

1                                       BEFORE THE LAND USE BOARD OF APPEALS

2   OF THE STATE OF OREGON

3  
4                                   CENTRAL KLAMATH COUNTY  
5                                   COMMUNITY ACTION TEAM,

6   *Petitioner,*

7  
8   vs.

9  
10    KLAMATH COUNTY,

11    *Respondent.*

12  
13   2001-175

14   ORDER ON COSTS

15               In *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001), we  
16 remanded the county’s approval of a cellular phone tower application. On remand, the  
17 county again approved the application, and petitioner appealed the decision to LUBA. After  
18 petitioner appealed the decision, the applicant below withdrew its application, and the county  
19 subsequently rescinded its decision approving the application. The county then moved to  
20 dismiss the LUBA appeal as moot, and petitioner filed a response in support of the motion  
21 stating it had achieved its desired result in appealing the decision by virtue of the county’s  
22 rescission of the approval. We then dismissed the second appeal. *Central Klamath County*  
23 *CAT v. Klamath County*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2001-175, December 7, 2001).

24               LUBA may award costs to the prevailing party pursuant to OAR 661-010-  
25 0075(1)(b)(A). In the present case, the parties dispute whether petitioner is the prevailing  
26 party. The county relies on Oregon Rule of Civil Procedure (ORCP) 54 A(3) to support its  
27 assertion that petitioner is not the prevailing party. Although the ORCPs are not binding on  
28 LUBA in the same sense that they bind state trial courts, the Court of Appeals has stated that  
29 ORCP 54 A(3) is “highly instructive as to what the legislature meant by ‘prevailing party’”  
30 regarding LUBA cases involving dismissal before reaching a final decision on the merits.

1 *Pfeifer v. City of Silverton*, 146 Or App 191, 195, 931 P2d 833 (1997). ORCP 54 A(3)  
2 provides:

3 “Costs and disbursements. When an action is dismissed under this section, the  
4 judgment may include any costs and disbursements, including attorney fees,  
5 provided by rule or statute. Unless the circumstances indicate otherwise, the  
6 dismissed party shall be considered the prevailing party.”<sup>1</sup>

7 We believe our prior decisions are in accord with ORCP 54 A(3). The petitioner is  
8 generally viewed as the prevailing party when the challenged decision is reversed or  
9 remanded. *Mackie v. Linn County*, 17 Or LUBA 1013 (1988). The respondent is generally  
10 viewed as the prevailing party when the decision is affirmed or the appeal is dismissed. *Id.*  
11 However, in certain situations we have made exceptions to our general rule. We believe  
12 those exceptions are equivalent to situations in which the “circumstances indicate otherwise”  
13 as described in ORCP 54 A(3).

14 In *Sewco Investments, Inc. v. Clackamas County*, 27 Or LUBA 678 (1994), we found  
15 the petitioner to be the prevailing party in an appeal that was dismissed when the local  
16 government withdrew its decision for reconsideration and subsequently adopted a new  
17 decision that was not appealed. *See also Clevanger v. City of Scio*, \_\_\_ Or LUBA \_\_\_  
18 (LUBA No. 2000-198, May 8, 2001) (same). In *Friends of Clean Living v. Polk County*, 37  
19 Or LUBA 979 (1999), after the petitioner appealed the initial decision, the county adopted  
20 two subsequent decisions with additional findings to support the same approval, which were  
21 also appealed. We dismissed the first two appeals as moot, and the petitioner prevailed on  
22 the third appeal. *Id.* We found the petitioner to be the prevailing party in all three appeals  
23 because the dismissed appeals led to the subsequent decision that was remanded. *Id.* at 979-  
24 80. In *1000 Friends of Oregon v. City of Grants Pass*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2000-  
25 253, Order on Costs, April 12, 2001), the petitioner appealed the city’s adoption of an  
26 ordinance. After the appealed decision had been stayed, the city adopted a new version of

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<sup>1</sup> Actions dismissed under this section include voluntary dismissals, stipulated dismissals, and court ordered dismissals. The present case is arguably similar to court ordered dismissal under ORCP 54 A(2).

1 the ordinance that eliminated the provision that prompted the appeal. Although the appeal  
2 was dismissed, we nonetheless found the petitioner to be the prevailing party:

3 “[A]s a result of petitioner’s appeal, the respondent revisited its decision and  
4 adopted a new decision that satisfied the petitioner’s concerns. In other  
5 words, petitioner has already prevailed by obtaining the result sought in  
6 appealing the decision. No purpose would be served in petitioner continuing  
7 such an appeal. \* \* \*” Slip op 2.

8 In all of the above-cited cases, the local government revisited its prior decision as a  
9 result of the petitioner’s appeal and adopted a new decision eliminating the concern that  
10 precipitated the appeal. Although the above-cited orders do not go into detail, the  
11 presumption in those cases is that as a consequence of the petitioner’s appeal the local  
12 government reconsidered the merits of the decision, changed its position, and adopted a  
13 decision in accord with the petitioner’s position. Under those circumstances, the petitioner is  
14 considered the prevailing party, notwithstanding that LUBA dismisses the appeal.

15 The county argues that the present case is distinguishable from the cited cases  
16 because the decision was rescinded due to the applicant’s voluntary withdrawal of its  
17 application. According to the county, petitioner has not established that petitioner’s appeal  
18 played any role in the county’s rescission of its decision.

19 In order for a petitioner to be deemed the prevailing party when a LUBA appeal is  
20 dismissed, the petitioner must establish that the petitioner’s appeal played some causative  
21 role in the local government action that mooted or otherwise justified dismissal of the appeal.  
22 Absent such a showing, we see no reason to declare the petitioner the prevailing party and  
23 require the respondent to pay the petitioner’s filing fee. In the present case, the county  
24 rescinded its decision upon the applicant’s request. Unlike the cases where we found the  
25 petitioner to be the prevailing party, in the present case petitioner offers no reason to believe  
26 the county’s action that justified dismissal is related to the appeal. Therefore, petitioner is  
27 not the prevailing party in this appeal.

1           Petitioner's cost bill seeking return of its filing fee is denied. The Board shall return  
2 petitioner's deposit for costs.

3           Dated this 18<sup>th</sup> day of January, 2002.  
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11           Tod A. Bassham  
              Board Member