

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4 DEPARTMENT OF LAND CONSERVATION )

5 AND DEVELOPMENT, )

6 )  
7                   Petitioner, )

8 )  
9           vs. )

10 WASCO COUNTY, )

11 )  
12                   Respondent, )

13 )  
14           and )

15 )  
16 )  
17 DANIEL E. VAN VACTOR and )

18 EVERETT METZENTINE, )

19 )  
20                   Intervenors-Respondent. )

LUBA No. 93-037

FINAL OPINION  
AND ORDER

21  
22  
23           Appeal from Wasco County.

24  
25           Larry Knudsen, Assistant Attorney General, Salem, filed  
26 the petition for review and argued on behalf of petitioner.  
27 With him on the brief was Theodore R. Kulongoski, Attorney  
28 General; Thomas A. Balmer, Deputy Attorney General; and  
29 Virginia L. Linder, Solicitor General.

30  
31           Bernard Smith, County Counsel, The Dalles; and James M.  
32 Habberstad, The Dalles, filed the response brief. Bernard  
33 Smith argued on behalf of respondent. James M. Habberstad  
34 argued on behalf of intervenor-respondent.

35  
36           KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,  
37 Referee, participated in the decision.

38  
39                   AFFIRMED                                   06/29/93

40  
41           You are entitled to judicial review of this Order.  
42 Judicial review is governed by the provisions of ORS  
43 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order dismissing  
4 petitioner's local appeal on the ground that it was not  
5 properly filed.

6 **MOTIONS TO INTERVENE**

7 Daniel E. Van Vactor and Everett Metzentine move to  
8 intervene on the side of respondent in this appeal  
9 proceeding. There is no objection to the motions, and they  
10 are allowed.

11 **REPLY BRIEF**

12 Petitioner requests permission to file a reply brief.  
13 There is no objection to the request, and the reply brief is  
14 allowed.

15 **FACTS**

16 Intervenors applied for permission to establish a farm  
17 dwelling on the subject 80 acre parcel zoned exclusive farm  
18 use (EFU-80). The planning department recommended denial of  
19 the application and referred the matter to the planning  
20 commission. On November 26, 1992, the planning commission  
21 conducted a public hearing and approved the application. On  
22 December 14, 1992, the planning commission approved the  
23 minutes of the November 26, 1992 hearing, and the county  
24 mailed the approved minutes to petitioner on December 16,  
25 1992. It is from these minutes that petitioner appealed to

1 the county court.<sup>1</sup> As part of its appeal, petitioner also  
2 requested the county court to waive the filing fee.

3 The county court denied petitioner's request to waive  
4 the local appeal fee on February 3, 1993.<sup>2</sup> On February 17,  
5 1993, the county court dismissed the local appeal.  
6 Petitioner appeals the county court's February 17, 1993  
7 decision.

8 **DECISION**

9 The challenged decision expresses the following reasons  
10 for dismissing petitioner's local appeal:

11 "Wasco County Land Use and Development \* \* \* Code  
12 [WCLUDC] Section 2.170(D)<sup>[3]</sup> requires the

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<sup>1</sup>The parties dispute whether the planning commission's decision became final on December 14 or 16, 1992. However, this issue is not material to resolving this appeal.

There is no dispute that local requirements, more fully discussed below, require the proper filing of a local appeal within ten days after the date the local decision to be appealed from becomes final. Petitioner's attempt file an appeal by facsimile (discussed below), occurred on December 23, 1993, and petitioner later submitted an original notice of appeal and state purchase order for payment for the filing fee, on December 28, 1992. If petitioner properly filed an appeal with the county on December 23, 1992, that appeal was filed within nine days of December 14, and within seven days of December 16, 1992. There is no dispute that if the local appeal was filed after December 26, 1992, it was untimely. The only question here is whether petitioner properly filed an appeal on December 23, 1992. Consequently, whether the challenged decision was final on December 14, 1992 or December 16, 1992, makes no difference to our resolution of this appeal.

<sup>2</sup>Petitioner does not appeal the county court's decision concerning petitioner's request for waiver of the appeal fee.

<sup>3</sup>WCLUDC 2.170 states, in relevant part:

"Review of a Decision of the Planning Commission

1            appellant to file the appeal and deliver the

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"Ten (10) days from the date of a final decision of the Planning Commission, the decision shall become effective unless review is sought pursuant to this Section. \* \* \*

"A. Review of the decision of the Planning Commission \* \* \*:

"1. Shall be made by the County Court, pursuant to Section 2.180, upon any party filing a Notice of Review with the Director within ten (10) days from the date of the final decision sought to be reviewed; or \* \* \*

"2. May be made by the County Court, pursuant to Section 2.180, on its own motion passed within ten (10) days from the date of the final decision sought to be reviewed. \* \* \*

\*\* \* \* \* \*

"C. Every Notice of Review shall contain:

"1. A reference to the decision sought to be reviewed;

"2. A statement as to how petitioner qualifies as a party;

"3. The specific grounds relied upon in the petitioner's request for review; and

"4. The date of the decision sought to be reviewed.

"D. A Notice Of Review shall be accompanied by a fee as set forth in the fee schedule established by the County Court.

"1. If the Court does not desire a transcript, the applicant or any party may request a transcript. Any such request shall be paid for by the person requesting it. The estimated cost of the transcript shall be specified by the Director. Within five (5) days of such estimate, the person filing the Notice of Review shall deposit the estimated cost with the Director. Any deposit excess shall be returned to the depositing person [sic]. Failure to comply with this subsection shall be a jurisdictional defect.

\*\* \* \* \* \*

1 filing fee to the Planning Department within ten  
2 (10) days of the Planning Commission decision.

3 "[Petitioner] delivered to the Wasco County  
4 Planning Department an original notice of appeal  
5 and an original \$100.00 State of Oregon purchase  
6 order on December 28, 1992. \* \* \*[4]

7 "[Petitioner] sent a copy of the notice of appeal  
8 and purchase order to the Wasco County Planning  
9 Department by a telephone facsimile transmission  
10 on December 23, 1992. \* \* \*

11 "Said purchase order and notice of appeal was not  
12 received within ten (10) days of the Wasco County  
13 Planning Commission decision dated December 14,  
14 1992. \* \* \*

15 "Failure to submit a filing fee is a  
16 jurisdictional defect under the [WCLUDC] and was  
17 not waived by the Wasco County Court. \* \* \*

18 "[Petitioner's staff] had notice of the ten (10)  
19 day requirement. \* \* \*

20 "The receipt of a facsimile transmission was not a  
21 filing as required by the [WCLUDC].

22 "\* \* \* \* \*

23 "IT IS HEREBY ORDERED that [intervenors'] Motion  
24 to Quash and Dismiss appeal of [their application  
25 for a] Farm Dwelling is granted and said appeal is

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<sup>4</sup>The purchase order states that the Wasco County Court is the "Vendor" and that the filing fee should be billed to DLCD. The purchase order is subject to the following conditions, among others:

"PAYMENT: Payment for completion of State of Oregon contracts are normally made within 30 days following the date the entire order is delivered or the date the invoice is received, whichever is later. \* \* \*

"TERMINATION: This contract may be terminated by mutual consent of both parties or by the State at its discretion. \* \* \*"  
Respondent and Intervenor's Brief Appendix I, 4.

1 dismissed." Record 8-9.

2 We interpret the challenged decision to determine that  
3 (1) a local appeal must be filed, together with the appeal  
4 fee, within ten days of the date of the local decision  
5 appealed from, and (2) petitioner's fax of its notice of  
6 appeal and purchase order does not constitute a properly  
7 filed appeal.

8 Petitioner argues WCLUDC 2.170(D)(1) does not specify  
9 that the failure to file the actual fee with the local  
10 notice of appeal is a jurisdictional defect. Petitioner  
11 argues that the statement in WCLUDC 2.170(D)(1) concerning  
12 jurisdictional defects pertains only to the transcript fee  
13 established by WCLUDC 2.170(D)(1). Further, petitioner  
14 argues that under the filing fee provisions of WCLUDC 2.070,  
15 the failure to file an appeal fee at the time a notice of  
16 appeal is filed is not a jurisdictional defect.  
17 WCLUDC 2.070 authorizes waiver of filing fees, as follows:

18 "A. Any application filed with the Planning  
19 Department shall be accompanied by the  
20 appropriate filing fee to reimburse the  
21 county for processing costs attendant upon  
22 the application.

23 "\* \* \* \* \*

24 "D. A filing fee may be waived by the County  
25 Court for Governmental agencies, or upon  
26 satisfactory showing that an applicant is  
27 without means and is unable to pay the  
28 established fee.

29 "\* \* \* \* \*"

1           Petitioner also argues that WCLUDC 2.170's silence  
2 concerning facsimile filings means that appeals, including  
3 the filing fees for such appeals, may be filed by facsimile.  
4 Finally, petitioner contends that the county court is  
5 estopped to dismiss petitioner's appeal because the county  
6 planning director represented that she would accept the  
7 local appeal the way in which it was filed.<sup>5</sup>

8           This Board must defer to a local government's  
9 interpretation of its own code, unless the local  
10 interpretation is clearly contrary to the express words,  
11 policy, or context of the local enactment. Clark v. Jackson  
12 County, 313 Or 508, 515, 836 P2d 710 (1992). In other  
13 words, we must sustain a local interpretation of local code  
14 provisions, unless the local interpretation is "clearly  
15 wrong." Goose Hollow Foothills League v. City of Portland,  
16 117 Or App 211, 217, \_\_\_\_\_ P2d \_\_\_\_\_ (1992); West v.  
17 Clackamas County, 116 Or App 89, 93, 840 P2d 1354 (1992).

18           Petitioner has not established that there is anything  
19 about the county court's interpretation of its own code that  
20 is "clearly wrong." WCLUDC 2.170(D)(1) provides that the  
21 "[f]ailure to comply with this subsection shall be a

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<sup>5</sup>Petitioner argues:

"Prior to filing its appeal, [petitioner's staff] contacted [the] Wasco County Planning Director, and specifically asked if she would accept a notice of review transmitted by telephone facsimile and a facsimile of a purchase order to secure the appeal fee. The planning director advised DLCD that the facsimiles would be acceptable." Petition for Review 5.

1 jurisdictional defect." (Emphasis supplied.) The WCLUDC  
2 identifies WCLUDC 2.170 as a "section." Subsection (D) of  
3 WCLUDC 2.170 requires that a notice of appeal be accompanied  
4 by the appeal fee, and WCLUDC 2.170(D)(1) is a part of that  
5 subsection. It is not "clearly wrong" for the county to  
6 determine that the requirement of WCLUDC 2.170(D)(1), that  
7 failure to comply with "this subsection" is a jurisdictional  
8 defect, refers to all parts of subsection (D) of  
9 WCLUDC 2.170.

10 In addition, the fact that nothing in the WCLUDC says a  
11 local appellant is prohibited from filing appeals and appeal  
12 fees by facsimile, does not establish that such filings are  
13 adequate under the local code. Further, there is nothing  
14 necessarily inconsistent between the county's determination  
15 under WCLUDC 2.170 that timely payment of appeal fees to the  
16 county court is jurisdictional, and the provision of  
17 WCLUDC 2.070 allowing waiver of filing fees for  
18 "applications." WCLUDC 2.060 expressly authorizes waiver of  
19 filing fees for applications pursuant to WCLUDC 2.070, and  
20 specifies the kinds of applications subject to such waiver.  
21 Among those applications subject to such fee waiver are  
22 "Appeals of Decision of Director \* \* \* and any ministerial  
23 action of the Director." WCLUDC 2.060(B)(13). However,  
24 WCLUDC 2.060 makes no mention of waiver of fees for appeals  
25 from the planning commission to the county court. Further,  
26 WCLUDC 2.160, relating to appeals from planning director

1 decisions to the planning commission, contains an express  
2 provision allowing waiver of appeal fees under WCLUDC 2.070.  
3 There is no explicit corollary provision authorizing the  
4 waiver of fees for an appeal to the county court.  
5 Accordingly, petitioner's arguments concerning WCLUDC 2.070  
6 do not establish that the challenged decision is "clearly  
7 wrong."

8 Finally, petitioner has not established that equitable  
9 estoppel is applicable here.<sup>6</sup> The supreme court has stated  
10 the following principles concerning equitable estoppel:

11 "The elements of equitable estoppel are:

12 "[T]here must (1) be a false  
13 representation; (2) it must be made with  
14 knowledge of the facts; (3) the other  
15 party must have been ignorant of the  
16 truth; (4) it must have been made with  
17 the intention that it should be acted  
18 upon by the other party; (5) the other  
19 party must have been induced to act upon  
20 it.' Coos County v. State of Oregon,  
21 303 Or 173, 180-81, 743 P2d 1348 (1987)  
22 (quoting from Oregon v. Portland General  
23 Electric Co., 52 Or 502, 528, 95 P 722  
24 (1908)).

25 "Generally, a 'misrepresentation must be one of  
26 existing material fact, and not of intention, nor  
27 may it be a conclusion from facts or a conclusion

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<sup>6</sup>We have also noted on previous occasions that it is unclear whether this Board has authority to reverse or remand a local government decision, that is otherwise consistent with the local code, based on the doctrine of equitable estoppel. See Cemper v. Clackamas County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-016, June 23, 1993), slip op 8; Pesznecker v. City of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-027, June 15, 1993), slip op 5; Lemke v. Lane County, 3 Or LUBA 11, 15 n 2 (1981).

1 of law.' Coos County v. State of Oregon, supra,  
2 303 Or at 181. A party claiming estoppel must  
3 show reliance and 'a right to rely upon the  
4 representation of the estopped party.' Id.,  
5 citing Marshall v. Wilson, 175 Or 506, 518, 154  
6 P2d 547 (1944); see Fred Messerle & Sons, Inc., v.  
7 Dept. of Rev., 8 OTR 413 (1980) (estoppel is a  
8 defense only if the required element of reliance  
9 is reasonable)."

10 Petitioner has not established the existence of any  
11 false representation. At best, petitioner alleges that the  
12 planning director stated that she would accept the notice of  
13 appeal and filing fee by facsimile. Apparently, she was  
14 willing to do so. However, it was the county court that  
15 dismissed the appeal after interpreting its own ordinance,  
16 as it has the authority to do.

17 Further, even if we were to infer a representation by  
18 the planning director which purported to bind the county  
19 court, petitioner has not established that it had a right to  
20 rely on and reasonably relied upon such a representation.  
21 Petitioner has not cited anything which authorizes the  
22 planning director to bind the county court regarding  
23 jurisdictional questions. Here, petitioner sought the  
24 planning director's interpretation of the code, and ran the  
25 risk that the county court would not agree with the planning  
26 director's interpretation. See Kamppi v. City of Salem, 21  
27 Or LUBA 498 (1991). The planning director's legal  
28 conclusion that an appeal and fee could properly be filed by  
29 facsimile transmission, is not a misrepresentation of fact  
30 upon which petitioner reasonably had a right to rely to

1 ensure that its appeal was properly filed. See Welch v.  
2 Washington County, 314 Or 707, 717, \_\_\_\_ P2d \_\_\_\_ (1992).

3       Petitioner's assignments of error are denied.

4       The county's decision is affirmed.

5