

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

3
4 ALAN MONTGOMERY,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF DUNES CITY,
10 *Respondent.*

11
12 LUBA No. 2009-125

APR13'10 PM 2:31 LUBA

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Dunes City.

18
19 Bill Kloos, Eugene, represented petitioner.

20
21 David N. Allen, Newport, represented respondent.

22
23 HOLSTUN, Board Member; RYAN, Board Member, participated in the decision.

24
25 BASSHAM, Board Chair, concurring.

26
27 TRANSFERED

04/13/2010

28
29 You are entitled to judicial review of this Order. Judicial review is governed by the
30 provisions of ORS 197.850.

INTRODUCTION

The city denied petitioner’s application for subdivision approval, and in a recent decision we remanded the city’s subdivision denial decision. *Montgomery v. City of Dunes City*, ___ Or LUBA ___ (LUBA No. 2008-135, January 7, 2010), *appeal pending* CA144619. The present appeal concerns a subsequent city decision in which the city sought payment from petitioner for the cost of processing petitioner’s subdivision application. The city moves to dismiss, arguing that its decision to charge petitioner the cost of processing his subdivision application is not a land use decision or limited land use decision that is subject to LUBA’s review.

FACTS

A. The City’s Permit Fee Ordinance and Resolution

On June 9, 2005, the city adopted Ordinance No. 179. That ordinance adopted a fee schedule for land use permit applications. Record 55. Under that permit fee schedule the application fee for a variance is \$600 and the application fee for a subdivision with more than four lots is \$1,200 plus \$50 per lot. Nearly two years later, on March 15, 2007, the city adopted Resolution 03-15-07. Record 51-53. That resolution purports to make the application fee required under Ordinance No. 179 a “deposit.” Under Resolution 03-15-07, the planning secretary is to track all city expenditures on land use applications and notify the applicant of the balance remaining on the deposit “no later than [the] end of the month following the month for which the accounting is being made.” Record 51. Resolution 03-15-07 provides that applicants must pay any city costs incurred in processing permit applications in excess of the deposit.

B. The City’s Decision on Montgomery View Estates

On October 1, 2007, petitioner filed applications for subdivision and variance approval and, pursuant to Ordinance No. 179 and Resolution 03-15-07, a deposit of

1 \$3,785.44. Record 48-50. After a hearing, the city planning commission recommended
2 approval of the subdivision with conditions. However, on July 22, 2008, the city council
3 denied the application for subdivision approval and took no action on the variance
4 application. That July 22, 2008 decision was appealed to LUBA and, as noted earlier, LUBA
5 subsequently remanded the city's July 22, 2008 decision on Montgomery View Estates to the
6 city. An appeal of LUBA's decision in that appeal is pending at the Court of Appeals
7 (A144619)

8 **C. The Fee Dispute**

9 **1. First Round**

10 On August 28, 2008, the city sent petitioner a letter with an invoice for \$21,945.63.
11 Record 37-39. Although that August 28, 2008 letter refers to an earlier August 7, 2008 letter,
12 that earlier letter is not included in the record. On September 4, 2008, petitioner sent the city
13 a letter asking the city to identify the city's authority for invoicing petitioner for \$21,945.63
14 and asking the city to identify the city's procedure for challenging the invoice. On September
15 8, 2008, petitioner's attorney and the city attorney exchanged e-mail messages. Record 34-
16 35. The city attorney's e-mail message states that the city's fee ordinance and resolution are
17 attached. Petitioner's attorney's e-mail message in response again asks if there is a local
18 appeal available to contest the invoice and with regard to the ordinance and resolution says "I
19 will absorb and get back to you." Record 34. On September 26, 2008, the city's attorney
20 advised petitioner's attorney in an e-mail message that he knew of no local right of appeal to
21 challenge the invoice.

22 **2. Second Round**

23 In a June 30, 2009 letter, the city makes a second demand for payment of the invoice.
24 That letter states in part:

25 "Our records show that payment for your billable time record from October
26 2007 through August 2008 remains unpaid and is late.

1 additional information regarding the invoice. Record 18-20. In an October 20, 2009 letter to
2 petitioner, the city refers to its July 7, 2009 letter and advises petitioner that no additional
3 public records will be provided until petitioner submits a completed public records request
4 form. Record 16. On that same date, October 20, 2009, Valley Credit Service sent a letter to
5 petitioner demanding payment of \$31,468.83 (\$21,945.63 principal; \$4,036.79 interest;
6 \$5,486.41 collection fee). Record 15. On October 29, 2009, petitioner filed a public records
7 request with a completed public records request form. Record 13-14.

8 **D. Petitioner's Second LUBA Appeal**

9 On November 6, 2009, petitioner filed with LUBA a notice of intent to appeal the
10 city's fee decision.² Record 1-12. The notice of intent to appeal provides the following
11 description of the appealed decision:

12 "Notice is hereby given that petitioner intends to appeal that land use decision
13 or limited land use decision of respondent, which determined to charge
14 Petitioner for costs claimed by the city to be the costs of processing and
15 denying Petitioner's application for tentative subdivision approval. The
16 charges claimed by the city are reflected in a document titled: 'Billable Time
17 Record, Montgomery Subdivision, SUB 01/07,' * * *. Petitioner responded to
18 the city's 'Final Notice,' with an October 16, letter * * * asking for
19 information about hearing procedures to contest the city invoice. The city put
20 the claim out to collection, as evidenced by the October 20, 2009 demand
21 letter from Valley Credit Service * * *.

22 "Petitioner has requested public records from the city to determine when it
23 made the final decision to put the claim out to collection, rather than to
24 provide any local procedure for determining the legitimacy of the claim. * * *
25 No response has been received from the city yet.

26 "Petitioner believes the final decision of the city was made sometime after
27 Petitioner's October 16 response to the city's 'Final Notice' letter but not later
28 than the October 20 demand letter from Valley Credit Service.

² We refer to this appeal as the second LUBA appeal to distinguish it from petitioner's earlier appeal of the city's subdivision denial decision that led to a LUBA decision that is now pending at the Court of Appeals.

1 “The city’s invoicing decision is a land use decision because it applies city
2 land use ordinances and resolutions that authorize the city to charge applicants
3 for city processing of land use applications.

4 “If LUBA determines that the decision is not a land use decision, then the
5 Petitioner requests transfer of this matter to circuit court.” Record 1-2.

6 On November 10, 2009, petitioner filed a Contingent Motion to Transfer, in which
7 petitioner requests that LUBA transfer this appeal to Lane County Circuit Court in the event
8 LUBA determines it lacks jurisdiction over the appealed decision.³ On December 11, 2009
9 the city filed a Motion to Determine Lack of Jurisdiction, which we treat as a motion to
10 dismiss or transfer to circuit court. We will refer to that motion as a motion to dismiss.

³ OAR 661-010-0075(11) provides:

“Motion to Transfer to Circuit Court:

- “(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12).
- “(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than ten days after the date a respondent's brief or motion that challenges the Board's jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than ten days after the date the moving party learns the Board has raised a jurisdictional issue.
- “(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.”

ORS 34.102(4) provides:

“A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition.”

1 If we understand the notice of intent to appeal correctly, petitioner takes the position
2 that although he does not have a copy of the city’s actual decision in this matter, the city’s
3 decision was reduced to writing and became final and subject to appeal to LUBA sometime
4 after his October 16, 2009 letter to the city and sometime before the city turned the matter
5 over to Valley Credit Service for collection and Valley Credit Service sent its letter on
6 October 20, 2009. If petitioner is correct about that, his November 6, 2010 notice of intent to
7 appeal was filed less than 21 days later and therefore was timely filed. OAR 661-010-
8 0015(1).⁴ If the city’s decision became final on October 12, 2009, the date of the city’s final
9 notice, it would appear that petitioner’s notice of intent to appeal was not timely filed with
10 LUBA.

11 On November 23, 2009, the city asked for additional time to transmit the record in
12 this appeal and indicated that petitioner did not object to the requested extension. LUBA
13 granted that request. As already noted, the city filed its motion to dismiss on December 11,
14 2009, and filed a separate motion requesting that the city not be required to file the record
15 until the jurisdictional question was resolved. In that motion, the city advised LUBA that
16 petitioner wanted the record settled before attempting to resolve the motion to dismiss.

17 On December 16, 2009, petitioner responded to the city’s motion to dismiss and took
18 the position that LUBA should require the city to file the record before attempting to decide
19 the motion to dismiss. On December 23, 2009, the city filed separate replies to petitioner’s
20 jurisdictional arguments and petitioner’s objection that the city should be required to transmit
21 the record before the city’s motion to dismiss is decided.

22 Petitioner next filed separate replies to the city’s replies, on December 30, 2009 and
23 December 31, 2009. LUBA initially anticipated that the pending motion to dismiss could be
24 resolved without requiring that the city file the record; however, LUBA later determined that

⁴ Under OAR 661-010-0015(1), the deadline for filing a notice of intent to appeal expires on “the 21st day after the date the decision * * * becomes final or within the time provided by ORS 197.830(3) through (5).”

1 it should have the record before ruling on the motion to dismiss. In a February 24, 2010
2 Order, LUBA gave the city 21 days to transmit the record in this appeal. LUBA received the
3 record on March 22, 2010.

4 Finally, on March 27, 2010, petitioner filed precautionary record objections and
5 additional jurisdictional arguments. Thereafter, on April 8, 2010, the city filed a
6 supplemental record and a response to petitioner's precautionary record objections and
7 additional jurisdictional arguments.

8 **MOTION TO DISMISS**

9 **A. The City's Argument**

10 The city contends that in assessing petitioner for the cost of processing his
11 subdivision application, the city relied on Ordinance 179 and Resolution 03-15-07. For
12 purposes of resolving the motion to dismiss, we will assume that the city is correct in this
13 contention. We also do not question the city's contention that Ordinance 179 and Resolution
14 03-15-07 were not adopted as part of the city's zoning ordinance or any other city land use
15 regulation.⁵ We understand the city to take the position that the \$21,945.63 it sought from
16 petitioner represents the actual cost of processing his subdivision application and variance
17 application, with credit for the initial deposit that petitioner paid for his subdivision
18 application and accompanying variance request. Citing *Friends of Lincoln County v.*
19 *Newport*, 7 Or LUBA 114 (1982), the city contends that its decision in this matter is a "fiscal
20 decision" and, as such, is not subject to LUBA review.

21 Before turning to *Friends of Lincoln County* and the subsequent decisions that
22 petitioner cites and relies on, we note that after the record was received by LUBA on March

⁵ Petitioner contends the fee the city is attempting to collect is limited by ORS 227.175(1) to the "actual" cost the city incurred. ORS 92.044(3), which authorizes local governments to prescribe fees for processing subdivision applications, may also play a role in ultimately resolving the parties' fee dispute on the merits. However, for purposes of resolving the jurisdictional questions presented by the city's motion to dismiss, it does not matter whether these statutes apply.

1 22, 2010, petitioner filed precautionary record objections and additional argument concerning
2 jurisdiction on March 27, 2010. In his additional jurisdictional arguments, petitioner argues
3 for the first time that the city may not yet have adopted a final written decision concerning the
4 amount of money the city believes it is owed by petitioner. In a March 25, 2010 letter, the
5 city takes the position that the October 12, 2009 final notice is the city's final decision in this
6 matter and for the first time suggests that petitioner's November 6, 2009 appeal may not have
7 been timely filed. We neither consider nor attempt to resolve the parties' new positions that
8 the city has not adopted a final land use decision or that petitioner's appeal may not have
9 been timely filed. As explained below, and without regard to the merits of either of those
10 arguments, we conclude that we do not have jurisdiction to review the challenged decision.
11 That conclusion requires that we transfer this appeal to circuit court. After that transfer there
12 may be a question whether the city has adopted a decision that is properly the subject of a
13 writ of review under ORS 34.010 through 34.102, but it will not matter whether the city has
14 rendered a written decision with all the formalities necessary to constitute a land use decision.
15 Similarly, following our transfer, it will not matter whether petitioner's appeal was filed
16 within the 21 days required by OAR 661-010-0015(1). The only relevant question regarding
17 the timeliness of petitioner's appeal will be whether petitioner's appeal was filed within the
18 60 days allowed by ORS 34.030. ORS 34.102(4).⁶ We turn to *Friends of Lincoln County*.

19 **B. *Friends of Lincoln County***

20 In *Friends of Lincoln County*, petitioners appealed a City of Newport planning
21 commission decision that granted subdivision approval. The city charged petitioners a \$50

⁶ Under ORS 34.102(4), after LUBA transfers an appeal to circuit court, the circuit court treats the transferred appeal as a "petition for writ of review." See n 3. Under ORS 34.102(4):

"If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition."

ORS 34.030 requires that a petition for writ of review must be filed within "60 days from the date of the decision."

1 appeal fee and ultimately charged petitioners an additional \$2,000 to prepare a transcript of
2 the planning commission proceedings. Petitioners paid the total \$2,050 fee under protest.
3 The subdivision applicant later withdrew the application for subdivision approval, and the
4 city council ultimately dismissed petitioner's local appeal. Petitioners appealed that city
5 council decision to LUBA.

6 At LUBA petitioners challenged the city council's dismissal decision on the merits,
7 and in an order dated May 26, 1982, LUBA rejected petitioners' challenge of the city
8 council's dismissal decision on the merits as moot. *Friends of Lincoln County v. Newport*, 5
9 Or LUBA 346 (1982). However, in that order LUBA also allowed the appeal to proceed with
10 regard to petitioners' challenge to the appeal and transcript fee. LUBA's final decision
11 dismissing petitioners' challenge to the appeal and transcript fee was issued over seven
12 months later, on December 28, 1982.

13 In challenging the appeal and transcript fee, petitioners in *Friends of Lincoln County*
14 argued that the resolution that the City of Newport relied on to collect the \$2,050 fee had not
15 been adopted in compliance with ORS 92.044 and 92.048.⁷ The city took the position that
16 the authority for the resolution was independent of those statutes. LUBA ultimately relied on
17 the Court of Appeals' decision in *Housing Council v. City of Lake Oswego*, 48 Or App 525,
18 617 P2d 655 (1980), *rev dismissed* 291 Or 878, 635 P2d 647 (1981), to conclude the city's
19 decision to require payment of the appeal and transcript fee was a fiscal decision that LUBA
20 lacked jurisdiction to review. Based on that conclusion LUBA dismissed the appeal.

⁷ In *Friends of Lincoln County*, LUBA provided the following description of ORS 92.044 and 92.048:

“ORS 92.044 allows counties and cities to adopt ordinances and resolutions providing for fees to process requests for subdivisions. ORS 92.048 requires, in part, that ordinances and resolutions adopted under authority of ORS 92.044 must be preceded by certain notices and must, when adopted and before being effective, be ‘filed’ in the county recorder’s office.” ⁷ Or LUBA at 114 n 4.

1 In *Housing Council*, the issue was whether the city was required to apply the
2 statewide planning goals in adopting an ordinance that would establish a systems
3 development charge.⁸ The Court of Appeals concluded that the ordinance was an exercise of
4 “fiscal policy” and, as such, was not a decision affecting land use and was not subject to the
5 statewide planning goals. The Court of Appeals first rejected the argument that some but not
6 all exercises of fiscal policy qualify as exercises of land use planning responsibility, which
7 are subject to the statewide planning goals, as too ambiguous and unworkable and then
8 rejected the argument that all fiscal policy must comply with the statewide planning goals as
9 “inconceivable:”

10 “The ambiguity of the line drawn by LCDC (‘significant impact’) and
11 unworkable procedure adopted by LCDC (determine impact from the evidence
12 presented at a local hearing that might not be held) persuades us that a rule
13 that some but not all local fiscal policy must comply with the goals cannot
14 have been the legislative intent. That leaves the either/or question of whether
15 the legislature intended *all* local fiscal policy or *no* local fiscal policy to
16 comply with the goals.

17 “We simply cannot imagine that the legislature intended that all local taxation,
18 budget and fiscal policy had to comply with the statewide planning goals. A
19 county might decide that it will or will not expend money to pave graveled
20 roads. A city might adopt either a very modest or very grandiose budget for
21 acquisition of park land and construction of parks. A city might set sewer and
22 water rates relatively high or relatively low. A school district might adopt a
23 bare-bones budget, or it might decide to build heated swimming pools and
24 indoor tennis courts at all the schools. All of these decisions would affect land
25 use interests like transportation, recreation and the efficient provision of
26 public services. All of these decisions could result in higher or lower fees and
27 taxes, thereby increasing or decreasing the cost of housing. Yet if the
28 legislature contemplated that all of these decisions are exercises of land use
29 planning responsibility that must comply with the goals, there is little or no
30 local government action that is not land use planning.

31 “* * * * *

⁸ As currently defined by ORS 223.299(4)(a), a systems development charge is “a reimbursement fee, an improvement fee or a combination thereof assessed or collected at the time of increased usage of a capital improvement or issuance of a development permit, building permit or connection to the capital improvement.”

1 “Having rejected as substantively and procedurally unmanageable any attempt
2 to say that some but not all fiscal policy must comply with the goals, and
3 having rejected as inconceivable the notion that the legislature intended that
4 all fiscal policy had to comply with the goals, the only remaining possibility is
5 that no local taxation or budget ordinance has to comply with the goals. We
6 so hold.” 48 Or App at 537-38 (emphases in original).

7 Relying in large part on *Housing Council*, in *Friends of Lincoln County* LUBA
8 concluded that the city’s decision to collect the \$2,050 fee was a fiscal decision that fell
9 outside LUBA’s review jurisdiction:

10 “* * * The relevant question is whether the charge made by the City of
11 Newport to recover its expenses is an exercise of a land use planning
12 responsibility for which land use criteria are applicable. * * * We conclude
13 that while applications for land use permits and appeals of local land use
14 decisions have such impacts and are exercises of planning and zoning
15 responsibilities, legitimate cost recovery for these services does not impact
16 land *uses* and is not an exercise of a land use planning responsibility. Unlike
17 subdivision, zoning and other land use activities, the criteria used to recover
18 the cost of conducting the service are not founded in land use goals or
19 standards, but in budgetary and fiscal analysis. As such, the amount charged
20 to such services is outside the considerations to be included in a local
21 comprehensive plan and not a matter of land use concern. Further, while the
22 application and appeals process is provided for and required by state law,
23 recovery of the costs is not mandated by state law. *See* ORS 227.160 to ORS
24 227.180 and ORS 215.402 to ORS 215.422. * * *” 7 Or LUBA at 118
25 (emphasis in original; footnote omitted).

26 LUBA reserved judgment over whether it might have authority to review the fee resolution
27 itself, if a timely appeal were filed. 7 Or LUBA 119 n 10. LUBA also left open the
28 possibility that a fee that was adopted as a “tool to limit access to the [land use] process”
29 might “significantly affect land uses” and for that reason be “subject to scrutiny as a land use
30 decision.” 7 Or LUBA at 120.

31 Although there are some differences between the fee dispute in *Friends of Lincoln*
32 *County* and petitioners’ fee dispute with the city in this appeal, *Friends of Lincoln County*
33 supports the city’s argument that this appeal should be dismissed.

1 **C. *Ramsey v. City of Portland***

2 *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995), is a significant case for two
3 reasons. In that case, the petitioner filed a local appeal of a hearings officer’s decision that
4 approved an application for a zone change, planned unit development and subdivision. The
5 city had previously adopted a fee schedule as part of its land use code and under that fee
6 schedule the appeal fee was equal to one-half the original application fee. Under the code,
7 the required appeal fee had to be submitted with a timely appeal. Petitioner submitted a
8 timely appeal, on the last day to appeal, but without the required appeal fee. Petitioner
9 instead submitted a request for waiver of the appeal fee with his appeal. The city code
10 authorized a low income waiver of the appeal fee, but if the appeal was filed without the
11 required appeal fee, the waiver had to be approved *before* the appeal was filed. Because
12 petitioner did not include the required appeal fee or receive prior approval for an appeal fee
13 waiver, the city dismissed the appeal. Petitioner appealed that dismissal to LUBA.

14 **1. Jurisdiction to Consider a Challenge to the Amount of a Land Use**
15 **Appeal Fee**

16 The first significant aspect of *Ramsey* was LUBA’s decision to consider petitioner’s
17 argument that the city’s appeal fee violated statutory limits on appeal fees. ORS
18 227.180(1)(c) was enacted in 1983, one year after LUBA’s decision in *Friends of Lincoln*
19 *County*, and placed limitations on permit appeal and transcript fees:

20 “[A city] governing body may prescribe, by ordinance or regulation, fees to
21 defray the costs incurred in acting upon an appeal from a hearings officer,
22 planning commission or other designated person. The amount of the fee shall
23 be *reasonable and shall be no more than the average cost of such appeals or*
24 *the actual cost of the appeal*, excluding the cost of preparation of a written
25 transcript. The governing body may establish a fee for the preparation of a
26 written transcript. The fee shall be reasonable and shall not exceed the actual
27 cost of preparing the transcript up to \$500. In lieu of a transcript prepared by
28 the governing body and the fee therefore, the governing body shall allow any
29 party to an appeal proceeding held on the record to prepare a transcript of
30 relevant portions of the proceedings conducted at a lower level at the party’s

1 own expense. If an appellant prevails at a hearing or on appeal, the transcript
2 fee shall be refunded.” ORS 227.180(1)(c) (emphasis added).⁹

3 In *Ramsey*, petitioner argued that the \$3,567.50 appeal fee the city charged was unreasonable
4 and exceeded the actual cost of the appeal. LUBA determined that it did not need to
5 determine whether that challenge was properly presented in an appeal of a decision applying
6 the previously adopted fee schedule, as opposed to a direct challenge to the decision that
7 adopted the fee schedule, because there was “no evidence in the record establishing that the
8 city’s appeal fee is unreasonable or that it exceeds the average or actual cost of such an
9 appeal.” 29 Or LUBA at 146. LUBA also noted that petitioner had not moved for an
10 evidentiary hearing at LUBA to present such evidence.

11 In considering and rejecting petitioner’s challenge to the city’s \$3,567.50 appeal fee
12 in *Ramsey*, LUBA neither acknowledged nor discussed its decision thirteen years earlier in
13 *Friends of Lincoln County*, where it had concluded that the City of Newport’s decision to
14 impose a \$2,050 appeal and transcript fee was a fiscal decision and therefore not reviewable
15 by LUBA under the reasoning in *Housing Council*. There are some differences in the facts in
16 those two cases and there have been statutory changes governing local land use permit and
17 appeal fees that may or may not explain the different jurisdictional results in *Friends of*
18 *Lincoln County* and *Ramsey*. However, on the question of LUBA’s jurisdiction to review
19 challenges to the amount a local government charges to accept a local appeal of a land use
20 decision, those cases are at least arguably inconsistent.

21 2. The Intervenor’s Motion to Dismiss in *Ramsey*

22 The intervenor in *Ramsey* did argue the fee section of the city’s zoning ordinance
23 qualified as a “fiscal ordinance” and because the challenged decision applied that fiscal
24 ordinance to dismiss petitioner’s local appeal, under *Housing Council* LUBA lacked
25 jurisdiction over the appeal. The second significant aspect of *Ramsey* is the reasoning LUBA

⁹ Identical legislation was also adopted in 1983 for counties. ORS 215.422(1)(c).

1 adopted in denying that motion to dismiss. As previously noted, LUBA neither cited nor
2 attempted to distinguish its earlier decision in *Friends of Lincoln County*. LUBA did,
3 however, distinguish its decision in *The Petrie Company v. City of Tigard*, 28 Or LUBA 535
4 (1995), an appeal that concerned a City of Tigard decision that denied a subdivision
5 developer’s request to form a reimbursement district to allow the subdivision developer to
6 recover part the costs of extending sewers to a previously approved and developed
7 subdivision. We will return to *Petrie* later in this opinion. The reasoning LUBA set out to
8 distinguish *Petrie* is set out below:

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

14 “However, the PCC chapter at issue here, PCC chapter 33.750 (Fees), is part
15 of the city’s zoning code and *is an integral part of the zoning code provisions*
16 *governing the processing and review of land use applications. As such, PCC*
17 *chapter 33.750 is not a purely fiscal ordinance, and its application to*
18 *petitioner’s attempted appeal of a hearings officer’s decision on a land use*
19 *application is not excepted from review by LUBA under Housing Council.”*
20 29 Or LUBA at 142 (underlining and italics added).

21 In the above-quoted text, LUBA appears to give two reasons for rejecting the
22 applicability of the *Housing Council* fiscal exception and concluding that it had jurisdiction
23 to review the city’s decision to dismiss the appeal based on the failure of petitioner to pay the
24 required appeal fee or secure an approved waiver before filing the appeal: (1) the fee schedule
25 and requirement that the fee accompany the local appeal were part of the city’s zoning code
26 and (2) appeal fees were “an integral part of the zoning code provisions governing the
27 processing and review of land use applications.”

28 The first reason (appeal fee schedule was adopted as part of the zoning ordinance) has
29 turned out to be of relatively little significance in subsequent decisions concerning the
30 reviewability of local decisions concerning land use application and appeal fees. However,

1 the second reason (fees are an integral part of reviewing land use applications) has been
2 relied on in a number of subsequent decisions to entertain challenges to land use permit
3 application fees and appeal fees.

4 **D. Direct Appeals of Decisions that Adopt or Amend Land Use Permit**
5 **Application Fees or Permit Appeal Fees**

6 *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002) concerned a
7 county decision that increased land use permit appeal fees and increased the fee the county
8 charged to request a hearing following notice of a permit decision that is initially rendered
9 without a hearing. Petitioner appealed that decision to LUBA, arguing the ordinance violated
10 ORS 215.416(11)(b) by imposing a fee in excess of \$250.¹⁰ In rejecting the county’s motion
11 to dismiss, LUBA first concluded that because the decision changed the fees that the county
12 charges for hearings under its zoning ordinance, the decision “concerns” the application of
13 the zoning ordinance and therefore falls within the statutory definition of “land use decision”
14 at ORS 197.015(10)(a). *See* n 12. Relying on language in *Ramsey*, LUBA rejected the
15 county’s argument that the decision in that appeal fell within the *Housing Council* fiscal
16 exception:

17 “Although the amended fee schedule at issue here is not codified as part of the
18 zoning ordinance [as it was in *Ramsey*], we see no reason to reach a different
19 conclusion here. The challenged decision is also ‘an integral part of the
20 zoning code provisions governing the processing and review of land use
21 applications.’” *Id.* at 275.

22 This view—that decisions that adopt or amend permit fee and permit appeal fee
23 schedules are reviewable by LUBA because they are an integral part of the zoning code and
24 local review of land use applications—has been adopted by LUBA in a number of subsequent

¹⁰ ORS 215.416(11)(b) provides in part:

“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. * * *”

1 decisions, and those decisions have rejected arguments that the *Housing Council* fiscal
2 decision exception should apply to exempt those kinds of decisions from LUBA review.
3 *Sommer v. Josephine County*, 52 Or LUBA 806, 807-09 (2006); *Doty v. City of Bandon*, 49
4 Or LUBA 411, 414-18 (2005); *Friends of Linn County v. City of Lebanon*, 45 Or LUBA 408,
5 410-16 (2003). In two more recent appeals challenging new or amended land use application
6 fees and appeal fees no jurisdictional issue has even been raised. *1000 Friends of Oregon v.*
7 *Crook County*, ___ Or LUBA ___ (LUBA No. 2009-077, December 17, 2009); *Landwatch v.*
8 *Lane County*, 52 Or LUBA 140 (2006).

9 **E. “As–Applied” Challenges to Application and Appeal Fee Schedules**

10 As we have already explained, in *Ramsey* LUBA first considered an “as–applied”
11 challenge to an appeal fee, albeit without explaining how that decision was consistent with
12 *Friends of Lincoln County*, which had concluded that LUBA lacked jurisdiction to consider
13 such a challenge. Other LUBA decisions have cited and relied on *Ramsey* to allow “as-
14 applied” challenges to appeal fees. *Eder v. Crook County*, ___ Or LUBA ___ (LUBA No.
15 2009-018, December 17, 2009), slip op 26-29; *Mazoral v. City of Bend*, 59 Or LUBA 260
16 263-68 (2009); *McGovern v. Crook County*, 57 Or LUBA 443, 451-55 (2008); *Young v.*
17 *Crook County*, 56 Or LUBA 704, 714-18, *aff’d* 224 Or App 1, 197 P3d 48 (2008).

18 **F. Decision**

19 Under existing statutes, the fees local governments charge for processing permit
20 applications may not exceed “the actual or average cost of providing that service.” ORS
21 215.416(1) (counties); ORS 227.175(1) (cities). Similarly, the fees local governments may
22 charge for appeals of a land use permit decision to a higher local body must “be reasonable
23 and shall be no more than the average cost of such appeals or the actual cost of the appeal
24 * * *.” ORS 215.422(1)(c) (counties) 227.180(1)(c) (cities). As we noted earlier there is also
25 an absolute statutory limit on the fee local governments may charge for some kinds of
26 appeals, *see* n 10, and ORS 215.422(1)(c) and 227.180(1)(c) also limit the fee local

1 governments can charge for transcripts. Under *Ramsey* and the decisions that have followed
2 *Ramsey*, it is reasonably clear that LUBA has in a number of cases decided that it has
3 jurisdiction to review (1) decisions that adopt new or amended fee schedules and (2) “as-
4 applied” challenges to those fee schedules that arise in the context of a LUBA appeal of a
5 land use decision or limited land use decision where the fee was required and paid at some
6 point in the local process that led to the final decision on the permit application.

7 Although we likely will at some point have to reconcile *Friends of Lincoln County*
8 and *Ramsey*, we need not decide here whether *Ramsey* is consistent with *Friends of Lincoln*
9 *County* and, if not, whether *Ramsey* or *Friends of Lincoln County* was correctly decided.
10 That is because *Ramsey* and all of the other “as-applied” challenges following *Ramsey* that
11 potentially have some direct bearing on the jurisdictional issue in this appeal were appeals of
12 what were undeniably land use decisions, where the petitioner also wished to challenge the
13 fee the local government charged petitioner to pursue a local appeal of the initial local
14 decision on the permit decision. In other words, the permit fee was paid during and was
15 arguably part of the same local land use proceeding that led to the permit decision on the
16 merits that was on appeal to LUBA. Petitioner’s present appeal is not such a case.

17 The city’s decision denying petitioner’s subdivision application was issued and
18 became final on July 22, 2008. As we have already noted, that decision was appealed to
19 LUBA, and in a January 7, 2010 decision, LUBA remanded the city’s decision denying that
20 application. No issues were raised in that appeal concerning the application fee petitioner
21 was required to pay. Petitioner’s fee dispute with the city did not even arise until over a
22 month *after* the city adopted its decision to deny petitioner’s subdivision application. As far
23 as we can tell, the fee dispute between petitioner and the city began on August 28, 2008,
24 when the city sent petitioner a letter with an invoice for \$21,945.63. The LUBA decisions we
25 cite and discuss above are at best authority for the proposition that petitioner could have
26 challenged the fee the city charged petitioner to process his subdivision application in his

1 LUBA appeal that challenged the July 22, 2008 decision on the merits. However, petitioner
2 does not argue that the city made a *final* decision to charge him \$21,945.63 and additional
3 collection fees until sometime after October 16, 2009, more than a year after the city rendered
4 its decision on petitioner’s subdivision application.

5 Although it did not concern a permit application fee, we believe our decision in *Petrie*
6 supports a conclusion that the *Housing Council* fiscal exception should apply here. In *Petrie*,
7 the developer of a subdivision had previously received subdivision approval and proceeded to
8 make sewer improvements that benefitted neighboring property owners. The subdivision
9 applicant later sought to recover some of those costs by seeking formation of a
10 reimbursement district pursuant to the city’s previously adopted procedure for creating such
11 reimbursement districts. The city voted to deny the request to form the reimbursement
12 district and the subdivision developer appealed that reimbursement district decision to
13 LUBA. LUBA has jurisdiction to review land use decisions. ORS 197.825(1).¹¹ Although
14 the local law that governed formation of reimbursement districts was codified separately from
15 the city’s zoning ordinance, LUBA concluded that it qualified as a land use regulation. 28 Or
16 LUBA at 538. Because the city’s decision applied the local laws governing formation of
17 reimbursement districts, which were land use regulations, the city’s decision literally fell
18 within the ORS 197.015(10)(a) definition of “land use decision.”¹² *Id.* Nevertheless, LUBA
19 concluded that it did not have jurisdiction to review the decision:

20 “The exemption created by *Housing Council* clearly applies to TMC Chapter
21 13.08 [regarding reimbursement districts]. Petitioner’s subdivision approval
22 was granted in a decision rendered in 1993, which is not the subject of this
23 appeal. The sewer improvements have already been constructed pursuant to

¹¹ ORS 197.825(1) provides, in part:

“Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision * * *.”

¹² As defined by ORS 197.015(10)(a), a final local government decision that concerns the application of a land use regulation is a land use decision.

1 that 1993 decision. The only purpose served by TMC Chapter 13.08 is to
2 provide a means whereby petitioner can recoup a portion of the cost of the
3 sewer improvements that it has already constructed pursuant to the 1993
4 subdivision approval decision. TMC Chapter 13.08 is much more a purely
5 fiscal ordinance than was the systems development charge ordinance at issue
6 in *Housing Council*.

7 “While *Housing Council* dealt with a facial challenge to a city fiscal
8 ordinance, and the decision before LUBA in this appeal is the city’s
9 application of a fiscal ordinance, the court of appeals’ decision in *Housing*
10 *Council* made it clear that just as the adoption of fiscal policy does not result
11 in a decision reviewable for compliance with land use requirements, neither
12 does the application of such fiscal policy. [48 Or App] at 538.” *The Petrie*
13 *Company*, 28 Or LUBA at 540 (footnote omitted).

14 It may be that under *Ramsey* and our decisions that have followed and applied *Ramsey*
15 that it is appropriate for LUBA to resolve any permit application fee or permit appeal fee
16 disputes that may arise as part of a land use proceeding, *in an appeal of the permit decision*
17 *that results from those land use proceedings*. However, neither *Ramsey* nor any of the cases
18 that have followed *Ramsey* are authority for the proposition that LUBA has jurisdiction to
19 resolve a fee dispute that does not arise until well over a year *after* the decision on the
20 underlying land use application becomes final. We would have to extend *Ramsey* to
21 conclude that we have jurisdiction to review such a fee dispute decision, and we decline to do
22 so. Instead, although our decision in *Petrie* does not concern a fee dispute, we believe it is
23 more appropriate to extend the reasoning in that case to the present appeal. Like the decision
24 in *Petrie*, the decision that petitioner has appealed to LUBA in this appeal postdates the city’s
25 decision on his subdivision application and is entirely divorced from the merits of that
26 subdivision decision under applicable land use law. In its current posture, the fee dispute
27 between petitioner and the city is a purely fiscal matter. The validity of the city’s decision
28 will turn on whether the fee the city seeks to collect from petitioner is consistent with

1 applicable local and state law, if any, that governs recovery of such costs.¹³ Whatever the
2 answer to that question, the current fee dispute between the city and petitioner did not arise
3 until long after the local proceedings that led to the city's July 22, 2008 decision to deny
4 petitioner's subdivision application were complete, and we conclude that we do not have
5 jurisdiction to consider petitioner's challenge to the \$21,945.63 and additional collection
6 fees.

7 **CONTINGENT MOTION TO TRANSFER TO CIRCUIT COURT**

8 As previously noted, pursuant to OAR 661-010-0075(11), petitioner filed a contingent
9 motion to transfer this appeal to Lane County Circuit Court, in the event LUBA determined
10 that it did not have jurisdiction to consider the appeal. We grant the motion. This appeal is
11 transferred to Lane County Circuit Court.

12 Bassham, Board Chair, concurring.

13 I agree with the majority reasoning and conclusion under *Petrie* that the decision
14 before us falls within the fiscal exception described in *Housing Council*. To the extent the
15 judicially-created fiscal exception doctrine has continued vitality in today's regulation-
16 saturated land use environment, the doctrine should be understood to encompass the kind of
17 financial dispute between petitioner and the city in the present case. For one thing, because
18 the city's application fee is based on its "actual" expenses incurred in processing the
19 application and invoiced after processing is completed, one of the likely issues in resolving
20 the financial dispute between the parties will be how accurately or adequately the city
21 documented its actual expenses. If so, that is primarily a factual rather than legal question,
22 which the circuit court is far better suited to resolve than this Board.

¹³ The parties dispute which laws governing subdivision processing fees apply in this case and presumably dispute whether the city complied with any procedures that govern recovery of the costs of processing petitioner's subdivision application. We need not and do not address or attempt to resolve those disputes.

1 I also agree that the results in *Friends of Lincoln County* and *Ramsey* and its progeny
2 appear to conflict, and that either the two decisions must be reconciled or one must be
3 overruled or modified. That analysis must await a different case. I write only to suggest that
4 the apparent conflict is less than it appears, when one considers that *Friends of Lincoln*
5 *County* predated the 1983 adoption of ORS 227.180(1)(c) and related legislation governing
6 application and appeal fees and transcript costs. It seems significant to me that the legislature
7 chose to place those new restrictions in the statutory chapters governing city and county land
8 use planning and decision-making. Given the timing of that legislation, it also seems likely
9 that the new restrictions were a legislative reaction to the *Friends of Lincoln County*
10 litigation, something I believe the legislative history of ORS 227.180(1)(c) bears out. In
11 other words, it is possible that both *Friends of Lincoln County* and *Ramsey* were correctly
12 decided, considering the intervening statutory changes. But that interesting question must be
13 addressed on another occasion.