

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

3 OREGON ELECTRIC SIGN                                   )  
ASSOCIATION, INC.,                                   )  
4                                   Petitioner,                                   )                                   LUBA No. 81-135  
5                                   )                                   )  
6                                   vs.                                   )                                   PROPOSED ORDER  
CITY OF BEAVERTON,                                   )                                   (EVIDENTIARY HEARING)  
7                                   )                                   )  
8                                   Respondent.                                   )

9  
10           Petitioner appeals the City of Beaverton's ordinance which  
11 adopts a sign code for the city. Petitioner believes the  
12 findings adopted in support of the ordinance are inadequate in  
13 and of themselves and also inadequate to show compliance with  
14 the statewide goals. Petitioner also alleges the sign  
15 ordinance is unconstitutional in many respects. Petitioner  
16 basically asserts the regulations are overbroad, vague, and  
17 deny equal protection of the law by extending preferential  
18 treatment to certain types of communication.

19           Respondent City of Beaverton has asserted that petitioner  
20 Oregon Electric Sign Association (OESA) lacks standing to bring  
21 this appeal. The Board understands the City of Beaverton  
22 denies the truth of the allegations in support of standing in  
23 the petition for review and also asserts that even if true the  
24 allegations are insufficient to give petitioner OESA standing.

25           The following allegation in support of petitioner's  
26 standing appears in the petition for review:

1 "The Oregon Electric Sign Association, Inc.  
2 (OESA) is an Oregon nonprofit corporation comprised of  
3 two groups: (1) sign professionals: designers,  
4 builders, installers, manufacturers and vendors of  
5 on-site signs; and (2) sign users: various kinds of  
6 businesses and institutions which rent or purchase  
7 on-site signs. OESA has actively represented the  
8 interests of its members within the City of Beaverton  
9 for many years. Its members have manufactured,  
10 installed and owned a large part of the signage within  
11 the City of Beaverton and this is expected to continue  
12 in the future. Many of the members are registered  
13 voters who have their businesses and homes within the  
14 City of Beaverton. OESA and some of its members fully  
15 participated in the hearings which led to the adoption  
16 of Beaverton's new sign ordinance.

9 "The new ordinance affects the actual present  
10 conduct of members of OESA in the operation of their  
11 businesses and in their ability to communicate both  
12 ideological and commercial information. Members  
13 already own or use virtually all of the types of signs  
14 regulated in the new ordinance. Moreover, in the  
15 future, OESA members will be constructing, selling,  
16 leasing, installing or using various types of signage  
17 including construction project signs, garage sale  
18 signs, gas station price signs, nameplates,  
19 noncommercial signs, professional and private real  
20 estate signs, public safety and convenience signs,  
21 window signs, changeable copy signs, fence signs,  
22 freestanding signs, wall signs, special event signs,  
23 projecting signs, electronic message centers, time and  
24 temperature signs, obstructing signs, portable signs,  
25 roof signs, flashing signs, rotating or revolving  
26 signs, inflatable signs, political signs, public  
information signs, pennant signs, flags, and other  
similar communication devices. Members of OESA will  
be primary applicants for these signs under the new  
code. These members are also the major users of  
existing similar signage which is regulated by the new  
code.

22 "As owners and users of the existing signage in  
23 the city, OESA members will also be responsible for  
24 removing a large number of the city's signs when the  
amortization period specified in the ordinance has run.

25 "OESA members suffer direct and substantial  
26 injury from the new provisions. Existing signs owned  
by members face removal. [Channels of First Amendment  
expression are limited]. The existing and proposed

1 signs of all members are subject to vague criteria  
2 which provide no notice of what is required and no  
3 limit on discretion. These, and other impacts of the  
4 ordinance, will cause substantial economic harm to  
5 OESA members and reduce their ability to exercise  
6 First Amendment freedoms.

7 "Finally, OESA and its members are interested in  
8 the proper implementaion [sic] of Oregon's land use  
9 laws. The organization has appeared over the years at  
10 hearings throughout the state in order to encourage  
11 local governments to follow these laws." Petition for  
12 Review, "Standing," pg 1-2.

13 The City of Beaverton requested discovery concerning the  
14 truth of the petitioner's standing allegations. Specifically,  
15 respondent City of Beaverton requested the following  
16 information:

17 "For each sign regulation which is challenged in  
18 the petition list the name and address of the member  
19 or members of your organization who is aggrieved or  
20 adversely affected, the manner in which they are  
21 aggrieved or adversely affected and provide proof of  
22 membership in your organization."

23 The city explained it was "necessary to have discovery to  
24 ascertain whether each of the challenged sections [of the  
25 ordinance] adversely affects or aggrieves at least one of  
26 petitioner's members."

During a conference call petitioner agreed to supply the  
city with written answers to the questions asked. Petitioner  
submitted written answers on May 23, 1982. On May 27, 1982,  
respondent City of Beaverton filed a motion to dismiss or in  
the alternative to strike for lack of standing. Respondent  
argued petitioner's answers failed to demonstrate petitioner

1 had standing to attack any provisions of the ordinance. In the  
2 alternative, respondent moved to strike those portions of those  
3 allegations in the petition for review for which no standing  
4 had been adequately alleged. Petitioner filed a reply  
5 memorandum addressing the arguments raised by the City of  
6 Beaverton. The answering memorandum also asserted additional  
7 facts which were not contained in the petitioner's written  
8 answers to the city's questions on standing. Respondent City  
9 of Beaverton then filed a memorandum supplementing its reply  
10 brief on standing. The Board thereafter conducted a conference  
11 call with the parties. During the conference call, petitioner  
12 indicated its desire to have an evidentiary hearing to enable  
13 petitioner to prove the truth of its standing allegations.<sup>1</sup>  
14 The Board agreed to issue a proposed order addressing the scope  
15 of the evidentiary hearing as well as the question of whether  
16 the allegations in the petition were adequate, if true, to give  
17 petitioner standing.

18 OPINION

19 The Board believes that in order for petitioner OESA to  
20 have standing it is only necessary for petitioner to establish  
21 that at least one of its members' interests are adversely  
22 affected or is aggrieved by the city's ordinance. Once that  
23 adverse effect or aggrievment is established, the petitioner  
24 may raise whatever legal issues it wishes with respect to any  
25 portion of the ordinance. Petitioner need not demonstrate the  
26 legal issue raised or the particular section of the ordinance

1 challenged relates to a specific interest of the petitioner.

2 1. Beaverton Sign Ordinance.

3 Beaverton's sign ordinance is divided into a number of  
4 sections. Section 181 exempts certain signs from the effect of  
5 Ordinance 3227. Signs which are exempt and which do not  
6 require permits under this section are: (1) traffic or other  
7 governmental street signs, such as railroad crossing signs and  
8 notices as may be authorized by the city (Section 181.1), and  
9 (2) signs of public utility companies indicating danger, or  
10 serve as an aid to public safety, or which designate the  
11 location of underground facilities or public telephones (181.2).

12 Section 182 sets forth those signs which are subject to  
13 ordinance regulation but for which no permit is required. The  
14 kinds of signs listed under Section 182 are the following:  
15 construction project signs, garage sale signs, gas station  
16 price signs, nameplates, noncommercial signs, or opening  
17 banners, private real estate transaction signs, public safety  
18 and convenience signs, and window signs. For each of the above  
19 named signs, however, the ordinance lists certain  
20 restrictions. For example, a construction project sign cannot  
21 exceed 64 square feet total and 32 square feet per face. No  
22 free standing construction project sign may exceed 8 feet in  
23 height. A garage sale sign cannot exceed 4 square feet per  
24 face and 4 feet in height. Certain of the foregoing signs are  
25 restricted in terms of when they may be put up and how long  
26 they may stay up. Also restricted are where they may be

1 placed. For example, a garage sale sign may not be erected  
2 prior to one week before the event and must be removed no later  
3 than the day after the event. A garage sale sign may not be  
4 placed in a public right-of-way or vision clearance area.

5 Section 183 sets forth those signs which are subject to  
6 ordinance regulation and for which a permit is required prior  
7 to on-site construction, installation or placement. Signs  
8 falling within this section are the following: changeable copy  
9 signs, fence signs, freestanding signs, real estate signs, wall  
10 signs, special event signs, projecting signs and time and  
11 temperature signs. The granting of permits for signs covered  
12 by Section 183 is governed by Sections 185 to 189 of the city's  
13 ordinance.

14 Section 184 of the ordinance sets forth those signs which  
15 are expressly prohibited within Beaverton city limits.  
16 Examples of signs which are prohibited include billboards,  
17 flashing signs, obstructing signs, portable signs, roof signs  
18 and rotating or revolving signs. Section 184.8 lists other  
19 kinds of signs which are prohibited. Included within this  
20 category are signs within certain vision clearance areas,  
21 pendants, streamers and the like; signs attached to any tree or  
22 public utility pole; signs which have visible the immediate  
23 source of illumination; any sign which might resemble a traffic  
24 warning sign; signs which are used for the purpose of emitting  
25 sound or disbursing smells; signs with a changing electronic  
26 message except for time and temperature signs; and inflatable

1 signs containing advertising or logos.

2 Section 185 of the ordinance contains the procedure for  
3 applying for a sign permit. A permit cannot be issued until it  
4 has been reviewed and approved by the Board of Site and Design  
5 Review and by the planning director. Real estate signs require  
6 an annual sign permit. Section 185 also includes a provision  
7 requiring that all signs together with their supports be kept  
8 in good condition.

9 Section 186 contains definitions for such terms as  
10 "single-face sign," "double-face sign," "size," "height of  
11 sign," "finish ground level" and "roof line."

12 Section 187 sets forth the regulations which apply to  
13 different kinds of signs within commercial and industrial  
14 zones. Signs which are allowed within commercial and  
15 industrial zones, subject to conditions set forth in Section  
16 187, include wall signs, projecting signs, freestanding signs,  
17 window signs, and real estate signs. Restrictions within  
18 Section 187 relate to the number of signs permitted per  
19 building or tax lot, permitted illumination of signs and  
20 location of signs.

21 Section 188 sets forth those signs which are allowed within  
22 residential zones. Non-residential uses within a residential  
23 zone are permitted one indirectly lighted wall sign which does  
24 not exceed 20 square feet in area. Subdivisions and  
25 multi-family units are allowed one single or double faced  
26 indirectly lighted sign so long as it does not exceed 32 square

1 feet per face. If the sign is a freestanding sign it cannot  
2 exceed 8 feet in height. The information which may appear on  
3 such a sign is limited to the name and address of the  
4 development. The Board of Site and Design Review has the right  
5 to approve the location and design of the sign. The only other  
6 kind of sign permitted within residential district is a real  
7 estate sign. Different restrictions are involved depending  
8 upon the type of real estate sign which is erected.

9 Section 189 of the ordinance is the variance section. The  
10 Board of Site and Design Review has the authority under this  
11 section to grant variances from the requirements of the  
12 ordinance. No variance may be granted unless it can be shown  
13 there are special circumstances involving size, shape,  
14 topography, location or surroundings attached to the property  
15 which do not apply generally to other properties in the same  
16 zoning district. It must be also shown that the granting of  
17 the variance will not result in material damage or prejudice to  
18 other property in the vicinity and will not be detrimental to  
19 the public safety and welfare.

20 Section 190 pertains to non-conforming signs and sets forth  
21 a time period within which non-conforming signs must be brought  
22 into conformance or removed. Signs erected ten or more years  
23 before the date the ordinance became effective have five years  
24 to be brought into conformance; signs erected five to ten years  
25 before passage of the ordinance have seven years to be brought  
26 into conformance; and signs erected within five years of the

1 date of passage of the ordinance have ten years to be brought  
2 into conformance. The Board of Site and Design Review may  
3 extend the time for signs to be brought into conformance by up  
4 to one year if it can be shown that special and unusual  
5 circumstances related to a specific piece of property make  
6 application of the conformance schedule an undue hardship.

7 2. Interests Adversely Affected Requirement.

8 Respondent City of Beaverton argues that petitioner OESA  
9 must show that at least one member of its organization will  
10 have its interests adversely affected or will be aggrieved by  
11 each section of the ordinance in order for petitioner to be  
12 able to challenge that particular section or the ordinance as a  
13 whole. Respondent City of Beaverton also argues that with  
14 respect to the constitutional issues, petitioner can only raise  
15 those constitutional issues in which its members have  
16 established some interest. In other words, we understand the  
17 City of Beaverton to be arguing that petitioner OESA can only  
18 assert the constitutional rights of its members and cannot  
19 assert the constitutional rights of non-members. If, for  
20 example, none of petitioner's members erects signs or  
21 constructs signs expressly prohibited within the City of  
22 Beaverton by Section 184 of the ordinance, then to the extent  
23 Section 184 might arguably restrict one's freedom of speech,  
24 petitioner OESA could not raise the issue because none of its  
25 members' freedom of speech is restricted by Section 184.

26 Respondent City of Beaverton's position on standing to

1 raise both the constitutional and non-constitutional issues  
2 appears to be based upon 1000 Friends of Oregon v Marion County  
3 Board of Commissioners, 1 Or LUBA 33 (1980). The City of  
4 Beaverton also argues that petitioner lacks standing even if an  
5 injury were shown to exist because this Board cannot give  
6 petitioner a remedy. The city argues, citing Central Hudson v  
7 Gas and Electric Corp Public Service Commission, 447 US 551  
8 (1981), that commercial speech cannot be challenged for  
9 vagueness and, therefore, petitioner is aggrieved without a  
10 remedy. Finally, the city argues petitioner lacks standing to  
11 challenge the ordinance for violation of the goals because  
12 petitioner has not alleged an injury based on the goals.

13 We address first respondent city's contention that standing  
14 to challenge one part of a legislative decision does not confer  
15 standing to challenge parts of the decision for which no  
16 standing has been demonstrated. In 1000 Friends of Oregon v  
17 Marion County Board of Commissioners, supra, we applied, in  
18 effect, a "severance" policy articulated to some extent by the  
19 Court of Appeals in 1000 Friends of Oregon v Multnomah County,  
20 39 Or App 917, 593 P2d 1171 (1979). We said petitioner had  
21 made no assertion as to how any members were affected by that  
22 portion of the ordinance on appeal which adopted the timber  
23 conservation (TC) zone, and that the TC zone did not appear  
24 inextricably tied legally or factually to the other zones also  
25 adopted by the ordinance and for which petitioner had  
26 established standing. No one raised as an issue in 1000

1 Friends of Oregon v Marion County Board of Commissioners,

2 supra, this Board's authority to invoke a "severance" policy.

3 It is questionable whether such authority exists given 1979 Or

4 Laws, ch 772, sec 4(3), as amended by 1981 Or Laws, ch 748.

5 LUBA's statute authorizes any person to appeal a land use

6 decision if the person can show that his or her interests are

7 adversely affected or s/he is aggrieved by the decision. The

8 notion of "severance" seems more likely to be a question of

9 policy - what issues will the reviewing body consider on appeal

10 - rather than a question of "standing." Standing to bring an

11 appeal is different from standing to raise issues on appeal

12 once the review is underway.

13 Whatever may be the discretion of courts to refuse to

14 consider issues on appeal, we believe our discretion is

15 severely limited. To the extent we have discretion, it is to

16 refuse to address an issue if (1) the issue is not necessary to

17 decide the appeal, or (2) we cannot make heads-or-tails out of

18 the argument or issue, or (3) the issue has not been adequately

19 addressed. We do not believe we can refuse to address an issue

20 once a case is before us just because we do not think the

21 petitioner has an interest in the issue. We now doubt very

22 strongly we have an "issues" severance authority or even a

23 subject matter severance authority in our review of a land use

24 decision. Unless and until we are told or persuaded to the

25 contrary, we will adhere to this position.

26 The question of whether petitioner is limited on review to

1 asserting only the constitutional rights of members whose  
2 constitutional rights are affected appears to require an  
3 analysis distinct from the idea of "severance" just discussed,  
4 although we conclude the result is the same. This subject has  
5 received extensive treatment in 3 Davis, Administrative Law  
6 Treatise, Sections 22.06 - 22.07. It appears to be the rule  
7 that one may not invoke judicial review of an administrative  
8 decision by asserting the constitutional rights of others. Id  
9 at Section 22.06. However, it also appears to be the rule that  
10 one who is adversely affected or aggrieved by a decision and,  
11 thus, has standing to start the judicial review machinery in  
12 motion may raise any issues concerning the decision, including  
13 constitutional issues involving the rights of third parties not  
14 before the reviewing body. Id at Section 22.06, 22.07.

15 It may be for purposes of review by this Board that we must  
16 look solely to 1979 Or Laws, ch 772, sec 4(3) for purposes of  
17 determining whether, once a person has established standing to  
18 appeal a land use decision, that person may raise  
19 constitutional as well as non-constitutional issues. It may be  
20 that the analysis in Davis only applies once a person seeks to  
21 establish standing for review in the federal court system. We  
22 believe that under either analysis, however, once petitioner  
23 OESA establishes that one of its members' interests will be  
24 adversely affected or one of its members will be aggrieved by  
25 the City of Beaverton's sign ordinance, or any section thereof,  
26 petitioner OESA may, in its representational capacity,

1 represent the interests of its member and raise any legal  
2 issues on appeal which this Board has the authority under its  
3 statute to consider.

4 Respondent City of Beaverton's second reason for asserting  
5 petitioner lacks standing appears to be that petitioner does  
6 not have a remedy if the city's sign ordinance is vague in  
7 regulating commercial speech. The city seems to be saying that  
8 petitioner cannot raise vagueness as it relates to commercial  
9 speech because there is no prohibition against vague commercial  
10 speech regulations. We believe this is an argument more  
11 properly addressed to the merits of petitioner's concern than  
12 to a question of petitioner's standing.

13 Respondent City of Beaverton's third attack on petitioner's  
14 standing is that petitioner asserts no interest to be protected  
15 by Goals 2, 9 and 12. There is no requirement in LUBA's  
16 statute that a person can only raise on appeal substantive  
17 issues in which the person can demonstrate an interest. For  
18 example, a farmer who is adversely affected by a land use  
19 decision in an EFU zone is not limited to raising Goal 3 as an  
20 issue, but may raise any issue that may have a bearing on the  
21 validity of the decision (we note procedural issues are a  
22 different question because petitioner must show prejudice to  
23 the petitioner resulted from the procedural error. See: 1979  
24 Or Laws, ch 772, sec 5 (4)(a)(B)).

25 For the foregoing reasons, petitioner need only demonstrate  
26 at the evidentiary hearing that at least one of its members

1 will have its interests adversely affected or will be aggrieved  
2 by at least some provisions of Beaverton's sign ordinance in  
3 order for petitioner OESA to meet the "interests adversely  
4 affected or aggrieved" requirement for appealing the ordinance.

5 3. Sufficiency of Allegations.

6 We turn next to the question of whether the allegations in  
7 the petition for review are adequate, if true, to give OESA  
8 representational standing. In a recent decision, we said a  
9 petitioner must not only allege that its interests are  
10 affected, but that they are affected adversely. See Warren v  
11 Lane County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 81-102, Slip Op., June  
12 23, 1982). While Warren involved review of a quasi-judicial  
13 decision and the present appeal involves review of a legislative  
14 decision, the "interests adversely affected or who is  
15 aggrieved" requirement for standing is identical for purposes  
16 of both types of decisions. Petitioner has alleged both that  
17 the ordinance will affect the interests of its members and that  
18 the effect will be adverse. Petitioner has alleged that "the  
19 actual present conduct of members of OESA in the operation of  
20 their businesses" are affected by the ordinance. Petitioner's  
21 members allegedly "will be constructing, selling, leasing,  
22 installing or using" the types of signage regulated by the  
23 ordinance. Petitioner's members allegedly will also be affected  
24 in that they will be required to remove existing signs which  
25 the ordinance bans outright or otherwise makes non-conforming.

26 Petitioner asserts the effect is adverse in that the

1 impacts "will cause substantial economic harm to OESA members"  
2 and will "reduce their ability to exercise First Amendment  
3 freedoms." Petitioner alleges the criteria by which expression  
4 is limited and signs may be removed are vague, providing "no  
5 notice of what is required and no limit on discretion." We  
6 believe the foregoing constitute a sufficient allegation of  
7 impact and harm resulting from the impact to meet the  
8 requirements of 1979 Or Laws, ch 772, sec 4(6)(a), as amended  
9 by 1981 Or Laws, ch 748.

10 Dated this 12th day of July, 1982.

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FOOTNOTE

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1      Petitioner has since filed a written motion requesting an evidentiary hearing.