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LOGAN RAMSEY, Petitioner,
v.
CITY OF PORTLAND, Respondent, and
GARY YOUNG and MICHELE YOUNG, Intervenors-Respondent.
LUBA No. 94-167.
Oregon Land Use Board of Appeals.
March 30, 1995.

Appeal from City of Portland.

Logan Ramsey, Portland, filed the petition for review and argued on his own behalf.

Ruth Spetter, Senior Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Edward S. McGlone III, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Wallace & Klor.

SHERTON, Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED.

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

FINAL OPINION AND ORDER

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Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a planning department decision rejecting petitioner's local appeal because it was not accompanied by the required appeal fee.¹

MOTION TO INTERVENE

Gary Young and Michele Young move to intervene in this proceeding on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

Intervenors applied to the city for approval of a zone change, planned unit development and subdivision. On August 5, 1994, after a public hearing in which petitioner participated, the hearings officer issued a decision approving intervenor's application. A copy of the decision was mailed to petitioner. The decision includes the following notice:

"Decisions of the Hearings Officer may be appealed to City Council. Unless appealed, this Decision of the Hearings Officer is effective on AUGUST 20, 1994, the day after the last day to appeal.

"ANY APPEAL OF THIS ACTION BY THE HEARINGS OFFICER MUST BE FILED AT THE PERMIT CENTER ON THE FIRST

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FLOOR OF THE PORTLAND BUILDING * *
* NO LATER THAN 4:30 P.M. ON AUGUST 19, 1994. An appeal fee of \$3,567.50 will be charged (one-half of the application fee for this case). Information and assistance in filing an appeal can be obtained from the Bureau of Planning at the Permit Center." (Emphases in original.) Record 39.

Petitioner arrived at the city permit center at 3:18 p.m. on the afternoon of August 19, 1994, the last day to appeal the hearings officer's decision. Record 10. Shortly before 4:30 p.m., after waiting for an available planner, petitioner filed an appeal of the hearings officer's decision.² Record 2. However, petitioner's appeal was not accompanied by the required appeal fee, but rather by a "Request for Fee Waiver." Record 9. On August 22, 1994, a city

planner sent petitioner the following letter, which is the decision challenged in this appeal:

"I am returning the appeal form and accompanying attached information turned in by you at the permit center on August 19th. Since no fee was filed with the appeal nor was a low-income fee waiver approved prior to submitting the appeal

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form, a legal appeal was not made. Please refer to [Portland City Code (PCC)] 33.750.050 and the appeal form about prior fee waiver approval requirements." Record 1.

MOTION TO DISMISS

Intervenors argue the challenged decision falls within either one of two exceptions to this Board's jurisdiction.

A. Fiscal Exception

Intervenors contend the challenged decision concerns the application of a fiscal ordinance and, therefore, is within the area of fiscal policy decisions which the Court of Appeals excepted from this Board's review jurisdiction in State Housing Council v. City of Lake Oswego, 48 Or App 525, 617 P2d 655 (1980) (Housing Council).

In The Petrie Company v. City of Tigard, ___ Or LUBA ___ (LUBA No. 94-110, January 17, 1995) (Petrie), slip op 7, we recently discussed the continuing viability of the Housing Council fiscal decision exception to our jurisdiction:

"In Westside Neighborhood v. School Dist. 4J, 58 Or App 154, 161, 647 P2d 962, rev den 294 Or 78 (1982), the Court of Appeals extended the holding in Housing Council in concluding that a fiscally motivated decision to close a school did not constitute a 'land use decision' subject to review by LUBA under the statutes governing LUBA review of land use decisions. In addition, the Court of Appeals recently cited Housing Council with approval,

and relied on that decision in part in concluding that farm and forest ad valorem tax preferential assessment programs, while clearly affecting land use, are not state agency programs affecting land use subject to review under

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ORS 197.180(1) for compliance with the statewide planning goals. Springer v. LCDC, 111 Or App 262, 267, 826 P2d 54, rev den 313 Or 354 (1992). We therefore conclude that the exemption from review for compliance with land use requirements announced in Housing Council for tax and other fiscal local legislation still applies."

In Petrie, we concluded a city code chapter establishing a process for owners of neighboring property to reimburse a developer for improvements already constructed was a purely fiscal ordinance, and that a decision applying that ordinance, long after a development was approved and the improvements constructed, is not a land use decision reviewable by this Board.

However, the PCC chapter at issue here, PCC chapter 33.750 (Fees), is part of the city's zoning code and is an integral part of the zoning code provisions governing the processing and review of land use applications. As such, PCC chapter 33.750 is not a purely fiscal ordinance, and its application to petitioner's attempted appeal of a hearings officer's decision on a land use application is not excepted from review by LUBA under Housing Council.

B. Ministerial Exception

Intervenors also contend the challenged decision is not a "land use decision" subject to LUBA review, because it comes within the exception of ORS 197.015(10)(b)(A) for local government decisions "made under land use standards which do not require interpretation or the exercise of policy or legal judgment."

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As demonstrated in our discussion of the second assignment of error, infra, the application

of the relevant provisions of PCC chapters 33.750 and 33.730 (Quasi-Judicial Procedures), in making the challenged decision, requires interpretation. However, even if that were not so, the challenged decision still would not be excepted from LUBA's jurisdiction under ORS 197.015(10)(b)(A).

Breivogel v. Washington County, 114 Or App 55, 834 P2d 473 (1992), was an appeal of a local government planning department decision rejecting a local appeal of a hearings officer's decision approving a development, due to failure to comply with an allegedly ministerial local requirement for a signature on the appeal document. In Breivogel, 114 Or App at 58, the Court of Appeals stated the relevant decision, for the purpose of determining LUBA's jurisdiction, was the hearings officer's decision to approve the proposed development (which was indisputably a land use decision), because the planning department's dismissal of petitioner's appeal made that hearings officer's decision the final county decision. The Court of Appeals explained:

"* * * If a dismissal for noncompliance with [the signature requirement] were treated as a decision that simply applies [a] nonreviewable 'ministerial' provision, rather than one that finalizes a 'land use decision,' the county could use [the signature requirement], even erroneously, to dismiss every appeal from every underlying land use decision and thereby evade review of all its decisions. * * *" Id.

In this case, it is indisputable that the hearings

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officer's decision to approve a zone change, planned unit development and subdivision was a land use decision. Therefore, the challenged decision rejecting petitioner's local appeal of that decision is not subject to the ORS 197.015(10)(b)(A) exception to LUBA's jurisdiction for "ministerial" decisions.

Intervenors' motion to dismiss is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the city improperly rejected his local appeal based on an incorrect interpretation of the relevant code provisions. According to petitioner, the only relevant deadline for filing an appeal is established by PCC 33.730.030(F) (Ability to Appeal):

"The review body's decision is final unless appealed. * * * The appeal must be submitted to the [Planning] Director within 14 days of the day the notice of decision is mailed. * * *"

Petitioner argues there is no dispute his appeal was filed within the time allowed by PCC 33.730.030(F). Petitioner further argues the PCC establishes no different deadline for filing a request for a fee waiver. According to petitioner, the city had one hour and forty-two minutes prior to the close of business in which to review and approve his request for a fee waiver, and it was only the city's inaction that prevented his fee waiver request from being approved before

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the deadline passed.³

PCC 33.730.030(H) states "[a]ppeals must comply with this subsection." PCC 33.730.030(H)(1) (Content of the Appeal) provides, in relevant part:

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

"* * * * *

"• The required fee." (Emphases added.)

The requirement that an appeal request include the required appeal fee is repeated in PCC 33.750.030(C) (Appeal Fee), but an exception is recognized:

"An appeal of a land use decision must include an appeal fee. The appeal fee is one-half

of the total application fee of the original land use review request. The appeal fee may be waived * * * as provided in [PCC] 33.750.050, Fee Waivers." (Emphasis added.)

PCC 33.750.050 (Fee Waivers) explains the process and requirements for granting fee waivers:

"The Planning Director may waive land use review

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fees in the following situations.^[4] The decision of the Director is final. The waiver approval must occur prior to submitting the application.

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

Construed together, the above PCC provisions establish a requirement that in order to be accepted by the city, an appeal request must include either (1) the required appeal fee, or (2) a fee waiver that has been approved by the planning director. This is the interpretation expressed in the challenged decision, and we believe it is reasonable and correct. Gage v. City of Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); McCoy v. Linn County, 90 Or App 271, 275-76, 752 P2d 323 (1988). When submitted, petitioner's appeal request included neither of these items. It was petitioner's responsibility to obtain approval of his fee waiver request prior to submitting his appeal, or to include the required appeal fee.⁵

The second assignment of error is denied.

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FIRST ASSIGNMENT OF ERROR

Petitioner contends the appeal fee required by the city violates ORS 227.180(1)(c), which provides:

"The [city] 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 by petitioner.)

Petitioner argues the appeal fee of \$3,567.50 "is not reasonable and is far in excess of the actual cost of such an appeal." Petition for Review 4. Petitioner's argument is based on his own suppositions regarding the amount of time required to conduct such an appeal and reasonable hourly rates charged for city staff time.

The city states the provision of PCC 33.750.030(C), quoted supra, setting the appeal fee at one-half of the original application fee, was adopted by Ordinance 163608 in January, 1991. The city argues petitioner failed to appeal the 1991 ordinance and, therefore, cannot attack PCC 33.750.030(C) in this appeal.

We need not decide whether a challenge to the amount of an appeal fee required by PCC 33.750.030(C) can be made in an appeal challenging the application, rather than the adoption, of PCC 33.750.030(C). That is because, even if such a challenge could be made here, there is no evidence in the record establishing that the city's appeal fee is

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unreasonable or that it exceeds the average or actual cost of such an appeal. Additionally, petitioner neither moves for an evidentiary hearing to submit such evidence nor establishes any other basis upon which we might consider the facts relied on in his argument.

The first assignment of error is denied.

The city's decision is affirmed.

Notes:

1. Petitioner's notice of intent to appeal states that petitioner also wishes to challenge a hearings officer's decision approving a zone change and planned unit development, from which petitioner attempted to file a local appeal. However, in Ramsey v. City of Portland, ___ Or LUBA ___ (LUBA No. 94-167, Order, November 1, 1994), slip op 8, we determined that our review in this appeal properly concerns only the planning department's decision to reject petitioner's local appeal.

2. Petitioner's appeal is on a two-sided city form titled "Appeal of a Type III Decision." The front side of the appeal form says that "[i]nformation on appeal fees and procedures is on the back of this page." Record 2. The back side of the appeal form includes information on appeal fees and fee waivers and states that "[w]aiver request information is available at the Permit Center." Record 8. The information on fee waivers includes the following statement:

"The Planning Director may waive required fees in the following situations. The decision of the Director is final. The low income waiver approval must occur prior to submitting the appeal and be submitted with it." Id.

3. In his brief, and at oral argument, petitioner referred to alleged statements made by planning department staff at the time he filed his appeal concerning the reason his request for a fee waiver could not be acted upon immediately. However, because such statements are not in the local record submitted to this Board, and petitioner has not established any other basis upon which we might consider such statements, we do not consider them.

4. PCC 33.750.050(A)-(C) set out the requirements for "recognized organization," "low income," and "city government and nonprofit [organization]" fee waivers, respectively.

5. Petitioner correctly observes there is nothing in the PCC requiring the planning director to act on a request for a fee waiver within a particular period of time. It is conceivable that under some circumstances the planning director's failure to act upon a fee waiver request, preventing the timely filing of a local appeal, could provide a basis for reversing or remanding a city decision not to accept such an appeal. However, failure to act on a fee waiver request within, at most, one hour and forty-two minutes is not such a circumstance.
