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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,)

LUBA No. 81-102

Petitioners,

vs.

FINAL OPINION
(ORDER OF DISMISSAL)

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

Respondents.)

Appeal from Lane County.

Timothy V. Sercombe, Eugene, filed the Petition for Review and argued the cause on behalf of Petitioners.

William Van Vactor, Eugene, filed the brief and argued the cause on behalf of Respondent Lane County.

Michael E. Farthing, Eugene, filed the brief and argued the cause on behalf of Respondents Renaghans.

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

DISMISSED

6/23/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 This case concerns an appeal by petitioner Tony Cole of
4 Lane County's approval of a subarea comprehensive plan change
5 and zone change. The comprehensive plan change is from natural
6 resource timber to tourist commercial for 26 acres and to
7 conservation/recreation/open space for 160 acres. The rezoning
8 decision also being appealed would rezone the 26 acres from
9 forest management to tourist commercial and the 160 acres from
10 forest management to natural resource. The changes in the
11 comprehensive plan and zoning for western Lane County are for
12 the purpose of enabling the Renaghans (applicants) to develop
13 the property with a 40 unit lodge, restaurant, trading post, 30
14 cabins, parking facilities, trails, 2 owner's residences, wells
15 and drain fields. The parcel is located approximately 15 miles
16 north of Florence and east of Highway 101. The property is
17 bifurcated in the southern section by Big Creek Road and Big
18 Creek.

19 Petitioner Tony Cole's standing has been challenged by
20 respondents.¹ Respondents contend the facts alleged in the
21 petition for review in support of petitioner's standing are
22 untrue. The Board conducted an evidentiary hearing to
23 determine the truth of the facts asserted in the petition for
24 review. After reviewing the evidence, we conclude that the
25 facts asserted in the petition for review in support of
26 standing are not supported by sufficient evidence to confer

1 standing on petitioner Cole. We, accordingly, conclude that
2 respondents' motion to dismiss should be granted.

3 PROCEDURAL HISTORY

4 Respondent Lane County and Respondents Renaghans moved to
5 dismiss the above captioned appeal on the basis that the
6 allegations in the petition for review in support of
7 petitioners' standing were insufficient to give petitioners
8 standing to appeal. In an order issued on March 29, 1982, this
9 Board concluded that certain of the allegations were
10 sufficient, if true, to give petitioners Tony and Ginger Cole
11 standing to appeal. The Board also held that the allegations
12 in support of the remaining petitioners were insufficient, even
13 if true, to give them standing.

14 In its order, the Board attempted to review the cases on
15 standing decided by the Court of Appeals to determine whether,
16 under the Board's statute, a workable standard for determining
17 standing could be devised. The Board concluded that what must
18 be shown to satisfy the "interests adversely affected or who is
19 aggrieved" requirement is that the petitioner have some
20 personal stake in the decision. We said, "The stake need not
21 be substantial so long as it exists." Order on Standing at

22 11. We also said:

23 "A personal stake in a decision can be shown in a
24 number of ways. Generally speaking, however, it is an
25 interest in the decision not commonly shared by
26 members of the community at large. If the particular
land use decision will impact a person in a way
different from other members of the community, that
person may be said to be affected or aggrieved by the

1 decision. We do not believe the impact need be
2 significant or that it will for certain even occur.
3 The impact need only be one reasonably likely to in
4 fact occur." Order on Standing at 11-12.

5 We then proceeded to analyze the allegations in the
6 petition for review concerning the standing of petitioners Tony
7 and Ginger Cole. We focused primarily on the following
8 allegations in the petition for review in concluding that the
9 Coles alleged sufficient facts to confer standing:

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

19 Concerning the above allegation we stated in the order:

20 "Assuming as we do for purposes of this order
21 that the Coles' allegations in their petition are
22 true, their allegations are sufficient to demonstrate
23 that they have a personal stake in the county's
24 decision. The Coles assert that Big Creek Road which
25 they use for access to their property will be blocked
26 temporarily and there will be delays caused by
27 construction equipment. We believe persons whose
28 ingress or egress to their property is affected or
29 threatened to be affected by a particular development
30 should have standing to challenge the decision which
31 authorizes the development. Such a decision would be
32 said to affect or be reasonably likely to affect those
33 persons' use of their property. The fact that the
34 proposed development is 5 1/2 miles from petitioners'
35 property does not matter. It is petitioners'
36 allegation that access to their property will be
37 blocked or interfered with which gives them a personal
38 stake in this decision." Order at 13-14.

39 Respondents asked us to reconsider our order on standing,

1 contending the order incorrectly stated the law in this state.
2 Respondents asserted that in saying the impact need not be
3 significant we were at odds with the Supreme Court test of
4 standing under the Writ of Review "injury to some substantial
5 right" standard set forth in Strawberry Hill Four Wheelers v
6 Benton County, 287 Or 591, 601 P2d 769 (1979). Respondents
7 contended the impact had to be substantial.

8 We analyzed the test for standing under Writ of Review, as
9 set forth by the Supreme Court, breaking it down into the
10 following parts: (1) Identifiable injury, and (2) Interest of
11 some substance. We said that even assuming a Writ of Review
12 test applied to the question of standing under 1979 Or Laws, ch
13 772, sec 4(3), as amended by 1981 Or Laws, ch 748, we did not
14 believe the "substantial impact" test urged by respondents was
15 part of the test for standing. We further stated:

16 "****What we said in our order was that the
17 petitioner must have an interest in the decision
18 which, generally speaking, is different from members
of the community at large, and that interest must be
impacted in some manner by the decision.

19 * * *

20 "Respondents argue the injury or impact should be
21 substantial because to require less than this would
22 enable persons to appeal who are merely inconvenienced
23 by governmental action. Respondents say the county's
24 decision on appeal in this case, which will require a
25 resurfacing of Big Creek Road, will actually benefit
26 petitioners at least in the long run. We do not
believe it is our function to decide whether someone
who is affected by a decision is merely
inconvenienced, greatly inconvenienced, substantially
injured or actually benefited by the decision. One
person's mere inconvenience may be another person's
substantial injury or even a third person's benefit.

1 We do not believe it wise and certainly do not believe
2 we are required to get involved in this tangled
3 thicket." Order on Reconsideration, April 2, 1982,
4 pg. 2-3.2

5 After the Board's orders on standing, an evidentiary hearing
6 was held to determine the truth of the allegations contained in
7 the petition for review. Only evidence as to the standing of
8 petitioner Tony Cole was introduced.³ The evidence consisted
9 primarily of the submission of affidavits from numerous
10 witnesses and cross-examination of those witnesses. After the
11 hearing, the Board issued a supplemental order in which the
12 Board attempted to clarify a question concerning petitioners'
13 burden of proof. We said:

14 "Having listened to the evidence presented on the
15 issue of what, if any, delays or obstructions to
16 travel on Big Creek Road will occur we believe our
17 earlier orders need clarification. We do not believe
18 every delay or the possibility of minor obstruction of
19 a roadway is, per se, injurious to a person. A
20 rebuttable presumption exists that one who is delayed
21 in traveling to and from his residence is adversely
22 affected. However, the evidence in a particular case
23 may indicate the presumption should not apply, and the
24 person who is subject to being delayed must prove that
25 his interest will be adversely affected by being
26 delayed.²" (Footnote omitted). Supplemental Order
on Standing at 2.

27 In the supplemental order following the above quote we
28 proceeded to state that we felt such proof on the part of
29 petitioner Cole was necessary in this particular case:

30 ***The evidence indicates petitioner Cole will
31 probably suffer some delay in traveling to and from
32 his residence by reason of the construction activity

1 on Big Creek Road. Reduced speed would be caused by
2 the existence of only a single-lane of travel during
3 the performance of certain work and the presence of
4 construction signs, flaggers and construction
5 activity. There was no direct testimony, however, as
6 to how much delay would result from having to slow
7 down.³ The evidence does show the probability is
8 very slight that petitioner Cole will have to stop
9 because of tree-felling or because of on-coming
10 vehicles during times of one lane travel.

11 "The evidence reveals Big Creek Road in the
12 winter months is subject to landslides and fallen
13 trees blocking the roadway causing delays in travel.
14 In addition, maintenance work occurs on the roadway in
15 the summer months which further creates the
16 possibility of delay to travelers such as petitioner
17 Cole.

18 "We cannot say that petitioner Cole is,
19 necessarily, adversely impacted by being subjected to
20 the potential for additional delays. He appears to
21 live with the potential for delay in travel on Big
22 Creek Road caused by landslides, trees blocking the
23 road, and normal maintenance on the road. We believe
24 it is incumbent on petitioner Cole to produce evidence
25 showing how it is that a potential delay in addition
26 to those which he normally must face is adverse to
27 him." (Footnote omitted). Supplemental Order at 2-3.

28 We granted petitioner Cole the opportunity to submit
29 additional evidence concerning how it is his interests would be
30 adversely affected or he would be aggrieved by the road
31 construction activity. We have received evidence from
32 petitioner concerning this issue as well as rebuttal evidence
33 and argument from respondents Renaghans.⁴

34 FACTS

35 Some of the facts concerning petitioner Cole's allegation
36 that his interests will be adversely affected or that he will
37 be aggrieved by the county's decision have been set forth in

1 the quote from the Board's supplemental order. The evidence in
2 this case shows that petitioner Cole will likely, at sometime
3 in the future, and for a period of approximately eight to nine
4 days, be delayed in traveling to and from his residence as a
5 result of the land use decision being appealed. The delay
6 would be caused by road construction required as a condition of
7 approval of the comprehensive plan and zone changes approved by
8 respondent Lane County. Petitioner Cole will use Big Creek
9 Road, the road on which construction will take place, for four
10 to five roundtrips per week during non-summer months and as
11 many as seven to ten roundtrips per week during summer months.
12 Thus, the potential is greater that petitioner Cole will be
13 exposed to delay, both in terms of the probability that it will
14 occur as well as the amount of the delay, if road construction
15 occurs in the summer as opposed to some other time of year.

16 The amount of delay to which petitioner Cole may be exposed
17 is unclear. For a period of approximately eight days there
18 will be one-way traffic on Big Creek Road in the area of
19 construction for a distance of approximately one-quarter mile.
20 Based on the evidence we find that a reasonable and prudent
21 driver would slow down due to the construction activity as well
22 as the single-lane of travel.⁵

23 While we find that it is likely that during this eight day
24 period of construction activity petitioner Cole will be
25 required to slow down somewhat and, thus, be delayed in his
26 travel to and from his residence, we find it unlikely that any

1 construction activity will actually require him to stop or be
2 delayed for any appreciable amount of time. The only
3 construction activities or related activities which the
4 evidence suggests might require him to stop are large
5 tree-felling and traffic coming in the opposite direction at
6 the stretch of road for which only a single-lane of travel is
7 provided. There is no evidence, however, as to the number of
8 large trees which might require felling. The evidence does
9 show that the activity will occur on a single day and that the
10 amount of time for which a car might be required to stop is
11 three to five minutes. This activity might require petitioner
12 Cole to stop once, at most, twice for up to three to five
13 minutes each in a single day. Absent evidence as to the number
14 of trees which will need to be felled, we can only say it is
15 possible that petitioner Cole may be required to stop as a
16 result of tree-felling.

17 The other activity which might require petitioner Cole to
18 have to stop is unlikely to occur as fewer than 50 cars per day
19 use Big Creek Road. Even if petitioner Cole should approach
20 the single-lane of travel at the exact time another car were
21 approaching from the opposite direction, petitioner Cole would
22 only be required to stop for that period of time needed by the
23 approaching car to travel the one-quarter mile construction
24 area distance. No evidence exists as to how long it might take
25 a car to travel the one-quarter mile distance. As an example,
26 however, if the approaching car were traveling at a speed of 20

1 miles per hour petitioner Cole would only be required to wait
2 three-quarters of a minute or 45 seconds.

3 Petitioner Cole has asserted that the delay which he might
4 occasion is adverse to him. He claims that it may make him
5 late for work or for some other business matter. Being late
6 may, in turn, result in loss of income and, perhaps, even loss
7 of employment. He also claims he may have one or more of his
8 children during the time of road construction. If he has the
9 children and construction is during the school year, petitioner
10 Cole will have to take his children to the bus stop at the
11 intersection of Highway 101 and Big Creek Road. If he is late
12 in getting his children to the bus, he will have to drive them
13 to school himself. This delay might make him late for work.
14 Should a medical emergency arise while he has his children
15 "delays of 5-15 minutes in such a context could be critical to
16 the health of the injured parties." Petitioner Cole also has
17 said in his affidavit that non-productive time or involuntary
18 loss of time can be aggravating and irksome. Related to this,
19 petitioner Cole also has a personal goal of being punctual
20 which might be frustrated by being less than punctual.

21 OPINION

22 We have issued three orders concerning standing in this
23 case. Try as we have, we still have not clearly enunciated a
24 workable test for determining whether a person's interests are
25 adversely affected or the person is aggrieved by a particular
26 land use decision. We, therefore, must make a fourth and, we

1 hope, final attempt to do so.

2 Simply stated, we believe it is our function to decide
3 first, whether petitioner may be impacted by the decision, and,
4 secondly, whether his claim of injury resulting from the impact
5 is reasonably likely to in fact occur. The extent of the
6 impact which may occur will often determine the severity of any
7 injury which will result to the petitioner. For example, in
8 Friends of Benton County v Benton County, 3 Or LUBA 165 (1981)
9 affirmed sub nom Benton County v Friends of Benton County, 56
10 Or App 567, ___ P2d ___ (1982), the feared impact was a
11 destruction of petitioner's residence from the possible
12 rechannelization of the Willamette River resulting from the
13 county's issuance of a permit authorizing gravel removal near
14 the river. The feared injury was to petitioner's use and
15 enjoyment of his property and the safety of himself and his
16 family. In Van Volkinburg v Marion County, 2 Or LUBA 112
17 (1980) (Order on Standing unreported), affirmed sub nom Merrill
18 v Van Volkinburg, 54 Or App 873, ___ P2d ___ (19__), the feared
19 impacts were that the development would be visible from
20 petitioners' property and would affect petitioners' use of the
21 roadway for walking and bicycling due to an increase of traffic
22 on the roadway. The feared injuries concerned petitioners' use
23 and enjoyment of their property and, again, their personal
24 health and safety.

25 Petitioner has alleged he will incur delays in traveling to
26 and from his residence and will experience temporary blockages

1 of Big Creek Road as a result of this land use decision.
2 Petitioner has, thus, asserted in the petition how he will be
3 impacted by the decision. No allegation has been made,
4 however, as to how petitioner will be injured or adversely
5 impacted. We previously ruled that petitioner's allegation was
6 sufficient, if true, to give him standing. In doing so,
7 however, we in effect supplied for petitioner an assertion
8 missing from the petition. We said petitioner's allegation of
9 temporary road blockage and delay would injure petitioner
10 because it would affect his ingress and egress to his property
11 and, hence, his use and enjoyment of his property. As we
12 attempted to explain in our supplemental order, petitioner's
13 assertion of road blockage and delay justified a presumption
14 that petitioner's use and enjoyment of his property would be
15 adversely affected. Having previously ruled that petitioner's
16 allegation in the petition is sufficient, we decline to depart
17 from that holding for purposes of this case. However, in the
18 future, the Board believes that not only must the petitioner
19 allege in the petition for review how the decision may impact
20 petitioner, but also what injury or adverse effect to
21 petitioner's interests will likely result from the impact. We
22 turn now to an analysis of the impact and injury involved in
23 the present appeal.

24 Nature of the Impact

25 The impact which petitioner has alleged in the petition for
26 review is that the decision will cause him delay in traveling

1 to and from his residence.⁶ The evidence shows petitioner
2 will likely be exposed to some delay in travel as a result of
3 the county's decision. The evidence does not show how much
4 delay petitioner will actually incur, but we can speculate the
5 probable range is somewhere between a few seconds and one
6 minute each time he travels over Big Creek Road during the
7 eight to nine day construction period. It is unlikely
8 petitioner Cole would be exposed to any delay in excess of this
9 amount, although it is possible he could experience a delay of
10 from three to five minutes on the one day large trees are
11 being felled.

12 Nature of the Injury

13 Petitioner Cole's stated reasons for being aggrieved or
14 having his interests adversely affected by delay can be broken
15 down into the following: (1) loss of income or employment, (2)
16 problems in obtaining needed medical care should a medical
17 emergency arise, and (3) irritation and aggravation which he
18 would experience at being delayed.

19 We do not believe that given the amount of delay which
20 petitioner Cole is likely to experience, there will be any loss
21 of income or employment. We do not accept, based on the
22 evidence in the record, that a potential delay of between a few
23 seconds and one minute in traveling from his home to his place
24 of employment is likely to result in loss of income. We also
25 do not accept, based on the evidence in the record, that a
26 delay of between a few seconds and one minute is likely to

1 cause any problems to petitioner Cole should a medical
2 emergency arise. Petitioner Cole has stated in his affidavit
3 that a five to fifteen minute delay in travel could be critical
4 in obtaining needed medical care. We agree that a five to
5 fifteen minute delay could possibly be critical, but a five to
6 fifteen minute delay assumes a fact situation different from
7 the one at hand. Moreover, the delay might injure petitioner
8 only if, during the time of construction, he had his children,
9 a medical emergency should arise and the emergency were such
10 that any delay would be critical. In our view, these "ifs"
11 make it less than likely any injury would occur should
12 petitioner be delayed in travel.

13 Finally, we do not believe mere mental aggravation or
14 irritation resulting from a land use decision involves an
15 injury to an interest which the law recognizes as adequate to
16 confer standing.⁷ A person could be irritated merely because
17 s/he has to look at a particular development while driving to
18 work, shopping downtown or visiting a friend on the other side
19 of town. We do not believe this type of irritation or
20 aggravation involves an interest which the legislature intended
21 to be sufficient for purposes of 1979 Or Laws, ch 772, sec
22 4(3), as amended by 1981 Or Laws, ch 748.

23 In summary, petitioner has alleged that the county's land
24 use decision will cause him delay in travel which, in turn, may
25 interfere with his ability to earn an income or obtain needed
26 medical assistance. Given the period during which petitioner

1 is likely to be exposed to some delay and the length of each
2 delay to which he is likely to be exposed, we do not believe
3 that the injuries which petitioner fears are reasonably likely
4 to occur. While petitioner may be irked or aggravated at
5 having to slow down while traveling on Big Creek Road, we do
6 not believe this "injury" is to an interest recognized under
7 1979 Or Laws, ch 772, sec 4(3), as amended by 1981 Or Laws, ch
8 748.

9 As a final matter, petitioner has asked us to adopt a more
10 "liberal" test for standing in this case because at issue is
11 the validity of an exception under Goal 2 to Goal 4, a resource
12 goal. Petitioner has also suggested that he be granted
13 standing because the county's decision involves the same
14 planning subarea of the county within which petitioner
15 resides. In other words, petitioner's mere residency within
16 the subarea is enough to give him standing:

17 "Where a county divides itself into small
18 geographic planning areas as the County did here for
19 twelve rural planing areas, it does so presumably
20 because of a community of interests in that geographic
21 area. Here, the subarea represents only about 3% of
22 the county population, having a population of 6,064 in
23 1970 (Coast Subara Plan, p. 11). Any resident of that
24 area is 'aggrieved' by a goal exception to that
25 established plan (as opposed to 'adversely
26 affected'). There can be little other content to
distinguishing 'adversely affected' from 'aggrieved'
under the 1979 Act." Petitioner's Memorandum in
Opposition to Motion for Evidentiary Hearing. Pg. 8.

24 We do not believe we have the authority to do that which
25 petitioner requests, even if we were inclined, for policy
26

1 reasons, to agree with petitioner that we should do so. 1979
2 Or Laws, ch 772, sec 4(3), as amended by 1981 Or Laws, ch 748,
3 requires a showing that a person's interests are adversely
4 affected or s/he is aggrieved by the land use decision.
5 Varying this standard depending upon the issues involved in the
6 appeal is not, in our judgment, allowed. Allowing standing
7 based upon mere residency within the subarea would require that
8 we entertain a presumption of adverse effect or aggrievement
9 which we find to be unwarranted.

10 The petition for review is dismissed.

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FOOTNOTES

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4 The Board has previously ruled that petitioners Warren,
5 Shelton, Myrowitz and Oregon Wilderness Coalition failed to
6 allege sufficient facts in the petition to grant them
7 standing. See Warren v Lane County, 5 Or LUBA 227 (1982)
8 (Order on Standing).

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11 One example of this problem is a decision which would
12 require paving of a road in front of a petitioner's house. One
13 person might think petitioner benefited because the paving. One
14 would reduce dust in front of the house, thus improving
15 petitioner's use and enjoyment of his property. Another might
16 think petitioner would be injured if the effect of paving were
17 to increase the number of cars using the road or cause the cars
18 to speed up in front of the house on the paved portion of the
19 roadway, thereby endangering the petitioner's use of the
20 roadway for bicycling or walking.

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22 3

23 Having failed to introduce evidence to support her factual
24 allegations of standing, petitioner Ginger Cole has failed to
25 meet her burden of proving standing. Cf Duddles v City of West
26 Linn, 21 Or App 310, 555 P2d 583 (1975); 1979 Or Laws, ch 772,
sec 4(7), as amended by 1981 Or Laws, ch 748.

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29 We stated in our supplemental order that petitioner must
30 explain why being subjected to delay is adverse to him since he
31 is already exposed to the potential for delay caused by
32 landslides and fallen trees in the winter time and the
33 performance of maintenance work on Big Creek Road during other
34 times of the year. Petitioner has responded to this as follows:

35 "Where other natural and artificial conditions
36 create delays (particularly during the winter, a time
37 when Mr. Cole's use of the road is less frequent) is
38 irrelevant to the issue of an adverse effect of this
39 construction work. A person who suffers from a broken
40 left arm is no less injured by a fracture to the bone
41 of the right arm.

42 "The premise here defies logic. Are colds less
43 bothersome to the elderly, who have suffered a greater

1 number of such illnesses in their lifetime, than to
2 the young? Do persons residing in polluted urban
3 areas have less standing to challenge a particular
4 point source emission than a hypothetical rural
5 resident? Because Mr. Cole suffers other delays in
6 traveling Big Creek Road, does not mean that the
7 delays occasioned by Respondents Renaghan are less
8 onerous."

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10 Petitioner's point is well-taken. The inquiry should not
11 be whether petitioner is already exposed to the potential for
12 delay, but why exposure to delay of a certain amount and over a
13 given period of time is adverse to petitioner. To the extent
14 we stated otherwise in our supplemental order, we retract such
15 statement.

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18 As we stated in the supplemental order on standing:
19 "The evidence does not suggest what a reasonable
20 speed of travel would be on Big Creek Road near its
21 intersection with Highway 101 without construction
22 activity or with construction activity. The delay
23 might be 22 1/2 seconds, as would occur from a
24 reduction in speed from 40 miles per hour to 20 miles
per hour for a distance of one quarter mile, more than
22 1/2 seconds or less than this amount. All the
evidence does suggest is that a reasonable and prudent
driver would slow down." Supplemental Order at 5,
Footnote 3.

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27 We note petitioner does not allege in the petition
28 that the development itself will injure petitioner's
29 aesthetic interests or interfere in some way with the use
30 and enjoyment of his property.

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33 The kind of mental aggravation or irritation
34 complained of in the instant case is to be distinguished
35 from aesthetic or other displeasue associated with one's
36 use and enjoyment of property. The latter usually is
involved when one can see or hear development activity
from one's own property.