

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.¹ 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

¹PSO 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.² The issues concerning PSO 3.020(1)-(4) were not

²PSO 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.