



MEMORANDUM

TO: Deschutes County Board of County Commissioners

FROM: Nathaniel Miller, AICP, Associate Planner

DATE: February 26, 2025

RE: Deliberations: A Commercial Activity in Conjunction with Farm Use (Winery) in the Multiple Use Agricultural Zone.

The Board of County Commissioners (Board) is conducting Deliberations on February 26, 2025, to consider a final decision for a commercial activity in conjunction with farm use to establish a Winery in the Multiple Use Agricultural Zone (MUA10). The applications and appeal are identified as file nos. 247-22-000464-CU, 466-SP, 24-018-A. The subject property is approximately 5.5 acres in size and is about 750 feet northwest of the City of Bend. Highway 97 is approximately 1,500 feet directly to the east. The property is addressed at 20520 Bowery Lane, Bend, and is further identified on County Assessor's Map 17-12-09B as Tax Lot 1000. A location map is included as **Attachment A**.

I. BACKGROUND

The Applicants, Duane and Dina Barker, have requested a Conditional Use Permit for a Commercial Activity in Conjunction with Farm Use to establish a Winery with associated uses in the Multiple Use Agricultural Zone (MUA10). The request also includes a Site Plan Review for the Winery and associated uses. The property owners propose 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.

The applications were submitted on June 7, 2022. An Incomplete Letter was mailed on July 7, 2022. On December 4, 2022, the applicants requested that the applications be deemed complete and 150-day clock be extended. The applications were referred to a Public Hearing on August 4, 2023. On September 15, 2023, the applicants then waived the 150-day clock.

The initial public hearing before the Hearings Officer was scheduled on Wednesday, October 10th, 2023. On October 6, 2023, the Applicant requested a two-week continuance of the Public Hearing pursuant to DCC 22.24.140(A)(1). The Hearings Officer opened the initial hearing, but no testimony was received, and the new hearing date was set for October 24, 2023.

During the continued hearing on October 24, 2023, Hearings Officer Brooks conducted a public hearing; testimony was received in support and in opposition to the proposal. An Open Record Period was set for seven days for New Evidence and Testimony, seven days for Rebuttal, and seven days for the Applicant's Final Legal Arguments. The record was closed 21 days after the hearing on November 14, 2023.

II. HEARING OFFICER DECISION

The Deschutes County Hearings Officer rendered a decision approving the Applicant's request for a Conditional Use Permit and Site Plan Review for the Winery on January 2, 2024.

Staff notes the following salient elements of the Hearings Officer Decision:

- The Hearings Officer addressed issues raised in the Staff Report specific to Title 22 and the Deschutes County Procedures Ordinance. These include:
 - The appropriate signatures on the application form
 - The open Code Enforcement Case on the property
 - The noticing requirements for the application
- The Hearings Officer determined the proposal meets the requirements of DCC 18.32.030(C) and qualifies as a Commercial Activity in Conjunction with Farm Use.
- The Hearings Officer determined the proposal likely conforms to the Site Plan Review standards of DCC 18.116 and DCC 18.124, however the Decision states that additional details are required. The Hearing Officer included 33 conditions of approval in the decision.
- The Hearings Officer determined the proposal meets the suitability requirements of DCC 18.128.015

III. APPEAL

The Appellant (Toby Bayard) submitted a timely appeal to the Hearings Officer's Decision on January 9, 2024. The Appellant requested the Board to initiate a review and conduct a hearing to evaluate the following issues:

- Whether wineries can only be cited on property in the Exclusive Farm Use Zone pursuant to ORS 215.452, and not in any other zone.

- Whether the Hearings Officer erred in finding that a winery can be approved on MUA10-zoned property as a Commercial Activity in Conjunction with Farm Use.
- Whether the Hearings Officer's Decision is inconsistent with the previous approval under Deschutes County File nos. 247-22-000024-CU, 22-025-SP, 22-757-A, 22-914-A (Commercial Activity in Conjunction with Farm Use for a Meadery in the EFU Zone).
- Whether the Hearings Officer erred in the incorporation of testimony placed into the public record.

IV. BOCC PUBLIC HEARING

On April 10, 2024, the Board held a Public Hearing on the appeal and received testimony from the applicant, the appellant, and members of the community. An open record was granted as follows:

BOCC Public Hearing Opened Record Period

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|---|--------------------------------|
| • New Evidence & Testimony Phase | Concluded April 17th at 4:00pm |
| • Rebuttal Phase | Concluded April 24th at 4:00pm |
| • Final Argument Phase (Applicant Only) | Concluded May 1st at 4:00pm |

All submittals received during the phases are uploaded and accessible on the proposal webpage and electronic record within.

<https://www.deschutes.org/cd/page/247-22-000464-cu-247-22-000466-sp-lava-terrace-cellars-winery-vinyard>

Leading up to, and during the BOCC Public Hearing, staff addressed the appellant's issue areas and highlighted conditions of approval in the Hearings Officer's Decision which require the exercise of discretion and thus should be addressed in the public review process. Deferring a determination of whether the applicant has met these specified conditions of approval will result in decision-making outside the public process. Specifically, these conditions of approval require determinations of whether the applicant has presented substantial evidence to establish compliance with the conditions without public notice or public comment. There are also a number of conditions of approval which are related to safety or that require outside agency approval. These conditions were outlined in the Staff Memo prior to the BOCC Public Hearing (ref. Agenda Packet 04/10/2024 Item #7). The applicant was also made aware of staff concerns via an email on March 28, 2024.

These conditions of approval are identified as:

Conditions of Approvals with Discretionary Elements

- J. Clear Vision Areas on the Site Plan.
- L. Available Parking.
- Q. Parking Area Landscaping.
- S. Access Aisles.
- T. Service Drive Width.
- U. Service Drive Boundaries.

- V. Off-street Parking Lot Design.
- W. Bicycle Parking Spaces.

Conditions of Approval for Safety and Outside Agency Approval

- B. General Division Permitting.
- X. Confirmation from Bend Fire & Rescue.
- EE. Evacuation of the Right of Way.
- GG. Ingress and Egress via Hunnell Road.

Staff understands the applicant's testimony in the BOCC Public Hearing and the two subsequent Open Record Periods were intended to address the issue areas and these highlighted conditions of approval. Staff notes that the applicant has submitted a version of a "Decision Matrix" and "Board Final Decision". These documents are included in the record.

Lastly, in response to questions raised about approving a winery as a commercial activity in conjunction with farm use, Deschutes County Legal Counsel prepared a memorandum explaining some of the relevant legal aspects of an approval (ref. 2024-04-12 DC Legal Counsel BOCC PH Staff Memo 22-464-CU, 466-SP, 24-018-A). This memorandum is included as **Attachment B**.

V. REOPENED RECORD

On Tuesday, May 21, 2024, prior to the scheduled Deliberations, Planning Division staff received a request from the applicant that the record be reopened to accept additional evidence from the applicant and appellant. The Board, as the Hearings Body, had discretion and authority to reopen the record either upon request or on its own initiative under DCC 22.24.160(A). The Board further has discretion and authority to choose between granting a continuance or leaving the record open under DCC 22.24.140(B). At the applicant's request, the Board reopened the record to allow for additional testimony to be added to the record. Pursuant to Order No. 2024-019, the Record Period was reopened with the following phases:

Reopened Record Period - May 29, 2024 & Order No. 2024-019

- New Evidence and Testimony Phase (9 Weeks) Concluded July 31, 2024, at 4:00pm
- Rebuttal Phase (3 Weeks) Concluded August 21, 2024, at 4:00pm
- Applicant's Final Legal Argument Phase(1 Week) Concluded August 28, 2024, at 4:00pm

All submittals received during these phases are uploaded and accessible on the proposal webpage and electronic record within.

As acknowledged in the course of the Board's review, the appellant has raised a number of issues specific to the Hearings Officer's decision. In addition, the Planning Division has received a number of public comments specific to the compatibility of commercial activity on the property with surrounding uses. Staff notes that site suitability for a conditional use is a criterion for review under DCC 18.128.015. Staff includes this issue area and code section to be addressed in Deliberations.

Staff has outlined the issue areas and the conditions of approval in a Decision Matrix. The attached

Decision Matrix is designed to assist the Board in their deliberations. It focuses on the issue areas of the application and that require Board determinations or interpretations. There are eight (8) key issues identified in testimony and materials that are related to approval criteria for the subject applications.

VI. RECENT TIMELINE AND SCHEDULING DELIBERATIONS

As noted above, the Applicant's Final Legal Argument Phase concluded August 28, 2024, at 4:00pm. In preparation for Board Deliberations in the fall of 2024, staff reviewed submittals of the Reopened Record Period and coordinated with the applicant and Deschutes County Legal Counsel regarding the final submittals and requests. Upon confirming the applicant's requests, staff prepared for Board Deliberations to be held in early 2025.

VII. STAFF RECOMMENDATION

As outlined in the Decision Matrix, staff recommends denial of applications based upon the following factors:

- The submitted site plan for the proposal does not demonstrate compliance with DCC 18.124 Site Plan Review and DCC 118.116.030 Off-Street Parking And Loading.
- The proposed Winery Building is a noncompliant structure and the Major Variance (Type I) requested by the applicant cannot be approved in Board Deliberations or added as a condition of approval in the Board's Decisions. An additional land use review process is required to demonstrate compliance with the provisions of DCC 18.132 Variances.
- It is unclear whether the proposal complies with the compatibility standards of DCC 18.128.015 Conditional Uses. More detailed information is needed to understand site layout and off-site impacts related to waste from wine production and compliance with Department of Environmental Quality (DEQ), Deschutes County Building Division, and Deschutes County Onsite Wastewater Division standards.

As discussed above, these factors cannot be addressed through the imposition of conditions of approval in a Board Decision approving the applications. To do so would impermissibly defer the exercise of discretion and would exclude determinations of compliance with conditions of approval from the public land use review process.

At any time prior to the Board's decision, the applicant may request withdrawal of the applications from the Board's consideration to more fully develop the record to address the above-outlined issues. Alternatively, if the matter proceeds to a final decision and the Board denies the applications, the applicant may re-apply for Conditional Use Permit and Site Plan Review supported by a more complete analysis of applicable criteria with specific details concerning off-street parking and loading, addressing the noncompliant structure (proposed Winery Building) and site layout and off-site impacts related to wine production waste and compliance with DEQ and Deschutes County Onsite Wastewater Division standards.

VIII. SUMMARY

Please see the Decision Matrix for issue items and summaries.

IX. 150-DAY LAND USE CLOCK

As noted above, on September 15, 2023, the applicants waived the 150-day clock in its entirety such that the clock is not running.

X. RECORD

The record for file nos. 247-22-000464-CU, 466-SP (appeal file nos. 24-018-A) is as presented at the following Deschutes County Community Development Department website:

<https://www.deschutes.org/cd/page/247-22-000464-cu-247-22-000466-sp-lava-terrace-cellars-winery-vinyard>

Staff notes that three public comments were received after the allotted phase in the Reopened Record Period. These comments are identified as:

2024-08-22 D. Gant - (Outside Record Phase) Email and Public Comment 22-464-CU, 466-SP, 018-A
2024-08-27 R. Freed - (Outside Record Phase) Email and Public Comment 22-464-CU, 466-SP, 018-A
2024-08-28 D. Voiles - (Outside Record Phase) Email and Public Comment 22-464-CU, 466-SP, 018-A

The Board should address whether it will accept these three untimely public comments as part of the record. If it does not accept the untimely public comments, the Board's deliberations and decision should not be based on these comments.

XI. ATTACHMENTS

Attachment A:	Location Map
Attachment B:	Deschutes County Legal Counsel Memorandum, April 12, 2024
Attachment C:	Decision Matrix
Attachment D:	Revised Site Plan