BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF DOUGLAS COUNTY and
SHELLEY WETHERELL,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

DARREN MCNEIL and KARYN SWANSON MCNEIL,
Intervenors-Respondent.

LUBA No. 2000-086

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Tracy Pool Reeve, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief was Reeve Kearns PC.

No appearance by Douglas County.

Harlan E. Levy, Salem, filed the response brief and argued on behalf of intervenors-respondent.

BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REVERSED 11/27/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision denying petitioner Friends of Douglas County party status to appeal an administrative decision approving a partition and nonfarm dwelling on land zoned exclusive farm use (EFU).

MOTION TO INTERVENE

Darren McNeil and Karyn Swanson McNeil (intervenors), the applicants below, move to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a vacant 137.78-acre parcel zoned EFU, currently used for livestock grazing. On October 18, 1999, intervenors' predecessors-in-interest applied to the county (1) to partition the subject property into a one-acre parcel and a 136.78-acre parcel, and (2) to site a nonfarm dwelling on the one-acre parcel.

The county reviewed the application under local provisions implementing ORS 215.416(11), under which the county planning director makes an administrative decision approving or denying the application. The county's Land Use and Development Ordinance (LUDO) 2.120(1)(c) requires that the planning director consider "written comments from parties or other persons." On November 4, 1999, while the record was open before the planning director, petitioner Shelley Wetherell submitted, on behalf of petitioner Friends of Douglas County (Friends or petitioner), comments objecting to approval of the application. The applicants then submitted additional material in response to Friends' objections. On December 6, 1999, the planning director issued a decision tentatively approving the application, in which the director addressed Friends' objections.

On the same date, the county sent notice of the director's decision to petitioners, pursuant to LUDO 2.130(1).[1] The notice stated that any persons entitled to notice of the application under LUDO 2.065 or who are adversely affected or aggrieved by the decision may file a local appeal of the decision within 12 days of the date the decision was mailed, pursuant to LUDO 2.130(2)(j).[2] Also on that date, the director sent petitioners a letter in which the director explained why she approved the application. On December 16, 1999, petitioner Wetherell, on behalf of Friends, filed a timely appeal of the director's decision with the planning commission, pursuant to LUDO 2.400.

A public hearing before the planning commission was conducted on February 17, 2000, in which the planning commission chair granted petitioner Friends party status, pursuant to LUDO 2.200(1) and (3), and LUDO 2.400(2).[3] Due to the lateness of the hour,

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[1]LUDO 2.130(1) provides:

> "Notice of an administrative decision shall be * * * mailed to the applicant, to those persons who are entitled to notice pursuant to [LUDO] 2.065.2, and to others who participated in the process."

[2]LUDO 2.130(2) requires that the notice of an administrative decision contain:

> "* * * * *
>
> "j. Notice that any persons who are entitled to written notice (pursuant to [LUDO] 2.065) or who are adversely affected or aggrieved by the decision may appeal the decision within twelve (12) days from the date the written notice of decision was mailed by filing a timely written statement with the Director."

[3]LUDO 2.200(1) provides in relevant part:

> "In order to have standing under this chapter, a person shall be recognized as a party by the presiding officer.
>
> "a. Party status, when recognized by the presiding officer, establishes the right of the person to be heard, either orally or in writing[,] and to pursue a review or appeal under this chapter.
>
> "b. Of those who appear and are heard at the time of hearing, the presiding officer shall determine who are parties and who are witnesses only, and shall give them an opportunity, if they choose, to be heard with regard to the ruling. Persons who appear by written communication only shall be accorded the status of witnesses unless they are included among those persons entitled to notice of the hearing under

the February 17, 2000 hearing was continued to March 16, 2000, without taking evidence or argument. On March 16, 2000, intervenors filed a petition to overrule the chair's decision and deny Friends party status. At the hearing on that date, the planning commission voted to dismiss Friends' appeal, because Friends had not demonstrated that it was a "party" as defined by LUDO 1.090, or "aggrieved" by the planning director's decision, and thus entitled to a *de novo* hearing under LUDO 2.130(2)(j)or ORS 215.416(11).[4] Findings to that effect

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this ordinance, or the written statement both asserts a position on the merits of the application and establishes the person's status as a party to the satisfaction of the presiding officer.

"c. For any determination made by the presiding officer under this section, the Approving Authority may overrule the presiding officer upon motion timely made and passed."

LUDO 2.200(3) provides in relevant part:

"Any person or entity who is entitled to notice may appeal a decision of the Director relative to an Administrative Action. In the conduct of a consequent hearing, the Approving Authority shall establish the appellant as a party or the appeal shall not be heard and the contested decision shall become final."

Similarly, LUDO 2.400(2) provides:

"Any person or entity who files a timely written statement may appeal a decision of the Director relative to an Administrative Action. In the conduct of a hearing, the Approving Authority shall establish the appellant as a party or the appeal shall not be heard and the contested decision shall become final."

[4]LUDO 1.090 defines "party" to include:

"a. The applicant and all owners or contract purchasers of record * * * of the property which is the subject of the application.

"b. All property owners of record * * * within the area of notification described in [LUDO] 2.065.

"c. A Planning Advisory Committee recognized by the Board pursuant to the Citizen Involvement Program approved pursuant to ORS 197.160.

"d. Any affected unit of local government or state or federal agency which has entered into an agreement with Douglas County to coordinate planning efforts.

"e. *Any other person, or entity whether or not a timely statement or request is made, may be recognized at the hearing if the person or entity is found by the presiding officer to be specially, personally, or adversely affected in the subject matter*." (Emphasis added.)

were prepared and issued on April 6, 2000. Petitioner Wetherell, on her own behalf and on behalf of Friends, then appealed the planning commission's decision to the board of commissioners. The board of commissioners conducted a hearing May 11, 2000, limited to considering whether the planning commission correctly dismissed Friends' appeal. One of the three commissioners was absent at the hearing, and the two remaining commissioners deadlocked on the issue. Pursuant to the county's code, the effect of the deadlock was to let the planning commission decision stand, affirming that decision.

This appeal followed.

MOTION TO DISMISS

Intervenors move to dismiss this appeal, because petitioners Wetherell and Friends lack standing to appeal to LUBA, pursuant to ORS 197.830(2).[5]

A. Petitioner Wetherell

Intervenors contend that petitioner Wetherell never appeared before the planning director or planning commission on her own behalf, but always appeared as a representative of petitioner Friends. Consequently, intervenors argue, petitioner Wetherell does not have standing to appeal the county's decision to LUBA under ORS 197.830(2)(b).

Petitioners filed a reply brief responding to intervenors' argument. Neither the reply brief nor the petition for review takes the position that petitioner Wetherell "appeared" before the planning director or planning commission on her own behalf. However, the reply brief cites to *Rochlin v. City of Portland*, 31 Or LUBA 509, 509-11 (1996) and *Terra v. City*

[5]ORS 197.830(2) provides that:

> "Except as provided in ORS 197.620(1) and (2), a person may petition [LUBA] for review of a land use decision or limited land use decision if the person:
>
> "(a) Filed a notice of intent to appeal the decision as provided in [ORS 197.830(1)]; and
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

of Newport, 24 Or LUBA 579 (1992), for the proposition that petitioner Wetherell's appearance on behalf of Friends was sufficient to constitute an appearance on her own behalf, for purposes of ORS 197.830(2)(b).

In *Terra*, we addressed whether an individual (Recht) who appeared on behalf of an organization "appeared" before the local government, as required in order for that person to intervene before LUBA under ORS 197.830(6):

> "* * * Recht did state, in various submittals to the planning commission and city council, that she was representing [the organization]. However, it is not disputed that Recht is an active member of [the organization] and, presumably, shares that organization's goals. Therefore, we do not assume that simply because she represented [the organization] in the city proceedings, she was not also representing herself.
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> "The Court of Appeals has recognized that one of the objectives of local land use proceedings is to facilitate citizen input, and that such local proceedings are not conducted with the formality of court proceedings. * * * It is not customary for individuals testifying or submitting documents in local land use proceedings to specifically state they are appearing on their own behalf. We believe the written and oral submittals by Recht cited in the record demonstrate that she was involved in the local proceedings and offered her own views, as well as [the organization]'s, at the local level. This is sufficient to constitute an appearance before the city." 24 Or LUBA at 584-85 (citations omitted).

Rochlin involved an individual who appeared before the city on behalf of an organization and, at least in one letter, on his own behalf. We applied the presumption described in *Terra*, and held in *Rochlin* that the petitioner had expressed his own views as well as the organization's, and thus "appeared" before the city for purposes of ORS 197.830(2)(b).

One difference between the present case and *Terra* and *Rochlin* is that, here, the county's code has a process at LUDO 2.300, which applies in every appeal from an administrative decision and which was applied here, that requires participants in the appeal to declare and the county hearings officer or planning commission to determine the status of

those participants.[6] In that context, we do not believe the presumption described in *Terra* and *Rochlin* is applicable. At no time during the proceedings before the planning director or the planning commission did petitioner Wetherell indicate, by word or deed, that she felt herself to be a party or aggrieved person independent of the organization she represented. The only issue addressed by the planning commission was whether petitioner Friends was a party or aggrieved person. It was incumbent on petitioner Wetherell under that circumstance to declare that she was appearing on her own behalf, as well as on behalf of Friends, so that the planning commission could make a determination regarding her status. We agree with intervenors that, having failed to do so, Wetherell did not "appear" before the planning commission within the meaning of ORS 197.830(2)(b), and lacks standing to appeal to LUBA.[7]

Petitioner Wetherell does not have standing in this appeal.

B. Friends of Douglas County

Intervenors also argue that petitioner Friends did not appear before the planning director or planning commission, because no hearing was ever held on the merits of the

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[6]Although it plays no role in our analysis, one other difference is that *Terra* involved "appearance" for purposes of the statute allowing intervention. There is no requirement that persons seeking to intervene in an appeal to LUBA demonstrate that they are aggrieved.

[7]It is not clear whether petitioners contend that petitioner Wetherell established individual standing for purposes of ORS 197.830(2)(b) by virtue of an individual appearance before the board of commissioners. The statement of material facts in the petition for review notes that petitioner Wetherell appealed the planning commission's decision on her own behalf as well as on behalf of Friends, but neither the petition for review nor the reply brief develops an argument why, based on that fact or petitioner Wetherell's subsequent appearance before the board of commissioners, petitioner Wetherell established individual standing. Intervenors argue that, to the extent petitioner Wetherell relies upon the notice of appeal to establish individual standing, that attempt is untimely. According to intervenors, LUDO 2.300 requires that participants establish their status before the hearings officer or planning commission. Further, pursuant to LUDO 2.700(1), the board of commissioners' review of a decision by a hearings officer or planning commission is confined to the record and arguments of the parties below. Intervenors argue that petitioner Wetherell's only opportunity to assert her claim to individual party or aggrieved status under the county's code was before the planning commission and, having failed to do so, petitioner Wetherell cannot belatedly assert her individual party or aggrieved status before the board of commissioners. We need not resolve that issue, because we do not understand petitioners to rely upon the notice of appeal or petitioner Wetherell's appearance before the board of commissioners to establish an individual status independent from Friends. Petitioners' only developed argument on petitioner Wetherell's individual status is their argument based on *Terra* and *Rochlin*.

planning director's decision. Intervenors cite *Franklin v. Deschutes County*, 30 Or LUBA 33, 40 (1995), *aff'd* 139 Or App 1, 911 P2d 339 (1996), for the proposition that a petitioner cannot "appear" before the local government for purposes of ORS 197.830(2)(b) where no hearing is held on the merits of the decision. However, *Franklin* involved a purportedly ministerial planning director's decision affecting the petitioners' property for which the county provided no notice or opportunity for the petitioners to participate. The petitioners attempted to appeal the director's decision to a hearings officer, but the hearings officer determined that she had no jurisdiction to review the director's decision. LUBA concluded that the petitioners had standing to appeal to LUBA under ORS 197.830(3), because the county had made a decision without a hearing that adversely affected the petitioners. In the present case, petitioner Friends "appeared" before the planning director in writing and before the planning commission both orally and in writing, and has appealed the county's decision to LUBA under ORS 197.830(9), not ORS 197.830(3). We conclude that Friends has standing, under ORS 197.830(2)(b), to appeal the county's decision to LUBA.

Intervenors' motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner contends that the county erred in determining that Friends was not "aggrieved" by the planning director's decision within the meaning of ORS 215.416(11)(a), and thus not entitled to a *de novo* hearing on the planning director's decision pursuant to that statute.[8] Intervenors disagree, arguing that the county properly exercised its "gatekeeping

[8]ORS 215.416(11)(a) provides:

> "(A) 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 any person who is adversely affected or aggrieved, or who is entitled to notice under [ORS 215.416(11)(c)], to file an appeal.
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> "(B) Written notice of the decision shall be mailed to those persons described in [ORS 215.416(11)(c)].

function" to determine in this case that petitioner lacks a sufficient interest in this land use proceeding to be recognized as a person aggrieved by the planning director's decision, for purposes of ORS 215.416(11)(a).

The parties agree that whether petitioner is aggrieved for purposes of ORS 215.416(11)(a) is a matter of state law, controlled by relevant appellate court decisions.[9] The county's decision relies on *Jefferson Landfill Comm. v. Marion Co.*, 297 Or 280, 686 P2d 310 (1984), to conclude that it has the authority to act as a "gate-keeper" for appeals to LUBA by recognizing or refusing to recognize a person's interest in the decision before it. In *Jefferson Landfill*, the Court reviewed LUBA's determination that an organization of citizens opposed to the county's decision lacked standing to appeal to LUBA under *former* ORS 197.830, which required, as relevant here, that persons appealing to

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> "(C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under [ORS 215.416(11)(c)] may appeal the decision by filing a written appeal in the manner and within the time period provided in the county's land use regulations. A county may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830.
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> "(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing."

[9]As discussed above, the county's code sets forth a process for persons to declare their interest in an appeal of an administrative decision, and for the reviewing body to make a determination whether that person is a "party" or not. However, the code definition of "party" does not refer to or have standards governing persons who are "aggrieved," although other code provisions make it clear that persons "aggrieved" by an administrative decision can appeal it to the planning commission. Accordingly, the planning commission decision first analyzes whether petitioner is a "party" as defined by the code, and answers that question in the negative. The planning commission decision then analyzes whether petitioner is "aggrieved" for purposes of ORS 215.416(11). Petitioner does not challenge the county's determination that it is not a "party" as defined by the county code, only its conclusions under the statute. Thus, the primary legal issue under this assignment of error is a narrow dispute regarding state law.

LUBA establish that (1) they appeared before the local government and (2) they were either adversely affected or aggrieved by the decision. The Court first distinguished between "adversely affected" and "aggrieved," and held that persons attempting to establish that they are aggrieved must show that:

> "1. The person's interest in the decision was recognized by the local land use decision-making body;
>
> "2. The person asserted a position on the merits; and
>
> "3. The local land use decision-making body reached a decision contrary to the position asserted by the person." 297 Or at 284 (footnote omitted).

The Court then discussed the role of the local government in recognizing a person's interest in the decision:

> "This construction of 'aggrieved' gives to the local land use decision-makers a gate-keeping responsibility for appeals to LUBA. Local decision-makers, by ordinance or otherwise, may determine who will be admitted or excluded as an interested person or limited to the status of a disinterested witness in a quasi-judicial proceeding. *Benton County* [*v. Friends of Benton County*, 294 Or 79, 89, 653 P2d 1249 (1982)]. These determinations may vary according to the nature of the land use decision in dispute, the issues involved and the particular proceeding. If the decision-makers have not made such a determination, by ordinance or otherwise, it will be assumed that when a person appears before the local body and asserts a position on the merits, the person has a recognized interest in the outcome." 297 Or at 284-85.

The Court then applied its construction of "aggrieved" and determined that, because the petitioner's members had appeared and expressed a position on the merits, the county's decision was contrary to that position and the county had not refused to recognize the petitioner's interest in the matter, the petitioner was aggrieved under the statute. 294 Or at 287.

The version of ORS 197.830 applicable in the present case does not require that a petitioner demonstrate aggrievement in order to appeal to LUBA, merely that the petitioner "appeared before the local government * * * orally or in writing." ORS 197.830(2)(b). However, a similar aggrievement requirement still exists when a petitioner appeals a local

government permit decision under ORS 215.416 or ORS 227.160. *See* ORS 215.422(1)(a) and 227.180(1)(a) (a party aggrieved by the action of a hearings officer may appeal to the planning commission or governing body); ORS 215.422(2) and 227.180(2) (a party aggrieved by the local government's final determination may appeal to LUBA). Further, the construction of "aggrieved" set forth in *Jefferson Landfill* and *Friends of Benton County* applies equally to the term "aggrieved" as used in ORS 215.416 *et seq*. and ORS 227.160 *et seq.* *Lamb v. Lane County*, 70 Or App 364, 367-68, 689 P2d 1049 (1984). Consequently, the county is correct that it retains some authority under statute to recognize, by ordinance or otherwise, a person's interest in the decision. The remaining questions are what is the permissible scope of that authority and whether the county's exercise of its authority in this case falls outside that scope.

The county cannot define the term "aggrieved" to mean something more restrictive than what is meant by ORS 215.416 and 215.422. *Overton v. Benton County*, 61 Or App 667, 672, 658 P2d 574 (1983). Nothing in the relevant statutes defines the term "aggrieved." However, both *Jefferson Landfill* and *Friends of Benton County* suggest that the county's discretion in determining what kind of interests can be "aggrieved" by a decision is very narrow. Both cases speak of the role of the local government in this context as distinguishing interested participants from those who are merely "disinterested witnesses," who appear before local government only as a source of information or expertise. In *Friends of Benton County*, the Court gave several examples of such "disinterested persons": planners, engineers, lawyers, economists or any other person who appears only as a witness or as an advocate for a client, as opposed to someone who appears in order to assert a position on the merits on his or her own behalf. 294 Or at 89.

The county's authority, if any, to expand the category of "disinterested persons" beyond those illustrated in these cases is unclear. *See Lamb*, 70 Or App at 369 (noting but not deciding that *Friends of Benton County* can be read to allow a local government to reach

a conclusion on aggrievement different from that which a court might reach, as long as the local government applies the correct test). Arguably, under *Jefferson Landfill* and *Friends of Benton County*, if a person appears before the local government and expresses a position on the merits on his or her own behalf, as opposed to a disinterested witness, expert or advocate for a client, the county has no further discretion to determine that that person's "interest" in the matter is insufficient. In the present case, there seems no dispute that petitioner appeared before the county and expressed a position on the merits on its own behalf, and not as a witness, expert or advocate for a client. In any case, even if the county has some discretion to expand the category of "disinterested persons" described in *Jefferson Landfill* and *Friends of Benton County*, we agree with petitioner in this case that the county applied an incorrect test in determining that petitioner was not aggrieved.[10]

The county's findings do little to explain why the county believes petitioner does not have a sufficient interest to be aggrieved within the meaning of ORS 215.416(11). The decision finds that petitioner is a nonprofit corporation whose membership includes local farmers and ranchers, and which has a philosophical interest in land use laws and their proper application. However, the county then emphasizes that petitioner has made no prior appearance in any land use proceeding in the county, and that neither petitioner nor any of its members own property that is affected by the planning director's decision. The county's decision discusses the holding of *Jefferson Landfill*, and then distinguishes the present case from *League of Women Voters v. Coos Co.*, 76 Or App 705, 712 P2d 111 (1985):

> "* * * *League of Women Voters* was based on the aggrievement tests of *Jefferson Landfill*, and concluded that the League of Women Voters organization had party status in the Coos County case. However, the facts in that case are distinguished from the facts in our case:

[10] *Cf. People for Ethical Treatment v. Inst. Animal Care*, 312 Or 95, 105, 817 P2d 1299 (1991) (the concept of standing as an "aggrieved" person in land use proceedings is broader than under similar provisions in the Oregon Administrative Procedures Act).

"1. The governing body of Coos County recognized that the organization had a long-standing interest in the correct application of land use laws.

"Here, [petitioner] has made no prior appearance in any land use matter.

"2. Coos County had no ordinance concerning party status.

"Here, Douglas County has an ordinance setting forth the specific requirements necessary to obtain standing.

"3. The appealed Coos County decision pertained to an unacknowledged comprehensive plan.

"Here, the Douglas County decision pertains to an acknowledged comprehensive plan.

"[Petitioner] is not entitled to party status under *League of Women Voters* because: (1) the appellant has no previous history of its interest; (2) the county has an ordinance with specific requirements that [petitioner] does not meet; and (3) this proceeding is under an acknowledged plan. [Petitioner] is not an aggrieved person." Record 9 (emphasis in original).

Petitioner argues, and we agree, that the county did not apply the correct test, and that the present case is not distinguishable in any material way from *League of Women Voters.* In *League of Women Voters*, the county found that the organization was not "aggrieved" because it alleged only a long-standing interest in proper application of land use laws, and thus failed to allege any special injury or interest that distinguished it from the public at large. The court rejected that reasoning:

"* * * The facts that [the petitioners] have no geographic proximity to the area affected by the decision and that they can suffer no economic or noneconomic harm are germane to whether they were adversely affected, not to whether they were aggrieved by the planning commission's decision. * * * Indeed, given that the planning commission's decision pertained to the allowance of a non-forest use in a forest district in a county with an unacknowledged comprehensive plan, the conceded fact that [the petitioners] showed that they had a long-standing interest in the correct application of the land use laws was sufficient to establish that they *were* aggrieved by the planning commission's rejection of the position they asserted." 76 Or App at 711 (citations omitted; emphasis in original).

Although the court relied upon the petitioners' "long-standing" interest in the correct

application of land use laws to establish aggrievement, the court does not state or suggest that the longevity of that interest is necessary for an organization to establish aggrievement. Neither the county's decision nor intervenors' response brief explains why an organization devoted to the correct application of land use laws is any less "interested" in a land use decision in which it appears, merely because its interest is not long-standing.[11] Indeed, there is a self-fulfilling aspect to the county's reliance on petitioner's prior lack of involvement. Under the county's reasoning, it is likely that no matter how long petitioner exists and attempts to participate in the county's quasi-judicial land use proceedings, it will never be able to establish standing.

The county's reliance on its ordinance also does not support its determination that petitioner is not aggrieved. As discussed above, the county's code sets forth a process for determining whether a person is a party, but nothing in the county's code, including the definition of "party" at LUDO 1.090, appears to provide any standards for determining when a person is "aggrieved" within the meaning of ORS 215.416(11). To the extent the county relies upon the definition of "party" at LUDO 1.090 to conclude that petitioner lacks a sufficient interest to qualify as an aggrieved person, that definition in relevant part appears limited to persons who are affected by the subject matter of the county's decision. As the court pointed out in *League of Women Voters*, whether petitioner is harmed by the decision is germane to whether it is adversely affected, but not to whether it is aggrieved.

Finally, neither the decision nor intervenors' response brief explains why the acknowledged status of the county's code is relevant to whether petitioner is "aggrieved" within the meaning of ORS 215.416(11). It is true that the county code in *League of Women Voters* was unacknowledged, but the significance of that fact in the court's analysis, if any, is

[11]Petitioner testified at the May 24, 2000 hearing before the board of commissioners that it was a "land use advocacy group which included farmers and other interested individuals and which has been in existence for a little over a year." Record 14.

not clear to us. It may be that the court felt that the participation of an organization interested in the correct application of land use laws has greater importance when the local government's land use legislation has not yet been acknowledged to comply with applicable land use planning goals. Nonetheless, we do not understand the court to suggest that the importance of participation by such organizations is eliminated once local legislation is acknowledged.

In sum, we conclude that *League of Women Voters* is not distinguishable from the present case for any of the reasons relied upon by the county, and the county applied the incorrect test in determining that petitioner is not aggrieved.

In addition to the foregoing, we question the *timing* of the county's determination that petitioner is not aggrieved. Even assuming that *League of Women Voters* is distinguishable, and the county has discretion to expand the category of disinterested witnesses to include participants such as petitioner, the ability of the county to deny petitioner's participation may be constrained after it has already allowed petitioner to appear and present a position on the merits before the county, and issued a decision contrary to that position. In *Lamb*, 70 Or App at 368-69, the court found it significant that, by the time the board of commissioners considered the petitioner's standing on appeal from the hearings officer's decision, the petitioner had already appeared before the hearings officer, and presented a position that was rejected by the hearings officer. In that circumstance, we understand the court to suggest, the board of commissioners could reconsider the petitioner's standing only if there were disputed facts regarding the petitioner's standing. Because the undisputed facts in that case were sufficient to establish that the petitioner was "aggrieved" as a matter of law, the court concluded, the board of commissioners could not decline to hear his appeal for lack of standing.

In the present case, petitioner opposed the application before the planning director, whose decision rejects petitioner's position. LUDO 2.130(2)(j) provides that notice of an

administrative decision must state that persons aggrieved by the planning director's decision can file a local appeal of that decision, which obviously indicates that persons appearing before the planning director can be aggrieved by the director's decision. The planning commission initially recognized petitioner as an interested person, but then concluded, for the reasons we rejected above, that petitioner is not aggrieved. However, *Lamb* suggests that, having allowed petitioner to become "aggrieved" by the planning director's decision, the county cannot belatedly send petitioner back through the gate, unless its earlier recognition was based on an erroneous understanding of the facts. Nothing in the present record indicates that there are any disputed facts regarding petitioner or that the planning director allowed petitioner's participation under an erroneous understanding of petitioner's status.

For the foregoing reasons, we conclude that the county erred in determining that petitioner is not aggrieved within the meaning of ORS 215.416(11). Accordingly, the county erred in failing to provide petitioner with a *de novo* hearing on the merits of the planning director's approval.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner contends that the county's decision approved a partition of EFU-zoned land that results in a parcel less than the applicable 80-acre minimum parcel size, in violation of ORS 215.780(1), as construed in *Dorvinen v. Crook County*, 153 Or App 391, 957 P2d 180, *rev den* 327 Or 620 (1998).[12]

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[12]ORS 215.780(1) provides in relevant part:

> "Except as provided in [ORS 215.780(2)], the following minimum lot or parcel sizes apply to all counties:
>
> "(a) For land zoned for exclusive farm use and not designated rangeland, at least 80 acres[.]"

Before turning to the parties' arguments under this assignment, we note that the usual consequence of our determination in sustaining the first assignment of error, that the county had failed to provide a *de novo* hearing to petitioner, would be to remand to the county to provide such a hearing. In that circumstance, LUBA generally would not address further assignments of error that challenge the merits of the county's decision. However, the issue raised under the second assignment of error involves a pure issue of state law, concerning which neither LUBA nor higher appellate bodies owe the county any deference. If petitioner is correct regarding the meaning of ORS 215.780(1), then the partition approved in the county's decision is prohibited as a matter of law. No purpose would be served in that circumstance in remanding the decision to the county for a *de novo* hearing. Accordingly, we reach and resolve the parties' arguments regarding ORS 215.780(1).

A. Waiver

Intervenors respond, first, that petitioner failed to raise the issue of compliance with ORS 215.780(1) before the close of the record, and has waived the ability to raise it before LUBA. ORS 197.763(1).[13] Intervenors argue that the issue of compliance with ORS 215.780(1) was not raised until March 24, 2000, in petitioner's initial notice of appeal of the planning commission decision to the board of commissioners. Intervenors submit that by that time the record before the planning commission was closed and, further, petitioner could not have raised that issue before the board of commissioners, whose review is confined to the record before the body below. LUDO 2.700(1).

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[13]ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

Petitioner responds that the county never conducted an evidentiary hearing on the merits of the planning director's decision, and therefore petitioner's failure to raise an issue prior to the "close of the record at or following the final evidentiary hearing on the proposal" is not a basis to find that issue waived. ORS 197.763(1). In the alternative, petitioner argues that it raised the issue of compliance with ORS 215.780(1) on March 24, 2000, prior to the planning commission's decision on April 6, 2000, and before the close of the record.

Where the local government did not hold a land use hearing, subject to the requirements of ORS 197.763, before making the challenged decision, a petitioner cannot waive the right to raise issues for the first time on appeal to LUBA, because no forum was provided in which to raise such issues at the local level. *Leathers v. Washington County*, 29 Or LUBA 343, 347 (1995). The county in the present case never conducted an evidentiary hearing subject to the requirements of ORS 197.763; consequently, the raise it or waive it rule in ORS 197.763(1) does not apply.

B. ORS 215.780(1)

Intervenors argue that the county's decision is consistent with ORS 215.780(1), for the reasons stated in the LUBA opinion affirmed by the Court of Appeals in *Dorvinen*. *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

In LUBA's *Dorvinen* decision, we addressed an argument that partition of a 40-acre EFU-zoned parcel into three parcels pursuant to ORS 215.284(3), on which three nonfarm dwellings would be sited, violated ORS 215.780(1) because it left no remaining farm parcel that satisfied the minimum lot or parcel size imposed by the statute. We determined that a text and context analysis of ORS 215.284(3) and ORS 215.780(1) did not yield an unambiguous answer to that question, and that resort to legislative history was warranted under the framework for statutory interpretation set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). Our examination of legislative history found evidence that the legislature contemplated that parcels on which nonfarm dwellings

would be sited need not comply with the 80-acre minimum lot or parcel size, although it was also contemplated that a remaining farm parcel must satisfy the 80-acre minimum. 33 Or LUBA at 724-25. However, the legislative history did not resolve the issue presented in *Dorvinen*: whether partition of an already sub-minimum parcel is allowed. We therefore proceeded to the third step of analysis described in *PGE*, and applied certain maxims of statutory construction to conclude that ORS 215.780(1) allows partition only if a parcel remains that meets the 80-acre minimum. Because the partition at issue in *Dorvinen* did not comply with ORS 215.780(1), we reversed the county's decision.

The Court of Appeals affirmed our holding in *Dorvinen* on narrower grounds, finding that the relevant statutes do not conflict and that no analysis beyond that of text and context was necessary. The court expressly reserved any opinion regarding our interpretation of the relevant statutes beyond that necessary to resolve the issue before it. 153 Or App at 397 n 4. After evaluation of the text and context of ORS 215.780(1), the court then concluded that the statutory minimum lot and parcel size applied across the board to parcels that result from land divisions for nonfarm dwellings under ORS 215.284(3). *Id.* at 399.

In *Alliance for Responsible Land Use v. Deschutes Co.*, 37 Or LUBA 215, 223 n 7 (1999), *aff'd* 166 Or App 166, 995 P2d 1227, *rev den* 330 Or 362 (2000), we questioned whether any part of LUBA's analysis of legislative history in *Dorvinen* remained valid after the Court of Appeals' decision in that case. Because the material facts in *Alliance* were indistinguishable from those in *Dorvinen*, we found no occasion to resolve that issue. The facts of the present case, however, require us to determine whether ORS 215.780(1), as construed in the Court of Appeals' *Dorvinen* decision, requires that all parcels resulting from a land division for nonfarm dwellings, including the parcel on which the dwelling will be sited, must meet the statutory minimum parcel size.

Although *Dorvinen* did not present the precise issue before us, it is difficult to read the Court of Appeals' opinion in that case as anything less than a determination that

ORS 215.780(1) applies by its terms to all parcels resulting from a partition for nonfarm dwellings. The court found nothing in ORS 215.780(1) or the text of the statutes providing context for that statute that was inconsistent with application of the statutory minimum parcel size to parcels resulting from a partition under ORS 215.284(3) and 215.263(4). Intervenors in the present case do not identify other relevant provisions that might compel a different or more circumscribed answer in the present case, or explain why the court's reasoning is not equally applicable to the facts before us. We conclude, therefore, that nothing in LUBA's *Dorvinen* opinion allows us to reject petitioner's argument under this assignment of error. For the reasons expressed in the Court of Appeals' *Dorvinen* decision, we agree with petitioner that the county erred in approving a partition that violates ORS 215.780(1).

The second assignment of error is sustained.

THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR

Our conclusion that the county's decision violates ORS 215.780(1) means that the decision "violates a provision of applicable law and is prohibited as a matter of law," and thus the county's decision must be reversed rather than remanded. OAR 661-010-0071(1)(c). Accordingly, no purpose is served in resolving petitioner's third, fourth and fifth assignments of error, which challenge the county's findings under criteria implementing ORS 215.284(3).

The county's decision is reversed.