BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANTHONY ROTH,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

GARRY WOOD and CRISTINA WOOD,
Intervenors-Respondent.

LUBA No. 2001-121

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, Jacksonville, and Cristina Wood, Jacksonville, represented themselves.

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

REVERSED 10/30/2001

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 approving a winery.

MOTION TO INTERVENE

Garry and Cristina Wood (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.[1]

FACTS

In January 2000, intervenors filed an application with the county to establish a winery on their 40-acre property located off Highway 238, near the unincorporated community of Ruch. The property is a flag lot that consists of two individual tax lots, 101 and 2504, that remain separate for tax purposes but were consolidated into a single parcel in 1981. Tax lot 101 is generally square and is zoned exclusive farm use (EFU). Tax lot 2504 is a 20-foot-wide strip of land that provides access to Highway 238 for tax lot 101. Tax lot 2504 is zoned Suburban Residential 2.5-acre minimum (SR 2.5). Tax lot 2504 also provides access to Highway 238 for three other residences, including petitioner's. The hearings officer originally approved the application, and petitioner appealed the decision to LUBA. We remanded the decision, in part, because the hearings officer erroneously concluded that the access provided by tax lot 2504 was a separate, distinct use. *Roth v. Jackson County*, 38 Or LUBA 894 (2000) (*Roth I*). On remand, the county conducted a public hearing, and the hearings officer again approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In *Roth I*, petitioner challenged the county's decision to allow the applicants to use tax lot 2504 as access to the winery. Under the Jackson County Land Development Ordinance (JCLDO), wineries are uses permitted subject to administrative review on land

[1]Although intervenors intervened in the appeal, neither they nor the county filed a response brief.

zoned EFU; however, they are not permitted on SR 2.5-zoned land. The hearings officer approved the application because he found that tax lot 101 would be used for the winery while tax lot 2504 would merely provide access. In *Roth I*, we relied on our disposition of a similar issue in *Bowman Park v. City of Albany*, 11 Or LUBA 197 (1984), to conclude:

> "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." 38 Or LUBA at 905.

On remand, the critical issue was whether wineries are allowed in the SR 2.5 zone. If wineries are allowed, then accessory uses, such as roads, may be permitted as well. The hearings officer concluded that wineries may be permitted in the SR 2.5 zone, for two reasons. First, the hearings officer noted that "agricultural uses" are permitted in the SR 2.5 zone. JCLDO 224.020(3).[2] The hearings officer reasoned that the term "agriculture," as it is used in JCLDO 224.020, encompasses the same uses that are allowed outright by statute on property zoned EFU. The hearings officer explained that wineries are permitted uses in EFU zones pursuant to ORS 215.283(1)(r). *See Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995) (uses permitted under ORS 215.213(1) and 215.283(1) are "uses as of right" in EFU zones and are not subject to county regulations that go beyond those set forth in the statutes). In addition, the hearings officer relied on *Craven v. Jackson County*, 308 Or 281,

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[2]JCLDO 224.020 provides, in relevant part:

> "The following uses shall be permitted subject to all other applicable rules, standards, or statutes governing such uses * * *:
>
> "* * * * *
>
> "(3) Agriculture, but not including intensive livestock, poultry, gamecocks, or fur-bearing animal production.
>
> "* * * * *
>
> "(7) Accessory uses."

779 P2d 1011 (1989) for the proposition that even if the ancillary uses connected with a winery (including sales of wine and souvenirs) are not permitted under ORS 215.283(1)(r), they may be considered to be a type of farm use, because the definition of "farm uses" at ORS 215.203(2)(b)(F) includes "land under buildings supporting accepted farm practices," and wineries and tasting rooms are "accepted farm practices."

If the issue was whether a road that provides access to a winery could be permitted in the county's EFU zone, then the hearings officer's conclusion might be correct. *See Gage v. City of Portland*, 319 Or 308, 316-17, 877 P2d 1187 (1994) (LUBA's review of the hearings officer's interpretation is whether the interpretation is reasonable and correct); *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988) (same). However, as we pointed out above, the question is whether wineries are permitted in the SR 2.5 zone. For the following reasons, we conclude that they are not.

First, the county's definition of "agricultural use" is different from the definition of "farm uses" in ORS 215.203.[3] Agricultural uses under the JCLDO do not include wineries. Second, the word "winery" is separately defined in the JCLDO.[4] From this, we infer that the county does not define wineries as a type of agricultural use that may be conducted on SR 2.5-zoned land.

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[3]JCLDO 00.040(12) defines "agriculture, agriculture use" as:

> "The use of the land for crop and tree farming; the raising of livestock, poultry, furbearing animals, or honeybees; the tilling of the soil; the raising of field and tree crops including agriculture, horticulture, floriculture, silviculture, viticulture, nurseries and greenhouses, and the necessary uses for storing produce that is incidental to that of normal agricultural activity. Agriculture includes the preparation and storage of the products raised on such land for human use and animal use, and disposal by marketing or otherwise. Agriculture use shall not include auction yards, slaughter houses, or rendering plants. When located outside of a commercial or industrial zone, a plant nursery or greenhouse involving wholesale or commercial sales is an agricultural use only if the products offered for sale are produced by the farm use of the property as defined by this Ordinance and ORS 215.203."

[4]JCLDO 00.040(280) defines "winery, commercial" as:

> "A facility for the preparation, processing, marketing, and distribution of wines. May include a tasting room and sales area."

This view of the JCLDO is supported by other provisions in the county ordinance. For instance, in Farm Residential (F-5) zones, agriculture uses are permitted uses. JCLDO 220.020(1). Commercial wineries, however, are allowed only as a conditional use. JCLDO 220.030(15). Similarly, in Rural Residential (RR-5, RR-10, RR-00) zones and the Applegate Rural Residential District (RR-5(A)) agriculture is a permitted use while wineries are conditional uses. JCLDO 222.020(3), 222.030(21), 222(A).020(3), 222(A).030(18).[5] In SR 2.5 zones, agriculture uses are permitted uses, but wineries are not listed as a permitted or conditional use. In *Sarti v. City of Lake Oswego*, 20 Or LUBA 387, *rev'd on other grounds* 106 Or App 594, 809 P2d 701 (1991), we explained that where a zoning ordinance specifically permits a particular use in one zoning district an inference is created that the particular use is not allowed under a more general provision within a second zoning district that does not specifically permit that particular use.

> "The general principle expressed in *Sevcik v. Jackson County* [16 Or LUBA 710, 713 (1988)] and *Clatsop County v. Morgan* [19 Or App 173, 178, 526 P2d 1393 (1974)] is that where a zoning ordinance specifically lists a use as allowed in one zoning district and fails to specifically list that use in a second zoning district, but includes in the list of permitted uses in the second zoning district a more subjective and open ended category of uses, there is an 'inference' that the use specifically allowed in the first zoning district is not also allowed in the second zoning district under the open ended use category." *Sarti*, 20 Or LUBA at 393.

We conclude that the inference discussed in *Sarti* applies in this case and supports petitioner's interpretation of the applicable JCLDO provisions. The JCLDO starts with wineries as uses permitted with administrative review in EFU zones and progressively restricts the siting of wineries as the zoning districts become less rural. We believe the correct inference or interpretation to be drawn from the JCLDO is that wineries are neither

[5] The F-5 zone lists "commercial wineries" as a conditional use while the RR and RR(A) zones list "wineries" as a conditional use. It is unclear to us what, if any, difference there is in the JCLDO between a winery and a commercial winery. What is clear is that neither wineries nor commercial wineries are "agriculture uses" under the JCLDO.

specifically permitted nor permitted generally under the more open ended category of "agriculture uses" in SR 2.5 zones. Therefore, intervenors' SR 2.5-zoned land may not be used as access for the proposed winery.

Petitioner requests that we reverse the hearings officer's decision. Reversal of a land use decision, unlike a remand, means the identified errors cannot be corrected by accepting additional evidence, adopting new findings, or both. *Seitz v. City of Ashland*, 24 Or LUBA 311, 314 (1992). Reversal of a land use decision approving development means the proposed development, as submitted, cannot be approved as a matter of law. *Id*.; OAR 661-01-0071(1)(c). The proposed winery includes SR 2.5-zoned land as an accessory use. In order to use the SR 2.5-zoned land as an accessory use, the winery must be a permitted use in the SR 2.5 zone. As discussed above, wineries are not permitted uses in SR 2.5 zones. This error cannot be corrected on remand, and the development, as submitted, cannot be approved as a matter of law.

The county's decision is reversed.[6]

[6] Due to our disposition of the first assignment of error, we need not reach petitioner's second assignment of error regarding applicable road standards.