

BEFORE THE LAND USE BOARD OF APPEALS

Nov 2 10 46 AM '82

OF THE STATE OF OREGON

THE OWYHEE CONSERVATIONISTS,)
an unincorporated association,)
and LARRY SULLIVAN, an)
individual,)

LUBA NO. 82-060

Petitioners,)

FINAL OPINION
AND ORDER

v.)

MALHEUR COUNTY, a political)
subdivision of the State)
of Oregon and LaVON KING,)
an individual,)

Respondent.)

Appeal from Malheur County.

Larry A. Sullivan, Ontario, filed a petition for review on behalf of Petitioners.

Stephen Vorhes, Vale, filed a respondent's brief on behalf of Respondent Malheur County.

Steven J. Pierce, Ontario, filed a Respondent's Brief on behalf of E. LaVon King.

Bagg, Referee; Cox, Referee; participated in the decision. Reynolds, Chief Referee, Dissenting.

Dismissed. 11/02/82

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 an order of the Malheur County Court
4 granting a zoning permit. Issuance of a zoning permit
5 permitted the applicant to secure a building permit for the
6 construction of a one-room cabin on a 40 acre tract of land in
7 Leslie Gulch in Malheur County.

8 The county order recognized that the land

9 "4. * * * under consideration is located in an
10 outstanding scenic area described as the area
11 between the rims of the canyon along the road
12 known as Leslie Gulch Road * * * and ending at
the Owyhee Reservoir. This area has unique
geographic and geological formations including
spires and towers."

13 "5. The principal land use in the Leslie Gulch scenic
14 area is recreational, as reflected in the camping
15 areas used by the general public for years on
16 applicant's land and the area in general. * * *
17 There are other cabins in existence in or near
18 similar scenic areas such as the Honeycombs * * *
19 * Other structures exist such as BLM facilities
for public use in the Leslie Gulch area. The
existing structure built on applicant's parcel as
described above would not be a conflicting use in
that it would not negatively impact the scenic
area identified above."

20 Applicant appealed the permit alleging violations of
21 Statewide Goals 3 and 5.¹

22 STANDING

23 Standing of petitioners is an issue in this case.

24 Petitioners allege as follows:

25 "The Owyhee Conservationists are an
26 unincorporated association formed in the Spring of
1981, and comprised of 10 to 15 regular members, with

1 a mailing list of 40 people, most of whom live in
2 Malheur County, Oregon. The organization was formed
3 in order to provide public input on a variety of
4 environmentally related issues. The most important
5 reason for the association's existence is to assist
6 the Vale District of the Bureau of Land Management in
7 its Congressionally-mandated wilderness inventory
8 program in Malheur County. The Owyhee
9 Conservationists have been active in visiting and
10 providing public comment about those areas designated
11 by the Bureau of Land Management as wilderness study
12 areas in order to insure that wilderness values are
13 emphasized in land use decisions. Among the number of
14 field trips conducted by the Owyhee Conservationists
15 was a field trip in the late Spring of 1981 to the Mud
16 Springs area of Leslie Gulch and adjoining tracts to
17 determine the wilderness potential of the area. Eight
18 members of the Owyhee Conservationists participated in
19 the Leslie Gulch field trip.

20 "Larry Sullivan is one of five Directors of the
21 Owyhee Conservationists. He was selected by the Board
22 of Directors to act as official spokesperson for the
23 Owyhee Conservationists in this case at the public
24 hearing conducted in Vale, Oregon on August 26, 1981,
25 at which he testified. Larry Sullivan is a resident
26 of Malheur County, residing at 1303 S.W. 12th Street,
Ontario, Oregon 97914, and has visited Leslie Gulch on
several occasions prior to the construction of the
cabin by the Kings, for the purpose of hiking and
photographing the scenery and wildlife.

"The decision to issue the zoning permit by
Malheur County for the cabin adversely affects the
interests of the Owyhee Conservationists and Larry
Sullivan by degrading the scenic and wildlife
qualities of Leslie Gulch, and by requiring the Bureau
of Land Management to evaluate the presence of the
cabin in its wilderness inventory program, with the
result that the BLM wilderness boundaries may well
have to be constricted from the cabin." Petition for
review, 6-7.

Respondent E. LaVon King challenges standing of Owyhee
Conservationists and Larry Sullivan. As we understand
Respondent King's argument, respondent believes that the
petitioners do not have a protectable, legal interest in the

1 controversy, and he cites Duddles v. City Council of West Linn,
2 21 Or App 310, 535 P2d 583 (1975). Respondent Malheur County
3 has a much more detailed attack on petitioners' standing.
4 Firstly, Respondent County argues the petitioners failed to
5 allege facts showing how any injury will result to petitioners,
6 "especially in light of the alleged interests pursued by
7 Petitioners." Respondent County recited that the existence of
8 the Owyhee Conservationists as stated by petitioners is "to
9 provide public input on a variety of environmentally related
10 issues * * * to insure the wilderness values are emphasized in
11 land use decisions." Petition for Review at 6. Petitioner
12 Sullivan alleges an interest in hiking and photography, but in
13 the case of each of the petitioners, facts showing how their
14 interests will be impacted in any way, much less adversely
15 affected, are not evident." Brief of respondent county at 1.
16 Respondent claims that the Owyhee Conservationists will be able
17 to continue providing comment on environmental issues in
18 appropriate cases regardless of the decision of the county in
19 this particular case, and Larry Sullivan may still take
20 pictures and hike in the same areas that were open to him
21 before the decision. Respondent claims that petitioners have
22 alleged no facts and made no allegations showing specifically
23 how hiking and photographic opportunities will be lost. See
24 Hilliard v. Lane County Commissioners, 1 Or LUBA 83 (1980).²

25 Respondent then states that even if allegations of injury
26 exist, facts showing how the county's decision will interfere

1 with petitioners' interests to any degree different than any
2 other citizen are absent. That is, there are no allegations
3 showing how it is that petitioners will be affected in any
4 manner different from anybody else. See Parsons, et al v.
5 Josephine County, 2 Or LUBA 383 (1981).³

6 We do not believe petitioners have alleged sufficient facts
7 showing adverse effect or aggrievement as required by Oregon
8 Laws 1979, ch 772, sec 4, as amended by Oregon Laws 1981, ch
9 748. That is, we do not believe either of petitioners has made
10 an adequate showing that its (or his) interests were adversely
11 affected or that it (or he) was aggrieved by the decision. As
12 noted by the respondent, the Owyhee Conservationists exist to
13 give "input" on environmental issues. There is nothing in this
14 decision that adversely affects the organization's ability to
15 provide that "input." Further, there has been no assertion by
16 the Conservationists that they have an interest in this
17 particular piece of property. Though the Conservationists say
18 that they have been active in visiting areas designated by BLM
19 as wilderness areas and though the Conservationists apparently
20 took a field trip to the Leslie Gulch area, there is no
21 indication as to how these field activities will be adversely
22 affected. In short, there is nothing to tie this particular
23 decision to the Conservationists. There is no allegation of
24 how this land use decision impacts the Owyhee
25 Conservationists. That impact is a prerequisite to any finding
26 by this Board that petitioners have standing. In Warren v.

1 Lane County, 5 Or LUBA 227 (1982), and ____ Or LUBA ____ (LUBA
2 No. 81-102, Final Opinion of June 23, 1982), we stated that
3 there must be an impact upon the potential petitioner, and that
4 impact must be adverse to the petitioner. Here, as in Warren,
5 the petitioners have not shown how it is that their exercise of
6 a right is impacted by the decision.

7 This same lack of sufficient allegation of impact exists
8 with respect to Larry Sullivan. Mr. Sullivan hikes and
9 photographs. He does not allege that this decision will
10 inhibit his hiking and photographing in the Leslie Gulch area.
11 Indeed, he does not even express a continuing interest in
12 hiking and photographing in the Leslie Gulch area. There is no
13 allegation that this particular structure will destroy a
14 particular view in the area used by him or which he has an
15 interest in continuing to use. Again, Mr. Sullivan has failed
16 to allege that he has suffered an impact as the result of the
17 erection of this structure. He has not alleged that his rights
18 to use the Leslie Gulch area (which we must presume will be
19 limited to public lands and public right of ways) will be
20 injured or inhibited in any way.⁴

21 This case must be dismissed for petitioners' failure to
22 state facts showing that they have standing to bring the
23 appeal. We wish to stress in making this decision that we are
24 not stating that aesthetic injury is not an injury which can
25 give rise to standing. Injury to aesthetic sensibilities may
26 be a sufficient interest to give rise to standing to challenge

1 a land use decision. See Sierra Club v. Morton, 405 US 727,
2 731 L Ed 2d, 82 S Ct 1361 (1972); Sierra Club v Morton, 348 F
3 Supp 219 (ND Calif. 1972). We simply state that injury to such
4 aesthetic interest must be specifically alleged. The person
5 must show that he himself is adversely affected. In this case,
6 there has been no allegation that interests of the individual
7 petitioners have been impacted by the decision in the manner
8 adverse to petitioners.

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1 REYNOLDS, Dissenting.

2 Petitioner Sullivan alleges:

3 (1) he has visited Leslie Gulch for hiking and
4 photographing scenery and wildlife, and

5 (2) the issuance of the permit will degrade the
6 scenic and wildlife qualities of Leslie Gulch.

7 I believe Mr. Sullivan has alleged an interest
8 (photographing scenery and wildlife) will be impacted by this
9 decision and that the impact will be adverse. He has alleged
10 that the scenery and wildlife which he wishes to photograph
11 will be degraded by this decision. His allegations are more
12 factual than were the allegations to support standing of
13 intervenor Hickham in Hilliard v Lane County, 1 Or LUBA 83
14 (1980). There may be some issue as to whether Mr. Sullivan's
15 allegations would be supported by the evidence were the Board
16 to conduct a hearing concerning the truth of the allegations.
17 But the question of the truth of Mr. Sullivan's allegations is
18 not before us at this time. We must, for purposes of this
19 motion, assume the allegations to be true. I believe them to
20 be adequate to give petitioner Sullivan standing. I,
21 accordingly, respectfully dissent.

FOOTNOTES

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4 Statewide Goal 3 is the Agricultural Lands goal and
5 Statewide Goal 5 is the Open Spaces, Scenic and Historic Areas,
6 and Natural Resources goal.

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8 In Hilliard, the Board rejected Kent Hickman's claim of
9 standing. His claim was based solely on aesthetic and
10 recreational grounds. Mr. Hickman's allegations of standing
11 were

12 "a. Intervenor is a resident of Oregon.

13 "b. Intervenor has visited the ocean beach adjacent
14 to the subject property on a regular basis for
15 the past ten years.

16 "c. During this ten year period, intervenor's visits
17 have occurred at least eight times per year.

18 "d. Intervenor's visits have been for recreational
19 purposes.

20 "e. Construction of the proposed residential
21 development on the foredune will injure
22 intervenor by impairing his aesthetic and
23 recreational enjoyment of the adjacent beach
24 area."

25 The Board determined that Mr. Hickman's allegations of standing
26 were insufficient to show his interests were adversely
aggrieved. Mr. Hickman's allegations did not enable the Board
to determine exactly how construction of the contested
structure would impair his aesthetic or recreational enjoyment
of Oregon beaches.

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28 Respondent also discusses petitioners' allegation about
29 wilderness boundaries. Respondent notes that wilderness area
30 designations are made by the United States Congress, not local
31 governments. The Bureau of Land Management wilderness
32 inventory does not apply to non-federal lands, and the property
33 here is, of course, private property. Respondent goes on to
34 question whether or not, because of the existence of an
35 improved roadway in Leslie Gulch, the area can be included

1 within a wilderness area at all.

2 We also note particularly petitioners' allegation that this
3 decision will require "the Bureau of Land Management to
4 evaluate the presence of the cabin in its wilderness inventory
5 program, with the result that the BLM wilderness boundaries may
6 well have to be constricted from the cabin." This allegation
7 would appear to be the kind of allegation that the Bureau of
8 Land Management would have to assert. How it is that this
9 particular land use action will affect the Bureau of Land
10 Management which in turn will affect the petitioners is not
11 explained.

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8 In Warren, the petitioner alleged that his use of private
9 property would be injured by the land use decision under
10 review. In that case, the petitioner had no continuing right
11 to be on the subject property. Here, as in Warren, the
12 structure is on private property. Petitioner's rights, then,
13 are limited to activities that he may conduct on land which he
14 is privileged to use, presumably public land.

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