Bateman Seidel

MEMORANDUM

TO: Oregon City Commission

FROM: Carrie A. Richter, Deputy City Attorney

DATE: July 23, 2017

RE: Resolution 16-13 - Adoption of Planning Fee Schedule

INTRODUCTION

At its meeting on July 17, 2019, the City Commission heard concerns regarding Resolution No. 19-13, which included a proposed fee schedule for land use planning applications. Although there were general objections about imposing fees, they were largely focused on the fee for appealing decisions from the Planning Commission and from the Historic Review Board. The concerns ranged from the method of fee schedule adoption, whether the fee was "reasonable," the foreclosure of public participation by too high of a fee, and the constitutionality of the amount of the appeal fee. As explained in greater detail below, state law authorizes local governments to recoup the costs of processing land use planning applications, including appeals, based on the "actual or average cost." So long as the calculations as to the amount of time spent and expenses incurred are "reasonable," it is probable that a court on review would affirm the City's decision. Ultimately, this decision is one of policy - to what extent the City Commission wishes to shift the costs associated with processing an appeal from an appellant to the citizens of Oregon City.

DISCUSSION

(1) State Law Authorizes Local Governments to Prescribe Land Use Fees by Resolution

State law authorizes the city to prescribe local appeal fees. 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 costs of such appeals or the actual costs of the appeal[.]

The City has implemented this statutory authority through the following land use regulation:

> 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. OCMC 17.50.290

The proposed fee schedule complies with the specific procedural requirements of OCMC 17.50.290 as it will be adopted by resolution. LUBA and the Oregon Court of Appeals affirmed the City's approach of adopting fee schedules by resolution in *Nicita v. City of Oregon City (Hackett Hospitality)*, where LUBA noted that although the case dealt with the application of fee rather than the adoption of a fee schedule:

> Even if that issue were before us, nothing in ORS 227.180(1)(c) prohibits the city's method of adopting its appeal fee. As explained, the city adopted OCMC 17.50.290 by ordinance and the city set its fee schedule by resolution. That procedure is not prohibited by ORS 227.180, which authorizes the city to "prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal." ___ Or LUBA ___ at p 6 (LUBA No. 2018-038, Nov 30, 2018), *aff'd w/o opinion* ___ Or App ___ (A169700, March 20, 2019).

LUBA has determined and the Court of Appeals affirmed that there is no error in the City adopting a fee schedule by resolution.

As for the question of legislative procedures, there is no question that a local government that amends its comprehensive plan or land use regulations must comply with certain statutory requirements including notice to the Department of Land Conservation and Development (DLCD), holding a hearing and providing notice of the decision. ORS 197.610 to 197.615. In *Doty v. City of Bandon,* 49 Or LUBA 411 (2005), LUBA concluded that the adoption a fee schedule by resolution was not a legislative land use regulation triggering these procedural protections. LUBA explained:

> The challenged decision is a resolution, not an ordinance, and it simply adopts a one-page schedule that is required by but is not part of the city's zoning ordinance. While the challenged decision concerns the application of a land use regulation, it does not adopt or amend a land use regulation. Petitioner has not established that the challenged decision is an 'ordinance establishing standards for implementing a comprehensive plan' or otherwise a post-acknowledgment plan or land use regulation amendment subject to ORS 197.610 to 197.615. Because those statutes do not apply, the arguments under these assignments of error do not provide a basis for reversal or remand." 49 Or LUBA at 418.

An issue was also raised about OCMC 17.50.170, which prescribes certain procedures for legislative hearings. The only language in this section relating to what types of decisions require these procedures is set forth in Subsection A, the Purpose section, and provides in relevant part:

> Legislative actions involve the adoption or amendment of the city's land use regulations, comprehensive plan, maps, inventories and other policy documents that affect the entire city or large portions of it.

The adoption of the fee schedule does not result in the adoption or amendment of a land use regulation, the comprehensive plan, maps, or inventories. The only possible interpretation that a legislative procedure is necessary for the adoption of a fee schedule is that it qualifies as a "policy document" that affects large portions of the city. Certainly, the fee schedule applies city-wide, but that does not mean it is a "policy document." Instead, the fee schedule merely sets the rate that will be charged to certain

applications, although it may include policy decisions to subsidize applications by charging less than the actual costs, the fee sheet itself is not a "policy document."

Moreover, by adopting OCMC 17.50.290, authorizing the City to set fees by resolution, the City has expressly disavowed any obligation to adopt a fee schedule through the legislative hearings process. In OCMC 17.50.290, the City set forth a policy of establishing fees by resolution as state law allows. This more specific directive for fee schedule adoption could reasonably be interpreted to prevail over the more general and vague authorization that applies to the adoption of a city-wide "policy document."

In other words, it does not appear that any additional "process" is required for the adoption of a fee schedule by resolution. One policy basis for this expedited review is that it represents nothing more than a reimbursement mechanism to recover the costs for a land use review that benefits an applicant or an appellant to a greater degree than the citizens at large. On the other hand, the City Commission may decide to subsidize those services to achieve other policy objectives, such as encouraging participation in the land use system.

(2) Appeal Fees Based on "Actual or Average Cost" are also "Reasonable"

The City Commission heard testimony that the statutory authorization to defray planning costs is limited to what is "reasonable" and determining what is "reasonable" must be independently evaluated as a separate inquiry from the actual or average cost of providing land use review. LUBA addressed this question directly in the case *Friends of Linn County v. City of Lebanon,* where the petitioners challenged the city's adoption of a resolution increasing the appeal fee as unreasonable. LUBA's analysis of this issue is lengthy but provided here, in full, for the Commission's consideration:

> Petitioner treats the reasonableness requirement of the appeal fee amount as a separate and presumably independent issue from the average or actual cost of the appeal. We do not see, however, that the two can be so easily divorced. We believe that the actual or average cost of an appeal is relevant as to whether the appeal fee itself is reasonable. The statute precludes fees in excess of the average cost or actual cost, even if such fees were independently reasonable. **Absent some argument or evidence that a local government spends an unreasonable amount of time or incurs unreasonable expenses in processing the appeals that are reviewed to compute or estimate an average or actual cost, we believe it is appropriate to presume the average costs or actual costs are also "reasonable," within the meaning of ORS 227.180(1)**.
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> The juxtaposition of these concerns is demonstrated by the difficulty in independently evaluating the reasonableness of a specific fee amount out of the context of the decision being appealed and the other types of decisions commonly appealed. Not only does the nature of the application itself come into play, but also a large number of other potential variables. **Clearly, what in a vacuum might seem reasonable for one type of appeal would seem just as unreasonable for another type of appeal. Therefore, we do not believe the reasonableness of an appeal fee can be determined in a meaningful way independently of the average or actual cost of the appeal**.

> Petitioner attempts to demonstrate the independent unreasonableness of the appeal fee by comparing it to the lesser amounts charged for appealing decisions to LUBA and the Oregon Court of Appeals and Supreme Court. The filing fees with LUBA and the appellate courts, however, are not intended to reflect the actual cost of processing such appeals and are not designed to provide substantial remuneration to those bodies. ORS 227.180(1)(c), on the other hand, does treat the amount of the appeal fee as more closely related to actual cost of the appeal and as a mechanism for reimbursing the local government for conducting that appeal.
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> Petitioner also raises the point that ORS 215.416(11)(b) and 227.175(10)(b) cap the amount counties and cities may charge for providing an initial public hearing at $250.00 While this is a closer question, those statutes provide an expedited alternative to providing the entire public hearing process for certain land use applications when no one objects to a preliminary decision. The provision of a public hearing is something the local government would have been required to provide in the first place, but for the possibility of proceeding without a hearing under the statutes. The provision of a public hearing is also different from the provision of an appeal process, and the amount of time and expense required for each is not necessarily equivalent. Furthermore, those statutes expressly cap the fee amount at $250. If the legislature had wished to similarly cap appeal fees in ORS 227.180(1)(c) then it could have done so. Therefore, we do not find that an appeal fee of $500 is inherently unreasonable. 45 Or LUBA 408, 417-418 (2003) (emphasis added).

In sum, where there is no evidence that the city is spending an excessive amount of time or is incurring unreasonable expenses, prescribing a fee based on the actual or average expenses is reasonable. No party has claimed that $10,477 does not represent the actual or average cost that the city expends processing an appeal from the Planning Commission. As a result, the City Commission may find that this amount is reasonable.

(3) The Constitutionality of Defraying Expenses for Land Use Review

The Commission heard testimony that the amount of the fee for appealing a Planning Commission decision is excessive and effectively bars access to courts "without purchase" in violation of Article I, section 10 of the Oregon Constitution.

Article I, section 10, 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 relationship between local government imposed land use fees and court-imposed filing fees was considered very recently by the Oregon Court of Appeals in *Bell v. City of Hood River,* 238 Or App 13 (2015). In *Bell,* the plaintiff sought a declaratory judgment from the court that the imposition of a nonwaivable appeal fee was unconstitutional under Article I, section 10, of the Oregon Constitution. The trial court concluded that Article I, section 10 applied to courts and had no application to fees

imposed by local governments. Although the Court of Appeals agreed with the trial court, the decision states:

> As explained above, **Article I, section 10, prescribes how justice is to be administered in the courts**. Plaintiffs, however, are not challenging the administration of justice in the courts. Plaintiffs are, in a declaratory judgment action brought against the city, directly challenging the validity of the city's fee—a fee that applies only to an appeal to the city council. The city's fee does not pose a direct bar to plaintiffs' access to the courts, and plaintiffs have expressly chosen not to assert that the city was acting as a court administering justice when it charged the fee. Rather, the bar to the courts that plaintiffs point out is the requirement in the land use statutes that plaintiffs must first exhaust local remedies before appealing. It may be that that exhaustion requirement, as applied in plaintiffs' case, imposes an onerous financial burden to the access to courts that is amenable to constitutional challenge. However, that is not the challenge that plaintiffs have brought. Simply put, plaintiffs' declaratory judgment action is not addressed to what Article I, section 10, prescribes. Thus, the trial court did not err in its legal conclusions. *Id* at 19. (emphasis added).

In short, the Court of Appeals held that the City's application of its fee schedule did not violate Article 1, section 10 because the fee itself did not bar access to the court.[1]

(4) The City may Prescribe Fees that are Less than the Actual or Average Costs

A concern was expressed that the City Commission could not arbitrarily choose a number and that the number must be a considered choice relative to the factors raised at the hearing. As noted above, the Commission's authority to set fees is found in ORS 227.180(1)(c):

> The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average costs of such appeals or the actual costs of the appeal[.]

Under that provision, any fee "shall be no more than" the actual or average costs. Once the City determines the actual or average costs, the City Commission is free to choose any number less than that amount as a result of its policy choice regarding how much the Commission should have other taxpayers subsidizing land use appeals.

[1] The court did acknowledge that the obligation to exhaust local remedies, which in turn requires payment of an appeal fee, "may be" subject to challenge as barring access to courts. The courts have provided no further guidance considering what essentially is *dicta* - an opinion by a court on a question that is not essential to its decision. What we do know is that the adoption of the fee schedule, such as the one contained in Resolution No. 19-13 does not alter exhaustion obligations that exist in local regulations and in state law. ORS 197.825(2)(a). State law authorizes local governments to seek reimbursement for services rendered at a maximum amount of the actual or average cost. ORS 227.180 If the act of doing so, when coupled with a statutory exhaustion obligation, runs afoul of Art 1, section 10, then the law must be subject to challenge and not merely the City's action in compliance with it.

CONCLUSION

Based on the law as it currently stands, the City should be reasonably certain that it may adopt a fee schedule, including setting the Planning Commission appeal fee, based on the actual or average cost of providing that review, without running afoul of any constitutional, statutory or local limitations.