

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 LANDWATCH LANE COUNTY,

5 *Petitioner,*

6  
7 vs.

8  
9 LANE COUNTY,

10 *Respondent.*

11  
12 LUBA No. 2006-039

13  
14 FINAL OPINION

15 AND ORDER

16  
17 Appeal from Lane County.

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19 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of  
20 petitioner. With her on the brief was the Goal One Coalition.

21  
22 Stephen L. Vorhes, Assistant County Counsel, Eugene, filed the response brief and  
23 argued on behalf of respondent.

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

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27 DAVIES, Board Member, did not participate in the decision.

28  
29 REMANDED

06/27/2006

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

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**NATURE OF THE DECISION**

Petitioner appeals a county order that increases the fees that the Lane County Land Management Division charges for its planning, subsurface sanitation, surveyor and building permit activities.

**FACTS**

Although the challenged order changes many fees, petitioner’s complaint is directed at only three fee increases. The county previously charged a fee of \$1,740 to appeal a planning director decision to the hearing official and a fee of \$1,740 to appeal a hearings official decision to the board of county commissioners. Record 15. The challenged order increases both fees to \$2,150. Record 3. The county previously charged a fee of \$1,160 to appeal a hearings official decision to the board of county commissioners, where the board of county commissioners has the discretion to elect not to hear the appeal.<sup>1</sup> Record 15. The challenged order increases that fee to \$1,435. Record 3. During the local proceedings, petitioner raised the following issue:

“Fees for an appeal from the Hearings Official (or the Planning Commission) to the Board of Commissioners must be ‘reasonable’ and cannot exceed the ‘average or actual cost’ of the appeal.

“It is not reasonable to charge an appellate either \$1,160 or \$1,435 for the Board of Commissioners to determine whether or not to hear an appeal. Such a fee is not authorized by ORS 215.422(1)(c).<sup>2</sup>”

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<sup>1</sup> Under the disputed order, as was the case before the disputed order, if the board of county commissioners elects not to hear the appeal, the appellant receives a refund of \$150. Record 15.

<sup>2</sup> As relevant, ORS 215.422(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. \* \* \** (Emphasis added.)

1 “There is no documentation in the record of this matter of the average or  
2 actual cost of handling an appeal or of determining whether or not to hear an  
3 appeal. There is no documentation of staff time or the cost of staff time for  
4 preparing for and holding an appeal hearing. There is no documentation of  
5 notice, mailing, copying, or any other costs associated with the processing of  
6 an appeal and the holding of an appeal hearing.

7 “In the absence of documentation in the record establishing that the fees  
8 imposed do not exceed the ‘average or actual’ cost of processing the appeals  
9 and holding appeals hearings, the proposed fees cannot be approved.” Record  
10 55.

11 The board of county commissioners adopted findings to respond to the above issue  
12 and adopted the disputed order. This appeal followed.

### 13 **ASSIGNMENT OF ERROR**

14 Although petitioner’s assignment of error is nominally a challenge to the adequacy of  
15 the county’s findings, the argument under that assignment of error also challenges the  
16 evidentiary support for the county’s critical findings. The county adopted six findings in  
17 support of its decision. Among other things, findings 1, 2, 3, 5 and 6 explain that the Land  
18 Management Division’s activities cost more than the Land Management Division recovers in  
19 fees that it charges for its activities. Finding 4 is more focused on the issue that petitioner  
20 raised below, and is set out below:

21 **Finding 4.** The increased cost of agenda items includes the appeals of  
22 Hearings Official decisions and the election to hear those appeals. In all of  
23 the fees for appeals except one, an initial hearing has been held before the  
24 appeal must be filed. *The Board [of County Commissioners] takes notice of*  
25 *the permit and appeal review process requirements and acknowledges the*  
26 *cost of preparing, noticing and presenting the appeal information to the*  
27 *Board to facilitate a final decision on appeal. No contradictory evidence has*  
28 *been presented to refute the representation that the proposed appeal fees*  
29 *recover only the average costs incurred for providing the services and are*  
30 *reasonable.* The Board concludes the proposed fees meet the requirements of  
31 ORS 215.416(11)(b) \* \* \*.” Record 13 (emphasis added).

32 The above-emphasized findings, if they were supported by substantial evidence,  
33 would likely be adequate to respond to the issue that petitioner raised below and again raises  
34 in this assignment of error. For example, if the record included a focused representation by

1 planning staff regarding the average or actual costs to the county of providing a local appeal  
2 to challenge a planning commission or hearings official decision and that explanation  
3 supported a conclusion that the costs exceed the existing and proposed increased fee, we  
4 would almost certainly be required to deny this assignment of error unless some opposing  
5 evidence had been submitted to the county to rebut that representation.<sup>3</sup> However, as we  
6 explain below, the county does not cite and we are unable to find the “representation” that  
7 finding four appears to rely on. The representations that the county identifies in its brief are  
8 generally directed at total Land Management Division costs and total Land Management  
9 Division fee revenues and make no attempt at all to focus on the three fees that are at issue in  
10 this appeal. Record 30-31, 48-49, 51-52, 57-62, 94-96, 97-102, 112. There does not appear  
11 to be any dispute that the total cost of operating the county Land Management Division, both  
12 before and after the challenged fee increases, exceeds the aggregate revenues that have been  
13 collected in the past and likely will exceed the revenue that will be collected in the future  
14 under the increased fee structure. The relevant question is whether a reasonable person  
15 would conclude from that fact that the three fees the challenged order adopts for appeals of  
16 planning commission and hearings official decisions will not exceed the average or actual  
17 costs of such appeals. Based on the present record, we do not believe a reasonable person  
18 would reach that conclusion.

19 By our rough count, the Land Management Division collects over 200 separate fees.  
20 Record 3-11. Those fees range from a \$33 fee to reproduce Rural Plan Policies to a \$13,275  
21 deposit to assure payment of the actual cost to process a major plan amendment. As we have  
22 already explained, the three fees that are the subject of petitioner’s assignment of error are

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<sup>3</sup> ORS 227.180(1)(c) imposes the same “reasonable” or “actual cost” limitation on the fees that cities can charge for appeals of planning commission and hearings officer decisions that ORS 215.422(1)(c) imposes on counties. In *Friends of Linn County v. City of Lebanon*, 45 Or LUBA 408, 422 (2003) we held that a city did not err in relying on evidence regarding the cost of appeals that were not subject to ORS 227.180(1)(c) in concluding that the fee it proposed to charge for appeals that were subject to ORS 227.180(1)(c) would not exceed costs “in the absence of any contradictory evidence.”

1 but a small component of the 200+ fees the Land Management Division collects. Even if the  
2 county generally attempts to match the amount of those 200+ service fees to the cost of  
3 providing the service, there could easily be cases where the fee revenues exceed the average  
4 cost of providing the service and vice versa. Had Land Management Division staff made any  
5 particularized effort to explain why it believes the three fees proposed for planning  
6 commission and hearings officer appeals do not exceed the average or actual costs of those  
7 appeals, it might be appropriate for the county to fault petitioner for not attempting to refute  
8 that testimony. However, as far as we can tell, the Land Management Division did not make  
9 any particular effort to explain why the three fees that are subject to ORS 215.422(1)(c)  
10 comply with the limitation imposed by that statute.

11 The county is in the best position to provide rough estimates of staff time costs and  
12 other significant costs for typical or average appeals that fall within the three categories  
13 listed in ORS 215.422(1)(c). We do not mean to suggest that the county is obligated to  
14 provide extensive evidentiary detail or adopt extensive findings to establish that the fees  
15 proposed for the three types of appeals do not exceed the average cost of such appeals.  
16 However, given the explicit direction in ORS 215.422(1)(c) that the fees charged for those  
17 three types of appeals may not exceed average costs, evidence that the Land Management  
18 Division's total revenues fall short of its total expenses and generalized testimony regarding  
19 the county's policy of having the Land Management Division fees equal its cost of services  
20 is not sufficient. Without a more particularized evidentiary effort to focus on the three types  
21 of appeals listed in ORS 215.422(1)(c), we agree with petitioners that there was nothing "in  
22 the record for any member of the public to 'refute,' \* \* \*." Petition for Review 4.

23 Petitioner's assignment of error is sustained.

24 The county's decision is remanded.