

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 LARRY KINE,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11
12 and

13
14 ELKAI WOODS
15 HOMEOWNERS ASSOCIATION,
16 ELKAI WOODS FRACTIONAL
17 HOMEOWNERS ASSOCIATION,
18 and SEVENTH MOUNTAIN GOLF
19 VILLAGE ASSOCIATION, INC.,
20 *Intervenors-Respondents.*

21
22 LUBA No. 2018-130

23
24 ORDER

25 **MOTION TO INTERVENE**

26 Elkai Woods Homeowners Association, Elkai Woods Fractional
27 Homeowners Association, and Seventh Mountain Golf Village Association, Inc.
28 move to intervene on the side of the respondent. No party opposes the motion
29 and it is allowed.

1 **ORDER SUSPENDING REVIEW**

2 The challenged decision is a board of county commissioners decision
3 concluding that petitioner's property constitutes one lot of record. We describe
4 the actions that led to the challenged decision before proceeding to suspend our
5 review of the challenged decision.

6 **A. The County Proceedings**

7 In July 2016, petitioner submitted a Lot of Record Verification for his
8 property seeking a county determination about the number of developable lots
9 that the property includes. Record 1168. The application was deemed complete
10 on August 29, 2016. Record 765. The county hearings officer conducted a
11 hearing on October 11, 2016, and on January 4, 2017, issued a decision on the
12 application. Record 763-72, 876. Petitioner appealed the hearings officer's
13 decision to the board of county commissioners. A hearing was scheduled for
14 March 8, 2017, and was subsequently postponed at petitioner's request to April
15 5, 2017. Record 568. The record was left open, and the board of county
16 commissioners considered the appeal on August 23, 2017 and again on October
17 25, 2017. Record 153-54, 193-94. On October 25, 2017, the board of county
18 commissioners reopened the record to allow further evidence and testimony in
19 writing until November 15, 2017. Thereafter, the board of county commissioners
20 took no further action on the application until July 30, 2018, when the board of
21 county commissioners deliberated on the appeal. Record 40. On October 1, 2018,

1 the board of commissioners issued its final written decision concluding that
2 petitioner's property constitutes one lot of record. Record 18.

3 **B. The Mandamus Proceeding**

4 On January 31, 2018, while his application was pending before the board
5 of county commissioners, petitioner filed a mandamus action in Deschutes
6 County Circuit Court pursuant to ORS 215.429 and under ORS 34.130, alleging
7 that the county failed to take final action on the application within 150 days as he
8 alleged was required by ORS 215.427(1). Some of the intervenors in this appeal
9 intervened in the mandamus action and moved to dismiss the appeal. On May 29,
10 2018, the circuit court entered an order granting those intervenors' motion to
11 dismiss the appeal. According to petitioner, the circuit court dismissed the
12 petition for alternative writ of mandamus because the court concluded that the
13 application was not an application for a "permit" as that term is used in ORS
14 215.429.¹ On June 18, 2018, the circuit court entered a general judgment
15 dismissing the appeal. On June 28, 2018, petitioner appealed the circuit court's
16 judgment to the Court of Appeals (A168165), where the matter is currently
17 pending and petitioner's opening brief has been filed.

¹ At the Board's request, after oral argument, petitioner submitted a letter to the Board explaining the mandamus proceeding, the reason for the circuit court's dismissal of the proceeding, and the status of the pending appeal before the Court of Appeals.

1 **C. The LUBA Appeal**

2 Petitioner timely appealed the board of county commissioners' October 1,
3 2018 decision to LUBA, and briefing proceeded. At oral argument, the Board
4 asked questions of the parties regarding the status of the pending appeal of the
5 circuit court's decision before the Court of Appeals. The Board informed the
6 parties of its concern about the possibility that proceeding with the LUBA appeal
7 might lead to inconsistent rulings from LUBA and the Court of Appeals or the
8 circuit court on the ultimate disposition of petitioner's application. The Board
9 also noted that questions exist about whether LUBA or the circuit court has
10 jurisdiction over the board of county commissioners' decision on the application.
11 The Board informed the parties that it would likely suspend the LUBA appeal
12 pursuant to ORS 197.840(1)(d) because there is a strong possibility of
13 inconsistent rulings if we were to proceed to resolve the merits of petitioner's
14 appeal of the board of county commissioners' decision, before the Court of
15 Appeals has ruled on petitioner's appeal of the mandamus decision, and before
16 any subsequent circuit court action that might be required by the Court of
17 Appeals' disposition of that appeal.

18 **D. Order Suspending Review**

19 ORS 197.840(1)(d) and (2) allow the Board to grant a continuance of the
20 77-day period for issuance of its final opinion under ORS 197.830(14) where, as
21 relevant here, the Board finds that "the ends of justice served by granting the
22 continuance outweigh the best interest of the public and the parties in having a

1 decision within 77 days.” ORS 197.840(2) sets forth the factors the Board must
2 consider in granting a continuance under ORS 197.840(1)(d) including, as
3 relevant here, that “the failure to grant a continuance in the proceeding would be
4 likely to make a continuation of the proceeding * * * result in a miscarriage of
5 justice.” ORS 197.840(2)(a). For the following reasons, we believe the present
6 circumstances warrant a finding that failure to grant a continuance of the LUBA
7 proceeding while the appeal of the circuit court’s dismissal of the mandamus
8 action is pending before the Court of Appeals would “result in a miscarriage of
9 justice” and that “the ends of justice served by granting the continuance outweigh
10 the best interest of the public and the parties in having a decision within 77 days.”
11 ORS 197.840(2).

12 First, conflicting decisions could result if we proceed with the LUBA
13 appeal while the appeal of the circuit court’s judgment dismissing the mandamus
14 proceeding is pending, possibly resulting in a “miscarriage of justice.” The Court
15 of Appeals could reverse the circuit court’s decision and send the mandamus
16 proceeding back to the circuit court to issue a decision on the very same
17 application that the board of county commissioners has issued a decision on, and
18 that is challenged in the LUBA appeal. If we proceed with the LUBA appeal on
19 LUBA’s accelerated review schedule, it is likely that our disposition of the appeal
20 (and any judicial review of our decision) would occur long before the Court of
21 Appeals has determined whether the circuit court correctly concluded that it

1 lacked jurisdiction in the mandamus proceeding, and could result in conflicting
2 obligations for the county.

3 Second, and more importantly, we note that statutes exist that appear to
4 divest LUBA of jurisdiction over a local government decision that is issued after
5 a writ of mandamus is filed under ORS 215.429. We first note that ORS
6 215.429(2) provides that:

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

12 Second, ORS 197.015(10)(e)(B), adopted in the same 1999 legislation as the
13 current version of ORS 215.429(2), excludes from the definition of “land use
14 decision” subject to LUBA’s exclusive jurisdiction:

15 “Any local decision or action taken on an application subject to ORS
16 215.427 or 227.178 after a petition for a writ of mandamus has been
17 filed under ORS 215.429 or 227.179[.]”

18 In *Stewart v. City of Salem*, 61 Or LUBA 77, *aff’d*, 236 Or App 268, 236 P3d 851
19 (2010), we dismissed an appeal of a city council decision on the petitioner’s
20 partition application that was made after the petitioner filed a petition for writ of
21 mandamus in circuit court pursuant to the city analog to ORS 215.429, ORS
22 227.179.² We concluded that “because ORS 227.179(2) expressly vests in the

² In that case, the circuit court dismissed the writ of mandamus action for lack of subject matter jurisdiction, and petitioner appealed the circuit court’s judgment

1 circuit court exclusive jurisdiction over ‘all decisions regarding the application’
2 once a petition for writ of mandamus is filed, LUBA lacks jurisdiction over the
3 city’s post-writ decision.” *Id.* at 85; *see also State ex rel Mel Stewart v. City of*
4 *Salem*, 241 Or App 528, 532 n 2, 251 P3d 783 (2011) (explaining LUBA’s
5 holding). We concluded that ORS 197.015(10)(e)(B) provides contextual support
6 for the conclusion that, in amending ORS 227.179 (and ORS 215.429) in 1999
7 and simultaneously enacting ORS 197.015(10)(e)(B), the legislature intended to
8 vest the circuit court, and not LUBA, with jurisdiction over all post-writ decisions
9 on an application. Our holding in *Stewart* strongly suggests that the Deschutes
10 County Circuit Court has jurisdiction over the board of county commissioners’
11 October 1, 2018 decision on petitioner’s land use application after the petition for
12 writ of mandamus was filed. If so, the appropriate disposition of the present
13 appeal to LUBA would be either dismissal or transfer to circuit court.

14 For the reasons explained above, the Board hereby grants a continuance of
15 the 77-day deadline in ORS 197.830(14).³ Petitioner shall notify the Board within
16 fourteen days after the Court of Appeals issues its opinion in A168165, and again
17 within 14 days after the Court of Appeals issues the appellate judgment in that
18 appeal. After the Court of Appeals issues the appellate judgment in A168165, we

of dismissal to the Court of Appeals, where the appeal of the circuit court’s
decision was pending when LUBA dismissed the LUBA appeal of the city
council’s decision.

³ The 77-day deadline currently expires on February 19, 2019.

1 will reactivate this appeal. When we reactivate this appeal, we will likely consider
2 the issue of the Board's jurisdiction over the appeal of the county's decision and
3 may request briefing from the parties on the jurisdictional issue.

4 Dated this 13th day of February, 2019.
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10 Melissa M. Ryan
Board Chair