

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 ST. JOHNS NEIGHBORHOOD

5 ASSOCIATION,

6 *Petitioner,*

7  
8 vs.

9  
10 CITY OF PORTLAND,

11 *Respondent,*

12  
13 and

14  
15 MULTNOMAH COUNTY,

16 *Intervenor-Respondent.*

17  
18 LUBA No. 2000-019

19  
20 FINAL OPINION

21 AND ORDER

22  
23 Appeal from City of Portland.

24  
25 Lake James Perriguey, Portland, filed the petition for review on behalf of petitioner.

26  
27 Ruth M. Spetter, Senior Deputy City Attorney, Portland, filed a response brief and  
28 argued on behalf of respondent.

29  
30 Timothy V. Ramis, Portland, and Dana L. Krawczuk, Portland, filed a response brief  
31 on behalf of intervenor-respondent. Dana L. Krawczuk argued on behalf of intervenor-  
32 respondent. With them on the brief was Ramis, Crew, Corrigan and Bachrach.

33  
34 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,  
35 participated in the decision.

36  
37 REMANDED

06/22/2000

38  
39 You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioner Saint Johns Neighborhood Association (SJNA) appeals a decision by the Director of the City of Portland Office of Planning and Development Review (OPDR). The decision denies SJNA’s request for an appeal fee waiver and, based on that denial, refuses to process its appeal of a city hearings officer decision.

**MOTION TO INTERVENE**

Multnomah County (intervenor), one of the applicants below, moves to intervene on the side of respondent in this appeal.<sup>1</sup> There is no objection to the motion, and it is allowed.

**FACTS**

On January 6, 2000, the city land use hearings officer granted Conditional Use Review and Environmental Review approval for a 525-bed medium security correctional facility. According to the notice of decision, the deadline for appealing the hearings officer’s January 6, 2000 decision was January 20, 2000, at 5:00 p.m. Record 28.

SJNA is a “recognized” neighborhood association.<sup>2</sup> SJNA received notice of the hearings officer’s decision on January 10, 2000. SJNA alleges it previously published notice of its January 10, 2000 meeting on December 23, 1999, and January 7, 2000. SJNA did not give individual notice to the applicants that an appeal of the hearings officer’s decision would be considered at the January 10, 2000 meeting. At the January 10, 2000 meeting, the general membership in attendance voted 10-0 to appeal the hearings officer’s decision to the city council.<sup>3</sup>

On January 13, 2000, at SJNA’s request, OPDR provided forms and instructions for

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<sup>1</sup>The Port of Portland, the other applicant below, has not intervened in this appeal.  
<sup>2</sup>The legal significance of being a “recognized” neighborhood association is discussed later in this opinion.  
<sup>3</sup>SJNA notes in the petition for review that both the Port of Portland and Multnomah County are eligible for membership. Neither the Port nor Multnomah County attended the January 10, 2000 meeting.

1 filing an appeal of the hearings officer's decision and for requesting an appeal fee waiver.  
2 Record 29-35. SJNA filed the appeal and the request for fee waiver on January 19, 2000.  
3 Record 8, 10. On January 25, 2000, SJNA received a letter, dated January 21, 2000, from the  
4 Director of OPDR (hereafter Director). The Director's letter advised SJNA that its fee  
5 waiver request was denied and that because its appeal had been filed without the required  
6 appeal fee, its appeal was invalid and would not be processed.<sup>4</sup> Record 7.

7 On January 28, 2000, SJNA sent a letter to the Director requesting mediation of the  
8 city's decision to deny SJNA's request for a fee waiver. On February 3, 2000, the Director  
9 denied the request for mediation. This appeal followed.

## 10 **INTRODUCTON**

11 Before turning to the parties' arguments we set out below (1) the only Portland City  
12 Code (PCC) provision that all parties agree applies to the challenged decision, and (2) the  
13 challenged decision itself.

### 14 **A. PCC 33.750.050**

15 PCC 33.750.050 authorizes the Director to grant appeal fee waivers in certain  
16 circumstances. As relevant, PCC 33.750.050 provides:

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<sup>4</sup>In the statement of facts included in the petition for review, SJNA states:

“\* \* \* On Thursday, January 20<sup>th</sup> at approximately 2:00 PM, Linda Hval (SJNA Chair) received several calls from the Planning Office to clarify information that was submitted. Ms. Hval was then told by Jean Hester of the Planning Office that everything was fine and in good order.

“Two hours later, however, at 4:00 PM (one hour before the deadline) on January 20<sup>th</sup>, Linda Hval was again called by the Planning Office and told that the fee waiver was being denied. \* \* \* The [Planning] Office told Ms. Hval that the fee waiver was being denied because the SJNA failed to provide adequate notification of its general meeting, at which the decision to appeal was made. Ms. Hval once again explained that the SJNA provided ample notification of that meeting. Having given this explanation, Ms. Hval was left with the impression that the Planning Office would give this further consideration and get back to her.” Petition for Review 6-7.

Although SJNA provides no references to the record to support the above allegations of fact, the above recitation of events is included in a letter that appears at page 4 of the record. Neither respondent nor intervenor dispute the allegations.

1 “The [Director of OPDR] may waive land use review fees in the following  
2 situations. The decision of the Director is final. The waiver approval must  
3 occur prior to submitting the application.

4 “A. **Recognized organization waiver.** An appeal fee may be waived for a  
5 recognized organization if all of the following are met:

6 “1. The recognized organization has standing to appeal;

7 “2. The appeal is not being made on the behalf of an individual;

8 “3. The decision to appeal was made by a vote of the general  
9 membership, of the board, or of a land use subcommittee in an  
10 open meeting; and

11 “4. The appeal contains the signature of the chairperson or the  
12 contact person of the recognized organization, as listed on the  
13 most recent list published by the Office of Neighborhood  
14 Associations, confirming the vote to appeal as required in  
15 Paragraph 3 above.”

16 One of the threshold problems in this appeal is determining whether the appeal fee waiver  
17 denial in this case is based on the provisions of PCC 33.750.050(A) and, if so, which  
18 provision.

19 **B. January 21, 2000 Letter**

20 The challenged decision is a January 21, 2000 letter from the Director to SJNA. As  
21 relevant that letter states:

22 “Your Appeal Fee Waiver Request for Organizations is denied. Neither the  
23 land use review applicant nor their representative was notified prior to the  
24 open meeting held on January 10, 2000 where their proposal was discussed  
25 and a vote to appeal the City’s decision was taken. This did not allow them  
26 the opportunity to participate in the open meeting.

27 “Because your waiver request is denied, no fee accompanied the appeal. Your  
28 appeal \* \* \* is not valid and will not be processed. I am returning it with this  
29 letter \* \* \*.” Record 7.

30 **SECOND ASSIGNMENT OF ERROR**

31 Petitioner’s second assignment of error includes two parts. We address here only the  
32 first part, where petitioner argues the Director erroneously concluded that failure to provide

1 individual notice means SJNA is not a “recognized organization” and for that reason does not  
2 qualify for an appeal fee waiver under PCC 33.750.050(A).<sup>5</sup> Petitioner’s argument is  
3 directed at the Director’s February 3, 2000 letter, which rejects SJNA’s request for mediation  
4 and provides the following explanation for the January 21, 2000 decision:

5 “I would like to further explain the basis for the denial of your fee waiver  
6 request. *In order to qualify as a recognized organization* under Portland  
7 Zoning Code Chapter 33.750.050(A) and be considered for a fee waiver, *your*  
8 *organization must meet the requirements of Portland City Code 3.96.060*  
9 *Requirements of Neighborhood Associations and the Office of Neighborhood*  
10 *Involvement Guidelines when applicable.* PCC 3.96.060[(A)] states, ‘All  
11 neighborhood associations shall be required to give reasonable notice to  
12 affected persons of neighborhood association elections and planning efforts  
13 prior to the commencement of those actions.’ PCC 3.96[.060(B)] states,  
14 ‘Neighborhood associations shall abide by all applicable statutes, rules and  
15 regulations, both municipal and state regulating open meetings and public  
16 records.’ The Oregon Revised Statute which regulates public meetings  
17 requires ‘public notice, reasonably calculated to give actual notice to  
18 interested persons . . .’ (ORS 192.640). Failure to meet the requirements of  
19 PCC 3.96.060 makes an organization ineligible for a fee waiver under Section  
20 33.750.050(A) of the Portland Zoning Code.

21 “Our published policy on fee waiver request requirements specifically  
22 implements the above-mentioned laws by requiring recognized organizations  
23 to notify the applicant, as an ‘affected person’ or ‘interested person,’ prior to  
24 the meeting where an appeal vote is taken. This gives the land use review  
25 applicant an opportunity to attend and participate.

26 “This requirement sets the standard for all recognized organizations to act on  
27 land use appeals in a consistent manner.” Record 1-2 (emphases added).

28 The February 3, 2000 letter can be read to take the position that failure to provide  
29 individual notice to the applicants has the legal effect, in and of itself, of extinguishing  
30 SJNA’s status as a “recognized organization.” To the extent the February 3, 2000 letter can  
31 be read to take that position, we agree with SJNA that such a position is not supportable

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<sup>5</sup>The other part of the second assignment of error essentially duplicates arguments presented under the first assignment of error and is addressed under the first assignment of error below.

1 under PCC Chapter 3.96 and applicable guidelines.<sup>6</sup> PCC 3.96.020 provides that recognized  
2 organizations must meet “the minimum standards of [PCC Chapter 3.96] and applicable  
3 guidelines adopted by the Office of Neighborhood Associations.” The Office of  
4 Neighborhood Involvement (ONI) Guidelines include the following definition of “recognized  
5 neighborhood association”:

6 “A ‘recognized neighborhood association’ is one which meets the minimum  
7 standards of [PCC Chapter 3.96] and applicable guidelines adopted by [ONI]  
8 and is currently recognized by [ONI]. ONI formally recognizes the  
9 neighborhood associations with a ‘Letter of Recognition’ which remains in  
10 effect unless a neighborhood association fails to meet the minimum standards  
11 and guidelines, at which point the association may be ‘derecognized’ by  
12 ONI.” Record 37.

13 Thus, assuming SJNA violated the notice requirements of PCC Chapter 3.96 or applicable  
14 guidelines in this case, those violations might provide a basis for *ONI* to derecognize SJNA.  
15 However, it is clear that neighborhood association violations of PCC Chapter 3.96 or  
16 applicable guidelines in individual cases do not have the *automatic* effect of derecognizing a  
17 recognized neighborhood association. Moreover it is ONI, not the Director, that recognizes  
18 and derecognizes neighborhood associations.

19 Although we agree with petitioner that violations of PCC Chapter 3.96 or the  
20 applicable guidelines do not have the automatic effect of extinguishing SJNA’s status as a  
21 “recognized” neighborhood association, the second assignment of error provides no basis for  
22 remand. The February 3, 2000 letter, in which the Director appears to take that position,  
23 postdates the decision and, therefore, is not part of the decision. Therefore, any erroneous  
24 reasoning included in the February 3, 2000 letter provides no basis for reversal or remand of  
25 the January 21, 2000 decision.

26 The second assignment of error is denied.

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<sup>6</sup>To the extent the letter takes the position that failure to provide notice is a sufficient basis in and of itself for denying the appeal fee waiver request, regardless of SJNA’s status as a recognized neighborhood association, we consider that question under our discussion of the first assignment of error.

1 **FIRST ASSIGNMENT OF ERROR**

2 In its first assignment of error, petitioner argues that the Director erred by denying the  
3 requested fee waiver based on “criteria not found in [PCC 33.750.050(A)].” Petition for  
4 Review 8. As our discussion below makes clear, the real problem is the failure of the  
5 Director’s decision to identify the criterion or criteria that she applied to deny the requested  
6 fee waiver, and we construe petitioners’ first assignment of error to assign error to that  
7 failure as well.

8 **A. Failure to Identify Relevant Criteria**

9 The Director’s January 21, 2000 letter and PCC 33.750.050(A) are set out in the  
10 introduction above. The Director’s January 21, 2000 letter makes no reference to PCC  
11 33.750.050(A) or any other criteria concerning fee waiver requests. The January 21, 2000  
12 letter denying the requested fee waiver gives a single reason for denying the fee waiver—  
13 SJNA’s failure to provide prior individual notice to the applicants of the January 10, 2000  
14 meeting. The reason given by the Director has no obvious connection to the four criteria in  
15 PCC 33.750.050(A) or any other criteria that expressly apply to a decision concerning a  
16 request for appeal fee waiver.

17 The parties suggest three possible theories concerning what those criteria are and  
18 proceed to argue about whether the Director’s decision is sustainable under those three  
19 theories. We decline the parties’ invitation to decide here which of those three interpretive  
20 theories is correct. *See Mental Health Division v. Lake County*, 17 Or LUBA 1165, 1176  
21 (1989) (although LUBA must determine in certain circumstances whether local government  
22 interpretations are reasonable and correct, LUBA does consider the local government’s  
23 interpretation in its review, and gives some weight to such interpretations if they are not  
24 contrary to the express language and intent of the enactment). Identification of the relevant  
25 approval criteria is for the Director in the first instance. We briefly identify below the three  
26 plausible theories identified by the parties. On remand, the Director must identify the

1 relevant approval criteria and, to the extent necessary to understand why the selected  
2 approval criteria govern the disputed decision, explain why those criteria apply to an  
3 application for an appeal fee waiver by a recognized neighborhood association.<sup>7</sup>

4 The most textually plausible theory is that the decision is governed exclusively by the  
5 criteria set forth in PCC 33.750.050(A). PCC 33.750.050(A) is the only PCC provision that  
6 the parties have identified that expressly applies to decisions concerning requests for fee  
7 waivers by recognized neighborhood associations. We understand petitioner to embrace this  
8 theory.

9 A less plausible, but perhaps supportable, theory is that the criteria in PCC  
10 33.750.050(A) in some way require or are dependant on compliance with various local and  
11 statutory notice requirements. We have some difficulty squaring this theory with the  
12 language of PCC 33.750.050(A), but the Director's February 3, 2000 letter can be read to  
13 embrace this theory. However, the February 3, 2000 letter postdates the January 21, 2000  
14 decision and does not adequately explain *why* that position is consistent with the language of  
15 PCC 33.750.050(A). Respondent and intervenor (respondents) apparently also embrace this  
16 theory in their briefs, but similarly do not explain how such a view is consistent with the  
17 language of PCC 33.750.050(A).

18 A third, plausible but undeveloped theory, suggested by respondents, is that PCC  
19 33.750.050(A) is one source of approval criteria, but not the *only* source. Under this theory,  
20 respondents argue, the Director may apply local and statutory notice requirements  
21 independently of PCC 33.750.050(A) and thus the Director could deny a requested fee  
22 waiver if local or statutory notice requirements are not met, regardless of whether the criteria  
23 in PCC 33.750.050(A) are met. As with the second theory, respondents simply state this

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<sup>7</sup>In listing and discussing the three theories advanced in this appeal, we do not mean to limit the Director's discretion on remand to adopt a different theory.

1 theory without attempting to explain why it is consistent with the language of PCC  
2 33.750.050(A).<sup>8</sup>

3 **B. Notice Requirements**

4 PCC 33.750.050(A) does not expressly require compliance with local or statutory  
5 public meeting notice requirements.<sup>9</sup> However, respondents identify a number of statutory  
6 and local notice requirements that they allege require individual notice to the applicants.  
7 Respondents argue those requirements were violated in this case. Because the arguments  
8 advanced by respondents concerning these statutory and notice provisions may have some  
9 bearing on remand in determining whether the disputed fee waiver request may be denied  
10 under the second or third theories discussed above, we address those arguments below.

11 **1. ORS 192.640(1)**

12 PCC 3.96.060(B) provides that neighborhood associations must “abide by all  
13 applicable statutes, rules and regulations, both municipal and state, regulating open meetings

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<sup>8</sup>We note that PCC 33.750.050(A) provides that the Director “may” grant fee waivers for recognized organizations if the stated four conditions are met. PCC 33.750.050(B) and (C) similarly provide the Director “may” waive appeal fees in other circumstances. However, PCC 33.750.050(D) provides “[t]he Director *will* waive land uses review fees for adjusting setback requirements in single dwelling residential zones if [certain] conditions are met[.]” The use of “may” in subsections A through C of PCC 33.750.050 and the use of “will” in subsection D of PCC 33.750.050 could suggest that the Director is *obligated* to grant a fee waiver under PCC 33.750.050(D) if the criteria in that section are met, but the Director is *not obligated* to grant fee waivers under PCC 33.750.050(A) through (C) even if the criteria in those subsections are met. However, if PCC 33.750.050 is interpreted in this manner, the question would become what limits, if any, PCC 33.750.050(A) imposes on the Director’s discretion to apply other criteria to deny a requested fee waiver.

<sup>9</sup>PCC 33.750.050(A)(3) requires that a decision to appeal must be made at a public meeting. At oral argument respondent suggested that a decision made at a public meeting where individual notice to the applicant was not given would not qualify as a “meeting” under ORS 192.610. That argument is not set out in respondent’s brief and, therefore, is not properly presented. Even if respondent’s brief could be read to present the argument, we would reject the argument for two reasons. First, as explained below, we do not agree that SJNA’s failure to provide individual notice to the applicants violates the notice requirements of ORS 192.640(1). Second, even if it did, the statutory definition of “meeting” does not state that a notice failure results in something other than a public “meeting,” as defined by statute. Moreover, the remedies for notice violation are set out at ORS 192.680, and that statute does not support respondent’s argument.

1 \* \* \*.” Notice requirements for meetings by public bodies are set out at ORS 192.640.<sup>10</sup>

2 ORS 192.640(1) provides:

3 “The governing body of a public body shall provide for and give public  
4 notice, reasonably calculated to give actual notice to interested persons  
5 including news media which have requested notice, of the time and place for  
6 holding regular meetings. The notice shall also include a list of the principal  
7 subjects anticipated to be considered at the meeting, but this requirement shall  
8 not limit the ability of a governing body to consider additional subjects.”

9 In support of its argument that SJNA’s failure to provide individual notice to the applicants  
10 violates ORS 192.640(1), respondent quotes a portion of the Attorney General’s *Public*  
11 *Records and Meetings Manual*. Respondent’s Brief 5. In discussing notice requirements for  
12 public meetings, the Attorney General’s *Public Records and Meetings Manual* explains:

13 “The Public Meetings Law does not require that every proposed item of  
14 business be described in the notice. The law requires a reasonable effort to  
15 inform the public and interested persons, including news media, of the nature  
16 of the more important issues (‘principal subjects’) coming before the body.  
17 And the governing body may take up additional ‘principal subjects’ arising  
18 too late to be mentioned in the notice. See ORS 192.640(1) (listing of  
19 principal subjects ‘shall not limit the ability of a governing body to consider  
20 additional subjects’). \* \* \*

21 “The goal of notice for any meeting is two-fold: to provide general notice to  
22 the public at large and to provide *actual* notice to specifically interested  
23 persons. The following are suggested methods of meeting the notice  
24 requirements for the three types of meeting addressed in the Public Meetings  
25 Law[.]” Attorney General’s *Public Records and Meetings Manual*, 102  
26 (1999) (emphasis in original).

27 The manual then discusses *suggested* methods of providing notice for “regularly scheduled  
28 meetings,” “special meetings,” and “emergency meetings.” For regularly scheduled  
29 meetings, such as SJNA’s January 10, 2000 meeting, the manual discusses press releases,  
30 mailing lists and notice boards. With regard to “interested persons,” the manual states:

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<sup>10</sup>The statutory provisions at ORS 192.610 to 192.690 are referred to as the Public Meetings Law.

1            “If a governing body is aware of persons having a special interest in a  
2            particular action, those persons generally should be notified, unless doing so  
3            would be unduly burdensome or expensive.” *Id.* at 103.

4            We do not agree that SJNA’s failure to provide individual notice to the applicants, in  
5            the circumstances presented in this case, constitutes a violation of ORS 192.640(1). When  
6            SJNA published notices of its regular January 10, 2000 meeting on December 23, 1999, and  
7            January 7, 2000, there would have been no reason to include notice that an appeal of the  
8            hearings officer’s January 10, 2000 decision would be considered. The hearings officer had  
9            not yet rendered her decision when those notices were published and there was no way to  
10           know whether the hearings officer’s decision would be adverse to SJNA’s position. Adding  
11           that item to the agenda on January 10, 2000, the same day SJNA received the hearings  
12           officer’s decision, clearly did not violate ORS 192.640(1). The statute specifically  
13           authorizes consideration of principal subjects that are not included in a notice of public  
14           meeting.

15           The only remaining question is whether some attempt to provide individual notice of  
16           the expanded agenda to the applicants was required under ORS 192.640(1), when SJNA  
17           made the decision on January 10, 2000, to take up the question of an appeal of the hearings  
18           officer’s decision. The statute’s explicit authority to consider principal subjects at a public  
19           meeting, even though they are not identified in the required notice of that meeting, does not  
20           include an explicit obligation to provide individual notice to interested persons when new  
21           principal subjects are added to the agenda after notice of the meeting is given. Even if there  
22           might be appropriate circumstances where that obligation could be implied, this is not one of  
23           them. There is no dispute that SJNA did not receive the hearings officer’s decision until  
24           January 10, 2000. While it might have been preferable for SJNA to attempt to provide the  
25           applicants individual notice that it would consider appealing that decision that night at its  
26           regularly scheduled meeting, we do not agree that its failure to do so in this case constitutes a  
27           violation of ORS 192.640(1).

1 In fact it is somewhat unclear to us whether the actual *decision* to amend the agenda  
2 to include consideration of the appeal was made before the January 10, 2000 meeting or at  
3 the meeting. SJNA’s January 28, 2000 letter states it did not find out about the hearings  
4 officer’s decision until “immediately prior to the January 10 meeting \* \* \*.” Record 5. The  
5 January 28, 2000 letter goes on to explain “[t]he question of whether to appeal the [hearings  
6 officer’s] Decision was brought up during the meeting under New Business, and the meeting  
7 proceeded in accordance with Robert’s Rules of Order and our Bylaws.” *Id.*<sup>11</sup>

8 **2. PCC 3.96.060(A)**

9 Respondents argue that SJNA failed to comply with PCC 3.96.060(A), which  
10 provides:

11 “All neighborhood associations shall be required to give reasonable notice to  
12 affected persons of neighborhood association elections and planning efforts  
13 prior to the commencement of those actions.”

14 We reject this argument, for the same reasons we conclude above that SJNA’s failure  
15 to provide individual notice to the applicants of its January 10, 2000 meeting does not violate  
16 ORS 192.640(1).

17 **3. Guidelines**

18 PCC 3.96.030 requires that neighborhood associations comply with guidelines  
19 adopted by the Office of Neighborhood Associations (hereafter Guidelines). Those  
20 Guidelines are included in the record and include a six-page appendix that purports to  
21 explain the requirements of the Public Meetings Law. Respondents argue SJNA’s actions in  
22 this matter violate provisions of the Guidelines and the Guideline appendix that restate or

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<sup>11</sup>Article III, Section 4 of SJNA’s bylaws states:

“Agenda. Subject to the approval of the board of directors, the chairperson shall prepare the agenda for board, general and special meetings of the SJNA. Any person may add an item to the agenda by submitting the item in writing or by phone to the chairperson at least seven (7) days in advance of the meeting. Any member of SJNA may make a motion to add an item to the board, general or special agendas at those respective meetings. Adoption of that motion requires a second and a majority vote of active voting members present.” Record 15.

1 explain the obligations imposed by ORS 192.640(1). For the reasons already explained  
2 above in our discussion of ORS 192.640(1), we reject those arguments.

3 **4. SJNA Bylaws**

4 The Guidelines also require that SJNA “[m]aintain and file \* \* \* an up-to-date set of  
5 bylaws \* \* \*.” Record 39. Among the provisions included in SJNA’s bylaws are the  
6 following requirements:

7 “\* \* \* The affairs of SJNA shall be managed by the board in the interim  
8 between general meetings. The board shall be accountable to the  
9 membership, shall seek the views of those affected by any proposed policies  
10 or reactions before adopting any recommendation on behalf of SJNA, and  
11 shall strictly comply with these bylaws.” Record 17.

12 “ARTICLE IX

13 “PROCEDURE FOR CONSIDERATION OF PROPOSALS

14 “Section 1. Submission of Proposals. Any person or group, inside or outside  
15 the boundaries of SJNA, and any city agency *may propose in writing* items for  
16 consideration and/or recommendation to the board. The board shall decide  
17 whether proposed items will appear on the agenda of \* \* \* the board, standing  
18 or special committees, or general or special meetings.

19 “Section 2. Notification. The proponent and *members directly affected by*  
20 *such proposals shall be notified in writing, not less than seven (7) days in*  
21 *advance, of the place, day and hour the proposal shall be reviewed.*” Record  
22 25 (emphases added).

23 Assuming the decision to appeal the hearings officer’s decision was preceded by a  
24 “proposal” “in writing” within the meaning of Article IX, Sections 1 and 2 of SJNA’s  
25 bylaws, we agree with respondents that SJNA’s failure to provide the applicants seven days  
26 advance notice of that proposal may violate Article IX, Section 2 of SJNA’s bylaws.  
27 However, because the challenged decision does not address that question, and does not

1 consider whether other portions of the bylaws or other related local requirements may have  
2 some contextual bearing on that question, we do not decide the question here.<sup>12</sup>

### 3 **5. Application Form Requirements**

4 Respondents appear to suggest that the application for fee waiver form itself and an  
5 instruction page that OPDR promulgated to accompany that form independently impose  
6 criteria that must be met for a neighborhood association to secure an appeal fee waiver. We  
7 reject the suggestion.

8 The appeal fee waiver form itself simply asks that the person submitting the form  
9 answer the following question: was “[t]he land use review applicant \* \* \* notified of the  
10 open meeting?” Record 10. That is a request for information. It is not an independent  
11 requirement that such notice be given. SJNA honestly answered the question by indicating  
12 that the applicants had not been given individual notice of the January 10, 2000 meeting,  
13 beyond the normal published notice of the meeting.<sup>13</sup> *Id.*

14 The one-page instruction sheet is reproduced at Record 35. That document states that  
15 it provides “information [that] will help neighborhood \* \* \* organizations that are recognized  
16 or listed in the Office of Neighborhood Involvement Directory to apply for fee waivers  
17 \* \* \*.” The document goes on to state that the PCC “states that the appeal fee may be  
18 waived for a recognized organization if all of the following conditions are met[.]” The  
19 document then lists the four criteria in PCC 33.750.050(A). Next, the document includes a  
20 section with the following heading: “What you can do to help your request for a fee  
21 waiver[.]” This section includes the following:

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<sup>12</sup>We specifically note that we are uncertain whether Article IX, Sections 1 and 2 or Article III, Section 4 of SJNA’s bylaws applies in this case. *See* n 11 and related text.

<sup>13</sup>Elsewhere on the application form SJNA indicated that notice was “[p]rovided at the meeting,” in response to the application form’s request for an affirmative or negative response to the following statement: “Notice of the meeting and the meeting agenda was given to interested persons and/or the general public.” Record 10.

1           “2. Notice of the agenda to be discussed must be provided to other  
2 interested persons and/or the general public as needed.

3           “● Indicate the type of notice (poster, flyer, mailer, phone call,  
4 e-mail), date posted or sent, who received notice and content of  
5 the notice, including agenda items.

6           “● If notice was posted, indicate where.” Record 35.

7           In their briefs, respondents apparently take the position that SJNA’s failure to  
8 demonstrate compliance with the above-quoted language provides an adequate basis, by  
9 itself, to deny the requested fee waive. We do not agree.

10           First, we seriously question whether the Director is authorized to promulgate criteria  
11 in addition to those contained in the PCC for ruling on applications for fee waivers. Second,  
12 we question whether the Director has done so. Third, to the extent the reference in the  
13 Director’s February 3, 2000 letter to “[o]ur published policy on fee waiver requests” is  
14 referring to the application form and instruction sheet, the letter takes the position that the  
15 policy “implements” the cited code and statutory requirements. The letter does not take the  
16 position that the “published policy” adopts supplemental criteria. Finally, even if the  
17 Director could adopt supplemental criteria and she were to take the position that the  
18 application form and instruction sheet adopt such supplemental criteria, we question whether  
19 a document that includes the above-quoted language under a heading that purports to identify  
20 “[w]hat you can do to help your request for a fee waiver” can be interpreted to independently  
21 impose a mandatory criterion that must be met to secure a fee waiver.

22           **C. Conclusion**

23           The first assignment of error is sustained. On remand, the Director must first clearly  
24 identify the criteria that govern the request for waiver of the appeal fee. If the Director  
25 determines that criteria beyond those stated in PCC 33.750.050(A) apply, the reasoning that  
26 leads the Director to conclude that those additional criteria apply must be included in the  
27 decision. After the relevant approval criteria are identified, the Director may consider

1 whether SJNA's compliance with its bylaws in this matter has any relevance in determining  
2 whether the identified approval criteria are met. If so, the Director must then determine  
3 whether, based on the facts of this case, SJNA violated Article IX, Section 2 of its bylaws  
4 and, if so, whether that violation provides a basis for denying the request for an appeal fee  
5 waiver.

6 The city's decision is remanded.<sup>14</sup>

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<sup>14</sup>Petitioner's third assignment of error asserts the Director applied unconstitutionally vague criteria in denying the requested fee waiver. The fourth assignment of error asserts the city improperly amended PCC 33.750.050(A) in the guise of applying it. The fifth assignment of error asserts the challenged decision is not supported by substantial evidence. In view of our resolution of the first and second assignments of error, we need not and do not consider the third, fourth and fifth assignments of error.