

OCT 23 3 24 PM '80

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

3	PONDEROSA PROPERTIES,)	
4	Petitioner,)	LUBA NO. 80-025
5	vs.)	FINAL OPINION
6	DESCHUTES COUNTY,)	AND ORDER
7	Respondent.)	(Order of Dismissal)

8 Appeal from Deschutes County.

9 David Jaqua, Redmond, filed memoranda for Petitioner.

10 Jill Thompson, Bend, filed memoranda for Respondent.

11 BAGG, Referee; REYNOLDS, Chief Referee; COX, Referee;
participated in the decision.

12 Dismissed. 10/23/80

13 You are entitled to judicial review of this Order.
14 Judicial review is governed by the provisions of Oregon Laws
15 1979, ch 772, sec 6(a).

1 BAGG, Referee.

2 This case is submitted to the Board to determine whether
3 revision of a fee for septic tank evaluation is a land use
4 decision within the meaning of Oregon Laws 1979, ch 772, sec
5 3. In its broadest terms, the questions may be characterized
6 as whether the establishment of such a fee or its application
7 is reviewable by this Board. The case is submitted without
8 oral argument on stipulated facts.

9 STANDING

10 Standing of petitioner is not at issue at this stage of the
11 proceeding.

12 FACTS

13 In May of 1979, petitioner was granted preliminary approval
14 of a subdivision plat by a county hearing's officer. The
15 approval was subject to conformance with county ordinance
16 provisions including approval of a septic tank system.
17 Deschutes County and the Department of Environmental Quality
18 had an agreement that septic tank site evaluations would be
19 performed by the county in accordance with DEQ rules and
20 standards. By law, DEQ sets the technical standards for septic
21 tank site suitability. ORS 454.725. Similar cooperative
22 agreements exist elsewhere in Oregon. Along with the provisions
23 for local administration of DEQ regulations, the law allows the
24 local jurisdictions to charge up to a certain sum for such
25 services. ORS 454.745. On September 10, 1979, the Sanitation
26 Department of Deschutes County revised its fee schedule for

1 site evaluation for septic tanks from \$25.00 to \$65.00. The
2 revision was within the maximum limits set by statute. On
3 September 11, the petitioner applied for a site evaluation.

4 Final plat approval was given by the county in October of
5 1979, and in January, 1980, petitioner requested and received a
6 refund from the county for the difference between the old site
7 evaluation fee and the revised fee. However, in February, the
8 commissioners reconsidered the matter and revoked the refund.¹

9 BOARD JURISDICTION

10 The sole question before the Board at this stage of the
11 proceedings is whether the Board has jurisdiction to hear
12 petitioner's complaint. It is petitioner's view that altering
13 the "financial burden" associated with the condition of
14 preliminary plat approval is a land use decision within the
15 meaning of Oregon Laws 1979, ch 772, sec 3. Petitioner claims
16 the fee increase amounts to a retroactive ordinance prohibited
17 under ORS 92.285 (with respect to subdivisions and partitions)
18 and ORS 215.110(6) (concerning ordinances implementing a
19 comprehensive plan).

20 The county has been given specific statutory authority
21 under ORS 454.745 to establish fees for septic tank site
22 evaluation and approval.² The authority to charge is
23 independent of the city planning and zoning responsibilities.
24 Conceivably, the imposition of fees for septic tank approvals
25 could have an effect on the number of persons requesting septic
26 tank approvals. But the imposition of that fee does not flow

1 from a grant of authority or a requirement to plan and zone.
2 Consequently, we do not believe this Board can consider the
3 possible effect of the change as a land use decision only. We
4 can find no hint that ORS Ch 197 has somehow impliedly repealed
5 the authority given counties in ORS ch 454. Reading the two
6 chapters together leads us to conclude that both must be given
7 effect and, therefore, that the county enjoys an independent
8 right to charge for septic tank evaluation. The Land Use Board
9 of Appeals and the Land Conservation and Development Commission
10 do not have the power to tell a local jurisdiction that a
11 specific statutory authorization to charge for services may not
12 be followed.

13 There is another reason for our holding. In State Housing
14 Council and 1000 Friends of Oregon v. City of Lake Oswego, Slip
15 Op of October 6, 1980, ____ Or App ____, ____ P2d ____, CA No.
16 15395 (1980), the Court of Appeals examined a "systems
17 development" charge made by a city. The court found the charge
18 to be related to providing services; and although the charge
19 might impact land use considerations, it was nonetheless a
20 fiscal and budgetary matter and not a matter that had to comply
21 with statewide land use goals.

22 In its discussion, the court examined whether "(1) all
23 fiscal policy that might impact land use must comply with the
24 statewide planning goals; (2) some, but not all, fiscal policy
25 must comply with the goals; and (3) no fiscal policy need
26 comply with the goals, regardless of the extent of its impact

1 on land use." The court concluded that "no local taxation or
2 budget ordinance has to comply with the goals." Slip Op at
3 14. This result was reached because an examination of local
4 fiscal and budget activities showed there was little such
5 activity that was not in some way related to land use
6 planning. The court went on to say

7 "[M]oreover, if the adoption of fiscal policy
8 were subject to the goals, then the administration of
9 that policy would likewise have to comply with the
10 goals. That would produce the possibility of an
11 appeal to LCDC of a county assessor's denial of a
12 property owner's request for a farm deferral property
13 tax assessment rate. That would produce the
14 possibility of an appeal to LCDC of the Department of
15 Revenue's denial of a corporation's claim of an income
16 tax credit for a pollution control device. We think
17 the legislature created LCDC to be part of the state
18 government, not to be the state government.

19 This matter is dismissed.
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FOOTNOTES

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A motion to dismiss on the ground that petitioner had failed to file a petition for review was withdrawn by oral stipulation of the parties on August 5, 1980.

We do not feel it necessary to deal with the matter of whether the county is free to raise the fee during the pendency of the subdivision approval. We note, however, that the application for septic tank evaluation was made after the county resolution raising the fee from \$25 to \$65.

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Note also the provision for surveyor's fees in ORS 92.100(2).