

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 TREADMILL JOINT VENTURE and  
5 BOYD IVERSON,  
6 *Petitioners,*

7  
8 vs.

9  
10 CITY OF EUGENE,  
11 *Respondent.*

12  
13 LUBA No. 2010-078

14  
15 FINAL OPINION  
16 AND ORDER

17  
18 Appeal from City of Eugene.

19  
20 Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.

21  
22 Emily N. Jerome, City Attorney, Eugene, filed the response brief and argued on behalf  
23 of respondent.

24  
25 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board Member,  
26 participated in the decision.

27  
28 DISMISSED

04/24/2012

29  
30 You are entitled to judicial review of this Order. Judicial review is governed by the  
31 provisions of ORS 197.850.

**NATURE OF THE DECISION**

In LUBA No. 2010-078, petitioners appeal a city staff decision charging petitioners a fee to appeal a hearings official’s decision approving a planned unit development (PUD) to the planning commission. This appeal is consolidated with LUBA No. 2010-107, which challenges the planning commission’s ultimate decision to approve the PUD with additional conditions. In this final order and opinion we bifurcate LUBA No. 2010-078 from LUBA No. 2010-107, and dismiss LUBA No. 2010-078. In a separate final order and opinion issued this date, we remand the planning commission decision at issue in LUBA No. 2010-107.

**FACTS**

We recite here the facts relevant to disposition of LUBA No. 2010-078. Additional factual background can be found in *Treadmill Joint Venture v. City of Eugene*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2010-107, April 24, 2012).

The hearing official approved petitioners’ application for phase III of the Rivendell PUD, with six conditions of approval. The hearing official rejected in whole or part petitioners’ requests for relief from three setback standards. On August 11, 2010, petitioners filed a timely appeal with the city, accompanied by an appeal fee in the amount of \$9,268.46. The statement accompanying the appeal challenged the hearing official’s resolution of petitioners’ requests for relief to adjust the three setbacks, and also included a challenge to the local appeal fee. Pursuant to a fee schedule adopted by the city manager, the local appeal fee is 50 percent of the application fee. Petitioners argued in their appeal statement that an appeal fee set at 50 percent of the application fee is inconsistent with ORS 227.180(1)(c).<sup>1</sup>

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<sup>1</sup> ORS 227.180(1)(c) provides in relevant part that

“The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearing officer, planning commission or other

1 Based on those arguments, petitioners requested that the city waive or return the appeal fee.  
2 City staff took no action on petitioners' request, but issued petitioners a receipt for the appeal  
3 fee. On August 30, 2010, petitioners filed with LUBA a self-described "precautionary"  
4 appeal of the city staff decision to charge the local appeal fee, attaching to the notice of intent  
5 to appeal a copy of the receipt and petitioners' appeal statement. Notice of Intent to Appeal  
6 (LUBA No. 2010-078) 1.

7 Meanwhile, petitioners continued to pursue the local appeal process. With respect to  
8 the appeal fee issue, the planning commission accepted into the record petitioners' testimony  
9 on that issue, but determined that the issue was beyond its scope of review. Petitioners  
10 appealed the October 10, 2010 planning commission decision to LUBA, and that appeal was  
11 assigned LUBA No. 2010-107. Petitioners moved to consolidate LUBA No. 2010-107 with  
12 LUBA No. 2010-078, as "closely related" decisions under OAR 661-010-0055. In the  
13 meanwhile the city filed a motion to dismiss LUBA No. 2010-078, and opposed  
14 consolidation. LUBA allowed consolidation, and took the motion to dismiss LUBA No.  
15 2010-078 under advisement. *Treadmill Joint Venture v. City of Eugene*, 62 Or LUBA 538  
16 (2010).

17 The consolidated appeals then proceeded to briefing and oral argument. The  
18 consolidated petition for review includes two assignments of error. The second assignment of  
19 error challenges both the staff decision to charge the local appeal fee at issue in LUBA No.  
20 2010-078, and the planning commission's determination that the planning commission lacks  
21 review authority to consider petitioners' challenges to the local appeal fee, at issue in LUBA  
22 No. 2010-107. At oral argument, the Board asked the parties if they would consent to  
23 suspend this review proceeding pending a decision by the Court of Appeals in an appeal of a  
24 different city planning commission decision that involved a challenge to the same city appeal

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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. \* \* \*

1 fee at issue in the present appeals. The parties consented to suspend the present review  
2 proceeding.

3 On August 17, 2011, the Court of Appeals decided *Willamette Oaks LLC v. City of*  
4 *Eugene*, 245 Or App 47, \_\_ P3d \_\_ (2011), *rev den* 351 Or 586, \_\_ P3d \_\_ (2012)  
5 (*Willamette Oaks*), in which the Court held that LUBA erred in remanding a decision to the  
6 City of Eugene planning commission to allow the petitioners in that appeal to submit into the  
7 local record testimony and evidence challenging the city’s local appeal fee. After the Court’s  
8 decision in *Willamette Oaks* became final, the parties moved the Board to re-activate these  
9 appeals and resolve the various motions and the merits. We now do so.

10 **MOTION TO DISMISS**

11 As noted, the city previously moved to dismiss LUBA No. 2010-078, and we took  
12 that motion under advisement. Briefly, the city argues that the August 11, 2010 staff  
13 decision to charge petitioners the appeal fee is excluded from LUBA’s jurisdiction under one  
14 or both of two theories. First, the city argues that the decision to charge an appeal fee is a  
15 “fiscal” decision and thus subject to the so-called “fiscal exception” to LUBA’s jurisdiction,  
16 based on *Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980).  
17 Second, the city argues that the August 11, 2010 decision to charge petitioners the appeal fee  
18 is excluded from LUBA’s jurisdiction under ORS 197.015(10)(b)(A), which excludes from  
19 the definition of “land use decision” a decision made under land use standards that “do not  
20 require interpretation or the exercise of policy or legal judgment.” Because we agree with  
21 the city’s second argument, we do not consider the city’s argument regarding the fiscal  
22 exception.

23 The city argues that in charging petitioners the appeal fee prescribed in the city’s fee  
24 schedule, city staff were not required to interpret any land use standard or exercise policy or  
25 legal judgment. Petitioners agree that the city’s 50 percent appeal fee is non-discretionary  
26 and the staff’s application of that fee in this case was ministerial, but argues nonetheless that

1 the *statute* authorizing the city to impose an appeal fee, ORS 227.180(1)(c), requires  
2 interpretation and the exercise of policy and legal judgment.

3         However, petitioners cite nothing in the city’s code or elsewhere that authorizes city  
4 planning staff to consider whether the city’s appeal fee is consistent with ORS 227.180(1)(c),  
5 in accepting a local appeal and appeal fee at the planning counter. As far as we are informed,  
6 there is no provision in the code for planning staff to waive appeal fees or to exercise any  
7 discretion whatsoever with respect to the amount of, or whether to accept, appeal fees  
8 required under the city’s fee schedule. As to ORS 227.180(1)(c), that statute is directed at  
9 city governing bodies and in relevant part authorizes the governing body to adopt local  
10 appeal fees, subject to certain restrictions. The statute does not function as a “land use  
11 standard” that applies to the actions of city staff in accepting a local appeal, for purposes of  
12 ORS 197.015(10)(b)(A).

13         Because the August 11, 2010 staff decision to charge petitioners the appeal fee falls  
14 within the ORS 197.015(10)(b)(A) exclusion, that decision is not a land use decision subject  
15 to our jurisdiction.

16         LUBA No. 2010-078 is hereby bifurcated from LUBA No. 2010-107, and dismissed.