



Oregon

John A. Kitzhaber, M.D., Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Fax: (503) 378-5518

www.oregon.gov/LCD



January 23, 2012

TO: Land Conservation and Development Commission (LCDC)

FROM: Jim Rue, Acting Director
Katherine Daniels, Farm and Forest Lands Specialist

SUBJECT: **Agenda Item 2 – Request to Appeal, January 26, 2012, LCDC Meeting**

REVIEW OF A DIRECTOR'S DECISION TO PARTICIPATE IN A CASE BEFORE THE LAND USE BOARD OF APPEALS

YAMHILL COUNTY

I. RECOMMENDATION

The director recommends, based on the information contained in this report, that the commission authorize the department to proceed with an appeal of a Yamhill County decision to the Land Use Board of Appeals (LUBA). The department must file a notice of intent to appeal with LUBA by January 26, 2012, the date of the commission hearing on the matter.

The department recommends the appeal in order to object to the county's decision

II. CASE SUMMARY

On January 5, 2012, the Yamhill County Board of Commissioners adopted an order approving a conditional use permit for a "commercial activity in conjunction with farm use," consisting of a new building to accommodate a new tasting room, 52 days of events annually, and a commercial kitchen for food service at an existing winery in an exclusive farm use (EFU) zone near Dayton. The application was submitted prior to the effective date of 2011 legislation changing permitted winery and event uses in EFU zones. Therefore, the county reviewed the application under the existing statutory and county ordinance criteria. Which provisions of the statutes apply and what the statutes permit are relevant to the case.

Specifically, permitted wineries and uses accessory to wineries are described in Oregon Revised Statute (ORS) 215.452 and House Bill 1055 (2010). A "commercial activity in conjunction with farm use" is permitted, subject to local approval, by ORS 215.283 (2). Neither the statute nor the administrative rule on EFU zoning (OAR chapter 660, division 33) define this use, but the

Yamhill County Zoning Ordinance does, and opinions from LUBA through the Supreme Court establish some guidance regarding what a county may approve under this authorization.

The department submitted a letter to Yamhill County on November 9, 2011 objecting to the county's use of "commercial activities that are in conjunction with farm use" to approve full food service and 52 events annually, viewing the county's action as contrary to statutory restrictions on wineries and outside appropriate use of the "commercial activity" authorization. The Oregon Department of Agriculture and Friends of Yamhill County also submitted letters of objection. The Oregon Department of Agriculture wishes to join the department in this appeal.

III. APPEAL FACTORS

To proceed with an appeal, the commission must base its decision on one or more of the following factors from OAR 660-001-023(3):

- (a) Whether the case will require interpretation of a statewide planning statute, goal or rule;
- (b) Whether a ruling in the case will serve to clarify state planning law;
- (c) Whether the case has important enforcement value;
- (d) Whether the case concerns a significant natural, cultural or economic resource;
- (e) Whether the case advances the objective of the agency's Strategic Plan;
- (f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance.

IV. ANALYSIS

(a) Whether the case will require interpretation of a statewide planning statute, goal or rule

The case involves the interpretation of ORS 215.283 (2)(a) regarding "commercial activities in conjunction with farm use." There are no rules that define this use more specifically than does statute. Case law has interpreted this use fairly narrowly, while Yamhill and other counties interpret it relatively broadly. A second issue needing clarification is whether counties may rely on general statutory authorizations when more specific and restrictive authorizations for the same use exist.

(b) Whether a ruling in the case will serve to clarify state planning law

Yamhill County findings indicate that it intends to continue in the future to approve event and related uses at wineries as commercial activities in conjunction with farm use. As other counties amend their zoning ordinances for compliance with recent legislation, the department has noted that some of them also indicate that they intend to continue to rely on a broad interpretation of commercial activities to approve uses at wineries. The department believes that this case will provide a valuable ruling for counties and will have significant precedent value. Depending on the ruling, the commission may wish to follow with rulemaking clarifying these issues.

(c) Whether the case has important enforcement value

The department finds that this criterion does not apply.

(d) Whether the case concerns a significant natural, cultural or economic resource

The case concerns the potential for cumulative adverse impacts on agricultural land.

(e) Whether the case advances the objectives of the agency's strategic plan

One of the department's Strategic Goals is to conserve coastal, farm, forest, riparian and other resource lands. The department and the Department of Agriculture are concerned that a proliferation of non-farm uses in EFU zones is contrary to conservation of farmland.

(f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance

Dispute resolution, enforcement proceedings or technical assistance would not provide the interpretation of statute and clarity that a court ruling would. Rulemaking could accomplish the objectives of this appeal. A LUBA determination in this case is especially timely in view of the recent passage of HB 3280 and county need for clarity in updating local ordinances for consistency with the new legislation.

V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION

The department recommends that the commission support the director's decision to appeal the Yamhill County decision.

Proposed Motion: I move that the commission authorize the department to appeal the subject Yamhill County decision to the Land Use Board of Appeals based on the information included in this report and its demonstration that OAR 660-001-0230(3)(a), (b), (d), and (e) apply.

Alternative Motion: I move that the commission not authorize the department to appeal the subject Yamhill County decision to the Land Use Board of Appeals.

ATTACHMENTS

- A. DLCD letter to Yamhill County
- B. Yamhill County decision and findings of fact
- C. Notice of intent to appeal



Oregon

John A. Kitzhaber, M.D., Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Fax: (503) 378-5518

www.oregon.gov/LCD



November 9, 2011

Yamhill County Board of Commissioners
Yamhill County Dept. of Planning and Development
525 NE Fourth St.
McMinnville, OR 97128

Re: Local File No. C-15-11/SDR-14-11, Red Hills Farm, LLC

Honorable Board members:

This letter is in response to the decision of the Yamhill County planning director to approve a conditional use permit for commercial activities in conjunction with farm use for a tasting room, winery expansion and 44 events at Stoller Vineyards. We have carefully considered the County's staff report and offer comments for your consideration in the appeal of that decision. Please enter these comments into the record of all hearings on this proposal.

Definition of Commercial Activities in Conjunction with Farm Use

Yamhill County has reviewed the proposed full food service and event venues at the site as "commercial activities in conjunction with farm use" as defined in the local zoning ordinance. A judicial interpretation of the term "commercial activities in conjunction with farm use" was established in *Craven v. Jackson County*, 308 Or 281 (1989). This case provided a generalized standard at the time, ruling that "commercial activities in conjunction with farm use" must "enhance the farming enterprises in the local agricultural community" or "occur together with agricultural activities in the local community."

In 1994, a much more specific standard for "commercial activities in conjunction with farm use" was established in *City of Sandy v. Clackamas County*, LUBA No. 94-104, which stated that such activities must provide goods or services that are "essential to the practice of agriculture." This definition establishes a strict guideline for qualifying uses and activities in EFU zones and has been the legal standard since 1994. While a later case (*Hiebenthal v. Polk Co.* 45 Or LUBA 297 (2003)) reiterated the Craven standard, that case must be understood in the narrow context of its application to the proposed expansion of a fruit processing facility. The staff report makes no findings on whether the proposed event venues and food service at the site are "essential to the practice of agriculture." It is not enough that these uses be found to be related in some manner to the processing of grapes or the marketing of wine. For such uses to be determined to be "commercial activities in conjunction with farm use," they must be found to be essential to the actual growing of grapes.

House Bill 3280

In any case, House Bill (HB) 3280, effective August 2, 2011, effectively precludes Yamhill County from reviewing food service and event venues associated with wineries as "commercial activities in conjunction with farm use." The County must now adopt, cross-reference or directly apply the new legislative review criteria for wineries and associated event venues and restaurants in HB 3280. The County may not rely on its existing provisions because the legislature has preempted this authority by adopting more specific and recent

review criteria. The more specific statute prevails over the more general statute and the later-adopted statute prevails over the earlier statute (*DLCD v. Jefferson County*, 55 Or LUBA 625 (2008)).

The County's staff report states that the subject winery produces 23,800 gallons of wine annually, well below the threshold of 150,000 gallons set in HB 3280 for wineries that are permitted to have full-service restaurants. The County approval allows up to 72 meals per event to be prepared and served on-site. The staff report recognizes that the application goes beyond what a winery is allowed as a permitted use, thus necessitating the request for a "commercial activity in conjunction with farm use." Here as well, the County has made no findings that full-service food preparation is "essential to the practice of agriculture."

The County has approved 44 events annually, lasting 52 days in total. Of these, 25 are permissible under HB 3280, section (2)(c), subject to review standards in the bill. However, the staff report does not characterize the types of events that are proposed. These proposed events must be shown to be directly related to the sale or promotion of wine produced in conjunction with the winery and incidental to the retail sale of wine on-site. We cannot determine from the information provided that these standards are satisfied. It is not sufficient that the conditions of approval simply include the review standards in HB 3280. The County must make findings that the proposed events meet these approval standards.

The County's staff report does not state whether the other 27 days of events are intended to be those allowed under HB 3280, section (8)(a) – other types of events permitted if the local government has issued permits "in similar circumstances" before the effective date of this bill. The staff report includes no statement as to whether the County has issued permits for events in similar circumstances. Testimony submitted by others indicates that County approvals for other wineries have been for fewer and smaller events, as well as events that are more clearly incidental to the retail sale of wine. If the County elects not to use the provisions of HB 3280 section (8)(a), it may instead consider using the event provisions of Senate Bill 960 (2011). What it may not use is the ORS 215.283(2)(a) provisions for "commercial activities in conjunction with farm use."

Conclusion

The proposed food service and events, as described, may not be considered "commercial activities in conjunction with farm use," but rather must be considered within the scope of allowed uses in HB 3280 and/or SB 960. The staff report includes no findings that the proposed food service and events meet the approval standards in HB 3280. Proposed events appear as well to go beyond the number and scale the County has permitted at other wineries in similar circumstances, and in the case of full food service, go beyond what is permitted under state law. For these reasons, the department urges the Board to affirm the appeal.

Thank you for the opportunity to comment on this proposal. Please feel free to contact me with any questions or concerns at (503) 373-0050 ext. 329 or katherine.daniels@state.or.us.

Sincerely,

Katherine H. Daniels, AICP
Farm and Forest Lands Specialist

Cc: Mike Brandt, Planning Director
Steve Oulman, Regional Representative

BEFORE THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON

FOR THE COUNTY OF YAMHILL

SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In the Matter of Denial of the Appeal of a Conditional Use and Site Design Review for Winery Expansion on Tax Lot 4305-100 & 101 and 4308-100, Applicant Ernest Munch Representing Red Hills Farm LLC, Planning Docket C-15-11/SDR-14-11)
) Board Order 12- 23
)
)

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board) sat for the transaction of county business on January 5, 2012, Commissioners Leslie Lewis, Kathy George and Mary P. Stern being present.

IT APPEARING TO THE BOARD that Planning Director Mike Brandt approved an application for a Conditional Use and Site Design Review for Winery Expansion on Tax Lot 4305-100 & 101, and

IT APPEARING TO THE BOARD that Friends of Yamhill County timely appealed this matter to the Board, which held a noticed public hearing, and then voted 3-0 to deny the appeal and approve the application. NOW, THEREFORE,

IT IS HEREBY ORDERED BY THE BOARD, that the appeal is denied and the application is approved as detailed in Exhibit "A," the Findings for Approval, hereby incorporated into this Order by this reference.

DONE this 5th day of January, 2012, at McMinnville, Oregon.

ATTEST:

YAMHILL COUNTY BOARD OF COMMISSIONERS

REBEKAH STERN DOLL
County Clerk

Leslie A. Lewis
Chair LESLIE LEWIS

By: _____
Deputy Anne Britt

Kathy George
Commissioner KATHY GEORGE

APPROVED AS TO FORM:

Rick Sanai
Rick Sanai
County Counsel

Commissioner MARY P. STERN

F:\Users\sanair\LU\StollerAppealBoardOrder.wpd

**Yamhill County Board of Commissioners
Findings of Fact and Conclusions of Law
For
Stoller Vineyards
Conditional Use Permit**

A. Background facts

1. *Property description*

The Stoller Vineyards property (the "Property") is located at 15151 NE McDougall Road in Dayton. The Property consists of three tax lots, 4305-100, 4305-101 and 4308-100, comprising a total of 373 acres. There are approximately 180 acres of vineyards on the Property, as well as a winery, four dwellings and several agricultural buildings. Stoller Vineyards ("Stoller") proposes to construct a new tasting room adjacent to the existing winery.

2. *Access*

The Property is accessed from McDougall Road, a paved County road that parallels Highway 99 W.

3. *Property zoning*

The Property is zoned EF-80, Exclusive Farm Use.

4. *Surrounding land uses and zoning*

The parcels to the west of the Property are zoned AF-10, Agriculture/Forestry Small Holding. These parcels are primarily 5-10 acre lots with rural residences and some small farming activity. The parcels to the north and east are zoned EF-80 and are predominately large farms consisting of vineyards, nursery stock and hay. South of the Property across McDougall Road are predominately 5 acre parcels with rural residences and small farming activity.

5. *Water supply*

Stoller Vineyards ("Stoller") obtains water from several existing on-site wells and two above ground reservoirs. Water rights appurtenant to the Property allow Stoller to appropriate water for storage, irrigation, winery operation, fire suppression and other uses. These water rights are documented in the following permits and certificates issued by the Oregon Water Resources Department: G-13083, G-15661, R-13977, S-54076 and Certificate 87198. Stoller provided copies of these documents to the Board of County Commissioners (the "Board") on November 2, 2011. The Property is not within a Groundwater Limited Area.

6. *Sewage disposal*

Stoller is served by an existing septic system on the Property. In September 2011, Stoller applied to the County Sanitarian for a permit to upgrade its septic system to serve its proposed use. The County Sanitarian approved this permit with conditions requiring specific best management practices. Stoller provided documentation of this approval to the Board on November 2, 2011.

7. *Fire protection*

The Property is served by the Dayton Rural Fire District. In addition, as described in Finding A5 above, Stoller maintains a reservoir for fire suppression and has a water right allowing it to appropriate water from the reservoir for this purpose.

8. *Previous land use approvals*

In 2005, the County approved Stoller's application for a variance to the sign size on the Property. See Docket SP-03-05/V-05-05.

In 2003, the County approved a site design review application for a permitted use winery and tasting room on the Property pursuant to YCZO 402.02H and 402.10I. This 2003 decision approved "serving meals to customers" but also imposed limitations related to the sale of food, specifically stating: "The winery shall allow only the sale of . . ."

Items directly related to wine, the sales of which are incidental to the retail sale of wine on-site and do not exceed 25 percent of the total gross receipts of the retail facility. Such items include those served by a limited service restaurant, which means a restaurant serving only individually portioned prepackaged foods prepared from an approved source by a commercial processor and nonperishable beverages, as defined in ORS 624.010.

In addition, the 2003 decision limited Stoller to "three events of one to three days in duration during a calendar year intended to draw customers to the site for the tasting and purchasing of wine . . ." See Docket SDR-17-03.

9. *Changes in state law governing permitted use wineries*

The County's rules at YCZO 402.02H and 402.10I governing permitted use wineries on EFU land implement state law codified at ORS 215.452 (defining the requirements for a permitted use EFU winery) and 215.283(1)(n) (listing a winery meeting the requirements of ORS 215.452 as a permitted use in EFU zones). State law prohibits the County from deviating from state rules established for this type of winery. See *Brentmar v. Jackson County*, 321 Or 481, 496 (1995) (requiring counties to apply state rules for land uses listed in 215.283(1)). In 2010, the Oregon Legislature adopted Senate Bill 1055 which allowed wineries approved pursuant to ORS

215.452 to sell “services . . . including private events hosted by the winery or patrons of the winery at which wine produced in conjunction with the winery is featured.” 2010 Or Laws Ch. 97. Sec. 1(2)(c). Senate Bill 1055 did not limit the number of such events, but instead limited a permitted use winery’s income from event fees and other incidental sales to 25 percent of a winery’s gross income from on-site retail sales of wine produced in conjunction with the winery. *Id.* Sec 1(3). The Oregon Legislature set a sunset date for the private events and incidental income provisions of Senate Bill 1055 of January 1, 2013. *See id.* Sec. 3.

In 2011, the Oregon Legislature adopted House Bill 3280, which made further changes to ORS 215.452. Among other things, HB 3280 allows permitted use wineries to conduct unlimited wine tours, wine tastings, wine club activities and “similar activities.” 2011 Or Laws Ch. 679 Sec. 2(2)(a). In addition, these wineries may host up to 25 days of private events per year subject to the 25% incidental income limit described above. *See id.* Sec. 2(2)(c). HB 3280 states that “‘private events’ includes, but is not limited to, facility rentals and celebratory gatherings.” *Id.* Sec. 2(9). The provisions of HB 3280 governing private events are scheduled to sunset January 1, 2014. *See id.* Sec. 11(3). HB 3280 was enacted into law and became effective on August 2, 2011.

10. *County rules governing conditional use wineries*

In addition to allowing wineries on EFU land as a permitted use under the rules described above, the County expressly allows a winery to be approved as a conditional use “commercial activity in conjunction with farm use.” The County’s definition of commercial activity in conjunction with farm use also allows additional visitor-oriented activities on EFU land such as “parties, receptions and banquets” and other events intended to promote agricultural products harvested or processed on site. See YCZO 402.04G and 402.10B. The County approved its definition of commercial activities in conjunction with farm use on November 30, 1994 and the Oregon Land Conservation (“LCDC”) and Development Commission acknowledged this definition sometime thereafter.

11. *Current visitor activities on the Property*

An October 31, 2011, letter from Bill Stoller explains that the Stoller winery currently hosts approximately 37 visitor activities and events on the Property per year, attracting 25-400 attendees. These activities occur in several locations on the Property, including the winery, a meadow north of the winery and an oak hollow adjacent to the meadow. The visitor activities include (1) public promotions such as daily wine tastings and holiday open houses; (2) wine club activities; (3) wine industry events such as the annual Oregon Pinot Camp and a dinner for the International Pinot Noir Celebration; and (4) community and business events such as charity functions and business networking events. Mr. Stoller’s October 31 letter explains that Stoller hosts these activities and events to build and promote its brand and sell wine to attendees. This description of Stoller’s visitor activities is corroborated by written and oral testimony received by the Board, including letters from Willamette Shakespeare, Chehalem Winery and the Chehalem Valley Chamber of Commerce. The Board therefore accepts Stoller’s description of its current visitor activities.

B. Procedural history

1. *Pre-application conference*

County Planning Director Michael Brandt testified before the Board that Stoller approached him to inquire about the proper land use permit to enable Stoller to build a new tasting room on the Property equipped with a commercial kitchen. Mr. Brandt held a pre-application conference with Stoller's architect and planner Ernest Munch on May 10, 2011. Mr. Brandt recommended that Stoller apply to become a conditional use commercial activity in conjunction with farm use due to the limitations on food service at permitted use (ORS 215.452) wineries. Mr. Brandt also explained that the County prefers the conditional use process for wineries because it enables the County to examine the land use impacts that may be associated with visitor activities at wineries on a case-by-case basis. See audio recording of Nov. 10, 2011, Board hearing at 00:21:30-00:24:45.

2. *Nature and timing of Stoller application*

Stoller submitted a conditional use permit ("CUP") application on May 31, 2011. The application sought approval to construct a new facility on the Property adjacent to the existing winery that would include a tasting room, a commercial kitchen, storage and staff offices. Stoller also proposed to conduct 44 events per year on the Property, and requested approval to provide meal service at events. The application explained that food for events would either be prepared in the proposed commercial kitchen or would be prepared off-site by a commercial caterer.

The County Planning Department deemed the May 31 application complete, and then issued public notice of the application on July 1, 2011. The only public comments received by the County in response to the notice was a July 18 letter of opposition from Friends of Yamhill County ("FYC"). FYC did not request a hearing on the application. Stoller submitted a second letter to the County with additional information regarding its proposed visitor activities and food service on July 28, 2011. FYC submitted a second letter of opposition to the County on August 9, 2011.

3. *Planning Director decision*

The Planning Director issued a Staff Report on September 21, 2011, and approved Stoller's conditional use application with conditions on the same day. The decision allowed Stoller to host 44 events per year with a maximum attendance of 400 people at any one event. The approval also required that the events feature wine produced in conjunction with the Stoller winery and be directly related to the sale and promotion of this wine. The events also had to be incidental and subordinate to the retail sale of wine on site and be hosted by the winery or patrons of the winery. The decision allowed catered meals to be served at any event, but limited the number of meals that could be prepared in the on-site kitchen to 72 per event in order to ensure the integrity of the septic system. Finally, the Planning Director's approval limited Stoller's income from "non-wine related activity" to 25 percent of Stoller's gross income from the on-site retail sale of wine produced in conjunction with the winery and required Stoller to

submit an annual report to the County demonstrating its compliance with the event-related conditions of its CUP.

The Planning Director provided public notice of his decision on September 21, 2011.

4. *Appeal*

FYC, together with Peter, Emily, Russell and Delphine Gladhart filed an appeal of the Planning Director's Decision on October 6, 2011. In response, the Board reopened the record to public comment and held a de novo public hearing on November 10, 2011, to accept additional evidence regarding Stoller's application. Numerous parties submitted written and oral argument and evidence both before and during this hearing. After considering this argument and evidence, the Board approved Stoller's application at its meeting on November 22, 2011.

C. **Applicable criteria**

The following section explains the approval criteria that the Board finds to be applicable to Stoller's CUP application, as well as the evidence demonstrating Stoller's compliance with these criteria. This section also addresses additional criteria raised by FYC and other opponents that the Board finds not to be applicable to Stoller's application.

1. *YCZO 1301 and Sec. 1400: Procedural requirements*

Based on the procedural history described in Findings B1-B4 above, the Board concludes that the County's procedural requirements have been satisfied. The Planning Director held a pre-application conference with a representative from Stoller, and Stoller submitted a proper land use application thereafter. The public received notice of Stoller's CUP application and had the opportunity to provide written comment and request an oral hearing. After no hearing was requested, the Planning Director reviewed Stoller's application, issued a decision and notified the public of this decision and the opportunity to appeal. FYC and the Gladharts did appeal. In response, the Board reopened the entire record and accepted extensive additional written and oral arguments and evidence from numerous parties. All interested parties therefore had an adequate opportunity to raise issues and present their views in this matter.

2. *Applicable state law related to wineries*

Stoller has applied for approval of its proposed tasting room and associated visitor activities as a conditional use commercial activity in conjunction with farm use, not as a permitted use winery. This land use approval converts the existing permitted use winery into a conditional use winery. FYC contends that Stoller is nevertheless limited to the uses allowed at a permitted use winery under ORS 215.452, either as that statute existed under 2010 Senate Bill 1055 or as it exists now under 2011 House Bill 3280. Katherine Daniels of the Oregon Department of Land Conservation and Development ("DLCD") and others also submitted written comments arguing that Stoller's proposed use is inconsistent with HB 3280.

The Oregon Supreme Court held in 1989 that a winery and its associated retail operations qualify as a commercial activity in conjunction with farm use under state law. In reaching this decision, the Court reasoned as follows:

The phrase upon which the validity of the CUP turns is “in conjunction with farm use,” which is not statutorily defined. 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 relates hosting the 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 [winemaker Andrew] Samad’s efforts to transform a hayfield into a vineyard successful, thereby increasing both the intensity and the 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.

Craven v. Jackson County, 308 Or 281, 289 (1989). *Craven* therefore allows wine production and retail activities to be permitted as conditional uses on EFU land.

Although the 1989 Oregon Legislature adopted ORS 215.452 in reaction to *Craven*, this statute was not intended to foreclose the CUP pathway. Rather, the legislature created ORS 215.452 to expedite the permitting process for wineries meeting certain production and acreage requirements. Nothing in the 1989 statute or its 2010 amendments (SB 1055) demonstrates a legislative intent to overrule *Craven* or otherwise suggest that a winery may not be permitted as a conditional use, rather than as a permitted use under ORS 215.452. See 1989 Or Laws, Ch. 525; 2010 Or Laws Ch. 97. Indeed, it has been common practice across the state for over twenty years to permit wineries that do not meet the various requirements of ORS 215.452 as conditional uses.

LCDC and DLCD have historically supported the conditional use process for winery approval. As noted above, Yamhill County’s commercial activity rules expressly allow the County to approve a winery as a conditional use. See YCZO 402.04G and 402.10B. LCDC acknowledged these rules after the County approved them in 1994. A 2002 letter from DLCD similarly describes the conditional use process as an alternative to approval of a winery as a permitted use under ORS 215.452. Finally, Mr. Brandt testified that DLCD continued to support conditional use permits for wineries during the Association of Oregon Counties’ Farmland Activities Task Force meetings held in preparation for the 2011 legislative session after the passage of 2010 Senate Bill 1055. See audio of Nov. 10, 2011, Board hearing at 00:29:00.

House Bill 3280, like the prior versions of ORS 215.452, only applies to permitted use wineries and not to conditional use wineries. In the course of the legislative debate over HB 3280, the legislature specifically rejected attempts to change the state commercial activity rules as they apply to wineries. *Compare* B-Engrossed HB 3280 at Section 4 (proposing to limit conditional use wineries to uses allowed at permitted use wineries) *with* 2011 Or. Laws Ch. 679 (maintaining prior law governing conditional use wineries).

The version of HB 3280 enacted into law was the product of a conference committee formed to reconcile differing House and Senate versions of the bill. Testimony from the June 23, 2011, conference committee hearing on the final version of HB 3280 further demonstrates the legislature's intent to preserve the conditional use permitting pathway for wineries. The final amendments to HB 3280 were drafted by Richard Whitman, together with Legislative Counsel to reflect the decisions of the HB 3280 Conference Committee. Mr. Whitman is the former director of DLCD and is currently serving as Governor Kitzhaber's natural resource advisor. At this hearing, Conference Committee member Representative Paul Holvey specifically asked Mr. Whitman whether a winery could obtain a conditional use permit for uses not authorized by ORS 215.452 as amended by HB 3280. Mr. Whitman replied in the affirmative. Another Conference Committee member, Representative Mary Nolan, concurred with Mr. Whitman and explained that the Conference Committee's intent with HB 3280 was to provide permitting "options that give the widest range of choices for these winery operations for them to choose from." Representative Holvey then agreed that providing these options "is a large part of the thrust of this bill." Audio of Conference Committee Hearing on HB 3280 at 13:00-15:48. Stoller provided the Board with a transcript of the relevant portion of this Conference Committee hearing on November 10, 2011.

In sum, the history of winery land use law since 1989 demonstrates that a winery may be approved on EFU land as either a permitted use "winery" under ORS 215.452 or as a conditional use "commercial activity in conjunction with farm use" under ORS 215.283(2)(a). 2011 House Bill 3280 did not amend state law as it relates to conditional use wineries. The Board therefore concludes that ORS 215.452, either as amended by 2010 Senate Bill 1055 or by 2011 House Bill 3280, does not provide criteria applicable to Stoller's CUP application.

Moreover, even if HB 3280 were otherwise relevant to Stoller's CUP application, the state's goal post rule prohibits this Board from applying HB 3280 in this case. ORS 215.427(3)(a) requires the County to evaluate a land use application under the standards and criteria existing on the date that the application is complete. The County accepted Stoller's May 31, 2011, application as complete and provided public notice of the application on July 1, 2011. HB 3280 did not become effective until August 2, 2011. The Board therefore finds that Stoller's application was complete before HB 3280 became law. As a result, the Board concludes that even if HB 3280 were relevant, the goal post rule prevents the Board from applying the provisions of HB 3280 as applicable criteria to Stoller's CUP application.

3. *ORS 215.283(2)(a), YCZO 402.04G and 402.10B: Commercial activity in conjunction with farm use rules*

a. *State law defining commercial activities in conjunction with farm use and consistency of the County's rules with state law*

Because Stoller has applied for approval of its proposed use as a commercial activity in conjunction with farm use, the Board finds that both the state and County law governing this use are applicable to Stoller's application. As noted above, ORS 215.283(2)(a) lists "commercial activity in conjunction with farm use" as a conditional use in EFU zones. The state EFU statutes do not define this term. Under the Oregon Supreme Court's *Brentmar* decision, counties are allowed to adopt additional regulations governing the conditional uses listed in ORS 215.283(2). See *Brentmar*, 321 Or at 496. Yamhill County has done so with regard to commercial activities in conjunction with farm use. Specifically, the County's definition of this use expressly allows wineries that do not qualify under ORS 215.452, as well as visitor-oriented activities such as "parties, receptions and banquets" and other events intended to promote agricultural products harvested or processed on site. YCZO 402.10B.

FYC, Ms. Daniels and Jim Johnson from the Oregon Department of Agriculture (collectively the "Opponents") all argue that Stoller's proposed events and food service are inconsistent with state law governing commercial activities in conjunction with farm use. The Opponents do not challenge Stoller's compliance with the County's more specific commercial activity rules, but essentially argue that the County's rules violate state law, at least as they apply to events and food service at wineries. In support of this position, the Opponents rely primarily on the Land Use Board of Appeals' ("LUBA") 1994 decision in *City of Sandy v. Clackamas County*. This case involved a farm supply store sited on a 3.2 acre EFU parcel. The store sought approval to sell trucks, portable storage buildings and mail and fax services as a commercial activity in conjunction with farm use. Citing a 1979 LCDC decision, LUBA held that these retail activities did not qualify as commercial activity in conjunction with farm use because they were not "essential to the practice of agriculture." LUBA also interpreted *Craven* to stand for the proposition that "a commercial activity in conjunction with farm use must be either exclusively or primarily a customer or supplier of farm uses." *City of Sandy v. Clackamas County*, 28 Or LUBA 316, 321-22 (1994). Based on *City of Sandy*, the Opponents argue that Stoller's proposed use violates state law because wine marketing events are not essential to the practice of agriculture and do not supply or purchase from farm uses. See, e.g., FYC November 10, 2011 letter at 4-5; Johnson November 9, 2011 letter at 2-3.

LUBA, however, reached a different conclusion about commercial activities in conjunction with farm use in the more recent case of *Hiebenthal v. Polk County*, 45 Or. LUBA 297 (2003). In *Hiebenthal*, LUBA reexamined the Oregon Supreme Court's holding in *Craven* and concluded as follows:

The only limitations placed [by state law] on uses that may be permitted as 'commercial uses [sic] in conjunction with farm use' within the meaning of ORS 215.283(2)(a) are that the proposed use must: (1) 'enhance the farming enterprises of the local agricultural

community to which the EFU land hosting that commercial activity relates;’ and (2) satisfy ORS 215.296” (citing *Craven*; emphasis added).

Both FYC and Ms. Daniels acknowledge *Hiebenthal*, but argue that it does not apply to Stoller’s application. Specifically, Ms. Daniels argues in her November 9, 2011, letter that *Hiebenthal* “must be understood in the narrow context of its application to the proposed expansion of a fruit processing facility.” Nothing in LUBA’s opinion, however, indicates that LUBA’s decision is limited to the facts of that case. To the contrary, LUBA’s statement that *Craven* provides “the only limitations” placed by state law on commercial activities in conjunction with farm use indicates just the opposite. The Board therefore finds that *City of Sandy* is not LUBA’s most recent interpretation of the state commercial activity in conjunction with farm use standard. Furthermore, the Board interprets the above language from *Hiebenthal* to supersede LUBA’s opinion in *City of Sandy*.

Moreover, it would be inconsistent with the Oregon Supreme Court’s holding in *Craven* to apply *City of Sandy* in the winery context as the Opponents advocate. The Oregon Supreme Court is a higher court than LUBA and LUBA is bound to follow precedent set by the Oregon Supreme Court. Under the Opponents’ interpretation of *City of Sandy*’s “essential to the practice of agriculture” standard, Mr. Samad’s winery at issue in *Craven* would not qualify as a commercial activity in conjunction with farm use. The *Craven* opinion indicates that Mr. Samad’s property was a hayfield before he planted his vineyard and sought approval for his winery. The cultivation of hay is, of course, agriculture, which means that none of the retail activities at Mr. Samad’s winery could be “essential” to the practice of agriculture on his property. Fortunately for Oregon’s wine country, the Oregon Supreme Court did not adopt such a myopic view of the commercial activity standard. Rather, the Court’s opinion in *Craven* acknowledges the benefit of “increasing both the intensity and the value of agricultural products coming from the same acres” as well as the importance of visitor activities that “cause others to come to the area and buy the produce of the vineyards . . .” Most important in terms of Oregon’s land use system, the *Craven* standard recognizes that the successful marketing of high-value farm products “reinforce[s] the profitability of [vineyard and winery] operations and the likelihood that agricultural use of the land will continue.” *Craven*, 308 Or at 289. The Board therefore concludes that *Craven* precludes application of *City of Sandy* in the way that the Opponents desire.¹

Ms. Daniels’ interpretation of *City of Sandy* is particularly puzzling given that her agency approved Yamhill County’s commercial activity definition shortly after LUBA issued the *City of Sandy* decision. At the November 11 hearing, Stoller’s attorney introduced documents into the record showing the respective dates of LUBA’s decision in *City of Sandy* as well as this Board’s

¹ A close reading of *City of Sandy* reveals that not even that case supports the Opponents’ proposition. In *City of Sandy*, LUBA quoted *Craven* at length and then concluded that “[s]o long as the nonfarm related aspect of the venture, such as the sale of souvenirs, is both incidental and supportive of the primary purpose, it is a permissible part of a commercial activity in conjunction with farm use.” LUBA then introduced the “essential to the practice of agriculture” standard and stated that this latter standard “was found to be satisfied by a winery . . .” *City of Sandy*, 28 Or LUBA at 321-22. *City of Sandy*’s “essential to the practice of agriculture” standard is therefore not as absolute as it may seem. This, of course, is somewhat confusing, which may explain why LUBA moved away from the *City of Sandy* standard in *Hiebenthal*.

approval of the County's commercial activity rules. These documents show that LUBA issued its *City of Sandy* opinion on November 23, 1994. The County did not adopt its rules governing commercial activities in conjunction with farm use until November 30, 1994. After that, DLCD had the opportunity to consider the County's rules in light of *City of Sandy* and to appeal the County's decision to LUBA. DLCD did not do so and the County's commercial activity rules were therefore considered "acknowledged" by LCDC. See ORS 197.625(1).² Instead, as Mr. Brandt testified on November 11, DLCD specifically endorsed the County's commercial activity rules in 1994 and has consistently supported them over the years until now. See audio of Nov. 11, 2011 hearing at 00:29:00.

FYC and Mr. Johnson also argue that Stoller's visitor events cannot be "in conjunction with farm use" because a winery is not a farm use. FYC and Mr. Johnson seek to segregate the grapes grown on the Stoller Property from the processing, sale and marketing on the same Property of wine made from those grapes. This argument misconstrues Oregon's EFU statutes, as well as *Craven*. As Stoller's attorney explained in his rebuttal testimony at the Board's November 11, 2011 hearing, the state EFU statutes define "farm use" in relevant part as:

the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops . . . "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use.

ORS 215.203(2)(a) (emphasis added). The state farm use definition thus incorporates the full economic life cycle of a farm crop into the "farm use" of the land. Grapes, of course, are a farm "crop," and wine is a "by-product" of that crop.³ The Board therefore concludes that commercial activity associated with a winery may qualify as "commercial activity in conjunction with farm use" under ORS 215.283(2)(a). This interpretation is consistent with *Craven*, where the Oregon Supreme Court determined that the sale of souvenirs at a winery qualifies as commercial activity in conjunction with farm use. *Craven*, 308 Or at 289.⁴

The County's acknowledged commercial activity rules reflect both the state farm use definition and *Craven*. In relevant part, the County's rules define a commercial activity in conjunction with farm use as "retail sales and promotion of agricultural products, supplies and

² This statute governing post-acknowledgment amendments to local land use regulations has not changed in relevant part since 1994. See 1993 Or Laws Ch. 792 Sec. 44 showing language in ORS 197.625(1) identical to present law.

³ LCDC's rules governing land uses on agricultural land similarly include processed farm crops within the definition of a "farm crop." See OAR 660-033-0130(23)(c).

⁴ FYC and Mr. Johnson appear to confuse the "farm use" definition at ORS 215.203(2)(a) with the lists of allowed EFU land uses in ORS 215.283. ORS 215.203(1) provides that EFU land "shall be used exclusively for farm use except as otherwise provided by ORS 215.213, 215.283, and 215.284." Under this provision, a use that is more specifically identified in the latter statutes must be sited according to the specific state standards governing that type of use, rather than as a generic "farm use." Here the question is not what siting standards govern a "commercial activity in conjunction with farm use," but rather the question is simply the meaning of that term. LCDC's rules governing agricultural land uses clarify that the ORS 215.203(2)(a) definition of "farm use" applies anytime the legislature uses the term "farm use" in ORS Chapter 215. OAR 660-033-0020(7)(a). A "commercial activity" under ORS 215.213(2)(c) or 215.283(2)(a), therefore, may be performed in conjunction with any endeavor that qualifies as a "farm use" under ORS 215.203(2)(a).

services directly related to the production, harvesting and processing of agricultural products.” YCZO 402.10B(2). This language bears a close relationship to the “farm use” definition discussed above as well as *Craven’s* endorsement of retail activities at wineries. The County follows its general definition of commercial activities with specific examples including wineries, parties, receptions, banquets and other events promoting farm products. The County’s inclusion of wineries here is a direct application of *Craven*. The County’s general allowance for events on farms that promote farm products is consistent with *Craven’s* approval of activities that encourage people to visit farms and make on-site purchases of farm products. The Board therefore concludes that the County’s commercial activity rules are consistent with *Craven* and that it is appropriate to apply these local rules alongside the *Craven* standard to Stoller’s proposed use.

In sum, the Board concludes that the Oregon Supreme Court’s decision in *Craven* provides the applicable criteria for determining whether Stoller’s visitor activities qualify as a commercial activity in conjunction with farm use under state law. LUBA reiterated the *Craven* standard in the *Hiebenthal* case, and this case supersedes LUBA’s earlier opinion in *City of Sandy*, at least in the winery context. The Board also concludes that, under the state EFU statutes and *Craven*, visitor activities at a winery may qualify as “commercial activities in conjunction with farm use” even though winery activities are one step removed from the actual viticulture on the land where the winery sits. Finally, the Board concludes that the County’s commercial activity definition is consistent with *Craven* and should be applied together with *Craven* to evaluate Stoller’s proposed use.

b. Stoller’s compliance with the state and local standards for commercial activity in conjunction with farm use

Stoller has explained that its winery business is rooted in the quality of its agricultural product. The Property includes over 180 acres of vineyards. Written and oral testimony from Mr. Stoller indicates that Stoller Vineyards prides itself on farming exceptional grapes through sustainable farming practices. Some of Stoller’s grapes are processed at the Stoller winery on the Property and others are sold to other local winemakers. Mr. Stoller’s letter from October 31 indicates that Stoller wine has received high ratings from leading wine critics for the past eight years and that Stoller grapes are used by some of the most successful producers of premium pinot noir in the County. Even opponent Russell Gladhart, who operates Winter’s Hill Vineyard, acknowledged that Stoller has “a well-deserved reputation for making excellent wine and grapes.” Audio of Nov. 11, 2011, hearing at 2:29:50. Mr. Stoller’s letter further explains that the success of Stoller’s vineyards and wines has allowed Stoller to steadily increase the vineyard acreage on the Property. Local wine tour operators Nicki Stokes and Ralph Stinton each testified as to the great interest that their respective customers have in viewing the Stoller vineyards and learning about Stoller’s viticultural methods. See audio of Nov. 11, 2011 hearing at 01:55:00-2:08:50.

Stoller has also presented evidence explaining the close relationship between its farm product and its wine marketing and retail activities on the Property. Specifically, Mr. Stoller’s November 11 letter details the four types of visitor activities that occur on the Property and how each promotes the Stoller wine brand and results in sales of Stoller wine. Although this

connection is self-evident in the case of wine tastings and wine club activities, it is less so with regard to the charitable, business and other community events held at the winery. Mr. Stoller though explained that these latter events help Stoller to attract people to the winery who may not otherwise visit and provide a unique platform from which to market wine. This testimony is corroborated by other evidence in the record, including a November 6 letter from Daniel Somerfield of Willamette Shakespeare. In this letter, Mr. Somerfield explains that “[w]hen someone has the opportunity to sit in a picturesque Oregon vineyard and experience a quality theatrical event with a glass of wine in hand, they leave with a much richer experience and a much deeper commitment to the winery and the region.” Finally, testimony from Mr. Stoller indicates that wine industry events currently held on the Property such as the International Pinot Noir Celebration dinner promote not only Stoller wine, but other local vineyards and wineries.

The evidence indicates that Stoller’s proposed plan for visitor activities and events is very similar to its current activities and events on the Property. Stoller proposes to increase the number of these functions from 37 to 44, but does not propose events that are different in character from those described above. FYC contended in its November 10 letter and oral hearing testimony that Stoller intends to “double-dip” on events by gaining approval for 44 events through this application and then using HB 3280’s allowance of 25 “private events” to host additional events on the Property. This allegation is not supported by the record. Stoller’s attorney addressed this issue in his November 2 letter, stating in footnote 1 that “Stoller’s CUP application accurately reflects its proposed use and Stoller chooses to submit to the County’s conditional use process to secure approval for its proposed use in the form of a CUP.” Mr. Stoller reiterated this in his oral hearing testimony. Nevertheless, the Board has imposed Condition #16 to limit the total number of events on the Property, Condition #15 to require annual reporting regarding income from events and Condition #17 to enable enforcement of the terms of Stoller’s CUP. The Board finds that these conditions are adequate to prevent the “double dipping” situation feared by FYC.

Substantial evidence presented by Stoller and its supporters also demonstrates the wine marketing value of serving food at winery events. A 2011 study of the economic impact of the Oregon wine industry presented by Stoller describes how the Oregon wine industry has benefitted from the growing demand for gourmet food. Mr. Munch’s written and oral testimony reinforces the conclusions of this study. Wine tour operator Mr. Stinton testified that offering catered food at winery activities enhances visitors’ appreciation for wine and their overall winery experience. The Board therefore finds that Stoller’s proposed food service is intended to promote Stoller wine and can be reasonably expected to enhance Stoller’s wine marketing efforts.

FYC’s contention that Stoller essentially seeks to operate a full-service restaurant on the Property is not supported by the record. Stoller requested only the ability to provide meal service at 44 events and has agreed to limit meals prepared in the on-site kitchen to 72 guests per event. The July 28 letter submitted by Mr. Munch on behalf of Stoller also states that Stoller will not offer menu options for food served at events. Finally, Stoller has consistently stated that food service with regular wine tastings will be limited to that required by law. See May 31 and July 18 letters from Mr. Munch and October 31 letter from Mr. Stoller. The Board therefore finds that FYC’s fears of a restaurant on the Property are unfounded. The Board further finds that the

conditions placed by this approval on the number of events with food service will sufficiently limit food service to that which supports the sale and marketing of Stoller's agricultural product.

The Board has also imposed a limit on the income that Stoller may generate through visitor activities other than wine sales. This limit, which is derived from ORS 215.452, is 25 percent of the gross income that Stoller generates from on-site sales of wine produced in conjunction with the winery. FYC argued that Stoller's advertised site rental fees and likely food charges indicate that Stoller cannot comply with this condition. Mr. Stoller and Stoller Events Director Grace Cargni both testified on November 11, however, that Stoller often waives its site rental fee and that Stoller often does not receive payment for food service because food arrangements are made between a caterer and patrons of the winery. Mr. Stoller further testified that Stoller's annual income from event fees is less than \$6,000. The Board therefore finds that it is feasible for Stoller to comply with the income limitation in this approval. The Board also finds that the annual reporting condition in this approval will ensure the enforceability of the income condition.

Based on the evidence discussed above, the Board finds that Stoller's proposed visitor facility and activities have a strong relationship to the agricultural activity of viticulture, both as occurs on the Stoller Property and in the surrounding area. The Board further finds that Stoller's proposed use can be expected to promote Stoller's grapes and further enhance the value of Stoller's vineyards and other local vineyards. These are the criteria set forth by the Oregon Supreme Court in *Craven* and in the County's commercial activity rules. The Board therefore concludes that Stoller has demonstrated compliance with the commercial activity in conjunction with farm use standard, as stated in ORS 215.283(2)(a) and YCZO 402.04G and 402.10B.

4. *ORS 215.296/YCZO 402.07A: the use may not force a change or increase the costs of local farming practices*

Both state and County law require Stoller to demonstrate that its proposed use will not force a change or increase the cost of surrounding farming practices. All EFU conditional uses listed in ORS 215.283(2) must meet the standard set by ORS 215.296. The County imposes an identical standard at YCZO 402.07. This standard is the following:

1. The use will not force significant change in accepted farming or forest practices on surrounding lands devoted to farm or forest use.
2. The use will not significantly increase the cost of accepted farming or forest practices on surrounding lands devoted to farm or forest use.

The Board first finds that the "surrounding lands" for the purposes of this standard is the area depicted on the large satellite map prepared by the County Staff and placed into the record at the November 11 hearing. This map depicts the full Property, lands adjacent to the Property, as well as additional parcels that share the common access of McDougall Road. These are the lands that have the potential to be impacted by Stoller's proposed use, either because they are

physically nearest to the Stoller Property and/or they may use McDougall Road for farm activities during times when visitors to Stoller winery are entering or exiting the Stoller Property along that road. It is also possible that farm use could take place along Stoller Road between McDougall and Highway 99, and this is a stretch of road that may also be used by winery visitors when traveling to or from the Stoller Property. The Board therefore considers this part of Stoller Road to also constitute "surrounding lands." As described above, the farming activities on these surrounding lands include viticulture, nursery stock and hay production, and other small farming uses associated with rural residential parcels.

Substantial evidence in the record demonstrates that Stoller's proposed use will not force a change or increase the cost of local farming practices. As noted above, Stoller's proposed visitor activities are very similar to those currently occurring on the Property. The Board received four letters from individuals who live on and farm land neighboring the Stoller Property. All of these letters state unequivocally that Stoller's visitor activities do not impact their farming operations and that they do not expect Stoller's proposed use to create an impact. The September 21 Staff Report and Mr. Brandt's hearing testimony also indicate that Stoller's visitor activities thus far have occurred without impact to local farming activities.

FYC, Mr. Johnson and Tim Stieber of the Yamhill Soil & Water Conservation district all generally assert that visitor activities at wineries can create impacts on local farms. None of them produced any evidence, however, that Stoller's visitor activities have or will create agricultural impacts. Russell Gladhart, who joined FYC in appealing to this Board, testified to the contrary at the hearing. Specifically, Mr. Gladhart stated that Stoller is a "very good neighbor" and that he is not concerned that Stoller's proposed use will interfere with his property. See audio tape of Nov. 11, 2011 hearing at 2:13:00.

The Board did receive one letter that appears to express concern regarding conflict between winery visitor activities and wine grape harvest on McDougall Road. A letter from Jim Kreuzbender states that "farm trucks, trailers and machinery" on McDougall road cause him to drive on the shoulder of that road. Mr. Kreuzbender's principal concern, therefore, appears to be with the farm uses protected by state and local law rather than with visitors to Stoller winery. Mr. Kreuzbender also states, however that "I've got grapes to move" and that "[a]n event center with lots of exiting vehicles is a recipe for disaster, but it would be especially problematic at grape harvest time." Although it is not entirely clear from this letter that Mr. Kreuzbender farms grapes on McDougall Road, that inference can be drawn from his comments. The Board however does not find Mr. Kreuzbender's general fear of Stoller event traffic on McDougall Road persuasive given the more specific letters from Stoller's neighbors described above. Mr. Kreuzbender's traffic comments are also contradicted by other testimony in the record, which is discussed in more detail in Findings C5(d) and (e) below. Finally, in response to a question at the hearing from Commissioner George regarding Mr. Kreuzbender's letter, Mr. Stoller testified that Stoller's vineyard and winery staff ensure that visitor events do not conflict with harvest and other agricultural activities. See audio of Nov. 11, 2011 hearing at 3:29:00.

For the reasons stated above, the Board finds that Stoller's proposed use will not force a change or increase the cost of farming practices on surrounding lands. Stoller has demonstrated its compliance with ORS 215.296 and YCZO 402.07.

5. *County conditional use criteria*

- a. *YCZO 1202A: The use is listed as a conditional use in the underlying zoning district*

Stoller has applied for approval as a commercial activity in conjunction with farm use. The Board finds that this use is listed as a conditional use in the EFU zone under YCZO 402.04G. For the reasons described in Finding C3 above, the Board concludes that Stoller's proposed use falls within the definition of this use under state and County law.

- b. *YCZO1202B: The use is consistent with those goals and policies of the Comprehensive Plan which apply to the proposed use*

The September 21, 2011, Staff report identifies two comprehensive plan provisions that the Staff deems applicable to Stoller's CUP application. The first provision, I.F, Goal 1, Policy (B), encourages economic development that does not conflict with the timber and agricultural character of the county. Second, the Staff cites Section I.G., Goal 1, Policy (E) encouraging tourist commercial uses to locate in existing urban centers.

In his November 2, 2011, letter, Stoller's attorney argues that neither of these two comprehensive plan provisions constitute applicable criteria because they merely encourage rather than mandate particular behavior. Stoller contends that Oregon courts have held that comprehensive plan provisions that merely set a policy direction or "encourage" action are not applicable criteria in land use permit applications. Stoller cites *Bennett v. Dallas*, 96 Or App 645, 647-49 (1989) as an example of such a case.

The Board finds that the two comprehensive plan policies cited by staff are not directly applicable to this quasi-judicial application. These policies encourage the county to set a policy direction, they are not mandatory standards to be applied in this quasi-judicial case. The policy direction called for in these policies has been incorporated into the County's adopted zoning code that applies in this case. Therefore, the policy direction called for in these policies is already reflected in the relevant approval criteria. In the alternative, if these policies do directly apply, the Board finds as follows:

As the Oregon Supreme Court recognized in *Craven*, the preservation of farmland requires viable agricultural businesses. As Stoller has explained, the success of Stoller wine has enabled Stoller to plant more grapes on the Property and to employ 22 full time workers and 100 seasonal workers. Numerous individuals testified orally and in writing as to the positive impact that Stoller and other local wineries have on their businesses. Many of these individuals also described the beauty of the Stoller Property and the care with which Stoller treats its farmland. The evidence therefore clearly indicates that Stoller's winery activities facilitate economic development that preserves the agriculture character of the County. The Board therefore finds that Stoller's current and proposed use is consistent with the economic development policy found at I.F, Goal 1, Policy (B) of the County Comprehensive Plan.

Several opponents of Stoller's proposed use argued that commercial activities at rural wineries stifle economic activity in the County's urban centers. In response, Stoller produced a

2011 economic study of the Oregon wine industry. Stoller interpreted the study to show that the Oregon wine industry creates 1.8 urban jobs for every rural job and that wine tourism generates considerable income for urban hotels, restaurants and retail stores. Although the study's conclusions may not be as clear as Stoller asserts, the study does show that local viticulture and wine production support a broad array of economic activity in Oregon, including in urban areas.

Additional evidence in the record demonstrates that Stoller's visitor activities support the County's urban businesses. For example, Stoller explained that local restaurants typically cater events held on the Property and that Stoller expects to continue this practice in the future. Stoller's events therefore do not compete with local restaurants but rather supply them with additional business. In addition, wine tour operators Ms. Stokes and Mr. Stinton both testified as to the significant number of out-of-town visitors who take advantage of local lodging in order to visit wineries such as Stoller. The Board therefore finds that Stoller's current and proposed use supports urban businesses. Stoller's proposed use is therefore consistent with Section I.G., Goal 1, Policy (E) of the County's comprehensive plan.

- c. *YCZO 1202C: The parcel is suitable for the proposed use considering its size, shape, location, topography, existence of improvements and natural features*

The Property comprises a total of 373 acres. The September 21 Staff Report indicates that the proposed new tasting room will be located approximately 200 feet from the nearest property line and that this location will significantly buffer the use from adjoining neighbors. As described above, the Board has received written and oral testimony from local wine business owners stating that the Property is aesthetically well suited for a visitor-oriented winery. Several neighbors have stated that the Stoller's operations do not disturb their respective properties or the local area. The large map of the area surrounding the Property also shows that the winery is a considerable distance from neighboring homes.

The site plan shows that the proposed facility is adjacent to the existing winery. Mr. Stoller and Mr. Munch explained at the hearing that the winery currently hosts tasting room visitors outside of the winery under a tent when weather permits, and the new building is intended to provide better facilities for visitors. Mr. Munch states in his July 28 letter that the new building is intended to fulfill the original plan for winery visitor facilities that was approved by the County in 2003 but scaled back by Stoller to due to economic constraints. Mr. Munch states in Stoller's May 31 CUP application that there are 11 fir trees on a knoll near the winery that will not be disturbed by construction of the new facility. This same letter indicates that there are no other significant natural features that will be disturbed by the construction.

For the reasons described above, the Board finds that the Property is suitable for the proposed use. The evidence in the record indicates that the size and geography of the Property insulate winery activities from surrounding properties and the proposed use will not be significantly more intensive than the current use. The proposed use will take place in the same location as the current use and therefore will not disturb land in agricultural use or significant natural features.

- d. *YCZO 1202D: The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zoning district*

Under this criterion, Stoller must demonstrate that its proposed use will not significantly impair or prevent the use of surrounding properties for the uses otherwise permitted on those properties under the zoning code. The Board finds that the “surrounding area” for the purposes of YCZO 1202D is the same as the “surrounding lands” defined in Finding C4 above. As we stated above, properties in this area are reasonably near to the Stoller Property and/or they are accessed via roadways also used by winery visitors when traveling to and from the Stoller Property. These properties therefore represent the area that could reasonably be impacted by Stoller’s proposed use.

The Board next finds that permitted uses in the surrounding area include agriculture, single-family residential homes and other uses permitted in the EFU and Agriculture/Forestry Small Holding zones. These properties could theoretically be impacted by physical damage from Stoller operations or nuisance activities on the Stoller Property, as well as by visitor traffic that interferes with access to surrounding properties or otherwise disturbs the character of the area.

The evidence in the record indicates that Stoller’s proposed use will not result in any physical damage or nuisance-type effects on property in the surrounding area. Stoller’s visitor activities will not physically impact any neighboring properties as visitor areas are a minimum of 200 feet from neighboring property lines. In addition, as stated above, the size and geography of the Stoller Property is such that no noise, visual nuisances or other effects of Stoller’s visitor activities will likely be noticed by individuals present on their properties in the surrounding area. Several of Stoller’s neighbors have testified as to the absence of these impacts and the Staff Report reaches this same conclusion.

Several opponents of the proposed use argued that Stoller’s proposed events will generate a large number of cars that will interfere with local traffic patterns on event days. FYC, for example, argued in its November 10 letter that “[a]fter a large event at Stoller ends, a hundred cars or more will leave Stoller’s more or less simultaneously” and that this will create “a recipe for disaster.” This argument, however, is contradicted by the written and oral testimony of Cal Kearns, who lives across McDougall Road from the Stoller Property and operates a business down the road at the intersection of McDougall, Highway 18 and Highway 99. Mr. Kearns testified that:

None of [Stoller’s] events have ever created a traffic problem or issue. At the end of events, I have personally witnessed from my house, watching the cars and vehicles leave Stoller winery and vineyard, they can come down the driveway. Yes, they can turn east and head down McDougall Road to the intersection and go out that way. They can continue on McDougall road to where the truck scales are on 99 and enter the highway there. I’ve seen many vehicles come down, turn right, and go down here to the Stoller Road, and turn south on 99W there. They can also turn north on

Stoller Road and go into Lafayette. They can continue on McDougall Road west towards Lafayette as well. I have witnessed the cars, as they come down, go several directions. Never have I seen a stack of cars stack up anywhere. At this intersection down here, yes, it is true—there can only be about three or four cars that can be there in a row before they begin to block some of the traffic on McDougall Road. Never have I witnessed that happen at the close of [an] event. In their statement, I believe that [FYC] said that a hundred or more cars can leave simultaneously, more or less. My personal experience is a lot less. Cars don't leave these events at the same time. An event doesn't close and, all of a sudden people go out and get into a hundred cars and drive down the driveway at the same time. It just doesn't happen. They leave the event sporadically, so it's never caused any kind of a problem or issue.

. . . True, McDougall corner here at 18, was, has been in the past, a difficult intersection with a lot of accidents. That changed dramatically about five years ago when ODOT no longer allows traffic to come across Highway 18 and cross Highway 99 off McDougall Road. They must go down there now. That really reduced the traffic accidents

Audio of November 11, 2011, hearing at 3:15:20.

Mr. Kearns' testimony regarding the lack of traffic impacts from Stoller's visitor activities is consistent with the comments of several other neighbors and local businesses. For example, Bern and Janice Coleman of Stoller Road wrote on November 7, 2011, that "[t]here have been no negative traffic issues relating to all vineyard events and activities and we do not expect that any future improvements or additions to the vineyard will create traffic issues in the future" Another neighbor, Anthony Bernards, wrote on November 7, 2011, that:

As a lifelong resident of this area and also a farmer who farms next to [Stoller] vineyard I have found the activities that the vineyard holds are well planned with no effect on our farming practices and I have not seen any traffic or other problems created by these activities.

Wine tour operator Nicki Stokes offered similar testimony at the hearing:

I'd say for bringing-having more traffic on the road because of this happening, it's just impossible. The only reason there's more traffic on the road is when the semis tip over and the [Highway] 99 gets closed, and then people are required to go onto McDougall Road. But other than that I never—I'm there every day, I never see anyone on that road. Literally, nobody is on that road.

Audio of November 11, 2011, hearing at 1:58:48.

The November 9 analysis of a Group MacKenzie traffic engineer supports this testimony. Specifically, the engineer concluded that “[t]he proposed conditional use application will not significantly impact the adjacent roadway infrastructure . . .”

Based on the evidence described above and additional evidence in the record, the Board finds that Stoller’s proposed use will not impair or prevent uses permitted in the surrounding area. Stoller has demonstrated compliance with YCZO 1202D.

- e. *YCZO 1202E: The proposed use is appropriate, considering the adequacy of public facilities and services existing or planned for the area affected by the use*
 - i. *Local road intersections and infrastructure*

The Board finds that the “area affected by the use” includes the “surrounding lands” and “surrounding area” as defined by the Board in Findings C4 and C5(d) above for the same reasons as described in those Findings above. This area includes the following intersections: (1) McDougall Road-Highway 99; (2) McDougall Road-Stoller Road; and (3) McDougall Road-Highway 18-Highway 99. The “area affected by the use” for purposes of YCZO 1202E also includes the easternmost portion of McDougall Road up to and including its intersection with Highway 99 east of Breyman Orchards Road. The Board finds that that this area is relevant to this criterion because Mr. Munch and others testified that some vehicles heading eastbound from the Property choose that intersection as an alternative to the Highway 18 intersection.

FYC and others argue that Stoller’s events will overwhelm the Highway 18 intersection (also known as McDougall Corner) and create a dangerous condition. In addition, Mr. Kreuzbender argues that the intersections to Highway 99 from McDougall Road are generally difficult.

The County Engineer, Stoller’s architect and planning consultant Mr. Munch, and the Group Mackenzie traffic engineer all disagree that Stoller’s proposed use will impact these local intersections. Specifically, Mr. Munch’s October 31 traffic letter⁵ and hearing testimony explain in detail how the four access points to Highway 99 off McDougall Road result in light traffic in this area. Stoller produced County traffic counts that reinforce this analysis. Mr. Munch also stated that Stoller’s proposed visitor activities will not increase traffic flows in the local area because Stoller does not propose to host events on the Property larger than current events.

The testimony from Ms. Stokes, Mr. Kearns and other neighbors and local businesses supports the analysis of the County Engineer and Stoller’s representatives. Mr. Kearns’ above testimony in particular undermines FYC’s theory that cars will stack up at the Highway 18 intersection after Stoller events and cause drivers to make dangerous decisions.

⁵ There are two letters from Mr. Munch dated October 31, 2011, in the record. The first is a summary and interpretation of the economic study discussed in Finding C5(b). The second is the traffic-related letter referenced here. Both of these letters were attached as exhibits to Stoller’s November 2, 2011, response to the appeal.

FYC and others cite recent accidents near the Highway 18 intersection as evidence that public facilities are inadequate to support Stoller's proposed use. They specifically point to an accident involving a commercial semi-truck carrying tuna that occurred on a recent morning at the Highway 18 intersection. This accident closed Highway 99 for several hours. The description of this accident offered by all parties, however, makes clear that it was entirely unrelated to any wine event. Mr. Kearns and Ms. Stokes both explained that although commercial trucks have caused accidents by traveling too fast near McDougall Corner, accidents have not occurred in the area as a result of winery-related functions. Mr. Kearns and others including opponents Ellen and Tom Abrego testified that the recent redesign of the Highway 18 intersection has made the intersection substantially safer.

Finally, FYC expressed concern that the Oregon Department of Transportation ("ODOT") had not been notified of Stoller's application. County planner Ken Friday however testified that the Staff did indeed notify ODOT of the application, and ODOT chose not to comment. See audio of Nov. 11, 2011 hearing at 3:18:30. The Board therefore finds that ODOT does not oppose Stoller's proposed use.

In conclusion, the Board is persuaded by the above evidence that Stoller's visitor activities have not created an impact on local road infrastructure in the area affected by the use. In addition, the Board finds that Stoller's proposed use will not create greater traffic impacts than its current use because Stoller does not propose to increase the size of its events or significantly increase the number of its events. The Board therefore concludes that Stoller has satisfied YCZO1202E with regard to public road infrastructure.

ii Other public facilities

Mr. Munch's October 31 traffic letter and October 27 site plan calculate that Stoller is required to supply 65 parking spaces on the Property to support winery visitors and employees. Mr. Munch proposes to supply 89 parking spaces. No party disputes these figures. The Board therefore finds that Stoller will supply adequate parking for its proposed use.

As described above, Stoller has documented its various water rights that allow Stoller to supply water for the various uses on the Property. These water rights are undisputed. The Board therefore finds that Stoller has an adequate water supply for its proposed use.

Evidence in the record also demonstrates that Stoller has secured a permit to upgrade its septic system to serve its proposed use and has developed best management practices with the County Sanitarian to ensure adequate functioning of the system. A condition of this approval requires Stoller to limit the number of meals prepared in the on-site kitchen to 72 per event in order to protect the integrity of its septic system. The Board therefore finds that Stoller's proposed use with this condition will ensure adequate sewage disposal for the proposed use.

Finally, the Board finds that Stoller's fire suppression water reservoir and associated water right, in addition to service from the Dayton Rural Fire District provide adequate fire protection for the Property.

Based on the above findings, the Board concludes that Stoller's proposed use satisfies YCZO1202E.

- f. YCZO 1202F: The use is or can be made compatible with existing uses and other allowable uses in the area.*

The Board finds that for the purposes of this criterion, "the area" is the same as the "surrounding lands" and the "surrounding area" as defined by the Board in Findings C4 and C5(d) above for the same reasons as described in those Findings above. Based on the evidence described in Findings C4, C5(c) and C5(d) above, the Board finds that Stoller's proposed use is compatible with existing uses in the area. The Board therefore concludes that Stoller has satisfied YCZO 1202F.

6. YCZO 1101.02: Site design criteria

The Yamhill County Zoning Ordinance requires the County to consider a number of factors when reviewing site development plans. The Board discusses each of these factors individually below. The September 21 Staff Report found that Stoller satisfied the County site design criteria, but required Stoller to produce a parking plan for its proposed use. Stoller submitted this plan with additional site design information on November 2.

1. Characteristics of adjoining and surrounding uses

The Board described the characteristics of adjoining and surrounding uses in Findings A4, C5(d) and C5(e). For the reasons described in those findings above, the Board finds that adjoining and surrounding uses have been adequately characterized for site design review of Stoller's CUP application.

2. Economic factors relating to the proposed use

The Board described economic factors relevant to Stoller's proposed use in Findings C3(b), C4 and C5(b) above. For the reasons described in those findings above, the Board finds that economic factors support Stoller's proposed site design.

3. Traffic safety, internal circulation and parking

The Board first finds that Stoller's proposed use will ensure adequate traffic safety on the public roads affected by Stoller's proposed use for the reasons stated in Findings C4, C5(d) and C5(e) above. For purposes of this site design criterion, the Board incorporates its definition of the "area affected by the use" stated in Finding C5(e) above.

The September 21 Staff Report concluded that Stoller had proposed adequate internal circulation and parking but required Stoller to submit a more detailed parking plan for clarity. No party challenged the Staff's conclusion. Stoller subsequently submitted the required plan. The Board finds that Stoller has satisfied YCZO 1101.02(3) based on the Staff's comments, the

internal circulation and parking detailed in Stoller's October 27, 2011, site design plans and Mr. Munch's further explanation of these site plans in his October 31 traffic letter.

4. *Provisions for adequate noise and/or visual buffering from noncompatible uses*

Stoller's May31 CUP application asserts that no noise or visual buffering provisions are required due to the distance between the proposed visitor facility and neighboring properties. This assertion is supported by written and oral testimony from Stoller's neighbors, as discussed in Findings C4, C5(d) and C5(e) above. The Planning Director's approval includes a condition prohibiting the use of outdoor amplified music or sound for events. The Board therefore finds that Stoller has satisfied YCZO 1101.02(4) based on the above evidence and the sound amplification condition incorporated into this approval.

5. *Retention of existing natural features on site*

Mr. Munch states in Stoller's May 31 CUP application that there are 11 fir trees on a knoll near the winery that will not be disturbed by construction of the new facility. This same letter indicates that there are no significant natural features that will be disturbed by Stoller's proposed use. The Staff report concurs with Mr. Munch's assessment and no party disputes this conclusion. The Board therefore finds that Stoller's proposed use will not impact natural features on the Property and concludes that Stoller has satisfied this criterion.

6. *Problems that may arise due to development within potential hazard areas*

The Staff Report indicates that there are no hazard areas impacted by Stoller's proposed use and this conclusion is undisputed. The Board therefore finds that there are no potential hazard areas impacted by Stoller's proposed use and concludes that Stoller has satisfied this criterion.

7. *Comments and/or recommendations of adjacent and vicinity property owners whose interests may be affected by the proposed use*

The Board described the comments of local property owners in Findings C4, C5(c), C5(d), and C5(e) above. For the reasons discussed in these above Findings, the Board finds that Stoller and the County have adequately considered the comments of local property owners as they relate to site design. The Board therefore concludes that Stoller has satisfied this criterion.

D. Conclusion

For all of the reasons stated above, the Board finds that Stoller has or can comply with the approval criteria applicable to Stoller's application, and therefore Stoller's is hereby **approved** subject to the following conditions:

1. The number of persons allowed in any portion of the winery building shall not exceed the maximum number of person allowed pursuant to the occupancy permit for such portion of the winery building, if applicable.
2. The applicant may have up to forty-four (44) events per year. This includes nine single-day events where attendance is not to exceed 400 patrons; three, three-day events where attendance is not to exceed 400 patrons per day, one three-day event where the attendance will not exceed 300 patrons per day; 21 by invitation-only, single-day events where the attendance will not exceed 200 patrons; and ten, by-invitation-only single-day events where the expected attendance will not exceed 100 patrons. Catered meals may be served at any event. For the purposes of this conditional use application, an "event" shall mean an activity for gathering or combination of activities or gatherings with a common theme, organization, or purpose.
3. The events, whether public or private, are allowed only if those events are; 1) directly related to the sale and promotion of wine produced in conjunction with the winery; 2) incidental and subordinate to the retail sale of wine on-site; 3) hosted by the winery or by patrons of the winery; and 4) feature wine produced in conjunction with the winery. The events shall be held between the hours of 8:00 AM and 11:00 PM. The total number of persons permitted on the subject property at any one time, excluding staff, for any one event shall not exceed four hundred (400) persons.
4. Prior to operation of the events any building and septic permits necessary for use of an existing area/building for the events shall be obtained from the Yamhill County Building Department. These include, but are not limited to, occupancy and fire, life safety approvals, permits and inspections.
5. The applicant shall have a local contact phone number and designated person to respond to neighborhood concerns. The facility shall substantially conform to the site map submitted with the application. In addition, the applicant shall submit a parking plan, drawn to scale to accommodate the 400 patrons for the events and a minimum parking area of one car per 100 square feet of floor area plus one space for each employee on maximum working shift. No on-street parking is allowed. Said parking plan shall be reviewed and approved by the Yamhill County Planning Director.
6. Prior to operation of the events, the applicant shall provide a statement from the Public Works Director, or his representative, that the proposed development complies with Ordinance 787.
7. The use may have one on-premise sign of not more than 24 square feet.
8. The use of outdoor amplified music or sound for events is not permitted.
9. Meals fully or partially prepared in the tasting room kitchen shall not be served to more than 72 guests per event. On-site meal service shall be inspected by the Public Health

Department. Catered meals shall be prepared by a commercial caterer that is licensed and inspected by the Public Health Department.

10. This approval shall expire two years from the date of this letter unless the use has been initiated. This approval shall be void if the use is discontinued for over one year.
11. Prior to operation of the facility, the applicant shall obtain all permits required by the Oregon Liquor Control Commission (OLCC).
12. The use is personal to the applicant and does not run with the land.
13. Prior to initiation of the operation, the landowner shall sign an affidavit acknowledging the following declaratory statement and record it in the deed and mortgage records for Yamhill County:

“The subject property is located in an area designated by Yamhill County for agricultural uses. It is the county policy to protect agricultural operations from conflicting land uses in such designated areas. Accepted agricultural practices in this area may create inconveniences for the owners or occupants of this property. However, Yamhill County does not consider it the agricultural operator's responsibility to modify accepted practices to accommodate the owner or occupants of this property, with the exception of such operator's violation of state law.”

14. The applicant shall obtain any occupancy permit from the State Fire Marshall that may be required.
15. An annual report on the facility to show that it meets the conditions related to the events shall be filed with the Planning Director. A fee for such review may be imposed. The gross income from the non wine related activity may not exceed 25 percent of the gross income from the retail sale on-site of wine produced in conjunction with the winery.
16. Modification of any of the above conditions requires approval under Section 1202.05 of the Yamhill County Zoning Ordinance. Violation of any of the above conditions may result in revocation of the conditional use permit with the process detailed in Section 1202.07 and 1202.08 of the Yamhill County Zoning Ordinance.

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT

LUBA Case No. _____

and

OREGON DEPARTMENT OF
AGRICULTURE,

NOTICE OF INTENT TO APPEAL

Petitioners,

v.

YAMHILL COUNTY,

Respondent.

NOTICE OF INTENT TO APPEAL

I.

Notice is hereby given that Petitioners, Department of Land Conservation and Development (“DLCD”) and Oregon Department of Agriculture (“ODA”), intend to appeal Respondent Yamhill County’s land use decision designated Board Order 12-23 and entitled “IN THE MATTER OF DENIAL OF THE APPEAL OF A CONDITIONAL USE AND SITE DESIGN REVIEW FOR WINERY EXPANSION ON TAX LOT 4305-100 & 101 and 4308-100, APPLICANT ERNEST MUNCH REPRESENTING RED HILLS FARM LLC, PLANNING DOCKET C-15-11/SDR-14-11” which became final on January 5, 2012 and in which Respondent Yamhill County approved an application for a conditional use and site design review for winery expansion. A copy of the decision is attached hereto as Exhibit 1.

II.

1 NOTICE: Anyone designated in paragraph V of this Notice who desires to participate as
2 a party in this case before the Land Use Board of Appeals must file with the Board a Motion to
3 Intervene in this proceeding as required by OAR 661-010-0050.

4 DATED this 26th day of January 2012.

5 Respectfully submitted,

6 JOHN KROGER
7 Attorney General

8
9 _____
10 Steven Shipsey, OSB #944350
11 Erin Donald OSB #042730
12 Assistant Attorneys General
13 Of Attorneys for Department of Land
14 Conservation and Development and Oregon
15 Department of Agriculture,
16 State of Oregon
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF FILING

I hereby certify that on January 26, 2012, I filed the original NOTICE OF INTENT TO APPEAL, together with two copies, with the Land Use Board of Appeals, 550 Capitol Street N.E. Salem, Oregon, 97310, by hand delivery.

DATED this 26th day of January 2012.

Erin Donald OSB #042730
Steven Shipsey, OSB #944350
Assistant Attorneys General

CERTIFICATE OF MAILING

I hereby certify that on January 26, 2012, I served a true and correct copy of the NOTICE OF INTENT TO APPEAL on all persons listed in paragraphs III, IV and V and in Exhibit B of this Notice pursuant to OAR 661-010-0015(2) by first-class mail.

DATED this 26th day of January 2012.

Erin Donald OSB #042730
Steven Shipsey, OSB #944350
Assistant Attorneys General