

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 CLARK KING,)

9)
10 Petitioners,)
11)

12 vs.)

LUBA No. 91-146

13)
14 WASHINGTON COUNTY,)
15)

FINAL OPINION
AND ORDER

16 Respondent,)
17)

18 and)

19)
20 KITE/CUPP LEGEND GOLF DEVELOPMENT)
21 COMPANY,)
22)

23 Intervenor-Respondent.)
24
25

26 On remand from the Court of Appeals.
27

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

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

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

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

43 AFFIRMED

9/21/92

44
45 You are entitled to judicial review of this Order.

1 Judicial review is governed by the provisions of ORS
2 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the county planning
4 director rejecting their local appeal of a decision of the
5 county hearings officer.

6 **FACTS**

7 This decision is before us on remand from the Court of
8 Appeals. Breivogel v. Washington County, 114 Or App 55, ___
9 P2d ____ (1992) (Breivogel II). In Breivogel v. Washington
10 County, ___ Or LUBA ____ (LUBA No. 91-146, April 13, 1992)
11 (Breivogel I), we remanded the planning director's letter
12 decision rejecting petitioners' local appeal of a hearings
13 officer decision approving a conditional use permit for a
14 golf course. In that case, we determined the challenged
15 decision failed to correctly interpret and apply Washington
16 County Community Development Code (CDC) 209-3.7, which
17 requires that a local appeal statement contain the signature
18 of the appellant (signature requirement). We held that the
19 signature requirement was met by the appeal documents filed
20 by the local appellants. The Oregon Court of Appeals
21 disagreed and reversed and remanded our decision. Breivogel
22 II. The Court of Appeals held that the signature
23 requirement was not satisfied, and that we must decide on
24 remand whether the challenged decision is invalid for other

1 reasons set out in the petition for review.¹

2 **INTRODUCTION**

3 To understand petitioners' arguments, it is necessary
4 to understand the factual background of this case. On
5 June 7, 1991, the hearings officer approved intervenor's
6 application for a golf course (June 7, 1991 decision).
7 Petitioners filed a proper, signed appeal of the June 7,
8 1991 decision. However, at the request of intervenor,
9 concerning an issue relating to traffic impacts, the
10 hearings officer agreed to reconsider his decision pursuant
11 to CDC chapter 208.² The hearings officer held an
12 additional hearing and, on August 8, 1991, the hearings
13 officer issued a modified decision approving the golf course
14 (August 8, 1991 decision). On August 15, 1992, the county
15 notified petitioners of the August 8, 1991 decision as
16 follows:

17 "This office is in receipt of your [appeal of the]
18 hearings officer's June 7, 1991 decision to the
19 Board of Commissioners. However, on August 8,
20 1991, the Hearings Officer modified the earlier
21 decision pursuant to [CDC chapter 208]. The
22 modified decision replaces the June 7, 1991
23 decision. Your appeal of the June 7, 1991
24 decision is void because the June 7, 1991 decision
25 has been modified." (Emphasis in original.)
26 Record 76.

¹We did not consider these other reasons in our decision in Breivogel I.

²CDC chapter 208 provides a detailed procedure for the reconsideration of local land use decisions.

1 On August 29, 1991, petitioners attempted to appeal the
2 August 8, 1991 decision within the appeal period provided in
3 CDC 208-6, quoted in full below. Petitioners failed to sign
4 the appeal document, as required by CDC 209-3. Thereafter,
5 the county planning director wrote a letter to petitioners
6 and advised them that the failure to sign the appeal
7 document within the time for filing a local appeal of the
8 August 8, 1991 decision meant their local appeal was
9 "negated." This was the only reason given by the county for
10 refusing to allow petitioners to appeal the August 8, 1991
11 decision. The planning director's letter rejecting
12 petitioners' appeal of the August 8, 1991 decision is the
13 decision appealed to this Board.

14 **FIRST ASSIGNMENT OF ERROR**

15 "The decision to 'negate' petitioners' original
16 appeal incorrectly interpreted the CDC.
17 Petitioners' original appeal is still valid and
18 must be heard by the Board [of Commissioners]."

19 CDC 208-6 provides:

20 "If the motion for reconsideration is denied or
21 the decision is not altered upon reconsideration,
22 any appeal timely filed shall be processed in
23 accordance with [CDC] 209. If the motion is
24 granted and the Review Authority modifies the
25 previous decision, the parties to the initial
26 decision shall be notified within 10 days of the
27 decision and shall have fourteen (14) calendar
28 days from receipt of the notice to appeal the
29 decision as modified." (Emphasis supplied.)

30 Petitioners argue their appeal of the June 7, 1991
31 decision survived the decision on reconsideration, and that

1 nothing in CDC 208-6 authorizes the county to reject their
2 properly filed appeal of the June 7, 1991 decision. In
3 other words, petitioners contend they may appeal the June 7,
4 1991 decision notwithstanding the county's August 8, 1991
5 decision.

6 CDC 208-6 expresses two principles. First, it provides
7 that where a motion for reconsideration is denied or an
8 initial decision is not modified by a reconsidered decision,
9 a timely appeal of the initial county decision will be
10 processed by the county. Neither of these events occurred
11 in this case.³

12 CDC 208-6 also provides that where an initial decision
13 is reconsidered and modified, the parties to the initial
14 decision must be notified and given an opportunity to appeal
15 the reconsidered decision. This is what occurred in this
16 case.

17 CDC 208-6 clearly requires that where a decision
18 maker's initial decision is modified, an appeal of the
19 modified decision is required. An applicant may not simply
20 rely on a previously filed appeal of the initial decision.
21 Therefore, petitioners may not rely on the properly filed
22 appeal challenging the June 7, 1991 decision to challenge
23 the modified August 8, 1991 decision.

24 The first assignment of error is denied.

³There is no dispute in this appeal that the August 8, 1991 decision modifies the June 7, 1991 decision.

1 **SECOND ASSIGNMENT OF ERROR**

2 "Even if the CDC required a new appeal upon
3 modification of the original decision, respondent
4 committed reversible error by accepting an
5 unsigned appeal and failing to inform petitioners
6 of the signature requirement until after the
7 appeal deadline had passed."

8 There is no dispute that a county information sheet
9 provided to the local appellants explains in detail local
10 appeal requirements, but says nothing about the signature
11 requirement which was the basis for the county's rejection
12 of petitioners' local appeal. Further, the information
13 sheet directs local appellants to the planning department
14 for additional information regarding local appeals.
15 Petitioners contend the planning department employee who
16 accepted their appeal said nothing about the necessity of a
17 signature on the appeal document. Petitioners argue that
18 under these circumstances, the county had a duty to advise
19 them, before the local appeal period expired, that their
20 appeal document lacked the required signature.

21 It is unfortunate that the county provided petitioners
22 with a detailed information sheet concerning local appeals
23 which did not indicate the existence of the county's
24 "jurisdictional" requirement that a local appeal document be
25 signed. However, nothing in the CDC, or any statute of
26 which we are aware, creates a "duty" on the part of the
27 county to advise local appellants of local appeal

1 requirements that are stated in the local code itself.⁴ See
2 Kamppi v. City of Salem, 21 Or LUBA 498, 504-05 (1991)
3 (where a local appeal is clearly available under the code,
4 local appellants are not excused from filing a appeal
5 locally on the basis that city employees asserted that no
6 local appeal of the challenged decision is available).
7 Accordingly, the county committed no legal error by failing
8 to advise the local appellants of the signature requirement.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 "Even if the CDC required a new appeal upon
12 modification of the original decision, the
13 director erroneously concluded that the appeal was
14 unsigned."

15 Petitioners argue that even though they did not sign
16 the document appealing the August 8, 1992 decision, the
17 local appellants are identified in that document and the
18 appeal fee was paid. Petitioners contend that under these
19 circumstances they have complied with the spirit of the
20 signature requirement.

21 While we might agree with petitioners that they
22 complied with the spirit of the signature requirement, CDC
23 209-3 requires that an appeal document be signed. Further,
24 CDC 209-3 expresses the signature requirement as

⁴Petitioners did not argue to the Court of Appeals, or to this Board, that the county's signature requirement contravenes state law. Consequently, like the Court of Appeals, we do not decide that question. See Breivogel II, supra, 114 Or App at 58-59.

1 "jurisdictional." We may not disregard such a mandatory
2 requirement. McKay Creek Valley Assoc. v. Washington
3 County, 16 Or LUBA 690, 693 (1988).

4 The third assignment of error is denied.

5 The county's decision is affirmed.