

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the county board of
4 commissioners approving a comprehensive plan map and zoning
5 map amendment and an urban growth boundary amendment.

6 **MOTION TO INTERVENE**

7 Chuck Ireland, Jr. (intervenor), the applicant below,
8 moves to intervene on the side of the respondent. There is
9 no opposition to the motion, and it is allowed.

10 **FACTS**

11 Petitioners' notice of intent to appeal was filed on
12 August 11, 1997. The record was settled on September 23,
13 1997. The petition for review was filed on October 14,
14 1997.

15 On November 19, 1997, the county and intervenor
16 (together, respondents) filed a motion for voluntary remand.
17 On November 24, 1997, petitioners filed a memorandum in
18 opposition to the motion for voluntary remand. Oral
19 argument in this case was set for December 2, 1997.

20 **MOTION FOR VOLUNTARY REMAND**

21 Respondents move for a voluntary remand. Petitioners
22 oppose the motion for various reasons, all of which stem
23 from petitioners' belief that it is more efficient for LUBA,
24 rather than the county, to resolve the issues raised in
25 sixteen assignments of error in the petition for review.

26 The appropriate inquiry in determining whether to grant

1 a motion requesting remand over the objection of a
2 petitioner is set out in Angel v. City of Portland, 20 Or
3 LUBA 541, 543 (1991), as follows:

4 "The legislature has clearly expressed an intent
5 that appeals of land use decisions be thoroughly
6 and expeditiously determined by the Board. ORS
7 197.805 and [197.835(11)(a)]. Granting a local
8 government request for remand of an appealed
9 decision, over petitioner's objection, is
10 consistent with this policy of expeditious and
11 complete review only if the local government
12 demonstrates that the proceedings on remand will
13 be capable of providing the petitioner with
14 everything he would be entitled to from this
15 Board. If the local government's request for
16 remand of its decision does not demonstrate that
17 all of the allegations of error made by petitioner
18 in the petition for review will be addressed on
19 remand, it is inappropriate to remand the decision
20 over petitioners' objection." (Citations and
21 footnote omitted.)

22 We have previously stated that unless the particular
23 circumstances of a case make obtaining a LUBA decision that
24 could potentially narrow the issues on remand clearly more
25 important than allowing a local government request for
26 remand of its decision to address each of the issues raised
27 in the petition for review, a motion for remand should be
28 granted. Mazeski v. Wasco County, 27 Or LUBA 45, 47 (1994);
29 Hastings Bulb Growers, Inc. v. Curry County, 25 Or LUBA 558,
30 562, aff'd 123 Or App 642 (1993).

31 As the above-quoted language from Angel v. City of
32 Portland makes clear, remand is appropriate when the
33 petition for review has identified as error something the
34 local government believes it cannot defend at LUBA. It does

1 not serve the goal of timely resolution of land use disputes
2 to force the city to defend a position it believes cannot
3 survive this Board's review. Mulholland v. City of
4 Roseburg, 24 Or LUBA 240, 243 (1992).

5 Respondents have requested remand "so that [they] may
6 consider the assignments of error raised by petitioners in
7 their brief." Motion for Voluntary Remand 1. We understand
8 respondents to say that all of the allegations of error made
9 by petitioners in the petition for review will be addressed
10 by the county on remand.

11 Petitioners assert that there are many issues in this
12 case that must be decided, and contend that it would be more
13 efficient for LUBA, rather than the county, to decide them.
14 However, there is a real possibility, not discussed by
15 petitioners, that if the county reconsiders its findings or
16 even its decision, it will make new findings or reach a
17 different decision. Petitioners have not identified
18 circumstances in this case that make a LUBA decision at this
19 time clearly more important than allowing the county to
20 address the issues raised in the petition for review.

21 Petitioners contend that the motion for voluntary
22 remand is untimely because it was filed two weeks after the
23 respondents' briefs were due. Petitioners note that
24 respondents have not filed briefs.

25 Whether we will accept a late response brief depends on
26 the circumstances of the particular case. In an order

1 addressing a motion to strike a response brief filed four
2 days late, we stated:

3 "Respondent's failure to file its response brief
4 within the time specified in an order of this
5 Board issued pursuant to OAR 660-10-026(5) is a
6 technical violation of our rules. Technical
7 violations of our rules do not interfere with our
8 review of a land use decision unless the
9 substantial rights of parties are prejudiced. OAR
10 661-10-005. The parties' substantial rights to
11 which OAR 661-10-005 refers are rights to (1) the
12 speediest practicable review, (2) a reasonable
13 opportunity to prepare and submit argument, and
14 (3) a full and fair hearing." Broetje-McLaughlin
15 v. Clackamas County, 21 Or LUBA 604 (1991). See
16 also Rhyne v. Multnomah County, 23 Or LUBA 703
17 (1992) (where brief of intervenor-respondent is
18 filed three days after the deadline established by
19 our rules, LUBA will overlook tardiness as a
20 technical violation unless it affects the
21 substantial rights of the parties.)

22 We concluded that because the petitioners did not contend
23 their substantial rights were prejudiced by a response brief
24 filed four days late, and we could not see that their
25 substantial rights had been prejudiced, we should deny the
26 motion to strike.

27 In a different order addressing a request for an
28 extension of two weeks in which to file a response brief, we
29 decided:

30 "The requested two week extension would
31 necessitate a delay in oral argument and a delay
32 in our final opinion and order. We will not grant
33 an extension of two weeks over petitioner's
34 objection. A one week extension will not delay
35 this appeal, and we conclude a one week extension
36 of time to file respondents' briefs is warranted."
37 Waugh v. Coos County, 26 Or LUBA 599 (1993).

1 Petitioners argue that a motion for voluntary remand
2 should not be a way to avoid the consequences of having
3 failed to file a timely response brief. However, as we have
4 made clear in earlier opinions, there are no consequences of
5 having failed to file a timely response brief, unless the
6 party seeking to strike the brief demonstrates substantial
7 prejudice arising from the late filing. The question we
8 must address in each case is whether the party objecting to
9 a procedural violation of our rules has demonstrated
10 prejudice to its substantial rights as a result of the
11 violation.

12 Because respondents do not seek to file late response
13 briefs, we need not address whether we would allow them to
14 do so. Rather, we consider whether petitioners have
15 demonstrated that their substantial rights have been
16 prejudiced by respondents' filing a motion for voluntary
17 remand one week prior to oral argument. Because petitioners
18 have not made any such demonstration, we allow the motion.

19 The county's decision is remanded.