

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 This appeal concerns a November 8, 2010 decision by the Clatsop County Board of
21 County Commissioners that authorizes a 41-mile long natural gas pipeline. Petitioners
22 appealed that decision to LUBA, and on January 13, 2011, the county gave notice that it was
23 withdrawing its decision for reconsideration pursuant to ORS 197.830(13)(b) and OAR 661-
24 010-0021(1). Intervenor objected to the withdrawal, but in a February 17, 2011 order, LUBA
25 allowed the withdrawal for reconsideration.

26 Pursuant to ORS 215.429, intervenor subsequently filed a petition for writ of
27 mandamus on March 4, 2011 to compel the county to approve its application. Under ORS
28 215.427(1), the county was required to take final action on intervenor's permit application
29 within 150 days. Although the county's November 8, 2010 decision complied with that 150-
30 day deadline, intervenor took the position in the mandamus proceeding that the 150-day
31 deadline also applied to any action the county might take following withdrawal of its
32 November 8, 2010 decision for reconsideration pursuant to ORS 197.830(13)(b) and OAR
33 661-010-0021(1). Intervenor took the position the 150-deadline expired after the county

1 withdrew its November 8, 2010 decision for reconsideration. ORS 215.429 authorizes
2 applicants to file a petition for writ of mandamus to compel a county to approve a permit
3 application, where the county fails to comply with the ORS 215.427(1) 150-day deadline.
4 Intervenor’s petition for writ of mandamus was dismissed by the circuit court on May 16,
5 2011. The circuit court concluded that ORS 215.427(1) does not apply when a decision is
6 withdrawn for reconsideration during a LUBA appeal and concluded it did not have
7 jurisdiction to grant mandamus relief under ORS 215.429. The circuit court’s judgment was
8 entered on June 6, 2011, and that decision was affirmed on appeal. *State ex rel Oregon*
9 *Pipeline v. Clatsop County*, 253 Or App 138, 228 P3d 1024 (2012), *rev den* 353 Or 428, 299
10 P3d 889 (2013). The Court of Appeals entered its “Amended Appellate Judgment and
11 Supplemental Judgment” on June 20, 2013, and the mandamus proceeding came to an end,
12 over 27 months after it was filed on March 4, 2011.

13 On March 7, 2011, three days after intervenor filed its petition for writ of mandamus
14 with the circuit court, intervenor advised the county that it believed that under ORS
15 215.429(2) the circuit court had exclusive jurisdiction over its application from the time the
16 petition for writ of mandamus was filed on March 4, 2011, and the county no longer had
17 jurisdiction to render a decision on reconsideration.¹ The county nevertheless proceeded with
18 its previously noticed March 9, 2011 public hearing. At the conclusion of that hearing, the
19 board of county commissioners voted to deny intervenor’s application and directed county
20 staff to return with a written decision on March 30, 2011. However, before the county took
21 final action on a written decision to deny intervenor’s application, intervenor sought and was
22 granted an emergency stay by the Oregon Supreme Court on March 29, 2011, ordering the
23 county to suspend its reconsideration process until the circuit court’s adjudication of the writ
24 of mandamus was complete. On May 24, 2011, LUBA issued an order suspending this

¹ ORS 215.429(2) provides, in part, that “[u]pon filing a petition [for writ of mandamus], jurisdiction for all decisions regarding the application, including settlement, shall be with the circuit court.”

1 appeal until the mandamus proceeding was complete and an appellate judgment was entered
2 in any appeal of the circuit court's decision on intervenor's petition for writ of mandamus.
3 As just noted, that appellate judgment was entered on June 20, 2013.

4 On June 26, 2013, the county moved to reactivate this appeal, requesting 45 days to
5 complete its reconsideration process. On July 10, 2013, intervenor joined in the county's
6 request to reactivate this appeal. However, intervenor requests that LUBA go further and
7 determine that the county lacked jurisdiction to conduct a public hearing in this matter on
8 March 9, 2011, because under ORS 215.429(2) the circuit court had exclusive jurisdiction
9 over the application at that time. Intervenor contends the county must conduct another public
10 hearing, now that the mandamus proceeding is complete and the county has jurisdiction to do
11 so. Intervenor also requests that LUBA rule that the county commissioners must disclose any
12 *ex parte* communications they may have had in this matter and allow intervenors to respond
13 to any previously undisclosed *ex parte* communications and challenge the impartiality of
14 individual county commissioners. Intervenor points out that there is language in the Court of
15 Appeals' decision in *State ex rel Oregon Pipeline* that suggests LUBA has a "supervisory"
16 role when appealed land use decisions are withdrawn for reconsideration. Intervenor urges
17 that LUBA exercise that supervisory role to require that a new public hearing be provided, *ex*
18 *parte* contacts be disclosed and intervenor be given an opportunity to challenge the
19 impartiality of individual county commissioners.

20 The county commissioners have not yet rendered a final written decision following its
21 withdrawal of the decision for reconsideration on January 13, 2011. And because the county
22 has not yet rendered its final decision on consideration, the county has not yet filed its
23 decision on reconsideration under OAR 661-010-0021(3). Until the county does so, LUBA
24 does not have a final county decision before it for review, to determine whether the decision
25 on reconsideration was correctly decided or whether the county committed procedural errors
26 in rendering that decision.

1 Intervenor reads too much into the Court of Appeals’ decision in *State ex rel Oregon*
2 *Pipeline*. In that case intervenor argued to the Court of Appeals that because OAR 661-010-
3 0021(5) requires “refiling of the original notice of intent to appeal or filing of an amended
4 notice of intent to appeal” if a party is dissatisfied with the decision on reconsideration,
5 LUBA lacks jurisdiction over the withdrawn decision until a decision on reconsideration is
6 filed with LUBA following withdrawal. In rejecting that argument, the Court of Appeals
7 observed “the withdrawal of an order does not divest LUBA of its ongoing supervisory role
8 over the reconsideration process before the local government.” 253 Or App at 148-49.

9 In its discussion that follows the above-quoted language, the Court of Appeals makes
10 it clear that under LUBA’s rules, LUBA’s supervisory role includes taking action to
11 reactivate an appeal if the local government that withdraws its decision fails to adopt a timely
12 decision on reconsideration. *Id.* at 149 (“LUBA’s] rule imposes safeguards against indefinite
13 delay or obstruction in the withdrawal and reconsideration process by authorizing LUBA to
14 ‘restart[] the appeal’ if the local government fails to file a decision on reconsideration within
15 the time limit established by LUBA.”). But there is nothing in *State ex rel Oregon Pipeline*
16 that even remotely suggests the Court of Appeals envisions that LUBA’s supervisory role
17 extends to issuing orders determining the propriety of interlocutory steps that the county takes
18 following withdrawal, prior to adopting its final decision on reconsideration, or giving the
19 county instructions regarding its *ex parte* contact disclosure or impartial decision maker
20 obligations. We decline intervenor’s invitation to comment on the propriety of the March 9,
21 2011 public hearing or to provide advice to the county concerning possible *ex parte* contacts
22 or bias. We express no position here on the merits of the parties’ arguments concerning those
23 matters.

24 The county only requests 45 days to complete its decision on reconsideration. Under
25 OAR 661-010-0021(1) “[a] copy of the decision on reconsideration shall be filed with
26 [LUBA] within 90 days after the filing of the notice of withdrawal or within such other time

1 as [LUBA] may allow.” Given the unusual course of events in this appeal and the legal
2 issues that have been generated by that unusual course of events, we exercise our discretion
3 to allow 90 additional days for the county to complete its deliberations and render a decision
4 on reconsideration. The county shall file its decision on reconsideration in this matter not
5 later than 90 days from the date of this order.

6 Dated this 29th day of August, 2013.
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Michael A. Holstun
Board Chair