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

REITA HRIBERNICK,)
)
Petitioner,)
)
vs.)
)
CITY OF GRESHAM,)
)
Respondent,)
)
and)
)
GSL PROPERTIES,)
)
Intervenor-Respondent.)

LUBA No. 98-118
FINAL OPINION
AND ORDER

Appeal from City of Gresham.

Paul R. Hribernick, Portland, filed the petition for review on behalf of petitioner. With him on the brief was Black Helterline LLP.

Richard D. Faus, Gresham, represented respondent.

Andrew H. Stamp, Portland, represented intervenor-respondent.

HOLSTUN, Board Member; GUSTAFSON, Board Chair; and HANNA, Board Member participated in the decision.

REMANDED 11/30/98

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's decision granting approval of a 54-lot planned unit
4 development subdivision, future street plan, development in a natural resource district and
5 major variance.

6 **MOTION TO INTERVENE**

7 GSL Properties, Inc., the applicant below, moves to intervene on the side of
8 respondent. There is no opposition to the motion, and it is granted.

9 **MOTION FOR VOLUNTARY REMAND**

10 The city and intervenor move for an order remanding the challenged decision. The
11 motion for voluntary remand represents that on remand the city will consider "all
12 assignments of error raised in the Petition for Review." Motion for Voluntary Remand 1.
13 Petitioner objects to the motion.

14 Unless a petitioner identifies particular circumstances that make LUBA review to
15 narrow the issues that are raised in the petition for review more important than allowing the
16 local government an opportunity to address those issues first, a motion for voluntary remand
17 should be granted. Hastings Bulb Growers, Inc. v. Curry County, 25 Or LUBA 558, 562
18 (1993). As we explained in Angel v. City of Portland, 20 Or LUBA 541, 543 (1991):

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

1 The rationale for granting a motion for voluntary remand, notwithstanding a petitioner's
2 objection to the motion, is simple—no purpose is likely to be "served by forcing the [local
3 government] to defend a decision it does not believe is defensible." Mulholland v. City of
4 Roseburg, 24 Or LUBA 240, 243 (1992).¹

5 Petitioner identifies several reasons why she believes the motion for voluntary
6 remand should be denied. Petitioner first contends that the motion should not be granted
7 unless the city concedes error and LUBA makes a finding that "the City believes it cannot
8 defend its decision because it is not well-founded in law and is not factually supported by
9 sufficient information." Objection to Motion for Voluntary Remand 1. We reject this
10 argument. It is not necessary for a local government to confess error as a condition of
11 seeking a voluntary remand. Mulholland, 24 Or LUBA at 242.

12 Petitioner next argues that the motion for voluntary remand must be denied because it
13 is untimely under ORS 197.830(12)(b). This argument is also without merit, because ORS
14 197.830(12)(b) governs a local government's unilateral right to withdraw a decision for
15 reconsideration. ORS 197.830(12)(b) has no bearing on whether this Board may grant a
16 motion for voluntary remand that is filed after the deadline for withdrawing a decision for
17 reconsideration has expired. Mazeski v. Wasco County, 27 Or LUBA 45, 47 (1994);
18 Mulholland, 24 Or LUBA at 243.

19 Petitioner next argues that the city need not be allowed an opportunity to address the
20 Goal 5 issues raised under the third assignment of error because LUBA will owe no
21 deference to the city's interpretation and application of Goal 5. While petitioner is correct
22 with regard to deference, her argument does not provide a sufficient reason to deny the city
23 an opportunity to consider the other assignments of error or an opportunity to reconsider its
24 application of Goal 5 in light of petitioner's third assignment of error.

¹In fact, following 1995 legislative amendments to ORS 197.830(14)(b), a local government's attempt to defend a decision that is not defensible may result in an award of attorneys fees.

1 Next, petitioner argues that the city may, following remand, attempt to amend its
2 existing code provisions such that the approval criteria applied to the disputed proposal on
3 remand could change. Even if petitioner is correct in this contention, the possibility of new
4 or amended approval criteria being applied on remand is not a sufficient reason to deny a
5 motion for voluntary remand. Petitioner is only entitled to review by this Board to ensure
6 that the decision correctly applies "whatever approval criteria may be applicable." Hastings
7 Bulb Growers, 25 Or LUBA at 563.

8 Finally, petitioner argues that granting the motion for voluntary remand will deny
9 petitioner the opportunity to have LUBA's decision settling the record in this matter
10 "reviewed by a superior tribunal." Objection to Motion for Voluntary Remand 4. Again,
11 even if petitioner is correct in this argument, it does not provide a sufficient reason to deny
12 the requested motion for voluntary remand. Any error that LUBA may have committed in
13 settling the record may be rendered moot by the city's proceedings on remand. If not,
14 petitioner may pursue her record objections in an appeal of the city's decision on remand to
15 this Board. Appellate review will be available to correct any error that LUBA may make in
16 settling the record in a subsequent appeal.

17 The city's decision is remanded.