

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 FRIENDS OF DOUGLAS COUNTY,
5 and SHELLEY WETHERELL,
6 *Petitioners,*

7
8 vs.
9

10 DOUGLAS COUNTY,
11 *Respondent.*

12 LUBA No. 2012-053
13

14 FINAL OPINION
15 AND ORDER
16

17 Appeal from Douglas County.

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19 Joanna Malaczynski, Portland represented petitioner.

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21 Paul E. Meyer, County Counsel, Roseburg, represented respondent.
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23 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
24 participated in the decision.

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26 DISMISSED

01/08/2013
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28 You are entitled to judicial review of this Order. Judicial review is governed by the
29 provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioners appeal a decision by the county approving an application for a forest template dwelling.

JURISDICTION

In their petition for review, we understand petitioners to allege that the county erred in failing to process the application for a forest template dwelling as a “permit” as defined in ORS 215.402(4) by providing either (1) notice of the decision and an opportunity to appeal the decision, or (2) providing a public hearing prior to issuing a decision on the application.¹ The county moves to dismiss the appeal as moot. In its motion, the county explains that after the county made the challenged decision, the applicant submitted a letter withdrawing the application that led to the challenged decision. Douglas County Land Use and Development Ordinance (LUDO) 2.040.4 provides in relevant part that if an applicant withdraws an application after a decision has been issued, withdrawal of the application “shall render the decision null and void. * * *.”² The county argues that the result of the applicant’s withdrawal of the application is to render the decision “void” and that therefore a decision by LUBA on the merits of the appeal of a void decision will have no practical effect.

¹ ORS 215.402(4) defines “permit” in relevant part as “discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto.” ORS 215.416 provides procedures for processing a “permit” application.

² LUDO 2.040.4 provides in its entirety:

“If an applicant submits a letter of withdrawal of an application, the application shall be terminated, the application withdrawn and the file closed with no opportunity for refund of the application fee. If a decision has been issued, withdrawal of the application shall render that decision null and void. If the withdrawn application is under appeal, the voiding of the decision shall render the appeal moot.”

Although we question whether the last sentence of LUDO 2.040.4 that specifies the circumstances in which an appeal of a land use decision is “moot” is binding on LUBA or a reviewing court, we need not resolve that issue here.

1 LUBA has determined that, with limited exceptions, it will dismiss appeals if they
2 become moot. *Fujimoto v. Metropolitan Service District*, 1 Or LUBA 93 (1980). An appeal
3 is moot where a decision on the merits of an appeal by LUBA will have no practical effect.
4 *Gettman v. City of Bay City*, 28 Or LUBA 121 (1994) (appeal of decision authorizing tree
5 removal became moot after trees were cut and removed). Typically, an appeal to LUBA may
6 be moot where some action subsequent to adoption of the challenged decision supplants,
7 revokes or rescinds the decision. *Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993).
8 In such circumstances, LUBA’s review would have no practical effect.

9 We have identified an exception to the prohibition on deciding moot cases where a
10 decision is “capable of repetition yet evading review.” *Wetherell v. Douglas County*, ___ Or
11 LUBA ___ (Order, LUBA No. 2012-051, November 8, 2012) (appeal not moot where the
12 underlying legal dispute regarding the legal propriety of a temporary use permit for an annual
13 music festival would remain unresolved even after the festival is held); *Davis v. City of*
14 *Bandon*, 19 Or LUBA 526, 527 (1990) (appeal of a city building moratorium should not be
15 dismissed as moot, even though the moratorium had expired, where the city adopted serial
16 short-term moratoria that were expiring before LUBA could complete its review of any of the
17 moratoria). Petitioners argue that the appeal is not moot because the county’s alleged errors
18 in failing to process the forest template dwelling application as a statutory permit and to
19 provide notice and an opportunity for public participation are capable of being repeated.
20 Petitioners argue:

21 “the underlying County practice of denying public notice and opportunity for
22 hearing remains, and has already adversely affected Petitioners.” Petitioners’
23 Opposition to Motion to Dismiss 1.

24 While that may be true as far as it goes, petitioners have not demonstrated that the challenged
25 decision approving a forest template dwelling on the subject property is “capable of
26 repetition” or explained why, even if the county approves another forest template dwelling
27 application for the same property, that decision will “evade review.” Moreover, petitioners

1 have not explained why any future decision approving a different forest template dwelling
2 application on the same or different property may not be appealed to and reviewed by LUBA.
3 Even if the county continues to process forest template dwelling applications as something
4 other than statutory permits with notice and opportunity to request a hearing, that does not
5 mean that such decisions cannot be appealed to LUBA. LUBA has no authority to issue
6 declaratory rulings regarding the county's "underlying practices" or whether the county's
7 land use regulations comply with state law. Because any decision LUBA might reach on the
8 merits of the decision challenged in this appeal would be without practical effect, this appeal
9 is moot.

10 LUDO 2.040.4 provides that where the application has been withdrawn, the decision
11 that approved the application is "void." Thus a decision by LUBA on the merits of the
12 appeal of a decision approving the application will have no practical effect.

13 The appeal is dismissed.