BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT,	)	
Petitioner,	)	LUBA No. 90-165
vs.	)	FINAL OPINION AND ORDER
JACKSON COUNTY,	)	
Respondent.	)	

Appeal from Jackson County.

Larry Knudsen, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General.

Arminda Brown, Medford, filed the response brief and argued on behalf of respondent.

SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 04/09/91

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a decision of the Jackson County Planning Director refusing to accept petitioner's notice of appeal challenging the planning director's approval of a nonfarm dwelling and minor partition.

FACTS

On June 6, 1990, applications were filed for a minor partition to create a separate one acre parcel within a 90 acre parent parcel and a permit to place a nonfarm dwelling on the one acre parcel. The subject property is zoned Exclusive Farm Use (EFU).

On October 31, 1990, without a hearing, the county planning director issued a decision approving the applications. Record 24-32. On the same date, notice of the planning director's decision was mailed to a number of individuals and organizations. The notice of the decision stated that if no appeal was received by 3 p.m. on November 13, 1990, the decision would become final. Record 17-18. The notice further stated that an appeal must include "a $150.00 filing fee." Record 17. The notice also stated that the filing of an appeal would result in the scheduling of a public hearing on the applications. Id.

On November 13, 1990, the planning department received a notice of appeal from petitioner. The notice stated that the $150 filing fee was not included because "ORS

215.422(1)(c) together with ORS 215.416 does not allow a fee to be charged for an appeal from a 'planning director's' decision to a hearings officer when that decision was made without a hearing conducted pursuant to ORS 215.405." Record 15. The notice of appeal also requested that the $150 filing fee be waived.

On December 10, 1990, the planning director issued a decision refusing to accept the notice of appeal because it was not accompanied by a $150 filing fee and, therefore, was not filed as required by Jackson County Land Development Ordinance (LDO) 285.020(6) and (7). Record 5. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The County acted in violation of ORS 215.416 and 215.4222 when it conditioned DLCD's right to a hearing upon the payment of a $150 filing fee * * *. In so doing, the County's decision violates a provision of applicable law and is prohibited as a matter of law. Further, the County's refusal to allow a hearing prejudiced DLCD's substantial rights."

Petitioner does not challenge the county's conclusion that under the LDO, petitioner's notice of appeal must be accompanied by a $150 filing fee. Rather, the sole issue presented by petitioner in this appeal is whether under ORS 215.416 and 215.422, the county is prohibited from requiring a filing fee for an appeal of a decision on a permit application made without hearing pursuant to ORS

215.416(11).[1]

ORS 215.416 and 215.422 provide in relevant part (relevant provisions added to the preexisting statute by Oregon Laws 1983, chapter 827, sections 20 and 21, are emphasized):

215.416

"(1) When required or authorized by the ordinances, rules and regulations of a county, an owner of land may apply in writing to such persons as the governing body designates, for a permit, in the manner prescribed by the governing body. The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service.

"* * * * *

"(3) Except as provided in subsection (11) of this section, the hearings officer shall hold at least one public hearing on the application.

"* * * * *

"(5) Hearings under this section shall be held only after notice to the applicant and also notice to other persons as otherwise provided by law * * *.

"* * * * *

"(11) The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other

[1]The parties agree that the minor partition and nonfarm dwelling approvals which petitioner seeks to appeal are "permits" subject to the requirements of ORS 215.402 to 215.to 215.428.

designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision. Notice of the decision shall be given in the same manner as notice of the hearing would have been given if a hearing had been held. An appeal from a hearings officer's decision shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be a de novo hearing."

215.422

"(1) (a) A party aggrieved by the action of a hearings officer or other decision making authority may appeal the action to the planning commission or county governing body, or both, however the governing body prescribes. The appellate authority on its own motion may review the action. The procedure and type of hearing for such an appeal or review shall be prescribed by the governing body, but shall not require the notice of appeal to be filed within less than seven days after the date the governing body mails or delivers the decision to the parties.

"(b) Notwithstanding paragraph (a) of this subsection, the governing body may provide that the decision of a hearings officer is the final determination of the county.

"(c) The governing body may prescribe by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer or planning commission. 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. The governing body may establish a fee for the preparation of a written transcript. The fee shall be reasonable and shall not exceed the actual cost of preparing the transcript up to $500 plus one-half the actual costs over $500.

"* * * * *"

Petitioner recognizes that ORS 215.416(11) allows a planning director to tentatively approve a permit application without a prior hearing, if interested persons are given notice of the decision and a right to obtain a de novo public hearing before the hearings officer, planning commission or governing body. The county followed this procedure below. Petitioner contends, however, that ORS 215.416 does not allow the county to charge appellants a fee to obtain an initial public hearing after tentative approval of a decision without hearing under ORS 215.416(11). Petitioner argues that ORS 215.416 only allows the county to charge land owners a fee for "processing" permits, in an amount not to exceed the cost of providing that "service." ORS 215.416(1). Petitioner concedes the statute does not define "processing" or the "service" provided, but contends it is clear from the statutory context of these provisions these terms include all activities described in ORS 215.416, including the holding of an initial public hearing on a permit application, whether before or after a tentative

decision by a planning director.

Petitioner also argues that the county is not authorized by ORS 215.422 to impose a fee on a party seeking review of a tentative decision made without prior hearing under ORS 215.416(11). Petitioner points out that ORS 215.422(1)(c) authorizes the county to charge fees to defray the costs of appeals "from a hearings officer or planning commission." Petitioner contends it is clear from the context of this provision that such appeals include only appeals to a planning commission or governing body from a decision made by a hearings officer or planning commission after a public hearing. See ORS 215.422(1)(a).

Petitioner further argues that the provisions of ORS 92.046 governing procedures for approval of minor partitions do not authorize the county to impose an appeal fee in this situation. According to petitioner, ORS 92.046(3)(a) allows the county to delegate the approval of tentative minor partition plans to the planning director, but only if the county provides for an appeal to the governing body.[2] ORS 92.046(3)(b). Petitioner argues that ORS 92.046(3)(c) only authorizes the county to charge a fee for appeals to the

[2]We note there is no dispute that a recently adopted LDO provision makes the decision of the hearings officer final with regard to decisions on partitions and subdivisions not made concurrently with plan amendments or zone changes, and does not provide for an appeal to the governing body from such decisions. Jackson County Ordinance No. 90-7. However, there is no issue raised in this appeal concerning compliance with the statutory requirement for providing an appeal to the governing body.

governing body, not to assess fees against a person requesting an initial public hearing before the county hearings officer.

Petitioner argues the relevant provisions of ORS 215.416 and 215.422 emphasized above, ORS 92.046(3)(c) and the parallel provision of ORS 92.044(2)(c) applicable to subdivisions and major partitions were enacted by the same legislation, Oregon Laws 1983, chapter 827, sections 19e to 21. Petitioner contends the purpose of the legislation was "to limit the costs imposed on aggrieved parties appealing to the planning commission or governing body in order to preserve the public's ability to exercise appeal rights." Petition for Review 9. According to petitioner, requiring an interested person to pay an appeal fee to obtain an initial public hearing on a permit application is inconsistent with the right to a hearing created by ORS 215.416.

Respondent argues the provisions of ORS 215.416(1) concerning fees for processing permit applications do not apply to appeals of decisions on permit applications under ORS 215.416(11). According to respondent, "processing" and "service" in ORS 215.416(1) refer simply to the processing of the permit application prior to an initial county decision. Respondent agrees with petitioner that ORS 215.422(1)(c) applies only to fees for appeals from a decision of a hearings officer or planning commission made

after a hearing. Respondent concludes, therefore that neither ORS 215.416(1) nor 215.422(1)(c) specifically authorizes it to charge fees for appeals from a decision of the planning director made without hearing. Respondent argues, however, that so long as the statutes do not prohibit the imposition of a fee to appeal permit decisions made by the planning director without a prior hearing, or indicate a clear intent to preempt the area of charges for local land use appeals, the county is free to legislate in that area by establishing a reasonable appeal fee. See LaGrande/Astoria v. PERB, 281 Or 137, 148, 576 P2d 1024 (1978).

Respondent agrees that an intent of the legislature at the time the 1983 amendments to ORS 215.416 and 215.422 were enacted was to limit the costs imposed on appellants in local land use proceedings. However, respondent argues that the legislative history of the relevant portions of Oregon Laws 1983, chapter 827 shows that the main concern prompting the addition of the fee limitation provisions was the cost charged for preparing transcripts of local hearings. Respondent argues that no distinction between fees for appeals from decisions by hearings officers made after hearings and from decisions by planning directors made without hearing was ever made in the enactment of Oregon Laws 1983, chapter 827. Therefore, according to respondent, there is no basis for petitioner's contention that there was

a legislative intent that no fees be imposed on appellants of decisions made without hearing.

If petitioner were correct that the fees for "processing" permit applications, referred to in ORS 215.416(1), must include any fees charged as a condition of providing an appeal of an initial decision made by the planning director without hearing, or that ORS 215.416 and 214.422 express an intent that no fee be charged for such appeals, we would agree with petitioner that the county exceeded its authority by imposing a fee for such appeals. However, it is unclear what "processing" refers to, and there is no intent expressed in the statute to prohibit fees for appeals from decisions made without hearing under ORS 215.416(11). Further, a review of the legislative history of the relevant portions of Oregon Laws 1983, chapter 827, leads us to agree with respondent that appeals under ORS 215.416(11) were not intended to be considered part of permit "processing" as that term is used in ORS 215.416(1) and that the legislature did not intend to prohibit fees for such appeals.

The subject legislation was introduced as HB 2295, and covered many topics related to land use. The issue raised in this case and other related concerns were referred to during the legislative proceedings as "local process" issues. On March 23, 1983, the House Committee on Environment and Energy (E&E) adopted a "consensus report on

local process." That report included two points relevant to this appeal:

> "5. Authorize city or county to allow planning director or other designate to decide certain classes of permits without hearing, with notice and opportunity to appeal to applicant and neighboring property owners.
>
> "6. Provide minimum 7-day period for filing any local level appeal." HB 2295, House E&E, March 23, 1983, Exhibit C.

On May 16, 1983, the House adopted amendments to HB 2295 which reflected these points. The proposed amendments to ORS 215.416 authorized decisions to be made on permit applications without a hearing, and provided that appeals of such decisions could be to the planning commission or governing body. The proposed amendments to ORS 215.422(1)(a), quoted supra, added actions of "other decision making authority" to those which might be appealed to a planning commission or governing body, and added a minimum seven day requirement for filing notices of any local appeal. These changes reflect an intent to treat appeals from decisions made without a hearing like any other local appeal, not like part of initial permit processing.

On June 20, 1983, the Senate Committee on Energy and Environment (E&E), in response to a request by the City of Eugene and League of Oregon Cities that the bill reflect current practices, changed the proposed amendments to ORS 215.416 allowing initial permit decisions to be made by a designated official without a hearing to provide that an

appeal from such decision could be to a hearings officer, as well as to a planning commission or governing body. The committee's failure to make a corresponding change to the language of ORS 215.422(1)(a) was apparently an oversight. Therefore, the fact that ORS 215.422(1)(a) does not specifically refer to local appeals of actions of "other decision making authority" to hearings officers does not mean that such proceedings are intended to be considered part of permit "processing" rather than local appeals.

The concern about excessive fees being charged for local appeals was initially raised before the Senate E&E Committee, as an issue entirely separate from that of allowing initial permit decisions to be made without a hearing, subject to an appeal. The concern was to a great degree prompted by a specific instance where appellants of a local decision made after a hearing had been charged allegedly excessive fees for the preparation of transcripts of the hearing. See HB 2295, Senate E&E, May 26, 1983, Exhibit C. We agree with respondent that the discussion of this issue and the concern expressed by legislators was primarily focussed on the transcript fee issue, and no distinction was ever expressed between fees for appeals of local decisions made after a hearing, pursuant to ORS 215.416(3) and (5), or without a hearing, pursuant to ORS 215.416(11). There was no intent expressed to prohibit charging fees to appeal a decision made without a hearing

under ORS 215.416(11).

We conclude that ORS 215.416 and 215.422 do not prohibit the county from establishing a fee requirement for appeals of planning director minor partition and nonfarm dwelling permit decisions made without a hearing. Therefore, the county did not misconstrue applicable law or exceed its authority by refusing to accept petitioner's appeal.

The first assignment of error is denied.

The county's decision is affirmed.[3]

[3]The petition for review contains two other assignments of error challenging the substance of the county's decision approving the minor partition and nonfarm dwelling. However, prior to oral argument, the parties submitted a stipulation which provides they agree that if this Board sustains the first assignment of error, the decision should be remanded to the county for further proceedings, and if this Board denies the first assignment of error, the county's decision should be affirmed. We agree with the parties' assessment of the consequences of our disposition of the first assignment of error and, therefore, do not consider petitioner's second and third assignments of error.