

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

3
4 CAROLYN FOSMORE and DAVE TOLER,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF CAVE JUNCTION,
10 *Respondent.*

11
12 LUBA No. 2005-134

13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from City of Cave Junction.

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19 Carolyn Fosmore and Dave Toler, Cave Junction, represented themselves.

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21 Patrick J. Kelly, Grants Pass, represented respondent.

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

25
26 REMANDED

03/07/2006

27
28 You are entitled to judicial review of this Order. Judicial review is governed by the
29 provisions of ORS 197.850.

Opinion by Davies.

On February 9, 2006, the city filed a motion for voluntary remand. The motion asserts that the city will address all assignments of error presented in the petition for review. Petitioners object to the motion, arguing that (1) the “motion lacks the appropriate authority” because the city council did not authorize its legal counsel to file the motion in a public hearing, (2) the motion fails to provide a “path of recourse,” as required by *Angel v. City of Portland*, 20 Or LUBA 541, 543 (1991), (3) the motion was initiated by a request from the applicant, who is not a party to this appeal, and (4) reversal is required under the second assignment of error of the petition for review. We will address each of petitioners’ objections in turn.

Petitioners first contend that the city council was required to authorize its legal counsel to file the motion for voluntary remand in a public meeting. Petitioners cite no authority for that proposition. Petitioners’ undeveloped argument that the city council must authorize the motion for voluntary remand in a public meeting does not provide a basis for denying the city’s motion for voluntary remand.

We generally grant a motion for voluntary remand, even over the objections of a petitioner, where the local government assures the Board that it will consider all of the assignments of error. *Angel v. City of Portland*, 20 Or LUBA 541, 543 (1991); *see also Doob v. Josephine County*, 43 Or LUBA 130 (2002). The city has indicated it will consider all of the assignments of error. Nothing further is required under *Angel*.

Petitioners next argue that, by acting as an agent of the applicant, who is not a party in this appeal, and requesting the voluntary remand *on behalf of* the applicant, the city “admits clear bias.” We do not agree that the mere fact that the applicant requested the remand, and that the city then moved for a voluntary remand, is an indication that the city

1 council or any of its members are incapable of rendering an unbiased decision.¹ The letter
2 from the applicant indicates that the reason for requesting the voluntary remand is the recent
3 adoption of an ordinance, Ordinance 477, which replaces an ordinance that was implemented
4 in the challenged decision, Ordinance 472. While the applicant may be required to file a new
5 application if it wishes to rely on a newly adopted ordinance, we do not believe that the
6 circumstances leading to the city’s motion provide a sufficient basis to (1) conclude that the
7 city council is incapable of rendering a neutral decision or (2) deny the city’s motion for
8 voluntary remand.

9 Finally, petitioners argue that the motion for voluntary remand should be denied
10 because the second assignment of error provides a basis for reversal. In determining whether
11 to grant a motion for voluntary remand, it is not the Board’s job to pre-determine the merits
12 of the assignments of error. However, we have held that where a motion for voluntary
13 remand is made after the record and petition for review are filed, the Board may grant the
14 motion where the remand is more likely to bring about a thorough and expeditious resolution
15 of the matter than would LUBA review. *Deal v. City of Hermiston*, 34 Or LUBA 767
16 (1998). We understand petitioners to argue that, because the second assignment of error
17 provides a basis for reversal, it would not be more expeditious to grant the city’s motion for
18 voluntary remand.

19 Petitioners’ second assignment of error alleges that the challenged decision was
20 adopted with only one public reading and without the full city council present, in violation of
21 the city charter. Petition for Review 5-6. Even if petitioners’ second assignment of error
22 were sustained, it would provide a basis to remand the decision, not to reverse it. *See OAR*

¹ Prior to the city’s formal motion for voluntary remand, the city’s mayor filed a letter with the Board forwarding the applicant’s written request that the matter be remanded. The mayor’s letter provides: “The City is willing to voluntarily remand the issue for reconsideration.” Accordingly, it seems clear that the city was not merely acting as the applicant’s agent, but that the applicant’s letter merely triggered the city’s decision to file the motion for voluntary remand.

1 661-010-0071. Further, it would seem that this is just the sort of procedural error that is best
2 remedied by the city on voluntary remand.

3 The city's motion for voluntary remand is granted.

4 The challenged decision is remanded.