

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

3
4 RONALD G. SIMONDS,)
5)
6 Petitioner,)
7) LUBA No. 96-010
8 vs.)
9) FINAL OPINION
10 HOOD RIVER COUNTY,) AND ORDER
11)
12 Respondent.)

13
14
15 Appeal from Hood River County.

16
17 Michael E. Haglund and Michael G. Neff, Portland, filed
18 the petition for review. With them on the brief was Haglund
19 & Kirtley. Michael G. Neff argued on behalf of petitioner.

20
21 Wilford K. Carey, Hood River, filed the response brief
22 and argued on behalf of respondent. With him on the brief
23 was Annala, Carey, VanKoten & Baker.

24
25 HANNA, Referee; GUSTAFSON, Referee, participated in
26 the decision.

27
28 AFFIRMED 06/25/96

29
30 You are entitled to judicial review of this Order.
31 Judicial review is governed by the provisions of ORS
32 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of his request
4 for a nonforest dwelling.

5 **FACTS**

6 Petitioner applied for a conditional use permit to
7 build a dwelling under ORS 215.750. A June 18, 1995, 21-
8 page staff report set forth the criteria applicable to the
9 application, and recommended denial of the application. The
10 planning commission held a hearing on July 26, 1995. At
11 that hearing it took testimony and then continued the
12 hearing until September 13, 1995, so that petitioner would
13 have time to address concerns raised in the staff report.
14 In a letter of August 10, 1995 to petitioner, the planning
15 staff made several inquiries regarding the application to
16 which petitioner was requested to respond. Petitioner
17 responded to that letter on August 29, 1995.

18 At the commencement of the September 13, 1995 planning
19 commission hearing, petitioner was given a supplemental
20 three-page staff memorandum which addressed petitioner's
21 response to the August 10, 1995 letter, and in which the
22 planning staff continued to recommend denial of the
23 application. The planning commission denied petitioner's
24 application on September 28, 1995.

25 Petitioner appealed the planning commission denial to
26 the board of county commissioners (board), objecting to the

1 lack of time he had to prepare to respond to the
2 supplemental staff memorandum¹. On December 4, 1995, the
3 board heard the appeal based on the planning commission
4 record. However, in accordance with its procedures, the
5 board accepted new evidence into the record, including some
6 evidence submitted by petitioner.² On December 27, 1995,
7 the board denied petitioner's appeal.

8 This appeal followed.

9 **ASSIGNMENT OF ERROR**

10 Petitioner argues that the failure of the county
11 planning commission to provide petitioner with the
12 supplemental staff memorandum seven days prior to the
13 continued hearing is a violation of ORS 197.763(4)(b).
14 Petitioner contends that his substantial rights were
15 violated because he did not know what was required of him to
16 meet his burden of proof under the staff memorandum.

17 ORS 197.763 establishes procedures for local government
18 hearings. ORS 197.763(4)(b) states:

19 "Any staff report used at the hearing shall be

¹The record is unclear as to whether petitioner was advised that, under the requirements of ORS 197.763(4)(b), he could request a continuance in response to the updated recommendation. Record 86. However, the record does indicate that, at the beginning of the hearing, petitioner was given an opportunity to request a continuance because only six of the seven planning commission members were present. Record 68.

²The Hood River County Zoning Ordinance Section 61.10.D allows the board of county commissioners to accept new evidence into the record if the board determines that there were "good substantial reasons" that evidence was not presented earlier.

1 available at least seven days prior to the
2 hearing. If additional documents or evidence are
3 provided by any party, the local government may
4 allow a continuance or leave the record open to
5 allow the parties a reasonable opportunity to
6 respond. * * *

7 The requirements of ORS 197.763(4)(b) that a staff
8 report be available seven days prior to a land use hearing
9 is a procedural requirement. Such a procedural error is not
10 a basis for reversal or remand absent a showing that
11 petitioner's substantial rights were prejudiced. ORS
12 197.835(9)(c) and (17); Thomas v. Wasco County, ___ Or LUBA
13 ___ (LUBA No. 95-114, October 31, 1995); Moore v. Clackamas
14 County, 29 Or LUBA 372 (1995); Forest Park Estate v.
15 Multnomah County, 20 Or LUBA 319 (1990). In addition, our
16 review is of the board's decision, and not the decision of
17 the planning commission. To sustain his contention of a
18 procedural violation by the planning commission, petitioner
19 must establish that the board's action on appeal did not
20 correct any error made by the planning commission. See
21 McInnis v. City of Portland, 25 Or LUBA 376, aff'd 123 Or
22 App 123 (1993).

23 Petitioner's objection that he had insufficient time to
24 prepare a response to the staff memorandum is persuasive
25 only if he can demonstrate that based on the staff
26 memorandum, he would have responded differently at the final
27 planning commission hearing. Forest Park Estate v.
28 Multnomah County, supra, 20 Or LUBA at 331. Petitioner

1 contends that because he was not represented by counsel at
2 the final planning commission hearing, he did not understand
3 how to respond to the staff memorandum that indicated that
4 he had not met his burden of proof.

5 The county contends that the staff memorandum "did not
6 vary in substance from Staff's August 10 letter and, in
7 fact, was a recapitulation of what was asked in the August
8 10, 1995 letter." Respondent's Brief 5. Moreover, the
9 county points out that petitioner was allowed to introduce
10 three pieces of new evidence at the board hearing that
11 responded to issues raised in the August 9, 1995 letter, and
12 addressed in the supplemental staff memorandum. Record 18A,
13 18B and 18C/D.

14 Petitioner has not established that the supplemental
15 staff memorandum raised any new issues to which he did not
16 have an opportunity to respond, and which were not corrected
17 on appeal. Accordingly, petitioner has not demonstrated
18 that his substantial rights were prejudiced by the county's
19 failure to provide the supplemental staff memorandum seven
20 days prior to the board hearing.

21 This assignment of error is denied.

22 The county's decision is affirmed.