

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MOLLY JACOBSEN and DANA JACOBSEN,
5 *Petitioners,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent,*

11
12 and

13
14 FULLERTON & LEFEVRE,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2007-203
18

19 **MOTION TO DISMISS**

20 The challenged decision is a decision approving a partition and a zone change. After
21 the petition for review and response briefs had been filed, this appeal was suspended on April
22 17, 2008 at the request of the parties until any party requested that the appeal be reactivated.
23 On June 23, 2010, we issued an order reactivating the appeal after petitioners requested that
24 the appeal be reactivated. That order scheduled oral argument in this appeal for August 26,
25 2010 at 11:00 a.m.

26 The county subsequently moved to dismiss the appeal. In its motion, the county
27 states that

28 “[T]he land use permit application has been withdrawn by the applicant. See
29 the letter dated July 8, 2010, attached hereto * * *. See also the county
30 planning department’s letter acknowledging receipt of the withdrawal letter
31 and closing the file without local approval, attached hereto * * *.” Motion to
32 Dismiss 1.

33 According to the county, the applicant’s purported withdrawal of the application renders the
34 appeal to LUBA of the county’s decision approving the partition and zone change moot. In
35 support of its argument, the county cites Douglas County Land Use and Development

1 Ordinance (LUDO) 2.040.04 and our decision in *Jacobsen v. Douglas County*, 54 Or LUBA
2 790 (2007). In *Jacobsen*, the county moved to dismiss the appeal under similar
3 circumstances where the applicant had withdrawn the application after the decision was
4 appealed to LUBA. We denied the county’s motion in part because it was not clear under the
5 LUDO what effect withdrawal of an application would have on the local government’s final
6 decision. According to the county, amendments to the LUDO enacted after *Jacobsen* clarify
7 the effect withdrawal of an application has on a local approval.

8 LUDO 2.040.4 provides:

9 “If an applicant submits a letter of withdrawal of an application, the
10 application shall be terminated, the application withdrawn and the file closed
11 *without a decision* [and] with no opportunity for refund of the application
12 fee.” (Emphasis added.)

13 We disagree with the county that LUDO 2.040.4 renders the challenged decision moot or
14 clarifies the effect of a withdrawal on a local approval of an application. That provision
15 includes language, emphasized above, indicating that upon receipt of a withdrawal letter, the
16 file will be closed “without a decision,” which suggests that it applies where an applicant
17 withdraws an application *prior to a final decision being made*. LUDO 2.040.4 does not
18 appear to apply where an application has been approved, and that approval decision has been
19 subsequently appealed to LUBA.

20 In that situation, we believe that *McKay Creek Valley Assoc. v. Washington County*,
21 16 Or LUBA 1028-29 (1987) and *Standard Insurance Co. v. Washington County*, 17 Or
22 LUBA 647, 660, *rev’d on other grounds*, 97 Or App 687, 776 P2d 1315 (1989) control. In
23 *McKay Creek*, we denied a similar motion to dismiss, noting that where “it is not clear from
24 the county code that the applicant’s withdrawal has any effect whatever on the decision * *
25 *, we decline to rule in the county’s favor on the motion to dismiss.” *Id.* at 1029. In
26 *Standard Insurance*, we concluded that the county lacked jurisdiction to take further action
27 on a decision that had been appealed to LUBA while that LUBA appeal was pending. Thus,

1 because the challenged decision has been appealed to LUBA, the county lacks jurisdiction to
2 take action to void the decision on appeal until LUBA renders a final decision in the appeal.

3 The county also cites our order in *Greer v. Deschutes County*, ___ Or LUBA ___
4 (LUBA No. 2005-038, June 20, 2006). In *Greer*, the county attempted to withdraw a
5 decision for reconsideration after that decision had been appealed to LUBA, with the
6 understanding that the applicant would withdraw the application that led to the appealed
7 decision. We denied the county's attempt to withdraw the decision for reconsideration
8 because the motion was filed after the date the record was due.¹ We went on to explain in
9 *Greer*, however, that the parties could likely achieve the same objective by agreeing to a
10 voluntary remand, followed by withdrawal of the application. We also suggested that
11 another possibility might be to have the applicant withdraw the application and then move to
12 dismiss the LUBA appeal as moot. That alternative suggestion appears to be what the county
13 has done in the present case. However, we now believe that alternative suggestion is
14 inconsistent with our decision in *Standard Insurance*.

15 The county could achieve its desired result by submitting a motion for voluntary
16 remand of the challenged decision in which it agrees to address all assignments of error in
17 the petition for review. After remand of the decision, the county would once again have
18 jurisdiction over the decision, at which point the applicant could request that the application
19 be withdrawn, and the county could lawfully make a decision on that withdrawal request,
20 consistent with *Standard Insurance*.

21 The county may, within 7 days of the date of this order, move for voluntary remand
22 of the decision and agree to address all issues presented in the petition for review. If the
23 county submits such a motion, it will likely be granted. But until such time as the county

¹ Under OAR 661-010-0021 and ORS 197.830(13)(b), local governments may only withdraw decisions for reconsideration if the notice of withdrawal is filed on or before the date the record is due.

1 files such a motion and the Board rules on it, oral argument remains scheduled for August
2 26, 2010 at 11:00 a.m.

3 Dated this 23rd day of July, 2010.

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9 Melissa M. Ryan

Board Member