

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

3
4 ROGUE ADVOCATES and PETER STORM,
5 *Petitioners,*

6
7 vs.

8
9 JOSEPHINE COUNTY,
10 *Respondent,*

11 and

12
13
14 BRIMSTONE NATURAL RESOURCE CO.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2015-101

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Josephine County.

23
24 Maura C. Fahey, Portland, represented petitioners.

25
26 M. Wally Hicks, County Counsel, Grants Pass, represented respondent.

27
28 James R. Dole, Grants Pass, represented intervenor-respondent.

29
30 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN Board
31 Member, participated in the decision.

32
33 DISMISSED 02/22/2016

34
35 You are entitled to judicial review of this Order. Judicial review is
36 governed by the provisions of ORS 197.850.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

NATURE OF THE DECISION

Petitioners seek review of a planning director’s decision approving a conditional use permit.

INTRODUCTION

Intervenor-respondent Brimstone Natural Resource Co. (Brimstone) filed an application for a conditional use permit to site a rock crusher. Brimstone’s application was deemed complete on April 17, 2015. Under ORS 215.427(1), the county was required to take final action, including resolution of any appeals, within 150 days of that date.¹ On July 29, 2015, the planning director approved the application with conditions. Petitioner Storm appealed that decision to the board of county commissioners.

On September 14, 2015, the ORS 215.427(1) 150-day deadline expired. Under ORS 215.429(1), Brimstone was therefore entitled to file a petition for writ of mandamus on that date to compel the county to approve its application for conditional use approval.² However, Brimstone did not file a petition for

¹ ORS 215.427(1) provides in relevant part that “[t]he governing body of a county or its designee shall take final action on all * * * applications for a permit * * *, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete * * *.”

²As relevant here, ORS 215.429(1) provides:

“[I]f the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within * * * 150 days * * * after the

1 writ of mandamus at that time, and under ORS 215.429(2), the county retained
2 jurisdiction to continue with the local appeal of the planning director’s July 29,
3 2015 conditional use permit approval decision.³ See *State ex rel Willamette*
4 *Cmty. Hlth. Sols. v. Lane County*, 274 Or App 545, 361 P3d 613 (2015) (“not
5 filing a mandamus petition constitutes an election to proceed with the
6 application”).

7 On December 7, 2015, the board of county commissioners held a hearing
8 on the appeal. At that hearing two of the commissioners voted to disqualify the
9 third commissioner. Then one of the two commissioners who voted to
10 disqualify the third commissioner recused himself. After those actions, the
11 board of commissioners no longer had a quorum, and the meeting was
12 adjourned without adopting any findings to reflect the December 7, 2015
13 actions regarding the appeal, and without adopting a written decision of any
14 kind.

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.”

³ If a county fails to take final action on a permit application within 150 days, ORS 215.429(2) provides:

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

1 On December 16, 2015, petitioners filed their notice of intent to appeal
2 with LUBA, seeking review of the planning director’s July 29, 2015 decision,
3 which petitioners alleged became final on December 7, 2015. Thereafter, on
4 December 23, 2015, Brimstone filed a petition for writ of mandamus in
5 Josephine County Circuit Court to compel the board of commissioners to
6 approve its application for conditional use approval.⁴ Finally, on January 6,
7 2016, the board of commissioners approved the minutes of the December 7,
8 2015 appeal hearing.

9 **MOTION TO DISMISS**

10 Brimstone moves to dismiss this appeal. Brimstone contends that
11 petitioners’ December 16, 2015 notice of intent to appeal was filed before the
12 county took final action on petitioner Storm’s appeal of the July 29, 2015
13 conditional use permit approval. Brimstone contends that because the county
14 did not take final action in writing on the appeal of the planning director’s
15 approval of its application for conditional use approval on December 7, 2015,
16 Brimstone was entitled to file its petition for writ of mandamus if the county
17 did not adopt a final written decision within 14 days.⁵ Brimstone filed its

⁴ Petitioners in this appeal have moved to intervene in that mandamus proceeding, which we are advised is now pending before the Josephine County Circuit Court. We are also advised that three of the circuit court judges have recused themselves from the mandamus proceeding.

⁵ ORS 215.429(4) provides:

1 petition for writ of mandamus on December 23, 2015, and argues the Josephine
2 County Circuit Court now has exclusive jurisdiction over this matter under
3 ORS 215.429(2). *See* n 3.

4 Petitioners contend that the board of county commissioners' failure to
5 maintain a quorum on December 7, 2015 had the legal effect of making the
6 planning director's July 29, 2015 decision the county's final decision in this
7 matter, as of December 7, 2015. Therefore, petitioners argue, their December
8 16, 2015 notice of intent to appeal was timely filed, and Brimstone's motion to
9 dismiss should be denied.

10 Our resolution of the motion dismiss turns on and whether the board of
11 county commissioners' actions on December 7, 2015 had the legal effect of (1)
12 adopting a final decision that made the planning director's July 29, 2015
13 decision the county's final decision in this matter or (2) adopting at most a
14 "preliminary decision," within the meaning of ORS 215.429(4), that would not
15 become final until it was reduced to writing and thereby made final. If the

"If the governing body does not take final action on an application within * * * 150 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 county 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."

1 board of county commissioners’ action on December 7, 2015, did not have the
2 legal effect of making the planning director’s July 29, 2015 decision the
3 county’s final decision on Brimstone’s application, and was either a non-
4 decision or a preliminary decision, then Brimstone’s December 23, 2015
5 petition for writ of mandamus means that the Josephine County Circuit Court
6 has exclusive jurisdiction for any proceedings concerning Brimstone’s
7 application, and LUBA does not have jurisdiction. For the reasons explained
8 below, we conclude the board of commissioners’ actions on December 7, 2015,
9 at most, constituted a “preliminary decision,” within the meaning of ORS
10 215.429(4). *See* n 5. It follows under ORS 215.429(2) and (4) that
11 Brimstone’s petition for writ of mandamus, filed 16 days later, resulted in the
12 Josephine County Circuit Court assuming exclusive jurisdiction in this matter
13 and that Brimstone’s motion to dismiss this LUBA appeal must be granted.

14 **DECISION**

15 LUBA’s jurisdiction to review land use decisions “[i]s limited to those
16 cases in which the petitioner has exhausted all remedies available by right
17 before petitioning the board for review[.]. ORS 197.825(2)(a).

18 The planning director’s July 29, 2015 decision granting Brimstone’s
19 application for conditional use approval without first providing a hearing was
20 subject to appeal to the board of county commissioners under Josephine
21 County Rural Development Code (RDC) 33.030. RDC 33.050(B) provides

1 “[t]he effect of an appeal to the Board [of County Commissioners] shall be to
2 stay or suspend the appealed action.” RDC 33.070 provides in part:

3 “Appeals from decisions made by the Planning Director without a
4 hearing shall be heard by the Board [of County Commissioners] as
5 a *de novo* hearing (a fully, open evidentiary hearing). * * *”

6 By appealing the planning director’s July 29, 2015 decision to the board of
7 county commissioners, petitioners were exhausting a remedy that was available
8 by right under the RDC.

9 In most cases, LUBA has exclusive jurisdiction to review land use
10 decisions. ORS 197.825(1). By definition, a land use decision must be a
11 “final” decision. ORS 197.015(10)(a). As LUBA’s rules define “[f]inal
12 decision:”

13 “A decision becomes final when it is reduced to writing and bears
14 the necessary signatures of the decision maker(s), unless a local
15 rule or ordinance specifies that the decision becomes final at a
16 later date, in which case the decision is considered final as
17 provided in the local rule or ordinance.” OAR 661-010-0010(3).

18 RDC 31.130 sets out the requirements for “Final Action” by the county
19 hearings officer, planning commission and board of county commissioners
20 when sitting as a hearing body following quasi-judicial and legislative land use
21 hearings. RDC 31.130(C) provides:

22 “A quasi-judicial decision of the hearing body shall not become
23 final until written findings of fact are prepared and approved by a
24 majority vote of the participating members, signed by the
25 presiding officer or a designate, and mailed as required by Article
26 33. The findings shall include the criteria, standards for approval,
27 the facts relied on in making the decision, and a statement showing
28 how the facts, when applied to the criteria, justify the final action.”

1 Under both OAR 661-010-0010(3) and RDC 31.130(C), for the county's
2 decision on petitioners' local appeal of the planning director's July 29, 2015
3 decision to become final, it had to be reduced to writing.

4 As far as we are informed by the parties, the board of commissioners has
5 never reduced its action on December 7, 2015 to "written findings of fact that
6 are prepared and approved by a majority vote of the participating members," as
7 required by RDC 31.130(C). Admittedly the nature of the board of
8 commissioners' decision—adjourning the hearing due to the lack of a
9 quorum—means those findings would not look like the typical land use
10 findings where an application for permit approval is approved or denied on the
11 merits. But the requirement under LUBA's rule and RDC 31.130(C) that the
12 board of commissioner's decision must be reduced to writing before it becomes
13 final does not depend on the nature of the decision.

14 LUBA has held that the minutes of the meeting or hearing at which
15 action is taken on a land use matter may satisfy the requirement that a decision
16 be reduced to writing before it can become final and appealable to LUBA as a
17 land use decision. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536, 545
18 (2003); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 750
19 (1987); *Astoria Thunderbird v. City of Astoria*, 13 Or LUBA 297, 300 (1985).
20 The minutes of the December 7, 2015 hearing indicate that one of the
21 commissioners "felt the parties would be best served by referring the matter to
22 [the] Land Use Board of Appeals." Notice Regarding Transmission of Record

1 and Request to Resolve Motion to Dismiss, Attachment, page 2. But those
2 minutes were not approved until January 6, 2016, *after* petitioners filed their
3 appeal with LUBA and *after* Brimstone filed its petition for writ of mandamus
4 with the circuit court. On the earliest date that the board of commissioners
5 took final action on petitioner Storm's local appeal, January 6, 2016, Brimstone
6 had already filed its petition for writ of mandamus with the Josephine County
7 Circuit Court. Under ORS 215.429(2) the Josephine County Circuit Court had
8 exclusive jurisdiction regarding the permit application.

9 To review, petitioner Storm filed an appeal of the planning director's
10 July 29, 2015 decision, and under RDC 33.050(B) the effect of that local
11 appeal was to suspend the planning director's July 29, 2015 decision until the
12 board of commissioners rendered its final decision on his appeal. Under ORS
13 215.427(1), the board of commissioners was required to issue its final decision
14 resolving that appeal not later than 150 days after April 17, 2015, or by
15 September 14, 2015. The board of commissioners did not issue a final decision
16 resolving that appeal before September 14, 2015. While Brimstone could have
17 filled a petition for writ of mandamus at that time to compel the county to
18 approve its application after September 14, 2015, Brimstone did not do so at
19 that time, and the county therefore retained jurisdiction to take action on the
20 appeal. ORS 215.429(1) and (2). *See* ns 2 and 3. On December 7, 2015, the
21 board of commissioners held a hearing on the appeal but was unable to take
22 action because they were unable to maintain a quorum after two commissioners

1 were disqualified. At the most, that inaction constituted a “preliminary
2 decision” on the appeal. Under ORS 215.429(4), having elected to proceed
3 with the local appeal, and assuming the board of commissioners’ action on
4 December 7, 2015 constituted a “preliminary decision,” Brimstone was
5 thereafter barred from filing a petition for writ of mandamus for 14 days, or
6 until December 21, 2015. On December 23, 2015, 16 days after the board of
7 commissioners’ preliminary decision on December 7, 2015, ORS 215.429(4)
8 no longer barred Brimstone from filing a petition for writ of mandamus, and
9 Brimstone filed its petition for writ of mandamus. Under ORS 215.429(2),
10 from the time that petition for writ of mandamus was filed, the circuit court had
11 exclusive jurisdiction “for all decisions regarding the application, including
12 settlement * * *.” *Stewart v. City of Salem*, 61 Or LUBA 77, 83, *aff’d* 236 Or
13 App 268, 236 P3d 851 (2010).

14 Finally, petitioners cite a number of cases in support of their position that
15 the planning director’s July 29, 2015 decision became the county’s final
16 decision in this matter on December 7, 2015, notwithstanding the board of
17 commissioners’ failure to reduce their decision to writing on December 7,
18 2015. *Franklin v. Deschutes County*, 139 Or App 1, 911 P2d 339 (1996); *Burk*
19 *v. Crook County*, 45 Or LUBA 516 (2003); *Dead Indian Memorial Rd. Neigh.*
20 *v. Jackson County*, 43 Or LUBA 597 (2002); *Hiebenthal v. Polk County*, 41 Or
21 LUBA 316 (2002); *Derry v. Douglas County*, 26 Or LUBA 25 (1993);
22 *Komning v. Grant County*, 20 Or LUBA 481 (1990); *Strawn v. City of Albany*,

1 20 Or LUBA 344 (1990). Those cases all address related matters when a local
2 appellate body declines review, dismisses a local appeal, or is unable to reach a
3 decision on the merits of the local appeal. However, none of those cases holds
4 that a local permit decision, which is the subject of a local appeal, becomes the
5 local government’s *final* decision and appealable to LUBA, without a final
6 written decision by the local appellate body. *Franklin v. Deschutes County*, 139
7 Or App at 3 (“the governing body of the county * * * declined review”);⁶
8 *Burke*, 45 Or LUBA at 518 (county court dismissed attempted local appeal
9 based on lack of standing and inadequate specification of grounds for appeal);⁷
10 *Dead Indian Memorial Rd. Neigh.*, 43 Or LUBA at 597 (“the hearings officer
11 issued an ‘Order Dismissing the Request for Hearing’”); *Hiebenthal*, 41 Or
12 LUBA at 320 (county counsel letter advised petitioner that county
13 commissioners had conflicts of interest and that hearings officer decision was
14 final and all local appeals had been exhausted); *Derry*, 26 Or LUBA at 27

⁶ Neither LUBA’s nor the Court of Appeals’ decision in *Franklin* indicates the county commissioners’ decision to decline review was not reduced to writing.

⁷ In *Burke*, LUBA dismissed petitioner’s LUBA appeal of a planning commission decision, concluding that the county court’s decision denying an attempted local appeal of that planning commission decision was the county’s final decision. 45 Or LUBA at 523-24. LUBA’s order denying a motion to dismiss a separate LUBA appeal of the county court’s decision states that the county court’s decision appears at record page 1. *Burke v. Crook County*, 45 Or LUBA 739, 740 (2003). There is no suggestion in LUBA’s *Burke* decisions that the county court’s decision was not reduced to writing before it was appealed to LUBA.

1 (after one commissioner recused herself, remaining commissioners split on
2 whether to affirm planning commission decision and determined “it should
3 adopt findings allowing the planning commission’s decision to stand”);
4 *Komning*, 20 Or LUBA at 484 (letter from county counsel advised petitioner
5 that all members of county court were disqualified from voting on appeal
6 “which causes the decision of the Planning Commission to become final insofar
7 as Grant County is concerned”); *Strawn*, 20 Or LUBA at 347 (“city council
8 determined that ‘since four affirming votes are required to pass a motion, the
9 decision of the Hearings Board is affirmed’”).⁸

10 When petitioners’ notice of intent to appeal was filed on December 16,
11 2015, that appeal was premature because the board of commissioners had not
12 taken final action to reduce their December 7, 2015 decision, or more precisely
13 their inability to reach a decision on December 7, 2015, to writing. Because
14 the board of commissioners did not reduce their decision to writing until
15 January 6, 2016, at the earliest—after Brimstone filed its petition for writ of
16 mandamus—the circuit court has jurisdiction over Brimstone’s application and
17 LUBA does not have jurisdiction to consider this appeal.

18 This appeal is dismissed.

⁸ The citation to the record in LUBA’s opinion was to the “minutes of the June 27, 1990 city council meeting.”