

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

4 MARLA MULHOLLAND and MERL)
5 MULHOLLAND,)
6)
7 Petitioners,)
8)

9 vs.)

10)
11 CITY OF ROSEBURG,)
12)
13 Respondent,)
14)

15 and)

16)
17 ALEX AUSTIN, and CASHWAY PLYWOOD)
18 OF BEND, INC.,)
19)
20 Intervenors-Respondent.)

LUBA No. 92-110

FINAL OPINION
AND ORDER

21
22
23 Appeal from City of Roseburg.

24
25 Allen L. Johnson, Eugene; and Daniel R. Lang, Roseburg,
26 represented petitioners.

27
28 Bruce R. Coalwell, Roseburg, represented respondent.

29
30 Neal Walker, Roseburg, represented intervenors-
31 respondent.

32
33 SHERTON, Chief Referee; HOLSTUN, Referee, participated
34 in the decision.

35
36 KELLINGTON, Referee, dissenting.

37
38 REMANDED 11/13/92

39
40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision approving a
4 preliminary subdivision plat dividing a 5.46 acre parcel
5 into 17 residential lots.

6 **MOTION FOR REMAND**

7 On September 14, 1992, petitioners filed a petition for
8 review containing eleven assignments of error. On
9 September 28, 1992, intervenors-respondent (intervenors)
10 filed a motion for remand. Intervenors move that the
11 challenged decision be remanded to respondent "for a hearing
12 on all issues raised by the Petitioners in their Petition
13 for Review * * *." Motion for Remand 1. On October 20,
14 1992, respondent informed the Board that if its decision is
15 remanded, it will consider and address on remand all of the
16 allegations of error made in the petition for review.

17 Petitioners object to the motion for remand for several
18 reasons. Petitioners point out the request for remand is
19 made by intervenors, and argue that this Board has not
20 previously remanded a decision over the objections of
21 petitioners if the motion for remand was not made by the
22 respondent itself. Petitioners also argue that the motion
23 for remand should not be granted because respondent has not
24 admitted any error in the challenged decision. Further,
25 petitioners contend the errors alleged in their first,
26 fourth and eleventh assignments of error cannot be corrected

1 on remand. According to petitioners, these assignments of
2 error require reversal, rather than remand, of the decision.
3 Finally, petitioners maintain they have a right to a
4 decision by this Board on the merits of all issues raised by
5 their petition for review under ORS 197.835(9)(a).¹

6 In Angel v. City of Portland, 20 Or LUBA 541, 543
7 (1991), the Board summarized its position on granting
8 motions for remand over petitioners' objections as follows:

9 "The legislature has clearly expressed an intent
10 that appeals of land use decisions be thoroughly
11 and expeditiously determined by the Board.
12 ORS 197.805 and 197.835(9)(a). Granting a local
13 government request for remand of an appealed
14 decision, over petitioner's objection, is
15 consistent with this policy of expeditious and
16 complete review only if the local government
17 demonstrates that the proceedings on remand will
18 be capable of providing the petitioner with
19 everything he would be entitled to from this
20 Board. Century 21 Properties v. City of Tigard,
21 17 Or LUBA 1298, 1307, rev'd on other grounds 99
22 Or App 435 (1989); Mobile Crushing v. Lane County,
23 ___ Or LUBA ___ (LUBA No. 84-092, Order Denying
24 Motion for Remand, January 16, 1985). If the
25 local government's request for remand of its
26 decision does not demonstrate that all of the
27 allegations of error made by petitioner in the
28 petition for review will be addressed on remand,
29 it is inappropriate to remand the decision over
30 petitioner's objections. Id." (Footnote omitted;
31 emphasis in original.)

¹ORS 197.835(9)(a) provides as relevant:

"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(14), the board shall decide all issues presented to it when reversing or remanding a land use decision * * * or limited land use decision * * *."

1 The motion for remand at issue in Angel was submitted
2 by the local government respondent. However, whether a
3 motion for remand is submitted by the respondent or
4 intervenors-respondent is not important, so long as the
5 respondent represents to the Board that it will consider and
6 address all issues raised in the petition for review on
7 remand. Additionally, it is not necessary for the
8 respondent to confess error in the challenged decision,
9 simply for it to agree to reconsider the issues raised by
10 petitioners.

11 The fact that some of petitioners' assignments of error
12 could provide a basis for reversing, rather than remanding,
13 the challenged decision does not establish that the local
14 proceedings on remand will not be capable of providing
15 petitioners with what they would be entitled to receive from
16 review by this Board. Here, petitioners' first, fourth and
17 eleventh assignments of error address (1) the propriety of
18 respondent relying on a particular area transportation plan
19 as a standard for approving the subject preliminary
20 subdivision plat, and (2) whether the proposed subdivision's
21 streets violate local code provisions concerning
22 cul-de-sacs. As respondent has agreed to reconsider all
23 issues raised by petitioners, on remand respondent may end
24 up agreeing with petitioners that it should not rely on the
25 disputed area transportation plan and that the proposed
26 subdivision streets violate the local code.

1 To the extent our decision in Century 21 Properties v.
2 City of Tigard, supra, can be read to suggest that
3 petitioners at LUBA have an absolute right to a ruling on
4 the merits from this Board, if they allege a basis for
5 reversal in their petition for review, we do not agree with
6 the suggestion. There are circumstances, and this case
7 presents such a circumstance, where a remand is entirely
8 appropriate and consistent with sound principles of judicial
9 review, even if this Board might reverse the challenged
10 decision if it were to reach the merits of the appeal.

11 Except in limited circumstances not present in this
12 appeal, the decision whether to reverse or remand a land use
13 decision is left to this Board. ORS 197.835. Further, this
14 Board is directed to exercise its review function,
15 "consistently with sound principles of judicial review."
16 ORS 197.805. No possible purpose could be served by
17 proceeding with this appeal and forcing the city and
18 applicant to defend a decision they believe the city should
19 reconsider and presumably do not believe will survive this
20 Board's review. If, as ORS 197.805 states, "time is of the
21 essence in reaching final decisions in matters involving
22 land use," that purpose is hardly served by forcing the city
23 to defend a decision it does not believe is defensible.
24 That purpose would be furthered by remanding the decision so
25 that the city can reconsider the decision and adopt a
26 decision it is prepared to defend.

1 As the dissent notes, because the record has been filed
2 in this matter, ORS 197.830(12)(b) does not apply, and there
3 is no statutory authority authorizing the city unilaterally
4 to withdraw its decision for reconsideration. However, the
5 discretion this Board is given under ORS 197.835 to reverse
6 or remand land use decisions, and the charge in ORS 197.805
7 that it do so in accordance with sound principles of
8 judicial review and the ultimate goal of reaching a final
9 decision in this matter, argue persuasively in favor of
10 granting the motion for remand.

11 We see no suggestion in ORS 197.830(12)(b) that the
12 legislature intended to preempt or in any way circumscribe
13 this Board's authority, in its discretion, to grant a motion
14 to remand a decision for reconsideration after the local
15 government record is filed. To the contrary, the
16 legislature's preference that land use matters be resolved
17 at the local level if possible, rather than on review by
18 this Board or the appellate courts, is demonstrated by ORS
19 197.830(12)(b). That preference is further demonstrated by
20 the requirement that petitioners exhaust administrative
21 remedies before appealing a land use decision to this Board.
22 ORS 197.825(2)(a); Lyke v. Lane County, 70 Or App 82, 688
23 P2d 411 (1984).² While a remand may not be required in the

²We also note that under ORS 183.482(6), if a state agency contested case order is appealed to the Court of Appeals, at any time prior to oral argument the state agency may withdraw the order for purposes of reconsideration. Although the parallel authority granted local governments

1 circumstances presented by this case, we believe it is the
2 prudent and preferable course and fully consistent with
3 sound principles of judicial review.³

4 The motion for remand is granted.

5 The city's decision is remanded.⁴

6

7 KELLINGTON, Referee, dissenting.

8 This referee would not grant intervenors' motion for
9 remand; and, accordingly, I respectfully dissent.

10 Intervenor request remand to enable the city to
11 reconsider the challenged decision. However,
12 ORS 197.830(12)(b) provides a specific statutory process
13 that authorizes local governments to withdraw land use

under ORS 197.830(12)(b) does not extend past the time the record is filed, ORS 183.482(6) provides at least some further indication that the legislature views voluntary reconsideration of governmental decisions by the deciding body with favor and that such reconsideration is consistent with sound principles of judicial review.

³We would feel differently if there were any suggestion that a local government's or applicant's request for a second bite at the apple was motivated by delay or other improper reasons. There is no suggestion here that the request is for reasons other than a chance to fully reconsider the decision so that identified errors can be corrected, either by an amended application, an amended decision, or both.

⁴The challenged decision was made by the city council. Respondent requests that the Board remand the decision to the city planning commission, rather than to the city council. However, we decline to direct our remand to a particular city body. The appropriate procedures to be followed after remand must be determined by respondent, considering respondent's representation that it will consider and address all issues raised by petitioners in their petition for review, and subject to applicable provisions of local regulations and state law. See Wentland v. City of Portland, ___ Or LUBA ___ (LUBA No. 92-015, June 3, 1992), slip op 8-9; Washington Co. Farm Bureau v. Washington Co., ___ Or LUBA ___ (LUBA No. 91-171, January 14, 1992), slip op 8.

1 decisions challenged at LUBA for the purpose of
2 reconsidering them. The apparent quid pro quo of this
3 process, however, is that the local government must withdraw
4 its decision for reconsideration prior to the date set for
5 the filing of the local record. It seems to me, that where
6 a petitioner (1) has filed a petition for review,
7 (2) alleges therein a basis for reversal of the challenged
8 decision, and (3) objects to an intervenors' request for
9 remand, that this Board should not grant a motion for remand
10 of the challenged decision. Rather, I believe the Board
11 should proceed to a decision on the merits.⁵

12 I am not aware of any statutory or administrative rule
13 basis for this Board to decline to issue a decision on the
14 merits under the circumstances presented here. While the
15 majority points out that during the reconsideration
16 proceedings on remand the city could conceivably decide in
17 favor of petitioners, I do not believe that possibility is
18 dispositive.

19 Here, there is no dispute that the issues alleged to
20 provide a basis for reversal of the city's decision in the
21 petition for review were thoroughly argued below, and the

⁵This is not the situation presented in Brice v. Portland Metropolitan Area Local Government Boundary Comm'n, 2 Or LUBA 245 (1980), where notwithstanding the petitioner's position that the challenged decision should be reversed due to inadequate findings, the Board granted the motion for remand over the petitioner's objections. In that case, the local government admitted its findings were inadequate, an admission that has not been made in this proceeding. In Brice, the Board stated that in such circumstances remand, rather than reversal, was the appropriate remedy.

1 city chose to adopt the challenged decision.⁶ In addition,
2 there is no dispute that petitioners contend the city
3 decision is erroneous as a matter of law.

4 While it is clear there are policy reasons favoring the
5 majority's resolution of the motion, it is equally clear
6 there are also policy reasons for denying the motion,
7 including a statutory policy in favor of the expeditious
8 resolution of land use disputes. Once a LUBA appeal has
9 proceeded as far as this one, it does not seem that this
10 statutory policy is furthered by LUBA refusing to decide
11 legal questions presented in a petition for review, in favor
12 of permitting the local government to revisit issues it
13 visited only a few months before. This, in addition to
14 ORS 197.830(12)(b), which states a statutory policy favoring
15 local government reconsideration of appealed land use
16 decisions only if such reconsideration is sought early on in
17 LUBA proceedings, would cause me to decide intervenors'
18 motion differently.⁷

⁶This is not a case where a reviewable issue at LUBA was not raised or considered during the local government proceedings below.

⁷The majority correctly notes that ORS 183.482(6) provides certain administrative agencies with specific authority to withdraw their contested case orders appealed to the Court of Appeals prior to the time of oral argument. ORS 197.830(12)(b) is written in substantially identical terms to ORS 183.482(6), except that 197.830(12)(b) requires a local government to withdraw its decision prior to the time the record is filed at LUBA, not any time prior to oral argument. This difference makes some sense when considered in light of LUBA's statutory charge to decide land use cases quickly. Consequently, it does not seem that ORS 183.482(6) lends support

to the majority's position. Rather, it seems to me that ORS 183.482(6) should cut the other way.