

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

3 MARK HEMSTREET,)
)
4 Petitioner,)
)
5 vs.)
)
6 SEASIDE IMPROVEMENT COMMISSION,)
the governing body of the)
7 Trails End Urban Renewal)
District,)
8 Respondent,)
)
9 and)
)
10 JOHN Q. HAMMONS,)
)
11 Participant-)
)
12 Respondent.)

LUBA No. 87-118
ORDER ON MOTION FOR
EVIDENTIARY HEARING

13 This proceeding concerns approval by the Seaside
14 Improvement Commission of a lease of air rights to
15 participant-respondent (respondent) Hammons. Petitioner moves
16 for an evidentiary hearing regarding an alleged conflict of
17 interest and ex parte contacts. Under ORS 197.830(11)(c) and
18 OAR 661-10-045, this Board is empowered to conduct evidentiary
19 hearings so that it may rule on

20 "disputed allegations of * * * ex parte contacts or
21 other procedural irregularities not shown in the
22 record which, if proved, would warrant reversal or
remand * * *."

23 In Lane County School District 71 v. Lane County, 15 Or
24 LUBA 608, 609-10 (1986), we explained the threshold showing
25 required of a party requesting an evidentiary hearing:

26 "We believe the statute and our rules on evidentiary
hearings should be read liberally, so as not to stifle

1 the presentation of legitimate issues to LUBA.
2 However, the statute and rules do not authorize
3 fishing expeditions for possible ex parte contacts.

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

21 In support of his motion for evidentiary hearing,
22 petitioner first points to a statement made by the chairman at
23 the beginning of the Seaside Improvement Commission December 2,
24 1987 hearing in this matter. The chairman stated that if the
25 lease were approved, he would "suffer a financial loss."¹
26 While it is not clear from the statement whether the chairman
intended to vote on the matter, the commission later deadlocked
3-3, and the chairman voted to award the lease to respondent
Hammons.

Petitioner argues the chairman's disclosure is not a full
disclosure, and it "appears that the chairman had an actual
personal interest in the * * * proposed Hammons development."
Memorandum in Support of Motion for Evidentiary Hearing at 3.
Petitioner argues the disclosure was not sufficient to advise
petitioner whether the chair "was impartial and whether he

1 intended to vote." Id.

2 Respondent answers that the chairman properly disclosed a
3 "potential conflict of interest" on the record as required by
4 ORS 244.120(a). Respondent argues that petitioner fails to
5 state with particularity what facts would be shown during an
6 evidentiary hearing that would warrant reversal or remand.
7 Respondent notes such a showing is required under
8 OAR 661-10-045. Respondent also argues the chairman's
9 testimony shows he will suffer a loss, not a gain, if the lease
10 is approved. Respondent says "any bias the chairman could have
11 had * * * would have been against [respondent] and in favor of
12 petitioner." Memorandum in Support of Motion to Strike
13 Petitioner's Motion for Evidentiary Hearing at 5.

14 Finally, respondent notes petitioner was present at the
15 December 2, 1987 meeting, and did not object to the chairman's
16 disclosure or to his participation in the decision. Citing
17 Union Station Business Community Association v. City of
18 Portland, 14 Or LUBA 556 (1986), respondent argues that
19 petitioner waived his right to challenge the disclosure or
20 alleged conflict of interest by failing to object at the
21 December 2, 1987 hearing.

22 Our review of the record shows petitioner testified through
23 his attorney immediately after the disclosure by the chairman
24 and made no objection to the completeness of that disclosure.
25 Similarly, the record shows no objection by petitioner
26 following the chairman's decision to vote on the proposed

1 lease, even though one of the commissioners questioned the
2 propriety of his voting on the matter. Record 15. In these
3 circumstances, we hold petitioner waived his right to an
4 evidentiary hearing to pursue the matter of the chairman's
5 potential conflict of interest. Union Station Business
6 Community Association v. City of Portland, supra; Younger v.
7 City of Portland, 15 Or LUBA 616, 617 (1987).

8 Even if we were not to find petitioner waived his right to
9 an evidentiary hearing as to the chairman's potential conflict
10 of interest, we would deny the motion. While the chairman's
11 declaration of a potential conflict of interest could have been
12 clearer, he did declare his potential conflict on the record.
13 We understand the declaration to be he would suffer an economic
14 detriment if the lease were granted.

15 We find nothing in the chairman's disclosure that would
16 suggest actual bias or a personal interest in the proposed
17 lease, and petitioner offers nothing to suggest such bias or
18 personal interest. We decline petitioner's invitation to
19 speculate that the chairman had an improper bias against
20 petitioner or a personal interest that would warrant reversal
21 or remand. See 1000 Friends of Oregon v. Wasco Co. Court, 304
22 Or 76, 742 P2d 39 (1987).

23 Petitioner's second basis for the requested evidentiary
24 hearing is alleged ex parte contacts between respondent Hammons
25 and the Seaside Improvement Commission. Petitioner bases his
26 allegations of ex parte contacts on a September 23, 1987 letter

1 from respondent to the mayor.

2 "Concerning ex-parte contacts, Petitioner refers the
3 Board to the [September 23, 1987] letter from
4 Respondent Hammons to Joyce Williams * * *. It states
5 in relevant part:

6 'It certainly has been a pleasure working with
7 you, several of the other council persons we have
8 talked with and particularly Larry Lehman and
9 Dick Pearson. We appreciate everyones [sic] fine
10 cooperation; however, time does seem to be
11 passing by quickly and we will need some
12 pertinent answers to several issues in order for
13 us to adequately assess our prospects for
14 operating the property that we would like to
15 build at Seaside.

16 'First, if we are able to proceed, we will have
17 to have the City's affirmation on the leasing of
18 air rights over the City parking lot . . .'

19 "It appears from the tone of the letter that
20 Mr. Hammons had cultivated a certain favorable bias as
21 a result of his secret dealings with certain council
22 members who later voted for his proposal at the
23 December 2nd proceeding. Indeed it appears that the
24 merits of leasing the parking lot to Mr. Hammons had
25 been dicussed and had already gained the approval of
26 some council members. * * *"²

We do not believe that suspicion based on the "tone" of a
letter is a sufficient basis for this Board to order an
evidentiary hearing. While the letter could lead one to
speculate that it is possible there were ex parte contacts, it
provides an extremely slender basis for such speculation.
Neither is petitioner's request that the Board consider the
Seaside Improvement Commission's apparent eagerness to lease
the subject property the kind of substantial allegation
necessary to reach the threshold that would justify an
evidentiary hearing. Lane County School District 71 v. Lane

1 County, supra.

2 Finally, we note petitioner submitted the September 23,
3 1987 letter to the Seaside Improvement Commission at its
4 December 2, 1987 meeting. However, petitioner did not at that
5 time raise any concerns regarding ex parte contacts.³
6 Whatever concerns regarding ex parte contacts might fairly be
7 raised by the letter, therefore, could have been raised at the
8 December 2, 1987 meeting. Petitioner failed to do so and may
9 not now raise those concerns for the first time as a basis for
10 an evidentiary hearing before this Board.

11 The motion for evidentiary hearing is denied.

12 Dated this 22nd day of April, 1988.

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Michael A. Holstun
Referee

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FOOTNOTES

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The chairman's complete statement was as follows:

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"I would like to declare a potential conflict of interest concerning the purchase of the Cohen property at the Turnaround. the Law states I must do so whether I stand to gain or lose financially. ORS 244.040 states that I should not vote on issues where I could gain monetarily. Since I do not own any of the aforementioned property and the sale of this property and the building of a new hotel would cause me a financial loss, it seems to me my voting opinions [sic] on this matter are at my discretion. I have been in contact with Betty Reynolds, Executive Director of the State's Ethics Commission, and Dan Van Thiel, City Attorney, and they have advised me to make this statement." Record 8.

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The Seaside City Council also serves as the Seaside Improvement Commission. Respondent offers an argument to the effect that any ex parte contacts suggested by the letter were directed to the individuals in question in their capacity as city council members rather than in their capacity as members of the Seaside Improvement Commission. We do not believe a contact that would be ex parte would be rendered otherwise simply because the person receiving the contact happened to be acting in his or her capacity as a city councillor rather than his or her capacity as a member of the Seaside Improvement Commission.

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