

GUIDANCE FOR FOOD SERVICE AT WINERIES ON FARMLAND Under Oregon Senate Bill 841

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Oregon Department of Land
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OREGON
WINEGROWERS
ASSOCIATION

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Introduction

Senate Bill (SB) 841 from 2013 provides comprehensive land use rules for wineries located in exclusive farm use (EFU) or mixed farm-forest zones throughout Oregon. SB 841 modified ORS 215.452 and was a consensus bill that culminated from several years of legislative initiatives. Pertinent statutes are provided at the end of this publication.

Among other changes to ORS 215.452, SB 841 established new rules governing food service at permitted use wineries. Since the passage of SB 841, questions have arisen regarding the interpretation of these rules. This document, issued by the Oregon Department of Land Conservation and Development and the Oregon Liquor Control Commission in coordination with the Oregon Winegrowers Association, provides guidance to local governments, wineries, and other stakeholders regarding the application of SB 841's food service rules.

Applicability of SB 841

Oregon statute contains two lists of uses allowed in EFU zones. The first list defines uses that are permitted as of right, and the second list defines uses that must be approved by the county subject to criteria (often called a "conditional use").¹ Pursuant to ORS 215.452, a winery that has least 15 planted vineyard acres on-site, and that abides by certain limitations on wine production and commercial activities, qualifies as a permitted use under the EFU statutes.² SB 841 applies to these permitted use wineries in EFU zones and in mixed farm-forest zones throughout Oregon.

SB 841 also affirms that a winery that does not meet the requirements of ORS 215.452 may be sited in an EFU zone as a conditional use under the category of "commercial activities that are in conjunction with farm use."³ The food service rules in SB 841 do not apply directly to these conditional use wineries, but counties have discretion to impose a range food service conditions on conditional use wineries.

Effect of SB 841 on pre-existing winery permits

Prior to SB 841, ORS 215.452 restricted food service at permitted use wineries to that of a "limited service restaurant," which is defined as "individually portioned prepackaged foods prepared from an approved source by a commercial processor."⁴ Land use permits for permitted use wineries issued by counties prior to SB 841 generally contain a condition that imposes this now outdated food service restriction.

¹ See ORS 215.213 and ORS 215.283. ORS 215.213 applies in Lane and Washington Counties; ORS 215.283 applies in all other counties, though the two statutes are generally similar and are identical with respect to winery zoning.

² See ORS 215.213(1)(p); ORS 215.283(1)(n); ORS 215.452

³ ORS 215.456

⁴ ORS 624.010(5).

In the 1995 case of *Brentmar v. Jackson County*,⁵ the Oregon Supreme Court held that counties may not impose additional restrictions on a permitted use in the EFU zone beyond the state EFU regulations that apply to that particular use. ORS 215.452 wineries are permitted uses in the EFU zone, and land use permits that impose the outdated limited food service requirement on these wineries are more restrictive than state law as set forth in SB 841. *Brentmar* therefore prohibits counties from enforcing limited service restaurant conditions on permitted use wineries.

**Legislative intent
of SB 841**

The food service provisions of SB 841 are intended to allow wineries to pair food with wine to enhance wine appreciation and to ensure responsible alcohol service. SB 841 allows wineries to conduct a range of marketing activities including, for example, “wine tastings” and “winemaker dinners and luncheons.”⁶ Wineries may also host charitable events and a limited number of commercial events such as weddings.⁷ SB 841’s food service provisions are tied to these marketing and event privileges as follows:

[ORS 215.452](2) In addition to producing and distributing wine, a winery established under this section may:

...

(c) Market and sell items directly related to the sale or promotion of wine produced in conjunction with the winery, the marketing and sale of which is incidental to on-site retail sale of wine, including food and beverages:

(A) Required to be made available in conjunction with the consumption of wine on the premises by the Liquor Control Act or rules adopted under the Liquor Control Act; or

(B) Served in conjunction with [a marketing activity or event] authorized by paragraph (b), (d) or (e) of this subsection. (emphasis added).

⁵ *Brentmar v. Jackson County*, 321 Or 481 (1995).

⁶ ORS 215.452(2)(b).

⁷ ORS 215.452(2)(d) and (e).

SB 841, however, prohibits a permitted use winery from operating as a restaurant. Specifically, the statute provides that:

(3) A winery may include on-site kitchen facilities licensed by the Oregon Health Authority under ORS 624.010 to 624.121 for the preparation of food and beverages described in subsection (2)(c) of this section. *Food and beverage services authorized under subsection (2)(c) of this section may not utilize menu options or meal services that cause the kitchen facilities to function as a café or other dining establishment open to the public.* (emphasis added).

SB 841 therefore establishes a qualitative standard that distinguishes between food pairings and discrete events with food on the one hand, and regular restaurant-type meal service on the other hand. Because food preparation is allowed for marketing and events, a winery may have a commercial-type kitchen. This kitchen may not, however, be used as a justification for a non-permitted restaurant.

Related ORS 215.452 regulations

Although the distinction between permitted food pairings and prohibited restaurant service is imprecise, it is important to note that SB 841's food provisions are part of a larger scheme of winery land use regulations. Much of the ambiguity in the food provisions is resolved by two other related requirements in ORS 215.452.

First, ORS 215.452(4) limits a winery's gross income from all retail sales of non-wine products and services to 25 percent of the winery's on-site retail sales of wine. The statute also expressly allows a local government to require a written statement from a winery's certified public accountant demonstrating the winery's compliance with the 25 percent income standard. The 25 percent rule therefore provides an additional, quantitative limit on a winery's food service.

Second, as noted in the italicized statutory language above, ORS 215.452 requires the marketing and sale of food to be "incidental" to the on-site retail sale of wine. This language indicates that wine tastings, wine sales, and related wine marketing, not food consumption, must be the primary visitor activities at a winery tasting room.

ORS 215.452 therefore provides local governments with several tools to evaluate whether a winery's food service is appropriate as a matter of land use law.

OLCC requirements for wineries

As noted above, SB 841 allows a permitted use winery to serve any food required to be made available by the Oregon Liquor Control Commission (OLCC) in conjunction with the consumption of wine on the premises. This provision is intended to avoid a conflict between land use rules and OLCC requirements for responsible alcohol consumption.

At this time, however, OLCC does not require that any particular food service be made available in conjunction with the consumption of wine at wineries. Although OLCC often considers food service in determining when *minors* may be present in a tasting room, this determination is *not* a requirement for a particular level of food service under SB 841. In other words, *a winery may not use an OLCC minor posting determination as a justification for food service that exceeds the food limits set forth in SB 841.*

Additional food service guidelines

The following guidelines are intended to assist local governments and wineries in determining whether particular food service practices are consistent with SB 841. No single factor in this list is necessarily determinative of a winery's compliance or violation of ORS 215.452.

- Whether the food is tailored to the wine offerings and marketed as an accompaniment to the wine or is a stand-alone offering;
- Whether the winery offers a menu of diverse and substantial food options and/or provides defined meal service (*e.g.*, lunch, dinner);
- Whether the winery consistently provides substantial food service, or instead reserves this service to special occasions;
- Whether the predominant activity in the tasting room is dining as opposed to wine tasting, wine sales and related wine marketing;
- Whether the winery can produce a straightforward accounting of compliance with the 25 percent rule or instead utilizes multiple business entities or unusual pricing schemes to influence the accounting of its revenue.

PERTINENT STATUTES

ORS 215.213 Uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993. (1) In counties that have adopted marginal lands provisions under ORS 197.247 (1991 Edition) [Lane and Washington counties], the following uses may be established in any area zoned for exclusive farm use:

* * *

(p) A winery, as described in ORS 215.452 or 215.453.

ORS 215.283 Uses permitted in exclusive farm use zones in nonmarginal lands counties. (1) The following uses may be established in any area zoned for exclusive farm use:

* * *

(n) A winery, as described in ORS 215.452 or 215.453.

ORS 215.452 Winery; conditions; permissible products and services; local government findings and criteria; fees. (1) A winery may be established as a permitted use on land zoned for exclusive farm use under ORS 215.213 (1)(p) and 215.283 (1)(n) or on land zoned for mixed farm and forest use if the winery produces wine with a maximum annual production of:

(a) Less than 50,000 gallons and:

- (A) Owns an on-site vineyard of at least 15 acres;
- (B) Owns a contiguous vineyard of at least 15 acres;
- (C) Has a long-term contract for the purchase of all of the grapes from at least 15 acres of a vineyard contiguous to the winery; or
- (D) Obtains grapes from any combination of subparagraph (A), (B) or (C) of this paragraph; or

(b) At least 50,000 gallons and the winery:

- (A) Owns an on-site vineyard of at least 40 acres;
- (B) Owns a contiguous vineyard of at least 40 acres;
- (C) Has a long-term contract for the purchase of all of the grapes from at least 40 acres of a vineyard contiguous to the winery;
- (D) Owns an on-site vineyard of at least 15 acres on a tract of at least 40 acres and owns at least 40 additional acres of vineyards in Oregon that are located within 15 miles of the winery site; or
- (E) Obtains grapes from any combination of subparagraph (A), (B), (C) or (D) of this paragraph.

- (2) In addition to producing and distributing wine, a winery established under this section may:
- (a) Market and sell wine produced in conjunction with the winery.
 - (b) Conduct operations that are directly related to the sale or marketing of wine produced in conjunction with the winery, including:
 - (A) Wine tastings in a tasting room or other location on the premises occupied by the winery;
 - (B) Wine club activities;
 - (C) Winemaker luncheons and dinners;
 - (D) Winery and vineyard tours;
 - (E) Meetings or business activities with winery suppliers, distributors, wholesale customers and wine-industry members;
 - (F) Winery staff activities;
 - (G) Open house promotions of wine produced in conjunction with the winery; and
 - (H) Similar activities conducted for the primary purpose of promoting wine produced in conjunction with the winery.
 - (c) Market and sell items directly related to the sale or promotion of wine produced in conjunction with the winery, the marketing and sale of which is incidental to on-site retail sale of wine, including food and beverages:
 - (A) Required to be made available in conjunction with the consumption of wine on the premises by the Liquor Control Act or rules adopted under the Liquor Control Act; or
 - (B) Served in conjunction with an activity authorized by paragraph (b), (d) or (e) of this subsection.
 - (d) Carry out agri-tourism or other commercial events on the tract occupied by the winery subject to subsections (5), (6), (7) and (8) of this section.
 - (e) Host charitable activities for which the winery does not charge a facility rental fee.

(3) A winery may include on-site kitchen facilities licensed by the Oregon Health Authority under ORS 624.010 to 624.121 for the preparation of food and beverages described in subsection (2)(c) of this section. Food and beverage services authorized under subsection (2)(c) of this section may not utilize menu options or meal services that cause the kitchen facilities to function as a café or other dining establishment open to the public.

(4) The gross income of the winery from the sale of incidental items or services provided pursuant to subsection (2)(c) to (e) of this section may not exceed 25 percent of the gross income from the on-site retail sale of wine produced in conjunction with the winery. The gross income of a winery does not include income received by third parties unaffiliated with the winery. At the request of a local government with land use jurisdiction over the site of a winery, the winery shall submit to the local government a written statement that is prepared by a certified public accountant and certifies the compliance of the winery with this subsection for the previous tax year.

(5) A winery may carry out up to 18 days of agri-tourism or other commercial events annually on the tract occupied by the winery.

(6) For events described in subsection (5) of this section for a winery in the Willamette Valley:

(a) Events on the first six days of the 18-day limit per calendar year must be authorized by the local government through the issuance of a renewable multi-year license that:

(A) Has a term of five years; and

(B) Is subject to an administrative review to determine necessary conditions pursuant to subsection (7) of this section.

(b) The local government's decision on a license under paragraph (a) of this subsection is not:

(A) A land use decision, as defined in ORS 197.015, and is not subject to review by the Land Use Board of Appeals.

(B) A permit, as defined in ORS 215.402 or 227.160.

(c) Events on days seven through 18 of the 18-day limit per calendar year must be authorized by the local government through the issuance of a renewable multi-year permit that:

(A) Has a term of five years;

(B) Is subject to an administrative review to determine necessary conditions pursuant to subsection (7) of this section; and

(C) Is subject to notice as specified in ORS 215.416 (11) or 227.175 (10).

(d) The local government's decision on a permit under paragraph (c) of this subsection is:

(A) A land use decision, as defined in ORS 197.015, and is subject to review by the Land Use Board of Appeals.

(B) A permit, as defined in ORS 215.402 or 227.160.

(7) As necessary to ensure that agri-tourism or other commercial events on a tract occupied by a winery are subordinate to the production and sale of wine and do not create significant adverse impacts to uses on surrounding land, the local government may impose conditions on a license or permit issued pursuant to subsection (6) of this section related to:

(a) The number of event attendees;

(b) The hours of event operation;

(c) Access and parking;

(d) Traffic management;

(e) Noise management; and

(f) Sanitation and solid waste.

(8) A local government may charge a fee for processing a license or permit under subsections (6) and (7) of this section. A fee may not exceed the actual or average cost of providing the applicable licensing or permitting service.

(9) A winery operating under this section shall provide parking for all activities or uses of the lot, parcel or tract on which the winery is established.

(10) Prior to the issuance of a permit to establish a winery under this section, the applicant shall show that vineyards described in subsection (1) of this section have been planted or that the contract has been executed, as applicable.

(11) A local government shall apply the standards described in this subsection. Standards imposed on the siting of a winery shall be limited solely to each of the following for the sole purpose of limiting demonstrated conflicts with accepted farming or forest practices on adjacent lands:

- (a) Establishment of a setback of at least 100 feet from all property lines for the winery and all public gathering places unless the local government grants an adjustment or variance allowing a setback of less than 100 feet; and
- (b) Provision of direct road access and internal circulation.

(12) A local government shall apply:

- (a) Local criteria regarding floodplains, geologic hazards, the Willamette River Greenway, solar access and airport safety;
- (b) Regulations of general applicability for the public health and safety; and
- (c) Regulations for resource protection acknowledged to comply with any statewide goal respecting open spaces, scenic and historic areas and natural resources.

(13) When a bed and breakfast facility is sited as a home occupation on the same tract as a winery established under this section and in association with the winery:

- (a) The bed and breakfast facility may prepare and serve two meals per day to the registered guests of the bed and breakfast facility; and
- (b) The meals may be served at the bed and breakfast facility or at the winery.

(14) As used in this section:

- (a) “Agri-tourism or other commercial events” includes outdoor concerts for which admission is charged, educational, cultural, health or lifestyle events, facility rentals, celebratory gatherings and other events at which the promotion of wine produced in conjunction with the winery is a secondary purpose of the event.
- (b) “On-site retail sale” includes the retail sale of wine in person at the winery site, through a wine club or over the Internet or telephone.

215.453 Large winery; conditions; products and services; local government findings and criteria.

(1) A winery may be established as a permitted use on land zoned for exclusive farm use under ORS 215.213 (1)(p) or 215.283 (1)(n) or on land zoned for mixed farm and forest use if:

- (a) The winery owns and is sited on a tract of 80 acres or more, at least 50 acres of which is a vineyard;
- (b) The winery owns at least 80 additional acres of planted vineyards in Oregon that need not be contiguous to the acreage described in paragraph (a) of this subsection; and
- (c) The winery has produced annually, at the same or a different location, at least 150,000 gallons of wine in at least three of the five calendar years before the winery is established under this section.

(2) In addition to producing and distributing wine, a winery described in subsection (1) of this section may:

- (a) Market and sell wine produced in conjunction with the winery;
- (b) Conduct operations that are directly related to the sale or marketing of wine produced in conjunction with the winery, including:
 - (A) Wine tastings in a tasting room or other location on the premises occupied by the winery;

- (B) Wine club activities;
 - (C) Winemaker luncheons and dinners;
 - (D) Winery and vineyard tours;
 - (E) Meetings or business activities with winery suppliers, distributors, wholesale customers and wine-industry members;
 - (F) Winery staff activities;
 - (G) Open house promotions of wine produced in conjunction with the winery; and
 - (H) Similar activities conducted for the primary purpose of promoting wine produced in conjunction with the winery;
- (c) Market and sell items directly related to the sale or promotion of wine produced in conjunction with the winery, the marketing and sale of which is incidental to retail sale of wine on-site, including food and beverages:
- (A) Required to be made available in conjunction with the consumption of wine on the premises by the Liquor Control Act or rules adopted under the Liquor Control Act; or
 - (B) Served in conjunction with an activity authorized by paragraph (b), (d) or (e) of this subsection;
- (d) Provide services, including agri-tourism or other commercial events, hosted by the winery or patrons of the winery, at which wine produced in conjunction with the winery is featured, that:
- (A) Are directly related to the sale or promotion of wine produced in conjunction with the winery;
 - (B) Are incidental to the retail sale of wine on-site; and
 - (C) Are limited to 25 days or fewer in a calendar year; and
- (e) Host charitable activities for which the winery does not charge a facility rental fee.
- (3) (a) The gross income of the winery from the sale of incidental items pursuant to subsection (2)(c) of this section and services provided pursuant to subsection (2)(d) of this section may not exceed 25 percent of the gross income from the on-site retail sale of wine produced in conjunction with the winery.
- (b) At the request of a local government with land use jurisdiction over the site of a winery, the winery shall submit to the local government a written statement, prepared by a certified public accountant, that certifies compliance with paragraph (a) of this subsection for the previous tax year.
- (4) A winery operating under this section:
- (a) Shall provide parking for all activities or uses of the lot, parcel or tract on which the winery is established.
 - (b) May operate a restaurant, as defined in ORS 624.010, in which food is prepared for consumption on the premises of the winery.
- (5) (a) A winery shall obtain a permit from the local government if the winery operates a restaurant that is open to the public for more than 25 days in a calendar year or provides for agri-tourism or other commercial events authorized under subsection (2)(d) of this section occurring on more than 25 days in a calendar year.
- (b) In addition to any other requirements, a local government may approve a permit application under this subsection if the local government finds that the authorized activity:

- (A) Complies with the standards described in ORS 215.296;
 - (B) Is incidental and subordinate to the retail sale of wine produced in conjunction with the winery; and
 - (C) Does not materially alter the stability of the land use pattern in the area.
- (c) If the local government issues a permit under this subsection for agri-tourism or other commercial events, the local government shall review the permit at least once every five years and, if appropriate, may renew the permit.
- (6) A person may not have a substantial ownership interest in more than one winery operating a restaurant under this section.
- (7) Prior to the issuance of a permit to establish a winery under this section, the applicant shall show that vineyards described in subsection (1) of this section have been planted.
- (8) A local government shall require a winery operating under this section to provide for:
- (a) Establishment of a setback of at least 100 feet from all property lines for the winery and all public gathering places; and
 - (b) Direct road access and internal circulation.
- (9) A local government shall apply:
- (a) Local criteria regarding floodplains, geologic hazards, the Willamette River Greenway, solar access and airport safety;
 - (b) Regulations for the public health and safety; and
 - (c) Regulations for resource protection acknowledged to comply with any statewide goal respecting open spaces, scenic and historic areas and natural resources.
- (10) The local government may authorize a winery described in subsection (1) of this section to sell or deliver items or provide services not described in subsection (2)(c) or (d) or (3) of this section under the criteria for a commercial activity in conjunction with farm use under ORS 215.213 (2)(c) or 215.283 (2)(a) or under other provisions of law.
- (11) (a) A local government may issue a permit for a winery operating under this section to host outdoor concerts for which admission is charged, facility rentals or celebratory events if the local government issued permits to wineries operating under this section in similar circumstances before August 2, 2011.
- (b) A local government may not issue a permit for a winery operating under this section to host outdoor concerts for which admission is charged, facility rentals or celebratory events if the local government did not issue permits to wineries operating under this section in similar circumstances before August 2, 2011.
- (12) When a bed and breakfast facility is sited as a home occupation on the same tract as a winery established under this section and in association with the winery:
- (a) The bed and breakfast facility may prepare and serve two meals per day to the registered guests of the bed and breakfast facility; and
 - (b) The meals may be served at the bed and breakfast facility or at the winery.

(13) As used in this section:

(a) “Agri-tourism or other commercial events” includes outdoor concerts for which admission is charged, educational, cultural, health or lifestyle events, facility rentals, celebratory gatherings and other events at which the promotion of wine produced in conjunction with the winery is a secondary purpose of the event.

(b) “On-site retail sale” includes the retail sale of wine in person at the winery site, through a wine club or over the Internet or telephone.

ORS 215.456 Siting winery as commercial activity in exclusive farm use zone. (1) A local government may authorize the siting of a winery, on land zoned for exclusive farm use, pursuant to the standards that apply to a commercial activity in conjunction with farm use under ORS 215.213 (2)(c) or 215.283 (2)(a) or other law if the winery:

(a) Does not qualify for siting under ORS 215.452 or 215.453; or

(b) Seeks to carry out uses or activities that are not authorized by ORS 215.452 or 215.453.

(2) If a county authorizes the establishment of a winery on land zoned for exclusive farm use or mixed farm and forest use under provisions of law other than ORS 215.452 or 215.453 after June 28, 2013, the gross income of the winery from any activity other than the production or sale of wine may not exceed 25 percent of the gross income from the on-site retail sale of wine produced in conjunction with the winery. The gross income of a winery does not include income received by third parties unaffiliated with the winery.