

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,

5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,

10 *Respondent.*

11
12 LUBA No. 2017-069

13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from Deschutes County.

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19 Carol E. Macbeth, Bend, represented petitioner.

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21 D. Adam Smith, Deschutes County Counsel, Bend, represented
22 respondent.

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

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27 HOLSTUN, Board Member, concurring.

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29 TRANSFERRED 10/12/2017

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

NATURE OF THE DECISION

Petitioner appeals a board of county commissioners’ resolution adopting fees for various county services, including appeal fees for appeals of decisions of the hearings officer to the board of county commissioners.

FACTS

Deschutes County Code (DCC) 4.12.010, part of the county code title entitled “Revenue and Finance,” requires an annual review by the county of all fees and charges for services for “compatibility with the actual cost of providing service prior to April 1 of each year” and provides that the fees “shall be adjusted and set as of each July 1st.” DCC 4.12.030 provides that “for fees for which no new fee is recommended by a department head, an annual adjustment will be made based on the applicable Consumer Price Index (CPI) * * * [.]”

In 2016, the county adopted a resolution (2016 Resolution) that set fees for services provided by the county, including fees for appeals of hearings officer decisions to the board of county commissioners. The 2016 fees were adopted after the county reviewed an October 2015 document entitled “The Deschutes County Community Development User Fee and Operating Plan,” prepared by a county consultant (2016 Fee Study). Record 451-518. The 2016 Fee Study analyzed the cost of community development department services including staff cost and time spent on applications, as well as other department

1 services, including appeals of hearings officer decisions to the board of county
2 commissioners. The 2016 Fee Study concluded that fees for local appeals did
3 not cover the actual cost of the county’s services. Record 491. However, while
4 in the 2016 Resolution the board of county commissioners increased the
5 application fees for several types of planning actions, the board of
6 commissioners left the fee for local appeals unchanged from the previous year,
7 at \$2,600 plus 20% of the fee for the underlying application.

8 On June 21, 2017, the board of county commissioners adopted
9 Resolution 2017-019 (2017 Resolution), which set fees effective July 1, 2017,
10 for services provided by the county, including fees for appeals of hearings
11 officer decisions to the board of commissioners. The 2017 Resolution set that
12 fee at \$2,665 plus 20% of the fee for the underlying application. The fees that
13 the county adopted in the 2017 Resolution are the same as the fees that the
14 county adopted in the 2016 Resolution that were effective until June 30, 2016,
15 except that the 2017 appeal fee includes an increase from \$2,600 to \$2,665
16 based on the CPI index, pursuant to DCC 4.12.030.

17 This appeal followed.

18 **JURISDICTION**

19 LUBA has exclusive jurisdiction to review land use decisions. ORS
20 197.825(1). As defined by ORS 197.015(10)(a), a land use decision includes:

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

- 1 “(i) The goals;
- 2 “(ii) A comprehensive plan provision;
- 3 “(iii) A land use regulation; or
- 4 “(iv) A new land use regulation[.]”

5 After the record was filed, the county moved to dismiss the appeal,
6 arguing that LUBA lacks jurisdiction over the appeal for several reasons.
7 Petitioner filed a response to the motion to dismiss. That response initially
8 takes the position that the Resolution is a “land use decision” as defined in
9 ORS 197.015(10)(a) because it is “a final decision that concerns the application
10 of the statewide planning goals (Goal 1) and county land use regulations.”
11 Petitioner’s Response to Respondent’s Motion to Dismiss for Lack of
12 Jurisdiction 1. The county does not dispute that the 2017 Resolution is a “land
13 use decision” as defined in ORS 197.015(10)(a) and we do not consider that
14 question.

15 ORS 197.015(10)(b) lists exceptions to the ORS 197.015(10)(a)
16 definition of “land use decision[.]” One of those exceptions is for a decision of
17 a local government “[t]hat is made under land use standards that do not require
18 interpretation or the exercise of policy or legal judgment[.]” ORS
19 197.015(10)(b)(A). According to the county, one of the reasons LUBA lacks
20 jurisdiction over the challenged decision is that the decision is subject to the
21 exception to LUBA’s jurisdiction for decisions made under land use standards
22 that “do not require interpretation or the exercise of policy or legal judgment.”

1 A second reason that the county argues LUBA lacks jurisdiction over the
2 decision is that petitioner’s appeal is in essence a collateral attack on the 2016
3 Resolution.¹ According to the county, prior to adopting the 2016 Resolution the
4 board of county commissioners evaluated the 2016 Fee Study, and concluded
5 that even though the existing appeal fee did not cover the actual cost of
6 providing the service, the fee should not be increased. According to the county,
7 in 2017 the board of county commissioners merely applied the required DCC
8 4.12.030 CPI increase to the fee established in the 2016 Resolution, and in this
9 appeal petitioner cannot challenge the fee established in the 2016 Resolution.

10 Petitioner does not identify any land use standards that the county
11 applied or should have applied that require interpretation or the exercise of
12 policy or legal judgment. In relevant part, the 2017 Resolution accomplished
13 only one thing: it increased appeal fees to account for inflation, as mandated
14 under DCC 4.12.030. Although petitioner argues that application of DCC
15 4.12.30 in the 2017 Resolution required interpretation or the exercise of policy
16 or legal judgment because the county in fact did not adjust some non-planning
17 fees for inflation, we agree with the county that it does not. First, DCC
18 4.12.030 is part of the county’s general code and not a part of the county’s

¹ The county also argues that the challenged decision is subject to the “fiscal exception” to LUBA’s jurisdiction explained in *Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dismissed* 291 Or 878, 635 P2d 647 (1981). Because we conclude we lack jurisdiction for other reasons we need not and do not address the county’s alternative argument.

1 zoning ordinance, and is arguably not a “land use standard” within the meaning
2 of ORS 197.015(10)(b)(A). Second, DCC 4.12.030 requires that for fees “for
3 which no new fee is recommended by a department head, an annual adjustment
4 will be made based on the applicable Consumer Price Index (CPI) * * *.” The
5 director of the Community Development Department did not recommend a new
6 fee for local appeals, so DCC 4.12.030 required the board of commissioners to
7 adjust the appeal fee based on the CPI. Third, petitioner does not explain or
8 otherwise identify the fees that petitioner alleges the county wrongly failed to
9 adjust for inflation, or establish that those fees that were not adjusted for
10 inflation were not adjusted because they were subject to a recommendation for
11 a new fee by a department head. Stated differently, that the county may have
12 failed to follow the mandate in DCC 4.12.030 to adjust some fees for inflation
13 while not adjusting others does not convert the decision into one that requires
14 interpretation or the exercise of policy or legal judgment.

15 We also agree with the county that, to the extent petitioner seeks in this
16 appeal of the 2017 Resolution to challenge the fees adopted in the 2016
17 Resolution, that decision is not before us. Any challenge to the 2016
18 Resolution would not be within our scope of review in this appeal.

19 We agree with the county that the county’s 2017 decision did not involve
20 land use standards that require the exercise of policy or legal judgment.
21 Accordingly, the decision is excluded from our jurisdiction under ORS
22 197.015(10)(b)(A), and LUBA lacks jurisdiction over the appeal.

1 **MOTION TO TRANSFER**

2 Pursuant to ORS 34.102 and OAR 661-010-0075(11), petitioner filed a
3 contingent motion to transfer this appeal to circuit court, in the event LUBA
4 determines that the challenged decision is not reviewable as a “land use
5 decision.”² The county does not oppose the motion. Because we have
6 concluded that the challenged decision is not reviewable as a land use decision,
7 the motion to transfer is granted.

8 The appeal is transferred.
9 Holstun, Board Member, concurring.

10 I agree that we do not have jurisdiction to review the resolution that is
11 the subject of this appeal, for the reasons set out in the opinion. I also believe
12 we lack jurisdiction to review the 2017 Resolution because it qualifies for the
13 fiscal exception to LUBA’s review jurisdiction. *Willamette Oaks LLC v. City of*
14 *Eugene*, 63 Or LUBA 75, 109-112 (Holstun, Board Member dissenting), *rev’d*
15 *and rem’d* 245 Or App 47, 261 P3d 85, *rev den* 351 Or 586, 274 P3d 857
16 (2011).

² OAR 661-010-0075(11)(c) provides:

“If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.”