BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF LINN COUNTY,
Petitioner,

vs.

CITY OF LEBANON,
Respondent.

LUBA No. 2003-057

FINAL OPINION
AND ORDER

Appeal from City of Lebanon.

Matthew B. McFarland, Portland, filed the petition for review and argued on behalf of petitioner.

Thomas A. McHill and Natasha A. Zimmerman, Lebanon, filed the response brief. With them on the brief was Morley, Thomas, McHill & Phillips, LLC. Natasha A. Zimmerman argued on behalf of respondent.

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

AFFIRMED 09/25/2003

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city resolution that raises the fee to appeal planning commission decisions to the city council as well as other city fees.

REPLY BRIEF

Petitioner moves to file a reply brief to address the issue of jurisdiction raised by the city. OAR 661-010-0039. Addressing jurisdictional challenges raised in the response brief warrants the filing of a reply brief. The motion is granted.

FACTS

This case began at the December 18, 2002 planning commission meeting at which a motion was passed to recommend to the city council that it set the fee to appeal any land use action, including planning commissions decisions, at a rate equal to the application fee. Prior to the challenged decision, a fee of $300 was charged to appeal planning commission decisions. At the January 15, 2003 planning commission meeting, the issue was again addressed, and the planning commission modified their recommendation to raise the fee to either $300 or half of the application fee, whichever was greater, up to a maximum of $1000. The city council eventually addressed the issue at its March 26, 2003 meeting, at which it adopted the challenged resolution that adopts a flat $500 fee to appeal planning commission decisions to the city council. The challenged decision adopted the increased fee along with approximately 227 other fee increases involving myriad different aspects of city government. This appeal followed.

JURISDICTION

The city argues that we do not have jurisdiction to decide this case because it is a "fiscal" decision that is excluded from our jurisdiction under the reasoning adopted by the Court of Appeals in *Housing Council v. City of Lake Oswego,* 48 Or App 525, 617 P2d 655 (1980), *rev dismissed* 291 Or 878, 635 P2d 647 (1981). In *Housing Council*, the court

considered whether a city ordinance that adopted a systems development charge (SDC) on new development was subject to review by the Land Conservation and Development Commission (LCDC) for compliance with the statewide planning goals.[1] While recognizing that many fiscal and budgetary decisions may have an impact on planning and zoning matters, the court held that tax and other fiscal matters were not subject to review for compliance with the goals.

> "Having rejected as substantively and procedurally unmanageable any attempt to say that some but not all fiscal policy must comply with the goals and having rejected as inconceivable the notion that the legislature intended that all fiscal policy had to comply with the goals, the only remaining possibility is that no local taxation or budget ordinance has to comply with the goals." *Id.* at 538.

Although some doubt has been cast on the continuing validity of the "fiscal" decision exception to our jurisdiction, *see Housing Council v. City of Lake Oswego*, 291 Or 878, 635 P2d 647 (1981) (Tongue, J. dissenting); *City of Pendleton v. Kerns*, 294 Or 126, 130-31, 653 P2d 992 (1982) (specifically reserving judgment on *Housing Council*), we have consistently applied that reasoning to dismiss taxation and budgetary decisions. *See Lewis v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2003-088, July 30, 2003) (creation of local improvement district (LID) is not a land use decision); *Jesinghaus v. City of Grants Pass*, 42 Or LUBA 477, 483 (2002) (creation of reimbursement district is not a land use decision); *Hazelnut A Partners v. City of Woodburn*, 42 Or LUBA 474, 475-76 (2002) (LID is not land use decision); *Baker v. City of Woodburn*, 37 Or LUBA 563, 568-69, *aff'd* 167 Or App 259, 4 P3d 775 (2000) (creation of reimbursement district is not a land use decision); *The Petrie*

[1] *Housing Council* predated the creation of LUBA. LCDC had jurisdiction to review local government decisions involving their "planning and zoning responsibilities" for compliance with the goals. Although the predicate for jurisdiction by LCDC in *Housing Council* and jurisdiction for LUBA in the present case are different, the reasoning in *Housing Council* nonetheless applies and not all local governmental actions that have tangential land use effects are reviewable by LUBA. *Westside Neighborhood v. School Dist. 4J*, 58 Or App 154, 161 n 4, 647 P2d 962, *rev den* 294 Or 78 (1982).

Company v. City of Tigard, 28 Or LUBA 535 (1995) (local decision repealing a sewer reimbursement district is not a land use decision).

In a separate line of cases, however, we have declined to treat appeals of local land use decisions involving local appeal fees as subject to the fiscal decision exception. In *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995), the challenged decision involved the rejection of a local appeal of the hearings officer to the city council due to the petitioner's failure to pay the local appeal fee required by the zoning ordinance. We held that application of the appeal fee portion of the zoning ordinance was not a purely fiscal matter and did not fall under the fiscal decision exception to our jurisdiction.

> "* * * the [Portland City Code (PCC)] chapter at issue here, PCC chapter 33.750 (Fees), is part of the city's zoning code and is an integral part of the zoning code provisions governing the processing and review of land use applications. As such, PCC chapter 33.750 is not a purely fiscal ordinance, and its application to petitioner's attempted appeal of a hearings officer's decision on a land use application is not excepted from review by LUBA under *Housing Council*." *Id*. at 142.

The above-quoted holding was based primarily on two considerations: (1) the appeal fee was part of the zoning ordinance; and (2) the appeal fee was an "integral part of the zoning code provisions governing the processing and review of land use applications." Unlike *Ramsey*, however, the increased appeal fee in the present case is not codified as part of the zoning code. The Lebanon Municipal Code (LMC) merely provides that fees will be reviewed by resolution of the city council.[2]

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[2] LMC 17.62.010 provides:

> "There are established fees to be charged by the city for reviewing and processing certain planning and development-related requests. The council shall set or revise such fees by resolution. The fees shall be representative of the total cost incurred by the city to perform the various classes of work which are requested. Said fees shall be assessed and charged by the city at the time that the request is made for review of the following planning and development-related activities:
>
> "* * * * *
>
> "E. Appeal[.] * * *"

In *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002), we faced a similar situation where the county sought to raise the fee to appeal planning commission decisions to the board of county commissioners, and the increased fee was not codified in the local zoning code. As in the present case, the applicable zoning ordinance specified that appeal fee amounts would be established by order of the governing body. We nonetheless held that the increase in local appeal fees qualified as a statutory land use decision:

> "* * * The challenged decision changes the fees the county charges to request public hearings in certain circumstances under the [county zoning ordinance] or to appeal certain decisions rendered under the [county zoning ordinance] without a public hearing. Public hearings and appeals of certain decisions rendered without public hearings under the [county zoning ordinance] 'concern' application of the [county zoning ordinance].[3] * * *. The challenged decision changes the fee that the county charges to exercise those rights under the [county zoning ordinance], and therefore it 'concerns' application of the [county zoning ordinance]. We recognize that the word 'concerns' in ORS 197.015(10)(a) might be interpreted and applied more narrowly here to conclude that the challenged decision does not "concern" application of the [county zoning ordinance]. However, we see no reason to believe that narrow construction would be consistent with the legislature's intent. If the legislature had intended that this part of the definition of the term 'land use decision' only include decisions that actually apply a land use regulation, it could have limited its scope to decisions that 'apply' a land use regulation rather than include decisions that 'concern the application' of a land use regulation." *Id*. at 273-74.

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[3] As relevant, ORS 197.015(10) provides the following definition of "land use decision":

> "'Land use decision':
>
> "(a) Includes:
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> "(A) A final decision or determination made by a local government or special district that *concerns* the adoption, amendment or application of:
>
> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]" (Emphasis added.)

After concluding that the decision challenged in *Friends of Yamhill County* fell within the statutory definition of "land use decision," we considered whether the decision nevertheless fell within the "fiscal" decision exception and concluded that it did not:

> "Although the amended fee schedule at issue here is not codified as part of the zoning ordinance, we see no reason to reach a different conclusion here. The challenged decision is also 'an integral part of the zoning code provisions governing the processing and review of land use applications.'" *Id*. at 275 (footnote omitted).

Friends of Yamhill County demonstrates that whether the appeal fee amount is codified in the zoning ordinance is not dispositive as to our jurisdiction under either the statutory definition of land use decision or the fiscal decision exception. The essential questions are: (1) whether the challenged appeal fees "concern" the application of a land use regulation; and (2) whether they are an integral part of the zoning code provisions governing the processing and review of land use applications. As in *Ramsey* and *Friends of Yamhill County*, we believe that appeal fees for planning commission decisions "concern" the application of the city's land use regulations and are an integral part of such zoning code provisions.

In *Friends of Yamhill County*, however, we discussed in *dicta* a potential scenario in which a challenge to appeal fees could fall within the fiscal decision exception.

> "* * * our decision is affected by the limited scope of the challenged decision. For example, if the challenged decision was a comprehensive change in the fees the county charges for a wide variety of county governmental services and the change in land use appeal fees was a small component of that larger fee change, treating such a decision as a land use decision might take on a tail-wagging-the-dog character that could support a different result. However, such is not the case here. The fiscal exception to our review jurisdiction does not apply." *Id*. at 275.

The challenged decision appears to present the circumstance we reserved judgment on in the above quoted *dicta* from *Friends of Yamhill County*. This decision is a comprehensive change in the fee amount the city charges for a vast array of goods and services. As stated earlier, approximately 228 different fees were involved in the challenged

decision. While some of the fee increases are related to land use, the majority appear to have nothing to do with land use whatsoever. Shelter rental fees at city parks, fingerprinting fees for the police department, bike licensing fees, library fees, court costs, business license fees, etc., are all affected by the resolution. In short, the change in the fee for appealing planning commission decisions that is challenged here was bundled together with a number of other fee changes into a single decision. Therefore, we must address the issue we left unresolved in *Friends of Yamhill County*.

Our review of decisions applying the fiscal exception indicates that the prevailing concern is that LUBA (or LCDC) should not review decisions that are fundamentally non-land use in nature, simply because such decisions might have indirect impacts on land use. *See Springer v. LCDC*, 111 Or App 262, 267, 826 P2d 54, *rev den* 313 Or 354 (1992) (Department of Revenue farm and forest tax program not subject to statewide planning goals). That concern is relatively easy to apply when the challenged decision does one thing, and that one thing is essentially fiscal in nature, with only indirect land use impacts or a tangential relationship with land use laws. *Housing Council*, 48 Or App at 538; *Westside Neighborhood*, 58 Or App at 161. It is considerably more difficult to apply when the local government bundles together into one decision discrete determinations that would certainly be subject to our jurisdiction, if they stood alone, with other determinations that would clearly fall outside our jurisdiction, if they stood alone.[4]

However that difficulty is resolved in different cases, we now believe, contrary to our suggestion in *Friends of Yamhill County*, that when a decision involving appeal fees is bundled together with decisions involving other fees that, standing alone, would not fall within our jurisdiction, the question of our jurisdiction does not turn on whether the appeal

[4] For example, it is easy to imagine, although perhaps unlikely in practice, that a local government might include in a single decision a comprehensive plan amendment or zone change with a decision creating an LID or reimbursement district.

fee is quantitatively a large or a small component of the decision viewed as a whole. To the extent our *dicta* in *Friends of Yamhill County* suggests otherwise, we reject that suggestion. As we suggested in *Ramsey* and *Friends of Yamhill County*, local appeal fees are often, and perhaps invariably, "an integral part of the zoning code provisions governing the processing and review of land use applications." Local appeal fees implicate core land use concerns regarding access to and citizen participation in land use reviews. The legislature has adopted several statutes regulating local governments' discretion to impose appeal fees and related transcript costs, codified in city and county zoning and planning chapters. ORS 215.416(11)(b), 215.422(1)(c), 227.175(10)(b), 227.180(1)(c). In short, appeal fees are different from other types of fiscal matters. *See Housing Council*, 48 Or App at 538 (noting a possible exception to its holding, where the challenged decision involves financing of the citizen involvement program required by Statewide Planning Goal 1 (Citizen Involvement)).

Given the integral role appeal fees play with respect to land use reviews and citizen involvement, we see no reason to decline to review a decision regarding land use appeal fees that is otherwise subject to our jurisdiction, simply because the challenged fee is bundled with a large number of other fee changes, most of which do not touch on land use matters. The challenge presented here is to the land use appeal fee. We therefore need not address the unpresented question of whether or to what extent LUBA may review challenges to non-land use aspects of the decision.[5]

[5] That question remains unresolved, although several cases hint that, if faced with that circumstance, the proper course is for LUBA to review the land use matters while declining to review any non land use matters. *City of Pendleton v. Kerns*, 294 Or 126, 131, 653 P2d 992 (1982) ("[t]o the extent the various aspects of an ordinance are severable, those which fall within the definition of 'land use decision' are subject to LUBA review even though other aspects are not"); *Carlsen v. City of Portland*, 169 Or App 1, 15-16, 8 P3d 234 (2000) (noting possibility that LUBA could have jurisdiction over land use and ancillary matters while non-land use matters would be subject to other jurisdiction); *see also Carlsen v. City of Portland*, 39 Or LUBA 93, 98-100 (2000) (LUBA may review challenges to application of local standards that are not comprehensive plan provisions or land use regulations, at least where the standards at issue resemble land use standards).

ASSIGNMENT OF ERROR

ORS 227.180(1)(c) provides that a city may set appeal fees for appeals of planning commission decisions but that the fees "shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of the preparation of a written transcript."[6] Petitioner argues that the statute thus establishes two requirements in setting the amount of fees to appeal planning commission decisions: (1) the amount must be reasonable; and (2) the amount must not exceed the average cost of such appeals or the actual cost of the appeal. Petitioner further argues that the $500 appeal fee established by the city is neither reasonable nor based on the average or actual cost of such appeals.

A. Reasonableness

Petitioner treats the reasonableness requirement of the appeal fee amount as a separate and presumably independent issue from the average or actual cost of the appeal. We do not see, however, that the two can be so easily divorced. We believe that the actual or average cost of an appeal is relevant as to whether the appeal fee itself is reasonable. The statute precludes fees in excess of the average cost or actual cost, even if such fees were independently reasonable. Absent some argument or evidence that a local government spends an unreasonable amount of time or incurs unreasonable expenses in processing the

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[6] ORS 227.180(1)(c) provides:

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. The governing body may establish a fee for the preparation of a written transcript. The fee shall be reasonable and shall not exceed the actual cost of preparing the transcript up to $500. In lieu of a transcript prepared by the governing body and the fee therefor, the governing body shall allow any party to an appeal proceeding held on the record to prepare a transcript of relevant portions of the proceedings conducted at a lower level at the party's own expense. If an appellant prevails at a hearing or on appeal, the transcript fee shall be refunded."

appeals that are reviewed to compute or estimate an average or actual cost, we believe it is appropriate to presume the average costs or actual costs are also "reasonable," within the meaning of ORS 227.180(1).

The juxtaposition of these concerns is demonstrated by the difficulty in independently evaluating the reasonableness of a specific fee amount out of the context of the decision being appealed and the other types of decisions commonly appealed. Not only does the nature of the application itself come into play, but also a large number of other potential variables.[7] Clearly, what in a vacuum might seem reasonable for one type of appeal would seem just as unreasonable for another type of appeal. Therefore, we do not believe the reasonableness of an appeal fee can be determined in a meaningful way independently of the average or actual cost of the appeal.

Petitioner attempts to demonstrate the independent unreasonableness of the appeal fee by comparing it to the lesser amounts charged for appealing decisions to LUBA and the Oregon Court of Appeals and Supreme Court.[8] The filing fees with LUBA and the appellate courts, however, are not intended to reflect the actual cost of processing such appeals and are not designed to provide substantial remuneration to those bodies. ORS 227.180(1)(c), on the other hand, does treat the amount of the appeal fee as more closely related to actual cost of the appeal and as a mechanism for reimbursing the local government for conducting that appeal.[9]

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[7] For example, the number of persons participating in support of or in opposition to an appeal or the size and complexity of a particular appeal could dramatically affect the cost of an appeal to the city.

[8] The filing fee at LUBA is $175 plus an additional $150 deposit for costs. ORS 197.830(9). The filing fee with the Court of Appeals and Supreme Court is $140. ORS 21.010(1).

[9] Petitioner notes that the amount of such appeal fees in Oregon range from as little as $100 to almost $2,500. Absent some explanation for the amounts charged by other local governments, we do not see that this greatly impacts our analysis of the present fee. If anything, the challenged decision would seem to fall well within the middle of the various amounts charged for such appeals.

Petitioner also raises the point that ORS 215.416(11)(b) and 227.175(10)(b) cap the amount counties and cities may charge for providing an initial public hearing at $250.[10] While this is a closer question, those statutes provide an expedited alternative to providing the entire public hearing process for certain land use applications when no one objects to a preliminary decision. The provision of a public hearing is something the local government would have been required to provide in the first place, but for the possibility of proceeding without a hearing under the statutes. The provision of a public hearing is also different from the provision of an appeal process, and the amount of time and expense required for each is not necessarily equivalent. Furthermore, those statutes expressly cap the fee amount at $250. If the legislature had wished to similarly cap appeal fees in ORS 227.180(1)(c) then it could have done so. Therefore, we do not find that an appeal fee of $500 is inherently unreasonable.

B. Average or Actual Cost

Petitioner also argues that there is no evidence, let alone substantial evidence, that the $500 appeal fee amount is based on either the average or actual cost of appeals of planning commission decisions. Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes* County, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, we may not substitute our judgment for that of the local decision maker. Instead, we must consider all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305

[10] Both ORS 215.416(11)(b) (counties) and 227.175(10)(b) (cities) provide:

> "If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial public hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less. * * *"

Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

The only evidence addressing this issue provided by the parties is a transcript of a discussion between the city administrator and the city council from the March 26, 2003 city council meeting.[11]

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[11] The relevant portions of that transcript are reproduced below:

City Administrator:

> "* * * There was a question regarding one fee in particular * * * and that is the appeal fee for those who wish to appeal decisions of the planning commission to yourselves, the city council. Previously, that fee was a flat $300; it's now being proposed to be 50% of the original application fee, whatever that might be, but not less than $300: so it would be a minimum of $300, no more than a maximum of $1000.
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> "In addition, some of the appeals we've had, we've done a certain amount of tracking of staff hours and we've found that at least in the more complex type of appeals, where there's a larger or thicker copy of documents to be maintained and provided for all the decision makers, as well as more requirements from the legal staff – it looked like we were spending approximately 100 staff hours on doing those more complex appeal cases"

City Councilor:

> "* * * have there been any appeals of a planning commission decision?"

City Administrator:

> "Yes."

City Councilor:

> "What ones were those?"

City Administrator:

> "WalMart."

City Councilor:

> "No, that came before the city council. * * *
>
> "I thought this only applied to planning commission decisions? * * *
>
> "So, there haven't been any of those?"

City Administrator:

As the discussion between the city administrator and city councilor indicates, the increased fee was not based on previous appeals of planning commission decisions. The only tracking or analysis of actual or average time and cost expended by the city responding to land use appeals concerned appeals of city council decisions to LUBA. As the city administrator admitted, he could only recall one planning commission appeal, and it had occurred only sometime in the last three years.

The city argues that even though the increase was not based on a representative sample of planning commission appeals, there is evidence that processing city council appeals has often required 100 hours of staff time, and testimony that the same time, effort, and money would be required for processing planning commission appeals as for city council appeals. Therefore, according to the city, the fee increase is based on the average *anticipated* cost of planning commission appeals.

While the evidence in support of the city's decision is admittedly meager, in the absence of any actual planning commission appeals to base the average cost upon, we do not see that the city had any alternative to analogizing to city council appeals to LUBA. While

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"There was one; not just recently. There was one, a couple-three years ago."

City Councilor:

"I know, but you're talking about city time that has been expended on actually something else other than this."

City Administrator:

"Well, based on the appeals that have occurred from the city council to LUBA and the recommendations that came from, obviously not related to appeals * * *.

City Councilor:

"But it doesn't affect that does it?"

City Administrator:

"No it doesn't, but it is anticipated that the time requirement would be approximately the same: staff and legal time requirement."

some of the examples the city used include more complex appeals, the fact that the city council reduced the potential fee ceiling from $1000 to $500 demonstrates that the city did take into account that more typical appeals might not be as complicated or costly. In conclusion, although the evidence the city relies upon is sparse, in the absence of any contradictory evidence, we cannot say that a reasonable person could not rely upon this evidence in reaching the city's decision.

The assignment of error is denied.

The city's decision is affirmed.