

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision denying his
4 request for an exception to Statewide Planning Goals 3
5 (Agricultural Lands) and 4 (Forest Lands) and comprehensive
6 plan and zoning map amendments.

7 **FACTS**

8 Petitioner's property includes soils subject to Goals 3
9 and 4. The subject property is a 27 acre portion of a 142
10 acre tax lot which is part of 935 contiguous acres owned by
11 petitioner. The subject property is presently designated
12 Forest Grazing on the Curry County Comprehensive Plan Map
13 and is zoned Forest Grazing. Petitioner requested approval
14 of an exception from Goals 3 and 4, and approval of changes
15 in the plan map designation to Rural Residential and the
16 zoning map designation to Rural Residential Five.¹

17 The initial evidentiary hearing was held before the
18 Curry County Board of Commissioners on December 17, 1990.
19 Thereafter, a new member replaced one of the county
20 commissioners who attended the December 17, 1990 hearing.
21 Subsequently, additional evidentiary hearings were held on
22 January 14, January 28, February 25, March 11 and April 1,
23 1991. Following the April 1, 1991 hearing, the board of

¹The goal exception was requested on the basis of irrevocable commitment to nonfarm and nonforest uses. ORS 197.732(1)(b); Goal 2, Part II(b); OAR 660-04-028.

1 commissioners voted to deny the application. Thereafter, a
2 written decision and supporting findings were prepared, and
3 the final written decision was signed on May 6, 1991.

4 The board of commissioners denied the goal exception
5 and plan and zoning map amendments, citing two reasons for
6 its decision. First, the board of commissioners found an
7 exception to Goal 4 was not justified, because there was not
8 substantial evidence in the record to support a finding that
9 forest use of the subject property was impracticable.²
10 Second, citing Goal 12 (Transportation), the board of
11 commissioners also found the applicant failed to demonstrate
12 that adverse transportation effects from increased use of
13 Whaleshead Road were adequately mitigated.³

14 Petitioner does not specifically challenge the findings
15 concerning the resource issues. Rather, petitioner contends
16 the board of commissioners committed errors in adopting
17 those findings such that reversal or remand is required.
18 Petitioner also advances a variety of procedural and
19 substantive arguments challenging the findings concerning
20 the transportation issues.⁴

²The county found an exception to Goal 3 was justified.

³Like the parties, in this opinion we refer to these bases for the decision as the "resource issues" and the "transportation issues."

⁴Petitioner's primary argument is that while Goal 12 is cited as a basis for denial in the final decision, the record shows the real transportation standard the county relied upon throughout the local proceedings is a local code standard that does not apply to plan and zoning map amendments.

1 **THIRD ASSIGNMENT OF ERROR**

2 "Respondent's decision to deny was based, in part,
3 on a county counsel memo which had not been
4 previously disclosed."

5 Petitioner contends the challenged decision is based in
6 part on a legal memorandum from the county's legal counsel.⁵
7 Petitioner contends the memorandum is an ex parte
8 communication and that the board of commissioners erred by
9 denying his request for an opportunity to rebut the
10 memorandum.

11 ORS 215.422(3) sets forth statutory requirements for
12 disclosure of and opportunity to rebut ex parte
13 communications. ORS 215.422(4) specifically provides that
14 "[a] communication between county staff and the planning
15 commission or governing body shall not be considered an ex
16 parte contact * * *." We conclude the county counsel's
17 memorandum falls within the exception provided by
18 ORS 215.422(4). The board of commissioners is entitled to
19 rely on its attorney for legal advice and an analysis of the
20 case, and the board of commissioners committed no error by
21 failing to provide petitioner an opportunity to rebut the
22 substance of the memorandum. Dickas v. City of Beaverton,
23 92 Or App 168, 172, 757 P2d 451 (1988) (parallel provisions

⁵Petitioner contends that commissioner Reagan particularly relied on the memorandum in finding petitioner failed to demonstrate compliance with the criteria applicable to statewide planning goal exceptions (the resource issues).

1 of ORS 227.180(4) applicable to cities exempt communications
2 between staff and city governing bodies from ex parte
3 communication disclosure and rebuttal requirements); Gruber
4 v. Lincoln County, 16 Or LUBA 456, 461 (1988).⁶

5 Finally, petitioner contends the county commissioners'
6 consideration of the disputed legal memorandum violated
7 Curry County Zoning Ordinance (CCZO) § 2.170(9)(b).⁷

8 We agree with the county that CCZO § 2.170(9)(b)
9 governs the acceptance of communications, reports, memoranda
10 and other materials containing new evidence by county
11 decision makers as part of the evidentiary record supporting
12 their decision.⁸ However, CCZO § 2.170(9)(b) does not
13 require disclosure of, and a right to rebut, communications

⁶This does not mean a governing body may accept evidence from staff outside of the public hearing process and thereafter include such evidence in the record and rely on that evidence without first providing the parties an opportunity to rebut such evidence. See Gruber v. Lincoln County, supra. However, the legal memorandum is not evidence upon which the board of commissioners relied in reaching its decision.

⁷CCZO § 2.170(9) provides, in pertinent part, as follows:

"Members of the decision making body shall [not]:

"* * * * *

"b) Take notice of any communication, reports, memoranda, or other materials prepared in connection with the particular case unless the parties are afforded an opportunity to contest the material so noticed."

⁸Although the county counsel's memorandum was attached to the minutes of the April 1, 1991 hearing and included in the record, its inclusion in the record apparently was inadvertent. The memorandum includes legal analysis rather than evidence, and explicitly states it "is not part of the record."

1 with legal counsel or other county staff which contain only
2 advice and analysis.

3 In summary, we reject petitioner's contentions that the
4 board of commissioners committed reversible error by
5 consulting with its legal counsel without providing the
6 parties a right to rebut the substance of that advice, or in
7 relying on that legal advice in reaching its decision.

8 The third assignment of error is denied.

9 **FOURTH ASSIGNMENT OF ERROR**

10 "The board chairman assured petitioner that he had
11 satisfied all resource issues; [petitioner] was
12 thereafter directed to address only road
13 improvement issues; and was prevented from further
14 addressing resource issues, all to the prejudice
15 of his substantial rights."

16 Under this assignment of error, petitioner first
17 contends that certain assurances by one of the county
18 commissioners, given early in the proceedings, render
19 improper the county commissioner's later determination that
20 the resource issues were inadequately addressed. During the
21 January 28, 1991 public hearing in this matter, one of the
22 county commissioners, while expressing concerns about the
23 transportation issues, made the following statement:

24 "* * * I personally am not persuaded on resource
25 issues that this application should not move
26 forward.* * * [I]n fact it appears to me, based on
27 my original review, that this land is irrevocably

1 committed * * *."⁹

2 To the extent petitioner suggests that the above
3 statement in some way bound the board of commissioners, or
4 that individual commissioner, later to find the subject
5 property is irrevocably committed to nonforest uses, we
6 disagree. As we have explained on numerous occasions, it is
7 the county's final written decision that is subject to our
8 review, not statements made during the proceedings leading
9 to adoption of a land use decision. Gruber v. Lincoln
10 County, supra, 16 Or LUBA at 460; Cook v. City of Eugene, 15
11 Or LUBA 344, 355 (1987); Oatfield Ridge Residents Rights v.
12 Clackamas Co., 14 Or LUBA 766, 768-69 (1986); S & J Builders
13 v. City of Tigard, 14 Or LUBA 708, 712 (1986); McCullough v.
14 City of Baker, 14 Or LUBA 198, 200 (1986); Citadel
15 Corporation v. Tillamook County, 9 Or LUBA 61, 67 (1983).

16 To the extent petitioner alleges the above statement
17 improperly led him to believe he need not submit additional
18 evidence, and on that basis warrants remand of the
19 challenged decision, we disagree with that argument as well.
20 Any positions that may have been expressed by one or more of
21 the county commissioners during the local proceedings are at
22 most preliminary and clearly are subject to change in the
23 final written decision. See Sokol v. City of Lake Oswego,

⁹The quoted statement appears on page 6 of Exhibit A to the Petition for Review, which is a hand written transcript of the January 28, 1991 board of commissioners' meeting.

1 18 Or LUBA 375, 400-01 (1989), aff'd 100 Or App 594 (1990)
2 (an oral decision is tentative and may be changed any time
3 before the decision is reduced to writing and becomes
4 final). A decision maker's expressed belief early in the
5 local proceedings that an applicant has carried his
6 evidentiary burden on a particular issue creates no right in
7 the applicant to expect the decision maker ultimately will
8 vote in accordance with such expressions. The burden to
9 assure that the record contains adequate evidence to support
10 an application is not affected by such observations by
11 individual decision makers. Decision makers may change
12 their minds for a variety of reasons. So long as the final
13 decision is legally correct and adequately supported by the
14 evidentiary record, such changes in position need not be
15 explained and do not provide a basis for reversal or remand.

16 Petitioner also argues that the same county
17 commissioner improperly required that he address allegedly
18 irrelevant transportation issues, while improperly denying
19 him the opportunity to address resource issues that
20 ultimately were relied upon in denying the requested
21 approvals.

22 We agree with respondent that the record does not
23 support petitioner's argument. Although the cited portions
24 of the record show instances where a county commissioner
25 requested argument on the transportation issues, they do not
26 establish that petitioner was denied an adequate opportunity

1 to address resource issues during the six public hearings in
2 this matter.¹⁰

3 The fourth assignment of error is denied.

4 **FIFTH ASSIGNMENT OF ERROR**

5 "A commissioner who denied the application joined
6 the board mid-way through the hearings, without
7 establishing for the record that she had read the
8 minutes of previous hearings, listened to tapes of
9 previous hearings, or otherwise reviewed the
10 record established by petitioner prior to her
11 participation."

12 CCZO § 2.190(3) requires, in pertinent part, as
13 follows:

14 "Only those members of the Board [of County
15 Commissioners] reviewing the entire record may act
16 on the matter reviewed. * * *."

17 Commissioner Reagan was not a member of the board of
18 county commissioners when the initial public hearing in this
19 matter was held on December 17, 1990.¹¹ The January 14,
20 1991 hearing was continued to allow commissioner Reagan to

¹⁰Record 13 simply shows a request to address the "road issue." During the March 11, 1991 public hearing, the applicant requested an opportunity to address resource issues of concern to commissioner Reagan. According to petitioner, he was "admonished not to pursue [the] resource issue; but to give presentation on the roads." Petition for Review, Exhibit B, page 1. However, the admonition was not absolute: "do roads first, if [commissioner] Reagan wants to discuss some of the other issues she can[.]" Id. Although commissioner Reagan did not thereafter affirmatively express reservations concerning resource issues at the March 11, 1991 hearing, we are not aware of any requirement that she do so. Neither do we understand the earlier admonition to preclude petitioner from pursuing resource issues later during the March 11, 1991 hearing.

¹¹Petitioner contends, and respondent does not dispute, that a great deal of evidence was submitted at the December 17, 1990 public hearing.

1 review the record. However, petitioner contends there is
2 nothing in the record to show that commissioner Reagan in
3 fact reviewed the entire record.

4 We agree with the county that CCZO § 2.190(3) does not
5 impose on the county or commissioner Reagan an affirmative
6 obligation to demonstrate that she reviewed the entire
7 record. Following the January 14, 1991 continuance, the
8 record indicates that at the January 28, 1991 meeting
9 commissioner Reagan stated she was ready to render a
10 decision. Several additional public hearings were held
11 before the county commissioners actually took action in this
12 matter, following the April 1, 1991 public hearing.
13 Petitioner offers no sufficient reason to assume that
14 commissioner Reagan did not base her decision on the entire
15 record, as required by CCZO § 2.190(3).¹²

16 The fifth assignment of error is denied.

17 **SIXTH ASSIGNMENT OF ERROR**

18 "The board chairman engaged in an ex parte contact
19 on the road improvement issue without complete
20 disclosure on the record."

21 Under this assignment of error, petitioner argues that

¹²Petitioner does point out that January 28, 1991, the date commissioner Reagan stated she was ready to render a decision, is the same date county counsel prepared the memorandum disputed in the third assignment of error, supra. Petitioner speculates commissioner Reagan's decision was based solely on the legal memorandum, but we see nothing in the record to support such speculation. Without such support, we assume commissioner Reagan performed her duties in accordance with CCZO § 2.190(3). See OEC 311(1)(j).

1 the chair of the board of county commissioners engaged in ex
2 parte contacts and inadequately disclosed those contacts.

3 Respondent points out that the alleged ex parte
4 contacts petitioner complains of were with petitioner and
5 his agent. No other parties were present. In addition,
6 respondent contends the contacts were disclosed when
7 petitioner requested that the contacts be placed on the
8 record, and petitioner did not object to the adequacy of the
9 disclosure.

10 The board chair, planning director and county
11 roadmaster disclosed the ex parte contacts of which
12 petitioner complains. Record 13. Therefore, even if
13 petitioner may properly allege his own ex parte contacts as
14 error, in view of petitioner's failure to object to the
15 completeness of the disclosure of such contacts, any
16 inadequacy in the disclosure provides no basis for reversal
17 or remand. Walker v. City of Beaverton, 18 Or LUBA 898,
18 901-03 (1989); Union Station Business Community Assoc. v.
19 City of Portland, 14 Or LUBA 556, 558-59 (1986).

20 The sixth assignment of error is denied.

21 **REMAINING ASSIGNMENTS OF ERROR**

22 Under our discussion of the third through sixth
23 assignments of error, we reject petitioner's challenges to
24 the county's findings that the subject application should be
25 denied based on failure to present substantial evidence to
26 support the requested exception to Goal 4 (the resource

1 issues). Those findings are sufficient to sustain the
2 county's decision to deny the requested exception and plan
3 and zoning map changes regardless of the adequacy of the
4 findings concerning the transportation issues, which provide
5 an alternative basis for denying the request. We therefore
6 do not consider petitioner's first two assignments of
7 error.¹³ Baughman v. Marion County, 17 Or LUBA 632, 636-37
8 (1989); Van Mere v. City of Tualatin, 16 Or LUBA 671, 675 n
9 2 (1988).

10 The county's decision is affirmed.

¹³Petitioner's seventh assignment of error requesting attorney fees is rejected because petitioner is not the prevailing party. OAR 661-10-075(1)(d).