

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DEXTER LOST VALLEY COMMUNITY ASSOCIATION,  
Petitioner,

v.

LANE COUNTY;  
ATR LAND, LLC; LEELYNN, INC.; and WILEY MT., INC.,  
Respondents.

Land Use Board of Appeals  
2012044

A152839

Argued and submitted on January 11, 2013.

Daniel J. Stotter argued the cause for petitioner. With him on the brief was Stotter & Associates LLC.

Bill Kloos and Law Office of Bill Kloos, PC, filed the brief for respondents ATR Land, LLC, Leelynn, Inc., and Wiley Mt., Inc.

Stephen E. Dingle waived appearance for respondent Lane County.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Duncan, Judge.

SCHUMAN, P. J.

Reversed and remanded.

1 SCHUMAN, P. J.

2 Intervenor applied to Lane County for a permit to build a bridge.  
3 Petitioner unsuccessfully opposed the application and then appealed the county's adverse  
4 decision to the Land Use Board of Appeals (LUBA). Lane County submitted the record  
5 in the case to LUBA. Subsequently, after receiving petitioner's petition for LUBA  
6 review, the county filed a motion for a voluntary remand, relying on LUBA's  
7 longstanding practice of permitting a local government to voluntarily withdraw a land use  
8 decision if the local government agreed to consider each of the petitioner's assignments of  
9 error. Petitioner opposed the motion, arguing that, although LUBA must permit a local  
10 government to withdraw a decision *before* the local government submits the record, the  
11 relevant statute, ORS 197.830(13), does not permit a voluntary remand *after* that event.  
12 LUBA granted the county's motion and remanded the decision. *Dexter Lost Valley*  
13 *Community Association v. Lane County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2012-044, Oct  
14 16, 2012). Petitioner seeks judicial review. We reverse and remand.

15 The relevant facts are all procedural. Three developers applied for a permit  
16 to build a bridge as part of a project in rural Lane County.<sup>1</sup> Over petitioner's opposition,  
17 a Lane County hearings official approved the permit. Petitioner appealed to the Lane  
18 County Board of Commissioners, which affirmed the hearings official without comment.

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<sup>1</sup> The developers are ATR Land, LLC; Leelynn, Inc.; and Wiley Mt., Inc. They were intervenors below and, along with Lane County, they are respondents on judicial review. Lane County did not file a brief or appear at oral argument; hereafter, "respondents" refers to the developers.

1 Thereafter, the following events occurred: On June 12, 2012, petitioner filed a notice of  
2 intent to appeal to LUBA. On July 23, the county, in response, took the first step in  
3 defending its decision by submitting the record in the case to LUBA. On August 14,  
4 petitioner filed its petition for review setting forth its various assignments of error. On  
5 August 27, apparently in response to the petition for review, the county submitted a  
6 "Motion for Voluntary Remand" in which it agreed to "consider each of the Assignments  
7 of Error presented in the Petition for Review" and "take final action \* \* \* within 90  
8 days." In doing so, the county relied on a series of LUBA decisions allowing for a  
9 voluntary remand after the record in a case is submitted if, but only if, the local  
10 government agrees to address in the remand all of the issues raised in the petition for  
11 review. *Mulholland v. City of Roseburg*, 24 Or LUBA 240, 241 (1992); *Angel v. City of*  
12 *Portland*, 20 Or LUBA 541, 543 (1991). Petitioner opposed the remand, arguing that  
13 LUBA's practice exceeded its statutory authority and violated the clear terms of ORS  
14 197.830(13)(b), which provides:

15 "At any time subsequent to the filing of a notice of intent and *prior*  
16 *to the date set for filing the record*, \* \* \* the local government or state  
17 agency may withdraw its decision for purposes of reconsideration. If a  
18 local government or state agency withdraws an order for purposes of  
19 reconsideration, it shall, within such time as the board may allow, affirm,  
20 modify or reverse its decision."

21 (Emphasis added.)

22 LUBA granted the motion, relying on a variety of its own precedents and  
23 policy considerations:

1 "Petitioner apparently views the unilateral right to withdraw a  
2 decision for reconsideration under ORS 197.830(13)(b) and the right to  
3 move for voluntary remand as the same thing. They are not. The right to  
4 withdraw a decision for reconsideration under ORS 197.830(13)(b) is  
5 unilateral, and must be granted by LUBA if timely filed. The right to move  
6 for voluntary remand is conditional. A local government that moves for  
7 voluntary remand must agree to consider all issues raised in the petition for  
8 review. *Mulholland v. City of Roseburg*, 24 Or LUBA [at 241]; *Angel v.*  
9 *City of Portland*, 20 LUBA [at 543]. \* \* \* LUBA frequently grants motions  
10 for voluntary remand if it concludes that granting the motion is 'consistent[]  
11 with sound principles governing judicial review.' ORS 197.805. In  
12 deciding whether to grant a motion for voluntary remand, LUBA is  
13 cognizant that the statutes under which LUBA operates express a  
14 'preference that land use matters be resolved at the local level if possible,  
15 rather than on review by [LUBA] or the appellate courts \* \* \*.'  
16 *Mulholland*, 24 Or LUBA at 243. LUBA also recognizes that by granting a  
17 motion for voluntary remand LUBA avoids 'forcing [a local government]  
18 and applicant to defend a decision they \* \* \* do not believe will survive  
19 [LUBA] review.' *Id.* And in such cases granting a motion for voluntary  
20 remand can actually shorten the time required to present LUBA with  
21 focused arguments on the legal matters that are contested, by allowing the  
22 local government an opportunity to 'adopt a decision it is prepared to  
23 defend.' *Id.*"

24 *Dexter Lost Valley Community Association*, \_\_\_ Or LUBA at \_\_\_ (LUBA No 2012-044  
25 at 2-3 (footnote omitted; second omission in original; third through fifth brackets in  
26 original)). This judicial review ensued.

27 Before this court, petitioner once again calls our attention to the well-settled  
28 precept that an administrative agency cannot act outside of its legislative grant of  
29 authority in order to "amend, alter, enlarge or limit the terms of a legislative enactment."  
30 *U. of O. Co-Oper. v. Dept. of Rev.*, 273 Or 539, 550, 542 P2d 900 (1975); accord *Avis*  
31 *Rent A Car System, Inc. v. Dept. of Rev.*, 330 Or 35, 41, 995 P2d 1163 (2000). Petitioner  
32 argues that, in ORS 197.830(13)(b), the legislature affirmatively limited LUBA's  
33 authority to allow voluntary remands after submission of the record. By allowing local

1 governments to withdraw orders before submission of the record, the legislature  
2 implicitly prohibited withdrawal afterward.

3            Respondents' brief on appeal focuses preliminarily on reviewability. Their  
4 first argument is that, by asking--in its original petition for review to LUBA--that LUBA  
5 reverse *or remand*, petitioner forfeited the right to seek judicial review when LUBA, in  
6 fact, remanded. We disagree. After the county filed its motion for voluntary remand,  
7 petitioner submitted an express and vigorous "Opposition to Motion for Voluntary  
8 Remand." Further, to the extent that petitioner sought remand in its original petition for  
9 review to LUBA, petitioner was seeking at least a partial adjudication on the merits of the  
10 county's decision; when petitioner now challenges the county's remand, petitioner is  
11 opposing LUBA's decision to refrain from an adjudication on the merits by allowing the  
12 county to reconsider its order. Those are different objectives, and asking for the first did  
13 not invite LUBA to perform the second. For similar reasons, we reject respondents'  
14 second reviewability contention--that petitioner has not demonstrated that its substantial  
15 rights were prejudiced. *See* ORS 197.850(9)(a) (the court may reverse or remand  
16 procedural error only if error is prejudicial). In granting the county's motion, LUBA  
17 delayed providing petitioner with a judicially reviewable decision on the merits of the  
18 county's order.

19            In addressing petitioner's argument, as opposed to the argument's  
20 reviewability, respondents maintain, "What is missing \* \* \* is any sound explanation as  
21 to why LUBA's practice of issuing voluntary remands after the filing of the record is

1 contrary to any statute or rule." (Underscoring in original.) According to respondents,  
2 ORS 197.830(13)(b) does not limit LUBA's authority to grant voluntary remands; seen in  
3 the context of LUBA's "historic" and "long-standing practice," the statute, "on its face,  
4 expands LUBA's authority to approve voluntary remands." (Underscoring in original.)  
5 Respondents' argument appears to be that, before the enactment of "the relatively recent"  
6 ORS 197.830(13)(b), LUBA had adopted the practice of granting voluntary remands at  
7 any time in the review process before hearing, but only if the local government agreed to  
8 address all of the issues. In order to enlarge LUBA's authority, the legislature in enacting  
9 ORS 197.830(13)(b) *eliminated* the requirement that a local government agree to address  
10 the issues, thereby empowering LUBA to do what it had not been empowered to do  
11 previously.

12 Further, respondents echo LUBA's reasoning. ORS 197.830(13)(b), they  
13 argue, establishes that LUBA *must* permit a local government to withdraw a decision if  
14 the withdrawal occurs after the filing of the notice of intent and before the date set for  
15 filing the record.<sup>2</sup> LUBA's policy, on the other hand, *allows* LUBA to grant a local  
16 government's *request* for a remand without temporal limitation, provided the local  
17 government agrees to address all assignments of error. According to respondents, the  
18 statute and the policy do not conflict; rather, they complement each other.

19 We conclude that each side has plausible textual and contextual arguments.

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<sup>2</sup> LUBA's obligation does not arise unless the local government provides notice of its withdrawal. OAR 661-010-0021(1).

1 Respondents' argument, however, cannot be reconciled with unusually persuasive  
2 legislative history. What is now ORS 197.830(13)(b) was enacted by the 1991  
3 Legislative Assembly. Or Laws 1991, ch 817, § 7. At one point in the process (in the  
4 "A3" amendments), the relevant portion of the provision read, "At any time subsequent to  
5 the filing of a notice of intent and prior to *the date set for oral argument*, the local  
6 government or state agency may withdraw its decision for purposes of reconsideration."  
7 HB 2261-A3 (June 3, 1991) (emphasis added). Written testimony submitted by 1000  
8 Friends of Oregon suggested a flaw in that language. In a letter to the chair and members  
9 of the Senate Agriculture and Natural Resources Committee, 1000 Friends' staff attorney  
10 stated,

11           "The A3 amendments would add a provision enabling local  
12 governments to withdraw a decision appealed to LUBA for purposes of  
13 reconsideration. 1000 Friends has no objection to that, but does object to  
14 allowing the withdrawal to be made at any time before the date set for oral  
15 argument. \* \* \* Giving a local government that long means the appellant  
16 might have to pay a lawyer substantial sums to prepare a brief and an oral  
17 argument, only to learn at the last minute such expenditures were not  
18 necessary. Some local governments might even wait until the last minute  
19 to exhaust an appellant's resources and hence his ability to challenge the  
20 decision.

21           "Accordingly, 1000 Friends recommends substituting the words  
22 'filing the record' for 'oral argument.' \* \* \* Thus, an appellant would not  
23 have to incur attorney fees until the local government made clear whether it  
24 would withdraw its decision."

25 Testimony, Senate Agriculture and Natural Resources Committee, HB 2261, June 7,  
26 1991, Ex Q (statement of Neil Kagan). 1000 Friends' staff attorney further explained the  
27 proposed amendment in another memorandum addressed to the same committee:

1            "This amendment [*i.e.*, changing 'oral argument' to 'filing the record']  
2 would give a local government an opportunity to withdraw a decision  
3 appealed to LUBA for purposes of reconsideration. The local government  
4 would be able to withdraw the decision at any time prior to the date set for  
5 filing the record.

6            "Unlike an earlier proposed amendment, 1000 Friends' proposed  
7 amendment would not allow a decision to be withdrawn at any time before  
8 the date set for oral argument. Giving a local government that long might  
9 have forced the appellant to pay a lawyer substantial sums to prepare a brief  
10 and an oral argument, only to learn at the last minute such expenditures  
11 were not necessary."

12 Testimony, Senate Agriculture and Natural Resources Committee, HB 2261, June 12,  
13 1991, Ex G (statement of Neil Kagan). The bill that ultimately passed and is now ORS  
14 197.830(13)(b) incorporated 1000 Friends' suggested language.

15            From the foregoing legislative history, we conclude that ORS  
16 197.830(13)(b), in allowing a state or local government to withdraw a decision  
17 "subsequent to the filing of a notice of intent and prior to the date set for filing the  
18 record," necessarily prohibits a state or local government from withdrawing a decision  
19 thereafter. LUBA's grant of Lane County's motion to withdraw its decision in this case  
20 was, therefore, error.

21            Reversed and remanded.