BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CAROL N. DOTY,
Petitioner,

vs.

CITY OF BANDON,
Respondent.

LUBA No. 2005-030

FINAL OPINION
AND ORDER

Appeal from City of Bandon.

Carol N. Doty, Bandon, filed the petition for review and argued on her own behalf.

Frederick J. Carleton, Bandon, filed the response brief and argued on behalf of respondent.

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

REMANDED 05/05/2005

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 Resolution No. 05-02, which adopts an amended land use fee schedule.

FACTS

City of Bandon Municipal Code (BMC) 17.120.180, part of the city's zoning ordinance, provides that the city council shall set planning, zoning and permit fees by resolution, at an amount no more than the actual or average cost of providing the planning or zoning service.[1] BMC 17.120.180 presumably implements ORS 227.175(1) and ORS 227.180(1)(c).[2] Pursuant to BMC 17.120.180 the city has adopted a land use fee schedule that sets fees for various planning actions, including subdivisions, conditional use permits and local appeals. Prior to the challenged decision, the city last amended the fee schedule in 2003, by adopting Resolution 03-18.

---

[1] BMC 17.120.180 provides:

> "The Bandon city council shall set planning, zoning and permit fees by resolution. Such fees shall be set at an amount no more than the actual or average cost of providing the planning or zoning service, excluding the cost of preparation of a written transcript up to five hundred dollars ($500.00) plus up to one-half the actual cost over five hundred dollars ($500.00)."

[2] ORS 227.175(1) provides:

> "When required or authorized by a city, an owner of land may apply in writing to the hearings officer, or such other person as the city council designates, for a permit or zone change, upon such forms and in such a manner as the city council prescribes. The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service."

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."

In response to increased costs for processing certain planning or permit applications, the city planning director proposed that the city council amend the fee schedule to increase fees for eight types of applications.[3] Accordingly, the planning director proposed adoption of Resolution 05-02 at a January 18, 2005 city council meeting. Petitioner sent the city a letter opposing the proposed resolution, arguing that it is inconsistent with state statute and BMC 17.120.180. At the January 18, 2005 meeting, city staff presented a staff report supporting the increased fees, following which the city council voted unanimously to adopt the resolution. The resolution supersedes the fee schedule adopted by Resolution 03-18 with a new schedule that includes the eight increased fees. This appeal followed.

JURISDICTION

The city argues that Resolution 05-02 is not a "land use decision" as defined at OAR 197.015(10).[4] According to the city, Resolution 05-02 does not concern the adoption,

---

[3] The following list summarizes the increased fees:

1. Complex zoning compliance determinations increased from $200 to $300.
2. Plan reviews in two identified zones increased from $300 to $400.
3. Partition applications increased from $400 to $500.
4. Subdivision tentative plan review increased from $800 plus $20 per lot to $800 plus $40 per lot.
5. Subdivision final plat review increased from $200 plus $20 per lot to $300 plus $30 per lot.
6. Planned Unit Development applications increased from $650 plus $20 per unit to $800 plus $30 per unit.
7. Variance applications increased from $450 to $500.
8. Conditional Use Permit reviews increased from $650 to $750.

The challenged decision does not directly amend the appeal fee, which remains at $100 or one-half the original application fee, whichever is greater. However, by increasing fees for eight types of applications, the decision indirectly increases the fee to appeal decisions on those types of applications.

[4] ORS 197.015(10) provides, in relevant part:

"'Land use decision'

"(a) Includes:

amendment or application of any goal, comprehensive plan provision, or land use regulation. In addition, the city argues, the challenged decision falls within one or both of two established exceptions to ORS 197.015(10)(a) and hence LUBA's jurisdiction. The city contends that adoption of Resolution 05-02 is a ministerial decision made under standards that "do not require interpretation or the exercise of policy or legal judgment," pursuant to ORS 197.015(10)(b)(A). Further, the city argues, Resolution 05-02 simply increases fees charged by the city, in order to keep up with the costs of processing applications, and therefore the decision is a fiscal decision not subject to LUBA's jurisdiction, under the reasoning in *Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980).

As the city recognizes, we have held that decisions that adopt, amend or apply fees governing local land use appeals may be "land use decisions" as defined at ORS 197.015(10). *Friends of Linn County v. City of Lebanon*, 45 Or LUBA 408 (2003), *aff'd* 193 Or App 151, 88 P3d 322 (2004); *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002); *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995). In *Ramsey*, we held that a city's application of the appeal fee section of its zoning ordinance to dismiss a local appeal was a land use decision, and not within the fiscal exception described in *Housing Council*. 29 Or LUBA at 142.

"(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;

"* * * * *

"(b) Does not include a decision of a local government:

"(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]"

In *Friends of Yamhill County*, we held that a county decision that increased the fee to file a local appeal from $250 to $700 was a land use decision subject to our jurisdiction, even though the county's fee schedule was not codified in its zoning ordinance, because the fee schedule is an "integral part of the zoning code provisions governing the processing and review of land use applications." 43 Or LUBA at 275 (quoting *Ramsey*, 29 Or LUBA at 142). We ultimately remanded the county's decision in *Friends of Yamhill County*, because the $700 local appeal fee applied to appeals of a decision made without a hearing under ORS 215.416(11), and thus was inconsistent with ORS 215.416(11)(b), which limits fees for appeal of such decisions to the actual cost of processing the appeal, or $250, whichever is less.[5]

Similarly, in *Friends of Linn County*, we held that a resolution amending a number of city fees, including land use application and appeal fees, did not fall within the fiscal exception to our jurisdiction. However, we rejected the petitioner's challenge to a $500 fee to appeal a planning commission decision to the city council under ORS 227.180(1), finding that there was sufficient evidence in the record to conclude that the appeal fee was "reasonable" and "no more than the average cost of such appeals or the actual cost of the appeal," as required by that statute. 45 Or LUBA at 421-22.

---

[5] ORS 215.416(11) is applicable to counties. ORS 227.175(10)(b), applicable to cities, includes an identical limitation:

> "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 hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee allowed in this paragraph shall not apply to appeals made by neighborhood or community organizations recognized by the governing body and whose boundaries include the site."

It is not clear whether the appeal fee of $100 or one-half the application fee that the city charges under its fee schedule applies to the initial hearing on a decision made without a hearing under ORS 227.175(10), or whether it only applies to appeals of decisions on which the city has already provided an initial hearing, as authorized under ORS 227.180(1)(c). *See* n 2. Petitioner does not cite to ORS 227.175(10)(b) or argue that the fee schedule is inconsistent with that statute, and we do not consider that question further.

The city argues that the foregoing cases are distinguishable because they all involve amendment or application of local appeal fees, while the present decision amends only certain land use application fees and does not amend the local appeal fee. We disagree. As noted, the challenged decision indirectly increases the local appeal fee to appeal eight types of development application decisions. Even if the challenged decision did not affect the local appeal fee in any way, we disagree with the city that the reasoning in the foregoing cases is inapplicable to decisions that increase land use application fees. In similar language to ORS 227.180(1)(c), ORS 227.175(1) prohibits land use permit application fees that are greater than "the actual or average cost" of processing the application. Further, land use application fees are just as much if not more an "integral part of the zoning code provisions governing the processing and review of land use applications" as are local appeal fees.

In short, for the reasons stated in *Ramsey*, *Friends of Yamhill County*, and *Friends of Linn County*, the challenged decision concerns the adoption, amendment or application of a land use regulation, and does not fall within the fiscal exception to our jurisdiction.

Turning to the ORS 197.015(10)(b)(A) exception for decisions made under standards that do not require interpretation or the exercise of policy or legal judgment, we understand the city to argue that the only standard governing the decision is the requirement, at BMC 17.120.180 and ORS 227.175(1), that the fees for planning and zoning permits be no more than the actual or average cost of providing that service. That requirement, the city contends, requires neither interpretation nor the exercise of policy or legal judgment. Presumably, the city would make the same argument under ORS 227.180(1), with respect to its requirement that local appeal fees be "reasonable" and "no more than the average cost of such appeals or the actual cost of the appeal."

BMC 17.120.180, ORS 227.175(1) and ORS 227.180(1) set limits on the fees a city may charge for land use applications and local appeal fees, but do not preclude cities from charging less for such services than the actual or average cost. Under the code and statutes, the city must decide whether to charge the maximum allowed or something less. Deciding whether to charge the

maximum or something less under the code and statutes will often if not invariably require the exercise of policy judgment. For example, the city may wish to charge the maximum for land use applications or for local appeals, because it wishes to discourage development applications or limit local appeals. Conversely, the city may decide to charge significantly less than the actual or average cost because it wishes to encourage development applications or provide greater access to appellate review. Further, the city may decide to subsidize certain development applications, or certain types of local appeals, and not subsidize others. In the present case, as discussed below, staff represented to the city council that even with the increased fees the city would still not recover the total cost of processing land use applications. For whatever reason, it appears that the city council made an implicit policy choice not to impose the maximum fees potentially allowed under the code and statutes. We disagree with the city that the challenged decision falls within the exception to our jurisdiction at ORS 197.015(10)(b)(A).

FIRST AND SECOND ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner argues that the city committed procedural error in adopting the challenged resolution without complying with the requirements at ORS 197.610 to 197.615 for amending a land use regulation.[6] Because the city did not provide the notice and public hearing required by those statutes, petitioner contends, the city's error prejudiced petitioner's substantial rights.

The premise for both assignments of error is petitioner's presumption that the challenged decision is a "land use regulation" subject to the requirements of ORS 197.610 to 197.615.

---

[6] ORS 197.610(1) provides:

> "A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the Director of the Department of Land Conservation and Development at least 45 days before the first evidentiary hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The notice shall include the date set for the first evidentiary hearing. The director shall notify persons who have requested notice that the proposal is pending."

ORS 197.015(11) defines "land use regulation" as a local government zoning ordinance, land division ordinance or "similar general ordinance establishing standards for implementing a comprehensive plan." The challenged decision is a resolution, not an ordinance, and it simply adopts a one-page fee schedule that is required by but is not part of the city's zoning ordinance. While the challenged decision concerns the application of a land use regulation, it does not adopt or amend a land use regulation. Petitioner has not established that the challenged decision is an "ordinance establishing standards for implementing a comprehensive plan" or otherwise a post-acknowledgment plan or land use regulation amendment subject to ORS 197.610 to 197.615. Because those statutes do not apply, the arguments under these assignments of error do not provide a basis for reversal or remand.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city failed to adopt adequate findings supported by substantial evidence demonstrating that the increased land use application fees and the appeal fee are no more than the actual or average cost of providing the planning or zoning service.

The challenged resolution finds in relevant part that "the proposed Land Use Fees accurately reflect the increasing costs of processing applications." Record 8. That finding is presumably based on the staff memorandum, which states as follows:

> "In 2003, the Council adopted Resolution 03-18, which amended the land use fee schedule. Staff has prepared an amended land use fee schedule which reflects increasing costs to the City for application processing. The proposed fee schedule still does not account for total cost recovery, but reflects the increase in time spent by staff in reviewing, processing, and inspecting projects. Please note that the proposed increases are in (**bold**) and are not across the board. Rather, staff re-evaluated the costs of each action and is recommending modest increases for certain applications. Attached please find a copy of the proposed resolution and the existing resolution.
>
> "* * * * *

> "The revenue generated by land use fees lessen the Planning Department's impact on the General Fund (less subsidizing), and has allowed the department to become more self-sufficient in difficult fiscal times. $49,000 was generated in Land Use Fees in FY '03/'04." Record 7.

According to petitioner, the record is void of any evidence showing the actual or average cost of providing application reviews, and thus there is no basis for the city to conclude that the proposed fee schedule complies with BMC 17.120.180 and ORS 227.175(1). Specifically, petitioner contends that,

> "[t]o comply with the Code and statute, one could expect to see the amount of time spent on several applications in each permit category where fees are to be raised. That would be one way to arrive at an average cost or the actual cost of processing applications. Alternatively, one might expect to see what it costs to run the planning department by the hour and how many hours or what percentage of departmental time is consumed on application reviews versus other planning duties. This kind of comparative information did not accompany the recommendation. The one fact in the recommendation is that the planning department generated $49,000 in FY 03/04 from fees." Petition for Review 15.

The city responds that the findings and record are sufficient to demonstrate that the proposed fee increases are consistent with BMC 17.120.180 and ORS 227.175(1). The city emphasizes that the challenged decision merely increases certain application fees in order to keep pace with increased costs of processing such applications, as stated in the staff memorandum.

The detailed comparative analysis that petitioner believes is required under BMC 17.120.180 and ORS 227.175(1) might well be necessary to support a decision that adopts application fees in the first instance or where the city is attempting to justify the maximum amount of fees authorized by the code and statute, *i.e.* fees that represent the actual or average cost of providing planning reviews. That level of detail seems less necessary where, as here, the city is simply increasing certain existing application fees to reflect increased costs and there is unrebutted testimony that, even with the increased fees, the fee schedule does not recover the total cost of application reviews. Petitioner offers no reason to doubt the staff testimony that staff evaluated the costs of application reviews, and the recommended fees accurately reflect increased costs of providing application reviews for certain types of development applications. Nor does petitioner

dispute the statement that, even with the increased fees, the fee schedule does not account for the total cost of such reviews. While the staff testimony on those points was not accompanied by any supporting facts or details, absent some reason to doubt that testimony or require more detail, we cannot say that a reasonable person could not rely on the staff testimony, to support a finding of compliance with BMC 17.120.180 and ORS 227.175(1). *See Friends of Linn County*, 45 Or LUBA at 421-22 (nonspecific staff testimony that the recommended appeal fee is consistent with the anticipated average cost of appeals is substantial evidence, absent contradictory evidence).

Most of petitioner's argument under this assignment of error is directed at the application review fee increases. However, petitioner also argues that the city does not show that "local or state law authorizes the setting of appeal fees and/or how [the city] determined that appeals costs '$100 or 1/2 the original application fee, whichever is greater.'" Petition for Review 15.

The city responds that ORS 227.180(1)(b) specifically authorizes the city to prescribe local appeal fees. In any case, the city argues, the challenged decision does not increase the appeal fee. Finally, the city asserts that an appeal fee of $100 or one-half the application fee is consistent with ORS 227.180(1)(b).

ORS 227.180(1)(b) certainly refutes petitioner's argument that no local or state law authorizes the city to set appeal fees. As noted earlier, petitioner does not cite ORS 227.180(1)(b) or make any arguments under that statute. Instead, petitioner appears to argue under ORS 227.175(1) that the city must show how it determined that "$100 or 1/2 the original application fee, whichever is greater" reflects no more than the actual or average cost of processing appeals. ORS 227.180(1)(c) appears to be the more direct source of that requirement with respect to local appeal of a hearings officer or planning commission decision. Nonetheless, we assume for purposes of this opinion that, like ORS 227.180(1), ORS 227.175(1) also proscribes setting appeal fees for appeal of a hearings officer or planning commission decision that are more than the actual or average cost.

As explained earlier, while the challenged decision does not expressly increase the appeal fee, it indirectly does so for some appeals by increasing eight application fees and hence the appeal fees for those types of applications. The city apparently did not recognize this consequence, because the staff report and discussion below do not discuss appeal fees, much less attempt to demonstrate that the increased fee will not exceed the actual or average cost of processing appeals. It may well be that that demonstration is relatively easy to make. For example, the same factors that increased the cost of application reviews for certain development applications may also increase appellate review costs to the same degree, without exceeding the maximum potentially allowed under the statute. However, without some evidence or testimony on that point, we agree with petitioner that remand is necessary for the city to make that demonstration.

The third assignment of error is sustained, in part.

The city's decision is remanded.