

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

4 DOUGLAS TIPTON, DENNIS BORK,)
5 RUTH BORK, CECI MOODY, and)
6 RONALD MOODY,)
7)
8 Petitioners,)
9)
10 vs.)
11)
12 COOS COUNTY,)
13)
14 Respondent.)

LUBA No. 95-035

FINAL OPINION
AND ORDER

15
16
17 Appeal from Coos County.

18
19 Douglas Tipton, Dennis Bork, Ruth Bork, Ronald Moody,
20 and Ceci Moody, Bandon, filed the petition for review.
21 Douglas Tipton, Ceci Moody and Dennis Bork argued on their
22 own behalf.

23
24 David R. Ris, County Counsel, Coquille, filed the
25 response brief and argued on behalf of respondent.

26
27 GUSTAFSON, Referee; LIVINGSTON, Referee, participated
28 in the decision.

29
30 AFFIRMED 07/27/95

31
32 You are entitled to judicial review of this Order.
33 Judicial review is governed by the provisions of ORS
34 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision dismissing their
4 local appeal of a planning commission decision for failure
5 to satisfy a jurisdictional filing requirement.

6 **FACTS**

7 Petitioners oppose a county planning commission
8 decision allowing a sawmill as a cottage industry.
9 Petitioners participated in the proceedings before the
10 planning commission and appealed the planning commission
11 approval to the county board of commissioners. In their
12 notice of intent to appeal, petitioners stated, as the basis
13 of their standing to appeal, "Ron Moody, Ceci Moody, Dennis
14 Bork, Ruth Bork are applicants."

15 The board of commissioners dismissed petitioners'
16 appeal for failure to satisfy the county's jurisdictional
17 requirement that the notice of intent to appeal specify the
18 basis of petitioners' standing.

19 This appeal followed.

20 **FIRST ASSIGNMENT OF ERROR**

21 Petitioners contend the county erred by dismissing
22 their appeal for lack of standing. Petitioners argue they
23 had standing to appeal under Coos County Zoning and Land
24 Development Ordinance (CCZO) 5.8.100, regardless of the
25 language in their notice of appeal, because they appeared
26 before the hearings body, were entitled to notice and a

1 hearing, had interests adversely affected and were aggrieved
2 by the planning commission decision.¹ They further argue
3 the members of the board of commissioners know petitioners,
4 and are fully aware of their standing and opposition to the
5 proposed use. Petitioners contend the mistake in their
6 notice of intent to appeal, wherein they state they are
7 "applicants" rather than "appellants," is "harmless error"
8 which the county should excuse. Petition for Review 14.

9 The county responds that petitioners have
10 mischaracterized the basis upon which the county dismissed
11 their appeal. The county does not dispute petitioners'
12 standing to appeal the planning commission decision.
13 Rather, the county dismissed the appeal because petitioners'
14 notice of intent to appeal does not satisfy the
15 jurisdictional filing requirement that the notice of intent
16 to appeal specify the basis for petitioners' standing.

17 CCZO 5.8.100(2) states:

¹CCZO 5.8.100 states,

"the hearings body must determine the petitioner's standing to appeal and adequacy of intent to appeal notice. Their determination shall be based on:

- "a. Was the petitioner entitled as of right to notice of the decision pursuant to Section 5.7.100 of this ordinance; or
- "b. Was the petitioner's interest adversely affected or was the petitioner aggrieved by the decision; and
- "c. Did the petitioner file a 'notice of intent to appeal' pursuant to Section 5.8.200 of this Ordinance."

1 "In the event the Board of Commissioners or
2 Hearings Body finds that the 'notice of intent to
3 appeal' does not comply with Section 5.8.200 of
4 this Ordinance, or if the petitioner is determined
5 to lack standing, then the Hearings Body shall
6 summarily dismiss the appeal." (Emphasis added.)

7 CCZO 5.8.200 states:

8 "The notice of intent to appeal must clearly and
9 specifically state:

10 "a. how the Planning Director erred in his
11 decision, or how the Hearings Body erred in
12 its decision; and

13 "b. the issues the petitioner seeks to have
14 reviewed; and

15 "c. the facts establishing that the petitioner
16 has standing, pursuant to this Article."

17 The board of commissioners determined petitioners did
18 not satisfy CCZO 5.8.200 because:

19 "The notice of intent to appeal did not state
20 facts establishing that the petitioner has
21 standing for the following reasons:

22 "a. The notice of intent to appeal stated that
23 the petitioner was the applicant. The record
24 shows that the applicant was * * * an agent
25 of the property owner. The petitioner was
26 not the applicant.

27 "b. The notice of intent to appeal stated no
28 additional facts to establish that the
29 petitioner had standing." Record, Volume II,
30 11.

31 Where a local government's filing requirements are
32 jurisdictional, we may not disregard them. Breivogel v.
33 Washington County, 24 Or LUBA 63, aff'd 117 Or App 195, 843
34 P2d 982 (1992). In Breivogel, petitioners did not sign

1 their appeal document. Washington County's code specified
2 that filing a signed appeal document was a jurisdictional
3 requirement. Even though we found petitioners had satisfied
4 the "spirit" of the filing requirements, we were required to
5 affirm the county's dismissal for failure to satisfy the
6 mandatory filing requirements.² Id. at 68. See also McKay
7 Creek Valley Assoc. v. Washington County, 16 Or LUBA 690,
8 693 (1988); Colwell v. Washington County, 79 Or App 82, 718
9 P2d 747, Rev Den 301 Or 338 (1986).

10 As in Breivogel, petitioners here satisfied the
11 "spirit," but not the letter, of a jurisdictional filing
12 requirement. CCZO 5.8.100(2) mandates that an appeal be
13 dismissed if the requirements of CCZO 5.8.200 are not
14 satisfied. The county was not at liberty to take notice of
15 petitioners' standing, or to excuse petitioners' failure to
16 satisfy an appeal filing requirement as "harmless error."
17 The county was mandated to dismiss the appeal³.

²In Breivogel, we initially excused petitioners' failure to sign their appeal document because they had signed the filing fee check, a copy of which accompanied the appeal. We determined the signature on the check was sufficient to satisfy the mandatory signature requirement. Breivogel v. Washington County, 23 Or LUBA 143 (1992). On appeal, the Court of Appeals reversed our determination, finding that the signature requirement related to the document itself, and could not be satisfied by a signature on the copy of a check. Breivogel v. Washington County, 114 Or 55, 834 P2d 473 (1992).

³The deficiency in petitioners' notice of intent to appeal is not simply mistaking the word "applicant" for "appellant." Even if petitioners had accurately referred to themselves as appellants, the document does not include any facts establishing they appeared below, were entitled to notice and hearing, and were adversely affected or aggrieved by the planning commission decision as required by CCZO 5.8.100(1).

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioners assert the county violated their due
4 process rights under the Fourteenth Amendment to the United
5 States Constitution by withholding their filing fee.
6 Petitioners contend the county's failure to return the fee
7 was a taking of their property without due process and was
8 intended to "obstruct their right to appeal." Petition for
9 Review 16.

10 Petitioners do not cite any requirement in the CCZO
11 requiring the county to return the filing fee when the
12 county dismisses an appeal. However, the county did not
13 find petitioners forfeited their filing fee. Rather, it
14 decided to retain the filing fee until it knows whether
15 there will be a hearing on the merits of petitioners' local
16 appeal. The county's order states:

17 "[I]f the appeal is dismissed, the County will not
18 incur all the costs normally associated with an
19 appeal hearing and it would be appropriate to
20 refund the appeal fee. But if the decision to
21 dismiss the appeal is appealed to LUBA and the
22 matter is remanded to the County for action on the
23 merits of the appeal, then the hearings costs
24 would be incurred and the appeal fee should not be
25 refunded." Record, Volume II, 11.

26 The county ordered the appeal fee be refunded to
27 petitioners if either the decision was not appealed to LUBA
28 or LUBA affirmed the county's decision.

29 We find no constitutional violation in the county's
30 handling of the appeal fee.

1 The second assignment of error is denied.

2 The county's decision is affirmed.