



1 \_\_ Or LUBA \_\_ (LUBA No. 2011-040, November 14, 2011).

2 On November 17, 2011, petitioner filed a motion to transfer this appeal to circuit  
3 court, pursuant to ORS 34.102(4) and OAR 661-010-0075(11)(a). OAR 661-010-  
4 0075(11)(b) requires that a motion to transfer must be filed within 14 days of the date that  
5 the jurisdictional issue is first raised in a respondent’s brief or motion, or on the Board’s own  
6 motion. *See* n 1. Petitioner first contends that the motion to transfer is not untimely, and was  
7 filed within 14 days of the date that LUBA first raised the jurisdictional issue “on its own  
8 motion,” for purposes of OAR 661-010-0075(11)(b). According to petitioner, for LUBA to  
9 raise a jurisdictional issue “on its own motion” within the meaning of OAR 661-010-  
10 0075(11)(b), LUBA must issue a written order to the parties, or at least orally frame the  
11 jurisdictional issue to the parties in the form of a “motion.”

12 Alternatively, petitioner argues that OAR 661-010-0075(11)(c), in providing that  
13 LUBA will dismiss an appeal unless a party files a motion to transfer under OAR 661-010-  
14 0075(11)(b), violates ORS 34.102(4). Petitioner notes that the statute provides in relevant  
15 part that a decision that is “not reviewable as a land use decision \* \* \* *shall* be transferred to  
16 the circuit court and treated as a petition for writ of review.” *See* n 1 (emphasis added).  
17 According to petitioner, ORS 34.102(4) does not require a petitioner to file a motion or

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“(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12).

“(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent’s brief or motion that challenges the Board’s jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than 14 days after the date the moving party learns the Board has raised a jurisdictional issue.

“(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.”

1 request transfer within any particular time frame in order to obtain a transfer to circuit court,  
2 but instead makes the transfer mandatory once LUBA concludes that the challenged decision  
3 is not a land use decision, even in the absence of a request to transfer. *But see Miller v. City*  
4 *of Dayton*, 113 Or App 300, 305, 833 P2d 299 (1992) (LUBA did not err in not transferring  
5 an appeal to circuit court under ORS 19.230(4), the prior codification of ORS 34.102(4),  
6 because the petitioner had not filed a motion to transfer pursuant to the predecessor to OAR  
7 661-010-0075(11))

8 Finally, petitioner argues that OAR 661-010-0075(11)(b) and (c) violate the Due  
9 Process Clause of the United States Constitution, because the rules require a petitioner to  
10 anticipate an adverse ruling by LUBA on jurisdictional grounds and to file a conditional  
11 motion to transfer prior to LUBA's ruling. According to petitioner, LUBA has no legitimate  
12 governmental interest in dismissing rather than transferring an appeal, and no interest in  
13 creating motion requirements and deadlines that may preclude a party from requesting  
14 transfer.

15 As petitioner recognizes in the last paragraph of his motion, LUBA has long held that  
16 we lack the statutory authority to reconsider a final order and opinion, once issued. *Central*  
17 *Klamath County CAT v. Klamath County*, 41 Or LUBA 524, 537 (2002); *Sarti v. City of Lake*  
18 *Oswego*, 20 Or LUBA 562 (1991); *Forest Highlands Neighborhood Association v. City of*  
19 *Lake Oswego*, 10 Or LUBA 416 (1984). More pertinently, in *Ehle v. City of Salem*, 55 Or  
20 LUBA 685, 687 (2007), and more recently in *Devereux v. Douglas County*, \_\_ Or LUBA \_\_  
21 (LUBA No. 2011-059, October 27, 2011, Order on Motion to Transfer), we held that we lack  
22 authority to modify the disposition of a final opinion, based on a motion to transfer that was  
23 filed after we have issued our final opinion. In the present case, petitioner cites no statute or  
24 other law that authorizes LUBA to reconsider or change the disposition of a final opinion.  
25 Thus, even assuming without deciding that our final opinion dismissing this appeal  
26 constitutes a violation of our rules, ORS 34.102(4) or the Due Process Clause, as petitioner

1 alleges, the only means to correct such errors is an appeal to the Court of Appeals pursuant to  
2 ORS 197.850 *et seq.*

3 The motion to transfer is denied.

4 Dated this 1st day of December, 2011.

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Tod A. Bassham  
Board Member