



APPEAL APPLICATION – BOARD OF COUNTY COMMISSIONERS

FEE: _____

EVERY NOTICE OF APPEAL SHALL INCLUDE:

1. A statement describing the specific reasons for the appeal.
2. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons the Board should review the lower decision.
3. If the Board of County Commissioners is the Hearings Body and *de novo* review is desired, a request for *de novo* review by the Board, stating the reasons the Board should provide the *de novo* review as provided in Section 22.32.027 of Title 22.
4. If color exhibits are submitted, black and white copies with captions or shading delineating the color areas shall also be provided.

It is the responsibility of the appellant to complete a Notice of Appeal as set forth in Chapter 22.32 of the County Code. The Notice of Appeal on the reverse side of this form must include the items listed above. Failure to complete all of the above may render an appeal invalid. Any additional comments should be included on the Notice of Appeal.

Staff cannot advise a potential appellant as to whether the appellant is eligible to file an appeal (DCC Section 22.32.010) or whether an appeal is valid. Appellants should seek their own legal advice concerning those issues.

Appellant's Name (print): John Herman Phone: (541) 588-5299

Mailing Address: PO Box 1524 City/State/Zip: Sisters, OR 97759

Email Address: john@lazyzranch.com

Land Use Application Being Appealed: 247-22-000757-A (247-22-000024-CU and -000025-SP)

Property Description: Township 15 Range 10 Section 10 Tax Lot 700

Appellant's Signature: [Signature] Date: 11/28/2022

By signing this application and paying the appeal deposit, the appellant understands and agrees that Deschutes County is collecting a deposit for hearing services, including "whether to hear" proceedings. The appellant will be responsible for the actual costs of these services. The amount of any refund or additional payment will depend upon the actual costs incurred by the county in reviewing the appeal.

Except as provided in section 22.32.024, appellant shall provide a complete transcript of any hearing appealed, from recordings provided by the Planning Division upon request (there is a \$5.00 fee for each recording copy). Appellant shall submit the transcript to the planning division no later than the close of

NOTICE OF APPEAL – HERMAN MEADERY

John Herman asks that the Board of Commissioners agree to hear an appeal of a decision by Hearings Officer Tommy Brooks, that declined for technical reasons to affirm County staff's approval of a winery on the Lazy Z Ranch, a farm property that is devoted to farm uses, including raising honeybees that produce honey used in making wine (mead). Mr. Herman asks that the Board limit its review to the issues identified in this Notice of Appeal and that it conduct a "de novo" review of these issues and waive the transcript requirement of DCC 22.32.024.

The primary reasons why the Board should hear the appeal is to correct an erroneous finding in the Hearings Officer's decision that shows that the hearings officer did not fully understand the applicant's proposal, and to allow the applicant to provide additional evidence that will demonstrate that the winery will not violate the "farm impacts" test. It should also hear this appeal to allow the applicant to provide additional information to show that his use of his property is a farm use supporting not only his, but also other farm uses in Deschutes County, including apiaries operated by Sisters-area and Central Oregon beekeepers and farmers who will also benefit from this Deschutes County ranch meadery.

County staff approved the meadery, after a rigorous and lengthy review, as a commercial activity in conjunction with farm use as allowed by State law and the County code. The meadery is a winery that will make honey wine. State law allows wineries as uses permitted outright in EFU zones but requires that 15 acres of grape vines be planted to qualify. State law, however, allows wineries that do not meet these requirements to be approved as commercial activities in conjunction with farm use and this is the route followed by Mr. Herman. Mr. Herman and his family have improved their property with 30 acres of regenerative bee pastures, berries, flowers, and pumpkins; with plans to plant fruit trees. They have established an apiary and are selling honey and storing it for use in making honey wine. The regenerative bee pastures are also, at targeted times of the year, used to graze livestock. The Hermans also generate farm income by boarding horses and growing pumpkins. Their gross farm income in 2022 thus far is \$31,083. The market value of the honey they produced and are saving to make mead is \$10,200 to \$12,000 for a total farm market income for eleven months of the year of \$41,283 to \$43,083. This compares favorably to the 2017 average market value of farm products sold by Deschutes County farms of \$19,386 per year.¹ The Herman farm is also larger than over 85% of other Deschutes County farm properties.² This increases the odds their farm will be profitable and makes it reasonable for them to expect to make a profit in money from farm use.

The hearings officer denied approval of the meadery for two reasons we list below. Mr. Herman asks that the Board limit review of this appeal to these two issues as described below, and the

¹ Information obtained from the 2017 US Census of Agriculture.

² According to the 2017 US Census of Agriculture 85% of Deschutes County farm are smaller than 50 acres in size.

issue whether the Herman property is in farm use, and accept new evidence on these three issues.

Appeal Issue One – Incidental and Subordinate Test

The hearings officer made the following finding when addressing the requirement that the commercial activity be incidental and subordinate to farm use that is not correct:

“[N]othing would prevent the Applicant from holding events and selling food from food carts in a manner the [sic] produces significantly more income than the farm use.”

In fact, the Herman application limits income from these incidental sales and events to 25% of the gross income of on-site retail sale of wine to assure that events and incidental sales are and remain incidental to farm use. This is the limit imposed by State law on wineries that are approved as commercial activities in conjunction with farm use by ORS 215.456, rather than as a winery allowed outright by ORS 215.452 and 215.453. This strict 25% limitation clearly prevents the Herman family from obtaining significantly more income from events and food cart sales than from the farm use/winery. The Hermans also ask that this 25% requirement replace the 25% requirement of Condition C which the hearings officer found would not achieve compliance with the incidental and subordinate test. The staff decision applied Condition C based on the requirements for a crop processing facility set out in DCC 18.16.025 but the use proposed is not a crop processing facility. In a prior decision for a distillery approved as a conditional use in conjunction with farm use in the EFU and MUA-10 zones, the County’s decision removed a similar 25% of crops grown on site requirement from the initial approval concluding that “nothing in State law requires imposition of a proportionality limitation for the distillation and processing activities.” MC-13-7 (Bendistillery), page 7. The Board should do the same here.

The hearings officer also failed to understand the nature of evidence regarding employees. He believed that the applicant plans to hire four employees for the meadery and only one to assist with farm operations. The information regarding meadery employees was provided as a worst-case estimate to County staff so it could determine the amount of parking required. There will, in fact, be zero employees working at the meadery other than the owners when it opens its doors to the public, and only one person staffing the food cart when it is in operation. The estimate of four employees is sufficient to provide parking for temporary employees needed to assist with events. Events will only be held infrequently (significantly less than the maximum allowed by the staff decision) given the fact that income from events may not exceed 25% of on-site wine sales. Additionally, the two adult members of the Herman family provide farm labor. This is one reason only one employee is expected to be needed for farm work. Also, the Hermans have hired contractors as needed, rather than employees, to help with the regenerative bee pastures and other farm activities. The Hermans graze cattle as a crop share with an area ranch family. This ranching family invests their time in conducting this farm use on the Herman property, but they are not employees.

Appeal Issue Two – Farm Impacts Test

Mr. Herman seeks Board review to allow him to provide even more specific information to the Board to support County staff's finding that the meadery complies with the "farm impacts" test. Mr. Herman identified farm activities within one mile of his farm/meadery and explained, in detail, why his honey winery would not negatively impact those activities at a level that satisfied County staff that the "farm impacts" test had been met. Mr. Herman provided a map illustrating the significant separation and buffering between the meadery and farm uses on other area properties. These facts made it clear that the meadery will not interfere with farming area properties, but the hearings officer determined that more specific information should be provided regarding the farm practices of area farms to prove what is obvious – that there will be no negative impact on area farm practices from operation of the winery. As a result, Mr. Herman asks for the opportunity to provide new evidence regarding specific farm practices so that the Board can confirm that approval of the meadery will meet the farm impacts test.

A recent Oregon Supreme case holds that this more detailed review is required where parties dispute whether a nonfarm use will force a significant change to farm practices. No such challenge was presented in this case. Not a single neighbor has opposed the application, despite three separate notifications mailed, to date. The only challenge to farm impacts test findings was a general claim by Central Oregon LandWatch that the analysis provided by Mr. Herman was not sufficiently detailed. Nonetheless, Mr. Herman seeks an opportunity to provide further evidence to confirm that his meadery will meet the farm impacts test.

Appeal Issue Three – Farm Use

The hearings officer determined that the Herman property is engaged in a "farm use" as the term is applied by LUBA in the recent case of *Friends of Marion County*. The Herman family is also engaged in farm activities intending to make a profit in money. They ask that the Board make a finding to that effect. To that end, they would like the opportunity to provide additional evidence regarding their farming activities and income thus far. The Hermans are making significant investments of time and money on behalf of their farm use on the property. Income from farm activities is being reinvested in the farm with the intention of obtaining a return on their investment, meeting the more rigorous "farm use" test LandWatch says should be applied.

We address, below, the County's requirements for appeals and request approval of a waiver of the transcript requirement of DCC 22.32.024.

DCC 22.32.010

Mr. Herman is a party in the matter appealed. He is the applicant seeking approval of the meadery.

DCC 22.32.015

Mr. Herman is filing a completed notice of appeal on a form prescribed by the Planning Division and with the applicable appeal fee prior to the expiration of the appeal period.

DCC 22.32.020

This document contains a statement raising any issue relied upon for appeal with sufficient specificity to afford the Board an adequate opportunity to respond and resolve each issue. The document also states reasons why the Board should review the hearings officer's decision. The applicant is requesting that the appeal be heard *de novo* but limited to a review of the issues stated in this appeal. The Board should allow a *de novo* review to allow the parties and the Board an opportunity to provide additional information to enable the Board to make robust findings of compliance with the farm impacts, incidental and subordinate and "farm use" tests if it affirms the Planning Division's administrative decision approving the meadery.

DCC 22.32.024

DCC 22.32.024 (D) allows the Board the right to waive the transcript requirement of DCC 22.32.024. Given the facts that: (a) the applicant is seeking *de novo* review; and (b) the hearing was video-recorded and available for view by any party, the public and Board; and (c) transcribing the hearing will increase the financial hardship imposed on the applicant to pursue a review of his application; and (d) it is believed that that Board routinely waives the transcript requirement for *de novo* appeals.

DCC 22.32.027

DCC 22.32.027(B)(4) says that the Board may "limit the issues on appeal to those listed in an appellant's notice of appeal." The applicant requests that the Board so limit appeal issues in this case.