BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANTHONY ROTH,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

GARRY WOOD, CRISTINA WOOD,
WILLIAM HALLER and GEORGIA HALLER,
Intervenors-Respondent.

LUBA No. 2000-083

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Anthony Roth, Jacksonville, filed the petition for review and argued on his own behalf.

No appearance by Jackson County.

Garry Wood and Cristina Wood, Jacksonville, represented themselves.

William Haller and Georgia Haller, Jacksonville, represented themselves.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED 10/27/2000

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a county decision to approve a winery.

MOTIONS TO INTERVENE

Garry Wood and Cristina Wood (intervenors Wood), the applicants below, and William Haller and Georgia Haller (intervenors Haller), move to intervene on the side of respondent. There is no opposition to the motions and they are allowed.

FACTS

On January 13, 2000, intervenors Wood filed an application with Jackson County Roads, Parks & Planning Services (RPPS) for a winery to be established on their 40-acre property located off of Highway 238, near the unincorporated community of Ruch. The subject property is made up of tax lot 101 and tax lot 2504. These two lots were consolidated by a lot line adjustment in 1981. Tax lot 2504 is a "flagpole," which provides access to Highway 238 from the subject property. Pursuant to easements, tax lot 2504 also provides access from three other residences to Highway 238. Tax lot 101 is zoned exclusive farm use (EFU). Tax lot 2504 is zoned suburban residential (SR 2.5).

A portion of the subject property is planted in grapes to be used in the winery. There is also an existing shop that intervenors Wood propose to use first as a temporary winery building and then as a warehouse after the proposed winery is completed. The remainder of the property is developed with a dwelling with an attached garage. The property also contains a meadow, wooded areas, a swale, and a seasonal creek.

The proposed winery would be located in the southwest portion of tax lot 101. In this same area, intervenors Wood propose to develop a parking area, an outdoor eating area and a kitchen. According to the applicants, the kitchen would provide limited food service to customers visiting the winery.

On March 21, 2000, RPPS issued a tentative approval for the winery. On March 23,

2000, an appeal was filed by petitioner. On May 1, 2000, a hearing was held to consider the appeal. On May 19, 2000, a final order was issued by the hearings officer adopting portions of the RPPS staff report and approving, with conditions, a permit for the winery.[1] The permit allows an unspecified number of promotional events to be held at the winery.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues the county failed to "[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue" within the notice of tentative approval and the notice of public hearing, as required by ORS 197.763(3). Petitioner contends that due to the lack of information provided in these notices, most of the affected property owners were not advised of criteria that apply to the application. Petitioner asks that we remand the county's decision to allow for proper notice and procedure.

Petitioner's argument provides no basis for reversal or remand. ORS 197.835(4)(a) allows petitioner to raise issues based upon the omitted criteria before LUBA, but the failure to list all applicable decisional criteria does not provide a reason for reversal or remand unless petitioner demonstrates that the failure to list the applicable criteria prejudiced *his* substantial rights. Petitioner has not done so.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends that the county failed to comply with Jackson County Land Development Ordinance (JCLDO) 218.090(9) when it issued the permit for the winery.

[1]The hearings officer's decision incorporates the findings and conclusions contained in a county staff report. Therefore, when we address petitioner's findings challenges, we consider both the hearings officer's decision and the staff report.

Petitioner first argues that the applicants' evidence does not address all applicable criteria. Second, petitioner argues that the county's decision is based upon conclusions that are not supported by substantial evidence. We address each subassignment of error separately.

A. Area Planted in Grapes

JCLDO 218.090[2] provides that a winery must have at least 15 acres of planted vineyard. Petitioner contends there is no substantial evidence that this requirement has been met. According to petitioner, the applicants submitted two maps which purport to show the requisite number of acres have been planted; however, only one map is attached to the decision, and that map shows only 11.5 acres planted in grapes. Record 10. The applicants submitted a supplemental map at Record 33, showing 17 acres of planted vineyard; however, petitioner contends that because this map was not included in the final order, there is no evidence that it was relied upon in making the decision. Petitioner raises this same issue in his third assignment of error.

The map at Record 10 notes a "17-acre vineyard." The map at Record 33 clarifies that the vineyard consists of an 11.5-acre portion and a 5.5-acre portion. Either map alone supports the county's conclusion that the 15-acre requirement is met. We believe that a reasonable decision maker could conclude that, in the absence of testimony or evidence to the contrary, 15 or more acres have been planted.

The first subassignment of error is denied.

---

[2]JCLDO 218.090(9)(A) provides in part that:

> "A winery may be approved upon finding that vineyards have been established, or that contracts have been executed, that will meet the grape supply needs of the winery at the levels described in [JCLDO] 218.025(22). * * * "

JCLDO 218.025(22)(A) defines a winery in part as a facility that produces:

> "[l]ess than 50,000 gallons and that * * * [o]wns an on-site vineyard of at least 15 acres[.]"

B. Ancillary Commercial Sales

Petitioner argues that the applicants failed to adequately describe the proposed commercial function of the winery as is required by JCLDO 218.090(9)(A)(ii).[3] Petitioner contends that the applicants' general statements that the commercial activities will be located within the wine tasting area and that the items to be sold will be incidentally related to wine sales are insufficient to show what "types of products and services" are going to be made available and exactly how much space those incidental commercial activities will use.

The application indicates that only those items allowed by the code and statute will be sold in a portion of the wine tasting area. JCLDO 218.090(9)(B) requires that

> "[t]he winery, if approved, shall allow only the sale of:
>
> "(i) Wines produced in conjunction with the winery; and,
>
> "(ii) Items directly related to wine, the sales of which are incidental to retail sale of wine on site. Such items include those served by a limited service restaurant as defined in ORS 624.010.
>
> "The conditions of approval shall include language limiting the winery to the sale of the items listed above."

The decision approves the commercial use with a condition that ancillary commercial activities will be incidental to wine consumption or will be connected to a limited service restaurant. Petitioner has pointed to nothing in the record that contradicts the evidence in the application, nor has petitioner indicated why the condition of approval is insufficient to assure compliance with JCLDO 218.090(9)(A)(ii).

The second subassignment of error is denied.

---

[3]JCLDO 218.090(9)(A)(ii) provides that an application for a winery must include:

> "A description of the planned commercial function of the winery * * *, including the amount of space to be committed to retail and food services and the types of products and services offered."

C. Traffic Impacts

JCLDO 218.090(9)(A)(iii) requires that the applicant submit:

> "A description of the traffic effects of public attendance at the winery, particularly addressing possible impacts on neighbors and nearby farms and a description of applicant's plans to mitigate any adverse traffic effects."

The hearings officer relied on the application and testimony to conclude that the proposed winery would "not exceed 10 average daily trips." Record 8. In addition, the hearings officer found that the 20-foot wide access "is sufficient for the traffic reasonably expected to be generated by the proposed use." *Id*. Petitioner argues that the findings fail to address the potential impact the increased level of traffic will have on the adjacent residential property owners. Petitioner also argues that the findings fail to address whether the mitigation efforts proposed by the applicants are adequate to ameliorate that impact. Petitioner is especially concerned with the nature and extent of the "promotional events" referred to in the application. According to petitioner, there is nothing in the record to demonstrate what promotional events are being considered to advertise the winery, or whether those promotional events will cause particular traffic impacts. Petitioner is also concerned that the width of the access road is insufficient to support the access to the residences plus the commercial activities that are envisioned by the applicants and approved by the county.

That an application lacks required supporting information provides no basis for reversal or remand unless the petitioner explains why the missing information is necessary to determine compliance with a specific approval standard. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312, 325 (1993). Here, the applicable approval standard appears to be JCLDO 218.090(9)(C), which provides in relevant part:

> "* * * Standards imposed on the siting of a winery shall be limited to the following for the sole purpose of limiting demonstrated conflicts with accepted farming or forest practices on adjacent lands:
>
> "(i) Establishment of a setback not to exceed 100 feet from all property lines for the winery and all public gathering places.

"(ii) Direct road access and adequate internal circulation and parking."

Tax lot 2504 provides access to the winery and to three residential properties. Petitioner has not demonstrated why failure to comply with the informational requirements of JCLDO 218.090(9)(A)(iii) necessarily results in the failure to adequately address the approval standards found in JCLDO 218.090(9)(C). JCLDO 218.090(9)(C) requires limitations on the siting of a winery only if there are "demonstrated conflicts with accepted farming and forest practices on adjacent lands." There is no demonstration of such conflicts.

The third subassignment of error is denied.

D. Direct Road Access

Petitioner contends that there is no "direct road access" to the winery, as required by JCLDO 218.090(9)(C)(ii).[4] Petitioner asserts that tax lot 101 is landlocked and relies on tax lot 2504 for access to Highway 238. Petitioner contends that this does not equal "direct" access, as that term is used in JCLDO 218.090(9)(C)(ii).[5]

The fact that there are two tax lots with different zoning designations does not mean that the tax lots are themselves separate parcels. JCLDO 00.040(197) states that "[t]he term parcel does not include a unit of land created solely to establish a separate tax account." The record demonstrates that tax lots 101 and 2504 were consolidated in 1981. The evidence in the record is sufficient to demonstrate that tax lots 2504 and 101 are one parcel, and thus there is direct access to Highway 238.

The fourth subassignment of error is denied.

The second assignment of error is denied.

---

[4]In the petition for review, petitioner refers to the direct access requirement as being required by JCLDO 218.090(9)(B)(ii). However, it is reasonably clear that petitioner means to refer to JCLDO 218.090(9)(C)(ii).

[5]The same issue is raised in the third assignment of error, and we address that aspect of the third assignment of error here.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the county erred by relying upon the evidence contained in the RPPS staff report. Petitioner contends that the findings are inadequate and the staff report is not supported by substantial evidence.

A. Wildlife Habitat

The staff report indicates that the subject property is located within a "very sensitive wildlife habitat" area. Record 68. According to petitioner, the proposal is therefore subject to JCLDO 280.110(3)(E)(vii), which regulates development within designated sensitive lands, and requires findings demonstrating "that the development will have minimum impact on winter deer and elk habitat."[6] *Id*. The staff report relies on a letter from the Oregon Department of Fish and Wildlife (ODFW), stating that the additional impact on wildlife from the construction of the winery would be minimal, to conclude that JCLDO 280.110(3)(E)(vii) has been satisfied. *Id*.

---

[6]JCLDO 280.110(3)(E)(vii) provides, in relevant part:

> "Any land use action subject to review under [JCLDO 280.110(3)(E)] shall include findings that the proposed action will have minimum impact on winter deer and elk habitat based on:
>
> "(a) Consistency with maintenance of long-term habitat values of browse and forage, cover, sight obstruction.
>
> "(b) Consideration of the cumulative effects of the proposed action and other development in the area on habitat carrying capacity.
>
> "(c) Location of dwellings and all other development within 300 feet of existing roads or driveways where practicable unless it can be found that habitat values and carrying capacity [are] afforded equal or greater protection through a different development pattern.
>
> "* * * * *
>
> "(e) Comments shall be solicited in writing from ODFW for all land use actions on winter range * * *. The ODFW shall be given a maximum of ten days to make such comments. Final decision by the County to decline or accept ODFW's position shall be based on substantive findings provided by the applicant."

Petitioner contends that the letter from ODFW is insufficient to demonstrate that the winery activity will not significantly impact wildlife. According to petitioner, ODFW's letter constitutes "comments" allowed pursuant to JCLDO 280.110(3)(E)(vii)(e) and, standing alone, without findings in regards to the rest of the ordinance requirements, cannot constitute substantial evidence that the "proposed action will have minimum impact on winter deer and elk habitat."

The county applied this ordinance provision and adopted a finding that appears to address JCLDO 280.110(3)(E)(vii)(e). However, the county does not appear to have addressed the three other applicable criteria of JCLDO 280.110(3)(E)(vii). Because the county did not adopt findings addressing all the applicable criteria listed within JCLDO 280.110(3)(E)(vii), the findings are inadequate.

The first subassignment of error is sustained.

B. Production of Less Than 50,000 Gallons of Wine Annually

Petitioner argues that the staff report's finding that the production of wine will be less than 50,000 gallons annually is not supported by substantial evidence in the record. However, the applicants state that the projected annual production of wine will be less than 50,000 gallons, and petitioner does not cite to any evidence to undermine this testimony. Record 90. That uncontroverted testimony is substantial evidence that less than 50,000 gallons of wine will be produced annually.

The second subassignment of error is denied.

C. Scenic Views

Petitioner also argues that because the proposed winery lies within an identified scenic view area of special concern, the application is subject to additional approval criteria. JCLDO 280.110(3)(M)(iii) provides in part that where a proposed development is located within important scenic areas:

> "* * * *any land use action subject to review* by [RPPS] shall include findings demonstrating that the proposal will have a minimal impact on identified scenic views, * * * either by nature of its design, mitigation measures proposed, or conditions of approval." (Italicized emphasis added.)

JCLDO 280.110(3)(M)(ii) provides, in part:

> "The following uses within [the area of special concern] shall be permitted without review by Jackson County, *unless otherwise provided by other regulations*:
>
> "* * * * *
>
> "(f) Other land uses or activities permitted in the underlying zone, subject to state and federal regulations." (Emphasis added.)

The county's decision concludes that pursuant to JCLDO 280.110(3)(M)(ii)(f), a "winery is a permitted use in the EFU zone, so is exempt from the requirements of [JCLDO 280.110(3)(M)]." Record 70. Petitioner argues that the staff report relied upon by the hearings officer incorrectly concluded that wineries are "permitted" in the county's EFU zone, because under the JCLDO, wineries are subject to an administrative review process. Petitioner contends that only those uses that are permitted without any restriction in the county's EFU zone are properly excluded from review under JCLDO 280.110(3)(M)(ii)(f).

The JCLDO chapter for EFU zones contains three categories of uses: (1) permitted uses described at JCLDO 218.030; (2) uses subject to administrative review described at JCLDO 218.040; and (3) conditional uses described at JCLDO 218.050. The permitted uses at JCLDO 218.030 do not include wineries. However, the uses subject to administrative review in the EFU zone include wineries. JCLDO 218.040(8). As the emphasized portions of JCLDO 280.110(3)(M) illustrate, there is a distinction between the treatment of permitted uses and the treatment of uses subject to administrative review. A use subject to administrative review is, by definition, a "land use action subject to review by [RPPS]." JCLDO 280.110(3)(M)(iii). Furthermore, a winery does not qualify for an exemption under JCLDO 280.110(3)(M)(ii)(f) because the review required by JCLDO 218.090(9) is the type of review "otherwise provided by other regulations." JCLDO 280.110(3)(M)(ii). The staff

interpretation relied upon by the hearings officer is incorrect.[7] *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988) (standard of review for hearings officer's interpretation of local ordinance is whether the interpretation is reasonable and correct).

The third subassignment of error is sustained.

The third assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the county cannot permit wineries on the subject property because a portion of the property is zoned SR 2.5 and wineries are not permitted on property zoned SR 2.5 under any circumstance. Petitioner contends that the winery is a use on the entire ownership and winery access is an essential part of the total development plan for the winery. When petitioner raised these arguments below, the hearings officer concluded

> "* * * that Tax Lot 101 will house the winery, not Tax Lot 2504, which will continue to be used for access by the subject property and three other parcels." Record 8.

We addressed a similar issue in *Bowman Park v. City of Albany*, 11 Or LUBA 197 (1984). In that case, the subject parcel was zoned for industrial use and the parcel providing access was zoned for residential use. The city's decision found that access to the industrial portion of the property did not constitute a "use" for zoning purposes, and therefore was allowed outright in all zones. There, we relied on cases from other jurisdictions to hold that "an access road to an industrial site is an accessory industrial use which cannot be

[7]A different result is not dictated by ORS 215.283(1)(r), which provides that wineries, as described in ORS 215.452, "may be established in any area zoned for exclusive farm use." In *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995), the Oregon Supreme Court established that the certain enumerated uses in ORS 215.283(1) were "uses as of right" upon which counties could not impose supplemental approval criteria. However, the court left open the question of whether a subset of the permitted uses in ORS 215.283(1) might refer to other statutes that grant a county a degree of discretion in approving those uses. In *Shadrin v. Clackamas County*, 34 Or LUBA 154, 161 (1998), we held that certain statutes could allow a local government the "discretion to regulate and even deny" otherwise permissible uses under ORS 215.283(1). ORS 215.452(5) authorizes the county to apply to wineries local regulations "acknowledged to comply with any statewide goal respecting open spaces, scenic and historic areas and natural resources." *See also Lindquist v. Clackamas County*, 146 Or App 7, 11, 932 P2d 1190 (1997) (certain statutes regulating uses permitted under ORS 215.283(1) may authorize county regulatory standards that are not included in the statute itself).

established on residentially zoned land." *Id.* at 203. The facts in *Bowman Park* are analogous to the situation here. A parcel providing access to a winery is an accessory use to the winery. Because wineries are not allowed in the SR 2.5 zone, an access road to the winery may not be established on the SR 2.5-zoned parcel. The hearings officer erred in concluding that access was a totally separate activity from the winery.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioner explains that JCLDO 05.060 contains standards regarding the establishment of a private road.[8] Petitioner argues that tax lot 2504 is a private road and, as

---

[8]JCLDO 05.040(1)(E) lists types of access including a private road, which is described as:

> "A road which provides access to residentially zoned properties to serve one to nine lots, parcels, areas or tracts of land, and which has been approved by the County * * *."

JCLDO 05.060 provides, in relevant part:

> "(1) * * * Private roads are low volume roads designed for residential traffic.
>
> "(A) Private roads are not permitted for commercial or industrial use or divisions.
>
> "* * * * *
>
> "(2) Minimum Construction Standards:
>
> "* * * * *
>
> "(H) The minimum easement for a private road shall be 25 feet * * *.
>
> "(I) * * *
>
> "* * * * *
>
> (ii) For four to six parcels:
>
> "(a) Three inches of 3/4-0 compacted, crushed rock, or equivalent top course, with an oil mat surface (Jackson County 0-7 asphalt penetration macadam oil mat with minimum of three shots of oil).
>
> "(b) Six inches of 1 1/2-0 compacted, crushed rock, or equivalent.

such, must conform to the county's requirements for a private road, including minimum design and construction standards. Petitioner argues that the county's decision fails to adopt findings addressing these design and construction standards, and that there is no evidence in the record to demonstrate that the access road across tax lot 2504 can meet the JCLDO 05.060 standards.

JCLDO 05.060 is part of the county's land use regulations governing land divisions. We have some doubt that provisions applying to the establishment of a private road in the context of a land division apply in this circumstance. However, because we must remand the county's decision to allow the county to address the third and fourth assignments of error, we sustain this assignment of error in order for the county to address the applicability of JCLDO 05.060 in the first instance.

The fifth assignment of error is sustained.

The county's decision is remanded.

> "(c) The subgrade shall be compacted to 90+ percent of maximum relative density. This standard shall be presumed to be satisfied when a wheel roll test, as described below, shows no appreciable deflection or reaction. This test shall utilize a 10 yard dump truck fully loaded with crushed rock. The wheel loads shall be placed over the entire cross-section of the road * * *.
>
> "(d) One- eleven foot wide travel lane with two- two foot wide shoulders, within a 40 foot wide easement."