BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK J. GREENFIELD,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent,

and

BELLA ORGANICS LLC, MIKE HASHEM,
ELIZABETH HASHEM, JOHNNY KONDILIS-HASHEM,
and SOFIA KONDILIS-HASHEM,
Intervenors-Respondents.

LUBA No. 2012-102

BELLA ORGANICS LLC, MIKE HASHEM,
ELIZABETH HASHEM, JOHNNY KONDILIS-HASHEM,
and SOFIA KONDILIS-HASHEM,
Petitioners,

vs.

MULTNOMAH COUNTY,
Respondent,

and

MARK J. GREENFIELD,
Intervenor-Respondent.

LUBA No. 2012-103

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Mark J. Greenfield, Portland, filed a petition for review and a response brief and argued on his own behalf.

Ty K. Wyman, Portland, filed a petition for review and a response brief and argued on behalf of petitioners Bella Organics, LLC et al. With him on the brief was Dunn Carney Allen Higgins and Tongue, LLP.

Jed R. Tomkins, Assistant County Attorney, Portland, filed a response brief and argued on behalf of respondent.

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

RYAN, Board Member, concurring.

REMANDED 06/19/2013

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

Opinion by Holstun.

NATURE OF THE DECISION

In these consolidated appeals petitioners challenge a county decision that approved modifications to a previously approved permit for a farm stand on exclusive farm use (EFU)-zoned land located on Sauvie Island.

INTRODUCTION

This appeal presents issues of statutory, administrative rule and zoning code interpretation concerning ORS 215.283(1)(o), OAR 660-033-0130(23) and Multnomah County Code (MC) 34.2625(G), all of which authorize "farm stands" on EFU zoned land. The central questions presented in this appeal concern whether "farm to plate dinners," "food carts," and "fee based small-scale gatherings such as birthday parties, picnics and similar activities," which are authorized by the challenged county decision, are permitted under the statute, rule and zoning code, all of which authorize "fee based activity to promote the sale of farm crops or livestock sold at [a] farm stand." At the threshold those might appear to be relatively straightforward questions. But as we explain below, they are anything but straightforward questions.

Our focus in this opinion is on OAR 660-033-0130(23) (the farm stand rule or the rule), which elaborates slightly on the statute, but is otherwise identical to the statute.[1] The relevant text of the rule is set out in the margin, omitting some of the farm stand rule's text that is not in dispute.[2] We attempt to restate the rule below in a way that may be a little

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[1] As far as we can tell, MC 34.2625(G) is identical to the rule.

[2] OAR 660-033-0130(23) provides, in relevant part:

"A farm stand may be approved if:

"(a) The structures are designed and used for sale of farm crops and livestock grown on the farm operation, * * * including the sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock sold at the farm stand if the

easier to follow than the rule itself. Under the rule, a farm stand may be approved, with the following limitations:

a. Farm stand structures must be designed and used for sale of **farm crops and livestock** grown on the farm operation.

1. **A farm stand may include** the sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock sold at the farm stand.

2. **Farm crops and livestock include** both fresh and processed farm crops and livestock.

3. **Processed crops or livestock include** jams, syrups, apple cider, animal products and other similar farm crops and livestock that have been processed and converted into another product.

4. **Processed crops or livestock does not include** prepared food items.

b. Farm stand structures may not be designed for:

1. Occupancy as a residence.

2. **Activities other than the sale of farm crops and livestock**.

3. **Banquets**.

4. Public gatherings.

5. Public entertainment.

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annual sales of the incidental items and fees from promotional activity do not make up more than 25 percent of the total annual sales of the farm stand; and

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

"(c) As used in this section, 'farm crops or livestock' includes both fresh and processed farm crops and livestock grown on the farm operation * * *. As used in this subsection, 'processed crops and livestock' includes jams, syrups, apple cider, animal products and other similar farm crops and livestock that have been processed and converted into another product but not prepared food items."

c. Annual sales from incidental retail sales and fees from promotional activity ((a)(1) above) must not make up more than 25 percent of the total annual sales of the farm stand.

To summarize, there are four main parts to the above farm stand rule. First, the farm stand rule authorizes structures that are "designed and used for the sale of farm crops and livestock" that are grown on the farm where the farm stand is located.[3] Second, the rule then authorizes two incidental uses that may accompany the sale of farm crops and livestock at a farm stand ("[1] sale of retail incidental items and [2] fee-based activity to promote the sale of farm crops or livestock sold at the farm stand"),[4] and to make it clear that farm crops and livestock includes both "fresh and processed farm crops and livestock," but does not include "prepared food items." Third, the rule specifically provides that farm stand structures may not include structures that are designed for "activities other than the sale of farm crops and livestock," and further prohibits structures designed for "banquets, public gatherings or public entertainment." Finally, the rule limits annual sales from incidental retail sales and fees from promotional activity to no more than 25 percent of the total annual sales of the farm stand. This requirement apparently was imposed to ensure that the sale of farm crops and livestock is the main or primary purpose of farm stands, rather than the activities that may be carried out to promote the farm stand. In this opinion we refer to this requirement as the 25 percent rule.[5]

FACTS

The 2012 county hearings officer's decision that is the subject of this appeal affirms a planning director decision that approves modifications to an existing farm stand permit. In

[3] The statute, rule and code also authorize sale of crops from "farm operations in the local agricultural area." Because that language is not in dispute, we have omitted any discussion of it to simplify this opinion.

[4] The parties refer to this clause of the statute as the promotions clause of the farm stand rule.

[5] To be clear, the 25 percent rule requires that the total sales of incidental retail items and fees from promotional activities—expressed as a percentage of total sales at the farm stand—must be no more than 25 percent.

one of these consolidated appeals, petitioner Greenfield (Greenfield) contends the approved modifications allow activities that are not permitted by the farm stand statute and rule. Petitioner Bella Organics, LLC (Bella), the permit holder, and others appeal the same decision in the other appeal, assigning error to several of the permit's conditions of approval.

Pursuant to a 2007 farm stand permit, which was modified in 2008, Bella was granted permission to operate a farm stand to sell farm products, "incidental" items, and "prepared food from the farm stand." Record 1057. That permit also authorized up to three fee-based special events. The project description also provided that "[d]uring special events, a mobile food car[t] or food booths will be used to promote the organic produce of the farm." Record 1061. Following approval of the 2007/2008 permit, Bella's farm stand engaged in a number of activities that went somewhat beyond the 2007/2008 permit approval.

In 2011, Bella and the county entered into a voluntary compliance agreement concerning activities at Bella that were not authorized by the 2007/2008 permit. Those activities included: "a for-fee corn maze," "[f]or-fee farm tours and field trips," [f]or fee Cow Train or Jumping House/bouncy House," "[f]or fee farm dinners," "[r]ental of the property for group parties and activities," "[f]or fee cooking classes," and a "festival to occur in August 2012." Record 1050-51. The voluntary compliance agreement required that Bella submit an application to modify its permit to authorize the "specific for-fee activities." Record 1052.

In 2012, Bella submitted an application to modify the 2007/2008 permit. Among other things, Bella sought approval for "[f]ee-based farm stand activities including * * * small scale gatherings such as birthdays, picnics and similar activities to be conducted any time the farm stand is open for business." Record 867. The application also sought approval for "[f]ee-based farm–to–plate dinner[s], limited to a maximum number of 150 guests and limited to 45 events per year." *Id.* The planning director approved these activities and some,

but not all of, the additional modifications that Bella requested. Bella and opponents each appealed the planning director's decision to the county hearings officer.

After a hearing, the hearings officer affirmed the planning director's decision with some modifications. As relevant in this appeal, the hearings officer's decision included the following authorizations, restrictions and requirements:

Farm-to-plate dinners.	The hearings officer approved farm-to-plate dinners, but reduced the proposed maximum number of guests from 150 guests to 75 guests and reduced the proposed maximum number of events from 45 events per year to 20. For these farm-to-plate dinners, Bella would prepare all the food. The hearings officer authorized two more farm-to-plate dinners per year where the event would be catered. Record 40-41.
Small scale gatherings.	The hearings officer affirmed the planning director's approval for "small scale gatherings such as birthdays, picnics and similar activities." Record 41.
Tents.	Although somewhat unclear, Bella appears to have requested permission to use tents on the property in conjunction with the farm-to-plate dinners and with other activities. The hearing officer denied that request and required Bella to remove four tents that have been erected on the property. Record 42.
Wholesale Sales.	In demonstrating compliance with the 25 percent rule, the hearings officer required that any wholesale sales from the farm not be counted as sales of farm crops and livestock *from the farm stand*. As we explain later, this has the effect of reducing the total sales at the farm stand and therefore also reducing the amount of income that may be earned from incidental retail sales and fee-based promotional activity under the 25 percent rule. Record 43-44.
Accounting.	For each year, the hearings officer required that Bella prepare an annual report before May 1 of

	the following year setting out the percentage of farm stand income attributable to incidental retail sales and promotional activity. Record 44.
Permanent fence.	A condition of approval requires that an existing crossing of Gillihan Road be closed and fenced and that an existing driveway be permanently closed. Record 21.
Food Carts.	The 2007/2008 permit's authorization for food carts is carried forward and applied to the expanded number of special events.

FIRST ASSIGNMENT OF ERROR [GREENFIELD]

Greenfield's first assignment of error is that the hearings officer "fail[ed] to consider the text of ORS 215.283(1)(o) in its context" and that the hearings official "ignor[ed] or overlook[ed] relevant legislative history." Greenfield Petition for Review 9. We agree with the county that the first assignment of error, as alleged, provides no basis for reversal or remand. The hearings officer expressly considered the relevant statutory text and legislative history. Record 35-37. Greenfield argues under other assignments of error that the hearings officer *incorrectly* interpreted the relevant statutory text and misunderstood the relevant legislative history or its significance. We consider those arguments under those assignments of error.

Greenfield's first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR [GREENFIELD]

In these assignments of error, Greenfield assigns error to the hearings officer's decision to authorize farm-to-plate dinners. The issue presented in these assignments of error is whether the approved farm-to-plate dinners may be authorized under the statutory and rule language that authorizes "fee-based activity to promote the sale of farm crops or livestock sold at the farm stand." A related question is whether the prohibition against farm stand "structures for banquets" has any bearing on that issue.

A. The Hearings Officer's Decision

As noted earlier, Bella sought approval for up to 45 farm-to-plate dinners with up to 150 guests at each dinner. The Hearing Officer adopted the following findings in approving the request with modifications:

> "[Bella compares its] planned dinners to those referred to as 'Plate and Pitchfork' and 'farm to plate dinners'. Meals catered by restaurants for 150 guests held 45 times a year sounds like a banquet facility or a restaurant operated on summer weekends. The most significant difference between what [Bella] proposed and the 'blueberry café,' (a topic referred to in the legislative history of [2001 legislation amending ORS 215.283(2)(o)]) is the lack of a building, but [Bella is] even proposing that tents (structures) be allowed to protect the diners in the event of rain.
>
> "In a Declaration dated October 15, 2012, Johnny Kondilis, declared that Bella has not hosted a farm-to-plate dinner using a commercial catering company and that in a farm-to-plate dinner held exclusively for family and friends, Bella prepared all the food. In addition, Mr. Kondilis also declared that Bella intended to conduct future farm to plate dinners as follows:
>
> > "'Any dinner will include a tour of Bella's greenhouses and crop fields, as well as a cooking demonstration at which Bella will teach attendees about our produce and how they can prepare it in their kitchen. Food prepared as part of the demonstration will be consumed as part of the dinner. At the conclusion of each dinner, Bella will give each customer a basket of our fruits, vegetable[s], flower[s], cheese, milk, apple cider, jams and sauces.'
> >
> > "'The dinner will cost no more than $25.00 per dinner and $75.00 per box of produce.'
>
> "* * * Mr. Kondilis' statement that Bella would 'give' each customer a basket of our fruits[,] vegetable[s], flower[s] cheese, milk, apple cider, jams and sauces seems to contradict his later comment that each guest will be paying $25.00 for the fee based farm to plate promotional dinner and $75.00 for farm stand products.
>
> "As described by Mr. Kondilis, the Bella plan for farm to plate dinners seems much more like a fee-based promotional activity designed to promote the sale of farm crops or livestock at a farm stand rather than like a restaurant o[r] banquet facility.

"The large number of customers per dinner and the frequency of events still has the appearance of a weekend restaurant or banquet facility. I will approve the farm-to-plate dinners, but limit the number of dinners and guests. Condition 5(d) is amended to read as follows:

> "d. Farm-to-plate dinners shall be limited to a maximum number of 75 guests or less per dinner and limited to no more than 20 events per year for those dinners for which Bella prepares all the food. In addition, Bella may host no more than 2 catered farm to plate dinners for 75 guests or less per year. No farm-to-plate dinners may be held in the month of October." Record 40-41. (citations omitted).

To summarize, the hearings officer concluded that the proposed farm-to-plate dinners (catered, up to 150 guests, up to 75 events a year, possibly using tents) was essentially a banquet facility or restaurant operated on summer weekends and therefore impermissible under the farm stand statute. However, the hearings officer reasoned that if the farm-to-plate dinners were limited to 75 guests and 20 events a year with Bella preparing all the food, with no use of tents for the farm to plate dinners, they would be permissible as "fee-based activity to promote the sale of farm crops or livestock sold at the farm stand."[6]

Greenfield makes a six-part argument challenging the above findings. Four of those arguments reduce to an argument that the farm-to-plate dinners either are, or are functionally the equivalent of, a "banquet," or a "restaurant," neither of which are permissible as a farm stand under the statute and rule.[7]

The county answers that it agrees with Greenfield that both public and legislative concerns about banquets and restaurants on EFU-zoned land pervade the legislative history, but argues those concerns were resolved by the legislature's retention of a statutory prohibition on structures for banquets. The hearings officer rejected Bella's request to use

[6] The hearings officer's reasoning for allowing up to two additional catered farm-to-plate dinners is not apparent to us, but ultimately does not affect our resolution of these assignments of error.

[7] The other two arguments raise technical, procedural objections. Our resolution of Greenfield's substantive arguments makes it unnecessary to resolve those technical, procedural objections.

tents in conjunction with the farm-to-plate dinners and therefore, the county argues, the farm-to-plate diners do not violate the ban on banquet structures. The county also argues that to the extent Greenfield's concern is with the scale or frequency of the farm-to-plate dinners, the 25 percent rule is sufficient to limit the scale and frequency of the event.

B. Statutory and Legislative History

In determining the meaning of statutes we begin with the text and context of the statute but give due consideration of any relevant legislative history. *State v. Gaines*, 346 Or 160, 165-73, 206 P3d 1042 (2009). Below we set out the relevant statutory history and briefly discuss some of the legislative history that attended those statutory changes. We then return to the text of the statute and resolve these assignments of error, relying on both the text and legislative history.

1. 1993 Legislation

When the statutory language that now appears at ORS 215.283(1)(o) was first enacted in 1993, it was very similar to the current statutory language.[8] That 1993 statute, like the current statute, authorized sales of "incidental items," subject to the 25 percent rule, *see* n 5, and prohibited structures for "banquets, public gatherings or public entertainment.[9]

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[8] In a 1993 letter that is included in the supplemental record, DLCD took the position that a farm stand that simply sells farm products produced on the farm that houses the farm stand qualifies as a farm use, and no land use approval is necessary for such farm stands. Supplemental Record 69. But farm stands where a majority of the farm products come from other farms must be approved as a "commercial activity provided in conjunction with farm use," which is now authorized by ORS 215.283(2)(a). *Id*. DLCD took the position that "[b]oth types of farm stands may also allow the incidental sale of promotional items directly related to the farm crops and livestock sold on [the] farm." *Id*.

[9] The 1993 statute authorized farm stands, if:

> "(A) The structures are designed and used for the sale of farm crops and livestock grown on farms in the local agricultural area, including the sale of retail incidental items, if the sales of the incidental items make up no more than 25 percent of the total sales of the farm stand; and
>
> "(B) The farm stand does not include structures designed for occupancy as a residence or for activities other than the sale of farm crops and livestock and does not include structures for banquets, public gatherings or public entertainment."

However, while the 1993 version of ORS 215.283(1)(o) authorized sales of "incidental items," subject to the 25 percent rule, the version of the statute that was enacted in 1993 did not include the express authorization for "fee-based activity to promote the sale of farm crops or livestock sold at the farm stand," which appears in the current statute. One of the supporters of the 1993 legislation suggested that the elimination of any reference in 1993 to promotional activity may have been intentional:

> "The [original version of the] bill contained provisions for promotional events. That language was eliminated because such events are not land use issues. Activities such as school tours, fund raising events, and other limited duration events are accessory or incidental uses that promote the sales of farm crops raised on the farm and sold at farmstands.
>
> "Such promotional activities, if added to the statute could create the misconception that other unlisted activities would be prohibited.
>
> "Since the initial bill required such uses be allowed subject to review, I didn't want to create the perception that a local land use hearing was required every time a farmer wanted to schedule a school tour, harvest festival or similar activity which is an incidental promotional event for their farm operation.
>
> "Limited duration incidental public gatherings would be recognized as authorized activities, not regulated uses. The public's right to assemble for purposes of fund-raising, education or promotion of the sales of farm products is not an issue to be regulated by exclusive farm use zoning.
>
> "Should such occasional and incidental use become the predominant use of the farm, such uses either become a commercial activity in conjunction with farm use or home occupations, subject to county review. As long as such activities remain an incidental part of farm activities, there is no problem." Supplemental Record 64; Testimony, House Natural Resources Subcommittee on Environment and Energy, SB 675, June 29, 1993, Ex S (Statement of Senator Bob Kintigh).[10]

In its 1993 letter, DLCD had a somewhat similar, but cautionary view on the issue of promotional activities at farm stands:

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[10] We would note at this point, that while the proponent's view might be viewed as pragmatic, as this case demonstrates perceptions about whether promotional events are "occasional and incidental" or have become "predominant" can vary dramatically.

> "You have also asked whether temporary promotional events or agricultural festivals are allowed in an EFU zone. This is an issue that is very unclear under Oregon law. It is not even clear whether such activities are considered a 'land use decision' and subject to the land use statutes. Clearly, they are not specifically listed as an allowed use in ORS Chapter 215. Several counties treat them as mass gatherings and provide a separate non land use approval process for them. *This may be an appropriate issue for the legislature to clarify*. * * *" Supplemental Record 69-70 (emphasis added);

Although we cannot know for sure, it seems likely that so long as promotional activities were, in the words of Senator Kintigh "occasional" and "limited duration incidental," they were viewed as an acceptable part of a farm stand and were not particularly controversial. It is when such promotions became of a frequency, scale and type that called into question their status as "occasional" and "limited duration incidental" that likely led to legislative reactions, both positive and negative, to a more prominent role for promotional activities.

2. 2001 Legislation

Although the 1993 version of the statute did not include express authorization for or limitation on promotional events at farm stands, statutory amendments adopted eight years later in 2001 did include such authorization. But the 2001 statute (HB 3924), as initially proposed, would have made other very different changes to the farm stand statute that would have significantly expanded the types and intensity of promotional activities that are permissible at farm stands. As introduced, the amendments would have both eliminated the 25 percent rule and eliminated the prohibition on structures for "banquets, public gatherings or public entertainment." Supplemental Record 33. The A-Engrossed version of the 2001 legislation would have gone further and expressly authorized structures "for food service and banquets, public gatherings and public entertainment," with limits on capacity. *Id*.

Following numerous expressions of concern that the proposed legislation might allow amusement parks and restaurants on EFU-zoned lands and allow farm stands to become convenience stores and large event venues, the B-Engrossed version of the 2001 legislation retained (1) the 25 percent rule to limit retail and promotional activity income and (2) the

prohibition on structures for "banquets, public gatherings or public entertainment." But the B-Engrossed version added statutory authorization for "fee-based activity to promote the sale of farm crops or livestock sold at the farm stand." Supplemental Record 34.

The petition for review includes a lengthy discussion of the legislative history of the 2001 legislation, which understandably emphasizes statements that the intent was to make a very limited change in existing law to allow limited promotional activity. But the petition for review demonstrates very clearly that there were a number of issues on which most parties agreed, including some that are particularly relevant in this appeal. Attached to the county's brief is a memorandum addressing the ORS 215.283(1)(o) promotions clause. That county memorandum was presented to the hearings officer in this case and is included in the record. Record 602-13. The county memorandum also considered relevant legislative history and includes a useful listing of activities that were specifically mentioned during the legislative proceedings and appeared to receive legislative committee support. The county memorandum also lists activities that were specifically mentioned that the committee did not believe should be authorized under the promotions clause. Greenfield generally agrees with those lists of activities, and they are set out below:

> "* * * Activities that appear to have garnered approval by committee members as authorized by the Promotions Clause include"
>
> "* * *:
>
> "● corn maze;
>
> "● farm animal exhibit;
>
> "● windmill exhibit;
>
> "● hayride; * * *
>
> "● pumpkin patch ride;
>
> "* * *
>
> "● pumpkin carving

"● basket weaving;

"● farm product food contests; * * *

"● farm product food preparation instruction (e.g. jellies and jams).

"By contrast, committee members understood that the following activities are not authorized under the Promotions Clause:

"* * * * *

"● '500 car parking lot or some enterprise that supports that;'

"● a 'Knotts Berry Farm;'

"● a large concession;

"● stadium;

"● public entertainment;

"● a 'Hollywood Video;'

"● arcade;

"● mall;

"● bowling alley; * * *

"● 'commercial activities not related to farming[;]'

"* * * * *

"● 'commercial ventures not tied to the farm itself;'

"● something 'totally unrelated to agriculture;'

"● banquets; * * *

"● restaurants[;]

"* * * * *

"● blueberry café; and

"● supermarket." Record 611-12.

Some of the above-listed activities are not particularly helpful since they so clearly fall within the legislature's intent in adopting the promotions clause (pumpkin carving, for example) or so clearly fall outside that legislative intent (something totally unrelated to agriculture, for example). But there are five activities on the above list that are helpful in trying to determine from the legislative history whether farm-to-plate dinners fall within or outside the legislature's intent in adding the promotions clause to the statute. Two activities that are within legislative intent are "farm product food contests" and "farm product food preparation instruction (e.g. jellies and jams)." The authorized farm-to-plate dinners will include "farm product food preparation instruction" and could include "farm product food contests." But three activities that the legislature clearly did not want to authorize under the promotions clause are "banquets," "restaurants," and café's such as the "blueberry café."[11] The authorized farm-to-plate dinners are also similar to those prohibited activities."

C. Farm to Plate Dinners

The relevant rule text was set out earlier at n 2 and related text. With that text and the above statutory and legislative history in mind we briefly discuss the larger statutory context, before turning to the interpretive issue presented by Greenfield's second and third assignments of error.

All parties recognize that farm stands are but one example of uses that are authorized on EFU-zoned property that often present difficult questions of statutory construction. Another notable example is "commercial activities that are in conjunction with farm use," ORS 215.283(2)(a). Counties have relied on ORS 215.283(2)(a) to approve wineries on EFU-zoned land. *Craven v. Jackson County*, 308 Or 281, 289, 779 P2d 1011 (1989). In a

[11] The blueberry café began as a blue berry farm, which added a kitchen to make baked goods with the blueberries and eventually blossomed into a 70-seat restaurant. Supplemental Record 81. When a neighboring farmer sought approval for a restaurant on his EFU-zoned land and was denied permission, the county and the owner of the Blueberry Café entered an agreement whereby the Blue Berry Café was permitted to continue production of baked goods at its kitchen, but was required to eliminate "sit down food service," and cease operation as "a restaurant." Supplemental Record 83.

recent LUBA decision a proposal to authorize a commercial kitchen in an ORS 215.283(2) winery tasting room that would serve meals at up to 44 annual events was one of the central disputes. *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___ (LUBA No. 2012-005, September 18, 2012), slip op 30-34, *aff'd* 255 Or App 636, 298 P3d 586 (2013). Disputes over the appropriate scope of wineries, or more accurately the scope and permissible intensity of permissible activities at wineries, led the legislature to amend the EFU zone in 2010 and 2011 to authorize wineries as a permitted use under subsection (1) of ORS 215.283, but impose certain limits on the permissible activities at those wineries. ORS 215.283(1)(n); 215.452; 215.453. Food service at wineries authorized by ORS 215.283(1)(n), 215.452, and 215.453 is allowed but strictly limited. ORS 215.452(2)(b), 215.453(4)(b) and (5). This larger context concerning food service at wineries under subsections (1) and (2) of ORS 215.283 is not directly applicable in resolving the issue presented in this appeal because ORS 215.283 subsection (1) wineries and subsection (2) commercial activities that are in conjunction with farm use are governed by different sections of the EFU zoning statute and by case law that is specific to wineries approved under ORS 215.283(2)(a). However, an awareness of the food service issues that have arisen in these other contexts is helpful, to highlight that controversy over food service on EFU zoned land has arisen in settings other than farm stands.

Turning to the farm stand rule text, resolving the issue presented in this appeal is complicated by a serious shortcoming in the rule language. The farm stand rule authorizes "farm stands," but does not define that term.[12] The rule expressly *authorizes structures* to be "designed and used" for some activities and for sales of some items (sale of farm crops or

[12] LUBA's 1981 edition of Webster's Third New World Dictionary does not define the term farm stand, and even if it did it likely would not provide a very useful definition for determining the scope of the term in today's farm stand rule. Because farm stands can vary in nature and extent so dramatically, it seems likely the legislature simply bypassed the definitional approach and decided to limit farm stands in EFU zones by placing limits on structures and income from other than farm product sales.

livestock, sale of retail incidental items, fee-based promotional activity), but also *prohibits some structures* that are designed for other uses (banquets, public gatherings or public entertainment). The rule says nothing explicitly about whether farm stand activities are permissible outside structures, raising a question regarding whether the rule authorizes any outdoor activities or in any way limits any authorized outdoor activities.

Although the text is quiet about outdoor activities, the legislative history makes it clear that the legislature intended to authorize farm stands to conduct at least some activities outside structures. There are some easy examples of activities that by their very nature generally occur outdoors.[13] A question could also be raised regarding whether the activities the rule authorizes in structures can also be conducted outdoors. We need not decide that question definitively here, but we see no obvious reason why the legislature could have generally intended to preclude the activities it authorized for farm stand structures from occurring outdoors where appropriate. So, for example, if a fee-based apple cider tasting event is appropriate as a "fee-based activity to promote the sale of farm crops" in a farm stand building, we see no obvious reason why that event could not be held outdoors. A far more difficult question, and the question presented by Greenfield's second and third assignments of error, is whether an event that would clearly be prohibited in a farm stand structure (such as a banquet) is permissible, so long as it (1) otherwise qualifies as a "fee-based activity to promote the sale of farm crops" and (2) is conducted entirely outdoors.

We have no trouble agreeing with the county that the 22 farm-to-plate dinners for up to 75 guests that are authorized by the disputed permit can reasonably be viewed as related to farm product production and could reasonably be expected to "to promote the sale of farm crops or livestock" sold at Bella's farm stand. As noted earlier, while the statute and farm stand rule only expressly authorize structures that are designed and used for such promotional

[13] Corn mazes and hayrides are two examples.

events, we believe the rule is correctly interpreted to authorize such uses outside structures unless some other prohibition in the farm stand rule applies.

The record includes copies of photographs from the website of Plate and Pitchfork, which Bella indicated provides al fresco dinners similar to the ones Bella proposes to provide. Supplemental Record 90, 100-105. The photographs show a long line of tables in an agricultural field, with white table cloths set with plates and dining ware and long lines of chairs on both sides of the table for an al fresco dinner for many participants. Under any reasonable definition of the word "banquet" that we can think of, the pictured al fresco dining qualifies as a "banquet," as that term is used in the farm stand rule.[14] The farm to plate dinners described in the application, even as limited by the hearings officer to 22 events per year with up to 75 diners, constitute banquets. But because the dining, as approved by the hearings officer, will be al fresco, it would not violate the farm stand rule's express prohibition against structures for banquets. The dispositive question becomes whether the approved al fresco banquets are necessarily permissible under the rule, simply because the farm stand rule's prohibition against *structures* that are designed for banquets is not violated.

As we have already noted, the rule is admittedly awkward because it is written in terms of the design and use of *structures* and prohibitions on *structures* designed for activities other than the sale of farm crops and livestock. If the rule is interpreted literally, it does not authorize any activities that would be carried out entirely outdoors. But if the rule is nevertheless to be read to authorize appropriate activities outside structures, as we have already concluded is appropriate, we believe it is also appropriate to consider whether the *prohibitions* the rule places on structures that are designed for certain activities might also apply to those activities themselves, even if those prohibited activities would be carried out

[14] *Webster's Third New Int'l Dictionary* 173 (unabridged ed. 1981) defines "banquet" as "an elaborate and often ceremonious meal attended by numerous people and often honoring a person or making some incident * * *."

entirely outdoors. We have no idea why the legislature used the word "banquets" to encapsulate its concerns regarding farm stands providing food service. But we cannot agree with the county that the concerns that the legislature had about banquets, which led it to ban structures designed for banquets, would be entirely alleviated if the banquet is simply moved outdoors. If the legislature believes farm to plate al fresco dinners of the type, scale and frequency authorized here should be viewed as something other than a banquet and allowed at farm stands, the farm stand statute and farm stand rule will need to be amended to state that intent. We conclude that the authorized farm to plate dinners are accurately described as "banquets" and are not permitted under the farm stand statute and the farm stand rule.

As noted earlier, Greenfield also raises two procedural objections. First, the hearings officer's decision to limit the catered farm-to-plate dinners to two events, and to require that Bella prepare the food for the remaining 20 authorized farm to plate dinners did not come until after the close of the evidentiary hearing. Greenfield contends that condition changed the nature of the application and the hearings officer should have required a new application. Greenfield contends the hearings officer's failure to do so prejudiced Greenfield's substantial rights. Greenfield also contends, based on an argument that was advanced by Bella's legal counsel, that Bella waived any right to seek approval of catered farm-to-plate dinners. Although we agree with the county's response that both procedural objections are without merit, our decision to sustain Greenfield's substantive challenge under these assignments of error make it unnecessary to resolve those procedural challenges, and we decline to do so.

Greenfield's second and third assignments of error are sustained in part.

SECOND ASSIGNMENT OF ERROR [BELLA]

The scope of Bella's second assignment of error is somewhat unclear. We understand Bella to argue that the hearings officer erred in finding that the existing corn maze platform

and tents qualify as structures that are impermissible under the farm stand rule.[15] For ease of reference, we repeat the relevant farm stand rule language, before turning to Bella's arguments. The farm stand rule authorizes farm stand structures if:

> "The structures are designed and used for sale of farm crops and livestock grown on the farm operation, * * * including the sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock sold at the farm stand[.]"

Bella first asserts the hearings officer erred in finding that the corn maze platforms and tents are "structures." As all parties recognize, the term "structures" is not defined in the farm stand statute or the farm stand rule. Multnomah County Code (MCC) 34.0005 defines "structure" as "[t]hat which is built or constructed. An edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner." The Oregon Specialty Code Section 202 similarly defines "structure" as "[t]hat which is built or constructed." The Oregon Specialty Code also defines "tent" as "a structure or enclosure, with our without side-wall or drops, constructed of fabric or pliable material supported in any manner except by or the contents it protects." While none of these definitions are dispositive, we reject Bella's contention that the corn maze structure and the tents do not qualify as "structures," within the meaning of the farm stand rule, simply because they are not "permanent structures affixed to the ground." Bella Petition for Review 9.

Assuming that the tents and corn maze structures are "structures," as that term is used in the farm stand rule, Bella assigns error to the hearings officer's reasoning that the tents and corn maze structures are not permissible uses under the farm stand rule. The hearings officer's reasoning is set out below:

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[15] Bella also asserts the same argument regarding the hearings officer's findings concerning Bella's proposal for a bouncy house. But the bouncy house was denied for another reason as well. The hearings officer found that the bouncy house does not qualify as a promotional activity: "applicants have not demonstrated a link between promotion of crops and the bouncy house." Record 42. Bella did not assign error to that finding. Therefore, even if the hearings officer is incorrect about whether the bouncy house could be approved as a structure for a qualifying promotional activity, the denial of the bouncy house would stand because the hearings officer's finding that the bouncy house does not qualify as a promotional activity is not challenged.

> "The appellants argue that the structures are used for fee-based promotional activity and should be allowed. I concur with the Post Hearing Brief of the Planning Director which asserts that the structure standard authorizes 'structures for **the sale of fee based activity**' not merely 'structures for fee based activity'. (Ex. 1-6) I concur with the decision of the Planning Director on this issue." Record 42 (bold lettering in original).

The planning director's attempt to explain how that interpretation operates is as follows: "In other words, public tents, viewing platforms and stages are prohibited, while a kiosk at the entrance to a corn maze for the purpose of collecting an entry fee is allowed." Record 432.

The relevant text of the farm stand rule was set out at the beginning of our discussion of this assignment of error. The planning director and hearings officer interpret the relevant language as though the underlined numbers were included:

> "The structures are designed and used for * * * the sale of (1) retail incidental items and (2) fee-based activity to promote the sale of farm crops or livestock sold at the farm stand."

Bella argues the above is an incorrect reading of the farm stand rule and that it should instead be read as though the underlined numbers were located as follows:

> "The structures are designed and used for * * * (1) the sale of retail incidental items and (2) fee-based activity to promote the sale of farm crops or livestock sold at the farm stand."

We do not agree with either party's reading of the statute. Bella's interpretation is inconsistent with the part of the farm stand rule that states that a "farm stand [may] not include structures designed for * * * activities other than the sale of farm crops and livestock." The county's interpretation, while not as inconsistent with the farm rule text, reads the words "sale of" to modify both "incidental retail sales" and "fee-based" promotional activities. That seems to us to be a strained reading of the statute, and we doubt the legislature conceived of structures that would be limited to those that *advertise* fee-based promotional activities, such as a kiosk.

We believe the more natural reading of the statute, is that the farm stand rule permits only structures that are "designed and used for sale of farm crops and livestock." That

reading is consistent with the text that appears later in the farm stand rule that expressly provides that a farm stand may "not include structures designed for * * * activities other than the sale of farm crops or livestock * * *." The farm stand rule authorizes the "sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock" inside structures that are "designed and used for sale of farm crops and livestock," but it does not authorize structures that are specifically designed and used for retail sales and fee-based promotional activity.

It seems unlikely to us that the corn maze structure or the tents qualify as structures that are "designed and used for sale of farm crops and livestock grown on the farm operation." But that is the question the hearings officer should ask and answer on remand. If they are not, the hearings officer may require that they must be removed.

Bella's second assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR [GREENFIELD]

FIRST AND THIRD ASSIGNMENTS OF ERROR [BELLA]

These three assignments of error all concern the 25 percent rule, which was set out earlier and summarized at footnote 2. For ease of reference, we set out the operative text from the rule again below:

> "[A]nnual sales of the incidental items and fees from promotional activity [must] not make up more than 25 percent of the total annual sales of the farm stand[.]"

A. Greenfield's Fourth Assignment of Error (Accounting)

In an October 25, 2012 declaration, the Bella farm supervisor made the following representation:

> "* * * At the conclusion of each [farm-to-plate] dinner, Bella will give each customer a basket of our fruits vegetables, flowers, cheeses, milk, apple cider, jams and sauces." * * * The dinner will cost no more than $25 per dinner and $75 per box of produce." Record 316.

In his fourth assignment of error, Greenfield argues the hearings officer erred "by tacitly authorizing Bella to engage in accounting practices that comingle income from fee-based activity with income from the sale of farm products, rather than requiring Bella to account for these as separate items for purposes of complying with the 25 percent requirement." Greenfield Petition for Review 33. Greenfield argues the prices suggested above are a sham and that the meals will be worth much more than $25 and the produce boxes will be worth much less than $75. The result will be, petitioner argues, a thinly veiled ruse to avoid the 25 percent rule.

Because we have already sustained Greenfield's second and third assignments of error we need not resolve this assignment of error. If we did have to resolve this assignment of error, we tend to agree with the county that Greenfield's challenge is at best premature and at worst challenges a decision that the county did not make, because the county did not authorize Bella to charge $25 for its meals or $75 for its produce baskets.

We need not and do not resolve Greenfield's fourth assignment of error.

B. Bella's First Assignment of Error (Wholesale Sales)

Condition 4, as modified by the hearings officer, is set out below:

> "All incidental sales, prepared food items and fee-based activities shall make up no more than 25% of the total sales from the farm stand. All income of independent contractors (e.g., food cart purveyors) conducting business on the farm operation that is subject of this permit shall be attributed to applicants and thereby subject to the 25% revenue standard in MCC 34.2625(G)(1) and to the accounting requirements set forth below in Condition #7; for purposes of establishing satisfaction of the 25% revenue standard, applicants shall account for the actual sales revenue received by such contractors and shall not substitute contract payments for such actual sales revenue. Processed products utilizing produce and fruit grown from outside the local agricultural area are also subject to the 25% of the total sales provision. Any produce sold from outside the local agricultural area (Oregon or an adjacent county in Washington that borders Multnomah County) shall count against the 25% annual sales limitation. *Revenue from wholesale sales of 'farm crops or livestock' as defined in MCC34.2625(G)(3) shall not be included in any determination of compliance with the 25% revenue standard in MCC 34.2625(G)(1). Here, the term 'wholesale sales' includes any sale of 'farm*

> *crops or livestock' to a reseller of such goods or any other person that will not themselves use such goods for personal use or gift.* Sales of prepared food from the farm stand may only occur when the stand is operating and may not operate independently during the off-season." Record 19 (emphasis added).

Bella assigns error to the italicized language, which draws a distinction between wholesale and retail sales and prohibits including the former in computing "annual sales of the farm stand." Bella contends that distinction and prohibition has no basis in the statute or farm stand rule. For the reasons explained below, we do not agree.

If a farmer can secure approval for a farm stand and thereafter sell farm products or livestock from an office in the farm stand that he formerly sold from an office in the barn or elsewhere on the farm, the farm stand annual income will be larger (and the permissible retail sales and promotional activity fees may be correspondingly larger under the 25 percent rule) than if those farm sales cannot be included in the farm stand annual income. We assume that concern and the possibility that a farmer might be motivated to make all farm sales from an office in a farm stand led the county to attempt to draw a distinction between retail sales and wholesale sales. But the relevant question under the 25 percent rule is what sales are properly attributable to (1) farm stand retail sales and fee-based promotional activity, (2) farm stand sales of farm crops and livestock, and (3) any farming operation sales that fall outside (1) and (2).

The county's definition of "wholesale sales" is an imperfect tool to require that category (3) sales (*i.e.*, sales of farm crops or livestock that are not attributable to the farm stand) be segregated from category (1) and (2) sales, because some drive-up customers that purchase small amounts of farm crops at the farm stand for use at home may also purchase items for sale to other persons, which as the county defines the term makes those purchases "wholesale sales." We doubt the legislature intended to exclude such sales from farm stand sales. But we also doubt that will present a real problem in practice, since it is unlikely that Bella will ask the customers that visit the farm stand in their car and make small purchases

farm products at the farm stand whether those purchases are for resale. Nor do we believe the county intended to exclude such sales as sales of the farm stand. But the county's requirement that Bella separately account for wholesale sales will prevent bulk purchases of crops and livestock from the farm from being included in farm stand sales, even though the order may be placed through an office in the farm stand. Given the inherent difficulties the county faces in giving effect to this part of the farm stand rule, we do not believe more precision is required in attempting to distinguish between farm sales generally and farm stand sales.

Bella's first assignment of error is denied.

C. Bella's Third Assignment of Error (Annual Farm Stand Sales Report)

Condition 7 of the hearings officer's decision is set out below:

> "7. For each year the farm stand is in business, the applicants shall prepare an annual report by May first of the following year setting forth the percentage allocation of farm stand income and percentage allocation of income from promotional activity (based on a combined total of 100% as per the statute). Above the signature line for the applicant signing the report shall be the statement: 'Under penalties of perjury, I declare that I have examined this report and statements therein and to the best of my knowledge and belief, they are true, correct, and complete.['] Applicants will account for and apportion the income in compliance with condition 4 of this decision. Applicants shall keep all farm, farm stand and promotional activity records for a period of 3 full years after the close of each calendar year. If the County has reasonable grounds to suspect that the farm stand annual reports filed by Applicants herein (or their successors) are inaccurate, the County may audit the farm stand records of the Applicants at the County's expense. If an audit demonstrates failure by the Applicants to accurately report data regarding the farm stand and promotional activities, the County may bring an enforcement action and seek reimbursement of the audit costs as part of the enforcement action." Record 19-20.

Bella contends the county does not have authority to impose such a condition. Bella appears to rely in large part on expressions of concern by a hearings officer in another permit decision about the county's inability to protect confidential information.

The farm stand rule authorizes promotional activities that have the potential to generate a large amount of income that, in turn, could make sales of farm crops and livestock secondary to the promotional activities, in terms of annual income. The 25 percent rule was imposed to ensure that the sales of farm crops and livestock at farm stands on EFU-zoned land are three times as large as retail sales and promotional fees. The 25 percent rule plays a crucial role in ensuring that the legislative authorizations for retail and promotional activities are carried out in the way the legislature intended, as clearly secondary to sales of farm crops and livestock.

Because the 25 percent rule is a performance standard, and the county likely has no way of directly monitoring farm stand sales as they are made, we have difficulty seeing how the county could ensure compliance with the 25 percent rule without imposing some sort of reporting requirement. In any event, the county responds that it has express statutory authority to enact local law to authorize conditions of approval ORS 215.416(4).[16] MCC 37.0660(A) expressly authorizes county land use decision makers to impose conditions of approval to ensure that approval criteria such as the 25 percent rule are complied with:

> "All county decision makers have the authority to impose reasonable conditions of approval designed to ensure that all applicable approval standards are, or can be, met."

Notwithstanding the hearings officer's expressions of concern about the county's ability to protect confidential information, the county clearly has authority to impose a condition of approval to require compliance with the 25 percent rule. Requiring that Bella allocate farm stand income according to the farm stand rule, prepare an annual report that demonstrates that allocation, swear to the report's accuracy, and keep the records that would be needed to confirm the accuracy of the annual report all seem to be reasonable conditions to us. Bella makes no attempt that we can understand to show that they are unreasonable.

[16] ORS 215.416(4) provides that in approving permits, the county may "include such conditions as are authorized by statute or county legislation."

Similarly the language authorizing a county audit at the county's expense and pursuit of an enforcement action if warranted by the audit in which the county may *seek* reimbursement of the audit costs all seems reasonable. The county either does or does not have authority to recover its audit costs, but we assume that determination would be made as part of any enforcement action.

Bella's third assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR [GREENFIELD]

The application sought approval for "[s]mall [g]atherings" and offered the following justification for approval of such gatherings under the promotions clause of the farm stand rule:

> "Farms are popular destinations for small group celebrations such as birthday parties, and picnics and are typically [h]eld in conjunction with u-pick activities or during the pumpkin season. They are held when families are meeting at the farm to pick berries, fruits, or pumpkins. The purpose of these gatherings is to participate in the group activity of harvesting one or more of the farm crops. The gatherings are proposed to be conducted only when the farm stand is open, introducing party/picnic attendees to the farm and encouraging the purchase of fruits and vegetables either during the event or in the future. The benefit of these gatherings is the exposure it provides to the farm and the potential for increased sales at the farm stand and U-pick fields." Record 873.

In approving the request for approval of small gatherings, the hearings officer imposed the following condition of approval:

> "5. The promotional events and fee based activities shall be limited to the hours that the farm stand is operating and shall not occur unless the farm stand is open for sales to retail customers. *The purpose of the special events and fee based activities shall be to promote the contemporaneous sale of farm crops or livestock grown on the farm operation and other farm operations in the local agricultural area.* Approved Promotional Events and Fee-Based Activities include:
>
> "* * * * *
>
> "e. Fee-based farm stand activities *shall promote the farm stand and contemporaneous crops sold in the farm stand*. Fee-based activities include a cow-train, school tours, and <u>small-scale</u>

> gatherings such as birthdays, picnics, and similar activities can be conducted any time the farm stand is open for retail sales." Record 19 (italics and underlining added).

The italicized text in Condition 5 repeats the farm stand rule's requirement that any fee-based activities must promote sale of farm crops or livestock on the farm. Greenfield does not object to the cow-train or school tours, but objects that the authorization of "small-scale gatherings such as birthdays, picnics, and similar activities" is too vague and open-ended. Greenfield argues that the "similar activities" language in particular could authorize weddings, and corporate events, which the county has concluded are inappropriate in other farm stand proceedings. Record 413-14. Greenfield also argues that concerts and family reunions, where the focus is on the celebration or gathering itself and is not on the purchase of farm crops or livestock, are not allowed.

In its brief, the county agrees that farm stand promotional activities do "not extend to gatherings for corporate retreats, family reunions, or weddings, because the primary focus of such gatherings is [the underlying gathering and] impermissible[.]" Response Brief 13. The county points out that it has reached that conclusion regarding corporate retreats, family reunions, or weddings in other proceedings. *Id.* We also conclude that corporate retreats, family reunions, and weddings inherently lack a sufficient connection with agriculture and sale of farm crops or livestock to qualify as farm stand promotional events. To that list we would add concerts and there are likely other activities that by their very nature have too tenuous a connection with sale of farm crops and livestock and simply cannot be reasonably brought within the parameters of the farm stand rule's authorization for farm stand promotional activities.

But we do not agree that the hearings officer's authorization of "small-scale gatherings such as birthdays, picnics, and similar activities" necessarily authorizes gatherings

that go beyond the scope of the farm stand promotion clause's scope. [17] The "small-scale" limitation is somewhat subjective, but in this context we do not believe it is impermissibly so. As noted above, condition 5 twice repeats the statutory requirement that such gatherings must promote sale of farm crops or livestock. Therefore the condition itself requires that the events must promote sale of farm crops and livestock, and if promotional events at Bella's farm stand fail to do so, Bella will be in violation of condition 5. Bella explained how the timing of such events with u-pick harvests and pumpkin harvest activities can be used to expose the participants to the farm offerings and thereby enhance sale of farm crops or livestock. Bella is obligated to take whatever other measures may be required to ensure that the small scale events authorized by condition 5 are not gatherings that fail to promote sale of farm crops or livestock, or it will be in violation of condition 5. Finally, the "similar activities" language authorizes small scale gatherings that are similar to birthday parties and picnics, and like birthday parties and picnics, any such small scale gatherings must be activities that promote the sale of farm crops or livestock. The small scale gatherings authorized under condition 5 while somewhat open ended are more circumscribed than the

[17] We agree with the reasoning set out in the county's brief regarding birthday parties and picnics:

> "[T]he county does not agree that birthday parties fall within the realm of impermissible gatherings * * *, though the County concedes that the basis for allowing small-scale gatherings for birthday parties is somewhat nuanced. The County's understanding commences with the recognition that the birthday party activity proposed by Bella and similar activities previously approved by the County are conducted as farm-themed events and include a tour of the farm, educational presentations on farm operations, and the harvesting of farm crops. Because of the commonness of birthday parties, the small-scale of these events, and the typically young age of the participants, the County believes that the agenda for these birthday parties is sufficient to elevate the farm operation above the birthday celebration such that the farm and farm stand occupy the primary focus of the event and the celebratory cause for the gathering takes a secondary role. In contrast, due to the less common occurrence and larger scale of gatherings for corporate retreats, family reunions, weddings, and the like, the County does not believe that *any* agenda of farm activities will shift the primary focus of such events (i.e., the retreat, reunion, wedding, etc.) to the farm operation.
>
> "Thus, with respect to this interpretive issue, the 'small-scale gatherings such as birthdays, picnics, and similar activities approved by the County fall within the authorization of promotional activity under the Farm Stand Law." County Response Brief 13-14 (emphasis in original).

farm stand promotional activities authorized by the statute and rule. To the extent Greenfield argues small scale birthday gatherings, picnics and similar activities by their nature cannot be made to promote sale of farm crops or livestock, we reject the argument. We do not agree the hearings officer's decision must be remanded for being too vague about the nature of the authorized activities.

Greenfield's fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR [GREENFIELD]

The 2007/2008 permit authorized three special events. Record 1060. The 2007/2008 permit also approved Bella's proposal to use a food cart or food booths at special events. "During special events, a mobile food car[t] or food booths will be used to promote the organic produce of the farm." Record 1061. The permit at issue in this appeal expands the authorized number of special events from three to 24.[18] Greenfield and the Department of Agriculture argued below that in approving the expanded use of food carts or food booths (hereafter food carts), the hearing officer should find that food carts are not allowed at farm stands under the statute and rule. Supplemental Record 26-28, 132. In his sixth assignment of error, Greenfield contends that food carts are not permitted at farm stands under the farm stand statute and rule, as a matter of law.

The hearings officer appears to have agreed that the issue of whether food carts are permissible at farm stands was presented below, but did not expressly address that issue. However the hearings officer approved the expanded number of events and with them the expanded use of food carts. She also imposed a condition that requires that any income from

[18] There are places in the record where Bella appears to take the position that the 2007/2008 permit authorized more than three special events, but in their response briefs neither the county nor Bella dispute Greenfield's contention that the modified permit increased the number of authorized special events from three to 24.

the food carts not be counted as sales of farm crops or livestock, as the farm stand rule specifically requires.[19] Record 19.

Greenfield argues the food carts are essentially restaurants on wheels and unrelated to the sale of farm crops or livestock. As such, Greenfield argues, food carts are not permitted at farm stands.[20] We understand Bella and the county to contend the food carts are permissible as "incidental retail sales" at the special events which are held to "promote the sale of farm crops or livestock." Bella also contends that the food carts are not unrelated to sale of farm crops and livestock, because they "are also used for the processing and preparation of farm products for canning, and for the freezer all to be sold retail at the farm store." Record 178.

The scope of the appealed permit's authorization for food carts is not entirely clear. All parties all appear to agree the challenged decision authorizes multiple food carts that are permitted to sell a variety of prepared food at up to 24 events per year, and we see no limit in the permit itself on the total number of food carts that potentially could be provided at special events. At least some of the food apparently would have no connection with Bella's produce. We have no trouble agreeing with Greenfield that such an expansive authorization of food carts cannot be characterized as "incidental retail sales" and is not permissible under the farm stand rule. Collectively those food carts could be every bit as large a food concession as the Blueberry Café, which was at the heart of the legislature's concern in adopting the 2001 legislative amendments.

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[19] As we noted earlier, the farm stand rule defines "farm crops or livestock" to include "processed farm crops or livestock" but provides that "processed farm crops or livestock" does not include "prepared food items."

[20] Greenfield points to pictures in the record that show food carts advertising "hamburgers," "sausages," "hot dogs," "fries," "corn on the cob," "spuds and corndogs," "elephant ears," "buffalo burgers," "beef burgers," and "hot wings" for sale. Supplemental Record 116-118.

However, we do not agree with Greenfield's broader and more categorical argument that under no circumstances could a food cart be approved under the farm stand rule. The authorized special events presumably will draw crowds of people who will want to purchase food to eat and will include at least some people who wish to purchase something other than Bella's organic produce to eat. If one cart or a limited number of food carts are provided at the special event and their operation is conditioned so that they are incidental to the special event, we cannot say that the farm stand rule categorically would preclude approval of such food carts. We note that while the farm stand rule does not specify what kind of "prepared food" can be sold at farm stands or how that prepared food can be sold, by clarifying that prepared foods do not constitute "processed farm crops or livestock" for purposes of the 25 percent rule, it appears to assume that *some* prepared food will be sold at farm stands. So long as any authorization of food carts at farm stand special events is appropriately limited so that it constitutes "sales of retail incidental items" in conjunction with farm stand sales and special events that are "fee based activity to promote the sale of farm crops or livestock," we believe they could be approved under the farm stand rule.

The challenged decision approves food carts at up to 24 events per year and imposes no limits on those food carts or on the number of food carts that may be employed at the special events. Such a broad unlimited authorization of food carts at Bella's farm stand cannot be characterized as "sales of retail incidental items" and is therefore not permitted under the farm stand rule.

Greenfield's sixth assignment of error sustained in part.

SEVENTH ASSIGNMENT OF ERROR [GREENFIELD]

Greenfield's sixth assignment of error is as follows: "[t]he Hearings Officer's decision violates ORS 215.283(1)(o) by allowing third party concessions at the farm stand." Greenfield Petition for Review 47. Greenfield argument in support of that assignment of error is set out in full below:

"Condition 4 to the Hearings Officer's decision states in part:

> "'4. All income of independent contractors (e.g., food cart purveyors) conducting business on the farm operation that is the subject of this permit shall be attributed to applicants and thereby subject to the 25% [rule] and to the accounting requirements set forth * * * in Condition #7.'
>
> "While Petitioner agrees that all income from food cart sales, if permitted at all, must be subject to the 25% standard, Petitioner believes ORS 215.283(1)(o) provides no authorization for third party businesses at farm stands. These are concessions, and the legislative history makes clear that farm stands are not to be turned into concessions. Rec. 226. Furthermore, the independent contractor's business is not the farm stand owner's business, and as such, it is not a lawfully permitted use under any element of ORS 215.283.
>
> "The Board should remand the decision to require the Hearings Officer to prohibit the use of independent contractors at the farm stand." *Id*. (underlining in original).

An initial problem with the seventh assignment of error is that Greenfield never identifies where the challenged decision authorizes independent contractors. Condition 4 does not expressly authorize independent contractors, it simply requires that sales by independent contractors not be counted as sales of farm crops or livestock under the 25 percent rule. But condition 4 admittedly does appear to assume that at least food cart purveyors may be independent contractors. The issue Greenfield raises under this assignment of error is whether any use of "independent contractors" at farm stands is categorically prohibited by the farm stand statute and rule. We see no such categorical prohibition in the farm stand statute and rule.

We question Greenfield's assumption that any activities that are put on by independent contractors, as opposed to farm stand employees, necessarily are "concessions." Even if they are, we do not agree that the legislative history demonstrates that the legislature

in enacting the farm stand statute intended to prohibit all concessions.[21] As we explained earlier in this opinion, the legislative history does support a conclusion that the legislature intended to preclude "large concessions[.]" Record 612. The legislative history does not support an assumption that the legislature intended to preclude any concessions, and the legislature's express authorization for "limited retail sales," without specifying who might be allowed to conduct those retail sales, undermines any such assumption.

Greenfield's seventh assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR [BELLA]

Bella's property lies on both the north and south sides of Gillihan Road, one of the main roads on Sauvie Island. Most of that property and the farm stand are north of Gillihan Road (tax lot 200), but Bella has a four-acre u-pick blueberry field on the south side of Gillihan Road (tax lot 400). A single family dwelling is located on tax lot 200 and formerly was accessed from Gillihan Road by a driveway.[22] Concerns about pedestrian and vehicular traffic between the farm stand on the north side of Gillihan Road and the u-pick blueberry field on the south side of Gillihan Road led the county in 2007/2008 to impose two conditions of approval. Pedestrians and vehicles using the u-pick field on the south side of Gillihan Road apparently were using the residential driveway on Bella's property on the north side of Gillihan Road to access the farm stand.[23] Condition 14 was imposed to prevent those

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[21] The only legislative history cited by Greenfield in his petition for review is the transcribed testimony of Representative Ackerman at Record 226. That testimony does not come anywhere near demonstrating a legislative intent to ban all concessions:

> "In dropping out the language, ah, 'structure for banquets, public gatherings or public entertainment,' I think there is some allowance for abuse there because you could turn a food * * * stand into a concession, a restaurant, a place for banquets, other public gathering, which would accommodate entertainment, and, um, I don't think that's very bad in a country setting. * * *" Record 226.

[22] Apparently that residence now is accessed from another location.

[23] Due to a curve in Gillihan Road at that point, there are sight distance problems.

crossing.[24] In a separate condition, condition 16, the county in 2007/2008 imposed a condition to require that the tax lot 400 u-pick customers park their cars on tax lot 400, to avoid the need for pedestrians to cross Gillihan Road to pick blueberries.[25]

Bella's fourth assignment of error is directed at condition 15 of the 2012 permit, which provides:

> "15. To prevent the need for people to walk across Gillihan Road to the 4 acre 'U-Pick' blueberry field (Tax Lot 400 * * *), 'U-Pick' customers visiting this field shall park their vehicles on Tax Lot 400 * * *. A temporary u-pick payment booth may be set up while the field is being picked. The property owners shall not maintain a pedestrian pathway that promotes crossing of the road. The existing crossing path gate shall be permanently fenced without a gate and the driveway shall be decommissioned. The property owners shall not promote pedestrian access to the blueberry field.* * *" Record 21.

Bella opposes the fence requirement and argues in its brief there is "no evidence to substantiate the required fence." Bella Petition for Review 14.

The hearings officer explained the reason for the fence requirement:

> "There have been allegations, confirmed by Mr. Hashem in a conversation with staff, that farm stand customers are walking across NW Gillihan road to get from the farm stand through a gated crossing point to the blueberry patch on the other side of the road. This gated crossing is an unpermitted access and has been required to be decommissioned by County Transportation. This

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[24] Condition 14 in the 2007/2008 permit provided:

> "14. The use of the driveway access point that leads to the existing single family dwelling on Tax Lot 200 * * * shall be for the residential use only. The use of this residential driveway access in conjunction with the operation of the farm stand, and/or associated special events, is prohibited. This driveway access point shall be chained or have a gate installed to regulate its use for the residents of the existing dwelling and to prevent the 'U-Pick' and farm stand-related vehicles from using the driveway to gain access to and from the site." Record 1058.

[25] Condition 16 provided as follows:

> "16. To prevent the need for people to walk across "Gillihan Road to the 4 acre 'U-Pick' blueberry field (Tax Lot 400 * * *), 'U-Pick' customers visiting this field shall park their vehicles on Tax Lot 400 * * *. A temporary payment booth may be set up while the field is being picked." Record 1058.

> pedestrian crossing does not meet Condition 16 [of the 2007/2008 permit] and must be closed and decommissioned as an access." Record 32.

We do not understand Bella to dispute the point that there has been unauthorized pedestrian traffic between the u-pick blueberry field on the south of Gillihan Road and the farm stand on the north side of Gillihan Road or to dispute that the county's transportation department has required it to be decommissioned as an access. We reject Bella's evidentiary challenge to Condition 15 in the current permit.

Finally, Bella raised an issue at oral argument that we do not understand to have been raised its petition for review. There may have been some confusion on the hearings officer's part about the location of Bella's proposal for a new pedestrian crossing. That crossing is proposed at a location approximately 350 feet northeast of the existing residential driveway, where sight distance on Gillihan Road is better than is the case at the existing residential driveway. Record 392. The county engineer and transportation planner apparently thought the proposed new pedestrian crossing required further study. But the hearings officer may not have understood that the proposed new crossing was at a different location than the existing driveway. Be that as it may, we cannot agree that any confusion on the hearings officer's part about the location of the proposed pedestrian crossing had any bearing on her decision to require a more permanent and effective barrier to stop continued pedestrian crossings at the driveway location.

Bella's seventh assignment of error is denied.

The county's decision is remanded.

Ryan, Board Member, concurring.

I concur with the majority that the decision should be remanded, but I write separately because I respectfully disagree with the majority's denial of Greenfield's fifth assignment of error. I would sustain petitioner Greenfield's fifth assignment of error that challenges the hearings officer's approval of "small-scale gatherings such as birthdays, picnics and similar activities * * *" in Condition 5.

Greenfield's fifth assignment of error argues that Condition 5's authorization of "small scale" birthday parties, picnics, and "similar activities" to birthday parties and picnics is inconsistent with the promotions clause. Greenfield argues that because it is not clear what activities are "small scale" and it is equally unclear what constitutes "similar activities," it was not possible for the hearings officer to approve those activities, consistent with the promotions clause. Greenfield additionally argues that "birthday parties" bear no connection to sales of farm crops or livestock and cannot be approved as promotional activities. The majority finds, based on the county's reasoning in its response brief, that

> "corporate retreats, family reunions, and weddings inherently lack a sufficient connection with agriculture and sale of farm crops or livestock to qualify as farm stand promotional events. To that list we would add concerts and there are likely other activities that by their very nature have too tenuous a connection with sale of farm crops and livestock and simply cannot be reasonably brought within the parameters of the farm stand rule's authorization for farm stand promotional activities." Slip op 29.

But the majority agrees with the county's position in its response brief that the connection of "birthday parties, picnics and similar activities" to the sale of farm crops and livestock is not so tenuous as the other proposed activities that it rejects. According to the majority, those activities are allowed under the promotions clause because they will promote the sale of farm crops or livestock, because the county has imposed a condition that requires that those activities must promote the sale of farm crops or livestock.

In my view, the majority and the county do not articulate a principled distinction between "birthday parties, picnics and similar activities" that the majority finds are acceptable promotional activities, and "corporate events, family reunions, weddings," and other unnamed activities that the majority concludes have too tenuous a connection with the sale of farm crops to be acceptable promotional activities. In my view, the majority's reasoning regarding corporate events, weddings, and in particular family reunions applies equally to "birthday parties, picnics and similar activities," and imposing a condition that

requires those approved activities to promote the farm stand does not cure that fundamental problem.

I also agree with Greenfield that, even assuming that birthday parties and picnics could be allowed promotional activities, there is nothing in the decision to support the hearings officer's conclusion that "small scale * * * similar activities" are consistent with the promotions clause where nothing in the decision attempts to define the parameters of those phrases. Does "small scale" mean less than 10 guests, or between 10 and 50 guests, or less than 100 guests? Is a bar mitzvah or a bat mitzvah a "similar activity" to a birthday party? Is a gathering to celebrate the life of a deceased person a "similar activity" to a birthday party?

Failing to specify the parameters of "small scale" and "similar activities" invites future time consuming and costly disputes in an enforcement setting about whether an event is authorized or not authorized under condition 5. A farm stand is a use allowed outright under ORS 215.283(1) and as such it is not required to comply with ORS 215.296, which applies to uses authorized under ORS 215.283(2), such as a commercial activity in conjunction with farm use under ORS 215.283(2)(a). A farm stand is also exempt from compliance with any other local code provisions that would otherwise apply to a use allowed under ORS 215.283(2). ORS 215.296 in turn requires the county to determine, *prior to* approving a use and with public participation, that the proposed use will not force a significant change in or significantly increase the cost of agricultural activities on surrounding lands. Because farm stand promotional activities are allowed outright, without any obligation on the county to consider impacts on surrounding agricultural practices, I believe that it is of paramount importance to carefully evaluate whether activities proposed under the promotions clause are in fact allowed under the farm stand statute and rule and to read the statute and rule narrowly to limit those promotional activities to those which are clearly allowed under the promotions clause. For the reasons explained above, I do not

believe that the activities authorized by condition 5 are allowed under the farm stand statute and rule and I would sustain the fifth assignment of error.