

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

3 RALPH AND CAROLYN YOUNGER,           )  
4 ROBERT AND DEBBIE RUSSELL, LOU       )  
5 AND KATHY JAFFE, RAYMOND AND        )  
6 CATHERINE A. HONERLAH, ROBERT       )  
7 HARDIN, JR. AND KRISTY HARDIN,       )  
8 MARILYN SCHULTZ, DR. ROBERT J.       )  
9 AND SUSAN NELSON, ANTHONY AND        )  
10 REGGIE BARSOTTI, RON AND JANE        )  
11 HARDY CEASE, JOE B. AND JO           )  
12 HANSEN, AND TIMOTHY AND MARLA        )  
13 NATHMAN, AND THE NEIGHBORHOOD       )  
14 PROTECTION COALITION,                )  
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Petitioners,

vs.

CITY OF PORTLAND,

Respondent.

LUBA No. 86-046

ORDER ON PETITION  
FOR DEPOSITIONS

14           Petitioners move for an order allowing them to take the  
15 depositions of Robert Ames, Roy Huser, Bud Clark, Mildred  
16 Schwab, Chris Tobkin, Phil Thompson, Michael Parker, and Cheryl  
17 Perrin. Petitioners allege the testimony of these persons is  
18 "material to this case." They claim the testimony will reveal  
19 the nature and extent of certain ex parte contacts which  
20 petitioners believe occurred and which they argue may have  
21 influenced the city's land use decision under review here.

22           The depositions of Robert Ames and Mayor Bud Clark are  
23 sought because Mr. Ames wrote of certain comments in a letter  
24 to Bud Clark. The letter advocates approval of the project.  
25 In addition, the letter states:  
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1 "despite the fact that I have told you how I feel  
2 about this personally, I thought it best to go on the  
3 record in writing so that as your staff keeps score,  
there will be one more checked in the 'do it'  
column!" Record 4200.

4 We understand petitioners view this letter as evidence an ex  
5 parte discussion occurred between Mr. Ames and Mayor Bud Clark.

6 This letter was in the record of the proceedings. It was  
7 submitted to the city auditor's office along with other  
8 exhibits. Petitioners were aware of the Ames letter on  
9 February 28, 1986. See Record 1118 and Petitioner Younger's  
10 brief at 30. There were some five subsequent public hearings  
11 before the decision approving the project was finally enacted.  
12 See Record 475, 537, 918, 1005, 1321. Petitioners had the  
13 opportunity to inquire as to the nature of the conversations  
14 referred to in the letter at these meetings. The record does  
15 not reveal petitioners pursued the matter of the Ames letter at  
16 the public hearings.

17 We do not believe petitioners are entitled to explore a  
18 matter now where they had the opportunity to do so while the  
19 local decision was still pending.

20 In Union Station Business Community Association v. City of  
21 Portland, we stated:

22 "We believe the petitioners should not be permitted to  
23 make inquiries it could have made during the city's  
24 hearings. Accordingly, even if the Mayor erred by  
25 failing to describe the ex parte contact in detail,  
the error would not be grounds for remand or reversal  
of the decision." Union Station Business Community  
26 Association v. City of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA  
No. 86-011, June 19, 1986).

1 Petitioners' failure to inquire as to the nature and content of  
2 known ex parte contacts before the local government bars  
3 inquiry of the same material during the course of our review  
4 proceeding.

5 The request to depose Mr. Ames is denied, and the request  
6 to depose Bud Clark about any contact with Mr. Ames is  
7 similarly denied.

8 Petitioners next request to depose Robert Huser. A letter  
9 in the record from Morna Huser to Orin Roberson (a Fred Meyer  
10 official) reveals a conversation took place between City  
11 Commissioner Mildred Schwab and Robert Huser about the Fred  
12 Meyer proposal. Petitioners allege Commissioner Schwab refused  
13 to disclose the nature of this contact. The Huser letter is  
14 written on stationery of "Huser Sales and Service, Inc." It  
15 states, in part, that:

16 "We placed a call to Mildred Schwab and in her  
17 intimitable way she stated she was in support of the  
18 zone change. She felt it was 'not too bright' that  
19 the Hearings Officer denied your request. With  
Mildred Schwab, one does not have to guess where she  
stands."

20 This letter was known by petitioners on February 28, 1986.  
21 See Record 1118 and Petitioner Younger's Brief at 30. Copies  
22 of the letter may be found in the record at 4142 and 4161, 4177  
23 and 4175. As with the Ames letter, petitioners had the  
24 opportunity at subsequent hearings to inquire as to the nature  
25 of the contact and did not do so. We decline petitioners'  
26 request to depose Roy Huser and Commissioner Mildred Schwab.

1           Next, petitioners seek to depose Chris Tobkin and Phil  
2 Thompson, both members of Mayor Clark's staff. Petitioners  
3 refer to memoranda from these staff members addressed to Mayor  
4 Clark. The memoranda discuss procedural matters about the Fred  
5 Meyer proposal, and Mr. Thompson's memorandum contains a policy  
6 analysis of the proposal along with a recommendation as to how  
7 the Mayor should vote. Petitioners claim there exists no  
8 doctrine similar to "executive privilege" between a mayor and  
9 his staff persons, and the full nature of any contacts between  
10 these individuals and the mayor must be revealed.

11           ORS 227.180(4) exempts memoranda such as those at issue  
12 here from the definition of ex parte contacts and the  
13 disclosure rule in ORS 227.180(3).<sup>1</sup> ORS 227.180(4) provides  
14 that communications between staff and the governing body "shall  
15 not be considered an ex parte contact" under ORS 227.180(3).

16           We find petitioners are not entitled to depose Chris Tobkin  
17 and Phil Thompson.

18           Petitioners next ask that we allow them to depose Michael  
19 Parker and Cheryl Perrin. Mr. Parker wrote a letter to Mayor  
20 Clark stating that he observed Ms. Perrin, an employee of Fred  
21 Meyer, speaking with Mayor Clark at a tavern, the Goose Hollow  
22 Inn. The letter does not disclose whether Mr. Parker overheard  
23 the nature of the discussion, only that the Mayor and Ms.  
24 Perrin were speaking with each other.

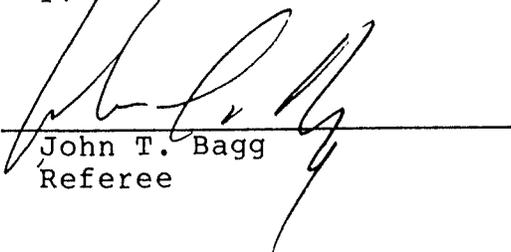
25           This letter was made part of the record. Record 382.

1 However, it was not specifically disclosed to petitioners or  
2 known to them during the course of the city's proceedings  
3 (until after the tentative decision). Younger's Petition for  
4 Review at 32. However, we do not believe failure to disclose  
5 this letter is error.

6 Nothing in Mr. Parker's letter suggests that he understood  
7 Ms. Perrin and Mayor Clark were discussing the Fred Meyer  
8 proposal. It may be that Mayor Clark and Ms. Perrin were  
9 discussing the merits of the proposal, it may also be that they  
10 were discussing matters having nothing at all to do with this  
11 land use decision. In this instance, there simply is no  
12 reasonable basis to believe that an ex parte contact took  
13 place. The fact that the particular people are seen talking to  
14 each other is not sufficient. See "Order on Motion for Special  
15 Evidentiary Hearing" in Lane County School District 71 v. Lane  
16 County, \_\_\_ Or LUBA \_\_\_, (LUBA No. 86-049, December 10, 1986.)  
17 Without further indication that an ex parte contact occurred,  
18 we will not order the depositions be taken.

19 Petition for Depositions is denied.

20 Dated this 29th day of January, 1987.

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25 John T. Bagg  
26 Referee

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FOOTNOTES

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ORS 227.180(3) states:

"(3) 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 the decision-making body, if the member of the decision-making body receiving the contact:

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

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