

**BEFORE THE CITY COMMISSION
FOR THE CITY OF OREGON CITY**

In the matter of a request by James J. Nicita for a waiver of appeal fees pursuant to OCMC 17.50.290(C) and a request for the City Commission to initiate an appeal on its own motion, relating to City appeal file no. AP-17-0006.

**FINDINGS OF FACT AND LAW,
CONCLUSION, AND FINAL ORDER
DENYING REQUEST FOR FEE WAIVER**

I. REQUEST

James J. Nicita, appellant (the “Appellant”) in City appeal file no. AP-17-0006 (the “Appeal”) requests (1) that the City Commission initiate and process the Appeal on its own motion, and (2), that if it declines to do so, the City Commission waive the appeal fee stated in the planning Fee Schedule on the date the appeal was filed.

II. DECISION

Appellant’s request that the City Commission initiate the appeal on its own motion is denied.

Appellant’s appeal fee waiver request is denied.

III. INTRODUCTION

A. Procedural History

On July 24, 2017, the Planning Commission, with a quorum present, opened the initial evidentiary hearing on CP-17-0002 (General Development (Concept) Plan), DP-17-0003 (Detailed Development Plan) and NR-17-0004 (Natural Resources Overlay District Verification) (together, the “Applications”) and, at the Applicant’s request, continued the hearing to August 14, 2017.

On August 14, 2017, the Planning Commission reconvened and conducted a continued hearing. A quorum of the Planning Commission was present at the meeting. The Planning Commission made the required announcements and continued the public hearing to September 11, 2017.

On September 11, 2017, the Planning Commission reconvened and held a public hearing and continued the public hearing to September 25, 2017.

The Planning Commission reconvened on September 25, 2017. The Applicant presented its final oral rebuttal. The Planning Commission held the written record open for three seven-day periods.

On October 23, 2017 the Planning Commission reconvened to deliberate to a tentative decision on the Applications. At the conclusion of its deliberations, the Planning Commission voted 6-0 to recommend that the City Commission approve the application, subject to the conditions recommended in the Staff Report, as amended by the addition of Conditions of Approval 17, 32 and 45, as detailed in the substantive findings adopted by the Planning Commission.

The Planning Commission thereafter adopted the Decision.

The City gave timely notice of the Planning Commission's Decision. The Appellant filed a timely appeal including payment of the base appeal fee. The Appeal included a request that the City Commission waive the appeal fee.

The City Commission convened on February 7, 2017. The City Council conducted a de novo hearing on the appeal fee waiver request. No person raised any procedural objections to the conduct of the hearing. No person made any challenges to the City Commissions' jurisdiction over the matter or any City Commissioners' ability to hear the matter. As explained below, the City Commission rejected the appeal fee waiver in whole or in part.

B. Legal Standard for Granting a Fee Waiver

The City allows appellants of a land use decision to request a waiver of the relevant appeal fee pursuant to Oregon City Municipal Code ("OCMC") 17.50.290.C, which is set forth below:

"C. Fee Waivers. The planning division may waive all or any portion of an application fee if, in the opinion of the director, a particular application must be resubmitted because of an error made by the city. Appeal fees may be waived, wholly or in part, by the city commission, if the city commission finds that, considering fairness to the applicant and to opposing parties, a full or partial waiver of the appeal fee is warranted. Appeal fees shall not be charged for an appeal filed by a city-recognized neighborhood association, so long as the appeal has been officially approved by the general membership or board of the neighborhood association at a duly announced meeting."

Thus, the City Commission must decide whether a fee waiver is justified "considering fairness to the applicant and to opposing parties."

Unlike in a land use application process where the burden of proof is on the Applicant, here the burden is on the Appellant to offer reasons, supported by facts, which explain why the appeal fee should be waived in whole or in part. Appellant has not done so. The City Commission finds that Appellant failed to address the applicable fairness standard directly and instead raised a number of facial challenges to his obligation to pay the fee by arguing that it is unconstitutional as well as illegal. For this reason, the City Commission finds that a partial or full waiver of the appeal fee is not warranted.

The City Commission considered all of the arguments that the Appellant raised regarding the legality of the appeal fee and rejects them for the reasons explained below.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The City Commission accepts, adopts, and incorporates within these findings, by reference, the January 31, 2018 Staff Report regarding the fee waiver request in its entirety and including all exhibits attached thereto, except to the extent that such incorporated documents conflict with these findings of fact and conclusions of law. In that event, these findings shall control.

A. Request by the Appellant that the City Commission conduct an appeal hearing of the Planning Commission Decision on its Own Motion

FINDING: ORS 227.180(1)(a) authorizes the City Commission to review (“call-up”) any decision of the Planning Commission on its own motion:

“A party aggrieved by the action of a hearings officer may appeal the action to the planning commission or council of the city, or both, however the council prescribes. The appellate authority on its own motion may review the action.”

The City has used its call-up authority infrequently and only in cases where the time limits or certain policy issues justified this approach. The Appellant does not provide any explanation of circumstances that justify a call-up of the Decision other than his challenges to the City’s authority to impose the fee, which are addressed below. Therefore, it is not clear what circumstance would justify a call-up in this instance. For these reasons, the City Commission will not exercise its discretion to review the Planning Commission Decision on its own motion.

B. Arguments raised by the Appellant in his November 28, 2017 Letter:

1. The Fee Schedule was adopted by resolution rather than by ordinance.

FINDING: The City Commission rejects this argument for five reasons. First, this appears to be a facial challenge to the procedures under which the 2017 Fee Schedule was adopted, and is therefore untimely. Second, assuming that this argument is timely, the City Commission rejects it because it is not supported with facts or argument explaining how citizens’ substantial rights were prejudiced as a result of the way the 2017 Fee Schedule was adopted. Third, the Appellant has failed to identify a legal standard requiring fee schedules to be adopted by ordinance. In fact, ORS 227.180(1)(c) authorizes a governing body to adopt fees by ordinance *or* regulation.¹ The Applicant cites *Doty v. City of Bandon*, 49 Or LUBA 411, 419 (2005), as authority for the

¹ ORS 227.180(1)(c) provides:

“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.”

proposition that a resolution is not a "regulation" as required by ORS 227.180(1)(c). The Appellant is incorrect: *Doty* simply held that a fee resolution was not a post-acknowledgment "land use regulation." *Id.*

Fourth, the Appellant fails to explain why adoption by resolution instead of by ordinance makes any difference to his substantive rights or to the validity of the Fee Schedule.

Finally, the City Commission rejects the Appellant's substantive argument that the "resolution makes no findings as to how the appeal fee satisfies the ORS 227.180(1)(c) requirement that "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." As an initial matter, Appellant fails to identify any requirement that the City make such findings. As to whether the Fee Schedule in fact complies with ORS 227.180(1)(c), the City Commission adopts the following explanation of the how the fee was adopted from the January 31, 2018 Staff Report:

"ORS 227.180(1)(c) authorizes local governments to charge a fee as a means to discharge the costs of acting on an appeal. It 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 City has acted pursuant to this authorization, imposing fees in land use cases to cover the cost of processing applications, as well as appeals, by regulation. Oregon City Municipal Code 17.50.290 – Fees provides:

"The city may adopt by resolution, and revise from time to time, a schedule of fees for applications and appeals. Fees shall be based upon the city's actual or average cost of processing the application or conducting the appeal process. The only exception shall be the appeal fee for a Type II decision, which shall be limited by ORS 227.175.10.b. The requirements of this section shall govern the payment, refund and reimbursement of fees."

This provision was enacted in 2004 as part of Ordinance No. 03-1014, which amended the OCMC to authorize the City to impose fees. [...]. This same year, the City adopted Resolution 04-01, modifying the planning and engineering fees for processing development applications as well as appeals. With regard to appeals, it included a provision that, in addition to a base fee of \$2,530, appellants would be required to pay the "actual city attorney fees." See attached. The Time Estimate table attached to this resolution explains how appeals, not including legal services, are estimated to take 42 hours of staff time at an actual average cost of \$2,519. For this reason, the fee was set at \$2,530.

The City's most recently adopted fee resolution, Resolution No. 16-23, sets the current appeal fee at "\$3,446 plus actual City Attorney fees." According to the latest resolution, the increase in staff costs is based on the "annual adjustment of the fees based on the consumer price index every year to account for inflation." Appellant does not challenge whether the \$3,446 fee accurately represents the average costs for processing an appeal.

The City's authority to impose fees is authorized by state law through the adoption of an ordinance, Ord. No. 03-1014, and a regulation as required by ORS 227.180(1)(c). The City has complied with this requirement by adopting a regulation that authorizes the imposition of fees that are "based on the city's actual or average cost of...conducting the appeal process." These fees are set by resolution, as authorized by the regulation. The imposition of a fee, at the rates identified is lawful because they reflect the average planning and engineering costs and actual legal services costs of processing an appeal."

For the above reasons, the City Commission finds that the 2017 appeal fee is consistent with OCMC 17.50.290.

2. "OCMC 17.50.290(D) is clearly unenforceable, if indeed it has never been adopted by ordinance."

FINDING: The City Commission finds that OCMC 17.50.290(D) is not applicable to an appeal fee waiver request because it applies to major development projects, not appeals, and therefore rejects this argument.

3. "An exhaustion of remedies requirement involving an excessive appeal fee may be an as-applied violation of [Art. I § 10 of the Oregon Constitution]."

FINDING: The Appellant argues that Oregon City's appeal fee requirement violates Art. 1 § 10 of the Oregon Constitution, which provides: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation." The Appellant identified a passage from *Bell v. Hood River*, 283 Or App 13 (2016), as support for his claim that the appeal fee is an "onerous financial burden" and therefore unlawful under Art. 1 § 10. In relevant part, this passage provides that "[i]t may be that that the exhaustion requirement, as applied in plaintiffs' case, imposes an onerous financial burden to the access to courts that is amenable to constitutional challenge." *Id.* at 15. The City Commission rejects this argument for several reasons:

First, *Bell* held that Art. 1 § 10 applies to courts, not administrative agencies or local governments, and therefore does not bind the City. *Id.* at 18. Second, ORS 227.180(1)(c) contemplates an accounting and assessment of fees, after the fact, when it authorizes the collection of fees based on "actual costs of the appeal." Any accounting of "actual costs" will not be knowable until the work is completed. However, the amount necessary to perfect the appeal is stated on the Fee Schedule. Finally, the City Commission rejects the Appellant's

argument that the fee constitutes an “onerous financial burden” even if Art. 1 § 10 applies because the Appellant makes no attempt to define what an “onerous financial burden” is, nor does his statement regarding the contents of his bank accounts demonstrate that the fee is an “onerous financial burden.”

4. “The appeal fee violates [the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution] because the 2017 Fee Schedule and OCMC 17.50.290(0) are both unconstitutionally vague.”

FINDING: The City Commission notes that virtually every jurisdiction in the State of Oregon requires a fee for filing an appeal. Moreover, the Appellant cites no precedent in either state or federal law standing for the proposition that a land use appeal fee violates either the 5th or 14th Amendments of the U.S. Constitution. Other than arguing that the appeal fee violates due process requirements, the Appellant fails to demonstrate how his procedural rights were violated in any way, since he paid his appeal fee and his appeal was heard.

The City Commission finds that the appeal fee requirement is not unconstitutionally vague because it is stated in the Fee Schedule and because OCMC 17.50.290(C) clearly explains how an appellant can obtain a fee waiver. The City Commission also rejects the argument that the fee is vague because it is clearly stated on the 2017 Fee Schedule, authorized by ORS 227.180(1)(c) to be determined after the local government proceeding is complete.

Finally, the City Commission rejects the argument that it is impossible to perfect an appeal before both the appeal fee and attorney fees are paid. The City does not require both the base fee and its attorney fees prior to hearing an appeal; rather, an appellant must only pay the stated fee amount of \$3,446 for the City Commission to accept an appeal. Attorney fees are due only after the appeal is decided and the City’s attorney fees are known. Thus, the Appellant is incorrect in stating that he must pay both the appeal and attorney’s fees upfront. The fact that Appellant was able to have the Appeal heard by the City Commission without paying attorney fees directly contradicts his argument in this regard.

For the above reasons, the City Commission rejects this argument and its related sub-arguments.

C. Arguments raised by Appellant in his February 7, 2018 Letter:

1. “Arguments under Fairness Standard of OCMC 17.50.290(C).”

FINDING: The Appellant raises a general argument followed by a number of sub-arguments, which amount to an assertion that the appeal fee, and particularly the assessment of attorney fees, are unfair. The Appellant’s arguments focus on explaining why the fee itself is unfair, rather than why “fairness to the applicant and opposing parties” requires relief from the fee, given the facts in this case. The City Commission interprets the fairness evaluation required by OCMC 17.50.290(C) to be limited to the circumstances affecting parties with respect to review of the subject application. This inquiry does not require an evaluation of whether the amount of the appeal fee is fair with respect to the imposition of other appeal fees or given its history of imposing such fees. Presumably, the propriety of requiring that an applicant reimburse the City for the fees incurred in processing an appeal was considered when it adopted Ordinance No. 03-

1014, authorizing the City to impose fees, including actual costs, and the resolutions imposing such fees that followed. OCMC 17.50.290(C) allows the City Commission to waive fees wholly or in part based on a consideration of the “fairness to the applicant and opposing parties.” Thus, the “fairness standard” may not be judged simply by what is fair to the Appellant, but also must be based on a consideration of fairness to the Applicant and other opposing parties, with respect to the appeal at hand. The City Commission adopts the following statement from the Applicant’s January 30, 2018 letter:

“[W]aiving the appeal fee in whole or in part is unfair to the Applicant and to opposing parties for the following reasons. First, the Applicant seeks approval of its applications submitted to, reviewed by, and approved by the Oregon City Planning Commission. An appeal may reverse the Planning Commission's approval of the applications. It would be unfair to Applicant to allow an appeal to proceed without the Appellant paying the appeal fee because it would encourage frivolous appeals since Appellant would have no risk of losing his funds in the event that his appeal is rejected.

Second, an appeal prolongs the decision-making process. While the appeal process is within the 120-day permit established in ORS 227.178(2), an appeal nevertheless prolongs the process. To the extent Appellant has a "free" appeal, it is unfair to the Applicant to allow an appeal to proceed without the Appellant bearing the burden of the appeal where the Planning Commission has rejected his arguments and approved the application.

Finally, [...] waiving the appeal fee in whole or in part is unfair to opposing parties. Allowing an appeal to be filed without paying the actual costs of the appeal prolongs the permit-approval process for opposing parties and is thus unfair to them as well.”

For these reasons, as well as those explained under the following sub-arguments, the City Commission finds that the appeal fee is not unfair and rejects these arguments.

1.1 “It is unfair because an appeal to from the Historic Review Board to the City Commission is only \$50.”

FINDING: This argument does not respond to OCMC 17.50.290(C) because it raises an argument as to the fairness of the appeal fee itself, not whether relief from that fee is warranted in this case. As explained above and in the January 30, 2018 Staff Report, the 2017 Fee Schedule was properly adopted according to the City’s authority under OCMC 17.50.290, which implements ORS 227.180(1)(c). The fact that appeals of different land use actions require different appeal fees does not demonstrate that the appeal fee in this case does not satisfy ORS 227.180(1)(c) or that relief from the appeal is warranted under OCMC 17.50.290(C). The City Commission rejects this argument.

1.2 “It is unfair that certain parties have been charged the “actual attorney fees” while others have not.”

FINDING: This argument does not respond to OCMC 17.50.290(C) because it raises an argument as to the fairness of the appeal fee itself, not whether relief from that fee is warranted in this case. The only appeals heard since 2004 and during a period when attorney fees were required were AP-17-0005—in which attorney fees were invoiced—and this Appeal. On February 7, 2017, the Appellant submitted a Supplemental Memorandum in Support of Fee Waiver Request, which included a number of ordinances and resolutions passed by the City Commission adopting fees, including appeal fees. The Appellant’s argument based on the items submitted at the hearing is that there was a period in between 2009 – 2012 when actual attorney fees were not collected and that this failure to uniformly assess appeal fees to include actual attorney fees amounts to unfairness. As pointed out above, the City Commission rejects the invitation to view fairness through a historical lens and instead considers “fairness to the applicant and to opposing parties.”

To the extent that history is relevant, the January 31, 2008 staff report included a summary of appeals from 2004 to the present is described on Table 1. The Appellants February 7 materials included a number of additional city enactments relating to fee assessments. Taken together, Table 1 from the staff report has been revised as follows:

Summary of Appeals and Applicable Fee Resolutions

File #	Description	Fee Ord. or Reso. #	Schedule includes Atty. Fees?	Filing Fee Paid	Attorney Fees Paid?*
AP-04-0007	Appeal of PD 04-02 and WR 04-12 – Rose Road PUD	Res. 04-01	Yes	\$2280	No
AP-08-0002	APPEAL OF TP 08-03, THAYER ROAD TOWNHOMES	Res. 07-26	No	\$3909.	No
AP-08-0004	Appeal of denial of CU 08-04, Cell Tower in ROW	Res. 07-26	No	\$3909	No
AP-09-0001	APPEAL OF CP 08-05, DP 08-03, WR 08-21, TP 08-11, US 08-03: Cove Development	Res. 07-26	No	\$3024	No
No appeals filed between 2009 - 2017	N/A	Interim Res. #s: Res. 10-19 (Appeal Fee \$3109) Res. 13-23 (Appeal Fee \$3345) Res. 15-31 (Appeal Fee \$3421) Res. 16-23 (Appeal fee \$3446) Res. 17-18 (Appeal Fee \$3488)	Yes Yes Yes Yes Yes	n/a	n/a
AP-17-0005	Appeal of TP 17-03 and ZC 17-02		Yes	\$3488	\$7,919

AP-17-0006	APPEAL OF CP 17-02 / DP 17-03 / NR 17-04	Pending	Yes	\$3488	Under Review
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The table shows that the City has been consistent in its collection of attorney fees when authorized by the applicable fee Resolution. The City did not charge attorney fees in 2008-2009 because the fee resolution in effect at the time did not authorize it, and the adopted fee schedule did not include their collection. There was no appeal of a Planning Commission decision between 2009 and 2017, a period during which the fee resolution authorized the collection of attorney fees. The City collected attorney fees as authorized by Resolution 17-18 for appeals filed in 2017.

Thus, the collection or non-collection of attorney fees for appeals has been consistent with applicable resolutions, and there is no evidence that some Appellants are favored over others.

The City Commission rejects this argument.

1.3 Neither the base fee nor the actual attorney fees in Resolution 17-18 have been justified with facts to comply with OCMC 17.50.290 or ORS 227.180(1)(c).

FINDING: This argument does not respond to the applicable standard, OCMC 17.50.290(C), because it raises a collateral argument as to the fairness of the appeal fee itself, not whether relief from that fee is warranted in this case. As explained above and in the January 30, 2018 Staff Report, the 2017 Fee Schedule was properly adopted according to the City's authority under OCMC 17.50.290, ORS 227.180(1)(c) and is based on "the City's actual or average cost of processing the application or conducting the appeal process."

The City Commission rejects this argument.

1.4 The fee set by resolution provided inadequate notice both to the public and the City Commission itself.

FINDING: The City Commission rejects this argument for two reasons. First, it is a facial challenge to the procedures under which the Fee Schedule was adopted and is, therefore, untimely. Even assuming that this challenge is timely, the City Commission rejects it because it is not supported with facts or argument explaining how citizens' substantial rights were prejudiced as a result of the way the 2017 Fee Schedule was adopted.

The City Commission rejects this argument.

1.5 An open-ended attorney fee provision subjects a citizen to the hypothetical possibility of retribution for pursuing their right to free speech or their right to seek redress of grievances against the City in Circuit Court or LUBA.

FINDING: The City Commission rejects this argument for two reasons. First, it is a facial challenge to the procedures under which the Fee Schedule was adopted and is, therefore,

untimely. Even assuming that this challenge is timely, the City Commission rejects it because it is not supported with facts or argument explaining how citizens' substantial rights were prejudiced as a result of the way the 2017 Fee Schedule was adopted. The Appellant has not offered argument or evidence which lends any support to an assertion that he or anyone else has suffered retribution by having to pay the appeal fee, nor has it dissuaded him from participating in the land use process.

2. Arguments under ORS 227.180(1)(c).

2.1 “OCMC 17.50.290 conflicts with ORS 227.180(1)(c) and is therefore legally invalid.”

FINDING: The City Commission rejects this argument for two reasons. First, it is a facial challenge to the procedures under which OCMC 17.50.290 and the Fee Schedule were adopted and is therefore untimely. Even assuming that this challenge is timely, the fact that a number of the resolutions assessing appeal fees, including the most recent Resolution 17-18, was approved on a consent agenda without communication with staff, if true, is irrelevant because a lack of staff communication during approval of the consent agenda does not demonstrate that the public did not have adequate notice of the proposed fee. Further, OCMC 17.50.290 authorizes revision of the fee schedule by resolution.

2.2 “The fact that Oregon City enacted its appeal fees by ordinance twice after the enactment of ORS 227.180(1)(c) demonstrates Oregon City’s understanding that this statute requires an “ordinance or regulation.”

FINDING: Appellant’s assumed intent is incorrect. The City fully complied with ORS 227.180(1)(c), when it adopted Ordinance No. 03-1014, amending its regulations and authorizing the City to impose fees pursuant to a fee schedule that would be adopted by resolution. The adoption of a fee schedule pursuant to an ordinance sometime in the past does not alter the City’s authority to adopt a resolution setting the fee assessments pursuant to an adopted and acknowledged regulation. ORS 227.180(1)(c) allows appeal fees to be adopted by ordinance *or* regulation. The Appellant has not demonstrated through citation to authority or any other legal analysis that the regulation authorizing the City to engage in the ministerial task of adopting a fee schedule, does not fall within the meaning of ORS 227.180(1)(c). In fact, the fee assessment in dispute in *Bell v. Hood River* was adopted by resolution, as authorized by Hood River Municipal Code Section 17.99.090. 283 Or App 13, 20. The City of Oregon City’s adoption of a fee schedule by resolution, as authorized by regulation, is identical. The City Commission has authority to act through ordinances or resolution and therefore, the correct reading of this statute is that it allows a “regulation” enacting appeal fees to be adopted by resolution by allowing adoption through a process other than an ordinance.

2.3 “The fees set by resolution, as opposed to ordinance, provided inadequate notice both to the public and City Commission itself.”

FINDING: The City Commission rejects this argument for two reasons. First, it is a facial challenge to the procedures under which the Fee Schedule was adopted and is therefore untimely. Even assuming that this challenge is timely, the City Commission rejects it because it is not supported with facts or argument explaining how citizens' substantial rights were prejudiced due to the way the 2017 Fee Schedule was adopted. There is also no evidence that the City Commission believed that it did not have "notice" of the 2017 Fee Schedule because it was on the consent agenda and any Commissioner could have moved adoption of the Fee Schedule to the regular agenda if s/he had concerns.

3. Argument under Justice without Purchase Clause of Oregon Constitution, Art. I § 10.

FINDING: The Appellant asserts that imposition of the appeal fee will constitute an "onerous financial burden" on him. As explained above, the City Commission finds that Art. I § 10 does not apply to City Council decisions. The City Commission also rejects the Appellant's argument that the fee constitutes an "onerous financial burden" even if Art. 1 § 10 applies because the Appellant makes no attempt to define what an "onerous financial burden" is in this context, nor does his statement regarding the contents of his bank accounts demonstrate that the fee is an "onerous financial burden" as to him or anyone else.

4. Arguments under Federal Due Process Clause, Fifth and Fourteenth Amendments to U.S. Constitution.

4.1 The appeal fees are "arbitrary and capricious."

FINDING: The City Commission rejects this argument because it has found that the 2017 Fee Schedule was adopted according to the applicable requirements of ORS 227.180(1)(c) and OCMC 17.50.290. Also, the fact that some fee schedules in the past have charged attorney fees while others have not does not suggest that charging attorney fees is arbitrary and capricious. On the contrary, the decision to charge attorney fees reflects the financial resources of the City at any given time. The attorney fees themselves are not arbitrary and capricious because they reflect the cost of conducting the appeal.

4.2 "The fairness standard of OCMC 17.50.290(C) is unconstitutionally vague."

FINDING: The City Commission rejects this argument because it is a bare assertion and is unsupported with legal authority, analysis, or evidence.

4.3 "It is unfair and arbitrary and capricious, and disparate treatment to apply "actual attorney fees" provision to some parties but not to other parties."

FINDING: The City Commission rejects this argument for two reasons. First, the Appellant has not yet been charged attorney fees, so his argument fails to make out a claim that he has suffered arbitrary, capricious, or disparate treatment. Second, to the extent that Appellant claims that there has been an unfair pattern of practice as to attorney fees, the Appellant fails to support such assertion with any evidence. As more fully explained in paragraph 1.2, above, the only

appeals heard since 2004, during a period when attorney fees were required, were AP-17-0005—in which attorney fees were invoiced—and this Appeal. Thus, substantial evidence demonstrates that the City has assessed attorney fees consistently during periods in which it was authorized to do so.

5. The fee waiver could have been obtained by a recognized neighborhood organization.

FINDING: The record shows that the McLoughlin Neighborhood Association (the “MNA”) considered but did not file an appeal of the Decision and by not doing so, it did not exercise its Goal 1 “Citizen Participation” ability under the OCMC to obtain an appeal fee waiver, even though the Appellant asked the MNA to do so and the MNA had standing to do so. The City Commission finds that this avenue could have avoided any appeal fee if a recognized neighborhood association had filed an appeal and requested a fee waiver. Thus, the Appellant had a readily available means to avoid any appeal fee if the MNA had agreed with his request.

V. Conclusion

Based upon the evidence and argument identified above and considering fairness to the applicant and to opposing parties, the City Commission finds that a full or partial waiver of the appeal fee is not warranted for City appeal file no. AP-17-0006, either wholly or in part.

VI. Order

The request by Appellant for a waiver of appeal fees for appeal AP-17-0006 is denied. The appeal fee paid by the Appellant shall not be refunded and the Appellant shall be assessed the actual attorney fees incurred in processing the Appeal.