

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the	)	Case No. CU 18-029
	)	
Application of:	)	Clerk's File No.
	)	
ARTEMIO & MARIA ROCIO MAGANA	)	Conditional Use

**ORDER**

**I. Nature of the Application**

This matter comes before the Marion County Hearings Officer on the application of Artemio and Maria Magana for a conditional use permit for a landscape contracting business in conjunction with farm use of the subject property, which is located in an exclusive farm use zone at 13581 Wilco Highway, NE, Woodburn, Marion County, Oregon (T5S, R1W, S27D, tax lot 100).

**II. Relevant Criteria**

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 17.119 and 17.136.

**III. Public Hearing**

A public hearing was held on this matter on May 8, 2018. The Planning Division file was made part of the record. The following persons appeared and provided testimony on the application:

1.	Brandon Reich	Planning Division
2.	Artemio Magana	Applicant
3.	Julian H. Batiste	Proponent

Objections were not raised to notice, jurisdiction, conflicts of interest, or to evidence or testimony presented at hearing.

The hearing was adjourned and the record closed.

**IV. Findings of Fact**

The hearings officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

1. The subject property is designated Primary Agriculture in the MCCP and is zoned for exclusive farm use (EFU). The property is

not within the area of any special management overlay zone. Pursuant to MCC 17.136.010, the purpose of the Primary Agriculture designation and EFU zoning is to provide areas for the continued practice of commercial agriculture; the EFU zone is also intended to allow other uses that are compatible with agricultural activities.

2. The subject property is located at 13581 Wilco Highway NE, Woodburn. The property consists of approximately 30 acres and contains a dwelling, garage, sheds, well and septic system. The Soil Survey of Marion County Oregon indicates 100% of the property is composed of high-value farm soils.
3. All surrounding properties are zoned EFU and in various types of farm use.
4. Applicant proposes to operate a landscaping contracting business in conjunction with a farm use -- to wit a nursery -- on the subject property. The business has been operating for a time without land use approval, and approval of the permit would remedy the land use violation.
5. The Marion County Planning Division (The Planning Division) requested comments on the proposal from various governmental agencies.

Marion County Public Works Land Development and Engineering Permits (MCPW LDEP) commented on engineering requirements:

- A. Wilco Highway is controlled by ODOT. Prior to site plan approval and issuance of building permits, evidence of obtaining ODOT concurrence is required.
- B. The subject property is within the unincorporated area of Marion County and will be assessed Transportation System Development Charges (SDCs) upon application for building permits, per Marion County Ordinance #00-1 OR.

Marion County Building Inspection commented that permits would be required for change of occupancy.

Marion County Building Inspection Onsite Wastewater Specialist commented that septic permits are required.

Marion County Assessor's Office responded, but did not comment.

Marion County Code Enforcement commented that there is a code enforcement case open on the property for operating a landscape business on the property without the proper permit and that



solid waste is present on site.

The Oregon Department of Transportation commented that the property abuts the Hillsboro-Silverton Hwy No. 140, State Route, OR-214. Currently, there are three approaches (driveways) to the property. See the attached drawing for the locations and the associated highway Mile Point (MP) for each of the three referenced approaches. Within the attached document, Approach No. 1 is to Colonel Patch Road, a private road that can be utilized by the applicant and an abutting property, Tax Lot 1100, directly to the south. If this is correct, ODOT recommends the county condition the applicant to provide evidence of proper easements.

ODOT recognizes approaches that were constructed prior to January 1, 2014 as having the presumption of written permission per Oregon Administrative Rule (OAR 734-051) when there is no access permit on record. ODOT's data indicates Approaches No. 1 and 3 were constructed prior to 2014, however ODOT has no evidence that Approach No. 2 was constructed prior to January 1, 2014. This approach is therefore unpermitted and does not have the presumption of written permission. As such, one of two actions must occur: 1. The approach will need to be removed; or 2. The property owner may submit an application for an approach to the highway. If said application is approved, the property owner will need to construct the approach to ODOT standards. If the application is denied, the property owner will need to remove the approach. ODOT would like to set up a preapplication meeting with the property owner to discuss the need and feasibility of a third approach to the property. The property owner should contact Robert Earl, Senior Permit Specialist, or myself, to set up that meeting. Robert can be reached at 503-986-2902.

Finally, upon review of the applicant's site plan and narrative it is unclear how the property will be accessed for vehicular traffic. The materials provided by the applicant do not specifically indicate the location of any existing or proposed approach(es). For this reason, based on the lack of information in the application materials, ODOT recommends the county condition the applicant to provide a more detailed site plan that identifies any approach to the site and which tax lot(s) the approaches are to serve. This site plan can be shared with ODOT staff at the recommended preapplication meeting.

Mr. Gerry Juster, of ODOT, can be reached at (503) 986-2732.

6. After a site visit, the Planning Division reports finding approximately 400 square feet of nursery stock in pots and

another 300 square feet of nursery stock planted in a greenhouse, and, based on the amount of existing nursery stock, concludes that the nursery is not a commercial nursery. In response to a question from the hearings officer, Mr. Reich explained that generally the Planning Division has considered about one acre of land dedicated to nursery to be a commercial nursery.

7. The Planning Division recommends the following conditions be applied if the hearings officer approves the application:

A. The applicant shall obtain approval for all required permits from the Marion County Building Inspection Division.

B. Prior to issuance of a building permit, the applicant shall sign and submit a Farm/Forest Declaratory Statement (enclosed) to the Planning Division. This statement shall be recorded by the applicant with the Marion County Clerk after it has been reviewed and signed by the Planning Director.

The applicant shall continuously operate the landscape contracting business in conjunction with the growing and marketing of nursery stock on the subject property and shall maintain current licenses to operate a nursery and landscape contracting business.

D. No yard debris or other decomposable materials shall be brought in from offsite and stored, disposed of, or used as fill.

E. Failure to continuously comply with the conditions of approval may result in this approval being revoked. Any revocation could be appealed to the county hearings officer for a public hearing.

F. The applicants should contact Mt. Angel Fire District to obtain a copy of the District's Recommended Building Access and Premise Identification regulations and the Marion County Fire Code Applications Guide. Fire District access standards may be more restrictive than County standards.

G. The applicant shall obtain from the Oregon Department of Transportation a permit for any driveway access off Wilco Highway or for work in the Wilco Highway right-of-way.

8. Other agencies contacted did not respond or object to the proposal.



9. At the hearing, on behalf of the Planning Division, Mr. Reich added to the planning file a copy of a report indicating that Marion County Code Enforcement had performed a site visit on the day of the hearing and noted that the solid waste violation had been resolved.
10. Julian H. Batiste testified that he is the business partner of Mr. Magana and "also a co-owner on the property... obviously my name doesn't appear there he is the head man."

#### **V. Additional Findings of Fact and Conclusions of Law**

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 OR 390 at 394-95 (1987):

"Preponderance of the evidence" means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted.)

Applicant must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If evidence for any criterion is equal or less, Applicant's burden is not met and the application shall be denied. If evidence for every criterion is in Applicant's favor, the burden is met and the application shall be approved.

2. Under MCC 17.119.100, the Planning Director has the power to forward conditional use applications to the hearings officer for initial decision. The Planning Director forwarded the application to the hearings officer for initial decision. **The hearings officer may hear and decide this matter.**
3. Under MCC 17.119.020, an application for a conditional use may only be filed by certain people, including the owner of the property that is the subject of the application. Artemio and Maria Rocio Magana own the subject property and can file the application. **MCC 17.119.020 is satisfied.**
4. Under MCC 17.119.025, conditional use applications must be signed by certain people, including all owners of the subject

property. Mr. Batiste testified that he is a co-owner of the property, but his name doesn't appear "there." The planning file contains copies of the statutory warranty deed by which Artemio and Maria Rocio Magana took ownership of the property as tenants by the entirety; and tax records in the file confirm that Artemio and Maria Rocio Magana are the record owners of the property. Property owners Artemio and Maria Rocio Magana signed the application. **MCC 17.119.025 is satisfied.**

5. Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in MCC title 17. Applicant applies for a conditional use permit to establish a landscaping contracting business in conjunction with the growing and marketing of nursery stock on the land that constitutes farm use of the subject property. MCC 17.136.050(D)(6) authorizes:

A landscape contracting business, as defined in ORS 671.520 or a business providing landscape architecture services, as described in ORS 671.318, if the business is pursued in conjunction with the growing and marketing of nursery stock on the land that constitutes farm use.

6. Under ORS 215.203 (2)(a), "farm use" includes "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops..." Essentially, the conclusion of the Planning Division that the subject property does not contain a commercial nursery suggests that the nursery does not constitute farm use, that is, the nursery is not a primary use of the land to obtain a profit in money.

Mr. Magana submitted active licenses to operate a landscape contract business, issued by the State of Oregon Landscape Contractors Board to US-A-CONSTRUCTION, LLC, and to operate a Nursery Stock Growers & Collectors of Native Plants business, issued by the Oregon Department of Agriculture to USA Nursery, LLC. Mr. Magana also provided business plans for the nursery and landscaping businesses. The subject property is approximately 30 acres of which approximately 25 to 28.5 acres is planted in clover and approximately 1.5 acres is dedicated to the dwelling, existing storage structures and the front and side yards. While the plan is ambitious enough to perceive a time at which the nursery as a farm use may extend into acreage now planted in clover, rather than immediately infringe on the existing area dedicated to clover, the plan for the nursery carves out a portion of the land now dedicated to side yard. Applicant represents:



The nursery stock that will be farmed to support the business will primarily be composed of shrubs (arborvitae and woodbox). Over 2,200 of shrubs are currently being grown on the property, in the greenhouse, and are about to be transferred into the ground. The 1.5-acre area east of the developed area on the property is being tilled and prepared for the planting of nursery stock.

Applicant also represents that the nursery business will not be a retail outlet and will not be operated in a manner that drives customer traffic to the subject property.

In response to questions, Applicant indicated that it would be acceptable if a condition of approval required Applicant to plant at least one acre of nursery stock to support the landscape contracting business.

Applicant presents a thoughtful business plan. Without a remedial aspect, the hearings officer might be less concerned with a business plan to grow the footprint of a nursery as a new farm use in coordination with the growth of a new landscape contracting business that proposed to use the farm crop in conjunction with meeting the needs of the landscape clients. That business plan would not suggest that the farm use is not a current employment of the land for the primary purpose of making a profit in money. However, in this instance, the landscape contracting business has been operated for a period of time without a permit and in violation of the land use laws. The nursery farm use cannot be a mere after-thought; it is a primary use of land in the EFU zone and the justification for the landscape contracting business as a subordinate land use. At the hearing Applicant expressed a willingness to conform his use of the property to the land use requirements of Marion County.

**Applicant should know:**

**For property in the EFU zone, farm use is the primary use. The landscaping contracting business is a subordinate use, allowed only because Applicant uses the land as a nursery to make a profit.**

Applicant described, in the application, a then on-going effort to till and prepare 1.5 acres for planting. **The hearings officer conditions approval of the application with a requirement that Applicant plant, and maintain, at least one acre of land in nursery stock for the use of the landscape contracting business.**

Applicant must submit evidence satisfactory to the Planning Division that the one acre is planted in nursery stock

(including nursery stock planted in a greenhouse) within two months after the date of approval of the application. If Applicant does not prove to the satisfaction of the Planning Division, the conditional use approval will be revoked on September 14, 2018.

**As conditioned, MCC 17.119.030 is satisfied.**

7. MCC 17.136.050 allows a landscape contracting business as a subordinate land use to the primary farm use, "subject to obtaining a conditional use permit and satisfying the criteria in MCC 17.136.060(A), and any additional criteria, requirements, and standards specified for the use."

Under MCC 17.136.060(A), the following criteria apply to all conditional uses in the EFU zone:

1. The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.
  2. Adequate fire protection and other rural services are or will be available when the use is established.
  3. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
  4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.
  5. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.
8. The landscape business is a subordinate use to the primary farm use of growing nursery stock on the subject property. The new nursery use will not decrease the amount of land on the property dedicated to other farm uses. Applicant proposes to operate the landscaping business near the center of northern boundary of the property at distances from neighboring farms of 400 feet or more. The agricultural operations on neighboring parcels will be



separated from the business operations by the agricultural operations on the property. Applicant will be required to present for recordation to the Marion County Clerk a Farm/Forest Declaratory Statement acknowledging that farm and forestry uses in the area could have an impact on the ability to operate the business. The hearings officer finds that the use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use.

The property is served by the Mt. Angel Fire District and law enforcement is provided by Marion County. A well and septic are available on the property. The hearings officer finds that adequate fire protection and other rural services are or will be available when the use is established.

The nursery stock buildings and outdoor nursery area are located near Wilco Highway. Because the property does not include identified wetlands, streams, wildlife habitat areas or geological hazards, the landscape business will have only little impact on the resources. The scale of the landscaping business should not have a significant effect on air quality. The hearings officer finds that the landscape business use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.

Applicant testifies that the business will generate approximately 20 vehicle trips per week, including commercial deliveries and employees arriving and leaving work. The record does not contain evidence that significant noise will be generated by the landscape business. The hearings officer finds that the landscape business will not generate noise that has a significant adverse impact on nearby land uses.

The area around the subject property is not identified as a potential water impoundment area in the Comprehensive Plan, and the area does not contain current or proposed significant mineral and aggregate sites. The hearings officer finds that the landscape business will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.

**MCC 17.136.060 (A) is satisfied.**

9. Under MCC 17.119.070, before granting a conditional use, the hearings officer shall determine:

(A) That the hearings officer has the power to grant the

conditional use;

- (B) That the conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;
- (C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.

The hearings officer has authority to grant the conditional use pursuant to MCC 17.119.030, 17.119.100 and 17.136.050(D)(6). A landscape contracting business in conjunction with the growing and marketing of nursery stock on the land that constitutes farm use is authorized by ORS 215.213 and 215.283 and by the acknowledged comprehensive plan and land use regulations adopted by Marion County. The hearings officer concludes that the landscape contracting business, as conditioned in this approval, is in harmony with the purpose and intent of the EFU zone; and the conditions imposed protect the public health, safety and welfare. **As conditioned, MCC 17.119.070 is satisfied.**

#### VI. Order

It is hereby found that applicant has met the burden of proving applicable standards and criteria for approval of a conditional use application to establish a landscape contracting business in conjunction with a nursery on the subject property in an EFU zone have been met. Therefore, subject to the following conditions, the conditional use application is **APPROVED**:

1. Applicant must obtain approval for all required permits from the Marion County Building Inspection Division.
2. Prior to issuance of a building permit, Applicant must sign and submit a Farm/Forest Declaratory Statement (enclosed) to the Planning Division. Applicant must present the statement to be recorded by the Marion County Clerk after it has been reviewed and signed by the Planning Director.
3. Applicant must maintain active licenses to operate the nursery and the landscape contracting business operated in conjunction with the nursery.
4. Applicant must operate the landscape contracting business in conjunction with the current employment of at least one acre of land for raising, harvesting and selling nursery stock to obtain a profit in money on the subject property. Applicant must prove



to the satisfaction of the Planning Department that the adequate acreage is planted in nursery stock (including nursery stock planted in a greenhouse) within two months after the date of approval of the application. If Applicant does prove to the satisfaction of the Planning Division, the conditional use approval will be revoked on September 14, 2018.

5. Applicant may not store, dispose or use as fill yard debris or other decomposable materials generated off-site by the landscape contracting business.
6. Applicant must comply with any more restrictive standards imposed by the Mt. Angel Fire District. Applicant is encouraged to contact Mt. Angel Fire District to obtain a copy of the District's Recommended Building Access and Premise Identification regulations and the Marion County Fire Code Applications Guide.
7. Applicant must obtain from the Oregon Department of Transportation a permit for any unauthorized driveway access to the subject property from Wilco Highway or for any work performed in the right-of-way of Wilco Highway. Applicant is encouraged to contact ODOT to ensure that driveway access is properly permitted.

A failure to comply continuously with a condition of approval may result in revocation of the conditional use permit. A revocation of the permit may be appealed to the Marion County Hearings Officer.

#### **VII. Other Permits**

Applicant is advised that the use of the property proposed in this application may require additional permits from other local, state or federal agencies. The Marion County land use review and approval process does not take the place of, or relieve the applicant of responsibility for, acquiring other permits, or satisfying any restrictions or conditions on the use. The land use permit approved herein does not remove, alter or impair in any way any covenants or restrictions imposed on the property by deed or other instrument.

#### **VIII. Effective Date**

The application approved herein becomes effective on the 14th day of July 2018, unless the Marion County Board of Commissioners, on their own motion or by appeal timely filed, is asked to review this order. In case of Board review, this order is stayed and is subject to final action taken by the Board.

#### IV. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 13<sup>th</sup> day of July 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 28<sup>th</sup> day of June 2018.



B Harrison Conley  
Marion County Hearings Officer



CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Artemio Magana  
13581 Wilco Hwy NE  
Woodburn, OR 97071

Bernhard Hitz  
12503 Elliott Prairie Rd NE  
Woodburn, OR 97071

Lud Hitz  
12784 Elliott Prairie Rd NE  
Woodburn, OR 97071

Roy Hitz  
13125 Hitz Ln  
Woodburn, OR 97071

Gerard Juster  
ODOT  
855 Airport Rd SE, Bldg. Y  
Salem, OR 97301

Agencies Notified

Planning Division (via email: [gfennimore@co.marion.or.us](mailto:gfennimore@co.marion.or.us))  
(via email: [breich@co.marion.or.us](mailto:breich@co.marion.or.us))

PW Engineering (via email: [jgrassmussen@co.marion.or.us](mailto:jgrassmussen@co.marion.or.us))

Code Enforcement (via email: [lpekarek@co.marion.or.us](mailto:lpekarek@co.marion.or.us))  
([bdickson@co.marion.or.us](mailto:bdickson@co.marion.or.us))

Building Inspection (via email: [deubanks@co.marion.or.us](mailto:deubanks@co.marion.or.us))

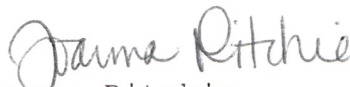
PW Onsite Wastewater (via email: [mpuntney@co.marion.or.us](mailto:mpuntney@co.marion.or.us))

PW Tax Office (via email: [adhillon@co.marion.or.us](mailto:adhillon@co.marion.or.us))

1000 Friends of Oregon (via email: [meriel@friends.org](mailto:meriel@friends.org))

AAC Member No. 6

by mailing to them copies thereof, except as specified above. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 28th day of June 2018, and that the postage thereon was prepaid.



Joanna Ritchie  
Secretary to Hearings Officer