

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

3
4 KENNETH A. THOMAS,
5 *Petitioner,*

6
7 vs.

8
9 WASCO COUNTY,
10 *Respondent,*

10/26/18 AM 9:18 LUBA

11
12 and

13
14 WOLF RUN RANCH LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2014-013

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Wasco County.

23
24 Peter Livingston, Beaverton, and Michael J. Lilly, Portland, represented
25 petitioner. Peter Livingston filed the petition for review and argued on behalf of
26 petitioner. With him on the brief was Black Helterline LLP.

27
28 Eric J. Nisley, Bradley V. Timmons, and Kristen A. Campbell, The Dalles,
29 represented respondent. Eric J. Nisley filed a joint response brief on behalf of
30 respondent.

31
32 Elaine R. Albrich and Caitlin P. Shin, Portland, represented intervenor-
33 respondent. Elaine R. Albrich filed a joint response brief and argued on behalf of
34 intervenor-respondent. With her on the brief was Stoel Rives, LLP.

35
36 RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board
37 Member, participated in the decision.

1
2
3
4

TRANSFERRED

10/26/2018

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

NATURE OF THE DECISION

Petitioner appeals a letter dated January 16, 2014, from the county code compliance officer that determines that no violations of the Wasco County Land Use and Development Ordinance (LUDO) are occurring on intervenor's property.

INTRODUCTION

Oral argument in this appeal was held on May 29, 2014. On June 13, 2014, we issued an Order extending the deadline for issuing our final opinion and order in this appeal, pending the outcome of two appeals pending before the Court of Appeals. *Thomas v. Wasco County*, 69 Or LUBA 503 (2014). Intervenor-respondent Wolf Run Ranch, LLC (intervenor) now moves to reactivate this appeal. Petitioner opposes the motion.

The present LUBA appeal is a small part of a larger dispute that has a lengthy and complex history. That dispute started when intervenor applied to the county for an outdoor mass gathering permit under ORS 433.735 to 433.770 (2013). That led petitioner to take several actions in opposition to intervenor's application and subsequent actions on the property on which the outdoor mass gathering would be held. We set out here only the history that assists in understanding this appeal.

1 **A. 2013 Outdoor Mass Gathering Permit**

2 On May 8, 2013, the board of county commissioners approved with
3 conditions intervenor’s application for authorization of an outdoor mass
4 gathering, for the purpose of hosting an outdoor music festival.¹ ORS 433.745(2)
5 (2013) provides that allowing an outdoor mass gathering permit “does not entitle
6 the organizer to make any permanent physical alterations to or on the real
7 property.”² Intervenor’s application for the mass gathering permit included a site
8 plan that showed removal of trees to accommodate the construction of a parking
9 area; construction of a ticket booth, new access road and multiple vehicle-arrival

¹ The procedures for seeking a permit for an outdoor mass gathering are set forth in ORS 433.750(1)(2013), which provides that the governing body of a county shall issue a permit “when the organizer demonstrates compliance with or the ability to comply with the health and safety rules governing outdoor mass gatherings to be regulated according to the anticipated crowd and adopted by the Oregon Health Authority.” OAR 333-039-0055(1) requires “easily accessible roads of all-weather construction at the outdoor mass gathering site.”

² As relevant here, ORS 433.745(2) (2013) provided:

“A permit issued under this section does not entitle the organizer to make any permanent physical alterations to or on the real property which is the site of the outdoor mass gathering.”

As amended by Oregon Laws 2015, chapter 428, section 1, ORS 433.745(2) now provides:

“A permit issued under this section does not entitle the organizer to make any permanent development to or on the real property. *Any permanent development on the real property must be made in accordance with any applicable state or local land use law.*” (Emphasis added.)

1 lanes; and construction of a culvert. In preparation for the outdoor music festival,
2 the property was improved as shown on the application's site plan.³

3 **B. 2013 Notification of Non-Violation (2013 NNV)**

4 On April 30, 2013, and on May 9, 2013, while intervenor's application for
5 authorization of the outdoor mass gathering was pending, petitioner filed
6 complaints with the county's code compliance officer, pursuant to LUDO
7 15.030.⁴ Petitioner argued the improvements sought in the outdoor mass
8 gathering permit application were already being made and would result in
9 permanent physical alterations to the subject property in violation of ORS
10 433.745(2), and in violation of the LUDO. Record 344-45.

11 On May 23, 2013, the county's code compliance officer issued a
12 Notification of Non-Violation (2013 NNV), addressed to petitioner's attorney.
13 The 2013 NNV found no violations of the LUDO in connection with the
14 improvements for the music festival. Record 346. The 2013 NNV concluded that

³ The festival took place as planned in July 2013.

⁴ LUDO 15.030 provides:

“Whenever necessary to enforce the provisions of this Ordinance, the Director, or the Director's designee, shall have the authority in addition to other remedies provided by law, to issue compliance notices and orders, assess penalties, record violations and liens with the County Clerk, issue citations, to institute injunction, mandamus, abatement or other appropriate proceedings to prevent, temporarily, or permanently enjoin or abate a violation.”

1 the parking and vehicle staging areas were “temporary,” rather than “permanent,”
2 and that the “driveway” and culvert were permitted in conjunction with the
3 existing dwelling and residential use. Petitioner did not appeal the 2013 NNV to
4 LUBA or the circuit court. We discuss in more detail the 2013 NNV and its
5 relevance to our disposition of this appeal later in the decision.

6 **C. Writ of Review Petition**

7 On May 14, 2013, petitioner filed a petition for a writ of review to the
8 circuit court under ORS 34.020 challenging the board of county commissioners’
9 May 8, 2013 order authorizing the mass gathering permit.⁵ Petitioner alleged that
10 the order impermissibly authorized “permanent physical alterations to or on the
11 real property which is the site of the outdoor mass gathering,” in violation of ORS
12 433.745(2).⁶ The county responded that the improvements authorized in the

⁵ ORS 433.750(5)(2013) provides that “[a]ny decision of a county governing body on an application for a permit to hold an outdoor mass gathering may be appealed to a circuit court for the county as provided in ORS 34.020 to 34.100.”

ORS 433.750 was amended in 2015, effective June 16, 2015. Or Laws 2014, ch 428, § 1. Except as noted, all references in this opinion to provisions in ORS chapter 433 are to the 2013 version, which was in effect when the permit was granted.

⁶ Petitioner also appealed the county’s May 8, 2013 order granting the outdoor mass gathering permit to LUBA. *Thomas v. Wasco County*, 68 Or LUBA 102 (2013). We dismissed petitioner’s appeal, explaining that “the county made only a single decision * * * which approves the [outdoor mass gathering], including the access road and the parking areas.” 68 Or LUBA 102, 104. Further, we reasoned that petitioner’s arguments that the county had erroneously approved permanent physical alterations to the land in violation of ORS 433.745(2) should

1 outdoor mass gathering authorization were either temporary or allowed under
2 previous land use authorizations. The respondents in the writ of review
3 proceeding also argued that petitioner should have appealed the 2013 NNV,
4 which involved the same improvements as the writ of review petition, to LUBA.

5 In a July 3, 2013 letter opinion, the circuit court denied the petition for
6 review, concluding in relevant part that the county’s decision did not approve
7 “permanent physical alterations” to the property. Record 338-42.

8 **D. Declaratory Judgement Action**

9 On July 3, 2013, petitioner sought a declaratory judgment in circuit court
10 that the development of the roads, parking areas, and water storage areas resulted
11 in development on the property in violation of the LUDO, and that the outdoor
12 mass gathering permit had therefore been issued in violation of law.

13 In a July 13, 2013 opinion, the circuit court dismissed the action,
14 concluding that it lacked subject matter jurisdiction over the action because the
15 circuit court lacks jurisdiction over “land use decisions” as defined in ORS
16 197.015(10)(a). Petitioner’s Response to Joint Motion to Dismiss, App, 22-26;
17 *see* ORS 197.825.⁷ Petitioner timely appealed both the July 3, 2013 and July 16,
18 2013 circuit court decisions to the Court of Appeals.

be presented to the circuit court, rather than LUBA, on petition for review of the order, because pursuant to ORS 197.015(10)(d) the decision was not a “land use decision,” and therefore LUBA does not have jurisdiction over that issue. 68 Or LUBA 102, 105.

⁷ ORS 197.825 provides, as relevant:

1 **E. LUBA No. 2014-013**

2 On August 5, 2013, petitioner filed another complaint with the county’s
3 code compliance officer, asserting that the development of roads, parking areas,
4 and water storage areas on the subject property occurred without the necessary
5 development approvals that are required by the LUDO. On January 16, 2014, the
6 county’s code compliance officer issued a No Violation Notification (2014
7 NNV), addressed to intervenor. Record 11. Petitioner appealed the 2014 NNV to
8 LUBA, and that is the decision challenged in the present appeal.

9 The appeal was briefed, and LUBA held oral argument on May 29, 2014.
10 Following oral argument, we determined pursuant to ORS 197.840(1)(d) and (2)
11 that it was appropriate to extend the deadline for issuing LUBA’s final opinion
12 and order until after the Court of Appeals had resolved petitioner’s challenges to

“(1) [T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

“* * * * *

“(3) Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:

“(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015(10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations * * * .”

1 the circuit court’s decisions on the writ of review petition and declaratory
2 judgment action.

3 **F. *Thomas v. Wasco County*, 284 Or App 17, 392 P3d 741 (2017)**

4 The Court of Appeals consolidated petitioner’s appeals of the circuit
5 court’s writ of review and declaratory judgment decisions. In March 2017, the
6 court issued an opinion, described below. *Thomas v. Wasco County*, 284 Or App
7 17, 392 P3d 741 (2017), *rev den* 362 Or 666 (2018).

8 The court affirmed the circuit court’s denial of the writ of review petition.
9 284 Or App at 27-32. However, the court determined that the circuit court erred
10 in dismissing petitioner’s declaratory judgment action. *Id.* at 32-37.

11 In his second claim for declaratory relief, petitioner alleged that intervenor
12 had constructed and was constructing various improvements for which it did not
13 seek county approval and for which no development permits had been issued, and
14 that the county was allowing the development in violation of the LUDO and state
15 law. As the court explained, the circuit court had concluded that petitioner’s
16 challenges “presented land use issues within LUBA’s exclusive jurisdiction that
17 should have been pursued through an appeal of the [2013] NNV, and not through
18 a claim for declaratory relief,” and dismissed the action. *Id.*

19 The court concluded that the circuit court had erred. The court concluded
20 that the 2013 NNV was “not a land use decision reviewable by LUBA.” *Id.* The
21 court reasoned that although the 2013 NNV did “concern[]” land use regulations
22 (the LUDO), and although the 2013 NNV determined the improvements

1 proposed in conjunction with the festival did not violate the LUDO, the 2013
2 NNV did not constitute an “application” of land use regulations for purposes of
3 ORS 197.015(10)(a). *Id.*

4 Moreover, the court reasoned that because the LUDO permitted only the
5 owner of the affected property to seek administrative review of the 2013 NNV,
6 there was no opportunity for petitioner to challenge the 2013 NNV in a way that
7 might have resulted in a “land use decision” appealable to LUBA. *Id.* at 36 n 15
8 (citing *Doney v. Clatsop County*, 142 Or App 497, 502, 921 P2d 1346 (1996)
9 (holding LUBA’s jurisdiction is exclusive where a land use decisional process
10 was available, even if not pursued)). Accordingly, the court concluded,
11 “petitioner could not have pursued an appeal of the [2013] NNV to LUBA to
12 address his concerns relating to development on the subject property.” *Id.* at 36.

13 Finally, the court noted that the circuit courts retain jurisdiction to grant
14 declaratory, injunctive, or mandatory relief in a proceeding brought to enforce
15 land use regulations. ORS 197.825(3)(a). *See* n 7. The court concluded that
16 petitioner’s second declaratory judgment claim is such a proceeding authorized
17 by ORS 197.825(3), and the circuit court erred in dismissing it. The court
18 remanded the declaratory judgment action to the circuit court for disposition of
19 petitioner’s claim.

20 **G. Motion to Reactivate**

21 On June 29, 2018, intervenor moved to reactive the present appeal.
22 Petitioner opposes reactivation, and takes the position that under the holding in

1 *Thomas*, LUBA does not have jurisdiction over the appeal of the 2014 NNV.⁸
2 According to petitioner, for the same reasons that the court concluded that the
3 2013 NNV was not a “land use decision,” the 2014 NNV is not a “land use
4 decision.” Petitioner’s Response to Motion to Reactivate 1-2. Now, petitioner
5 argues, under the court’s decision in *Thomas*, LUBA lacks jurisdiction over this
6 matter. However, petitioner has not moved to withdraw or dismiss his appeal.

7 Intervenor responds that the court’s decision in *Thomas* only determined
8 that the 2013 NNV was not a land use decision. Intervenor argues that the present
9 appeal before LUBA concerns the 2014 NNV, which is a new decision based on
10 a different record.

11 **JURISDICTION**

12 As the appealing party, petitioner bears the burden of establishing that
13 LUBA has jurisdiction to review the challenged decision. *Billington v. Polk*
14 *County*, 299 Or 471, 475, 703 P2d 232 (1985). Setting aside the peculiarity of the
15 jurisdictional positions that petitioner and intervenor now take—petitioner, that
16 LUBA lacks jurisdiction over the appeal he filed, and intervenor, that LUBA has
17 jurisdiction to decide the merits of the appeal—we agree with petitioner that
18 under the holding in *Thomas*, the 2014 NNV is not a land use decision over which
19 LUBA has jurisdiction.

⁸ Petitioner explains that in 2014 when he filed this appeal, the circuit court had issued its July 2013 decision holding that LUBA had exclusive jurisdiction over NNV decisions. Petitioner’s Response to Motion to Reactivate 3.

1 As the court explained in *Thomas*, in the 2013 NNV, the county code
2 compliance officer concluded that the parking area and vehicle staging areas were
3 temporary, and that the road and culvert are permitted uses that are accessory to
4 the existing residential use on the property. 284 Or App at 35. The court found
5 that conclusion “concern[ed]” the LUDO, but that it did not constitute the
6 “application of” the LUDO, within the meaning of ORS 197.015(10)(a). *Id.* at
7 34.

8 The 2014 NNV concluded that the areas that were cleared for a vehicle
9 staging area, water storage areas and a lake near the existing dwelling, identified
10 as Items 4, 5, and 6 in the 2014 NNV, are “necessary for forest management
11 operations and farm uses; such uses are permitted without review in the forest
12 zone.”⁹ Record 11. If the 2013 NNV’s conclusion that the road and culvert are
13 permitted uses as accessory to the existing residential use is not the “application
14 of” the LUDO, then it is difficult to see how the 2014 NNV’s conclusion that the
15 cleared area for parking and water storage are permitted uses in the forest zone is
16 the “application of” the LUDO. Intervenor offers no argument that attempts to

⁹ As relevant here, the 2014 NNV lists nine issues that “were identified in the initial and revised complaints,” including “1) Construction of second (west) driveway with new access to Dufur Valley Road; 2) Widening and improvement of an existing road connecting second driveway to original driveway; [and] 3) Construction of Wolf Run Ditch crossing, including culvert, associated with second driveway * * *.” Record 11. Items 4, 5 and 6 identified cleared areas on the property used for parking, water storage, and a lake. The 2014 NNV does not appear to reach a conclusion about Items 1, 2, and 3. Record 11.

1 distinguish the 2013 NNV from the 2014 NNV, except that it is a different
2 decision based on a different record and that LUBA's review is confined to the
3 record. That argument does not address the court's conclusion in *Thomas* at all.

4 For the above reasons, under the holding in *Thomas*, we conclude that the
5 2014 NNV is not a "land use decision" within the meaning of ORS
6 197.015(10)(a) because it does not constitute the "application" of the LUDO.
7 Accordingly, LUBA lacks jurisdiction over the appeal.

8 **MOTION TO TRANSFER**

9 In a footnote in his May 2, 2014 Response to Joint Motion to Dismiss,
10 petitioner requests that in the event LUBA concludes it lacks jurisdiction over the
11 appeal, the appeal be transferred to circuit court. OAR 661-010-0075(11).

12 The appeal is transferred to Wasco County Circuit Court.