BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VIRGINIA COX, KRISTIN ANDERSEN, and DOUGLAS PARMETER, Petitioners, vs. YAMHILL COUNTY, Respondent, and LEE RUFF STARK ARCHITECHTS, Intervenor-Respondent.	LUBA No. 95-203 FINAL OPINION AND ORDER

Appeal from Yamhill County.

Virginia Cox, Kristin Anderson, Amity, and Douglas Parmeter, Sheridan, filed the petition for review. Virginia Cox and Douglas Parmeter argued on their own behalf.

No appearance by respondent.

James Bean and Thomas Cutler, Portland, filed the response brief. With them on the brief was Lindsay Hart Neil & Weigler. James Bean argued on behalf of intervenor-respondent.

LIVINGSTON, Chief Referee; GUSTAFSON, Referee, participated in the decision.

AFFIRMED 06/14/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioners appeal a decision of the board of county commissioners adopting a "reasons" exception to Statewide Planning Goal 3 (Agricultural Land) to allow a church on a 7.4-acre parcel, changing the comprehensive plan map designation of that parcel from Agricultural/Forestry Large Holding to Public, and changing the zoning of the parcel from Exclusive Farm Use (EF-40) to Public Assembly Institutional (PAI).

MOTION TO INTERVENE

Lee Ruff Stark Architects (intervenor), the applicant below, moves to intervene in this proceeding on the side of the respondent. There is no opposition to the motion, and it is allowed.

FACTS

The challenged decision follows our remand in Cox v. Yamhill County, 29 Or LUBA 263 (1995) (Cox I). We remanded because the alternative sites analysis required by the "reasons" exception was inadequate with respect to one of several alternative sites specifically identified in the county's findings, the so-called "2.75-acre parcel." We stated:

> "Given the unchallenged determination that the proposed use requires a three-acre site, a finding that 1/3 of the 2.75-acre Amity site is unbuildable could provide an adequate basis for concluding that the Amity site is not a reasonable

> alternative. However, the findings do not explain why or how 'neighborhood opposition' makes any portion of the site unbuildable. Further, the parties cite no evidence in the record supporting the county's finding that neighborhood opposition and wetlands make 1/3 of the Amity site unbuildable. Therefore, we conclude the county has not satisfied ORS 197.732(1)(c)(B) and OAR 660-04-020(2)(b) with regard to the Amity site." Cox I at 272.

We also addressed a site identified in materials submitted by the applicant to the county as "site 24." With respect to site 24, we stated:

> "Since the proposed use requires at least three acres, and the findings indicate some portion of the approximately 2.4 acres of site 24 outside the 'flag pole' access strip are unbuildable due to high water, the above findings are adequate to establish that site 24 is not a reasonable alternative for the proposed use." Cox I at 270.

As it turns out, the "2.75-acre parcel" and "site 24" are the same property, which we refer to henceforth as site 24. On remand, the county held another hearing and then made additional findings to support the reasons exception adopted in Ordinance 581, the county's original decision, which was appealed in Cox I.

ASSIGNMENTS OF ERROR

Petitioners make three assignments of error, all pertaining to the county's application of OAR 660-04-020(2)(b), which describes the process that must be followed prior to a determination that "[a]reas which do not require a new exception cannot reasonably accommodate the [proposed] use." All of these assignments fail because they attempt to

reopen issues already decided in Cox I and not appealed: the size of site 24, which we described variously in Cox I as 2.7 acres, 2.75 acres or approximately 3 acres, but never as more than 3 acres; the amount of buildable land required by the proposed church (at least 3 acres); the one-third acre portion of site 24 that is unbuildable because of the access strip or "flag"; and the marshy portion of the property that is unbuildable due to high water. See Cox I at 270.

ORS 197.835(11)(a) provides:

> "Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830(13), [LUBA] shall decide all issues presented to it when reversing or remanding a land use decision * * *."

The Oregon Supreme Court has interpreted the statute to narrow the scope of LUBA's remand and thereby avoid redundant proceedings. A party may not raise old, resolved issues during remand proceedings. Beck v. City of Tillamook, 313 Or 148, 152-53, 831 P2d 678 (1992).[1]

Petitioners contend that in a video tape submitted prior to Cox I, they made clear that site 24 should include

[1]A local government may ordinarily choose to expand the scope of remand proceedings to consider additional questions or adopt a different decision or different findings in support of its decision. Schatz v. City of Jacksonville, 113 Or App 675, 679, 835 P2d 923 (1992). However, in the local proceedings on remand in this case, the county expressed its intention to limit the subject of the proceedings as much as possible. Record 55, 71.

not only the 2.75 acres, but also an adjacent 0.66-acre parcel. Petitioners could have assigned error to the characterization of site 24 as 2.75 acres in the petition for review filed prior to Cox I. They did not.[2] If they had, their next step, which was not taken, would have been a timely appeal from our opinion in Cox I to the Court of Appeals.

Petitioners' assignments of error are denied.

The county's decision is affirmed.

PETITION FOR ATTORNEY FEES

Attorney fees petitions have become more common in response to 1995 amendments to ORS 197.830(14)(b), which now provides:

> "[LUBA] shall * * * award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in law or on factually supported information."

Our rules state that petitions for attorney fees must be filed within 14 days after our final order is issued. OAR 661-10-075(1)(a). Intervenor includes a petition for an award of attorney fees in its response brief. We see no harm in one party to an appeal informing another party as soon as possible that an award of attorney fees is being or

[2]The Cox I petition for review, page 7, does refer to site 24 as "approximately 3 acres." However, this reference is insufficient to raise the issue on which petitioners now attempt to base their appeal: that site 24 is 2.75 acres plus 0.66 acres.

will be requested.

Our rules do not specify any particular form for attorney fees petitions. For an appropriate form, we look to ORCP 68(C)(4)(a)(i), which requires that attorney fees petitions in state court include "a signed and detailed statement of the amount of attorney fees." For obvious reasons, intervenor's petition for attorney fees neither states an amount requested nor provides sufficient detail to justify the award of any amount. Yet without such a statement, we cannot consider an attorney fees petition.

If the petition for attorney fees is included in a brief, the "signed and detailed statement" specified above must be filed after the issuance of our opinion, to alert the opposing party that a response is appropriate. We will not normally consider an attorney fees petition until after the opposing party has had the 10 days allowed by our rules to respond. See OAR 661-10-075(1)(f).

To save the parties more work, however, we resolve intervenor's petition as it stands, without additional briefing. In view of the confusion surrounding the issues resolved in Cox I, created in part by the form in which the decision and supporting findings in that case were reduced to writing, we do not find that petitioners, appearing pro se, were without probable cause to believe their position was well-founded in law or on factually supported information. Intervenor's petition for attorney fees is

denied.