

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HASTINGS BULB GROWERS, INC.,)
5 OREGON HYDRANGEA COMPANY,)
6 C. CROCKETT, S. FREEMAN SCOTT,)
7 and C. FREEMAN,)

FINAL OPINION
AND ORDER

8)
9)
10 Petitioners,)
11 vs.)

LUBA No. 92-175

12)
13 CURRY COUNTY,)
14)
15 Respondent,)
16)
17 and)

18)
19 HENRY WESTBROOK, ROBERT)
20 WESTBROOK, and HARBOR)
21 CONSTRUCTION LTD.,)
22)

23 Intervenors-Respondent.)
24 _____))

25)
26 HASTINGS BULB GROWERS, INC.,)
27 OREGON HYDRANGEA COMPANY,)
28 C. CROCKETT, S. FREEMAN SCOTT,)
29 and C. FREEMAN,)

LUBA No. 92-176

30)
31 Petitioners,)
32)
33 vs.)

34)
35 CURRY COUNTY,)
36)
37 Respondent,)
38)

39 and)
40)

41 HENRY WESTBROOK, ROBERT)
42 WESTBROOK, and HARBOR)
43 CONSTRUCTION LTD.,)
44)

45 Intervenors-Respondent.)

1 _____)
2)
3 1000 FRIENDS OF OREGON,)
4)
5 Petitioner,)
6)
7 vs.)
8) LUBA No. 92-178
9 CURRY COUNTY,)
10)
11 Respondent,)
12)
13 and)
14)
15 HENRY WESTBROOK, ROBERT)
16 WESTBROOK, and HARBOR)
17 CONSTRUCTION LTD.,)
18)
19 Intervenors-Respondent.)

20 _____)
21)
22 OREGON DEPARTMENT OF)
23 TRANSPORTATION,)
24)
25 Petitioner,)
26) LUBA No. 92-179
27 vs.)
28)
29 CURRY COUNTY,)
30)
31 Respondent,)
32)
33 and)
34)
35 HENRY WESTBROOK, ROBERT)
36 WESTBROOK, and HARBOR)
37 CONSTRUCTION LTD.,)
38)
39 Intervenors-Respondent.)

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41
42 Appeal from Curry County.
43
44 Stephen Mountainspring, Roseburg, filed a petition for
45 review on behalf of petitioners Hastings Bulb Growers, Inc.,
46 et al.

1
2 Mary Kyle McCurdy, Portland, filed a petition for
3 review and on behalf of petitioner 1000 Friends of Oregon.

4
5 Larry Knudsen, Assistant Attorney General, Salem, filed
6 a petition for review on behalf of Oregon Department of
7 Transportation.

8
9 M. Gerard Herbage, Gold Beach, represented respondent.

10
11 Allen L. Johnson, Eugene, represented intervenors-
12 respondent.

13
14 HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON,
15 Referee, participated in the decision.

16
17 REMANDED 07/13/93

18
19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of ORS
21 197.850.

1 Opinion by HOLSTUN.

2 **NATURE OF THE DECISION**

3 Petitioners challenge county decisions changing the
4 comprehensive plan and zoning map designations for
5 approximately 1,100 acres of land.

6 **MOTION TO INTERVENE**

7 H. Westbrook, R. Westbrook, and Harbor Construction
8 Ltd., the applicants below, move to intervene in this
9 proceeding on the side of respondent. There is no
10 opposition to the motion, and it is allowed.

11 **DECISION**

12 Intervenors-respondent (hereafter applicants) move for
13 a "voluntary remand of this matter to Respondent Curry
14 County for a hearing on all issues set forth in the
15 respective Petitions for Review." Motion for Remand 2.
16 Respondent supports the motion, but petitioners in LUBA Nos.
17 92-175 and 92-176 (hereafter petitioners) object.

18 The appropriate inquiry in determining whether to grant
19 a motion for voluntary remand over the objection of a
20 petitioner is set out in Angel v. City of Portland, 20 Or
21 LUBA 541, 543 (1991), as follows:

22 "The legislature has clearly expressed an intent
23 that appeals of land use decisions be thoroughly
24 and expeditiously determined by the Board. ORS
25 197.805 and [197.835(9)(a)]. Granting a * * *
26 request for [voluntary] remand of an appealed
27 decision, over petitioner's objection, is
28 consistent with this policy of expeditious and
29 complete review only if the local government
30 demonstrates that the proceedings on remand will

1 be capable of providing the petitioner with
2 everything he would be entitled to from this
3 Board. If the local government's request for
4 remand of its decision does not demonstrate that
5 all of the allegations of error made by petitioner
6 in the petition for review will be addressed on
7 remand, it is inappropriate to remand the decision
8 over petitioners' objection." (Citations and
9 footnote omitted.)

10 Notwithstanding respondent's agreement to address all
11 issues raised in the petitions for review, petitioners offer
12 several reasons why they believe a voluntary remand is
13 inappropriate in this case.

14 **A. Improper Motives**

15 Petitioners contend the applicants stand to profit
16 handsomely from the subject development proposal and that
17 the applicants are therefore in a position to outspend them
18 in this challenge to that development proposal. Petitioners
19 cite several specific reasons why they believe the motion is
20 not made in good faith, and they contend a decision by this
21 Board is needed to narrow the issues on remand.¹

¹Petitioners cite statements by representatives of the applicants that petitioners' appeal is "going to cost * * * a great deal of money" and that if petitioners "intended to make any trouble with regard to the decision, it would come back to them." Memorandum in Response to Motion for Remand 5. Petitioners also contend applicants' former attorney rescinded a verbal agreement to allow additional time for filing their petition for review, knowing such action would place an extreme hardship on petitioners. Finally, petitioners argue the county knew or should have known of the issues raised in the petition for review, because many of these issues were identified in the staff report during the proceedings below, and the county failed to adequately deliberate on those issues before making its decision, even though it could have done so. Finally, petitioners complain the county gave the applicants carte blanche to prepare the findings and conditions it ultimately adopted and, therefore, respondents should not be given "a second bite of the apple." Id. at 7.

1 In any land use appeal proceeding, one side may be in a
2 position to spend significantly more to challenge or to
3 defend the appealed decision. We do not infer bad faith or
4 improper motives in this case from the potential economic
5 return the applicants stand to receive if the proposed
6 development is ultimately approved. Neither do we infer bad
7 faith or improper motives from the statements petitioners
8 claim were made during the proceedings below or from
9 petitioners' arguments that respondent could have or should
10 have correctly addressed the relevant criteria in the
11 initial local proceedings leading to the decision challenged
12 in this appeal.

13 Finally, petitioners' point that a decision by this
14 Board potentially would narrow the issues on remand is of
15 course true, as it would be in the case of any request for
16 voluntary remand. However, unless the particular
17 circumstances of a case make narrowing the issues clearly
18 more important than allowing a local government's request
19 for a remand of its decision to address each of the issues
20 raised in the petition for review, we believe a motion for
21 voluntary remand should be granted. Here, petitioners'
22 allegations of improper motives do not demonstrate the
23 presence of such circumstances.

24 **B. Change of Decision Criteria**

25 Under ORS 215.428(3), a decision concerning a request
26 for approval of a permit or zone change must be based on the

1 standards and criteria in effect when the permit application
2 is first submitted. Kirpal Light Satsang v. Douglas County,
3 96 Or App 207, 212, 772 P2d 944, modified on reconsideration
4 97 Or App 614, rev den 308 Or 382 (1989). Petitioners
5 contend that on remand new or amended criteria (which
6 potentially could be more favorable to the applicants) may
7 apply to the disputed decisions.

8 The decisions challenged in this appeal include a
9 comprehensive plan map amendment and a zoning map amendment.
10 Only the zoning map amendment is subject to ORS 215.428(3).
11 Therefore, the plan map amendment would be subject to any
12 new or amended criteria on remand, but the zoning map
13 amendment would be subject to the criteria in effect when
14 the application was first submitted.² However, we fail to
15 see how the potential for different criteria applying to
16 either the plan amendment or the zone change on remand
17 provides a reason for denying the request for voluntary
18 remand. Petitioners are entitled to obtain review by this
19 Board to assure a correct decision is rendered, whatever
20 approval criteria may be applicable. That right will not be
21 affected by the requested voluntary remand.

22 **C. Questions of State Law**

23 Petitioners contend in their petition for review that

²Even the zoning map amendment would be subject to new or amended criteria, if a new application were submitted by the applicants. See Sunburst II Homeowners v. City of West Linn, 18 Or LUBA 695, 702, aff'd 101 Or App 458, rev den 310 Or 243 (1990).

1 respondent incorrectly interprets several statutory and
2 statewide planning goal provisions, and while LUBA must give
3 significant deference to respondent's interpretation of its
4 own plan and land use regulations under Clark v. Jackson
5 County, 313 Or 508, 836 P2d 710 (1992), it owes no deference
6 to respondent's interpretation of state law. See Kenagy v.
7 Benton County, 115 Or App 131, 134, 838 P2d 1076, rev den
8 315 Or 271 (1992).

9 Petitioners are correct that this Board is not required
10 to give any particular deference to a local government's
11 interpretation of state law. However, a number of the
12 issues raised by petitioners do not turn on interpretation
13 of state law. We agree with applicants that the presence of
14 questions of state law does not, alone, make a voluntary
15 remand inappropriate.

16 **D. Attorney Fees**

17 Petitioners contend an award of attorney fees may be
18 appropriate if the petitioners are able to demonstrate
19 applicants or respondent "presented a position without
20 probable cause to believe that the position was well-
21 founded, and primarily for a purpose other than to secure
22 appropriate action by [LUBA]." ORS 197.830(15)(b).
23 Petitioners argue they intend to request attorney fees if
24 they prevail, and that the requested voluntary remand will
25 therefore deny them something they are entitled to request.

26 Presumably one of the reasons respondent and applicants

1 seek a voluntary remand is to avoid having to make arguments
2 that they believe have no merit. If petitioners' argument
3 is that the voluntary remand should be denied so that
4 respondents will be forced to make arguments in support of
5 the challenged decision that might lead to a successful
6 request for attorney fees, we reject the argument.

7 To the extent petitioners argue that positions taken by
8 respondent or the applicants during the proceedings below or
9 in the challenged decision itself may provide the basis for
10 a request for attorney fees, we reject that argument as
11 well. It is only the positions taken taken by a party in
12 the appeal before LUBA that may lead to an award of attorney
13 fees under ORS 197.830(15)(b).

14 **E. Notice**

15 Petitioners' final argument against allowing the motion
16 for voluntary remand is that the county has not explicitly
17 agreed to provide notice of the proceedings on remand "to
18 all persons entitled thereto under ORS 197.763." Memorandum
19 in Response to Motion for Remand 10.

20 Absent some reason to believe otherwise, we will assume
21 that respondent will observe its responsibility to provide
22 notice of any hearings on remand.

23 The motion for voluntary remand is allowed.

24 The county's decisions are remanded.