

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 LAVERNE BJERK and DELLA BJERK,)
5))
6 Petitioners,)
7))
8 vs.)
9))
10 DESCHUTES COUNTY,)
11))
12 Respondent.)
13

LUBA No. 93-166

FINAL OPINION
AND ORDER

14
15 Appeal from Deschutes County.
16

17 Robert S. Lovlien, Bend, filed the petition for review.
18 With him on the brief was Holmes, Hurley, Bryant, Lovlien &
19 Lynch.
20

21 Bruce W. White, Assistant County Legal Counsel, Bend,
22 filed the response brief.
23

24 SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,
25 Referee, participated in the decision.
26

27 AFFIRMED 01/18/94
28

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision dismissing their
4 appeal of a decision by the county hearings officer.

5 **FACTS**

6 Petitioners filed an application for a conditional use
7 permit for a bed and breakfast. On September 15, 1992, the
8 county hearings officer held a public hearing on
9 petitioners' application. On October 12, 1992, the hearings
10 officer issued a decision approving petitioners'
11 application, with conditions. On October 22, 1992,
12 petitioners filed a notice of appeal challenging the
13 hearings officer's decision.¹

14 A copy of the county's audio tape of the September 15,
15 1992, hearing was picked up by petitioners' attorney's staff
16 on November 4, 1992. On November 16, 1992, the county
17 planning department received a letter from petitioners'
18 attorney requesting an extension of time for submitting a
19 transcript of the September 15, 1992 hearing, on the grounds
20 that the transcription firm to which petitioners' attorney
21 had submitted the tape had not prepared a transcript or
22 returned the audio tape. Petitioners' attorney also
23 requested a second copy of the audio tape.

¹The notice of appeal indicates petitioners sought to challenge a condition requiring them to establish a separate well to serve the proposed bed and breakfast and to disconnect from a well they currently share with the owners of adjoining properties. Record 86-89.

1 On January 7, 1993, the planning director issued a
2 decision denying the requested extension of time and
3 dismissing petitioners' appeal. On January 19, 1993,
4 petitioners appealed the planning director's decision.² On
5 August 4, 1993, the county board of commissioners held a
6 hearing on petitioners' appeal of the planning director's
7 decision dismissing their appeal. On September 22, 1993,
8 the board of commissioners issued the challenged decision
9 denying petitioners' appeal and upholding the planning
10 director's decision.

11 **ASSIGNMENT OF ERROR**

12 "The county erred in not allowing Petitioners'
13 request for an extension of time to file a
14 transcript of [the September 15, 1992 hearing]."

15 Deschutes County Code (DCC) 22.32.015 states:

16 **"Filing appeals.**

17 "1. To file an appeal, an appellant must file a
18 completed notice of appeal on a form
19 prescribed by the Planning Division, an
20 appeal fee, and a transcript of any hearing
21 appealed from.

22 "2. The notice of appeal and appeal fee must be
23 received at the offices of the Deschutes
24 County Community Development Department no
25 later than 5:00 PM on the tenth day following
26 mailing of the decision. * * *

27 "3. The transcript of the hearing may be

²We note that petitioners obtained a second copy of the audio tape of the September 15, 1992 hearing on February 2, 1993. On February 24, 1993, petitioners submitted a transcript of the September 15, 1992 hearing to the county.

1 submitted to the Community Development
2 Department within 10 days after the date the
3 notice of appeal is filed or within ten (10)
4 days after the hearing tape is mailed or
5 given to the appellant, whichever is later."

6 Petitioners argue use of the mandatory word "must" in
7 subsection (2) above indicates that filing of the notice of
8 appeal and appeal fee within the specified time period is
9 jurisdictional, whereas use of the permissive word "may" in
10 subsection (3) indicates that filing of a hearing transcript
11 within the specified time is not jurisdictional.
12 Petitioners further argue the county's interpretation of the
13 DCC 33.32.015(3) deadline for filing a hearing transcript as
14 jurisdictional is inconsistent with the rules of the
15 appellate courts and LUBA, which make timely filing of a
16 notice of appeal jurisdictional, but allow extensions of
17 time for other acts. According to petitioners, the county's
18 interpretation of DCC 22.32.015 as not providing discretion
19 to grant an extension of time to file a hearing transcript is
20 "clearly wrong," even under the standard established by
21 Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992).

22 The challenged decision interprets and applies
23 DCC 22.32.015 as follows:

24 "[T]he plain language of DCC 22.32.015(1) [means]
25 that the filing of a transcript is an essential
26 element of perfecting an appeal. Absent timely
27 filing of all essential elements of a notice of
28 appeal, an appeal cannot be processed.

29 "[T]he deadline for filing the transcript is
30 controlled by DCC 22.32.015(3). That [sub]section

1 provides for an extension of time for an appellant
2 to provide a transcript, recognizing that the
3 ordinary 10-day time period for filing the notice
4 of appeal set forth in DCC 22.32.015(2) may not be
5 sufficient to allow an appellant to determine
6 whether an appeal should be filed and also arrange
7 for transcribing the hearing before the 10-day
8 appeal period runs.

9 "Under [DCC] 22.32.015(3), the deadline for filing
10 the transcript was Monday, November 16, 1992
11 * * *. [S]ubsection (3) cannot be interpreted to
12 allow for exceptions, even in circumstances that
13 are beyond an [appellants'] control. [A]ny
14 interpretation that would allow for an extension
15 to the 10-day transcript deadline would be
16 problematic for the reason that the [DCC] provides
17 no guidance in such situations as to what the
18 deadline would be for filing a transcript."³
19 Record 6-7.

20 This Board is required to defer to a local government's
21 interpretation of its own ordinances, unless that
22 interpretation is contrary to the express words, policy or
23 context of the local enactment. Clark v. Jackson County,

³The challenged decision also states:

"[Appellants] would not be aided even if the [board of
commissioners] tried to construct an interpretation [of
DCC 22.32.015] to address situations such as that presented
here where failure to meet the 10-day deadline was not the
fault of the [appellants]. For example, if the [board of
commissioners] were to interpret [DCC 22.32.015] to toll the
running of the 10-day timeline for the period of time during
which the [appellants] did not have a tape from which to make a
transcription, [appellants] still would not have [submitted a
transcript] within 10 days of receipt of the tape." Record 7.

In the above findings, the county refers to the fact that petitioners
eventually submitted a transcript of tape of the September 15, 1992 hearing
to the county on February 24, 1993, 22 days after petitioners obtained a
second copy of the tape.

1 supra, 313 Or at 514-15. 1993 Oregon Laws, chapter 792,
2 section 43, basically codifies the Clark v. Jackson County
3 decision, with the exception that we are not required to
4 defer to a local government's interpretation of its
5 regulations if that interpretation is contrary to a state
6 statute, statewide planning goal or administrative rule
7 which the regulations implement.

8 As petitioners point out, DCC Chapter 22.32 (Appeals),
9 which establishes procedures for appeals at the county
10 level, is similar in subject matter to the rules of LUBA and
11 the appellate courts which establish procedures for appeals
12 before those bodies. However, petitioners do not argue that
13 DCC 22.32.015 implements some requirement imposed on the
14 county by a state statute, statewide planning goal or
15 administrative rule. Therefore, we must defer to the
16 county's interpretation of DCC 33.22.015, unless that
17 interpretation is "clearly wrong." Goose Hollow Foothills
18 League v. City of Portland, 117 Or App 211, 217, 843 P2d 992
19 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d
20 1354 (1992).

21 The county's interpretation of the relevant provisions
22 of DCC 22.32.015 explains that if a hearing was held by the
23 initial county decision maker, subsection (1) makes filing a
24 transcript of such hearing an essential part of perfecting
25 an appeal. The county interprets subsection (3) to
26 establish the deadline for filing the transcript as being

1 either 10 days after the notice of appeal is filed or 10
2 days after the appellant is provided with a tape of the
3 hearing, whichever date is later. The county finds the DCC
4 provides no authority to grant extensions to this time
5 limit, based on the lack of any provision in the DCC
6 providing procedures or standards for granting an extension
7 of time to file the transcript required by DCC 22.33.015(1)
8 and (3). The county's interpretation is not "clearly
9 wrong."

10 The assignment of error is denied.

11 The county's decision is affirmed.