

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 DEXTER LOST VALLEY
5 COMMUNITY ASSOCIATION,
6 *Petitioner,*

7
8 vs.
9

10 LANE COUNTY,
11 *Respondent,*

12
13 and

14
15 ATR LAND LLC, LEELYNN, INC,
16 and WILEY MT., INC.,
17 *Intervenors-Respondents.*
18

19 LUBA No. 2012-044

20
21 FINAL OPINION
22 AND ORDER
23

24 Appeal from Lane County.

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26 Daniel J. Stotter, Corvallis, represented petitioner.

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28 Stephen L. Vorhes, Lane County Counsel, Eugene, represented respondent.

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30 Bill Kloos, Eugene, represented intervenors-respondents.

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32 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
33 participated in the decision.
34

35 REMANDED

10/16/2012

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

DECISION

Petitioner appeals a county decision that authorizes construction of a bridge in a forest zone. The record in this appeal was received by LUBA on July 23, 2012. Petitioner’s petition for review was filed on August 13, 2012. On August 27, 2012, respondent filed a motion for voluntary remand. In that motion, the county represents that if LUBA grants the motion for voluntary remand, “Lane County agrees to consider each of the Assignments of Error presented in the petition for review.” Motion for Voluntary Remand 3. Petitioner opposes the motion for voluntary remand.

Under ORS 197.830(13)(b), the county has a unilateral right to withdraw its decision for reconsideration, provided it withdraws the decision before the record is filed.¹ *Bates v. City of Cascade Locks*, 37 Or LUBA 993 (1999). As petitioner correctly notes, the county did not exercise its unilateral right to withdraw its decision for reconsideration under ORS 197.830(13)(b) prior to filing the record in this appeal. Petitioner argues that once the record is filed the county no longer has any right to withdraw the challenged decision over the objection of petitioner.

Petitioner apparently views the unilateral right to withdraw a decision for reconsideration under ORS 197.830(13)(b) and the right to move for voluntary remand as the same thing. They are not. The right to withdraw a decision for reconsideration under ORS

¹ ORS 197.830(13)(b) provides:

“At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, or, on appeal of a decision under ORS 197.610 to 197.625, prior to the filing of the respondent’s brief, the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. An amended notice of intent shall not be required if the local government or state agency, on reconsideration, affirms the order or modifies the order with only minor changes.”

1 197.830(13)(b) is unilateral, and must be granted by LUBA if timely filed. The right to
2 move for voluntary remand is conditional. A local government that moves for voluntary
3 remand must agree to consider all issues raised in the petition for review. *Mulholland v. City*
4 *of Roseburg*, 24 Or LUBA 240, 241 (1992); *Angel v. City of Portland*, 20 Or LUBA 541, 543
5 (1991). LUBA has denied motions for voluntary remand where local government does not
6 agree to address all issues presented in the petition for review. *Jacobsen v. City of Winston*,
7 61 Or LUBA 536, 537 (2010); *Grabhorn v. Washington County*, 48 Or LUBA 657, 659
8 (2005). LUBA frequently grants motions for voluntary remand if it concludes that granting
9 the motion is “consistent[] with sound principles governing judicial review.” ORS 197.805.²
10 In deciding whether to grant a motion for voluntary remand, LUBA is cognizant that the
11 statutes under which LUBA operates express a “preference that land use matters be resolved
12 at the local level if possible, rather than on review by [LUBA] or the appellate courts * * *.”
13 *Mulholland*, 24 Or LUBA at 243. LUBA also recognizes that by granting a motion for
14 voluntary remand LUBA avoids “forcing [a local government] and applicant to defend a
15 decision they * * * do not believe will survive [LUBA] review.” *Id.* And in such cases
16 granting a motion for voluntary remand can actually shorten the time required to present
17 LUBA with focused arguments on the legal matters that are contested, by allowing the local
18 government an opportunity to “adopt a decision it is prepared to defend.” *Id.*

19 Petitioner relies almost entirely on the dissenting opinion in *Mulholland*. The
20 dissenting opinion and majority opinion adequately set out the competing arguments
21 regarding whether a motion for voluntary remand should be granted if it is filed after the
22 deadline expires for unilaterally withdrawing a land use decision for reconsideration under

² ORS 197.805 provides, in part:

“It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. * * *”

1 ORS 197.830(13)(b). No purpose would be served by repeating all of that discussion here.
2 While there is potential for unfairness to petitioner in granting a motion for voluntary
3 remand, that potential can be minimized and is offset in this case by the potential for judicial
4 review efficiencies. Petitioner essentially asks that we overrule *Mulholland*. We conclude
5 that the majority’s analysis in *Mulholland* is more persuasive and decline to overrule that
6 decision.

7 Petitioner complains that LUBA lacks authority to grant the county’s motion for
8 voluntary remand, and argues that granting such motions could allow a local government to
9 abuse the appellate process by filing multiple motions for voluntary remand and forcing
10 petitioners to write many petitions for review:

11 “[LUBA’s] present policy of allowing a voluntary remand, after the Petitioner
12 has gone through the time and expense of preparing and filing their brief
13 (simply because they do not wish to defend the challenged decision), is both
14 *ultra vires* and inefficient in promoting expedient resolution of land use
15 disputes, creating a never ending process for those parties challenging a local
16 government land use decision, that is at odds with * * * statutory procedures
17 and policy. Instead of exercising the option of [withdrawing its decision for
18 reconsideration] prior to filing the local government record (as provided by
19 ORS 197.830(13)(b)), a local government can apparently (under [LUBA’s]
20 existing ‘rule’) seek a remand 100 + times, promising only to ‘consider’ any
21 issues presented on remand, under [LUBA’s] policy of liberally granting
22 voluntary remand at any time, allowing a local government to simply wait
23 until the Petitioner ha[s] gone through the expense and time of preparing their
24 brief, and setting the policy of ‘promoting expedited review’ on its head – it
25 could be many years before a final decision is issued under the Board’s policy
26 of freely allowing even untimely voluntary remands that disregard the clearly
27 stated statutory deadline.” Petitioner’s Opposition to Motion for Voluntary
28 Remand 4-5.

29 On one point that petitioner makes elsewhere in his opposition to the motion for
30 voluntary remand, we agree with petitioner. LUBA’s long standing practice of granting
31 voluntary remands to facilitate final resolution of land use disputes, where appropriate,
32 should probably be made part of LUBA’s administrative rules. LUBA will consider
33 correcting that omission in its next administrative rule amendments. However, petitioner’s

1 contention that LUBA’s practice is *ultra vires* is not correct, and his speculation that LUBA
2 might grant over 100 motions for voluntary remand, and in doing so prolong final resolution
3 of land use disputes for years, simply has no basis in law or fact.

4 In ORS 197.805 the legislature expresses a policy that LUBA is to conduct its review
5 proceedings “consistently with sound principles governing judicial review.” Granting a
6 motion for voluntary remand where LUBA concludes it will give the local government an
7 opportunity to eliminate some contested legal issues, facilitate focused arguments on any
8 contested legal issues that remain, and thereby facilitate any required final appellate
9 disposition of a land use dispute is clearly within the ORS 197.805 legislative policy that
10 LUBA conduct its appeal proceedings “consistently with sound principles governing judicial
11 review.” We conclude that such is the case here. Granting motions for voluntary remand in
12 such circumstances is consistent with ORS 197.805 and therefore is not *ultra vires*. Granting
13 such motions is also consistent with the legislative preference that land use disputes be
14 settled locally if possible, rather than at the appellate level.

15 Petitioner’s speculation about the harm that might result to petitioners from multiple
16 voluntary remands is exactly that—speculation. As LUBA specifically cautioned in
17 *Mulholland*, motions for voluntary remand would not be appropriate in that circumstance:

18 “We would feel differently if there were any suggestion that a local
19 government’s or applicant’s request for a second bite at the apple was
20 motivated by delay or other improper reasons. There is no suggestion here
21 that the request is for reasons other than a chance to fully reconsider the
22 decision so that identified errors can be corrected, either by an amended
23 application, an amended decision, or both.” 24 Or LUBA at 244, n 3.

24 There is no reason to suspect that LUBA would grant multiple motions for voluntary remand
25 that are designed to “wear out” a petitioner, and petitioner cites no such cases. As was the
26 case in *Mulholland*, there is no reason to suspect that the county’s request in this appeal is
27 made for any reason other than to have a second chance to adopt a defensible response to the
28 issues that petitioner raises in the petition for review. Petitioner therefore has achieved its

1 objective in this appeal by having the county's decision remanded. And if petitioner is not
2 satisfied with the county's decision on remand, an appeal of that decision to LUBA is
3 available to resolve any remaining disagreements petitioner and the county may have
4 regarding the county's decision on remand.

5 The county's decision is remanded.