BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STUART WILSON and MELINDA WILSON,
*Petitioners,*

vs.

WASHINGTON COUNTY,
*Respondent,*

and

KEEP HELVETIA LIVABLE AND SAFE,
ROBERT ELLINWOOD, HARRY DE BOER,
and LINDA DE BOER,
*Intervenors-Respondents.*

LUBA No. 2011-007

FINAL OPINION
AND ORDER

Appeal from Washington County.

Dana L. Krawczuk, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief were Stephen T. Janik and Ball Janik LLP.

No appearance by Washington County.

Jeffrey L. Kleinman, Portland, filed the response brief and argued on behalf of intervenors-respondents.

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

AFFIRMED 05/17/2011

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

Opinion by Ryan.

**NATURE OF THE DECISION**

Petitioners appeal a decision by the county denying their application for Special Use Approval and Development Review to convert a residence to a winery.

**MOTION TO INTERVENE**

Keep Helvetia Livable and Safe, Robert Ellinwood, Harry De Boer, and Linda De Boer move to intervene on the side of the county. There is no opposition to the motion and it is granted.

**FACTS**

We take the description of the property and the application from the decision:

> "The property consists of 70 acres on two adjoining lots. The northern lot is approximately 40 acres and is zoned EFU [exclusive farm use]. The southern lot is approximately 30 acres and is zoned EFC [exclusive forest conservation]. On the EFU zoned lot, [petitioners] have established a vineyard, and have produced wine off-site from the grapes grown in the vineyard. The access road to the EFU zoned lot crosses the EFC zoned lot.
>
> "According to [petitioners], they have been hosting events at Garden Vineyards without land use permits since at least 2005.
>
> "[Petitioners] propose to convert an existing residence into a winery. The proposal includes renovations to the existing residence to allow a portion of it to be used as a tasting room and to the carport area to allow it to be used for wine processing; and conversion of the existing garage to a wine lab/office. The winery will produce Pinot noir, Pinot gris, Chardonnay and Sparkling Wine, which will be sold directly to the consumer through on-site wine sales and special on-site, public and private promotional wine events. The proposed events will be held in the tasting room and outdoor courtyards. The proposed events include weddings, Sunday brunch, evening wine tasting, Thursday movie night, and corporate events. [Petitioners] state that there will be two private and one public event each week. The application proposes to limit outdoor events to no more than 299 guests that will take place in the tasting room and on the 2 acre gardens adjacent to the tasting room. Special events during the winter months will be held in the tasting room and will be limited to 50 guests.
>
> "All food service is to be provided by an off-site catering company. [Petitioners] explain that they are not proposing to operate a commercial kitchen on site. Food for the private events will be provided exclusively by a

> private caterer, who prepares the food in its licensed kitchen, finishes the preparation and presentation in [petitioners'] outdoor area, and brings all of its own equipment necessary to prepare, serve and clean up." Record 9.

Petitioners submitted the application on January 8, 2010, and over the course of the next five months until June 8, 2010, petitioners submitted materials that had been identified by the county as missing from the original application submittal.

After multiple hearings on the application, the hearings officer denied the application. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

As noted, petitioners own two parcels totaling approximately 70 acres. The northern 40-acre EFU zoned parcel is where the winery will be located and the associated events are proposed to be held. Wineries are allowed uses in the EFU zone under ORS 215.213(1)(p) and Washington County Community Development Code (CDC) 340-4.1.T, subject to the provisions of ORS 215.452, as implemented by the county in CDC 430-145.[1] Access to the northerly 40-acre parcel is over an approximately 12-foot wide north/south driveway across the 30-acre EFC-zoned parcel. The driveway connects with NW Dick Road, a public road.[2] Wineries are not allowed uses in the EFC zone.

The hearings officer found that since the driveway to the winery is located on land zoned EFC, and wineries are not permitted in the EFC zone, the application could not be approved. The hearings officer based her conclusion on LUBA's decisions in *Bowman Park v. City of Albany*, 11 Or LUBA 197 (1984) and in *Roth v. Jackson County*, 38 Or LUBA 894 (2000). The parties also cite and discuss *Central Oregon Landwatch v. Deschutes County*, 56 Or LUBA 280 (2008). We discuss all three cases below.

---

[1] As we discuss under the second assignment of error, ORS 215.452 was amended during the 2010 legislative session by Senate Bill 1055 that took effect on March 23, 2010. The 2010 legislation authorized wineries to host "private events." Oregon Laws 2010, Chapter 97, §1.

[2] There is a site plan in the record that suggests that 3 acres of the minimum 15 acres of grapes required under CDC 430-145(A) may be located on the parcel zoned EFC. Record 596.

In their first assignment of error, petitioners challenge the hearings officer's reliance on *Bowman Park* and *Roth* to conclude that the winery could not be approved where a winery is not a permitted use under the zoning that is applied to the parcel on which the driveway to the winery is located. We understand petitioners to argue that *Bowman Park* and *Roth* are inapposite in the present appeal for two reasons. First, petitioners argue that our decisions in *Bowman Park* and *Roth* are inapposite because the CDC does not list driveways as "accessory uses" in the EFU zone Second, petitioners argue that the holdings in *Bowman Park* and *Roth* should be limited to circumstances where the parcel that provides the access to the proposed winery is zoned for residential use.

In *Bowman Park*, the parcel that was to be developed with industrial buildings was zoned for industrial use, but the access drive that provided access to the public right of way was zoned for residential use. Based in part on the city's definition of "use" and "development" that included the establishment of access, we concluded that the proposed industrial use included the access to that industrial use. In other words, we concluded the access as part of the industrial use and could not be sited in a residential zone.

In *Roth*, the subject property was a flag parcel with the flag portion zoned EFU and the flag pole portion that provided access to the flag portion of the parcel zoned residential. We agreed with the petitioners' argument that access to the proposed winery was an essential part of the proposed winery use and that that access had to be evaluated as part of the proposal. In *Roth*, we relied on *Bowman Park* to conclude that because the parcel on which the access to the winery would be located did not allow winery uses, the application could not be approved. We explained that "[a] parcel providing access to a winery is an accessory use to the winery." *Id*. at 905.

In *Central Oregon Landwatch v. Deschutes County*, the applicants proposed to partition EFU-zoned land and construct non-farm dwellings on the new EFU parcels. The required public road frontage for the new parcels was to be provided by extending an

existing road that crossed several nearby parcels of land zoned for Surface Mining (SM). But unlike *Bowman Park* and *Roth*, the roadway extension at issue in *Central Oregon Landwatch* was not the driveway that connected the proposed dwelling with the public right of way but rather an extension of a road to be located in a public right of way. We explained the driveway/public right of way distinction as follows;

> "*Roth* did not concern a right of way that is to be dedicated to the public for the purpose of carrying traffic. Dedicated rights of way almost always cross many different zoning districts. The rule that petitioner suggests would make most dedicated rights of way unapprovable, since dedicated public rights of way are almost always approved to provide access to uses that are not allowed in at least some of the zoning districts those rights of way cross." *Id*. at 284.

We do not see anything in *Bowman Park* or *Roth* that supports petitioners' argument that the hearings officer incorrectly relied on those cases or that they are inapposite in the present appeal. *Bowman Park* and *Roth* stand for the somewhat unremarkable proposition that where a property is to be developed with a commercial or industrial use, the internal driveway on that property that connects the commercial or industrial buildings to the nearest public right of way is properly viewed as part of the commercial or industrial use. Whether that driveway is labeled as "accessory" to the business, as in *Roth*, or an integral part of the use itself, as in *Bowman Park*, is not material. Similarly, although the facts in the present appeal differ somewhat from *Bowman Park* and *Roth*, because the driveway is not located on the same parcel as the proposed business and the 30-acre parcel the driveway must cross to access NW Dick Road is not zoned for residential use, neither of those factual differences supports a different result. We see nothing in *Bowman Park* or *Roth* that leads us to conclude that the outcome of those cases depended on the residential zoning of the proposed driveways, or that the outcome would have been different had the proposed access to the uses been zoned something other than residential. Rather, it was the fact that the proposed businesses were not allowed in the zoning district the driveway crossed. In addition, the fact that petitioners' property is made up of two parcels rather than one parcel does not mean the

driveway on their property which is essential to connect the winery with NW Dick Road is properly viewed as something other than a driveway.

Where, as here, the proposal includes establishing and operating a winery under CDC 430-145, the proposed winery use includes the driveway that is necessary to connect that winery with the nearest public right of way. The hearings officer's conclusions that (1) petitioners' proposed winery includes the driveway providing access to the winery, and (2) the winery could not be approved because wineries are not allowed uses in the zoning district that applies to one of the parcels that driveway crosses is correct. *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323 (1988). There is nothing in the language of any relevant CDC provisions that leads us to a different conclusion.

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

Generally LUBA need only review and sustain one basis for denial of an application for permit approval. *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998). However, because the issue presented in the second assignment of error could arise again if a solution is found to the problem identified in the first assignment of error, we review petitioners' challenge to a second basis for the hearings officer's denial of the application.

The hearings officer also denied the application because she concluded that the events that were proposed as part of the application could not be approved under CDC 430-145.[3] In

---

[3] CDC 430-145 provides:

> "430-145 Winery
>
> "Wineries are structures where the grapes or other fruits or produce of the applicant or others may be processed and converted to wine, bottled, blended, stored, sold at wholesale or directly to a consumer for consumption off or on the premises.
>
> "430-145.1 A winery, as described by ORS 215.452, may be permitted in the EFU and AF-20 Districts subject to the following standards:
>
> "A. Maximum annual production is less than 50,000 gallons and that:

"(1) Owns an on-site vineyard of at least fifteen (15) acres;

"(2) Owns a contiguous vineyard of at least fifteen (15) acres;

"(3) Has a long-term contract for the purchase of all of the grapes from at least fifteen (15) acres of a vineyard contiguous to the winery; or

"(4) Obtains grapes from any combination of 1, 2, or 3 of this subsection; or

"B. Maximum annual production is at least 50,000 gallons and no more than 100,000 gallons and that:

"(1) Owns an on-site vineyard of at least forty (40) acres;

"(2) Owns a contiguous vineyard of at least forty (40) acres;

"(3) Has a long-term contract for the purchase of all the grapes from at least forty (40) acres of a vineyard contiguous to the winery; or

"(4) Obtains grapes from any combination of 1, 2, or 3 of this subsection.

"C. A winery described in Section 430-145.1 A. or B. shall allow only the sale of:

"(1) Wines produced in conjunction with the winery; and

"(2) 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.

"D. Prior to the issuance of a permit to establish a winery under Section 430-145.1, the applicant shall show that the vineyards, described in Section 430-145.1 A. and B, have been planted or that the contract has been executed as applicable.

"E. Standards imposed upon a winery shall be limited solely to each of the following for the sole purpose of limiting demonstrated conflicts with farming or forest practices on adjacent lands:

"(1) Establishment of a setback, not to exceed one hundred (100) feet, from all property lines for the winery and all public gathering places; and

"(2) Provision of direct road access, including safety and operational considerations and the standards of Section 501-9.3, internal circulation and parking.

"(a) Internal access shall be based upon the maximum number of people at the tasting room or restaurant, including times of special events. Access shall be approved by the appropriate fire marshal.

"(b) On-site parking requirements shall be based upon the maximum number of employees at the winery, the size of

their second assignment of error, petitioners argue that the hearings officer's denial of their application misconstrues applicable law. According to petitioners, CDC 430-145 does not provide a basis for the hearings officer to deny the application to convert the existing residence to a winery solely on the basis of petitioners' proposed events at the winery. According to petitioners, the hearings officer was required to determine whether petitioners' application for a winery met the definition of "winery" in CDC 430-145 and the criteria in CDC 430-145.1, and none of those criteria allow the hearings officer to deny the application based on petitioners' proposed events. We understand petitioners to argue that the hearings officer should have approved the part of the application that proposed to convert the existing residence to a winery, and should have only denied the part of the application that proposed events that are not permitted in the EFU zone as part of a winery, or limited those events through conditions of approval so that they could be allowed in the EFU zone.

---

the tasting room and/or restaurant, and the expected number of visitors.

"(c) On premise temporary parking shall be available for special winery events.

"(d) A festival permit (Section 430-135.1 E.) shall be required for special events in excess of one (1) day.

"(3) The Review Authority shall also apply, when applicable, the standards of Sections 421 (Flood Plain and Drainage Hazard Area Development), Section 422 (Significant Natural Resources), and other standards regarding geologic hazards, airport safety, and other regulations for resource protection acknowledged to comply with any statewide planning goal respecting open spaces, scenic and historic areas and natural resources.

"F. Findings shall be made to demonstrate compliance with the standards of Section 430-145.1.

"G. A winery, which does not comply with the standards of Section 430-145 A or Section 430-145 B., may be approved as a Commercial Activity in conjunction with Farm Use (Section 430-33) upon demonstration of compliance with the applicable review criteria."

Intervenors respond that the issue presented in the second assignment of error was not preserved under ORS 197.763(1) and ORS 197.835(3) and petitioners may not now raise the issue for the first time on appeal. ORS 197.835(3) limits the issues that may be raised in a LUBA appeal and provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

The "raise it or waive it" principle serves the purpose of providing fair notice of the issue to the decision maker and other parties, so they have an adequate opportunity to respond and address the issue. *Boldt v. Clackamas County*, 107 Or App 619, 813 P2d 1078 (1991).

We tend to agree with intervenors that the issue presented in the second assignment of error was not presented to the hearings officer in a way that could have led to the hearings officer's consideration of the issue. Throughout the proceedings before the hearings officer, petitioners' main thesis was that the winery, including the proposed events, should be approved under the amended version of ORS 215.452 that took effect on March 23, 2010, which specifically allows "private events" as part of a winery, rather than under the prior version of that statute that does not specifically allow "private events."[4] *See* n 1. Petitioners never argued to the hearings officer that the winery alone, without the proposed events that are not allowed under the prior version of the statute, should be approved under the prior version of the statute.

Intervenors also respond that even if the issue was not waived, the events were proposed as an integral part of the application, and the hearings officer correctly concluded that county was not required to rewrite petitioners' application to meet the applicable approval criteria or to ignore the portion of the application that proposed events that are not

[4] The hearings officer concluded that the application was governed by the version of the statute in effect prior to the 2010 amendments to the statute, and petitioners do not challenge that finding or otherwise argue that the application should be governed by the 2010 amendments to ORS 215.452. Petition for Review 14.

permitted under CDC 430-145. We agree with intervenors. An applicant bears the burden of proof to demonstrate that an application complies with applicable approval standards, and a local government is not required to approve a noncomplying development proposal, even if conditions of approval might be imposed that would render the proposal consistent with the applicable criteria. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77, 91 (2003), *rev'd on other grounds*, 192 Or App 567, 86 P3d 1140 (2004).[5] Petitioners submitted an application that proposed as its two main features (1) conversion of an existing residence to a winery and (2) holding a number of events on the property and within that existing residence and in new buildings. Petitioners repeatedly objected to conditions of approval limiting the events that were proposed by planning staff and by intervenors. Petitioners have pointed to nothing in the CDC or elsewhere that requires the county to separate the application into discrete parts and approve some parts and either reject others or limit the proposed events through conditions of approval, particularly where the applicant has not proposed such limiting conditions of approval and in fact repeatedly objected to conditions proposed by staff. Accordingly, the hearings officer did not err in denying the application based on her conclusion that the proposed events that were an integral part of the application were not permitted under CDC 430-145.

The second assignment of error is denied.

The county's decision is affirmed.

[5] Although petitioners do not cite or rely on ORS 197.522, we held in *Reeder v. Multnomah County*, 59 Or LUBA 240, 254-55 (2009) that there is no requirement in that statute that a local government impose reasonable conditions to make a permit application approvable where the local government has not declared a moratorium on development under ORS 197.520, or a *de facto* moratorium has not been found under ORS 197.524.