

1 BEFORE THE LAND USE BOARD OF APPEALS

2
3 OF THE STATE OF OREGON

4
5 RIVERVIEW ABBEY
6 MAUSOLEUM COMPANY,
7 *Petitioner,*

8
9 vs.

01/04/19 PM12:40 LUBA

10
11 CITY OF PORTLAND,
12 *Respondent,*

13
14 and

15
16 SOUTH BURLINGAME
17 NEIGHBORHOOD ASSOCIATION,
18 *Intervenor-Respondent.*

19
20 LUBA Nos. 2018-016 and 2018-017

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from City of Portland.

26
27 Christopher P. Koback, Portland, filed the petition for review and argued
28 on behalf of petitioner. With him on the brief was Hathaway Larson LLP.

29
30 Lauren A. King, Deputy City Attorney, Portland, filed a joint response
31 brief and argued on behalf of respondent.

32
33 Carrie A. Richter, Portland, filed a joint brief and argued on behalf of
34 intervenor-respondent. With her on the brief was Bateman Seidel, P.C.

35
36 ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board
37 Member, participated in the decision.

1 LUBA No. 2018-016 AFFIRMED 01/04/2019
2 LUBA No. 2018-017 AFFIRMED 01/04/2019

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

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NATURE OF THE DECISION

Petitioner appeals (1) a city staff decision granting a local appeal fee waiver to a neighborhood association, and (2) a city council decision on local appeal denying petitioner’s application to subdivide property.

REPLY BRIEF

Petitioner filed a reply brief in response to the joint response brief of the city and intervenor-respondent (together, respondents). There is no opposition to the brief and it is allowed.

FACTS

The subject property is comprised of approximately 14.17 acres of vacant land that is zoned Single Dwelling Residential 10,000 (R10) with environmental protection and environmental conservation overlays. Petitioner filed an application to subdivide the property into 21 lots for single-dwelling residences and requested an environmental review and modifications to satisfy requirements in the environmental overlay zones. Petitioner requested environmental violation review to correct violations related to vegetation modification and ground disturbance. Petitioner’s application was processed in a Type III procedure with a public hearing before the city hearings officer. The hearings officer approved with conditions the subdivision, environmental review, environmental modifications, and environmental violation review. Record 3863.

1 The deadline for filing a local appeal of the hearings officer’s decision was
2 January 12, 2018, at 4:30 p.m.¹ On January 12, 2018, at 2:59 p.m., the president
3 of intervenor-respondent, the South Burlingame Neighborhood Association (the
4 neighborhood association), filed two forms provided by the city’s Director of
5 Bureau of Development Services (BDS): (1) a Type III Decision Appeal Form
6 (appeal form) and (2) a Type III Decision Appeal Fee Waiver Request for
7 Organizations (fee waiver form). Both forms are marked “Received By” a BDS
8 staff person. Record 3737, 3741. The appeal form contains a preprinted line that
9 provides “[Y] [N] Fee Waived.” The “[Y]” is marked on the appeal form. Record
10 3737. The fee waiver form contains a preprinted line that provides two check
11 boxes “[] Waiver Approved [] Waiver Denied.” Neither box is checked on the
12 fee waiver form. Record 3741.

13 On January 12, 2018, after the neighborhood association submitted its
14 appeal and fee waiver request, Robert Griffith (Griffith), an owner of petitioner
15 Riverview Abbey Mausoleum Company and a member of the neighborhood
16 association, submitted written argument that the local appeal was invalid and
17 should not be heard by the city council. According to Griffith, the neighborhood
18 association’s vote to file the local appeal was not made in accordance with the
19 neighborhood association’s bylaws governing emergency meetings, as explained

¹ We previously set out the following facts in a prior order denying the city’s motion to dismiss. *Riverview Abbey Mausoleum Company v. City of Portland*, ___ Or LUBA ___ (LUBA Nos 2018-016/017, Order, Oct 12, 2018).

1 in greater detail in our discussion under the second and third assignments of error.
2 Record 3746–50. On January 17, 2018, BDS issued a notice of public hearing for
3 February 7, 2018. Record 3885. On February 5, 2018, petitioner’s attorney
4 submitted a letter to the city council asserting that the appeal was invalid for the
5 same reasons argued in Griffith’s January 12, 2018, letter. Record 3981–85.

6 In its final decision, the city council decided that BDS had waived the
7 appeal fee and that the local appeal was valid. However, the city council did not
8 review whether the appeal fee waiver was properly allowed. The city council
9 explained:

10 “[Petitioner] submitted testimony to Council (letter from
11 [petitioner’s counsel] dated February 5, 2018) questioning the
12 Council’s jurisdiction to hear this appeal. Specifically, [petitioner]
13 believes [the neighborhood association] was improperly granted an
14 appeal fee waiver. He argues that their appeal, which was submitted
15 before the appeal period ended but without an appeal fee, was
16 invalid. PCC 33.750.020 provides that the Director of BDS
17 determines the rules and procedures for waiver of fees. The Type III
18 Decision Appeal Form, in the record, indicates that BDS staff
19 waived the fee. [Petitioner’s] argument regarding validity of an
20 appeal fee waiver is not properly before Council as Council has
21 delegated authority to waive appeal fees to the BDS Director. BDS
22 Administrative Rule ENB [Environment (Built)] 13.25 provides that
23 the decision of the Director of BDS to waive fees is final. BDS’s
24 decision is separate from Council’s decision on the application that
25 is the subject of these findings.” Record 17.

26 On the merits of the appeal, the city council denied petitioner’s application
27 for subdivision, environmental review, and modifications and approved with
28 conditions the environmental violation review. Record 63–64. Petitioner filed

1 two separate appeals to LUBA challenging the BDS fee waiver decision (LUBA
2 No. 2018-017) and the city council's final decision (LUBA No. 2018-016).
3 LUBA consolidated those appeals.

4 Petitioner does not challenge the substance of the city council's decision
5 on petitioner's subdivision application. Petitioner's arguments focus solely on the
6 fee waiver decision in relation to the validity of the appeal proceeding before the
7 city council. Petitioner's three assignments of error present interrelated legal
8 arguments. Petitioner argues that the city never actually made an effective
9 decision to waive the appeal fee, and that the BDS staff decision upon which the
10 city council relied was not an effective, final decision on the neighborhood
11 association's fee waiver request. Accordingly, petitioner argues that the
12 neighborhood association's appeal was invalid, and the city council's decision
13 must be reversed. For the reasons explained below, we reject petitioner's
14 arguments and affirm the city council's determination that BDS made an
15 effective decision approving the fee waiver and, thus, the local appeal is valid.

16 **FIRST ASSIGNMENT OF ERROR**

17 Under the first assignment of error, petitioner makes three primary
18 arguments: (1) the city council lacked jurisdiction because, according to
19 petitioner, an appeal fee must be paid or waived before the appeal deadline; (2)
20 fee waivers must be decided by the Director of BDS (Director) (and not BDS
21 staff); and (3) an effective fee waiver requires a signed, written decision and
22 notice of decision.

1 **A. Waiver**

2 Respondents initially respond that petitioner’s arguments were not
3 presented to the city council and, thus, are waived. *See* ORS 197.835(3) (LUBA’s
4 review is limited to issues raised by a participant before the local hearings body).
5 Petitioner replies, and we agree, that preservation and waiver principles are
6 inapposite here. A petitioner is not required to anticipate erroneous findings or
7 interpretations in a final decision in order to challenge them at LUBA. *See, e.g.,*
8 *Fernandez v. City of Portland*, 73 Or LUBA 107, *aff’d*, 278 Or App 873, 380 P3d
9 1207 (2016) (a petitioner is not required to anticipate that a city will adopt
10 allegedly erroneous interpretations and object to those interpretations to preserve
11 a right to assign error at LUBA). Petitioner raised the fee waiver issue to the city
12 council and argued that the local appeal was invalid. Petitioner could not have
13 known that the city council would rely on the BDS appeal form as the operative
14 fee waiver decision, with attendant findings and interpretations, until the city
15 issued its final decision. Accordingly, petitioner did not have the opportunity to
16 raise the specific challenges to the BDS fee waiver decision during the local
17 proceeding and may raise them for the first time in this appeal.

18 **B. The city council decision**

19 Petitioner argues that the city council erred in hearing the local appeal
20 because the appeal was not perfected. We start by explaining the applicable law.
21 Portland City Code (PCC) 33.730.030(H)(1) governs type III procedures and
22 provides that an appeal is filed when completed BDS forms are submitted with

1 the required fee.² However, the appeal fee may be waived. The Director
2 establishes the rules and procedures for land use review and appeal fee payment,
3 refund, and waiver. PCC 33.750.020.³ The Director, or her delegate, accepts,
4 reviews, and decides fee waiver requests pursuant to BDS Administrative Rule
5 (Environment (Built)) (ENB) 13.25.⁴ See PCC 33.710.090 (providing that the

² PCC 33.730.030(H)(1) provides:

“H. When an appeal is filed. Appeals must comply with this subsection.

“1. Content of the appeal. The appeal must be submitted on forms provided by the Director of BDS. All information requested on the form must be submitted in order for the appeal form to be accepted. The appeal request must include:

- “• The file number and land use review(s) appealed;
- “• The appellant’s name, address, signature, phone number, and relationship to the land use action;
- “• A statement of which sections of the Zoning Code or which approval criteria the decision violates; and
- “• The required fee.” (Boldface in original.)

³ PCC 33.750.020 provides:

“Required fees for land use reviews and appeals of land use decisions are stated in the Fee Schedule for Title 33, available at the Development Services Center. Rules and Procedures for the payment of fees, refunds, and waiver of fees are determined by the Director of BDS.”

⁴ ENB 13.25 provides, in relevant part:

“IV. Fee Waivers or Refunds

“The Director of BDS will consider fee waivers or refunds on a case by case basis. The decision of the Director to waive or refund fees is final.

“A. Fee Waivers

“The Director may waive BDS land use review application or appeal fees as specified below for recognized organizations, low-income applicants, City government or nonprofit organizations. (A ‘recognized organization’ is defined in PCC 33.910.) An application for a fee waiver may be filed concurrently with the land use review application or appeal form.

“1. Recognized organization appeal fee waivers.

- “a. Type II and IIx land use review appeals.** Per state law, no appeal fee is charged to recognized organizations for the appeal of a Type II or Type IIx land use review and the site must be within that neighborhood or community organization’s boundaries. To be deemed ‘recognized’ by the Office of Neighborhood Involvement (ONI), the organization has to abide by the Oregon Public Records and Public Meeting Laws, and ONI requires that any vote of the neighborhood association be in accordance with the organization’s bylaws.
- “b. Type III land use review appeals.** The Director may waive land use review appeal fees for recognized organizations for Type III land use reviews if all of the following conditions are met:

1 Director is responsible for implementing PCC Title 33, Planning and Zoning, and
2 may delegate review and decision-making authority to BDS staff).

3 Petitioner argues that the city misconstrued the applicable law regarding
4 local appeal submission requirements. *See* ORS 197.835(9)(a)(D) (LUBA “shall
5 reverse or remand the land use decision under review” if the board finds that the
6 local government “improperly construed the applicable law”). Petitioner argues
7 that the neighborhood association’s appeal was invalid under PCC
8 33.730.030(H)(1) because the appeal form was not accompanied by either (1) the
9 required fee or (2) a fee waiver that was approved prior to the appeal deadline.
10 Petitioner relies on *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995), for the
11 proposition that either payment of the appeal fee or a prior granted fee waiver
12 request is a prerequisite to a valid appeal, and that nonpayment of the appeal fee
13 or failure to obtain a fee waiver prior to the appeal deadline deprives the city

“**1**) The recognized organization has standing to appeal. (See City Zoning Code Section 33.730.030.F, Ability to appeal);

“**2**) The appeal is being made on behalf of the recognized organization; and

“**3**) The appeal contains the signature of the chairperson of the organization, as recognized by the Office of Neighborhood Involvement, or the signature of other persons authorized by the organization, confirming the vote to appeal was done in accordance with the organization’s bylaws.” (Boldface in original.)

1 council of jurisdiction to hear the local appeal. Petitioner notes that the code
2 provision governing local appeal submission requirements was the same in
3 *Ramsey* as the code provision in this case, PCC 33.730.030(H)(1), which requires
4 that the appeal request include the required fee.

5 In *Ramsey*, LUBA affirmed the city’s interpretation that then-applicable
6 PCC provisions required an appeal request include either the required appeal fee
7 or a fee waiver that had been approved by the planning director prior to the appeal
8 deadline. The holding in *Ramsey* was based on *former* PCC 33.750.050, which
9 required that “[t]he waiver approval must occur prior to submitting the
10 application.” As respondents correctly point out in this case, while PCC
11 33.730.030(H)(1) is the same, PCC 33.750 has been amended since *Ramsey* was
12 decided.⁵ Importantly, the city’s code no longer requires a fee waiver be approved
13 prior to the appeal deadline. Instead, a local appellant may submit a fee waiver
14 request and appeal request together. ENB 13.25(IV)(A) (“An application for a
15 fee waiver may be filed concurrently with the land use review application or
16 appeal form.”). In this land use proceeding, the city was not bound by its prior
17 code, or its interpretation of its prior code. In short, *Ramsey*, and subsequent
18 similar cases applying the prior city code, *Babbit v. City of Portland*, 41 Or

⁵ PCC 33.750 was last amended by Ordinance No. 179980, effective April 22, 2006. Current PCC 33.750 does not contain *former* section 33.750.050. The application in this matter was submitted in 2016 and deemed complete in 2017. Thus, the applicable PCC 33.750 does not contain *former* section 33.750.050.

1 LUBA 151 (2001), and *St. Johns Neighborhood Assoc. v. City of Portland*, 38 Or
2 LUBA 275, 277 (2000), are not controlling in this case. We proceed to review
3 the city council’s decision under the current code.

4 Respondents argue that the fee waiver was granted by BDS staff in
5 advance of the appeal deadline, “as evidenced by both the [appeal form] as well
6 as the City Council’s decision processing the appeal on the merits.” Response
7 Brief at 11. We agree with petitioner that we cannot tell on this record precisely
8 when the appeal fee was waived. The city council did not find that the fee waiver
9 was granted in advance of the appeal deadline. However, the specific timing of
10 the fee waiver does not appear to be material to the city council’s determination
11 that the local appeal was perfected.

12 Importantly, even if the fee waiver request was approved after the appeal
13 deadline, petitioner has not established that under the current code, prior approval
14 of the fee waiver is a jurisdictional prerequisite to city council review. *See, e.g.,*
15 *Golden v. City of Silverton*, 58 Or LUBA 399, 405–406, *aff’d*, 228 Or App 757,
16 210 P3d 946, *rev den*, 347 Or 42 (2009) (explaining that local appeal submission
17 requirements are not all jurisdictional requirements). The city council explained
18 that PCC 33.750.020 provides that the Director determines the rules and
19 procedures for waiver of fees and the decision of the Director to waive fees is
20 final. The code requires only that the appeal be submitted on forms provided by
21 BDS, and the appeal form, and fee waiver request may be submitted concurrently.
22 PCC 33.730.030(H)(1) (“The appeal must be submitted on the forms provided by

1 the Director of BDS.”); ENB 13.25(IV)(A) (“An application for a fee waiver may
2 be filed concurrently with the land use review application or appeal form.”).
3 Nothing in PCC 33.730.030(H), PCC 33.750.020, or any other code provision
4 cited to us, requires that a fee waiver be approved prior to the appeal deadline.

5 The city council found that the appeal form indicates that BDS staff waived
6 the fee. Record 17. The city council interpreted PCC 33.730.030(H) and PCC
7 33.750.020 as satisfied by the submission of a completed appeal form and fee
8 waiver request before the appeal deadline. That interpretation is not only
9 plausible but also correct. Thus, we conclude that the city council did not
10 misconstrue the applicable law in determining that the neighborhood
11 association’s local appeal was timely and valid. ORS 197.829(1); *Siporen v. City*
12 *of Medford*, 349 Or 247, 243 P3d 776 (2010) (LUBA is required to affirm a local
13 government’s interpretation of its own land use regulations if the interpretation
14 is not inconsistent with the express language, purpose, or policy of the
15 comprehensive plan or land use regulations).⁶

⁶ ORS 197.829(1) provides:

“[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:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]

1 Petitioner argues that the city council did not make adequate findings
2 supported by substantial evidence that the appeal was perfected. ORS
3 197.835(9)(a)(C) (LUBA “shall reverse or remand the land use decision under
4 review” if the board finds that the local government “made a decision not
5 supported by substantial evidence in the whole record”). Petitioner challenged
6 the city council’s authority to hear the appeal. In response, the city council found
7 that appeal was submitted before the appeal period ended, but without an appeal
8 fee. The city then found that the appeal form indicates that BDS staff waived the
9 fee and that the decision is final. Record 17. Those findings are adequate to
10 support the city’s decision to hear the appeal on the merits. A reasonable person
11 could rely on the appeal form to decide that the appeal fee was waived. *Dodd v.*
12 *Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) (substantial evidence
13 is evidence a reasonable person would rely on in making a decision).

14 **C. The BDS decision**

15 The city council found that BDS staff waived the fee as evidenced by the
16 appeal form. As a threshold issue, petitioner argues that there is no evidence
17 regarding who marked the “[Y]” on the appeal form “[Y] [N] Fee Waived” or
18 when that mark occurred. The city council found that BDS staff waived the

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 appeal fee based on the appeal form. We conclude that a reasonable person could
2 rely on the appeal form to conclude that BDS staff waived the appeal fee.

3 Petitioner next argues that the BDS fee waiver decision is ineffective
4 because a waiver must be decided by the Director and not BDS staff. We agree
5 with respondents that the city council did not err in concluding that BDS staff
6 could and did waive the appeal fee. The Director was not required to personally
7 decide the fee waiver request. While the Director is ultimately responsible for the
8 decisions and recommendations required of the Director, the city has authorized
9 the Director to delegate review and decision-making authority to BDS staff. PCC
10 33.710.090. PCC 33.910 defines “Director of BDS” as the “Director of the City
11 of Portland Bureau of Development Services, or the Director’s designee.” As
12 respondents emphasize, the city’s code requires the Director to issue a decision
13 or take other action in numerous instances. The code does not require that the
14 Director personally decide or expressly delegate authority to BDS staff for each
15 action or decision for which the Director is responsible. The city council found
16 that the BDS staff fee waiver decision was the final decision on that matter, and
17 petitioner has not established that interpretation is implausible. ORS 197.829(1);
18 *Siporen*, 349 Or 247; see n 6.

19 Petitioner argues that the fee waiver decision is not effective because the
20 appeal form does not contain a signature and BDS did not provide notice of the
21 fee waiver decision. The city’s code does not require the fee waiver decision be
22 reduced to writing with findings, signature, and mailed notice. Petitioner’s

1 argument conflates three distinct issues: (1) whether the BDS fee waiver decision
2 was effective to waive the appeal fee; (2) whether the BDS fee waiver decision
3 was “final” for the purposes of the city council’s review on appeal; and (3)
4 whether the BDS fee waiver decision is “final” for the purposes of LUBA’s
5 review.

6 We previously resolved the question of whether the BDS decision was
7 final for purposes of LUBA’s review in our prior order. *Riverview Abbey*
8 *Mausoleum Company v. City of Portland*, ___ Or LUBA ___ (LUBA Nos 2018-
9 016/017, Order, Oct 12, 2018). The city moved to dismiss petitioner’s appeal of
10 the fee waiver decision arguing that LUBA lacked jurisdiction to review that
11 decision because the fee waiver decision was an unreviewable ministerial
12 decision or it was untimely filed. We rejected the city’s jurisdictional challenges
13 and denied the motion to dismiss. We characterized the fee waiver decision as an
14 interlocutory decision in the local appeal that became “final” for purposes
15 LUBA’s review only when the city council issued its final decision on the merits
16 of the application and appeal. We concluded that we had jurisdiction to review
17 the fee waiver decision as an interlocutory decision made during the course of
18 the local land use proceeding that culminated in the city council’s final land use
19 decision. We did not conclude that the fee waiver decision was an independently
20 appealable final land use decision *See Vanspeybroeck v. Tillamook County*, 51
21 Or LUBA 546, 552 (2006) (LUBA lacks jurisdiction over interlocutory decisions

1 in the absence of a final decision; however, in an appeal of the final decision, a
2 party may raise issues regarding the interlocutory decision).

3 We also rejected the city’s argument that petitioner’s appeal of the fee
4 waiver decision was untimely, observing that the fee waiver decision was not
5 “final” for purposes of our review when the appeal form was marked “received
6 by” BDS staff. We observed that the fee waiver decision lacked signatures that
7 can be a necessary component to constitute a final decision for purposes of LUBA
8 review and jurisdiction under OAR 661-010-0010(3).⁷ *Riverview Abbey*
9 *Mausoleum Company v. City of Portland*, ___ Or LUBA ___ (LUBA Nos 2018-
10 016/017, Order, Oct 12, 2018) (slip op at 15). We did not conclude that the city’s
11 code requires the appeal form or fee waiver form be signed by the Director or
12 BDS staff. To the extent that was implied in our order, we disavow that
13 understanding.

14 The fee waiver decision was “final” for the purposes of the city council’s
15 review in the sense that the city council refused to review BDS staff’s
16 determination that the neighborhood association had satisfied the conditions for
17 a fee waiver, an issue that we discuss under the second and third assignments of
18 error.

⁷ OAR 661-010-0010(3) provides: “‘Final decision’: A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.”

1 The city council held that a BDS staff decision, evidenced by the appeal
2 form, was sufficient to waive the appeal fee for purposes of the local appeal.
3 Petitioner has not demonstrated that the applicable law requires a signature on a
4 city fee waiver decision for that decision to be effective for purposes of
5 proceeding with a local appeal and we conclude that the city council did not err
6 in relying on an unsigned appeal form to determine that the appeal fee was
7 waived.

8 Petitioner next argues that the fee waiver decision is not effective because
9 the city did not provide notice of that decision. Petitioner appears to rely on PCC
10 33.730.015(F), which provides that the BDS Director will mail notice of certain
11 quasi-judicial decisions to the property owner, applicant, and any person or
12 organization who submitted written comments.⁸ It is not apparent to us that the
13 procedures in PCC 33.730.015(F) apply to an appeal fee waiver decision, which
14 is not a Director's land use decision for which the city provides a quasi-judicial
15 process. Petitioner cites no other applicable rule that requires written notice of a
16 fee waiver decision. We reject petitioner's argument that the fee waiver decision
17 is ineffective due to lack of written notice.

⁸ PCC 33.730.015(F) provides:

“Notice of decision. The Director of BDS will mail notice of the decision to the owner, the applicant if different, and to any person or organization who submitted written comments. See 33.730.070.F, Type I, Type Ix, and Type IV notice of decision.” (Boldface in original.)

1 Even assuming for the sake of argument that PCC 33.730.015(F) applies
2 to the fee waiver decision, and requires BDS to provide written notice of the fee
3 waiver decision, the city's failure to provide notice is, at most, a procedural error.
4 We may remand a land use decision or limited land use decision for procedural
5 error only if the procedural error "prejudiced the substantial rights of the
6 petitioner." ORS 197.828(2)(d); ORS 197.835(9)(a)(B).

7 Petitioner has not alleged or established any prejudice to its substantial
8 rights due to the city's failure to provide written notice of the fee waiver decision.
9 PCC 33.750.020 provides that the Director determines the rules and procedures
10 for the payment of fees and fee waivers. The applicable administrative rule, ENB
11 13.25(IV), provides that the Director may waive the appeal fee for a Type III
12 appeal proceeding if certain conditions are met. However, the city's code and
13 administrative rules do not appear to provide any procedure for a party to
14 challenge a BDS decision on a fee waiver request. Instead, the Director's decision
15 is final. In this case, petitioner was aware of the neighborhood association's
16 appeal and fee waiver request and petitioner challenged the fee waiver during the
17 appeal proceeding before the city council. Petitioner appears to have been
18 provided a full and fair hearing in the subdivision appeal proceeding, and
19 petitioner does not argue otherwise. Petitioner has not established any prejudice.
20 Thus, petitioner's argument that the city failed to provide notice of the appeal fee
21 waiver decision provides no basis for reversal or remand.

1 In sum, the city council did not misconstrue applicable law or make a
2 procedural error prejudicing petitioner's substantial rights in deciding that the
3 local appeal was valid, and the city council's decision is supported by substantial
4 evidence.

5 The first assignment of error is denied.

6 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

7 As explained above, the city council decided that BDS staff granted the fee
8 waiver and the local appeal was therefore not invalid. However, the city council
9 declined to review petitioner's challenges to the merits of the BDS decision to
10 approve the fee waiver. In the second and third assignments of error, petitioner
11 argues that, even if BDS staff made a final decision waiving the neighborhood
12 association appeal fee, BDS staff erred in approving the fee waiver request. The
13 city council did not review whether BDS staff properly allowed the fee waiver.
14 Instead the city council declined to review the fee waiver decision. Accordingly,
15 we review the second and third assignments of error for legal correctness and
16 interpret the applicable law in the first instance. ORS 197.835(9)(a)(D).

17 Petitioner first argues that the fee waiver form does not indicate that the
18 appeal fee was waived or that the neighborhood organization was notified of the
19 waiver decision. As explained under the first assignment of error, the city relied
20 on the appeal form, and not the fee waiver form, to determine that the fee was
21 waived. In the circumstances of this case, the fact that the fee waiver form does

1 not indicate whether the waiver request was approved does not invalidate the city
2 council's conclusion that BDS staff waived the appeal fee.

3 Petitioner next argues that the applicable regulations do not allow BDS
4 staff to rely solely on the applicant's representations to conclude that the
5 conditions for a fee waiver set out in ENB 13.25(IV)(A)(1)(b) were satisfied.
6 Respondents respond that BDS staff was not required to independently evaluate
7 whether the appeal fee waiver conditions were met, but instead was entitled to
8 rely upon representations contained in the signed fee waiver form.

9 A recognized organization may obtain a fee waiver for a Type III land use
10 review appeal if all of the following three conditions are met: (1) the recognized
11 organization has standing to appeal; (2) the appeal is made on behalf of the
12 recognized organization; and (3) the appeal contains the signature of the
13 chairperson or other persons authorized by the organization, confirming the vote
14 to appeal was done in accordance with the organization's bylaws. ENB
15 13.25(IV)(A)(1)(b). ENB 13.25(IV) provides that BDS will consider fee waivers
16 on a case-by-case basis and that the BDS decision is "final," in the sense that the
17 city provides no review of a BDS fee waiver decision. Consistent with that
18 procedure, the city council declined to review or decide petitioner's argument
19 regarding the correctness of the BDS appeal fee waiver decision. Record 17.

20 It is undisputed that, at all relevant times, the neighborhood association
21 was and is a "recognized organization" under the city code. PCC 3.96.020(B)
22 ("Neighborhood Association: An autonomous organization formed by people for

1 the purpose of considering and acting on issues affecting the livability and quality
2 of their Neighborhood, formally recognized by the Office of Community & Civic
3 Life, and subject to Chapter 3.96.”). PCC 3.96.030(D) provides benefits,
4 responsibilities, and consequences of formal neighborhood association
5 recognition:

6 “1. Any Neighborhood Association meeting the minimum
7 requirements established by 3.96.030, upon request, is entitled to
8 formal recognition and benefits from the Office of Community &
9 Civic Life pursuant to the adopted Standards.

10 “2. If a Neighborhood Association fails to meet the minimum
11 requirements of 3.96.030, the Office of Community & Civic Life
12 may, pursuant to the adopted Standards, suspend partial or all
13 benefits to that Neighborhood Association and may ultimately
14 revoke formal recognition of that Neighborhood Association.”

15 A recognized organization must abide by the Oregon Public Records and Public
16 Meeting Laws, and any vote must comply with the organization’s bylaws. ENB
17 13.25(IV)(A)(1)(a).

18 We do not understand petitioner to dispute that the neighborhood
19 association had standing to appeal or that the appeal was submitted on behalf of
20 the neighborhood association. Petitioner argues that the neighborhood
21 association did not follow its bylaws in voting to file the local appeal.
22 Specifically, petitioner argues that the vote was conducted at an emergency board
23 meeting on January 7, 2018, and the organization’s meeting minutes fail to
24 demonstrate that an emergency meeting was necessary, as required by the
25 organization’s bylaws.

1 The neighborhood association’s bylaws provide, in part:

2 “The association, in all its activities, shall comply with the
3 requirements of the Southwest Neighborhood, Inc., Office of
4 Neighborhood Involvement [(ONI)] Standards for neighborhood
5 associations.” Record 3766.

6 The ONI standards for emergency meetings provides:

7 “F. Notice for emergency meetings

8 “Emergency meetings may be held with less than seven days’ notice
9 but not less than 24 hours’ notice. Direct notice as timely as
10 practicable under the circumstances shall be provided to members
11 of a board or committee that is meeting, and to individuals and news
12 media that have requested notice. Notice to the general public shall
13 be provided as set forth above in this section E, 1, a: Notice * * *.
14 Parties who are known to have a direct interest in the topic of a
15 meeting should receive direct notice, even if they have not
16 specifically requested so in writing. *Minutes of the emergency*
17 *meeting shall state the nature of the emergency and state why the*
18 *meeting could not be delayed to allow at least seven days’ notice.*
19 Members conducting business at the meeting may make decisions
20 or deliberate toward decisions only on the agenda topic or topics for
21 which the emergency meeting was called.” Record 3776 (emphasis
22 added).

23 Respondents do not dispute that the neighborhood association was bound
24 by the above standards when the neighborhood association voted to file the local
25 appeal. Petitioner argues that the neighborhood association’s January 7, 2018,
26 emergency board meeting minutes fail to state the nature of the emergency and
27 argues that the vote on the appeal could have been conducted at a regular meeting.

1 Petition for Review 36, Record 3782–84 (Jan 7, 2018, meeting minutes).⁹
2 Petitioner argues that the neighborhood association’s president incorrectly
3 represented to city staff that the neighborhood association’s vote to appeal was
4 done in accordance with the organization’s bylaws. Consequently, petitioner
5 argues, city staff erred in granting the fee waiver, which means the local appeal
6 was invalid, the city council therefore lacked jurisdiction to hear the local appeal,
7 and, thus, we must reverse the city council’s decision.¹⁰ We disagree with
8 petitioner. Even assuming that the neighborhood association’s minutes did not
9 conform to its bylaws, that fact provides no basis for reversal or remand in this
10 proceeding.

11 PCC 33.730.030(H)(1) requires the appeal “be submitted on forms
12 provided by the Director of BDS.” The applicable administrative rule requires
13 that the fee waiver form contain the signature of a person authorized by the
14 recognized organization, “confirming the vote to appeal was done in accordance
15 with the organization’s bylaws.” ENB 13.25(IV)(A)(1)(b). The fee waiver form
16 supplies check boxes for the appellant organization to provide information
17 establishing that the organization has standing, the appeal is made on behalf of
18 the organization (and not an individual), and that the vote to appeal was made in

⁹ Griffith attended and made comments at the January 7, 2018, meeting.

¹⁰ Petitioner appears to assume that the hearings officer’s approval would be revived by a LUBA decision reversing the city council’s denial decision.

1 accordance with the organization's bylaws. Record 3741. By filling out, signing,
2 and submitting the form, the individual who purports to act on behalf of the
3 recognized organization confirms and certifies the facts that support the
4 conclusion that the conditions for fee waiver are met. The city's fee waiver rules
5 do not require BDS staff to independently evaluate whether the organization's
6 vote conforms with the organization's bylaws. Instead, BDS need only conclude
7 that the person who signed the appeal represented his or authority to act on behalf
8 of the organization and represented that the vote to appeal conformed with the
9 organization's bylaws. The authorized signature itself constitutes the required
10 representations.

11 Here, the neighborhood organization's president submitted the fee waiver
12 request and certified that the vote to appeal was done in accordance with the
13 organization's bylaws. ENB 13.25(IV)(A)(1)(b) requires a signature,
14 "confirming the vote to appeal was done in accordance with the organization's
15 bylaws." The rule does not require the organization to submit confirming
16 evidence. The fee waiver form does not *require* the organization attach the
17 minutes of the meeting at which the appeal vote was cast; instead, the
18 organization may confirm the appeal decision *either* by attaching a copy of the
19 minutes from the meeting when the vote to appeal was taken *or* simply state the
20 vote results. Record 3741. In this case, the neighborhood association provided a
21 copy of the minutes *and* stated that the vote to appeal was unanimous with seven
22 in favor and zero opposed. *Id.*

1 While we understand petitioner’s concern that BDS may potentially waive
2 a fee for a recognized organization that incorrectly certifies that it satisfies the
3 fee waiver conditions, the city’s administrative rules and land use review
4 regulations do not require BDS staff to “look behind the curtain” of the appeal
5 and fee waiver forms submitted by a recognized organization. We agree with
6 respondents that the signature criterion in the administrative rules and on the
7 required forms represents the city’s policy choice to accept a party’s
8 representations. To the extent that there may be misrepresentations or procedural
9 irregularities in the recognized organization’s process in approving, authorizing,
10 and submitting an appeal and fee waiver request, the city does not provide any
11 procedure within the land use review process to contest the organization’s
12 certification on the city’s forms.¹¹ Similarly, we do not review the BDS fee
13 waiver decision to determine whether the neighborhood association satisfied the
14 fee waiver conditions.

¹¹ That is not to say that allegations concerning misrepresentations stated as part of a neighborhood association’s application for a fee waiver cannot be heard and resolved in an appropriate non-land use forum, with potential consequences to the neighborhood association. Presumably, a dispute regarding a recognized organization’s noncompliance with its bylaws could be presented to the Office of Community & Civic Life. *See* PCC 3.96.060 (providing that responsibilities of the Office of Community & Civic Life, include recognizing, suspending, and revoking formal recognition of a Neighborhood Association and establishing grievance procedures for Neighborhood Associations).

1 For purposes of resolving the second and third assignments of error,
2 petitioner's allegation that the neighborhood association violated its bylaws does
3 not provide a basis for LUBA to conclude that BDS erred in approving the fee
4 waiver, and thus does not provide a basis to reverse or remand the BDS decision.

5 The second and third assignments of error are denied.

6 The city's decision is affirmed.