

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

3
4 MARK FRITCH,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent,*

11 and

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13 ROBIN JACOBS, LON WELSH,
14 CHRISTINA MEDLYN, MARILYN SULLIVAN,
15 SUZANNE PILAND and DIANA PARTIN,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2012-094

19
20 ORDER

21
22 **MOTION TO INTERVENE**

23 Robin Jacobs, Lon Welsh, Christina Medlyn, Marilyn Sullivan, Suzanne Piland, and
24 Diana Partin (intervenors) move to intervene on the side of the county. There is no
25 opposition to the motion and it is granted.

26 **MOTION FOR VOLUNTARY REMAND**

27 The challenged decision is a hearings officer's decision denying petitioner's
28 application for a conditional use permit to operate a log home manufacturing business in the
29 Timber District (TBR) zoning district. After petitioner appealed the decision, the county
30 transmitted the record. After the record was transmitted, the board of county commissioners
31 directed the county to seek a voluntary remand of the decision. Joint Motion for Voluntary
32 Remand 2. Thereafter, the county and petitioner jointly moved for voluntary remand of the
33 decision.

1 Intervenors object to the motion. Intervenors argue that LUBA lacks authority to
2 grant a motion for voluntary remand after the record is filed. According to intervenors, the
3 legislature has not provided authority for LUBA to remand a decision after the record has
4 been filed, and LUBA’s administrative rules do not allow LUBA to grant a motion for
5 voluntary remand. In our recent decision in *Dexter Lost Valley Community Association v.*
6 *Lane County*, __ Or LUBA __ (LUBA No. 2012-044, October 16, 2012), *review pending*
7 (CA 152839), we rejected identical arguments and we reject them here for the reasons we
8 explained in *Dexter*.

9 In their motion, the county and petitioner describe two assignments of error that
10 petitioner takes the position he would raise in his petition for review if it is filed with
11 LUBA.¹ In the motion, the county agrees to address these two assignments of error “in a
12 public evidentiary remand hearing before the Hearings Officer and to render a new decision.”
13 Joint Motion for Voluntary Remand 2-3.

14 The general principle that LUBA has applied where a local government requests a
15 voluntary remand and the *petitioner* opposes the request was stated in *Angel v. City of*
16 *Portland*, 20 Or LUBA 541, 543 (1991):

17 “The legislature has clearly expressed an intent that appeals of land use
18 decisions be thoroughly and expeditiously determined by the Board. ORS
19 197.805 and 197.835[(11)](a). Granting a local government request for
20 remand of an appealed decision, over petitioner’s objection, is consistent with
21 this policy of expeditious and complete review only if the local government
22 demonstrates that the proceedings on remand will be capable of providing the
23 petitioner with everything he would be entitled to from this Board. If the local
24 government’s request for remand of its decision does not demonstrate that *all*
25 of the allegations of error made by petitioner in the petition for review will be
26 addressed on remand, it is inappropriate to remand the decision over
27 petitioners objections.” (Citations omitted.)

¹ Although the petition for review has not been filed, LUBA has granted a motion for voluntary remand over a petitioner’s objection and where the petition for review has not yet been filed, where the local government agrees to address on remand all issues that a petitioner raises on remand. *Verizon Wireless, LLC v. City of Elgin*, __ Or LUBA __ (LUBA No. 2009-095, September 30, 2009); *Jacobsen v. City of Winston*, __ Or LUBA __ (LUBA No. 2006-060, August 12, 2010).

1 As far as we are aware, this appeal presents unusual circumstances because it is the petitioner
2 (whose application was denied) who supports a remand, and intervenors (who opposed the
3 application that was denied) who object to a remand. *Brugh v. Coos County*, 30 Or LUBA
4 467 (1996), involved a similar situation where the local government denied an application,
5 and an intervenor-respondent objected to a petitioner's motion for voluntary remand. In
6 *Brugh* we denied the petitioner's request for a voluntary remand of the decision where the
7 intervenor objected, where the county did not unequivocally agree to address all issues raised
8 in the petition for review, and where we concluded that a decision by LUBA on the merits of
9 the appeal could narrow the issues by interpreting the state statute at issue in that appeal.

10 We see no reason why the principle explained in *Angel* that land use appeals be
11 decided thoroughly and expeditiously would not support granting a local government request
12 for remand of an appealed decision, over an intervenor-respondent's objection, if the local
13 government demonstrates that the proceedings on remand will be capable of providing all
14 parties, including the objecting intervenors, everything they would be entitled to from LUBA.
15 Under OAR 661-010-0035, intervenors would be entitled to file a response brief to respond
16 to the assignments of error set out in a petition for review that seeks to overturn the county's
17 decision denying the application. And under OAR 661-010-0030(7), intervenors may be
18 entitled to file a cross petition for review that includes one or more assignments or error and
19 may include contingent cross-assignments of error that the Board will address only if the
20 decision on appeal is reversed or remanded under the petition for review.

21 The county's motion for voluntary remand does not acknowledge that intervenors are
22 entitled to file a cross petition for review, and therefore it does not demonstrate that the
23 proceedings on remand will be capable of providing intervenors everything they would be
24 entitled to from LUBA. Instead, the motion expressly acknowledges an obligation to address
25 only the two potential assignments of error that the petitioner states he would raise in the
26 petition for review. Accordingly, the motion for voluntary remand is denied. Within 14 days

1 of the date of this order, the county may refile its motion for voluntary remand and
2 demonstrate that the proceedings on remand will be capable of providing intervenors
3 everything they would be entitled to from LUBA.

4 **MOTION FOR STAY**

5 Intervenors move to stay the decision. The statutory standards under which LUBA
6 may grant a request to stay a decision that has been appealed to LUBA are set out at ORS
7 197.845(1), which provides:

8 “Upon application of the petitioner, the board may grant a stay of a land use
9 decision or limited land use decision under review if the petitioner
10 demonstrates:

11 “(a) A colorable claim of error in the land use decision or limited land use
12 decision under review; and

13 “(b) That the petitioner will suffer irreparable injury if the stay is not
14 granted.”

15 Intervenors’ motion does not come close to demonstrating that the statutory standards for
16 granting a stay are met. Intervenors’ motion is denied.

17 **BRIEFING SCHEDULE**

18 The parties previously agreed to extend the deadline for filing record objections.
19 Objections to the record shall be filed within 14 days of the date of this order. Unless
20 objections to the record are filed within 14 days of the date of this order, the petition for
21 review is due 21 days from the date of this order. The response briefs are due 42 days from
22 the date of this order. The Board’s final opinion and order is due 77 days from the date of
23 this order.

24 Dated this 12th day of February, 2013.

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Melissa M. Ryan
Board Member