BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, NAOMI PRICE,
GARY YOUNG, MOLLIE EDER
and CHARLES McGOVERN,
Petitioners,

vs.

DEC17'09 PM 2:52 LUBA

CROOK COUNTY,
Respondent.

LUBA No. 2009-077

FINAL OPINION
AND ORDER

Appeal from Crook County.

David C. Noren, Hillsboro, filed the petition for review and argued on behalf of petitioners.

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

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

REMANDED 12/17/2009

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

Petitioners appeal a county order that, among other things, establishes the fees required to appeal planning commission decisions to the county court.

FACTS

Pursuant to Crook County Code (CCC) 18.172.050, the county court annually establishes fees for permits, variances, zone map amendments, comprehensive plan amendments, zone text amendments, appeals, and other reviews and permits. Under ORS 215.422(1)(c), the county may provide fees to defray the cost of a local appeal from a lower decision-maker to the governing body, which shall be "reasonable" and "no more than the average cost of such appeals[.]"[1]

To establish the local appeal fee pursuant to CCC 18.172.050 and ORS 215.422(1)(c), the county court relied on a memorandum from the county counsel. The memorandum itemizes almost all costs associated with a "typical appeal," such as intake, assignment, file review, record preparation, record copying, hearing scheduling and notice, preparation of the staff report, preparation for the appeal hearing, the hearing itself, and post-hearing procedures. Some of the estimated costs are fixed, apparently because they do not vary from appeal to appeal. Other costs vary depending on the type of application and complexity of

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[1] 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. 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."

issues raised. For such variable costs, the memorandum estimates a range of costs. For example, for the cost of making seven copies of the record for the appeal hearing, the director estimated a range of $112 to $1484, based on 100 to 2000 record pages at ten cents per page. Some variable costs, such as the cost to copy the staff report, were not considered. Finally, the director added together the itemized fixed and variable costs and derived a "total average cost" of $1805.61 to $6331.11. Record 96.

The appeal fee considered by the county court is derived from a formula: a base rate of $1850 for each appeal, plus 20% of the application fee for the underlying land use application. Application fees in the county vary widely, from a low of $100 for certain types of site plan review, to a high of $25,000 for a destination resort application. Thus, under the county's formula the appeal fees range from a low of $1870 ($1850 + 20% of $100) for certain site plan reviews to a high of $6850 for a destination resort ($1850 + 20% of $25,000). Based on the county counsel's memorandum, the county court concluded that the appeal fees under that formula are not more than the average cost of appeals, and adopted the fee schedule. This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Average Cost of Such Appeals

Petitioners contend that the county has not demonstrated that its appeal fees are consistent with the ORS 215.422(1)(c) requirement that appeal fees be "no more than the average cost of such appeals[.]"[2] According to petitioners, the county counsel's memorandum fails to determine the "average cost" of appeals to the County Court, and the

[2] ORS 215.422(1)(c) also permits counties to impose appeal fees that do not exceed the "actual cost of the appeal." Under that approach, a county would presumably require the appellant to submit a deposit, and after the appeal is over the county would calculate its actual costs to process that particular appeal and partially refund the deposit if it exceeded the actual cost. In the present case, the county did not choose to justify its appeal fee under the "actual cost" language, and we do not consider that language further.

county's formula of imposing a $1850 base fee plus 20% of the application fee fails to ensure that the county's appeal fees do not exceed the "average cost" of appeals.

According to petitioners, ORS 215.422(1)(c) requires calculation of the "average" costs of appeals, meaning the sum of two or more data points divided by the number of data points. Instead of calculating the average cost of appeals, petitioners argue, the county estimated a *range* of costs for typical appeals, with a low value of $1805.61 and a high value $6331.11, but provided no data points in between and made no calculation of the *average* of any data points, including those low and high values.

In addition, petitioners argue that ORS 215.422(1)(c) does not permit the county to establish different appeal fees for different types of land use applications, as the county sought to do using its "base fee plus 20 percent of application fee" formula. Petitioners contend that the county must establish a *single* appeal fee applicable to all appeals of planning commission decisions, after first considering the costs of appeals for different types of land use applications, and then calculate the average cost of all appeals. Petitioners argue:

> "[I]f there was only one appeal that cost the high end of $6,331 and ten that cost the low end of $1,805, the total for the eleven appeals would be $24,381 and the average cost would be $2,216. Because the Fee Order formula starts with $1,850 and adds 20% of the application fee, the fee to appeal a destination resort is $6,850, which clearly would exceed the average cost. Because the [county counsel's] memorandum includes the estimated high end cost and estimated low end cost, but not the number of appeals at each end or other basis for determining the 'average cost' of appeals from the planning commission, the decision lacks substantial evidence for determining the 'average cost of such appeals' and therefore lacks substantial evidence that the appeal fees for some types of appeals do not exceed that average cost." Petition for Review 10.

Petitioners also argue that a mere estimation of appeal costs is insufficient; that to provide an adequate factual base the county must base its estimates on "an accurate calculation of the cost of at least some appeals, based on at least some recordkeeping as to time spent by staff." *Id.*

The county responds that ORS 215.422(1)(c) does not prohibit a county from determining the "average cost of such appeals" based on estimations of costs of typical appeals. The county also argues that ORS 215.422(1)(c) does not require the county to establish a "single" appeal fee for all appeals. According to the county, it is consistent with the statute to establish different appeal fees for appeals of different types of land use applications. The county notes that in the memorandum the county counsel observed that application fees represent an average cost, with more difficult and time consuming applications costing more than simple ones. The county counsel concluded that "[i]t follows then that appeals of complex applications are more complex than simple ones."[3] According to the county, that premise supports the establishment of a range of "average" fees applicable to appeals of different types of land use applications, and therefore the county's base fee plus 20% of application fee approach is consistent with ORS 215.422(1)(c).

1. Arithmetical Average

ORS 215.422(1)(c) and its cognate applicable to cities limit the maximum amount local governments may charge for local appeals fees to the governing body, but do not specify how "average" costs must be calculated, the type of evidence that can be considered, or what approaches local governments may use to ensure that appeal fees do not exceed the average costs of appeals. In *Sommer v. Josephine County*, __ Or LUBA __ (LUBA No. 2006-150, March 18, 2009), slip op 6, we stated that

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[3] The memorandum states, in relevant part:

> "* * * The County's proposed fee for appeals to the County Court from final decisions of the planning commission (or hearings officer if one was appointed) is $1850 + 20% of the application fee. The application fee also represents an average cost, with more difficult and time consuming applications costing more than simple applications. It follows then that appeals of complex applications are more complex than simple ones. Appeals usually come to the Court 'on the record,' meaning no new evidence is allowed in the appeal hearing and only arguments based on the record. There is a procedure for allowing new evidence that is sometimes used, in which case the hearing becomes de novo in part or whole. De novo hearings usually take more time. So, as with other kinds of permits, appeals will also have a wide range of process times and costs." Record 93.

> "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. * * *."

We remanded the legislative decision adopting the appeal fee in *Sommer* because the county made no attempt to ensure that the fee does not exceed the average cost of appeals. Similarly, in *Landwatch Lane County v. Lane County*, 52 Or LUBA 140 (2006), the county made no particularized effort to explain why it believed the appeal fee did not exceed the average costs of appeals, observing that:

> "The county is in the best position to provide rough estimates of staff time costs and other significant costs for typical or average appeals that fall within the three categories listed in ORS 215.422(1)(c). We do not mean to suggest that the county is obligated to provide extensive evidentiary detail or adopt extensive findings to establish that the fees proposed for the three types of appeals do not exceed the average cost of such appeals. However, given the explicit direction in ORS 215.422(1)(c) that the fees charged for those three types of appeals may not exceed average costs, evidence that the Land Management Division's total revenues fall short of its total expenses and generalized testimony regarding the county's policy of having the Land Management Division fees equal its cost of services is not sufficient. * * *" *Id.* at 144.

There can be no reasonable dispute (and we do not understand the county to dispute) that ORS 215.422(1)(c) requires that the county determine the "average cost of such appeals," in order to ensure that a proposed appeal fee does not exceed the average cost. The term "average cost" is not defined in the statute. However, dictionary definitions suggest that petitioners are correct that "average" refers to an arithmetic average, or approximate

midpoint, of a set of numbers.[4] We agree with petitioners that determining the "average cost of such appeals" for purposes of ORS 215.422(1)(c) requires some kind of arithmetic calculation of the average of a set of numbers, meaning the sum of the numbers in that set divided by the count of the numbers.[5] The county cites to nothing in the text or context of ORS 215.422(1)(c) suggesting that "average" means something other than an arithmetic average of a set of numbers.

In the present case, the county did not attempt to determine the arithmetic average of any set of numbers. The memorandum estimates that appeals to the county court cost anywhere from $1805.61 to $6331.11. While an arithmetic average could be calculated based on the two extremes in that limited set of numbers, it is doubtful that such a calculation would accurately reflect the range of appeal costs that the county actually or is likely to experience. The definition at fn 4 indicates that synonyms for "average" include "typical, common, ordinary." Viewed in that light, we understand the legislature to intend under ORS 215.422(1)(c) that appeal fees be no more than the costs incurred in processing "typical, common or ordinary" appeals. To reliably determine "average" appeal costs, we believe that the set of numbers used to generate the required average must be broadly representative or reflective of the range of appeals costs that the county is likely to experience. Unless all

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[4] Webster's Third New International Dictionary (1981) at 150 defines the adjective form of the term "average" in relevant part as:

> "**1 :** equaling an arithmetic mean <an ~ annual rainfall of 20 inches> **2 a :** approximating or resembling an arithmetic mean specif. in being about midway between extremes **:** not out of the ordinary for members of the group under consideration * * * **:** TYPICAL, COMMON, ORDINARY * * *."

[5] We recognize that there is a difference between the "average" and the "mean" of a range of numbers. The above-quoted definition appears to use both terms interchangeably. The main difference, as we understand it, is that if a set of numbers has a very large or small numeric outlier compared to the rest of the group, calculating the average will tend to skew the result toward the outlier, as illustrated by the joke about the billionaire who walks into a bar and suddenly the "average" patron of that bar is a millionaire. In such circumstances, calculating the mean (middle number) rather than the average will tend to more accurately represent the "typical" mid-point of the set. While ORS 215.422(1)(c) uses the term "average," it is not clear to us that the statute would necessarily preclude calculating the mean, if that would more accurately reflect the "typical" midpoint of the range of numbers considered.

appeals cost the same, something that the record does not reflect and that seems highly unlikely in practice, the range of appeal costs that the county actually or is likely to experience will vary considerably. The county counsel's memorandum describes a wide range of costs, but generates only two data points, a low value of $1805.61 and a high value of $6331.11. Such a limited set of values cannot possibly generate an "average" that is representative or reflective of the appeal costs the county is likely to experience over any significant period of time. As petitioners point out, if most of the appeals to the county court involve simple permit applications rather than more complex applications such as destination resorts, then the "average" of a set of all appeals filed within a given period of time would be located closer to the lower end of the range of appeal costs. Conversely, if most of the appeals to the county court typically involve more complex matters and higher appeal costs, then the average of that set would be closer to the high end of the range. For that reason, we believe that the calculation of arithmetic average required by ORS 215.422(1)(c) must be applied to a set that is populated by more than two numbers, and moreover a set that is broadly representative of the kinds of appeals and appeal costs that the county is likely to experience.

Accordingly, we agree with petitioners that remand is necessary for the county to determine the "average cost" of appeals to the county court, consistent with the above discussion. Several issues remain, however, regarding how the county develops the data set that is being averaged, and what those numbers are based on. We turn to those issues.

2. Estimated Appeal Costs

As noted, petitioners argue that the county must consider "at least some recordkeeping as to time spent by staff" in prior appeals, in order to generate an accurate calculation of average appeal costs, and cannot rely solely upon mere estimates of appeal costs.

ORS 215.422(1)(c) is silent as to what kind of evidence is required to support a determination of the average cost of appeals. In *Landwatch Lane County*, quoted above, we commented that "[t]he county is in the best position to provide rough estimates of staff time costs and other significant costs for typical or average appeals * * *," which suggests that estimates of costs, as opposed to detailed contemporaneous record keeping of actual costs in past appeals, can be sufficient for purposes of ORS 215.422(1)(c). Petitioners argue that the county counsel's estimates are merely educated guesses regarding hypothetical appeal costs, and not substantial evidence that a reasonable person would rely upon, unless based on an examination of actual staff time and other costs incurred in at least some actual past appeals. Although all parties agree the county has not in the past kept records of actual staff time spent with respect to individual past appeals, petitioners argue that the county could easily develop a means of tracking such actual costs and use them in determining the "average cost" of appeals so that concerned citizens have an opportunity to review identified costs and evaluate whether the time spent was reasonable.

It is certainly the case that any estimate of appeal costs will be more reliable if based in part on a reliable accounting of staff time and other costs in one or more actual appeals, at least as a check on the accuracy of the estimate. However, we cannot say that ORS 215.422(1)(c) *requires* the county to calculate appeal costs based on a contemporaneous accounting of actual staff time and costs in past appeals, or that appeal costs derived *solely* from estimates of costs cannot constitute substantial evidence for purposes of establishing an appeal fee under the statute. Any evaluation of appeal costs will involve some estimation, even if the county bases that evaluation as much as possible on records of actual costs incurred in prior appeals. In the present case, the county counsel's memorandum describes the appeal processes and associated costs in some detail, at Record 93-96. While an accounting of actual staff time and costs in past appeals would more likely generate reliable data regarding past appeal costs, which presumably could be extrapolated to future costs, we

cannot say that pure estimates of staff time and costs are intrinsically unreliable, or that such estimates must in every case be supported by an accounting of staff time and costs in actual past appeals.

That said, as explained above, whatever evidence is used to generate the cost estimates that populate the set of numbers that is averaged for purposes of ORS 215.422(1)(c), that set must be broadly representative of the type of appeals and associated costs that the county is likely to experience, and provide an adequate factual basis to determine the "average cost" of appeals. Doing so will probably require at least some examination of individual past appeals. For example, the county might examine the number and types of appeals filed during the past year or some given period of time that includes a representative number and type of appeals, document or estimate the costs associated with those appeals, either individually or by related types or sub-types, and populate the set to be averaged with the resulting numbers. As an illustration, if the county had 10 appeals during the relevant time period,[6] five of which were appeals on relatively simple permit applications, three on more complex subdivision applications, and two on very complex destination resort applications, the county could provide or estimate the costs associated with all 10 appeals and populate the set with 10 individual numbers to be averaged.

3. Single or Multiple Appeal Fees

Under the county's formula of a base fee plus 20 percent of the application fee, there is a sliding scale of appeal fees ranging from $1870 to $6850, with the amount charged in many cases depending primarily on the size of the application fee. In the memorandum, the county counsel explained that the size of the application fee reflects the county's estimation of how complex and time-consuming, and hence costly, the application will be to process.

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[6] Obviously, the period of time that is evaluated could have an impact on how representative the appeal costs are. If the time period is too short, or covers a period in which there was an atypical pattern of appeals, then it may not be reasonable to extrapolate actual or estimated appeal costs during that period to future appeals.

As noted, the county counsel reasoned that "appeals of complex applications are more complex than simple ones," and that premise is the apparent justification for the sliding scale nature of the appeal fee formula. *See* n 3. In other words, rather than establish a single appeal fee applicable to all appeals, the county attempted to establish a range of appeal fees that vary depending on the presumed complexity and hence costs associated with appeals of different types of land use applications.

Petitioners argue:

> "[T]he 'average cost of such appeals' means the average cost of appeals from a hearings officer, or the average cost of appeals from a planning commission, or the average cost of appeals from an other designated person. It does not allow the county to establish a range of appeal fees within each of these categories. Nor does it allow the county to assert that, because the average cost of appeals of certain types of applications may be higher than the average of all appeals, the appeal fee for those types of applications may be higher than the average of all appeals." Petition for Review 9.

We understand petitioners to argue that the statute essentially requires the county to establish a single appeal fee based on consideration of the costs of all appeals as a single set, and that nothing in the statute authorizes the county to establish different fees for appeals of different types of applications, based on different costs for those appeals. In particular, petitioners object to the county's attempt to establish appeal fees for the more expensive types of appeals, such as those involving destination resorts, that are almost certainly higher than the average of all appeals.

We repeat the relevant terms of ORS 215.422(1)(c):

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, 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 first sentence states that the governing body may prescribe "fees" to defray appeal costs. That use of the plural certainly suggests that the county can establish more than one fee

to defray the costs incurred in acting upon appeals to the governing body. However, it could also simply refer collectively to both "the fee" described in the second sentence, and the "fee" for transcripts described in the third sentence. The use of the singular "fee" in the second sentence could be understood as authorizing only a single appeal fee applicable to all appeals, exclusive of a separate fee to prepare the transcript. However, that is certainly not clear from the text of ORS 215.422(1)(c). The second sentence authorizes a fee based either on the "actual cost of the appeal" or the average cost of appeals. Under the "actual cost" approach, the fee charged appellants will necessarily vary from appeal to appeal, depending on the actual costs of each individual appeal. That suggests that the legislature was not particularly concerned with imposing a single uniform appeal fee across all appeals. In our view, the principal regulatory concern of ORS 215.422(1)(c) is to place limitations on the *maximum* amounts a county can charge for processing a local appeal. We do not believe that concern is implicated by adoption of multiple appeal fees that apply to different types of appeals, as long as the fees so adopted are consistent with the statute's limitations within each different type of appeal.

In addition, we note that reading ORS 215.422(1)(c) to implicitly prohibit multiple appeal fees for different categories of appeals with different appeal costs would necessarily result in some classes of appellants subsidizing the appeal costs of other classes of appellants. Under a single uniform appeal fee approach that is established at or just below the average of all appeals, appellants who file appeals of a type that tend to incur fewer expenses will effectively subsidize appellants who file appeals of a type that are intrinsically more expensive to process. For example, the appellant of a simple site plan review decision will pay the same appeal fee as the appellant of a destination resort decision, notwithstanding that the costs associated with the typical destination resort appeal are almost certainly much higher. The fee paid by the appellant of the site plan review decision will be much more, and may bear little relationship to, the actual or likely costs of that type of appeal, while the

appeal fee paid by the appellant of a destination resort decision will be much less, and may bear little relation to, the actual costs of processing that type of appeal. In fact, it could be argued that where the record reflects a wide divergence in appeal costs associated with different kinds of appeals, a single uniform appeal fee based on an average of all appeals might be deemed "unreasonable" as applied to an appeal of a type of decision that is at the lower extreme of the spectrum of costs.

Moreover, as noted above, the legislature is clearly comfortable with allowing counties to impose appeal fees that are individually tailored to the actual costs of particular appeals. Given that, it would be strange to conclude that the legislature intended to prohibit counties from establishing different appeals fees for different categories of appeals with different levels of costs. That is essentially a hybrid approach between individually tailored appeal fees and a single, uniform appeal fee, and one that avoids some of the problems noted in the preceding paragraph. For those reasons, we decline to read into ORS 215.422(1)(c) an intent to prohibit counties from establishing multiple appeal fees for different types of appeals with different levels of appeal costs. We disagree with petitioners that the statute authorizes counties to impose only a single appeal fee based on a calculation of the average of all appeals considered. In our view, if there is substantial evidence to support it, the county may define different categories of appeals that tend to have similar levels of appeal costs, and within a specific category determine a set of costs for processing that type of appeal. Based on that set of costs, the county can calculate the arithmetic average of the set, and determine the average cost of appeals in that category. Having determined the relevant average, the county can then establish an appeal fee applicable only to that category of appeals that does not exceed the average cost of appeals in that category.

In the present case, the county's formula can be understood as an attempt to establish different appeal fees for different types of appeals with similar costs. However, as explained above, the county failed to determine any kind of average appeal cost in a manner consistent

with ORS 215.422(1)(c), and therefore the county has not demonstrated that its appeal fees are no more than the average cost of such appeals.

B. Reasonable Appeal Fee

In addition to limiting appeal fees to the actual or average cost, ORS 215.422(1)(c) requires that the appeal fee "shall be reasonable." Petitioners challenge some of the specific expenses detailed in the memorandum, arguing that they are unreasonable on their face, and therefore the county has not demonstrated that the appeal fees based on the memorandum are "reasonable." However, we need not address those arguments, because for the reasons set out above the county's decision must be remanded to recalculate the average cost of appeals. That remand will almost certainly require additional evidence, that must be evaluated consistent with the above discussion of how to determine the average cost of appeals. Therefore, there is no point in addressing petitioners' challenges to the existing body of evidence the county relied upon.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Under ORS 215.422(1)(c), the appeal fee is exclusive of the cost of a written transcript. The statute provides in relevant part:

> "* * * 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."

In the challenged order, the county chose not to establish a fee for the preparation of a written transcript. Instead, the county imposed a requirement that the "appellant must also provide transcripts of relevant meeting tapes at appellant's expense." Record 26.

Petitioners argue that ORS 215.422(1)(c) do not authorize a county to *require* an appellant to prepare a transcript, much less require a complete transcript of the proceedings. Doing so, petitioners argue, vitiates the $500 limit imposed on county-prepared transcripts. According to petitioners, if the county does not establish a fee for a county-prepared transcript, under the statute the county must *allow* a party to prepare a transcript of *relevant* portions of the proceedings below, but the county cannot require an appellant to prepare a transcript, whether it is a partial or complete transcript.

The county responds that while the fee order does require the appellant to provide a transcript, the county argues that it does not require a complete transcript, merely a transcript of "relevant meeting tapes" of the proceedings below, consistent with ORS 215.422(1)(c). The county notes that Crook County Code (CCC) 18.172.110(11) provides that "[t]he appellant shall provide a copy of the transcript of the proceedings appealed from to the county planning department seven calendar days before the hearing date set by the county court." However, the county argues that CCC 18.172.110(11) does not explicitly require a complete transcript and can be read to require only a partial transcript.

The county appears to agree that ORS 215.422(1)(c) does not authorize the county to require an appellant to submit a *complete* transcript of all the media recordings of the proceedings below. The fee order does not require a complete transcript of the media recordings of all proceedings below, only those of "relevant meeting tapes." The meaning of that language is not clear to us. "Relevant" modifies "meeting tapes," and "portion" is not mentioned. The fee order can be read to require a transcript of the media recording of an *entire* hearing that is deemed "relevant." CCC 18.172.110(11) does not even include that limitation, and can be read to require a transcript of all hearings, relevant or not.

The phrase used in ORS 215.422(1)(c) is "relevant portion of the proceedings conducted at a lower level." That language is also not entirely clear, but in our view, it means that if the county chooses not to require a county-produced transcript and fee therefor,

it may instead allow appellants to submit a transcript of those "portions" of the media recording of one or more hearings that are deemed "relevant."

ORS 215.422(1)(c) does not explicitly clarify who determines what portions are deemed "relevant," but in context it appears to be the appellant. Therefore, if the appellant believes, for example, that only a portion of a media recording for one hearing is "relevant," the appellant can submit a transcript only of that portion. Presumably, if other parties believe other portions of the recordings are relevant, they are at liberty to supply their own partial transcripts at their own expense. Therefore, to the extent the fee order is understood to require appellants to submit a transcript of the *entire* media recording of one or more hearings, even those portions the appellant deems to be irrelevant, it is inconsistent with ORS 215.422(1)(c).

The county and petitioners disagree regarding whether ORS 215.422(1)(c) authorizes the county to *require* appellants to submit any transcript at all, even a partial one limited to the portions deemed relevant. However, that disagreement is largely academic, given our conclusion above that if the county elects not to produce its own transcripts and opts to have the appellant supply a transcript of "relevant portions" of the proceedings below, nothing in the statute dictates what portions of the media recordings are deemed "relevant," and that choice appears to be entirely up to the appellant. Even if ORS 215.422(1)(c) is understood to implicitly authorize the county to *require* an appellant to provide a transcript of "relevant portions" of the media recordings for one or more hearings, if the appellant deems only a small portion, or no portion, to be "relevant," then such a requirement would be an empty one. The county appears to agree that the county could not refuse to hear an appeal simply because the appellant has not submitted any transcript at all or only a partial transcript.[7]

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[7] The county argues:

In sum, we agree with petitioners that the requirement in the challenged decision that the "appellant must also provide transcripts of relevant meeting tapes at appellant's own expense" is inconsistent with ORS 215.422(1)(c), to the extent it is understood to require appellants to submit a transcript of the *entire* media recording of one or more hearings, even those portions the appellant deems to be irrelevant. On remand, the county should modify that language to be consistent with the above discussion.[8]

The second assignment of error is sustained.

The county's decision is remanded.

"Absent evidence in the record that the County has refused to accept either no transcript at all or partial transcripts prepared by the appellants on appeal, the County has not violated ORS 215.422(1)(c)." Response Brief 12.

[8] The county may also wish to consider, in a separate legislative proceeding, amending CCC 18.172.110(11) to clarify that the appellant need not submit complete transcripts of the proceedings below.