BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GEORGE FENN and FRANCES FENN,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent.

LUBA No. 2007-175

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Robert A. Smejkal, Eugene, filed a petition for review and represented petitioners.

Paul E. Meyer, Roseburg, represented respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member, participated in the decision.

REMANDED 03/03/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a property line adjustment and a conditional use permit for a hunting preserve.

MOTION FOR VOLUNTARY REMAND

The petition for review in this appeal alleges four assignments of error. Respondent did not file a response brief. Instead, respondent filed a motion seeking voluntary remand. In that motion, respondent agrees to address all of petitioner's assignments of error. Petitioners oppose the motion for three reasons.

Petitioners first object that the county has not appeared and for that reason cannot move for voluntary remand. We do not understand the argument. Although the county did not file a response brief, we do not agree that such a failure on the county's part precludes the county from filing a motion for voluntary remand.

Petitioners next object that there is "no assurance that the County will require that the remanded application comply with applicable law." The county has agreed to address all of petitioner's assignments of error. The county is not required to establish in advance that its decision on remand will comply with applicable law. If petitioners believe the county's decision on remand violates applicable law, it may appeal that decision to LUBA.

We turn to petitioners' third reason for objecting to the county's motion for voluntary remand. As a general rule, where a local government agrees to address all of a petitioner's assignments of error, LUBA will grant a motion for voluntary remand over a petitioner's objections. *Angel v. City of Portland*, 20 Or LUBA 541, 543 (1991). One potential exception to that general rule is where a petitioner includes an assignment of error that, if sustained, would require reversal of the challenged decision. *Century 21 Properties v. City of Tigard*, 17 Or LUBA 1298, 1307 n 9, *rev'd on other grounds* 99 Or App 435, 783 P2d 13 (1989). *But see Mulholland v. City of Roseburg*, 24 Or LUBA 240, 242 (1992) (alleging a

basis for reversal does not create an absolute right to a ruling on the merits by LUBA where voluntary remand is sought).

This appeal concerns a property line adjustment. If we understand the facts correctly, one of the parcels in question is zoned FG (Exclusive Farm Use – Grazing) and the other parcel is zoned a combination of FG and FC-3 (Exclusive Farm Use – Cropland). Both zones apparently are exclusive farm use zones and both zones impose a minimum 80-acre minimum parcel size. According to the application, before the property line adjustment, the first parcel included 162.41 acres and the second parcel included 5.88 acres. Record 139. After the property line adjustment, the first parcel included 160.91 acres and the second parcel included 7.38 acres. *Id*. Petitioners allege in their first assignment of error that under the Court of Appeals' decision in *Phillips v. Polk County*, 213 Or App 498, 162 P3d 338 (2007), the county's decision must be reversed. In *Phillips*, the Court of Appeals held that within an EFU zone all parcels that are the product of a property line adjustment generally must meet the 80-acre minimum parcel size, without regard to whether the parcels complied with the 80-acre minimum parcel size before their common property line was adjusted.[1]

Although we do not have the benefit of a brief from the county, petitioners appear to be correct that under the statutes that were in effect when the Court of Appeals issued its decision in *Phillips*, county approval of a property line adjustment between a 162.41-acre parcel and a 5.88-acre parcel to leave a 160.91-acre parcel and a 7.38-acre parcel would not be lawful. However, whatever the merits of the first assignment of error, the challenged decision approves both a property line adjustment and a conditional use permit. Although petitioners argue it was error to approve the conditional use permit if the property line adjustment was erroneously approved, it is not clear to us whether the property line

[1] The only exception to this general rule is where a county has exercised the authority provided by ORS 215.780(5) to approve lots or parcels that are smaller than 80 acres. The county does not appear to have exercised that authority in the FC and FG zones.

adjustment necessarily is an essential part of the conditional use permit. In that circumstance, we believe remand is the appropriate disposition. On remand the county must consider whether the requested property line adjustment is barred by *Phillips* and, if so, whether the conditional use permit must be denied for that reason.

Our decision to grant voluntary remand rather than to proceed to a decision on the merits of the county's decision is influenced by a second factor. In its recently completed special session, the Oregon Legislature adopted legislation in response to LUBA's and the Court of Appeals' decisions in *Phillips*. House Bill 3629. That bill will take effect upon signature by the Governor. It is likely that a new application would be required before that new legislation would apply. *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993). But if that legislation applies, it might now be possible for the county to approve the requested property line adjustment, even if its earlier approval was erroneous.

The county's decision is remanded.