated with the home occupation shall be parked on the site at any given time.
 - h. There shall not be more than 20 vehicle trips per day on the subject site as a result of the home occupation use.
 - i. There shall be no vehicles repaired, parked or stored in the public right-of-ways.

- j. There shall be only one of the allowed vehicles in excess of a gross weight of 11,000 pounds in conjunction with the home occupation parked on the property at any given time.
 - k. The home occupation shall take access from S Moore Rd, a Minor Arterial road.
8. ***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 2nd day of January, 2019.



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).