

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 DONNA BABBITT,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11 and

12
13 JEFF L. JORGENSEN,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2001-130

17
18 FINAL OPINION
19 AND ORDER

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22 Appeal from City of Portland.

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24 Donna M. Babbitt, Portland, filed the petition for review and argued on her own
25 behalf.

26
27 Peter A. Kasting, Senior Deputy City Attorney, Portland, filed a response brief and
28 argued on behalf of respondent.

29
30 Jeff L. Jorgenson, Portland, filed a response brief and argued on his own behalf.

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32 HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member,
33 participated in the decision.

34
35 AFFIRMED

12/05/2001

36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.
39

NATURE OF THE DECISION

Petitioner appeals a July 9, 2001 letter that explains why petitioner’s local appeal fee waiver request was rejected.

MOTION TO STRIKE

Petitioner moves to strike intervenor’s brief because the wrong zip code was used in mailing it to petitioner on October 31, 2001.¹ It is unclear whether petitioner ever received the copy of intervenor’s brief that was mailed to her on October 31, 2001. However, upon learning that the brief was mailed to the wrong zip code, intervenor made a number of efforts to contact petitioner to make arrangements to provide her with a copy of the brief. Two days before oral argument, on November 6, 2001, a copy of intervenor’s brief was transmitted to petitioner by facsimile and received by her on that date.

The argument presented in intervenor’s brief is less than one page long. That argument does not add anything of substance to the brief that was filed by the city and received by petitioner sometime before October 31, 2001. We do not believe the delay in providing petitioner a copy of intervenor’s brief resulted in any prejudice to her substantial rights. For that reason, the motion to strike is denied.

FACTS

On June 8, 2001, the city land use hearings officer granted major land division approval for a 28-lot subdivision and conditional use approval for 23 attached houses. That June 8, 2001 decision stated that the decision could be appealed to the city council. The decision also stated that it would become final on June 23, 2001 if no appeal was filed on or before June 22, 2001.² The decision further stated that the fee to appeal the decision was

¹We previously allowed intervenor-respondent’s motion to intervene.

²Under the city’s zoning ordinance, the hearings officer’s decision was a Type III quasi-judicial land use decision. Portland City Code (PCC) 33.730.030(F) governs appeals of Type III land use decisions and provides

1 equal to one-half the application fee, or \$6,021.50. Finally, the June 8, 2001 decision (1)
2 states that “low-income individuals may qualify for a waiver of the appeal fee,” (2) states
3 that appeal fee waivers for low income individuals must be approved prior to filing the
4 appeal, and (3) requests that appellants “allow three working days for fee waiver approval.”
5 Record 33.

6 On June 18, 2001, petitioner filed a request for a fee waiver to challenge the hearings
7 officers June 8, 2001 decision. Record 39. On June 22, 2001, the Director of the Office of
8 Planning Development and Review (OPDR) (hereafter the Director) responded to the fee
9 waiver request in a letter, which provides in relevant part:

10 “As a low income household, you are eligible to receive a fee waiver based on
11 the documentation provided, a 2000 IRS 1040A tax return. Also based on this
12 information and pursuant to the authority granted to the Director in [PCC]
13 33.750.050(C), I am authorizing a waiver of the land use review appeal fee.

14 “* * * Please include a copy of the this letter with your appeal application.”
15 Record 24.

16 On June 22, 2001, petitioner filed her appeal of the hearings officer’s decision.³ That
17 appeal was filed without the required fee, but petitioner attached the Director’s June 22, 2001
18 letter approving her request for a fee waiver.

19 In a June 26, 2001 letter to petitioner, the Director states that the June 22, 2001 fee
20 waiver was granted in error and further states, “I must rescind my approval of the waiver and
21 reject your appeal.” Record 17. The Director goes on to explain why she believes the June
22 22, 2001 fee waiver approval was erroneous. Finally, the Director states:

23 “Because you requested the fee waiver 5 days prior to the end of the 14-day
24 appeal period, I will extend the original appeal deadline (June 22, 2001) for an
25 additional 5 days from today, until July 3, 2001 for you to file the appeal with
26 the required appeal fee. This gives you the same advantage to appeal the

that an “appeal must be submitted to the Director * * * within 14 days of the day the notice of decision is mailed.” If a timely local appeal is not filed, PCC 33.730.030(G) provides that the Type III decision becomes final “on the day after the last day to appeal.”

³There is no dispute that petitioner’s June 22, 2001 appeal was timely filed.

1 above-mentioned land use case as if I had rejected your request for a fee
2 waiver when you originally requested it on June 18, 2001.” *Id.*

3 Petitioner did not appeal the Director’s June 26, 2001 letter to LUBA. Instead, in a
4 June 29, 2001 letter to the Director, petitioner argued that she was entitled to the requested
5 fee waiver under PCC 33.750.050(B)(1) and (2) and that the Director had improperly
6 rescinded the fee waiver under PCC 33.750.050(C).⁴

⁴As relevant, PCC 33.750.050 provides:

“The Director of OPDR may waive land use review fees in the following situations. *The decision of the Director of OPDR is final.* The waiver approval must occur prior to submitting the application.

“* * * * *

“B. Low income waiver.

“1. Land use review fees. An individual applying for a land use review who believes that he or she cannot pay the required fee(s), may request a waiver of fees. Applicants receiving a fee waiver must be an individual or noncorporate entity. An applicant for a fee waiver will be required to certify gross annual income and household size. The fee will be waived only for households with a gross annual income of less than 50 percent of the area median income as established by the Department of Housing and Urban Development (HUD), as adjusted for household size. Information relating to fee waivers must be made available by the Director of OPDR. The Director of OPDR will determine eligibility for fee waivers. Financial information provided by the applicant will remain confidential.

“2. Appeal fees. The appeal fee may be waived for those qualifying under Paragraph 1 above who are appealing the decision on their application. In addition, an appeal fee may be waived for a low income individual (as specified in B.1 above) or noncorporate entity appealing a land use review decision, provided the following are met:

“a. The individual resides or the entity is located within the required notification area for the review; and

“b. The individual has resided in a dwelling unit at that address for at least 60 days.

“C. City government and nonprofit waiver. The Director of OPDR may waive the land use review fees for City Bureaus and for nonprofit organizations that directly serve low-income individuals. In either case, the Director of OPDR must find that the activities, but not necessarily the specific request of the organization, are consistent with and further the goals and policies of the City.” (Emphasis added.)

1 In a July 9, 2001 letter to petitioner, the Director provided the following additional
2 explanation for her June 26, 2001 decision to reject petitioner's June 22, 2001 appeal.

3 "This is in response to your [June] 29th letter to me in which you list and
4 include the Portland Zoning Code sections pertaining to low-income fee
5 waivers. Please note that each of these sections, as well as the Decision of the
6 Hearings Officer * * * states that the Director 'may' waive appeal fees for low
7 income individuals. As I explained in my previous letter and on the phone,
8 the Code provides me this discretion with the use of the word 'may'. I denied
9 your fee waiver in accordance with our agency's long-established written
10 policy. Our policy, as I previously indicated, is to allow fee waivers only to
11 low-income individuals who are applicants or appellants for land use reviews
12 associated with their primary residence.

13 "With regard to our telephone conversation, I am sorry that you construed my
14 approach as abrupt when I explained that I was rescinding my approval of
15 your appeal fee waiver. I know that this news was upsetting to you.
16 However, to approve your appeal fee waiver request would be unfair to those
17 individuals in similar circumstances whose requests were denied." Record 1.

18 Petitioner filed with LUBA her notice of intent to appeal the Director's July 9, 2001 letter 21
19 days later, on July 30, 2001.

20 JURISDICTION

21 Respondent challenges our jurisdiction in this matter. According to respondent, the
22 Director's decision to rescind the fee waiver and reject petitioner's local appeal of the
23 hearings officer's decision was made on June 26, 2001, not July 9, 2001. Petitioner received
24 the June 26, 2001 letter. There is no right of local appeal to challenge the Director's June 26,
25 2001 decision. Under PCC 33.750.050, the Director's decision concerning the fee waiver is
26 final. *See* n 4.⁵ Rather than appeal the June 26, 2001 decision to LUBA, petitioner sought to
27 have the Director reconsider the June 26, 2001 decision and allow her attempted local appeal
28 to go forward without paying the local appeal fee. Record 12-16. Because the Director
29 refused to do so in her July 9, 2001 letter, petitioner now attempts to appeal the July 9, 2001

⁵Petitioner does not identify any PCC provision that authorizes a local appeal to challenge the part of the Director's June 26, 2001 decision that rejects petitioner's local appeal.

1 letter. Respondent contends that although the July 9, 2001 letter provides additional
2 explanation for the June 26, 2001 decision, the city's *final* decision to reject petitioner's
3 appeal nevertheless was made on June 26, 2001. According to the city, the June 26, 2001
4 decision has never been appealed to LUBA, and petitioner's July 30, 2001 notice of intent to
5 appeal would be beyond the 21-day appeal period to challenge that decision under ORS
6 197.830(9) in any event.

7 Before seeking review of a land use decision at LUBA, parties must first exhaust any
8 available local appeals that are available by right under local land use legislation.
9 ORS 197.825(2)(a); *Lyke v. Lane County*, 70 Or App 82, 688 P2d 411 (1984). However,
10 where no local right of appeal is provided, as is the case here, a petitioner may not fail to
11 appeal a final decision to LUBA within the 21-day appeal period that is provided by ORS
12 197.830(9) and thereafter seek to challenge the final decision that was not appealed in an
13 appeal of a second decision that merely reiterates the earlier final decision. *Smith v. Douglas*
14 *County*, 17 Or LUBA 809, 816-17, *aff'd* 98 Or App 379, 780 P2d 232, *rev den* 308 Or 608
15 (1989).

16 Were we to reach the merits of petitioner's assignments of error, we have some
17 difficulty understanding how the Director could grant the fee waiver and then, after petitioner
18 filed a timely appeal of the hearings officer's decision and the appeal deadline expired,
19 revoke the fee waiver and reject the local appeal.⁶ It also seems questionable that the
20 Director could unilaterally extend the 14-day deadline established by PCC 33.730.030(F) for
21 appealing the hearings officer's decision to allow petitioner an opportunity to refile her
22 appeal with the required appeal fee. *See* n 2. However, even if the Director's June 26, 2001

⁶Like petitioner, we also question the director's reliance on the permissive word "may" in PCC 33.750.050 as authority to promulgate additional informal criteria for fee waivers that (1) do not appear in PCC 33.750.050 and (2) have the effect of disqualifying local appellants who satisfy the PCC 33.750.050(B) criteria for fee waivers. *See St. Johns Neighborhood Assoc. v. City of Portland*, 38 Or LUBA 275, 289 (2000) (questioning the Director's authority to informally promulgate such additional criteria).

1 decision rejecting petitioner’s fee wavier and local appeal was wrong, that does not mean it
2 was not final and appealable to LUBA. As the Court of Appeals explained in affirming our
3 decision in *Smith v. Douglas County*:

4 “* * * Petitioner confuses the questions of whether [the county’s first]
5 decision was final and whether it was wrong. It was final, because there is no
6 provision for a county appeal from it. Petitioner therefore could have
7 appealed [the county’s first] decision directly to LUBA * * *. Any
8 inconsistency between the ordinance and state law could have been the basis
9 for an assignment of error in that appeal * * *.” 98 Or App at 382-83.

10 Because the Director’s June 26, 2001 letter was the city’s final decision to rescind the
11 appeal fee waiver and reject petitioner’s local appeal, and petitioner did not file a timely
12 appeal of that decision with LUBA, we do not have jurisdiction to review that decision.

13 The July 9, 2001 letter appears to be a “land use decision,” as that term is defined by
14 ORS 197.015(10)(a), because it is final and it applies the city’s zoning ordinance (a land use
15 regulation).⁷ Therefore, we have jurisdiction to review the July 9, 2001 letter, and we deny
16 the city’s motion to dismiss. Nevertheless, the July 9, 2001 letter simply reiterates the
17 Director’s earlier June 26, 2001 decision to rescind the appeal fee waiver and reject
18 petitioner’s local appeal. Petitioner may not collaterally attack the June 26, 2001 decision in
19 this appeal of the July 9, 2001 decision.

20 Because petitioner’s assignments of error are directed entirely at the Director’s
21 decisions to rescind the appeal fee waiver and to reject petitioner’s local appeal, and those
22 decisions were made in the June 26, 2001 decision, petitioner’s assignments of error provide
23 no basis for reversing or remanding the July 9, 2001 decision. The city’s decision is
24 therefore affirmed.

⁷As relevant, ORS 197.015(10)(a) defines “[l]and use decision” to include “[a] final decision or determination made by a local government * * * that concerns the * * * application of” “[a] land use regulation.”