

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 PAUL CHOBAN,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 WASHINGTON COUNTY,) LUBA No. 90-113
11)
12 Respondent,) FINAL OPINION
13) AND ORDER
14 and)
15)
16 WASHINGTON COUNTY DEPARTMENT OF)
17 LAND USE AND TRANSPORTATION,)
18)
19 Intervenor-Respondent.)

22 Appeal from Washington County.

24 John M. Wight, Portland, filed the petition for review
25 and argued on behalf of petitioner. With him on the brief
26 was Glasgow & Wight, P.C.

28 David C. Noren, Assistant County Counsel, Hillsboro,
29 filed a response brief and argued on behalf of respondent.

31 Dan R. Olsen, Assistant County Counsel, Hillsboro,
32 filed a response brief and argued on behalf of intervenor-
33 respondent.

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

38 REMANDED 07/14/93

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the Washington County
4 Board of Commissioners approving a road realignment.

5 **FACTS**

6 On May 9, 1989, intervenor-respondent (intervenor)
7 submitted its application for a development permit to
8 authorize the realignment and construction of a portion of
9 S.W. Barnes Road, across a flood plain, within an area
10 designated on the county comprehensive plan as a significant
11 natural resource area. Specifically, the proposal is as
12 follows:

13 "[R]ealign Barnes Road with four travel lanes,
14 bike lanes, curbs, and sidewalks. [The] proposed
15 realignment will replace the existing road across
16 the wetland area. The existing road will be
17 removed with [the] proposed project.

18 "The proposed construction crosses Johnson Creek *
19 * * the 100 year flood plain, and wetland areas.

20 *****

21 "The proposed road construction will fill 1.3
22 acres of existing wetlands * * *.

23 "The mitigation proposed with the road
24 construction will create 1.3 acres of new wetland
25 area. This wetland creation results from removal
26 of the existing Barnes Road and construction of a
27 series of wet cattail ponds in the existing County
28 right of way. In addition, a 1.0 acre wetland
29 pond with island west of the existing right of way
30 will be excavated. A 10 foot wide gravel access
31 road will remain along the east side of the
32 existing right-of-way. * * *" Record 327-28.

1 "This application proposes to fill a portion of
2 the Johnson Creek flood plain in order to provide
3 a roadbed for the new alignment of Barnes Road.
4 [The proposal also includes compensating
5 excavation within the existing Barnes Road right-
6 of-way and to the west * * *." Record 299.

7 The county planning department approved the application
8 on December 26, 1989. On January 8, 1990, petitioner
9 appealed to the hearings officer. On March 9, 1990, the
10 hearings officer conducted a hearing on petitioner's appeal.
11 On April 16, 1990, the hearings officer rejected many of the
12 issues raised by petitioner, but remanded the decision to
13 the planning department for further information regarding
14 compliance with county drainage and flood plain standards.

15 On April 24, 1990, the planning department mailed the
16 hearings officer's decision to the parties, together with
17 certain documents attached to that decision entitled "Notice
18 of Decision" and "Appeal Information" (documents).
19 Record 207, 218. These documents stated, among other
20 things, that the last day to file an appeal of the hearings
21 officer's decision was May 8, 1990. Record 207, 218.

22 On May 3, 1990, intervenor appealed the hearings
23 officer's decision to the board of commissioners, requesting
24 "partial de novo" review.¹ The justification given for
25 partial de novo review was (1) intervenor's belief that the

¹Intervenor appealed that portion of the hearings officer's decision determining that inadequate information had been submitted to establish that certain Washington County Community Development Code (CDC) floodplain and drainage standards were satisfied. Record 1.

1 hearings officer erred in remanding the decision to the
2 planning department to establish compliance with drainage
3 and flood plain standards, and (2) intervenor's desire to
4 submit more detailed engineering studies in support of its
5 application. Record 203-06.

6 On July 10, 1990, the board of commissioners conducted
7 a partial de novo hearing on intervenor's appeal.
8 Intervenor submitted additional engineering information
9 regarding the proposed road realignment. In particular,
10 intervenor submitted documents constituting the drainage
11 plan for the proposal.

12 On August 2, 1990, the board of commissioners approved
13 intervenor's application. While the board of commissioners
14 disagreed with the hearings officer's determination that
15 more information was required to establish compliance with
16 certain county drainage and flood plain standards, it
17 adopted much of the hearings officer's decision as its own,
18 as well as additional findings and conditions of approval.
19 Record 1. This appeal followed.²

20 **MOTION TO FILE REPLY BRIEF**

21 Pursuant to OAR 661-10-039, petitioner moves for
22 permission to file a reply brief. OAR 661-10-039 provides

²During the pendency of this appeal, the parties requested twice that the appeal be suspended to allow them an opportunity to settle their differences. The Board granted the last such request on July 24, 1991, in an order suspending further proceedings until either party requested an opinion be issued. On June 28, 1993, this Board received from respondent Washington County a request for an opinion on the merits.

1 the following:

2 "A reply brief may not be filed unless permission
3 is first obtained from the Board. A reply brief
4 shall be confined solely to new matters raised in
5 the respondent's brief. * * *

6 Petitioner's proposed reply brief addresses arguments
7 raised for the first time in the response briefs. Those new
8 arguments are respondent's and intervenor's (respondents')
9 contentions that petitioner (1) failed to exhaust local
10 remedies because he did not file an appeal of the hearings
11 officer's decision to the board of county commissioners, and
12 (2) is precluded from raising various issues because of
13 statutory and local code waiver provisions.

14 Arguments contained in respondents' briefs, that
15 petitioner failed to exhaust local appeals and that he is
16 precluded from raising particular issues before this Board,
17 are new matters not contained in the petition for review
18 which warrant the filing of a reply brief. See Caine v.
19 Tillamook County, ____ Or LUBA ____ (LUBA No. 92-153, Order
20 on Motion for Leave to File Reply Brief, January 20, 1993).
21 Therefore, petitioner's motion to file a reply brief is
22 allowed.

23 **JURISDICTION**

24 Washington County Community Development Code
25 (CDC) 209.3.4 provides that to appeal a hearings officer's
26 decision to the board of commissioners, the appealing party

1 must file a local "petition for review."³ CDC 209.3.4
2 provides certain requirements for a local petition for
3 review, including the following:

4 "A petition for review shall contain the following

5 * * * * *

6 "The nature of the decision and the specific
7 grounds for the appeal. Unless otherwise directed
8 by the [board of commissioners], the appeal shall
9 be limited to the issue(s) raised in the petition;

10 * * * * *. (Emphasis supplied.)

11 Petitioner did not appeal the hearings officer's April
12 14, 1990 decision and, accordingly, filed no local petition
13 for review pursuant to CDC 209-3.4.⁴

14 Intervenor argues petitioner's failure to file a local
15 appeal pursuant to CDC 209.3.4 means that petitioner failed
16 to exhaust his administrative remedies and that this Board
17 lacks jurisdiction under ORS 197.825(2)(a).

18 ORS 197.825(2)(a) provides the jurisdiction of this Board:

19 "[is] limited to those cases in which the
20 petitioner has exhausted all remedies available by
21 right before petitioning the board for review."

22 We do not believe that petitioner failed to exhaust

³CDC 209.3.4 has been amended since the challenged decision was made. However, no party argues that we should apply amended CDC provisions to the proposal.

⁴However, this is not particularly surprising because while the hearings officer denied several of petitioner's contentions of error, the hearings officer nevertheless remanded the decision to the planning department. Intervenor did appeal the hearings officer's April 14, 1990 decision.

1 local administrative remedies. First, petitioner was a
2 prevailing party in the hearings officer's proceedings
3 because the hearings officer remanded the decision to the
4 county planning department. Second, a local appeal of the
5 hearings officer's decision was filed by intervenor. That
6 petitioner himself did not file the appeal with the board of
7 commissioners is not dispositive of whether petitioner
8 exhausted his administrative remedies. McConnell v. City of
9 West Linn, 17 Or LUBA 502, 525 (1989). What matters is that
10 an appeal to the highest local decision maker was filed and
11 that petitioner participated in the appeal hearing.
12 Therefore, petitioner exhausted his local administrative
13 remedies, and we have jurisdiction over this appeal.

14 **INTRODUCTION**

15 Respondents assume ORS 197.763 (enacted in 1989, as is
16 more fully explained below) and corresponding limitations on
17 our scope of review expressed in ORS 197.835(2)(1989), apply
18 to this appeal proceeding.⁵ In this regard, respondents

⁵ORS 197.835(2)(1989) provides:

"Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763.
* * *

"* * * * *

ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with

1 argue that petitioner is precluded from raising in the
2 petition for review, several of the issues included in the
3 first through sixth assignments of error and the tenth
4 assignment of error, because those issues were not raised in
5 the county proceedings below.⁶

6 ORS 197.763 and the provisions of ORS 197.835(2)(1989)
7 relating to limitations on our scope of review that refer to
8 ORS 197.763, were enacted by 1989 Oregon Laws, chapter 761,
9 sections 10(a) and 12, respectively, and became effective on
10 October 3, 1989. The effective date of ORS 197.763 and the
11 corresponding provisions of ORS 197.835(2)(1989), is
12 relevant because of ORS 215.428(3). ORS 215.428(3)
13 provides:

14 "[A]pproval or denial of the application shall be
15 based upon the standards and criteria that were
16 applicable at the time the application was first
17 submitted."

18 Intervenor's development application was submitted on
19 May 9, 1989. ORS 197.763, and the limitations on our scope
20 of review expressed in ORS 197.835(2)(1989), were not in
21 effect until nearly six months after intervenor's

sufficient specificity so as to afford the governing body,
planning commission, hearings body or hearings officer, and the
parties an opportunity to respond to each issue."

⁶Respondents also argue that although some the disputed issues were raised during the proceedings before the board of commissioners, they were not sufficiently raised to enable the board of commissioners to adequately respond, and are thus waived under ORS 197.835(2). Because we determine below that ORS 197.835(2) is inapplicable to this appeal proceeding, we do not consider this argument further.

1 application was submitted. Those statutory standards
2 operate together. They require that local governments
3 follow certain procedures and provide that if such
4 procedures are followed, this Board's scope of review is
5 limited to issues raised during the local proceedings.
6 However, because ORS 197.763 was not in effect at the time
7 intervenor's application was submitted, the county was not
8 required to follow the procedures outlined in that statute.
9 See Warren v. City of Aurora, _____ Or LUBA _____ (LUBA
10 No. 92-188, March 8, 1993). Where ORS 197.763 is
11 inapplicable to the proceedings below, the limitation on our
12 scope of review in ORS 197.835(2)(1989) based on ORS 197.763
13 is also inapplicable. Therefore, neither ORS 197.763 nor
14 ORS 197.835(2)(1989) apply here to limit our scope of our
15 review to issues raised below.

16 Respondents' briefs include related arguments that our
17 scope of our review should be limited to issues raised
18 during the local proceedings, based on local code
19 provisions. Specifically, respondents contend that, under
20 CDC 209-3.4,⁷ petitioner was required to appeal to the board
21 of commissioners issues resolved adversely to him by the

⁷CDC 209-3.4 requires the following for a petition for review:

"The petition for review shall contain the following:

"The nature of the decision and the specific grounds for appeal. Unless otherwise directed by the appellate authority, the appeal shall be limited to the issue(s) raised in the petition."

1 decision of the hearings officer or be barred from raising
2 those issues in both local and state appellate forums.
3 Respondents maintain that because petitioner did not file a
4 local appeal of the hearings officer's decision to the board
5 of commissioners, pursuant to CDC 209-3.4, the board of
6 commissioners considered only those issues identified in
7 intervenor's appeal statement, and did not consider many of
8 the arguments in the first through sixth assignments of
9 error, and did not consider any of the arguments in the
10 tenth assignment of error. According to respondents,
11 because the board of commissioners did not consider those
12 issues, we also may not consider those issues.

13 CDC 209-3.4 limits the board of commissioners' review
14 of the hearings officer's decision to issues identified in
15 the local "petition for review," unless the board of
16 commissioners elects to conduct a broader review - -
17 something it did not do in this case.⁸ See Smith v. Douglas
18 County, 93 Or App 503, 763 P2d 169 (1988), aff'd 308 Or 191
19 (1989) (under a local ordinance restricting board of
20 commissioners' review to issues identified in a local notice
21 of appeal, the board of commissioners may not address issues
22 not identified in a local notice of review).

23 Clearly, the county has authority to regulate the

⁸We note that under CDC 209-3.4, the board of commissioners could have considered issues not identified in the local notice of appeal if it had chosen to do so.

1 conduct of local proceedings, including authority to
2 establish procedures for the conduct of local appeals.
3 ORS 215.412, ORS 215.422(1)(a).⁹ It is equally clear that
4 local ordinances can and do, within an appropriate statutory
5 context, affect our review authority.¹⁰ However, at the
6 time intervenor's development application was filed, the
7 existing statutes had been interpreted to mean that LUBA's
8 review authority over a challenged decision is not limited
9 to issues raised locally. See 1000 Friends of Oregon v.
10 Lane County, 102 Or App 68, 74, 793 P2d 885, 888 (1990).
11 Also there was no applicable statute authorizing local
12 appeal limitations to affect our scope of review.¹¹

⁹ORS 215.422(1)(a) provides in relevant part:

"* * * The procedure and type of hearing for * * * an appeal
* * * shall be prescribed by the governing body * * *."

¹⁰For example, the court of appeals and this Board have determined that the decision regarding when a local decision becomes final for purposes of seeking appellate review; whether local remedies are exhausted; and whether a party is "aggrieved" for purposes of determining his standing to appeal, is a question of state and local law. See Columbia River Television v. Multnomah County, 299 Or 325, 702 P2d 1065 (1985) (finality); Jefferson Landfill Comm. v. Marion County, 297 Or 280, 248-285 (1985) (standing); Benton County v. Friends of Benton County, 294 Or 79, 653 P2d 1249 (1982); Lyke v. Lane County, 11 Or LUBA 117, aff'd 70 Or App 82, 688 P2d 411 (1984) (exhaustion).

¹¹ORS 197.763(1) and ORS 197.835(2), as enacted and amended in 1989, respectively, change this situation somewhat, but neither is applicable to this appeal. These statutes specify that issues raised before LUBA must be raised before the local government prior to the close of the record "at or following the final evidentiary hearing." While a local government is free to adopt local code provisions narrowing the scope of review in local appeal proceedings, under these statutes such local requirements do not similarly limit our scope of review. Friends of the Metolius v. Jefferson

1 We conclude that petitioner's failure to follow the CDC
2 procedure for filing a petition for review of the hearings
3 officer's decision does not affect our scope of review of
4 the challenged board of commissioners decision.
5 Accordingly, we review petitioner's assignments of error.

6 **FIRST ASSIGNMENT OF ERROR**

7 "The county exceeded its jurisdiction, made a
8 decision not supported by substantial evidence in
9 the whole record and improperly construed the
10 applicable law when it approved [a] permit for
11 road construction and wetland mitigation without
12 submitting an application for an essential and
13 integral part of the project."

14 **SECOND ASSIGNMENT OF ERROR**

15 "The County exceeded its jurisdiction, made a
16 decision not supported by substantial evidence in
17 the whole record and improperly construed the
18 applicable law when it approved a permit to do
19 wetland mitigation on a County road right-of-way
20 without the consent of the fee owners."

21 Under this assignment of error, petitioner argues the
22 approval of the proposed road realignment impermissibly
23 relies on "off-site" wetland mitigation in violation of
24 various CDC provisions.¹² While not clear, it appears
25 petitioner makes two alternative arguments in this regard.

26 **A. County Jurisdiction to Approve Wetland Mitigation**

County, ____ Or LUBA ____ (LUBA No. 93-002, June 8, 1993), slip op 5;
Davenport v. City of Tigard, ____ Or LUBA ____ (LUBA No. 92-104,
March 15, 1993), slip op 4, aff'd 121 Or App 135 (1993); Tice v. Josephine
County, 21 Or LUBA 371, 376 (1991).

¹²"Off-site" means that the proposed wetland mitigation is not contemplated to occur within the area covered by intervenor's development application for the Barnes road realignment.

1 **Plan**

2 Petitioner argues that several CDC provisions require
3 the county to mitigate adverse impacts of the proposed road
4 realignment on affected wetland areas. Petitioner
5 acknowledges that the county approved an off-site wetland
6 mitigation plan. However, petitioner maintains the county
7 lacks jurisdiction to approve the proposed wetland
8 mitigation plan because the county does not own the land
9 upon which the proposed mitigation is to occur, and the land
10 is not within the ambit of intervenor's application for
11 development approval. According to petitioner, because the
12 county lacks jurisdiction to approve the particular
13 mitigation plan it did, no mitigation plan was really
14 approved.

15 The county's wetland mitigation plan is contained
16 within the terms of Division of State Lands (DSL) and the
17 Army Corps of Engineers (Corps) wetland permits issued for
18 the subject project.¹³ The wetland mitigation plan is
19 designed to address the impacts of filling the existing
20 wetland area to construct the proposed realigned road. The
21 DSL wetland permit requires the creation of replacement
22 wetland areas and ponds, as well as the following:

23 "The wetland shall be constructed prior to or

¹³The county points out that its wetland mitigation plan has been approved by the DSL and the Corps as meeting the requirements of relevant state and federal law, and that those agencies have issued permits for the proposal.

1 concurrently with the road fill project.

2 "The shoreline of the newly created wetland shall
3 be revegetated with riparian and wetland species
4 of plants as described * * *

5 "The north and west boundaries shall be fenced
6 outside the 20-foot vegetated buffer area.

7 "The design of the wetland's pond area and
8 associated stream shall be engineered to maintain
9 a minimum of two (2) feet of standing water in
10 summer months." Record 324.

11 The county states the proposal meets relevant CDC
12 standards because the challenged decision approves the
13 construction of the proposed realigned road based on the
14 following conditions of approval:

15 "1. Construct mitigation ponds and related work
16 outside of the existing Barnes Road as
17 required for Corps and DSL compliance prior
18 to opening the new Barnes Road. Remove
19 existing Barnes Road and complete required
20 mitigation in that area within one year of
21 opening new Barnes Road.

22 * * * * *

23 "3. Failure to maintain valid Corps and DSL
24 permits, and comply with their terms, shall
25 be deemed a violation of this approval.

26 "4. Within 14 days of this approval notify DSL
27 and Corps of:

28 "a. Cut and fill based on final engineering;

29 "b. Condition No. 1.

30 "Prior to construction commencing, obtain written
31 confirmation that condition No. 1 is consistent
32 with the existing permits. If not, obtain new
33 permits consistent with the condition. If said
34 permits are denied, the applicant shall not

1 proceed unless Condition No. 1 is modified through
2 the type II process.

3 " * * * * " ¹⁴ Record 19.

4 We disagree with petitioner that the county lacks
5 authority to approve a wetland mitigation plan for property
6 other than property covered by the application. We also
7 disagree with petitioner that the county lacks authority to
8 approve the wetland mitigation plan simply because the plan
9 covers property other than county owned property or property
10 not within the specific scope of intervenor's application.

11 The conditions in the challenged decision require
12 compliance with the wetland mitigation plan to reduce the

¹⁴Portions of the hearings officer's decision are incorporated by reference into the challenged decision. The hearings officer's decision dealt with this issue as follows:

 " * * * Petitioner further contends that the development permit
 cannot be issued because the proposed construction with (sic)
 existing Barnes Road is on land that is not within the County's
 ownership or control. Assuming, arguendo, the right of way is
 not within the County's control, such fact would not prevent
 the issuance of a development permit which requires as a
 condition of approval, construction of off-site improvement
 such as this wetland mitigation * * * project. It is
 commonplace for local jurisdictions to impose conditions of
 approval that require off-site improvements. When such is the
 case, it is incumbent on the applicant to satisfy the condition
 of approval by whatever means are available, be it acquisition
 of the property where the off-site improvement must be located,
 lease of that property, or obtaining permission from the
 property owner to construct the improvement.

 " * * * * *

 "[A]ny condition of approval relating to implementation of the
 mitigation plan must require such plan to be implemented before
 or concurrently with installation of the fill which will
 accommodate the realigned Barnes Road." Record 214-16.

1 expected adverse impacts on wetlands that are the direct
2 result of the proposed development. Petitioner cites
3 nothing, and we are aware of nothing, that prohibits the
4 county from requiring off-site mitigation of on-site impacts
5 from the proposed road realignment.¹⁵

6 This subassignment of error is denied.

7 **B. Adequacy of Wetland Mitigation**

8 Petitioner does not argue the proposed wetland
9 mitigation plan is, in itself, inadequate to meet relevant
10 CDC standards. Rather, petitioner's arguments are related
11 to its challenges to the county's authority to approve the
12 wetland mitigation plan, resolved above. Petitioner argues
13 the proposed wetland mitigation plan cannot be implemented
14 because of various perceived defects. Petitioner contends
15 the wetland mitigation plan impermissibly relies upon the
16 utilization of land the county does not own. Petitioner
17 maintains that such reliance violates CDC requirements for
18 wetland mitigation. In addition, petitioner argues the
19 challenged decision impermissibly relies upon land not
20 within the scope of the application for the proposed road
21 relocation. According to petitioner, the proposed off-site
22 wetland mitigation plan cannot be implemented where

¹⁵Respondents make the cogent point that it would make little sense in view of limited public funding resources for the county to condemn and purchase the off-site property to implement a wetland mitigation plan that it did not even know to be approvable against relevant federal, state and county standards.

1 intervenor has no right to use such off-site land.
2 Petitioner also argues that because the mitigation
3 improvements are on off-site land not within the express
4 scope of intervenor's application, approval of those
5 improvements is meaningless.

6 Petitioner also contends (and respondents do not
7 dispute), that intervenor must first obtain county approval
8 to construct the proposed mitigation improvements before the
9 proposed road realignment can legally be constructed.¹⁶
10 Petitioner argues the county may not rely upon a particular
11 off-site wetland mitigation plan, containing particular
12 wetland mitigation strategies to meet the relevant CDC
13 wetland standards, where there is no determination that the
14 relied upon off-site mitigation may legally be pursued.

15 Respondents state the proposed conditions of approval
16 require that prior to "opening" the proposed road, most of
17 the required mitigation improvements must be constructed.
18 Respondents also point out that the conditions of approval
19 explicitly state the county may not begin construction of
20 the proposed realigned road unless required permits are
21 obtained. Respondents conclude that because the conditions
22 of approval require construction of many of the off-site
23 mitigation improvements as a prerequisite to opening the

¹⁶There is no dispute that intervenor has not yet obtained the required county approvals for construction of the proposed off-site wetland mitigation measures.

1 proposed realigned road, intervenor will have to secure the
2 right to construct the off-site wetland mitigation
3 improvements before opening the realigned road.

4 We agree with respondents that the challenged decision
5 contains conditions of approval adequate to ensure
6 intervenor will have the right to control the land upon
7 which the off-site improvements will be constructed, prior
8 to the time the realigned road will be allowed to be
9 "opened." Further, we believe the county's conditions of
10 approval are adequate to ensure the county permits necessary
11 to construct the proposed off-site wetland mitigation
12 improvements will be secured prior to the time the road is
13 opened. Finally, simply because the land upon which the
14 proposed wetland mitigation improvements are to occur is not
15 specifically identified in the application for the realigned
16 road, does not mean that the off-site wetland mitigation
17 plan does not meet CDC requirements for wetland mitigation.

18 This subassignment of error is denied.

19 The first and second assignments of error are denied.

20 **THIRD ASSIGNMENT OF ERROR**

21 "The County made a decision not supported by
22 substantial evidence in the whole record and
23 improperly construed the applicable law by failing
24 to demonstrate that it would preserve and protect
25 natural drainage channels, include provisions to
26 retain off-site natural drainage patterns, and
27 that roadside ditches would be properly sized to
28 pass all required flows with regard to the north
29 branch of Johnson Creek."

30 Petitioner argues the challenged decision fails to

1 establish compliance with three CDC 412 drainage
2 standards.¹⁷ Petitioner argues the proposal will cause
3 water to drain onto his property and, as such, the
4 challenged decision allows the alteration of an "existing
5 natural drainage channel" in violation of CDC 412-3.1.
6 Petitioner claims the proposal does not "assure" that the
7 water which will drain from the "development" is "free of
8 pollutants," as required by CDC 412-3.3. Finally petitioner
9 contends the existing roadside ditch is not "properly
10 sized," in violation of CDC 412-4.1.

11 There is no dispute that CDC 412 applies to the

¹⁷Specifically, petitioner argues the proposal fails to comply with CDC 412-3 ("Drainage Standards") which provides, in relevant, part as follows:

"The drainage plan shall provide standards which:

"412-3.1 Protect and preserve existing natural drainage channels[.]

"412-3.3 Assure that waters drained from the development are free of pollutants, including sedimentary materials[.]

Petitioner also argues the proposal violates CDC 412-4.1, which provides:

"Roadside ditches shall be properly sized to pass all required flows, have a minimum depth of no more than two (2) feet as measured from the shoulder of the road, side slopes no steeper than 2:1 and have a minimum flow velocity of three (3) feet per second when flowing full. All other ditches shall be properly sized to pass all required flows but are not limited to the geometric restrictions of roadside ditches."

1 proposal or that CDC 412 requires the submission of a
2 drainage plan meeting specific standards. Record 6-8.
3 Intervenor's application acknowledges the applicability of
4 CDC 412 and states the following regarding the proposal's
5 compliance with the drainage standards:

6 "All drainage for this project will maintain
7 existing natural drainage patterns and natural
8 channels. Two main culverts are to be constructed
9 for this project. Final engineering plans will
10 meet the standards of this section and a
11 registered engineer will approve the design."
12 Record 562.

13 The challenged decision determines compliance with
14 CDC 412-3.1, based on the following findings:

15 * * * The construction drawings show that the
16 arch and culvert conduct the water through the new
17 roadway at exactly the same location as the
18 existing channels. There is no decrease in
19 channel width. No ditching or rechannelization is
20 proposed. The existing flow lines shown match
21 with arch/culvert locations, demonstrating no flow
22 change * * * (Exhibit citations omitted.)
23 Record 8.

24 In addition, the county adopted by reference the following
25 findings of its engineering expert:

26 "There is no impact to the drainage patterns. A
27 structure and culvert are located at the existing
28 crossings (Johnson Creek and the drainage ditch to
29 the north respectively), thus retaining the off-
30 site natural drainage patterns. The culvert for
31 the north drainage ditch * * * does not increase
32 the flow in its immediate area, it merely allows
33 water to enter the below-grade wetland in the
34 proposed excavation of old Barnes Road right-of
35 way." Record 168.

36 Intervenor argues these findings establish the

1 "existing natural drainage channels" will be preserved, and
2 that substantial evidence in the record supports the
3 county's findings in this regard. Intervenor contends the
4 evidence in the record establishes that the water currently
5 flowing through the northern portion of petitioner's
6 property will continue to flow through petitioner's property
7 and, accordingly, there is no violation of CDC 412-3.1.

8 We agree with intervenor that these findings are
9 adequate to establish compliance with CDC 412-3.1. Further,
10 we agree with intervenor that there is substantial evidence
11 in the whole record to support the county's findings that
12 there will be no change to the existing natural drainage
13 channels, including the channels which currently flow over
14 the northern portion of petitioner's property.

15 With regard to CDC 412-3.3, the county adopted the
16 following findings:

17 "The Board accepts the testimony of Rick Raetz,
18 P.E., that the interim improvement will have
19 roadside ditches at the new pavement or top of the
20 fill to catch pollutants and sedimentation. These
feed into the special pollution control manholes
21 and biofiltration systems shown in the
22 construction plans. It is also noted that he
23 testified the project will be certified as in
24 compliance with the DEQ '65-85' permanent water
25 quality standards." (Exhibit numbers omitted.
26 Emphasis supplied.) Record 8.

28 While these findings state the proposed construction
29 includes pollution control and biofiltration systems, they
30 do not "assure" that the water which is drained from the
31 development will be "free of pollutants," as required by

1 CDC 412-3.3. However, we do not reverse or remand a local
2 government's decision on the basis of inadequate findings if
3 the parties cite evidence which "clearly supports" the
4 challenged decision. ORS 197.835(9)(b).

5 Intervenor cites engineering plans which show the
6 specific design of the pollution control devices that are to
7 be constructed. Further, intervenor cites its application
8 narrative for the DSL wetland permit. The narrative is one
9 of the documents which make up intervenor's proposed
10 drainage plan.¹⁸ Record 8. The DSL wetland permit
11 narrative cited by intervenor contains the following
12 information regarding the proposed pollution control
13 measures:

14 "Storm drainage from the roadway and tributary
15 commercial areas will be discharged * * * after
16 passing through a Water Quality Control manhole to
17 remove floatable materials, oils and sediments.
18 This manhole will discharge to a sediment pond to
19 remove additional oils and sediments. The flows
20 then route from the sediment pond to the wetland
21 cattail ponds proposed in the county right-of-way.
22 From the cattail ponds, the flow leaves the
23 existing county right of way to the west into a
24 1.0 wetland pond with an island." Record 319.

25 Intervenor also cites the following conclusion of an
26 engineering expert:

27 "The plan includes pollutant/sediment trapping

¹⁸As is explained below, while intervenor, as the applicant for development approval, has proposed a drainage plan for the development, no drainage master plan has yet been adopted for the subject area by the county.

1 drainage structures [The w]ater quality manhole
2 was designed to intercept the storm water prior to
3 its release into the creek.

4 "The plan does not increase erosion potential.
5 All outfalls are designed to reduce flow
6 velocities to non-erosive levels." Record 168.

7 Petitioner cites to no contrary or conflicting
8 evidence.

9 We believe the evidence cited by intervenor "clearly
10 supports" a determination that the construction plans for
11 the proposed road development "assure" that the water
12 drained from the development will be "free of pollutants."

13 With regard to CDC 412-4.1, quoted supra, we do not
14 understand petitioner to argue the proposed roadside ditches
15 themselves are inadequate to meet the requirements of
16 CDC 412-4.1. Rather, we understand petitioner to argue that
17 a particular existing roadside ditch, proximate to his
18 property, historically has been improperly maintained and is
19 unable to handle water flows. For purposes of resolving
20 this assignment of error, we assume this allegation to be
21 accurate.

22 Under CDC 421-4.1, the challenged decision simply must
23 establish that roadside ditches themselves meet certain
24 design specifications. Here, no party argues the particular
25 ditch at issue fails to meet relevant CDC specifications.¹⁹

¹⁹To establish compliance with CDC 412-4.1, the challenged decision adopts by reference the following determinations by the county's engineering expert:

1 Therefore, this assignment of error provides no basis for
2 reversal or remand of the challenged decision.

3 The third assignment of error is denied.

4 **SIXTH ASSIGNMENT OF ERROR**

5 "The County made a decision not supported by
6 substantial evidence in the whole record and
7 improperly construed applicable law by admitting
8 into evidence Exhibit 3, by failing to demonstrate
9 and failing to make a finding of compliance with
10 CDC §§ 421-10.6 and 421-11."

11 CDC 421-10.6, part of CDC 421-10 ("Utilities"),
12 provides:

13 "Drainage systems shall be designed and
14 constructed according to the adopted drainage
15 master plan for the area, if one is completed."

16 CDC 421.11 ("Piping"), provides:

17 "Piping or use of culverts or manmade creek bed to
18 drain or alter water flow other than what is
19 required to provide access to [improvements not
20 relevant here] is prohibited unless it implements
21 an adopted Drainage Master Plan for the area as
22 provided in [CDC] 421-10.6 or is approved in
23 conjunction with a Planned Development including
24 provisions for open space and is processed as a
25 Type III action * * *." (Emphasis supplied.)

26 Petitioner argues the proposal fails to establish
27 compliance with CDC 421-10.6 and 421-11. However, we agree
28 with intervenor that CDC 421-10.6 does not apply to the

"The Barnes Road ditches pass all the required flows, have depths no greater than two feet and side slopes no steeper than 2:1, have a minimum flow velocity greater than three feet per second." Record 168.

Petitioner makes no specific challenge to this finding.

1 proposal because while there is a drainage master plan for
2 the area, it has never been adopted by the county. CDC
3 421-11 only requires compliance with an adopted drainage
4 master plan pursuant to CDC 421-10.6.

5 There is another reason that we believe CDC 421-11 is
6 inapplicable to the challenged decision. The hearings
7 officer's decision, incorporated by reference into the
8 challenged decision, states the following concerning the
9 inapplicability of CDC 421.11:

10 "[CDC 421.11] limits the use of culverts or
11 man-made creek beds to drain or alter water flows.
12 The Hearings Officer concludes that Section 421-11
13 does not apply in this instance. Section
14 421-4[.5]^[20] specifically authorizes the issuance
15 of development permits within a Flood Plain
16 through a Type II procedure for the establishment
17 or construction of a public street. Clearly, the
18 prohibition set forth in Section 421-11 is
19 inconsistent with the type of development
20 permitted by Section 421-4.5. Because the
21 prohibition set forth in Section 421-11 is general
22 in nature, and because the express provision for
23 construction and establishment of public streets
24 set forth within Section 421-4.5 is specific, the
25 Hearings Officer concludes that the requirements

²⁰CDC 421-4.5 provides in relevant part:

"Unless specifically prohibited in the applicable Community Plan, a development permit may be approved in the Flood Plain * * * through a Type II procedure for the following:

* * * * *

"Establishment, construction, maintenance or termination of public or private streets, * * * and drainage systems together with necessary minor accessory structures.

* * * * *

1 of Section 421-11 do not apply to this
2 application. This should not be construed to mean
3 that the effects the culverts may have on off-site
4 flood hazards, flood flow velocities and flood
5 surface elevation are to be ignored. * * *
6 Record 213.

7 We are required to defer to a local government's
8 interpretation of its own local enactments if the local
9 interpretation is not clearly contrary to the express words,
10 policy, or context of the relevant code provision. Clark v.
11 Jackson County, 313 Or 508, 515, 836 P2d 710 (1992). In
12 other words, the inquiry this Board must make is whether the
13 interpretation reflected in the challenged decision of local
14 code provisions, is "clearly wrong." West v. Clackamas
15 County, 116 Or App 89, 94, 840 P2d 1354 (1992).

16 The interpretation of the county code expressed in the
17 challenged decision is not clearly contrary to the express
18 words, policy or context of CDC 421-11 and CDC 421-4.5.
19 CDC 421-4.5 presumes a type II process and CDC 421-11
20 presumes a type III process. CDC 421-4.5 authorizes the
21 construction of roads, subject to mitigation standards, CDC
22 421-11 prohibits development, generally, if various
23 identified negative impacts are found to be associated with
24 such development. We defer to the county's interpretation
25 of these code sections and to the determination that CDC
26 421-11 is inapplicable to intervenor's application.

27 We agree with intervenor that CDC 421.-11 is
28 inapplicable to the proposal and, therefore, it makes no

1 difference that the proposal may not be in compliance with
2 its terms.

3 The sixth assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 "The County made a decision not supported by
6 substantial evidence in the whole record and
7 improperly construed the applicable law by failing
8 to demonstrate that the project will not change
9 the direction or velocity of flood water flow and
10 will not increase the flood surface elevation."

11 CDC 421-6.1 provides:

12 "Proposed flood plain * * * development shall
13 demonstrate that:

14 "The proposal will not change the flow of surface
15 water during flooding such as to cause off site
compounding of flood hazards or change the
16 direction [or] velocity of flood water flow."
17 (Emphasis supplied.)

18 Petitioner contends CDC 421-6.1 contains an absolute
19 requirement that development not increase the velocity of
20 flood water flow.²¹ Petitioner points out the challenged
21 decision concedes there will be some increase in the
22 velocity of the flood water flow, but concludes that such
23 increase complies with CDC 421-6.1 because the county's
24 engineer concluded that it the increase in flood water flow
25 velocity is not "significant." Petitioner challenges the
26 county's interpretation of CDC 421-6.1 that it allows

²¹Petitioner also argues the proposal violates CDC 421-11.2. However, we determine above that CDC 421-11 is inapplicable to the proposal. Therefore, that the decision may fail to apply CDC 421-11.2 to the proposal provides no basis for reversal or remand of the challenged decision.

1 increases in flood velocities deemed to be "insignificant."

2 We agree with respondents that CDC 421-6.1 does not
3 impose an absolute standard. It requires a determination
4 that flood velocities not be increased by a development
5 proposal "such as to cause off site compounding of flood
6 hazards or change the direction [or] velocity of flood water
7 flow." In this regard, there is nothing "clearly wrong"
8 with the county's determination that CDC 421-6.1 is
9 satisfied by determining the development proposal will cause
10 only an "insignificant" increase in flood water velocities.
11 Clark v. Jackson County, supra; West v. Clackamas County,
12 supra.

13 The fourth assignment of error is denied.

14 **FIFTH ASSIGNMENT OF ERROR**

15 "The County made a decision not supported by
16 substantial evidence in the whole record,
17 improperly construed existing law and failed to
18 make a finding regarding the requirements of CDC
19 §§ 421-6.4[7], 421-11.3 and 422-3.4 * * *."

20 Under this assignment of error, petitioner argues the
21 county failed to adopt any findings of compliance with
22 CDC 421-11.3²² and 422-3.4. Petitioner also argues the
23 county finding of compliance with CDC 421-6.47 is
24 inadequate. Finally, petitioner challenges the evidentiary

²²We determine under the sixth assignment of error that CDC 421-11 is inapplicable to the proposal. Therefore, that there are no findings of compliance with CDC 421-11.3 provides no basis for reversal or remand of the challenged decision.

1 support for findings of compliance with 421-6.1 and 421-6.2
2 (flood surface elevation), and 421-11.1 requiring
3 culverts.²³

4 **A. Absence of Findings**

5 CDC 422-3.4 provides:

6 "Any development requiring a permit from
7 Washington County which is proposed in a
8 Significant Natural Area, as identified by the
9 applicable Community Plan * * * shall reduce its
10 impact, to the maximum extent feasible, on the
11 unique or fragile character or features of the
12 Significant Natural Area. Appropriate impact
13 reducing measures shall include:

14 "A. Provision of additional landscaping or open
15 space

16 " * * * * "

17 CDC 422-3.4 is an apparently applicable standard.
18 However, respondents do not cite any findings of compliance
19 with CDC 422-3.4. Respondents rely solely on their
20 contentions, rejected above, that compliance with this
21 standard was not an issue raised below.

22 We agree with petitioner that the county erred by
23 failing to adopt findings of compliance with CDC 422-3.4 or
24 to explain why that standard is inapplicable to the
25 proposal.

26 This subassignment of error is sustained.

²³Petitioner also includes arguments under this assignment of error that are resolved above concerning the adequacy of the county wetland mitigation plan. We need not address those arguments again here.

1 **B. Inadequate Finding**

2 CDC 421-6.47 provides, in relevant part, as follows:

3 "Proposed flood plain and drainage hazard area
4 development shall demonstrate that:

5 " * * * * *

6 "[T]he environmental impact of the disturbance or
7 alteration of riparian wildlife and vegetation has
8 been minimized to the extent practicable.
9 Enhancement of riparian habitats through planting
10 or other such improvements may be required to
11 mitigate adverse effects. Significant features
12 such as natural ponds, large trees and endangered
13 vegetation shall be protected when possible."

14 The challenged decision includes the following findings

15 concerning this standard:

16 "Mitigation for the fill in the flood plain is to
17 be provided by construction of 0.3 acres of
18 cattail wetland within the right-of-way of the
19 existing Barnes Road and a 1.0 acre pond with
20 island on the parcel located top the west of the
21 existing Barnes Road. This property is currently
22 in the process of being acquired by the County. A
23 separate application for that alteration will be
24 submitted later." Record 16.

25 Petitioner's challenge under this subassignment of

26 error focuses on the last sentence of these findings.

27 Petitioner asserts that the above quoted findings are

28 inadequate because the last sentence suggests that

29 compliance with CDC 421-6.47 is deferred to a later point.

30 However, petitioner does not explain why the preceding

31 findings, explaining how CDC 421-6.47 is satisfied by the

32 proposal, are inadequate to establish compliance with that

33 standard and we do not see that they are. The fact that the

1 application that will enable the construction of identified
2 improvements, which are the means to satisfy CDC 421-6.47,
3 will be submitted in the future does not establish the
4 county findings that CDC 421-6.47 will be satisfied by those
5 improvements are inadequate.

6 This subassignment of error is denied.

7 **C. Evidentiary Support**

8 Petitioner simply asserts, without explanation, that
9 the county's findings of compliance with CDC 421-6.47 and
10 422-3.4 lack evidentiary support. Respondents cite evidence
11 in the record supporting the findings of compliance with
12 these CDC provisions. The evidence cited by respondent is
13 evidence upon which a reasonable person could rely in making
14 the findings of compliance with CDC 421-6.47 and 422-3.4.
15 Therefore, the challenged findings are supported by
16 substantial evidence in the whole record.

17 This subassignment of error is denied.

18 The fifth assignment of error is sustained, in part.

19 **SEVENTH ASSIGNMENT OF ERROR**

20 "The County exceeded its jurisdiction, made a
21 decision not supported by substantial evidence in
22 the whole record, and improperly construed the
23 applicable law by failing to demonstrate that the
24 appeal to the Board of Commissioners was filed
25 within the time allowed."

26 CDC 209-1 provides the following requirements for local
27 appeals:

28 "A decision of the [hearings officer] may be
29 appealed only if [a local appeal is filed] within

1 fourteen (14) calendar days after written notice
2 of the decision is provided to the parties * * *."

3 CDC 209-3.7 provides an appellant's failure to file a
4 local appeal on the date the local appeal is due "shall be a
5 jurisdictional defect."²⁴

6 Petitioner argues the hearings officer's decision was
7 "transmitted" to all parties on April 16, 1990, and that the
8 date the decision was "transmitted" is the date it was
9 "provided to the parties" for purposes of calculating the
10 appeal period under CDC 209-3.7. However, petitioner does
11 not explain what he means by the word "transmitted", and it
12 is not clear to us what he means in this regard. Deschutes
13 Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

14 The parties do not dispute that the hearings officer's
15 decision was mailed to the parties on April 24, 1990 and the
16 local appeal was filed on May 3, 1990. Further, reading the
17 challenged decision as a whole, it determines the date the
18 hearings officer's decision was mailed to parties is the
19 date from which the 14 day local appeal period is
20 calculated, and concludes that so calculated, an appeal from
21 the hearings officer's decision was due on or before May 8,
22 1990, and that intervenor's May 3, 1990 local appeal was
23 timely. Record 3-5. This interpretation of CDC 209-1, that
24 the 14 day appeal period runs from the date the decision is

²⁴CDC 209-3.7 has since been amended, but the amendments are inapplicable here. ORS 215.428(3).

1 mailed to parties, is not clearly contrary to the express
2 words, or policy or context of CDC 209-1 and, therefore, we
3 defer to it. Clark v. Jackson County, supra.

4 The seventh assignment of error is denied.

5 **EIGHTH ASSIGNMENT OF ERROR**

6 "The County exceeded its jurisdiction, made a
7 decision not supported by substantial evidence in
8 the whole record, and improperly construed the
9 applicable law by failing to demonstrate that the
10 appeal to the Board of Commissioners was filed by
11 an authorized person."

12 The appeal of the hearings officer's decision to the
13 board of commissioners was filed by a representative of
14 intervenor. Intervenor is a county department. Under this
15 assignment of error, petitioner argues the representative of
16 intervenor had no authority to file an appeal on behalf of
17 intervenor.

18 The challenged decision states the following on this
19 issue:

20 "The Petition for Review was signed by [a
21 representative of intervenor, who is a] Manager
22 [of the] Engineering Division of [intervenor]. *
23 * * [The representative] work[s] under the
24 direction of Bruce Warner, Director of
25 [intervenor].

26 "[CDC] 209-1.2 provides that the Director [of
27 intervenor] may file a Petition for Review.
28 Director is defined to include his designee. CDC
29 106-6.1. [Intervenor] has been a party
30 throughout, and can act only through its
31 employees. CDC 209-1.1.

32 "[The board of commissioners] takes notice that
33 Division Managers operate at the direction or

1 pursuant to authorization of the Director. The
2 application is for a major public improvement
3 involving significant staff time and department
4 cost. It is highly improbable that [intervenor's
5 representative] was not authorized.

6 "Further, CDC 206-2 provides that a procedural
7 error shall invalidate the action only if the
8 error prejudices the substantive rights of a party
9 and that the party bears the burden of proving the
10 error occurred and demonstrating prejudice.

11 "[Petitioner] has submitted no evidence
12 demonstrating that [intervenor's representative]
13 acted without authorization and no evidence of
14 substantial prejudice." Record 5-6.

15 We interpret these findings to determine that
16 intervenor's representative had authority to file the appeal
17 to the board of commissioners, and that even if he did not,
18 under the local code, such failure is no more than a
19 procedural error for which there is no prejudice to
20 petitioner's substantial rights.

21 The interpretation of CDC 209-1 as allowing an appeal
22 to be filed by a manager of intervenor's engineering
23 division, who was acting as the director's designee at the
24 time he filed the appeal (petition for review) with the
25 board of commissioners, is not clearly contrary to the
26 terms, policy or context of CDC 209-1.2, 106-6.1 and,
27 therefore, we defer to it.²⁵ Clark v. Jackson County,
28 supra.

²⁵We express no position concerning the findings that, in general terms, an appellant's failure to have authority to file an appeal constitutes procedural error.

1 Petitioner also argues that there is no evidentiary
2 support in the record for the determination that
3 intervenor's representative filed the appeal clothed with
4 any authority to do so. However, we believe the above
5 quoted findings demonstrate the board of commissioners
6 ratified intervenor's representative's authority to act.
7 Unless specifically prohibited by the local code, arguably
8 irregular acts may be ratified by later actions by persons
9 with authority. Simonson v. Marion County, 21 Or LUBA 313,
10 318-19 (1991). There is nothing in the CDC prohibiting the
11 board of commissioners, the county governing body, from
12 ratifying intervenor's representative's authority to file an
13 appeal on behalf of either the county or intervenor's
14 director. We conclude the challenged decision ratifies the
15 authority of intervenor's representative to file an appeal
16 of the hearings officer's decision to the board of
17 commissioners and the challenged decision itself therefore
18 provides evidentiary support for the determination that
19 intervenor's representative possessed authority to file the
20 appeal.

21 The eighth assignment of error is denied.

22 **NINTH ASSIGNMENT OF ERROR**

23 "The County exceeded its jurisdiction, made a
24 decision not supported by substantial evidence in
25 the whole record, failed to make findings, and
26 improperly construed the applicable law when it
27 granted a partial de novo hearing on appeal."

28 CDC 209-5.5 authorizes partial de novo appeal hearings

1 under the following circumstances:

2 "The request is not necessitated by improper or
3 unreasonable conduct of the requesting party or by
4 a failure to present evidence that was available
5 at the time of the previous review."

6 Partial de novo review was allowed by the board of
7 commissioners to allow the introduction of evidence of:

8 * * * final engineering and related
9 documentation, including computer modeling used to
10 determine the 100 year design flow and 100 year
11 flood plain levels." Petition for Review 26.

12 The challenged decision includes the following findings
13 explaining why such de novo review was allowed:

14 "Throughout the proceedings, [petitioner] has
15 sought additional information to evaluate the
16 impacts of the proposal. Admission of the
17 exhibits addresses his desire for more
18 information. Thus, it does not prejudice his
19 substantial rights.

20 "Further, the exhibits provide a clearer
21 description of the proposal and its impacts for
22 the [board of commissioners.] Submission of this
23 extensive analysis assisted the [board of
24 commissioners] in making a more fully informed
25 decision, benefiting all parties and the public.

26 "Analysis is further enhanced by the fact that
27 many of the [proposed] exhibits are now
28 sufficiently complete to bear an engineer's stamp.
29 This assurance could not have been provided if the
30 [board of commissioners] had attempted review
31 based on the [hearings officer's] record.

32 "Although preliminary work has been done, most of
33 the final engineering [work] submitted as exhibits
34 [is] dated after the hearings below.

35 "Although counsel for [petitioner] argued that the
36 [proposed] exhibits went beyond the scope of the
37 de novo request, the uncontroverted testimony was

1 that the items were prepared for[,] or by[,]
2 registered engineers and are considered to
3 constitute the 'final engineering and related
4 documentation' referenced in the request for de
5 novo [review].

6 "Finally, [petitioner] articulated no specific
7 objection to the accuracy, adequacy or relevancy
8 of the proposed exhibits, either at the time of
9 the de novo request or the hearing. * * *

10 "** * * The [board of commissioners] finds that the
11 standards for granting partial de novo [review,]
12 pursuant to CDC 209-5.5[,] have been met."
13 Record 4-5.

14 These findings provide an adequate explanation of the
15 county's reasons for authorizing partial de novo review, and
16 state an interpretation of CDC 209-5.5 that is not clearly
17 contrary to its express words, policy or context. The fact
18 that the information and studies which were the subject of
19 the partial de novo proceedings could have been prepared in
20 advance of the hearings officer's proceedings does not
21 establish that such information was prepared and thus was
22 "available," as is required by 209-5.5, prior to the appeal
23 proceedings before the board of commissioners.

24 The ninth assignment of error is denied.

25 **TENTH ASSIGNMENT OF ERROR**

26 "The County made a decision in which it failed to
27 follow applicable procedures, that prejudiced the
28 petitioner, made a decision not supported by
29 substantial evidence in the whole record and
30 [improperly] construed the applicable law where it
31 admitted evidence that was illegally obtained by
32 County agents in support of its application."

33 Petitioner argues the hearings officer admitted

1 evidence concerning wetlands in a "Wetland Delineation
2 Report," and that the admission of this evidence was
3 improper because the evidence was obtained by trespass "of
4 County agents upon petitioner's property." Petition for
5 Review 30. Petitioner argues the "exclusionary rule"
6 applicable to criminal proceedings should be applied to land
7 use proceedings to exclude evidence alleged to be illegally
8 obtained.

9 In Ross v. City of Springfield, 56 Or App 197, 207, 641
10 P2d 600, rev'd on other grounds 294 Or 357 (1982), the court
11 of appeals stated:

12 * * * Even assuming that the evidence was
13 improperly obtained, the exclusionary rule does
14 not apply in a civil proceeding." (Citations
15 omitted.)

16 Similarly, we believe there is no basis for the application
17 of the "exclusionary rule" in local land use proceedings.

18 The tenth assignment of error is denied.

19 The county's decision is remanded.