



1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals an order of the Jackson County Board of  
4 Commissioners approving a conditional use permit for a winery.  
5 The winery was approved as a commercial activity in conjunction  
6 with farm use in an exclusive farm use district. Petitioner  
7 asks that we reverse the decision or, in the alternative,  
8 remand it to the County.

9 FACTS

10 The applicant proposes to establish a vineyard and winery on  
11 a 23 acre parcel zoned Exclusive Farm Use (EFU). The proposed  
12 winery is to be constructed before the accompanying vineyard is  
13 fully planted. The winery will process grapes grown on site  
14 and at other vineyards, but as the accompanying vineyard  
15 produces more grapes, the percentage of wine produced from  
16 those grapes will increase.

17 The proposed winery is to be constructed in two stages,  
18 with a total annual production capacity of 20,000 gallons. The  
19 first stage of approximately 7,500 gallon capacity is planned  
20 for this year, and the balance for 1994.

21 Attached to the approval are a number of conditions, one of  
22 which requires the applicant to plant no fewer than 12 acres of  
23 grapes within five years. The applicant plans ultimately to  
24 plant up to 18 acres of grapes. The conditions also limit  
25 retail sales at the winery to wine and other products produced  
26 or bottled on the premises with the exception of cork screws,

1 posters of the winery, wine books, postcards of the winery,  
2 glasses and T-shirts bearing the winery name and logo.

3 MOTION TO INTERVENE

4 The applicant, U. Andrew Samad, moves to intervene in this  
5 proceeding. There is no objection to the intervention, and it  
6 is granted.

7 MOTION TO AMEND PETITION FOR REVIEW

8 Petitioner requests the opportunity to file an amended  
9 petition for review under OAR 661-10-030(4). Specifically,  
10 petitioner requests that an amendment be allowed to include the  
11 full text of certain provisions of the Jackson County  
12 Comprehensive Plan and Zoning Ordinance and to clarify certain  
13 portions of the first assignment of error.<sup>1</sup> Petitioner also  
14 wishes to add discussion concerning application of Statewide  
15 Planning Goal 3 (Agricultural Lands) to this land use  
16 decision. We deny the motion.

17 OAR 661-10-030(1) provides that the petition for review  
18 must be filed 21 days after LUBA receives the record. The  
19 petition for review was filed within that time. The petition  
20 conforms in all major respects to the requirements of our  
21 rules. Further, the request to file an amended petition for  
22 review arrived at our office on June 7, 1988, only two days  
23 before the briefs of the respondents were required to be filed  
24 under OAR 661-10-035(1).

25 ORS 197.830(12), providing that our review must be  
26 completed within 77 days of the transmittal of the record,

1 implements the legislative policy that LUBA proceed quickly to  
2 resolve land use review proceedings. ORS 197.805. We do not  
3 believe this policy is served by allowing amendments to a  
4 petition for review where such amendments go to the substance  
5 of petitioner's arguments and are filed so close to the date  
6 respondents are required to file their briefs. To do so would  
7 effectively allow petitioner to add a new assignment of error  
8 to the petition 19 days after the deadline for filing the  
9 petition for review. This addition in turn would trigger a  
10 need to give respondents additional time to respond. Our  
11 review proceeding would be delayed. Under such circumstances,  
12 we believe allowing an amendment is inappropriate. Kellogg  
13 Lake Friends v. City of Milwaukie, LUBA No. 88-022 (Order on  
14 Motion to File an Amended Statement of Standing, June 13,  
15 1988). The motion to amend the petition for review is denied.

16 MOTION TO FILE A REPLY BRIEF

17 Petitioner also moves to file a reply brief to  
18 intervenor-respondent's brief. Permission to file the reply  
19 brief is granted. We note, however, that the reply brief filed  
20 includes an extensive discussion of the applicability of  
21 Statewide Planning Goal 3 and whether a goal exception has to  
22 be taken for conversion of the applicant's land to nonresource  
23 use. We do not consider this argument because it is neither  
24 relevant to the arguments included in the petition for review  
25 nor responsive to the issues raised in intervenor-respondent's  
26 brief.<sup>2</sup>

1           Petitioner also asked to file a reply brief to respond to  
2 the brief of the Department of Land Conservation and  
3 Development (DLCD). Petitioner was unaware of the DLCD brief  
4 until the day of oral argument. Permission to file a reply  
5 brief is granted.

6           FIRST ASSIGNMENT OF ERROR

7           "Jackson County improperly construed the applicable  
8 law by granting a conditional use permit for a  
9 commercial activity with farm use within an exclusive  
farm district, when the farm use to which the  
commercial activity relates has not been established."

10           Petitioner argues that a commercial winery may not be  
11 placed in operation before an accompanying vinyard produces  
12 grapes. Petitioner's premise is that a "commercial activity in  
13 conjunction with farm use" as provided in ORS 215.283(2)(a) and  
14 the Jackson County Land Development Ordinance does not  
15 contemplate allowing commercial activities on property which  
16 does not furnish the farm products for that commercial  
17 activity.

18           Petitioner recognizes that in Earle v. McCarthy, 28 Or App  
19 541, 560 P2d 665 (1977), the Court of Appeals held that a hops  
20 storage warehouse was acceptable as a commercial activity in  
21 conjunction with farm use in an EFU zone, even though the hops  
22 stored would be grown off-site and no farm use would occur on  
23 the subject property. Petitioner attempts to explain the  
24 apparent lack of a requirement for farm use of the subject  
25 parcel in Earle by citing Balin v. Klamath County, 3 LCDC 8  
26 (1979), wherein the applicant sought a zone change to establish

1 a farm implement dealership in an area currently zoned for  
2 agriculture and forestry uses. The Land Conservation and  
3 Development Commission construed the statutory authority in ORS  
4 215.213 to establish commercial activities in conjunction with  
5 farm use as follows:

6 "[t]he statute is not intended to allow the  
7 establishment of grocery stores and gas stations on  
8 agricultural lands solely because they are situated in  
9 a primarily agricultural area and serve primarily  
10 agricultural needs. However, it can and should be  
11 read to express the legislative judgement that  
commercial activities limited to providing products  
and services essential to the practice of agriculture  
directly to the surrounding agricultural businesses  
are sufficiently important to justify the resulting  
loss of agricultural land." 3 LCDC at 19.

12 Petitioner attempts to distinguish the winery proposed in  
13 this case from the commercial uses which the court and LCDC  
14 found acceptable as commercial activities in conjunction with  
15 farm use in Earle v. McCarthy, supra, and Balin v. Klamath  
16 County, supra, by suggesting that a winery which purchases  
17 grapes grown off-site and includes a wine tasting room and sale  
18 of wine-related paraphernalia may not properly be viewed as  
19 "essential to the practice of growing grapes." Petition for  
20 Review 8.<sup>3</sup>

21 Thus, petitioner likens the issue presented in this  
22 assignment to one we considered in Matteo v. Polk County, 11 Or  
23 LUBA 259 (1984). In that case, we considered ORS 215.283(1)(f)  
24 permitting a dwelling "customarily provided in conjunction with  
25 farm use" in an EFU zone. We held that such a dwelling could  
26 not be allowed before establishment of farm use on the subject

1 property. Id. at 263.

2 The Department of Land Conservation and Development and  
3 respondent Jackson County disagree. DLCD argues ORS 215.283(2)  
4 allows the establishment of certain nonfarm uses in exclusive  
5 farm use zones subject to the approval of the local governing  
6 body. DLCD claims that there is no need to establish a farm  
7 use of the subject property prior to siting nonfarm use on the  
8 same property under ORS 215.283(2)(a) provided (1) the proposed  
9 use is a commercial use in conjunction with farm use and (2)  
10 the applicant complies with the standards imposed by the local  
11 government.

12 DLCD supports its argument by citing Earle v. McCarthy,  
13 supra. In that case, the court considered whether all of the  
14 products stored in a warehouse in an exclusive farm use zone  
15 had to come from the parcel on which the warehouse was to be  
16 located. The court said:

17 "It is subsection (b) that plaintiffs erroneously  
18 contend is limited to on-site produce. To the  
19 contrary, since "commercial activities that are in  
20 conjunction with farm use" is designated by the  
21 ordinance and the statute as "nonfarm use," then it  
22 must allow something more than what would be allowed  
23 as a "farm use." It is reasonable, therefore, to  
24 construe the term as including a warehouse for the  
25 commercial storage of agricultural products of lands  
26 other than that on which the warehouse is located.  
Accordingly, we hold that such a use is a permitted  
conditional use in an EFU zone." (Emphasis added).  
Id. at 542.

24 DLCD argues that under the court's decision in Earle v.  
25 McCarthy, the winery may process grapes grown on land other  
26 than that on which the winery is to be sited.

1 DLCD distinguishes our decision in Matteo v. Polk County,  
2 supra. DLCD notes that ORS 215.283(2)(a) does not have the  
3 words "customarily provided" found in ORS 215.283(1)(f). DLCD  
4 suggests that the "customarily provided" language in  
5 215.283(1)(f) signifies a more stringent requirement; viz, that  
6 the farm use to which the dwelling relates must exist before  
7 the dwelling may be constructed. DLCD argues that "farmers  
8 'customarily' locate their dwellings on the land they farm."  
9 Brief of DLCD at 6.

10 DLCD also argues that commercial activities are in  
11 conjunction with farm use if they provide products or services  
12 essential to the general practice of agriculture in the  
13 surrounding area, not simply the subject parcels. Therefore, a  
14 winery which is in conjunction with farm use may process grapes  
15 grown on sites other than the one upon which the winery is  
16 located.<sup>4</sup>

17 As noted by respondent-intervenor Samad, the "commercial  
18 activities that are in conjunction with farm use" language in  
19 Section 218.040(1) of the Jackson County Code and the similar  
20 language in ORS 215.213(2)(c) and 215.283(2)(a) suggest that  
21 the commercial activity and the farm use are joined together  
22 for a common purpose. It is not necessary to read the local  
23 ordinance and the statutes to require that the grapes and the  
24 final processing facility be located on the same parcel.  
25 Indeed, in Earle v. McCarthy, supra, the Court of Appeals  
26 implicitly rejects such a requirement.

1 We believe Earle provides direct support for the county's  
2 position that a winery in an exclusive farm use zone may  
3 process grapes grown off-site and is not required to be  
4 accompanied by farm use of the parcel on which the winery is  
5 located. The Balin case similarly recognizes that commercial  
6 activities may serve agriculture in the surrounding area and  
7 makes no mention of any requirement that farm use occur on the  
8 subject parcel. See Balin v. Klamath County, 3 LCDC at 19. In  
9 this case, the applicant's winery will process and market wine  
10 produced from grapes grown in the area, eventually to include  
11 grapes grown on the subject parcel itself.

12 We conclude that neither ORS 215.283(2)(a) nor the county  
13 code requires that farm use of the subject property be  
14 established prior to approval of a commercial activity in  
15 conjunction with farm use. The county did not misconstrue the  
16 applicable law in granting a conditional use permit for the  
17 proposed winery prior to the production of grapes on the  
18 property.<sup>5</sup>

19 The first assignment of error is denied.

20 SECOND ASSIGNMENT OF ERROR

21 "Jackson County's decision is not supported by  
22 substantial evidence in the whole record, in that  
23 Petitioner was not permitted to substantiate evidence  
placed in the record before the Planning Commission."

24 Petitioner complains as follows:

25 "Petitioner raised an objection to the proposed winery  
26 application based on his concerns over traffic safety  
at the Planning Commission hearing on January 18, 1988  
(R-067). Petitioner attempted to submit a copy of

1 police traffic reports during the Board of County  
2 Commissioner's hearing on the proposed application to  
3 substantiate his prior objection (R-018). Without the  
4 use of the police accident report the Board of County  
5 Commissioners was unable to make an informed decision  
6 regarding the impact of additional traffic on the  
7 surrounding area and public safety." Petition for  
8 Review at 12.

9 The county responds that the appeal before the board of  
10 commissioners was on the record established before the planning  
11 commission. Respondent county notes that its ordinance at  
12 Section 285.020(9) provides that

13 "[a]ppeals shall be heard and considered only on the  
14 record of the decision from which the appeal is taken,  
15 and the arguments of the parties confined to that  
16 record and the issues raised in the statement of  
17 appeal. \* \* \* If an evidentiary public hearing has  
18 not been held, the record shall, for the purposes of  
19 an appeal, consist of: the application, the decision  
20 of the Department, supporting documentary evidence  
21 placed in the file by the applicant and staff prior to  
22 the decision being mailed; and the appeal statement  
23 filed pursuant to Section 285.020(6)."

24 An evidentiary hearing was held before the planning commission.

25 We understand respondent to argue that the county is not  
26 obliged to admit additional evidence. ORS 215.422(1) grants  
the county authority to prescribe local appeal procedures. We  
find no error as alleged, because the county board of  
commissioners acted in accordance with the procedures specified  
in its ordinance when it declined to consider petitioner's  
evidence.

The second assignment of error is denied.

The decision of Jackson County is affirmed.

FOOTNOTES

1  
2  
3 1  
4 Petitioner also argues the amendment is needed to correct  
5 erroneous citations to certain comprehensive plan provisions.  
6 We do not believe any amendment is necessary. Petitioner's  
7 argument and the applicable law are quite clear from the  
8 original petition.

9  
10 2  
11 We note petitioner argues in his reply brief that the  
12 applicant should have provided compelling reasons and facts  
13 that demonstrate an exception was justified for his use. This  
14 language suggests petitioner believes an exception is necessary  
15 for the proposed use. If petitioner wished to make such an  
16 argument, petitioner should have included it in the petition  
17 for review. Petitioner may not make the argument for the first  
18 time in his reply brief.

19  
20 3  
21 We interpret this portion of petitioner's argument as  
22 limited to distinguishing the proposed use in this case from  
23 those in Earle v. McCarthy and Balin v. Klamath County, supra.  
24 We do not read petitioner's first assignment of error to claim  
25 the proposed winery is not a "commercial activity in  
26 conjunction with farm use" as defined in ORS. 215.283(2)(a), as  
long as it follows, rather than precedes, establishment of a  
vineyard on the property.

27  
28 4  
29 In addition to DLCD's argument, the county argues the  
30 record shows wineries "customarily" accept and process grapes  
31 from vineyards on other parcels. Record 6.

32  
33 5  
34 Intervenor-respondent Samad argues that a winery is a farm  
35 use under 215.203(2)(a). ORS 215.203(2)(a) provides that a  
36 farm use includes "preparation and storage of the products  
37 raised on such land for human use and animal use and disposal  
38 by marketing or otherwise." Respondent-intervenor argues that  
39 because the winery will rely on its own grapes and grapes grown  
40 locally, the making and marketing of wine is a farm use under  
41 the statute.

42  
43 We do not reach this question as the county did not in fact  
44 determine that the proposed winery is a farm use. However, we

1 note that the winery will also sell wine-related  
2 paraphernalia. We have some question as to whether the sale of  
3 the related paraphernalia could be considered part of disposal  
4 of the eventual grape product.  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26