



MEMORANDUM

TO: Deschutes County Board of Commissioners

CC: David Doyle, Legal Counsel
Nathaniel Miller, Associate Planner
Jacob Ripper, Principal Planner
Will Groves, Planning Manager

FROM: Stephanie Marshall, Assistant Legal Counsel

DATE: April 12, 2024

RE: Lava Terrace Cellars, LLC
File Nos. 247-22-000464-CU/466-SP and 247-24-000018-A
Whether a Winery may be Permitted on the Property Zoned MUA-10

INTRODUCTION

This matter is before the Deschutes County Board of Commissioners ("Board") on appeal of a Hearings Officer decision approving an application for conditional use permit and site plan review submitted by Lava Terrace Cellars, LLC ("Applicant"). The application seeks approval to establish a winery as a commercial activity in conjunction with farm use in the Multiple Agricultural Zone (MUA-10). The Applicant proposes to convert a portion of an existing accessory building into a tasting room and office space. The proposal also includes the conversion of an existing barn for small scale wine production and wine storage. The approval would include the production of up to 2,000 cases of wine annually as well as hosting wine related events on the property, wine tastings, wine dinners, and other wine marketing events directly related to the sale and promotion of wine produced from the vineyard. No new buildings or structures are included in the proposal.

A Hearings Officer Decision approved the Applicant's application with conditions. Appellant Toby Bayard filed a timely appeal to the Board and the Board accepted review of the appeal. The Board held a public hearing on the appeal on April 10, 2024. The record was left open until April 17, 2024 at 4:00 p.m. for submission of additional evidence. Rebuttal evidence is permitted until April 24, 2024.

DOES MUA-10 ZONING AND STATE LAW ALLOW POTENTIAL APPROVAL OF A WINERY ON THE PROPERTY?

One of the primary legal issues in the appeal is whether a winery may be permitted on the subject property located at 20520 Bowery Lane (the "Property") which is within the MUA-10 zone. The Hearings Officer addressed opposing parties' arguments at the time, which asserted that the only zone in which a winery may be permitted under the Deschutes County Code (DCC) and state law is the Exclusive Farm Use (EFU) zone. On appeal, appellants also assert that the

proposed use is not allowable on the Property unless an additional Goal 3 exception is taken. This argument is addressed separately below.

In a Decision mailed on January 2, 2024 (the “Decision”), the Hearings Officer concluded that the Applicant established that the proposed winery use is a “commercial activity in conjunction with farm use,” which is listed as a conditional use under DCC 18.32.030(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.

No provisions exist in the MUA-10 chapter specific to wineries. The Hearing Officer determined that, because the applicant met the 4-step test¹ to broadly establish “commercial activity in conjunction with farm use,” it is not necessary that the Code specifically lists wineries as a conditional use in the MUA-10 zone. A range of commercial activities could be permitted under DCC 18.32.030(C), including wineries where the 4-step test is met:

1. Is there a farm use?
2. Is the commercial activity associated with that farm use on the parcel?
3. Is the proposal a commercial activity?
4. Are the farm products produced in Deschutes County or an adjoining county?

There is no dispute that a vineyard is a “farm use” under DCC 18.04.030:

“Farm use” means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. “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. “Farm Use” also includes the current employment of the land for the primary purpose of obtaining a profit in money by stabling or training equines, including but not limited to, providing riding lessons, training clinics and schooling shows. “Farm use” also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. “Farm use” includes the on-site construction and maintenance of equipment and facilities used for the activities described above. “Farm use” does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in ORS 215.203(3). Current employment of the land for farm use also includes those uses listed under ORS 215.203(2)(b).

There is also no dispute that the winery is a commercial use, that the winery is associated with the vineyard farm use, or that the Applicant will use local grapes. Decision, p. 7. The Applicant’s satisfaction of the 4-part test is not in question. What is in question is whether appellants and other opponents are correct that the only zone that allows a winery is EFU, because that is the only zone in which wineries are listed as a conditional use.

The Hearings Officer rejected that contention and stated, “opposing comments do not explain how this operates as a prohibition on wineries in other zones when there is a separate basis in the Code for that use.” Decision, p. 7. He further found:

DCC Chapter 18.16 implements state-level requirements in the EFU Zone, and the reference to wineries in that Code Chapter expressly refers to wineries allowed by ORS 215.422. That statute allows the development of some wineries in the EFU Zone, based on certain sizes, but it does not prohibit all wineries that do not satisfy those

¹ Commercial activity in conjunction with farm use may be approvable when it meets the standards set by Deschutes County Board of Commissioners in *Rank* (file no. 247-15-000472-MC) and the Hearings Officer in *Tumalo Land Partners*.

statutory provisions. Wineries that do not qualify under ORS 215.452 may nevertheless be permitted as “commercial activities in conjunction with agriculture” under ORS 215.283(2)(a) and the corresponding Code provision in DCC 18.16.030(E).² Because there is no language in the Code that prohibits wineries in the MUA-10 Zone, and because the proposed winery meets the criteria for a commercial activity in conjunction with a farm use, I find that the Applicant’s proposal is not prohibited as a matter of law and that it can be approved if it satisfies all approval criteria related to that use.

County Legal concurs with the analysis and conclusions in the Hearings Officer’s Decision. If the Board agrees that the evidence supports a determination that the 4-step test is met, the proposed winery is a use that may be conditionally permitted on the Property pursuant to DCC 18.32.030(C), subject to DCC Chapter 18.128.

IS A GOAL 3 EXCEPTION REQUIRED?

In a letter to the Board dated April 9, 2024, appellant raised a new issue not before the Hearings Officer. Such argument may be considered by the Board in these *de novo* proceedings. Appellant argues that, in the Final Deschutes County Goal Exception Statement submitted to the Land Conservation and Development Commission (LCDC) in 1979, the County requested LCDC to approve a “committed exception” to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) for certain lands including the subject property.³

The Goal 3 Exception as applied to the Property (and the preexisting Rock o’ the Range rural subdivision within which the Property is located) allowed the County to upzone the Property to Multiple Use Agriculture from Exclusive Farm Use in recognition of the fact that the lands had largely been sold and committed to non-resource uses. In other words, the County sought approval to establish more intensive uses on the Goal 3 Exception lands than that permitted under agricultural/exclusive farm use zoning. Page 1 of the Final Deschutes County Goal Exception Statement says, “The County’s plan is to restrict future division of the resource lands while recognizing that development which exists and establishing a more efficient development pattern.”

Appellants emphasize a reference in the Goal Exception Statement on pages 10 and 11 which states the County will establish an MUA zone to “encourage the use of these lands as agricultural, although at a “hobby farm” or non-commercial level which requires a subsidy of the agricultural operation by employment elsewhere.” This statement does not preclude in any way commercial level agricultural use of MUA-10 lands.

The Goal Exception Statement requested LCDC to recognize the limits on continued agricultural uses on lands that had been “committed” to development. See Goal Exception Statement at page 6 (Exception Analysis) and page 9 (Exception Area Plan). It does not propose prohibition or constraint of continued resource uses on such lands.⁴ Importantly, DCC Chapter 18.32, which was enacted following approval of the Goal Exception Statement, does not restrict or constrain the type of “agricultural use” permitted in the MUA-10 zone. See DCC 18.32.020(A) (broadly allowing “agricultural use as defined in DCC Title 18”).

Appellants’ arguments that the proposed use cannot be approved under the very zoning classification adopted by the County following approval of the Goal 3 Exception is not supported. No further exception to Goal 3 is required because application of the previously approved Goal 3 Exception recognized and allowed more intensive uses of (now previously) EFU-zoned lands. If the Property had remained zoned EFU and had not been rezoned to MUA-10 in accordance with the Goal Exception, a winery still would be permissible pursuant to ORS 215.422. Allowance of a winery, as a commercial activity in conjunction with farm use, is not inconsistent with state law, the Goal 3 Exception or the MUA-10 zone.

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

³ Appellant’s letter, which attached a copy of the Exception Statement, is included in the record.

⁴ The Goal Exception Statement uses the term “*encourage*,” with respect to non-commercial farming uses, rather than “limit” or “restrict” uses to such a level.