EFFECTIVE LAND USE TESTIMONY

III. STANDING IS VITAL

1. A Party, Or A Witness?

Brochure 1 in Party Series. *A Party, Or A Witness?* July 26, 2004

"Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter— i.e., having had no pre-hearing or ex parte contacts concerning the question at issue — and to a record made and adequate findings executed." Fasano v. Washington Co. Comm., 264 Or 574, 586, 507 P2d 23 (1973)

A Party Or A Witness?

Parties Josephine County has established a procedure that each participant in a land use proceeding is to establish their status as either a party or a witness. Person(s) speaking at the hearing shall identify themselves as:

1. a witness, or
2. a party, or
3. a county or other public official.

Persons appearing at a hearing either orally or in writing (including those representing an organization) shall state at the beginning of their testimony the facts which support their status as a party or a witness.

County procedure is that persons who were not entitled to notice [for decisions without a hearing ORS 215.416(11)(a) requires notice to be sent to adjacent property owners, and adversely affected and aggrieved persons], but who claim party status because they will be adversely affected or aggrieved by the decision, shall identify and document the facts showing how they will be adversely affected or aggrieved. Persons who fail to do so shall be witnesses.

At the close of their statement of facts on how they will be adversely affected or aggrieved, the presiding officer will promptly rule on whether that person will be treated as a party or not. After party and/or witness status has been determined, anyone challenging the ruling shall be heard immediately and the presiding officer (or the hearing body) may change its decision on party status.

Parties Can Give Testimony, Surrebuttal and Summation

Adversely Affected Party	ORS 197.830(3), (4) & (5) & ORS 215.416(11)(a)
Aggrieved Party	ORS 215.416(11)(a) & ORS 215.422(1)(a) and (2)

Party Party status with local hearing bodies determines how interested persons give testimony and appeal locally. **This is different than party status in a appeal to LUBA**.

If you think you are a party because you are adversely affected or aggrieved it is important to establish this fact early in your testimony (e.g., in writing and/or orally) because these "parties" give testimony at hearings as "opponents" and opponent parties have the opportunity to give testimony with surrebuttal and summation rights.

Locally being a recognized party is critical as witnesses can not present surebuttal and summation, and they do not get as much time to give testimony. For example, presenting surebuttal and summation can be critical in effectively sharing a message, especially if the original testimony is separated from the final hearing body by several months and one or more hearings.

2. Aggrieved Party

Brochure 2 in Party Series. *Aggrieved Party.* July 26, 2004

Aggrieved for Purposes of ORS 215.416(11)(a)(A) and ORS 215.422(1)(a) and (2) Is a Matter of State Law, Controlled by Relevant Appellate Court Decisions.

Aggrieved Party/Aggrieved ORS 215.416(11)(a) & ORS 215.422(1)(a) and (2)

ORS 215.416(11)(a)(A) The county is required to give mailed notice of a land use decision without a hearing to all three categories of persons described in statute.

1. Adversely Affected Persons,
2. Aggrieved Persons, and
3. Adjacent Property Owners (within certain distances of proposed land use request).

ORS 215.422 Standing for aggrieved persons in instances where one has not "appeared" because no local hearing was held or a person did not receive notice are convoluted. However, the context of ORS 215.416(11)(a) leads to the same conclusion with respect to adversely affected and aggrieved persons. Under ORS 215.422(1)(a) and (2), respectively, an aggrieved party may appeal "the action of a hearings officer" to the county planning commission or governing body, and may appeal the county's final decision to LUBA.

Aggrieved Testimony

Friends of Douglas County v. Douglas County, 39 Or LUBA 156 (2000). 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 *Benton County v. Friends of Benton County*, 294 Or 79, 90-91, 653 P2d 1249 (1982) 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.

Whether petitioner is aggrieved for purposes of ORS 215.416(11)(a) is a matter of state law, controlled by relevant appellate court decisions. The Court held that persons attempting to establish that they are aggrieved must show the following.

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.

Aggrieved Persons Individuals or representatives of land use or environmental organizations who track land use applications to assure laws are correctly applied are personally interested. Or, a participant can become personally interested by sharing their personal philosophy about land use in general, such as protecting lands or groundwater supplies or keeping development within the limits of facilities and services. And, you must state a position on the merits of the application so that one will know if a decision favors or disfavors your position.

LUBA found in *Friends of Douglas County* that the petitioner was aggrieved because "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."

3. Adversely Affected Party

Brochure 3 in Party Series. *Adversely Affected Party*. July 26, 2004

"*Persons who are adversely affected is intended to refer, at a minimum, to persons who are within sight and sound of a development proposal." Kamppi v. City of Salem*, 21 Or LUBA 498, 501 (1991)

Adversely Affected ORS 197.830(3), (4) & (5) & ORS 215.416(11)(a)

Wilber Residents v. Douglas County, 34 Or LUBA 634 (1998) Whether a person is "adversely affected" within the meaning of ORS 215.416(11)(a) is a fact-specific inquiry that depends upon the nature of 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.

Petitioners demonstrate they are adversely affected by a sewage treatment facility, where there is no attempt to rebut petitioner's allegations that they are adversely affected because they are within "sight and smell" of the facility and petitioners also allege "direct, specific, tangible and negative impacts" from the proposed facility.

Walz v. Polk County, 31 Or LUBA 363, 369 (1996) It is well-established that someone whose property is within sight and sound of a property is presumptively considered "adversely affected or aggrieved" by land use decisions affecting it.

Sight, Sound, & Smell

Physical Proximity Closeness or nearness (e.g., within sight, sound, or smell) and harm are criteria to consider when making a "standing" determination because of adversely affected, but physical proximity is not the sole standard. However, it has become a sort of proxy for adversely affected versus the real issue which is harm.

Friends of Douglas County v. Douglas County, 39 Or LUBA 156 (2000). 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.

Jefferson Landfill Comm. v. Marion Co., 297 Or 280, 283, 686 P2d 310 (1984). In the context of section 4(3), "adversely affected" means that 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.

Jefferson Landfill Comm. v. Marion Co. 65 Or App 323, 325 (1983). The court pointed out that the statute does not limit either adverse affect or aggrievement to property interests which must be in physical "proximity" to the disputed land.

More Information

Benton County v. Friends of Benton County, 294 Or 79, 653 P2d 1249 (1982). The court held that the interpretation of the statutory words, "adversely affected" or "aggrieved" in section 4(3) is a question of law to be decided by the court, citing *McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979). It went on to discuss the two terms, stating that "aggrieved" means something more than being "adversely affected" by it. The court pointed out that the statute does not limit either adverse affect or aggrievement to property interests which must be in physical "proximity" to the disputed land use.

Marbet v. Portland Gen. Elect., 277 Or 447, 454, 561 P2d 154 (1977). Nor does the statute support PGE's contention that the "public interest" is restricted geographically. Communities in immediate proximity to a proposed site have economic and other reasons to desire or to oppose a project that differ from the interests of a wider public, as the hearing in this case shows.

4. "Actual" Notice of Decision

Brochure 4 in Party Series. *"Actual" Notice of Decision.* July 26, 2004

*"If the local government fails to provide the notice of decision required by ORS 215.416(11) * * *, it cannot rely on that failure to prevent it from providing the opportunity for a de novo local appeal required by statute. Therefore, in such a situation, the time for filing a local appeal does not begin to run until a local appellant is provided the notice of decision to which he or she is entitled."*
Tarjoto v. Lane County, 137 Or App at 305 (1995)

Notice. ORS 215.416(11)(a)(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 paragraph (c) of this subsection, to file an appeal.*"

The county is required to give mailed notice of a land use decision without a hearing to all three categories of persons described in statute.

1. Adversely Affected,
2. Aggrieved, and
3. Adjacent property owners within certain distances of proposed land use request.

ORS 215.422(1)(a) "*A party aggrieved by the action of a hearings officer or other decision-making authority may appeal the action to the planning commission or county governing body, or both, however the governing body prescribes. The appellate authority on its own motion may review the action. The procedure and type of hearing for such an appeal or review shall be prescribed by the governing body, but shall not require the notice of appeal to be filed within less than seven days after the date the governing body mails or delivers the decision to the parties."*

"(2) A party aggrieved by the final determination may have the determination reviewed in the manner provided in ORS 197.830 to 197.845."

"Actual" Notice The Oregon Court of Appeals has ruled adversely affected or aggrieved persons not receiving notice of final land use decisions without a hearing have a right to appeal to LUBA per ORS 215.416(11)(a) within 21 days of actual notice of the decision without satisfying the requirements of ORS 197.830(2).

Wilber Residents v. Douglas County, 151 Or App 523, 950 P2d 368 (1997). ". . . ORS 197.830(3) provides that a person *adversely affected* by a local land use decision may appeal it to LUBA if the decision was made without a hearing or without a prehearing notice that adequately communicates the nature of the proposal on which the final decision was made. As we suggested in *Tarjoto*, 137 Or App at 308-09, 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. That context supports the interpretation that giving notice to adversely affected person 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 decision that are made without a hearing, is a requirement and not an option. The context of ORS 215.416(11)(a) also leads to the same conclusion with respect to aggrieved persons. Under ORS 215.422(1)(a) and (2), respectively, an aggrieved party may appeal "the action of a hearings officer" to the county planning commission or governing body, and may appeal the county's final decision to LUBA.

More Information The clear purpose of the notice and appeal provision in ORS 215.416(11)(a) is to safeguard opportunities to pursue and participate in hearing and appeal procedures in cases where a county elects to make an initial decision without a hearing. County government is required to give notice of final decisions and provide an opportunity for appeal to any person who entitled to notice, **or** adversely affected **or** aggrieved, ORS 215.416(11)(a), as the record discloses even if outside the formal geographic notice area for those entitled to notice, ORS 215.416(11)(c).

5. Geographic Proximity

Brochure 5 in Party Series. *Geographic Proximity.* July 26, 2004

The court pointed out that the statute does not limit either adverse affect or aggrievement to property interests which must be in physical "proximity" to the disputed land.
Jefferson Landfill Comm. v. Marion Co. 65 Or App 323, 325 (1983)

Adversely Affected Persons	ORS 197.830(3), (4) & (5) & ORS 215.416(11)(a)
Aggrieved Persons	ORS 215.416(11)(a) & ORS 215.422(1)(a) and (2)

Wilber Residents v. Douglas County, 34 Or LUBA 634 (1998) Whether a person is "adversely affected" within the meaning of ORS 215.416(11)(a) is a fact-specific inquiry that depends upon the nature of 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.

Merely because a person owns property from which he can see or hear a proposed development does not necessarily render that person adversely affected by the decision.

Warren v. Lane County, 297 Or 290, 300, 686 P2d 316 (1984). Petitioner's reliance on their residency in a small planning area to establish aggrievement by a comprehensive plan amendment is misplaced. We clarified the distinction between aggrievement and adverse effect in *Jefferson Landfill Comm. v. Marrion* Co., 297 Or 280, 686 P2d 310 (1984).

Geographic Proximity Closeness or nearness (i.e., within sight and sound) and harm are criteria to consider when making a "standing" determination because of adversely affected, but physical proximity is not the sole standard. It has become a sort of proxy for the **real issue which is harm.** However, geographic proximity of property interests to the disputed land use is not a consideration when determining whether a person is aggrieved.

Friends of Douglas County v. Douglas County, 39 Or LUBA 156 (2000). The facts that the petitioners have no geographic proximity to the area affected by the decision and that they can suffer no economic or non-

economic harm are germane to whether they were adversely affected, not to whether they were aggrieved by the planning commission's decision.

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More Information *Marbet v. Portland Gen. Elect.,* 277 Or 447, 454, 561 P2d 154 (1977). The statute does not support the contention that the "public interest" is restricted geographically. Communities in immediate proximity to a proposed site have economic and other reasons to desire, or to oppose a project that differ from the interests of a wider public.

Marbet v. Portland Gen. Elect. is illustrative that public interests may be localized, but that more distant geographic interests may be applicable in demonstrating standing. Much depends on the statute and the nature of the issues. For example, in this case the court found merit in considering several levels of geographic interests: local construction and operating standards; some regional consequences such as ability of affected areas to absorb industrial and population growth; interests beyond the boundaries of the state; environmental effects on air, water, and biological organisms that may enter the food chain; and possible dangers that transporting toxic materials may pose for public health or safety.