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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent.

LUBA No. 2000-247

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Michael K. Collmeyer, Portland, represented petitioner.

Laurie E. Craghead, Bend, represented respondent.

BASSHAM, Board Chair; HOLSTUN, Board Member; BRIGGS, Board Member,
participated in the decision.

DISMISSED 02/11/2003

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

1 Bassham, Board Chair.

2 This appeal involves petitioner’s challenge to a county ordinance that was adopted to
3 implement Ballot Measure 7 (2000) (Measure 7). This appeal was stayed while the Oregon
4 Supreme Court decided the constitutionality of Measure 7. The Supreme Court held that
5 Measure 7 was unconstitutional and never took effect. *League of Oregon Cities v. State of*
6 *Oregon*, 334 Or 645, 56 P3d 892 (2002). The county subsequently repealed its ordinance
7 implementing Measure 7, thereby making this appeal moot. Petitioner has now moved to
8 dismiss the appeal. The motion to dismiss is granted.

9 Petitioner also moves for recovery of its filing fee and deposit for costs as the
10 prevailing party, pursuant to OAR 661-010-0075(1)(b)(A).¹ The county objects to the
11 motion for costs, asserting that petitioner is not the prevailing party. Generally, the petitioner
12 is viewed as the prevailing party when the challenged decision is reversed or remanded,
13 while the respondent is viewed as the prevailing party when the decision is affirmed or the
14 appeal is dismissed. *Mackie v. Linn County*, 17 Or LUBA 1013, 1014 (1988). However, we
15 have recognized an exception to that general rule where, notwithstanding that the appeal was
16 dismissed, petitioner may demonstrate that it is the prevailing party.

17 In *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 600, 601-02
18 (2002), we reviewed several cases discussing the circumstances under which the petitioner
19 may be deemed to be the prevailing party, notwithstanding that the appeal was dismissed.

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

- “(a) Time for Filing: The prevailing party may file a cost bill or a motion for attorney fees, or both, no later than 14 days after the final order is issued. The prevailing party shall serve a copy of any such cost bill or motion for attorney fees on all parties.
- “(b) 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.”

1 *1000 Friends of Oregon v. City of Grants Pass*, ___ Or LUBA ___ (LUBA No. 2000-253,
2 Order on Costs, April 12, 2001); *Friends of Clean Living v. Polk County*, 37 Or LUBA 979
3 (1999); *Sewco Investments, Inc. v. Clackamas County*, 27 Or LUBA 678 (1994). We
4 concluded under the foregoing cases that the petitioner may be deemed the prevailing party
5 when the challenged appeal is dismissed only where petitioner establishes that the appeal
6 played some causative role in the local government action that mooted or otherwise justified
7 dismissal of the appeal. 41 Or LUBA at 602.

8 The question in the present case, therefore, is whether petitioner has established that
9 the appeal played some causative role in the county's decision to repeal the ordinance. Not
10 surprisingly, the parties disagree on the answer. Petitioner asserts that it agreed to dismiss
11 the LUBA appeal only on the condition that the ordinance was repealed or otherwise
12 rendered null and void. Petitioner argues that the county's subsequent decision to repeal the
13 ordinance means that petitioner's appeal played a causative role in the action justifying
14 dismissal of the appeal. The county, on the other hand, asserts that the reason it repealed the
15 ordinance was because the Oregon Supreme Court ruled Measure 7 was unconstitutional.

16 Petitioner has not established that the LUBA appeal played the requisite causative
17 role in the county action that mooted this appeal. The ordinance appealed in this case was
18 the county's response to Measure 7, and established a means for paying claims under that
19 measure, and a procedure for waiving county land use regulations to avoid liability for such
20 claims. This appeal was suspended before LUBA pending the court's review of Measure 7's
21 constitutionality. After the court ruled Measure 7 unconstitutional, petitioner wrote the
22 county and offered to dismiss the appeal if the county proceeded to repeal the ordinance.
23 The county then repealed the ordinance. Petitioner argues that the county's decision to
24 repeal the ordinance followed petitioner's written offer to dismiss the appeal. Therefore,
25 petitioner reasons, the offer caused the repeal. However, that sequence of events is not
26 sufficient to establish that petitioner's appeal led to repeal of the challenged ordinance, given

1 that the Supreme Court had struck down the ballot measure the ordinance was adopted to
2 implement. Following that decision, it is highly unlikely the county would retain the
3 ordinance to pay claims it is no longer obliged to pay, or to waive its regulations to avoid
4 such claims. Petitioner has not established that its appeal played a causative role in the
5 repeal of the challenged ordinance.

6 The circumstances in *1000 Friends of Oregon v. City of Grants Pass* present a useful
7 contrast. In that case, petitioner challenged a city's ordinance that, like the ordinance at issue
8 in this case, also implemented Ballot Measure 7. In response to the appeal, the city agreed to
9 repeal that ordinance and enact a modified ordinance that removed the provision that
10 prompted petitioner's appeal. We found that petitioner was the prevailing party because it
11 was reasonably clear that the city had repealed the ordinance because of the LUBA appeal.
12 Measure 7 had not been struck down yet, and the city had no reason to repeal and adopt a
13 modified ordinance other than petitioner's appeal. Here, it is not clear that the county
14 repealed the ordinance as a result of petitioner's appeal, and it appears more probable that
15 repeal was prompted by the Supreme Court's decision. Under these circumstances,
16 petitioner has not established that it is the prevailing party. The motion for award of the
17 filing fee is denied. The board will return petitioner's deposit for costs.

18 This appeal is dismissed.