



1 subsequent approval of a non-resource dwelling on the lot.

2 Our final opinion and order dismissed No. 84-101 as moot.

3 We took this action sua sponte, on grounds the administrator's

4 lot of record determination had been superseded by the

5 governing body's later action on the dwelling permit. We then

6 reviewed the petition in No. 84-102, concluding, among other

7 things, that the governing body's recognition of TL 3332-104 as

8 a lot of record was an improper construction of the zoning

9 ordinance. See Futornick v. Yamhill Co., \_\_\_ Or LUBA \_\_\_,

10 (LUBA Nos. 84-101 and 84-102, Slip Opinion dated June 19,

11 1985).

12 ORDER ON COSTS

13 ORS 197.830(13)(a) reads as follows:

14 "Upon entry of its final order the board may, in its  
15 discretion, award costs to the prevailing party  
16 including costs of preparation of the record if the  
17 prevailing party is the local government, special  
18 district or state agency whose decision is under  
19 review. The deposit required by subsection (7) of  
20 this section shall be applied to any costs charged  
21 against the petitioner."

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19 1. No. 84-101

20 Our dismissal of No. 84-101 on mootness grounds raises

21 doubt as to which party, if either, should be awarded costs in

22 this appeal. We conclude our discretion under ORS

23 197.830(13)(a) should be exercised by declining to make an

24 award to either party.

25 The dismissal of No. 84-101 rules out an award of costs to

26 petitioners. They did not prevail in that appeal. We view

1 their status as prevailing parties in the companion appeal (see  
2 below) as a separate matter.

3 Correspondingly, we do not believe an award of costs to  
4 respondent should be made in No. 84-101. Concededly, dismissal  
5 of the appeal shielded the county administrator's lot of record  
6 decision from our review. The dismissal might therefore be  
7 described as a victory for respondent. However, that analysis  
8 would overlook two important points.

9 First, as the statement of facts indicates, the  
10 administrator's decision was not the county's final word on the  
11 status of TL 3332-104 as a lot of record. The final  
12 determination on the issue was rendered by the governing body.  
13 We overturned that determination in No. 84-102, the companion  
14 appeal.

15 Second, the record indicates petitioners might have  
16 withdrawn No. 84-101 early in the proceedings had respondent  
17 stipulated to a point its own counsel conceded had merit, viz.,  
18 that the lot's legal status was reviewable in the companion  
19 appeal. However, respondent refused to so stipulate. The  
20 record shows its refusal was motivated by the belief the  
21 litigation in No. 84-101 could be of value to the county in  
22 establishing favorable precedent.<sup>1</sup> As a result, both appeals  
23 went forward.

24 Under the foregoing circumstances, we do not believe it  
25 would be appropriate to make an award of costs to respondent in  
26 No. 84-101. Cf Robertson v. Henderson, 181 Or 200, 206, 179

1 P2d 747 (1947).

2 2. No. 84-102

3 Petitioners are prevailing parties in No. 84-102. They  
4 are entitled to an award of the \$50 filing fee. Respondent  
5 county shall reimburse petitioners in that amount.<sup>2</sup>

6 Dated this 17th day of July, 1985.

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10 Laurence Kressel  
11 Referee  
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FOOTNOTE

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4 The record indicates the county viewed No. 84-101 as a test  
5 case for the proposition that, under its ordinance, the  
6 administrator's lot of record decision is not subject to  
7 review. Thus, although informally agreeing with petitioners  
8 that the lot of record issue was reviewable in No. 84-102, the  
9 county would not stipulate to that point. To do so might have  
caused petitioners to drop the appeal in No. 84-101, thereby  
cutting off the county's chance to achieve a victory in that  
case. This rationale emerges from the following colloquy  
between County Counsel Garrettson and LUBA Referee Kressel  
during a telephone conference concerning the appeals.

10 GARRETTSON:

"The county zoning ordinance requires  
that before you can apply for this  
conditional use permit you must have a  
lot of record. Therefore, it is one of  
the criteria in the conditional use  
permit. As such, I think Margaret  
[petitioners' counsel] has a good  
argument that they are entitled to have  
review of all of the criteria through the  
application. At the same time, the  
county probably would raise the  
collateral attack argument. However, to  
be honest with the referee, I, as the  
county's advocate, do not have a lot of  
faith in the merits of that particular  
argument. I think that if as a criteria  
for the conditional use application, it  
is certainly a criteria which can be  
considered by LUBA.

20 REFEREE KRESSEL:

"Well, you might do us all a world of  
good if you would agree, maybe not now if  
you do not feel comfortable doing it, but  
later in waiving any objection to that  
issue, because that would make it  
possible for No. 84-101 to go away as far  
as I can tell. Then we wouldn't have to  
issue a ruling on . . ."

24 GARRETTSON:

"The problem with agreeing to it at this  
point is that 84-101 of course raises  
some, what we feel fundamental issues.

1 REFEREE KRESSEL: "Well, what are you talking about - the  
2 issues of timing or of the merits of  
whether the decision was right or wrong?"

3 GARRETTSON: "Basically on the issue of whether the  
4 county can have a procedure which is not  
reviewable. Whether there are certain  
5 ministerial decisions which in fact are  
not reviewable and are what we... Our  
6 position would be essentially on the  
conditional use permit application is  
7 that that application, if LUBA has  
jurisdiction to review conditional use  
8 permits, gives LUBA jurisdiction to  
review all prior decisions that lead up  
9 to it that are criteria for the  
conditional use permit.

10 REFEREE KRESSEL: "One of which in this case seems to be  
that it is a legal lot of record.

11 GARRETTSON: "But that the steps, if we have  
12 intermediate steps, such as a lot of  
record determination before we accept the  
13 application for the CUP, those  
intermediate steps are not appealable and  
14 depending, I guess that issue is  
important so it makes it difficult for me  
15 to say at this point I could stipulate  
that we could consider the issue  
16 altogether. At the same time I don't  
think I can make a legitimate legal  
17 argument that LUBA can not look at the  
lot of record criteria."

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20 Petitioners' deposits for costs in No. 84-101 and No.  
84-102 shall be returned to them by the Board.

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