

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,

5 *Petitioner,*

6
7 vs.

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9 CROOK COUNTY,

10 *Respondent.*

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12 LUBA No. 2013-005

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14 OREGON DEPARTMENT

15 OF FISH AND WILDLIFE,

16 *Petitioner,*

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18 vs.

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20 CROOK COUNTY,

21 *Respondent.*

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23 LUBA No. 2013-006

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25 DEPARTMENT OF LAND CONSERVATION

26 AND DEVELOPMENT,

27 *Petitioner,*

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29 vs.

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31 CROOK COUNTY,

32 *Respondent.*

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34 LUBA No. 2013-007

35 ORDER

1 This appeal concerns a post-acknowledgment plan and land use
2 regulation amendment. The appeal was suspended and restarted twice, at the
3 request of the parties. Petitions for review have been filed by all three
4 petitioners in this consolidated appeal. The deadline for respondent to file its
5 response brief was April 12, 2017. Before that deadline expired, on April 3,
6 2017, respondent filed a motion seeking voluntary remand so that it could
7 reconsider its decision in light of the arguments presented in the petitions for
8 review. Petitioners oppose the motion, and seek a LUBA decision on the
9 merits of the assignments of error set out in their petitions for review.

10 Respondent's motion for voluntary remand, and petitioners' opposition
11 to that motion rely on LUBA case law in which LUBA in the past granted
12 motions for voluntary remand, over the objection of one or more parties, in
13 certain circumstances:

14 "The legislature has clearly expressed an intent that appeals of
15 land use decisions be thoroughly and expeditiously determined by
16 the Board. ORS 197.805 and 197.835(9)(a). Granting a local
17 government request for remand of an appealed decision, over
18 petitioner's objection, is consistent with this policy of expeditious
19 and complete review only if the local government demonstrates
20 that the proceedings on remand will be capable of providing the
21 petitioner with everything he would be entitled to from this Board.
22 If the local government's request for remand of its decision does
23 not demonstrate that *all* of the allegations of error made by
24 petitioner in the petition for review will be addressed on remand, it
25 is inappropriate to remand the decision over petitioner's
26 objections." *Angel v. City of Portland*, 20 Or LUBA 541, 543
27 (1991) (Citations and footnote omitted; the word "all" emphasized
28 in original.)

1 LUBA relied on its general authority in ORS 197.835 to “reverse or remand”
2 land use decisions and the general ORS 197.805 requirement that LUBA do so
3 in accordance “with sound principles of judicial review” to grant motions for
4 voluntary remand that were opposed by one or more parties.

5 A more specific statutory avenue for local governments to reconsider
6 their decisions after those decisions are appealed to LUBA, which is not cited
7 or addressed by the parties, is set out at ORS 197.830(13)(b).¹ Under ORS
8 197.830(13)(b), a local government has a unilateral right to withdraw an
9 appealed decision, and need not make the showing that LUBA has required in
10 the past for motions for voluntary remand, so long as the right to withdraw the
11 decision is exercised before the applicable deadline specified in the statute.
12 Under ORS 197.830(13)(b), in an appeal concerning a post-acknowledgement

¹ ORS 197.830(13)(b) provides:

“At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, or, on appeal of a decision under ORS 197.610 to 197.625, prior to the filing of the respondent’s brief, the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. An amended notice of intent shall not be required if the local government or state agency, on reconsideration, affirms the order or modifies the order with only minor changes.”

1 plan amendment, the decision must be withdrawn “prior to the filing of
2 respondent’s brief;” in an appeal of other kinds of land use decisions, the
3 decision must be withdrawn before the “date set for filing the record.” *See* n 1.

4 The Court of Appeals’ decision in *Dexter Lost Valley Community Assn.*
5 *v. Lane County*, 255 Or App 701, 300 P3d 1243 (2013) rejected the distinction
6 that LUBA previously drew between motions for voluntary remand that are
7 opposed by one or more parties and the unilateral right a respondent has to
8 withdraw a decision for reconsideration under ORS 197.830(13)(b). LUBA’s
9 current rules allow LUBA to grant motions for voluntary remand, but all parties
10 must join in the motion.² Where one or more parties oppose a local
11 government’s request to be allowed to reconsider a decision that has been
12 appealed to LUBA, ORS 197.830(13)(b) is now the sole authority for LUBA to
13 allow such reconsideration.

14 While respondent’s motion is styled a “motion for voluntary remand”
15 and respondent cites and relies on cases where LUBA granted motions for
16 voluntary remand over the objections of other parties, we treat respondent’s
17 motion for voluntary remand as a “notice of withdrawal,” under ORS

² The current version of OAR 661-010-0071 authorizes LUBA to remand a land use decision if “[a]ll parties stipulate in writing to remand.” OAR 661-010-0071(2)(e). As petitioners Department of Land Conservation and Development and Department of Fish and Wildlife correctly point out, this appeal is governed by a prior version of LUBA’s rules that did not include OAR 661-010-0071(2)(e). LUBA’s prior rules did not specifically address motions for voluntary remand.

1 197.830(13)(b). Because the decision on appeal is a post-acknowledgment plan
2 and land use regulation amendment, the deadline for filing the notice of
3 withdrawal is “prior to the filing of the respondent’s brief * * *.” *See* n 1. As
4 previously noted, the county’s motion was filed before the deadline for filing
5 respondent’s brief, and no respondent’s brief has been filed. The notice of
6 withdrawal was therefore timely filed.

7 Under OAR 661-010-0021(2), the filing of a notice of withdrawal has
8 the effect of suspending the LUBA appeal proceeding until a decision on
9 reconsideration is filed with LUBA by the respondent. Under OAR 661-010-
10 0021(1), a decision on reconsideration is required to be filed with LUBA, and
11 served on the parties, within 90 days after the date the notice of withdrawal was
12 filed. The procedures for reconsideration and, if necessary, for recommencing
13 this appeal after adoption of a reconsidered decision are set out at OAR 661-
14 010-0021.

15 The county’s motion for voluntary remand, which we treat as a notice of
16 withdrawal under ORS 197.830(13)(b), was filed on April 3, 2017. While the
17 90-day deadline for filing a decision on reconsideration would normally be
18 measured from April 3, 2017, to account for LUBA’s delay in deciding to treat
19 the motion as a notice of withdrawal, a decision on reconsideration is required
20 to be filed with LUBA within 90 days after the date of this order.

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1 Dated this 25th day of April, 2017.

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Michael A. Holstun
Board Chair