

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 VILLAGE PROPERTIES, L.P.,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CITY OF OREGON CITY,)
11)
12 Respondent.)

LUBA No. 96-154

13 _____)

14)
15 G.T. DANIELSON and VIRGINIA)
16 DANIELSON,)
17)
18 Petitioners,)

FINAL OPINION
AND ORDER

19)
20 vs.)
21)
22 CITY OF OREGON CITY,)
23)
24 Respondent,)

LUBA No. 96-160

25)
26 and)
27)
28 VILLAGE PROPERTIES, L.P.,)
29)
30 Intervenor-Respondent.)

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33 Appeal from City of Oregon City.

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35 Stephen T. Janik and Christen C. White, Portland,
36 represented Village Properties, L.P.

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38 Jonathan R. Gilbert, Portland, represented petitioners
39 Danielson.

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41 Daniel Kearns, Portland, represented respondent.

42
43 LIVINGSTON, Referee; HANNA, Chief Referee; GUSTAFSON,
44 Referee, participated in the decision.

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REMANDED

05/14/97

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 In this consolidated proceeding, petitioners appeal a
4 decision of the city planning commission approving
5 construction of a retail store subject to conditions.

6 **MOTION TO INTERVENE**

7 Village Properties, L.P. (Village) moves to intervene
8 on the side of the respondent in LUBA No. 96-160. There is
9 no opposition to the motion, and it is allowed.

10 **MOTION FOR VOLUNTARY REMAND**

11 **A. Submissions of Parties**

12 This is the second time we have had to remind the
13 parties in this case that our rules do not permit additional
14 submissions beyond the answer to a record objection or
15 motion. OAR 661-10-026(4); OAR 661-10-065(2). See Village
16 Properties, L.P. v. City of Oregon City, ___ Or LUBA ___
17 (LUBA No. 96-154, Order on Objections to Record, November
18 25, 1996), slip op 2-3. Nevertheless, the city filed a
19 reply to Village's answer, which incited Village to answer
20 the reply, which resulted in yet another city response.
21 This serial approach to argument is detrimental to our
22 review, particularly when the arguments of the parties
23 appear to evolve and change. Furthermore, it is not fair to
24 a party that relies on our rules to permit that party to be
25 overwhelmed by one that does not.

26 We recognize that, in the past, our application of OAR

1 661-10-026(4) and OAR 661-10-065(2) has been lenient.
2 Circumstances occasionally justify additional submissions,
3 particularly if the answer to a motion introduces new
4 arguments that could not have been anticipated at the time
5 the motion was made. However, the party that relies on our
6 leniency, particularly when that party provides no
7 explanation of why leniency is justified, takes a risk that
8 additional submissions will not be read. Our rules allow
9 the responding party to have the last word. If the moving
10 party insists on the last word, the result is a potentially
11 endless series of unwelcome submissions. See, e.g., Dominey
12 v. City of Astoria, 31 Or LUBA 523 (1996).

13 **B. Discussion**

14 The city moves for a remand of the decision challenged
15 in this consolidated appeal. The petitioners in LUBA No.
16 96-160 do not object, but Village does object.

17 The appropriate inquiry in determining whether to grant
18 a motion requesting remand over the objection of a
19 petitioner is set out in Angel v. City of Portland, 20 Or
20 LUBA 541, 543 (1991), as follows:

21 "The legislature has clearly expressed an intent
22 that appeals of land use decisions be thoroughly
23 and expeditiously determined by the Board. ORS
24 197.805 and [197.835(11)(a)]. Granting a local
25 government request for remand of an appealed
26 decision, over petitioner's objection, is
27 consistent with this policy of expeditious and
28 complete review only if the local government
29 demonstrates that the proceedings on remand will
30 be capable of providing the petitioner with

1 everything he would be entitled to from this
2 Board. If the local government's request for
3 remand of its decision does not demonstrate that
4 all of the allegations of error made by petitioner
5 in the petition for review will be addressed on
6 remand, it is inappropriate to remand the decision
7 over petitioners' objection." (Citations and
8 footnote omitted.)

9 We have previously stated that unless the particular
10 circumstances of a case make obtaining a LUBA decision that
11 could potentially narrow the issues on remand clearly more
12 important than allowing a local government request for
13 remand of its decision to address each of the issues raised
14 in the petition for review, a motion for remand should be
15 granted. Mazeski v. Wasco County, 27 Or LUBA 45, 47 (1994);
16 Hastings Bulb Growers, Inc. v. Curry County, 25 Or LUBA 558,
17 562, aff'd 123 Or App 642 (1993).

18 As the above-quoted language from Angel v. City of
19 Portland makes clear, remand is appropriate when the
20 petition for review has identified as error something the
21 local government believes it cannot defend at LUBA. It does
22 not serve the goal of timely resolution of land use disputes
23 to force the city to defend a position it believes cannot
24 survive this Board's review. Mulholland v. City of
25 Roseburg, 24 Or LUBA 240, 243 (1992).

26 In the first assignment of error in its petition for
27 review, Village contends the city planning commission
28 committed procedural error by excluding from the record a
29 traffic report and memorandum submitted by Village on August

1 5, 1996 (August 5 submission). In its third and final
2 submission related to its request for remand, the city
3 explains its reason for volunteering to accept a remand:

4 "[T]he city wants a remand to correct a perceived
5 procedural error below. That error was that the
6 planning commission's order discusses the
7 applicant's final traffic report submission;
8 whereas, the planning commission never actually
9 saw or reviewed that report. On remand, the
10 planning commission may decide to review and
11 exclude the traffic report as evidence that should
12 be rejected. It may accept the traffic report and
13 allow the opponents an opportunity to respond to
14 the traffic report. It may elect to follow some
15 [fourth] option. As the Board can see, there are
16 many procedural possibilities that the planning
17 commission will select among." (Emphasis in
18 original.) Oregon City's Response to Village
19 Properties' Reply to the City's Request for
20 Voluntary Remand 1-2.

21 The city also promises to address on remand all of the
22 issues raised in the petitions for review.

23 In Mulholland, 24 Or LUBA at 242, we stated that a
24 remand is appropriate if the local government agrees to
25 reconsider the issues raised by petitioners. We added that
26 it is not necessary for the local government to confess
27 error. See also Fectig v. City of Albany, 24 Or LUBA 577
28 (1993). We noted that we would feel differently if there
29 were "any suggestion that a local government's or
30 applicant's request for a second bite at the apple was
31 motivated by delay or other improper reasons." Mulholland,
32 24 Or LUBA at 244 n4.

33 We perceive no improper reason for the city's request

1 for a remand.¹ The city has acknowledged that the issue of
2 whether to accept or reject the August 5 submission requires
3 reconsideration or, otherwise stated, consideration for the
4 first time by the appropriate decision maker. We reject
5 Village's suggestion that we should order the city to accept
6 the August 5 submission. Although we can imagine
7 circumstances in which it might be appropriate to limit or
8 direct the proceedings on remand, those circumstances are
9 not present here. We believe it would further the
10 objectives of expeditious land use review and local
11 government decision making to allow the city planning
12 commission to review the August 5 submission with the
13 benefit of the arguments Village makes in its petition for
14 review, and explain in its findings why it has chosen to
15 include or exclude the submission. As it has agreed to do,
16 the city must also address the assignments of error in the
17 petition for review filed by the petitioners in LUBA No.
18 96-160.

19 The city's decision is remanded.

¹Village stated in oral argument that the city refused to consent to a voluntary remand until after Village's petition for review had been filed. We do not infer bad faith or improper motives in this case from the fact that the city waited until it could review the assignments of error in the petition for review before requesting remand.