

JUN 8 3 52 PM '87

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

1
2
3 LEAGUE OF WOMEN VOTERS OF)
COOS COUNTY, MARGUERITE)
4 WATKINS, ALICE CARLSON,)
1000 FRIENDS OF OREGON)
5 and HOWARD WATKINS,)
6)
Petitioners,)
7 vs.)
8 COOS COUNTY,)
9 Respondent.)

LUBA No. 86-052

FINAL OPINION
AND ORDER

10
11 Appeal from Coos County.

12 Robert L. Liberty, Portland, filed the petition for review
and argued on behalf of petitioners.

13 David R. Ris, Coquille, filed a response brief and argued
14 on behalf of Coos County.

15 BAGG, Referee; DuBAY, Chief Referee; participated in the
decision.

16 REMANDED 06/08/87

17 You are entitled to judicial review of this Order.
18 Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners seek review of a Coos County order denying them
4 standing to appeal a decision of the Coos County hearings
5 body.¹ Petitioners ask that we remand the order to Coos
6 County for consideration on the merits.

7 FACTS

8 In February, 1986, an application was filed requesting
9 approval of a single family forest dwelling. The planning
10 director approved the application in March. On April 10, three
11 members of the Coos County Planning Commission, serving as the
12 hearings body, voted to review the approval on its own
13 initiative as provided for in the Coos County Zoning
14 Ordinance. The hearing was held on May 8, 1986. Appearing at
15 that meeting was Alice Carlson, representing the League of
16 Women Voters of Coos County. She presented written testimony
17 opposing the permit. Howard Watkins, one of the three members
18 of the planning commission voting to review the approval,
19 submitted a memorandum of his own urging reversal. Robert
20 Liberty, acting as attorney for League of Women Voters,
21 Marguerite Watkins, Alice Carlson and 1000 Friends of Oregon,
22 also submitted written testimony opposing the approval. The
23 hearings body voted to approve the application.

24 On May 27, 1986, the planning department received a notice
25 of intent to appeal the hearings body's decision. The notice
26 was filed on behalf of the League of Women Voters, Alice

1 Carlson, Marguerite Watkins, 1000 Friends of Oregon and Howard
2 Watkins. The appeal was accompanied by the requisite filing
3 fee, and included allegations supporting each of petitioners'
4 claim for standing.

5 On June 9, 1986, the Board of County Commissioners
6 considered the appeal and voted, tentatively, to deny standing
7 to all the would-be appellants. The order was made final on
8 June 18, 1986 and petitioners appealed that decision to this
9 Board. We upheld the county's decision in League of Women
10 Voters v. Coos County, ___ Or LUBA ___ (LUBA No. 86-052, August
11 29, 1986). Our decision was reversed in League of Women Voters
12 of Coos County, 82 Or App 673, 729 P2d 588 (1986).² The case
13 is now before us on remand from the Court of Appeals.

14 ASSIGNMENT OF ERROR

15 "The County Erred In Its Legal Conclusion That
16 Petitioners Had The Status Of 'Witnesses' And Thus
17 Lacked Standing To Appeal To The Board Of
Commissioners As Persons 'Aggrieved' By The Decision
Of The Hearings Body."

18 Section 5.7.300 of the Coos County Zoning Ordinance
19 provides an opportunity to present and rebut evidence
20 before the county's hearings officer and the county
21 board. Any person may present and rebut evidence, but
22 must state for the record their name and address prior to
23 presenting testimony. The ordinance goes on to define
24 those appearing as either parties or witnesses.

25 "'Party' means any person or agency entitled to notice
26 under this ordinance or any other person meeting the
requirements of standing as established by Section

1 5.8.100 and has been recognized as a party by the
2 presiding officer at the hearing.

3 "'Witness' means a person who is authorized by the
4 presiding officer at a hearing to offer testimony. A
5 witness shall not be considered a party to the hearing
6 unless the presiding officer recognizes the witness as
7 a party.

8 "All parties shall be afforded opportunity to present
9 and rebut evidence. Irrelevant, immaterial or unduly
10 repetitious evidence shall be excluded.

11 "Of those who appear and are heard at the time of
12 hearing, the presiding officer shall determine who are
13 parties and who are witnesses only, and shall give
14 them an opportunity, if they choose, to be heard with
15 regard to the ruling. Persons who appear by written
16 communication only shall be accorded the status of
17 witnesses unless they are included among those persons
18 entitled to notice of hearing under this ordinance, or
19 the written statement both asserts a position on the
20 merits of an application, and establishes the person's
21 status as a party to the satisfaction of the presiding
22 officer." Section 5.7.300.

23 Party status then, is conferred upon an individual by the
24 hearings officer.

25 At Section 5.8.100, the county ordinance outlines standing
26 to appeal and restricts standing to "parties," or, those whose
interest is recognized by the hearings body.

"SECTION 5.8.100. Standing to Appeal. Any person who
has filed a notice of intent to appeal as provided in
Section 5.8.200 may seek review of an administrative
decision by the Planning Director or quasi-judicial
decision by the Hearings Body if:

* * *

"B) in the case of quasi-judicial³ decisions by the
Hearings Body, the person--

"1. appeared before the Hearings Body orally
or in writing; and,

"ii. was a person entitled as of right to
notice⁴ and hearing prior to the

1 decision to be reviewed or was a person
2 whose interests are adversely affected or
3 who was aggrieved by the decision.

4 "C) as used in this Section, a person

5 "i. 'aggrieved' is one who's [sic] intent
6 [sic] was recognized by the Hearings Body,
7 asserted a position on the merits and the
8 Hearing's Body decision was contrary to
9 the position asserted by that person,

10 "ii. is 'adversely affected' by the Hearings
11 Body decision if the decision infringes
12 upon the use and enjoyment of his or her
13 property or otherwise detracts from
14 interests personal to that person.

15 The county ordinance provides detailed guidance in the
16 notice of intent to appeal.

17 "SECTION 5.8.200 Notice of Intent to Appeal.

18 "A) A written notice of intent to appeal shall
19 include the required fee and be filed with the
20 Planning Director as follows:

21 "i. an appeal of an administrative decision to
22 the Hearings Body shall be filed within 15
23 days of publication in a local newspaper of
24 general circulation;

25 "ii. an appeal of a Hearings Body decision to the
26 Board of Commissioners shall be filed within
30 days of the date the final action was
reduced to writing. (See Section 5.7.800).

"B) The notice of intent to appeal shall not be
accepted unless it is accompanied by the fee
prescribed in Section 1.3.900.

"C) The notice of intent to appeal must clearly and
specifically state--

"i. how the Planning Director erred in his
decision, or how the Hearings Body erred in
its decision; and,

"ii. the issues the petitioner seeks to have
reviewed; and,

1 "iii. the facts establishing that the petitioner
2 has standing, pursuant to this Section, or
3 Section 5.8.150."

4 At Section 5.8.400, the board of commissioners is to
5 determine the adequacy of a notice of intent to appeal
6 (including standing issues) within 15 days after petitioners
7 file a notice of intent to appeal the hearings body's
8 decision.

9 In this case, the county found that the notice of intent to
10 appeal was timely filed, was accompanied by the appropriate
11 fee, stated how the hearings body erred, stated what issues the
12 appellant sought to have reviewed and included facts and
13 allegations discussing why appellants believed they were
14 entitled to standing. The county found, however, that

15 "3. League of Women Voters of Coos County, 1000
16 Friends of Oregon, Marguerite Watkins and Alice
17 Carlson appeared by a written statement submitted
18 by their attorney, Robert Liberty, and that
19 statement addressed the merits of the matter but
20 did not include any information to establish
21 those persons' status as parties.

22 "4. Howard Watkins also appeared by written statement
23 which he submitted on his own behalf. That
24 written statement addressed the merits but did
25 not include information establishing his status
26 as a party.

"5. Alice Carlson appeared personally before the
Hearings body representing the League of Women
Voters and stated that the appearance was not as
a party.

"6. The Hearings Body, independently of the above
reasons, discussed the status of the five
appellants and the presiding officer, pursuant to
Section 5.7.300 of the Ordinance determined that
all five appellants had the status of witness.

1 "7. The Hearings Body decision was contrary to the
2 position asserted by the appellants."

3 Based on these findings, the county dismissed the appeal
4 claiming that the hearings body did not recognize the interest
5 of any of the appellants; and, therefore, they were not
6 aggrieved by the hearings body decision. Record 14.

7 Petitioners argue the county is not entitled, under the
8 facts of this case, to designate the petitioners other than as
9 parties. Petitioners say their comments are quite unlike those
10 offered by an independent witness. Petitioners say they
11 complained about the proposed forest dwelling and did not
12 comment as "disinterested" witnesses on some aspect of the
13 permit request as might an engineer, surveyor, planner or other
14 person having no personal interest in the outcome of the
15 decision. Petitioners say under Jefferson Landfill, supra, and
16 Warren, supra, they are entitled to "party" status.

17 Respondent agrees (1) that petitioners made the requisite
18 appearance under the county ordinance and (2) that they stated
19 a position on the merits. Respondent also agrees with
20 petitioners that the hearings body made a decision which was
21 contrary to the position asserted by petitioners. Respondent's
22 argument, however, is that petitioners did not completely
23 satisfy the test for standing because none of petitioners were
24 recognized by the hearings body as having a sufficient interest
25 in the proceeding. Respondent grounds its argument on
26 Jefferson Landfill Committee v. Marion County, 297 Or 280, 686

1 P2d 310 (1984).

2 Respondent points out that in the Jefferson Landfill case,
3 the court stated that local government has a "gatekeeping"
4 responsibility. This duty is to determine whether or not the
5 person seeking standing has a sufficient interest in the
6 decision. Respondent notes that the Supreme Court in Jefferson
7 Landfill expressly provided that some persons, otherwise
8 meeting the appearance requirement and having asserted a
9 position on the merits, may be denied standing. Respondent
10 county cites the following portion of the court's opinion.

11 "Within the limits of the applicable rules governing
12 participation, persons who appear before the local
13 governing body may be denied interested person
14 status." Jefferson Landfill, supra, 297 Or at 285.

15 Respondent explains that in this case, information
16 establishing each of petitioners' status as a party was simply
17 not provided. Respondent adds that the League of Women Voters,
18 in making its presentation before the hearings body, explained
19 that it was not a party. The representative of the League was
20 asked whether her appearance was as a party or as a witness,
21 and the representative's response was "I am not a party."
22 Respondent's Brief at 1-2. Respondent argues that later
23 attempts to clarify the answer are not relevant.

24 In Jefferson Landfill, supra, the court noted the issue of
25 whether or not a particular individual was "recognized" as
26 having sufficient interest in the controversy to be afforded
party status is a matter for LUBA's determination:

1 "When the interests were not specifically recognized
2 by the local decision-makers, LUBA will sometimes be
3 able to discern from the record whether the person
4 appeared at the proceeding to urge a position on the
5 merits on his or her own behalf or merely as a
6 disinterested witness, i.e., a planner, engineer or
7 economist. Benton County, supra, 294 Or at 89.
8 Likewise, if a petitioner's status as an interested
9 person or disinterested witness is contested, LUBA may
10 determine the status based upon the record, including
11 any applicable ordinances."⁵ Jefferson Landfill,
12 supra, 297 Or at 285.

13 According to these rules, standing may be determined by the
14 local decision maker in the first instance. This "gatekeeping"
15 role is further discussed in a companion case, Warren v. Lane
16 County, 297 Or 290, 686 P2d 316 (1984). In Warren, the court
17 said:

18 "Local decision-makers, by ordinance or otherwise, may
19 determine who will be admitted or excluded as an
20 interested person or limited to the status of a
21 disinterested witness in a quasi-judicial proceeding.
22 These determinations may vary according to the nature
23 of the land use decision and dispute, the issues
24 involved or the particular proceeding. If the
25 decision-makers have not made such a determination, by
26 ordinance or otherwise, it would be assumed that when
a person appears before the local body and asserts a
position on the merits, the person has a recognized
interest in the outcome." Warren v. Lane County, 297
Or at 300-301.

The record in this case reveals the county was at least
aware that the petitioners were against the proposed use. In
the minutes for the May 8, 1986 hearings body meeting, there is
a heading entitled Persons For or Against at Hearing and under
a subheading labeled "against" is a list as follows:

"Howard Watkins, Alice Carlson, (League of Women
Voters), Robert Liberty (Attorney for LWV, Carlson and
1000 Friends of Oregon)."⁶ Record 50.

1 The county's order does not provide an analysis of why
2 petitioners were not regarded as parties. The order does not
3 articulate what criteria were used to decide whether or not
4 petitioners were disinterested witnesses or parties, and the
5 county ordinance provides no guidance.

6 The county's failure to fully articulate the standards used
7 and the facts found to reach the conclusion that petitioners
8 did not qualify as parties is ground for remand. However, we
9 believe it important to explain what we understand the
10 gatekeeping function to be. We see little point in remanding
11 this case for the development of findings without providing the
12 county with our view as to the limits of its power to close the
13 gate in circumstances where petitioners (1) appeared and (2)
14 expressed an opinion on the merits of the application which is
15 contrary to that adopted by the decisionmaker.

16 Jefferson Landfill, supra and Warren, supra, along with
17 League of Women Voters v. Coos County, supra, do not offer much
18 detail to help those responsible for exercising the gatekeeping
19 function. The three cases taken together show that the gate is
20 relatively easy to open and relatively difficult to close.

21 For example, in League of Women Voters v. Coos County,
22 supra, the court rejected Coos County's view that the
23 petitioners' articulated interest was not sufficient to earn
24 standing. The county claimed petitioners' interest in the
25 correct application of the land use laws was not sufficient to
26 establish petitioners were aggrieved by rejection of their

1 position by the county's planning commission. League of Women
2 Voters v. Coos County, 76 Or App at 711. This holding suggests
3 a philosophical interest is sufficient to warrant recognition by
4 the local decisionmaker.

5 Respondent argues the League of Women Voters case is only
6 applicable to preacknowledgement decisions. We do not agree.

7 As petitioners note:

8 "The county does not provide any analysis of why the
9 petitioners could have standing as aggrieved parties
10 before acknowledgement but become 'disinterested
11 witnesses' once the plan is acknowledged. There is no
12 logical difference between (1) an interest in securing
13 the compliance of quasi-judicial decisions with the
14 statewide planning goals (before acknowledgement) and
15 (2) an interest in securing the compliance of local
16 quasi-judicial decisions with comprehensive plans
17 implementing the statewide planning goals (after
18 acknowledgement)."

19 We conclude, therefore, that a person may be "aggrieved" by
20 not having his views adopted, and this frustration is
21 sufficient "interest" under the Warren test to earn standing.

22 We now consider when the gatekeeping function may be exercised.

23 The court's opinion in Jefferson Landfill listed the three
24 elements of the standing test in the following order: 1) the
25 person's interest in the decision was recognized by the
26 decisionmaker, 2) the person asserted a position on the merits,
and 3) the decisionmaker reached a decision contrary to that
asserted by the would-be petitioner. Jefferson Landfill, 297
Or at 284.⁷ This listing illustrates there are two times
when a county may exercise the gatekeeping function. The first
occurs when the would-be petitioner makes the first appearance

1 before the decisionmaker. At that initial appearance, the
2 county officer conducting the proceeding might inquire as to
3 petitioner's interest and decide at that point whether the
4 interest in the application is sufficient to allow the person
5 to speak. The county may determine whether the individual is a
6 witness on behalf of some other individual, is speaking on his
7 own behalf because of his own interest in the proceeding, or
8 simply there on a lark with no particular interest in the
9 decision.⁸

10 The next and more likely time for exercise of the
11 gatekeeping function is after the potential petitioner's
12 appearance and subsequent filing of an appeal, within the local
13 government hearing and appeal structure. At that point, the
14 proper gatekeeping function is to determine whether the
15 potential petitioner appeared on his own behalf and in
16 furtherance of his own interests or on behalf of someone else.
17 That is, the decisionmaker must determine whether the
18 individual is appearing to express his or her personal views
19 about the matter at issue or as a witness in support of someone
20 else's interests in the proceeding. An obvious example of the
21 latter case, and one used by the court in Jefferson Landfill,
22 supra, was the appearance by an engineer or planner in support
23 of another's request for a development permit. The engineer or
24 planner may express a professional view as to the merits of the
25 application, but the expression is not personal to him. It is
26 on behalf of a client or other person.⁹ In the latter case,

1 the person may appropriately be characterized as a witness.

2 We note that Coos County Ordinance does not provide
3 standards for determining the interest of potential parties,
4 nor does it require a potential parties to state their
5 interests. The ordinance is an invitation to make ad hoc
6 determinations that the petitioners lack sufficient interest
7 for any reason or for no reason.

8 We conclude the county has misconstrued its gatekeeping
9 responsibility and has lumped petitioners together as witnesses
10 with no substantial basis in fact in the record. There is
11 nothing in this record to suggest that any of the individual
12 petitioners appeared on behalf of any other person. What
13 emerges from the record is that each petitioner appeared on his
14 or her own behalf whether in person or through counsel.¹⁰
15 Each expressed a position on the merits of the decision which
16 was contrary to that taken by the county hearings body. Under
17 these conditions, we believe petitioners' interest should be
18 assumed to be sufficient to grant them standing. See the
19 passage from Warren, supra, quoted at page 9.

20 In sum, we find no justification for the county to find
21 that the individual petitioners appeared without the requisite
22 interest in the outcome of the case. See League of Women
23 Voters v. Coos County, 76 Or App 705, 712 P2d 111; rev den 301
24 Or 76 (1986).

25 The county's decision is remanded.

FOOTNOTES

1
2
3 1
4 In Coos County, the "hearings body" serves as the county's
land use hearings officer. See ORS 215.406.

5 2
6 We upheld the county's decision on a question of timeliness
7 having nothing to do with the issues in this proceeding or the
merits of the county's decision.

8 3
9 We note our discussion throughout this opinion is limited
10 to standing to appeal quasi-judicial decisions.

11 4
12 In cases where the appearance is made by written
13 communication, the county's ordinance at Section 5.7.300
14 provides a person is considered a witness unless the
communication establishes the person's status as a party to the
satisfaction of the presiding officer.

15 If a person is entitled to notice under the county
16 ordinance, he or she is automatically afforded standing to
appeal a hearings body decision. Petitioners in this case do
not claim entitlement to notice.

17 5
18 The cite to Benton County is Benton County v. Friends of
19 Benton County, 294 Or 79, 653 P2d 1249 (1982).

20 6
21 The county board was apparently confused about Mr.
22 Liberty's role. Mr. Liberty is the attorney for the
23 petitioners. The county board apparently rejected his
24 standing, claiming he was "disinterested" in the proceeding.
The county commissioners failed to understand his appearance
was on behalf of his clients, the petitioners herein. See
Petitioners' Reply Brief at 3.

25 7
26 Our discussion here is limited to the question of
aggrievement, and not the alternative issue of adverse affect.

1
2 8

3 It seems unlikely, but is certainly possible, that an
4 individual with no interest in the proceeding might take the
5 time to appear and speak. Perhaps a traveler from another
6 state with no intention of returning to Oregon and the
7 particular location might seek to express a view on the
8 decision. Under such circumstances, a traveler's interest in
9 the case might be doubtful and the county might be justified in
10 closing the gate.

11 This procedure is fraught with danger. Citizens may not be
12 able to articulate the nature of their interest beyond a mere
13 "I don't like this," unless the local government makes clear
14 what it is asking for when it asks the speaker for a statement
15 of his interest.

16
17 9

18 We add that it is not necessary that a petitioner announce
19 that he is appearing on his own behalf. We believe it may be
20 assumed that where an individual makes an appearance and argues
21 the position on the merits contrary to that finally adopted by
22 the decisionmaker, that that person is appearing for himself
23 and not as a witness for another. Warren, 297 Or at 301.

24 We note that in this case the county commissioners
25 apparently misunderstood the attorney's appearance. The county
26 commissioners appeared to believe that the attorney was
27 appearing on his own behalf and was seeking standing for
28 himself. The record does not support this understanding. The
29 attorney appeared on behalf of the petitioners in this
30 proceeding, not on his own behalf. His appearance is their
31 appearance. In this case the appearance makes it quite clear
32 not only that the petitioners appeared, but that they expressed
33 a position on the merits contrary to that eventually adopted.

34
35 10

36 It is correct that Alice Carlson stated before the hearings
37 body that "I am not a party." See Petitioners' Reply Brief, p.
38 1. However, she stated she represented League of Women Voters
39 which was opposed to the request, and her attorney later
40 explained that her answer reflected her understanding that she
41 did not meet the county's definition of party, but believed
42 that definition inconsistent with state law. Record 31.