

FILED: October 24, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE ex rel OREGON PIPELINE COMPANY, LLC,
Relator-Appellant,

v.

CLATSOP COUNTY,
a political subdivision,
Defendant-Respondent,

and

COLUMBIA RIVERKEEPER
and THE NORTHWEST PROPERTY RIGHTS COALITION,
Intervenors-Respondents.

Clatsop County Circuit Court
112101

A148770

Philip L. Nelson, Judge.

Argued and submitted on August 10, 2012.

E. Michael Connors argued the cause for appellant. With him on the briefs was Hathaway Koback Connors LLP.

Harlan E. Jones argued the cause for respondent Clatsop County. With him on the brief was Jordan Ramis PC.

Brett VandenHeuvel argued the cause for respondents Columbia River Keeper and The Northwest Property Rights Coalition. With him on the brief was Lauren Golberg.

Before Armstrong, Presiding Judge, and Brewer, Judge, and Norby, Judge pro tempore.

BREWER, J.

Affirmed.

1 BREWER, J.

2 Appellant Oregon Pipeline (Pipeline) appeals from a circuit court judgment
3 dismissing its petition for a writ of mandamus, brought under ORS 215.429, in which it
4 sought to compel respondent Clatsop County (the county) to approve Pipeline's
5 application for a land use approval of a natural gas pipeline. The circuit court dismissed
6 the petition for lack of jurisdiction, and we affirm.

7 The pertinent facts are procedural. Pipeline applied to the county for land
8 use approval to construct a natural gas pipeline, pursuant to a review of a conditional use
9 permit and a geologic hazard permit. Pipeline's application was deemed complete on
10 February 16, 2010. On November 8, 2010, the county issued a written decision,
11 including findings of fact, approving that application. A third party, Columbia
12 Riverkeeper, appealed the county's decision to the Land Use Board of Appeals (LUBA).
13 During the pendency of that appeal--in which Pipeline actively participated--the county,
14 on January 13, 2011, sought permission from LUBA to withdraw its decision for
15 reconsideration pursuant to ORS 197.830(13)(b). Pipeline objected.

16 On February 9, 2011, while LUBA was considering the county's request,
17 the county held a public meeting in which Pipeline participated. At that meeting, a
18 county representative indicated, among other things, that the county intended to issue
19 proposed findings and conclusions on reconsideration by March 30, 2011. On February
20 17, 2011, LUBA allowed the county to withdraw the decision for reconsideration,
21 rejecting Pipeline's objection and setting a deadline of April 13, 2011, for the county to

1 complete the reconsideration process.

2 On March 4, 2011, Pipeline filed a petition for a writ of mandamus in
3 which it asked the circuit court to compel the county to approve its land use application.
4 Pipeline argued that, because the county had withdrawn its decision, the county had
5 failed, for purposes of ORS 215.429, to take "final action" on the application within 150
6 days after the application was deemed complete. Thus, Pipeline asserted, it was entitled
7 to a circuit court judgment compelling the county to approve the application.

8 ORS 215.429 provides, in pertinent part:

9 "(1) Except when an applicant requests an extension under ORS
10 215.427, if the governing body of the county or its designee does not take
11 *final action* on an application for a permit, limited land use decision or zone
12 change within 120 days or 150 days, as appropriate, after the application is
13 deemed complete, the applicant may file a petition for a writ of mandamus
14 under ORS 34.130 in the circuit court of the county where the application
15 was submitted to compel the governing body or its designee to issue the
16 approval.

17 "(2) The governing body shall retain jurisdiction to make a land use
18 decision on the application until a petition for a writ of mandamus is filed.
19 Upon filing a petition under ORS 34.130, jurisdiction for all decisions
20 regarding the application, including settlement, shall be with the circuit
21 court."

22 (Emphasis added.)

23 The county moved to dismiss the petition for lack of jurisdiction, arguing
24 that, because its decision had been appealed to LUBA, that tribunal had exclusive
25 jurisdiction over the matter, and the withdrawal and reconsideration process that ensued
26 had not affected the finality of its original decision. The circuit court agreed with the
27 county, explaining:

1 "In the present case, there is no indication Clatsop County did not
2 make a final decision on November 8, 2010. Pipeline also acknowledges
3 the county can withdraw its decision pursuant to ORS 187.830(13).
4 Pipeline takes the position that since Clatsop County cannot at this time
5 point to a 'final' decision, there is no final decision. As a result it is entitled
6 to mandamus relief pursuant to ORS 215.429. The problem with that
7 argument is that this court would have to ignore the specific legislation that
8 allows Clatsop County and LUBA to follow the reconsideration process.
9 This court would also have to disregard those statutes and appellate
10 decisions which place the appeal process of land use decisions exclusively
11 in LUBA's realm.

12 "By statute and Oregon Supreme Court decision, exclusive
13 jurisdiction of Pipeline's land use application is still with LUBA. If the
14 reconsideration process is being abused by Clatsop County or in violation
15 of either state statute or LUBA regulation, then LUBA is the only tribunal
16 that can make a decision."

17 The circuit court entered a judgment dismissing Pipeline's petition; this appeal followed.¹

18 The dispositive jurisdictional issue on appeal is whether, for purposes of
19 ORS 215.429, the county took qualifying final action on Pipeline's application, despite
20 the fact that it later withdrew its decision during the course of the appeal to LUBA. To
21 resolve that issue, we consider the nature of the mandamus remedy that Pipeline sought
22 in the context of the pertinent statutory framework for review of land use decisions.

23 In effect, ORS 215.429(1) operates "to ensure that local governing bodies
24 issue a decision," by providing an applicant with a mandamus remedy if the local

¹ The reader may wonder what ultimately occurred on reconsideration before the county. Without elaborating in unhelpful detail, suffice it to say that the record shows that, in a separate peremptory mandamus proceeding, the Supreme Court entered an order on March 29, 2011, staying the county's "proceedings and decisions regarding [plaintiff's] application until" the circuit court adjudicated the mandamus proceeding at issue here. The parties have not edified us as to what, if any, further proceedings have occurred on reconsideration before the county after the trial court entered its judgment dismissing this action.

1 government fails to take final action within the applicable time limit. *Simon v. Board of*
2 *Comm. of Marion Co.*, 91 Or App 487, 491, 755 P2d 741 (1988) (so holding with regard
3 to former ORS 215.428, a statute substantially identical to ORS 215.429).² The
4 mandamus remedy "is not designed to provide review of a local government's land use
5 decisions," but, instead, provides "an incentive for timely governmental action, along
6 with a remedial mechanism that results in an approval," subject to defenses that the local
7 government must prove. *State ex rel Compass Corp. v. City of Lake Oswego*, 319 Or
8 537, 542, 544, 878 P2d 403 (1994) (construing ORS 227.178(7), the analog to ORS
9 215.429 that applies to city governments).

10 When a local government makes a land use decision, the legislature has
11 provided for exclusive review by LUBA. *See* ORS 197.825 (providing that LUBA "shall
12 have exclusive jurisdiction to review any land use decision * * * of a local government").
13 LUBA's review authority is prescribed by ORS 197.830, which provides, in pertinent
14 part:

² *Former* ORS 215.428(7) provided:

"If the governing body of the county or its designate does not take final action on an application for a permit or zone change within 120 days after the application is deemed complete, the applicant may apply in the circuit court of the county where the application was filed for a writ of mandamus to compel the governing body or its designate to issue the approval. The writ shall be issued unless the governing body shows that the approval would violate a substantive provision of the county comprehensive plan or land use regulations as defined in ORS 197.015."

1 "(1) Review of land use decisions or limited land use decisions
2 under ORS 197.830 to 197.845 shall be commenced by filing a notice of
3 intent to appeal with the Land Use Board of Appeals.

4 "* * * * *

5 "(13)(b) At any time subsequent to the filing of a notice of intent and
6 prior to the date set for filing the record * * * the local government or state
7 agency may withdraw its decision for purposes of reconsideration. If a
8 local government or state agency withdraws an order for purposes of
9 reconsideration, it shall, within such time as the board may allow, affirm,
10 modify or reverse its decision. If the petitioner is dissatisfied with the local
11 government or agency action after withdrawal for purposes of
12 reconsideration, the petitioner may refile the notice of intent and the review
13 shall proceed upon the revised order. An amended notice of intent shall not
14 be required if the local government or state agency, on reconsideration,
15 affirms the order or modifies the order with only minor changes."

16 The withdrawal and reconsideration process set out in ORS 197.830(13)(b)
17 is, thus, an integral dimension of LUBA's review jurisdiction. The Supreme Court
18 explained the relationship between the mandamus statutes and the LUBA review process
19 in *Compass*:

20 "LUBA reviews a local government decision. The predicate for a
21 mandamus proceeding under [the mandamus statutes] is the local
22 government's failure to make a timely final decision on an application.
23 Because the local government has failed to make a decision, the mandamus
24 proceeding is not a process for 'review' of a local government's decision."

25 319 Or at 544. With that understanding of the statutory framework in mind, we return to
26 the question whether the county's original decision constituted final action under ORS
27 215.429.

28 In the absence of a countervailing ordinance, a county takes "final action"
29 under *former* ORS 215.428 "when the application is complete and the decision on it is
30 made." *Bigej Enterprises v. Tillamook Co.*, 118 Or App 342, 346, 847 P2d 869, *rev den*,

1 317 Or 162 (1993).³ Because the pertinent text of ORS 215.429 is practically identical to
2 *former* ORS 215.428(7), we apply the test that we articulated in *Bigej* for determining
3 whether a local government has taken "final action" under ORS 215.429. Here, the
4 parties do not dispute that Pipeline's application was complete and that the county made a
5 qualifying decision approving that application on November 8, 2010. Accordingly, under
6 *Bigej*, we tentatively conclude that the county took "final action" on Pipeline's application
7 on November 8, 2010.

8 Pipeline remonstrates that *Bigej* is distinguishable because, in that case, the
9 county had not withdrawn its decision for reconsideration under ORS 197.830(13)(b).

10 Relying on dictionary definitions of the term "final," Pipeline reasons that

11 "[b]y definition, *you cannot have two final actions*. Therefore, the county's
12 withdrawal of the November 8th decision under ORS 197.830(13)(b)
13 served to nullify and invalidate that decision. Since the November 8th
14 decision is no longer valid, it cannot constitute 'final action' even under the
15 rationale [of *Bigej*]."

16 (Emphasis added.) We disagree.

17 In *Simon*, the county had failed to meet the 120-day deadline set out in
18 ORS 215.428(7), but nonetheless had taken final action on the petitioner's application
19 before the petitioner filed a petition for a writ of mandamus. We agreed with the circuit
20 court that it lacked jurisdiction and that LUBA had exclusive jurisdiction to review the
21 county's decision:

³ The county has not argued that it has adopted an ordinance setting out what qualifies as "final action."

1 "Construing ORS 215.428(7) to continue jurisdiction in the circuit
2 court after a governing body has acted, even belatedly, would be
3 inconsistent with the statutory scheme. The mandamus remedy is not
4 subject to expedited review, and it makes little sense to review a decision
5 through a slower process simply because the governing body failed to act
6 more quickly. It also makes little sense to require a second tribunal to
7 make a second initial decision. To provide an alternative channel of review
8 would also defeat the legislature's obvious intent to funnel review of land
9 use decisions through LUBA.

10 "The legislature has made clear that review by LUBA is the norm.
11 The mandamus remedy is intended to effectuate LUBA's role, not undercut
12 it. The evident purpose of ORS 215.428 is to ensure that local governing
13 bodies issue a decision. Once the governing body acts, the purpose of ORS
14 215.428(7) has been met, and there is no reason for resort to the circuit
15 court."

16 91 Or App at 491.

17 We relied on *Simon in Bigej*. There, the petitioners had argued that the
18 county, which denied their application on May 1, had not taken final action within the
19 120-day deadline because the petitioner had not received written notice of that decision
20 until May 3, two days after the deadline expired. Because we had held in *League of*
21 *Oregon Women Voters v. Coos Co.*, 82 Or App 673, 792 P2d 588 (1986), that a county
22 land use decision does not become final, for purposes of calculating the time within
23 which a party may appeal to LUBA, until the party receives notice of the decision
24 required by ORS 215.416(10), the petitioners in *Bigej* argued that the same inquiry was
25 required for determining whether a decision constituted "final action" under the
26 mandamus statute. After reciting the passage from *Simon* quoted above, we rejected that
27 argument:

1 "Given that holding and reasoning, it would make no sense to extract
2 a county land use decision from LUBA's jurisdiction, and to make the
3 mandamus remedy available, by reading ORS 215.416(10) and ORS
4 215.428 in the way that plaintiffs urge. The county *has* made a decision
5 that could have been appealed to LUBA. Plaintiff's effort to extend the
6 holdings in *League of Women Voters* * * * and similar cases to shorten the
7 time within which mandamus relief becomes available would not achieve
8 the symmetry they claim for it; rather, it would undermine the LUBA
9 review process, and the access of the parties to that process, that those cases
10 were designed to protect. We adhere to our holding that, in the absence of a
11 county rule that defines when a decision is final under ORS 215.428, an
12 action is 'final' when the application is complete and the decision on it is
13 made."

14 *Bigej*, 118 Or App at 346 (emphasis in the original).

15 We adhered to our holdings in *Simon* and *Bigej* in *State ex rel Fraley v.*
16 *Deschutes Co. Bd. of Comm.*, 151 Or App 201, 948 P2d 1249 (1997), *rev den*, 327 Or
17 305 (1998). There, the plaintiff had filed an application with the county, which, more
18 than 120 days after the application had been deemed complete, had issued an approval.
19 A party opposing the application appealed that decision to LUBA, which remanded the
20 county's decision. The plaintiff sought judicial review, and this court affirmed.
21 Following our decision, LUBA's remand to the county became final on December 22,
22 1995, and then, more than 120 days later, the county issued a decision with which the
23 plaintiff was dissatisfied. The plaintiff again appealed to LUBA and, during the
24 pendency of that appeal, filed a mandamus action under ORS 215.428(7). 151 Or App at
25 203-04.

26 Before this court, the plaintiff relied on *Compass* and argued that ORS
27 215.428(7) "creates a remedy--a judicially compelled approval--for a county's violation

1 of the 120-day deadline contained in ORS 215.428(1)." *State ex rel Fraley*, 151 Or App
2 at 206. According to the plaintiff, the right to such a remedy was not impaired by the
3 county's decision, after the 120-day period had expired, to deny the application. The
4 plaintiff's argument posited that mandamus relief may be obtained whether the action is
5 brought before or after the county's decision, if that decision had not been made within
6 the 120-day period.

7 We rejected that argument, relying on the Supreme Court's conclusion in
8 *Murphy Citizens Advisory Com. v. Josephine County*, 325 Or 101, 107 n 6, 934 P2d 415
9 (1997), that:

10 "Compass holds that, *once the mandamus procedure at ORS 227.178(7)*
11 *(or, in this case, the identical procedures at ORS 215.428(7)) has been*
12 *invoked*, the local government's belated *denial* of the application at issue
13 does not divest a circuit court of jurisdiction to enter a *peremptory writ*
14 *compelling approval*."

15 (Emphases in original.) We concluded that the court's statement in *Murphy* "clearly
16 implie[d] that a mandamus action under one of the two parallel statutes must have been
17 brought *before* the belated local decision was made in order for the mandamus remedy to
18 be available." *State ex rel Fraley*, 151 Or App at 208 (emphasis added).

19 It is apparent from the foregoing decisions that the mandamus remedy was
20 meant to require local governments to take "final action" within a specified amount of
21 time; when such action has been taken, the purpose of the mandamus statutes has been
22 satisfied, and an aggrieved party must look to LUBA for further review.

23 Correspondingly, no appellate decision to date has suggested that mandamus is available

1 after a local government has taken "final action," and, particularly, after such a decision
2 has been appealed to LUBA.

3 Pipeline argues that *Compass* compels a different conclusion. According to
4 Pipeline, "*Compass* prohibits the court from interpreting the LUBA review statutes in a
5 manner that modifies the obligations and/or rights under the mandamus statutes in the
6 absence of express language to that effect." Pipeline reasons that,

7 "[a]lthough *Compass* did not address the specific jurisdictional issue
8 presented in this case, the same rationale applies. ORS 197.830 governs
9 the LUBA process exclusively and is separate and distinct from the
10 mandamus statutes. The mere fact that ORS 197.830(13)(b) provides a
11 time frame for withdrawal and reconsideration for purposes of LUBA's
12 process does not create an ambiguity or imply that the legislature intended
13 to exempt a local government from complying with the separate time
14 restrictions under the mandamus statutes."

15 Pipeline's argument is not persuasive. In *Compass*, unlike in this case, the
16 county did not take final action until *after* the plaintiff had filed a mandamus petition. *Id.*
17 at 540. The Supreme Court concluded that the county could not divest the circuit court of
18 mandamus jurisdiction by taking final action denying the application while the plaintiff's
19 petition was pending in the circuit court. *Id.* at 545. That was true because an applicant
20 has a right under the mandamus statutes

21 "not merely to an order that rules on the application, but to an order
22 *compelling an approval*. If a city could avoid the mandamus remedy by
23 denying the application on the eve of a court hearing, the incentive to make
24 a timely decision within 120 days would disappear. Properly viewed, the
25 approval action that the court compels through mandamus is not a second
26 decision by the city; it is an action that the law requires as a consequence of
27 the city's violation of the 120 day deadline. For that reason, a belated
28 decision to deny an application does not render moot the applicant's claim
29 to the mandamus remedy."

1 319 Or at 545-46 (emphasis in original). By contrast, here, the county did *not* fail to
2 comply with the time limits prescribed by the mandamus statute. As explained, the
3 county took "final action" within the 150-day time limit; the circumstance that LUBA
4 review of that decision, including the withdrawal and reconsideration process set out in
5 ORS 197.830(13)(b), was available thereafter does not alter that conclusion.

6 Pipeline protests that, because a dissatisfied petitioner may "re-file" its
7 notice of intent to appeal after a local government has issued a revised order, it must
8 follow that the withdrawal of an appealed decision divests LUBA of jurisdiction over the
9 matter. Pipeline reasons that, if LUBA retained jurisdiction, "there would be no need to
10 invoke LUBA's jurisdiction by filing a notice of intent to appeal." That argument
11 presupposes that the re-filing of a notice of intent has the effect of freshly "invoking"
12 LUBA jurisdiction. However, that is not what the statute contemplates. Instead, ORS
13 197.830(13)(b) provides that, where a petitioner has "refile[d] the notice of intent," "*the*
14 *review shall proceed upon the revised order.*" (Emphasis added.) Thus, the statute does
15 not require a new appeal after a local government issues a revised order on
16 reconsideration, but, rather, envisions a continuation of the existing appeal. Moreover,
17 the withdrawal of an order does not divest LUBA of its ongoing supervisory role over the
18 reconsideration process before the local government. In particular, the statute does not
19 grant the local government an indefinite period of time within which to act. Instead, it
20 must "affirm, modify, or reverse its decision" "within such time as [LUBA] may allow."

21 LUBA's administrative rule, OAR 661-010-0021, implements its

1 jurisdictional authority under ORS 197.830(13)(b) over the withdrawal and
2 reconsideration process. That rule provides, in pertinent part:

3 "(1) If a local government or state agency, pursuant to ORS
4 197.830(13)(b), withdraws a decision for the purposes of reconsideration, it
5 shall file a notice of withdrawal with the Board on or before the date the
6 record is due. A copy of the decision on reconsideration shall be filed with
7 the Board within 90 days after the filing of the notice of withdrawal or
8 within such other time as the Board may allow.

9 "(2) The filing of a notice of withdrawal under section (1) of this
10 rule shall suspend proceedings on the appeal until a decision on
11 reconsideration is filed with the Board, or the time designated therefor
12 expires, unless otherwise ordered by the Board. *If no decision on*
13 *reconsideration is filed within the time designated therefor, the Board shall*
14 *issue an order restarting the appeal."*

15 (Emphasis added.)

16 The rule imposes safeguards against indefinite delay or obstruction in the
17 withdrawal and reconsideration process by authorizing LUBA to "restart[] the appeal" if
18 the local government fails to file a decision on reconsideration within the time limit
19 established by LUBA. The rule thus contemplates a monolithic process in which an
20 appeal from an initial final decision remains in suspense during the reconsideration
21 process. If the local government fails to issue a decision on reconsideration within 90
22 days or such other time as LUBA may allow, the appeal is to proceed. In short, LUBA is
23 not divested of jurisdiction by the withdrawal and reconsideration process; under the
24 terms of both the statute and its implementing rule, LUBA's exclusive jurisdiction over
25 the appeal is continued until the reconsideration process ends and the appeal thereafter is
26 resolved.

1 To recapitulate: Because the county took final action by issuing its
2 decision on November 8, 2010, the circuit court lacked jurisdiction to adjudicate
3 Pipeline's petition for a writ of mandamus in March 2011. When Pipeline filed that
4 petition, the county's final decision had already been appealed to LUBA. Because the
5 county's withdrawal of that decision for reconsideration did not divest LUBA of its
6 exclusive jurisdiction over the appeal under ORS 197.825, the circuit court lacked
7 jurisdiction to adjudicate Pipeline's petition for a writ of mandamus and properly granted
8 the county's motion to dismiss.⁴

9 Affirmed.

⁴ Pipeline also assigns error to the circuit court's award of attorney fees to the county, as a prevailing party, pursuant to ORS 34.210(2). Pipeline does not argue that the amount of the fee award was unreasonable or that the award was otherwise unsound. Because we conclude that the circuit court properly granted the county's motion to dismiss, we reject Pipeline's challenge to the attorney-fee award without further discussion.