LUBA
JUN 25 2024 AM10:36

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 FRIENDS OF YAMHILL COUNTY,
5 *Petitioner*,
6
7 vs.
8
9 YAMHILL COUNTY,
10 *Respondent*,
11
12 and
13
14 GROUND 152, LLC,
15 *Intervenor-Respondent*.
16
17 LUBA No. 2024-008
18
19 FINAL OPINION
20 AND ORDER
21
22 Appeal from Yamhill County.
23
24 Sean T. Malone filed the petition for review and reply brief and argued on
25 behalf of petitioner.
26
27 Jodi M. Gollehon filed a joint response brief on behalf of respondent. Also
28 on the brief was Steve Elzinga, Anderson Beals, and Sherman, Sherman, Johnnie
29 & Hoyt, LLP.
30
31 Steve Elzinga filed a joint response brief and argued on behalf of
32 intervenor-respondent. Also on the brief was Jodi M. Gollehon, Anderson Beals,
33 and Sherman, Sherman, Johnnie & Hoyt, LLP.
34
35 ZAMUDIO, Board Member; RYAN, Board Chair; RUDD, Board
36 Member, participated in the decision.
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38

1 REMANDED 06/25/2024
2
3 You are entitled to judicial review of this Order. Judicial review is
4 governed by the provisions of ORS 197.850.

1 Opinion by Zamudio.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a board of commissioners' decision approving a
4 conditional use permit (CUP) for the operation of a commercial activity in
5 conjunction with farm use to allow the sale of wine, beer, other malt beverages,
6 and cider at an existing farm stand on land zoned for exclusive farm use (EFU).

7 **BACKGROUND**[1]

8 The subject parcel is approximately 81.5 acres that is split-zoned with most
9 of the parcel located in the EF-80, Exclusive Farm Use zone and a small portion
10 within the AF-20, Agriculture/Forestry Large Holding zone. Ground 152, LLC
11 (intervenor) is part of a collection of farm entities with a collective operation that
12 spans 440 acres and raises cows, pigs, chickens, ducks, turkeys, vegetables, and
13 edible flowers. Intervenor raises cows, pigs, and chickens on the subject property,
14 which is developed with a single-family dwelling, residential accessory
15 structures, and agricultural structures.[2] Land use in the surrounding area includes
16 residential, agricultural, and forest uses.

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[1] In a separate decision issued this same date we remand a separate county decision based on the reasoning set out in this decision. *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___ (LUBA No 2024-009, June 25, 2024).

[2] In 2021, the county approved a replacement dwelling and a conditional use permit for a bed and breakfast on the subject property. We affirmed that approval, the Court of Appeals reversed, and the Supreme Court allowed review. *Friends of Yamhill County v. Yamhill County* ___ Or LUBA ___ (LUBA No 2022-081,

1 The county previously approved a farm stand on the EF-80-zoned area of
2 the subject property. The farm stand sells meat and produce. Intervenor applied
3 to the county for a CUP to sell wine, beer, cider, and other malt beverages
4 (fermented beverages) primarily produced in Oregon and provide wine-tasting
5 services at the farm stand, while continuing to sell meat and produce. The
6 additional sale of fermented beverages would involve improvements to the
7 interior of the farm stand. Intervenor does not produce fermented beverages.
8 Intervenor does not produce or process crops used to produce fermented
9 beverages such as grapes, grain, or hops. The county planning director approved
10 the CUP. Petitioner appealed the director's decision to the board of
11 commissioners, which, after a public hearing, also approved the CUP. This
12 appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 We begin by summarizing the pertinent law. Statewide Planning Goal 3
15 (Agricultural Lands) is "[t]o preserve and maintain agricultural lands." State law
16 restricts the uses that are allowed on agricultural land to farm uses and specified
17 nonfarm uses. *See* ORS 215.203(1) (generally requiring that land within EFU
18 zones be used exclusively for "farm use"); ORS 215.283 (identifying permitted
19 uses on EFU land).

20 "'[F]arm use' means the current employment of land for the primary

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Dec 27, 2022), *rev'd*, 325 Or App 282, 529 P3d 1007, *rev allowed*, 371 Or 333 (2023).

1 purpose of obtaining a profit in money by raising, harvesting and
2 selling crops or the feeding, breeding, management and sale of, or
3 the produce of, livestock, poultry, fur-bearing animals or honeybees
4 or for dairying and the sale of dairy products or any other
5 agricultural or horticultural use or animal husbandry or any
6 combination thereof. 'Farm use' includes the preparation, storage
7 and disposal by marketing or otherwise of the products or by-
8 products raised on such land for human or animal use." ORS
9 215.203(2)(a).

10 ORS 215.283(1) lists 26 nonfarm uses that counties must allow on EFU
11 land, subject to standards adopted by the Land Conservation and Development
12 Commission (LCDC). *See* OAR 660-033-0130 (setting out standards applicable
13 to permitted and conditional uses on agricultural land). Uses authorized in ORS
14 215.283(1) are allowed "as of right" and are not subject to additional local
15 criteria. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995).
16 ORS 215.283(2) contains a list of nonfarm uses that a county may allow as
17 conditional uses in an EFU zone, if the county concludes that the use will not
18 significantly affect surrounding lands devoted to farm use under ORS 215.296,
19 the "farm impacts test."[3] The county may adopt additional local criteria for uses
20 listed in ORS 215.283(2). ORS 215.296(10); *Brentmar*, 321 Or at 488.

21 The county approved the CUP under Yamhill County Zoning Ordinance
22 (YCZO) 402.04(G), which allows, as a conditional use, "[c]ommercial activities
23 that are in conjunction with farm use as defined in Section 402.10(B), but not

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[3] Petitioner does not challenge the county's determination that the approval satisfies ORS 215.296(1).

1 including the processing of farm crops which are a permitted use as described in

2 subsection 402.02(E), subject to Section 1101, Site Design Review." YCZO

3 402.04(G) implements ORS 215.283(2)(a), which provides:

4 "The following nonfarm uses may be established, subject to the
5 approval of the governing body or its designee in any area zoned
6 [EFU] subject to ORS 215.296:

7 "(a) *Commercial activities that are in conjunction with farm use*,
8 including the processing of farm crops into biofuel not
9 permitted under ORS 215.203(2)(b)(K) or 215.255."
10 (Emphasis added.)

11 YCZO 402.10(B) provides:

12 "B. Commercial Activities in Conjunction with Farm Use - As
13 authorized under subsection 402.04, *a commercial activity in*
14 *conjunction with farm use is*:

15 "1. The processing, packaging, and wholesale distribution and
16 storage of a product not derived primarily from farm activities
17 on the premises;

18 "2. *Retail sales and promotion of agricultural products, supplies*
19 *and services directly related to the production, harvesting,*
20 *and processing of agricultural products*. Such uses include,
21 but are not limited to, the following:

22 "• Storage, distribution and sale of feed, fertilizer, seed,
23 chemicals, and other products used for commercial
24 agriculture

25 "• Livestock auction or sales yards

26 "• Farm equipment storage and repair facilities

1 “• Storage, repair, or sale of fencing, irrigation pipe and
2 pumps, and other commercial farm-related equipment
3 and implements

4 “• Veterinarian clinics

5 “• Slaughtering of animals, including attendant retail and
6 wholesale sales

7 “• Wineries not listed as a permitted use

8 “• Rental or lease of facilities, with or without a fee, in
9 conjunction with an agricultural use for events such as
10 parties, receptions, and banquets with the primary
11 intent of indirect promotion of the product harvested or
12 processed on the site.

13 “• Four or more promotional events in a calendar year that
14 are directly related to the marketing of products
15 harvested or processed on the site that are reasonably
16 expected to attract more than 750 visitors daily. An
17 ‘event’ shall not exceed three consecutive days.

18 “• Psilocybin Service Centers located on ‘licensed
19 premises’ as that term is defined under OAR 333-333.
20 A permit to operate a psilocybin service center does not
21 authorize any other use that would otherwise require
22 authorization under the YCZO, unless additional land
23 use approval is obtained.” (Emphases added.)

24 Petitioner argues that the county’s approval misconstrues the phrases
25 “commercial activities that are in conjunction with farm use,” “agricultural
26 product,” and “directly related.” Petitioner also argues that the county’s findings
27 concerning those phrases are inadequate and not supported by substantial
28 evidence.

Petitioner argues that the sale of the fermented beverages is not "commercial activity in conjunction with farm use" because intervenor does not produce, harvest, or process the crops used to produce the fermented beverages nor process or produce the beverages themselves. Essentially, petitioner argues that to be "in conjunction with farm use," there must be a nexus between the farming activity on the subject property and the commercial use.

As we understand the arguments, petitioner does not argue that the YCZO 402.10(B) terms "agricultural product" and "directly related" impose additional local restraints on a commercial use that those allowed under ORS 215.283(2)(a). Instead, petitioner argues that those terms support petitioner's nexus argument—which is that because none of the "agricultural products" that intervenor produces are used in the production of the fermented beverages, the sale and serving of fermented beverages is not "directly related to the production, harvesting, and processing of agricultural products." YCZO 402.10(B). Petitioner argues that the county's findings and interpretation of "directly related" are inconsistent with state law and are inadequate because the findings fail to apply tests from case law construing ORS 215.283(2)(a) to determine whether the commercial activity will be exclusively or primarily used by farm uses and essential to farm practices. Petition for Review 2.

The county found:

> "[Intervenor's] proposed use is for the retail sales and promotion of processed agricultural products, in the form of alcohol and wine produced by farmers in the local area. State law defines the local

1 area as the State of Oregon. If approved, the farmstand will be
2 limited to wine tasting and the sale of alcohol that has been produced
3 in Oregon. Because the Applicant has only explicitly defined these
4 beverages to include wine, cider, beer and other malt beverages, that
5 is what was evaluated and considered for approval. Wines, ciders,
6 beer or other malt beverages sold at the farmstand that are from
7 outside the local area would be considered incidental items, and the
8 sale of any incidental items at the farmstand shall not account for
9 more than 25 [percent] of the total sales at the farmstand." Record
10 28.[4]

11 The county concluded that commercial activity in conjunction with farm
12 use is not limited "to only commercially market products derived from onsite
13 farm uses." Record 28. Instead, the county concluded that the proposed
14 commercial activity is "in conjunction with farm use" because intervenor's
15 proposed commercial activity provides "an additional local market outlet for both
16 (1) direct sale of alcohol products from local wineries and farm breweries[,] and
17 (2) indirect sale of locally grown hops, grapes, and other fruits that are processed
18 into those alcohol products." Record 29.

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[4] All record citations in this decision are to the amended record. While the challenged decision does not cite it, we assume that the county reference to "state law" refers to the LCDC farm stand rule, which we set out fully below under the second assignment of error, and which provides that a farm stand may sell "farm crops and livestock grown on the farm operation, or grown on the farm operation and other farm operations in the local agricultural area[.]" OAR 660-033-0130(23)(a). For purposes of that rule, "'local agricultural area' includes Oregon or an adjacent county in Washington, Idaho, Nevada or California that borders the Oregon county in which the farm stand is located." OAR 660-033-0130(23)(d). Petitioner does not challenge the county's determination that the local agricultural area includes the entire state.

1 The county also found that "[n]othing in YCZO 402.10(B)(2) limits farm
2 sales only to what is produced by the operator's farm." Record 29 (underscoring
3 in original). The county reasoned that the inclusive list of commercial activities
4 in YCZO 402.10(B) "are deliberately not intended to serve only the onsite farm
5 activities but to collectively serve the local farming community." Record 30. The
6 county noted that two of the items on the YCZO 402.10(B)(2) list—facility
7 rentals and promotional events—require the commercial activity to be directly
8 related to promotion of products harvested or processed on site, but that limitation
9 does not apply to retail sales of agricultural products. Record 29.

10 The parties dispute the applicable standard of review. Petitioner argues that
11 this appeal concerns the interpretation of state law that we review for legal error
12 with no deference to the county local governing body's interpretation.
13 Differently, intervenor argues that we review the county's interpretation of the
14 local code terms "agricultural product" and "directly related" with deference to
15 the county's decision under ORS 197.829(1)(d).

16 ORS 197.829(1)(d) provides that we "shall affirm a local government's
17 interpretation of its comprehensive plan and land use regulations, unless [we
18 determine] that the local government's interpretation * * * is contrary to a state
19 statute, land use goal or rule that the comprehensive plan provision or land use
20 regulation implements." We must defer to a local governing body's interpretation
21 of its own regulation if that interpretation is not "inconsistent with the express
22 language of the comprehensive plan or land use regulation" or inconsistent with

1 the underlying purposes and policies of the plan or regulation. ORS 197.829(1);
2 *Siporen v. City of Medford*, 349 Or 247, 258-59, 243 P3d 776 (2010) (applying
3 ORS 197.829(1)). We do not, however, defer to the governing body's
4 interpretation of a local provision that implements and adopts statutory language.
5 *Kenagy v. Benton County*, 115 Or App 131, 134-36, 838 P2d 1076, *rev den*, 315
6 Or 271 (1992).

7 We review the county's interpretation of the language from ORS
8 215.283(2)(a) "commercial activity in conjunction with farm use" for legal error
9 with no deference. ORS 215.283(2)(a) does not contain the terms "agricultural
10 product" and "directly related." We explained above that the county may impose
11 additional local criteria on uses authorized under ORS 215.283(2) and restrict
12 those uses more severely than provided by state law; however, petitioner does
13 not argue that the county has done so. Because the only issue before us is whether
14 the county's interpretation of the YCZO phrases "agricultural product" and
15 "directly related" exceed the scope of commercial activities authorized by ORS
16 215.283(2)(a), we do not afford any deference to the county's interpretation.

17 In reviewing the county's interpretation of ORS 215.283(2)(a), we
18 examine the statutory text, context, and legislative history with the goal of
19 discerning the enacting legislature's intent. *State v. Gaines*, 346 Or 160, 171-72,
20 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-
21 12, 859 P2d 1143 (1993). We are independently responsible for correctly
22 construing statutes. *See* ORS 197.805 (providing the legislative directive that

1 LUBA "decisions be made consistently with sound principles governing judicial
2 review."); *Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803
3 (2012) ("In construing statutes and administrative rules, we are obliged to
4 determine the correct interpretation, regardless of the nature of the parties'
5 arguments or the quality of the information that they supply to the court." (Citing
6 *Dept. of Human Services v. J. R. F.*, 351 Or 570, 579, 273 P3d 87 (2012); *Stull v.*
7 *Hoke*, 326 Or 72, 77, 948 P2d 722 (1997).)). For the reasons explained below,
8 we conclude that the county did not misconstrue the applicable law and that it
9 made adequate findings.

10 In 1973, the legislature created a list of nonfarm conditional uses allowed
11 in EFU zones in an amendment to ORS 215.213, including "commercial
12 activities that are in conjunction with farm use." Or Laws 1973, chap 503, § 4;
13 *see Central Oregon Landwatch v. Deschutes County*, 276 Or App 282, 291-93,
14 367 P3d 560 (2016) (examining the legislative history of ORS 215.213 and ORS
15 215.283); *Brentmar*, 321 Or at 490-91 (same). The same phrase, without
16 modification, was carried over from ORS 215.213(2)(a) into ORS 215.283(2)(a)
17 in 1983, when ORS 215.283 was enacted. Or Laws 1983, chap 826, § 17.

18 The phrase "commercial activities that are in conjunction with farm use"
19 is not defined by statute or LCDC rule. "Conjunction" is not defined by statute
20 for purposes of ORS 215.283(2)(a). The plain meaning of the term "conjunction"
21 is "occurrence together[,] concurrence esp[ecially] of events * * *." *Webster's*
22 *Third New Int'l Dictionary* 480 (unabridged ed 2002). Thus, ORS 215.283(2)(a)

1 requires that the commercial activities occur at the same point in time or space
2 with a farm use. In this case, the subject property is in active farm use, raising
3 animals and growing produce. In addition, as the county concluded, the proposed
4 commercial activity is "in conjunction with" the farm uses of production and
5 processing of crops used in making fermented beverages, such as grape producers
6 in the county.[5]

7 Nothing in ORS 215.283(2)(a) requires that the subject property be in farm
8 use or that the commercial activity be directly related to a farm use occurring on
9 the subject property or the immediate vicinity. In construing ORS 215.283(2)(a)
10 the Court of Appeals has rejected a "petitioner's contentions that the use is not
11 connected with farming because no independent grape growing activities are now
12 being conducted on the parcel and because the winery may serve grape farming
13 operations which are not located in the immediate vicinity." *Craven v. Jackson*
14 *County*, 94 Or App 49, 53, 764 P2d 931 (1988) (*Craven I*), *aff'd*, 308 Or 281,
15 779 P2d 1011 (1989) (*Craven II*) (footnote omitted). The court explained that it
16 had previously construed a county ordinance "which was materially identical to
17 ORS 215.283(2)(a)" in *Earle v. McCarthy*, 28 Or App 539, 560 P2d 665 (1977),
18 and had therein upheld a CUP for a warehouse for the storage of hop crops and
19 the storage and sale of string and burlap for hop production on an EFU parcel on

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[5] Intervenor asserts that the farm stand is also a farm use. Joint Respondent's Brief 7, 12. A farm stand is a nonfarm use that is authorized under ORS 215.283(1)(o).

1 which no independent farming activities were conducted. *Craven I*, 94 Or App at
2 52-53 (citing *Earle*, 28 Or App at 539-42; *Balin v. Klamath County*, 3 LCDC 8,
3 19 (1979) (concluding that a farm and irrigation equipment dealership and
4 demonstration area qualify as commercial activity in conjunction with farm use)).

5 While the *Earle* and *Balin* decisions predated the enactment of ORS
6 215.283(2)(a), those cases provide context for construing ORS 215.283(2)(a).
7 Decisional law that predates the enactment of a statute provides context for
8 construing a statute because we presume that the enacting legislature is aware of
9 decisional law on the same subject matter. *See Blachana, LLC v. Bureau of Labor*
10 *and Industries*, 354 Or 676, 691, 318 P3d 735 (2014) ("We presume that the
11 legislature was aware of existing law[.]"); *Lindell v. Kalugin*, 353 Or 338, 349,
12 297 P3d 1266 (2013) ("Case law existing at the time of the adoption" of the rule
13 or statute "forms a part of the context."); *Mastriano v. Board of Parole*, 342 Or
14 684, 693, 159 P3d 1151 (2007) ("[W]e generally presume that the legislature
15 enacts statutes in light of existing judicial decisions that have a bearing on those
16 statutes."); *see also J & D Fertilizers, Ltd. v. Clackamas County*, 105 Or App 11,
17 14, 803 P2d 280 (1990), *rev den*, 311 Or 261 (1991) (stating, in dicta, that the
18 storage of agricultural products on land other than the site of their production can
19 be allowed as a conditional use on agricultural land).

20 The legislative history of which we are aware demonstrates that the
21 legislature considered and rejected language that would limit commercial
22 activities on farm land by requiring that they relate to farming activities occurring

1 on the subject property. Instead, the legislature intentionally adopted broader
2 language. Tape Recording, Subcommittee to Senate Committee on Revenue, SB
3 101, May 11, 1973, Tape 37, Side 2 (discussion between Mr. Sullivan, Sens
4 Macpherson, Hoyt, and Atiyeh). ORS 215.283(2)(a) does not require a nexus
5 between the products of farm use *on the subject property* and the proposed
6 commercial activity. Accordingly, the county did not misconstrue the statute by
7 not requiring intervenor to demonstrate such a nexus.

8 Petitioner argues that the county misconstrued the phrases "agricultural
9 products" and "directly related" in YCZO 402.10(B)(2). Again, YCZO
10 402.10(B)(2) permits, as a conditional use, "[r]etail sales and promotion of
11 agricultural products, supplies and services directly related to the production,
12 harvesting, and processing of agricultural products."

13 Petitioner argues that the county improperly construed the phrase
14 "agricultural products" in concluding that fermented beverages are "agricultural
15 products." According to petitioner, "agricultural products" includes only "a raw
16 product from the farm (*i.e.*, a farm crop)" such as grapes, hops, and apples, and
17 does not include processed products such as wine, beer, and cider. Petition for
18 Review 21-22. Intervenor responds, and we agree, that the phrase "agricultural
19 products" does not specify "raw" or "unprocessed" and can be read to include
20 processed products such as wine, cider, and beer.

21 Petitioner argues that a broad interpretation of "agricultural products" is
22 contrary to the statewide policy of preserving agricultural land for agricultural

use and would allow stand-alone liquor stores and wine tasting rooms on agricultural land. That fact pattern is not presented in this case. The commercial use at issue here will operate within a farm stand structure that is separately allowed on agricultural land. The approval contains a condition of approval requiring the commercial use to "occur within the existing farm stand building." Record 19. The challenged decision does not allow the expansion of the farm stand footprint or the construction of any new structures with a resulting loss of farmland. The language of ORS 215.283(2)(a) authorizing commercial activity in conjunction with farm use is broad and petitioner has not provided any legislative history demonstrating that the legislature intended a narrower range of discretion than the county exercised in this appeal.

Petitioner argues that the county adopted inadequate findings explaining whether and why fermented beverages are "agricultural products." Findings must (1) address the applicable standards, (2) set out the facts relied upon, and (3) explain how those facts lead to the conclusion that the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). "[T]o be sufficient for review, findings need only 'establish the factual and legal basis for the particular conclusions drawn in a challenged decision.'" *Niederer v. City of Albany*, 79 Or LUBA 305, 314 (2019) (quoting *Thormahlen v. City of Ashland*, 20 Or LUBA 218, 229-30 (1990)). The above-quoted findings establish that the county found and approved the sale of fermented beverages as "processed agricultural products" and explained that the sale of fermented beverages both benefits

1 intervenor's farm operation and enhances the market for farmers that grow the
2 crops that are processed into the fermented beverages. Record 29-30. Those
3 findings are adequate to support the county's decision.

4 Petitioner argues that, even if the fermented beverages are agricultural
5 products, the decision fails to demonstrate that those products are "directly
6 related to the production, harvesting and processing of agricultural products."
7 YCZO 402.10(B)(2). Again, we do not understand petitioner to argue that the
8 phrase "directly related" imposes any additional requirement that is more
9 stringent than state law. Instead, petitioner argues that the county's interpretation
10 of "directly related" is inconsistent with case law. We proceed to examine that
11 case law and conclude that the county's interpretation is not inconsistent with it.
12 *See State v. Cloutier*, 351 Or 68, 100-101, 261 P3d 1234 (2011) (explaining that
13 precedential prior appellate construction of statutory language is an important
14 consideration in construing a statute).

15 Whether a commercial activity is authorized by ORS 215.283(2)(a) is
16 determined on a case-by-case, fact-specific basis. Thus, generally, no case will
17 provide an apt matrix for determining whether a different use under a different
18 fact pattern is authorized by ORS 215.283(2)(a). "Agricultural practices are
19 diverse, and the types of commercial activities that are in conjunction with farm
20 uses may be equally diverse. Whether the commercial activities are in
21 conjunction with farm use depends on the relationship between the commercial

1 activities and farm uses." *Friends of Marion County v. Marion County*, ___ Or
2 LUBA ___, ___ (LUBA Nos 2021-088/089, Apr 21, 2022) (slip op at 22).

3 In *Craven II*, after ORS 215.283(2)(a) was enacted, Jackson County
4 approved a CUP for a winery and retail sale of wine and other products produced
5 or bottled on the premises and incidental sales of "cork screws, posters of the
6 winery, wine books, postcards of the winery, glasses, and T-shirts bearing the
7 winery name and logo." 308 Or at 284. At the time of the CUP approval, the
8 subject property had been planted in vineyards with vines that were not yet
9 producing grapes for winemaking. The petitioner objected to the winery, tasting
10 room, and other retail activity, arguing that those activities were not "in
11 conjunction with farm use."

12 The applicant argued that their requested uses were "farm uses" because
13 they were the "employment of land for the primary purpose of obtaining a profit
14 in money * * * by marketing or otherwise of the products or by-products raised
15 on such land for human or animal use." ORS 215.203(2)(a). The court agreed
16 that farming is a commercial enterprise and yet declined to construe ORS
17 215.203(2)(a) so broadly as to allow, as a farm use, *any* commercial activity that
18 sells or markets farm products.

19 "Such an interpretation could permit a shopping mall or supermarket
20 as a farm use so long as the wares sold are mostly the products of a
21 farm someplace. Marketing of farm products could be established
22 by a gift shop selling candles of tallow and beeswax, a clothing store
23 that sells wools, cottons, and silks from worms nourished on
24 cultivated mulberry leaves, perhaps even a furrier who specializes

> in ranch mink coats, a bakery, a coffeehouse, a butcher shop, and a pharmacy with a section featuring natural remedies from foxglove, flea bane, and Saint-John's-wort. The goal of preserving land in productive agriculture would be subverted." *Craven II*, 308 Or at 288.

The court reasoned that the applicant's winery and incidental retail sales are allowed as "commercial activities that are in conjunction with farm use." ORS 215.283(2)(a). The court explained:

> "We believe that, to be 'in conjunction with farm use,' the commercial activity must enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates. The agricultural and commercial activities must occur together in the local community to satisfy the statute. Wine production will provide a local market outlet for grapes of other growers in the area, assisting their agricultural efforts. Hopefully, it will also make [the applicant's] efforts to transform a hayfield into a vineyard successful, thereby increasing both the intensity and value of agricultural products coming from the same acres. Both results fit into the policy of preserving farm land for farm use.
>
> "Sales of souvenirs which advertise the winery may cause others to come to the area and buy the produce of the vineyards and farms roundabout. Such sales may reinforce the profitability of operations and the likelihood that agricultural use of the land will continue. At least LUBA could reasonably so find, as it did, and interpret the incidental sales of souvenirs with logos as being 'in conjunction with farm use.'" *Craven II*, 308 Or at 289.

While *Craven II* was pending in the Supreme Court, the legislature authorized wineries as permitted uses on EFU-zoned land. Or Laws 1989, ch 525, § 2. In 2011, the legislature added a new category for large wineries. Or Laws 2011, ch 679, § 8 (*see* ORS 215.283(1)(n) (allowing "[a] winery, as described in

1 ORS 215.452 or 215.453")). ORS 215.452 and 215.453 impose acreage
2 requirements, wine production, and marketing limitations for wineries. In
3 authorizing wineries as permitted uses under ORS 215.283(1)(n), the legislature
4 did not repeal or amend the ORS 215.283(2)(a) authorization for commercial
5 activities as conditional uses on EFU-zoned land.

6 After those statutory changes, Yamhill County approved a CUP under the
7 county's implementation of ORS 215.283(2)(a) for the Stoller Vineyards
8 property approving the following commercial uses: "a new building—including
9 a tasting room, commercial kitchen, storage, and staff offices—and to host up to
10 44 events (with meal service) each year[.]" *Friends of Yamhill County v. Yamhill*
11 *County*, 255 Or App 636, 638, 298 P3d 586 (2013) (*Stoller*). Stoller had obtained
12 a prior approval for a winery and tasting room on the subject property under ORS
13 215.283(1)(n) and ORS 215.452, which allowed the sale of wine and incidental
14 items, a limited-service restaurant, and three events per calendar year. The
15 petitioner challenged the county's approval, arguing that the county erred in
16 approving the CUP because the approved commercial uses exceeded the
17 limitations on wineries under ORS 215.283(1)(n) and ORS 215.452. The Court
18 of Appeals rejected that argument, reasoning that the legislature adopted ORS
19 215.283(1)(n) to authorize wineries as a limited permitted use with a process
20 "that is quicker and simpler than the conditional-use process that is available
21 under ORS 215.283(2)(a)." *Stoller*, 255 Or App at 645. The court also rejected
22 the petitioner's argument that the limitations for permitted-use wineries applied

to conditional use commercial activities. In other words, the limitations in ORS 215.452 and 215.453 do not apply to conditional uses authorized under ORS 215.283(2)(a). The court concluded that the county's "approval of Stoller's CUP application converted its winery and tasting room operations from a permitted-use winery under ORS 215.283(1)(n) and ORS 215.452 to a conditional-use winery under ORS 215.283(2)(a)." *Stoller*, 255 Or App at 647-49 (footnote omitted).

The court concluded that the scope of Stoller's commercial activity is authorized under ORS 215.283(2)(a), as construed in the *Craven I* and *Craven II*. The court explained that whether a commercial activity is authorized by ORS 215.283(2)(a) is determined on a case-by-case, fact-specific basis.

> "[T]he type of activity proposed is not necessarily the determining factor; rather, as the Supreme Court explained in *Craven II*, 'to be "in conjunction with farm use," the commercial activity must enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates.' 308 Or at 289. As we put it in *Craven I*,
>
> > "[a] commercial use which assists farmers in processing and marketing crops can be as supportive of agricultural operations as one which aids them in producing crops. The fact that the marketing technique may prove to be effective enough to attract travelers hardly means that the farmers whose processed produce the travelers purchase are not benefited. 94 Or App at 54." *Stoller*, 255 Or App at 650.

1 The court rejected the petitioner's contention that Stoller's commercial
2 activities (events and food service) would overtake the primary activities of
3 producing grapes and processing and selling wine. The court explained that

> 4 "it is patent from the *Craven* decisions that any commercial activity
> 5 beyond the direct processing and selling of wine must, to be
> 6 approved as a commercial activity in conjunction with the farm use
> 7 of viticulture, be both 'incidental' and subordinate to the processing
> 8 and selling activities of the winery. *Craven II*, 308 Or at 289; *Craven*
> 9 *I*, 94 Or App at 54. As we warned in *Craven I*, the incidental and
> 10 secondary winery activities cannot become 'the tail [that] wag[s] the
> 11 dog.' [*Id.*] As always, farm-use-related commercial activity must
> 12 promote 'the policy of preserving farm land for farm use.'" *Craven*
> 13 *II*, 308 Or at 289." *Stoller*, 255 Or App at 650–51 (first and second
> 14 brackets in original, third brackets added).

15 The court reasoned that the county's conditions—including that the events be
16 "directly related" to the sale and promotion of wine produced at the winery—
17 were designed to ensure that the event and food service activities will remain
18 incidental and secondary to the processing and sale of wine. Moreover, the court
19 found that the approved commercial activities would enhance the marketing of
20 Stoller wine and would "'reinforce the profitability of operations and the
21 likelihood that agricultural use of the land will continue,' thus promoting the goal
22 of preserving farm land." *Stoller*, 255 Or App at 652 (quoting *Craven II*, 308 Or
23 at 289 (footnote omitted)).

24 Similarly, here, the county found that the commercial sale of fermented
25 beverages will reinforce the profitability of intervenor's farm use and enhance
26 the farming enterprises of the local agricultural community. The county found:

"Robust farmstands are symbiotic with the agriculture surrounding them. Selling alcohol produced by nearby vineyards and farm breweries will not make [intervenor] any less a farm. Instead, the entire county's farming is furthered. [Intervenor] will also have an additional profit source to benefit overall farming operations and draw in customers for the veggies and meats that [intervenor] produces and which serve as the core of farmstand sales.

"Due to inflation, international trade pressure, taxes, red tape, and other factors, it is increasingly difficult for farmers to make a profit. [Petitioner's] arguments would make it harder for farmers to earn a living from farming; all farms and farmstands would be harmed.

"[Petitioner] appears to contend that allowing a small amount of alcohol sales and tasting at an existing farmstand to complement the core meat and veggie sales will somehow adversely alter the character of the area. Such concerns are simply unfounded. A low-volume use that is similar to many surrounding uses does not adversely impact the surrounding area. Rather, these applications further the local economic synergy of the wine industry. For decades, expanding wine-related agriculture has been a goal of Yamhill County." Record 30.

The county's interpretation of "commercial activities in conjunction with farm use" and "directly related" are consistent with the court's construction in *Craven I*, *Craven II*, and *Stoller*. We address below petitioner's contention that the decision impermissibly allows sales of fermented beverages to overtake the farm use.

Petitioner relies on and extensively cites *City of Sandy v. Clackamas County*, 28 Or LUBA 316 (1994) for the proposition that commercial activity in conjunction with farm use may only be permitted when the nonfarm commercial products or services are "essential to the practice of agriculture" and where the

1 commercial operator is "exclusively or primarily a customer or supplier of farm
2 uses." *Id.* at 321-22. In *City of Sandy*, the county approved a CUP for the sale and
3 rental of large trucks and trailers, sale of portable storage buildings, operation of
4 a mailbox and shipping facility, and construction of a 4,800-square-foot building
5 to house the operation. We concluded that the disputed uses were not commercial
6 activities in conjunction with farm use. We explained that

> 7 "even if a commercial activity primarily sells to farm uses, that may
> 8 not be sufficient to allow the commercial activity to qualify as a
> 9 commercial activity in conjunction with farm use. There is a second
> 10 inquiry that must be satisfied. The products and services provided
> 11 must be 'essential to the practice of agriculture.' While farmers must
> 12 eat and farm equipment frequently operates on gasoline, that is not
> 13 sufficient to make grocery stores or gas stations commercial
> 14 activities in conjunction with farm use. The connection must be
> 15 closer to the 'essential practice of agriculture.' [*Balin*, 3 LCDC at
> 16 19.] * * *
>
> 17 "* * * * *
>
> 18 "[T]here is no reason to believe the trucks, trailers, and equipment
> 19 intervenor is authorized to sell and rent under the [CUP], will be
> 20 purchased or rented exclusively or primarily by farms or farmers in
> 21 the area. The same holds true for the mailbox, UPS and fax services.
> 22 There is evidence that *some* of intervenor's expected sales and
> 23 rentals will be to farm uses, but it is equally clear from the record
> 24 that there is a potentially large number of customers for the items
> 25 and services intervenor will offer that are *not* farm uses. The record
> 26 in this case is inadequate to demonstrate sales and rentals will be
> 27 primarily to farm uses in the area and, for that reason, is inadequate
> 28 to demonstrate that the authorized use is a 'commercial activity in
> 29 conjunction with farm use.'" *Id.* at 322 (citing *Chauncey v.*
> 30 *Multnomah County*, 23 Or LUBA 599, 606-007 (1992) (emphases
> 31 in original; footnote omitted)).

1 *City of Sandy* stands for the proposition that products and services which
2 could be used for farm uses and by farm workers, but are also used by a variety
3 of other nonfarm uses and users, lack a sufficient connection to farm use to be
4 considered "commercial activities in conjunction with farm use." "[I]n
5 conjunction with farm use" requires a customer/seller or seller/customer
6 relationship between the proposed commercial use and farm uses in the
7 community. *See Earle*, 28 Or App at 539 (upholding CUP for warehouse storage
8 of hop crops and the storage and sale of string and burlap for hop production on
9 an EFU parcel on which no independent farming activities were conducted);
10 *Balin*, 3 LCDC at 19 (concluding that a farm and irrigation equipment dealership
11 and demonstration area qualify as commercial activity in conjunction with farm
12 use).

13 Intervenor argues, and we agree, that *City of Sandy* is distinguishable from
14 the facts of this case and not instructive to the fact-specific inquiry under ORS
15 215.283(2)(a). In *City of Sandy*, there was no primary farm use of the subject
16 property and a tenuous connection to farm uses in the area. Here, the proposed
17 commercial use is not a stand-alone commercial sale of fermented beverages on
18 EFU-zoned land. Intervenor operates a farm and farm stand and the commercial
19 use will occur "in conjunction with" those uses. The commercial activity will also
20 relate to and enhance farming activity in the local agricultural area. Unlike the
21 commercial use at issue in *City of Sandy*, intervenor in this case is both a customer
22 and a seller of processed farm products. *City of Sandy* is not analogous, let alone

1 dispositive, and the county did not err in failing to make specific findings
2 responding to petitioner's arguments relying on that case.

3 Petitioner argues that "the commercial activity is not secondary or
4 incidental to the farm use, which will result in the 'tail wagging the dog[,]'" and
5 that "the farm use could very well be eclipsed by the sales of alcohol, leading to
6 what is essentially a soft-liquor store on EFU land." Petition for Review 32-33,
7 31 (footnote omitted); *see Craven I*, 94 Or App at 54 ("There is, of course, a risk
8 of the tail wagging the dog in many situations where secondary activities are
9 permitted because they serve primary ones[.]"). Intervenor responds that because
10 the commercial activity will operate within the existing farm stand, "and the rule
11 that the [commercial activity] is, by definition, secondary to the underlying farm
12 use, appropriately limits the scope of the [commercial activity] such that the
13 [commercial activity] will remain supportive of the farm use of the subject parcel
14 and the surrounding area." Joint Respondent's Brief 42.[6]

15 The parties agree that a commercial activity under ORS 215.283(2)(a)
16 must be "subordinate" and "secondary" to the primary farm and farm stand uses.
17 Joint Respondent's Brief 41-42. Those limitations are not express in ORS
18 215.283(2)(a). We understand the parties to agree that those requirements are

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[6] Intervenor provides not citation to any "rule." We assume that the "rule" intervenor refers to is the limitation in the courts' construction in *Stoller* and *Craven* that a commercial use approved under ORS 215.283(2)(a) may not become "the tail that wags the dog." *Stoller*, 255 Or App at 651 (citing *Craven II*, 308 Or at 289; *Craven I*, 94 Or App at 54).

derived from case law construing ORS 215.283(2)(a), namely, *Craven I*, *Craven II*, and *Stoller*, summarized above. Because the parties agree that those limitations apply to the proposed use, we accept them as applicable for purposes of this decision. From that premise, we agree with petitioner.

The county concluded that it was "allowing *a small amount* of alcohol sales and tasting at an existing farmstand *to complement* the core meat and veggie sales" as "[a] *low-volume* use." Record 30 (emphases added). The challenged decision does not include any conditions limiting the sales of fermented beverages or any findings explaining the county's conclusion that the conditional commercial activity "will be a secondary use that is in conjunction with the primary use on the property." Record 31. Intervenor does not point to anything in the application or the decision that imposes any limit on the sale and service of fermented beverages that ensures that those commercial activities remain "subordinate" or "secondary" to the preexisting farm use and the farm stand use. On remand, the county must adopt findings explaining that conclusion.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county's decision is inconsistent with the farm stand statute, which allows the sale of farm crops or livestock and limits the sale of "incidental items" to no more than "25 percent of the total annual sales of the farm stand[.]" ORS 215.283(1)(o)(A). Intervenor responds, and we agree, for

reasons explained below, that the farm stand limitation does not apply to the approved conditional commercial use.

In 1993, four years after the Supreme Court's decision in *Craven II*, the legislature specifically authorized farm stands as a permitted use in on agricultural land. Or Laws 1993, ch 466, § 2. Farm stands may be established on EFU zoned land under ORS 215.283(1)(o), which provides:

> "(1) The following uses may be established in any area zoned for exclusive farm use:
>
> "* * * * *
>
> "(o) Farm stands if:
>
> "(A) The structures are designed and used for the sale of farm crops or livestock grown on the farm operation, or grown on the farm operation and other farm operations in the local agricultural area, including the sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock sold at the farm stand if the annual sale of incidental items and fees from promotional activity do not make up more than 25 percent of the total annual sales of the farm stand; and
>
> "(B) The farm stand does not include structures designed for occupancy as a residence or for activity other than the sale of farm crops or livestock and does not include structures for banquets, public gatherings or public entertainment."

LCDC promulgated the farm stand rule, OAR 660-033-0130(23), which provides:

> "A farm stand may be approved if:

1 “(a) The structures are designed and used for sale of farm crops
2 and livestock grown on the farm operation, or grown on the
3 farm operation and other farm operations in the local
4 agricultural area, including the sale of retail incidental items
5 and fee-based activity to promote the sale of farm crops or
6 livestock sold at the farm stand if the annual sales of the
7 incidental items and fees from promotional activity do not
8 make up more than 25 percent of the total annual sales of the
9 farm stand; and

10 “(b) The farm stand does not include structures designed for
11 occupancy as a residence or for activities other than the sale
12 of farm crops and livestock and does not include structures
13 for banquets, public gatherings or public entertainment.

14 “(c) As used in this section, ‘farm crops or livestock’ includes both
15 fresh and processed farm crops and livestock grown on the
16 farm operation, or grown on the farm operation and other
17 farm operations in the local agricultural area. As used in this
18 subsection, ‘processed crops and livestock’ includes jams,
19 syrups, apple cider, animal products and other similar farm
20 crops and livestock that have been processed and converted
21 into another product but not prepared food items.

22 “(d) As used in this section, ‘local agricultural area’ includes
23 Oregon or an adjacent county in Washington, Idaho, Nevada
24 or California that borders the Oregon county in which the
25 farm stand is located.

26 “(e) A farm stand may not be used for the sale, or to promote the
27 sale, of marijuana products or extracts.”

28 *See Greenfield v. Multnomah County*, 259 Or App 687, 317 P3d 274 (2013)

29 (examining limits of the farm stand permitted use).

30 Petitioner argues that the CUP improperly allows the sale of fermented

31 beverages that may surpass the sale of meat and produce. Petitioner argues that

1 the county may not allow a commercial activity in conjunction with farm use that
2 would exceed the limitations in the farm stand statute.

3 Petitioner's argument is analogous to the petitioner's argument in *Stoller*,
4 that the county was prohibited from allowing a conditional commercial use under
5 ORS 215.283(2)(a) that exceeds the limited permitted winery use under ORS
6 215.283(1)(n). The court rejected that argument, reasoning that the permitted use
7 winery limitations do not apply to the conditional commercial use. *Stoller*, 255
8 Or App at 647-49 (footnote omitted). Similarly, here, intervenor did not seek an
9 amended or additional farm stand approval and, instead, sought separate
10 conditional commercial use approval. To be sure, the commercial use will operate
11 within the farm stand. However, the CUP approval is distinct and the farm stand
12 limitations are inapplicable. Accordingly, the county did not misconstrue the
13 applicable law.

14 The second assignment of error is denied.

15 The county's decision is remanded.