

DEC 20 3 54 PM '82

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

3 FRIENDS OF LINCOLN COUNTY,)
INC., and OREGON SHORES)
4 CONSERVATION COALITION, INC.,)
5 Petitioners,)
6 v.)
7 CITY OF NEWPORT,)
8 Respondent,)
9 and)
10 RICHARD and MARGARET ANDERSEN,)
11 Participants.)

LUBA NO. 82-016

FINAL OPINION
AND ORDER

12 Appeal from City of Newport.

13 Corinne C. Sherton, Salem, filed a brief and argued the
14 cause for Petitioners. With her on the brief were O'Donnell,
Sullivan & Ramis.

15 Evan Boone, Newport, filed a brief and argued the cause for
16 Respondent City of Newport.

17 Bagg, Board Member; Cox, Board Member; participated in the
decision.

18 DISMISSED

12/28/82

19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioners appeal a portion of the City of Newport
4 decision dismissing their appeal of a subdivision approval by
5 the Newport Planning Commission. The dismissal resulted
6 because the subdivision application had been withdrawn.
7 Petitioners' complaint here is about the sum of \$2,050 in
8 appeal fees and transcript charges made by the city.
9 Petitioners ask that amounts improperly charged be
10 refunded.

11 FACTS

12 A subdivision application was filed with the City of
13 Newport by a Mr. and Mrs. Andersen. The proposed subdivision
14 was to be known as "Beachland Estates." The matter was heard
15 by the City of Newport Planning Commission on March 9 and April
16 13, 1981; and the Planning Commission granted the subdivision
17 application on April 27, 1981, along with findings of fact and
18 conclusions of law.

19 On May 26, 1981, petitioners jointly filed an appeal of the
20 planning commission's decision to the city council.
21 Petitioners paid an appeal fee of \$50 and an advance transcript
22 production charge of \$750. The petitioners protested both
23 payments on the ground that the city's authority to charge fees
24 and costs rested on an improperly passed fee resolution. The
25 \$750 figure was the city planner's estimate of the amount a
26 transcript of the planning commission proceedings would cost.

1 During the course of the next several months, petitioners were
2 issued additional bills to reimburse the city for additional
3 costs of preparing the transcript. All of the amounts paid
4 were paid "under protest." On October 19, 1981, the city
5 council limited the maximum transcript costs to be paid by
6 petitioners to \$2,000. Petitioners paid a total of \$2,050 in
7 fees and transcript costs.¹

8 On February 1, 1982, the applicant's attorney announced
9 that the applicant was withdrawing his request for tentative
10 plan approval of the Beachland Estates Subdivision. The city
11 made findings and an order, and this appeal followed.²

12 DECISION

13 Petitioners make six assignments of error:

- 14 1. "The City Council exceeded its jurisdiction by
15 conducting an appeal of the Planning Commission's
16 approval of the tentative plan for Beachland
17 Estates Subdivision without having adopted an
18 ordinance to implement ORS 92.044, in compliance
19 with ORS 92.048."
- 20 2. "The City Council exceeded its jurisdiction by
21 requiring petitioners to pay \$2,050 in fees to
22 appeal the Planning Commission's approval of the
23 tentative plan for Beachland Estates Subdivision
24 without having validly adopted, pursuant to ORS
25 92.048, an ordinance or regulation authorizing
26 the requirement for such appeal fees."
3. "The City Council failed to follow applicable
procedures and thereby prejudiced petitioners'
substantial rights. The City Council relied upon
rules of evidence not adopted by the City for
such proceedings, the application of which
petitioners were not given advance notice, and
refused to accept evidence offered by
petitioners."
4. "The City Council misconstrued Resolution 2104 in

1 interpreting it to authorize the city to require,
2 after an appeal has been filed and initial fees
3 paid, that a transcript must be prepared by a
4 much more costly method and to require additional
5 fees to be paid."

6 5. "The transcript fee requirement of City of
7 Newport Resolution 2104, and the manner in which
8 it was applied by the City Council, violate due
9 process and equal protection requirements of the
10 United States Constitution in that the City
11 Council required the transcript to be prepared in
12 an unjustifiably costly manner not required of
13 any previous appellants to the City Council."

14 6. "The City Council's decision is not supported by
15 adequate findings, in that the findings adopted
16 fail to address petitioners' arguments regarding
17 the interpretation of Resolution 2104 and the
18 City's choice of the method of preparation of the
19 transcript of the Planning Commission
20 proceedings."

21 Each of the above assignments of error attacks the filing
22 fee and transcript charges. In summary, the arguments are that
23 the city lacked authority to levy the fee and transcript charge
24 because its subdivision ordinance (Ordinance 991) and fee
25 resolution (Resolution 2104) had not been passed with the
26 requisite statutory formalities. The petitioners also claim
they were charged in a manner that violated Resolution 2104 and
violated petitioners' right to due process of law. Lastly,
petitioners say the city did not make findings required in
support of the charges levied. In making these complaints,
petitioners do not distinguish between the initial filing fee
and the transcript charge. Also, petitioners do not appear to
contest the city's power to recover its legitimate expenses.
Petitioners requested relief is as follows:

1 "For the reasons stated above, this Board should
2 reverse the City of Newport's decision that
3 petitioners must pay either all of the \$2,050 demanded
4 by the city in appeal fees or the additional \$1,250
5 demanded by the city subsequent to the filing of
6 petitioners' appeal. This Board should order
7 Respondent City of Newport to return to petitioners
8 any fees improperly required to be paid."

9 Respondent City argues that Resolution 2104, and any filing
10 fee or other charge made under the resolution, is a budgetary
11 matter and is not a land use decision as defined in ORS
12 197.015(10)³. Respondent cites State Housing Council v. City
13 of Lake Oswego, 48 Or App 525, 617 P2d 655, 291 Or 878, 635 P2d
14 647 (1982), for the proposition that local taxation, budget
15 and fiscal decisions are not challengeable as land use
16 decisions or decisions that have to comply with state land use
17 planning standards. The city argues Resolution 2104, setting
18 charges for a number of different land use planning permits and
19 appeals, was enacted independently of ORS 92.044 and,
20 therefore, did not have to comply with any of the formalities
21 of ORS 92.048.⁴ As we understand respondent's argument,
22 respondent assumes the city's authority to make such charges
23 comes independently of ORS Chapter 92 or ORS Chapter 227.⁵
24 Respondent posits that if Resolution 2104 is a budgetary matter
25 and not an exercise of the City of Newport's land use planning
26 responsibilities, it is not a land use decision under ORS
197.015(10). Respondent concludes that the Land Use Board of
Appeals has no jurisdiction to hear petitioners' complaints.

The Court of Appeals held in State Housing Council, supra,

1 that all units of government must comply with the statewide
2 planning goals when, but only when, exercising their "land use
3 planning responsibilities."⁶ The relevant question is
4 whether the charge made by the City of Newport to recover its
5 expenses is an exercise of a land use planning responsibility
6 for which land use criteria are applicable. In deciding this
7 question, we look to Peterson v Klamath Falls, 279 Or 249, 566
8 P2d 1193 (1977). In that case, the court decided that a city
9 decision to annex property was an exercise in planning and
10 zoning responsibilities under ORS 197.175 in part because the
11 act would have "a significant impact on present or future land
12 uses...." Peterson, 279 Or at 254. In Jurgensen v Union
13 County Court, 42 Or App 505, 600 P2d 1241 (1979), the Court of
14 Appeals broadened the definition to include those acts which
15 cumulatively have a significant impact on present or future
16 land uses. We conclude that while applications for land use
17 permits and appeals of local land use decisions have such
18 impacts and are exercises of planning and zoning
19 responsibilities, legitimate cost recovery for these services
20 does not impact land uses and is not an exercise of a land use
21 planning responsibilities. Unlike subdivision, zoning and
22 other land use activities, the criteria used to recover the
23 cost of conducting the service are not founded in land use
24 goals or standards, but in budgetary and fiscal analysis. As
25 such, the amount charged for such services is outside the
26 considerations to be included in a local comprehensive plan and

1 not a matter of land use concern.⁷ Further, while the
2 application and appeals process is provided for and required by
3 state law, recovery of the costs is not mandated by state law.
4 See ORS 227.160 to ORS 227.180 and ORS 215.402 to ORS 215.422.

5 We are aware that ORS 92.044(3) gives local governments the
6 authority to charge for processing the applications. We also
7 note the "fees" designed under the statute are to "defray
8 costs" and as such are amounts to reimburse the local
9 government for its expenses in performing the subdivision review
10 service. They are not gross revenue producing charges or
11 charges arbitrarily set to control access to the local land use
12 process. We do not view this permissive cost recovery statute
13 to transform a fiscal matter into a land use matter. We note
14 there is no similar provision for other land use permits, and
15 we believe cities and counties have independent authority to
16 charge the cost of processing land use matters, including
17 subdivisions and appeals. That independent authority exists
18 for cities in ORS 221.410 and Oregon Constitution, Article 11,
19 Sec 2. For counties, the authority is found in ORS 203.111.
20 These provisions allow local governments to pass ordinances
21 over matters of city and county concern, respectively, and we
22 view recovery of expenses for land use applications to be
23 matters of city and county concern.⁸ As a matter of local
24 fiscal policy, the validity of the local government's exercise
25 of its power to charge for these services does not belong
26 before this Board.

1 We add that petitioners' challenge is to the charges
2 levied, and the prayer is for a repayment of all or some of the
3 charges made. Petitioners are asking, we believe, for some
4 sort of equitable or legal relief, not a "reversal or remand"
5 based on a review of the city's decision against land use
6 planning criteria.⁹ Because we do not believe that the
7 charges made by the City of Newport constitute a "land use
8 decision" reviewable by this Board under the provisions of
9 Oregon Laws 1979, ch 772, as amended by Oregon Laws 1981, ch
10 748, and because we do not believe we have the authority to
11 grant the specific relief requested by the petitioner, we find
12 it unnecessary to reach petitioners' other assertions about the
13 validity of the adoption of the city's subdivision ordinance
14 and fee resolution.¹⁰

15 In so holding, we stress that there may be circumstances,
16 wherein a charge for a land use service, whether it is called a
17 "fee" or a transcript charge or whatever, is not a cost
18 recovery measure but a tool to limit access to the process by
19 potential applicants or appellants. In such cases, the purpose
20 of the measure may be to significantly impact land uses; and,
21 as such, the measure may be subject to scrutiny as a land use
22 decision. No such allegation has been made in this case,
23 however, and we express no opinion on this potential issue.

24 This case is dismissed.
25
26

FOOTNOTES

1
2
3 1
4 Petitioners did not offer to prepare the transcript
5 themselves.

6 2
7 In an order dated May 26, 1982, we dismissed as moot
8 petitioners' charges against certain findings used by the city
9 in its order reciting withdrawal of the subdivision application
10 and dismissing the appeal. Friends of Lincoln County v.
11 Newport, 5 Or LUBA 346 (1982).

12 3
13 ORS 197.015(10) states:

14 "(a) A final decision or determination made by a local
15 government or special district that concerns the adoption,
16 amendment or application of

17 "(A) The goals;

18 "(B) A comprehensive plan provision; or

19 "(C) A land use regulation; or

20 "(b) A final decision or determination of a state agency
21 other than the commission with respect to which the agency
22 is required to apply the goals."

23 4
24 ORS 92.044 allows counties and cities to adopt ordinances
25 and resolutions providing for fees to process requests for
26 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.

27 5
28 ORS Chapter 227 is the general enabling chapter for city
29 land use planning.

30 6
31 In the Housing Council, the allegation was made that the

1 "Systems Development Charge" was so excessive as to price some
2 individuals out of housing and, therefore, violate Goal 10's
3 requirement that housing be provided at prices and rent levels
"commensurate with the financial capabilities of Oregon
households * * * *"

4 7

A "Comprehensive Plan" is defined in ORS 197.015(5) as
5 follows:

6 "'Comprehensive plan' means a generalized, coordinated
7 land use map and policy statement of the governing
8 body of a local government that interrelates all
9 functional and natural systems and activities relating
10 to the use of lands, including, but not limited to,
11 sewer and water systems, transportation systems,
12 educational facilities, recreational water quality
13 management programs. 'Comprehensive' means
14 all-inclusive, both in terms of the geographic area
15 covered and functional and natural activities and
systems occurring in the area covered by the plan.
'General nature' means a summary of policies and
proposals in broad categories and does not necessarily
indicate specific locations of any area, activity or
use. A plan is 'coordinated' when the needs of all
levels of governments, semipublic and private agencies
and the citizens of Oregon have been considered and
accommodated as much as possible. 'Land' includes
water, both surface and subsurface, and the air."

16 8

17 The authority to charge for such service is limited by the
18 Oregon Constitution and by statute. For example, the county
19 may not levy what amounts to a tax beyond its tax base without
20 authority from the voters. See OR CONST. art. 1, sec. 32, and
OR CONST. art XI, sec. 11. Haugen v. Gleason, 226 Or 99, 359
P2d 108 (1961).

21 In this case, there is no allegation that the city did not
22 really incur any or all of the \$2,050 charged to the
petitioners.

23 9

24 Petitioners have not challenged a land use decision such as
25 a zone change or a grant of subdivision and included a
26 complaint about charges. Were such a challenge to be made, the
monetary issues might be separable from the land use element of
the decision. In that regard, we note the Supreme Court's
comments in City of Pendleton v. Kerns, 294 Or 126 (1982)

1 wherein the court considered a city decision to improve a
2 street that was made as part of a local improvement district
(LID).

3 "Respondents do not by this action challenge the
4 validity of the fiscal aspect of the ordinance, i.e.,
5 that part imposing the LID; their challenge here is
6 only with regard to the decision to construct the
7 street. Even assuming arguendo that the decision to
8 create the LID is not a 'land use decision' reviewable
9 by LUBA, it does not necessarily follow that other
10 aspects of the ordinance are non-reviewable. A local
11 government does not immunize a land use decision from
12 LUBA review merely through the expedience of attaching
13 financing provisions. To the extent the various
14 aspects of an ordinance are severable, those which
15 fall within the definition of 'land use decision' are
16 subject to LUBA review even though other aspects are
17 not. Accordingly, the fact that Ordinance No. 3141
18 authorizing the street construction work has a
19 concomitant LID financing provision does not, of
20 itself, operate to divest LUBA of jurisdiction to
21 review the decision to undertake the street
22 construction." Kerns, 294 Or at 131.

14 10
15 We make no statement as to our authority to review the
16 validity of the adoption of the city's subdivision ordinance
17 and fee resolution.