



Type III Decision Appeal Form

LU Number: LU 19-192268 CU

FOR INTAKE, STAFF USE ONLY

Date/Time Received <u>12/19/19 @ 12:20pm</u>	<input checked="" type="checkbox"/> Action Attached <u>HO Decision, narrative</u>
Received By <u>Elizabeth Duncan</u>	Fee Amount <u>\$2,500.00</u>
Appeal Deadline Date <u>12/19/19 @ 4:30pm</u>	<input type="checkbox"/> [Y] <input checked="" type="checkbox"/> Fee Waived
<input type="checkbox"/> Entered in Appeal Log	Bill # <u>4626554</u>
<input type="checkbox"/> Notice to Auditor	<input type="checkbox"/> [Y] <input checked="" type="checkbox"/> Unincorporated MC
<input type="checkbox"/> Notice to Dev. Review	

APPELLANT: Complete all sections below. Please print legibly.

PROPOSAL SITE ADDRESS 611 SW KINGSTON AVE DEADLINE OF APPEAL 12/19/19

Name Portland Japanese Garden

Address 611 SW KINGSTON AVE City PORTLAND State/Zip Code OR 97205

Day Phone 503-542-0295 Email charuyama@japanese-garden.org Fax _____

Interest in proposal (applicant, neighbor, etc.) APPLICANT

Identify the specific approval criteria at the source of the appeal:

Zoning Code Section 33. 815 . 105.C Zoning Code Section 33. _____ . _____

Zoning Code Section 33. 815 . 105.A Zoning Code Section 33. _____ . _____

Describe how the proposal does or does not meet the specific approval criteria identified above or how the City erred procedurally:

- SEE ATTACHED -

Appellant's Signature Chi Hagaman on behalf of THE PORTLAND JAPANESE GARDEN

FILE THE APPEAL - Submit the following:

- This completed appeal form
- A copy of the Type III Decision being appealed
- An appeal fee as follows:
 - Appeal fee as stated in the Decision, payable to City of Portland
 - Fee waiver for ONI Recognized Organizations approved (see instructions under Appeals Fees A on back)
 - Fee waiver request letter for low income individual is signed and attached
 - Fee waiver request letter for Unincorporated Multnomah County recognized organizations is signed and attached

The City must receive the appeal by 4:30 pm on the deadline listed in the Decision in order for the appeal to be valid. To file the appeal, submit the completed appeal application and fee (or fee waiver request as applicable) at the Reception Desk on the 5th Floor of 1900 SW 4th Ave, Portland, Oregon, between 8:00 am and 4:30 pm Monday through Friday.

The Portland City Council will hold a hearing on this appeal. The land use review applicant, those who testified and everyone who received notice of the initial hearing will receive notice of the appeal hearing date.

Information about the appeal hearing procedure and fee waivers is on the back of this form.

Type III Appeal Hearing Procedure

A Type III Decision may be appealed only by the applicant, the owner, or those who have testified in writing or orally at the hearing, provided that the testimony was directed to a specific approval criterion, or procedural error made. It must be filed with the accompanying fee by the deadline listed in the decision. The appeal request must be submitted on the Type III Appeal Form provided by the City and it must include a statement indicating which of the applicable approval criteria the decision violated (33.730.030) or what procedural errors were made. If the decision was to deny the proposal, the appeal must use the same form and address how the proposal meets all the approval criteria. There is no local Type III Appeal for cases in unincorporated Multnomah County.

Appeal Hearings for Type III Decisions are scheduled by the City Auditor at least 21 days after the appeal is filed and the public notice of the appeal has been mailed.

Appellants should be prepared to make a presentation to the City Council at the hearing. In addition, all interested persons will be able to testify orally, or in writing. The City Council may choose to limit the length of the testimony. Prior to the appeal hearing, the City Council will receive the written case record, including the appeal statement. The City Council may adopt, modify, or overturn the decision of the review body based on the information presented at the hearing or in the case record.

Appeal Fees

In order for an appeal to be valid, it must be submitted prior to the appeal deadline as stated in the decision and it must be accompanied by the required appeal fee or an approved fee waiver. The fee to appeal a decision is one-half of the original Bureau of Development Services Land Use Services application fee. The fee amount is listed in the decision. The fee may be waived as follows:

Fee Waivers (33.750.050)

The director may waive required fees for Office of Neighborhood Involvement (ONI) Recognized Organizations and for low-income applicants when certain requirements are met. The decision of the director is final.

A. ONI Recognized Organizations Fee Waiver

Neighborhood or business organizations recognized by the City of Portland Office of Neighborhood Involvement (ONI) or Multnomah County are eligible to apply for an appeal fee waiver if they meet certain meeting and voting requirements.

These requirements are listed in the Type III Appeal Fee Waiver Request for Organizations form and instruction sheet available from the Bureau of Development Services Development Services Center, 1st floor, 1900 SW 4th, Portland, OR 97201. Recognized organizations must complete the Type III Appeal Fee Waiver Request for Organizations form and submit it prior to the appeal deadline to be considered for a fee waiver.

B. Low Income Fee Waiver

The appeal fee may be waived for an individual who is an applicant in a land use review for their personal residence, in which they have an ownership interest, and the individual is appealing the decision of their land use review application. In addition, the appeal fee may be waived for an individual residing in a dwelling unit, for at least 60 days, that is located within the required notification area. Low income individuals requesting a fee waiver will be required to certify their annual gross income and household size. The appeal fee will only be waived for households with a gross annual income of less than 50 percent of the area median income as established and adjusted for household size by the federal Department of Housing and Urban Development (HUD). All financial information submitted to request a fee waiver is confidential. Fee waiver requests must be approved prior to appeal deadline to be considered for a fee waiver.

**Appeal of Hearings Officer's Decision, File Number LU 19-192268 CU
(Hearings Office 4190024)**

The purpose of this submittal is to provide the basis for an appeal of the above-referenced decision (the "Decision"). Under PCC 33.730.030.I.1, an appeal must include "[a] statement of which sections of the Zoning Code or which approval criteria the decision violates." This submittal provides that information.

The Decision erred in finding that certain approval criteria can only be met if the use of the Kingston House as an office is temporary, in this case limited to four years. Specifically, the Decision held that PCC 33.815.105.C and Oregon Statewide Goal 10, Housing, can only be met for the office as a temporary use. It is not clear if the Decision found PCC 33.815.105.A to be met on the same basis. To the extent the Decision does so find, that determination, too, is in error. The Japanese Garden believes that the applicable approval criteria are met for the use on a permanent basis; however, the Garden has limited the use to only ten years as an accommodation to the neighborhood and asks Council to amend the Decision to allow the ten years requested. It is the Garden's goal to find suitable, permanent office space to replace the Kingston House within close proximity to the main Japanese Garden development, with Washington Park being the ideal location. This transition in office space, however, will take time, because the Garden is exploring opportunities with Portland Parks and Recreation.

The Decision determined that PCC 33.815.105.C could not be met if the office use is permanent, because the "residential area" in this case is "unique" and that "*any* additional or different noise, glare from lights, late-night operations, odors, litter, and/or privacy/safety impacts do adversely impact the livability of the 'residential area.'" Decision at 29. This finding misconstrues PCC 33.815.105.C and is not supported by any evidence in the record. First, PCC 33.815.105.C requires the office use to not have "*significant* adverse impacts" on the livability of the nearby residential area. The Decision does not find any significant adverse impacts. Instead it converts PCC 33.815.105.C to a standard that requires that the use not have "*any*" additional or different impacts from the enumerated impacts. The Decision does this by deeming the nearby residential area "unique." The Decision does not adequately explain why the nearby residential is unique, and, if it were unique, the Decision does not explain why or how that would convert the approval criterion from a prohibition on "significant adverse impacts" to one that prohibits "any additional or different" impacts.

Even if the criterion required the office use not to have "any additional or different" impacts, the criterion would still be met, because the Decision did not identify any noise, glare, late-night operations, odors, litter, privacy or safety issues caused by the office use. The opponents tried to make the case that the office use increased crime in the neighborhood, but the Decision does not find evidence of such a connection.¹ Decision at 24.

¹ Some of the opponent testimony related to alleged impacts from the Garden operations, not the office use of the Kingston House. This application is limited to the use of the Kingston House, and so any such impacts are not relevant to this proceeding. Even so, before the hearings officer the Japanese Garden responded to opponents' contentions about the Garden operations and demonstrated that the contentions either lacked merit or had already been addressed.

The Decision also determined that Goal 10 cannot be met unless the office use is limited in nature. For the reasons set forth in staff submittals and the Garden's final argument, the Garden respectfully disagrees.

The chief flaw in the Decision is that it appears to start from the premise that the office use cannot meet certain approval criteria unless the use is temporary, but then never really explains why that is so. This premise is inherent in the following troubling query from the hearings officer: "If Council finds that this approval criterion is technically satisfied, then the Hearings Officer asks, 'how and when can Council *ever* deny an Applicant request for an extension?'" Decision at 30. That query strikes at the very heart of the accepted standards for a land use decision. If a land use application meets the approval criteria, it must be approved. What the hearings officer appears to be asking Council is: "How do we deny this application if it meets the applicable approval criteria?" The answer is, "You can't and you don't."

Although there may have been some question in 2009 about how the office use might integrate with the neighborhood, there should be no question now. The Garden has demonstrated through this application that over the past ten years the office use has not only caused none of the PCC 33.815.105.C-enumerated significant adverse impacts on the surrounding neighborhood, the use has no significant adverse impacts of any kind. The preponderance of evidence in the record demonstrates that. **Therefore, the Garden respectfully requests that the Decision be modified to allow the office use for an additional ten years instead of four years.**