

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

3
4 MARK J. MAZESKI,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 WASCO COUNTY,) LUBA No. 94-001
11)
12 Respondent,) FINAL OPINION
13) AND ORDER
14 and)
15)
16 OREGON DEPARTMENT OF)
17 TRANSPORTATION,)
18)
19 Intervenor-Respondent.))

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21
22 Appeal from Wasco County.

23
24 Mark J. Mazeski, Mosier, represented himself.

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26 Bernard L. Smith, District Attorney, The Dalles,
27 represented respondent.

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29 Lucinda D. Moyano, Assistant Attorney General, Salem,
30 represented intervenor-respondent.

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

34
35 REMANDED 03/18/94

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county court order affirming a
4 planning commission "determination of significance" with
5 regard to 40 aggregate sites.¹ Record CC-10.

6 **MOTION TO INTERVENE**

7 The Oregon Department of Transportation (ODOT) moves to
8 intervene in this proceeding on the side of respondent.
9 There is no objection to the motion, and it is allowed.

10 **MOTION FOR VOLUNTARY REMAND**

11 Petitioner filed his petition for review on
12 February 10, 1994. On February 28, 1994, ODOT filed a

¹Apparently, the county planning commission is in the process of considering an amendment to the county comprehensive plan to add the subject 40 sites to the plan's Inventory of Significant Aggregate Sites. Record 39. As an initial step in the planning process required by Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) and OAR Chapter 660, Division 16 (Goal 5 rule), the planning commission determined the subject sites qualify as significant aggregate resource sites. However, the notice given of the planning commission decision appears to recognize that sites determined to be significant must proceed through the remainder of the Goal 5 planning process, including the identification of conflicting uses and analysis of the economic, social, environmental and energy (ESEE) consequences of such conflicts, before the planning commission makes its final recommendation to the county court concerning the proposed plan amendment. Record 20-22. Nevertheless, the county court allowed petitioner to appeal the planning commission's "determination of significance" and issued the challenged order denying that appeal. No issue is raised in this appeal concerning whether Goal 5 and the Goal 5 rule allow the county court to make a final decision concerning the significance of the subject aggregate sites without completing the rest of the Goal 5 planning process. But see Nathan v. City of Turner, ___ Or LUBA ___ (LUBA No. 93-107, January 10, 1994), slip op 13-14 (decision adding site to local government inventory of significant Goal 5 aggregate sites under OAR 660-16-000(5)(c), while deferring completion of the Goal 5 planning process required by OAR 660-16-005 and 660-16-010, violates Goal 5 and the Goal 5 rule).

1 motion requesting voluntary remand of the challenged
2 decision to "allow the county to address the issue raised by
3 Petitioner in the Petition for Review regarding its
4 ordinance provision." Motion for Voluntary Remand 1. The
5 county joins in the motion.

6 Petitioner opposes the motion for voluntary remand.
7 Petitioner argues that if the county wished to withdraw its
8 decision for reconsideration, it should have done so under
9 ORS 197.830(12)(b), before the record was filed. Petitioner
10 also argues it is unlikely the county will change its
11 position, and that nothing can be gained from a remand
12 because the single issue raised by petitioner is an issue of
13 law that LUBA must decide.

14 While ORS 197.830(12)(b) grants a local government the
15 unilateral power to withdraw an appealed decision for
16 reconsideration before the date the record is due, it does
17 not eliminate the discretion this Board has under
18 ORS 197.835 and 197.805 to grant a motion for voluntary
19 remand after the record is filed, in accordance with sound
20 principles of judicial review. Mulholland v. City of
21 Roseburg, 24 Or LUBA 240, 243 (1992). We have previously
22 stated that unless the particular circumstances of a case
23 make obtaining a LUBA decision that could potentially narrow
24 the issues on remand clearly more important than allowing a
25 local government request for remand of its decision to
26 address each of the issues raised in the petition for

1 review, a motion to remand should be granted. Hastings Bulb
2 Growers, Inc. v. Curry County, 25 Or LUBA 558, 562, aff'd
3 123 Or App 642 (1993).

4 The single issue raised in the petition for review is
5 whether Wasco County Land Use and Development Ordinance
6 (LUDO) 3.815(A) allows the county to determine that an
7 aggregate site with less than 250,000 cubic yards of reserve
8 is a "significant aggregate resource site."² The challenged
9 decision does not appear to include any findings
10 interpreting LUDO 3.815(A). It consists of a two-page order
11 including the following:

12 * * * Based upon the findings of fact and
13 conclusion of law[, the county court] decided to
14 deny [petitioner's] appeal and upheld the decision
15 of the Wasco County Planning Commission * * *."
16 (Emphasis added.) Record CC-10.

17 No "findings of fact and conclusion of law" are attached to

²LUDO 3.815(A) provides:

"Information to demonstrate the significance of a resource shall include:

"1. A survey map, or other legal description that identifies the location and perimeter of the mineral and aggregate resource; and

"2. Information demonstrating that the resource meets or can meet two of the following minimum [quality] requirements:

* * * * *

* * * ; and

"3. Information demonstrating that the quantity of the resource indicates at least 250,000 cubic yards of reserve."

1 the challenged order, nor is such a document listed in the
2 record table of contents. Neither does there appear to be a
3 written decision of the planning commission in the record
4 that includes findings interpreting and applying
5 LUDO 3.815(A).

6 Under Gage v. City of Portland, 123 Or App 269, 860 P2d
7 282, on recon 125 Or App 119 (1993), and Weeks v. City of
8 Tillamook, 117 Or App 449, 453-54, 844 P2d 914 (1992), this
9 Board is required to review a local government's
10 interpretation of its code and may not interpret the local
11 government's code in the first instance. Additionally, to
12 be reviewable by LUBA, a local government's interpretation
13 of its regulations must be provided in the challenged
14 decision or the supporting findings, not in the local
15 government's brief. Eskandarian v. City of Portland, ___
16 Or LUBA ___ (LUBA No. 93-012, October 15, 1993), slip op 15;
17 Miller v. Washington County, 25 Or LUBA 169, 179 (1993).

18 Thus, because the challenged decision does not contain
19 a county interpretation of LUDO 3.815(A) for us to review,
20 proceeding with this appeal would do nothing to narrow the
21 issues the county must consider on remand.

22 Intervenor's motion is granted.

23 The county's decision is remanded.