

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

3
4 SANDY BARR, dba SANDY BARR)
5 ENTERPRISES,)
6)
7 Petitioner,)

8)
9 and)
10)

11 DONALD H. OWEN and JUDITH J. OWEN,)
12)
13 Intervenors-Petitioner,)

LUBA No. 90-142

)
FINAL OPINION

) AND

14 ORDER

15)
16 vs.)
17)

18 CITY OF PORTLAND,)
19)

20 Respondent.)
21
22

23 On remand from the Court of Appeals.

24
25 Benjamin Rosenthal, Portland, represented petitioner.

26
27 Peggy Hennessy, Portland, represented intervenors-
28 petitioner.

29
30 Peter A. Kasting, Portland, represented respondent.

31
32 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,
33 Referee, participated in the decision.

34
35 DISMISSED;

36 PRIOR DECISION VACATED

12/27/91

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Sherton.

2 Petitioner appeals an October 12, 1990 City of Portland
3 Code Hearings Officer order directing petitioner and the
4 owners of certain property to cease all "flea market" and
5 other similar commercial activities on that property. This
6 Board issued a final opinion and order affirming the
7 challenged decision. Barr v. City of Portland, ___ Or LUBA
8 ___ (LUBA No. 90-142, April 30, 1991). Petitioner appealed
9 to the Court of Appeals. On August 21, 1991, the Court of
10 Appeals issued a per curiam opinion which states, in its
11 entirety:

12 "In the light of concessions made at oral argument
13 in this court, we reverse and remand to LUBA for
14 reconsideration.

15 "Reversed and remanded for reconsideration." Barr
16 v. City of Portland, 108 Or App 478, 479, ___ P2d
17 ___ (1991).

18 The parties agree that this appeal is moot because
19 under a new city zoning code which became effective on
20 January 1, 1991, while the appeal was initially pending
21 before this Board,¹ petitioner's "flea market" operation is
22 a permitted use of the subject property.² The parties

¹When this appeal was initially before us, no party called our attention to the existence of the new city zoning code or raised any issue concerning its effect on this appeal.

²Intervenors-petitioner, owners of the subject property, ask that this decision also include a statement that the existing use of the property for a sports arena is permitted outright under the new city zoning code. However, the challenged decision does not address use of the subject property for a sports arena, and its use for a sports arena was not an

1 further agree that the Board's April 30, 1991 final opinion
2 and order in this appeal should be vacated. Beyond these
3 points, the parties disagree. Respondent argues that the
4 appeal should be dismissed. Petitioner argues that the
5 city's decision should be remanded, with instructions to the
6 city to dismiss its code enforcement proceeding as being
7 moot. Miller Brands, Inc. v. OLCC, 90 Or App 266, 752 P2d
8 320 (1988) (declaratory judgment proceeding remanded to
9 trial court with instructions to dismiss complaint as moot
10 where statute at issue repealed while appeal pending).

11 ORS 197.805 establishes a statutory policy that LUBA's
12 decisions "be made consistently with sound principles
13 governing judicial review." Pursuant to this policy, we
14 have stated that an appeal will be dismissed as moot if our
15 decision on the merits of the appeal will be without
16 practical effect. Davis v. City of Bandon, ___ Or LUBA ___
17 (LUBA No. 90-009, Order on Motion to Dismiss, May 2, 1990),
18 slip op 2; Mobile Crushing Company v. Lane County, 13
19 Or LUBA 97, 99 (1985); Struve v. Umatilla County, 12 Or LUBA
20 54, 59 (1984).

21 Here, the parties agree the appeal is moot, but
22 petitioner asks that, rather than dismiss the appeal, we
23 remand the challenged decision to the city, with
24 instructions to dismiss the city code enforcement

issue when this appeal was initially before us. Therefore, we do not
express any position on the status of sports arena use of the subject
property under the new city zoning code.

1 proceedings as moot. We do not have authority to do what
2 petitioner requests. Under ORS 197.835, we are authorized
3 to reverse or remand a challenged decision only when certain
4 specified deficiencies are found in the decision or in the
5 procedures by which the decision was adopted. Further, with
6 one exception not relevant here, we are not authorized, when
7 reversing or remanding a decision, to order a local
8 government to carry out specific acts.

9 This appeal is dismissed. The Board's April 30, 1991
10 final opinion and order is vacated.