

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

4 GARY SEITZ and DIANE SEITZ,)
5)
6 Petitioners,)
7)
8 vs.)
9)
10 CITY OF ASHLAND,)
11)
12 Respondent,)
13)
14 and)
15)
16 JOHN SULLY, JEAN SULLY, CARL)
17 OATES, ROASALIE OATES, DENNIS)
18 FRIEND, and LINDA FRIEND,)
19)
20 Intervenors-Respondent.)

LUBA No. 92-135

FINAL OPINION
AND ORDER

21
22
23 Appeal from City of Ashland.

24
25 Douglass H. Schmor, Medford, filed the petition for
26 review and argued on behalf of petitioners. With him on the
27 brief was Brophy, Mills, Schmor, Gerking & Brophy.

28
29 No appearance by respondent.

30
31 Daniel C. Thorndike, Medford, filed a response brief
32 and argued on behalf of intervenors-respondent. With him on
33 the brief was Blackhurst, Hornecker, Hassen & Thorndike &
34 Ervin B. Hogan.

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

38
39 REMANDED 12/04/92

40
41 You are entitled to judicial review of this Order.
42 Judicial review is governed by the provisions of ORS
43 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners seek review of a city decision denying
4 their request for approval of a revised application for
5 subdivision outline plan approval.

6 **MOTION TO INTERVENE**

7 John Sully, Jean Sully, Carl Oates, Roasalie Oates,
8 Dennis Friend and Linda Friend move to intervene on the side
9 of respondent in this matter. There is no objection to the
10 motion, and it is allowed.

11 **FACTS**

12 In Sully v. City of Ashland, ___ Or LUBA ___ (LUBA No.
13 90-144, March 12, 1992), we reversed a prior city decision
14 granting subdivision outline plan approval for property
15 owned by petitioners. We held the city incorrectly
16 construed city requirements limiting the permissible length
17 of cul-de-sac streets within subdivisions. Because the cul-
18 de-sac proposed in the application originally submitted by
19 petitioners was longer than permitted under city
20 requirements, we reversed the city's decision.

21 Following our decision, petitioners submitted an
22 amended application. The cul-de-sac proposed in the amended
23 application was shortened to comply with city requirements.
24 Petitioners took the position below that the city was
25 required to allow the original application to be amended and
26 that the standards in effect when the original application

1 was first submitted govern the amended application as well.
2 Intervenors argued below that our decision in Sully had the
3 effect of denying the initial application and that a new
4 application is therefore required. Intervenors further
5 argue the new application must comply with the current
6 standards governing subdivision outline plan approval.¹

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioners argue in the first assignment of error that
9 under ORS 227.173(1), they are entitled to have their
10 application approved or denied based on criteria set forth
11 in the city comprehensive plan and applicable city
12 development ordinances.² Moreover, petitioners argue they
13 are entitled under ORS 227.178(3) to have a decision from
14 the city on their application based on the city criteria in
15 effect on the date the application was first submitted.³

¹The standards governing subdivision outline plan approval at the time the original application in this matter was submitted subsequently were amended.

²ORS 227.173(1) provides as follows:

"Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

³ORS 227.178(3) provides as follows:

"If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and

1 With regard to the original application, petitioners'
2 understanding of their rights under ORS 227.173(1) and
3 ORS 227.178(3) is correct. The first question presented
4 under this assignment of error is whether ORS 227.178(3)
5 requires both that the city allow petitioners to amend their
6 original application and that the city apply the criteria in
7 existence when the original application was submitted to the
8 amended application. For the reasons explained below, we
9 conclude that ORS 227.178(3) does not impose such a
10 requirement. The second question presented under this
11 assignment of error is whether our reversal in Sully
12 precludes the city from (1) allowing petitioners to submit
13 an amended application, and (2) reviewing that amended
14 application under the city criteria in existence at the time
15 the original application was submitted. For the reasons
16 explained below, we conclude the city erroneously reads our
17 decision in Sully to preclude it from selecting this option.

18 **A. Reversal vs. Remand**

19 As an initial point, intervenors assign particular
20 significance to the fact that our decision in Sully reversed
21 rather than remanded the city's decision. With regard to
22 the issues presented in this appeal, the distinction between
23 a reversal and remand is not dispositive. A reversal of a

the city has a comprehensive plan and land use regulations
acknowledged under ORS 197.251, approval or denial of the
application shall be based upon the standards and criteria that
were applicable at the time the application was first
submitted."

1 land use decision by this Board, unlike a remand, means that
2 a local government will not be able to correct all of the
3 identified errors by adopting new findings, by accepting
4 additional evidence, or both. In other words, reversal of a
5 land use decision approving a application for permit
6 approval simply means the subject application, as submitted,
7 cannot be approved under the applicable criteria, as a
8 matter of law. This means that an amended or a new
9 application is required to correct at least one of the
10 allegations of error sustained in the Board's final opinion
11 reversing the decision. A reversal does not preclude a
12 local government from accepting an amended application.

13 **B. ORS 227.178(3)**

14 ORS 227.178(3), see n 3 supra, assures permit
15 applicants that a city cannot change the applicable approval
16 standards after an application for a permit is submitted.
17 See Kirpal Light Satsang v. Douglas County, 96 Or App 207,
18 212, 772 P2d 944, modified 97 Or App 614, rev den 308 Or 382
19 (1989). Petitioners attempt to extend this rule regarding
20 the applicable approval criteria much further than the
21 statute provides. Petitioners essentially argue that
22 because the city's decision approving the original
23 application was based on an erroneous construction of its
24 cul-de-sac length criteria, following remand of that
25 decision, the statute guarantees the applicant a right to
26 amend its application so that it may again be reviewed by

1 the city based on a correct interpretation of the criteria.

2 Whatever policy arguments there might be in favor of
3 petitioners' position, ORS 227.178(3) simply does not impose
4 such a requirement on the city. When the city reviewed the
5 original application and granted approval, albeit based in
6 part on an erroneous construction of the city's criteria
7 restricting the length of cul-de-sacs, petitioners received
8 everything they were entitled to under ORS 227.178(3), with
9 regard to the original application.⁴ ORS 227.178(3)
10 entitles petitioners to a decision on their permit
11 application based on the criteria that were in effect when
12 the application was submitted. This particular statutory
13 provision does not guarantee petitioners a decision, based
14 on those criteria, that correctly interprets and applies
15 those criteria.⁵

16 In summary, ORS 227.178(3) identifies the criteria that
17 must be applied to a permit application. ORS 227.178(3) has
18 no bearing on whether the city must, following reversal or
19 remand of a permit decision by this Board, (1) accept an

⁴As explained later in this opinion, we see no reason why the city could not allow petitioners to amend the original application to correct the deficiency identified in our decision in Sully. In that event, ORS 227.178(3) would entitle petitioners to a decision on the amended permit application based on the criteria that were in effect when the original application was submitted.

⁵Of course other statutes entitle petitioners, as well as other parties to the local proceedings, to appellate review of such decision, and to reversal or remand of such decision if it improperly construes the applicable law.

1 amended application (and review that amended application
2 against the criteria in effect when the original application
3 was submitted), or (2) require a new application (and review
4 that new application against the criteria in effect when the
5 new application is submitted).

6 **C. Discretion to Allow Modification**

7 While ORS 227.178(3) does not require that the city
8 allow petitioners to modify their original application, and
9 thereafter review that application based on the standards in
10 effect when the original application was submitted, neither
11 does ORS 227.178(3) or any other statutory provision or
12 authority we are aware of, preclude the city from doing so.
13 Petitioners argue, incorrectly, that our decision in
14 Wentland v. City of Portland, ___ Or LUBA ___ (LUBA No. 92-
15 015, June 3, 1992), requires the city, after reversal or
16 remand, to (1) allow the original permit application to be
17 amended, and (2) apply the criteria that governed the
18 original application. Wentland holds that the city may do
19 so, absent local requirements to the contrary; it does not
20 hold that the city must do so. We explained as follows:

21 "We * * * conclude the city did not err in failing
22 to require that a new application be filed. This
23 conclusion is consistent with our prior cases
24 considering the effect of amendments to a permit
25 application prior to the local government's
26 initial decision on the application. In that
27 context we have held that the local government
28 need not, in all cases, require that amendments to
29 the permit application be treated as new permit
30 applications. Bonner v. City of Portland, 11 Or

1 LUBA 40, 60 (1980); see Billington v. Polk County,
2 13 Or LUBA 125, 135-36 (1985). We see no reason
3 why a different rule should apply where the
4 modification to the permit application occurs
5 following remand of the initial permit decision by
6 this Board." Wentland, supra, slip op at 7-8.

7 Turning to the city's decision in this matter, we
8 conclude the city erroneously interpreted our decision in
9 Sully to preclude it from allowing petitioners to submit an
10 amended application and reviewing that application under the
11 criteria in existence when the original application was
12 submitted.

13 The city's decision concludes as follows:

14 "The council, having heard the arguments by the
15 parties regarding the status of this case as a
16 result of the LUBA decision, enters this order:

17 "Because LUBA reversed this council's previous
18 decision, approving the outline plan, the council
19 will not further consider this case or the
20 amendment to the application submitted by the
21 applicants. The effect of LUBA's decision is to
22 deny the original application. If the applicants
23 wish to proceed, they must submit a new
24 application." Record 1.

25 Reading the second of the above quoted paragraphs as a
26 whole, we believe it concludes the city cannot allow a
27 amended application and approve that application if it meets
28 the criteria in effect when the original application was
29 submitted. Because that conclusion is erroneous, we sustain
30 the first assignment of error, in part, and remand the
31 city's decision so that it may determine whether it will

1 allow an amended application or require a new application.⁶

2 The first assignment of error is sustained in part.

3 **SECOND ASSIGNMENT OF ERROR**

4 "The City of Ashland's decision is flawed by
5 procedural errors that prejudice the substantial
6 rights of petitioners."

7 Under this assignment of error, petitioners allege the
8 notice of the city council's July 7, 1992 public hearing
9 failed to adequately advise them that the legal effect of
10 this Board's decision in Sully would be decided by the city
11 council.

12 The alleged errors in the notice are procedural errors
13 and would only provide a basis for reversal or remand if
14 petitioners' substantial rights were prejudiced.
15 ORS 197.835(7)(a)(B). Although this case must be remanded
16 in any event, we agree with intervenors that petitioners
17 fail to demonstrate that their substantial rights to present
18 arguments concerning the legal effect of our decision in
19 Sully were prejudiced in any way by the alleged defects in
20 the notice of public hearing.

21 The second assignment of error is denied.

22 The city's decision is remanded.

23

⁶As noted earlier in this opinion, we are aware of no local criteria governing the city's decision concerning which of these options to pursue. However, if there are such criteria, they must be complied with.