

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 OTAK, INC., on behalf of GENSTAR
5 LAND COMPANY NORTHWEST,
6 *Petitioner,*

7
8 vs.

9
10 CITY OF SHERWOOD,
11 *Respondent.*

12 LUBA No. 2001-036

13
14
15 FINAL OPINION
16 AND ORDER

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18 Appeal from City of Sherwood.

19
20 Jack L. Orchard and Kristin L. Udvari, Portland, represented petitioner.

21
22 E. Shannon Johnson, Keizer, represented respondent.

23
24 HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member,
25 participated in the decision.

26
27 REMANDED

06/26/2001

28
29 You are entitled to judicial review of this Order. Judicial review is governed by the
30 provisions of ORS 197.850.

31

1 Holstun, Board Member.

2 The decision challenged in this appeal grants preliminary plat approval for Phase 9 of
3 the Woodhaven Planned Unit Development (PUD). That decision imposes a condition of
4 approval that requires that lot sizes in Phase 9 must be at least 5,000 square feet in area.
5 Petitioner, the applicant below, contends the only minimum lot size applicable to this PUD is
6 set out at Sherwood Zoning and Community Development Code (SZCDC) 2.304.01, which
7 specifies a 3,200 square foot minimum lot size.

8 The petition for review includes four assignments of error challenging the above-
9 described condition. In those assignments of error petitioner argues that, in requiring a 5,000
10 square foot minimum size, the city (1) exceeded its jurisdiction under the SZCDC, (2)
11 adopted inadequate findings, (3) adopted a decision that is not supported by substantial
12 evidence and (4) misconstrued the previously approved PUD Final Development Plan.

13 The city moves for voluntary remand, “so that it can address each of Petitioner’s
14 assignments of error and reconsider whether there is a minimum lot size applicable to single
15 family dwellings in this Phase of the PUD.” Motion for Extension for Filing Response Brief
16 and Motion for Voluntary Remand 3. Petitioner objects to the city’s motion, and requests
17 that we require the city to file its brief and proceed with review of the city’s decision on the
18 merits.¹

19 The general principle that LUBA applies where a local government requests a
20 voluntary remand, and petitioner opposes the request, was stated in *Angel v. City of Portland*,
21 20 Or LUBA 541, 543 (1991):

22 “The legislature has clearly expressed an intent that appeals of land use
23 decisions be thoroughly and expeditiously determined by the Board. ORS
24 197.805 and 197.835[(11)](a). Granting a local government request for
25 remand of an appealed decision, over petitioner’s objection, is consistent with

¹Petitioner also requests oral argument on its objection to the city’s motion for voluntary remand. We decide the city’s motion based on the parties’ written arguments. The request for oral argument is denied.

1 this policy of expeditious and complete review only if the local government
2 demonstrates that the proceedings on remand will be capable of providing the
3 petitioner with everything he would be entitled to from this Board. If the
4 local government’s request for remand of its decision does not demonstrate
5 that *all* of the allegations of error made by petitioner in the petition for review
6 will be addressed on remand, it is inappropriate to remand the decision over
7 petitioner’s objections.” (Citations and footnote omitted; emphasis in
8 original.)

9 We understand the city to represent that it will consider all of petitioner’s assignments of
10 error on remand and “reconsider” whether it can impose a minimum lot size. That means the
11 city may determine on remand that it cannot impose that minimum lot size. In that event, we
12 assume the city would eliminate the condition. That is precisely what petitioner seeks to
13 have LUBA require of the city. Of course we recognize that it is also possible that the city
14 will again determine that it can impose that condition and that the city may offer a different
15 or more elaborate rationale for imposing the condition. However, we do not believe that
16 possibility, in and of itself, is a sufficient basis for denying the city’s motion.

17 We denied a request for voluntary remand where it was uncertain whether local
18 review would “result in thorough and expeditious resolution of [the] appeal” and the remand
19 would have the effect of halting construction that had already begun based on the appealed
20 decision. *Deal v. City of Hermiston*, 34 Or LUBA 767 (1998). We have also indicated that
21 requests for voluntary remand might not be appropriate in other circumstances. *See*
22 *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558, 562, *aff’d* 123 Or App 642,
23 859 P2d 1208 (1993) (where narrowing issues on remand is more important); *Mulholland v.*
24 *City of Roseburg*, 24 Or LUBA 240, 244 n 3 (where request appeared to be “motivated by
25 delay or other improper reasons”). However, none of those circumstances is present here.
26 As we explained in *Hribernick v. City of Gresham*, 35 Or LUBA 329, 331 (1998):

27 “The rationale for granting a motion for voluntary remand, notwithstanding a
28 petitioner’s objection to the motion, is simple—no purpose is likely to be
29 ‘served by forcing the [local government] to defend a decision it does not
30 believe is defensible.’ *Mulholland*[, 24 Or LUBA at 243].” (Footnote
31 omitted.)

1 The petition for review presents a set of discrete issues, and we see no reason to
2 doubt the city's representation that petitioner will receive a complete review of the
3 arguments it advanced in the petition for review. As a product of that review on remand,
4 petitioner may receive a complete and final resolution of the disputed condition that will
5 make further appeal to LUBA unnecessary. Therefore, we conclude that it is appropriate to
6 grant the city's motion for voluntary remand.

7 The city's decision is remanded.