

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

3
4 MEL STEWART,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent.*

11
12 LUBA No. 2009-052

13 ORDER SUSPENDING REVIEW

14 Petitioner seeks city approval of a partition of a lot in an existing subdivision. While
15 his application for partition approval was pending before the city, petitioner filed a
16 mandamus action in Marion County Circuit Court alleging that the city failed to take final
17 action on his application within the 120 days required by ORS 227.178, and requesting that
18 the circuit court order the city to approve his partition application. The circuit court
19 dismissed petitioner’s mandamus action as prematurely filed, and petitioner has appealed that
20 circuit court decision to the Court of Appeals, where the matter is now pending.

21 While the mandamus action was pending before the circuit court, the city took action
22 to deny the application. That city denial is the decision that is before LUBA in this appeal.
23 After the conclusion of oral argument in this appeal, we allowed the city the opportunity to
24 file a motion to suspend this LUBA appeal pending a decision by the Court of Appeals in
25 petitioner’s appeal of the circuit court’s decision in the mandamus proceeding, and we
26 allowed petitioner an opportunity to respond to any such motion. The city subsequently
27 moved to suspend this appeal, and petitioner opposes the motion.

28 The city moves to suspend this appeal “in the interests of judicial economy, and
29 because conflicting decisions would result in [the city] having conflicting obligations.”
30 Motion to Suspend Proceedings 1. The city notes that in *Cascade Pumice, Inc. v. Deschutes*
31 *County*, 28 Or LUBA 787 (1995), we suspended the appeal pending the outcome of a circuit

1 court mandamus proceeding “in the interest of judicial economy, and consistent with sound
2 principles governing judicial review.” *Id.* We also explained in *Cascade Pumice* that a
3 motion seeking such a suspension operated to suspend the 77-day deadline for issuing
4 LUBA’s final opinions pursuant to ORS 197.840(1)(b).¹ *Id.*

5 Petitioner responds that suspension would not be in the interests of judicial economy
6 because no conflicting decisions or obligations could occur. Petitioner apparently considers
7 only the possibility that he will prevail at both LUBA and the Court of Appeals, and
8 apparently believes that the only possible outcome of both lines of appeals is the ultimate
9 approval of the partition subject to the same set of conditions of approval. However, even if
10 petitioner ultimately prevailed in both forums it is not at all clear to us that there is no risk of
11 conflicting obligations, and it is far from clear to us that petitioner is certain to prevail in
12 both forums. We agree with the city that suspension of this appeal pending resolution of the
13 proceedings before the Court of Appeals is in the interest of judicial economy, and consistent
14 with sound principles governing judicial review. Therefore, this review proceeding is
15 suspended until the Court of Appeals and any additional circuit court mandamus proceedings
16 are concluded.

17 Once the mandamus action is concluded, we will reactivate this appeal. When we do
18 reactivate this appeal, we will likely consider the issue of the Board’s jurisdiction over the
19 city’s decision. Although the city does not dispute our jurisdiction, we note that statutes
20 exist that arguably divest the Board of jurisdiction over a local government decision that is

¹ ORS 197.840(1) provides, in part:

“The following periods of delay shall be excluded from the 77-day period within which the board must make a final decision on a petition under ORS 197.830 (14):

“* * * * *

“(b) Any 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.”

1 issued after a writ of mandamus is filed under ORS 227.179. We first note that ORS
2 227.179(2) provides that:

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

7 When the city adopted the written decision that is before us in this appeal, petitioner
8 had already filed his petition for writ of mandamus and the circuit court had not yet
9 dismissed the mandamus proceeding. Under the last sentence of ORS 227.179(2), the city
10 almost certainly lost jurisdiction to render its decision denying the partition application.
11 Because the circuit court has exclusive jurisdiction “for all decisions regarding the
12 application,” it would appear to follow that the circuit court, and not LUBA, would have
13 jurisdiction to review the city’s decision on the application that was issued after the writ of
14 mandamus was filed.

15 Support for that view is provided by ORS 197.015(10)(e)(B), which excludes from
16 the definition of “land use decision” subject to LUBA’s exclusive jurisdiction:

17 “Any local decision or action taken on an application subject to ORS 215.427
18 or 227.178 after a petition for a writ of mandamus has been filed under ORS
19 215.429 or 227.179[.]”

20 Where ORS 197.015(10)(e)(B) applies, it is clear that LUBA would have no jurisdiction over
21 a decision taken on a application after a petition for writ of mandamus is filed under ORS
22 227.179. Jurisdiction to review such a decision would almost certainly lie with the circuit
23 court, pursuant to ORS 227.179(2).

24 We note that ORS 197.015(10)(e)(B) does not apply in the present case, at least not
25 directly, because the challenged decision denies an application for tentative partition plat,
26 and therefore the decision falls within the definition of a “limited land use decision” as
27 defined at ORS 197.015(12). The exclusion at ORS 197.015(10)(e)(B) applies only to the
28 definition of “land use decision,” and there is no equivalent statutory exclusion for limited

1 land use decisions. That may be a simple legislative oversight, as it is difficult to imagine
2 any reason why the legislature would intend that LUBA review local decisions taken on an
3 application for a limited land use decision after a petition for a writ of mandamus has been
4 filed, while for all other types of decisions made in the same circumstances the circuit court
5 would exercise jurisdiction. The requirements of ORS 227.178 apply equally to “limited
6 land use decisions” as well as decisions on permit or zone change applications that fall
7 within the definition of “land use decision.” More importantly, ORS 227.179(2) does not
8 distinguish between different types of decisions, but instead vests with the circuit court
9 jurisdiction for *all* decisions regarding an application subject to ORS 227.178 after a petition
10 for a writ of mandamus has been filed under ORS 227.179(1). That alone strongly suggests
11 that the circuit court has jurisdiction over a local decision taken on a limited land use
12 application after a petition for writ is filed. If so, the appropriate disposition of the present
13 appeal to LUBA would be either dismissal or transfer to circuit court.

14 We consider the jurisdictional question no further, but when this appeal is reactivated
15 we will give the parties an opportunity to file briefing on jurisdiction. For the reasons set
16 out above, this appeal is suspended. LUBA requests that the city promptly advise the Board
17 of the disposition of the Court of Appeals’ proceedings on the appeal of the circuit court’s
18 decision.

19 Dated this 2nd day of March, 2010.

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Tod A. Bassham
Board Chair