

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

ROBERT WARREN, TONY COLE)
GINGER COLE, EDWARD MYROWITZ,)
OREGON WILDERNESS COALITION,)
an Oregon corporation, and)
DONNA SHELTON,)

Petitioners,)

vs.)

LANE COUNTY,)
VICTOR RENAGHAN and)
LINDA RENAGHAN,)

Respondents.)

LUBA No. 81-102

ORDER ON
STANDING

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REYNOLDS, Chief Referee; COX, Referee; participated in this
decision.

BAGG, Referee, Dissenting.

FEBRUARY 26, 1982

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioners appeal Lane County's approval of a subarea
4 comprehensive plan change from natural resource timber to
5 tourist-commercial for 26 acres and to
6 conservation/recreation/open space for 160 acres. Petitioners
7 also appeal the county's decision to rezone the 26 acres from
8 forest-management to tourist-commercial and the 160 acres from
9 forest-management to natural-resource. The changes in the
10 comprehensive plan and zoning for western Lane County are for
11 the purpose of enabling the Renaghans (applicants) to develop
12 the property with a 40 unit lodge, restaurant, trading post, 30
13 cabins, parking facilities, trails, two owner's residences,
14 wells and drain fields. All necessary services and facilities
15 for the project are proposed to be provided on site, including
16 a community water system, community waste disposal system and
17 fire protection facilities.

18 The parcel is located approximately 15 miles north of
19 Florence and east of Highway 101. The property is bifurcated
20 in the southern section by Big Creek Road and Big Creek.

21 STANDING

22 Standing to appeal a land use decision in Oregon is
23 governed by 1979 Oregon Laws, ch 772, section 4(2) and (3).
24 One who appeals other than a quasi-judicial decision (i.e. a
25 legislative decision) must only demonstrate the person's
26 interests are adversely affected or the person is aggrieved by
Page the decision. Chapter 772, section 4(2). If review is sought

1 of a quasi-judicial decision, a person must either satisfy the
2 test for appealing a legislative decision or demonstrate that
3 s/he was entitled as of right to notice and hearing prior to
4 the decision for which review is sought. In addition to
5 meeting one of the foregoing (adverse effect/aggravement or
6 entitlement to notice) to appeal a quasi-judicial decision, the
7 person must have appeared before the local governing body
8 orally or in writing at some stage of the proceedings. See
9 Weber v Clackamas County, 3 Or LUBA 273 (1981).

10 The parties to the present appeal seem to agree that
11 standing is governed by chapter 772, section 4(3) requiring
12 both (1) appearance by petitioners and (2) either entitlement
13 to notice or a showing petitioners' interests were adversely
14 affected or petitioners were aggrieved by the decision.

15 Petitioners, for purposes of claiming standing, do not assert
16 they were entitled as of right to notice and hearing.¹

17 Petitioners claim they have met the standing requirement in
18 that they appeared and have interests which are adversely
19 affected or they are aggrieved by the decision.

20 Respondent Lane County and Intervenors-Respondents

21 Renaghans take issue with petitioners' standing. Collectively,
22 respondents argue:

- 23 (1) Petitioners failed to "appear" because they
24 did not appear orally or in writing before
the Board of Commissioners;
- 25 (2) Petitioners have failed to allege sufficient
26 facts to show their interests are adversely
affected or that they are aggrieved by the
decision.

1 Respondents Renaghan have also objected to our consideration of
2 certain "additional documents" and "affidavits" of petitioners
3 Shelton, Tony Cole and Ginger Cole as substantiating in any way
4 petitioners' fact allegations because these documents and
5 affidavits were not part of the record below. Respondents
6 Renaghans believe the factual support for fact allegations made
7 in the petition for review must exist in the record as it comes
8 to this Board from the governing body.

9 1. Exclusion of Documents and Affidavits

10 The "additional documents" which respondents Renaghan ask
11 us to disregard consist of objections filed by petitioners
12 Meyrowitz and Oregon Wilderness Coalition (OWC) to Lane County
13 on September 3, 1981 and September 28, 1981. The objections
14 submitted on the latter date were specifically directed at the
15 county board's proposed findings of fact. Petitioners
16 Meyrowitz and OWC cite these "objections" as evidence of their
17 "appearance" before the county. Respondents Renaghan argue we
18 should not consider the "objections" because they were
19 submitted to the county board after the close of its public
20 hearing. Lane County advised in its cover letter transmitting
21 these documents to this Board that they are not part of the
22 record on review.

23 Whether we exclude the documents themselves has no bearing
24 at this point on whether petitioners OWC and Meyrowitz have
25 alleged facts sufficient to indicate they appeared before Lane
26 County. The facts in support of standing must be alleged in

1 the petition for review. 1979 Or Laws, ch 772, section 6(a).
2 The facts alleged in the petition need not be supported by
3 evidence in the record or in documents outside the record. If
4 the facts alleged are disputed the Board may "take evidence" to
5 determine whether the facts alleged are true. 1979 Or Laws, ch
6 772, section 4(7). If the evidence had to already exist in the
7 record, Section 4(7) allowing the board to "take evidence"
8 would not make sense. Moreover, requiring that the evidence to
9 support standing appear in the record

10 "****is unworkable because either standing might
11 not have been an issue before the inferior
12 tribunal or, if an issue, might have been
13 determined by the inferior tribunal under a
14 different standard than...applicable once the
15 matter reaches the court system. Duddles v City
16 Council of West Linn, 21 Or App 310, 328, 535 P2d
17 583 (1975).

18 The county has asserted that the "additional documents" are
19 not part of the record. Petitioners have not objected to this
20 assertion, and the time for objecting to the completeness or
21 accuracy of the record has long passed. We conclude,
22 therefore, that the documents are not part of the record of
23 Lane County's proceedings which we may utilize in reviewing the
24 merits of the decision in this case.

25 Whether the documents are, nevertheless, properly in front
26 of us on the standing question is a different issue than
whether they are part of the record, although we conclude the
result is the same. Petitioners have alleged in their petition
for review that these documents were submitted to Lane County

1 on September 3 and 28, 1982. The fact they were submitted is
2 not disputed by respondents. We do not need to have the
3 documents physically in front of us because there is no dispute
4 that they were submitted or when they were submitted. See 1979
5 Or Laws, ch 772, sec 4(7). Whether submission of the documents
6 after the close of the public hearings constitutes an
7 "appearance" before the county board is purely a legal
8 question. As the Board need not "take evidence" on
9 petitioners' allegation concerning submission of the documents,
10 the documents are not part of the record in this case. The
11 motion to exclude is, therefore, unnecessary.

12 The affidavits submitted by petitioners to which
13 Respondents Renaghan object are those of Tony and Ginger Cole
14 and Donna Shelton. These affidavits were submitted solely to
15 provide evidentiary support for these petitioners' factual
16 allegations concerning standing. As with the above discussed
17 additional documents, however, the affidavits would only be
18 needed if the Board decided there were a dispute concerning the
19 factual allegations in the petition. The affidavits could then
20 be used to supply evidence to support the factual allegations.
21 As no such determination has yet been made by this Board, the
22 affidavits should not be considered.

23 PETITIONERS' STANDING

24 1. The meaning of "a person whose interests are
25 adversely affected or who was aggrieved by the
decision."

26 Perhaps no other area of the land use law is as ill defined

1 as the question of who has standing to seek review of a land
2 use decision. In Duddles v City Council of West Linn, 21 Or
3 App 310, 535 P2d 583 (1975), the Court of Appeals discussed the
4 substantive standards for standing under the Writ of Review
5 "injury of some substantial right" statutory test. See ORS
6 34.040. The opinion mentioned the "wide range of views on what
7 the controlling standards should be" expressed by the parties
8 but did not develop a standard to be applied. Instead, the
9 Court said:

10 "As interesting and important as the standing
11 questions are, we find the present record insufficient
12 to fully resolve them. We have previously assumed
13 that a non-contiguous property owner in reasonably
14 close proximity to rezoned property has standing to
15 challenge the rezoning decision. [citing cases] We
16 continue to believe that contiguous ownership should
17 not be the sine qua non of standing; if it were, land
18 developers could effectively insulate some zone change
19 decisions from judicial review if they were the only
20 contiguous owner.⁹ And we continue to believe
21 that a property owner in reasonably close proximity -
22 such as within sight or sound of a proposed use of
23 land - should ordinarily have standing to challenge a
24 zoning decision." (Footnote omitted).

18 While the Court in Duddles established for purposes of the
19 Writ of Review test that a person within sight or sound of a
20 proposed development should have standing to challenge the
21 decision allowing the development, the Court did not elaborate
22 upon the reason for this rule. The Court also did not indicate
23 whether a person not within sight or sound should have standing
24 and if so, under what circumstances.

25 In Clark v Dagg, 38 Or App 71, 588 P2d 1298 (1979), the
26 Court of Appeals said that the test in ORS 34.040 of "injury to

1 some substantial right" and the statutory standing requirement
2 of "aggrieved" in ORS 215.422

3 "...serve the same fundamental purpose of
4 requiring plaintiff to show some injury resulting from
5 the official action. No Oregon case has distinguished
6 the two standards, and we see no meaningful or
7 workable distinction between them. Accordingly, we
8 construe them to have equivalent meaning."

9 In Clark v Dagg, supra, the Court of Appeals was concerned with
10 whether a planning organization had either representational
11 standing (i.e., standing to represent one of its members) or de
12 jure standing (i.e., whether the organization itself were
13 injured). In analyzing whether the organization had
14 representational standing, the Court looked to Clark, a member
15 of the organization. In deciding that Clark had not alleged an
16 injury sufficient to confer standing the Court referred to
17 Clark's claims of injury as "speculative" and "not sufficiently
18 significant to justify judicial interference." The Court also
19 talked in terms of whether the injury to Clark was a
20 "substantial injury in fact" or whether he had suffered "an
21 injury to a substantial right distinct from that of members of
22 the public at large," referring to Eacret v Holmes, 215 Or 121,
23 124-15, 333 P2d 741 (1958).

24 In 1000 Friends of Oregon v Multnomah County, 39 Or App
25 917, 593 P2d 1171 (1979), the Court was confronted with yet a
26 third test for determining standing. The test involved in 1000
Friends of Oregon was that contained in ORS 197.300(1)(d),
(1979 Replacement Part) and granted standing to any person

1 "whose interests are substantially affected" by a land use
2 decision. Although more concisely than in Duddles, the Court
3 referenced the arguments of the parties as to the differing
4 standards which might be employed under the "substantially
5 affected" test. The issues noted by the Court were whether the
6 "substantially affected" test was the same as the federal
7 "trivial impact" test, whether the "substantially affected"
8 test was a "stricter test, placing emphasis on the connection
9 between the perceived injury and the challenged state action,"
10 or whether the "substantially affected" test "emphasizes the
11 degree of impact which the challenged provisions exert on
12 petitioner's interest." The Court did not resolve these
13 questions, however, instead concluding that the petitioner had
14 an interest which was "sufficient under any standard to grant
15 him standing."

16 For our purposes, perhaps the most significant feature of
17 any of the three cases cited above is a footnote in the 1000
18 Friends of Oregon v Multnomah County opinion which stated:

19 "We did not intend to suggest in Duddles nor do
20 we here, that LCDC could not establish rules setting
21 out other reasonable criteria for establishing
22 standing. Where LCDC has not done so, however, the
23 task becomes ours. See Fish and Wildlife Dept. v
24 LCDC, 37 Or App 607, 615, 588 P2d 80 (1978)."

25 Following the Court's footnote quoted above, we believe
26 this Board has the ability, if not the responsibility, to give
some meaning to the terms used in 1979 Oregon Laws, chapter
772, section 4, subsection 3 "a person whose interests are

1 adversely affected or who is aggrieved by the decision." We
2 have already, in essence, adopted the "sight or sound" test
3 announced in Duddles. See Van Volkinburg v Marion County, 2 Or
4 LUBA 112 (1980), affirmed, Merrill v Van Volkinburg, 54 Or App
5 873, ___ P2d ___ (1981). Beyond this, however, our decisions
6 relating to standing have involved for the most part pleading
7 questions, such as whether the petitioner had alleged facts
8 showing an injury of any kind. See e.g., Parsons v Josephine
9 County, 2 Or LUBA 343 (1981); Citizens for Planned Development
10 v The Dalles, 2 Or LUBA 359 (1981).

11 We do not believe there is any meaningful distinction to be
12 drawn from the use of different phrases "injury of some
13 substantial right," "aggrieved," "substantially affected" or
14 "interests adversely affected or who is aggrieved." Cf. 1000
15 Friends of Oregon v. Douglas County, 1 Or LUBA 42, 45, aff'd;
16 Flury v. Land Use Board of Appeals, 50 Or App 263, 623 P2d 671
17 (1981). If the legislature did intend to mean something
18 different by using different phrases, its intent is no where to
19 be found. To understand what these terms mean, therefore, we
20 believe it helpful to examine the reason why there is a
21 standing requirement. The reason why there is a standing
22 requirement is so that not everyone can avail him or herself of
23 the judicial system to right what that person may believe to be
24 an injustice or simply a governmental decision wrongly made.
25 Opening the system up to just anyone might overburden the
26 courts as well as give to the courts a "general oversight of

1 the elected branches of government" not contemplated by our
2 forefathers. See United States v Richardson, 418 US 166, 188,
3 41 L Ed 2d 678, 945 Ct 2940 (1974). Thus, Article III of the
4 United States Constitution has been consistently interpreted by
5 the Supreme Court as requiring a plaintiff to have an interest
6 at stake before federal judicial intervention will be allowed.
7 See Davis, Administrative Law of the Seventies (1976), p. 524.
8 The requirement that a plaintiff have an interest at stake is
9 in keeping with fundamentals of the common law which have
10 existed for hundreds of years. Id. at 485, 525. As Professor
11 Davis puts it:

12 "If A continues to trespass on B's land, B has
13 standing to enjoin A, but C, who has no interest in
14 the land is unaffected by the trespassing, lacks
15 standing. That seems natural, and a departure from
16 that proposition seems unnatural. Why should C be
17 allowed to get the injunction if he has no interest at
18 stake? And is not the problem the same if an
19 economic, environmental, aesthetic or other interest
20 is substituted for the interest in land and if A is
21 the government?" Id. at 525.

22 It doesn't appear to us that it makes any real difference
23 whether one is seeking standing to appear in federal court
24 under the U.S. Constitution, under the federal APA or in a
25 state proceeding such as the present one. What is required is
26 that the person have a personal stake in the decision. The
stake need not be substantial so long as it exists.

A personal stake in a decision can be shown in a number of
ways. Generally speaking, however, it is an interest in the
decision not commonly shared by members of the community at

1 large. If a particular land use decision will impact a person
2 in a way different from other members of the community, that
3 person may be said to be affected or aggrieved by the
4 decision. We do not believe the impact need be significant or
5 that it will for certain even occur. The impact need only be
6 one reasonably likely to in fact occur.

7 2. Standing of Individual Petitioners

8 (a) Adverse Effect or Aggrievement

9 (1) Petitioners Tony and Ginger Cole

10 Petitioner Tony Cole alleges he is adversely affected by
11 Lane County's decision to approve this development as follows:

12 "Petitioner Tony Cole is adversely affected by
13 the enacted plan and zoning changes by virtue of the
14 proximity of his residence to the subject property.
15 His use of Big Creek Road (which bifurcates the
16 subject parcel) for entering and leaving his
17 residence, the necessity to travel on the property to
18 pick up his mail, his history of fishing and picnicing
19 on the parcel and the Big Creek area, and his
20 employment at Washburn State Park immediately south
21 and adjacent to the subject parcel."

22 Petitioner Ginger Cole alleges she has been adversely affected
23 as follows:

24 "Petitioner Ginger Cole has suffered similar
25 effects from this development: increased traffic on
26 the access road to owned property, inconvenience
caused by construction activities on Big Creek Road
(both road and project construction), loss of use of
the property for fishing, hunting and other
recreational pursuits."

Both Tony and Ginger Cole, in addition to the foregoing, allege
that they received no notification of the county's August 5,
1981, hearing and that had they received such notice, they

1 would have appeared, testified and offered evidence in
2 opposition to the proposed development. Petitioners also make
3 the following allegation:

4 "Because of the Cole's necessary use of Big Creek
5 Road to their home, they will be uniquely affected by
6 the widening of that road and reconstruction of its
7 intersection with Highway 101 as required by the
8 conditions of approval for the rezoning of the
9 property (R.8). These effects include temporary
10 blockage of the road during reconstruction and delays
11 associated with use of construction equipment on the
12 road and the adjacent development."

13 Finally, petitioner Tony Cole alleges that, as he regularly
14 fishes in the Big Creek area, he will be adversely affected "to
15 the extent the record reveals that fishing opportunities in the
16 lower Big Creek will be diminished or eliminated." Because
17 they did not receive notice from the county, the Coles contend
18 they lost their citizenry participation rights given to them
19 under LCDC Goal 1 and they are, therefore, adversely affected
20 by the process the county used in reaching its decision.

21 Assuming as we do for purposes of this order that the
22 Coles' allegations in their petition are true, their
23 allegations are sufficient to demonstrate that they have a
24 personal stake in the county's decision. The Coles assert that
25 Big Creek Road which they use for access to their property will
26 be blocked temporarily and there will be delays caused by
construction equipment. We believe persons whose ingress or
egress to their property is affected or threatened to be
affected by a particular development should have standing to
challenge the decision which authorizes the development. Such

1 a decision would be said to affect or be reasonably likely to
2 affect those persons' use of their property. The fact that the
3 proposed development is 5 1/2 miles from petitioners' property
4 does not matter. It is petitioners' allegation that access to
5 their property will be blocked or interfered with which gives
6 them a personal stake in this decision.

7 We do not believe, however, that the Coles remaining
8 allegations concerning their recreational and other uses of the
9 property on which the development will be located, if true,
10 give them a personal stake in this decision. These allegations
11 concern, essentially, the Coles' use of the subject property
12 and how that use will be interfered with if the proposed
13 development is allowed to occur. The subject property is
14 private property, however, and petitioners do not assert in
15 their petition for review that they have the right to use the
16 subject property for any purpose. Petitioners have pointed to
17 ORS 105.655 as setting forth a public policy in this state that
18 private lands be used for recreational purposes. If it is
19 petitioners' assertion that this statute confers upon them some
20 right or gives them some interest in using private lands for
21 recreational or other purposes, we disagree. All ORS 105.655
22 does, in our view, is to insulate from liability owners of
23 private land who choose to make their property available to the
24 public for recreational or other purposes.

25 Petitioners Tony and Ginger Cole assert one remaining basis
26 for standing. They claim the county's failure to give them

1 notice of the county's proceedings adversely affected them
2 because they were unable, as a result, to appear and present
3 evidence in opposition to the proposed development.

4 We believe, however, that the county's alleged failure to
5 give petitioners notice is not sufficient in and of itself to
6 confer standing on petitioners. 1979 Oregon Laws, chapter 772,
7 section 4, subsection 3 requires that a petitioner demonstrate
8 his or her interests are adversely affected or s/he is
9 aggrieved by the decision. If the petitioner can show a
10 personal stake in the ultimate decision, then, but only then,
11 may the petitioner raise procedural errors which are
12 prejudicial to the petitioner. In other words, a petitioner's
13 assertion s/he was adversely affected (prejudiced) by the
14 process used in reaching the decision merely gives the
15 petitioner the right to raise this issue on review. A
16 demonstration of prejudice from an alleged procedural error
17 must be made to entitle one to obtain reversal of a decision on
18 the basis of the procedural error. 1979 Oregon Laws, ch 772,
19 sec 5, sub sec 4(a)(B). But, we believe, prejudice resulting
20 from alleged errors must be asserted in addition to asserting a
21 personal stake in the ultimate decision. It is not enough to
22 get one's foot in the review door to simply assert prejudice
23 from the alleged procedural error. To hold otherwise would
24 give anyone within the scope of a citizen involvement program
25 (CIP) standing to challenge a decision on the basis of
26 non-compliance with CIP procedures regardless of whether that

1 person had a personal stake in the ultimate result. Such a
2 holding would enable a citizen to stall a development in which
3 the citizen had no personal interest merely because a
4 notification error contrary to CIP procedures caused the person
5 to not receive notice and not appear to testify in opposition.

6 (2) Petitioner Oregon Wilderness Coalition (OWC)

7 Petitioner OWC asserts in the petition for review the
8 following as its basis for standing:

9 "Petitioner Oregon Wilderness Coalition is a
10 non-profit association composed of nearly 80
11 sportsmen, conservation, recreation and education
12 organizations and approximately 2,000 individual
13 members. Approximately 13 of its member organizations
14 are based in Lane County together with nearly 400 of
15 its individual members. Some of its individual
16 members use the subject parcel and the Big Creek area
17 for recreational, aesthetic, hunting, fishing and
18 spiritual purposes. OWC's organizational purpose is
19 the protection of Oregon's remaining wildlands and
20 waters for recreational, fish and wildlife, scenic,
21 cultural, historical and watershed purposes
22 (additional documents 87)."

23 Petitioner OWC's allegation as to its interest in the
24 county's decision is insufficient, in our view, to give OWC's
25 members a personal stake in the outcome of the decision. As
26 with the Coles, petitioner OWC does not assert that its members
have any continuing right to use the subject property for
recreational, aesthetic, hunting, fishing and spiritual
purposes. Petitioner OWC may be alleging that its members
utilize adjacent property for their various activities. If so,
the allegation is still insufficient because petitioner OWC
fails to assert how it is these activities will be adversely

1 affected by development on the subject property. Thus, to the
2 extent petitioner OWC is seeking to have standing based on a
3 representational theory, standing must be denied because it has
4 not been shown how OWC's individual members have a personal
5 stake in the county's decision.

6 Although it is unclear from the petition, OWC may be
7 seeking de jure standing based upon the organization's stated
8 purpose of protecting Oregon's remaining wildlands and waters
9 for recreational, fish and wildlife, scenic, cultural,
10 historical and watershed purposes. As with an individual
11 plaintiff, however, we believe an organization to establish de
12 jure standing must show that it has a personal stake in the
13 outcome of the decision. Simply stating that its purpose is to
14 protect Oregon's remaining wildlands for certain specified
15 purposes is not enough to show how it is OWC has a stake in
16 this particular decision. Cf Sierra Club v Morton, 405 US 727,
17 92 Supreme Court 1361, 31 L Ed 2d 636 (1972).

18 Petitioner OWC also asserts that it was adversely affected
19 by the county's failure to consider OWC's timely filed
20 objections. Petitioner OWC claims its Goal 1 rights were
21 violated by this failure and that this is sufficient to confer
22 standing on OWC. As we discussed earlier, however, we believe
23 petitioner OWC must first establish that it has a personal
24 stake in the ultimate decision before it can have standing to
25 raise procedural errors which it alleges were prejudicial.
26 Petitioner OWC has demonstrated no personal stake in the

1 county's decision.

2 (3) Petitioner Meyrowitz

3 Petitioner Meyrowitz asserts the following as his basis for
4 standing:

5 "Petitioner Meyrowitz has visited the property
6 several times in the recent years in order to
7 photograph the elk herds and to fish in the Big Creek
8 (additional documents 89). His objections to the
9 proposed findings of fact and conclusions of law, as
10 well as those objections submitted by OWC, were not
11 considered. He is 'adversely affected' by the loss of
12 such recreational opportunities by the development.
13 He is 'aggrieved' by the county's refusal to consider
14 his objections (R. 82)."

15 We believe that the allegation quoted above is insufficient
16 to give Petitioner Meyrowitz standing. As with OWC and the
17 Coles petitioner has shown no continuing right to be on the
18 subject property and, therefore, has alleged no personal stake
19 in any land use decision which affects the property.

20 Petitioner does not allege that he enjoys property adjacent to
21 the subject property and that his use of such property will be
22 affected by the proposed development. The assertion petitioner
23 Meyrowitz is aggrieved because the county failed to consider
24 his timely filed objections is, for the reasons stated above
25 concerning petitioner OWC, insufficient by itself to give him
26 standing to challenge the county's ultimate decision.

(4) Petitioner Warren

Petitioner Robert Warren does not assert in the petition
for review any facts showing how it is his interests are
adversely affected or he is aggrieved by the county's

1 decision. Petitioner Warren does not, therefore, have standing
2 in this appeal.

3 (5) Petitioner Shelton

4 Petitioner Shelton asserts the following as the basis for
5 her standing:

6 "Petitioner Shelton is a member of the West Lane
7 Planning Commission and has suffered specific harm in
8 the procedures below with respect to citizen
9 involvement and notification of the hearing before the
10 county commissioners. (See, Assignment of Error No.
11 1, infra). To the extent the decisions of the West
12 Lane Planning Commission are overturned by the county
13 commissioners without a notice process designed for
14 effective citizen involvement, and to the extent
15 decisions of a local planning agency on the local
16 comprehensive plan are reversed, it decreases the
17 status and effectiveness of a planning commission.
18 Moreover, petitioner Shelton has a particular
19 interest, by virtue of her position in effective
20 citizen participation in the development and amendment
21 of comprehensive plans, the loss of which is alleged
22 herein. She is, therefore, 'aggrieved' by the
23 decision below, having voted against the proposal at
24 the planning commission level. (See, Affidavit in
25 Support of Standing)."

16 Petitioner Shelton's allegation is that the county's
17 decision has adversely affected her in her official capacity as
18 a member of the West Lane Planning Commission. Her objection,
19 as with petitioners OWC and Meyrowitz, is to the procedures
20 employed by the county and not with the ultimate decision.
21 Petitioner Shelton alleges no interest either in her official
22 capacity or as a private individual in whether the proposed
23 development is ultimately allowed. Her only concern is with
24 the process used. For the reasons stated above with respect to
25 petitioners OWC and Meyrowitz, petitioner Shelton's concern
26

1 with the procedures followed by Lane County is insufficient to
2 give her standing absent a demonstration that she has some
3 interest in the ultimate decision.

4 (b) Appearance

5 Because we have concluded only Tony and Ginger Cole have
6 alleged facts sufficient to demonstrate they have a personal
7 stake in the county's decision, we will discuss the question of
8 appearance only with respect to them. Tony and Ginger Cole
9 testified in opposition to the proposal before the West Lane
10 Planning Commission. They did not appear directly before the
11 county because they allegedly did not receive notice of the
12 county's proceedings.

13 Both respondent Lane County and respondents Renaghans
14 assert that the Coles' failure to appear directly before the
15 County Board of Commissioners constitutes a failure to appear
16 within the meaning of 1979 Oregon Laws, ch 772, sec 4 sub 3.
17 Both respondents acknowledge our decision in Weber v Clackamas
18 County, 3 Or LUBA 237 (1981), in which a majority of this Board
19 held that appearance before the planning commission satisfied
20 the appearance requirement in section 4, subsection 3. We are
21 asked, however, to either reconsider our holding in Weber or
22 distinguish Weber from the facts in the present case.

23 Respondent Lane County says the Board of Commissioners was
24 "virtually unaware" of the Coles' objections to the proposed
25 development because the Board of Commissioners only had the
26 "brief" minutes of the planning commission's proceedings.

1 These brief minutes did not contain the Coles' objections.
2 Respondent Lane County argues our holding in Weber would be
3 logical for "on the record" appeals but is not for proceedings
4 such as the present one because the County Board of
5 Commissioners may never be made aware of objections voiced
6 before the planning commission. Respondent Lane County
7 contends to apply the holding in Weber to proceedings before
8 boards of commissioners such as the present one

9 "is unfair in that it lets an opponent 'hide in
10 the weeds' only to level a barrage of objections at
11 LUBA when the respondent cannot respond to the
12 objections, except through legal briefs, and then with
13 a record naturally void on the newly raised
14 issues...opponents should be required to come forward
15 and object, not hide in the weeds until they are in
16 court. In addition, if opponents were forced to come
17 forward, may be the governing body would be persuaded
18 by their arguments and this litigation would not even
19 be necessary."

20 Respondent Lane County is probably correct that the reasons
21 for our holding in Weber pertain more to on the record appeals
22 by local governing bodies than they do to appeals in which the
23 governing body does not review the record of the planning
24 commission or hearings officer as the case may be. In fact, in
25 deciding Weber, we assumed that a governing body in conducting
26 its review would be reviewing the entire record of the planning
27 commission or hearings officer's decision. We said in Weber
28 that the legislative objective of getting people involved in
29 the local process and having their input heard by the
30 decision-makers would be achieved whether a person appeared
31 directly before the Board of Commissioners or indirectly by

1 appearing before the planning commission. Lane County's
2 procedure of sending only brief minutes of the planning
3 commission proceedings to the Board of Commissioners and not
4 the entire record would probably not result in the Board of
5 Commissioners receiving the views of persons who had appeared
6 before the planning commission.

7 Nevertheless, we decline to depart from our holding in
8 Weber just because the governing body has not reviewed the
9 record from the planning commission in making its decision.
10 The overriding purpose, we believe, of the legislature's
11 requirement that a person in order to appeal a local decision
12 "appear" in the proceedings at the local level was to make
13 certain that people would get involved at the local level. As
14 we said concerning the appearance requirement in Twin Rocks v.
15 Rockaway, 2 Or LUBA 36 (1980):

16 " * * * In our view the appearance requirement was for
17 the purpose of limiting the right to appeal
18 quasi-judicial decisions to those who felt they had a
19 sufficient interest in the outcome to participate in
20 some minimal fashion in the proceeding. It could be
21 as simple as a letter from a person stating he or she
22 objects to the land use request under consideration. *
23 * * *" 2 Or LUBA at 41.

24 Would a person who submits a letter to the planning
25 commission stating "I object to the proposal," have to submit a
26 second letter to the board of commissioners or city council
stating the same thing in order to have standing to appeal to
this board? Similarly, should one who appears and testifies at
length before the planning commission be required to repeat the

1 testimony before the board of commissioners, or at least appear
2 before the board of commissioners and say "I still object" to
3 have standing to appeal? We do not believe the legislature was
4 concerned with making citizens engage in such meaningless
5 redundancies in order to perfect their right of appeal.²

6 We conclude, therefore, that the Coles did "appear" within
7 the meaning of 1979 Oregon Laws, ch 772, sec 4(3)(a).

8 The motion to deny standing with respect to petitioners
9 Tony and Ginger Cole is denied. The motion to deny standing to
10 the remaining petitioners is granted.

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1 BAGG, Referee.

2 I respectfully dissent for the same reasons I noted in
3 Weber v Clackamas County, 2 Or LUBA 233 (1981). I agree that
4 Tony and Ginger Cole "have alleged facts sufficient to
5 demonstrate that they have a personal stake in the county's
6 decision * * * *" I do not agree that they have standing to
7 bring the appeal because I do not believe they have "appeared"
8 before the Lane County Board of Commissioners.

9 As I read Oregon Laws 1979, ch 772, sec 4(3), the
10 Legislature has set out a procedure that will filter appeals of
11 local land use decisions. A person wishing to appeal a land
12 use decision to this Board must show that he has made a direct
13 appearance (orally or in writing) before whatever appeal
14 authority exists at the local level. That is, he must follow
15 whatever the local government has established for appeals of
16 decisions within the local jurisdiction (as from a planning
17 commission to a board of commissioners or from a planning
18 director to a planning commission). By doing so, he
19 demonstrates a continuing interest in the outcome of the local
20 decision. Those that fail to show this continuing interest are
21 filtered out.

22 I believe there is reason for this filtering process. A
23 person opposed to a proposal before a planning commission may
24 change his mind. He may decide that the local decision is so
25 air tight as to make an appeal fruitless, or he may even change
26 his mind as to the merits of the decision. He may even decide

1 on whim not to carry the matter any further. A person with a
2 continuing interest, however, will pursue his objection to the
3 local governing body through whatever appeal process exists in
4 the local jurisdiction. I believe Oregon Laws 1979, ch 772,
5 sec 4(3), as a filter, requires that kind of pursuit.

6 My view of the process requires an effort by the potential
7 appellant. In a county with an appeal procedure that provides
8 only for an appeal "on the record," a potential appellant must
9 formally appeal the planning commission decision to the board
10 of commissioners or be foreclosed from bringing the matter
11 before the Land Use Board of Appeals. In counties where
12 appeals from planning commission actions are, in essence, new
13 cases with additional testimony or argument permitted, I
14 believe the individual must come before the board of
15 commissioners, orally or in writing, as though the proceeding
16 before the board were a new proceeding. I do not view a record
17 of an appearance before a planning commission or other lower
18 county body as sufficient.

19 Under the facts in this case, I don't believe the necessary
20 "appearance" has been made by a party that can demonstrate
21 aggrievement.³

FOOTNOTES

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4 Curiously enough, however, petitioners do claim they were
entitled to notice in their First Assignment of Error.

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6 Moreover, as we stated in Twin Rocks, supra, there is no
7 requirement in the statute that in order to raise substantive
8 issues on appeal a person must first raise those issues before
9 the local body. Were there such a requirement, the county's
10 argument that to apply Weber to the facts in this case would be
11 unfair might have some merit. Absent such a requirement,
12 however, whether or not a person appears before the governing
13 body directly to merely state "I object," that person may still
14 level a "barrage of objections" on appeal which were not raised
15 in the local proceeding.

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17 There is an issue in this case as to whether the county's
18 notice procedures were properly followed, and I would allow the
19 Coles to raise that issue only. If they were successful before
20 LUBA in claiming the county violated some notice procedure,
21 they could then be sure to "appear" before the board of
22 commissioners on remand. Arguably, their right to petition for
23 review here could then be established.