BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAN McKENZIE, Petitioner, vs. MULTNOMAH COUNTY, Respondent, and ARNOLD ROCHLIN, Intervenor-Respondent.	LUBA No. 93-205
ARNOLD ROCHLIN, Petitioner, vs. MULTNOMAH COUNTY, Respondent, and DAN McKENZIE, Intervenor-Respondent.	LUBA No. 93-209

FINAL OPINION AND ORDER

Appeal from Multnomah County.

Dan McKenzie, Portland, filed a petition for review in LUBA No. 93-205 and a response brief in LUBA No. 93-209, and argued on his own behalf.

Arnold Rochlin, Portland, filed a petition for review in LUBA No. 93-209 and a response brief in LUBA No. 93-205,

and argued on his own behalf.

John L. DuBay, County Counsel, Portland, filed a response brief and argued on behalf of respondent.

KELLINGTON, Chief Referee; SHERTON, Referee, participated in the decision.

REMANDED 07/21/94

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal a decision of the board of commissioners (1) determining that a conditional use permit authorizing construction of a nonforest dwelling has not expired (LUBA No. 93-209), and (2) granting design review approval (LUBA Nos. 93-205 and 93-209).

MOTION TO INTERVENE

Dan McKenzie, the applicant below, moves to intervene on the side of respondent in LUBA No. 93-209.[1] There is no objection to the motion, and it is allowed.

FACTS

This is the second time an appeal of a decision concerning the placement of a nonforest dwelling on the subject property has been before this Board. In Rochlin v. Multnomah County, 25 Or LUBA 637, 638-39 (1993) (Rochlin I), we stated:

> "The subject property consists of three acres and is zoned Multiple Use Forest (MUF-19). A stream crosses the subject property, and the portion of the subject property where a stream crossing was constructed is within a Significant Environmental Concern (SEC) overlay zone.
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> "In 1991, the applicant obtained three permits covering the subject property -- (1) a conditional use permit for a dwelling, (2) a HD [Hillside

[1]We previously granted intervenor Rochlin's motion to intervene. McKenzie v. Multnomah County, ____ Or LUBA _____ (LUBA Nos. 93-205 and 93-209, Order on Motion to Intervene and Record Objections, April 21, 1994).

> Development] permit to allow the construction of a bridge and driveway on slopes in excess of 20%, and (3) a SEC [Significant Environmental Concern] permit to construct a bridge to provide access to the dwelling. However, the applicant did not construct a bridge crossing. Rather, the applicant constructed a culvert and fill crossing over the stream. Thereafter, the applicant requested permission to modify the HD and SEC permits, to allow the culvert and fill crossing. The planning department approved the request, and petitioner appealed to the hearings officer. The hearings officer reversed the decision of the planning department and denied the request. The applicant appealed the hearings officer's decision to the board of commissioners.
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> "* * * The board of commissioners * * * determined that a SEC permit is not required, and approved the request for a modification of the HD permit to allow the culvert and fill crossing. * * *" (Emphasis supplied.)

We reversed the decision challenged in Rochlin I because under the county code, the board of commissioners lacked authority to adopt that decision. As we explain below, this had the effect of restoring the original, unmodified SEC and HD permits.

While Rochlin I was pending before this Board, the planning director granted design review approval based on the board of commissioners' decision modifying the HD permit and determining that an SEC permit is unnecessary. The planning director also determined that substantial construction occurred and, therefore, the conditional use permit for a nonforest dwelling had not expired, notwithstanding the passage of time. An appeal of the

planning director's decision was filed with the county hearings officer.

While the local appeal before the county hearings officer was pending, we issued Rochlin I. The hearings officer considered the design review appeal in light of Rochlin I, and affirmed the design review decision, but added an additional condition of approval requiring the applicant to comply with the SEC and HD permits as originally granted or subsequently amended. The hearings officer also affirmed the planning director's decision that substantial construction has occurred and that the conditional use permit remains valid.

The hearings officer's decision was appealed to the board of commissioners. The board of commissioners affirmed the hearings officer's decision, but amended the condition of approval to require the submittal of an amended design review plan, which would include a bridge crossing, and also to require review of the amended design review plan under Multnomah County Code (MCC) 11.15.7840 to 11.15.7845. These appeals followed.

PRELIMINARY ISSUES

A. Petitioner Rochlin's Standing (LUBA No. 93-205)

In his response brief, intervenor McKenzie asserts petitioner Rochlin lacks standing to appeal the challenged decision. However, Rochlin appeared during the local proceedings leading to the challenged decision and,

therefore, he has standing. ORS 197.830(2)(b); McKenzie v. Multnomah County, supra, slip op 2-3.

B. Scope of Review of Assignments in McKenzie Petition for Review (LUBA No. 93-205)

At the outset we note petitioner McKenzie raises two issues in his petition for review that we may not consider in this appeal. First, petitioner McKenzie seeks to challenge the correctness of our previous decision in Rochlin I. Petitioner McKenzie did not appeal our decision in Rochlin I to the court of appeals, and may not collaterally attack that decision in this appeal proceeding. Corbett/Terwilliger/Lair Hill Neigh. Assoc. v. City of Portland, 16 Or LUBA 49, 52 (1987); Cope v. City of Cannon Beach, 15 Or LUBA 558 (1987).

Second, petitioner McKenzie argues the subject property is not within a SEC overlay zone and that the county erroneously required him to obtain the significant environmental concern (SEC) permit required for properties within the SEC overlay zone.

In Rochlin I, supra, 26 Or LUBA at 638, we determined the subject property is within a SEC overlay zone. We may not revisit that determination here. Clark v. Jackson County, 103 Or App 377, 380, 797 P2d 1061 (1990), aff'd 313 Or App 508 (1992).

We do not consider these issues further.

FIRST ASSIGNMENT OF ERROR (MCKENZIE)

Petitioner argues the city erroneously required design

review approval for the proposed nonforest dwelling. Petitioner contends the challenged decision represents the first time the county has applied design review to an application for a conditional use permit for a nonforest dwelling.

There is no dispute a conditional use permit is required to authorize the proposed nonforest dwelling. MCC 11.15.7125 provides the following requirement applies to conditional uses:

> "Uses authorized under this section shall be subject to design review approval under MCC [11.15].7805."

MCC 11.15.7820 provides as follows:

> "The [design review] provisions of MCC [11.15].7805 through [11.15].7865 shall apply to all conditional and community service uses in any district * * *[.]"

We are required to defer to a local government's interpretation of its own code so long as the interpretation is not contrary to the express language, purpose or policy of the enactment. ORS 197.829; Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992).[2] We see nothing in the MCC to suggest the county erred by applying the MCC design review provisions to the proposed nonforest dwelling. In addition, even if the challenged decision represents the first time

[2]There is no contention here that the county's interpretation is inconsistent with a statute, goal or administrative rule implemented by the MCC provisions at issue. See ORS 197.829(4).

the county has applied MCC design review requirements to such a conditional use, this would not establish the county erred by doing so.[3]

Petitioner McKenzie's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (MCKENZIE)

Under this assignment of error, petitioner includes seventeen subassignments challenging the county's imposition of a condition requiring a bridge crossing over Balch Creek.

A. Authority to Impose Condition

Petitioner argues the county board of commissioners lacks authority to impose a condition, as part of design review approval, requiring a bridge. Petitioner argues the board of commissioners only has authority to impose conditions of approval required for a proposed use to comply with applicable approval standards. Petitioner also argues the challenged decision contains an inadequate explanation of why the disputed condition is "necessary" to avoid deleterious effects of the proposed use, as required by MCC 11.15.8280(A).

MCC 11.15.8280(A) provides as follows:

> "The [Board of Commissioners] may affirm, reverse or modify the decision of the Planning Commission or Hearings Officer and may grant approval subject

[3]This is not a situation where there is evidence the local government arbitrarily applied standards to some development applications and not others.

> to such modifications or conditions as may be necessary to carry out the Comprehensive Plan or to achieve the objectives of MCC [11.15].8240(D)."

MCC 11.15.8240(D)(2) provides in relevant part:

> "Conditions shall be reasonably designed to fulfill public needs emanating from the proposed land use in either of the following respects:
>
> "(a) Protection of the public from the potentially deleterious effects of the proposed use[.]
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> "* * * * *"

MCC 11.15.8280(A) and 11.15.8240(D)(2) provide the board of commissioners with authority to impose conditions of approval that protect the public from adverse effects associated with a proposed use. We are aware of nothing in the above cited or other MCC provisions limiting the board of commissioners' authority to impose conditions of approval to situations where such conditions are required to establish compliance with a particular standard.

In addition, the challenged decision contains an adequate explanation of why a bridge is determined to be necessary to avoid the deleterious effects associated with the proposed use.

This subassignment of error is denied.

B. Authority to Accept the Appeal of the Planning Director's Decision

Petitioner argues that under MCC 11.15.7865 and

11.15.8290(A),[4] only the applicant for development approval has authority to appeal a planning director's decision on design review.

Under ORS 215.416(3) and (11), it is clear the county must either conduct at least one public hearing on an application for a permit or provide an opportunity to obtain a hearing through a local appeal.[5] Such mandatory statutory requirements must be observed regardless of contrary provisions in a local code. Forster v. Polk County, 115 Or App 475, 478, 839 P2d 241 (1992).

Here, the planning director's design review approval decision was adopted without a public hearing. The planning director's decision would have become final if no "appeal" was filed within ten days following the planning director's decision. In these circumstances, although the MCC provides

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[4]MCC 11.15.7865 provides:

> "A decision on a final design review plan may be appealed to the hearings officer in the manner provided in MCC [11.15].8290 and [11.15].8295."

MCC 11.15.8290(A) provides:

> "A decision made by the planning director on an administrative matter made appealable under this section by ordinance provision, shall be final at the close of business on the tenth calendar day following the filing of the written decision, findings and conclusions with [the Planning Director], unless prior thereto, the applicant files a notice of appeal with the department, under subsections (B) and (C)." (Emphasis supplied.)

[5]There is no dispute that the subject design review approval approves a "permit," as that term is defined in ORS 215.402(4).

only for an appeal by the applicant, under ORS 215.416(11), the county is required to provide an opportunity to obtain a hearing through an appeal to:

> "* * * those who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision. * * *"

Here, the planning director's decision was appealed by the Forest Park Neighborhood Association. Petitioner does not contend the neighborhood association would not have had a right to notice if a public hearing had been scheduled on the subject design review application.[6] Neither does petitioner contend the neighborhood association was not adversely affected or aggrieved by the planning director's decision. We therefore conclude the county did not err by allowing the neighborhood association an opportunity to obtain a public hearing by appealing the planning director's decision.

This subassignment of error is denied.

C. Appeal Fee

Petitioner next argues the fee paid by the local appellant to appeal the hearings officer's decision was inadequate. Petitioner argues failure to pay a proper fee

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[6]Hearings on permit applications are quasi-judicial land use hearings subject to the requirements of ORS 197.763. ORS 197.763(2)(b) requires that notice of such a hearing be provided to "any neighborhood or community organization recognized by the governing body and whose boundaries include the site."

constitutes a "jurisdictional" defect in the local appeal.

MCC 11.15.8260(C) requires payment of the required appeal fee and deposit for the estimated costs of a transcript "as specified by the Planning Director." There is no dispute the appeal fee paid by the local appellant was the amount specified by the planning director. Even assuming the planning director made a mistake in calculating the amount of the appeal fee and that he could have charged more, the MCC requires only payment of the fee specified by the planning director. The local appellant paid the amount specified by the planning director and, therefore, complied with MCC 11.15.8260(C).

This subassignment of error is denied.

D. Oral Comments

Petitioner argues the challenged decision differs from oral comments made by the local decision makers during public hearings. Petitioner also complains that the local appellant's representative corresponded, and had a conversation, with the county planning director during the pendency of the local appeals and that this constitutes an unlawful ex parte contact.

It is well established that this Board reviews the final, written decision of a local government. That the challenged decision differs from the oral comments of individual local decision makers does not provide a basis for reversal or remand of the challenged decision. Derry v.

Douglas County, 26 Or LUBA 25, 29 (1993); Terra v. City of Newport, 24 Or LUBA 438 (1993); Gray v. Clatsop County, 22 Or LUBA 270 (1991).

The challenged decision was adopted by the board of commissioners, not the planning director. Correspondence and conversations between parties to a local land use proceeding and local government staff are not unlawful ex parte contacts.

This subassignment of error is denied.

D. Scope of Local Review

Petitioner next contends that during the appeal proceedings before the hearings officer, the hearings officer erroneously considered issues not raised in the local notice of appeal. These issues are the necessity of a bridge and the effect of Rochlin I. Petitioner objects to the hearings officer's consideration of Rochlin I because it was issued after the local notice of appeal was submitted to the county. Petitioner states MCC 11.15.8295(A) requires the bases for an appeal to be specified in the local notice of appeal.

Intervenor Rochlin, who represented the local appellant Forest Park Neighborhood Association below, argues he raised issues in the local notice of appeal concerning the proposal's compliance with relevant standards and that this adequately raises the necessity of a bridge. Intervenor Rochlin also contends petitioner's legal counsel conceded

the hearings officer proceedings were de novo and that the hearings officer could consider new issues.

The hearings officer proceedings were the first time a public evidentiary hearing was conducted on the disputed application. The proceedings were de novo. During the hearings officer's proceedings, our decision in Rochlin I was issued, and invalidated the earlier county decision which removed the requirement for a bridge crossing. Under these circumstances, the local appellant was entitled to raise any relevant issue. However, even if we were to assume the issues before the hearings officer were limited to those identified in the local notice of appeal, we agree with intervenor Rochlin that the issue of the necessity of a bridge crossing was adequately raised by the broadly worded local notice of appeal.

Regarding the hearings officer's authority to consider our decision in Rochlin I, we believe the local notice of appeal was broadly enough worded to raise an issue concerning the proposal's compliance with applicable law, including applicable law established by LUBA decisions directly affecting the property at issue. Therefore, that the hearings officer considered our decision in Rochlin I provides no basis for reversal or remand of the challenged decision.

This subassignment of error is denied.

F. Testimony Regarding SEC and HD Permits

Petitioner contends the hearings officer erred by considering testimony regarding the SEC and HD permits.

We do not understand how the hearings officer's consideration of this testimony could provide a basis for reversal or remand of the challenged design review decision. Allowing testimony, even arguably irrelevant testimony, at least in the circumstances presented here, is not an error that could result in reversal or remand of the challenged design review decision. Finally, if it is error, it is a procedural one. Petitioner has not established how the alleged procedural error prejudiced his substantial rights, and we do not see that it did. ORS 197.835(7)(a)(B).

This subassignment of error is denied.

G. Burden of Proof

Petitioner, the applicant below, contends the county erred by placing the burden of establishing compliance with relevant standards on him. Petitioner contends the local appellant, not the applicant, has the burden of establishing the planning director's decision is erroneous.

Petitioner is wrong. The applicant has the burden of establishing that his proposal satisfies relevant approval standards. Forest Park Estate v. Multnomah County, 20 Or LUBA 319 (1990). The planning director's decision was made without the benefit of a public hearing. As we state above, by statute the county is required either to conduct a public

hearing on petitioner's application or to provide an opportunity for interested persons to obtain a public hearing through an appeal. A hearing was conducted by the county hearings officer. It would turn planning on its head to say that during the proceedings before the hearings officer, the person requesting the initial public hearing was required to prove the proposal does not comply with relevant approval standards. The applicant had the burden of establishing his proposal satisfies relevant approval standards.

This subassignment of error is denied.

H. ORS 215.428(3)

ORS 215.428(3) requires that approval or denial of a permit application be based on standards and criteria applicable at the time the application is first submitted to the county. Petitioner argues Rochlin I was not an applicable standard at the time the application for design review was submitted to the county and, therefore, the county erred by applying Rochlin I to his design review application. According to petitioner, the county should have applied only the modified HD permit in considering his application for design review.

At the time petitioner's application was submitted to the county, a county decision modifying the HD permit to allow a culvert and fill crossing over Balch Creek was in effect, but was under review by this Board. In Rochlin I,

we reversed the county decision modifying the HD permit and declaring the SEC permit unnecessary. In reversing the county's decision, this Board restored the unmodified HD permit and SEC permit. This is not a change in applicable standards or criteria in the county code, subject to the prohibition of ORS 215.428(3). Rather, Rochlin I simply changed the effective version of the related HD permit to be considered during design review. The hearings officer did not err in considering Rochlin I.

This subassignment of error is denied.

Petitioner McKenzie's second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR (MCKENZIE)

Petitioner argues the county should not have required a bridge to access the proposed dwelling. As we understand it, petitioner argues Rochlin I is wrongly interpreted to restore the original SEC and HD permits.[7]

The effect of Rochlin I is to restore the original HD and SEC permits requiring the construction of a bridge over Balch Creek. The county correctly interpreted the effect of Rochlin I. We may not second guess the county's determination regarding whether a bridge is a good idea and

[7]Petitioner also argues that if it is properly interpreted in this way, Rochlin I is wrongly decided. Petitioner also contends his property is not located within an SEC overlay zone. However, we state above we do not consider in this appeal proceeding arguments that the subject land is not located within an SEC zone or arguments concerning the validity of Rochlin I.

do not consider petitioner's arguments that requiring a bridge is unwise. These assignments of error provide no basis for reversal or remand of the challenged decision.

Petitioner McKenzie's third and fourth assignments of error are denied.

FIRST ASSIGNMENT OF ERROR (ROCHLIN)

Petitioner contends neither the challenged decision nor the record identifies the approved design review plan. Petitioner contends it is extremely difficult to determine whether the challenged decision is consistent with applicable standards where the approved design review plan is not available.

The decision does not identify the approved design review plan. The record contains a one-page document labeled "Revised Site Plan." Record 274. However, intervenor McKenzie states this document is not the approved design review plan. Respondents cite numerous pages in the record that they contend comprise the design review plan. However, these documents are fractured and provide little or no insight into what the county approved as the design review plan. We cannot tell what the county approved when it granted design review approval. If the county grants design review approval on remand, the county should identify the design review plan that it is approving.

Petitioner Rochlin's first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR (ROCHLIN)

Petitioner contends the challenged design review decision lacks evidentiary support.

We determine under petitioner Rochlin's first assignment of error that we are unable to determine what constitutes the approved design review plan. The challenged decision relies upon the design review plan for evidentiary support. Record 49. Therefore, we cannot review the evidentiary support for the challenged decision. No purpose is served in reviewing this assignment of error further.

Petitioner Rochlin's second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR (ROCHLIN)

Petitioner contends the approved design review plan does not comply with the conditional use, HD and SEC permits for the proposed use because it does not provide for a bridge. Petitioner notes the challenged decision includes the following condition of approval:

> "The applicant shall amend the Final Design Review Plan * * * to include a bridge for the driveway crossing over the Thompson Fork of Balch Creek. Construction plans and grading design for the bridge shall be consistent with related [HD and SEC permits]. The amended Final Design Review Plan required herein shall be reviewed by the Planning Director pursuant to [MCC] 11.15.7840 [to MCC 11.15].7845. Public notice of the Planning Director's decision on the amended plan shall be provided to the parties with an opportunity for a public hearing as provided in ORS 215.416(11)." Record 40.

Petitioner argues the above condition constitutes an "unlawful remand in the county decision." Petition for Review 14.

We see nothing improper in the county requiring the applicant to amend his design review plan to show a creek crossing by a bridge. It is apparent the county believes that doing so will bring the design review plan into conformity with the requirements of the previously issued HD and SEC permits. Further, under the condition imposed, the planning director will review the amended design review plan and, specifically, will review the bridge proposed by the amended plan. Members of the public will be provided with notice of the planning director's decision on the amended design review plan and will be provided an opportunity for appeal. The county did not err by utilizing this procedure.

Petitioner Rochlin's third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (ROCHLIN)

The challenged decision determines the previously approved conditional use permit for a nonforest dwelling has not expired. Petitioner argues the challenged decision misconstrues certain MCC provisions, particularly MCC 11.15.7110(C), governing expiration of conditional use permits.

MCC 11.15.7110(C) provides, in relevant part:

> "[T]he approval of a Conditional Use shall expire two years from the date of issuance of the Board

[of Commissioners'] Order in the matter, or two years from the date of final resolution of subsequent appeals, unless:

"* * * * *

"(3) The Planning Director determines that substantial construction has taken place. That determination shall be processed as follows:

"(a) [The a]pplication shall be * * * filed with the [Planning] Director at least 30 days prior to the expiration date.

"* * * * *" (Emphasis supplied).

Petitioner contends the minutes of the board of commissioners' April 23, 1991 meeting indicate the board of commissioners accepted and implemented the planning commission's decision to approve the subject conditional use permit by "Board Order" on that date. Record 312. Therefore, according to petitioner, under MCC 11.15.7110(C) the subject conditional use permit expired on April 23, 1993, unless intervenor McKenzie filed an application for a determination that substantial construction had taken place at least 30 days prior to that date, i.e. no later than March 24, 1993. Because intervenor McKenzie's application was filed on March 26, 1993, petitioner contends it was untimely and, therefore, the conditional use permit expired.

The challenged decision contains the following interpretation of MCC 11.15.7110(C):

"There is a dispute about how to construe MCC [11.15].7110(C) * * *. The dispute follows from the fact that the Board of Commissioners did

not issue a 'Board Order' [on the conditional use permit]. Therefore, there is no date of issuance of such an order from which to measure the expiration of the permit. The [Board of Commissioners] does not issue a written order when acknowledging a [planning commission] decision that has not been appealed. Therefore, the use of the term 'Board Order' in MCC [11.15].7110(C) * * * is ambiguous and must be construed. * * *

"* * * * *

"[T]he term 'Board Order' should be construed to mean 'the final order of the most superior county approval authority to address the merits of a proposed conditional use permit.' This best reflects the legislative intent that a [conditional use] permit expire two years after it is approved. It is not approved until the county issues a final order. The most superior county approval authority to issue a final order [on the disputed conditional use permit] was the planning commission. [Its] decision was final [ten] days after submitted to the Clerk [of the Board of Commissioners].[8]

"Given the ambiguity regarding the term 'submittal' [in MCC 11.15.8260(A)], the Hearings Officer finds that it should be construed to mean 'received,' because:

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[8]MCC 11.15.8260(A) provides:

"Decisions of the Planning Commission or the Hearings Officer shall be final at the close of business on the tenth day following submittal of the written decision to the Clerk of the Board under MCC [11.15].8255 unless:

"(1) A Notice of Review from a party is received by the Planning Director within ten days after the decision has been submitted to the Clerk of the Board [of Commissioners] under MCC [11.15].8255; or

"(2) The Board [of Commissioners], on its own motion, orders review under MCC [11.15].8265."

"a. The [MCC] does not expressly provide that mailing is sufficient for submittal in this context, as it does in other instances where that is the case.

"b. [T]he purpose for providing a [ten]-day period between the date the decision is submitted and the date it becomes final is to ensure that all interested persons have an adequate opportunity to receive and review the decision and to determine whether to file a Notice of Appeal, and to ensure that the [Board of Commissioners has] ample time to determine whether to file a Board Order for Review. Until the Clerk actually receives the decision, the Clerk cannot distribute it. Therefore, the [ten] day time period should not begin to run until the Clerk actually receives the decision.

"The Hearings Officer finds the oral [Board of Commissioners] acknowledgment on April 23[, 1991] is not a Board Order, because it was not memorialized in any written form. All contested case decisions are required to be in writing and signed by the approval authority to * * * facilitate judicial review. Nowhere does [the MCC] provide for a decision to be made without a written decision containing findings and conclusions. In the absence of a written decision or an appeal of that decision by a party or [Board of Commissioners] member, the reporting of a decision to the [Board of Commissioners] is just that -- a report and acknowledgment of that report. It does not affect the permit decision. [Board of Commissioners] acknowledgment of an unappealed [planning commission] decision is not required by MCC [11.15].8255,[9] nor given any

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[9]MCC 11.15.8255 provides:

"The written decision of the Planning Commission * * * shall be submitted to the Clerk of the Board [of Commissioners] by the Planning Director not later than ten days after the decision is announced. The Clerk shall summarize each decision on the

> weight or meaning by another provision of [the MCC]." (Emphasis in original.) Record 55-56.

Under this interpretation, the planning commission decision approving the conditional use permit became final on April 26, 1992, ten days after it was received by the Clerk. Further, the applicant's request for a determination of substantial construction was timely filed on March 26, 1993, 31 days before the two year period expired on April 26, 1993. Therefore, under MCC 11.15.7110(C)(3)(a), the conditional use permit has not expired if the planning director determines substantial construction occurred.[10]

We are required to defer to a local government's interpretation of its own code unless the interpretation is contrary to the express words, purpose or policy of the enactment. ORS 197.829. In other words, we must determine the local government's interpretation is "clearly wrong" to justify reversal or remand of a challenged decision. West v. Clackamas County, 116 Or App 89, 94, 840 P2d 1354 (1992). We cannot say the challenged county interpretation is clearly wrong.

Petitioner Rochlin's fourth assignment of error is denied.

> agenda for the next Board [of Commissioners] meeting on planning and zoning matters * * *." (Emphasis supplied.)

[10]The substance of the planning director's determination is challenged in petitioner Rochlin's fifth and sixth assignments of error.

FIFTH ASSIGNMENT OF ERROR (ROCHLIN)

MCC 11.15.7110(C)(3)(b) provides:

> "[The Planning Director's] decision [that substantial construction occurred] shall be based on findings that:
>
> "(i) Final Design Review approval has been granted under MCC [11.15.]7845 on the total project[.]
>
> "* * * * *"

Petitioner argues a determination that substantial construction occurred cannot be made (1) before final design review approval is obtained, and (2) where the design review plan is submitted after the two-year period allowed by MCC 11.15.7110(C) has expired. Petitioner states final design review approval has not been obtained for the proposal. Petitioner maintains this is clear from the following statement in the challenged decision:

> "The design review decision is inconsistent with the permits reinstated by [Rochlin I] because it does not provide for a bridge to cross the creek. A condition of approval is warranted requiring the design review plan to be amended to be consistent with those permits * * * before the design review plan is approved in final form, to conform the design review plan to the now-applicable [SEC and HD] permits. * * *" Record 54.

According to petitioner, the absence of final design review approval means a determination that substantial construction occurred may not lawfully be made. Petitioner also argues that the applicant failed to submit a design review plan for review prior to the expiration of the two-year period established under MCC 11.15.7110(C) and that the

determination of substantial construction cannot be based on approval of a design review plan submitted after that date.[11]

As stated above, this Board is required to defer to a local government's interpretation of its own code so long as the interpretation is not contrary to the words, purpose or policy of the enactment. The county's only interpretation of MCC 11.15.7110(C)(3)(b)(i) is the following:

> "[F]inal design review approval was granted under MCC [11.15].7845 on the total project as it existed and was approved at that time. [Rochlin I] has since effectively reinstated the decisions [on the SEC and HD permits]. Therefore, the design review plan is no longer consistent with the applicable permits * * *. However, when the planning director made the determination [granting design review approval], there was a final design review plan that complied with applicable permits and standards. That is the appropriate reference time for compliance with MCC [11.15].7110(C)(3)(b)(i), because that is when the decision being appealed was made. [Rochlin I] should not void the design review decision for purposes of compliance with MCC [11.15].7110(C)(3)(b)(i), because it is not clearly required by the [MCC], and it would conflict with the purpose of MCC [11.15].7110(C)(3) generally." (Emphases supplied.) Record 57.

As we understand it, the above interpretation simply states the "final design review approval" required under MCC 11.15.7110(C)(3)(b)(i) is granted where the planning

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[11]Petitioner notes that even if the "Revised Site Plan," discussed infra, is ultimately determined to be the design review plan, it was not received by the county until May 5, 1993.

director issues a determination granting design review approval, regardless of whether the planning director's decision is appealed. This is contrary to MCC [11.15].7110(C)(3)(b)(i), which requires final design review approval. At a minimum, no final design review approval can be granted until the local design review process is complete. That no final design review approval was granted here is clear from the fact that the planning director's decision was appealed. As we explain above, under ORS 215.416(3) and (11), the planning director's design review approval decision could not mature into a final design review approval decision if a local appeal was filed. For the county to interpret MCC 11.15.7110(C)(3)(b)(i) to mean a final design review decision was made by the planning director, for purposes of adopting a "substantial construction" determination, would make the public hearing on appeal of the planning director's design review decision required by ORS 215.416(3) and (11) meaningless. Because the county's interpretation is inconsistent with ORS 215.416(3) and (11), we may not defer to it. See Forster v. Polk County, supra. On remand, the county must interpret MCC 11.15.7110(C)(3)(b)(i) in a manner that is consistent with ORS 215.416(3) and (11) and must address the two relevant interpretational issues raised by petitioner under this assignment of error.

Petitioner Rochlin's fifth assignment of error is

sustained.

SIXTH ASSIGNMENT OF ERROR (ROCHLIN)

MCC 11.15.7110(C)(3)(b)(ii) provides:

> "At least ten percent of the dollar cost of the total project value has been expended for construction or development authorized under a sanitation, building or other development permit. Project value shall be as determined by MCC [11.15].9025(A) or [11.15].9027(A)."

MCC 11.15.7815 states:

> "No building, grading, parking, land use, sign or other required permit shall be issued for a use subject to this section, nor shall such a use be commenced, enlarged, altered or changed until a final design review plan is approved by the Planning Director, under this Ordinance."

A. Expenditures

Petitioner argues the county erroneously counted toward the ten percent of project cost required by MCC 11.15.7110(C)(3)(b)(ii), expenditures that were incurred before a final design review plan was approved by the planning director. Petitioner argues the county may not include any expenses incurred before final design review approval is given. According to petitioner, this is because under MCC 11.15.7815, the county is prohibited from issuing any permits until design review approval is obtained. However, except as explained below regarding the culvert and fill creek crossing, petitioner does not dispute the county issued permits authorizing the construction for which expenditures are included in the county's determination of

substantial construction.

The challenged decision determines:

> "(i) * * * MCC [11.15].7110(C)(3)(b)(ii) and MCC [11.15].7815 conflict. The former anticipates that certain development can occur before a final design review plan is approved. The latter does not. Therefore, the hearings officer must construe them.
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> "(ii) * * * MCC [11.15].7110(C)(3)(b)(ii) is the more specific provision as it relates to the issue at hand. The cost of development consistent with that section should count toward the ten percent figure notwithstanding such development might not be permitted under MCC [11.15].7815 until a final design review plan is approved. The hearings officer finds such a result is more consistent with the scheme in MCC [11.15].7110(C) and recognizes that [the SEC, HD and sanitation permits] have authorized development on the site notwithstanding the lack of design review approval." Record 59.

We agree with the county. MCC 11.15.7110(C)(3)(b)(ii) authorizes the inclusion of expenditures in the ten percent calculus that are authorized under a permit. SEC, HD and sanitation permits are in effect, and were in effect at the time the disputed expenditures were made, notwithstanding the absence of final design review approval.[12] Under MCC 11.15.7110(C)(3)(b)(ii), expenditures authorized by a permit may be counted.

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[12]Noncompliance with MCC 11.15.7815 may provide a basis for challenging the issuance of such permits before a final design review plan is approved. However, in this case, no such challenges were made when the permits in question were issued.

However, petitioner is correct that at the time the applicant incurred the expenditures related to the culvert and fill crossing over Balch Creek, no permit had been issued authorizing construction of a culvert and fill crossing rather than a bridge. Therefore, the county erred by counting the culvert and fill related expenditures in the ten percent calculus.[13] Because the county erroneously included the culvert and fill expenditures, on remand the county must reevaluate whether ten percent of the total project value has been expended in the absence of those expenditures.

Petitioner also argues the costs associated with a survey should not be included in the ten percent calculus. However, petitioner's arguments related to the survey are based on petitioner's vested rights theory, not on MCC 11.15.7110(C)(3)(b)(ii). Therefore, petitioner furnishes no basis upon which we may require the county to exclude the applicant's survey expenditures.

This subassignment of error is sustained, in part.

B. Total Project Value

Petitioner contends the county failed to include certain costs in its calculation of the total project value. These costs include the costs of: a foundation, outdoor lighting, plumbing, well pump, water pressure tank, heating

[13]However, the county may count any expenditures made toward construction of the bridge authorized under the HD and SEC permits.

system, landscaping and a screened recreation area. Neither the challenged decision nor respondents in their briefs explain why these costs should not be included. Petitioner has raised a relevant issue concerning the total project value. On remand, the county must either explain why it believes the costs identified by petitioner should not be included in total project value, or include those costs in the total project value. See Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979).

In addition, petitioner also contends the values listed for certain items included in the total project value calculation are not supported by substantial evidence. We address one of petitioner's contentions in this regard. The challenged decision states:

> "* * * There is not substantial evidence in the record about the cost of [the garage, the well, utilities, building site preparation, and the driveway from the home to the road], but reasonable estimates of expenses can be drawn from the proposal. The hearings officer estimates the garage would cost about $20,000 (864 square feet x $25/sq. ft); the well would cost not more than $4,000; and utility, site preparation and road work would cost not more than $10,000, bringing the total project cost to about $100,000." Record 58.

Petitioner contends there must be, but is not, evidence in the record concerning the total project value, and that it is inadequate for the hearings officer simply to guess at these aspects of the total project value in the challenged decision. We agree with petitioner.

This subassignment of error is sustained.

Petitioner Rochlin's sixth assignment of error is sustained, in part.[14]

The county's decision is remanded.

[14]In his response brief, intervenor McKenzie attempts to assign error regarding the manner in which the county calculated expenditures and total project value. However, intervenor did not raise these issues in his petition for review or file a cross-petition for review. He may not challenge the county's decision in his response brief. Consequently, we do not consider his arguments in this regard.