

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

Regarding an application by Donald Schott for a home occupation permit for vehicle parking and an office for a paving business on property at 26646 S. Highway 224 in unincorporated Clackamas County, Oregon

) **FINAL ORDER**
) **File No.**
) **Z0540-22-HO**
) **(Checkedred Flag Paving)**

A. SUMMARY

1. Donald Schott (the “applicant”) filed an application for approval of a Level 3 Home Occupation permit on a roughly five-acre parcel located at 26646 S. Highway 224; also known as tax lot 01603, Section 24, Township 2 South, Range 3 East of the Willamette Meridian, Clackamas County (the “site”). The applicant originally proposed to use a 110 square foot portion of an existing 1,250 square foot detached accessory building and a new 1,390 square foot shop and maintenance building for parking, storage, and repair of up to 20 vehicles and equipment used in the applicant’s paving business.

2. On March 28, 2023, the planning director (the “director”) issued a written decision denying the application because the number of vehicles proposed exceeded the maximum number allowed by ZDO 822.04.L(3) and the applicant’s existing 32-square foot sign exceeded the maximum size allowed by ZDO 1010.06.B. (Exhibit 1).

3. On April 6, 2023, attorney Wendie Kellington filed a written appeal of the director’s decision on behalf of the applicant. (Exhibit 2).

4. The applicant revised the application during the course of the appeal. The applicant now proposes to utilize an 11- x 11-foot portion of an existing storage building as an office, construct a new 30- x 40-foot shop building for maintenance and storage of the vehicles and equipment used in the applicant’s paving business, as well as a fenced area for parking of one large truck with a trailer and two additional business vehicles. The applicant proposed to install a sight obscuring fence to screen the outdoor parking area from offsite views. The applicant will conduct primary business operations, including client meetings, off site.

5. County Hearings Officer Joe Turner (the "hearings officer") conducted an online public hearing regarding the appeal. County staff recommended that the hearings officer grant the appeal and approve the application as modified, subject to conditions of approval. The applicant’s attorney testified in support of the appeal. No one else testified orally or in writing.

6. Based on the findings adopted or incorporated in this final order, the hearings officer concludes that the applicant sustained the burden of proof that the revised application complies with all applicable approval criteria for a Level 3 Home Occupation. Therefore the hearings officer grants the appeal and approves Z0540-22-HO (Checkedred Flag Paving), subject to the conditions of approval at the conclusion of this final order.

B. HEARING AND RECORD HIGHLIGHTS

1. The hearings officer received testimony at the public hearing about this appeal on June 8, 2023. All exhibits and records of testimony are filed at Clackamas County Department of Transportation and Development. At the beginning of the hearing, 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 following is a summary by the hearings officer of selected testimony and evidence offered at the public hearing.

2. County planner Lizbeth Dance summarized her PowerPoint presentation. She noted that the majority of vehicles included in the original application were the applicant's personal vehicles that are not related to the proposed home occupation. The applicant has removed the majority of vehicles from the site. The applicant also removed the existing sign. The applicant revised the proposal to limit the use to an 11- x 11-foot portion of an existing accessory building as a home office, a new 30- x 40-foot shop for storage and repair of vehicles and equipment used in the applicant's business, and a screened outdoor parking area for one large truck with a trailer and two additional vehicles as shown in the applicant's updated site plan, Exhibit 10. As revised the application complies with all applicable approval criteria. Therefore, she recommended the hearings officer grant the appeal and approve the application subject to conditions of approval as set out in Exhibit 3a.

3. Attorney Wendie Kellington appeared on behalf of the applicant. She accepted the revised findings and conditions of approval proposed by Ms. Dance.

4. County planning manager Lindsey Nesbitt noted that the conditions of approval are open ended to allow the applicant the ability to utilize the maximum 1,500 square feet of indoor space allowed by the Code.

5. The hearings officer closed the record at the end of the hearing and announced his intention to approve the application subject to conditions of approval.

C. DISCUSSION

1. ZDO Table 1307-1 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a)(D), appeals of administrative decisions must be reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record. He is not bound by the prior decision of the planning director and does not defer to that decision in any way. New evidence may be introduced in an appeal, and new issues may be raised. The hearings officer must decide whether the applicant carried the burden of proof that the application complies with all applicable approval criteria in light of all relevant substantial evidence in the whole record, including any new evidence.

2. The hearings officer adopts the following findings as his own.

1. **ZDO Section 316 Rural Residential Farm Forest**

Section 316 of the Clackamas County Zoning and Development Ordinance provides for Home Occupations, as noted in Table 316-1, subject to Section 822 – Home Occupations.

2. **ZDO Section 202 Definitions**

Home Occupation: An occupation or business activity that results in a product or service and is conducted, in whole or in part, in a dwelling unit, an accessory building normally associated with primary uses allowed in the subject zoning district, or both. Home occupations do not include garage sales, yard sales, holiday bazaars, or home parties which are held for the purpose of the sale or distribution of goods or services unless such sales and parties are held more than six times in a calendar year or operate in excess of 24 total days in a calendar year.

Finding: The applicant is proposing to conduct a home occupation.

3. **ZDO Section 822 Home Occupation**

822.04 Level Two and Three Major Home Occupations

A major home occupation requires review as a Type II application pursuant to Section 1307, *Procedures*, and shall be subject to the following standards and criteria:

A. Operator: The operator shall reside full-time in a lawfully established dwelling unit on the tract on which the home occupation is located.

Finding: Applicant states they are full-time resident of the dwelling of the site. Criterion met.

B. Employees: The home occupation shall have no more than five employees.

Finding: The conditions list that no more than five employees are allowed. In this case, applicant states there will be two employees. Criterion met.

C. Noise: Noise shall be regulated as follows:

1. From 8:00 a.m. until 6:00 p.m., 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.

- a. Noise generated by vehicles entering or exiting the subject property, but not by idling vehicles, shall be exempt from Subsection 822.04(C)(1).
 - b. Subsection 822.04(C)(1) shall not apply to noise detectable on public rights-of-way and railroad rights-of-way.
2. A noise study may be required to demonstrate compliance with Subsection 822.04(E)(1). If a noise study is required, measurements shall be made with a sound level meter. The sound level meter shall be an instrument in good operating condition, meeting the requirements of a Type I or Type II meter, as specified in ANSI Standard 1.4-1971. The sound level meter shall contain at least an A-weighted scale, and both fast and slow meter response capability. Personnel making measurements shall have completed training in the use of the sound level meter, and measurement procedures consistent with that training shall be followed.

Finding: applicant states this criterion will be satisfied. Maintenance and office use both will be contained in a building, and as described will not create noise rising to the level of requiring a sound study. A condition of approval is recommended to ensure compliance with this standard. As conditioned this standard can be met.

- D. Vibration, Glare, Fumes, and Odors: The home occupation shall 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 standard, but idling vehicles shall not.

Finding: applicant states the office operation will be completely indoors and does not anticipate any additional vibrations, glare, fumes or odors with this home occupation. As proposed and conditioned this criterion is satisfied.

- E. Electrical Interference: The home occupation shall not create visual or audible electrical interference in any radio, television, or other electronic device off the subject property, or cause fluctuations in line voltage off the subject property.

Finding: None expected based on type of business, not applicable.

- F. Storage and Display: No outside storage, display of goods or merchandise visible from outside the enclosed building space in which such goods or merchandise are stored, or external evidence of the home occupation shall occur, except as specifically allowed by Subsection 822.04. Notwithstanding this provision, business logos flush-mounted on vehicles used in the daily operations of the home occupation are allowed.

Finding: Some of the vehicles – including the one large truck will be parked on site. A fence is proposed at the center of the property to shield these vehicles from view. Existing shipping containers/connex structures on site are for personal use not associated with the home occupation. As conditioned this standard can be met.

G. Signs: Signs shall be permitted pursuant to Section 1010, *Signs*.

Finding: See submitted site plan. Subsection 1010.06(B) allows for maximum sign area of eight square feet (per side) in the rural area. A staff site visit conducted on May 30, 2023 verified that the applicant has removed existing signage. As conditioned, this standards can be met

H. Parking: Vehicles associated with the home occupation shall not be stored, parked, or repaired on public rights-of-way. Parking spaces needed for employees or customers of the home occupation shall be provided in defined areas of the subject property. Such areas shall be accessible, usable, designed, and surfaced for parking.

Finding: Parking area for the business vehicles including one large truck with trailer is identified in the center of the property. Screening is required along the parking area to ensure vehicles will not be visible form off site. As conditioned, this standard can be met.

I. Access: If the subject property takes access via a private road or access drive that also serves 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.

Finding: The site takes access of Highway 224. This criterion does not apply.

J. Type of Buildings: Notwithstanding the definition of home occupation in Section 202, *Definitions*, in the AG/F, EFU, and TBR Districts, the home occupation shall be operated substantially in the operator’s dwelling or other buildings normally associated with uses permitted in the applicable zoning district.

Finding: The site is not located in the AG/F, EFU or TBR Districts. Therefore, this criterion is inapplicable.

K. Hazardous Materials: 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.

Finding: The primary on site operations will be office space with the storage of one large truck and no more than four other vehicles. Vehicle maintenance if re-established on site will safely dispose of any excess fluids off site at the appropriate waste facility. No use or storage of hazardous materials greater than those associated with residential uses are planned here. As conditioned, this criterion can be met.

- L. Level Two and Three Major Home Occupations: Major home occupations are classified as level two or three. A level three major home occupation may be established only if at least 50 percent of the lots of record abutting the subject property are larger than two acres; however, a renewal application shall be evaluated on the basis of the lot size analysis first applied to the home occupation. A lot of record is considered to be abutting if it is contiguous to the tract on which the home occupation is proposed, or if it is directly across an access drive, private road, or public or county road with a functional classification below that of a collector.

Finding: The property meets qualifications for a Level Three Home Occupation as all surrounding lots of record are larger than two acres. This criterion is met.

The following standards differ depending on whether the proposed home occupation is a level two or three

- 1. Building Floor 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. For a level two major home occupation, a maximum of 500 square feet of accessory building floor space may be used for the home occupation. For a level three major home occupation a maximum of 1,500 square feet of accessory building floor space may be used for the home occupation.

Finding: this proposal for a Level Three Home Occupation involves up to 1,500 square feet of accessory building floor space split between two accessory buildings one established with 121 square foot office area and a proposed new 1,390 square foot building for a shop. Additional floor plan and site plan details are needed in order to verify the home occupation does not exceed the maximum allowed floor space. As conditioned this criterion can be met.

- 2. Traffic: A level two major home occupation shall not generate more than 20 vehicle trips per day, and a level three major home occupation shall not generate more than 30 vehicle trips per day.

Finding: Applicant shows two one-way trips per day, less than the 30 trips per day maximum allowed for a Level Three Home Occupation. As conditioned this standard can be met.

- 3. Vehicles: Vehicles shall be regulated as follows:
 - a. Level Three Home Occupation: The maximum number of

vehicles that are associated with a level three major home occupation and located on the subject 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 be located within an enclosed building or in 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.

Finding: Applicant/appellant has submitted vehicle licensing and registration for two personal vehicles, two personal trailers and one business vehicle and one work truck with trailer over 11,000 pounds. Business vehicle parking area shall be delineated from personal vehicle parking and screened as not to be visible off site. A staff site visit conducted on May 30, 2023 verified that the applicant has removed all 16 vehicles that are not licensed and registered to the property owner. As conditioned this criteria can be met.

D. CONCLUSION

Based on the above findings and discussion, the hearings officer concludes the applicant sustained the burden of proof that the application does or can comply with the applicable approval criteria for a Level 3 Major Home Occupation permit, and the appellant failed to rebut that proof with at least equally probative evidence. Therefore the application must be approved subject to the conditions in the director's decision as modified herein.

E. DECISION

In recognition of the findings and conclusions contained herein, the hearings officer hereby denies the appeal and upholds the planning director's decision in Z0540-22-HO (Checkered Flag Paving), subject to the following amended conditions:

1. Approval of this land use permit is based on the submitted written narrative and plan(s) filed with the County. No work shall occur under this permit other than which is specified within these documents, unless otherwise required or specified in the conditions below. It shall be the responsibility of the property owner(s) to comply with this document(s) and the limitation of any approval resulting from the decision described herein.
2. Approval of the home occupation is subject to the following requirements of the Zoning and Development Ordinance (ZDO) Section 822:
 - a. The operator shall reside full-time in a lawfully established dwelling unit on the tract on which the home occupation is located.
 - b. The home occupation shall have no more than five employees.

- c. Noise shall be regulated as follows:
- From 8:00 a.m. until 6:00 p.m., 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.
 - Noise generated by vehicles entering or exiting the subject property, but not by idling vehicles, shall be exempt from Subsection 822.04(C)(1).
 - Subsection 822.04(C)(1) shall not apply to noise detectable on public rights-of-way and railroad rights-of-way.
- d. The home occupation shall 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 standard, but idling vehicles shall not.
- e. The home occupation shall not create visual or audible electrical interference in any radio, television, or other electronic device off the subject property, or cause fluctuations in line voltage off the subject property.
- f. No outside storage, display of goods or merchandise visible from outside the enclosed building space in which such goods or merchandise are stored, or external evidence of the home occupation shall occur, except as specifically allowed by Subsection 822.04.
- g. Signs for the home occupation shall comply with ZDO Section 1010, Signs. Appropriate permitting is required for any signs, which shall be no larger than eight square feet and six feet in height.
- h. Vehicles associated with the home occupation shall not be stored, parked, or repaired on public rights-of-way. Parking spaces needed for employees or customers of the home occupation shall be provided in defined areas of the subject property. Such areas shall be accessible, usable, designed, and surfaced for parking.
- i. 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.
- j. A maximum of 1,500 square feet of accessory building floor space may be used for the Level 3 home occupation. The applicant is proposing to use a 121 square foot portion of one existing structure, and a new 30- x 40-foot (1,200 square foot) shop and maintenance building. Associated building permits to establish the new development are required prior continuation of use.

- k The level three major home occupation shall not generate more than 30 vehicle trips per day.
- l. The maximum number of vehicles that are associated with a level three major home occupation and located on the subject 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 be located within an enclosed building or in 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. The vehicle parking and screening plan/fencing shall be established and verified by county staff prior to continuation of use. A Building Permit is required for fences over eight feet in height.

DATED this 13th day of June 2023.



Joe Turner, Esq., AICP
Clackamas County Land Use Hearings Officer

ENDANGERED SPECIES ACT NOTICE

This decision addresses only the applicable criteria under the ZDO. It does not address whether the activities allowed by this decision will comply with the provisions of the federal Endangered Species Act (“ESA”). This decision should not be construed or represented to authorize any activity that will conflict with or violate the ESA. It is the applicant, in coordination, if necessary, with the federal agencies responsible for the administration and enforcement of the ESA, who must ensure that the approved activities are designed, constructed, operated, and maintained in a manner that complies with the ESA.

APPEAL RIGHTS

ZDO 1307.14.D(6) provides that the Land Use Hearings Officer’s decision is the County’s final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules adopted by LUBA describe when and how an appeal must be filed with LUBA. 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.” ZDO 1307.17.I(1) provides that this decision will be “final” for purposes of a LUBA appeal as of the date of mailing of this final order (which date appears on the last page herein).