

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

3  
4           MICHAEL ANNETT,                                    )  
5    )  
6                            Petitioner,                    )  
7    )  
8                            vs.                                    )  
9    )  
10           CLACKAMAS COUNTY,                                )  
11    )  
12                            Respondent.                    )  
13  
14

LUBA No. 92-231  
FINAL OPINION  
AND ORDER

15           Appeal from Clackamas County.

16  
17           Paul Norr, Portland, filed the petition for review and  
18 argued on behalf of petitioner.

19  
20           Gloria Gardiner, Assistant County Counsel, Oregon City,  
21 filed the response brief and argued on behalf of respondent.

22  
23           KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,  
24 Referee, participated in the decision.

25  
26                            REMANDED                                    03/23/93

27  
28           You are entitled to judicial review of this Order.  
29 Judicial review is governed by the provisions of ORS  
30 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the Clackamas County  
4 Hearings Officer denying an application for a conditional  
5 use permit authorizing construction of two volleyball courts  
6 and one tennis court.

7 **FACTS**

8 The subject property consists of 1.5 acres and is zoned  
9 Rural Recreational (RR). The petition for review contains  
10 the following additional facts:

11 "A few years ago, petitioner did some site  
12 clearing and grading [on the subject property]  
13 which unfortunately damaged some on-site wetlands.  
14 This situation was rectified with the cooperation  
15 and approval of the Army Corps of Engineers and  
16 the Division of State Lands. During the attempts  
17 to resolve the wetlands issues, petitioner was in  
18 contact with Clackamas County, and following the  
19 County's review of the situation and satisfaction  
20 with the wetlands corrections, petitioner was  
21 instructed [by county staff] to apply for a  
22 grading permit prior to beginning site work.

23 "Petitioner did pursue a grading permit before  
24 beginning site work, but was informed by the  
25 County staff that he qualified for an exemption  
26 from a grading permit and requested such an  
27 exemption. Petitioner was then orally informed  
28 [by county staff] that no exemption approval per  
29 se was necessary and that no grading permit would  
30 be required. In fact, no grading permit was  
31 required by the County. Petitioner thereafter  
32 began site work, including the placement of less  
33 than [one] foot of fill in portions of the upland  
34 area, as authorized by the County, but  
35 petitioner's work was thereafter interrupted  
36 following complaints which led the County to  
37 conclude that [a] conditional use [permit] was

1 required.

2 "Two small depressions \* \* \* were [created and]  
3 temporarily left in the less than one foot of fill  
4 material \* \* \* when the County [required  
5 petitioner to stop] site work.

6 "It is these two (2) small depressions \* \* \* which  
7 the Hearings Officer now finds are 'new' wetlands  
8 which prohibit the site from being used for  
9 recreational [tennis and volleyball] courts.

10 "[Petitioner complied with the county's request  
11 that he apply for a conditional use permit.  
12 Following public hearings, the Hearings Officer  
13 denied petitioner's application].

14 "The Hearings Officer found that each applicable  
15 criterion for approval is satisfied outright[,] or  
16 with reasonable conditions of approval can be  
17 satisfied, except for the issues relating to the  
18 Hearings Officer's determination that 'The record  
19 now establishes that the grading which occurred on  
20 the subject property created two wetland areas on  
21 the southwest portion of the property which are  
22 included within the area now proposed for  
23 development.'" (Record citations omitted.)  
24 Petition For Review 4-5.

25 This appeal followed.

26 **Decision**

27 Clackamas County Zoning and Development Ordinance  
28 (ZDO) 1203.01(B) provides that approval of a conditional use  
29 permit requires a finding that the:

30 "\* \* \* characteristics of the proposed site [are]  
31 suitable for the proposed use, considering \* \* \*  
32 natural features."

33 ZDO 305.07(B) provides that "development shall not occur in  
34 wetlands \* \* \*." ZDO 202 defines the following areas as  
35 wetlands:

1 "Areas inundated by surface or ground water  
2 sufficient to support a prevalence of vegetation  
3 or aquatic life which requires saturated or  
4 seasonally saturated soil conditions for growth  
5 and reproduction. Wetlands generally include  
6 swamps, marshes, bogs, sloughs, wet meadows, river  
7 overflows, mud flats, natural ponds, and other  
8 similar areas. Except when provided as a  
9 mitigation measure to satisfy County, State or  
10 Federal Regulations, wetlands do not include areas  
11 of private property which otherwise satisfy the  
12 above definition if it was created by human  
13 activity as part of an approved development  
14 project \* \* \*."

15 The challenged decision determines:

16 "The existence of wetlands within the area  
17 proposed for development precludes development as  
18 proposed." Record 3

19 Petitioner argues the record lacks substantial evidence  
20 to support the county's determination that the subject  
21 property contains wetlands as defined in ZDO 202, because  
22 the disputed wetland is simply two small depressions created  
23 by the applicant's recent grading activity. Petitioner also  
24 argues the county's interpretation of its definition of the  
25 term "wetland" is clearly wrong because, among other things,  
26 it fails to consider the exception in ZDO 202 for areas  
27 "created by human activity as part of an approved  
28 development project." Petitioner contends the grading  
29 activity which created the two "wetland" areas, was  
30 accomplished with county approval and, therefore, is within  
31 this exception to the ZDO 202 definition of wetland.

32 ZDO 202 contains both a description of wetlands and an  
33 exception for lands that would otherwise satisfy that

1 description. We address petitioner's arguments concerning  
2 these two parts of the ZDO 202 definition of wetlands  
3 separately below.

4 **A. ZDO 202 Wetland Description**

5 The ZDO 202 description of what constitutes a "wetland"  
6 is very broad. It requires the county to make factual  
7 determinations concerning the characteristics of property  
8 subject to certain development applications. There is  
9 evidence in the record that the depressions created by the  
10 applicant satisfy the ZDO 202 description, because there is  
11 evidence that certain hydrophytic plants are growing within  
12 the two depressions, establishing a probability of saturated  
13 soil conditions. Record 166. However, the same record  
14 document also states:

15       "\* \* \* Sufficient time has not elapsed for  
16 permanent hydric soil characteristics to develop  
17 in the fill material, so no positive soil  
18 indicators were observed."<sup>1</sup> Id.

19 It is a close call concerning whether there is  
20 substantial evidence in the record to support the hearings  
21 officer's determination that the depressions created by the  
22 applicant satisfy the description of wetlands contained in  
23 ZDO 202. However, it is petitioner's obligation to  
24 establish that the application complies with all applicable

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<sup>1</sup>There is also evidence in the record that the two depressions created by petitioner would not constitute "wetlands" under state and federal definitions. However, as the county points out, this does not establish that the county's definition of "wetland" is not met.

1 approval criteria. Under ZDO 305.07(B), the application  
2 must be denied if the disputed depressions constitute  
3 wetlands, as that term is described in ZDO 202, unless the  
4 exception provided in ZDO 202 applies. The county found  
5 that the depressions satisfy the ZDO 202 description of  
6 wetlands. We cannot say as a matter of law, that the  
7 evidence in the record demonstrates the depressions on the  
8 site created by petitioner's grading activity are not  
9 "wetlands," as that term is described in the first part of  
10 ZDO 202.<sup>2</sup>

11 **B. ZDO 202 Exception**

12 The challenged decision indicates the county did not  
13 consider the applicability of the exception to the ZDO 202  
14 definition of wetland, for land that would otherwise qualify  
15 as a wetland but for the fact that it was "created by human  
16 activity as part of an approved development project." To  
17 the contrary, the hearings officer found that ZDO 202 does  
18 not distinguish between natural and "created wetlands."  
19 Record 3.

20 We are required to defer to a local government's  
21 interpretation of its code, so long as the interpretation is

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<sup>2</sup>Because the challenged decision is one to deny proposed development, it is not sufficient for petitioner to show that there is evidence in the record to support his position. Rather, he must demonstrate that the evidence establishes he satisfied each approval standard, as a matter of law. Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982); Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979); Leabo v. Marion County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 92-202, February 12, 1993); Consolidated Rock Products v. Clackamas County, 17 Or LUBA 609, 619 (1989).

1 not "clearly contrary to the enacted language," or  
2 "inconsistent with express language of the ordinance or its  
3 apparent purpose or policy." Clark v. Jackson County, 313  
4 Or 508, 514-15, 836 P2d 710 (1992). The Court of Appeals  
5 has stated that under Clark, the question is not whether a  
6 local government interpretation of its own code is "right,"  
7 but rather whether it is "clearly wrong." Goosehollow  
8 Foothills League v. City of Portland, 117 Or App 211, 217,  
9 \_\_\_ P2d \_\_\_ (1992); West v. Clackamas County, 116 Or App 89,  
10 92-93, \_\_\_ P2d \_\_\_ (1992). Here, there is no serious  
11 dispute that the grading activity which created the  
12 "wetlands" was done with the county's knowledge and consent.  
13 ZDO 202 does distinguish between natural and created  
14 wetlands, and we believe it is clearly wrong for the county  
15 to fail to consider whether the grading in this case was  
16 "human activity as part of an approved development project."

17 The county's decision is remanded.