

IN THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL
SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In the Matter of Upholding the Planning Director's Land Use Compatibility Statement Approval; Docket M-05-24; Tax Lot No. R3210 00500; Applicant: Red Hills Farm, LLC

BOARD ORDER 24-281

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board) sat for the transaction of county business on September, 12, 2024, Commissioners Lindsay Berschauer, Kit Johnston, and Mary Starrett being present.

IT APPEARING TO THE BOARD as follows:

WHEREAS, The Applicant, Red Hills Farm, LLC, originally submitted a conditional use application (Planning Docket C-02-24) for establishment of a reservoir in the AF-20 Agriculture/Forestry Zone ("CUP Application"); and

WHEREAS, The CUP Application went to a public hearing before the Planning Commission on April 4, 2024, and a request was made to leave the record open; and

WHEREAS, During the open record period, the Applicant's attorney submitted an argument that, because the proposed reservoir would be used solely to support irrigation, the proposed use would fall under the definition of farm use and therefore would not require a conditional use approval under the County's Zoning Code; and

WHEREAS, The Planning Director agreed with the Applicant's argument and analysis and thereafter approved a Land Use Compatibility Statement (LUCS) for the subject property (attached hereto as Exhibit A); and

WHEREAS, Following public notice, the LUCS approval was timely appealed, and the Board held a public hearing on the matter on August 15, 2024; and

WHEREAS, Following deliberation, the Board voted unanimously to uphold the Planning Director's LUCS approval and deny the appeal; and now, therefore,

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IT IS HEREBY ORDERED BY THE BOARD AS FOLLOWS:

Section 1. The Applicant's Land Use Compatibility Statement, Docket M-05-24, is hereby approved.

Section 2. The Board hereby adopts the findings set forth in Exhibit A, attached hereto and incorporated herein, in support of this approval.

DATED this 12th day of September, 2024, at McMinnville, Oregon.

ATTEST

KERI HINTON
County Clerk

By: Carolina Rook
Deputy CAROLINA ROOK

FORM APPROVED BY:
Jodi Gollehon
JODI GOLLEHON
Assistant Yamhill County Counsel



YAMHILL COUNTY BOARD OF
COMMISSIONERS

Lindsay Berschauer
Chair LINDSAY BERSCHAUER

Kit Johnston
Commissioner KIT JOHNSTON

Mary Starrett
Commissioner MARY STARRETT

Approved by the Yamhill County Board of
Commissioners on 09/12/2024
via Board Order 24-281

Yamhill County

DEPARTMENT OF PLANNING AND DEVELOPMENT

400 NE BAKER STREET | McMinnville, Oregon 97128

Phone:(503) 434-7516 | Fax:(503)434-7544 | TTY 1-800-735-2900 | Internet Address: www.yamhillcounty.gov

April 26, 2024

MEMORANDUM

To: Tax Lot File 3210-00500

From: Ken Friday, Planning Director

Re: **Land Use Compatibility Statement for Red Hills Farm, LLC, Docket M-05-24**

An application has been made by Red Hills Farm, LLC (“Red Hills Farm”) seeking to construct a dam and associated agricultural irrigation reservoir at 15110 NE Quarry Road, Sherwood, Oregon (Tax Lot #3210-00500) to store water for irrigation of vineyards on the subject parcel and adjoining parcels in the same ownership. The stated purpose of the proposed irrigation storage reservoir is to provide necessary irrigation to a significant portion of the existing and planned commercial vineyard lands under Red Hills Farm’s contiguous ownership of over 270 acres.

The subject parcel for the reservoir is zoned AF-20 Agriculture/Forestry Large Holding. This zoning has a list of permitted uses including 403.02(A) which lists, “Farm uses as defined in Subsection 403.12(E).” The definition in 403.12(E) states:

“403.12 Definition of Terms Used in this Section:

E. Farm Use - The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. Farm use also includes the current employment of land for the primary purpose of obtaining profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. Farm use includes the on-site construction and maintenance of equipment and facilities used for the activities described in the subsection. (Underline added). Farm use does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in ORS 215.203(3), or land described in 321.267(1)(3) or 321.824(3). “

"Current employment" of land for farm use includes:

- *Water impoundments lying in or adjacent to and in common ownership with farm use land".*

Based on the information included with the conditional use application and the testimony presented recently at the April 4, 2024, Planning Commission hearing, the proposed on-site irrigation improvements for application on contiguous vineyard lands owned by Red Hills Farm constitutes a "farm use" pursuant Section 403.12(E.) of the YCZO and ORS 215.203(2)(a). As such, a conditional use permit approval is not required for this specific proposed farm use pursuant to Section 403 of the Yamhill County Zoning Ordinance and ORS 215.203. This conclusion is supported by the ruling in *Brentmar v Jackson County*, 321 OR 481, 900 P2d 1030 (1995) that uses listed in ORS 215.203 may not be subject to local criteria more restrictive than the statute. Therefore, our office has signed the attached Land Use Information Form for Red Hills Farm, LLC to apply for permitting from the Oregon Water Resources Department.

979-24-00032-PLNG

Land Use Information Form



Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301-1266
(503) 986-0900
www.oregon.gov/OWRD

| | | | | |
|---|------------------------|---------------------|--|--|
| NAME Red Hills Farm, LLC | | | PHONE 503.726.6603 Jason Tosch | |
| MAILING ADDRESS 7401 Washo Court, Suite 201 | | | | |
| CITY Tualatin | STATE Oregon | ZIP 97062 | EMAIL jason@stollerwinegroup.com | |

A. Land and Location

Please include the following information for all tax lots where water will be diverted (taken from its source), conveyed (transported), and/or used or developed. Applicants for municipal use, or irrigation uses within irrigation districts, may substitute existing and proposed service-area boundaries for the tax-lot information requested below.

| Township | Range | Section | ¼ ¼ | Tax Lot # | Plan Designation (e.g., Rural Residential/RR-5) | Water to be: | | | Proposed Land Use: |
|-----------|-----------|-----------|--------------|------------|---|--|--|--|--------------------|
| 3S | 2W | 10 | SW-NE | 500 | AFLH/AF20 | <input checked="" type="checkbox"/> Diverted | <input checked="" type="checkbox"/> Conveyed | <input checked="" type="checkbox"/> Used | Farming |
| | | | | | | <input type="checkbox"/> Diverted | <input type="checkbox"/> Conveyed | <input type="checkbox"/> Used | |
| | | | | | | <input type="checkbox"/> Diverted | <input type="checkbox"/> Conveyed | <input type="checkbox"/> Used | |
| | | | | | | <input type="checkbox"/> Diverted | <input type="checkbox"/> Conveyed | <input type="checkbox"/> Used | |

List all counties and cities where water is proposed to be diverted, conveyed, and/or used or developed:

| |
|-----------------------|
| Yamhill County |
|-----------------------|

NOTE: A separate Land Use Information Form must be completed and submitted for each county and city, as applicable.

B. Description of Proposed Use

Type of application to be filed with the Oregon Water Resources Department:

- Permit to Use or Store Water
 Water Right Transfer
 Permit Amendment or Ground Water Registration Modification
 Limited Water Use License
 Exchange of Water
 Allocation of Conserved Water

Source of water: Reservoir/Pond Ground Water Surface Water (name) **a) diffuse surface runoff, b) an unnamed tributary of an unnamed tributary of Cedar Creek; and, c) an unnamed tributary of Cedar Creek**

Estimated quantity of water needed: **40** cubic feet per second gallons per minute acre-feet

Intended use of water: Irrigation Commercial Industrial Domestic for _____ household(s)
 Municipal Quasi-Municipal Instream Other **Multipurpose**

Briefly describe:

| |
|--|
| Applicant is pursuing a permit to store water. Following issuance of that permit, applicant will file, with OWRD, for a secondary water right permit to use the stored water for irrigation and agricultural use on the adjacent vineyards. |
|--|

Note to applicant: For new water right applications only, if the Land Use Information Form cannot be completed while you wait, please have a local government representative sign the receipt on the bottom of page 4 and include it with the application filed with the Oregon Water Resources Department.

See Page 2 →

EXHIBIT B: FINDINGS & CONCLUSIONS

In the Matter of an Appeal of a Planning Director Approval of an Agricultural Reservoir as a Permitted Farm Use in the AF-20 Agricultural/Forestry Zone

| | |
|---------------------------------|---|
| DOCKET NO.: | M-05-24 |
| PROJECT: | An appeal of Planning Directors approval of a request for the construction of a dam and water storage reservoir which will be used to supply irrigation water for the 26.64-acre subject parcel and adjoining parcels of approximately 245 acres under the same ownership |
| DIRECTOR INTERPRETATION: | The Yamhill County Planning Director interprets the proposed project falls under the definition of "farm use" listed in Sections 403.02(A) and 403.12(E) of the Yamhill County Zoning Ordinance and is therefore a permitted use in this zone. |
| APPELLANT: | Karyn Hanson |
| APPLICATION/OWNER: | Red Hills Farm, LLC |
| TAX LOT: | 3210-500 |
| LOCATION: | 15110 NE Quarry Road, Sherwood |
| ZONE: | AF-20, Agriculture/Forestry Large Holding District |
| CRITERIA: | Sections 403.02(A), 403.12(E) and 1404.01 of the Yamhill County Zoning Ordinance. Oregon Revised Statute 215.203 (In the Oregon Supreme Court decision on <i>Brentmar v. Jackson County</i> , 321 OR 481, 900 P2d 1030 the court determined that local regulations could not be more restrictive than the uses permitted in the farm zone). |

1. Nature of the Land Use Application and Planning Director's Decision

Applicant Red Hills Farm LLC ("Red Hills") is seeking required local and state agency authorizations to construct an impoundment and associated agricultural irrigation reservoir on real property located at 15110 NE Quarry Road, Sherwood Oregon (Tax Lot 23210-00500) to store water for the purpose of irrigating existing and future vineyards on the subject parcel and on adjoining lands in the same ownership. The record before the County in these proceedings indicates that the stated purpose of the proposed irrigation storage reservoir is to provide necessary irrigation to the subject 26-acre parcel and to a significant portion of 245 contiguous acres of agricultural land, all of which is under the ownership of Red Hills Farm LLC and currently is planted or is planned to be planted in commercial vineyards.

Pursuant to the need for approval of the proposed impoundment and reservoir by the Oregon Department of Water Resources ("OWRD") and the agency's requirement for pre-

approval execution by the County Planning Director of a Land Use Information Form (“LUCS”) confirming that the proposed impoundment and reservoir is either “. . . allowed outright or not regulated by . . . (the County’s) . . . comprehensive plan.” Red Hills submitted the subject OWRD Form, together with an explanatory memorandum from Red Hills counsel, Mr. Steven Pfeiffer, to the Planning Director for execution. In response to this submittal, Mr. Ken Friday, County Planning Director issued the requested LUCS, together with an explanatory memorandum, on April 25 and April 26, 2024, respectively, with the express notation that the proposed impoundment/reservoir and associated water use is allowed outright in the AF-20 zoning district under Section 403 of the Yamhill County Zoning Ordinance as a “farm use” based on the definition of this allowed activity as set forth in Section 403.12. and ORS 215.203(2)(a). Specifically, the LUCS determination issued by the Director included the following supportive findings and conclusion:

“Based on the information included with the conditional use application and the testimony presented recently at the April 4, 2024, Planning Commission hearing, the proposed on-site irrigation improvements for application on contiguous vineyard lands owned by Red Hills Farm constitutes a “farm use” pursuant Section 403.12(E) of the YCZO and ORS 215.203(2)(a). As such, a conditional use permit approval is not required for this specific proposed farm use pursuant to Section 403 of the Yamhill County Zoning Ordinance and ORS 215.203. This conclusion is supported by the ruling in *Brentmar v Jackson County*, 321 OR 481, 900 P2d 1030 (1995) that uses listed in ORS 215.203 may not be subject to local criteria more restrictive than the statute. Therefore, our office has signed the attached Land Use Information Form for Red Hills Farm, LLC to apply for permitting from the Oregon Water Resources Department.”

Public notice of the Director’s decision and the opportunity to file an appeal of the same with this Board was provided on April 26, 2024, by publication in the News Register newspaper and by direct mailed notice to persons who are entitled to such notice under the County Zoning ordinance and applicable state law.

2. Appeal Filing

An appeal of the Director’s decision was filed on May 13, 2024, by appellant Karen Hansen (“Appellant”). The subject appeal raises the following issues for review by the Board:

- The Director’s decision that the proposed impoundment and reservoir “. . .is inconsistent and contrary to the clear and unambiguous text that any proposed Reservoir and Water Impoundments in the AF-20 District requires conditional use approval under the County’s Zoning Ordinance. Section 403.04 S.”
- The Director’s “. . .reliance on *Brentmar v. Jackson County* to support the interpretation is misplaced. *Brentmar* applies to property zoned EFU. Here, Red Hills Farm, LLC’s propriety is zoned AF-20.”

The initial allegation noted above that the Director erred in not requiring conditional use review and approval for the proposed project also was raised in testimony submitted by Friends of Yamhill County.

No other issues regarding code interpretation by the Director or any other aspect of his decision including the evidence in the record relied upon in support of the decision are raised in the appeal. Further, the Board notes that public testimony received the Appellant or other participant in the review proceedings before the Board related to the appeal does not raise any other issues or allegations related to the criteria apply by the Director, nor does such testimony challenge or otherwise contest the evidence in the record relied upon by the Director. Further, the Board finds that no allegations of procedural error are raised in the appeal as filed or during public testimony before the Board.

Upon receipt of the appeal, published and mailed notice of a de novo public hearing before the Board on July 18, 2024, and the opportunity for participation by interested parties in addition the Appellant was provided on or before June 25, 2024, was provided to all persons entitled to such notice under County ordinance and applicable state law. At the close of the public hearing, the Board directed that the record remains open for the submission of additional public testimony or evidence until August 1, 2024, and until August 8, 2024, exclusively for the submittal of final written argument by Red Hills. Deliberation and final action by the Board was scheduled for and occurred on August 15, 2024.

3. Scope of Review

When addressing the criteria which are the subject of this appeal and considering available evidence in the record, the Board used the standard of review required for land use decisions under established Oregon law. In addition, where the ordinance provisions applied by the Director were ambiguous, the Board applied the *PGE v. BOLI* methodology to arrive at what he believes to be the correct construction of the statute. *State v. Gaines*, 346 Or 160, 171–172, 206 P3d 1042 (2009). In so doing, the Board attempted to rely, as much as possible, on past interpretation adopted by the Board, while still making sure that the interpretation would be affirmed if appealed.

The standard by which Land Use Board of Appeals (LUBA) and the courts will review the Board's decision is also an important consideration. ORS 197.829 provides as follows:

197.829 Board to affirm certain local government interpretations.

(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

- (a) Is inconsistent with the express language of the comprehensive plan or land use regulation;**

(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. (Emphasis added).

When addressing the criteria and considering evidence, the Board used the standard of review required for land use decisions. The applicant has the burden to provide substantial evidence, supported by the record, to demonstrate that all approval standards are met.

In addition, where the ordinance provisions were ambiguous, the Board applied the *PGE v. BOLI* methodology to arrive at what he believes to be the correct construction of the statute. *State v. Gaines*, 346 Or 160, 171–172, 206 P3d 1042 (2009). In so doing, the Board attempted to rely, as much as possible, on past interpretation adopted by the Board, while still making sure that the interpretation would be affirmed if appealed.

The standard by which Land Use Board of Appeals (LUBA) and the courts will review the Board's decision, if appealed, is also an important consideration. ORS 197.829 provides as follows:

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(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. (Emphasis added).

The Oregon Supreme Court has construed ORS 197.829(1) to require LUBA and the courts to affirm a local government code interpretation of its own code if the interpretation

is “plausible.” *Siporen v. City of Medford*, 349 Or 247, 255, 243 P3d 776 (2010); *Southern Oregon Pipeline Information Project, Inc. v. Coos County*, 57 Or LUBA 44 (2008), *aff’d without op.*, 223 Or App 495, 195 P3d 123 (2008), *rev den.*, 346 Or 65 (2009). That deferential standard of review applies only to interpretations of local law adopted by the governing body (as opposed to the interpretations made by lesser bodies such as planning staff, hearings officers or Planning Commissions. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994)). However, if the Board formally adopts a Hearings Officer’s recommendation as its own findings, the deference principle applies. See *Derry v. Douglas County*, 132 Or App 386, 888 P2d 588 (1995). LUBA has also clarified that the deferential standard of review set forth in ORS 197.829(1) applies to a County’s interpretation of plan maps as well. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

One important exception to this principle occurs when the local code provision implements state law: LUBA and the courts are not required to give deference to a local government’s interpretation of state law, or to code interpretations if the code standard at issue implements or mimics state law. *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500, 519 (2006). Interpretations of any local code provisions which implement Statewide Planning Goals, as an example, will be reviewed by LUBA to ensure that they are consistent with the language, policy, and purpose of the applicable state statute and/or Goal provision which is implemented via the County Zoning Ordinance. ORS 197.829(1)(d). For reasons explained below, this exception to deference on appeal and the corresponding legal obligation of this Board to interpret and apply such implementing local regulations in a manner which is consistent with the relevant statute, Goal or administrative rule is an important factor in the Board’s decision in this appeal.

4. Motion to Dismiss

On July 9, 2024, Red Hills filed a motion to dismiss the pending appeal as untimely under applicable County ordinance requirements and established law with the consequence being that the Board lacks jurisdiction to review to the Director’s decision and that such decision is final and beyond further appeal. For the reasons set forth below, the Board concludes that the appeal filed in a timely manner and, accordingly, the Board has jurisdiction to consider and take final action on the appeal.

The Board notes that the subject decision was a Land Use Compatibility Statement (LUCS) signed by the Planning Director on April 25, 2024, and finds that this was the date of decision. While the LUCS was signed on April 25, 2024, the Director’s accompanying memo explaining the decision was completed on April 26, 2024, and a public notice of decision was mailed to neighboring property owners on April 26, 2024. Subsection 1301.02 of the Yamhill County Zoning Ordinance lists the “Effective Date of Decision” as follows:

The effective date of decision is the date of recording of the final order or, if the decision is such that no order is to be filed, the effective date of decision is the date the letter notifying the applicant of the decision. (Underline added).

Therefore, since the decision was both written up on April 26, 2024, and notice of the decision mailed on that same date, the Board concludes that Friday, April 26, 2024, is the correct date of decision.

The first paragraph of Subsection 1401.01 of the Yamhill County Zoning Ordinance, "Appeals From Decisions of the Planning Director", reads as follows:

Where it is alleged that there is error in any land use decision made by the Director on the interpretation of this ordinance, an appeal therefrom may be made by an affected party only to the Board on a form prescribed by the Director. Such written appeal shall be filed with the Director within fifteen (15) days of the decision on a proposed action and shall be accompanied by the appropriate filing fee. Upon determination that the appeal request is complete and in order, a public hearing before the Board shall be scheduled and public notice mail and published according to the public notice requirements contained in Section 1402. (Underline added).

Since the decision was made and mailed out on Friday, April 26, 2024, the 15-day appeal window would have closed on Saturday, May 11, 2024. The motion to dismiss asserts that the 15-day appeal period is not extended because it lands on a weekend, and suggests that planning staff provided erroneous advice in the appeal notice by setting the deadline on Monday May 13, 2024. The motion to dismiss goes on to assert that it is incumbent upon the person filing the appeal to submit it by May 10, 2024. However, I believe that this reading would not comply with Subsection 1401.01 because, in this instance, it would have only allowed the interested party 14 days to file their appeal instead of the 15-days required under the ordinance. That appeal window could have been further shortened if a holiday or office closure were to land on the days before the weekend.

This suggested reading of the appeal deadline would also be contrary to the County's longstanding past practice. For over 35 years, Yamhill County has followed the same practice for the computation of time that is followed by Oregon state courts for criminal and civil procedures, and that is followed by the Land Use Board of Appeals (LUBA) under its administrative rules. LUBA's administrative rules provides for the computation of time in OAR 661-010-0075(6) as follows:

Miscellaneous Provisions, subsection (6) Computation of Time: Time deadlines in these rules shall be computed by excluding the first day and including the last day. If the last day is Saturday, Sunday or other state or federal legal holiday, the act must be performed on the next working day. (Underline added).

In conclusion, since the last day to appeal was a Saturday (May 11, 2024) the appeal deadline was extended to the next working day of Monday, May 13, 2024. Therefore, the Board concludes that the May 13, 2024 appeal filed by Karyn Hanson was filed in a timely manner and that this decision is consistent with the language, purpose and policy of our local land use regulations, that our office provided the correct information and that we

followed the most appropriate and legally defensible interpretation of the applicable ordinance provisions.

5. Resolution of the appeal

Based on the testimony presented to the Board by Jason Tosch, Vice President of Vineyard Operations for Red Hills and Stoller Vineyards, the specific land use and associated physical improvements proposed by Red Hills which are the subject of the Director's LUCS decision is an irrigation water storage reservoir and surface water dam located on real property under Red Hills ownership. As confirmed by the testimony of Mr. Tosch, the sole purpose of the proposed reservoir and associated improvements is to provide irrigation to Red Hills's existing and planned commercial vineyards located on the subject 26 acre parcel and on a significant portion of contiguous commercial vineyards also owned by Red Hills. Further evidence of the specific nature, location and purpose of the proposed improvements as being exclusively for the employment of Red Hill's agricultural practices on its commercial vineyard operation located on Red Hill's contiguous ownership is set forth in (1) a preliminary conditional use application included in the record, which ultimately was withdrawn pursuant to the LUCS decision and (2) a memorandum dated from Steven Pfeiffer to the Director dated April 22, 2024 in support of the LUCS application. The Board notes that there is no conflicting testimony or evidence in the record challenging or controverting this evidence of agricultural irrigation of contiguous lands in the AF-20 zoning district as the purpose or nature of Red Hill's proposed land use and improvements as understood and addressed by the Director.

Based on the above understanding of the nature and location of the use proposed by Red Hills, the Director concluded in the LUCS decision under review that applicable County ordinance provisions, together with applicable state statutory provisions set forth in ORS 215.203(2)(a) which these local code provisions implement as a matter of law, indicate that the proposed dam and irrigation reservoir are allowed outright as a "farm use" in the AF-20 zoning district pursuant to Section 403.02(A) of the Yamhill County Zoning Ordinance. The Appellant does not challenge the Director's conclusion that the proposed project constitutes a "farm use" but instead appears to argue that a more restrictive code provision indicating that reservoirs in the AF-20 zone generally require conditional use review somehow renders void the unambiguous alternate code provision that such uses and activities undertaken in conjunction with commercial farm uses are allowed as of right. However, the appellant provides no legal authority for such a conclusion and the Board otherwise is aware of none. The Board understands and concurs that the basis for this interpretation that the proposed dam and impoundment is a "farm use" allowed as of right in the AF-20 zone is as follows:

- Farm uses are allowed in the AF-20 zone per the provisions below:

"403.02 Permitted Uses.

In the Agriculture/Forestry District, the following uses shall be permitted subject to the standards and limitations set forth in Subsection 403.11, and any other applicable provisions of this Ordinance:

A. Farm uses as defined in Subsection 403.12(E)".

- The key definitions of "farm use" and "current employment of land for farm use" are set forth in Section 403.12 below and clearly include on-site reservoirs in common ownership with farmed lands:

"403.12 Definition of Terms Used in this Section:

E. Farm Use - The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. Farm use also includes the current employment of land for the primary purpose of obtaining profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. Farm use includes the on-site construction and maintenance of equipment and facilities used for the activities described in the subsection. (underline emphasis added) Farm use does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in ORS 215.203(3), or land described in 321.267(1)(3).

"Current employment" of land for farm use includes:

Water impoundments lying in or adjacent to and in common ownership with farm use land".

Based on the evidence available in the record including specifically the testimony presented by Mr. Tosch to this Board at the hearing on July 18, 2024 and the written submittals to the Director, the Board concurs with the analysis and interpretative determination by the Director that the proposed on-site irrigation storage reservoir and dam constructed and operated for the sole purpose of providing irrigation to contiguous commercial vineyard lands owned by Red Hills Farm constitutes both a "farm use" pursuant Section 403.12.E and ORS 215.203(2)(a), as well as the "current employment" of land for "farm use". Appellant does not challenge the Director's conclusion that the proposed project constitutes a "farm use" but instead appears to argue that a more restrictive code provision indicating that reservoirs in the AF-20 zone generally require conditional use review somehow renders void the unambiguous alternate code provision that such

uses and activities undertaken in conjunction with commercial farm uses are allowed as of right. Under this apparent analysis, the Appellant argues the conditional use provision in Section 403.04S, which the Board finds must be read and applied in conjunction with Section 403.02(A) to avoid internal code conflicts, constitutes an "...applicable provision of this Ordinance." and thus requires the Board to disregard the express allowance of the proposed use under Section 403.2(A). However, the appellant provides no legal authority for such a conclusion the County is allowed, let alone required, to disregard the express language and implementation of Section 403.02(A) and the Board otherwise is not aware of any such legal authority or requirement.

Based upon and as a necessary consequence of the Board's conclusion that the Director has correctly determined that the reservoir and related improvements are an allowed outright use under Section 403.02 to allow the reservoir and related improvements as of right, which again is not challenged by the Appellant, the Board rejects the appellant's contention that a reservoir which constitutes a "farm use" as defined in the County Zoning Ordinance as proposed nonetheless requires conditional use review and approval.

The Board further finds that this conclusion that the proposed use and improvements constitute a "farm use" which is allowed under Section 403.02 and ORS 215.203(2)(a) is consistent with established appellate rulings addressing this specific interpretive question. Specifically, in response to allegations that the storage and placement of biosolids on agricultural lands does not constitute a "farm use" as the term is defined in ORS 215.203(2) and local ordinance, the Oregon Land Use Board of Appeals held in *Friends of the Creek v. Jackson County*, LUBA No. 98-158 (1999) that:

"The second problem with petitioner's argument is that it does not consider subsection (b) of ORS 215.203(2). As relevant, ORS 215.203(2)(b) provides:

"Current employment" of land for farm use includes:

** * * * **

*"(F) [L]and under buildings supporting accepted farm practices * * * [.]"* In a case with many similarities to the present case, LUBA relied on the language in ORS 215.203(2)(b)(F) to conclude that a proposal to apply effluent on EFU-zoned land constituted 21 a farm use. *Swenson v. DEQ*, 9 Or LUBA 10 (1983).

"An example of such a farm would include a farm operation that is marginally profitable, where the farmer continues the farming operation primarily because the farmer is dedicated to continuing the family farm.

Such a farmer's primary reason for continuing the farm might have little to do with the profit realized from the farm.

Under petitioner's argument, such a farm would not constitute farm use while the next door neighbor's identical farm would constitute a farm use, if the next door neighbor was primarily motivated by the profit derived from the farm.

In Swenson, the applicant proposed to (1) pipe effluent from a cannery to a 20 acre holding pond on EFU-zoned property, (2) treat the effluent at the holding pond, and (3) spray irrigate that treated effluent on a 9.87 acre farm. We pointed out that the purpose of the project in Swenson was to dispose of wastewater rather than to make a profit on the irrigated crops. Id. at 17.

Nevertheless, we concluded the proposal constituted a farm use, because "[t]he land occupied by the irrigation equipment can be considered land in current employment for farm use in the same way that 'land under buildings supporting accepted farm practices' is land in farm use." Id. at 17-18. In reaching that conclusion we stated that irrigation was an accepted farming practice and the source of the irrigation water is irrelevant.

The only apparent significant factual difference between Swenson and the present appeal is the part of the current proposal to dry and apply sludge to the land. However, just as irrigation is indisputably an accepted farming practice, it seems equally obvious that fertilizing and taking other appropriate actions to improve the productivity of the soil is also an accepted farming practice.

We reject petitioner's argument that the city's primary motive in this case for applying effluent and biosolids to the subject property is such that, as a matter of law, the proposal cannot be viewed as a farm use."

See also *Farrell v. Jackson County*, 41 OR LUBA 29 (2001); *Swanson et al v. Oregon Department of Environmental Quality*, 9 OR LUBA 10 (1983).

Further, the Board concurs with the Director's determination that the ruling by the Oregon Supreme Court's in *Brentmar v Jackson County*, 321 OR 481, 900 P2d 1030 (1995) that uses listed in ORS 215.203(1) may not be subject to local criteria more restrictive than the statute is applicable in this instance to prohibit as a matter of law any interpretation of Section 403 by the County that the proposed use and improvements, which clearly constitute a "farm use" under Section 403 and ORS 215, requires conditional use authorization by the County. Pursuant to the ruling in *Brentmar*, the Board finds that ORS 215.283(1) establishes a range of land uses and activities including "farm use" which must be allowed under applicable County land use regulations "as of right" and thus may not be subject to additional local criteria, as correctly determined by the Director in the subject LUCS decision. See also *Kenagy v Benton County*, 115 OR App 131, 838 P2nd, 1076 (1992).

For the above reasons, the Board concludes that the Director correctly determined that the appropriate and lawful interpretation of Section 403.04(S), which requires conditional use authorization for "S. Reservoirs and water impoundments" in the AF-20 zone district is that this CU review requirement is applicable only to such facilities proposed for location in the AF-20 zone district which do not meet the definition of "farm use" as set forth in Section 403.12 and ORS 215.283.203(2).

The Appellant also argues that the Director erred in his reliance upon the Supreme Court's direction *Brentmar* based on legally unsubstantiated assumption that the County's AF-20 zone designation is not an agricultural zone designation which implements Statewide Planning Goal 3 and ORS 215.283 and thus the proposed farm use is not subject to the unequivocal prohibition on the application of any County-initiated review standards or criteria including conditional use status imposed by the Supreme Court in *Brentmar*. Notably, The Board finds that the Appellant provides no legal authority or citation to appellate rulings which support their stated assumption, and the appellant also fails to provide any response to the directly applicable appellate rulings in the record provided by Red Hills in support of the Director's analysis regarding the applicability of the *Brentmar* ruling to his decision and the legal interpretive obligations of the County in this circumstance.

Consistent with the Director's analysis, The Board finds that both the Oregon Land Conservation and Development Commission and the Oregon Land Use Board of Appeal expressly disagree with Appellant's analysis. For purposes of providing state policy direction to Oregon counties regarding the scope and type of allowable zone designations deemed adequate to implement the required protection of agricultural land under Goal 3, the Commission enacted the following administrative regulation:

OAR 660-006-0050 Uses Authorized in Agricultural/Forest Zones

(1) Governing bodies may establish agriculture/forest zones in accordance with both Goals 3 and 4, and OAR chapter 660, divisions 6 and 33.

*(2) Uses authorized in Exclusive Farm Use Zones in ORS Chapter 215 (County Planning), and in OAR 660-006-0025 (Uses Authorized in Forest Zones) and 660-006-0027 (Dwellings in Forest Zones, **subject to the requirements of the applicable section**, may be allowed in any agricultural/forest zone. The county shall apply either OAR chapter 660, division 6 or 33 standards for siting a dwelling in an agriculture/forest zone based on the predominant use of the tract on January 1, 1993. (emphasis added)"*

Via this adopted regulation, the Commission has authorized such as Yamhill County to adopt and rely upon mixed farm/forest zone designations such as the subject AF-20 zone as well as exclusive farm use zones to implement the agricultural land protection requirements established under Goal 3 and ORS Chapter 215, but only if such local designations include and are subject to the requirements of ORS Chapter 215 and

applicable provision of Goal 4 addressing allowed development on forest lands. Accordingly, the County adopted Comprehensive Plan Policy II.1.C, which provides:

“C. Yamhill County recognizes that certain areas of the county are characterized by such a mixture of farm and forest use that the agricultural lands and forest lands goals of this Plan are both applicable. Farm and forest resources within these areas shall be protected through mixed-use zoning that recognizes both types of use. Any proposal to change the zoning designation of a parcel from a farm or forest classification to a mixed-use zone shall include a demonstration that the use of the parcel is such a mixture August 1, 2024 that neither the farm nor forest land goals can be exclusively applied.” (emphasis added).

The Board concludes that the stated intent of this adopted policy, together with the mandatory direction from the Commission that mixed use zones must mirror the statutory requirements of ORS Chapter 215, is precisely why the range of uses identified in Sections 402 and 403 as “Permitted Uses” are largely if not completely identical. Since the *Brentmar* analysis regarding the prohibition of additional local review standards applies to all use identified in ORS 215.283(1) and these same statutory uses are allowed equally in Sections 402 and 403 on agricultural lands subject to Goal 3 as Permitted Uses, the Board finds that there is no plausible conclusion other than the Director’s determination that the *Brentmar* analysis imposing a prohibition on additional local regulation applies equally to Red Hills proposed farm use in both EFU and mixed farm/forest zones including AF-20.

Given the above regulatory provisions established by the Legislature and LCDC addressing the local implementation requirements under on lands subject to Goal 3, a subsequent LUBA ruling in *City of Albany v. Linn County*, LUBA No. 2001-011 (2001) comes as no surprise to the Board. In *City of Albany*, LUBA addressed the identical assumption offered by the Appellant that the statutory and administrative rule provisions applicable to uses in exclusive farm use zones do not apply to mixed farm/forest designation. In response, the Board concluded at pps 4-5 of the opinion:

“OAR 660-006-0050 permits counties to adopt mixed farm/forest zones to satisfy the requirements of both Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). In those circumstances, uses authorized in exclusive farm use zones in ORS chapter 215, subject to the restrictions contained within the chapter and administrative rules implementing ORS chapter 215, may be allowed in the mixed farm/forest zone. OAR 660-006-0050(2). The county’s farm/forest zone is a mixed zone that allows uses listed in ORS chapter 215, subject to the restrictions provided in that chapter. Therefore, the county must apply the standards found in ORS 215.275 for siting a utility facility in an exclusive farm use zone to the city’s application.”

The appellant further states on page 8 of its Closing Statement that “Statewide Goal 3 specifically refers to land that qualifies as Exclusive Farm Use land that requires

protection under an EFU zone.” and offers language which is expressly identified as being set forth in the text of Statewide Planning Goal 3. To the contrary, the Board finds that the text of Statewide Planning Goal does not include the term “Exclusive Farm Use” in any context, and the language represented as a quote from the text of Goal 3 text in fact is not included in the Goal in any matter. Consequently, the appellant’s argument that the express language of Goal 3 states that the required protections for agricultural lands are legally confined to lands zoned Exclusive Farm Use not only is not accurate, but the quote offered in support of this incorrect argument is not included within the language of the Goal as represented.

Based upon the Board’s finding that the text of Goal 3 relies exclusively on the term “agricultural lands” and a science-based definition of such lands to identify the lands to which counties must apply the required Goal protections via “.... zoning applied to agricultural lands”, the Board concludes that the express text and apparent intent of Goal 3, coupled with the administrative regulations noted above, further confirms that EFU zoning is only one of many available zone designations which may be enacted locally to implement the Goal and ORS chapter 215 to address the varied types of “agricultural lands” and that the County’s AF-20 has been acknowledged by the Oregon Land Conservation and Development Commission to be a zoning designation which provides such Goal 3 implementation.

Again, the above findings an analysis, coupled with relevant appellate authority leads the Board to conclude that the Director was correct in determining that:

(1) the County’s acknowledged AF-20 zoning district is an agricultural zoning designation which implements Statewide Planning Goal 3 as matter of law, and

(2) the interpretation of Section 403.02(A) to acknowledge that the proposed agricultural reservoir is a farm use allowed as of right, in addition to being a reasonable and unambiguous free-standing Code interpretation, is subject to the ruling in Brentmar that the County is prohibited as a matter of law from adopting the Appellant’s proposed interpretation that the proposed farm use is subject to conditional use review.

Finally, the Board notes that testimony received from the Appellant, and Friends of Yamhill County, and David Brown raised concerns regarding issues related to potential impacts associated with development of proposed irrigation reservoir including groundwater availability impacts, wildlife habitat impacts and the potential scope of analysis by the County which would be provided if conditional use review were to be required contrary to the Director’s determination. With regard to this testimony, the Board finds that these concerns and issues, while acknowledged by the Board, are not relevant to the Board’s analysis of the underlying issue raised in the appeal regarding whether conditional use review is required as a matter of law under applicable Yamhill County zoning ordinance provision, state statute and administrative regulations and applicable appellant rulings.

Consequently, the Board concurs with the Director's determination that conditional use or other discretionary County permit approvals are not required for this specific proposed farm use at this location pursuant to Section 403 of the Yamhill County Zoning Ordinance and ORS 215.203, and the concludes that the Director correctly executed the OWRD LUCS affidavit to confirm this County ordinance and statutory interpretation.

6. Conclusion

For the above reasons, the Board concurs with the Director's determination that conditional use or other discretionary County permit approvals are not required for this specific proposed farm use at this location pursuant to Section 403 of the Yamhill County Zoning Ordinance and ORS 215.203, and the concludes that the Director correctly executed the OWRD LUCS affidavit to confirm this interpretation and application of applicable County ordinance and statutory provisions. The pending appeal is denied and the Directors decision regarding the LUCS determination dated April 25, 2024 is affirmed by the Board.