

File

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

3	UNION STATION BUSINESS)	
4	COMMUNITY ASSOCIATION)	LUBA NO. 86-011
)	
5	Petitioner,)	ORDER DENYING
)	MOTION TO TAKE DEPOSITIONS
6	vs.)	AND MOTION FOR SPECIAL
)	EVIDENTIARY HEARING
7	CITY OF PORTLAND,)	
)	
8	Respondent)	

9 This appeal concerns an ordinance amending Portland's
10 Downtown Waterfront Urban Renewal Plan. The challenged
11 amendment was proposed by the city's urban renewal agency, the
12 Portland Development Commission and approved by the city
13 council.

14 The amendment authorizes acquisition of two dilapidated
15 hotels (the Beaver and the Estate) in the North of Burnside
16 area. The hotels are to be acquired and managed as low-income
17 residences by a non-profit agency, Central City Concern. A
18 portion of the Beaver Hotel will also be occupied by a social
19 service program.

20 The record is settled. Petitioner has filed two motions.
21 The first seeks an order allowing petitioner to take the
22 depositions of Respondent's Mayor and Mr. Donald Clark, the
23 Executive Director of Central City Concern. See OAR
24 661-10-045(6). Petitioner claims the depositions will reveal
25 the extent, substance, and nature of the Mayor's ex parte

1 contacts concerning the amendment. The second motion is for a
2 special evidentiary hearing. ORS 197.830(11); OAR
3 661-10-045(1). Petitioner states that a hearing is necessary
4 to enable it to prove that

5 "Mayor J.E. 'Bud' Clark failed to comply with the
6 provisions of ORS 227.180(3) in that he had several ex
7 parte contacts, the substance and nature of which were
not disclosed during the course of the public
hearing." Motion for Evidentiary Hearing at 1.

8 The motions are supported by the affidavit of petitioner's
9 counsel. The affidavit states that (1) at the council's
10 hearing of January 23, 1986, Mayor Clark distributed a list of
11 ex parte contacts concerning the amendment, (2) the list does
12 not set forth the substance and content of the ex parte
13 contacts and (3) the list may not be complete because it does
14 not refer to ex parte communications between the Mayor and
15 Donald Clark. To buttress the charge of undisclosed contacts
16 between the Mayor and Donald Clark, the affiant quotes the
17 following from a newspaper article about the amendment:

18 "For the moment, Don Clark seems to be satisfied with
19 this state of affairs. He has, by his count, four of
the City Councils' five votes in his pocket. (Mildred
20 Schwab, who owns property in the neighborhood, may
abstain from voting). Bud Clark seems to be
21 satisfied because he traveled to Seattle to see their
homeless, and believes he is taking a thoughtful
22 approach to this admittedly messy business."
Affidavit of Joseph S. Voboril at 2.

23 We deny the motions.

24 As a general rule, our review of land use decisions¹ is
25 confined to the record established at the local level. ORS
26 197.830(11). However, we may conduct a hearing for the

1 presentation of evidence where there are

2 "disputed allegations of unconstitutionality of the
3 decision, standing, ex parte contacts or other
4 procedural irregularities not shown in the record,
which, if proved, would warrant reversal or remand."
Id (emphasis added).

5 As the emphasized portion of the statute shows, an allegation
6 of ex parte contacts is not by itself sufficient to warrant a
7 special evidentiary hearing. The alleged irregularity must
8 also be (1) not shown in the record and (2) one which, if
9 proved, would warrant remand or reversal of the challenged
10 decision.

11 Petitioner's first allegation is that Respondent's Mayor
12 publically disclosed a list of persons with whom he had
13 prehearing contacts about the amendment but did not disclose
14 the substance and content of the contacts. However, an
15 evidentiary hearing is neither necessary nor appropriate for
16 proof of this allegation because proof is already in the
17 record. The Mayor's list of ex parte contacts, Record at
18 707-710, provides little or no detail about the substance of
19 prehearing discussions he had with others concerning the
20 amendment.² Since the alleged irregularity is shown in the
21 record, a prerequisite for a special evidentiary hearing is
22 absent. ORS 197.830(11).³

23 There is an additional reason to reject the request for an
24 evidentiary hearing to prove the substance and content of the
25 Mayor's ex parte contacts. The courts and this board have held
26 that where a party is represented by legal counsel at local

1 government hearings and fails to object to a procedural error,
2 the error cannot be assigned in a LUBA appeal as grounds for
3 remand or reversal of the decision. South of Sunnyside
4 Neighborhood League v. Board of County Commissioners of
5 Clackamas County, 280 Or 3, 10, 569 P2d 1063 (1977); Turner v.
6 Washington County, 8 Or LUBA 234, aff'd, 70 Or App 575, 689 P2d
7 1318 (1984). Mason v. Linn County, 13 Or LUBA 1, aff'd 73 Or
8 App 334, 698 P2d 529, rev den 299 Or 314 (1985). In this
9 instance, the record indicates that petitioner's counsel warned
10 the Mayor that the substance and content of ex parte contacts
11 concerning the amendment should be publically disclosed.
12 Thereafter, at a public hearing on the amendment, the Mayor
13 responded by presenting a list of persons and organizations
14 with whom he had discussed the amendment. The Mayor then
15 stated:

16 "Because of the extensive nature of the list of
17 potential contacts I have prepared, probably including
18 more meetings than actually involved discussion of the
19 issues considered here today, I have not addressed
20 every comment made at each meeting. I will, to the
21 best of my ability, respond to any specific questions
22 regarding issues raised at any particular meeting."
23 Record at 70.

24 Petitioner did not take up the Mayor's invitation. Instead,
25 petitioner awaited a final decision. When the decision proved
26 adverse to its interests, petitioner appealed it to this Board.

We believe petitioner should not now be permitted to make
the inquiries it could have made during the city's hearings.
Accordingly, even if the Mayor erred by failing to describe the

1 ex parte contacts in detail, the error would not be grounds for
2 remand or reversal of the decision.

3 A different rationale supports our refusal to allow a
4 deposition and special evidentiary hearing concerning the
5 alleged ex parte contacts between Respondent's Mayor and Donald
6 Clark. The sole basis for this allegation, as noted
7 previously, is a news article indicating Donald Clark's belief
8 that a majority of the city council would vote for the
9 amendment. The article is not a reasonable basis for belief
10 that Mr. Clark met privately with the Mayor to discuss the
11 pending amendment. We hold that the motions should not be
12 granted under these circumstances. OAR 661-10-045(2)(a); OAR
13 661-10-045(6)(a)(B).

14 There may be an additional ground for rejecting
15 petitioner's motions. Petitioner has not persuaded us that the
16 challenged amendment is the sort of decision requiring
17 disclosure of ex parte contacts. We read the statutory⁴ and
18 decisional law⁵ to require disclosure of ex parte contacts
19 when the proceeding is adjudicatory or quasi-judicial in
20 nature. The supreme court has identified two principal
21 elements of adjudicatory action:

22 Generally, to characterize a process as an adjudica-
23 tion presupposes that the process is bound to result
24 in a decision and that the decision is bound to apply
preexisting criteria to concrete facts. Strawberry
Hill 4-Wheelers v. Benton County, 287 Or 591,602, 601
P2d 769 (1979).

25 Petitioner insists that "certain procedures were set in motion"
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1 once the Portland Development Commission recommended council
2 approval of the amendment, but petitioner does not demonstrate
3 that these procedures were bound to result in a decision on the
4 proposal. The pertinent statutes require presentation of a
5 proposed urban renewal plan to the governing body of each
6 affected taxing district, ORS 457.085(5). The statutes also bar
7 plan implementation until the governing body having
8 jurisdiction over the affected area approves the plan. ORS
9 457.085(6). However, the statutes do not seem to require
10 approval or denial of a measure once it is proposed by the
11 urban renewal agency and reviewed by the planning commission.
12 The options of postponing the measure indefinitely, or
13 abandoning it, remain. ORS 457.095 provides, in pertinent part:

14 "The governing body of the municipality, upon receipt
15 of a proposed urban renewal plan and report from the
16 municipality's urban renewal agency and after public
17 notice and hearing and consideration of public
18 testimony and planning commission recommendations, if
19 any, may approve the urban renewal plan. The approval
20 shall be by nonemergency ordinance which shall
21 incorporate the plan by reference.

18 The procedure for adopting a substantial change of an urban
19 renewal plan (as in this case) is identical to the procedure
20 for plan adoption. ORS 457.220(2).

21 We do not read the urban renewal statute to entail a
22 process that is "bound to result in a decision." Thus, a key
23 element of adjudication or quasi-judicial procedure is absent.
24 Strawberry Hill 4-Wheelers v. Benton County, supra, 287 Or at
25 602. Nor do we find any city ordinance or other regulation
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1 confining the council's discretion in this regard.
2 Accordingly, the rule requiring disclosure of ex parte contacts
3 is not applicable. See Neuberger v. City of Portland, 288 Or
4 585, 590, 607 P2d 722 (1979). It follows that proof of the
5 allegations supporting the motion for depositions and a special
6 evidentiary hearing would not warrant reversal or remand of
7 the challenged decision. ORS 197.830(11).

8 The motions are denied. The petition is due within 21 days
9 of the date of this order. OAR 661-10-045(5). Respondents'
10 briefs are due within 42 days of the date of this order.

11 Dated this 19th day of June, 1986.

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Laurence Kressel
Chief Referee

FOOTNOTES

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Under the city's urban renewal plan, the challenged amendment is a "substantial amendment" because it involves the acquisition of property. See Downtown Waterfront Urban Renewal Plan Section H (4/21/83). Such a substantial amendment must be found to comply with the city's comprehensive plan. See ORS 457.095(3); ORS 457.220(2). It follows that the amendment is a "land use decision" reviewable by LUBA. ORS 197.015(10); Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985). See also Tides Unit Owners Assoc. v. Seaside, 11 Or LUBA 84 (1984); Burrell v. Salem, ___ Or LUBA ___, No. 86-Q05 (3/26/86)

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The Mayor's disclosure list identifies the persons and organizations with whom he discussed the urban renewal amendment. The list summarizes each discussion in these words: "general discussion of homeless issues and purposes for hotel acquisition project". See Record at 707-710. The summary does not provide the kind of detail that would enable an interested party to respond to information obtained by the Mayor outside of the public forum. See Peterson v. City of Lake Oswego, 32 Or App 181, 574 P2d 326 (1978).

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The courts have advised that the purpose of the disclosure rule is to enable interested persons to rebut the substance of the communication. See e.g., Peterson v. City of Lake Oswego, 32 Or App 181, 574 P2d 326 (1978). Obviously, rebuttal cannot be offered after a decision is made and appealed to this Board. Thus, it would serve no purpose for petitioner to bring the substance of ex parte communications to our attention by way of a special evidentiary hearing. Where the disclosure rule has been violated, the correct remedy (assuming the rule is applicable) would be to remand the decision so that rebuttal of the information obtained ex parte can be offered.

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ORS 227.180(3) provides :

"No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of a decision-making body, if the member of the decision-making body receiving the contact:

1 "(a) Places on the record the substance of any written or
2 oral ex parte communications concerning the decision
3 or action and

4 "(b) Has a public announcement of the context of the
5 communication and of the parties' right to rebut the
6 substance of the communication made at the first
7 hearing following the communication where action will
8 be considered or taken on the subject to which the
9 communication related."

10 The statute appears in a section pertaining to procedures for
11 the issuance of land use permits. A "permit" is the
12 "discretionary approval of a proposed development of land."
13 ORS 227.160(2). We do not construe the city's approval of the
14 urban renewal amendment (authorizing acquisition of the hotels
15 for later rehabilitation) as a permit action or decision.

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28 See e.g., Fasano v. Washington County Comm., 264 Or 574,
29 507 P2d 23 (1973); Neuberger v. Portland, 288 Or 585, 607 P2d
30 722 (1979); Tierny v. Duris, 21 Or App 613, 536 P2d 435 (1975).

1 CERTIFICATE OF MAILING

2 I hereby certify that I served the foregoing Order Denying
3 Motion to Take Depositions and Motion for Special Evidentiary
4 Hearing for LUBA No. 86-011, on June 19, 1986, by mailing to
5 said parties or their attorney a true copy thereof contained in
6 a sealed envelope with postage prepaid addressed to said
7 parties or their attorney as follows:

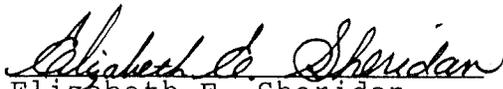
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27 Dated this 19th day of June, 1986.

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