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November 30, 2010

Dwight Ellis, Commissioner Chair
Dave Toler, Commissioner
Sandi Cassanelli, Commissioner
Josephine County
Room 154, Courthouse
Grants Pass, Oregon 97526



James Black, Planner
Josephine County Planning Office
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Reference: For “The Record” Testimony At *Walker v. Josephine County*, 60 Or LUBA 186 (2009) Remand Hearing Before The Josephine County Board of County Commissioners

Dear Commissioners
Dear James Black:

I started preparing this testimony when I received information confirming the local remand hearing for *Walker v. Josephine County* was scheduled for December 8, 2010. That hearing has now been cancelled, but I submit this local testimony in advance of the remand hearing to be rescheduled “for the local remand record”.

It is very clear that when the record is reopened, including remand hearings, to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue (ORS 197.763(7); *Siporen v. City of Medford*, 55 Or LUBA 29 (2007) goes further in clarifying ORS 197.763(7); Appendix A).

In conflict, the Josephine County Rural Land Development Code (RLDC) is very clear that only parties to the LUBA appeal can participate in the local remand hearing. In light of ORS 197.763(7) and/or *Siporen v. City of Medford*, I challenge the legality of RLDC 33.130.D - Remand Hearings which follows:

“D. Participation in the remand hearing shall be strictly limited to those persons or organizations who were legal parties in the higher appeal. Procedures shall therefore be limited in the following respects:

1. *Written notice shall be given only to the persons or entities who were parties to the higher appeal.*

2. *Only parties to the higher appeal may present arguments (in the case of a hearing on the record), or present evidence, witnesses, testimony and arguments (in the event new evidence is allowed) in the remand hearing.”*

It is clear from *Siporen v. City of Medford* (pages 18 - 26 of LUBA opinion; Appendix A) that a remand hearing is open for all interested participants to testify. A party who otherwise has standing to participate in a local government’s land use public hearings under the government’s land use legislation may not be denied standing to participate in public hearings following a remand from LUBA, simply because he or she failed to participate in the LUBA appeal.

To further complicate the issue and in acknowledged conflict with RLDC 33.130.D is the county’s position that new evidence has been admitted for the record (see “for the local remand record”), and that the remand hearing is also open to the Oregon Department of Transportation, a stakeholder that was not a legal party to the LUBA appeal.

It is clear that potential participants substantial rights will have been prejudiced if they are denied notice of a remand meeting open to all, and/or the opportunity to present arguments for the *Walker v. Josephine County*, 60 Or LUBA 186 (2009) remand hearing before the Josephine County, Board of County Commissioners.

ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a decision where the decision maker:

“Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]”

As LUBA explained in *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

“Under ORS 197.835[(9)(a)(B)] the ‘substantial rights’ of parties that may be prejudiced by failure to observe applicable procedures are the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing.” *Siporen v. City of Medford*

If the county applies the limitations of RLDC 33.130.D to the proceedings on remand, potential participants’ substantial rights delineated in *Siporen v. City of Medford* will be prejudiced, which will result in a procedural error remand from LUBA.

Sincerely,

/s/ Mike Walker

Mike Walker, Director/Vice President
Rogue Advocates

/s/ Mike Walker

Mike Walker, Chief Petitioner
Walker v. Josephine County, 60 Or LUBA 186 (2009)

/s/ Mike Walker

Mike Walker, As An Individual

/s/ Mike Walker

Mike Walker, Member
Hugo Land Use Committee
Hugo Neighborhood Association & Historical Society

/s/ Mike Walker

Mike Walker, Member
Goal One Coalition Advisory Board

Appendix A. Standing At Local Remand Hearing

LUBA Headnote 25.11 Local Government Procedures – Action After Remand. A party who otherwise has standing to participate in a city’s land use public hearings under the city’s land use legislation may not be denied standing to participate in public hearings following a remand from LUBA, simply because he or she failed to participate in the LUBA appeal. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

***Siporen v. City of Medford*, 55 Or LUBA 29 (2007)**

“Although a local government is entitled to limit the issues it will consider on remand to those that must be addressed to respond to the remand, there are a variety of factors that may complicate a local government’s job in distinguishing between issues that must be considered on remand and issues that are resolved or have been waived by virtue of prior local or appellate proceedings and no longer need be addressed in the remand proceedings. The procedures the local government elects to follow on remand may broaden the issues that must be addressed on remand. For example, if the local government holds additional evidentiary hearings, or even holds additional hearings to allow additional argument only, those hearings may have the effect of expanding the issues that must be addressed on remand. ORS 197.763(7).¹⁰ Additionally, allowing an applicant to modify the proposal that led to the remand in the first place may raise issues concerning approval criteria that might otherwise be resolved or waived issues if the application had not been modified. But with the caveat that a local government may encounter difficulties in determining what issues it must address to adequately respond to a remand, a local government clearly has authority to limit its proceedings on remand to addressing those issues and may select the procedures it believes are most appropriate, provided those procedures do not improperly exclude any parties who are entitled to participate in those remand proceedings.”

It would needlessly further complicate this appeal if we were to explain why Wal-Mart's attempt to distinguish *Lengkeek* would not avoid a remand in this appeal. We therefore do not do so and instead extend our holding in *Lengkeek*. Even if the city had not allowed the application for permit approval that led to *Wal-Mart I* to be amended following remand, as we previously noted, this is a quasi-judicial land use proceeding in which the public has an interest in the ultimate outcome; it is not a case of civil litigation between private litigants. We now resolve any question we left unanswered in *Lengkeek* regarding whether a local government may deny standing to participate in public hearing following a LUBA remand, simply because a person did not participate in the LUBA appeal as party. We resolve that question in the negative. As this case demonstrates, a local government is free to change its decision significantly following a LUBA remand. A person who was satisfied with a decision to deny Wal-Mart's application could easily object to a decision on remand to approve that application. That person may be limited in the issues he or she may raise in the city's remand proceedings to the issues that must be addressed to respond to LUBA's remand. But a party who otherwise has standing to participate in the city's land use public hearings under the city's land use legislations may not be denied standing to participate in those remand proceedings, simply because he or she failed to participate in the LUBA appeal.¹²

LUBA Headnote 24.2.1 Standing - Before LUBA - Generally. Persons who made an appearance during the local government proceedings that led to a city decision that was remanded by LUBA satisfy the ORS 197.830(7)(b) requirement that a person who moves to intervene in a subsequent LUBA appeal of the city's decision following LUBA's remand must have "appeared." The appearance during the initial local government proceedings is sufficient to satisfy the ORS 197.830(7)(b) appearance requirement, and it does not matter that the local government refused those persons' attempt to appear during the remand proceedings. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

LUBA Headnote 24.2.1 Standing - Before LUBA - Generally. Where a person attempts but is denied the right to appear during a local government's proceedings that lead to a land use decision, in a subsequent LUBA appeal that attempt to appear is sufficient to satisfy the ORS 197.830(7)(b) appearance requirement, to allow that person to intervene in the LUBA appeal to assign error to the local government's refusal to allow a local appearance. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

In *Lengkeek v. City of Tangent*, 52 Or LUBA 509, 512 (2006), LUBA noted that the right of a local government to limit participation in remand proceedings was unclear.

"As the parties note, in *Crowley v. City of Bandon*, 43 Or LUBA 79, 96 (2002), we stated that whether a local government 'may limit participation in the proceedings on remand to the parties in the original appeal is an open question.' We now answer that question, at least as it applies to the present circumstances. In this case, as we have already noted, the applicant modified his proposal and submitted additional documentation in support of that amended application. In such a case, while the city may limit legal argument and any evidentiary submittals on remand to argument and evidence that is relevant to the issues that must be resolved on remand, we do not believe the city may limit participation to the parties who participated in the first appeal.

"Neither the parties to the first appeal nor other persons who for whatever reason did not participate in the first appeal have had an opportunity to comment on the modified application. As petitioners correctly point out, the city's own plan guarantees its citizens a right to do so. The city erred in limiting participation below to the parties in [the LUBA appeal]." (Footnote omitted.) *Siporen v. City of Medford*

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