

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

3 ARTHUR W. LYDON, SR.,)
4 ARTHUR W. LYDON, JR.,)
5 MICHAEL E. LYDON and)
6 HARLAN J. FERRY,)

7 Petitioners,)

8 v.)

9 COMMON COUNCIL FOR THE)
10 CITY OF SALEM and PORTLAND)
11 GENERAL ELECTRIC,)

12 Respondents.)

LUBA No. 80-157

ORDER ALLOWING PGE's MOTION
TO STRIKE AND DISMISS
AND DENYING PETITIONERS'
MOTION TO AMEND

13 Respondent Portland General Electric (PGE) moves for an
14 order striking certain portions of the petition for review and
15 for an order dismissing that portion of petitioners' appeal
16 relating to the zoning of PGE's property. Specifically, PGE
17 moves that paragraph C(10) on page 13 and the tenth assignment
18 of error on pages 45 through 47 be stricken from the petition
19 for review. Paragraph C(10) of the petition for review is a
20 summary of petitioners' tenth assignment of error.

21 Petitioners' tenth assignment of error is that "[t]here was no
22 substantial evidence in the record to justify that portion of
23 the Ordinance changing the zoning for contiguous property
24 owned by Portland General Electric Company from Commercial
25 General (CG) to Industrial Commercial (IC)."

26 PERTINENT FACTS

By Ordinance No. 108-80, the City of Salem established
zoning on property which had been annexed to the City. The

1 whole of the property annexed under Marion-Polk Local
2 Government Boundary Commission Final Order No. 80-11 consists
3 of approximately 137.42 acres which was classified by Marion
4 County at the time of annexation under the following
5 designations: Area I - CG (Commercial General); Area II - RA
6 (Residential Agricultural); Area III - RM (Multi-family
7 residential); Area IV - RA (Residential Agricultural). At the
8 time of annexation the Salem Area Comprehensive Plan designated
9 the subject property under three classifications as follows:
10 "Area I - Industrial; Area II - Multifamily; Area III -
11 Multifamily; Area IV - Portion west of Portland Rd - Developing
12 Residential, Portion 2 acres east of Portland Rd - Multifamily."

13 Area I is the property owned by PGE and the subject of the
14 contested assignment of error no. 10 in the petition for
15 review. Area II is owned by the petitioners and is the subject
16 of the remaining nine assignments of error in the petition for
17 review. The record reveals that the city dealt with each area
18 separately throughout the proceedings on Ordinance 108-80 even
19 though the entire annexed property (137 plus acres) is the
20 subject of a single ordinance number. Section 4 of the
21 contested ordinance (108-80) states that the Common Council
22 treated each area as a severable and separate fact situation.
23 Section 4 states in pertinent part:

24 "The Common Council declares that each Area and
25 portion thereof for which a change of zoning
26 classification is herein accomplished was considered
separately and on its own merits and that any decree
or ruling of a tribunal of competent jurisdiction

1 invalidating such action with respect to one such
2 tract shall not affect the others."

3 DECISION

4 PGE moves to strike the contested portions of the petition
5 for review on two grounds: first, PGE argues petitioners did
6 not give notice of their intent to appeal the zone change on
7 PGE's property and thus failed to satisfy the requirement of
8 Oregon Laws 1979, ch 772 which mandates that a notice of intent
9 to appeal be filed within 30 days of the land use decision
10 being contested; second, PGE argues that petitioners did not
11 allege sufficient facts in their petition for review to show
12 standing to appeal the PGE zone change and thus failed to
13 "satisfy Oregon Laws 1979, ch 772, sec 3(A) [sic] and LUBA
14 Procedural Rule 7(C)(1)." For the purpose of this order, we
15 only address PGE's second argument.

16 Oregon Laws 1979, ch 772, sec 4(3) states:

17 "Any person who has filed a notice of intent to
18 appeal as provided in subsection (4) of this section
19 may petition the board for review of a quasi-judicial
20 land use decision if the person:

21 "(a) Appeared before the city, county or special
22 district governing body or state agency orally or in
23 writing; and

24 "(b) Was a person entitled as of right to notice
25 and hearing prior to the decision to be reviewed or
26 was a person whose interests are adversely affected or
27 who was aggrieved by the decision." (Emphasis added).

28 PGE argues that petitioners did not appear before the City of
29 Salem Common Council on the issue of zoning PGE's property
30 (Area I) and, therefore, cannot contest the zoning on Area I

1 because they do not meet the standing requirement in Oregon
2 Laws 1979, supra. In response, petitioners point to a portion
3 of their statement of standing in their petition for review
4 which states:

5 "This hearing was held on the date indicated, at
6 which time Harlan J. Ferry appeared and testified in
7 favor of adopting the planning commission's
8 recommendation as to the petitioners' property. (R. 40
9 and 58)." (Emphasis added).

10 Petitioners reason that since they appeared during the
11 proceedings on Ordinance 108-80 that they have met the
12 appearance requirement of Oregon Laws 1979, ch 772, sec 4(3)
13 supra.

14 The basis for standing must appear in the petition for
15 review.¹ Petitioners' own statement above indicates they
16 only appeared concerning "petitioners' property." Just because
17 petitioners alleged standing to contest that portion of
18 Ordinance 108-80 involving their property does not mean they
19 automatically have standing to challenge all land affected by
20 the Ordinance which on its face treated each tract of land
21 severably. See 1000 Friends v. Marion County, 1 Or LUBA 33
22 (1980).

23 After PGE filed its motion to strike and dismiss
24 petitioners moved to amend their petition for review by adding
25 the following:

26 "Petitioners were entitled to Notice of the
27 proposed zone change for property owned by PGE
28 inasmuch as Petitioners own property abutting the PGE
29 property.

1 "Petitioner Harlan J. Ferry appeared personally
2 at the aforementioned public hearing and testified
3 before the Common Council that in order to develop the
4 Petitioners' property they would have to construct
5 uniform, essential water, sewer and street services
6 along the frontage of PGE's property according to the
7 specifications of the Salem Urban Growth Management
8 Program.

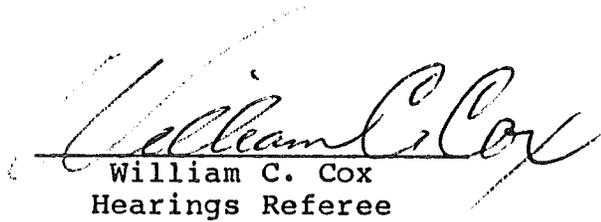
9 "Petitioners were adversely affected by the zone
10 change granted PGE from CG to IC in that PGE was
11 exempted from the requirements of the UGMP subsequent
12 to such zone reclassification as an industrial use
13 thereby permitting PGE to obtain a building permit for
14 construction of temporary non-uniform essential
15 services. PGE's construction of temporary facilities
16 imposes financial hardship on Petitioners who must
17 remove these facilities and construct permanent
18 facilities at their own cost when they develop their
19 property."

20 LUBA Procedural Rule 7(D) allows amendment of petitions for
21 review within this Board's discretion. We not only determine
22 that petitioners' proposed amendment is untimely but we also
23 find it will not cure the defect discussed above. Petitioners
24 still do not allege they appeared regarding PGE's property
25 (Area I). Petitioners motion to amend serves no purpose and is
26 therefore denied.

Based on the foregoing, it is the ruling of this Board that
Respondent PGE's motion to strike Item C(10) on page 13 of the
petition for review and the petitioners' tenth assignment of
error is allowed. Petitioners have failed to show that they
appeared before the city, county or special district governing
body or state agency orally or in writing as regards that
portion of the City of Salem Ordinance 108-80 affecting PGE's
property (Area I). Therefore, they have no standing to contest

1 the zone designation granted to PGE's property in Area I. That
2 portion of their petition for review is dismissed.

3 Dated this 20th day of August, 1981.

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7 William C. Cox
8 Hearings Referee
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FOOTNOTE

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4 Even if we were to review the record pages cited by
5 petitioners they indicate that petitioners appeared only
6 regarding their own property (Area II) and did not comment on
7 or make an appearance regarding PGE's property (Area I). Page
8 40 of the record is a copy of the notice of public hearing
9 which sets forth the various tracts of land and identifies them
10 by area number, i.e. Area I, Area II, etc. The minutes on Page
11 58 of the record indicate the following:

12 "Mr. Harlan Ferry, referring to Area II, said he
13 owns that property jointly with other investors and
14 asked the Council to consider the staff report
15 carefully and he called particular attention to Page 5
16 regarding conditions found by Marion County. He said
17 those conditions are no longer required but he would
18 request consistency in rezoning the area to RM and
19 said it is adjacent to an IC zone and so designated in
20 the Comprehensive Plan. He said if they construct a
21 mobile home park in that area, the investors will be
22 willing to go along with the new City ordinance on
23 that subject. Mayor Aldrich said he is somewhat
24 confused over exactly what Mr. Ferry is asking,
25 especially since the first presentation he heard on
26 this subject had to do with a request for a large
mobile home park.

"Mr. Ferry said what he is asking is a change in
RM zone with no conditions, and, while the intent was
to construct a mobile home park, he does not want it
so designated forever."