

NATURE OF THE DECISION

Petitioner appeals a city decision denying his partition application.

MOTION FOR RECONSIDERATION

On December 31, 2009, petitioner filed a motion for reconsideration of our order dated December 23, 2009, which denied petitioner’s motion to take evidence outside the record under OAR 661-010-0045. In the motion for reconsideration, petitioner advanced additional arguments why the Board should consider the extra-record documents attached to his motion to take evidence. A motion to reconsider an order on a motion is a renewed motion. *Papadopuolos v. Benton County*, __ Or LUBA __ (LUBA No. 2004-151, December 16, 2005 Order) (motion to reconsider order on record objections considered a renewed record objection). Under OAR 661-010-0045(9), filing the motion to reconsider had the effect of suspending time limits for other events in this appeal. In an order dated January 5, 2010, we took petitioner’s motion for reconsideration under advisement.

Petitioner’s motion for reconsideration does not persuade us that the original motion to take evidence should be granted or that we erred in denying the motion. The motion for reconsideration is denied.

FACTS

On October 31, 2008, petitioner applied to partition an approximately one-third of an acre residential parcel into two parcels. The city deemed the application complete on December 10, 2008, although petitioner believes the application became final a week earlier, on December 2, 2008. As discussed below, the date the application is deemed complete begins the statutory 120-day deadline for the city to issue its final written decision on the application, pursuant to ORS 227.178(1).¹ The city planning administrator issued an

¹ ORS 227.178(1) provides:

1 administrative approval of the proposed partition, and the city council decided to review the
2 matter on its own motion. The city council held a hearing on March 30, 2009, and orally
3 voted to deny the application on the grounds that a geologic assessment was required because
4 of uncompacted fill located on the property.

5 On April 3, 2009, after the city’s oral decision, but before the city adopted its final
6 written decision denying the partition application, petitioner filed a petition for writ of
7 mandamus in Marion County Circuit Court, pursuant to ORS 227.179(1), seeking an order
8 compelling the city to approve the application.² On April 6, 2009, the city council adopted
9 an order and written findings, which were issued on April 8, 2009, which the city believes to
10 be within the 120-day deadline. Petitioner appealed to LUBA the city’s April 6, 2009
11 decision to deny the partition, and that is the decision before us in this appeal.

12 In the meantime, petitioner continued to pursue his mandamus action before the
13 circuit court. The circuit court ultimately agreed with the city’s view of the date the
14 application was deemed complete, and on July 9, 2009, the court dismissed petitioner’s

“Except as provided in subsections (3), (5) and (11) of this section, the governing body of a city or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 227.180, within 120 days after the application is deemed complete.”

The parcels that would be created by petitioner’s proposed partition would be located within an urban growth boundary and a final city decision that approves or denies that application therefore qualifies as a “limited land use decision.” ORS 197.015(12).

² ORS 227.179(1) provides:

“Except when an applicant requests an extension under ORS 227.178 (5), if the governing body of a city or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days after the application is deemed complete, the applicant may file a petition for a writ of mandamus under ORS 34.130 in the circuit court of the county where the application was submitted to compel the governing body or its designee to issue the approval.”

1 mandamus case as prematurely filed.³ Petitioner subsequently appealed the circuit court's
2 decision to the Court of Appeals, where the case is currently pending.

3 At oral argument before LUBA, the parties informed the Board of the circuit court
4 mandamus proceeding and the pending appeal of the circuit court's decision before the Court
5 of Appeals. The Board questioned whether proceeding on the LUBA appeal might lead to
6 inconsistent rulings from LUBA and the Court of Appeals or the circuit court on the ultimate
7 disposition of the partition application. LUBA allowed the city the opportunity to move to
8 suspend this appeal pending the outcome of the mandamus case, and on January 14, 2010,
9 the city filed a motion to suspend the appeal. Petitioner responded and objected to the
10 motion, arguing that there is no possibility of inconsistent dispositions, because petitioner
11 anticipates he will prevail in both appeals. On March 2, 2010, LUBA issued an order
12 granting the city's motion to suspend the appeal pending final resolution of petitioner's
13 mandamus action presently before the Court of Appeals. In that order, we also questioned
14 whether LUBA has jurisdiction over the city's decision, and stated that when the appeal was
15 reactivated we would request from the parties briefing on the jurisdictional issue.

16 On March 26, 2010, petitioner filed a petition for an alternative writ of mandamus in
17 Marion County Circuit Court, pursuant to ORS 197.830(14).⁴ Through this second

³ It is not clear whether the city also argued to the circuit court under ORS 227.179(4) that the mandamus action was improper because it had been filed within 14 days of the date the governing body made its tentative oral decision. ORS 227.179(4) provides:

"If the governing body does not take final action on an application within 120 days of the date the application is deemed complete, the applicant may elect to proceed with the application according to the applicable provisions of the local comprehensive plan and land use regulations or to file a petition for a writ of mandamus under this section. If the applicant elects to proceed according to the local plan and regulations, the applicant may not file a petition for a writ of mandamus within 14 days after the governing body makes a preliminary decision, provided a final written decision is issued within 14 days of the preliminary decision."

⁴ ORS 197.830(14) provides:

"[LUBA] shall issue a final order within 77 days after the date of transmittal of the record. If the order is not issued within 77 days the applicant may apply in Marion County or the circuit

1 mandamus action, petitioner seeks to compel LUBA to issue a final decision and order in this
2 appeal. According to petitioner, LUBA is in violation of the statutory mandate that LUBA
3 issue a final opinion in an appeal within 77 days of transmittal of the record.⁵ Petitioner also
4 seeks attorney fees, costs, and disbursements against LUBA, as well as potential damages
5 caused by the delay in petitioner’s development.

6 **SUSPENSION UNDER ORS 197.840(1)(d)**

7 In his petition for an alternative writ of mandamus, petitioner argues that LUBA has
8 authority to suspend this appeal pending the outcome of the Court of Appeals proceeding
9 only under ORS 197.840(1)(d), and that LUBA made no findings under that statute in our
10 order suspending review.⁶ ORS 197.840(1)(d) authorizes LUBA to exclude from the 77-day
11 deadline any reasonable period of delay based on findings that “the ends of justice served by
12 granting the continuance outweigh the best interest of the public and the parties in having a
13 decision within 77 days.”

14 Although we did not cite or rely on ORS 197.840(1)(d) in our March 2, 2010 order
15 suspending the appeal, for the reasons set out in that order a continuance under

court of the county where the application was filed for a writ of mandamus to compel the
board to issue a final order.”

⁵ In fact, the 77-day deadline for issuing our final order under ORS 197.830(14) has not yet expired. At oral argument, we informed the parties that according to our calculations the statutory deadline for issuing our final opinion at that time was March 10, 2010. However, on the day following oral argument the city filed a motion to suspend this appeal. ORS 197.840(1)(b) allows LUBA to exclude from the 77-day period “[a]ny period of delay resulting from a motion, including but not limited to, a motion disputing the constitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record.” LUBA issued its order on the city’s motion on March 2, 2010. When the delay resulting from the city’s motion is excluded under ORS 197.840(1)(b), the deadline to issue LUBA’s opinion does not expire until April 26, 2010. In any case, as noted above, petitioner filed a motion to reconsider that under OAR 661-010-0045(9) had the effect of automatically suspending the 77-day deadline. Therefore, petitioner’s March 26, 2010 petition for alternative writ of mandamus was filed prematurely.

⁶ ORS 197.840(1)(d) provides:

“Any reasonable period of delay resulting from a continuance granted by a member of the board on the member’s own motion or at the request of one of the parties, if the member granted the continuance on the basis of findings that the ends of justice served by granting the continuance outweigh the best interest of the public and the parties in having a decision within 77 days.”

1 ORS 197.840(1)(d) and (2) would be appropriate. We stated in that order that “suspension of
2 this appeal pending resolution of the proceedings before the Court of Appeals is in the best
3 interest of judicial economy, and consistent with sound principles governing judicial
4 review.” __ Or LUBA __ (LUBA No. 2009-052, Order March 2, 2010). As explained in our
5 order, there is a strong possibility of inconsistent rulings if we proceed to resolve the merits
6 of petitioner’s appeal of the city’s decision before the Court of Appeals has ruled on
7 petitioner’s appeal of the mandamus decision, and before any subsequent circuit court action
8 required by the Court of Appeals’ disposition. We believe the present circumstance would
9 warrant a finding that “the ends of justice served by granting the continuance outweigh the
10 best interest of the public and the parties in having a decision within 77 days.”

11 Nonetheless, we see no need to make that finding or continue to suspend this appeal.
12 For the reasons set out below, we conclude that we do not have jurisdiction to consider this
13 appeal and that exclusive jurisdiction over an appeal of the city’s post-writ decision lies with
14 the circuit court. Having considered the parties’ jurisdictional arguments, we now believe
15 that a decision dismissing this appeal is unlikely to complicate final resolution of petitioner’s
16 first mandamus proceeding that is now pending before the Court of Appeals, and may in fact
17 facilitate final resolution of that appeal. We therefore turn to the jurisdictional question.

18 **JURISDICTION**

19 As noted, when we reactivated this appeal we requested additional briefing from the
20 parties on the jurisdictional issue raised in our March 2, 2010 order. The city argues that we
21 do not have jurisdiction over the appeal, for the reasons set out in our order. Petitioner’s
22 position is less clear. Initially, petitioner appears to dispute that the jurisdictional question is
23 properly before LUBA, since the Board raised the question on its own motion. If that is
24 petitioner’s position, it is wrong. LUBA may raise the issue of jurisdiction on its own
25 motion. *Adams v. City of Ashland*, 33 Or LUBA 552, 554 (1997) (LUBA is obligated to
26 examine its jurisdiction *sua sponte*, regardless of whether the issue is raised by the parties),

1 citing *Springer v. Gollyhorn*, 146 Or App 389, 393, 934 P2d 501 (1997) and *Lyke v. Lane*
2 *County*, 70 Or App 82, 84, 688 P2d 411 (1984). Furthermore, the issue of jurisdiction may
3 be raised at any time. *Dobson v. City of Newport*, 47 Or LUBA 589, 595 (2004) (citing OAR
4 661-010-0065(2)).⁷

5 On the question of whether jurisdiction over a post-writ decision subject to
6 ORS 227.179(2) lies with the LUBA or the circuit court, petitioner acknowledges that the
7 question is complex and interesting, and suggests that the answer may not be known until the
8 Court of Appeals issues a decision in the mandamus action. Petitioner states that he is
9 willing to join with LUBA or the city to “provide specific questions for the Court of Appeals
10 to resolve as long as it does not delay this proceeding.” Petitioner’s Memorandum on
11 Jurisdiction 3. It is not clear to us what course of action, if any, petitioner is suggesting.⁸

12 ORS 227.179(2) provides:

13 “The governing body shall retain jurisdiction to make a land use decision on
14 the application until a petition for a writ of mandamus is filed. *Upon filing a*
15 *petition under ORS 34.130, jurisdiction for all decisions regarding the*
16 *application, including settlement, shall be with the circuit court.*” (Emphasis
17 added.)

18 Under ORS 227.179(2), once a petition for writ of mandamus is filed, the city is divested of
19 jurisdiction over the application, and jurisdiction “for all decisions regarding the application”
20 is vested in the circuit court. Consequently, on April 3, 2009, when petitioner filed a petition

⁷ OAR 661-010-0065(2) provides:

“Time of Filing: A party seeking to challenge the failure of an opposing party to comply with any of the requirements of statutes or Board rules shall make the challenge by motion filed with the Board and served on all parties within 10 days after the moving party obtains knowledge of such alleged failure. *However, motions to dismiss for lack of jurisdiction may be filed at any time.* An opposing party may, within 14 days from the date of service of a motion, file a response.” (Emphasis added.)

⁸ On April 9, 2010, petitioner filed a response to the city’s jurisdictional memorandum, in which petitioner argues that LUBA should certify the jurisdictional question to the Court of Appeals, pursuant to ORS 34.102(5). However, that statute applies only when the circuit court transfers a petition to LUBA, or LUBA transfers a notice of intent to appeal to circuit court, and the reviewing body to which the petition/notice is transferred disputes that it has jurisdiction. No transfer has occurred in the present case.

1 for writ of mandamus, the city lost jurisdiction to issue its decision denying petitioner’s
2 application. That much seems beyond doubt. The only remaining uncertainty is which
3 review body—LUBA or the circuit court—has jurisdiction to review a legal challenge to the
4 city’s post-writ decision issued on April 8, 2009.⁹ Because the city’s post-writ decision is
5 clearly a decision “regarding the application,” we believe that review of the merits of that
6 post-writ decision would also result in a decision “regarding the application.” Under that
7 view, ORS 227.179(2) vests the circuit court with exclusive jurisdiction to review the city’s
8 post-writ decision. That view also has the practical result that the same review body would
9 have before it both the petition for writ of mandamus and a petition for writ of review
10 challenging the city’s post-writ decision, which would eliminate the possibility of
11 inconsistent dispositions.

12 As noted in our March 2, 2010 order, contextual support for the view that LUBA does
13 not have jurisdiction over the city’s decision is provided by ORS 197.015(10)(e)(B), adopted
14 in the same 1999 legislation as ORS 227.179(2), which excludes from the definition of “land
15 use decision” subject to LUBA’s exclusive jurisdiction:

16 “Any local decision or action taken on an application subject to ORS 215.427
17 or 227.178 after a petition for a writ of mandamus has been filed under ORS
18 215.429 or 227.179[.]”

19 We explained that although ORS 197.015(10)(e)(B) is not directly applicable because the
20 city’s decision is a *limited* land use decision rather than a land use decision, it nonetheless
21 provides contextual support for the conclusion that, in amending ORS 227.179(2), the
22 legislature intended to vest the circuit court, and not LUBA, with jurisdiction over post-writ
23 decisions.¹⁰

⁹ It does not seem likely that review of the city’s April 6, 2009 decision would be complicated, since ORS 227.179(2) clearly divested the city of jurisdiction to render a decision on the application after petitioner filed his initial petition for writ of mandamus on April 3, 2009.

¹⁰ We explained in the March 2, 2010 order:

1 In other pleadings, petitioner appears to argue that LUBA has jurisdiction over the
2 city’s decision, notwithstanding ORS 227.179(2), based on *Murphy Citizens Advisory Com.*
3 *v. Josephine County*, 325 Or 101, 934 P2d 415 (1997), *State ex rel Coastal Management v.*
4 *Washington Cty.*, 159 Or App 533, 979 P2d 300 (1999), and *State ex rel K.B. Recycling v.*
5 *Clackamas Cty.*, 171 Or App 46, 14 P3d 643 (2000). However, the decisions cited by
6 petitioner predate the 1999 amendment to ORS 227.179(2) providing that after a writ is filed
7 “jurisdiction for all decisions regarding the application * * * shall be with the circuit court.”
8 See *K.B. Recycling*, 171 Or App at 48, n 3 (“[w]e note that [county equivalent to ORS
9 227.178] has since been replaced [by the county equivalent to ORS 227.179], which were
10 enacted in 1999 but which are not applicable here.”). See also *State ex rel Coastal*
11 *Management v. Washington Cty.*, 178 Or App 280, 286-87, 36 P3d 993 (2001) (explaining
12 effect of 1999 amendments).

13 In sum, because ORS 227.179(2) expressly vests in the circuit court exclusive
14 jurisdiction over “all decisions regarding the application” once a petition for writ of

“Where ORS 197.015(10)(e)(B) applies, it is clear that LUBA would have no jurisdiction over a decision taken on an application after a petition for writ of mandamus is filed under ORS 227.179. Jurisdiction to review such a decision would almost certainly lie with the circuit court, pursuant to ORS 227.179(2).

“We note that ORS 197.015(10)(e)(B) does not apply in the present case, at least not directly, because the challenged decision denies an application for tentative partition plat, and therefore the decision falls within the definition of a ‘limited land use decision’ as defined at ORS 197.015(12). The exclusion at ORS 197.015(10)(e)(B) applies only to the definition of ‘land use decision,’ and there is no equivalent statutory exclusion for limited land use decisions. That may be a simple legislative oversight, as it is difficult to imagine any reason why the legislature would intend that LUBA review local decisions taken on an application for a limited land use decision after a petition for a writ of mandamus has been filed, while for all other types of decisions made in the same circumstances the circuit court would exercise jurisdiction. The requirements of ORS 227.178 apply equally to ‘limited land use decisions’ as well as decisions on permit or zone change applications that fall within the definition of ‘land use decision.’ More importantly, ORS 227.179(2) does not distinguish between different types of decisions, but instead vests with the circuit court jurisdiction for all decisions regarding an application subject to ORS 227.178 after a petition for a writ of mandamus has been filed under ORS 227.179(1). That alone strongly suggests that the circuit court has jurisdiction over a local decision taken on a limited land use application after a petition for writ is filed. If so, the appropriate disposition of the present appeal to LUBA would be either dismissal or transfer to circuit court.” Slip op 3-4 (emphasis in original).

1 mandamus is filed, LUBA lacks jurisdiction over the city’s post-writ decision. It follows that
2 the proper disposition of this appeal is dismissal, unless petitioner has filed a motion for
3 transfer to circuit court within the time provided under OAR 661-010-0075(11).¹¹ However,
4 petitioner has not filed a motion to transfer this appeal to circuit court. Therefore, this appeal
5 must be dismissed. *7th Street Station LLC v. City of Corvallis*, 58 Or LUBA 93, 100 (2008),
6 *aff’d* 227 Or App 506, 206 P3d 286 (2009); *Ehle v. City of Salem*, 54 Or LUBA 688, 691
7 (2007); *Lindsey v. City of Eugene*, 37 Or LUBA 695, 700 (2000).

8 The appeal is dismissed.

¹¹ OAR 661-010-0075(11) provides:

“Motion to Transfer to Circuit Court:

- “(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12).
- “(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than ten days after the date a respondent’s brief or motion that challenges the Board’s jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than ten days after the date the moving party learns the Board has raised a jurisdictional issue.
- “(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.”