

**DECISION AND FINDINGS OF
THE DESCHUTES COUNTY HEARINGS OFFICER**

FILE NUMBERS: 247-22-000464-CU and 247-22-466-SP

HEARING DATES: October 10, 2023, and October 24, 2023

HEARING LOCATION: Videoconference and
Barnes & Sawyer Rooms
Deschutes Services Center
1300 NW Wall Street
Bend, OR 97708

APPLICANT/OWNER: Applicant: Lava Terrace Cellars, LLC
Owners: Duane Barker and Dina Fay Barker

SUBJECT PROPERTY: Map and Tax Lot: 171209B001000
Account: 113221
Situs Addresses: 20520 Bowery Lane
Bend, OR 97703

REQUEST: The Applicant requests a Conditional Use Permit and Site Plan Review to establish a winery as a Commercial Activity in Conjunction with Farm Use in the Multiple Use Agricultural Zone (MUA-10).

HEARINGS OFFICER: Tommy A. Brooks

SUMMARY OF DECISION: This Decision APPROVES the Application WITH CONDITIONS.

I. STANDARDS AND CRITERIA

Deschutes County Code (DCC)

Title 15, Deschutes County Buildings & Construction Ordinance

Chapter 15.08, Signs

Title 18, Deschutes County Zoning Ordinance:

Chapter 18.04, Title, Purpose, and Definitions

Chapter 18.32, Multiple Use Agricultural Zone (MUA-10)

Chapter 18.116, Supplementary Provisions

Chapter 18.124, Site Plan Review

Chapter 18.128, Conditional Use

Title 22, Deschutes County Development Procedures Ordinance

Chapter 22.20, Review of Land use Action Applications

II. BACKGROUND AND PROCEDURAL FINDINGS

A. Request and Nature of Proceeding

This matter comes before the Hearings Officer as a request by the Applicant to approve wine production (“Winery”), wine tasting activities, and wine marketing events as “commercial activities in conjunction with farm use” in the Multiple Use Agricultural Zone (“MUA-10 Zone”). The Application seeks two land use approvals – a Conditional Use Permit and a Site Plan Review.

As described by the Applicant, the proposed use would convert an existing accessory building to a tasting room and office space, and wine production would occur in an existing barn on the Subject Property. The Applicant does not propose any new structures. If approved, the Winery would produce up to two thousand (2,000) cases of wine on an annual basis. The Applicant proposes to limit tastings and wine-related events to specific hours, depending on the season. Based on the hours and size of the facilities, the Applicant anticipates an average of six to eight (6-8) people per tasting appointment. The Applicant’s proposal expressly excludes the use of the proposed winery or Subject Property by third parties, such as weddings or other events.

The County reviews conditional uses in accordance with the standards and procedures set forth in Deschutes County Code (“DCC” or “Code”) Chapter 18.128 and Title 22. The proposed use must also satisfy the standards of the underlying MUA-10 Zone – set forth in DCC Chapter 18.32 – which in turn requires compliance with the applicable provisions of DCC Chapter 18.116, Supplementary Provisions, and Chapter 18.124, Site Plan Review.

B. Application, Notices, Hearing

The Applicant submitted the Application on June 7, 2022. On July 7, 2022, Staff of the County’s Community Development Department (“Staff”) provided notice to the Applicant that it did not deem the Application to be complete (“Incomplete Notice”). On December 2, 2022, the Applicant requested that the Application be deemed complete, and that the review process be tolled.

On September 14, 2023, Staff mailed a Notice of Public Hearing (“Hearing Notice”). The Hearing Notice stated the Hearing would be held on October 10, 2023. On September 15, 2023, the Applicant made an additional request to toll the deadline for a final County decision under ORS 215.427 – the “150-day clock” – and waived the deadline altogether.

Pursuant to the Hearing Notice, I presided over the Hearing as the Hearings Officer on October 10, 2023, opening the Hearing at 6:03 p.m. At the request of the Applicant prior to the Hearing, and pursuant to DCC 22.24.140(A)(1), I continued the Hearing to October 24, 2023. Prior to doing so, I gave other participants the option to provide testimony, but no participant did.

The continued Hearing began on October 24, 2023, at 6:01 p.m. The Hearing was held in person and via videoconference, with the Hearings Officer appearing remotely. At the beginning of the Hearing, I provided an overview of the quasi-judicial process and instructed participants to direct comments to the approval criteria and standards, and to raise any issues a participant wanted to preserve for appeal if

necessary. I stated I had no *ex parte* contacts to disclose or bias to declare. I invited but received no objections to the County's jurisdiction over the matter or to my participation as the Hearings Officer.

The Hearing concluded at 7:40 p.m. Prior to the conclusion of the Hearing, I announced that the written record would remain open as follows: (1) any participant could submit additional materials until October 31, 2023 ("Open Record Period"); (2) any participant could submit rebuttal materials (evidence or argument) until November 7, 2023 ("Rebuttal Period"); and (3) the Applicant could submit a final legal argument, but no additional evidence, until November 14, 2023, at which time the record would close. Staff provided further instruction to participants, noting that all post-Hearing submittals needed to be received by the County by 4:00 p.m. on the applicable due date. No participant objected to the post-Hearing procedures.

C. Review Period

As noted above, the Applicant has waived the 150-day clock. The 150-day clock serves as a protection for an applicant and ensures that a local jurisdiction acts on a land use decision in a timely manner. The only remedy for the violation of the 150-day clock belongs to an applicant. Specifically, if the local jurisdiction does not make a final decision within the applicable time frame, the applicant can seek a *writ of mandamus* in the Circuit Court pursuant to ORS 215.429(1). Under ORS 215.429(2), the local government retains jurisdiction of the application until a writ of mandamus is filed. Because the Applicant has waived the 150-day clock entirely, the County retains jurisdiction over the Application and no review period applies.

D. Record Issues

As noted above, the written record remained open after the Hearing for a limited purpose. According to the schedule established at the end of the Hearing, the Rebuttal Period concluded on November 7, 2023, and all rebuttal materials were required to be submitted to the County by 4:00 p.m. that day. After that time period, only the Applicant was authorized to submit anything else to the record – a final legal argument – and no new evidence was to be accepted from any participant, including the Applicant.

On November 16 and November 17, 2023, after the record was closed to all participants, including the Applicant, participant Michel Bayard submitted two emails to the County. The email dated November 16, 2023, appears to be a request to Staff seeking a status update regarding this proceeding and not expressly intended to be included in the record. Based on the timing and apparent intent of that document, I find it should be excluded from the record. The email dated November 17, 2023, appears to address the substance of the Application. Because that email was submitted after the close of the record, I find that it should also be excluded from the record.

Between November 8 and November 21, 2023, participant Toby Bayard submitted thirty-two (32) emails, all of which appear to address the substance of the Application. Because those submittals all occurred after the Rebuttal Period when the record closed to any new evidence, I find that each of those submittals should be excluded from the record.

The findings below are based only on the evidence and testimony that are part of the record. I have not reviewed in detail the records that are excluded, and I have given no consideration to those records.

III. SUBSTANTIVE FINDINGS AND CONCLUSIONS

A. Staff Report

On October 4, 2023, Staff issued a report setting forth the applicable criteria and presenting evidence in the record at that time (“Staff Report”).

The Staff Report does not make a final recommendation. Instead, the Staff Report notes that Staff believed additional information was necessary to determine if the Application satisfied all approval criteria. The Staff Report also recommends the imposition of several conditions of approval if the Application is approved.

Because much of the information and analysis provided in the Staff Report is not refuted, portions of the findings below refer to the Staff Report and, in some cases, adopt sections of the Staff Report as my findings. In the event of a conflict between the findings in this Decision and the Staff Report, the findings in this Decision control.

B. DCC Chapter 22.08, General Provisions

DCC Title 22 contains the County’s procedural requirements for the application and review of development and land use approvals. Comments in the record addressing the Title 22 provisions are discussed below.

1. DCC 22.08.010 Application Requirements

This Code provision states in part that an application for development or land use action must be submitted by the property owner or a person who has written permission from the property owner. The Application form identified the Applicant as “Lava Cellars Terrace (c/o Duane and Dina Barker). In their pre-Hearing submittal, the Applicant’s attorney confirmed that the Application form was signed by Dina and Duane Barker.¹ It is undisputed that the Barkers are the owner of the Subject Property. Testimony indicated that the Barkers also own Lava Terrace Cellars, LLC. The Staff Report confirms that the Barkers are also listed as the managing members of Lave Terrace Cellars, LLC.

Based on the foregoing, I find that the Barkers, owners of the Subject Property, caused the Application to be submitted and, by the signature on the Application form, consented to the Application. I therefore find that this Code provision is satisfied.

¹ I note that the Application form appears to have only one signature. However, based on the representation from the Applicant’s attorney that the signature represented the signature of the Barkers, which no participant disputed, I find that the Barkers signed the Application form. The remainder of this decision will also use “Applicant” to refer to Lava Terrace Cellars, LLC, and the Barkers, collectively.

2. DCC 22.20.015, Code Enforcement and Land Use

DCC 22.20.015 prohibits the County from approving new land use development applications and land use decisions if a property is in violation of an applicable land use regulation or condition of approval. As the Staff Report notes however, the County's Board of Commissioners has interpreted this Code provision such that it applies only where there has been an "adjudicated" violation, or where it is otherwise necessary to resolve a potential violation as part of the review of a land use application and such review is the best forum for adjudicating an alleged violation.

Some comments in the record indicate that the Applicant already operates a winery on the Subject Property, presumably without authorization since no conditional use permit has been issued for that purpose. The Staff Report notes the existence of a County compliance case, the record for which Staff says indicates "the unpermitted winery is confirmed as a code violation." The Staff Report also notes, however, that approval of the Application would bring the winery into conformance with the Code. Staff therefore suggests a condition of approval, which would include a requirement to obtain all other approvals and documenting closure of the enforcement matter.

Although the information Staff provides leads to the conclusion that the "winery is confirmed as a code violation," it is not clear from the record if the alleged violation has been "adjudicated". For example, considering the fact that the County compliance case is apparently still open, it is not clear what process remains before the County can conclude that code enforcement process. Even so, I find that it is not necessary to address the alleged violation as part of this proceeding. If the Application is approved with the condition Staff recommends, the winery would not be allowed to operate until the Code compliance matter is closed. If the Application is denied, then the County would not be approving a land use decision. Either way, this Code provision is satisfied. Because this Decision approves the Application, Staff's proposed condition, which the Applicant does not oppose, is included below with other conditions of approval.

3. DCC 22.24.030, Notice of Hearing or Administrative Action

Section (A) of this Code provision requires the County to provide notice of a land use application twenty (20) days prior to a hearing. As applicable to this proceeding, that notice must be sent to property owners within two hundred fifty (250) feet of the Subject Property.

Testimony in the record implies that the notice was not sufficient. However, that testimony seems to be aimed at whether a homeowners association received notice, without specifying whether the association is a property owner entitled to receive notice. That testimony also implies that the lack of notice relates to the operation of the existing winery, and it is not evident that any participant asserts that the notice of the Application itself is insufficient for purpose of this review.

The Staff Report confirms that the appropriate notice was mailed to all property owners within two hundred fifty (250) feet of the Subject Property. Based on that confirmation, and the lack of more specific evidence indicating the notice was not sufficient, I find that this Code provision is satisfied.

Section (B) of this Code provision requires a notice of the land use action to be posted on the Subject Property for at least ten (10) continuous days prior to the date set for receipt of comments. Testimony in the record asserts that the posting was not sufficient because notice was posted on the Subject Property beginning on June 21, 2022, and that the deadline for comments was June 25, 2022. The latter date is apparently derived from the Application Notice, which asks for comments by that date. With respect to this proceeding, the “due date” for any comments would have been, at the earliest, the date of the Hearing, which did not take place until more than a year after the Application Notice. Based on the foregoing, I find that it was not an error for the Applicant to post the Subject Property beginning on June 21, 2022.

C. DCC Chapter 18.32, Multiple Use Agricultural Zone (MUA-10)

The Subject Property is in the MUA-10 Zone. The following findings address the applicable provisions of that zone.

1. DCC 18.32.030, Conditional Use Permitted

The following uses may be allowed subject to DCC 18.128:

- C. Commercial activities in conjunction with farm use. The commercial activity shall be associated with a farm use occurring on the parcel where the commercial use is proposed. The commercial activity may use, process, sort or market farm products produced in Deschutes County or an adjoining County.*

The Applicant seeks to establish a winery as a commercial activity in conjunction with farm use, which is allowed as a conditional use. As summarized in the Staff Report, prior decisions by the County’s Board of Commissioners (“Board”) interpret this Code provision as requiring the Applicant to demonstrate the following: (1) there is a farm use occurring on the parcel; (2) the proposed use is a commercial activity; (3) the proposed commercial activity is associated with the farm use; and (4) the farm products used in the commercial use are produced in Deschutes County or an adjoining County.

There is no dispute in the record that the Subject Property contains an existing vineyard and that a vineyard is a farm use. DCC 18.04 defines a “farm use” in part as the employment of land “by raising, harvesting, and selling crops.” The fact that the Applicants raise and harvest grapes – a crop grown on vines – demonstrates that there is a farm use currently on the Subject Property.

According to the Applicant, the commercial activities it proposes are the processing of grapes into wine, together with supporting commercial activities like wine sales and tastings. The Staff Report notes that processing grapes into wine is an industrial use. While that appears to be the case based on the definitions of “commercial use” and “industrial use” in the Code, DCC 18.128 does not use the phrase “commercial use” and instead refers to a “commercial activity”. The Code language then goes on to state that the commercial activity “may use, process, sort or market farm products...”. Because the proposed use here will process a farm product, I find that the proposed use is a “commercial activity” for purposes of this Code provision.

For the same reason set forth in the above findings, I find that the proposed commercial activity is associated with a farm use. That is, the proposed commercial activity processes grapes into wine, the grapes are a crop from the vineyard farm use, and, therefore, the processing of wine (and wine tastings) are associated with that farm use.

According to the Applicant, the grapes it will process at the Winery will primarily be from the Subject Property. The Applicant indicates that other grapes may be used in the process, but that those grapes will come from Deschutes County. There is no evidence in the record that the Applicant intends to process grapes from outside Deschutes County. To ensure that such an outcome remains, I find that it is appropriate to impose a condition of approval that prohibits the Applicant from processing grapes if the grapes are not from Deschutes County or an adjacent county.

The opposing comments in the record do not dispute that the vineyard is a farm use, that the winery is a commercial use, that the winery is associated with the vineyard farm use, or that the Applicant will use local grapes. Instead, multiple comments suggest that a winery is not an allowable use at all in the MUA-10 Zone. Those comments assert that the only zone that allows a winery is the Exclusive Farm Use (“EFU”) Zone. While it appears to be true that the EFU Zone is the only zone in the Code that addresses wineries specifically, the opposing comments do not explain how this operates as a prohibition on wineries in other zones when there is a separate basis in the Code for that use.

DCC Chapter 18.16 implements state-level requirements in the EFU Zone, and the reference to wineries in that Code Chapter expressly refers to wineries allowed by ORS 215.452. That statute allows the development of some wineries in the EFU Zone, based on certain sizes, but it does not prohibit all wineries that do not satisfy those statutory provisions. Wineries that do not qualify under ORS 215.452 may nevertheless be permitted as “commercial activities in conjunction with agriculture” under ORS 215.283(2)(a) and the corresponding Code provision in DCC 18.16.030(E).² Because there is no language in the Code that prohibits wineries in the MUA-10 Zone, and because the proposed winery meets the criteria for a commercial activity in conjunction with a farm use, I find that the Applicant’s proposal is not prohibited as a matter of law and that it can be approved if it satisfies all approval criteria related to that use.

Based on the foregoing, I find that Application satisfies DCC 18.32.030(C).

2. DCC 18.32.040, Dimensional Standards

The Applicant asserts that the proposed development satisfies the dimensional standards set forth in this Code provision. No participant disputes that assertion. I adopt the finding in the Staff Report relating to DCC 18.32.040 as my finding and will include the conditions of approval Staff recommends in that finding.

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² See *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012) (explaining alternative methods of permitting wineries).

3. DCC 18.32.050, Yards

Only the Applicant and Staff address the criteria contained in this Code provision. The Applicant initially asserted that the proposed development satisfies the standards set forth in this Code provision. No participant disputes that assertion, but the Staff Report indicated it was unclear if the barn, which will be the production and storage facility, meets the twenty (20) foot front yard setback requirement. According to Staff, aerial imagery shows that the building may be only seventeen (17) feet from the south property line, which abuts a local street right of way. The Applicant does not appear to address this lack of clarity in later submittals. I therefore find that this Code provision is satisfied only with a condition of approval, and the Applicant must document the precise location of the front yard setback prior to the initiation of the use. That condition is included below.

D. Chapter 18.116, Supplementary Provisions

DCC Chapter 18.116 contains supplementary provisions applicable to multiple zones. The specific Code provisions identified in this section were identified by the Applicant or Staff as being applicable to the proposal. Other participants were offered an opportunity to identify applicable Code provisions, but none did.

1. DCC 18.116.020, Clear Vision Areas.

DCC 18.116.020 requires the maintenance of clear vision areas. The Application initially stated that “adequate site distance is available,” but as noted in the Staff Report, no details were offered to support that statement or otherwise to address the clear vision area criteria. In subsequent submittals, the Applicant provided site plans and other information addressing this Code provision, noting that the clear vision area from the planned access drive is one hundred fifty (150) feet, much farther than any clear vision area required in the Code. At the same time, the actual clear vision area itself does not appear to be delineated on the updated site plan. Although no participant disputes the Applicant’s updated site plan and characterization of the clear vision area, I find it appropriate to impose a condition of approval to better document this area. The Applicant’s final submittal agrees with such a condition, and that condition appears below. Based on the foregoing, I find that this Code provision is satisfied.

2. DCC 18.116.030, Off street Parking and Loading.

DCC 18.116.030 imposes various off-street parking and loading requirements. There is no dispute that the proposal in the Application complies with a majority of those requirements. I adopt the findings in the Staff Report as my findings relating to DCC 18.116.030, except for the specific subsections of this Code provision discussed in this section. The remainder of the findings in this section replace the relevant findings in the Staff Report addressing each subsection.

DCC 18.116.030(C) and (D) require off-street parking for all uses. The Staff Report calculates that a minimum of nine off-street parking spaces must be provided for the wine production and tasting room activities contemplated in the Application. That calculation, however, did not include any allocation of parking spaces for “wine events”, which the Applicant plans to host as part of its commercial activities. In its subsequent submittals, the Applicant provided information indicating that a wine event would

include up to twenty-five (25) people, requiring up to twelve (12) parking spaces. It is not clear from the record if parking for wine events is required in addition to tasting room activities, or if the wine event would be held in lieu of tasting room activities. I must therefore assume the former, more intensive use, meaning the proposed use requires twenty-one (21) parking spaces – three (3) for employees, six (6) for tasting room activities, and twelve (12) for wine events.

The Applicant's site plan shows thirteen (13) parking spaces, and the Applicant asserts that it can use other areas on the Subject Property for temporary parking during wine events, such as in the area of the decommissioned drive, along the secondary access drive, and in a pasture. No participant disputes that these areas are adequate for eight (8) additional parking spaces. At the same time, by showing only the general location of these parking areas on the site plan, it is unclear how the Applicant will ensure these areas remain available for parking. I therefore find it appropriate to impose a condition of approval that requires the Applicant to identify the specific location of the eight (8) additional spaces. That condition appears below.

DCC 18.116.030(F)(1) requires off-street parking adjacent to a residential use to be screened either by a fence or a landscaped buffer. The Application states that parking is screened from residential uses due to distance (a buffer area) that is landscaped (with vines from the vineyard). The Applicant provided photographs of the Subject Property and additional detail about the location of adjacent residential uses. Based on the distance from the residential use, as well as the topography and existing vegetation that is depicted in the photographs, I find that the proposal satisfies the screening requirement of this Code provision.

DCC 18.116.030(F)(4) requires areas for standing and maneuvering of vehicles to be paved unless the Applicant can meet the standards of certain exceptions spelled out in this Code provision. The Applicant asserts that it qualifies for an exception under DCC 18.116.030(F)(4)(b) because it will maintain these areas in a manner that will not create dust problems. This exception is available for the Subject Property because it is outside of an unincorporated community. The manner in which the Applicant proposes to maintain these areas is to gravel, grade, and water the parking area to prevent dust. No participant disputes that such maintenance complies with DCC 18.116.030(F)(4)(b). Based on the evidence in the record, and the above finding that will require the Applicant to identify all parking areas on the site plan, I find that this Code provision is satisfied, with the imposition of Staff's proposed condition (which the Applicant states it agrees with) that will ensure the surfaces are graveled at all times.

DCC 18.116.030(F)(5) requires access aisles to be of sufficient width. According to the Staff Report and information provided by the Applicant, the required access aisles need to be twenty-four (24) feet for two-way traffic and 12-feet for one-way traffic. The Applicant asserts that its updated site plan shows that the new driveway will be sixteen (16) feet wide, and the secondary access will be twelve (12) feet wide. According to those calculations, each access would therefore be wide enough to provide only one-way travel. The Applicant also notes that additional space is available to widen the new driveway, and that the access permit process will ensure that the access aisle requirement for the driveways is met. Based on the Applicant's submittal, I find that this Code provision can be met only through a condition of approval requiring the Applicant to submit a site plan that depicts the actual width of each access aisle, with twenty-four (24) foot aisles for two-way traffic and twelve (12) foot aisles for one-way traffic.

DCC 18.116.030(F)(6) and (7) require service drives to be of adequate width and to have clear vision areas as set forth in those Code provisions. The Staff Report states, and no participant disputes, that a service drive is adequate if it is twenty-four (24) feet wide. The Applicant states that it can meet this requirement, but the Applicant's submittals appear to address access drives and not service drives, and the Applicant has not provided a site plan that clearly depicts the service drives, their widths, or their associated clear vision areas. I find that this Code provision can be met only through conditions of approval requiring the Applicant to submit a site plan that depicts the service drives and demonstrates that the width of those service drives is twenty-four (24) feet with the appropriate clear vision areas.

DCC 18.116.030(G) imposes certain requirements relating to the size of parking stalls. The Applicant's site plans do not appear to describe the actual size of parking stalls. The Applicant proposes to satisfy this Code provision through the condition of approval proposed in the Staff Report. I find that this Code provision can be met only through a condition of approval, which is set forth below.

3. DCC 18.116.031, Bicycle Parking.

DCC 18.116.031 imposes minimum bicycle parking requirements whenever the alteration of an existing use requires Site Plan Review. As an initial matter, DCC 18.116.031(A)(1)(a) establishes the minimum number of bicycle parking spaces is one space for every five required off-street motor vehicle parking spaces. When calculating that number, DCC 18.116.031(A)(4) requires that any fractional space be rounded up to the next whole space. As established in earlier findings, the Applicant is required to provide twenty-one (21) parking spaces. Under DCC 18.116.031(A)(1)(a), the Applicant is therefore required to provide five (5) bicycle parking spaces.

The Applicant seeks an exception to DCC 18.116.031(A)(1)(a), which is authorized if the Applicant can show compliance with at least one of the factors in DCC 18.116.031(A)(1)(c). The Applicant relies on two of those factors and asserts: (1) that the proposed use generates less than fifty (50) vehicle trips per day and (2) that no existing building on the site will accommodate bicycle parking and no new buildings are proposed. The Applicant does not explain in any detail why existing buildings on the site will not accommodate bicycle parking. The record does establish, however, that the proposed use generates fewer than fifty (50) vehicle trips per day. I therefore find that the exception to the bicycle parking requirements is available to the Applicant. I further note that the Applicant does not seek to develop zero bicycle parking spaces, but rather seeks to avoid the requirement in DCC 18.116.031(A)(1)(b) that requires sheltered bicycle parking. The Applicant's request for an exception does not include a request to reduce the required number of bicycle parking spaces. The Applicant states that it will provide "at least" three spaces, and the updated site plan appears to show eight (8) spaces or racks. As determined above, the minimum number of spaces required is five. I therefore find that the Applicant's proposal for eight (8) spaces is sufficient and that those spaces should be depicted on the final site plan.

I find that DCC 18.18.116.031(A)(2) and (3) are not applicable to the Applicant's proposal. No participant has asserted otherwise.

The Applicant's request for an exception to the bicycle parking standards also requests relief from the requirements of DCC 18.116.031(B)(1)-(6), which regulate the design of the required bicycle parking spaces. For the reasons set forth above, I find that this exception is available. However, the Applicant's

submittals state that the Applicant has proposed bike racks for the unsheltered parking. I therefore find that, notwithstanding the Applicant's request for an exception, the Applicant has agreed to provide those racks as set forth in DCC 18.116.031(B)(1)(b), and a condition of approval is appropriate to require the Applicant to continue to identify the location of those racks on a final site plan.

4. DCC 18.116.035, Bicycle Commuter Facilities.

DCC 18.116.035 requires larger commercial employers to have bicycle commuter facilities. No participant in this proceeding asserts that this requirement applies to the proposal, and I find that it is not applicable.

E. Chapter 18.124, Site Plan Review

1. DCC 18.124.030, Approval Required.

DCC Chapter 18.124 sets forth the standards and criteria for a Site Plan Review. Pursuant to DCC 18.124.030, Site Plan Review is required for, among other uses, commercial uses that require parking facilities and all industrial uses. As discussed in earlier findings, the Applicant's proposed use can be characterized as a "commercial activity" for purposes of the MUA-10 Zone, but it also includes an industrial use (processing grapes into wine) and, therefore, Site Plan Review is required.

2. DCC 18.124.060, Approval Criteria.

DCC 18.124.060 sets forth the specific approval criteria that must be satisfied for a site plan to be approved.

DCC 18.124.060(A) requires that a proposed development "relate harmoniously" to both the natural environment and existing development. As the Staff Report notes, prior interpretations of the County's Board conclude that this Code provision requires an applicant to demonstrate that the site plan arranges the development in a way that evaluates the natural environment and existing development in the area, and that by doing so, demonstrate that the applicant has minimized visual impacts and reasonably preserved natural features including views and topographic features. In making that interpretation, the County's Board expressly drew a distinction between the analysis of the site plan required by this Code provision and the consideration of the compatibility of the proposed use required by other Code sections. Only the site plan is relevant to this Code provision.

To demonstrate compliance with DCC 18.124.060(A), the Applicant relies largely on the fact that it will use existing buildings for the winery and that no new buildings are proposed. Further, the Applicant submits photographs and other information depicting and describing a site plan that relies on setbacks and vegetation to screen the Winery use from other development. The Applicant also asserts that neither existing buildings nor new plantings adversely affect natural features.

While comments in the record object to the approval of the Winery, I do not read any of those comments as asserting the Applicant's proposed site plan does not relate harmoniously to the natural environment or existing development, or that this Code provision is otherwise not satisfied. The one exception may be

that several commenters addressed concerns over potential traffic impacts. However, those comments were aimed more at potential impacts from users traveling to and from the site, which would occur regardless of the specifics of the site plan. I therefore treat those comments as addressing the adequacy of site access or the compatibility of the proposed use, which are addressed below in separate findings. Although the Applicant's evidence is not particularly detailed, I find that the Applicant has met its burden of demonstrating compliance with DCC 18.124.060(A).

DCC 18.124.060(B) requires the Applicant to demonstrate that the landscape and existing topography will be preserved to the greatest extent possible. This Code provision also requires preserved trees and shrubs to be protected. The Application proposes almost no changes to the landscape, and no discernible changes to topography. This is because the Applicant will use existing buildings, and the only changes in landscaping will result from closing one driveway, which will allow the addition of new plantings, and creating a new driveway. Based on the foregoing, I find that this Code provision is satisfied. The Staff Report recommends a related condition of approval requiring the Applicant to protect all trees and shrubs not required to be removed by the development. The Applicant opposes this condition. I agree with the Applicant that the proposed condition is not necessary; it largely re-states the requirement in the Code to protect preserved trees and shrubs. Without further explanation by Staff for why its proposed condition is necessary to meet this Code provision, I decline to impose it.

DCC 18.124.060(C) requires the Applicant to demonstrate that the site plan provides a safe environment, while offering appropriate opportunities for privacy and transition from public to private spaces. The Applicant asserts that existing vegetative screening and a new gate will help with the transition from private to public spaces, which it characterizes as the transition from the Subject Property to Bowery Lane. The Applicant further asserts that the site plan provides a safe environment because the site will accommodate fire and safety vehicles, and that the Applicant's use of either a private well or the public water system will be reviewed and approved by appropriate authorities to ensure the safety of the use and the appropriateness of the usage. The Applicant notes that safety considerations are also incorporated into the approval by local and state licensing agencies prior to operating. To that end, the Applicant accepts the proposed conditions of approval in the Staff Report relating to this Code provision. One comment in the record asserts that the Winery may impose a safety risk because of the wastewater that will be generated from the Winery. The treatment or disposal of wastewater, however, is also governed by permits that regulate such impacts. Based on the foregoing, I find that DCC 18.124.060(C) is satisfied with Staff's proposed conditions of approval, which require approvals from other regulating entities.

DCC 18.124.060(D) requires the Applicant to demonstrate that, when appropriate, the site plan shall provide for the special needs of disabled persons. The Application states that the Applicant will provide a parking space and restrooms that comply with the federal Americans with Disabilities Act. The Staff Report states that other considerations for disabled persons are determined as part of the issuance of building permits. No participant disputes that statement or otherwise asserts that the site plan does not comply with this Code provision. Based on the foregoing, I find that this Code provision is satisfied.

DCC 18.124.060(E) requires the Applicant to demonstrate that the location and number of points of access, the interior circulation patterns, the separation of pedestrians from vehicles, and the overall parking arrangement is harmonious with buildings and structures. The Applicant relies on the location of the parking areas compared to the buildings on the Subject Property as evidence that this criterion is met. The

Applicant further states that the proposed parking is all on-site and screened from the roadway with existing vegetation and vineyards. The proposed parking and circulation are distant from neighboring buildings and structures, which furthers what the Applicant describes as a harmonious feeling. No comments in the record dispute the Applicant's characterization. Based on the foregoing, I find that this Code provision is satisfied.

DCC 18.124.060(F) requires the Applicant to demonstrate that surface drainage systems are designed to prevent adverse impacts on neighboring properties, streets, and water quality. The Applicant relies on its characterization of existing drainage patterns as all flowing to ponds and grass areas on the Subject Property. No participant disputes that characterization, but the Staff Report states that the Applicant must provide a letter or report from a licensed engineer to demonstrate that drainage patterns operate as the Applicant suggests they do. The Staff Report therefore recommends conditions of approval requiring such a letter or report and requiring the Applicant to maintain drainage systems in good working condition. The Applicant objects to such a condition, largely because of the amount of pervious surfaces on the Subject Property and what the Applicant characterizes as the low likelihood that surface water runoff would have any off-site impacts.

The Staff Report does not cite any Code language that requires a letter or report from a licensed engineer. The express language of DCC 18.124.060(E) states only that surface drainage systems must prevent adverse impacts on neighboring properties, streets, and water quality. It does not appear to impose any requirements on the type of evidence that can be used to show compliance with that criterion. Because the Applicant's evidence is the only evidence in the record relating to surface drainage, and in the absence of express language requiring a specific kind of evidence, I find that the Applicant has met its burden and that DCC 18.124.060(F) is satisfied without the imposition of any condition of approval.

DCC 18.124.060(G) requires the Applicant to demonstrate that areas and facilities for storage, machinery, and equipment, and loading and parking are buffered or screened to minimize adverse impacts on the site and on neighboring properties. The Applicant relies on the buffer and vegetation of the existing site to minimize the impact of all on site uses on neighboring properties. With respect to the site itself, the Applicant asserts there is no visual impact because, in part, there are outbuildings in which machinery and equipment can be stored. No participant disputes the Applicant's characterization of the lack of visual impacts or otherwise asserts this Code provision is not satisfied. Based on the foregoing, I find that this Code provision is satisfied.

DCC 18.124.060(H) requires the Applicant to demonstrate that above ground utility installations will be located to minimize visual impacts. It is not disputed that the Applicant has not proposed any such installations and, therefore, this Code provision is not applicable.

DCC 18.124.060(I) does not impose any additional criteria and, instead, incorporates any specific criteria imposed by the underlying zone, such as setbacks. Those criteria are addressed in other findings in this Decision.

DCC 18.124.060(J) requires exterior lighting to be shielded so that it does not directly project off site. The Applicant proposed to meet this criterion through a condition of approval. No participant objects or

otherwise states that this criterion cannot be satisfied in that manner. Based on the foregoing, I find that this Code provision is satisfied with the condition of approval proposed in the Staff Report.

DCC 18.124.060(J) requires the Applicant to show adequate transportation access to the site. If necessary, the Applicant must implement mitigation measures for transportation impacts. The Applicant asserts that the existing transportation system provides adequate access to the site, and notes that the transportation system is being improved through the paving of Hunnel Road, which it says can be used for access to the site to reduce impacts to Bowery Lane. In support of its assertion, the Applicant submitted a traffic analysis, including an update to that analysis. The County's Senior Transportation Planner reviewed and provided comments on the initial traffic analysis, agreeing with the conclusion in that report that the proposed use could assume thirty-seven (37) daily vehicle trips. Using that trip count, neither the Applicant's engineer nor the County's Senior Transportation Planner identified a need for specific improvements to the transportation system. The Applicant's updated analysis concluded that even fewer trips would be expected. The County's Senior Transportation Planner does propose multiple conditions of approval to remedy observed encroachments in the right-of-way, to ensure the Applicant obtains the appropriate access permits, and to provide directional signage so that patrons of the winery are more likely to use the improved Hunnel Road. Neither the Applicant nor any participant objects to these conditions.

Comments in the record opposing the Application express a general concern over traffic safety. These concerns are grounded in the observation that Bowery Lane is a relatively narrow road without sidewalks. No comments in the record dispute the technical information the Applicant provides. The Applicant proposes to address these concerns in part through the above-identified conditions of approval. The Applicant also proposed to provide winery patrons with directions to the winery in pre-visit communications, which would instruct patrons to use Hunnel Road.

Based on the technical opinion of the Applicant's engineer and the concurring review of the County's Senior Transportation Planner, I find that the transportation access to the Subject Property is adequate, with the conditions proposed in the Staff Report and the conditions volunteered by the Applicant. Those conditions appear below. Based on the foregoing, I find that DCC 18.124.060(J) is satisfied.

3. DCC 18.124.070. Required Minimum Standards.

DCC 18.124.070 contains additional minimum standards applicable in various scenarios, many of this are not relevant to the Application. I adopt the findings in the Staff Report as my findings relating to DCC 18.124.070, except for the specific subsections of this Code provision discussed in this section. The remainder of the findings in this section replace the relevant findings in the Staff Report addressing each subsection.

DCC 18.124.070(B)(2)(a) contains additional landscaping requirements for parking and loading areas, requiring defined landscaped areas totaling no less than twenty-five (25) square feet per parking space. The Applicant asserts that this landscaping requirement does not apply to a winery in the MUA-10 Zone. However, the Applicant does not explain the legal basis for that assertion. Nor is the Applicant's assertion consistent with the plain language of this Code provision, which clearly applies to "parking and loading areas" as part of a Site Plan Review, regardless of the underlying use or zone. I therefore find that this criterion applies to the Applicant's site plan.

As an alternative argument, the Applicant states that this criterion is satisfied because “the entire property is already landscaped with a vineyard and pasture. That argument, however, fails to tie that “landscaping” to the Code’s requirement to improve a parking area “with defined landscaped areas”, and it also does not attempt to quantify the improved, defined landscaped area. Based on an earlier finding that the proposed use requires twenty-one (21) parking spaces, the total improved, defined landscaped area for that parking is a minimum of five hundred twenty-five (525) square feet. The Applicant does note that some other (presumably defined) landscaping exists around existing buildings and that additional landscaping can be added where the existing driveway will be decommissioned.

Based on the foregoing, I find that this criterion can be satisfied only through a condition of approval requiring the Applicant to denote on its site plan five hundred twenty-five (525) square feet of landscaping around parking areas. The Code does not define “defined landscaping”, but as the Staff Report notes, the common meaning of that word denotes that the item being defined must show some shape or outline. Even if the Applicant relies on existing vegetation for that purpose, it must at least show the shape or outline of the area that will be maintained as landscaping for this purpose and document the size of that area.

DCC 18.124.070(B)(2)(d)-(h) provide additional detail for the design of the landscaping required for parking areas. Because the Applicant does not believe landscaping requirements are applicable, or that the site’s existing vegetation are adequate for this Code provision, it does not fully address these Code sections in detail. I therefore find that these Code provisions are satisfied only through the imposition of a condition of approval requiring the Applicant to depict the width of the landscaped area on the site plan and to describe whether and how such landscaping will be watered. The condition will also require the Applicant to note whether any trees are to be planted under overhead utility lines.

F. Chapter 18.128, Conditional Use

The Applicant seeks approval of the winery as a commercial activity in conjunction with farm use. Such uses are allowed conditionally in the MUA-10 Zone, subject to the provisions of DCC 18.128. The findings in this section address the applicable provisions in that Code chapter.

1. DCC 18.128.015, General Standards Governing Conditional Uses.

This Code provision sets forth specific standards for uses other than single family dwellings that apply in addition to the standards of the underlying zone. The applicable provisions of this Code section are set forth below.

- A. *The site under consideration shall be determined to be suitable for the proposed use based on the following factors:*
1. *Site, design and operating characteristics of the use;*
 2. *Adequacy of transportation access to the site; and*
 3. *The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values.*

This Code provision requires an analysis of the suitability of the site for the proposed use based on the listed factors. The Applicant asserts that the site is suitable for the Winery, wine tastings, and wine-related

events. The Applicant bases this assertion in part on the fact that existing buildings are being repurposed for the Winery and the fact that there is sufficient space for the planned activities.

With the exception of the adequacy of transportation access to the site, no participant asserts that the site is not suitable for the proposed use, or otherwise asserts that this Code provision is not satisfied. The adequacy of transportation access to the site is addressed in previous findings, and those findings are incorporated here. For the same reason set forth in those findings, I conclude that the proposed use on the site, as conditioned, is suitable when taking the adequacy of transportation access into account. Based on the foregoing, I find that DCC 18.128.015(A) is satisfied.

B. The proposed use shall be compatible with existing and projected uses on surrounding properties based on the factors listed in DCC 18.128.015(A).

This Code provision is similar to DCC 18.128.015(A) but focuses on the proposed use's compatibility with surrounding properties rather than on the suitability of the site itself.

The Applicant provides an analysis of this Code provision by first identifying uses on surrounding properties, which include other parcels in the MUA-10 Zone, as well as properties designated as "Urbanizable Areas" or "Commercial General". These uses are largely residential or farmed. Projected uses include uses allowed in those zones. As the Staff Report notes, current uses on surrounding properties are likely representative of projected uses.

The Applicant then identifies potential off-site impacts and assesses whether those impacts are compatible with surrounding properties. The potential off-site impacts include noise, odor, lights, traffic, visual impacts, water demand, and wastewater disposal. Based on the size of the Subject Property, the relatively distant location of "nearby" uses, and the Applicant's proposal to limit tasting room hours, the Applicant suggests that none of the potential off-site impacts it identifies will prevent the winery from being compatible with uses on surroundings properties.

With the exception of alleged transportation impacts, no participant identifies off-site impacts from the proposed use that are incompatible with surrounding properties, or otherwise asserts that this Code provision is not satisfied.³ The adequacy of transportation access to the site is addressed in previous findings, and those findings are incorporated here. For the same reason set forth in those findings, I conclude that the proposed use, as conditioned, is compatible with surrounding uses when taking the adequacy of transportation access into account. Based on the foregoing, I find that DCC 18.128.015(B) is satisfied.

C. These standards and any other standards of DCC 18.128 may be met by the imposition of conditions calculated to ensure that the standard will be met.

As explained in prior findings, I find it appropriate to impose several conditions of approval. These include limitations on the proposed use offered by the Applicant, such as a limit on tasting room hours and a

³ Comments in the record complain of the use of shotguns to discourage birds from eating grapes. Because those comments are aimed at the farm use (the vineyard) and not the Winery, I find that they are not necessary to address in this Decision.

prohibition on third-party rentals of the Subject Property. These conditions will also help ensure that the conditional use standards are met, because they limit the total potential of any impacts.

G. DCC Chapter 15.08 - Signs

The Staff Report notes that the uses on the Subject Property may require informational or directional signs. Such a requirement is incorporated above to address potential transportation impacts. Staff proposes a condition of approval requiring compliance with the County's sign regulations. Because the Applicant does not object to the Staff's proposed condition, that condition is included below.

IV. CONCLUSION AND CONDITIONS OF APPROVAL

Based on the foregoing findings, I find the Application meets the applicable standards for a Conditional Use Permit and Site Plan Review with the following conditions of approval:

- A. This approval is based upon the application, site plan, specifications, and supporting documentation submitted by the applicant, as required to be supplemented by these conditions. Any substantial change in this approved use will require review through a new land use application. The Applicant's proposal includes the following, which shall be conditions of this approval:
- The winery will process grapes only from Deschutes County or an adjacent county.
 - This approval does not include third-party rental of the Subject Property
- B. General Division Permitting. The property owner shall obtain any necessary permits from the Deschutes County Building Division and Onsite Wastewater Division.
- C. Winery Signage. All signs on the property for the winery shall comply with Deschutes County Sign Code Title 15. The property owner shall obtain all required permits for signage pursuant to Title 15.
- D. Code Compliance for Case No. 247-21-000164-CE: *Prior to any initiation of use*, the unpermitted winery on the property shall receive all required permits from Deschutes County for the winery and any related construction. The applicant shall provide all necessary receipts of approval/closure to the Planning Division to demonstrate compliance.
- E. Winery Hours of Operation. *At all times*, the property owner shall observe the following hours of operation:
- Summer Hours (Memorial Day Weekend – September 30th): by appointment or invite only, three to four (3-4) days per week during the hours of 12 to 7 p.m.
 - Winter Hours (October 1st – January 1st): by appointment or invite only, on Friday and Saturdays with additional appointments on holiday weekends (Thanksgiving, Christmas, New Year's) during the hours of 12 to 7 p.m.
 - Closed (January 2nd – Second week of March).

- Spring Hours (Second week of March – First week of April): by appointment or invite only, three to four (3-4) days per week for the traditional school spring break for Oregon, California, and Washington (tourist season) during the hours of 12 to 7 p.m.

- F. Building and Structure Height. No building or structure shall be erected or enlarged to exceed thirty (30) feet in height, except as allowed by DCC 18.120.040.
- G. Front Yard Setback for Wine Storage Building. *Prior to the issuance of building permits*, the property owner will submit confirmation that the Wine Storage Building meets the front yard setback requirements.
- H. Solar Setbacks. Structural setbacks from any north lot line shall meet the solar setback requirements in DCC 18.116.180.
- I. General Setbacks. In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.
- J. Clear Vision Areas on the Site Plan. *Prior to the issuance of building permits*, a revised and final site plan shall be submitted to the Planning Division which correctly illustrates the clear vision areas at all access points.
- K. Clear Vision Area. The clear vision areas located at the intersection of the service drives/ driveways and Bowery Lane, as well as other points of access, shall be maintained in accordance with DCC 18.116.020(A).
- L. Available Parking. This approval is conditioned upon the unqualified continuance and availability of the amount of parking and loading space required by DCC Title 18 as set forth in this Decision. The Applicant shall submit a revised and final site plan showing where the required parking spaces will be located, including the size of each parking stall.
- M. Parking and Loading/ Unloading. Off-street parking areas used to fulfill the requirements of DCC Title 18 shall not be used for loading and unloading operations except during periods of the day when not required to take care of parking needs.
- N. Establishment of Parking. Required parking facilities shall be provided prior to or concurrently with construction and/or initiation of the proposed use.
- O. Use of Parking Facilities for the Winery. Required parking space shall be available for the parking of operable passenger automobiles of residents, customers, patrons, and employees only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.
- P. Parking Area Lighting. Any lighting used to illuminate the off-street parking area shall be so arranged that it will not project light rays directly upon any adjoining property in a residential

zone.

- Q. Parking Area Landscaping. *Prior to the issuance of building permits*, the property owner shall submit a revised site plan depicting the parking area landscaping required by this Decision, which must note whether any trees are to be planted under overhead utility lines and, if so, show that the height of those trees has been taken into consideration.
- R. Graveled Surface for Standing and Maneuvering of Vehicles. *Prior to the initiation of use*, the applicant shall gravel all areas for the standing and maneuvering of vehicles onsite as depicted on the site plan. This includes the individual parking areas as proposed and all service drives which provide access for the winery. *At all times*, the graveled surfaces shall be maintained in a manner which will not create dust problems for neighboring properties.
- S. Access Aisles. *Prior to the issuance of building permits*, the property owner shall submit a revised site plan depicting access aisles at a minimum width of twenty-four (24) feet for all two-way traffic and a minimum width of twelve (12) feet for all one-way traffic.
- T. Service Drive Width. *Prior to the issuance of building permits*, the property owner shall submit a revised site plan depicting service drives at a minimum width of twenty-four (24) feet for all two-way access aisles and a minimum width of twelve (12) feet for all one-way access aisles.
- U. Service Drive Boundaries. *Prior to the issuance of building permits*, the property owner shall submit a revised site plan depicting service drive boundaries which are clearly and permanently marked and defined through the use of rails, fences, walls or other barriers or markers.
- V. Off-street Parking Lot Design. *Prior to the issuance of building permits*, a revised and final site plan shall be submitted to the Planning Division which illustrates the parking aisles and spaces and demonstrates compliance with DCC 18.116.030(G)(1-4).
- W. Bicycle Parking Spaces. *Prior to the issuance of building permits*, a revised and final site plan shall be submitted to the Planning Division which illustrates the location of the required bicycle parking spaces.
- X. Confirmation from Bend Fire & Rescue. *Prior to the issuance of building permits*, Receipt of approval will be provided to the Planning Division from Bend Fire & Rescue that the access and site design for emergency vehicles are acceptable.
- Y. Use of Private Well. *Prior to the Initiation of Use of the Winery*, the property owners shall have the well, if it will provide any water to the public, reviewed, and approved as a Public Water System by either the Oregon Department of Agriculture (ODA) or the Deschutes County Environmental Health Department.
- Z. Licensing From Deschutes County Environmental Health Department. *Prior to the Initiation of Use of the Winery*, the property owner shall obtain all necessary permits from the Deschutes County Environmental Health Department.

AA. Licensing From the Oregon Department of Agriculture. *Prior to the Initiation of Use of any Aspect of the Winery*, the property owner shall obtain all necessary permits and approvals from the Oregon Department of Agriculture Food Safety Program.

BB. Licensing From the Oregon Liquor and Cannabis Commission (OLCC). *Prior to the Initiation of Use of any Aspect of the Winery*, the property owner shall obtain all necessary permits and approvals from the Oregon Liquor and Cannabis Commission.

CC. Licensing From the US Alcohol and Tobacco Tax and Trade Bureau (TTB). *Prior to the Initiation of Use of any Aspect of the Winery*, the property owner shall obtain all necessary permits and approvals from the US Alcohol and Tobacco Tax and Trade Bureau.

DD. Exterior Lighting. All exterior lighting shall be shielded so that direct light does not project off site.

EE. Evacuation of the Right of Way. *Prior to the issuance of building permits*, the property owner shall cause for the removal of all private property, including fences, posts, walls, crops, landscaping, and other features, from the existing public right of way for Bowery Lane along the frontage to the subject property.

FF. Driveway Access Permits. *Prior to the issuance of building permits*, the property owner shall obtain driveway access permits for all driveway accesses to Bowery Lane for the subject property pursuant to DCC 12.28.050 and 17.48.210(A).

GG. Ingress and Egress via Hunnell Road. *At all times, once Hunnell Road construction is complete*, wayfinding or directional messaging provided by the property owner to vendors and patrons of the proposed commercial activities shall direct vendors and patrons to utilize Hunnell Road and the western section of Bowery Lane for ingress and egress to the subject property.

Dated this 29th day of December 2023.



Tommy A. Brooks
Deschutes County Hearings Officer