BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL and FRIENDS
OF DOUGLAS COUNTY,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent.

LUBA No. 2012-051

ORDER DENYING MOTION TO DISMISS

INTRODUCTION

In this appeal, petitioners challenge a temporary use permit that authorizes a music festival on land zoned for exclusive farm use (EFU). The festival was held on July 20, 2012. Because the festival authorized by the temporary use permit for July 20, 2012 is over, the county argues this appeal is moot and should be dismissed. For the reason explained below, we conclude that the appeal should not be dismissed.

The application that led to the disputed temporary use permit was filed with the county on March 29, 2012. Almost a month later, the county gave notice of a May 17, 2012 planning commission hearing on the application. Following that May 17, 2012 hearing, the planning commission approved the temporary use permit on June 21, 2012. Petitioners appealed that planning commission decision to the county board of commissioners on June 29, 2012, and on July 12, 2012 the board of commissioners declined review and the county's decision became final. As previously noted, the music festival was held 8 days later on July 20, 2012.

Petitioners' appealed the county's decision to LUBA on July 27, 2012, seven days after the July 20, 2012 music festival was over. The LUBA appeal proceeded without interruption—the record was received on August 21, 2012; the petition for review was filed

on September 11, 2012; and the county moved to dismiss the appeal as moot on September 26, 2012. LUBA suspended the briefing deadline on September 28, 2012, and allowed time for petitioner to respond to the motion to dismiss and allowed additional time for replies and sur-replies.

MOTION TO DISMISS

Shortly after its creation, LUBA determined that it would dismiss appeals if they became moot. *Fujimoto v. Metropolitan Service District*, 1 Or LUBA 93 (1980). An appeal is moot, where a decision on the merits of an appeal by LUBA will have no practical effect. *Gettman v. City of Bay City*, 28 Or LUBA 121 (1994) (appeal of decision authorizing tree removal became moot after trees were cut and removed); *Oregon Waste Systems v. City of Portland*, 18 Or LUBA 510 (1989) (appeal of legislative decision that omitted subject property from industrial rezoning is moot after subsequent quasi-judicial decision rezoned subject property industrial); *1000 Friends of Oregon v. Dept. of Environmental Quality*, 7 Or LUBA 84 (1982) (appeal of water pollution control facility permit is moot where a subsequent water pollution control facility permit supersedes and entirely replaces the appealed permit). A decision by LUBA in this appeal will have no practical effect with regard to the July 20, 2012 music festival or the proponents or opponents of that festival, because that festival came to an end over three months ago. The county moves to dismiss this appeal as moot.

Petitioners contend this appeal should not be dismissed as moot, because the appeal falls with the recognized exception to the mootness doctrine for cases that are "capable of repetition yet evading review:"

> "[T]he United States Supreme Court * * * recognized an exception to the federal mootness doctrine that allows for discretionary review of disputes 'capable of repetition, yet evading review.' *See Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 US 498, 514, 31 S Ct 279, 55 L Ed 310 (1911) (recognizing exception). Since that time, every state, except Oregon, has adopted that exception and has employed the exception from time to time in cases involving alleged harms of a short-term effect—

> harms that are too ephemeral for courts to adjudicate before factual developments render the disputes involving those harms moot." *Yancy v. Shatzer*, 337 Or 345, 359-60, 97 P3d 1161 (2004).

Despite the Supreme Court's statement in the above-quoted language from *Yancy* that Oregon did not adopt the exception to the mootness doctrine for cases that are capable of repetition yet evading review, the Supreme Court later stated in *Yancy* that Oregon in fact did adopt that exception in *Perry v. Oregon Liquor Control Commission*, 180 Or 495, 177 P2d 406 (1947). 337 Or 361. We discuss *Yancy* further later in this opinion.

A. This Case is Capable of Repetition Yet Evading Review

The county contends this case is not a case that is capable of repetition yet evading review. The county first suggests there is no reason to think that the property owner will seek another temporary use permit for a music festival. However, this is the second time a music festival has been authorized and held on the property that is the subject of this appeal. *In Devereux v. Douglas County*, 64 Or LUBA 191 (2011), we dismissed an appeal of a temporary use permit for a music festival on the property in 2011.[1] The record in this appeal includes a flyer for this year's 2012 music festival. Record 184. According to that flyer, the "July 20, 2012" "North Umpqua Music Fest" is "our 2nd Annual event." *Id*. We agree with petitioners that there is no reason to doubt that the property owners will seek additional temporary use permits for additional annual North Umpqua Music Fests in the future.

To the extent the county contends that temporary use permits for the North Umpqua Music Fest could be appealed to LUBA and reviewed by LUBA before the appeal becomes moot, we do not agree. This appeal was filed after the July 20, 2011 music festival. Even if the appeal had been filed before July 20, 2012, it is extremely unlikely the appeal could have

[1] We dismissed that appeal because we concluded that the festival qualified as an "outdoor mass gathering" under applicable state and local law. Under ORS 197.015(10)(d), outdoor mass gatherings are excluded from the statutory definition of "land use decision" and thus fall outside LUBA's review jurisdiction. Subsequently the county amended its land use laws and no party contends that the music festival that is the subject of this appeal qualifies as an "outdoor mass gathering."

been filed far enough in advance of the July 20, 2012 music festival to allow LUBA time to complete review before the July 20, 2012 festival was over. LUBA review typically takes a little over three months even if the record is promptly filed, there are no record objections and there are no delays in the briefing schedule.

The application for the temporary use permit was submitted on March 29, 2012. The board of county commissioners' final decision that rejected petitioners' local appeal and constituted the county's final decision granting the requested temporary use permit was issued on July 11, 2012, eight days before the music festival was held. The elapsed time between the application for the temporary use permit and the county's final decision was 104 days. Under ORS 215.427(1), the county could have taken as many as 150 days to render its final decision. If a temporary use permit application is submitted in 2013 or other years in the future, it is extremely unlikely that the county could or would take action quickly enough to allow a LUBA appeal and a decision by LUBA on the merits before the music festival is over.

The county next argues petitioner could obtain relief by seeking a stay of the temporary use permit from LUBA. A decision by LUBA to stay the temporary use permit would not solve the mootness problem. Even if a LUBA appeal challenging a temporary use permit for the music festival could be filed before the date authorized for the music festival and LUBA granted a stay, it is still highly unlikely LUBA could issue a final decision on the merits before the date authorized for the music festival came and went. At that point the appeal would be moot, and the parties' underlying legal dispute regarding the legal propriety of temporary use permits for the annual music festival on EFU-zoned land would remain unresolved.

B. The Capable of Repetition Yet Evading Review Exception to the Mootness Doctrine is not Recognized by the Oregon Supreme Court

In a 1990 decision, LUBA relied on the capable of repetition yet evading review exception to the mootness doctrine to conclude that a LUBA appeal of a city building

moratorium should not be dismissed, even though the moratorium had expired. *Davis v. City of Bandon*, 19 Or LUBA 526, 527 (1990). In that case the city adopted serial short-term moratoria that were expiring before LUBA could complete its review of any of the moratoria.

In its 2004 decision in *Yancy*, the Oregon Supreme Court held that under Oregon's constitution, the power of the judicial branch is limited and "[t]he judicial power under the Oregon Constitution does not extend to moot cases that are 'capable of repetition, yet evading review." 337 Or at 363. In *Yancy*, the court overruled *Perry* where the Oregon Supreme Court appeared to have recognized the capable of repetition yet evading review exception. Thus while federal courts and the judicial branch courts of every state except Oregon recognize that exception, after *Yancy* Oregon courts no longer do. Although the county does not argue that the Supreme Court's *Yancy* decision should also lead LUBA to refuse to apply that exception and to dismiss this appeal as moot, we raise that issue on our own and conclude that LUBA should apply that exception, notwithstanding *Yancy*.

LUBA is an executive branch review tribunal, not a judicial branch court. While LUBA is not a judicial branch court, the review function it performs is quite similar to the review function that is performed by appellate courts. The legislature's stated objectives in creating LUBA appear at ORS 197.805, which is set out below:

> "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives."

Consistent with ORS 197.805, LUBA strives to conduct its appeals "consistently with sound principles governing judicial review" that are followed by judicial branch courts, even though LUBA is not a judicial branch court. One of those sound principles of judicial review is the principle that courts generally do not decide moot cases.

The Oregon Supreme Court decided in *Yancy* that the power granted to the judicial branch by the Oregon Constitution did not extend so far as to allow the judicial branch to

decide moot cases, even if the moot case is capable of repetition yet evading review. But because LUBA is not part of the judicial branch, that limitation does not apply directly to LUBA. If that limitation applies to LUBA at all, it only applies indirectly through the ORS 197.805 requirement that LUBA decide appeals consistently with "sound principles of judicial review." *See Just v. City of Lebanon*, 193 Or App 132, 144, 88 P3d 312 (2004), *rev dismissed*, 342 Or 117, 149 P3d 139 (2006) (ORS 197.805 "does not require LUBA to apply all of the judicial review principles in exactly the same way that a court would apply them"). As the Supreme Court acknowledged in *Yancy*, the federal courts and the courts of 49 states all recognize an exception to the mootness doctrine for case that are capable of repetition yet evading review. Oregon's Supreme Court does not recognize that exception. But the Oregon Supreme Court's decision not to recognize that exception is not because the exception is not a sound principle of judicial review. The court simply interprets the Oregon Constitution not to permit Oregon's judicial branch to recognize and apply that sound principle of judicial review, which is widely recognized and applied by other judicial branch courts that are not limited by the Oregon Constitution. Because LUBA is not a judicial branch court, it is not similarly limited, and we continue to recognize and apply the mootness doctrine exception for cases that are capable of repetition yet evading review. *Thunderbird Hotels, LLC v. City of Portland*, 218 Or App 548, 557, 180 P3d 87 (2008) ("constitutional justiciability principles that are applicable to courts, including principles relating to mootness and standing, do not apply to LUBA").

The county's motion to dismiss is denied. The county shall have 21 days from the date of this order to file its response brief.

Dated this 8th day of November, 2012.

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Michael A. Holstun
Board Member