BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PHILIP ROBERTS and JANET ROBERTS, Petitioners, vs. CROOK COUNTY, Respondent, and DORIS HOWLETT, Intervenor-Respondent.	LUBA No. 96-227 FINAL OPINION AND ORDER

Appeal from Crook County.

Philip Roberts and Jane Roberts, Powell Butte, filed the petition for review on their own behalf. Philip Roberts argued on his own behalf.

No appearance by respondent.

Edward P. Fitch, Redmond, filed the response brief on behalf of intervenor-respondent.

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

REMANDED 06/06/97

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county's approval of three nonfarm dwellings on exclusive farm use (EFU) zoned land, and a partition of the 67-acre parcel to provide a separate parcel for each dwelling.

MOTION TO INTERVENE

Doris Howlett (intervenor), the applicant below, moves to intervene on the side of respondent. Petitioners object to the motion to intervene on the grounds that it was not timely filed.

The notice of intent to appeal was filed on November 20, 1996. On February 4, 1997 we issued an order explaining:

> "The petition for review in this case was filed on December 31, 1996. On January 28, 1996, upon receiving no response brief, we notified the parties that the appeal would be considered on petitioners' brief alone. In response to our letter, on February 3, 1996, the county notified us that it has not yet received the petition for review.
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> "According to the county's letter, petitioner * * * informed the county counsel that she personally delivered a copy of the petition for review to the county, leaving it on an unoccupied desk of a secretary in the county counsel's office. [She] acknowledged that her Affidavit of Service was inaccurate as that Affidavit indicated that she had mailed a copy of the Petition For Review [to the county.]" Roberts v. Crook County, ___ Or LUBA ___ (LUBA No. 96-227, Order, February 4, 1997) slip op 1.

We ordered petitioner to immediately serve the petition for review on the county, with proof of service to this office, and allowed the county 21 days from the date of service to file its response brief. Petitioner filed the notice of service with LUBA on February 18, 1997. The county's response brief was due on March 11, 1997.[1]

The motion to intervene was filed on February 24, 1997. On March 27, 1997, intervenor requested a new briefing schedule, explaining:

> "Neither party has any objection to this revised schedule. The schedule is being requested for the reason that there was a delay in service of the brief on the County and subsequently on the Intervenor, and the Intervenor's need of additional time to review the record and prepare a responsive brief."[2] Intervenor's Request for a New Schedule 1.

We granted intervenor's request for a new briefing schedule. Intervenor's Brief was filed in accordance with that schedule on April 10, 1997.

ORS 197.830(6)(a) provides:

> "Within a reasonable time after a petition for review has been filed with the board, any person may intervene in and be made a party to the review proceeding * * *."

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[1]The county did not file a response brief in this proceeding.

[2]In a letter to the Board, petitioners state that they do not object to the briefing schedule, but they do present a somewhat different version of the facts surrounding the delay in service of the petition for review than does intervenor. However, the facts surrounding service of the petition for review are not relevant to our resolution of the motion to intervene.

A party's failure to file a motion to intervene on the side of respondent "as soon as practicable after the notice of intent to appeal is filed," as required by OAR 661-10-050(2), is a technical violation of LUBA's rules that does not affect the parties' substantial rights unless it disrupts the briefing schedule or otherwise delays the review and resolution of the appeal. Testa v. Clackamas County, 29 Or LUBA 577 (1995), Ramsey v. City of Portland, 22 Or LUBA 295 (1991).

Although intervenor's motion was not filed "as soon as practicable after the notice of intent to appeal" was filed, petitioners did not object to the new briefing schedule or argue that their substantial rights were otherwise affected by the delay in filing the motion to intervene.

The motion to intervene is allowed.

DISCUSSION

Intervenor has a 67-acre parcel on EFU zoned land. She seeks to partition the subject property into three parcels and to obtain permits to construct one nonfarm dwelling on each parcel. The county approved petitioner's request.

Petitioners make two arguments: (1) that the county's conclusion that the subject property is not suitable for agricultural use misconstrues the law and is not supported by substantial evidence in the record; and (2) that the county's conclusion that approval of the application will not affect the stability of the land use pattern in the area

misconstrues the law and is not supported by substantial evidence in the record.[3]

Intervenor concedes that the county's findings of fact are inadequate and that the findings of fact are not supported by substantial evidence in the record. Intervenor concludes that the matter should be remanded to the county.

In their petition for review, petitioners request that the decision be "reversed or remanded." However, petitioners provide no argument to support their request for reversal. Petitioners argued for the first time at oral argument that this matter should not be remanded but, rather, should be reversed. At oral argument, petitioners now contended the decision should be reversed because there

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[3]Petitioners rely on the three-step test set forth in Sweeten v. Clackamas County, 17 Or LUBA 1234 (1989), which we have found to apply to local determinations of whether a nonfarm dwelling will materially alter the stability of the overall land use pattern in the area of a particular property. The three-step test requires:

> "First, the county must select an area for consideration. The area selected must be reasonably definite including adjacent land zoned for exclusive farm use. Second, the county must examine the types of uses existing in the selected area. In the county's determination of the uses occurring in the selected area, it may examine lot or parcel sizes. However, area lot or parcel sizes are not dispositive of, or even particularly relevant to, the nature of the uses occurring on such lots or parcels. It is conceivable that an entire area may be wholly devoted to farm uses notwithstanding that area parcel sizes are relatively small. Third, the county must determine that the proposed nonfarm dwelling will not materially alter the stability of the existing uses in the selected area. Id. at 1246.

In past decisions, we have remanded a local government's decision for failure to properly apply this three-step test. Still v. Marion County, ___ Or LUBA ___ (LUBA No. 95-224, September 23, 1996).

is not substantial evidence in the record upon which the county could base adequate findings of approval and the county is precluded from reopening the record to accept additional evidence. Petitioners provide no authority to substantiate their argument that the county may not open the record on remand.

In Thede v. Polk Cty, 3 Or LUBA 335, 339 (1981) the petitioner argued that the county erred in reopening the record on remand. We stated:

> "The Board views petitioners' argument to be unreasonable. To argue that a local government has no authority to rehear a matter that has been reviewed and found wanting by an appellate body is to strip applicants, petitioners and governing bodies of the opportunity to correct errors. Surely a substantial injustice is done if a local governing body can not move to reconsider a matter where an appellate review has found an error to have been committed. Id. at 339.

On remand, if the county determines that its findings are inadequate, it may prepare new findings without opening the record. Cf. Friends of the Metolius v. Jefferson County, 28 Or LUBA 591 (1995) (requiring record to be reopened when the city adopts new findings). If the county determines that there is not substantial evidence in the record upon which findings of approval could be based, the county may reopen the record to accept additional evidence. Cf. Bradbury v. City of Independence, 22 Or LUBA 783 (1991) (requiring an evidentiary hearing on remand).

Reversal of a local government's decision is

appropriate if the decision is erroneous as a matter of law. OAR 661-10-071(1)(c). That is, the local government cannot correct the defects in its decision. Because, on remand, the county may be able to correct the defects in its decision, the challenged decision is not erroneous as a matter of law. Thus, the decision is subject to remand rather than reversal.

The county's decision is remanded.