

LAND USE
BOARD OF APPEALS
MAY 17 3 24 PM '84

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

3	SCHREINER'S GARDENS and)	
4	DAVID SCHREINER,)	
)	
5	Petitioners,)	
)	
6	vs.)	LUBA Nos. 84-003
)	84-004
7	DEPARTMENT OF ENVIRONMENTAL)	84-005
	QUALITY, STATE OF OREGON,)	
)	
8	Respondent,)	FINAL OPINION
)	AND ORDER OF DISMISSAL
9	and)	
)	
10	TRANS-ENERGY OF OREGON,)	
)	
11	Participant.)	

12 Appeal from the Department of Environmental Quality.

13 Ronald Saxton and Catherine Riffe, Portland, filed the
14 Petition for Review and Catherine Riffe argued the cause on
15 behalf of Petitioners. With them on the brief were Lindsay,
Hart, Neil & Weigler.

16 Michael B. Huston, Salem, filed the response brief and
17 argued the cause on behalf of Respondent DEQ.

18 Wallace W. Lien, Salem, filed the response brief and argued
19 the cause on behalf of Participant Trans-Energy of Oregon.
20 With him on the brief were Rhoten, Rhoten & Speerstra.

21 BAGG, Chief Referee; DuBAY, Referee; KRESSEL, Referee,
22 participated in this decision.

23 DISMISSED 05/17/84

24 You are entitled to judicial review of this Order.
25 Judicial review is governed by the provisions of Oregon Laws
26 1983, ch 827.

1 Opinion by BAGG.

2 NATURE OF THE DECISION

3 Petitioner challenges three permits issued by the
4 Department of Environmental Quality of the State of Oregon
5 (DEQ). The permits are an air contaminant discharge permit, a
6 waste discharge permit (for liquid wastes) and a solid waste
7 disposal permit. The permits are necessary for the operation
8 of a solid waste or garbage burning facility in Marion County.
9 Siting of the facility has been approved by Marion County. The
10 siting approval was the subject of an appeal to this Board in
11 Schreiner's Gardens and David Schreiner v. Marion County and
12 Trans--Energy Systems, ___ Or LUBA ___ (LUBA No. 83-065, 1983);
13 66 Or App 194, ___ P2d ___ (1983).¹

14 STANDING

15 Petitioner David Schreiner alleges he is doing business as
16 Schreiner's Gardens, a specialty nursery raising commercial
17 irises. We understand, therefore, that Petitioner Schreiner's
18 allegations are also those of his business, Schreiner's
19 Gardens. Our comments are applicable to the standing of both
20 Mr. Schreiner and Schreiner's Gardens.

21 Petitioner Schreiner makes the following statement in
22 support of his standing:

23 "Petitioner personally, and through his attorney, made
24 written submissions to respondent Department of
25 Environmental Quality (DEQ), opposing approval of the
26 permits, during that agency's consideration of the
requested permit approval. Petitioner's positions
were rejected and he is thereby aggrieved. Petitioner
has been further aggrieved by the decision of DEQ in

1 that his property and flowers will be injured as a
2 result of the impact of emissions of hydrogen
3 chloride, hydrogen fluoride and sulphur dioxide.
4 Additionally, the garbage burner will interfere with
5 scenic views, destroy open space and increase traffic
6 on roadways, thus adversely affecting petitioner's
7 enjoyment of his land. In addition, petitioner will
8 be injured as a result of the depletion of ground
9 water which will be caused by the proposed plant."
10 Petition for Review at 1.

11 Respondent Trans-Energy challenges petitioner's standing on
12 the ground that not only has petitioner stated untrue facts,
13 but the facts alleged, even if accepted as true, are not
14 sufficient to confer standing. Trans-Energy denies there will
15 be emissions of chemicals harmful to crops. The company also
16 alleges Petitioner Schreiner's property is more than 3400 feet
17 from the construction site. According to Trans-Energy, the
18 project site is not visible from petitioner's property; and,
19 therefore, petitioner will not be adversely affected or
20 aggrieved because of a loss of view or open space.

21 Trans-Energy responds to petitioner's claim about traffic by
22 characterizing petitioner's allegation to be "speculative at
23 best and factually inaccurate."² Lastly, Trans-Energy denies
24 that there will be any injury to petitioner as a result of the
25 depletion of groundwater. Trans-Energy states there is
26 sufficient groundwater for the plant and surrounding water
27 users.

28 Because Trans-Energy challenges the truth of petitioner's
29 allegations about crop damage from chemicals, loss of scenic
30 views and open space, and depletion of groundwater, and because

1 Trans-Energy asserts what it believes to be the "true facts,"
2 petitioner is obliged to come forward with evidence showing his
3 assertions are true. Duddles v. City of West Linn, 21 Or App
4 310, 535 P2d 539, rev den (1975); Howell v. Hood River County,
5 4 Or LUBA 332 (1981); OAR 661-10-035 and OAR 661-10-045.
6 Petitioner has made no request to present proof of any of his
7 allegations of fact. Under such circumstances, these
8 allegations alone are insufficient to show that petitioner has
9 standing. See ORS 197.830(9)(a) and OAR 661-10-030(3).

10 Petitioner's claim of increased traffic on roadways, by
11 itself, is not a sufficient independent basis for standing.
12 Petitioner's assertion does not specify how increased traffic
13 will aggrieve or injure the petitioner. It is not even clear
14 from the allegation that the traffic will increase on a road
15 used by petitioner. As we noted in Parsons v. Josephine
16 County, 2 Or LUBA 343 (1981),

17 "[e]ven if we presume the roadway will become more
18 crowded, petitioner does not tell us how any greater
19 use of the roadway will injure him. Increased traffic
20 on any roadway may interfere with an individual's use
of the road, but to no greater or lesser degree than
any other citizen in the area that may use the road."
Parsons, 2 Or LUBA 345.

21 Finally, petitioner's allegation that he appeared before
22 DEQ and presented positions contrary to those finally adopted
23 is not sufficient to confer standing. As the Court of Appeals
24 noted in a recent case considering standing before LUBA,
25 appearance before a local governing body and an assertion of a
26 position on the merits does not necessarily mean the individual

1 is aggrieved. Jefferson Landfill Committee v. Marion County,
2 65 Or App 319, 322-3, 671 P2d 763 (1983). Petitioner must
3 allege facts which show him to be more than abstractly affected
4 by the decision he seeks to challenge.

5 CONCLUSION

6 In this case, most of petitioner's claims of injury and
7 aggrievement must be disregarded because they have been
8 challenged and he has made no effort to prove them. In the
9 case of the unchallenged claim about traffic, the allegations
10 do not explain how the asserted harm has any direct bearing on
11 an interest of petitioner.

12 Under these circumstances, this appeal must be dismissed
13 for lack of standing.

14 Dismissed.

15

16

17

18

19

20

21

22

23

24

25

26

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 We dismissed the appeal because petitioner failed to file a
petition for review within the time allowed. The Court of
Appeals affirmed the dismissal.

2 We are not certain what respondent means by "factually
inaccurate" because at the hearing, respondent's counsel said
Trans-Energy did not dispute that there would be an increase in
traffic. We will treat respondent's argument as one
challenging the sufficiency of petitioner's assertion about
traffic.