

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

3
4 ALBERT EHLE,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent.*

11
12 LUBA No. 2007-089

13 ORDER

14 On August 13, 2007, we issued the final opinion and order dismissing this appeal.
15 Prior to issuing our final opinion and order, on July 3, 2007 we issued an order in which we
16 questioned whether we had jurisdiction over the appeal. In that order, we stated in relevant
17 part:

18 “Petitioner shall have 14 days from the date of this order to file a
19 memorandum regarding whether LUBA has jurisdiction over this appeal. If
20 petitioner argues that LUBA has jurisdiction, notwithstanding ORS 92.100(7),
21 respondent shall have 14 days to file a response and, if appropriate, a motion
22 to dismiss. If respondent files a motion to dismiss, petitioner shall have 14
23 days to file a response and, if appropriate, a motion to transfer this appeal to
24 circuit court pursuant to OAR 661-010-0075(11). Following that briefing,
25 LUBA will determine whether it has jurisdiction.* * *”

26 On July 16, 2007, petitioner’s attorney submitted a memorandum in which petitioner argued
27 that LUBA had jurisdiction over the appeal. That memorandum did not contain a request or
28 motion to transfer the appeal to circuit court. On July 25, 2007, the city moved to dismiss
29 the appeal, based on a lack of jurisdiction. As noted, we subsequently dismissed this appeal
30 on August 13, 2007.

31 On October 12, 2007, petitioner, representing himself, filed a “Motion to Transfer

1 Record to Marion County Circuit Court.”¹ On October 16, 2007, the city responded that
2 petitioner’s motion should be denied. On October 25, 2007, petitioner submitted a “Reply to
3 Respondent’s Response to Motion to Transfer Record to Circuit Court.”

4 OAR 661-010-0075(11) provides in relevant part:

5 “(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by
6 filing a motion to transfer to circuit court not later than ten days after
7 the date a respondent’s brief or motion that challenges the Board’s
8 jurisdiction is filed. If the Board raises a jurisdictional issue on its
9 own motion, a motion to transfer to circuit court shall be filed not later
10 than ten days after the date the moving party learns the Board has
11 raised a jurisdictional issue.

12 “(c) If the Board determines the appealed decision is not reviewable as a
13 land use decision * * *, the Board shall dismiss the appeal unless a
14 motion to transfer to circuit court is filed as provided in subsection
15 11(b) of this rule, in which case the Board shall transfer the appeal to
16 the circuit court of the county in which the appealed decision was
17 made.”

18 Under the rule, petitioner was required to file a motion to transfer the appeal to the circuit
19 court not later than ten days after the city filed its motion to dismiss. The motion to transfer
20 was filed more than two months after the city filed its motion. Petitioner offers no reason or
21 basis for the Board to overlook that violation of our rules.

22 More importantly, LUBA lacks authority to grant a motion to transfer an appeal once
23 the Board has issued a final opinion and order in that appeal. *Central Klamath County CAT v.*
24 *Klamath County*, 41 Or LUBA 524, 537 (2002); *Alliance for Responsible Land Use v.*

¹ Notwithstanding the title of petitioner’s motion, we treat petitioner’s motion as a motion to transfer the appeal, rather than merely the record in the appeal, to circuit court pursuant to ORS 34.102(4), which provides:

“A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition.”

1 *Deschutes County*, 23 Or LUBA 717 (1992). Because petitioner's motion was not filed
2 within the time provided by OAR 661-010-0075(11)(b), and the Board lacks authority to
3 grant the motion in any event, petitioner's motion is denied.

4 Dated this 26th day of October, 2007.
5
6
7
8
9

10 _____
11 Melissa M. Ryan
12 Board Member