



1 79, 85 (1990):

2 "Where a petitioner and respondent have settled the disagreement concerning  
3 a land use decision which led to the petitioner's filing of a notice of intent to  
4 appeal, it is consistent with the \* \* \* policy favoring timely resolution of land  
5 use matters to allow the petitioner to withdraw its notice of intent to appeal.  
6 Furthermore, we believe this conclusion is also consistent with sound  
7 principles governing judicial review."

8 Our decision in National Advertising Company relied in part on our earlier decision in Gross  
9 v. Washington County, 17 Or LUBA 640, 646 (1989), where we explained that "[w]e have  
10 no statutory basis for jurisdiction" to review a land use decision where "the notice of intent to  
11 appeal is not timely filed or is timely filed and later withdrawn." These cases stand for the  
12 straightforward proposition that LUBA will not proceed with an appeal of a land use  
13 decision, where a petitioner has decided it no longer wishes to pursue the appeal and  
14 withdraws its notice of intent to appeal.<sup>2</sup> In such cases, the challenged land use decision  
15 stands as though it had not been appealed, although the challenged decision may already be  
16 affected in some way by additional land use decisions adopted by the local government or  
17 may be affected by additional land use decisions the local government may subsequently  
18 adopt.<sup>3</sup>

19 **B. The Stipulated Withdrawal in this Case**

20 The Stipulated Withdrawal that has been filed in this case differs from the  
21 withdrawals that were filed in National Advertising Company and Gross. Those withdrawals  
22 were filed by the petitioner only. While the respondent in those appeals did not resist the  
23 petitioner's withdrawals, neither did they stipulate to the withdrawal, as respondent has done  
24 in this case. We would be inclined to view this as a nonmaterial difference, except that the  
25 Stipulated Withdrawal in this case also includes other differences.

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<sup>2</sup>In this order we refer to "withdrawals of notices of intent to appeal" simply as "withdrawals" and refer to the Stipulated Notice of Withdrawal and Dismissal of Appeal for Mootness in this appeal as the Stipulated Withdrawal.

<sup>3</sup>Of course, any such additional land use decisions would themselves be subject to appeal to LUBA.

1           The withdrawal in Gross did not specify a reason. The withdrawal in National  
2 Advertising Company advised LUBA that the reason the petitioner withdrew its notice of  
3 intent to appeal was that it had reached an agreement with the city. However, the terms of  
4 that agreement were not specified in the withdrawal. 20 Or LUBA at 81. In neither case was  
5 it legally significant why the petitioner decided to terminate the appeal. In this case, the  
6 Stipulated Withdrawal sets out reasons why petitioner and respondent believe this appeal is  
7 moot. The Stipulated Withdrawal states:

8           "Counsel for Petitioner and Respondent City of Sherwood hereby stipulate  
9 that this appeal may be withdrawn and be dismissed by LUBA \* \* \* for the  
10 reason that the issues between Petitioner and Respondent \* \* \* have become  
11 moot, specifically:

12           "(a) As to Petitioner's First Assignment of Error and Second Assignment of  
13 Error, the conditions of approval at issue have been reinterpreted,  
14 revised and satisfied by virtue of the Respondent City's adoption of a  
15 February 22, 1999 Resolution disclaiming and relinquishing any City  
16 interest or right to a 7.53-acre park site in Woodhaven P.U.D. Phase  
17 7B (so that it can be conveyed to Sherwood School District No. 88J)  
18 and instead designating (with Petitioner's concurrence) an  
19 approximately 6-acre park site elsewhere within the Woodhaven  
20 P.U.D. as a substitute park site to be subsequently acquired by the  
21 City; and

22           "(b) As to Petitioner's Third Assignment of Error, Respondent City of  
23 Sherwood has acknowledged in its Response Brief herein that the City  
24 erred and the City's land use order should be amended to incorporate  
25 revised conditions as set forth in Petitioner's Third Assignment of  
26 Error." Stipulated Withdrawal 1-2.

27           The first difficulty with petitioner's and respondent's recitation of the facts that they  
28 believe have rendered this appeal moot is that the Stipulated Withdrawal can be read to  
29 suggest that a LUBA final opinion dismissing this appeal would establish that the cited  
30 resolution satisfies the condition of approval that is disputed in this appeal and renders this  
31 appeal moot. If the question of whether this appeal is moot were presented in a motion to  
32 dismiss, along with supporting argument, we might properly consider and decide the

1 question. However, we cannot decide that question by deferring to a "stipulation" signed by  
2 two of the five parties in this appeal.<sup>4</sup>

3 An additional problem in the Stipulated Withdrawal is presented by the remaining  
4 language which is as follows:

5 "Based on the foregoing stipulation, this appeal is dismissed, \* \* \* and the  
6 City of Sherwood's land use order relating to the preliminary plat approval for  
7 Woodhaven P.U.D. Phase 7B shall be amended to reflect both grounds of the  
8 parties' stipulation as set forth above."

9 "Dated this 6th day of July, 1999.

10 "LAND USE BOARD OF APPEALS

11 "By: \_\_\_\_\_  
12 "Board Member

13 If LUBA were to dismiss this appeal based on this language, it would not only  
14 suggest that we agree the appeal is moot, for the reasons suggested by petitioner and  
15 respondent, we would be both dismissing the appeal and directing that certain changes be  
16 made in the city decision challenged in this appeal. LUBA has statutory authority to direct  
17 "approval of an application for development," in certain limited circumstances, when it  
18 reverses a land use decision. ORS 197.835(10). However, this appeal does not present such  
19 a circumstance; and, in any event, petitioner and respondent seek dismissal of the appeal, not  
20 reversal of the city's decision. LUBA does not have statutory authority to dismiss an appeal  
21 of a land use decision and direct that particular actions be taken by the city following such  
22 dismissal.

23 In summary, the Stipulated Withdrawal can be read to suggest that LUBA's dismissal  
24 of this appeal, based on the Stipulated Withdrawal, has the legal effect of (1) establishing that  
25 the cited resolution satisfies the disputed condition of PUD approval and renders this appeal  
26 moot and (2) directing that the challenged decision be amended in the ways identified in the

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<sup>4</sup>Intervenors-respondent Ernster and Howe did not file a brief. Intervenor-respondent Claus did file a brief.

1 Stipulated Withdrawal. LUBA does not have authority to grant such a dismissal based on an  
2 agreement signed by petitioner and respondent.<sup>5</sup>

3 **C. Conclusion**

4 If petitioner is satisfied with the agreement it has reached with the city to complete  
5 approval and development of the disputed PUD such that continued prosecution of this  
6 appeal by petitioner is unnecessary, petitioner may submit an unqualified motion to withdraw  
7 its notice of intent to appeal. Under our decisions in Gross and National Advertising  
8 Company, we likely would be required to dismiss this appeal for lack of jurisdiction upon  
9 receipt of such a motion, notwithstanding any objections from intervenor-respondent.  
10 However, such a dismissal would express no position on the legal effect of the cited  
11 resolution or any actions that may have been taken or may yet be taken pursuant to that  
12 resolution or petitioner's and respondent's agreement in the future. Any questions that may  
13 be raised by those actions can be presented in the appropriate forum and would not be  
14 affected by our dismissal of this appeal.

15 Petitioner shall have until 7 days from the date of this order to file an unqualified  
16 withdrawal or motion to dismiss. If such a notice or motion is not received by LUBA within  
17 3 working days after that date, LUBA will reschedule oral argument and proceed with a  
18 decision in this appeal on the merits.

19 Dated this 6th day of August, 1999.  
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26 \_\_\_\_\_  
27 Michael A. Holstun  
28 Board Chair

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<sup>5</sup>We also question whether we could grant such a dismissal with directions even if the "stipulation" were in fact signed by all parties to this appeal. However, we need not and do not consider that question here.