BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ERIC NAVICKAS,
*Petitioner*,

vs.

JACKSON COUNTY,
*Respondent*,

and

MT. ASHLAND ASSOCIATION,
*Intervenor-Respondent.*

LUBA No. 2013-087

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Eric Navickas, Prospect, filed the petition for review and argued on his own behalf.

No appearance by Jackson County.

Daniel B. O'Connor, Medford, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Huycke, O'Connor, Jarvis, Dreyer, Davis & Glatte, LLP.

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

BASSHAM, Board Member, concurring.

AFFIRMED 01/21/2014

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

Opinion by Holstun.

## NATURE OF THE DECISION

Petitioner appeals a hearings officer's dismissal of his local appeal of a planning department site plan approval for a parking lot at Mount Ashland Ski Area.

## MOTION TO INTERVENE

Mt. Ashland Association, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

## FACTS

The proposed 1.1-acre parking lot would be located adjacent to and directly downhill from some existing ski runs. The proposed parking lot would be an expansion of an existing, inadequately sized parking lot. The expanded parking lot would require excavation of a currently undeveloped sloped area between the existing ski runs and Mount Ashland Road. Mount Ashland Road provides access to the ski area.

The Jackson County Planning Department issued a notice of tentative staff decision (staff decision) approving the site plan on June 27, 2013. Under Jackson County Land Development Ordinance (LDO) 2.7.5(D), that decision was subject to appeal by persons who were entitled to notice of the staff decision and persons who were "adversely affected or aggrieved by the decision[.]" Petitioner appealed the staff decision to the county hearings officer. The county hearings officer found that petitioner was not entitled to notice of the decision and was not adversely affected or aggrieved by the decision. Based on those findings, the hearings officer dismissed petitioner's local appeal. Petitioner seeks LUBA review in this appeal of the hearings officer's decision.

## INTRODUCTION

We note at the outset, that there is no dispute that petitioner has standing to appeal the hearings officer's decision to LUBA. Appeal of the hearings officer's decision to LUBA is governed by ORS 197.830(2). In relevant part, that statute provides that a person who "[f]iled a notice of intent to appeal" and "[a]ppeared before the local government * * *" may appeal a land use decision to LUBA. Petitioner filed a notice of intent to appeal and appeared before the hearings officer.

The issue before LUBA in this appeal is whether the hearings officer correctly concluded that petitioner lacked standing to appeal the staff decision. If he did, then the hearings officer's decision must be affirmed. If the hearing officer erred, and petitioner has standing to appeal the staff decision, then the hearings officer's decision must be remanded so that the hearings officer can proceed with petitioner's appeal of that decision on the merits.

## ASSIGNMENT OF ERROR

All parties take the position that LDO 2.7.5(D) governs the staff decision. In relevant part, LDO 2.7.5(D) provides:

> "**Appeal of a Decision**
>
> "1) Decisions made without first holding an initial evidentiary hearing may be appealed by any person or entity who:
>
> "a) Is entitled to notice under this Section; or
>
> "b) Is adversely affected or aggrieved by the decision, whether or not they received notice."

The LDO parallels and presumably was adopted to comply with ORS 215.416(11), which authorizes counties to issue statutory permits without first

providing a hearing if a right of local appeal of the permit is provided. ORS 215.416(11)(a)(A) provides:

> "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 paragraph (c) of this subsection, to file an appeal."

The subject property is in a forest zone. Paragraph (c) of ORS 215.416(11) requires notice to property owners within 750 feet of the property. LDO 2.7.5(B)(2)(c) requires the same notice. The county gave written notice of the staff decision to property owners within 750 feet of the subject property. Because petitioner's property is located over 42 miles from the subject property, he was not given written notice of the staff decision. However, petitioner apparently learned of the staff decision and filed a timely local appeal of that decision.

The applicant moved to dismiss, and the hearings officer found that petitioner did not have standing to appeal the staff decision as a person who was entitled to notice. Petitioner does not assign error to that finding or claim that he was entitled to notice of the staff decision. The sole issues in this appeal are whether petitioner has standing to appeal the staff decision as a person who is (1) "adversely affected" or (2) "aggrieved."

### A. Standing as a Person Aggrieved by the Planning Department's Tentative Decision

#### 1. Preliminary Issues

There are two preliminary problems with petitioner's argument that he qualifies for standing as an aggrieved person. First, as far as we can tell, petitioner never argued to the hearings officer that he was aggrieved by the

planning department decision. His only argument to the hearings officer was that he was adversely affected by that decision. Record 20-23. The second problem is that the hearings officer found that petitioner was not "aggrieved," because he does not qualify as an "aggrieved party," as LDO 13.3(7) defines that term.[1]

> "* * * The Appellant does not claim to own any property that is affected by the Staff Approval, asserting that the impacts he suffers are personal. The Appellant is not an aggrieved party under Section 2.7.5(D)(1)(b)." Record 4.

While it is certainly questionable that LDO 13.3(7) necessarily establishes the meaning of the word "aggrieved" as used in ORS 215.416(11)(a)(A), petitioner does not assign error to the hearings officer's finding.[2]

Because petitioner did not preserve the issue of whether he has standing for a local appeal as an aggrieved party and does not assign error to the hearings officer's reasoning that he is not an aggrieved party, we reject his arguments that he qualifies as an aggrieved party.

**2. Standing as an Aggrieved Party**

While we reject petitioner's argument that he qualifies as an aggrieved party without reaching the merits of that argument, some discussion of the

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[1] LDO 13.3(7) sets out the following definition:

> "AGGRIEVED PARTY: Any person(s) or entity(ies) who can demonstrate that their property will be injured by a land use decision of the County; or anyone requiring notice pursuant to this Ordinance."

[2] As our discussion below makes clear, as defined by LDO 13.3(7), the LDO definition of "aggrieved party" means roughly the same thing as "adversely affected."

merits is warranted to make it clear that the merits of that question are far more complicated than the parties recognize.

When LUBA was first created, Oregon Laws 1979, chapter 772, section 4(3) provided in part that for a person to have standing to appeal a quasi-judicial land use decision to LUBA, that person must be "a person entitled as of right to notice and hearing prior to the decision to be reviewed or * * * a person whose interests were adversely affected or who was aggrieved by the decision." Between 1981 and 1984 there were three appeals of LUBA decisions that addressed a number of questions regarding standing to appeal land use decisions to the newly formed Land Use Board of Appeals, and all of those appeals resulted in decisions by the Court of Appeals and Supreme Court. *Friends of Benton County v. Benton County*, 3 Or LUBA 165 (1981), *aff'd Benton County v. Friends of Benton County*, 56 Or App 567, 642 P2d 358, *aff'd* 294 Or 79, 653 P2d 1249 (1982); *Jefferson Landfill v. Marion County*, 6 Or LUBA 1 (1982), *aff'd Jefferson Landfill Comm. v. Marion County*, 65 Or App 319, 671 P2d 763 (1983), *rev'd and remanded* 297 Or 280, 686 P2d 310 (1984); *Warren v. Lane County*, 6 Or LUBA 47 (1982), *aff'd* 62 Or App 682, 662 P2d 755, *on reconsideration* 66 Or App 7, 672 P2d 1213 (1983), *rev'd and remanded* 297 Or 290, 686 P2d 316 (1984). In *Benton County v. Friends of Benton County*, the Supreme Court adopted an extensive analysis of the term "aggrieved" in Oregon Laws 1979, chapter 772, section 4(3), and concluded that it means something very different from the term "adversely affected."

> "A person whose interest in the decision has been recognized by the body making a quasi-judicial decision and who has appeared and asserted a position on the merits as an interested person, rather than only as a source of information or expertise, can be 'aggrieved' by an adverse decision within the meaning of section 4(3). As in [*Marbet v. Portland Gen. Elec. Co.*, 277 Or 447, 454,

> 561 P2d 154 (1977)], to be 'aggrieved' a person must be more than abstractly dissatisfied with the outcome after the fact. The decision must be contrary to the request or other position that the person espoused during the proceeding." 294 Or at 89.

In *Jefferson Landfill Comm. v. Marion County*, the Supreme Court readopted and elaborated on the meaning of the term "aggrieved." Under the Supreme Court's analysis in *Jefferson Landfill Comm.*, a person qualifies as an aggrieved party under Oregon Laws 1979, chapter 772, section 4(3) if the following test is satisfied:

> "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.

Petitioner simply assumes that the Supreme Court's explanation of the meaning of the word "aggrieved" in 1979, Oregon Laws 1979, chapter 772, section 4(3) in *Jefferson Landfill Comm. v. Marion County* also applies in ORS 215.416(11)(a)(A) and LDO 2.7.5(D)(1)(b). Although we do not decide the issue here, there is at least some support for that assumption. While the statutes are different statutes, they are both land use statutes and the key statutory language is the same. The substance of the language that is now codified at ORS 215.416(11)(a)(A) was enacted in 1983, including the terms "adversely affected or aggrieved." Since the language now codified at ORS 215.416(11)(a)(A) was enacted in 1983, after the Supreme Court's decision in *Benton County v. Friends of Benton County* that clearly drew a distinction between "adversely affected" and "aggrieved," the legislature presumably was aware of that distinction when it adopted the words "adversely affected or

aggrieved" in ORS 215.416(11)(a)(A), and may have intended that meaning in adopting those words in ORS 215.416(11)(a)(A). *See Benton County v. Friends of Benton County*, 294 Or 86-87 (where the court assumes the words "adversely affected or aggrieved" were drawn from similar wording in the Oregon Administrative Procedures Act (APA) that was interpreted in *Marbet*, and that the legislature must have been aware of that interpretation).

But petitioner's assumption that the meaning given to the word "aggrieved" in Oregon Laws 1979, chapter 772, section 4(3) in *Jefferson Landfill Comm. v. Marion County* also applies in ORS 215.416(11)(a)(A) and LDO 2.7.5(D)(1)(b) has problems. The biggest problem is that under a literal application of *Jefferson Landfill Comm.*, petitioner would have to have "asserted a position on the merits" of the staff decision to be "aggrieved" by the staff decision *before* he could appeal that decision to the hearings officer, since that is a requirement for standing to file the appeal in the first place. Petitioner did not assert a position on the merits of the staff decision until *after* he appealed that decision to the hearings officer.

Of course it is not surprising that neither the petitioner nor any other person other than the applicant asserted a position on the merits of the application that led to the staff decision, since the staff decision was rendered as a permit decision without a prior hearing, and in the usual case there would be no opportunity to assert a position on the merits of the application until after the appeal is filed. *Benton County v. Friends of Benton County*, *Jefferson Landfill Comm. v. Marion County*, *and Warren v. Lane County* all concerned quasi-judicial land use decisions where there were prior hearings and an opportunity to assert a position on the merits before the decision became final and subject to appeal. Similarly, in *Marbet*, an APA contested case proceeding

provided a prior hearing and an opportunity for persons to assert a position on the merits.

In summary, if the word "aggrieved" in ORS 215.416(11)(a)(A) and LDO 2.7.5(D)(1)(b) has the same meaning that it was given in *Benton County v. Friends of Benton County*, *Jefferson Landfill Comm. v. Marion County*, petitioner is not aggrieved because he did not assert a position on the merits before that decision was subject to the local appeal. A possible issue is whether the legislature intended to give some different meaning to the word "aggrieved" in ORS 215.416(11)(a)(A) and LDO 2.7.5(D)(1)(b), to reflect the fact that it would be unlikely under the statutory procedure for issuing a decision on a permit without a prior hearing that there would be an opportunity for any person other than the applicant to assert a position on the merits before filing a local appeal. Petitioner does not recognize the issue or provide any argument about how the issue should be resolved. Neither does intervenor-respondent. Absent any assistance from the parties, we decline to attempt to resolve this issue on our own.

Because petitioner (1) did not preserve his argument that he is aggrieved by the staff decision, and (2) does not assign error to the hearings officer's finding that he is not aggrieved by that decision, we reject petitioner's contention on appeal that the hearings officer erred in dismissing his appeal on the basis that he is not aggrieved. Even if we were to reach the merits of petitioner's argument in the petition for review that he qualifies as an aggrieved party, for the reason explained above, petitioner's arguments are insufficiently developed to provide a basis for reversal or remand.

This subassignment of error is denied.

### B. Standing as a Person Who is Adversely Affected by the Planning Department's Tentative Decision

The Supreme Court in *Jefferson Landfill* stated the following understanding of the term "adversely affected," in Oregon Laws 1979, chapter 772, section 4(3):

> "In the context of section 4(3), 'adversely affected' means that a local land use decision impinges upon the petitioner's use and enjoyment of his or her property or otherwise detracts from interests personal to the petitioner. Examples of adverse effects would be noise, odors, increased traffic or potential flooding." 297 Or at 283.

The parties seem to assume the words "adversely affected" have the same meaning in ORS 215.416(11)(a)(A) and LDO 2.7.5(D)(1)(b), and for purposes of this appeal we will assume they do. The hearings officer's analysis and conclusion that petitioner failed to establish that he is adversely affected by the staff decision includes the following:

> "The Appellant stated that his interest in the Parking Lot area stems from the fact that he uses it in its current undeveloped condition to snowshoe toward a geographic feature to the east that he identified as 'the knoll'. He did not identify the location of the knoll. The Appellant stated that he sometimes leads others on such hikes, but he did not assert that he has any commercial business in that regard. The Appellant did not claim to be a member of any organization with an interest in this area or these activities, nor did he claim to represent any others.
>
> "The Appellant did not indicate how often he snowshoes across this area either individually or while with others. He stated that the benching out of this area to create the Parking Lot would force him to use an alternative route to get to the knoll, but he did not say that he could not do so, only that it would be more difficult. His most specific concern in this regard is the following:

> "'I would be prevented from walking through a pristine area to the knoll. I would then have to go through developed areas to get to the knoll whereas now this is a pristine ridgeline that we can get to the knoll from. We'll have to push into the edge of the developed recreational area…During operational hours I'm not even sure that it's legal for me to be within those, on snowshoes.' Oral testimony.

"At another point he stated that he was 'quite confident' he would not be allowed to do so.

"The Appellant's statements with regard to his ability to reach that geographic feature by an alternate route are based entirely on supposition, and they do not establish that he would not be allowed to traverse the Ski Area to reach the knoll.

"The Applicant stated that there currently is not a designated or established trail in the Parking Lot area from which the Appellant would be excluded by the development. The Applicant also argued that even if it is his preferred access to the knoll, the disruption he will suffer does not support standing under the LDO.
* * *

"* * * * *

"The impact claimed by the Appellant is that he would be deprived of his preferred approach to the knoll on snowshoes. It is an indirect outcome that is more in the nature of a disruption of his pattern or an inconvenience. Perhaps it is a considerable inconvenience or disruption, but it is not, by way of example, a noxious odor that threatens his health, noise that prevents his quiet enjoyment of his property, traffic that interferes with the conduct of his business or a disturbance of the surface of the land that threatens flooding." Record 4-6.[3]

[3] Petitioner's declaration also included the following:

Although it is a reasonably close question, we generally agree with the hearings officer. As noted, petitioner does not own property in the area and lives over 40 miles away. Petitioner's speculation that construction of the parking lot will adversely affect water quality and adversely affect his use of the nearby Pacific Crest Trail is pure speculation and insufficient to demonstrate he will be "adversely affected" by the parking lot, within the meaning of ORS 215.416(11)(a)(A).

Petitioner's allegations concerning his use of the currently undeveloped area to access the nearby knoll presents a much closer question. We are influenced, as was the hearings officer, by petitioner's failure to specify how often he visits and petitioner's failure to establish that there are not alternative routes to reach the knoll. Had he done so, we almost certainly would conclude that construction of the parking lot implicates the "interests personal to the petitioner" prong of the *Jefferson Landfill* "adversely affected" test. But if there are other ways to reach the knoll, and based on this record we must assume there are, then the only significant impact of the parking lot is to deprive petitioner of his preferred route to reach the knoll.

It is worth noting that whatever petitioner means in describing the area to be occupied by the parking lot as "pristine," that area is a 1.1 acre area located between a developed ski area and a county road. Depriving petitioner of a route that he uses with unspecified frequency to reach the knoll is similar to the impact that LUBA and the Court of Appeals found to be insufficient to

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> "* * * I enjoy fresh water within the streams below the proposed development within both drainages, Cottonwood Creek and Ashland Creek that may be impacted by the proposed parking lot expansion. * * *" Record 23.

constitute an adverse effect in *Warren v. Lane County*. One of the standing issues in *Warren* was whether road improvement construction activity and tree felling, which would temporarily delay travel by a household located at the end of a five and one-half mile long road, "adversely affected" a member of that household within the meaning of Oregon Laws 1979, chapter 772, section 4(3). The petitioner in *Warren* argued that delays might make him late to work, with a resultant loss of income, prevent the family from obtaining timely medical care, and cause irritation and aggravation. LUBA rejected the late to work, loss of income and delay in medical care arguments as too speculative. And LUBA concluded that any irritation or aggravation petitioner might suffer as a result of the delays constituted an injury that was not sufficient to satisfy the "adversely affected" prong of Oregon Laws 1979, chapter 772, section 4(3). *Warren*, 6 Or LUBA at 54-55. The Court of Appeal agreed with LUBA's analysis. *Warren*, 62 Or App 690. Although the Supreme Court reversed those decisions because they incorrectly applied the "aggrieved" prong of Oregon Laws 1979, chapter 772, section 4(3), LUBA's analysis was not reversed with regard to the "adversely affected" prong.

For the reasons set out above, we conclude, based on the record in this appeal, that the hearings officer correctly concluded that petitioner is not "adversely affected" by the loss of his preferred route to the knoll, within the meaning of ORS 215.416(11)(a)(A) and LDO 2.7.5(D)(1)(b).

This subassignment of error is denied.

**C. Goal 1 (Citizen Involvement)**

Finally, petitioner suggests the county's denial of his local appeal violates Statewide Planning Goal 1. Since the county's comprehensive plan and land use regulations have been acknowledged, and the county's decision is

a decision on a permit appeal that is subject to those acknowledged land use regulations, Goal 1 does not apply directly. *Byrd v. Stringer*, 295 Or 311, 316-17, 666 P2d 1332 (1983). Even if Goal 1 did apply directly, petitioner's entire Goal 1 argument is as follows:

> "Goal 1 of Oregon's Statewide Planning Goals * * * addresses citizen involvement and states the goal's interest in developing 'a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process." Petition for Review 6.

The above argument makes no attempt to explain why the hearings officer's conclusion that petitioner lacks standing under ORS 215.416(11)(a)(A) and LDO 2.7.5(D)(1)(b) is inconsistent with the Goal 1 mandate to adopt a citizen involvement program, and we do not see that it is.

This subassignment of error is denied.

The county's decision is affirmed.

Bassham, Board Member, concurring:

I concur with the entirety of the majority opinion, and write only to add that the potential problems the majority identifies with applying the understanding of "aggrieved" that was articulated in *Friends of Benton County* and *Jefferson Landfill* are not limited to local appeals of permit decisions under ORS 215.416(11) and its cognate applicable to cities, at ORS 227.175(10).

In 1999, the legislature added ORS 197.830(4) to LUBA's organic statute. In the circumstances where ORS 197.830(4) applies, it provides a person who is "adversely affected or aggrieved" by a permit decision made without a hearing under ORS 215.416(11) and ORS 227.175(10) a right to appeal the permit decision directly to LUBA within 21 days of the date the local appeal period expires. Where ORS 197.830(4) applies, there will have

been no local appeal of a permit decision made without a hearing and, in many if not all cases, no hearing or proceeding at which the petitioner could appear, have their interest recognized, and present a position.

As the cross-reference indicates, the phrase "adversely affected or aggrieved" as used in ORS 197.830(4) appears to have the same meaning as that phrase as used in ORS 215.416(11) and ORS 227.175(10). If "aggrieved" as used in these three statutes has the same meaning ascribed to that word in *Friends of Benton County* and *Jefferson Landfill*, which addressed a similar but now superseded statute, then the category of persons who has standing as aggrieved persons to file a local appeal or a direct appeal to LUBA is a very small, and perhaps empty, category. That may well have been the legislature's intent, but it is also possible that—at least in adopting ORS 197.830(4)—the legislature intended "aggrieved" to have a different meaning than that ascribed to it in *Friends of Benton County* and *Jefferson Landfill*.

The legislature has used the phrase "adversely affected or aggrieved" in at least 12 statutes, in a variety of contexts. *See Wilcox v. Board of Parole and Post-Prison Supervision*, 197 Or App 623, 642, n 2, 107 P3d 637, 648 (2005) (Armstrong, dissenting), *rev allowed* 341 Or 366, 143 P3d 239 (2006); *dismissed as moot* 343 Or 160, 164 P3d 1161 (2007). The term "aggrieved" originates in the Administrative Procedures Act, where it has the meaning of a person who (1) suffered an injury to a substantial interest resulting directly from the challenged governmental action, or (2) seeks to further an interest that the legislature expressly wished to have considered, or (3) has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding. *See People for Ethical Treatment v. Inst'l Animal Care*, 312 Or 95, 101-102, 817 P2d 1299 (1991).

In *People for Ethical Treatment*, the petitioner attempted to invoke the broader "participation" test articulated in *Friends of Benton County* and *Jefferson Landfill* for "aggrieved" as that term was used in the former LUBA standing statute. The Court rejected that argument, commenting that land use is *sui generis*, and that trying to generalize rules of standing from the land use arena to other statutory contexts is inappropriate. Presumably, the converse is true, and courts and LUBA should not try to generalize from non-land use contexts the meaning of "aggrieved" as used in land use statutes.

However, the legislature is not so constrained. It is apparent that the phrase "adversely affected or aggrieved" is a stock phrase that the legislature has chosen to insert as a standing requirement in a number of different non-APA contexts. In many if not most of those contexts, the phrase presumably has the general meaning described in *People for Ethical Treatment.* It is possible that the 1999 legislature, in choosing to use the term "aggrieved" in ORS 197.830(4)(b), had in mind the more common meaning described in *People for Ethical Treatment*, and did not have in mind the *sui generis* "participation" test described in *Friends of Benton County* and *Jefferson Landfill*. That "participation" test was specifically articulated in the context of land use statutes that, at the time, required that all permit decisions be made pursuant to a proceeding at which persons could participate. Under the current permit scheme in effect since 1983, that is not necessarily the case. It would be rather odd if, in adopting ORS 197.830(4)(b), the 1999 legislature intended to require that persons seeking LUBA review of a decision made without a hearing as aggrieved persons must demonstrate that they participated in a non-existent hearing.

The foregoing plays no role in resolving the arguments offered in the present case, but in an appropriate case under ORS 197.830(4)(b) resort to legislative history of the 1999 amendment may be necessary to determine the legislature's understanding of the term "aggrieved" as used in that statute.