

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 COLUMBIA RIVERKEEPER and  
5 NW PROPERTY RIGHTS COALITION,  
6 *Petitioners,*

7  
8 vs.

9  
10 CLATSOP COUNTY,  
11 *Respondent,*

12  
13 and

14  
15 OREGON PIPELINE COMPANY, LLC,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2010-109

19 ORDER

20 **INTRODUCTION**

21 We set out the key events in this appeal in some detail in two prior orders. *Columbia*  
22 *Riverkeeper v. Clatsop County*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2010-109, Order, February  
23 17, 2011) and *Columbia Riverkeeper v. Clatsop County*, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
24 2010-109, Order Extending Deadline, April 8, 2011). We limit our discussion of the facts in  
25 this order to the facts that are needed to understand and resolve intervenor-respondent  
26 Oregon Pipeline Company, LLC's (OPC's) motion to dismiss.

27 **A. Appeal and Withdrawal of the County's November 8, 2010 Permit**  
28 **Approval Decision**

29 This appeal concerns a November 8, 2010 decision by the board of county  
30 commissioners that authorizes a 41-mile natural gas pipeline. Petitioners' notice of intent to  
31 appeal that November 8, 2010 decision to LUBA was filed on November 24, 2010. As  
32 relevant, ORS 197.830(13)(b) provides "[a]t any time subsequent to the filing of a notice of  
33 intent [to appeal] and prior to the date set for filing the record \* \* \*, the local government or  
34 state agency may withdraw its decision for purposes of reconsideration." Shortly before the

1 November 8, 2010 decision was issued, the county elected three new county commissioners.  
2 Those three new county commissioners were sworn in on January 12, 2011, and on that date  
3 the newly constituted board of county commissioners voted to withdraw the November 8,  
4 2010 decision for reconsideration. The county gave notice of its withdrawal of the decision  
5 for reconsideration on January 13, 2011. ORS 197.830(13)(b); OAR 661-010-0021(1).<sup>1</sup>  
6 OPC opposed the withdrawal. In a February 17, 2011 order, LUBA found that the notice of  
7 withdrawal was timely filed and that there was no basis for denying the county’s January 13,  
8 2011 withdrawal. Under OAR 661-010-0021(1), the 90-day deadline for the county to file  
9 its reconsidered decision with LUBA would have expired on April 13, 2011.

10 **B. OPC’s Petitions for Writs of Mandamus**

11 On March 4, 2011, OPC filed a petition for alternative writ of mandamus in Clatsop  
12 County Circuit Court under ORS 215.427 and 215.429. ORS 215.427(1) requires that a  
13 county “take final action on an application for a permit, limited land use decision or zone  
14 change” within 120 or 150 days, depending on the nature of the decision and the location of  
15 the affected property. Under ORS 215.429(1), if a county does not take final action within  
16 120 or 150 days after an application for permit approval is complete, as required by ORS  
17 215.427(1), “the [permit] applicant may file a petition for a writ of mandamus under ORS  
18 34.130 in the circuit court of the county where the application was submitted to compel the

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<sup>1</sup> The complete text of ORS 197.830(13)(b) is set out below:

“At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, or, on appeal of a decision under ORS 197.610 to 197.625, prior to the filing of the respondent’s brief, the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. An amended notice of intent shall not be required if the local government or state agency, on reconsideration, affirms the order or modifies the order with only minor changes.”

OAR 661-010-0021(1) requires that a reconsidered decision be filed with LUBA within 90 days after a notice of withdrawal for reconsideration is filed with LUBA.

1 governing body or its designee to issue the approval.” Under ORS 215.427(1), the county  
2 was required to take “final action” on OPC’s permit application within 150 days after the  
3 application was complete.

4 OPC concedes that the county’s November 8, 2010 decision was issued within the  
5 150-day deadline set by ORS 215.427(1). However, OPC contends that when the county  
6 withdrew that decision for reconsideration on January 13, 2011 that November 8, 2010  
7 decision no longer qualifies as the county “final action” on OPCs permit application, within  
8 the meaning of ORS 215.427(1). OPC contends that by March 4, 2011 the ORS 215.427(1)  
9 150-day deadline expired. On March 4, 2011, OPC filed its petition for writ of mandamus  
10 pursuant to ORS 215.429(1) to compel to county to approve its permit application. The  
11 alternative writ issued that same date.

12 The county takes the position that the 150-day deadline applies only to the November  
13 8, 2010 decision that approved OPC’s application and that ORS 215.427(1) does not apply to  
14 decisions on reconsideration pursuant to ORS 197.830(13)(b), following withdrawal of a  
15 decision that has been appealed to LUBA. The county continued with its reconsideration of  
16 the withdrawn November 8, 2010 decision, and on March 10, 2011 the county moved to  
17 dismiss OPC’s Clatsop County mandamus proceeding. On March 18, 2011 the Clatsop  
18 County Circuit vacated the alternative writ of mandamus, *sua sponte*.

19 On March 21, 2011, OPC filed another petition for writ of mandamus, this time with  
20 the Oregon Supreme Court. OPC requested that the Supreme Court direct the Circuit Court  
21 to reinstate OPC’s mandamus proceeding and issue a stay of all “proceedings and decisions”  
22 by the county until the Circuit Court mandamus proceeding is complete. On March 29,  
23 2011, the Supreme Court issued a peremptory writ and a stay. The peremptory writ orders  
24 the Clatsop County Circuit Court to “(1) vacate your order entered on March 18, 2011,  
25 vacating the alternative writ of mandamus in the underlying case; and (2) continue the  
26 mandamus process under ORS 215.429.” The stay states in part: “Adverse party Clatsop

1 County’s proceedings and decisions regarding [OPC]’s application are stayed until the trial  
2 court has complied with this court’s peremptory writ and has adjudicated the mandamus  
3 proceeding pending before it.”

4 Based on the Oregon Supreme Court peremptory writ and stay, LUBA suspended the  
5 April 13, 2011 deadline for the county to submit its decision on reconsideration, pending  
6 final resolution of the Circuit Court mandamus proceeding.

7 **MOTION TO DISMISS**

8 On April 14, 2011, after we issued our April 8, 2011 order suspending the deadline  
9 for the county to file its reconsidered decision, OPC moved to dismiss this appeal. In cases  
10 where the ORS 215.427(1) 150 day deadline applies, once a petition for writ of mandamus is  
11 filed under ORS 215.429(1), the circuit court has jurisdiction “for all decisions regarding the  
12 application.” ORS 215.429(2).<sup>2</sup> Consistent with ORS 215.429(2), under ORS  
13 197.015(10)(e)(B), any decision that a county might adopt after a petition for alternative writ  
14 of mandamus is filed under ORS 215.429(1) is not a land use decision subject to LUBA  
15 review.<sup>3</sup> Under ORS 215.429(2), it is clear that the county does not have jurisdiction to  
16 adopt a reconsidered decision on OPC’s permit application while the Circuit Court  
17 mandamus proceeding is pending. Based on those statutes and LUBA’s decision in *Stewart*  
18 *v. City of Salem*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2009-052, April 9, 2010), *aff’d* 236 Or App  
19 268, 236 P3d 851 (2010), OPC argues that this appeal must be dismissed. OPC also argues

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<sup>2</sup> ORS 215.429(2) provides:

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

<sup>3</sup> As relevant in this appeal, LUBA’s jurisdiction is limited to “land use decisions.” As defined by ORS 197.015(10), a land use decision does not include “[a]ny local decision or action taken on an application subject to ORS 215.427 or 227.178 after a petition for a writ of mandamus has been filed under ORS 215.429 or 227.179.” ORS 197.015(10)(e)(B).

1 that even if the county is ultimately successful in its motion to dismiss OPC’s pending  
2 Clatsop County mandamus proceeding, the county would suffer no prejudice if LUBA  
3 dismisses this appeal:

4 “Nor is there a reason or need for [LUBA] to extend or suspend the deadline  
5 for reconsideration while the mandamus case is proceeding. The County will  
6 not be prejudiced by a dismissal because a local government retains the  
7 authority to make a decision on reconsideration even if the underlying appeal  
8 that led to the reconsideration is dismissed. *6710 LLC v. City of Portland*, 43  
9 Or LUBA 177 (2002), *aff’d* 186 Or App 136, 63 P3d 55, *rev den* 335 Or 422,  
10 69 P3d 1232 (2003). Since the county already withdrew the previous decision  
11 that was the subject of the appeal, its authority to adopt a new decision on  
12 reconsideration is not tied to the appeal. *Id.*” Intervenor-Respondent’s  
13 Response to Respondent’s Motion for Extension of Time & Motion to  
14 Dismiss 2.

15 We first consider whether our decision in *Stewart* lends any support for OPC’s motion to  
16 dismiss and then consider whether our decision in *6710 LLC* has any bearing on whether this  
17 appeal should be dismissed.

18 **A. *Stewart v. City of Salem***

19 The different facts in *Stewart* render that case of limited assistance in resolving the  
20 jurisdictional question posed by OPC’s motion to dismiss. In *Stewart*, the permit applicant  
21 and the city took different positions regarding the date the 120 day deadline for final city  
22 action on his application began to run.<sup>4</sup> On the date that the applicant believed the 120 day  
23 deadline expired, he filed a petition for writ of mandamus in Circuit Court. The city  
24 proceeded to adopt a decision denying his application *after* the petition for writ of mandamus  
25 had been filed and while the Circuit Court mandamus proceeding was pending. Petitioner  
26 appealed that city decision to LUBA, and the city moved to dismiss the appeal. We  
27 concluded in *Stewart* that where a city nevertheless proceeds to adopt a decision on an  
28 application *after* a petition for writ of mandamus is filed, the exclusive jurisdiction that ORS

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<sup>4</sup> *Stewart* concerned a city decision rather than a county decision, but ORS 227.178 and 227.179 impose a 120 day deadline and provide a mandamus remedy that is materially identical to the ORS 215.427 and 215.429 deadlines and mandamus remedy that applies to counties.

1 227.179(2) gives to circuit courts “for all decisions regarding [an] application” for permit,  
2 limited land use decision or zone change approval includes jurisdiction “to review” any such  
3 “post-writ” decision. *Stewart*, slip op at 7-8. Because the decision that was appealed to  
4 LUBA in *Stewart* was adopted by the city *after* the applicant filed his petition for writ of  
5 mandamus with the circuit court under ORS 215.429(1), and the circuit court had exclusive  
6 jurisdiction over decisions concerning the application under ORS 215.429(2), we dismissed  
7 the appeal.<sup>5</sup>

8 If we follow *Stewart* here, under ORS 215.429(2), once OPC filed its petition for  
9 alternative writ of mandamus on March 14, 2011, the county lost jurisdiction to render a  
10 reconsidered decision on OPC’s application. The Supreme Court’s March 29, 2011 stay  
11 made it unnecessary to determine whether LUBA or the Circuit Court would have  
12 jurisdiction to review a county reconsidered decision if it had been adopted after OPC’s  
13 petition for writ of mandamus was filed on March 14, 2011 and while the mandamus  
14 proceeding remained pending. However, under our decision in *Stewart*, if the county had  
15 adopted a final reconsidered decision while the Circuit Court mandamus proceeding was  
16 pending, the Circuit Court would have had jurisdiction to review that reconsidered decision.

17 But it does not follow from our decision in *Stewart* that this LUBA appeal must be  
18 dismissed. *Stewart* was not an appeal where the appealed decision had been withdrawn for  
19 reconsideration before a petition for writ of review had been filed. As we have already  
20 noted, the county contends that the ORS 215.427(1) 150 day deadline does not apply to  
21 decisions following withdrawal of a decision on appeal to LUBA under ORS 197.830(13)(b).  
22 The county has moved to dismiss OPC’s pending mandamus proceeding. If that motion to  
23 dismiss is granted and becomes final, the Circuit Court will no longer have exclusive

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<sup>5</sup> The petitioner in *Stewart* did not ask that LUBA transfer his appeal of the belated city permit decision to the circuit court under OAR 661-010-0075(11) in the event LUBA determined it lacked jurisdiction. We therefore dismissed the appeal.

1 jurisdiction over OPC’s application, and the city would again be free to reconsider its  
2 November 8, 2010 decision. If the county were to adopt such a decision on reconsideration,  
3 petitioners have a statutory right to continue this appeal if they are “dissatisfied with the \* \*  
4 \* action after withdrawal for purposes of reconsideration[.]” *See* n 1. And in that event,  
5 LUBA would have jurisdiction to proceed with this appeal if petitioners refile their notice of  
6 intent to appeal or file an amended notice of intent to appeal. OAR 661-010-0021(5)(a).<sup>6</sup>  
7 Because we cannot know at this point whether the county’s motion to dismiss OPC’s  
8 mandamus proceeding will be granted or denied, we believe the action that is most consistent  
9 with sound principles of judicial review is to continue the suspension we ordered in our April  
10 8, 2011 Order.

11 **B. *6710 LLC v. City of Portland***

12 In *6710 LLC* the city at first denied the applicant’s request for a zoning map  
13 correction. While the applicant’s appeal of the denial to LUBA was pending, the city  
14 withdrew the decision for reconsideration. The application opponents then moved to dismiss  
15 the applicant’s appeal, arguing that the applicant’s appeal was untimely filed. LUBA agreed  
16 with the opponents and dismissed the appeal. After LUBA had dismissed the applicant’s  
17 appeal, the city nevertheless continued its deliberations regarding the withdrawn denial

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<sup>6</sup> OAR 661-010-0021(5) provides, in part:

“After the filing of a decision on reconsideration:

“(a) If the petitioner wishes review by the Board of the decision on reconsideration:

“(A) Except as provided in paragraph (B) of this subsection, the petitioner shall file an amended notice of intent to appeal together with two copies within 21 days after the decision on reconsideration is received by the Board.

“(B) In the event the local government or state agency affirms its decision or modifies its decision with only minor revisions, the petitioner may refile the original notice of intent to appeal, with the date of the decision on reconsideration indicated thereon, together with two copies within 21 days after the decision on reconsideration is received by the Board.”

1 decision and adopted a reconsidered decision in which it approved the zoning map  
2 correction. The application opponents then appealed the reconsidered decision to LUBA and  
3 argued to LUBA that the city lacked jurisdiction to adopt the reconsidered decision once  
4 LUBA dismissed the applicant’s appeal. The application opponents argued that once that  
5 appeal was dismissed, the city decision denying the requested zoning map correction became  
6 the city’s final decision. LUBA rejected the application opponents’ argument in *6710 LLC*,  
7 and concluded that the city had “authority to make a decision on reconsideration, even when  
8 the appeal that led to the withdrawal for reconsideration is dismissed.” *6710 LLC*, 43 Or  
9 LUBA at 183.

10 In the reasoning that led up to our conclusion that LUBA’s dismissal of the appeal  
11 did not affect the city’s authority to continue to reconsider the decision that was withdrawn  
12 in the dismissed appeal, we stated that the statutes are “fairly clear” regarding that retained  
13 authority. *Id.* at 182. We now question whether the statutes do support that conclusion, but  
14 we need not revisit that question here. It may be that the county could proceed with  
15 reconsideration of the November 8, 2010 decision if its motion to dismiss OPC’s mandamus  
16 proceeding is granted, even if LUBA were to dismiss this appeal before the mandamus  
17 proceeding is dismissed. In that event it might be that any rights the “county” might have in  
18 this matter would not be prejudiced. However, it is the *petitioners* that ORS 197.830(13) and  
19 OAR 661-010-0021 give a right to revive this appeal if they are “dissatisfied with the  
20 [county] action after withdrawal for purposes of reconsideration[.]” *See* ns 1 and 6. As far  
21 as we can tell, that right likely would be lost if we were to grant the OPC’s motion to  
22 dismiss, and we therefore conclude that our decision in *6710 LLC* provides no basis for  
23 granting OPC’s motion to dismiss.

24 **C. Conclusion**

25 For the reasons explained above, OPC’s motion to dismiss is denied. We continue to  
26 believe that the appropriate course in the circumstances presented in this appeal is to suspend

1 the deadline for the county to submit its reconsidered decision. As LUBA was preparing to  
2 issue this order, it received a May 20, 2011 letter from the county advising LUBA that the  
3 Circuit Court had dismissed OPC's petition for writ of mandamus. A copy of the Circuit  
4 Court's May 16, 2011 letter opinion is attached to the county's letter. An appeal of the  
5 Circuit Court judgment seems likely, once a judgment is entered in the Circuit Court  
6 mandamus proceeding. The Circuit Court's May 16, 2011 letter opinion has no immediate  
7 effect on the reasoning that leads us to conclude in this order that we should (1) deny OPC's  
8 motion to dismiss this appeal and (2) continue the suspension of this appeal that we ordered  
9 on April 8, 2011.

10 If OPC does not appeal the Circuit Court's judgment, any party may request that we  
11 reactivate this appeal and establish a new deadline for the county to issue its reconsidered  
12 decision. If OPC does appeal the Circuit Court's judgment dismissing its petition for writ of  
13 mandamus, once an appellate judgment is issued in that appeal, any party may request that  
14 LUBA take action consistent with the appellate judgment. Unless and until LUBA receives a  
15 request to reactivate this appeal or take other appropriate action, this appeal shall remain  
16 suspended.

17 Dated this 24<sup>th</sup> day of May, 2011.

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Michael A. Holstun  
Board Chair