BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ORAN THOMAS WOLVERTON and BEVERLY WOLVERTON,	)	
Petitioner,	)	
vs.	)	
	)	LUBA No. 97-233
CROOK COUNTY,	)	
	)	FINAL OPINION
Respondent.	)	AND ORDER

Appeal from Crook County.

Thomas Johnson, Portland, filed the petition for review and argued on behalf of petitioner.

Peter M. Schannauer, Crook County Counsel, filed the response brief and argued on behalf of respondent.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 05/29/98

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the county's approval of a nonfarm dwelling in an exclusive farm use (EFU) zone.

MOTION TO INTERVENE

Gary Reagan and Luree Reagan (applicants) the applicants below, move to intervene on the side of the county. Petitioners object to applicants' motion to intervene, on the ground that the motion was untimely filed.

Petitioners' notice of intent to appeal (NITA) was filed November 12, 1997. Applicants' motion to intervene was filed December 11, 1997. Until recent legislative amendments, ORS 197.830(6)(a) provided that:

> "Within a reasonable time after a petition for review has been filed with [LUBA], any person may intervene in and be made a party to the review proceeding upon a showing of compliance with [ORS 197.830(2)]."

Oregon Laws 1997, chapter 187, section 1, effective October 4, 1997, amended ORS 197.830(6)(a) to state:

> "Within 21 days after a notice of intent to appeal has been filed with the board under [ORS 197.830(1)], any person may intervene in and be made a party to the review proceeding upon a showing of compliance with [ORS 197.830(2)]."

Failure to comply with the 21-day deadline at ORS 197.830(6)(a) must result in denial of the motion to intervene. ORS 197.830(6)(c). Applicants do not dispute that their motion to intervene was filed more than 21 days after petitioners' NITA was filed.

Applicants respond, however, that the legislative amendments to ORS 197.830(6)(a) do not alter the exceptions at ORS 197.830(6)(b), which continues to provide:

> "Notwithstanding the provisions of [ORS 197.830(6)(a)], persons who may intervene in and be made a party to the review proceedings, as set forth in [ORS 197.830(1)], are:
>
> "(A) The applicant who initiated the action before the local government, special district, or state agency; or
>
> "(B) Persons who appeared before the local government, special district or state agency, orally or in writing."

We disagree with applicants that ORS 197.830(6)(b)(A) exempts the applicant from the 21-day filing requirement of ORS 197.830(6)(a). ORS 197.830(6)(b) narrows the "any person" language of ORS 197.830(6)(a) by defining two categories of persons who may intervene in a review proceeding: the applicant and persons who appeared before the local government. In essence, ORS 197.830(6)(b) exempts applicants from the appearance requirement, but it does not exempt applicants from the 21-day filing requirement at ORS 197.830(6)(a). Under applicants' view, ORS 197.830(6)(b) would exempt both categories of potential intervenors from the 21-day filing requirement at ORS 197.830(6)(a), rendering that provision a nullity. We conclude that applicants' motion to intervene was not timely filed.

Applicants' motion to intervene is denied.

MOTION TO FILE REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to the issues with respect to petitioners' standing raised in the response brief, and the subject of a motion to dismiss, discussed below. A reply brief accompanies the motion.

Petitioners' reply brief is confined solely to the issue of standing raised in the response brief and motion to dismiss. Accordingly, we grant petitioners' motion to file a reply brief. OAR 661-10-039.

MOTION TO DISMISS

Petitioners filed their petition for review on January 5, 1998. Petitioners state that they have standing because they appeared before the county court in this matter, citing to Record 35-36. Record 35-36 is a letter petitioners wrote to the county court, marked as received by the county on October 3, 1997 (October 3, 1997 letter). The October 3, 1997 letter is petitioners' sole basis for standing in this case.

The county moves to dismiss petitioners' appeal on the ground that the October 3, 1997 letter was not properly before the county court and thus petitioners did not "appear" before the court within the meaning of ORS 197.830(2). The county notes that the challenged decision in this case is a decision of the county court dated October 22, 1997, denying an appeal of the planning commission decision dated August 29, 1997. According to the county, the county court's review was "on the

record" of the planning commission. The county reasons that because the county court did not receive the October 3, 1997 letter until after the planning commission's record closed, the letter was not properly part of the record before the county court, and thus petitioners did not "appear" before the county court within the meaning of ORS 197.830(2).[1]

Petitioners respond that, notwithstanding the county's reasoning set forth above, the October 3, 1997 letter is sufficient to constitute an "appearance" before the county court because the October 3, 1997 letter was placed before the county court, which not only did not exclude it from the record, but specifically referred and responded to it in the challenged decision. Record 8-9.

We agree with petitioners that the October 3, 1997 letter suffices to establish petitioners' standing to pursue this appeal. The fact that the local government had previously closed the record is not dispositive. The record of the local government includes everything submitted to and not rejected by the local government prior to the adoption of the final decision. When a local government accepts a document after the record is formally closed but before the final decision is adopted, it has, by its conduct, reopened the record for the submission of that new evidence. See Richards-Kreitzberg v.

[1]The county submitted the October 3, 1997 letter with the record. The county does not dispute that the letter is part of the record on appeal, but argues that the letter is not properly part of the county record before the local decision maker.

Marion County, 30 Or LUBA 476 (1996); Leathers v. Marion County, 30 Or LUBA 437 (1995).

We conclude that the county, by its conduct, reopened the record in this case and accepted the October 3, 1997 letter into the record. That letter is a sufficient appearance to provide petitioners standing to appeal.

The county's motion to dismiss is denied.

FACTS

The subject property is a 5.7-acre lot within an unrecorded subdivision once part of a livestock ranch called the Riverside Ranch. In 1969 or 1970 the ranch was partially subdivided into two units (units 2 and 3) containing a total of 166 lots each five to 10 acres in size. The subdivision has not been platted, and all of the land within it and surrounding it is zoned EFU-1, the county's primary rangeland zoning. The lots within the ranch are owned by multiple persons, including the county, which owns a significant number of the lots and is selling them lot by lot, apparently to allow buyers to build nonfarm dwellings. Approximately 10 nonfarm dwellings have been approved or constructed in both units of the subdivision. The subject property is in unit 2, which contains 82 lots and four nonfarm dwellings.

The subdivision is surrounded to the north, east and south by petitioners' cattle ranch, operated on 6,175 deeded acres and 11,000 leased acres that were once part of the Riverside Ranch. Land to the west of the subdivision is owned

by the Bureau of Land Management. Petitioners own exclusive water rights to water in Lucky Creek. All access to the subdivision is via a public right of way that crosses four miles of open range on petitioners' ranch. Petitioners testified that the existing nonfarm dwellings in the subdivision have significantly impacted their ranching operation, citing diminished flow in Lucky Creek due to residential wells, cows killed by cars or shot by residents of the subdivision, and increased trespass, vandalism, and harassment of cattle by dogs. Petitioners also testified that the subject property is one-quarter mile from ranching operations, and that further extensive development of the subdivision will likely force them out of business.

On May 28, 1997, the county sold the subject property to applicants.[2] On June 30, 1997, applicants submitted their application for a nonfarm dwelling on the subject property. The county planning commission denied the application, finding that there was insufficient evidence that the proposed nonfarm dwelling was compatible with agricultural operations in the area, and that the proposed nonfarm dwelling is part of a development pattern that will change the land use pattern and result in negative cumulative impacts on agriculture in the area. Applicants appealed to the county court, which sustained the appeal, approving the application.

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[2]The bargain and sale deed is signed by the county judge and county commissioners who are the decision makers in this appeal. Record 51-52.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Approval of nonfarm dwellings in the county's EFU-1 zone is governed by Crook County Zoning Ordinance (CCZO) 3.010(8).[3] Petitioners argue that the county court's finding of compliance with CCZO 3.010(8)(A), requiring that the proposed nonfarm dwelling be compatible with farm uses, is not supported by substantial evidence.

The county court disagreed with the planning commission's conclusion that the proposed nonfarm use was not compatible with agricultural operations, stating:

> "The planning commission's decision was based on several factual and conceptual errors. Conceptually, it is clear that the commission did not consider the individual subject lot, when it analyzed compatibility with agricultural practices. Factually, it erred when it found that the subject property was within a quarter mile of a ranch

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[3] CCZO 3.010(8) provides:

> "The County may approve a non-farm residential dwelling upon a finding that the proposed dwelling:
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> "(A) Is compatible with farm uses described in ORS 215.203(2) and is consistent with the intent and purposes set forth in ORS 215.243;
>
> "(B) Does not seriously interfere with accepted farming practices, as defined in ORS 215.203(2)(C), on adjacent lands devoted to farm use;
>
> "(C) Does not materially alter the stability of the overall land use pattern of the area;
>
> "(D) Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil and land conditions, drainage and flooding, vegetation, location and size of the tract; and
>
> "(E) Complies with such other conditions as the County considers necessary."

> operation, when in fact the subject property is 2 to 3 miles from that operation. While other portions of the Riverside ranch Subdivision are within 0.25 mile, the subject property is substantially further away. In fact, the evidence presented by opponents to the Reagan application did not address the impact of the subject parcel, but only considered the impact of the entire subdivision, which consists of almost a thousand acres of five and ten acre lots.
>
> "* * * * *
>
> "[T]he Court finds significant evidence in the record to support its conclusion that the establishment of a residence on this lot which is 2 to 3 miles from the nearest ranch operation will not negatively affect agricultural operations in the area. The operator of the ranch provided written testimony which among other items stated that the use of the Conant Basin Road negatively affects the ranch operations. The Court declines to find that the mere usage of a County Road and Public Way will harm the ranch operations. Roads exist throughout the EFU-1 District dividing ranch operations in parts, and the ranch operations have prospered." Record 8-9 (emphasis added).

Petitioners argue that the county merely makes a conclusory finding that sufficient evidence exists to support the conclusion that the proposed nonfarm dwelling is compatible with farm uses, without identifying that evidence or explaining why that evidence demonstrates compliance with CCZO 3.010(8)(A). More to the point, petitioners argue that the only evidence in the record regarding compatibility of the nonfarm dwelling with farm uses is supplied by petitioners and tends to demonstrate that the nonfarm dwelling is incompatible with farm uses. Accordingly, petitioners contend that the county court's finding of compliance with CCZO 3.010(8)(A) is not supported by substantial evidence.

The key to the county court's finding of compatibility appears to be its conclusion that the subject parcel is two to three miles from the nearest ranch operation, rather than the quarter-mile distance that petitioners testified to and that the planning commission found. The only evidence to which we are directed in the record regarding nearby agricultural operations, other than petitioners' testimony, is a comment by one of the subdivision residents that "[t]here's no farming going on within 2-3 miles of this. There is some range land adjacent to it." Record 26.[4]

Petitioners argue that the county court clearly misunderstood the quoted comment as a statement that no ranching, i.e. grazing as opposed to crop production, occurs within two to three miles of the subject property. Petitioners point out that the comment the county court relies upon acknowledges that there is range land, i.e. grazing land, adjacent to the subject property, consistent with petitioners' testimony that ranch operations occur within one-quarter mile of the subject property.

The choice between conflicting evidence belongs to the county, as long as a reasonable person could reach the conclusion the county did. Canby Quality of Life Committee v. City of Canby, 30 Or LUBA 166, 175 (1995). However, we agree

[4]The county cites to testimony of other residents, at Record 24 and 27-28, as supporting the county's finding. However, the testimony cited to refers to the absence of farming on lots within the subdivision, not the location or existence of farming or ranching on lands adjacent to or near the subdivision.

with petitioners that the "conflict" here is not with the evidence itself, but between the evidence and the county court's unsupported assumption that the "farming" referred to as existing two to three miles distant from the subject property is the ranching operation to which petitioners testified. There is undisputed evidence in the record that range lands exist closer than two to three miles to the subject property, and no evidence to which we are directed contradicting petitioners' testimony and the planning commission's finding that ranch operations occur within one-quarter mile of the subject property. We conclude that the county court's finding with respect to the distance between the proposed nonfarm dwelling and ranching operations is not supported by substantial evidence.

The county court's finding of compatibility relies heavily, if not exclusively, on its determination that two to three miles separate the proposed nonfarm dwelling from ranching operations. The only other apparent support for the county court's finding of compatibility is the relative absence of evidence in the record on conflicts between the proposed nonfarm dwelling and farm uses, an "absence" stemming from the county court's dismissal of petitioners' testimony regarding conflicts, because that testimony was directed at residential use in the subdivision as a whole rather than the subject property.

The county's findings must address and respond to specific issues raised in the local proceedings that are relevant to compliance with approval standards. Thomas v. Wasco County, 30 Or LUBA 302, 310 (1996). Petitioners argue that the county court does not mention or address the testimony regarding reduced stream flows in Lucky Creek from residential well drilling, or the incidents of increased theft, vandalism, cow-car collisions and harassment of cows by dogs. The only negative impact the decision addresses is use of the Conant Basin Road by subdivision residents. The county court declines to find that "mere usage" of the road will harm petitioners' ranch operation. Record 9.

We understand petitioners to contend that their testimony raises the issue, with respect to all the identified residential/farm conflicts, whether the existing level of residential uses is compatible with its ranching operation and hence whether the proposed nonfarm dwelling, which will contribute to and thus increase those conflicts, can be compatible with nearby ranch uses.

We conclude that the issues petitioners raised are relevant to compliance with CCZO 3.010(8) and that the county is required to address them. The proposed nonfarm dwelling represents a 10% increase in the number of constructed and approved residential uses in the subdivision, as well as a fraction of the potential nonfarm residential uses in the subdivision that the county is, apparently, promoting by sale

of lots in the subdivision.[5] The applicants, not petitioners, bear the burden of demonstrating the compatibility of the proposed nonfarm dwelling with farm uses. The county's finding of compliance with CCZO 3.010(8) is based solely on an erroneous assumption and on the absence of evidence on which the applicants bear the burden of proof. All the evidence in the record to which we are directed tends to demonstrate that the proposed nonfarm dwelling is not compatible with farm uses, and thus cannot comply with CCZO 3.010(8).[6]

For the foregoing reasons, we conclude that the county court's findings with respect to CCZO 3.010(8) are not supported by substantial evidence in the record.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued the applicable law in finding that the proposed nonfarm dwelling will not materially alter the stability of the overall land use pattern in the area, pursuant to CCZO 3.010(8)(C).

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[5]A proponent of the application testified that he and his extended family had recently bought seven lots within the subdivision from the county, with an assurance that there would be "no problem" getting a permit for nonfarm dwellings on each of the lots. Record 24.

[6]The county's arguments with respect to the first assignment of error do not dispute the impacts raised by petitioners, but argue instead that petitioners' letter is not in the record for the reasons discussed in its motion to dismiss, and thus the evidence submitted in that letter has no weight in the substantial evidence calculus. At oral argument, the county presented a variant of this position, contending that the county accepted the letter only for purposes of the argument contained therein, not for additional evidence. Our determination with respect to the motion to dismiss resolves both contentions.

CCZO 3.010(8)(c)(C) implements ORS 215.284(2)(d) and OAR 660-33-130(4)(C). Accordingly, the county cannot apply CCZO 3.010(8)(C) in ways inconsistent with the statute and administrative rule. DLCD v. Crook County, ___ Or LUBA ___ (LUBA No. 96-230, March 26, 1998), slip op. 6.

In Sweeten v. Clackamas County, 17 Or LUBA 1234 (1989), we articulated a three-part inquiry necessary for determining whether a nonfarm dwelling will materially alter the stability of the overall land use pattern in the area:

> "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. * * * 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 1245-46.

In DLCD v. Crook County, 26 Or LUBA 478 (1994), we clarified that the stability standard requires "a clear picture of the existing land use pattern, the stability of that existing land use pattern, and an explanation for why introducing [the proposed nonfarm use] will not materially alter that stability." Id. at 491.

Petitioner argues, first, that the county failed to select a reasonably definite area for study. The county court's findings appear to identify units 2 and 3 of the subdivision as the relevant area, but the discussion appears to examine only the lots adjacent to the subject property:

> "[T]he land use pattern of the area surrounding the subject property consists of five-acre parcels which

> have established residences. The land use of the area around the [subject] property has been established as single-family dwellings on five-acre parcels. Certainly, this application is consistent with that land use pattern. The cumulative effects from the residential development of nearby undeveloped five-acre lots will not change that pattern. As applications are received for other lots within the subdivision which are within a mile of the existing ranch operation, applicants may have a heavier burden of showing lack of impact both by the individual application, and cumulatively. The land use pattern closer to the ranch may not be as developed residentially as the area of the more distant subject. The decision approving this application should not be interpreted by those who own lots in closer proximity to the ranch operation as a precedent, because the facts and impacts may be very different." Record 9.

Petitioners argue that the county fails to identify a reasonably definite study area, or to the extent the boundaries of a study area can be inferred, fails to justify those boundaries. We agree with petitioners that it is unclear whether the study area consists of the adjacent properties with established residences,[7] the immediate area of unit 2, property within a particular distance of the subject property, all of the lots within unit 2, all of the lots within the subdivision or a larger area including portions of petitioners' ranch, any of which finds some support in the county court's findings and discussion.

In defining an area to study, the county must explain what justifies the scope and contours of the study area. DLCD

[7]Petitioners note, elsewhere, that the decision seems to state that each of the lots surrounding the subject property is established with a residence, when in fact only four of the eight lots adjacent to the subject property, and none other of the 82 lots in unit 2, have dwellings.

v. Crook County, ___ Or LUBA ___ (LUBA No. 96-230, March 26, 1998), slip op. 9 (citing Bruck v. Clackamas County, 15 Or LUBA 540, 543 (1987)). We agree with petitioners that, to the extent any of the above study boundaries can be inferred, the county fails to justify the scope and contours of the area selected.

The county's failure to identify a reasonably definite study area so undermines its attempts to satisfy the other two elements of the Sweeten analysis that our review of petitioners' arguments with respect to the other two elements would be an exercise in speculation. Accordingly, we do not address petitioners' arguments with respect to the second and third steps of the Sweeten analysis. See DLCD v. Crook County, ___ Or LUBA ___ (LUBA No. 96-230, March 26, 1998) (discussing extensively the second and third elements of the Sweeten test).

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the county makes no findings of compliance with CCZO 3.010(8)(B). CCZO 3.010(8)(B) requires a finding that that the proposed nonfarm dwelling "[d]oes not seriously interfere with accepted farming practices, as defined in ORS 215.203(2)(C), on adjacent lands devoted to farm use." Petitioners cite to the evidence they raised with respect to impacts on their ranching operation, and contend that the county addressed only a portion of those impacts and

did not address or find compliance with CCZO 3.010(8)(B). The county does not respond to the third assignment of error, either in its brief or at oral argument.

We agree with petitioners that the county erred in not addressing or finding compliance with CCZO 3.010(8)(B). Although CCZO 3.010(8)(B) speaks of farming practices on "adjacent" properties, the statute that CCZO 3.010(8)(B) implements requires a finding that the proposed dwelling or activities associated with it "will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use." ORS 215.284(2)(a) (emphasis added). The county cannot interpret or apply ordinances implementing statutory provisions in ways that are inconsistent with those statutory provisions. DLDC v. Crook County, 26 Or LUBA at 488. The county is required to make findings regarding farm and forest practices on nearby lands and address the impacts of the proposed nonfarm dwelling and activities associated with it on those practices.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the county failed to make adequate findings supported by substantial evidence in concluding that the subject property is "generally unsuitable" for the production of crops or livestock, pursuant to CCZO 3.010(8)(D).

CCZO 3.010(8)(D) implements ORS 215.284(2)(b), which provides that a lot or parcel "shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land." Further OAR 660-33-130(4)(c)(B) in relevant part, states that

> "[a] lot or parcel is not 'generally unsuitable' simply because it is too small to be farmed profitably by itself. If a lot or parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, it is not 'generally unsuitable.'"

The challenged decision includes the following findings with respect to suitability of the subject property for agriculture:

> "The land where the subject property is located is not suitable for agriculture of any kind. The soil depth to rock is very shallow, and the soil consists of rocky sand. No irrigation rights exist at this property which is located at an altitude of almost 4,000 feet. Even if climactic conditions were favorable, the significant parcelization of the subdivision would not permit agricultural operations." Record 9.

Petitioners argue that there is evidence in the record that the subject property was once grazed as part of a livestock ranch, that the subject property is located in the county's prime range lands and zoned for that use, and that the soils and vegetation on the subject property are similar to nearby range lands. Petitioners argue that the county's finding that the property is unsuitable for agriculture is fatally undermined by the property's historic use for grazing. Petitioners acknowledge that the choice of conflicting

evidence belongs to the county, but argue that the county must explain why the applicant's evidence is more persuasive than other, contravening evidence in the record. Le Roux v. Malheur County, ___ Or LUBA ___ (LUBA No. 96-088, October 21, 1996), slip op. 18.

Further, petitioners contend that the county's reliance on the degree of parcelization in the subdivision to find the subject property unsuitable for grazing is inconsistent with the statutory requirements. Size or location of a parcel is not a determinative factor where the subject property could be used in conjunction with other lands for grazing or agriculture. ORS 215.284(2)(b); OAR 660-33-130(4)(c)(B). Petitioners argue that the county makes no effort to consider whether the subject property, which is part of nearly a thousand acres of vacant range land surrounded by ranching operations, could not be used in conjunction with those operations.

The county does not respond to the fourth assignment of error, either in its brief or at oral argument. We agree with petitioners that the county's findings regarding the suitability standard do not address the requirements of ORS 215.284(2)(b) and OAR 660-33-130(4)(c)(B). We also agree that the county is required to explain why, in light of the history of grazing on the property, the property is unsuitable for agriculture, alone or in conjunction with adjacent or nearby

lands. Because the county's findings are inadequate, we need not address petitioners' substantial evidence challenge.

The fourth assignment of error is sustained.

The county's decision is remanded.