

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 LUBA No. 2007-008

13 ORDER

14 The notice of intent to appeal was filed on January 5, 2007. The record was therefore
15 due on January 26, 2007. The record has not been filed. Instead of filing the record, the
16 county moved to dismiss the appeal as moot, because, according to the county, the applicant
17 has withdrawn its application. Petitioners object to the motion to dismiss.

18 The county cites *Greer v. Deschutes County*, ___ Or LUBA ___ (LUBA No. 2005-
19 038, June 20, 2006) for the proposition that withdrawal of an application for partition renders
20 the appeal moot. In *Greer*, the county attempted to withdraw a decision for reconsideration
21 after that decision had been appealed to LUBA, with the understanding that the applicant
22 would withdraw the application that led to the appealed decision and no decision on
23 reconsideration would be filed. We denied the county's attempt to withdraw the decision for
24 reconsideration because the motion was filed after the date the record was due.¹ We went on
25 to explain in *Greer*, however, that the parties could likely achieve the same objective by
26 agreeing to a voluntary remand, followed by withdrawal of the application. We also
27 suggested that another possibility might be to have the applicant withdraw the application
28 and then move to dismiss the LUBA appeal as moot. This alternative suggestion appears to

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. A notice of withdrawal filed after the record is due is ineffective. *Bates v. City of Cascade Locks*, 37 Or LUBA 993 (1999).

1 be what the county has done in the present case.

2 There are two problems with the county's motion. First, we cannot tell that the
3 application actually has been withdrawn. The county provides only a letter from the
4 applicant's representative asking that the application be withdrawn. We have no way of
5 knowing whether the application is in fact withdrawn. Second, and more importantly, we
6 have repeatedly stated that where the local code does not make clear that withdrawal of an
7 application has any effect on the local government's final decision, LUBA will deny a
8 motion to dismiss. *Davis v. City of Bandon*, 28 Or LUBA 38, 44 (1994); *Berg v. Linn*
9 *County*, 22 Or LUBA 507, 509 (1992); *Gilson v. City of Portland*, 22 Or LUBA 343, 352
10 (1991); *McKay Creek Valley Assoc. v. Washington County*, 16 Or LUBA 1028, 1029 (1987).

11 In the present case, the county does not explain what effect withdrawal of the
12 application has on its final decision under its local code. Petitioners argue that the local code
13 implies that there is no effect. The burden is on the county to demonstrate that the
14 application has in fact been withdrawn and to explain how withdrawal under the local code
15 renders the county's decision ineffective. The county has done neither.

16 The motion to dismiss is denied.

17 Petitioners move for order requiring the county to file the record in this appeal. The
18 county shall either file a renewed motion to dismiss explaining, consistent with this order,
19 why this appeal is in fact moot, or file the record within 14 days of the date of this order.
20 The county might also obtain the same objective by moving for a voluntary remand, followed
21 by withdrawal of the application, as suggested in *Greer*.

22 Dated this 29th day of May, 2007.
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25

26 _____
27 Melissa M. Ryan
28 Board Member