

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

3
4 CENTRAL OREGON LANDWATCH,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11 and

12
13
14 2T SUSTAINABLE LAND & CATTLE HOLDINGS, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2023-073

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Deschutes County.

23
24 Rory Isbell represented petitioner.

25
26 David Doyle represented respondent.

27
28 Liz Fancher represented intervenor-respondent.

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30 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
31 Member, participated in the decision.

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33 TRANSFERRED 02/02/2024

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

NATURE OF THE DECISION

Petitioner appeals a September 18, 2023, board of commissioners’ order declining review of a hearings officer’s decision approving development of a guest ranch.

MOTION TO INTERVENE

2T Sustainable Land & Cattle Holdings, LLC (intervenor), the applicant below, moves to intervene on the side of the county. The motion is allowed.

BACKGROUND

Intervenor applied for a conditional use permit and site plan review approval for a guest ranch and for two related property line adjustments. The application was deemed complete on March 28, 2023.¹ Pursuant to ORS

¹ ORS 215.427(2) provides:

“If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section and ORS 197A.470 upon receipt by the governing body or its designee of:

- “(a) All of the missing information;
- “(b) Some of the missing information and written notice from the applicant that no other information will be provided; or
- “(c) Written notice from the applicant that none of the missing information will be provided.”

1 215.427(1), the county was required to make a final decision, including resolving
2 all local appeals, on or prior to August 25, 2023.² Intervenor requested that the
3 150-day period be extended for a short period, and as a result, the county was
4 required to take final action by September 15, 2023. Record 46.

5 The county hearings officer held a hearing on the application, and on
6 September 5, 2023, the hearings officer issued a written decision approving
7 intervenor's applications. On September 15, 2023, petitioner filed a local appeal
8 seeking board of commissioners' review of the hearings officer decision.

9 On September 18, 2023 at 12:07 p.m., intervenor filed a petition for writ
10 of mandamus in Deschutes County Circuit Court pursuant to ORS 34.130.
11 Motion to Take Evidence Attachment 2, 1. Also on September 18, 2023 during
12 its meeting that began at 1:00 p.m., the board of commissioners voted to decline
13 review of the hearings officer's decision, and adopted an Order Denying Review
14 (Order). Record 10-11. On October 13, 2023, petitioner filed its Notice of Intent
15 to Appeal the Order.

² ORS 215.427(1) is commonly referred to as the 150-day rule and provides, in relevant part, that

“[t]he governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete, except as provided in subsections (3), (5) and (10) of this section.”

1 Meanwhile, events were occurring in circuit court. On September 22,
2 2023, the circuit court issued a writ of mandamus directing the county to return
3 the writ either approving the applications or showing cause why it had not done
4 so. Motion to Take Evidence Attachment 3, 6. On October 17, 2023, the circuit
5 court issued a peremptory writ commanding the county to approve the
6 applications by adopting the hearings officer's decision. Motion to Take
7 Evidence Exhibit A. On October 23, 2023, the board of commissioners adopted
8 an order responding to the peremptory writ and approving the applications.
9 Motion to Take Evidence Attachment 3.

10 **MOTION TO TAKE EVIDENCE**

11 Intervenor moves for us to take evidence not in the record in support of its
12 motion to dismiss the appeal. In making a threshold decision regarding whether
13 LUBA has jurisdiction to review the decision on appeal, LUBA may consider
14 extra-record evidence. *Homebuilders Association v. City of Eugene*, 54 Or LUBA
15 692, 700 (2007); *Vanspeybroeck v. Tillamook County*, 51 Or LUBA 546, 548
16 (2006); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33
17 (1988); *Grimstad v. Deschutes County*, 74 Or LUBA 360, 362 n 1 (2016), *aff'd*,
18 283 Or App 648, 389 P3d 1197 (2017) (LUBA may consider evidence outside
19 the record for the limited purpose of resolving disputes regarding LUBA's
20 jurisdiction). Intervenor seeks for us to consider (1) Exhibit A, the October 17,
21 2023 peremptory writ of mandamus issued by the Deschutes County Circuit
22 Court; (2) Attachment 1, the petition for writ of mandamus pursuant to ORS

1 34.130 filed in Deschutes County Circuit Court; (3) Attachment 2, the receipt of
2 the filing of the petition issued by the Oregon Judicial Department’s efilng
3 system (4) Attachment 3, an October 23, 2023 board of commissioners order
4 adopting the hearings officer’s September 5, 2023 decision in response to the
5 writ; (5) Attachment 4, the circuit court’s registry of actions for the circuit court
6 case; and (6) an affidavit from intervenor’s attorney. Petitioner does not object to
7 the motion. The motion is granted.

8 **JURISDICTION**

9 LUBA has jurisdiction to review a “land use decision.” ORS 197.825(1).
10 ORS 197.015(10)(a) provides that “land use decision” includes certain “final”
11 decisions made by local governments or special districts.

12 ORS 197.015(10)(b) through (e) contain a lengthy list of local government
13 decisions that the legislature has explicitly specified do not qualify as a “land use
14 decision.” ORS 197.015(10)(e)(B) provides that a “land use decision” does not
15 include “[a]ny local decision or action taken on an application subject to ORS
16 215.427 * * * after a petition for a writ of mandamus has been filed under ORS
17 215.429[.]”

18 ORS 215.429 provides that:

19 “(1) Except when an applicant requests an extension under ORS
20 215.427, if the governing body of the county or its designee
21 does not take final action on an application for a permit,
22 limited land use decision or zone change within 120 days or
23 150 days, as appropriate, after the application is deemed
24 complete, the applicant may file a petition for a writ of

1 mandamus under ORS 34.130 in the circuit court of the
2 county where the application was submitted to compel the
3 governing body or its designee to issue the approval.

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

9 “ * * * * *

10 “(5) The court shall issue a peremptory writ unless the governing
11 body or any intervenor shows that the approval would violate
12 a substantive provision of the county comprehensive plan or
13 land use regulations as those terms are defined in ORS
14 197.015. The writ may specify conditions of approval that
15 would otherwise be allowed by the county comprehensive
16 plan or land use regulations.”³ (Emphasis added.)

17 Intervenor moves to dismiss the appeal on the basis that LUBA lacks
18 jurisdiction under ORS 197.015(10)(e)(B) because, prior to the board of
19 commissioners’ September 18, 2023, adoption of the Order, intervenor filed a

³ ORS 215.427(4), which the parties do not cite or rely on, provides:

“If the governing body does not take final action on an application within 120 days or 150 days, as appropriate, 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 petition for writ of mandamus pursuant to ORS 215.429(1) and ORS 34.130 in
2 Deschutes County Circuit Court. Intervenor argues that its filing of the petition
3 for writ of mandamus under ORS 215.429(1) and ORS 34.130 means that the
4 circuit court has jurisdiction for all decisions regarding its applications. Petitioner
5 filed a response to the motion, and intervenor filed a response to petitioner's
6 response and the Motion to Take Evidence.

7 As the party seeking LUBA review, the burden is on petitioner to establish
8 that the appealed decision is a land use decision. *Billington v. Polk County*, 299
9 Or 471, 475, 703 P2d 232 (1985). Petitioner's response includes a number of
10 arguments that seek to establish that the hearings officer's decision qualifies as a
11 "final" decision under ORS 197.015(10)(a) and that petitioner exhausted its
12 administrative remedies as required by ORS 197.825(2)(a). Response to Motion
13 to Dismiss 7. However, those arguments do not address ORS 197.015(10)(e)(B).

14 Petitioner's only response to the basis for intervenor's motion to dismiss
15 that merits discussion is petitioner's argument that intervenor filed a petition for
16 an "alternative," rather than a "peremptory," writ of mandamus and accordingly,
17 ORS 197.015(10)(e)(B) does not apply. We reject that argument. Intervenor filed
18 a "Petition for Writ of Mandamus Pursuant to ORS 34.130," and moved for the
19 circuit court to approve the peremptory writ of mandamus as allowed by ORS
20 215.429(5). Motion to Take Evidence, Attachment 1, 1, 3, 5. The circuit court
21 issued a peremptory writ. Motion to Take Evidence Exhibit A, 2.

1 In *Stewart v. City of Salem*, 61 Or LUBA 77, *aff'd*, 236 Or App 268, 236
2 P3d 851 (2010), we dismissed an appeal of a city council decision on the
3 petitioner’s partition application that was made after the petitioner filed a petition
4 for writ of mandamus in circuit court pursuant to the city analog to ORS 215.429,
5 ORS 227.179. We concluded that “because ORS 227.179(2) expressly vests in
6 the circuit court exclusive jurisdiction over ‘all decisions regarding the
7 application’ once a petition for writ of mandamus is filed, LUBA lacks
8 jurisdiction over the city’s post-writ decision.” *Id.* at 85; *see also State ex rel*
9 *Stewart v. City of Salem*, 241 Or App 528, 532 n 2, 251 P3d 783 (2011)
10 (explaining LUBA’s holding). Under ORS 215.429(2), upon the filing of the
11 petition for writ of mandamus, “jurisdiction for all decisions regarding the
12 application, including settlement,” is with the circuit court. Accordingly, under
13 ORS 197.015(10)(e)(B), LUBA lacks jurisdiction over petitioner’s appeal of the
14 Order.

15 **MOTION TO TRANSFER**

16 Petitioner moves to transfer the appeal to circuit court pursuant to ORS
17 34.102(4), which provides:

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

1 34.010 to 34.100, the court shall dismiss the petition.”⁴

2 OAR 661-010-0075(9)(c) implements ORS 34.102(4) and provides that:

3 “If the Board determines the appealed decision is not reviewable as
4 a land use decision or limited land use decision as defined in ORS
5 197.015(10) or (12), the Board shall dismiss the appeal unless a
6 motion to transfer to circuit court is filed as provided in subsection
7 (9)(b) of this rule, in which case the Board shall transfer the appeal
8 to the circuit court of the county in which the appealed decision was
9 made.”

10 Intervenor opposes the motion to transfer. Intervenor argues that the appeal
11 is moot, and that dismissal, and not transfer, is the correct disposition of moot
12 proceedings, citing *Grabhorn v. Washington County*, 46 Or LUBA 672, 678
13 (2004) (so stating where LUBA determines that the appealed decision is a non-
14 final decision). According to intervenor, the appeal is “moot” because on October
15 17, 2023, the circuit court issued a stipulated peremptory writ and general
16 judgment of dismissal that ordered the county to approve the applications by
17 adopting the hearings officer’s decision, and on October 23, 2023, the county
18 adopted an order that did so. Therefore, intervenor argues, any decision by LUBA
19 or the circuit court would have no practical effect.

20 *Grabhorn* does not assist intervenor, because *Grabhorn* did not involve an
21 application for which a circuit court action under ORS 215.429 and ORS 34.130
22 had already been filed in which, “upon filing a petition under ORS 34.130,
23 jurisdiction for all decisions regarding the application, including settlement, shall

⁴ “Municipal corporation” includes a county. ORS 34.102(1).

1 be with the circuit court.” The circuit court thus has jurisdiction over “all
2 decisions regarding the application.” The circuit court will have the opportunity
3 to decide whether the transferred decision is moot or otherwise unreviewable.

4 The requirements of ORS 34.102(4) are met, because LUBA has
5 determined that pursuant to ORS 197.015(10)(e)(B), the challenged decision is
6 not a land use decision over which we have jurisdiction. OAR 661-010-0075(9)
7 provides that in that event, if a motion to transfer is filed timely, the appeal “shall
8 be transferred to circuit court.”

9 The appeal is transferred to the Deschutes County Circuit Court.