

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 OREGON COAST ALLIANCE

4 and CATHERINE WILEY,

5 *Petitioners,*

6 vs.

7 CITY OF BROOKINGS,

8 *Respondent,*

9 and

10 U.S. BORAX, INC.,

11 *Intervenor-Respondent.*

12 LUBA No. 2011-023

13 ORDER

14 **MOTION TO COMPEL SUBMISSION OF THE RECORD**

15 On April 8th, 2011, petitioners filed a motion to compel submission of the record.

16 On April 20, 2011, the record was transmitted to LUBA and served on petitioners.

17 Accordingly, the motion is moot.

18 **MOTION TO INTERVENE**

19 U.S. Borax, Inc. (intervenor), the applicant below, moves to intervene on the side of
20 respondent. No party opposes the motion, and it is granted.

21 **MOTION FOR EVIDENTIARY HEARING**

22 The decision challenged in this appeal is a letter from the city planning director
23 rejecting petitioners' local appeal of a planning commission decision to the city council. The
24 planning commission decision approved a 163-lot residential development. The planning
25 director rejected the local appeal because petitioners did not pay in full the deposit that is
26 required to secure the petitioners' future obligation to pay the appeal fee required under the
27 city's fee schedule.

1 By Resolution 09-R-910, the city has adopted a master fee schedule for
2 administrative and other city services, including land use application and appeal fees. Under
3 the city's master fee schedule, for an appeal from the planning commission to the city
4 council the city requires the appellant to pay an "appeal fee" that is essentially a deposit
5 equal to the cost of the development permit application fee. Under Resolution 09-R-910 city
6 staff then keep track of actual appeal expenses, and the final appeal fee is subsequently
7 "adjusted, up or down, based on final cost recovery." Record 47. In this case, the city's fee
8 schedule specifies an application fee of \$7,128.00 for the type of development application at
9 issue, so the initial appeal fee (or deposit) required was also \$7,128.00. Brookings Municipal
10 Code (BMC) 17.152.010 provides in relevant part:

11 "[An] appeal [from the planning commission to the city council] shall be
12 made on forms provided by the planning department (available at office or on
13 city webpage) and submitted to that department together with the appropriate
14 fee. The appeal fee shall be paid by the appellant."

15 In a letter dated February 14, 2011, petitioners requested an "adjustment" to the
16 appeal fee, arguing that a \$7,128.00 appeal fee is inconsistent with ORS 227.180(1)(c),
17 which requires that local appeal fees shall be "reasonable and * * * no more than the average
18 cost of such appeals or the actual cost of the appeal."¹ However, to avoid missing the
19 February 16, 2011 filing deadline, petitioners submitted their appeal application on February
20 15, 2011, along with a check for \$1,000—the amount petitioners considered a reasonable
21 estimate of the actual costs to process their appeal. Record 35-39. On February 16, 2011,
22 planning staff and the city's attorney informed petitioners that the full \$7,128.00 was due by
23 the close of business that day for the appeal to be timely filed. Record 33. Petitioners did

¹ As pertinent to this order, 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 costs of such appeals or the actual costs of the appeal[.]"

1 not submit the full fee, and in a letter dated February 17, 2011, the planning director returned
2 the appeal form and \$1,000 check to petitioners.²

3 Petitioners appealed the February 17, 2011 letter to LUBA, and on appeal move to
4 take evidence not in the record pursuant to OAR 661-010-0045.³ To prevail on a motion to
5 take evidence, the movant must identify “disputed factual allegations” not contained in the
6 record that concern one or more of a limited set of grounds for the motion, including
7 “procedural irregularities not shown in the record,” “which, if proved, would warrant
8 reversal or remand of the [challenged] decision.”

² Petitioners attempted to file a local appeal of the February 17, 2011 letter with the city, to exhaust local remedies, but were informed that no local appeal of the February 17, 2011 letter is available.

³ OAR 661-010-0045 provides, in relevant part:

“(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *

“(2) Motions to Take Evidence:

“(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.

“(b) A motion to take evidence shall be accompanied by:

“(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or

“(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule.

“(c) Depositions: the Board may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. * * *”

1 Here, petitioners seek to depose city planning staff and others to establish the amount
2 of staff time and other expenses necessary to prepare an appeal of a planning commission
3 decision to the city council. Petitioners contend that the testimony to be elicited will concern
4 “procedural irregularities not shown in the record[.]” OAR 661-010-0045(1). We
5 understand petitioners to argue that the city committed procedural error by rejecting the local
6 appeal for petitioners’ failure to pay the full appeal deposit, because that prevented
7 petitioners from making a challenge to the eventual appeal fee that would have been charged
8 them after the city council resolved their appeal. Petitioners also contend that making
9 appellants pay the full appeal deposit as a prerequisite to disputing the appeal fee is itself a
10 procedural error that prejudiced petitioners’ substantial rights.

11 The legal issue that forms the basis for petitioners’ motion to consider extra-record
12 evidence—whether the \$7,128.00 deposit the city required to accept petitioners’ appeal
13 exceeds the actual cost of petitioners’ appeal—is not a legal issue that need be resolved or
14 will be resolved in this appeal. ORS 227.180(1)(c) gives the city the option of establishing
15 an appeal fee that does not exceed the actual cost of the appeal or an appeal fee that does not
16 exceed the average cost of such appeals. The city has elected to charge an appeal fee that
17 equals the actual cost of the appeal. The actual cost of petitioners appeal cannot be known
18 until the appeal is complete. The legal issue presented in this appeal is whether the city may
19 refuse to accept and process an appeal where the local appellant refuses to pay a deposit that
20 is established by city resolution, where any portion of that deposit that exceeds the actual
21 cost of the appeal must be refunded by the city at the conclusion of the appellant’s appeal.
22 Even if we were to grant petitioners’ motion, they could not at this point prove what the
23 actual cost of their appeal will be and LUBA does not need to know the actual cost of
24 petitioners’ appeal to resolve what will almost certainly be the dispositive issue in this
25 appeal. If neither ORS 227.180(1)(c) nor any other law precludes the city from requiring
26 payment of a deposit as a mandatory prerequisite for proceeding with a local permit appeal,

1 the city's decision will be affirmed. If ORS 227.180(1)(c) or some other law does preclude
2 the city from charging a deposit that may exceed the actual cost of the appeal and, if so, have
3 to be refunded at the conclusion of the appeal, something petitioners have not yet established
4 and which goes to the merits of this appeal, the city's decision will be remanded so that the
5 city can accept and process petitioners' appeal without payment of the required deposit. In
6 either event, the type of evidence that petitioners seek to have LUBA consider would have no
7 impact on this appeal, and for that reason petitioners' motion is denied.

8 The motion to take evidence outside the record is denied.

9 **BRIEFING SCHEDULE**

10 The filing of petitioners' motion to take evidence suspended all deadlines, pending
11 resolution of the motion. OAR 661-010-0045(9). The petition for review shall be due 21
12 days, and the response briefs due 42 days, from the date of this order. The Board's final
13 opinion and order is due 77 days from the date of this order.

14 Dated this 6th day of July, 2011.

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21 _____
22 Tod A. Bassham
Board Member