

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

1
2
3 LANE COUNTY SCHOOL DISTRICT 71)
4 Petitioner,)
5 vs.)
6 LANE COUNTY,)
7 Respondent,)
8 and)
9 JASPER MOUNTAIN CENTER,)
10 Respondent-Intervenor.)

LUBA No. 86-049
ORDER ON MOTION
FOR SPECIAL
EVIDENTIARY HEARING

11 Petitioner requests an evidentiary hearing on

12 "whether there were undisclosed ex parte contacts
13 between one or more Lane County Commissioners and
14 representatives of Jasper Mountain Center in the
15 adoption of Lane County Ordinance PA 900, PA 900-A,
16 and related proceedings; and, if there were such
17 undisclosed contacts, their effect on petitioner's
18 rights as well as on the action of the Lane County
19 Board of Commissioners." Motion for Special
20 Evidentiary Hearing p.1.

21 Petitioner makes the motion 5 days after the oral argument on
22 the merits of this case before this Board and well after the
23 time for filing the Petition for Review and Respondent's
24 Briefs. An accompanying affidavit by petitioner's attorney,
25 Larry O. Gildea, asserts that the ex parte contacts were not
26 disclosed "either on or off the record," and, had the
 disclosure been made, petitioner would have examined the
 persons "who were involved in the ex parte contacts...."
 Affidavit of Larry Gildea p. 2. We understand the affidavit to

1 say that the alleged improper conduct was not discovered until
2 after briefing and the oral argument had been completed.

3 ORS 197.830(11) provides:

4 "(11)Review of a decision under ORS 197.830 to 197.845
5 shall be confined to the record. In the case of
6 disputed allegations of unconstitutionality of the
7 decision, standing, ex parte contacts or other
8 procedural irregularities not shown in the record
9 which, if proved, would warrant reversal or remand,
10 the board may take evidence and make findings of fact
11 on those allegations. The board shall be bound by any
12 finding of fact of the local government, special
13 district or state agency for which there is
14 substantial evidence in the whole record."

15 The statute authorizes LUBA to take evidence where there
16 are disputed allegations of ex parte contact, which, if proved,
17 would warrant remand or reversal. It thus conditions allowance
18 of an evidentiary hearing on allegations which would warrant
19 relief if proved. That threshold standard is not met in this
20 case for the reasons discussed below.

21 Petitioner's motion includes several illustrations of what
22 it believes is evidence of improper ex parte contact or bias on
23 the part of the decisionmaker.

24 The first submittal is a letter from Dave Ziegler, of the
25 Intervenor Jasper Mountain Center to Lane County Commissioner
26 Peter DeFazio. It is dated August 7, 1984 and is not part of
the record submitted by Lane County in this proceeding.

We understand petitioner to allege the letter (1)
constitutes an improper ex parte contact and (2) suggests there
were additional ex parte contacts because it invites further
inquiry by Commissioner DeFazio about JMC's expansion plans.

1 The letter allegedly justifies allowance of the motion,
2 followed by discovery depositions aimed at proving the extent
3 of ex parte contacts with Commissioner DeFazio.

4 As noted, the statute (ORS 197.830)(11) allows for
5 presentation of evidence of ex parte contacts in certain
6 circumstances. We believe the statute and our rules on
7 evidentiary hearings should be read liberally, so as not to
8 stifle the presentation of legitimate issues to LUBA. However,
9 the statute and rules do not authorize fishing expeditions for
10 possible ex parte contacts.

11 A threshold must be crossed to justify an evidentiary
12 hearing and the procedures (e.g., depositions) that could
13 accompany such a hearing. The motion must allege that an ex
14 parte contact actually took place, or that there is a
15 reasonable basis to believe that such contact probably took
16 place. The allegations must be substantial, i.e., the facts
17 that serve as the basis for the motion must also be alleged.
18 See OAR 661-10-045(2)(a). The motion must also show, with
19 supporting legal authority, that proof of the alleged ex parte
20 contact would warrant remand or reversal. See ORS
21 197.830(11).¹ Once the requisite allegations are made, the
22 petitioner is entitled to an evidentiary hearing to prove
23 them. Under our rules, allowance of the motion would set the
24 stage for depositions designed to produce proof justifying the
25 ultimate relief sought. OAR 661-10-045(6).

26 The threshold requirement for an evidentiary hearing

1 described above has not been met here.

2 The August 7 letter to Commissioner DeFazio was sent before
3 a formal application was filed with the planning department.
4 Technically, therefore, the letter does not constitute a
5 contact about a pending application. However, our reason for
6 concluding the letter does not constitute an improper ex parte
7 contact does not rest on this technical point.² The letter
8 simply explains, with minimal detail, that the center wishes to
9 expand. It contains no factual information that is not already
10 in the record in other forms. Therefore, a remand requiring
11 that the letter be summarized on the record or be made part of
12 the record in order to allow rebuttal would be pointless.

13 Carlson v. City of Eugene, 3 Or LUBA 175 (1981).

14 In addition, neither the August 7 letter nor petitioner's
15 other submittals provide a reasonable basis to believe that the
16 letter was followed by ex parte contact with the commissioner.
17 The letter states in part:

18 "If you need further information, please let me know.
19 I can meet with you any time other than Tuesday
morning. Again, thanks for your help."

20 This leaves the door open to Commissioner DeFazio to
21 contact the applicants, but it is a weak base for the premise
22 that Commissioner DeFazio actually did so. We find the letter
23 insufficient to warrant allowance of the motion for an
24 evidentiary hearing at this stage of this appeal. It does not
25 justify the requested general exploration of county personnel
26 to determine whether such contacts occurred.

1 Petitioner next asks to take

2 "[T]estimony, either in person or through deposition
3 (sic) transcripts, of Commissioner Peter DeFazio,
4 applicant Dave Ziegler, former County Counsel Margie
5 Henricksen, present County Counsel William VanVactor,
6 Jasper Mountain Center's counsel, Bill Kloos, and any
other witnesses whose names are discovered before the
hearing. Petitioner expects these witnesses to
testify to the extent of ex parte contacts and
communication." Motion for Evidentiary Hearing, p. 2.

7 Petitioner submits this request in the hope that discovery will
8 reveal improper ex parte contact between proponents of the
9 expansion and officials of the county.

10 This request is not supported by facts showing a reasonable
11 basis to believe that the named persons engaged in improper
12 conduct. Without such facts, we decline to authorize an
13 evidentiary hearing and the depositions which would be part of
14 such a proceeding.

15 Petitioner also supports the motion with an affidavit of
16 its superintendent, Mr. Ron Johnson. Mr. Johnson states that
17 Commissioner DeFazio

18 "is biased in favor of Jasper Mountain Center's
19 application, and has exercised this bias in his
20 position as a commissioner to obtain approval of the
application." Affidavit of Ron Johnson, p. 3.

21 The affidavit also states that the affiant attended an
22 August 13, 1985 joint meeting of the Lane County Planning
23 Commission and the Board of Commissioners to discuss Ordinance
24 PA-900. Ordinance PA-900 approved the Center in 1985, but was
25 remanded by this Board on request of Lane County. The
26 affidavit states:

1 "At the time that Mr. VanVactor asked for the recess,
2 the objections which I raised on the School District's
3 behalf were about to be resolved according to the
4 concepts which Mr. Kloos had stated and which I've
5 quoted in this affidavit. Upon that basis, I did not
6 stay at the hearing. Had I known then that
7 Commissioner DeFazio had already had contact with Mr.
8 Kloos and Mr. Ziegler, I would have remained at the
9 meeting to insist that the Planning Commission and
10 Board of Commissioners resolve my objections in a
11 manner consistent with the concepts which Mr. Kloos
12 told Commissioner Rogers he agreed with.

13 "When I left the meeting, I assumed that the Board of
14 Commissioners would require the applicant to do as his
15 counsel agreed. When that did not happen, we continued
16 the protest. At later meetings, Commissioner DeFazio
17 has expressed hostility and animosity toward the
18 School District's position." Affidavit of Ron
19 Johnson, pp. 2-3 (emphasis added).

20 This affidavit is insufficient to justify an evidentiary
21 hearing. Even when read in conjunction with the August 7
22 letter from JMC to Commissioner DeFazio, it does not provide a
23 reasonable basis to believe that there were ex parte contacts.
24 The emphasized portion of Mr. Johnson's statement implies that
25 he had knowledge of contacts between Mr. Kloos, Mr. Ziegler and
26 Commissioner DeFazio, but the statement is unsupported by facts
to buttress the implication. The statement does not meet the
threshold test for an evidentiary hearing to prove that ex
parte contacts took place.

We also note that the motion claims Mr. Johnson would not
have attempted to enter into a compromise agreement about
education for children placed at the center "had Commissioner
DeFazio disclosed the ex parte contact and its extent." We
assume the statement is made to show how petitioner was

1 prejudiced by the alleged ex parte contact. However, since the
2 motion does not provide a reasonable basis to conclude that ex
3 parte contact took place, or probably took place, we need not
4 consider whether remand or reversal would be warranted by the
5 alleged contact.³ See ORS 197.830(11).

6 We conclude that the affidavit, considered alone or in
7 conjunction with petitioner's other submittals, does not show a
8 basis to believe that ex parte contacts warranting relief
9 occurred.

10 The fourth item in the motion is a letter of March 20, 1985
11 from Bill Kloos, the applicant's attorney, to Roy Burns, Lane
12 County Planning Director.⁴ The letter is part of the record
13 in this proceeding and therefore does not warrant an
14 evidentiary hearing. ORS 197.830(11).

15 The fifth item is the following statement of Commissioner
16 DeFazio at the March 5, 1986 hearing:

17 "There's no place for the Board of Commissioners in
18 this decision. This is a decision that pertains to
19 education and children and that doesn't involve the
20 Lane County Board of Commissioners. We deal with land
21 use and that's very tangential. Land use is being
used in this case for a social purpose and that's not
the purpose of land use, we were drug in on legal
technicalities and I'm going to tell you that I'm
having problems with that." Record Item 10, p. 29.

22 Petitioner claims, as we understand it, that this statement
23 shows Mr. DeFazio to be biased.

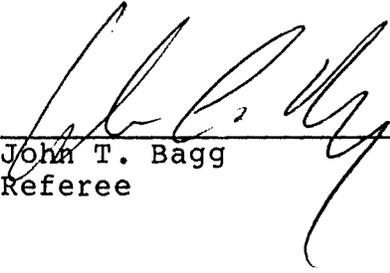
24 The commissioner's statement is in the record of this
25 proceeding. Like the letter from Mr. Kloos, it was therefore
26 available to petitioner to cite in its petition for review in

1 an assignment of error alleging bias. Petitioner made no such
2 allegation and we will not entertain one at this stage of the
3 appeal.

4 The next item in petitioner's motion refers to statements
5 Mr. DeFazio made during the commissioners' meeting of June 4,
6 1986. Petitioner says the statements show bias. Again, the
7 June 4, 1986, transcript is part of the record. Petitioner did
8 not allege bias in its petition for review. As with the
9 previous claim, we will not entertain a bias claim now.

10 The motion for evidentiary hearing is denied.

11 Dated this 10th day of December, 1986.

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15 _____
16 John T. Bagg
17 Referee
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FOOTNOTES

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Where, as here, the statute and rules are invoked in the late stages of an appeal, particular scrutiny of a motion for evidentiary hearing is required, lest the goal of speedy decisionmaking (ORS 197.805) be unjustifiably sacrificed.

2
Indeed, by this order we do not wish to sanction a practice of "bending the ear" of local officials prior to the filing of an application simply to avoid a prohibition against ex parte influences.

3
In any event, the county's order does not depend on the existence of a compromise. The order stands on its own.

4
The letter states that "we" prepared documents supporting a need exception for the SCAR property. The letter also requests a waiver for reduction of the normal application fee (which is \$600). The letter mentions that the law firm is providing services at no cost to SCAR. Lastly, the letter asks for a commitment to accept the necessary applications and defer payment of fees pending a decision on the fee reduction request. The letter closes with a thank you to the staff for "continued support in facilitating the process of this application."