

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

4 KENNETH A. THOMAS,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 WASCO COUNTY,) LUBA No. 95-114
11)
12 Respondent,) FINAL OPINION
13) AND ORDER
14 and)
15)
16 JOSEPH HINES and JODI HINES,)
17)
18 Intervenors-Respondent.)

19
20
21 Appeal from Wasco County.

22
23 Michael J. Lilly, Portland, filed the petition for
24 review and argued on behalf of petitioner. With him on the
25 brief was Lane Powell Spears Lubersky.

26
27 Wilford K. Carey, Hood River, and Bernard L. Smith,
28 County Counsel, The Dalles, filed a response brief. With
29 them on the brief was Annala, Carey & Vankoten. Wilford K.
30 Carey argued on behalf of respondent.

31
32 Michael G. Neff, Portland, filed a response brief and
33 argued on behalf of intervenors-respondent. With him on the
34 brief was Haglund & Kirtley.

35
36 GUSTAFSON, Referee; HANNA, Referee, participated in the
37 decision.

38
39 AFFIRMED 10/31/95
40

41 You are entitled to judicial review of this Order.
42 Judicial review is governed by the provisions of ORS
43 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the County's refusal to consider his
4 appeal of a non-forest dwelling approval.

5 **MOTION TO INTERVENE**

6 Joseph and Jodi Hines, the applicants below, move to
7 intervene on the side of respondent. There is no opposition
8 to the motion, and it is allowed.

9 **FACTS**

10 On September 8, 1994, the county mailed notice of a
11 Type II decision to approve a non-forest dwelling in the F-
12 2(80) Forest zone. In accordance with the county's land
13 development ordinance (WCDO), the notice included a
14 description of the property, the action taken by the county,
15 and a statement of appeal rights. That statement, labeled
16 "APPEAL PROCESS," stated:

17 "The decision of the Director shall be final
18 unless an appeal from an aggrieved party is
19 received by the Director within ten (10) days of
20 the mailing date of this decision or unless the
21 Planning Commission or County Court on its own
22 motion orders review within ten (10) days of the
23 date of decision. Notice of Appeal forms may be
24 obtained at the Wasco County Planning and
25 Development Office." Record 81.

26 The notice, however, did not include the county's findings
27 of fact, as required by WCDO 2.120(b)(2), nor did it include
28 a list of applicable criteria.

29 Because the tenth date after the decision was mailed

1 fell on a Sunday, the ten day appeal period expired on
2 September 19, 1995. No appeals were filed within the appeal
3 period.

4 Petitioner was out of town during the appeal period,
5 and did not pick up his mail, which included the decision
6 notice, until September 19, 1995. On September 22, 1995,
7 petitioner went to the county planning office and requested
8 a right to appeal. The planning office informed him that the
9 appeal period had expired.

10 On October 7, 1994, petitioner filed a notice of intent
11 to appeal with LUBA (LUBA No. 94-185). After the county
12 moved to dismiss the appeal for lack of jurisdiction, the
13 parties stipulated to a stay of that appeal pending
14 petitioner's exhaustion of local remedies.

15 On November 14, 1994, petitioner filed an appeal of the
16 administrative decision with the planning director. On
17 December 14, 1994, the planning office notified petitioner
18 that it was unable to accept an untimely filed appeal. On
19 December 22, 1994 petitioner filed an appeal to the planning
20 commission of the planning director's refusal to accept his
21 appeal. After a hearing on February 13, 1995, the planning
22 commission voted to deny petitioner's appeal. That decision
23 was signed March 6, 1995. On March 10, 1995 petitioner
24 appealed the planning commission's decision to the county
25 court. After a public hearing on May 3, 1995, the county
26 court issued an order on May 17, 1995, affirming the

1 planning commission and planning director, and denying
2 petitioner's request to appeal the September 8, 1994
3 decision.

4 This appeal followed.

5 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

6 Petitioner contends the county erred in denying him the
7 opportunity to appeal the September 8, 1994 decision because
8 the county's notice of the decision was defective in that it
9 failed to include (1) the county's findings of fact and
10 conclusions of law, as required by WCDO 2.120(b)(2); and (2)
11 the applicable approval criteria, as required by ORS
12 197.763(b) and ORS 215.416(11). He argues that the defects
13 prejudiced his substantial rights because they denied him
14 the opportunity to challenge a land use decision to which he
15 objects.

16 The county and intervenors do not dispute that the
17 county's notice was defective, but respond that petitioner
18 has not established that he was prejudiced by the defect.

19 Under ORS 197.835(7)(a)(B), LUBA may reverse or remand
20 a challenged decision because the decision maker failed to
21 follow applicable procedural requirements, including notice
22 requirements, only if that failure prejudices petitioner's
23 substantial rights. See e.g., Moore v. Clackamas County,
24 ___ Or LUBA ___, LUBA No. 94-252 (June 27, 1995). The fact
25 that the violated code requirement is mandatory provides no
26 independent grounds for relief when petitioner does not

1 establish that the violation prejudices his substantial
2 rights. West Amazon Basin Landowners v. Lane County, 24 Or
3 LUBA 508, 512 (1993).

4 Petitioner essentially argues that, because of the
5 defect, his substantial rights were violated because he was
6 deprived of appealing the underlying decision. Petitioner
7 argues that "[a]lthough the notice did state that there was
8 a right to appeal, Thomas could not be expected to make the
9 decision to appeal without being able to determine whether
10 there was a basis for an appeal." Petition for Review 6.
11 Petitioner also argues, in essence, that the seriousness of
12 both the defect and the result evidence the prejudice to
13 petitioner's substantial rights.

14 If the county's procedural error deprived petitioner of
15 the opportunity to participate in the process, his
16 substantial rights would be violated. However, the fact of
17 the procedural error does not, in itself, establish
18 petitioner's right to participate was denied. Petitioner
19 must demonstrate a relationship between the defect and the
20 result in order to establish that the defect prejudiced his
21 substantial rights.

22 The notice petitioner received specifically stated the
23 appeal deadline, and the procedure for filing an appeal. The
24 undisputed facts show that petitioner was out of town during
25 the appeal period, and did not pick up his mail until the
26 date of the deadline for filing an appeal. Petitioner did

1 not inquire with the county about appealing the decision
2 until three days later. Petitioner does not allege that he
3 even read the notice before the appeal period had passed.
4 Petitioner has not established even a tangential link
5 between the county's procedural violation and petitioner's
6 failure to file a timely appeal.

7 While the notice was defective, it was not defective
8 for failure to explain petitioner's appeal rights or provide
9 the necessary information regarding the appeal deadline.
10 Had petitioner read the notice of decision prior to the
11 deadline, petitioner would have been on notice as to when
12 the appeal must be filed. Petitioner has not established
13 that the county's error in its notice of decision in any way
14 impacted his failure to meet the appeal deadline, or that
15 the defect substantially prejudiced his opportunity to
16 participate in the land use process.

17 The first and second assignments of error are denied.¹

18 **THIRD ASSIGNMENT OF ERROR**

19 Petitioner contends the county's failure to allow him
20 to appeal the September 8, 1994 decision violates his

¹Petitioner's argument that the county's notice of decision was defective for failure to include the applicable criteria pursuant to ORS 197.763(b) and 215.416(11) fails for a second reason. ORS 197.763(b) addresses only the requirement that the applicable code provisions be included in the notice of hearing, not in the notice of decision. The directive in ORS 215.416(11) that notice of the decision "be given in the same manner as required by ORS 197.763" refers to the individuals entitled to receive notice. It does not create an additional requirement that the applicable criteria provided in the notice of hearing must also be provided in the notice of decision.

1 federal due process rights.

2 As discussed above, petitioner has not established that
3 the procedural defect in the county's notice was in any way
4 related to his failure to timely challenge the underlying
5 decision. Due process does not mandate that the county
6 extend the deadline for filing an appeal of a local decision
7 on the basis that the petitioner did not meet the filing
8 deadline.

9 The third assignment of error is denied.

10 The county's decision is affirmed.