BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILBUR RESIDENTS FOR A CLEAN NEIGHBORHOOD, JANET DIXON, KEVIN DIXON, DOROTHY BRANCH, ALICE MOHR, MARCIA BYERS, GLEN BYERS and BOB WONLESS, Petitioners, vs. DOUGLAS COUNTY, Respondent, and DICK HEARD, Intervenor-Respondent.	LUBA No. 96-178 FINAL OPINION AND ORDER

Appeal from Douglas County.

David Bahr, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Bahr & Stotter Law Offices.

No appearance by respondent.

David Smith, Tigard, filed the response brief and argued on behalf of intervenor-respondent.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

REMANDED 7/16/98

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal Douglas County's approval of a conditional use permit for a septic tank waste treatment facility in the county's Exclusive Farm Use-Grazing (FG) zone.

FACTS

This matter is on remand to us from the Court of Appeals, Wilber Residents v. Douglas County, ___ Or LUBA ___, (LUBA No. 96-178, August 11, 1997), rev'd 151 Or App 523, (1997). We repeat relevant facts from our earlier opinion, with some additional facts.

On June 10, 1996, Dick Heard (intervenor) filed an application with the planning department for a conditional use permit for a septic tank waste treatment facility (the facility). The facility is proposed to be located on the northernmost portion of a 17.29-acre parcel, zoned FG (the subject property). The facility will consist of two lagoons or ponds for primary and secondary treatment of septage. The facility will receive five truckloads of septage per day from private septic tank pumping operators throughout southwestern Oregon, and three million gallons per year of partially treated effluent water from a nearby community sewer system. The primary treatment lagoon will be approximately 100 feet by 100 feet and will contain up to 450,000 gallons of waste material. The secondary lagoon will be approximately 200 feet by 300 feet, with a capacity of up to 4.4 million gallons of

waste material. The treatment lagoons will be partially above ground within engineered containment berms. The processed waste will be pumped to nearby agricultural lands where it will be applied as a liquefied organic fertilizer.

The area of the facility has a low residential density. The nearest dwelling is one quarter mile to the north of the subject property under the same ownership as the site itself. The next nearest dwellings are located approximately one-half mile to the west on Rodgers Road.

The county planning director processed intervenor's application without a public hearing, pursuant to Douglas County Land Use and Development Ordinance (LUDO) 2.060 and 2.100. The county sent pre-decision notice of the application to the applicant and owners of property within 500 feet of subject property, but did not send notice to any of the individual petitioners, who own property further than 500 feet from the subject property, but in the immediate area. The planning director issued the challenged decision approving the permit on July 9, 1996, sending notice of the decision to applicant, to persons who submitted written comments and to owners of property within 500 feet of the subject property. Again, the individual petitioners were not among the persons to whom the county provided notice. Petitioners received actual notice of the challenged decision on September 3, 1996, and filed a notice of intent to appeal on September 23, 1996.

The petition for review alleged standing for individual

petitioners, and hence representational standing for petitioner Wilbur Residents for a Clean Neighborhood (WRCN), based on allegations that each of the individual petitioners was "adversely affected" within the meaning of ORS 197.830(3) because each individual petitioner owns property adjacent or proximate to land on which the treated sewage would be applied.[1] These allegations were supported by the affidavit of petitioner Janet Dixon, attached to the petition for review. In addition, the petition for review alleges that two of the named petitioners, Bob Wonless and Dorothy Branch, and two members of WRCN not named as petitioners, Steve and Cheryl Gern, own property that, while not immediately adjacent to the subject property, "is in close proximity to, and within sight and hearing distance from, the proposed septic lagoons" as well as the property on which treated sewage would be applied. Petition for Review 5. Petitioners cite the affidavit of Janet Dixon to support this allegation. However, as discussed below, the affidavit of Janet Dixon attached to the petition for review does not support the allegation that any

---

[1]ORS 197.830(3) provides in relevant part:

> ""If a local government makes a land use decision without providing a hearing * * * a person adversely affected by the decision may appeal the decision to the board under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

petitioners own property within sight and sound of the proposed lagoons.

At oral argument, we questioned petitioners' attorney whether any petitioners owned property within sight and sound of the proposed septic lagoons themselves. Seventeen days after oral argument, petitioners submitted a motion for an evidentiary hearing and alternative motion to file supplemental affidavits. Both motions sought to submit for our consideration affidavits by individual petitioners Janet Dixon, Kevin Dixon, Alice Mohr, Bob Wonless and Marcia Byers. Each affidavit avers that the affiant owns property within close proximity and "visual and smelling distance" of the facility itself. Each affidavit includes photographs, taken from each affiant's property, in which one of the septic lagoons is visible. One affiant also states that his property is so close to one of the lagoons that dust raised by construction of the lagoon settled on his car parked outside his home.

On August 11, 1997, we dismissed petitioners' appeal for lack of standing. We concluded that application of the treated sewage to property adjacent to the individual petitioners was not part of the application or the challenged decision, and that none of the petitioners had established that they are "adversely affected" by operation of the facility itself. Our decision also denied petitioners' motions for an evidentiary hearing and to submit supplemental

affidavits, stating that:

> "Because petitioners have not attempted to show that they are adversely affected or aggrieved by the operation of the proposed facility, we conclude that the facts to be presented in the requested evidentiary hearing would not affect the outcome of the appeal. For the same reasons, we deny petitioners' alternative request that we consider affidavits in which they attempt to establish that they are adversely affected or aggrieved." Slip op. 8.

The Court of Appeals affirmed our conclusion that petitioners were not adversely affected by application of the treated sewage to properties adjacent and proximate to petitioners' properties. However, the court reversed and remanded on the grounds that we did not address petitioners' allegation in the petition for review that some individual petitioners owned property within sight and sound of the proposed septic lagoons. The court stated that

> "we conclude that the second reason set out in the petition for review presents a facially tenable basis for showing that some or all of petitioners were adversely affected. Therefore, if being adversely affected could give petitioners a right to notice under the circumstances here, LUBA must reconsider the jurisdictional question in light of petitioners' contentions regarding their proximity to [intervenor's] proposed facility and the consequences that petitioners allege will ensue." 151 Or App at 526-27.

The court then remanded the issue of petitioners' alternative basis for standing because "[t]he question may involve factual issues that LUBA or the county must resolve * * *." 151 Or App at 527, n2.

JURISDICTION

Pursuant to the Court of Appeals' mandate, we consider whether petitioners have established that some or all of the petitioners own property within sight and sound of the facility, and if so, whether those petitioners are "adversely affected" within the meaning of ORS 197.830(3). Whether some petitioners are "adversely affected" for purposes of ORS 197.830(3) depends, in this case, on whether they are "adversely affected" by the decision as defined by ORS 215.416(11)(a), and hence entitled to notice of the decision under that statute.[2] As the Court of Appeals explained,

> "the relationship between ORS 197.830(3) and ORS 215.416(11)(a) is complementary, in that the former 'safeguards the ability to appeal a decision to LUBA if it is made without a required hearing or ability to participate in the hearing,' while the latter is aimed in part at assuring the availability of those procedures at the local level. * * * [G]iving notice to adversely affected persons whom ORS 215.416(11)(a) expressly makes eligible for it when the county does not conduct a hearing, and who are expressly made eligible by ORS 197.830(3) to appeal to LUBA from county decisions that are made without a hearing, is a requirement and not an option." 151 Or App at 530 (quoting Tarjoto v. Lane County, 137 Or App 305, 308-09, 904 P2d 641 (1995)).

---

[2]ORS 215.416(11)(a) provides in relevant part:

> "The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision. Notice of the decision shall be given in the same manner as required by ORS 197.763."

Thus, under the facts of this case, analysis of whether petitioners were entitled to notice of the decision pursuant to ORS 215.416(11) is dispositive of the jurisdictional question whether petitioners have standing to appeal and have timely appealed the challenged decision to LUBA under ORS 197.830(3)(a).

As presented to us, petitioners' theory of standing relied almost exclusively on the proximity of petitioners' property to land on which the treated sewage would be applied. However, as the Court of Appeals noted, the three page discussion of standing in the petition for review contains a paragraph alleging an alternative theory of standing for named petitioners Bob Wonless, Dorothy Branch and represented petitioners Steve and Cheryl Gern: ownership of property within sight and sound of the facility itself. OAR 661-10-030(3)(a) requires that the petition for review "state the facts that establish petitioner's standing." The paragraph at issue states:

> "The remaining petitioners, Bob Wonless and Dorothy Branch, in addition to Steve and Cheryl Gern (who are members of WRC but are not individually named Petitioners) own property which, while not immediately adjacent, is in close proximity to, and within sight and hearing distance from, the proposed septic lagoons and the Scardi and Wells properties upon which the septic waste is to be disposed. Id. [Citing to pages 2-3 of Janet Dixon's affidavit]. They will personally be adversely affected by the operation of the proposed facility based on the likelihood of potential health effects, aesthetic degradation, increased traffic flow in the area, degradation of their drinking water source due to

site runoff into Sutherlin Creek, and reduction in their property values. Id." Petition for Review 5.

The petition for review cites to the attached affidavit of Janet Dixon as supporting its contentions of standing. However, Janet Dixon's affidavit does not aver facts supporting petitioners' alternative theory of standing.[3] Where standing and hence our jurisdiction is disputed, mere allegation of facts without citation to the record or supporting documentation or affidavits is insufficient to establish standing. We conclude therefore that, as presented to us in the petition for review, petitioners have not established that any of them own property that is within sight and sound of the facility itself.

The question then becomes whether we may consider petitioners' supplemental affidavits, submitted 17 days after oral argument, in assessing whether petitioners have met their burden of establishing their standing to appeal. We denied petitioners motion for an evidentiary hearing and motion to file supplemental affidavits because, it appeared to us, petitioners had not alleged and did not intend the supplemental affidavits to prove that they were adversely

---

[3]The closest statement we find in the affidavit of Janet Dixon is the following, which is directed solely at petitioners' principal theory of standing:

> "It is my information and belief that Steve and Cheryl Gern, and Dorothy Branch own property which is in close proximity to, and in direct line-of-sight of, the Scardi and Wells properties upon which the septic waste is to be dispersed." Affidavit of Janet Dixon 3.

affected by the facility itself. However, as the Court of Appeals pointed out, our understanding of petitioners' allegations was incomplete: Petitioners did make a "facially tenable" allegation that some petitioners owned property within sight and sound of the facility, and thus are adversely affected by the facility itself. Thus, it appears that our decision to deny petitioners' motion for an evidentiary hearing and alternative motion to submit supplementary affidavits was based on a misunderstanding of petitioners' allegations. Accordingly, we conclude that it is appropriate to revisit our decision to deny petitioners' motions.

Intervenor opposed both of petitioners' motions, arguing that the facts establishing petitioners' standing must be stated in the petition for review. Intervenor recognizes that we have on occasion permitted a petitioner to amend a petition for review to establish standing where allowing the motion will not delay our review. Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 1093, 1095 (1988). However, intervenor argues that allowing either motion would violate the spirit and letter of our rules and the statutory policy at ORS 197.805 that "time is of the essence in reaching final decisions in matters involving land use." Specifically, intervenor contends that petitioners have known throughout these proceedings the facts they now rely upon to establish standing. Yet petitioners failed to establish those facts despite numerous opportunities to do so: in the petition for

review, in response to intervenor's motion to dismiss, in a reply brief or in an amended petition for review. Instead, intervenor argues, petitioners waited until 17 days after oral argument to attempt to prove facts establishing their alternative theory of standing. Intervenor submits that, at this late stage in the review proceeding, the timing of petitioners' motions are not mere technical violations of this Board's rules, but would so delay review as to constitute a direct violation of the statutory policy favoring speedy review.

Petitioners respond that, until oral argument, they had no idea that intervenor or the Board questioned the adequacy of their allegation that some petitioners owned property within sight and sound of the facility. Petitioners argue that none of intervenor's pleadings disputed those allegations, and that even now intervenor does not dispute any of the facts petitioners rely upon to establish standing. Because intervenor does not dispute any of the facts alleged, or state any prejudice to intervenor other than a generalized concern for delay, petitioners urge us to allow their alternative motion to submit the supplementary affidavits.

It is petitioners' obligation to state and support the facts establishing standing and hence our jurisdiction. The timing, quantity and quality of proof needed to satisfy that obligation depends in some part on whether and to what extent standing is disputed. In the present case, petitioners

alleged facts in their petition for review supporting their alternative theory of standing, but did not substantiate those facts other than by citation to an affidavit that did not support those facts.

However, given the predominant focus of both parties on petitioners' main theory of standing, we do not agree with intervenor that petitioners' failure to substantiate their alternative allegations until after oral argument is necessarily fatal. We perceive no reason why our consideration of the supplemental affidavits will result in further delay of this review proceeding or otherwise prejudice intervenor. As petitioners point out, intervenor does not dispute any of the facts alleged in the supplemental affidavits, and thus there is no need for an evidentiary hearing.[4] We agree with petitioners that we may consider the information in the supplemental affidavits for the purpose of deciding whether petitioners are adversely affected and thus have standing to prosecute this appeal. Accordingly, we grant

[4]An evidentiary hearing may be necessary and appropriate where there are disputed allegations in the parties' briefs regarding standing. OAR 661-10-045(1). However, in the present case intervenor does not dispute the facts alleged and relied upon to establish standing. Where the opposing party does not object, we may consider documents outside the record in determining whether we have jurisdiction over the appeal. Mazeski v. Wasco County, 31 Or LUBA 126, 128 (1996). In this case, while intervenor objects to our consideration of the supplemental affidavits, that objection is based solely on the timeliness of the motion rather than concerns about the probity of the evidence submitted. In this circumstance, because intervenor does not dispute the accuracy of the supplemental affidavits, we see no purpose in conducting an evidentiary hearing to establish the facts averred in those affidavits. We conclude that we may consider those affidavits for purposes of determining whether petitioners have standing and hence whether we have jurisdiction.

petitioners' motion to consider the supplemental affidavits in determining whether any petitioners are "adversely affected."

We have held that a person within sight and sound of a proposed development is presumptively "adversely affected and aggrieved" within the meaning of ORS 215.416(11)(a). Walz v. Polk County, 31 Or LUBA 363, 369 (1996). As summarized above, the affidavits state that each of the affiants owns property within visual and smelling distance of one of the septic lagoons. Each affidavit includes a photograph of one of the lagoons, taken from the affiant's property.[5] The affidavits allege other impacts such as loss of property value, aesthetic and environmental degradation, and increased traffic from trucks delivering septage.

Whether a person is adversely affected by a proposed development, and thus entitled to notice of the decision under ORS 215.416(11)(a), is a fact-specific inquiry that depends upon the nature of the development and its externalities, the proximity of the person's property to the development, and any factors regarding the person's property or activities thereon that render the property more or less susceptible to impacts from the development. Thus, merely because a person owns property from which he can see or hear a proposed development may not necessarily render that person adversely affected by

[5]While the affidavits do not state the distance between the affiant's property and the lagoon visible in the photographs, it appears from the photographs that the distances range from approximately a quarter of a mile to a mile.

the decision approving the development.

In the present case, although each of the affiants owns property that is farther than 500 feet from the subject property, the particular nature of the facility could cause external, olfactory impacts beyond adjacent property boundaries. Intervenor has not attempted to rebut the "presumption" that petitioners are adversely affected by virtue of being within sight and smell of the facility. Walz, 31 Or LUBA at 369. Petitioners have not relied on that presumption, but have also alleged direct, specific, tangible and negative impacts to them from the proposed development. We conclude that the supplemental affidavits suffice to establish that the affiants are "adversely affected" by the facility within the meaning of ORS 215.416(11)(a).[6]

Because the county made a decision without a hearing, but did not send notice of the decision to persons adversely affected by the decision as required by ORS 215.416(11)(a), those persons are entitled and have standing to appeal the county's decision to LUBA pursuant to ORS 197.830(3)(a). Accordingly, we conclude that petitioners Janet Dixon, Kevin Dixon, Alice Mohr, Marcia Byers and Bob Wonless have established individual standing to appeal the county's

[6]We recognize that our elaboration of the "adversely affected" standard at ORS 215.416(11)(a) may require local governments in future cases to identify, or require an applicant to identify, a potentially broader category of persons affected by the development than the category of landowners within a certain distance from the subject property. If so, that is a necessary consequence of the statutory framework.

decision, pursuant to ORS 197.830(3)(a).[7] The affidavit of Marcia Byers alleges that her husband, petitioner Glen Byers, resides with her on their property near the subject property. Although Glen Byers did not file a separate affidavit, we conclude that the affidavit of Marcia Byers suffices to establish standing for him. We dismiss the remaining named petitioner, Dorothy Branch.

Because some of petitioners have established standing to appeal the county's decision, we conclude that we have jurisdiction over that decision.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county failed to provide petitioners with notice of the decision or an opportunity to appeal the challenged decision, and thus "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights" of petitioners. ORS 197.835(9)(a)(B).

As a necessary part of our jurisdictional analysis, we determined that petitioners are "adversely affected" for purposes of ORS 215.416(11)(a). It follows that petitioners were entitled to notice of the decision and an opportunity for local appeal pursuant to ORS 215.416(11)(a). Petitioners' right to notice of the decision and opportunity for local

[7]Petitioner WRCN claims standing only by virtue of its representational capacity. Because members of WRCN have established individual standing, WRCN has standing in its representational capacity. See Wilbur Residents v. Douglas County, ___ Or LUBA ___ (LUBA No. 96-178, Order, March 11, 1997).

appeal, and hence participation in the decision, is a fundamental and therefore substantial procedural right. See Flowers v. Klamath County, 98 Or App 384, 389-90, rev den 308 Or 592 (1989). We conclude that the county's failure to provide petitioners the notice and opportunity for local appeal to which they were entitled prejudiced petitioners' substantial rights. ORS 197.835(9)(a)(B).

The second assignment of error is sustained.

FIRST, THIRD, FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR

Petitioners' remaining assignments of error raise substantive objections to the challenged decision, based on alleged violations of local provisions, the lack of adequate findings, or the lack of substantial evidence supporting the decision.

However, we decline to reach the merits of these assignments of error. We deem it more consistent with our review authority to allow the county to address petitioners' challenges in the first instance, some of which may require interpretations of the county's comprehensive plan and land use ordinances. Our review of petitioners' challenges in the first instance would fail to give effect to petitioners' procedural rights to notice and opportunity for local appeal and our determination that the county violated those rights. Accordingly, we remand the decision to the county to provide petitioners a first opportunity to present their challenges to the county.

We emphasize, however, that our decision not to reach the merits of the remaining assignments of error should not be construed as license to conduct an empty procedural exercise on remand and then readopt the initial decision without addressing petitioners' challenges. The merits of the first assignment of error, in particular, raise grave concerns whether the challenged decision approving the septage treatment facility on agricultural land is not prohibited as a matter of law.

The county approved the treatment facility as a "commercial activity in conjunction with farm use" as defined by LUDO 1.090, a conditional use in the FG zone. LUDO 1.090 defines "commercial activity in conjunction with farm use" as:

> "The processing, packaging, treatment and wholesale distribution and storage of a product primarily derived from farm activities on the premises. Also, retail sales of agricultural products, supplies and services directly related to the production and harvesting of agricultural products. * * *"

The challenged decision describes the proposed use as a treatment facility that produces fertilizer, and finds, without analysis, that it is a "commercial activity in conjunction with farm use" or similar to one. However, if it is a treatment facility that produces fertilizer, it would appear to fall under the first sentence of the definition rather than the second, in which case it seems clear that the product, the treated sewage, must be "derived from farm activities on the premises." The facility receives its raw materials from septic tanks from throughout southwestern

Oregon, and three million gallons of effluent water per year from a nearby community sewer system. LUDO 1.090 requires, by its plain terms, that if a commercial product is produced on agricultural land, it must be derived from farm activities on the premises. The challenged decision provides no explanation how a facility that treats residential sewage produces a product that is derived from farm activities on the premises, or any other basis under LUDO 1.090 to believe the facility is a "commercial activity in conjunction with farm use" or a similar use.[8]

We note also that the challenged decision appears to contain little or no findings or analysis directed at the conditional use factors at LUDO 3.3.150, particularly the requirement that granting the permit will not "materially alter the stability of the overall land use pattern of the area."

The county's decision is remanded.

[8]On appeal to us, intervenor argues that the treatment facility is similar to a commercial use that is listed as an example under LUDO 1.090: "[s]torage, distribution and sale of feed, fertilizer, seed, chemicals, and other products used for commercial agriculture." Intervenor suggests that the treatment facility does not produce fertilizer so much as it stores fertilizer. We express no opinion regarding the merits of that argument.