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

JOHN and CINDY WITZEL,)
)
Petitioners,)
)
vs.)
)
HARNEY COUNTY,)
)
Respondent,)
)
and)
)
OREGON NATURAL DESERT)
ASSOCIATION,)
)
Intervenor-Respondent)

LUBA No. 98-009
FINAL OPINION
AND ORDER

Appeal from Harney County.
William C. Cox, Portland, represented petitioners.
Tim Colahan, Burns, represented respondent.
Jack K. Sterne, Camp Sherman, represented intervenor-respondent.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

DISMISSED 05/04/98

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Gustafson, Board Chair.

2 **NATURE OF DECISION**

3 Petitioners appeal the county's denial of their zone
4 change application.

5 **MOTION TO INTERVENE**

6 The Oregon Natural Desert Association moves to intervene
7 on the side of respondent. There is no opposition to the
8 motion, and it is allowed.

9 **FACTS**

10 Petitioners applied to the county for a Statewide
11 Planning Goal 2 exception to Goal 3 (Agriculture) and an
12 amendment to the county zoning map to add a Limited Use Zone
13 Overlay of Commercial (C-1) to petitioners' property.

14 Following hearings on petitioners' application, on
15 November 5, 1997 the county court voted unanimously to deny
16 the application.¹ On November 19, 1997, petitioners submitted
17 a letter to the county court, requesting withdrawal of their
18 application. That request states, in part:

19 "We understand that submitted land use applications
20 may be withdrawn by the applicant at anytime prior
21 to a final decision by the County. We are
22 requesting that our application for a limited use
23 zone overlay on 12.5 acres in [Exclusive Farm and

¹The minutes of the November 5, 1997 county court hearing state, in relevant part:

"After reviewing all the testimony and applying it to the exception criteria, it was the consensus of the court that the testimony and evidence did not meet all the exception criteria. Commissioner Kenneth J. Bentz made a motion to deny the application for zone change. Judge Dale White seconded. Motion carried unanimously." Record 8.

1 Range Use] EFRU-1 to allow for a lodge with a
2 restaurant and gift shop and cabins be withdrawn
3 from the county." Supp R 1.

4 On November 26, 1997, the county court considered
5 petitioners' request. The minutes of that proceeding state,
6 in relevant part:

7 "Judge Dale White made a motion to deny
8 [petitioners'] request to withdraw the application
9 for a limited use zone overlay on 12.5 acres in
10 EFRU-1 to allow for a lodge with a restaurant and
11 gift shop and cabins, and to proceed with the
12 completion of the process and doing findings and
13 decision." Supp R 3.

14 That motion passed unanimously.

15 On December 17, 1997, the county court adopted findings
16 denying petitioners' application. The relevant minutes of
17 that proceeding state:

18 "In the Matter of Findings & Decision for Witzel
19 Amendment Application. After reviewing the Findings
20 and Decision, Commissioner Dan Nichols made a motion
21 to approve the Findings and Decision of the Harney
22 County Court on the Application of John and Cindy
23 Witzel for an Amendment to the Zoning Map.
24 Commissioner Kenneth Bentz seconded. Motion carried
25 unanimously." Record 5.

26 Each of the commissioners signed the findings and decision
27 denying petitioners' application that day. The final sentence
28 of the decision states:

29 "This decision becomes final 21 days after the date
30 these findings were mailed unless an appeal has been
31 filed with the Land Use Board of Appeals (LUBA)."
32 Record 28.

33 Petitioners appeal the county's decision.

1 **MOTION TO DISMISS**

2 Petitioners move to dismiss this appeal as moot, arguing
3 that the county lacked jurisdiction to issue the challenged
4 decision. Petitioners argue that once they requested that
5 their application be withdrawn, the county no longer had any
6 authority to act on that application. Petitioners rely on the
7 Board's holding from Robert Randall Company v. City of
8 Wilsonville, 8 Or LUBA 185, 189 (1983), which also considered
9 a request for withdrawal after an oral decision to deny an
10 application, but before that decision was reduced to writing.

11 We held there:

12 "Because a final decision had not been made by the
13 time petitioner Randall Company requested withdrawal
14 of the application, we believe the request was
15 sufficient to deprive the city of jurisdiction over
16 the application. We are not concerned that the
17 withdrawal took the form of a 'request.' We take
18 the language to be a polite but nonetheless
19 effective withdrawal of the application. With no
20 application before it, any decision the city
21 rendered in the absence of an application is a
22 nullity."

23 See also Torgeson v. City of Canby, 19 Or LUBA 214 (1990);
24 Friends of Lincoln City v. City of Newport, 5 Or LUBA 346
25 (1982); Lamb v. Lane County, 14 Or LUBA 127 (1985).

26 The county responds that the distinguishing factor
27 between this case and the cases upon which petitioners rely is
28 that here the county had already made its decision before
29 petitioners submitted the withdrawal request. The county
30 argues that in Randall, while the withdrawal request was
31 submitted after the governing body had continued the hearing

1 for a decision, no actual decision had yet been placed on the
2 record. In contrast, the county argues that

3 "[t]he record is clear here that the County Court
4 made its decision to deny the application prior to
5 the withdrawal request being made. Each county
6 commissioner made a statement and explained their
7 reasons for denying the application. The written
8 order that followed in December, 1997 merely put
9 these reasons in written form." Memorandum in
10 Opposition to Motion to Dismiss 1.

11 The county's characterization of the legal effect of the
12 county court's actions in this case is incorrect. A local
13 government's decision is final when it is reduced to writing
14 and signed by the authorized governing body. An oral decision
15 that precedes the preparation of findings through a final
16 written decision is necessarily tentative, and is subject to
17 change at any time until the final decision is made. Citizens
18 for Resp. Growth v. City of Seaside, 23 Or LUBA 100 (1992);
19 Carsey v. Deschutes County, 21 Or LUBA 118, 128-29 (1991),
20 aff'd 108 Or App 339 (1991); Sokol v. City of Lake Oswego, 18
21 Or LUBA 375 (1989).

22 In this case, the court's November 5, 1997 vote did not
23 result in a final decision. Because it preceded findings and
24 was not reduced to writing, it was, at best, a tentative
25 decision. Like the decisions at issue in Robert Randall and
26 the other cases upon which petitioners rely, petitioners'
27 motion to withdraw their application preceded the county's
28 final decision. Thus, the county court lacked jurisdiction
29 over the application when it adopted its final decision on

1 December 17, 1997. Accordingly, that decision is not a final
2 land use decision subject to this Board's jurisdiction.

3 Petitioners' motion to dismiss this appeal is granted.

4 This appeal is dismissed.