

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 LOUISIANA PACIFIC, a Delaware)
5 Corporation,)

6)
7 Petitioner,)

8)
9 vs.)

10) LUBA No. 94-054
11 UMATILLA COUNTY,)

12) FINAL OPINION
13 Respondent,) AND ORDER

14)
15 and)

16)
17 CONFEDERATED TRIBES OF THE,)
18 UMATILLA INDIAN RESERVATION,)

19)
20 Intervenor-Respondent.)

21
22
23 Appeal from Umatilla County.

24
25 D. Rahn Hostetter, Enterprise, filed the petition for
26 review and argued on behalf of petitioner. With him on the
27 brief was Mautz, Baum, Hostetter & O'Hanlon.

28
29 William C. Jones, Pendleton, filed a response brief and
30 argued on behalf of respondent.

31
32 Daniel W. Hester, Boulder, Colorado, filed a response
33 brief and argued on behalf of intervenor-respondent. With
34 him on the brief was Fredericks, Pelcyger, Hester & White.

35
36 KELLINGTON, Chief Referee, SHERTON, Referee,
37 participated in the decision.

38
39 HOLSTUN, Referee, dissenting.

40
41 REMANDED 09/08/94

42
43 You are entitled to judicial review of this Order.
44 Judicial review is governed by the provisions of ORS
45 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision denying its
4 request for approval of a farm dwelling.

5 **MOTION TO INTERVENE**

6 Confederated Tribes of the Umatilla Indian Reservation
7 moves to intervene on the side of respondent in this appeal
8 proceeding. There is no opposition to the motion, and it is
9 allowed.

10 **FACTS**

11 Petitioner submitted an application for a farm dwelling
12 to be located on a 1,542 acre parcel zoned Grazing/Farm
13 (GF). The subject 1,542 acre parcel is part of an ownership
14 totaling approximately 28,000 acres. The board of
15 commissioners determined the application complies with the
16 applicable approval criteria and approved the application,
17 subject to a number of conditions. Petitioner appealed the
18 county's decision to this Board, alleging six assignments of
19 error. This Board rejected four of those assignments of
20 error, but sustained petitioner's second and third
21 assignments challenging one of the conditions imposed by the
22 county. That condition required the applicant to reopen and
23 dedicate to the public an approximately two-mile section of
24 McKay Creek Road that the county had previously vacated.
25 Louisiana Pacific v. Umatilla County, 26 Or LUBA 247 (1993)
26 (Louisiana Pacific I). This Board held the disputed

1 condition requiring the dedication and reopening of the
2 vacated portion of McKay Creek Road lacked a sufficient
3 connection to the proposed farm dwelling. We stated:

4 "The only error sustained * * * relates to the
5 condition challenged under the second and third
6 assignments of error requiring rededication of the
7 former McKay Creek Road right-of-way. That
8 condition does not appear to have been relied upon
9 in the remaining portion of the decision where the
10 county found that all relevant approval standards
11 are met. However, we are unwilling to speculate
12 that such is the case. * * * We therefore remand
13 the challenged decision to the county for
14 disposition consistent with our decision that the
15 condition is unconstitutional in the circumstances
16 presented in this case." (Emphasis supplied.)
17 Louisiana Pacific I, supra, 26 Or LUBA at 259.

18 **DECISION**

19 On remand the county conducted additional hearings and
20 adopted the challenged decision (remand decision). The
21 remand decision contains determinations that the proposal
22 violates a number of approval criteria the county found to
23 be satisfied in Louisiana Pacific I. Petitioner contends
24 the remand decision is an improper, de novo county
25 reconsideration of the decision challenged in Louisiana
26 Pacific I. Petitioner argues the county improperly
27 revisited issues that were settled by Louisiana Pacific I.

28 In Beck v. City of Tillamook, 313 Or 148, 831 P2d 678
29 (1992), the Oregon Supreme Court held that judicial review
30 of a LUBA decision did not extend to issues conclusively

1 resolved against petitioners in a first LUBA appeal.¹ The
2 reasoning applied by the supreme court in reaching this
3 conclusion has a direct bearing on the issue presented in
4 this appeal, i.e., the appropriate scope of the county's
5 decision on remand following our decision in Louisiana
6 Pacific I.

7 In Beck, the supreme court relied on several statutory
8 provisions. One of those provisions is ORS 197.835(9),
9 which generally requires that LUBA consider all issues
10 presented in an appeal when reversing or remanding a land
11 use decision. The supreme court explained:

12 " * * * The effect of ORS 197.835(9) is to allow
13 LUBA to narrow the scope of the remand to those
14 issues that require further exploration. Doing so
15 can avoid redundant proceedings and thereby
16 facilitate the 'policy of the Legislative Assembly
17 that time is of the essence in reaching final
18 decisions in matters involving land use.' ORS
19 197.805." Beck, supra, 313 Or at 152.

20 A second statute cited by the supreme court in Beck is
21 ORS 197.763(7), which provides that when the local
22 government decision maker reopens the evidentiary record to
23 accept new evidence, new issues relating to the new evidence
24 may be raised. The supreme court explained the import of
25 ORS 197.763(7) as follows:

26 "In other words, when the record is reopened,

¹The supreme court made it clear in Beck that the issues resolved conclusively against petitioners include both issues that were specifically raised and rejected in the first appeal and issues that were not raised in the first appeal, but could have been raised.

1 parties may raise new, unresolved issues that
2 relate to new evidence. The logical corollary is
3 that parties may not raise old, resolved issues
4 again. When the record is reopened at LUBA's
5 direction on remand, the 'new issues' by
6 definition include the remanded issues, but not
7 the issues that LUBA affirmed or reversed on their
8 merits, which are old, resolved issues." Beck,
9 supra 313 Or at 153.

10 Based on the court's holding in Beck, and the above
11 reasoning, we conclude the permissible scope of local
12 proceedings following a LUBA remand of a local government's
13 decision, is framed by LUBA's resolution of the assignments
14 of error in the first appeal. Resolved issues, which may
15 not be considered in the local government proceedings on
16 remand, include (1) issues presented in the first appeal and
17 rejected by LUBA; and (2) issues which could have been, but
18 were not, raised in the first appeal. Unresolved issues,
19 which may be considered in a local government proceeding on
20 remand, include (1) issues presented in the first appeal
21 that LUBA either sustains or does not consider, and (2)
22 issues that could not have been raised in the first appeal.²
23 Thereafter, in a subsequent appeal to LUBA of a local
24 decision on remand, a petitioner may raise issues concerning
25 the local government's determinations regarding such
26 unresolved issues.

²For example, if a local government properly reopens the local evidentiary record on remand, new issues may arise which could not have been raised in the first LUBA appeal. In this situation, new issues relating to the newly submitted evidence may be raised in an appeal to LUBA. ORS 197.763(7).

1 Turning to the instant appeal, in Louisiana Pacific I,
2 we explained it was unclear whether the county relied upon
3 on the disputed right-of-way dedication condition in
4 determining that relevant approval standards are met. The
5 only unresolved issue presented in our remand in Louisiana
6 Pacific I, is whether the county relied upon the condition
7 requiring reopening and rededication of a portion of the
8 McKay Creek Road right-of-way in concluding relevant
9 approval standards are met by the proposal. However, the
10 remand decision does not address that issue. Instead, the
11 remand decision determines that (1) the applicant has not
12 honored, and will not in the future honor, certain
13 conditions included in the original decision,³ and (2) the
14 applicant actually intends to operate a hunting lodge, not a
15 farm dwelling.⁴ Based on these findings, the county
16 concluded several of the applicable approval standards are
17 not met.

18 The county misconstrued the scope of our remand in
19 Louisiana Pacific I. Accordingly, the remand decision is
20 again remanded to the county. On remand, the county must do

³We rejected petitioner's appeal of several of these condition in Louisiana Pacific I. We pointed out in Louisiana Pacific I, and note here, that the county retains authority to take appropriate action to enforce the conditions it imposed to ensure the dwelling at issue in this appeal is, in fact, used as a farm dwelling and that notice be given of surface disturbing activities that may impact cultural resources on the property.

⁴This is not a situation involving new issues which could not have been raised in Louisiana Pacific I.

1 one of two things. The county may explain why eliminating
2 the right-of-way dedication condition leads it to conclude
3 applicable approval standards are not met, and deny the
4 subject application. On the other hand, the county may
5 determine the right-of-way dedication condition is
6 unnecessary to its determinations in Louisiana Pacific I
7 that relevant approval standards are met, and approve the
8 subject application without the disputed right-of-way
9 dedication condition.

10 One final point merits comment. Petitioner argues the
11 remand decision should be reversed under ORS 197.835(8).⁵
12 However, ORS 197.835(8) applies only in circumstances where
13 this Board determines a local government made a land use
14 decision exceeding such local government's discretionary
15 authority under applicable comprehensive plan and land use
16 regulation provisions. In this appeal we simply determine
17 the county misconstrued its permissible scope of review
18 under Louisiana Pacific I. Therefore, ORS 197.835(8) does
19 not apply, and remand is the appropriate course.

⁵ORS 197.835(8) provides:

"[LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if [LUBA] finds, based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances. If [LUBA] does reverse the decision and orders the local government to grant approval of the application, [LUBA] shall award attorney fees to the applicant and against the local government."

1 The county's decision is remanded.

2 Holstun, Referee, dissenting.

3 I see no reason or authority for this Board to remand
4 the decision to the county for a second time to address the
5 same issue we identified in Louisiana Pacific I. Neither do
6 I agree with the majority that ORS 197.835(8) is
7 inapplicable in this case.⁶ In its first decision, the
8 county found all approval standards are met. In its remand
9 decision following Louisiana Pacific I, the county failed to
10 explain why eliminating the right-of-way dedication
11 condition affects those findings of compliance with the
12 approval standards, but nevertheless denied the permit
13 application for reasons going beyond the scope of our
14 remand. I see no basis for speculating that the county
15 believes the right-of-way dedication condition is necessary
16 for compliance with one or more approval standards, since it
17 did not express that belief in its decision on remand. In
18 my view ORS 197.835(8) requires that we reverse the county's
19 decision, and, for that reason, I respectfully dissent.

⁶See n 5, supra.