

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 OREGON COAST ALLIANCE,

5 *Petitioner,*

6
7 and

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9 OREGON SHORES CONSERVATION COALITION,

10 *Intervenor-Petitioner,*

11
12 vs.

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14 CURRY COUNTY,

15 *Respondent,*

16
17 and

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19 ELK RIVER PROPERTY DEVELOPMENT LLC,

20 *Intervenor-Respondent.*

21
22 LUBA No. 2014-051

23
24 ORDER ON COSTS

25 Petitioner appealed a county decision approving intervenor-respondent's
26 (Elk River) conditional use permit application for a golf course. The county
27 withdrew the decision for reconsideration pursuant to OAR 661-010-0021. On
28 reconsideration, Elk River withdrew the land use application, explaining that a
29 second, more conservative application for the same use had been filed with the
30 county and was then currently under consideration. On October 2, 2014, the
31 board of county commissioners issued an order vacating the original approval.
32 LUBA subsequently dismissed the appeal of the original conditional use permit
33 approval.

1 Petitioner filed a cost bill, stating that it is a prevailing party, and
2 requesting (1) an award of the cost of the \$200 filing fee, (2) return of the \$200
3 deposit for costs, pursuant to OAR 661-010-0075(1)(b)(A) and (d). Intervenor-
4 petitioner (intervenor) filed a cost bill, stating that it is also a prevailing party,
5 and requesting an award of the cost of its \$100 fee to intervene, pursuant to
6 OAR 661-010-0075(1)(b)(D).¹

7 The county opposes both costs bills, arguing that neither petitioner nor
8 intervenor are prevailing parties. According to the county, the appeal was
9 dismissed because the applicant withdrew the application, not because the
10 appeal played a “causative role in the local government action that mooted or
11 otherwise justified dismissal of the appeal.” *Central Klamath County CAT v.*
12 *Klamath County*, 41 Or LUBA 600, 602 (2002).

13 In *Central Klamath County CAT*, as in the present case, the county
14 withdrew the decision for reconsideration and the applicant withdrew the
15 application. The county then rescinded its original decision, resulting in
16 dismissal of the appeal as moot. The petitioner moved for its costs, arguing

¹ OAR 661-010-0075(1)(b) provides, in relevant part:

“Recoverable Costs: Costs may be recovered only for the items set forth in this subsection.

“(A) If the petitioner is the prevailing party, the petitioner may be awarded the cost of the filing fee.

“* * * * *

(D) If an intervenor under OAR 661-010-0050 or a state agency under OAR 661-010-0038 is the prevailing party, the intervenor or state agency may be awarded the cost of the fee to intervene or to file a state agency brief.”

1 that it was the prevailing party because it achieved its goal in obtaining
2 rescission of the appealed decision.

3 We reviewed several cases where an appeal had been dismissed after
4 being withdrawn for reconsideration, but nonetheless the petitioner was
5 deemed the prevailing party. To be a prevailing party in such circumstances,
6 we concluded that the petitioner must demonstrate that the appeal caused the
7 local government to reconsider the merits of the decision, change its position,
8 and adopt a decision on reconsideration in accord with petitioner's position.
9 *Id.* at 602. We held that the petitioner was not the prevailing party, because the
10 county rescinded its original decision due to the applicant's withdrawal of the
11 application, not due to the petitioner's appeal.

12 We see no meaningful distinction between the present circumstances and
13 those in *Central Klamath County CAT*. The only difference is that in *Central*
14 *Klamath County CAT* the applicant withdrew the application but did not,
15 apparently, file a new application for the same use. In the present case, the
16 applicant explained that it withdrew the original application because it had
17 filed a second, more conservative application for the same use. It is possible
18 that the "more conservative" aspects of the second application were prompted
19 by perceived vulnerabilities in the original decision, which petitioner and
20 intervenor might have challenged had the appeal been briefed on the merits.
21 However, petitioner and intervenor offer no basis to conclude that such was the
22 case. Petitioner and intervenor have not demonstrated that the appeal played a
23 causative role in the dismissal of the appeal, or that the county effectively
24 changed its position on reconsideration. Petitioner and intervenor are not
25 prevailing parties in this appeal, and therefore are not entitled to an award of
26 costs for their filing fees.

1 LUBA will return petitioner's deposit for costs, pursuant to OAR 661-
2 010-0075(2)(d).

3 Dated this 17th day of April, 2015.
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Tod A. Bassham
11 Board Member