

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

3
4 ELAINE CUMMINGS,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 TILLAMOOK COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 DONALD K. NUSSMEIR and)
17 DAVID L.FARR,)
18)
19 Intervenors-Respondent.)

LUBA No. 94-232

FINAL OPINION
AND ORDER

20
21
22 Appeal from Tillamook County.

23
24 Gary Abbott Parks, Portland, filed the petition for
25 review and argued on behalf of petitioner.

26
27 No appearance by Tillamook County.

28
29 Stephen T. Janik, Richard H. Allan and Linly A. Ferris,
30 Portland, filed the response brief. With them on the brief
31 was Ball, Janik & Novack. Richard H. Allan argued on behalf
32 of intervenors-respondent.

33
34 GUSTAFSON, Referee; HANNA, Referee, participated in the
35 decision.

36
37 AFFIRMED 09/13/95

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's rejection of her local
4 appeal for failure to pay the appeal filing fee.

5 **FACTS**

6 The county planning commission approved intervenors'
7 application for two preliminary subdivision plats and two
8 variances. The county's notice of decision included the
9 requirements for appealing the decision to the board of
10 county commissioners and stated that the appeal form and the
11 appeal fee must be submitted by the appeal deadline.

12 Petitioner appealed all four of the planning
13 commission's approvals to the board of county commissioners.
14 The required appeal filing fee for the four appeals totaled
15 \$4,420.00. Petitioner did not pay the required filing fee.
16 Instead, when she filed her appeals, she submitted a check
17 for \$25.00 and an application for fee waiver.¹ The fee
18 waiver application form petitioner completed required an
19 explanation of the reason for the waiver application and
20 specified that the following information be included:

21 "The applicant shall provide convincing evidence
22 that the project for which the application is

¹There is no explanation in the record or in petitioner's brief as to why she paid \$25.00. There is a provision in the county's waiver and refund ordinance, Order 90-10, which provides that, with regard to refunds of fees already paid, a \$25.00 administrative charge is required. The record does not reflect what, if anything, the county did with petitioner's \$25.00 check.

1 required will provide substantial public benefits
2 and that the applicants has [sic] very limited
3 financial resources." Record 10.

4 The county clerk who accepted petitioner's appeal
5 documents informed petitioner that the submission of her
6 appeal without the required filing fee put her at risk that
7 her appeal would be found incomplete.

8 The board of commissioners considered petitioner's
9 appeal and application for fee waiver at a regularly
10 scheduled meeting and decided to reject the appeal because
11 it was filed without the required appeal fee. The county
12 notified petitioner in writing of the commissioner's
13 decision to reject her appeal.²

14 This appeal followed.

15 **FIRST ASSIGNMENT OF ERROR**

16 Petitioner contends the county misapplied the
17 applicable law, and made inadequate findings not based on
18 substantial evidence in determining the amount of
19 petitioner's appeal fee. Petitioner does not dispute that
20 the appeal fee the county charged her was calculated in
21 accordance with Order 93-69, the county ordinance
22 establishing the amount of appeal fees. Rather, petitioner

²The notification was signed by the three commissioners and states:

"This is to inform you that on October 26, 1994, the Board of Commissioners' [sic] decided not to accept your appeal filed without the required fees, regarding the Planning Commission's approval of V-94-19, V-94-22, Pine Beach Replat I and Pine Beach Replat II." Record 5.

1 contends the county cannot charge her the required appeal
2 fee because the amount due under Order 93-69 violates ORS
3 215.422(1)(c).

4 Petitioner contends that under ORS 215.422(1)(c) the
5 county was allowed to charge only an amount that was
6 "reasonable" for petitioner to pay in light of her income.
7 She further contends the amount must have been necessary to
8 defray the costs of petitioner's appeal, and that the amount
9 could not be more than the average cost of appeals or the
10 actual cost of petitioner's appeals.

11 Intervenors respond that petitioner's argument is a
12 collateral attack on Order 93-69. Intervenors further argue
13 petitioner has not established how alleged excessiveness of
14 the county's appeal fees entitles her to a fee waiver.

15 ORS 215.422(1)(c) states:

16 "The governing body may prescribe, by ordinance or
17 regulation, fees to defray the costs incurred in
18 acting upon an appeal from a hearings officer,
19 planning commission or other designated person.
20 The amount of the fee shall be reasonable and
21 shall be no more than the average costs of such
22 appeals or the actual cost of the appeal,
23 excluding the cost of preparation of a written
24 transcript. * * *"

25 Petitioner's reliance on ORS 215.422(1)(c) is
26 misplaced. ORS 215.422(1)(c) authorizes local governing
27 bodies to legislatively establish appeal fees by ordinance
28 or regulation. It does not become independently applicable
29 to quasi-judicial local appeals when a petitioner disagrees
30 with the legislatively established local fees. Nor does it

1 require the county to independently evaluate each appeal to
2 determine whether the legislatively established appeal fee
3 is reasonable and necessary given the particular
4 petitioner's financial situation and the likely costs of an
5 individual appeal.

6 The county exercised its legislative authority under
7 ORS 215.422(1)(c) when it adopted Order 93-69 in 1993.
8 Petitioner's challenge to the county's authority to charge
9 her the established appeal fee is an attack on Order 93-69.
10 The time for challenging Order 93-69 was within 21 days
11 after its adoption. Petitioner cannot collaterally attack
12 the county's fee ordinance through this appeal on the basis
13 that the county required her to comply with it.

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioner contends the county misconstrued the
17 applicable law and made inadequate findings not based on
18 substantial evidence in "rejecting" her application for
19 appeal fee waiver. Petitioner further argues that, by
20 failing to act on her fee waiver application, the county
21 deprived her of the opportunity to submit the required fee
22 with her appeal.

23 Petitioner's argument that the county was required to
24 evaluate her application for fee waiver is premised on Order
25 90-10(A)(4). Order 90-10 is entitled:

26 "In the Matter of Establishing a Policy For
27 Application of Fee Refund or Waiver For the

1 Department of Community Development In Certain
2 Enumerated Circumstances."

3 That order states, in relevant part:

4 "A. Waiver of all or a portion of applicable fees
5 may be authorized by the Director of the
6 Department of Community Development under the
7 following circumstances:

8 "1. Fees shall be waived for applications
9 from Public Works and General Fund
10 supported County departments * * *.

11 "2. Fees shall be charged for applications
12 from County departments with their own
13 tax base and from state and federal
14 agencies.

15 "3. Fees cannot be waived which must be
16 passed on to state or federal agencies.

17 "4. Fee waivers for other entities may be
18 approved under exceptional circumstances
19 where the following criteria are met:

20 "a. The applicant has provided
21 convincing evidence that the project
22 for which the application is
23 required will provide substantial
24 public benefits that will be
25 available to persons in addition to
26 the applicant or those represented
27 by the applicant.

28 "b. The applicant has established that
29 the group that they represent has
30 very limited financial resources and
31 very limited opportunity to raise
32 additional funding.

33 "5. Waiver of the application fee shall not
34 presume approval of the application."
35 (Emphasis added.)

36 Order 90-10 is the county's only fee waiver provision.

37 The form petitioner completed to apply for the fee waiver

1 summarizes the two requirements of Order 90-10(A)(4).
2 Notwithstanding the language of the county's fee waiver
3 ordinance, petitioner reasons she was authorized to apply
4 for a fee waiver under Order 90-10(A)(4). She asserts,
5 however, that subsection "a", the first of the two
6 requirements, does not apply to her because she is not the
7 applicant. She further asserts that subsection "b" applies
8 to her, reasoning that "[t]his criterion can be construed to
9 apply to either the original applicant for county services
10 or, arguably, to an opponent of the project who is appealing
11 a decision of approval and is applying for a fee waiver."
12 Petition for Review 16.³ Petitioner concludes she satisfies
13 subsection "b" because she has very limited financial
14 resources.

15 Petitioner's desired construction of subsection "b"
16 notwithstanding, there is no indication in Order 90-10(A)(4)
17 that it ever applies to development opponents. Nor does the
18 order apply to any appeals, regardless of whether the
19 appellant is the applicant or an opponent. The order
20 specifically restricts its applicability to applicants for
21 certain limited development applications.

22 Petitioner's acknowledged inability to satisfy the
23 first fee waiver criterion does not, as petitioner asserts,

³Petitioner acknowledges in her fifth assignment of error that subsection "b" does not apply to her and that, in fact, by its terms, Order 90-10 allows only development applicants to apply for fee waivers.

1 excuse her from complying with the criterion. It simply
2 evidences her inability to qualify for a fee waiver.
3 Petitioner's inability to satisfy the second criterion is
4 equally evident. On the face of Order 90-10, petitioner
5 does not satisfy the fee waiver criteria: The order
6 provides a process for development applicants to request
7 waivers of application fees; it is not a process for a
8 development opponent to request waivers of appeal fees.

9 The county made no findings on the applicability of
10 Order 90-10 or on petitioner's fee waiver application.
11 Rather, the board of commissioners evaluated petitioner's
12 appeal to determine whether it was properly filed. The
13 commissioners rejected petitioner's appeal as not properly
14 filed because it did not contain the required appeal fee.⁴

15 Generally, under Weeks v. City of Tillamook, 117 Or App
16 449, 453-54, 844 P2d 914 (1992), this Board is required to
17 review a governing body's interpretation of its local code
18 and may not interpret the code in the first instance.
19 However, in some instances, where the inapplicability of a
20 provision is clear on its face, or the challenge to its
21 applicability is so untenable as to obviate the need for the
22 county's authoritative interpretation, a remand for such

⁴Petitioner cites to no authority that would even allow the board of commissioners to act on a fee waiver request. By its express terms, the Director of Community Development is the sole authority to evaluate and act on fee waiver requests. Petitioner does not assert, nor is there any evidence in the record, that she submitted her fee waiver request to the Director of Community Development as mandated by Order 90-10.

1 purpose is unnecessary. Gage v. City of Portland, 123 Or
2 App 269, 275, 860 P2d 282 (1993), rev'd on other grounds,
3 319 Or 308, 877 P2d 1187 (1994); Towry v. Lincoln City, 26
4 Or LUBA 554 (1994); Terra v. City of Newport, 24 Or LUBA 438
5 (1993).

6 Order 90-10 allows a process whereby certain
7 development applicants can apply to the Director of
8 Community Development for a waiver of their application
9 fees. Under no interpretation of that Order could a
10 development opponent qualify for a waiver of appeal fees.
11 To remand this case to the county for findings establishing
12 that petitioner does not qualify for a fee waiver would be
13 an empty act, devoid of any substantive purpose.

14 Petitioner also argues that, because the county did not
15 act on her fee waiver request, she did not know the amount
16 she was "required" to pay. Accordingly, she argues that
17 after determining the amount of her required fee, the county
18 was further required to give her a reasonable time to submit
19 any required fee.

20 Petitioner does not dispute that the county provided
21 her written notice that the appeal fee must be submitted
22 with her notice of appeal. Nor does she dispute that the
23 county's fee is set by ordinance, and that she knew the
24 amount of the appeal fee when she submitted her appeal. She
25 further does not challenge the evidence in the record that
26 the county clerk who accepted her appeal documents informed

1 her that if she failed to pay the appeal fee, she risked
2 rejection of her appeal. Rather, petitioner asserts that
3 the county's requirements should be modified or suspended
4 because she submitted a clearly inapplicable waiver request.
5 Petitioner cites no authority, in Order 90-10 or elsewhere,
6 to support the process she finds the county was required to
7 follow.

8 The county does not have a fee waiver provision for
9 which petitioner qualifies. The county was not required to
10 accept petitioner's appeal without the required filing fee
11 on the basis that she does not qualify for a fee waiver.
12 Nor was the county required to make findings to determine
13 the amount of her required fee, or grant her additional time
14 before it could charge her the legislatively established
15 fee. Petitioner has not established that the county
16 deprived her of an opportunity to submit her appeal fee, or
17 that it otherwise violated its procedural requirements in
18 rejecting her appeal for failing to pay the appeal fees.⁵

19 The second assignment of error is denied.

20 **THIRD ASSIGNMENT OF ERROR**

21 Petitioner challenges the county's calculation of the

⁵Petitioner also asserts the county violated ORS 197.763 in evaluating her appeal. ORS 197.763 provides the procedural safeguards for quasi-judicial hearings. The county did not conduct a hearing on petitioner's appeal because it determined the appeal was not properly filed. Petitioner does not assert the county lacked authority to conduct a public meeting to determine whether petitioner's appeal was complete. Petitioner has not established that ORS 197.763 applies to the meeting at which petitioner's appeal was considered.

1 required \$4,420 appeal fee. Petitioner contends that under
2 ORS 215.422 the county could charge only one appeal fee,
3 rather than an appeal fee for each of the four approvals
4 petitioner appealed. Petitioner reasons that, under ORS
5 215.422, appeal fees are based on the number of decisions
6 made by the decision maker, not on the number of approvals
7 within a decision. She concludes that the county
8 inappropriately required an appeal fee for each of the four
9 planning commission approvals, "even though those approvals
10 occurred at virtually the same moment." Petition for Review
11 21. According to petitioner, the planning commission made
12 only one decision, with four approvals contained within that
13 decision and, therefore, the county could only require one
14 appeal fee.

15 Pursuant to its legislative authority under ORS
16 215.422, the county established its appeal fees in 1993
17 through Order 93-69. Order 93-69 establishes the amount of
18 the appeal fee for each planning commission approval.
19 Petitioner does not challenge the accuracy of the county's
20 calculation of the appeal fees under Order 93-69. Rather,
21 petitioner disagrees with the process and fees established
22 in Order 93-69. If petitioner considered the county's fee
23 ordinance to violate ORS 215.422, the time for challenging
24 statutory compliance was within 21 days of adoption of that
25 ordinance in 1993. Petitioner's challenge to the amount of
26 the county's appeal fees is an impermissible collateral

1 attack on Order 93-69.

2 The third assignment of error is denied.

3 **FOURTH ASSIGNMENT OF ERROR**

4 Petitioner contends the county's adoption of
5 "exaggerated" fees and its subsequent refusal to waive those
6 fees deprives petitioner of her federal constitutional due
7 process right to appeal.

8 Petitioner's challenge to the county's adoption of its
9 fee schedule in Order 93-69 is an impermissible collateral
10 attack on Order 93-69. We do not consider that challenge.

11 Petitioner contends the county's refusal to waive its
12 appeal fees deprives her of her due process right to appeal
13 because, without a fee waiver, she cannot afford to appeal
14 the planning commission's decisions. Petitioner further
15 contends ORS 215.422(1)(a) guarantees the right to appeal a
16 land use decision to the governing body. According to
17 petitioner, if she is "prevented from exhausting her
18 administrative remedies by arbitrary and unreasonable
19 conduct of the county and state, her fundamental right of
20 access to the courts is infringed." Petition for Review 23.

21 ORS 215.422(1)(a) provides:

22 "A party aggrieved by the action of a hearings
23 officer or other decision-making authority may
24 appeal the action to the planning commission or
25 county governing body, or both, however the
26 governing body prescribes. * * *"

27 ORS 215.422(1)(c) authorizes the governing bodies to
28 establish fees for such appeals.

1 Petitioner cites no authority to support her contention
2 that federal constitutional due process entitles her to a
3 free appeal of a local land use decision. Petitioner was
4 entitled to, and did, participate in the local hearings
5 process; her right to be heard has not been denied. While
6 ORS 215.422(1)(a) provides a right to appeal, it does not
7 guarantee petitioner the "right" to a free appeal. We find
8 no federal constitutional due process violation in a state
9 statute which authorizes local governing bodies to establish
10 fees for appeals of local land use decisions, or in the
11 county's enforcement of its appeal procedures, which
12 required petitioner to pay an appeal fee.

13 The fourth assignment of error is denied.

14 **FIFTH ASSIGNMENT OF ERROR**

15 Petitioner contends the county has violated her right
16 to equal protection, under both Article I, Section 20 of the
17 Oregon Constitution and the Fourteenth Amendment of the
18 United States Constitution, by providing a fee waiver
19 mechanism for which she does not qualify. According to
20 petitioner, the county's legislative classification which
21 allows only applicants to apply for fee waivers, does not
22 bear a rational relationship to a legitimate state interest
23 and, therefore, is a violation of the federal equal
24 protection clause and the state privileges and immunities
25 clause.

26 Order 90-10 allows certain applicants applying for

1 publicly beneficial land uses to apply for waivers of their
2 development application fees. To that extent, the ordinance
3 "discriminates" against all individuals and groups who do
4 not satisfy the waiver criteria. However, such
5 discrimination does not per se violate either Article I,
6 Section 20 of the Oregon Constitution or the Fourteenth
7 Amendment to the United States Constitution.

8 To establish a privileges and immunities violation
9 under Article I, Section 20 of the Oregon Constitution,
10 petitioner must prove that she was denied a privilege
11 granted to others, that she is a member of a true class and
12 that the county's legislative classification has no rational
13 basis. See State v. Scott, 96 Or App 451, 455, 733 P2d 394
14 (1989).

15 Order 90-10 does not preclude any individual applying
16 for development with substantial public benefit from use of
17 the fee waiver process. Petitioner has not established that
18 Order 90-10 grants special privileges or immunities not
19 belonging to all citizens, that she is a member of a true
20 class, or that a county ordinance, allowing applicants for
21 land uses with substantial public benefit to apply for fee
22 waivers, has no rational basis.

23 Under the Fourteenth Amendment to the United States
24 Constitution, the legislation must bear a rational
25 relationship to a legitimate state interest. Sealey v.
26 Hicks, 309 Or 387, 398, 788 P2d 435 (1990). The county

1 determined in Order 90-10 that application fee waivers were
2 appropriate in certain, limited circumstances, where the
3 applicant provides "convincing evidence that the project for
4 which the application is required will provide substantial
5 public benefits that will be available to persons in
6 addition to the applicant or those represented by the
7 applicant" and that the applicant has limited financial
8 resources. Petitioner has not established a lack of
9 legitimate state interest in the county's ordinance.⁶

10 The fifth assignment of error is denied.

11 The county's decision is affirmed.

⁶Moreover, as intervenor noted, if the county's ordinance did violate either the Oregon or Federal constitutions, the violation would not enable petitioner to qualify for a fee waiver under that illegal ordinance. Rather, the fee waiver ordinance would be invalidated.