

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

3
4 J. ROBERT BREIVOGEL, PATRICIA)
5 KLIEWER, SUSANNA L. STEPHENSON,)
6 MICHAEL STEPHENSON, JERRY L. ROSS,)
7 TERESA ROSS, M. LIANNE McNEIL,)
8 PATRICIA McINTYRE, and)
9 CLARK KING,)

10)
11 Petitioners,)
12)

13 vs.)

LUBA No. 91-146

14)
15 WASHINGTON COUNTY,)
16)

FINAL OPINION
AND ORDER

17 Respondent,)
18)

19 and)
20)

21 KITE/CUPP LEGEND GOLF DEVELOPMENT)
22 COMPANY,)
23)

24 Intervenor-Respondent.)
25
26

27 Appeal from Washington County.
28

29 Maria Hall, Portland, filed the petition for review and
30 argued on behalf of petitioners.
31

32 David C. Noren, Hillsboro, filed a response brief and
33 argued on behalf of respondent.
34

35 Gregory S. Hathaway and Virginia L. Gustafson,
36 Portland, filed a response brief on behalf of intervenor-
37 respondent. With them on the brief was Garvey, Schubert &
38 Barer. Gregory S. Hathaway argued on behalf of intervenor-
39 respondent.
40

41 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
42 Referee, participated in the decision.
43

44 REVERSED

04/13/92

1 You are entitled to judicial review of this Order.
2 Judicial review is governed by the provisions of ORS
3 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county planning director decision
4 rejecting their appeal of a hearings officer decision
5 approving a conditional use permit for a golf course.

6 **MOTION TO INTERVENE**

7 Kite/Cupp Legend Golf Development Company moves to
8 intervene on the side of the respondent in this appeal
9 proceeding. There is no objection to the motion, and it is
10 allowed.

11 **FACTS**

12 Intervenor-respondent (intervenor), the applicant
13 below, submitted an application for approval of a golf
14 course on a 345 acre parcel zoned Exclusive Farm Use (EFU)
15 and Agriculture and Forest (AF-5).

16 On June 7, 1991, the hearings officer approved the
17 application. Petitioners appealed that decision to the
18 board of commissioners and also requested that the hearings
19 officer reconsider his June 7, 1991 decision. The hearings
20 officer granted petitioners' request for reconsideration.
21 On August 8, 1991, after reconsideration proceedings, the
22 hearings officer again approved the application.

23 On August 29, 1991, petitioners appealed the hearings
24 officer's August 8, 1991 decision to the board of
25 commissioners, by filing a petition for review which
26 included the requisite filing fee, paid by petitioner

1 Breivogel's personal check. The personal check had
2 previously been submitted to the county, and a photocopy of
3 it was attached to the petition for review. While the text
4 portion of the petition for review was unsigned, it
5 identified the "petitioners" as "Joseph Robert Breivogel
6 * * * Mr. Breivogel is the Petitioners' group
7 representative." Record 3.

8 On September 13, 1991, the planning director issued the
9 following letter decision rejecting petitioners' appeal on
10 the basis that the petition for review was not signed:

11 "This department is in receipt of your petition
12 for review appealing the Hearing's Officer's
13 decision * * * to the Board of County
14 Commissioners. County Counsel's office, after
15 reviewing the petition, has determined that the
16 petition is deficient * * *. Because the petition
17 does not comply with the Community Development
18 Code's jurisdictional requirement, the petition
19 for review may not be submitted to the Board [of
20 County Commissioners]. As such, the appeal is
21 negated and the Hearings Officer's decision
22 stands. A refund of the appeal fee is already
23 being processed and should reach you within two
24 weeks. * * *" Record 1.

25 This appeal followed.

26 **JURISDICTION**

27 This Board has jurisdiction to review "land use
28 decisions" as defined in ORS 197.015(10). ORS 197.825(1).
29 Intervenor challenges this Board's jurisdiction to review
30 the appealed decision based on ORS 197.015(10)(B)(b)(A),
31 which provides that the term "land use decision":

32 "(b) Does not include a decision of a local

1 government:

2 "(A) Which is made under land use standards
3 which do not require interpretation or
4 the exercise of factual, policy or legal
5 judgment[.]

6 "* * * * *"

7 Intervenor contends the challenged decision that the local
8 petition for review was unsigned does not require
9 interpretation or the exercise of factual, legal or policy
10 judgment.

11 As explained below, under the applicable code
12 specifications for a local "petition for review," whether a
13 petition for review meets requisites set out in the
14 Washington County Community Development Code (CDC) is not a
15 straightforward matter. Specifically, whether a local
16 "petition for review" meets the jurisdictional signature
17 requirement requires interpretation and the exercise of
18 factual judgment. Therefore, we have jurisdiction to review
19 the challenged decision.¹

¹There is no question that a county final decision approving or denying an application for a golf course in the EFU and AF-5 zones would be a "land use decision" which this Board has jurisdiction to review. If the county's decision rejecting petitioner's local petition for review is correct, the legal effect of that decision is that the hearings officer's decision is the county's final land use decision on the subject application. Additionally, and again assuming the county correctly refused to accept petitioners' local petition for review, the hearings officer's decision could not be appealed to this Board by petitioners, because they would have failed to exhaust an available local administrative remedy. ORS 197.825(2)(a). Because we conclude the county's decision not to accept petitioners' local petition for review involved discretion, we need not determine whether under ORS 197.015(10)(b)(A) we would have jurisdiction over such a decision rejecting a local appeal of a land use decision, even

1 **THIRD ASSIGNMENT OF ERROR**

2 "Even if the CDC required a new appeal [to the
3 board of commissioners of] the [hearings
4 officer's] modification of the original decision,
5 the director erroneously concluded that the appeal
6 was unsigned."

7 CDC 209-1 requires an appeal of a hearings officer's
8 decision to be filed within 14 days "after written notice of
9 the decision is provided to the parties * * *." CDC 209-3
10 provides as follows:

11 "A petition for review shall contain the
12 following:

13 "[1] The name of the applicant and the County case
14 file number;

15 "[2] The name of the petitioner and statement of
16 the interest of the petitioner to determine
17 party status.

18 "If a group consisting of more than one
19 person is filing a single petition for
20 review, one individual shall be
21 designated as the group's representative
22 for all contact with the Department.
23 All Department communications regarding
24 the petition, including correspondence,
25 shall be with this representative;

26 "[3] The date that notice of the decision was sent
27 as specified in the notice;

28 "[4] The nature of the decision and the specific
29 grounds for appeal. Unless otherwise
30 directed by the appellate authority, the
31 appeal of [certain] decisions shall be
32 limited to the issue(s) raised in the

if the decision rejecting the local appeal were made under standards which do not "require interpretation or the exercise of factual, policy or legal judgment."

1 petition;

2 "[5] The appeal fee set by Resolution and Order of
3 the Board;

4 "[6] In appeals to the Board, a request for a
5 partial or full de novo hearing as provided
6 in Section 209-5.4, if desired;

7 "[7] Failure to file a signed original petition
8 with the [planning department] by 5:00 p.m.
9 on the due date, with the proper fee, shall
10 be a jurisdictional defect. Failure to amend
11 a petition to correct any other identified
12 deficiency within seven (7) calendar days of
13 notice thereof shall be a jurisdictional
14 defect." (Emphasis supplied.)

15 The county interpreted CDC 209-3.7 to require that a
16 signature appear in the portion of the text of the local
17 petition for review containing the grounds for appeal.
18 While some deference is due a local government's
19 interpretation of its own ordinances, it is ultimately this
20 Board's responsibility to determine the correct
21 interpretation of disputed code provisions. McCoy v. Linn
22 County, 90 Or App 271, 275-76, 752 P2d 323 (1988).

23 At best, CDC 209-3.7 provides a jurisdictional
24 requirement that some portion of the petition for review be
25 signed. CDC 209-3.5 states the contents of the petition for
26 review include the appeal fee. Petitioner Breivogel's
27 signed check was submitted to pay the appeal fee. If the
28 county, in addition to making the required signature a
29 jurisdictional requirement, wishes to make inclusion of the
30 required signature in a particular part of the petition for

1 review a jurisdictional requirement, it must explicitly
2 state that requirement in the CDC. See Simonson v. Marion
3 County, ___ Or LUBA ____ (LUBA No. 90-171, June 21, 1991),
4 slip op 6; Rustrum v. Clackamas County, 16 Or LUBA 369, 372
5 (1989).

6 Where, as here, the required appeal fee is paid by the
7 personal check of one of the local appellants, and that
8 check is signed by such local appellant, we conclude the
9 petition for review is "signed" within the meaning of
10 CDC 209-3.7. Consequently, the county erred in dismissing
11 the local appeal on the basis of CDC 209-3.7, as a matter of
12 law.

13 The third assignment of error is sustained.

14 The county's decision is reversed.