BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARY YOUNG,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

GREGORY SCHPANKYN,
Intervenor-Respondent.

LUBA No. 2007-250

FINAL OPINION
AND ORDER

Appeal from Crook County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioner. With her on the brief was the Goal One Coalition.

David M. Gordon, County Counsel, and Heidi T.D. Bauer, Prineville, filed the response brief. Heidi T.D. Bauer argued on behalf of respondent.

Gregory Schpankyn, Paulina, represented himself.

BASSHAM, Board Member; RYAN, Board Chair, participated in the decision.

HOLSTUN, Board Member, did not participate in the decision.

REMANDED 06/11/2008

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a decision approving a nonfarm dwelling on a 25-acre tract zoned exclusive farm use (EFU).

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to respond to waiver issues raised in the response brief. There is no opposition to the motion and brief, and they are allowed.

FACTS

The subject property is part of unplatted subdivision located approximately 4 miles east of the community of Paulina. The subdivision includes 23 tax lots ranging in size from five to 40 acres, four of which are developed with nonfarm or lot of record dwellings, and the rest of which are vacant. The subject property is not irrigated, but has some history of grazing use. The subdivision is surrounded by large farm parcels in excess of 500 acres, and the subject property is located adjacent to a large irrigated farm parcel owned by petitioner.

Intervenor-respondent (intervenor) applied to the county for a nonfarm dwelling approval on the subject property, and the county planning commission approved the application. Petitioner appealed the planning commission decision to the county court, which remanded the decision back to the planning commission for additional evidentiary proceedings. On remand, the planning commission again approved the application. Petitioner filed an appeal of the planning commission decision on remand. The county court affirmed the planning commission decision, adopting its own findings and decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Crook County Code (CCC) 18.16.080(2) authorizes the county to approve a nonfarm dwelling on EFU-zoned land if, among other things, the applicant demonstrates that the "dwelling will not materially alter the stability of the overall land use pattern of the area,"

here referred to as the "stability standard."[1] CCC 18.16.080(2) implements OAR 660-033-0130(4)(c), which in turn references the more detailed standards at OAR 660-033-0130(4)(a)(D).[2] The ultimate test under OAR 660-033-0130(4)(a)(D) is whether

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[1] CCC 18.16.080(2) provides:

> "Land Use Pattern. The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, the county shall consider the cumulative impacts of new nonfarm dwellings on other lots or parcels in the area. If the application involves the creation of a new parcel for the nonfarm dwelling, the county shall consider whether creation of the parcel will lead to the creation of other nonfarm parcels, to the detriment of agriculture in the area. To address this standard, the applicant shall:
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> "(a) Identify a study area representative of the surrounding agricultural area including adjacent and nearby land zoned for exclusive farm use. Nearby land zoned for rural residential or other urban or nonresource uses shall not be included;
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> "(b) Identify the types and sizes of all farm and nonfarm uses and the stability of the existing land use pattern within the identified study area; and
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> "(c) Explain how the introduction of the proposed nonfarm dwelling will not materially alter the land use pattern within the identified study area."

[2] OAR 660-033-0130(4)(a)(D) provides:

> "The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall:
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> "(i) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas. Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area;
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> "(ii) Identify within the study area the broad types of farm uses (irrigated or nonirrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, nonfarm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of nonfarm/lot-of-record dwellings that could be approved under subsections (3)(a), (3)(d) and section (4) of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993 and the parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4). The findings shall

> "* * * *the cumulative effect of existing and potential nonfarm dwellings* will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area[.]" (Emphasis added.)

County staff identified the potential for 29 new nonfarm dwellings within a 2000-acre, one-mile radius study area, in addition to the four existing nonfarm dwellings in that area. Seventeen of the potential dwellings could be sited on existing vacant parcels that are part of the 1971 subdivision in which the subject parcel is located. The county court adopted the following finding addressing the stability standard:

> "The Court finds, pursuant to CCC 18.16.080(2), that the proposed dwelling will not materially alter the stability of the overall land use pattern of the area. Despite the potential for 29 nonfarm dwellings in the one-mile study area, there are only four existing nonfarm dwellings, the most recent having been approved in December 2005 on a lot of record. In part due to the rate of growth in the area, the Court is not persuaded that approval of this application would result in subsequent development sufficient to materially alter the stability of the land use pattern." Record 6.

Petitioner challenges that finding, arguing that the county failed to analyze the "cumulative effect" of the existing, proposed and potential nonfarm dwellings, as required by CCC 18.16.080(2) and OAR 660-033-0130(4)(a)(D). According to petitioner, the stability standard requires analysis of a "worst-case scenario," under which the county must assume that potential development of nonfarm dwellings on similarly situated parcels will occur, and based on that analysis determine whether the stability of the area for continued agriculture

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> describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible nonfarm dwellings under this subparagraph;
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> "(iii) Determine whether approval of the proposed nonfarm/lot-of-record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area[.]"

would be upset. *Lichvar v. Jackson County*, 49 Or LUBA 68, 72-73 (2005). Instead, petitioner argues, the county appears to have assumed that the 29 potential new nonfarm dwellings would not be built, or would be built at such a slow rate over time that any destabilization of the land use pattern in the area would occur far in the future. Petitioner argues that there is no basis under the code, the administrative rule or the relevant caselaw to conclude that the stability standard is met simply because the historic pace of nonfarm dwelling development in the area has been slow and destabilization of the agricultural land use pattern in the area is not imminent.

Citing *Wolverton v. Crook County*, 39 Or LUBA 256, 274 (2000), the county responds it is permissible under the stability standard for the county to take into account "predictions of future development" based on historic development trends and other factors affecting the potential for future nonfarm dwelling approvals.

Wolverton, like the present case, involved a tract within an old, largely undeveloped subdivision on EFU lands, involving approximately 178 lots that were each five to six acres in size. The county concluded, based on past development trends, current restrictive laws, and a memorandum of understanding that the county had signed with the Department of Land Conservation and Development, that the potential for new nonfarm dwellings within the subdivision was limited to larger tracts of lots that had been consolidated into single ownership, such as the 20-acre tract at issue in that appeal. The county found that few such tracts had been or could be aggregated, which limited the total number of potential nonfarm dwellings to a level that, the county concluded, would not materially alter the stability of the overall land use pattern of the area if built out. On review, LUBA affirmed, rejecting the petitioner's argument that the county's findings were not supported by substantial evidence in the record. *Id.* at 273-75.

We agree with petitioner that *Wolverton* does not assist the county. In *Wolverton*, the county complied with the relevant code and administrative rules by projecting the total

number of potential nonfarm dwellings that could be built in the area, and determining whether the cumulative effect of existing and potential nonfarm dwellings in the area will destabilize the land use pattern. Here, the county did not perform the analysis required by CCC 18.16.080(2) and OAR 660-033-0130(4)(a)(D). The county made no findings whether the cumulative effect of the existing, proposed and 29 potential dwellings within the one-mile study area will destabilize the agricultural land use pattern of the area. Nor did the county determine whether the cumulative effect of existing and potential nonfarm dwellings "will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area[.]"

While historic development trends are certainly a legitimate and necessary consideration under the stability standard, the county identifies no reason to believe that the same relatively slow pace of nonfarm dwelling development in the area would continue. Even if it is reasonable to assume that the historic pace of development would continue, the stability standard essentially requires the county to project a full development, worst-case scenario and determine whether under that scenario the agricultural land use pattern would be destabilized at some point in the future. In our view, if the answer to that question is affirmative, the county must either (1) deny the application or (2) identify some reason or mechanism, supported by the record, why that scenario is not likely to occur and nonfarm dwelling development in the study area will not reach levels that destabilize the agricultural land use pattern.[3]

[3] One such potential reason or mechanism is discussed below, with respect to a county comprehensive plan policy that limits residential density within critical deer winter range (which apparently includes most of the county) to one dwelling per 160 acres. Depending on how the county gives meaning to that density limitation, and how consistently that meaning is applied in future circumstances, the density limitation could act as a significant legal barrier to future development of the vacant lots within the existing subdivision and nearby

As an illustration, in *Wolverton* the county identified various constraints that the county concluded would likely ensure that the worst case scenario (development of all 178 five-acre lots) would not occur and that existing, proposed and potential nonfarm development would not reach a level that destabilizes the agricultural land use pattern in the area. In the present case, the county identifies no such constraints. For all the record shows, approval of intervenor's nonfarm dwelling application is likely to encourage the owners of other lots within the subdivision to file applications for nonfarm or lot of record dwellings, increasing the historic rate of development. Further, even if there were some reason to believe that the rate of nonfarm dwelling development in the area would remain relatively slow, if the end result is destabilization we do not see that a relatively slow pace of destabilization is a sufficient basis to conclude that the stability standard is met under CCC 18.16.080(2) and OAR 660-033-0130(4)(a)(D).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

The subject property is located within an area that the Crook County Comprehensive Plan (CCCP) identifies as Critical Deer Wintering Range. CCCP Wildlife Policy 2 requires that residential density within Critical Deer Wintering Range shall not exceed one dwelling per 160 acres.[4] Intervenor presented evidence of the existing average residential density within one-mile through four-mile radii, showing that whatever radius is used the average residential density is considerably less than one dwelling per 160 acres. Based on that

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lands. If so, we see no reason the county could not use that barrier in its analysis under the stability standard, in determining the maximum number of non-farm dwellings that could be approved within the study area.

[4] CCCP Wildlife Policy 2 provides:

> "Density within [Critical] Wintering Areas for deer shall not be greater than one residence for each 160 acres and for the General Winter Range, not more than one residence for 80 acres, except in the EFU-3 zone in which 40 acres may be allowed per residence."

evidence, the county concluded that the proposed dwelling is consistent with CCCP Wildlife Policy 2.

Petitioner argues that the county erred in evaluating the *average* density in the area. According to petitioner, the purpose of CCCP Wildlife Policy 2 to protect critical deer winter range is not served by allowing high residential densities in one portion of the range, offset by low residential densities in other portions of the range. To give effect to that purpose, petitioner argues that the county must apply the 160-acre density limitation to the subject property rather than to an average across a larger area. The result, according to petitioner, is that Wildlife Policy 2 effectively prohibits construction of a dwelling on the subject 25-acre parcel, or indeed any parcel less than 160 acres in size.

In support of that proposition, petitioner cites to *Wetherell v. Douglas County*, 44 Or LUBA 745, 759 (2003), which involved a proposed 200-dwelling unit destination resort on a 500-acre parcel that was located in a peripheral big game habitat overlay zone with a residential density of one dwelling per 40 acres. The overlay zone provided a variance mechanism to achieve higher densities on a case-by-case basis. The county planning commission analyzed the average residential density within a 1.2-million acre area with over 12,000 existing dwellings, with an average density of approximately 90 acres per dwelling. Based on that analysis, the county found that the one dwelling per 40 acres density requirement was met. On review, LUBA rejected that approach as inconsistent with the purpose of the density requirement, noting that under the county's interpretation the density requirement had no practical effect until the county had approved more than 28,000 dwellings in the area. We also noted that the county's approach seemed inconsistent with the variance mechanism incorporated into the relevant code provision, which contemplated a case-by-case evaluation of whether higher density per 40 acres should be allowed. We observed that an interpretation more consistent with the purpose and context of the density requirement as applied in that case was to use the 500-acre subject property as the

denominator, and if necessary to use the variance mechanism provided in the code to increase the residential density on the parcel beyond one dwelling per 40 acres. We also recognized that

> "* * * a density standard that permitted selection of some larger local area, *i.e.*, a local area larger than the 500-acre subject property but smaller than the 1,121,378-acre applied here, might provide the county with desirable flexibility to permit clustered residential development in areas with lesser habitat value if some way could be found to further limit or bar residential development altogether in areas with high habitat value. However desirable that flexibility might be, as written, [the code] does not permit application of the one dwelling unit per 40 acres standard over an area that is larger than the property that is the subject of the application. If the county wishes the density limit to apply in some other manner, it must amend [the code] to achieve that result." *Id*. at 759.

The county court rejected petitioner's argument that *Wetherell* compels the county to interpret CCCP Wildlife Policy 2 to effectively prohibit dwelling approval on any parcel less than 160 acres. We agree with the county and intervenor that *Wetherell* does not compel any such interpretation. First, it is worth noting that in *Wetherell* we reviewed a planning commission's interpretation of local code provisions, not the governing body's. A governing body's interpretation of local provisions is entitled to some deference under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) and *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), unlike a planning commission's interpretation. Consequently, even if the standards and the interpretations at issue in both cases were identical, it does not necessarily follow that we would reach the same disposition in the present case. If the county court's interpretation of CCCP Wildlife Policy 2 is consistent with its express language, purpose and underlying policy, we must affirm it. ORS 197.829(1).[5]

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[5] ORS 197.829(1) provides, in part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

Second, we did not hold as a general proposition in *Wetherell* that all residential density limitations designed to preserve game winter range or habitat must use the property that is the subject of land use approval as the denominator. To the extent that suggestion can be read into our opinion, we disavow the suggestion. The question of which denominator a county must or may use for purposes of applying a residential density limitation such as CCCP Wildlife Policy 2 will depend on the text, context and purpose of that limitation. We held in *Wetherell* that applying a 1.2-million acre denominator is inconsistent with the purpose of the density limitation at issue in that case. As a general matter, for the reasons set out in *Wetherell* it seems likely that any approach using such an enormous denominator would be inconsistent with the purpose of a residential density limitation that is intended to protect wildlife habitat, if that limitation is to be given any meaning or effect. However, we cannot say that it is categorically inconsistent with the purpose of such a density limitation to use an area larger than the subject property as the denominator, if a larger area can be justified based on applicable code or comprehensive plan provisions, or otherwise shown to be consistent with the text, context and purpose of the limitation.[6]

In the present case, petitioner cites to no text or context suggesting that the denominator for CCCP Wildlife Policy 2 is limited to the subject property or that prohibits the county from applying a denominator larger than the subject property. As far as petitioner has shown, the CCCP is simply silent as to how the one dwelling for each 160 acres density limitation is applied or calculated. As noted, intervenor presented evidence of residential

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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

[6] As an example of one approach, among others, that would seem to be facially consistent with the text and apparent purpose of CCCP Wildlife Policy 2, the county could apply a 160-acre template over the proposed building site on the subject property and approve the proposed dwelling if there are no other dwellings located within that 160-acre area, even if the 160-acre area includes other parcels or portions of parcels.

density within a one-mile as well as a four-mile radius of the subject property. The one-mile radius was presumably chosen because it corresponds to the 2000-acre study area required by OAR 660-033-0130(4)(a)(D).[7] Because the stability standard also functions as a kind of density limitation, it seems congruent, at least, to use a similar one-mile radius, 2000-acre study area for purposes of applying the CCCP Wildlife Policy 2 density limitation. Absent a more focused challenge from petitioner, we cannot say that the county's approach in averaging residential density across a 2000-acre area centered on the subject property is inconsistent with the purpose of CCCP Wildlife Policy 2.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As noted, petitioner appealed the planning commission's initial decision to the county court, which remanded the initial decision back to the planning commission. Petitioner then appealed the planning commission's second decision to the county court, which issued the decision before us. Pursuant to the county's fee schedule, for the first appeal the county charged petitioner a fee of $1,850 plus 20 percent of the application fee. The application fee was $900, so petitioner paid an extra $180, for a total of $2,030 for the initial appeal. The county court waived appeal fees for the second appeal.

ORS 215.416(1) provides that 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." ORS 215.422(1)(c) provides that the governing body may prescribe fees to defray the costs incurred in acting upon an appeal of an initial permit decision from a hearings officer or planning commission. However, "[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,

[7] Testimony in the record suggests that the four-mile radius area was chosen because that is the distance to the community of Paulina. Record 109. We express no opinion regarding whether that is a sufficient justification for using a four-mile radius area for purposes of CCCP Wildlife Policy 2.

excluding the cost of preparation of a written transcript."[8] Similarly, Crook County Code (CCC) 18.172.050 requires the county to set application and appeal fees annually, and requires that "[f]ees charged for processing permits shall be no more than the actual or average cost of providing that service."[9]

Petitioner argues that the appeal fee charged in this case ($2030) is more than double the application fee ($900), and is therefore is unreasonable. Petitioner contends that the issue was raised below, but the county's findings fail to address the issue or provide any evidence regarding whether the fee charged in this appeal is reasonable or consistent with the "average or actual costs" of such appeals.

Intervenor makes three initial responses that we briefly consider and reject. First, intervenor notes that the county waived a second fee for the second round of appeals which led to the challenged decision. We understand intervenor to argue that in order to preserve a challenge to the appeal fee paid for the first local appeal petitioner was required to appeal to

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[8] ORS 215.422(1)(c) provides:

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. 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. In lieu of a transcript prepared by the governing body and the fee therefor, the governing body shall allow any party to an appeal proceeding held on the record to prepare a transcript of relevant portions of the proceedings conducted at a lower level at the party's own expense. If an appellant prevails at a hearing or on appeal, the transcript fee shall be refunded."

[9] CCC 18.172.050 provides, in relevant part:

> "(1) All fees for permits, variances, zone map amendments, comprehensive plan amendments, zone text amendments, appeals, and any other necessary review or permits pursuant to this title shall be set annually as determined by the county court.
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> "* * * * *
>
> "(4) Fees charged for processing permits shall be no more than the actual or average cost of providing that service."

LUBA the county court's initial decision remanding the initial decision to the planning commission. If that is intervenor's position, we reject it. The county court's initial decision remanding back to the planning commission was almost certainly not a final decision that could have been appealed to LUBA. *See Ratzlaff v. Polk County*, 53 Or LUBA 480, 483 (2007) (county's decision denying a motion to dismiss a local appeal of a planning director's decision was not a final land use decision appealable to LUBA). The proceedings on the first and second rounds of appeal constituted a single proceeding. While the county might have used the second round of appeals to cure any errors in the first round, absent such circumstances we see no reason why petitioner could not challenge uncured errors in the first round of appeals, on appeal of the county court's second and final decision.

Second, intervenor argues that petitioner failed to challenge the appeal fee during the proceedings on the second appeal, and thus that issue was waived or abandoned, pursuant to ORS 197.763(1). However, in the reply brief petitioner cites to testimony submitted during the hearing before the county court on the second appeal, raising that issue. Supplemental Record 2-4.

Third, intervenor argues that the county's appeal fees are set by order of the county court on an annual basis, and that petitioner's failure to appeal the most recent such order bars petitioner from attempting to challenge the appeal fee in the context of the present case. We understand the county to argue that petitioner cannot challenge application of a particular fee on an as-applied basis, but instead can only advance a facial challenge to adoption of the fee schedule, at the time the schedule is adopted. The county contends that petitioner's as-applied challenge in the present appeal is essentially an impermissible collateral attack on the county's previously adopted fee schedule.

In *Ramsey v. City of Portland*, 29 Or LUBA 139, 145-46 (1995), the city made a similar argument that the petitioner's as-applied challenge was an impermissible collateral attack on the earlier, unappealed decision adopting the appeal fee schedule. We chose not to

decide that question, because we concluded that the petitioner alleged but failed to substantiate that the appeal fee was unreasonable or exceeded the average or actual costs of such an appeal.

However, in *Cummings v. Tillamook County*, 30 Or LUBA 17, 25 (1995), we addressed the issue we avoided in *Ramsey*, and held that "[i]f petitioner considered the county's fee ordinance to violate ORS 215.422, the time for challenging statutory compliance was within 21 days of adoption of ordinance in 1993." *Id.* at 25. *See also Maxwell v. Lane County*, 39 Or LUBA 556, 574, *rev'd and rem'd on other grounds*, 178 Or App 210, 35 P3d 1128 (2001) (citing *Cummings*).

To the extent *Cummings* and *Maxwell* categorically reject the possibility of advancing an as-applied challenge under ORS 215.422(1)(c) to the local appeal fee imposed in a particular case, we question whether those cases were correctly decided. Neither *Cummings* nor *Maxwell* cites

any authority for that conclusion. No authority that we are aware of renders quasi-judicial land use decisions immune from review under applicable statutes simply because those decisions apply local regulations or standards that were adopted in an earlier, unappealed decision. While local land use decisions rendered pursuant to acknowledged comprehensive plans and regulations are not reviewable for compliance with statewide planning goals and rules, that principle does not apply to arguments that land use decisions applying acknowledged regulations may be inconsistent with applicable state statutes. *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992).

However, we need not decide whether petitioner is categorically barred from challenging the particular fee the county charged in this case, on an as-applied basis. That is because we agree with the county that, even if such an as-applied challenge is permissible, petitioner has not demonstrated that the appeal fee charged in this case is unreasonable or exceeded the average cost of such appeals or the actual cost of the appeal.

Petitioner argues that "because the assessed appeal fee of $2030 is more than double the application fee, it is 'unreasonable' and thus is prohibited by both the state statute and the local code." Petition for Review 8. However, petitioner must do more than simply assert that an appeal fee is unreasonable. Petitioner makes no effort to substantiate his claim that an appeal fee that is twice the amount of the fee to file a permit application is *per se* unreasonable, and we cannot say that as a matter of law it is unreasonable.[10]

We do not understand petitioner to argue that the appeal fee is "more than the average cost of such appeals or the actual cost of the appeal," or if that argument is intended, petitioner cites to no evidence supporting that claim. Instead, petitioner argues that the county failed to produce data regarding the average or actual costs of appeals. *Id*. However, we believe that in the context of an as-applied challenge the initial burden rests on the local appellant to produce a *prima facie* case that the appeal fee that is charged pursuant to a previously adopted fee schedule is "more than the average cost of such appeals or the actual cost of the appeal," depending on which approach the county's fee schedule has taken. We do not believe that the county has that initial burden in an as-applied challenge, merely because the local appellant asserts below that the appeal fee charged the appellant is inconsistent with ORS 215.422(1)(c). Petitioner cites to no evidence whatsoever regarding

[10] We note that, in the reply brief, petitioner responds to the county's waiver argument by citing to a letter from 1000 Friends of Oregon challenging the appeal fee charged petitioner in this case. Supplemental Record 1-5. Neither the petition for review nor the reply brief cites to that letter for any evidentiary purpose. Some of the arguments in that letter cite to evidence that might relate to the reasonableness of the appeal fee charged in this case, for example, that four Oregon counties charge a flat fee for appeals much lower than the $1850 + 20 percent of the application fee charged under the county's formula. However, most of the arguments appear to challenge the formula itself as it might be applied in a variety of circumstances, rather than its application in the present case. For example, the letter argues that given the large range of application fees in the county (between $100 and $25,000), appeal fees can vary widely in many cases, even though the actual costs of processing appeals on different applications may be similar. Other arguments are directed at goal compliance rather than statutory compliance. For example, the letter argues that the average county income level is low compared to the rest of the state, and therefore the county should not charge relatively high appeal fees, because doing so violates Goal 1 (Citizen Involvement). Because petitioner does not cite to the letter for any evidentiary purpose, we do not consider its evidentiary value. However, we observe that, pursuant to CCC 18.172.050, the county determines the amount of permit application and appeal fees on an annual basis. Many of the arguments presented in the letter at Supplemental Record 1-5 would be more appropriately presented to the county in the context of those annual fee setting decisions.

whether the appeal fee charged in this case is "more than the average cost of such appeals or the actual cost of the appeal." Accordingly, petitioner's arguments under this assignment of error do not provide a basis for reversal or remand.

The third assignment of error is denied.

The county's decision is remanded.