

**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)	Z0287-20-HO Appeal
Occupation Permit for a Landscape Business.)	(Villanueva)

A. SUMMARY

1. The applicant and owner is Miguel Villanueva.
2. The appellant is Chris Paren.
3. The subject property is located at 13525 Southeast Briggs Street, Milwaukie, Oregon 97222. The legal description is T2S, R1E, Section 1DB, Tax Lot 3900, W.M. The subject property is approximately .5 acres and is zoned R-10 – Urban Low Density Residential.
4. On October 27, 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 closed.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing on this application on October 27, 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. Miguel Villanueva testified in favor of the application.
4. The appellant, Chris Paren, as well as neighbors Anna Walls and Greg Deffinbaugh 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 landscape and maintenance business. The subject property is a .5-acre R-10 parcel located at 13525 Southeast Briggs Road, Milwaukie, OR 97222. The property is located in an area of R-10 zoning and surrounded by other single family residences. The applicant operates a landscape and maintenance building on the property. The applicant originally obtained an approval of a home occupation permit to operate the business in 2017. As home occupation permits are granted for a three year period, the applicant now seeks to essentially renew the home occupation permit. During the last three years there have been numerous complaints about the business as well as code enforcement investigations of the business. All of the code enforcement complaints were resolved to the satisfaction of the County. 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.

D. DISCUSSION

The applicants' property is zoned R-10, 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

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]."

findings and conclusions in the Planning Director's decision in this decision, except as discussed further.

This is a slightly unusual home occupation case. Generally, opponents argue that the application does not satisfy one or more of the approval criteria. In the present case, opponents do not so much argue that the approval criteria *cannot* be satisfied but rather that they *will not* be satisfied. There does not seem to be any dispute that the Planning Director's decision accurately determines that the applicable approval criteria could be satisfied if the applicant satisfies the reasonable conditions of approval imposed in the decision.² Instead, the appellant argues that the applicant has a long history of not complying with home occupation conditions of approval and will likely not comply in the future as well. According to the appellant, it is not feasible for the applicant to comply with the conditions of approval.

The appellant details with testimony and pictures numerous alleged violations of the conditions of approval from the expiring home occupation decision. Those alleged violations include, among other things: excessive vehicles, excessive vehicle trips, excessive number of employees, excessive fumes, improper outdoor storage, improper parking in the right of way, exceeding permissible hours of operation, and exceeding noise requirements. The appellant also argues that the County always gives the applicant notice of when it is coming to do inspections, so the applicant has the opportunity to cure the violations for the inspection and then resume the improper activity after the inspection.

I do not think it is necessary to go over each and every one of the appellant's allegations. Suffice it to say that I am more than convinced by the appellant's persuasive testimony and documentary evidence that there have been numerous violations over the years.³ The question, however, is not whether there have been violations in the past, but whether it is feasible for the applicant to comply with the conditions of approval in the

² The appellant raised some procedural issues such as the fact that the letters in support of the application came from outside of the notice area and are largely from clients of the applicant. The notice area is merely a specific area that is required by state law and local ordinance to receive notice of the application. The notice area has no determination on who may participate in the land use process. While the fact that participants may be clients of the applicant may certainly be taken into consideration when determining the persuasiveness of their testimony, it does not preclude them from participating.

³ The appellant's testimony was seconded by a neighbor who lives across the street. As the appellant, who lives next door, and the neighbor who lives across the street are much closer to the property they are in a better position to know about the effects of the business.

Planning Director's decision in the future. While I sympathize with the appellant's situation, I just cannot say that it is not feasible for the applicant to comply with the conditions of approval. The applicant offers assurances that he will comply with the conditions of approval, explanations for why there may have been prior violations, and points out that the prior code enforcement cases were closed without any punitive actions taken. It is a relatively low bar to meet to demonstrate that reasonable conditions of approval can be complied with. The applicant has cleared that low bar.

While I find that the applicant has cleared the low bar of demonstrating that it is feasible to satisfy the conditions of approval, as discussed I tend to agree with the appellant that the applicant does not have a particularly good record of complying with required conditions. This is a land use application, however, rather than a code enforcement matter and absent very compelling evidence the applicant is generally given the opportunity to comply with conditions if it is possible to do so. To the appellant's credit, he appears to understand this situation. While I am not the code enforcement hearings officer and this is obviously dicta, the applicant certainly appears to have violated numerous conditions of approval in the past and is certainly on notice about the requirements for compliance with the current conditions of approval. For what it is worth, in any future potential code enforcement cases it would seem dubious at best for the applicant to plead ignorance of what is actually required of him under the home occupation permit conditions of approval or that he was not aware he was violating the conditions of approval.

With the conditions of approval in the planning director's decision, all of the 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 Z0287-20-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.

2. Compliance with Sections 315 and 822 must be met. Failure to comply will be cause for revocation of this permit.
3. The operators of the home occupation, Miguel Angel Quintanilla, shall reside in a dwelling unit on the property. This decision is not transferrable to other parties.
4. There shall be no more than five employees on the property at a given time to operate the business.
5. The applicant is limited to a maximum of 500 square feet to operate the business. All activities and storage associated with the home occupation use shall be conducted wholly within an existing accessory structure(s) not to exceed a total of 500 square feet.
6. A seven foot high wall shall separate the area proposed for the home occupation use from the remaining square footage of the existing accessory structure. A door to provide access from the domestic and home occupation use is allowed.
7. Noise levels are not to exceed 60 dBA between the hours of **8 AM to 6 PM or ambient noise levels whichever is the lessor, and not to exceed the ambient noise level as measured off the property line during all other hours.**
8. No glare from security or other lighting, fumes, vibrations, or electrical interference shall be caused by the home occupation
9. Outside storage associated with the home occupation is prohibited.
10. The home occupation shall not function to exceed more than 20 vehicle trips per day (10 round trips) on the subject site as a result of the home occupation use. A trip is defined in accordance to Subsection 822.02 as *“a vehicular movement either to or from the subject property by any vehicle used in the home occupation, any delivery vehicle associated with the home occupation, or any customer or client vehicle.”*
11. Home occupation associated parking shall be located on the on-site hard surfaced driveway or along the east property line.
12. **There shall be no home occupation vehicles repaired, parked or stored in the public right-of-ways.**
13. There **shall not be more than four vehicles** associated with the home occupation on the site at any given time.

13. No home occupation related vehicles located on the property at any given time shall be in excess of a gross weight of 11,000 lbs.
14. Access to the proposed home occupation will be from SE Briggs Street, a local road.
15. The home occupation shall not include the storage of hazardous materials in excess to quantities exempt from the current edition of the Oregon Structural Specialty Code on the site.
16. Signage on the property is subject to Subsection 1010.06(A) and of the Zoning Development Ordinance (ZDO) which **limits signs in the urban residential area to no more than one (1) sign no more than three (3) square feet per side and either inside the dwelling or flat against the dwelling.** If signage is used the applicant shall provide elevations, dimensions, and location of the allowed sign for submittal into case file Z0376-17-HO.
17. Prior to use of an accessory structures for the home occupation use the applicant shall obtain and have final the appropriate building permits, if any are required, that may include a “Change of Use” permit, to operate a commercial business within the allowed accessory space. A “Statement of Use” form shall also be submitted to the Building Codes Division for operating the commercial home occupation. All permits shall be in conformance with the State of Oregon Structural Specialty Code and/or One and Two Family Dwelling Code. If a building permit is not required a statement to this effect from the Building codes Division staff shall be submitted to planning staff for submittal in case file Z0287-20. The Clackamas County Building Codes Division can be reached at (503) 742-4240.
18. Approval is subject to the above stated conditions. Failure to comply with all of the conditions of approval shall be cause for revocation of this permit.

DATED this 4th day of November, 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).