BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOLGER T. SOMMER, HAL B. ANTHONY,
MIKE WALKER, RON RAY, PHYLLIS RAY,
JEAN MOUNT, HERBERT NEELUND
and VALERIE NEELUND,
Petitioners,

vs.

JOSEPHINE COUNTY,
Respondent.

LUBA No. 2006-150

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Holger T. Sommer, Merlin, Hal B. Anthony, Mike Walker and Jean Mount, Grants Pass, filed the petition for review and Holger T. Sommer and Mike Walker argued on their own behalf. Ron Ray, Phyllis Ray, Herbert Neelund and Valerie Neelund, Grants Pass, represented themselves.

Steven E. Rich, County Counsel, Grants Pass, filed the response brief and argued on behalf of respondent.

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

REMANDED 03/18/2009

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a 2006 county order that adopted fees for planning permits and services.

STANDING

OAR 661-010-0030(4)(a) requires that the petition for review "state the facts that establish petitioner's standing." In order to have standing to appeal, the party appealing must have "[a]ppeared before the local government." ORS 197.830(2)(b). The county argues that the petition for review fails to establish that all petitioners that signed the petition for review appeared before the local government during the proceedings that led to the challenged decision.[1]

The petition for review includes citations to record pages that, according to petitioners, establish the standing of petitioners Sommer, Walker, Anthony, and Mount. We agree with petitioners that the record citations demonstrate that petitioners Sommer, Anthony, and Mount satisfied the requirement that they "[a]ppeared before the local government." Record 7 (minutes indicating testimony by petitioners Sommer and Anthony); Supplemental Record 25A (letter from petitioner Mount). However, regarding petitioner Walker, we do not think the cited record pages demonstrate that he appeared below during the proceedings that led to the challenged decision. The record pages cited in the petition for review are citations to petitioner Walker's testimony during county proceedings in 2004 that led to a different land use decision than the one appealed here. Some of the documents and testimony from those earlier proceedings made their way into the record in the present appeal. Those documents and testimony were sufficient to constitute an appearance in the

[1] Only one petition for review was filed in this appeal. Petitioners Ron Ray, Phyllis Ray, Herbert Neelund and Valerie Neelund did not sign that petition for review. Accordingly, those petitioners are dismissed from this appeal.

earlier proceeding. However, the fact that those documents from the earlier proceedings were also added to the record of the proceedings that led to the challenged decision does not mean the author of those documents made an appearance in the proceedings that led to the challenged decision. Accordingly, we agree with the county that petitioner Walker has failed to establish that he has standing to appeal the challenged decision.

ASSIGNMENT OF ERROR

A. 2006 Order

The appealed decision is a county order dated July 26, 2006 that adopted a schedule of fees for planning services. At oral argument, LUBA was informed for the first time that in 2007, the county adopted a similar order that replaced the 2006 schedule of fees with a new schedule of fees for planning services, and that in 2008 the county adopted yet another order that set still another new schedule of fees. ORS 197.805 requires that LUBA "decisions be made consistently with sound principles governing judicial review." Because LUBA is an Executive Department administrative review tribunal, and not part of the Judicial Department, it is not constitutionally required to dismiss appeals simply because a decision by LUBA in an appeal would have no practical effect. However, based on ORS 197.805, LUBA has frequently dismissed appeals when it determines that they have become moot. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524, 531 (2002); *Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993), *Barr v. City of Portland*, 22 Or LUBA 504, 505 (1991).

The potential practical effect of our review of what appears to be a twice-superceded 2006 fee schedule is unclear to us. However, the county has not moved to dismiss the appeal or otherwise argued that this appeal should be dismissed as moot because our review of the decision would not have any practical effect. Rather than proceed to address and attempt to resolve that issue without any assistance from the parties, we will proceed to the merits.

B. Assignment of Error

ORS 215.416(1) provides:

> "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*." (Emphasis added.)

ORS 215.422(1)(c) provides in relevant part:

> "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.* * *" (Emphasis added.)

These statutes are both a grant of authority and a limitation. Counties are authorized to charge fees for processing permits and processing local permit decision appeals. But in both cases, those fees must be limited to the average or actual cost of processing the permit applications or local appeals.[2]

Petitioners argue that there is no evidence in the record to show that the county 2006 fees for processing permits and the fees for appeals are based on either actual costs of providing those services or the average cost of providing those services under ORS 215.416(1) and ORS 215.422(1)(c). Petitioners argue that the county incorrectly set its fees for those services based on the projected revenue needed to support its entire planning department, rather than calculating the fees for those services based on the cost to the planning department of processing permits and appeals.

The county's order includes the following finding:

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[2] ORS 215.416(11)(b) imposes additional restrictions on the fees that may be charged for appeals of permit decisions that are issued without a prior public hearing. Petitioners do not cite or discuss that statute, and we do not consider it further in this opinion.

> "The cost of the proposed fees is calculated to cover the actual or average cost of providing the services and administration of the programs directly related to the proposed fees." Record 1.

The county responds by first arguing that its finding need not be supported by substantial evidence. We reject that argument. Under ORS 197.835(9)(a)(C), LUBA is directed to reverse or remand a land use decision if it is "not supported by substantial evidence in the whole record [.]"

The county next responds by citing *Young v. Crook County*, 224 Or App 1, 197 P3d 48 (2008). In *Young*, the petitioner alleged before the county that the fee the county charged him for his local appeal of a decision on a permit violated ORS 216.416(1). LUBA held that in the context of such an "as applied" challenge to fees, the initial burden rests on the appellant to produce evidence that the fee charged pursuant to a previously adopted fee schedule violates ORS 215.416(1), and that petitioner had not pointed to any evidence in the record demonstrating that the fee he was charged was "more than the average cost of such appeals or the actual cost of the appeal * * *" under the statute. *Young v. Crook County*, 56 Or LUBA 704, 717-718 (2008). The Court of Appeals agreed. *Young*, 224 Or App at 7-8.

However, *Young* does not assist the county. The present appeal is a direct challenge to the order that adopted the county's 2006 fee schedule, and in that context, the burden is not on the appellant to produce evidence that the appeal fees violate the statute, but rather on the county to point to evidence in the record that demonstrates that the fees were set consistent with the statute's mandate that the fees that are subject to ORS 215.416(1) and ORS 215.422(1)(c) will not exceed average or actual costs of processing permits or appeals. The county does not point to anything in the record indicating that there was any consideration regarding whether the fees the county planned to charge in 2006 for processing permits and appeals would not exceed the actual or average cost of providing those services. Petitioners appear to be correct that the county's approach to setting its fee schedule is fundamentally flawed. It appears the county is first attempting to determine the amount of

revenue required to support the entire planning department, and then setting the fees for a variety of planning services, including processing permits and appeals, based on the amount of revenue needed to support the department. That approach is only permissible under the statutes if the county makes some effort to ensure that the revenue it hopes to collect from fees for processing permits and appeals is equal to the average or actual cost of providing those services. As far as we can tell, if that is the case here it was a pure accident because the fees appear to be driven entirely by hoped-for revenues and have no obvious connection to costs. Based on the record that is before us in this appeal, there is simply no way to know whether the 2006 fee schedule for processing the permits and appeals that are subject to ORS 215.416(1) and 215.422(1)(c) was limited to the average or actual cost of providing those services or whether the 2006 fee schedule was set at a level that would collect more than necessary to pay the average or actual cost of providing those services, and thus subsidize other planning functions, in contravention of ORS 215.416(1) and 215.422(1)(c).

Finally, the precise meaning of the statutory limitation of fees to "average or actual costs" is not entirely clear. Although the question is not presented in this appeal, we see no reason why a county could not review prior years and determine what the average or actual cost of processing permits and processing appeals were in those prior years, and then set its fee schedule for future permit applications and appeals based on assumptions about whether those average or actual costs would remain the same or change in the future. There may be other approaches that are consistent with the statute. But what the county may not do with regard to the fees on the fee schedule that are subject to the ORS 215.416(1) and 215.422(1)(c) limits is to set those fees without making any attempt to ensure that the fees will not exceed the average or actual cost of processing permits and appeals. That appears to be what the county did in 2006. Therefore, remand is required.

The assignment of error is sustained.

The county's decision is remanded.