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

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RICHARD L. GALLAGHER, W. SCOTT)
OVERTON, GILBERT J. SAEGERT,)
ANNABELLE O. SAEGERT, RICHARD)
S. MILES, HOMER F. TWEDT,)
LELAND HILL, and)
CAROL HEMPHILL,)

Petitioners,)

vs.)

BENTON COUNTY,)

Respondent.)

LUBA No. 81-104

CA A24719

* * * * *

Submitted on reversal and remand from the Oregon Court of Appeals, May 3, 1983.

Judicial Review from the Land Use Board of Appeals.

This matter is before the Board on remand from the Court of Appeals. The Court issued an opinion on February 16, 1983, reversing the matter to the Board with instructions to declare Benton County Ordinance 22-Y to be inconsistent with and in derogation of ORS 215.422(1).

For the reasons expressed in the Court's opinion, Benton County Ordinance 22-Y is declared to be inconsistent with and in derogation of ORS 215.422(1), and the decision of the Benton County Board of Commissioners on appeal to the Board in the above entitled matter is reversed.

Dated this 25 day of May, 1983.

LAND USE
BOARD OF APPEALS

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RICHARD L. GALLAGHER,)
W. SCOTT OVERTON,)
GILBERT J. SAEGAERT,)
ANNABELLE O. SAEGAERT,)
RICHARD S. MILES,)
HOMER F. TWEDT, LELAND)
HILL and CAROL HEMPHILL,)
Petitioners,)
vs.)
BENTON COUNTY,)
Respondent.)

LUBA NO. 81-104
FINAL OPINION
AND ORDER

Appeal from Benton County.

Richard C. Stein, Salem, filed the Petition for Review and argued the cause on behalf of Petitioners.

Richard T. Ligon, Corvallis, filed the brief and argued the cause on behalf of Respondent.

REYNOLDS, Chief Referee; COX, Referee; participated in this decision; BAGG, Referee, dissented.

AFFIRMED 4/22/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 NATURE OF THE DECISION

3 Petitioners appeal Benton County Ordinance 22K which
4 establishes procedures for appeals of planning official and
5 planning commission decisions and defines the persons and
6 parties who may appeal.¹

7 FACTS

8 Benton County Ordinance 22K allows decisions of the
9 planning official to be appealed to the planning commission
10 within 14 days of the planning official's decision. The appeal
11 must be in writing, state reasons for the appeal and be
12 accompanied by required fees. Any individual or organization
13 in Benton County may appeal the decision of the planning
14 official to the planning commission.² The Board of
15 Commissioners review of planning commission decisions is
16 governed by the following:

17 "For purposes of this Ordinance, the affected
18 Citizen's Advisory Committee or any individual or
19 organization that testified at the Planning
20 Commissions' public hearing or which, prior to the
21 hearing, submitted written testimony regarding the
22 matter to the Planning Department or Planning
23 Commission; and who lives, owns, leases or possesses a
24 contractual interest or, in the case of an
25 organization, has a member who lives, owns, leases, or
26 possesses a contractual interest in property within
300 feet of the property involved (or within 1500 feet
if the property is zoned EFU, EFU-HA, FC-20, or FC-40)
exclusive of a Planning Commission member; may appeal
a Planning Commission decision.

24 "If an appeal is not filed within the period specified
25 above, the decision of the Planning Official or
26 Planning Commission shall be final."

1 "The Planning Commission may determine upon its own
2 initiative to review a decision of the Planning
3 Official and the County Board may determine upon its
4 own initiative to review a decision of the Commission
5 pursuant to this Ordinance within fourteen (14) days
6 of the decision. Written notice of review shall be
7 given as for any other public hearing matter
8 considered by the Board or Commission. For purposes
9 of review by the Board of Commissioners on its own
10 initiative of decisions by the Planning Commission
11 pursuant to Section XXIII.03 of the Benton County
12 Zoning Ordinance:

13 "1. An individual, or an organization with a member,
14 who lives, owns, leases or possesses a
15 contractual interest in land located beyond
16 1,500 feet in an EFU, EFU-HA, FC, or MPA (when
17 adopted) zone, and beyond 300 feet in all other
18 zones, who believes that he/she is aggrieved by
19 the Planning Commission decision, may submit a
20 written statement to the Board of Commissioners,
21 within five (5) days of the decision, indicating
22 the following:

23 "a. The nature of the individual's interest in
24 his/her real property.

25 "b. Description of how he/she is aggrieved by
26 the Planning Commission decision because of:

"(1) Physical, personal injury; or

"(2) Demonstrable economic injury to
real property.

c. The description noted in 'b' above must
indicate that the aggrievement is direct,
substantial and adverse, and is not merely
speculative and/or remote.

"2. Upon receipt of the written statement described
above, the Board, within five (5) days, shall
conduct an evidentiary hearing to consider the
evidence regarding the aggrievement. Notice of
the evidentiary hearing shall be served upon the
party alleging the aggrievement and on the
applicant at least three (3) days prior to the
hearing. The party alleging an aggrievement and
the applicant may present relevant oral or
written testimony limited to the issue of the
aggrievement. Any person presenting oral

1 testimony shall do so under oath.

2 "3. Within three (3) days of the conclusion of the
3 evidentiary hearing, the Board shall decide
4 whether the person(s)/organization is directly,
5 substantially and adversely aggrieved. Notice of
6 the Board's decision shall be served on the party
7 alleging the aggrievement, and on the initial
8 applicant, and shall be supported by written
9 findings of fact.

10 "4. If the Board concludes that the individual is
11 directly, substantially and adversely aggrieved by
12 the decision of the Planning Commission, the Board
13 shall review the Planning Commission's decision,
14 through the formal quasi-judicial process.

15 "5. A fee equivalent to that required for a regular
16 appeal of a Planning Commission decisions [sic]
17 must accompany the written statement. If the
18 Board finds that the party alleging the
19 aggrievement is not aggrieved, 75% of the fee
20 shall be refunded.

21 "6. In addition to the above, the Board may review the
22 decision of the Planning Commission on its own
23 motion pursuant to ORS 215.422.

24 "No permits or authorization shall be issued until the
25 decision of the Planning Official or Planning
26 Commission is final." (Emphasis added).

In summary and for purposes of this appeal, Ordinance 22 K

(1) allows anyone to appeal a decision of the planning
official to the planning commission;

(2) gives to any person who is "aggrieved" by the planning
commission decision, as aggrieved is defined by Ordinance 22K,
the right to appeal to the Board of Commissioners;

(3) gives to any person who lives within a prescribed
distance from the property involved the right to appeal the
planning commission decision to the Board of Commissioners;

(4) allows the Board of Commissioers on its own motion to

1 review the planning commission decision, and

2 (5) provides that any decision of the hearings official or
3 planning commission which is not appealed is "final."

4 STANDING

5 Petitioners each allege that they are adversely affected
6 and aggrieved by passage of the ordinance. The allegations of
7 particular aggrievement are based on hypothetical situations.
8 Petitioner Twedt alleges that he farms both sides of U.S.
9 Highway 20 northeast of Corvallis, and rain water runs off to
10 the Willamette River east of his farm. He says recent
11 developments in the vicinity of his farm have caused runoff to
12 flood portions of his property. One such subdivision is
13 alleged to lie beyond 1500 feet from his property and
14 "Ordinance 22K will prevent Twedt from appealing approval of
15 similar developments in the area which will exacerbate his
16 drainage problem." Petition for Review at 1. Similarly,
17 Petitioner Gallagher alleges he lives in the Corvallis area and
18 served on the Mary's River Basin Committee. The petitioner
19 relates that the committee has studied flooding in the basin,
20 and he has learned that residential development in the basin
21 "one half mile away could subject his property to flooding."
22 Under Ordinance 22K he is unable to appeal county approval of a
23 residential development more than 300 feet distant." Petition
24 for Review at 2.

25 Respondent objects to standing of petitioners. Respondent
26 replies that the ordinance does not deny petitioners the

1 opportunity to appeal quasi-judicial decisions if they are in
2 fact aggrieved by the decisions. Persons living within 300
3 feet of a proposal (or within 1500 feet of the proposal is
4 zoned EFU, EFU-HA, FC-20, or FC-40) may appeal decisions as a
5 matter of right providing they have testified at the planning
6 commission public hearing or have submitted written testimony
7 to the planning commission. For persons beyond the 300 and
8 1500 foot limits, persons must show aggrievement by the
9 decision. Respondent submits that the ordinance offers
10 "reasonable and expediate alternatives to each citizen in
11 Benton County, who suffers an aggrievement because of a
12 Planning Commission decision, to appeal that decision to the
13 Board of Commissioners." Brief of Respondent at 2. The
14 ordinance has the affect of "ensuring that unless a person
15 truly will suffer an aggrievement, he will not be in a position
16 to unduly hinder the individual who desires to use his property
17 in a particular way." Ibid. Respondent claims that none of
18 the petitioners are in fact aggrieved within the meaning of Or
19 Laws 1979, ch 772, sec 4 because they in fact do have a right
20 to appeal.

21 "Aggrievement" sufficient to confer standing to appeal a
22 legislative decision does not require certainty of injury.
23 Petitioners have alleged that they may be precluded from
24 appealing certain land use decisions within Benton County. To
25 the extent the petitioners allege the ordinance may preclude
26 petitioners from appealing decisions they otherwise would be

1 allowed to appeal, petitioners have alleged a sufficient injury
2 to meet the burden imposed by Oregon Laws 1979, ch 772, sec
3 4(2) as amended by Oregon laws 1981, ch 748. The injury
4 alleged need not be a certainty. J.R. Golf v. Linn
5 County, ____ Or LUBA ____ (LUBA NO. 81-112), Warren, et al v.
6 Lane Co., ____ Or LUBA ____ (LUBA No. 81-102, 1982). See
7 Benton County v. Friends of Benton County, ____ Or App ____,
8 ____ P2d ____ (CA No. A21709, Slip Opinion) (1982); 1000
9 Friends v. Multnomah County, 39 Or App 917, 593 P2d 1171 (1979).

10 Petitioners stand in the same position as any citizen of a
11 county aggrieved by an ordinance provisions that may affect his
12 rights and responsibilities. Even though the injury alleged is
13 not certain, petitioners are entitled to standing to test the
14 ordinance against statewide land use laws. As this ordinance
15 has an effect on future appeals of land use decisions in Benton
16 County, petitioners are entitled to a determination of whether
17 any appeal rights given by statute are taken away by the
18 ordinance. Adoption of the county's theory would mean no
19 legislative textural provision could be appealed until the
20 provision is applied to petitioner's property through some
21 subsequent act of the governing body.³

22 ASSIGNMENTS OF ERROR

23 In each of the following assignments of error, petitioners
24 allege that the manner of appeal provided within Benton County
25 works to deprive some otherwise eligible persons of an appeal
26 to the Land Use Board of Appeals (LUBA). Petitioners believe

1 that in order to appeal a decision of Benton County to LUBA, a
2 person must have the decision reviewed first by the Board of
3 Commissioners. Benton County uses, assert petitioners, a
4 standard for determining standing to appeal to the Board of
5 Commissioners which is more restrictive than the standard for
6 appeal to LUBA. As a result, persons who may ultimately seek
7 review by LUBA will be unable to do so because they will have
8 been denied review by the Board of Commissioners, which review
9 is a prerequisite to LUBA review.

10 ASSIGNMENT OF ERROR NO. 1

11 Ordinance 22K Violates ORS 215.422(1) by Denying
12 Appeal by Parties Aggrieved by Action of the Planning
Commission

13 Petitioners allege that ORS 215.422(1) requires the
14 respondent to allow parties adversely affected or aggrieved by
15 planning commission actions to appeal to the Board of
16 Commissioners.⁴ Petitioners claim the ordinance allows some
17 but not all parties so aggrieved to appeal. Petitioners say
18 the ordinance does not recognize as sufficient to confer
19 standing injuries embraced by the "aggrieved" standard in the
20 statutes. Petitioners base their conclusion in part on the
21 ordinance provision requiring the injury and aggrievement to be
22 a "physical, personal injury" or a "demonstrable economic
23 injury to real property." See Ordinance 22K above.
24 Petitioners give as an example of an interest recognized under
25 the statutory standard, but not the county standard, an injury
26 to non-economic interest such as scenic views.

1 Petitioners add that the county ordinance demands an
2 individual demonstrate the injury to be direct, substantial and
3 adverse. There is no such requirement in ORS 215.422(1), claim
4 petitioners.

5 We disagree with petitioners' premise that ORS 215.422(1)
6 requires Benton County to allow appeal of planning commission
7 decisions to the Board of Commissioners by a person who is
8 aggrieved by the planning commission decision. Prior to the
9 amendments to ORS 215.422 by 1981 Or Laws, ch 748, sec 42, ORS
10 215.422(1) required the county to allow an appeal by an
11 aggrieved person from a hearings official's decision to either
12 the planning commission or the Board of Commissioner's or to
13 both. There was, however, no requirement that a county which
14 allowed an appeal by an aggrieved person from a hearings
15 official to the planning commission also allow an appeal from
16 the planning commission to the board of commissioners: doing so
17 was optional with the county.

18 Oregon Laws 1981, ch 748, sec 42 amended ORS 215.422(1) by
19 adding subsection (1)(b). This amendment allows the county to
20 delegate final decision-making authority to the planning
21 official. With this amendment a county is no longer required
22 to allow any appeals from planning official decisions. Because
23 the county is not required under ORS 215.422(1) to allow any
24 appeals from planning official decisions and the Board of
25 Commissioners is not required to review any decisions of the
26 planning commission, we fail to see how it is that Benton

1 County Ordinance 22K violates ORS 215.422(1). Ordinance 22K
2 allows anyone to appeal a planning official decision to the
3 planning commission. The ordinance does not limit appeals to
4 persons aggrieved. Accordingly, Ordinance 22K does more, not
5 less than is required by ORS 215.422(1).

6 Ordinance 22K also allows review by the Board of
7 Commissioners of planning commission decisions under certain
8 circumstances. Again, because no review is required at all by
9 the Board of Commissioners under ORS 215.422(1) Ordinance 22K
10 does more, not less, than required by ORS 215.422(1). Because
11 Ordinance 22K does not restrict rights to appeal granted by ORS
12 215.422(1), we conclude Ordinance 22K does not violate this
13 statute.

14 ASSIGNMENT OF ERROR NO. 2

15 Ordinance 22K Violates ORS 215.422(2) by Denying
16 Appeal of a County Governing Body Decision by Parties
Aggrieved

17 Petitioners argue that ORS 215.422(2) "guarantees" to
18 parties aggrieved a right of appeal to LUBA. Persons can only
19 appeal to LUBA, however, if they are parties to a review
20 conducted by the governing body, argue petitioners. Because
21 some persons who may be "aggrieved" within the meaning of ORS
22 215.422(2) by a decision of the county planning commission can
23 be denied an appeal to the Board of Commissioners under
24 Ordinance 22K, such persons will not be able to appeal to
25 LUBA. Hence, Ordinance 22K violates ORS 215.422(2) to the
26 extent it may deny to persons aggrieved by a planning

1 commission decision an appeal to the Board of Commissioners and
2 thereafter to LUBA.

3 Again, we disagree with petitioners' premise which is that
4 Board of Commissioners' review is always a prerequisite to LUBA
5 review. What is necessary for LUBA review is a "land use
6 decision," defined, in part, as "a final decision or
7 determination of a local government or special district." ORS
8 197.015(1). (Emphasis added). Prior to 1981, the definition
9 of land use decision was, in part, "a final decision or
10 determination made by a city, county or special district
11 governing body..." (Emphasis added). 1979 Or Laws, ch 772,
12 sec 3 (1981 Replacement Part). Construing the definition of
13 land use decision in 1979 Or Laws, ch 772, sec 3 (1981
14 Replacement Part), we said in Griffiths v City of Portland,
15 that this statute, together with LUBA's rules, required that
16 the decision being appealed "must be that of the local
17 governing body" and

18 "essentially provide[d] that a person seeking to
19 overturn a land use decision exhaust all of the
20 remedies available at the local level before asking
the Land Use Board of Appeals for review." 1 Or LUBA
192 at 192.

21 In Griffiths, we dismissed an appeal of a decision made by
22 a Portland hearings officer which had not been appealed to the
23 city council in the manner provided by the city's code. We
24 said:

25 "***Oregon law places emphasis on local decision
26 making, and it would be inconsistent with this policy
to allow intervention by a state agency before all

1 local level procedures have been tried." 1 Or LUBA
192 at 192-193.

2 The amendments to 1979 Or Laws, ch 772, by 1981 Or Laws, ch
3 748 which resulted in deleting sec 3 of ch 772 and adopting a
4 revised definition of land use decision do not, in our view,
5 require that we alter our holding in Griffiths v City of
6 Portland that exhaustion of administrative remedies is still
7 required. However, this does not mean that a county must
8 provide administrative remedies to exhaust, as was discussed in
9 connection with petitioners' first assignment of error. If a
10 county delegates to a hearings officer authority to make a
11 final decision and provides no appeal at the county level, then
12 the decision of the hearings official is "final" for purposes
13 of review by LUBA: the decision is the "final decision or
14 determination of a local government." Where, as with Benton
15 County Ordinance 22K, a hearings official decision can be
16 appealed by anyone to the planning commission, the decision of
17 the hearings official will never be the "final" decision of the
18 county for purposes of appeal to LUBA because an administrative
19 remedy - appeal to the planning commission - is always
20 available. Under Ordinance 22K, decisions of the planning
21 commission may or may not be appealed to LUBA, depending upon
22 the circumstances of the particular case. If the person who
23 wants to appeal the planning commission decision to the Board
24 of Commissioners has an administrative remedy available (i.e.,
25 can meet the county's standing requirements), then the person
26

1 must exhaust this remedy prior to seeking LUBA review.
2 Conversely, if the person cannot meet the county's standing
3 requirements, then no local administrative remedy is available
4 to be exhausted, the county's decision with respect to that
5 individual is "final" and appeal to LUBA of the planning
6 commission's decision would be the appropriate course to follow.

7 We recognize that some confusion may result from a person
8 who may be unsure of his or her ability to demonstrate standing
9 to the county's satisfaction. A prudent individual would
10 probably have to appeal both to the county governing body and
11 to LUBA in order to be quite certain of preserving his or her
12 right of appeal. The county ordinance may, in this manner,
13 serve to complicate the review of land use decisions in Benton
14 County. We find, however, nothing in the law that prohibits
15 the county from selectively choosing which appeals it will
16 consider on its own.⁵

17 ASSIGNMENT OF ERROR NO. 3

18 Ordinance 22K Violates Oregon Laws Chapter 772,
19 section 4(3); Article I, Section 10 of the Oregon
20 Constitution; the due process Provisions of the 14th
21 Amendment, Section 1 of the United States
22 Constitution; and the Citizen Involvement Goal (Goal
23 1)⁶

24 Petitioners argue the ordinance violates Or Laws 1979, ch
25 772, sec 4(3) because it denies the right of appeal to the Land
26 Use Board of Appeals by persons to whom the legislature
guaranteed a right of such appeal. Petitioners use a
hypothetical to show how it might be possible for a person to

1 satisfy all the requirements of Oregon Laws 1979, ch 772, sec
2 4(3), as amended by Oregon Laws 1981, ch 748 and not be able to
3 perfect the appeal because s/he is unable to satisfy Benton
4 County standing requirements under Ordinance 22K.

5 As to violation of Article 1, sec 10 of the Oregon
6 Constitution, petitioners note that this constitutional
7 provision requires that each man shall have a remedy "for
8 injury done him in his person, property or reputation."
9 Petitioners claim the ordinance deprives persons of a land use
10 remedy because the ordinance speaks in terms of injury to
11 person or real property, exclusive of personal property.
12 Petitioners argue that the Oregon Constitution makes no such
13 distinction.

14 Petitioners also argue that the language in the ordinance
15 goes beyond language in the constitution and gives too much
16 discretion in the commissioners. There are no standards set
17 out to determine what is an injury or when an injury is direct,
18 substantial and adverse, and a person must rely on the
19 discretion of the county commissioners to enforce his or her
20 rights. Petitioners claim this reliance is against the "very
21 essence of due process guarantees." Supplemental Petition for
22 Review at 3.

23 As stated earlier, we do not believe the county's ordinance
24 works to deny an appeal to LUBA by a person who otherwise meets
25 standing requirements contained in Oregon Laws 1981, ch 748.
26 As such, we see no violation of any of the cited provisions of

1 the Oregon Constitution.

2 ASSIGNMENT OF ERROR NO. 4

3 Ordinances 22K and E-22-2 Violate Article I, Section
4 20 of the Oregon Constitution and the 14th Amendment,
5 Section 1 of the United States Constitution in that it
6 denies equal protection of the law to citizens
7 similarly situated.

8 Petitioners argument is that some individuals are allowed
9 to appeal simply by virtue of their proximity to the property
10 which is the subject of the land use action, and others outside
11 the geographical boundaries specified in the ordinance are not
12 allowed to appeal. Also, persons with a demonstrable physical
13 injury are allowed to appeal, and those who are otherwise only
14 "aggrieved" are not allowed to appeal. Petitioner believes
15 these distinctions work to give appeal rights to some persons
16 and not to others. This discrimination violates the equal
17 protection provisions of the United States and Oregon's
18 constitutions.

19 Because of our holding in assignments of error 1 through 3,
20 we can not agree with petitioners. The right of persons who
21 are aggrieved to appeal is granted by Oregon Laws 1979, ch 772,
22 sec 4(2) and (3), as amended by Oregon Laws 1981, ch 748 and
23 may not be abridged by the Benton County ordinance. The rules
24 governing standing to appeal to LUBA are quite independent of
25 standing rules established within the county. Under Oregon
26 Laws 1979, ch 772, sec 4(7), as amended by Oregon Laws 1981, ch
27 748, LUBA determines whether a person's interests are
28 substantially affected or the person is aggrieved by a local

1 decision, not the county. The petition for review filed with
2 LUBA is the document showing petitioners' aggrievement. Any
3 challenge to the allegations of aggrievement is undertaken in
4 front of LUBA, not at the local level.

5 GOAL ISSUES

6 "Ordinance 22K as amended violates the citizen
7 involvement goal (Goal 1)."

8 Petitioners argue that appeals of land use decisions are
9 part of the land use planning process. The citizen involvement
10 goal (Goal 1) requires an opportunity for citizen involvement
11 "in all phases of the planning process." Petitioners claim
12 that Goal 1 applies to adoption of ordinances, and the
13 ordinance must, therefore, conform to Goal 1. Petitioners
14 state that the county made no findings demonstrating that the
15 ordinances complied with Goal 1.

16 Additionally, petitioners argue that the ordinance fails to
17 provide aggrieved persons an opportunity to present evidence or
18 receive a final order addressing their concerns. Petitioners
19 argue that the "feedback mechanism" in Goal 1 requires the
20 county to assure persons aggrieved by a land use decision of an
21 opportunity to present evidence and receive a response. The
22 ordinance deprives persons of this necessary opportunity,
23 according to petitioners.

24 Respondent denies any violation of Goal 1 by stating that
25 "if a person is aggrieved, then an appeal will be processed and
26 the aggrieved person will be permitted to present evidence and

1 will receive a final order." Brief of Respondent at 9.

2 Respondent states that the ordinance simply requires that if a
3 person is beyond certain distances from the subject property,
4 then the aggrievement must be "demonstrated." Respondent
5 concludes that Goal 1 does not extend a right of appeal to one
6 who is not adversely affected.

7 We do not find a violation of Goal 1 as alleged by
8 petitioners. The petitioners have not alleged that the public
9 was not involved in the proceedings in Benton County leading to
10 the adoption of Ordinance 22K as amended by E-22-2. The record
11 in this case shows petitioners to have been present and very
12 actively involved in the proceedings leading up to adoption of
13 Ordinance 22K. We do not believe that this involvement needs
14 to be demonstrated by specific findings supporting a
15 legislative enactment such as the one at issue. See Gruber v.
16 Lincoln County, 1 Or LUBA 80 (1981). We believe the record
17 here, as in the Gruber case, demonstrates intense public
18 interest and involvement in the proceeding.

19 As to the second part of petitioners' allegation of a Goal
20 1 violation, it is our view that Goal 1 is not violated where
21 public participation in plan and ordinance formulation and
22 implementation measures is assured.⁷ Here, the public may
23 participate in any quasi-judicial land use decision making
24 process through the planning commission level. It is only at
25 the time of appeal that persons may be excluded if they do not
26 meet standing criteria.

1 We do not believe Goal 1 can be read as forcing governing
2 bodies to allow anyone to appeal a decision. The legislature
3 appears to have already spoken on this issue in ORS 215.422 and
4 227.180. These provisions suggest that review of permit
5 decisions is discretionary with the governing body. There is
6 no indication in ORS ch 197 that the legislature intended to
7 confer upon LCDC the authority to tell governing bodies who may
8 appeal quasi-judicial decisions, at least where the opportunity
9 has been provided to all persons who may be affected by a
10 particular decision to participate in the making of that
11 decision at some level. The fact certain people may be
12 excluded from being able to appeal that decision to the
13 governing body does not violate Goal 1.

14 For the reasons cited above, we find no violation of
15 Statewide Planning Goal 1.

16 Affirmed.

1 BAGG, Referee, Dissenting.

2 I respectfully dissent.

3 ORS 215.422(1) provides a local governing body with the
4 authority to delegate appellate authority. The Board of
5 County Commissioners of Benton County could choose to hear no
6 appeals under the statute, and presumably, the Board of
7 Commissioners could choose to hear only some appeals. I do not
8 understand the Benton County ordinance to limit appellate
9 jurisdiction of the Board of Commissioners, only to restrict
10 requests to exercise jurisdiction to persons showing a
11 "physical" injury. This injury, I believe, is a different
12 injury than that included in the terms "adversely affected" or
13 "aggrieved" as the terms appear in Oregon Laws 1981, ch 748,
14 sec 35 and ORS 215.422(1a). I view the county's definition of
15 injury to be one cognizable in tort. That is, the county's
16 choice of a person injured sufficiently to earn standing is a
17 person who has suffered damage to person or property and not
18 just to his aesthetic sensibilities.

19 The county has not included in its ordinance any provision
20 that vests "final decision" making authority in the hearings
21 officer or the planning commission. By "final decision" I mean
22 a decision that is not subject to higher review. I conclude
23 the county intended that the Board of County Commissioners be
24 the "final" decisionmaker in all cases where disputes exist at
25 the local level and the local appeal process is followed. The
26 county did not clearly delegate final decision-making authority

1 to the hearings officer or planning commission and did not
2 invasion appeal of a planning commission decision directly to
3 LUBA.

4 A right of appeal is granted, if at all, by statute. Where
5 granted, the appeal must be exercised in the manner prescribed.

6 "While the right of appeal is sometimes referred to as
7 a constitutional right, the form of review is
8 controlled by statute. Accordingly, the procedure
9 authorized by statute must be followed." 4 Anderson,
10 American Law of Zoning, sec 2502 (2d ed, 1977).

11 "An appeal is not a matter of absolute right, but a
12 statutory privilege. See list of cases in 2 Oregon
13 Digest, p. 276. This is true of criminal as well as
14 civil cases. [citations omitted]. We have repeatedly
15 said that it is unnecessary to cite authorities for a
16 rule so well established and familiar, and do so now
17 only because of a contention in the defendant's brief,
18 to be noticed later, that appeal in Oregon is a matter
19 of constitutional right." State v. Endsley, 214 Or
20 537, 539, 331 P2d 338 (1958).

21 See also City of Klamath Falls v. Winters, 289 Or 757, 768, ___
22 P2d ___ (1980); Ortwein v. Schwab, 262 Or 375, 498 P2d 757
23 (1972), 411 US 656, 97 S Ct 1172, 35 L Ed 2d 572 rev den 411 US
24 922 (1973).

25 I believe the allowance for local rules about the conduct
26 of appeals in ORS 215.422 must be read with Oregon Laws 1981,
ch 748. A county attempt to alter who may utilize a local
appellate structure is not contemplated in the law. The
permission given counties in ORS 215.422 to delegate final
decision making authority (final in the sense of no further
appeal) is a grant for a procedural framework, not an allowance
for restrictions on who may exercise appeal rights. It is a

1 person "aggrieved" who may appeal at the local level (ORS
2 215.422), and at the state level (Oregon Laws 1981, ch 748).
3 Nowhere does state law give local governments the power to
4 decide who may appeal to what local tribunal based on a local
5 definition of standing that differs from that in state law. My
6 view, therefore, is that where a county creates a right of
7 appeal by ordinance, the ordinance must be consistent with ORS
8 215.422 and Oregon Laws 1981, ch 748, sec 35.⁸

9 In order to be consistent, the county may not limit appeals
10 to the Board of Commissioners by changing the meaning of the
11 term "aggrieved." If there is to be an appeal, the statute
12 requires all aggrieved persons have access to the appeal.

13 I would, therefore, find the county to be in violation of
14 ORS 215.422(1), and I would sustain petitioners' first
15 assignment of error.⁹

FOOTNOTES

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3 1
4 The matter of Ordinance 22K was heard before the Board on
5 December 3, 1981. Subsequently, Benton County adopted
6 Ordinance E-22-2 amending Ordinance 22K. A supplemental
7 Petition for Review was filed and a supplemental reply was
8 filed by the county. We will refer to Ordinance 22K as amended
9 by Ordinance E-22-2 as Ordinance 22K.

7 2
8 Ordinance 22K provides:
9 "For purposes of this Ordinance any individual or
10 organization in Benton County may appeal a decision of the
11 Planning Official to the Planning Commission."

11 3
12 Of course, legislative acts having immediate effect on land
13 uses, such as plan and zone changes, would be appealable under
14 the county's theory.

14 4
15 ORS 215.422 states:

16 "(1)(a) A party aggrieved by the action of a
17 hearings officer may appeal the action to the planning
18 commission or county governing body, or both, however
19 the governing body prescribes. The appellate
20 authority on its own motion may review the action.
21 The procedure and type of hearing for such an appeal
22 or review shall be prescribed by the governing body.

20 "(b) Notwithstanding paragraph (a) of this
21 subsection, the governing body may provide that the
22 decision of a hearings officer is the final
23 determination of the county.

22 "(2) A party aggrieved by the final
23 determination may have the determination reviewed in
24 the manner provided in sections 4 to 6, chapter 772,
25 Oregon Laws 1979, as amended by sections 35 to 35a,
26 chapter 748, Oregon Laws 1981."

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Selective consideration of appeals seems also to be expressly permitted by ORS 215.422(1) by providing that the " * * appellate authority on its own motion may review the action."

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The discussion of the alleged violation of the citizen involvement goal is set forth at pages 16-18; infra.

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8 Goal 2 defines "Implementation Measures" as

9 "the means used to carry out the plan. These are of
10 two general types: (1) management implementation
11 measures such as ordinances, regulations or project
12 plans, and (2) site or area specific implementation
measures such as permits and grants for construction,
construction of public facilities or provision of
services."

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Oregon Laws 1981, ch 748, sec 35 states:

15 "Section 4, chapter 772, Oregon Laws 1979, is amended
16 to read:

17 "Sec. 4. * * * (2) Except as provided in subsection
18 (3) of this section, any person whose interests are
adversely affected or who is aggrieved by a land use
19 decision and who has filed a notice of intent to
appeal as provided in subsection (4) of this section
20 may petition the board for review of that decision.
Subject to the provisions of subsection (3) of this
21 section, any person whose interests are adversely
affected or who is aggrieved by a land use decision
22 may, within a reasonable time after a petition for
review of that decision has been filed with the board,
23 intervene in and be made a party to any review
proceeding pending before the board.

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26 As to petitioners' claim that the county ordinance works to limit appeals to LUBA, I agree with the majority to the extent the majority states the county can not control LUBA jurisdiction. It may be possible that a

1 person entitled to appeal to LUBA would be shut out of the
2 local appeal process under Ordinance 22K and might,
3 therefore, not be able to meet the "appearance"
4 requirement in Oregon Laws 1981, ch 748, sec 35.
5 Presumably, the potential petitioner could be said to have
6 appeared if he attempted appeal to the Board of
7 Commissioners. It is also possible that under the
8 circumstances created by Ordinance 22K, the potential
9 petitioner would not be required to attempt an appearance
10 before the Board of Commissioners. See Weber v. Clackamas
11 County, 3 Or LUBA 237 (1981).
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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

RICHARD L. GALLAGHER,
W. SCOTT OVERTON,
GILBERT J. SAEGAERT,
ANNABELLE O. SAEGAERT,
RICHARD S. MILES,
HOMER F. TWEDT, LELAND
HILL and CAROL HEMPHILL,

Petitioners,

vs.

BENTON COUNTY,

Respondent.

LUBA NO. 81-104

PROPOSED OPINION
AND ORDER

Appeal from Benton County.

Richard C. Stein, Salem, filed the Petition for Review and argued the cause on behalf of Petitioners.

Richard T. Ligon, Corvallis, filed the brief and argued the cause on behalf of Respondent.

BAGG, Referee; REYNOLDS, Chief Referee; COX, Referee; participated in this decision.

3/30/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 BAGG, Referee.

2 NATURE OF THE DECISION

3 Petitioners appeal Benton County Ordinance 22K as amended
4 by Ordinance E-22-2. The ordinance establishes procedures for
5 appeals of planning official and planning commission decisions
6 and defines the persons and parties who may appeal.¹

7 FACTS

8 The Benton County ordinance allows decisions of the
9 planning official to be appealed to the planning commission
10 within 14 days of the planning official's decision. The
11 appeals must be in writing, state reasons for the appeal and be
12 accompanied by required fees. Any individual or organization
13 in Benton County may appeal the decision of the planning
14 official to the planning commission. The Board of
15 Commissioners may review planning commission decisions but only
16 where review is initiated by persons who meet certain criteria:

17 "For purposes of this Ordinance any individual or
18 organization in Benton County may appeal a decision of
the Planning Official to the Planning Commission.

19 "For purposes of this Ordinance, the affected
20 Citizen's Advisory Committee or any individual or
organization that testified at the Planning
21 Commissions' public hearing or which, prior to the
hearing, submitted written testimony regarding the
22 matter to the Planning Department or Planning
Commission; and who lives, owns, leases or possesses a
23 contractual interest or, in the case of an
organization, has a member who lives, owns, leases, or
24 possesses a contractual interest in property within
300 feet of the property involved (or within 1500 feet
25 if the property is zoned EFU, EFU-HA, FC-20, or FC-40)
exclusive of a Planning Commission member; may appeal

1 a Planning Commission decision.

2 "If an appeal is not filed within the period specified
3 above, the decision of the Planning Official or
4 Planning Commission shall be final."

5 The Board of Commissioners may also review decisions of the
6 planning commission on the Board's own initiative:

7 "The Planning Commission may determine upon its own
8 initiative to review a decision of the Planning
9 Official and the County Board may determine upon its
10 own initiative to review a decision of the Commission
11 pursuant to this Ordinance within fourteen (14) days
12 of the decision. Written notice of review shall be
13 given as for any other public hearing matter
14 considered by the Board or Commission. For purposes
15 of review by the Board of Commissioners on its own
16 initiative of decisions by the Planning Commission
17 pursuant to Section XXIII.03 of the Benton County
18 Zoning Ordinance:

19 "1. An individual, or an organization with a member,
20 who lives, owns, leases or possesses a
21 contractual interest in land located beyond
22 1,500 feet in an EFU, EFU-HA, FC, or MPA (when
23 adopted) zone, and beyond 300 feet in all other
24 zones, who believes that he/she is aggrieved by
25 the Planning Commission decision, may submit a
26 written statement to the Board of Commissioners,
within five (5) days of the decision, indicating
the following:

"a. The nature of the individual's interest in
his/her real property.

"b. Description of how he/she is aggrieved by
the Planning Commission decision because of:

"(1) Physical, personal injury; or

"(2) Demonstrable economic injury to
real property.

c. The description noted in 'b' above must
indicate that the aggrievement is direct,
substantial and adverse, and is not merely
speculative and/or remote.

"2. Upon receipt of the written statement described

1 above, the Board, within five (5) days, shall
2 conduct an evidentiary hearing to consider the
3 evidence regarding the aggrievement. Notice of
4 the evidentiary hearing shall be served upon the
5 party alleging the aggrievement and on the
6 applicant at least three (3) days prior to the
7 hearing. The party alleging an aggrievement and
8 the applicant may present relevant oral or
9 written testimony limited to the issue of the
10 aggrievement. Any person presenting oral
11 testimony shall do so under oath.

12 "3. Within three (3) days of the conclusion of the
13 evidentiary hearing, the Board shall decide
14 whether the person(s)/organization is directly,
15 substantially and adversely aggrieved. Notice of
16 the Board's decision shall be served on the party
17 alleging the aggrievement, and on the initial
18 applicant, and shall be supported by written
19 findings of fact.

20 "4. If the Board concludes that the individual is
21 directly, substantially and adversely aggrieved by
22 the decision of the Planning Commission, the Board
23 shall review the Planning Commission's decision,
24 through the formal quasi-judicial process.

25 "5. A fee equivalent to that required for a regular
26 appeal of a Planning Commission decisions [sic]
must accompany the written statement. If the
Board finds that the party alleging the
aggrievement is not aggrieved, 75% of the fee
shall be refunded.

"6. In addition to the above, the Board may review the
decision of the Planning Commission on its own
motion pursuant to ORS 215.422.

"No permits or authorization shall be issued until the
decision of the Planning Official or Planning
Commission is final."

STANDING

Petitioners each allege that they are adversely affected
and aggrieved by passage of the ordinance. The allegations of
particular aggrievement are based on hypothetical situations.
Petitioner Twedt alleges that he farms both sides of U.S.

1 Highway 20 northeast of Corvallis, and rain water runs off to
2 the Willamette River east of his farm. He says recent
3 developments in the vicinity of his farm have caused runoff to
4 flood portions of his property. One such subdivision is
5 alleged to lie beyond 1500 feet from his property and
6 "Ordinance 22K will prevent Twedt from appealing approval of
7 similar developments in the area which will exacerbate his
8 drainage problem." Petition for Review at 1. Similarly,
9 Petitioner Gallagher alleges he lives in the Corvallis area and
10 served on the Mary's River Basin Committee. The petitioner
11 relates that the committee has studied flooding in the basin,
12 and he has learned that residential development in the basin
13 "one half mile away could subject his property to flooding.
14 Under Ordinance 22K he is unable to appeal county approval of a
15 residential development more than 300 feet distant." Petition
16 for Review at 2.

17 Respondent objects to standing of petitioners. Respondent
18 replies that the ordinance does not deny petitioners the
19 opportunity to appeal quasi-judicial decisions if they are in
20 fact aggrieved by the decisions. Persons living within 300
21 feet of a proposal (or within 1500 feet of the proposal is
22 zoned EFU, EFU-HA, FC-20, or FC-40) may appeal decisions as a
23 matter of right providing they have testified at the planning
24 commission public hearing or have submitted written testimony
25 to the planning commission. For persons beyond the 300 and
26 1500 foot limits, persons must show aggrievement by the

1 decision. Respondent submits that the ordinance offers
2 "reasonable and expediate alternatives to each citizen in
3 Benton County, who suffers an aggrievement because of a
4 Planning Commission decision, to appeal that decision to the
5 Board of Commissioners." Brief of Respondent at 2. The
6 ordinance has the affect of "ensuring that unless a person
7 truly will suffer an aggrievement, he will not be in a position
8 to unduly hender the individual who desires to use his property
9 in a particular way." Ibid. Respondent claims that none of
10 the petitioners are in fact aggrieved within the meaning of Or
11 Laws 1979, ch 772, sec 4 because they in fact do have a right
12 to appeal.

13 "Aggrievement" sufficient to confer standing to appeal a
14 legislative decision does not require certainty of injury.
15 Petitioners have alleged that they may be precluded from
16 appealing certain land use decisions within Benton County. To
17 the extent the petitioners allege the ordinance may preclude
18 petitioners from appealing decisions they otherwise would be
19 allowed to appeal, petitioners have alleged a sufficient injury
20 to meet the burden imposed by Oregon Laws 1979, ch 772, sec
21 4(2). The injury alleged need not be a certainty. J.R. Golf
22 v. Linn County, _____ Or LUBA _____ (LUBA NO. 81-112), Warren, et
23 al v. Lane Co., _____ Or LUBA _____ (LUBA No. 81-102, 1982).
24 See Benton County v. Friends of Benton County, _____ Or App _____,
25 _____ P2d _____ (CA No. A21709, Slip Opinion) (1982); 1000
26 Friends v. Multnomah County, 39 Or App 917, 593 P2d 1171 (1979).

1 Petitioners stand in the same position as any citizen of a
2 county aggrieved by an ordinance provisions that may affect his
3 rights and responsibilities. Even though the injury alleged is
4 not certain, petitioners are entitled to standing to test the
5 ordinance against statewide land use laws. As this ordinance
6 has an effect on future appeals of land use decisions in Benton
7 County, petitioners are entitled to a determination of whether
8 any appeal rights given by statute are taken away by the
9 ordinance. Adoption of the county's theory would mean no
10 legislative textual provision could be appealed until the
11 provision is applied to petitioner's property through some
12 subsequent act of the governing body.²

13 NON-GOAL ISSUES

14 Discussion of petitioners' assignments of error dealing
15 with other than statewide land use planning goals will be
16 issued at a later date. What follows is a discussion of that
17 portion of petitioners' assignment of error 3 that allege
18 violation of Statewide Land Use Planning Goal No. 1. Upon
19 issuance of our opinion as to other assignments of error, the
20 following discussion will be incorporated into one final
21 opinion. The final opinion will also include LCDC's
22 determination as to our discussion of the goal issue.

23 GOAL ISSUES

24 Assignment of Error No. 1

25 "Ordinance 22K as amended violates the citizen
26 involvement goal (Goal 1)."

1 Petitioners argue that appeals of land use decisions are
2 part of the land use planning process. The citizen involvement
3 goal (Goal 1) requires an opportunity for citizen involvement
4 "in all phases of the planning process." Petitioners claim
5 that Goal 1 applies to adoption of ordinances, and the
6 ordinance must, therefore, conform to Goal 1. Petitioners
7 state that the county made no findings demonstrating that the
8 ordinances complied with Goal 1.

9 Additionally, petitioners argue that the ordinance fails to
10 provide aggrieved persons an opportunity to present evidence or
11 receive a final order addressing their concerns. Petitioners
12 argue that the "feedback mechanism" in Goal 1 requires the
13 county to assure persons aggrieved by a land use decision of an
14 opportunity to present evidence and receive a response. The
15 ordinance deprives persons of this necessary opportunity,
16 according to petitioners.

17 Respondent denies any violation of Goal 1 by stating that
18 "if a person is aggrieved, then an appeal will be processed and
19 the aggrieved person will be permitted to present evidence and
20 will receive a final order." Brief of Respondent at 9.

21 Respondent states that the ordinance simply requires that if a
22 person is beyond certain distances from the subject property,
23 then the aggrievement must be "demonstrated." Respondent
24 concludes that Goal 1 does not extend a right of appeal to one
25 who is not adversely affected.

26 We do not find a violation of Goal 1 as alleged by

1 petitioners. The petitioners have not alleged that the public
2 was not involved in the proceedings in Benton County leading to
3 the adoption of Ordinance 22K as amended by E-22-2. The record
4 in this case shows petitioners to have been present and very
5 actively involved in the proceedings leading up to adoption of
6 Ordinance 22K. We do not believe that this involvement needs
7 to be demonstrated by specific findings supporting a
8 legislative enactment such as the one at issue. See Gruber v.
9 Lincoln County, 1 Or LUBA 80 (1981). We believe the record
10 here, as in the Gruber case, demonstrates intense public
11 interest and involvement in the proceeding.

12 As to the second part of petitioners' allegation of a Goal
13 1 violation, it is our view that Goal 1 is not violated where
14 public participation in plan and ordinance formulation and
15 implementation measures is assured.³ Here, the public may
16 participate in any quasi-judicial land use decision making
17 process through the planning commission level. It is only at
18 the time of appeal that persons may be excluded if they do not
19 meet standing criteria.

20 We do not believe Goal 1 can be read as forcing governing
21 bodies to allow anyone to appeal a decision. The legislature
22 appears to have already spoken on this issue in ORS 215.422 and
23 227.180. These provisions suggest that review of permit
24 decisions is discretionary with the governing body. There is
25 no indication in ORS ch 197 that the legislature intended to
26 confer upon LCDC the authority to tell governing bodies who may

1 appeal quasi-judicial decisions, at least where the opportunity
2 has been provided to all persons who may be affected by a
3 particular decision to participate in the making of that
4 decision at some level. The fact certain people may be
5 excluded from being able to appeal that decision to the
6 governing body does not violate Goal 1.

7 For the reasons cited above, we find no violation of
8 Statewide Planning Goal 1.

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FOOTNOTES

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3 The matter of Ordinance 22K was heard before the Board on
4 December 3, 1981. Subsequently, Benton County adopted
5 Ordinance E-22-2 amending Ordinance 22K. A supplemental
6 Petition for Review was filed and a supplemental reply was
7 filed by the county. We will consider Ordinance 22K as amended.

6

2

7 Of course, legislative acts having immediate effect on land
8 uses, such as plan and zone changes, would be appealable under
9 the county's theory.

9

3

10 Goal 2 defines "Implementation Measures" as

11 "the means used to carry out the plan. These are of
12 two general types: (1) management implementation
13 measures such as ordinances, regulations or project
14 plans, and (2) site or area specific implementation
15 measures such as permits and grants for construction,
16 construction of public facilities or provision of
17 services."
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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

RICHARD L. GALLAGHER,
W. SCOTT OVERTON,
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HOMER F. TWEDT, LELAND
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Petitioners,

vs.

BENTON COUNTY,

Respondent.

LUBA NO. 81-104

PROPOSED OPINION
AND ORDER

Appeal from Benton County.

Richard C. Stein, Salem, filed the Petition for Review and argued the cause on behalf of Petitioners.

Richard T. Ligon, Corvallis, filed the brief and argued the cause on behalf of Respondent.

BAGG, Referee; REYNOLDS, Chief Referee; COX, Referee; participated in this decision.

3/30/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 BAGG, Referee.

2 NATURE OF THE DECISION

3 Petitioners appeal Benton County Ordinance 22K as amended
4 by Ordinance E-22-2. The ordinance establishes procedures for
5 appeals of planning official and planning commission decisions
6 and defines the persons and parties who may appeal.¹

7 FACTS

8 The Benton County ordinance allows decisions of the
9 planning official to be appealed to the planning commission
10 within 14 days of the planning official's decision. The
11 appeals must be in writing, state reasons for the appeal and be
12 accompanied by required fees. Any individual or organization
13 in Benton County may appeal the decision of the planning
14 official to the planning commission. The Board of
15 Commissioners may review planning commission decisions but only
16 where review is initiated by persons who meet certain criteria:

17 "For purposes of this Ordinance any individual or
18 organization in Benton County may appeal a decision of
the Planning Official to the Planning Commission.

19 "For purposes of this Ordinance, the affected
20 Citizen's Advisory Committee or any individual or
21 organization that testified at the Planning
22 Commissions' public hearing or which, prior to the
23 hearing, submitted written testimony regarding the
24 matter to the Planning Department or Planning
25 Commission; and who lives, owns, leases or possesses a
26 contractual interest or, in the case of an
organization, has a member who lives, owns, leases, or
possesses a contractual interest in property within
300 feet of the property involved (or within 1500 feet
if the property is zoned EFU, EFU-HA, FC-20, or FC-40)
exclusive of a Planning Commission member; may appeal

1 a Planning Commission decision.

2 "If an appeal is not filed within the period specified
3 above, the decision of the Planning Official or
4 Planning Commission shall be final."

5 The Board of Commissioners may also review decisions of the
6 planning commission on the Board's own initiative:

7 "The Planning Commission may determine upon its own
8 initiative to review a decision of the Planning
9 Official and the County Board may determine upon its
10 own initiative to review a decision of the Commission
11 pursuant to this Ordinance within fourteen (14) days
12 of the decision. Written notice of review shall be
13 given as for any other public hearing matter
14 considered by the Board or Commission. For purposes
15 of review by the Board of Commissioners on its own
16 initiative of decisions by the Planning Commission
17 pursuant to Section XXIII.03 of the Benton County
18 Zoning Ordinance:

19 "1. An individual, or an organization with a member,
20 who lives, owns, leases or possesses a
21 contractual interest in land located beyond
22 1,500 feet in an EFU, EFU-HA, FC, or MPA (when
23 adopted) zone, and beyond 300 feet in all other
24 zones, who believes that he/she is aggrieved by
25 the Planning Commission decision, may submit a
26 written statement to the Board of Commissioners,
within five (5) days of the decision, indicating
the following:

"a. The nature of the individual's interest in
his/her real property.

"b. Description of how he/she is aggrieved by
the Planning Commission decision because of:

"(1) Physical, personal injury; or

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real property.

c. The description noted in 'b' above must
indicate that the aggrievement is direct,
substantial and adverse, and is not merely
speculative and/or remote.

"2. Upon receipt of the written statement described

1 above, the Board, within five (5) days, shall
2 conduct an evidentiary hearing to consider the
3 evidence regarding the aggrievement. Notice of
4 the evidentiary hearing shall be served upon the
5 party alleging the aggrievement and on the
6 applicant at least three (3) days prior to the
7 hearing. The party alleging an aggrievement and
8 the applicant may present relevant oral or
9 written testimony limited to the issue of the
10 aggrievement. Any person presenting oral
11 testimony shall do so under oath.

12 "3. Within three (3) days of the conclusion of the
13 evidentiary hearing, the Board shall decide
14 whether the person(s)/organization is directly,
15 substantially and adversely aggrieved. Notice of
16 the Board's decision shall be served on the party
17 alleging the aggrievement, and on the initial
18 applicant, and shall be supported by written
19 findings of fact.

20 "4. If the Board concludes that the individual is
21 directly, substantially and adversely aggrieved by
22 the decision of the Planning Commission, the Board
23 shall review the Planning Commission's decision,
24 through the formal quasi-judicial process.

25 "5. A fee equivalent to that required for a regular
26 appeal of a Planning Commission decisions [sic]
must accompany the written statement. If the
Board finds that the party alleging the
aggrievement is not aggrieved, 75% of the fee
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decision of the Planning Commission on its own
motion pursuant to ORS 215.422.

"No permits or authorization shall be issued until the
decision of the Planning Official or Planning
Commission is final."

22 STANDING

23 Petitioners each allege that they are adversely affected
24 and aggrieved by passage of the ordinance. The allegations of
25 particular aggrievement are based on hypothetical situations.
26 Petitioner Twedt alleges that he farms both sides of U.S.

1 Highway 20 northeast of Corvallis, and rain water runs off to
2 the Willamette River east of his farm. He says recent
3 developments in the vicinity of his farm have caused runoff to
4 flood portions of his property. One such subdivision is
5 alleged to lie beyond 1500 feet from his property and
6 "Ordinance 22K will prevent Twedt from appealing approval of
7 similar developments in the area which will exacerbate his
8 drainage problem." Petition for Review at 1. Similarly,
9 Petitioner Gallagher alleges he lives in the Corvallis area and
10 served on the Mary's River Basin Committee. The petitioner
11 relates that the committee has studied flooding in the basin,
12 and he has learned that residential development in the basin
13 "one half mile away could subject his property to flooding.
14 Under Ordinance 22K he is unable to appeal county approval of a
15 residential development more than 300 feet distant." Petition
16 for Review at 2.

17 Respondent objects to standing of petitioners. Respondent
18 replies that the ordinance does not deny petitioners the
19 opportunity to appeal quasi-judicial decisions if they are in
20 fact aggrieved by the decisions. Persons living within 300
21 feet of a proposal (or within 1500 feet of the proposal is
22 zoned EFU, EFU-HA, FC-20, or FC-40) may appeal decisions as a
23 matter of right providing they have testified at the planning
24 commission public hearing or have submitted written testimony
25 to the planning commission. For persons beyond the 300 and
26 1500 foot limits, persons must show aggrievement by the

1 decision. Respondent submits that the ordinance offers
2 "reasonable and expediate alternatives to each citizen in
3 Benton County, who suffers an aggrievement because of a
4 Planning Commission decision, to appeal that decision to the
5 Board of Commissioners." Brief of Respondent at 2. The
6 ordinance has the affect of "ensuring that unless a person
7 truly will suffer an aggrievement, he will not be in a position
8 to unduly hender the individual who desires to use his property
9 in a particular way." Ibid. Respondent claims that none of
10 the petitioners are in fact aggrieved within the meaning of Or
11 Laws 1979, ch 772, sec 4 because they in fact do have a right
12 to appeal.

13 "Aggrievement" sufficient to confer standing to appeal a
14 legislative decision does not require certainty of injury.
15 Petitioners have alleged that they may be precluded from
16 appealing certain land use decisions within Benton County. To
17 the extent the petitioners allege the ordinance may preclude
18 petitioners from appealing decisions they otherwise would be
19 allowed to appeal, petitioners have alleged a sufficient injury
20 to meet the burden imposed by Oregon Laws 1979, ch 772, sec
21 4(2). The injury alleged need not be a certainty. J.R. Golf
22 v. Linn County, ____ Or LUBA ____ (LUBA NO. 81-112), Warren, et
23 al v. Lane Co., ____ Or LUBA ____ (LUBA No. 81-102, 1982).
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25 ____ P2d ____ (CA No. A21709, Slip Opinion) (1982); 1000
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1 Petitioners stand in the same position as any citizen of a
2 county aggrieved by an ordinance provisions that may affect his
3 rights and responsibilities. Even though the injury alleged is
4 not certain, petitioners are entitled to standing to test the
5 ordinance against statewide land use laws. As this ordinance
6 has an effect on future appeals of land use decisions in Benton
7 County, petitioners are entitled to a determination of whether
8 any appeal rights given by statute are taken away by the
9 ordinance. Adoption of the county's theory would mean no
10 legislative textural provision could be appealed until the
11 provision is applied to petitioner's property through some
12 subsequent act of the governing body.²

13 NON-GOAL ISSUES

14 Discussion of petitioners' assignments of error dealing
15 with other than statewide land use planning goals will be
16 issued at a later date. What follows is a discussion of that
17 portion of petitioners' assignment of error 3 that allege
18 violation of Statewide Land Use Planning Goal No. 1. Upon
19 issuance of our opinion as to other assignments of error, the
20 following discussion will be incorporated into one final
21 opinion. The final opinion will also include LCDC's
22 determination as to our discussion of the goal issue.

23 GOAL ISSUES

24 Assignment of Error No. 1

25 "Ordinance 22K as amended violates the citizen
26 involvement goal (Goal 1)."

1 Petitioners argue that appeals of land use decisions are
2 part of the land use planning process. The citizen involvement
3 goal (Goal 1) requires an opportunity for citizen involvement
4 "in all phases of the planning process." Petitioners claim
5 that Goal 1 applies to adoption of ordinances, and the
6 ordinance must, therefore, conform to Goal 1. Petitioners
7 state that the county made no findings demonstrating that the
8 ordinances complied with Goal 1.

9 Additionally, petitioners argue that the ordinance fails to
10 provide aggrieved persons an opportunity to present evidence or
11 receive a final order addressing their concerns. Petitioners
12 argue that the "feedback mechanism" in Goal 1 requires the
13 county to assure persons aggrieved by a land use decision of an
14 opportunity to present evidence and receive a response. The
15 ordinance deprives persons of this necessary opportunity,
16 according to petitioners.

17 Respondent denies any violation of Goal 1 by stating that
18 "if a person is aggrieved, then an appeal will be processed and
19 the aggrieved person will be permitted to present evidence and
20 will receive a final order." Brief of Respondent at 9.
21 Respondent states that the ordinance simply requires that if a
22 person is beyond certain distances from the subject property,
23 then the aggrievement must be "demonstrated." Respondent
24 concludes that Goal 1 does not extend a right of appeal to one
25 who is not adversely affected.

26 We do not find a violation of Goal 1 as alleged by

1 petitioners. The petitioners have not alleged that the public
2 was not involved in the proceedings in Benton County leading to
3 the adoption of Ordinance 22K as amended by E-22-2. The record
4 in this case shows petitioners to have been present and very
5 actively involved in the proceedings leading up to adoption of
6 Ordinance 22K. We do not believe that this involvement needs
7 to be demonstrated by specific findings supporting a
8 legislative enactment such as the one at issue. See Gruber v.
9 Lincoln County, 1 Or LUBA 80 (1981). We believe the record
10 here, as in the Gruber case, demonstrates intense public
11 interest and involvement in the proceeding.

12 As to the second part of petitioners' allegation of a Goal
13 1 violation, it is our view that Goal 1 is not violated where
14 public participation in plan and ordinance formulation and
15 implementation measures is assured.³ Here, the public may
16 participate in any quasi-judicial land use decision making
17 process through the planning commission level. It is only at
18 the time of appeal that persons may be excluded if they do not
19 meet standing criteria.

20 We do not believe Goal 1 can be read as forcing governing
21 bodies to allow anyone to appeal a decision. The legislature
22 appears to have already spoken on this issue in ORS 215.422 and
23 227.180. These provisions suggest that review of permit
24 decisions is discretionary with the governing body. There is
25 no indication in ORS ch 197 that the legislature intended to
26 confer upon LCDC the authority to tell governing bodies who may

1 appeal quasi-judicial decisions, at least where the opportunity
2 has been provided to all persons who may be affected by a
3 particular decision to participate in the making of that
4 decision at some level. The fact certain people may be
5 excluded from being able to appeal that decision to the
6 governing body does not violate Goal 1.

7 For the reasons cited above, we find no violation of
8 Statewide Planning Goal 1.

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FOOTNOTES

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The matter of Ordinance 22K was heard before the Board on December 3, 1981. Subsequently, Benton County adopted Ordinance E-22-2 amending Ordinance 22K. A supplemental Petition for Review was filed and a supplemental reply was filed by the county. We will consider Ordinance 22K as amended.

2
Of course, legislative acts having immediate effect on land uses, such as plan and zone changes, would be appealable under the county's theory.

3
Goal 2 defines "Implementation Measures" as
"the means used to carry out the plan. These are of two general types: (1) management implementation measures such as ordinances, regulations or project plans, and (2) site or area specific implementation measures such as permits and grants for construction, construction of public facilities or provision of services."