

6/30/81

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

3	BRUCE WEBER,)	
)	
4	Petitioner,)	LUBA No. 80-162
)	
5	v.)	ORDER ON MOTION
)	TO DISMISS
6	CLACKAMAS COUNTY,)	
)	
7	Respondent.)	

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9 Reynolds, Chief Referee; Cox, Referee; participated in the decision and Bagg, Referee dissents.

10 This matter is before the Board on Respondent Clackamas
11 County's motion to dismiss the Notice of Intent to Appeal on the
12 ground that the petitioner does not have standing to appeal.¹

13 The basis for respondent's motion to dismiss is as follows:

14 "Chapter 772, Oregon Laws 1979, Section 4(3)
15 provides that to have standing to appeal a
16 quasi-judicial land use decision to this Board a person
17 must have 'appeared before the city, county or special
18 district governing body or state agency orally or in
19 writing . . .'. From a review of the County's records
20 in this case, it appears that petitioner submitted a
21 letter to the County Hearings Officer stating his
22 opposition to the proposed nonfarm use application, but
23 made no appearance either personally or in writing in
24 the subsequent proceedings before the Board of County
25 Commissioners. Therefore, the petitioner has no
26 standing to seek review of the Board of County
Commissioners' decision because he did not appear before
the County governing body."

22 The question presented by respondent's motion is whether
23 appearance before the governing body requires direct appearance
24 - i.e., oral argument before or a letter to the governing body
25 (in this case the Board of Commissioners), or permits also
26 indirect appearance - i.e., appearance via the record

1 transmitted to the Board of Commissioners. In other words, may
2 a person satisfy the appearance requirement so long as s/he
3 appears at some stage of the local government's proceedings?
4 We believe the answer is yes.

5 Oregon Laws 1979, chapter 772 is not clear as to whether
6 "appearance before the governing body" is satisfied simply by
7 appearance at some stage in the proceedings at the local
8 level. The legislative history also fails to illuminate the
9 legislative intent on this precise issue. However, the
10 legislative history is clear as to why the requirement of
11 appearance was instituted in Chapter 772.² The requirement
12 was instituted because the legislature desired to end the
13 ability of a person to do nothing until a decision was made at
14 the local level and yet still be entitled to appeal that
15 decision just because s/he could demonstrate aggrievement by
16 the decision.

17 Requiring that to appeal a local land use decision a
18 petitioner must have appeared before the governing body
19 directly, such as by orally arguing before the Board of
20 Commissioners or arguing in a written form directly to the
21 Board of Commissioners, would further the legislative policy of
22 requiring a person to get involved at the local level.³
23 However, requiring appearance only at some stage of the
24 governing body's proceedings, such as at the hearings officer
25 or planning commission level, would also further the
26 legislative policy of involving people at the local level and

1 securing their input. We are not persuaded that appearance
2 directly before the governing body is necessarily more
3 effective for presenting one's views at the local level than
4 appearance earlier in the proceedings. In many cases a person
5 who appears at the hearings officer or planning commission
6 level where the initial decision is made often will have more
7 impact on the outcome of that decision than will a person who
8 waits until the matter is before the Board of Commissioners to
9 appear. If a person appears by means of a letter submitted in
10 the course of the proceedings, it probably makes little
11 difference in terms of its impact on the Board of Commissioners
12 whether that letter comes directly to the Board of
13 Commissioners or indirectly as part of the record below. Thus,
14 we do not believe it can be demonstrated that appearance
15 directly before the governing body in all or most cases is more
16 effective than an appearance made earlier in the proceedings.

17 Since both interpretations - direct appearance before the
18 governing body or indirect appearance via the written record -
19 further the legislative policy of securing citizen involvement
20 at the local level, and since neither approach could probably
21 be demonstrated to be the more effective one, we must look to
22 other factors to ascertain legislative intent.

23 To require direct appearance before the governing body to
24 preserve appeal rights could have negative ramifications. It
25 would do little to expedite review of decisions by the
26 governing body and may unduly delay proceedings at that level.

1 If a person has appeared before the hearings officer or
2 planning commission, that appearance will be reflected in the
3 record and the governing body is required to review the
4 record. The person's views will, therefore, have been made
5 known to the governing body. To require the person who has
6 once appeared to appear again and to go through what need only
7 be a mechanical process of restating views already expressed
8 appears to us to be a needless exercise. The practical effect
9 of such a requirement in many cases, would simply be to make
10 more lengthy what is already a time consuming process at the
11 local level and to further enlarge already sizeable records on
12 appeal to this Board.

13 We are cognizant of the diverse procedures employed by
14 cities and counties in the review of land use decisions made
15 initially by hearings officers and planning commissions. At
16 least one county of which we are aware may consider an appeal
17 from a hearings officer's or planning commission's decision
18 strictly on the record made below and without affording anyone
19 the opportunity to appear directly before the Board of
20 Commissioners. Obviously, an interpretation of Oregon Laws
21 1979, chapter 772, section 4(3)(a) urged by Respondent
22 Clackamas County in this case would be difficult to apply where
23 the local governing body did not even allow appearance before
24 it directly when exercising its review powers.

25 For the foregoing reasons, the majority of this Board
26 concludes that in order to satisfy the "appearance" requirement

1 in Oregon Laws 1979, chapter 772, section 4(3)(a), one need
2 only appear orally or in writing at some stage of the
3 proceedings before the governing body. As petitioner in this
4 case did appear in writing before the hearings officer, he
5 satisfied the appearance requirement. Respondent Clackamas
6 County's motion to dismiss is, therefore, denied.

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1 BAGG, Referee. I respectfully dissent.

2 The facts in this matter are not in dispute. John M. and
3 Betty J. Rankin made application before the Clackamas County
4 hearings officer for approval of a division of a 19 acre lot in
5 an EFU-20 zone. Mr. Weber voiced his disapproval of the
6 application in writing before the Clackamas County hearings
7 officer. A subsequent appeal proceeding was held before the
8 Clackamas County Board of Commissioners, and the parties agree
9 that Mr. Weber made no appearance either orally or in writing
10 before the Board of Commissioners.

11 Oregon Laws 1979, ch 772, sec 4(3) provides that in order
12 to have standing to appeal a quasi-judicial land use decision,
13 a person must have "appeared before the city, county or special
14 district governing body or state agency orally or in writing .
15 . . ." No definition is given of "appearance," and no
16 definition is given of "governing body." However, the term
17 "governing body" is used elsewhere in Oregon Law, and a
18 definition of the term becomes clear from other statutes
19 involving land use planning activities. The statutes may be
20 read together and when read together, they will give an
21 accurate definition of the term. 2A Sands Sutherland,
22 Statutory Construction, sec 51.01 (4th ed, 1973).

23 ORS 215.406 provides that a local "governing body" may
24 delegate its responsibilities to hear applications for permits
25 and contested cases to a planning commission or hearings
26 officer. ORS 215.422 goes on to say that if so delegated, an

1 appeal from an application shall be allowed to the "planning
2 commission or county governing body, or both, however, the
3 governing body prescribes." The use of those two terms
4 illustrates a distinction by the legislature between a
5 "governing body" and a "planning commission" or "hearings
6 officer." The appeal may be either to the governing body
7 itself or to the planning commission. The two bodies are
8 treated quite separately.

9 It is my view that "governing body" means the Board of
10 County Commissioners of Clackamas County. Had Clackamas
11 County's "governing body" decided to delegate its appeal powers
12 to a planning commission, it would have done so in its own
13 ordinances. If there had been such a delegation and if no
14 appeal were possible to the governing body, I believe Oregon
15 Laws 1979, ch 772, sec 4(3) could be interpreted to allow
16 appeals to this Board from planning commission actions. After
17 all, the purpose of chapter 772 establishing this Board is to
18 allow a review of land use decisions. The statute should not
19 be read to deny a person an appeal where he has complied with
20 whatever acts are necessary to give him capacity or standing to
21 bring an appeal.

22 "Appear," as Black's Law Dictionary defines it is "[t]o be
23 properly before a court * * * ." Black's Law Dictionary 125
24 (4th Ed 1968). "Appearance" means "[a] coming into court as a
25 party to a suit * * *," and "is the act of appearing, coming,
26 or being in sight, becoming visible or clear to apprehension of

1 the mind, of being known as subject of observation or
2 comprehension." Ibid. I believe the word "appearance" as it
3 is used in Oregon Laws 1979, ch 772 is clear on its face and
4 means that a petitioner must come forward, orally or in
5 writing, directly to the county governing body.

6 Here, the petitioner did not appear at an appeal hearing
7 before the governing body simply because he felt he had no
8 evidence to present. He made his appearance before the
9 planning commission. I believe Mr. Weber had a responsibility
10 to make an appearance before the County Commission (or attempt
11 to make an appearance and be rejected) in order to perfect his
12 standing to appeal to the Land Use Board of Appeals.

13 I would dismiss the appeal.

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FOOTNOTES

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Normally, standing matters are raised after the petition for review is filed. See Oregon Laws 1979, ch 772, sec 4(6), LUBA Rule 8C(2). However, by agreement of the parties, the question of petitioner's standing in this case has been raised and is to be decided before transmittal of the record to the Board.

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Perhaps appearance was an implied requirement under the old writ of review process since only "parties" could seek a writ and to become a party presumably appearance was required. However, appearance was clearly not required under ORS 197.300 (1979 Replacement Part) involving review of land use decisions for goal compliance by LCDC.

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We say "argue," as opposed to introducing new evidence, because many if not most jurisdictions limit appeal from a hearings officer or a planning commission decision in most cases to matters already in the record.