

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

3
4 LOGAN RAMSEY,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 94-167
10 CITY OF PORTLAND,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 GARY YOUNG and MICHELE YOUNG,)
17)
18 Intervenors-Respondent.)

19
20
21 Appeal from City of Portland.

22
23 Logan Ramsey, Portland, filed the petition for review
24 and argued on his own behalf.

25
26 Ruth Spetter, Senior Deputy City Attorney, Portland,
27 filed a response brief and argued on behalf of respondent.

28
29 Edward S. McGlone III, Portland, filed a response brief
30 and argued on behalf of intervenors-respondent. With him on
31 the brief was Wallace & Klor.

32
33 SHERTON, Referee; KELLINGTON, Referee, participated in
34 the decision.

35
36 AFFIRMED 03/30/95

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a planning department decision
4 rejecting petitioner's local appeal because it was not
5 accompanied by the required appeal fee.¹

6 **MOTION TO INTERVENE**

7 Gary Young and Michele Young move to intervene in this
8 proceeding on the side of respondent. There is no objection
9 to the motion, and it is allowed.

10 **FACTS**

11 Intervenors applied to the city for approval of a zone
12 change, planned unit development and subdivision. On
13 August 5, 1994, after a public hearing in which petitioner
14 participated, the hearings officer issued a decision
15 approving intervenor's application. A copy of the decision
16 was mailed to petitioner. The decision includes the
17 following notice:

18 "Decisions of the Hearings Officer may be appealed
19 to City Council. Unless appealed, this Decision
20 of the Hearings Officer is effective on AUGUST 20,
21 1994, the day after the last day to appeal.

22 "ANY APPEAL OF THIS ACTION BY THE HEARINGS OFFICER
23 MUST BE FILED AT THE PERMIT CENTER ON THE FIRST

¹Petitioner's notice of intent to appeal states that petitioner also wishes to challenge a hearings officer's decision approving a zone change and planned unit development, from which petitioner attempted to file a local appeal. However, in Ramsey v. City of Portland, ___ Or LUBA ___ (LUBA No. 94-167, Order, November 1, 1994), slip op 8, we determined that our review in this appeal properly concerns only the planning department's decision to reject petitioner's local appeal.

1 FLOOR OF THE PORTLAND BUILDING * * * NO LATER THAN
2 4:30 P.M. ON AUGUST 19, 1994. An appeal fee of
3 \$3,567.50 will be charged (one-half of the
4 application fee for this case). Information and
5 assistance in filing an appeal can be obtained
6 from the Bureau of Planning at the Permit Center."
7 (Emphases in original.) Record 39.

8 Petitioner arrived at the city permit center at
9 3:18 p.m. on the afternoon of August 19, 1994, the last day
10 to appeal the hearings officer's decision. Record 10.
11 Shortly before 4:30 p.m., after waiting for an available
12 planner, petitioner filed an appeal of the hearings
13 officer's decision.² Record 2. However, petitioner's
14 appeal was not accompanied by the required appeal fee, but
15 rather by a "Request for Fee Waiver." Record 9. On
16 August 22, 1994, a city planner sent petitioner the
17 following letter, which is the decision challenged in this
18 appeal:

19 "I am returning the appeal form and accompanying
20 attached information turned in by you at the
21 permit center on August 19th. Since no fee was
22 filed with the appeal nor was a low-income fee
23 waiver approved prior to submitting the appeal

²Petitioner's appeal is on a two-sided city form titled "Appeal of a Type III Decision." The front side of the appeal form says that "[i]nformation on appeal fees and procedures is on the back of this page." Record 2. The back side of the appeal form includes information on appeal fees and fee waivers and states that "[w]aiver request information is available at the Permit Center." Record 8. The information on fee waivers includes the following statement:

"The Planning Director may waive required fees in the following situations. The decision of the Director is final. The low income waiver approval must occur prior to submitting the appeal and be submitted with it." Id.

1 form, a legal appeal was not made. Please refer
2 to [Portland City Code (PCC)] 33.750.050 and the
3 appeal form about prior fee waiver approval
4 requirements." Record 1.

5 **MOTION TO DISMISS**

6 Intervenor's argue the challenged decision falls within
7 either one of two exceptions to this Board's jurisdiction.

8 **A. Fiscal Exception**

9 Intervenor's contend the challenged decision concerns
10 the application of a fiscal ordinance and, therefore, is
11 within the area of fiscal policy decisions which the Court
12 of Appeals excepted from this Board's review jurisdiction in
13 State Housing Council v. City of Lake Oswego, 48 Or App 525,
14 617 P2d 655 (1980) (Housing Council).

15 In The Petrie Company v. City of Tigard, ___ Or LUBA
16 ___ (LUBA No. 94-110, January 17, 1995) (Petrie), slip op 7,
17 we recently discussed the continuing viability of the
18 Housing Council fiscal decision exception to our
19 jurisdiction:

20 "In Westside Neighborhood v. School Dist. 4J, 58
21 Or App 154, 161, 647 P2d 962, rev den 294 Or 78
22 (1982), the Court of Appeals extended the holding
23 in Housing Council in concluding that a fiscally
24 motivated decision to close a school did not
25 constitute a 'land use decision' subject to review
26 by LUBA under the statutes governing LUBA review
27 of land use decisions. In addition, the Court of
28 Appeals recently cited Housing Council with
29 approval, and relied on that decision in part in
30 concluding that farm and forest ad valorem tax
31 preferential assessment programs, while clearly
32 affecting land use, are not state agency programs
33 affecting land use subject to review under

1 ORS 197.180(1) for compliance with the statewide
2 planning goals. Springer v. LCDC, 111 Or App 262,
3 267, 826 P2d 54, rev den 313 Or 354 (1992). We
4 therefore conclude that the exemption from review
5 for compliance with land use requirements
6 announced in Housing Council for tax and other
7 fiscal local legislation still applies."

8 In Petrie, we concluded a city code chapter establishing a
9 process for owners of neighboring property to reimburse a
10 developer for improvements already constructed was a purely
11 fiscal ordinance, and that a decision applying that
12 ordinance, long after a development was approved and the
13 improvements constructed, is not a land use decision
14 reviewable by this Board.

15 However, the PCC chapter at issue here, PCC
16 chapter 33.750 (Fees), is part of the city's zoning code and
17 is an integral part of the zoning code provisions governing
18 the processing and review of land use applications. As
19 such, PCC chapter 33.750 is not a purely fiscal ordinance,
20 and its application to petitioner's attempted appeal of a
21 hearings officer's decision on a land use application is not
22 excepted from review by LUBA under Housing Council.

23 **B. Ministerial Exception**

24 Intervenors also contend the challenged decision is not
25 a "land use decision" subject to LUBA review, because it
26 comes within the exception of ORS 197.015(10)(b)(A) for
27 local government decisions "made under land use standards
28 which do not require interpretation or the exercise of
29 policy or legal judgment."

1 As demonstrated in our discussion of the second
2 assignment of error, infra, the application of the relevant
3 provisions of PCC chapters 33.750 and 33.730 (Quasi-Judicial
4 Procedures), in making the challenged decision, requires
5 interpretation. However, even if that were not so, the
6 challenged decision still would not be excepted from LUBA's
7 jurisdiction under ORS 197.015(10)(b)(A).

8 Breivogel v. Washington County, 114 Or App 55, 834 P2d
9 473 (1992), was an appeal of a local government planning
10 department decision rejecting a local appeal of a hearings
11 officer's decision approving a development, due to failure
12 to comply with an allegedly ministerial local requirement
13 for a signature on the appeal document. In Breivogel, 114
14 Or App at 58, the Court of Appeals stated the relevant
15 decision, for the purpose of determining LUBA's
16 jurisdiction, was the hearings officer's decision to approve
17 the proposed development (which was indisputably a land use
18 decision), because the planning department's dismissal of
19 petitioner's appeal made that hearings officer's decision
20 the final county decision. The Court of Appeals explained:

21 "* * * If a dismissal for noncompliance with [the
22 signature requirement] were treated as a decision
23 that simply applies [a] nonreviewable
24 'ministerial' provision, rather than one that
25 finalizes a 'land use decision,' the county could
26 use [the signature requirement], even erroneously,
27 to dismiss every appeal from every underlying land
28 use decision and thereby evade review of all its
29 decisions. * * *" Id.

30 In this case, it is indisputable that the hearings

1 officer's decision to approve a zone change, planned unit
2 development and subdivision was a land use decision.
3 Therefore, the challenged decision rejecting petitioner's
4 local appeal of that decision is not subject to the
5 ORS 197.015(10)(b)(A) exception to LUBA's jurisdiction for
6 "ministerial" decisions.

7 Intervenor's motion to dismiss is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 Petitioner contends the city improperly rejected his
10 local appeal based on an incorrect interpretation of the
11 relevant code provisions. According to petitioner, the only
12 relevant deadline for filing an appeal is established by
13 PCC 33.730.030(F) (Ability to Appeal):

14 "The review body's decision is final unless
15 appealed. * * * The appeal must be submitted to
16 the [Planning] Director within 14 days of the day
17 the notice of decision is mailed. * * *"

18 Petitioner argues there is no dispute his appeal was filed
19 within the time allowed by PCC 33.730.030(F). Petitioner
20 further argues the PCC establishes no different deadline for
21 filing a request for a fee waiver. According to petitioner,
22 the city had one hour and forty-two minutes prior to the
23 close of business in which to review and approve his request
24 for a fee waiver, and it was only the city's inaction that
25 prevented his fee waiver request from being approved before

1 the deadline passed.³

2 PCC 33.730.030(H) states "[a]ppeals must comply with
3 this subsection." PCC 33.730.030(H)(1) (Content of the
4 Appeal) provides, in relevant part:

5 "The appeal must be submitted on forms provided by
6 the Director. All information requested on the
7 form must be submitted in order for the appeal
8 form to be accepted. The appeal request must
9 include:

10 * * * * *

11 "• The required fee." (Emphases added.)

12 The requirement that an appeal request include the required
13 appeal fee is repeated in PCC 33.750.030(C) (Appeal Fee),
14 but an exception is recognized:

15 "An appeal of a land use decision must include an
16 appeal fee. The appeal fee is one-half of the
17 total application fee of the original land use
18 review request. The appeal fee may be waived
19 * * * as provided in [PCC] 33.750.050, Fee
20 Waivers." (Emphasis added.)

21 PCC 33.750.050 (Fee Waivers) explains the process and
22 requirements for granting fee waivers:

23 "The Planning Director may waive land use review

³In his brief, and at oral argument, petitioner referred to alleged statements made by planning department staff at the time he filed his appeal concerning the reason his request for a fee waiver could not be acted upon immediately. However, because such statements are not in the local record submitted to this Board, and petitioner has not established any other basis upon which we might consider such statements, we do not consider them.

1 fees in the following situations.^[4] The decision
2 of the Director is final. The waiver approval
3 must occur prior to submitting the application.

4 "* * * * *" (Emphasis added.)

5 Construed together, the above PCC provisions establish
6 a requirement that in order to be accepted by the city, an
7 appeal request must include either (1) the required appeal
8 fee, or (2) a fee waiver that has been approved by the
9 planning director. This is the interpretation expressed in
10 the challenged decision, and we believe it is reasonable and
11 correct. Gage v. City of Portland, 319 Or 308, 316-17, 877
12 P2d 1187 (1994); McCoy v. Linn County, 90 Or App 271,
13 275-76, 752 P2d 323 (1988). When submitted, petitioner's
14 appeal request included neither of these items. It was
15 petitioner's responsibility to obtain approval of his fee
16 waiver request prior to submitting his appeal, or to include
17 the required appeal fee.⁵

18 The second assignment of error is denied.

⁴PCC 33.750.050(A)-(C) set out the requirements for "recognized organization," "low income," and "city government and nonprofit [organization]" fee waivers, respectively.

⁵Petitioner correctly observes there is nothing in the PCC requiring the planning director to act on a request for a fee waiver within a particular period of time. It is conceivable that under some circumstances the planning director's failure to act upon a fee waiver request, preventing the timely filing of a local appeal, could provide a basis for reversing or remanding a city decision not to accept such an appeal. However, failure to act on a fee waiver request within, at most, one hour and forty-two minutes is not such a circumstance.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner contends the appeal fee required by the city
3 violates ORS 227.180(1)(c), which provides:

4 "The [city] governing body may prescribe, by
5 ordinance or regulation, fees to defray the costs
6 incurred in acting upon an appeal from a hearings
7 officer, planning commission or other designated
8 person. The amount of the fee shall be reasonable
9 and shall be no more than the average cost of such
10 appeals or the actual cost of the appeal,
11 excluding the cost of preparation of a written
12 transcript. * * *" (Emphasis by petitioner.)

13 Petitioner argues the appeal fee of \$3,567.50 "is not
14 reasonable and is far in excess of the actual cost of such
15 an appeal." Petition for Review 4. Petitioner's argument
16 is based on his own suppositions regarding the amount of
17 time required to conduct such an appeal and reasonable
18 hourly rates charged for city staff time.

19 The city states the provision of PCC 33.750.030(C),
20 quoted supra, setting the appeal fee at one-half of the
21 original application fee, was adopted by Ordinance 163608 in
22 January, 1991. The city argues petitioner failed to appeal
23 the 1991 ordinance and, therefore, cannot attack
24 PCC 33.750.030(C) in this appeal.

25 We need not decide whether a challenge to the amount of
26 an appeal fee required by PCC 33.750.030(C) can be made in
27 an appeal challenging the application, rather than the
28 adoption, of PCC 33.750.030(C). That is because, even if
29 such a challenge could be made here, there is no evidence in
30 the record establishing that the city's appeal fee is

1 unreasonable or that it exceeds the average or actual cost
2 of such an appeal. Additionally, petitioner neither moves
3 for an evidentiary hearing to submit such evidence nor
4 establishes any other basis upon which we might consider the
5 facts relied on in his argument.

6 The first assignment of error is denied.

7 The city's decision is affirmed.