

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
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5 JOHN DEVEREUX and NORVA DEVEREUX,
6 *Petitioners,*

7
8 vs.
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10 DOUGLAS COUNTY,
11 *Respondent,*

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13 and

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15 WILLIAM FRIEBEL, DEBRA FRIEBEL,
16 and WILLIAM HEMPHILL,
17 *Intervenors-Respondents.*
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19 LUBA No. 2011-059

20 ORDER ON MOTION TO TRANSFER

21 On September 29, 2011, LUBA issued its final opinion and order dismissing this
22 appeal for lack of jurisdiction. OAR 661-0100-0075(11) provides that a party may request
23 transfer of an appeal to circuit court, in the event LUBA determines that it lacks jurisdiction
24 to review the appealed decision, provided that the request for transfer is filed not later than
25 14 days from the date the Board's jurisdiction is challenged. Intervenors-respondents
26 (intervenors) challenged whether LUBA had jurisdiction in their brief filed September 6,
27 2011. Petitioners did not file the motion to transfer this appeal to circuit court until October
28 3, 2011, more than 14 days from the date jurisdiction was challenged, and several days after
29 LUBA issued its final opinion and order dismissing the appeal. Intervenors oppose the
30 motion to transfer, arguing that it was untimely filed more than 14 days after the
31 jurisdictional challenge was raised. Petitioners reply that an untimely motion to transfer
32 should be denied only if granting the motion would prejudice other parties' substantial rights,
33 and intervenors have not argued that granting the motion would prejudice their substantial
34 rights. OAR 661-010-0005 (technical violations of LUBA's rules not affecting the

1 substantial rights of the parties shall not interfere with LUBA’s review).

2 If petitioners had filed the motion to transfer before LUBA issued its final opinion
3 and order dismissing the appeal, we might agree with petitioners that, absent a showing of
4 prejudice to intervenors’ substantial rights, petitioners’ filing of the motion to transfer more
5 than 14 days after the jurisdictional challenge was raised is not a basis to deny the motion.
6 However, as intervenors also argue, LUBA lacks authority to modify or reconsider a final
7 opinion once issued. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524,
8 537 (2002) (LUBA no longer has jurisdiction over an appeal once a party seeks judicial
9 review of LUBA’s final order in that appeal, pursuant to ORS 197.850); *Sarti v. City of Lake*
10 *Oswego*, 20 Or LUBA 562 (1991) (the Board lacks statutory authority to reconsider its final
11 decisions); *Forest Highlands Neighborhood Association v. City of Lake Oswego*, 10 Or
12 LUBA 416 (1984) (the Board as a state agency has only those powers granted by legislature,
13 and the Board lacks statutory authority to reconsider its final decisions). Changing the
14 disposition in our September 29, 2011 final opinion likely would qualify as a modification or
15 reconsidering of that final opinion. Even if it would not, LUBA has already determined that
16 it lacks jurisdiction to transfer an appeal to circuit court, after it has issued a final decision
17 dismissing the appeal. *Ehle v. City of Salem*, 55 Or LUBA 685, 687 (2007); *see also Miller*
18 *v. City of Dayton*, 113 Or App 300, 305, 833 P2d 299 (1992) (LUBA did not err by
19 dismissing an appeal rather than transferring the appeal to circuit court, where petitioner had
20 not filed a motion to transfer pursuant to OAR 661-010-0075(11)).

21 Here, petitioners request that LUBA modify the disposition of the September 29,
22 2011 final opinion and order from “dismissal” to “transfer.” We agree with intervenors that
23 LUBA lacks authority to modify the disposition of a final opinion and order. The motion to
24 transfer this appeal to circuit court is denied.

1 Dated this 27th day of October, 2011.

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Tod A. Bassham

9 Board Member