

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

1
2
3 JOHN MCGINTY,)
4) Petitioner,)
5) vs.)
6 CURRY COUNTY,))
7) Respondent,)
8) and)
9 CITY OF BROOKINGS,)
10) Intervenor-Respondent.)

LUBA No. 88-085
ORDER ON MOTION FOR
EVIDENTIARY HEARING
AND DEPOSITION

11
12 This case involves respondent Curry County's (county's)
13 approval of a division of resource land zoned Forestry
14 Grazing. The approved land division creates a new parcel of
15 approximately 116 acres from a parent parcel containing
16 approximately 1,500 acres. In the "Standing of Petitioner"
17 section of his petition for review,¹ petitioner alleges as
18 follows:

19 "Petitioner, John McGinty, is a real estate broker and
20 developer who has testified orally and in writing at
21 three planning commission hearings and on appeal to
22 the Board of Commissioners. The livelihood [sic] of
23 petitioner is based on reasonable expectation of
24 consistency in application of land use laws, and could
25 be adversely affected if decisions based on false or
26 misleading testimony are allowed to become a precedent
in Oregon's land use processes.

27 "Additionally, petitioner personally guaranteed a loan
28 secured by a portion of the land in question that was
29 condemned by applicant City of Brookings specifically
30 for use as a golf course, and is still obligated for
31 the balance of the loan. If this matter is reversed

1 or remanded, then petitioner would have the right to
petition the courts for rescission of the deed and have
2 the property reconveyed to its original ownership.
That property is now a part of the subject of this
3 appeal, and is commonly known as the 'Jack's Creek
Golf Course.'" Petition for Review 1.

4 Intervenor-respondent City of Brookings (intervenor) moves
5 for an evidentiary hearing pursuant to ORS 197.830(11)(c) and
6 OAR 661-10-045. In support of its request for an evidentiary
7 hearing, intervenor argues:

8 "This motion is made on the basis that the City of
Brookings intends to file a Respondent's Brief in
9 reply to Petition for Review in this matter. In the
Respondent's Brief the City of Brookings will contest
10 the standing of the Petitioner to file a Notice of
Appeal and Petition for Review. The City of Brookings
11 will contest certain factual allegations contained in
the petition for review under 'standing of
12 petitioner.' * * *

13 "In order to expedite the hearing and to allow the
City of Brookings to prepare for such a hearing it is
14 requested that the Board take the deposition of the
Petitioner John McGinty, by the City of Brookings,
15 pursuant to OAR 661-10-045(8) * * *. The Petitioner
has made allegations in his Petition for Review
16 concerning his standing to file a Petition for Review
and Notice of Appeal. The City of Brookings will
17 contest the factual allegations contained in that
portion of the Petition for Review and requires the
18 deposition of the Petitioner in order to assist in
evaluating and disproving said allegations.
19 Deposition is also required in order to enable the
City of Brookings to develop its own evidence to
20 refute the standing of Petitioner. * * *"

21 A. Scope of ORS 197.830(11)(c)

22 ORS 197.830(11)(c) provides as follows:

23 "In the case of disputed allegations of
24 unconstitutionality of the decision, standing, ex
parte contact or other procedural irregularities not
25 shown in the record which, if proved, would warrant
reversal or remand, the Board may take evidence and
26

1 make findings of fact on those allegations. * * *²
(Emphases added.)

2 Intervenor seeks to challenge petitioner's standing to
3 bring this appeal. If intervenor is successful in his
4 challenge to petitioner's standing, the legal consequence would
5 be dismissal of petitioner's appeal, not "reversal or remand"
6 as provided in ORS 197.830(11)(c). We believe the explicit
7 reference to disputed allegations concerning standing in
8 ORS 197.830(11)(c) authorizes us to conduct an evidentiary
9 hearing in an instance where the resolution of such disputed
10 allegations is critical to determining whether the appeal
11 should be dismissed. We reach this conclusion notwithstanding
12 the failure of the statute to recognize explicitly that
13 dismissal of an appeal, rather than reversal or remand, may be
14 required by the evidence produced in an evidentiary hearing.

15 B. Disputed Allegations Concerning Petitioner's
16 Standing

17 ORS 197.830(3) provides as follows:

18 * * * a person may petition the board for review of
19 a quasi-judicial land use decision if the person:

20 "(a) Filed a notice of intent to appeal the decision
21 as provided in subsection (1) of this section;

22 "(b) Appeared before the local government, special
23 district or state agency orally or in writing; and

24 "(c) Meets one of the following criteria:

25 "(A) Was entitled as of right to notice and
26 hearing prior to the decision to be
reviewed; or

"(B) Is aggrieved or has interests adversely
affected by the decision."

1 On October 5, 1988, the Board received a notice of intent
2 to appeal signed by petitioner. The record demonstrates that
3 petitioner appeared during hearings before the planning
4 commission and the board of county commissioners. Accordingly,
5 the requirements in ORS 197.830(3)(a) and (b) are met, and we
6 do not understand intervenor to challenge petitioner's standing
7 based on those criteria.

8 Although intervenor does not explicitly say so, we
9 understand intervenor to challenge petitioner's factual
10 allegations relevant to the requirement of ORS 197.830(3)(c)(B)
11 that petitioner be "aggrieved or [have] interests adversely
12 affected by the decision."

13 The Oregon Supreme Court has explained that adverse effects
14 and aggrievement are distinct and alternative bases for
15 standing. Jefferson Landfill Comm. v. Marion County, 297 Or
16 280, 686 P2d 310 (1984). The court explained the requirements
17 for establishing "aggrievement" as follows:

18 "(1) The person's interest in the decision was
19 recognized by the local land use decision-making
body;

20 "(2) The person asserted a position on the merits; and

21 "(3) The local land use decision-making body reached a
22 decision contrary to the position asserted by the
person." 297 Or at 284.

23 The court distinguished the requirements for demonstrating
24 adverse effects as follows:

25 "'Adversely affected' means that a local land use
26 decision impinges upon the petitioner's use and
enjoyment of his or her property or otherwise detracts

1 from interests personal to the petitioner. Examples
2 of adverse effects would be noise, odors, increased
3 traffic or potential flooding. See e.g., Yamhill
4 County v. Ludwick, 294 Or 778, 663 P2d 398 (1983) and
5 Benton County v. Friends of Benton County, [294 Or 79,
6 653 P2d 1249 (1986)]." 297 Or 283.

7
8 Returning to petitioner's statement of "Standing of
9 Petitioner," the first sentence, "[p]etitioner * * * is a real
10 estate broker and developer who has testified orally and in
11 writing at three planning commission hearings and on appeal to
12 the Board of Commissioners * * *" appears to be an attempt by
13 petitioner to satisfy the standing requirement of
14 ORS 197.830(3)(c)(B) as a person aggrieved. The balance of
15 petitioner's standing statement, quoted supra, is relevant, if
16 it is relevant at all, only to the statutory basis for standing
17 as a person adversely affected by the decision.

18 The first sentence of petitioner's statement of standing is
19 not adequate to allege standing as a person aggrieved. It
20 implies, but does not allege, that petitioner took a position
21 on the merits of the decision. More importantly, it does not
22 allege the county reached a decision contrary to the position
23 he asserted. However, as we recently explained in Freels v.
24 Wallowa County, ___ Or LUBA ___ (LUBA No. 88-046, November 14,
25 1988) a petitioner has standing if adequate facts are alleged
26 somewhere in the petition for review.

On pages four and five of the petition for review, under
petitioner's statement of facts, petitioner does allege (1) he
appeared before the county commissioners, (2) he took a

1 position against the requested land division, and (3) the
2 county commissioners rejected his appeal and granted the
3 requested land division. These allegations are sufficient to
4 establish petitioner's standing as a person aggrieved.

5 Intervenor does not challenge the statements of fact which
6 we find sufficient to establish petitioner's aggrievement.
7 Rather, it appears intervenor challenges petitioner's
8 allegations in his statement of standing which address the
9 "adversely affected" basis for standing.³ However, because
10 petitioner alleges facts sufficient to show he has standing as
11 a person aggrieved, it does not matter whether petitioner's
12 other factual allegations following the first sentence in his
13 statement of standing are erroneous. Accordingly, the
14 requested evidentiary hearing would not serve any purpose.
15 Intervenor's request for an evidentiary hearing is denied.⁴

16 Intervenor's request for an evidentiary hearing was
17 received March 8, 1989. Under OAR 661-10-045(7) "the filing of
18 a motion for an evidentiary hearing shall suspend the time
19 limits for all other events in a review proceeding including
20 the issuance of the Board's final order." The time limits in
21 this review proceeding, therefore, will be extended 12 days as
22 follows:

23 (1) Respondent's brief is due March 26, 1989.

24 (2) The Board's final opinion and order is due April 30, 1989.

25 / / /

26

Dated this 20th day of March, 1989.

Michael A. Holstun by *ccs*
Michael A. Holstun
Chief Referee

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1

OAR 661-10-030(3) provides in part:

"Contents of Petition:

"The petition for review shall:

"(a) state the facts that establish petitioner's standing;

"* * * * *"

2

OAR 661-10-045 contains substantially identical language.

3

Respondent's brief, received by the Board on March 17, 1989, makes it clear that it is the factual allegations that would establish standing as a person with interests adversely affected that intervenor disputes.

4

Because we find no purpose would be served by granting the request for an evidentiary hearing and deny the request, no purpose would be served by the requested deposition. We therefore deny the motion for deposition as well.