

Land Use Application

DESCHUTES COUNTY
117 NW Lafayette Avenue
PO Box 6005
Bend, OR 97703
541-388-6575

Appeal - BOCC

247-24-000018-A

www.deschutes.org/cd

cdd@deschutes.org

APPLICATION DESCRIPTION

Type of Application: Appeal - BOCC

Description of Work: Appeal of Hearings Officer Decision for File Nos. 247-22-000464-CU, 466-SP

LOCATION INFORMATION

Property Address:

20520 Bowery Ln, Bend, OR 97703

Parcel:

171209B001000 - Primary

Owner:

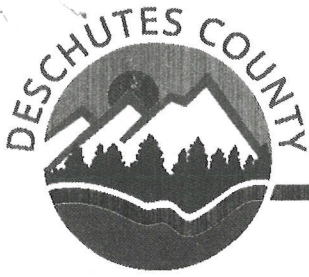
Address:

APPLICANT INFORMATION

Applicant:	Business Name:	Address:	City:	State:	Zip
Toby Bayard		20555 Bowery Lane	Bend	OR	97703

APPLICATION FEES

Fee Description	Quantity		Amount
Appeals to Board of County Commissioners Deposit	1.00	Qty	\$3,448.00
Appeals to Board of County Commissioners Additional Fee (20% of original fee)	1,414.40	Amount	\$1,414.40
	Total Fees:		\$4,862.40



RECEIVED

JAN 9 2024

Deschutes County CDD

COMMUNITY DEVELOPMENT

APPEAL APPLICATION – BOARD OF COUNTY COMMISSIONERS

FEE: \$4,862.40

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): Toby Bayard Phone: (541) 977-5341
Mailing Address: 20555 Bowery Lane City/State/Zip: Bend, OR 97703
Email Address: tobybayard@gmail.com
Land Use Application Being Appealed: 247-22-000464 and 247-00466-SP
Property Description: Township 27 Range 12 east Section 09 Tax Lot
Appellant's Signature: Toby Bayard Digitally signed by Toby Bayard Date: 2024.01.07 12:18:24 -08'00' Date: 01-07-2024

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. Charges for actual cost of services in excess of the collected deposit will be invoiced to the applicant once the hearing is completed.

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 the day five (5) days prior to the date set for the de novo hearing or, for on-the-record appeals, the date set for receipt of written records.

NOTICE OF APPEAL

Please the associated printed documents as my appeal
is too lengthy to describe on this sheet

Thank you. *Jody Bayard*

**STATEMENT DESCRIBING SPECIFIC REASONS FOR THE APPEAL
AND TOBY BAYARD'S LIST OF DOCUMENTS ASSOCIATED OF DOCUMENTS SUBMITTED**

1. DOCUMENT SET INCLUDING THE APPEAL APPLICATION – BOARD OF COUNTY COMMISSIONERS WITH ATTACHED CHECK NUMBER 1446, WRITTEN ON THE ACCOUNT OF BAYARD MANAGING LLC, IN THE AMOUNT OF \$4,862.40 (AS PER NATHANIEL MILLER'S INSTRUCTIONS).
2. NOTICE OF HEARING OFFICER'S DECISION (247-000464-CU WHICH APPROVES A WINERY ON 5.45 ACRES OF LAND ZONED MULTIPLE USE AGRICULTURE-10 ACRES MINIMUM (5 PAGES PLUS ASSOCIATED MAP)
3. FILE NO. 247-22-000757-A (A CONFLICTING DECISION AND FINDINGS OF THE DESCHUTES HEARING AS COMPARED TO 247-22-000464-CU and 247-22-000466-SP)
4. EMAIL EXCHANGE WITH ASSOCIATE PLANNER NATHANIEL MILLER "Thanks for taking the time to speak with me."
 - a. IN WHICH MY ORIGINAL EMAIL I STATED THAT THERE WAS A CONFLICT WITH FILE no. 247-22-000757-A (**RULING ON THE APPEAL OF CENTRAL OREGON LAND WATCH IN WHICH HE CITED THE CORRECT APPLICABLE STANDARDS AND CRITERIA USING DCC 18.16, CHAPTER 18.16, EXCLUSIVE FARM USE, CHAPTER 28.120 EXCEPTIONS AND CHAPTER 18.128, CONDITIONAL USE.** *In this exchange, Nathaniel Miller noted that "It is unclear to staff why arguments are being made to apply Exclusive Farm Use (EFU) zoning and ORS 215.452 to the proposal. ORS 215.452 is specific to property owners who would like to establish a winery on property in the EFU district. Our understanding is that these provisions do not preclude a similar use on properties which are outside the EFU zone. (Please refer to the email copy for more).*
5. OFFICER TOMMY BROOKS REJECTED AN APPEAL FILED BY CENTRAL OREGON LANDWATCH WITH A HEARING DATE OF OCTOBER 26, 2022, 6 PM).
6. YET, IN THE JANUARY 2, 2024, DECISION ISSUED BY HEARINGS OFFICER TOMMY BROOKS, AND USED TO APPROVE DUANE AND DINA BARKERS (LAVA TERRACE CELLARS) CONDITIONAL USE APPLICATION FILE NUMBER 247-22-000464-CU, 247-22000466-SP, HEARINGS OFFICER TOMMY BROOKS USED APPLICABLE CRITERIA AS FOLLOWS:

IN THIS APPEAL RULING, HEARING OFFICER BROOKS INCORRECTLY CITED APPLICABLE STANDARDS AND CRITERIA USING THE DESCHUTES COUNTY CODE (DCC) TITLE 18, DESCHUTES COUNTY ZONING ORDINANCE AS FOLLOWS:

 - **CHAPTER 18.04 - Chapter 18.04 of Deschutes County contains definitions of the terms used in Title 18, none of which include the word "winery".**
 - **CHAPTER 18.32 – Multiple Use Agricultural Zone - MUA**
 - **CHAPTER 18.116 – Supplementary Provisions**
 - **CHAPTER 18.124 – Site Plan Review**
 - **CHAPTER 18.128 – Conditional Use**

IN THE JANUARY 2, 2024, DECISION ISSUED BY HEARINGS OFFICER TOMMY BROOKS, AND USED TO APPROVE DUANE AND DINA BARKERS (LAVA TERRACE CELLARS) CONDITIONAL USE APPLICATION FILE NUMBER 247-22-000464-CU, 247-22000466-SP, HEARINGS OFFICER TOMMY BROOKS USED APPLICABLE CRITERIA AS FOLLOWS:

CHAPTER 18.04 – DEFINES THE PURPOSE AND DEFINITIONS ASSOCIATED WITH CHAPTER 18 OF DESCHUTES COUNTY CODE:

18.04.020. TITLE PURPOSE AND DEFINITIONS

- A. The intent or purpose of DCC Title 18 is to promote the public health, safety and general welfare and to carry out the Deschutes County Comprehensive Plan, the provisions of ORS 215 and the Statewide Planning Goals adopted pursuant to ORS 197. DCC Title 18 is to establish zoning districts and regulations governing the development and use of land within portions of Deschutes County, Oregon;
- B. To provide regulations governing nonconforming uses and structures; to establish and provide for the collection of fees; to provide for the administration of DCC Title 18 and for the officials whose duty it shall be to enforce the provisions thereof; to provide penalties for the violations of DCC Title 18; and to provide for resolution of conflicts;
- C. To regulate the placement, height and bulk of buildings; and the placement and growth of vegetation within the County to ensure access to solar energy by reasonably regulating interests in property within the County, as authorized under ORS 215.044 and ORS 105.880 through 105.890, to promote and maximize the conservation of energy by preserving the option to utilize solar energy and to implement the Comprehensive Plan policies relating to solar energy; and

CHAPTER 18.32 – Multiple Use Agricultural Zone - MUA

18.32.010. Purpose.

The purposes of the Multiple Use Agricultural Zone are to preserve the rural character of various areas of the County while permitting development consistent with that character and with the capacity of the natural resources of the area; to preserve and maintain agricultural lands not suited to full-time commercial farming for diversified or part-time agricultural uses; to conserve forest lands for forest uses; to conserve open spaces and protect natural and scenic resources; to maintain and improve the quality of the air, water and land resources of the County; to establish standards and procedures for the use of those lands designated unsuitable for intense development by the Comprehensive Plan, and to provide for an orderly and efficient transition from rural to urban land use. (Ord. 95-075 §1, 1995)

18.32.020. Uses Permitted Outright.

The following uses and their accessory uses are permitted outright:

- A. Agricultural uses as defined in DCC Title 18.

- B. A single family dwelling, or a manufactured home subject to DCC 18.116.070.
- C. Propagation or harvesting of a forest product.
- D. Class I and II road or street project subject to approval as part of a land partition, subdivision or subject to the standards and criteria established by DCC 18.116.230.
- E. Class III road or street project.
- F. Noncommercial horse stables, excluding horse events.
- G. Horse events, including associated structures, involving:
1. Fewer than 10 riders;
 2. Ten to 25 riders, no more than two times per month on nonconsecutive days; or
 3. More than 25 riders, no more than two times per year on nonconsecutive days.
- (Incidental musical programs are not included in this definition. Overnight stays by participants, trainers or spectators in RVs on the premises is not an incident of such horse events.
- H. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.
- I. Type 1 Home Occupation, subject to DCC 18.116.280.
(Ord. 2004-002 §3, 2004; Ord. 2001-039 §2, 2001; Ord. 2001-016 §2, 2001; Ord. 94-008 §10, 1994; Ord. 93-043 §4, 1993; Ord. 93-001 §1, 1993; Ord. 91-038 §1, 1991; Ord. 91-020 §1, 1991; Ord. 91-005 §18, 1991; Ord. 91-002 §6, 1991)

MUA-10 (18.32.030) states Conditional Uses Permitted:

The following uses may be allowed subject to DCC 18.128:

- A. Public use.
- B. Semipublic use.
- 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, store or market farm products produced in Deschutes County or an adjoining County.
- D. Dude ranch.
- E. Kennel and/or veterinary clinic.
- F. Guest house.
- G. Manufactured home as a secondary accessory farm dwelling, subject to the requirements set forth in DCC 18.116.070.
- H. Exploration for minerals.
- I. Private parks, playgrounds, hunting and fishing preserves, campgrounds, motorcycle tracks and other recreational uses.

- J. Personal use landing strip for airplanes and helicopter pads, including associated hangar, maintenance and service facilities. No aircraft may be based on a personal-use landing strip other than those owned or controlled by the owner of the airstrip. Exceptions to the activities permitted under this definition may be granted through waiver action by the Aeronautics Division in specific instances. A personal use landing strip lawfully existing as of September 1, 1975, shall continue to be permitted subject to any applicable regulations of the Aeronautics Division.
- K. Golf courses.
- L. Type 2 or Type 3 Home Occupation, subject to DCC 18.116.280.
- M. A facility for primary processing of forest products, provided that such facility is found to not to seriously interfere with accepted farming practices and is compatible with farm uses described in ORS 215.203(2). Such a facility may be approved for a one-year period which is renewable. These facilities are intended to be only portable or temporary in nature. (Portion of this use "M" has been eliminated to reduce the size of this document).
- N. Destination resorts.
- O. Planned developments.
- P. Cluster developments.
- Q. Landfills when a written tentative approval by the Department of Environmental Quality (DEQ) of the site is submitted with the conditional use application.
- R. Time-share unit or the creation thereof.
- S. Hydroelectric facility, subject to DCC 18.116.130 and 18.128.260.
- T. Storage, crushing and processing of minerals, including the processing of aggregate into asphaltic concrete or portland cement concrete when such uses are in conjunction with the maintenance or construction of public roads or highways.
- U. Bed and breakfast inn.
- V. Excavation, grading and fill and removal within the bed and banks of a stream or river or in a wetland subject to DCC 18.120.050 and 18.128.270.
- W. Churches, subject to DCC 18.124 and 18.128.080.
- X. Private or public schools, including all buildings essential to the operation of such a school.
- Y. Utility facility necessary to serve the area subject to the provisions of DCC 18.124.
- Z. Cemetery, mausoleum or crematorium.
- AA. Commercial horse stables.
- BB. Horse events, including associated structures, not allowed as a permitted use in this zone.
- CC. Manufactured home park on a parcel in use as a manufactured home park prior to the adoption of PL-15 in 1979 and being operated as of June 12, 1996, as a manufactured home park, including any expansion of such uses on the same parcel, as configured on June 12, 1996.

Further, Hearings Officer Brooks only considered testimony placed into the Public record between the dates of 11/8/2023 and 11/18/2023:

- (2023-11-14-E. Albrich – Applicants Final Legal Argument 22-464-CU-SP, 2023-11-2023 and ...
- L. Green – Letter Rebuttal dated 11-7-2023, the emphasis of which was placed on the creation of human- “proposed commercial conditional land use create a human-caused detrimental condition negatively impacting all the properties located along Bowery Lane in the Rock O’ The Range neighborhood, but further reaching to those properties a few miles north of the subject site along Hunnell Rd. Hunnell Rd. is being “improved” for a collector arterial to the proposed applicants’ property. In response, our five neighbors have also each expressed their opposition (in the case file) to the applicants’ proposed CUP land use.
- 2023-10-30 B. Levin Testimony.pdf
- 2023-10-31 Placing Crystal Dollhausen’s written testimony turned in to the Community Development Building: “New Evidence and Testimony (Placed in public record on 10/31/2023 but initially omitted from the public record reviewed by Hearings Officer Brooks)”
- Email from Loel Jensen that was likewise written testimony turned in to the Community Development Building: “New Evidence and Testimony (Placed in public record on 10/31/2023 but initially omitted from the public record reviewed by Hearings Officer Brooks.

18.116. SUPPLEMENTARY PROVISIONS

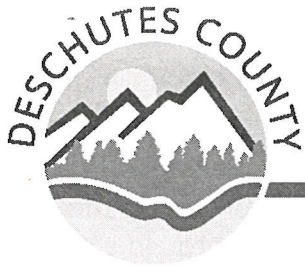
18.116.010 Authorization Of Similar Uses

- The purpose of DCC 18.116.010 is to, consistent with provisions of state law, provide for land uses not specifically listed in any zone, but which are similar in character, scale, impact and performance to a permitted or conditional use specified in a particular zone. However, the Barker’s land is definitely zoned Multiple Use Agricultural, 10 acres minimum. However, they only have 5.45 acres because their plot of land was grandfathered, and does not have to meet the 10 acre minimum.

A winery is specifically listed in a specific zone (Exclusive Farm Use) and the Barkers, in their application for a Conditional Use SPECIFICALLY applied for a winery.

The allowable use for a winery is ONLY identified in Deschutes County Code Exclusive Farm use, 18.16.025: Uses Permitted Subject to the Special Provisions Under DCC Section 18.16.025:

F. “Winery, as described in ORS 215.452”. **There is NO AMBIGUITY in the description provided as it states F. Winery, as described in ORS 215.425, which is exact the same statute used by Hearing Officer Tommy Brooks in his “Decisions and Findings” of File No. 247-22-000757A – an appeal of the granting of a Conditional Use Permit by Central Oregon LandWatch.**



Mailing Date:
Tuesday, January 02, 2024

02/24/24

COMMUNITY DEVELOPMENT

NOTICE OF HEARINGS OFFICER'S DECISION

The Deschutes County Hearings Officer has approved the land use application(s) described below:

- FILE NUMBER:** 247-22-000464-CU, 247-22-000466-SP
- LOCATION:** The subject property has an assigned address of 20520 Bowery Lane, Bend, OR 97703 and is identified on the County Assessor Tax Map 17-12-09B, as Tax Lot 1000.
- OWNER:** Duane & Dina Fay Barker
- APPLICANT:** Lava Terrace Cellars
- PROPOSAL:** 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 (MUA10).
- STAFF PLANNER:** Nathaniel Miller, Associate Planner
Phone: 541-317-3164
Email: Nathaniel.Miller@Deschutes.org
- RECORD:** Record items can be viewed and downloaded from:
www.buildingpermits.oregon.gov
- APPLICABLE CRITERIA:** The Hearings Officer reviewed this application for compliance against criteria contained in Chapters 18.04, 18.32, 18.116, 18.124, and 18.128 in Title 18 of the Deschutes County Code (DCC), the Deschutes County Zoning Ordinance, as well as against the procedural requirements of Title 22 of the DCC.

DECISION: The Hearings Officer finds that the application meets applicable criteria, and approval is being granted subject to the following conditions:

I. 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.

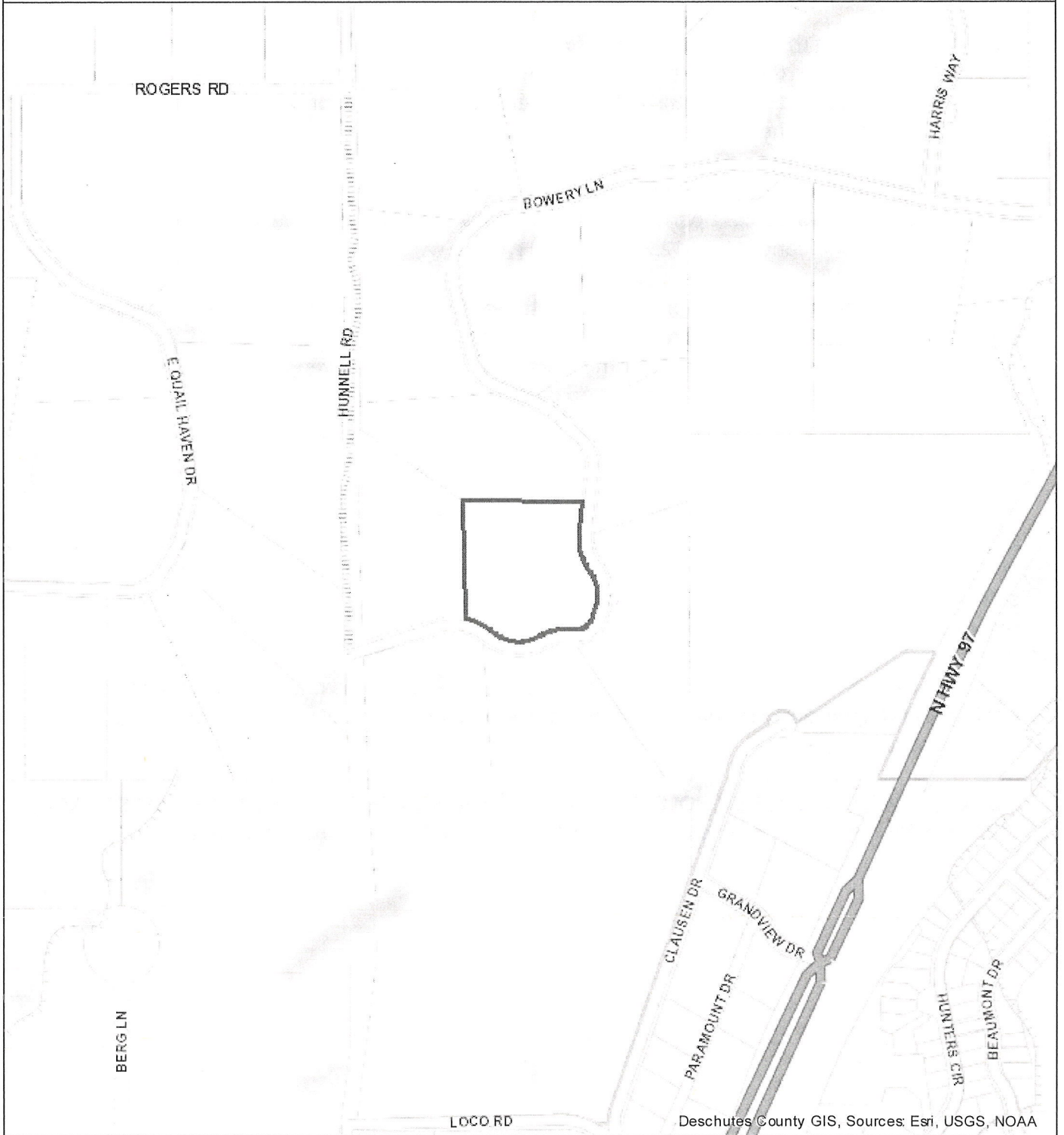
This decision becomes final twelve (12) days after the date mailed, unless appealed by a party of interest. To appeal, it is necessary to submit a Notice of Appeal, the base appeal deposit plus 20% of the original application fee(s), and a statement raising any issue relied upon for appeal with sufficient specificity to afford the Board of County Commissioners an adequate opportunity to respond to and resolve each issue.

Copies of the decision, application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost. Copies can be purchased for 25 cents per page.

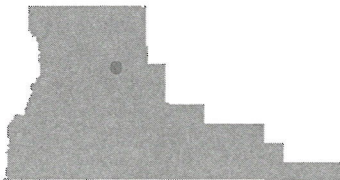
NOTICE TO MORTGAGEE, LIEN HOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST BE PROMPTLY FORWARDED TO THE PURCHASER.

File: 247-22-000464-CU, 466-SP

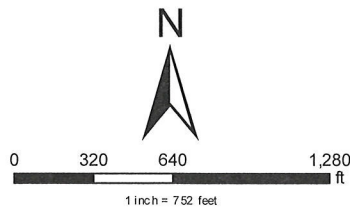
20520 Bowery Lane, Bend, OR 97703



Deschutes County GIS, Sources: Esri, USGS, NOAA



Date: 9/7/2023



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

FILE NUMBERS: File No. 247-22-000757-A
(Appeal of files 247-22-000024-CU and 247-22-000025-SP)

HEARING DATE: October 26, 2022, 6:00 p.m.

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

APPLICANT/OWNER: John Herman

SUBJECT PROPERTY: Tax Lot 00700, Map 15-10-10
Situs Address: 68540 E Highway 20, Sisters, OR 97759

APPELLANT: Central Oregon LandWatch

REQUEST: Appeal of an administrative decision: (1) approving a conditional use for a meadery and associated activities as a commercial activity in conjunction with farm use; (2) approving a site plan approval for the meadery.

HEARINGS OFFICER: Tommy A. Brooks

SUMMARY OF DECISION: The Hearings Officer finds that the Applicant has not met its burden of proof with respect to a commercial activity in conjunction with farm use and, therefore, SUSTAINS the appeal, and DENIES the Application, based on the findings in this Decision.

I. APPLICABLE STANDARDS AND CRITERIA

Deschutes County Code (DCC)
Title 18, Deschutes County Zoning Ordinance
Chapter 18.16, Exclusive Farm Use Zones
Chapter 18.120, Exceptions
Chapter 18.128, Conditional Use

II. BACKGROUND AND PROCEDURAL FINDINGS

A. Nature of Proceeding

This matter comes before the Hearings Officer as an appeal of a decision by the Deschutes County Planning Department (“Staff”) in which Staff approved: (1) the operation of a meadery as a commercial activity in conjunction with a farm use (File 247-22-000024-CU); and (2) a site plan for the meadery (File 247-22-000025-SP) (together, the “Staff Decision”).

The specific proposal in the Application underlying the Staff Decision is the Applicant’s proposal to operate a meadery on the Subject Property. According to the Applicant and other information in the record, a meadery makes mead, a type of wine fermented from honey rather than from grapes. Mead is sometimes referred to as “honey wine,” and a meadery is sometimes referred to as a “honey winery.” The Applicant currently maintains beehives on the Subject Property from which honey is harvested and engages in the production of mead. The Applicant plans to use honey from the Subject Property and from other farms around the county and state as part of the planned meadery, which will produce mead on a larger scale for sale. In addition to the meadery itself, the Applicant proposes other commercial activities such as an indoor tasting room, an outdoor tasting area, food carts, “winery-related” events, and other unidentified activities “related to the production, sale, marketing, and distribution of wine, farm products, and related incidental items.” The Application includes a request for use of the Subject Property as a music venue to support local events that may not be winery related, such as the Sisters Folk Festival. This decision will refer to the meadery and the proposed commercial activities as the “Meadery.”

B. Notices, Decision, Appeal, and Hearing

The Application was filed on January 19, 2022. On January 28, 2022, the County issued a Notice of Application to several public agencies and to property owners in the vicinity of the Subject Property (together, “Application Notice”). The Application Notice invited comments on the Application.

On September 7, 2022, Staff issued a decision on the Application, styled “Findings and Decision” (the “Staff Decision”). On September 19, 2022, the County received an Appeal Application with a Notice of Appeal on behalf of Central Oregon Landwatch (“Appellant”), seeking review of the Staff Decision. There is no dispute in this proceeding that the appeal documents were timely filed.

On September 30, 2022, the County mailed a Notice of Public Hearing (“Hearing Notice”) announcing an evidentiary hearing (“Hearing”) for the appeal of the Staff Decision. Pursuant to the Hearing Notice, I presided over the Hearing as the Hearings Officer on October 26, 2022, opening the Hearing at 6:01 p.m. The Hearing was held via videoconference, with Staff, the Applicant, and a representative of Appellant present in the hearing room. The Hearings Officer appeared 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 asked for but received no objections to the County’s jurisdiction over the matter or to my participation as the Hearings Officer.

No participant requested that the record remain open. The Hearing concluded at approximately 7:35 p.m. At that time, I closed the Hearing and the record, and I took this matter under advisement.

C. 150-day Clock

The Applicant submitted the Application on January 19, 2022. Staff reviewed the Application and, on February 18, 2022, notified the Applicant that the Application was incomplete (“Incomplete Notice”). The Applicant provided additional information on or about March 8, 2022 and March 17, 2022, and continued to provide information to the record in response to Staff inquiries. On July 15, 2022, Applicant’s attorney notified Staff that the Applicant had provided information in response to the Incomplete Notice, thereby confirming that the Applicant believed the Application to be complete as of that date.

Using July 15, 2022, as the date of completeness, the deadline within which the County must make a final decision under ORS 215.427 – “the 150-day clock” – is December 12, 2022.

III. SUBSTANTIVE FINDINGS AND CONCLUSIONS

A. Adoption of Findings in Staff Decision

The Staff Decision contains comprehensive findings related to the Application and the Subject Property. The vast majority of the findings in the Staff Decision are not challenged in this Appeal, and, although this proceeding is *de novo*, most criteria in the Staff Decision are not re-addressed by the participants during the appeal. As a result, I hereby adopt the findings in the Staff Decision as my findings, as supplemented and modified by the findings in this Decision, which address the issues and criteria that were raised on appeal. To the extent any of the findings in this Decision conflict with the findings in the Staff Decision, my intent is to have these findings control.

B. Issues on Appeal

The Appellant’s Notice of Appeal sets forth several bases for appeal of the Staff Decision, and Appellant raised other issues during the Hearing. Appellant seeks denial of the Application based on the following assertions: (1) a meadery is not an allowed use in the Exclusive Farm Use (“EFU”) zone either because no local or state law allows such a use, or because a meadery is not a “winery”, which can be allowed by statute; (2) there is insufficient evidence on which to base a finding that there is any farm use currently on the Subject Property; (3) there is insufficient evidence on which to base a finding that the Meadery will produce income that is “incidental” or “subordinate” to income from farm uses on the Subject Property; (4) the Applicant has not adequately addressed the farm impacts test required by ORS 215.296; and (5) the Staff Decision violates ORS 215.416(8) because it is based on provisions relating to grape wineries rather than a meadery. The findings below address each of those issues.

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1. Is a meadery an allowed use in the EFU zone?

The Applicant's proposed Meadery includes meadery facilities for processing mead and several associated commercial activities such as tasting areas, food carts, and incidental sales of mead-related items. Appellant asserts that the Meadery is not an allowed use in the EFU zone.

ORS 215.203 establishes a statewide construct for determining which uses are allowed in the EFU zone. Under that statute, an EFU zone "shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284."¹ ORS 215.213 and ORS 215.284 are not applicable in the present matter. ORS 215.283 sets forth various specific uses, other than "farm uses", that are allowed in the EFU zone. The non-farm uses in ORS 215.283(1) are uses a county must allow by right, subject only to statutory standards rather than local standards.² The non-farm uses listed in ORS 215.283(2), in contrast, are considered "conditional" uses that a county can choose to allow, and in doing so a county can impose additional restrictions on those uses.³

Appellant is correct that neither the Deschutes County Code ("DCC" or "Code") nor ORS 215.283 expressly lists "meadery" as an allowed non-farm use in the EFU zone. ORS 215.283(1)(n) does list a "winery" as a use permitted by right, but only if the winery is the type of winery described in ORS 215.452 or ORS 215.453. DCC 18.16.025(F) mirrors that statute and also refers to ORS 215.452, which the Code incorporates through DCC 18.16.038(B). By the express terms of those statutory and Code provisions, such wineries are wineries that produce wine from grapes.⁴ Those statutes therefore do not provide a basis for permitting the Meadery, which processes honey rather than grapes.

In contrast to the winery example, ORS 215.283 and the Code also establish broader categories of non-farm uses that encompass multiple specific uses. ORS 215.283(1)(c), for example, authorizes "utility facilities necessary for public service", but that category has been applied to allow different types of specific utilities.⁵ The absence of the word "meadery" in the statute or Code, therefore, does not mean a meadery cannot ever be approved, and it is possible to approve a meadery under one of the listed use categories, as long as the Meadery is a type of use contemplated by that broader category.

The broader category the Applicant seeks as the basis for approving the Meadery is set forth in ORS 215.283(2)(a) – "commercial activities that are in conjunction with farm use." The express terms of that statute do not limit that category to any particular type of commercial activity and, instead, require only that the commercial activity be in conjunction with a farm use. Indeed, that is how the courts have applied that statute. Applying ORS 215.283(2)(a) prior to the legislature's enactment of ORS 215.452 and ORS 215.453, which now expressly allow certain wineries as a non-farm use, the Oregon Supreme Court upheld the issuance of a conditional use permit for a winery in the EFU zone as a commercial activity in

¹ ORS 215.203(1).

² *Brentmar v. Jackson Cty.*, 321 Or 481, 496 (1995).

³ *Id.*

⁴ *See, e.g.*, ORS 215.452(1), authorizing wineries that "produce wine" and that either includes an onsite vineyard, includes a contiguous vineyard, or sources grapes from a contiguous vineyard.

⁵ *See, e.g.*, *Dayton Prairie Water Ass'n v. Yamhill County*, 38 Or LUBA 14 (2000) (applying statute to approve water facilities); *c.f. WKN Chopin, LLC v. Umatilla County*, 66 Or LUBA 1 (2012) (applying statute to approve electric transmission line).

conjunction with a farm use.⁶ It did so because the winery at issue in that case satisfied the criteria of ORS 215.283(2)(a) and despite the fact that “winery” was not separately listed as an allowed use in the EFU zone.

Based on the foregoing, I find that the Meadery is an allowed use in the EFU zone as long as the proposed use satisfies the standards required for “commercial activities that are in conjunction with farm use” as contemplated by DCC 18.16.030, which is the County’s version of ORS 215.283(2)(a).⁷

a. Is the Subject Property currently in farm use?

Appellant asserts that a farm use is “a predicate for the approval of a commercial activity in conjunction with farm use.” More particularly, Appellant’s assertion is that “a current farm use” must be shown before any commercial activities in conjunction with farm use can be permitted. Appellant argues that the record is not sufficient to demonstrate that the Subject Property is “currently” in farm use, as defined by ORS 215.203(2). In support of this argument, Appellant relies on *Friends of Marion County v. Marion County*, -- Or LUBA --, LUBA No. 2021-088/089 (Apr. 21, 2022) (“*Friends of Marion County*”).

As presented to the Hearings Officer, Appellant argues only that the Applicant has not demonstrated a “current” farm use. The difficulty with Appellant’s argument is that it does not address whether the proposed use of the Subject Property as a Meadery, which would occur in the future, will be in conjunction with a farm use that will exist at that time. Rather, Appellant’s written and oral comments acknowledge that the activities the Applicant proposes to produce mead in the future – which include beekeeping and honey production – are farm uses. I therefore understand Appellant’s argument to be that, regardless of what future farm uses occur as part of the proposal, the Applicant must nevertheless demonstrate that there are currently farm uses on the Subject Property.

The *Friends of Marion County* case and other cases interpreting ORS 215.283(2)(a) make it clear that a “farm use” must exist if there is to be an allowed commercial activity in conjunction with that farm use. Contrary to Appellant’s argument, however, those cases do not hold that the farm use must already be in existence at the time of the application. In other words, they do not prevent an applicant from proposing a future commercial activity that will be in conjunction with a future farm use developed at the same time, and in fact, those cases imply or acknowledge that the farm use can be developed in the future.

In *Friends of Marion County*, for example, the issue LUBA addressed was the argument that “none of the findings or the evidence in the record demonstrates that intervenors currently operate or will operate a farm use.”⁸ LUBA reversed the county’s approval in that case based on its conclusion that a farm use did not currently exist. However, the county’s findings in that case determined that the current uses on the subject property were “farm uses” and the county required the applicant to maintain those same uses as part of the approval of the commercial uses the applicant proposed. Because LUBA concluded that the

⁶ *Craven v. Jackson County*, 308 Or 281 (1989).

⁷ I also note that Appellant’s representative appears to have agreed with this conclusion during the Hearing. In response to a question from the Hearings Officer asking if all meaderies are excluded from the EFU zone as a matter of law, the representative responded that was likely not the case and that it would need to be determined on a case-by-case basis under ORS 215.283(2)(a).

⁸ *Friends of Marion County* at *10.

current activities were not “farm uses” as defined by statute, the applicant could therefore not rely on those same activities as a basis for the approval of commercial uses in conjunction with farm uses. That case did not involve a record that contemplated the further development of farm uses like the record in this matter does. *Craven* also illustrates this point. In that case, the Court considered a conditional use permit granted to an applicant who “proposes to establish a vineyard and winery”, which “winery is to be constructed before the accompanying vineyard is fully planted.”⁹ Thus, the Court approved the commercial activity in conjunction with a farm use that was not yet established. The Court was concerned only whether the farm use would exist at the same time the proposed commercial activities were conducted.

Based on the foregoing, I cannot agree with Appellant’s assertion that the Applicant is required to show that a farm use “currently” exists on the Subject Property. As in *Craven*, the permit can be issued as long as the commercial activities are conducted in conjunction with a farm use, which farm use may be developed in tandem with the commercial activities once the permit is issued.

If the Applicant were required to show that the Subject Property, as it currently exists, is in farm use, this would be a more difficult issue to resolve. Appellant takes issue with the fact that the Applicant has not demonstrated a “profit” from farm activities. As explained in *Friends of Marion County*, “profit” is a broad term, and profit exists “so long as crops are raised, harvested and sold for a gross profit.”¹⁰ In that case, LUBA held that a farmer had not demonstrated a profit where the farmer “simply testified that they sold the field crops with no other documentation of their production or sale.” Here, while it is an extremely close call, I find the Applicant has provided more than mere testimony that it has sold crops. The Applicant has also testified that there has been a gross profit from those sales and that the revenue earned has been reinvested in the farming operation. Based on this record, and although the Applicant has provided little corroboration of revenue from the current farm, I find it more likely than not that the Subject Property is currently in farm use.

b. Does the Meadery satisfy the standard for commercial activities in conjunction with farm use?

Appellant asserts that the Meadery does not meet the standard for allowing commercial activities in conjunction with farm use. Appellant’s specific arguments are that the Meadery is not incidental and subordinate to Applicant’s planned farm uses, and that it does not enhance the local agricultural community.

Appellant’s arguments are grounded in the case law that interprets ORS 215.283(2)(a). One clear articulation of the standard from the Court of Appeals states that any commercial activity beyond the direct processing and selling of a farm product must “be both ‘incidental’ and subordinate to” the farm use.¹¹ In *Friends of Yamhill County*, the Court of Appeals addressed a county’s approval of a permit to allow 44

⁹ *Craven*, 308 Or at 283-84.

¹⁰ *Friends of Marion County* at *16 citing *Cox v. Polk County*, 39 Or LUBA 1, 7-12 (2000).

¹¹ *Friends of Yamhill County v. Yamhill County*, 255 Or App 636, 650-51 (2013) citing *Craven*, 308 Or at 289.

annual events as part of a winery.¹² Finding the approval to be “dangerously close” to creating a scenario in which the incidental and secondary activities overtake the primary activity, the court nevertheless upheld the approval. The court explained that its decision was based on a condition of approval that limited non-farm income from the commercial activity from exceeding 25 percent of the gross income from the farm use activity, which was the onsite retail sales of wine.¹³

The Applicant’s proposal and the Staff Decision in this matter imposed a condition of approval similar to the condition in *Friends of Yamhill County*. Specifically, the Staff Decision imposes a condition that requires the Applicant to confirm, on an annual basis, that no less than 25% of the honey used to produce mead is generated from the Subject Property. However, this condition of approval does not address the same issue the court was concerned with in *Friends of Yamhill County*. The condition in *Friends of Yamhill County* ensured that the scale of the non-farm commercial use was not greater, and therefore subordinate to, the primary farm use. In contrast, the condition in the Staff Decision that the Applicant relies on controls only the scale of the farm product being used for the commercial activity, ensuring that the Subject Property is the primary source of the farm product. That condition does not appear to impose any limitations on the scale of the non-farm commercial uses. Thus, for example, even if the Applicant sourced all of its honey from the Subject Property, nothing would prevent the Applicant from holding events and selling food from food carts in a manner the produces significantly more income than the farm use. If that occurred, the non-farm commercial activities would end up being the primary activity rather than the secondary activity.

As the Appellant points out, there are other components of the Application indicating that the non-farm commercial uses are not subordinate to the farm use. For example, the Applicant intends to have four employees for the Meadery, but perhaps only one, if any, for the farm operations. It is perhaps possible to have such a disparity in employees and still have the farm use be the primary use. However, as the Appellant notes, the Applicant simply has not attempted to quantify the magnitude of the farm use or the magnitude of the non-farm commercial activities. Some attempt at quantifying those activities is necessary if they are to be compared for the purpose of identifying a primary use and a secondary use.¹⁴ That burden lies with the Applicant. Based on the record before me, I find that the Applicant has not met that burden.¹⁵

Although I agree with the Appellant that the Applicant has not demonstrated the Meadery will be incidental and subordinate to a farm use, I disagree with the Appellant’s argument that the Applicant has not demonstrated the Meadery enhances the local agricultural community. The *Craven* decision is informative in this regard. In that case, the Court determined that the proposed winery did enhance the local agricultural community because it provided a local market outlet for grapes of other growers in the area. The Court also noted that it would help transform a hayfield into a vineyard, which increases the

¹² The application in that case was made pursuant to ORS 215.283(2)(a) as a commercial activity and not under ORS 215.283(1)(n) as a winery.

¹³ The definition of “farm use” includes “the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use.” ORS 215.203(2)(a).

¹⁴ See, e.g., *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992) (holding that an application without evidence establishing the quantity of products delivered or dollar amount of sales to cannot demonstrate, as a matter of law, the proposed use is a commercial activity in conjunction with farm use).

¹⁵ Appellant also relies on *Friends of Yamhill County v. Yamhill County*, 301 Or App 726 (2020). That case, although it addresses commercial activities, applies ORS 215.283(4), and is therefore not directly applicable to this matter.

intensity and value of agricultural products. LUBA has built on the decision in *Craven* and stated that, to demonstrate an activity enhances the local agricultural community, “a commercial activity in conjunction with farm use must be either exclusively or primarily a customer or supplier of farm uses.”¹⁶

The Applicant’s proposal here is nearly identical to the situation in *Craven* and *City of Sandy v. Clackamas County*. Specifically, the Applicant proposes to purchase honey from other farmers. Although the Applicant will not be a supplier of other farm uses, it will be primarily a customer of farm uses. The Applicant also proposes to develop regenerative bee pastures, which enrich the soils and, ultimately, increases the intensity and value of agricultural products. I therefore find that the Applicant’s proposal satisfies this part of the standard in ORS 215.283(2)(a).

Based on the foregoing, I find that the Application must be denied because the Applicant has not met its burden of demonstrating the Meadery – as proposed – will be incidental and subordinate to a primary farm use on the Subject Property.

c. Did the Applicant adequately address the farm impacts test required by ORS 215.296?

As noted above, a commercial activity in conjunction with farm use is an allowed use in the EFU Zone, subject to any additional conditions the County may impose in its Code. Pursuant to DCC 18.16.040, the County has imposed several limitations on conditional uses, including commercial activities in conjunction with farm use authorized under DCC 18.16.030. The specific restrictions in DCC 18.16.040(A)(1) and (2) are required by state law and are a codification of the restrictions in ORS 215.296(1). LUBA sometimes refers to these restrictions as the “Farm Impacts Test.”

An applicant carries the burden of proving that ORS 215.296(1) has been met.¹⁷ LUBA has a well-established methodology for demonstrating compliance with the farm impacts test.¹⁸ Under that methodology, a proposal can be approved only if it: (1) describes farm practices on surrounding lands devoted to farm use; (2) explains why the proposed development will not force a significant change in those practices; and (3) explains why the proposed development will not significantly impact or increase the cost of those practices. To begin that process, LUBA has held that “[i]n applying ORS 215.296(1), it is entirely appropriate for the applicant to begin by visually surveying surrounding lands to identify the farm and forest uses to which those lands are devoted.”¹⁹ Other parties are then free to dispute the initial findings, or to add to the record additional evidence of nearby farm uses and farm practices that the applicant must respond to.²⁰

In addressing the Farm Impacts Test, the Applicant initially followed the process described above by providing what amounted to a visual survey of the surrounding land. Specifically, the Applicant provided an inventory of all parcels within a one-mile radius of the Subject Property that are devoted to farm use. As part of that inventory, the Applicant also identified specific farm uses in the study area,

¹⁶ *City of Sandy v. Clackamas County*, 28 Or LUBA 316, 321 (1994).

¹⁷ *Schrepel v. Yamhill County*, -- Or LUBA – (LUBA No. 2020-066), 2020 WL 8167220, at *6.

¹⁸ See *Brown v. Union County*, 32 Or LUBA 168 (1996).

¹⁹ *Dierking v. Clackamas County*, 38 Or LUBA 106, 120-21 (2000).

²⁰ *Id.*

noting that they included “a combination of grass hay, permaculture, forest, [and] bare land.” Other information provided by the Applicant indicates that some properties have horses, cattle, and pastures.

The Applicant concludes, primarily based on geographic separation, that there will be no impacts to forest or farm practices on the farm uses identified in the inventory. For example, the Applicant states a nearby property “is buffered by our own dwellings, farm buildings, 12 acres of regenerative bee pasture, and a 20-acre field that will eventually become regenerative bee pasture. At this distance, the winery will not significantly change or increase the cost of any of the accepted farm practices on this farm property.” The Applicant arrived at a similar conclusion for potential noise and light impacts, noting that, because of the adjacent noise and lights from Highway 20, these impacts are already accepted by all adjoining farm and forest land.

The flaw in the Applicant’s analysis is that it does not actually identify any farm practices that are associated with the various farm uses it identifies. As applied by LUBA and the courts, the Farm Impacts Test must focus on impacts to farm practices. Further, the fact that a similar impact may already exist does not mean that an increase in that impact is necessarily acceptable. An impact that already exists may nevertheless force a significant change to the farm practices associated with that use, or significantly increase the costs of those practices. That determination cannot be made, however, unless the Applicant first identifies specific farm practices that may be impacted.

In summary, the record does not include a description of the farm practices on surrounding lands devoted to farm use, nor does it include any explanation for why the proposed development will not force a significant change or cost to those practices. It is quite possible that the meadery will not have significant impacts on farm practices, but the burden to demonstrate compliance with the Farm Impacts Test unequivocally lies with the Applicant. Without any analysis of the accepted farm practices that are associated with the identified farm uses, I cannot make a factual finding regarding the existence of those farm practices, or a finding that it is more likely than not that the Meadery will not force a significant change to those farm practices. I therefore find that the Applicant has not met its burden to demonstrate compliance with DCC 18.16.040(A)(1) and (2).

d. Did the Staff Decision comply with ORS 215.416(8)?

Because a meadery is a type of winery, the Applicant refers to the winery statutes and compares the proposed meadery to a grape winery. As noted in earlier findings, state statutes contain provisions specific to grape wineries and grape wineries are allowed in the EFU zone either outright through ORS 215.283(1)(n), as implemented by ORS 215.452 and ORS 215.453, or conditionally through ORS 215.283(2)(a) as a commercial activity in conjunction with agriculture. Applicant’s stated purpose for comparing a meadery to a winery is that using the winery statutes as a guide helps ensure the meadery remains “incidental and subordinate to farm use.” Appellant asserts that this approach is akin to approving the meadery based on inapplicable criteria and, therefore, violates ORS 215.416(8). That statute requires that approval or denial of a permit application be based only on applicable standards and criteria set forth in a county’s land use regulations. Appellant argues that the winery statutes are not applicable and, therefore, cannot be relied on for approval of the Meadery.

Even though this Decision reverses the outcome of the Staff Decision, ORS 215.416(8) applies to both the approval or denial of an application. I therefore find it appropriate to address whether the Staff Decision violated ORS 215.416(8). I find that it did not.

There is no dispute in this proceeding that the Applicant seeks approval of the meadery under ORS 215.283(2)(a) as a commercial activity in conjunction with agriculture. The Applicant refers to the winery statutes as a guide and Applicant's express request to the County was "We have suggested that the County consider imposing most of the limitations on the meadery that ORS 215.452 applies to small wineries as a means of assuring that activities associated with the meadery are incidental and subordinate to farm use." Indeed, the Applicant recognized that ORS 215.452 was not a basis for approval of the meadery where it referred to ORS 215.456, which points back to ORS 215.283(2)(a) as a means of approving a winery that cannot otherwise be approved under ORS 215.283(1)(n), ORS 215.452, and ORS 215.453.

Contrary to Appellant's assertion, the Staff Decision did not rely on the winery statutes and, therefore, did not rely on inapplicable criteria. Indeed, the Staff Decision very clearly articulated the standard under ORS 215.283(2)(a) and set forth the three components of such a use that Staff would review: (1) the use must be a "commercial" activity; (2) it must be "in conjunction with farm use;" and (3) it must not be the processing of farm crops as described in Section 18.16.025. The Staff Decision then made findings relating to each of those components, and did so without reference to the requirements of the winery statutes. The criteria the Staff Decision relied on are each incorporated into the County's Code. The Staff Decision therefore did not violate ORS 215.416(8).

C. Conditions of Approval

The Staff Decision imposed several conditions of approval as part of Staff's approval of the Application. The Hearings Officer notes that no participant challenged any condition of approval or otherwise asserted such conditions could not or should not be applied if the Application were approved. Because this Decision finds that the Application cannot be approved based on the current record, however, there is no basis to impose any conditions of approval.

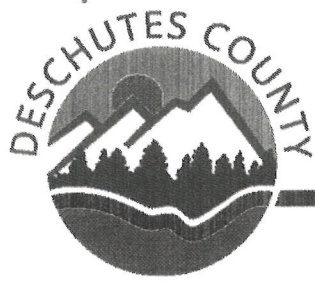
IV. CONCLUSION

Based on the foregoing findings, I find the Applicant has not met its burden of proof with respect to the standards for approving commercial activities in conjunction with a farm use and with respect to the Farm Impacts Test. The appeal of the Staff Decision is therefore SUSTAINED, and the Application is DENIED.

Dated this 17th day of November 2022



Tommy A. Brooks
Deschutes County Hearings Officer



Mailing Date:
Wednesday, September 7, 2022

COMMUNITY DEVELOPMENT

FINDINGS AND DECISION

FILE NUMBER: 247-22-000024-CU, 247-22-000025-SP

**SUBJECT PROPERTY/
OWNER:** Mailing Name: HERMAN, JOHN & RENEE ET AL
Map and Taxlot: 1510100000700
Account: 135891
Situs Address: 68540 HWY 20, SISTERS, OR 97759

APPLICANT: John Herman

REQUEST: The applicant request a Conditional Use Permit for commercial activities in conjunction with farm use to establish a Meadery (Honey Winery) with associated uses. The request also includes a Site Plan Review for the Meadery.

STAFF CONTACT: Nathaniel Miller, AICP, Associate Planner
Phone: 541-317-3164
Email: Nathaniel.Miller@deschutes.org

RECORD: Record items can be viewed and downloaded from:
www.buildingpermits.oregon.gov

I. APPLICABLE CRITERIA

Title 18 of the Deschutes County Code, the County Zoning Ordinance:

- Chapter 18.04, Title, Purpose and Definitions
- Chapter 18.16, Exclusive Farm Use Zones (EFU)
- Chapter 18.80, Airport Safety Combining Zone (AS)
- Chapter 18.84, Landscape Management Combining Zone (LM)
- Chapter 18.56, Surface Mining Impact Area Combining Zone (SMIA)
- Chapter 18.116, Supplementary Provisions
- Chapter 18.120, Exceptions
- Chapter 18.124, Site Plan Review
- Chapter 18.128, Conditional Use

Title 22, Deschutes County Development Procedures Ordinance

II. BASIC FINDINGS

LOT OF RECORD: The subject property is a legal lot of record being platted Parcel 1 of Minor Partition MP-02-44.

SITE DESCRIPTION: The subject 83.48-acre property is a developed ranch with 2 single-family dwellings, farm buildings, and supporting ranch infrastructure. The majority of the property is pastureland on the northwest and southeast sides. The developed portion of the property is along the southwest property line which abuts Highway 20. There is a light cover of Ponderosa Pine trees and other vegetation at the northeast, southeast, and around the ranch houses and barns. The property is irregular in shape, and fronts on Highway 20 to the southwest and Highway 126 to the northeast. The grade of the property is relatively even across the parcel. The subject property is depicted in *Image One* below.

Image One – Subject Property



REVIEW PERIOD: The subject application(s) were submitted on January 19, 2022 and deemed incomplete by the Planning Division on February 18, 2022. The application was deemed complete on July 15, 2022. The 150th day on which the County must take final action on this application is December 12, 2022. The submitted application materials are incorporated herein by reference.

PROPOSAL: The applicant requests a Conditional Use Permit for commercial activities in conjunction with farm use to establish a Meadery (Honey Winery) with associated uses. The Meadery will operate similarly to a winery combining wine production and onsite sales, events, consumption, and education. As outlined below, the proposed Meadery as the commercial activity includes the following associated uses (actions) and subordinate features:

1. Mead Production, Aging, & Packaging
2. Meadery Indoor Tasting Area & Wine Sales
3. Meadery Outdoor Tasting Area
4. Farm Store
5. 1 Food Cart
6. Winery Activities
 - Wine Tasting
 - Wine Club Gatherings
 - Winery and Bee Pasture Tours
 - Business Functions
 - Staff Functions
 - Promotional Events
7. Winery Related Events (Limited to 20 Events Annually)
 - Events (18 Events Annually)
 - Concerts (2 Live Music Events Annually)
 - 2 Addition Food Carts

The proposed Meadery will be located in an existing 3,000-square-foot farm building which will be converted to the "Winery Building". The production, parking, tasting areas, food carts are located in, or in close proximity to, the Winery Building. The Winery Related Events will be staged in the same area but include a lawn and stage area to the northwest, as well as additional parking to the north and east.

As the seven (7) associated uses (actions) differ with respect to characteristics, function, and location on the site, staff classifies the uses into the following three aspects for the purposes of this review:

I. Mead Production

Mead Production, Aging, & Packaging

II. Winery Operations

Meadery Indoor Tasting Area & Wine Sales

Meadery Outdoor Tasting Area

Farm Store

1 Food Cart

Winery Activities

- Wine Tasting
- Wine Club Gatherings
- Winery and Bee Pasture Tours
- Business Functions

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DESCHUTES COUNTY MUNICIPAL CODE (MUNICODE)
Exclusive Farm Use (18.16.010 Purpose)

1. The purpose of the Exclusive Farm Use zones is to preserve and maintain agricultural lands and to serve as a sanctuary for farm uses.
2. The purposes of this zone are served by the land use restrictions set forth in the Comprehensive Plan and in DCC 18.16 and by the restrictions on private civil actions and enforcement actions set forth in ORS 30.930 through 30.947.

Multiple Use Agricultural Zone (18.32.010 Purpose)

The purposes of the Multiple Use Agricultural Zone are to preserve the rural character of various areas of the County while permitting development consistent with that character and with the capacity of the natural resources of the area.

1. To preserve and maintain agricultural lands not suited to full-time commercial farming for diversified or part-time agricultural uses;
2. To conserve forest lands for forest uses;
3. To conserve open spaces and protect natural and scenic resources;
4. to maintain and improve the quality of the air, water and land resources of the County;
5. to establish standards and procedures for the use of those lands designated unsuitable for intense development by the Comprehensive Plan, and
6. to provide for an orderly and efficient transition from rural to urban land use.

In MUA-10 zoned land, the following uses and their accessory uses are permitted outright:

1. Agricultural uses as defined in DCC Title 18.
2. A single-family dwelling, or a manufactured home subject to DCC 18.116.070.
3. Propagation or harvesting of a forest product.
4. Class I and II road or street project subject to approval as part of a land partition, subdivision or subject to the standards and criteria established by DCC 18.116.230.
5. Class III road or street project.
6. Noncommercial horse stables, excluding horse events.
7. Horse events, including associated structures, involving:
 1. Fewer than 10 riders;
 2. Ten to 25 riders, no more than two times per month on nonconsecutive days; or
 3. More than 25 riders, no more than two times per year on nonconsecutive days.
Incidental musical programs are not included in this definition. Overnight stays by participants, trainers or spectators in RVs on the premises is not an incident of such horse events.
8. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.

□

9. Type 1 Home Occupation, subject to DCC 18.116.280.
10. Historic Home Accessory Dwelling Units, subject to DCC 18.116.350.
11. Residential Accessory Dwelling Units, subject to DCC 18.116.355.

January 2, 2024

Hi Toby,

This letter is about a conversation I had with Duane Barker.

You know we live at 20525 Bowery Lane which is across Bowery from the Barkers. And, we have often complained to Duane because he also used his tractor to take gravel from our side of Bowery Lane to his side of the road. He also shoots across Bowery to scare birds out of his grapes and punctured my irrigation pipe with his shotgun which indicates he's shooting into my land.

He also runs a squawk box all day during the summer to keep birds out of his grape vines. We have to listen to this all summer. And now he wants to have a winery. I asked him if all the things he'd applied to have going on and all the cars on our 1 lane road – how could he get away with this? Our HOA doesn't allow businesses that sell to customers directly from their property and also the blind corners are very dangerous.

How could his application get approved? I'm not sure those were my exact words but the conversation was about how he could get away with having a winery on his land. And he kind of smirked and said I know Tony Debone. Before that I heard he had bragged to neighbors and people from the county that he had personal friends in high places at the county.

Anyway Tony Debone is a county commissioner. I guess commissioners decide these things. But it really isn't fair to the rest of us because we obey the law and county rules and share the road enough as it is without a bunch of customers coming to his property illegally to drink and buy wine.

Hope this information helps our neighborhood to remain peaceful.

Van Jensen

A handwritten signature in black ink that reads "Stephen V. Jensen". The signature is written in a cursive, flowing style.

Deschutes County Code 18.16.025

https://www.deschutes.org/sites/default/files/fileattachments/community_development/page/736/exclusive_farm_use_efu_zoning_ordinance_chapter_18.16.pdf

18.16.025. Uses Permitted Subject to the Special Provisions Under DCC Section 18.16.038 or DCC Section 18.16.042 and a Review Under DCC Chapter 18.124 where applicable.

- A. Dwellings customarily provided in conjunction with farm use (farm-related dwellings), subject to DCC
- B. A relative farm assistance dwelling, subject to DCC 18.16.050.
- C. Churches and cemeteries in conjunction with churches consistent with ORS 215.441, that are not within 3 miles of an acknowledged urban growth boundary, on nonhigh value farmland.
- D. Churches and cemeteries in conjunction with churches consistent with ORS 215.441, that are within 3 miles of an acknowledged urban growth boundary, subject to Oregon Administrative Rules 660-0330130 on nonhigh value farmland.
- E. Expansion of an existing church or cemetery in conjunction with a church on the same tract as the existing use, subject to Oregon Administrative Rules 660-033-0130.
- F. Utility facilities necessary for public service, including wetland waste treatment systems, but not including commercial facilities for the purpose of generating electrical power for public use by sale and transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in DCC 18.16.038(A).
- G. Winery, as described in ORS 215.452.

Oregon Public Law Statute: ORS 215.452 - https://oregon.public.law/statutes/ors_215.452

A winery may be established as a permitted use on land zoned for exclusive farm use under ORS 215.213 (Uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993) (1)(p) and 215.283 (Uses permitted in exclusive farm use zones in nonmarginal lands counties) (1)(n) or on land zoned for mixed farm and forest use if the winery produces wine with a maximum annual production of:

(a) Less than 50,000 gallons and:

- (A) Owns an on-site vineyard of at least 15 acres;
- (B) Owns a contiguous vineyard of at least 15 acres;
- (C) Has a long-term contract for the purchase of all of the grapes from at least 15 acres of a vineyard contiguous to the winery; or
- (D) Obtains grapes from any combination of subparagraph (A), (B) or (C) of this paragraph; or

(b) At least 50,000 gallons and the winery:

- (A) Owns an on-site vineyard of at least 40 acres;
- (B) Owns a contiguous vineyard of at least 40 acres;
- (C) Has a long-term contract for the purchase of all of the grapes from at least 40 acres of a vineyard contiguous to the winery;
- (D) Owns an on-site vineyard of at least 15 acres on a tract of at least 40 acres and owns at least 40 additional acres of vineyards in Oregon that are located within 15 miles of the winery site; or
- (E) Obtains grapes from any combination of subparagraph (A), (B), (C) or (D) of this paragraph.

ORS 215.283

Uses permitted in exclusive farm use zones in nonmarginal lands counties *

- (1) The following uses may be established in any area zoned for exclusive farm use:
- (a) Churches and cemeteries in conjunction with churches. ...N/A
 - (b) The propagation or harvesting of a forest product. ...N/A
 - (c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power ...N/A
 - (d) A dwelling on real property used for farm use if the dwelling is occupied by a relative of the farm operator or the farm operator's spouse...N/A
 - (e) Subject to ORS 215.279 (Farm income standard for dwelling in conjunction with farm use), primary or accessory dwellings and other buildings customarily provided in conjunction with farm use.
 - (f) Operations for the exploration for and production of geothermal resources as defined by ORS 522.005 (Definitions) and oil and gas as defined by ORS 520.005 (Definitions)N/A
 - (g) Operations for the exploration for minerals as defined by ORS 517.750 (Definitions for ORS 517.702 to 517.989). Any activities or construction relating to such operations shall not be a basis for an exception under ORS 197.732 (Goal exceptions) (2)(a) or (b).
 - (h) Climbing and passing lanes within the right of way existing as of July 1, 1987... N/A
 - (i) Reconstruction or modification of public roads and highways N/A
 - (j) Temporary public road and highway detours that will be abandoned and restored N/A
 - (k) Minor betterment of existing public road and highway related facilities such as maintenance yards, weigh stations and rest areas, within right of way existing as of July 1, 1987, and contiguous public-owned property utilized to support the operation and maintenance ...N/A
 - (l) A replacement dwelling to be used in conjunction with farm use if the existing dwelling has been listed in a county inventory as historic property as defined in ORS 358.480 (Definitions for ORS 358.480 to 358.545). ...N/A
 - (m) Creation, restoration or enhancement of wetlands. ...N/A
 - (n) A winery, as described in ORS 215.452 (Winery) or 215.453 (Large winery) ←

* Deschutes is one of only two Oregon counties that does not have Marginal lands

Deschutes County Code 18.16.025

https://www.deschutes.org/sites/default/files/fileattachments/community_development/page/736/exclusive_farm_use_efu_zoning_ordinance_chapter_18.16.pdf

18.16.025. Uses Permitted Subject to the Special Provisions Under DCC Section 18.16.038 or DCC Section 18.16.042 and a Review Under DCC Chapter 18.124 where applicable.

- A. Dwellings customarily provided in conjunction with farm use (farm-related dwellings), subject to DCC
- B. A relative farm assistance dwelling, subject to DCC 18.16.050.
- C. Churches and cemeteries in conjunction with churches consistent with ORS 215.441, that are not within 3 miles of an acknowledged urban growth boundary, on nonhigh value farmland.
- D. Churches and cemeteries in conjunction with churches consistent with ORS 215.441, that are within 3 miles of an acknowledged urban growth boundary, subject to Oregon Administrative Rules 660-0330130 on nonhigh value farmland.
- E. Expansion of an existing church or cemetery in conjunction with a church on the same tract as the existing use, subject to Oregon Administrative Rules 660-033-0130.
- F. Utility facilities necessary for public service, including wetland waste treatment systems, but not including commercial facilities for the purpose of generating electrical power for public use by sale and transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in DCC 18.16.038(A).
- G. Winery, as described in ORS 215.452.

Oregon Public Law Statute: ORS 215.452 - https://oregon.public.law/statutes/ors_215.452

A winery may be established as a permitted use on land zoned for exclusive farm use under ORS 215.213 (Uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993) (1)(p) and 215.283 (Uses permitted in exclusive farm use zones in nonmarginal lands counties) (1)(n) or on land zoned for mixed farm and forest use if the winery produces wine with a maximum annual production of:

(a) Less than 50,000 gallons and:

- (A) Owns an on-site vineyard of at least 15 acres;
- (B) Owns a contiguous vineyard of at least 15 acres;
- (C) Has a long-term contract for the purchase of all of the grapes from at least 15 acres of a vineyard contiguous to the winery; or
- (D) Obtains grapes from any combination of subparagraph (A), (B) or (C) of this paragraph; or

(b) At least 50,000 gallons and the winery:

- (A) Owns an on-site vineyard of at least 40 acres;
- (B) Owns a contiguous vineyard of at least 40 acres;
- (C) Has a long-term contract for the purchase of all of the grapes from at least 40 acres of a vineyard contiguous to the winery;
- (D) Owns an on-site vineyard of at least 15 acres on a tract of at least 40 acres and owns at least 40 additional acres of vineyards in Oregon that are located within 15 miles of the winery site; or
- (E) Obtains grapes from any combination of subparagraph (A), (B), (C) or (D) of this paragraph.

Oregon Revised Statute (ORS) § 215.452:

Section 215.452 - Winery; conditions; permissible uses

(1) A winery may be established as a permitted use on land zoned for exclusive farm use under ORS 215.213(1)(p) and 215.283(1)(n) or on land zoned for mixed farm and forest use if the winery produces wine with a maximum annual production of:

- (a) Less than 50,000 gallons and:
 - (A) Owns an on-site vineyard of at least 15 acres;
 - (B) Owns a contiguous vineyard of at least 15 acres;
 - (C) Has a long-term contract for the purchase of all of the grapes from at least 15 acres of a vineyard contiguous to the winery; or
 - (D) Obtains grapes from any combination of subparagraph (A), (B) or (C) of this paragraph; or
- (b) At least 50,000 gallons and the winery:
 - (A) Owns an on-site vineyard of at least 40 acres;
 - (B) Owns a contiguous vineyard of at least 40 acres;
 - (C) Has a long-term contract for the purchase of all of the grapes from at least 40 acres of a vineyard contiguous to the winery;
 - (D) Owns an on-site vineyard of at least 15 acres on a tract of at least 40 acres and owns at least 40 additional acres of vineyards in Oregon that are located within 15 miles of the winery site; or
 - (E) Obtains grapes from any combination of subparagraph (A), (B), (C) or (D) of this paragraph.

(NOTE: Exclusive Farm Use is also referred to as lands zoned "EFU")

ORS 215.456

Siting winery as commercial activity in exclusive farm use (EFU) zone

(1) A local government may authorize the siting of a winery, on land zoned for exclusive farm use, pursuant to the standards that apply to a commercial activity in conjunction with farm use under ORS 215.213 (Uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993) (2)(c) or 215.283 (Uses permitted in exclusive farm use zones in nonmarginal lands counties) (2)(a) or other law if the winery

(NOTE: Deschutes County does not have marginal lands)

- (a) **Does not qualify for siting under ORS 215.452 (Winery) or 215.453 (Large winery); or**
- (b) **Seeks to carry out uses or activities that are not authorized by ORS 215.452 (Winery) or 215.453 (Large winery).**

(2) If a county authorizes the establishment of a winery on land zoned for exclusive farm use or mixed farm and forest use under provisions of law other than ORS 215.452 (Winery) or 215.453 (Large winery) after June 28, 2013, the gross income of the winery from any activity other than the production or sale of wine may not exceed 25 percent of the gross income from the on-site retail sale of wine produced in conjunction with the winery. The gross income of a winery does not include income received by third parties unaffiliated with the winery. [2013 c.554 §3]

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Thanks for taking the time to speak with me.

Inbox



tobybayard@gmail.com Nov 21, 2023, 1:40 PM

Hi Nathaniel,

Thanks for speaking with me today about the Barker's CUP application 247-22-000464. I've always worked well with Deschutes County's Community Development Department. I remain hopeful that this will continue. Your ruling for the Lazy Z Meadery (honey wine) business gives me hope that you understand Oregon Revised Statutes and Deschutes County Title 18 code as it relates to wineries.

Please put the attached into the public record with the Barkers' application.

Respectfully,

Toby (and Michel) Bayard
20555 Bowery Lane, Bend 97703

541-977-5341

One attachment • Scanned by Gmail

Nathaniel Miller <Nathaniel.Miller@deschutes.org> Nov 22, 2023, 10:18 AM

- It is unclear to staff why arguments are being made to apply Exclusive Farm Use (EFU) zoning and ORS 215.452 to the proposal. ORS 215.452 is specific to property owners who would like to establish a winery on property in the EFU Zone district. Our understanding is that these provisions do not preclude a similar use on properties which are outside the EFU Zone.

The only applicable zone district for the property is the Multiple Use Agricultural Zone (MUA10). The Staff Report, which was drafted for the Hearings Officer and public, can only address those criteria which are legally relevant. As such, we cannot apply EFU zoning or ORS regulation which address uses in the EFU zone only. Our apologies if previous attempts to explain this were miscommunicated. Also, please note that a Staff Report is not an approval, but a synopsis of a proposal, public and agency participation, and whether the application materials meet the standards of the zoning code.

- The applicant is applying for a "Commercial Activity in Conjunction with Farm Use" which is a permissible conditional use in the MUA 10 Zone if the applicant can successfully demonstrate that they meet the criteria. The requirements for a Site Plan Review will also need to be satisfied. As was stated in the Staff Report on page 59, it is unclear to staff if the proposal can be approved. This was why the proposal was referred to a public hearing and a third-party reviewer (Hearings Officer).

Again, we appreciate your participation in the process. We anticipate a decision from the Hearings Officer in mid-December. You and your neighbors who are within 250 feet of the subject property, and all parties-of-interest, will be notified of the Hearing Officer's decision. A 12-day appeal period will follow the issuance of the decision. Please let me know if you have any additional concerns or questions, I am happy to help. Please call me directly at: 541-317-3164.

Regards,

Nathaniel

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Nathaniel Miller, AICP | Associate Planner
Deschutes County Community Development
117 NW Lafayette Ave | Bend, Oregon 97703
Tel: (541) 317-3164 | www.deschutes.org/cd

Disclaimer: Please note that the information in this email is an informal statement made in accordance with DCC 22.20.005 and shall not be deemed to constitute final County action effecting a change in the status of a person's property or conferring any rights, including any reliance rights, on any person

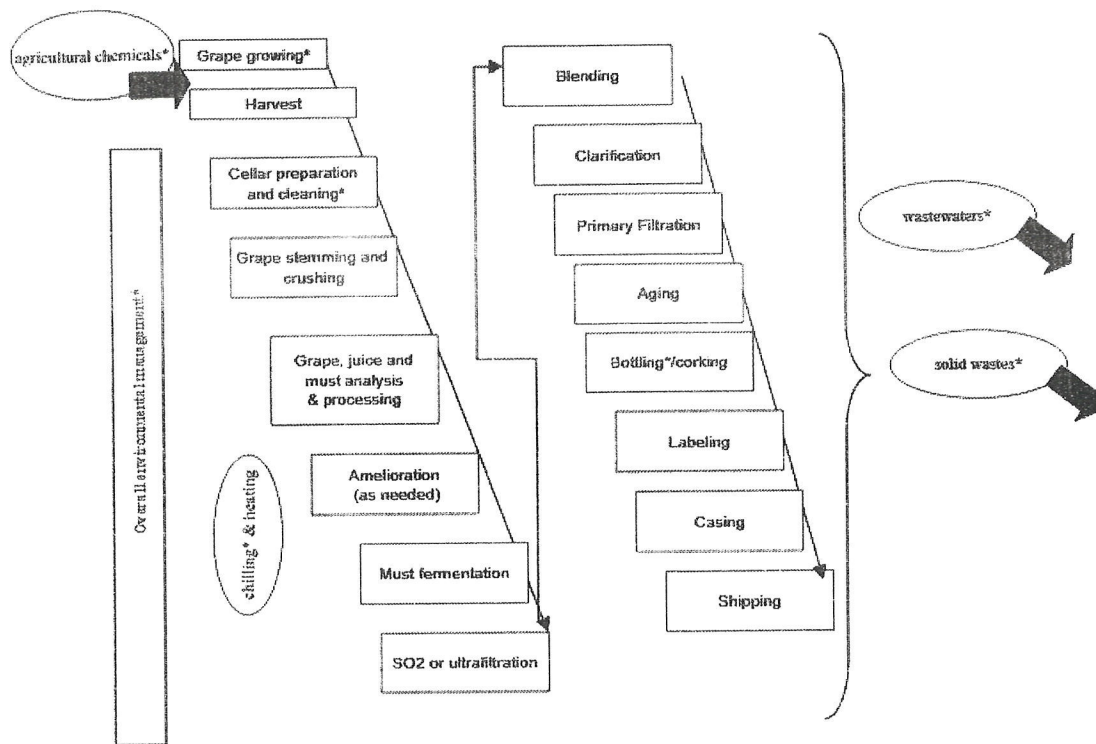
From: tobybayard@gmail.com <tobybayard@gmail.com>
Sent: Tuesday, November 21, 2023 1:40 PM
To: Nathaniel Miller <Nathaniel.Miller@deschutes.org>
Cc: ben@colw.org; mlbayard1943@gmail.com; tobybayard@gmail.com; tryonsharon1@gmail.com; gkrambeal@gmail.com; bruce@levins774.com
Subject: Thanks for taking the time to speak with me.
Importance: High

5 Attachments • Scanned by Gmail

Waste water treatment issues associated with wineries

First, I must state that I have a degree in Chemical Engineering with a minor in Oenology from the University of Bordeaux, France. I worked several summers in Saint Emilion wineries which are near Bordeaux. As a result, I'm well aware of the main challenges that wineries face. A major one is contamination in the manufacturing process.

If the wine manufacturing equipment is not kept completely free of contaminants, the risk of microbial spoilage and undesirable compounds in wine manufacturing is high and the result is costly for the winery.



Contamination risk is present at *every* stage of the manufacturing process. It can result from improper removal of cleaning agents, dirty production lines, etc. Product contamination is a costly problem that all wineries face.

Small wineries (such as what Lava Terrace Cellars will be, if their CUP application is approved) face significant challenges in managing this waste water.

In St. Emilion, some of the smaller wineries I consulted for had only septic and leach field systems. They inevitably clogged after the high solid stages in wine processing. The result was untreated wastewater being discharged in the surrounding fields. And, due to "economies of scale, these wineries often used cheaper cleaning chemicals. For instance, chlorine-based bleach is one of the two key contributors to the creation of 2,4,6-trichloroanisole (TCA), a major wine fault. When a wine has TCA present beyond the sensory threshold, it's "corked" and will give off undesirable musty aromas. Adding to this problem is that the sensory threshold is very low. It's

less than five (5) nanograms per liter (5 billionths of a gram) the wine consumer will begin to notice the unpleasant aromas of TCA.

But wine equipment must be cleaned throughout the manufacturing process. In St. Emilion, the risk of severe pollution was significant as these cheaper cleaning agents result in waters that contain many dangerous chemicals. If this chemical cleaning agents are not constantly removed from the manufacturing process, they can seep down into to the underlying aquifer. In the Rock O' The Range neighborhood, where Lava Terrace Cellars is sited, this would have disastrous consequences since most residents rely on the aquifer for their drinking water.

A better solution for small wineries is to build wastewater pond systems. But, these require a significant amount of land. Lave Terrace Cellars stated in its CUP application that it plans on producing 2000 cases of wine per year. This would create about 16,000 gallons of wastewater over a period of two months (mid-September to mid-November) and would require multiple ponds over an area close to one acre. Considering that Barker's 5.45 acres are already occupied by multiple buildings, parking areas, vines, a pond, etc. there is no room for such a wastewater treatment on their 5.45 acre parcel.

In addition, wastewater treatment ponds are not effective at breaking dawn fruits contaminants, tannins and other toxic chemicals since they don't provide sufficient biological oxygen demand (BOD). Such wastewater should not be released in the environment without further treatment that should be done off site.

Lastly, wastewater pond generate very unpleasant odors. These would be totally unacceptable in a residential neighborhood such as the Rock O' The Range.



Michel Bayard, Ph.D

Return to: Izzie Liu, Associate Planner
Community Development Dept.
117 NW Lafayette, P.O. Box 6005
Bend, OR 97708-6005



06/08/2020 10

D-IPPS Cnt=1 Stn=3 AS
\$25.00 \$11.00 \$61.00 \$10.00 \$6.00

CONDITIONS OF APPROVAL AGREEMENT

THIS AGREEMENT, made and entered into by and between Deschutes County, a political subdivision of the State of Oregon, ("County"), and Duane & Dina Barker, ("Developers"), owner/s of certain real property described in Exhibit A, Deschutes County, Oregon, as set forth in that certain Statutory Warranty Deed, dated October 15th, 1998, recorded in Deschutes County Book of Records 1998-5171128 ("Real Property").

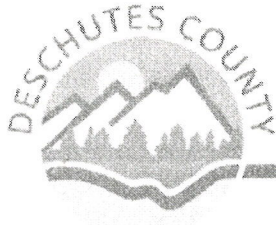
WITNESSETH:

WHEREAS County has granted approval of a land use permit 247-18-000126-AD ("Permit") for the Real Property upon the condition that Developer construct and maintain certain requirements as specified therein; now, therefore,

IT IS HEREBY AGREED, by and between the parties, for and in consideration of the mutual covenants and agreements herein, as a condition precedent to the granting of final approval or occupancy, as follows:

Scope of Agreement. This Agreement affects the Real Property described above. This Agreement shall cover those improvements and requirements described in the section of this Agreement entitled "Conditions of Final Approval." Nothing in this Agreement shall require Developer to construct any improvements under the Permit, but if Developer undertakes the construction of buildings or structures, the division of real property or otherwise exercises the Permit, Developer shall be required to complete and maintain all improvements, as defined herein, in accordance with applicable County Ordinances and the Permit.

Definition of Improvement. As used herein, "improvement" means any private or public facility or service such as roadways, bike paths, access ways, pedestrian walkways, landscape areas, sewage collection and disposal systems, water systems, lighting systems, parking lots, cable utilities, circulation areas, outdoor storage areas, service and delivery areas, outdoor recreation areas, retaining walls, signs and graphics, cut-and-fill areas, buffering and screening measures, street furniture, drainage facilities, or other similar improvements as approved and required in the Permit.



Mailing Date:
Wednesday, June 20, 2018

COMMUNITY DEVELOPMENT

FINDINGS & DECISION

FILE NUMBER: 247-18-000126-AD
APPLICANT/OWNER: Duane & Dina Barker
REQUEST: The applicant is requesting an Administrative Determination to establish a Type 1 home occupation for wine storage in the Multiple Use Agricultural Zone.
STAFF CONTACT: Izzie Liu, Associate Planner

I. APPLICABLE CRITERIA:

Title 18, Deschutes County Zoning Ordinance:
Chapter 18.04, Title, Purpose and Definitions
Chapter 18.32, Multiple Use Agricultural (MUA10) Zone
Chapter 18.116, Supplementary Provisions
Title 22, Deschutes County Development Procedures Ordinance

II. BASIC FINDINGS:

- A. LOCATION:** The subject property is located at 20520 Bowery Lane, Bend; and is further identified on County Assessor's Map 17-12-09B as tax lot 1000.
- B. LOT OF RECORD:** Legal lot of record verification is not required pursuant to DCC 22.04.040(B)(2)(e)¹.
- C. ZONING:** The subject property is zoned MUA10.
- D. SITE DESCRIPTION:** The subject property is approximately 5.45 acres and is irregular in shape. The property is developed with an existing single-family dwelling and five accessory

¹ For permits listed in subsection (B)(1)(e) only, the lot or parcel previously received a land use or building permit prior to November 1, 2017, a structural permit after November 1, 2017, or a non-emergency on-site sewage disposal permit.

structures. The property owners are also growing wine grapes on the southern portion of the property. Access is taken from Bowery Lane, a rural local road.

- E. **PROPOSAL:** The applicant requests approval of a Type 1 home occupation to utilize 160 square feet of an existing storage container on the subject property for wine storage. Although grapes are grown on the subject property, the applicant has stated that the grapes are taken to a wine maker to ferment, barrel, and bottle. The wine will be transported back to the subject property and stored on-site to be distributed from a single delivery vehicle to local wine shops, tasting rooms, restaurants and a limited number of grocery stores. The applicant is not proposing to process grapes into wine or other products on-site.
- F. **REVIEW PERIOD:** The subject application was submitted on February 7, 2018 and deemed the application incomplete on March 9, 2018. Upon submission and review of additional materials, the Planning Division deemed the application complete on March 29, 2018. The 150th day on which the County must take final action on this application is August 27, 2018.

III. FINDINGS & CONCLUSIONS:

Title 18, Deschutes County Zoning Ordinance.

A. CHAPTER 18.04. TITLE, PURPOSE AND DEFINITIONS

1. Section 18.04.030, Definitions

"Home Occupation" means an occupation or profession carried on within a dwelling and/or a residential accessory structure by a resident of the dwelling or employees, depending on type pursuant to DCC 18.116.280 and is secondary to the residential use of the dwelling and/or the residential accessory structure.

FINDING: The applicant proposes a Type 1 home occupation, which will consist of wine storage within an existing storage container on the subject property. Based on the applicant's submittal, the proposed use is considered a home occupation. Findings to DCC 18.116.280 are provided below.

B. CHAPTER 18.32. MULTIPLE USE AGRICULTURAL ZONE

1. Section 18.32.020, Uses Permitted Outright

The following uses and their accessory uses are permitted outright.

- I. *Type 1 Home Occupation, subject to DCC 18.116.280.*

FINDING: The applicant proposes a Type 1 home occupation. The Oregon Liquor Control Commission and the Bureau of Alcohol, Tobacco, Firearms and Explosives require County signoff

occupation. There will be no employees or contractors. This criterion will be met.

for the proposed use. For this reason, an Administrative Determination is necessary to make appropriate findings.

FINDING: As stated under 2 above, only the residents will be conducting the proposed home occupation. There will be no employees or contractors. This criterion will be met.

C. CHAPTER 18.116. SUPPLEMENTARY PROVISIONS

1. Section 18.116.280. Home Occupations.

B. *Types. In addition to the home occupations allowed in Section A above, three Types of home occupations may be allowed with limitations on location and intensity of allowed uses. Type 1 allows low intensity uses and Types 2 and 3 allow progressively greater intensity of uses.*

C. *Type 1. Where permitted outright, a Type 1 home occupation does not require a land use permit but shall be subject to the following criteria. A Type 1 home occupation:*

1. *Does not require a minimum parcel size.*

FINDING: Staff notes that in order for the Planning Division to sign off on a State or Federal license, a land use permit is required. The proposed use does not require a minimum parcel size. This criterion is met.

2. *Is conducted within a dwelling or a residential accessory structure only by residents of the dwelling.*

FINDING: The proposed home occupation will be conducted within an existing storage container, a residential accessory structure, on the subject property. The only people conducting the use will be the residents of the dwelling, Duane and Dina Barker. This criterion will be met.

3. *Does not occupy more than 25 percent of the combined floor area of the dwelling including attached garage and one accessory structure.*

FINDING: The combined square footage for the dwelling and accessory structure is 3,564 square feet. The home occupation will be conducted within a 160-square-foot area of an existing storage container, which is approximately 4.5 percent of combined floor area of the two structures. This criterion will be met.

4. *Creates no more than five (5) trips to the site per day for customers or clients, including parcel delivery services.*

FINDING: The applicant states that the use will not generate more than 1 trip to the site per week. This criterion will be met.

5. *May include employees or contractors that work off-site.*

FINDING: As stated under 2 above, only the residents will be conducting the proposed home occupation. There will be no employees or contractors. This criterion will be met.

6. *Does not produce prolonged odor, dust, glare, flashing lights or noise, smoke, and vibrations in excess of that created by normal residential use.*

FINDING: The applicant stated that the home occupation as described, will not produce prolonged odor, dust, glare, flashing lights or noise, smoke, and vibrations that will be in excess of that created by normal residential use. A condition of approval will be added to ensure compliance.

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7. *Does not involve the on-site advertisement display or sale of stock in trade, other than vehicle or trailer signage.*
8. *Does not include building or ground mounted signs.*

FINDING: The applicant does not propose on-site advertisement display or sale of stock in trade with this home occupation application. Furthermore, the applicant does not propose building or ground-mounted signage. These criteria will be met.

9. *Does not include outside storage of equipment or materials used in the operation of the home occupation.*

FINDING: The applicant indicated on their application that there will be no outdoor storage of equipment or materials for the proposed home occupation. This criterion will be met.

10. *Has adequate access and on-site parking for not more than one (1) customer, or delivery vehicle at any given time.*

FINDING: The subject property has access from Bowery Lane, a rural local road. The submitted site plan shows adequate access and parking for a delivery vehicle. The applicant has stated in the application materials that no customers will be coming on-site. Based on staff review of the site plan, staff finds this criterion will be met.

11. *Allows on-site one (1) business-related vehicle or truck not exceeding 15,000 pounds gross vehicle weight and one (1) other non-motorized wheeled equipment (trailer) which shall not exceed 3,000 pounds gross vehicle weight.*

FINDING: The applicant has not provided specific details on the type and size of vehicle used for the home occupation. An ongoing condition of approval will ensure that the subject property will meet this criterion.

12. *Complies with all requirements of the Deschutes County Building Safety Division and the Environmental Health Division² and any other applicable state or federal laws. Compliance with the requirements of the Deschutes County Building Safety Division shall include meeting all building occupancy classification requirements of the state-adopted building code.*

² This is now known as the Environmental Soils Division.

13. *Is conducted in such a way that it is compatible with the residential character, or in resource zones, resource-oriented character of its location.*

FINDING: The subject property is zoned MUA10 and is adjacent to rural residential properties. The subject property is not located within a resource zone (EFU or Forest). The applicant proposes to conduct the use within an existing storage container on the subject property. The proposed home occupation will be operated exclusively by the residents, Duane and Dina Barker, with no employees or contractors. According to the applicant, no more than one trip to the site will be expected per week. As stated under 6 above, there will be no prolonged odor, dust, glare, flashing lights or noise, smoke, and vibrations in excess of that created by normal residential use. Staff finds that the proposed use will be compatible with the residential character of the area. This criterion is met.

14. *Does not involve any external changes to the dwelling in which the home occupation will be established that would give the dwelling an outward appearance of a business.*

FINDING: The applicant does not propose external changes to the dwelling or the existing storage container on the subject property. This criterion is met.

15. *Allows for servicing, inspecting, loading, and or dispatching of vehicles and equipment incidental to the home occupation and stored within the dwelling, attached garage or accessory structure.*

FINDING: The applicant will be allowed to use vehicles as described in this criterion as part of the home occupation.

IV. CONCLUSION:

Based on the foregoing Findings of Facts, staff concludes that the proposed Type 1 home occupation can comply with the applicable standards and criteria of the Deschutes County zoning ordinance.

Other permits may be required. The applicant is responsible for obtaining any necessary permits from the Deschutes County Building Division, the Deschutes County Environmental Soils Division and the Deschutes County Road Department, as well as any required state and federal permits.

V. DECISION:

APPROVAL, subject to the following conditions of approval.

VI. CONDITIONS OF APPROVAL:

- A. This approval is based upon the application, site plan, specifications, and supporting documentation submitted by the applicant. Any substantial change in this approved use will require review through a new conditional use application.
- B. Prior to initiation of use, the applicant shall obtain all required permits or licenses from the Deschutes County Building Safety and Environmental Health Divisions, the Oregon Liquor Control Commission, and the Bureau of Alcohol, Tobacco, Firearms and Explosives.
- C. The employees of the proposed home occupation shall be limited to the residents, Duane and Dina Barker.
- D. This approval is subject to review of the home occupation approval every 12 months by the Planning Division to ensure compliance with the requirements of this section and the conditions required for approval of the use.
- E. No onsite sales to customers are allowed.

- F. The proposed use shall meet all Building Safety Division standards, and any other state-adopted building codes.
- G. The subject property shall not have more than one on-site business-related vehicle or truck exceeding 15,000 pounds gross vehicle weight and one other non-motorized wheeled equipment exceeding 3,000 pounds gross vehicle weight.
- H. The proposed use shall not produce prolonged odor, dust, glare, flashing lights or noise, smoke, and vibrations in excess of that created by normal residential use.
- I. Within 30 days of the date of mailing of this decision, the applicant shall sign and record a Conditions of Approval Agreement that includes conditions B through H above.

VII. DURATION OF APPROVAL:

The applicant shall commence the proposed use within two (2) years from the date this decision becomes final, or an extension of time pursuant to Section 22.36.010 of the County Code obtained, or this approval shall be void.

This decision becomes final twelve (12) days after the date of mailing, unless appealed by a party of interest.

DESCHUTES COUNTY PLANNING DIVISION



Written by: Izze Liu, Associate Planner



Reviewed by: Peter Gutowsky, Planning Manager

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

FILE NUMBERS: File No. 247-22-000757-A
(Appeal of files 247-22-000024-CU and 247-22-000025-SP)

HEARING DATE: October 26, 2022, 6:00 p.m.

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

APPLICANT/OWNER: John Herman

SUBJECT PROPERTY: Tax Lot 00700, Map 15-10-10
Situs Address: 68540 E Highway 20, Sisters, OR 97759

APPELLANT: Central Oregon LandWatch

REQUEST: Appeal of an administrative decision: (1) approving a conditional use for a meadery and associated activities as a commercial activity in conjunction with farm use; (2) approving a site plan approval for the meadery.

HEARINGS OFFICER: Tommy A. Brooks

SUMMARY OF DECISION: The Hearings Officer finds that the Applicant has not met its burden of proof with respect to a commercial activity in conjunction with farm use and, therefore, SUSTAINS the appeal, and DENIES the Application, based on the findings in this Decision.

I. APPLICABLE STANDARDS AND CRITERIA

Deschutes County Code (DCC)
Title 18, Deschutes County Zoning Ordinance
Chapter 18.16, Exclusive Farm Use Zones
Chapter 18.120, Exceptions
Chapter 18.128, Conditional Use

II. BACKGROUND AND PROCEDURAL FINDINGS

A. Nature of Proceeding

This matter comes before the Hearings Officer as an appeal of a decision by the Deschutes County Planning Department (“Staff”) in which Staff approved: (1) the operation of a meadery as a commercial activity in conjunction with a farm use (File 247-22-000024-CU); and (2) a site plan for the meadery (File 247-22-000025-SP) (together, the “Staff Decision”).

The specific proposal in the Application underlying the Staff Decision is the Applicant’s proposal to operate a meadery on the Subject Property. According to the Applicant and other information in the record, a meadery makes mead, a type of wine fermented from honey rather than from grapes. Mead is sometimes referred to as “honey wine,” and a meadery is sometimes referred to as a “honey winery.” The Applicant currently maintains beehives on the Subject Property from which honey is harvested and engages in the production of mead. The Applicant plans to use honey from the Subject Property and from other farms around the county and state as part of the planned meadery, which will produce mead on a larger scale for sale. In addition to the meadery itself, the Applicant proposes other commercial activities such as an indoor tasting room, an outdoor tasting area, food carts, “winery-related” events, and other unidentified activities “related to the production, sale, marketing, and distribution of wine, farm products, and related incidental items.” The Application includes a request for use of the Subject Property as a music venue to support local events that may not be winery related, such as the Sisters Folk Festival. This decision will refer to the meadery and the proposed commercial activities as the “Meadery.”

B. Notices, Decision, Appeal, and Hearing

The Application was filed on January 19, 2022. On January 28, 2022, the County issued a Notice of Application to several public agencies and to property owners in the vicinity of the Subject Property (together, “Application Notice”). The Application Notice invited comments on the Application.

On September 7, 2022, Staff issued a decision on the Application, styled “Findings and Decision” (the “Staff Decision”). On September 19, 2022, the County received an Appeal Application with a Notice of Appeal on behalf of Central Oregon Landwatch (“Appellant”), seeking review of the Staff Decision. There is no dispute in this proceeding that the appeal documents were timely filed.

On September 30, 2022, the County mailed a Notice of Public Hearing (“Hearing Notice”) announcing an evidentiary hearing (“Hearing”) for the appeal of the Staff Decision. Pursuant to the Hearing Notice, I presided over the Hearing as the Hearings Officer on October 26, 2022, opening the Hearing at 6:01 p.m. The Hearing was held via videoconference, with Staff, the Applicant, and a representative of Appellant present in the hearing room. The Hearings Officer appeared 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 asked for but received no objections to the County’s jurisdiction over the matter or to my participation as the Hearings Officer.

No participant requested that the record remain open. The Hearing concluded at approximately 7:35 p.m. At that time, I closed the Hearing and the record, and I took this matter under advisement.

C. 150-day Clock

The Applicant submitted the Application on January 19, 2022. Staff reviewed the Application and, on February 18, 2022, notified the Applicant that the Application was incomplete (“Incomplete Notice”). The Applicant provided additional information on or about March 8, 2022 and March 17, 2022, and continued to provide information to the record in response to Staff inquiries. On July 15, 2022, Applicant’s attorney notified Staff that the Applicant had provided information in response to the Incomplete Notice, thereby confirming that the Applicant believed the Application to be complete as of that date.

Using July 15, 2022, as the date of completeness, the deadline within which the County must make a final decision under ORS 215.427 – “the 150-day clock” – is December 12, 2022.

III. SUBSTANTIVE FINDINGS AND CONCLUSIONS

A. Adoption of Findings in Staff Decision

The Staff Decision contains comprehensive findings related to the Application and the Subject Property. The vast majority of the findings in the Staff Decision are not challenged in this Appeal, and, although this proceeding is *de novo*, most criteria in the Staff Decision are not re-addressed by the participants during the appeal. As a result, I hereby adopt the findings in the Staff Decision as my findings, as supplemented and modified by the findings in this Decision, which address the issues and criteria that were raised on appeal. To the extent any of the findings in this Decision conflict with the findings in the Staff Decision, my intent is to have these findings control.

B. Issues on Appeal

The Appellant’s Notice of Appeal sets forth several bases for appeal of the Staff Decision, and Appellant raised other issues during the Hearing. Appellant seeks denial of the Application based on the following assertions: (1) a meadery is not an allowed use in the Exclusive Farm Use (“EFU”) zone either because no local or state law allows such a use, or because a meadery is not a “winery”, which can be allowed by statute; (2) there is insufficient evidence on which to base a finding that there is any farm use currently on the Subject Property; (3) there is insufficient evidence on which to base a finding that the Meadery will produce income that is “incidental” or “subordinate” to income from farm uses on the Subject Property; (4) the Applicant has not adequately addressed the farm impacts test required by ORS 215.296; and (5) the Staff Decision violates ORS 215.416(8) because it is based on provisions relating to grape wineries rather than a meadery. The findings below address each of those issues.

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1. Is a meadery an allowed use in the EFU zone?

The Applicant's proposed Meadery includes meadery facilities for processing mead and several associated commercial activities such as tasting areas, food carts, and incidental sales of mead-related items. Appellant asserts that the Meadery is not an allowed use in the EFU zone.

ORS 215.203 establishes a statewide construct for determining which uses are allowed in the EFU zone. Under that statute, an EFU zone "shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284."¹ ORS 215.213 and ORS 215.284 are not applicable in the present matter. ORS 215.283 sets forth various specific uses, other than "farm uses", that are allowed in the EFU zone. The non-farm uses in ORS 215.283(1) are uses a county must allow by right, subject only to statutory standards rather than local standards.² The non-farm uses listed in ORS 215.283(2), in contrast, are considered "conditional" uses that a county can choose to allow, and in doing so a county can impose additional restrictions on those uses.³

Appellant is correct that neither the Deschutes County Code ("DCC" or "Code") nor ORS 215.283 expressly lists "meadery" as an allowed non-farm use in the EFU zone. ORS 215.283(1)(n) does list a "winery" as a use permitted by right, but only if the winery is the type of winery described in ORS 215.452 or ORS 215.453. DCC 18.16.025(F) mirrors that statute and also refers to ORS 215.452, which the Code incorporates through DCC 18.16.038(B). By the express terms of those statutory and Code provisions, such wineries are wineries that produce wine from grapes.⁴ Those statutes therefore do not provide a basis for permitting the Meadery, which processes honey rather than grapes.

In contrast to the winery example, ORS 215.283 and the Code also establish broader categories of non-farm uses that encompass multiple specific uses. ORS 215.283(1)(c), for example, authorizes "utility facilities necessary for public service", but that category has been applied to allows different types of specific utilities.⁵ The absence of the word "meadery" in the statute or Code, therefore, does not mean a meadery cannot ever be approved, and it is possible to approve a meadery under one of the listed use categories, as long as the Meadery is a type of use contemplated by that broader category.

The broader category the Applicant seeks as the basis for approving the Meadery is set forth in ORS 215.283(2)(a) – "commercial activities that are in conjunction with farm use." The express terms of that statute do not limit that category to any particular type of commercial activity and, instead, require only that the commercial activity be in conjunction with a farm use. Indeed, that is how the courts have applied that statute. Applying ORS 215.283(2)(a) prior to the legislature's enactment of ORS 215.452 and ORS 215.453, which now expressly allow certain wineries as a non-farm use, the Oregon Supreme Court upheld the issuance of a conditional use permit for a winery in the EFU zone as a commercial activity in

¹ ORS 215.203(1).

² *Brentmar v. Jackson Cty.*, 321 Or 481, 496 (1995).

³ *Id.*

⁴ *See, e.g.*, ORS 215.452(1), authorizing wineries that "produce wine" and that either includes an onsite vineyard, includes a contiguous vineyard, or sources grapes from a contiguous vineyard.

⁵ *See, e.g.*, *Dayton Prairie Water Ass'n v. Yamhill County*, 38 Or LUBA 14 (2000) (applying statute to approve water facilities); *c.f. WKN Chopin, LLC v. Umatilla County*, 66 Or LUBA 1 (2012) (applying statute to approve electric transmission line).

conjunction with a farm use.⁶ It did so because the winery at issue in that case satisfied the criteria of ORS 215.283(2)(a) and despite the fact that “winery” was not separately listed as an allowed use in the EFU zone.

Based on the foregoing, I find that the Meadery is an allowed use in the EFU zone as long as the proposed use satisfies the standards required for “commercial activities that are in conjunction with farm use” as contemplated by DCC 18.16.030, which is the County’s version of ORS 215.283(2)(a).⁷

a. Is the Subject Property currently in farm use?

Appellant asserts that a farm use is “a predicate for the approval of a commercial activity in conjunction with farm use.” More particularly, Appellant’s assertion is that “a current farm use” must be shown before any commercial activities in conjunction with farm use can be permitted. Appellant argues that the record is not sufficient to demonstrate that the Subject Property is “currently” in farm use, as defined by ORS 215.203(2). In support of this argument, Appellant relies on *Friends of Marion County v. Marion County*, -- Or LUBA -- , LUBA No. 2021-088/089 (Apr. 21, 2022) (“*Friends of Marion County*”).

As presented to the Hearings Officer, Appellant argues only that the Applicant has not demonstrated a “current” farm use. The difficulty with Appellant’s argument is that it does not address whether the proposed use of the Subject Property as a Meadery, which would occur in the future, will be in conjunction with a farm use that will exist at that time. Rather, Appellant’s written and oral comments acknowledge that the activities the Applicant proposes to produce mead in the future – which include beekeeping and honey production – are farm uses. I therefore understand Appellant’s argument to be that, regardless of what future farm uses occur as part of the proposal, the Applicant must nevertheless demonstrate that there are currently farm uses on the Subject Property.

The *Friends of Marion County* case and other cases interpreting ORS 215.283(2)(a) make it clear that a “farm use” must exist if there is to be an allowed commercial activity in conjunction with that farm use. Contrary to Appellant’s argument, however, those cases do not hold that the farm use must already be in existence at the time of the application. In other words, they do not prevent an applicant from proposing a future commercial activity that will be in conjunction with a future farm use developed at the same time, and in fact, those cases imply or acknowledge that the farm use can be developed in the future.

In *Friends of Marion County*, for example, the issue LUBA addressed was the argument that “none of the findings or the evidence in the record demonstrates that intervenors currently operate or will operate a farm use.”⁸ LUBA reversed the county’s approval in that case based on its conclusion that a farm use did not currently exist. However, the county’s findings in that case determined that the current uses on the subject property were “farm uses” and the county required the applicant to maintain those same uses as part of the approval of the commercial uses the applicant proposed. Because LUBA concluded that the

⁶ *Craven v. Jackson County*, 308 Or 281 (1989).

⁷ I also note that Appellant’s representative appears to have agreed with this conclusion during the Hearing. In response to a question from the Hearings Officer asking if all meaderies are excluded from the EFU zone as a matter of law, the representative responded that was likely not the case and that it would need to be determined on a case-by-case basis under ORS 215.283(2)(a).

⁸ *Friends of Marion County* at *10.

current activities were not “farm uses” as defined by statute, the applicant could therefore not rely on those same activities as a basis for the approval of commercial uses in conjunction with farm uses. That case did not involve a record that contemplated the further development of farm uses like the record in this matter does. *Craven* also illustrates this point. In that case, the Court considered a conditional use permit granted to an applicant who “proposes to establish a vineyard and winery”, which “winery is to be constructed before the accompanying vineyard is fully planted.”⁹ Thus, the Court approved the commercial activity in conjunction with a farm use that was not yet established. The Court was concerned only whether the farm use would exist at the same time the proposed commercial activities were conducted.

Based on the foregoing, I cannot agree with Appellant’s assertion that the Applicant is required to show that a farm use “currently” exists on the Subject Property. As in *Craven*, the permit can be issued as long as the commercial activities are conducted in conjunction with a farm use, which farm use may be developed in tandem with the commercial activities once the permit is issued.

If the Applicant were required to show that the Subject Property, as it currently exists, is in farm use, this would be a more difficult issue to resolve. Appellant takes issue with the fact that the Applicant has not demonstrated a “profit” from farm activities. As explained in *Friends of Marion County*, “profit” is a broad term, and profit exists “so long as crops are raised, harvested and sold for a gross profit.”¹⁰ In that case, LUBA held that a farmer had not demonstrated a profit where the farmer “simply testified that they sold the field crops with no other documentation of their production or sale.” Here, while it is an extremely close call, I find the Applicant has provided more than mere testimony that it has sold crops. The Applicant has also testified that there has been a gross profit from those sales and that the revenue earned has been reinvested in the farming operation. Based on this record, and although the Applicant has provided little corroboration of revenue from the current farm, I find it more likely than not that the Subject Property is currently in farm use.

b. Does the Meadery satisfy the standard for commercial activities in conjunction with farm use?

Appellant asserts that the Meadery does not meet the standard for allowing commercial activities in conjunction with farm use. Appellant’s specific arguments are that the Meadery is not incidental and subordinate to Applicant’s planned farm uses, and that it does not enhance the local agricultural community.

Appellant’s arguments are grounded in the case law that interprets ORS 215.283(2)(a). One clear articulation of the standard from the Court of Appeals states that any commercial activity beyond the direct processing and selling of a farm product must “be both ‘incidental’ and subordinate to” the farm use.¹¹ In *Friends of Yamhill County*, the Court of Appeals addressed a county’s approval of a permit to allow 44

⁹ *Craven*, 308 Or at 283-84.

¹⁰ *Friends of Marion County* at *16 citing *Cox v. Polk County*, 39 Or LUBA 1, 7-12 (2000).

¹¹ *Friends of Yamhill County v. Yamhill County*, 255 Or App 636, 650-51 (2013) citing *Craven*, 308 Or at 289.

annual events as part of a winery.¹² Finding the approval to be “dangerously close” to creating a scenario in which the incidental and secondary activities overtake the primary activity, the court nevertheless upheld the approval. The court explained that its decision was based on a condition of approval that limited non-farm income from the commercial activity from exceeding 25 percent of the gross income from the farm use activity, which was the onsite retail sales of wine.¹³

The Applicant’s proposal and the Staff Decision in this matter imposed a condition of approval similar to the condition in *Friends of Yamhill County*. Specifically, the Staff Decision imposes a condition that requires the Applicant to confirm, on an annual basis, that no less than 25% of the honey used to produce mead is generated from the Subject Property. However, this condition of approval does not address the same issue the court was concerned with in *Friends of Yamhill County*. The condition in *Friends of Yamhill County* ensured that the scale of the non-farm commercial use was not greater, and therefore subordinate to, the primary farm use. In contrast, the condition in the Staff Decision that the Applicant relies on controls only the scale of the farm product being used for the commercial activity, ensuring that the Subject Property is the primary source of the farm product. That condition does not appear to impose any limitations on the scale of the non-farm commercial uses. Thus, for example, even if the Applicant sourced all of its honey from the Subject Property, nothing would prevent the Applicant from holding events and selling food from food carts in a manner the produces significantly more income than the farm use. If that occurred, the non-farm commercial activities would end up being the primary activity rather than the secondary activity.

As the Appellant points out, there are other components of the Application indicating that the non-farm commercial uses are not subordinate to the farm use. For example, the Applicant intends to have four employees for the Meadery, but perhaps only one, if any, for the farm operations. It is perhaps possible to have such a disparity in employees and still have the farm use be the primary use. However, as the Appellant notes, the Applicant simply has not attempted to quantify the magnitude of the farm use or the magnitude of the non-farm commercial activities. Some attempt at quantifying those activities is necessary if they are to be compared for the purpose of identifying a primary use and a secondary use.¹⁴ That burden lies with the Applicant. Based on the record before me, I find that the Applicant has not met that burden.¹⁵

Although I agree with the Appellant that the Applicant has not demonstrated the Meadery will be incidental and subordinate to a farm use, I disagree with the Appellant’s argument that the Applicant has not demonstrated the Meadery enhances the local agricultural community. The *Craven* decision is informative in this regard. In that case, the Court determined that the proposed winery did enhance the local agricultural community because it provided a local market outlet for grapes of other growers in the area. The Court also noted that it would help transform a hayfield into a vineyard, which increases the

¹² The application in that case was made pursuant to ORS 215.283(2)(a) as a commercial activity and not under ORS 215.283(1)(n) as a winery.

¹³ The definition of “farm use” includes “the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use.” ORS 215.203(2)(a).

¹⁴ See, e.g., *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992) (holding that an application without evidence establishing the quantity of products delivered or dollar amount of sales to cannot demonstrate, as a matter of law, the proposed use is a commercial activity in conjunction with farm use).

¹⁵ Appellant also relies on *Friends of Yamhill County v. Yamhill County*, 301 Or App 726 (2020). That case, although it addresses commercial activities, applies ORS 215.283(4), and is therefore not directly applicable to this matter.

intensity and value of agricultural products. LUBA has built on the decision in *Craven* and stated that, to demonstrate an activity enhances the local agricultural community, “a commercial activity in conjunction with farm use must be either exclusively or primarily a customer or supplier of farm uses.”¹⁶

The Applicant’s proposal here is nearly identical to the situation in *Craven* and *City of Sandy v. Clackamas County*. Specifically, the Applicant proposes to purchase honey from other farmers. Although the Applicant will not be a supplier of other farm uses, it will be primarily a customer of farm uses. The Applicant also proposes to develop regenerative bee pastures, which enrich the soils and, ultimately, increases the intensity and value of agricultural products. I therefore find that the Applicant’s proposal satisfies this part of the standard in ORS 215.283(2)(a).

Based on the foregoing, I find that the Application must be denied because the Applicant has not met its burden of demonstrating the Meadery – as proposed – will be incidental and subordinate to a primary farm use on the Subject Property.

c. Did the Applicant adequately address the farm impacts test required by ORS 215.296?

As noted above, a commercial activity in conjunction with farm use is an allowed use in the EFU Zone, subject to any additional conditions the County may impose in its Code. Pursuant to DCC 18.16.040, the County has imposed several limitations on conditional uses, including commercial activities in conjunction with farm use authorized under DCC 18.16.030. The specific restrictions in DCC 18.16.040(A)(1) and (2) are required by state law and are a codification of the restrictions in ORS 215.296(1). LUBA sometimes refers to these restrictions as the “Farm Impacts Test.”

An applicant carries the burden of proving that ORS 215.296(1) has been met.¹⁷ LUBA has a well-established methodology for demonstrating compliance with the farm impacts test.¹⁸ Under that methodology, a proposal can be approved only if it: (1) describes farm practices on surrounding lands devoted to farm use; (2) explains why the proposed development will not force a significant change in those practices; and (3) explains why the proposed development will not significantly impact or increase the cost of those practices. To begin that process, LUBA has held that “[i]n applying ORS 215.296(1), it is entirely appropriate for the applicant to begin by visually surveying surrounding lands to identify the farm and forest uses to which those lands are devoted.”¹⁹ Other parties are then free to dispute the initial findings, or to add to the record additional evidence of nearby farm uses and farm practices that the applicant must respond to.²⁰

In addressing the Farm Impacts Test, the Applicant initially followed the process described above by providing what amounted to a visual survey of the surrounding land. Specifically, the Applicant provided an inventory of all parcels within a one-mile radius of the Subject Property that are devoted to farm use. As part of that inventory, the Applicant also identified specific farm uses in the study area,

¹⁶ *City of Sandy v. Clackamas County*, 28 Or LUBA 316, 321 (1994).

¹⁷ *Schrepel v. Yamhill County*, -- Or LUBA – (LUBA No. 2020-066), 2020 WL 8167220, at *6.

¹⁸ See *Brown v. Union County*, 32 Or LUBA 168 (1996).

¹⁹ *Dierking v. Clackamas County*, 38 Or LUBA 106, 120-21 (2000).

²⁰ *Id.*

noting that they included “a combination of grass hay, permaculture, forest, [and] bare land.” Other information provided by the Applicant indicates that some properties have horses, cattle, and pastures.

The Applicant concludes, primarily based on geographic separation, that there will be no impacts to forest or farm practices on the farm uses identified in the inventory. For example, the Applicant states a nearby property “is buffered by our own dwellings, farm buildings, 12 acres of regenerative bee pasture, and a 20-acre field that will eventually become regenerative bee pasture. At this distance, the winery will not significantly change or increase the cost of any of the accepted farm practices on this farm property.” The Applicant arrived at a similar conclusion for potential noise and light impacts, noting that, because of the adjacent noise and lights from Highway 20, these impacts are already accepted by all adjoining farm and forest land.

The flaw in the Applicant’s analysis is that it does not actually identify any farm practices that are associated with the various farm uses it identifies. As applied by LUBA and the courts, the Farm Impacts Test must focus on impacts to farm practices. Further, the fact that a similar impact may already exist does not mean that an increase in that impact is necessarily acceptable. An impact that already exists may nevertheless force a significant change to the farm practices associated with that use, or significantly increase the costs of those practices. That determination cannot be made, however, unless the Applicant first identifies specific farm practices that may be impacted.

In summary, the record does not include a description of the farm practices on surrounding lands devoted to farm use, nor does it include any explanation for why the proposed development will not force a significant change or cost to those practices. It is quite possible that the meadery will not have significant impacts on farm practices, but the burden to demonstrate compliance with the Farm Impacts Test unequivocally lies with the Applicant. Without any analysis of the accepted farm practices that are associated with the identified farm uses, I cannot make a factual finding regarding the existence of those farm practices, or a finding that it is more likely than not that the Meadery will not force a significant change to those farm practices. I therefore find that the Applicant has not met its burden to demonstrate compliance with DCC 18.16.040(A)(1) and (2).

d. Did the Staff Decision comply with ORS 215.416(8)?

Because a meadery is a type of winery, the Applicant refers to the winery statutes and compares the proposed meadery to a grape winery. As noted in earlier findings, state statutes contain provisions specific to grape wineries and grape wineries are allowed in the EFU zone either outright through ORS 215.283(1)(n), as implemented by ORS 215.452 and ORS 215.453, or conditionally through ORS 215.283(2)(a) as a commercial activity in conjunction with agriculture. Applicant’s stated purpose for comparing a meadery to a winery is that using the winery statutes as a guide helps ensure the meadery remains “incidental and subordinate to farm use.” Appellant asserts that this approach is akin to approving the meadery based on inapplicable criteria and, therefore, violates ORS 215.416(8). That statute requires that approval or denial of a permit application be based only on applicable standards and criteria set forth in a county’s land use regulations. Appellant argues that the winery statutes are not applicable and, therefore, cannot be relied on for approval of the Meadery.

Even though this Decision reverses the outcome of the Staff Decision, ORS 215.416(8) applies to both the approval or denial of an application. I therefore find it appropriate to address whether the Staff Decision violated ORS 215.416(8). I find that it did not.

There is no dispute in this proceeding that the Applicant seeks approval of the meadery under ORS 215.283(2)(a) as a commercial activity in conjunction with agriculture. The Applicant refers to the winery statutes as a guide and Applicant's express request to the County was "We have suggested that the County consider imposing most of the limitations on the meadery that ORS 215.452 applies to small wineries as a means of assuring that activities associated with the meadery are incidental and subordinate to farm use." Indeed, the Applicant recognized that ORS 215.452 was not a basis for approval of the meadery where it referred to ORS 215.456, which points back to ORS 215.283(2)(a) as a means of approving a winery that cannot otherwise be approved under ORS 215.283(1)(n), ORS 215.452, and ORS 215.453.

Contrary to Appellant's assertion, the Staff Decision did not rely on the winery statutes and, therefore, did not rely on inapplicable criteria. Indeed, the Staff Decision very clearly articulated the standard under ORS 215.283(2)(a) and set forth the three components of such a use that Staff would review: (1) the use must be a "commercial" activity; (2) it must be "in conjunction with farm use;" and (3) it must not be the processing of farm crops as described in Section 18.16.025. The Staff Decision then made findings relating to each of those components, and did so without reference to the requirements of the winery statutes. The criteria the Staff Decision relied on are each incorporated into the County's Code. The Staff Decision therefore did not violate ORS 215.416(8).

C. Conditions of Approval

The Staff Decision imposed several conditions of approval as part of Staff's approval of the Application. The Hearings Officer notes that no participant challenged any condition of approval or otherwise asserted such conditions could not or should not be applied if the Application were approved. Because this Decision finds that the Application cannot be approved based on the current record, however, there is no basis to impose any conditions of approval.

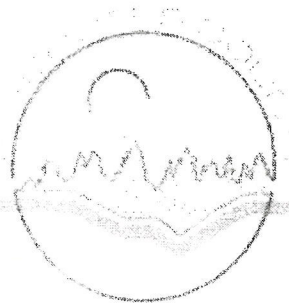
IV. CONCLUSION

Based on the foregoing findings, I find the Applicant has not met its burden of proof with respect to the standards for approving commercial activities in conjunction with a farm use and with respect to the Farm Impacts Test. The appeal of the Staff Decision is therefore SUSTAINED, and the Application is DENIED.

Dated this 17th day of November 2022



Tommy A. Brooks
Deschutes County Hearings Officer



Mailing Date:
Friday, March 09, 2018

Community Development Department

Planning Division Building Safety Division Environmental Soda Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
Phone (541) 398-6575 Fax (541) 398-1704
<http://www.deschutes.org/cd>

March 9, 2018

Dunne & Dina Barker
20520 Bowery Lane
Bend, OR 97703

Re: File No. 247-18-000126-AD for property located at 20520 Bowery Lane, Bend, OR 97703; and further identified on County Assessor's Map 17-12-09B, as Tax Lot 1000

Dear Applicants,

I am reviewing your application for an Administrative Determination approval to establish a Type 1 Home Occupation for the storage of wine produced on the subject property. Below, staff notes the following aspects of the submitted burden of proof statement, site plan, and supporting materials are lacking the necessary information to complete the review. Your application is not complete, because it lacks information related to the following Deschutes County Code (DCC) approval criteria identified below.

Title 18. Deschutes County Zoning Ordinance.

CHAPTER 18.32. MULTIPLE USE AGRICULTURAL ZONE - MUA.

1. Section 18.32.020. Uses Permitted Outright.

The following uses and their accessory uses are permitted outright:

- A. *Agricultural uses as defined in DCC Title 18.*
- B. *A single family dwelling, or a manufactured home subject to DCC 18.116.070.*
- ...
- I. *Type 1 Home Occupation, subject to DCC 18.116.280.*

STAFF RESPONSE: Based on the submitted application materials, it appears the scope of the proposed use exceeds the Type 1 Home Occupation standards. The cultivation of grapes is an agricultural use and is permitted outright. However, the processing of the grapes into wine or other products requires conditional use and site plan review.

2. Section 18.32.030. Conditional Uses 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,*

50

process, store or market farm products produced in Deschutes County or an adjoining County.

STAFF RESPONSE: Based on the submitted application materials, it appears the scope of the proposed use is a commercial activity in conjunction with a farm use consisting of the processing of grapes into wine, and the subsequent storage and sale of the wine. Please submit a Conditional Use application addressing the applicable standards in DCC 18.128.

CHAPTER 18.124. SITE PLAN REVIEW.

1. Section 18.124.030 Approval Required.

B. The provisions of DCC 18.124.030 shall apply to the following:

- 1. All conditional use permits where a site plan is a condition of approval;*
- 2. Multiple family dwellings with more than three units;*
- 3. All commercial uses that require parking facilities;*
- 4. All industrial uses;*
- 5. All other uses that serve the general public or that otherwise require parking facilities, including, but not limited to, landfills, schools, utility facilities, churches, community buildings, cemeteries, mausoleums, crematories, airports, parks and recreation facilities and livestock sales yards; and...*

STAFF RESPONSE: Based on the submitted application materials, it appears the scope of the proposed use includes the processing of grapes into wine, which is considered an industrial use¹. Please submit a Site Plan application addressing the applicable standards in DCC 18.124.

Title 22. Deschutes County Development Procedures Ordinance.

CHAPTER 22.02. GENERAL PROVISIONS.

1. Section 22.08.010. Application Requirements.

D. A deposit for hearings officers' fees may be requested at any time prior to the application being deemed complete and, if the application is heard by a hearings officer, the applicant will be responsible for the actual costs of the hearings officer.

STAFF RESPONSE: As indicated on the land use application form, the applicant understands and agrees that Deschutes County may require a deposit for hearings officers' fees prior to applications being deemed complete. Furthermore, if a hearings officer hears the application, the applicant will be responsible for the actual costs of the hearings officer. *It is not clear if all of the applicable criteria can be met* and the matter may need to be referred to a hearings

¹ Deschutes County Code (DCC) 18.04.030 defines "Industrial use" as the use of land primarily for the manufacture, processing, storage or wholesale distribution of products, goods or materials. It does not include commercial uses.

officer for a decision. Therefore, a deposit of \$5,000 is required to be submitted to the Planning Division prior to the application being deemed complete.

Completeness Determination

Your application will be determined to be complete in accordance with ORS 215.427 when you have submitted in writing one (1) of the following:

1. All of the missing information,
2. Some of the missing information and a written notice to the County that no other information will be provided; or
3. Notice that none of the missing information will be provided.

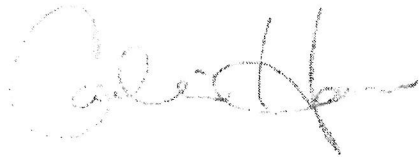
If you submit one of the items noted in 1, 2 or 3, above, within 180 days from the date the application was first submitted, approval or denial of the application will be based upon the standards and criteria that were applicable at the time the application was first submitted. If you fail to respond within 180 days, the application will be void on the 181st day after being submitted, pursuant to ORS 215.427(4). No refund is available on applications which become void.

As noted in ORS 215.427, the total period for the County to issue a final decision on your application may be extended for a specific period of time by submittal of a written request from you. However, the total extension of time approved for a final decision shall not exceed 215 days.

Please feel free to contact me if you have any questions or concerns about this matter at (541) 317-3148 or caroline.house@deschutes.org.

Sincerely

DESCHUTES COUNTY PLANNING DIVISION



I. 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 gravelled 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.

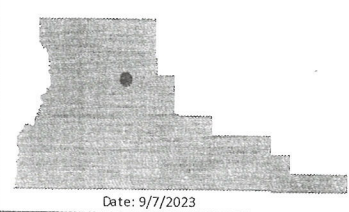
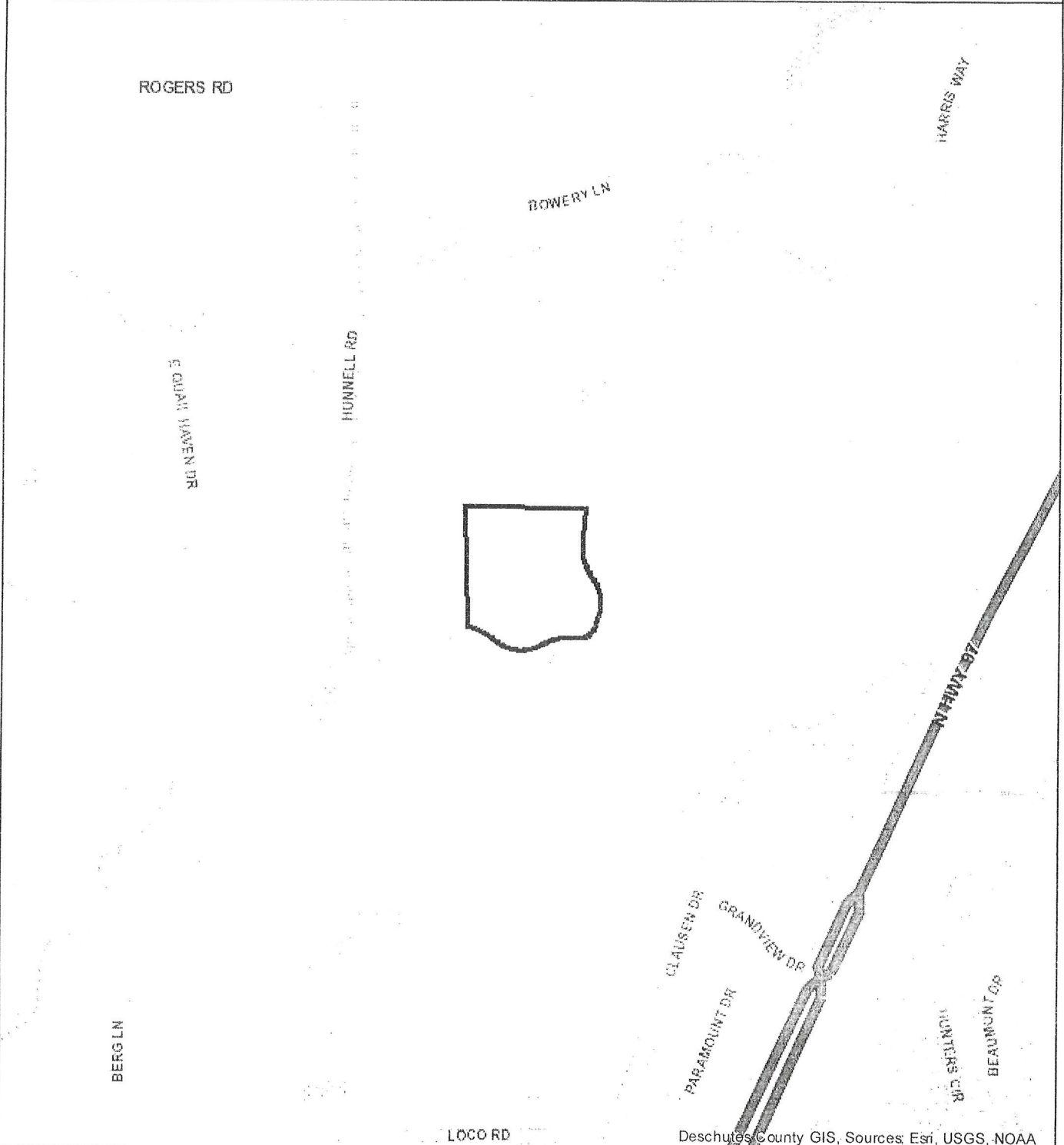
This decision becomes final twelve (12) days after the date mailed, unless appealed by a party of interest. To appeal, it is necessary to submit a Notice of Appeal, the base appeal deposit plus 20% of the original application fee(s), and a statement raising any issue relied upon for appeal with sufficient specificity to afford the Board of County Commissioners an adequate opportunity to respond to and resolve each issue.

Copies of the decision, application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost. Copies can be purchased for 25 cents per page.

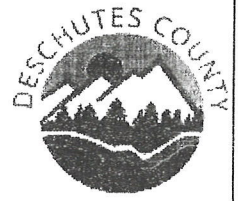
NOTICE TO MORTGAGEE, LIEN HOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST BE PROMPTLY FORWARDED TO THE PURCHASER.

File: 247-22-000464-CU, 466-SP

20520 Bowery Lane, Bend, OR 97703



Date: 9/7/2023



BACKGROUND

On 6/7/22, Duane and Dina Barker submitted a land use application to establish a winery as a “commercial activity in conjunction with farm use”.

Prior to that, they were operating a winery while holding only a Type 1 Home Occupation Permit which they were granted on June 8, 2020. When first applying for the permit in March 2018, they made this statement in an email sent to Isabella Liu, who was, at the time, an Associate Planner with Deschutes County.

Isabella Liu

From: Duane Barker <duane@barkergroupnw.com>
Sent: Thursday, March 29, 2018 4:34 PM
To: Isabella Liu
Subject: 247-18-00126-AD

Thank you for your time and information from our meeting at the counter this last week.

This letter is to further describe our intent and why we are filing for a permit. There appears to be an assumption that we are intending to process grapes to wine at this location. We are not. As we understand from the OLCC, we must have the county on board for distributing wine from our location. We are growing wine grapes at this location. We are not making wine in any commercial way at this location and do not intend to. At harvest the grapes are taken to a wine maker and the wine is made, barreled bottled and cases up at that location. Our intent of this permit is to have that cased wine stored here in the described convex container at the same property that it was grown at. The container is onsite now and has been for number of years. The wine is to be stored and distributed from the property by one delivery vehicle. We have no intention of having a wine tasting room or anything of that nature. Just a distribution point for local, wine shops, existing tasting rooms, restaurants and some retail grocery stores. In regards to our existing business. We are promotional products distributor and have been for 20 plus years. It consist of a desks, phones and sample products storage. There are no customer visits as we face to face contact with our clients at their place of business not ours.

Thank you,

Duane Barker, Consultant

BB brilliance in branding

(800) 329-5406 Toll Free | (541) 382-5406 Office | (541) 280-9935 Cell | (888) 839-7103 Fax
Email: Duane@barkergroupnw.com

However, according to Phil Henderson, who filed a lawsuit (a Temporary Restraining Order in an attempt to halt the Rock O' the Range Homeowners' efforts to hold its Annual Meeting) the Barkers began selling wine from their property (20520 Bowery Lane, Bend, OR 97703) in 2018.

8.

In 2012, Plaintiffs planted a grape vineyard on their property which is zoned Multiple Use Agriculture (MUA). On or about 2018 Plaintiffs formed an Oregon Limited Liability Company, (named Lava Terrace Cellars, LLC.) and obtained a Type 1 Home Occupation Permit through Deschutes County. They harvested their first grape crop and prepared their first commercial wine by using off-site custom Crush business in 2018. Plaintiffs were authorized under their permit to store wine product on their property and have done so and have grown their commercial vineyard to cover approximately 3 acres. Plaintiffs have carried out wine sales from their property.

Figure 3: Lawsuit filed by Duane and Dina Barker in May, 2023

The following is an email sent to me by Rachel Vickers, Associate Planner,

Hi Toby,

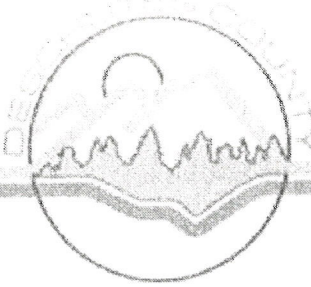
Thanks for your email, I have answered some of your questions below in red:

Recently, you and I were discussing Bowery Lane. During the conversation, I asked for an update on land use actions in our neighborhood and discovered that Duane and Dina Barker have applied for a Conditional Use Permit; 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, store or market farm products produced in Deschutes County or an adjoining County.

· The Barkers applied for a conditional use permit/site plan review to lawfully establish a commercial activity in conjunction with farm use on 6/7/2022. Their 30-day completeness period will be up on 7/7/2022. After their application is deemed complete I will have 150 days to issue a land use decision.

The Barkers live at 20520 Bowery Lane - Map and Taxlot: 171209B001000 . Their land is largely covered with a vineyard: Lava Terrace Cellars. Wine Club | Lava Terrace Cellars. They are planning to host events and hold wine tastings, etc. Previously, Nick Lelack filed a code compliance complaint against the Barkers, as they were holding wine tastings without the proper Type 3 Home Occupation Permit. They were also serving food without a license.

· We are aware that the Bakers have been hosting wine events and tasting without permits, which is likely why they have chosen to come in and apply for this land use permit. However If you would like to submit more detailed materials into the record about what sort of operation is at their property you can email me, and I will add those details to the record.



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend Oregon 97708-6005
Phone: (541) 388-6575 Fax: (541) 385-1764
<http://www.deschutes.org/cd>

LAND USE APPLICATION

INCOMPLETE APPLICATIONS WILL NOT BE ACCEPTED

1. Complete the application form and provide appropriate original signatures. To ensure timely processing of your application, all materials must be submitted on single-sided, 8.5" x 11" paper. Do not use binders, tabs/dividers, staples or tape.
2. This application shall include one full-sized plan set (to scale) and one plan set reduced to no larger than 11" x 17". Include a plot plan that shows all property lines and existing and proposed structures, parking, landscaping, lighting, etc.
3. Include a copy of the current deed showing the property owners.
4. Attach correct fee.
5. All applicable standards and criteria must be addressed in writing prior to acceptance of the application. Detailed descriptions, maps and other relevant information must be attached to the application.

TYPE OF APPLICATION (check one):

Administrative Determination (AD) Partition (MP) Site Plan (SP)
 Conditional Use (CU) Subdivision (TP) Variance (V)
 Declaratory Ruling (DR) Temporary Use (TU) Setback Exception (SE)
 Other

FEE: \$984

Applicant's Name (print): Duane Barker Phone: (541) 280-9935
 Mailing Address: 20520 Bowery Ln City/State/Zip: Bend, OR 97703
 Applicant's Email Address: duane@barkergroupnw.com
 Property Owner's Name (if different)*: N/A Phone: ()
 Mailing Address: SAME City/State/Zip:

1. Request: Type 1 Home Occupation

2. Property Description: Township 17 Range 12 Section 09B Tax Lot 1000

3. Property Zone(s): MUA10 Property Size (acres or sq. ft.): 5.45

4. Lot of Record? (State reason): Exception: 22.04.040 (B)(2)(e)

5. Property Address: 20520 Bowery Ln Bend

(over) →

- 6. Present Use of Property: Residential/farming
- 7. Existing Structures: house, detached garage, pole barn, in-laws quarters
- 8. Property will be served by: Sewer _____ Onsite Disposal System
- 9. Domestic Water Source: well

To the best of my knowledge, the proposal complies with all previous conditions of approval and all other applicable local, state, and federal laws. By signing this application, I acknowledge that Deschutes County planning staff may make a site visit(s) to the address(es) listed on this application in order to evaluate the property(ies) with the Deschutes County Code criteria applicable to the land use request(s) submitted. Please describe any special circumstances regarding a potential site visit:

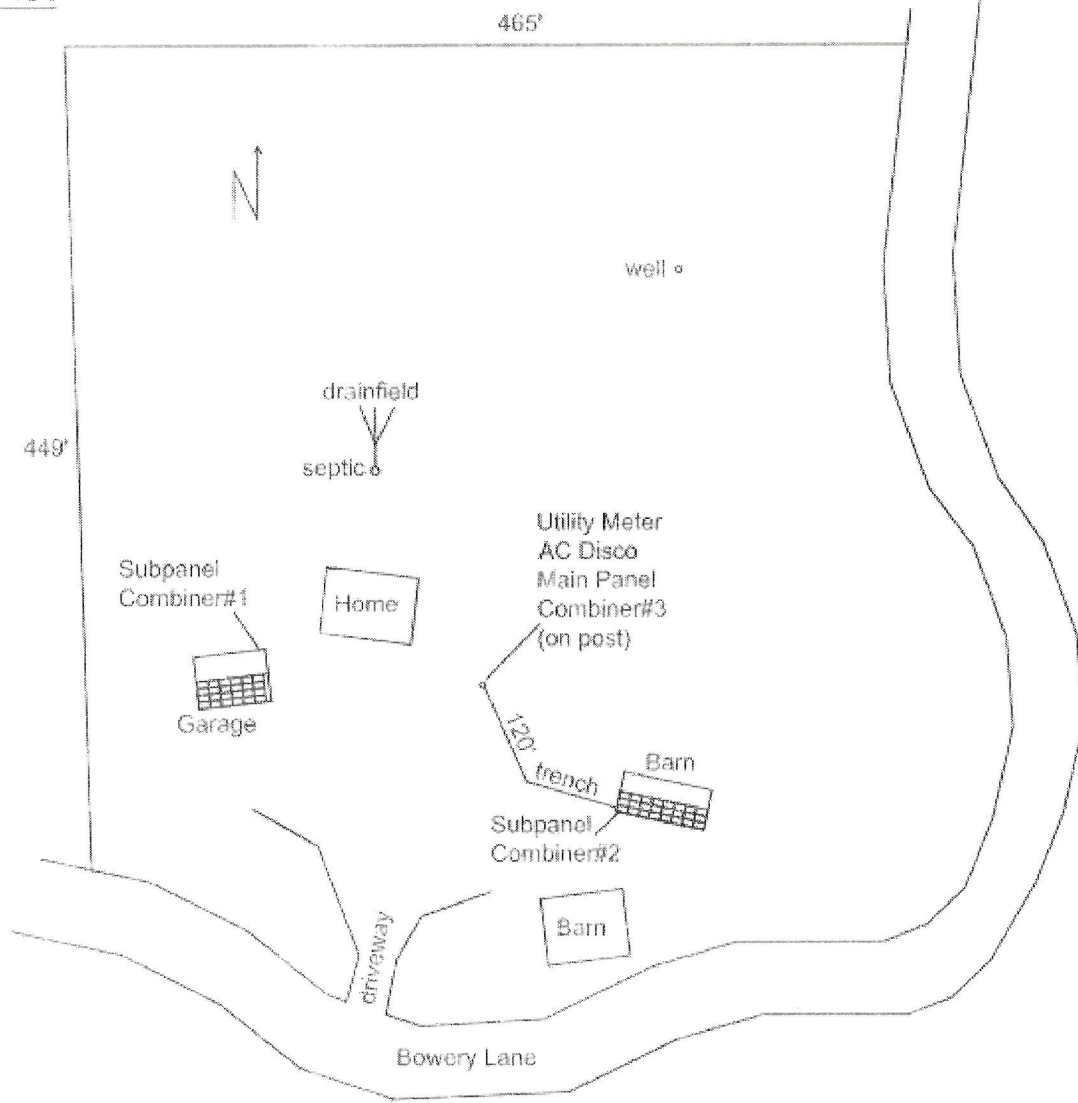
Applicant's Signature:  Date: 2-7-2014

Property Owner's Signature (if different)*: _____ Date: _____

Agent's Name (if applicable): N/A Phone: (____) _____

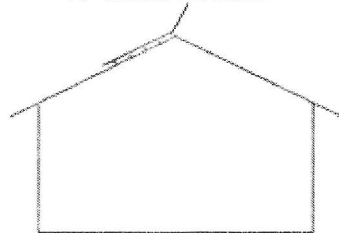
*If this application is not signed by the property owner, a letter authorizing signature by the applicant must be attached. By signing this application, the applicant understands and agrees that Deschutes County may require a deposit for hearings officers' fees prior to the application being deemed complete. If the application is heard by a hearings officer, the applicant will be responsible for the actual costs of the hearings officer.

Plot



Elevation

≥12" Section 3111.4.6.1
<18" Section 3111.5.3.5



Page 1 of 5

Job:	Address:
PNW472	Duane, Dina Barker
Rev.	20520 Bowery Lane
1-AM	Bend, OR 97703
PROSTAT ELECTRIC & SOLAR	

Caroline House

From: Dina Barker <dina@barkergroupnw.com>
Sent: Friday, March 02, 2018 1:26 PM
To: Caroline House
Cc: Duane Barker
Subject: RE: Letter for Application #247-18-000126-AD
Attachments: 20520 Bowery Ln - Google Maps.jpg; Office layout.pdf; F109613396.pdf; 2d_iso_40_ft_shipping_container_drawing.jpg

Follow Up Flag: Follow up
Flag Status: Flagged

Good afternoon Caroline,

Here are the revised documents and site plan we talked about and hopefully I have answered all the questions you had. The site plan using satellite images shows exactly where the storage container currently sits and all other adjacent buildings, septic field, property line and driveway configuration. Will this work? Its really the best representation of what exists out here.

The shipping Container will be the sole storage area for all wine cases – square footage to be utilized is 160 (half the container area). There are currently shelves inside the Container. The building next to the container is our office, we telecommute for work. There are no living quarters, no kitchen, only a bathroom and utility sink. The Container and office are not attached. The only access into the container is the wide doors on the driveway end.

No additional space will be used inside the office building, aside from Duane's existing desk area as it currently resides. There will be no storage of wine inside the office building.

The paperwork does not give space for adding the square footage of the Container for storage, but it is noted above. And, I did include office space to be utilized for calls and computer work.

With the limited vintages of wine being produced from the onsite vineyard, we anticipate having no more than 300 cases of wine onsite at any given time. Please let me know if there is anything further you need to process the request.

Kindest Regards,

Dina Barker
Direct: (541) 408-7991 Email: dina@barkergroupnw.com

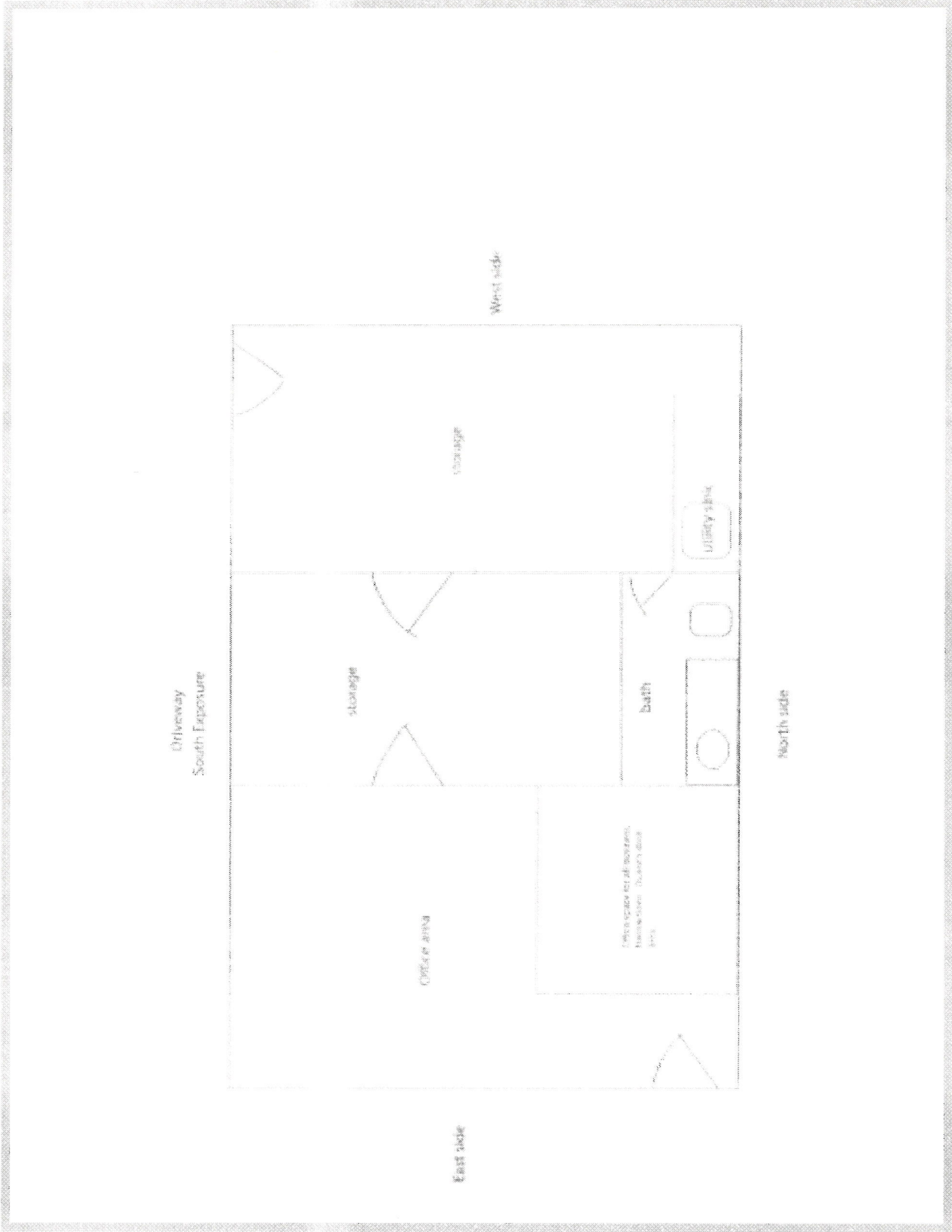
64

Google Maps 20520 Bowery Ln



<https://www.google.com/maps/place/20520+Bowery+Ln,+Olathe,+KS/@39.7701188,97.701188,121.298792,20520/data=!3m1!1e3!1s0x5406ce650d767b767b:0d0f5e57b33de77b7b21544.118879...>

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Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005

Phone: (541) 388-6575 Fax: (541) 385-1764

<http://www.deschutes.org/cd>

SUPPLEMENTAL APPLICATION FOR HOME OCCUPATION LAND USE PERMIT

- Type of Home Occupation: Type 1 Type 2 _____ Type 3 _____ (check one)
- Description of Proposed Home Occupation: Storage and base of distribution for bottled cases of wine. No onsite sales, no customer visits, no signage.
- Property Size (acres or square feet): 5.5 acres
- Location of Home Occupation: How much floor area (square feet) will be used for the home occupation?
In dwelling: 0 In accessory building: 112
Total floor area of dwelling: 2700 Total floor area of accessory building: 864
- Employees: Will you have employees report to and work from your home?
Yes _____ No If Yes, How Many _____
- Onsite Sales: Will you have onsite sales of products related to your business?
Yes _____ No If yes, please describe: _____
- Vehicle Trips: How many daily trips to and from your property will be made related to the home occupation (a trip represents one trip to or from a property)? Include trips by any employees, customers, and parcel delivery services:
No daily trips. Vehicle trip estimate is 1 per week.
- Access and Parking for Employees: On the site plan, describe and show the access to the road that provides property access and parking area you will provide.

Quality Services Performed with Pride

9. Hours of Operation: Time (Hours of Day) 3 Days of the Week 1

10. Proposed Construction: Please show on scale drawings any proposed alterations to your dwelling and/or accessory building that will accommodate the home occupation. N/A

11. Equipment and Materials: Please list the equipment and materials that will be used to conduct the home occupation. Please indicate whether the equipment will generate noise, vibrations, dust, smoke, and/or odors that would be detectable off-site:

40' shipping container, already on site will be used to store the cases of wine. The area will be locked at all times. It does not create any outside noise or disturbances.

12. Other Permits and/or Approvals: Please list other operating permits or approvals you are required to obtain for your home occupation. Example: Other permits from Deschutes County or the State of Oregon _____

OLCC permit from State of Oregon and permit from ATF.

13. Signs: Type 2 and Type 3 home occupations can have one (1) ground-mounted or wall-mounted sign (without a sign permit) that is no more than three (3) square feet in area, non-illuminated, and located on your property. Will such a sign be provided?

Yes _____ No _____ If yes, please include a scale drawing of the sign (include height and width) and show location of sign on site plan.

14. Outdoor Storage for a Type 3 Conditional Use Permit: Please complete this section if you are applying for a Type 3 home occupation and if you propose an outdoor storage area for equipment and materials that will be used in the home occupation.

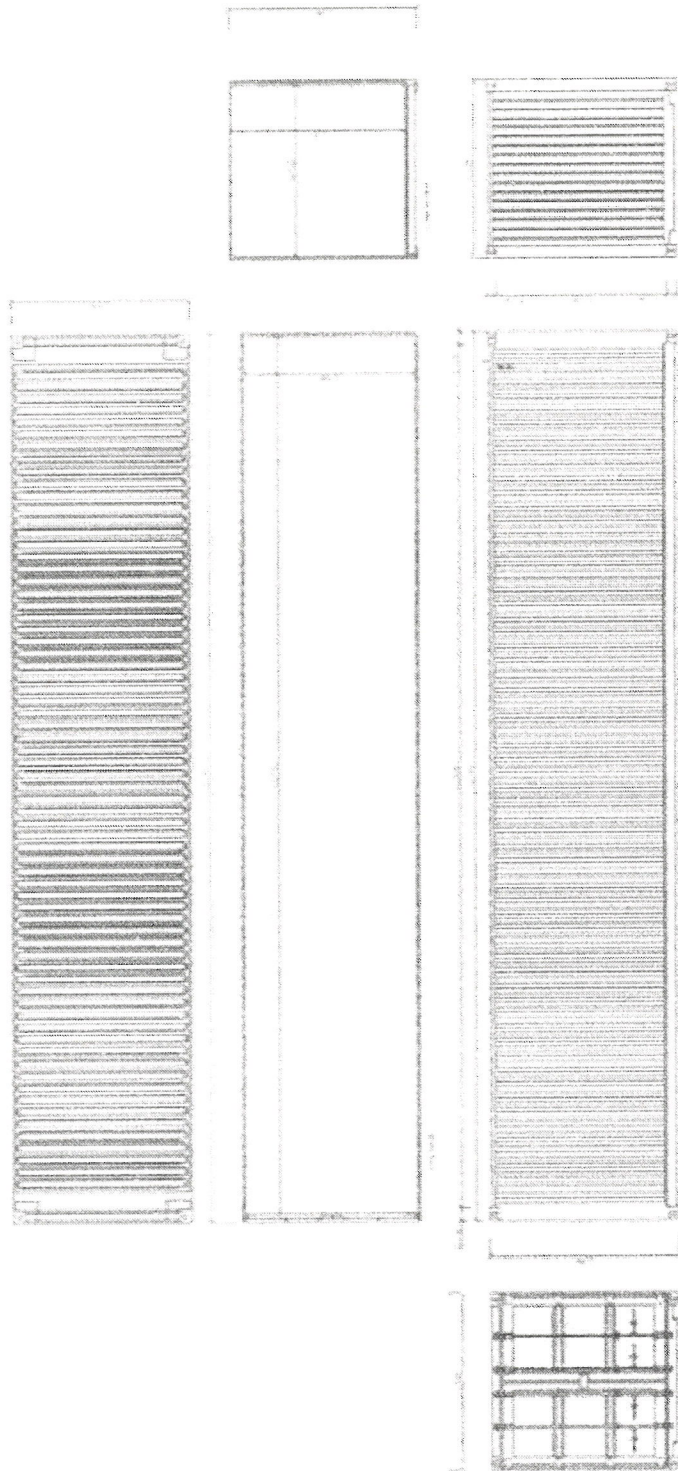
- a. Identify the area of your property that will be used for outside storage on your site plan. Please indicate the distance of this area from your property lines.
- b. Indicate which forms of screening (check all that apply) you will use to screen the outdoor storage area and indicate the location of this screening on the site plan:

Sight-obscuring fence	
Mature tree cover	
Topography	
Existing buildings on site	
Introduced landscaping (such as trees, shrubs, berms)	

15. Additional Information: Please also include any information you feel will be useful to evaluate the application (e.g. photographs). Use additional sheets of paper if necessary.

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2D - ISO 40' Cargo Container



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Return to: Izze Liu, Associate Planner
Community Development Dept.
117 NW Lafayette, P.O. Box 6005
Bend, OR 97708-6005



012942220000262010050057

06/08/2020 10:13 AM

D-IPPS Cat=1 Str=3 AS
\$25.00 \$11.00 \$51.00 \$10.00 \$6.00

\$113.00

CONDITIONS OF APPROVAL AGREEMENT

THIS AGREEMENT, made and entered into by and between Deschutes County, a political subdivision of the State of Oregon, ("County"), and Duane & Dina Barker, ("Developers"), owner/s of certain real property described in Exhibit A, Deschutes County, Oregon, as set forth in that certain Statutory Warranty Deed, dated October 15th, 1998, recorded in Deschutes County Book of Records 1998-5171128 ("Real Property").

WITNESSETH:

WHEREAS County has granted approval of a land use permit 247-18-000126-AD ("Permit") for the Real Property upon the condition that Developer construct and maintain certain requirements as specified therein; now, therefore,

IT IS HEREBY AGREED, by and between the parties, for and in consideration of the mutual covenants and agreements herein, as a condition precedent to the granting of final approval or occupancy, as follows:

Scope of Agreement. This Agreement affects the Real Property described above. This Agreement shall cover those improvements and requirements described in the section of this Agreement entitled "Conditions of Final Approval." Nothing in this Agreement shall require Developer to construct any improvements under the Permit, but if Developer undertakes the construction of buildings or structures, the division of real property or otherwise exercises the Permit, Developer shall be required to complete and maintain all improvements, as defined herein, in accordance with applicable County Ordinances and the Permit.

Definition of Improvement. As used herein, "improvement" means any private or public facility or service such as roadways, bike paths, access ways, pedestrian walkways, landscape areas, sewage collection and disposal systems, water systems, lighting systems, parking lots, cable utilities, circulation areas, outdoor storage areas, service and delivery areas, outdoor recreation areas, retaining walls, signs and graphics, cut-and-fill areas, buffering and screening measures, street furniture, drainage facilities, or other similar improvements as approved and required in the Permit.

Definition of Permanent Maintenance. As used herein, "permanent maintenance" generally means maintenance of the structures, improvements, and landscaping that are the subject of this Agreement in a manner that will keep such structures, improvements, and landscaping in good repair or good condition and in a condition that is not a hazard to public safety. With respect to landscaping, Developer's obligations shall include, without limitation, continued irrigation of landscaping and, where applicable, pruning of landscaping to guarantee required sight distances and to otherwise protect against hazardous conditions. With respect to drainage facilities, Developer's obligations shall include, without limitation, periodic cleaning of drainage ponds, drywells, or other drainage facilities of obstructions or silt that would limit the performance or effectiveness of drainage facilities. With respect to


Figure 1:: Page 1: Barkers' Application for a Type 1 Home Occupation Permit (issued on March 24, 2020)

NOTE: Continued on


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improvements, such as pavement and sidewalks, Developer's obligations shall include, without limitation, maintenance of the impervious nature of impervious surfaces, maintenance of evenness of surfaces so that such surfaces are not hazardous to the operation of vehicles or use by pedestrians.

Construction and Permanent Maintenance. If Developer is required under the Permit to construct improvements of any kind or to install landscaping or plantings and Developer elects to proceed with development under the permit, Developer agrees: (1) to undertake the construction and landscaping required under the land use permit, as more specifically set forth in the conditions set out herein and in the land use permit; and, (2) in the event that this Agreement and the Permit do not expire as set forth herein, to the permanent maintenance of required landscaping and improvements.


Enforcement. This Agreement shall be enforceable against any person bound by this Agreement in possession of or having fee title to the property. If any party bound by this Agreement defaults on the obligations set forth herein, the County shall be entitled to enforce this Agreement in equity. The prevailing party at trial or on appeal in any enforcement action shall be entitled to reasonable attorney fees and costs. This provision shall not limit County's rights to use other means provided by law, including but not limited to issuing a civil citation, to enforce the conditions of the Permit. 

Authority of Signatories. By their signatures, all signatories to this Agreement signing in a representative capacity certify that they are authorized to sign on behalf of and bind their respective principals.

Expiration. This Agreement and the Permit shall expire on its expiration date or by the revocation of the Permit or by the explicit release by the County from this Agreement granted as part of an approval for a change of use of the Real Property. Additionally, this Agreement and the Permit shall automatically expire upon the foreclosure of any prior encumbrance upon the Real Property which results in the extinguishment of this Agreement. 

No Partnership. County is not, by virtue of this Agreement, a partner or joint venture of Developer in connection with activities carried on under this Agreement, and shall have no obligation with respect to Developer's debts or any other liabilities of each and every nature, and is not a guarantor of the Developer, the project, or the work to be performed.

Limitations. Should this Agreement violate any constitutional or statutory provision, it shall be void. 

Persons Bound by Agreement. The original of this Agreement shall be recorded with the Deschutes County Clerk and shall run with the land. It is the intent of the parties that the provisions of this Agreement shall be binding upon the parties, the parties' successors, heirs, executors, administrators, and assigns, or any other parties deriving any right, title or interest or use in or to the Real Property, including any person who holds such interests as security for the payment on any obligation, including the Mortgagee or other secured party in actual possession of the Real Property by foreclosure or otherwise or any person taking title from such security holder. 

Conditions of Final Approval. The following are the required conditions of final approval for the Permit: 

1. Prior to initiation of use, the applicant shall obtain all required permits or licenses from the Deschutes County Building Safety and Environmental Health Divisions, the

Caroline House

From: Isabella Liu
Sent: Monday, February 12, 2018 12:22 PM
To: Caroline House
Subject: FW: Letter for Application #247-18-000126-AD

Follow Up Flag: Follow up
Flag Status: Completed

From: Dina Barker [mailto:dina@barkergroupnw.com]
Sent: Monday, February 12, 2018 11:23 AM
To: Isabella Liu <Isabella.Liu@deschutes.org>
Subject: Letter for Application #247-18-000126-AD

Good morning Izze,

Per the Land Use Application submitted 2/7/18, the following information details the reason for the application.

The purpose of obtaining the Administrative Determination – Minor is exclusively for storing cases of bottled wine. The secured storage facility is a climate controlled 40 ft shipping container situated on said property.

No on-premise sales will be conducted. Wine will be distributed/delivered directly to the buyer at an approved location to resell or distribute alcoholic beverages, but not outside the state of Oregon.

Once this application process is approved and the determination made, we can move forward with submissions to the OLCC for permits required to wholesale/retail wine in the state of Oregon.

Thank you,

Duane Barker,



Isabella Liu

From: Duane Barker <duane@barkergroupnw.com>
Sent: Thursday, March 29, 2018 4:34 PM
To: Isabella Liu
Subject: 247-18-00126-AD

Thank you for your time and information from our meeting at the counter this last week.

This letter is to further describe our intent and why we are filing for a permit. There appears to be an assumption that we are intending to process grapes to wine at this location. We are not. As we understand from the OLCC, we must have the county on board for distributing wine from our location. We are growing wine grapes at this location. We are not making wine in any commercial way at this location and do not intend to. At harvest the grapes are taken to a wine maker and the wine is made, barreled, bottled and cases up at that location. Our intent of this permit is to have that cased wine stored here in the described convex container at the same property that it was grown at. The container is onsite now and has been for number of years. The wine is to be stored and distributed from the property by one delivery vehicle. We have no intention of having a wine tasting room or anything of that nature. Just a distribution point for local, wine shops, existing tasting rooms, restaurants and some retail grocery stores. In regards to our existing business. We are promotional products distributor and have been for 20 plus years. It consist of a desks, phones and sample products storage. There are no customer visits as we face to face contact with our clients at their place of business not ours.

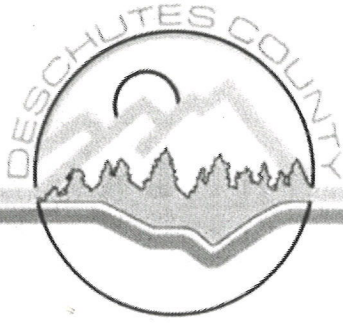
Thank you,

Duane Barker, Consultant

 **BB** brilliance in branding

(800) 329-5406 Toll Free | (541) 382-5406 Office | (541) 280-9935 Cell | (888) 839-7103 Fax
Email: Duane@barkergroupnw.com

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Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005

Phone: (541) 388-6575 Fax: (541) 385-1764

<http://www.deschutes.org/cd>

MINUTES

DESCHUTES COUNTY PLANNING COMMISSION
DESCHUTES SERVICES CENTER
1300 NW WALL STREET, BEND, OREGON, 97701
OCTOBER 22, 2015 – 5:30 P.M.

I. CALL TO ORDER

Meeting was called to order at 5:30 p.m. by Chair Hugh Palcic. Members present were Vice Chair Ed Criss, Maggie Kirby, Susan Tunno, Dale Crawford and Steve Swisher. Absent: James Powell. Staff present were Nick Lelack, CDD Director; Peter Gutowsky, Planning Manager; and Sher Buckner, Administrative Secretary.

Note change in order of agenda items.

II. WORK SESSION: 247-15-000542-TA, Text Amendments regulating marijuana related businesses – Matthew Martin, Associate Planner, and Nick Lelack, Director

Matt presented PowerPoint slides regarding the Text Amendments. Commissioner Kirby asked about additional setbacks and the reason behind the 300-foot buffer. Matt said it was there to provide additional protections to existing property owners. The Board looked at existing codes in Washington for examples. A person developing a new dwelling would not be subject to the 300 feet. Commissioner Kirby said that in Clackamas County there were additional requirements for odor controls stating that fans had to be in good working order and mentioning use of other alternatives. Matt said that just did not make it into the proposal. Commissioner Kirby asked if middle and junior high schools were included and whether they should be listed in the 1000-foot setback. Matt said he would research the language. Commissioner Kirby said that in Clackamas they also have buffers outside parks and other public areas – have those been omitted in Deschutes County due our park locations? Matt said that Clackamas had contemplated other uses which are hard to identify and which can change – the Board thought that was a little too comprehensive. Commissioner Kirby said that regarding secure disposal, there was no language regarding discarded items remaining in control of the licensee, which Matt said also was not included.

Commissioner Swisher mentioned after-school centers, boys' and girls' clubs, etc., and he would like to see those included. Matt said we may need to clarify the language – "child care center" is a specific use, which is what was mentioned. Also, we have a boys' and girls' center that changes locations around Bend, and that would need to be considered.

Nick said that this is a fluid process and a moving target, but we do not have a choice. The rules will continue to change, proposals keep coming forward. In the next couple of days Clackamas County will have public hearing and will be coming forth with an almost entirely new proposal. This could happen in Deschutes County too.

- III. **PUBLIC HEARING: 247-15-000333-CU/334-S**, Conditional use permit and site plan review approval to establish a 184-acre regional park to be known as the Riley Ranch Nature Reserve. The proposed park will include open space, trails, boardwalks, three parking areas, gathering areas, restroom facilities, overlooks, river access areas, environmental education and programming, road improvements, and a bridge that will cross the Deschutes River – Peter Gutowsky, Planning Manager

Peter Gutowsky presented PowerPoint slides and discussed the proposal. Commissioner Swisher asked for clarification on the Hearings Officer's definition of the bridge as being a structure. Peter said she addressed it on page 11 as it relates to the definitions in Title 19.

Public Testimony

Jim Figurski (Bend Park & Rec District), Susan Cunningham (ESA) and Joe Bessman (Kittleson) testified on behalf of the applicant. They agree with the recommendations of the Hearings Officer and would like to discuss the sight distance issue further this evening. They also would like to present further testimony on whether or not the bridge is a structure. Slides were presented showing the site. Jim said this area is a real asset to the public, with all sorts of wildlife and plant life, multiple terrain types and biohabitats including a striking rimrock area. The area is well located for connections to other trail systems such as Shevlin Park, Tumalo State Park, etc., and they are working on these connections. There was a citizens' advisory committee and adjacent property owners in Glen Vista were informed as much as possible. A house in one location will eventually be repurposed for an educational center, and a separate application will be filed. No dogs will be allowed anywhere on the property. We want people to park on the edge and experience the area on foot. No bicycles will be allowed, either, and no large groups of more than 30, to keep the area quiet and contemplative. There is space for only one bus to park, and there will be no large school groups which would also be an issue with the flaking rimrock. There will be bicycle parking at the edges but people will have to view the area on foot. The proposed bridge will look similar to other bridges that cross the river – the South Canyon Bridge, the Farewell Bend Bridge, and First Street Rapids Bridge, and the Sawyer Park Bridge.

Joe said there are high speeds on O.B. Riley and there is an urban-to-rural transition to consider. Today we have speeds that are higher than the posted speed of 35 mph due to the transition. The 85th percentile speed is 44.5 mph, and with the vegetation the available sight distance is 325 feet. We can bring this to 366 feet and reduce speeds to 35 mph. The City and County are both involved due to the location. There is a menu of options and there will be a lot of coordination for options like LED lights on the signs. Bend Parks and Rec will be responsible for putting in these improvements so drivers comply with the existing posted speed limit. The standards within the right-of-way can be met, and outside that we can make it much better. There are private mailboxes within the right-of-way that may need to be relocated.

Susan Cunningham said that Title 19 is not an often-used section of the Code, so they want to be sure they address it in their application. They had three pre-application meetings, one

of which was specifically about the bridge, and nowhere did the setback issue come up until Anthony Raguine wrote his staff report. If staff had advised us to get a variance, we would have done that. The Riley Ranch property is landlocked with a rimrock cliff of up to 250 feet. There is no current or historical vehicle access to the canyon floor, and we need to have access. One access will be provided with an easement across the Culligan property which will be the main vehicle access. An access through Johnson Road is also being worked on. The Hearings Officer found that the bridge was a standalone structure. Title 19 does not define scale for driveways, walks or fences. The Hearings Officer may have overlooked the definition of "access" or "access way." The main purpose of the proposed bridge is for pedestrians and bikeways - with no public vehicle access, which will be off Glen Vista Road. The bridge is needed to connect two sections of trail and to get up to Tumalo State Park. We have received our State Scenic Waterway Permit. Oregon Parks and Rec does not consider bridges to be structures.

Commissioner Swisher asked if the bridge would accommodate rescue vehicles, and Susan said yes. Vice Chair Criss wanted to clarify that the bridge would not be for vehicle use except for maintenance and emergencies, and Susan said yes.

George Findling said he lives in the Windemere neighborhood, across from the proposed park, and the Windemere Association supports the idea of the park and a connecting trail system. They do have one concern which is about parking. The basic plan is to access the park by road, from O.B. Riley from the north, but they are concerned that there is no parking plan for people who want to access the park from the other side of the river. The closest access right now is about a four-mile walk. People already park illegally inside Windemere. Windemere is concerned that the parking problem will get worse. Before the bridge is approved, a parking plan should be implemented. The Hearings Officer did not think this was an issue. He would like to respectfully disagree, recognizing that it is judgment call, but they already see a problem which will only increase. He would like to recommend an addition to the conditions of approval – language that would say that a comprehensive public parking plan for pedestrians accessing the park via the bridge should be prepared. Commissioner Swisher asked how many homes are in Windemere, and George said approximately 90. The Deschutes River Trail runs approximately parallel to the lower part of their subdivision. Commissioner Crawford asked how many vehicles currently park in the area; George said there are two places where people are improperly parking – the switchback near R.G. Briggs, all the time, two to five vehicles; and where the trail crosses Northcliff, two to four cars a week. These vehicles are parking on private property.

Justin Gottlieb said he has participated at Bend Parks and Rec since 2011. He has visited the Riley Ranch area twice on bus tours, and it will be a beautiful park. BPRD is not very good at building bridges.

Rick Johnson said he drives through this intersection all the time. The park will be nice, although he is disappointed in the dog ban as a dog owner. Traffic in the area does move at 45 mph regularly; the 35-mph speed zone is a recent change in the past few years. There is also Knife River equipment going up and down the road, a lot which needs to be considered. There is a school that was recently built near Tumalo State Park which has created several hundred extra cars in the morning and afternoon, so volume is not spread evenly throughout the day. He has noticed a lot more road kills – recently two coyotes and a deer. The Juniper Ridge improvements will have impacts coming across Cooley Road, and the volume numbers will go up. Future mitigation measures need to be addressed. Also, the mailbox relocations and people crossing the road to get to their mailboxes will not be improved near the "park

chop" intersection and may require people to cross the street more or make U-turns to return to their residences.

Dan Kiesow testified his history with this project goes back to emailing Jim Figurski in 2014 and writing a letter to a number of people (copy submitted). He feels the park is a good idea, but he has concerns about the intersection and Glen Vista Road which has a substandard easement for a city street. He and his wife worked with ODOT to decrease the speed limit on the road. He has attended to accident victims twice at the intersection and it is a dangerous area – not only the sight distance but the lack of compliance with the speed limit. The mitigation measures proposed will allow people to drive faster – removal of vegetation, etc. The road usage includes many people riding their bikes, and they will want to access the park which will result in real traffic issues on Glen Vista Road. The applicant will spend 3.7 million dollars to improve the park, but parts of the road are 22 feet side with no shoulders. It won't be long before you have 40 bicycle parking spaces, 66 vehicle parking spaces, restrooms, kiosks, overlooks, etc. They are rushing to develop a park without proper access. He would like to see them build the bridge and extend the river trail, but his main objection is that we need to look hard at not only the intersection of O.B. Riley and Glen Vista, but the one area of only 22 feet in width. They need to come in and repave an area that is 30-32 feet wide, with a bicycle/pedestrian path lined off so people can separate from the traffic. The Hearings Officer also states that Swalley provides potable water and they do not. He would not like to see this permitted at this time – let's see what happens with the urban growth boundary and not rush to spend the money.

Ed Elkins said he owns the Gopher Gulf Ranch and sold the property to Bend Park and Rec. He has a few issues with not calling the bridge a structure, since it will have steel, etc. There are other ways to access the west side, through Tumalo State Park on a pathway. They talked to George Kolb years ago about sight distance and got an agreement for a 60-foot-wide dedicated easement between Cooley Road and Bend-Redmond Highway; otherwise there is no way to haul a truck and trailer and it is a deadly zone. At that intersection, the post office moved a resident's box closer to his property because of the safety issue – it is a gamble to cross the road to get mail. There are no crosswalks – that intersection needs them, with the warning systems and flashing lights. The traffic study should be rejected until it is really defined. The mine is not gone yet although it was supposed to be. Commissioner Tunno asked Ed for clarifications on accessing the west side – he said there is no way any firefighter is going down into a canyon to fight a fire. You can go to Tumalo State Park; you can walk across the bridge and come across the other side, so why do you need another bridge? There is already road access there for emergency vehicles. The road that feeds the bridge is an old dirt road and will have more traffic, as well. He feels the Hearings Officer was correct in her decision.

Russ Grayson, CDD Director for the City of Bend and City Engineer, testified that the City is reviewing the application to make sure it meets City Code. They reviewed the traffic study and agreed with trip generation data. It does not trigger any intersection analysis, so the issue is one of sight distance which does not meet criteria. Supplemental information from Kittleson as to what they can achieve meets the minimum criteria for stopping and sight distance. We agree with their proposal that additional improvements would help decrease speed. Regarding maintenance questions (City or County), speed flashing signs will be located within the County jurisdiction as well as an LED flasher on the intersection light which would have to be maintained by the County. Their traffic engineer reviewed all of the information he is presenting today. Between 2012 and 2015 there were no calls for public safety officers for that intersection. There were no crashes reported between 2007 and 2013.

Nunzie Gould felt that normally this project would be submitted by the County Parks Department which we do not have – she would like the Planning Commission to think about the needs within the County and questions of road maintenance and emergencies. The draw to recreational amenities is not just from the City but from tourism as well. We know the City of Bend has huge deficiencies in their roads; the County does not accept maintenance on new roads that are going in. What is the role of the County in planning for regional facilities and draws, and what is the funding mechanism? Looping the recreational amenities of Johnson and O.B. Riley Roads, linking cities through the County, the year-round cycling movement we have – the transportation planning aspect needs to be thought through. It is time for our County to provide expertise and planning for these interconnected systems.

Jim Figurski said they believe they have provided a reasonable alternative definition of the bridge, which should be exempt from the requirements for setbacks. There are traffic issues, and he lives 500 yards down the road and walks his dogs regularly; but they have provided reasonable answers and are willing to accept the Hearings Officer's conditions of approval. Susan Cunningham said they may be in favor of a shorter timeframe for the comment period to be left open. There is no quick and simple road that exists along the west side, and they will have to acquire easements in the future. Park and Rec recognizes there is a huge demand for people wanting to access the Deschutes River Trail. The bridge will not be built for at least two years. Park and Rec is working on a master plan for the trail that will help alleviate access issues. Jim said that they have been discussing with the Coates property owners a trailhead where the public would park. When the mine is closed down, they will have additional parking and additional trailhead, although no vehicular traffic will be allowed, only emergency/maintenance vehicles. Joe Bessman said mailboxes won't be moved across the road but farther down the road, and they really want to go above and beyond. He has walked the entire distance on Glen Vista, on the pavement and gravel and it was a comfortable walk. The pavement ranges from 22 to 24 feet wide and contributes to the lower speeds. Jim said, regarding the comments about "rushing" to develop the property - they have been working on the property for over two years and have had a year's-long worth of citizens' involvement meetings, etc. It will be another year before drawings are completed.

Peter Russell said that he and the Road Department have agreed with the traffic study provided by Kittelson. Glen Vista Road is a low-volume road. O.B. Riley has around 1100 cars a day. The use itself, a recreational park, is a low traffic generator. The Glen Vista/O.B. Riley area has no crash data for the past five years. Chair Palcic and Peter discussed the proposals of flashing signs, etc., and Peter said they were fine with them.

Peter Gutowsky summarized options for the Planning Commission to proceed. Commissioner Swisher suggested keeping the written record open for a week and then a few days for the applicant's final argument before deliberation.

Motion: Commissioner Swisher motioned to close the oral record and keep the written record open until October 29, with an opportunity for the applicants to respond until November 4, and then hold deliberations on November 12. Seconded by Vice Chair Criss.
Motion passed.

- IV. **PUBLIC HEARING:** 247-15-00491-TA, amend Deschutes County Code 22.20 and 1.16 to allow the County to not process development permits for properties with an existing code violation – Peter Russell, Senior Transportation Planner

Peter summarized the application and process to date. Chair Palcic and Peter discussed procedural changes if the application is approved. Commissioner Swisher asked how staff would determine an emergency how that affects the time for working on a code violation. Peter said Planning staff, Building and possibly Environmental Soils may be involved with interpretation.

Merry Ann Moore testified in favor of the proposal and felt it has the potential to reduce conflicts between neighbors. If a property has an unimplemented wildlife mitigation plan, it would be great if this shows on DIAL and the next owner has to comply if the property is sold.

William Kuhn testified that he lives in the middle of the winter deer range and he is the one who brought forward this proposal. They brought to the County's attention in 1997 the lack of a homeowners' association agreement in their cluster development (two lots) with a 33-acre jointly owned wildlife habitat. They started in January 1997 because there were things going on that needed to be addressed through an association process. This text amendment will not help them and would not have helped them at that time, because they could not convince CDD that there was no homeowners' association agreement. CDD made the wrong interpretation in 1988 that deed restrictions constituted the homeowners' association agreement. They have a stipulation agreement from the County that they made a mistake in 1988.

Jerry Norquist encouraged approval of this amendment and moving it forward as soon as possible.

Paul Lipscomb said he was a member of the committee that drew this up as a consensus process. County planning staff and the legal department were also participants, and he hopes the hearing will be closed this evening.

Bruce Bowen testified that he thinks this is a good compromise and many people have worked hard on it. He would support moving this ahead as quickly as possible.

Eva Eagle said this proposal will make a huge difference to the ability to deal with property owners who don't obey the rules, and this needs to become part of the standard procedures of the Planning Department.

Motion: Commissioner Crawford motioned to close the oral and written testimony and proceed to deliberation. Seconded by Vice Chair Criss. **Motion passed.**

Motion: Chair Palcic moved to recommend approval; seconded by Commissioner Swisher.

Discussion: Commissioner Swisher said several members of his community had indicated to him they are in favor of this proposal.

Motion passed.

- V. **DELIBERATIONS:** 247-15-000444-TA, Text Amendment to DCC 18.113.060, Standards for Destination Resorts, to modify the current process and requirements for Eagle Crest to provide the County with annual accountings related to the inventory of overnight lodging units – Peter Gutowsky, Planning Manager

Peter Gutowsky summarized the application to date. Vice Chair Criss asked if this would fix the problem. Peter said staff has coordinated with the applicant, legal counsel has been involved, and from a staff standpoint this text amendment is plausible to remedy the need for overnight lodging units. Before the application was initiated, we reached out to DLCD which has no concerns. If this application is successful, staff will track their time and the reports submitted by the applicant – we may need a fee to recover costs for this and all hours will be documented. Chair Palcic and Peter discussed that we are in uncharted territory here. Deschutes County has the most destination resorts in the state, and they were established to bring in visitation which they have done. The state helped lead the Goal 8 process and we heard no issues from them before the formal hearing on this application commenced.

Nick said that it is incumbent on us as staff to demonstrate whether this addresses the issue and we need transparency/a public process. We need to provide these reports on an annual basis – it has been a challenge and the rules have changed.

Commissioner Swisher felt this entire issue is troubling. Eagle Crest was one of the new places after the Code changed. He would much rather see the units built and the bonding in place, but historically we cannot completely go back and blame and the owners and developers. This is a solution that bears watching and annual reporting to see if it works, but he would not want to see this solution being applied to new applicants. If we have more destination resorts we need to hold to the standard. This solution mitigates a historical issue, but he is still troubled by it.

Chair Palcic said he worries about whether we are compounding problems or solving them, as well. What kinds of challenges will we face if this is approved? Commissioner Crawford felt that no matter what, we do set precedents. He is concerned about what the lots were originally platted for and has serious considerations about approving this. Commissioner Swisher suggested that if the Commissioners do approve this, the penalty portion be doubled. Vice Chair Criss felt that Deschutes County has taken quite a few liberties with Goal 8. We need to be careful and understand that we need to do business differently in the future. This does address the problem with Eagle Crest and gets things closer to where they should be, but he is concerned about Judge Lipscomb's letter and the precedents we may not want to be involved in. Some time ago, we had someone in here testifying about how they could not sell homes due to deed restrictions and rental requirements. So now we don't have deed restrictions and we'll just count rentals as overnights. He is not so sure this will fix the real problem and is concerned about certain legal precedents. Chair Palcic said we should aspire to do the right thing and not bail out the bottom of the boat. This patchwork will come back to haunt us. We really should be trying to get this right. Commissioner Kirby asked if we have requested guidance from the state and whether terms are evolving. Peter said the applicants do fall under the obligation to make units available for overnight use through a central reservation system. They have that role and responsibility today and the obligation to submit the text amendment. The entire text amendment was shared with the DLCD and we conveyed to them that we would like to know if they had any concerns – they have indicated they do not.

Commissioner Tunno said that this definition and Goal 8 are not about managing the brick and boards of real estate. Real estate includes structures attached to the land. Goal 8 talks about the use of a brick and board structure – using individual units for overnight lodging. This whole evolution includes reserving through online booking agencies to use these spaces. She does disagree with the confusion about booking agencies and the Judge's interpretation about Goal 8 – the discussion is about how this resort can meet the

requirements and prove that they are making available so many units for overnight lodging. On whom does the onus fall to do this? She doesn't see the problem with this and feels some of the terminologies have gotten off track with actual use of real estate. Chair Palcic said the effort is admirable but it doesn't get us where we want to go.

Commissioner Swisher appreciated Commissioner Tunno's description. What would "better" be? Chair Palcic said there are other approaches to this and it has many holes. We don't "know" and are calling it a pilot program which says a lot. Commissioner Swisher said he hoped no other resort would use this methodology. Chair Palcic said he was recently at a hearing where the applicant used photos and tried to justify their exception to the rule by saying other parcels already violated it. That puts more gravity on getting this right so it isn't another picture in the scrapbook.

Vice Chair Criss remarked this has been narrowly fashioned to deal with the applicant's issue and not set a precedent. Chair Palcic said down the road, one piece of this might work for someone and they'll need that and won't see how it would be a problem. Commissioner Tunno said that each of these resorts is hatched in a different timeframe with a changing landscape – how would this effort ever be applicable to any other resorts of today? The custom things we do for South County do not apply anywhere else. Chair Palcic asked how many overnight units have been built at Pronghorn – there's still Caldera, etc. There are a number of these that have not complied, so they may indeed want to use part of this.

Peter Gutowsky spoke about the language tying this to Eagle Crest-specific property. All of the other resorts are complying with the Code. Pronghorn posted millions of dollars to fund a two-phase hotel; Phase 1 in 2017 and Phase 2 in 2018. Once built, they will no longer need to bond because they'll have met the ratio. For any other platted units, they will need overnights. Thornburgh has a bond and is building hotels – we are making sure any proposed plats maintain the 2.5:1 ratio; the same is true of Caldera Springs. Tetherow uses Conditions of Approval Agreements. This text amendment is dealing with a resort that does not have the ratio in compliance; the others do. Eagle Crest wants to use its online reservation system to demonstrate compliance. Nick added that if other resorts were to amend the Code, they could then amend their conceptual and final master plans and either have deed restrictions, be bonded or have this new option to comply. Pronghorn is only half built out; a Thornburgh hearing is on the horizon. It would be a significant hurdle to get over as to whether the Planning Commission and Board want to extend this to other resorts. It is possible that the Code could be amended. The question is whether it is practical.

Motion: Vice Chair Criss motioned to move this forward with approval. Seconded by Commissioner Swisher.

Discussion:

Commissioner Swisher asked what happens if the Planning Commission has no recommendation; Nick said we would take that to the Board to consider.

Commissioner Swisher said he was contemplating withdrawing his second and recommending moving this forward to the Board without a recommendation. Vice Chair Criss said he is past worrying about other resorts using this because they would have to apply for it. If this fixes the problem with Eagle Crest, great, but this should not be the norm for destination resorts in the County. Nick discussed the Thornburgh case and said that the first 50 units have to be built prior to the sale of real estate.

Commissioner Swisher said he would let his second stand. Chair Palcic again wanted to reinforce that he agrees with Judge Lipscomb on this and we should try to achieve better. Commissioner Swisher mentioned this would get tax dollars flowing.

Motion passed.

VI. PUBLIC COMMENTS:

Nunzie Gould encouraged the Commissioners to look at the legislative history as to why the resorts wanted to increase their overnights and how the standard went from 2 to 2.5. It is hypocritical that it is a challenge now – this is a slippery slope and every resort now wants 2.5 to 1 instead of 2 to 1. Pronghorn has put multiple bonds before the County with something like six extensions. Overnights are not being built and that is rural sprawl. It is incumbent on this Commission to understand what that is doing in the community. Get the legislative history from DLCD. Eagle Crest has been the tiger and Deschutes County has been whiplashed to the tail.

VII. PLANNING COMMISSION AND STAFF COMMENTS:

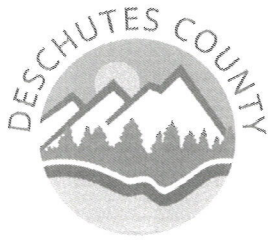
The Goal 11 public hearing is next Wednesday at 6:00 in Sunriver. The Board on Monday said they had not ever seen this many controversial, high-profile projects on their plates in such a short period of time. Peter Gutowsky and Commissioner Kirby discussed the issue of hunting sage-grouse and why it is allowed. Peter will be providing more information.

VIII. ADJOURN

There being no further business, the meeting was adjourned.

Respectfully submitted,

Sher Buckner
Administrative Secretary



COMMUNITY DEVELOPMENT

Code Compliance Program Policy and Procedures Manual

June 30, 2021

*To request this information in an alternate
format, please call (541) 395-1707 or send an
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PREFACE

Code enforcement in Deschutes County is a priority of the Board of County Commissioners ("Board"). The Board believes the policies and procedures in this manual will enhance code compliance and thereby the quality of life in Deschutes County.

In August 1994, the Board established the Deschutes County Code Enforcement Task Force to study County Code Enforcement, to recommend improvements to the program and to identify statutory or County Code changes that could increase the effectiveness of County Code enforcement. The task force included residents, representatives of the construction and real estate industries, representatives of the state court system and law enforcement, County Legal Counsel, managers of the County's Community Development Department ("CDD") and the County's Code Enforcement staff.

The task force met three times during 1994. In January of 1995, they presented a report to the Board containing their recommendations. The Board accepted those recommendations, and directed County staff to begin to implement them. Among the recommendations was the development of a County Code Enforcement policy and procedures manual.

The key task force recommendation in 1995 was the implementation of a more "proactive", or County-initiated, Code Enforcement program. Such a program would begin simultaneously with adoption of the manual and would apply to County Code violations occurring on or after the effective date of the manual. This recommendation effectively created a two-pronged approach to code enforcement— somewhat different policies and procedures for violations occurring before, and after, the effective date of the manual. The intent of this approach was both to increase code enforcement after giving the community ample notice of the County's new, "tougher" enforcement policy, as well as to set enforcement priorities and manage the County's Code Enforcement workload in a manner that is realistic, clear and credible to the community. The original policies and procedures manual reflected this new approach.

The County amended the manual in 1997 to reprioritize the criteria in Section IV and to reclassify and add enforcement staff. Since then, the County added Deschutes County Code ("DCC") Chapter 1.17 to adopt the required administrative hearings process required by ORS 455.157 adopted by the State Legislature in 2009 for building and specialty code violations. The County also amended Chapter 1.16 to add an additional injunctive remedy once a violation is cited into Circuit Court.

In 2014, CDD staff reviewed the manual and suggested changes to the Board, which reviewed the staff-proposed changes and made additional revisions.

In 2021, CDD staff reviewed the manual again and suggested changes to the Board. A noteworthy recommendation from this review was an option to change the title of the Community Development Department program from Code Enforcement to Code Compliance. The concept behind this change, which was adopted by the Board, was to better align the program title with its objective. This manual update is reflective of this and other minor operational updates approved by the Board.

By the guidance of this 2021 manual and integration of the County's "Every Time Standards", the Community Development Department Code Compliance Program will continue protecting and enhancing the quality of life in Deschutes County.

I. MISSION

The mission of Deschutes County's Code Compliance Program is to protect the health and safety of the County's residents and visitors, and the livability of the community, by assuring compliance with the County's land use, environmental and construction codes. The County will assure County Code compliance both by encouraging voluntary compliance and by sanctioning code violators who do not comply.

II. PURPOSE

The purpose of the Deschutes County Code Compliance Program Policy and Procedures Manual (hereafter "manual") is to provide written guidelines for:

- A. The prioritization of code enforcement cases;
- B. Initiation and investigation of code violation complaints;
- C. Enforcement of the County Code through voluntary compliance;
- D. Prosecution of code violators who do not comply;
- E. Sanctioning of code violators and the assessment of fines and penalties; and
- F. Recovery of the County's investigation and enforcement costs.

These written guidelines are intended to increase consistency and predictability within the County's Code Compliance Program, and to educate the County's residents and property owners about code compliance and the consequences of violating the County Code.

III. INTERPRETATION

This manual describes the standard policies and procedures for code compliance, and should be interpreted so as to maximize both the efficiency of the program and operations as well as compliance with County Code. This manual should be followed unless otherwise directed by the CDD Director or designee, the County Administrator or designee, or the Board of County Commissioners ("Board").

IV. CODE COMPLIANCE PHILOSOPHY

Policy: The County's policy is to achieve compliance with County Code in all cases of reported and verifiable code violations. However, the County may not always have sufficient resources to expeditiously address all cases. Consequently, the County has established, through this manual, both a priority ranking for code enforcement and procedures designed to maximize available code compliance resources. The Code Compliance Program should follow the priority ranking set forth in Section V of this manual. It also should be flexible enough to allow the level of enforcement that best fits the type and circumstances of the code violation(s), within clear and objective criteria set forth in this manual and consistent with the priorities.

A. Enforcement Levels. The levels of enforcement available to the County are:

1. Mediated settlement of code violation complaints;
2. Pre-Enforcement Notice (hereafter "PEN");
3. Investigative fees on permits required for code compliance;
4. Obtaining voluntary compliance;
5. Warning letters;
6. Citation and prosecution of violation in state court or Notice of Violation and Proposed Civil Penalty (hereafter "NOV") through County administrative hearings;
7. Petition for injunction in circuit court;
8. Nuisance or dangerous building abatement;
9. Permit revocation

- B. Sequence of Enforcement.** The levels of enforcement are not mutually exclusive, and may be used alone or in sequence or combination with other levels. However, in most code violation cases, the County will use the code enforcement levels in the sequence they appear in Paragraph A.
- C. Criteria for Choosing Level of Enforcement.** Some code violation cases may have aggravating circumstances requiring a different sequence for enforcement activity than that set forth in Paragraph A. The County may choose a different sequence if one or more of the following circumstances is present:
1. The code violation is severe (e.g., deviates greatly from the Code);
 2. The violation poses a significant threat to public health and safety, or to the environment as determined by the Community Development Director or designee;
 3. The violation may cause economic harm to residents or to the County as a whole;
 4. The physical size or extent of the violation is significant as determined by the Community Development Director or designee;
 5. The violation has existed uncorrected for a significant period as determined by the Community Development Director or designee;
 6. There is a previous history of complaints and code enforcement on the subject property and/or with the alleged code violator;
 7. There is good potential for combining enforcement action on the violation with other violations;
 8. There is little likelihood of obtaining voluntary compliance.

V. PRIORITIES FOR CODE ENFORCEMENT

Policy: County staff shall attempt to investigate and resolve all code violations within budget and staffing resources. However, because of limited code compliance resources, there may be times when all code violations cannot be given the same level of attention and some code violations may receive no attention at all for a period of time as determined by the Community Development Director or designee.

In circumstances where not all code violations can be investigated, the most serious violations, as determined under the priorities set forth in this section and the criteria for enforcement in Section IV(C) of this manual, shall be addressed before the less serious violations are addressed, regardless of the order in which the complaints are received. However, complaints alleging both priority and non-priority violations should be processed together to maximize efficiency.

- A. Priority Cases.** The Board has established the following priorities for CDD code violations:
1. Violations that present an imminent threat to public life, health and safety;
 2. Violations which impact rivers, streams, floodplains, and wetlands,
 3. Solid Waste Code violations, Environmental Soils violations, and Building Code violations consisting of ongoing non-permitted construction or failure to obtain permits;
 4. Land use violations.

B. Lower Priority Cases

Policy: Complaints alleging code violations that do not fall within the priority ranking above should be processed in the order in which the complaints are received, and as code enforcement resources allow.

Exception. At the discretion of Code Compliance Specialists and in consultation with the Community Development Director or designee staff, complaints may be processed in any order that maximizes the efficiency of enforcement.

Procedure: All complaints concerning a particular type of code violation (e.g., non-permitted manufactured homes in manufactured home parks), or all complaints of violations occurring in a particular geographic area, may be processed together, regardless of the order in which the complaints are received.

- C. **Solid Waste.** The County Solid Waste Department may engage any other County Department/ Office to administer its code compliance program for County solid waste code violations.

VI. APPLICABILITY

Policy: This manual applies to all code compliance administered by CDD, its employees and agents. Except as otherwise provided, the policies and procedures in this manual apply to all alleged code violations whether or not they existed or were known by the County on the effective date of this manual. The policies and procedures in this manual supersede any conflicting County policies and procedures.

Non-Applicability to Covenants, Conditions and Restrictions. Many subdivisions and planned communities are subject to private, recorded covenants, conditions and restrictions (CC & Rs). The County's policy is not to enforce private CC & Rs.

Non-Applicability to Private Legal Action. Residents may undertake private legal action to enforce County Code, including civil litigation against the alleged code violator, as well as personally filing citations and prosecuting County Code violations in court. The policies and procedures in this manual do not apply to private legal action to abate violations. Neither should they be interpreted to suggest that the County will participate in such private legal action.

VII. INITIATION OF CODE ENFORCEMENT

Code enforcement may be initiated by any of the following methods:

- A. **Resident Complaints.** Any person may make a complaint to the County alleging one or more code violations.

1. **Form.** A resident may initiate a complaint by submitting a letter or email, complaint form (available online), or by contacting CDD in person or by telephone. If a resident submits a complaint by phone or written communication other than a completed complaint form, County staff shall complete the complaint form. If the County receives a written complaint other than the County-approved complaint form, the written complaint shall be attached to a complaint form completed by County staff. To be investigated, a resident complaint must contain all information required on the complaint form.

2. **Anonymous Complaints**

Policy: The County's policy is to not accept anonymous County Code violation complaints.

The County believes that anonymous complaints are not as reliable as those made by complainants who are willing to identify themselves. In addition, in many cases, the complainant's identification and testimony in court may be necessary for successful prosecution of Code violators and code enforcement.

Exceptions. The County recognizes there may be cases justifying an exception to this policy. These are cases where the nature of an anonymous complaint reliably suggests the existence of code violations presenting an imminent threat to public life, health and safety or to the environment, which threat easily may be verified by County staff. In such cases, as determined by the CDD Director or designee, County staff shall accept the anonymous complaint for investigation.

3. **Confidentiality**

Policy: The County's policy is to maintain the confidentiality of code enforcement complaint files and computer records, including the identity of the complainant, to the extent legally possible. The County believes it is important to maintain this confidentiality to assure effective investigation and prosecution of code violations. In addition, the County recognizes that some complainants do not want their names disclosed to the alleged code violator for fear of retaliation. However, in

some cases it may be necessary for successful prosecution and enforcement for the complainant to be identified and to testify in court.

Exceptions. In cases where the County chooses to cooperate with, or defer to, federal or state agencies for code enforcement, the contents of the file may be disclosed, as necessary, to the other agency.

Procedure: In order to maintain the confidentiality of code enforcement complaint files and the identity of the complainants, while assuring effective prosecution and enforcement and compliance with state law, the following procedures apply:

- a. Code enforcement files will be maintained as confidential files throughout investigation, violation prosecution and/or other types of code enforcement to the extent legally permissible.
 - b. The contents of code enforcement files will not be disclosed to anyone other than County staff who have a reason to know about and who are involved in the investigation, or to similar staff of an agency with which the County is cooperating. The contents of the file will not be disclosed to any other person absent court order, until: 1) the investigation is complete and a citation discovery request is made; or 2) the file is closed and disclosure is made pursuant to the public records law.
- B. Observation by Code Compliance Staff.** Code enforcement staff often observe additional potential County Code violations while conducting complaint investigations. Such observations may form the basis for additional investigation and enforcement action.

Policy: The County's policy is that code enforcement staff document any potential code violations the staff observes on property that is the subject of their current investigation. Code enforcement staff shall investigate documented additional potential violations. If substantiated, staff may address noted additional violations. Staff may also document and address code violations observed on any property adjacent to the subject property, which violations are observable from the subject property.

- C. Proactive Code Enforcement.** Within available code enforcement resources, the County may undertake a number of County-initiated procedures for proactive code enforcement. These procedures may include:
1. Investigations and prosecutions of code violations in particular geographic areas;
 2. Investigations and prosecutions of code violations of a particular type throughout the County;
 3. Timely and regular follow-up by CDD staff for compliance with conditions and requirements for permits and approvals;
 4. Reporting by County staff of code violations observed while conducting County business;
 5. Examination and comparison of County files for evidence of code violations;
 6. Revocation of permits and approvals for failure to comply with requirements or conditions;
 7. Cooperation with code compliance by other regulatory and licensing agencies; and
 8. Cooperation with utility companies to terminate service, to the extent authorized by law, to non-permitted uses on property.
- D. Permit/Approval Condition Monitoring by CDD Staff.** The County routinely issues land use, environmental and construction permits with a variety of requirements and conditions, and timelines for meeting them. For example, a land use approval may require landscaping the site by a certain date, and building permits expire if construction progress and inspections are not made within periods set by state law. Code violations occur when these permit and approval conditions are not timely met.

Policy: The County's policy is that CDD staff may conduct timely and regular monitoring of conditions of approval and similar permit requirements for all permits and approvals.

Procedure:

1. All persons issued permits or approvals shall be given written notice of the consequences of failure to comply with requirements and conditions, including potential code enforcement.
 2. If any permits and approvals are found not to be in compliance with conditions of approval or other permit requirements, staff in the appropriate CDD division assigned to the permit or approval monitoring shall undertake appropriate action to obtain compliance.
 3. If the assigned CDD staff are unable to obtain compliance within a reasonable time established for that purpose, they shall report the violation and any enforcement action already taken to Code Compliance staff for further code enforcement action.
- E. Report by County Staff.** In many cases, County staff may be in a unique position to observe potential code violations. For example, a property appraiser in the Assessor's office may be the only person able to observe new construction for which there is no permit.
- Policy:** Any County staff member may report to code enforcement staff possible Code violations observed while conducting County business.
- Procedure:** Reports by County staff under this subsection shall be made on a complaint form provided by CDD Code Compliance Staff.
- F. Report by County Commissioner.** A County Commissioner may report a potential code violation, or request that code enforcement staff investigate a resident report of a potential code violation by submitting a complaint form or in any other written form or requesting CDD staff to submit a complaint form on behalf of the Commissioner, along with necessary information to initiate an investigation.
- G. Information from Official County Records.** Potential code violations may be discovered by examining the County's own official records. For example, cross-referencing between the Assessor's records and CDD's records may reveal construction or land use activity without necessary permits or approvals. CDD staff may also discover code violations by comparing the County's own land use, environmental health and construction permit records with each other.
- Policy:** CDD staff may regularly compare all pertinent County records to identify potential Code violations.
- Procedure:** Code violations discovered through comparison of information in County files shall be reported to Code Compliance on a complaint form.

VIII. RECORDING COMPLAINTS

All complaints received by the Code Compliance Program shall be recorded in CDD's computer system. The Complaint Record is the official record of the complaint and its investigation and resolution. The Complaint Record shall include the following minimum information:

1. An assigned complaint number;
2. The tax map number and tax map for the subject property;
3. Which code enforcement staff is assigned to the case;
4. The complaint form;
5. Documentation of investigation;
6. Assessor's information on the subject property.

IX. NOTICE OF INVESTIGATION

When Code Compliance staff initiates an investigation, they may provide notice to any CDD division, other County department, or federal or state agency that may have an interest in the alleged code violation.

X. INVESTIGATION

- A. **Preliminary Matters.** At the beginning of each investigation, the following shall be established:
1. **Jurisdiction.** The property upon which the alleged code violation exists must be in the County's code enforcement jurisdiction.
 2. **Zoning.** The zoning of the subject property shall be determined.
 3. **Permit Status.** The status of any land use, environmental soils, building, electrical, construction (including, but not limited to structural, mechanical, plumbing) or other similar permits on the subject property shall be determined.
 4. **Property Ownership.** All persons with a recorded legal interest in the subject property should be identified. These persons should include the owners, contract purchasers, lessees and lienholders or other security interest holders.
 5. **Other Potentially Responsible Persons.** In addition to the persons listed in subparagraph 4 of this paragraph, any other persons potentially responsible for the alleged code violation(s) should be identified. These persons could include tenants, construction and landscape contractors and excavators.
 6. **Identification of Applicable Code Provisions.** Code Compliance staff, with the assistance of other CDD staff and County Legal Counsel as necessary, shall identify the pertinent provisions of the County Code that may have been violated according to the complaint.
 7. **Prior Complaint History.** Code Compliance staff shall examine CDD records to determine the existence and status of any prior or existing code violation complaints on the subject property or concerning the alleged violator.
- B. **Establishing the Elements of a Violation.** Before a Pre-Enforcement Notice ("PEN") is sent, it must be determined whether the complaint establishes a code violation. If it does not, the case will be resolved by file closure as provided in Section XII of this manual. Code Compliance staff may, in some instances, make mediation referrals where such referral is anticipated to protect safety or livability.

Code Compliance staff, with the assistance of other CDD staff and County Legal Counsel as necessary, and after any necessary field investigation, shall determine if the following elements have been established.

1. **Responsible Person.** The person or persons who are reasonably believed to have committed the code violation, or who are or may be legally responsible for the alleged code violation, have been identified.
 2. **Alleged Violation Occurred or is Occurring.** A complaint may allege a code violation that occurred in the past (e.g., construction without a permit) or that occurs only intermittently (e.g., surfacing sewage from a drain field, or periodic non-permitted commercial activity in a residential zone). Code Compliance staff shall determine whether there are reasonable grounds to find the alleged violation occurred or is occurring. Such grounds may be established either by personal observation by Code Compliance staff or by reliable evidence from a complainant.
If Code Compliance staff determines that reasonable grounds do not exist, no enforcement action will be taken until the complainant or the Code Enforcement staff has had a reasonable opportunity to develop such grounds. If no reasonable grounds are developed within a reasonable period, the case will be resolved by file closure as provided in Section XII of this manual.
 3. **Relevance of Statute.** In some instances, a complaint may allege a code violation on property subject to other protections. A common example is the State's prohibition on local laws governing forest and farm practices (ORS 30.934 and 30.935). Code Compliance staff shall, with the assistance of other CDD staff and County Legal Counsel as necessary, consider the relevance of statutes in substantiating a County Code violation. If Code Compliance staff verifies conflicting relevance under the law, the case should be resolved by file closure as provided in Section XII of this manual.
- C. **Assignment of Investigation and Enforcement Responsibility**

Policy: The responsibility for field investigation and code enforcement should be assigned to the CDD staff most able and qualified to conduct the investigation and undertake appropriate enforcement action. For example, alleged violations of environmental soils/health codes may best be investigated and resolved by County Environmental Soils Specialists. However, all code enforcement activity should be coordinated with Code Compliance staff and all PEN's and Voluntary Compliance Agreements (VCA's) will be drafted by Code Compliance staff.

Procedure:

1. **Assignment.** Assignment of field investigation and code enforcement responsibility shall be made by the CDD Director or designee, on a case-by-case basis or pursuant to standing policies in this manual or elsewhere. The following criteria shall be used for assignment of responsibility:
 - a. The nature of the code violation(s) alleged in the complaint;
 - b. The knowledge and expertise needed to investigate the alleged violation;
 - c. The history of prior code enforcement on the subject property or with the alleged violator;
 - d. The status of permits and approvals on the subject property; and
 - e. The workload of the relevant CDD division staff and the projected timeline for investigation and resolution of the complaint.
2. **Coordination.** Whenever responsibility for code enforcement activity is assigned to CDD staff other than Code Compliance staff, such staff shall consult with Code Compliance staff and keep them advised of their activities. When CDD staff other than Code Compliance staff is assigned to investigate a code violation complaint for which a Complaint Record has been created, such staff shall enter into the record a report of any action undertaken to investigate or to obtain compliance.

D. Field Investigation

1. **Purpose.** The purposes of code enforcement field investigation are to:
 - a. Verify the existence and severity of code violations;
 - b. Document code violations by means of written notes, photographs, witness interviews, etc.; and
 - c. Obtain supporting evidence such as photographs, measurements, names and statements of potential witnesses, etc.
2. **Coordination.** Whenever responsibility for field investigation is assigned to CDD staff other than Code Compliance staff, the coordination and notification described in Paragraph C (2) of this section shall occur.
3. **Preparations and Precautions**

Policy: Code Compliance staff and other assigned CDD staff, as well as members of the public, should not be exposed to unreasonable risks of violent confrontation or injury during the course of field investigations. Code Compliance staff and other assigned CDD staff shall take whatever actions are reasonable and necessary to minimize the known risk of violent confrontation or injury to themselves or others in conducting their field investigations.

Procedure:

- a. **Law Enforcement Assistance.** When appropriate, Code Compliance staff or other assigned CDD staff should contact the Sheriff's Office to determine if there have been previous criminal complaints or investigations concerning the subject property or alleged code violator, and whether, in the opinion of the Sheriff's Office, a field investigation would present any threat to the safety of Code Compliance staff, other staff, the alleged code violator or other persons present during a field investigation. Code Compliance staff or another assigned CDD staff person may request law enforcement assistance in conducting the field investigation, and may postpone such investigation until law enforcement assistance is available.
- b. **Announced/Unannounced Field Visits.** At the discretion of Code Compliance staff or other assigned CDD staff, a field visit to the vicinity of the subject property may be conducted with or

without prior notice to the property owner, occupant or alleged code violator. The determination of whether or not to give prior notice shall be made on the basis of the following criteria:

1. The nature of the alleged violation;
2. Whether or not prior notice will make detection and documentation of the alleged violation more difficult; and
3. Whether or not prior notice will unnecessarily increase the known risk of violent confrontation or injury to Code Enforcement staff or other assigned CDD staff.

c. Entering Upon Property or Premises

Policy: It is the County's policy that Code Compliance staff and other assigned CDD staff shall not enter upon private property or premises to conduct a field investigation without authority to enter.

Procedure: Code Compliance staff may enter unposted property to seek permission to investigate on the premises. Unless permission is granted, the investigation shall be conducted from public roads or property where permission to enter has been granted. If Code Compliance staff or other assigned CDD staff does not have permission or other authority to enter upon property or premises, and entry upon the property or premises is necessary to conduct the investigation, Code Compliance staff or other assigned CDD staff shall consult with County Legal Counsel about obtaining a search warrant.

E. Report of Investigation

Report. Upon completion of the initial investigation, Code Compliance staff or other assigned CDD staff shall complete a report of investigation in the Case Record. The Field Investigation Report should be completed as soon as reasonably possible after the date and time of the field visit to ensure a complete and accurate report.

1. The report shall include at least the following information:
 - a. Name of investigator;
 - b. Date, time and place of field visit;
 - c. Code violation(s) observed;
 - d. If no code violation(s) observed, an explanation;
 - e. Witnesses, if any, interviewed and other persons present, if known, on site at the time of the investigation;
 - f. Evidence, if any, obtained (e.g., photographs);
 - g. Discussion, if any, of violation with owner, occupant or other responsible person;
 - h. Action necessary, if known, to correct violation; and
 - i. Recommended enforcement action.
2. **Complainant Notification.** Upon completion of the initial investigation, Code Compliance staff shall notify all resident and other agency complainants of the status of complaint investigation. This notification should include information on whether a case will be opened, the reason a case will or will not be opened, and name and contact information of the staff member assigned the code enforcement case.

XI. ENFORCEMENT PROCEDURES

A. Voluntary Compliance

Policy: The primary objective of the CDD Code Compliance Program is voluntary compliance. Staff encourages voluntary code compliance by providing code violators and other responsible persons with information about the County Code and an opportunity to comply with the County Code within reasonable timeframes and with little or no penalty. The County believes that voluntary compliance generally is less expensive for all parties and of a more satisfactory and lasting nature than involuntary compliance.

Notwithstanding this objective, the County believes that allowing Code violators the opportunity to voluntarily comply any time during code enforcement, or outside reasonable time limits for such

compliance, may actually result in abuse of this opportunity in order to delay compliance. Therefore, it is the County's policy to limit the time frame during which Code violators may come into voluntary compliance with little or no penalty. **Procedure:**

The following procedure shall apply whenever a Code violator brings his or her property into compliance during the code enforcement process:

1. Compliance Timing and Staff Response

Timing of Compliance	Disposition
After complaint/ before citation or NOV.	File closed. Application of permit investigative fees where applicable.
After citation/before trial or hearing before hearings officer	CDD recommends dismissal of citation, no cost recovery, application of permit investigative fees where applicable.
At time of trial or hearing before hearings officer	CDD recommends prosecution, conviction or guilty plea, fine or civil penalty, injunction, cost recovery, application of permit investigative fees where applicable.

2. **Limited Time Frames.** Opportunities for voluntary compliance, where provided, shall be of limited duration. The facts in each case differ. Therefore, Code Compliance staff shall consider the appropriate time frame for compliance on a case-by-case basis.
3. **Time Extended by Voluntary Compliance Agreement.** Following the issuance of a PEN, if the alleged violator admits the violation(s) and requests extended time for voluntary compliance, the alleged violator shall sign a "Voluntary Compliance Agreement in a form acceptable to the County." County Legal Counsel will determine what is acceptable to the County. The agreement shall provide that, in exchange for the extended time for voluntary compliance, the alleged violator agrees to abate the violation(s) by a specified time, and, if voluntary compliance is not obtained during this extended time, to waive hearing in any subsequent violation proceeding and consent to entry of judgment and imposition of penalties, costs, injunction, and/or such other relief as is deemed appropriate.

B. Pre-Enforcement Notice (PEN)

1. **Timing.** When Code Compliance staff or other assigned CDD staff determines there are reasonable grounds to find a violation did or does occur, based upon the information in the complaint and any field investigation, an PEN shall be sent on a standard form approved by the CDD Director or designee in a letter or notice sent by the appropriate CDD division staff.
2. **To Whom Sent.** A PEN shall be sent to all persons liable for the violation under Deschutes County Code.
3. **How Sent.** PENs shall be sent by certified mail or by other method of delivery as approved by the CDD Director or Designee to the best available address for the persons described in Subsection 2 above. Email may be used in addition to certified or other mail delivery options to expedite the notification process.
4. **Follow Up.** If, within 15 days of the mailing of the PEN, the liable persons have not contacted Code Compliance staff, staff shall determine the next step in the code enforcement process, including warning and/or citation.
5. **Compliance.** If the Code Compliance staff determines that the required corrections have been made or the liable persons have provided evidence that no violation exists, the date and method of compliance shall be noted in the Complaint Record and the case shall be resolved by file closure pursuant to section XII of this manual.
6. **Corrective Action.** In some cases, corrective action may consist of both applying for and obtaining necessary permits or approvals. In such cases, the permit or approval application alone will not be

sufficient to assure compliance. The liable person must complete the application process, including all appeals, within a reasonable time and not allow the application to expire. Once permit approval is obtained, the liable person must complete all permit conditions prior to the expiration of any permit approval.

Policy: All code violation cases shall remain open until all permit conditions and other required corrective measures are completed.

Procedure:

1. Where the required corrective action consists of both applying for and obtaining permits or approvals, Code Compliance staff, in consultation with other appropriate CDD staff, shall determine a reasonable time frame for applying for and obtaining the necessary permits or approvals.
2. If at any time during the process for obtaining necessary permits or approvals the alleged violator fails to meet the reasonable timelines established by Code Compliance staff and such failure does not result from the actions of others, Code Compliance staff shall cite the alleged violator pursuant to Paragraph C of this section.
3. If the alleged code violator is not granted the necessary permits or approvals, Code Compliance staff shall cite the alleged violator pursuant to Paragraph C of this section unless (a) the alleged code violator enters into a written agreement with the County to comply with the County Code within a time frame established by Code Compliance staff, or (b) a lender has begun foreclosure proceedings and, in the opinion of Code Compliance staff, is likely to address the violation within a reasonable time after the foreclosure.

C. Citation and Complaint

1. **Non-Compliance.** Where voluntary compliance cannot be obtained by CDD within a reasonable timeframe, Code Compliance staff may cause a citation to issue or may issue a Notice of Violation and Proposed Civil Penalty (NOV) and initiate administrative enforcement hearing proceedings in accordance with County Code.
2. **Investigation Required.** No citation to state court or NOV shall be prepared unless and until an investigation has verified the existence of a Code violation.
3. **Form.** All citations to state court shall be on a uniform citation which conforms to ORS 153.045 through ORS 153.051. NOV's for administrative enforcement hearing proceedings shall be on the form required by County Code.
4. **Issuance of Citation.** Any person authorized by County Code Section 1.08.025 may issue a citation or NOV. The person issuing the citation or NOV must verify the conduct or circumstances constituting a violation.
5. **Service.** All citations to state court shall be served in accordance with ORS 153.154. NOV's shall be served in accordance with County Code.
6. **Setting Arraignment/Administrative Hearings.** For citations to state court, the officer serving the citation shall set the date for arraignment. For NOV's, Code Compliance Staff shall set the date for the hearing in accordance with the County Code.
7. **Arraignment in State Court**
 - a. **Purposes:** The purposes of arraignment are to:
 1. Allow the defendant to enter a plea to the citation;
 2. Resolve any jurisdictional issues;
 3. Set a trial date if the plea is not guilty; and
 4. If the plea is guilty, allow the defendant, the Sheriff's Office Deputy and other County Code Compliance staff the opportunity to provide information to the court regarding penalties and related matters.
 - b. **Appearance by County Legal Counsel.** County Legal Counsel shall not represent the County at arraignment unless the defendant has legal counsel at arraignment.

8. **Failure to Appear at Arraignment in State court.** If the defendant fails to appear at arraignment, Code Compliance staff may request that the court enter a default judgment in favor of the County and impose penalties against the defendant.
9. **Trial.** If the defendant pleads not guilty to the allegations in the citation, Code Compliance staff shall request that the court set the matter for trial at the earliest available date.
 - a. **Burden of Proof.** The County has the burden of proving at trial, by a preponderance of the evidence, the allegations in the citation.
 - b. **Responsibility of Code Compliance Staff.** At trial, the responsibility of Code Compliance staff is to prosecute the case by presenting evidence, calling witnesses and offering any relevant documents and other exhibits in support of the citation.
 - c. **Appearance by County Legal Counsel.** County Legal Counsel shall not represent the County at trial unless the defendant is represented by legal counsel at trial.

10. Fines

- a. **Schedule.** The schedule of maximum fines for County Code violations is set forth in DCC 1.16.010.
 - b. **Amount.** If the defendant is convicted, Code Compliance staff shall request that the court impose a fine in an amount consistent with the County Code.
11. **Suspension of Fines.** The Circuit Court has authority to suspend the imposition of all or a portion of a fine. In some cases, the court may wish to suspend imposition of a fine or a part thereof on the condition that the defendant comply with County Code within a specified time period.
- a. **Policy:** It is the County's policy to increase the effectiveness of code enforcement activity and the incentives for code compliance by discouraging any suspension of fines in County Code violation cases.
 - b. **Procedure:** If a defendant is convicted, Code Compliance staff and/or County Legal Counsel shall advise the court of the County's policy against fine suspension and shall ask the court not to suspend imposition of fines.
12. **Collection and Distribution of Fines.** Fines imposed by the state court for County Code violations are collected by the State Court Administrator and are remitted in part to the County. Fines imposed from civil penalty hearings are remitted to the County Treasurer.
- a. **Policy:** It is the County's policy that all fines imposed for County Code violations and remitted to the County should be used to pay the costs of County Code enforcement.
 - b. **Procedure:** All fines imposed by the court or the Code Enforcement Hearings Officer for County Code violations and remitted to the County shall be deposited in the CDD Revenue Fund for budgeting and expenditure in the Code Compliance program.

D. Injunctions

Policy: Code Compliance staff shall seek injunctions from the court in cases where other methods of code enforcement may be inadequate or have been unsuccessful.

Procedure:

1. **When Sought.** Code Compliance staff may request County Legal Counsel to obtain/ coordinate injunctions in any case in which:
 - a. Code violation(s) present an imminent threat to the public life, health and safety or to the environment; or
 - b. Code violations have not been corrected within a reasonable time after a defendant was found by the court or County Hearings Officer to be guilty of a code violation.
2. **By Whom.** Pursuant to DCC 1.16.040, Code Compliance staff (or County Legal Counsel if appearing in the case) may request that the court order injunctive relief and/or abatement as part of the penalty in a code enforcement proceeding. Alternatively, County Legal Counsel may initiate a separate legal action for injunctive relief and/or abatement of a violation.
3. **How Enforced.** After issuance of an injunction, if the defendant fails to comply within the time period specified in the injunction, the Sheriff's Office or CDD staff shall request that County Legal Counsel initiate civil contempt proceedings against the defendant.

- E. **Permit Revocation.** Certain County Codes authorize the revocation of permits or approvals for failure to comply with their requirements or conditions.

Policy: To maximize code compliance, the County shall revoke permits and approvals to the extent authorized by law in appropriate cases. Revocation of permits are particularly appropriate in cases in which corrective action may not be effective in bringing the subject property into code compliance due to the nature of the violation and the deliberateness of the code violator's actions in violating the Code.

Procedure:

1. **Report to Code Compliance Staff.** If the County staff responsible for monitoring and/or reviewing a particular type of permit determines that the conditions or requirements of a permit or approval have not been met, that staff member shall inform Code Compliance staff of such violation, and Code Compliance staff shall enter the information in the code enforcement electronic files.
2. **Revocation Procedure.** The County staff responsible for monitoring and/or reviewing a particular type of permit shall determine whether to undertake permit revocation proceedings as authorized under the applicable County Code provisions. The following factors shall be considered:
 - a. Whether the criteria for permit revocation set forth in the applicable County Code provisions exist;
 - b. The severity of the deviation from the permit or approval requirements or conditions;
 - c. The deliberateness of the deviation from the permit or approval requirements or conditions; and
 - d. Whether compliance can be achieved more effectively through other code enforcement methods.

- F. **Nuisance Abatement.** Chapter 13.36 of the Deschutes County Code (hereafter "Code") authorizes the abatement of County Code violations that are defined as "public nuisances."

Policy: County Code violations constituting public nuisances may be abated pursuant to Chapter 13.36 of the Code and within available resources.

Procedure: When County staff discovers or receives a verified complaint of a code violation that may constitute a "public nuisance," staff shall provide the information to Code Compliance staff who shall enter the information into the code enforcement file. Code Compliance staff or other assigned CDD staff may consult County Legal Counsel to initiate nuisance abatement proceedings pursuant to Chapter 13.36 of the Code.

- G. **Dangerous Building Abatement.** Chapter 15.04 of the Code authorizes the abatement of buildings containing violations rendering them "dangerous buildings" as defined in the Code.

Policy: County Code violations that may render a structure a "dangerous building" shall be abated pursuant to Chapter 15.04 of the Code and within available resources.

Procedure: When Code Compliance staff or other CDD staff discovers or receives a verified complaint of code violations in a structure that may render the structure a "dangerous building," the staff shall provide the information to Code Compliance staff, who shall enter in the information into a Complaint Record. The Deschutes County Building Official (hereafter "building official") shall be notified and shall promptly consult with County Legal Counsel to initiate abatement proceedings under chapter 15.04 of the code.

- H. **Investigative Fees.** Certain provisions of the state building code allow municipalities administering and enforcing a building inspection program to charge investigative fees for work commencing without the required permit.

Policy: To maximize the incentives to comply with County Code, the County shall charge investigative fees, to the extent authorized by law, for permits sought for non-permitted construction or installation.

Procedure: Whenever County staff discovers or receives a verified complaint of non-permitted construction or installation, the information shall be submitted to Code Compliance staff, who shall enter the information into the Code Compliance Complaint Record.

To the extent allowed by law, the County shall charge investigative fees for the permit(s) necessary to comply with the County Code.

- I. **Assisting Enforcement by Other Regulatory/Licensing Agencies.** In some cases, County Code violations also may constitute violations of federal and/or state statutes or administrative rule. For example, surface mining without County land use approval may also violate state statutes and administrative rules governing mining, and performing building construction without necessary permits may also constitute violations of state statutes and administrative rules governing the conduct of licensed contractors.

Policy: To maximize code enforcement and the incentives for compliance, County staff shall promptly advise the appropriate federal and/or state agency of County Code violations reported or discovered that may also violate the statutes or administrative rules of that agency.

The County shall also cooperate with federal or state agencies, to the extent authorized or required by law or by intergovernmental agreement, to obtain voluntary compliance or to punish violations. The County may defer investigation and prosecution to the appropriate federal or state agency in cases in which, as determined by the CDD Director or designee, the federal or state agency enforcement procedure will result in more effective correction of the violation(s).

Procedure:

1. **Reporting.** Whenever County staff discovers or receives a verified complaint regarding a County Code violation that may also constitute a violation of federal or state statute or administrative rule, the staff shall advise the appropriate federal or state agency.
 2. **Cooperation.** To the extent authorized or required by law or by intergovernmental agreement, County staff shall cooperate with the federal or state agency to obtain voluntary compliance or to prosecute and punish violations. That cooperation may include sharing information, conducting joint investigations, appearing as witnesses and/or providing evidence in enforcement proceedings, and coordinating the timing of investigations and/or enforcement proceedings to maximize their effectiveness.
 3. **Deferral to Other Agency.** The County may defer some or all code enforcement to a federal or state agency, and forego County Code enforcement, where the Board, CDD Director or the Director's designee determines that the federal or state enforcement activity will be more effective than County Code enforcement. In making the determination to defer to other agencies, the following factors shall be considered:
 - a. The nature of the violation and necessary corrective action;
 - b. The comparative severity of the penalties available to the federal or state agency and to the County; and
 - c. The comparative time frames required for enforcement by the federal or state agency and by the County.
- J. **County Cost Recovery.** The County incurs costs investigating code violations and enforcing codes. They include the cost of personnel and equipment, legal advice and representation, service of citation, and administrative expenses.

Policy: It is the policy of the County to maximize code enforcement and to increase the incentives for code compliance by recovering its reasonable code enforcement costs from code violators.

Procedure: In determining whether to cite a code violator to court or to engage in the administrative hearings process, Code Compliance staff may consider which process will prompt code compliance and/or result in the maximum cost recovery to the CDD.

- K. **Liens.** In many cases, the most effective way for the County to recover its code enforcement costs, as well as to collect any civil penalties assessed through administrative hearings, is to file a legal claim for those costs or penalties against the property subject to code enforcement, or against other property owned by the code violator.

Policy: It is the County's policy to assure recovery of its costs, as well as the collection of civil penalties assessed through administrative hearings, by filing claims for those costs and penalties in the form of liens on property subject to code enforcement, or upon other property owned by code violators.

Procedure: In the appropriate cases, the County staff will explore with County Legal Counsel the means by which liens may be placed against the real property of the code violator for the collection of code enforcement costs and civil penalties assessed through County administrative hearings.

XII. RESOLUTION OF CODE COMPLAINTS

Policy: It is the County's policy to attempt to reach final, satisfactory resolution of all code violation complaints. However, the County recognizes that not all complaints may be resolved successfully, due to factors outside the County's control. These factors can include the indigence of the code violator, the lack of County or other resources to assist the violator, statutory limitations on potential fines or other penalties for code violations, and the large number of complaints to be resolved.

Therefore, the County shall focus its code enforcement resources on the code violations that meet the priorities set forth in Section V of this manual, and attempt to resolve those violations within a reasonable period. It is the County's policy not to close a case until it is resolved.

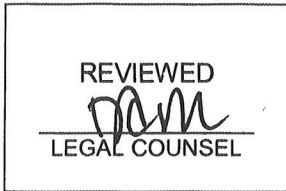
Procedure:

- A. File Closure.** A code violation complaint will be resolved by file closure in the following cases:
1. When no code violation is found after investigation;
 2. After there is voluntary compliance;
 3. After the property owner and/or other responsible person has been found guilty of a violation and has corrected the violation(s);
 4. After an injunction has been issued and the property owner or other responsible person has corrected the violation(s);
 5. After investigation and prosecution of the violation(s) have been completed by a federal or state agency to which the County deferred code enforcement;
 6. When the property on which the violation exists is sold or transferred and a new Code Enforcement case is opened in the name of the new owner.
- B. Notice of Resolution.** The County shall notify complainant when the complaint is resolved, describing the resolution.
- C. Alternate Methods of Resolution.** The County may explore alternate methods to resolve Code violations including mediation.

XIII. AMENDMENTS

This manual may be amended when deemed necessary by the CDD Director or designee, County Administrator, or the Board.

Amendments may be proposed by County staff, Board members and other interested persons.



For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Adopting the Community
Development Department Code Compliance
Program Policy and Procedures Manual.

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ORDER NO. 2021-029

WHEREAS, Deschutes County Community Development Department ("CDD") Code Enforcement staff initiated revisions to the CDD Code Enforcement Policy and Procedures Manual to update the manual that was developed in 1995, adopted in 1996, and amended in 1997 and 2014; and

WHEREAS, the Board of County Commissioners ("Board") held a public hearing on June 30, 2021; and

WHEREAS, the Board finds that a change of the CDD program title emphasizing "code compliance" better aligns the program with its objectives and to be in the best interest of the public; and

WHEREAS, the Board finds that the updates to the CDD Code Compliance Program Policy and Procedures Manual to be in the best interest of the public because the updated policies and procedures will provide for a more efficient and clear code enforcement program; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. The Community Development Department Code Compliance Program Policy and Procedures Manual, attached as Exhibit "A" and incorporated by reference herein, is adopted.

Section 2. The Community Development Department Code Compliance Program Policy and Procedures Manual, attached as Exhibit "A", supersedes all prior Community Development Department Code Enforcement Program policy and procedures.

DATED this 30 day of June, 2021.

BOARD OF COUNTY COMMISSIONERS

ANTHONY DEBONE, Chair

PHIL CHANG, Vice Chair

PATTI ADAIR, Commissioner

ATTEST:

Recording Secretary

ORDER NO. 2021-029