

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,*

11  
12   and

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

16  
17   LUBA No. 2014-013

18   ORDER

19                   Petitioner appeals a January, 2014 decision by the county’s code  
20 compliance officer determining that no violations of the Wasco County Land  
21 Use and Development Ordinance (LUDO) exist on intervenor-respondent’s  
22 property located in Wasco County.

23                   **BACKGROUND**

24                   **A. The Mass Gathering Permit and the Circuit Court**  
25                   **Proceedings**

26                   In May, 2013, the county board of commissioners issued an order  
27 authorizing a mass gathering under ORS 433.735 to 433.770 for an outdoor art  
28 and music festival to be held on intervenor’s property, in July of 2013, subject  
29 to 11 conditions of approval. The site plan that was included with the  
30 application for the mass gathering permit showed additional and expanded  
31 roads on the property, several parking areas, and cut and fill areas to contain a

1 splash pool area and other water storage areas. In preparation for the mass  
2 gathering, the property was improved as shown on the site plan.

3 Petitioner filed a petition for a writ of review under ORS 34.010,  
4 pursuant to ORS 433.750(5), challenging the order authorizing the mass  
5 gathering, on the ground that the order impermissibly authorized “permanent  
6 physical alterations to or on the real property which is the site of the outdoor  
7 mass gathering” in violation of ORS 433.745(2) by approving the site plan  
8 showing the above-described improvements to the property.<sup>1</sup> In a July 3, 2013  
9 decision, the circuit court affirmed the county’s decision to authorize the mass  
10 gathering, concluding in relevant part that the order did not approve  
11 “permanent physical alterations \* \* \*” to the property. Record 338-342.

12 In July, 2013, petitioner sought a declaratory judgment and injunctive  
13 relief against intervenor on the basis that the development of the roads, parking  
14 areas and water storage areas shown on the site plan resulted in development  
15 on the property without required development approvals, in violation of the  
16 LUDO. In a July 16, 2013 opinion, the circuit court dismissed the action,  
17 concluding that it lacked subject matter jurisdiction over the action because the  
18 circuit court lacks jurisdiction over land use decisions. Petitioner’s Response  
19 to Joint Motion to Dismiss App. 22-24.

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<sup>1</sup> ORS 433.745(2) provides:

“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.”

1           **B.     The Appellate Court Proceedings**

2           Petitioner appealed both of the circuit court’s decisions to the Court of  
3 Appeals, and those appeals were consolidated and are now pending.  
4 Petitioner’s opening brief assigns error to the circuit court’s decision in the writ  
5 of review proceeding that the county did not approve “permanent physical  
6 alterations to or on the real property” in violation of ORS 433.745(2).  
7 Petitioner also assigns error to the circuit court’s decision that it lacked subject  
8 matter jurisdiction over petitioner’s declaratory judgment action brought to  
9 enforce the provisions of the LUDO pursuant to ORS 197.825(3)(a).<sup>2</sup>

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<sup>2</sup> ORS 197.825 provides in relevant part:

“(1) Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the 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           **C.     The August 2013 Complaint and the January, 2014 Notice of**  
2           **Non-Violation**

3           In August, 2013, petitioner filed a code compliance complaint with the  
4 county, alleging that the roads, parking areas and water storage areas shown on  
5 the site plan submitted with the mass gathering permit application were  
6 developed without necessary development approvals required under the  
7 LUDO. The decision that is challenged in this appeal is the January, 2014  
8 county code compliance officer’s decision resulting from that complaint. The  
9 code compliance officer applied a number of provisions of the LUDO and state  
10 law and concluded that no violations of the LUDO are occurring on the  
11 property. Petitioner’s second and third assignments of error challenge the  
12 compliance officer’s decision that no LUDO violations are occurring on the  
13 property on the basis that the decision is not supported by substantial evidence  
14 in the whole record and fails to include adequate findings. ORS  
15 197.835(9)(a)(C).

16           **ORS 197.840 FINDINGS**

17           Under ORS 197.830(14), the statutory deadline for issuing LUBA’s final  
18 opinion and order in this appeal is June 17, 2014. Under ORS 197.840, LUBA  
19 may extend the deadline for issuing its final opinion and order if it makes the  
20 findings required under ORS 197.840(1)(d) and (2).<sup>3</sup> We conclude that an

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<sup>3</sup> As relevant, ORS 197.840 provides:

“(1) 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):

“\* \* \* \* \*

1 extension of the deadline is appropriate in this case.

2         The crux of petitioner’s appeal of the circuit court’s decision in the writ  
3 of review proceeding that affirmed the county’s issuance of the mass gathering  
4 permit is that the circuit court erred in upholding the county’s issuance of the  
5 mass gathering permit because the county in issuing the permit approved

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“(d) 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.

“(2) No period of delay resulting from a continuance granted by the board under subsection (1)(d) of this section shall be excludable under this section unless the board sets forth in the record, either orally or in writing, its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and the other parties in a decision within the 77 days. The factors the board shall consider in determining whether to grant a continuance under subsection (1)(d) of this section in any case are as follows:

“(a) Whether the failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible or result in a miscarriage of justice; or

“(b) Whether the case is so unusual or so complex, due to the number of parties or the existence of novel questions of fact or law, that it is unreasonable to expect adequate consideration of the issues within the 77-day time limit.

1 “permanent physical alterations to or on the real property” in violation of ORS  
2 433.745(2). The crux of petitioner’s appeal of the circuit court’s decision  
3 dismissing his declaratory judgment and injunction action is that the circuit  
4 court erred in concluding that it lacked jurisdiction over the action because the  
5 circuit court does not have jurisdiction over land use decisions.

6 In our view, the Court of Appeals’ decision on the parties’ dispute over  
7 whether the order authorizing the mass gathering unlawfully approved  
8 permanent alterations to the property in violation of ORS 433.745(2) is a  
9 threshold issue that has some bearing on our resolution of petitioner’s  
10 challenges to the county’s decision that no LUDO violations are occurring. An  
11 even more important threshold issue is presented by petitioner’s challenge to  
12 the circuit court’s dismissal for lack of subject matter jurisdiction of  
13 petitioner’s declaratory judgment action brought to enforce the provisions of  
14 the LUDO. That is so because LUBA is being asked to decide the very same  
15 question that was presented to the circuit court in the declaratory judgment  
16 action and will ultimately be resolved by the Court of Appeals: whether the  
17 alterations to the property violate the LUDO.

18 The Board hereby adopts the following findings in accordance with ORS  
19 197.840(1)(d) and (2):

- 20 1. The Board finds that this appeal is of unusual complexity  
21 because of the related proceedings in different forums, and  
22 that the ends of justice served by granting the continuance  
23 outweigh the best interests of the public and the other  
24 parties in issuing a final opinion within the current statutory  
25 deadline.
- 26 2. The Board finds that this appeal presents complex and novel  
27 legal issues, including novel questions of law regarding the  
28 interaction and legal effect of multiple statutes that govern

1 mass gatherings and review of decisions that are related to  
2 mass gathering permits, and the effect of the pendency of a  
3 related action in the Court of Appeals, the outcome of which  
4 could affect the Board's resolution of the issues in this  
5 appeal.

6 3. The Board finds that delaying action on the appeal until  
7 such time as the Court of Appeals renders its decision on  
8 petitioner's challenges to the circuit court's decisions will  
9 preclude unnecessary rulings by this Board, and the interests  
10 of the parties, which include an interest in obtaining  
11 consistent rulings on the issues presented in the appeals to  
12 the Court of Appeals and the appeal to LUBA, will not be  
13 prejudiced by the delay.

14 4. Based on all of the above factors, an extension of the  
15 statutory deadline is warranted.

16 The statutory deadline under ORS 197.830(14) for issuing our final  
17 opinion and order in this appeal is extended pending issuance of a notice of  
18 appellate judgment by the Court of Appeals in petitioner's challenges to the  
19 circuit court's decisions. The parties shall provide the Board with written  
20 notice of the Court of Appeals' notice of appellate judgment within seven days  
21 after the date it is issued. Thereafter, the Board shall notify the parties  
22 regarding the deadlines for future events in this appeal.

23 Dated this 13<sup>th</sup> day of June, 2014.

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29 Melissa M. Ryan  
Board Chair