

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 FRIENDS OF YAMHILL COUNTY,

4 *Petitioner,*

5  
6  
7 vs.

8 YAMHILL COUNTY,

9 *Respondent.*

10 LUBA No. 2002-090

11 FINAL OPINION

12 AND ORDER

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16  
17 Appeal from Yamhill County.

18  
19 Matthew B. McFarland, Portland, filed the petition for review and argued on behalf  
20 of petitioner.

21  
22 Frederic Sanai, Assistant County Counsel, McMinnville, filed the response brief and  
23 argued on behalf of respondent.

24  
25 HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,  
26 participated in the decision.

27  
28 REMANDED

11/05/2002

29  
30 You are entitled to judicial review of this Order. Judicial review is governed by the  
31 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a county decision that increases the fee the county charges to request a hearing on certain land use applications and to appeal planning commission decisions to the board of county commissioners.

**MOTION TO FILE REPLY BRIEF**

Petitioner requests leave to file a reply brief to address arguments raised in the response brief alleging that (1) the challenged decision is not a land use decision subject to LUBA’s jurisdiction and (2) petitioner failed to satisfy the exhaustion requirement at ORS 197.825(2)(a). There is no opposition to the proposed reply brief, and we agree with petitioner that is warranted under our rules.

**FACTS**

The challenged decision increases the fee that the county charges for the appeals and requests set out below, from \$250 to \$700:

- “a. Appeals of Planning Commission decisions to the Board of Commissioners.
- “b. Requests for hearings on Type B applications.<sup>[1]</sup>
- “c. Appeals of Planning Director decisions on Type B applications.”  
Record 3-4.

Under ORS 215.422(1)(c), the county is authorized to establish appeal fees, provided “[t]he 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

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<sup>1</sup> Under the Yamhill County Zoning Ordinance (YCZO) “Type B Procedures,” the planning director may make a decision without a public hearing after giving notice that a public hearing may be requested. If a public hearing is requested, it must be provided. YCZO 1301.01(B)(3). If no public hearing is requested, the planning director may then make a decision without a public hearing. YCZO 1301.01(B)(4). However, such decisions by the planning director may be appealed to the planning commission or hearings officer, and in that event a public hearing is required. *Id.*

1 transcript.” No question is presented in this appeal whether the increased appeal fees are  
2 reasonable or exceed the average cost of appeals. However, under ORS 215.416(11)(b), the  
3 county is limited in the fee it can charge in certain circumstances. As relevant the statute  
4 provides:

5 “If a local government provides only a notice of the opportunity to request a  
6 hearing, the local government may charge a fee for the initial hearing. The  
7 maximum fee for an initial hearing shall be the cost to the local government of  
8 preparing for and conducting the appeal, or \$250, whichever is less. \* \* \*”

9 In its first assignment of error, petitioner contends the \$700 fee for requests for  
10 hearings on Type B applications (item b above) violates ORS 215.416(11)(b). In its second  
11 assignment of error, petitioner contends the \$700 appeal fee for planning director decisions  
12 on Type B applications, where no public hearing is requested prior to the planning director  
13 decision, violates ORS 215.416(11)(b).

#### 14 **MOTION TO DISMISS**

15 As relevant here, under ORS 197.825(1), LUBA’s jurisdiction is limited to land use  
16 decisions. The county moves to dismiss this appeal, arguing that the challenged decision is  
17 not a “land use decision,” as that term is defined by ORS 197.015(10).<sup>2</sup> The county also  
18 argues the challenged decision does not qualify as a “significant impact test” land use

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<sup>2</sup> As relevant, ORS 197.015(10) provides the following definition of “land use decision”:

“Land use decision”:

“(a) Includes:

“(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

1 decision, as described in *Petersen v. Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977) and  
2 *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). Finally, the county argues the  
3 challenged decision is not within LUBA’s review jurisdiction, because it is a fiscal matter  
4 that is excluded under the reasoning adopted by the Court of Appeals in *State Housing*  
5 *Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dismissed* 291 Or  
6 878, 635 P2d 647 (1981) (*Housing Council*).

7 The county’s motion to dismiss is denied. The challenged decision changes the fees  
8 the county charges to request public hearings in certain circumstances under the YCZO or to  
9 appeal certain decisions rendered under the YCZO without a public hearing. Public hearings  
10 and appeals of certain decisions rendered without public hearings under the YCZO “concern”  
11 application of the YCZO. *See* n 2.<sup>3</sup> The challenged decision changes the fee that the county  
12 charges to exercise those rights under the YCZO, and therefore it “concerns” application of  
13 the YCZO. We recognize that the word “concerns” in ORS 197.015(10)(a) might be  
14 interpreted and applied more narrowly here to conclude that the challenged decision does not  
15 “concern” application of the YCZO. However, we see no reason to believe that narrow  
16 construction would be consistent with the legislature’s intent. If the legislature had intended  
17 that this part of the definition of the term “land use decision” only include decisions that  
18 actually apply a land use regulation, it could have limited its scope to decisions that “apply”  
19 a land use regulation rather than include decisions that “concern the application” of a land  
20 use regulation.

21 Based on our decision that the challenged decision qualifies as a statutory land use  
22 decision, we need not also determine whether it might also qualify as a significant impact test

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<sup>3</sup> *Webster’s Third New Int’l Dictionary*, 470 (unabridged ed 1993) defines “concern” as follows:

“**1 a** : to relate or refer to : be about \* \* \* **b** : to bear on \* \* \* **2** : to have an influence on :  
AFFECT, INVOLVE \* \* \*.”

1 land use decision. We now turn to respondent’s contention that the challenged decision is  
2 not reviewable by LUBA because it is a fiscal decision.

3 The decision at issue in *Housing Council* was a city legislative decision to adopt  
4 systems development charges. In reviewing a Land Conservation and Development  
5 Commission decision that such legislation was subject to the statewide planning goals, the  
6 Court of Appeals concluded that it “simply [could not] imagine that the legislature intended  
7 that all local taxation, budget and fiscal policy had to comply with the statewide planning  
8 goals.” 48 Or App at 537. The so-called “fiscal exception” to statewide land use planning  
9 standards has been discussed in other contexts as well. *Springer v. LCDC*, 111 Or App 262,  
10 267, 826 P2d 54 (1992) (farm and forest preferential ad valorem tax assessment programs,  
11 while clearly affecting land use, are not state agency programs affecting land use subject to  
12 review under ORS 197.180(1) for compliance with the statewide planning goals); *Westside*  
13 *Neighborhood v. School Dist. 4J*, 58 Or App 154, 161, 647 P2d 962 (1982) (school closure  
14 decision not a land use decision); *Petrie Company v. City of Tigard*, 28 Or LUBA 535, 539-  
15 40 (1995) (city decision denying request to form sewer reimbursement district is a fiscal  
16 decision that is not subject to review by LUBA).

17 The scope of the “fiscal exception” to statewide land use planning standard generally  
18 and LUBA’s jurisdiction in particular is not well defined. However, in *Ramsey v. City of*  
19 *Portland*, 29 Or LUBA 139, 142 (1995), we concluded that the city’s application of the  
20 appeal fee section of its zoning ordinance to dismiss a local appeal that was filed without the  
21 appeal fee that the zoning ordinance required was a land use decision. In reaching that  
22 decision we distinguished our earlier decision in *Petrie*:

23 “In *Petrie*, we concluded a city code chapter establishing a process for owners  
24 of neighboring property to reimburse a developer for improvements already  
25 constructed was a purely fiscal ordinance, and that a decision applying that  
26 ordinance, long after a development was approved and the improvements  
27 constructed, is not a land use decision reviewable by this Board.

1           “However, the [zoning ordinance provision] at issue here, PCC chapter 33.750  
2 (Fees), is part of the city’s zoning code and is an integral part of the zoning  
3 code provisions governing the processing and review of land use applications.  
4 As such, PCC chapter 33.750 is not a purely fiscal ordinance, and its  
5 application to petitioner’s attempted appeal of a hearings officer's decision on  
6 a land use application is not excepted from review by LUBA under *Housing*  
7 *Council.*” 29 Or LUBA at 142.

8 Although the amended fee schedule at issue here is not codified as part of the zoning  
9 ordinance, we see no reason to reach a different conclusion here.<sup>4</sup> The challenged decision is  
10 also “an integral part of the zoning code provisions governing the processing and review of  
11 land use applications.” *Id.*

12           Finally, our decision is affected by the limited scope of the challenged decision. For  
13 example, if the challenged decision was a comprehensive change in the fees the county  
14 charges for a wide variety of county governmental services, and the change in land use  
15 appeal fees was a small component of that larger fee change, treating such a decision as a  
16 land use decision might take on a tail-wagging-the-dog character that could support a  
17 different result. However, such is not the case here. The fiscal exception to our review  
18 jurisdiction does not apply.

19 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

20           As we noted earlier, the parts of the challenged decision that petitioner challenges  
21 under these assignments of error appear to violate ORS 215.416(11)(b). Respondent makes  
22 no attempt to defend its decision on the merits and argues only that this appeal should be  
23 dismissed because the challenged decision is not a land use decision. As we have already  
24 determined, the challenged decision is a land use decision subject to our review. Without  
25 some contrary argument from respondent, we agree with petitioner that the challenged  
26 decision violates ORS 215.416(11)(b) as alleged in the first and second assignments of error.

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<sup>4</sup> YCZO 1405.02 provides that “[appeal] fees and the amounts thereof shall be established by order of the Board [of County Commissioners].”

1 Accordingly, the challenged decision is remanded so that the county can determine whether  
2 it wishes to amend its decision to delete the parts of the decision that are inconsistent with  
3 ORS 215.416(11)(b) and readopt its decision as amended.

4 The county's decision is remanded.