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

HORIZON CONSTRUCTION, INC.,)
RICH RACETTE, and WALT RACETTE,)
Petitioners,)
vs.)
CITY OF NEWBERG,)
Respondent.)

LUBA No. 93-065
FINAL OPINION
AND ORDER

Appeal from City of Newberg.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioners.

Terrence D. Mahr, City Attorney, Newberg, filed the response brief and argued on behalf of respondent.

SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

REMANDED 07/28/93

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision denying a
4 conditional use permit for a 108 unit apartment complex.

5 **FACTS**

6 This is the second time a city decision denying
7 petitioners' application for a conditional use permit for
8 the subject apartment complex has been before this Board.
9 In Horizon Construction, Inc. v. City of Newberg, 23 Or LUBA
10 159, 160-61 (1992) (Horizon I), we described petitioners'
11 proposal as follows:

12 "The subject property is a vacant 5.64 acre parcel
13 owned by petitioners Racette. The property is
14 designated Mixed Use on the Newberg Comprehensive
15 Plan Map. The subject property is zoned Community
16 Commercial (C-2). Approximately one-third of the
17 parcel is within the Approach Surface of Sportsman
18 Airpark, and is subject to the Airport Overlay
19 (AO) zone.

20 "The land adjoining the subject parcel to the
21 west, north and east is also vacant and zoned C-2.
22 One parcel adjoining the subject parcel to the
23 south is zoned Light Industrial (M-2) and contains
24 two industrial businesses. The other parcel
25 adjoining the subject parcel to the south is zoned
26 Medium Density Residential (R-2) and contains a
27 mobile home park. Record 203.

28 "On September 27, 1991, petitioners applied for a
29 conditional use permit for development of the
30 proposed 108 unit apartment complex on the subject
31 parcel. The site plan accompanying the
32 conditional use permit application indicates the
33 proposed dwelling units would be located on the
34 periphery of the parcel, with parking areas in the
35 center. * * *" (Footnotes omitted.)

1 At the beginning of the city council's December 17,
2 1991 deliberation on petitioners' application, which took
3 place after the public hearing had been closed, a city
4 council member announced that he had received an ex parte
5 contact concerning petitioners' proposal some two months
6 previously. Petitioners contended in Horizon I that under
7 ORS 197.835(10), the challenged decision should be remanded
8 because the city council member did not comply with
9 ORS 227.180(3).¹ Petitioners argued the city council member
10 erred by disclosing the ex parte contact after the close of
11 the public hearing, when there was no opportunity for
12 rebuttal testimony by petitioners, and by failing to place

¹ORS 197.835(10) provides in relevant part:

"The board may reverse or remand a land use decision under review due to ex parte contacts or bias resulting from ex parte contacts with a member of the decision-making body, only if the member of the decision-making body did not comply with * * * ORS 227.180(3) * * *."

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 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."

1 in the record the substance of the ex parte communication.

2 In Horizon I, 23 Or LUBA at 162, we characterized the
3 city council member's delay in disclosing the ex parte
4 contact and failure to make an announcement of the right to
5 rebut the substance of the ex parte communication as
6 procedural errors. We reasoned that because petitioners
7 were present at the city council meeting where the council
8 member's announcement occurred, they had an opportunity to
9 object to these procedural errors. Because petitioners
10 failed to object to the timing of the disclosure and the
11 lack of opportunity for rebuttal, we rejected this
12 assignment of error and, after rejecting petitioners' other
13 assignments of error as well, affirmed the city's decision.

14 The court of appeals, reversed and remanded our
15 decision. Horizon Construction, Inc. v. City of Newberg,
16 114 Or App 249, 834 P2d 523 (1992) (Horizon II). The court
17 of appeals stated:

18 "ORS 227.180(3) does not simply establish a
19 procedure by which a member of a deciding tribunal
20 spreads a fact on the record. It requires that
21 the disclosure be made at the earliest possible
22 time. Implicit in that requirement is that the
23 parties to the proceeding must be given the
24 greatest possible opportunity to prepare for and
25 to present the rebuttal that ORS 227.180(3)(b)
26 requires that they be allowed to make. The
27 purpose of the statute is to protect the
28 substantive rights of the parties to know the
29 evidence that the deciding body may consider and
30 to present and respond to evidence.

31 "[A]n objection by petitioner here would not have
32 been likely to cure the prejudice that it suffered

1 from the disclosure violation. An objection to
2 the timeliness of the disclosure at the December
3 17[, 1991 city council] meeting, at which the
4 council made its decision, could not have cured
5 the city's antecedent failure to follow the
6 statutorily required procedures to assure that
7 petitioners have the opportunity to respond to the
8 ex parte communication while evidence was still
9 being prepared and presented. * * *

10 "Arguably the city could have reopened and
11 extended the proceedings, if an objection had been
12 made on December 17. However, we are unwilling to
13 assume that would have occurred, given that the
14 meeting was not one at which either additions to
15 the record or public participation, by way of
16 objections or otherwise, were scheduled to be
17 entertained. * * * Petitioner and the other
18 proponents were utterly unprepared for the
19 eventuality that a response would be necessary or
20 could be made to the council member's belated
21 disclosure.

22 "Failure to comply with ORS 227.180(3) requires a
23 remand to the city council and a plenary rehearing
24 on the application. * * *" (Footnotes omitted.)
25 Id. at 253-54.

26 On February 1, 1993, after we remanded the challenged
27 decision to the city, the city council held a public hearing
28 on petitioners' application. The record was left open until
29 March 25, 1993 for submittal of written material. During
30 this period, petitioners submitted revised application
31 materials, including revised site plans which show the
32 proposed dwelling units clustered in structures at the
33 center and south end of the subject parcel, with parking
34 areas located primarily along the east and west margins of
35 the parcel. The city council scheduled its deliberation on
36 the application for its April 5, 1993 meeting. In this

1 regard, a notice mailed to interested parties by the city
2 states:

3 "* * * The City Council will be considering the
4 Horizon Construction matter at [its] April 5
5 meeting * * *. No additional oral testimony is
6 expected to be taken at that time." Record 90.

7 The minutes of the city council's April 5, 1993 meeting
8 include the following:

9 "[The mayor] called for any ex parte contacts,
10 conflicts of interest. [A council member] asked
11 if the public hearing was closed. [The mayor]
12 stated the public hearing was closed. * * *

13 "[The city attorney stated] all testimony has been
14 presented. All written documents have been
15 presented in this matter. Council has received
16 written copies of the staff's recommendation. All
17 Council members have read the editorial that was
18 published in the Newberg Graphic and wanted to
19 declare [that] for the record[,] if that is an
20 ex parte contact by the Council members reading
21 the editorial. [The city attorney] stated that if
22 anyone had any objections to the procedure, the
23 record, wished to respond further to the Newberg
24 Graphic editorial, or request that the record be
25 reopened or remain open, that they should do so
26 now or they may waive any right to raise such
27 issues at LUBA. There were no objections or
28 requests to have the record be reopened or remain
29 open." Record 16.

30 After further deliberation, the city council adopted a
31 resolution denying petitioners' conditional use permit
32 application. Record 1-13. This appeal followed.

33 **MOTION TO STRIKE**

34 Petitioners move to strike Appendices 1 and 2 to
35 respondent's brief. These appendices consist of (1) an
36 article from Sec. 1, Page 2 of the Newberg Graphic, dated

1 April 3, 1993; and (2) an affidavit by the city planning
2 director, dated June 22, 1993, concerning whether a
3 particular individual is an authorized representative of
4 petitioner Horizon Construction, Inc. and was present at the
5 April 5, 1993 city council meeting. Petitioner also moves
6 to strike 16 portions of respondent's brief that refer to
7 attendance at the April 5, 1993 city council meeting or the
8 contents of the Newberg Graphic article. Petitioners
9 contend the appendices are not in the record of the local
10 proceedings submitted to LUBA and the provisions in
11 respondent's brief are based on facts not in the record.
12 Petitioners argue that under ORS 197.830(13)(a), this
13 Board's review is limited to the local record. Petitioners
14 also point out respondent did not "avail itself of any
15 statutory or rule procedures to get extra-record information
16 properly before this Board * * *." Motion to Strike 4.

17 Respondent contends it may submit the Newberg Graphic
18 article to this Board because it is referred to in the
19 minutes of the April 5, 1993 city council meeting.
20 Respondent also identifies several references in the
21 petition for review concerning who was or was not present at
22 the April 5, 1993 city council meeting, and argues that it
23 should be able to respond to those references in its brief
24 and by submitting the affidavit of the planning director.
25 Respondent also argues this Board should simply disregard,
26 rather than strike, portions of a brief that are without

1 factual support in the record.

2 This Board's review is limited by ORS 197.830(13)(a) to
3 the record of the proceeding below, except in instances
4 where an evidentiary hearing is authorized under
5 ORS 197.830(13)(b). Ramsey v. City of Portland, 23 Or LUBA
6 291, 294, aff'd 115 Or App 20 (1992). ORS 197.830(13)(b)
7 recognizes that evidentiary hearings are warranted in
8 instances where there are "disputed allegations of
9 unconstitutionality of the decision, standing, ex parte
10 contacts or other procedural irregularities not shown in the
11 record which, if proved, would warrant reversal or remand
12 * * *."² (Emphasis added.)

13 However, ORS 197.805 also states a legislative policy
14 that "time is of the essence in reaching final decisions in
15 matters involving land use." The filing of a motion for
16 evidentiary hearing suspends the time limits for all further
17 events in the Board's review. ORS 197.840(1)(b);
18 OAR 661-10-045(7). To minimize the need for lengthy delays
19 to resolve motions for evidentiary hearing, it is the
20 practice at LUBA for a party that wishes the Board to
21 consider a document not in the local record, for one of the
22 purposes described above, to attach that document to its
23 brief and explain in its brief why the Board should consider

²OAR 661-10-045(1) also provides that, in addition to the statutory grounds for an evidentiary hearing, an evidentiary hearing may be held "to consider disputes regarding the content of the record or requests for stays, attorney fees and actual damages under ORS 197.845."

1 the document. If another party does not object to the Board
2 considering the document, the document becomes part of the
3 Board's record (although not the local record) and is
4 considered by the Board for the requested purpose. If an
5 objection is entered, the party offering the document may
6 then file a motion for evidentiary hearing under
7 OAR 661-10-045. Von Lubken v. Hood River County, 19 Or LUBA
8 548, 550 (1990).

9 In this case, it is clear the newspaper article and
10 affidavit in Appendices 1 and 2 to respondent's brief are
11 not part of the local record.³ Petitioners object to the
12 Board's consideration of these items. Respondent does not
13 request an evidentiary hearing to place these items before
14 the Board. Consequently, we may not consider them.
15 Petitioners' motion to strike is granted with regard to
16 Appendices 1 and 2 to respondent's brief.

17 However, with regard to the disputed statements in
18 respondent's (and petitioners') briefs, LUBA has previously
19 determined that it will not grant motions to strike portions

³Respondent may be arguing that the newspaper article should be considered part of the local record because it is referred to in the city council minutes that are in the local record. Record 16. A document is part of the local record only if it was placed before the local decision makers during the local proceedings leading to the appealed decision. Bloomer v. Baker County, 19 Or LUBA 482, 483 (1990). That a document was received by an individual decision maker outside the local proceedings, or is referred to in testimony in the local record, does not make that document part of the local record. Hoffman v. City of Lake Oswego, 19 Or LUBA 607, 610 (1990). In any case, the article was not included in the local record submitted by respondent, and the contents of the local record were settled before the briefs in this case were filed.

1 of a brief, based on allegations that the disputed portions
2 are inaccurate or without factual support. Rather LUBA will
3 simply disregard any such inaccurate or unsupported
4 assertions.⁴ Mannenbach v. City of Dallas, ___ Or LUBA ___
5 (LUBA No. 92-183, March 31, 1993), slip op 3, aff'd 121
6 Or App 441(1993); Hammack & Assoc. v. Washington County, 16
7 Or LUBA 75, 78, aff'd 89 Or App 40 (1987). Accordingly,
8 petitioners' motion to strike portions of respondent's brief
9 is denied. The Board will disregard any statements in
10 either petitioner's or respondent's brief regarding the
11 content of the newspaper article in question, or the
12 identity of those in attendance at the April 5, 1993 city
13 council hearing, which are not supported by the record.

14 **FIRST ASSIGNMENT OF ERROR**

15 "Respondent erred in disclosing ex parte
16 communications after the record in this case had
17 closed[,] in violation of ORS 227.180(3) and
18 petitioner's right to present rebuttal evidence."

19 Petitioners contend that under ORS 197.835(10), we
20 should remand the challenged decision because the city
21 council members disclosed an ex parte contact, but failed to
22 follow the procedures required by ORS 227.180(3) (quoted in

⁴Once a party challenges the accuracy of or evidentiary support for allegations in another party's brief, the Board expects such other party to establish the accuracy of, or identify evidentiary support in the record for, those allegations, either in a reply brief or at oral argument. Id.

1 n 1, supra).⁵ Petitioners argue the city erred by not
2 having a public announcement of the contents of the Newberg
3 Graphic editorial made and not placing the contents of the
4 editorial in the record, as required by ORS 227.180(3)(a)
5 and (b). Petitioners further argue the city erred by not
6 giving them notice of and an opportunity to rebut the
7 contents of that editorial at a public hearing. Petitioners
8 point out the April 5, 1993 city council meeting was not
9 scheduled to include a public hearing or the receipt of
10 additional evidence.

11 Respondent contends that the city council members
12 reading a Newberg Graphic editorial does not constitute an
13 ex parte contact. Respondent argues there are no LUBA or
14 appellate court cases holding that decision makers reading
15 "newspaper accounts of the hearings or opinions expressed in
16 a newspaper editorial" constitute ex parte contacts.
17 Respondent's Brief 16. According to respondent, holding
18 that such actions do constitute ex parte contacts would
19 require that local decision makers be sequestered during the

⁵At the beginning of the April 5, 1993 city council meeting, one council member, who had previously disclosed an ex parte contact at the February 1, 1993 hearing on remand, announced that he would abstain. Record 16. Petitioners make an unsupported assertion that this council member had additional ex parte contacts, and argue the city erred because petitioners were not given an opportunity to inquire as to the reason the council member decided to abstain. Petitioners offer no legal theory in support of their claim to a right to inquire into the reasons for the council member's abstention. Petitioners' argument in this regard is insufficiently developed for review. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

1 course of local land use proceedings.

2 Respondent further argues that even if an ex parte
3 contact did occur, there is no basis for reversal or remand,
4 because the city followed the procedures required by
5 ORS 227.180(3). According to respondent, the city properly
6 made an announcement that the ex parte contact had occurred
7 and invited objections, responses or rebuttal. Respondent
8 argues that because petitioners made no objection to the
9 procedure followed at that time, and did not respond to the
10 city's invitation to request the opportunity for rebuttal,
11 they have waived the ability to raise this issue before this
12 Board.

13 In this case, a declaration was made at the April 5,
14 1993 city council meeting that an ex parte contact may have
15 occurred, in that all city council members had read a
16 Newberg Graphic editorial. If the decision makers reading
17 that editorial outside the hearing process constitutes an
18 ex parte contact, ORS 227.180(3) requires that the contents
19 of the editorial be placed in the record and a public
20 announcement of the contents be made. The city failed to do
21 this. Without disclosure of the contents of the ex parte
22 communication, the city attorney's invitation to those in
23 attendance at the meeting to respond to the editorial did
24 not provide the opportunity for rebuttal required by
25 ORS 227.180(3)(b).

26 In addition, in Horizon II, 114 Or App at 253, the

1 court of appeals explained that ORS 227.180(3) protects the
2 substantive rights of parties to know the evidence that the
3 decision maker may consider and to respond to that evidence.
4 The court of appeals rejected the notion that local
5 government failure to follow the procedures required by
6 ORS 227.180(3) does not constitute a basis for remand if the
7 party seeking remand failed to object during the proceedings
8 below. Therefore, the fact that petitioners did not respond
9 to the city attorney's request for objections at the
10 April 5, 1993 meeting does not prevent them from assigning
11 as error the city's failure to follow the procedures
12 required by ORS 227.180(3).⁶

13 Thus, if the city council members reading the Newberg
14 Graphic editorial constituted an ex parte contact, the city
15 failed to follow the procedures required by ORS 227.180(3),
16 and the challenged decision must be remanded to the city for
17 a new hearing. What remains to be considered is
18 respondent's argument that the city council members reading
19 the Newberg Graphic editorial did not constitute an ex parte
20 contact.

21 "Ex parte contact" is not defined in ORS ch 227.
22 However, the Administrative Procedures Act contains a

⁶This is particularly true because the April 5, 1993 meeting was not scheduled to include the submittal of evidence. In Horizon II, the court of appeals disapproved of the idea that parties could be required to exercise their right to rebuttal under ORS 227.180(3)(b) at a meeting for which no advance notice had been given that evidence would be taken.

1 provision similar to ORS 227.180(3), requiring an agency to
2 place on record a statement of the substance of any ex parte
3 communications made to the agency during a contested case
4 proceeding and to notify the parties of their right to rebut
5 the substance of such communication. ORS 183.462. The
6 Attorney General's Uniform and Model Rules of Procedure
7 define "ex parte communication," in relevant part, as
8 follows:

9 "[A]n oral or written communication to an agency
10 decision maker * * * not made in the presence of
11 all parties to the hearing, concerning a fact in
12 issue in the proceeding * * *." OAR
13 137-03-055(1).

14 We see no significant difference between the use of
15 "ex parte communication" in ORS 183.462 and "ex parte
16 contact" in ORS 227.180(3). Under the above quoted
17 definition, there is no inherent reason why a local
18 government decision maker's reading of a newspaper
19 editorial, outside the local hearing process, would not be
20 an ex parte contact, if that editorial was directed to the
21 decision making body, in the sense of urging it to take a
22 particular course of action, and discussed a fact or facts
23 at issue in the local proceedings. Contrary to respondent's
24 argument, this interpretation does not create a need to
25 sequester all local government decision makers.
26 ORS 227.180(3) and 197.835(10) do not prohibit ex parte
27 contacts, they simply require disclosure and provision of an
28 opportunity to rebut such contacts.

1 However, we cannot resolve respondent's argument that
2 the city council members reading the specific editorial in
3 question does not meet the definition of an ex parte
4 contact, because respondent neither placed the contents of
5 the editorial in the local record nor submitted them to this
6 Board through an evidentiary hearing. Consequently, we must
7 remand the challenged decision to the city, either to follow
8 the procedures required by ORS 227.180(3) or to establish
9 that an ex parte contact did not occur.⁷

10 The first assignment of error is sustained.

11 **SECOND ASSIGNMENT OF ERROR**

12 "Respondent violated ORS 227.173 in failing to
13 advise petitioners * * * of what respondent
14 adopted as findings and conclusions to support its
15 decision * * *."

16 ORS 227.173 provides, in relevant part:

17 "* * * * *

18 "(2) Approval or denial of a permit application
19 * * * shall be based upon and accompanied by
20 a brief statement that explains the criteria
21 and standards considered relevant to the
22 decision, states the facts relied upon in
23 rendering the decision and explains the
24 justification for the decision based on the
25 criteria, standards and facts set forth.

26 "(3) Written notice of the approval or denial
27 shall be given to all parties to the
28 proceeding."

29 On April 9, 1993, the city planning director sent

⁷We note that under either option, a reopening of the local record is required.

1 petitioners notice of the challenged decision, in the form
2 of a letter.⁸ The letter notice identifies its subject as
3 being the "[a]ppeal of a Conditional Use Permit to construct
4 a 108 unit apartment complex in a C-2 zone, located east of
5 Elliott on Hayes Street" on an identified tax lot and gives
6 the city planning department file number. Petition for
7 Review Appendix A. The letter states that on April 5, 1993,
8 the city council reversed the planning commission's approval
9 of the conditional use permit. The letter further states
10 the city council's decision may be appealed to LUBA.

11 Petitioners argue that ORS 227.173(2) establishes
12 content requirements for the notice required by
13 ORS 227.173(3). According to petitioners, the notice of
14 decision sent to them is deficient because it does not
15 contain a statement of the basis for the city's decision, as
16 required by ORS 227.173(2). Petitioners also complain the
17 notice was inadequate because it did not inform them of the
18 existence of the city council resolution that is the subject
19 of this appeal.

20 ORS 227.173(2) describes the requirements for the
21 findings of fact and statement of reasons that must be
22 adopted as part of a city decision approving or denying a

⁸This notice of the challenged decision is not included in the local record submitted by respondent. However, petitioners attached it to their petition for review, and respondent does not object to our considering it. Therefore, we consider it for the limited purpose of determining whether respondent complied with the procedural requirements of ORS 227.173.

1 development permit application. ORS 227.173(3) provides
2 that a city must give parties to the proceeding written
3 notice of such a decision. ORS 227.173(3) does not specify
4 what the content of such a notice must be or require that
5 the decision itself must be given to the parties. The
6 purpose of the notice required by ORS 227.173(3) is to
7 inform the parties that the city has made a final,
8 appealable decision on a permit application. We believe the
9 notice sent to petitioners serves that purpose. It
10 identifies the application to which it relates, states the
11 city council made a decision denying the application on a
12 particular date and provides that the city council's
13 decision may be appealed to this Board. With this
14 information, petitioners were placed in a position where
15 they could request a copy of the decision itself from the
16 city and exercise their right to appeal. ORS 227.173(3)
17 requires nothing more.

18 The second assignment of error is denied.

19 **THIRD THROUGH SEVENTH ASSIGNMENTS OF ERROR**

20 In these assignments of error petitioners challenge the
21 city's interpretation of certain city comprehensive plan and
22 code provisions, the adequacy of the findings supporting the
23 challenged decision and the evidentiary support for the
24 challenged decision. In view of our resolution of the first
25 assignment of error, the city's decision must be remanded,
26 additional local proceedings will be held and a new decision

1 will be made. Therefore, no useful purpose would be served
2 by reviewing these assignments of error based on the current
3 decision and record.

4 The city's decision is remanded.