

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

4 PRINEVILLE PROPERTIES, INC.,       )  
5    )  
6                Petitioner,                )  
7    )  
8                vs.                                )  
9    )  
10 CITY OF PRINEVILLE,                )  
11    )  
12                Respondent,                )  
13    )  
14                and                                )  
15    )  
16 DONALD CHILDRESS, VESTA M.        )  
17 CHILDRESS, KATHY HUNTLEY, TIM        )  
18 HUNTLEY, OLIVIA KRAMER, WILLIAM    )  
19 KRAMER, JUDY POKORNY, LESLIE        )  
20 SULLIVAN, JOAN WITTY and JOHN        )  
21 WITTY,                                        )  
22    )  
23                Intervenors-Respondent.        )

LUBA No. 96-030  
  
FINAL OPINION  
AND ORDER

24  
25  
26                Appeal from City of Prineville.

27  
28                Carlyle F. Stout, III, Medford, filed the petition for  
29 review on behalf of petitioner.

30  
31                Carl M. Dutli, Prineville, filed a response brief on  
32 behalf of respondent.

33  
34                John V. Witty, Prineville, filed a response brief on  
35 behalf of intervenors-respondent.

36  
37                LIVINGSTON, Referee; HANNA, Chief Referee; GUSTAFSON,  
38 Referee, participated in the decision.

39  
40                AFFIRMED                               10/24/96

41  
42                You are entitled to judicial review of this Order.  
43 Judicial review is governed by the provisions of ORS  
44 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner, the applicant below, appeals a limited land  
4 use decision approving with conditions a tentative  
5 subdivision plan for 35 residential lots.

6 **MOTIONS TO INTERVENE AND TO FILE REPLY BRIEF**

7 Ten individuals (intervenors) move to intervene on the  
8 side of respondent. Petitioner moves to file a reply brief,  
9 and attaches a reply brief that responds to new issues  
10 raised in the response briefs. There is no opposition to  
11 the motions, and they are allowed.

12 **FACTS**

13 Petitioner's application for tentative plan approval of  
14 the first phase of a three-phase residential subdivision was  
15 initially considered by the city planning commission on  
16 February 15, 1994. The application, submitted as "Phase I  
17 of Pioneer Heights Subdivision," was for 39 lots, with a  
18 total of 129 lots proposed in three phases in the tentative  
19 plan. Record 324. The planning commission approved the  
20 application for Phase I with conditions, reducing the  
21 approval to 35 lots. The approval was appealed to the city  
22 council, which conducted a hearing, denied the appeal, and  
23 affirmed the planning commission's approval. That decision  
24 was appealed to LUBA, and was remanded. Andrews v. City of  
25 Prineville, 28 Or LUBA 653 (1995) (Andrews).

26 In Andrews we remanded because the city had improperly

1 shifted the burden of proof and had limited the scope of  
2 issues in the appeal before the city council to traffic and  
3 water. We noted the difficulty in determining the city's  
4 basis for limiting the scope of issues, since neither the  
5 city nor the applicant (who had intervened) filed a brief.  
6 The apparent basis was the city council's determination that  
7 the issues it considered were the only ones raised before  
8 the planning commission. However, the record did not  
9 include transcripts, the city did not make planning  
10 commission tapes available for the appeal despite requests  
11 to do so, and the minutes of the four-hour planning  
12 commission hearing consisted of one page. We concluded that  
13 the planning commission record was inadequate for the city  
14 council to limit the scope of issues. Andrews at 661-62.

15 While the appeal of Phase I was pending before LUBA,  
16 petitioner applied for approval of additional phases  
17 pursuant to a new master plan for Pioneer Heights  
18 Subdivision with a total of 232 lots. The revised master  
19 plan includes the 35-lot Phase I that was the subject of the  
20 appeal in Andrews (and which is the subject of this appeal),  
21 and 10 additional phases, called "additions." Additions 1-6  
22 are all new property, located to the east of the original  
23 proposed subdivision, that was not part of the original  
24 three-phase tentative plan; additions 7-10 encompass the  
25 area included within Phases II and III of the original  
26 tentative plan. Running north and south through the middle

1 of additions 1-6 is a new collector street, Hudspeth Road,  
2 that would provide primary access to additions 1-6 and  
3 alternative access to east-west streets in the original  
4 Phase I and additions 7-10. The planning commission  
5 approved each of the 10 additions, apparently as separate  
6 applications, in July and August of 1994. The approvals  
7 included identical conditions regarding the sequencing of  
8 the development of the additions, requiring that they be  
9 developed in numerical order from south to north, then east  
10 to west, so that the new collector street and other public  
11 facilities would be constructed to each stage before the  
12 next stage could be developed. None of those approvals was  
13 appealed to the city council, and none is at issue here.

14 Following our remand in Andrews, the city council  
15 mailed notice of a public hearing "to specifically address  
16 the four assignments of error contained in the Final Opinion  
17 and Order of LUBA No. 94-101." Record 126. The council  
18 opened the public hearing, and accepted a staff report  
19 recommending the council refer the matter to the planning  
20 commission "to hold a hearing and establish a proper  
21 record." Record 114. The mayor agreed with the  
22 recommendation, noting it was also the recommendation of  
23 opposers' attorney. Without allowing argument from  
24 petitioner, the council passed a motion "to accept the staff  
25 recommendation and refer this back to the Planning  
26 Commission to hold a hearing and establish proper record."

1 Record 114.

2 All parties had an opportunity to raise issues and  
3 present evidence before the planning commission. The master  
4 plan submitted for the 10 additions, showing the new  
5 collector street as alternative access to Phase I, is part  
6 of the record of those proceedings. Record 77-78.  
7 Petitioner argued that the 35-lot Phase I application should  
8 be considered independently of the 10 additions. However,  
9 the planning commission minutes state:

10 "[Petitioner's agent] continued his testimony on  
11 behalf of the applicants by stipulating that the  
12 subject Phase I had been revised to 35 lots as  
13 required by the original Planning Commission  
14 approval conditions versus the original proposal  
15 of 39 lots, and was to actually be developed as  
16 the '6th unit' of the overall development master  
17 plan thereby providing that the realigned and  
18 extension of Hudspeth Road would be available as  
19 an alternate traffic route at the time said unit  
20 was to be developed." Record 99.

21 The planning commission eventually approved the 35-lot  
22 application with the following condition:

23 "That said Phase 1 only be developed in sequence  
24 of the overall development as Phase 5 or 6; i.e.  
25 not until the planned extension and realignment of  
26 Hudspeth Road from Laughlin Road north to  
27 intersect with Nyman Court and Sunrise Lane  
28 extension as part of said Phase 1 be completed."  
29 Record 52.

30 Petitioner appealed that decision to the city council,  
31 contending that "[t]here was no new 'factual' evidence  
32 submitted by opponents that would alter the original  
33 Decision of the City

1 Council." Record 39. Petitioner again argued that the  
2 Phase I application was independent of the 10 additions in  
3 the master plan. The city council rejected petitioner's  
4 appeal, and petitioner now seeks our review.

5 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

6 Petitioner contends the city council violated its land  
7 use regulations governing notice of hearings and hearings  
8 procedures when it remanded the matter to the planning  
9 commission. The gist of these arguments is that petitioner  
10 was not afforded the opportunity to present argument and  
11 rebuttal on the issue of how the city should proceed on  
12 remand from LUBA. However, petitioner had full opportunity  
13 to present and rebut evidence and argument at the planning  
14 commission hearing on remand and at the subsequent appeal  
15 hearing before the city council.

16 Absent local government regulations to the contrary,  
17 when a decision is remanded by LUBA, the local government is  
18 not required to repeat the procedures applicable to the  
19 initial proceedings, unless LUBA's remand specifically  
20 requires that those procedures be followed. Sanchez v.  
21 Clatsop County, 29 Or LUBA 26 (1995). The Prineville  
22 subdivision ordinance (PSO), City Ordinance No. 805 as  
23 amended, states subdivision, partitioning, and other land  
24 development standards and procedures. PSO 12.040(3) lists  
25 procedures for hearings, and provides that the procedures  
26 shall be followed "except as otherwise modified or set forth

1 by the hearing authority in the case of a hearing regarding  
2 a review or appeal \* \* \*." The same section provides that  
3 the hearing authority may "stipulate other hearing  
4 procedures that are deemed necessary to facilitate an  
5 orderly hearings process." The city's decision to refer the  
6 matter for further evidence before the planning commission  
7 did not violate procedures in the PSO.

8 Even if there were procedural error in the city's  
9 choice of hearing process on remand, petitioner has not  
10 identified prejudice to its substantial rights. Petitioner  
11 does not dispute that all parties had a full opportunity to  
12 present argument and evidence before the planning commission  
13 and council, including argument on the proper scope of the  
14 city's proceedings on remand. In its reply brief,  
15 petitioner asserts that the time lost on appeal from the  
16 planning commission to the council resulted in increased  
17 costs, causing economic harm. However, the "substantial  
18 rights" referred to in ORS 197.835(9)(a)(B) are the rights  
19 to an adequate opportunity to prepare and submit a case and  
20 a full and fair hearing. See *McInnis v. City of Portland*,  
21 25 Or LUBA 376, 379 (1993), and cases cited therein.  
22 Petitioner was able to present all aspects of its case  
23 without prejudice to these rights.

24 The first and third assignments of error are denied.

25 **SECOND ASSIGNMENT OF ERROR**

26 Petitioner contends that the planning commission

1 exceeded the scope of its authority to establish a record  
2 when it "took issues up for discussion based on items  
3 already reviewed and ruled upon by the Land Use Board of  
4 Appeals." Petition for Review 12.

5 Petitioner is correct that, in some circumstances,  
6 issues decided by LUBA and not appealed may not be further  
7 litigated after remand to the local government. See Beck v.  
8 City of Tillamook, 313 Or 148, 831 P2d 678 (1992). However,  
9 as the analysis in Beck makes clear, when the local  
10 government reopens the record on remand, new issues may be  
11 raised and may be the basis for a new decision, or grounds  
12 for subsequent appeal. The Court of Appeals, while  
13 acknowledging the statutory restraints identified in Beck on  
14 what a local government may consider, has characterized the  
15 relationship between LUBA and local governments:

16 "[P]etitioners' view that a remand by LUBA  
17 necessarily defines and limits the scope of a  
18 local government's inquiry fundamentally  
19 misapprehends the relationship of the bodies and  
20 their functions. LUBA may require local  
21 governments to resolve certain questions before  
22 making a new decision; generally speaking,  
23 however, it cannot prevent them from considering  
24 other questions. The relationship is not like  
25 that of appellate and trial courts, where  
26 decisions are made within a single system that has  
27 defined and comparatively rigid preservation and  
28 procedural restraints." (Emphasis in original.)  
29 Schatz v. City of Jacksonville, 113 Or App 675,  
30 680, 835 P2d 923 (1992).

31 In this case, petitioner points to nothing (such as an  
32 interpretation of law) in our decision in Andrews that

1 establishes limitations on issues concerning the new master  
2 plan and the relation of Phase I to the other phases.  
3 Although the PSO does not explicitly authorize approval of  
4 tentative plans in phases, such approvals are implicitly  
5 authorized by PSO 3.070, which requires "[a]n overall  
6 'Master Development Plan'" for all developments planning  
7 phase or unit development.<sup>1</sup> We understand the original  
8 three-phase tentative plan to have functioned as a master  
9 plan in the proceedings prior to Andrews, while a new plan,  
10 showing Phase I with 10 additions and a new collector

---

<sup>1</sup>PSO 3.070 provides:

MASTER DEVELOPMENT PLAN. An overall 'Master Development Plan' shall be submitted for all developments of more than 25 parcels or for all developments planning phase or unit development. The Master Development Plan shall include, but not be limited to, the following elements:

- "(1) Overall development plan, including phase or unit sequences.
- "(2) Schedule of improvements initiation and completion.
- "(3) Overall transportation and traffic pattern plan.
- "(4) Sales program timetable projection.
- "(5) Development plans of any common elements or facilities.
- "(6) Financing plan for all improvements.
- "(7) If the proposed subdivision has an unknown impact upon adjacent lands or lands within the general vicinity, the Planning Commission may require a potential street development pattern for adjoining lands to be submitted together with the tentative plan as part of the Master Development Plan for the subject subdivision, so as to verify the non-detrimental impact of the subject subdivision upon adjacent lands."

1 street, functioned as the master plan on remand.

2 The planning commission hearing on remand thus included  
3 evidence that the original subdivision plan with three  
4 phases had been amended, that other adjoining property had  
5 been included in separate phased approvals, and that those  
6 approvals all included conditions for the construction of  
7 water system improvements and a new collector street that  
8 would serve Phase I as well as the additions. Leaving aside  
9 the obligation to correctly apply the burden of proof, this  
10 new information is sufficient to allow the local government  
11 to revisit the findings that were reviewed by this Board in  
12 Andrews.

13 Moreover, although opposers of the application raised  
14 issues concerning transportation and water in the first  
15 appeal, the specific approval standards we addressed in  
16 Andrews are different from the standards on which the city  
17 apparently relied when it imposed the sequencing  
18 condition in this case. In Andrews, we denied opposers'  
19 assignments of error concerning PSO 8.010 and 8.020. The  
20 staff report to the city council after remand reflected the  
21 new master plan information and identified evidence related  
22 to PSO 3.020(1)-(4) as the grounds for the sequencing  
23 condition.<sup>2</sup> The issues concerning PSO 3.020(1)-(4) were not

---

<sup>2</sup>PSO 3.020 identifies findings necessary for approval, including:

"(1) The subdivision is an effective, efficient and unified treatment of the development possibilities on the project

1 resolved or even raised in the first appeal, and the city  
2 was not precluded from considering them on remand in the  
3 light of the new evidence.

4 The second assignment of error is denied.

5 **FOURTH ASSIGNMENT OF ERROR**

6 Petitioner's fourth assignment of error states:

7 "The Planning Commission Decision dated November  
8 21, 1995, and the City Council Decision dated  
9 January 23, 1996, do not state the basis of  
10 evidence relied upon or an explanation that would  
11 reverse a prior decision." Petition for Review  
12 15.

13 Petitioner's only objection appears to be that there is  
14 not sufficient new evidence to support the change in the  
15 city's decision. However, nothing prohibits the city from  
16 weighing the existing evidence differently on remand,  
17 particularly where the city improperly shifted the burden of  
18 proof to opposers in the earlier proceedings. In any case,  
19 we review for substantial evidence in the whole record. ORS

---

site while remaining consistent with the comprehensive  
plan relative to orderly development and land use  
patterns in the area \* \* \*.

"(2) The subdivision will be compatible with the area  
surrounding the project site, and will not create an  
excessive demand on public facilities and services  
required to serve the development.

"(3) Proof that financing is available to the applicant  
sufficient to assure completion of the subdivision as  
proposed or required.

"(4) That there will not be any adverse impacts on neighboring  
properties, natural resource quality, area livability,  
and public services and facilities."

1 197.835(9)(a)(C). Because petitioner has not challenged the  
2 adequacy of the evidence in the whole record, there is no  
3 basis for reversal or remand.

4 It may be that petitioner is asserting that the city's  
5 decision to impose the sequencing condition is not supported  
6 by substantial evidence in the whole record. If that is  
7 petitioner's contention, it is difficult to make it out,  
8 since the arguments, both from petitioner and from  
9 respondent and intervenors, are directed at petitioner's  
10 point that there is no new evidence that would support the  
11 condition. Intervenors direct us to the findings, which  
12 discuss the city's "responsibility to consider the impacts  
13 of the overall development and to make sure that the long-  
14 range development of the area and the City in general was  
15 done in an orderly manner." Record 10. Intervenors comment  
16 generally that the record supports the city's conclusion.

17 While as a rule we will not search the record for  
18 evidence in support of findings, our discussion of the  
19 second assignment of error points to evidence in the record  
20 concerning provisions of PSO 3.020 that supports the  
21 sequencing condition. In addition, PSO 3.070 requires that a  
22 master plan be submitted that includes the "overall  
23 development plan, including phase or unit sequences" and  
24 "overall transportation and traffic pattern plan." Given  
25 the new master plan, we conclude that there is substantial  
26 evidence in the whole record to support the sequencing

1 condition for this 35-lot phase as part of the overall  
2 development.

3 The fourth assignment of error is denied.

4 The city's decision is affirmed.